19

Recent Landmark Decisions

Advancing Climate Litigation and State Obligations

Margaretha Wewerinke-Singh and Joe Udell[*]

19.1 INTRODUCTION

The field of climate litigation is evolving at a breakneck pace, presenting a distinct challenge for a project like this Handbook. While compiling it, we witnessed the emergence of numerous landmark decisions that threatened to outpace our analysis. Thanks to the diligent efforts of our contributors, we managed to integrate many of these developments into the relevant chapters. Still, two groundbreaking decisions were handed down after we had submitted the full manuscript of this book for publication: the Advisory Opinion of the International Tribunal for the Law of the Sea (ITLOS) on climate change and marine protection,[1] delivered on 21 May 2024, and the judgment of the European Court of Human Rights (ECtHR) in *Verein KlimaSeniorinnen Schweiz and Others v Switzerland*, issued on 9 April 2024.[2] These decisions mark a significant advancement in global climate jurisprudence, reinforcing and expanding upon many of the themes explored throughout this Handbook.

This chapter aims to analyse these late-breaking developments, situating them within the broader context of climate litigation and exploring their implications for future cases. After contextualising these cases and highlighting their key findings, we will draw connections to relevant analysis identified in other chapters, providing an up-to-date perspective on the rapidly evolving field of climate litigation.

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[1] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)*, ITLOS Case No 31 (Advisory Opinion of 21 May 2024).

[2] *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* App No 53600/20 (ECtHR).

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This analysis will demonstrate how these decisions both reflect and advance emerging best practice in climate jurisprudence, potentially opening new avenues for legal intervention in the global fight for climate justice. We conclude by considering the implications for key issues in climate litigation, and how these rulings have the potential to drive more ambitious and equitable climate action through legal channels.

19.2 ITLOS ADVISORY OPINION: CLARIFYING STATE OBLIGATIONS UNDER UNCLOS

On 21 May 2024, ITLOS delivered a unanimous Advisory Opinion in response to questions submitted by the Commission of Small Island States on Climate Change and International Law (COSIS). This Opinion represents a significant development in international law as it pertains to climate change, clarifying States' obligations under the United Nations Convention on the Law of the Sea (UNCLOS) in relation to climate change.

19.2.1 *Background and Context*

The Commission, representing some of the world's most climate-vulnerable nations, posed two legal questions to the Tribunal:

> What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea ('UNCLOS'), including under Part XII:
>
> (a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?
> (b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?[3]

19.2.2 *Key Findings*

The Tribunal's Opinion demonstrates a commitment to interpreting UNCLOS dynamically in light of current scientific knowledge. By recognising greenhouse gas (GHG) emissions as a form of marine pollution and setting out a range of specific climate-related obligations of States arising from UNCLOS, ITLOS has confirmed

[3] ITLOS Advisory Opinion (n 1) [3].

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that UNCLOS provides a legal basis for compelling more ambitious and equitable climate action.[4]

The Opinion also illuminates the distinct role UNCLOS plays in the overall international legal framework applicable to climate change, including its relationship with the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement. It emphasises that climate measures taken under UNCLOS should be determined objectively, taking into account the best available science and relevant international rules and standards.

This section highlights the key findings of the Tribunal by topic.

19.2.2.1 Jurisdiction

ITLOS unanimously decided it had jurisdiction to give the Advisory Opinion, affirming its role in interpreting UNCLOS in connection with the climate crisis. This determination, however, was not a foregone conclusion, as there was some initial scholarly speculation that procedural obstacles would be a deterrent.[5]

One concern was whether the COSIS Agreement properly confers advisory jurisdiction to the Tribunal pursuant to Article 21 of the ITLOS Statute and Article 138 of the Rules of ITLOS.[6] In its analysis, ITLOS first considered Article 21, which dictates that its jurisdiction 'comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal'.[7] To that end, the COSIS Agreement explicitly states that it is 'authorized to request advisory opinions from the International Tribunal for the Law of the Sea (ITLOS) on any legal question within the scope of the 1982 United Nations Convention on the Law of the Sea, consistent with Article 21 of the ITLOS Statute and Article 138 of its Rules'.[8] The Tribunal accordingly explained that the authorisation enabling the Commission to request advisory opinions 'confers jurisdiction on the Tribunal' under Article 21.[9]

The Tribunal then turned to the conditions that needed to be satisfied under Article 138; notably that:

[4] See also Korey Silverman-Roati and Maxim Bönnemann, 'The ITLOS Advisory Opinion on Climate Change' (*Verfassungsblog*, 22 May 2024) <https://verfassungsblog.de/the-itlos-advisory-opinion-on-climate-change/> accessed 27 September 2024.

[5] See e.g. Armando Rocha, 'The Advisory Jurisdiction of the ITLOS in the Request Submitted by the Commission of Small Island States' (*Sabin Center for Climate Change Law*, 12 April 2023) <https://blogs.law.columbia.edu/climatechange/2023/04/12/the-advisory-jurisdiction-of-the-itlos-in-the-request-submitted-by-the-commission-of-small-island-states/> accessed 12 August 2024.

[6] ibid.

[7] ITLOS Advisory Opinion (n 1) [84].

[8] ibid [88].

[9] ibid.

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> (a) there is an international agreement related to the purposes of the Convention which specifically provides for the submission to the Tribunal of a request for an advisory opinion; (b) the request has been transmitted to the Tribunal by a body authorized by or in accordance with the agreement; and (c) the request submitted to the Tribunal concerns a legal question.[10]

After analysing the COSIS Agreement, the request for an Advisory Opinion submission process, and the legal nature of that request, the Tribunal concluded that it had jurisdiction to deliver the Advisory Opinion.[11]

19.2.2.2 Anthropogenic GHG Emissions as Marine Pollution

In a crucial finding, the Tribunal determined that anthropogenic GHG emissions constitute pollution of the marine environment within the meaning of UNCLOS Article 1(1)(4), which defines marine pollution as the 'introduction by man, directly or indirectly, of substances' into the marine environment that is 'likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health'.[12] The Tribunal's finding on this point is unambiguous: rather than suggesting that GHG emissions *may* or *could* amount to marine pollution, the Tribunal found that they *do* so: '[T]he Tribunal concludes that anthropogenic GHG emissions into the atmosphere constitute pollution of the marine environment within the meaning of article 1, paragraph 1, subparagraph 4, of the Convention.'[13] This interpretation confirms the broad scope of marine pollution under UNCLOS, with the effect of directly linking climate change to the Convention's regulatory framework. Part of this framework are the obligations flowing from Articles 192, 193, and 194(1)–(2) of the UNCLOS, which are widely recognised as codified rules of customary international law, such as the duty to protect and preserve the marine environment, the principle of State sovereignty over natural resources, and the 'no harm' principle, which prohibits activities within a State's jurisdiction from causing environmental harm to other States. Additionally, the framework includes provisions like Articles 207, 211, and 212, which impose obligations related to pollution from land-based sources, vessels, and the atmosphere.

The Opinion emphasises the obligation of States to exercise due diligence in fulfilling their obligations, with the standard of care required being 'stringent' given the high risks of serious and irreversible harm to the marine environment from GHG emissions.[14] This aligns with the precautionary approach, which the Tribunal considers implicit in the very notion of marine pollution under UNCLOS.[15]

[10] ibid [95].
[11] ibid [96]–[109].
[12] ibid [161].
[13] ibid [179].
[14] ibid [243].
[15] ibid [242].

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19.2.2.3 Specific Obligations of States

The Opinion outlines a range of specific obligations for States under UNCLOS.[16] These include the following:

- Taking all necessary measures to prevent, reduce, and control marine pollution from anthropogenic GHG emissions (Article 194(1));[17]
- Ensuring that activities under their jurisdiction do not cause harm by pollution to other States and their environment (Article 194(2));[18]
- Adopting laws and regulations to prevent, reduce, and control marine pollution from GHG emissions from various sources (Articles 207, 211, 212);[19]
- Enforcing these laws and regulations (Articles 213, 217, 222);[20]
- Cooperating in formulating international rules and standards to address marine pollution from GHG emissions (Article 197);[21] and
- Conducting environmental impact assessments for activities that may cause substantial pollution or significant harm to the marine environment through GHG emissions (Article 206).[22]

19.2.2.4 Role of the Paris Agreement

The Opinion makes it clear that the UNFCCC, the Kyoto Protocol, and the Paris Agreement in no way preclude the application of other rules of international law, nor do they substitute the content of such other rules. It states: 'The Tribunal also does not consider that the Paris Agreement modifies or limits the obligation under the Convention. In the Tribunal's view, the Paris Agreement is not *lex specialis* to the Convention and thus, in the present context, *lex specialis derogat legi generali* has no place in the interpretation of the Convention.'[23] The Tribunal's interpretation positions UNCLOS obligations as directly applicable to climate change issues, rather than serving merely as tools to interpret the Paris Agreement. Instead, ITLOS refers to the Paris Agreement in its interpretation of relevant provisions of UNCLOS, while at the same time recognising the independent legal nature of both instruments.[24] This approach firmly establishes that States' climate change

[16] See also Margaretha Wewerinke-Singh and Jorge E. Viñuales, 'More than a Sink' (*Verfassungsblog*, 7 June 2024) <https://verfassungsblog.de/more-than-a-sink/> accessed 27 September 2024.
[17] ITLOS Advisory Opinion (n 1) [441(3)(b)].
[18] ibid [441(3)(d)].
[19] ibid [441(3)(f)–(g)].
[20] ibid [441(3)(h)–(i)].
[21] ibid [441(3)(j)].
[22] ibid [441(3)(l)].
[23] ibid [224].
[24] ibid [223].

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obligations under UNCLOS are in no way substituted or diluted by the existence of climate change treaties.[25]

19.3 *KLIMASENIORINNEN V SWITZERLAND*: A BREAKTHROUGH IN EUROPEAN HUMAN RIGHTS LAW

The ECtHR Grand Chamber judgment in *KlimaSeniorinnen*, delivered on 9 April 2024, marks a watershed moment in climate litigation.[26] The decision represents the first time that the Court has ruled on the application of the European Convention on Human Rights (ECHR) with respect to climate change.[27] Notably, the ECtHR not only recognised that climate change implicates various rights protected under the ECHR, it also identified specific positive obligations for States to protect those rights by combating climate change. Moreover, it clarified its standing criteria for associations engaged in climate protection.

The Court announced the *KlimaSeniorinnen* judgment on the same day as two other climate change cases: *Duarte Agostinho v Portugal and 32 other States*,[28] and *Carême v France*.[29] *Duarte Agostinho*, which was brought by six Portuguese youth applicants, was found to be inadmissible because jurisdiction was lacking for all respondents save Portugal; and because the applicants had not first exhausted domestic remedies before national courts in Portugal.[30] *Carême* was inadmissible due to a lack of victim status since the applicant – the former mayor of the Grande-Synthe municipality – no longer lived in the affected region of France, having moved to Brussels.[31]

19.3.1 *Case Background*

After exhausting domestic remedies, where Swiss courts dismissed their claims primarily on standing grounds, the KlimaSeniorinnen association, representing over 2,000 elderly women and four individual applicants, turned to the ECtHR. They alleged that worsening climate impacts – notably heatwaves – were increasingly affecting their health.[32] The applicants claimed that Switzerland's insufficient action on climate change violated their rights under Articles 2 (right to life) and 8 (right

[25] See also Jacqueline Peel, 'Unlocking UNCLOS' (*Verfassungsblog*, 24 May 2024) <https://verfassungsblog.de/unlocking-unclos/> accessed 27 September 2024.

[26] *KlimaSeniorinnen* (n 2).

[27] See also Maria Antonia Tigre and Maxim Bönnemann, 'The Transformation of European Climate Change Litigation' (*Verfassungsblog*, 9 April 2024) <https://verfassungsblog.de/the-transformation-of-european-climate-change-litigation/> accessed 27 September 2024.

[28] *Duarte Agostinho v Portugal and 32 other States* App No 39371/20 (ECtHR).

[29] *Carême v France* App No 7189/21 (ECtHR).

[30] *Duarte Agostinho* (n 28) [231].

[31] *Carême* (n 29) [83], [88].

[32] *KlimaSeniorinnen* (n 2) [10]–[20].

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to respect for private and family life) of the ECHR. Moreover, they argued that the dismissal of their case in the domestic courts violated their right to a fair trial (Article 6(1)) and right to an effective remedy (Article 13) under the ECHR.

19.3.2 *Key Findings*

The Court's reasoning represents a significant contribution to judicial practice on climate change under the ECHR. In particular, the judgment contains several groundbreaking elements with respect to the role of the Paris Agreement; the positive obligations that States have to address climate change under Article 8 ECHR; the standard of review; Switzerland's violation of Articles 8 and 6(1) ECHR; State responsibility; the rejection of the 'drop in the ocean' argument; and the standing of the KlimaSeniorinnen association. The following section highlights and summarises the key findings with respect to each of these issues.

19.3.2.1 Role of the Paris Agreement

KlimaSeniorinnen – along with relevant parts of the Court's reasoning in *Duarte Agostinho* and *Carême* – unequivocally establishes that human rights law is applicable to climate change.[33] The Court also makes it crystal-clear that neither the UNFCCC nor its subsidiary treaties, the Kyoto Protocol and the Paris Agreement, replace or substitute States' human rights obligations.[34] Rather, the Court points at the imperative of an integrated approach whereby States' commitments under international climate change law coupled with the best available science serve to create a 'floor' for States' obligations under the ECHR:

> In line with the international commitments undertaken by the member States, most notably under the UNFCCC and the Paris Agreement, and the cogent scientific evidence provided, in particular, by the IPCC [Intergovernmental Panel on Climate Change] (see paragraphs 104–120 above), the Contracting 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, notably the right to private and family life and home under Article 8 of the Convention.[35]

[33] See also Jannika Jahn, 'The Paris Effect: Human Rights in Light of International Climate Goals and Commitments' (*Sabin Center for Climate Change Law*, 26 April 2024) <https://blogs.law.columbia.edu/climatechange/2024/04/26/the-paris-effect-human-rights-in-light-of-international-climate-goals-and-commitments/> accessed 30 September 2024.

[34] *KlimaSeniorinnen* (n 2) [410]–[411].

[35] ibid [546].

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19.3.2.2 Positive Obligations

The judgment confirms that the ECHR imposes positive obligations on States to take effective measures to mitigate climate change.[36] These obligations flow directly from the causal relationship between climate change and the enjoyment of ECHR rights.[37] According to the Court, Article 8 ECHR provides 'a right for individuals to enjoy effective protection by the State authorities from serious adverse effects on their life, health, well-being and quality of life arising from the harmful effects and risks caused by climate change'.[38] Each State's 'obligation under Article 8 is to do its part to ensure such protection' and its 'primary duty is to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change'.[39]

The Court then laid out a set of specific standards that it would evaluate in climate cases to determine if domestic authorities 'have had due regard to the need to':

(a) adopt general measures specifying a target timeline for achieving carbon neutrality and the overall remaining carbon budget for the same time frame, or another equivalent method of quantification of future GHG emissions, in line with the overarching goal for national and/or global climate-change mitigation commitments;
(b) set out intermediate GHG emissions reduction targets and pathways (by sector or[40] other relevant methodologies) that are deemed capable, in principle, of meeting the overall national GHG reduction goals within the relevant time frames undertaken in national policies;
(c) provide evidence showing whether they have duly complied, or are in the process of complying, with the relevant GHG reduction targets (see sub-paragraphs (a)(b) above);
(d) keep the relevant GHG reduction targets updated with due diligence, and based on the best available evidence; and
(e) act in good time and in an appropriate and consistent manner when devising and implementing the relevant legislation and measures.[41]

The Court arrived at these obligations by adapting its general principles guiding the interpretation of Article 8 ECHR to the specific context of climate change. In Article 8 environmental disputes prior to *KlimaSeniorinnen*, the Court's case law established that States have a duty to, *inter alia*, put in place an adequate legislative framework

[36] ibid [544].
[37] ibid [545].
[38] ibid [544]. Note that the Court found it unnecessary to analyse Article 2 ECHR given that Article 8 'undoubtedly' applied given the circumstances. ibid [536].
[39] ibid [545].
[40] ibid [550].
[41] ibid.

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that will 'provide effective protection of human health and life'.[42] These environmental cases refer to situations where 'there is a nexus between a source of harm and those affected by the harm', and the requisite mitigation measures are easily identifiable.[43]

However, the Court found that the key characteristics of climate change are 'significantly different' from the circumstances surrounding other environmental cases, thus complicating the adjudication of such disputes.[44] These features include the multitude of sources that cause GHG emissions; the fact that carbon dioxide is not toxic *per se* at ordinary concentration levels; the transboundary nature of emissions; and the complex and unpredictable causal chain of events that eventually results in harm to human life.[45] The Court accordingly asserted that it must adapt the general parameters of positive obligations under Article 8 to effectively address 'the special nature of the phenomenon' of climate change'.[46] In so doing, it ensured that the ECHR, as a treaty protecting human rights, continues to be interpreted such that it is 'practical and effective, not theoretical and illusory'.[47]

19.3.2.3 Level of Judicial Scrutiny

A central aspect of the Court's modification of Article 8 ECHR principles was the level of judicial scrutiny it established for disputes in the climate context. When determining if an Article 8 violation has occurred, the ECtHR noted that it will look at whether the respondent State remained within its margin of appreciation.[48]

In *KlimaSeniorinnen*, the Court established two different margins of appreciation for States.[49] To do so, it first established a distinction between (1) States' commitments to addressing climate change; and (2) the manner in which they carry out their climate actions. While acknowledging that States have a wide margin of appreciation in choosing the means to achieve their climate objectives, the Court explained that States have a reduced margin of appreciation with respect to

[42] ibid [538(a)].
[43] ibid [415].
[44] ibid [416].
[45] ibid [415]–[422].
[46] ibid [540].
[47] ibid [545].
[48] ibid [538(c)]. This doctrine refers to the amount of deference granted in a given situation – the Court will scrutinise acts or omissions much more intensely in circumstances where States operate under a narrow margin of appreciation; conversely, this scrutiny will be less significant for acts or omissions in areas where States benefit from a wide margin of appreciation. See e.g. Dean Spielmann, 'Allowing the Right Margin: The European Court of Human Rights and The National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (2012) Cambridge Yearbook of European Legal Studies 381.
[49] See also Annalisa Savaresi, Linnéa Nordlander, and Margaretha Wewerinke-Singh, 'Climate Change Litigation before the European Court of Human Rights: A New Dawn' (*GNHRE*, 12 April 2024) <https://gnhre.org/?p=17984> accessed 30 September 2024.

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their climate commitments.[50] This heightened scrutiny is attributed to the 'nature and gravity of the threat and the general consensus as to the stakes involved in ensuring the overarching goal of effective climate protection'.[51] The Court thus found that States' discretion in policy choices is confined by an objective requirement to address climate change 'in good time, in an appropriate and consistent manner' and base their approach on the best available scientific evidence.[52]

19.3.2.4 Violation of Article 8

The Court found a violation of Article 8 ECHR based on an analysis of Switzerland's climate policies under a reduced margin of appreciation.[53] Ultimately, Switzerland's 2011 CO_2 Act, 2022 Climate Act, and lack of a quantified carbon budget fell short of meeting the positive obligations described in the previous section. The ECtHR evaluated Switzerland's ineffective compliance with its Article 8 obligations as follows:

> [T]here were some critical lacunae in the Swiss authorities' process of putting in place the relevant domestic regulatory framework, including a failure by them to quantify, through a carbon budget or otherwise, national GHG emissions limitations. Furthermore, the Court has noted that, as recognised by the relevant authorities, the State had previously failed to meet its past GHG emission reduction targets. By failing to act in good time and in an appropriate and consistent manner regarding the devising, development and implementation of the relevant legislative and administrative framework, the respondent State exceeded its margin of appreciation and failed to comply with its positive obligations in the present context.[54]

In highlighting Switzerland's 'critical lacunae' in its regulatory framework, the Court clearly established that States must have a national carbon budget (or an equivalent) set in light of the global carbon budget to comply with its relevant duty of care.

19.3.2.5 Violation of Article 6(1)

The ECtHR also found a violation of the right of access to a court under Article 6(1) ECHR, concluding that the Swiss courts had failed to engage seriously with the merits of the applicants' claims regarding the effective implementation of mitigation

[50] *KlimaSeniorinnen* (n 2) [543].
[51] ibid.
[52] ibid [548].
[53] See also Sandra Arntz and Jasper Krommendijk, 'Historic and Unprecedented: The ECtHR Upholds Positive Human Rights Obligations to Mitigate Climate Change' (*Sabin Center for Climate Change Law*, 10 April 2024) <https://blogs.law.columbia.edu/climatechange/2024/04/10/historic-and-unprecedented-the-ecthr-upholds-positive-human-rights-obligations-to-mitigate-climate-change/> accessed 30 September 2024.
[54] *KlimaSeniorinnen* (n 2) [573].

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measures under existing domestic law.[55] The Court was 'not persuaded' by the Swiss courts' assertion that there was still time to address the most severe climate impacts because the existing scientific evidence 'suggest[ed] that there was a pressing need to ensure the legal protection of human rights'.[56] This shortcoming was made clearer by the fact that, according to the ECtHR, domestic courts have a 'key role' to play in ensuring effective protection of Convention rights in the climate context, signalling that restrictions on access to justice in environmental matters will be subject to close scrutiny.[57] Accordingly, Switzerland's domestic courts did not take the proper action to ensure that the human rights enshrined in the ECHR were being observed.[58]

19.3.2.6 State Responsibility

The *KlimaSeniorinnen* judgment expressly recognises the application of the general law of State responsibility to climate change to anthropogenic emissions of greenhouse gases from a State. The ECtHR noted that:

> [W]hile climate change is undoubtedly a global phenomenon which should be addressed at the global level by the community of States, the global climate regime established under the UNFCCC rests on the principle of common but differentiated responsibilities and respective capabilities [CBRD-RC] of States (Article 3 § 1). This principle has been reaffirmed in the Paris Agreement (Article 2 § 2) and endorsed in the Glasgow Climate Pact (cited above, paragraph 18) as well as in the Sharm el-Sheikh Implementation Plan (cited above, paragraph 12). It follows, therefore, that each State has its own share of responsibilities to take measures to tackle climate change and that the taking of those measures is determined by the State's own capabilities rather than by any specific action (or omission) of any other State (see Duarte Agostinho and Others, cited above, §§ 202–03). The Court considers that a respondent State should not evade its responsibility by pointing to the responsibility of other States, whether Contracting Parties to the Convention or not […]
>
> This position is consistent with the Court's approach in cases involving a concurrent responsibility of States for alleged breaches of Convention rights, where each State can be held accountable for its share of the responsibility for the breach in question (see, albeit in other contexts, *M.S.S. v Belgium and Greece*, cited above, §§ 264 and 367, and *Razvozzhayev v Russia and Ukraine and Udaltsov v Russia*, nos. 75734/12 and 2 others, §§ 160–61 and 179–81, 19 November 2019). It is also consistent with the principles of international law relating to the plurality of responsible States, according to which the responsibility of each State is determined individually, on the basis of its own conduct and by reference to its own international obligations

[55] ibid [636]. Note that the Court found it unnecessary to analyse Article 13 given that it is 'absorbed by the more stringent requirements of Article 6'. ibid [644].
[56] ibid [635].
[57] ibid [639].
[58] ibid [640].

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(see International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Commentary on Article 47, paragraphs 6 and 8). Similarly, the alleged infringement of rights under the Convention through harm arising from GHG emissions globally and the acts and omissions on the part of multiple States in combating the adverse effects of climate change may engage the responsibility of each Contracting Party.[59]

19.3.2.7 Standing

While denying standing to the individual applicants due to *actio popularis* concerns, the Court granted standing to the KlimaSeniorinnen association, significantly lowering the threshold for associational standing in climate cases.[60] This decision marks a notable development in the ECtHR's standing jurisprudence as associations are generally 'not in a position to rely on health considerations to allege a violation of Article 8'.[61]

However, the Court explained that associations have an important role to play in modern societies faced with challenges like climate change, which require complex administrative decision-making processes. In this context, 'recourse to collective bodies such as associations is one of the accessible means, sometimes the only means, available to [citizens] whereby they can defend their particular interests effectively'.[62] As such, the Court revealed a broadened standing test for Article 8 climate disputes, which requires that an association is:

(a) lawfully established in the jurisdiction concerned or have standing to act there;
(b) able to demonstrate that it pursues a dedicated purpose in accordance with its statutory objectives in the defence of the human rights of its members or other affected individuals within the jurisdiction concerned, whether limited to or including collective action for the protection of those rights against the threats arising from climate change; and
(c) able to demonstrate that it can be regarded as genuinely qualified and representative to act on behalf of members or other affected individuals within the 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.[63]

Furthermore, when analysing these criteria, the ECtHR stated that it would look to the following factors: the purpose of the association; whether it is of a non-profit character; the nature and extent of its activities; its membership and representativeness;

[59] ibid [442]–[443].
[60] See also Jeremy Letwin, 'Klimaseniorinnen: The Innovative and the Orthodox' (*EJIL: Talk!*, 17 April 2024) <www.ejiltalk.org/klimaseniorinnen-the-innovative-and-the-orthodox/> accessed 30 September 2024.
[61] *KlimaSeniorinnen* (n 2) [473].
[62] ibid [489].
[63] ibid [502].

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its principles and transparency of governance; and whether granting standing to the organisation would be in the interest of the proper administration of justice.[64] With respect to KlimaSeniorinnen's standing, the Court recognised that, as a result of its membership basis, representativeness, and purpose, the association 'represents a vehicle of collective recourse aimed at defending the rights and interests of individuals against the threats of climate change in the respondent State'.[65]

19.4 DISTILLING EMERGING BEST PRACTICE FROM THE TWO DECISIONS

The ITLOS Advisory Opinion and the *KlimaSeniorinnen* judgment, while emerging from different legal regimes, display notable similarities in their approach to climate change. Together, they contribute significantly to the consolidation of key aspects of the emerging best practices examined throughout this Handbook. This section will identify and connect notable examples of those approaches with the discussions in previous chapters.

19.4.1 *Recognition of Urgency*

Both decisions acknowledge the pressing nature of climate change and the need for immediate and effective action. This approach represents emerging best practice, reflecting the critical state of the climate crisis as described in Chapters 2 and 3.

For instance, the ITLOS Advisory Opinion relies on IPCC findings to explain that climate impacts due to past and future emissions are 'irreversible for centuries to millennia, especially changes in the ocean, ice sheets and global sea level'.[66] The Tribunal also stressed that 'climate change represents an existential threat and raises human rights concerns'.[67] Establishing this sense of urgency sets the stage for the novel duties for States outlined later in the decision.

Likewise, *KlimaSeniorinnen* details and explicitly refers to both the 'climate emergency'[68] and the 'climate crisis'.[69] Resolving this crisis, according to the Court, demands a 'comprehensive and complex set of transformative policies involving legislative, regulatory, fiscal, financial and administrative measures as well as both public and private investment',[70] with 'critical issues aris[ing] from failures to act, or inadequate action' at the State level.[71]

[64] ibid.
[65] ibid [523].
[66] ITLOS Advisory Opinion (n 1) [62].
[67] ibid [66].
[68] *KlimaSeniorinnen* (n 2) [433].
[69] ibid [479].
[70] ibid.
[71] ibid.

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These judicial approaches – coupled particularly with the positive climate obligations that States have under UNCLOS and the ECHR – advance emerging best practice in that both decisions properly identify the alarming state of the climate crisis, then explain how States have a legal duty to address this critical situation.

19.4.2 *Reliance on the Best Available Science*

The ITLOS Advisory Opinion and *KlimaSeniorinnen* both rely on the best available scientific evidence, particularly reports from the IPCC. In so doing, ITLOS and the ECtHR further emerging best practice by grounding the facts of their respective cases in the most recent scientific consensus on climate change. This reliance on scientific consensus and best available evidence reinforces the importance of robust climate science in litigation, as explored in Chapters 2 and 3, and further identified as emerging best practice throughout the Handbook.

The ITLOS Advisory Opinion maintains that best available science plays a 'crucial role' in determining the content of the necessary measures that States must take to prevent, reduce, and control marine pollution.[72] These findings, according to the Tribunal, are 'key to understanding the causes, effects and dynamics of such pollution and thus to providing the effective response'.[73] Moreover, as due diligence is a variable concept, States must be aware of new scientific developments as they formulate their climate actions.[74]

The Tribunal's finding that anthropogenic GHG emissions amount to marine pollution was explicitly informed by this best available science. Amongst other things, ITLOS noted: 'Being itself a component of climate change, ocean warming, according to the IPCC findings made with high confidence, "accounted for 91% of the heating in the climate system" (WGI 2021 Report, p. 11).'[75] The Tribunal also relied on IPCC reports to establish the content of States' obligations to address climate change under UNCLOS. In doing so, it made clear that 1.5°C – as opposed to well below 2°C – is the relevant temperature goal of the Paris Agreement:

> Such measures [to prevent, reduce and control marine pollution] should be determined objectively, taking into account, *inter alia*, the best available science and relevant international rules and standards contained in climate change treaties such as the UNFCCC and the Paris Agreement, in particular the global temperature goal of limiting the temperature increase to 1.5°C above pre-industrial levels and the timeline for emission pathways to achieve that goal.[76]

[72] ibid [212].
[73] ibid.
[74] ibid [239].
[75] ibid [175].
[76] ibid [243].

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Importantly, ITLOS stressed that the need for alignment with the 1.5°C temperature goal 'applies equally' to the obligations to take necessary measures to prevent transboundary GHG pollution under Article 194, paragraph 2.[77]

KlimaSeniorinnen similarly dictates that States align their GHG reduction targets with the best available evidence and update these targets as insights evolve.[78] To that end, the ECtHR highlighted IPCC reports such as the Special Report on Global Warming of 1.5°C, as well as the Sixth Assessment Report.[79] The Court expressly added that those reports were not 'challenged or called into doubt by the respondent or intervening States'.[80] The findings of the IPCC thereby proved to be essential in terms of establishing the undisputed facts of the case – all of which underscore the magnitude of the current state of the climate crisis:

> [T]hat there are sufficiently reliable indications that anthropogenic climate change exists, that it poses a serious current and future threat to the enjoyment of human rights guaranteed under the Convention, that States are aware of it and capable of taking measures to effectively address it, that the relevant risks are projected to be lower if the rise in temperature is limited to 1.5°C above pre-industrial levels and if action is taken urgently, and that current global mitigation efforts are not sufficient to meet the latter target.[81]

The Court's approach here not only further cements the key role of best available science in climate litigation, it also illustrates how that evidence can effectively establish the reference point – specifically the Paris Agreement's temperature limit of 1.5°C, as opposed to 2°C – that climate action is measured against.

19.4.3 *Standing*

The ECtHR's flexible approach to this issue opens new possibilities for collective action in climate litigation. Despite the Court's more restrictive stance for individuals, its willingness to adapt and broaden its standing criteria for associations in the context of climate change embodies the emerging best practice emphasised in Chapter 5, which highlighted the importance of easing standing burdens in climate litigation.[82] Accordingly, associations engaged in climate change issues will likely be empowered to represent their membership on rights-based grounds in domestic courts. As the ECtHR's standing rules are different from those of domestic courts, should domestic courts not find *KlimaSeniorinnen's* jurisprudence to be persuasive,

[77] ibid [250].
[78] *KlimaSeniorinnen* (n 2) [550(d)].
[79] ibid [107]–[120].
[80] ibid [432].
[81] ibid [436].
[82] Note that, although domestic courts generally use the term 'standing' for both individuals and associations, the ECtHR refers to 'victim status' in relation to individuals and '*locus standi*' in relation to associations.

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associations denied standing at the national level will conceivably have a promising chance for the ECtHR to hear their claims on the merits.

19.4.4 *Admissibility*

ITLOS and the ECtHR promoted the emerging best practice identified in Chapter 5 by exercising their legal powers to oversee the respective proceedings in a manner consistent with the climate crisis. ITLOS, for instance, invoked its discretion to render its Advisory Opinion by stressing that climate change 'is recognized internationally as a common concern of humankind' while also noting 'the deleterious effects climate change has on the marine environment and the devastating consequences it has and will continue to have on small island States, considered to be among the most vulnerable'.[83] Likewise, the ECtHR notably fast-tracked *KlimaSeniorinnen*, along with *Duarte Agostinho* and *Carême*, to the Grand Chamber, thus furthering the notion that climate change requires admissibility to be assessed in a timely manner. The Court's willingness to admit climate claims brought forward by associations also represents a transparent effort to balance *actio popularis* concerns with the effective protection of human rights under the ECHR.

19.4.5 *Separation of Powers*

Both decisions assert a robust role for the judiciary in addressing climate change, while respecting the principle of separation of powers. The ECtHR, in particular, advanced the emerging best practice discussed in Chapter 6 by encouraging more assertive judicial engagement with climate issues at the national and regional levels. On one hand, the Court emphasised the 'key role which domestic courts have played and will play in climate-change litigation'.[84] This sentiment will be critical in the near future as domestic courts will most assuredly receive submissions from plaintiffs seeking to hold States accountable for their positive Article 8 obligations. With respect to exercising its own judicial authority, the Court importantly stressed that, despite the deference it extends to the policy-setting authority of States, scrutinising potential ECHR violations falls well within its authority as a matter of law.[85]

19.4.6 *Human Rights*

Although these rulings both acknowledge the connection between climate change and human rights, *KlimaSeniorinnen* provides a particularly powerful new tool for

[83] ITLOS Advisory Opinion (n 1) [122].
[84] *KlimaSeniorinnen* (n 2) [639].
[85] ibid [450].

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climate litigants and advances the rights-based approaches discussed in Chapter 7. The ECtHR incorporated all three forms of emerging best practice identified in that chapter into its decision: recognising the impacts that climate change is having and will continue to have on human rights; recognising that States must adopt and implement a wide range of climate actions to protect human rights; and referring to norms of international environmental law and best available science to interpret States' human rights obligations in the climate context. On this point, ITLOS aligned with the first emerging best practice, albeit much less explicitly than the ECtHR, by acknowledging that 'climate change represents an existential threat and raises human rights concerns'.[86] Given the ECtHR's respected stature as a regional court focused on safeguarding human rights, as well as plaintiffs' frequent invocation of Article 8 ECHR in European climate litigation, the Court's approach in *KlimaSeniorinnen* will most likely have a significant positive impact on a range of rights-based cases.[87]

19.4.7 *Extraterritoriality*

Both decisions highlight the global nature of climate change and the need to address it through national efforts and international cooperation, with due regard to extraterritorial impacts of actions under scrutiny. This recognition echoes the emerging best practice discussed in Chapter 8. The ITLOS Advisory Opinion's emphasis on preventing transboundary pollution under Article 194(2) UNCLOS, which may require States to act with an even more stringent standard of due diligence than under Article 194(1),[88] is a particularly potent contribution to this emerging best practice.

The ECtHR, in contrast, may at first glance seem to have offered little in terms of guidance on climate change and extraterritoriality, other than stating in *Duarte Agostinho* that climate change does not warrant a special approach to jurisdiction.[89] However, in *KlimaSeniorinnen* the Court did take a globally oriented approach in its brief discussion on trade-related emissions. According to the Court, it would be 'difficult, if not impossible, to discuss Switzerland's responsibility for the effects of its GHG emissions' on human rights 'without taking into account the emissions generated through the import of goods and their consumption', otherwise known as 'embedded emissions'.[90] It acknowledged that embedded emissions 'contain an extraterritorial aspect'[91] and confirmed that this aspect fell within the scope of the case. While the Court did not examine the impact of these emissions in detail, its

[86] ITLOS Advisory Opinion (n 1) [66].
[87] See e.g. *VZW Klimaatzaak v l'État Belge* [2021] 2015/4585/A (Tribunal de première instance francophone de Bruxelles, Section Civile); *State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda* [2019] ECLI:NL:HR:2019:2007.
[88] ITLOS Advisory Opinion (n 1) [256].
[89] *Duarte Agostinho* (n 28) [184]–[214].
[90] *KlimaSeniorinnen* (n 2) [280].
[91] ibid [287].

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pronouncements provide important guidance to domestic courts and signal that the Court's door is open to future cases addressing this dimension.[92]

19.4.8 *Duty of Care*

Both decisions articulate specific positive obligations for States to adopt and implement a number of comprehensive measures to address climate change. To distil these obligations from relevant treaty texts, ITLOS and the ECtHR draw on a range of sources – most notably the UNFCCC and the Paris Agreement, but also principles of international environmental law and best available science. This line of judicial reasoning reflects emerging best practices discussed in Chapter 9, which demonstrates how judicial bodies can interpret treaties in a way that safeguards their effectiveness in a world existentially threatened by climate change.

19.4.9 *International Atmospheric Trust*

Although neither the ITLOS Advisory Opinion nor *KlimaSeniorinnen* directly engage with the application of the public trust doctrine in climate litigation, both decisions contain jurisprudence that could further international atmospheric trust cases. For example, the broad emphasis that ITLOS and the ECtHR place on intergenerational equity resonates with the emerging best practice described in Chapter 10. As the sovereign's traditional duty is to protect trust resources for the benefit of current and future generations, the positive intergenerational equity jurisprudence in the ITLOS Advisory Opinion and *KlimaSeniorinnen* could strengthen the application of the public trust doctrine to non-traditional resources, such as the atmosphere. The ECtHR's exploration of the role of domestic courts is notable in this context, given the synergies between the public trust doctrine and the protection of human rights,[93] as well as the fact that international atmospheric trust disputes have historically been adjudicated at the national level. This emphasis on domestic courts as key protectors of human rights could thereby encourage more judicial engagement with international atmospheric trust litigation.

19.4.10 *Rights of Nature*

While neither ruling expressly examines the rights of nature, the Tribunal's consideration of the effects of climate change on the marine environment has an ecocentric quality that echoes the emerging best practice in Chapter 12. Most notably, the

[92] ibid.

[93] See e.g. David Takacs, 'The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property' (2010) NYU Envtl L J; Mary Christina Wood and Rance Shaw, 'Enforcing Human Rights Against Fracking Through the Public Trust Principle' (*Center for Humans & Nature*, 3 March 2017) <https://humansandnature.org/enforcing-human-rights-against-fracking-through-the-public-trust-principle/>;

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Tribunal frames its entire legal analysis within extensive IPCC findings on the myriad ways that climate change alters the ocean and the species that inhabit it.[94] When discussing States' obligations under UNCLOS, the Tribunal reiterates that 'climate change and ocean acidification affect virtually all forms of marine life, including fish and corals that build structures providing the habitat for large numbers of species'.[95] Such language furthers the belief that nature has intrinsic value and is deserving of protection independent of its worth to humans. The Tribunal's finding that States have an obligation to conduct environmental impact assessments for activities that may harm the marine environment through GHG emissions seems aligned with this recognition.

19.4.11 *International Law*

Both ITLOS and the ECtHR built upon the emerging best practices described in Chapter 12 by relying on international climate change law to define the content of States' obligations under UNCLOS and the ECHR, most notably the commitments made as Parties to the Paris Agreement. Moreover, principles of international environmental law, including the principles of due diligence, CBDR-RC, no-harm, prevention, and precaution, also substantively inform the scope of States' respective duties. As a representative example, *KlimaSeniorinnen* requires States to keep their emissions reduction targets updated with due diligence,[96] while the ITLOS Advisory Opinion maintains that States have a stringent due diligence obligation to safeguard the marine environment from pollution[97] – which, as noted earlier, can be even more stringent in the context of preventing transboundary pollution.[98]

19.4.12 *Common but Differentiated Responsibilities and Respective Capabilities*

The principle of CBDR-RC, much like the principle of due diligence described earlier, had an essential role in outlining States' obligations pursuant to the respective treaties. In so doing, both decisions furthered the emerging best practice discussion in Chapter 13. In the ITLOS Advisory Opinion, the Tribunal explained that CBDR-RC requires both developed and developing States to make mitigation efforts to safeguard the marine environment from pollution, even if the measures taken vary by country.[99] This approach echoes the notion that, although developed nations must take the lead in terms of climate action, developing countries cannot focus strictly on climate adaptation. At the same time, it reinforces developed countries'

[94] ITLOS Advisory Opinion (n 1) [46]–[66].
[95] ibid [409].
[96] *KlimaSeniorinnen* (n 2) [550(d)].
[97] ITLOS Advisory Opinion (n 1) [239]–[243].
[98] ibid [258].
[99] Note that although the Convention does not explicitly refer to the principle of CBDR-RC, the Tribunal explained that 'it contains some elements common to this principle'. ibid [229].

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obligations to provide finance, technology transfer, and capacity building to enable ambitious climate action in developing countries.

Similarly, the ECtHR invoked and relied on the principle of CBDR-RC in finding that Switzerland had failed to comply with its obligations under Article 8. Whereas the requirement that States must quantify their overall remaining carbon budget for the time period until they reach carbon neutrality may appear to be largely procedural,[100] it is clear from the Court's application of the obligation to Switzerland that it is not. Rather, it flows from the Court's reasoning on this point that a State's climate measures can only align with its duty to adopt and implement regulations capable of mitigating harmful climate impacts[101] if they are based on the overarching long-term temperature goal of 1.5°C as well as that State's fair share of the remaining global carbon budget. This conclusion is primarily supported by five points.

First, the Court maintained that the ECHR should be interpreted in harmony with the UNFCCC and the Paris Agreement,[102] and it explicitly highlighted the central importance of CBDR-RC.[103] In this regard, the Court noted that each State 'has its own share of responsibilities to take measures to tackle climate change and that the taking of those measures is determined by the State's own capabilities rather than by any specific action (or omission) of any other State'.[104]

Second, as explained earlier, States have a reduced margin of appreciation with respect to their climate commitments.[105] It follows then that States have limited discretion when it comes to the quantification of their climate targets and national carbon budgets in relation to the global 1.5°C temperature limit referenced by the Court, and that they are subject to strict judicial scrutiny for their conformity with the Convention.[106]

Third, the Court explicitly rejected Switzerland's efforts to justify its lack of a national carbon budget by positing that there is no established methodology to do so. To that end, the Court referenced the *Neubauer* decision, which similarly 'rejected the argument that it was impossible to determine the national carbon budget, pointing to, *inter alia*, the principle of common but differentiated responsibilities under the UNFCCC and the Paris Agreement'.[107] The Court explained that '[t]his principle requires the States to act on the basis of equity and in accordance with their own respective capabilities'.[108] In other words, the Court held that States *can* determine their national carbon budget and that their

[100] *KlimaSeniorinnen* (n 2) [550(a)].
[101] ibid [545].
[102] ibid [455]–[456].
[103] ibid [133], [134], [136], [137], [140], [164], [442], [478], [571].
[104] ibid [442].
[105] ibid [543].
[106] See ibid e.g. [436], [558].
[107] ibid [571].
[108] ibid.

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methodology for doing so must be based on the principle of CBDR-RC. It also formulated equity as a guiding principle for such a determination. This is an explicit confirmation of the requirement that States determine their national carbon budget on the basis of a fair share determination, taking account of CBDR-RC, and grounded in principles of equity. Importantly, the Court tacitly acknowledged that an equal per capita emissions approach falls short of what is required under the principle of CBDR-RC, as it does not adequately account for States' differing historical responsibilities and capabilities.[109] This underscores that methodologies used to determine national carbon budgets need to capture these different dimensions of CBDR-RC.

Fourth, the Court rejected Switzerland's claim that its national climate policy – based on internal assessments and its nationally determined contributions – was similar in approach to establishing a national carbon budget.[110] In doing so, it relied on the estimated remaining Swiss carbon budget to stay within 1.5°C, which was informed by evidence from the KlimaSeniorinnen association.[111] Based on this information, the Court noted that under its current climate strategy, Switzerland 'allowed for more GHG emissions than even an "equal per capita emissions" quantification approach would entitle it to use'.[112] It is important to underscore that the Court did *not* suggest that meeting an equal per capita emissions standard would amount to compliance with its obligations; rather, it highlighted that Switzerland was exceeding even this insufficient standard, thereby evidencing a breach. The Court's reference reaffirms that the equal per capita approach sets a baseline that is too low and does not fully reflect the higher standard required under CBDR-RC.

Fifth, the Court built on the earlier point and asserted that it 'has difficulty accepting that the State could be regarded as complying effectively with its regulatory obligation under Article 8' without 'any domestic measure attempting to quantify the respondent State's remaining carbon budget'.[113]

These points thereby infer that a State's climate measures can only align with its duty to adopt and implement regulations capable of mitigating harmful climate impacts[114] if they are based on the overarching long-term temperature goal of 1.5°C as well as that State's fair share of the remaining global carbon budget. An equal per capita approach is insufficient in this context, as it fails to account for the differentiated responsibilities and capabilities of States, particularly those with greater historical emissions and higher capacities to reduce emissions.

[109] ibid [569].
[110] ibid [570]–[571].
[111] ibid [569].
[112] ibid.
[113] ibid [572].
[114] ibid [545].

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19.4.13 *Intergenerational Equity*

Both ITLOS and the ECtHR promote the emerging best practice discussed in Chapter 14 by incorporating aspects of intergenerational equity into their decisions, thus bolstering the normative development of this international environmental law principle. For instance, the Advisory Opinion's emphasis on protecting the ocean as an inherently valuable part of the environment – as opposed to a mere sink that absorbs emissions – requires States to introduce more ambitious climate policies that must, in turn, protect future generations. In the same vein, *KlimaSeniorinnen* frames States' positive climate obligations under Article 8 ECHR around the need to 'avoid a disproportionate burden on future generations',[115] thereby encouraging a fair distribution of climate obligations over time.

19.4.14 *State Responsibility*

Both decisions embody emerging best practice by explicitly rejecting the 'drop in the ocean' argument. This approach highlights that each State is required to do its own part to the best of its abilities to reduce greenhouse gas emissions, and especially resonates with the discussion in Chapter 15. ITLOS, for instance, specifically rejected the argument that climate change can only be regulated through 'joint action' and concluded instead that:

> While the importance of joint actions in regulating marine pollution from anthropogenic GHG emissions is undisputed, it does not follow that the obligation under article 194, paragraph 1, of the Convention is discharged exclusively through participation in the global efforts to address the problems of climate change. States are required to take all necessary measures, including individual actions as appropriate.[116]

Similarly, in *KlimaSeniorinnen*, Switzerland had posited that climate change is a global phenomenon and that its GHG emissions, on their own, were not significant enough to represent an Article 8 ECHR violation.[117] The Court pointed out that domestic courts have rejected this argument numerous times[118] and further asserted that State responsibility is engaged when domestic authorities fail to take reasonable actions that could have mitigated the relevant harm:

> Lastly, as regards the 'drop in the ocean' argument implicit in the Government's submissions – namely, the capacity of individual States to affect global climate change – it should be noted that in the context of a State's positive obligations under the Convention, the Court has consistently held that it need not be determined with certainty that matters would have turned out differently if the

[115] ibid [549].
[116] ITLOS Advisory Opinion (n 1) [202].
[117] *KlimaSeniorinnen* (n 2) [346], [441].
[118] ibid [441].

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> authorities had acted otherwise. The relevant test does not require it to be shown that 'but for' the failing or omission of the authorities the harm would not have occurred. Rather, what is important, and sufficient to engage the responsibility of the State, is that reasonable measures which the domestic authorities failed to take could have had a real prospect of altering the outcome or mitigating the harm […] In the context of climate change, this principle should also be understood in the light of Article 3 § 3 of the UNFCCC according to which States should take measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects.[119]

Thus, whether in the context of the marine environment or with respect to human rights, emerging best practice affirms that no State can escape its responsibility by pointing at a lack of action on the part of other States or to an alleged immateriality of its own contribution to global greenhouse gas emissions.

19.4.15 *Causation*

The Advisory Opinion and *KlimaSeniorinnen* further the emerging best practices outlined in Chapter 16 by taking a more flexible approach to causation that adapts to the complexities of the climate crisis. ITLOS, for example, acknowledged that causation in the transboundary context can be difficult to establish, but that reality did not prevent the Tribunal from determining that States still have an obligation to prevent transboundary pollution under Article 194(2) UNCLOS.[120]

The ECtHR similarly observed that causation in climate change cases is challenging because, unlike in classic environmental disputes, the harm originates from a global problem, instead of a single source.[121] Despite this complexity, the Court rejected Switzerland's drop in the ocean argument as well as the strict 'but for' causation test, noting that 'it need not be determined with certainty that matters would have turned out differently if the authorities had acted otherwise'; rather, what matters is whether authorities failed to take reasonable action that had 'a real prospect of altering the outcome or mitigating the harm'.[122]

With respect to attribution, the ECtHR highlighted the 'critical lacunae' in Switzerland's climate policies, then explained that the actions implemented this decade would 'have impacts now and for thousands of years'.[123] This approach aligns with the emerging best practice identified in Chapter 17 by expressly linking global climate impacts to failures in State climate policies.

[119] ibid [444].
[120] ITLOS Advisory Opinion (n 1) [252].
[121] *KlimaSeniorinnen* (n 2) [424].
[122] ibid [444].
[123] ibid [562].

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19.4.16 *Remedies*

As Chapter 18 explained, providing an effective climate remedy is an essential part of addressing the harm caused by climate-related impacts. *KlimaSeniorinnen's* declaratory judgment illustrates this approach (noting that advisory opinions do not order remedies). While the ECtHR stopped short of mandating more ambitious remedies, such as awarding just satisfaction or ordering general measures to prevent similar violations in the future, *KlimaSeniorinnen's* declaratory relief should nevertheless promote systemic change that will fundamentally influence climate law and policy across Europe. Declaratory relief, moreover, falls in line with the Court's standard approach to ECHR violations, its subsidiary role as a regional body, and the deference it traditionally grants to States to address breaches of the Convention.[124] In this regard, the outcome mirrors domestic approaches to remedies in other notable rights-based cases against governments, such as *VZW Klimaatzaak v Kingdom of Belgium and Others*,[125] where courts likewise drew a line in the sand while leaving details about implementation to be resolved by the other branches of government.

19.5 IMPLICATIONS FOR KEY ISSUES IN CLIMATE LITIGATION

These landmark decisions have significant implications for climate litigation, from bolstering the ability of plaintiffs to hold States accountable for climate action to offering authoritative jurisprudence to courts in rights-based cases. This section examines the potential of the ITLOS Advisory Opinion and *KlimaSeniorinnen* to further accelerate and expand the field of climate litigation.

The ITLOS Advisory Opinion significantly strengthens the legal basis for climate action under UNCLOS. By clarifying States' specific obligations related to GHG emissions and marine protection, it provides a robust framework for assessing State compliance and establishing State responsibility where compliance has been lacking.

The Opinion's emphasis on due diligence, the precautionary principle, and the use of best available science potentially opens new avenues for legal challenges against States that fail to take adequate measures to reduce GHG emissions or protect the marine environment from climate impacts. Plaintiffs in those disputes will particularly benefit from the normative developments furthered by ITLOS, including States' stringent due diligence obligations and the 1.5°C global temperature goal. As climate change litigation progressively evolves, the Opinion will also help inform courts' judgments across jurisdictions, especially in disputes that invoke arguments related to marine pollution and associated activities. Furthermore, the Tribunal's broad interpretation of marine pollution to include

[124] ibid [656].

[125] *VZW Klimaatzaak v l'État Belge* [2021] 2015/4585/A (Tribunal de première instance francophone de Bruxelles, Section Civile).

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GHG emissions could influence other areas of international environmental law, potentially leading to more comprehensive legal approaches to addressing climate change globally.

KlimaSeniorinnen also stands to shift the climate litigation landscape significantly. As the ECtHR's first climate change ruling, it will have immediate impact across Council of Europe Member States. Countries that do not adhere to their legal duty to put in place comprehensive climate policies will accordingly be liable for not safeguarding human rights. To that end, the new standing criteria for associations, as well as the ECtHR's emphasis on the key role of domestic courts in climate litigation, should further unlock access to justice in climate disputes. Courts outside Europe, moreover, are likely to look to the *KlimaSeniorinnen* judgment for guidance as they adjudicate human rights claims. This persuasive impact will only grow as rights-based climate litigation continues to expand across the globe.

Although *KlimaSeniorinnen* left several topics open to interpretation, those questions will likely not remain unanswered for long. For instance, it remains to be seen precisely how the ECtHR will interpret its new standing criteria in the climate context for organisations more generally focused on human rights and/or environmental issues. Relatedly, more Article 8 jurisprudence would be helpful to ascertain the scope and content of States' required regulatory framework. With six such cases pending before the ECtHR at the time of writing, the Court's climate case law is just beginning.[126] The outcomes of those disputes will likely shed crucial light on the obligations established under *KlimaSeniorinnen*, which will benefit public authorities and stakeholders alike. Beyond those disputes, the ECtHR's caseload will depend in part on the extent to which domestic courts provide access to justice in their respective jurisdictions and examine governments' climate actions under the ECHR.

Finally, it is important to note here that a handful of cases discussed in this Handbook remain pending on appeal at the time of this writing and/or were overturned by courts of appeals or apex courts during the publication process. These include the landmark *Milieudefensie and Others v Royal Dutch Shell*,[127] which is pending in the Hague Court of Appeal following the district court ruling in favour of the plaintiffs, and *Klimatická žaloba ČR v Czech Republic*,[128] which was overturned

[126] *Uricchiov v Italy and 31 Other States* App No 14615/21 (ECtHR) and *De Conto v Italy and 32 Other States* App No 14620/21 (ECtHR); *Müllner v Austria* App No 18859/21 (ECtHR); *Greenpeace Nordic and Others v Norway* App No 34068/21 (ECtHR); *The Norwegian Grandparents' Climate Campaign and Others v Norway* App No 19026/21 (ECtHR); *Soubeste and four other applications v Austria and 11 Other States* App Nos 31925/22, 31932/22, 31938/22, 31943/22, and 31947/22 (ECtHR); *Engels v Germany* App No 46906/22 (ECtHR).

[127] *Milieudefensie v Royal Dutch Shell* [2021] ECLR:NL: RBDHA: 2021:5339 (District Court of the Hague).

[128] *Klimatická žaloba ČR v Czech Republic* [2022] No 14A 101/2021 (Prague Municipal Court).

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by the Supreme Administrative Court of the Czech Republic and will be appealed by the plaintiffs.[129] Although the respective outcomes of these appeals remain uncertain at the time of writing, they illustrate that the timing of *KlimaSeniorinnen* comes at a pivotal juncture for the field of climate litigation.

19.6 CONCLUSION

The international decisions discussed in this chapter mark historic advancements in climate litigation. The ITLOS Advisory Opinion provides a robust framework for addressing climate change under UNCLOS and related customary international law, while the *KlimaSeniorinnen* judgment significantly advances human rights law as it pertains to the climate crisis. However, as this chapter has shown, both decisions also reflect and consolidate emerging best practices on a range of issues of broader relevance, including many of the issues discussed in this Handbook. Together, they represent a significant step forward in judicial engagement with climate change that could embolden judges around the world.

[129] 'Czech Climate litigation' (*Klimazaloba*) <www.klimazaloba.cz/en/> accessed 13 August 2024.

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