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CASE NOTES

Consistent Inconsistencies in the ECtHR's Approach to Victim Status and *Locus Standi*

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Abstract

The ECtHR's landmark judgment in the case *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* contains novel findings on procedural and substantive aspects of human rights protection in the climate change context. To reconcile effective protection of Convention rights with the exclusion of *actiones populares*, the Court set a high threshold for the individual applicants' victim status while applying mostly formal criteria to the *locus standi* of the applicant association. On this count, only the association's application was admissible. On the merits, the Court found violations of Articles 8 and 6(1) ECHR because Switzerland failed to comply with its positive obligation to protect individuals from the adverse effects of climate change and its courts did not engage seriously with the applicant association's action. This case note takes a closer look at the ECtHR's interpretation of standing for individuals and associations and discusses its (non-)alignment with previous case law. In particular, it reflects on the Court's implicit understanding of the concept of victim in *KlimaSeniorinnen* and explores whether allowing representative standing is justified based on the Court's existing case law. The case note concludes with an outlook on the enforcement of collective human rights issues through associations.

Keywords: *actio popularis*; climate change; European Court of Human Rights; human rights; standing; victim status

Case of Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, Application No. 53600/20, Judgment of 9 April 2024;

Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 005, entry into force: 3 September 1953 (European Convention on Human Rights, ECHR)

I. Introduction

On 9 April 2024, the European Court of Human Rights (ECtHR) delivered a landmark judgment on States' human rights obligations relating to climate change in the case of *Verein KlimaSeniorinnen v. Switzerland*.[1] The Grand Chamber judgment is the ECtHR's first judgment that acknowledges a climate change related human rights violation under the

[1] *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* [GC] App no 53/600 (ECtHR, 9 April 2024).

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European Convention on Human Rights (ECHR).[2] It is therefore a milestone in the development of rights-based climate litigation where individuals invoke their rights before courts to seek more ambitious climate action from their governments.[3] So far, only a few such cases have reached the merits stage. However, several national courts[4] as well as the United Nations (UN) Human Rights Committee[5] have produced important judicial pronouncements on the interpretation of human and fundamental rights in light of climate change. The *KlimaSeniorinnen* judgment builds on these findings.

In this case, the Grand Chamber found violations of Articles 8 and 6(1) ECHR (right to respect for private and family life and right of access to court, respectively) given the government's failure to adopt and implement adequate measures to combat climate change and the domestic courts' refusal to properly examine the applicant association's complaint. Besides its clarifications on the scope of Article 8 ECHR and respective obligations with regards to climate change, the judgment is remarkable because of its interpretation of the admissibility requirements under Article 34 ECHR: While the ECtHR did not grant victim status to the four individual applicants, it accepted standing of the applicant association.

Because the Court has received heavy criticism for overstretching the limits of evolutive interpretation, this case note aims to put the judgment into context with previous case law to assess to what extent it is a novelty. After a summary of the facts of the case (II.) the key findings on the admissibility and merits are presented (III.). The case note will then discuss in more detail the Court's approach to victim status and locus standi in light of its past case law and its reasoning in *KlimaSeniorinnen* as well as its implications for the judicial enforcement of human rights (IV.).

II. Facts of the case

The case was brought before the Court by the Swiss association Verein KlimaSeniorinnen Schweiz (applicant association) and four older Swiss women (individual applicants) who are members of the association. The Verein KlimaSeniorinnen was established to promote and implement effective climate protection on behalf of its members, all women whose average age is 73, inter alia through legal action. In particular, the applicants raised concerns about the adverse effects of global warming on their living conditions and health as they suffer from medical problems exacerbated by heat waves.

On 25 November 2016, the applicants submitted a request to the Swiss Federal Department of the Environment, Transport, Energy and Communications to take more ambitious climate mitigation measures and to meet the reduction targets set by the 2015 Paris Agreement. Their request and subsequent appeals to the Federal Administrative Court and Federal Supreme Court (FSC) were dismissed as inadmissible on the grounds that

[2] Previous cases, including the two other cases *Duarte Agostinho and Others v Portugal and 32 Others* (dec) [GC] App no 39371/20 (ECtHR, 9 April 2024) and *Carême v France* (dec) [GC] App no 7189/21 (ECtHR, 9 April 2024) that were decided on the same day as *KlimaSeniorinnen*, were declared inadmissible.

[3] For a more detailed account on the role of rights-based climate change litigation, see, eg, Jacqueline Peel and Hari M Osofsky, "A Rights Turn in Climate Litigation?" (2018) 7 Transnational Environmental Law 37; Riccardo Luporini and Annalisa Savaresi, "International Human Rights Bodies and Climate Litigation: Don't Look Up?" (2023) 32(2) Review of European, Comparative and International Environmental Law 267.

[4] For example in the Netherlands: Dutch Supreme Court (Hoge Raad), *Urgenda Foundation v the Netherlands*, 20 December 2019, ECLI:NL:HR:2019:2006, paras 5.6.1–5.8; and in Germany: German Federal Constitutional Court, Order of the First Senate of 24 March 2021, ECLI:DE:BVerfG:2021:rs20210324.1bvr265618.

[5] *Teitiota v New Zealand*, Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No 3624/2019, UN Doc CCPR/C/127/D/2728/2016 (7 January 2020); *Daniel Billy et al v Australia*, Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No 3624/2019, UN Doc CCPR/C/135/D/3624/2019 (22 September 2022).

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the applicants were not personally affected to a sufficient degree in their right to life (Article 10(1) of the Swiss Constitution, Article 2 ECHR) and right to respect for family and private life (Article 8 ECHR) but pursued general-public interests.[6] Based on that reasoning, the FSC did not examine the association's standing.

The applicants then turned to the ECtHR and, on 26 November 2020, lodged an application claiming a violation of Articles 2, 8, 6(1) and 13 ECHR. They argued that Switzerland's failure to set adequate reduction targets and take corresponding implementation measures negatively impacts their lives, health, and living conditions and this violates their rights under Articles 2 and 8 ECHR. They also complained that the Swiss courts denied them access to justice as granted under Article 6(1) ECHR by not responding properly to their requests and by giving arbitrary decisions on their civil rights related to the government's inaction. Lastly, they claimed a violation of Article 13 ECHR on account of the lack of any effective domestic remedy available to them for the purpose of vindicating their human rights.

III. Summary of the judgment

1. Admissibility

The crux of the admissibility was the applicants' standing. As regards the individual applicants, the Court found that the fact that climate change affects an unlimited number of people required a special approach to victim status.[7] It accordingly set out specific and strict criteria for individual climate applications. To be regarded as personally and directly affected by governmental action or inaction, there must be: (a) a high intensity of exposure of the applicant to the adverse effects of climate change, and (b) a pressing need to ensure the applicant's individual protection.[8] The Court then held that the medically substantiated adverse effects on the health and living conditions of the four individual applicants and their belonging to a vulnerable group as older women were not sufficient to meet that high standard, and that their complaint was thus inadmissible due to lack of victim status.[9]

Concerning the question of standing of the applicant association, the Court referred, on the one hand, to climate change being a common concern of humankind and considerations of intergenerational burden-sharing demanding to open access to the Court and, on the other hand, to the exclusion of general public interest complaints (*actiones populares*) inherent in the Convention system. Taking this tension into account, it established requirements for representative climate applications by associations. To lodge a climate application on behalf of individuals, an association must be lawfully established, it must pursue a dedicated objective in the protection of the human rights of its members or other affected persons within the jurisdiction concerned against climate change, and be a genuine representative of said persons.[10] What is important is that those on whose behalf the case has been brought do not themselves need to fulfil the criteria for individual victim status set out above. The applicant association met these criteria; hence its application was admissible.

[6] Swiss Federal Administrative Court, Judgment of 27 November 2018, A-2992/2017; Swiss Federal Supreme Court, Judgment of 5 May 2020, 1C_37/2019.

[7] *KlimaSeniorinnen*, *supra*, note 1, § 479.

[8] Ibid, §§ 481–88.

[9] Ibid, §§ 531–35.

[10] Ibid, § 502.

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2. *Merits*

The Court first turned to Article 8 ECHR and held that this article was applicable because climate change negatively impacts individuals' lives, health, well-being and quality of life. To ensure effective protection of these rights, Contracting States are obliged to adopt and apply measures and regulations capable of mitigating the adverse present and future effects of climate change.[11] Although the Court emphasized the need for intergenerational burden-sharing to substantiate its finding that Article 8 ECHR not only protects against present harm resulting from climate change but also against the risk of future harms,[12] it did not go so far as to recognize future generations as human rights subjects. The ECtHR specified the States' positive obligations by relying on other international commitments undertaken by Member States, such as the UN Framework Convention on Climate Change and the 2015 Paris Agreement, as well as the scientific findings by the Intergovernmental Panel on Climate Change (IPCC). This means that States need to "put in place the necessary regulations and measures aimed at preventing an increase in GHG concentrations in the Earth's atmosphere and a rise in global average temperature beyond levels capable of producing serious and irreversible adverse effects on human rights."[13] Their respective regulatory framework needs to include quantified targets and timelines.[14] Because Switzerland's reduction targets and pathways were inadequate or incomplete and Switzerland had also not met its own targets, the Court found that it exceeded its margin of appreciation, violating its positive obligations under Article 8 ECHR.[15]

With respect to Article 6(1) ECHR, the Court found a violation concerning the applicant association's complaint before the domestic courts in so far as it sought the implementation of mitigation measures under existing law. Because the Swiss courts had not engaged meaningfully with the applicant association's complaints and had rejected its legal action without convincing reasoning and consideration of compelling scientific evidence regarding climate change, and left the association without any further legal avenues, they impaired its right to access to justice as protected under Article 6(1) ECHR.[16]

In light of its findings under Articles 8 and 6(1) ECHR, the Court did not examine the case under Articles 2 and 13 ECHR. It left the execution of the judgment to the discretion of the Swiss Confederation, subject to assistance and supervision by the Committee of Ministers.[17] Finally, it ordered Switzerland to pay EUR 80,000 in respect of costs and expenses to the applicant association.

IV. Comment

The following section takes a closer look at the ECtHR's decision and reasoning on victim status and standing. It discusses its (non-)alignment with previous case law and to what extent it broadens access to the Court. In particular, it reflects on the Court's implicit understanding of the concept of victim in *KlimaSeniorinnen* and explores whether allowing representative standing is justified based on the Court's existing case law.

[11] Ibid, §§ 519, 545.
[12] Ibid, §§ 435–36, 519–20, 544.
[13] Ibid, § 546.
[14] Ibid, §§ 549–50.
[15] Ibid, §§ 558–74.
[16] Ibid, §§ 535–40.
[17] On 4 October 2024, Switzerland has communicated its action report to the Committee of Ministers: Bilan d'action, Communication de la Suisse concernant l'affaire Verein KlimaSeniorinnen Schweiz et autres c Suisse (requête no 53600/20), DH-DD(2024)1123.

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1. New interpretation of victim status for individual climate applications?

For the assessment of the individual applicants' victim status, the Court thoroughly outlined its past case law before establishing a tailored and more restrictive test for climate change related applications. It first reiterated the principle that, to bring a case to the Court, applicants need to be directly and personally affected in their own Convention rights.[18] Exceptionally, it has accepted applications by "indirect victims", where a person other than the direct victim is also affected due to a ricochet effect of the violation,[19] and by "potential victims", where a person is affected by a general-abstract measure because they fall within the scope of a law and/or are threatened with sanctions.[20] The Court further recalled that future violations may give rise to potential victim status if the impending violation is sufficiently probable, which is often argued in environmental cases.[21] However, for climate cases and thus for *KlimaSeniorinnen*, the Court chose to apply a specific test with strict requirements, namely a high intensity of exposure and a pressing need to ensure individual protection.[22]

The Court's approach may be seen as a missed opportunity to rely on its existing case law to apply the notion of individual victim status in the context of climate change in a more inclusive way. Based on the Court's own statement that the concept of victim must be interpreted in a flexible and evolutive fashion,[23] the case group of future violations together with the case law on environmental harm would have been an interesting avenue to explore. The Court could have considered climate risks as sufficiently impending harm analogous to imminent environmental hazards. Instead, the ECtHR in *KlimaSeniorinnen* quickly declared this exception unfit for climate cases because it would confer victim status to everyone and thus not fulfil a limiting function.[24] The Court also argued that because the applicants' claim was aimed at general prevention or mitigation measures – rather than the redress of specific harm already suffered – it required a more restrictive approach.[25] This shows the Court's reluctance to incorporate protection against risks into the Convention system.

Judge Eicke notes in his Separate Opinion that the pre-*KlimaSeniorinnen* exceptions to direct victim status all ground in the rationale to allow important rights to be asserted in court.[26] Although he considers none of these exceptions to be applicable in the *KlimaSeniorinnen* case, this reasoning could have provided a basis for a broader understanding of individual victim status in the climate change context. Instead, the

[18] *KlimaSeniorinnen*, *supra*, note 1, § 460 with reference to *Roman Zakharov v Russia* [GC] App no 47143/06 (ECtHR, 4 December 2015) § 164. See also, eg, *Tănase v Moldova* [GC] App no 7/08 (ECtHR, 27 April 2010) § 104; *Lambert and Others v France* [GC] App no 46043/14 (ECtHR, 5 June 2015) § 89; *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania* [GC] App no 47848/08 (ECtHR, 17 July 2014) § 96.

[19] *KlimaSeniorinnen*, *supra*, note 1, §§ 467–68 with reference to *Câmpeanu*, *supra*, note 18, §§ 97–100 and *Vallianatos and Others v Greece* [GC], App nos 29381/09 and 32684/09 (ECtHR, 7 November 2013) § 47. These cases are typically applications by the deceased direct victim's next of kin or by a person who can show harm or a valid personal interest in bringing the violation to an end.

[20] *KlimaSeniorinnen*, *supra*, note 1, § 469 with reference to *Senator Lines GmbH v Austria and Others* (dec) [GC] App no 56672/00 (ECtHR, 10 March 2004); *Tănase*, *supra*, note 18, § 104; *Berger-Krall and Others v Slovenia* App no 14717/04 (ECtHR, 12 June 2014) § 258.

[21] *KlimaSeniorinnen*, *supra*, note 1, §§ 470–71. See also *Noël Narvii Tauira and 18 Others v France* (dec) App no 28204/95, Commission decision of 4 December 1995, DR 83-B 112, 130–33; *Asselbourg and Others v Luxembourg* (dec) App no 29121/95 (ECtHR, 29 June 1999); *Cordella and Others v Italy* App nos 64414/13 and 54264/15 (ECtHR, 24 January 2019) §§ 100–09.

[22] *KlimaSeniorinnen*, *supra*, note 1, §§ 481–88.

[23] Ibid, §§ 461, 482.

[24] Ibid, § 485.

[25] Ibid, §§ 479–80.

[26] *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* [GC] App no 53/600 (ECtHR, 9 April 2024), Partly Concurring Partly Separate Opinion of Judge Eicke, § 37.

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Court seem to have gone the opposite way and tightened the screws for its test of victim status. Its high threshold for individual climate applications may be perceived as a reinforcement of its traditional understanding of the notion of direct victim with the intention of keeping the circle of possible individual applicants small.[27] This reflects the Court's concern about a rising number of cases at its docket, perhaps in an excessive manner. Considering the strict application of this test in *KlimaSeniorinnen*, one may wonder whether, in practice, there remains room for individual victim status concerning climate change at all.

The Court also rejected the individual applicants' vulnerability as older women as sufficient to grant them victim status.[28] If the ECtHR had instead recognized the interplay between vulnerability, individual harm and access to justice, it could have given its new victim test for climate cases more contours. Future cases could bring more clarity about which factors or arguments the Court will accept for victim status based on vulnerability in climate cases. For instance, the pending *Müllner* case[29] not only challenges the Court's requirements as to the intensity of health impairments, their correlation to climate change and the availability of adaption measures,[30] but also raises the question of whether the Court will accept disability or intersectionality as qualifiers for victim status.[31] Although the Court itself acknowledged that the fact that climate change affects a magnitude of people does not exclude particular vulnerabilities,[32] this might be overshadowed by a shift towards representative applications.[33] The Court's strict requirements for individual victim status and its strong emphasis on specific individual harm perhaps aim to grasp exactly these particularities, but this approach might backfire if no one will actually be able to meet this standard.

2. Locus standi *of associations to lodge climate applications*

Regarding the standing of the applicant association, the Court again first laid out its past case law. The exclusion of *actio popularis* also applies to associations. An association may file an application in its own name if it claims to be a victim of a human rights violation itself and the Convention right in question is not designed solely for natural persons.[34] Exceptionally, the Court has accepted representative applications

[27] Jeremy Letwin, "Klimaseniorinnen: the Innovative and the Orthodox" (*EJIL:Talk!*, 17 April 2024) <https://www.ejiltalk.org/klimaseniorinnen-the-innovative-and-the-orthodox/> accessed 21 August 2024; Dina Lupin/Maria A Tigre/Natalia U Gutiérrez, "*KlimaSeniorinnen* and Gender" (*Verfassungsblog*, 9 April 2024) <https://verfassungsblog.de/klimaseniorinnen-and-gender/> accessed 31 October 2024.

[28] *KlimaSeniorinnen*, *supra*, note 1, §§ 308–11, 531. For a critical perspective, see Lupin/Tigre/Gutiérrez, *supra*, note 27.

[29] *Müllner v Austria*, App no 18859/21, communicated on 18 June 2024.

[30] *KlimaSeniorinnen*, *supra*, note 1, §§ 533–34; Janine Prantl, "After Switzerland Comes Austria" (*Verfassungsblog*, 24 May 2024) <https://verfassungsblog.de/after-switzerland-comes-austria/> accessed 17 October 2024.

[31] Angela Hefti, "Intersectional Victims as Agents of Change in International Human Rights-Based Climate Litigation" (2024) 13(3) Transnational Environmental Law 610, in particular 616–18 (arguing that incorporating intersectionality into the victim status analysis would enhance procedural climate justice and could also help to delineate a group of applicants).

[32] *KlimaSeniorinnen*, *supra*, note 1, § 488. See also *Cordella*, *supra*, note 21, §§ 100–09, where the Court accepted individual victim status for all residents of an area that was exposed to harmful emissions, and Antonio Mariconda, "Victim Status of Individuals in Climate Change Litigation before the ECtHR" (2023) 3 The Italian Review of International and Comparative Law 260, 275.

[33] Corina Heri, "KlimaSeniorinnen and Its Discontents: Climate Change at the European Court of Human Rights" (2024) 4 European Human Rights Law Review 317, 328.

[34] The Court considers that the rights under Articles 2, 3, 5 or 8 ECHR are not susceptible of being exercised by an association. See *Asselbourg*, *supra*, note 21; *Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği v Turkey* (dec) App no 37857/14 (ECtHR, 7 December 2021) § 41.

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where the association may assert a human rights violation on behalf of an individual who is the direct victim of that violation.[35] As it has acknowledged in *Gorraiz Lizarraga*, in complex disputes recourse to associations can be the only means for individuals to defend their rights effectively.[36]

In *KlimaSeniorinnen*, the applicant association's complaint was a representative application. However, the ECtHR did not confirm victim status for any specific individual on whose behalf the application would be brought. This distinguishes the case from the earlier *Câmpeanu* case. In *Câmpeanu*, the ECtHR accepted the complaint by an association on behalf of Mr Câmpeanu due to the particular circumstances and seriousness of the allegations. Mr Câmpeanu could not file an application himself for factual reasons (extreme vulnerability, severe health impairments, no relatives, later death), not because he did not possess victim status (legal reason). According to the Court, it was indisputable that, during his lifetime, he was a direct victim.[37]

Based on *KlimaSeniorinnen*, it appears that an association can bring an application *without there being a designated individual victim*. While the ECtHR examined a violation of Article 8 ECHR, the holders of that right were not specifically identified in the judgment. Let it be recalled that the Court did not accept victim status for the individual applicants. The Court also emphasized the necessity to consider the impacts of climate change on a particular person or group of persons[38] without however further specifying these when examining a violation of Article 8 ECHR in the merits. Moreover, it stated that an association can claim a human rights violation of its members but also of *other affected individuals* in the jurisdiction concerned. The association's application is therefore no longer linked to a specific individual who is a victim of a human rights violation, as was the case in past representative applications.

However, before classifying this as an *actio popularis* it is worth considering the distinction between a large number of people (or even everyone) being affected in their human rights, which entails an individual assessment, and something being a public concern, which entails an abstract review.[39] The ECtHR made clear that climate change has a causal effect on the enjoyment of the human rights of individuals.[40] This may be read as meaning that there is a link to a violation of (many or even all) (unknown) individuals' rights. At the same time, it could imply that climate change is a general human rights issue and addressing that is a public concern. These are distinct and not necessarily exclusive conceptions, but the ECtHR appears to throw them into one basket when it argues that the exclusion of *actio popularis* from the Convention system requires delimitating criteria for victim status in the climate change context.[41] To avoid the unsatisfactory idea that all individuals are entitled to adequate climate protection, but do not automatically have a corresponding individual

[35] *KlimaSeniorinnen*, *supra*, note 1, §§ 474–77; *Câmpeanu*, *supra*, note 18, §§ 104–14.

[36] *Gorraiz Lizarraga and Others v Spain*, App no 62543/00 (ECtHR, 27 April 2004) §§ 38–39, where the Court accepted victim status and exhaustion of domestic remedies for the individual applicants because their interests were defended by the applicant association as an intermediary on the domestic level. See also *Yusufeli*, *supra*, note 34, § 39.

[37] *Câmpeanu*, *supra*, note 18, § 106.

[38] Ibid, § 500.

[39] Corina Heri, "On the *Duarte Agostinho* Decision" (*Verfassungsblog*, 15 April 2024) <https://verfassungsblog.de/on-the-duarte-agostinho-decision/> accessed 21 August 2024 (arguing that the fact that climate change potentially affects everyone does not make a complaint an *actio popularis*, which asks for an abstract review); see also George Letsas, "Did the Court in Klimaseniorinnen create an actio popularis?" (*EJIL:Talk!*, 13 May 2024) <https://www.ejiltalk.org/did-the-court-in-klimaseniorinnen-create-an-actio-popularis/> accessed 31 July 2024 (exploring this distinction with respect to future generations as victims).

[40] *KlimaSeniorinnen*, *supra*, note 1, §§ 435–36, 439, 478, 509, 519, 542, 545.

[41] Ibid, § 483.

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remedy,[42] the Court then introduces a threshold for an interference with this right corresponding to the requirements for individual victim status.[43] It thereby transfers a limitation on the merits of a violation to the procedural level.[44]

This limitation however becomes blurry again when the Court accepts the association's application on behalf of "individuals". Although the Court does not elaborate on this, the wording of its *locus standi* test ("members or other individuals affected"[45]) suggests that there is a delimitation of people whose rights are defended. A possible reading of this approach is a "second degree" victim status that is narrower than the general public but broader than the threshold of victim status as applied to the individual applicants in *KlimaSeniorinnen*. This could imply a distinct understanding of victim in the sense of individuals whose rights are affected by climate change but who may assert this violation only through an association. Such a reading highlights a very functional approach by the Court in its interpretation of Article 34 ECHR. On a practical level, this provides a tool to channel complaints addressing such concerns through a representative application, possibly with the intention to keep the number of applications at bay, especially ill-founded ones. It furthermore creates consistency in recognising the collective dimension of climate change as a human rights challenge[46] and establishing the corresponding procedural counterpart, namely the possibility for associations to lodge an application on account of a collective concern.

Leaving the ambiguity concerning the represented victims aside, the aspect of the need for representation by an association can be grounded on the ECtHR's existing case law. Analogous to *Câmpeanu* and *Gorraiz Lizarraga* it can be argued that, in view of the complexity of climate claims and the financial means and expertise required, it was factually impossible for the individual applicants to effectively assert their rights before the ECtHR without the association.[47] Associations are often far better equipped with the knowledge and resources needed to effectively present a well-substantiated claim before the Court.[48] One could also say that the Court itself reinforced the need to allow representative standing by applying such a restrictive test to the individual applicants. This could be viewed as contradictory: Because the self-imposed, particularly high legal requirements for victim status are not met, another path, ie, access to court for associations, must be paved to ensure the justiciability of human rights in the climate change context.

Judge Eicke claims this reasoning justifies exceptional representative standing only if the Court decides that the high threshold for victim status is *never* met by *any individual* (which he considers to be the case for climate claims).[49] However, he argues that by denying victim status only for the individual applicants *in concreto* while upholding the theoretical possibility of an application by individuals, the Court chose "the worst of both worlds"[50] and undermined the reason for granting exceptional standing, namely that otherwise, important rights could not be asserted at all.

[42] Jakob Hohnerlein, "Who Is Afraid of *Actio Popularis*? On Separating Rights and Remedies in the ECtHR's Climate Judgment" (*Verfassungsblog*, 26 April 2024) <https://verfassungsblog.de/who-is-afraid-of-actio-popularis/> accessed 27 August 2024.

[43] *KlimaSeniorinnen*, *supra*, note 1, § 520.

[44] See also Hohnerlein, *supra*, note 42, who argues that the interference threshold is a question of the merits and should not limit access to court on the procedural level.

[45] *KlimaSeniorinnen*, *supra*, note 1, § 502.

[46] Ibid, §§ 413, 420, 451.

[47] On this line of argument, see Helen Keller/Viktoriya Gurash, "Expanding NGOs' Standing: Climate Justice Through Access to the European Court of Human Rights" (2023) 14(2) Journal of Human Rights and the Environment 194.

[48] Christian Schall, "Public Interest Litigation Concerning Environmental Matters before Human Rights Courts: A Promising Future Concept?" (2008) 20(3) Journal of Environmental Law 417, 444.

[49] Separate Opinion, *supra*, note 26, § 40.

[50] Ibid, § 41.

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This reasoning is not convincing. First, generally excluding the possibility of individual climate complaints would go beyond the scope of the case presented to the Court and disregard the need to protect human rights effectively. Second, the fact that opening access to court for associations was only possible by creating a new standing test does not automatically make the judgment legally wrong. Previous exceptions also represented a break with earlier case law to some extent when they were introduced. Third, the Court based the association's standing to challenge Switzerland's ineffective climate action on the consideration that "on the whole, in the particular circumstances of a case, the grant of such standing is in the interests of the proper administration of justice".[51] Recalling the reasoning in *Câmpeanu* and *Gorraiz Lizarraga*, one can discern a common thread in the Court's development of exceptional standing cases by focusing on the underlying considerations and, admittedly, conceding some doctrinal flexibility.

3. Outlook on the judicial enforcement of human rights

Reflecting on further procedural implications of the Court's ruling in *KlimaSeniorinnen*, one question is whether other collective issues may be brought before the Court through associations. The applicability of the new standing test to environmental litigation is perhaps the most obvious. Although the Court was very careful to emphasize the special features of climate change and the scientific consensus on its impacts reflected in particular in the IPCC reports, it relied on the Aarhus Convention, which addresses public participation in environmental matters, to establish standing for the KlimaSeniorinnen association.[52] Moreover, the complexity and required legal and scientific expertise equally play a role in environmental cases and make the involvement of associations crucial for effective human rights enforcement.[53] In any event, a flood of climate or environmental lawsuits is not necessarily to be expected, as the *KlimaSeniorinnen* case also shows the enormous financial resources and time these types of proceedings entail.

Another open question concerns the exhaustion or availability of domestic remedies. If a national legal system does not grant associations standing, the association has no domestic remedies to exhaust and could, theoretically, directly turn to the ECtHR, who would then act as a first instance court. This would not be in the interests of either the Court or the States.[54] However, it does not necessarily follow that States will amend their procedural law as to provide standing for associations (as suggested by Judge Eicke)[55] or that applications by associations will only be possible in certain jurisdictions. Switzerland's Federal Council has announced that it will not expand associations' access to courts for climate related issues.[56] The ECtHR indicated that it may accept an application by an association if the rights in question have been asserted before domestic courts by the representees.[57] The Court's approach thus shows some flexibility and immunity against domestic procedural hurdles. Yet, collective concerns are more difficult for individuals to assert effectively. Associations are better suited to bring those

[51] *KlimaSeniorinnen*, *supra*, note 1, § 502.

[52] Ibid, §§ 490–95, 501.

[53] Keller/Gurash, *supra*, note 47. See also Schall, *supra* note 48, for a critical discussion of the role of NGOs and public interest litigation concerning environmental matters.

[54] Separate Opinion, *supra*, note 26, § 47.

[55] Ibid, § 50.

[56] Press Release by the Federal Council of 28 August 2024 <https://www.admin.ch/gov/fr/accueil/documentation/communiques/communiques-conseil-federal.msg-id-102244.html> accessed 29 August 2024.

[57] *KlimaSeniorinnen*, *supra*, note 1, § 503. See also *Gorraiz Lizarraga*, *supra*, note 36, §§ 37–39 and Keller/Gurash, *supra*, note 47.

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before a court. Hence, aligning domestic procedural law with the ECtHR's requirements for access to court would certainly advance the enforcement of human rights and the effectiveness of their protection already at the national level.

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