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# The *KlimaSeniorinnen* Judgment and its Implications

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# Overview of the *KlimaSeniorinnen* Judgment

Swiss applicants challenged Switzerland’s climate policy in administrative procedure, emphasizing vulnerability of older people

Governmental authority rejected application, and appeals were dismissed in 2 instances, for lack of standing (without consideration of the substance)

ECtHR held that Switzerland had violated its obligations under the ECHR

### Standing of the association

- Association was granted standing, since climate change questions involve special considerations:
  - Complexity
  - global nature (“*common concern of humankind*”)
  - urgency
  - severity of consequences
  - potential irreversibility
  - “intergenerational burden-sharing”

### Article 8 violation (Respect for private and family life)

- Article 8 includes right to protection by State against climate change effects
- States have a **reduced** margin of appreciation as to the necessity of combating climate change and its adverse effects, and the setting of the requisite aims and objectives
- but States enjoy a **wide** margin of appreciation as to the choice of means
- Switzerland had fallen short, e.g., gaps in its framework, failure to quantify carbon budgets, failure to achieve targets

### Article 6 violation (right to fair trial)

- The failure to address the question of the association’s standing, and the substantive merits, amounted to a violation of Article 6, since the action sought to address the applicants’ rights under the ECHR

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# Climate Change Related Obligations under the ECHR

Take measures for substantial and progressive reduction of GHG emissions, to **reach net neutrality within the next three decades**

Set **adequate intermediate reduction goals** for the period leading to net neutrality

**Act in good time** (*i.e.*, take immediate action) to mitigate climate change and **in an appropriate and consistent manner**

In effect, Paris Agreement is now **enforceable** by individuals *vis à vis* governments through ECHR !

Paragraph 548

*It follows from the above considerations that effective respect for the rights protected by Article 8 of the Convention requires that each Contracting State undertake measures for the substantial and progressive reduction of their respective GHG emission levels, with a view to reaching net neutrality within, in principle, the next three decades. In this context, in order for the measures to be effective, it is incumbent on the public authorities to act in good time, in an appropriate and consistent manner ....*

Paragraph 549

*Moreover, in order for this to be genuinely feasible, and to avoid a disproportionate burden on future generations, **immediate action needs to be taken and adequate intermediate reduction goals must be set for the period leading to net neutrality**. Such measures should, in the first place, be incorporated into a binding regulatory framework at the national level, followed by adequate implementation. The relevant targets and timelines must form an integral part of the domestic regulatory framework, as a basis for general and sectoral mitigation measures. Accordingly, and reiterating the position taken above, namely that the margin of appreciation to be afforded to States is reduced as regards the setting of the requisite aims and objectives, whereas in respect of the choice of means to pursue those aims and objectives it remains wide, the Court finds it appropriate to outline the States' positive obligations (see paragraph 440 above) in this domain as follows.*

# Implications of the judgment for climate change policy

## Increased accountability for domestic climate change policy

- Article 8 became **new source of potential liability for States'** failure to take adequate measures to mitigate climate change (NB reduced margin of appreciation)
- Courts need to give more serious consideration to both admissibility and merits of climate change related claims/applications under ECHR
- Since associations may have standing to enforce Convention Rights, **there may be an increase in human rights claims**

## ECtHR's approach reinforces climate obligations

- 1.5°C temperature-increase limit
- Interim goals (2030, 2035)
- consideration of “embedded emissions” (emissions generated through import and consumption of goods)

## UK AS EXAMPLE

- **Acts of public authorities** can generally be challenged on the basis that they are incompatible with Convention Rights, under Section 6 HRA 1998
- Such claims may now:
  - Be brought to **challenge the UK Government's climate change actions** (including insufficient commitment to a 1.5°C limit, interim goals, or consideration of embedded emissions / analogous concepts)
  - Be brought **by associations** (standing under the HRA is the same as under the ECHR), which may be better resourced and able to litigate such issues than individuals
  - need to be given **more serious consideration** to avoid risks of Article 6 violations
- **Primary legislation** is not generally reviewable under the HRA, but must be **interpreted** as far as possible in a way **compatible with Article 8 obligation** to take adequate steps to mitigate climate change (Section 3 HRA 1998)
- In any case, the UK may respond to ECtHR judgments as a matter of political pressure

# Impact on Other Governments and Pending Cases

## Express consideration of human rights in certain cases:

### ECtHR

- ***Greenpeace Nordic v Norway (2021)***: Challenge to Norway’s decision to issue new licences for oil and gas exploration that bring new fossil fuels to market from 2035 and beyond, and broader alleged insufficiencies in Norway’s climate policy (e.g., regarding exported emissions)
- **Other cases:** *Norwegian Grandparents’ Climate Campaign v Norway* (2021), *De Conto v Italy and 32 other States* (2021), *Müllner v Austria* (2021), *Engels and Others v Germany* (2022),

### Before national courts

- *ClientEarth v Poland* (2021)
- *A Sud et al v Italy* (2021)
- *Foley and others v Sweden* (2022)
- *R (Friends of the Earth Ltd, and others) v SoS for Environment, Rood & Rural Affairs* (challenge to the Third National Adaptation Programme)(2023)
- *Declic et al v The Romanian Government* (2023)
- *Greenpeace Netherlands and 8 citizens of Bonaire v The Netherlands* (2024)

### ICJ

#### ***Advisory Opinion on Climate Change***

- UN General Assembly requested Opinion from ICJ on the obligations of States under international law in respect of climate change, and legal consequences where inaction causes significant harm to climate and environment
- The request covers: (i) human rights (Universal Declaration of HR and International Covenant on Civil and Political Rights), and (ii) interests of individuals and peoples of future generations

“Persuasive authority” for other Human Rights cases, including Inter-American Court of Human Rights case, Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, etc.

# Impact on Liability of Private Parties

## HORIZONTAL EFFECT OF ECHR ON TORT LAW

- Courts, as public authorities, must enforce ECHR
- In **civil law**, tort is an “open norm”
  - In *Milieudefensie v Shell*, Hague District Court recognised that general tort “duty of care” resulted in GHG emission reduction obligations. This was informed by Convention rights (and “soft law”, scientific consensus, international instruments)
- In **common law**, courts may not develop *new* tort causes of action (*Wainwright*)?
  - But where existing causes of action are relevant, courts may take Convention Rights into account
    - For example, consideration of Convention Rights may lead to **recalibration of tort liability** (*Campbell*) or may **affect specific policy arguments** against imposing tort liability (*D v East Berkshire Community NHS Trust*)
  - **Negligence** claims may be influenced by Dutch *Shell*
  - **Public Nuisance**: one of the grounds for the claims in *Smith v Fonterra* (NZ) and *California v Exxon Mobil*
  - **New Climate Damage Tort?** To be considered in *Smith v Fonterra* (NZ). NZSC requires “consideration of...human rights obligations”, derived from “both domestic rights legislation and international instruments”.

## ECHR REINFORCED IN EEA BY CORPORATE SUSTAINABILITY DD DIRECTIVE (AND CSRD)

- CS3D will impose wide-ranging obligations on in-scope companies, including to conduct human-rights/environmental due diligence (Art 4), to prevent, mitigate and end adverse environmental and human-rights impacts resulting from the company’s operations (Art 7-8), and to adopt and put into effect transition plans (Art 15)
- Where negligent/intentional failure to comply with some these obligations (Art 7-8) causes damage to a natural or legal person’s interest protected under national law, this may result in civil liability
- The CS3D further introduces certain procedural protections to ensure effectiveness of these civil-liability provisions (limitation periods, costs, enforcement through trade unions/NGOs, remedies, disclosure of evidence etc).
- These provisions do not limit/restrict liability for environmental/human-rights impacts that would otherwise exist under national law (like tort law)

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# What Does This Mean For Investors, and For Engagement with Governments?

## Implications for engagement with governments

- Stronger lobby to create level playing field and reduce climate damage
  - Article 8 obligations (or arguments by analogy) provide new leverage in support of mitigation advocacy
  - New possibilities for collaboration, policy dialogues, etc (e.g., with human rights think tanks, NGOs, etc)
- Basis for possible *amicus briefs* in climate litigation against governments

## Impact on investors

- Increase in risk of litigation/enforcement action against:
  - **Large-emitter portfolio companies** (incl. tort claims, possibly litigation on directors' fiduciary duties)
  - Possibly, against **investors themselves for enabling** high-emission activities
- Keep in mind other legal and scientific developments, e.g., in relation to:
  - Obligations related to climate change mitigation (e.g., transition plan requirements under CS3D)
  - Causation/attribution, and assessment of loss/damage (much greater than expected -- British Actuaries, Humboldt, Exeter Un, Columbia/Oxford studies)

Stronger arguments that **cooperation is allowed under antitrust law**



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