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Verein KlimaSeniorinnen Schweiz and Others v. Switzerland: the European Court of Human Rights' Answer to Climate Change

Andreas Hösli
Faculty of Law, University of Zurich, Zurich, Switzerland
Corresponding Author
andreas.hoesli@walderwyss.com

Meret Rehmann
Faculty of Law, University of Berne, Berne, Switzerland
mr@bs-advo.ch

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Abstract

In *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, the European Court of Human Rights issued its first climate-change-related decision. In a near-unanimous decision, the Grand Chamber of the Court found that Switzerland had breached its obligations under the European Convention on Human Rights. It held that the Alpine state must review and amend its climate change policies accordingly. In this case note, we highlight the key points of the judgment and comment briefly on certain points.

Keywords

climate change litigation – Switzerland – European Court of Human Rights – human rights – domestic climate policy – locus standi – access to justice – carbon budget – separation of powers

1 Introduction

On 9 April 2024, the Grand Chamber of the European Court of Human Rights delivered a near-unanimous decision in the case of *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*.[1] The decision is unprecedented. Noting that climate change is an international human rights issue, the Court found that Switzerland's climate policy failed to meet the standard of protection required by the European Convention on Human Rights. While there is a large body of case law in which the Court has interpreted human rights in the context of environmental issues, *KlimaSeniorinnen* marks the first time that the ECtHR has taken a position on the issue of climate change.

On the same day, the ECtHR handed down two other judgments relating to climate change. It declared both inadmissible on formal grounds.[2]

In 2016, four elderly women, who were the individual plaintiffs in the case, together with a co-plaintiff association, *Verein KlimaSeniorinnen Schweiz*, with a membership of more than 2,000 women over the age of 64,[3] requested the Swiss Federal Council, Switzerland's highest executive body, and three other national authorities,[4] to take adequate measures to protect them from the adverse impacts of climate change. The plaintiffs argued that Switzerland's climate policy violates their rights to life and to private and family life under the Swiss Constitution[5] and the ECHR.[6] The plaintiffs relied on scientific evidence showing that heat waves are associated with increased mortality and morbidity, particularly among older women, and that several Swiss summers in recent years have been among the warmest ever recorded in the country.[7]

The Swiss Federal Department of the Environment, Transport, Energy and Communications, which was the authority that answered the plaintiffs'

1 App. No. 53600/20 (available in both of the Court's official languages, English and French).

2 *Carême v. France* (9 April 2024), App. No. 7189/21 (lack of victim status), and *Duarte Agostinho and Others v. Portugal and 32 Others* (9 April 2024), App. No. 39371/20 (non-exhaustion of domestic remedies and lack of extra-territorial jurisdiction).

3 Until recently, 64 was the ordinary retirement age for women under Swiss law. In 2022, the Swiss voted in favour of raising the retirement age for women to the same as that for men (65).

4 The Federal Department of the Environment, Transport, Energy and Communications (DETEC) and two of DETEC's subordinate administrative units, the Federal Office for the Environment and the Federal Office of Energy.

5 Federal Constitution of the Swiss Confederation (SR 101).

6 For a detailed case description, see Cordelia Bähr, et al., 'KlimaSeniorinnen: Lessons from the Swiss Senior Women's Case for Future Climate Litigation', 9(2) *Journal of Human Rights and the Environment* 194 (2018); the English translation of the request is available at <https://klimaseniorinnen.ch/wp-content/uploads/2017/05/request_KlimaSeniorinnen.pdf>.

7 See ibid., at 200 (with references). See *Verein KlimaSeniorinnen*, para. 529.

request, declared it inadmissible for lack of standing. The plaintiffs appealed the decision to Switzerland's Federal Administrative Court, and then to the Federal Supreme Court, Switzerland's highest court. Both appeals were dismissed.[8] Hence the Swiss courts did not come to discuss the substance of the plaintiffs' arguments (on the violation of human rights). On 1 December 2020, the plaintiffs filed a complaint against the Federal Supreme Court's decision with the ECtHR in Strasbourg. The plaintiffs, now 'applicants', claimed that Switzerland had violated their right to life (ECHR Article 2), their right to private life and well-being (ECHR Article 8), and their right of access to justice (ECHR Articles 6 (right to a fair trial) and 13 (right to a fair remedy)).

The sheer number of third-party interventions – 23 in total – indicates the importance of the case far beyond Switzerland as the directly involved state. Eight European states filed third-party interventions, as did fifteen other interveners (including UN-appointed and other experts as well as NGOs).

2 The Court's Decision

2.1 *The Ruling*

Siding with the applicants, the Grand Chamber of the ECtHR found that Switzerland had breached its positive duties under the ECHR by failing to take sufficient action to mitigate the adverse effects of climate change on human rights. Interpreting the Convention, the judges, in a 16:1 majority, found that the Article 8 right to private and family life included a 'right to effective protection by the public authorities from the serious adverse impacts of climate change on lives, health, well-being and quality of life' (para. 519). In assessing the adequacy of the Swiss legislative framework on climate change, the Court found that Switzerland had violated its positive obligations under Article 8. In addition, the judges found, unanimously this time, that the Swiss courts' failure to discuss the merits of the case constituted a violation of Article 6 (right of access to court).[9] Having found a violation of these two articles, the

8 See Decision of the Federal Court, 146 I 145, of 5 March 2020, and Decision of the Federal Administrative Court, BVGE A-2992/2017, of 17 November 2018.

9 In his partly concurring and partly dissenting opinion ('Eicke Opinion'), Judge Eicke, of the United Kingdom, argues that the majority overstepped the limits of evolutive interpretation of the ECHR (paras 16 et seq.), raising false hope that proceedings before the ECtHR could lead to faster and more effective climate protection (para. 69). According to Judge Eicke, the majority erred in granting standing to the association (paras 40 et seq.). Judge Eicke further argues that the Court should not have created what he characterizes as a 'new right' to effective protection against the effects of climate change under ECHR Articles 2 and 8 (paras 62 et seq.). We will make further references to the Eicke Opinion below.

Court held that it was not necessary to consider the applicability of Articles 2 and 13.

The Grand Chamber's decision is formally binding on Switzerland and cannot be appealed (ECHR Articles 44(1), 46(1)). Recognizing the complexity of the matter and the wide margin of appreciation enjoyed by Switzerland in determining the specifics of its national climate policy (below, section 2.4.6), the Court refrained from prescribing specific measures to be taken by Switzerland to comply with the judgment (para. 657). The judges held that Switzerland, assisted by the Committee of Ministers (the Council of Europe's decision-making body), are better placed than the ECtHR to determine the specific measures to be taken to comply with Switzerland's obligations under the Convention, as clarified by the decision (ibid.). The Court did not make an award for damages, as the applicants had not claimed damages (ibid.). The Court ordered Switzerland to pay the applicants part of the costs of the proceedings (€80,000; para. 650). This represents just over 10 per cent of the legal costs incurred by the applicants (approx. €700,000, para. 648). The Court was not convinced that all the costs and expenses claimed by the applicants were incurred of necessity (para. 650).

2.2 *Relevant Legal Framework*

The ECtHR drew on a wide range of legal sources and materials from three levels of law: domestic, international, and comparative. The domestic legal framework consists of the Swiss Constitution and several administrative acts at the federal level (paras 121 et seq.; see below, section 2.4.6(c)). At the international level, the Court considered, inter alia, the UNFCCC framework, the Aarhus Convention, the UN General Assembly's resolution on the human right to clean, healthy, and sustainable development, and several resolutions and special procedures of the UN Human Rights Council (as well as reports by its special rapporteurs). It is noteworthy that the Court also took into account EU law (para. 201 et seq.), as Switzerland, while having close economic ties to the Union, is not an EU member. The Court's comparative considerations related to eight other European states: France, Germany, Ireland, the Netherlands, Norway, Spain, the United Kingdom, and Belgium (paras 232 et seq.).

2.3 *Victim Status and Locus Standi*

The Court accepted that the applicant association, *Verein KlimaSeniorinnen Schweiz*, had locus standi to claim a violation of ECHR Articles 2 and 8 on behalf of its members, but it did not grant victim status to the four individual applicants.

2.3.1 Individual Applicants

The Court denied the four elderly women victim status (ECHR Article 34) in respect of the alleged violations of ECHR Articles 2 and 8. Reiterating the inadmissibility of an *actio popularis* (para. 460), it held that the number of persons affected by climate change, in different ways and to different degrees, is 'indefinite' (para. 479). Accordingly, the Court found that an especially high threshold must be applied for victim status in climate change cases (para. 488).

In order for an applicant to be 'directly affected' by the effects of climate change, and, thus, to qualify as a victim under the Convention, two criteria must be met. First, the applicant must be subject to a high intensity of exposure to the adverse effects of climate change; second, there must be a pressing need to ensure the applicant's individual protection due to the absence or inadequacy of any reasonable measures to mitigate the harm (para. 487).

According to the Court, simply belonging to a group that is particularly vulnerable to the effects of climate change is not sufficient for victim status (para. 531). The Court found that it was not apparent that the applicants were exposed, or were at risk of being exposed at any relevant future point, to adverse climate-change-related effects with a degree of intensity that would give rise to a pressing need to ensure their personal protection, as required by the high threshold for victim status (para. 533). Further, the judges found that it could not be said that the aggravation of a critical medical condition from heat waves (which was not proven by the applicants) could not be alleviated by adaptation measures available in Switzerland or by reasonable personal adaptation measures (ibid.). Therefore, the high threshold for victim status was not met in this case (ibid.). The Court's reasoning appears to leave the door open to granting victim status in cases where an individual applicant can be shown to be suffering from a serious, heat-affected, medical condition.[10]

With these findings, the Court has developed a special approach for assessing the victim status in climate change cases. The ubiquitous nature of the effects of climate change sets the issue apart from other environmental matters previously adjudicated by the Court, where negative environmental effects were more localized and were attributable to one or only a few polluters (para. 415).[11]

We note, however, that other types of environmental damage (such as air or water pollution) are also caused by a multitude of sources and also affect large

10 See the pending application *Müllner v. Austria* (App. No. 18859/21) before the ECtHR, where the applicant suffers from a temperature-dependent form of multiple sclerosis.

11 For an overview of the previous rulings concerning the environment, see Council of Europe, *Manual on Human Rights and the Environment*, 3rd ed., 2022, 19–106.

sections of the population or even the whole population (see further section 2.4.3, below). In several cases before the ECtHR, the widespread nature of the environmental harm did not exclude the applicant's victim status.[12] Although the Court did not discuss these cases, it presumably decided to distinguish climate change and its ubiquitous effects from other environmental harms, however widespread. The Court may have been fearful of opening the floodgates to a plethora of climate change cases brought by individuals.

2.3.2 Applicant Association

The Court granted the applicant association locus standi (but not victim status, for the association, as a legal construct, cannot be a victim of an alleged violation of human rights). In doing so, the Court relied on case law which had recognized the locus standi of associations in certain circumstances (para. 476).[13]

With regard to climate change, described by the Court as 'a matter of common concern to mankind', the decision highlights the importance of associations as one of the accessible means of defending the interests of citizens (para. 489). In addition, the Court recognized that collective action through associations may be 'one of the only means' by which the interests of future generations can be incorporated into the decision-making process of the present generation (para. 489). The judges also took into account practical considerations, such as the significant financial and logistical resources and coordination required for climate change litigation. It found that these weighed in favour of litigation through associations (para. 497).

By extending the rules on the locus standi of associations, the decision highlights the important role of environmental associations under the Aarhus Convention,[14] which is applicable in most member states of the

12 E.g. *Di Sarno and Others v. Italy* (10 April 2012), App. No. 30765/08, para. 81 (concerning the Campania region's failure to provide a properly functioning waste-disposal system); *Cordella and Others v. Italy* (24 January 2019), App. No. 54414/13, para. 100 (concerning emissions from a large steel plant affecting a population of several hundred thousand).

13 Relying on the precedents *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* (17 July 2014), App. No. 47848/08; *Association for the Defence of Human Rights in Romania – Helsinki Committee on behalf of Ionel Garcea v. Romania* (24 March 2015), App. No. 2959/11. For a detailed discussion of the previous case law of the ECtHR on NGO standing, see Helen Keller and Vikoriya Gurash, 'Expanding NGOs' Standing: Climate Justice through Access to the European Court of Human Rights', 14(2) *Journal of Human Rights and the Environment* 194 (2023), 197 et seq.

14 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25 June 1998 (Aarhus Convention).

ECHR (including Switzerland).[15] The Court also relied on a comparative study conducted for the purposes of the proceedings (paras 232–4), finding that there was almost universal ratification of the Aarhus Convention among the Council of Europe member states, and that, in those states, associations were generally granted standing to bring actions in the interest of environmental protection or individuals affected by specific environmental hazards or industrial projects (para. 494). The Court further observed that the standing of associations in the context of climate change litigation, which is not (expressly) covered by the Aarhus Convention, was still a developing issue (ibid.; see the *Urgenda* case, referred to by the Court in paras 260 et seq.).

In light of these considerations, and against a background of urgency in 'combating the adverse effects of climate change and the severity of its consequences' (para. 499), the Court considered it appropriate to recognize locus standi for an association provided that it is:

> (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. (para. 502)

In order to assess whether these conditions were met in the case, the Court took into account factors such as the purpose for which the association was established, its not-for-profit character, the nature and extent of its activities in the relevant jurisdiction, its membership and representativeness, its 'principles and transparency of governance', and whether, in the circumstances, it is in the interests of the proper administration of justice to grant standing (ibid.).

15 However, the objectives of the ECHR and the Aarhus Convention differ remarkably; see Birgit Peters, 'Unpacking the Diversity of Procedural Environmental Rights: The European Convention on Human Rights and the Aarhus Convention', 30(1) *Journal of Environmental Law* 1 (2018), 21–2.

With a membership of over 2,000 women of an average age of 73 at the time of the decision, with a commitment to engage in activities aimed at reducing greenhouse gas emissions in Switzerland, and with a purpose to act in the interests of future generations, the applicant association was found to satisfy the identified requirements (para. 524).

In granting the applicant association standing to bring forward its claims under Articles 2 and 8, the Court heeded calls from academics and practitioners to relax its rules on standing for NGOs in order to promote the effective protection of human rights in the environmental field.[16] A core element of the decision is the Court's willingness to embrace a collective (group) dimension for human rights protection in climate change cases. It remains to be seen whether the Court will continue this approach in other environmental matters with widespread impacts (such as air pollution), or whether this approach will be limited to human rights affected by climate change.

2.4 *Violation of ECHR Article 8*

2.4.1 General Considerations

The Court unequivocally recognized climate change as 'one of the most pressing issues of our time', and one that raises questions of intergenerational justice (para. 410). It also recognized that climate change has a disproportionate impact on a variety of vulnerable groups in society, which therefore need 'special care and protection from the authorities' (ibid.). The Court went on to say that the inadequacy of state action at the global level to combat climate change is widely recognized and is exacerbating the adverse effects of climate change (para. 413). Further, the Court acknowledged that in the political decision-making process, short-term interests prevail over the 'pressing needs for sustainable policy-making', underlining the aggravating consequences for future generations (para. 420).

Does the ECHR, as a human rights instrument, apply to climate change issues? Although the Convention does not contain a provision protecting the environment in its own right, the Court has often dealt with environmental issues that are considered to affect the enjoyment of Convention rights, in particular under Article 8 (paras 445–6). In these cases, a harmful effect *on a person* is required, whereas a general deterioration of the environment is not sufficient (see the exclusion of *actiones populares*: paras 446 and 460; and see

16 E.g. Keller and Gurash, supra note 13; Irmina Kotiuk, Adam Weiss, and Ugo Taddei, 'Does the European Convention on Human Rights Guarantee a Human Right to Clean and Healthy Air? Litigating at the Nexus between Human Rights and the Environment – The Practitioners' Perspective', 13 *Journal of Human Rights and the Environment* 122 (2022) 143–6.

section 2.3.1, above). This is despite the fact that the Court has occasionally made reference to a right of affected people 'to live in a safe and healthy environment' (para. 447, with references, including to the recognition of the human right to a clean, healthy, and sustainable environment at the UN level[17]). With regard to jurisdiction, the Court noted that jurisdiction under Article 1 of the Convention is 'principally territorial', but that each state has its own responsibilities within its jurisdiction (para. 444; and see section 2.4.5, below).

The Court recognized the need to deal with a complex body of scientific evidence and the particular importance of the IPCC reports in this regard (paras 427–9). Neither Switzerland nor any intervening state questioned or contested the IPCC's findings, nor did they contest that there was a climate emergency (paras 432–3). The Court went on to note the recent widespread recognition that environmental degradation can have, and has had, serious and potentially irreversible adverse effects on the enjoyment of human rights (para. 431, with references). Reflecting these developments, the Court stressed that the Convention is a living instrument which must be interpreted in the light of contemporary conditions and in accordance with developments in international law so as to reflect the 'increasingly high standard' required in the field of the protection of human rights (para. 434).

The ECtHR reiterated that its mandate is limited to ensuring that the Convention is complied with and that it does not have the authority to ensure compliance with other international treaties and obligations (paras 453–4). However, the judges reaffirmed that the interpretation and application of the rights conferred by the Convention 'can and must' be influenced by factual issues and developments affecting the enjoyment of human rights (in this case, climate change) as well as by relevant legal instruments. As the Court has consistently held, the ECHR should, as far as possible, be interpreted in harmony with other rules of international law, confirming the 'dynamic and evolutive' approach taken by the ECtHR (para. 455). Thus, the Court concluded that it

> cannot ignore the pressing scientific evidence and the growing international consensus regarding the critical effects of climate change on the enjoyment of human rights, having regard to the voluntary commitment of States, such as those under the Paris Agreement. (para. 456)

17 UN General Assembly Resolution 76/300, and Committee of Ministers Recommendation CM/Rec(2022)20. See also Eicke Opinion, para. 10(b).

2.4.2 Separation of Powers

The judges recognized the difficulty of making a clear distinction between questions of law and questions of policy-making and political choice, given the complexity of environmental policy-making, and reiterated the fundamentally subsidiary role of the Convention (para. 449). The Court acknowledged that national authorities have direct democratic legitimacy, and are, in principle, better placed than an international court to assess the relevant needs and conditions (ibid.). In a democracy, the actions to address climate change depend on democratic decision-making, and judicial intervention cannot substitute for action to be taken by the legislative and executive branches of government (paras 411–12). However,

> this does not exclude the possibility that where complaints raised before the Court relate to State policy with respect to an issue affecting the Convention rights of an individual or group of individuals, this subject matter is no longer merely an issue of politics or policy but also a matter of law. (para. 450)

The role of the judiciary is to provide the necessary supervision of compliance with the law, which includes assessing the proportionality of measures taken (or not) by a state (para. 412). Agreeing with the intervening UN Special Rapporteurs, the Court commented that 'the question is no longer whether, but how, human rights courts should address the impacts of environmental harms on the enjoyment of human rights' (para. 451).

2.4.3 The Lack of Specific Nexus in Climate Change Cases in Contrast with 'Traditional' Environmental Cases

The Court identified important differences between the issues raised in its body of environmental case law and in cases concerned with climate change (para. 414).

While it is true that such differences exist and have important legal implications, not all of the Court's considerations under this heading are entirely convincing, as explained below. In any event, the recognition of the specific characteristics of climate change provided the foundation for the Court's subsequent reasoning on causation and state responsibility, as well as on states' positive obligations under the Convention (sections 2.4.3–2.4.5, below).

The ECtHR's jurisprudence on traditional environmental cases involves specific sources of environmental damage (e.g. a polluting plant). In these

situations, individuals exposed to a particular harm can be identified and 'localised' with a reasonable degree of certainty, and the causal link (or 'nexus') between an identifiable source of harm and the harmful impact on groups of individuals is also 'generally determinable' (para. 415). Similarly, the measures taken (or not) to mitigate the harm, whether regulatory or practical, are also specifically identifiable (ibid.).

In contrast, the Court identified the following key characteristics and circumstances of climate change cases that are 'significantly different' from those of traditional environmental cases (paras 416–21).

First, there is no 'single or specific' source of harm, given that greenhouse gas emissions emanate from a multitude of sources (para. 416). Further, the harm derives from aggregate levels of greenhouse gas emissions (ibid.).

In our view, this point is only partly convincing. While the multiplicity of sources is particularly evident in the case of climate change, many other environmental problems (e.g. air pollution) are also caused by a multiplicity of sources of harm.

Second, carbon dioxide, the primary greenhouse gas, is not toxic per se 'at ordinary concentrations' (para. 416). Greenhouse gas emissions have harmful consequences as a result of a complex chain of effects which has no regard for national borders (ibid.).

While the point that the Court intended to make here is clear, it could have been made more precisely. The reference to 'ordinary concentrations', which the Court did not specify, raises a concern. We can safely assume that the harmfulness of any chemical or pollutant to human health or to nature is correlated with its concentration. It is well known that inhaling carbon dioxide, at a high concentration, can be fatal.[18]

Third, compared to 'other emissions of specific toxic pollutants', the chain of effects is more unpredictable in terms of time and place, and, in the longer term, climate change risks destroying the basis of human livelihood and survival in the most affected areas (para. 417).

We find this to be an oversimplification by the Court. There is a plethora of environmental threats with very complex chains of effects and with unpredictable, potentially fatal consequences. In fact, we are currently facing a multitude of inextricably linked planetary crises.[19]

Fourth, greenhouse gas emissions arise from sources that are not limited to activities that could be labelled dangerous, but rather are produced in the

18 E.g. Nigel J. Langford, 'Carbon Dioxide Poisoning', 24 *Toxicological Reviews* 229 (2005).

19 E.g. Johan Rockström, et al., 'Safe and Just Earth System Boundaries', 619 *Nature* 102 (2023). See Eicke Opinion, paras 5–6.

context of 'basic activities in human societies', in areas such as industry, energy production, transport, housing, construction, and agriculture (para. 418). According to the Court, mitigation measures 'cannot generally be localised or limited to specific installations from which harmful effects emanate' (ibid.).

Again, this view is, we believe, overly simplistic. While it is obvious that the sources of greenhouse gases are everywhere, it is well established (e.g. in IPCC reports) that certain human activities and industrial subsectors are *disproportionately* greenhouse-gas-intensive, such as energy production from fossil fuels, animal agriculture (livestock farming), industrial-scale fishing, and air transport. It appears that the judges at this point shied away from naming any specific sectors or activities. Furthermore, much (if not most) environmental pollution is caused by what we normally think of as basic human activities, such as transport, housing, consumption; and so on; therefore, it is not a specific feature of climate change.

Fifth, mitigating climate change as a polycentric issue does not depend on the adoption of select local or single-sector measures; rather, decarbonization can only be achieved through comprehensive and profound transformations across sectors (para. 419). According to the Court, these 'green transitions' require a 'very complex and wide-ranging set of coordinated actions, policies and investments involving both the public and the private sectors' and they involve intergenerational burden-sharing (paras 419–20).

Here too, though, the Court's reasoning is not entirely convincing. The actions needed to mitigate climate change are easily identifiable, in many cases not complex per se (but rather common-sensical), and have been described in detail in scientific reports, including by the IPCC (halting deforestation, rapidly moving away from fossil fuels and industrial-scale livestock farming and fishing, reducing air travel, etc.). The real problem is that, for a variety of reasons (mostly having to do with the challenges of collective action and, to some extent, with sheer ignorance), the implementation of the (readily identifiable) measures to counter climate change is hampered by a range of economic, societal, and psychological barriers, and, as a result, it is not happening at anywhere near the scale and speed that would be consistent with the 1.5°C scenario outlined by the IPCC. In short, the problem of climate change, its effects and what to do about the problem are well understood (climate change is one of the best-researched environmental problems), yet we are simply failing to implement the behavioural changes needed.

Finally, the Court observed that, while the challenges of mitigating climate change are global, the relative importance of different sources of greenhouse gas emissions, as well as the measures required to mitigate and adapt to climate change, vary from country to country.

Here, it is again not entirely clear how the Court distinguishes climate change from other major transboundary environmental problems (such as water, air, or soil pollution), which also vary in importance from country to country.

Although not all of the Court's reasoning is fully convincing, the result is persuasive: while drawing 'some inspiration' from the principles of the Court's existing case law (rather than directly transposing it), the Court considered it appropriate to adopt a tailored approach that takes into account the particular (or, in our view, not so particular) characteristics of climate change (para. 422).

2.4.4 Causation and State Responsibility

Issues of causation have a bearing on the assessment of victim status (section 2.2, above) and a state's positive obligations under the Convention (section 2.4.5, below). Given the specifics of climate change (section 2.4.3, above), the Court held that questions of victim status and the specific content of states' obligations cannot be determined on the basis of a strict *conditio sine qua non* relationship between harm from climate change and its causes (para. 439).

The Court distinguished four 'dimensions' of causation, involving both scientific and legal issues (para. 425): the link between greenhouse gas emissions and the various 'phenomena' of climate change; the link between the various adverse effects of climate change and the risk that such effects will impact on the enjoyment of human rights in the present and the future; the link between the harm, or risk of harm, allegedly suffered by particular persons or groups of persons and the acts or omissions of the state against which the complaint is directed; and the attributability of responsibility to a particular state for the adverse effects of climate change on individuals or groups of individuals (taking into account the multiplicity of contributors).

The ECtHR recalled its jurisprudence that Article 8 can be invoked not only in the case of actual adverse effects on individuals but also in the case of sufficiently serious risks of such effects (para. 435).[20] Referring to its case law, the Court added that Article 8 applies in environmental cases not only when pollution is directly caused by a state, but also when state responsibility arises from a failure to properly regulate private industry (ibid.). Consequently, this 'duty to regulate' concerns not only actual harm but also the risks inherent in various activities (ibid.). As a result, a state has a duty to take measures to ensure the effective protection of those who might be exposed to the risks inherent in the harmful activity (para. 437). The appropriate measures may

20 See Eicke Opinion, paras 59–60 (criticizing the majority's assessment as to the requirement of a 'real and imminent risk').

vary considerably from case to case, depending on the severity of the impact on the applicant's human rights under the Convention and the burden imposed on the state (para. 438; and section 2.4.5, below).

It is a common argument of states in climate litigation that their individual contribution to climate change is relatively small and that a state has no capacity on its own to effectively address climate change (the 'drop in the ocean' argument; paras 253, 257, and 441). This argument was also put forward, at least implicitly, by the Swiss government. The Court rejected it, pointing to the principle of common but differentiated responsibilities and respective capabilities (CBDR) incorporated into the international law on climate change (para. 442).[21] In the Court's view, 'each State has its own share of responsibilities to take measures to tackle climate change' and 'the taking of those measures is determined by the State's own capabilities rather than by any specific action (or omission) of any other State' (ibid.). Rejecting the Swiss government's argument, the Court held that the relevant test for triggering the responsibility of the state is not a but-for test but rather 'that reasonable measures which the domestic authorities failed to take could have had a real prospect of altering the outcome or mitigating the harm' (para. 444).

This finding is persuasive and consistent with the ECtHR's approach in cases of concurrent responsibility of states for alleged breaches of Convention rights, where each state may be held accountable for its share of responsibility for the breach in question. It is also consistent with the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (para. 443). Moreover, the ECtHR's approach is reminiscent of that taken by the District Court of The Hague in *Milieudefensie et al. v. Shell*.[22]

2.4.5 States' Positive Obligations in the Context of Climate Change

States have a positive obligation to establish the relevant legislative and administrative framework for the effective protection of human health and life, and to apply that framework effectively in practice (para. 538). In addition, states have a positive obligation to provide access to information that enables individuals to assess risks to their health and lives (ibid.). In principle, the choice of means is a matter that falls within the state's margin of appreciation, which

21 See Eicke Opinion, para. 14 (arguing that CBDR 'seems to be difficult to reconcile (if not wholly inconsistent) with the Court's primary role of ensuring observance of a common minimum standard of protection applicabe equally to all Contracting Parties').

22 There, the Court referred to the individual partial responsibility of private actors in the context of climate change mitigation; see Andreas Hösli, '*Milieudefensie et al. v. Shell*: A Tipping Point in Climate Change Litigation against Corporations?', 11 *Climate Law* 195 (2021), 205.

in environmental cases is wide, according to the Court (ibid.). In assessing Switzerland's compliance with its positive obligations, the Court considered whether the country has remained within its margin of appreciation (ibid.). In doing so, a court must have regard to the particular circumstances of the case, the origin of the threat, and the extent to which the risk can be mitigated (ibid.). While it is not for the ECtHR to determine what measures should have been taken, it can assess whether the authorities have approached the matter with due care and have taken account of all the competing interests (ibid.).

2.4.5.1 *Margin of Appreciation*

The Court first summarized its case law on a state's positive obligations under Articles 2 and 8 in environmental cases. In assessing whether the state remained within its margin of appreciation, the ECtHR gives particular weight to *procedural safeguards* available to individuals under domestic law (para. 539).

In accordance with the principle of subsidiarity, but subject to the supervision of the Court, states have primary responsibility to ensure the rights and freedoms defined in the Convention; accordingly, states enjoy a margin of appreciation (para. 541; see also the Preamble to the Convention). Referring to the scientific evidence on climate change, including the urgency of addressing its effects, the severity of its impacts, the grave risk of its reaching irreversible tipping points, the widespread recognition of the link between the adverse effects of climate change and the enjoyment of human rights, the global nature of climate change, and the generally inadequate track record of states in taking action to address the risks of climate change, the Court found it justified to 'consider that climate protection should carry considerable weight in the weighing-up of any competing considerations' (para. 542).[23]

On the basis of these considerations, the Court distinguished between the state's margin of appreciation with regard to (i) its commitment to the need to combat climate change and the setting of objectives and targets to that end, and (ii) the choice of means to achieve those objectives (para. 543). With regard to the former, the Court found that there was a reduced margin of appreciation, in view of the nature and gravity of the threat of climate change 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' (para. 543).

23 See Eicke Opinion, para. 13 (arguing that, given the complexity of the UNFCCC regime, the Court does not have the capacity to review the adequacy of Switzerland's actions).

2.4.5.2 *Content of States' Positive Obligations*

Given that individuals have a right under Article 8 to enjoy *effective* protection against serious adverse effects of climate change on their life, health, well-being, and quality of life, the Court held that a state's primary duty is to adopt regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change and to effectively apply these in practice (paras 544–6). This obligation also stems from states' commitments under the UNFCCC and the Paris Agreement as well as from scientific evidence (para. 546–7). The Court concluded that each Contracting State is required to 'undertake measures for the substantial and progressive reduction of their respective GHG emission levels, with a view to reaching net neutrality within, in principle, the next three decades' (para. 548). In order to make this genuinely feasible and to avoid placing a disproportionate burden on future generations, immediate action must be taken and appropriate interim reduction targets must be set for the period leading up to net neutrality (para. 549). Accordingly, such measures should consist of a binding national regulatory framework, including the necessary objectives and targets, followed by adequate implementation (ibid.).

Based on these considerations, the Court outlined a five-pronged test to determine whether a state had remained within its margin of appreciation in relation to climate change mitigation.[24] According to the test, the Court is to consider whether the competent authorities (legislative, executive, or judicial) have had due regard to the need to:

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

24 See Eicke Opinion, para. 67 (arguing that the Court is 'ill-equipped and ill-suited' to perform such a test).

(e) act in good time and in an appropriate and consistent manner when devising and implementing the relevant legislation and measures. (para. 550)

The judges added that mitigation measures must be complemented by effective adaptation measures in order to mitigate the most severe or imminent climate change impacts (para. 552).

Reiterating the crucial importance of procedural safeguards in determining whether the state has respected its margin of appreciation (including in matters of general policy), the Court stressed the need to ensure that (i) the public, and in particular those who may be affected by the relevant regulations and measures (or lack thereof), have access to the relevant studies on which public authorities base their regulations and measures on climate change; and (ii) the views of the public, and in particular of those most affected, can be taken into account in the decision-making process (para. 554).

2.4.5.3 *Application to the Particular Situation in Switzerland*

The Court assessed the situation as it was on the date of the adoption of the judgment, namely 14 February 2024 (para. 556). This is relevant because, since the Swiss Federal Supreme Court ruling in March 2020 (above, section 1), Switzerland has amended its climate change policy framework, and further legislative processes were underway at the time the ECtHR took its decision (para. 97).

The Court noted that the Swiss CO_2 Act 2011[25] requires a 20 per cent reduction in greenhouse gas emissions by 2020 compared to 1990 levels (paras 84 and 558). However, based on the scientific evidence available at the time the law was drafted in 2009 (namely, the IPCC's Fourth Assessment Report of 2007), and as the Swiss government itself acknowledged in 2009, a 20 per cent reduction target was insufficient for an industrialized country like Switzerland (para. 558). Instead, a target of 25–40 per cent would have been required, referenced to a (then current) target of limiting global warming to 2–2.4°C above pre-industrial levels, which is less ambitious than the 'currently required' limit of 1.5°C (ibid.). Further, even the (insufficient) 20 per cent target by 2020 was missed, as the Swiss government acknowledged (paras 87 and 559). In fact, the Court says, Switzerland only achieved an average greenhouse gas reduction of around 11 per cent between 2013 and 2020, which the Court took as an indication that the Swiss government's climate action has been insufficient (para. 559).

25 Federal Act on the Reduction of CO_2 Emissions of 23 December 2011 (CO_2 Act 2011), SR 641.71, in force since 1 January 2013.

The Court then goes on to summarize the proposed revision to the CO_2 Act 2011 for the post-2020 period, which would have imposed a 50 per cent reduction in greenhouse gas emissions by 2030 compared to 1990, including a 30 per cent reduction in domestic emissions, with the remainder to be achieved extra-territorially (para. 560). However, this revision was rejected by a narrow margin in a popular referendum[26] in June 2021 (para. 561). Accordingly, a 'legislative lacuna' existed for the period after 2020, which Switzerland sought to address by enacting, on 17 December 2021, a partial revision of the CO_2 Act (para. 561). This, however, left the period after 2024 unregulated, which was, in the ECtHR's words, 'incompatible with the requirement of the existence of general measures specifying the respondent State's mitigation measures in line with a net neutrality timeline' (ibid; cf. para. 550(a)). According to the Court, the regulatory lacunae (for the periods after 2020 and after 2024) indicate a failure on the part of the state to fulfil its positive obligations under Article 8 to establish an adequate regulatory framework for the state's mitigation measures (paras 561–2). The Court added that its assessment was 'irrespective of the way in which the legislative process is organised from the domestic constitutional point of view' (para. 561).[27]

The Court went on to discuss the Swiss Climate and Innovation Act 2022 (SCIA), which was drafted after the rejection of the revision of the CO_2 Act (para. 564). The SCIA was confirmed in a popular referendum in June 2023. It largely reflects Switzerland's commitment as expressed in its updated NDC of December 2021, namely to achieve climate neutrality by 2050 (para. 563). The new law sets out general objectives and targets, but it does not specify the concrete measures to be taken to achieve them, leaving it to the Federal Council to define them and propose them to the parliament 'in good time' (SCIA Article 11(1)). Furthermore, these measures are to be provided for under the CO_2 Act (SCIA Article 11(2)), which the Court considered to be insufficient in its current form (ibid.). Moreover, the SCIA provides intermediate targets only for the period after 2031, leaving the imminent period between 2025 and 2030 unregulated until new legislation is enacted (para. 566). While acknowledging the 'significant progress to be expected' from the SCIA (without explaining

26 As an expression of the direct democratic system under the Swiss Constitution, a sufficient number of citizens (at least 50,000) may request a popular referendum on amendments to federal laws (Swiss Constitution, Art. 141); and see Daniel Moeckli, 'Of Minarets and Foreign Criminals: Swiss Direct Democracy and Human Rights', 11 *Human Rights Law Review* (2011), 774.

27 See Eicke Opinion, para. 21 (where Judge Eicke argues that a finding of a violation of Article 8 should not be perceived to be relying, at least in part, on the expression of the democratic will of the Swiss people).

this optimism), the judges concluded that the new legislation, which had not entered into force at the time of the decision (it is expected to enter into force on 1 January 2025), is not sufficient to remedy the shortcomings of the current legal framework (para. 568).

On 15 March 2024, and thus one month after the decision's cut-off date (14 February 2024), the Swiss Parliament adopted the final version of the CO_2 Act for the period from 2025 until 2030, which is set to enter into force on 1 January 2025, along with the SCIA. We can only speculate about whether this revision would have met the judges' expectations in terms of adequately regulating the period from 2025 to 2030.[28]

The final point of contention was the lack of a specific 'carbon budget' for Switzerland (paras 569–72). (The term is rather inaccurate, as not all greenhouse gases contain carbon.) Siding with the applicants, the Court did not accept that the lack of quantification of Switzerland's remaining carbon budget could be considered to be in compliance with Article 8 (para. 572). The Court rejected the government's argument that there was no established methodology for determining a country's carbon budget, and also rejected the government's reliance on its NDC as sufficient for this purpose; the judges held that an effective climate change regulatory framework is not possible without quantification of national greenhouse gas emission limits, whether through a carbon budget or otherwise (para. 570).

Overall, the Court concluded that, by failing to act in a timely, adequate, and consistent manner with respect to the design, development, and implementation of the relevant legislative and administrative framework, Switzerland exceeded its margin of appreciation and thus failed to fulfil its positive obligations in the present context, in violation of Article 8 (paras 573–4).

2.5 *Violation of ECHR Article 6(1)*

The individual applicants and the applicant association argued that Switzerland violated their right of access to a court as part of the right to a fair trial in ECHR Article 6(1), because the Swiss courts had refused to deal with the merits of their claim.

Article 6(1) grants a right of access to a court if a 'civil right' is at stake. According to the ECtHR case law, this requires that there be a genuine and

28 See Eicke Opinion, para. 15(a) (arguing that in cases of abstract review of a regulatory regime there is a risk that that regime will have long since been replaced or amended by the time of the Court's judgment; we note, however, that this risk was not (or only marginally) present in the present case, as the Court took into account developments up to shortly before its judgment).

serious dispute concerning a civil right, which can be said, at least arguably, to be recognized under domestic law.[29] In addition, the outcome of the proceedings must be 'directly decisive' for the applicant's right. In line with its case law in environmental cases, the Court held that a civil right within the meaning of the provision is affected when the rights to life, physical integrity, and property are at stake (para. 600). The judges considered this requirement to be met in the present case (para. 617).

The Court also reiterated that Article 6(1) does not confer a right of access to a court in relation to complaints about legislative shortcomings, as the ECHR does not oblige states to initiate a constitutional review (paras 594 and 615). However, since the applicants had not only complained about Switzerland's legislative shortcomings but also about the ineffective implementation of existing mitigation measures, Article 6(1) could still be applied to the part of the application concerning the implementation of existing law (para. 616).

The Court went on to hold that Article 6(1) applied to the association's application, but it denied its applicability to the individual applicants. The latter had failed to show that 'effectively implementing mitigation measures alone would have created sufficiently imminent and certain effects on their individual rights' (para. 624). Regarding the applicant association, the Court found that it sought to defend the civil rights of its members in relation to the adverse effects of climate change (para. 621). Reiterating the importance of collective action by associations in the field of the environment (see section 2.3.2, above), in particular in the context of climate change, the Court considered Article 6(1) to be applicable (para. 622).

As the Swiss courts had not discussed the merits of the applicant association's claim (para. 633), the Court held that the very essence of the right of access to a court in Article 6(1) was impaired (para. 638). It emphasized the key role of domestic courts in climate change litigation and the importance of access to justice in this field (para. 639).

The decision on Article 6(1) is in line with the Court's findings on victim status and locus standi, underlining its preference for associations rather than individual applicants to bring claims for human rights violations in the context of climate change. From a formal point of view, however, it is not clear why the Court considered the dispute concerning the failure to implement national greenhouse gas reduction targets to be directly relevant to the rights of the

29 See Council of Europe, supra note 11, 84–5.

members of the association but not to the rights of the individual applicants as members of the association.[30]

2.6 *ECHR Article 13*

The applicants had also complained of a violation of ECHR Article 13 (right to an effective remedy), as the national courts had not considered the merits of their claims under this heading. But since the Court had already held that there was a violation of Article 6(1), which is *lex specialis* to Article 13, the Court found it unnecessary to examine the complaint under Article 13 separately (para. 644). The individual applicants had no arguable claim under Article 13, said the Court (para. 645).

3 Concluding Remarks

Switzerland, commonly associated with beautiful snow-capped mountains, fine chocolate, and superbly engineered watches, is significantly affected by climate change already today, as evidenced not least by the dramatic retreat of once majestic glaciers.[31] With the ECtHR's landmark ruling in *Verein KlimaSeniorinnen*, Switzerland will go down in history as the first country to be found by an international court to have violated the human rights of (certain members of) its population by failing to take adequate action on climate change.

Switzerland ratified the ECHR on 28 November 1974. Half a century later, the ECtHR's ruling in *Verein KlimaSeniorinnen* sent shockwaves through the Federal Parliament in the country's capital, Bern. The Court's decision sparked a heated debate in Switzerland, leading to parliamentary declarations from both chambers of the Swiss parliament claiming that the Court had overstepped its powers and calling on the Swiss government to ignore the ruling. Others welcomed the decision as an important step toward greater government action on climate change in Switzerland and beyond.[32]

30 This critique is also evident in the Eicke Opinion, leading Judge Eicke to the conclusion that the majority should have acknowledged a violation of ECHR Article 6(1) regarding the individual applicants (para. 57 et seq.).

31 See, for instance, Federal Office for the Environment, *Management Summary: Climate Change in Switzerland* (2020) <www.meteoswiss.admin.ch/services-and-publications/publications/various/2021/climate-change-in-switzerland-indicators-of-driving-forces-impacts-and-response.html>.

32 See, e.g., Charlotte Blattner, 'European Ruling Linking Climate Change to Human Rights Could Be a Game Changer: Here's How', 628 *Nature* 691 (2024).

In any event, the Swiss judiciary, executive and legislature are bound by this judgment and must take it into account in their future actions and decisions. In the short term, the judgment requires the Swiss Federal Government to develop a methodologically robust carbon budget. All other ECHR member states, and therefore most European states, will also have to respect the Court's considerations. We expect the judgment to have far-reaching implications for many European jurisdictions, and perhaps beyond Europe. Interested actors (including plaintiffs in climate litigation) in various European jurisdictions (and possibly elsewhere) are likely to rely on this decision in relation to the ECtHR's findings on causality, state responsibility, and other key issues in the decision. We further expect that *Verein KlimaSeniorinnen* will generally strengthen the case for allowing standing for associations before national courts in climate change cases in jurisdictions where this point is not yet settled. On the other hand, as the reaction in Switzerland shows, the decision triggered political defensiveness, the wider implications of which, perhaps beyond Switzerland, remain to be seen. Suffice to say here that, after a loss in court, the losing party is usually disappointed.

On a final note, the decision is very unlikely to be the last in which the ECtHR takes a stance on climate change, as several other climate change cases are currently pending before the Court, including from applicants in Norway, Germany, and Austria.[33]

33 E.g. *Norwegian Grandparents' Climate Campaign and Others v. Norway*, App. No. 19026/21; *Greenpeace Nordic and Others v. Norway*, App. No. 34068/21; *Engels and Others v. Germany*, App. No. 46906/22; *Müllner v. Austria* (App. No. 18859/21); *Soubeste and Others v. Austria and 11 Other States*, App. No. 31925/22.