

CASE N.º 56000/20: THE LIVING INSTRUMENT DOCTRINE AS A WAY OF REACHING CLIMATE JUSTICE

CASO N.º 56000/20: A DOCTRINA DO INSTRUMENTO VIVO COMO FORMA DE ALCANÇAR A JUSTIÇA CLIMÁTICA

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RESUMO

In analyzing the case of Verein Klimaseniorinnen Schweiz and Others v. Switzerland n.º 53600/20, the European Court of Human Rights concluded that the Swiss State violated Article 8 of the European Convention on Human Rights, which concerns the positive obligations to respect family and private life. Handed down on April 9th, 2024, the purposes of this research is the emblematic aspect of the decision that does not lie in the Court's resignification of the victim status, nor in the application of the jurisprudence of the Grand Chamber which, for a long time, understands that the scope of protection on Article 8 of the Convention extends to adverse effects on human health, wellbeing and quality of life, resulting in many sources of environmental harm and risk of damage. The threshold lies in the Court's conclusion that, despite the initiatives provided in the Federal Act on the Reduction of CO₂ Emissions of December 23rd, 2011 and the Federal Act on Climate Protection Objectives, Innovation and Strengthening Energy Security September 30th, 2022, Switzerland lacks a satisfactory regulatory framework to ensure compliance with its duty to protect individuals within its jurisdiction from the adverse effects of climate change on their life and health.

Palavras-chave: Climate justice. Case n.º 56000/20.

ABSTRACT

Ao analisar o caso Verein Klimaseniorinnen Schweiz e outros contra a Suíça n.º 53600/20, o Tribunal Europeu dos Direitos Humanos concluiu que o Estado suíço violou o artigo 8.º da Convenção Europeia dos Direitos Humanos, que diz respeito às obrigações positivas de respeitar a vida familiar e privada. Proferida em 9 de abril de 2024, o objetivo desta investigação é o aspecto emblemático da decisão que não reside na resignificação do estatuto de vítima pelo Tribunal, nem na aplicação da jurisprudência da Grande Câmara que, há muito tempo, entende

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que o âmbito de proteção do artigo 8.º da Convenção se estende aos efeitos adversos sobre a saúde humana, o bem-estar e a qualidade de vida, resultando em muitas fontes de danos ambientais e risco de prejuízos. O limiar reside na conclusão do Tribunal de que, apesar das iniciativas previstas na Lei Federal sobre a Redução das Emissões de CO₂, de 23 de dezembro de 2011, e na Lei Federal sobre Objetivos de Proteção Climática, Inovação e Fortalecimento da Segurança Energética, de 30 de setembro de 2022, a Suíça carece de um quadro regulamentar satisfatório para garantir o cumprimento do seu dever de proteger os indivíduos dentro da sua jurisdição dos efeitos adversos das alterações climáticas na sua vida e saúde.

Keywords: Justiça climática. Caso n. n.º 56000/20.

1. Introduction

In analyzing the case of Verein Klimaseniorinnen Schweiz and Others v. Switzerland n.º 53600/20, the European Court of Human Rights concluded that the Swiss State violated Article 8 of the European Convention on Human Rights, which concerns the positive obligations to respect family and private life.

Handed down on April 9th, 2024, the purposes of this research is the emblematic aspect of the decision that does not lie in the Court's resignification of the victim status, nor in the application of the jurisprudence of the Grand Chamber which, for a long time, understands that the scope of protection on Article 8 of the Convention extends to adverse effects on human health, wellbeing and quality of life, resulting in many sources of environmental harm and risk of damage. The threshold lies in the Court's conclusion that, despite the initiatives provided in the Federal Act on the Reduction of CO2 Emissions of December 23rd, 2011 and the Federal Act on Climate Protection Objectives, Innovation and Strengthening Energy Security September 30th, 2022, Switzerland lacks a satisfactory regulatory framework to ensure compliance with its duty to protect individuals within its jurisdiction from the adverse effects of climate change on their life and health.

Proclaimed by the light of the European Convention on Human Rights and the obligations set out in the United Nations Framework Convention on Climate Change of 1992 (UNFCCC), in the Paris Agreement of December 12th, 2015, based in Glasgow Climate Pact, among other acts originating from international law, although in the decision the European Court of Human Rights recognizes the significant progress promoted by the Federal Law on Climate Protection Objectives, Innovation and Strengthening Energy Security of September 30, 2022, when assessing the merit of the public policies advocated by the Swiss Government and asserting that such measures were not sufficient to remedy the deficiencies identified in the legal framework applicable until now, the Court practically recasts Article 8 of the European Convention on Human Rights, to the point that Judge Eicke asserted, in his partially concurring and partially dissenting opinion, that the interpretation used by the Court is creating a new law and a new primary duty.

Although it is noted that the measures and methods that determine the details of the State's climate policy fall within its broad margin of appreciation (point of timidity), when assessing the actions that are being adopted by Switzerland at a domestic level and stating that effective respect for the rights protected by Article 8 of the Convention requires that each State party to the aforementioned international acts, notably the Paris Agreement, adopt measures to substantially and progressively reduce its respective levels of greenhouse gas (GHG) emissions until achieving net neutrality within, in principle, the next three decades, the decision arouses the interest of academic, since, in favor of resolving the climate crisis, it clarifies that it is up to public authorities to act in a timely, appropriate and consistent manner.

Deriving from Article 8 of the Convention the right of individuals to enjoy effective protection against serious adverse effects on their life, health, wellbeing and quality of life resulting from the harmful effects and risks caused by climate change and the obligation of the State to do its part to ensure such protection, the extension given by the European Court of Human Rights to that precept, the following research hypothesis arises: if in case n.º 53600/20 a new right of individuals and a new primary duty of the signatory States of the European Convention on Human Rights or any other provision or

Protocol to the Convention were created, how does the decision affect the idea of State sovereignty and whether the decision correctly applied the evolutionary interpretation and the doctrine of the living instrument.

Connected to the theme of trans-humanity and the environment, the research hypothesis works with the main thesis that the European Court of Human Rights, *a priori*, established a new right and a new primary duty. However, this innovation is not only based on the Court's consideration that the right to an ecologically balanced environment is configured as an interest of humanity, expressing, in the climate crisis, a collective responsibility for protection, but also on an evolutionary interpretation of the European Convention on Human Rights, aligned with the doctrine of the living instrument.

The aim of the research is to demonstrate that the Court's decision, while a landmark, does not represent undue interference in the sovereignty of the State and that beyond the possibility of international liability based on *pacta sunt servanda*, the profound climate changes and the harmful effects they cause across the globe actually require an evolutionary interpretation, the use of the living instrument doctrine and the liability of the State for actions that, at first glance, would be carried out by private individuals.

The method is scientific. The methodology used is deductive and analytical, with bibliographical research in books, articles, law cases and other documents related to the research hypothesis, which will provide the necessary basis for the conclusion.

The relevance of the research is due to the status of the decision – issued at the beginning of last year –, the proximity of COP 30 and the impacts that the decision has on the reduction of greenhouse gas emissions and climate justice.

2. Development

Case n.º 53600/20 emerge from an individual application filed with the European Court of Human Rights by five applicants who had their appeal against the decision of the Federal Administrative Court dismissed by the Federal Supreme Court of Switzerland.

According to the circumstances of the case, relying on Section 25a of the Federal Administrative Procedure Act December 20th, 1968 and Articles 6 and 13 of the European Convention on Human Rights, the applicants requested the Federal Council, the Federal Department of Environment, Transport, Energy and Communications, the Federal Office for the Environment and the Federal Office of Energy of Switzerland to take a formal decision on alleged failures to act in climate protection.

The focus of the application was to compel the Swiss authorities, in the interest of safeguarding their lives and health, to take all necessary measures required by the Swiss Constitution and the European Convention on Human Rights to prevent a rise in global temperatures.

Explaining that the applicants considered the domestic emission reduction targets set by Switzerland to be insufficient, unconstitutional and incompatible with the European Convention on Human Rights and international law, they emphasized that the authorities had no justification for their inaction in the field of climate change, the central claim was that the omissions violated the applicants'

rights under the European Convention on Human Rights, in particular the right to life, health and physical integrity protected in Article 2 and Article 8, in relation to the positive duty to protect. Specifically, the applicants argued that Switzerland had a duty to implement the necessary regulatory framework and administration, considering the specific situation at hand and the level of risk. Admitted by the European Court of Human Rights, after the manifestation of the government involved, the intervention of other States and the investigation of the case, in a ruling dated April 9th, 2024, the Grand Chamber decided, by a majority vote, to reject the preliminary objections and on the merits that Switzerland violated, among others, Article 8 of the European Convention on Human Rights.

Having determined, aligned with Article 46-2 of the Convention, the general measures that should be adopted by Switzerland under the supervision of the Committee of Ministers, for the purposes of this research, the most relevant sections of the decision are those that concern the general principles (4A), the positive obligations of States in the context of climate change (4B) and the Application of the above principles to the present case (4C).

Not forgetting the essentiality of the other sections for the overall understanding of what was decided by the Court, although it is recommended to read the judgment in its full content, it is in the above sections that the Grand Chamber, by a majority vote, recognized Switzerland's responsibility for climate inaction. That is why they are used in this expanded summary.

Having provided this initial explanation of application n.º 53600/20, the content of Article 8 of the European Convention on Human Rights, which the Court considered to have been violated by Switzerland, is transcribed below:

ARTICLE 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and Family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others².

Protecting the right to privacy and family life and given that the right to life is enshrined in Article 2 of the Convention – which was not considered applicable in the case – the provision may, at first sight, gives the impression that the Convention would be protecting the right to privacy and private life. However, the European Court of Human Rights does not interpret Article 8 of the Convention only in this dimension, since, as noted in items 544 to 550 of the decision:

² EUROPEAN COURT OF HUMAN RIGHTS. **European Convention on Human Rights**. Available at: https://www.echr.coe.int/documents/d/echr/convention_ENG. Access in: 21 apr 2025.

544. As stated above, the Court already held long ago that the scope of protection under Article 8 of the Convention extends to adverse effects on human health, well-being and quality of life arising from various sources of environmental harm and risk of harm. Similarly, the Court derives from Article 8 a right for individuals to enjoy effective protection by the State authorities from serious adverse effects on their life, health, well-being and quality of life arising from the harmful effects and risks caused by climate change (see paragraph 519 above).

545. Accordingly, the State's obligation under Article 8 is to do its part to ensure such protection. In this context, the State's primary duty is to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change. This obligation flows from the causal relationship between climate change and the enjoyment of Convention rights, as noted in paragraphs 435 and 519 above, and the fact that the object and purpose of the Convention, as an instrument for the protection of human rights, requires that its provisions must be interpreted and applied such as to guarantee rights that are practical and effective, not theoretical and illusory (see, for instance, *H.F. and Others v. France*, cited above, § 208 in fine; see also paragraph 440 above).

546. In line with the international commitments undertaken by the member States, most notably under the UNFCCC and the Paris Agreement, and the cogent scientific evidence provided, in particular, by the IPCC (see paragraphs 104-120 above), the Contracting States need to put in place the necessary regulations and measures aimed at preventing an increase in GHG concentrations in the Earth's atmosphere and a rise in global average temperature beyond levels capable of producing serious and irreversible adverse effects on human rights, notably the right to private and family life and home under Article 8 of the Convention.

547. Bearing in mind that the positive obligations relating to the setting-up of a regulatory framework must be geared to the specific features of the subject matter and the risks involved (see paragraphs 107-120 and 440 above) and that the global aims as to the need to limit the rise in global temperature, as set out in the Paris Agreement, must inform the formulation of domestic policies, it is obvious that the said aims cannot of themselves suffice as a criterion for any assessment of Convention compliance of individual Contracting Parties to the Convention in this area. This is because each individual State is called upon to define its own adequate pathway for reaching carbon neutrality, depending on the sources and levels of emissions and all other relevant factors within its jurisdiction.

548. It follows from the above considerations that effective respect for the rights protected by Article 8 of the Convention requires that each Contracting State undertake measures for the substantial and progressive reduction of their respective GHG emission levels, with a view to reaching net neutrality within, in principle, the next three decades. In this context, in order for the measures to be effective, it is incumbent on the public authorities to act in good time, in an appropriate and consistent manner (see, *mutatis mutandis*, *Georgel and Georgeta Stoicescu v. Romania*, no. 9718/03, § 59, 26 July 2011).

549. Moreover, in order for this to be genuinely feasible, and to avoid a disproportionate burden on future generations, immediate action needs to be taken and adequate intermediate reduction goals must be set for the period leading to net neutrality. Such measures should, in the first place, be incorporated into a binding

regulatory framework at the national level, followed by adequate implementation. The relevant targets and timelines must form an integral part of the domestic regulatory framework, as a basis for general and sectoral mitigation measures. Accordingly, and reiterating the position taken above, namely that the margin of appreciation to be afforded to States is reduced as regards the setting of the requisite aims and objectives, whereas in respect of the choice of means to pursue those aims and objectives it remains wide, the Court finds it appropriate to outline the States' positive obligations (see paragraph 440 above) in this domain as follows³.

Having stated that under Article 8 of the Convention the primary duty of the State is to adopt and effectively implement regulations and measures capable of mitigating the existing and potentially irreversible future effects of climate change, as agreed in the international commitments undertaken by States, among others, under the UNFCCC and the Paris Agreement, the Grand Chamber stated that in assessing whether a State has remained within its margin of appreciation, the Court will examine whether the competent domestic authorities, whether at the legislative, executive or judicial level, have given due consideration to the need to:

- (a) adopt general measures specifying a target timeline for achieving carbon neutrality and the overall remaining carbon budget for the same time frame, or another equivalent method of quantification of future GHG emissions, in line with the overarching goal for national and/or global climate-change mitigation commitments;
- (b) set out intermediate GHG emissions reduction targets and pathways (by sector or other relevant methodologies) that are deemed capable, in principle, of meeting the overall national GHG reduction goals within the relevant time frames undertaken in national policies;
- (c) provide evidence showing whether they have duly complied, or are in the process of complying, with the relevant GHG reduction targets (see sub-paragraphs (a)-(b) above);
- (d) keep the relevant GHG reduction targets updated with due diligence, and based on the best available evidence; and
- (e) act in good time and in an appropriate and consistent manner when devising and implementing the relevant legislation and measures⁴.

³ EUROPEAN COURT OF HUMAN RIGHTS. **Case of Verein Klimaseniorinnen Schweiz and others v. Switzerland.** Available at: [https://hudoc.echr.coe.int/#{%22respondent%22:\[%22CHE%22\],%22article%22:\[%228%22\],%22itemid%22:\[%22001-233206%22\]}](https://hudoc.echr.coe.int/#{%22respondent%22:[%22CHE%22],%22article%22:[%228%22],%22itemid%22:[%22001-233206%22]}). Access in: 21 apr 2025.

⁴ EUROPEAN COURT OF HUMAN RIGHTS. **Case of Verein Klimaseniorinnen Schweiz and others v. Switzerland.** Available at: [https://hudoc.echr.coe.int/#{%22respondent%22:\[%22CHE%22\],%22article%22:\[%228%22\],%22itemid%22:\[%22001-233206%22\]}](https://hudoc.echr.coe.int/#{%22respondent%22:[%22CHE%22],%22article%22:[%228%22],%22itemid%22:[%22001-233206%22]}). Access in: 21 apr 2025.

Having explained the criteria used by the Court to verify whether the State remained within the limits of its freedom of formation, the decision points out that, in addition, the effective protection of the rights of individuals against serious adverse effects on their life, health, wellbeing and quality of life requires that mitigation measures to be complemented by adaptation measures aimed at alleviating the most serious or imminent consequences of climate change, taking into account any relevant specific protection needs, which must be implemented and effectively enforced in accordance with the best evidence and consistent with the general framework of the State's positive obligations in this context.

Having delimited the core of the positive obligations extracted by the Grand Chamber from Article 8 of the Convention, assessing Switzerland's compliance with its positive obligations, after extensive consideration (see paragraphs 558 to 572 of the judgment), the Court concludes:

[...] there were some critical lacunae in the Swiss authorities' process of putting in place the relevant domestic regulatory framework, including a failure by them to quantify, through a carbon budget or otherwise, national GHG emissions limitations. Furthermore, the Court has noted that, as recognized by the relevant authorities, the State had previously failed to meet its past GHG emission reduction targets (see paragraphs 558 to 559 above). By failing to act in good time and in an appropriate and consistent manner regarding the devising, development and implementation of the relevant legislative and administrative framework, the respondent State exceeded its margin of appreciation and failed to comply with its positive obligations in the present context⁵.

Noting that the 2011 CO₂ Law, in force since 2013, required that by 2020, GHG emissions be reduced by 20% compared to 1990 levels, that as the applicants point out, in an assessment dating back to August 2009, the Swiss Federal Council found that limiting global warming to 2 to 2,4°C above pre-industrial levels - therefore above the limit currently required by the Paris Agreement of 1,5°C - required a reduction in global emissions of at least 50-85% by 2050 compared to 1990 levels and that the Swiss Government acknowledged that the relevant domestic assessments had found that even the 2020 GHG reduction target had been missed, contrasted with the legislative review operated on 30 September 2022, the Court stated:

[...] that the Climate Act sets out the general objectives and targets but that the concrete measures to achieve those objectives are not set out in the Act but rather remain to be determined by the Federal Council and proposed to Parliament "in good time" (section 11(1) of the Climate Act). Moreover, the adoption of the concrete measures is to be provided under the 2011 CO₂ Act (section 11(2) of the Climate Act), which, as already noted in paragraphs 558 to 559 above, in its current form cannot be considered as providing for a sufficient regulatory framework.

566. It should also be noted that the new regulation under the Climate Act concerns intermediate targets only for the period after 2031. Given the fact that the 2011 CO₂ Act provides for legal regulation of the intermediate targets only up until 2024 (see

⁵ EUROPEAN COURT OF HUMAN RIGHTS. **Case of Verein Klimaseniorinnen Schweiz and others v. Switzerland.** Available at: [https://hudoc.echr.coe.int/#{%22respondent%22:\[%22CHE%22\],%22article%22:\[%228%22\],%22itemid%22:\[%22001-233206%22\]}](https://hudoc.echr.coe.int/#{%22respondent%22:[%22CHE%22],%22article%22:[%228%22],%22itemid%22:[%22001-233206%22]}). Access in: 21 apr 2025.

paragraph 561 above), this means that the period between 2025 and 2030 still remains unregulated pending the enactment of new legislation.

567. In these circumstances, given the pressing urgency of climate change and the current absence of a satisfactory regulatory framework, the Court has difficulty accepting that the mere legislative commitment to adopt the concrete measures “in good time”, as envisaged in the Climate Act, satisfies the State’s duty to provide, and effectively apply in practice, effective protection of individuals within its jurisdiction from the adverse effects of climate change on their life and health (see paragraph 555 above).

568. While acknowledging the significant progress to be expected from the recently enacted Climate Act, once it has entered into force, the Court must conclude that the introduction of that new legislation is not sufficient to remedy the shortcomings identified in the legal framework applicable so far.

569. The Court further observes that the applicant association has provided an estimate of the remaining Swiss carbon budget under the current situation, also taking into account the targets and pathways introduced by the Climate Act (see paragraph 323 above). Referring to the relevant IPCC assessment of the global carbon budget, and the data of the Swiss greenhouse gas inventory [205], the applicant association provided an estimate according to which, assuming the same per capita burden-sharing for emissions from 2020 onwards, Switzerland would have a remaining carbon budget of 0.44 GtCO₂ for a 67% chance of meeting the 1.5°C limit (or 0.33 GtCO₂ for an 83% chance). In a scenario with a 34% reduction in CO₂ emissions by 2030 and 75% by 2040, Switzerland would have used the remaining budget by around 2034 (or 2030 for an 83% chance). Thus, under its current climate strategy, Switzerland allowed for more GHG emissions than even an “equal per capita emissions” quantification approach would entitle it to use.

570. The Court observes that the Government relied on the 2012 Policy Brief to justify the absence of any specific carbon budget for Switzerland. Citing the latter, the Government suggested that there was no established methodology to determine a country’s carbon budget and acknowledged that Switzerland had not determined one. They argued that Swiss national climate policy could be considered as being similar in approach to establishing a carbon budget and that it was based on relevant internal assessments prepared in 2020 and expressed in its NDCs (see paragraph 360 above). However, the Court is not convinced that an effective regulatory framework concerning climate change could be put in place without quantifying, through a carbon budget or otherwise, national GHG emissions limitations (see paragraph 550 (a) above).

571. In this regard the Court cannot but note that the IPCC has stressed the importance of carbon budgets and policies for net-zero emissions (see paragraph 116 above), which can hardly be compensated for by reliance on the State’s NDCs under the Paris Agreement, as the Government seemed to suggest. The Court also finds convincing the reasoning of the GFCC, which rejected the argument that it was impossible to determine the national carbon budget, pointing to, *inter alia*, the principle of common but differentiated responsibilities under the UNFCCC and the Paris Agreement (see Neubauer and Others, cited in paragraph 254 above, paragraphs 215-29). This principle requires the States to act on the basis of equity and in accordance with their own respective capabilities. Thus, for instance, it is instructive for comparative

purposes that the European Climate Law provides for the establishment of indicative GHG budgets (see paragraph 211 above)⁶.

In this context, the Grand Chamber has held Switzerland liable for climate inaction, despite repeatedly acknowledging that the measures and methods determining the details of the State's climate policy fall within its broad margin of appreciation and that national authorities enjoy direct democratic legitimacy and are in principle better placed than the Court to assess the needs and conditions relevant to the formulation of domestic policies, notably environmental policies, and by a majority, it notes that this does not exclude the Court's jurisdiction.

Allowing itself to interfere in the assessment of public policies formulated by the High Contracting Parties, it agrees with the dissenting opinion cast by Judge Eicke that, in the judgment of Application n.º 53600/20, the majority created a new right of individuals to effective protection by state authorities against serious adverse effects on their life, health, wellbeing and quality of life resulting from the harmful effects and risks caused by climate change and imposed on the signatory States of the European Convention on Human Rights a new primary duty to adopt and effectively implement regulations and measures capable of mitigating the existing and potentially irreversible future effects of climate change and that each Member State takes measures to substantially and progressively reduce its respective GHG emission levels, with the aim of achieving net neutrality within, in principle, the next three decades, since, in fact, none of them has any a priori basis in Article 8 or in any other provision or Protocol to the Convention. However, the Court did not undermine the text of the Convention, did not infringe on the sovereignty of the Member States, nor did it promote an abrupt break with previous case law, because, although it does not forget the precedent cited by Judge Eicke⁷, the doctrine of the living instrument cannot be forgotten.

The Convention, in the view of the European Court of Human Rights, is a living instrument that must be interpreted in light of current conditions and in accordance with developments in international law, so as to reflect the increasingly higher standard required in the area of human rights protection, thus demanding greater firmness in the assessment of violations of the fundamental values of democratic societies, especially in the context of climate change and the urgency of addressing its adverse effects on the enjoyment of numerous human rights⁸.

An appropriate and tailored approach to the various issues of the Convention that may arise in the context of climate change needs to take into account the existing and constantly developing scientific

⁶ EUROPEAN COURT OF HUMAN RIGHTS. **Case of Verein Klimaseniorinnen Schweiz and others v. Switzerland.** Available at: [https://hudoc.echr.coe.int/#{%22respondent%22:\[%22CHE%22\],%22article%22:\[%228%22\],%22itemid%22:\[%22001-233206%22\]}](https://hudoc.echr.coe.int/#{%22respondent%22:[%22CHE%22],%22article%22:[%228%22],%22itemid%22:[%22001-233206%22]}). Access in: 21 apr 2025.

⁷ Eslovénia v. Croácia (dez.) [GC], n.º. 54155/16, § 60, of 18 November 2020 (EUROPEAN COURT OF HUMAN RIGHTS. **Case of Verein Klimaseniorinnen Schweiz and others v. Switzerland.** Available at: [https://hudoc.echr.coe.int/#{%22respondent%22:\[%22CHE%22\],%22article%22:\[%228%22\],%22itemid%22:\[%22001-233206%22\]}](https://hudoc.echr.coe.int/#{%22respondent%22:[%22CHE%22],%22article%22:[%228%22],%22itemid%22:[%22001-233206%22]}). Access in: 21 apr 2025).

⁸ See items 434 a 436 (EUROPEAN COURT OF HUMAN RIGHTS. **Case of Verein Klimaseniorinnen Schweiz and others v. Switzerland.** Available at: [https://hudoc.echr.coe.int/#{%22respondent%22:\[%22CHE%22\],%22article%22:\[%228%22\],%22itemid%22:\[%22001-233206%22\]}](https://hudoc.echr.coe.int/#{%22respondent%22:[%22CHE%22],%22article%22:[%228%22],%22itemid%22:[%22001-233206%22]}). Access in: 21 apr 2025).

evidence on the need to combat climate change and the urgency of addressing its adverse effects, including the risk of its inevitability and irreversibility, as well as the scientific, political and judicial recognition of a link between the adverse effects of climate change and the enjoyment of lots human rights.

As the Court has already recognized, Article 8 of the Convention can be applied in environmental cases, whether the pollution is directly caused by the State or whether the State's liability arises from the failure to adequately regulate private industry, and has also considered that the duty to regulate does not only relate to actual damage resulting from specific activities, but also extends to the inherent risks involved, from which it is clear that the Court's law case has assessed questions of causality always in the light of the factual nature of the alleged violation and the nature and scope of the legal obligations in question. After all, according to Friedrich Müller's structuring theory, words used abstractly in the law only acquire legal meaning when integrated by parts of reality, under penalty of lacking normativity, not being able to order reality⁹.

Integrated into the structure of the norm, as it forms part of the normative scope, reality directly impacts the Law. For this reason, it is considered that when interpreting Article 8 of the Convention in an evolutionary manner and based on the doctrine of the living instrument, the majority did not disregard the fact that the Convention must be interpreted in light of the rules of interpretation provided by Articles 31 to 33 of the Vienna Convention on the Law of Treaties of May 23rd, 1969¹⁰, because, its given the transformations that modern society has undergone, with an increasingly aggressive use of environmental resources, given the nature of climate change and its various adverse effects and future risks, in addition to the number of people affected, it is indeed necessary to promote a reinterpretation of Article 8 of the Convention to ensure a new right and impose a new primary duty, because, without a balanced environment, it is not possible to exercise the right to private life, family life or obtain the safeguard of any right, always remembering that planet Earth is the permanent home of all humanity.

Although the preparatory work of the European Convention on Human Rights¹¹ do not provide further clarification on the idea that prompted the Consultative Assembly of the Council of Europe to include Article 8 in the text of the Convention, it cannot be forgotten that in the light of Article 53 "nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party"¹².

Given that the Court is responsible under Article 32 for resolving all questions involving the interpretation and application of the Convention and its protocols, the decision given by the majority of the Court is in line with its powers and with international law, notably when the United Nations, issuing

⁹ MÜLLER, Friedrich. **Fragmentos (sobre) o Poder Constituinte do Povo**. São Paulo: Revista dos Tribunais, 2004, p. 33.

¹⁰ PUBLIC PROSECUTOR'S OFFICE OF PORTUGAL. **Vienna Convention on the Law of Treaties**. Available at: <https://dcjri.ministeriopublico.pt/sites/default/files/documentos/instrumentos/rar67-2003.pdf>. Access in: 26 apr 2025.

¹¹ EUROPEAN COURT OF HUMAN RIGHTS. **Travaux Préparatoires to the Convention**. Available at: <https://www.echr.coe.int/documents/d/echr/echrtravaux-art8-dh-56-12-en1674980>. Access in: 26 apr 2025.

¹² EUROPEAN COURT OF HUMAN RIGHTS. **European Convention on Human Rights**. Available at: https://www.echr.coe.int/documents/d/echr/convention_ENG. Access in: 21 apr 2025.

Resolution A/RES/76/300, “notes that the right to a clean, healthy and sustainable environment is related to other rights and existing international law”¹³.

Affirmed, “[...] that the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral environmental agreements under the principles of international environmental law”¹⁴, in view of the prospective changes verified in the *corpus iuris gentium*, the evolutionary interpretation and the application of the doctrine of the living instrument should have been employed by the European Court of Human Rights in Application n.º. 53600/20, especially in view of the singularities of international law and *pro-homine*.

Since there is no interference by the European Court of Human Rights in the sovereignty of the High Contracting Parties, nor does it conflict with the provisions of domestic law – which, based on both the Maastricht Treaty and Article 27 of the Vienna Convention on the Law of Treaties, cannot be invoked to justify non-compliance with a treaty – Switzerland, being a signatory to the UFCC and the Paris Agreement, must ensure that its public policies comply with the internationally agreed emission limits, under penalty of legitimizing the imposition of sanctions.

As problematic as hermeneutics may be in the sphere of international law¹⁵, the interpretative technique used by the majority of the Grand Chamber in the judgment of the case of Verein Klimaseniorinnen Schweiz and Others v. Switzerland is in line with the demands and developments around human rights protection, which have increasingly emphasized the need to maintain a healthy and ecologically balanced environment.

The decision, despite its timidity in defining the strategies that should be employed by the Swiss Government, represents an important milestone in climate justice, being responsible not only for recasting the notion that permeates Article 8 of the European Convention on Human Rights, but also for reinstating the special responsibility of the State for damages caused by individuals, since, according to Malcolm Shaw:

In general, states must ensure that their international obligations are respected on their territory. Many treaties require states parties to legislate with regard to particular issues, in order to ensure the implementation of specific obligations. Where is an international agreement requires, for example, that certain limits be placed upon emissions of a particular substance, the state would be responsible for any activity that exceeded the limit, even if it was carried out by a private party, since the state had undertaken a binding commitment¹⁶.

¹³ UNITED NATIONS. **A/RES/76/300**. Available at: <https://digitallibrary.un.org/record/3982508?ln=en&v=pdf#files>. Access in: 26 apr 2025.

¹⁴ UNITED NATIONS. **A/RES/76/300**. Available at: <https://digitallibrary.un.org/record/3982508?ln=en&v=pdf#files>. Access in: 26 apr 2025.

¹⁵ COELHO, Inocência Mártires. A questão hermenêutica no direito das gentes. **Revista de Direito Internacional**, Brasília, v. 13, n. 2, 2016, p. 581-593.

¹⁶ SHAW, Malcon Nathan. **International Law**. 5. ed. Cambridge: Cambridge University Press, 2003.

3. Conclusion

Based on the research carried out, the conclusion is that the decision handed down by the European Court of Human Rights in case n.º 56000/20 was correct, as a result of establishing a new right and a new primary duty for the signatory States of the European Convention on Human Rights, a measure that is based on the evolutionary interpretation and the doctrine of the living instrument. The critical issues arise from failures in the action or inadequate actions of the States, so that, orbiting around omissions, judgments in this area will invariably require the Court to take a more active stance, drawing the boundaries or delimiting the measures that should be adopted by the State to ensure the effective mitigation of the adverse effects of climate changes or adaptations to its consequences in the realization of the human rights guaranteed by the Convention.

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