Norwegian Human Rights Institution

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LEGAL ANALYSIS

The Norwegian climate change framework in light of Article 8 of the ECHR

1. INTRODUCTION 2
2. SUMMARY AND RECOMMENDATIONS 3
3. A BRIEF OVERVIEW OF THE THREE CLIMATE DECISIONS 9
3.1 Introduction 9
3.2 Extraterritorial jurisdiction under Article 1 of the ECHR 10
3.3 Why is climate change relevant under Article 8 of the ECHR? 11
3.3.1 Point of departure 11
3.3.2 The connection between the right to privacy, family life and home and climate change 12
3.3.3 Causality and the "drop in the ocean" argument 13
4. ANALYSIS OF THE STATE'S SUBSTANTIVE OBLIGATION TO PROTECT AGAINST CLIMATE CHANGE UNDER ARTICLE 8 OF THE ECHR 14
4.1 Introduction 14
4.2 The ECtHR's margin of appreciation in a national context 15
4.3 An effective human rights protection require substantive, progressive and immediate emission reductions 16
4.3.1 The climate framework must entail a goal of net neutrality within, in principle, the next three decades 17
4.3.2 Must the regulations form part of a binding regulatory framework? 19
4.3.3 The use of emission trading systems (carbon markets) 20
4.4 Assessment of whether the framework is suitable to achieve net neutrality 28
4.4.1 Introduction 28
4.4.2 Timeline for carbon neutrality and a carbon budget or equivalent 29
4.4.3 Intermediate climate targets and a pathway to net neutrality 32
4.4.4 Evidence for timely implementation of the climate targets 33

4.4.5 Process for updating climate targets in line with science 34

4.4.6 Act in good time in an appropriate and consistent manner by devising and implementing relevant legislation and measures 34

4.4.7 Summary 35

5. DOES NORWAY FULFIL ITS SUBSTANTIVE OBLIGATION TO PROTECT AGAINST CLIMATE CHANGE ACCORDING TO ARTICLE 8 OF THE ECHR? 36

5.1 Introduction 36

5.2 Norway's national greenhouse gas emissions and climate targets 36

5.3 Is the 2050 target in the Climate Change Act sufficient under Article 8 of the ECHR? 37

5.4 Is the framework otherwise suitable to ensure that Norway becomes a low-emission society by 2050? 42

5.4.1 Timeline for carbon neutrality and a carbon budget or equivalent 43

5.4.2 Intermediate climate targets and a pathway to net neutrality 49

5.4.3 Evidence for timely implementation of the climate targets 52

5.4.4 Process for updating climate targets in line with science 54

5.4.5 Act in good time in an appropriate and consistent manner by devising and implementing relevant legislation and measures 54

5.5 Conclusion 56

6. RIGHT TO ENVIRONMENTAL INFORMATION AND PARTICIPATION IN DECISION-MAKING PROCESSES UNDER ARTICLE 8 OF THE ECHR 58

7. ARE EXPORTED AND IMPORTED EMISSIONS RELEVANT UNDER THE ECHR? .61

8. THE RIGHT TO A FAIR TRIAL UNDER ARTICLE 6 OF THE ECHR 66

9. CONCLUSION 67

1. Introduction

On 9 April 2024, the Grand Chamber of the European Court of Human Rights (ECtHR) decided on three principled and important cases regarding the relationship between climate change and Article 8 of the European Convention on Human Rights (ECHR). For the first time, in *KlimaSeniorinnen et al. v. Switzerland,* the ECtHR recognized that all Contracting Parties must reduce their greenhouse gas emissions in order to do their part to protect the lives of individuals as well as their health and quality of life, against climate change under Article 8. The judgment represents a paradigm shift, because States that have ratified the ECHR must now fulfil these legal obligations. The ball is now in the court of national governments and legislatures, who must ensure compliance with Article 8 of the ECHR as authoritatively interpreted by the ECtHR.

In this legal analysis, the Norwegian National Human Rights Institution (NIM) assesses what these decisions mean for Norway, being a Party to the ECHR and having incorporated the ECHR into Norwegian law.[1] The main question is whether the Norwegian authorities fulfil their duty under Article 8 to reduce greenhouse gas emissions in order to protect their citizens from harmful climate change.[2]

Pursuant to our statutory mandate to advise the authorities to "promote and protect human rights in Norway", NIM also recommends a strengthening of the Norwegian Climate Change Act.[3] Strengthening the Climate Change Act will ensure a democratic anchoring of climate policy in Parliament, improve predictability for companies and individuals, as well as reducing the risk of non-compliance by

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[1] This report was mainly written by advisor Hannah Cecilie Brænden, in close collaboration with advisor Vetle Seierstad, senior advisor Peter Dawson and director Adele Matheson Mestad. During our work we held meetings with various stakeholders, and received input on the text from Ane Sydnes Egeland, research fellow at the Scandinavian Institute of Maritime Law and Stig Schjølset, manager of ZERO. There has also been contact between NIM and the Ministry of Climate and Environment about this report, where NIM has given updates on the progress of the report. A comprehensive transformation such as that required by the climate targets can be analysed based on different methodologies and perspectives (economic, social, administrative, psychological, etc.) This report adopts a human rights perspective, with analysis based on standard legal methodology.

[2] This means that NIM will not address all the legal issues raised by the decision, including victim status under Article 34 of the ECHR, the right to life under Article 2 of the ECHR, or a human rights obligation to implement adaptation measures (see *Verein KlimaSeniorinnen Schweiz et al. v. Switzerland* [GC] (53600/20) 09.04.2024, § 552).

[3] Act relating to the Norwegian National Human Rights Institution Section 3. See also the UN General Assembly resolution of 26 October 2023 (A/C.3/78/L.27), which emphasizes the importance of NHRIs exercising their mandates by monitoring, reporting to and advising governments in relation to climate mitigation. This includes the implementation of ECHR judgements, see the Department for the Execution of Judgments of the European Court of Human Rights, *Guidance for NHRIs on implementation of ECHR judgments,* 26.04.2021, available here: https://www.coe. int/en/web/execution/-/guidance-for-nhris-on-echr-judgment-implementation (retrieved 06/28/2024).

Norway with its human rights obligations. This will also reduce the risk of future climate litigation.

We hope that this legal analysis and the accompanying recommendations constitute a constructive contribution to the government's own review of the judgment, aimed to ensure compliance with the requirements set out by the ECtHR, even though the case did not directly concern Norway.[4]

2. Summary and recommendations

Climate change is already having dramatic consequences for people's lives, health and safety all over the world. It also affects Norway to a significant extent. According to the IPCC, there is a rapidly closing window of opportunity to secure a liveable and sustainable future for all, and the choices and actions implemented in this decade will have impacts now and for thousands of years.[5] The remaining carbon budget to limit global warming to 1.5°C is very small and is shrinking rapidly due to continued high global greenhouse gas emissions.[6]

In the judgment *KlimaSeniorinnen et al. v. Switzerland,* the ECtHR clarified that Article 8 must be seen as encompassing 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 quality of life. The authorities have a positive obligation to 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.[7] Every State must do *its part* to reduce its greenhouse gas emissions and protect its citizens under the ECHR. The IPCC has emphasized that every tonne of CO_2 adds to global warming.

The decisions from the ECtHR clarify the role of the courts in the area of climate change and human rights, based on thorough assessments of the relationship

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[4] Ministry of Climate and Environment, *Avgjørelse i klimasaker fra Den europeiske menneskerettsdomstolen,* 9 April 2024, available here: https://www.regjeringen.no/no/aktuelt/avgjorelse-i-klimasaker-fra-den-europeiske-mensenserettsdomstolen/id3033297/ ("We now have to read the judgments thoroughly to see what the Court's reasoning is, and what that might mean for Norway [...].") (our translation, retrieved 17.9.2024).

[5] IPCC, *AR6 SYR SPM,* 2023, para C.1.

[6] Piers M. Forster et al., "Indicators of Global Climate Change 2023: annual update of key indicators of the state of the climate system and human influence" *Earth System Science Data* 16, no. 6 (2024), chapter 8. Carbon budget is a commonly used term to describe a budget for greenhouse gas emission units, or an emissions budget.

[7] The term net neutrality – or net zero – refers to an equilibrium where the amount of greenhouse gas emissions resulting from human activity is balanced by corresponding emissions that are taken up or removed from the atmosphere through various processes and mechanisms. This can be achieved either by reducing emissions, or by increasing the uptake of greenhouse gases. The goal is that the sum of total emissions and uptake equal zero, so that human activity does not increase the concentration of greenhouse gases in the atmosphere. See further in section 4.3.1.

between law and politics. The ECtHR emphasizes that national authorities have democratic legitimation and are better placed to decide on the choice of means to reduce emissions (so-called “wide margin of appreciation”). However, the Court will review whether the Contracting Parties have a legal framework that ensures domestic emission reductions towards net naturality (so-called “reduced margin of appreciation”).

The question now is whether the Norwegian authorities, in light of the clarifications from the ECHR, fulfil their obligations under Article 8 of the ECHR. The assessment of this question must be based several factors, in particular whether the Norwegian framework is in accordance with the five requirements mentioned by the ECHR in *KlimaSeniorinnen* § 550. These concern whether the state authorities have:

a) adopted a timeline for achieving carbon neutrality and a carbon budget or equivalent method of quantification
b) set out intermediate GHG emissions reduction targets and pathways that can achieve net neutrality
c) evidence showing whether they have duly complied, or are in the process of complying, with the relevant GHG reduction targets
d) a process to keep the climate targets updated with due diligence in line with the best available science
e) acted in good time and in an appropriate and consistent manner to devise and implement relevant legislation and measures to achieve the goals.

In assessing whether Norway fulfils these obligations, NIM takes the view that the Norwegian long-term target, in Section 4 of the Climate Change Act of becoming a low-emission society by 2050 is a good starting point for Norway to do its part to protect against dangerous climate change under Article 8 of the ECHR. Section 5 of the Climate Change Act also provides for a good process for reviewing climate targets every five years based on the best available science, in line with the requirement mentioned in *KlimaSeniorinnen* § 550 d.

Nevertheless, NIM's overall conclusion is that the Climate Change Act is unlikely to meet the obligations under the ECHR. This is because, in our opinion, the Climate Change Act does not fulfil the other four requirements, mentioned above, which ECtHR set out as a part of its overall assessment in *KlimaSeniorinnen* § 550.

Firstly, Norway does not have a comprehensive carbon budget that ensures substantial, progressive and immediate emission cuts towards net zero by 2050, in line with international climate targets (*KlimaSeniorinnen* § 550 a). Norway has not adopted a carbon budget or an equivalent method of quantification that sets emission limits for 2050, based on Norway's share of the remaining global carbon budget within the 1.5°C target in the Paris Agreement. The current targets in the

Climate Change Act seem to allow for more Norwegian emissions than what a method where the global carbon budget is distributed by population (per capita) would allow for. The same was true for the Swiss Climate Act, which was one of the arguments emphasised by the ECtHR in favour of its finding that Switzerland was in breach of Article 8 of the ECHR. It therefore seems uncertain whether Norway can be said to take a sufficiently large responsibility for protecting individuals against climate change.

Secondly, Norway has not adopted sufficient intermediate climate targets in the Climate Change Act or a pathway for how emissions are to be reduced in various sectors by 2050 (*KlimaSeniorinnen* § 550 b). Norway does not have statutory intermediate climate targets between 2030 and 2050, and has not adopted a pathway for how such targets are to be reached, set out by sectors or other relevant methodologies, as the ECtHR requires. It is a step in the right direction that the government has taken action to strengthen climate policy by creating the Government's Climate Status and Plan (Green Book). In NIM's view, however, this does not meet the requirements for pathways as set out by the ECtHR, nor does it set out measures for emission cuts necessary to reach the climate targets by sector (or similar methodology) and within relevant time frames. A lot of work remains to develop and strengthen policies, instruments and specific measures that could achieve the climate targets. The Green Book also provides little clarification on how greenhouse gas emissions are to be reduced after 2030.

Thirdly, Norway has only reduced territorial emissions by 9.1% since 1990. This is significantly less than Switzerland, which had reduced its emissions by 19%, but which the ECtHR still found to be contravening Article 8 of the ECHR due to, among other things, too low emission cuts. This indicates that Norway would not be able to provide evidence showing that it is duly complying with relevant emission reduction targets (*KlimaSeniorinnen* § 550 c).

Norwegian authorities, however, have long met their climate targets by contributing to emission cuts in other countries through carbon emissions trading under its agreement with the EU (primarily EU Emission Trading System) and under the Kyoto Protocol. Although the ECtHR does not directly discuss the use of flexible mechanisms as a means of achieving emission reductions, the Court normally interprets the ECHR in harmony with other international agreements concluded by the Contracting Parties. This indicates that emission trading in line with international agreements can be included in the overall assessment under Article 8. At the same time, the 2050 Climate Change Committee, the Committee on Norway and the EEA, the Norwegian Environment Agency and the Office of the Auditor General of Norway have recently pointed out that Norway risks a rapid and abrupt

transition if we continue to delay territorial emission cuts.[8] By 2050, all emissions must be reduced to net zero, and by 2040, it is estimated that the emission cap under the EU ETS will be reduced to zero. As the 2050 Climate Change Committee has pointed out, the question is then no longer which territorial emissions should be reduced, but "which minor emissions should remain."[9] In order to achieve net neutrality within the next three decades, the authorities must demonstrate how they plan to reduce emissions in Norway to net zero. Delayed national cuts will increase the risk of future swift and abrupt measures that may affect human rights, which could be a particular burden for young people and future generations. Low territorial emission reductions in Norway therefore indicates that the transition to a low-emission society is going too slowly, and thus that this third requirement has not been met.

Fourthly, Norway has not clarified whether, or how, the climate targets are going to be achieved in cooperation with the EU. This creates uncertainty as to whether the authorities will act in good time to develop the legislation and measures necessary to fulfil the climate targets in the Climate Change Act (*KlimaSeniorinnen* § 550 e). The Climate Change Act largely presumes that Norway will achieve the climate targets through regulations originating from Norway's cooperation with the EU. Norway will continue to participate in the EU Emission Trading System. However, when it comes to emissions that are not covered by this system, as well land use and forestry, Norway only has an agreement with the EU to achieve a 40% reduction by 2030. It is unclear when an agreement to achieve a 55% reduction by 2030 will be reached, and Norway has no agreement with the EU after 2030. It therefore seems uncertain whether Norway fulfils the fourth requirement of acting in good time to reach net zero emissions by 2050.

In total, NIM believes that these four requirements indicate that the Norwegian authorities have not taken sufficient action to adopt and implement the legal framework that is required in order to safeguard the requirements under Article 8 of the ECHR in the climate area.

In NIM's view, to protect human rights, the authorities must strengthen the Climate Change Act and Norwegian climate targets. By quickly implementing a number of existing recommendations, in particular the from the 2050 Climate Change Committee, the Norwegian Environment Agency, and the Office of the Auditor General the authorities would go a long way in achieving this goal.

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[8] See sections 4.3.3 and 5.3.

[9] NOU 2023: 25 p. 24.

In the following, NIM will present our recommendations for how human rights protection against climate change can be strengthened, on the basis of the requirements set out by the ECtHR. It is important that these recommendations are seen as a whole, in the same way that the ECtHR assesses the overall legal framework.

NIM recommends a strengthening of the **Climate Change Act** by:

- **Adoption a carbon budget:** The Climate Change Act should enshrine an obligation to have a carbon budget or an equivalent method of quantification that sets emission limits for 2050. The carbon budget should be based on Norway's share of the remaining global carbon budget required to limit global warming to 1.5°C.[10] In this context, the authorities should consider which methodology best reflects Norway's share, and how that reflects what is possible and feasible to achieve.
- **Setting climate targets for 2035, 2040 and 2045:** The Climate Change Act should lay down binding climate targets for 2035, 2040 and 2045, based on the best available science, ensuring that Norway does its part to reduce emissions and protect human rights. NIM supports the recommendation from the Norwegian Environment Agency that Norway should aim to reduce emissions in 2035 by at least 80% of national emissions in 1990, and a separate target that *national emissions* should be reduced by at least 60% in 2035 compared to 1990.[11]
- **Providing annual roadmaps to the Parliament:** The government should have an obligation under the Climate Change Act to prepare an annual roadmap for Parliament, which explains the effects of planned climate policies and measures, in both the short and long term, including whether Norway is on track to fulfil its climate targets right up to 2050.
- **Establishing an independent climate council:** In order to ensure an independent, scientific basis for climate policy, including the determination of a carbon budget, NIM reiterates our recommendation to the authorities to consider the establishment of an independent climate council. Such a council could strengthen the democratic debate and provide a better factual basis for democratic decision-making on climate politics, including

[10] See sections 4.4.2 and 5.4.1 and the 2050 Climate Change Committee, *The transition to low emissions – Climate policy choices towards 2050*, Norwegian Official Report (NOU) 2023: 25 – English Edition, p. 353, recommending that the Climate Change Act should "stipulate a requirement in the Climate Change Act to create five-year emission budgets, present comprehensive climate and energy plans every other year and to present a joint scientific basis every year."

[11] See sections 4.4.3 and 5.4.2, and the Norwegian Environment Agency, *Et 2035-bidrag som sikrer omstilling nasjonalt*, 2023, s. 2.

by providing an independent assessment of whether the authorities are on track to meet the climate targets in the Climate Change Act.[12]

Furthermore, NIM recommends that the authorities:

- **Ensure a proportionate distribution of the burden of reducing national emissions:** A strategy should be established for how the burden of cutting *territorial* emissions to net zero could be distributed proportionally between generations, to avoid an abrupt transition that could necessitate more extensive interferences with human rights in the future.[13]
- **Promptly consider a climate agreement with the EU:** To ensure that necessary climate measures and legislation are implemented well before the climate targets are to be reached, the authorities should clarify the content of a possible new climate agreement with the EU as soon as possible.[14]

In this process, NIM recommends that the authorities look to other climate laws, particularly in the EU, Denmark and Great Britain, which contain regulations that better realise the requirements of Article 8 of the ECHR.[15]

In NIM's view, a thorough human rights assessment is necessary when revising the Climate Change Act, in order to comply with the human rights obligations in this field. At the same time, we emphasize that a strengthening of the Climate Change Act does not lead to "judicialization" in the sense of transferring power from the legislature to the courts.[16] On the contrary, it will contribute to a legal framework for climate policy that can safeguard human rights, ensure progress and predictability for individuals and companies, while ensuring clear democratic anchoring and control in Parliament. This will also potentially reduce the risk of climate litigation,

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[12] See section 6.

[13] See sections 4.3.3, 5.3, and 5.4.2.

[14] See sections 4.4.6 and 5.4.5.

[15] This is, inter alia, because these climate laws require territorial emission reductions, contain intermediate and ambitious climate targets, require the creation of carbon budgets and/or the establishment of independent climate councils which aim ensure public debate and access to environmental information on the status of the various targets set out by the climate laws. See *Klimalov* (LBK no 2580 of 13/12/2021) available in Danish here: https://www.retsinformation.dk/eli/lta/2021/2580 and an unofficial English translation here: https://www.en.kefm.dk/Media/1/B/Climate%20Act_Denmark%20-%20WEBTILG%C3%86NGELIG-A.pdf; *Climate Change Act* 2008 (UK) available here: https://www.legislation.gov.uk/ukpga/2008/27/contents (both retrieved 27.06.2024); *Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999* ('European Climate Law') , OJ L 243, 09.07.2021.

[16] "Judicialization" can also be used to mean several different things, see the discussions in Ingrid Rindal Lundberg «Rettsliggjøringens makt» *Nytt Norsk Tidsskrift 22*, nr. 1 (2005), s. 30-44; Lars Blichner og Anders Molander «Maktutredningens rettsliggjøringsbegrep» *Tidsskriftet for samfunnsforskning 47*, nr. *4* (2006), s. 601-611; Lars Blichner og Anders Molander (2008) «Mapping Juridification» *European Law Journal* 14, nr. 1 (2008), s. 36-54.

as both Norwegian courts and the ECtHR often show increased deference to the choices and considerations of authorities where these have properly assessed the relevant human rights implications. Failing to take the necessary measures could, on the other hand, increase the risk of climate litigation, as national courts are obliged to enforce the ECHR as interpreted by the ECtHR.

3. A brief overview of the three climate decisions

3.1 Introduction

The ECHR must be interpreted in accordance with the customary rules of treaty interpretation, codified in the Vienna Convention on the Law of Treaties (VCLT) Articles 31–33.[17] Norwegian courts and legal practitioners attach great importance to decisions from the ECtHR when interpreting the ECHR, which has been incorporated in Norwegian law through the Human Rights Act, and which will prevail in case of conflict with other national laws.

On 9 April 2024, the Grand Chamber of the ECtHR published decisions in three climate lawsuits:

- *KlimaSeniorinnen et al. v. Switzerland* (hereafter *KlimaSeniorinnen*)
- *Carême v. France* (hereafter *Carême*)
- *Duarte et al. v. Portugal and Norway et al.* (hereafter *Duarte*)

This was the first time the Court ruled on the relationship between human rights and climate change.

In *KlimaSeniorinnen,* Switzerland was found to violate the right to a fair trial under Article 6 of the ECHR (unanimously) and the right to respect for private life, family life and home under Article 8 of the ECHR (16-1). NIM's analysis will mainly concern the interpretative clarifications the Grand Chamber provides for the interpretation of Article 8 of the ECHR.

The latter two cases, *Carême* and *Duarte*, were dismissed because the procedural requirements under Articles 1 and 34 of the ECHR for bringing them before the ECtHR were not fulfilled. Consequently, the ECtHR did not address whether the 32 states, including Norway, had breached their human rights obligations. The three climate rulings cannot be approached in isolation from each other – rather, they

[17] For a closer analysis of the methodology used in interpretation of the ECHR, see NIMs guidelines on human rights law and legal research: *Veileder for utredning av menneskerettslige problemstillinger: Kilder, tolkning, metode,* 24.10.2023, section 2.6.3. available here: https://www.nhri.no/rapport/veileder-for-utredning-av-menneskerettslige-problemstillinger/ (retrieved 27.06.2024).

form a trilogy, establishing key procedural and substantive Convention principles in litigation relating to climate change.[18]

In this Chapter, we briefly explain how the ECtHR clarified some main questions about jurisdiction, causation and the application of Article 8 in the climate sphere.

3.2 Extraterritorial jurisdiction under Article 1 of the ECHR

According to Article 1 of the ECHR, each Contracting Party shall secure to everyone within their jurisdiction the rights and freedoms laid down in the ECHR. Without jurisdiction, a State cannot be held responsible for human rights violations.

The point of departure is that a State only has human rights responsibility in its own territory. In *KlimaSeniorinnen,* jurisdiction was thus not a contested issue, because the alleged victims were within Swiss territory, and the respondent state was Switzerland.

However, the ECtHR has recognised that, as an exception to the principle of territoriality, acts of the Contracting Parties performed, or producing effects, outside their territories might constitute an exercise of jurisdiction within the meaning of Article 1 of the Convention (*extraterritorial jurisdiction*).[19] The Court has established such exceptions particularly in cases where states exercise authority (e.g. through the military) abroad or where there are other special features that can exceptionally justify why a state has human rights responsibility outside its own borders.[20]

In *Duarte,* extraterritorial jurisdiction was a key issue. The applicants were all residents of Portugal, but had brought their case against 32 European countries, alleging that these countries had extraterritorial jurisdiction over them. The issue before the ECtHR was whether greenhouse gas emissions in one country (e.g. Norway), which have consequences for individuals in another country (e.g. Portugal), opens the door for the "emitting" Convention State to have extraterritorial human rights responsibility for individuals the latter Convention State.

The Grand Chamber of the ECtHR recognized that climate damage raises special issues that *could* justify developing the existing case-law on extraterritorial jurisdiction adaptations in the court's existing case law. However, the Court concluded that there was no basis for extraterritorial jurisdiction in the field of

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[18] See ECtHR, *Exchange of views with the Committee of Ministers – Speech by Síofra O'Leary*, 10.04.2024, p. 5, avaliable here: https://prd-echr.coe.int/documents/d/echr/speech-20240410-oleary-exchange-views-cm-coe-bil.

[19] A thorough review of this case law can be found in *Duarte etc. v. Portugal and Norway et al.* [GC] (dec.) (39371/20) 09.04.2024, §§ 168-214.

[20] *Duarte*, §§ 181-184.

climate change.[21] Among other things, the ECtHR emphasized that such jurisdiction would entail a radical departure from the rationale of the Convention protection system, and that the scope of the extraterritorial jurisdiction sought by the applicants would in effect be without any identifiable limit.[22] The case against Norway, among others, was thus rejected.

3.3 Why is climate change relevant under Article 8 of the ECHR?

3.3.1 Point of departure

Article 8 of the ECHR states that "Everyone has the right to respect for his private and family life, his home and his correspondence".

This Article has long provided individuals with human rights protection against various environmental threats that affect their lives, health and quality of life. This is because ECHR not only obliges the states not to infringe on these rights themselves (negative obligation), but also to take measures to actively protect individuals against threats to these rights (positive obligation). In hundreds of cases, the ECtHR has held that States must take adequate measures to protect individuals against the risk of environmental threats such as pollution, asbestos, floods and landslides.[23]

The question before the ECtHR was whether this jurisprudence meant that the Contracting Parties also have a human rights obligation to take measures to protect against climate change.

Although there are several similarities between environmental and climate cases, there are also several differences. The ECtHR highlighted five factors which meant that previous cases regarding local environmental challenges cannot be easily transferred to threats resulting from climate change:

1. There is no single or specific source of harm.
2. CO_2 – the primary greenhouse gas – is not toxic *per se* at ordinary concentrations.
3. The casual chain of effects (casual connection) is both complex and more unpredictable in terms of time and place than in the case of other emissions of specific toxic pollutants.
4. The sources of greenhouse gas emissions are not limited to specific activities that could be labelled as dangerous.

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[21] *Duarte*, § 189.

[22] *Duarte,* §§ 201, 207.

[23] See Council of Europe, *Manual on Human Rights and the Environment (3rd edition),* February 2022, available here: https://rm.coe.int/manual-environment-3rd-edition/1680a56197 (retrieved 27.06.2024).

5. Combating climate change, and halting it, does not depend on the adoption of specific localised or single-sector measures.[24]

The Court therefore emphasized that previous environmental practice under Article 8 of the ECHR must be adapted to these special characteristics. In the following, NIM reviews the relationship between Article 8 of the ECHR and climate change and the question of causality.

3.3.2 The connection between the right to privacy, family life and home and climate change

The ECtHR takes the reports from the Intergovernmental Panel on Climate Change (IPCC) as a starting point in its assessment of the connection between human rights and climate change. This is because the IPCC is an intergovernmental body of independent experts set up to review and assess the science related to climate change, which are based on comprehensive and rigorous methodology, where the reports are finally approved by States.[25] In its review of the facts, the ECtHR emphasizes, among other things:

- Findings from the IPCC and other studies establishing that climate change has led to more extreme weather events and heat-related mortality, where the elderly and women are among the most vulnerable.[26]
- Statements from the IPCC that there "is a rapidly closing window of opportunity to secure a liveable and sustainable future for all, and "the choices and actions implemented in this decade will have impacts now and for thousands of years".[27]
- Findings from the IPCC on how much more harmful a global warming of 2°C is, compared to 1.5°C.[28]
- Statements from the IPCC on how important national carbon budgets are in order to be able to achieve net zero emissions within the global carbon budget that is left, to limit global warming to 1.5°C.[29]
- The IPCC's latest report, which shows that global net zero CO_2 emissions must be achieved in early 2050 to limit warming to 1.5°C.[30]

On this basis, the ECtHR majority concluded that Article 8 of the ECHR must be seen as encompassing a right for individuals to effective protection by the State

[24] *KlimaSeniorinnen,* §§ 415-422.
[25] *KlimaSeniorinnen,* §§ 429 and 432. See also §§ 103-120.
[26] *KlimaSeniorinnen,* §§ 510, 511.
[27] *KlimaSeniorinnen,* §§ 542, 562.
[28] *KlimaSeniorinnen,* §§ 106-116.
[29] *KlimaSeniorinnen,* §§ 116, 569, 570.
[30] *KlimaSeniorinnen,* § 113.

authorities from serious adverse effects of climate change on their life, health, well-being and quality of life.[31] The majority thus confirmed how several national courts, including in the Netherlands, Germany and Belgium, already had interpreted the ECHR.[32] Whether a breach of these obligations can be invoked in individual cases before the courts, must be assessed procedurally in light of the circumstances of the particular cases. In any case, State authorities are obliged to fulfil these obligations fully nationally.[33]

3.3.3 Causality and the "drop in the ocean" argument

Climate change that causes damage to individuals is a consequence of States' global, combined greenhouse gas emissions. This means that one State alone cannot prevent harmful climate change. In the cases before the ECtHR, several States therefore argued that their emissions were insignificant, and that they could not be responsible under human rights law for the harmful effects climate change has on individuals' lives, health and quality of life (the "drop in the ocean" argument).

This question of causation, which the ECtHR thoroughly assesses, has both a scientific and a normative dimension.[34]

The Court first states that the "causal link between the acts or omissions on the part of State authorities in one country, and the harm, or risk of harm, arising there, is necessarily more tenuous and indirect compared to that in the context of local sources of harmful pollution." At the same time, the IPCC has stated that, *scientifically speaking,* every ton of CO_2 contributes to climate change, and that extreme weather events become more likely with any increase in temperature.[35]

The ECtHR then emphasizes that a State, *legally speaking,* should not be able to avoid their responsibility by pointing out that other States' measures are also insufficient. In several cases, the ECtHR has rejected claims that the State's own actions must be a necessary contributory cause of the damage to individuals' rights (a so-called "but for"-test, which is the starting point in tort law). Rather, what is "sufficient to engage the responsibility of the State, is that reasonable measures

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[31] *KlimaSeniorinnen,* §§ 514-520.

[32] *Urgenda v. the Netherlands,* ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands) 20.12.2019; *Neubauer v. Germany,* BvR 2656/18 (Federal Constitutional Court of Germany) 24.03.2021, para. 147, 148, 99; *Klimatzaak v. Belgium et al.*, no 2021/AR/15gs 2022/AR/737 2022/AR/891 (Brussels Court of Appeal) 30/11/2023. The federal authorities of Belgium have not appealed, making the judgement final and legally binding, see https://www.vrt.be/vrtnws/nl/2023/12/01/zuhal-demir-cassatie-klimaatzaak/ (retrieved 22.05.2024).

[33] See Section 92 of the Norwegian Constitution and Article 1 of the ECHR.

[34] *KlimaSeniorinnen,* §§ 423-424, 437-444.

[35] IPCC, *AR6 Climate Change 2021 The Physical Science Basis: Summary for Policymakers (SPM)*, 2021, sec. B.2.2, pp. 19–24, 35, 41; IPCC, *AR6 Climate Change 2021 The Physical Science Basis: Full report*, 2021, sec. 11.3.5.

which the domestic authorities failed to take could have had a real prospect of altering the outcome or mitigating the harm."[36] In the area of climate, this is the case, as every ton counts from a science point of view. In addition, the ECtHR points out that States have adopted international agreements to reduce their own emissions in order to limit the worst effects of climate change.

In the ECtHR's view, this constitutes a sufficiently relevant link between a State's greenhouse gas emissions and consequences for individuals' rights. The Court thus rejects the "drop in the ocean" argument and concludes that under the ECHR, every State must do *its part* to protect human rights against climate change.[37]

4. Analysis of the State's substantive obligation to protect against climate change under Article 8 of the ECHR

4.1 Introduction

Under Article 8 of the ECHR, states have a positive substantive obligation to do *their part* to reduce the damage that climate change has for individuals within their territory by cutting their respective greenhouse gas emissions.

This chapter analyses in more detail what this duty entails in the following way:

- Section 4.2 discusses the states' margin of appreciation in this area. The ECtHR believes that, under the ECHR, the courts cannot assess the authorities' choice of means to reduce emissions. However, in order to protect individuals from climate change, the ECHR requires the States to adopt and implement a framework capable of reducing the existing and potentially irreversible future effects of climate change.[38]
- Sections 4.3.1 and 4.3.2 analyse the requirements to the national framework in the field of climate change. This include *substantial, immediate* and *progressive* emission reductions with the aim of achieving net neutrality, *in principle* within the next three decades.[39]
- Section 4.3.3 discusses the relationship between territorial emissions and the use of flexible mechanisms under Article 8 of the ECHR.
- Section 4.4 analyses the five requirements that the ECtHR set out to assess whether the legal framework in the field of climate change is sufficient to achieve the goal of net neutrality.

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[36] *Bljakaj and Others v. Croatia* (74448/12) 18.09.2014, § 124 with further references.
[37] *KlimaSeniorinnen,* §. 444.
[38] *KlimaSeniorinnen,* §§ 538, 545.
[39] *KlimaSeniorinnen,* §§ 547-554.

4.2 The ECtHR's margin of appreciation in a national context

The Grand Chamber begins the discussion of the States' positive obligations under Article 8 of the ECHR by assessing how wide the margin of appreciation afforded to States should be. In this context, the ECtHR thoroughly assesses the separation of power issues that the climate cases raise.[40] The decisions from the ECtHR clarify the role of the courts in the field of climate change and human rights, based on thorough assessments of the relationship between law and politics.

The ECtHR clearly states that judicial intervention "cannot replace or provide any substitute for the action which must be taken by the legislative and executive branches of government."[41] Dealing with the climate crisis is primarily a political task. National authorities have "direct democratic legitimation and are in principle better placed than an international court to evaluate the relevant needs and conditions."[42]

At the same time, courts – including the ECtHR – have a right and duty to ensure that rights are respected. If governments around the world had reduced their emissions following the adoption of the UN Framework Convention on Climate Change in 1992, courts would not have had to discuss the consequences of targets being missed and what impact this has on human rights. The ECtHR emphasizes that the states have a "generally inadequate track record", and that when science shows that climate change has had serious consequences for individuals' lives, health and quality of life, the topic becomes a human rights issue.[43]

A main purpose of human rights is to protect minorities and vulnerable groups. In this area, the ECtHR believes that judicial review can be particularly justified from an intergenerational perspective. [44] Although children and future generations will bear the greatest burden of climate change, they are not represented politically today. The ECtHR's held that when there is a risk of irreversible changes, it is justified that courts can exercise some control over the authorities, to counter that short-term considerations impair the right of children and future generations to effective protection by state authorities against serious harmful effects of climate change on their lives, health and quality of life.

This balancing act leads the ECtHR to conclude that, based on Article 8 of the ECHR, courts can review whether States are doing enough to protect their citizens

[40] *KlimaSeniorinnen,* §§ 541-543 with further references.
[41] *KlimaSeniorinnen,* §§ 412.
[42] *KlimaSeniorinnen,* §§ 410-412, 449-451.
[43] *KlimaSeniorinnen,* §§ 542.
[44] *KlimaSeniorinnen,* §§ 420.

from climate change by emission cuts. At the same time, the ECHR grants the states a *wide margin of appreciation* for choosing *which* climate measures they want to implement. [45] It will still be up to national authorities to assess local needs and decide on the choice of means to reduce emissions.

The principle on the margin of appreciation pertains to the distribution of responsibility for implementing the ECHR between the ECtHR and the Contracting Parties. Each Contracting Party has the primary responsibility for securing the rights in the ECHR, and the ECHR's role is subsidiary. However, the principle *does not imply* that convention rights are weaker or offer less protection.[46]

In human rights assessment by Norwegian *decision-makers*, the margin of appreciation can therefore not be applied directly.[47] The legislative and executive branch must ensure a broad assessment of their human rights obligations to fulfil their independent responsibility to respect and secure human rights, regardless of the intensity of a potential judicial review. To find the best solutions within the margin of appreciation, decisions must base their assessments on a solid factual basis where different considerations are weighed. In practice, thorough human rights assessments by the legislative and executive branch lead to a wider margin of appreciation for cases that reach the ECtHR.[48]

We will not analyse further how the ECtHR's statements on the margin of appreciation should be applied by Norwegian *courts*.[49]

4.3 An effective human rights protection require substantive, progressive and immediate emission reductions

[45] *KlimaSeniorinnen,* § 543.

[46] See, for example, *the Copenhagen Declaration,* para. 10: "Reiterates that strengthening the principle of subsidiarity is not intended to limit or weaken human rights protection, but to underline the responsibility of national authorities to guarantee the rights and freedoms set out in the convention", available here: https://rm.coe.int/copenhagen-declaration/16807b915c (retrieved 27.06.2024).

[47] See for this, NIMs guidelines on human rights law and legal research: *Veileder for utredning av menneskerettslige problemstillinger: Kilder, tolkning, metode,* 24.10.2023, section 2.6.3.4 ("Subsidiaritet og skjønnsmargin"), available here: https://www.nhri.no/rapport/veileder-for-utredning-av-menneskerettslige-problemstillinger/ (retrieved 16.09.2024).

[48] See e.g. *Animal Defenders International v. Great Britain* [GC] (48876/08) 22.04.2013, § 108. See similarly, under the Norwegian Constitution, HR-2010-258-P (shipping tax), para. 172.

[49] In summary, the Supreme Court has clarified that the margin of appreciation that follows from ECtHR case law applies to the Convention States and is not transferable to a domestic court's review of measures imposed in that State, see HR-2022-718-A, para. 89. This is particularly relevant in situations where different rights and legitimate objectives must be balanced against each other. This raises the question of how intense the *domestic review* of climate issues under the ECHR should be. Many of the issues raised by the ECtHR in favour of a margin of appreciation for states, including the fact that climate policies must ensure an even distribution of their cost and burden, and are based on complex scientific and political considerations, will also argue in favour of a less intense domestic review. On the other hand, domestic courts are better places to review both facts and administrative assessment than the ECtHR.

As seen above, the States' margin of appreciation is narrow when it comes to the question of whether the legal framework and plans to reduce emissions towards net neutrality are sufficient and based on the best available science.

In sum, this framework must aim to prevent a global temperature rise above levels that are compatible with the effective protection of human rights, seen in light of the UN Framework Convention on Climate Change, the Paris Agreement and climate science from the IPCC. [50] In other words, the ECtHR has a purpose-oriented approach which assumes that the rights of individuals must be *effectively protected* against dangerous climate change.

In the following, we analyse how the ECtHR operationalises this main obligation trough specific requirements for the legal framework in the climate area.

4.3.1 The climate framework must entail a goal of net neutrality within, in principle, the next three decades

The ECtHR takes the following starting point:

> [E]ffective 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.[51]

NIM understands the term GHG emissions to mean *all greenhouse gas emissions*.[52]

The ECtHR does not define the term "net neutrality". Net neutrality – or net zero – generally refers to a state where there is a balance between the amount of greenhouse gas emissions that come from human activity and the corresponding emissions that are taken up or removed from the atmosphere through various processes and mechanisms.[53] This can happen either by reducing emissions, or by increasing the uptake of greenhouse gases. The aim is that the total emissions and absorption should be equal to zero, so that human activity does not increase the concentration of greenhouse gases in the atmosphere.

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[50] *KlimaSeniorinnen,* § 546.

[51] *KlimaSeniorinnen,* § 548.

[52] For a more detailed consideration of this, see Chris Hilson and Oliver Geden, *Climate or carbon neutrality? Which one must states aim for under Article 8 ECHR?,* Ejil:Talk!, 29.04.2024, https://www.ejiltalk.org/climate-or-carbon-neutrality-which-one-must-states-aim-for -under-article-8-echr/ (retrieved 16.09.2024).

[53] See *the Paris Agreement,* 3156 UNTS p. 79 (12.12.2015, entered into force 4.11.2016) article 4.1 and *the UN Framework Convention on Climate Change* 1771 UNTS (p.107) (9.5.1992, entered into force 21.3.1994) article 1.8, which defines a "sink" as "any process, activity or mechanism which removes a greenhouse gas, an aerosol or a precursor of a greenhouse gas from the atmosphere". Removal can e.g. occur in natural systems such as forests and oceans.

For this to be possible, and to avoid future generations bearing a disproportionate share of the burden of reducing emissions, the ECtHR believes that *immediate* emission cuts must be implemented and that the States must have intermediate targets on the way to net neutrality.[54]

The fact that the ECtHR establishes that net neutrality must be achieved "in principle" within the next three decades allow for some flexibility. Because the ECtHR considers the Paris Agreement relevant for its interpretation, it can be argued that "in principle" should be understood in light of relevant principles under the Paris Agreement. Roughly speaking, Article 4.1 of the Paris Agreement is interpreted as a *global* goal that requires the world to reach net zero emissions for *all greenhouse gases* after the year 2050, before 2100.[55] At the same time, Article 4.1 indicates that determining when an *individual* country should achieve net zero emissions must be assessed in light of:

1. best available science
2. the principle that the Parties to the Paris Agreement have a common but differentiated responsibility for climate change and respective capabilities to address it, in the light of different national circumstances.

As the framework established under to Article 8 of the ECHR must be adapted to the risk posed by climate change, the best available science should be emphasized in the understanding of this term.[56] The wording "in principle" may thus imply that European countries should (or may have to) reach net zero emissions before three decades have passed from 2024.

Progressive emission reductions can be interpreted as prohibiting a weakening (regression) of the climate targets under the ECHR.[57] We will not go further into this.

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[54] *KlimaSeniorinnen,* § 549.

[55] Christina Voigt, 'Kapittel 5 – Parisavtalen' in *Klimarett. Internasjonal, europeisk og norsk klimarett mot 2030*, Hans Christian Bugge, ed. (Oslo: Universitetsforlaget, 2021), p. 142. Article 4.1 of the Paris Agreement reads: "In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty."

[56] *KlimaSeniorinnen,* § 547.

[57] For comparison, the Paris Agreement Article 4.11 stipulates that the parties may at any time adjust their nationally determined contribution "with a view to enhancing its level of ambition", i.e. an increase (progression). This has been interpreted such that the Paris Agreement precludes a regression - weakening - of climate targets, see for example: Lavanya Rajamani and Jutta Brunnee, "The Legality of Downgrading Nationally Determined Contributions under the Paris Agreement: Lessons from the US Disengagement " *Journal of Environmental Law* 29, No. 3 (2017) pp. 547–549 ; Markus Vordermayer-Riemer, *Non-Regression in International Environmental Law: Human Rights Doctrine and the Promises of Comparative International Law* (Cambridge: Intersentia, 2020) p. 312.

4.3.2 Must the regulations form part of a *binding* regulatory framework?

A question is whether the goal of net neutrality and intermediate climate goals must be regulated in the form of a law by the legislative power, or whether it is sufficient that it emerges from administrative regulations or other documents from the executive power. The ECtHR states the following in *KlimaSeniorinnen*:

> 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.[58] (Emphasis added).

This paragraph consists of three elements. Firstly, the authorities must take immediate action and adopt adequate intermediate climate targets to cut emissions down towards net neutrality. Secondly, such measures *should* be introduced in a legally binding framework that can be implemented. Thirdly, the authorities *must* establish intermediate targets and also include targets and timelines for both general and sectoral emission cuts for the entire period up to climate neutrality, and these must form an integral part of the national framework.

In the specific assessment of Switzerland, the ECtHR took as its starting point the fact that a CO_2 Act from 2011 only regulated emission cuts until 2020. A revision of this act, which was supposed to set a new climate target for 2030, was rejected in a referendum. Switzerland thus lacked a legal regulation of emission cuts after 2020. The ECtHR assessed whether the regulations nevertheless were adequate, as other regulatory initiatives in the form of reported nationally determined contributions under the Paris Agreement and a new Climate Act, which had climate targets from 2031 to 2050, had been adopted in 2023.

The ECtHR stated that even with this new law, the period between 2025 and 2030 was unregulated. The legislative lacuna for these five years was a central premise for the ECtHR's conclusion that Switzerland had violated Article 8 of the ECHR.[59] This suggests that the ECHR now requires that the intermediate targets towards net

[58] *KlimaSeniorinnen,* § 549.

[59] *KlimaSeniorinnen,* § 561, 562 and 573.

neutrality are incorporated in a legally binding framework, whereas it would be insufficient that these targets appear only in administrative documents.[60]

Against this background, NIM interprets the judgment to imply that the goal of net neutrality and the remaining national carbon budget, probably must – and in any case should – be regulated by law. In NIM's view, human rights would in any case be better protected if the obligation of substantial, progressive and immediate emission cuts are secured trough law. This will also ensure progress and predictability, for individuals and companies, with a democratic anchoring in the Parliament.

4.3.3 The use of emission trading systems (carbon markets)

The point of departure under international climate agreements is that the State Parties are responsible for reducing their *territorial emissions*.[61] The need to reduce emissions towards net zero is based on the IPCC's latest report, which shows that net zero emissions must be achieved early in 2050 in order to limit warming to 1.5°C.[62] Through the Paris Agreement, 195 countries have also agreed on a goal to "achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century", which in practice means that emissions must be reduced to net zero, see Article 4.1.

However, several intergovernmental agreements, including the Kyoto Protocol, the Paris Agreement and EU regulations, allow for states to trade carbon credits under international emissions trading systems as a means to reach its own climate targets on the way to net zero emissions.[63] Emission trading for companies is regulated by

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[60] This has certain similarities with the assessment of the Norwegian Supreme Court in HR-2020-2472-P (Climate), where they stated in para 139 that Section 112 of the Constitution could be asserted directly in court when it concerns an environmental issue that the legislature has not considered, i.e. where there is a *legislative gap*.

[61] This is based on a need to ensure global coordination and avoid a double counting of territorial emissions reductions. However, this is not intended to preclude responsibility for reductions of imported or exported emissions under other instruments where this can promote the objectives of the Paris Agreement.

[62] *KlimaSeniorinnen,* § 113.

[63] The EU allows some trading of emission allocations between Member States to meet climate targets. This is the case under *Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to Climate Change Action to meet commitments under the Paris Agreement* ("Effort Sharing Regulation") OJ L 156/26, 19.6.2018, article 5(4), later amended by *Regulation (EU) 2023/857 of the European Parliament and of the Council* (Reinforced Effort Sharing Regulation), OJ L 111, 26.4.2023). It is also the case under *Regulation (EU) 2018/841 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework* ("LULUCF Regulation"), OJ L 156, 19.6.2018, article 12(2), later amended by *Regulation (EU) 2023/839 of the European Parliament and of the Council of 19 April 2023 amending Regulation (EU) 2018/841 as regards the scope, simplifying the reporting and compliance rules, and setting out the targets of the Member States for 2030, and Regulation (EU) 2018/1999 as regards improvement in monitoring, reporting, tracking of progress and review,* (Reinforced LULUCF Regulation) OJ L 107, 21.4.2023.

the EU Emission Trading System.[64] Article 6 of the Paris Agreement allows States to pursue voluntary cooperation in the implementation of their nationally determined contributions "to allow for higher ambition in their mitigation and adaptation actions",[65] including through bilateral agreements on trade emission reductions.

Many countries make use of these emission trading systems. Political and economic debates on the rationale behind emission trading systems as an alternative to territorial emission reductions have been numerous, complex, and ongoing for years. However, NIM will only focus on the human rights dimensions of this issue, in light of the best available science.

In the following, we will discuss the use of emission trading systems to achieve climate targets under Article 8 of the ECHR.

In *KlimaSeniorinnen,* the ECtHR does not explicitly assess the use of emission trading systems. The ECtHR generally refers to the States' obligation to implement measures for substantial and progressive reductions in "their respective greenhouse gas emissions" to achieve net neutrality in principle within the next three decades.[66] Considering international agreements, NIM understand the term "respective" as referring to territorial emissions.

Implicitly, however, the use of emission trading systems comes up in the concrete assessment of Switzerland's compliance with its positive obligations under Article 8, because Switzerland made use of emission trading under the Kyoto Protocol and joined the EU ETS on 1 January 2020.[67] The ECtHR highlights the following emissions cuts from Switzerland in the discussion:

> At the outset, the Court notes that the currently existing 2011 CO2 Act (in force since 2013) required that by 2020 GHG emissions should be reduced overall by 20% compared with 1990 levels [...]

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[64] *Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading* (EU ETS), OJ L 275/32, 13.10.2003, amended by a number of subsequent directives and regulations (the latest available consolidated version is from 1 March 2024).

[65] Andrew Howard, "Voluntary Cooperation (Article 6)" in David Klein et al. (eds) *The Paris Agreement on Climate Change: Analysis and Commentary,* David Klein et al. eds., (Oxford: Oxford Academic, 2017), section C.1. See also Matthieu Wemaëre, "Article 6: Voluntary Cooperation/NDCs" in *The Paris Agreement on Climate Change* (Geert Van Calster et al., eds. (Cheltenham, UK: Edward Elgar Publishing, 2021) para. 6.02.

[66] *KlimaSeniorinnen,* § 548.

[67] *Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emission trading systems* , OJ L 322, 7.12.2017 and *Council of the EU, Linking of Switzerland to the EU emissions trading system - entry into force on 1 January 2020* , 9.12.2019, available here: https://www.consilium.europa.eu/en/press/press-releases/2019/12/09/linking-of-switzerland-to-the-eu-emissions-trading- system-entry-into-force-on-1-january-2020/ (retrieved 16.09.2024).

> Moreover, as the Government acknowledged, the relevant domestic assessments found that even the GHG reduction target for 2020 had been missed. Indeed, on average over the period between 2013 and 2020, Switzerland reduced its GHG emissions by around 11% compared with 1990 levels [...] which indicates the insufficiency of the authorities' past action to take the necessary measures to address climate change.[68]

As the Court points out, Switzerland did not meet its target of cutting domestic *territorial* emissions in Switzerland by 20% by 2020 compared to 1990. According to Switzerland, the country achieved a 19% reduction between 1990-2020.[69]

The ECtHR points out that Switzerland's average emission cut for the period 2013–2020, compared to the year 1990, was 11%. This time frame corresponds to the commitment period Switzerland had under the Kyoto Protocol, where Switzerland had committed to reduce its emissions between 2013 and 2020 by 15.8% on average compared to 1990. Switzerland achieved this goal by making use of, and factoring in, emission cuts through emission trading.[70] In other words, the ECtHR did not attach weight to the results from emission trading as a way to compensate for low territorial emission reductions.

For the goals after 2020, the ECtHR refers to Switzerland's national contribution under the Paris Agreement, where it appears that Switzerland planned to use flexible mechanisms to reach its climate goals under Article 6 of the Paris Agreement.[71] The ECtHR does not comment on this.

The new Swiss Climate Act from 2023 also provided for extensive use of emission trading.[72] The relevant parts of Article 3 of the Climate Act read as follows:

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[68] *KlimaSeniorinnen,* §§ 558, 559.

[69] *KlimaSeniorinnen*, §§ 87 and 358. See also Office fédéral de l'environnement, *Émissions de gaz à effet de serre visées par la loi sur le CO2 et par le Protocole de Kyoto, 2 e période d'engagement (2013–2020)* , April 2022, available here: https://www.bafu.admin.ch/bafu/fr/home/themes/climat/info-specialists/reduction-emissions/realisation-objectifs/objectif-2020.html (retrieved 16.09.2024).

[70] *KlimaSeniorinnen*, § 358.

[71] *KlimaSeniorinnen,* § 563, referring to the Report "*Switzerland's information necessary for clarity, transparency and understanding in accordance with decision 1/CP.21 of its updated and enhanced nationally determined contribution (NDC) under the Paris Agreement (2021-2030)"*, p. 12, where it is stated that "Internationally transferred mitigation outcomes (ITMOs) from cooperation under Article 6 of the Paris Agreement will partly be used", available here: https://unfccc.int/sites/default/files/NDC/2022-11/Swiss %20NDC%202021-2030%20incl%20ICTU_0.pdf (retrieved 27.06.2024).

[72] *Loi fédérale sur les objectifs en matière de protection du climat, sur l'innovation et sur le renforcement de la sécurité énergétique,* 19.01.2023. The French version is available here: https://www.fedlex.admin.ch/eli/fga/2022/2403/fr (retrieved 27.06.2024).

> The Confederation shall ensure a reduction to net zero by 2050 of human-induced [GHG] emitted in Switzerland (net-zero objective) through the following measures:
>
> a) reducing [GHG] emissions as *far as possible,* and
>
> b) offsetting the impact of residual [GHG] emissions through the use of *negative -emissions technologies* in Switzerland and *abroad*.
>
> After 2050, the quantity of CO_2 removed and stored using negative-emissions technologies must be greater than the residual [GHG] emissions.
>
> The Confederation shall ensure a reduction in [GHG] emissions compared with 1990 levels. The intermediate reduction targets shall be the following:
>
> a) between 2031 and 2040: at least 64% on average;
>
> b) by 2040: at least 75%;
>
> c) between 2041 and 2050: at least 89% on average.
>
> The reduction targets must be technically feasible and economically sustainable. *As far as possible, they should be achieved through emissions reductions in Switzerland*. [73] (Emphasis added).

The ECtHR criticizes the formulation that greenhouse gas emissions in Switzerland must be reduced "as far as possible". In combination with the fact that the Climate Act only obligated the authorities to implement climate measures "in good time", the ECtHR had difficulty accepting that the Climate Act was a satisfactory regulatory framework.[74] This indicates that the ECtHR was critical of the fact that Switzerland had not clearly defined how and when the goal of ne neutrality will be achieved, or the distribution between national reductions and emission trading systems. The EU ETS is not mentioned by the ECHR, even though Switzerland informed the Court that they joined the EU ETS in 2020.[75]

It therefore appears that the ECtHR only emphasizes territorial reductions and discounts the emission cuts under the Kyoto Protocol. However, the Court did not explicitly hold that only territorial emission cuts are relevant.

The question of whether cuts through emission trading systems that contribute to emission cuts in other countries are relevant according to Article 8 of the ECHR, thus remains unresolved. In NIM's view, the questions of the relevance of emission trading under Article 8 of the ECHR should be assessed in the light of the general

[73] English translation in *KlimaSeniorinnen,* § 127.
[74] *KlimaSeniorinnen,* § 564–567.
[75] *KlimaSeniorinnen*, § 86.

rules of international law on treaty interpretation, relied on by the ECtHR, and the ECtHR's particular principles of interpretation. Here, we will particularly point to three relevant elements:

1. The ECtHR's method of interpretation is often referred to as "dynamic" or *purpose-oriented*: the ECHR must be interpreted in good faith, in accordance with the general meaning of the treaty's terms, seen in their context, and in the light of the treaty's object and purpose.[76] The ECtHR has repeatedly emphasized that the Convention's purpose is to secure rights that are not theoretical and illusory, but practical and effective.[77]
2. As mentioned above, the ECtHR grants States a *margin appreciation*, which varies from area to area.
3. The ECtHR has repeatedly emphasized that the ECHR must be interpreted *in harmony with international law and EU law*.[78] The purpose is to ensure that states under the ECHR should not have to choose between *which* international law obligations they want to fulfil, and seeks, as far as possible, to avoid conflicts between different sets of rules, for example by interpreting the ECHR in harmony with EU law and international agreements.[79]

Applied to the question of cuts through emission trading, these interpretive principles point in two different directions.

On the one hand, harmonization of the ECHR with international agreements and EU law suggests that emission cuts carried out using emission trading systems should be included in the assessment under Article 8 of the ECHR.

All the Convention States that are parties to the ECHR are also parties to the Paris Agreement, where Article 6 allows countries to choose to make use of emission trading. In addition, all the EU countries, the EEA countries and Switzerland are party to both the ECHR and the EU ETS, and other EU regulations that opens for emission trading. These systems can contribute to global emission cuts which in turn help to protect individuals from harm, which seen in isolation is in line with the ECtHR overall requirement of the commitment to substantial, progressive and immediate emission cuts. The ECtHR normally looks at such international

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[76] See Vienna Convention on the Law of Treaties, 1155 UNTS 331 (23.05.1969, entered into force 27.01.1980).
[77] See, for example, *Demir and Baykara v. Turkey* [GC] (34503/97) 12.11.2008, § 66, *Klass and Others v. Germany* (5029/71) 06.09.1978, § 34.
[78] See e.g. *Avotiņš v. Latvia* [GC] (17502/07) 23.05.2016, § 113 and *Pirozzi v. Belgium* (21055/11) 17.07.2018, § 60.
[79] See e.g. *Michaud v. France* (12323/11) 06.03.2013, § 104. According to the Vienna Convention, Article 31(3)(c), other relevant rules of international law that applicable between the parties can also be taken into account.

agreements, as well as the consideration of effective international cooperation. This consideration is probably even stronger in the climate change sphere, because climate change is a global challenge that no State can solve alone.[80]

Moreover, the Court's split approach to the margin of appreciation also points in the same direction: the ECtHR stated that the choice of means to achieve emission cuts is within the wide margin of appreciation of States. The choice between reducing greenhouse gas emissions on one's own territory or through emission trading on the way to net zero emissions around 2050 falls within the field of political discretion regarding choice of means.

On the other hand, the ECHR must be interpreted so that the rights therein remain practical and effective. The ECtHR emphasizes two principles that are particularly relevant in this discussion – the principle of intergenerational burden-sharing and the precautionary principle.

Firstly, the ECtHR emphasizes the importance of *intergenerational burden-sharing* of reducing emissions, which may require interference with the rights of individuals.[81] If only some emissions were to be reduced, emission trading alone could be a sensible strategy. But when the world is set to reduce greenhouse gas emissions down to net zero in line with the Paris Agreement, there is a real risk that quotas and flexible mechanisms will eventually become unavailable in the future.[82] The ECtHR is explicit about the need for *immediate* emission cuts to ensure *an intergenerational burden-sharing* of emission reductions on the way to net zero emissions, in principle within the next three decades.[83] The absence of progressive territorial reductions creates a risk that the burden of reducing territorial emissions is shifted to children and future generations, who will risk facing an abrupt transition in the 2040s.

A well-known objection to this human rights argument is that children and future generations will have a greater financial leeway if the cheapest cuts are made through emission trading today, and that technological development may make emission cuts nationally less demanding in the future. But this is uncertain, because it is not currently known how the technology to reduce emissions will develop. In addition, there are some types of emission reductions where it is not

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[80] The ECtHR highlights this in *KlimaSeniorinnen,* §§ 442, 489 and *Duarte,* §§ 193–194 and 202.
[81] *KlimaSeniorinnen* §§ 419, 420.
[82] See section 5.3 with references to inter alia NOU 2023: 25, p. 27; NOU 2024:7 *Norge og EØS: Utvikling og erfaringer* p. 150; Norwegian Environment Agency, *Klimatiltak i Norge: Kunnskapsgrunnlag* (2024) p. 7; Office of the Auditor General of Norway, *Riksrevisjonens undersøkelse av myndighetenes styring og samordning for å nå Stortingets vedtatte klimamål,* Dokument 3:15 (2023-2024), 11.06.2024, p. 16.
[83] *KlimaSeniorinnen* par. 548, 549.

necessarily worth waiting for technological development, because decisions about, for example, using resources more efficiently or taking care of nature should be implemented quickly anyway.[84]

Secondly, if there is uncertainty about this, the authorities should in any case consider *the precautionary principle,*[85] which the ECtHR has also referred to in its case law.[86] One author has described the principle it this way: "The core of the principle is that, in the absence of certain knowledge, we must give the environment the benefit of the doubt".[87] Seen from this point of view, the authorities should make sure today that the burden of reducing emissions *nationally* should be distributed between generations.

At present, it is NIM's assessment that a delayed national transition due to the overuse of emission trading systems today may pose a *risk* of extensive interference with human rights in the future.[88] This can be formulated as a risk of an anticipated breach of Article 8 of the ECHR and other human rights. Overall, a precautionary approach, considering the need for intergenerational burden-sharing to reduce *national* emissions down to net zero, suggest that States cannot rely exclusively on flexible mechanisms to cut emissions under the ECHR.

Such an obligation will not conflict with international agreements or EU law. The ECHR can imply a stricter responsibility for *territorial emission cuts*, and an obligation to do *more,* without it implying a direct conflict with or undermining the obligations the EU Member States have undertaken through the EU ETS or the Paris Agreement. The EU's climate regulations do not prevent the Member States from having more ambitious national climate targets, and allows for the national states to

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[84] See 2050 Climate Change Committee, NOU 2023: 25, pp. 68 and 82.

[85] The principle is so widely accepted that it constitutes customary law, see Philippe Sands et al., *Principles of International Environmental Law* 4th ed, (Cambridge: Cambridge University Press, 2018), pp. 239-240.

[86] *Asselbourg and Others v. Luxembourg* (dec.) (29121/95) 29.6.1999 p. 7; *Tătar c. Roumanie* (67021/01) 27.01.2009 §§ 109, 112, 120. See also Council of Europe, *Guide on case-law of the Convention – Environment*, 31.08.2022 p. 85.

[87] Hans Christian Bugge, *Lærebok i miljøforvaltningsrett*, (Oslo: Universitetsforlaget, 2022) p. 62.

[88] Note that the ECtHR, in parts of the judgement, refers to the German *Neubauer* case, where the German Constitutional Court held the following: "It follows from the principle of proportionality that one generation must not be allowed to consume large portions of the CO2 budget while bearing a relatively minor share of the reduction effort, if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to serious losses of freedom – something the complainants describe as an "emergency stop". It is true that even severe losses of freedom may, at some point in the future, be deemed proportionate and justified in order to prevent climate change", cf. *Neubauer* para. 192. Official English translation from the Court available here: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html (last read: 14.05.2024).

implement stricter national climate measures within the framework of EU law.[89] Also within the EU ETS, national measures in addition to using this system could lower the emission cap.[90]

Summary

The ECtHR does not take an explicit position on the use of flexible mechanisms in *KlimaSeniorinnen*. After a comprehensive reading of the judgment, assessed in light of the rules on treaty interpretation emphasized by the ECtHR in line with the VCLT, NIM concludes with the following:

- The Contracting Parties have a responsibility to reduce their respective emissions *substantially* and *progressively* towards net neutrality, in principle within three decades. This is necessary in order for each State to do *its part* to protect its citizens from climate change. This overall commitment necessitates a progressive share of territorial emission cuts, as all States are expected to reach net zero around 2050.
- On the road to net neutrality, the authorities have a margin of appreciation in the choice of instruments and measures, as long as these contribute to real emission reductions that protect their citizens against climate change under Article 8 of the ECHR.[91] Domestic reductions in greenhouse gas emissions will be a factor in the overall assessment, but must be seen in connection with other elements in the framework and the State's use of emission trading systems.
- In other words, the territorial emission reductions achieved will not in itself determine whether there has been a breach of the ECHR, but they may indicate that the transition to a low-emission society is going too slowly. Low

[89] See e.g. the Effort Sharing Regulation, recital 32: "This Regulation is without prejudice to more stringent national objectives"; *Túrkevei Tejtermelő Kft.*, C-129/16, EU:C:2017:547, para. 61; *Urgenda* paras. 7.3.1–7.3.6 (Climate regulations in the EU "are without prejudice to the individual responsibility of the EU Member States by any other virtue", and the Effort Sharing Regulation does not preclude more stringent national objectives"); *Neubauer* para. 141 ("[t]he Federal Climate Change Act's background in EU law does not rule out the admissibility of the constitutional complaints").

[90] The Ministry of Climate and Environment, *Regjeringas klimastatus- og plan,* annexed to Prop. 1 S (2023–2024), 6 October 2023 (hereinafter "The Government's climate status and plan") p. 108 ("Norway has for a long period of time taken extra measures in sectors covered by EU ETS, including a CO" tax in the petroleum and aviation sectors, support for research and development, and major initiatives to develop new climate technology like Carbon capture and storage", our translation). See also *NOU 2024:7* p. 150 ("The climate agreement [*ed. with the EU*] does not by itself contain any measures or instruments to reduce emissions, aside from access to emissions trading with EU states. This means that additional measures must be developed nationally. Norway can legally develop a broad spectrum of measures. […] In order to achieve the Norwegian targets in the climate agreement with the EU, Norway should adopt stronger measures to reduce emissions, including territorial emissions.", our translation).

[91] A system that includes emissions trading must be transparent and safeguard procedural guarantees, such as citizens' access to environmental information and participation in key decision-making processes (see Section 6).

emission cuts today thus create a risk that the framework is considered insufficient to ensure *immediate* emission reductions and an intergenerational burden-sharing.

In order to have a holistic approach to this, the authorities should have a plan for the use of emission trading systems that shows how territorial emissions are to be cut down towards net zero over time, so that the burden of cutting territorial emissions is distributed proportionally between generations.

Regardless of the obligations under Article 8 of the ECHR, it may make sense to have an ambition to contribute to greater international emission cuts through measures that come *in addition to*, *not at the expense of,* territorial cuts. As mentioned, Article 6 of the Paris Agreement allows for this. It is nevertheless important that information about such initiatives is presented in a sound and informed manner. In the EU, for example, it is now considered a misleading trade practice to claim that "based on the offsetting of greenhouse gas emissions, [that] a product has a neutral, reduced or positive impact on the environment in terms of greenhouse gas emissions".[92]

4.4 Assessment of whether the framework is suitable to achieve net neutrality

4.4.1 Introduction

According to the ECtHR, compliance with Article 8 must be assessed as a whole, considering whether the legal framework as such is suitable to protect rights by ensuring *substantial* and *progressive* emission reductions in the States' respective greenhouse gas emissions, with the aim of achieving net neutrality *in principle* within the next three decades. The question thus becomes whether the authorities have adopted sufficient regulations to ensure that legislation and measures are in place in good time to ensure that this goal is reached.

In this assessment, the Court will examine whether the competent domestic authorities, be it at the legislative, executive or judicial level, have had due regard to the need to respecting five requirements, which we will review below.[93] This

[92] *Directive (EU) 2024/825 of the European Parliament and of the Council of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and through better information* (Empowering Consumers Directive) OJ L, 2024/825, 6.3.2024, Annex, point 2, inserting a new point 4c in *Directive 2005/29/EC*, Annex I.

[93] *KlimaSeniorinnen,* § 550.

assessment will be of an overall nature, meaning that a shortcoming in one respect alone will not necessarily mean that Article 8 is violated.[94]

4.4.2 Timeline for carbon neutrality and a carbon budget or equivalent

The first requirement that the Court defines in § 550 a) reads:

> […] 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 […]

Carbon budget is "a commonly used term to describe a budget for emission units for greenhouse gases, or an emissions budget".[95] The wording "or equivalent" does not dilute the obligation to define limits for which remaining greenhouse gas emissions the State will accept, but simply implies that there can be different ways of *categorizing* such a calculation. The ECtHR rejects, for example, that the assessments behind a nationally determined contribution under the Paris Agreement can correspond to a carbon budget.[96]

The ECtHR criticized Switzerland for not adopting a national carbon budget. Switzerland claimed that there was no established method for this, and that they had other climate targets – including a nationally determined contribution to the Paris Agreement – that could replace the need for a carbon budget.[97] However, the ECtHR did not think this was sufficient, and noted that the IPCC had emphasized the importance of carbon budgets, and that the German Constitutional Court had rejected that it was impossible to set national carbon budgets.[98] The ECtHR concluded that it was "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."[99] This indicates that a legal framework cannot be considered sufficient without States having a carbon budget or a similar limit for the remaining permitted emissions.

According to the ECtHR, the national carbon budget or equivalent must be in line with the overarching goal for national and/or global climate-change mitigation

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[94] *KlimaSeniorinnen,* § 551. NIM's analysis in the following sections takes as its starting point the independent duty of the legislative and executive powers to respect and ensure human rights under Section 92 of the Constitution. Because these obligations are incumbent on the legislative and executive, they are not conditional on issues that would arise if the judiciary were to consider the matter, like the intensity of review. (see Section 4.2).

[95] See for this definition, Prop. 77 L (2016–2017) p. 57 (in Norwegian, our translation).

[96] *KlimaSeniorinnen,* § 570.

[97] *KlimaSeniorinnen,* § 570.

[98] *KlimaSeniorinnen,* § 571.

[99] *KlimaSeniorinnen,* § 570.

commitments. The size of the remaining global carbon budget depends on which temperature goal in the Paris Agreement, and which probability of reaching that goial, one is aiming for.

The ECtHR points out that carbon budgets or equivalents must be assessed in light of *global emission targets,* which in practice are the temperature targets of 1.5°C to well below 2°C in the Paris Agreement.[100] The ECtHR mentions twice the 1.5°C target as a "limit".[101] The Court also points out that research since the Paris Agreement was adopted in 2015 has shown how much more harmful a warming of 2°C is. That is why States now primarily are working to limit warming to 1.5°C, not 2°C.[102] In addition, the ECtHR only refers to the carbon budgets from the IPCC which give a 67% or 83% chance of reaching the 1.5°C target.[103] In NIM's view, a national carbon budget should therefore be based on the remaining global carbon budget in order to reach the 1.5°C target with these degrees of probability.

Several methods can be used to calculate a national carbon budget from the global carbon budget, based on various normative choices.[104] The ECtHR does not say which method should be used. In *KlimaSeniorinnen,* the ECtHR rejected that the Court itself could derive what would be a fair share of the global carbon budget to limit warming to 1.5°C, because the States themselves must define their path towards carbon neutrality.[105] At the same time, the ECtHR emphasized that Switzerland intends to allow more emissions than a method that distributes the global carbon budget to each country based on their population ("equal *per capita* emissions") would have allowed.[106] Such a method, which does not take into account historical responsibility for emission cuts or economic ability to change, gives a larger carbon budget to rich, industrialized countries. A method that distributes the carbon budget to countries based on the number of inhabitants should therefore be seen as a minimum, and not interpreted as being sufficient.

This reflects the Paris Agreement, which recognizes that developing countries will need more time to reach the peak of their greenhouse gas emissions. The

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[100] Paris Agreement Article 2.1. See also *KlimaSeniorinnen,* §§ 546, 547.
[101] *KlimaSeniorinnen,* §§ 558, 569. See also § 436.
[102] *KlimaSeniorinnen,* §§ 106, 569.
[103] *KlimaSeniorinnen,* § 569.
[104] The Norwegian Environment Agency, *Et 2035-bidrag som sikrer omstilling nasjonalt*, p. 85, mentions the following methods: (i) current emissions shares by country (sovereignty); (ii) emissions share per capita (equality); (iii) emission shares by country and per capita (sovereignty/equality); (iv) historical cumulative emissions per capita (equality/responsibility); (v) GDP per capita (capability/need); (vi) historical emissions and GDP per capita (responsibility/capability/need); (vii) mitigation potential based on marginal mitigation costs (cost optimization); and (vii) the inclusion of consumption-based emissions.
[105] *KlimaSeniorinnen,* § 547. See for the applicants' arguments on this: §§ 303, 304, 320, 323-325.
[106] *KlimaSeniorinnen,* § 569.

agreement is based on the principle that emission cuts should reflect each country's highest possible ambition in light of the states' common but differentiated responsibilities, respective capacities and national circumstances.[107] If all countries choose the most advantageous method of calculating their carbon budget, the global carbon budget to limit warming to 1.5°C will in practice be exceeded.[108] Methods that take into account both the number of inhabitants, historical greenhouse gas emissions and economic capacity will be a loyal and purpose-oriented implementation of the Paris Agreement.[109]

The remaining carbon budget in order to limit global warming to 1.5°C is very small and shrinking rapidly due to continued high global greenhouse gas emissions.[110] For many industrialized countries, their *per capita* share of the remaining global carbon budget will therefore be either very small or already exhausted. Setting national climate targets based on such a budget may therefore require immediate and drastic emission cuts, which in some cases may be perceived as impossible for political, economic or social reasons. Regardless of this, to comply with the ECtHR's judgment, it is still necessary to assess, through a carbon budget, whether a country's climate target is sufficient to limit global warming to 1.5°C. If a country considers that its highest possible ambition for emission cuts should still allow more emissions than its *per capita* share of the global carbon budget, this must be explained, and other measures considered *in addition to* national cuts to compensate for this shortfall, such as financing emission reductions in other countries (as the EU's Climate Council has proposed, see section 5.4.1).

In short, States must set a national carbon budget in light of the Paris Agreement and explain how this will be enough for the State to do its part to effectively protect its individuals' lives, health and quality of life against climate change under Article 8 of the ECHR. Considering the ECtHR's statements in *KlimaSeniorinnen,* this should preferably be based on the global carbon budget with the 1.5°C target at 67% or

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[107] The Paris Agreement, including articles 2.2, 4.1, 4.3 and 4.4.

[108] See e.g. Yann Robiou du Pont and Malte Meinshausen, "Warming assessment of the bottom-up Paris Agreement emissions pledges", *Nature Communications* 9, No. 1 (2018); Malte Meinshausen et al., "National post-2020 greenhouse gas targets and diversity-aware leadership", *Nature Climate Change* 5, (2015) pp. 1098–1106.

[109] See e.g. Lavanya Rajamani et al., "National 'fair shares' in reducing greenhouse gas emissions within the principled framework of international environmental law", *Climate Policy* 21, no. 8 (2021); European Scientific Advisory Board on Climate Change, *Scientific advice for the determination of an EU-wide 2040 climate target and a greenhouse gas budget for 2030–2050* , 15.06.2023, pp. 27-28, available here: https://climate- advisory-board.europa.eu/reports-and-publications/scientific-advice-for-the-determination-of-an-eu-wide-2040 (retrieved 27.06.2024).

[110] Piers M. Forster et al., "Indicators of Global Climate Change 2023: annual update of key indicators of the state of the climate system and human influence" *Earth System Science Data* 16, no. 6 (2024), Chapter 8.

83% degree of probability. The choice of method for calculating the national carbon budget should also be explained in light of the principles under the Paris Agreement.

4.4.3 Intermediate climate targets and a pathway to net neutrality

The second requirement in section 550 b) reads:

> [...] 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 [...]

NIM believes that in the context where the term "pathway" is used, it must be understood as concrete goals, plans and measures to achieve an emissions trajectory in various sectors, which enables the climate targets to be reached within the relevant timeframes, and not just *a possible* path.[111]

In practice, this requirement includes two components:

1. **Intermediate climate targets**: The authorities must prepare intermediate climate targets towards net neutrality. This must be seen in the context of *KlimaSeniorinnen* § 549, where the ECtHR holds that the State *must* reduce emissions immediately and have intermediate climate targets that show the way to net neutrality, in order to ensure an intergenerational sharing of the burden of reducing emissions. A progressive reduction of greenhouse gas emissions is necessary to protect rights over time, because climate damage occurs as a result of accumulated emissions in the atmosphere over time. As mentioned above, the ECtHR pointed out that the Swiss framework had a legislative lacuna because it lacked climate targets between 2025 and 2030, which underlines the need for regulations covering all periods up to net zero emissions. With the new Climate Act adopted in 2023, Switzerland legislated intermediate climate targets for (i) the period between 2031 and 2040, (ii) by 2040, and (iii) the period between 2041 and 2050. The ECtHR did not comment on whether these intermediate targets after the change in the law were sufficient.
2. **A pathway for emission cuts in various sectors:** The authorities must establish a pathway that shows how they will achieve emission reductions

[111] The ECtHR does not define the term, but the word “pathway” is defined in English as “a particular course of action or a way of achieving something”, see Collins Dictionary, available here: https://www.collinsdictionary.com/dictionary/english/ pathway (retrieved 16.09.2024). Internationally, “pathway” is often used to refer to the climate scenarios used by the IPCC to determine the necessary course of action for reducing global emissions and achieve global targets. A pathway developed by an individual state would be similar but targeted at national actions and targets.

towards net neutrality around 2050. The ECtHR emphasizes that this can be done by sector, or through other relevant methods, and that the authorities must plan for which measures will be used to achieve their own climate targets. This must be seen in the context of § 550 c), which emphasizes the need to provide evidence showing whether they are complying with the climate targets (*forward-looking*). In general, this information is also necessary for the legislative and executive branches to assess the need for adjustment or additional instruments and measures to reduce greenhouse gas emissions.

4.4.4 Evidence for timely implementation of the climate targets

The third requirement the ECtHR sets out is whether the authorities can "[...] 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) [...]", see § 550 (c).

The *relevant* climate goals refer to both intermediate goals and the final goal of net neutrality, in line with international agreements. With this, an assessment is made of whether the authorities can *prove* that the goals the states themselves have set are being complied with, both in the past and looking ahead. These assessments will be linked to various forms of documentation.

The question of *achieved territorial cuts* is a matter of measuring which greenhouse gas emissions that have been reduced. Switzerland had not reached its target of a 20% reduction by 2020 compared to 1990, and the ECtHR used this as a central premise for determining that Switzerland had violated Article 8 of the ECHR.[112]

The *forward-looking assessment* of whether a State is in the process of complying with its targets will have to be based on forecasts based on other types of documentation, where there will be a greater degree of uncertainty as to whether the concrete measures will be sufficient.

The ECtHR assessed whether Switzerland could provide evidence that they were on track to reach climate targets for 2030, 2040 and 2050. The ECtHR assessed whether the statutory targets were designed in a way that was able to prove that Switzerland was on track to achieve future goals. As mentioned, the ECtHR pointed out that the Climate Act from 2023 was insufficient, because it contained wording that greenhouse gas emissions should be reduced *as far as possible*, and that the measures should be decided *in good time*.[113] In the ECtHR's view, this was not enough to fulfil the State's duty to "provide, and effectively apply in practice,

[112] *KlimaSeniorinnen,* §§ 558, 559, 573.
[113] *KlimaSeniorinnen,* §§ 564, 565.

effective protection of individuals within its jurisdiction from the adverse effects of climate change on their life and health".[114] In other words, this line of reasoning necessitates an assessment of the clarity and effectiveness of the underlying regulations, which must be suitable to ensure that the States act in a way that makes it likely that they meet the climate goals they have undertaken.

4.4.5 Process for updating climate targets in line with science

The fourth requirement the ECtHR sets out is whether the authorities have taken into account the need to "[...] keep the relevant GHG reduction targets updated with due diligence, and based on the best available evidence; [...]", see § 550 (d).

This requirement points to two things. Firstly, the ECtHR establishes a *due-diligence* obligation, which requires the states to continuously update their own climate targets based on developments in the field of climate change, and that they assess which measures are necessary. Second, this obligation must be based on up-to-date and best available science. This should be seen in connection with *the precautionary principle.*[115]

This requirement must also be seen in the context of § 548, where the ECtHR states that the main obligation under Article 8 of the ECHR is that States must do what they can to effectively protect individuals against climate change. As the ECtHR requirement for net neutrality is not absolute ("in principle"), it is conceivable that the obligation to reach net zero emissions within the next three decades extends further, for example so that negative emissions are necessary to effectively protect individuals' rights under ECHR Article 8. It also relates to § 550 a) and the assessment of the remaining global carbon budget to meet the Paris Agreement targets, as the global carbon budget is continuously updated, not only to reflect actual emissions in the years since the budget was set, but also because of new scientific evidence and assessments.[116] This due diligence requirement thus supplements the general norms set by the ECtHR, by pointing out that States must update their targets based on what is scientifically necessary to protect individuals.

4.4.6 Act in good time in an appropriate and consistent manner by devising and implementing relevant legislation and measures

The fifth and last requirement that the ECtHR establishes refers to an assessment of whether the authorities "[...] act in good time and in an appropriate and

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[114] *KlimaSeniorinnen,* § 567.

[115] As mentioned, the principle is so widely accepted that it is considered to constitute customary law, see Sands et al., *Principles of International Environmental Law* pp. 239-240. The ECtHR also makes use of the principle in its case law, see inter alia *Asselbourg and Others* and *Tătar* (see above).

[116] See e.g.: Forster et al., "Indicators of Global Climate Change 2023: annual update of key indicators of the state of the climate system and human influence", chapter 8.

consistent manner when devising and implementing the relevant legislation and measures.", see § 550 (e).

This requirement refers to a general criterion developed in the ECtHR's environmental cases, where the Court has repeatedly emphasized that an administrative and legal framework has limited value if it is not effectively implemented in practice.[117]

Effective implementation here means both timely and in an appropriate manner. This must be seen in the context of the ECHR's purpose, which is to provide effective and practical, not illusory, protection of human rights. To protects rights, emissions need to be reduced in line with the States' objectives and with what is scientifically necessary. Therefore, the Court also requires implementation. This partly corresponds to § 550 c) and d), which emphasizes the need to provide evidence that the climate targets have been reached or are in the process of being reached, as well as to act in a diligent manner in light of the best available science.

4.4.7 Summary

After an overall assessment, the ECtHR concluded that Switzerland did not meet the requirements under Article 8. In conclusion, the Court highlights (i) the lacunae in the legal framework resulting from the fact that emission cuts in the period 2025 to 2030 were unregulated, (ii) a failure by the Swiss authorities to quantify, through a carbon budget or otherwise, national GHG emissions limitations and (iii) a failure by the Swiss authorities to meet its past reduction target. These findings sufficed for the Court to conclude that Switzerland has not fulfilled its duty 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."[118]

This highlights the connection between the *design* and *implementation* of the legal framework that must be in place to protect rights. This does not mean that the State is obliged to prevent all climate damage to individuals – what is decisive is whether the State has done *its part* to reduce emissions to protect rights under Article 8 of the ECHR, in line with the requirements the ECHR mentions in *KlimaSeniorinnen*.[119]

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[117] See e.g. *Cuenca Zarzoso v. Spain* (23383/12) 16.04.2018, § 51, cited in *KlimaSeniorinnen* § 538 to the effect that: "Regulations to protect guaranteed rights serve little purpose if they are not duly enforced and the Convention is intended to protect effective rights, not illusory ones. The relevant measures must be applied in a timely and effective manner."

[118] *KlimaSeniorinnen,* § 573.

[119] *KlimaSeniorinnen,* § 444.

5. Does Norway fulfil its substantive obligation to protect against climate change according to Article 8 of the ECHR?

5.1 Introduction

In Norway, the ECHR is incorporated into the Human Rights Act and takes precedence over other legislation in the event of a conflict.[120] The ECtHR has established that Article 8 of the ECHR encompasses 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 quality of life.

There is no doubt that climate change now, and in the future, entails a human rights risk for residents of Norway.[121] The Supreme Court has already stated that there is no doubt that the consequences of climate change in Norway will lead to the loss of human life, for example in the case of floods or landslides.[122] A risk for Norway is also that tipping points in the climate system are triggered with irreversible effects, particularly in the event of a strong weakening or collapse of the Atlantic meridional overturning circulation.[123] A study estimates that exceeding 1.5°C global warming could trigger multiple climate tipping points, for example the collapse of the ice sheets in Greenland and West Antarctica, as well as sudden and extensive thawing of the permafrost.[124]

Norwegian authorities must therefore do their part to protect their citizens against climate change under Article 8 of the ECHR. The question in the following is whether Norway fulfils its positive obligation to protect its citizens against climate change under Article 8 of the ECHR.

5.2 Norway's national greenhouse gas emissions and climate targets

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[120] Section 3 of the Human Rights Act.

[121] See more about this in NIM, *Klima og menneskerettigheter: Syv spørsmål og svar,* 27.08.2024, available here: https://www.nhri.no/2023/klima-og-menneskerettigheter-syv-sporsmal-og-svar/# -why-is-climate-change-a-0 (retrieved 19.09.2024).

[122] HR-2020-2472-P (*Climate*) para. 167. See also the Ministry of Energy *Tryggare framtid – førebudd på flaum og skred*, Meld. St. 27 (2023-2024), p. 17 ("Natural hazards can threaten fundamental values, essential functions, and put life and health at risk. The existing climate is already causing challenges, and climate change will cause more challenges going forward", our translation).

[123] Ministry of Climate and Environment, *Meld.St.26 (2022–2023) Klima i endring – sammen for et klimarobust samfunn,* p. 14 and Institute of Metrology, *Hva er AMOC og hva betyr det at den kan kollapse*, 14/05/2024, available here: https://www.met.no/nyhetsarkiv/hva-er-amoc-og-hva-betyr-det-at-den-kan-kollapse (retrieved 27.06.2024).

[124] David I. Armstrong Mckay et al., "Exceeding 1.5°C global warming could trigger multiple climate tipping points", *Science* 377, No. 6611 (2022).

In 1990, Norway's greenhouse gas emissions were 51.3 million tons of CO_2 equivalents. In 2022, Norway had reduced its territorial emissions by 4.7%, while preliminary figures show that emissions in 2023 were 9.1% lower than in 1990.[125]

Norway has so far fulfilled its international obligations under, among other things, the Kyoto Protocol by financing emission reductions in other countries.[126] Norway has also been part of the EU ETS since 2008, and this regulation is incorporated under Article 74 of the EEA Agreement.[127]

Norway has adopted several climate targets, which cover different emissions, and have different conditions and varying degrees of commitment. This is a complex picture. A table with an overview of Norway's goals and commitments can be found in the 2050 Climate Change Committee report.[128] For the present analysis, the most important targets to highlight are the following:

- The Parliament has adopted a Climate Change Act with climate targets for 2030 and 2050, which came into force in January 2018, and has since been amended twice. The Norwegian authorities have also adopted other targets, but these are not enshrined in law.
- Norwegian climate policy and targets have traditionally distinguished between emissions subject to the EU ETS, emissions *not* subject the EU ETS and emissions from land use and forestry. Norway cooperates with the EU to reduce emissions in all these sectors. The EU ETS emissions are included in the EEA agreement, but cooperation on the others follows from the climate agreement between Norway and the EU, lasting until 2030.
- Most of the climate targets allow for the use of emission trading, except for the government's "transition target", which is not legally binding.

5.3 Is the 2050 target in the Climate Change Act sufficient under Article 8 of the ECHR?

The question here is whether Norway, in the form of legislation, has made a commitment that aligns with the requirement that emissions must be reduced to

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[125] NOU 2023: 25, p. 40; Statistics Norway, *Klar nedgang i utslipp av klimagasser i 2023,* 07.06.2024, available here: https://www.ssb.no/natur-og-miljo/forumurnings-og-klima/statistikk/spälling-til-luft/artikler/ clear-decrease-in-emissions-of-greenhouse-gases-in-2023 (retrieved 26.06.2024).

[126] NOU 2023: 25, p. 40.

[127] Which states that "Annex XX contains the specific provisions on protective measures which shall apply pursuant to Article 73." The ETS directive with relevant changes and decisions are included in Annex XX section III, point 21al., available in English here: https://www.efta.int/sites/default/files/media/documents/legal-texts/eea/the-eea-agreement/Annexes%20to%20the%20Agreement/annex20.pdf (retrieved 16.10.2024).

[128] NOU 2023: 25, p. 34.

net neutrality within, in principle, the next three decades, see *KlimaSeniorinnen* §§ 548 and 549.

The Parliament passed the Climate Change Act in 2017, and it entered into force on 1 January 2018.[129] It has seven sections. According to Section 1,

> The purpose of this Act is to promote the implementation of Norway's climate targets as part of its process of transformation to a low-emission society by 2050.
>
> The purpose of the Act is also to promote transparency and public debate on the status, direction and progress of this work.
>
> *The Act is not intended to preclude joint fulfilment with the EU of climate targets set out in or adopted under the Act.* (Emphasis added).

According to Section 2 of the Climate Change Act, the Act applies "to the emissions and removals of greenhouse gases covered by Norway's first nationally determined contribution submitted under the Paris Agreement." In other words, the Act regulates *territorial emissions,* not exported or imported emissions.

Section 4, first paragraph, determines the climate target for 2050:

> The target is for Norway to become a low-emission society by 2050. A low-emission society means one where greenhouse gas emissions, on the basis of the best available scientific knowledge, global emission trends and national circumstances, have been reduced in order to avert adverse impacts of global warming, as described in Article 2 1.(a) of the Paris Agreement of 12 December 2015.

Section 4, second paragraph, first sentence specifies that "[t]he target is to achieve reductions of greenhouse gas emissions of the order of 90-95 % by 2050 from the level in the reference year 1990." NIM interprets the wording as meaning that *emissions* must be reduced by 90-95% compared to 1990, where only some *removals* from land use and forestry can be considered.[130]

Emissions and removals from land use and forestry from before 1990 are usually left out in Norway, because the overall net uptake for land use and forestry is so

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[129] *Act relating to Norway's climate targets (Climate Change Act),* LOV-2017-06-16-60, unofficial translation provided by the Ministry of Climate and Environment available here: https://lovdata.no/pro/#document/NLE/lov/2017-06-16-60?searchResultContext=1232&rowNumber=2&totalHits=6980.

[130] Additional uptake and emissions from the forestry and land use sector, in addition to those that existed in 1990, *could* be counted towards the climate targets. The Ministry of Climate and Environment has, however, stated that including such uptake to a larger degree than is done under the existing Norwegian climate targets would be a clear breach of the Paris Agreement, which does not allow regression in ambition, see Prop. 182 L (2020–2021) p. 3-4, 9.

large that including this would not be a satisfactory expression of the size of Norwegian greenhouse gas emissions.[131] Given that the removals from forest and land use are greater than 2.5–5 million tonnes of CO_2-equivalents, this assumption implies that the 2050 target is not a target of *net zero emissions,* but a *net negative* target.[132] This indicates that Section 4 of the Climate Change Act meets the requirements the ECtHR formulates in *KlimaSeniorinnen* § 548.

Section 4 of the Climate Change Act, second paragraph, second sentence further clarifies that "The effect of Norway's participation in the EU Emissions Trading System is to be taken into account in assessing progress towards this target." Section 1 third paragraph Act also mentions cooperation with the EU.

The wording of the Climate Change Act does not refer to emission trading under Article 6 of the Paris Agreement. NIM is not aware that the Ministry of Climate and Environment has opened for the use of emission trading under the Paris Agreement to reach the 2050 target, and therefore understands Section 4 of the Climate Change Act to exclude this. This is positive from a human rights point of view, because it is difficult to assess whether the system under Article 6 of the Paris Agreement at present has a sufficient environmental integrity in order for States to use it to reduce their greenhouse gas emissions as part of their duties under Article 8 of the ECHR. As the Office of the Auditor General pointed out in 2024, the rules and regulations for emission trading under Article 6 has not been fully completed, and there is uncertainty associated with such agreements.[133] In a letter to the Auditor General in 2024, the Minister for Climate and Environment acknowledges that there is a great uncertainty connected to such agreements.[134] The 2050 Climate Change Committee also emphasizes that it is not a given that the mechanisms under the Paris Agreement will have sufficient environmental integrity for Norway to use them to meet its own obligations.[135]

Section 4 of the Climate Change Act explicitly allows the use of *EU ETS* when assessing the achievement of the 2050 target. After several reforms in recent years, the EU ETS seems to contribute to emission reductions and thereby the protection

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[131] NOU 2023: 25, p. 33. See also p. 57.

[132] In 2021, uptake in the forest and land use sector was approximately 15 million tonnes of CO_2 equivalents, see NOU 2023: 25, p. 30. This is much more than the 2.5-5 million tonnes of CO_2 equivalents constituting the remaining 5-10% of emissions that could remain under the existing Norwegian 2050 climate target.

[133] Dokument 3:15 (2023-2024) p. 16.

[134] Dokument 3:15 (2023-2024) p. 34 ("The Minister of Climate and Environment recognises that there is great uncertainty related to the purchase of emission units and forest credits within the EU's climate framework and the purchase of quotas under Article 6 of the Paris Agreement.", our translation)

[135] NOU 2023: 25, pp. 66-67.

of individuals against climate change according to Article 8 of the ECHR.[136] The market stability reserve implies that national climate policy in addition to the EU ETS can lead to a higher withdrawal of emission allowances in the EU, accelerating the reduction of global emissions.[137]

The Ministry of Climate and Environment stated in the preparatory work of the Climate Change Act from 2017 that Norway's share of allowances under the EU ETS after 2030 is not known today, and that it was therefore not possible to say anything precise about the contribution of the EU ETS to the fulfilment of the 2050 target.[138]

After the reforms in the EU ETS after 2017, new estimates show that the cap on emissions will probably be lowered towards zero in 2040. [139] In that case, there will be no room for subsequent emissions from the sectors covered by the EU ETS.

The risk the authorities run in the event of a late and abrupt transition by postponing emission cuts in Norway has been pointed out by several entities over the past year, such as the 2050 Climate Committee,[140] the Committee on Norway and the EEA Committee,[141] and the Norwegian Environment Agency.[142] Emission trading may

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[136] See *Decision (EU) 2015/1814 Concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme* OJ L 264, 9.10.2015 , article 1(5a), amended by a number of later directives (latest available consolidated version is from 1.1.2024). See for the background and content of the latest amendments here: https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets/market-stability-reserve_en (retrieved 26.06.2024).

[137] *The government's climate status and plan* p. 17 ("As a consequence of the market stability reserve and the deletion mechanism, national policies for emission reductions can contribute to certain reductions in global emissions. When there is a surplus of allowances in the marked, parts of that surplus could be permanently removed through the deletion mechanism. If policies to reduce emissions result in a reduced demand for allowances from the Norwegian market, leading to a higher surplus of allowances and more being deleted, that could contribute to global emissions reductions.", our translation).

[138] Prop. 77 L (2016-2017) p. 55.

[139] The Norwegian Environment Agency, *Et 2035-bidrag som sikrer omstilling nasjonalt* pp. 6-7; NOU 2023: 25, pp. 65-67. See also Duwe et al. *Can current EU climate policy reliably achieve climate neutrality by 2050? Post-2030 crunch issues for the move to a net zero economy* , (Berlin: Ecologic Institute, Oeko-Institut, 2023), p. 12; Energi og Klima, "Kvotemarked: EU og verden", available here: https://www.energiogklima.no/klimavakten/kvotemarked-eu-og-verden (retrieved 16.09.2024) ("The EU's long-term goal of net zero greenhouse gas emissions by 2050 means that the quantity of allowances must be further reduced after 2030. According to experts on the allowance market, the latest reforms will result in the cap on emissions being lowered towards zero in 2040.", our translation)

[140] NOU 2023: 25, p. 27: ("A strategy that postpones all emission cuts in Norway until other, cheaper cuts have been implemented in other countries can result in a late and abrupt transition in Norway as we approach 2050").

[141] NOU 2024:7 p. 150: ("By 2050 Noray will be faced with a diminishing quantity of presumably significantly more expensive allowances for all sectors. With a continued low rate of territorial emission reductions, it could become necessary to implement very costly measures within a short period of time to reach the climate targets. For those reasons, measures that lead to greater territorial emission reductions in Norway are necessary", our translation).

[142] Norwegian Environmental Protection Agency, *Klimatiltak i Norge: Kunnskapsgrunnlag* s p. 7 ("Use of flexible solutions on a large scale will also delay the necessary transition. By 2050, virtually all current emissions must be eliminated. 2050 is a short time away, and there is a need for increased ambition and predictability in climate policies", our translation) and the Norwegian Environment Agency, *A 2035 contribution that ensures transition nationally,* p. 6: "The emissions trading system cannot by itself achieve the necessary transition" (our translation).

have been a beneficial strategy in the past and have benefits in the short term. As mentioned earlier, it could also have been a sound strategy if the goal were to reduce only certain emissions. However, from a 2050 perspective, this approach is inadequate, as the Paris Agreement requires the near-total removal of emissions around that time. This requires major cuts in territorial emissions. In a 2050 perspective, the 2050 Climate Committee states that "[e]missions trading and carbon offsetting is thus more a question of when an emission should be cut than whether it should be cut", and a question of "which minor emissions should remain"[143]

The Office of the Auditor General recently criticized the authorities for not taking this into account:

> The Office of the Auditor General cannot see that the uncertainty of access to emission units, forest credits and quotas has been taken into account in the management and coordination in the area. We find no evidence – neither in documents we have reviewed, nor in interviews – that the ministries have jointly discussed how they should deal with the fact that the possibility of buying emission units and allowances is uncertain.[144] (Our translation).

The Office of the Auditor General concludes that the Government's climate status and -plan for 2024 has not elaborated on uncertainties or how the ministry works with the possible use of such mechanisms, and that this uncertainty has not been sufficiently discussed and communicated, neither in the dialogue between the ministries, nor before the Parliament.[145]

Furthermore, NIM is not aware of any consideration by the authorities on how to ensure an intergenerational distribution of the burden of reducing territorial emissions to net zero. From a human rights perspective, a delayed and sudden transition to net zero – where significant measures to cut emissions are postponed until the last minute – risks shifting the burden of emission reductions onto children and future generations. In simple terms, current policies may defer taking the necessary actions to future rights holders. NIM believes this approach is problematic under Article 8 of the ECHR and falls short of the safeguards the ECtHR deems necessary to protect individuals from the dangers of climate change.

Summary

In summary, NIM believes that the Climate Change Act's 2050 targets meet the overall requirements the ECtHR sets for long-term targets (net neutrality) in

[143] NOU 2023: 25, p. 67 and p. 24.
[144] Dokument 3:15 (2023-2024) p. 19.
[145] Dokument 3:15 (2023-2024) p. 19.

KlimaSeniorinnen § 548, without taking *all* uptake from land use and forestry into account, and where emission trading under the Paris Agreement is excluded. These prerequisites should be specified in the Climate Change Act, as the 2050 Climate Committee proposes.[146] Furthermore, in our view, the authorities should consider how the use of the EU ETS will be able to ensure a proportional intergenerational sharing of the burden of reducing territorial emissions.

For the sake of completeness, NIM mentions that in 2016 the Parliament adopted a *goal of climate neutrality* in 2030 (before 2050).[147] This goal is not enshrined in law and will therefore not be sufficient to meet the obligations under the ECHR. Furthermore, this goal will largely be achieved through international cooperation, offsets and emission trading,[148] which potentially might challenge the need for progressive territorial cuts. Developments since 2016 also raise questions of whether the definition of "climate neutrality" has changed. For example, as mentioned, an EU directive from 2024 defines it as a misleading trade practice to claim that a product has climate neutrality through so-called "offsetting".[149] While the goal of climate neutrality does not meet the requirements of Article 8 of the ECHR, it is nonetheless positive that there are initiatives supporting international emission reductions that *complement, rather than replace,* territorial cuts.

5.4 Is the framework otherwise suitable to ensure that Norway becomes a low-emission society by 2050?

The next question is whether Norway's framework for becoming a low-emission society in 2050 is, taken as a whole, suitable to ensure that Norway does its part to reduce emissions and protect individuals against climate change. This must be decided following an overall assessment of several requirements, see *KlimaSeniorinnen* § 550.

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[146] NOU 2023: 25 p. 77 (Update the Climate Change Act to "Specify Norway's climate target for 2050 as to reduce emissions from Norwegian territory by 90–95 per cent compared with the 1990 level, to between 2.5 and 5 million tonnes of CO2 equivalents, without including emissions and removals from the forestry and land use sector. Norway should not use emissions trading to achieve this target. This implies a clearer and somewhat more ambitious target […]").

[147] Stortingsvedtak No. 897 (14/06/2016): "The parliament asks the government to ensure emission reductions corresponding to total Norwegian emissions from 1 January 20230. This climate neutrality can be achieved through the EU market for allowances, international cooperation on emissions reductions, emissions trading, and project-based cooperation" (our translation). Available here: https://www.stortinget.no/no/Saker-og-publikasjoner/Vedtak/Vedtak/Sak/?p=65501 (retrieved 16.09.2024).

[148] See *the Government's climate status and plan,* p. 18, about this goal: "For this reason, Norway participates in international emissions trading with the aim of increasing the speed and scope of global emission cuts." (our translation)

[149] *Empowering Consumers Directive*, Annex point 2, inserting a new point 4c in *Directive 2005/29/EC*, Annex I.

5.4.1 Timeline for carbon neutrality and a carbon budget or equivalent

The question here is whether Norway has a carbon budget or has set corresponding limits for the remainder emissions, assessed in light of global targets for emission reductions, see *KlimaSeniorinnen* § 550 a).

Under Section 6 second paragraph of the Climate Change Act,

> Each year, the Government shall, on the basis of scientific information, provide the Storting in a suitable manner with [...]
>
> d. a status report on Norway's carbon budget, taking into account relevant arrangements within the framework of joint fulfilment with the EU, if agreed.

The Government meets this obligation through the Government's Climate Status and Plan ("Green Book").

Through the climate agreement with the EU, Norway has joined the Effort Sharing Regulation (ESR) for 2021–2030.[150] This provides Norway with a carbon budget for emissions in *non-ETS sectors* for the period 2021–2030, where, under the current agreement, Norway must reduce emissions by at least 40% by 2030 compared to 2005 levels.[151] Through Norway's adherence to the ESR, Norway receives annual carbon budgets for emissions not subject to quotas, which is determined by ESA.[152] The ESR stipulates that each country's efforts shall be distributed on the basis of relative Gross Domestic Product (GDP) per capita.[153] Countries with a high gross national product per capita must cut the most, but it is possible to adjust the budget to a certain degree, depending on which countries have the greatest potential for cost effective reductions.

Norway has not entered into an agreement with the EU to voluntarily join the enhanced Effort Sharing Regulation for 2021–2030.[154] However, according to its Climate Status and Plan, the Government considers that Norway must reduce emissions under the Effort Sharing Regulation by 50% by 2030.[155] Moreover, Norway has not entered into a new climate agreement with the EU that will apply after 2030.

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[150] See *the EEA Agreement - Protocol 31 on cooperation in special areas outside the four freedoms*, article 3.8. Available here: https://www.efta.int/sites/default/files/documents/legal-texts/eea/the-eea-agreement/Protocols%20to%20the%20Agreement/protocol31.pdf (retrieved 17.10.2024).

[151] *The government's climate status and plan*, p. 14.

[152] EFTA Surveillance Authority Decision, *Setting out the annual emission allocations for the period from 2021 to 2030 for Iceland and Norway pursuant to the Effort Sharing Regulation*, 21.7.2021 (Decision No: 204/21/COL).

[153] Effort Sharing Regulation, recital 2.

[154] The authorities have not yet decided whether Norway will join the Enhanced Effort Sharing Regulation from 2023, see the Government's position paper, *Forsterket innsatsfordeling 2021-2030*, 12 June 2023, available here: https://www.regjeringen.no/no/sub/eos- notatbasen/notatene/2021/aug/enforsterket-instasfordeling-2021-2030/id2878385/ (retrieved 27.06.2024).

[155] *The government's climate status and plan*, p. 14.

This means that Norway does not have a binding carbon budget for non-ETS sectors after 2030.

For *EU ETS sectors,* Norway has not set a carbon budget beyond Norway's participation in the ETS. Following the latest reforms of the EU ETS, the cap on emissions is projected to be reduced by 4.3% per year from 2024,[156] down to zero by 2040. In practice, this system *de facto* set limits for which emissions that can be allowed in the EU ETS sectors, similar to a carbon budget. At the same time, after the reforms in the EU ETS, a national carbon budget for EU ETS sectors emissions will contribute to a further reduction of greenhouse gases below the European emission cap. The government's assumptions that formed the basis of whether a national carbon budget should be introduced when the Climate Change Act was adopted in 2017, have therefore changed.[157]

This means that there is no nationally set carbon budget or equivalent limits for how *all emissions in Norway* must be reduced *after 2030*.

Moreover, Norway has, to our knowledge, not decided how large a share we can consume of the remaining global carbon budget in order to limit global warming to 1.5°C. Likewise, the Norwegian Environment Agency is unaware of any analyses that quantify what Norway's emission targets and contributions under the Paris Agreement should be, based on the IPCC's carbon budget and fair burden-sharing assessments.[158] In *KlimaSeniorinnen,* Switzerland argued that there was no established method for calculating each State's share of the global carbon budget, and that, in any case, the government's internal assessments when preparing climate targets were equal to a carbon budget. However, the ECtHR rejected this argument. The Court pointed out that the Paris Agreement contains burden-sharing principles that can help calculate national carbon budgets, that the IPCC has emphasized the importance of such a process, and that the EU's climate law allows for indicative carbon budgets.[159]

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[156] Ministry of Climate and Environment, *Dette er klimakvotesystemer på bedriftsnivå,* 22.01.2024, available here: https://www.regjeringen.no/no/tema/klima-og-miljo/klima/innsiktsartikler-klima/klimakvoter/id2076655/ (retrieved 27.06.2024).

[157] In 2023, the Ministry of Climate and Environment stated that "If policies to reduce emissions result in a reduced demand for allowances from the Norwegian market, leading to a higher surplus of allowances and more being deleted, that could contribute to global emissions reductions" (our translation), see. *The Government's climate status and plan* p. 17. See, by contrast, Prop.77 L (2016-2017) p. 45 ("Emission reductions will take place where the costs are lowest and it is not important how much each country reduces its emissions within the ceiling. On the contrary, a national limitation on emissions covered by the emissions trading system could negative consequences for business activities and business development in Norway", our translation).

[158] The Norwegian Environment Agency, *Et 2035-bidrag som sikrer omstilling nasjonalt*, p. 20.

[159] *KlimaSeniorinnen,* § 570-571.

An analysis of Norway's share of this budget will need to be based on the fact that the remaining global carbon budget to limit warming to 1.5°C is approximately 150 $GtCO_2$ for a 67% chance, and approximately 100 $GtCO_2$ for an 83% chance, as of January 2024.[160] Given today's global emissions, this budget will be exhausted before 2030.

There are several tools for calculating each country's share of the global carbon budget using different methods. One example is the "Carbon Budget Explorer", which has been developed by the Netherlands eScience Center in collaboration with the Dutch Environmental Assessment Agency.[161] This tool indicates that current targets in the Norwegian Climate Change Act for 2030 and 2050 allow for higher Norwegian emissions than Norway's share of the remaining carbon budget in order to limit warming to 1.5°C, even with a method where Norway's share is calculated based on population (*per capita*).[162] Another study supports the same conclusion.[163]

Methods based on historical greenhouse gas emissions (*polluter pays*), or financial capacity (*ability to pay*), require Norway to reduce emissions even more. Methods that maintain the State's current share of global emissions into the future (*grandfathering*) will allow for higher emissions in Norway, but are generally considered inconsistent with a fair burden sharing under the Paris Agreement.[164]

Summary

The absence of a comprehensive carbon budget for all emissions up to 2050 was central to the conviction of Switzerland, because the ECtHR was not convinced that

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[160] Forster et al., "Indicators of Global Climate Change 2023: annual update of key indicators of the state of the climate system and human influence".

[161] This tool is available here: https://www.carbonbudgetexplorer.eu/ (retrieved 26.06.2024). Partially on the basis of this tool, the Dutch Environment Directorate has recommended that the Netherlands reduce its emissions by 90% by 2040 and further contribute by financing emission reductions globally, see Detlef van Vuuren et al., "What are Just and Feasible Climate Targets for the Netherlands?" (PBL Netherlands Environmental Assessment Agency, 2024), available here: https://www.pbl.nl/en/publications/what-are-just-and-feasible-climate-targets-for-the-netherlands (retrieved 27.06 .2024).

[162] According to this tool, if one distributes the global carbon budget, basing it off a 67% chance of reaching the 1.5°C target, equally between all states based on population (*per capita*), Norway has to reduce its emissions by 69% by 2030 compared to its 1990 level, and by 90% by 2040. To have an 83% chance of reaching the 1.5°C target, Norway must reduce its emissions by 80% by 2030 and reach net negative emissions by 2040. Under such an approach Norway has a remaining carbon budget of less than 100 $MtCO_2$ in 2024. Please note that this tool uses a global emissions database which appears to overestimate Norway's emissions in recent years. However, we do not expect this to have significant effects on the estimated *per capita* carbon budget for Norway.

[163] Dr. Yann Robiou du Pont, "Calculation of a carbon budget for Norway", expert opinion attached to the applicants' submission in Greenpeace Nordic and Others. v. Norway (34068/21), 14.08.2024, available here: https://www.greenpeace.org/norway/klimaendringer/klimasoksmal/ecthr-documents/ (retrieved 13.09.2024).

[164] See e.g. Rajamani et al., "National 'fair shares' in reducing greenhouse gas emissions within the principled framework of international environmental law".

an effective framework in the climate area could be in place without quantifying national limits for greenhouse gas emissions through a carbon budget or otherwise.[165] Switzerland was also criticized by the ECtHR for not having a carbon budget, and for allowing more greenhouse gas emissions than even an "equal per capital emissions" quantification approach would entitle it to use.[166]

Norway, like Switzerland, has yet to establish a carbon budget or equivalent limits for its remaining greenhouse gas emissions across all sectors for the period after 2030, in light of Norway's fair share of the remaining carbon budget to limit warming to 1.5°C. Data NIM has examined indicates that Norway's current climate targets will permit higher emissions levels than what is compatible even with a distribution of the global carbon budget based on population. This element therefore strongly suggests that Norway's framework is insufficient under Article 8 of the ECHR.

Recommendation

NIM therefore recommends that Norway, based on the remaining global carbon budget for the 1.5°C target, establish a comprehensive carbon budget for all emissions, which shows the distribution of emission reductions until 2050.

NIM will here present two examples that illustrate different procedures and methods for determining such a carbon budget. Both are based on expert advice from independent climate councils and ensure openness and transparency that is the basis for the authorities' assessments of the carbon budget. This enables an informed democratic debate as to what responsibility Norway takes and should take to reach the 1.5°C target. While the remaining global carbon budget to meet the 1.5°C target is very limited, these methods also consider what is realistically achievable within a given timeframe, both in terms of territorial emissions and through the use of emissions trading systems.

The first example is the method the European Scientific Advisory Board on Climate Change used to advise the EU on its 2040 target.[167] According to the European Climate Law, one of the roles of the Advisory Board is to provide scientific advice and issue reports on indicative greenhouse gas budgets for the EU.[168] The Advisory Board uses a method that assesses the EU's share of the remaining global carbon budget to limit warming to 1.5°C in light of both methods for fair burden distribution

[165] *KlimaSeniorinnen,* § 570.
[166] *KlimaSeniorinnen,* § 569.
[167] European Scientific Advisory Board on Climate Change, *Scientific advice for the determination of an EU-wide 2040 climate target and a greenhouse gas budget for 2030–2050*, chapters 4.5 and 5.1.
[168] European Climate Law, Article 3(2)(b).

between countries, and feasible emission reduction scenarios for the EU. In an assessment of this, the Advisory Board concluded with the following:

> The lowest feasible budget estimates from the scenarios assessed in this report are still higher than the equal per capita emissions allocations and other fair share estimates based on principles such as 'polluter pays' and 'ability to pay'. Whichever ethical principle is considered, there is a gap between the feasibility estimates and fair share estimates. This indicates that the EU should be looking to address this shortfall as part of its commitment to the Paris Agreement temperature goal.[169]

In other words, the Advisory Board concluded that no feasible emission reduction scenarios for the EU were compatible with an equal *per capita* distribution of the remaining global carbon budget for the 1.5°C target. Therefore, the Advisory Board argued that the EU should ensure international emission reductions that *complement, rather than replace,* EU-wide emission reductions. The Advisory Board therefore recommended that the EU should reduce emissions by 90-95% by 2040, with a carbon budget of 11-14 $GtCO_2$ for the period 2030-2050. The Advisory Board concluded that pursuing the more ambitious end of the 2040 target range improves the fairness of the EU's contribution, and that domestic emission reductions must be complemented by measures outside the EU to achieve a fair contribution to climate change mitigation.[170]

According to the European Climate Law, the European Commission must, based on this advice, publish its projected indicative Union greenhouse gas budget for the 2030-2050 period, which takes the best available science and the EU's obligations under the Paris Agreement into account.[171] In February 2024, the European Commission proposed a target of 90% emission cuts by 2040 with a corresponding indicative carbon budget of 16 $GtCO_2e$ for the period 2030-2050.[172] After the elections to the European Parliament in June 2024, the incoming president of the

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[169] European Scientific Advisory Board on Climate Change, *Scientific advice for the determination of an EU-wide 2040 climate target and a greenhouse gas budget for 2030–2050*, p. 48.
[170] Ibid, pp. 10 and 48.
[171] European Climate Law, Article 4(4).
[172] *Communication from the Commission: Securing our future Europe's 2040 climate target and path to climate neutrality by 2050 building a sustainable, just and prosperous society* , COM/2024/63 final, Document 52024DC0063, 06.02.2024, available here: https://eur -lex.europa.eu/legal-content/EN/TXT/?uri=COM:2024:63:FIN (retrieved 20.09.2024); *Commission Staff Working Document Impact Assessment Report Part 5 Accompanying the Communication* , SWD/2024/63 final, Document 52024SC0063, 06.02.2024, p. 10, available here: https://eur-lex.europa.eu/legal-content/ EN/TXT/?uri=CELEX:52024SC0063 (retrieved 20.09.2024).

European Commission stated that this 2040 target will be enshrined in European Climate Law.[173]

The second example comes from the Danish Council on Climate Change. In 2019, it estimated that if Denmark were to reach its climate target of 70% emission reduction by 2030 and net zero by 2050, the country would have a remaining carbon budget of 325–525 $MtCO_2e$.[174] The Council found that this was in line with Denmark's share of the global carbon budget for the 1.5°C target, calculated based on population (*per capita*).[175] Denmark's emissions in the last five years have used up at least half of this budget. Norway will probably have roughly the same remaining *per capita* carbon budget as Denmark, since the country has a similar population and thus a roughly equivalent share of the world's population.

Since 2022, the Council has used a new climate model which has many similarities to a carbon budget, but which instead uses a hypothetical scenario in which Denmark's emissions are scaled up to a global level based on Denmark's share of the world's population.[176] According to this model, Denmark's current climate target will still be in line with the goal of keeping global warming below 1.5°C by 2100, but there will be a long period where the temperature overshoots this level. To reduce the risk of overshoot, the Council recommends that Denmark consider more ambitious targets, such as an 80% emission reduction in 2030, 90% in 2035 and net zero by 2040.[177] In NIM's view, this is an example of a method that sets limits for the remaining emissions a country permits, which can be compared to a carbon budget.

These two examples illustrate methods for determining a national carbon budget. While the ECtHR does not require a specific method, having a carbon budget or its equivalent is crucial to ensure the legal framework now required under Article 8 of the ECHR. An evidence-based, transparent process – where a proposed carbon budget is subject to public consultation and evaluated against realistic emission scenarios – not only ensures a robust democratic debate, but also helps ensure that

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[173] Statement at the European Parliament Plenary by President Ursula von der Leyen, candidate for a second mandate 2024-2029, 18.07.2024, available here https://neighbourhood-enlargement.ec.europa.eu/news/statement-european-parliament-plenary-president-ursula-von-der-leyen-candidate-second-mandate-2024-2024-07-18_en (retrieved 16.09.2024).

[174] Klimarådet, *Rammer for dansk klimapolitik: Input til en ny dansk klimalov med globalt udsyn*, 02.10.2019, p. 10-11, available here: https://klimaraadet.dk/da/node/362 (retrieved 30.08.2024).

[175] Ibid, p. 12. This is based on a 66% chance of meeting the 1.5°C target.

[176] Klimarådet, *Danmarks klimamål: Vurdering af Danmarks nuværende og kommende klimamål i et globalt klimaperspektiv*, 2022, chapter 4.2, available here: https://klimaraadet.dk/da/analyse/danmarks-klimamaal (retrieved 30.08.2024).

[177] Ibid, chapter 6.

Norway contributes its fair share to emission reductions in line with the 1.5°C target and protects the rights safeguarded by Article 8 of the ECHR.

5.4.2 Intermediate climate targets and a pathway to net neutrality

The second requirement in *KlimaSeniorinnen* § 550 b) points to two things. Firstly, the authorities must adopt intermediate climate targets towards net neutrality. Secondly, the authorities must establish a pathway that shows how they will achieve emission reductions towards net neutrality around 2050.

Intermediate climate targets

The first question is whether Norway has set out intermediate climate targets that, in principle, appear to be capable of ensuring that Norway transition to a low-emission society by 2050.

Norway has a climate target for 2030. According to Section 3 of the Climate Change Act, "[t]he target is for greenhouse gas emissions to be reduced by at least 55 % by 2030 from the level in the reference year 1990." Norway has no other statutory climate targets between 2030 and 2050.

Under the Climate Change Act, Norway can achieve its 2030 target in collaboration with the EU, as it currently does through its climate agreements with the EU. The methods to calculate and allocate these emissions will, as for the 2050 target, be decisive for which emissions must be reduced in Norway.

For removals from *land use and forestry,* the Ministry of Climate and Environment specified in the preparatory work that Norway's existing climate targets under the Paris Agreement correspond to the level of ambition in the EU's enhanced climate targets for 2030 for non-ETS sectors (except for land use and forestry) EU ETS emissions.[178] Furthermore, the Ministry has held that the change of the 2030 climate target in 2023 was not meant to change the prerequisites for the target, nor the approach to *removals from land use and forestry which* are to be taken into account.[179] As NIM understands it, emissions and removals from land use and forestry are not included when assessing the 2030 target in comparison to 1990 levels. However, in 2023, the Ministry seems to suggest that *additional* emissions and removals from the forest and land use sector, beyond those that existed from 1990, could be considered. How this will be done still needs to be clarified, according to the Ministry of Climate and Environment.[180]

[178] Prop. 182 L (2020–2021) pp. 4-5, 9.
[179] Prop. 107 L (2022–2023) p. 1, section 2.3.
[180] Prop. 107 L (2022–2023) s. 4.

The wording of Section 3 of the Climate Change Act does not specify whether, and if so which, allowances under the EU ETS are to be considered in the assessment of whether the target is achieved. In a 2023 proposal for amending the 2030 target in the Climate Change Act, the Ministry held the following:

> Several of the consulted parties also propose that the Climate Change Act should include a legal requirement that achieving climate targets must be based on emission reductions within Norway. The Ministry would like to point out that market cooperation under Article 6 of the Paris Agreement will only happen if the target is not met through Norway's participation in the EU's climate framework, making such cooperation necessary. As long as a settlement mechanism with the EU to ensure consistent reporting is not in place, it is uncertain whether Norway's participation in the EU's climate framework will enable the country to fully achieve the 55 percent emission reduction target.[181]

In other words, the Climate Change Act sets up a system where emission trading systems to a large extent can be used to achieve the 2030 target. In this way, Section 3 of the Act creates a risk of a delayed and abrupt transition to a low emission society, increasing the likelihood that children and future generations will face greater infringements on their rights. As the ECtHR emphasizes in §§ 548–549 and in § 550 b), States must reduce their emissions immediately and progressively. Territorial emission reductions are essential to ensure a fair distribution of the reduction burden between generations. It does not seem that Norway's Climate Change Act adequately plans for this. This is an element that points in the direction of Norway not fulfilling its obligations under Article 8 of the ECHR.

Additionally, the government has adopted a "transition target", according to which all emissions are to be reduced *in Norway* – without the use of emission trading systems – by 55% compared to 1990 by 2030.[182] This takes better account of the need for a gradual transition, which is positive from a human rights point of view. However, the target is not legally binding, and the government has rejected to include it in the Climate Change Act.[183] Accordingly, it does not satisfy the criteria the ECtHR sets for a legally binding climate framework.

It can also be mentioned that the Government is working on adopting a new climate target for 2035, which is to be registered under the Paris Agreement. The Norwegian

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[181] Prop. 107 L (2022–2023) pp. 6-7 (our translation).

[182] See the political platform of the sitting government: "En regjering for vanlige folk" (a government for ordinary folks), *Hurdalsplattformen* (2021), p. 29, available in Norwegian here: https://www.regjeringen.no/no/dokumenter/hurdalsplattformen/id2877252/

[183] Ministry of Finance, *Meld. St. 2 (2022-2023), Revidert nasjonalbudsjett 2022*, section 3.6.4.

Environment Agency has assessed what this target should be and recommends that Norway should aim to reduce emissions of greenhouse gases by at least 80% in 2035 compared to 1990, and a separate target for a 60% reduction *nationally*.[184]

Pathways towards the 2050 target

The second question is whether the authorities have drawn up a pathway for emission reductions which the authorities must achieve in various sectors to become a low emission society by 2050.

Under section 6 of the Climate Change Act, the government is obliged to annually report to Parliament on their climate work. This applies, among other things, to implementation of climate targets in the Climate Change Act, projections of emissions and uptake and "an overview showing sectoral emission trajectories for emissions that are not covered by the EU Emissions Trading System and the types of measures that will be necessary to achieve them".

Since 2022, the government fulfils the reporting requirements under Section 6 of the Climate Change Act through the Government's Climate Status and Plan ("Green Book"), where Chapter 4 discusses the status for the climate targets and target achievement. This is an important move that strengthens the management and reporting mechanism under Section 6 of the Climate Change Act.

At the same time, as the Office of the Auditor General has pointed out, much work remains in order to develop the necessary climate measures to achieve the climate targets. This particularly applies to the planning for concrete measures to reach the 2050 target. The Office of the Auditor General criticizes that the measures referred to in the reporting are in many cases not given specific timelines or concrete details, and it is not clear from the plan which ministry is responsible for finalizing and implementing the various measures. These shortcomings highlight the uncertainty surrounding whether the government has established sufficient measures to achieve the necessary reductions in greenhouse gas emissions for Norway to become a low-emission society by 2050.[185]

The Danish Climate Act has a system that obliges the authorities to a greater extent to have a pathway to reach net zero emissions. In addition to a general provision on a Climate Status and Plan, Section 7 of the Act stipulates that the Minister for Climate, Energy and Utilities must annually present a climate programme for the

[184] The Norwegian Environment Agency, *Et 2035-bidrag som sikrer omstilling nasjonalt*, p. 2. This is based on a methodology similar to the one utilised by the European Scientific Advisory Board.
[185] Dokument 3:15 (2023-2024) p. 10.

Danish Parliament that includes "[t]he planned climate initiatives and measures, including short- and long-term effect and the projected future effect thereof."

The ECtHR also points out that it is relevant in the overall assessment whether the authorities have set targets for different sectors. The Norwegian Parliament has adopted ambitions for some sector areas, but these are not enshrined in the Climate Change Act. The Office of the Auditor General concludes that the lack of sectoral strategies for the climate work can contribute to a weakening of the perceived commitment of different ministries.[186]

In NIM's view, Norway thus lacks a sufficient pathway that shows the emission trajectories that the authorities must achieve in various sectors towards net zero emissions around 2050, in line with *KlimaSeniorinnen* § 550 b).

Summary

Norway has not adopted legally binding climate targets for 2035, 2040 and 2045. In NIM's view, the 2030 target set in the Climate Change Act is not on its own sufficient to ensure an emissions trajectory capable of reaching the 2050 target. Moreover, the authorities also do not adequately account for the expected effect of various climate measures and tools that show an achievable pathway to 2050. In NIM's view, both of these shortcomings suggest that Norway does not meet its obligations under Article 8 of the ECHR.

5.4.3 Evidence for timely implementation of the climate targets

The third relevant requirement is whether Norwegian authorities can provide evidence showing whether they have duly complied, or are in the process of complying, with the relevant GHG reduction targets.

Norway has contributed to international emission reductions. Among other things, Norway has participated in the EU ETS since 2008,[187] and fulfilled its obligations under the Kyoto Protocol. This has contributed to emission reductions and thereby to protecting individuals against climate change. As discussed in section 4.3.3, NIM argues that it is within the authorities' margin of appreciation to use emission trading systems as part of its approach to protect citizens from climate change on the way to a low-emission society. However, this approach must be accompanied by a comprehensive plan showing how territorial cuts will progressively increase over time, ensuring the achievement of net neutrality by around 2050.

In 2022, Norway had reduced *territorial* emissions by 4.7% since 1990. Preliminary data indicates that emissions in 2023 were reduced by 9.1% compared to 1990

[186] Dokument 3:15 (2023–2024) p. 14.

[187] *The government's climate status and plan* p. 16.

levels, meaning that reductions last year were almost twice as much in 2023 as in the last 22 years. This is a step in the right direction and a necessary change of pace. Nevertheless, reductions in Norway's cuts are lower than the reductions Switzerland was criticized for by the ECtHR. It is also far below what other countries in national courts have been ordered to reduce under Article 8 of the ECHR.[188]

Regarding the government's projected emission reductions, the Government's *Climate Status and Plan* as of 6 October 2023 shows that the assessments of whether it was on track to meet its climate targets varied:

- With *adopted policy* in the national budget for 2023, the government could document expected *territorial* emission reductions of approximately 24% compared to 1990 in 2030, below the "transition target" of 55%.[189]
- For emissions in *non-ETS sectors,* Norway has incurred an emissions debt of 2.8 million tonnes under the climate agreement with the EU. The government presented new policies, instruments and measures which for the first time made it likely that Norway will reduce these emissions by 50% in 2030 compared to 2005.[190] However, ESA published a report on 31 October 2023, where they concluded that Norway had a significant emissions gap to even achieve 40% emission reductions in the non-ETS sector.[191]
- The authorities can only document the effect from *EU ETS* under the 2030 target when an intergovernmental settlement between Norway and the EU is finalized.[192]
- In the event that the 2030 target is not met through Norway's participation in the EU's climate framework, the government has opened the possibility for *ad hoc* use of agreements under Article 6 of the Paris Agreement. However, it remains unclear to what extent these credits will meet the necessary quality standards that should decide whether they are accepted.

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[188] Without it being directly relevant for the questions considered here, we note that national courts have ordered states to reduce their territorial emissions by 25% and 30% by 2020 compared to 1990 in order to protect the right to life and privacy under Articles 2 and 8 of the ECHR, see *Urgenda*, para. 7.5.1; *Klimatzaak*, paras. 169, 176, 179, 191, 199, 202, 213, 214.

[189] *The government's climate status and plan* pp. 97 and 106. For the expected emission reductions resulting from current policies, and assessed potential for increased reductions, see figure 4.7 on p. 106.

[190] *The government's climate status and plan*, *pp.* 4-7, 97, 100.

[191] EFTA Surveillance Authority, *ESA Climate Progress Report 2023,* 31.11.2023, p. 11, available here: https://www.eftasurv.int/cms/sites/default/files/documents/gopro/Climate_Progress_Report_2023_Final.pdf (retrieved 27.06. 2024)

[192] *The government's climate status and plan,* p. 17: (it is "necessary to carry out an intergovernmental settlement to distribute the climate effect of the quota system between the EU and Norway.", our translation)

At present, the authorities cannot document that they are in the process of complying with the “transition target”. Based on available documentation, it appears somewhat more likely that the target enshrined in Section 3 of the Climate Change Act will be reached, and if so, with the use of emission trading systems.[193]

In light of the limited territorial emission reductions so far, and the need for progressive, substantial, and immediate reductions, this is an element that suggests that Norway is complying with its positive obligation to protect against climate change according to Article 8 of the ECHR.

5.4.4 Process for updating climate targets in line with science

The fourth requirement the ECtHR mentioned requires an assessment of whether the authorities have in place a process to keep the relevant GHG reduction targets updated with due diligence, based on the best available evidence.

Section 5 of the Climate Change Act reads as follows:

> To promote the transformation to a low-emission society, see section 4, the Government shall in 2020 and thereafter every fifth year submit updated climate targets to the Storting. These shall:
>
> a) be based on the best available scientific knowledge;
>
> b) as far as possible be quantitative and measurable.
>
> Climate targets submitted under this section shall represent a progression from the preceding targets and promote a gradual transformation in the period up to 2050. [...]

Such a process, which explicitly stipulates that the targets *shall* constitute a progression, promoting a gradual transformation towards 2050, and based on the best available science, is in our view sufficient to meet the requirements set out by the ECtHR in *KlimaSeniorinnen* § 550 d). This element therefore suggests that Norway has an adequate climate framework.

5.4.5 Act in good time in an appropriate and consistent manner by devising and implementing relevant legislation and measures

The fifth and final requirement that the ECtHR sets out is that States must act in good time in an appropriate and consistent manner by designing and implementing relevant legislation and measures. As mentioned, the choice of means to achieve the climate targets lies within the authorities' margin of appreciation.

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[193] However, the EEA review committee writes that "Under the climate agreement as it currently stands, based on the EU's original climate regulations for 2030 adopted in 2018, Norway is not likely to reach the targets under neither the Effort Sharing Regulation nor the LULUCF-Regulation.", see NOU 2024:7, p. 146 (our translation).

The Climate Change Act allows Norway to achieve its climate targets in collaboration with the EU. It is up to the authorities to decide how closely Norway's climate policies should be linked to the EU. However, if the authorities choose to cooperate with the EU to achieve the climate targets, they must demonstrate how this cooperation ensures timely action to adopt relevant legislation and measures that enable net neutrality in principle within the next three decades.

Norway's participation in the EU ETS is anchored in the EEA agreement, ensuring that roughly half of Norwegian greenhouse gas emissions will be reduced through EU collaboration, regardless of whether Norway enters into a new climate agreement with the EU for the period after 2030.

Norway's current climate agreement with the EU regulates the other half of Norway's emissions, which are covered by Effort Sharing Regulation. The climate agreement also regulates cooperation on forestry and land use (LULUCF Regulation). However, the current climate agreement between Norway and the EU still only applies to a 40% emission reduction in 2030. It is unclear when an agreement for a joint fulfilment of a 55% reduction in 2030 will be in place. At present, Norway does not have an agreement to collaborate on emission reductions for these sectors after 2030 with the EU.[194]

This creates uncertainty about the measures and legislation Norway will implement to meet its climate targets. While the EU has several regulations relevant to Norway in the climate sector, it takes time to clarify the applicability of these regulations within the EEA agreement and then to incorporate them into Norwegian law. This delay contributes to uncertainty and may result in a shorter time frame for Norway to ensure a gradual transformation to a low-emission society by 2050. The Committee on Norway and the EEA therefore recommends, among other things, reducing the backlog on implementing climate-relevant EU regulations and improving Norway's coordination of its positions in the European discussions on new policies.[195]

The need for timely and immediate action to reduce emissions suggests that the government should decide and create a plan for how it will implement measures that protect against dangerous climate change under Article 8 of the ECHR. This can be achieved either through collaboration with the EU in designing relevant legislation and measures, or by Norway designing them independently. If cooperation with the EU is to lead to Norway becoming a low-emission society by

[194] NOU 2024:7, p. 143: "Norwegian media reported in 2023 about disagreements within the government concerning climate cooperation with the EU on forestry and land use, and the climate agreement has not been updated as of January 2024." (our translation)
[195] NOU 2024:7, pp. 148–151.

2050, NIM emphasises the need for the regulations from the EU to be designed and implemented in good time in order to achieve the 2050 target. According to its *Climate Status and Plan,* the government wants to continue to cooperate with the EU after 2030, and engage in ongoing dialogue regarding the terms under which climate regulations are to be applied in Norway.[196] However, as of the time of writing (2024), this has yet to be clarified.

Without such clarification, it is difficult to conclude that the authorities are fulfilling the requirement the ECtHR sets for the authorities to act in good time by designing, developing and implementing the relevant legal framework. [197] This requirement therefore also suggest that Norway is not meeting its obligations under the ECHR.

5.5 Conclusion

In assessing whether Norway its obligation under ECHR Article 8 to reduce emissions to protect against dangerous climate change, NIM takes the view that the Norwegian long-term target, in Section 4 of the Climate Change Act of becoming a low-emission society by 2050, is a good starting point for Norway to do its part to protect against dangerous climate change under Article 8 of the ECHR. Section 5 of the Climate Change Act also provides for a good process for reviewing climate targets every five years based on the best available science, in line with the requirement mentioned in *KlimaSeniorinnen* § 550 d.

Nevertheless, NIM's overall conclusion is that the Climate Change Act is unlikely to meet the obligations under the ECHR. This is because, in our opinion, the Climate Change Act does not fulfil the other four requirements, mentioned above, which ECtHR set out as a part of its overall assessment in *KlimaSeniorinnen* § 550.

Firstly, Norway does not have a comprehensive carbon budget that ensures substantial, progressive and immediate emission cuts towards net zero by 2050, in line with international climate targets (*KlimaSeniorinnen* § 550 a). Norway has not adopted a carbon budget or an equivalent method of quantification that sets emission limits for 2050, based on Norway's share of the remaining global carbon budget within the 1.5°C target in the Paris Agreement. The current targets in the Climate Change Act seem to allow for more Norwegian emissions than what a method where the global carbon budget is distributed by population (per capita) would allow for. The same was true for the Swiss Climate Act, which was one of the arguments emphasised by the ECtHR in favour of its finding that Switzerland was in breach of Article 8 of the ECHR. It therefore seems uncertain whether Norway can

[196] *The government's climate status and plan*, p. 15.
[197] *KlimaSeniorinnen,* § 572.

be said to take a sufficiently large responsibility for protecting individuals against climate change.

Secondly, Norway has not adopted sufficient intermediate climate targets in the Climate Change Act or a pathway for how emissions are to be reduced in various sectors by 2050 (*KlimaSeniorinnen* § 550 b). Norway does not have statutory intermediate climate targets between 2030 and 2050, and has not adopted a pathway for how such targets are to be reached, set out by sectors or other relevant methodologies, as the ECtHR requires. It is a step in the right direction that the government has taken action to strengthen climate policy by creating the Government's Climate Status and Plan (Green Book). In NIM's view, however, this does not meet the requirements for pathways as set out by the ECtHR, nor does it set out measures for emission cuts necessary to reach the climate targets by sector (or similar methodology) and within relevant time frames. A lot of work remains to develop and strengthen policies, instruments and specific measures that could achieve the climate targets. The Green Book also provides little clarification on how greenhouse gas emissions are to be reduced after 2030.

Thirdly, Norway has only reduced territorial emissions by 9.1% since 1990. This is significantly less than Switzerland, which had reduced its emissions by 19%, but which the ECtHR still found to be contravening Article 8 of the ECHR due to, among other things, too low emission cuts. This indicates that Norway would not be able to provide evidence showing that it is duly complying with relevant emission reduction targets (*KlimaSeniorinnen* § 550 c).

Norwegian authorities, however, have long met their climate targets by contributing to emission cuts in other countries through carbon emissions trading under its agreement with the EU (primarily EU Emission Trading System) and under the Kyoto Protocol. Although the ECtHR does not directly discuss the use of flexible mechanisms as a means of achieving emission reductions, the Court normally interprets the ECHR in harmony with other international agreements concluded by the Contracting Parties. This indicates that emission trading in line with international agreements can be included in the overall assessment under Article 8. At the same time, the 2050 Climate Change Committee, the Committee on Norway and the EEA, the Norwegian Environment Agency and the Office of the Auditor General of Norway have recently pointed out that Norway risks a rapid and abrupt transition if we continue to delay territorial emission cuts.[198] By 2050, all emissions must be reduced to net zero, and by 2040, it is estimated that the emission cap under the EU ETS will be reduced to zero. As the 2050 Climate Change Committee

[198] See sections 4.3.3 and 5.3.

has pointed out, the question is then no longer which territorial emissions should be reduced, but "which minor emissions should remain."[199] In order to achieve net neutrality within the next three decades, the authorities must demonstrate how they plan to reduce emissions in Norway to net zero. Delayed national cuts will increase the risk of future swift and abrupt measures that may affect human rights, which could be a particular burden for young people and future generations. Low territorial emission reductions in Norway therefore indicates that the transition to a low-emission society is going too slowly, and thus that this third requirement has not been met.

Fourthly, Norway has not clarified whether, or how, the climate targets are going to be achieved in cooperation with the EU. This creates uncertainty as to whether the authorities will act in good time to develop the legislation and measures necessary to fulfil the climate targets in the Climate Change Act (*KlimaSeniorinnen* § 550 e). The Climate Change Act largely presumes that Norway will achieve the climate targets through regulations originating from Norway's cooperation with the EU. Norway will continue to participate in the EU Emission Trading System. However, when it comes to emissions that are not covered by this system, as well land use and forestry, Norway only has an agreement with the EU to achieve a 40% reduction by 2030. It is unclear when an agreement to achieve a 55% reduction by 2030 will be reached, and Norway has no agreement with the EU after 2030. It therefore seems uncertain whether Norway fulfils the fourth requirement of acting in good time to reach net zero emissions by 2050.

In total, NIM believes that these four requirements indicate that the Norwegian authorities have not taken sufficient action to adopt and implement the legal framework that is required in order to safeguard the requirements under Article 8 of the ECHR in the climate area.

6. Right to environmental information and participation in decision-making processes under Article 8 of the ECHR

According to Article 112 second paragraph of the Norwegian Constitution, "citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out".[200]

Under Article 8 of the ECHR, citizens also have procedural rights in the area of climate and the environment. In *KlimaSeniorinnen,* the ECtHR highlights two

[199] NOU 2023: 25 p. 24.

[200] An unofficial translation of the Constitution of the Kingdom of Norway provided by the Parliament available here: https://lovdata.no/pro/#document/NLE/lov/1814-05-17. Domestic courts will adopt a more intensive review when examining compliance with Section 112 during the legislative procedure, see HR-2020-2472-P (*Climate*), para. 182.

elements. Firstly, the citizens' right to information concerning the climate, and secondly, the citizens' right to participate in public decision-making processes.[201] As Switzerland did not meet the material requirements under the ECHR Article 8, the ECtHR did not assess whether Switzerland's framework regarding the climate met these procedural requirements.[202]

In NIM's view, these procedural rights are important, particularly because climate change and climate policy are complex and may be difficult to understand for many. Adequate information and broad consultations are therefore democratizing tools that can make important issues more accessible to the public.

The purpose of the Climate Change Act, according to Section 1 second paragraph, is to "promote transparency and public debate on the status, direction and progress of" Norway's transformation to a low-emission society by 2050.

Although the review of the climate targets every five years according to Section 5 and 6 of the Climate Change Act does not in itself facilitate citizens' participation in the process, the government has previously submitted proposals for new climate targets for Norway for public consultation. This is positive from a human rights point of view. However, public participation is far more complicated when it concerns Norway's climate agreements with the EU.

The Environmental Information Act, which is referred to in the preparatory work for the Climate Change Act, gives citizens the right to environmental information from public and private actors, and the right to participate in decision-making processes related to the preparation of legislation, plans and programmes.[203] However, the right to environmental information could also have strengthened under the Climate Change Act in general, and particularly under Section 6 of the Climate Change Act, in connection with the government's annual report to Parliament on the status of Norway's climate efforts.

The Office of the Auditor General finds that, among other things, the Government's Climate Status and Plan provides limited information concerning uncertainties, planned policies and the climate impact of the state budget.[204] These weaknesses affect the quality of information available to decision-makers, influencing how

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[201] *KlimaSeniorinnen,* § 554.

[202] Procedural rights in the climate sector might, however, become more important in other cases for the ECHR, for example in relation to the question of due diligence obligations for climate impacts when *opening* new oil fields under ECHR articles 2 and 8 in *Greenpeace Nordic and Others. against Norway.*

[203] Prop. 77 L (2016-2017) pp. 26-27. An English translation of the Act, provided by the Ministry of Climate and Environment, is available here: https://www.regjeringen.no/en/dokumenter/environmental-information-act/id173247/

[204] Dokument 3:15 (2023–2024) p. 20.

climate policy is developed. This issue is even more significant for citizens, who have fewer resources and opportunities to fully understand and engage with this complex process and the information it provides.

One can only care about what one knows about. NIM believes it is important for citizens to receive clear and accessible information about how the government is addressing one of the most significant human rights challenges of our time, which affects fundamental right to the environment, home, property, life and health. Norway's numerous climate goals, their varying prerequisites, and cooperation with the EU make climate policy particularly complex. This complexity makes it difficult for the public and other stakeholders to fully grasp and monitor progress towards these goals. As a result, it becomes more difficult for citizens to exercise their right to sufficient environmental information, essential for safeguarding their right to a healthy environment as guaranteed by Article 112 of the Constitution.

Before the adoption of the Climate Change Act in 2017, several bodies advocated for the establishment of an independent climate council to serve as a key source of information and analysis for informed public debate.[205] At the time, the Ministry argued that a Technical Committee for Estimating Emission Effects of Climate Measures under the Norwegian Environment Agency addressed this need. However, this Committee has since been dissolved. While the Norwegian Environment Agency continues to play a central and important role and is professionally independent, it remains subject to political oversight from the Ministry of Climate and Environment.

NIM therefore believes the authorities should consider the experiences of other countries with independent climate councils. There are over 20 such councils in the world, including in Denmark, the EU, Finland, Sweden and Great Britain.[206] Research indicates that these *independent* climate councils provide significant benefits by facilitating long-term, fact-based and ambitious climate action. They contribute to transparency, engage citizens in central decision-making processes, and help to hold authorities accountable for the implementation of democratically adopted climate targets.[207] In this manner, they contribute to the democratic legitimacy of political decisions in the climate area.

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[205] Prop 77. L (2016–2017) pp. 10 and 47.

[206] See more generally on this topic, the website of the International Climate Council Network's : https://climatecouncilsnetwork.org/members/ (retrieved 27.06.2024).

[207] Nick Evans et al., *Climate governance systems in Europe: the role of national advisory bodies* (Ecologic Institute, and IDDRI, 2021); Harriet Dudley et al., *Independent expert advisory bodies facilitate ambitious climate policy responses* (ScienceBrief Review, 2021); Alina Averchenkova et al., «The influence of climate change advisory bodies on political debates: evidence from the UK Committee on Climate Change» *Climate Policy* 21, No. 9 (2021); Erika

While climate councils are not explicitly mentioned as a procedural guarantee in *KlimaSeniorinnen*, NIM believes their establishment would significantly enhanced protection against climate change, improve access to environmental information, and foster more effective public participation in decision-making processes. This could contribute to promoting Article 112 of the Constitution and the procedural aspects of Article 8 of the ECHR. NIM has previously submitted a recommendation to Parliament to consider the establishment of such a climate council, and repeats this recommendation here.[208]

7. Are exported and imported emissions relevant under the ECHR?

Norway *exports* and *imports* goods that lead to greenhouse gas emissions beyond what is included in Norway's territorial emissions. According to the Norwegian Environment Agency, Norwegian households, private businesses and the public sector *consumed* a total greenhouse gas emission of 70 million tonnes of CO_2e in 2020.[209] These emissions are thus approximately 43% greater than Norway's annual territorial emissions. As the 2050 Climate Change Committee points out, Norwegian consumption is very high by global standards.[210] For *exported* goods, the petroleum sector is in a special position. Norway exports oil and gas abroad with emissions that are ten times greater than territorial annual greenhouse gas emissions (about 500 million tonnes of CO_2e).[211]

Under international climate agreements, the point of departure is that each State is responsible for reducing its *territorial* emissions. This is based on the need for

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Karttinen et al., *Kartlegging av klimaråd – erfaringer med uavhengige, akademiske, klimaråd* (Menon Economics and CICERO, rapport no. 9, 2023) available here: https://www.menon.no/kartlegging-av-klimarad/ (retrieved 16.09.2024).

[208] NIM, *Menneskerettighetene i Norge 2020: NIMs årsmelding, Dokument 6 (2020-2021),* pp. 36-37. The Climate Committee 2050 has recommended the establishment of an independent climate panel, see NOU 2023: 25, p. 353.

[209] Richard Wood et al., *Carbon Footprint of the Economic Activity of Norway – Environmentally Extended Input-Output Analysis of Emissions from Norwegian Economic Activity* (Vector Sustainability and XIO Sustainability Analytics A/S, report no. M-2651, 2023), for The Norwegian Environment Agency, see points 5.2 and 5.3, particularly figures 6, 10 and table 2, available here: https://www.miljodirektoratet.no/aktuelt/fagmeldinger/2024/januar-2024/spälling-av-klimagasser-fra-norsk- consumption-is-calculated/ (retrieved 27.06.2024).

[210] NOU 2023: 25, p. 150.

[211] The Norwegian Petroleum Directorate (later renamed to “The Norwegian Offshore Directorate”), "Sokkelåret 2021", 2022, p. 13, available here: https://www.sodir.no/aktuelt/publikasjoner/rapporter/sokkelaret/sokkelaret-2021/ (retrieved 16.09.2024); NOU 2023: 25 pp. 224-225; Robbie Andrew, "Norway's emissions exports", 2023, available here: https://folk.universitetetioslo.no/roberan/t/export_emissions.shtml (retrieved 16.09.2024).

global coordination to prevent the double counting of territorial emission reductions.[212]

However, before the ECtHR, the question was whether a State can have a human rights responsibility to reduce all the emissions it can control, including emissions from imported and exported goods. While multiple States may be responsible for the same harmful act, the ECtHR specifies that a State's responsibility must be assessed at an individual level. The key issue is whether a State could take reasonable measures that had a real prospect to reduce the danger climate change poses for individual rights.[213] In the area of human rights, a natural point of departure is that States must do their part – and what they can – to protect their citizens from the impacts of climate change.

In *KlimaSeniorinnen,* Switzerland argued that embedded greenhouse gas emissions from goods the country imports from abroad did not fall under the State's jurisdiction according to Article 1 of the ECHR. The rationale was that the authorities did not exercise direct control over such emissions, as the emission source was abroad.[214] However, the ECtHR held that this question was not about extraterritorial jurisdiction, based on the geographical location of the emission source. Rather, it was a question of causation and responsibility. As long as the individuals who allege a human rights violation as a result of climate change were within the State's territory, the question is *which* greenhouse gas emissions a State is responsible for under Article 8 of the ECHR. [215] In NIM's view, the answer will depend on which emissions a state has a realistic opportunity to reduce (see section 3.3.3).

Switzerland also argued that the applicants claim concerning liability for imported emissions came too late to be dealt with by the ECtHR. The Court rejected this. In that context, the ECtHR stated that Switzerland had accepted that emissions from imported goods accounted for 70% of Switzerland's footprint in 2015, and that

> It would therefore be difficult, if not impossible, to discuss Switzerland's responsibility for the effects of its GHG emissions on the applicants' rights without taking into account the emissions generated through the import of goods and their consumption or, as the applicants labelled them, "embedded emissions".[216]

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[212] This is not intended to preclude the competence of the Parties to set targets for reductions in exported or imported emissions, which the Parties are fully entitled to do, see e.g. NOU 2023: 25 p. 213 and the discussion in *Waratah Coal Pty Ltd v. Youth Verdict et al.* (No 6) [2022] QLC 21, 25.11.2022, paras. 674–681 and 695.
[213] *KlimaSeniorinnen,* §§ 441-444.
[214] *KlimaSeniorinnen,* § 285.
[215] *KlimaSeniorinnen,* § 287.
[216] *KlimaSeniorinnen,* § 280.

This implies that the ECtHR acknowledges that emissions from imported goods may be relevant under the ECHR. However, the majority do not discuss embedded emissions further in the judgment. The dissenting judge interprets the majority view as establishing that States have a positive obligation under Article 8 to also reduce embedded emissions.[217] NIM believes it is more accurate to say is that the majority in *KlimaSeniorinnen* did not explicitly determine whether the States have responsibility for such emissions under Article 8, but rather left the door open for the States' responsibility to also include this in the future.[218]

Another question is whether States are responsible for reducing greenhouse gas emissions from goods they *export* under Article 8 of the ECHR.

Emissions from exported goods were not a central part of the applicants claims in *KlimaSeniorinnen*. Consequently, the Grand Chamber did not consider this issue explicitly there. In *Duarte,* however, the Grand Chamber specified that the States have "ultimate control over public and private activities based on their territories that produce GHG emissions". The Court specifically pointed out that

> More fossil fuels being extracted or burned anywhere in the world, beyond what can be offset by natural carbon sinks (net zero), will inevitably lead to higher GHG concentrations in the atmosphere and therefore to worsening the effects of climate change globally.[219]

This did not, however, justify establishing any special extraterritorial jurisdiction for damages to individuals abroad.[220]

Although the question of responsibility under Article 8 of the ECHR for emissions from imported and exported goods is not resolved, the majority in *KlimaSeniorinnen* suggests that the Convention have a broader responsibility for emissions that can cause harm within their territory, beyond just their national emissions. The ECtHR emphasizes that the export and combustion of fossil fuels leads to higher

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[217] See *Partly Concurring Partly Dissenting Opinion of Judge Eicke* in *KlimaSeniorinnen*, § 4.

[218] See for a similar interpretation: Andreas Buser, "A Human Right to Carbon Import Restrictions? On the Notion of 'Embedded Emissions' in Klimaseniorinnen v Switzerland", *EJIL: Talk!*, 16.04.2024 available here: https://www.ejiltalk.org/a-human-right-to-carbon-import-restrictions-on-the-notion-of-embedded-emissions-in-klimaseniorinnen-v-switzerland / (retrieved 16.09.2024), "Given the above-mentioned supportive findings, it may well be that the Court in future cases requires States to include embedded emissions in their regulatory frameworks and national carbon budgets, but for now, the Court did not clearly decide the issue". See for a more expansive interpretation: Geraldo Vidigal, "International Trade and ' Embedded Emissions' after KlimaSeniorinnen – The Extraterritoriality of Climate Change Obligations", *VerfBlog, 2024/5/01*, available here: https://verfassungsblog.de/international- trade-and-embedded-emissions-after-klimaseniorinnen/ (retrieved 16.09.2024).

[219] *Duarte,* §§ 192, 194.

[220] The question of responsibility for exported oil and gas under the ECHR might, however, be clarified with the upcoming case of *Greenpeace Nordic et al. v. Norway* (complaint against HR-2020-2472-P).

greenhouse gas emissions, which exacerbate the negative effects of climate change. From NIM's perspective, a purpose-oriented and functional approach also indicates that States are responsible under Article 8 of the ECHR for reducing emissions they have a direct impact on or can take action against.

Such an approach would be consistent with the Norwegian Supreme Court's assessment of this question under Article 112 of the Constitution. The Supreme Court came to the following conclusion regarding responsibility for exported emissions from goods in general and oil and gas:

> [I]f Norway is affected by activities taking place abroad that Norwegian authorities may influence directly on or take measures against, this must also be relevant to the application of Article 112. An example is combustion of Norwegian-produced oil or gas abroad, when this causes harm also in Norway.[221]

The greenhouse gas emissions and associated damage to the rights of individuals in Norway, which the authorities may influence directly, can therefore be relevant to consider under Article 112 of the Constitution.

Overall, NIM believes that it would undoubtedly be positive from a human rights perspective that States regulate emissions from the goods they import and export, something they have the capacity to do. Considering the above, authorities should also assess whether there may be a legal risk to refrain from regulating such emissions.

A prerequisite for regulating these emissions is to assess how large they are. Norwegian authorities already do this. Subsequently, it is relevant to assess which consequences these emissions could have for individuals' lives, health and property. The government is now planning to conduct an environmental impact assessment on the effects of combustion emissions from oil and gas on the environment in Norway, in light of, among other things, recommendations that NIM has made over time.[222]

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[221] HR-2020-2472-P (*Climate*), paras. 149, 155. An English translation of the judgement, provided by the Information Department of the Supreme Court of Norway, is available here: https://lovdata.no/pro/#document/HRENG/avgjorelse/hr-2020-2472-p-eng/KAPITTEL_3-3-6. See also the dissenting opinion, para 260 ("I agree with Justice Høgetveit Berg that both types of emissions, as a starting point, fall within Article 112 of the Constitution").

[222] However, NIM has also submitted a number of comments on the proposed changes in administrative procedure, including the fact that the Environmental Impact Assessment Directive (Directive 2011/92/EU) imposes a legal *obligation* to assess the consequences of downstream greenhouse gas emission (so-called "scope 3" emissions), see NIM, *Høringsuttalelse – Justering av saksbehandlingsprosessen knyttet til forbrenningsutslipp,* 7 June 2024, available here: https://www .nhri.no/wp-content/uploads/2024/06/Horingsuttalelse-fra-NIM-Proslag-til-endring-i-

Concerning possible material obligations under the ECHR, it is plausible that the duties set out by the ECtHR in *KlimaSeniorinnen* §§ 548–550 also apply, or may apply, to imported and exported emissions. By comparison, larger companies now have a responsibility to regulate export and import emissions (often called scope 3 emissions) in the EU's new directive on corporate sustainability due diligence.[223] These requirements are reminiscent of those laid down by the ECtHR.

The authorities should therefore consider regulating these emissions in a manner similar to territorial emissions, by assessing their scope, setting climate targets to reduce them, and developing strategies and plans to achieve these targets. In this context, it is particularly relevant to consider that:

- The 2050 Climate Change Committee recommends that Norway establish a national target for reduction of greenhouse gas emissions from consumption that is consistent with the goals of the Paris Agreement.[224] Another possible measure to regulate some import emissions,[225] could be for Norway to incorporate the EU regulation on a Carbon Border Adjustment Mechanism into the EEA agreement.[226]
- The 2050 Climate Change Committee recommends that the authorities prepare a strategy for the final phase of Norwegian petroleum activities and present it to Parliament as soon as possible. Until such a strategy is completed, no further licensees for development and operation (PDO) or installation and operation (PIO) should be awarded, and the authorities should ensure broad public involvement when determining the strategy's knowledge base.[227]

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veileder-til-PUD-PAD.pdf (retrieved 27.06.2024). The Supreme Court of the United Kingdom took this view of the Directive in *R (on the application of Finch on behalf of the Weald Action Group) (Appellant) v. Surrey County Council and others (Respondents),* 20.06.2024, Trinity Term [2024] UKSC 20.

[223] *Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/285* (CSDDD), OJ L, 2024/ 1760, 5.7.2024, Article 22.

[224] NOU 2023: 25, p. 223.

[225] *Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a Carbon Border Adjustment Mechanism (CBAM),* OJ L 130, 16.5.2023 article 2(1) and Annex I point 2. For the time being, CBAM covers cement, electricity, fertilisers, iron and steel products, aluminum products and hydrogen. In the long run the aim is for CBAM to have a broader scope, covering same activities as EU ETS, see. Article 1(2) and recitals 27–30.

[226] The CBAM-directive is marked as EEA-relevant, but the Ministry of Foreign Affairs has, after an overall assessment, "come to the conclusion that the regulation is not EEA-relevant in the sense that Norway is legally obliged to incorporate it into the EEA agreement" (our translation), and has not taken any position on whether it should be introduced on a more voluntary basis, see the EØS-notatbasen, *CBAM,* 28.11.2023, available here https://www.regjeringen.no/no/sub/eos-notatbasen/notatene/2023/okt/cbam/ id2999873/ (retrieved 27.06.2024).

[227] NOU 2023: 25, p. 255.

8. The right to a fair trial under Article 6 of the ECHR

Under Article 6 of the ECHR, everyone has the right to a fair trial, which includes the right to be able to review decisions concerning civic rights and duties before a court. The right is applicable when there is a *dispute* (*contestation*) about a *civil right* recognized under domestic law.[228]

The ECtHR concluded that the association *KlimaSeniorinnen* had such a dispute regarding the part of the complaint that pertained to the lack of effective implementation of national climate targets. The dispute was based, among other things, on the right to life and protection of physical integrity under the Swiss Constitution, and the outcome was directly decisive for the association.[229] The assessment of applicability under Article 6 had to take into account the special features of climate change, for example that the consequences of climate change occur gradually over time, and that this threatens rights in general, not just the rights of specific individuals.[230] The ECtHR also referred to the arguments for why associations should be granted victim status under the ECHR.[231]

The Grand Chamber then examined whether Switzerland had violated Article 6 of the ECHR by rejecting the applicants' case in its national courts. In principle, the restriction pursued a legitimate purpose, by seeking to distinguish the issue of individual protection from the relevant democratic processes and general challenges to legislation (*actio popularis*).[232] However, the rejection could not be justified. The ECtHR held that Swiss courts had not sufficiently considered scientific evidence, as the Swiss Supreme Court had stated that "there was still some time to prevent global warming from reaching the critical limit."[233] The ECtHR emphasized "the key role which domestic courts have played and will play in climate-change litigation, a fact reflected in the case-law adopted to date in certain Council of Europe member States, highlighting the importance of access to justice in this field".[234] The restriction in this case meant that the organization itself did not have

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[228] See e.g. *Grzęda v. Poland* [GC] (43572/18) 15.03.2022, §§ 257–260 and *Bilgen v. Turkey* (1571/07) 09.06.2021, §§ 53–64.

[229] *KlimaSeniorinnen,* §§ 615–625.

[230] *KlimaSeniorinnen,* §§ 612–614.

[231] *KlimaSeniorinnen,* §§ 621–622, see §§ 489-501 and §§ 521-526. In brief, the ECtHR emphasized that (i) in modern societies, in the face of complex administrative decisions, associations may represent one of the few opportunities for individuals to effectively uphold their rights; (ii) the important role of environmental organizations in protecting the environment is recognized in the Aarhus Convention, which has been ratified by almost all Council of Europe member States; (iii) organizations are generally granted legal standing in Council of Europe member States; (iv) climate change is a "common concern of mankind", and the need for "intergenerational burden-sharing" speaks in favour of recognising the standing of associations in cases dealing with climate issues.

[232] *KlimaSeniorinnen,* § 631. The Court nevertheless questions the accuracy of that classification, see § 634.

[233] *KlimaSeniorinnen,* § 635.

[234] *KlimaSeniorinnen,* § 639.

access to a Court, nor did it have any other remedies under national law to such access. The right of access to a tribunal was restricted in such a way and to such an extent that the very essence of the right was impaired.[235]

Against this background, the Grand Chamber unanimously concluded that Switzerland had violated Article 6 of the ECHR, as national courts had refused to deal with the complainants' claim that Switzerland violated the right to life and privacy by not reducing emissions sufficiently.

The Norwegian Climate Change Act does not contain sanctions and does not allow for judicial review of whether the targets under the Climate Change Act are complied with. At the same time, the preparatory work for the Climate Change Act specifies that it will not change access to judicial review of climate issues with basis in other rules.[236] In the climate area, it is possible to envisage Norway's legal framework, including the Climate Change Act, being challenged on the basis of Article 8 of the ECHR. The right to bring an action before a court must be assessed concretely under the Dispute Act Section 1-3 and 1-4, understood in the light of, among other things, the aforementioned requirements under Article 6 of the ECHR.[237]

Since the focus of this analysis is on whether the authorities meet their climate obligations under Article 8 of the ECHR, NIM does not provide a detailed analysis of what these clarifications under Article 6 of the ECHR mean for Norway.

9. Conclusion

The main question in this analysis is whether the Norwegian authorities fulfil their obligation under Article 8 to reduce greenhouse gas emissions in order to protect their citizens from harmful climate change.

NIM's overall conclusion is that the Climate Change Act is unlikely to meet the obligations that follow from Article 8 of the ECHR. This is because, in our opinion, the Climate Change Act does not fulfil four of the five requirements, mentioned above, which ECtHR set out as a part of its overall assessment in *KlimaSeniorinnen* § 550.

In NIM's view, the Climate Change Act and Norwegian objectives must therefore be strengthened to ensure the fulfilment of human rights.

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[235] *KlimaSeniorinnen,* §§ 629–640, particularly §§ 637– 638.

[236] Prop. 77L (2016-2017) pp. 34-35.

[237] On the right to bring a declaratory action of a more general nature, see in particular HR-2021-417-P (*Acer*) and HR-2024-826-A.