

ECtHR: VEREIN KLIMASENIORINNEN SCHWEIZ AND OTHERS v. SWITZERLAND (Application No. 53600/20, 9 April 2024): Insufficient Measures to Combat Climate Change Resulting in Violation of Human Rights / Sandra Žatková, Petra Paľuchová

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Abstract: *The present paper focuses on the analysis of the landmark decision of the European Court of Human Rights in which the Court has, for the first time, ruled on human rights violation due to climate change. It begins with the description of the convention as a so-called living instrument that aims at the interpretation of the European Convention on Human Rights taking into account the current social circumstances and challenges, such as the growing need for environmental protection and addressing climate change. In the judgment in question, the Court held that Switzerland had violated the applicant's rights due to insufficient legislative measures to protect individuals from the adverse effects of climate change. As a result of the long-awaited but unconventional conclusion, the judgment has become the target of much criticism. The paper thus concentrates on the main seemingly innovative or rather surprising pillars of the judgment, such as the court's determination of locus standi, the scope of a state's positive obligations in the context of climate change and its related margin of appreciation, as well as the unprecedented consideration of scientific evidence. The paper concludes by summarising the possible implications of the court's arguments for similar future cases, which will undoubtedly increase in number.*

Key words: *Climate Change; ECtHR; Human Rights; Living Instrument; Positive Obligation; Actio Popularis; Climate Litigation*

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1. INTRODUCTION

The core of the relationship between the environment and human rights is the dependence of people on their relationship with the non-human world and human vulnerability to environmental change. A safe, clean, healthy, and sustainable environment is essential for the full enjoyment of a wide range of human rights, including

the right to life, health, safe drinking water and sanitation, housing, self-determination, culture and work.

However, for some years now, Human Rights Council has explicitly expressed concern that climate change has contributed and continues to contribute to an increase in the occurrence and intensity of sudden-onset natural disasters, as well as slow-onset negative events, and that these events have an adverse impact on the full enjoyment of all human rights.¹ The abovementioned position is brought into focus also by The Office of the High Commissioner for Human Rights,² as well as by the Intergovernmental Panel on Climate Change (IPCC).³

The European Court of Human Rights has held that the exercise of human rights recognised by the European Convention on Human Rights (hereinafter referred to as „**the Convention**“) can be impaired by environmental harm and risks indeed. However, it should be pointed out that, being a key instrument in the protection of individual rights in Europe, it does not contain an article or provision directly dealing with the human right to the environment or any kind of protection against climate change.

However, the case law of the European Court of Human Rights (hereinafter referred to as „**ECTHR**“ or „**the Court**“), established that the content of the Convention must be interpreted in the light of the current social circumstances. The ECTHR gives weight to the so-called *living tree interpretation* and stresses that the Convention must be interpreted as a „*living instrument*“ so as not to neglect the constant evolution of international law. According to some judges, this doctrine is in principle a *conditio sine qua non* for the application of the Convention to cases that arise in practice (Sicilianos, 2020).

The case law of the European Court of Human Rights thus guarantees the protection of the right to a healthy environment mainly through the right to life enshrined in Art. 2 and through the protection provided by Art. 8 of the Convention, enshrining the right to respect for private and family life, home and correspondence. With regard to the procedural dimension of this right, protection is provided primarily through the right to a fair trial (Art. 6), the freedom of expression and the right to information (Art. 10), the right to freedom of assembly and association (Art. 11) and the right to an effective remedy (Art. 13).⁴ Thus, by now, the ECTHR has developed a fairly extensive environmental jurisprudence.

Recently, however, the ECTHR has gone even further, with the Grand Chamber of the ECTHR delivering judgments on three climate change complaints that both, the public and professionals have been eagerly awaiting. This marked a significant milestone in the environmental protection provided by the ECTHR as a human rights body, but also a

¹ United Nations General Assembly. 41/21. Resolution adopted by the Human Rights Council on 12 July 2019. A/HRC/RES/41/21, 2019.

² United Nations General Assembly. 10/61. Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights. A/HRC/10/61, 2009.

³ See e.g., Intergovernmental Panel on Climate Change (2022). Climate Change 2022: Impacts, Adaptation and Vulnerability. Cambridge: Intergovernmental Panel on Climate Change. Available at: https://report.ipcc.ch/ar6/wg2/IPCC_AR6_WGII_FullReport.pdf (accessed on 19.05.2024).

⁴ See, e.g., ECTHR, López Ostra v. Spain, app. no. 16798/90, 9 December 1994; ECTHR, Taşkin and Others v. Turkey, app. no. 46117/99, 10 November 2004; ECTHR, Fadeyeva v. Russia, app. no. 55723/00, 9 June 2005; or ECTHR, Di Sarno and Others v. Italy, app. no. 30765/08, 10 January 2012. For further information see: United Nations Environment Programme (2019). Environmental Rule of Law: First Global Report. Nairobi: United Nations Environment Programme, pp. 146-147. Available at: https://wedocs.unep.org/bitstream/handle/20.500.11822/27279/Environmental_rule_of_law.pdf?sequence=1&isAllowed=y (accessed on 19.05.2024).

milestone in the growing field of climate litigation.⁵ Two of them were declared inadmissible⁶ and alongside them, there was a notable judgment issued that distinguishes itself from the others for various reasons. Based on that, this paper thus focuses on an analysis of this particular judgement.

2. DEVELOPMENT OF THE CASE AT NATIONAL LEVEL AND THE ECtHR'S TURNING OF THE TIDE

On 9 April 2024, the Grand Chamber of the ECtHR issued its long-awaited judgment (De Spiegeleir and Brucher, 2023; Jorio, 2023) *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, (GC), app. no. 53600/20, 9 April 2024. (hereinafter referred to as "*KlimaSeniorinnen*" or "*the judgement*"). For the first time, the ECtHR recognised a right to climate protection. By 16 votes to 1 (Judge Eicke expressed disagreement with the majority), it set forth new standards regarding climate change cases and climate litigation, with its perspectives on how Art. 2 as well as 8 of the Convention would substantively apply to such cases. It found that the mitigation of climate change represents a duty falling under the umbrella concept of the right to private life under Art. 8 of the Convention. The duty which Switzerland failed to fulfil. This is the first time the Court has ruled on climate change issues, although such case law already exists at the national level.⁷

2.1 *Proceedings at the National Level*

The case concerned an application lodged by four women and the Swiss association *Verein KlimaSeniorinnen Schweiz* („Senior Women for Climate Protection”), whose members are elderly women complaining about the effects of global warming on their living conditions and health.

In 2016, this group of senior women together with the association (*Verein KlimaSeniorinnen Schweiz*) filed a lawsuit against the Federal Council, the Federal Department of the Environment Transport, Energy and Communications, The Federal Office for the Environment, and the Federal Office for Energy claiming that these Swiss

⁵ According to UN Environment Programme (UNEP) and the Sabin Center for Climate Change Law at Columbia University that, among other tasks, provides databases of climate change caselaw, the total number of climate change court cases has more than doubled since 2017 and is growing worldwide showing that climate litigation is becoming an integral part of securing climate action and justice. See: United Nations Environment Programme (2023). *Global Climate Litigation Report: 2023 Status Review*. Nairobi: United Nations Environment Programme, p. 12. Available at: https://wedocs.unep.org/bitstream/handle/20.500.11822/43008/global_climate_litigation_report_2023.pdf?sequence=3 (accessed on 19.05.2024).

⁶ ECtHR, *Carême v. France*, (GC), app. no. 7189/21, 9 April 2024; ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others*, (GC), app. no. 39371/20, 9 April 2024.

⁷ For example, the following cases: *PSB et al. v. Brazil* (on Climate Fund), Federal Supreme Court of Brazil, ADPF 708, 1 July 2022 (Brazil) (In this case of 2022, the Brazilian Supreme Court held in that the Paris Agreement is a human rights treaty, which enjoys "supranational" status.); *Milieudefensie et al. v. Royal Dutch Shell plc.*, The Hague District Court, C/09/571932 / HA ZA 19-379, 25 April 2022 (Netherlands) (It is the case in which a Dutch court ordered oil and gas company Shell to comply with the Paris Agreement and reduce its carbon dioxide emissions by 45 per cent from 2019 levels by 2030. The case is pretty significant indeed as it was the first time a court found a private company to have a duty under the Paris Agreement.) or even a well-known case of *Neubauer* (Neubauer, et al. v. Germany, Federal Constitutional Court of Germany, 29 April 2021 (Germany)), in which German court struck down Parts of Germany's Federal Climate Protection Act were declared to be incompatible with constitutional rights to life and health, among others, because the legislation did not include sufficient provisions for emissions cuts beyond 2030.

authorities had failed to comply with their obligations under the Swiss Constitution and the Convention. The applicants expressed their concern that the Swiss authorities, despite their obligations under the Convention, are not taking sufficient measures to mitigate the effects of climate change, which are contained in international legal obligations, particularly the Paris Agreement on climate change.⁸ *In concreto*, they claimed that the Government had violated the Swiss Constitution as regards Article 10 (right to life), Article 73 (principle of sustainability) and Article 74 (protection of the environment), as well as Articles 2 and 8 of the Convention. Furthermore, they stated that their demographic group is particularly susceptible and vulnerable to the heat waves that are expected as a result of climate change. Heat waves caused by climate change have caused, are causing and will continue to cause further deaths and illnesses among older women such as the applicants. According to recent studies, 30 % of the heat-related deaths in Switzerland can be attributed to the anthropogenic climate change (Vicedo-Cabrera et al., 2021).

In addition, studies conducted in 2021 also confirm that in Switzerland, women over the age of 75 are a demographic group with the highest risk of heat-related health impairment (Saucy et al., 2021). According to the applicants, the medical certificates and personal statements can also be seen as evidence of the physical and mental suffering inflicted on them by the heat waves. According to the Federal Office for Meteorology and Climatology, the average temperature rise in Switzerland between 2013 and 2022 was 2.5 °C, which is almost twice the global average. Staying within the 1.5 °C limit, which Switzerland already exceeded at the turn of the new millennium, would significantly reduce the risk of excess mortality and morbidity due to heat (Jorio, 2024).

As a result, the applicants called on the Swiss Parliament and the relevant federal agencies to develop a regulatory approach for a number of sectors that would achieve greenhouse gas emission reductions of at least 25% below 1990 levels by 2020 and at least 50% below 1990 levels by 2050. Thereby they were critically responding to the objectives that were being debated in Parliament at the time. These provided for a 20% reduction in emissions by 2020 and a 30% reduction by 2030. They referred to studies which confirmed that the Swiss Government's climate ambitions were not in line with the stated limit of no more than 1.5 °C of warming. Measures by which the government would pursue these targets were also perceived by the applicants as not being in place at all or not sufficiently in place.

Federal Department of the Environment Transport, Energy and Communications dismissed the applicants' request on 25 April 2017. It found that the applicants lacked standing because their rights were not affected as required by Article 25a (1) APA (Swiss Administrative Procedure Act). It further determined that instead of seeking a remedy for an infringement of their specific legal rights, they sought regulation of global CO₂ emissions through general regulations. They were also further found not to have victim status under the Convention because they sought an injunction to serve the wider public interest of adoption of legislative reform to reduce CO₂ emissions. Hence, they appealed the dismissal on 26 May 2017.

⁸ The Paris Agreement on climate change was adopted on 12 December 2015 at the Paris Climate Conference. It entered into force on 4 November 2016, following ratification by 55 Parties to the UN Framework Convention on Climate Change, which account for more than 55% of global greenhouse gas emissions. Its main objective is to keep the increase in global average temperature well below 2°C above pre-industrial levels and to make efforts to limit the temperature increase to 1.5°C above pre-industrial levels. These targets have the potential to significantly reduce the risks and impacts of climate change. Under the Agreement, participants commit to reducing their greenhouse gas emissions relative to the 1990 baseline through nationally determined contributions (NDCs).

On 27 November 2018, the appeal was rejected by the Swiss Federal Administrative Court which essentially upheld the position of Federal Department of the Environment Transport, Energy and Communications stating that the applicants were not affected by Switzerland's climate protection measures in a way that goes beyond that of the general public. It therefore reiterated that Swiss women over 75 years of age were not exclusively affected by climate change impacts.

Thus, in January of 2019, the judgement was followed by another appeal lodged with the Swiss Supreme Court. In May 2020, it repeatedly rejected the appeal, pointing out the insufficient intensity by which the applicants' rights were affected. What is more, the Supreme Court suggested to seek the remedy through political rather than legal means. It specified that Swiss constitutional law provides citizens with various means of democratic participation for shaping current policy areas such as the election of the Parliament, the right to take a popular initiative for a total or partial revision of the Federal Constitution and the right of petition, as well as some other more.⁹

Subsequently, on 26 November 2020, having exhausted all domestic remedies,¹⁰ the applicants applied to the ECtHR arguing there was a violation of their rights under the Arts. 2, 8, 6 and 13 of the Convention.

The applicants claimed that the Swiss legislative and executive authorities failed to implement international conventions, above all the Paris Agreement on climate change, which aim to mitigate the effects of global warming.

2.2 ECtHR's Approach towards the Protection of Rights Threatened by Climate Change

After several unsuccessful attempts at the national level, the applicants finally succeeded with the ECtHR. The Court gave the entire case a new dimension offering an interesting perspective on resolving the case and the impact of the climate crisis on the (not only) applicants' human rights. The judgment thus constituted a reason to rejoice not only for the applicants or the public involved, but also for legal scholars.

The Court found a violation of the right to respect for private and family life (Art. 8) and the right to a fair trial (Art. 6(1)). It determined, although taking into account a margin of appreciation of every state in regards to commitment to the necessity of combating climate change and its adverse effects, the Art. 8 must be seen as encompassing a right for individuals to effective protection by the State authorities. Such protection must shield individuals from serious adverse effects of climate change on their life, health, well-being and quality of life.¹¹ In relation to Art. 6, the Court emphasised the domestic courts' key role in climate-change litigation and of access to justice in this field,¹² even though, in principle, complaints concerning political decisions that are the product of democratic processes do not fall within the scope of Art. 6 of the Convention. In the present case, however, the applicants complained that the Swiss authorities did not comply properly with their international legal obligations in the field of climate change. At the same time, the Court pointed out the domestic courts' failure to *i)* engage seriously or at all with applicant association's action, *ii)* provide convincing reasons for non-examination of merits of the case, *iii)* consider compelling scientific evidence concerning

⁹ Federal Supreme Court [of Switzerland], Public Law Division I, Judgment 1C_37/2019 of 5 May 2020, par. 4.3.

¹⁰ In accordance with Art. 35 of the Convention.

¹¹ *KlimaSeniorinnen*, par. 519.

¹² *Ibid.*, par. 639.

climate change and to *iv*) examine applicant association's legal standing leading to impairment of the very essence of its right to access to court.

The present judgment examines a wide range of arguments in great detail and shows the Court's conviction in its role in protecting the environment and mitigating the effects of climate change under the umbrella of protecting the fundamental human rights that are affected. It has to be said that the reference to the alleged violation of Art. 8 of the Convention and the finding that States are obliged to participate in mitigating the effects of climate change is not so surprising, given the "Convention as a living instrument" concept established in the field of environmental protection. More surprising or innovative (which makes it prone to a wave of criticism) appear to be certain parts of the Court's reasoning (relating to e.g., standing to invoke the right to climate protection), as well as the sources referred to by the Court, which will be further discussed in more detail.

3. OVERCOMING THE INADMISSIBILITY OF *ACTIO POPULARIS*

The ECtHR's approach to the admissibility of claims has basically remained unchanged since its inception (Ahmadov, 2018). Throughout the years, the Court has consistently held that its task is not to review the relevant law and practice *in abstracto*, as the Convention does not provide for the institution of an *actio popularis*.¹³ Individuals or groups of individuals are therefore not permitted to complain about a provision of national law simply because it may contravene the Convention without having been directly affected by it.¹⁴

The court did not depart from this approach in deciding the admissibility of another climate case on the same day, April 9, either. In the case of *Carême v. France*,¹⁵ where the applicant was a former resident and mayor of the municipality of Grande-Synthe. That municipality was alleged to be exposed to the risks associated with climate change leading to increased heavy rainfall and rising sea levels which might lead to flooding and submergence of the municipality below the sea level. Because of this, he argued that he could not contemplate living in his home village (at the time he was a MEP living in Brussels). However, the Grand Chamber declared the complaint inadmissible in that case: „*Holding otherwise, and given the fact that almost anyone could have a legitimate reason to feel some form of anxiety linked to the risks of the adverse effects of climate change in the future, would make it difficult to delineate the actio popularis protection – not permitted in the Convention system – from situations where there is a pressing need to ensure an applicant's individual protection from the harm which the effects of climate change may have on the enjoyment of their human rights.*“¹⁶

In the *KlimaSeniorinnen* case, however, the ECtHR no longer upheld the inadmissibility of *actio popularis* in the climate case and the „*victim status*“¹⁷ became one of the salient issues of the Court's judgement.

¹³ The term referring to actions taken to obtain a remedy by a person or a group in the name of the general public while the persons or groups concerned are neither themselves victims of a violation nor have they been authorised to represent any victims or potential victims. See e. g., ECtHR, *Zakharov v. Russia*, (GC), app. no. 47143/06, 4 December 2015, par. 164.

¹⁴ *KlimaSeniorinnen*, par. 460. See also: ECtHR, *Aksu v. Turkey*, (GC), app. no. 4149/04 and 41029/04, 15 March 2012, par. 50, 51.

¹⁵ ECtHR, *Carême v. France*, (GC), app. no. 7189/21, 9 April 2024.

¹⁶ *Ibid.*, par. 84.

¹⁷ As set out in the Art. 34 of the Convention.

In accordance with the Art. 34 of the Convention, the Court may receive applications from any person, NGO or group of individuals who claim to be the victim of a violation under one or more provisions of the Convention.

It is required by the Court's well-established case law that there exists an established causation between the alleged violation and the harm allegedly suffered. The Court stated that, in general, the word „victim” under Art. 34 denotes the following categories of persons: *the direct victims* (those directly affected by the alleged violation of the Convention), *the indirect victims* (those indirectly affected by the alleged violation of the Convention), and *the potential victims* (those potentially affected by the alleged violation of the Convention).¹⁸ However, in any event, the link between the applicant and the harm, which he or she claims to have sustained as a result of the alleged violation, is a prerequisite.¹⁹

In spite of the abovementioned, in the present case, the Court has stressed that the victim-status criterion is not to be applied in a rigid, mechanical and inflexible way.²⁰ As all of the other provisions, it is to be interpreted in an evolutive fashion in the light of conditions in contemporary society²¹ in order not to make the protection of the rights guaranteed by the Convention ineffectual and illusory.²² By that, the Court simply held that in the context of the climate change, a special approach to the victim status appeared to be a necessity. In this case, the Court held that there was undoubtedly *nexus causalis* between the State's acts or omissions and the harm caused to the individual.

Naturally, the Court differentiated among victim status of individuals and *locus standi* (representation) of association. The Court found that the four individual applicants did not meet the criteria for victim status under Art. 34 of the Convention. On that basis, it declared their application inadmissible. Accordingly, it noted that in order to claim victim status under the Convention in the context of harm or risk of harm arising from alleged failures of the states to combat climate change, the following circumstances concerning the applicant's situation must be met:

- (a) the applicant must be subject to 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 affecting the applicant must be significant, and
- (b) 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.²³

According to the Court, the threshold for fulfilling these criteria is especially high. Due to the exclusion of *actio popularis*, the Court must have taken into account e. g., the actuality/remoteness and/or probability of the adverse effects of climate change over time. It has also considered the specific impact on the applicant's life, health, or well-being, the magnitude and duration of the harmful effects, the scope of the risk (whether localised or general), and the nature of the applicant's vulnerability.²⁴ In this case, the

¹⁸ ECtHR, Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania, (GC), app. no. 47848/08, 17 July 2014, par. 96 - 101.

¹⁹ ECtHR, Mansur Yalçın and Others v. Turkey, app. no. 21163/11, 16 September 2014, par. 40.

²⁰ ECtHR, Albert and Others v. Hungary, (GC), app. no. 5294/14, 7 July 2020, par. 121.

²¹ ECtHR, Gorraiz Lizarraga and Others v. Spain, app. no. 62543/00, 27 April 2004, par. 38 and ECtHR, Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği v. Turkey, app. no. 37857/14, 7 December 2021, par. 39.

²² Gorraiz Lizarraga and Others, cited above, par. 38.

²³ *KlimaSeniorinnen*, par. 486, 487.

²⁴ *Ibid.*, par. 488.

individual applicants did not meet the victim-status criteria under the Convention. Therefore, their complaints were declared inadmissible as being incompatible *ratione personae*.²⁵ The Court found that they were not exposed to a health risk that could not be alleviated by the adaptation measures available in Switzerland, nor were they subject to the adverse effects of climate change with a degree of intensity that would necessitate ensuring their individual protection. Such conclusion is particularly relevant given the high threshold which necessarily applies to the fulfilment of the criteria designated by the Court.²⁶

On the contrary, the applicant association (*Verein Klimaseniorinnen*) was found to have a standing (*locus standi*) on behalf of those individuals whose Convention rights may arguably be subject to specific threats or adverse effects due to the climate change. The ECtHR reiterated that in modern-day societies, recourse to collective non-profit bodies such as associations is sometimes the only means available to citizens whereby they can defend their particular interests effectively.²⁷ This is especially true in the context of climate change as a global and complex phenomenon having multiple causes and its adverse effects that are „a common concern of humankind”.²⁸

In the context of climate change, intergenerational burden-sharing assumes particular importance for the currently living generation as well as the future one that is likely to bear an increasingly severe burden of the consequences of present failures and omissions to combat climate change while, at the same time, has no possibility of participating in the current decision-making processes (Schröder, 2021; Weiss, 2008).²⁹ Hence, associations or other interest groups may be one of the sole way by which the voice of those at a distinct representational disadvantage can be heard. In this sense, this argument thus enhances the justification for the possibility of judicial review in climate change cases.

Similarly, in this case, the Court set out specific criteria that an association must meet.³⁰ In this regard, it must be: (a) lawfully established in the jurisdiction concerned or have standing to act there; (b) able to demonstrate that it pursues a dedicated purpose in accordance with its statutory objectives in the defence of the human rights of its members or other affected individuals within the jurisdiction concerned, whether limited to or including collective action for the protection of those rights against the threats arising from climate change; and (c) able to demonstrate that it can be regarded as genuinely qualified and representative to act on behalf of members or other affected individuals within the jurisdiction who are subject to specific threats or adverse effects of climate change on their lives, health or well-being as protected under the Convention.

The Court then went even further and added that the standing of an association to act on behalf of its members or other affected individuals would not be subject to a separate requirement of showing that those on whose behalf the case has been brought

²⁵ Within the meaning of Art. 35 § 3 of the Convention.

²⁶ *KlimaSeniorinnen*, par. 533.

²⁷ See e. g., in *Gorraiz Lizarraga and Others v. Spain*, cited above, par. 38.

²⁸ With reference to preamble of the United Nations Framework Convention on Climate Change (1992).

²⁹ *KlimaSeniorinnen*, par. 420. The rights of the next generation were also the basis of another climate case of 9 April 2024, in which, however, as in *Carême v. France*, the complaint was declared inadmissible. In the present case, *Duarte Agostinho and Others v. Portugal and 32 Others* (cited above), the complaint was brought by six young Portuguese nationals against Portugal and 32 other Convention States for the breach of Art. 2, 8 and 14 of the Convention. The applicants' argument laid in their exposure to a risk of harm from climate change which would probably augment in the years to come and therefore affect their children in the future, indeed.

³⁰ *KlimaSeniorinnen*, par. 502.

would themselves have met the victim-status requirements for individuals in the climate-change context.³¹

Moreover, the special feature of climate change as a common concern of humankind is said to speak in favour of recognising the standing of associations before the Court in climate-change cases.³²

In its decision, the court appealed several times to the exclusion of *actio popularis*. Yet, this fact alone did not prevent³³ it from giving a different, more modern, perhaps even more necessary view of the complaint brought in the name of the general public.

Such interpretation of *actio popularis* by the Grand Chamber of the Strasbourg Court has sent a rather clear signal, which may provide an incentive not only for international climate litigation, but also for authorities at the national level not to reject climate complaints (following strict formalism) at first hand.

4. POSITIVE OBLIGATIONS OF A STATE THROUGH THE PRISM OF CLIMATE AND SCIENCE

As outlined above, the „greening“ of the Convention is based, on its evolutionary as well as dynamic interpretation, that is, on the interpretation of its provisions as a „living instrument“ and on the doctrine of positive obligations (Braig and Panov, 2020). The argument lies in the fact that the Convention predates most environmentally related international or regional treaties (Dupuy and Viñuales, 2015).

So far, in the environmental field, the ECtHR had elaborated on the doctrine of positive obligations, including procedural as well as substantive duties, by requiring States to actively protect human rights through the prism of e.g., an obligation to grant access to courts regarding environmental matters,³⁴ an obligation to grant access to environmental information,³⁵ a duty to meet adequate safety precautions,³⁶ an obligation to guarantee public participation in environmental decision-making processes,³⁷ an obligation to enact environmental legislation³⁸ or also a duty to deal with omissions by the States and inefficient measures³⁹ (Braig and Panov, 2020).

In *KlimaSeniorinnen*, the Court relied heavily on its general environmental jurisprudence emphasising the obligation of states to put in place a relevant framework designed to provide an effective protection of human health and life, in particular, regulations geared to the specific features of the activity in question, particularly with regard to the level of risk potentially involved.⁴⁰ What appears to be interesting however

³¹ *Ibid.*. See also: ECtHR, Asselbourg and Others v. Luxembourg, app. no. 29121/95, 29 June 1999 and Yusufeli İlçesini Güzelleştirme Yaşamta Kültür Varlıklarını Koruma Derneği v. Turkey, cited above, par. 41, where the Court had previously stated that it may be possible for an association to have standing before the Court despite the fact that it cannot itself claim to be the victim of a violation of the Convention.

³² *KlimaSeniorinnen*, par. 499.

³³ Partly Concurring Partly Dissenting Opinion of Judge Eicke. In: ECtHR, Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, (GC), app. no. 53600/20, 9 April 2024.

³⁴ ECtHR, Howald Moor v. Switzerland, app. no. 52067/10 and 41072/11, 11 March 2014.

³⁵ ECtHR, Guerra and Others v. Italy, (GC), app. no. 14967/89, 19 February 1998, par. 60.

³⁶ ECtHR, Budayeva v. Russia, app. no. 15339/02, 11673/02, 15343/02, 20058/02 and 21166/02, 20 March 2008, par. 156.

³⁷ ECtHR, Hatton v. United Kingdom, (GC), app. no. 36022/97, 8 July 2003, par. 189, 227.

³⁸ ECtHR, Öneriyildiz v. Turkey, (GC), app. no. 48939/99, 30 November 2004, par. 79.

³⁹ ECtHR, Oluic v. Croatia, app. no. 61260/08, 20 May 2010, par. 66.

⁴⁰ *KlimaSeniorinnen*, par. 538

is, in fact, the extent to which the Court proceeded regarding the obligation a state is required to comply with so as to fulfil its duties under Art. 8.

4.1 Positive Obligation in the Climate Context

In ensuring the implementation of Art. 8 of the Convention, the margin of appreciation of a state plays a crucial role since the burden borne by the state must not be inadequate. In this respect, the Court pointed out that in cases concerning climate change, it is necessary to balance between the states' commitment to the necessity of combating climate change and its adverse effects (setting of the requisite aims and objectives in this respect) and the choice of means designed to achieve the set objectives. The ECtHR has established that the nature and gravity of the threat of climate change, the general consensus in relation to this issue and the overall GHG reduction targets leading to carbon neutrality, require a reduced margin of appreciation for states in setting targets to combat climate change. With regard to the choice of means, including operational decisions and policies adopted to meet international commitments, states should be granted a wide margin of appreciation.⁴¹

In the course of assessment whether Switzerland remained within its margin of appreciation, the ECtHR examined whether the relevant domestic authorities, at the legislative, executive or judicial level:

- (a) adopted 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) provided evidence showing whether they had duly complied, or were in the process of complying, with the relevant GHG reduction targets,
- (d) kept the relevant GHG reduction targets updated with due diligence, and based on the best available evidence, and
- (e) acted in good time and in an appropriate and consistent manner when devising and implementing the relevant legislation and measures.⁴²

Even before the judgment itself, it was partly assumed that the Grand Chamber would produce in some respect a landmark decision on climate change. That is what happened, but with the difference that the Court, perhaps surprisingly, went further than expected. In addition to linking climate change to human rights, the Court stated that measures taken at the national level by states should achieve net neutrality over the next three decades.⁴³ This statement is consistent with the objectives set out in the EU climate legislation as well as in the domestic legal order of many states. Measures should avoid, *inter alia*, a disproportionate burden on future generations.⁴⁴ In this respect, the Court essentially followed the decision in the case of *Neubauer*, concerning the decision of the

⁴¹ *Ibid.*, par. 543.

⁴² *Ibid.*, par. 550.

⁴³ *Ibid.*, par. 548.

⁴⁴ *Ibid.*, par. 549.

German Federal Constitutional Court on the review of the constitutionality of the Federal Climate Law through the prism of Article 20a of the German Basic Law (Nolan, 2024).⁴⁵

It is fair to say that the Court's requirements for determining whether a state departed from its permitted margin of appreciation in ensuring the implementation of Art. 8 of the Convention are not as detailed as would be desirable or expected. However, it gives the Court (and not only) greater scope of Convention interpretation, allowing for more nuanced and adaptable future decision-making. The foregoing can also mean that, in order to avoid a rash of similar climate actions in the future, the Court has stated that it would generally look at the big picture when deciding if a state has met the requirements above. Thus, a shortcoming in one particular respect alone will not necessarily mean that a state overstepped its margin of appreciation.⁴⁶ The fact that the requirements are not unqualifiedly strict does not make them too burdensome for states.

In respect to Switzerland, the ECtHR noted that the currently existing Swiss 2011 CO₂ Act (in force since 2013) required that by 2020 GHG emissions should be reduced overall by 20% compared with 1990 levels. Yet, the applicants pointed out that the industrialised countries such as Switzerland had to reduce their emissions by 25-40% by 2020 compared to 1990 levels.⁴⁷ According to the Swiss government, even the GHG reduction target for 2020 had been missed. On average over the period between 2013 and 2020, the reduction of Swiss GHG emissions was around 11% compared with 1990 levels. The clearly indicates an insufficiency of the authorities to combat climate change by adopting necessary measures.

In line with the targets of the Paris Agreement, the Swiss government proposed an amendment to the climate law in 2017 to ensure a domestic reduction of 30% in emissions by 2030 compared to 1990 as part of an overall reduction of 50% of GHG emissions. However, the amendment in question was rejected in a referendum in June 2021 due to concerns about potential increases in gasoline prices and other cost-of-living increases. The Federal Council sought to respond with further action and so an amendment to the Act was enacted in late 2021, setting the emissions reduction target for 2021 to 2024 at 1.5% *per annum* compared to 1990 levels. What is more, the Climate Act was subsequently passed on 30 September 2022 and confirmed in a popular vote on 18 June 2023. This piece of legislation set a target of achieving 'zero' emissions by 2050, but it is rather vague and contains only targets and intentions. There is no mention of any concrete measures.⁴⁸ Such a lack of detailed measures creates significant uncertainty in their implementation. This subsequently hinders timely and effective progress towards the set goal. In such cases, it is also problematic to hold the state and its competent authorities accountable for insufficient protection of the individual rights of its citizens, which are threatened by the impacts of climate change.

It was therefore the absent regulatory measures that led the Grand Chamber to state: *„By failing to act in good time and in an appropriate and consistent manner regarding the devising, development and implementation of the relevant legislative and administrative framework, the respondent State exceeded its margin of appreciation and failed to comply with its positive obligations in the present context.“*⁴⁹ Hence, Switzerland

⁴⁵ See also ref. 8 above.

⁴⁶ *KlimaSeniorinnen*, par. 551.

⁴⁷ *Ibid.*, par. 558. In an assessment of August 2009, the Swiss Federal Council found that at that time there was an existing scientific evidence relating to the limitation of global warming to 2 to 2.4°C above pre-industrial levels (thus above the currently required 1.5°C limit) which required a reduction in global emissions of at least 50-85% by 2050 compared with 1990 levels.

⁴⁸ *KlimaSeniorinnen*, par. 560-564.

⁴⁹ *Ibid.*, par. 573.

has failed to try to reverse future effects of climate change. This obligation of a state to do so was said to flow from the causal relationship between climate change and the enjoyment of Convention rights and the sole fact that the purpose of the Convention requires its provisions to be interpreted and applied such as to guarantee rights that are practical and effective, not theoretical and illusory.⁵⁰ Given that, the Court thus found a violation of the right to privacy protected by Art. 8 of the Convention.

4.2 Reliance on Complex Scientific Evidence

The Court's approach to examining the evidence that resulted in finding a violation of the Convention by Switzerland is also quite interesting. On the one hand, the Court pointed out that each individual state shall be able to define its own proportionate pathway for reaching carbon neutrality based on all the relevant factors within its jurisdiction. The basis for this must also be the global targets set out in the Paris Agreement. These targets should not, however, be the sole criterion for assessing compliance with the Convention by individual parties.⁵¹ On the other hand, it is notable to what extent the Court then refers to findings from natural sciences.

Building its judgment largely upon complex scientific evidence is, on one hand, interesting and perhaps unconventional. However, the Grand Chamber of the ECtHR is not such a pioneer in this regard. Rather, it can be said that by its willingness to „grapple with“ scientific evidence, the ECtHR has joined a growing number of national and international⁵² legal bodies that attribute significant weight to the findings of the IPCC.⁵³

The judgment was largely based on natural science also in relation to the violation of the right to a fair trial protected by Art. 6 of the Convention, where the Court stated that the biggest flaw in the domestic process was that the decisions were not based on sufficient examination of the scientific evidence concerning climate change, which was already available at the relevant time.⁵⁴

Cogent scientific evidence were also able to surpass the well-established causation test (as the Court states the „*but for*“ test⁵⁵), which the Court relaxed and determined that it did not need to be applied so strictly in climate change cases since, in this particular case there was a „legally relevant relationship of causation“ whereupon climate change had led to increased morbidity among certain vulnerable groups.

5. CONCLUSION

The Grand Chamber judgement presented above is, indeed, the first of its kind where the Court found a violation of the Convention provisions in a climate change context. It can be seen, *inter alia*, as a prime example of the way in which an individual can, through legal proceedings, enforce compliance with an international convention (in this case, in particular, the Paris Agreement on climate change, which, it could be said,

⁵⁰ *Ibid.*, par. 545.

⁵¹ *Ibid.*, par. 547.

⁵² International court actions focused on climate change have been relatively few in number probably due to the procedural hurdles, as in many international courts and tribunals (outside of the area of human rights or investor–state arbitration) litigation can only be brought by states (Peel and Lin, 2019; Bruce, 2017).

⁵³ See *inter alia* also the recent decision in case of *Held v. Montana, No. CDV-2020-307 (Mont. 1st Dist. Ct.) (14 Aug. 2023)*. Mention may also be made e.g., of the International Tribunal for the Law of the Sea which delivered a long-awaited Advisory Opinion on climate change and international law on May 21, 2024 (Silverman-Roati and Bönemann, 2024).

⁵⁴ *KlimaSeniorinnen*, par. 635.

⁵⁵ *Ibid.*, par. 315.

has acquired a normative binding character for the states of the Council of Europe, from which individual rights arise that individuals can claim against the states).

The ECtHR was thus confronted with a challenging task, trying to strike a balance between a pressing societal challenge and avoiding an uncontrolled expansion of the interpretation of the Convention. The judgment thus represents a significant legal development naturally raising questions about its future implications and possible consequences.

First and foremost, it is necessary to mention the fact that the provisions of the Convention are part of the legal systems of 46 Council of Europe member states. Legal systems of individual states are influenced by the findings of the ECtHR as a judicial body that oversees the application of the Convention and interprets its provisions. Consequently, it is thus not inconceivable that, given the extension of victim status in cases concerning climate change, states may be prompted to adopt stricter domestic legislation to achieve net neutrality, as defined by the court, over the next 30 years. Such measure would be taken to meet their positive climate protection obligations, which are designed to ensure the protection of the fundamental rights of individuals. The gradual reduction of GHG emissions may therefore have a significant impact on investors in states and the private sector operating there.

The biggest wave of controversy surrounding the *KlimaSeniorinnen* judgment has arisen in relation to its potential to affect other pending climate change cases, particularly those where applicants allege a violation of their fundamental rights.

An example of a pending case before the Court such as *Greenpeace Nordic and Others v. Norway*, application no. 34068/21 concerning the issuance of new licenses for oil and gas exploration in the Barents Sea. Additionally, mention may also be made of a pending case before the International Court of Justice which is about to give an advisory opinion relating to international law obligations of states aimed at ensuring protection from climate change for present as well as future generations that has been requested by UN General Assembly and is expected to be delivered in 2025.

Last but not least, it is also necessary to mention the judgment's possible impact on ongoing or future proceedings before national judicial authorities initiated in the context of climate actions, where, at least in our Central European legal environment, it appears to be fair to mention the cases initiated in the Czech Republic.⁵⁶ The judgment naturally applies only to states, yet nothing prevents it from being used as a supporting argument in future cases by NGOs or individuals.

On the other hand, according to opinions of some legal scholars, the judgment is not so fundamentally transformative in terms of its impact on future decision-making or legislative practice. The reason for this can be found in the legal vacuum on climate change that was specific to Switzerland, where the lack of regulation was reflected in failed domestic referendum rejecting ambitious emission reduction commitments (Pedersen, 2024). Many other countries, especially EU countries, are bound by the European Climate Law⁵⁷ creating binding emission reduction obligations upon the state.

⁵⁶ See also: Klimatická žaloba ČR. Skupinová žaloba na českou vládu (2021). Klimatická žaloba ČR, <https://www.klimazaloba.cz/soudni-dokumenty/> (accessed on 19.05.2024).

⁵⁷ Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').

Development in climate change cases has also been largely influenced by environmental decision-making, and both national and supranational courts have been able to extend the application of environmental obligations to climate change.⁵⁸

Either way, the significance of a state's positive obligation to enact environmental legislation should not be underestimated. In this context, it seems crucial to acknowledge that the state's positive obligation to take necessary measures to mitigate the impacts of climate change at all levels has extensive implications for various aspects of its international legal responsibilities, indeed. There is a broad scientific consensus that climate change significantly exacerbates displacement and migration (Wentz and Burger, 2015). Projections estimate that by 2050, there could be up to 1.2 billion climate refugees.⁵⁹ Existing evidence⁶⁰ demonstrates a causal relationship between climate change and regional social and political instability (Tiryaki, 2023), underscoring that climate change poses not only immediate threats to individuals but also long-term risks capable of gradually destabilising societies and economies. Although climate migration predominantly remains a domestic issue,⁶¹ the rising frequency of global environmental disasters and associated security challenges amplify the importance of the state's positive obligation to enact environmental legislation.

Nevertheless, some significance of the decision is undoubtedly clear: its compelling symbolism for the development of the Convention's interpretation progressing alongside the challenges society faces, as well as a significant human rights achievement in the sphere of booming climate litigation. In the years to come, it thus remains to be seen whether steps will be taken in the direction advocated by the Swiss authorities, namely that legal means will replace political ones in each sensitive case, where both domestic and international judicial bodies will be used as a means of how to take an urgent action. At the end of the day, they are the ones that interpret and enforce, among others, climate-related legislation within their jurisdictions, holding governments and competent authorities accountable for climate actions.

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⁵⁸ This was also the case, for example, in the Dutch case of *Urgenda* (State of the Netherlands v Urgenda Foundation, ECLI:NL:HR:2019:2007, 20 December 2019).

⁵⁹ Institute for Economics & Peace (2020). Over one billion people at threat of being displaced by 2050 due to environmental change, conflict and civil unrest. London: Institute for Economics & Peace. Available at: <https://www.economicsandpeace.org/wp-content/uploads/2020/09/Ecological-Threat-Register-Press-Release-27.08-FINAL.pdf> (accessed on 28.06.2024).

⁶⁰ For example, the civil war in Syria, which broke out in 2011 and was preceded by the worst drought in the country's history (between 2006 and 2011).

⁶¹ Human rights league (2024). Klimaticki migranti – fakty a pojmy. Available at: <https://www.hrl.sk/sk/onas/aktualy/klimaticki-migranti-%E2%80%93-fakty-a-pojmy> (accessed on 28.06.2024).

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