

# Human rights-based tools to protect the environment and future generations

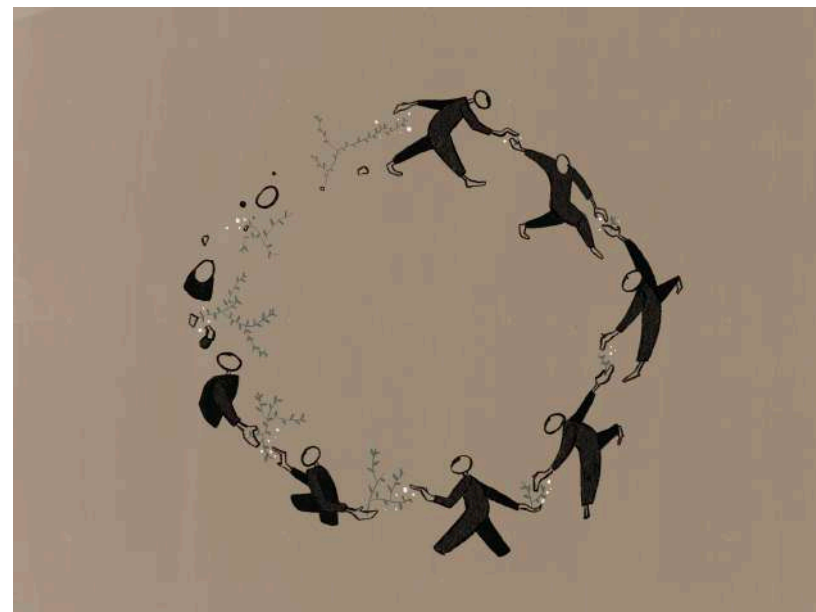
## EUFJE Annual Report 2024

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Generations



# Questionnaire and inputs received

- 5 overarching topics: (i) Legal basis and forms of protection; (ii) Normative content, (iii) Enforcement mechanisms; (iv) Procedural issues; (v) Substantive questions; (vi) Broader issues
- 22 national questionnaires (totalling over 200 pages): Albania, Belgium, Croatia, Czechia, Estonia, France, Germany, Greece, Hungary, India, Ireland, Italy, Mauritius, Montenegro, North-Macedonia, Norway, Romania, Spain, Sweden, the Netherlands, the UK, and Ukraine
- Input from the ECtHR
- Draft report (30 pages) – will be circulated

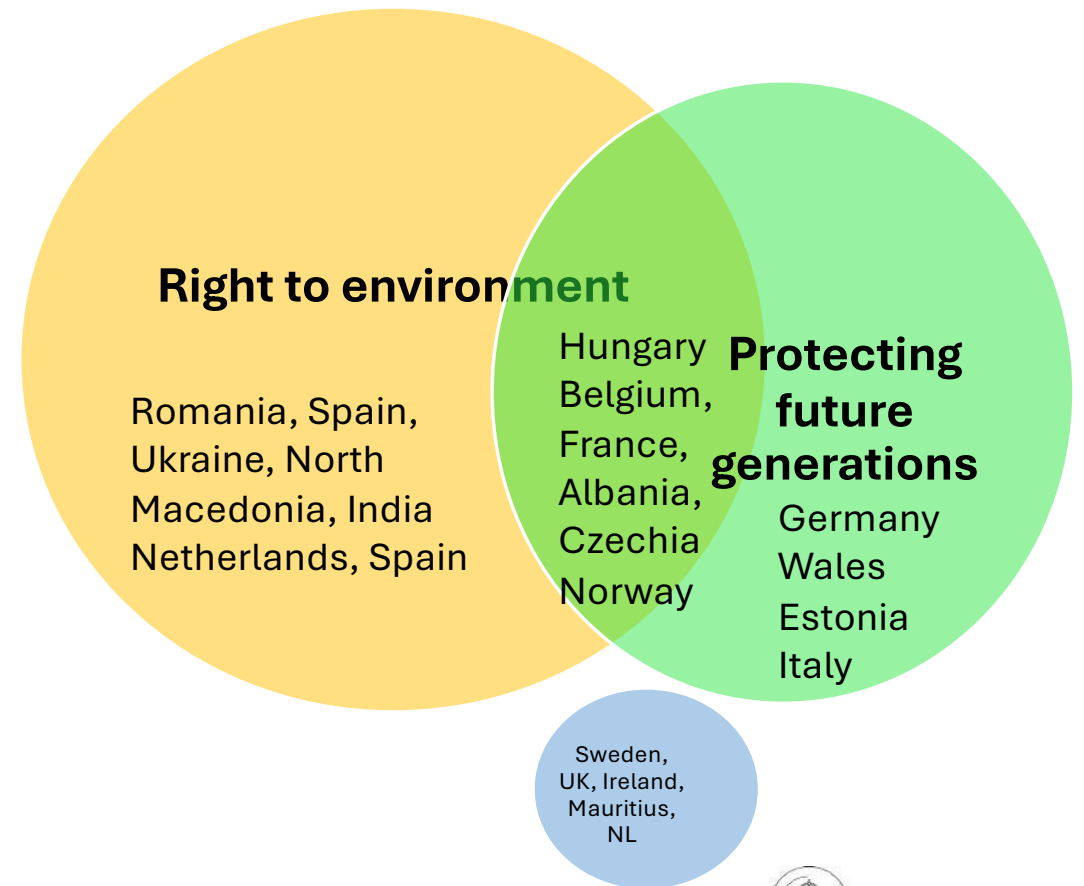




# Forms and basis of protection

# Constitutional forms of protection

- All have constitutional provisions on environmental protection
- Increasing inclusion of future generations in constitutions
- Some use high-ranking laws instead of constitution
- Some rely solely on European Convention on Human Rights (e.g. UK, Netherlands)
- Recent amendments (e.g. I, E, F) or recently growing judicial practice (B), in other States it has long history (HU)



# Protection of the environment

## Where?

- human right,
- as a duty for the State,
- a constitutional value,
- a State objective,
- or as a reference in the preamble



## Environmental protection in the constitution as:

- provision on environmental protection,
- natural resources,
- landscape and the historical and artistical heritage,
- common heritage concepts,
- common ownership concept,
- sustainable development,
- a right of public access to lands,
- environment as a goods of general interest



# Provisions on future generations

- preambular reference (Albania, Czechia, Estonia),
  - an explicit duty (e.g. Hungary, Germany),
  - a standalone legislation (Wales),
  - a qualifier of human rights obligations (France, Norway, Czechia).
    - Apart from these, the human rights-based language is virtually absent from the protection of future generations
- + judicial practice (India, NL, E): even in the absence of explicit constitutional provision



Normative content



# Normative content of the right to environment

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- Subject of rights: typically everyone, individual or collective right
- Socio-economic right, social right, mixed right, special right
- Obligations: both negative and positive obligations (increasing importance in climate cases - positive obligations are different vis-à-vis domestic and extraterritorial individuals, GER)
- mostly anthropocentric, but in some States also eco-centric:
  - France, Greece, India, Spain
  - Mar Menor lagoon has rights to exist, evolve naturally, and receive protection
- Justiciable (except for the NL)
- Temporal scope: responsive to future risks, not only to environmental damage already occurred

# Duty bearers

- Duty-bearers: primarily states, but increasingly also private entities
- Some constitutions explicitly enshrine an individual duty for environmental protection (CZ, F, H, EST, India, ROM, NM, E)
- Due diligence duties of corporations (NL, F)
- Horizontal effects: no such effects (NL, EST), not decided yet (GER), some allow application between private parties (B, Greece, F)



# Future generations protection

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## DEFINITION / TEMPORAL SCOPE

- No legal system provides a clear definition of 'future generations'
- Welsh Well-being of Future Generations Act: only defines well-being objectives for future generations but doesn't define the term itself
- Hungarian Constitutional Court uses it to refer to long-term environmental interests of everyone
- ECtHR: generations not yet born
- French Constitutional Council: all generations yet to be born and those too young to act for themselves



# Interests of future generations

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- Predominantly invoked in environmental context (ALB, HU, I, F)
  - "natural foundations of life" (GER)
  - "habitable planet" (NL)
- Also mentioned in cases concerning energy resources (e.g. LNG terminals, nuclear waste, renewable energy)
- Climate protection (I, NL, B, F, EST, E, ECtHR)
- Cultural wealth and heritage (e.g. Italy, HU)
- Some countries apply even more widely, like budgetary policy, pension reform, spatial planning (e.g. Belgium, Estonia)

## IMPACT:

- generally mandates taking a longer-term view to evaluate cumulative effects of state decisions
- counterbalance to short-term political considerations



# Protecting future generations

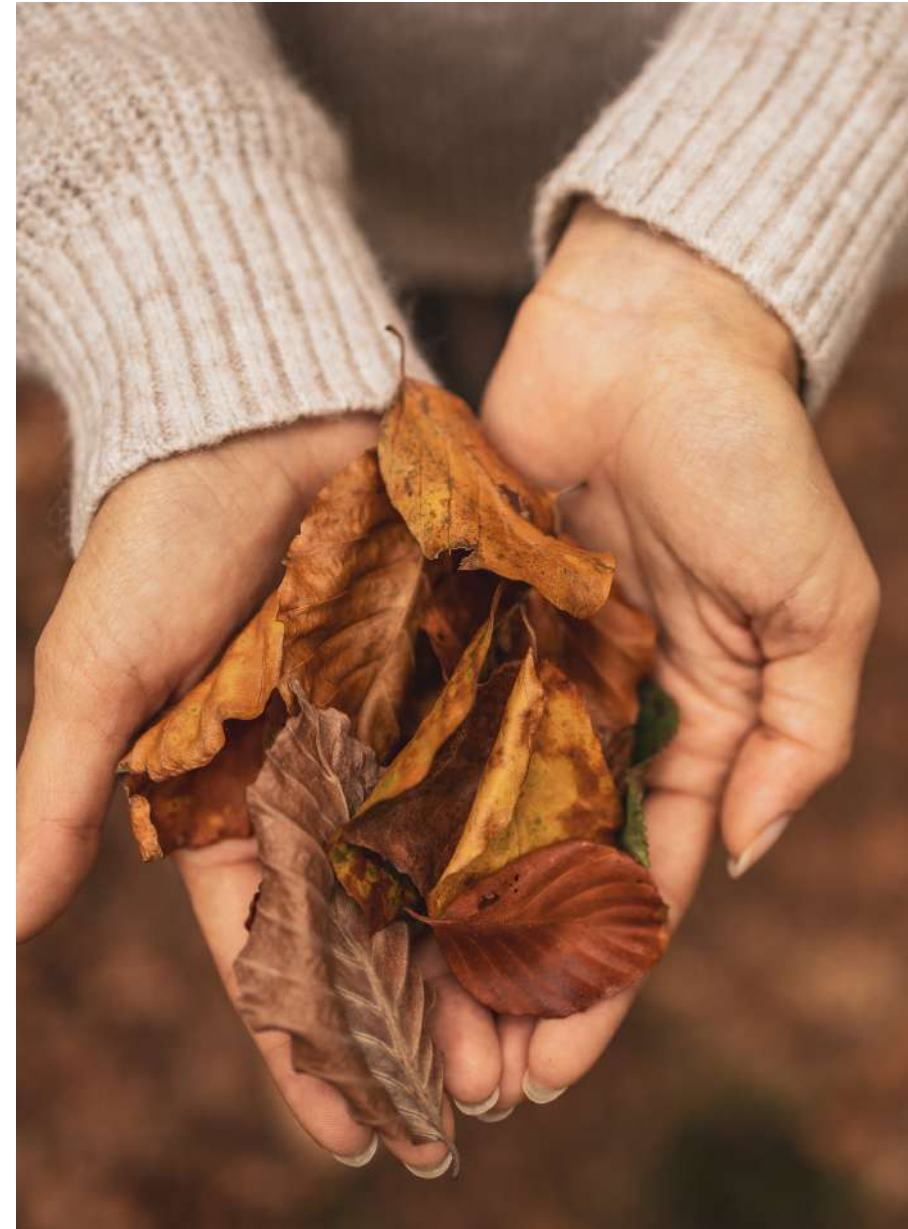
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## OBLIGATIONS:

- public trust duties of state authorities to preserve the trust's assets for posterity (HU, India),
- sustainable development (France, Albania),
- solidarity between generations (Belgium),
- intergenerational equity (Hungary),
- a legal qualifier of state authorities' environmental duty (Germany),
- a list of detailed obligations for state authorities to take "appropriate steps" towards realizing "well-being objectives" for future generations (Wales)
- intergenerational justice including the right to access to a clean environment (India),
- duty to manage *natural resources* on the basis of comprehensive long-term considerations (Norway)
- importance of inter-generational burden-sharing (ECtHR)

# Interplay between right to environment and future generations

- Overlap: both are mainly used in environmental context
- Differences:
  - may be in justiciability (in Belgium only the right to environment can be the basis of constitutional review, in Hungary only the right to environment can be invoked in constitutional complaints)
  - in normative content (the right to environment only compels not to step back from already existing statutory protection, whereas future generations protection entails a proactive duty to adopt new legislation, HU)





# Enforcement mechanisms



# Types of fora

- Only constitutional courts (Ro, Hun)
- Constitutional and ordinary courts (Ger, B, F, SE, E)
- Only ordinary courts (NL, NO, UK)

## PROCEEDINGS:

- constitutional complaints: Ger, Hun, Ukr
- abstract constitutional review: Hun, F, Belgium (only together with other rights), Ukr, India
- no individual constitutional complaint: North Macedonia
- only in concreto constitutionality review: Norway
- no constitutionality review of formal laws enacted by government or parliament: NL
- only in tort cases (NL), judicial review cases (UK)

## NON-JUDICIAL BODIES:

- National Green Tribunal (India)
- Ombudsman for Future Generations (Hungary)
- Welsh Commissioner for Future Generations
- Ombuds institutions (Albania, Cz, B, Est, Greece, NM, No, Ukr, E, UK)



# Types of plaintiffs in rights-based environmental disputes

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- predominantly NGOs: Romania, North Macedonia, Norway, Czechia, France, Estonia
- predominantly individuals: in Germany
- Members of the opposition parties, the ombudsman (HU)
- Business entities: Belgium
- Municipalities: Czechia
- ECtHR: in environmental pollution cases: dominantly individuals, in climate litigation: NGOs can establish standing more easily

# Enforcement powers, challenges

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## SPECIAL POWERS:

- penalty payments to encourage compliance (e.g., Belgium, India)
- interim measures and deliver judgments quickly in urgent cases (Belgium)

## CHALLENGES:

- Ambiguity of rights (e.g. Estonia)
- Governments may counteract court findings through new legislation
- Enforcement of restoration orders can face significant hurdles (e.g., Spain)
- Conflicting priorities, resistance from powerful industry or political actors, data limitations (e.g., India)
- Marginalized groups often lack means to ensure enforcement of court orders
- Limited public awareness can hinder the enforcement of environmental rights
- Spain's Mar Menor law faces difficulties due to lack of detailed enforcement mechanisms and resource allocation

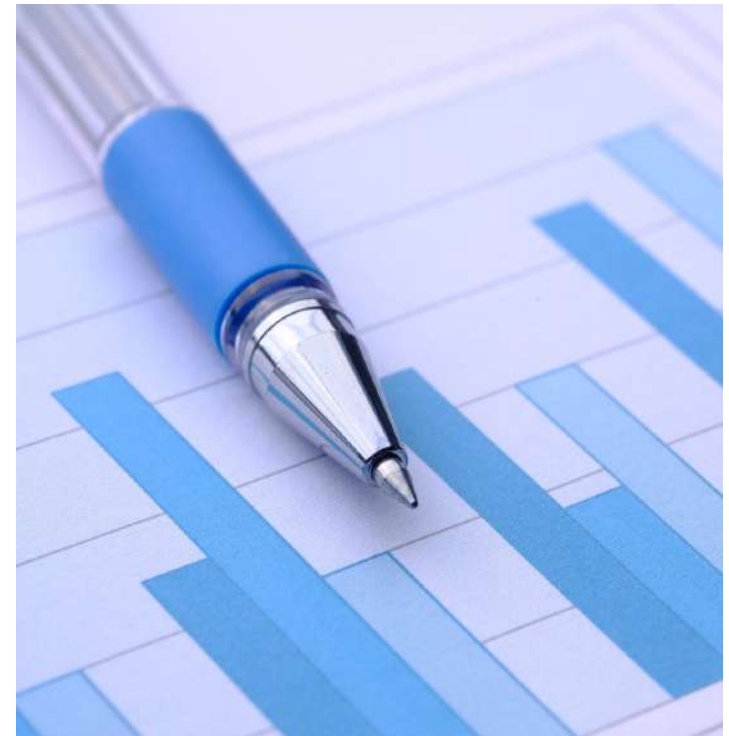
# Statistics

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- No official statistics
- ECtHR: 400 environmental cases, 3 climate cases

## SUCCESS RATE:

- Low probability of success: NM, UK , Italy (no successful case yet)
- Rights-based claims often successful (9 violations in Belgium), but no violation of solidarity between the generations
- HU: long track record of successful cases since 1994 both for rights-based cases and future generations cases





# Procedural questions

# Standing

## NGO STANDING

- Statutory requirements vary
- Easy to establish: B, E
- Emerging restrictive interpretation: HU

## ACTIO POPULARIS

- Not possible in the majority of jurisdictions
- Exception: India – relaxed rules for claiming standing to bring a case in the public interest in environmental matters

# Scientific fact-finding

- No special powers reported in the majority of jurisdictions
- IPCC reports in climate case (GER)
- Constitutional Court relies on the reports of prestigious scientific organizations, e.g. National Academy of Sciences (HU)
- National Green Tribunal: two full-time expert members (India)

## DEFINING WHAT CONSTITUTE RELEVANT INTERESTS:

- Climate litigation: global average temperature as a key indicator, achieving climate neutrality is in posterity's interest (GER)
- long-term, aspirational goals set out in non-binding sectoral strategies (soft law) must be duly respected by binding legislation (HU)





# Substantive questions

# Separation of powers

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- Applies in all jurisdictions, courts typically confine their review to internal and external legality, not policy desirability
- Especially contested in climate litigation
- Some jurisdictions are more restrictive (e.g. NM, Czechia)
- Cases dismissed due to separation of powers concerns (I)
- Other courts have rendered judgments despite criticism (F)
- Separation of powers influences the types of remedy courts may grant (Belgium)
- ECtHR perspective:
  - Affirms court competence in climate matters while recognizing limits
  - Stresses that judicial intervention is complementary to democratic processes





# Margin of appreciation

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## WIDE MARGIN

- methodologically sound manner, which is not based on unrealistic assumptions and whether the reasons for the forecast results are plausible (GER)
- Manifestly unreasonable (B)
- Whether interference reaches a level that makes it impossible to realise the basic needs of human life (Cz)

## STRICTER REVIEWS

- Non-regression principle: strict proportionality – necessity review (HU)
- Intensive constitutionality control until the economic crisis (Greece)

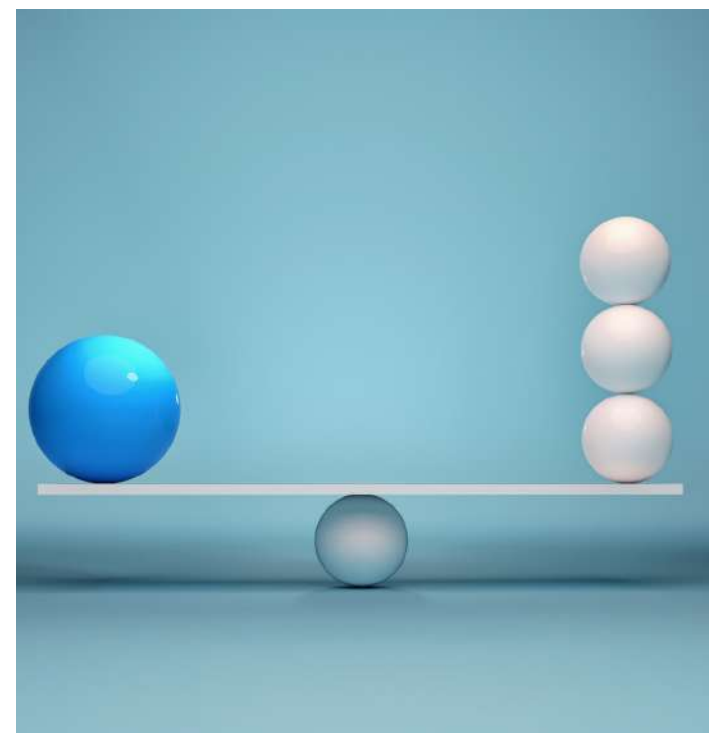
## ECtHR:

- Environmental matters: States do enjoy a wide margin of appreciation, an impossible or disproportionate burden must not be imposed on the authorities
- Climate cases: margin of appreciation is reduced, States have an obligation to reach carbon neutrality and to set appropriate GHG reduction targets for such a goal

# Balancing

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- not an absolute right but prevails over other rights, often an express limit to the freedom of business (HU, CZ, B, F, NM, No, EST)
- Can be restricted only to give way to constitutional rights and duties, in a proportionate way (F, HU)
- Balancing through sustainable development - different outcomes:
  - Environment is a supreme public interest (Greece)
  - Economic development is essential to well-being (India)
- Climate context: environmental interests become progressively more important (GER)
- Future generations provision:
  - allows the courts to afford a heightened protection to long-term environmental interests against future risks (F, HU)



# Main principles developed by courts

- precautionary principle (UK, I, HU, F, CZ, EST, GRE, IND, ROM, NM, NOR, E, ECtHR)
- Principle of sustainability/sustainable development: Greece, India, Spain
- principle of sustainable use: Estonia, Romania
- intergenerational equity: Hungary, India, Spain, ECtHR
- polluter pays: India, Hungary, Spain
- Prevention principle: CZ, HU, GRE, NM, E
- public participation: Spain, Hungary, Ukraine
- Principle of full compensation for environmental damage caused (Ukraine, Hungary)
- Non-regression principle (HU, B), non-deterioration of the ecological situation (Ukraine)
- principle of proportionality: Estonia, North Macedonia
- Solidarity, cooperation, subsidiarity, progressivity (Spain)
- Economic and rational use of natural resources: (HU)
- Principle of intertemporal preservation of freedom (GER)
- duty of legislature to adapt environmental laws to the latest scientific developments (GER)
- obligation to participate in international climate protection efforts (GER)
- Obligation not to use property to the detriment of a person and society (Ukraine)
- Duty of care to keep the country habitable (NL)
- Duty of due vigilance of corporations (F)



# Broader issues

# Enforcing a right to environment and protection of future generations

- Renewable energy disputes (e.g., wind turbine regulations in Germany, Norway)
- Climate change litigation (e.g., speed limit on highways in Germany, cases in Italy, Netherlands, France, Belgium)
- Water management issues (e.g., Albania, Hungary)
- Forestry cases (e.g., Hungary)
- Land use and planning disputes (e.g., B, HU)
- Nuclear energy and fossil fuels (e.g. France)
- Biodiversity litigation (e.g., France, Greece, HU)
- Corporate duty of care cases (France, NL)
- Soil decontamination (e.g. NM, HU)
- Cultural heritage protection (e.g. North Macedonia, HU)
- Petroleum production (e.g., Norway)
- Plastic pollution (e.g., Spain's legislation on single-use plastics)
- Water scarcity (Spain)
- Pollution cases (India)
- Building permits and land-use plans (e.g., Czechia)
- Noise pollution cases (e.g., windfarm construction in Estonia)

# Interplay between national law and the Convention

- In certain States, the Convention is the main (sole) basis of rights-based environmental adjudication (UK, Ireland, NL)
- Synergies, complementary system:
  - ECtHR's reasoning may give guidance – e.g. expansive approach to positive obligations
  - Convention may fill the void left by restrictions of domestic laws
- Differences:
  - NGO standing in climate cases is easier before the ECtHR than in many national legal settings
  - Substantive rights are sometimes different – different system of protection



**Thank you for  
your attention!**

Questions and comments are  
welcome at:

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