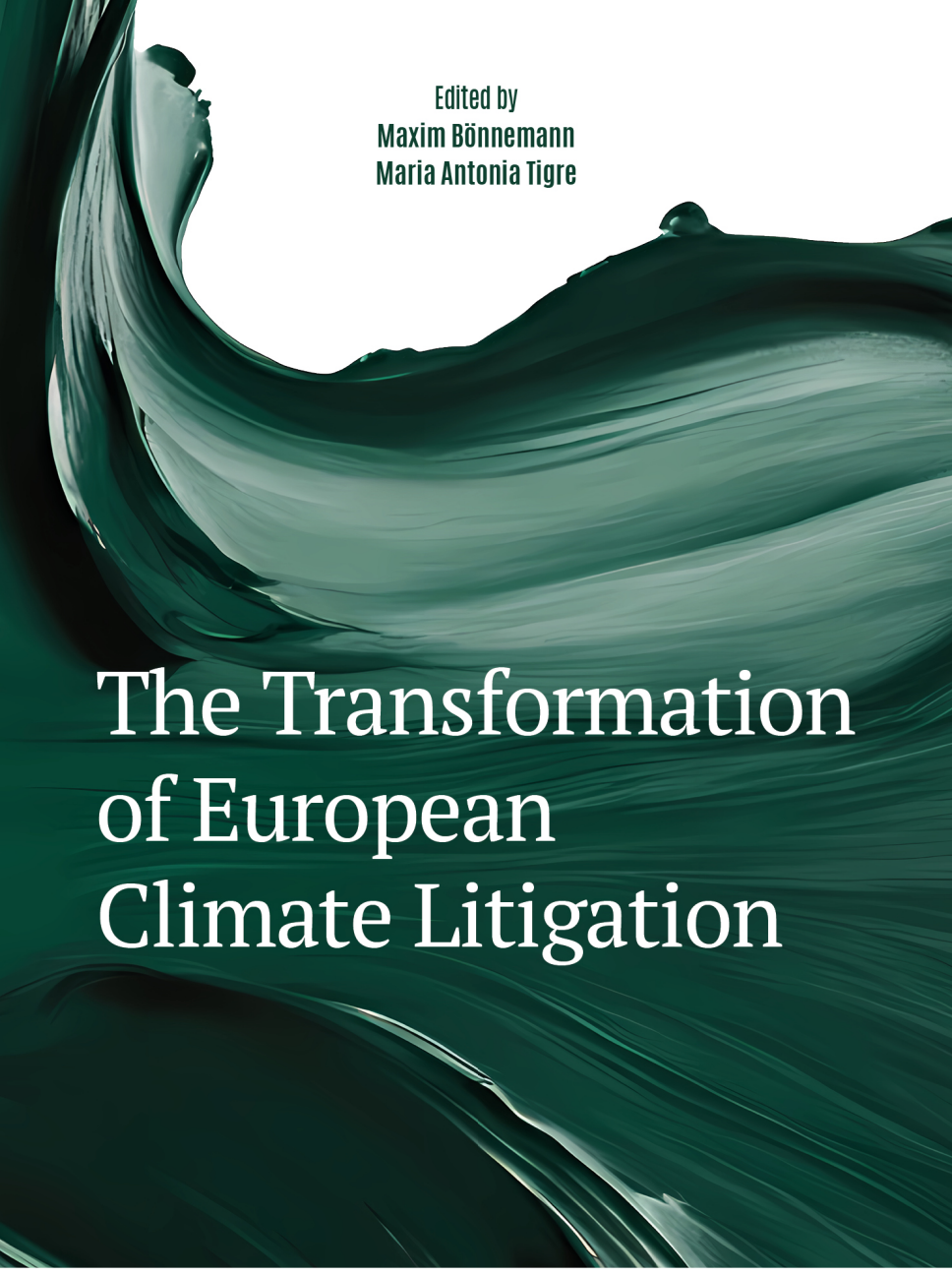

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The Transformation of European Climate Litigation

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ON MATTERS CONSTITUTIONAL

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Content

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The Transformation of European Climate Litigation

An Introduction

In the spring of 2024, video cameras from numerous global news outlets turned their attention to a court in Strasbourg. People traveled from across Europe, gathering with signs in front of the courthouse. Minors from Portugal stood alongside senior citizens from Switzerland to witness one of the most significant moments in the recent history of the European Convention on Human Rights. For the first time, the European Court of Human Rights (ECtHR) ruled on the impact of the climate crisis on human rights and what this means for the Convention's signatory states. The court's Grand Chamber issued rulings on three cases: the case of *Carême v. France*[1] ("*Carême*"), brought by the former mayor of Grande-Synthe, France; the case of *Duarte Agostinho and Others v. Portugal and 32 Others*[2] ("*Duarte Agostinho*"), brought by six youth applicants from Portugal; and the case of *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*[3] ("*KlimaSeniorinnen*"). While the first two cases were deemed inadmissible, the court handed down a ruling in *Klimaseniorinnen*, which is already regarded as one of the most important judgments in climate change litigation. The court stated that "the state has a positive duty to adopt, and effectively implement in practice, regulations and measures capable of mitigating the existing and potentially irreversible future effects of climate change". Regarding the Swiss government, one of the Convention's signatory states, the court concluded that by failing to put in place a sufficient domestic regulatory framework for climate change mitigation, the government violated Article 8 of the European Convention on Human Rights (ECHR), the right to respect for private and family life. Article 8 requires "that each Contracting State undertake measures for the substantial and progressive reduction of their respective GHG emission levels, with a view to reaching net neutrality within, in principle, the next three

decades" (*KlimaSeniorinnen*, para. 548). Moreover, the Court found a violation of the right of access to court (Article 6 of the ECHR).

The judgment is a milestone for human rights protection. Its implications are far-reaching, not only concerning the positive obligations of the Council of Europe member states regarding climate protection but also for the judicial enforcement of human rights related to the climate crisis by NGOs. At the same time, however, the judgment has also led to political upheaval. In Switzerland, in particular, the Strasbourg judges were accused of judicial activism, entering an area that should be reserved for politics.[4] Even Switzerland's withdrawal from the ECHR was discussed in both the Council of States and the National Council (with the motion being rejected in both chambers). There was also criticism of the other two rulings. *Carême*, "the most overlooked of the three climate decisions"[5], was criticized for the court adhering to an overly strict line of jurisprudence on the applicability of Article 8 in contexts of environmental damage. In *Duarte Agostinho*, on the other hand, some observed that the court invisibilizes the racialized distribution of the impacts of climate change and was overall driven by concerns about preventing litigation from the Global South.[6]

Regardless of whether one finds each line of critique convincing, there is no doubt that the court's "climate trio" will shape European human rights protection and national climate policies in the coming years. It sets standards for state mitigation measures, might impact areas from the calculation of carbon budgets to international trade, and has quickly been used as an argumentative resource in climate change litigation cases before national courts. Furthermore, with several other pending climate cases before the ECtHR, these decisions will be the first of many to come.

This edited book aims to provide an initial overview of the impacts of the decisions in the court's "climate trio". It is based on a

blog symposium organized by Verfassungsblog and the Sabin Center for Climate Change Law's Climate Law Blog. All chapters align with the blog posts published in the symposium, with some having been updated where necessary.

In the remainder of this introduction, we briefly outline the three rulings and provide an overview of the book's chapters.

The three climate rulings

While the three rulings are distinct in their individual circumstances, the cases share a common thread: they all center around governmental frameworks regarding climate change mitigation (i.e., systemic mitigation cases) and challenge the overall inadequacy of states' efforts to mitigate GHG emissions, without prejudice of an underlying question regarding adaptation measures. Specifically, they question a state's ambition and/or implementation of emissions reduction targets.[7] The cases draw inspiration from the landmark *Urgenda*[8] decision but demonstrate a heightened ambition by advocating for broader reductions in GHG emissions and invoking a more extensive array of rights (i.e., access to justice, discrimination, among others), vulnerabilities (i.e., gender, children, and youth), and impacts (flooding, heatwaves, among others). Furthermore, they align with the evolving interpretation of the ECHR in tandem with the principles of the international climate regime and the latest scientific findings. This alignment mirrors both the Advisory Opinion issued by the International Tribunal for the Law of the Sea and the anticipated direction of further advisory opinions expected in the coming months.

Verein KlimaSeniorinnen Schweiz and Others v. Switzerland

In *KlimaSeniorinnen*, four women and the association of Senior Women for Climate Protection Switzerland took the Swiss government to the ECtHR in 2020 due to the health impacts of heatwaves on older women. The claimants argued that both the inadequately ambitious Swiss climate legislation and its implementation violated their rights under the ECHR. The applicants exhausted domestic remedies, but had their complaints rejected by the Swiss Federal Supreme Court.

The application listed three main grievances: (i) inadequate climate policies violating the right to life and health (Articles 2 and 8 of the ECHR); (ii) the Federal Supreme Court's arbitrary rejection violating the right of access to court (Article 6); and (iii) authorities' failure to address their complaints, violating the right to an effective remedy (Article 13).

The court ruled the complaint brought by the four individual women inadmissible due to the lack of victim status and maintained its strict requirements under Article 34 of the Convention. For human rights violations in the climate change context, the court establishes two core criteria: (i) the applicant must be subject to a high intensity of exposure to the adverse effects of climate change, and (ii) there must be a pressing need to ensure the applicant's individual protection, owing to the absence or inadequacy of any reasonable measures to reduce harm (para. 487). None of the four individual applicants, the Court held, fulfills these criteria.

However, in a significant expansion of the standing of non-governmental organizations (NGOs) under Article 34, the Court granted *locus standi* to the applicants' association of Senior Women for Climate Protection Switzerland (for the purpose of Article 8). The Court highlighted, among other factors, the special feature of climate change as a common concern of humankind and the neces-

sity of promoting intergenerational burden-sharing as a reason to grant standing to the applicant's association. Although this openness of the court is still not fully aligned with the Aarhus Convention, it still marks a major breakthrough in the case-law of the ECtHR. This is a welcome and much-needed development (although not granting standing to the four individuals while broadening standing requirements regarding the NGO might not take into account that NGOs cannot be established everywhere as easily as in Switzerland, as pointed out by Evelyne Schmid[9]).[10]

On the merits, the court has ruled that Article 8 entails a right for individuals to effective protection by the State authorities from serious adverse effects of climate change on their life, health, well-being, and quality of life (para. 519, 544). The State, therefore, has a positive obligation to ensure such protection, in this case, "to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change". This is undoubtedly the most significant finding of the judgment as the Court specifies that each Contracting State must undertake measures for the substantial and progressive reduction of their respective greenhouse gas (GHG) emission levels, with a view to reaching net neutrality within, in principle, the next three decades (para. 543). The Court developed a five-step test to assess whether the state has remained within its margin of appreciation. In a nutshell, when assessing the adequacy of a State's mitigation measures, the Court considers whether the state (i) adopted general targets for achieving carbon neutrality within a specified timeline, in line with national and global climate mitigation commitments; (ii) defined intermediate GHG reduction goals and pathways; (iii) demonstrated compliance or efforts toward meeting GHG reduction targets; (iv) regularly updated targets with due diligence; and (v) acted in good time and in an appropriate and

consistent manner when developing and implementing relevant legislation and measures.

Applying these principles to the regulatory framework of Switzerland, the Court found that there were critical gaps in the Swiss authorities' establishment of the necessary domestic regulatory framework, including a failure by the authorities to quantify national GHG emissions limitations, either through a carbon budget or alternative means.

Carême v. France

In *Carême*, the former mayor of Grande-Synthe, France, filed an application in 2021 against the French government concerning flooding in the seaside town near Dunkirk. While the domestic case (*Commune de Grande-Synthe v. France*[11]) was successful in calling for national emission reduction targets of 40% by 2030, the applicant's individual claims made in the domestic case were rejected for lack of interest. The Council of State rejected, however, the application insofar as it was brought by the applicant on the grounds that he did not show any interest in the case since his claims were limited to the argument that, as an individual, his home was situated in an area likely to be subject to flooding by 2040 (for an assessment of the *Câreme* case in the light of ECtHR Environmental case law, see Torre-Schaub[12]).

In his application to the ECtHR, Carême, as a resident and mayor of Grande-Synthe, argued that exposure to climate risks, including coastal erosion, floods, and coastal flooding, violated his right to private and family life (Article 8 of the ECHR) and the right to life (Article 2 of the ECHR). However, at the hearing, the applicant noted that he no longer lived in France. Therefore, the ECtHR found that, since the applicant no longer resided (or owned or rented property) in Grande-Synthe, he could not claim victim status

under the Convention (para. 84). In this analysis, the ECtHR referred to the general principles of victim status established in *KlimaSeniorinnen*. Furthermore, the ECtHR held that the applicant could not complain to the Court as a mayor of Grande-Synthe, since the municipalities, considered "governmental organizations", have no standing to make an application to the Court.

Duarte Agostinho and Others v. Portugal and 32 Others

In 2020, six Portuguese children and youth lodged a complaint with the ECtHR against Portugal and 32 other respondent States for insufficient action on climate change. They alleged violations of Articles 2, 8, and 14 of the ECHR, citing threats to their right to life due to climate impacts like forest fires, infringement upon their right to privacy by heatwaves, and discrimination as young people disproportionately affected by climate change. Notably, they did not exhaust domestic remedies before reaching the ECtHR.

Regarding the extraterritorial jurisdiction of the 32 respondent States other than Portugal, the Court found that there were no grounds in the Convention for the extension of their extraterritorial jurisdiction in the manner requested by the applicants. This interpretation is despite the acknowledgment that (i) States had control over GHG emitting activities based on their territories, had undertaken international commitments, and developed domestic laws and policies under the Paris Agreement (para. 192), (ii) there is a (complex and multi-layered) causal relationship between GHG emitting activities in a State's territory and the adverse impact on the rights and well-being of people residing outside the borders of that State (para. 193), and (iii) climate change is a problem of an existential nature for humankind, setting it apart from other cause-and-effect situations (para. 194). Overall, the Court found that extending extraterritorial jurisdiction would lead to an "untenable

level of uncertainty for States" and entail an unlimited expansion of jurisdiction under the Convention towards people "practically anywhere in the world" (para. 208). As such, territorial jurisdiction was only established with respect to Portugal.

Despite Portugal's territorial jurisdiction, the complaint against Portugal was also found inadmissible since the applicants failed to exhaust domestic remedies (para. 216). The Court noted that Portugal's domestic legal system had sufficient legal avenues and remedies available for the applicants to pursue a domestic case. As such, there were no special reasons for exempting the applicants from the requirement to exhaust domestic remedies. The Court recalled the principle of subsidiarity and noted that it was not a court of first instance and lacked the capacity to adjudicate the number of cases that would undoubtedly derive from such an exemption.

The chapters of this book

The rulings from the ECtHR have far-reaching implications for global climate litigation at both regional and domestic levels. These decisions will directly influence other climate cases currently before the ECtHR, which had been adjourned pending these rulings. For instance, two cases – *De Conto v. Italy and 32 other States* and *Uricchio v. Italy and 32 other States* – may encounter similar admissibility challenges as seen in *Duarte Agostinho*, given that they were also filed against 33 states. Moreover, there is now a direct interpretation of how the ECHR applies to climate cases, which will set a precedent for applications against countries like Germany, Norway, and Austria, among others.

At the domestic level, this decision is likely to affect several pending framework cases against governments that challenge inadequate or insufficient measures to combat climate change, such

as in Belgium, Germany, Poland, and Portugal. Finally, it is anticipated that advisory opinions from the International Court of Justice and the Inter-American Court of Human Rights will likely draw upon the decision for guidance, ensuring consistency of interpretation across international and regional courts and tribunals.[13]

To help navigate the implications of these and other climate rulings, the chapters of this book analyze the decisions from a variety of perspectives, including international law, international trade, and gender. The book begins with general discussions of the three rulings before later chapters delve into more specific issues.

Sandra Arntz and *Jasper Krommendijk* provide an overview of the three rulings. Focusing on questions of victimhood and extraterritoriality, they argue that the rulings will set the tone for climate litigation in the years to come.

Johannes Reich explains why the Court decided to incorporate significant elements of international climate change law into the ECHR in the *KlimaSeniorinnen* decision. *Reich* argues that, from an institutional perspective, this approach – though not without its weaknesses – represents the ECtHR's effort to maintain the relevance of the Convention in the context of the climate crisis while simultaneously striving to respect the domain of politics.

Corina Heri provides an analysis of the *Duarte Agostinho* decision. Although the plaintiffs may not regard the decision as a success, *Heri* contends that it presents an opportunity to define what we consider "success" in this context. This depends on our expectations – whether the aim is to raise awareness, trigger mobilization, encourage judicial engagement with an issue, clarify the law, or pursue a particular outcome, among other factors.

Marta Torre-Schaub analyzes the *Carême* decision and demonstrates how the Court has reaffirmed its least progressive environ-

mental jurisprudence. *Torre-Schaub* argues that this decision could dangerously imply a regression in environmental matters.

Chris Hilson addresses a hidden element, an "Easter egg", in the *KlimaSeniorinnen* judgment. In computer gaming, an "Easter egg" refers to a concealed feature included by developers to surprise and reward attentive players. Such a surprise could be the impacts of the judgment on determining national carbon budgets. Although it is not yet clear how large the margin of appreciation will be that the court grants to the Convention states in the future, conflicts could arise in this area.

Turning to the question of States' extraterritorial jurisdiction, one of the main issues in *Duarte Agostinho*, *Armando Rocha* argues that the Court's decision highlights a gap in human rights protection and creates a mismatch between the ECtHR's case law and that of the Inter-American Court of Human Rights and the UN Committee on the Rights of the Child.

Patrick Abel sees in the *KlimaSeniorinnen* decision "mixed signals for domestic climate law". While the climate rulings are regarded as landmark decisions, the impact on the domestic law of the state parties is not clear-cut. States are left with a wide margin of appreciation to define their climate mitigation ambitions, and many states may not have to tighten their climate laws. However, the enhanced role of environmental associations could have a significant impact on domestic law.

Jannika Jahn examines the international law dimension of the *KlimaSeniorinnen* decision and illustrates why the ruling is a striking example of the "Paris effect": the influence of the non-binding collective goals of the Paris Agreement on the interpretation of domestic constitutional law or international human rights law in climate litigation.

Anaïs Brucher and *Antoine De Spiegeleir* examine the climate rulings from the perspective of the rights of future generations. They argue that the Court has struck a pragmatic yet somewhat cynical balance between the significant demands it faces and the substantial responsibilities it owes to European citizens, other institutions, and itself.

Charlotte Blattner focuses on one of the most controversial questions in the *KlimaSeniorinnen* ruling: the separation of powers principle. *Blattner* demonstrates how the Court addresses separation of powers and the role of the judiciary in adjudicating human rights, particularly in the context of climate change. She argues that concerns about ECtHR overreach are unwarranted. Contrary to the claims of critics, *Blattner* asserts that the judgment forms an integral part of democratic governance – particularly in Switzerland – while also promoting better laws and policies.

Geraldo Vidigal illustrates in his chapter that a key and underrated aspect of the climate rulings is that the ECtHR has highlighted the role of trade-related greenhouse gas (GHG) emissions in States' carbon footprints. While most international climate agreements focus on the reduction of domestic GHG emissions, in the *KlimaSeniorinnen* case, the ECtHR found the GHG emissions occurring abroad to be "attributable" to Switzerland, as they were "embedded" in goods (and possibly services) "consumed" in Switzerland.

Vladislava Stoyanova addresses what may initially appear to be a more technical aspect of the judgment, namely the question of causation. By untangling the "analytical gymnastics" that the Court performs concerning this issue, *Stoyanova* argues that the reasoning regarding causation is rather confusing and that it is unclear how specifically the "real prospect" test is applied in determining a breach.

Dina Lupin, *Maria Antonia Tigre*, and *Natalia Urzola Gutiérrez* illuminate the relevance of the *KlimaSeniorinnen* case to the discussion of vulnerability and intersectional gender in climate litigation. To date, very few climate cases have addressed the gendered dimensions of climate change, and there was some hope that this case would do so. However, despite the fact that *KlimaSeniorinnen* involves the impacts of climate change on elderly women, the Court fails to engage meaningfully with gender as a determinant of the harms suffered by individuals. Consequently, gender remains an overlooked issue in climate litigation.

Miriam Cohen, *Vladyslav Lanovoy*, *Camille Martini*, *Armando Rocha*, *Maria Antonia Tigre*, and *Eneas Xavier* examine the question of reparation for climate change-related harm. While redress is a crucial issue to consider in relation to climate change, it has, somewhat surprisingly, received less attention from scholars and has not yet been directly addressed by international courts and tribunals. In this context, *KlimaSeniorinnen* may be regarded as a missed opportunity for the ECtHR.

Catherine Higham, *Isabela Keuschnigg*, *Tiffanie Chan*, and *Joana Setzer* explore what the ECtHR' first climate change decision means for climate policy. The ECtHR has provided clear guidelines for member states to follow in aligning their climate policies with human rights obligations. Domestic legislators across Europe must take these requirements seriously to ensure that their climate laws not only meet these minimum standards but also effectively contribute to global climate goals.

Piet Eeckhout observes in his chapter that *KlimaSeniorinnen* has established a remedy that, in EU law, is difficult to locate and may even be unavailable due to restrictive CJEU case law. *Eeckhout* argues that sooner or later, the CJEU will be faced with a *KlimaSeniorinnen* claim. If the CJEU were to declare such a claim

inadmissible, it would position itself among courts that refuse to engage with climate change policies. This, however, would be unfortunate for a court that has long been at the forefront of legal progress.

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Sandra Arntz, Jasper Krommendijk

Historic and Unprecedented

Climate Justice in Strasbourg

The three much-awaited rulings rendered by the European Court of Human Rights on 9 April 2024 are truly historic and unprecedented. In *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*[1], the Grand Chamber established that climate change is "one of the most pressing issues of our times" and poses a threat to human rights. With this ruling, the Court confirmed that States have a positive obligation to adopt measures to mitigate climate change under Article 8 ECHR, the right to family and private life. According to the Court, Switzerland failed to comply with this obligation and exceeded its margin of appreciation by not meeting its past greenhouse gas emissions reduction targets and allowing for "critical lacunae" in its regulatory framework. The Court also determined a violation of Article 6 ECHR, the right of access to court. The Court declared the two other cases, *Carême v. France*[2] and *Duarte Agostinho and Others v. Portugal and 32 Others*[3], inadmissible on procedural grounds (no victimhood and a failure to exhaust domestic remedies).[4] This chapter provides a quick overview of the three rulings, most notably *KlimaSeniorinnen*, and sketches out the most important implications. It obviously does not do justice to the richness of the judgments. It is primarily written with the idea that scholars and experts will delve into all the intricacies in this edited volume and the years to come (see already Milanovic[5], and Buyse and Istrefi[6]).

KlimaSeniorinnen: major substantive take-aways

With *KlimaSeniorinnen*, the Court follows in the footsteps of various national courts, most notably the Dutch *Urgenda* ruling[7] (see also the extensive overview of the domestic case-law in paras. 236–272), as well as international courts and bodies (e.g. the Inter-American Court of Human Rights[8] and the UN Committee on the

Rights of the Child[9]). The Court can be commended for the relatively swift handling of these cases under its priority policy, involving 37(!) third-party interventions and 33 respondent States. The judgment in *Klimaseniorinnen* is 657(!) paragraphs long, while the inadmissibility decision in *Duarte* is not brief either (231 paragraphs).

In their case against Switzerland, the four Swiss elderly women and the association relied on Articles 2 and 8 ECHR and argued that the increase in heatwaves poses a health risk to them, considering their age. They also alleged breaches of Article 6 (the right to access to court) and Article 13 ECHR (the right to an effective remedy) for the authorities' failure to respond seriously to their requests and provide an effective remedy with respect to the alleged violations of Articles 2 and 8 ECHR.

Before delving into the procedural aspects, we will first examine various important elements related to the merits. Not unimportantly, the Court responds to (and preempts) criticism as to the undemocratic role of courts in relation to climate change (paras. 410–414 and 449–451). The UK government, for example, noted critically that the applicants are "asking the Court to act as legislator"[10]. The Court emphasizes that judicial intervention cannot replace legislative or administrative action but that "democracy cannot be reduced to the will of the majority … in disregard of the requirements of the rule of law" (para. 412).

With respect to Article 8 ECHR, the Court forcefully holds that this provision encompasses the right for individuals to effective protection from serious adverse effects of climate change on their life, health, well-being and quality of life (para. 519). Particularly noteworthy is also the distinction in relation to the scope of the margin of appreciation. The Court adopts a reduced margin in relation to the *necessity* of combating climate change, while it accords

states a wide margin as to the *choice of means* (para. 543). In order to guarantee Article 8 ECHR, States have a positive obligation to adopt, and effectively apply regulations and measures capable of mitigating the existing and potentially irreversible effects of climate change (para. 545). The Court even determines that Article 8 ECHR requires states to "undertake measures for the substantial and progressive reduction of their respective GHG emission levels, with a view to reaching net neutrality within, in principle, the next three decades" (para. 548). These principled pronouncements are truly groundbreaking, as also illustrated by the partly (and only!) dissenting opinion of the British Judge Tim Eicke. According to Eicke, this newly created right to effective protection by the State does not have any basis in Article 8 or any other provision (para. 4).

While the Court does not find a violation of Article 2 ECHR, it acknowledges that the principles developed under the right to life are "to a very large extent" similar to those under Article 8 (para. 537). Regarding Article 6 ECHR, the Court gives the domestic courts of Switzerland a rap over the knuckles for not addressing the issue of standing of the association. The failure of the domestic courts to engage "seriously or at all" in the action brought by the applicant association, and the absence of other legal avenues, impaired the very essence of the association's right of access to a court (paras. 636–638).

Victimhood: welcoming associations while turning down individual applicants

The most important procedural take-away from *KlimaSeniorinnen* relates to Article 34 ECHR. The Court allows for legal action by associations in relation to climate change. This confirms the hints

that were already made by President O'Leary during the hearing in relation to the Aarhus Convention (paras. 490–501).[11] Most importantly, the Court determines that an association does not need to show that its members or other affected individuals on whose behalf it is acting would themselves have met the victim-status requirements (para. 502). The judgment also builds on the Court's previous case law in *Melox*[12] and *Câmpeanu*[13] and the recognition of the (theoretical) possibility for environmental associations to bring climate cases in most member states (para. 234). In order to avoid "abstract complaint[s] about a general deterioration", the Court presents three criteria mostly related to the legal position and representativeness of the association (para. 501). To appreciate the implications of these considerations, it is worthwhile to read the partly dissenting opinion of Judge Eicke. He criticizes the Court for its all-too evolutive interpretation of the victim requirement that essentially opens the door to *actio popularis* type complaints.

While the Court adopts a welcoming attitude towards associations, it is more discouraging towards individual applicants. The Court declares that the four elderly Swiss women lack victimhood and are not directly affected. In doing so, the Court upholds the high threshold of a minimum level of severity in its earlier case law (para. 472). The Court points to the potentially huge number of persons when a low threshold is being applied, because everyone is or will be affected by the adverse effects of climate change. Considering the exclusion of *actio popularis*, the Court lays down two strict criteria: a high intensity of exposure to the adverse effects of climate change with significantly severe adverse consequences of governmental (in)action as well as a pressing need owing to the absence or inadequacy of reasonable measures to reduce harm. The four applicants failed to satisfy these requirements, considering that they were not in any "critical medical condition" and that

there was no proof of a correlation with the asthma of one of the women (para. 533). The Court also reiterates its well-established case law[14] that future risks can "only in highly exceptional circumstances" be taken into account (para. 470). The implication of *KlimaSeniorinnen* is that NGOs and associations have an easier job than "lone wolves" in accessing the Court in climate cases. This approach clearly streamlines the potentially high number of complaints that would otherwise be lodged in Strasbourg.

Carême exemplifies a straightforward and unsurprising application of the victim requirements under Article 34 ECHR. Carême claimed that the government of France violated its positive obligations under Articles 2 and 8 ECHR by not taking all appropriate emission reduction measures to reach the goals France has set for itself under the Paris Agreement. The Court concluded that the former mayor of Grande-Synthe lacked victimhood since he no longer lives in France. He has no relevant links with the municipality Grande-Synthe aside from the fact that his brother is living there. Furthermore, Carême has no right to lodge a complaint on behalf of the municipality of which he was the former mayor.

Duarte Agostinho: no extraterritoriality

The Court declared the most mediagenic[15], high-profile and ambitious case of *Duarte Agostinho* inadmissible. The six Portuguese youngsters in this case did not only bring a claim against their home State for violating Articles 2, 3, 8 and 14 ECHR, but also against 32 other States. The applicants had not exhausted domestic remedies in any of the respondent States. In addition, the case raised the contentious issue of extraterritoriality. The Court follows the defending States and relies on a strict territorial test requiring effective control over the emissions. While acknowledging the pe-

culiarity of climate change, the Court is wary of creating a "novel ground" for extraterritorial jurisdiction "by way of judicial interpretation" (para. 195). This would result in "a radical departure from the rationale of the Convention protection system, which was primarily and fundamentally based on the principles of territorial jurisdiction and subsidiarity" (para. 205). The Court also points to "an untenable level of uncertainty for the States" when the extraterritorial jurisdiction is expanded, turning the ECHR into a global climate change treaty that can be activated by people anywhere in the world (para. 208). The Court's approach, nonetheless, differs from the UN CRC Committee[16] and IACtHR[17] which required merely that the harm was "reasonably foreseeable" to the State Party (as analyzed by Wewerinke-Singh[18] and Suedi[19]). The Court explicitly acknowledges this difference (para. 212).

The Court subsequently concludes that the Portuguese youngsters failed to exhaust domestic remedies in the only state that has jurisdiction, Portugal. The youngsters should have started a case before the Portuguese courts. This follows from the subsidiary nature of the ECHR system, and the Court makes clear that it also benefits from a prior review by national courts (para. 228). The various *Urgenda*-type national court cases in the past years also illustrate that this requirement is not unreasonable, also considering the risk of opening the "floodgates". The Court's inadmissibility decision is thus not surprising and aligns with the decision of the UN CRC Committee in *Sacchi et al v. Argentina et al*.[20]

Despite the case's inadmissibility, the Court acknowledges several points made by the applicants. It, for example, recognizes that States have ultimate control over private and public activities on their territories that produce greenhouse gas emissions and those emissions do have an impact on people beyond a State's border (para. 192).

The impetus to climate litigation

The judgments will undeniably set the tone for climate litigation in the years to come. It will impact both litigation and other procedures before other international courts (i.e. the Advisory Opinions before the International Court of Justice[21], International Tribunal for the Law of the Sea[22] and IACtHR[23]) as well as national courts. Formally speaking, judgments of the Court are only binding between the parties (*inter partes*). The judgments are, nonetheless, considered to contain *res interpretata*. This means that an interpretation by the court is part of the ECHR and is generalisable beyond the concrete case.

This has certainly not been the last word of Strasbourg. Six other climate cases are still pending in Strasbourg.[24] The judgments will also leave their mark more broadly in the environmental area and provide a much-needed impetus considering the considerable limitations that dominate this area.[25] As Lambert noted in 2020: the Court "reached the end of the road with regard to environmental protection"[26]. The Court's approach can also be contrasted with the absence of a "rights turn" in the case law of the Court of Justice of the EU, primarily resulting from restrictive standing requirements (in *Carvalho*[27]).[28] The reliance on Aarhus by the Court could be a valuable source of inspiration for the CJEU's *locus standi* requirements in relation to the action for annulment (263(4) TFEU), also considering Article 52(3) of the Charter and the EU's ratification of the Aarhus Convention.

The question remains what the judgments imply for the ongoing discussions with respect to the recognition of the right to a clean, healthy and sustainable environment as a separate self-standing human right (e.g. the UNGA Resolution adopted in July 2022[29]), or even a distinct right against the adverse effects of cli-

mate change (e.g. the Indian Supreme Court in March 2024[30]). Following a resolution of the Committee of Ministers[31], the CDDH Drafting Group on Human Rights and the Environment held its last meeting about the environment and human rights in March 2024 and sent its draft report to the CDDH for its adoption in June 2024.[32] In *KlimaSeniorinnen*, the Court acknowledges these developments but tries to stay away by mentioning that it is not for the Court to determine whether such a right exists. Its role is to assess the Convention issues before it (para. 448). Concluding, *KlimaSeniorinnen* evidences the beauty of the ECHR as a living instrument which enables the Court to engage with urgent issues.

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Johannes Reich

KlimaSeniorinnen and the Choice Between Imperfect Options

Incorporating International Climate Change Law to Maintain the ECHR's Relevance Amid the Climate Crisis

"Everything could be different – and yet there is almost nothing I can change."[1] This is, as Niklas Luhmann observed, the paradoxical blend that modern democracies impose on citizens, inviting either utopianism or fatalism. Disillusionment with the transformative potential of democracy is indeed widespread in the face of the "rapidly closing window of opportunity to secure a liveable and sustainable future for all"[2] on the one hand, and the often inadequate action[3] taken to reduce anthropogenic greenhouse gases (GHG) emissions on the other.

Fatalism, however, was not something the more than 2,000 Swiss women with an average age of 73 joining together in the Association (German: *Verein*) "*KlimaSeniorinnen Schweiz*", succumbed to. Rather, as part of a strategic litigation effort[4] initiated by "Greenpeace Switzerland", an NGO, *KlimaSeniorinnen* made the case that the Swiss federal executive branch of government's failure to initiate a revision of the existing climate legislation[5] amounted to a violation of the country's positive obligations stemming from the right to life and the right to respect for private and family life enshrined in the European Convention on Human Rights (ECHR). Senior female citizens, they maintained, would be adversely affected by heat waves[6] occurring both more frequently and severely[7] on account of omissions by federal authorities to reduce Switzerland's GHG emissions (see para. 22).

Neither the Swiss Federal Administration nor the Federal Administrative Court nor, as critically appraised[8], the Federal Supreme Court (paras. 43–63) considered the motion of *KlimaSeniorinnen* and four of their members on its merits.

Categorical differences between KlimaSeniorinnen and Court's existing environmental case law

KlimaSeniorinnen had thus exhausted all domestic remedies. This indicates that not only democracy but also litigation to compel governments to reduce GHG emissions is fraught with obstacles. This is mainly due to the interplay of climate physics underpinning climate change and the rationale of the judicial process. Carbon dioxide (CO2) accounts for two-thirds of all GHGs emitted.[9] Multiple lines of evidence indicate a causal and "almost linear relationship between cumulative CO2 emissions and projected global temperature change".[10] Each tonne of CO2 emitted into the atmosphere anywhere on Earth at any given time thus had, has and will have an almost identical effect on the average global temperature. Due to the high heat capacity of the Earth system, an average of 10.2 years elapses between emission of CO2 and its maximum effect in terms of the resulting global warming.[11] Climate change induced by increased atmospheric CO2 concentration "remains largely irreversible for 1,000 years after emissions stop".[12] The rise in the global average temperature is therefore, as the European Court of Human Rights (ECtHR) acknowledged in the *KlimaSeniorinnen* decision (paras. 416–7, 425, 439), essentially determined by the *cumulative* level of all GHG emissions accrued over centuries, to the effect that "[m]ost aspects of climate change will persist for many centuries even if emissions of CO2 are stopped".[13]

By contrast, the ECtHR's existing environmental case law refers to situations in which harm (toxic waste, pollution, etc.) inflicted on applicants can be traced directly to a specific source (e.g., industrial steelworks complex or landfill) located within the jurisdiction of the respondent State. Given this state authorities can take ef-

fective action to reduce the infringement (rf., e.g., *Cordella and Others v. Italy*[14]). In this previous environmental case law, there was, in other words, a direct link "between a source of harm and those affected by the harm", and the measures necessary to alleviate the harm were "identifiable and available to be applied at the source of the harm" (para. 415). Therefore, recourse to "positive obligations"[15] derived from the Convention, especially its Articles 2 and 8 (see paras. 538–540), is essential for the Court to ensure that, in environmental cases as well, the judicial process may serve its main purpose: to provide relief to individuals who have suffered specific, measurable, and unlawful harm at the hands of the party bearing legal responsibility for the infringement.

An institutional dilemma: choosing the best imperfect option

Owing to the interaction between the physics underpinning climate change and the rationale of the judicial process, the "fundamental differences" (para. 422) between *KlimaSeniorinnen* and the existing environmental case law presented the Court with a serious dilemma: the remedy sought by the applicants (i.e. a drastic reduction of GHG emissions; see paras. 22, 319–336) would not have alleviated their harm, despite the "causal relationship between climate change and the enjoyment of Convention rights" (para. 545; see also paras. 431–436). This left the Court with few options – all of them imperfect.

To find the alleged omissions outside the scope of the guarantees of the Convention would not only have risked neglecting the link between climate change and the severe consequences for many aspects of human life[16], which are closely intertwined with some guarantees of the Convention, but would also have rendered both the Convention and the Court – the "Conscience of Europe"[17] –

largely irrelevant with regard to "one of the most pressing issues of our times" (para. 410). However, maintaining the relevance of both the Convention and the Court is fraught with considerable peril for the institution, especially at a time when human rights law in general and the ECHR in particular have come under mounting scrutiny.[18]

What the ECtHR thus refers to as a "tailored approach" (paras. 422, 434 & 436) amounts, at least partly, to the Court's attempt to maintain both the Convention's and its own relevance in the midst of one of the most pressing challenges facing humanity, while at the same time carefully seeking to respect the realm of politics with regard to concrete "measures to be implemented" (para. 657).

A "tailored approach": incorporating international climate change law

This "tailored approach" (para. 422) essentially consists of incorporating objectives, obligations, and aspirations of international climate change law under the UNFCCC, including the Paris Agreement, to define the scope of the positive obligations deriving from Article 8 of the Convention (see paras. 541–549). The Court also prescribed a comprehensive set of criteria for States to fulfil in order to comply with the Convention (see paras. 550–554).

The Court derives its approach from the positive obligation of States to protect individuals from "adverse effects on human health, well-being and quality of life arising from various sources of environmental harm and risk of harm" (para. 544; see also para. 435) and from a "harmonious and evolutive interpretation of the Convention in the light of the developing rules and principles

of international environmental law" (para. 453). This doctrine has been established in previous case law on the basis of Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties.[19]

With respect to Articles 6 and 8 ECHR, the Court granted the applicant association (KlimaSeniorinnen) *locus standi* (paras. 526, 623, 625), while holding that the four individual applicants failed to satisfy the criteria for victim status (paras. 535, 624, 625). This is consistent with the fact that, for the reasons rooted in climate physics noted above, it is local adaptation measures, such as free home visits by medical professionals during heatwaves, or "reasonable measures of personal adaptation" (para. 533), rather than the GHG emission reductions requested by the applicants (see paras. 22, 319–336), that can mitigate the adverse impacts of climate change for individual applicants.

The Court, while finding Switzerland in violation of both Articles 6 and 8 of the Convention (paras. 574 & 640), shied away from prescribing any concrete "measures to be implemented in order to effectively comply" with its judgment. The Court deemed "the respondent State, with the assistance of the Committee of Ministers" to be "better placed than the Court to assess the specific measures to be taken" instead (para. 657).

Emphasizing the collective dimension - an administrative turn

The Court's approach highlights the collective dimensions of climate change,[20] while seeking to account for the threats posed by the effects of anthropogenic GHG emissions to the values protected by the Convention's rights. The stringent criteria for associations to have standing (see paras. 502–503) are likely to ensure that only well-founded applications reach the Court. Given the Court's reluctance to prescribe specific measures to be implemen-

ted by the respondent state (para. 657), the "tailored approach" (para. 422) risks transforming applications to the ECtHR to compel states to reduce their GHG emissions into a hybrid form of weak public interest litigation, akin to supervisory complaints in administrative law.

Excessively "harmonious": turning "Paris" upside down

The Paris Agreement, which the Court in part incorporates to define the scope of the positive obligations deriving from ECHR's Article 8, "contains provisions spread across the spectrum of legal character"[21]. The Treaty's provisions on "loss and damage" are mere "soft obligations" that "recommend" but (do not require) certain actions,[22] not least due to the United States' stance at COP 21 that any stricter provision would "kill the deal".[23] The Paris Agreement's core provision, Article 4 (2) on "Nationally Determined Contributions" (para. 136), states an obligation ("shall") of conduct ("intends to achieve") rather than one of result.[24] This deliberate shift away from the Kyoto Protocol's binding reduction commitments is often referred to as a transition from a "top-down" to a "bottom-up" approach.[25, 26]

Despite these crucial nuances in the "terms of the treaty", the Court refers to the UNFCCC and the Paris Agreement as "international commitments undertaken by the member States" (para. 546) when determining the scope of States' positive obligations. There are, to be sure, legitimate policy considerations to call for a much more robust and effective mechanism for states to effectively reduce their GHG emissions. However, deriving not only such obligations of result but a judicial supervisory mechanism (paras. 550–554) from the meticulously negotiated and crafted "terms" of the Paris Agreement tends to turn its "'bottom-up' approach" on its

head and is likely to go well beyond what a "harmonious (…) interpretation" (para. 453) allows for.

Conclusion: reiterating the prerogative of politics

In a seemingly paradoxical way, *KlimaSeniorinnen* reaffirms the prerogative of politics: while member States' of the Council of Europe climate policies must, according to the ECtHR, comply with a detailed set of criteria in order to be in accordance with the Convention (see paras. 550–554) the Court still refrained from prescribing concrete "measures to be implemented" (para. 657). Hence, only in hindsight will we be able to tell whether *KlimaSeniorinnen*, on which the Court has expended considerable political capital, turned out to be as "transformative"[27] as one hopes for. The "owl of Minerva", after all, "begins its flight only with the falling of dusk".[28]

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Corina Heri

On the Duarte Agostinho Decision

On April 9, 2024, the European Court of Human Rights (ECtHR) issued its first-ever findings concerning climate change. The present chapter, as part of this edited volume on the ECtHR decisions, discusses *Duarte Agostinho and Others v. 32 Member States*[1]. The case was brought by six youth applicants from Portugal, who alleged breaches of Articles 2, 3, 8 and 14 of the European Convention on Human Rights (ECHR) based on the present and future impacts of climate change, including heatwaves and wildfires, caused by the respondent States' greenhouse gas (GHG) emissions.

Like the landmark decision in the *KlimaSeniorinnen*[2] case, which was also handed down on April 9, *Duarte Agostinho* shed light on who can bring climate cases to Strasbourg. In *Duarte Agostinho*, the clarification predominantly concerned the territorial scope of ECHR protection, with the Court finding that climate mitigation cases of this kind cannot be brought by individuals located extraterritorially. This chapter analyses the Court's findings and reflects on what "success" means in these kinds of climate cases.

The Court's findings

Extraterritorial jurisdiction: the demand for a special test

The *Duarte Agostinho* case originally concerned 33 Council of Europe Member States (including Russia, which is no longer a Member State, but against which the case was continued, and Ukraine, against which it was dropped by the applicants in light of the ongoing Russia-Ukraine war). Because the applicants live in Portugal, the claim against that State was territorial; against the others, it was extraterritorial. A key question in the case was accordingly whether the respondent States other than Portugal could be held responsible for the climate-related impacts that their emissions contributed to, but that were felt overseas. Here, the Court

drew parallels to its migration-related case-law (*M.N. and Others v. Belgium*[3], on visa applications submitted at embassies abroad). In doing so, it agreed with the applicants that this case did not fit the Court's established models of extraterritorial jurisdiction under Article 1 of the ECHR (which is primarily territorial, except when (i) a State exercises "effective control" outside its borders; (ii) its agents have power and control over a person abroad or (iii) more rarely, there are specific procedural elements to a case).

The Court then examined the applicants' argument for the creation of a special test for jurisdiction based on underlying principles and the exceptional circumstances concerned. In *KlimaSeniorinnen*, it had shown a willingness to revise the victim status test in response to the specific problem of climate change, creating a special approach to victim status and setting out criteria with a high threshold for both individual applicants and associations.[4] Therefore, the Court considered whether a special approach was also needed here, for extraterritorial jurisdiction.

In its analysis, the Court agreed with the applicants on certain points, namely that: (i) climate change has special features; (ii) States have ultimate control over public and private emissions on their territories; (iii) emissions have adverse effects on the rights of people outside a State's borders "and thus outside the remit of that State's democratic process" (para. 193); and (iv) climate change is a problem "of a truly existential nature for humankind, in a way that sets it apart from other cause-and-effect situations" (para. 194).

However, the Court was not convinced to revolutionize its approach to extraterritoriality, and rejected several other arguments made by the applicants. In particular, it found that (i) jurisdiction had to be considered separately from the merits; (ii) there was no particular link to any respondent State apart from Portugal; (iii) capacity to impact rights abroad was insufficient to establish jurisdic-

tion; (iv) EU citizenship was irrelevant in this regard; (v) "the Convention is not designed to provide general protection of the environment as such" (para. 201), and (vi) its protection is based on principles of territoriality and subsidiarity.

As Rocha discusses in his contribution to this book, the Court accordingly rejected the idea of a new test for jurisdiction based on control over Convention interests, rights enjoyment, or the source of harm. Based on an extensive collage of past cases, it found that jurisdiction "requires control over the person himself or herself rather than the person's interests" (para. 205). Any other conclusion would cause "a critical lack of foreseeability" and allow cases from "anyone adversely affected by climate change wherever in the world he or she might feel its effects" (para. 206).

The Court expressed its concern that the applicants' arguments "would turn the Convention into a global climate-change treaty" (para. 208). This was considered untenable, and the Court refused to follow the more expansive approaches of other human rights bodies (specifically the Inter-American Court of Human Rights[5], as followed by the Committee on the Rights of the Child in *Sacchi et al. v. Argentina et al.*[6]), declaring them "based on a different notion of jurisdiction" (para. 212). The Court also noted that the extension of jurisdiction sought could not be limited to the Convention's legal space (its "*espace juridique*"). As a result, the claims against all of the respondent States save Portugal were declared inadmissible.

Exhaustion of domestic remedies: foregrounding the role of domestic courts

While the ECtHR determined that it had jurisdiction to hear the complaint against Portugal, it likewise dismissed that complaint. It did so because the applicants had not exhausted the domestic remedies. Here, the Court reiterated well-trodden case law, noting its

subsidiary role and the fact that the ECtHR is not a court of first instance. While applicants are not required to exhaust remedies that are ineffective, futile, or inadequate, and although there is some flexibility here, mere doubts about the effectiveness of a remedy are insufficient to suspend the exhaustion rule.

Applying these standards, the Court concluded that the applicants should have exhausted the remedies offered by the Portuguese legal system. It noted that Portugal recognizes an explicit and judiciable constitutional right to a healthy environment, and that domestic law allows for *actio popularis* cases. Using the domestic remedies would have allowed the Portuguese courts to examine the case themselves, allowing the Court to benefit from their assessment of the facts and the law. The impact of the failure to exhaust domestic remedies was also reiterated in a brief *obiter dictum* on victim status, where the Court noted that the lack of domestic rulings deprived it of clarity about the applicants' situations.

Contextualizing the case: whither global climate justice?

Savaresi, Nordlander and Wewerinke-Singh have argued that the Court's findings on extraterritoriality here "risk limiting access to justice for those most vulnerable to climate harms".[7] While I have no qualms in agreeing with this, I will explore two arguments here: one concerning the perceived inevitability of this finding, and the second more closely investigating the global versus domestic orientation of the Grand Chamber's climate rulings.

No such thing as inevitability

The outcome on extraterritoriality in *Duarte Agostinho* has been described as inevitable.[8] And certainly, it is consistent with existing case law. The alternative would have represented a radical depar-

ture from existing approaches and could have paved the way for climate cases from all around the world to come to Strasbourg, inundating the Court's docket. Still, it is important to recall that the Court's Grand Chamber is not in the business of considering cases that are "inevitably" inadmissible. Such cases are subject to summary proceedings, and three other climate cases have already met this fate, meaning that they were declared inadmissible by single judges or committees without any findings being made.[9] Neither should we read anything into the lack of separate opinions in this case – these are in fact not *possible* in inadmissibility decisions.[10]

Looking to the future, one has to wonder whether there are no procedural innovations that would have been available to admit this case while simultaneously preventing a global flood of follow-up cases. An analogy to the creation of the pilot judgment procedure to manage the Court's docket may have been able to serve as an inspiration.[11] After all, as Raible has argued, absent coherent and ambitious action from States on the domestic and international level, human rights bodies may need to devise new and potentially "non-ideal" solutions – which is essentially what happened in *KlimaSeniorinnen* as concerns victim status.[12] In short: while the Court's decision in this case was predictable, it was not inevitable.

The professed failure of the Court to ensure global protection

In this case, the Court refused to follow the approach of the IACtHR (as echoed by the CRC) along with long-standing academic discussions about the disjointed state of Article 1 ECHR.[13] Rocha, citing Murcott, Tigre, and Zimmermann[14], accordingly describes *Duarte Agostinho* in his contribution to this book as passing up "the" opportunity for the ECtHR to learn from the Global South and revise its understanding of extraterritoriality.

These first cases will inevitably be followed by more climate rulings from the ECtHR. To understand what is at stake, it must be reiterated that climate change is a fundamentally inequitable phenomenon. This is certainly true for the disparate impacts on vulnerable communities in countries facing development constraints.[15] It is also well-established that some parts of Europe will be more severely and quickly affected by climate change than others (evocative of Doelle and Seck's idea of a "south within the north"[16]).[17] It has likewise been scientifically proven – and reiterated by the Court in *KlimaSeniorinnen* – that "populations at 'highest risk' of temperature-related morbidity and mortality include older adults, children, women, those with chronic diseases, and people taking certain medications" (para. 510). Corresponding cases are sure to come before the Court and, in fact, are already pending. And currently, the Court's Grand Chamber rulings only scratch the surface of these inequities, rendering this case a distinct – if understandable – disappointment.

However, the Court's approach in *Duarte Agostinho* is coherent with the overall vision of climate litigation that the Court presented on April 9th, and must be understood in light of the *KlimaSeniorinnen* judgment, where the Court found that States must create and implement an adequate regulatory framework to control emissions. In *KlimaSeniorinnen*, like *Duarte Agostinho*, territorial scope was a major concern for the Court. The Court in *KlimaSeniorinnen* required associations and their members to have a link to the jurisdiction in question in order to have victim status in mitigation cases (para. 502), again limiting claims from abroad. At the same time, *KlimaSeniorinnen* shows that the Court is willing to review emissions abroad, including those embedded in trade and imported into Switzerland (para. 287). Despite noting that these

emissions contain "an extraterritorial aspect", the Court considered them reviewable given their impacts in Switzerland.

The rulings show that, while understanding the need for ECHR-based review, the Court is restrictive concerning who can contest climate policy. This is justified by the fact that climate change potentially affects everyone, and this is understood as equivalent to an *actio popularis* (falsely, I would argue, if we understand an *actio popularis* as an *abstract* form of review). At the same time, we should not lose sight of the fact that a binding ECHR obligation to regulate and mitigate GHG emissions, understood comprehensively to include embedded emissions, is a key step towards ensuring a liveable climate, and has global benefits.

The breadth of ambition, and understandings of success

We may not readily describe *Duarte Agostinho* as a success. But it does offer an excellent opportunity to clarify what we mean by "success" in this context. Arguably, this depends on our expectations – whether that's to generate attention, trigger mobilization, seek judicial engagement with an issue, clarify the law, or pursue a given outcome, among others.

Some expected *Duarte Agostinho* to be inadmissible from the beginning. For example, Milanovic has argued that the applicants were "bound to fail, so much so that pursuing this litigation was potentially counterproductive".[18] In response, I would argue that the latter (counterproductivity) does not necessarily follow from the former (inadmissibility), and that a case can be inadmissible and still have striking impacts (with *Sacchi* as a key example).

After this ruling, we know that these impact-based arguments about territorial jurisdiction will not fly in Strasbourg, creating legal clarity – arguably a type of success. In any case, this know-

ledge is not a setback. It tells us how far the Court is willing to go under current circumstances, enabling litigants to shape future cases accordingly, and it provides input for ongoing discussions about the proposed additional protocol to the ECHR[19] recognizing a human right to a healthy environment.

In addition, it should be noted that – as part of the Grand Chamber trio of climate cases – *Duarte Agostinho* presented ambitious arguments about States' fair shares and the harmonization of human rights law with the international climate regime. The submissions made in this case are a resource for other litigants, they are carried forward in part by the KlimaSeniorinnen's submissions, and they pushed the legal imagination around what was possible here, perhaps making it more feasible for the Court to make its landmark finding in *KlimaSeniorinnen*. These can all be understood as their own kind of success, meaning that success is subjective – at least to a degree.

Conclusion

The first wave of climate rulings from Strasbourg has clearly established that, while the Court is willing to hear climate cases, it will do so under specific circumstances that allow it to control who can bring climate cases, and from where. This is a pragmatic solution that balances institutional needs against demands for climate justice. By refusing to create a new test for extraterritorial jurisdiction in climate cases, and insisting on the exhaustion of domestic remedies, *Duarte Agostinho* is a key part of this pragmatism.

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Marta Torre-Schaub

The European Court of Human Rights' Kick Into Touch

Some Comments under Carême v. France

On April 9, 2024, the European Court of Human Rights (ECtHR) ruled on three applications concerning the fight against climate change and the positive obligations of the signatory states of the European Convention on Human Rights (ECHR) in this respect. Two of the applications were declared inadmissible (*Duarte Agostinho and Others v. Portugal and 32 Other States*[1] and *Carême v. France*[2]). The third, *Klimaseniorinnen v. Switzerland*[3], was a great success. This chapter analyzes the *Carême* decision in which the Court declared inadmissible an application brought by a former mayor of a French town on the grounds of incompatibility *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 (para. 88). In my view, this is an ill-developed decision, which could dangerously imply a regression in environmental matters.

This decision presents three interesting points in particular.

Firstly, the *Carême* ruling is the most overlooked of the three climate decisions handed down on April 9, 2024. Because this decision is insufficiently argued, a few thoughts on it deserve to be shared. Secondly, this rejection is a reminder of the arduous road ahead for the protection of environmental human rights. Finally, the decision cruelly points out the absence of a right to a healthy environment recognized by the Convention. Given that climate change is one of the world's most pressing environmental problems, this ruling serves as a reminder that little has yet been achieved in terms of the human right to a healthy, stable climate. Despite the success of the *KlimaSeniorinnen* case, there is still a long way to go.

Lenten request reminder

Mr. Carême was mayor of Grande-Synthe, France from 2001 to 2019. Grande-Synthe is a town in Northern France that is particularly exposed to climate-related risks. On November 19, 2018, Mr. Carême, acting on his own behalf and in his capacity as mayor, asked the French government to take all useful measures to curb national greenhouse gas (GHG) emissions, adopt all necessary legislative and regulatory initiatives to "make climate priority mandatory", prohibit all policies likely to increase GHG emissions, and implement immediate measures to adapt to climate change in France. The national authorities failed to respond, and Mr. Carême then appealed to the Conseil d'Etat (French Supreme Administrative Court) on grounds of excess of power.[4]

The petition to the Conseil d'Etat highlighted the future risks associated with climate change, and the need for immediate and ambitious measures to progressively limit GHG emissions. It should be noted that even that first petition to the national court claimed a violation of Articles 2 and 8 of the ECHR. In its decision of November 19, 2020, the Conseil d'Etat ruled that the claims were subject to judicial review.[5] With regard to the interest of the applicants, the Conseil drew a distinction between the case of the town and that of Mr. Carême. For the judges, the municipality had an interest, while Damien Carême did not. Two further decisions by the same court followed (July 1, 2021[6] and May 10, 2023[7]), in which the Council ruled that, while the government had adopted additional measures to address climate change, the available evidence did not provide a sufficiently credible guarantee that the GHG emissions reduction plan would be achieved. The Council enjoined the government to take additional measures before June 30, 2024.

Mr. Carême appealed to the ECtHR in 2022, alleging that the measures taken by France to combat climate change were insufficient, thereby violating his rights under Articles 2 and 8 of the Convention. On May 31, 2022, the Chamber in charge of the case relinquished jurisdiction in favor of the Grand Chamber. Two years later, the Court declared the application inadmissible for lack of interest on the part of the applicant.

In the Court's view, an individual, as a citizen, does not have an interest in the matter

In their defense, the French government argued that the Conseil d'Etat's decision of July 2021 had already deprived the claimant of victim status. The government explained that the decision had satisfied the claims formulated by the claimant before the domestic courts by admitting the admissibility of the application lodged by the town. The ECtHR agreed, once again denying Mr. Carême the status of victim (paras. 76–81).

The ECtHR explained that it "*sees no reason to depart from the conclusions reached by the Conseil d'Etat as to the hypothetical nature of the risk linked to climate change with regard to the applicant…*" (para. 80). While it is likely that climate change affects individuals differently depending on their place of residence, living conditions and state of health, for the Court, the applicant does not show the existence of a serious and specific threat to his health and property (paras. 77, 79 & 82). And, to follow,

> *"the applicant did not justify an interest giving him standing to act on the sole ground that his current residence was in an area likely to be subject to flooding by 2040…there was nothing to in-*

> *dicate what the applicant's residence would be in the years to come, a fortiori in 20 years or more, so that his interest appeared to be affected in too uncertain a manner…"*
> (paras. 78, 79 & 81)

Having moved to Brussels in May 2019, Mr. Carême no longer owns nor rents property in Grande-Synthe. The only link is the fact that his brother lives there. The Court recalled that, according to its established case law, adult siblings cannot rely on the family life component of Article 8, unless they can demonstrate the existence of additional elements of dependence, which is not the case here (para. 81) (see *Mamasakhlisi v. Georgia & Russia*[8]).

The Court thus explained that the applicant had not demonstrated the existence of a direct and sufficiently serious interference with his rights protected by Article 8 (para. 83). He had not established the existence of a direct link between, on the one hand, the State's omissions in reducing GHG emissions and, on the other, his personal life. Furthermore, he had not shown that he had already suffered restrictions in the enjoyment of his home, or that he was personally concerned by the future risks associated with climate change. The argument that he suffered from asthma as a result of carbon dioxide pollution was also rejected by the Court (para. 87), despite its flexible case law on this point (*López Ostra v. Spain*, 1994[9]; *Sciavilla v. Italy,* 2000[10]; *Solyanik v. Russia*, 2022[11]).

As a politician, Monsieur Carême is no victim either

Mr. Carême had also submitted his application in his capacity as former mayor of Grande-Synthe. The Court rejected this ground too (para. 85), referring to its established case law (*Assanidzé v. Georgia*, 2004[12] ; *Slovenia v. Croatia,* 2020[13]). In its view, decentral-

ized authorities exercising "public functions", irrespective of their degree of autonomy from central bodies are regarded, as "governmental organizations" not entitled to apply to the Court under Article 34 of the Convention. Consequently, the Court concluded that the applicant is not entitled to lodge an application with the Court, or submit a complaint to it, on behalf of this town.

Defending the environment at all is not acceptable to the Court either

In response to Carême's application, the French Government took the view that he was seeking to have the ECtHR review the measures taken by France to limit GHG emissions. It was clear, explained the government representative, that Carême's action was not aimed at protecting his individual rights, but at defending the general interest. For the defendants, it was an *actio popularis*. The Convention, explained the government, does not provide for an *in abstracto* review of domestic legislation or measures, including in environmental matters (*Caron v. France,* 2010[14]). The right of individual petition cannot be intended to prevent the possible occurrence of a future violation (*Aly Bernard & al. Greenpeace Luxembourg v. Luxembourg,* 1999[15]).

The ECtHR agreed with the defendants on this point and explained that the applicant could not claim, under any of the headings of Article 8, to be a victim for the purposes of Article 34 of the Convention. The Court noted that, having regard

> *"to the fact that anyone, or almost anyone, could have a legitimate reason to feel some form of anxiety about the future risks of the harmful effects of climate change, to find that the applicant*

> *could claim such victim status would make it difficult to distinguish the defense of interests pursued by way of actio popularis – which is not recognized in the Convention system – from situations where there is a compelling need to ensure the individual protection of an applicant against the harm that the effects of climate change could cause to the enjoyment of his fundamental rights."*
> (paras. 84–86)

Here, the Court takes up its strictest line of jurisprudence on the applicability of Article 8, pointing out that the State's obligations under this provision only arise "if there is a direct and immediate link between the situation at issue and the applicant's home or private or family life" (*Ivan Atanasov v. Bulgaria*, 2010[16]). Environmental damage must have a direct impact (*Luginbühl v Switzerland*, 2006[17]) or direct repercussions on the applicant's right to respect for his or her home, family or private life, or directly affect the applicant's home, family or private life (*Solyanik v. Russia*, 2022[18]). A general deterioration of the environment is not enough. There must be an adverse effect on a person's private or family sphere.

Obscure statements on the exhaustion of remedies

On this point, the ECtHR seems to be sowing a certain amount of confusion, creating uncertainty in particular with regard to future actions. In the absence of any individualization of his grievances, the Court expresses, indirectly, that it is doubtful whether the applicant has duly exhausted domestic remedies (paras. 87 & 88). The Court also justified its rejection by noting that the *Grande Synthe* case is still pending before the Conseil d'Etat. Which implicitly expresses that the case has then not exhausted domestic remedies

(para. 86). In my view, these are contradictory statements. Either, in the view of the judges, the applicant was unable to provide sufficient proof of the individual and direct nature of his grievance, in which case it is hard to see what this has to do with the question of exhaustion of domestic remedies. Or the Court considers that, since the *Grande Synthe* case is still pending because the government has not fully executed what it was enjoined to do in 2021, Mr. Carême would not have exhausted the remedies in France either. However, the Conseil d'Etat itself stated back in 2020 that Mr. Carême's personal petition was inadmissible for lack of interest in acting. So what exactly does the ECtHR mean here? It's hard to understand its comments, which are obscure, to say the least, and even contradictory. The Court confuses the personal request of Carême – whose application was already rejected in 2020 – and the case of the city of Grande Synthe, which is still pending.

Conclusions

In the meantime, Mr. Carême is suffering a denial of justice: the Conseil d'Etat dismissed his action for lack of interest to act in 2020. The French government nevertheless argued in its response to the petition that he has not exhausted domestic remedies. How can one not feel a little lost in the face of such confounding arguments? What recourse will Carême have in France when the highest administrative court already rejected his action more than 3 years ago?

Two possibilities could open up, but neither seems particularly viable. One could read here an invitation from the French government for Mr. Carême to lodge a new application under domestic law, for example, with the Constitutional Court. But on what basis, given that the Conseil d'Etat has already ruled that there are no

grounds for accepting violations of the ECHR with regard to Mr. Carême? He could also attempt a new appeal before the administrative court, this time alleging the lack of speed of French climate policies, particularly the National Low Carbon Strategy -SNBC-, like the "Affaire du siècle".[19] It would then be an action for liability for "state failure", alleging, as the "Affaire du siècle" did, an aggravation of the ecological damage caused to the atmosphere due to an excess of greenhouse gases. But it would be a completely new action, long and costly. It could of course open a new chapter in the history of climate justice in France. Nevertheless, the chances of success of such an attempt would be slimmer than those encountered by the "Affaire du siècle" since France has shown this year that it has just correctly reduced its GHG emissions and moved closer to its objective of achieving carbon neutrality by 2050.[20]

Alternatively, one could read between the lines and interpret that the ECtHR itself invites Mr. Carême to start all over again and base a new application on the violation of Article 6 of the Convention on the right to a fair trial.

In the process, the ECtHR also rejected the claims of the individual victims in the *Duarte Agostinho* and *KlimaSeniorinnen* cases, on the grounds that they had no interest as victims. A way, unfortunately, of reaffirming its least progressive environmental jurisprudence. But, let us at least keep in mind the success of the *Verein KlimaSeniorinnen*'s decision and its future positive consequences on European climate justice.

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Chris Hilson

The Meaning of Carbon Budget within a Wide Margin of Appreciation

The ECtHR's KlimaSeniorinnen Judgment

The much-awaited European Court of Human Rights (ECtHR) Grand Chamber rulings in three key climate cases have arrived, with two ruled inadmissible (*Carême v. France*[1] and *Duarte Agostinho and Others v. Portugal and 32 Others*[2]) and one, brought by senior Swiss women, successful on the merits (*Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*[3] – "*KlimaSeniorinnen*").

Although the *KlimaSeniorinnen* judgment discusses a number of rights of the European Convention on Human Rights (ECHR), including Article 6 (right of access to a court), Article 2 (right to life), and Article 13 (right to an effective remedy), the focus of this chapter is on its discussion of Article 8 (right to private, home and family life). The question raised by that discussion is whether the judgment is one that will "frighten the horses" and lead to oppositional cries of judicial overreach around the separation of powers, or if it is more an unexceptional case of "move on, nothing to see here". My argument is that the judgment is mostly the latter but that it has what, in computer gaming terms, is known as an "Easter egg" – a hidden element included by the developers to surprise and reward those who look carefully. That could turn out to be more controversial.

Article 8 and climate targets

The main treatment of Article 8 in *KlimaSeniorinnen* comes in relation to the applicants' core claim, which was that the Swiss Government's policy action on climate change was inadequate for the purposes of protecting their human rights, especially given their vulnerability to heatwaves associated with climate change. This inadequacy was largely centered around the Swiss government's failures in both setting binding climate mitigation targets and putting in place sufficient policy measures to achieve them.

Conscious of the "subsidiary" role of the ECtHR and the need to respect democratic decision-making by states in line with the separation of powers, the Court emphasized the discretion or "margin of appreciation" enjoyed by state governments (paras. 449, 457). However, it allowed for a reduced margin of appreciation in relation to the setting of state targets on climate change, and a wide one for the policy measures then used to implement and meet those targets (paras. 543, 549).

First, the Court held in discretionary language that states must set targets "with a view to reaching carbon neutrality *within, in principle*, the next three decades" (para. 548, emphasis added). What followed (para. 550) was more prescriptive. According to the Court, these targets must be accompanied by carbon budgets (or an equivalent), which quantify how much emissions room or space the state has during that timeframe. States must also have adequate *intermediate* greenhouse gas (GHG) emissions reduction targets and pathways (e.g., sectoral) showing how the longer term goals will be met. States are obliged to use due diligence to keep their GHG reduction targets updated in accordance with appropriate scientific evidence. Finally, states must be able to provide evidence to show that they are complying with the relevant targets and act in good time, both in setting legislative targets and implementing relevant measures to meet them.

Two further points are also noteworthy on these target principles. First, the Court stated that it will conduct an "overall" assessment of whether a state has fulfilled these requirements rather than a "tick the box" approach, which means that a shortcoming in one will not necessarily lead to a conclusion that a state has exceeded its margin of appreciation (para. 551). Second, the Court drew attention to the need for all relevant competent domestic authorities, including the legislature, executive, and judiciary, to have

"due regard to the need" to respect these target principles (para. 550). Mention of the judiciary there is instructive, because it gives a baton to Council of Europe member court judges to use these principles in climate change litigation cases in national courts.

Applying the above principles to the Swiss case (paras. 555–574), the Court held that the government had not adopted a comprehensive set of legally binding climate targets covering the relevant time span, did not have a relevant carbon budget in place, and did not act in good time. That meant it was in breach of Article 8.

Carbon budgets

In many ways there is nothing controversial about the above aspect of the judgment. The Court is merely saying that, to fulfil their human rights obligations, states must, procedurally, have in place a rigorous regulatory framework on climate mitigation (and also adaptation) (paras. 418, 547, 549, 552). It does not substantively dictate what the ambition of that climate policy action should look like (beyond an uncontroversial, mid-century net-neutral destination). Or does it? The most ambiguous and potentially contentious part of the ruling relates to the Court's discussion of "carbon budgets" (paras. 550, 569–573).

Carbon budgets are used in two senses in the climate law and policy world. First, they can, like the United Kingdom's carbon budgets simply lay out a cap or maximum level that GHG emissions must be brought below in order to meet the climate targets that a state has set. Examples of this sort of carbon budget are found in the United Kingdom's Climate Change Act 2008, and the European Union's European Climate Law (Regulation (EU) 2021/1119). In both of those instruments, the cap on emissions is reduced over subsequent budget periods, and accompanied by a demonstration

of how the various policy measures adopted by the UK/EU will enable them to keep within that reducing cap.

Second, and more controversially, a global carbon budget can be devised and used to show how much carbon the earth as a whole can afford to allow into the atmosphere to keep within the Paris Agreement's 1.5 degrees Celsius temperature goal (although Paris speaks of keeping well below 2 degrees and pursuing efforts at 1.5, Switzerland had accepted 1.5, and the Court emphasized that 1.5 posed less of a risk to human rights). This global budget is then divided up between states, in line with "fair shares". The budgets that the Swiss government might set for itself in order to meet its intermediate and 2050 climate targets are not necessarily the same as a fair share budget of the latter type advocated by third parties like Climate Action Tracker[4], cited in the applicants' submissions (para. 78). Of course, the Swiss are obliged under Article 4(3) of the Paris Agreement to consider the principle of fairness (common but differentiated responsibilities and respective capabilities, in the light of different national circumstances, CBDR-RC-NC) in setting their successive Nationally Determined Contributions (NDC), but it is up to them to decide what that fair share is. That is both a weakness of the Paris Agreement but also, some would say, its strength. Attempts to create a top-down budget allocation did not work in the past – that is why the Paris Agreement went for the bottom-up NDC approach (see for more Geden, Knopf and Schenuit[5]).

Precisely what the ECtHR meant on carbon budgets in its judgment is therefore important. Is it a gaming-style Easter egg that might be used by courts in the future to hold states substantively to more ambitious climate targets in line with their "fair share" of global budgets? Or did the Court intend the idea of a carbon budget to have a more "vanilla", procedural incarnation, with states still the masters of their own climate target ambition and the carbon

budget simply helping them to account for whatever goals they have set for themselves? The answer is likely the latter, because the Court associates the issue of budget setting with a wide margin of appreciation.

The applicants were arguing for a particular, progressive "fair share" approach. While the Court did not tell Switzerland what fairness methodology, if any, it should adopt in setting its carbon budget, it arguably leant more towards a less progressive "equal per capita emissions" quantification approach as a basis for determining what the Swiss fair global share of remaining GHG emissions might look like (para. 569). The applicants regarded this per capita approach as falling short of what Switzerland's fair share should be (para. 77), based on other elements such as historical responsibility and capability.

Conclusion

In the end then, the judgment leaves a number of unanswered questions. It is clear that member states must now adopt carbon budgets. But is *how* these budgets are determined a matter for the courts? In this case, all the Court ruled was that Switzerland was in breach of Article 8 in not having a budget at all. What if a state has one but has determined it simply by reference, for example, to its climate target, rather than setting both that target and the associated budget with reference to a global fairness-based methodology? Would that be a basis for a court to intervene on human rights grounds? What if a state has used a fairness methodology but that methodology is based on current equal per capita emissions rather than a fair share calculation based on historical emissions already used up and on capabilities? Would a court intervene then? Not having a budget at all is clearly manifestly unreasonable.

However, the others look more like something for a state's margin of appreciation, especially because the Paris Agreement adopts a bottom up approach that was intended to afford states flexibility.

In what is otherwise an admirably clear judgment, uncertainty around this carbon budgets point seems likely to be picked up by applicants in national courts and may need to be revisited in future cases heard by the ECtHR. In that respect, it may even have been an intentional Easter egg, with the Court keeping the option open to progressively develop its views on carbon budgets in future judgments.

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Armando Rocha

States' Extraterritorial Jurisdiction for Climate-Related Impacts

States' extraterritorial jurisdiction was one of the hot topics decided by the European Court of Human Rights (ECtHR) in *Duarte Agostinho*[1]. Strictly speaking, the "lack of it" led the ECtHR to declare the complaint inadmissible with respect to all defendant States except Portugal. This finding is in line with previous ECtHR case law but highlights a gap in human rights protection and creates a mismatch between the ECtHR's case law and that of the Inter-American Court of Human Rights (IACtHR) and the UN Committee on the Rights of the Child (UNCRC). This chapter provides a brief review of the ECtHR's understanding of States' extraterritorial jurisdiction in the context of climate change and explains how and why it expressly ruled out different views that could close the gap between emitters and affected individuals.

The ECtHR's understanding of States' extraterritorial jurisdiction

In human rights law, jurisdiction implies, but does not refer to, a State's competence to prescribe and enforce norms. Rather it refers to the State's obligation to secure the human rights of specific individuals. In this sense, jurisdiction is the tool that demarcates the pool of rights-holders to whom States bear obligations and, accordingly, the pool of potential applicants and defendants in a case before human rights bodies.

The European Convention on Human Rights (ECHR) states that "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined . . . in this Convention" (Article 1 of the ECHR). The drafters envisioned a decisive role for jurisdiction but they did not explain what it meant. The reason is simple: they assumed that, where States infringed on human

rights, those infringements would be targeted at individuals within the State's territory, and that exceptions (i.e., where state actions infringed upon the human rights of individuals outside their territory) would be marginal and easily settled by the doctrine of States' *de facto* control.

In the case law of the ECtHR (see, for instance, the cases *Al-Skeini*[2], *M.N. and others*[3], and *Ukraine and the Netherlands v. Russia*[4]), this notion of *de facto* control was used to deal with cases relating to an "effective overall control over a foreign territory", or where State agents exercise authority and control over individuals outside their territory. Under this latter umbrella, the ECtHR has accepted two sets of cases: (i) when State agents exercise physical power and control over an individual and (ii) when State agents employ force outside their territory with sufficient proximity to the affected individual (e.g., target killings).

In all these cases, the ECtHR emphasized that the state must have "control over the victim", meaning that the exceptional circumstances envisioned by the ECtHR refer to cases where there is a certain, but qualified, degree of control over the perpetrators *and* the affected individuals alike, even if they are outside the State's territory.

Control over the "source" but not the "victim"

Since greenhouse gas (GHG) emissions are transboundary and the climate system is shared globally, the risk and harm produced by GHG emissions have an extraterritorial impact. This means that States effectively control the "source" of the risk or harm (which is produced from activities within its territory) but may not exercise any control over the victims of such risk or harm. This yields an odd result – there is harmful conduct (i.e., excessive GHG emis-

sions) attributable to a State under the general rules of international law, but this State's jurisdiction cannot be established under the ECHR.

The case law of the ECtHR is crystal-clear and was confirmed in *Duarte Agostinho*: if States lack effective control over the victim, they do not hold extraterritorial jurisdiction for the purposes of Article 1 of the ECHR, irrespective of their level of control over the source of the harm. Since the applicants in *Duarte Agostinho* live in Portugal, the ECtHR concluded that the other defendant States do not have extraterritorial jurisdiction since they do not hold any level of control over the applicants.

As Murcott, Tigre, and Zimmermann wrote, *Duarte Agostinho* was *the* opportunity for the ECtHR to get inspiration from the Global South and adopt a different understanding of States' extraterritorial jurisdiction.[5] The ECtHR could have bridged the gap between emitters and affected individuals by viewing jurisdiction as requiring "control-over-the-source" (but not necessarily control of the victim). That approach was, however, expressly ruled out by the Court.

Different understandings of jurisdiction

The ECtHR's understanding of States' extraterritorial jurisdiction is not written in stone (and much less in the very wording of Article 1 of the ECHR). A view of jurisdiction as "control-over-the-source" is aligned with Principle 21 of the Stockholm Declaration, which mentions that States cannot cause environmental harms beyond their borders. It was espoused by other human rights bodies in relation to similar treaty clauses.

For example, in Advisory Opinion OC-23/17, the IACtHR decided that "jurisdiction" under Article 1(1) of the American Con-

vention on Human Rights (ACHR) also includes an extraterritorial element and declared that States must prevent the production of environmental harm extraterritorially, *provided the source of that harm lies on their territory* (para. 95-104, emphasis added).[6] Therefore, according to the IACtHR, States' extraterritorial jurisdiction can result alternatively from control over the source or control over the victim.

This view of jurisdiction as "control-over-the-source" was also endorsed by the UNCRC in *Sacchi et al. v. Argentina et al.*[7] (para. 10.10) and, afterwards, in the General Comment No. 26[8] (para. 88 and 108).

The understanding shared by the IACtHR and the UNRCR is not alien to the ECtHR: it explicitly took note of it (para. 210), but added (in a single, short sentence) that "both [bodies] are based on a different notion of jurisdiction, which, however, has not been recognized in the [ECtHR]'s case-law" (para. 212).

Other special or exceptional circumstances were also invoked by the applicants and eventually ruled out by the ECtHR, including the specificity of climate change-related harms *vis-à-vis* mainstream environmental harms (paras. 191 ff.), the collective nature of the mitigation effort (para. 202-203), the impact on the applicants' interests under the ECHR (paras. 205–208), or the developments in other treaty regimes, namely multilateral environmental agreements (paras. 209–213).

Although mindful of these alternative views on States' extraterritorial jurisdiction, the ECtHR found that the ability of a State's decision to impact the situation of individuals abroad is not sufficient in itself to establish jurisdiction for the purposes of Article 1 of the ECHR (para. 184).

What does this mean in practice?

At first glance, it is dismaying that a human rights court would reject States' accountability for the extraterritorial impact of activities taking place within their territory. A more careful look, however, may reveal a different reading of *Duarte Agostinho*.

First, this outcome was predictable in light of the prior case law of the ECtHR. One can just guess what the concerns of the judges are, but their cautious stance might be explained by their fear of opening the ECtHR's gates to almost eight billion potential applicants; or their fear of the impacts of adopting this view of jurisdiction as "control-over-the-source" in other fields (e.g., the use of armed force or cyber-activities).

Second, the mismatch between *Duarte Agostinho*, on the one hand, and Advisory Opinion OC-23/17 and *Sacchi et al.*, on the other hand, is not necessarily that sharp. It is noteworthy that the ECtHR referred to the "*respondent* States' extraterritorial jurisdiction" (para. 213, emphasis added). The court thus emphasized that the States themselves can exercise their powers to properly regulate and effectively control GHG emissions from their territory, considering the impact on individuals living in other States. Likewise, the Court did not rule out the use of domestic courts by affected individuals abroad if the rules on the international competence of courts are met. In line with *Duarte Agostinho*, therefore, one can detach the notion of States' extraterritorial *primary* obligations, on the one hand, from their justiciability before the ECtHR, on the other hand. This is not expressly stated in the judgment – but the reasoning set out in this judgment was careful enough to accommodate a view of States' human rights obligations towards individuals living in other States, whilst rejecting their enforcement before the ECtHR.

Conclusion

For the time being, *Duarte Agostinho* settled the issue of States' jurisdiction in relation to the extraterritorial impacts of GHG emissions. Following a conception of jurisdiction as control-over-the-victim, the ECtHR declared the case inadmissible regarding all defendant States except Portugal. This creates a protection gap between emitters and affected individuals. However, this does not mean that States have a *carte blanche* to emit GHG or cause harm to individuals outside their territory. For one thing, since global climate change is caused by the rising concentration of GHGs in the atmosphere, emissions that cause extraterritorial harm are the same emissions that cause harm in the territory of the State (and these were analyzed in *KlimaSeniorinnen*[9]). In addition, non-justiciability before the ECtHR does not imply that States do not bear a primary obligation under the ECHR to avoid the production of extraterritorial environmental harm, which can be enforced through domestic courts.

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Patrick Abel

Mixed Signals for Domestic Climate Law

The Climate Rulings of the European Court of Human Rights

The climate rulings of the Grand Chamber of the European Court of Human Rights (ECtHR) are landmark decisions. However, it is not obvious what they mean precisely for the State parties of the European Convention on Human Rights (ECHR). Have we witnessed, in *Verein KlimaSeniorinnen Schweiz*[1], a landslide victory for the activists that will revolutionize domestic climate law? Or do the two other decisions in which the Grand Chamber dismissed the applications preponderate?

Milanović has rightly pointed out that the judgment in *Verein KlimaSeniorinnen Schweiz* is "very sophisticated"[2]. All three rulings contain passages that forcefully advocate climate action and a prominent role of the ECHR therein. Other paragraphs defend the sovereignty of states and the margin of appreciation for democratic decision-making. Overall, the rulings send mixed signals. This is not unusual for Grand Chamber rulings that were reached almost unanimously. They reflect a compromise among the judges. In this chapter, I will unpack the consequences of the three rulings for the domestic climate policies of the ECHR parties.

Linking human rights and climate change

First things first: In *Verein KlimaSeniorinnen Schweiz*, the Grand Chamber recognized positive obligations to combat climate change under the right to private and family life (Article 8 ECHR). This is the most essential message of *Verein KlimaSeniorinnen Schweiz*. The Court clarified that the ECHR requires States to act. This will affect the interpretation of human rights in many domestic jurisdictions. In Austria, for example, the ECHR has constitutional status. In other jurisdictions, like Germany, fundamental rights must be interpreted in an ECHR-friendly manner.

Likely, many States will not have to tighten their climate laws

It is less clear whether many ECHR parties must tighten their climate laws following the rulings. This is due to an important distinction the Court made in *Verein KlimaSeniorinnen Schweiz*: between the "State's commitment to the necessity of combating climate change and its adverse effects, and the setting of the requisite aims and objectives in this respect" (para. 543), on the one side ("if" they engage in consistent climate action), and the means to implement this framework to meet the targets and commitments, the "operational choices and policies" (para. 543) ("how" they engage in climate action), on the other. While State parties have a "reduced" margin of appreciation in the first situation, it is "wide" in the second (paras. 543, 549).

The Grand Chamber focused on the former. It listed five criteria for evaluating a climate law framework (para. 550 and additional procedural criteria in paras. 553 et seq.).[3] In essence, States must plan ahead and use a science-based methodology that quantifies GHG emissions and sets adequate intermediate emission reduction pathways and targets in line with their climate-change mitigation commitments. They have to provide evidence of compliance with GHG reduction targets and keep them duly updated. Also, they must implement these measures in good time, appropriately and consistently. Many States have planned ahead in recent years along those lines. In fact, European Union (EU) law requires EU Member States to do it, for example, under the European Climate Law (Regulation (EU) 2021/1119) and the EU Governance Regulation (Regulation (EU) 2018/1999).

Uncomfortable questions on GHG budgeting

As noted by Hilson, the requirement to set a GHG budget will likely be the most problematic for States.[4] The Court held that States must "specify" an "overall remaining carbon budget", "or another equivalent method of quantification of future GHG emissions" (para. 550). This is connected to the global overall GHG emissions budget estimated by the IPCC, which approximately quantifies how much GHG can be emitted on Earth in the future without the average global temperature exceeding 1.5 or 2 degrees Celsius compared to pre-industrial levels, respectively. The ECtHR now requires States to estimate a *national* overall remaining GHG budget, in other words, to estimate the remaining volume of GHG that can be emitted *from their territory* in the future (if not using another equivalent method). This is a question of climate justice. It is about dividing the global carbon budget among States. And this goes to the heart of the debate on the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC). Many States have shied away from definite answers to the question so far. One could understand that the ECtHR meant that States must make this decision. However, it also held that it would only assess the five criteria mentioned above in an overall assessment (para. 551). Thus, shortcomings in quantifying an overall remaining national carbon budget must not necessarily mean overstepping the margin of appreciation. In any event, it is surprising that the Court had little to say about climate justice and the relationship of ECHR parties to developing states. States will likely have to face uncomfortable questions on this front in the future.

Wide margin of appreciation to define climate mitigation ambition

The Grand Chamber was cautious in setting requirements for States' climate mitigation ambition. It found that State parties must "undertake measures for the substantial and progressive reduction of their respective GHG emission levels, with a view to reaching net neutrality within, in principle, the next three decades" (para. 548). One is left to wonder what "in principle" means and in which circumstances the Court may consider that State parties do not need to reach net neutrality in time. Meanwhile, "it is obvious" for the Grand Chamber that, based on the Paris Agreement, "each individual State is called upon to define its own adequate pathway for reaching carbon neutrality" (para. 547). Hence, it seems that States decide their ambition level – as long as they have an effective general framework in place with the features described above that "in principle" leads to carbon neutrality in the next thirty years. This leeway is still substantial.

States can choose the means to combat climate change

The leeway is even greater for States to select the "operational choices and policies", for which the Court attested a "wide margin of appreciation" (paras. 543, 549). States largely remain free to decide whether they prefer market-based mechanisms such as emissions trading systems, command-and-control regulations such as prohibiting selling cars with combustion engines, subsidies, or a variety of other policy tools – and how to account for and distribute the social burdens and benefits that the transformation entails. Arguably, this is where the domestic discussions are most conten-

tious, and the choice of means will impact whether and how climate law affects reality.

Extraterritoriality and embedded emissions

As noted by Rocha, the ECHR did not impose obligations on States related to how emissions from their territory affect people abroad.[5] The Grand Chamber rejected the creation of a new exception for extraterritorial jurisdiction under Article 1 ECHR in *Duarte Agostinho* (paras. 210, 213). This simplifies matters for States as, legally, they can focus on the effects on their territory in most situations regarding the ECHR. Needless to say, domestic human rights laws may say otherwise and offer standing before domestic constitutional courts to people living abroad (e.g., the German Federal Constitutional Court in the *Neubauer* case[6], paras. 101, 173 et seq.).

The Grand Chamber did also consider extraterritoriality in *Verein KlimaSeniorinnen Schweiz* regarding embedded emissions. These are emissions "generated abroad and attributed to Switzerland through the import of goods for household consumption" (para. 275). The Grand Chamber did not see a problem of jurisdiction under Article 1 ECHR as that link was already established by the applicants living in Switzerland (para. 287). Instead, "embedded emissions" were only a question of State responsibility to be dealt with on the merits, "if necessary" (para. 287), but which the Court eventually left open. This matter will lead to further strategic litigation in the future.

An upgraded role for environmental associations, also domestically

Likely, the most significant consequence of the ECtHR climate cases for domestic law is the upgraded role of environmental associations. As described in more detail elsewhere[7], the Grand Chamber set relatively lenient requirements for the standing of environmental associations in *Verein KlimaSeniorinnenSchweiz* (while setting the bar high for individuals). The Court connected this international question of standing under Article 34 ECHR to domestic law via Article 6 ECHR on the right to access a court (paras. 614, 622). It held that Switzerland had violated this provision because its domestic courts did not seriously consider claims made by the applicant environmental association, the Verein KlimaSeniorinnen Schweiz. The Swiss administration and courts had concentrated their reasoning on the individual co-applicants – senior women and association members – leaving the association's standing open (paras. 28 et seq., 34 et seq., and 52 et seq.). The Grand Chamber found this to be insufficient. It explained this by referring to its findings on Article 34 ECHR. In the court's view, the complexities of climate change and the problem of representing those that will suffer from it in the future called for a strong role of environmental associations, also domestically (paras. 614, 622). Thus, it seems like the Court will review cases if domestic jurisdictions accord a similarly prominent role to associations as the ECHR does or at least seriously consider their standing, building on the Aarhus Convention. The question remains whether domestic courts would already comply with these requirements by seriously investigating associations' standing (even if, eventually, rejecting it based on adequate reasoning). Also, Article 6 ECHR does not entail the right to inval-

idate or override a law enacted by the legislature, if not provided so by domestic law (paras. 594, 609). In any event, the judgment will likely strengthen the position of NGOs in domestic climate litigation.

Conclusion

Overall, the climate rulings of the Grand Chamber will have significant implications for the domestic legal orders of the ECHR parties. They are nuanced decisions that send mixed signals. Both the proponents of a more activist role for courts and of leaving ample discretion to democratic decision-making will have reasons to criticize and celebrate different parts of the rulings. This is not the worst outcome that a regional human rights court can achieve.

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Jannika Jahn

The Paris Effect

Human Rights in Light of International Climate Goals and Commitments

The judgment of the European Court of Human Rights (ECtHR) in the case *Verein KlimaSeniorinnen v. Switzerland*[1] is a striking example of the Paris effect: the influence of the non-binding collective goals of the Paris Agreement (PA) on the interpretation of domestic constitutional law or international human rights law in climate litigation. In its ground-breaking and bold ruling, the ECtHR established positive obligations for Switzerland to take steps to protect against the adverse effects of climate change on the enjoyment of the right to private and family life enshrined in Article 8 European Convention on Human Rights (ECHR). For this finding, the Court interpreted ECHR rights dynamically in line with international climate goals and commitments, relying on the scientific and political consensus about climate change and its negative impacts. By basing the human rights risk assessment on this consensus, the Court took a logical step from a human rights perspective. Moreover, it did not fall into the trap of pitting democracy against human rights and demonstrated that human rights protection is a key element of democratic governance. Contrary to what Judge Eicke maintained in his partial dissent, the majority did not compromise the concept of "effective political democracy" or, as argued by some scholars[2], turn the PA consensus upside down, establishing obligations of result and a regional judicial supervisory mechanism. Instead, the Court's decision proves to be an essential element in triggering the necessary democratic debates on which the PA relies "from the bottom up". Reinforcing the procedural limb of Article 8 ECHR will be an essential step towards further strengthening democratic decision-making in the societal transition to climate neutrality.

The Paris Effect on climate litigation

The PA operationalizes the United Nations Framework Convention on Climate Change (UNFCCC). The agreement has been interpreted as leaving it largely to the Contracting States to decide on their level of climate ambition.[3] Binding commitments undertaken under the PA are limited to those of conduct. The PA goals – to keep global warming to well below 2°C compared with pre-industrial levels and to pursue efforts to limit temperature increase to 1.5°C (Article 2 (1) (a) PA) – as well as the pathway to meet these goals – achieving climate neutrality by the second half of the century and reaching global peaking of greenhouse gas (GHG) emissions as soon as possible (Article 4 (1) PA updated in COP 26, Glasgow Climate Pact) – are not binding among parties. According to Article 4 (2) PA, each party has the legal obligation to prepare, communicate and update nationally determined contributions (NDCs) and to pursue measures that aim for meeting these NDCs. Pursuant to Article 4 (3) PA, Contracting States' successive NDCs will represent a progression beyond the previous NDC, i.e. an increased level of climate ambition, and reflect the state party's highest possible ambition, i.e. its best efforts in light of individual responsibilities and capabilities. Overall, parties to the PA are not subject to a duty of result to submit NDCs that are consistent with the climate goals or to actually achieve their NDCs.

Despite its goals being non-binding, and yet perhaps precisely because of its "bottom-up" nature, the PA has triggered climate litigation at international level and domestically in several countries. This is happening in an environment where public debates focus on the failure of states to adequately reduce greenhouse gas emissions to meet the PA temperature goals.[4]

Several highest courts have ordered governments to adopt substantive and procedural measures for effective climate action that align with the goals of the PA (I call this the Paris Effect). For example, in September 2018, the Dutch Supreme Court in *Urgenda v. the Netherlands*[5] drew on the temperature goal expressed in the PA as a basis for establishing a duty of care for the Dutch state as regards CO2 reduction efforts (para. 50). In Germany, the Federal Constitutional Court (FCC) held in its first climate ruling in May 2021 that the statutory provisions of the Climate Act were insufficient to meet the PA temperature goal that the Act had incorporated into domestic law.[6] The French Conseil d'État took a similar decision in July 2021 regarding the claim by Carême acting in his capacity as mayor of the municipality of Grande-Synthe (see also *Carême v. France*[7], paras. 35–36).[8]

The Paris Effect on the dynamic interpretation of the ECHR

The *KlimaSeniorinnen* case brought a novel set of facts and new legal questions before the Court. For the first time, the ECtHR was called to decide on matters of climate change and it was unclear if the Convention's rights could be applied to this existential, yet diffuse, environmental threat. The Court found a violation of Article 8 ECHR. For this finding, it did not rely on the right to a healthy environment, as endorsed by the UN General Assembly.[9] Instead, it based its ruling on the already existing harmful impacts and the risk of potentially irreversible and serious adverse effects on the enjoyment of Article 8 ECHR caused by climate change (paras. 519, 545). In defining the positive obligations flowing from Article 8 ECHR, the Court interpreted the Convention *in line with* the international commitments undertaken by the states, most notably under the UNFCCC and the PA.

To this end, the Court applied the standards of dynamic and evolutive interpretation as developed in its case law, interpreting the Convention – as a so-called living instrument – within its factual and legal context, which includes other rules of international law (cf. Article 31 (3) c) Vienna Convention), at least if all Convention states are subject to them (paras. 434, 455-456). To justify the dynamic interpretation of Article 8 ECHR, the Court explicitly relied on the scientific and political consensus among Convention states about the critical effects of climate change on the enjoyment of human rights, as reflected in the UNFCCC and the PA (paras. 455-456). A failure to maintain a dynamic interpretative approach would hinder human rights from accommodating social change (para. 456). Emphasizing that it interpreted the Convention and did not add a – consciously rejected – judicial enforcement mechanism to the PA (para. 454), the Court did not further engage with the PA's "bottom-up" nature or the concept of self-differentiation, as pointed out by the Swiss and intervening governments (paras. 352, 366).

Contrary to what has been argued,[10] the Court did not simply incorporate the PA commitments into Article 8 ECHR (para. 454), nor did it invert PA obligations of conduct into human rights obligations of result. Instead, it developed a human rights-based duty of appropriate and consistent conduct. Accordingly, it required Switzerland to establish a regulatory framework and an administrative process that would protect citizens from the adverse impacts of climate change on their life, health, well-being and quality of life (paras. 544-550). Additionally, it held that "[e]ffective respect for the rights protected by Article 8 ECHR requires that each Contracting State undertake measures for the substantial and progressive reduction of their respective GHG emission levels, with a view to reaching net neutrality within, in principle, the next three

decades" (para. 548). To this end, Convention states would have to act "in good time, in an appropriate and consistent manner" (para. 548) which would require Convention states to establish a residual CO2 budget or make their CO2 reduction targets otherwise quantifiable, as NDCs alone would not suffice (paras. 571-572).

It follows that the Court will, from now on, thoroughly review the appropriate level of ambition – "the State's commitment to the necessity of combating climate change and its adverse effects, and the setting of the requisite aims and objectives" (para. 543) – and the internal consistency of a state's climate action, including compliance. The requisite level is determined on the basis of equity and the respective capabilities of a state, and quantifiable by means of the residual CO2 budget (para. 571, with reference to the principle of CBDR-RC). This seems to suggest that the Court developed a state duty to exercise due diligence geared towards the PA goals, which, thereby, gain indirect legal force. This arguably goes beyond what the majority of states understands as a duty of conduct under the PA, but ties in with how scholars have derived duties of "appropriate" conduct, i.e., due diligence, from the PA.[11, 12]

Logical step from a human rights perspective

From a human rights perspective, the Court arguably took a logical step. This is because human rights obligations are inherently different from inter-state obligations. Even if neither the PA goals nor the requirement to align NDCs with these goals are binding among PA parties, this does not mean that a Convention state is not accountable to those under its jurisdiction for protecting against foreseeable, potentially irreversible, and serious adverse effects of climate change on the enjoyment of human rights. If there is a political consensus that such effects will inevitably occur once the

temperature goals are exceeded, requiring effective CO2 reduction programs as part of the state's positive obligations to its citizens seems logical. Conversely, it would be flawed not to bring human rights to bear on a challenge that jeopardizes a state's ability to keep its human rights promises in the future. Otherwise, the long-standing interpretative guideline that human rights shall be interpreted to be "practical and effective, not theoretical and illusory" (paras. 545-548) would appear hollow.

In support of its provision of judicial review, the Court invoked its complementary function to the democratic process of Convention states which are not purely majority-bound but democracies based on the rule of law (para. 412). It added that the inherent characteristics of democratic governance undermine effective responses to climate change because the democratic process is focused on short-term gains and leaves young and future generations un(der)represented (para. 420). One could further adduce that the ECtHR further strengthens democratic governance through its judgment by triggering political debate, establishing the positive obligation to increase climate action, yet leaving the manner of implementation (i.e. the means and methods) to the Convention states' margin of appreciation (see paras. 440, 543, 572). "Effective political democracy" is thereby rather reinforced than compromised (but see Judge Eicke, para. 20).

Reinforcing democracy through the procedural limb of Article 8 ECHR

However, it should be noted that climate change differs from other human rights constellations. It is not the individual who opposes a repressive state, nor is it the individual who demands protection

from the state against certain third parties or from the effects of an uncontrollable natural disaster, but it is the individual who demands that the state commit the whole of society to avoid future harm to themselves and everyone else over the next 30 years and beyond. Creating space for political debate is thus a crucial step in this process. The majority of the Court was therefore right to strengthen the procedural part of Article 8 ECHR by requiring access to information to enable people to participate in designing and implementing climate change policies and regulations, in addition to ensuring responsive governance (para. 554). In this case, the ECtHR could also have examined in more detail whether there was a violation of these procedural elements of Article 8 ECHR (cf. Judge Eicke, para. 68). The Aarhus Convention, even if originally designed for linear, local environmental issues (para. 501), is an existing instrument whose potential could be further exploited in this respect. The more people who are constructively involved in thinking about how to achieve the necessary CO2 transition, the smaller the risk that climate action can successfully be purported to come at the expense of democratic governance.

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The European Court of Human Rights' April 9 Climate Rulings and the Future (Thereof)

Across Europe, activists of all ages have taken to the streets to pressure their governments to take effective action against climate change.[1] As domestic decision-makers failed them, they knocked at Strasbourg's door. Three generations of right-holders turned to the European Court of Human Rights (ECtHR): senior women, young citizens, and a middle-aged ex-mayor. They complained about the past and current effects of climate change on their enjoyment of human rights, as well as the expected worsening of the climate crisis and its future effects on their rights. Expectations were high.[2] Not only would the ECtHR deal with the nexus between climate change and human rights in the here and now but also for the future, including the thorny question of "intergenerational equity," i.e., the duties owed today to individuals too young to have a voice, or even not-yet-born.

Did the ECtHR live up to these expectations? The answer is bittersweet. Some room was definitely given to future generations and intergenerational equity considerations – almost as a common thread through the cases (especially in Verein *KlimaSeniorinnen Schweiz and Others v. Switzerland*[3] and, more incidentally, in *Duarte Agostinho and Others v. Portugal and 32 Other States*[4]). At the same time, the April 9 rulings seem to have been heavily influenced by the ECtHR's concern for preserving its own future and its refusal to become some sort of great global climate change court. While foreseeable, this compromise may have disappointed a few future generations aficionados. In this chapter, we briefly touch on the bitter and the sweet.

Future generations in the April 9 rulings: The future is not now

The ECtHR made a decisive statement on the impact of climate change, not just on current generations, but future ones too. As it

noted, while individuals currently alive already suffer from climate change, "it is clear that future generations are [also] likely to bear an increasingly severe burden of the consequences of present failures and omissions to combat climate change [...] and that, at the same time, they have no possibility of participating in the relevant current decision-making processes" (*KlimaSeniorinnen*, para. 419). In the context of climate change, "intergenerational burden-sharing assumes particular importance both in regard to the different generations of those currently living and in regard to future generations" (ibid). This clear statement by the Court is most welcome. It is an important recognition by the key European human rights judicial authority of the importance of protecting future generations who cannot themselves participate in today's decisive debates.

Beyond this symbolic statement, the Court also accounted for future generations in at least two ways. First, in *KlimaSeniorinnen*, the ECtHR justified granting legal standing to the applicant non-profit association partially on the basis of the necessity to guarantee that future generations do not suffer from an absence of timely reaction today. The ECtHR emphasized that "members of society who stand to be most affected by the impact of climate change" are "at a distinct representational disadvantage" (*KlimaSeniorinnen*, para. 484). Consequently, "collective action through associations or other interest groups may be one of the only means through which the voice of those at a distinct representational disadvantage can be heard and through which they can seek to influence the relevant decision-making processes" (*KlimaSeniorinnen*, para. 489). Second, the detailed and interventionist Article 8-related positive obligations imposed on Switzerland in *KlimaSeniorinnen* were designed with an eye to "avoid[ing] a disproportionate burden on future generations" (*KlimaSeniorinnen*, para. 549). For that very reason, the

ECtHR declared that "immediate action" ought to be taken and "adequate intermediate reduction goals [ought to] be set for the period leading to neutrality" (ibid).

Hence, protecting future generations helped shape two major wins in the April 9 rulings: (i) the legal standing of non-profit associations and (ii) the positive obligations under Article 8. Still, this welcome development of the case law by no means constitutes a groundbreaking change in future generations' legal situation. In fact, the greatest question of all remained unanswered as the ECtHR failed to rule on the victim status of young generations in *Duarte* – we will come back to this below.

One easily understands why future generations received only slender room in the April 9 rulings. To start with, these cases were never intended to be the panacea for all current and future generations' fate in the face of climate change. The ECtHR remains, after all, only one among many actors with a potential role to play in addressing climate change. Plus, while it is hard to disagree with the argument that future generations deserve equitable treatment, it is easier to bicker over the practical implementation of this broad argument in the here and now.

The current debate on what to do about the interests of people not-yet-born is obscured by the impossibility of pinpointing whom exactly we are talking about when we talk about "future generations". Generations are best understood as an endless, seamless chain rather than strictly separated categories. The principle of intergenerational equity underscores this understanding of human life as an endless cycle. This may be the principle's main added value in the climate change litigation context. At any given time, three broad "generational groups" coexist: (i) youngsters, including all those who were just born; (ii) adults roughly through the age of retirement; and (iii) seniors. Interestingly, these three groups were

represented in the three climate cases taken up by the Grand Chamber. Missing were future generations as such: the yet-to-be-born youngsters, adults, and seniors of tomorrow. One could argue that the Court tried to insert these yet-to-be born citizens back into the loop with the abovementioned considerations. However, their meager role in the rulings reflects the inner limitations of the exercise: the nature of the Court's judicial function is, after all, "by definition reactive rather than proactive" (*KlimaSeniorinnen*, para. 481), and there is indeed no legal basis in the European Convention on Human Rights for protecting future generations against future risks. There is also the difficulty of ruling on intergenerational equity without discussing the fair distribution of responsibility between "the West" and "the Rest". In other words, there were many complex legal questions around which the ECtHR had to make its way on April 9. In the remainder of this chapter, we argue that it did so with one obvious concern in mind: self-preservation.

Judicial self-preservation in the April 9 rulings

In *KlimaSeniorinnen*, the ECtHR immediately set the tone. While the threat posed by climate change is real, so are the dangers of going beyond the permissible limits of evolutive interpretation of the Convention in climate change cases. The question is "no longer whether, but how, human rights courts should address" climate change matters (*KlimaSeniorinnen*, para. 379), while safeguarding the principle of the separation of powers, the role of the Court, and its sacrosanct subsidiarity. We could even venture that the Court's own future was at stake on April 9 as it sought by all means possible to avoid becoming this heroic figure of a savior-like global climate change court.

The three April 9 rulings were each tainted by this objective of judicial self-preservation. One visible strategy used by the ECtHR to avoid becoming the global arbiter of climate change was to underscore the *specificity* of its review: as the ECtHR emphasized time and again, it was tasked with hearing specific claims brought by specific applicants, arising out of a specific set of facts, and based on a specific set of human rights protected in the Convention. Self-preservation concerns were also reflected in the ECtHR's overall approach to these cases, which was extremely pragmatic and, at times, bordering on the cynical. For instance, under Article 34 of the Convention, the Court ruled that, since climate change affects an indefinite number of persons, to be granted victim status, one would have to showcase a need for protection more pressing than the need of one's peers of the same generational group (*KlimaSeniorinnen*, para. 487). The ECtHR was also extremely rigorous when it came to avoiding *actio popularis*, which goes against the foundations on which the Convention system was built, though it appears to be the ideal avenue for protecting future generations' interests.

All of this is unsurprising. The ECtHR operates within a defined system of rules and is understandably mindful of maintaining its relevance and legitimacy in already troubled times. Much of the criticism of the ECtHR relates to how the overall European human rights framework is built and should probably be addressed elsewhere. That being said, the ECtHR could have been more ambitious in dealing with future generations. The most striking illustration of the Court's limited ambition in this matter relates to the victim status of representatives of the younger generation in *Duarte*. In its decision, the ECtHR decided simply not to address the individual applicants' victim status, as it was a "complicated matter and that [the ECtHR] did not need to look at it" (paras. 229-230).

One might have hoped the ECtHR would have welcomed the opportunity created by *Duarte* to pave the way for other (domestic) adjudicators by expanding on how to assess the victim status of youngsters who suffer from the current effects of climate change and legitimately worry about its future effects, all the while being virtually deprived of a voice in the public sphere. Of course, the ECtHR was not strictly required to rule on their victim status in *Duarte*: it had already found the case to be inadmissible on the grounds of the non-exhaustion of domestic remedies, amongst others. But nothing prevented the ECtHR from addressing it nonetheless. Admittedly, no decision on youngsters' victim status is probably preferable to a sparsely reasoned decision blankly denying them such status. Yet one cannot help but feel somewhat let down by the ECtHR's refusal to deal with a thorny question of profound relevance to climate action because it is "too complex". The somewhat counterintuitive consequence of this refusal is that future generations enthusiasts will have to dig into the case brought by a collective of senior women to find some guidance as to how the interests of future generations can and should be protected in European human rights law.

Concluding remarks

To close this short chapter, we argue that the principle of intergenerational equity can be viewed as extending beyond just the direct relationship between current decision- makers and future right-holders. The principle also suggests that current decision-makers may have a responsibility not only to future citizens but also to future decision-makers. Accordingly, the principle of intergenerational equity can be understood to encompass the duties owed by today's adjudicators, like the ECtHR, to the judges of to-

morrow. This extended understanding of intergenerational equity is meant as a provocation. But we believe it is useful in that it highlights the continuity between generations (of decision-makers) and also because the sense of responsibility toward "colleagues not-yet-born" captured by the outstretched interpretation we propose is reflected in the April 9 rulings.

By recognizing the responsibility they have toward future individuals who will be standing in their shoes, current decision-makers are encouraged to adopt long-term perspectives and consider the broader implications of their actions beyond the immediate. This responsibility is echoed in numerous statements by the ECtHR in its rulings about how it understands its own role in European society and the world, and about the deference it believes it owes to domestic decision-makers on the one hand, and to its own past and future work on the other hand. In this light, the ECtHR has struck a pragmatic yet slightly cynical balance between the great demands it was faced with and the great responsibilities it owes to European citizens, to other institutions, and to itself.

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Charlotte E. Blattner

Separation of Powers and KlimaSeniorinnen

Amid governments' unwillingness to effectively curb climate change, the European Court of Human Rights (ECtHR) has delivered a bold judgment in favor of a viable future for all in the case *KlimaSeniorinnen and Others v. Switzerland*[1] (*KlimaSeniorinnen*) in April 2024. The ruling made judicial history. Many claim for the better, as it's widely hailed as a landmark ruling[2] and a victory for climate justice.[3] However, not all are welcoming this turn of events. The Energy Secretary of the United Kingdom, Claire Coutinho, expressed her concerns about the verdict on X: "How we tackle climate change affects our economic, energy, and national security. Elected politicians are best placed to make those decisions."[4] Similar arguments were brought forward by the eight countries who intervened in the climate seniors case, including Ireland[5] and Norway[6].

Especially in Switzerland, the ruling met with sharp criticism. The rightwing Swiss People's party (Schweizerische Volkspartei, SVP) (predictably) accused the Court of judicial overreach and demanded that Switzerland leave the Council of Europe.[7] Concerns were also expressed in public media. Swiss Radio and Television (Schweizer Radio und Fernsehen, SRF) asked its readership: "Do you think it's good when courts interfere in climate policy?".[8] The Tages-Anzeiger, a Swiss newspaper, spoke of a "dangerous judgment",[9] made by "foreign judges";[10] the Aargauer Zeitung of democracy being "overridden";[11] former Judge of the Swiss Federal Court, Ulrich Meyer, in a guest commentary in the NZZ talked of a "crossing of the Rubicon".[12]

Many of these criticisms were published within hours – some within minutes – after the judgment was handed down by the Strasbourg Court on April 9. It's questionable if that gave commentators sufficient time to get an accurate picture of what the 17 judges held in their 260-page long-ruling – and the things they ex-

plicitly steered clear from, among others, for reasons of judicial deference. It is thus important to disentangle justified criticism from "opportunistic" criticism, which merely uses the ruling to express general disapproval of the ECtHR and climate lawsuits more broadly.

Less predictable, and to the surprise of many, the public and political criticism culminated in a vote of the Federal parliament in June 2024 to snub the ECtHR's decision. First the upper[13] and then the lower house[14] of parliament accused the Strasbourg judges of "inadmissible and inappropriate judicial activism." Among others, they claimed that the Court had created a "new human right" (i.e., a right to climate protection), which would be far removed from the Convention's text and spirit, and thereby exceeded the limits of dynamic interpretation. They further suggested that the Court failed to observe the principle of subsidiarity, openly questioned its legitimacy and "observed" (yet threateningly) that this "could lead to a weakening of the effective protection of human rights in Europe." Finally, they called on the Federal Council to inform the Committee of Ministers that Switzerland "sees no reason to follow the Court's judgment" since its previous efforts and new laws and amendments would show it abides by all domestic and international climate-related obligations.

In August 2024, the Federal Council, whose task it is to ensure that the judgment is implemented, has taken a stand on the issue. Whilst reinforcing the European Convention on Human Rights (ECHR) and Switzerland's membership in the Council of Europe, the Federal Council criticizes the broad interpretation of the Convention rights, and, too, sees no reason in further adapting its climate law and policy.[15]

Given these developments, it seems unequivocal that the ECtHR decision goes to the heart of separation of powers and

the role of the judiciary in adjudicating human rights, specifically in the context of climate change. Responding to the mounting criticism and domestic (as well as international) backlash to the ruling, this chapter unpacks the decision and argues that concerns about ECtHR overreach are unwarranted. It shows how the judgment forms an integral part of democratic governance (particularly in Switzerland) whilst being conducive to better laws and policies.

Should the Court hear climate change cases at all?

Before the *KlimaSeniorinnen* case, and the other lead cases decided on April 9 (*Duarte Agostinho and Others v. Portugal and Others*[16] and *Carême v. France*[17]), gained traction, many had questioned whether the Court should hear climate change cases at all.[18]

There were two main objections to ECtHR review. First, invoking the principle of subsidiarity and states' margin of appreciation, parties argued that national authorities "are in principle better placed than an international court to evaluate the relevant needs and conditions" and that "[i]n matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight" (*Hatton and Others v. UK*, para. 97).[19] Especially because the parties to the United Nations Convention on Climate Change (UNFCCC) had not established a judicial review mechanism for, e.g., the Paris Agreement, adjudicating climate matters at the ECtHR would mean the Court unduly acts as "the supreme court of environmental or climate disputes" which can "only create tension", according to Switzerland.[20]

Second, there were concerns about separation of powers, à la *Juliana v. United States*.[21] A "judicialization" of climate matters at the international level, according to the Swiss Government, would

risk "circumventing the democratic debate and complicating the search for politically acceptable solutions."[22] Judge Eicke forcefully makes this point in his Dissenting Opinion in *KlimaSeniorinnen*. What is more, forcing domestic authorities to assess their regulations and measures, and design and adopt new ones, may well have the opposite effect of strengthening climate protection, as Members States "will now be tied up in litigation" (paras. 69-70; he previously made this argument in an Inaugural Lecture in 2021[23]).

Tackling climate change as the primary responsibility of democratic decision-making processes

The *KlimaSeniorinnen* judgment contains several passages in which the remaining 16 judges, including the Swiss judge, addressed these concerns head-on. The judges emphasized that the primary responsibility for navigating the complex scientific, policy, economic, and other issues posed by climate change lies with the domestic legislative and executive branches (para. 413). These typically set up the overarching policy frameworks and specific measures in sectoral fields (para. 411), which requires balancing various conflicting interests (para. 421). The Court emphasized that, in a democracy, "which is a fundamental feature of the European public order expressed in the Preamble to the Convention together with the principles of subsidiarity and shared responsibility …, such action … necessarily depends on democratic decision-making" (para. 411).

In emphasizing the primary responsibility (and thus prerogative) of the domestic democratic legislature and executive, the Court does not, *a contrario*, suggest that the judiciary substitutes them in authority, competence, function, or form at any point in

time. On the contrary, it clarifies that "(j)udicial intervention, including by this Court, *cannot replace or provide any substitute for the action which must be taken by the legislative and executive branches of government*" (para. 412, emphasis added).

Complementary role of the judiciary not outside, but as an indispensable part of the democratic order

Does that mean climate law and policy are outside the remit of judicial oversight? By no means. If Montesquieu and Madison are to be believed, such means of checks and balances are foundational for a democracy (and conducive to better policies and laws, if that's something we're still concerned about). Conversely, separation of powers would, in fact, be breached if the executive or legislature deprived the judiciary of its capacity to check the others.[24]

The Court clarified that "democracy cannot be reduced to the will of the majority of the electorate and elected representatives, in disregard of the requirements of the rule of law. The remit of domestic courts and the Court is therefore complementary to those democratic processes" (para. 412). The task of the judiciary has always been – and continues to be in an age of climate change – to ensure the necessary oversight of compliance with legal requirements. This oversight is no less, but all the more important, if we consider the complex time horizons of governing climate change. Especially from an intergenerational perspective, there is a "risk inherent in the (…) political decision-making processes, namely that short-term interests and concerns may come to prevail over, and at the expense of, pressing needs for sustainable policy-making" and this, the Court stated, "add(s) justification for the possibility of judicial review" (para. 420).

Looking specifically at Switzerland, this risk is certainly not hypothetical. Some 15 years ago, in 2009, the Federal Council, in its dispatch,[25] acknowledged the need for an "at least" -40% reduction of greenhouse gas (GHG) emissions among developed countries until 2020 (compared to 1990 levels) to keep global warming at a safe level but explicitly decided against it, as doing so would "entail the risk of an excessive burden on the Swiss economy." As a nod to the principle of subsidiarity, the Court reiterated that democratic decision-making processes should be the first to grapple with these conflicts, whose processes and outcomes are in complementary fashion reviewed through judicial oversight on the domestic level, and only subsequently by engaging the ECtHR (paras. 412, 421).

Competence of Court

Switzerland voluntarily accepted the jurisdiction of the Court as a last resort in this long cascade of review (the *KlimaSeniorinnen* case is now in its 9th year) by ratifying the ECHR in 1974. This adds a vertical dimension to the separation of powers and checks and balances (sometimes known as "vertical separation of powers"[26]).

Review by the Strasbourg Court, or – to be more precise – review of ECHR rights, is all the more important in Switzerland, where the "immunity clause" for federal laws (Article 190 Const.) limits judicial review.[27] The ECHR rights require the Court, as well as domestic courts, to establish a violation and remedy it – Article 190 Const. notwithstanding.[28] Therefore, "the Court's competence in the context of climate-change litigation cannot, as a matter of principle, be excluded" (para. 451).

The Court reiterates that if complaints are raised before it that relate to State policy with respect to an issue affecting the ECHR rights of an individual or group of individuals, this is "no longer merely an issue of politics or policy but *also a matter of law having a*

bearing on the interpretation and application of the Convention" (para. 450, emphasis added). So, where violation of Convention rights stands to question, "the Court cannot ignore … its role as a judicial body tasked with the enforcement of human rights" (para. 413).

Judicial review of the ECtHR is, however, significantly narrower than on the domestic level (para. 412). Article 19 ECHR limits the exercise of its competence to ensure that the Convention is complied with (para. 411). The Court is mindful that doing so in the context of climate change may mean that there is an overlap of human rights and climate change law and policy, but it emphasizes that it "does not have the authority to ensure compliance with international treaties or obligations other than the Convention" (para. 454). The Court's competence is not only limited in scope but also in terms of the depth of review. While determining "the proportionality of general measures adopted by the domestic legislature" (para. 412), the Court pays "substantial deference to the domestic policy-maker and the measures resulting from the democratic process concerned and/or the judicial review by the domestic courts" (para. 450).

A Differentiated Margin of Appreciation

This deference is key to the functioning (and legitimacy) of the ECtHR, but it does not go as far as rendering the Court's review of the conformity of State acts with ECHR rights a mere formality or, more cynically put, a rubber-stamp exercise. The margin of appreciation is a central doctrine (admittedly one of the most debated ones[29]) of the ECtHR, by which it seeks to strike a balance between deference and jurisprudence. With a view to climate change impacting Convention rights, the Court developed a differentiated margin of appreciation.

States' margin of discretion is narrow when it comes to their "commitment to the necessity of combating climate change and its adverse effects, and the setting of the requisite aims and objectives" (para. 543). The Court justifies this with reference to the nature and gravity of the threat of climate change, the general consensus as to the stakes involved, and the parties' commitments to achieve carbon neutrality. The margin of appreciation remains wide, by contrast, regarding the means to achieve those objectives, including operational choices and policies (para. 543). This seems to suggest that the question of ambition in climate mitigation, i.e., the level of protection of rights holders from adverse effects of climate change, is reviewable by the Court, while the modalities of said level of protection remain largely outside its remit.

In light of this, one would expect the Court to determine what maximum level of global warming still secures ECHR rights and by what year net neutrality should be achieved to limit warming to that level, to set interim targets and percentage reductions for GHG emissions, and lay down modalities for review. Opponents of the judgment at least implicitly suggest this, when they claim that the Court essentially "made climate policy".[30] So what did the Court do, in fact?

Margin of appreciation in action

The Court held that "the State's primary duty is to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change" (para. 545). Reminding us that the ECHR "must be interpreted and applied such as to guarantee rights that are practical and effective, not theoretical and illusory" (para. 545), the Court found that "the Contracting States need to put in place the

necessary regulations and measures aimed at *preventing an increase in GHG concentrations* in the Earth's atmosphere and a rise in global average temperature *beyond levels capable of producing serious and irreversible adverse effects on human rights,* notably the right to private and family life and home under Article 8 of the Convention" (para. 546, emphasis added). As such, with a view to climate change impacts on human rights guarantees, we shouldn't get to the point of no return, not even to the point of last return.

No Human Right to Climate Protection

Does that mean there is now a right to climate protection, as some have claimed?[31] The Court clarified that this is not the case. It emphasized that "no Article of the Convention is specifically designed to provide general protection of the environment as such" (para. 445). Its ruling is about "the existence of a harmful effect on a person and not simply the general deterioration of the environment" (para. 446). This is why, among others, *actio popularis* complaints are still not tolerated in the Convention system.

Substantive and Procedural Standards of Due Diligence

The Court then drilled down on what this qualitative standard means, more specifically, with a 5-pronged test in the much-discussed para. 555. States should set out a timetable and targets for achieving carbon neutrality (using carbon budgets), as well as pathways and interim targets to reduce their GHG emissions. These must be implemented in timely, appropriate, and consistent manner. Governments must provide evidence showing whether they have complied with targets or not, and, finally, update targets regularly. These elements are evaluated in an overall assessment and depend on adaptation measures (paras. 551-552).

These criteria are rather conservative.[32] The Court steered clear of determining timetables, long-term objectives, interim targets and pathways, or specific years for reductions. Instead, it determined, on a broader level, that "effective respect for the rights protected by Article 8" requires "substantial and progressive reduction" of GHG emissions (para. 548); that "immediate action needs to be taken and adequate intermediate reduction goals must be set" (para. 549); and that to this end, measures should be incorporated into "a binding regulatory framework at the national level" (para. 549). In doing so, the Court has, as Reich has argued,[33] endeavored to find a reasonable middle way.

Elsewhere in the judgment, there is an interesting and far less conservative note on the scope of GHG emissions. In assessing the scope of the complaint, the Court declared "embedded emissions" (i.e., emissions from Switzerland's import of goods for household consumption) relevant for its assessment (paras. 283, 287), however, "without prejudice" to the examination of state responsibility (para. 283). Judge Eicke, in his Dissenting Opinion, seems to suggest that the state duties formulated by the Court under Article 8, with a view to climate mitigation, cover both domestic and embedded emissions (Dissenting Opinion of Judge Eicke, para. 4). This point will surely prompt and require further scholarly discussion.

Less controversial, and in addition to the above five elements, as part of the procedural limb of Article 8, the Court determined that states must observe two procedural requirements, namely provide adequate information about climate regulations and measures (or the absence thereof) to the public, in particular to the people most affected; and have procedures in place through which their views about the regulations and measures can be taken into account in the decision-making process (para. 554).

This is the minimum level of substantive and procedural due diligence states must show in the context of climate change mitigation to respect Convention rights.

… Applied to Switzerland

The Court then applied those standards to Switzerland. It found that Switzerland does not have a sufficient regulatory framework in place to "provide, and effectively apply in practice effective protection of individuals within its jurisdiction from the adverse effects of climate change on their life and health" (para. 567). Switzerland also failed to quantify its GHG budget and observe its own targets in the past, which led the Court to find a violation of Article 8. In its finding, the Grand Chamber did in fact also consider the latest legislative amendments and proposals (which Parliament and the Federal Council seem to have overread) and found that "the new legislation is not sufficient to remedy the shortcomings identified in the legal framework applicable so far" (para. 568).

Toward human-rights-proofing Swiss climate law and policy?

Over the past decade, the Swiss government has done little more than gloss over its lax performance in climate mitigation. In the meantime, a determined group of senior women have invested enormous time, financial and human resources to identify gaps in Swiss climate law and policy and find creative and meaningful new ways to remedy its biggest shortcomings. As the first group in the world to overcome the extremely difficult procedural and political hurdles before the ECtHR in climate change matters, they obtained a landmark ruling that will be decisive for decades to come.

Switzerland could have taken an example of the Netherlands and Germany and embraced the judicial clarification that it is doing

too little (which, as shown above, it knew all along).[34] It could have carefully studied the judgment to determine the steps that must be taken at each level of government – federal, cantonal, and municipal – for its climate law and policy to be aligned with human rights. A careful examination of the ruling would have shown, as Swiss Parliamentarian Li Marti succinctly stated, that "democracy and human rights are not contradictory, but complementary."[35] However, neither the Swiss legislature nor the Swiss executive proved to be prepared for this and rejected the ruling mostly on opportunistic rather than justified grounds. In this respect, one can rightly ask, as Marti did, whether Parliament and Council "are the only ones practising activism here, not the ECHR".[36]

It is to be hoped that Switzerland, whether as a member of the Council of Europe or as a party to all major climate agreements, will move away from questioning the judgment and the Court's legitimacy, to finally – 32 years after signing the UNFCCC – initiate a qualified, informed, substantive, and open debate on how it can decisively reduce its emissions and thereby prevent serious harm not only to the climate seniors, but for the benefit of all.

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International Trade and Embedded Emissions after KlimaSeniorinnen

The Extraterritoriality of Climate Change Obligations

A key and underrated aspect of the recent triad of climate rulings of the European Court of Human Rights (ECtHR) is that the ECtHR has brought to the fore the role of trade-related greenhouse gas (GHG) emissions in states' carbon footprints. While most international climate agreements focus on the reduction of domestic GHG emissions, in the *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*[1] Judgment (*KlimaSeniorinnen*), the ECtHR found "attributable" to Switzerland the GHG emissions taking place abroad, "embedded" into goods (and possibly services) consumed in Switzerland. As I will argue, the ruling appears to require Switzerland to adopt a climate-oriented trade policy.

I begin by examining the notion of "embedded emissions" in trade and how *KlimaSeniorinnen* establishes that parties to the European Convention on Human Rights (ECHR) are responsible not only for produced emissions but also for consumed ones. I then consider what compliance with the underlying demands might entail and how it can be achieved in light of Switzerland's commitments under the World Trade Organization (WTO) and other trade agreements. Perhaps counter-intuitively for those who follow international trade law from a distance, trade agreements not only permit trade-related climate measures but may boost their operation, by (i) requiring demonstration that the measures taken contribute to their stated objective and (ii) prohibiting measures that cosmetically affect some producers while sparing others that equally contribute to the problem.

Embedded emissions and international trade

Production is a crucial source of anthropogenic GHGs. Discussion of state action regarding climate change, including in the Paris Agreement, often focuses on industrial and agricultural production

within each state. However, in a global economy, goods are routinely traded internationally and, increasingly, produced specifically to meet external demand. Thus, many states' economies and societies contribute to GHG emissions not by themselves producing goods, but by consuming high-emission products produced elsewhere (or producing goods with imported high-emission inputs), so that the bulk of a state's contribution may be due to production outside that state's borders whose emissions are "embedded" in traded goods.

This is particularly true for advanced economies, like Switzerland, which focus on producing low-emissions services and high-end products and import many goods and services associated with high emissions. In *KlimaSeniorinnen*, the ECtHR noted the general acceptance, including by Swiss authorities, that "the GHG emissions attributable to Switzerland through the import of goods and their consumption form a significant part (an estimate of 70% for 2015) of the overall Swiss GHG footprint" (para. 279).

Two types of issues may arise with respect to embedded emissions. The first is "carbon leakage", which may occur if a jurisdiction charges for or restricts GHG emissions nationally. In response, production may simply shift to jurisdictions that do not limit emissions. Regardless of individual producers' decisions, production may shift as consumers worldwide respond to the price increase and purchase the cheaper products produced without emissions restrictions.

Addressing carbon leakage is the stated aim of the European Union's Carbon Border Adjustment Mechanism (CBAM)[2], which, from 2027, will charge, at the EU border, importers for what the EU determines are the embedded emissions in six categories of products. While the CBAM aims to mirror the EU's internal carbon pricing mechanism, the ECtHR seems to demand something differ-

ent from Switzerland: directly addressing the GHG emissions occurring abroad that are "attributable" to Switzerland through its consumption of the relevant products. In effect, then, Switzerland must orient its trade policy towards decarbonization.

A climate oriented trade policy?

Three elements in *KlimaSeniorinnen* point to a requirement for Switzerland to orient trade policy towards decarbonization. First, in deciding whether to accept the (late) inclusion of embedded emissions within the scope of the complaint, the ECtHR noted that the proportion of Swiss emissions consumption attributable to imports made it "difficult, if not impossible, to discuss Switzerland's responsibility for the effects of its GHG emissions on the applicants' rights without considering the emissions generated through the import of goods and their consumption" (para. 280). Given this proportion, if the complainants had not themselves mentioned embedded emissions in their application and arguments, the ECtHR would have been allowed "to clarify, if necessary even of its own motion, these facts" (para. 280).

Second, the ECtHR rejected the Swiss government's argument that the Court did not have jurisdiction over embedded emissions and "GHG emissions generated abroad could not be considered to attract the responsibility of Switzerland", since Swiss authorities "did not have direct control over the sources of emissions" (para. 285).

The ECtHR disagreed. The claim regarding embedded emissions "contain[ed] an extraterritorial aspect", the Court reasoned, but the relevant basis for its jurisdiction was ECHR Article 1, which requires parties to "secure to everyone within their jurisdiction the rights and freedoms" guaranteed in the Convention. The

extraterritorial step between state action (in this case, omission) and effects on applicants' Convention rights, the Court ruled, did not prevent jurisdiction; it could only be relevant in assessing Switzerland's responsibility for the effects caused by the extraterritorial event on the applicants' ECHR rights (para. 287). Put more broadly, the ECHR party's responsibility is to prevent harms to Convention rights and freedoms of those within their jurisdiction. If the immediate cause of the harm to ECHR rights and freedoms are GHG emissions taking place abroad to meet an ECHR party's demand for goods (and possibly services), failure to address these embedded emissions may engage that state's responsibility under the Convention.

Finally, the Court established, albeit indirectly, an obligation, at least for a state in Switzerland's position, to act with respect to embedded emissions. The ECtHR's main assertion was that parties to the ECHR have a duty to "undertake measures for the substantial and progressive reduction of their respective GHG emission levels, with a view to reaching net neutrality within, in principle, the next three decades" (para. 548). The Court described this duty as follows:

> *the State's primary duty is to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change. … the Contracting States need to put in place the necessary regulations and measures aimed at preventing an increase in GHG concentrations in the Earth's atmosphere and a rise in global average temperature beyond levels capable of producing serious and irreversible adverse effects on human rights.*
> (para. 546)

This description provides little clarity as to the content of the regulations and measures to be adopted by Contracting States. At the same time, the Court found that, for ECHR parties, merely addressing domestic emissions is insufficient to comply with their Convention obligations. Although global aims formulated, among others, in the Paris Agreement, must "inform the formulation of domestic policies", the ECtHR found that "the positive obligations relating to the setting up of a regulatory framework must be geared to the specific features of the subject matter and the risks involved". Global aims "cannot of themselves suffice as a criterion for any assessment of Convention compliance". Instead, "each individual State is called upon to define its own adequate pathway for reaching carbon neutrality, depending on the sources and levels of emissions and all other relevant factors within its jurisdiction" (para. 547).

These findings seem designed to be read in light of the Court's assertion that there are "GHG emissions attributable to Switzerland through the import of goods" (para. 279) and that it would be "difficult, if not impossible, to discuss Switzerland's responsibility for the effects of its GHG emissions on the applicants' rights without taking into account the emissions generated through the import of goods and their consumption" (para. 280). It would seem that – besides and beyond specific treaty obligations – an ECHR party such as Switzerland, whose contribution to global GHG emissions is largely attributable to its imports, would, in its path towards carbon neutrality, be required to act upon a key source of its contribution, i.e., imports.

The Court is vague regarding the specific policies that must be adopted. One possibility is that Switzerland could adopt a similar, if not identical, measure to the EU's CBAM, imposing a charge on imported products for their asserted carbon content. An alternative

possibility would be to require imports with potentially high levels of embedded emissions to be credibly certified as produced with a lower carbon footprint. A more extreme possibility would be to prohibit certain imports entirely.

Climate obligations, action on embedded emissions, and trade agreements - considering the real challenges

Fulfilling ECHR obligations, as interpreted by the ECtHR in *KlimaSeniorinnen*, may require imposing constraints on imports to address their embedded emissions. This raises the traditional question of a possible conflict between trade obligations and human rights or environmental obligations. Luckily, over the past two decades, international trade adjudicators have largely consolidated the understanding that this is a false conflict.[3, 4]

It is a false conflict not only in the sense that states *can* comply with their trade obligations while complying with their human rights and environmental obligations – an abstract-sounding claim that human rights and environmental activists see with understandable suspicion.[5] It is false also in the sense that, under their contemporary interpretation, trade commitments fundamentally operate in favour of the fulfilment, by trade-related environmental measures, of their environmental objectives.

Setting aside the maze of commitments, defences and exceptions in trade agreements, their contemporary interpretation plainly permits the restriction of trade to fulfil legitimate objectives. This permission has two conditions. First, the measure must indeed make a contribution to the fulfilment of its stated objective. Second, the measure must have a non-discriminatory application: any negative impact that they produce on a trade partner's exports,

as compared to domestic production and third-country exports, must also be justifiable under a legitimate objective. In other words, in imposing import restrictions to address GHG emissions and comply with ECHR obligations, Switzerland must choose restrictions that (i) actually contribute, demonstrably or credibly, to a reduction in GHG emissions; and (ii) are "even-handed" in that they operate to restrict domestic production, and the production of all other trade partners, in light of the same objective. This was recently reaffirmed by the WTO panel report in *EU – Palm Oil*[6], which stated – for the first time unequivocally – that climate change, a phenomenon "inherently global in nature", affects each WTO Member's territory, allowing every Member to adopt genuine and non-discriminatory trade-related climate measures (para. 7.314).

There is therefore little scope for questioning whether Switzerland can adopt trade-related climate measures. The thorny questions will relate to the means it can employ, in particular so as to avoid charges of discrimination (which can get complicated, see Ukpe and Weinhardt[7], Meyer[8], and Lydgate[9]). I conclude this chapter with four challenges that may arise if Switzerland (and/or other ECHR parties) seeks to impose trade-related climate measures:

(1) Non-discrimination is simplest with regard to "apples-to-apples" comparisons. For example, the emissions price charged from, say, Indian steel, cannot be higher than the price charged for Swiss or German steel emissions. A more challenging question will occur if, like CBAM, Swiss measures target some products but not others. Can a measure be discriminatory due to the selection of products it targets, if it heavily affects imports while leaving intact products, with similar levels of emissions, largely produced domestically?

(2) Can Switzerland adopt an emissions charge while banding with the EU and others to form a "climate club", exempting each other from charges owing to the adoption of similar domestic systems for emissions pricing? Can this "climate club" include parties like the United States, whose decarbonization measures are non-financial, while leaving out others? I have investigated this elsewhere.[10]

(3) What role is there for the principle of common but differentiated responsibilities and respective capabilities in the assessment of discrimination? The ECtHR noted that this principle undergirds treaties that are central to the climate regime (para. 442). Does this principle allow ECHR parties to differentiate in favour of certain states, or perhaps require this differentiation? Can such differentiation be justified before a trade adjudicator? And can the absence of differentiation violate trade commitments?

(4) The climate regime has moved from requiring specific measures under the Kyoto Protocol to allowing each state to establish its Nationally Determined Contributions (NDCs) under the Paris Agreement. Does imposing restrictions on specific imported products, linked to their embedded emissions, deny Paris Agreement parties the right to establish their own NDCs and the means to achieve them?

It was uncontroversial in this case that 70% of the overall Swiss GHG footprint is connected to imports. If Switzerland has an obligation to reduce its footprint to attain carbon neutrality, it is hard to see how this obligation may be fulfilled without affecting emissions embedded in imported products (and perhaps, even more challengingly, services). The *KlimaSeniorinnen* judgment thus would seem to require Switzerland, and presumably other similarly situated ECHR parties, to adopt trade-related climate measures to reduce their carbon footprint arising from consumption.

This requirement is likely to face resistance from the countries where the emissions are produced, grounded not only on charges of discrimination but also on charges of extraterritorial regulation. The charge is likely to be all the stronger when it comes from former European colonies and countries that, not having been responsible for significant levels of emissions until very recently[11], perceive decarbonization requirements as an instrument for "kicking away the ladder" of development-through-emissions used by all currently developed countries.

Negotiating between heeding legitimate demands for development, on the one hand, and preventing individual states' development strategies from leading to an uninhabitable planet, on the other, is possibly the most challenging collective action problem humanity has faced so far. The *KlimaSeniorinnen* judgment lays down an important piece of this puzzle, first by refusing to accept that externalizing emissions exempts states from their obligation to work towards emissions reduction, and second by clarifying that this obligation must be performed, among others, by addressing embedded emissions. The other international courts expected to weigh in on international climate-related obligations this year[12] would do well to consider providing further guidance in this regard.

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KlimaSeniorinnen and the Question(s) of Causation

In *Verein Klimaseniorinnen Schweiz and Others v Switzerland*[1] ("*KlimaSeniorinnen*"), the European Court of Human Rights (ECtHR) makes many general statements about the nature of climate change and different actors' roles in addressing it. For example, "the Court notes that climate change is one of the most pressing issues of our times" (para. 410), thus conveying to the public that the ECtHR takes the issue very seriously. There are also general statements regarding the separation of powers and the role of courts (e.g., "Judicial intervention, including by this Court, cannot replace or provide any substitute for the action which must be taken by the legislative and executive branches of government" (para. 412)) which appear to be intended to assuage concerns by States about interventionist courts.

Many of these general points have been addressed in this edited volume. In my chapter, I turn to a more technical aspect of the judgment, namely the question of causation. I will untangle the analytical gymnastics that the Court performs regarding this question. I will argue that the reasoning regarding causation is confusing and that it is not clear how specifically the "real prospect" test is applied for finding a breach.

Different causal relationships

KlimaSeniorinnen is the first judgment where the ECtHR devotes whole sections to the question of causation. Causation has not been a standard that the Court has previously given much attention to, nor consistently developed in its case law on positive obligations under the European Convention on Human Rights (ECHR).[2, 3] However, in *KlimaSeniorinnen*, the Grand Chamber addresses causation upfront, given that the applicants' claims were unprecedented in that they implied modification (one can also

choose the much more neutral term "development" instead of "modification") of the established standards. In this sense, the statement in para. 422 that "it would be neither adequate nor appropriate to follow an approach consisting in directly transposing the existing environmental case-law to the context of climate change" is very apt.

In para. 415 of its judgment, located in Section III. C.1. (Preliminary points), the ECtHR summarizes the characteristics of its previous environmental case law (also called "classic environmental cases" in para. 424):

> *"The Court's existing case-law in environmental matters concerns situations involving specific sources from which environmental harm emanates. Accordingly, those exposed to that particular harm can be localised and identified with a reasonable degree of certainty, and the existence of a causal link between an identifiable source of harm and the actual harmful effects on groups of individuals is generally determinable. Furthermore, the measures taken, or omitted, with a view to reducing the impugned harm emanating from a given source, whether at the regulatory level or in terms of implementation, can also be specifically identified. In short, there is a nexus between a source of harm and those affected by the harm, and the requisite mitigation measures may be identifiable and available to be applied at the source of the harm."*

This paragraph references at least two causal relationships that need to be distinguished. The first is the link between a cause and actual harm (i.e., the effect). The second is the link between measures and elimination (or mitigation) of the cause.

In the following paragraphs (416–422), where the Court explains (and correctly so) the distinguishable characteristics of the

climate change case compared to the previous environment-related cases, there is a constant oscillation between these two causal relationships. They reflect the difference between the existence of harm, which is normally beyond question, and what we as a society decide to do about it (i.e., what measures should be undertaken as a matter of human rights law *obligations*). There is a tension here, which explains the oscillation, given the idealistic aspirations and aims of human rights, on the one hand, and the practical and societal limitations as to what measures/means to choose to achieve these aims and whether these measures should be the content of any legal obligations, on the other.

The Court observes that "the specificity of climate-change disputes, in comparison with classic environmental cases, arises from the fact that they are not concerned with single-source local environmental issues but with a more complex global problem" (para. 424). This might be the case regarding the first of the above-mentioned links. However, "classic environmental cases" also raise complexities as to the variety and multiplicity of measures that could have been adopted to eliminate the cause. In this sense, the omitted measures (measures that could have been taken) are not that easy to identify (even more so *specifically* identify). There is, therefore, no sharp distinction; the difference is possibly one of degree. More generally, this variety and multiplicity of measures that could be adopted to address the cause are the *content* of States' positive obligations. This content consists of a variety of measures, and States can make choices about which measures to undertake.[4]

In para. 424, the Court tries to explain the complexities of the causation question in human rights law by distinguishing its different dimensions: "In the context of human rights-based complaints against States [in "climate change disputes"], issues of causation arise in different respects which are distinct from each other and

have a bearing on the assessment of victim status as well as the substantive aspects of the State's obligations and responsibility under the Convention." The Court continues in para. 425 to identify *four* dimensions of the causation question:

> *"The first dimension of the question of causation relates to the link between GHG emissions – and the resulting accumulation of GHG in the global atmosphere – and the various phenomena of climate change. This is a matter of scientific knowledge and assessment. The second relates to the link between the various adverse effects of the consequences of climate change, and the risks of such effects on the enjoyment of human rights at present and in the future. In general terms, this issue pertains to the legal question of how the scope of human rights protection is to be understood as regards the impacts arising for human beings from an existing degradation, or risk of degradation, in their living conditions. The third concerns the link, at the individual level, between a harm, or risk of harm, allegedly affecting specific persons or groups of persons, and the acts or omissions of State authorities against which a human rights-based complaint is directed. The fourth relates to the attributability of responsibility regarding the adverse effects arising from climate change claimed by individuals or groups against a particular State, given that multiple actors contribute to the aggregate amounts and effects of GHG emissions."*

Let's unpack these four dimensions.

The first dimension

According to the Court's reasoning, the first dimension is about "scientific knowledge and assessment", which is later reframed as "issues of proof" (para. 427–420). The assertion, however, that the assessment of the link between a cause and harm is merely "a matter of scientific knowledge", is not correct. While the assessment does depend on scientific knowledge, it is also equally dependent on normative decisions on what measures to take to respond to risks (on the distinction between legal causation and natural causation, see e.g. Steel, page 41[5]); these decisions are often reflected in domestic laws and international standards. In this sense, the reiteration of how the Court "attaches importance to the fact the situation complained of breached the relevant domestic law" and to "relevant international standards" (para. 428) is very apt. In this sense, "issues of proof" and, more specifically, the proof about the link between GHG emissions and "the various phenomena of climate change" are not determined exclusively with reference to "scientific knowledge". As argued elsewhere, in its positive obligations case law, the Court has used domestic law and international legal standards as proxies for scientific knowledge.[6] In this sense, knowledge and proof in human rights law are as much legal/normative questions as scientific questions.

The second dimension

The second dimension of the causation question is framed by the Court as the "effects of climate change on the enjoyment of Convention rights" (para. 431–436). Within this aspect, the Court addresses the harm of climate change on "the lives, health and well-being of individuals" (para. 433) and "a link between the adverse

effects of climate change and the enjoyment of (various aspects of) human rights" (para. 435). As per para. 425, this is perceived in the reasoning to be "a legal question". It is a legal question since it is ultimately about the definitional scope of the rights (see Brems and Gerards[7]), i.e., the normative decision as to *how broadly the interests* protected by these rights should be interpreted.

The key here is the expansion of these interests to include not only actual harm but also *risks* of harm. In this sense, human rights law is further modeled as a body of law about risk regulation. The Court tries to qualify this with reference to "sufficiently *severe* risks of such effects on individuals" (emphasis added). In para. 487–488, guidance is offered as to the severity threshold in climate change-related cases. According to the court, there must be "a high intensity of exposure to the adverse effects of climate change, that is, the level and severity of (the risk of) adverse consequences of governmental action or inaction affect the applicant must be significant" and "a pressing need to ensure the applicant's individual protection". These guidelines pertain to the victim status.

Having in para. 435 determined that the interests protected by the ECHR rights include risk aversion, the Court concludes this paragraph by adding that "issues of causation must always be regarded in the light of the factual nature of the alleged violation and the nature and scope of the legal obligations at issue". It is unclear exactly what this means. A possible explanation might be that, since the "alleged violation" (i.e., the adversely affected interests) is about risk, this will necessarily change "the nature and scope of the legal obligations". Such a change seems to be necessary since the obligations would have to be about risk regulation.

This, as confirmed by para. 436, reveals that this second dimension is not considered in isolation. It is intertwined with considerations as to whether states have obligations and their scope (see

Stoyanova[8] for how the questions as to whether there is a positive obligation, what its scope might be, and whether it is breached collapse into each other).

The third dimension

The third dimension of the causation question is about "the link, at the *individual level*, between a harm, or risk of harm, allegedly affecting specific persons or groups of persons, and the acts or omissions of State authorities against which a human rights-based complaint is directed" (emphasis added) (para. 425). I will not unpack each sentence in the reasoning where the Court explains this third dimension. Three things are clear, however, from para. 437–440, where this third dimension is elaborated upon. First, even at the individual level, the assessment is about the risk that "sufficiently close[ly]" affects the applicant. Second, the Court tries again to invoke a severity threshold since the assessment depends on "a threshold of severity of the risk of adverse consequences on human lives, health and well-being" (para. 440). Third, risk is not considered in isolation. Similarly to what was stated above, it is intertwined with considerations as to whether states have obligations and what their scope could be.

Further guidance on the severity threshold is offered in paras 513 and 519, where the ECtHR discusses the definitional scope of Articles 2 and 8 respectively. As to Article 2, the ECtHR notes that there must be "real and immediate" risk to life, a test that "may be understood as referring to a serious, genuine and sufficiently ascertainable threat to life, containing an element of material and temporal proximity of the threat to the harm complained of by the applicant". As to Article 8, the threshold is set as "serious adverse ef-

fects of climate change on their [the applicants'] life, health, well-being and quality of life".

The fourth dimension

The fourth dimension of the causation question "relates to the attributability of responsibility regarding the adverse effects arising from climate change claimed by individuals or groups against a particular State, given that multiple actors contribute to the aggregate amounts and effects of GHG emissions." (para. 425) In para. 441–444, this "attributability" is reframed as "the issue of proportion of State responsibility". It is difficult to disentangle all the issues that the Court throws in here (attributability, responsibility, concurrent responsibility, jurisdiction, capabilities). What is perhaps most striking is how the Court discusses responsibility without first addressing whether there are any obligations to start with and what their content and scope might be.

The ECtHR does affirm the "real prospect" causation test in para. 444. This test has nothing to do with "proportion of State responsibility" as related to any responsibility or obligations of other States. The test demands that for a breach of a positive obligation to be found, it needs to be demonstrated that the measure that arguably forms the content of the obligation and that the State should have undertaken at the relevant point in the past had "a real prospect of altering the outcome or mitigating the harm".[9] Interestingly, the Court says nothing here about risk of harm or any possible modification of the test given the emphasis on risk. Even more interestingly, after being mentioned in para. 444, the "real prospect" test is completely forgotten till the very end of the judgment. One can only remain to wonder about its role in actually finding a breach of Article 8.

Conclusion

The *KlimaSeniorinnen* judgment contains some useful statements about the role of causation in human rights law. The Court distinguished four dimensions of the causation question. The most important one, from the perspective of positive obligations that are based on omissions, concerns the causal link between the allegedly omitted measures and the elimination (or mitigation) of the cause of the harm. At a general level, it was established that the measures should have "a real prospect of altering the outcome or mitigating the harm" so that their omission can lead to a violation. It will be interesting to continue to observe how this "real prospect" text will continue to be developed in the case law.

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KlimaSeniorinnen and Gender

Much has been said already about the decision in *KlimaSeniorinnen v. Switzerland*[1] granted on Apr 9, 2024 by the European Court of Human Rights (ECtHR or the Court). The Court's decision was groundbreaking in that it established an obligation to mitigate greenhouse gas (GHG) emissions as a human rights duty, required countries to establish a carbon budget, and arguably established a new right under the European Convention on Human Rights (ECHR).[2, 3] Still, there is much more to discuss regarding its broader implications for climate litigation. This chapter discusses the relevance of the *KlimaSeniorinnen* case to the discussion of vulnerability and intersectional gender in climate litigation. To date, very few climate cases have addressed the gendered dimensions of climate change and there was some hope that this case would. However, as this chapter argues, despite the fact that *KlimaSeniorinnen* is a case about the impacts of climate change on elderly women, the Court fails to meaningfully engage with gender as a determinant of the harms suffered by individuals. Gender remains an overlooked issue in climate litigation.

Women are distinctively and intersectionally vulnerable to climate change

While climate change impacts all of us, our social identities – and the experiences, exclusions, and opportunities that result from those identities – radically change the nature, timing, and extent of the harm we suffer as a result of climate impacts. Factors such as gender, age, disability, location, sexual orientation, education, and poverty, among many others, amplify the risks faced by these groups.

Historical and ongoing practices of discrimination against certain social groups have rendered those groups more vulnerable to the impacts of climate change and less able to adapt to changing conditions and temperatures. Vulnerability to climate change impacts is particularly pronounced among those who occupy multiple social identities and have been the target of oppressive or exclusionary practices. The intersection of race and gender, for example, or of economic status and disability, creates unique experiences of discrimination, multiple burdens, and distinctive vulnerabilities to climate change. Women, gender-diverse and non-binary groups often find themselves at the intersection of various social and structural inequalities related to their multiple identities.

Nonetheless, very few climate cases have meaningfully addressed or focused on the gendered impacts of climate change or the intersectional oppressions that make women, gender-diverse, and non-binary groups vulnerable to climate harm. As one of the many essential paths to drive climate action, climate litigation can be a powerful instrument for addressing gendered impacts, integrating useful definitions of gender into states' climate responses, and engaging with women, girls, and gender-diverse and non-binary groups about their particular needs and goals.

The relative scarcity of gender-based arguments in climate litigation to date makes the *KlimaSeniorinnen* case even more significant. The case highlights the intersectional nature of gendered identities and vulnerabilities. The applicants were women over the age of 70 and their representative association. Each individual applicant argued that they – as older women – were more severely impacted by climate change (and, in particular, heatwaves) than the rest of the population. The combination of their gender and age, they argued, made them uniquely at risk of the impacts of temperature increases. The applicants produced evidence to show

that "overall, women aged above 75 (such as applicants nos. 2-5) were at greater risk of premature loss of life, severe impairment of life and of family and private life, owing to climate change-induced excessive heat than the general population" (para. 67).

How the court addressed gendered vulnerability

In its judgment, the ECtHR provides a detailed overview of the evidence and law on the differentiated impacts of climate change. The ECtHR considered, for example, the 2021 report of the Independent Expert on the enjoyment of all human rights by older persons, which stated that "in emergencies brought on by climate change impacts, older women might be viewed as a burden and therefore be vulnerable to abuse and neglect … The specific risks and impacts for older women are, however, generally invisible"[4] (para. 170). The Office of the High Commissioner for Human Rights (OHCHR) has also found that "both ageing and climate change have differential effects when it comes to gender" (para. 185). The OHCHR found that more older women are likely to live alone, experience higher levels of poverty, and face disproportionate health risks, including from air pollution harms and extreme heat events. Gender discrimination and unequal access to resources and power make older women particularly vulnerable, and they are more likely to be viewed by others as a burden and suffer abuse or neglect (para. 185).

The ECtHR also recalled the 2022 Human Rights Council Resolution 50/9 on human rights and climate change[5], specifically where it calls States to adopt "a comprehensive, integrated, gender-responsive, age-inclusive, and disability-inclusive approach to climate change adaptation and mitigation policies, consistent with the United Nations Framework Convention on Climate Change and

the objective and principles thereof" (para. 157). Similarly, General Recommendation No. 37 of the Committee on the Elimination of Discrimination against Women covered gender-related dimensions of disaster risk reduction in the context of climate change and the principles of the Convention on the Elimination of All Forms of Discrimination Against Women applicable to climate change disaster risk reduction (para. 177).[6] Further, the ECtHR noted the 2018 Statement of the Committee on Economic, Social and Cultural Rights[7] which, in its discussion of the Nationally Determined Contributions of States, found that human rights are implicated, including principles of gender sensitivity (para. 180).

Acknowledging that this is the first time the ECtHR has addressed the topic of climate change, the Court recognized the challenges of specifying a nexus between the source of harm and those affected by the harm, with the additional requisite that mitigation measures are (i) identifiable and (ii) available at the source of the harm (para. 415). As a polycentric issue, the Court noted that climate change policies involve "intergenerational burden-sharing" (para. 419).

Standing of individual victims

In the original Swiss case that led to the application to the ECtHR, *Association of Swiss Senior Women for Climate Protection v. Federal Department of the Environment Transport, Energy and Communications (DETEC) and Others*[8], the Swiss Federal Administrative Court held that the appellants' rights had not been sufficiently violated to give them a cause of action. In particular, the court found that Swiss women over 75 were not exclusively affected by climate change. In making that decision, the Swiss Court assessed whether the applications were affected differently compared to the general

public, i.e., whether they were particularly affected (para. 7.2) to an extent that goes beyond that of the general public (para. 7.4.1). The Court listed several impacts of climate change on people, animals, and plants and then noted that "the group of women older than 75 years of age is not particularly affected by the impacts of climate change". It further explained that "[a]lthough different groups are affected in different ways, … it cannot be said from the perspective of the administration of justice the proximity of the appellants … was particular, compared with the general public" (para. 7.4.3). Upon appeal, the Swiss Supreme Court concluded that plaintiffs' rights had not been affected with sufficient intensity and that the remedy they sought must be achieved through political rather than legal means.

The ECtHR seems to have followed a similar approach in analyzing victimhood of the individual applicants. While the ECtHR allowed an association to bring a climate case, it rejected the individual application of the four women due to a failure to establish victimhood. As noted by Arntz and Krommendijk in this book, the threshold for individual plaintiffs remains especially high, with the ECtHR requiring individual applicants to meet the following two criteria: (i) high intensity of exposure to the adverse effects of climate change with significantly severe adverse consequences of governmental (in)action and (ii) a pressing need owing to the absence or inadequacy of reasonable measures to reduce harm (para. 527). Since the applicants had failed to show "a critical medical condition" (para. 533), they did not have victim status.

A missed opportunity

This aspect of the decision is disappointing. As Angela Hefti argues, "individual access to the ECtHR remains crucial in fu-

ture climate cases since underrepresented groups may not be able to establish their own association across the 46 Council of Europe member states".[9] A high threshold to establish victim status has the unavoidable effect of excluding underrepresented voices in decision-making. Welcoming such voices has been one of the most important advances in climate litigation, with a growing number of cases brought by marginalized groups, including children, youth, and Indigenous Peoples, who are often excluded from law-making processes and mainstream policy discussions. While not everyone should be able to claim victim status, it is crucial that certain individuals can. This is essential to ensure access to justice (and other procedural environmental rights) in the context of climate change.

While the Court discussed extensive evidence on the vulnerability of women over 75 years of age, repeatedly finding scientific evidence that this group is suffering and dying in rising temperatures and heatwaves, there is no mention of this in the Court's ruling and no duty created for States to better understand or address these impacts. This outcome is, perhaps, unsurprising given the remedies requested by the applicants, who sought state-level climate policy change, beneficial to the entire population, rather than remedies that specifically addressed the harm suffered as a result of age and gender. Still, it is discouraging that after carefully assessing the evidence of disproportionate impacts, the Court simply fails to engage with their legal consequences.

Despite recognizing that victim status must be interpreted in a flexible and evolutive manner (para. 461), the Court rejected each individual applicant's claim arguing that the alleged omissions in this case could affect indefinite numbers of persons (para. 480). In particular, the Court invoked the climate change context as one that affects "everyone, one way or another and to some degree" (para. 483). As a result, the individual claims could, in the Court's

opinion, contradict the exclusion of *actio popularis* from the Convention mechanism. The Court also acknowledged that members of society who are potentially most affected by climate change could be considered at a distinct representational disadvantage. However, in the Court's opinion, climate change impacts affect everybody, and as a result could not be used as a limiting criterion (para. 485).

The high threshold for individual standing meant that the Court did not meaningfully engage with the question of how social determinants (gender and age) should be assessed or understood in the context of individual experiences of harm. The Court seems to acknowledge that gender and age render certain groups highly vulnerable to climate impacts but fails to recognize this as producing a higher intensity of exposure or a pressing need to ensure individual protection (paras. 478–488). The Court fails to recognize that vulnerability by virtue of intersecting social identities is not merely a collective concern, but manifests in individual harm. This failure to translate social identity vulnerabilities into individual experiences seems to treat the idea, affirmed by the Court, that the impacts of climate change are gendered as empty rhetoric. In doing so, the Court suggests that, at the end of the day, gender does not actually matter.

The judgment risks enabling and enforcing a dismissive and silencing denial of the claims of women. We see this in Marko Milanovic's comment on the case: "I've always found the argument that little old ladies in Switzerland are somehow especially affected by climate change to be entirely bogus. If they are affected, why wouldn't I be – why would their interests matter more than mine (or anyone else's), simply because they have fewer years left to live (well I hope) and are more affected by summer heat?"[10]

The Court had the opportunity to engage with the differentiated and gendered impacts of the climate crisis and failed to do so.

Even though climate change affects everyone, it does not affect everyone equally. As Hefti notes, the Court overlooked "the socially constructed impact of heatwaves".[11] Had the Court dealt with the particular and individual situation of the applicants from an intersectional and gender-conscious perspective, these vulnerabilities would have become apparent. The climate crisis calls for a more nuanced and revolutionary approach to law and legal institutions to account for the lived experiences of those particularly affected by its impacts. Failing to do so will only perpetuate power imbalances and oppressions.

Broader structural issues: A matter of climate justice in Europe and beyond

The Court's interpretation of the notion of victim status is potentially a barrier to climate justice in at least two ways. First, it fails to consider the differentiated effects of climate change on different individuals, reducing recognition of the social determinants of climate harm to mere rhetoric. Second, it reinforces structural barriers to access to justice by historically marginalized groups. Children[12], youth[13], women, Indigenous[14] and local communities are taking matters before the courts to demand the protection of their rights and the recognition of their particularly vulnerable situation. Grouping climate impacts altogether, without considering the differentiated degrees and ways in which people are affected, risks overlooking the root causes behind the disproportionate effects. This, in turn, risks reproducing oppressive dynamics in the adopted solutions to address the climate crisis. For example, women's work tends to be highly implicated in climate solutions,

with little to no consideration as to the needs and desires of said women.

Structural barriers are also reinforced when failing to acknowledge the differentiated impacts of climate change. An especially high threshold that does not incorporate a critical gender lens results in a too narrow understanding of victim status that does not consider prevailing local circumstances and individual vulnerabilities. Under a veil of universality, the specificities of marginalized groups and individuals that make them more vulnerable to climate change are overlooked.

Following the Court's interpretation, many other applicants, and more broadly climate plaintiffs, might have difficulty accessing justice. Failing to engage with the disproportionate and differentiated ways historical oppressions determine vulnerability to climate change risks placing yet another burden on marginalized groups to access justice and remedies for climate inaction or inadequate action.

Finally, the failure to engage with the legal implications of the disproportionate impacts of climate change, while recognizing, from a scientific perspective, these same impacts, risk giving a false sense of success to the overall gender perspective in climate justice. The case has been widely reported as a "gender win," since it was brought by women (see, e.g., reports by Vox[15] and Euronews[16]). While there are certainly successes in the overall decision and the reshaping of the narrative of women as victims, the missed opportunity in establishing the legal consequences of a violation of the rights of *women* in the context of climate change (i.e., the related responsibilities of States towards them and the remedies available) still lingers as a sore point in the decision.

Conclusion

The *KlimaSeniorinnen* case is, without a doubt, trailblazing. Its influence is likely to extend beyond the Court's jurisprudence and reach other regional, as well as domestic jurisdictions. Further, it has the potential to influence the current advisory opinions proceedings before the international tribunals (International Court of Justice[17], International Tribunal on the Law of the Sea[18], and the Inter-American Court of Human Rights[19]), helping clarify States' obligations regarding climate change and the subsequent legal consequences. However, the lack of gender analysis of climate change impacts remains a concern. The climate crisis is gendered, but as of today, this aspect remains largely understudied and underaddressed in climate litigation despite the initial promises of *KlimaSeniorinnen*.

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Reparation for Climate Change at the ECtHR

A Missed Opportunity or the First of Many Decisions to Come?

The recent rulings on climate change by the European Court of Human Rights (ECtHR) are – as others have pointed out in this edited volume – both "historic and unprecedented"[1] for various reasons, not least regarding the question of reparation for climate change-related harm. While redress is a pivotal question to think through in relation to climate change, it has, somewhat surprisingly, received less attention from scholars and has not yet been directly addressed by international courts and tribunals. In this regard, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*[2] might be considered a missed opportunity on the part of the ECtHR.

KlimaSeniorinnen was one of three cases concerning climate change before the ECtHR and the only one that reached a decision on its merits. Complaints in the two other cases – *Duarte Agostinho and Others v. Portugal and 32 Other States*[3] and *Carême v. France*[4] – were declared inadmissible.

The applicants in *KlimaSeniorinnen*, four elderly women and an association established "to promote and implement effective climate protection on behalf of its members", relied on article 2 (right to life), article 6 (right to access to court), article 8 (right to private and family life) and article 13 (right to an effective remedy) of the European Convention on Human Rights (ECHR). The applicants claimed that the increase in heat waves associated with climate change caused a health risk for elderly women, including the individual applicants, in view of their age. They further alleged that Swiss authorities had failed to take appropriate climate change mitigation measures and thus violated various articles of the ECHR. The court agreed, finding violations of Articles 6 and 8 of the ECHR. The Grand Chamber then went on to consider Articles 41 and 46, and thus touched upon, albeit not comprehensively, the issue of reparation under Article 41 of the ECHR specifically.

In *KlimaSeniorinnen*, the ECtHR could have addressed the links between human rights violations caused by climate change and potential remedies. Such a discussion would have been especially valuable given that other international or regional courts and tribunals have yet to pronounce upon the topic. The issue may be addressed in the advisory opinions that will soon be rendered by the International Tribunal for the Law of the Sea[5], the Inter-American Court of Human Rights[6], and the International Court of Justice[7]. Those opinions will naturally be circumscribed by the respective areas of jurisdiction of these courts and tribunals. Yet, it is the ruling of the ECtHR, delivered in the context of a dispute brought by individuals and a legal person, that had the greatest potential to develop the law in respect of reparations for climate change.

Reparations within the framework of the ECtHR: Fit for (climate change) purpose?

Discussing rights under the ECHR necessarily requires reflecting on the available remedies in case of violations of those rights. The analysis must start with a determination of whether it is possible to award *just satisfaction* under Article 41 of the ECHR. The jurisprudence of the ECtHR on reparations is abundant, and much has been written on the question of remedies before the Court (see e.g. Ichim[8], Abdelgawad[9], or Fikfak[10]).

The Court held that the individual applicants' complaints were inadmissible and the KlimaSeniorinnen association did not claim damages under Article 41 of the Convention (para. 647). Considering the Court's consistent jurisprudence, it unsurprisingly decided to make "no award under this head" (*ibid*). As such, the ECtHR did

not have to address the topic of climate change-related reparations, nor explain, for example, what reparations are owed under the umbrella of lack or insufficient mitigation or adaptation measures, or the relationship between claims for compensation under the ECHR and other regimes (e.g. loss and damage). These topics are critical to understanding whether the ECHR regime is capable of adequately addressing reparations for loss and damage related to climate change.

Notably, the ECtHR did address a different set of legal consequences under Article 46 ECHR, which grants the Court the competence to order general (and individual) measures to assist States in fulfilling their obligations to "abide by the final judgment of the Court in any case to which they are parties". These measures are prospective and cannot be qualified as reparation as such. When such measures are taken by States, they tend to mitigate the risk of future human rights infringements, in this case those related to climate change. However, mindful of the separation of powers and principle of subsidiarity, the ECtHR took a cautious stance in its holding on Article 46.

In its *Observations on the facts, admissibility and the merits*[11] ("*Observations*"), KlimaSeniorinnen submitted "considerations [that] should guide the Court in devising the general measures (Art. 46 ECHR) to be taken by the Respondent" (Observations, para. 187), and submitted the following requests to order general measures under Article 46 ECHR:

> *"(5) to order the Respondent to adopt the necessary legislative and administrative framework to do its share to prevent a global temperature increase of more than 1.5°C above pre-industrial levels,*

(6) to specify what this entails, namely:
a. ensuring a [greenhouse gas (GHG)] emission level in 2030 that is net-negative as compared to the emissions in 1990;
b. reducing domestic emissions by 61% below 1990 levels by 2030, and to net-zero by 2050, as the domestic component of a.
c. preventing and reducing any emissions occurring abroad that are attributable to the Respondent, in line with the 1.5°C above pre-industrial levels limit;
d. permanently removing GHG emissions from the atmosphere and storing them in safe, ecologically and socially sound GHG sinks, if, despite a., b., c., any GHG emissions continue to occur within the control of the Respondent, or the concentration of GHG in the atmosphere is exceeding the level corresponding to the 1.5ºC above pre-industrial levels limit;

(7) to set a binding time-limit for the Respondent to implement such a framework which is adequate in view of (5 and 6) above."
(Observations, Section 3)

Notwithstanding the above, the Court found that KlimaSeniorinnen did not specify general measures *per se*, but rather sought an order that Switzerland take all suitable measures to achieve certain climate change policy objectives. The Court held in this regard that:

"[t]he applicants submitted that in the event of a finding of a violation by the Court, Article 46 [ECHR] should also be applied. However, given that the choice of means to implement the Court's judgment was primarily for the respondent State, the Court should not specify the measures to be taken. It should rather indicate that the State would need to take all suitable measures to allow it to achieve a level of annual emissions compatible with its

> *target of attaining a minimum reduction of 40% in GHG emissions by 2030, and carbon neutrality by 2050."*
> (para. 653)

As is common with cases involving environmental issues, the Court refused to order any "specific general measures". It relied on its previous jurisprudence to point out the declaratory nature of its judgments and that "it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its obligation under Article 46 [ECHR], provided that such means are compatible with the conclusions and spirit of the Court's judgment" (para. 656).

Nonetheless, the Court highlighted that States have a "positive obligation" to prevent serious and irreversible adverse effects on human rights, notably the right to private and family life under Article 8 of the ECHR (paras. 440, 538 and 544-554). Accordingly, States do not have *carte blanche* when it comes to identifying the appropriate measures to mitigate and adapt to climate change. In this regard, the Court drew a fundamental distinction between "the scope of the margin [of appreciation] as regards, on the one hand, the State's commitment to the necessity of combating climate change and its adverse effect, and the setting of the requisite aims and objectives in this respect, and, on the other hand, the choice of means designed to achieve those objectives" (para. 543). While the former aspect calls for a "reduced margin of appreciation for the States", the latter justifies "a wide margin of appreciation" (para. 543). In particular, the Court emphatically stated that it would examine whether domestic authorities have taken into account the need to:

"(a) adopt general measures specifying a target timeline for achieving carbon neutrality and the overall remaining carbon budget for the same time frame, or another equivalent method of quantification of future GHG emissions, in line with the overarching goal for national and/or global climate-change mitigation commitments;
(b) set out intermediate GHG emissions reduction targets and pathways (by sector or other relevant methodologies) that are deemed capable, in principle, of meeting the overall national GHG reduction goals within the relevant time frames undertaken in national policies;
(c) provide evidence showing whether they have duly complied, or are in the process of complying, with the relevant GHG reduction targets (see sub-paragraphs (a)-(b) above);
(d) keep the relevant GHG reduction targets updated with due diligence, and based on the best available evidence; and
(e) act in good time and in an appropriate and consistent manner when devising and implementing the relevant legislation and measures."
(para. 550)

Furthermore, specifically with respect to Switzerland, the Court noted the "critical lacunae" in its domestic regulatory framework, "including a failure … to quantify, through a carbon budget or otherwise, national GHG emissions limitations" (para. 573); and noted that, as recognized by the relevant authorities, the State had previously failed to meet its past GHG emission reduction targets (see paras. 558–559).

Thus, while the Court did not order specific measures to be implemented pursuant to Article 46, its conclusions on the merits are quite prescriptive in relation to the actions that it considers

Switzerland ought to take pursuant to Article 46(1) to comply with Article 8 of the ECHR. In particular, Switzerland could remedy its violation by (i) quantifying its national GHG emissions limitations through a carbon budget, and (ii) undertaking "measures for the substantial and progressive reduction of [its] GHG emission levels, with a view to reaching net neutrality within, in principle, the next three decades" (paras. 548 and 573).

Conclusion

In *KlimaSeniorinnen*, the ECtHR effectively held that Member States to the Convention must adopt and apply regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change. That is, ECHR Member States must adopt targets and timelines as a part of the domestic regulatory framework with a view to reaching net neutrality, in principle within the next three decades.

The Court's decision was both prescriptive and deferential. On the one hand, it identified specific failures by Switzerland (e.g., the failure to adopt legislation and determine a carbon budget). On the other hand, the Court afforded Switzerland a margin of appreciation in the selection of individual measures taken to comply with Article 8 (subject to supervision by the Committee of Ministers). While the ECtHR continues "to treat remedies as an afterthought"[12], it provided the applicants (and others) guidance on how to continue exerting pressure on the Swiss government at the domestic level.

This decision will undoubtedly lead to more litigation before the Court. It will also influence cases pending before domestic courts in Europe that rely on the ECHR, and perhaps also elsewhere. Thus, while it was a missed opportunity on the part of the

Court to address the topic of remedies related to climate change, it may also be the first of many decisions to come.

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Catherine Higham, Isabela Keuschnigg, Tiffanie Chan, Joana Setzer

What Does the European Court of Human Rights' First Climate Change Decision Mean for Climate Policy?

On 9 April the European Court of Human Rights (ECtHR) issued its first ever comprehensive decision in a climate litigation case.[1] The judges of the Court's Grand Chamber ruled that Switzerland was in breach of its positive obligations to protect the health, well-being and quality of life of Swiss citizens from the impacts of climate change. This violation was attributed to the Swiss government's failure to implement the robust regulatory framework necessary for fulfilling its commitment to reduce emissions as set out in the Paris Agreement.

As the dust begins to settle on this case, a critical question emerges: what implication will the judgment have for how Switzerland and the 45 other signatories of the European Convention on Human Rights (ECHR) address climate change. In this short piece, we consider whether the type of regulatory framework envisioned by the ECtHR in its ruling can effectively drive countries to meet their legislative climate commitments.

Could this ruling catalyse the rapid cross-cutting action that is urgently needed to combat climate change?

Firstly, this is a question of *compliance*: will Switzerland and the other ECHR signatories find the judgment a compelling reason to amend their climate laws in line with the guidance given by the court? Most commentators have focused on this element. While there appears to be a general understanding that the ruling will be "transformative"[2], some have treated it more cautiously[3]. In particular, while the case is expected to have "knock-on"[4] effects on law and policymaking at the domestic and international levels, the extent of these impacts will take time to crystallise. Some researchers argue that, with its ruling, the ECtHR has merely set a "minimum

standard"[5] and thus they question whether it will lead to ECHR signatories significantly tightening their climate laws.[6] This question is accentuated by the subsequent rejection of the decision by the Swiss parliament, which casts a shadow on the possible policy implications of the ruling.[7]

But importantly, when examining the implications of the ruling there is also an underlying question of *effectiveness* to be asked: can the type of regulatory framework envisioned by the ECtHR drive countries to meet their legislative climate commitments? We focus our analysis below on this aspect, seeking to assess how effective the type of regulatory framework envisioned by the Court can be in accelerating credible climate action.

A domestic regulatory framework aligned with human rights obligations

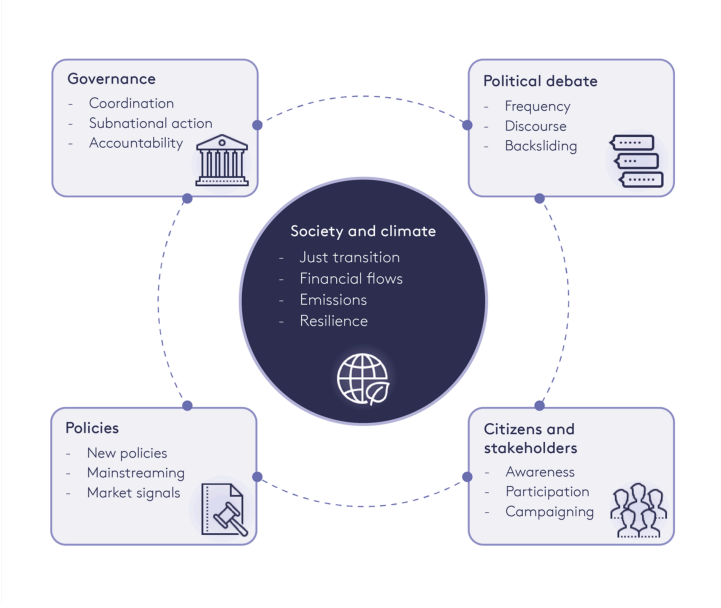
In its judgment, the ECtHR set out a series of minimum requirements that a domestic climate change regulatory framework must meet to align with human rights obligations. These are firmly grounded in the architecture of the Paris Agreement, reflecting global practices in climate governance and strong scientific foundations.[8]

Climate framework laws have emerged as a prominent tool to drive domestic climate action, including establishing regulatory frameworks. To date, 62 countries, including 26 ECHR signatories, have enacted climate framework laws.[9] These laws set the strategic direction for national climate policies,[10] and also often include long-term climate objectives: for example, 17 countries' laws contain net zero or climate neutrality targets.[11]

The scope of climate framework laws varies significantly, however.[12] Some countries, like Nigeria, set up inter-ministerial coordination bodies to prepare national climate action plans designed to meet targets,[13] whereas others, like Canada, mandate interim targets or carbon budgets based on the advice of independent expert advisory bodies.[14] In some cases, like Japan, legislation separately addresses mitigation and adaptation efforts.[15] At times, countries also establish domestic governance processes across multiple laws, executive policies or through informal processes.

Unfortunately, when it comes to understanding the impact of such climate framework laws, empirical evidence remains limited, particularly regarding how impacts might vary across different socioeconomic and political contexts. However, research conducted by the Grantham Research Institute into the impacts of climate framework laws in the United Kingdom[16], and most recently in Germany, Ireland and New Zealand[17], has uncovered varied impacts across five key areas (see Figure 1). These findings indicate that the most significant impacts of climate framework laws are observed in the areas of governance and political debate.

Figure 1. Impacts of climate framework laws



Source: Averchenkova et al. (2024)[18], image licensed under CC BY-NC 4.0.

Mapping the Court's minimum requirements against the building blocks of effective climate laws

The ECtHR's specified set of minimum requirements for a State's regulatory framework on climate change (paragraph 550 of the judgment) align closely with what our research identifies as the core building blocks of effective climate framework laws – see Table 1 below.[19] Not only do these elements of climate laws have

the most direct influence, but they also lead to the most significant impacts. Our research shows that these building blocks directly contribute to the robustness of regulatory frameworks, ensuring that climate action is both ambitious and grounded in scientific evidence.

Table 1. The ECtHR's minimum requirements mapped against our identified building blocks for effective climate framework laws

ECtHR minimum requirements	**Core building blocks of climate laws**
• Adoption of **general measures** specifying **targets** for achieving **carbon neutrality** and the remaining **carbon budget** for that timeline, or equivalent, in line with national and/or global climate change mitigation commitments. • **Intermediate emissions reduction targets** and pathways.	• Establishing targets and carbon budgets.
• Evidence of **compliance** with the relevant targets. • **Updating** the relevant targets with due diligence in line with the best available science.	• Setting standards for reporting, assessment and review of progress.
• Acting in good time and appropriately and consistently when **implementing** the laws and measures.	• Mandating public sector actions. • Shaping planning and policy processes.

The synthesis presented in Table 1 suggests that the majority of the ECtHR's stipulated requirements for climate regulatory frameworks coincides with the building blocks that make climate framework laws most effective. These similarities between what the court ruling established and the minimum requirements for effective climate laws suggest that the approach required by the Court could have significant positive impacts in countries' efforts to align with carbon neutrality goals.

However, while the identified components are integral in designing effective climate framework laws, they may not be sufficient on their own to catalyse rapid and enduring change. For example, although many climate framework laws mandate public consultation, the specifics of these processes are often imprecisely defined, leaving uncertainty about how public participation, stakeholder engagement and deliberative processes are to be continuously or formally integrated into an institutional framework. This integration is vital for ensuring public acceptance of climate policies.

The ECtHR addressed this need in paragraph 554 of its judgment, underscoring the importance of public participation and access to information in developing climate policies. The extent to which this aspect of the judgment will influence future legislative practices and improve the inclusivity and effectiveness of climate governance remains an open question.

Helpful guidance from the Court - but ultimately it comes down to political will

Our research also highlights that there are significant challenges to implementing climate framework laws: in particular, without sustained political will, enforcement becomes very difficult. Another recurring issue is the absence of stringent penalties for non-compliance, which undermines the credibility of these laws and poses risks to democratic accountability.

Litigation, while a last resort, can strengthen both administrative and political accountability for fulfilling climate commitments. The ECtHR ruling in the *KlimaSeniorinnen* case highlighted significant gaps in Switzerland's regulatory framework and its failure to

meet previous emissions targets, underscoring the judiciary's role in holding states accountable for their climate obligations.

The ECtHR not only highlighted the gaps in the Swiss regulation, it has also set out clear directions for member states to follow to align their climate policies with human rights obligations. Domestic legislators across Europe must give these requirements serious consideration to ensure their climate laws not only meet these minimum standards but also effectively contribute to global climate goals. This is imperative for both environmental sustainability and the protection of fundamental human rights that climate change is affecting.

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Piet Eeckhout

From Strasbourg to Luxembourg?

The KlimaSeniorinnen Judgment and EU Remedies

The judgment in *Verein KlimaSeniorinnen*[1] is transformational. The European Court of Human Rights (ECtHR) has now established, with great care and articulation, that States' failure to take adequate action against climate change amounts to a violation of Article 8 of the European Convention on Human Rights (ECHR). It has, ingeniously, constructed an "appropriate and tailored" remedy by accepting the standing of associations representing "the individuals whose rights are or will be affected" (see e.g. paras 422, 434 and 498). It has struck an appropriate balance between the judicial protection of fundamental rights and democratic policy-making on climate change.[2] Following the Court's decision, States retain discretion to decide on the appropriate means and measures to reduce GHG emissions, but their overall aims, objectives and trajectory must fit the political and scientific consensus that global warming must be contained, preferably to 1.5C.[3]

This chapter offers a first examination of whether the EU system of remedies accommodates the remedy established in *Verein KlimaSeniorinnen v Switzerland* ("*KlimaSeniorinnen*"): that environmental associations fighting climate change should be able to challenge inadequate action against climate change. As will be seen, in order to achieve this, the CJEU will need to show flexibility and a willingness to innovate.

KlimaSeniorinnen and the EU

KlimaSeniorinnen applies directly to the ECHR Contracting Parties, which do not include the EU. However, for those States that are party to the ECHR and also EU Member States, the EU is the elephant in the room. It is the main driver of climate change mitigation policies – in essence, the reduction of GHG emissions – in and of the EU Member States. It has signed on to the Kyoto Protocol

and the Paris Agreement, has established an emissions trading scheme, and has wide and overarching competences in product regulation (internal market), environmental protection, energy and international trade.

When the ECtHR finds that climate change policies are within the scope of the right to respect for private and family life, the EU is potentially in the dock, even if it is not an ECHR Contracting Party. That is because that right is also protected in EU law, namely in Article 7 of the EU Charter of Fundamental Rights, which the EU needs to respect (Article 6(1) TEU). And Article 52(3) of the EU Charter of Fundamental Rights provides: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention."

Possible EU remedies

KlimaSeniorinnen reminds us of the maxim *ubi ius, ibi remedium* – no right without a proper remedy. The remedy constructed by the ECtHR is straightforward. NGOs fighting climate change, and thereby representing all those who are affected, within a particular jurisdiction, must have standing to challenge "acts or omissions in respect of various types of general measures, the consequences of which are not limited to certain identifiable individuals or groups but affect the population more widely" (para. 479). This is so because, as regards the fight against climate change: "The critical issues arise from failures to act, or inadequate action. In other words, they arise from omissions" (idem). These are quotations from the section of the judgment which examines victim status. The ECtHR considers that "the issue of victim status must be inter-

preted in an evolutive manner (…) and that any excessively formalistic interpretation of that concept would make protection of the rights guaranteed by the Convention ineffectual and illusory" (para. 482).

The question therefore arises whether the EU system of remedies enables NGOs to challenge the EU for failing to act, or for taking inadequate action against climate change. There are, at least in theory, several possible avenues for bringing such a challenge.

The first route is an indirect one, through a national court, which may refer a question of validity of EU climate legislation to the Court of Justice of the European Union (CJEU) (Article 267, Treaty on the Functioning of the EU (TFEU)). That is not, in my view, an adequate remedy for a number of reasons. In preliminary rulings cases, it is the national court which decides whether to make a referral to the CJEU, not the parties. Assuming that a right of action under the law of a Member State allows an NGO to challenge general EU climate legislation – not a straightforward matter – it is for the NGO to convince the national court that the EU is indeed failing in its human rights obligations by not taking adequate action on climate change. But national courts are not the appropriate venue for assessing this. As we have learned from *KlimaSeniorinnen*, the assessment requires an in-depth review of the scientific evidence and of the whole EU legislative and regulatory framework, which national courts are not well placed to undertake. Moreover, even if a reference is made, the procedure of a preliminary rulings case is wholly unsuited for the in-depth review which the CJEU should undertake (as most cogently demonstrated by Advocate General Jacobs in *UPA*[4]). The CJEU cannot find facts in preliminary rulings cases and decides purely on matters of law. It must base its decision on the fact file as it has been constituted by the referring court. The Court of Justice, which hears

these cases, is rarely dealing with fact-intensive cases; that is the role of the General Court in the EU system. The preliminary rulings procedure is not adversarial: the parties have two months to make their submissions but cannot respond to each other's arguments other than at the hearing. Those are just some of the reasons to question the effectiveness of this remedy.

A second option for challenging the adequacy of EU climate action is via direct actions for annulment (Article 263 TFEU). This may be a more viable route, particularly after the decision in *KlimaSeniorinnen*.

A general challenge to EU climate policy was attempted in *Armando Carvalho* (2019)[5]. That case showed that private parties could not directly challenge EU climate legislation because they were not "directly and individually concerned" by the legislation (Article 263, fourth paragraph, TFEU). That restrictive interpretation of the standing requirements is about as old as the CJEU, dating back to *Plaumann* (1963)[6]. One of its most infamous applications was in *Greenpeace and Others* (1998)[7], where the CJEU held that local residents affected by the building of two power stations on the Canary Islands, co-funded by the EU, were not directly and individually concerned by that funding decision.

The CJEU has shown an unwillingness to reconsider its interpretation of the concepts of direct and individual concern so as to allow challenges to EU legislation by private parties. It will clearly not do so through a general re-interpretation, which opens up actions for the annulment of legislation, across the board. The argument that an exception must be made for alleged human rights violations was also rejected on the grounds that "a fundamental right is always likely to be concerned in one way or another by measures of general application" and that "the claim that the acts at issue infringe fundamental rights is not sufficient in itself to es-

tablish that the action brought by an individual is admissible, without running the risk of rendering the requirements of the fourth paragraph of Article 263 TFEU meaningless" (*Armando Carvalho*, paras. 47–48).

Could the judgment in *KlimaSeniorinnen* lead the CJEU to make an exception for the "appropriate and tailored" remedy which that judgment constructed, exclusively in the sphere of climate change policy? It ought to, in my view. The potential counter-argument that such an exception was already rejected in *Armando Carvalho* is unconvincing. *KlimaSeniorinnen* is not limited to finding a breach of a substantive right protected by the ECHR but also establishes the need for this uniquely tailored remedy. The right to an effective remedy is protected by both the ECHR and the EU Charter (Article 47). The CJEU's insistence that this right "cannot have the effect of setting aside the conditions expressly laid down" in Article 263 TFEU (*Armando Carvalho*, para. 78) is now besides the point. Those conditions must also be interpreted in the light of other provisions of EU law, including Articles 7, 47 and 53 of the EU Charter. In *KlimaSeniorinnen*, the ECtHR found that "The specific considerations relating to climate change weigh in favour of recognizing the possibility for associations, subject to certain conditions, to have standing before the Court as representatives of the individuals whose rights are or will be affected" (para. 498).

Given that the EU Charter must be interpreted in light of the ECHR, the CJEU should find that associations coming within the scope of the "specific and tailored" remedy are directly and individually concerned by EU climate policy. That does not amount to setting aside the conditions laid down in Article 263 TFEU. It amounts to interpreting them so that they are tailored to "the specific considerations relating to climate change". Nor does it estab-

lish an *actio popularis*, to use the words of the ECtHR in *KlimaSeniorinnen*, precisely because of its exceptional character.

Even if the CJEU were willing to establish this specific interpretation of the conditions in Article 263, fourth paragraph, TFEU, there are doubts about the appropriateness and effectiveness of this particular remedy. *KlimaSeniorinnen* speaks of the need for a remedy against failure to act or inadequate action. It is not clear whether a challenge to EU climate legislation, which in any event needs to be brought within a two-month period after its adoption, enables an environmental association to make the claim that particular legislation is inadequate – or indeed that the EU is, in general, not taking adequate action. The two-month period means that an association must wait for the adoption of new, general climate legislation, or for the amendment of such legislation. However, the fact that EU action is inadequate may only become apparent with time, as the intensity of the climate emergency manifests itself.

It may therefore be worthwhile to look at another EU law remedy, one that is hardly ever used: the action for failure to act (Article 265 TFEU). It governs cases where EU institutions, "in infringement of the Treaties, fail to act". Those terms best fit the appropriate and tailored remedy established by the ECtHR, focused as it is on failure to act or inadequate action.

Undoubtedly, the EU Treaties require action on climate change (Article 191(1) TFEU and Article 7 EU Charter). There is a hurdle, though. A natural or legal person may only bring an action for failure to act where the EU institution "has failed to address to that person any act other than a recommendation or opinion" (Article 265 TFEU). The CJEU interprets that provision by extending the requirements of direct and individual concern to this remedy, in order to widen it to certain acts that are not addressed to a person,

and to ensure that the action for failure to act is the mirror image of the action for annulment. Again, the CJEU ought to accept an interpretation that accommodates the specific, exceptional climate change remedy. After *KlimaSeniorinnen*, it is arguable that environmental associations may rightfully claim that inadequate EU climate change policy amounts to a failure to address to them – the accepted representatives of all EU (potential) victims of climate change – the requisite acts.

Finally, there is also the possibility of an action in damages (Articles 268 and 340 TFEU). That may also be an avenue for challenging failure to act, or inadequate action against climate change. However, whether it is an effective remedy is again open to doubt, in light of the stringent requirements imposed in the case law (such as the need to establish a "sufficiently serious" violation).

Conclusion

As can be seen, *KlimaSeniorinnen* has established a remedy which, in EU law, is not easy to locate and may actually be unavailable in light of restrictive CJEU case law. Whatever one's views on this restrictive case law, it is a fact that the EU Charter of Fundamental Rights now obliges the CJEU to do as much as it can to accommodate the *KlimaSeniorinnen* remedy and to interpret the relevant TFEU provisions flexibly. One may assume that, sooner or later, the CJEU will be confronted with a *KlimaSeniorinnen* claim. If the CJEU were to declare such a claim inadmissible, it will put itself in the corner of courts refusing to engage with climate change policies. That would be unfortunate for a court that has long been at the forefront of legal progress.

There is also a further question as to whether a denial of this remedy would constitute a manifest deficiency in the standard of

EU fundamental rights protection. Such a manifest deficiency could be established by the European Court of Human Rights (see *Bosphorus*[8]), notwithstanding the fact that the EU is not an ECHR Contracting Party. That would be most unfortunate, for the EU, for the CJEU, for the protection of fundamental rights, and for the fight against climate change.

References

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