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KlimaSeniorinnen: Changing Legal Opportunity Structures in the Face of the Climate Crisis

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Abstract: *The essay discusses the recent KlimaSeniorinnen judgement of the European Court of Human Rights. Selected issues such as standing for associations are elaborated on in more detail.*

Abstract: *Der Beitrag bespricht die KlimaSeniorinnen Entscheidung des EGMR vom April 2024. Ausgewählte Fragestellungen dazu, wie etwa rund um die Beschwerdeberechtigung von Vereinigungen, werden näher diskutiert.*

Keywords*: Climate litigation; Strategic Litigation; Access to Justice; Standing for NGOs; locus standi; Legal Opportunity Structures.*

Inhalt

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I. Introduction and Scope of the Essay

The *KlimaSeniorinnen* case[1] has been widely and prominently discussed from the outset of the proceedings.[2] Each stage of the litigation efforts brought forward a large number of commentators and critics.[3] Unsurprisingly, the long-awaited judgement of the ECtHR, delivered on 9 April 2024, has already garnered a lot of attention, be it in the general media[4] or through academic outlets.[5]

In the following essay, I will briefly summarize the judgement and then focus on a few issues that seem worth highlighting and to which I feel I can add substantial thoughts. These include considerations on aspects of strategic litigation in this case, the much-

[1] ECtHR 09.04.2024, Verein KlimaSeniorinnen Schweiz / Switzerland, application no 53600/20 (references to paragraphs without other specifications refer to this decision). The ECtHR issued its decisions on two other climate cases on the same day: ECtHR 09.04.2024, Duarte Agostinho and Others / Portugal and 32 others, application no 39371/20 ("case of the Portugese children", declared inadmissible due to lack of jurisdiction and lack of exhaustion of remedies relating to Portugal) and ECtHR 09.04.2024, Carême / France, application no 7189/21 ("case of the French Mayor", declared inadmissible due to lack of victim status). These decisions are not discussed here. For a comparative discussion see *Pedersen*, Climate Change and the ECHR: The Results Are In, EJIL:Talk!, 11.04.2024, https://www.ejiltalk.org/climate-change-and-the-echr-the-results-are-in/. This and all other weblinks were accessed on 31.07.2024.

[2] To name only a few examples: *Bähr/Brunner/Casper/Lustig*, KlimaSeniorinnen: lessons from the Swiss senior women's case for future climate litigation, Journal of Human Rights and the Environment, 9:2 (2018) 194 ff; *Niska*, Climate Change Litigation and the European Court of Human Rights - A Strategic Next Step?, Journal of World Energy Law and Business 13 (2020) 331 ff; *Keller/Bornemann*, New Climate Activism between Politics and Law: Analyzing the Strategy of the KlimaSeniorinnen Schweiz, Politics and Governance 9:2 (2021) 124 ff.

[3] Cf *Schmid*, Victim Status before the ECtHR in Cases of Alleged Omissions: The Swiss Climate Case, EJIL:Talk!, 30.04.2022, https://www.ejiltalk.org/victim-status-before-the-ecthr-in-cases-of-alleged-omissions-the-swiss-climate-case/.; *Arling/Taghavi*, KlimaSeniorinnen v. Switzerland – A New Era for Climate Change Protection or Proceeding with the Status Quo?, EJIL:Talk!, 06.04.2023, https://www.ejiltalk.org/klimaseniorinnen-v-switzerland-a-new-era-for-climate-change-protection-or-proceeding-with-the-status-quo/; *Grosz*, Klimaschutz vor Schweizer Gerichten, Swiss Review of International and European Law 33 (2023) 351 ff.

[4] For Austria: *Somek*, Grundrecht kraft Mitlaufens mit dem Zeitgeist, Die Presse, 15.04.2024; *Pflügl*, Heimische Nachbeben des Klimaurteils, Der Standard 2024, 11.04.2024; *Kary*, Klimaklagen: Muss jetzt auch Österreich zittern?, Die Presse, 06.06.2024; *Ennöckl*, Ein kleiner Klimaprotest mit großer Wirkung, Die Presse, 27.05.2024.

[5] *Arntz/Krommendijk*, Historic and Unprecedented, Verfassungsblog, 09.04.2024, https://verfassungsblog.de/historic-and-unprecedented/ and the other contributions (currently – 31.07.2024 – 17 contributions) under the Verfassungsblog debate „The Transformation of European Climate Litigation", all available under https://verfassungsblog.de/category/debates/the-transformation-of-european-climate-litigation/; *Auner*, Recht auf effektive Maßnahmen zur Eindämmung des Klimawandels (Entscheidungsanmerkung), Newsletter Menschenrechte (2024) 123 ff; *Bella*, Klimaklagen: EGMR stimmt Völkerrechtsblog zu, Völkerrechtsblog, 06.05.2024, https://voelkerrechtsblog.org/klimaklagen/; *Ennöckl/Handig/Polzer/Rathmayer/Vouk*, Klimaseniorinnen erkämpfen Recht auf Klimaschutz vor dem EGMR, Österreichische Jurist:innenzeitung 2024, 10 ff; *Hollaus*, Das Urteil des EGMR im Fall KlimaSeniorinnen und seine Implikationen für den europäischen Grundrechtsschutz, Juristische Blätter (2024) 485 ff; *Hofer*, Klimaschutz als Grundrecht: EGMR erkennt positive Klimaschutzpflichten der Vertragsstaaten an, Recht der Umwelt (2024) 136 ff;); *Eschenhagen*, Anmerkung zum EGMR-Urteil „Verein KlimaSeniorinnen Schweiz and Others v. Switzerland", Klimarecht 2024, 147 ff; *Fremuth*, Klimawandel vor dem EGMR und die Grenzen der Menschenrechtskonvention Zugleich Besprechung von EGMR Urt. v. 9.4.2024, Europäische Zeitschrift für Wirtschaftsrecht (2024) 697 ff; *Payandeh*, Völkerrecht: Konventionsrechtliche Implikationen des Klimawandels - Beschwerdebefugnis von Umweltverbänden und Umfang und Inhalt der staatlichen Schutzpflicht, Juristische Schulung (2024) 896 ff.

discussed issue of standing for associations, and some remarks on the costs of the proceedings. This selection is not meant to imply that other parts of the judgement might be less important or worthy of discussion.[6]

II. Summary of Main Points of the Judgement

The judgement in KlimaSeniorinnen originated in applications of the Verein KlimaSeniorinnen Schweiz (the association) and four women born between 1931 and 1942 (applicants 2 to 5), all of which are members of the association[7] and complained of severe health problems during climate-change-induced heat waves.[8] Applications to the ECtHR were lodged in November 2020,[9] after requests to the national Swiss authorities to take necessary measures to reduce greenhouse gas emissions and comply with the Paris agreements' targets and the ensuing proceedings before the Swiss Federal Administrative Court and the Swiss Federal Supreme Court were unsuccessful, as the applications were considered inadmissible.[10] In April 2022, the case was transferred to the jurisdiction of the Grand Chamber,[11] together with two other pending climate cases.[12] A large number of written third party comments were received,[13] and a hearing took place on 29 March 2023.[14]

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[6] For a broader perspective on human rights and climate litigation cf *Varvastian*, The Advent of International Human Rights Law in Climate Change Litigation, Wisconsin International Law Journal 38:2 (2021) 369 ff; *Vanhala/Hilson*, Climate Change Litigation: Symposium Introduction, Law & Policy 35:3 (2012) 141 ff. For the Austrian Perspective *Ennöckl*, Klimaklagen – Strukturen gerichtler Kontrolle im Klimaschutzrecht (Teil II), Recht der Umwelt (2022) 184 ff; *Fitz*, Klimaklagen in Ennöckl (Hg) Handbuch Klimaschutzrecht (2023) 517 ff (534 ff); combining Austrian and Swiss experiences: *Prantl*, Unsichere Zeiten für Klimaklagen? Perspektiven aus Österreich und der Schweiz, Nachhaltigkeitsrecht (2023) 451 ff.

[7] Para 1.

[8] Cf para 12 ff.

[9] Para 1.

[10] Cf para 22 ff. For a summary and analysis cf *Niska*, Climate Change Litigation and the European Court of Human Rights - A Strategic Next Step?, Journal of World Energy Law and Business 13 (2020) 331 (337 f).

[11] Para 4.

[12] Para 5. ECtHR 09.04.2024, Duarte Agostinho and Others / Portugal and 32 others, application no 39371/20; ECtHR 09.04.2024, Carême / France, application no 7189/21.

[13] Para 6 ff. This includes eight intervening Governments and more than 15 other third party interveners, such as the UN High Commissioner for Human Rights, the International Commission of Jurists, the Sabin Center for Climate Change Law, Greenpeace Germany and Oxfam.

[14] Para 8 f.

The major part of the judgement deals with the alleged violations of Articles 2 and 8 ECHR.[15] In this part of the judgement, the Court frames its legal assessment with preliminary remarks and general considerations relating to climate-change cases.[16] Here, the court prominently states that "climate change is one of the most pressing issues of our time"[17] and goes on to discuss, inter alia, the delicate task of ensuring compliance with human rights obligations as an international court that has to be respectful of the democratic legitimation of national governments and parliaments.[18] The Court further highlights the difficulties of attributing greenhouse gas emissions, the subsequent change in climate and its consequences to specific sources[19] and the resulting necessity of polycentric measures to combat climate change.[20] Connected to this, the Court also elaborates on the importance of intergenerational burden-sharing.[21] All this serves the Court to establish the need to depart from its existing environmental case-law, in order to take into account the specificities of climate change and climate-change related cases.[22]

The Court then goes on to describe the effects of climate change on the enjoyment of Convention rights broadly, relying heavily on the summaries of scientific evidence prepared by the IPCC.[23] It thus comes to the preliminary conclusion that climate change "poses a serious current and future threat to the enjoyment of human rights guaranteed under the Convention, that States are aware of it and capable of taking measures to effectively address it, that the relevant risks are projected to be lower if the rise in temperature is limited to 1.5°C above pre-industrial levels and if action is taken urgently, and that current global mitigation efforts are not sufficient to meet the latter target"[24].

Detailing the legitimate scope of its assessment, the Court then stresses that the ECHR does not guarantee a right to a healthy environment, but environmental deterioration may have a harmful effect on the enjoyment of the rights guaranteed by the Convention

[15] Para 296 to 576.
[16] Para 410 ff and para 423 ff respectively.
[17] Para 410.
[18] Para 412; see also para 449 f.
[19] Para 416 ff. See also the considerations on causation and proof at para 424 ff and the discussion of the issue of the proportion of State responsibility at para 441 ff.
[20] Para 419.
[21] Para 420.
[22] Para 422.
[23] Para 431 ff.
[24] Para 436.

(first and foremost: Article 8) and thus be relevant from the Convention's point of view.[25] As the final general issue, the Court reiterates the principles regarding the interpretation of the Convention as an international treaty established in its case-law.[26] Here, the Court stresses that the Convention "should be interpreted, as far as possible, in harmony with other rules of international law "[27].

After these preliminary remarks, the Court assesses the admissibility of the applications by connecting elaborations on the victim status of the applicants with the discussion of the applicability of Articles 2 and 8 ECHR.[28] At the outset, the Court stresses that the concept of victim (Article 34 ECHR) "must also be interpreted in an evolutive manner in the light of conditions in contemporary society"[29] and distinguishes categories of direct victims, indirect victims and potential victims.[30] The Court also differentiates between victim status and *locus standi*, the latter in principle relating to the question of representation of victims before the Court.[31] Faced with the difficult task of delineating the circle of victims in a way that makes the impact of climate-change on Convention rights actionable but does not open up the Convention for an *actio popularis*, the Court finds that the concept of "potential victims" is too broad and thus not suitable in climate-change related cases.[32] Instead, the Court establishes a relatively new test of level and severity of the risk of adverse consequences and a pressing need to ensure the applicant's individual

[25] Para 445 ff.
[26] Para 452 ff.
[27] Para 455, citing ECtHR 11.05.2021, Caamaño Valle / Spain, application no 43563/17, para 53 f.
[28] Para 458 ff.
[29] Para 461 and 482. Here, the Court cites ECtHR 27.04.2004, Gorraiz Lizarraga / Spain, application no 62543/00, para 38: "Admittedly, the applicants were not parties to the impugned proceedings in their own name, but through the intermediary of the association which they had set up with a view to defending their interests. However, like the other provisions of the Convention, the term "victim" in Article 34 must also be interpreted in an evolutive manner in the light of conditions in contemporary society. And indeed, in modern-day societies, when citizens are confronted with particularly complex administrative decisions, recourse to collective bodies such as associations is one of the accessible means, sometimes the only means, available to them whereby they can defend their particular interests effectively. Moreover, the standing of associations to bring legal proceedings in defence of their members' interests is recognised by the legislation of most European countries. That is precisely the situation that obtained in the present case. The Court cannot disregard that fact when interpreting the concept of "victim". Any other, excessively formalistic, interpretation of that concept would make protection of the rights guaranteed by the Convention ineffectual and illusory." The Court also references ECtHR 07.12.2021, Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği / Turkey, application no 37857/14, para 39.
[30] Para 463, 465 ff.
[31] Para 464 (citing ECtHR 17.07.2014, Centre for Legal Resources on behalf of Valentin Câmpeanu / Romania, application no 47848/08, para 102 f) and para 477.
[32] Para 484 f.

protection.[33] The individual applicants in the case at hand, however, failed to meet this criteria.[34]

The Court then goes on to elaborate on assessment criteria for the standing of associations,[35] highlighting the important role associations and other interest groups play in a complex society faced with issues of intergenerational burden-sharing.[36] The role of these associations is also recognized in international instruments, most prominently the Aarhus Convention, which the Court discusses in relative detail, also taking into account the relevant domestic practice and the practice of the EU.[37] This leads the Court to conclude that "the special feature of climate change as a common concern of humankind and the necessity of promoting intergenerational burden-sharing in this context [...] speak in favour of recognising the standing of associations before the Court in climate-change cases"[38]. This *locus standi* is independent of the victim status of an association's members.[39] In order to exclude the possibility of *actio popularis*, the Court then finds it necessary to devise a test for standing of associations, which it develops by taking into account the principles of the Aarhus Convention.[40] This test of *locus standi* is met by an association that 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

[33] Para 486 ff. As for the relationship of these new criteria to the relatively established criteria to test whether Article 8 is applicable in environmental cases (actual interference or serious risk) see para 520.
[34] Para 533, 536.
[35] Para 489 ff.
[36] Confirmed also in para 497 f, with specific focus on climate change litigation.
[37] Para 490 ff.
[38] Para 499.
[39] Para 502, but see 503: „In the event of existing limitations regarding the standing before the domestic courts of associations meeting the above Convention requirements, the Court may also, in the interests of the proper administration of justice, take into account whether, and to what extent, its individual members or other affected individuals may have enjoyed access to a court in the same or related domestic proceedings."
[40] Para 501.

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"[41].

Having laid out these criteria, the Court goes on to assess the applicability of Articles 2 and 8 ECHR. Regarding Article 2, the Court reiterates that this provision is applicable only in cases of real and imminent risks to life,[42] which according to the Court is not the case in view of the individual applicants.[43] Regarding the association, the Court does not make a final decision on whether it meets these conditions, but chooses to examine only Article 8 in detail.[44] Regarding the applicability of Article 8, the Court holds 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 on their life, health, well-being and quality of life."[45] The Court then refers back to the criteria established for *locus standi* of associations, which are met by the applicant association.[46] The individual applicants do not fulfil the criteria for victim status with regard to Article 8, according to the Court.[47]

Having established the admissibility of the association's application (and the inadmissibility of the individual applications), the Court goes on to elaborate on the merits of the case regarding Article 8.[48] Here, the Court highlights the existing margin of appreciation, but also emphasizes the procedural safeguards established in its case-law, such as States having to rely on appropriate scientific evidence made available to the public.[49] The Court then goes on to find that "climate protection should carry considerable weight in the weighing-up of any competing considerations",[50] and becomes even more precise by stating that Article 8 in principle demands Contracting States to reach net neutrality within the next three decades.[51] This principle is accompanied by specific procedural safeguards, such as the duty to adopt general measures specifying a timeline

[41] Para 502.
[42] Para 513.
[43] Para 533, 536.
[44] Para 536.
[45] Para 519.
[46] Para 521 ff.
[47] Para 527 ff.
[48] Para 538.
[49] Para 539 ff.
[50] Para 542.
[51] Para 548.

to reach this target as well as intermediate reduction targets and pathways.[52] According to the Court, Switzerland failed to meet these criteria and thus violated Article 8.[53]

The judgement then goes on to deal with the alleged violation of Article 6, again first reiterating the principles established in previous case-law[54] and then elaborating on necessary modifications in the climate change context.[55] These modifications include a more distinct approach to the question of whether the object of proceedings can be considered directly decisive for the rights relied on, taking into account the specific role of associations within climate litigation.[56]

The Court highlights that in the national proceedings, the applicants relied on the right to life (and physical integrity), which is protected under the Swiss Constitution and qualified as „civil in nature for the purpose of the first limb of the test for the applicability of Article 6"[57]. The Court then finds that the parts of the application that relate to the effective implementation of mitigation measures provided for in existing Swiss law in principle fall under Article 6.[58] Insofar, the Court found the association's application to be admissible and rejected the individual applications.[59] After having conducted a proportionality test, the Court found there to be a violation of Article 6.[60]

III. Some Thoughts on the Judgement

A. Strategic Litigation, Strategic Judgement?

The KlimaSeniorinnen judgement did not just "happen". To reach the ECtHR was the culmination point of litigation efforts that began in 2016[61] and were initiated by

[52] Para 550.
[53] Para 572 ff.
[54] Para 594 ff.
[55] Para 608 ff.
[56] Para 613 f, 622.
[57] Para 617.
[58] Para 616. The parts of the application that concern policy decisions subject to the relevant democratic processes do not fall under Article 6 ECHR; ibid.
[59] Para 623 ff.
[60] Para 640.
[61] Cf para 22 ff.

Greenpeace Switzerland after the success of *Urgenda*[62] in the Netherlands.[63] Year-long proceedings are not uncommon within the ECHR-system, given that exhaustion of remedies is necessary to fulfil the admissibility criteria. Compared to many other proceedings in Strasbourg, the judgement was handed down rather speedily in KlimaSeniorinnen.[64] What is special about this case is, however, that KlimaSeniorinnen as the applicant association has as one of its statutory goals to take legal action in the interests of its members with regards to the effect of climate change[65] and was founded already with a litigation strategy (focussing on the human rights of senior women) in mind.[66]

Whilst the involvement of the KlimaSeniorinnen association did not seem decisive for the outcome of the court proceedings in front of the Swiss Courts, it was the focal point and success factor for the application to the ECtHR. This shows how challenging yet important the involvement of collective actors in litigation is for legal mobilization.[67] The involvement of such collective actors (such as associations and NGOs) is qualified as one of the key elements of strategic litigation by some.[68] From this perspective, the KlimaSeniorinnen case can be qualified as a prime example of strategic litigation. Whether it is to be qualified as successful strategic litigation depends on the observer's point of view:

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[62] Hoge Raad (Supreme Court of the Netherlands) 20.12.2019, 19/00135, ECLI:NL:HR:2019:2007 (Urgenda). For an analysis of the judgement see for instance *Pedersen*, The networks of human rights and climate change: The State of the Netherlands v Stichting Urgenda, Supreme Court of the Netherlands, 20 December 2019 (19/00135), Environmental Law Review 22:3 (2020) 227 ff.

[63] *Bähr/Brunner/Casper/Lustig*, KlimaSeniorinnen: lessons from the Swiss senior women's case for future climate litigation, Journal of Human Rights and the Environment, 9:2 (2018) 194 (201). For a comparison of Urgenda and KlimaSeniorinnen within the relevant context for instance *Schupisser*, Judging Climate Change: A Comparative Legal and Political Analysis of the KlimaSeniorinnen Schweiz and the Urgenda Cases, Global Europe – Basel Papers on Europe in a Global Perspective 124 (2023) 43 ff.

[64] The ECtHR applies a priority policy, cf https://www.echr.coe.int/documents/d/echr/priority_policy_ENG .

[65] Cf para 10.

[66] *Bähr/Brunner/Casper/Lustig*, KlimaSeniorinnen: lessons from the Swiss senior women's case for future climate litigation, Journal of Human Rights and the Environment, 9:2 (2018) 194 (202).

[67] For the concept of legal mobilization: *Zeman,* Legal mobilization: The neglected role of the law in the political system, American Political Science Review 77:3 (1983) 690 ff, esp 700: "(t)he law is mobilized when a desire or a want is translated into a demand as an assertion of one's rights". Cf *McCann*, Litigation and Legal Mobilization, in Caldeira et al (eds) The Oxford Handbook of Law and Politics (2008) Oxford: Oxford University Press, 523 ff–540 (523 ff).

[68] *Hahn*, Strategische Prozessführung. Ein Beitrag zur Begriffsklärung, Zeitschrift für Rechtssoziologie 39:1 (2019) 5 ff; *Weber*, Zum Begriff der Strategischen Prozessführung, in Weber (Hg) Strategische Prozessführung in Österreich (2024) 11 (17 f); cf *Guerrero*, Strategische Prozessführung – eine Annäherung, Zeitschrift für Menschen rechte 2020, 26 (38).

First, one can look at the judgement itself. On the one hand, looking at the outcome for the individual applicants and the way the Court detailed the conditions of victim status, not everyone might view this judgement as a success. On the other hand, the novel approach to locus standi of associations is definitively a win from the perspective of associations active in the field of climate litigation. Given the objective of the applications, which aimed at remedying the impact of climate change on the enjoyment of human rights through both individual and collective means, the judgement can be qualified as a partial "win".

Second, and much harder, one can try to evaluate the impact the judgement will have for advancing climate protection. Here, it is definitively noteworthy that the Court used the opportunities it had to highlight the imminent danger climate change holds for the enjoyment and protection of human rights. The Court did not shy away from making quite general statements with potentially far-reaching consequences, such as regarding the weighing of climate protection interests and States' obligation to mitigate greenhouse gas emissions and strive for net neutrality.[69] Looking at the case-law of the Court more broadly, the elaboration of procedural safeguards based on which the Court will evaluate States' compliance with the Convention guarantees was to be expected and is in line with the general trend towards procedural control.[70] What is surprising, however, is the detail in which the Court lays down these procedural safeguards. Ultimately, however, the impact all these requirements will have on climate protection "on the ground" depends on the willingness of States[71] to comply with them swiftly.[72] Here, reference to the partly concurring, partly dissenting opinion of Judge *Eicke* is due: He appears to be very sceptic

[69] As to the preciseness of this obligation see *Hilson/Geden*, Climate or carbon neutrality? Which one must states aim for under Article 8 ECHR?, EJIL:Talk!, 29.04.2024, https://www.ejiltalk.org/climate-or-carbon-neutrality-which-one-must-states-aim-for-under-article-8-echr/.

[70] Cf *Brems*, The ‚Logics' of Procedural-Type Review by the European Court of Human Right, in: Gerards / Brems (editors) Procedural Review in European Fundamental Rights Cases. Cambrigde, Cambridge University Press (2017) 17 (17 ff); *Pavlidis*, Integrierung einer Verhaltenskontrolle gegenüber dem Gesetzgeber in die Grundrechtsprüfung? Diskutiert anhand des „Procedural Turn" des EGMR, Zeitschrift für Verwaltung 85:1 (2021) 85 (85 ff).

[71] For the discussion of the Judgement in the Swiss Parliament (declaring the judgement to be in violation of democratic values): https://www.parlament.ch/de/services/news/Seiten/2024/20240612113101111194158159026_bsd076.aspx .

[72] In principle, the requirements the Court established for national legislators are in line with was has been established as the "building blocks of effective climate laws": *Higham/Keuschnigg/Chan/Setzer*, What Does the European Court of Human Rights' First Climate Change Decision Mean for Climate Policy?, Verfassungsblog 15.05.2024, https://verfassungsblog.de/what-does-the-european-court-of-human-rights-first-climate-change-decision-mean-for-climate-policy/.

as to whether judgements of the ECtHR (and, it seems, courts in general) are a suitable means to compel States to the urgent action needed to combat the climate crisis.[73] This criticism has some truth to it insofar as it acknowledges that courts alone may not be able to exert the pressure that is (obviously) needed to initiate and drive transformative policy. What is left out of the picture in this position is, however, that strategic litigation is usually part of a bigger strategy to advocate for social change. Court judgements can help to legitimize this advocacy efforts, especially when these judgements refer to human rights argumentation.[74] As such, these judgements may help to put topics like climate change back on the political agenda and shift policy-makers' attention and priorities.

Lastly, one can ask whether the Court itself acted strategically when devising the judgement. Commentators have called the judgement "tainted by [the] objective of judicial self-preservation", as the Court did not consider in depth the claims brought forward relating to intergenerational equity,[75] which is even more obvious in view of the *Duarte*[76] case. Nevertheless, the Court did introduce standing for NGOs and thus allowed for a range of future cases, probably also bringing up (again) intergenerational issues.

B. Standing for Associations

One of the major novelties within the KlimaSeniorinnen judgement is the Court's approach to associations and their opportunities to access the Court.[77] The Court introduced a novel concept of *locus standi* of associations, independent of the victim

[73] Eicke, para 69.
[74] For the strategic orientation of the KlimaSeniorinnen case and the narratives employed cf *Keller/Bornemann*, New Climate Activism between Politics and Law: Analyzing the Strategy of the KlimaSeniorinnen Schweiz, Politics and Governance 9:2 (2021) 124 (128 f, 131); highlighting the intersectionality of the approach: *Sußner*, Intersektionalität als Strategie: Der Fall KlimaSeniorinnen v. Switzerland, Zeitschrift des deutschen Juristinnenbundes (2023) 74 ff; *Jong*, Beyond the turn to human rights: a call for an intersectional climate justice approach, The International Journal of Human Rights 28:5 (2024), 738 ff; *Hefti*, Intersectional Victims as Agents of Change in International Human Rights-Based Climate Litigation, Transnational Environmental Law (2024) 1 ff.
[75] *Brucher/De Spiegeleir*, The European Court of Human Rights' April 9 Climate Rulings and the Future (Thereof), Verfassungsblog, 29.04.2024, https://verfassungsblog.de/the-european-court-of-human-rights-april-9-climate-rulings-and-the-future-thereof/.
[76] ECtHR 09.04.2024, Duarte Agostinho and Others / Portugal and 32 others, application no 39371/20.
[77] Cf also *Wende*, Das KlimaSeniorinnen-Urteil des EGMR – Was ist neu daran?, EnergieKrise-Aktuell (2024) 010346.

status of their members. In doing so, the Court went beyond was what initially conceived of as possible by the claimants.[78]

The main justification for this new approach stems from the specificities of the climate crisis and the resulting harms.[79] In order to ensure that claims alleging human rights violations due to lack of climate change mitigation can reach the Court without allowing for *actio popularis*, the Court found it necessary to develop its case-law in the fashion described above in the summary section.

Given that *locus standi* is the most obvious novelty, it is unsurprising that this aspect has received a major part of scholarly attention and criticism. In Line with Judge *Eicke*, scholars criticise the ECtHR for overstepping the boundaries of the explicit provisions of the Convention,[80] namely Article 34 ECHR that reads: "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto." Critics argue that Article 34 ECHR demands a direct link between the applicant and the alleged violation of human rights.

However, as the Court has pointed out, the terms of the Convention are usually interpreted as being part of a living document that evolves with the changing of circumstances. It is not unusual, then, that one and the same word (in this case: victim) has more than one meaning and is shaped into different categories of meaning. In the specific climate change context, the Court has argued that the "classic" victim concepts lead to a lack of enforceability of human rights and thus developed a new approach,

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[78] Cf *Bähr/Brunner/Casper/Lustig*, KlimaSeniorinnen: lessons from the Swiss senior women's case for future climate litigation, Journal of Human Rights and the Environment, 9:2 (2018) 194 (220), who argue that KlimaSeniorinnen could lead to new developments related to standing in climate litigation, but throughout use the argument of being specifically affected as individuals or group of individuals, which is more closely related to the previously established categories of victim status.

[79] In the same vein: *Letwin*, Klimaseniorinnen: the Innovative and the Orthodox, EJIL:Talk!, 17.04.2024, https://www.ejiltalk.org/klimaseniorinnen-the-innovative-and-the-orthodox/.

[80] For instance: *Wegener*, „Globuli für Umweltjuristen", Verfassungsblog, 11.04.2024, https://verfassungsblog.de/globuli-fur-umweltjuristen; *Auner*, Recht auf effektive Maßnahmen zur Eindämmung des Klimawandels (Entscheidungsanmerkung), Newsletter Menschenrechte (2024) 123 (124 f); *Piska/Winkler/Zehetner*, Verein Klimaseniorinnen vs Schweiz: Es ist nicht alles Gold, was glänzt, ecolex (2024) 449 ff; *Fremuth*, Klimawandel vor dem EGMR und die Grenzen der Menschenrechtskonvention Zugleich Besprechung von EGMR Urt. v. 9.4.2024, Europäische Zeitschrift für Wirtschaftsrecht (2024) 697 (702); discussing said criticism and highlighting the limitations of the „new" *locus standi* for NGOs *Hollaus*, Das Urteil des EGMR im Fall KlimaSeniorinnen und seine Implikationen für den europäischen Grundrechtsschutz, Juristische Blätter (2024) 485 (491 ff).

consisting in the privileged position of associations meeting certain criteria to bring applications. This new approach is in line with the development in international law and practice,[81] where associations – mostly: environmental NGOs – are increasingly relied on as an important pillar of civil society.[82] The most relevant document in this regard is the Aarhus Convention,[83] which qualifies environmental NGOs as important part of civil society.[84]

Here, it is interesting to note that the Court found climate-change litigation not to be covered by the Aarhus Convention. This is true only insofar as legislative acts or emissions are concerned, as legislators and courts do not fall under the Aarhus Convention's definition of "public authority"[85]. Whilst the Court dealt with exactly these legislative omissions, legislation and executive measures often mix when it comes to climate mitigation, and effective climate mitigation does in many cases depend on implementing executive regulations. In these cases, the Aarhus Convention is directly applicable. There, it will be interesting to observe if and how the criteria established by the Court for associations to have standing will converge with the criteria established under the Aarhus Convention and within implementing domestic legislation.

In addition to this, looking at the quite broad thematic scope of the Aarhus Convention highlights another issue of the Court's new approach: Is *locus standi* of associations limited to human rights based climate litigation only? Whilst the climate crisis is definitively one of the most pressing global challenges, the climate is only one of the planetary boundaries relevant for sustaining a liveable planet.[86] Whilst it might be much less evident or imminent that human rights violations could result from a loss of biodiversity or the acidification of the oceans, it is not unconceivable to argue that these issues also pose a threat to human rights (mainly: Article 2 and 8 ECHR). In addition to that, even if *locus*

[81] For the aspects of the judgement relying on international climate law (in particular: the Paris agreement) see *Jahn*, The Paris Effect. Human Rights in Light of International Climate Goals and Commitments, Verfassungsblog, 25.04.2024, https://verfassungsblog.de/the-paris-effect/.
[82] Cf *Hollaus*, Das Urteil des EGMR im Fall KlimaSeniorinnen und seine Implikationen für den europäischen Grundrechtsschutz, Juristische Blätter (2024) 485 (491 ff).
[83] 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 2161 UNTS 447.
[84] Cf the Aarhus Convention's definitions of "public" (Article 2 para 4) and "public concerned" (Article 2 para 5).
[85] Article 2 para 2 Aarhus Convention: „This definition does not include bodies or institutions acting in a judicial or legislative capacity".
[86] For the planetary boundaries, cf https://www.stockholmresilience.org/research/planetary-boundaries.html.

standi of association might be granted for climate litigation cases only, a very broad range of legislation is, in fact, relevant for reaching set climate targets.[87]

C. The Literal Costs of KlimaSeniorinnen –Justice is Not Accessible For All

Another issue worth highlighting are the literal costs of KlimaSeniorinnen. Altogether, the applicant association claimed expenses of roughly EUR 715.000, only CHF 9.000 of which were costs imposed by the Swiss Courts at domestic level.[88] The Court deemed only a fraction of these costs as necessarily incurred and awarded EUR 80.000 to the applicant association.[89]

Whilst it is speculative to consider whether the case would have been equally successful with less or less expensive legal advice, it is nevertheless obvious that the litigation strategy employed by KlimaSeniorinnen was costly. It has been pointed out in the literature that the efforts were only made possible through Greenpeace's financial support.[90] This of course begs the question whether the Court unwillingly opened up the door for a very elitist climate litigation scene, allowing only associations with a very stable financial background to bring claims of human rights violations resulting from lacking climate change mitigation. Whilst this allegation might have some truth to it, one has to keep in mind that access to justice in general is usually a privilege of the few, not the reality of the many.[91] Taking human rights disputes to the ECtHR is a lengthy process, demanding not only from a financial perspective, but also time-wise, psychologically and mentally. This is even more so with prominent cases, where applicants are under the critical eye of the public (sometimes also: seek media attention to further their case).

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[87] Cf for the debate on speed limits on Austrian highways: *Krempelmeier/Kirchmair*, Verfassungswidrigkeit klimaschädlicher Verkehrsgesetzgebung. Warum Tempo 130 km/h auf Autobahnen und Tempo 100 km/h auf Freilandstraßen (derzeit) verfassungswidrig ist, Recht der Umwelt – Beilage Umwelt und Technik (2023) 39 (43 f).

[88] Para 648.

[89] Para 650.

[90] *Keller/Bornemann*, New Climate Activism between Politics and Law: Analyzing the Strategy of the KlimaSeniorinnen Schweiz, Politics and Governance 9:2 (2021) 124 (131).

[91] See recently *Hahn*, Strategische Prozessführung im Klagekollektiv (2024) BadenBaden Nomos, 187 ff with many references. For a critical perspective taking into account the recent climate decisions of the ECtHR cf *Raible*, Priorities for Climate Litigation at the European Court of Human Rights, EJIL:Talk!, 02.05.2024, https://www.ejiltalk.org/priorities-for-climate-litigation-at-the-european-court-of-human-rights/; *Schayani*, No Global Climate Justice from this Court, Völkerrechtsblog, 15.04.2024, https://voelkerrechtsblog.org/no-global-climate-justice-from-this-court/.

Given that the Court found that climate litigation aimed at ensuring the effective implementation of existing climate legislation falls under Article 6 ECHR, the case-law on legal aid for the civil limb of Article 6 ECHR might become relevant in these cases.[92] In climate cases, not only the courts,[93] but first litigants have to deal with complicated legal issues as well as with an increasingly complex factual situation. Given the need to provide proper evidence and scientific studies to support claims of alleged human rights violations through lacking climate protection efforts,[94] the question of costs for acquiring this expertise might be even more relevant for climate litigation. Here, next to the principle of equality of arms,[95] the Court might want to take a closer look at Article 9 (4) Aarhus Convention, demanding that procedures should not be "prohibitively expensive".[96] In addition, the procedural safeguards laid down by the Court, including the obligation to make scientific evidence and evaluations of policies and legislation available to the public could support the realisation of more equitable access to justice.

[92] For a summary see CoE/ECtHR, Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (civil limb). Updated to 31 August 2023 (2023), available at https://ks.echr.coe.int, para 163 ff. For a discussion of Article 6 issues in KlimaSeniorinnen cf *Hollaus*, Das Urteil des EGMR im Fall KlimaSeniorinnen und seine Implikationen für den europäischen Grundrechtsschutz, Juristische Blätter (2024) 485 (498 ff).

[93] For a discussion of Judge *Eicke*'s critical perspective on this issue and a rebuttal see *Humphreys*, A Swiss human rights budget?, EJIL:Talk!, 12.04.2024, https://www.ejiltalk.org/a-swiss-human-rights-budget/ .

[94] For the experience in the KlimaSeniorinnen case cf *Blattner/Vicedo-Cabrera/Frölicher/Ingold/Raible/Wyttenbach*, How science bolstered a key European climate-change case, Nature 621 (2023) 255 ff.

[95] Cf ECtHR 15.05.2005, Steel and Morris / United Kingdom, application no 68416/01, para 59 ff. In this case, the Court found that the refusal to grant legal aid in a complex defamation case, facing a wealthy opponent, resulted in a violation of the principle of equality of arms. The Court took into account the legal and factual complexity of the case as well as the diverging economic characteristics of the opponents, insofar as they resulted in different levels of legal assistance being available. Taking these criteria seriously and applying them to climate litigation cases, one could argue that States have a duty to provide legal aid resulting from Art 6 ECHR and the principle of equality of arms: Climate litigation usually involves complex legal and factual issues. In addition to that, in administrative or constitutional proceedings falling under Art 6 ECHR where litigants face „the State" (legislator or executive branch), the State is typically in a privileged position to gain both legal and factual expertise.

[96] The Aarhus Convention Compliance Committee (ACCC) has developed a rich case-law on this provision in its practice. See recently ACCC, 03.09.2021, Findings and recommendations with regard to communication ACCC/C/2015/130 concerning compliance by Italy, ECE/MP.PP/C.1/2021/22.

IV. Changing Legal Opportunity Structures; Opportunities Yet to be Seized

The KlimaSeniorinnen judgement can be qualified as revolutionary as it[97] brings about major changes for the position of associations and their opportunities to challenge human rights violations caused by insufficient climate mitigation measures. Given that this is a new development, it is unsurprising and not uncommon for this new doctrine to come with some unanswered questions. These questions relate, inter alia, to the applicability of the doctrine (whether "only" in climate litigation cases or beyond) and the precise criteria associations must fulfil to be granted standing. It remains to be seen how this development will impact domestic legal opportunity structures[98] and ensuing climate litigation. As of yet, restrictive admissibility criteria often hinder substantive decisions on climate issues at the domestic level.[99]

From a substantive perspective, the Court developed its environmental case-law coherently, taking into account the specificities of the climate crisis. A strong focus was placed on procedural safeguards, which the Court derived from Article 8 ECHR. According to the Court, Article 8 ECHR imposes a general obligation of Contracting States 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"[100].

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[97] As the ambiguity of the title of this essay might already suggest to some readers, it is justified to see both the ECtHR and the association KlimaSeniorinnen (as well as the many individuals involved in the litigation efforts) as drivers of the resulting change in legal opportunity structures.

[98] For the concept of legal opportunity structures see *Vanhala*, Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK, Law & Society Review 46:3 (2012) 523 (526 ff); *Vanhala*, Shaping the Structure of Legal Opportunities: Environmental NGOs Bringing International Environmental Procedural Rights Back Home, Law & Policy 40:1 (2018) 110 ff; *Andersen,* Out of the Closets & into the Courts. Legal Opportunity Structure and Gay Rights Litigation (2006) Ann Arbor: University of Michigan Press, 204 ff.

[99] For a comparative perspective on admissibility criteria in Austria, Germany and Switzerland see *Marhold*, Klimaklagen. Zulässigkeitsprüfung im Rechtsvergleich (2024) Vienna, Linde Verlag; cf *Madner*, Climate Change as a Challenge for Constitutional Courts: Fundamental Freedoms and Duties of Protection – A Perspective from Austria, Human Rights Law Journal (2023) 354 ff.

[100] Para 548.

While it is true that this judgement is only one piece within the larger puzzle of necessary transformative steps,[101] it could become a very important piece.[102] It remains to be seen how the new opportunities will be utilized by legislators, governments, courts and civil society alike.[103]

[101] Positioning litigation as one of many avenues to strengthen climate protection: *Vanhala*, Coproducing the Endangered Polar Bear: Science, Climate Change, and Legal Mobilization, Law & Policy 42:2 (2020) 105 ff. For a fundamental critique of the role of courts for social change cf eg *Rosenberg*, Tilting at Windmills: Brown II and the Hopeless Quest to Resolve Deep-Seated Social Conflict through Litigation, Law & Inequality: A Journal of Theory and Practice 24:1 (2006) 31 ff; however, *Rosenberg* also points to the relevance of legislative action, and this is exactly what KlimaSeniorinnen and further climate litigation efforts aim at triggering.

[102] It should also be noted that there are a few climate cases still pending, most notably Müllner / Austria; cf *Prantl*, After Switzerland Comes Austria. Why the ECtHR could soon grant individual standing in a climate mitigation case for the first time, Verfassungsblog, 24.05.2024, https://verfassungsblog.de/after-switzerland-comes-austria/.

[103] Possible consequences for the EU system of legal protection are discussed by *Eeckhout*, From Strasbourg to Luxembourg? The KlimaSeniorinnen judgment and EU remedies, Verfassungsblog, 05.06.2024, https://verfassungsblog.de/from-strasbourg-to-luxembourg/. Observations on the role of collective actors (that has been strengthened by the KlimaSeniorinnen judgement) for mobilizing the law with many references: *Hahn*, Strategische Prozessführung im Klagekollektiv (2024) BadenBaden Nomos, 215 ff.