INTERNATIONAL DECISIONS

Review Essay

Climate change and human rights adjudication—the European Court of Human Rights—Article 8

Disruption, Special Climate Considerations, and Striking the Balance

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I. Introduction

Climate change litigation before international human rights tribunals reached a milestone with the three decisions handed down by the Grand Chamber of the European Court of Human Rights (ECtHR or Court) on April 9, 2024. For the first time, an international human rights court confirmed that climate change triggers the application of human rights law and has the potential to violate the European Convention on Human Rights (ECHR or Convention). In reaching this conclusion, the Grand Chamber adds an authoritative judicial voice to the crescendo that has been building around the link between human rights and climate change by United Nations institutions, including the Human Rights Committee,[1] the Committee on the Rights of the Child,[2] and the Human Rights Council.[3] The significance of the Grand Chamber's decisions in *Verein KlimaSeniorinnen Switzerland et al v. Switzerland*,[4] *Carême v. France*,[5] and *Duarte Agostinho and Others v. Portugal and 32 Others*[6] was not lost on the Court, having relinquished the three cases to the Grand Chamber from a climate change docket including six other pending cases. Each of the three cases represents a unique set of factual circumstances and gives rise to novel and exceptional legal questions, giving the Grand

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[1] UN International Covenant on Civil and Political Rights, Views Adopted by the Committee Under Article 5(4) of the Optional Protocol, Concerning Communication No. 3624/2019, Daniel Billy et al. v. Australia, CCPR/C/135/D/3624/2019 (adopted July 21, 2022).

[2] UN Convention on the Rights of the Child, Decision Adopted by Committee Under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communication No. 104/2019, Sacchi and Others v. Argentina, CRC/C/88/D/104/2019 (adopted Sept. 22, 2021).

[3] GA Res. 50/9 (July 14, 2022).

[4] Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, App. No. 53600/20, Decision (ECtHR Apr. 9, 2024).

[5] Carême v. France, App. No. 7189/21, Decision (ECtHR Apr. 9, 2024).

[6] Duarte Agostinho and Others v. Portugal and Others, App. No. 39371/20, Decision (ECtHR Apr. 9, 2024).

Chamber an opportunity to establish an authoritative framework on the nexus between climate change and human rights. From the three decisions, it is evident that the Grand Chamber walked a judicial tightrope, balancing the call to carve out new doctrinal ground capable of addressing one of the most pressing collective action problems of modern times with the desire to anchor a consistent framework of Convention rights in the Convention as a living instrument.

II. Victim Status and Jurisdiction

This tension represented itself with varying degrees in the three cases. In *Carême*, the Grand Chamber dismissed the applicant's claim that the French government had not taken sufficient steps to prevent climate change. The claim focused specifically on flooding and the argument that the government's failure had infringed the applicant's right to life under Article 2 and the right to respect for his private and family life and his home under Article 8. The basis for declaring the complaint inadmissible was the fact that the applicant, who was a former mayor of Grande-Synthe—an area predicted to be severely affected by flooding—was no longer a resident or property owner in the area. This lack of connection to the area deprived the applicant of victim status under Article 34 of the ECHR. The key point in making this finding was not that the Court sought to cast doubt on the impact of climate change in general or on the specific area of Grande-Synthe, but that expanding the definition of victims to cover individuals with no clear connection to the harm 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."[7]

In *Duarte*, the tension between recognizing the risks that climate change poses to human rights and the need to maintain fidelity to the wording of the Convention presented itself in respect to the two issues of jurisdiction and exhaustion of domestic remedies. The claim in *Duarte* was launched by six Portuguese children against Portugal and thirty-two other states. The applicants claimed that severe wildfires in Portugal made them anxious and prevented them from attending school and being outside—and more generally, that the extreme risk of fire negatively impacted the enjoyment of their right to life (Article 2), resulted in inhuman or degrading treatment (Article 3), and infringed their right to respect for private and family life (Article 8). On jurisdiction, the key question before the Court was whether the thirty-two non-territorial states had extraterritorial jurisdiction over the applicants residing in Portugal. Portugal's territorial jurisdiction was not contested.

Jurisdiction under the Convention is ordinarily only established within a contracting state's territory. For the applicants to fall within the jurisdiction of the non-territorial states, wholly exceptional circumstances would have to be established. In previous cases, the Court has held that extraterritorial application of the Convention may be established where a responding state exercises "effective control" over a non-territorial area or through "state agent authority," where an agent of the state exercises control over a victim.[8] In *Duarte*,

[7] *Carême v. France*, *supra* note 5, para. 84.

[8] Ukraine and the Netherlands v. Russia, App. Nos. 8019/16, 43800/14 and 28525/20, Decision, 555–65 (ECtHR Nov. 30, 2022); Georgia v. Russia (II), App. No. 38263/08, Grand Chamber Decision, para. 155 (ECtHR Jan. 21, 2021).

the applicants accepted that their claim did not fit within any of these circumstances and instead advanced three arguments in support of jurisdiction. First, the applicants argued that jurisdiction ought to be based on the argument that "the respondent States' emissions and/or failures to regulate/limit their emissions produced *effects* outside their territories bringing the applicants within their jurisdiction."[9] This line of argument, which effectively seeks to present the question of jurisdiction as one that ought to be considered as part of the merits of the decision, rather than as a separate procedural issue, has some support in the decisions delivered by the Inter-American Court of Human Rights in its advisory opinion of 2017 on the environment and human rights,[10] and the UN Committee on the Rights of the Child's decision in *Sacchi*.[11] In other words, the applicants sought to persuade the Grand Chamber that jurisdiction was present simply on the grounds that emissions from the thirty-two states were felt in Portugal and that the Grand Chamber ought to be guided by developments elsewhere in international law. Second, the special features of climate change (its multilateral nature, severe impact, the lack of alternative effective means of redress with respect to the non-territorial states, and the need for rapid cuts in emissions) coupled with the need to secure a means of holding non-territorial states responsible, pointed toward establishing jurisdiction. Third, and more generally, the applicants argued that jurisdiction ought to be established for the thirty-two non-territorial states on the basis that their emissions interfered with the applicants "convention interests."[12]

The Grand Chamber rejected all these claims, reiterating instead that jurisdiction under the Convention is primarily territorial. In respect to the first argument, the Grand Chamber found that jurisdiction is to be kept separate from the merit claims of a case. This means that jurisdiction must be established prior to the Court ruling on the merits. In other words, the requirement for jurisdiction cannot be dispensed with as this is a conditional threshold to be crossed at the outset. In respect to the second claim, the Grand Chamber noted that the Convention is not an instrument aimed at providing general protection of the environment.[13] Linked to this, establishing jurisdiction by reference to a desire to use the Convention as a tool for general climate change litigation—as a substitute for proceedings in the non-territorial states brought by their own nationals—would "entail a radical departure from the rationale of the Convention protection system, . . . fundamentally based on the principles of territorial jurisdiction and subsidiarity."[14] Finally, the Grand Chamber rejected the claim that the thirty-two non-territorial states exercised jurisdiction over the applicants' "convention interest" by noting that accepting this would result in "a critical lack of foreseeability of the Convention's reach" "without any identifiable limits."[15] Specifically, the Grand Chamber held that accepting the applicants' claim would turn the "Convention into a global climate-change treaty."[16]

[9] *Duarte Agostinho and Others v. Portugal and Others*, *supra* note 6, para. 121 (emphasis added).
[10] Advisory Opinion OC-23/17 (Inter-Am. Ct. Hum. Rts. Nov. 15, 2017).
[11] *Sacchi and Others v. Switzerland*, *supra* note 2.
[12] *Duarte Agostinho and Others v. Portugal and Others*, *supra* note 6, para. 127.
[13] *Id.*, para. 201.
[14] *Id.*
[15] *Id.*, paras. 206–07.
[16] *Id.*, para. 208. On this argument, the International Tribunal for the Law of the Sea (ITLOS) seems to be slightly more accommodating in respect to the scope of UNCLOS to engage climate change. *Cf.* Request for an

In finding against expanding the reach of the Convention, the Grand Chamber expressly dismissed calls to follow the markers laid out in *Sacchi* and in the advisory opinion of the Inter-American Court of Human Rights. Somewhat unusually, considering the way it readily refers to relevant international instruments in its environmental cases, the Grand Chamber held "that both are based on a different notion of jurisdiction not recognized by the ECtHR."[17] This possibly suggests that the willingness of the ECtHR to borrow from other international developments has limits and only comes into play when the Court assesses a claim on the merits. In this context, the Court relies on international instruments to fill in the gap that emerges from the fact that the Convention is silent on the actual content of the positive environmental obligations. In contrast, on core and preliminary procedural issues such as jurisdiction, the Grand Chamber is less willing to stray from established doctrines anchored in the textual understanding of the Convention.

On the territorial claim against Portugal, the Grand Chamber likewise dismissed the applicants' case. This was done with reference to the requirement in Article 34 that claimants must exhaust domestic remedies prior to launching a claim with the Court. The applicants in *Duarte* had not done so, arguing instead that the lack of domestic case law on the matter, coupled with the generic nature of the environmental obligations in the Portuguese Constitution, deprived them of an effective remedy.[18] This argument was, not surprisingly, dismissed by the Grand Chamber on two grounds. First, Portuguese law establishes many different judicial and administrative pathways to challenge executive inaction. Second, by reference to the assumed effectiveness of these, the Grand Chamber specifically rejected the applicants' call to act as the key European steer for climate litigation instead emphasizing the importance of subsidiarity. Crucially, the failure to utilize domestic remedies deprives the Court of the all-important domestic fact-finding basis, which is so central in environmental cases where the margin of appreciation plays a central role.[19]

In response to what to many might have seemed a weak claim, advisors to the applicants in *Duarte* have argued that the case aimed to serve two purposes.[20] First, the aim was to invite the Court to interpret interstate climate change obligations in a manner that provides protection for the most vulnerable (in Europe, Southern European States like Portugal are disproportionately affected by climate change). Second, to confront the fact that climate change is inherently a relational interstate problem, which, to the applicants, makes it desirable to secure an international basis for domestic courts. On both counts, the Grand Chamber decided against the applicants, albeit for justifiable reasons. A slim hope for the argument that environmental issues in general are relational challenges, might be found in that fact that the Grand Chamber restricted its assessment of jurisdiction to the adverse effects arising from climate change without dealing with the "possible issues of extraterritorial jurisdiction, such as those which might arise, for instance, in the context of more localised transboundary

Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion, paras. 222–24 (ITLOS May 21, 2024).

[17] *Duarte Agostinho and Others v. Portugal and Others*, *supra* note 6, para. 212.

[18] *Id.*, para. 131.

[19] Ole W. Pedersen, Case of Pavlov and Others v. Russia, 117 AJIL 689 (2023).

[20] Gerry Liston, *Reflections on the Strasbourg Climate Rulings in Light of Two Aims Behind* Duarte Agostinho *Case*, EJIL:Talk! (May 7, 2024), *at* https://www.ejiltalk.org/reflections-on-the-strasbourg-climate-rulings-in-light-of-two-aims-behind-the-duarte-agostinho-case.

environmental harm," suggesting that, in the future, extraterritorial jurisdiction might be established in cases of classic transboundary environmental harm.[21]

In light of the inadmissibility decisions in *Carême* and *Duarte*, the Grand Chamber's judgment in *KlimaSeniorinnen* is all the more significant. Not only because the Grand Chamber ultimately found a violation of Article 8 on the right to respect for private and family life and Article 6 on the right to a fair trial, but because the Grand Chamber evidently took great care to respond to the fact that climate change presents acute human rights challenges. This is most notable in the close and in-depth engagement afforded by the Grand Chamber to both the latest assessment reports of the Intergovernmental Panel on Climate Change (IPCC) and concurring developments in other international courts and jurisdictions. For those reasons, the judgment provides a clear steer for subsequent decisions as well as important guidance for domestic courts and other international tribunals, even if its impact on climate change governance in Europe is limited.

III. Attribution of Emissions

The claim in *KlimaSeniorinnen* was brought by an association registered under Swiss law, representing more than two thousand mainly elderly women, and four Swiss, again elderly, women. As in *Carême* and *Duarte*, the central claim advanced by the applicants was that the Swiss government's failure to take effective efforts of mitigation violated their right to life (Article 2) and right to respect for private and family life (Article 8)—particularly with reference to the impacts that heatwaves have on the applicants' health. In addition, the applicants argued that the failure of the Swiss courts to hear their case on the merits constituted a violation of the applicants' right to a fair trial. Unlike in *Duarte*, however, the initial issue of jurisdiction did not prove fatal to the case, despite the broad nature of the applicants' claim. The applicants argued that Switzerland's responsibility ought to include so-called embedded emissions. That is, emissions attributable to Switzerland despite these being emitted outside of its territory, e.g., through import and consumption of goods produced elsewhere. The Swiss government argued that including embedded emissions in the Court's assessment would be tantamount to extraterritorial jurisdiction, which would run counter to the settled practice of only allocating responsibility for territorial emissions as established in, e.g., the UN Framework Convention on Climate Change. Simply because the applicants were all under the territorial jurisdiction of Switzerland, the Grand Chamber held that "no genuine issue of jurisdiction, within the meaning of Article 1 of the Convention, arises in the context of the complaint about 'embedded emissions.'"[22]

Instead, the issue of Switzerland's responsibility for embedded emissions became a separate question to be assessed as part of the merits and not at the initial procedural stage. On the surface, this finding seems straightforward as the requirement going forward becomes one of territorial jurisdiction over applicants and not "jurisdiction" over emissions (as the applicants attempted to argue in *Duarte*). The requirement is simply that an alleged victim can prove territorial jurisdiction. The problem in *KlimaSeniorinnen*, however, is that the Grand Chamber did not return to the question of whether the Swiss government was responsible

[21] *Duarte Agostinho and Others v. Portugal and Others*, *supra* note 6, para. 167.
[22] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, *supra* note 4, para. 287.

for embedded emissions when assessing the claim on the merits. In his dissenting opinion, Judge Eicke took the majority of the Grand Chamber to task for creating a new "primary duty" to apply domestic regulations "covering both emissions emanating from within their territorial jurisdiction as well as 'embedded emissions,'" suggesting that overseas emissions do indeed form part of a state's responsibility.[23] However, from the parts of the judgment of the majority itself, which spell out the positive obligations of the Swiss government (discussed below), it is not necessarily clear that this is what the Grand Chamber intended.[24] This is largely because the matter was not directly or expressly addressed in the majority's decision. Consequently, the territorial quantity of emissions that a state is responsible for under the Convention is not settled and, in the future, there is scope for litigants to persuade the Court that embedded emissions ought to form part of a state's responsibility. Doing so, however, evidently requires a claim that can be analogized to the territorial jurisdiction over applicants as in *KlimaSeniorinnen* and distinguished from the decision about extraterritoriality in *Duarte*.

In assessing the case on its merits, the Grand Chamber took care to frame climate change as a legal, political, and social issue. It recognized that climate change is "one of the most pressing issues of our time," that judicial engagement with it "cannot replace or provide any substitute for [legislative and executive] action," that review of domestic courts "may be considerably wider" than that provided by the ECtHR, that climate change presents a set of unique challenges that require the Court to move beyond its existing case law on environmental pollution, and that "intergenerational burden-sharing assumes particular importance both in regard to the different generations of those currently living and in regard to future generations."[25] Each of these reference points are significant, even if they state the obvious. They serve not only to preempt criticism of the judgment (e.g., on grounds of judicial overreach) but also to signal to future litigants that there are inherent limits in pressing claims before an international court like the ECtHR.[26]

Drawing on its existing environmental case law, coupled with a heavy reliance on IPCC reports, the Grand Chamber not surprisingly held that "Article 8 is capable of being engaged" and that climate change "poses a serious current and future threat to the enjoyment of human rights guaranteed under the Convention."[27] Simply as a matter of course, "the Court's competence in the context of climate-change litigation cannot, as a matter of principle, be excluded."[28] However, as has been customary in much of its environmental law case law, the Grand Chamber recognized that in the context of the environment "it may be difficult to clearly distinguish issues of law from questions of policy and political choices," meaning that the Convention and the Court's supervision becomes subsidiary and that the margin of appreciation plays a key role.[29] Though these points pull in opposite directions, it effectively

[23] *Id.* (partly concurring partly dissenting opinion, Eicke, J.).

[24] *See also* Andreas Buser, *A Human Right to Carbon Import Restrictions? On the Notion of "Embedded Emissions" in* Klimaseniorinnen v. Switzerland, EJIL:TALK! (Apr. 16, 2024), *at* https://www.ejiltalk.org/a-human-right-to-carbon-import-restrictions-on-the-notion-of-embedded-emissions-in-klimaseniorinnen-v-switzerland.

[25] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, *supra* note 4, paras. 410, 412, 420.

[26] *E.g.*, Tonja Jacobi, *The Judicial Signaling Game: How Judges Shape their Dockets*, 16 SUP. CT. ECON. REV. 1 (2008).

[27] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, *supra* note 4, paras. 435–36.

[28] *Id.*, para. 451.

[29] *Id.*, para. 459.

entails an approach to the margin of appreciation which is two-tiered: states have a clear obligation under the Convention to engage with climate change even if the precise regulatory details of that duty are left to the states themselves (see below).

Prior to ruling on the merits, the Grand Chamber had to consider whether the individual applicants and the association had standing under the Convention. Historically, in the context of environmental claims, where a material risk of harm persists but the harm itself might not yet have occurred, victim status has been conferred on applicants who can demonstrate a "real and imminent risk" of harm (to trigger Article 2) or an exposure to a serious risk (to trigger Article 8) by reference to a minimum level of severity, the duration of exposure, and geographical proximity to the source of harm.[30] As in *Carême*, a central issue was thus the applicants' victim status under Article 34. Here, the Grand Chamber was ultimately faced with trying to balance two competing points: that the Convention does not allow for *actio popularis* claims, against the need for a special approach to victim status, which recognizes that climate change affects the entire population of Europe.[31]

IV. Right of Standing for Associations

In *KlimaSeniorinnen*, the Grand Chamber found against affording the individual applicants victim status. Seemingly, the Grand Chamber relied on two drivers in making this finding. Specifically, the Grand Chamber identified two conditions for affording victim status in climate change cases: First, the applicant must be subject to a high intensity of exposure to the adverse effects of climate change (an intensity or significance test). Second, 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 (an urgency test).[32]

The intensity and urgency tests were supported by a desire to delineate victim status from any right of an *actio popularis*. The Grand Chamber specifically underlined that the general nature of climate change might result in a situation where a "huge number of persons could claim victim status under the Convention," which would not sit well with the exclusion of *actio popularis* from the Convention.[33] Consequently, the threshold for applicants meeting the intensity and urgency test was "especially high."[34] With respect to the individual applicants, who argued that heatwaves to varying degrees negatively affected them, the Grand Chamber ruled that even if climate change affected their quality of life "[it was not] with a degree of intensity giving rise to a pressing need to ensure their individual protection."[35] In other words, due to the lack of information evidencing a critical medical condition, the individual applicants did not meet the high threshold of the intensity and urgency tests.[36]

[30] Taskin and Others v. Turkey, App. No. 46117/99, Judgment (ECtHR Nov. 10, 2004).
[31] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, *supra* note 4, para. 479.
[32] *Id.*, para. 487.
[33] *Id.*, para. 483.
[34] *Id.*, para. 488.
[35] *Id.*, para. 533.
[36] The threshold is likely to be tested in the pending case of *Müllner v. Austria*, where the applicant suffers from a temperature-dependent form of multiple sclerosis. *See* https://climatecasechart.com/non-us-case/mex-m-v-austria.

In respect to the victim status of associations, the existing case law of the Court is sparse but nevertheless formed a basis for the Grand Chamber to develop a new doctrine for associations in climate change claims.[37] Additional support for accommodating standing of associations under Article 34 was the "evolution in contemporary society as regards recognition of the importance of associations," which has specifically taken place in the context of environmental governance and been given considerable force in Europe through the Aarhus Convention —arguably to the extent that a clear European consensus exists on the matter of standing for associations and NGOs.[38] In environmental governance, this evolution is specifically driven by the need for technical expertise and financial resources, which is particularly prominent in the climate change context.[39] On the back of this, the Grand Chamber developed a new set of criteria for when associations may bring claims against a government for environmental harms.

The association 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.[40]

From this somewhat elaborate test, it follows that: it is not a requirement that the association necessarily has standing to bring claims in domestic law (as long as it is lawfully incorporated); the association's purpose must relate to human rights protection of individuals within the state's territorial jurisdiction (that is, not to protection of extraterritorial rights); and the members whom it represents must encounter specific, individualized risks from climate change.

On the one hand, this expansion of victim status is groundbreaking and indicative of the Grand Chamber's willingness to recognize the special circumstance of climate change. On the other hand, as the Grand Chamber itself recognizes, it is an expansion that maps on to developments in international law in general and environmental governance in particular. On this, it is worth noting that the conditions developed by the Grand Chamber are more accommodating than the corresponding conditions in the Aarhus Convention, which provides scope for state parties to restrict standing for associations by reference to standards laid down in domestic law.

More importantly, however, there is an inconsistency at play in the decision to allow victim status for the association whilst stressing the prohibition of *actio popularis* under the

[37] Centre for Legal Resources on behalf of Valentin Câmpeanuk v. Romania, App. No. 47848/08, Judgment (ECtHR July 17, 2024).

[38] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Art. 1 (July 25, 1998), 38 ILM 517 (1999).

[39] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, *supra* note 4, para. 499.

[40] *Id.*, para. 502.

Convention.[41] This is because, although the third limb of the test requires that the association *represents* individuals who are affected by specific threats or impacts of climate change, which suggests a qualification of the interests that an association can claim to present, this condition seemingly sets a lower threshold than the "especially high" intensity and urgency threshold for individual applicants.[42] In other words, the individuals that the association claims to represent do not need to fulfill the threshold for victim status on an individual level in order for the association to acquire victim status, implying a lower threshold for the association. This suggests that it is a public interest claim which is the very definition of an *actio popularis*.

V. Positive Climate Obligations

On the substantive question of whether a violation had taken place, the Grand Chamber examined only the application of Article 8 (associations cannot claim an Article 2 violation). The Grand Chamber initially laid out that Article 8 "must be seen as encompassing a right for individuals to effective protection by the State authorities from serious adverse effects of climate change."[43] The Grand Chamber then took significant care to frame this assessment as one that naturally flows from its existing environmental doctrine, whilst noting that "the general parameters of the positive obligations must be adapted to the specific context of climate change."[44]

This has a direct knock-on effect on the application of the margin of appreciation, which traditionally, in environmental claims, has been construed broadly, affording states wide scope to adopt regulatory responses. In the climate change context, however, the Grand Chamber notes "that climate protection should carry considerable weight in the weighing-up of any competing considerations."[45] The consequence of this is that the margin of appreciation effectively becomes differentiated so that the Convention requires the responding state to take regulatory action to combat climate change, although the operational choice of means designed to achieve those objectives remain at that state's discretion.[46] Again, there is a desire to strike a balance between recognizing the unique challenge of climate change and doing so within the existing and well-established doctrines as these are applied in the environmental case law.

What comes across as major doctrinal developments is not necessarily significant in the context of European climate governance. Most European states (including EU member states) already have domestic climate laws in place. This follows partly from the fact that these states are already parties to the Paris Agreement, as is Switzerland, but largely by virtue of them being subject to the EU's Climate Law, implementing, in part, the Paris Agreement.[47] Significantly, however, not being in the EU, Switzerland stands outside of

[41] *See* George Letsas, *Did the Court in* KlimaSeniorinnen *Create an* Actio Popularis*?*, EJIL:Talk! (May 13, 2024), *at* https://www.ejiltalk.org/did-the-court-in-klimaseniorinnen-create-an-actio-popularis.

[42] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, *supra* note 4, para. 488.

[43] *Id.*, para. 519.

[44] *Id.*, paras. 538–40.

[45] *Id.*, para. 542.

[46] *Id.*, para. 543.

[47] Parliament and Council Regulation 2021/1119 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"), 2021 OJ L243/1 [hereinafter ECL].

this. This gave rise to a unique Swiss situation where its domestic climate change regime contained several significant gaps.

The Swiss climate gap emerged because of a referendum held in 2021 in which the electorate rejected proposals for ambitious emission reduction obligations. This meant that Switzerland was without any domestic emission reduction obligations for several periods between 2020–2030, and subsequently enacted initiatives aimed at remedying this were not yet in force.[48] Held against the finding that "the Convention requires that each Contracting State undertake measures for the substantial and progressive reduction of their respective [greenhouse gas (GHG)] emission levels," finding against Switzerland seems less surprising than it might appear at first sight.[49] Bringing a claim against Switzerland was consequently a strategic win compared to both *Duarte* and *Carême* if the aim was to get the Court to deliver a judgment on the merits.

The positive Article 8 obligations developed by the Grand Chamber stand out and represent a significant doctrinal novelty. This is because of the relative precision and length of the Grand Chamber's judgment on the nature of the obligations. In much of its environmental case law, the Court has refrained from going into much detail on the actual content of the due diligence obligation. In respect to climate change, however, the Grand Chamber evidently identified a need for spelling out the positive obligations in detail. The Grand Chamber held that states must:

(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.[50]

These obligations are supplemented by a duty to enact measures of adaptation "aimed at alleviating the most severe or imminent consequences of climate change," as well as procedural obligations to make climate change information available to the public.[51]

Spelling out the positive obligations, with specific reference to carbon budgets, pathways, and targets shows the Grand Chamber's willingness to recognize the special circumstances of climate change. It nevertheless remains the case that, for many European countries, the

[48] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, *supra* note 4, para. 561.
[49] *Id.*, para. 548.
[50] *Id.*, para. 550.
[51] *Id.*, paras. 552, 554.

obligations are not overly onerous. They map onto the "core building blocks" already in place.[52] The Grand Chamber specifically took note of the fact that the EU's Climate Law provides for indicative climate budgets (although not in the form of budget allocations distributed across states but instead across sectors). And whilst there is scope in future claims to probe the precise content of each of the positive obligations, the Grand Chamber specifically noted that "a shortcoming in one particular respect alone will not necessarily entail that the state would be considered to have overstepped [the] margin of appreciation."[53]

In addition to finding a violation of Article 8, the Grand Chamber found a violation of the applicant association's Article 6 right. As with the Article 8 violation, the Grand Chamber stressed the importance of recognizing the special nature of climate change and the implications this has for the applicability of Article 6 with its focus on "determination of civil rights." Ordinarily, Article 6 does not entail a right to institute actions before a court for the purpose of compelling the enactment of legislation. However, in the context of climate change, where there is a real and probable risk of harm to Convention interests, and when Article 8 has been established as entailing a right to be protected from climate change, there is a clear requirement for "an adequate corrective action for the alleged failures and omissions on the part of the authorities in the field of climate change."[54] Having failed to engage with the merits of the applicant's claim, the Swiss courts ultimately restricted access to a fair trial. In another important exercise of signaling, the Grand Chamber noted that such domestic restrictions are regrettable considering the "key role which domestic courts have played and will play in climate-change litigation."[55]

VI. Conclusion

Climate change litigation raises "existential questions about the nature of law and adjudication," forcing disruption and reconsideration of established doctrines.[56] This holds true also for the ECtHR's decisions in *Duarte*, *Carême*, and *KlimaSeniorinnen*. In each of the three cases, the Grand Chamber balanced the novel challenge of climate change against established doctrines of adjudication and environmental claims. It was willing to accept a degree of disruption to its doctrine of victim status and standing in *KlimaSeniorinnen*. Conversely, the invitation to accommodate doctrinal disruption of the rules of jurisdiction in *Duarte* proved a point too far for the Grand Chamber. Consequently, there is significant symbolism associated with the judgment in *KlimaSeniorinnen*.

This symbolism is particularly evident in light of the point that Article 8 now seemingly includes an individual right of protection from serious adverse effects of climate change; this is the first declaration of such a right by an international human rights tribunal. However, context is important. As such, this right comes into play for individual applicants only where they

[52] *See, e.g.*, Catherine Higham, Isabela Keuschnigg, Tiffanie Chan & Joana Setzer, *What Does the European Court of Human Rights' First Climate Change Decision Mean for Climate Policy?*, Grantham Research Inst. (May 9, 2024), *at* https://www.lse.ac.uk/granthaminstitute/news/what-does-the-european-court-of-human-rights-first-climate-change-decision-mean-for-climate-policy.

[53] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, *supra* note 4, para. 551.

[54] *Id.*, para. 614.

[55] *Id.*, para. 639.

[56] Elizabeth Fisher, Eloise Scotford & Emily Barritt, *The Legally Disruptive Nature of Climate Change*, 80 Mod. L. Rev. 173, 201 (2017).

can show that the high victim threshold is crossed. Based on the Grand Chamber's restrictive approach, this is a significant barrier.

In reality, though, this high threshold might not do much to deter future claims as it is seemingly countered by a relaxation of the threshold for associations to bring claims, which is now notably lower than for individual applicants. Strong symbolism is also found in the Grand Chamber's reference in connection with the right to future "intergenerational burden-sharing"/"intergenerational solidarity."[57] Although the Court is clear that future generations cannot hold rights under the Convention, it recognizes the intergenerational dimension of climate change and uses this to pivot the positive obligations.

Moreover, it will likely also become clear that, although the climate due diligence obligation developed by the Grand Chamber sets unusually clear and detailed standards, meeting those standards are not in and of themselves sufficient to prevent significant climate change impacts. The central focal point in this regard is the need for responding states to adopt a carbon budget.[58] The lack of a carbon budget became the key issue for Switzerland. The actual content of the carbon budget and its stringency, however, remains elusive apart from the reference to "carbon neutrality" by 2050. In other words, determining what amounts to a state's "fair share" of carbon emissions is left to the state's own discretion. Tellingly, the Grand Chamber refrained from endorsing the argument advanced by the applicants that the "fair share" should be based on the method used by the climate action tracker program, which is based on what is consistent with the 1.5C aspiration of the Paris Agreement.[59] As a result, relying on human rights, as expressed in the ECHR, in an attempt to strengthen and enforce the ambitions of the Paris Agreement provides little in the way of extra doctrinal support.[60]

As a standalone judgment, *KlimaSeniorinnen* is unlikely to have much effect on the global efforts to minimize climate change impacts. On this, the Grand Chamber's response is clear: we are a human rights court, and we cannot be charged with drawing up regulatory responses that belong in the political arena. Likewise, the Grand Chamber stressed that it "does not have the authority to ensure compliance with international treaties or obligations other than the Convention [and that] it is not bound by interpretations given to similar instruments by other bodies."[61] This is entirely reasonable, even if it serves to highlight the inherent limitations in utilizing the international human rights system as part of a climate change litigation strategy.

The last time the Grand Chamber delivered a significant environmental decision in *Hatton*, the decision became a touchstone in the Court's environmental case law because of the way in which it emphasized the importance of procedural environmental rights and the way in which it laid out the Court's approach to environmental cases going forward in terms of methods and levels of scrutiny.[62] Similarly, *KlimaSeniorinnen* is likely to provide a

[57] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, *supra* note 4, para. 364.

[58] *Id.*, para. 550.

[59] *See* Chris Hilson, *The Meaning of Carbon Budget Within a Wide Margin of Appreciation: The ECtHR's* KlimaSeniorinnen *Judgment*, VERFASSUNGSBLOG (Apr. 11, 2024), *at* https://verfassungsblog.de/the-meaning-of-carbon-budget-within-a-wide-margin-of-appreciation.

[60] Stephen Humphreys, *A Swiss Human Rights Budget*, EJIL:TALK! (Apr. 12, 2024), *at* https://www.ejiltalk.org/a-swiss-human-rights-budget.

[61] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, *supra* note 4, para. 454.

[62] Hatton and Others v. United Kingdom, App. No. 36022/97, Judgment (ECtHR July 8, 2003).

key background for future cases even if it largely follows the pointers set out in *Hatton*. The real significance, however, will be in relation to the forthcoming and remaining pending climate claims before the ECtHR.[63] On this, it is clear that procedure matters; domestic courts remain the key focal point for human rights and climate change adjudication, and this is perhaps where the real potential lies. It is equally clear that although states have a duty in human rights law to ensure that individuals are protected from climate change impacts, this is a due diligence obligation with a high degree of discretion afforded to the state. And as in *Hatton* and its environmental case law in general, the European Court of Human rights will supervise the implementation of this duty, securing a minimum baseline for climate change governance.

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Climate litigation—Paris Agreement—environmental rights—obligations of states to conserve the environment—protection of fundamental rights

2020Hun-Ma389, 2021Hun-Ma1264, 2022Hun-Ma854, 2023Hun-Ma846 (Consolidated). *At* https://www.ccourt.go.kr/site/kor/event/adjuList.do (available only in Korean). Constitutional Court of the Republic of Korea, August 29, 2024.

On August 29, 2024, the Constitutional Court of the Republic of Korea issued a landmark ruling finding that the National Assembly and president of the Republic of Korea (collectively, the Government) violated the obligation to protect the environmental rights of the complainants. This decision is the first high court ruling on climate change in both Korea and Asia, and among the few such cases beyond Western countries. Given the unprecedented number of interventions made by states and international organizations to the advisory proceeding on climate change at the International Court of Justice, this judgment provides insights into the global spread of human rights-based climate change litigation.

* * * *

This case arises out of a complaint filed by nineteen members of a youth-driven organization named "Youth 4 Climate Action" against the Government in 2020. The complaint caused a chain reaction involving 255 complainants and four separate cases, eventually reviewed and decided in consolidation by the Court. Notably, sixty-two complainants that filed a complaint in 2022 were children aged not more than ten years old, including one twenty-week fetus that the mother represented. Given the nationwide interest in this matter, the Court held two public hearings, which the Court does not normally do in constitutional cases. The core arguments of the complainants were that the legislation setting insufficient

[63] At present, six claims are pending before the Court. *See* Climate Case Chart, *at* https://climatecasechart.com/non-us-jurisdiction/european-court-of-human-rights.