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European Court of Human Rights and Climate Change

Abstract

In 2024, the European Court of Human Rights decided three cases related to climate change. It explained the issues regarding the admissibility of complaints in this type of cases. The case of Verein Klimaseniorinnen Schweiz and Others v. Switzerland is of particular importance, as the ECtHR established the link between the rights protected in the Convention and climate change, stating that Article 8, protecting the right to privacy and family life, should be seen as covering the state's obligation to protect against these changes. It also defined the nature and scope of the state's positive obligations connected with climate change under the Convention. Therefore, the findings of the ECtHR presented in these cases will be of significant importance in similar cases considered in the Strasbourg docket in the future. In the case of Verein Klimaseniorinnen Schweiz and Others v. Switzerland, the ECtHR also established the conditions that must be met in order for an applicant alleging a violation of his Convention rights due to climate change to be considered a victim within the meaning of Art. 34 of the Convention, and these conditions are defined separately for natural persons and for associations that are legal persons. The judgment in the case of Verein Klimaseniorinnen Schweiz and others v. Switzerland can be considered a landmark ruling in terms of threats to human rights resulting from climate change. Having the status of a real precedent, this judgment will certainly encourage further complaints about the negative effects of climate change, which may result in mobilizing national authorities to review national climate policies. Despite the controversy that accompanies it, the ruling in the Verein Klimaseniorinnen Schweiz case may play an important role in mobilizing the authorities of the 46 states parties to the Convention to undertake more intensive efforts to counteract the enormous threats associated with the phenomenon of climate change.

KEY WORDS: climate change, European Court of Human Rights, right to privacy, positive obligations

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1 Introduction

The European Court of Human Rights (ECtHR) is an international court established in 1959 on the basis of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), undoubtedly the most important convention in the field of individual rights adopted within the framework of the Council of Europe. The Court is now considered as one of the most important institutions in the European legal order. At the same time, it is a unique institution, not only on a European scale, but also internationally.

One of the characteristics of this international judicial body is certainly the progressive nature of its jurisprudence. Since its establishment in 1959, the Court has already issued more than 30,000 judgments, which certainly makes it the most active international court in terms of jurisprudence. At the same time, the Court has been accused of the so-called judicial activism. In the case of the ECtHR, this term refers not so much to the sheer number of judgments issued, but primarily to judgments that expand the scope of rights protected by the European Convention on Human Rights. The Court's activism since the second half of the 1970s, coupled with the wider introduction of pro-human rights interpretation tools, has had a significant impact on the development of human rights protection in Europe over the following decades.

At that time, an approach called *the living instrument* was emerging in Strasbourg jurisprudence, and thus the assumption that the Convention is a living instrument that should be interpreted dynamically[1]. The approach based on the doctrine *of the living instrument* was combined with the recognition that the Convention protects rights that are practical and effective, rather than theoretical and illusory, thus applying the principle of effectiveness, which began to play a key role in the Strasbourg jurisprudence supporting the interpretation of the ECHR in favor of human rights. This principle was of fundamental importance especially in the development of the concept of positive obligations of the states-parties to the Convention[2].

1 Pieter van Dijk, Godefridus J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (The Hague-Boston-London: Kluwer Law International, 1998), 74.

2 Positive duties are not provided *expressis verbis* in the text of the Convention. As C. Mik, their inclusion in the *corpus iuris* of the ECHR, as well as the definition of the content, scope and standard of control of implementation, is to the credit of the EPTC; see Cezary Mik, „Teoria obowiązków pozytywnych państw-stron

Indeed, the Strasbourg jurisprudence has recognized that the obligations of states under the Convention are not only to refrain from interfering with protected rights, but also, in certain situations, to take positive measures to ensure respect for those rights[3]. The positive obligations of States have also been extended to the area of threats to the rights protected by the Convention from environmental hazards.

While the ECHR does not guarantee any right to a healthy environment as such, and the Strasbourg Court has repeatedly stressed that "no article of the Convention is specifically designed to provide general protection of the environment as such; for these needs, other international instruments and national laws are more appropriate"[4]. Nonetheless, since at least the mid-1990s, the Court has begun to recognize in its jurisprudence that environmental threats affect the protection of rights protected under the ECHR. In its judgment of December 9, 1994 in the case of López Ostra v. Spain, the ECtHR stated that „serious environmental pollution may affect the well-being of individuals and prevent them from using their homes in a way that adversely affects their private and family life, but without seriously endangering their health"[5]. In particular, it has been recognized that the scope of protection under Article 8 of the Convention includes adverse effects on human health, well-being and quality of life resulting from various sources of environmental damage and risk of harm[6]. The European Court of Human Rights has so far ruled in some 300 environment-related cases linking environmental risks including pollution, natural or man-made disasters or the issue of access to environmental information to violations of rights such as the right to life, freedom of expression, the right

traktatów w dziedzinie praw człowieka na przykładzie Europejskiej Konwencji Praw Człowieka", [w:] *Księga Jubileuszowa Prof. dra hab. Tadeusza Jasudowicza*, red. Jan Białocerkiewicz, Michał Balcerzak, Anna Czeczko-Durlak (Toruń: Towarzystwo Naukowe Organizacji i Kierownictwa „Dom Organizatora", 2004), 260.

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4 ECtHR judgment in Kyrtatos v. Greece, May 23, 2003, Application no. 41666/98, para. 52.

5 ECtHR judgment in López Ostra v. Spain, December 9, 1994, Application no. 16798/90, para. 51.

6 ECtHR Grand Chamber judgment in Verein Klimaseniorinnen Schweiz and others v. Switzerland, April 9, 2024, Application no. 53600/20, para. 544.

to privacy and" (family life) to a wide range of issues[7]. In this situation, it should come as no surprise that for some time there has been a growing trend for individuals and organizations to use the Strasbourg system to address environmental issues.

The specific nature of the problems arising from climate change in the context of the issues raised under the Convention has not yet been addressed in the Court's jurisprudence. Only in 2024. The ECtHR decided three climate change cases, Carême v. France[8], Duarte Agostinho and others v. Portugal and 32 other countries[9] and Verein Klimaseniorinnen Schweiz and others v. Switzerland[10] clarifying issues concerning the admissibility of complaints in such cases. The latter case is of particular importance. This is because in it the ECtHR established the connection between the rights protected under the Convention and climate change, stating that Article 8, which protects the right to privacy and family life, should be seen as encompassing the state's obligation to protect against these changes. It also defined the nature and scope of the state's positive obligations under the Convention in climate change cases. Therefore, the ECtHR's findings in these cases will be important in similar cases pending on the Strasbourg docket in the future. Hence, a closer examination of these rulings is particularly relevant.

Within a broader context, these cases are part of what is known as *climate change litigation*, i.e., endeavors to take various types of action, especially through the courts, with the goal, in particular, of forcing public authorities to take action to combat climate change.

Given the comprehensiveness of the issues related to the application of the ECHR in connection with the threats posed by climate change to conventionally protected rights, this study does not pretend to be a comprehensive exhaustion of the issues involved. The present study is more focused on a thorough examination of the issue of admissibility of complaints in climate cases in terms of recognition as victims of violations within the meaning of Article 34 of the Convention. Secondly, it aims to clarify the link between human rights, particularly Article 8 of the ECHR,

7 Protecting the environment using human rights law, Council of Europe. [accessed: 2.12.2024].

8 Decision of the Grand Chamber of the ECtHR in Carême v. France, April 9, 2024, Application No. 7189/21.

9 Decision of the Grand Chamber of the ECtHR in the case of Duarte Agostinho and others v. Portugal and 32 other states, April 9, 2024, Application No. 39371/20.

10 Judgment in the case of Verein Klimaseniorinnen Schweiz.

and the dangers posed by climate change. This, in turn, gives rise to the issue of the state's positive obligation to combat climate change in the context of the Convention's subsidiarity, as determined by an analysis of the Court's Grand Chamber judgment in Verein Klimaseniorinnen Schweiz and Others v. Switzerland. The important question that arises in connection with the judgment in the Swiss case in particular is whether the ECtHR did not exceed the principle of subsidiarity.

2 „Victim" status in climate cases

A major difficulty in bringing climate change complaints before the Strasbourg Court is meeting the conditions for admissibility. In particular, this concerns proving a violation of one of the rights protected by the Convention and meeting the condition of being a victim of such a violation within the meaning of the provision of Article 34 of the ECHR. In the case of Verein Klimaseniorinnen Schweiz and Others v. Switzerland, the ECtHR outlined the criteria for determining whether a complainant who alleges a violation of the Convention-protected rights due to climate change can be considered a victim under Article 34 of the Convention. These criteria are applied separately for individuals and for associations that are legal entities.

In its previous case law on environmental cases, the ECtHR has stated that the key element that must be present in determining whether, in the circumstances of a given case, environmental harm has adversely affected one of the rights protected by the Convention is the existence of a harmful effect on a person, and not just a general deterioration of the environment[11]. In the case law to date it has been held that in order to prove victim status in environmental cases it is not sufficient to base the complaint on the allegation of general environmental damage. It is necessary for the complainant to demonstrate that he or she has been affected by environmental damage or its risk. The criteria developed to date include, in particular, the need to demonstrate a minimum level of severity of the harm in question, its duration, and the existence of a sufficient connection to the complainants, including in some cases: geographic proximity

11 ECtHR judgment in di Sarno v. Italy, January 10, 2012, Application No. 30765/08, paras 80-81.

between the complainant and the alleged environmental harm[12]. For example, in environmental pollution cases, the ECtHR held that Article 8 applied in a case in which the complainants lived within one kilometer of a chemical factory and found that, because of the factory's geographical location, its emissions were often directed towards the area where the applicants lived, which had a direct impact on them[13]. In contrast, in Okyay and Others v. Turkey, a case involving the closure of three polluting thermal power plants in Muğla province, southwestern Turkey, the Court ruled that plaintiffs living within 250 kilometers of this source of pollution could claim protection under national law against environmental damage caused by the hazardous activity, even if the risks they were exposed to were not the same as those faced by residents living in the immediate vicinity of the plants[14]. In Pavlov and others v. Russia, the ECtHR found that the level of pollution experienced by the plaintiffs over the course of their daily lives for more than two decades was not insignificant and beyond the environmental risks associated with living in a modern city, and that pollution from industrial enterprises in Lipetsk adversely and sufficiently affected their private lives during the period under consideration[15]. In any case involving the question of whether pollution can be considered to adversely affect a complainant's rights under Article 8 of the Convention, the decision depends on the specific circumstances of the case and the available evidence[16].

In determining victim status under Article 34 of the ECHR in climate cases, the ECtHR identified three possible approaches. First, victim status can be examined as a separate preliminary issue in the case. Second, it can be examined in the context of assessing the application of the relevant provision of the Convention. Third and finally, it can be examined

12 See, inter alia, the ECtHR decision in Greenpeace e.V. and Others v. Germany, May 12, 2009, Application no. 18215/06; Hardy and Maile v. United Kingdom, February 14, 2012, Application no. 31965, paras. 190-192; Pavlov and others v. Russia of 11/01/2023, Application no. 31612/09, paras. 65-70.

13 ECtHR Grand Chamber judgment in Guerra and others v. Italy of February 19, 1998, Application no. 14967/89, para. 57.

14 ECtHR judgment in Okyay and others v. Turkey, July 12, 2005, Application no. 36220/97, paras. 66-69.

15 ECtHR judgment in Pavlov and others v. Russia, October 11, 2023, Application no. 31612/09, paras. 70-71.

16 ECtHR decision in Çiçek and others v. Turkey, February 4, 2020, Application No. 44837/07.

in conjunction with an examination of the complaint on the merits[17]. In the *Verein* Klimaseniorinnen Schweiz case, bearing in mind, in particular, that the question of victim status is one of the most pertinent issues in climate change cases, the ECtHR found it necessary, on the one hand, to discuss the general principles of victim status separately, and, on the other hand, given the close connection between victim status and the applicability of the relevant provisions of the Convention, the question of whether the applicants have victim status in this case was examined together with the Court's assessment of the applicability of Articles 2 and 8 of the Convention[18].

The Convention does not provide for the institution of *actio popularis*, and the Court's task is not to review the relevant law and practice *in abstracto*, but to determine whether the manner in which they were applied to the applicant had an impact on him causing a violation of the Convention. According to Article 34 the term "victim" includes the following three categories of persons: those directly affected by the alleged violation of the Convention (direct victims); those indirectly affected by the alleged violation of the Convention (indirect victims); and those potentially affected by the alleged violation of the Convention (potential victims)[19].

The Court has indicated that a special approach to determining victim status is necessary in climate cases. This is due to the fact that complaints in these cases may concern the actions or omissions of national authorities with respect to various types of general measures, the consequences of which are not limited to specific, identifiable individuals or groups, but affect the broader population. Indeed, the solution to the climate crisis depends on a comprehensive and complex set of transformational policies that include legislative, regulatory, fiscal, financial and administrative measures, as well as public and private investment. The dangers lie in failing to act or taking inadequate action in this regard[20].

In the Verein Klimaseniorinnen Schweiz case, the ECtHR formulated separate criteria for being considered a victim in the case of complainants who are natural persons and complainants who are legal entities. In the case of complaints brought by individuals, the ECtHR noted that given the nature of climate change and its various negative effects and future

17 Judgment in Verein Klimaseniorinnen Schweiz, para. 458.
18 Ibidem, para. 459.
19 Ibidem, paras. 460 i 463.
20 Ibidem, para. 479.

risks, the number of people affected in different ways and to different degrees is indeterminate[21]. However, if the circle of "victims" within the general population of persons subject to the jurisdiction of States Parties is drawn in a broad and general manner, this risks disrupting national constitutional principles and the separation of powers by opening up wide access to the judiciary as a means of effecting changes in overall climate change policy. On the other hand, if the circle is drawn too narrowly and restrictively, there is a risk that even obvious shortcomings or dysfunctions in government action or democratic processes could lead to the rights of individuals and groups of individuals under the Convention being affected without recourse to the Court[22]. Given the specific characteristics of climate change, the ECtHR has chosen to base itself on distinguishing criteria such as the specific level and severity of the risk of adverse effects of climate change affecting the person or persons concerned, taking into account the urgency of their need for individual protection[23]. Therefore, in order to claim victim status under Article 34 of the Convention in the context of complaints alleging harm or risk of harm resulting from alleged state negligence in combating climate change, an individual complainant must demonstrate that he or she has been personally and directly affected by the alleged negligence of national authorities. This will require establishing the following circumstances regarding the applicant's situation: (1) the 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 (2) 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[24].

As the ECtHR stated, „the threshold for meeting these criteria is particularly high"[25]. However, it is necessary in order to exclude *actio popularis* complaints, which the Convention excludes. Meeting this threshold for complainants will depend on a careful assessment of the specific circumstances of the case such as prevailing local conditions and individual peculiarities and vulnerabilities. The Court's assessment will also address

21 Ibidem.
22 Ibidem, para. 484.
23 Ibidem, para. 486.
24 Ibidem, para. 487.
25 Ibidem, para. 488.

the nature and scope of the applicant's complaint, the timeliness/distance and/or likelihood of the adverse effects of climate change over time, the specific impact of these changes on the applicant's life, health or well-being, the magnitude and duration of the adverse effects of climate change, the extent of the risk (local or general), and the nature of the applicant's vulnerability to the adverse effects of climate change[26].

Turning to the analysis of victim status in the case of the complainant association Verein Klimaseniorinnen Schweiz, the ECtHR noted that there has been a contemporary evolution in the recognition of the importance of associations in litigating climate change on behalf of those affected[27]. This is because climate change disputes often involve complex legal and factual issues, requiring significant financial and logistical resources and coordination, and the outcome of the dispute inevitably affects the position of many individuals.

In addition, recognition of the special position of associations is supported by the special nature of climate change. In light of the urgent need to combat the adverse effects of climate change and the serious risk of their irreversibility, states should take appropriate action, particularly through appropriate general measures, to safeguard not only the Convention-protected rights of those currently affected by climate change, but also those within their jurisdiction whose enjoyment of Convention rights may be seriously and irreversibly affected in the future in the absence of timely action. It should therefore be considered expedient to allow associations to pursue legal remedies to obtain protection of the rights of those affected, as well as those who are at risk of being adversely affected by climate change, rather than relying solely on proceedings brought by each person on his or her own behalf[28].

In light of these considerations, the ECtHR established a criteria for determining the status of associations in the context of climate proceedings[29]. In doing so, it referred to the importance of the Aarhus Convention, emphasizing the difference between that Convention, which aims to increase public participation in environmental matters, and the nature and purpose of the ECHR, which aims to protect the human rights of individuals.

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26 Ibidem.

27 Ibidem, para. 497.

28 Ibidem, para. 499.

29 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed June 25, 1998 in Aarhus.

The test that allows the ECtHR to find that an association has standing to bring an action under Article 34 of the Convention on the ground of an alleged failure by a State Party to take appropriate measures to protect individuals from the negative effects of climate change on human life and health, includes three conditions. First, the association must be legally established in the country. Second, it should be able to demonstrate that it is pursuing a specific purpose consistent with its charter to defend the human rights of its members or other affected individuals in the jurisdiction, whether limited to or including collective action to protect those rights from the dangers of climate change. Third, the association must be able to demonstrate that it can be considered genuinely competent and representative to act on behalf of members or other individuals affected by climate change in a given state party to the ECHR[30]. In this regard, the ECtHR will take into account factors such as the purpose for which the association was established, whether it is non-profit in nature, the nature and scope of its activities within the relevant jurisdiction, its membership and representativeness, the principles and transparency of its governance, and whether, overall, in the particular circumstances of the case, it is in the interests of the proper administration of justice to grant such a status[31].

The ECtHR determined that the complaint filed by the Verein Seniorinen Schweiz association was admissible, that the association had the necessary standing in the proceedings, and that Article 8 applied to the association's complaint. In contrast, the complaints of individuals filed in this case were deemed inadmissible because they did not meet the high threshold for admissibility of complaints filed by individuals in climate cases.

30 Ibidem, para. 502.
31 Ibidem.

3 The right to protection from climate change and the obligations of states arising in connection with combating climate change

The judgment in Verein Klimaseniorinnen Schweiz and Others v. Switzerland is significant because of its precedent-setting nature. Notably, it marks the first instance in which the ECtHR has identified a violation of rights protected under the Convention in the context of the perils posed by climate change. While the Court has previously ruled on violations of Convention rights in environmental cases, the case law in these cases may provide some degree of guidance. However, the ECtHR has identified significant legal distinctions in climate change cases that were not present in previous environmental cases[32].

The environmental cases examined to date have involved specific sources of environmental harm. Therefore, it was possible to identify people exposed to specific environmental damage, and it was also possible to establish a causal link between an identifiable source of damage and the actual harmful effects of specific groups of people. Furthermore, it was possible to identify the measures taken or omitted to reduce the disputed harm from a particular source[33].

In the case of climate change, the key features and circumstances are significantly different. First, there is no single or specific source of harm. Greenhouse gas emissions come from multiple sources, and the damage results from all types of such emissions combined. Second, CO_2 – the main greenhouse gas – is not itself toxic in ordinary concentrations. Instead, emissions cause harmful consequences through a complex chain of effects, and these effects transcend national borders[34]. Third, this chain is both complex and more unpredictable in terms of time and place than other emissions of specific toxic pollutants[35]. Fourth, the sources of GHG emissions are not limited to specific activities that could be described as hazardous. In many places, the main sources of GHG emissions are in areas such as industry, energy, transportation, housing, construction and agriculture, and therefore arise in the context of basic activities in human communities.

32 Ibidem, para. 413.
33 Ibidem, para. 415.
34 Ibidem, para. 416.
35 Ibidem, para. 417.

Consequently, mitigation measures cannot be generally localized or limited to the specific installations from which the harmful effects originate[36].

Fifth, fighting and stopping climate change does not depend on the adoption of specific local or sectoral measures. Climate change is a polycentric issue. Decarbonization of economies and lifestyles can only be achieved through comprehensive and profound transformations across sectors. Such transformations require a very complex and broad set of coordinated actions, policies and investments involving both the public and private sectors. Policies to combat climate change inevitably include issues of social adaptation and burden sharing across generations, both for different generations of people currently living and for future generations[37]. In the specific context of climate change, burden sharing between generations takes on special importance, both with regard to different generations of people currently living and with regard to future generations[38].

With this important specificity of climate change in mind, the ECtHR established for the first time in the Verein Seniorinen Schweiz case the relationship between the rights protected by the Convention and the threats associated with these changes. In doing so, it found that the scope of protection under Article 8 of the Convention encompasses adverse effects on human health, well-being and quality of life resulting from various sources of environmental damage and the risk of such damage. Article 8 of the Convention therefore provides for the right to benefit from effective protection by public authorities against serious negative consequences for their life, health, well-being and quality of life resulting from threats caused by climate change[39].

The provision of Article 8 of the European Convention on Human Rights protecting the right to privacy and family life should be seen as encompassing the state's positive obligation to protect against climate change. Coming to this conclusion was preceded by an analysis based on scientific data indicating the fact of climate change. In addition, the ECtHR noted the obligations of states in this regard under instruments of international law. A positive obligation on the part of the State to implement and effectively apply in practice appropriate measures to mitigate the effects of climate change following from Article 8 means that a finding that the State has

36 Ibidem, para. 418.
37 Ibidem, para. 419.
38 Ibidem, para. 420.
39 Ibidem, para. 544.

failed to fulfil this aspect of its positive obligations is sufficient to establish a violation of the Convention.

Referring to the evidence in this regard, the ECtHR noted that back in 1992 there was less scientific evidence and knowledge than there is today regarding the effects of climate change[40]. Today, however, the situation has changed significantly, and actions taken in the current decade will be crucial to countering these changes. Central to the ECtHR's argument is the linkage between the effects of climate change and the threat to human rights protected under the Convention. It was noted in the judgement, among other things, that the Intergovernmental Panel on Climate Change (IPCC) has stressed the urgent need for short-term integrated climate action. Indeed, climate change poses a threat to human well-being and the state of the planet. It appears that the window of opportunity is closing relatively quickly when it comes to addressing climate change, and the choices and actions implemented in the current decade will have an impact now and for thousands of years[41]. In the Panel's view, deep, rapid and sustained mitigation and accelerated implementation of adaptation actions in the current decade will reduce projected losses and damages to people and ecosystems[42].

An important role in the justification of the judgment is played by the findings of scientific research and the conclusions drawn from them, in particular regarding the catastrophic effects of climate change and the real urgent need to take the necessary measures to solve this problem. It is important to realize that there is very little time left to prevent a catastrophic rise in temperature. Accordingly,

> in construing and applying Convention rights, the Court had to have regard to this scientific consensus: that climate change had existential implications for life on Earth, that there was a real risk of exceeding critical further thresholds known as "tipping points", and that significant climate change mitigation measures had to be taken as a matter of extreme urgency to avoid the most catastrophic impacts, even if all impacts could no longer be avoided[43].

40 Ibidem, para. 104.
41 Ibidem, para. 118.
42 Ibidem, para. 119.
43 Ibidem, para. 334.

The ECtHR has noted that, in accordance with the international obligations undertaken by Member States, in particular under the 1992 United Nations Framework Convention on Climate Change and the 2015 Paris Agreement, as well as compelling scientific evidence, States must implement the necessary laws and measures to prevent greenhouse gas concentrations in the Earth's atmosphere from increasing and global average temperatures from rising beyond levels likely to cause serious and irreversible adverse effects on human rights, in particular the right to private and family life and home under Article 8 of the Convention[44]. The Court noted that

> the Paris Agreement targets the States formulated, and agreed to, the overarching goal of limiting warming to "well below 2oC above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels", recognising that this would significantly reduce the risks and impacts of climate change (Article 2 § 1 (a)). Since then, scientific knowledge has developed further and States have recognised that "the impacts of climate change will be much lower at the temperature increase of 1.5°C compared with 2°C" and thus resolved "to pursue further efforts to limit the temperature increase to 1.5°C"[45].

In order to assess the compliance of positive actions by national authorities with the Convention, it is important to divide the measures to be taken by these authorities into mitigation measures and ancillary adaptation measures. The IPCC has shown that the most effective mitigation measures to reduce greenhouse gas emissions by 2030 – the period most important to avoid exceeding the 1.5°C limit – are to replace fossil fuels with renewable energy and increase energy efficiency[46]. In turn, effective protection of the rights of individuals against serious adverse effects on their lives, health, well-being and quality of life requires that the above-mentioned mitigation measures be complemented by adaptation measures aimed at mitigating the most severe or imminent effects of climate change, taking into account any relevant special conservation needs. Such adaptation measures must be implemented and effectively applied in accordance

44 Ibidem, para. 546.
45 Ibidem, para. 106.
46 Ibidem, para. 404.

with the best available evidence and in line with the overall structure of the state's positive obligations in this context[47].

In its examination of whether the Swiss authorities have fulfilled their positive obligations in the field of combating climate change, the ECtHR stated that it will assess the compliance of the national authorities' actions with the obligation to implement and effectively apply in practice appropriate mitigation measures. Deficiencies in this regard are sufficient to conclude that the state has not fulfilled its positive obligations under Article 8 of the Convention, without having to examine whether ancillary adaptation measures have been implemented[48].

The ECtHR went on to say that its assessment may take into account the overall situation in the respondent state, including any relevant information that has come to light regarding the situation since the conclusion of the domestic proceedings. However, given the ongoing national legislative process in Switzerland, the Court's assessment was limited in this case to examining the national legislation in force on the date of this judgment, i.e. 14 February 2024[49].

The doctrine of margin of appreciation, which is now mentioned in the Preamble to the Convention, is of significant importance in assessing the performance of positive obligations by states parties to the ECHR. Considering, in particular, the scientific evidence on how climate change affects the rights set forth in the Convention, and taking into account the scientific evidence on the urgency of combating the negative effects of climate change, the seriousness of its consequences, including the grave risk that they will reach the point of irreversibility, as well as the scientific, political and judicial recognition of the link between the negative effects of climate change and the enjoyment of (various aspects of) human rights, the Court found it reasonable to conclude that climate protection should be given considerable weight in balancing competing considerations. In this balancing, states must enjoy a certain margin of appreciation[50]. This margin is reduced when it comes to the state's obligations regarding the need to combat climate change and its negative effects and to set the required goals

47 Ibidem, para. 552.
48 Ibidem, para. 555.
49 Ibidem, para. 556.
50 Ibidem, paras. 542-543.

and targets in this regard. In turn, this margin is wider as it goes to the selection of measures to achieve these goals[51].

The primary obligation of the state in the context of climate change risks is to adopt and effectively apply in practice laws and measures that can mitigate the existing and potentially irreversible future effects of climate change. This obligation arises from the causal relationship between climate change and the enjoyment of Convention rights[52]. In determining whether the respondent State has exceeded its margin of appreciation in the matter of climate change prevention, the Court will examine whether the competent national authorities, at the legislative, executive and judicial levels: (1) Have given due consideration to the need to adopt general measures setting a target timetable for achieving carbon neutrality and a total remaining carbon budget within the same timeframe, or some other equivalent method of quantifying future GHG emissions, in accordance with the overarching goal of national and/or global commitments to mitigate climate change; (2) Have set intermediate targets and pathways for reducing GHG emissions that are considered to be broadly capable of achieving overall national targets for reducing GHG emissions within the relevant timeframe set forth in national policies; (3) Have provided evidence that they have adequately adjusted or are in the process of adjusting to the relevant GHG reduction targets; (4) Have updated the relevant GHG reduction targets with due diligence and based on the best available evidence; (5) Have they acted in a timely, appropriate and consistent manner in developing and implementing relevant regulations and measures[53].

At the same time, the Tribunal noted that its assessment of whether the above requirements had been met would, in principle, be of a comprehensive nature. This means that a deficiency in one particular respect will not necessarily result in a finding that the State has exceeded its relevant margin of appreciation[54].

In assessing the Swiss national authorities' efforts to address climate change based on the above guidelines, the ECtHR found that there were some critical gaps in the Swiss authorities' implementation of the relevant national regulatory framework, including the failure to quantify, through a carbon budget or otherwise, national limits on greenhouse gas emissions. It also noted that Switzerland has failed to meet its previous GHG reduction

51 Ibidem, para. 543.
52 Ibidem, para. 545.
53 Ibidem, para. 550.
54 Ibidem, para. 551.

targets. By failing to act in a timely manner and in an appropriate and consistent manner in the design, development and implementation of an adequate legal and administrative framework, Switzerland had overstepped its margin of discretion and failed to fulfill its positive obligations to address climate change. Consequently, the ECtHR found a violation of Article 8 of the Convention.

4 The principle of subsidiarity

The ECtHR's judgment in the Verein Klimaseniorinnen Schweiz case raises the question of its compatibility with the principle of subsidiarity. The ruling sparked a lively debate in Switzerland. It led to parliamentary declarations by both chambers of the Swiss parliament, which stated that the ECtHR had exceeded its authority and called on the Swiss government to ignore the ruling[55]. It should be recalled that according to the principle of subsidiarity, the task of protecting rights and freedoms rests primarily with the parties to the Convention, which enjoy a margin of appreciation in doing so. The system established by the Convention is to engage in this protection only after internal remedies through the complaint procedure have been exhausted[56]. Under Protocol 15 to the ECHR, this principle, together with the principle of margin of appreciation, was included in the Preamble to the Convention.

In the reasons for its ruling in the Verein Klimaseniorinnen Schweiz case, the ECtHR referred to the principle of subsidiarity, affirming that it can deal with issues arising from climate change „only within the limits of the exercise of its competence under Article 19 of the Convention, which is to ensure the observance of the engagements undertaken by the High Contracting Parties to the Convention and the Protocols thereto. In this regard, the Court is, and must remain, mindful of the fact that to a large extent measures designed to combat climate change and its adverse effects require legislative action both in terms of the policy framework and in various sectoral fields. In a democracy, which is a fundamental feature of

55 Andreas Hösli, Meret Rehmann, „Verein KlimaSeniorinnen Schweiz and Others v. Switzerland: the European Court of Human Rights' Answer to Climate Change" *Climate Law* (2024): 22.

56 Handyside Judgment, para. 48.

the European public order expressed in the Preamble to the Convention together with the principles of subsidiarity and shared, such action thus necessarily depends on democratic decision-making"[57]. It is also difficult not to agree with the judgment's statement that, consequently, "judicial intervention, including by this Court, cannot replace or provide any substitute for the action which must be taken by the legislative and executive branches of government"[58].

However, in justifying its intervention in the case of combating climate change, the ECtHR further stated 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. The remit of domestic courts and the Court is therefore complementary to those democratic processes. The task of the judiciary is to ensure the necessary oversight of compliance with legal requirements. The legal basis for the Court's intervention is always limited to the Convention, which empowers the Court to also determine the proportionality of general measures adopted by the domestic legislature[59].

The ECtHR justified its intervention by, among other things, „widely acknowledged inadequacy of past State action to combat climate change globally", which entails an intensification of the risk of its negative effects and the resulting threats to the enjoyment of human rights – threats already recognized by governments around the world[60]. In a further argument, the ECtHR noted, on the one hand, the problem of who can claim judicial protection against climate change before national courts, then before the ECtHR, and on the other hand, the problem of separation of powers[61]. The Court also noted the specificity of climate change, as opposed to other environmental cases that have been decided before on the Strasbourg court[62].

The ECtHR's reasoning on subsidiarity leaves one unsatisfied, as it does not clearly explain where the ECtHR sees the limits of its competence in the context of both the principle of subsidiarity and the principle of separation of powers. The mention of "widely acknowledged inadequacy of past

57 Judgment in Verein Klimaseniorinnen Schweiz, para. 411.
58 Ibidem, para. 412.
59 Ibidem.
60 Ibidem, para. 413.
61 Ibidem.
62 Ibidem.

State action to combat climate change globally", which is associated with an increased risk of negative consequences for the enjoyment of human rights, clearly suggests that the ECtHR has decided to intervene in defense of rights protected by the Convention in the face of the ineffectiveness of action on the part of national authorities, i.e. both the legislative and executive branches. This is confirmed by the previously mentioned narrowing of the limits of the margin of appreciation enjoyed by national authorities with regard to the very necessity of combating climate change. However, the lack of a convincing explanation of the ruling issued in the context of the principle of subsidiarity and the separation of powers explains the Swiss authorities' contestation of the judgement.

5 Conclusions

The judgment in Verein Klimaseniorinnen Schweiz and Others v. Switzerland can be considered a landmark ruling when it comes to the threats to human rights posed by climate change. For the first time, the ECtHR explicitly linked the fact of climate change to rights protected under the Convention, stating that Article 8, which protects the right to privacy and family life, should be seen as encompassing the state's duty to protect against climate change. This obligation derives from the causal link between climate change and the enjoyment of Convention rights. It is the duty of the state party to the Convention to adopt and put into practice regulations and measures capable of mitigating the existing and potentially irreversible future effects of climate change. The ECtHR judgment undoubtedly has far-reaching implications, as it sets a precedent for all 46 member states of the Council of Europe. States are required to adopt plans to reduce greenhouse gases, achieve the goal of climate neutrality within three decades, and determine how to get there.

The ruling in the Swiss case has understandably generated significant controversy, with both chambers of the Swiss parliament calling on the Swiss government to ignore it. On the other hand, the fact that the ruling was issued by the Grand Chamber of the ECtHR is significant. It is noted that this ruling will not be the last one in which the ECtHR takes a position on climate change; several other climate change cases are currently

pending on the Strasbourg docket, including those filed by complainants from Norway, Germany and Austria[63].

Due to its precedent-setting status, this ruling will certainly encourage further complaints about the negative effects of climate change. Their effect may be to mobilise national authorities to review their national climate policies. Despite the controversies surrounding it, the ruling in the Verein Klimaseniorinnen Schweiz case may play an important role in mobilizing the authorities of the 46 States Parties to the Convention to undertake more intensive efforts to counteract the enormous threats associated with the phenomenon of climate change.

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63 Hösli, Rehmann, „Verein KlimaSeniorinnen", 22.

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