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The *KlimaSeniorinnen* Case, the ECtHR and the Question of Access to Court in Climate Change Cases

1. *Introduction*

The European Court of Human Rights (ECtHR) has a long-standing jurisdiction on environmental matters. Even though – as the ECtHR has repeatedly held – the European Convention on Human Rights (ECHR) does not provide a right to a healthy environment as such, the court recognises that the exercise of certain Convention rights may be undermined by the existence of environmental harms or exposure to environmental risks. It has thus held that positive state duties derive from the ECHR, in particular from the right to life and to private and family life (including the home) guaranteed in articles 2 and 8 of the Convention, states thus having the duty to protect these rights from environmental risks and harms.

The question currently pressing is whether this jurisprudence also applies to the context of climate change. Indeed, the environmental cases dealt with by the ECtHR so far have all concerned environmental issues in a more traditional sense, such as dangerous industrial activities, waste disposal or others, and not climate change more specifically. Since several climate change cases are currently pending before the ECtHR, the latter will soon have the possibility to clarify whether – and if so, to what extent – states do have a duty to protect against the dangers of climate change.

While two cases have already been judged inadmissible and several other climate change cases have been adjourned[1], three cases (hereinafter: "main cases") have been relinquished to the Grand Chamber, thus reflecting their importance as raising a «serious question affecting the interpretation of the Convention or its Protocols»[2]. One of these three main cases is the Swiss *KlimaSeniorinnen* case.

1. Until decision by the Grand Chamber in the "main cases".
2. Article 30 ECHR.

In the *KlimaSeniorinnen* case, but also in the other (main) climate change cases pending at the ECtHR, admissibility issues as well as access to the court(s) are of particular importance. This has not only been thus in the context of national proceedings, but will also be the case in the context of proceedings before the ECtHR. Other than facing the challenge of applying its own admissibility rules to climate change cases, the latter will indeed have the important role of assessing whether the national admissibility requirements and their application in the climate change cases were in line with human rights guarantees deriving from the ECHR, thus helping to clarify the role of (national) courts in determining and enforcing legal obligations in the climate policy context.

With climate change cases challenging the traditional understanding of admissibility and access to court and the latter thus posing one of the main problems – if not the biggest hurdle – for climate change cases, at least in a European setting, we will focus on these aspects. Starting with an introduction to the *KlimaSeniorinnen* case and taking it as a starting point (para 2), several admissibility issues can be identified, which we will focus on in more detail in the following sections of the paper. These issues are the questions of justiciability and area of competence of courts (para 3), the admissibility requirement of «being affected in one's rights» (para 4) as well as the assessment of facts and its implications for climate change cases (para 5). Even though the focus will be on the *KlimaSeniorinnen* case, we will not only analyse the procedural provisions specifically applicable in that case. Because although the different national, regional or international courts do each have their own procedural codes and rules, some admissibility issues are of larger interest, *nota bene* seeing that (similar) procedural requirements might be stipulated in different jurisdictions, making some admissibility questions challenging independently of the specific procedural code or rule applicable. We will thus take a more general approach, looking at admissibility issues more largely, rather than (only) analyse specific procedural provisions in detail. In doing so, we will not only discuss how and why some admissibility requirements can be an issue in the context of climate change litigation, but rather argue that they do not represent an insurmountable hurdle, sometimes also discussing possible alternatives to the *status quo – de constitutione/lege lata* or *ferenda*.

2. *The* KlimaSeniorinnen *Case*

The applicants in the *KlimaSeniorinnen* case are the "*Verein KlimaSeniorinnen Schweiz*" – an association according to Swiss law and whose members are all women with an average age of over 72 – as well as four individuals – all women aged 74 or older at the time of the first request. They allege different omissions with regards to climate change and preventing its negative effects by the Federal Council, the Federal Department of the Environment, Transport, Energy and Communications (DETEC), the Federal Office for the Environment (FOEN), as well as the Federal Office of Energy (FOE), all federal governmental authorities belonging to the executive branch of government[3].

In particular, they claim that not only both the greenhouse gas (GHG) reduction target until 2020[4] as well as the (then) planned reduction target until 2050 are insufficient[5], but also the measures to reach these targets[6]. Furthermore, they claim that the respondents violate other (but related) duties, such as the duty to adequately and correctly inform the legislature of the dangers of climate change and the Swiss legal obligations to prevent its negative effects[7]. In the proceedings before the 2nd and 3rd Swiss instance, as well as in the proceedings before the ECtHR, alleged procedural insufficiencies are central[8].

The appellants request the respondents – in their respective area of competence – to undertake all actions that are necessary for the contribution of Switzerland to limiting global warming to comply with the "well below 2°C" target set in the Paris Agreement as well as to undertake all actions that are necessary to reach the national reduction targets, which should be fixed at a minimum of 25% until 2020 and of 50% until 2030.

3. For procedural reasons, however, it was the DETEC that issued the ruling which was subsequently appealed against at the Federal Administrative Court (hereinafter: FAC) and the Federal Court (hereinafter: FC), which is why in the proceedings before the FAC and the FC, the DETEC was the sole defendant.

4. *KlimaSeniorinnen* and four individual appellants, Request of 25 November 2016 to stop omissions in climate protection pursuant to Art. 25a APA and Art. 6 para. 1 and 13 ECHR, available at: www.klimaseniorinnen.ch (accessed 13 March 2023; hereinafter: Request), chap. 8.2 para. 292 ff.

5. Request, chap. 8.4 para. 321 ff.

6. Request, chap. 8.3 para. 316 ff. and chap. 8.5 para. 325 ff.

7. Request, chap. 8.2.1.1 para. 292 ff.

8. *Nota bene* the right to access to court and to an effective remedy (articles 6 and 13 ECHR).

Eventualiter, the applicants request that the respective omissions – to the requested actions – are to be declared unlawful[9].

The applicants claim that, through these alleged omissions, the respondents violate their right to life and to private and family life guaranteed in articles 2 and 8 of the ECHR as well as article 10 of the Swiss Constitution. Indeed, while the applicants have originally referred to a very varied set of legal sources, such as different obligations according to international law, the UNFCCC and the subsequent agreements and protocols in particular (especially the Paris Agreement)[10], but also the principle of precaution established in international as well as national law (on the national level see art. 74 para. 2 Cst.)[11], and to the principle of sustainable development fixed in art. 73 Cst.[12], they narrowed down their approach in the course of the national proceedings to a human rights narrative. Legal sources other than the human rights guarantees are only referred to in the context of the interpretation of the scope of human rights[13].

In procedural terms, the applicants argue that, as elderly women, they are particularly affected in their rights by the negative effects of climate change[14], from which fact they derive a right to access to court based on Swiss administrative law on the one hand – article 25a Administrative Procedure Act (hereinafter: APA) more specifically[15] – but also on the right to access to court guaranteed in article 6 ECHR[16] as well as the right to an effective remedy (article 13 ECHR)[17].

To substantiate their claims, the applicants refer to scientific data, proving, on the one hand, a temperature rise and (more frequent) occurrence of heatwaves in Switzerland, and that these temperature effects are caused by man-made climate change. On the other hand, they refer to scientific data indicating an increased mortality and morbidity rate for elderly women caused by these temperature effects. Furthermore, the four individual applicants provide medical proof that they have already suffered

9. Request, requests for legal remedy on pp. 3 ff.
10. See Request, chap. 5.1 para. 104 ff.
11. See Request, chap. 5.3 para. 116 ff.
12. See Request, chap. 5.2 para. 112 ff.
13. Namely to specify the right to life and private and family life and the duties possibly being derived from these guarantees in the context of climate policy; Reference is made particularly to the Paris Agreement and the precautionary principle.
14. Request, chap. 4.4 para. 88 ff.
15. Request, chap. 6.2 para. 207 ff.
16. Request, chap. 6.1.2 para. 190 ff.
17. Request, chap. 6.1.3 para. 201 ff.

different (health) impairments caused by heat – ranging from having to confine themselves to their houses up to having passed out during heat waves. From this, they conclude that – as elderly women – they are (already now) affected in their health – due to both the actual impairments suffered and to the higher risk of mortality and morbidity (which will increase with the scientifically predicted further temperature increase and more regular occurrence of heatwaves). The respondents – being aware of these facts and risks but still omitting to take all the necessary and adequate measures – would thus violate their duty to protect the rights invoked by the applicants.

In the national proceedings, it is admissibility, more precisely the procedural requirement of having to be particularly affected in one's right according to article 25a APA, that has been decisive. According to this provision, one can only act against omissions by public authorities if one is particularly affected in one's right by these omissions. If this requirement is met, one can – rather than directly challenge (alleged) omissions in court – request a ruling from the competent public authority regarding the (alleged) omissions, whereby that ruling can then be subject to an appeal at court[18].

Hence, the applicants, in a first step, requested a ruling from the competent public authority, namely the DETEC, which rejected their request on procedural grounds, thus not entering *in materiae,* arguing that the applicants did not meet the requirement of being particularly affected in their right(s)[19]. This ruling was subsequently upheld by the second and third national instances – the FAC and FC[20]. While the FAC justified its decision in this regard by holding that the applicants are not particularly affected in comparison to the general public, the FC held that the applicants – like the rest of the Swiss population – are not affected with sufficient intensity by the omissions[21]. It argues that the temperature rise

18. See art. 44 APA; see also art. 31 of the Federal Act on the Federal Administrative Court, according to which the FAC does in principle act in cases of an appeal against a ruling in the sense of the APA; see also art. 86 of the Federal Act on the Federal Court (hereinafter: AFC), according to which an appeal to the FC in public law affairs is only admissible against decisions of certain specific previous instances, amongst them the FAC.
19. DETEC, Ruling of 25 April 2017 on the Request of 25 November 2016 of the Appellants *Verein KlimaSeniorinnen et al.*, available at www.ainees-climat.ch (accessed on 13 March 2023; hereinafter: Ruling).
20. BGE 146 I 145 (hereinafter: FC, *KlimaSeniorinnen*); Decision A-2992/2017 of the Federal Administrative Court, 27 November 2018 (hereinafter: FAC, *KlimaSeniorinnen*).
21. See FC, *KlimaSeniorinnen*, para. 4.1 and 5.5.

limit of "well below 2°C" in terms of the Paris Agreement is not expected to be exceeded in the near future, that there is still some time available to prevent global warming exceeding this limit and that global warming can be slowed down by suitable measures[22].

The national instances have also concluded that the applicants could not derive a right to have their request treated on the merits from procedural human rights guarantees, namely articles 6 para. 1 (right to access to court) and 13 (right to an effective remedy) ECHR, arguing respectively that the actions requested by the applicants could not have directly reduced the general risk of danger stemming from global warming, hence there being no real dispute of a serious nature whose outcome would have been decisive for the applicants claims (FAC)[23], and – referring to its previous considerations according to which the applicants were not sufficiently affected in their rights – that the applicants could not assert an "arguable claim" under national law (FC)[24].

More generally, the national instances have concluded that the applicants' request does not serve their individual legal protection, but is rather aimed at reviewing the existing climate protection measures at the federal level and those planned until 2030 in the abstract with regard to their compatibility with the state's duty to protect derived from the rights invoked and indirectly – via the requested action of state authorities – to initiate the tightening of these measures. Such concerns should be addressed through political means, rather than pursued through courts. The applicants' request was thus qualified as an inadmissible *actio popularis*[25].

The *KlimaSeniorinnen* case is illustrative for three main admissibility issues which we will discuss in detail in the next sections, namely the question of the area of competence of courts as opposed to the political powers and related questions of justiciability, the requirement of having to be "(particularly) affected in one' s right(s)" as well as the assessment of facts, in particular scientific data.

22. See FC, *KlimaSeniorinnen*, para. 5.3. f.
23. FAC, *KlimaSeniorinnen*, para. 8.3 f.
24. FC, *KlimaSeniorinnen*, para. 6 f.
25. See FC, *KlimaSeniorinnen*, para. 5.5.

3. *Justiciability and Area of Competence of Court(s)*

A first important issue is what courts can or cannot or should or shouldn't decide, in terms of content and functionality, and thus questions with regards to justiciability and the area of competence of courts. Indeed, it is often argued that the questions raised in climate change cases – in particular if they concern mitigation rather than adaptation – can (or should) not be answered by courts – because they are political rather than legal questions and because the legal sources the applicants rely on are (only) addressed to the political powers, leaving the latter with a certain margin of appreciation, and also too vague for courts to deduce concrete (legal) obligations from them. The challenges associated with these questions are rendered more difficult in that in climate change cases, it is often not an act but a failure to act on the part of the state that is at issue.

National courts thus have to address separation of powers considerations – in particular the differentiation between legal and political questions and how to deal with the margin of appreciation of the political powers (or other actors more generally). In the context of the ECtHR, such or similar questions arise namely in connection with the principle of subsidiarity and the margin of appreciation doctrine.

3.1 *Areas of Judicial Competence in View of the Margin of Appreciation of Other Actors*

Contrary to what is sometimes asserted – and has been indirectly held by the Swiss instances in the *KlimaSeniorinnen* case – it is argued here that a general exclusion of judicial competences in cases in which (some of) the (legal) obligations are addressed to the political powers, leaving them with a – more or less far reaching, depending on the legal source – margin of appreciation as is the case in climate change cases cannot be justified with reference to the separation of powers principle. Rather, inherent to the principle of separation of powers are also ideas of checks and balances and mutual control and constraint of state powers[26]. An understanding of the separation of powers as a strict division of powers principally excluding

26. Elaborately, see e.g. C. Möllers, *The Three Branches, A Comparative Model of Separation of Powers*, Oxford, 2013, 43 f.; see also e.g. E. Carolan, *Balance of Powers*, in A.F. Lang - A. Wiener (eds.), *Handbook on Global Constitutionalism*, Cheltenham/Northampton, 2017, 212-221, as an example of a scholar deviating from the terminology of "separation", thus indicating even terminologically a shift away from the idea of "separation" (or even

judicial control over the political state powers is thus contrary to the very idea of separation of powers, which is to organise state powers in such a way as to prevent power abuse and to protect human rights of the citizens.

3.1.1 *Separation of Powers, Political Questions and Areas of Judicial Competence*

That the political powers – like all state powers – can be controlled, checked and if necessary restrained is justified because they are not outside the law, in a legal vacuum or lawless area, but rather bound and limited[27] by the law[28]. This is a fundamental principle deriving from the rule of law[29]. The state powers – including the political powers – are under a duty to comply with their legal obligations, such (binding) legal obligations arising from national as well as international law, in particular in the field of human rights. The constitutional system should hence be designed[30] in such a way as to guarantee compliance with these legal obligations, which can be best ensured by putting in place mechanisms controlling and checking the different state powers. Thus, not only can the separation of powers principle not justify the exclusion of control mechanisms of state actors, but rather, it requires suitable control mechanisms to be put in place in the constitutional system. Such control mechanisms should not only exist in the context of (allegedly) unlawful action, but also in the context of (allegedly) unlawful inaction.

This is all the more true since the "classical" understanding of the separation of powers[31] – which was based on the idea of the state as a Leviathan that has to be restrained from abusing its powers – only insufficiently apprehends the current conception and reality of the state. Indeed, the role and form of the state, its tasks and goals have changed

"division") of powers towards the conception of "balance" (or "organisation" or similar) of powers.

27. See e.g. article para. 1 Cst.

28. Instead of many: D. Grimm, *Rule of Law and Democracy*, in G. Amato - B. Barbisan - C. Pinelli (eds.), *Rule of Law vs Majoritarian Democracy*, Oxford / New York / Dublin, 2021, 43-61, 52 ff.

29. See e.g. J.R. Preston, *The Contribution of the Courts in Tackling Climate Change*, in *Journal of Environmental Law*, 28, 2016, 12.

30. On the separation of powers principle as a «design feature» for constitutional systems, see e.g. C. Saunders, *Theoretical Underpinnings of Separation of Powers*, in G. Jacobsohn - M. Schor, *Comparative Constitutional Theory*, Cheltenham/Northampton, 2018, 66-85, 67.

31. For a «comparative sketch» on the traditional understanding of the separation of powers, see C. Möllers, *op. cit.*, 16 ff.

considerably compared to the historical context at the time of the original development of the principle of separation of powers. This development has been – and still is – influenced by various aspects, including the increasing globalisation and inter- and transnational linkages. Not only have the state's responsibilities multiplied and become more complex compared to the times of Locke, Rousseau or Kant, but the state apparatus has also grown and its organisation and the factual situations to be regulated have become more elaborate. Indeed, the state is no longer conceived of as a classical-liberal *Nachtwächterstaat* which has to provide the framework for free market economy and the individual development of human beings within it and otherwise refrain from interfering with individuals' lives, but rather a social state that also has to provide certain state services, actively protect individuals rights and guarantee a minimum standard of social security[32].

Related to and illustrative of this development is the advancement of human rights guarantees. The catalogue of human rights that are guaranteed has grown steadily since their first recognition. Indeed, while first generation of human rights guarantees comprised primarily – if not exclusively – classical-liberal rights, so-called civil and political rights (e.g. right to life, procedural rights, freedom of expression, etc.), the second generation of human rights also included economic, social and cultural rights (e.g. right to housing or food, etc.)[33]. Moreover, while fundamental rights initially have solely been accorded a negative dimension, a so-called "duty to respect" in the sense of a duty to refrain from interfering with individuals' rights, positive dimensions are now recognised as well, in particular a "duty to protect" as well as a "duty to fulfil"[34]. These positive duties in turn include and require various types of state action – whether they be factual, legislative or administrative. Individuals therefore not only have the negative right to demand the state to refrain from unlawful interferences with their rights, but also positive rights to demand the state

32. See e.g. W. Haller - A. Kölz - T. Gächter, *Allgemeines Staatsrecht*, Zurich/Basel/Geneva, 2020, 157 f., for an account of the development of the social state; see also C. Möllers, *op. cit.*, 40 f.

33. See e.g. W. Kälin - J. Künzli, *Universeller Menschenrechtsschutz, Der Schutz des Individuums auf globaler und regionaler Ebene*, Basel, 2019, 36. The third generation of human rights is still developing and includes solidarity and group rights. This generation is particularly important in the field of climate change litigation.

34. In the context of the ECtHR, see e.g. W.A. Schabas, *The European Convention on Human Rights, A Commentary*, Oxford, 2015, Article 1, 90 f. on the positive dimension of human rights.

to act in order to protect their human rights. These developments towards a complex social welfare state have to be taken into account when looking at the separation of powers.

The principle of separation of powers requiring all state powers to be controlled and checked does not imply that the control mechanisms necessarily or imperatively need to be judicial[35]. However, it is argued here that courts are well suited to take the role of checks and balances to the political powers – also in the context of climate change litigation[36]. Considering that some obligations in the climate change context – even though addressed to the political powers – are of a legally binding character and not mere political statements – which is the case for most of the legal sources invoked by the applicants in climate change cases, such as the Paris Agreement[37] or the ECHR – areas of judicial competence do indeed exist, despite political margins of appreciation, and should be recognised as such.

The latter is what courts – other than the Swiss instances in the *KlimaSeniorinnen* case – have indeed argued convincingly. In the landmark case "*Urgenda*", the Supreme Court of the Netherlands has held that «in the Dutch constitutional system of [government,] decision-making on the reduction of greenhouse gas emissions is a power of the government and parliament. They have a large degree of discretion to make the political considerations that are necessary in this regard»[38]. However, as the Court also held, «it is up to the courts to decide whether, in availing themselves of this discretion, the government and parliament have remained within the limits of the law by which they are bound»[39]. Such limits

ensue from the ECHR, among other things. The Dutch Constitution requires the Dutch courts to apply the provisions of this convention, and they must do so in accordance with the ECtHR's interpretation of these provisions. This mandate to

35. On the idea of political powers «enforcing constitutional limits on their own power», see e.g. M. Tushnet - F. Gonzalez-Bertomeu, *Justiciability*, in M. Tushnet - T. Fleiner - C. Saunders (eds.), *Routledge Handbook of Constitutional Law*, Oxfordshire/London, 2013, 111-120, 118 f.

36. See chap. 3.2.

37. L. Rajamani, *The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations*, in *Journal of Environmental Law*, 2016, 28, 337-358.

38. Supreme Court of the Netherlands, Stichting Urgenda v The State of the Netherlands, App. No. 19/00135, 20 December 2019, ECLI:NL:HR:2019:2007 (hereinafter: Urgenda), para. 8.3.2.

39. Urgenda, para. 8.3.2.

the courts to offer legal protection, even against the government, is an essential component of a democratic state under the rule of law[40].

In the presence of legally binding obligations, such as those derived from the ECHR and from the Paris Agreement, areas of judicial competence thus do exist. The difficulty rather lies with delimiting the political margins of appreciation from the limits provided for by law. Indeed, where political margins of appreciation exist, courts have to take these into account. However, since the assessment of these discretionary powers is often complex and requires a detailed examination of the legal bases and the facts of the case, the existence of such discretionary powers should not be an obstacle to admissibility, but rather be considered on the merits[41]. This is all the more true since procedural requirements oftentimes coincide with substantive requirements. Such an approach does not lead to an "unleashed" judiciary. Indeed, as has been rightly held,

> [T]he critical constraint on judicial interference with democracy lies not in the procedural conditions for judicial action but in the substantive standard that courts apply on the merits. Most fundamentally, it lies in the principle that courts do not review the wisdom of the actions of the political branches but only their legality[42].

Looking at the *KlimaSeniorinnen* case, we find that the national instances' engagement with and assessment of legal obligations, scientific facts and measures taken by the state have been rudimental and cursory[43]. Focusing on procedural aspects, they have indeed not directly addressed the (alleged) legal duties invoked by the appellants. Rather than assessing the question of whether such duties could be derived from the rights invoked, they have taken the position that such claims cannot be enforced by judicial means but have to be pursued by political instruments[44]. There has thus not been a detailed evaluation of and differentiation between what is a legally binding obligation (deriving from sources of law) and what

40. Urgenda, summary of para. 8.3.3.
41. Similarly, but specifically in the context of the procedural requirement of demonstrating a significant disadvantage: H. Keller - A.D. Pershing, *Climate Change in Court: Overcoming Procedural Hurdles in Transboundary Environmental Cases*, in *European Convention on Human Rights Law Review*, 3, 2022, 23-46, 45 f.
42. J.R. Siegel, *A Theory of Justiciability*, in *Texas Law Review*, 86 (1), 2007, 73-140, 125; see chap. 5.2 regarding a discussion of the standard of review.
43. For more detail, see chap. 5.
44. See f.ex. FC, *KlimaSeniorinnen*, para. 5.5 *in fine*.

falls within the political margin of appreciation, amounting to excluding judicial areas of competence *prima facie*. This line of argumentation is not in line with the understanding of the separation of powers principle as elaborated before, providing a starting point for further criticism.

3.1.2 *Margins of Appreciation and Subsidiarity*

As we have seen, assessing margins of appreciation of other (state) actors is generally crucial for courts to delimit their area of competence, which is why we will discuss this aspect in the following.

In the context of the ECtHR, the principle of subsidiarity and the margin of appreciation doctrine are of particular importance in this regard. To discuss the principle of subsidiarity and the margin of appreciation doctrine – and particularly the differentiation between the two – in detail would exceed the scope of this paper. Indeed, both notions are rather complex and their scope and interpretation is not always clear[45]. I will thus limit myself to state that both have been introduced into the preamble of the ECHR and are closely linked, based on similar foundations and pursue similar goals[46]. Basically, they are methods dealing with the vertical relationship of powers between and impacting the respective areas of competence of the ECtHR – or the Council of Europe institutions more generally – and the Contracting Parties, which is «characterized by overlapping jurisdictions and institutional pluralism»[47]. Based on a functional criterium, they suggest that the competence to implement the ECHR and to assess and if necessary remedy violations should primarily lie with the Contracting Parties, the ECtHR thus having to grant deference to the contracting states' judgment, unless justified reasons require supranational oversight by the ECtHR, which is the case when a European consensus on a minimum standard exists, which the relevant national institutions do not recognise or cannot guarantee[48].

45. See e.g. M. Iglesias Vila, *Subsidiarity, margin of appreciation and international adjudication within a cooperative conception of human rights*, in *International Journal of Constitutional Law*, 15 (2), 2017, 393-413, 401 and 407.

46. For a more detailed discussion see e.g. M. Iglesias Vila, *op. cit.*, 400 ff. and 405 ff.; furthermore: A. Mowbray, *Subsidiarity and the European Convention on Human Rights*, in *Human Rights Law Review*, 15, 2015, 313-341, 321, with further references. The margin of appreciation doctrine is often qualified as one aspect of the subsidiarity principle, see e.g. A. Mowbray, 322 and 339 with further references.

47. Instead of many, see F. Fabbrini, *The Margin of Appreciation and the Principle of Subsidiarity: A Comparison*, in *iCourts Working Paper Series No° 15*, 2015, 7 ff. (quotation p. 8).

48. See e.g. F. Fabbrini, *op. cit.*, 8; M. Iglesias Vila, *op. cit.*, 400 ff. and 406.

It is sometimes argued that these principles would have a negative dimension only, in that they would limit and constrain the ECtHR in favour of the contracting parties, and not *vice versa*[49]. In the context of climate change litigation, this could mean – as is sometimes argued[50] – that the ECtHR has to restrain itself when assessing the contracting parties' (alleged) omissions with regards to climate change policy, in recognition of the principle of subsidiarity and the contracting parties' margin of appreciation. This, however, is not necessarily so. Rather, it follows from the principle of subsidiarity and the margin of appreciation doctrine being based on federalist ideas and functional criteria for power-sharing[51] as well as in recognition that the margin of appreciation of the contracting parties is not unlimited[52] that the ECtHR not only has the right, but the duty to intervene if the contracting parties cannot guarantee the necessary required safeguards or lack «the required impartiality for adequate protection», for example if, for structural or political reasons, they are not able to strike a just balance between competing interests[53]. Judicial restraint in favour of the contracting parties is thus normatively desirable, as I argue, where diversity is tolerable or even crucial. This is particularly the case in culturally sensitive areas such as religion[54]. Judicial restraint, however, should be limited where diversity cannot justify falling short of a required minimum standard, *nota bene* in the case of a global challenge demanding a uniform and consistent response such as climate change. The global nature of the climate change challenge and the necessity of a uniform response being widely recognised – and oftentimes invoked by respondent state parties in climate change cases –, it would indeed be contradictory to at the same time demand of the ECtHR to exercise judicial restraint in helping define such a uniform response[55].

49. See e.g. F. Fabbrini, *op. cit.*, 9; dissenting: M. Iglesias Vila, *op. cit.*, 402 f.; A. Mowbray, *op. cit.*, 340.

50. Most defendant states do indeed argue in this sense; see furthermore e.g. C. Schall, *Public Interest Litigation concerning Environmental Matters before Human Rights Courts: A Promising Future Concept*, in *Journal of Environmental Law*, 20 (3), 2008, 417-454, 446.

51. F. Fabbrini, *op. cit.*, 8.

52. M. Iglesias Vila, *op. cit.*, 406; see also chap. 3.1.1 above.

53. See e.g. *ivi*, 403, 411.

54. See e.g. ECtHR, *Osmanoğlu and Kocabaş v Switzerland*, App. No. 29086/12, 10 January 2017, para. 87 ff.

55. The question whether this conclusion should be differential with regards to mitigation vs adaptation or reduction targets vs. reduction measures will have to be discussed elsewhere.

That the ECtHR can derive new obligations form the ECHR despite the principle of subsidiarity and margin of appreciation doctrine is in line with the conception of the ECHR as a living instrument that evolves over time and for which a gradual and progressive implementation and enhancement of human rights protection and standards are essential[56]. As critics may highlight, the above defended line of argumentation is (partly) in disagreement with the European consensus approach, according to which the (minimal) standards of human rights protection that the ECtHR can legitimately derive from the ECHR have to correspond to what the "European consensus" on the matter is[57]. However, in light of the federal and functional idea and background of the subsidiarity principle and margin of appreciation doctrine, European consensus can only be relevant for matters in which the contracting parties are actually (better) suited to find an appropriate balance between diverging interests and ensure an adequate standard for human rights protection. Indeed, as is rightly held, «[C]citing lack of consensus, and thereby increasing state discretion, would be questionable if it were detrimental to the regional standard of [human rights] protection»[58].

The question of the scope and limits of the margin of appreciation of other actors is also relevant when looking at the national level. On the national level – and in contrast to the ECtHR context –, however, the focus mainly lies on considerations of horizontal separation of powers[59]. It can be observed that national courts – like the ECtHR – exercise judicial restraint in favour of other state actors[60]. For example, the German *Bundesverfassungsgericht* applies a very restrictive standard of review when assessing whether political powers have taken sufficient measures to ful-

56. See e.g. M. Iglesias Vila, *op. cit.*, 403 ff.; for the ECHR as a living instrument see also C. Heri, *Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability*, in *The European Journal of International Law*, 33 (3), 2022, 925-951, 927; furthermore C. Schall, *op. cit.*, 434; furthermore W.A. Schabas, *op. cit.*, Introduction, 47 ff.

57. For a detailed discussion of the European consensus see e.g. J.T. Theilen, *European Consensus between Strategy and Principle, The Uses of Vertically Comparative Legal Reasoning in Regional Human Rights Adjudication*, Baden-Baden, 2020.

58. M. Iglesias Vila, *op. cit.*, 410.

59. Even though questions with regards to vertical separation of powers do arise as well, mainly in the federal states. Indeed, there are climate change cases in which the federal element is crucial, for example in the Belgium climate change case discussed in another contribution to this publication.

60. On (deferential) standards of review in favour of the political powers see M. Tushnet - F. Gonzalez-Bertomeu, *op. cit.*, 112 ff.

fil duties to protect derived from fundamental rights ("*grundrechtliche Schutzpflichten*"). Indeed, it will find a violation of such a duty only

if no precautionary measures whatsoever have been taken, or if the adopted provisions and measures prove to be manifestly unsuitable or completely inadequate for achieving the required protection goal, or if the provisions and measures fall significantly short of the protection goal[61].

It justifies this judicial restraint as follows:

The question of whether sufficient measures have been taken to fulfil duties of protection arising from fundamental rights can only be reviewed by the Federal Constitutional Court to a limited extent […]. There is an essential difference between the subjective, defensive rights against state interference that arise from fundamental rights on the one hand, and the state's duties of protection that result from the objective dimension of fundamental rights on the other. In terms of purpose and content, defensive rights are aimed at prohibiting certain forms of state conduct, whereas duties of protection are essentially unspecified. It is for the legislator to decide how risks should be tackled, to draw up protection strategies and to implement those strategies through legislation. Even where the legislator is under obligation to take measures to protect a legal interest, it retains, in principle, a margin of appreciation and evaluation as well as leeway in terms of design […][62].

A detailed discussion of these – or similar – justifications would go beyond the scope of this paper[63]. However, it can be argued with good reasons that judicial self-restraint that is too far-reaching is criticisable, in particular with reference to the rule of law and separation of powers as discussed above[64]. It is indeed questionable whether a standard of review limited to assessing whether any precautionary measures whatsoever have been taken at all, and whether these measures – if they have been taken – are manifestly unsuitable, completely inadequate or

61. BVerfG, Order of the First Senate, App. No. 1 BvR 2656/18, 24 March 2021, ECLI:DE:BVerfG:2021:rs20210324.1bvr265618 (hereinafter: *Klimabeschluss*), para. 152 with further references.
62. *Klimabeschluss*, para. 152 with further references.
63. In particular because they largely depend on the legal provision and the arising legal obligations at stake as well as on the state of the scientific data, at least in the climate change context.
64. See chap. 3.1.1.

fall significantly short of their goals can actually and effectively ensure compliance with minimum legal standards. In any case, however, the foregoing suggests that the evaluation of the margin of appreciation of other state powers should not be an obstacle to admissibility – after a cursory assessment on procedural grounds –, but rather be discussed in detail on the merits.

3.2 *Justiciability and Functional Suitability of Courts*

After establishing that judicial competences should not be excluded *per se* even in areas in which political powers are addressed and do have some margin of appreciation, we now have to discuss the scope – and limits – of judicial competences in these areas in terms of functionality. The question of what courts should and are able to decide or not is often framed in terms of justiciability.

Justiciability is a complex concept – it has indeed been metaphorically depicted as «something of a chameleon»[65]. For the purpose of this paper[66], justiciability is understood as an issue being «suitable for judicial resolution» and thus being decided on the merits by the appropriate court[67]. It hence encompasses procedural, institutional and substantive elements[68]. In the following, we will draw on considerations regarding the latter two to argue that and why the former, in particular admissibility requirements, should not be interpreted – or set up – too restrictively.

From a purely institutional perspective, justiciability does not only include the very broad rule of law, democracy and separation of powers considerations already addressed[69], but also the – very closely related – more specific institutional position and set-up of courts[70]. From a most basic institutional perspective, courts are apt to act as a check to the political powers because they are an institutional authority that is already in place – as opposed to some other institutional authority that would have

65. D. McGoldrick, *The Boundaries of Justiciability*, in *The International and Comparative Law Quarterly*, 59 (4), 2010, 981-1019, 981.
66. For a detailed discussion see e.g. M. Tushnet - F. Gonzalez-Bertomeu, *op. cit.*; specifically in the context of the US, see J.R. Siegel, *op. cit.*; in the context of the UK see: J. Mance, *Justiciability*, in *The International and Comparative Law Quarterly*, 67 (4), 2018, 739-757.
67. M. Tushnet - F. Gonzalez-Bertomeu, *op. cit.*, 111.
68. D. McGoldrick, *op. cit.*, 985 f.
69. Chap. 3.1.1.
70. D. McGoldrick, *op. cit.*, 985.

to be (newly) instituted. In more advanced terms and more importantly, courts are appropriate to balance and check political powers by virtue of their institutional separation and independence from the political powers as well as of the principle of impartiality required of judges[71].

From a substantive and cross-cutting perspective – what some might call justiciability «in the proper sense»[72] or in the strict sense – justiciability is a question of interpretation of the law to determine the scope of legal obligations and to delimit them from political discretion and the question of whether the respective court has «judicially manageable rules»[73] or judicially «manageable standards» and the «requisite "expertise" to judge the issues»[74] it is confronted with. Other than that justiciability understood in this sense largely depends on the legal provision at stake, several aspects are important to highlight.

Firstly, interpreting the law and assessing the conformity of acts (or omissions) with legal requirements and standards is precisely the area of competence of courts[75]. This is true even if the legal provision at stake contains very broad formulations or vague terms or if the assessment of the constitutionality or legality requires a complex balancing of interests[76]. Indeed, both interpreting broad legal terms as well as balancing of multi-faceted and competing interests are pivotal – and nothing new or uncommon – when it comes to judicial decision-making, particularly when constitutional law and human rights are concerned, but also in other areas of the law[77]. In this regard, it would be wrong to reduce the judicial function to simply and mechanically applying general and abstract legal provisions in concrete and individual cases, but it rather has to be recognised that the judicial function of interpreting and applying

71. Instead of many see: W. Haller - A. Kölz - T. Gächter, *op. cit.*, n. 935 ff.; see also J. Mance, *The Role of Judges in a Representative Democracy*, in G. Amato - B. Barbisan - C. Pinelli (eds.), *Rule of Law vs Majoritarian Democracy*, Oxford / New York / Dublin, 2021, 335-352 (hereinafter: J. Mance, *Judges*, cit.), 337.

72. M. Tushnet - F. Gonzalez-Bertomeu, *op. cit.*, 115.

73. *Ibidem*.

74. D. McGoldrick, *op. cit.*, 986.

75. See e.g. J.R. Preston, *op. cit.*, 11.

76. On the interpretation of the ECHR see e.g. W.A. Schabas, *op. cit.*, Introduction, 32.

77. For example if the criminal law court has to assess whether an act has been carried out to safeguard «interests of higher value» in order to decide whether the act was «legitimate […] in a situation of necessity» according to article 17 of the Swiss Criminal Code or if a public law court has to decide whether some specific psychological decision qualifies as disease according to article 3 of the Federal Act on the General Principles of Social Insurance Law.

the law also encompasses an element of developing the law – through the interpretation of the law, by applying it to novel circumstances as well as through filling legal gaps[78]. In doing so, the judges are not free to substitute political discretion by their own, but bound by the law they interpret and apply[79]. Other than by the text of the legal provision at stake, the court is also limited through its adherence to judicial methodology, applying «well-established approaches and methods»[80].

Secondly, as to the (allegedly lacking) expertise and know-how of courts in certain areas, I argue here that the existing possibilities of bringing such expertise and know-how into the judicial proceedings – in the form of (pieces of) evidence – are appropriate to sufficiently inform the judicial decision-making process. Looking at the Swiss case at hand[81], the court relies on means of evidence such as official documents – including official reports by recognised expert authorities in the field – and expert opinions, as well as information from the parties or third parties[82]. Indeed, the need for courts to rely on specialist expertise is not exclusive to climate change litigation, but rather frequent in other areas as well[83]. One could even argue that the evidence base in the climate context – as opposed to other areas where scientific facts are pivotal – is relatively well documented, at least in current times, in that quite a lot of widely recognised fora and centres for expertise do exist, collect data and impart their knowledge[84]. Just like the interpretation of the law, assessing such scientific findings and applying it to the (legal) case at hand is part of the "daily work" of courts[85].

78. See e.g. J. Mance, *Judges*, cit., 340 ff.; see also and more generally R.A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy Maker*, in *Journal of Public Law*, 6 (2), 279-295; W. Haller - A. Kölz - T. Gächter, *op. cit.*, n. 640; furthermore on the role of courts in addressing normative gaps: A.HY. Chen - M. Poiares Maduro, *The Judiciary and Constitutional Review*, in M. Tushnet - T. Fleiner - C. Saunders (eds.), *Routledge Handbook of Constitutional Law*, Oxfordshire/London, 2013, 97-109, 104 ff.
79. See e.g. D. McGoldrick, *op. cit.*, 990 ff.
80. J. Mance, *Judges*, cit., 341 [with regards to common law, but the relevance of the disciplinary methods (as "limits" to the judicial reasoning) applies to civil law countries as well].
81. But presumably the situation is similar in most other jurisdictions.
82. Exemplary: article 12 APA for Swiss public proceedings in administrative matters.
83. E.g. psychological expertise to assess fault in criminal law, medical or biomechanical expertise to establish causality in criminal law or tort law, to name but a few examples.
84. The IPCC being the most iconic example, providing even summaries of its reports "for policymakers" that the courts should also be able to rely on in their decision-making process.
85. See chap. 5 and examples given therein.

In the context of the ECtHR, *amicus curiae* interventions – or third party interventions more generally[86] – can also be helpful with regards to advancing and interpreting scientific facts, but also with regards to the interpretation of law[87]. In order to facilitate climate change litigation – or other types of litigation where (understanding of) scientific facts or other forms of specialist expertise are essential, arguing in favour of establishing the possibility for such interventions in countries in which they are not (yet) allowed – as is the case in Switzerland – or of strengthening the possibilities for such interventions or their relevance might thus be one of the approaches to take. Should one consider – in spite of the above – that the existing mechanisms are insufficient, establishing specialised courts, as is the case, for example, for Patent Courts, might be a possibility to consider *de lege ferenda*.

Not least relevant is the fact that what is deemed to be suitable to be decided by courts is subject to change over time[88]. The boundaries of justiciability might indeed evolve. Such an evolution may be mediated in particular by determining justiciability not on the basis of and in order to perpetuate existing (and historically conditioned)[89] power relations between state powers, but rather by means of functional criteria (suitable to take into account current circumstances and developments as well). We should thus move away from the idea of judicial "no-go areas" *per se* reserved to the political powers and "forbidden" for courts, using functional and not historical criteria to differentiate between the areas of competence of the judiciary and the margin of appreciation of political powers the court can not interfere with, assessing these questions on the merits rather than holding the case to be inadmissible for lack of justiciability[90]. It is argued elsewhere that affirming justiciability, shifting the assessment of critical issues to the analysis on the merits indeed already is «the modern judicial trend»[91].

86. Article 36 ECHR.
87. On *amicus curiae* interventions as having elements of public interest litigation see C. Schall, *op. cit.*, 450 f.
88. D. McGoldrick, *op. cit.*, 983-985, with further references.
89. E.g. the criterion of «embarrassment in foreign relations» to affirm non-justiciability of foreign affairs and policy questions in the UK.
90. D. McGoldrick, *op. cit.*, *nota bene* 1017 ff., with an analysis of pertinent UK jurisprudence. Even though his comments and conclusions have been made specifically in the context of the UK, I hold that they are relevant for other jurisdictions too.
91. *Ivi*, 981 ff.

4. *The Criterion of "Being Affected in One's Rights"*

As has been shown, in the *KlimaSeniorinnen* case, the procedural requirement of having to be (particularly) affected in one's rights and its application in the climate change context has been pivotal. Switzerland, however, is not the only country stipulating this requirement. Rather, many other states – in particular in the European legal context – do so. In the ECtHR's realm, this requirement is reflected in the admissibility criterion of "victim status" stipulated in article 34 ECHR. An application to the ECtHR is only admissible if the applicant is – directly or indirectly – affected by the alleged violation of convention rights, and thus a victim in the sense of article 34 ECHR. The applicant has to be someone «to whom a violation could cause harm» or «who has a legitimate interest in seeing it brought to an end»[92].

The application of this requirement in the climate change context can be challenging. This is all the more true for legal systems that require the applicant to be "particularly" affected, thus more strongly affected than the general population, as is the case in Switzerland. Indeed, since the (negative) effects of climate change potentially affect a large number of people – if not the whole population – some actors argue that climate change actions aiming at having state actors taking further-reaching and more extensive measures to prevent climate change or to protect against its negative effects would indeed not serve the individual interests of the respective applicants, but would rather be of general interest. Establishing and proving that one is individually affected can be difficult, particularly because some of the negative (and more severe) consequences of climate change will only materialise in the future – even if scientific evidence of the likelihood of their (future) occurrence exists.

However, for various reasons, some of which we will discuss below, the requirement of «being affected in one's right(s)» should not prove to be an insurmountable hurdle to climate change litigation.

4.1 *Interpretation and Application of the Criterion of «Being Affected in One's Right»*

The requirement of having to be affected in one's right(s) is intended to delimitate admissible individual claims from *actiones populares*, which

92. Instead of many, see ECtHR, *Vallianatos and others v Greece*, App Nos. 29381/09 and 32684/09, 7 November 2013, para. 47.

are not permissible in Switzerland[93], in many other European countries[94] and before the ECtHR[95]. In this legal environment – and contrary to what is the case in other legal contexts where standing requirements are less restrictive in order to allow civil society actors to bring actions to court independently of a uniquely individual interest[96] –, the prevailing opinion is that claims can only be brought to courts if the applicants have a personal interest to defend their individual rights. The difficulty thus lies in differentiating between individual and general interests, on the one hand, and in assessing individual affectedness, on the other.

4.2 Actio Popularis *and Differentiation between Individual and General Interests*

The inadmissibility of *actiones populares* does not pose an insurmountable problem for climate change cases. This becomes apparent when considering what legal actions are to be (rightly) qualified as *actiones populares*, the latter being understood as legal actions in view of the protection of public interests – as opposed to private interests – which «could be brought by "any one among the people"»[97].

Indeed, it has to be specified and emphasised in that regard that – as the German constitutional court rightly points out in its *Klimabeschluss* – «the mere fact that very large numbers of people are affected does not exclude persons from being individually affected in their own fundamental rights»[98]. This is actually – and at least recently – also undisputed in Swit-

93. Paradigmatic: FC, *KlimaSeniorinnen,* para. 4.1 and 5.5 with further references.
94. See e.g. C. Schall, *op. cit.*, 421 ff.; C. Errass, *Zur Notwendigkeit der Einführung einer Popularbeschwerde im Verwaltungsrecht*, in *Aktuelle Juristische Praxis*, 2010, 1351-1372, 1358 ff. with further references; See also H. Keller - A.D. Pershing, *op. cit.*, who even hold – and in my opinion rightly so – that «the European human rights system has signalled a deep aversion to *actio popularis*», 41.
95. Instead of many: ECtHR, *Roman Zakharov v Russia*, App. No. 47143/06, 4 December 2015, para. 164, with reference to the Court's «consistent case law» in that matter.
96. See e.g. M. Murcott - M.A. Tigre - N. Zimmermann, *What the ECtHR Could Learn from Courts in the Global South*, in *Verfassungsblog*, 2022, 3 f.
97. *Nota bene* P. Mercer, *The Citizen's Right to Sue in the Public Interest: The Roman Actio Popularis Revisited*, in *University of Western Ontario Law Review*, 21 (1), 1983, 89-104, 97 ff. with a detailed discussion of the *actio popularis* of Roman origin and a comparison with other forms of public interest litigation (cit. on p. 97); on the concept of public interest litigation more generally see C. Schall, *op. cit.*, 419 f.
98. *Klimabeschluss*, para. 110.

zerland[99]. Hence, even if a large number of people is (potentially) affected, this does not necessarily mean that (only) general interests are at stake. Rather, (some) people can still be individually affected, signifying that an *actio* brought to court in these cases does not necessarily represent an inadmissible *actio popularis*.

Furthermore, the mere fact that a case is brought to court by an interest group does not mean that it necessarily is an *actio popularis*, and the same goes if general interests are at stake in addition to individual interests[100]. In fact, the ECtHR has held in a recent case concerning an interest association having intended legal action on behalf of two of its members without formal legal representation that

> even if there might have been an element of strategic litigation in the […] Association lodging the complaint on the applicants'behalf, this is irrelevant for the admissibility of the applicants' complaint. It suffices to note that the legal action brought by the […] Association was not an *actio popularis*, since it acted not on the basis of any abstract situation, […] but in response to specific facts affecting the rights of the two applicants – members of that association – under the Convention […][101].

Against this background, it can indeed be reasonably maintained that legal action is not necessarily an *actio popularis* even if some element of general interest is involved – provided that an individual interest of the applicant(s) exists.

The Swiss instances concluded that the *KlimaSeniorinnen*'s complaint concerns general interests. However, to conclude from this that their claim is an *actio popularis* is premature. Indeed, the Swiss instances have failed to examine whether and to what extent individual interests were affected

99. V. Marantelli-Sonanini - S. Huber, *Commentary on Article 48 APA*, in B. Waldmann - P.L. Krauskopf (eds.), *Praxiskommentar Verwaltungsverfahrensgesetz*, Zurich/Geneva, 2023, 1125-1188, N 14, with many further references to jurisprudence and scholarship; earlier see C. Errass, *op. cit.*, 1355 with examples and further references.
100. See also H. Keller - A.D. Pershing, *op. cit.*, 41, with further references; with regards to general interests existing in addition to individual interests see also ECtHR, *Gorraiz Lizarraga and Others v. Spain*, App. No. 62543/00, 27 April 2004, para. 45 f., where the court – even though not in the context of admissibility – considered that the defence of specific interests of the association's members were at stake «in addition to defence of the public interest», which it did not judge to be prejudicial to the applicants claims.
101. ECtHR, *Beizaras and Levickas v Lithuania*, App. no. 41288/15, 14 January 2020, para. 80.

in addition to the general interests they have identified. For example, they did not consider the applicants' line of argument, according to which they were *already currently* (and individually) affected by the consequences of climate change due to their age and gender. This is particularly true with regard to the four individual applicants who had claimed concrete and heat-related health impairments, which the Swiss instances did not address at all.

4.2.1 *Individual Affectedness in One's Right(s)*

The difficulty thus rather lies with establishing that one actually is individually affected. In this regard and first of all, we have to address the requirement of having to be particularly affected applied in Switzerland and which additionally specifies and narrows down the requirement of individual affectedness. This additional requirement – its applicability and appropriateness *per se* as well as its interpretation and application by the Swiss instances in the *KlimaSeniorinnen* case – is indeed criticisable.

As to its appropriateness in principle, the requirement of having to be particularly affected is justified by arguing that it would be necessary in order to distinguish an admissible individual claim from an inadmissible *actio popularis*[102]. This justification can easily be refuted by highlighting that the requirement of having to be (individually) affected in one's right alone – without the additional qualification of having to be particularly affected – allows a sufficient differentiation from an *actio popularis*. In its *Klimabeschluss*, the German constitutional court has explicitly emphasised this, holding that

> in constitutional complaint proceedings, it is not generally required that complainants are especially affected – beyond simply being individually affected – in some particular manner that differentiates them from all other persons[103].

This is all the more important because the requirement of being particularly affected furthermore is not suitable for determining questions of justiciability and its limits according to functional criteria[104].

102. See FC, *KlimaSeniorinnen*, para. 4.1 and 5.5; FAC, *KlimaSeniorinnen*, para. 6.2 *in fine*, 7.2 and 7.4.1.
103. *Klimabeschluss*, Para. 110.
104. Along these lines see M. Rehmann, *Besondere Betroffenheit als Element der Beschwerdebefugnis im Umweltrecht, Reformoptionen aus funktionaler und völkerrechtlicher Sicht*, Zurich/Baden-Baden/Vienna, 2024, 552 ff.; see also chap. 3.2 regarding justiciability.

Against this background, the applicability of the requirement of having to be particularly affected can be challenged in the Swiss context as well. Indeed, article 25a APA, pertinent in the *KlimaSeniorinnen* case, does not specify that one has to be particularly affected in order to be able to request a ruling. Rather, this qualificatory requirement of having to be particularly affected is stipulated by doctrine[105] and jurisprudence[106]. Other than the justification concerning the differentiation from inadmissible *actiones populares* addressed and refuted above, the requirement of particular affectedness is justified, on more technical terms, with reference to the general procedural requirements of administrative law, in particular the *locus standi* requirement set in article 48 para. lit. b APA, according to which a right of appeal is only accorded if one «has been specifically [particularly] affected by the contested ruling», which should also apply to article 25a APA[107].

This line of argumentation can be criticised for various reasons. First, it has to be highlighted that the requirements of article 48 apply to appeals against rulings, whereas article 25a APA opens up the possibility of requesting the issuing of such a ruling in the first place. Furthermore and more generically, the general procedural requirements, contrary to what is the case for article 25a APA, have been established with view to rulings – as opposed to factual administrative conduct ("real acts") or even administrative inaction. In light of these important differences, the application of the criterion of having to be particularly affected in the context of article 25a APA ("by analogy") can reasonably be criticised as inept. Indeed, in the presence of rulings, it is easy to establish that at least one person – the addressee of the ruling – is particularly affected. The same, however, is not necessarily the case in connection with factual administrative action – or inaction in particular – which do not have a specific addressee. Furthermore, a ruling has to be notified – to the addressee at least – which entails that at least one person is made aware of the regulation of rights and obligations contained in the ruling. Being (made) aware that one's rights are (potentially) affected is necessary in order to act against the source of such affectedness. In the case of factual administrative action – and

105. Instead of many (and with further references), see I. Häner, *Commentary on Article 25a APA*, in B. Waldmann - P.L. Krauskopf (eds.), *Praxiskommentar Verwaltungsverfahrensgesetz*, Zurich/Geneva, 2023, 635-656, n. 30 f.
106. Instead of many (and with further references), see FC, *KlimaSeniorinnen*, para. 4.1.
107. Instead of many (and with further references), see I. Häner, *op. cit.*, article 25a APA n. 31.

more so, inaction – which by nature are not notified externally, becoming aware of such action or inaction and the effect it can have on one's rights is at least substantially more difficult. Moreover, it is not necessary – and, as I argue, rather not appropriate – that the requirement for requesting a ruling on real acts in the first place is as restrictive as the requirement for filing an appeal against a notified ruling. All this justifies why the (strict) requirement of being particularly affected would not necessarily have to be applied in the context of article 25a APA[108].

This is all the more important since – as has been argued, in my view convincingly – a too strict interpretation of the requirement of having to be affected – generally, and not only if a particular affectedness is required – is not in line with procedural guarantees of the ECHR[109], as well as with standards stipulated in the Aarhus Convention[110]. The latter in particular, and more specifically its article 9 paragraph 3, would indeed ban a systematic exclusion of the possibility of appeal by individuals[111], which at least the interpretation and application of the requirement of having to be (particularly) affected in the *KlimaSeniorinnen* case would amount to[112]. In this respect, it is further relevant that article 25a APA was introduced precisely with view to human rights guarantees of access to court, more specifically in order to close a gap in legal protection[113].

Before this background, the interpretation and application of the requirement of having to be (particularly) affected in one's right(s) – generally and by the Swiss authorities – has to be (re)considered. This does not only concern the appropriate standard of review, level of proof and assessment of facts[114], but also – and particularly – the criterion by which individual (and particular) affectedness is assessed. Indeed, in the "classical" environmental cases predominant so far, the criterion to decide whether an applicant is affected or not has been geographical proximity to the "source" of their affectedness. In these cases, the "source" of the

108. Some argue, however, that there is not much difference in practice between whether the requirement is to be affected in one's right or the more strict requirement of having to be particularly affected. In the *KlimaSeniorinnen* case, it is only the FAC that has based its rejection of the applicants appeal based on the conclusion that they were not particularly affected.

109. M. Rehmann, *op. cit.*, 529, 540 ff., 543 ff.

110. *Ivi*, 487 ff., 543 ff.

111. *Ivi*, 433 ff., in particular 467 f., all with further references.

112. *Ivi*, 480.

113. I. Häner, *op. cit.*, article 25a APA n. 5, with further references.

114. See chap. 5.

applicant's affectedness has been a geographically clearly identifiable spot, such as a dangerous waste disposal site[115], an industrial site[116] or others. In such – or similar – circumstances, one can determine the group of (particularly) affected people by defining a perimeter (of geographical proximity) within which the effects on the rights of people were considered (or even presumed) to reach the required intensity. This system of «geographical reference point» to determine (particular) affectedness is not easily applicable in the context of climate change cases. If it may be possible where adaptation measures are concerned, it is difficult to imagine in cases in which mitigation is at the fore. Indeed, the sources – and effects – of mitigation omissions can not (easily) be spatialised/mapped to specific geographical areas. Since the known system of defining affectedness through geographical nearness only inadequately captures the context of climate change, courts have to develop new ways of assessing affectedness independently of – or not solely linked to – a geographical reference point. This is what the *KlimaSeniorinnen* argue in their case, taking not geographical factors, but their (particular) vulnerability due to gender and age as a "reference point" to determine their (particular) affectedness[117].

Vulnerability – in the sense of a "special", qualified vulnerability in comparison to the "standard vulnerability" of human rights applicants[118] – as criterion to assess affectedness offers many opportunities and is indeed an interesting approach that should be considered[119]. In fact, the ECtHR has repeatedly referred to vulnerability, not only to deduce from it special positive state duties, in particular with regards to the right to life[120] and private and family life[121] but also to justify measures of procedural facilitation. Invoking the criterion of vulnerability, the ECtHR has in-

115. ECtHR, Öneryildiz *v Turkey*, App. No. 48939/99, 30 November 2004.
116. Instead of many: ECtHR, *Cordella and others v Italy*, App. No. 54414/13 and 54264/15, 24 January 2019.
117. See in this regard also L. Kneubühler - J. Hänni, *Umweltschutz, Klimaschutz, Rechtsschutz*, in *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht*, 122, 2021, 479-502, 494 f.
118. On this differentiation in detail see S. Besson, *La vulnérabilité et la structure des droits de l'homme: l'exemple de la jurisprudence de la Cour européenne des droits de l'homme*, in L. Burgorgue Larsen (ed.), *La vulnérabilité saisie par les juges en Europe*, Paris, 2014, 59-85, 64.
119. On the potential avenues of vulnerability in the climate change context more broadly see nota bene C. Heri, *op. cit.*, 948 ff.
120. ECtHR, *Salman v Turkey*, App. No. 21986/93, 27 June 2000.
121. ECtHR, *Chapman v The United Kingdom*, App. No. 27970/02, 24 June 2008.

deed extended its interpretation of the indirect victim status[122], and it is conceivable that the court further extends this mechanism to the status of potential victim[123], which could be interesting – and would in fact be desirable – for the climate change cases pending before it. Furthermore, the ECtHR considers that vulnerability may impede on the effective exercise of the right to appeal to it and has thus referred to vulnerability to assert its jurisdiction in cases where the right of appeal could be limited[124]. Even if the ECtHR has made these considerations with regards to its own jurisdiction, it would not be too far-fetched to reason that similar considerations should also hold true for national courts and their jurisdictions. The Swiss instances have not entered into the debate on a potential less restrictive interpretation of admissibility requirements. However, it will be interesting to see the ECtHR's stance on this question.

Before this background, it is expedient to highlight that the requirement of victimhood according to the ECHR can be interpreted in such a way as to accommodate the described developments and notably the particular circumstances in the context of climate change. Indeed, the notion of victimhood is very broad, including not only direct, but also indirect and even potential victims[125], and not requiring the applicant to suffer any prejudice[126], merely temporary effects being sufficient[127]. Furthermore, the ECtHR has repeatedly held that the notion of victim and its interpretation can evolve with time and «in the light of conditions in contemporary society» and that it should not be interpreted in an excessively formalistic way[128]. This broad understanding of the victimhood status and its openness to develop with time to adapt to new circumstances leaves ample room allowing the ECtHR to include (individual)[129] applicants in climate change cases as fulfilling the requirements of victimhood[130].

122. ECtHR, *Ilhan v Turkey*, App. No. 22277/93, 27 June 2006, para. 54 f.
123. See also S. Besson, *op. cit.*, 77.
124. ECtHR, *Akdivar and others v Turkey*, App. No. 21893/93, 16 September 1996, para. 105.
125. Instead of many, see ECtHR, *Shortall and others v Ireland*, App. No. 50272/18, 19 October 2021, para. 47, where the court refers to and lists the different constellations in which it has accepted potential victimhood.
126. ECtHR, *Brumarescu v Romania*, App. No. 28342/95, 28 October 1999, para. 50.
127. ECtHR, *Monnat v Switzerland*, App. No. 73604/01, 21 September 2009, para. 33.
128. Instead of many. ECtHR, *Gorraiz Lizarraga and others v Spain*, App. No. 62543/00, 27 April 2004, para. 38.
129. For groups see chap. 4.2.1.
130. Along these lines see H. Keller - A.D. Pershing, *op. cit.*, 36 f.

4.3 *Alternatives to Individual Legal Claims*

In light of the challenges associated with having to bring an individual action to court as well as (potential) disadvantages of such an approach, we will in the following discuss alternatives to individual claims, in the form of group actions and access to court by associations on the one hand and the *actio popularis* or public interest litigation more generally on the other.

4.3.1 *Group Actions and Access to Court by Associations*

Group actions or the right of access to court by NGOs or other organisations may be one possible way of circumventing some of the challenges an individual would face when having to present a legal action on their own.

Indeed, grouping action(s) in environmental cases is rightly argued to promote efficiency and effectiveness of otherwise individual claims[131]. Not only can individuals through pooling their claims or bringing them to court via an association overcome otherwise (too) heavy financial burdens of bringing an individual claim to court[132]. Rather, they can also overcome structural disadvantages – such as lack of experience regarding judicial proceedings as opposed to the governmental authority they are acting against[133] – as well as profit from a larger pool of knowledge and expertise – or from easier access to it – in particular if they involve an NGO or any other knowledgeable association[134]. The pooling of legal actions, however, is not only beneficial for the individual claimants, but for courts as well. Indeed, not only will they be disburdened by having to deal with one legal action instead of with many (similar) ones, thus being able to concentrate their resources as well. Rather, they might also profit from the fact that the submissions by the parties may be qualitatively better – due to the described advantages for the applicants in terms of resource and knowledge concentration etc.

In view of these advantages, group actions or access to court by associations should be allowed extensively, as is argued here. This entails not interpreting the right of access to court of NGOs or other associations or the admissibility requirements for group actions overly restrictively

131. See nota bene *Urgenda*, para. 5.9.2; furthermore C. Schall, *op. cit.*, 444.
132. See e.g. H. Keller - A.D. Pershing, *op. cit.*, 38 f., who refer to studies on the costs of judicial proceedings in different European countries.
133. H. Keller - A.D. Pershing, *op. cit.*, 39 f.
134. See e.g. C. Schall, *op. cit.*, 444.

where such rights exist according to the procedural rules of the concerned jurisdiction on the one hand. On the other hand, it should be considered to introduce such rights if they do not yet exist.

The former conclusion is even more appropriate – or rather normatively required – as it can be argued that the obligation to allow for (some form of) right of access to courts by NGOs in environmental matters can be derived from international law, in particular the Aarhus Convention, whose objective – amongst others – specifically is to guarantee and promote «access to justice in environmental matters» (article 1). Although the Convention, and particularly its article 9 para. 2 and 3, reserve a certain margin with regards to national admissibility criteria[135], it precludes the contracting parties from systematically excluding the possibility of access to court – for individuals as well as for interest groups. This has been explicitly recognised nota bene in the Belgian *Klimaatzaak* case, where a right for NGOs to access national courts has been derived from article 9 para. 3 Aarhus Convention read in conjunction with articles 2 para. 4 and 3 para. 4, the latter two highlighting the important role of NGOs in the promotion of environmental protection and thus the relevance of their appropriate recognition and support through national law[136]. The court has held – with reference to other judgments (by the CJEU and the Belgian Constitutional Court) – that even though these provisions do leave a certain margin of appreciation to the states to determine through national law for which associations and under which conditions access to court shall be granted, they were not free to exclude access to courts for associations *per se*. Rather, access to court should be the rule in environmental cases, the presumption and not the exception[137]. Such a line of argumentation would be transposable to other member states of the Aarhus Convention, such as Switzerland.

The question thus is whether existing admissibility requirements can be interpreted as allowing access to court for NGOs or other organisations or whether they would have to be adapted *de lege ferenda* to grant access to courts for groups. In the context of proceedings before the ECtHR,

135. Leading some authors to question the effects the Convention might have on potential broadening of admissibility criteria, see e.g. C. Schall, *op. cit.*, 432 f., 438, 443, with regards to national jurisdictions as well as with regards to the ECtHR.
136. Tribunal de première instance francophone de Bruxelles, *ASBL Klimaatzaak v The State of Belgium and others*, App. No. 2015/4585/A, 17 June 2021 (hereinafter: *Klimaatzaak*), 51 ff.
137. *Klimaatzaak*, 52 f.

advocacy organisations and associations are not principally excluded from access to the court. Indeed, by stating that «any person, non-governmental organisation or group of individuals» may apply to the ECtHR, article 34 ECHR is very broad and does not exclude groups or NGOs from accessing the ECtHR. Furthermore – and as has already been said with regards to individual applicants – the notion of victim «must […] be interpreted in an evolutive manner in the light of conditions in contemporary society»[138]. There is thus nothing precluding the court from granting victim status to NGOs in the climate change context[139].

This is valid even though the ECtHR has so far been rather strict with granting standing to associations, in particular through not granting victim status to associations "simply" because their members, in whose interest they act, are (potential) victims[140]. Indeed, it can be argued, on the one hand, that the cases concerning applications by NGOs the ECtHR has been confronted with so far are different from climate change cases in that in the former, there have always been some individuals that were (relatively) clearly identifiable as victims, hence making the ECtHR conclude that it should principally be these individuals that have to apply. On the other hand, one can observe a tendency of the ECtHR to ease admissibility requirements for NGOs[141]. In particular, it has recently granted victimhood status to an association specifically set up to defend the interests of workers on the grounds of the association otherwise being deprived of fulfilling its statutory objectives by the contested state measures[142]. Furthermore, the ECtHR recognises and accepts that under certain circumstances, NGOs take part in domestic proceedings, instead of the individual applicants and defending the latter's interests. In this context, the ECtHR has even recognised that

> in modern-day societies, when citizens are confronted with particularly complex administrative decisions, recourse to collective bodies such as associations is one

138. ECtHR, *Gorraiz Lizarraga and others v Spain*, App. No. 62543/00, 27 April 2004, para. 38.
139. Along these lines, see H. Keller - A.D. Pershing, *op. cit.*, 37 f.
140. E.g. ECtHR, *Nencheva and others v Bulgaria*, App. No. 48609/06, 18 June 2013, para. 90, 93, with further references.
141. See along these lines A. Kulick, *Commentary of article 34 ECHR*, in J. Meyer-Ladewig - M. Nettesheim - S. von Raumer (eds.), *Handkommentar Europäische Menschenrechtskonvention*, Basel, 2023, n. 25 with reference to case-law.
142. ECtHR, *Communauté Genevoise D'Action Syndicale (CGAS) v Switzerland*, App. No. 21881/20, 5 September 2022, para. 36 ff., in particular para. 41 f., currently pending before the Grand Chamber.

of the accessible means, sometimes the only means, available to them whereby they can defend their particular interests effectively. Moreover, the standing of associations to bring legal proceedings in defence of their members' interests is recognised by the legislation of most European countries. […] The Court cannot disregard that fact when interpreting the concept of "victim". Any other, excessively formalistic, interpretation of that concept would make protection of the rights guaranteed by the Convention ineffectual and illusory[143].

This is what the association *KlimaSeniorinnen* is arguing, and it will be interesting to see the ECtHR's stance on the matter.

It may be of interest, in this context, to note the ECtHR's approach to NGOs in other fields. Indeed, the ECtHR has repeatedly highlighted the important function of NGOs in society and in the context of the protection of human rights. For example, it has recognised and highlighted the importance of NGOs as «public watchdogs»[144]. Even if this function has been attributed to NGOs in the context of access to information, it can be argued with good reason that NGOs play an important role in the context of climate change litigation as well and that the ECtHR would do good to apply a privileged status to NGOs in the context of environmental matters, *nota bene* through interpreting the admissibility requirements for NGOs in environmental cases extensively.

In the Swiss legal system, possibilities for group actions or actions by associations are limited. Indeed, actions by groups are only admissible in two constellations. Either an association's right of appeal has to be provided for by law, which is the case for some associations active with regards to environmental matters, but not for climate change associations[145]. Or legal standing is granted to groups – usually associations – if the statutes of the group in question stipulate safeguarding its members interests as a statutory objective, if the interests at stake (potentially) affect the majority or at least a large number of its members, and if the members themselves would be entitled to lodge an appeal on their behalf[146]. It was the latter constellation of possible group actions that the association *KlimaSeniorinnen* based their request and appeals on, arguing in particular that most of

143. ECtHR, *Gorraiz Lizarraga and Others v. Spain*, App. No. 62543/00, 27 April 2004, para. 38.
144. ECtHR, *Magyar Helsinki Bizottság v Hungary*, App. No. 18030/11, 8 November 2016, para.164 ff.
145. For more detail see e.g. L. Kneubühl - J. Hänni, *op. cit.*, 490 ff.
146. Instead of many: BGE 136 II 539, para. 1.1.

their members are affected by the challenged omissions[147]. However, the question of whether the courts followed their line of argumentation and more generally of whether the association *KlimaSeniorinnen* had a legal standing on their own was left open in the national proceedings. Since the national instances have denied the *KlimaSeniorinnen* as individual women have a sufficient interest in their claims, it is very likely though that they would have held that the conditions for access to court have not been met by the association either. In light of what has been stated before, this would be criticizable. Rather, it can be argued with good reasons that the requirements to grant standing to the association *KlimaSeniorinnen* have been fulfilled, particularly since these requirements should not be interpreted too restrictively. Going one step further, one could also argue that it would be beneficial to establish a specific (statutory) right to access to court for NGOs in the context of climate change. This has already been put forward by scholars and it will be interesting to see whether Switzerland will pick up on this proposal[148].

4.3.2 Actiones Populares *and Other Forms of Public Interest Litigation*

In light of the difficulties associated with establishing – and proving – an individual interest with which applicants are confronted in climate change cases, one could go one step further and question whether the general exclusion of *actiones populares* – or other forms of public interest litigation – should not be reconsidered, at least in certain areas where a potentially large number of people is affected and where proving an individual interest is difficult[149]. In fact, (some form of) public interest litigation is provided and has been used in climate change cases in other countries, particularly in the Global South[150], but also in the

147. See more detailed line of argumentation for this reasoning above in the answer to question 1 with regards to the appellants.

148. See *nota bene* L. Kneubühler - J. Hänni, *op. cit.*, 496 ff.

149. Concerning Switzerland: In favour of the introduction of the *actio popularis* in cases where a large number of people is potentially affected, see e.g. C. Errass, *op. cit.*, 1351 ff.; For a discussion of different earlier proponents of an introduction of the *actio popularis* in Switzerland, see M. Rehmann, *op. cit.*, 233 ff.; Highlighting the advantages of public interest litigation and the shortcomings of current more restrictive standing requirements but ultimately concluding the unsuitability of public interest litigation for European human rights courts see C. Schall, *op. cit.* On the problem of standing rules and the need to adapt them in situations in which a large number of people is affected, specifically in the context of the US, see J.R. Siegel, *op. cit*., 135 ff.

150. See e.g. M. Murcott - M.A. Tigre - N. Zimmermann, *op. cit*., 3, referring to section 38 of the South African Constitution and section 24 of the National Environmental

Dutch *Urgenda* case[151], and it is interesting to consider whether and if so, how, Switzerland and other European countries excluding *actiones populares per se* could draw a lesson from such examples.

Indeed, the inadmissibility of *actiones populares* is always proclaimed as a given, but – regrettably – seldom justified and substantiated[152]. If it is, it is mainly argued that general interests should be addressed in the political discourse and with political means, thus guaranteeing the highest democratic legitimisation[153], and drawing on the "classical" division between objective and subjective rights. Furthermore, it is argued that opening up access to court to *actiones populares* would create a floodgate, overwhelming courts with cases they do not have the means to deal with[154]. As to the first argument, we have already established that from a separation of powers and rule of law perspective, it is indeed normatively desirable to have control mechanisms ensuring that all state actors – the political as well – fulfil their legal duties[155]. This holds true even if these legal duties concern general interests as is often the case. Furthermore, not only has to be highlighted that courts – if they are not as directly democratically legitimised as parliament – do not lack democratic legitimisation[156], but also – as has been convincingly argued[157] – courts can be an enabling factor for liberal democracy. Not least, it has to be emphasised that democratic legitimacy is not the only form of legitimacy, but that there are other forms of legitimacy which are pertinent as

Management Act providing standing to act in the public interest and different climate change cases in the form of public interest litigation that have been conducted; see also the respective chapters of this publication.

151. *Urgenda*, para. 3.2.2.

152. For Switzerland see e.g. M. Rehmann, *op. cit.*, 56 f. with further references, who also holds that it would indeed be desirable if not necessary to address and debate the reasons for the exclusion of *actiones populares*.

153. See e.g. FC, *KlimaSeniorinnen*, para. 4.1 with further references; furthermore: M. Rehmann, *op. cit.*, n. 72 ff. with further references.

154. See e.g. M. Rehmann, *op. cit.*, 71 ff. with further references; earlier and with references already P. Mercer, *op. cit.*, 91; with regards to public interest litigation see C. Schall, *op. cit.*, 445.

155. See para. 3.1.1.

156. In many cases, judges are elected or appointed by democratically elected delegates (members of parliament, the president). In Switzerland, judges on a cantonal level are often even elected directly by the people.

157. A. Durbach - I. Reinecke - L. Dargan, *Enabling Democracy: The Role of Public Interest Litigation in Sustaining and Preserving the Separation of Powers*, in *Australian Journal of Human Rights*, 26 (2), 2020, 1-14.

well – *nota bene* forms of out-put legitimacy based on considerations of justice. This is all the more relevant as scientific research highlights the problems – or rather shortcomings – the (short-term oriented) political process[158] and actors are confronted with when having to deal with long-term challenges such as climate change[159], making it reasonable to argue that political means are actually not best suited to tackle these challenges. In contrast, *actiones populares* – especially in the form of public interest litigation – present certain advantages. For example, the functioning of courts based on objectivity, impartiality and rational arguments and facts might be better suited than the interest-driven political process to decide on certain matters with regards to climate change[160]. Also, it can be an advantage that courts, once a case is brought to them and provided that the admissibility criteria are fulfilled, generally have the duty to take a decision and render a judgment, as opposed to the political process, where it can be difficult – if not impossible – to make the political actors take a decision and act if, for whatever – even legitimate – reason, they are not inclined or capable to do so[161]. Not least, courts might be the only forum for people excluded from the political process – *nota bene* because they are under age or foreigners – to participate.

As to the "floodgate argument", it would remain to be seen whether such a scenario would materialise in practice. There are reasons to believe that it would not[162], one of them being that when wanting to access

158. This phenomenon has even been named as a problem of «short-termism in democratic politics», see e.g. A.M. Jacobs, *Policy Making for the Long Term in Advanced Democracies*, in *Annual Review of Political Science*, 19, 2016, 433-454, 438 with further references.
159. *Ivi*, 438 ff.; D.F. Sprinz, *Long-Term Environmental Policy: Definition, Knowledge, Future Research*, in *Global Environmental Policis*, 9 (3), 2009, 1-8; J. Hov - D.F. Sprinz - A. Underdal, *Implementing Long-Term Climate Policy: Time Inconsistency, Domestic Politics, International Anarchy*, in *Global Environmental Policis*, 9 (3), 2009, 20-39; R.W. Stone, *Risk in International Politics*, in *Global Environmental Policis*, 9 (3), 2009, 40-60; on the shortcomings of a system based on individual rights protection in environmental matters, *nota bene* with regards to enforcement, see also L. Kneubühler - J. Hänni, *op. cit.*, 489 f., 493.
160. E.g. J.R. Preston, *op. cit.*, 16 f.; C. Schall, *op. cit.*, 445.
161. E.g. J.R. Preston, *op. cit.*, 12 with reference to Sax.
162. See e.g. C. Schall, *op. cit.*, 445, who refers to a study of European national legal systems suggesting that «the broadening of standing requirements did not lead to a significant rise in applications». However, the author questions whether these findings would be applicable to the context of the ECtHR as well; Furthermore M. Rehmann, *op. cit.*, 297 ff., referring to the Canadian system of public interest litigation whose introduction had not let to applicants flooding the court.

a court, one is confronted with many other difficulties and hurdles, *nota bene* factual and in particular financial reasons[163]. Furthermore, it could be argued, on the contrary, that *actiones populares*, if designed in a way so that sufficiently similar interests can be pooled, would render legal proceedings more efficient and effective[164], thus disburdening courts. Indeed, even with the current admissibility requirement of having to be affected in one's rights, there is a potential for a large number of applications – be they admissible or not, and in particular in cases in which large-scale emissions (potentially) affecting a large group of people[165]. However, even if allowing *actiones populares* could lead to an increase in applications, this danger of flooding courts could be prevented with other mechanisms, for example the use of the Pilot Judgement Procedure in the context of the ECtHR[166], or other procedural instruments, such as treating one or a few main cases speedily, adjourning other, similar ones until a decision has been taken in these main cases, which is how the ECtHR is currently proceeding with regards to the climate change cases before it.

5. *Assessment of Facts and their Implications for Access to Courts*

Facts and their assessment by courts are pivotal in the judicial decision-making process. Indeed, the factual situation and its evaluation by the court is essential for the outcome of a case. This is perhaps particularly true in the context of climate change litigation, as the status of scientific data is not only relevant when applying the law to a specific case, thus evaluating whether a legal duty has been breached, but also in the process of interpreting the law in order to determine which specific legal obligation(s) can indeed be derived from a certain legal provision. However, questions regarding the assessment of facts might also be particularly challenging in the climate change context due to its global character and

163. See further references in chap. 4.2.1.
164. See chap. 4.1.1 f., *nota bene* with reference to *Urgenda*, para. 5.9.2. with further references.
165. Along these lines see M. Rehmann, *op. cit.*, 585 ff.
166. Art. 61 of the Rules of the Court; for a detailed discussion of the pilot judgment procedure see e.g. J. Gerards, *The Pilot Judgment Procedure Before the European Court of Human Rights as Instrument for Dialogue*, in M. Claes - M. de Visser - P. Popelier - C. Van de Heyning (eds.), *Constitutional Conversations in Europe*, Cambridge/Antwerp/Portland, 2012, 371-395. Proposing the introduction of a similar procedure on a national level, see C. Errass, *op. cit.*, 1371.

scientific and societal complexity leading to further difficult questions regarding causality and the attribution of responsibility.

Indeed, the assessment of scientific data has in fact been essential in the *KlimaSeniorinnen* case – and will continue to be so in the context of climate change litigation more generally, which is why, as a final – and more technical – aspect, we will now discuss questions regarding the assessment of facts, focusing on their implications for access to courts.

5.1 *Assessment of Evidence by Courts*

In light of the critical importance of the assessment of facts in the judicial decision-making process, it might seem surprising that there are relatively few rules, sometimes no rules at all, as to how courts should perform the task of assessing evidence – and the facts they (allegedly) contain. Indeed, many – at least national – jurisdictions do provide rules as to who has to establish facts[167], who bears the burden of proof[168], or which pieces of evidence are admissible[169]. The court, however, can assess the pieces of evidence and the facts behind them freely[170].

Although not principally an issue, this can prove to be problematic where a court only insufficiently takes into account the relevant scientific data it is presented with in the proceedings. This problem can be exacerbated in that the possibilities to challenge the assessment of facts before a higher instance are oftentimes limited. For example, the evaluation of facts can only be challenged before the FC if it is manifestly incorrect or based on an infringement of the law[171]. Similarly, the ECtHR holds that

167. Exemplary: In administrative procedures based on public law in Switzerland, it is in principle the public authority that has to establish the facts of the case *ex officio* in (art. 12 APA). The parties are, however, obliged to cooperate in establishing the facts of the case (art. 13 APA). The FC, in turn, bases its judgment on the facts of the case as established by the previous instance (art. 105 para. 1 AFC).

168. Chap. 5.2.

169. Exemplary: article 12 APA listing the different means of evidence; Sometimes, the law even provides a privileged treatment of certain pieces/means of evidence, e.g. public registers and public deeds in civil proceedings (see article 9 Swiss Civil Code).

170. For Switzerland: Article 40 Federal Act on the Federal Civil Proceedings (referred to in article 19 APA); for more detail, see: R. Kiener - B. Rütsche - M. Kuhn, Öffentliches *Verfahrensrecht*, Zurich/St. Gallen, 2015, n. 722; concerning the ECtHR, see C. Bicknell, *Uncertain Certainty: Making Sense of the European Court of Human Rights' Standard of Proof*, in *International Human Rights Law Review*, 8 (2), 155-187, 187; furthermore W.A. Schabas, *op. cit.*, article 38, 810

171. Article 97 Federal Act on the Federal Court.

«it is not its function to deal with errors of fact or law allegedly made by a national court, unless and in so far as they may have infringed rights and freedoms protected by the Convention»[172].

It is thus important to highlight that – like with any other exercise of discretion by public powers – the court has to assess the evidence according to its best judgment, and that its assessment has to be objectively comprehensible[173]. This particularly relates to the required standard of review and level of proof[174], but also to the court's duty to take a "reasoned decision" deriving from procedural guarantees, *nota bene* article 6 ECHR. This duty comprises indicating «with sufficient clarity the grounds» on which a decision is based as well as basing the «reasoning on objective arguments»[175].

The assessment of facts and scientific evidence is indeed a particularly important – and in my opinion criticizable – aspect of the decisions of the national instances in the *KlimaSeniorinnen* case. Even though IPCC reports were used as proper science and to establish facts, the examination and consideration of the scientific findings – or at least the reasoning given by the court to that effect – were very basic and not in line with the requirements of a «reasoned decision».

Indeed – and especially when compared to other climate litigation judgments –, the references to scientific facts and findings were extremely brief and superficial. The first instance referred to the IPCC only twice and each time in one phrase only – once saying that the Federal Council had based Switzerland's targets on the scientific recommendations of the IPCC without, however, going into more detail, and once highlighting that the IPCC's Fifth Assessment Report had shown that there is a direct correlation between the development of emissions and the rise in temperature[176]. The second national instance was even briefer with regards to references to scientific facts, mentioning the IPCC once in the context of a «brief overview of possible impacts of climate change», not directly referring to one of the IPCC reports but rather on an overview provided by the FOEN based on the IPCC Assessment[177]. The FC referred to one

172. ECtHR, *Perez v France*, App. No. 47287/99, 12 February 2004, para. 82.
173. R. Kiener - B. Rütsche - M. Kuhn, *op. cit.*, n. 725.
174. Chap. 5.2.
175. ECtHR, *Taxquet v. Belgium*, App. No. 925/05, 16 November 2010, para. 91; in the context of Switzerland, see FC, *KlimaSeniorinnen*, para. 3 (unpublished).
176. Ruling, 11.
177. FAC, *KlimaSeniorinnen*, para. 7.4, in particular 7.4.2.

of the IPCC reports in somewhat more detail[178]. Still, the reference to the IPCC report's content was very basic. This can be illustrated in quantitative terms on the one hand. Whereas the FC's reference to the IPCC report did not exceed one page, the appellants first request counted 15 pages on scientific facts and findings[179]; the German Constitutional Court in its Climate Order elaborated on the factual bases of climate change and climate action on 21 pages[180]; the Decision of the Dutch Supreme Court in the *Urgenda* case contained 5 pages dedicated to the "Facts"[181]. Furthermore, the FC referred solely to one IPCC report whereas the appellants as well as the German and Dutch courts all referred to multiple IPCC reports and included references to other scientific studies as well. Even if the quantitative mention alone is not decisive, it is nevertheless a significant indication.

On the other hand, the FC's dealing with facts can also be criticised in terms of content. Indeed, the FC used the IPCC report to deduce from it that the temperature rise limit of "well below" 2°C in terms of the Paris Agreement is not expected to be exceeded in the near future, that there is still some time available to prevent global warming exceeding this limit and that global warming can be slowed down through suitable measures, facts from which it then concludes that the appellants are not affected in their rights with sufficient intensity[182]. This could be qualified – as I argue – as a rather one-sided and partial approach to facts rather than a detailed assessment.

Indeed, the *KlimaSeniorinnen* have unsuccessfully challenged the reasonings of the respective lower court(s) before the FAC and the FC. This provides the perfect opportunity for the ECtHR to revisit the application of courts' duty to take a «reasoned decision» as described above. Indeed, even though the duty to give reasons «may vary according to the nature of the decision and must be determined in the light of the circumstances of the case» and even if the court is not required to «give a detailed answer to every argument»[183], this does not encompass the court outright failing

178. FC, *KlimaSeniorinnen*, para. 5.3.
179. Request, chap. 4 para. 22 ff.
180. *Klimabeschluss*, para. 16 ff.
181. *Urgenda*, para. 2.1.
182. FC, *KlimaSeniorinnen*, para. 5.3 f.; That the applicants are affected in their rights is procedurally required for them to be able to act against the criticised omissions by the state. See also answer to questions 1 and 2.
183. Instead of many: ECtHR, *Lăcătuş and Others v. Romania*, App. No. 12694/04, 13 November 2012, para. 97; with regards to Switzerland, see FC, *KlimaSeniorinnen*, para. 3.2.

to address the applicants' main line of argumentation[184] – without giving reason of why it would not be pertinent –, particularly concerning the four individual applicants, whose health problems and the evidence provided to prove the latter's existence as well as the link to climate change the FC has not mentioned once. Rather it is under a duty to properly examine the submissions, arguments and evidence provided by the parties[185]. In this context, it is particularly important that «reasoned decisions also serve the purpose of demonstrating to the parties that they have been heard, thereby contributing to a more willing acceptance of the decision on their part»[186].

5.2 *Standard(s) of Review, Level of Proof and Burden of Proof*

The concepts of standard(s) of review, level of proof and burden of proof are very complex and context dependent. Most basically, standard of review refers to the level of scrutiny of a court in assessing a case; level of proof – although differently understood depending on the jurisdiction at hand[187] – pertains to the «threshold of probabilistic likelihood [of a fact] given the evidence»[188] or to the «degree of satisfaction» to which the judges «have to be persuaded of that proof»[189]; and burden of proof determines who has to bear the consequences of lack of evidence[190]. While these concepts are clearly distinguishable in theory, they (and particularly the first two) are often intertwined in practice. We will thus discuss them – or rather their implications for access to court in climate change cases – together.

In the *KlimaSeniorinnen* case, standard of review and level of proof have been a particularly important element in the context of the assessment of the requirement of having to be particularly affected, in which context the interplay between the two is indeed pronounced. As to the applicable standard of review, having to show that one is affected in a right does not mean that one has to prove the violation of that right, not even that one's

184. Namely that they, as elderly women, were (already now and particularly) affected in their right to life and private and family life.
185. ECtHR, *Perez v France*, App. No. 47287/99, 12 February 2004, para. 80.
186. ECtHR, *Taxquet v. Belgium*, App. No. 925/05, 16 November 2010, para. 91.
187. For a more detailed discussion, see e.g. K.M. Clermont, *Standards of Proof Revisited*, in *Vermont Law Review*, 33 (3), 2009, 469-488.
188. G. Gardiner, *The Reasonable and the Relevant: Legal Standards of Proof*, in *Philosophy and Public Affairs*, 47 (3), 2019, 288-318, 288.
189. C. Bicknell, *op. cit.*, 158.
190. *Ibidem*.

right has been restricted *stricto sensu*[191]. Rather, the required intensity of the impairment of the right is lower. The question is whether an act or omission potentially affects the scope of the alleged right[192]. This signifies that – at least on procedural grounds – the applicants did (and do) not have to show that their rights have been violated, but rather – and "only" – that the alleged omissions by the criticised state actors are potentially fit to reach the degree of a restriction and subsequent violation of their rights[193].

Regarding the level of proof, it is rightly held – at least in the scope of application of article 25a APA – that it is limited to having to establish *prima facie* evidence (that one is affected in one's right)[194]. It is thus not necessary to bring the full proof, which would require the court to not have serious doubts but to be convinced of the correctness of a factual assertion based on objective grounds[195]. Rather, a fact is established *prima facie* if certain elements speak in favour of its existence, even if the court still deems possible that the fact in question might in fact not have materialised[196]. Limiting the level of proof to *prima facie* evidence and holding that – on procedural grounds – the applicants do not yet have to substantiate a violation of their right, but only that they are affected in their right is all the more justified, as I argue here, by reference to the right to access to court guaranteed in article 6 ECHR. According to this provision – and if the other stipulated requirements are met –, access to court has to be granted not only if the existence of a claim is fully proven, but already if the applicants can substantiate an arguable claim that such a right exists according to national law[197]. The question whether the right and claim do indeed exist is not a question to be solved on procedural grounds, but on the merits of the case.

This must also be similar with regards to the victim status according to the ECHR. Indeed, if it is required at the admissibility stage that an

191. The FC itself states this in its *KlimaSeniorinnen* decision, see FC, *KlimaSeniorinnen*, E. 4.4, with further references to BGE 144 II 233 (concerning a national health prevention campaign against HIV and alleged negative effects of this campaign for children and youths) E. 7.3.1 and BGE 140 II 315 (concerning accident prevention measures for the nuclear powerplant "*Mühleberg*") E. 4.3 and 4.5, each with further references.
192. BGE 144 II 233 E. 7.3.2 with further references; but also FC, *KlimaSeniorinnen*, E. 4.4; see also I. Häner, *op. cit.*, article 26 APA n. 28.
193. See BGE 144 II 233 E. 7.3.2.
194. S. Müller, *op. cit.*, 354; affirmative: I. Häner, *op. cit.*, article 25a APA n. 28.
195. BGE 130 III 321, para. 3.2.
196. BGE 132 III 715, para. 3.1; also: BGE 140 III 610, para. 4.1.
197. E.g. ECtHR, *Mennitto v Italy*, App. No. 33804/96, 5 October 2000, para. 23.

applicant has to "claim" that they are a victim of a violation, this is not equivalent to having to prove the existence of a violation. This is particularly evident in the case of a potential victim, in which context the ECtHR has explicitly held that the potential victim is «required to provide reasonable and convincing evidence of the likelihood that a violation affecting him personally will occur»[198].

In the *KlimaSeniorinnen* case, this means that – from a procedural perspective – the applicants did (and do) not have to fully convince the court of their being affected in their rights. Rather, merely establishing that certain elements speak in favour of their being affected and providing reasonable evidence would have been sufficient. The reasoning of the Swiss FC, however, according to which the applicants – like the rest of the Swiss population – are not affected with sufficient intensity by the omissions as required by art. 25a APA because the temperature rise limit of "well below" 2°C in terms of the Paris Agreement is not expected to be exceeded in the near future and because global warming can be slowed down by suitable measures, thus concluding that there is still some time available to prevent global warming exceeding this limit[199], can be argued to amount to requiring the proof of the existence of a violation of a right, the FC hence having misconceived the appropriate standard of review and level of proof.

A similar line of argumentation regarding the standard of review and level of proof can be defended concerning the question of shared causality and responsibility as well as the assessment of probabilities and risk. As to the first, it can be highlighted that shared causality and responsibility is not equivalent to no causality and responsibility. Rather, jurisprudential examples, namely the *Urgenda* case, show that it is possible to establish causality and responsibility, even if many actors might collectively contribute[200]. Furthermore, models for the attribution of responsibility and addressing shared causality do exist – *nota bene* in criminal law or tort law – and could serve as an inspiration.

As to the second, it is indeed disputable whether the FC's conclusion from the (only) IPCC-report it has cited reflects the appropriate standard of review and level of proof, particularly in light of the principle of precaution as well as seeing that the IPCC's basis for calculation is not a "no-risk-approach" but rather on a basis of 66% probability. The FC has

198. ECtHR, *Senator Lines GmbH v Austria et al.*, App. No. 56672/00, 10 March 2004.
199. See FC, *KlimaSeniorinnen*, para. 4.1 and 5.3 ff.
200. Regarding responsibility: *Urgenda*, para. 5.7.1 ff.; Referring to the reasoning in the *Urgenda* case, see also H. Keller - A.D. Pershing, *op. cit.*, 30.

indeed only taken into account that the temperature rise limit of "well below 2°C" is not expected to be exceeded in the near future, that global warming can be slowed down by suitable measures, and that there is still some time available to prevent global warming exceeding this limit. It has not, however, considered that the effects of the failure to reduce GHG emissions – even though already caused – will only materialise in the future, or the costs shifting the burden to reduce GHG emissions into the future will have, or an assessment of the measures taken, or other relevant aspects.

Not least, the question of the burden of proof has to be (re)considered. In the *KlimaSeniorinnen* case, it was indeed the appellants that hold the burden of proof. For in the Swiss system, the burden of proof lies with the party that derives rights from the fact to be proven[201]. In the context of the ECtHR as well, the burden of proof lies with the party making the claim, a rule that has been qualified by some as general principle of international law[202].

However, this rule can be questioned. This is particularly apparent in the Swiss context, where the burden of proof rule stems from private law and has been applied in administrative law *per analogiam*[203]. Indeed, in the archetypical private law proceedings concerning two individuals, it is generally assumed that they have – at least approximately – the same "power", whereas in the archetypical public law proceedings, an individual faces the state, thus constituting a situation in which a certain power imbalance is inherent. Since holding the burden of proof can be disadvantageous, one can argue that it would indeed not be appropriate to attribute it to an already "weaker" adversary. Such dynamics of "weaker" vs "stronger" adversaries existing more generally, the criticism of the burden of proof rule applies not only in contexts where the latter explicitly stems from private law.

One could therefore consider to draw inspiration from examples in other areas of law where facilitated standards of proof or even the reversal of the burden of proof exist. The most "extreme" example is criminal law, where the state has to proof the criminal liability of the defendant, as opposed to the defendant having to prove their innocence[204]. But less

201. See art. 8 of the Swiss Civil Code; Indeed, this civil law rule on the burden of proof is applicable in public law proceedings as well as a general principle of law.
202. W.A. Schabas, *op. cit.*, article 38, 810.
203. R. Kiener - B. Rütsche - M. Kuhn, *op. cit.*, 186.
204. E.g. W.A. Schabas, *op. cit.*, article 6, 298.

far-reaching examples do exist, *nota bene* in civil law proceedings in constellations where a typically "stronger" party faces a "weaker" party in terms of power relations, as in tenancy law of labour law, to give two examples[205].

Before this background and in light of the power relations in public law proceedings as well as with view to the immense difficulties for applicants to prove certain elements – *nota bene* causality –, facilitating standards of proof or reversing the burden of proof could – or should I say "should" – be considered in climate change cases.

In this context, it is important to notice that the ECHR and the ECtHR do not exclude the possibility for reversal of the burden of proof. Rather, the ECtHR has already implemented a reversal of the burden of proof in some cases[206]. In this context as well, it has indeed been held that «reversing the BoP actually operates as something of a leveller, bringing greater parity between parties in the dispute»[207].

6. *Conclusion*

This paper has highlighted that and in what way climate change cases challenge the traditional understanding of admissibility and access to courts, at least in a European setting. Focusing on the *KlimaSeniorinnen* case currently pending before the ECtHR, but looking at admissibility issues more generally, we have argued that and how access to court and admissibility do not pose an insurmountable hurdle to climate change litigation. In this regard, we have discussed approaches and means to deal with admissibility issues – *de constitutione* and *lege lata* or *ferenda*.

In terms of a conclusion, I would like to propose a few final recommendations regarding access to court and admissibility. The first would be an *in dubio pro* admissibility rule, proposing to – when in doubt – assess

205. In Switzerland, for example, tenancy and labour law are two areas in which so-called simplified civil proceedings ("*vereinfachtes Verfahren*") are stipulated (article 243 ff. of the Swiss Civil Procedure Code). The policy considerations behind this is to make it easier for the (socially) weaker litigant to assert their claims or to defend against opposing demands and to enable them to conduct the case without legal representation, see e.g. S. Mazan, *Commentary on Article 247*, in K. Spühler - L. Tenchio - D. Infanger (eds.), *Schweizerische Zivilprozessordnung, Basler Kommentar*, Basel, 2017, n. 4.
206. First case: ECtHR, *Kurt v Turkey*, App. No. 15/1997/799/1002, 25 May 1998.
207. C. Bicknell, *op. cit.*, 159.

the critical questions on the merits rather than from a procedural perspective. Indeed, not only do admissibility issues sometimes pose complex questions, but also they are often very closely linked to questions on the merits. This is *nota bene* the case with victimhood status or the question of «being affected in one's right», but also regarding questions of causality and responsibility. The court would do good and be better equipped to answer these questions on the merits[208].

Secondly, it is recommendable, sometimes even normatively required in light of superordinate legal obligations such as procedural human rights guarantees as well as the Aarhus Convention, to interpret existing admissibility criteria extensively where they allow so. This is *nota bene* possible regarding the requirement of «being affected in one's right» or the recognition of victimhood and standing to NGOs and other groups.

Thirdly, and particularly where existing admissibility requirements do not lend themselves to an extensive interpretation, alternatives should be seriously considered. Amongst such alternatives are more extensive rights of access to court for groups or even allowing public interest litigation. Instead of offhandedly rejecting them, possible disadvantages and advantages should carefully be weighed up.

Lastly, these questions of access to court should be guided by functional criteria, taking into account current circumstances and new developments.

In the meantime, it will be interesting to wait and see the ECtHR's approach to admissibility questions and access to court. This contribution should at least have pointed out that issues in that regard are not insurmountable hurdles, but that there rather is a way forward for climate change litigation – before the ECtHR as well as before national courts.

208. See along these lines e.g. ECtHR, *Siliadin v France*, App. No. 73316/01, 26 July 2005, para. 63; furthermore: ECtHR, *Hirsi Jamaa and others v Italy*, App. No. 27765/09, 23 February 2012, para. 111 f., where the ECtHR has expressly held: «The Court notes that the issue raised by this preliminary objection is closely bound up with those it will have to consider when examining the complaints under Article 3 of the Convention. That provision requires that the Court establish whether or not there are substantial grounds for believing that the parties concerned ran a real risk of being subjected to torture or inhuman or degrading treatment after having been pushed back. This issue should therefore be joined to examination on the merits. The Court considers that this part of the application raises complex issues of law and fact which cannot be determined without an examination on the merits. It follows that it is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

Although the assessment of these climate change cases on the merits, in turn, is yet another question, the approaches discussed here with regards to procedural grounds may provide some insights concerning the merits as well.