

IF THE CLIMATE CRISIS WAS A BANK, SWITZERLAND WOULD BAIL US OUT!



07:30, 29 March 2023, European Court of Human Rights, Strasbourg, France

The KlimaSeniorinnen (Swiss Climate Senior Women) hold up their banner and Climate Justice flaglets. They wave homemade paper flowers of welcome to the European Court of Human Rights. Cameras whirr; reporters jot; friends and supporters greet and hug.

It's 29 March 2023 and the Court's Grand Chamber is holding its first ever hearing on States' human rights obligations in the context of the Climate Crisis. Its ruling will affect all 46 Members of the Council of Europe. We tingle with the sensation that we're all part of climate *Herstory*.

The KlimaSeniorinnen organisation, founded in 2016 by a few hundred Swiss women pensioners has now grown to 3,400 members. They battled through the Swiss courts, where judges ignored their scientific proofs of premature deaths from extreme heat waves. Their Supreme Court ruled that the planet has not yet reached 2 degrees of global warming, so this should be left to the politicians. The politicians blamed the electorate for failing to pass a deeply flawed climate change referendum. The KlimaSeniorinnen applied to the European Court of Human Rights, which not only fast-tracked their case but referred it to the Grand Chamber.

Adrenaline pumps in the packed courtroom. Our two rows of lawyers take their seats in front of two individual applicants, Bruna Molinari and Maryelle Budry, alongside the KlimaSeniorinnen's co-chairs, Anne Mahrer and Rosmarie Wylder-Wälti. Behind them, a hundred Seniorinnen, colourfully dressed and exuding infectious confidence. The buzz of excitement is palpable. *Good luck, bonne chance, Alles Gute.*



Raphaël Mahaim and Lou Fournier with (l to r) Rosmarie Wylder Wälti, Anne Mahrer, Marie Budry and Bruna Molinari.

Pre-hearing Introductions

Before the hearing, lead counsel for each team meets privately with the Court’s President, Siofra O’Leary of Ireland. The Swiss government waits until this last moment to hand up two documents: an academic paper written by a Swiss professor three years before the Paris Agreement; and a 60 page document in German - not an official ECtHR language. These, they say, were “taken into account in developing Switzerland’s climate target,” whatever that means. Both parties had been ordered to submit relevant documentation by 5 December 2022. Our counsel protest at this “ambush” and President O’Leary agrees we should not have to respond to them today.

Georg Klingler, Greenpeace Switzerland’s campaign director, has been at the heart of the KlimaSeniorinnen’s campaign to bring this case to Strasbourg. Together with Dennis van Berkel, our “secret weapon”, whose *Urgenda* Foundation first inspired the KlimaSeniorinnen to seek climate justice through the courts, they disappear into a side room to see if the Swiss government’s “surprise” could affect the arguments we had been working on for so long.



"Secret Weapons", Dennis van Berkel & Georg Klingler



Late Night Drafting Session

“La Cour!”

As in a theatre or opera house, the hubbub subsides expectantly. A functionary appears: “Ladies and gentlemen the hearing is about to begin. Please switch off your mobile phones and refrain from taking photographs.” Papers rustle, coughs suppress themselves, whispers hush, final media shutters click. A long bell rings. Everybody stands. Seatbacks slam.

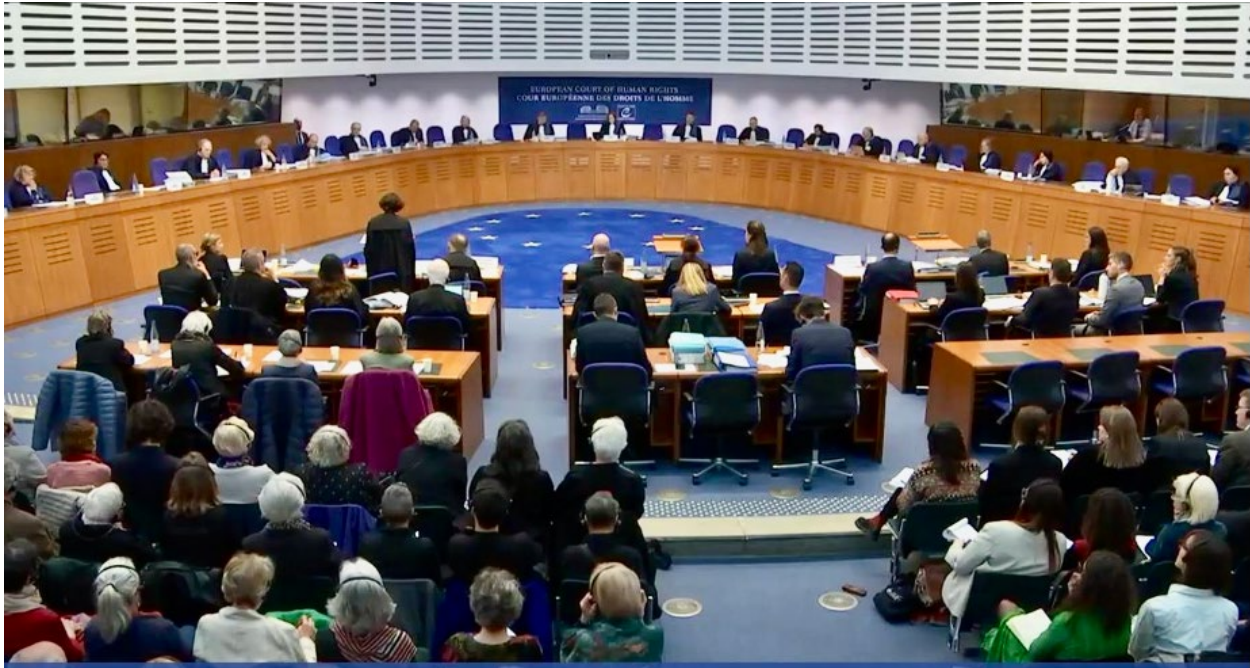
A short bell and then: “**La Cour!**” The 22 judges (17 + 5 alternates) file with judicial solemnity to their seats on the horseshoe-shaped podium. We’re surrounded. “Please be seated”, says President O’Leary. She reads out the title of the case, the names of the parties and their representatives.

The Respondents

Alain Chablais, the lead Swiss advocate, pleads in French: “*There is no magic formula ... Climate, energy and policy making must remain a political and democratic exercise. Switzerland is an alpine country with climate changing twice as fast ... Net zero policy since 2021 ... unfair to suggest we are insufficiently ambitious or have failed to reach the targets we have set ... Not possible to derive climate change human rights from this ... extremely complex for this court to engage in such an undertaking ... setting quantified reduction targets or deadlines would commit the court to interfering with the state's freedom of choice as to means.*”

Switzerland’s “Ambassador for the Environment”, Franz Perrez, steps forward to assure the judges that his government is fulfilling its duty to protect, protesting that “*only reduction by all the players, in particular the major emitters, would make it possible to protect the Applicants from the worst effects of climate change.*” We’ve heard it all before, the same argument advanced by the Dutch government and rejected in 2019 by the Netherlands Supreme Court in *Urgenda*.

The Applicants



Jessica Simor addresses the Court

Now it's the applicants' turn. Jessica Simor KC rises with the speech on which our team has been working for weeks, and well-past-midnight for the last days. Every word polished and honed to shoe-horn our argument into the 30 minute time limit. Jessica begins with the words of former UN Commissioner for Human Rights, Michele Bachelet:

*"The world has never seen a threat to **human rights** of the scope presented by climate change. This is not a situation where any country, any institution, any policy-maker can stand on the sidelines. The economies of all nations; the institutional, political, social and cultural fabric of every State; and the rights of all...people - and future generations - will be impacted."*

Jessica cites the previous week's IPCC report: "[e]very increment of global warming will intensify multiple and concurrent hazards ... The cumulative scientific evidence is unequivocal: Climate change is a threat to human well-being and planetary health. Any further delay in concerted anticipatory global action on adaptation and mitigation will miss a brief and rapidly closing window of opportunity to secure a liveable and sustainable future for all."

She lays out Switzerland's failures: its courts' refusal to consider the KlimaSeniorinnen case at all; *First*, the Applicants are already suffering from the effects of climate change. For elderly women, increasingly frequent and severe heat waves pose an extremely serious threat to their very existence; Switzerland doesn't dispute that "heat kills" and women over 65 are at real risk not only of severe physical and mental impairment from heat-induced illness, but of death.

Secondly, Urgenda and other State Court cases have used ECtHR case law to hold that States have positive obligations to people's lives and health for activities which contribute to climate change, as climate change involves a "real and immediate" threat to life and well-being; that threat is both genuine and imminent. She points to the international scientific consensus on risks to life and harms from climate change, and the international legal consensus that this requires human rights protection. Any ruling that undermines those State court judgments would be extremely retrogressive. And that impact would not be confined to the ECHR Contracting States.

Thirdly, she itemises Switzerland's total failure to protect our Applicants' rights: (1) by failing to legislate for even minimum acceptable emissions reduction targets by 2020, and then failing to meet even its own inadequate target; (2) its proposed target for 2030 is manifestly inadequate and has not even been passed into law; and (3) its 2050 target doesn't even commit Switzerland to net zero domestic emissions; and (4) even that inadequate target has not been passed into law.

She details what Switzerland's targets *should* be, to do its "fair share" in global emissions reduction goals. Judges are taking careful notes throughout and she concludes: "*there is only one way to prevent the 1.5 degree limit from being breached and that is for global emissions not to exceed the remaining carbon budget. That budget must be fairly shared between States.*"

Then Marc Willers KC takes up the theme, explaining the Carbon Budget. For a 67% chance that average global temperature increase will *not* exceed 1.5°C, the remaining carbon budget is 400 gigatons of CO₂. Distributing that on a *per capita* basis from 2020 onwards, Switzerland will use up its remaining share by 2034 on its current proposed approach. This means Switzerland has failed to assess a budget compatible with 1.5 degrees, and will use up the share of other States. Judges lean forward and take careful note as Marc says: "*This is carbon theft.*"

He continues: "*It is on this basis that we seek an order requiring Switzerland to achieve at least net negative emissions by 2030.*" He reinforces the *Urgenda* point on the need for mutual trust between Paris Agreement states and delivers our next carbon budget punchline: "*If a State as rich and technically advanced as Switzerland does not do its fair share - taking the lead as well as pursuing its highest possible ambition - then other States will also fail to do so.*"

He dismisses Switzerland's attempts to evade responsibility by claiming that its actions alone will not be enough to prevent or avoid climate risks to Swiss Elder Women: when Switzerland fails to do its share to meet its Paris Agreement objectives, it not only increases emissions *directly* but also *indirectly*, because it encourages other States not to comply.

Marc turns to the Swiss government's last line of defence: blaming its own people for rejecting a Climate Law referendum. States don't have different Convention obligations depending on how their democratic systems operate, he says. And even if the Climate Law *had* passed, its proposed measures would still have been woefully inadequate.

I've read our conclusion time and again, but it still leaves me breathless:

“Members of the Court, there is no time left; dangerous climate change is with us; the Applicants are suffering and fear the future. Switzerland has no excuse for its failures to protect the Applicants’ rights. It has known the harm that inadequate action would cause and, despite that knowledge, it has failed to act with sufficient urgency and application, undermining global efforts and mutual trust. If a country as rich and technologically advanced as Switzerland cannot do its fair share – I go further, does not even take the trouble to assess what its fair share should be – what hope is there that other countries will step up to the challenge we face?”

The Court has granted permission for two non-parties to make oral presentations. First, the Irish Government’s lawyer, Catherine Donnelly SC, asserts that we’re trying to bypass the democratic process and the international framework by telling the judges to set themselves up as a new international environmental court.

Then Jenny Sandvig, counsel to the European Network of National Human Rights Institutions (ENNHRI), opens with: *“Few people have it in their power to change the course of history. You do. On behalf of all National Human Rights Institutions in Europe, ENNHRI urges the Court to use its power to protect vulnerable individuals from irreversible and escalating climate harm.”*

She ends with: *“It follows from the Court’s established case-law that Articles 2 and 8 logically apply to climate attributed death and sickness, requiring emission cuts to prevent irreparable harm. According to the IPCC, the window of opportunity to safeguard a liveable future for all is rapidly closing. It would be appropriate for the Court to uphold individual rights at this critical juncture in history. After all, the Court is set up within the Council of Europe to protect individuals for ‘the preservation of human society and civilisation.’”*

The Judges’ Questions

Now the President calls on the judges to pose their questions. We’ve been told to expect two or three judges, with maybe about five points between them and then we’d get 15 minutes to huddle in another room before coming back to answer them. We’re in for a bit of a surprise.

Norway’s Judge Bårdsen asks us: *“What is the legal justification for this court to take on this new responsibility of carrying out extensive investigation of domestic policy?”* Then he asks Switzerland to explain its positions on the “precautionary principle” the “polluter pays principle” and “intergenerational equity.” Andorra’s Judge Villanova asks Switzerland to explain the contrast between the Federal government’s claim that there is still time to act and the declarations of climate emergency already issued by some of Switzerland’s cantons.

Germany's Judge Seibert-Fohr has a raft of questions: Are we claiming in respect of past failures to take action or also future potential harms; what do we say is the difference between impacts on life and impacts on private life; do we say Switzerland should reduce emissions to the extent recommended by the IPCC? Does Switzerland say adaptation is the sole responsibility of the Applicants? How are the Applicants different from other vulnerable people, such as infants? Where should the court draw the [vulnerability] line?

Slovenia's Judge Bošnjak asks, if the court concludes that Switzerland's regulatory framework is insufficient, what should the Convention criteria be, and how should international environmental law inform the court's criteria? What part do emission reduction pathways play?

Albania's Judge Pavli asks Switzerland to explain how it calculates its carbon budget from now through 2050. Does it incorporate net neutrality into its calculation? If not, will it do so now? And do the Applicants say Switzerland must not claim that it doesn't matter whether reductions are made domestically or by carbon credits abroad?

France's Judge Guyomar asks if there is an intergenerational dimension to the Applicants' claim? Switzerland's Judge Zünd asks why we say older women are more adversely affected than older men. And he asks Switzerland if it has yet reached its 2020 goal of reducing GHGs by 23%.

Finally, President Siofra O'Leary, noting that several cases are stayed, pending the outcome of these hearings, asks whether the parties say the ECtHR should review its previous case law and the "victim standing" of associations in the environmental context, particularly in light of the Aarhus Convention approach to admissibility? If not, why not? She then announces a half hour break, instead of the usual 15 minutes, for the parties to prepare answers.

We've been working together with allies for weeks on possible questions. We withdraw to our room and Jessica takes out her trusty fountain pen as we wield our laptops. It's intense and tightly disciplined with no time for detailed debate, as crisp answers to the multiple questions flow back and forth. Suddenly, we're being summoned back into court and it seems we haven't yet answered all the questions. Jessica is unfazed.

Alain Chablais leads off for Switzerland, answering most of the judges' questions. Then Franz Perrez is on his feet, addressing the judges like a political meeting: "*Switzerland is a very special situation,*" he pleads. "*It will not have potential for rapidly reducing emissions, so we need a little bit more time ... We want to achieve net zero domestically by 2050 ... there will be some remaining emissions that cannot be avoided and for those we will use carbon offsets ... We're very confident we will develop measures to attain our targets ... So we want to achieve net zero but we cannot do*

that in the next years ... Can we achieve our 2020 target by 2022? No, we will achieve that in two years, 2024.”

Jessica restores calm to the proceedings, dealing with every question, including those we hadn't had time to discuss. She refers the judges to paragraphs in our submissions where they can find their questions answered and succinctly explains the complexities of carbon budget calculations.

Incredibly, it's over. The judges file solemnly out. We stand, a little dazed. Hug and congratulate each other, embrace dozens of climate women warriors, pose for a final group photo in the courtroom, and stumble out to a host of media cameras and mics that await Jessica and Marc.



Dennis van Berkel, Jessica Simor, Martin Looser, Cordelia Bähr, Marc Willers, Raphaël Mahaim, Richard Harvey, Lou Fournier.

At the Court's gates we catch up with the cheering crowd of KlimaSeniorinnen and head across the road to La Pavillon Joséphine (yes, that Joséphine) for lunch and an all-woman panel facilitated by Greenpeace International's global project leader Nina Schulz.



Nina Schulz (right) with KlimaSeniorinnen Board Members and Lawyers Cordelia Bähr, Jessica Simor and Louise Fournier

We celebrate those who helped to begin the fight but who are no longer here in person. They lead us in a song about gratitude for life. Co-chair Rosmarie Wylder-Wälti reminds us that her generation of baby boomers set the world on fire and bears responsibility for this dreadful climate crisis. As she says, “that’s why it’s obvious that we have the responsibility to turn it around.”

Best of all Causes. Best of all Cases.

Nina Schulz asks the lawyers what this case has meant to them. Cordelia Bähr, with her colleagues Martin Looser and the late Ursula Brunner, began working on the KlimaSeniorinnen’s original demand for climate protection back in 2015. Cordelia speaks for all when she says: “The case has changed my approach to law and my approach to life. I can’t imagine better clients to work with. This is the best of all cases.”



Cordelia: The case has changed my approach to law and my life. I can't imagine better clients to work together with. This is the best of all cases

We join together to express solidarity with the Portuguese youth whose case will be heard by the same judges on 27 September 2023. Their lawyer, Gerry Liston, is applauded by an enthusiastic audience, as are Nick Flynn and his colleagues from the advocacy organisation Avaaz.



The packed audience shows their appreciation

Many in the legal team reflect on the all too tenuous relationship of law to justice, yet how community activism has the power to achieve the “impossible”. Inspiring people, inspirational tales. Tears are being shed. Then, just days after the Swiss government stepped in to rescue Credit Suisse from collapse, Anne Mahrer delivers the line of the day and the packed room nearly explodes: “If the Climate Crisis was a bank, Switzerland would bail us out.”



Anne Mahrer and Elizabeth Stern

Moments later, news breaks from New York and Greenpeace International’s Climate Justice leader Valentina Panagiotopoulou (known to all as Val*) hands me the mic to announce:

“Today, 29th March 2023 will forever be known as International Climate Justice Day, here and around the world. The UN General Assembly has just accepted Vanuatu’s request to seek an Advisory Opinion from the International Court of Justice on the duties of States to protect Human Rights in the face of the Climate Crisis.

The Resolution passed by consensus. Not one single State has dared to vote against it.”

Our judgment won’t come for many months yet. Until then, in the words of Arundhati Roy:

Another world is not only possible, she is on her way.

On a quiet day, I can hear her breathing.

Richard Harvey

24 July 2023

The Webcast of the full hearing is available at:

https://www.echr.coe.int/Pages/home.aspx?p=hearings&w=5360020_29032023&language=en.