The European Court's Legitimacy after *Klimaseniorinnen*

George Letsas, Professor of Law, UCL.*

I. The Convention as a system of individual justice

Since the early years of the European Court of Human Rights (ECtHR, Court), it became clear that the European Convention on Human Rights (ECHR, Convention) was to be understood as a constantly evolving system, whose standards adapt to present-day challenges. Numerous social issues that the Contrasting states did not intend, or expect, to fall under the scope of the Convention, have been gradually found by the Court, through the notion of a 'living instrument', to give rise to a human rights violation. Of course, governments and conservative politicians did not readily endorse this dimension of the Convention system. Charges of judicial activism, 'over-reach' or 'micro-management' soon became a recurrent motif, levelled all too often against the Court. Meanwhile, calls for a wider margin of appreciation to be afforded to states became louder over the years, culminating in the Brighton Declaration and the adoption of Protocol 15, which introduced an explicit reference to the principle of subsidiarity in the preamble of the ECHR. Yet, despite these pressures, the Court has stayed the course and has succeeded in building a detailed and coherent set of legal principles, bootstrapping its own legitimacy. Occasional backslides aside, it has undoubtedly raised the standards of human rights protection in Europe and has made a pivotal contribution to solidifying the values of democracy and the Rule of Law, unique in international law.

Climate change, however, arguably the most pressing political issue of our times, posed a very difficult challenge for the Court. Several procedural and substantive hurdles made even staunch supporters of the Court very sceptical that a state can be found legally liable for climate change within the logic of the Convention system. Let me mention the most difficult of these hurdles. First, the Convention does not recognise a human right to a clean and healthy environment. Environmental issues had been previously adjudicated before the Court only indirectly, in so far as they impacted a Convention right, such as the right to life (art. 2 ECHR) and the right to private life (art. 8 ECHR).

Second, applicants before the Strasbourg Court must show that they have been a victim of a violation of a Convention right. This admissibility requirement means that applicants must have been individually affected, either directly or indirectly, in exercising a Convention right, with very few and narrow exceptions recognised in the case law where applications can be brought on behalf of victims.[1] In the case of climate change, one would normally be expected to show, not only that one suffered environmental harm above a certain threshold of severity, but also that one was affected directly and is not merely bringing an action in the public interest (an *actio popularis*), which is not permitted by the Convention. And, at least on appearance, measures to combat climate change appear to be a paradigm case of public interest, at least in the sense that everyone benefits from reducing greenhouse gas emissions.

Third, applicants must show that the environmental harm, or risk of harm, to their Convention rights can be attributed to acts or omissions of the respondent state. In the Court's previous case law, the environmental harm was typically localised, concerning things such as

* I would like to thank the editors of the *ECHR Law Review* for the invitation to contribute and for their very thorough comments and suggestions on an earlier draft. I have also benefited enormously from discussions with Veronika Fikfak, Sonam Gordham, Devika Hovell, Maria Lee, Virginia Mantouvalou, Eloise Scotford, and Lisa Vanhala.

[1] *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania,*[gc] App no 47848/08 (ECtHR 17 July 2014)

floods, or toxic waste. It concerned environmental harm within a specific region for which the state was causally responsible or could have prevented. In climate change, by contrast, the risk of harm is global rather than localised. It comes from aggregate greenhouse gas emissions, rather than the emissions of any single state. Even if one state, like Switzerland, did all it could to reduce its emissions, this measure – on its own – would not suffice to reduce the risk of environmental harm to individuals within the jurisdiction of Switzerland, unless all other states also take appropriate measures.

Finally, under the principle of subsidiarity, states enjoy a wider margin of appreciation with respect to positive obligations, where the violation lies in the failure of the state to take action such as legislative measures. This is typically the case with complex matters of policy, where there are multiple ways in which states can comply with their obligations under the Convention. The 8 countries that intervened in *Klimaseniorinnen*[2] precisely raised this issue. Even if it was accepted that climate change falls within the scope of the Convention and applicants could show victim status, the ruling of a violation seemed unlikely since it was not clear what specific measures the Court could order a state to take.

I must admit that, before the judgment was handed down, I could not see how the Court could overcome all the above hurdles and rule a violation. But there was also a broader issue of principle at stake. The Convention system is based on the principle of individual justice. This principle underpins the right of individual application under Article 34 ECHR and the requirement for the applicant to be a victim. But it also underpins the more general point that human rights do not exhaust the whole realm of political justice and nor should human right law. Not everything that is wrong, unjust, or unethical is a human rights violation. Governments may adopt all kinds of ill-judged policies, or implement good policies in deficient or incompetent ways, without violating human rights. A bill of rights should not aim at tackling all the ways in which a government may fare badly. It would not be possible, for instance, to mount an ECHR challenge against the UK's decision to leave the European Union, merely on the basis that it harmed substantially the country's economy, or deprived younger generations of significant opportunities. What is crucial for a human rights violation is the cognisable impact that an act or omission has on the lives of individuals. The paradigm human rights abuses, such as torture or extra-judicial killing, are not just wrong ways for government officials to behave, but more importantly wrongs done *to* particular individuals, what is called a *directed* wrong. It is in virtue of their status as victims of a directed wrong that individuals have standing to initiate legal proceedings. It is true, of course, that other member states can also submit an interstate application with respect to individual violations. But this still presupposes the existence of a directed wrong done to an individual.

Most people would agree that sticking to the adjudication of directed wrongs done to individuals, and not venturing into broader issues of social and political justice is a necessary condition for the legitimacy of the Court. Yet this is not an easy distinction to draw, and context is crucial. The Court in *Klimaseniorinnen* went to great pains to justify the ruling of a violation under the Convention, particularly the granting of standing to the association and the refusal to recognise victim status for individual applicants. In the flood of academic commentary that followed the judgment, this move was widely seen as the introduction of 'public interest litigation' into the Convention system.[3] Most commentators welcomed the move as an acceptable moment of judicial activism, justified by the urgency of the climate crisis and in

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[2] *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* [gc] App no 53600/20 (ECtHR, 9 April 2024)

[3] See for instance, Linos-Alexander Sicilianos and Maria-Louisa Deftou, 'Breaking New Ground: Climate Change before the Strasbourg Court', available at: https://www.ejiltalk.org/breaking-new-ground-climate-change-before-the-strasbourg-court/; Johannes Reich, 'KlimaSeniorinnen and the Choice Between Imperfect Options', available at: https://blogs.law.columbia.edu/climatechange/2024/04/18/klimaseniorinnen-and-the-choice-between-imperfect-options/.

line with climate change litigation in other fora.[4] Were this to be the case, however, the Court would have compromised the principle of individual justice and undermined its legitimacy. The precedent set would be hard to follow, and to justify. Why not allow public interest litigation for other pressing issues of our times, such as the cost-of-living crisis, or affordable housing? The Court could set broad targets for governments to aim at in those areas (e.g., increase percentage of available housing, or reduce inflation), like the ones it set for reducing Greenhouse gas emissions. It could so before any individual becomes destitute and can claim victim status under articles 3 or 8 ECHR.

Setting these worries aside, I want to sketch briefly in this guest editorial, one way in which the Court's judgment can be made compatible with the principle of individual justice. No doubt, some will think I am clutching at straws to defend the Court against charges of judicial activism. But it is crucial that we carefully reconstruct the Court's reasoning and try to see it in its best light. If one interpretation of what the Court decided can escape the conclusion that it effectively allowed an *actio popularis*, then it should be preferred. This is because that interpretation would cohere better with the Court's case law and the normative underpinnings of the ECHR, as well as the role that justiciable human rights play more broadly. It would also cohere with the Court's persistent claim in the judgment that *actio popularis* is not permitted under the ECHR. Judicial interventions that are inconsistent with the underlying principles of an area of law, naturally raise charges of arbitrariness and undermine the court's legitimacy.

II. A paradox in the Court's approach

Perhaps the thorniest issue in *Klimaseniorinnen* is how to square the prohibition on *actio popularis* with the granting of standing to the applicant association, but not to the individual applicants. How can the four individual applicants lack victim status, as the Court held, yet the association, of which the applicants were members, had standing and won the case on the merits? The association, the Court held, was not pursuing a complaint regarding its own rights, but was simply representing individuals whose interests are affected by climate change. The Court's approach, on its face, appears paradoxical. If there was a violation of article 8 ECHR, as the Court accepted, then who is the victim? If the victims included the members of the association, on whose behalf the association brought the claim, then why do they lack victim status?

The result would not, of course, be paradoxical if the Court had openly abandoned the prohibition on *actio popularis* and accepted that it is creating a 'public interest litigation' exemption to the right of individual application under Article 34 ECHR. Such exemption would give associations standing to pursue legal action in the public interest, rather than represent individuals who are victims. Crucially, associations would have standing under such exemption, regardless of whether any individual, including their members, have victim status. Yet this is not what the Court said it is doing, since it sought to uphold the prohibition on *actio popularis*. In his dissent, Judge Tim Eicke, raised precisely this point. He argued that the majority "created exactly what the judgment repeatedly asserts it wishes to avoid, namely a basis for *actio popularis* type complaints".[5]

Is Judge Eicke right? We should begin by noting that the prohibition of *actio popularis* is not meant to serve as a way of blocking a large number of admissible applications, what is

[4] See Corina Heri, *Climate Cases as Public Interest Litigation Before the European Court of Human Rights,* in Justine Bendel and Yusra Suedi, *Public Interest Litigation in International Law* (Taylor and Francis 023

[5] Partly Concurring Partly Dissenting Opinion of Judge Eicke in *Klimaseniorinnen*, para 45.

often called the 'floodgates of litigation'. In the context of the Convention, it is uncontroversial that a very large number of individuals may be victims of a violation.[6] It is moreover conceivable that a legislative act may directly affect millions, or even the entire population within its jurisdiction. In the case of *Modinos v Cyprus*,[7] the Court held that the very existence of legislation criminalising homosexual conduct was sufficient for the applicant to be considered a victim. This was even though the criminal prohibition was not enforced against the victim. We can only speculate about how many other people in the country were affected by this legislation and hence qualified as victims. Though their number was indefinite, this was no obstacle to admissibility. Indeed, imagine that a state criminalised the expression of all political speech and threatened to enforce the prohibition. Virtually all individuals in this hypothetical would qualify as victims under the Convention and all would be symmetrically affected.

So, it cannot be a necessary condition of admissibility under the Convention that the individual victim must be affected *differently* to others. This is often used as a criterion for when a lawsuit is not an *actio popularis*; but it is merely a proxy. The criteria for victim status are non-comparative; one can be *directly* affected by an act, even if one is affected in the same way compared to the general population. Victims, moreover, can be indefinite in the sense that we cannot know their identity or their number, as was the case with those affected by the prohibition of homosexual conduct in *Modinos*. The floodgates argument is based on a logic, foreign to the Convention system, that if it is very costly to hear the applications of all victims, then those victims should be deemed not to have a legal right. What matters, instead, under the Convention is whether one's rights have been affected in a legally relevant way.

We should therefore be puzzled by the Court's statement in paragraph 483:

> While it is true that in the context of general situations/measures, the class of persons who could claim to be victim status "may indeed be very broad", it would not sit well with the exclusion of *actio popularis* from the Convention mechanism and the effective functioning of the right to individual application to accept the existence of victim status in the climate-change context without sufficient and careful examination.[8]

The Court here seems to conflate two separate questions. The first is whether climate change may directly affect the Convention rights of an indefinite number of people, and potentially everyone, in a legally relevant way. The second is whether one can bring a complaint about climate change in the public interest, rather than on behalf of a victim of a Convention right. If the answer to the first question is positive, then no issue arises under the second question, and hence no violation of the prohibition of *actio popularis*, even if the number is very high.

That the Court interpreted the prohibition on *actio popularis* as a pragmatic concern about floodgates is even clearer in para 484 where it said that if the circle of victims is drawn too widely, this would "risk disrupting national constitutional principles and the separation of powers by opening broad access to the judicial branch as a means of prompting changes in general policies regarding climate change".[9] But this is a non-sequitur because no disruption to separation of powers occurs when a large number of individuals are *in fact* victims of a Convention right. No such disruption occurred in length-of-proceedings cases, or in cases like

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[6] For example, in Article 6 ECHR cases to do with length of proceedings), where the number of victims is very high, the issue has been dealt by the Court under the familiar mechanism of a pilot-judgment. See e.g., *Rumpf v Germany,* App no 46344/06 (ECtHR, 2 September 2010).

[7] *Modinos v Greece*, App no 15070/89 (ECtHR, 22 April 1993).

[8] *Klimaseniorinnen*, para 483

[9] Ibid., para 484.

Modinos v Cyprus. In sum, if the Court's reason for denying the four applicants victim status, and for granting standing to the association, was a utilitarian concern with floodgates, and a worry about an indefinite number of victims, then it was the wrong kind of reason. A claim is an *actio popularis* only when it is brought *solely* in the public interest, and not by (or on behalf of) a victim of a rights violation.

III. Children and Future Generations as Victims

Should then the Court have granted victim status to the four women applicants? Arguably, it is not clear that the Convention rights of these women, and of thousands of other persons in Switzerland who are similarly situated, were victims under the Convention criteria. If this is correct, it poses a dilemma. Either the association brought the claim on behalf of its members, in which case it should not have been granted standing, given that the four women were found to lack victim status; or, alternatively, the association brought the claim solely in the public interest, in which case the Court allowed an *actio popularis,* in contravention of article 34 ECHR. The first option commits the Court to an inconsistency, whereas the second option constitutes a case of judicial activism. I want to highlight here a third option, however, that might avoid these problems: the association represented the Convention rights of future generations, who currently count as victims, but are unable to bring a complaint. Could this interpretation find any ground in the Court's case law and the logic of the Convention system?

As Judge Eicke noted in his dissent, only in 'highly exceptional circumstances' has the Court accepted that a) an applicant can be a victim of a risk materialising in the future and that b) an association has standing to represent victims without their authorisation. In exploring these exceptions under the heading of 'potential victim', the Court was quick to find that they were not applicable in the case of climate change.[10] But the reason the Court gave there was again based on a misconception of *actio popularis*. It said that 'in the context of climate change, this could cover virtually anybody and would therefore not work as a limiting criterion'.[11] As argued already, however, the fact that an interpretation will result in an indefinite number of individuals counting as victims, is not in itself a reason to reject it.

However, a focus on the rights of future generations, as opposed to the living population, does provide a limiting criterion: it helps to distinguish between individuals who, at the moment, are not affected by climate change at a very high threshold of severity, and those who will certainly be so affected in the future, if no state action to combat climate change is taken. A careful reading of the Court's judgment reveals the key role that the rights of future generations play in it. We can reconstruct the Court's argument as follows:

Premise 1: Future generations are likely to bear an increasingly severe burden of the consequences of present failures and omissions to combat climate change.[12]

Premise 2: This inevitably calls for intergenerational burden-sharing.[13]

Premise 3: There is a risk that short-term interests and concerns may come to prevail over, and at the expense of, pressing needs for sustainable policy-making.[14]

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[10] Ibid., para 485.
[11] Ibid., para 485.
[12] Ibid., para 421.
[13] Ibid., para 420
[14] Ibid., para 421

Premise 4: Future generations, who stand to be most affected by the impact of climate change, can be said to be at a representational disadvantage.[15]

Conclusion: Collective action through associations or other interest groups may be one of the only means through which the voice of those at a distinct representational disadvantage can be heard.[16]

It is hard to doubt the cogency of this argument. Future generations are not represented in current legislative decision-making. This absence of representation allowed, for example, the concerns of Swiss people about the possible rise of petrol prices to affect the result in the referendum of 2021, and to defeat the passing of the CO2 Act.[17] The argument also ties in well with the Court's case law that has afforded strong protection to under-represented or unrepresented minority groups, such as prisoners, children and immigrants.

Is there a doctrinal obstacle to viewing future generations as potential victims under the Convention? The Court's existing case law supports this interpretation. We know from cases like *Norris*[18] and *Soering*[19] that individuals count as victims even though the risk of enforcing legislation, or the risk of being subjected to the ill-treatment if extradited, has not materialised yet. It is the *present* risk that makes them victims under the Convention system. To be sure, there are conditions: there must be evidence of a high degree of probability, the risk of harm must be direct and the consequences not too remote. But all these conditions appear to be met in the case of climate change: the scientific evidence is unquestionable that unless action is taken, future generations will suffer much more severe harm directly and with certainty. Though the harm is remote in terms of time, it is not in terms of causation. This is one respect in which climate change differs from other pressing political issues, such as the cost-of-living crisis.

Is the fact that future generations do not exist yet, and cannot come before the Court, an obstacle? The Court already examines applications about individuals who do not exist, because they have died. In fact, these are precisely the cases where the Court has allowed associations to bring a complaint on behalf of the victim without their authorisation, as in the case of *Centre for Legal Resources on behalf of Valentin Campeanu v Romania*. And it is not clear that anything relevant hangs on the distinction between the rights of a dead person and the rights of a future person. In any case, today's young children already face the risk of much more severe harm materialising in their lifetime due to climate change, than current adults. These children may already have victim status under the Convention because the present risk of harm to them has reached a very high level of severity. And, just like deceased persons, they cannot bring an application before the Court. But their relatives can. The same logic that would grant standing to the relatives of these children, would also grant standing to associations to bring a complaint on behalf of the children whose relatives are unable to do so. And it is a small step from that proposition to allowing associations to bring claims on behalf of future generations. The general principle is that associations can have standing before the Court on behalf of actual victims who are unable to bring a claim, yet it is important that the Court examines whether there has been a violation.

This interpretation avoids the initial paradox, which judge Eicke rightly pointed out. If we accept that future generations, or even today's young children, are victims, then we can explain *both* why associations have standing to bring claims on their behalf *and* why the four

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[15] Ibid., para 484
[16] Ibid., paras 489 and 616.
[17] See https://www.swissinfo.ch/eng/politics/vote-on-co2-law-could-be-close-pollsters-say/46664200
[18] *Norris v Ireland*, App no 10581/83 (ECtHR, 26 October 1988).
[19] *Soering v United Kingdom*, App no 14038/88 (ECtHR, 7 July 1989).

individual applicants did not have victim status. *Klimaseniorinnen* can be then seen as having brought a claim not in the public interest, or on behalf of its members, but on behalf of victims who are currently unable to do so. To be sure, the Court did not say this in the judgment. But it cannot be true *both* that the applicant association did not bring the claim on behalf of victims *and* that the Convention prohibits *actio popularis*. One of the two propositions must be rejected, and the interpretation I am putting forward rejects the former, while still finding ground in the Court's reasoning. The Court placed great emphasis on intergeneration justice in several parts of the judgment but did not make the connection to standing and the requirement to be a victim. This, in my view, was simply an oversight and the Court's reasoning can achieve greater interpretive coherence if this connection is made.

If the above analysis is correct, *Klimaseniorinnen* is neither a radical departure from the Court's existing case law, nor a potential avenue for expanding the scope of the Convention through public interest litigation. It is limited to the particularities of climate change, as a cognisable threat to individual rights and sets no broader precedent. More importantly, it strengthens, rather than undermines, the Court's legitimacy as a guardian of fundamental rights in Europe.