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THE CLIMATE CHANGE RULINGS AND THE TRIAD OF “**URGENCY**”, “**SECURITY**” AND “**TRANSITION**”

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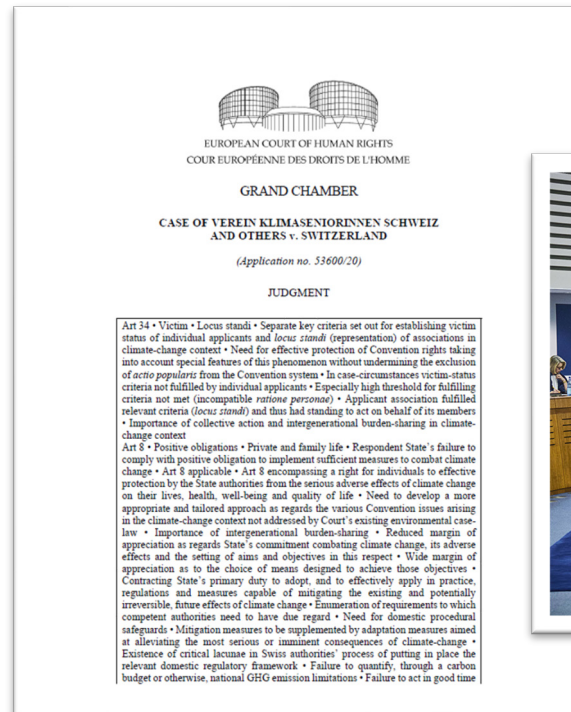
What is the European Court of Human Rights?

- International court set up in 1959, based in Strasbourg, France.
- Decides complaints submitted by individuals and States alleging violations of the (primarily) civil and political rights set out in the European Convention on Human Rights (“**Convention**”), which entered into force in 1953.
- 46 State parties to the Convention which are Member States of the Council of Europe, including all 27 Member States of the European Union.
- Convention incorporated into the legislation of the State Parties.
- Judgments finding violations are binding on States concerned under international law and they are obliged to execute them, including making legislative changes if necessary.
- Convention and the ECtHR’s judgments therefore not binding on non-State entities.

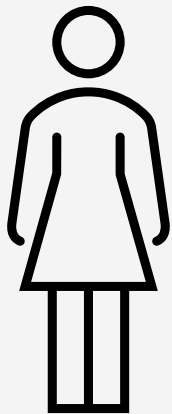


The Climate Change Rulings, Judgment & Decisions, 9 April 2024

- [Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, no. 53600/20, judgment \(Grand Chamber\) of 9 April 2024 \(“KlimaSeniorinnen”\)](#)
- [Carême v. France, no. 7189/21, decision \(Grand Chamber\) of 9 April 2024 \(“Carême”\)](#)
- [Duarte Agostinho and Others v. Portugal and 32 Others, no. 39371/20, decision \(Grand Chamber\) of 9 April 2024 \(the “Portuguese Youth Climate Case”\)](#)



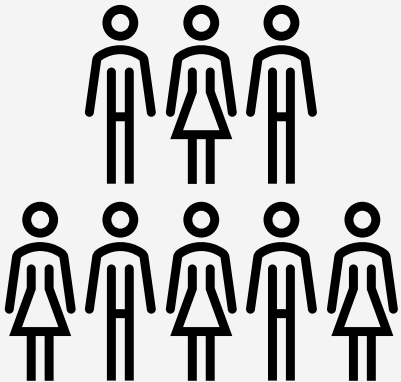
Court's Position on Individual Standing



A High Threshold

- Prohibition on “*actio popularis*”.
- Court’s findings: an “**especially high**” threshold (¶ 487).
- For **individual standing** to bring climate change complaints asserting human rights harms there must be:
 - (a) a “**significant**” **severity of risk** to the individual; and
 - (b) an **absence or inadequacy of reasonable measures** to reduce harm to that individual (¶ 488).
- This finding may prove significant for climate changes cases at domestic level brought by individuals and NGOs against States but also corporates (see later).

Court's Position on NGO Standing



An Expansion of Associational Standing

- For **NGO standing** to assert climate change harms, it must:
 - a) be **established to defend the human rights of its members** (or other affected members in the jurisdiction); and
 - b) be **qualified to act on behalf of those who are subject to specific threats or adverse effects of climate change** (¶ 502).
- Reference by Court to *“the necessity of promoting intergenerational burden-sharing in this context”* and having a *“collective recourse aimed at defending the rights and interests of individuals against the threats of climate change”* (¶¶ 499, 523).
- Clear repercussions for **national standing rules**
 - An NGO’s standing *“will not be subject to a separate requirement of showing that those on whose behalf the case has been brought would themselves have met the victim-status requirements for individuals in the climate-change context”* (¶ 502, emphasis added).

Articles 2 and 8 of the Convention

Article 2(1) (Right to life)

“Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”

Article 8(1) (Right to respect for private and family life)

“Everyone has the right to respect for his private and family life, his home and his correspondence.”



What does the Court Require Member States to do?

Positive Obligations Imposed by Article 8

- “[T]he Court derives from Article 8 a right for individuals to enjoy effective protection by the State authorities from serious adverse effects on their life, health, well-being and quality of life arising from the harmful effects and risks caused by climate change” (¶ 544).
- This requires Member States to: “[U]ndertake 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” (¶ 548).
- “Such measures should, in the first place, be incorporated into a binding regulatory framework at the national level, followed by adequate implementation” (¶ 549).

What does the Court Require Member States to do?

Positive Obligations Imposed by Article 8

When assessing whether a State has remained within its margin of appreciation, the Court will examine whether the competent domestic authorities, be it at the legislative, executive or judicial level, have had due regard to the need to:

- “adopt general measures specifying a target timeline for achieving carbon neutrality and the overall remaining carbon budget for the same time frame ...” (¶ 550(a)).
- “... 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” (¶ 550(b)).
- “act in good time and in an appropriate and consistent manner when devising and implementing the relevant legislation and measures” (¶ 550(e)).

Implications of the *Klima- Seniorinnen* Judgment: Non- Convention Member States

- The Court heavily emphasises the requirement to set **carbon budgets** (i.e., a restriction on the total amount of GHGs that can be emitted over a certain period) as a **mitigation strategy**:
 - “is not convinced that an effective regulatory framework concerning climate change could be put in place without quantifying, through a carbon budget or otherwise, national GHG emissions limitations” (¶ 570).
 - “Local” vs “global” (i.e. “fair share”) concept of carbon budget – unclear from *KlimaSeniorinnen*.
- The Court included “**embedded emissions**”, i.e. GHG emissions generated abroad and attributed to Switzerland through the import of goods for household consumption, which formed 70% of Switzerland’s GHG emissions in 2015, as part of Switzerland’s GHG emissions.
 - Nb: the Court did not find that this presented a jurisdictional issue within the meaning of Article 1 (despite having an extraterritorial aspect) ¶ 287.
 - What are the implications for trade?

The dual scope of the Margin of Appreciation in the Climate Change Context

“Taking as a starting-point the principle that States must enjoy a certain margin of appreciation in this area, the above considerations entail a distinction between the scope of the margin as regards, on the one hand, 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, and, on the other hand, the choice of means designed to achieve those objectives. As regards the former aspect, the nature and gravity of the threat and the general consensus as to the stakes involved in ensuring the overarching goal of effective climate protection through overall GHG reduction targets in accordance with the Contracting Parties’ accepted commitments to achieve carbon neutrality, call for a reduced margin of appreciation for the States. As regards the latter aspect, namely their choice of means, including operational choices and policies adopted in order to meet internationally anchored targets and commitments in the light of priorities and resources, the States should be accorded a wide margin of appreciation” (¶ 543).

Implications of the *Klima-Seniorinnen* Judgment: Public Enforcement Model



- *KlimaSeniorinnen* will likely trigger further litigation against European States (“**the public enforcement model**”), which could also affect the private sector (see, e.g. *Greenpeace v. Norway*).
 - However, *KlimaSeniorinnen* only requires the adoption of “*climate framework laws*”.
 - To date 59 countries, including 25 Convention signatories, have already enacted such laws.
- **Cross-fertilisation:**
 - 21 May 2024: the unanimous advisory opinion of the **International Tribunal for the Law of the Sea**.
 - However, the legal basis for this Opinion is radically different to the Court’s: “*anthropogenic GHG emissions into the atmosphere constitute pollution of the marine environment*” under the Convention on the Law of the Sea.
 - *KlimaSeniorinnen* may also impact the pending advisory opinion of the **ICJ** relating to States’ international law obligations to ensure protection from climate change for present and future generations.
 - And the pending request for an Advisory Opinion before the **Inter-American Court of Human Rights**.

Implications of the *Klima- Seniorinnen* Judgment: For Private Sector

No Horizontal Application to Corporates but Might Trigger Cross-Fertilisation

Tort-based Human Rights Claims

- The *Milieudefensie* private enforcement model.
- Unwritten or statutory based (open-ended) tort standards of duty of care (negligence, nuisance or novel tort of climate system damage).
- Tort standards ‘interpreted’ or ‘filled’ with human rights norms, the Hague District Court in *Royal Dutch Shell* case: “factor in the human rights and the values they embody in its interpretation of the unwritten standard of care”.
- See now also:
 - *Greenpeace v. ENI S.p.A* (2023)
 - *Milieudefensie v. ING* (2024)

Non Human Rights-based Claims Against the Private Sector

On the basis that the trajectory is in favour of climate activism.

Shareholder Activism/Derivative Claims

- E.g. *ClientEarth v. Shell*

“Polluter Pays”

- E.g. *Lliuya v. RWE AG*
- E.g. *Hugues Falys v. TotalEnergies*
- E.g. *Asmania et al. v. Holcim*

Criminal Complaints

- Request to the International Criminal Court to investigate BP Executives for their role in climate change
- French criminal complaint against TotalEnergies' board of directors and main shareholders

Implications of the *Klima-Seniorinnen* Judgment: Implications for ISDS

- *KlimaSeniorinnen* may be viewed as part of a wider trend in international law, along with the advisory opinion of the ITLOS, in imposing framework-oriented positive obligations on States to adopt reduction targets, mitigation and adaptation measures.
- On that basis, States parties to multilateral and bilateral investment treaties may adopt regulatory changes which could prompt new investor State claims, if such legislative changes (for example, the phase out of production of electricity from certain fossil fuels) were implemented in such a manner that could be considered a breach of the States' investment treaty obligations.
- However, *Klimaseniorinnen* does not, as things stand, encompass a broader set of rules applicable within the context of public international law, as such, but is confined to the ECHR.
- The pending advisory opinion of the ICJ will further clarify the position under public international law.

Main Takeaways

– A First Step by the ECHR?

1. An important judgment but limited to the imposition of climate framework laws.
2. Has potential to significantly affect the trajectory of public international law.
3. Individual victim status very narrow under Article 8 of the Convention.
4. Associations the main drivers of climate change litigation.
5. Further development of Convention protections by national judges – strong emphasis on the principle of subsidiarity.
6. Limited horizontal application in private to private relations.
7. A first step by the ECHR, but certainly not the last.



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