

## Madame de Staël Prize, ALLEA 6 Nov 2021

Mister President of ALLEA, dear Ambassador Seger, dear friends and family

It is wonderful that we can come together here in Berlin, it is particularly wonderful after the experience of the Covid pandemic. Of course, I am thrilled by the fact that the ALLEA is awarding me the Madame de Stael Prize and that Ambassador Seger has made it possible for us to celebrate this event in this beautiful embassy. I thank you very much for all this. And finally, I am extremely pleased to present to you some thoughts on climate litigation – my new research project.

### Introduction

This year, climate change has had a particularly strong impact. Germany was affected by severe flooding in early summer. Canada and Sicily reported record temperatures. Less present in our media was the fact that Madagascar has also been hit by an unprecedented heat waves.

Climate change is here. The latest IPCC report makes it clear: the influence of humans on climate change is scientifically proven and we must do everything we can to prevent a climate catastrophe in the coming decades.

It is in *this* broader context that we must understand climate litigation. This phenomenon is on the rise worldwide. Citizens are filing lawsuits against state actors (and in some cases also against private companies) on the grounds that states have done too little to reduce CO2 emissions.

### Overview

I have structured my presentation as follows.

In the first part, I will try to explain why climate lawsuits arise in general, and what the common arguments are against courts taking up these lawsuits. Then I'll go over the pending applicants before the ECtHR. I will show that it is not clear whether the ECtHR can declare these applications admissible at all. Finally, in the

third and last part, I will try to look into the future and ask: if courts do accept climate cases, what significant issues will they have to tackle on the merits? This should provide us with enough material for an exciting discussion.

## Part I: Climate Litigation

I start with the following question: Why do these climate litigation cases occur? There are several reasons:

1. Many people feel existentially threatened by climate change. They claim that their right to private and family life, the prohibition of ill-treatment and ultimately their right to life are being violated.
2. These claimants have the impression that the climate gets too little weight in the political opinion-forming process, and that the national climate protection laws are shaped too much by short-term thinking and economic interests.
3. In many countries, there are no binding standards for climate protection.

On top of all this, there is another aspect at the international level: We have little binding law on climate protection, and we have no international body that could verify compliance with these standards, so we have no International Climate Court.

In simplified terms, we are confronted with the following situation: Great need for action, low density of normative requirements and no strong international institution that could enforce compliance with soft (and sometimes hard) law standards.

As a result, more and more individuals are invoking human rights before national and international bodies in order to combat climate change. This is where it starts to get exciting for me as a former judge at the ECtHR and as an academic, because the question arises whether courts are up to this task. In the political and scientific arena, a heated debate has arisen around the question of whether courts should decide these climate lawsuits.

What are the most common arguments against climate lawsuits?

1. Courts are not democratically legitimized and therefore should not decide such cases.
2. Human rights are not climate protection rights.

3. There are too many different interests at stake. Courts are overwhelmed by this type of case.
4. The climate cases are too complex because the scientific data is so voluminous.
5. It is up to the legislative branch to deal with climate change.

As to the first argument, courts do have democratic legitimacy and must decide on the complaints that are brought before them. The argument that courts are "not a democratic" institution is an all-round attack against courts that denies the courts any function. Courts, however, fulfil an indispensable task in the modern state.

As for the second argument, that is probably correct. Human rights, especially as they were adopted after the Second World War, were primarily intended to protect individuals from state interference. Climate change was not even an issue in the 1950s and 1960s. However, all human rights bodies have emphasised that human rights must be interpreted in a contemporary manner and that people must also be protected against new forms of threat.

The third argument against climate action also has some merit. Indeed, we are confronted with very different interests when it comes to climate lawsuits. But is that so unusual for courts? No, it is the same in other areas, think of modern reproductive medicine. There, too, a fair solution has to be found between very different interests.

The fourth argument is probably true as well: Climate cases are difficult. They demand that the courts take an in-depth look at scientific reports and deal with different data. But this is nothing new. Courts have to do this regularly, e.g. in environmental or medical law.

And finally, as to the last argument: yes, it is up to the political branches to define solutions for the climate crisis, fair enough. But what legal steps are possible to individuals who claim that the legislator has not fulfilled its task of protecting them from the effects of climate change? Then the only option is to go to court.

My presentation is therefore based on the following premise: Courts have an important, albeit difficult role to play in tackling the climate crisis. They are walking a tightrope where, on the one hand, they have to assume responsibility for human rights, but on the other hand, they must not make decisions that are too activist, otherwise they endanger their legitimacy.

Let's go on now to the second part, on "access to court" in climate litigation, and in particular access to the ECtHR. Courts do not operate in an empty space, but have to apply the law, and in particular obey their own procedural requirements.

## Part II: Procedural hurdles/admissibility issues before the ECtHR

### The pending cases before the ECtHR

To date, the ECtHR has never decided a climate change case. In fact, although the Court has ruled on over 300 cases related to the environment, it has not heard any climate change case on the merits. At present, two climate complaints are at an advanced stage, i.e. they have been communicated to the parties.

The first case, *Duarte Agostinho and Others v. Portugal and 32 Other States*, was filed on 2 September 2020. The applicants are six Portuguese youths (pictured here), who assert that climate change has and will continue to impact their lives and health. They claim that the increased frequency and intensity of heatwaves in Portugal interferes with their ability to sleep, exercise and spend time outdoors, and causes them anxiety about potential impacts both on them and on the families they hope to have in the future. They also contend that, because of their age, the interferences with their rights are greater than for older generations, not only because they will live longer, but also because the impacts of climate change will worsen over time. The case has been communicated to all 33 respondent countries.

The second case, *KlimaSeniorinnen v. Switzerland*, was filed on 26 November 2020. The applicants are a group of older women who argue that, because of their age and gender, they are particularly vulnerable to premature loss of life or severe impairment of life due to climate change-related heat waves. They maintain that Switzerland has failed to implement and enforce measures to meet its target under the Paris Climate Agreement, and that this failure significantly increases the risk of heat-related excess mortality among older women.

Two other cases have also arrived in Strasbourg. One concerns a young man. He suffers from a specific form of MS that gets much worse when the temperature rises. The second case concerns Norway. Six young climate activists, along with two environmental organisations from Norway, filed an application to bring the issue of Arctic oil drilling to the European Court of

Human Rights. These two cases are not yet communicated. This means that these cases are still at a very early stage of proceedings. But as you can see, there is a whole range of climate cases coming to the ECtHR, and these cases are certainly not the last.

Before the ECtHR can judge a case on the merits, it must check whether all the admissibility requirements have been met. The most important admissibility requirements are listed here (slide). For the non-lawyers among you:

Admissibility requirements are important both in practical and theoretical terms. At the ECtHR, more than 90% of all cases fail this hurdle, that means they are declared inadmissible. Respecting the admissibility requirements is also important for the legitimacy of the Court. These rules are fundamental for the interaction between the Court and the Member States. The latter must know in advance which cases can come before the ECtHR. The ECtHR will therefore not lightly disregard the admissibility requirements.

My talk will focus on three procedural requirements that will likely pose particular challenges:

### *Exhaustion of domestic remedies*

The **first** procedural hurdle is the problem of demonstrating exhaustion of domestic remedies. Exhaustion of domestic remedies is a fundamental principle in international law that requires an applicant to attempt to resolve their issues using domestic legal mechanisms before turning to an international tribunal.

In the Swiss case, the exhaustion requirement is in my view fulfilled. The applicants brought proceedings before the Federal Administrative Court and finally before the Swiss Federal Supreme Court arguing that the Switzerland has failed to protect them adequately.

In the Portuguese case, however, requiring the applicants to first bring their case before the relevant domestic tribunals in all 33 countries concerned appears to have been difficult for the applicants. The applicants argue that “[t]he likelihood of every one of the Respondents’ domestic courts providing such a remedy in time to prevent global warming exceeding 1.5°C [one point five degree Celsius] will be greatly enhanced if the [European Court] recognises that the Respondents share presumptive responsibility for climate change.”

The applicants' main argument is: Given the urgency of the issue, they have no time to exhaust the national remedies.

Furthermore, requiring applicants to come up with the financial resources needed to fund separate lawsuits in each Member State would be costly, so costly that this would probably fly in the face of the Court's case-law. The Court has repeatedly held that the exhaustion requirement should not impose an unreasonable burden on an applicant.

What are the legal avenues if the ECtHR wants to make a generous exception to this admissibility requirement? The Court's case-law in this regard is already well established, though it has not yet been applied in the climate context. There are two exceptions that could be easily transferable.

The **first** exception to the exhaustion requirement arises in cases where the national authorities remain totally passive in the face of serious allegations of misconduct or infliction of harm by State agents. These arguments are most often used in the context of torture or other violations perpetrated by State officials. The exception makes sense in this context—it would be unfair to require applicants to work within a system that is itself responsible for the harm complained of.

This same exception should apply in the climate context. A State's failure to act to avert climate catastrophe and protect people from extraordinary harm should be recognized as serious misconduct. Where a State completely ignores the threat of climate change, or where a State's laws and policies in fact contribute to climate change, applicants should be exempt from having to comply strictly with the exhaustion requirement.

The **second** exception to the exhaustion requirement arises in cases where a government has adopted a practice that is incompatible with the Convention and where proceedings to counter the practice would be futile, ineffective, or constitute an unreasonable requirement.

The Court has characterized a "practice incompatible with the Convention" as one that "consists of an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system." Although the exact facts will vary by case, a pervasive system of providing tax breaks or other benefits to fossil fuel companies, or a continued failure to act to reduce a

State's carbon footprint for example may very well be enough to demonstrate a pattern of violations.

This brings me to a *first interim conclusion*. On the basis of previous case-law, there are exceptions to the exhaustion requirements, but whether these are sufficient to declare the Portuguese case admissible against *all* 33 states, I dare to doubt. Do we therefore need to rethink the question of exhaustion in cases that deal with a global problem?

### *Victim status*

I will now turn to the **second** significant procedural barrier: "victim status".

To be considered a victim, an applicant must be able to show that they were negatively affected by the measure of which they complain. The Court applies this criterion in a flexible manner. So long as the applicant has been legally affected, they may be considered a victim. Given this broad definition, individual applicants in climate cases who are able to demonstrate that their own rights have been violated will likely not face significant trouble in convincing the Court of their victim status. In the Swiss case, the victim status of the senior women is disputed. The Government argues that the elderly women are no more affected by global warming than anyone else. This question of victim status is therefore not easy for the Court to answer in this case. And we not only have the individual senior women applying to the Court in this case, but also an association that advocates for the rights of the "Klimaseniorinnen", or female climate seniors. The question is whether this association has victim status as well.

Environmental groups may have even more difficulty convincing the Court that they qualify as "victims". However, there are good reasons why the Court should recognize environmental groups' standing to bring climate cases as well. The Court's case-law is not absolutely clear on this issue. However, there are isolated cases where the Court has granted victim status to environmental associations. I think the Court should build on this and develop the case-law further.

The Court has long held that victim status may be granted to an organization that is directly affected by a particular government measure. But an organization may also be accorded victim status under circumstances where

individuals who are negatively affected can best confront the problem by forming an association. This was the case in *Gorraiz Lizarraga and Others v. Spain*. In that case, multiple individuals came together to form the Coordinadora de Itoiz association to resist the construction of a dam that would lead to the flooding of several small villages. The flooding would have resulted in the expropriation and population displacement.

The Court considered the Coordinadora de Itoiz association to have victim status. The Court said, and I quote, that “in modern-day societies, when citizens are confronted with particularly complex administrative decisions, recourse to collective bodies such as associations is one of the accessible means, sometimes the only means, available to them whereby they can defend their particular interests effectively”. Reinforcing this position, the Court has also emphasized that the term “victim” in the Convention “must be interpreted in an evolutive manner in the light of conditions in contemporary society”. The wording of Article 34 is very open; there is nothing in the text of the Article itself that precludes a group from bringing a claim.

Finally, would an application by an environmental organization be tantamount to an *actio popularis*? As far back as the European Commission’s decisions in *Becker v. Denmark*, in 1975, the European human rights system has signaled a deep aversion to *actiones populares*. This aversion has continued into the present.

But not every case that is brought by a group is an *actio popularis*. Applicants may be victims within the meaning of the Convention even if their interests align with the interests of the general public. Cases brought by groups comprised of vulnerable individuals seeking to protect their human rights are very different from cases brought in the name of a group for the purpose of using the Court as a workaround of Member States’ legislative systems. The Court is empowered to accept the former and dismiss the latter. This concern should therefore not prevent environmental groups from securing victim status.

This brings me to *my second preliminary conclusion and several follow-up questions*: Victimhood is a real challenge in climate cases, both for individuals and organisations. Do we need to re-define the concept of victimhood for global human rights problems that potentially affect everyone? Will there be certain groups in the future who are particularly legitimised to bring climate applications to the ECtHR because of their vulnerability?

### *Significant disadvantage/damage*

Let us turn now to the **third** barrier: “significant disadvantage”.

Within the sphere of the Convention, a significant disadvantage means that the violation complained of attains the minimum level of severity needed to warrant consideration by the Court. For those applicants who bring claims stemming from climate-related harms that have already occurred, demonstrating a significant disadvantage is unlikely to present an issue. Indeed, the Court has only declared a very limited number of cases inadmissible because of this criterion. Thus, applicants bringing climate change cases based on allegations of past or current harm, including the elderly women in the Swiss case will likely be able to satisfy this requirement with relative ease.

But this requirement may present a much more significant challenge for applicants who attempt to bring cases based on a theory of *future harm*, rather than current or past harm. The Court has historically been reluctant to hear cases where an applicant’s complaint is based only on the risk of a future violation. However, there are two arguments in favor of allowing cases centered on a risk of future harm. The first is that there is some precedent for allowing these sorts of cases. The second is that the significant disadvantage requirement may be bypassed if doing so is in the interest of protecting human rights.

Turning **first** to the issue of precedent. The Court has, under some circumstances, allowed cases to proceed even if the allegations concerned potential future harms. For example, in *Taskin v. Turkey*, the applicants complained that a gold mine’s proposed use of sodium cyanide to extract the ore would threaten the surrounding environment and, ultimately, the applicants’ health and safety. Although these claims were based only on a hypothetical (though probable) future risk, the Court declared the case admissible and found a procedural violation of Article 8.

The case of *Öneryıldız v. Turkey* also provides some precedent in this area. In *Öneryıldız*, the applicants had suffered the loss of nine close relatives due to an explosion at a refuse site that the Turkish government had failed to adequately maintain. The Court concluded that there had been a violation of Article 2 of the Convention in its procedural aspect in the case. Importantly, the Court supported this conclusion by noting not only the lack of adequate safeguards of

the right to life for the individuals who were killed, but also because there were no safeguards in place to, I quote, “deter [] similar life-endangering conduct in [the] future”.

It is reasonable that the Court should take a similar approach in cases related to climate change. As long as the applicants make an arguable claim that they are very likely to suffer harm, the Court should accept the application as admissible. All other considerations, including questions of attribution or establishing a direct causal link, should be joined with and examined on the merits.

As a **second** argument in favor of allowing applications concerning future harms to proceed, the Court must hear a case if respect for human rights requires an examination of the application on the merits—even if the case does not otherwise meet the requisite “significant disadvantage” standard.

This is the exact situation that is likely to arise in a number of climate change cases. The harm that applicants themselves have experienced may not reach the significant disadvantage threshold, but the importance of the questions they raise may nonetheless require the Court to hear the case [under Article 35 § 3 (b)].

This brings me to *my third preliminary conclusion*: the requirement of significant damage might be a problem for all climate cases in which the applicants argue that the damage arises in the future. But the Court should find a solution to solve this admissibility issue on the basis of existing case-law.

[A look into to future/the doctrinal challenges in environmental cases](#)

I hope that I have been able to show you with these explanations that national and international courts are being challenged in climate cases. The devil lies in the proverbial details of many admissibility requirements. For the ECtHR, this means that it has to set new standards for various admissibility requirements in the light of the climate crisis. This is possible, but the Court must handle these questions carefully so that the Strasbourg judges cannot be accused of activism. I have tried to give you an overview of possible admissibility questions in the two first climate cases pending before the Court. However, there are many more questions to be resolved in climate cases in the future, such as:

Who may file applications on behalf of future generations?

Is there a historical responsibility of industrialised countries that the Court must take into account in their balancing of interests?

Is there an inter-temporal dimension of climate justice, as well as an inter-local one? Can people in other regions of the world invoke the lack of climate protection measures in Europe?

How do we define jurisdiction in the meaning of Article 1 ECHR for a problem that is interlinked globally?

Do we have to recast the principle of equality and the prohibition of discrimination so that we can create climate justice?

There is still a long way to go for the courts on the national and international level. Let's hope that the courts will soon tackle these issues, and decide them wisely. In any case, we will have enough material in our research project for the analysis of court decisions in climate cases.