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# Strengthening democracy beyond majoritarianism: The European Court of Human Rights ruling in *KlimaSeniorinnen*

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- 1 ECtHR 9 April 2024, ECLI:CE:ECHR:2024:0409JUD005360020 (*KlimaSeniorinnen Schweiz et al. v Switzerland*), par. 412.
- 2 *KlimaSeniorinnen Schweiz et al. v Switzerland*, par. 412.
- 3 See *KlimaSeniorinnen Schweiz et al. v Switzerland*, par. 56.
- 4 Judge Eicke in the *Daily Mail*: 'British ECHR judge warns the court's ruling on climate change went beyond its "legitimate and permissible" remit', *dailymail.co.uk*, 12 April 2024 and 'Communication from Switzerland concerning the case of *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Application No. 53600/20)', available at: *coe.int*, 8 October 2024. See for salient quotes from Swiss media: Ch.E. Blattner, 'Separation of Powers and KlimaSeniorinnen', *verfassungsblog.de*, 30 April 2024; C. Heri, 'Implementatie van de KlimaSeniorinnen-uitspraak:

The European Court of Human Rights' ruling in *KlimaSeniorinnen* (2024) establishes obligations for states to do their part to mitigate the climate crisis. It also strengthened participatory and deliberative elements in the domestic democratic process, e.g., by enhancing standing for associations, reducing the margin of appreciation for mitigation objectives, and imposing a duty to quantify a state's fair share.

## 1 Introduction

In anticipation of possible criticisms, the Grand Chamber of the European Court of Human Rights (ECtHR) held in its first ever climate case, *KlimaSeniorinnen*, that 'democracy cannot be reduced to the will of the majority of the electorate and elected representatives, in disregard of the requirements of the rule of law'.<sup>1</sup> The ECtHR emphasized in this context that '[t]he remit of domestic courts and the Court is complementary to those democratic processes' and that '[t]he task of the judiciary is to ensure the necessary oversight of compliance with legal requirements'.<sup>2</sup>

*KlimaSeniorinnen* confirmed and developed the meaning of the European Convention on Human Rights (ECHR) for the ongoing climate crisis. By the time it reached the ECtHR, the case had been rejected by Swiss courts in two instances considering that the substance of this case was a *matter for the political arena* and not a violation of human

rights.<sup>3</sup> The ECtHR disagreed and found Switzerland in violation of article 8 (private life) and 6 (access to justice) ECHR.

## *KlimaSeniorinnen* confirmed and developed the meaning of the European Convention on Human Rights for the ongoing climate crisis

The Court did not have to wait long for the anticipated criticism. Numerous commentaries in the Swiss media, the formal positions of the Swiss Parliament and of Switzerland vis-à-vis the Committee of Ministers argued that the ECtHR overstepped its mandate and harmed the democratic process.<sup>4</sup> Also, the 23 third-party interventions, eight of which by governments, took very different positions on this matter.

Different models of democracy exist, both in the different legal orders and in scholarship.<sup>5</sup> All models of democracy in Europe are more or less liberal. They all commit to the majoritarian logic of representative democracy based on general elections. At the same time, they are all based on the rule of law as an acknowledged constraint setting practical boundaries to majoritarianism. They all have also participatory and deliberative elements, such as consultations or even referenda and parliamentary discussions or even mini-publics. The latter have become more prominent over time, as they are generally accepted to strengthen the robustness of democracy, which cannot be reduced to majoritarian decision-making alone. Indeed, scholars have described a robust democracy as one in which challenges can be transversed without eroding the support for democracy or the authority of its decisions.<sup>6</sup> Among other things, a robust democratic space appears to require that a pluralism of voices and actors can participate in the decision-making processes and where, as a result, citizens could reasonably feel ownership about public decisions.

## This paper concludes that the Court did not overstep its judicial role and, in fact, contributed to the robustness of the domestic democratic process

This paper offers a deep analysis of the ECtHR's position on standing for associations; the partially reduced margin of appreciation; the positive obligation to quantify a national fair share carbon budget; and the Court's position on extraterritorial plaintiffs and emissions. It concludes that the Court did not overstep its judicial role and, in fact, contributed to the robustness of the domestic democratic process. Against the backdrop of the dominant theoretical understanding that a robust democracy requires more than majoritarian decision-making, the paper highlights how the Court strengthened participatory and deliberative elements in the ongoing process of developing an adequate response to the climate crisis.

The paper is structured as follows: Section 2 briefly introduces the ECtHR's decision in *KlimaSeniorinnen*. Section 3 to 6 reflect on the democratic implications of the extension of standing for associations (Section 3), the

reduced margin of appreciation for climate mitigation objectives (Section 4); the positive obligation to quantify a national fair share carbon budget (Section 5); and the Court's framing of the scope of the complaint to cover 'embedded', i.e., trade related emissions (Section 6). Section 7 concludes.

## In a novel interpretation of the standing requirements under the ECHR, the Court granted Verein KlimaSeniorinnen victim status and standing to represent the human rights claims of elderly women as a particularly vulnerable group

### 2 Facts and law in *KlimaSeniorinnen*

In *KlimaSeniorinnen*, the ECtHR found Switzerland to violate articles 8 and 6 ECHR for not having adopted sufficient climate policies to protect its citizens from the negative effects of the climate crisis and for having unduly denied the association judicial engagement with the merits of its claim, respectively. Four elderly women and the association Verein KlimaSeniorinnen challenged the alleged omissions of the Swiss federal government to adopt a regulatory framework to develop adequate climate protection policies.<sup>7</sup> They argued that elderly women are a particularly vulnerable group that is particularly severely impacted by climate impacts, such as heatwaves. In a novel interpretation of the standing requirements under the ECHR, the Court granted the association victim status and standing to represent the human rights claims of elderly women as a particularly vulnerable group. It denied standing to the four women individually.<sup>8</sup>

On the same day, the ECtHR declared two other climate cases inadmissible: *Carème*, for lack of interest on the part of the applicant, and *Duarte Agostinho*, in relation to Portugal for failing to exhaust domestic legal remedies prior to their application to the ECtHR and in relation to the other 31 defendant states for lack of (extraterritorial) jurisdiction.<sup>9</sup> The latter case will be discussed below as it is of interest for the Strasbourg Court's position on separation of powers, the domestic democratic process, and its own role in that process.

een tussentijds verslag', *nederlandrechtsstaat.nl*, 2 July 2024; discussions in the Swiss Parliament (Nationalrat), 12 June 2024, available at [parlament.ch](http://parlament.ch).

- 5 See for a fundamental overview: D. Held, *Models of Democracy*, Cambridge: Polity Press 2006; C. Lafont, *Democracy without shortcuts: A participatory conception of deliberative democracy*, Oxford: Oxford University Press 2019.
- 6 E. Sørensen & C. Ansell, 'Towards a Concept of Political Robustness', *Political Studies* (71) 2023, issue 1, p. 69-88, at p. 69.
- 7 See the national case at: Bundesgericht (Switzerland) 5 May 2020, [2020] 1C\_37/2019 (*KlimaSeniorinnen Schweiz et al. v Federal Department of the Environment, Transport, Energy and Communications*).
- 8 See for a more detailed presentation of the case: A. Hösli & M. Rehmann, 'Verein KlimaSeniorinnen Schweiz and Others v. Switzerland: the European Court of Human Rights' Answer to Climate Change', *Climate Law* 2024, p. 1-22.
- 9 ECtHR 9 April 2024, ECLI:CE:ECHR:2024:0409DEC000718921 (*Carème v. France*) – lack of victim status; ECtHR 9 April 2024, ECLI:CE:ECHR:2024:0904DEC003937120 (*Duarte Agostinho and Others v. Portugal and 32 Others*) – non-exhaustion of domestic remedies and lack of extra-territorial jurisdiction.



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### 3 Representation through associations

One of the novel legal developments in *KlimaSeniorinnen* is that civil society associations that are not victims in their own right may have standing to represent the interests of individuals ‘without a specific authority to act’.<sup>10</sup> In this context, the Court sketches that if the circle of those being able to bring cases was ‘drawn in a wide-ranging and generous manner’ this ‘would risk disrupting national constitutional principles and the separation of powers by opening broad access to the judicial branch as a means of prompting changes in general policies regarding climate change’; however, if the circle was ‘drawn too tightly and restrictively, there is a risk that even obvious deficiencies or dysfunctions in government action or democratic processes’ could persistently infringe Convention rights.<sup>11</sup>

Striking the right balance between allowing sufficient participation through judicial recourse to protect domestic constitutional principles and institutional interaction, on the one hand, without, on the other, interfering with the basic representational and majoritarian elements of decision-making by elected parliamentarians is the main guid-

ing objective of the ECtHR. In other words, the Court aims to protect the robustness of democratic decision-making by contributing to the relevance of constitutional rights and principles and strengthening participation by those whose rights are affected.

One of the novel legal developments in *KlimaSeniorinnen* is that civil society associations that are not victims in their own right may have standing to represent the interests of individuals ‘without a specific authority to act’

In the same paragraph, the ECtHR introduces ‘considerations of intergenerational burden-sharing related to the impacts and risks of climate change’ and emphasizes that ‘members of society who stand to be most affected by the impact of climate change can be considered to be at a distinct representational disadvantage’.<sup>12</sup> The Court purports that the

<sup>10</sup> *KlimaSeniorinnen Schweiz et al. v Switzerland*, par. 498-503; quote: *KlimaSeniorinnen Schweiz et al. v Switzerland*, par. 476.

<sup>11</sup> *KlimaSeniorinnen Schweiz et al. v Switzerland*, par. 484.

<sup>12</sup> *KlimaSeniorinnen Schweiz et al. v Switzerland*, par. 484.

climate context makes '[th]e need to ensure [...] effective protection of the Convention rights [...] [without] slip[ping] into de facto admission of *actio popularis* [...] particularly acute'.<sup>13</sup> In fact, '*actio popularis*' is mentioned 38 times in *KlimaSeniorinnen*. One can sense the Court's own understanding that it is between a rock and a hard place. It does not want to open the floodgates by giving standing to anyone whose rights are affected by the climate crisis, as this is pretty much everyone, but it also recognizes that certain groups and interests are insufficiently able to participate and have their voice heard in the political process dominated by short-term interests of the (economically) powerful.

### The Court points at the crucial short-comings of the political process in protecting long-term interests of those already born and still to be born. This is a crucial point of the ruling and a core justification for the Court's ruling

The climate crisis is perhaps the most dominating human rights concern of the century and climate impacts lead already today but even more so in the future to infinite victims. The Court points at the crucial short-comings of the political process in protecting long-term interests of those already born and still to be born.<sup>14</sup> This is a crucial point of the ruling and a core justification for the Court's ruling. Not only the concern of (being accused of allowing for) *actio popularis* and the potential of opening the floodgates for numerous further cases was on the Court's mind, but also its own 'subsidiary' institutional role as a (regional) court in addressing the legal question relating to this prevailing crisis.<sup>15</sup> It saw one of its contributions, and arguably of the judiciary in general, to represent underrepresented future (long-term) interests, including those of future generations and more generally the most affected.

The exceptional relevance of associations to defend effectively the interests of those affected in complex modernity, which is amplified in the context of the climate crisis, is extensively highlighted by the Court.<sup>16</sup> The Court points to both a general trend in the domestic legal orders of Contracting Parties and the particular relevance of the Aarhus

Convention in recognizing the relevance of interest representation through associations.<sup>17</sup> Representation through associations is a non-majoritarian instrument, which complements but cannot replace the equality commitment of general elections and majoritarian decision-making.

The judicial requirement of demonstrating standing and an alleged rights violation frames the climate crisis, more so than in politics, as a narrative of individual harm and, arguably, on the side of the defendants, one of individualized responsibility. The emphasis on the role of associations and the need to allow for structures in society that can represent collective interests contrasts with this individualization of climate issues. Emphasizing that mitigating the climate crisis is 'a common concern of humankind', citing the Preamble of the United Nations Framework Convention on Climate Change (UNFCCC),<sup>18</sup> brings a global perspective into otherwise limited legal framing of domestic courts reasoning within one domestic jurisdiction and domestic politics catering towards their particular constituency.

In more detail, the Court outlined a number of 'factors' determining the standing rights of associations *in climate cases*.<sup>19</sup> The association must be:

'(a) lawfully established in the jurisdiction concerned or have standing to act there; (b) able to demonstrate that it pursues a dedicated purpose in accordance with its statutory objectives in the defence of the human rights of its members or other affected individuals within the jurisdiction concerned [...]; 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* [...].'<sup>20</sup>

#### Representativeness depends on factors such

'as the *purpose* for which the association was established, that it is of *non-profit character*, the nature and extent of its *activities* within the relevant jurisdiction, its *membership and representativeness*, its principles and transparency of governance and whether on the whole, in the particular circumstances of a case, the grant of such standing is *in the interests of the proper administration of justice*.<sup>21</sup>

The non-profit character demonstrates the role of associations of vehicles of participation of the *common* interest rather than economic gain. Most importantly however, the distinction between 'membership' and 'representativeness' allows an association not only to defend human rights of 'its members', *i.e.*, persons that have chosen to affiliate with

<sup>13</sup> *KlimaSeniorinnen Schweiz et al. v Switzerland*, par. 484. *Actio popularis* refers to a public or universal right to initiate a lawsuit.

<sup>14</sup> *KlimaSeniorinnen Schweiz et al. v Switzerland*, par. 420.

<sup>15</sup> Explicitly: *KlimaSeniorinnen Schweiz et al. v Switzerland*, par. 539 and par. 449 (difficulty to distinguish legal from political choices/policy questions).

<sup>16</sup> *KlimaSeniorinnen Schweiz et al. v Switzerland*, par. 489.

<sup>17</sup> *KlimaSeniorinnen Schweiz et al. v Switzerland*, par. 489-497. In total, the Court refers to the Aarhus Convention 51 times.

<sup>18</sup> *KlimaSeniorinnen Schweiz et al. v Switzerland*, par. 489.

<sup>19</sup> *KlimaSeniorinnen Schweiz et al. v Switzerland*, par. 502.

<sup>20</sup> *KlimaSeniorinnen Schweiz et al. v Switzerland*, par. 502, emphasis added.

<sup>21</sup> *KlimaSeniorinnen Schweiz et al. v Switzerland*, par. 502, emphasis added.

the association and its purpose, but also ‘other affected individuals’ ‘without a specific authority to act’.<sup>22</sup> This extends to individuals who do not know or agree to this representation.<sup>23</sup> This is crucial to understanding the conception of representation of the ECtHR. This representation extends elderly women as a group, *i.e.*, beyond elderly women of today to those in the future. The Court speaks of ‘serious and potentially irreversible adverse effects’ on the enjoyment of Convention rights,<sup>24</sup> which entails logically that these rights require protection today in order to avoid this irreversibility which will make protection in the future impossible.

Interesting in this context is that the Court, while rejecting that the four individual applicants demonstrated that they qualified as victims within the meaning of article 34 ECHR, left the door open for future applicants to show that they are sufficiently gravely affected that they meet the victim threshold. This may apply today for example to those suffering from a health condition.<sup>25</sup> With increasing climate impacts it will be an increasingly different position to argue that the suffering of an individual does not meet the threshold of being a victim.

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What role one foresees for civil society associations in a robust democracy depends on the value that one attaches to the majoritarian elements as opposed to participatory and deliberative elements of democracy. Associations do not and cannot meet an equivalent level of formally equal representation as elections and majoritarian decision-making. However, associations can allow participation and defence of the interests of certain groups, including in the judicial process. In democracies based on the rule of law and acknowledging the importance of participation and plurality, they

make a relevant contribution to the robustness of the democratic process by enhancing the participation of diverse voices and hereby, arguably, the possibility of ownership over and acceptance of public decisions.

#### 4 Two margins of appreciation: Framing political discretion

The ECtHR struggles in *KlimaSeniorinnen* to reconcile the urgent need to mitigate the climate crisis and the inevitable resulting grave human rights violations, on the one hand, with the *subsidiary* role of the ECtHR as a regional court tasked to ensure *minimum* protection of human rights, on the other. Against the backdrop of the different elements of a robust democracy, the Court’s role is to ensure compliance with the (minimum) constraints of the Convention (rule of law dimension). It interpreted this role in *KlimaSeniorinnen* as requiring it to ensure that the gravest dangers for human rights are avoided, including in the future. The Court concluded that only if emissions are reduced sufficiently quickly so that overall cumulative global emissions remain within the global budget that corresponds to staying below 1.5 °C these *gravest* human rights violations are averted.<sup>26</sup> The Court explains that the long-term temperature limit of 1.5 °C is the global *political* consensus.<sup>27</sup> Its decision to take 1.5 °C as the yardstick, or one could even say as red line beyond which the gravity of human rights violations breaches the Convention, is hence rooted in this political (and democratically legitimized) consensus expressed in numerous legal instruments and political statements.<sup>28</sup>

The global budget that scientifically corresponds to 1.5 °C, however, does not translate into each individual country’s fair share without further work of *normative* interpretation and methodological choices that follow from that interpretation. The Court avoided entering into a concretization of methods or specific interpretations of equity principles of international law, such as the controversially discussed principle of Common But Differentiated Responsibilities and Respective Capabilities (CBDR-RC). Instead, it formulated a requirement to justify whatever the particular state puts forward as climate mitigation targets and policies in relation to the global carbon budget that corresponds to 1.5 °C. It hence showed considerable deference towards the political process by leaving room for all reasonably possible justifications of a particular way to construe a state’s fair share.

<sup>22</sup> *KlimaSeniorinnen Schweiz et al. v Switzerland*, par. 502.

<sup>23</sup> *KlimaSeniorinnen Schweiz et al. v Switzerland*, par. 476.

<sup>24</sup> *KlimaSeniorinnen Schweiz et al. v Switzerland*, par. 431.

<sup>25</sup> E.g., ECtHR, 18859/21 (*Müllner v. Austria*), pending.

<sup>26</sup> In many cases, climate impacts are already infringing on human rights, with global warming still below 1.5 °C.

<sup>27</sup> *KlimaSeniorinnen Schweiz et al. v Switzerland*, par. 105-106.

<sup>28</sup> The 2015 Paris Agreement read in light of successive decisions of the Conference of the Parties, including the Glasgow Climate Pact.

The yardstick of 1.5 °C (and the corresponding, scientifically established global carbon budget) against which states need to justify what they are proposing and doing falls outside of the wide margin of appreciation of the Contracting Parties. A reduced margin of appreciation applies to the temperature goal that has been established and confirmed time and again in international and national legally-binding and political communications and the corresponding budget that is a scientific question that has been answered in the calculations of the remaining global carbon budget drawn up by the Intergovernmental Panel on Climate Change (IPCC), which is a scientific body of unmatched recognition.<sup>29</sup> The Court points out that

*‘the nature and gravity of the threat and the general consensus as to the stakes involved in ensuring the overarching goal of effective climate protection through overall GHG reduction targets in accordance with the Contracting Parties’ accepted commitments to achieve carbon neutrality, call for a reduced margin of appreciation for the States’.*<sup>30</sup>

Hence, the Court justifies the reduced margin of appreciation by reference to the exceptional nature of the climate crisis and the only way to prevent it, *i.e.*, staying within the global carbon budget (facts), together with commitments of the Contracting Parties (international and national, political and legal obligations).

The ECtHR emphasizes that the regulations and measures that states put into place must be ‘[i]n line with the international commitments undertaken by [them][...], most notably under the UNFCCC and the Paris Agreement, and the cogent scientific evidence provided, in particular, by the IPCC’.<sup>31</sup> The UNFCCC and the Paris Agreement are democratically legitimized (international) law, specified political statements made by democratically elected representatives of the different countries. Thus, the Court justifies the reduced margin of appreciation at least indirectly also in light of considerations relating to a certain consistency between what states say in international and national climate governance and law and what they do in light of an assessment based on the best available science. Such consistency is lacking in ‘public climate-washing’, *i.e.*, misleading citizens into believing that climate policies are adequate to avert the greatest human rights violations/warming above 1.5 °C. Lack of consistency between words and actions may be expected to affect over time trust in public institutions.

This also reflects the Court’s commitment to protect the authority of the domestic public institutions over time, including from pure majoritarianism with its propensity to be captured by (often short-term and economic) powerful interests. This is one of the underlying purposes of the rule of law and the powers of the judiciary to uphold that rule of law.

At its core, this is a question of what is a matter of law and may be decided by judges. It is also a question of how an issue becomes a matter of law which the judiciary may legitimately enforce. The reduced margin of appreciation in relation to the objective of keeping warming below 1.5 °C is justified by reference to the overwhelming legal and political support of this objective expressed repeatedly by each and every Contracting Party to the UNFCCC, including Switzerland.

## The judiciary demands justification from the state against the state’s own formal and informal commitments in connection with scientific assessments of what the consequences of the states (in-)action are

Ultimately, the Strasbourg Court set out rules for a test of justification of domestic climate targets and policy and this test can be traced back to a right to demand justification if states infringe on human rights.<sup>32</sup> The judiciary demands justification from the state against the state’s own formal and informal commitments in connection with scientific assessments of what the consequences of the states (in-)action are. This enhances the deliberative element of democracy by allowing for a reasoned exchange in relation to political consensus and its scientifically established implications.

### 5 Quantifying a fair share carbon budget is the task of domestic politics

In *KlimaSeniorinnen*, the ECtHR confirmed under its article 8 ECHR assessment a duty to regulate, *i.e.*, ‘positive obligations of States relating to the setting up of a regulatory framework [...] geared to the specific features of [climate change]’, emphasizing that ‘each State is called upon [under the Paris Agreement] to define its own pathway’.<sup>33</sup> This builds

<sup>29</sup> [www.ipcc.ch](http://www.ipcc.ch).

<sup>30</sup> *KlimaSeniorinnen Schweiz et al. v Switzerland*, par. 543.

<sup>31</sup> *KlimaSeniorinnen Schweiz et al. v Switzerland*, par. 546.

<sup>32</sup> C. Eckes, ‘The Urgenda Case is Separation of Powers at Work’, in: N. de Boer, B. Michel, A. Nieuwenhuis & J-H. Reestman (eds.), *Liber amicorum Besselink*, Amsterdam: Universiteit van Amsterdam 2021, p. 207-231.

<sup>33</sup> *KlimaSeniorinnen Schweiz et al. v Switzerland*, par. 547.

directly on the ECtHR's case law placing a positive obligation on governments that insufficiently protect their citizens from environmental risks or harms to facilitate regulatory and administrative regimes, including to control hazardous activities.<sup>34</sup> Importantly, such duty extends to serious risks, i.e., potential rather than actual harm, and these regulatory regimes must allow for public participation to assess the magnitude of the risk.<sup>35</sup>

The Court further emphasized that each state had an obligation

*'to do its part [i.e. its fair share!] to ensure effective protection from serious adverse effects of climate change and that its 'primary duty is to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change'.*<sup>36</sup>

The Swiss government argued that there is 'no established methodology to determine a country's carbon budget'.<sup>37</sup> The Court by contrast confirmed that, despite the fact that different methodologies exist, 'the State [...] [must] act on the basis of equity and in accordance with their own respective capabilities' and determine its reduction target in relation to the still remaining global budget for breaching the temperature target.<sup>38</sup> It identified a legal obligation to determine a state's fair share on the basis of fairness principles enshrined in international law. In addition, and equally influential, the Court's reasoning relies on the *factual necessity* that only if each state remains within a fair share quantification of the remaining global budget the collective efforts of all states are logically ever at least potentially capable of mitigating the climate crisis and avoiding even greater harms. The consideration of factual necessity remains more obscure than other arguments of the Court. It is the underlying consideration that leads the Court to come to its conclusion that it 'is *not convinced that an effective regulatory framework* concerning climate change could be put in place *without quantifying*, through a carbon budget or otherwise, national GHG emissions limitations',<sup>39</sup> i.e. that any mitigation that is not based on quantification and justification in relation to the global budget could be 'effective' to address a global problem. This is why the ECtHR requires states to 'quantify' what the country itself deems to be its fair share of the remaining budget.<sup>40</sup> This ties in neatly with the reduced margin of appreciation for the objective of keeping global warming below 1.5 °C, as explained above.

The Court also contributed to the transparency and publicity of the process of drawing up a fair share carbon budget by making clear that an *implied budget* 'provided by an estimate of the remaining Swiss carbon budget under the current situation, taking into account the targets and pathways introduced by the Climate Act' *is not enough*. In other words, the Court rejected that the necessary quantification of the remaining carbon budget could be drawn implicitly from an established emission reduction percentage, i.e., percentage reductions by 2030 and 2040, but required the Swiss state to produce explicit quantifications of its fair share carbon budget with which civil society actors and academics can engage and join into the deliberative process. Again, the Court establishes a framework of legal constraints that has the potential to ensure a reasoned exchange that is grounded in scientific facts and requires participants to relate their positions to the political consensus. In many ways, the reduced margin of appreciation in relation to the target of 1.5 °C and the obligation to justify one's own contribution to achieving this target are intrinsically related.

**The Court establishes a framework of legal constraints that has the potential to ensure a reasoned exchange that is grounded in scientific facts and requires participants to relate their positions to the political consensus**

## 6 Extraterritorial harms and emissions

In *Duarte* (inadmissible), the ECtHR pointed out that while there is

*'a certain causal relationship between public and private activities based on a State's territories that produce GHG emissions and the adverse impact on the rights and well-being of people residing outside its borders and thus outside the remit of that State's democratic process'*<sup>41</sup>

this does not lead it to change the control test for extraterritorial responsibility. Non-residents (in *Duarte* the Portuguese school children) could not bring other Contracting Parties (other than Portugal) before the Strasbourg Court.

In *KlimaSeniorinnen*, however, the Court engaged with *extraterritorial effects of territorial emissions*, namely with 'embedded

34 E.g., ECtHR 27 January 2009, 67021/01 (*Tătar v Romania*); ECtHR 20 March 2008, 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (*Budayeva and Others v Russia*); ECtHR 28 February 2012, 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05 (*Kolyadenko and Others v Russia*).

35 *KlimaSeniorinnen Schweiz et al. v Switzerland*, par. 435.

36 *KlimaSeniorinnen Schweiz et al. v Switzerland*, par. 435, emphasis added.

37 *KlimaSeniorinnen Schweiz et al. v Switzerland*, par. 570-571, referring to German Federal Constitutional Court 24 March 2021 (*Neubauer*).

38 *KlimaSeniorinnen Schweiz et al. v Switzerland*, par. 571.

39 *KlimaSeniorinnen Schweiz et al. v Switzerland*, par. 569 and 570, respectively (emphasis added).

40 *KlimaSeniorinnen Schweiz et al. v Switzerland*, par. 324-325 demonstrate the applicants' emphasis on the need for quantification. The Court confirmed the importance of quantification in *KlimaSeniorinnen Schweiz et al. v Switzerland*, par. 550 and par. 569-573.

41 *Duarte Agostinho*, par. 193.

emissions', *i.e.*, emissions caused elsewhere by consumption on the territory of Switzerland.<sup>42</sup> The Court considered these to fall within the remit of the complaint.

At first sight, these conclusions may appear contradictory. Pursuant to this logic, a state is responsible for human rights violations on its own territory, including in situations in which the state does not have the means to protect its residents because the enjoyment of their rights depends on effective climate mitigation. Mitigation in turn depends on emission reductions worldwide, of which a specific state's contribution is only a very small share.

However, in light of the Court's considerations about the democratic process and the responsibilities of the legislature and the executive for climate mitigation its reasoning appears reasonable. Swiss authorities can regulate and influence consumption on Swiss territory and can hence be legally obliged to do so under the Convention, irrespective of the fact that the emissions of production of the consumed goods may occur elsewhere. At the same time, opening up the judicial procedure before a regional court to applicants from all Contracting Parties against all Contracting Parties for harm occurring in their home state would place the ECtHR in the uncomfortable position of having to adjudicate cross-border factual situations of harms in one state caused by (in-)action in a different state.

The Court's decision to exclude complaints from citizens of one Contracting Party against another Contracting Party frames responsibility for emissions as an issue that can be negotiated *through interaction of the institutions of one democratic state*. One can read this as a means to protect the democratic process from interference, *i.e.* participation, by non-residents. In other words, the Court's choice avoids an 'untenable level of uncertainty for the States' caused by complaints by non-residents and how they may affect the domestic process of democratically negotiating emission reduction.<sup>43</sup> While this may certainly raise issues of justice, both individual and collective (*vis-à-vis* harmed groups abroad), it is a way of protecting the domestic democratic process. The citizens of one state may participate in general elections (majoritarian element). They may also participate by challenging (a lack of) public actions that infringe their rights in court. This allows them to demand justification for such rights-relevant (lack of) action. This may also, at least potentially, enhance the quality of deliberation in the public sphere. States need to explain and justify

their (in-)actions in relation to laws and political commitments they made, read through the lens of science.

Moreover, one has to read this limitation to participation by citizens (or at least residents) in the context of two ways in which the Court connects to the global nature of the climate crisis. First, its commitment to international fairness principles through the demand to quantify the domestic fair share carbon budget in connection to the global budget. This necessarily requires considering the position of those abroad. And, second, its way of framing responsibility for behaviour within that state's territory in a way that it covers emissions triggered by that behaviour elsewhere because these can be regulated in the domestic political process.

All European states, the European Union, the ECHR, international treaties explicitly commit to an understanding of democracy that is built on the rule of law and besides majoritarian elements also on elements of participation and deliberation

## 7 Conclusions and national context

The democratic process depends on more than majoritarian decision-making. All European states, the European Union, the ECHR, international treaties, such as prominently the Aarhus Convention explicitly commit to an understanding of democracy that is built on the rule of law and besides majoritarian elements also on elements of participation and deliberation. Together, they ensure that minorities can become majorities (rule of law) and that citizens can actually (participation) and potentially (deliberation) feel ownership over decisions of public authorities.

The OECD Trust Survey 2023 concluded that two factors outweigh all others in whether citizens have trust in public institutions, namely that decision-making is evidence-based and that some form of intergenerational equity is ensured.<sup>44</sup> On the first point, it in fact increasingly appears that the ability of democratic societies to protect the well-being of their citizens at least also depends on finding a way to counter polarization and perhaps even a culture war with empiri-

<sup>42</sup> *KlimaSeniorinnen Schweiz et al. v Switzerland*, par. 275.

<sup>43</sup> Duarte Agostinho, par. 208.

<sup>44</sup> OECD, *OECD Survey on Drivers of Trust in Public Institutions – 2024 Results: Building Trust in a Complex Policy Environment*, Paris: OECD Publishing 2024, <https://doi.org/10.1787/9a20554b-en>.

45 D. Kahan, 'Fixing the communicative failure', *Nature* (463) 2010, p. 296-297.

46 *KlimaSeniorinnen Schweiz et al. v Switzerland*, par. 421 'existential risk'; see also: European Climate Law, Regulation (EU) 2021/1119 of 30 June 2021 establishing the framework for achieving climate neutrality, *OJ* 2021/L 243, p. 1-17, and UN General Assembly Resolution The human right to a clean, healthy and sustainable environment, *UN Doc A/RES/76/300*, 28 July 2022.

47 E.g., *KlimaSeniorinnen Schweiz et al. v Switzerland*, par. 412.

48 The latter is what the courts did in *Rb. Den Haag* [Court of First Instances The Hague] 24 June 2015, ECLI:NL:RBDHA:2015:7145, *AB* 2015/336 (*Urgenda*, first instance); *hof Den Haag* [Court of Appeals The Hague] 9 October 2018, ECLI:NL:GHDHA:2018:2591, *JB* 2019/10 (*Urgenda*, Court of Appeal); *Hoge Raad* 20 December 2019, ECLI:NL:HR:2019:2007 (*Urgenda*, Supreme Court) and *Cour d'Appel Bruxelles* [Court of Appeals Brussels] (2nd ch.) 30 November 2023, J.L.M.B. 24/045 (Belgium) (*Klimaatzaak*, Court of Appeal).

49 *KlimaSeniorinnen Schweiz et al. v Switzerland*, par. 657.

50 *KlimaSeniorinnen Schweiz et al. v Switzerland*, par. 657.

51 'Communication from Switzerland concerning the case of *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Application No. 53600/20)', available at: *coe.int*, 8 October 2024.

52 'Communication from Switzerland concerning the case of *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Application No. 53600/20)', available at: *coe.int*, 8 October 2024, Section 3 and 5.2.5.

53 Art. 2 United National Framework Convention on Climate Change (UNFCCC), signed and ratified by Switzerland in 2016 and 2017, respectively.

54 *KlimaSeniorinnen Schweiz et al. v Switzerland*, par. 325.

55 *Vragen van het lid Kröger (GroenLinks-PvdA) aan de Minister van Klimaat*

cal data.<sup>45</sup> In *KlimaSeniorinnen*, the ECtHR took its role seriously to set legal framework conditions that reflect long-term interests of current and future generations and, in the face of an 'existential threat',<sup>46</sup> ultimately even a polity's fundamental commitment to act in a way that ensures its survival. It did so based on scientific facts that it drew from the IPCC and the submissions of the parties, demanding quantification and justification in light of these facts. It hence directly contributed to the two important trust-building factors identified by the OECD Trust Survey.

In addition, the Court, while taking its role to set (minimum) framework conditions for democratic decision making, left the choice of the precise methods, *i.e.*, interpretation of fairness requirements under international law, deployed to quantify a domestic fair share carbon budget and choice of means to achieve the necessary emission reductions to the domestic democratic process of the defendant state. Its ruling does not prescribe how precisely the quantification has to take into account these fairness principles. It demands justification in light of the political consensus that global warming must stay below 1.5 °C and climate science establishing a corresponding global carbon budget. In this process, the specific circumstances of the individual Contracting Party, developing political and legal commitments, as well as climate impacts, would reasonably have to be assessed and considered. In other words, *KlimaSeniorinnen* is a judicial assignment of a regional court to the domestic institutions, which include, as the court emphasizes on several occasions, the legislature, the executive and *the domestic judiciary*.<sup>47</sup> The Strasbourg Court does not set a floor in the form of a minimum substantive emission reduction obligation either.<sup>48</sup>

Throughout the judgment the ECtHR highlights the relevance of the domestic democratic process and the dysfunctions of the democratic process in climate policy-making, notably its inability to give adequate consideration to long-term interests. Protecting the domestic democratic process can be traced as a core motivating reason for the Court's choices, including establishing the duty to justify a national fair share carbon budget, the reduced margin of appreciation for the reduction objectives but not means, the emphasis on the representational disadvantage of future interests and generations, the expanded standing for associations, as well as the responsibility for 'embedded emissions'

in combination with a rejection to broaden the opportunities of foreigners to bring complaints.

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Strategic climate litigation is a legitimate and rule-conform means to put pressure on democracies to protect human rights, live up to their (international) legal commitments and demand justification if they do not do so. However, the question remains how governments and parliaments react to and engage with the court rulings in climate litigation. Climate litigation has its place in the institutional interaction. It also has the potential to incite institutional conflict and polarize when lawmakers, who run up against the boundaries of what is lawful and legitimate conduct in light of growing human rights violations from climate impacts, do not take responsibility for the need to address the climate crisis but try to win over the electorate by scapegoating the judiciary for demanding justification for these rights violations in light of the scientific and political consensus that global warming above 1.5 °C will lead to significantly more human rights violations and the related need to stay within the global carbon budget that corresponds to 1.5 °C.

Because of 'the complexity and the nature of the issues involved' the ECtHR saw itself, in line with its overall deference towards the domestic political process, 'unable to be detailed or prescriptive as regards any measures to be implemented in order to effectively comply with the present judgment'.<sup>49</sup> It considered that Switzerland, 'with the assistance of' and under the supervision of the Committee of Ministers, is better placed than the Court to assess the specific measures to be taken.<sup>50</sup> In this process, Switzerland has submitted its formal position.<sup>51</sup> Centrally, it rejected *KlimaSeniorinnen* in general and the budgetary approach in particular as judicial overreach.<sup>52</sup> The wording and generality of Switzerland's rejection of *KlimaSeniorinnen*

is highly problematic. It prioritizes majoritarian decision-making over the rule of law, trust in public institutions, international credibility, and aims to undermine the legitimacy of the ECtHR. It does not offer any justification of Swiss climate mitigation policy in relation to what is globally necessary, but instead challenges the institutional structure that publicly holds it to its international commitments to do its fair share ‘to prevent dangerous anthropogenic interference with the climate system’.<sup>53</sup>

One may go as far as pointing out the shocking neocolonial undertones of an argument that no established methodology for the distribution of the remaining global carbon budget exists and that, therefore, Switzerland cannot be stopped by a regional court to allocate to itself twice the amount that would correspond to the share of its population as part of the world population.<sup>54</sup> This simply cannot be justified in light of any conception of fairness that Switzerland committed under the UNFCCC and the Paris Agreement. However, Switzerland is not alone with this position. The Dutch government’s response of 23 September 2024 to parliamentary questions about *KlimaSeniorinnen* for example equally reflects that the Dutch government reads the ruling in an unduly limited way to reduce its impact in the Dutch political debate.<sup>55</sup>

*KlimaSeniorinnen* follows several landmark decisions of national courts, confirming that the climate crisis is a human rights issue and that courts have the mandate to demand justification and action from the political institutions. *KlimaSeniorinnen* will strengthen this interpretation

*KlimaSeniorinnen* is not an isolated instance of climate litigation. The ruling follows several landmark decisions of national courts, confirming that the climate crisis is a human rights issue and that courts have the mandate to demand justification and action from the political institutions.<sup>56</sup> *KlimaSeniorinnen* will strengthen this interpretation. The conversation on the appropriate role of law and the judiciary when states (and companies) do not adopt adequate climate mitigation targets and measures will continue, between national courts and the ECtHR, but also in domestic and international political exchanges, and more broadly in the public sphere.<sup>57</sup>

en Groene Groei over het vonnis van het EHRM over de *KlimaSeniorinnen*-zaak (ingezonden 16 juli 2024), met Antwoorden van Minister Hermans (Klimaat en Groene Groei) (ontvangen 20 september 2024) (*Aanhangsel Handelingen II* 2024/25, nr. 32).

<sup>56</sup> C. Eckes, ‘Tackling the Climate Crisis with Counter-majoritarian Instruments: Judges between Political Paralysis, Science, and International Law’, *European Papers* (6) 2022, issue 3.

<sup>57</sup> With appeals pending in national courts against Italy and Belgium; more climate cases pending before the Strasbourg Court (*Uricchio v. Italy and 31 other States* (14615/21) and *De Conto v. Italy and 32 other States* (14620/21); *Müllner v. Austria* (18859/21); *Greenpeace Nordic and Others v. Norway* (34068/21); *The Norwegian Grandparents’ Climate Campaign and Others v. Norway* (19026/21); *Soubeste and 4 other applications v Austria and 11 other States*, 31925/22, 31932/22, 31938/22, 31943/22 and 31947/22 (application filed in January 2022)); *Engels v. Germany* (46906/22)) and cases against companies drawing on *KlimaSeniorinnen Schweiz et al. v Switzerland*, see above all: Rb. Den Haag 26 May 2021, ECLI:NL:RBDHA:2021:5339 and hof Den Haag 12 November 2024, ECLI:NL:GHDHA:2024:2099 (*Vereniging Milieudéfensie v Royal Dutch Shell*).