

CLIMATE CHANGE

AT THE EUROPEAN COURT OF HUMAN RIGHTS



On 9 April 2024, the European Court of Human Rights ('Court') delivered its first decisions regarding the impacts of climate change in three cases: *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, *Carême v. France*, and *Duarte Agostinho and Others v. Portugal and 32 Others*. These cases brought unprecedented issues before the Court, leading it to establish new criteria for determining the victim status of individual applicants and the *locus standi* (representation) of associations in the context of climate change. Moreover, interpreting the European Convention on Human Rights ('Convention'), the Court identified the positive obligations of States to adopt and to effectively implement regulations and measures capable of mitigating the existing and potentially irreversible future effects of climate change. This visual report explains the Court's decisions.

EXPLAINER

by Aylin Yıldız Noorda

OVERVIEW OF CASES

	<i>KlimaSeniorinnen</i>	<i>Carême</i>	<i>Duarte Agostinho</i>
Applicants	5 in total: 1 association (consisting more than 2,000 senior women), and 4 individual applicants (women aged over 80)	1 individual applicant: previous mayor and resident of Grande-Synthe	6 individual applicants: all children and young adults
Respondents	Switzerland	France	Portugal and 32 Other States
Interveners	23 in total: 8 governments, UN experts, scientists, researchers and NGOs	2 in total: NGOs	12 in total: EU institutions, UN experts, scientists, researchers and NGOs
Convention Rights	Articles 2, 6 § 1 (civil), 8 and 13	Articles 2 and 8	Articles 2, 3, 8 and 14
Admissible?	Partly: admissible regarding Articles 6 and 8 complaints of the association, but inadmissible for the 4 individual applicants (failure to establish victim status regarding Article 8, incompatible <i>ratione materiae</i> regarding Article 6)	No: incompatible <i>ratione personae</i>	No: non-exhaustion of remedies with respect to Portugal, lack of jurisdiction with respect to 31 States, and struck out with respect to Ukraine
Margin of appreciation	Differentiated: Reduced for effective climate protection through reduction targets to achieve carbon neutrality, wide for the choice of means to meet climate targets and commitments	N/A	N/A
Violation?	Only with respect to Articles 6 § 1 (civil) and 8 rights of the association	N/A	N/A
Measures	No measures specified under Article 46 of the Convention, and EUR 80,000 awarded with the default interest rate	N/A	N/A

KEY QUESTION



CAN (AND SHOULD) THE COURT ASSESS THE CLIMATE CHANGE LAWS AND POLICIES OF GOVERNMENTS?

Below is a summary of some of the arguments presented in the *KlimaSeniorinnen* judgment.

YES

- ✓ Inadequate State action to combat climate change exacerbates the risks of harmful consequences and subsequent threats for the enjoyment of human rights protected under the Convention. The Court cannot ignore these present-day conditions confirmed by scientific knowledge (Applicants, p. 132; European Network of National Human Rights Institutions, p. 155; Group of academics from the University of Bern, pp. 162-163).
- ✓ Scrutiny of emission cuts would strengthen democracy and that would be consistent with the requirements of international law (European Network of National Human Rights Institutions, p. 156).
- ✓ A popular initiative could not be considered as a means to put in place the relevant obligations to protect the fundamental rights of applicants (Professors Evelyne Schmid and Véronique Boillet, p. 158; also previously argued by the applicants in their submissions).
- ✓ It is clear that future generations are likely to bear an increasingly severe burden of the consequences of present failures and omissions to combat climate change. As the future generations do not take part in present day democracy and do not vote in present day elections, the judicial branch appears to be best placed to protect the future generations against the decisions of present-day politicians. This intergenerational perspective adds justification for the possibility of judicial review (The European Commission for Democracy Through Law, pp. 91-92).

NO

- ✗ The 'judicialisation' of climate change would only create tension from the perspective of the principle of subsidiarity and the separation of powers. Proposals for shaping current policy areas should in principle be pursued by way of democratic participation, such as referendums, and not litigation. A referendum was organised on the adoption of a new CO2 Act, which was rejected by the Swiss people (Swiss government, pp. 34, 141, 146).
- ✗ The Convention does not explicitly recognise a right with respect to climate change or the environment, including the right to a healthy environment. In fact, the Contracting States have been negotiating under the auspices of the Council of Europe to provide the Court with an express competence in relation to a right to clean and healthy environment (Norwegian government, p. 151; Slovakian government, p. 152).
- ✗ The Paris Agreement provides that each State could autonomously define their emissions reduction targets on the basis of the respective national circumstances. Furthermore, the agreement does not provide for an obligation of result or legal sanctions for non-achievement of the reduction goals (Austrian government, p. 148; Portuguese government, p. 151).
- ✗ A new right/obligation created with a judicial intervention may detract attention from the ongoing legislative and negotiating efforts. Public authorities will now be tied up in litigation, and forced to assess existing measures or design or adopt new regulatory frameworks which will prove an unnecessary distraction (Opinion of Judge Eicke, p. 257).



The Court decided that, when the necessary criteria are fulfilled, it can assess the effects of climate change laws and policies of the governments of Contracting States on the Convention rights of applicants.

Below is a summary of the Court's findings as outlined in the *KlimaSeniorinnen* judgment.

- Complaints relating to State policy with respect to any issue affecting Convention rights are 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. The Court retains competence, with 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. Accordingly, the margin of appreciation for the domestic authorities is not unlimited and goes hand in hand with a European supervision by the Court (The Court, pp. 176-178).
- Governments worldwide already recognise climate change as a common concern of humankind. They have accepted the importance of collective action and committed to reducing their emissions at the 'highest possible ambition'. The task of the judiciary is to ensure the necessary oversight of compliance with legal requirements (The Court, p. 166).
- 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 complementary to those democratic processes, including direct and semi-direct democratic processes (The Court, p. 166).
- The intergenerational perspective of climate change underscores the risk inherent in the relevant 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, rendering that risk particularly serious and adding justification for the possibility of judicial review (The Court, p. 169).
- Article 8 of the Convention encompasses a right to effective protection by the State authorities from the serious adverse effects of climate change on lives, health, well-being and quality of life (The Court, p. 196).

KEY CONCEPTS

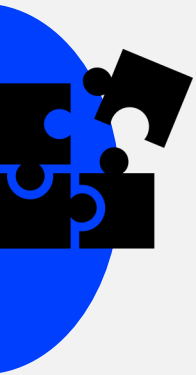


ACTIO POPULARIS

Refers to bringing an action in the general or public interest. The Court reiterated that its task is not normally to review the relevant law and practice in abstract, but to determine whether the manner in which they were applied to or affected the applicant gave rise to a violation of the Convention.

Underscores that wealthy States must contribute fairly towards the costs of mitigation and adaptation in low-income countries. Although it was argued that Climate Action Tracker can be used to assess the fair-share burden of responding States, the Court did not include such a reference when it outlined the positive obligations of States (see page 8 of this Explainer).

FAIR-SHARE BURDEN

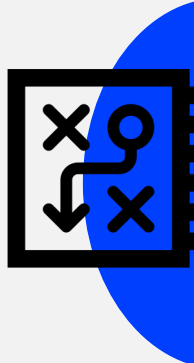


EMBEDDED EMISSIONS

Refers to the emissions generated through the import of goods and their consumption, and may also include the emissions caused by finance flows, such as investing, underwriting, lending and insurance activities. The Court found that embedded emissions are an issue of responsibility and not of jurisdiction (see next page).

Attribution science helps to establish the causal relationship between State actions and/or omissions relating to climate change and the harm. The Court rejected a 'but for' test for establishing causation, examining instead the reasonable actions that might have been taken to change the outcome or mitigate the harm (see next page).

CAUSALITY VS ATTRIBUTION



Jurisdiction vs Responsibility

Understanding the 'drop in the ocean' argument



States argued that their emissions were only a small contributing cause to climate change, in other words, that no individual State had the capacity to affect global climate change. The Court rejected this argument, determining that a single State's actions in combating climate change contributes substantively to creating the mutual trust necessary for other States to act. Accordingly, the Court decided that any extent of contribution should be considered as being relevant.

The Court added that the relevant test (see below) in the context of a State's positive obligations under the Convention should be understood in the light of Article 3 § 3 of the UNFCCC, according to which States should take measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects.

The relevant test does not require it to be shown that 'but for' the failing or omission of the authorities the harm would not have occurred. Instead, to engage the responsibility of the State, it is sufficient that reasonable measures which the domestic authorities failed to take could have had a real prospect of altering the outcome or mitigating the harm.

JURISDICTION

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The issue of jurisdiction is primarily examined as an admissibility issue to ensure that the Court has the legal authority to adjudicate the case.

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The Court did not find grounds for creating, by way of judicial interpretation, a novel basis for extraterritorial jurisdiction or for expanding the existing ones in the field of climate change.

*

The Court reiterated that territorial jurisdiction may be established when the applicants are residents of the respondent State. Extraterritorial jurisdiction may be established if the case comes under the established exceptions to the territoriality principle (e.g. effective control over an area, State agent authority and control, or the jurisdictional link criterion as regards the procedural obligation to investigate under Article 2 of the Convention).

RESPONSIBILITY

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The issue of responsibility is a separate matter to be examined, if appropriate, on the merits of the complaint.

*

The Court clarified that jurisdiction cannot be established on the basis of alleged responsibility. The alleged infringement of Convention rights through harm arising from emissions may engage the responsibility of States, subject to it having jurisdiction.

*

In line with the Court's approach to the concurrent responsibility of States, each State has its own share of responsibilities to take measures to tackle climate change and taking of those measures is not determined by any specific action or omission of any other State. A respondent State should not evade responsibility by pointing to the responsibility of other States, within or outside the Convention space.




ALLEGED VIOLATIONS OF ARTICLES 2 AND 8: GENERAL CONSIDERATIONS



Scope of the Court's assessment

The Court acknowledged that no Article of the Convention is specifically designed to provide general protection of the environment as such. Instead, the Court clarified that it deals with various environmental problems that affect the Convention rights, particularly Article 8. In ensuring the protection of Convention rights, the Court explained that it has due regard for environmental concerns in the assessment of legitimate aims and the weighing-up of rights and interests in the context of the application of the Convention. Accordingly, the Court stated that its competence in the context of climate-change litigation cannot, as a matter of principle, be excluded.



Issues of Proof

The Court explained that it applies the standard of proof 'beyond reasonable doubt', meaning a mere allegation of failure to comply with domestic rules and environmental or technical standards was not in itself sufficient. As regards climate change, the Court stated that it takes into account scientific evidence (particularly the IPCC reports), the nature of the substantive right at stake, and any evidentiary difficulties involved. The Court clarified that generally, its function is to review the reasoning adduced by domestic judicial authorities from the point of view of the Convention, and not to establish the facts or substitute the domestic court's assessment of the facts.



Enjoyment of Convention rights

The Court reiterated that the Convention is a living instrument which must be interpreted in light of the climate emergency, particularly the IPCC reports, States' international commitments, and intervening third-party experts. In sum, the Court took it as a matter of fact that there are sufficiently reliable indications that anthropogenic climate change exists, that it poses a serious current and future threat to the enjoyment of human rights safeguarded by the Convention, that States are aware of it and capable of taking measures to effectively address it, that the relevant risks are projected to be lower if the temperature rise is limited to 1.5°C, and that the current global mitigation efforts are insufficient.

ALLEGED VIOLATIONS OF ARTICLES 2 AND 8: ADMISSIBILITY AND MERITS

Victim Status of Individuals (The Court's New Cumulative Test)

1

Has the applicant been subjected to a high intensity of exposure to the adverse effects of climate change? This means the level and severity of (the risk of) adverse consequences of governmental action or inaction affecting the applicant must be significant.

2

Is there a pressing need to ensure the applicant's individual protection, owing to the absence or inadequacy of any reasonable measures to reduce harm?

Standing of Associations (The Court's New Cumulative Test)

1

Is the association lawfully established in the jurisdiction concerned or have standing to act there?

2

Is the association 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?

3

Is the association 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?

Positive Obligations of States (as expressed by the Court)

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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.

*

Set out intermediate GHG emissions reduction targets and pathway (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.

*

The Court found that the Swiss government failed to fulfil its positive obligation to devise a regulatory framework setting these requisite objectives and goals. The Court also rejected the Swiss government's argument that the determination of the national carbon budget was impossible due to a lack of harmonised methodology. Stemming from the principle of common but differentiated responsibilities in international climate law, the Court decided that States were required to act on the basis of equity and in accordance with their own respective capabilities.

*

Keep the relevant GHG reduction targets updated with due diligence, and based on the best available evidence.

*

Provide evidence showing whether they have duly complied, or are in the process of complying, with the relevant GHG reduction targets.

*

Act in good time and in an appropriate and consistent manner when devising and implementing the relevant legislation and measures.

ALLEGED VIOLATION OF ARTICLE 6 § 1 (CIVIL): ADMISSIBILITY AND MERITS

Victim Status/Standing

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The Court found that it is normally sufficient that the applicant individual or association is affected as a party to the proceedings brought by them before the domestic courts.

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The Court explained that an environmental association relying on Article 6 must show that the dispute or claim raised by it has a sufficient link with a specific civil right on which the association itself can rely.

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The Court reiterated that generally, maintaining the separation of powers between the legislature and the judiciary is a legitimate aim as regards limitations on the right of access to a court.

General Principles (The Court's Cumulative Test)

1

Does a 'right' of 'civil' nature exist? This can be drawn from whether the domestic law recognises an individual right to environmental protection where the rights to life, to physical integrity and of property are at stake, or whether the proceedings intended to defend certain specific interests of an association's members, namely the lifestyles and properties of its members.

2

Does a genuine and serious dispute exist? The Court generally views disputes concerning environmental matters as genuine and serious. This can be drawn from whether the relevant appeal has been declared admissible at the domestic level, or from the arguments used by the domestic courts to dismiss a given action.

3

Is the outcome of the proceedings 'directly decisive' for the applicant's right? This requires the complaint to not concern a hypothetical environmental impact.

Special Considerations

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The Court found that legal actions taken by associations must be seen in the light of their role as a means through which the Convention rights of those affected by climate change, including those at a distinct representational disadvantage, can be defended and through which they can seek to obtain an adequate corrective action for the alleged failures and omissions of domestic authorities.

*

The Court paid considerable attention to the Aarhus Convention, which is designed to provide access to justice in environmental matters. Of the 46 Council of Europe member States, only 5 have not ratified the Aarhus Convention. In at least 34 of the 38 member States surveyed by the Court, environmental non-governmental associations are allowed to bring cases in the interests of the protection of the environment and/or in the interests of private individuals who may be affected by specific environmental hazards or in industrial projects.

*

The Court reiterated that complaints concerning policy decisions that are subject to the relevant democratic processes are outside the scope of Article 6. However, complaints concerning the effective implementation of the mitigation measures under existing law are matters capable of falling within scope.

*

In the *KlimaSeniorinnen* case, the Court found that Article 6 § 1 applied to the association but not to the 4 individual applicants. The Court opined that the dispute with respect to the individuals' rights had a more tenuous connection with, or remote consequences for, their rights relied upon under national law. Thus, the outcome of the dispute was not directly decisive for their civil rights. Their complaint was accordingly considered inadmissible as being incompatible *ratione materiae*.

CONCLUSION



WHAT'S NEXT?

Implementation

In Switzerland

When the Court finds a breach of the Convention, the Court judgment requires the respondent State not only to pay the awarded sums to the affected parties but also to take necessary actions, under the supervision of the Committee of Ministers ('CM'), to end the violation and remedy its effects within its domestic legal system.

Accordingly, the Swiss government is under a legal obligation to pay the awarded sum and to remedy the effects with respect to the violations of Articles 6 § 1 (civil) and 8 of the Convention.

The Court was not detailed or prescriptive as regards any measures to be implemented to effectively comply with its judgment. This means that the Swiss government, with the assistance of the CM, must assess the means to be used in its domestic legal order to discharge its obligation to end the violations and remedy the effects. When choosing the appropriate measures, the Swiss government [must take into account](#) the positive obligations of States in the field of climate change with respect to Article 8. The Court delineated a number of measures, such as the quantification of the overall remaining carbon budget.

The CM is responsible for supervising the enforcement of the Court's judgment, which has different tools at its disposal. This presents an opportunity for '[human-rights-proofing Swiss climate law and policy](#)'. However, this is proving to be difficult. For instance, the legal affairs committee of the upper house of the Swiss parliament [voted to reject](#) the Court's ruling on the grounds that Switzerland was taking enough climate action.

Within the Convention's legal space

The Court's decisions may be relevant for other Contracting States on a national level, impacting not only the judiciaries but also the legislators. This is because the Court's authoritative interpretations are considered part of the binding treaty provisions to which they apply.

Outside the Convention's legal space

The Court's decisions may be important for other States in two ways. First, the principle of systemic integration of international law, as outlined in the Vienna Convention on the Law of Treaties, mandates interpreting instruments of international law harmoniously with both other multilateral systems and the general body of international law. This suggests that the Court's decisions may influence other interpreters of international law. Second, these decisions are part of a growing trend in climate litigation. Notable examples include the recent advisory opinion of the [International Tribunal on the Law of the Sea](#), and forthcoming opinions from the [Inter-American Court of Human Rights](#) and the [International Court of Justice](#), expected in 2024 and 2025. Transnational networks of lawyers, scientists, civil society members and affected individuals may leverage the Court's decisions to inform their cases, particularly with respect to the recognition of the standing of associations.

Instructions for use

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