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The relaxation (if not exclusion) of victim status before the ECtHR in climate litigation

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Abstract: The purpose of this paper is to analyse the victim requirement of Article 34 of the European Convention in the case law of the first climate litigation before the ECtHR. On the one hand, we will examine what we consider to be a tightening of the conditions in the case of individuals, and on the other, we will analyse the relaxation of these requirements in the case of associations.

Keywords: ECtHR, Victim, Locus standi, climate change, collective action, association, private and family life, mitigation measures.

(A) INTRODUCTION.

The preamble with which the European Court of Human Rights (ECtHR) began its ruling in the case of *Verein KlimaSeniorinnen Schweiz v. Switzerland* prepared us, as it said, to find ourselves with a new approach, given the particularities of climate change, far removed from the solid environmental case-law[1]. It is, in our view, a clear example of the technique of *distinguishing*, which is rare in the Court's case-law, allowing it to depart from previous decisions in the face of disparate factual situations[2]. Certainly, the Court was not faced with an environmental issue with similar to those of previous claims, so it advised as a preliminary point, before entering into the merits of the case, that the issues raised had never before been addressed by the Court. Consequently, environmental case-law would be of limited value because they dealt with very different challenges[3].

Indeed, the Court, which had come from examining environmental situations whose consequences on individuals or groups of individuals were identifiable and focused, was now, in this case, dealing with effects or risks on an indefinite number of people, affecting not only the enjoyment of rights at present but also in the future[4]. Unlike polluting events due to local sources, major greenhouse gas emissions generated in the jurisdiction of a given State are only responsible for causing part of the damage, so the

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1 *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* [GC] nº. 53600/20, § 410, 9 April 2024.

2 See R. Siltala, *Theory of Precedent: from Analytical Positivism to a Post-Analytical Philosophy of Law* (Hart Publishing, Oxford, 2000) at 73.

3 Para 414.

4 Para 479.

causal link between the actions and omissions of State authorities is necessarily indirect and weaker, as the Court itself pointed out[5].

The multitude of unique considerations to be addressed by the Court depended, in any event, on how the status of victim was to be assessed, as the application was brought not only by individuals but also by associations. The decision it took, moreover, was to condition the admissibility of other applications before the Grand Chamber (*Carême v. France*[6]; *Duarte Agostinho and Others* v. *Portugal and 32 States*[7]) and those pending before the Court[8]. Certainly, it seems to me that its decision on this point has not definitively resolved, far from it, what the limits to the right to petition are, although we can unquestionably confirm a certain relaxation of the requirements regarding the standing of associations, which may lead, in the future, to a change in the strategies of climate litigation.

(B) RECOGNITION OF THE IMPACT OF CLIMATE CHANGE ON HUMAN RIGHTS

As the United Nations has been pointing out for years, the effects of climate change can impede the enjoyment of human rights[9], including the right to life, the right to adequate food, the right to the highest attainable standard of physical and mental health, the right to adequate housing, the right to self-determination, the right to safe drinking water and sanitation, the right to work and the right to development. They also disproportionately affect certain vulnerable groups (persons with disabilities, women, older persons)[10]. The monitoring bodies have recognised this situation. Thus, the Human Rights Committee has considered that certain effects of climate change (rising sea levels) pose a real risk of violating the right to life[11], while recognising that the impairment of rights by a State's actions or omissions in relation to carbon emissions are reasonably foreseeable[12].

In this sense, and on the conclusions of the *Intergovernmental Panel on Climate Change*, the ECtHR has pointed out in this case that anthropogenic climate change poses a serious current and future threat to the enjoyment of the human rights guaranteed in the European Convention[13]. It further considers that mortality and morbidity have increased, especially among the most vulnerable groups. For these reasons, it indicates

5 Para 439.
6 *Carême v. France* (dec.) [GC], nº. 7189/21, 9 April 2024.
7 *Duarte Agostinho and Others v. Portugal and 32 Others* (dec.) [GC], nº. 39371/20, 9 April 2024.
8 ECHR, *Factsheet-Climate change*, April 2024, available at https://www.echr.coe.int/documents/d/echr/FS_Climate_change_ENG.
9 See J. H. Knox, 'Linking Human Rights and Climate Change at the United Nation', 33 *Harvard Environmental Law Review* (2009) , at 477-498.
10 Human Rights Council Resolution 41/21, *Human rights and climate change*, 12 July 2019, doc. A/HRC/RES/41/21.
11 *Teitiota v. New Zealand*, communication nº. 2728/2016, of 24 October 2019, doc. CCPR/C/127/D/2728/2016, para. 8.6.
12 *Chiara Sacchi et al. v. Argentina*, communication nº. 104/2019, of 22 September 2021, doc. CRC/C/88/D/104/2019, para 10.14.
13 Para 436.

that there is a legally relevant causal link between the actions and omissions of States and the harm affecting individuals[14].

However, this recognition is not sufficient, at least in the European system, to determine the responsibility of a State. Despite being an instrument for the collective guarantee of human rights, certain limits have been imposed on the right of individual petition, firstly by the Convention itself requiring the condition of victim and then by the jurisprudential configuration of the requirement of personal involvement in the violation[15].

(C) COMPETENCE RATIONE PERSONAE: INDIVIDUALS AND NON-GOVERNMENTAL ORGANISATIONS.

According to Article 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, applicants, who may be a person, a non-governmental organisation or a group of individuals, must demonstrate that they are *victims of* a violation of a treaty right. This is a particularity of the European system that is not reproduced in other treaty provisions. Such a requirement is not contemplated, for example, in Article 44 of the American Convention on Human Rights, where a distinction is made between victim and petitioner, where it is not necessary to demonstrate a personal interest in the latter case, so that complaints can be lodged both in one's own name and in that of third parties[16].

In the case of person, it must be shown that the individuals are directly and personally affected by the alleged violation, that there is a sufficiently close link between the claimant and the harm suffered[17]. It is not possible to allege a general deterioration of the environment, as there must be a negative effect or impact (or a real and imminent risk) on the individual's life (Art.2) or on their private or family sphere (Art.8)[18].

And in the case of associations, they cannot, in principle, be direct victims of a violation of certain rights, which are only held by natural persons, such as the right to life, health or privacy, which are often precisely those that arise in environmental cases[19]. Nuisances or problems alleged under Article 8 cannot be invoked as natural persons do, not even respect for the home, merely because the organisation's headquarters are located close to the activity or installation in question, as long as the nuisance does not affect individuals[20]. They could, however, claim infringement of others, many of them of a procedural nature, such as the right to effective judicial protection[21].

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14 Para 478.

15 See F. Voeffray, *L'actio popularis ou la défense de l'intérêt collectif devant les juridictions internationals* (Graduate Institute Publications, Geneva, 2004), at 77.

16 See L. Burgorgue-Larsen and A. Úbeda de Torres, *Les grandes décisions de la Cour Interaméricaine des Droits de L'homme* (Bruylant, Brussels, 2008) at 127-132.

17 *Caron et autres c. France (déc.)*, nº. 48629/08, 29 June 2010, para. 1.

18 *Kyrtatos v. Greece*, nº. 41666/1998, § 52, 22 May 2003.

19 *Sdruženi Jihočeské Matky v. Czech Republic (déc.)*, nº. 19101/03, 10 July 2006, para. 2.1.

20 *Asselbourg and Others v. Luxembourg (déc.)*, nº. 29121/95, 29 June 1999, para. 1.

21 *Gorraiz Lizarraga and Others v. Spain*, nº. 62543/00, § 45-46, 27 April 2004.

The effects of pollution must reach a minimum threshold of severity, which is relative and depends on the circumstances of the case, such as the intensity and duration of the pollution and its physical or psychological effects[22]. Environmental damage is considered to be intolerable or extremely serious when acceptable levels of exposure or quality are exceeded. This may be caused either by a concentration of polluting substances or by the continuous repetition of episodes of noise pollution[23]. Trivial damage is not allowed, that is environmental nuisances of a small magnitude that the individual would have to bear because they are of minor importance[24], i.e. damage that is insignificant in comparison with what the Court calls 'environmental hazards inherent to in life in every modern city'[25].

The European system is not intended to prevent potential violations of the Convention. Petitions examine, in principle, violations that have already occurred. Only in exceptional cases are potential or future violations admitted, in view of the seriousness and irreparable nature of the injury[26]. For example, where the execution of an extradition order may infringe torture or inhuman treatment contrary to Article 3 of the Convention[27]. In environmental matters, claims alleging the potential nature of the injury have been unsuccessful, probably because the threats are of a diffuse nature[28]. The best-known claim is the *Tauira* case, concerning nuclear testing in the Pacific. Faced with the risks of radioactive contamination to the health and lives of individuals, the Court ruled that in order to qualify as a victim, a person must present reasonable and convincing evidence of the likelihood of a violation affecting them personally, not mere suspicion or conjecture. A mere invocation of the risks inherent in the use of nuclear energy is not enough; a degree of likelihood that harm will occur, in the absence of sufficient precautions, from the resumption of nuclear testing, and provided that the eventual consequences are not too remote, is required[29].

(D) THE TIGHTENING OF THE VICTIM STATUS OF INDIVIDUALS.

To the traditional restrictive interpretation of the condition of victim in environmental cases, the Court will add in this situation, for different reasons, new requirements in the case of climate claims, which will further narrow the circle of individuals who will be able to sue States for lack of action or inadequate measures in this area.

The first reason given is that the number of people potentially affected by climate change is indeterminate. The complaints concern general measures affecting the population at large, the consequences of which are not limited to certain identifiable

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22 *Fadeyeva v. Russia*, nº. 55723/00, § 68-69, 9 June 2005.
23 *Udovičić v. Croatia*, nº. 27310/09, § 140, 24 April 2014.
24 See F. Simón Yarza, *Medio ambiente y derechos fundamentales* (Centro de Estudios Políticos y Constitucionales, Madrid 2012), at 258.
25 *Hardy and Maile v. United Kingdom*, nº. 31965/07, § 188, 14 February 2012.
26 *Lambert and Others France* [GC], nº. 46043/14, § 115, 5 June 2015
27 *Soering v. United Kingdom*, nº. 14038/88, § 85, 7 July 1989.
28 E. Martínez Pérez, *La tutela ambiental en los sistemas regionales de protección de los derechos humanos* (Tirant lo Blanch, Valencia, 2017), at 17.
29 *Tauira and Others v. France*, nº. 28204/95, Commission Decision of 4 December 1995. Decisions and Reports (DR) 83-B, p. 131.

individuals or groups. Legal proceedings will be eminently prospective because they will have an effect beyond individual rights[30]. The special focus is determined, secondly, because 'in the climate-change context, everyone may be, one way or another and to some degree, directly affected, or at a real risk of being directly affected, by the adverse effects of climate change'. Consequently, there are potentially a large number of people who may be victims[31]. And third, expanding the number of victims could undermine national constitutional principles and the separation of powers by giving rise to very broad access to the courts that would drive changes in national climate change policies[32].

All these reasons lead the Court to limit access to potential and indirect victims in the context of climate change, despite the fact that both figures are admitted in its case law, as we have seen. It should be recalled that, although the Convention does not allow individuals to complain about a provision in domestic law simply because, without having directly suffered its effects, it appears to them to be violated, an individual 'that a Law violates his rights, in the absence of an individual measure of implementation, if he is required either to modify his conduct or risks being prosecuted or if he is a member of a class of people who risk being directly affected by the legislation'[33]. In addition, it provides for the status of (indirect) victim to anyone who is harmed by the violation or who has a valid and personal interest in the cessation of the violation[34]. However, for the Court, none of these can be applied to the area of climate change because any "category of persons" will have a "legitimate personal interest" in being affected by current and future risks, so it would not serve as a limiting criterion[35].

The result of these considerations explains the requirements which have already been recognised in case-law with two conditions to be proven by persons: on the one hand, 'the applicant must be subject to a high intensity of exposure to the adverse effects of climate change, that is, the level and severity of (the risk of) adverse consequences of governmental action or inaction affecting the applicant must be significant'; and, on the other hand, 'there must be a pressing need to ensure the applicant's individual protection, owing to the absence or inadequacy of any reasonable measures to reduce harm'[36]. And, furthermore, it warns that the threshold for meeting these requirements will be particularly high. Among other requirements, the local situation and the existence of individual particularities and vulnerabilities must be taken into account, in addition to 'the nature and scope of the applicant's Convention complaint, the actuality/remoteness and/or probability of the adverse effects of climate change in time, the specific impact on the applicant's life, health or well-being, the magnitude and duration of the harmful effects, the scope of the risk (localised or general),[37].

I consider that the Court, as it has already done in other environmental cases, is subjecting the individual victims to a veritable *probatio diabolica*, which is almost

30 Para 479.
31 Para 483.
32 Para 484.
33 *Tănase v. Moldova* [GC], nº 7/08 , § 104, 27 April 2010.
34 *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09 , § 47, 7 November 2013.
35 Para 485.
36 Para 487.
37 Para 488.

impossible to prove. Firstly, because the higher threshold of severity under Article 2 is maintained in order to verify whether the environmental aggressions have affected the health of the appellants[38], in that the interference must be capable of causing the death of the person[39]. It must therefore be a *real* threat, that is to say, serious, accredited, sufficiently verifiable and *imminent*, there must be a physical and temporal proximity of the threat that provokes the risk[40]. But this threshold is also extended to the scope of Article 8, which despite being considered as a 'right for individuals to effective protection by the State authorities from serious adverse effects of climate change on their life, health, well-being and'[41], requires a very strict *individualised* test based on the seriousness and urgency[42]. Thus, while recognising that the adverse effects of climate change (in particular heatwaves) affect older women in Switzerland, subject to particular risk, with increased hospitalisations, and demonstrated increased mortality rates and illness, it finds that the applicants did not suffer critical medical problems because of them[43].

Furthermore, it includes at this stage of the assessment of evidence the general and personal adaptation measures[44] as a relevant element to exclude victim status. If this is the case, in the future, States that do not take measures to limit the foreseeable risks arising from climate change (e.g. by failing to provide practical information on how to respond to a heatwave) would be more likely to be found responsible of violating these treaty rights. Otherwise, it will be difficult to prove victim status.

(E) THE RELAXATION OF THE VICTIM STATUS OF ASSOCIATIONS.

In the wake of normative developments in various international legal instruments, notably the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998), the ECtHR has been strengthening the *locus standi* of associations to access justice in environmental matters. Despite the aforementioned limitations, it has affirmed 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'[45] . Consequently, and on the basis of an evolving systemic interpretation in line with the european and international normative context and state practice, they recognise the standing of associations in climate disputes before the ECtHR.

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38 See S. Lecomte and C. Moisan, 'Le droit a la vie et l'environnement', *in* L Robert, L (dir.), *L'environnement et la Convention européenne des droits de l'homme* (Bruylant, Brussels, 2013), at 21.

39 See N. de Sadeleer, 'Les droits fondamentaux au secours de la protection de l'environnement: examen du droit l'UE et de la CEDH', *in* L Robert, L (dir.), *L'environnement et la Convention européenne des droits de l'homme* (Bruylant, Brussels, 2013), at 105-130.

40 Para 512.

41 Para 519.

42 Para 531.

43 Para 533.

44 Para 533.

45 *Gorraiz Lizarraga and others v. Spain*, nº. 62543/00, § 38, 27 April 2004.

I recognise, as does the Court, that we are dealing with a global and complex phenomenon, with multiple causes, which affects not only the present generation but also future generations, and that, for this reason, it is necessary to strengthen decision-making, which must be done through collective action mechanisms[46]. Likewise, these are judicial processes that deal with very complex issues of law and fact, where evidence requires significant logistical and financial resources[47]. And that they seek not only to protect those currently affected by climate change, but also those individuals whose enjoyment of Convention rights may be seriously and irreversibly affected in the future[48].

Thus, it is, in principle, not surprising that *locus standi* is recognised for associations that meet these requirements: (a) lawfully established in the jurisdiction concerned or have standing to act there; (b) able to demonstrate that it pursues a dedicated purpose in accordance with its statutory objectives in the defence of the human rights of its members or other affected individuals within the jurisdiction concerned, whether limited to or including collective action for the protection of those rights against the threats arising from climate change; and c) able to demonstrate that it pursues a dedicated purpose in accordance with its statutory objectives in the defence of the human rights of its members or other affected individuals within the jurisdiction concerned, whether limited to or including collective action for the protection of those rights against the threats arising from climate change [49].

On the basis of these premises, however, the question must be asked as to who the victims are, i.e. whether the association itself, its members or other persons affected. In line with its established case law, the Court recognises that an association cannot be considered a victim under Articles 2 and 8 of the Convention for nuisance or health problems resulting from climate change, which can only affect natural persons[50]. With regard to members, the Court recognises, in exceptional circumstances, the associations' *locus standi* to bring applications on their behalf. These are cases involving individuals who are vulnerable because of their age, gender or disability. However, in all the cases admitted by the ECtHR, the association represented a (deceased) *victim*, which is not the case here[51]. Was the application brought on behalf of members who are currently affected by climate change? An affirmative answer would certainly be inconsistent, as they would include the women who were denied victim status, unless, as has been pointed out by the doctrine, the test of claims when representing individuals is different, and of course much less demanding[52]. However, it should be indicated what kind of test. We have always advocated, because I believe it is also a possibility envisaged by the ECtHR, a simplified test, for example through a combination of indirect evidence and strong

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46 Para 489.

47 Para 497.

48 Para 499.

49 Para 502.

50 Para 496.

51 *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], nº. 47848/08, §§ 111-113, 17 July 2014; *Association for the Defence of Human Rights in Romania – Helsinki Committee on behalf of Ionel Garcea v. Romania, no. 2959/11*, §§ 42-46, 24 March 2015.

52 See H. Corina, 'KlimaSeniorinnen, the prohibition of actio popularis cases, and future generations a false dilemma?', *EJIL: Talk!*, December 19, 2024 (available at https://www.ejiltalk.org/klimaseniorinnen-the-prohibition-of-actio-popularis-cases-and-future-generations-a-false-dilemma)

presumptions[53]. However, none of this is indicated in the judgment. On the contrary, it is advocated to recognise them as having standing as representatives of the persons whose rights have been or will be affected (omitting victim status), given the common concern of humanity and the need to promote burden sharing between generations in this context of climate change[54].

And a final interpretation: did the association then represent the rights of future generations? It seems that, in principle, only claims of living persons, within the jurisdiction of a State, can be brought under Article 34 of the Convention, so that no reference would be made to the unborn[55]. Are we talking about today's children? The conditions set out in the jurisprudence of potential victims should be required, i.e. the likelihood of a serious violation affecting them personally in an immediate way. Is this the case? For some authors it is, because children would be victims because of the present risks of serious harm materialising that would directly affect them throughout their lives compared to adults[56]. If we accept this theory, we would be subjecting vulnerable victims (older persons and children) to asymmetrical tests that are difficult to sustain, since it fails to understand why in one case a high level of severity has been reached and in others it has not; why the consequences are remote in one case and not in another; and, above all, why adaptation measures, which relieve the State of responsibility, cannot apply equally to future generations.

(F) IS THIS A CASE OF *ACTIO POPULARIS*?

The European system of human rights protection does not allow *actio popularis*, claims in defence of a general or public interest without identifying a personal harm[57], so the victims affected by the violation they invoke must be identified[58]. It does not allow claims based on general dangers, in the abstract review of the relevant legislation and practice[59]. The judgement recognises its prohibition on many occasions, contrasting the general deterioration of the environment with the harmful effects on individuals[60]. And warning that it does not admit individual or collective complaints about legislative provisions that may contravene the Convention without applicants who have been directly affected[61].

In my view, we are certainly not dealing with a class action, because the complaint is not filed for the protection of a general interest. However, it is a complaint that serves to indirectly protect collective interests, of the majority of the population, which is not

53 *Grimkovskaya v. Ukraine*, nº. 38182/03, § 60-62, 21 July 2011.
54 Para 494.
55 Para 420.
56 See L. George, 'The European Court's Legitimacy After KlimaSeniorinnen', 5 European Convention on Human Rights Law Review (2024), at 444-453.
57 *L'Erablière A.S.B.L. v. Belgium*, nº. 49230/07, § 25 29, 24 February 2009.
58 *Sdruženi Jihočeské Matky v. Czech Republic (dec.),* nº 19101/03, 10 July 2006.
59 *Roman Zakharov v. Russia* [GC], nº. 47143/06 , § 164, 4 December 2015.
60 Para 446.
61 Para 460.

prohibited by the Court's jurisprudence. Instead, what is apparent is an abstract control of the regulatory framework, without dwelling on any justification of personal damage.

We believe then that at no point, despite the fact that the claim was brought on behalf of individuals, has the relationship between *ius standi* and the victim requirement been explained, leaving aside the question of causation. We understand the Court's position that, in the interests of the proper administration of justice, it must modulate the requirements for victim status in the light of domestic restrictions on access to justice, but this should certainly be done by strengthening the guarantees protected under Articles 6 (right to a fair trial) and 13 (right to an effective remedy).

Although it may seem otherwise, I believe that the Court, with this decision, is closing the door to limit the flow of complaints in the context of climate change because, on the one hand, it sets stringent requirements for individual applications, rescuing the most restrictive jurisprudence on the subject while, on the other hand, it warns that it will not allow restrictions on access to the courts for either individuals or associations. Otherwise, it is possible that it will be the Court itself that in the first instance will review the climate regulatory framework, which, as we have seen, leaves little margin of appreciation to the States[62]. It would not be surprising to see in the coming years a gradual reduction in the procedural obstacles to bringing actions in the context of climate change at the domestic level, which will also lead to a huge reduction in the number of complaints brought before the Court.

[62] Partly Concurring Partly Dissenting Opinion of Judge Eicke, para 50.