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Review Paper

LEGAL STANDING AND VICTIM STATUS OF INDIVIDUALS AND ASSOCIATIONS AFTER THE 'KLIMASENIORINNEN' CASE*

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Abstract. *In its judgment Verein KlimaSeniorinnen Schweiz and Others, the ECtHR created a positive obligation for Contracting States under Article 8 ECHR to protect individuals from the serious adverse effects of climate change. In order to prevent universal public access to the ECtHR (actio popularis), which has only a subsidiary role in the protection of fundamental rights, the Court developed new criteria for the legal standing and the victim status of applicants, and came to a peculiar conclusion: while associations are generally granted legal standing and can act before the ECtHR, their individual members are largely denied the victim status and, therefore, cannot bring an application before the Court (Article 34 ECHR). In this article, the author will critically analyse the criteria and findings of the Court on legal standing and victim status in light of the Convention and the settled case law.*

Key words: *Aarhus Convention, access to justice, admissibility, climate change, European Convention on Human Rights, European Court of Human Rights, locus standi, victim status.*

1. INTRODUCTION

In the Grand Chamber judgment *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (2024)[1], the European Court of Human Rights (ECtHR) created a positive obligation to protect the life, health and well-being of individuals from the serious adverse

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[1] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Appl.no.53600/20), paras. 519, 544-545.

effects of climate change.[2] Article 8 (right to respect for private and family life) of the European Convention on Human Rights (ECHR) requires States to adopt measures and intermediate targets for the substantial and progressive reduction of their respective greenhouse gas emission levels, with a view to achieving net emission neutrality by 2050.[3]

A general problem in climate litigation is that applicants (individuals, environmental organisations) are usually not directly affected by the negative consequences of climate change. Unlike individual official acts (for example, decisions, judgments or direct acts of state authorities without any procedural requirements like arrests), which always directly concern applicants, climate change (i.e. inadequate climate legislation) affects the public in general, not just particular individuals (Jelić, Fritz, 2024:151).[4] Direct concern is an admissibility requirement in court proceedings, especially at the level of constitutional jurisdiction. Similarly, Article 34 ECHR, which sets out the right of individual application to the ECtHR, requires applicants to be victims of a violation of the ECHR or its Protocols.

In *KlimaSeniorinnen*, the ECtHR denied the victim status of the four individual applicants (Swiss senior women). However, it affirmed the legal standing of the applicant association *Verein KlimaSeniorinnen*, which acted on behalf of its members (including the four individual applicants), creating the possibility for associations to bring climate cases before the Court. The affirmation of the legal standing of associations is to be welcomed from the perspective of climate protection and has to be seen in light of the ECtHR's understanding of the ECHR as a 'living instrument' that must be interpreted in present-day conditions.[5] However, as *KlimaSeniorinnen* departs from the settled case law of the ECtHR, the judgment requires particular dogmatic foundation and scrutiny. Therefore, the author will analyse the *KlimaSeniorinnen* judgment in relation to Article 34 ECHR and the settled case law of the ECtHR on individual applicants (section 2) and associations (section 3), focusing on the weaknesses of the judgments. The author will touch on remaining uncertainties and will generalise the ECtHR's findings in view of future climate litigation cases. Finally, the author will outline possible implications for national and EU climate litigation (section 4).[6]

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[2] See also: *Carême v. France and Case* (Appl.no.7189/21); *Duarte Agostinho and Others v. Portugal and 32 Others* (Appl.no.39371/20). According to previous case law, Articles 2 and 8 ECHR as well as Article 1 Protocol No. 1 to the ECHR established a positive obligation for Contracting States to prevent serious environmental damage; see, for example: *Öneryıldız v. Turkey* (Appl.no.48939/99), paras. 89 ff and 134 ff; *Cordella v. Italy* (Appl.no.54414/13, 54264/15), paras. 158 ff.

[3] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Appl.no.53600/20), paras. 548-550. For an overview of national court proceedings, see: Hösli, Rehmann, 2024: 2 ff; Žatková, Paľuchová, 2024: 229-232; Hilson, Geden, 2024; Raible, 2024.

[4] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Appl.no.53600/20), para. 459. Also, often there is no national remedy against legislative inactivity, for example, if States refuse to set climate reduction targets, see: Prantl, 2024.

[5] For example, see: *Tyrer v. the United Kingdom* (Appl.no.5856/72), para. 31.

[6] Substantive aspects of *KlimaSeniorinnen* are not discussed here. For a critical view of the fundamental right to climate protection, see Zahar, 2024: 8-9; regarding the extent of a Contracting State's duties, see Raible, 2024; Humphreys, 2024; Hilson, Geden, 2024; Ekardt, 2024; regarding 'intergenerational burden-sharing', see Brucher, De Spiegeleir, 2024; Netto, 2024; regarding democratic legitimation, see Blattner, 2024; regarding embedded emissions, see Vidigal, 2024; regarding extraterritoriality issues, see Theilen, 2024; Schayani, 2024.

2. Victim Status of Individuals

In *KlimaSeniorinnen*, the ECtHR first examined the victim status of individual applicants. To better understand its findings, this section first introduces the settled case law of the ECtHR. Then, it presents the relevant findings of *KlimaSeniorinnen*. This is followed by a critical analysis of the most important aspects of the judgment.

2.1. Settled Case Law

Article 34 ECHR requires an individual applicant to be a *victim* of a violation of a Convention right to bring an application to the Court. The ECHR does not provide for the institution of an *actio popularis*.[7] The 'victim' concept has to be interpreted autonomously of domestic law in light of the ECHR and the case law of the ECtHR. An applicant needs to present a causal link between the alleged violation and the harm allegedly suffered.[8] Otherwise, the application will be declared inadmissible *ratione personae* (Article 35 § 3 ECHR). According to the settled case law of the ECtHR, individual applicants qualify as 'victims' in three ways. First, they can be direct victims**,** if they are 'personally and actually affected'[9] by an alleged violation of the ECHR as a result of an act or an omission of the Contracting State (such as the application of a law contrary to the ECHR; an unjustified arrest in violation of Article 5 ECHR).[10] In environmental cases, for example, persons are direct victims when their health is seriously affected by industrial pollution.[11] Second, applicants may be indirect victims of an ECHR violation, if they represent persons who have died before bringing an application to the ECtHR.[12] Furthermore, applicants may be **potential victims**, first and foremost in cases where they have alien status and their removal, which would expose them to treatment contrary to Article 3 ECHR in the receiving country, has been ordered but not yet enforced.[13] In such cases, applicants must provide reasonable and convincing evidence that a violation of the ECHR rights affecting them personally is likely to occur.[14]

2.2. The ECtHR's Findings in *KlimaSeniorinnen*

Given the particularities of climate litigation, namely that the consequences of climate change are not limited to certain identifiable individuals or groups but affect the public, the ECtHR's Grand Chamber departed from its established criteria for victim status[15] and

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[7] For example, see: *Roman Zakharov v. Russia* (Appl.no.47143/06), para. 164. An *actio popularis* entails a broad possibility for applicants to complain against *any* provision domestic law, domestic practice or public acts without being directly affected.

[8] For example, see: Žatková, Paľuchová, 2024: 233.

[9] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Appl.no.53600/20), para. 465.

[10] For example: *Marckx v. Belgium* (Appl.no.6833/74), para. 27; *Vallianatos and Others v. Greece* (Appl.no.29381/09, 32684/09), para. 47.

[11] For example, see: *López Ostra v. Spain* (Appl.no.16798/90) on nuisance caused by a waste-treatment plant close to housing; *Cordella v. Italy* (Appl.no.54414/13, 54264/15) on lack of reaction to air pollution by a steelworks, harming the surrounding population's health; also see: Mariconda, 2023:274.

[12] For example: *Magnitskiy and Others v. Russia* (Appl.no.32631/09, 53799/12), paras. 278-279.

[13] For example: *Soering v. the United Kingdom* (Appl.no.14038/88).

[14] For example, see: *Vijayanathan and Pusparajah v. France* (Appl.no.17550/90, 17825/91) on expulsion order; *Segi and Gestoras Pro-Amnistía and Others v. 15 States of the European Union* (Appl.no.6422/02); *Senator Lines GmbH v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom* (Appl.no.56672/00).

[15] See section 2.1.

introduced a new approach. According to it, victims must show that they have been personally and directly affected by the alleged failures of the respondent State.[16] Specifically,

- '(a) an applicant must be subject to a high intensity of exposure to the adverse effects of climate change, that is, the level and severity of (the risk of) adverse consequences of governmental action or inaction affecting the applicant must be significant; and
- (b) there must be a pressing need to ensure the applicant's individual protection, owing to the absence or inadequacy of any reasonable measures to reduce harm.'[17]

The threshold for these criteria is particularly high. In the individual assessment, the ECtHR will have due regard to circumstances such as the prevailing local conditions and individual specificities and vulnerabilities. Its assessment will include considerations relating to the nature and scope of the applicant's complaint, the actuality/remoteness and/or probability of the adverse effects of climate change in time, the specific impact on the applicant's life, health or well-being, the magnitude and duration of the harmful effects, the scope of the risk and the nature of the applicant's vulnerability.[18]

Regarding the four senior female applicants, the ECtHR found that elderly people in general belong to some of the most vulnerable groups and are particularly affected by the effects of climate change (for example, increased mortality resulting from heat waves). However, the applicants had failed to show that they were individually exposed to a particularly high and severe degree giving rise to a pressing need to ensure their individual protection. Although the applicants had shown health deficiencies, such as cardiovascular problems or the risk of high blood pressure,[19] the ECtHR did not find that they suffered from a medical condition that could not be alleviated by personal adaptation measures. Consequently, their complaint was rejected *ratione personae* under Article 35 § 3 ECHR.[20]

2.3. Critical Analysis of *KlimaSeniorinnen*

The following subsection will critically reflect on the ECtHR's findings in *KlimaSeniorinnen*.

2.3.1. 'New' Victim-Status

The specific criteria developed for the victim status of individuals in climate litigation are compatible with the wording of Article 34 ECHR. That being said, the provision only introduces the term 'victim' but does not specify it. Furthermore, the criteria are in line with the existing case law of the ECtHR.[21] Thus, there was no need to create a new type of victim in addition to the three forms already established. As shown above (section 2.1), the concept of the potential victim covers cases where applicants are likely (but not yet directly) to be affected by an act or an omission of the State. In order to maintain the continuity of the ECtHR's case law, it would have been possible to develop the concept of

[16] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Appl.no.53600/20), para. 479.
[17] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Appl.no.53600/20), para. 487.
[18] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Appl.no.53600/20), para. 488.
[19] Compare, for example, the particular situation of the third applicant, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Appl.no.53600/20), para.15.
[20] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Appl.no.53600/20), paras. 529, 535.
[21] Similar: Letwin (2024): The Court applied its existing case law.

'potential victim' in light of the specificities of climate litigation.[22] Furthermore, if applicants are already suffering from the consequences of climate change (for example, their private lives are dictated by the occurrence of heat waves), they could be direct victims regarding the State's inability to protect their life and health.

The reason for the novel approach in *KlimaSeniorinnen* originates from the ECtHR's deliberate demarcation from *actio popularis* (Jelić, Fritz, 2024: 151). While the ECtHR's task is not to review the relevant law and practice *in abstracto*,[23] in climate litigation it necessarily has to assess the national climate law in some general way. Therefore, the demarcation from *actio popularis* is not an easy task. In the present case, the Court has decided to introduce a particularly high threshold for individual applicants to bring applications regarding climate protection.[24]

2.3.2. Who Could Be a 'Victim'?

Unfortunately, the criteria for victim status were applied in a rather superficial, 'pragmatic' manner (Brucher, De Spiegeleir, 2024). The ECtHR merely found that the senior age of the applicants as such did not make them 'victims', without addressing their other claims of alleged restrictions on their private lives (see section 2.2). Also, the ECtHR did not assess the two criteria (subject to high intensity of exposure to adverse effects, and the pressing need for individual protection) separately, but carried out an overall examination. Thus, it provided little guidance on the interpretation and meaning of the criteria.[25]

Could a particularly young age qualify a (minor) applicant for victim status? In light of the *KlimaSeniorinnen* judgment, young (minor) applicants will also need to demonstrate that they are particularly affected by climate change and that there is a pressing need to protect them.[26] Nonetheless, youngsters and future generations are likely to bear an increasingly heavy burden of the consequences of current failures and omissions to tackle climate change.[27] The ECtHR pointed out that it will take into account the actuality (or remoteness) and the probability of adverse effects of climate change in its examination. In addition, it raised the issue of 'intergenerational burden-sharing' on several occasions,[28] which it also considered when granting legal standing to associations.[29] On a side note, in its famous 'climate case' *(Klimabeschluss)*, known as *'Neubauer'* or '*Göppel and Others'*,[30] the German Federal Constitutional Court *(Bundesverfassungsgericht)* found that the underage applicants were 'presently, individually and directly affected in their fundamental

[22] Also, see: *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Appl.no.53600/20), Dissenting Opinion of Judge Eicke, para. 41.
[23] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Appl.no.53600/20), para. 460; also, see: *Roman Zakharov v. Russia* (Appl.no.47143/06), para. 164 with further references; *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* (Appl.no.47848/08), para. 101.
[24] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Appl.no.53600/20), para.488.
[25] Compare: *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Appl.no.53600/20), para.533.
[26] In *Duarte Agostinho and Others v. Portugal and 32 Others* (Appl.no.39371/20), six applicants born between 1999 and 2012 complained against 33 States because of the negative impact of climate change in Portugal (heat weaves, fires, etc). The complaint was rejected as inadmissible pursuant to Article 35 § 1 ECHR, because the domestic remedies had not been exhausted.
[27] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Appl.no.53600/20), para. 420.
[28] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Appl.no.53600/20), paras. 410, 420, 484, 489.
[29] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Appl.no.53600/20), paras. 499.
[30] German Federal Constitutional Court *(Bundesverfassungsgericht*), Appl.no.1 BvR 2656/18/1 and Others.

freedoms‘ due to insufficient climate protection regulations in Germany: ‘The described risk of future restrictions on freedom gives rise to fundamental rights being presently affected because this risk is built into the current legislation’.[31] Even if the ruling has to be seen in light of the specific requirements for constitutional complaints in Germany,[32] it has opened up a possible avenue for young applicants to be granted victim status, based on present shortcomings of the respondent State. However, given the strict approach to individual applicants in *KlimaSeniorinnen*, the ECtHR will unlikely qualify (minor) applicants as victims solely because of their age.

If particular locations are vulnerable to climate change (for example, where a person’s home is at risk of flooding due to rising sea levels), the applicant must demonstrate a relevant connection to the location. In the climate case *Carême*,[33] the fact that the applicant used to be the mayor of the village, but at the time of the complaint was neither the owner nor the tenant of a property in the town, and his only connection was his brother who lived there, was not sufficient to grant him victim status.[34]

The pending case of *Müllner v. Austria* (also called ‘*Mex M*’)[35] will be of special importance for the clarification of the victim status. The particularly vulnerable applicant (Mex M.) suffers from temperature-dependent multiple sclerosis and is confined to a wheelchair when temperatures exceed 30 degrees Celsius. Unlike the senior applicants in *KlimaSeniorinnen*, in *Müllner*, there seems to be a ‘direct correlation between the deterioration of his health and rising temperatures’. Thus, the first criterion for victim status (subject to high intensity of exposure to adverse effects of climate change) should be met (Prantl, 2024).

In this context, it will be of interest how the ECtHR will develop the concept of personal adaptation to climate change, which is part of the second test criterion and, if interpreted broadly, could exempt the respondent State from climate change mitigation. In *KlimaSeniorinnen*, the ECtHR did not go into much detail on personal adaptation although the third applicant demonstrated that climate change had already limited her in daily life. She pointed out that she had to stay at home all day during heat waves, keeping the window blinds down and the air conditioning turned on; she also had to measure her blood pressure regularly and seek medical advice.[36] If such restrictions exist for an unjustifiably long period of time or if they lead to relocation, they have a negative impact on the right to establish and develop relationships with other human beings and the outside world, and therefore will interfere with Article 8 ECHR (Prantl, 2024).

2.3.3. Victim Status versus Examination on the Merits?

The high threshold for victim status does not reflect in the level of the examination on the merits. In *KlimaSeniorinnen*, the ECtHR essentially conducted an abstract review of the Swiss climate law, demanding the establishment of and compliance with national carbon budgets and emission reduction targets. In other words, the core of the positive obligation under Article 8 ECHR is the introduction of mitigation measures to reach net emission neutrality by 2050.[37] In

[31] Appl.No.1 BvR 2656/18/1, paras. 110, 129-130.
[32] Appl.No.1 BvR 2656/18/1, para. 110.
[33] *Carême v. France* (Appl.no.7189/21), paras. 80-81.
[34] The case also shows that there cannot be extraterritorial jurisdiction in climate litigation.
[35] *Müllner v. Austria* (Appl.no.18859/21).
[36] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Appl.no.53600/20), para. 15.
[37] *Verein KlimaSeniorinnen Schweiz* (Appl.no.53600/20), para 550; for more detail, see: Raible, 2024.

case of vulnerable persons or locations severely affected by climate change (see section 2.2), does the State have to take further measures to protect the specific applicants as such, similar to the concept of vulnerability in Article 3 ECHR (prohibition of torture), where vulnerable persons (like children) are entitled to special protection?[38] If so, will the State have to take mitigation measures (to address climate change at a general level) or will personal adaption measures be sufficient (e.g. installation/funding of air conditioning, construction of sea barriers)? Or, is the positive obligation always limited to meeting the aforesaid targets? The ECtHR's findings in *KlimaSeniorinnen* do not answer these questions, as the ECtHR did not have to deal with vulnerable applicants yet. Its examination on the merits must rather be seen in light of the allegations on the inadequacy of Swiss law made by the applicant association.

3. Legal Standing of Associations

While the ECtHR's findings in *KlimaSeniorinnen* regarding individual applicants were evolutionary rather than revolutionary, the case broke new ground in respect of the legal standing of associations. Like section 2, this section begins with a review of the settled case law of the ECtHR regarding the legal standing of organisations and groups of individuals. Then, it presents the relevant findings of *KlimaSeniorinnen*. This is followed by a critical analysis of the most important aspects of the judgment.

3.1. Settled Case Law

Pursuant to Article 34 ECHR, non-governmental organisations and groups of individuals must, in principle, also be victims of a violation of the ECHR to file an individual application.[39] However, this is only possible in terms of ECHR rights that are susceptible to being exercised by an association, such as the right to information (as part of Article 10 ECHR)[40] or the right to be recognized as a religious community (Articles 9 and 11 ECHR).[41] Other rights can only be exercised by the individual members of the organisation (i.e. natural persons), such as the rights under Article 2 (right to life), Article 3 (prohibition of torture), and Article 5 (right to liberty and security) of the ECHR. In these cases, however, applicant organisations can act as representatives of their members or employees in the same way as lawyers represent their clients.[42] To be compliant with Article 34 ECHR, the members of the representing organisation must qualify as 'victims', while the organisation itself must only have legal standing (*locus standi*).[43]

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[38] For example: *X and Others v. Bulgaria* (Appl.no.22457/16), para.177; *R.B. v. Estonia* (Appl.no.22597/16), para. 78.

[39] Legal entities (e.g. companies, foundations) also have legal standing before the ECtHR according to the criteria set out below, provided that they are 'non-governmental'; for example, see: *Österreichischer Rundfunk v. Austria* (Appl.no.35841/02), paras. 46-54.

[40] For example: *Magyar Helsinki Bizottság v. Hungary* (Appl.no.18030/11); recently, *Sieć Obywatelska Watchdog Polska v. Poland* (Appl.no.10103/20), where the Constitutional Court's refusal to grant access to judges' diaries of meetings breached the NGO's right to receive and impart information.

[41] *Föderation der Aleviten Gemeinden in Österreich v. Austria* (Appl.no.64220/19) involved refusal to register the applicant association as a religious community; in general, for example, see Keller, Pershing, 2022: 37.

[42] For example, see: *Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği v. Turkey* (Appl.no.37857/14), para. 41; also see: *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Appl.no.53600/20), Dissenting Opinion of Judge Eicke, para. 32.

[43] For a similar stance, see: Keller, Pershing, 2022: 38.

3.2. The ECtHR's Findings in *KlimaSeniorinnen*

In the *KlimaSeniorinnen* judgment, the ECtHR initially recognised that the applicant association could not rely on health considerations or nuisances and problems associated with climate change because these could only be experienced by natural persons.[44] However, taking into account the specific considerations relating to climate change, the importance of associations in domestic climate change litigation,[45] the need to avoid *actio popularis*,[46] and the Aarhus Convention[47] (see section 3.3.4), the ECtHR found that associations have legal standing in climate change cases under certain conditions. In particular, the applicant association must be:

'(a) lawfully established in the jurisdiction concerned or have standing to act there;

(b) able to demonstrate that it pursues a dedicated purpose in accordance with its statutory objectives in the defence of the human rights of its members or other affected individuals within the jurisdiction concerned, whether limited to or including collective action for the protection of those rights against the threats arising from climate change; and

(c) able to demonstrate that it can be regarded as genuinely qualified and representative to act on behalf of members or other affected individuals within the jurisdiction who are subject to specific threats or adverse effects of climate change on their lives, health or well-being as protected under the Convention.'[48]

In this assessment, the ECtHR will take into account additional factors, such as the purpose for which the association was founded, its non-profit character, the nature and scope of its activities, its membership and representativeness, its principles and transparency of governance, and whether granting legal standing is in the interest of the proper administration of justice.[49] The individual members of the association are not required to demonstrate that they have met the victim-status requirements.[50]

As regards the applicant association *Verein KlimaSeniorinnen*, the ECtHR found that it had legal standing to file an application under Article 6 and 8 ECHR. It was a non-profit association established under Swiss law for the promotion and implementation of effective climate protection. Having more than 2,000 female members in Switzerland averaging the age of 73, it carried out various activities not only in the interest of its members but also of the general public and future generations. Therefore, *Verein KlimaSeniorinnen* was found to have a solid membership base and to be representative. The ECtHR also considered that the individual applicants did not have access to a court in Switzerland in the present case.[51]

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[44] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Appl.no.53600/20), para. 496.
[45] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Appl.no.53600/20), paras. 497-499.
[46] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Appl.no.53600/20), para. 500.
[47] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Appl.no.53600/20), para. 501.
[48] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Appl.no.53600/20), para. 502.
[49] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Appl.no.53600/20), para. 502.
[50] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Appl.no.53600/20), para. 502.
[51] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Appl.no.53600/20), paras. 519-526; for more on the Swiss court proceedings, see: Hösli, Rehmann, 2024: 2.

3.3. Critical Analysis of *KlimaSeniorinnen*

Associations have a significant advantage in comparison to individual applicants.[52] They can bring a climate case to the ECtHR because they have legal standing, while the persons they represent (in most cases) cannot because they lack victim status.[53]

3.3.1. Broad Concept of Association

The term 'association' is not mentioned in Article 34 ECHR, but the norm provides guidance on the organisation of an 'association', limiting it to either a non-governmental organisation or a group of individual persons (thus excluding State organisations). In light of Article 11 ECHR (freedom of assembly and association), the term 'association' implies a voluntary grouping for a common purpose.[54] It has an autonomous meaning and must be interpreted independent from national law. A national classification has only a relative value and is only a starting point for the interpretation.[55]

Associations in climate litigation are, therefore, much more diverse than, for example, environmental organisations in national law. For example, political parties and trade unions could also be associations and have legal standing in climate cases if they meet the further criteria introduced by the ECtHR.

3.3.2. Criteria Developed by the ECtHR in KlimaSeniorinnen

As noted above (section 3.2), after the *KlimaSeniorinnen* judgment, an applicant association must be 'lawfully established in the jurisdiction concerned or have standing to act there'. This departs from the autonomous approach of the ECHR. Under Article 34 ECHR, legal status is generally assessed autonomously, independent from the national *locus standi*[56], as is the term 'association' under Article 11 ECHR.[57] However, the ECtHR's approach could limit the ability of associations to bring climate law cases to the Court, as the State has the discretion to restrict the recognition and scope of environmental associations.[58] For example, pursuant to Section 19 §§ 6 and 7 of the Austrian Federal Act on Environmental Impact Assessment ('*Umweltverträglichkeitsprüfungsgesetz*'),[59] environmental organisations (which could also be considered associations in climate litigation) must have existed for at least three years, pursue the objective of environmental protection, and have at least 100 members before they can apply for recognition under national law. While excessive national restrictions are contrary to Article 11 ECHR, would an organisation that does not

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[52] Letwin, 2024 noted that the Court created a 'loophole' by allowing associations to bypass all ordinary rules on victim-status; also see: Schayani, 2024; Hösli, Rehmann, 2024: 6; Keller, Pershing, 2022: 41.
[53] See: Letwin, 2024.
[54] *Young, James & Webster v. the United Kingdom* (Appl.no.7601/76, 7806/77, 7806/77), para. 167.
[55] *Chassagnou and Others v. France* (Appl.no.25088/94, 28331/95, 28443/95), para. 100; *Schneider v. Luxembourg* (Appl.no.2113/04), para. 70.
[56] *Vallianatos and Others v. Greece* (Appl.no.29381/09, 32684/09), para. 47; *Gorraiz Lizarraga and Others v. Spain* (Appl.no.62543/00), para. 35.
[57] See section 3.3.1; *Chassagnou and Others v. France* (Appl.25088/94, 28331/95, 28443/95), para.100; *Schneider v. Luxembourg* (Appl.no.2113/04), para. 70.
[58] Schayani (2024) offered another interesting argument: 'If associations are granted standing because of the special nature of climate change as a common global and intergenerational concern, there is no reason to base that standing on the representation of individuals within the jurisdiction concerned.'
[59] Austrian Federal Act on Environmental Impact Assessment (*Umweltverträglichkeitsprüfungsgesetz),* Austrian Federal Law Gazette 697/1993, amended version I 26/2023.

meet the national criteria still have legal standing in a climate case under Articles 6 and 8 ECHR?

The ECtHR provided guidance on the interpretation of the criteria for legal standing by listing certain factual aspects relating to associations which it would take into account in its assessment (see section 3.2). In addition to factors such as the number of association members, it will also consider the 'interests of proper administration of justice'. This gives the ECtHR a wide discretion to grant (or deny) legal standing to applicant associations. While it could be argued that, in light of the respect for human rights (Article 35 § 3(b) ECHR), Article 37 § 1 ECHR requires a generous recognition of applicant associations, the ECtHR's resistance to *actio popularis* in climate cases suggests otherwise. In any case, such factors must be used with caution in order not to undermine the legitimacy and recognition of the ECtHR's case law.

3.3.3. Conflict with Wording of the ECHR and Settled Case Law of the ECtHR

The criteria developed by the ECtHR have to be seen in the context of climate change. The ECHR as a whole (also Article 34 ECHR) must be interpreted in an evolutive manner; excessive formalism would make the protection of the rights guaranteed by the ECHR ineffective and illusory.[60] However, as discussed above (section 3.1), the wording and purpose of Article 34 ECHR require either the association or its members to have victim status when claiming a violation of Articles 6 and 8 ECHR for the application to be admissible *ratione personae*. In the present case, however, neither had victim status.[61]

Contrary to the ECtHR's findings, there is no basis in its existing case law for associations to have standing if their members are not victims under Article 34 ECHR.[62] Moreover, there is no consensus in the Contracting States' legal systems on the *locus standi* of climate associations, which could serve as basis for an evolutive interpretation of the ECHR.[63]

Other arguments forwarded in *KlimaSeniorinnen*, such as the particular importance of associations in (national) climate litigation[64] or the need for significant financial and logistical resources,[65] are hardly supported by the ECHR, but could serve as an argument for admitting applications on the grounds of 'respect for human rights' (Article 35 §3(b) ECHR). This is the only way to avoid an interpretation of the ECHR *contra legem.*

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[60] See: *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Appl.no.53600/20), paras. 434, 482 with further references.

[61] On a side note, if an association has standing in national proceedings, it has victim status before the ECtHR regarding a violation of Article 6 ECHR; see: *Gorraiz Lizarraga and Others v. Spain* (Appl.no.62543/00), para. 36. Thus, it could be argued that associations are direct victims under Article 34 in combination with Article 6 ECHR if *locus standi* is unduly denied in national law.

[62] Compare: *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland Case* (Appl.no.53600/20), para.477, 498; *Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği v. Turkey* (Appl.no.37857/14), para. 40 (opposition to the construction of a dam and a hydroelectric power plant); *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* (Appl.no.47848/08), para. 106 (action taken by NGO on behalf of a deceased person with intellectual disability); for critical remarks, also see: Letwin, 2024.

[63] The ECtHR avoids this when stating that, in most Contracting States, there seems to be at least a 'theoretical possibility' of bringing climate lawsuits.

[64] See section 3.2; for critical remarks, see: *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Appl.no.53600/20), Dissenting Opinion of Judge Eicke, paras. 37-42; also see Zahar, 2024: 24-26.

[65] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Appl.no.53600/20), para. 497; also, see Jelić, Fritz, 2024: 151. Keller and Pershing (2022: 40) offered another notable argument: 'Individual citizens are more likely to bring cases focused on adaptation and are less likely to focus on mitigation, while the inverse appears to be true for organisations'.

3.3.4. References to the Aarhus Convention and Case Law of the CJEU

In *KlimaSeniorinnen*, the ECtHR repeatedly referred to the Aarhus Convention,[66] which grants the public (concerned) and environmental organisations access to environmental information, public participation in environmental protection and access to justice in environmental matters. In particular, the criteria to be met by applicant organisations are strongly influenced by the Aarhus Convention, specifically the first criterion (legal recognition in the respondent State) and the second criterion (specific purpose). According to Article 2 § 5 Aarhus Convention, '*non-governmental organizations promoting environmental protection and meeting any requirements under national law*' are members of the 'public concerned'.

While it is not uncommon to interpret the ECHR in light of international law,[67] there are several factors that speak against considering the Aarhus Convention in the context of Article 34 ECHR in climate litigation. First, the Aarhus Convention has not been ratified by all Contracting States; thus, it is not intended to be applicable between all Contracting States in the sense of Article 31 § 3(c) Vienna Convention.[68] Second, the Aarhus Convention only grants procedural rights for protecting the environment. Although its broad scope presumably makes it applicable to climate change law as well (Nóbrega, 2020: 92-93),[69] this has not been confirmed by the judicature yet. In general, climate protection has a much broader, global scope and requires other measures than environmental protection does.[70] Third, the purpose of the Aarhus Convention is different from that of the ECHR. It is neither an instrument of human rights law nor does it guarantee effectuation of human rights. It grants procedural rights of access to information, public participation, and access to justice in environmental matters to protect the environment. Despite the terminology of Article 1 Aarhus Convention,[71] it tends to focus on the protection of the environment as such and does not take a human-centred approach. For example, contrary to many national legal orders,[72] instead of requiring individuals to prove standing or show a violation of an individual (subjective) right, Article 9 § 3 Aarhus Convention grants wide-ranging access to court (or administrative procedures) for members of the public to challenge acts and

[66] UN ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 2161 UNTS 447 (1999), 25 June 1998, Aarhus, Denmark, (the Aarhus Convention); see: *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Appl.no.53600/20), paras. 491, 501. The ECtHR continuously uses the Aarhus Convention to interpret the ECHR in environmental cases; for example, see: *Taşkın and Others v. Turkey* (Appl.no.46117/99), para. 99; *Tătar v. Romania* (Appl.no.67021/01), para. 43; for more detail, see: Peters, 2018: 10-11.

[67] Article 31 §3(c) of the Vienna Convention on the Law of Treaties (23 May 1969), UN Treaty Series, Vol.1155, p.331.

[68] For example: *Rantsev v. Cyprus and Russia* (Appl.no.25965/04), para. 282.

[69] Other authors affirm the applicability of the Aarhus Convention in climate cases without further justification (for example, Weber, 2023: 67).

[70] In *KlimaSeniorinnen*, the ECtHR merely stated that it would bear in mind the difference between climate change and environmental issues, which are addressed by the Aarhus Convention, see *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Appl.no.53600/20), para. 501.

[71] Article 1 Aarhus Convention reads: '*In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being […]*'.

[72] For example, in Austrian and German administrative law, individuals are only granted legal standing insofar as they have subjective rights. In Austrian building-permit procedure, a neighbour can only object to subjective rights that have been conferred to him by law (e.g. compliance with building-distance regulations). Thus, he does not have legal standing regarding adverse effects on the environment by the building.

omissions by private persons and public authorities which contravene provisions of national environmental law.[73]

Ultimately, the ECtHR's reference to the case law of the Court of Justice of the European Union (CJEU) cannot legitimise the application of the Aarhus Convention.[74] The CJEU regularly grants access to justice to environmental organisations under Article 47 CFR (Charter of Fundamental Rights of the EU)[75], which is based on Articles 13 and 6 § 1 ECHR[76] in conjunction with Article 9 § 3 Aarhus Convention.[77] However, access to justice before national courts is only granted in respect of provisions of EU environmental secondary law (for example, to check compliance of groundwater with nitrate values laid down in Directive 91/676/EEC).[78] Neither EU law nor the CJEU provide a general enforceable right to protect environmental or climate matters. Environmental protection envisaged in Article 37 CFR is not a (fundamental) right but a principle of the Charter; therefore, it is not directly enforceable (Article 52 § 5 CFR).

4. Summary and Outlook

In *KlimaSeniorinnen*, the ECtHR denied the victim status of the four individual senior applicants and established strict criteria for natural persons who submit an application to the Court. This complies with Article 34 ECHR and is in line with the settled case law, albeit the ECtHR developed a new 'victim' category specific to climate law cases (section 2).

On the contrary, the Court enabled associations to bring climate cases by granting them legal standing under certain (seemingly easily achievable) criteria (section 3.2). It is questionable whether this approach will prevent an *actio popularis* in climate litigation.[79] Moreover, granting legal standing to associations while denying the victim status of their members is contrary to Article 34 ECHR. The ECtHR did not address this issue. Instead, it applied the Aarhus Convention to establish criteria for the legal standing of associations. However, the inapplicability of the Aarhus Convention in some Contracting States, its scope and its purpose speak against its application in the context of Article 8 ECHR (section 3.3.4).

Furthermore, it remains to be seen how the Contracting States will react to *KlimaSeniorinnen.* In order to guarantee effective protection of the ECHR rights (Article 1 ECHR), the Contracting States must also grant legal standing to associations in national proceedings,[80] irrespective of the fact that according to *KlimaSeniorinnen* they are able to introduce additional criteria and thereby restrict the recognition of environmental associations (section 3.3.2). If States fail to comply, they will violate Article 6 § 1 and Article 13 ECHR.

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[73] However, it does not require the introduction of an *actio popularis;* for more, see the Aarhus Convention Implementation Guide (UN, 2014: 198). For more on the relationship between the Aarhus Convention and the ECHR, see: Peters, 2018.

[74] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Appl.no.53600/20), paras. 212-214, 492.

[75] Charter of Fundamental Rights of the European Union (CFR), *OJ* C 326, 26 October, 2012, pp. 391-407.

[76] Explanations relating to the Charter of Fundamental Rights 2007/C 303/02; Title VI: Justice, Explanation on Article 47 CFR: Right to an effective remedy and to a fair trial. *Official Journal of the EU,* C303/17.

[77] CJEU cases: Case C-240/09 *Lesoochranárske zoskupenie VLK*; Case C-664/14 *Protect Natur-, Arten- und Landschaftschutz Umweltorganisation*.

[78] Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources, OJ L 375, pp.1-8; see: Case C-197/18 *Wasserleitungsverband Nördliches Burgenland and Others.*

[79] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Appl.no.53600/20), para. 500.

[80] *Verein KlimaSeniorinnen Schweiz* (Appl.no.53600/20), Dissenting Opinion of Judge Eicke, para. 50.

In addition, if there are no remedies available under national law that are accessible, capable of providing redress for complaints and have a reasonable chance of success,[81] pursuant to Article 35 § 1 ECHR (exhaustion rule) associations could apply directly to the ECtHR without having to exhaust domestic remedies (Keller, Pershing, 2022: 35-36).[82]

Finally, the procedural implications of *KlimaSeniorinnen* discussed here will also influence EU law and institutions, even though the EU has not acceded to the ECHR.[83] Article 7 CFR corresponds to Article 8 ECHR,[84] and must therefore include a fundamental right to be protected from the adverse effects of climate change by EU institutions and Member States implementing Union law (Article 52 § 3 CFR).[85] Enforcement by (national) courts must be guaranteed pursuant to Article 47 CFR. At the level of the CJEU, fundamental rights in the context of climate change will inevitably play a role in preliminary ruling proceedings (Article 267 TFEU), which interpret EU law in a binding way for all Member States. Regarding actions of annulment of EU acts (in particular, directives or regulations) that violate the right to climate protection, however, the CJEU follows a very strict approach to legal standing, originating from the 'Plaumann' formula.[86] It has not yet recognised the legal standing of individuals or NGOs in climate litigation because they have not been able to demonstrate a particular direct concern caused by climate change.[87]

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[81] For example: *Sejdovic v. Italy* (Appl. 56581/00), para. 46; *Paksas v. Lithuania* (Appl.no.34932/04), para. 75.

[82] In *Neubauer and Others v Germany* (BvR 2656/18/1), para. 136, the German *Bundesverfassungsgericht* declined the legal standing of environmental organisations. Similarly, the Austrian *Verfassungsgerichtshof* does not grant legal standing of associations in individual application proceedings due to the lack of individual direct concern; for example: Case V 134/2015, Austrian Constitutional Court decision of 14 December 2016; Case V 87/2014, Austrian Constitutional Court decision of 14 December 2016. Also, there is no remedy to combat legislative inactivity (see: Prantl, 2024).

[83] See: Case Appl. 2/13 to the Court of Justice EU, CJEU Opinion 2/13 of 18 December 2014; for summary, see: Douglas-Scott, 2014

[84] Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), Explanation on Article 7 CFR.

[85] Regarding the field of application, see Article 51 § 1 CFR.

[86] Case C-25/62 *Plaumann v. Commission of the EEC*, CJEU judgment of 15 July 1963, Luxembourg.

[87] Case C-565/19P, *Carvalho and Others v. Parliament and Council*, paras. 39-44; for more, see: Nakanishi, 2024: 2, 4; Eeckhout, 2024, who also discusses the option for an action for failure to act (Article 265 TFEU).

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AKTIVNA PROCESNA LEGITIMACIJA I STATUS ŽRTVE PODNOSILACA PREDSTAVKI NAKON PRESUDE EVROPSKOG SUDA ZA LJUDSKA PRAVA U SLUČAJU „KLIMASENIORINNEN”

U presudi Verein KlimaSeniorinnen Schweiz i ostali protiv Švajcarske (Apl.53600/20), Evropski sud za ljudka prava (ES) je na osnovu člana 8 Evropske konvencije o ljudskim pravima (EK) ustanovio pozitivnu obavezu država ugovornica da zaštite pojedince od ozbiljnih štetnih efekata klimatskih promena. Da bi onemogućio univerzalni pristup Sudu, t.j. pokretanje actio popularis, koja ima samo supsidijarnu ulogu u zaštiti osnovnih ljudskih prava, Sud je razradio nove kriterijume koji se odnose na aktivnu procesnu legitimaciju (locus standi) i status žrtve podnosilaca predstavki (pojedinaca i udruženja), i došao do neobičnog zaključka. Udruženjima se generalno priznaje aktivna procesna legitimacija tako da mogu podnositi predstavke i postupati pred Sudom u predmetima koji se odnose na klimatske promene, dok individualni članovi udruženja (pojedinci) ne dobijaju status žrtve ukoliko nisu lično pogođeni određenom merom pa stoga ne mogu uložiti zahtev Sudu (član 34. EK). U radu autor kritički analizira kriterijume i nalaze Suda koji se odnose na aktivnu procesnu legitimaciju (locus standi) i status žrtve podnosilaca predstavki u svetlu relevantnih odredbi Evropske konvencije i ustaljene sudske prakse.

Ključne reči: *Arhuška konvencija, pristup pravdi, osnovanost/prihvaljivost zahteva, Evropska konvencija o ljudskim pravima, Evropski sud za ljudska prava, aktivna procesna legitimacija (locus standi), status žrtve.*