The Limits of Climate Change Litigation in the European Court of Human Rights

The European Court of Human Rights ('ECtHR') is currently dealing with its first wave of climate change cases. At the time of writing, three such cases have been decided by the Grand Chamber – *KlimaSeniorinnen, Duarte Agostinho* and *Carême* – while a further six are due to be decided in light of these Grand Chamber decisions.[1] In the only successful case so far, there were five applicants: the association Verein KlimaSeniorinnen Schweiz (a non-profit group of elderly Swiss women) and four specific members of that group. They claimed that the harmful effects of climate change, exacerbated by the Swiss state's inaction in reducing its emissions, violated their rights under Articles 2 and 8 ECHR (and also alleged breaches of Articles 6 and 13). In a surprising move, the Court held that only the association had standing and that its Article 8 rights were engaged (but held that the individual applicants lacked victim-status). In the Court's view, the duty of states under Article 8 was, in essence, to adopt an adequate framework for achieving carbon neutrality, to comply with that framework, and to meet certain procedural requirements. The Swiss state had failed to adopt an adequate framework and had failed to comply with those targets which had been set, and the Court concluded that Article 8 was thus breached. The Court found it unnecessary to examine the case under Article 2, but also found a violation of Article 6 on procedural grounds.

There are many new elements to the Court's judgment. The Court was clear that although its existing environmental jurisprudence could 'offer guidance up to a point', climate change cases had special features which justified the adoption of a 'tailored approach' that would draw 'some inspiration' from the existing case law but would not directly transpose that case law to the context of climate change.[2] One novelty was the Court's conclusion that the applicant association had standing, which represents a striking departure from its existing case law (discussed in more detail below).[3] Equally novel, and also starkly in contrast with its well-established case law, was the Court's approach to attribution, responsibility, and causation. Historically, the Court has taken the view that states are not responsible for harms unless there are at least some 'available measures which could have had a real prospect of altering the outcome'.[4] Controversially, the Court in *KlimaSeniorinnen* creatively re-interpreted this element of its jurisprudence in order to reject the so-called 'drop in the ocean' argument that might otherwise have been fatal to the case. In the light of these and other novelties, many commentators have labelled *KlimaSeniorinnen* 'groundbreaking'.[5]

The Court's innovations might lead one to wonder, 'where does it all end?'. This first wave of climate change cases in the ECtHR is likely to be no more than the start of a long process.

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[1] *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* [GC] 53600/20 (ECtHR, 9 April 2024); *Duarte Agostinho and Others v Portugal and Others* [GC] 39371/20 (ECtHR, 9 April 2024); *Carême v France* [GC] 7189/21 (ECtHR, 9 April 2024)

[2] *KlimaSeniorinnen* (n 1), paras 414 and 422

[3] On which, see George Letsas, 'The European Court's Legitimacy After *KlimaSeniorinnen*' (2024) 5(4) *ECLR* 444–453; and Julia Laffranque, '*KlimaSeniorinnen* – Climate Justice and Beyond', (2024) 5(4) *ECLR* 433–443; see also Jeremy Letwin, '*Klimaseniorinnen*: the Innovative and the Orthodox', (EJIL Talk, 17 April 2024) <https://www.ejiltalk.org/klimaseniorinnen-the-innovative-and-the-orthodox/>

[4] *O'Keeffe v Ireland* [GC] 35810/09 (ECtHR, 28 January 2014), para 149; see also *E and Ors. v the United Kingdom* 33218/96 (ECtHR, 26 November 2002), para 99; n.b. while the Court claims that its judgment in *KlimaSeniorinnen* is consistent with this principle, the Court's understanding of this principle is nonetheless highly novel given that Switzerland's compliance with the judgment could not alone materially affect the applicants' circumstances.

[5] E.g. Linos-Alexander Sicilianos and Maria-Louiza Deftou, 'Breaking New Ground: Climate Change before the Strasbourg Court', (EJIL Talk, 12 April 2024) <https://www.ejiltalk.org/breaking-new-ground-climate-change-before-the-strasbourg-court/>

Having opened the door in *KlimaSeniorinnen*, the Court will very probably continue to be called upon to decide many difficult climate change cases over the coming decades. It is only natural to ask how far the Court will go in imposing obligations on states to mitigate and adapt to the effects of climate change. With this question in mind, I argue that there are at least four limits on the Court's ambitions in future climate change cases. I argue that these four limits are deeply grounded in the Court's pre-existing environmental jurisprudence and are congruent with the judgment in *KlimaSeniorinnen*. They represent red lines that the Court will not cross in future climate change judgments if (and insofar as) it wants to maintain coherence with its wider environmental jurisprudence going forward.

The four limits are: (1) that the effects of climate change should be taken to interfere with Convention rights only when their impact on victims passes a test of severity, comparative intensity, specificity, and temporal immediacy; (2) that the Court cannot adopt a strong version of the precautionary principle in climate change cases; (3) that a state should not be held culpable for a failure to meet emissions targets where it has taken appropriate measures to reduce emissions and the failure is thus not attributable to the state; and (4) that substantive positive obligations in climate change cases should be construed narrowly. In the following four sections of this paper, I discuss each of these four limits in turn.

If the Court respects these four limits, each of which has deep roots in its existing environmental jurisprudence, this will help the Court to respond to potential backlash and to mitigate worries about 'opening the floodgates', 'judicial activism', 'mission creep', and 'rights inflation'.[6] However, while the application of these limits to climate change cases is a necessary condition for maintaining coherence with the Court's environmental jurisprudence, it is by no means a sufficient condition for maintaining such coherence. On the contrary, there are many other important limiting principles outside of the four I discuss which might also command the respect of the Court. So, for example, it might be argued that the Court should also limit its ambitions in climate change cases by taking into account climate treaties rather than 'incorporating' them;[7] by keeping tight limits on the circumstances in which states have extraterritorial obligations;[8] by keeping states' obligations individualised rather than collective;[9] or by treating future generations as interest-holders but never as rights-holders.[10] Indeed, there is a potentially endless list of things the Court should *not* do if it wants to maintain coherence with its existing jurisprudence and avoid criticism.

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[6] E.g. Judge Eicke's dissent in *KlimaSeniorinnen* (n 1); see also Richard Ekins, 'Strasbourg's absurd climate ruling will see environmental policy annexed by the courts' (Conservative Home, 12 April 2024) <https://conservativehome.com/2024/04/12/richard-ekins-strasbourgs-absurd-climate-ruling-will-see-environmental-policy-annexed-by-the-courts/>; Laura Burgers, 'Should Judges Make Climate Change Law', (2020) 9(1) *Transnational Environmental Law* 55–75, p.58; also c.f. Benoit Mayer, 'Climate Litigation and the Limits of Legal Imagination: A Reply to Corina Heri', (CIL Dialogues: An International Law Blog, 4 Nov 2022) <https://cil.nus.edu.sg/blogs/climate-litigation-and-the-limits-of-legal-imagination-a-reply-to-corina-heri/>

[7] Benoit Mayer, 'Climate Change Mitigation as an Obligation under Human Rights Treaties?', (2021) 115(3) *AJIL* 409-451, pp.436-451

[8] Ibid, pp.426-428

[9] Ibid, pp.428-430

[10] C.f. Stephen Humphreys, 'Against Future Generations' (2022) 33(4) *EJIL* 1061-1092; and Richard Hiskes, *The Right to a Green Future* (Cambridge University Press 2008); on the role of future generations in *KlimaSeniorinnen*, see Aiofe Nolan, 'Inter-generational Equity, Future Generations and Democracy in the European Court of Human Rights' *Klimaseniorinnen* Decision', (EJIL Talk, 15 April 2024) <https://www.ejiltalk.org/inter-generational-equity-future-generations-and-democracy-in-the-european-court-of-human-rights-klimaseniorinnen-decision/>

I restrict myself here to talking about these four specific limiting principles because of their particular practical importance for future climate change litigation, because of their strong pedigree in the ECtHR's environmental jurisprudence, and because they have received less attention than they merit given their significance. Victim status was at the heart of the Court's recent climate change decisions, is likely to remain an important issue in future climate change litigation, and is well-established in the Court's environmental jurisprudence; but the limits of the test for victim status in future climate change cases have not yet been thoroughly explored. The precautionary principle features heavily in arguments about climate change cases; but the reasons why a strong version of the principle would be incompatible with the Court's environmental jurisprudence have been largely overlooked by academic commentators. Turning to state culpability, while it is clear from the Court's environmental jurisprudence that the causes of a state failing to meet emissions targets will partly determine a state's responsibility for that failure, and while it is clear that this question of causes is likely to be salient in many future climate change cases (given, inter alia, the increasing marginal cost of climate change mitigation), the issue has not received even a passing mention in the literature so far. Finally, the scope and content of substantive positive obligations will no doubt prove central to future climate change cases, given the Court's equivocation on these issues in *KlimaSeniorinnen*; but while the scope and content of substantive obligations in general are well-studied, the implications for climate change cases have yet to be elucidated.

These four limits can be seen against the background of a surge of human rights-based climate change litigation before national courts across the world and a lively academic discourse about the true role of human rights standards in climate change cases. Both the decisions of these national courts and the academic contributions occupy a wide a spectrum of views about the proper relationship between human rights law and climate change litigation. At one end of this spectrum is the 'reformist' view that human rights law requires states to achieve some 'minimum fair share' of greenhouse gas ('GHG') emission reductions informed by the Paris Agreement (represented by Dutch Court's judgment in *Urgenda*).[11] At the other end of the spectrum, is the 'sceptical' view that human rights law is powerless because climate change mitigation involves high level, polycentric, economic and social policy questions of the sort which should be left to democratically elected governments (represented by the judgments of courts in the UK and the USA).[12]

Set against this background, the four limits can be seen to embody a 'moderate' approach to climate change litigation in the ECtHR. They imply that the ECtHR should not go as far as the Dutch Courts in *Urgenda*, but do not preclude the ECtHR from finding violations of the Convention arising from failures to meet the imperative of climate change mitigation. In short, they are highly congruent with a 'middle way' between the 'reformist' and 'sceptical' ends of the spectrum. The moderate approach embodied by these four limits shares much with – and takes much inspiration from – the work of scholars and jurists who occupy the middle ground in debates about the ECtHR's approach to climate change cases (such as Pedersen, Braig and Panov, Eicke in his extra-judicial writing, and more recently Jelic and Fritz).[13] The approach

[11] Supreme Court of the Netherlands, *State of the Netherlands v Urgenda*, ECLI:NL:HR:2019:2006, 20 December 2019; see also the judgment of the Brussels Court of Appeal, *VZW Klimaatzaak v Kingdom of Belgium & Others*, 30 November 2023

[12] E.g. *Juliana v United States*, 947 F 3d 1159, 1171 (9th Cir 2019); *Plan B Earth v The Prime Minister* [2021] EWHC 3469 (Admin), at [50]

[13] See Tim Eicke, 'Human Rights and Climate Change: What Role for the European Court of Human Rights?' (2021) 3 *EHRLR* 262-273; Tim Eicke, 'Climate Change and the Convention: Beyond Admissibility' (2022) 3

embodied by these four limits also shares something with the work of scholars (like Heri and others) whose views incline more towards the reformist end of the spectrum, in that the four limits do not preclude the ECtHR playing an active role in enforcing climate change mitigation and adaptation; the key difference, however, is that the focus of these scholars is on opportunities for norm development, whereas the four limits will, if observed, constrain such norm development.[14] The approach embodied by these four limits shares something too with the work of scholars (like Mayer) whose views incline more towards the sceptical end of the spectrum, in that all four limits are concerned with the dangers of human rights courts being overly ambitious in climate change litigation; however, whereas these scholars' focus is primarily on the problems inherent in the use of human rights law to tackle climate change, my focus is on the extent to which the four limits contained in the ECtHR's pre-existing environmental jurisprudence permit the Court to act in climate change cases.[15]

Although my principal concern here is with the four limits and their enduring importance beyond *KlimaSeniorinnen*, I also argue that the observance by the Court of these limits is consistent with much of the Court's judgment in *KlimaSeniorinnen*. As I will show, apart from the striking innovations in causation and standing (the rejection of the 'drop in the ocean' argument and the acceptance that the association itself had standing), the rest of the *KlimaSeniorinnen* judgment is congruent with the Court's pre-existing, well-established environmental jurisprudence insofar as it coheres with each of the four limiting principles contained in this previous jurisprudence. This consistency between the four limits and the *KlimaSeniorinnen* judgment also illustrates how the Court might coherently build on that judgment in future climate change cases if it continues to apply the same limitations.

My main claims, then, are that the four limits are important, that they are deeply grounded in the Court's pre-existing environmental jurisprudence, that they are congruent with the judgment in *KlimaSeniorinnen*, and that they represent red lines the Court should not cross in future climate change cases if it wants to maintain coherence with its environmental jurisprudence going forward. This is importantly different from any claim that the four limits are inherent red lines that the Court could not possibly cross. I do not argue that these four limits are morally or legally right, all things considered, or that they constitute any form of absolute line. The Court may of course choose not to maintain coherence; it evidently can and

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ECLR 8-16; Ole Pedersen, 'Any Role for the ECHR When it Comes to Climate Change?' (2022) 3 *ECLR* 17-22; Katharina Braig and Stoyan Panov, 'The Doctrine of Positive Obligations as a Starting Point for Climate Litigation in Strasbourg: The European Court of Human Rights as a *Hilfssheriff* in Combating Climate Change?', (2020) 35 *Journal of Environmental Law and Litigation* 261-298; Ivana Jelić and Etienne Fritz, 'The 'Living Instrument' at the Service of Climate Action: The ECtHR Long Standing Doctrine Confronted to the Climate Emergency', (2024) 36 *JEL* 141–158; see also, Stefan Theil, *Towards an Environmental Minimum* (Cambridge University Press 2021); and outside of the ECHR context, see Alan Boyle, 'Climate Change, the Paris Agreement and Human Rights', (2018) 67 *ICLQ* 759–777 and Alan Boyle, 'Human Rights and the Environment: Where Next?', (2012) 23(3) *EJIL* 613–642

[14] E.g. Corina Heri, 'Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability', (2022) 33(3) *EJIL* 925–95, p.934; Lucy Maxwell, Sarah Mead and Dennis van Berkel, 'Standards for adjudicating the next generation of *Urgenda*-style climate cases', (2021) 13(1) *Journal of Human Rights and the Environment* 35–63; and Gary Liston, 'Enhancing the efficacy of climate change litigation: how to resolve the 'fair share question' in the context of international human rights law', (2020) 9(2) *CILJ* 241–263; and outside of the ECHR context, see John Knox, 'Climate Change and Human Rights Law' (2009) 50 *Va. J. Int'l. L.* 163 and John Knox, 'Bringing Human Rights to Bear on Climate Change', (2019) 9 *Climate Law* 165-179

[15] E.g. Mayer (n 7); Alexander Zahar, 'The Limits of Human Rights Law: A Reply to Corina Heri', (2022) 33(3) *EJIL* 953-959

sometimes does break with precedent. Accordingly, my claim is merely that the four limits represent red lines that the Court will not cross *if it wants to maintain coherence* with the existing environmental case law. Nevertheless, I proceed on the following two assumptions: (a) the normative proposition that it is, *ceteris paribus*, desirable for the Court to maintain coherence with its existing case law; and (b) the empirical proposition that ECtHR judges in fact 'attach a very high importance to the existing case law'.[16] Together, these two assumptions imply that the demand for coherence is, and will be treated by the Court as, a weighty reason for action; but they do not imply that the demand for coherence is, or will be treated by the Court as, a conclusive reason for action.

1. The Four-Part Test of Victim-Status: Severity, Comparative Intensity, Specificity, and Temporal Immediacy

The first of the four limits is that the effects of climate change (or of any other environmental change) should be taken to interfere with Convention rights only when their impacts on victims reach certain thresholds of severity, comparative intensity, specificity, and temporal immediacy. This limiting principle is grounded in the concept that human rights represent only a part of justice rather than the whole of it,[17] the concomitant doctrine of the Court that it can deal with issues only insofar as they engage Convention rights,[18] and the resulting view that the Convention is applicable only to a subset of the threats to human flourishing posed by environmental harms.[19] The environmental case law from before the climate change cases reflects these fundamental points by adopting a four-part test of victim-status to determine when environmental harms interfere with Convention rights. Thus, environmental harms must: (i) reach a certain minimum threshold of severity; (ii) reach a further threshold of 'comparative' intensity; (iii) directly and specifically affect the applicant; and (iv) be temporally proximate.

1.1. Severity

Regarding the minimum threshold of severity required for victim-status, the Court in *Fadeyeva* stated that the 'assessment of that minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance, and its physical or mental effects'.[20] At least in the context of Article 8, no 'danger to health' is required, but 'severe environmental pollution affecting individuals' well-being and preventing them from enjoying their homes', or pollution which seriously affects an applicant's 'quality of life at home', will need to be

[16] Krzysztof Wojtyczek, 'Precedent in the System of the European Convention on Human Rights' in *Constitutional Law and Precedent*, M Florczak-Wątor (ed), (Routledge 2022), p.249; see also Jeremy Letwin, 'Why Completeness and Coherence Matter for the European Court of Human Rights' (2021) 2 *ECLR* 119; Alastair Mowbray, 'An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case Law' (2009) 9(2) *HRLR* 179-201; and Yonatan Lupu and Erik Voeten, 'Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights' (2011) 42 *B.J.Pol.S.* 413–439

[17] See James Griffin, *On Human Rights* (OUP 2008), p. 33; and applying this notion to the ECtHR's environmental jurisprudence, see George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007), p.129

[18] See generally *KlimaSeniorinnen* (n 1), para 411

[19] Ibid, paras 446, 460, 481, 483, 484, 488, 500, and 501

[20] *Fadeyeva v Russia* 55723/00 (ECtHR, 9 June 2005), para 69 (citing *López Ostra v Spain* 16798/90 (ECtHR, 09 December 1994), para 51 and *Hatton and Ors. v the United Kingdom* [GC] 36022/97 (ECtHR, 8 July 2003), para 118)

present.[21] This threshold of severity for victim-status is essentially a quantitative (as opposed to qualitative) measure of suffering,[22] and although the Court has avoided defining in any mechanistic way the precise quantity of severity required,[23] from the extensive case law it is clear that environmental harms must reach a high threshold to engage Convention rights. Thus, in *Fägerskiöld*, for example, the Court held that nuisance caused by relatively low-level noise and light reflections from wind turbines 'were not so serious as to reach the high threshold established in cases dealing with environmental issues'.[24] And the relevant thresholds of severity are, unsurprisingly, far higher in relation to the right to life under Article 2.[25]

1.2. Comparative Intensity

Alongside this doctrine of a high absolute quantitative threshold, the Court has also developed a 'comparative' threshold for victim-status, holding that there would be 'no arguable claim under Article 8 if the detriment complained of was negligible in comparison to the environmental hazards inherent to life in every modern city'.[26] This threshold was applied, for example, in *Galev* where the noise from a dentist's surgery did not rise 'above the usual level of noise in an apartment block in a modern town' and in *Kožul* where it had not been shown that the 'that noise and air quality' effects of illegally constructed industrial buildings had 'exceeded the environmental hazards inherent in life in every modern town'.[27] Though the Court has never made it explicit, the decisions in cases such as *Galev* imply that (whilst a harm sufficiently severe to engage Article 2 will not be subject to a further test)[28] a given harm might reach the relevant threshold of severity for victim-status in purely quantitative terms, but might nonetheless be insufficient to engage Article 8 because the degree of harm does not exceed the environmental hazards inherent to life in the relevant type of location.

1.3. Direct and Specific Impact

Further, the Court has established that harms must directly and specifically affect the applicant to engage Convention rights.[29] In the context of Article 2, this means that there must be a genuine threat to the life of the applicant. So, for example, in *Kolyadenko*, which concerned flooding, the Court held that because some of the applicants 'were away from their homes

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[21] *Jugheli and Ors. v Georgia* 38342/05 (ECtHR, 13 July 2017), para 70; citing, inter alia, *López Ostra* (n 20), para 51; and *Fadeyeva* (n 20), para 88

[22] On the ECtHR's rejection of a purely subjective conception of well-being see Jeremy Letwin, 'Proportionality, Stringency and Utility in the Jurisprudence of the European Court of Human Rights' (2023) 23(3) *HRLR* 1-23

[23] As the Court has often said, 'quality of life' is 'a subjective characteristic which hardly lends itself to a precise definition' – e.g. in *Ledyayeva and Ors. v Russia* 53157/99, 53247/99, 53695/00 and 56850/00 (ECtHR, 26 October 2006), para 90

[24] *Fägerskiöld v Sweden* 37664/04 (ECtHR, 26 February 2008), para 1

[25] E.g. *Nicolae Virgiliu v Romania* 41720/13 (ECtHR, 25 June 2019), para 143

[26] *Fadeyeva* (n 20), para 69; see also, for example, *Hardy and Maile v the United Kingdom* 31965/07 (ECtHR, 14 February 2012), para 188 and *Dzemyuk v Ukraine* 42488/02 (ECtHR, 4 September 2014), para 78

[27] *Galev v Bulgaria* 18324/04 (ECtHR, 29 September 2009), para 1; and *Kožul and Ors. v Bosnia and Herzegovina* 38695/13 (ECtHR, 22 October 2019), para 36

[28] In none of the leading Article 2 cases concerning environmental issues is such a test applied. See, ECtHR Registry, 'Guide on Article 2 of the European Convention on Human Rights', 31 August 2023 <https://ks.echr.coe.int/documents/d/echr-ks/guide_art_2_eng>

[29] N.b. this point should not be confused with the very different strand of the Court's jurisprudence about causation. I am not concerned here with the Court's jurisprudence on attribution, responsibility, or causation, but rather with the test for which harms – howsoever caused – reach the level of an interference with an individual's Convention right.

during the flood' and 'by the time they returned home in the evening there was already no water left in their flats … there was no evidence that any threat to [their lives] had ever existed as a result of the flood'; as a result, the Court found that Article 2 was 'inapplicable'.[30] Likewise, in its Article 8 jurisprudence, the Court has stressed the need for the applicant to be 'directly' affected in order to qualify as a victim.[31] In *Asselbourg*, for example, the Court held that 'mere suspicions or conjectures' were 'not enough' to engage Article 8, and that the applicant would have to produce 'evidence of the probability of the occurrence of a violation concerning him or her personally'; the Court therefore concluded that 'the mere mention of the pollution risks inherent in the production of steel from scrap iron is not enough to justify the applicants' assertion that they are the victims of a violation of the Convention'.[32] Similar standards apply under Article 6(1).[33] The essential point here is that generalised, theoretical, and improbable risks are not normally enough to trigger Convention obligations.[34] As Braig and Panov comment, 'the Strasbourg legal system has been designed to protect against concrete and imminent hazards rather than to avert only potential risks'.[35]

1.4. Temporal Proximity

Finally, though more ambiguously, the Court has applied temporal restrictions to the application of Convention rights. These limit the extent to which environmental harms too far in the future engage Convention rights. In the context of Article 2, a state only has a duty to take 'preventative operational measures' to protect individuals from risks to their life if those risks are 'real and immediate'.[36] However, as Stoyanova notes, there is some ambiguity or flexibility in the Court's case law about how short the timeframe must be for a risk to qualify as 'immediate': in its medical negligence case law, the Court seems to suggest that 'immediate' means only a few days, whereas in the domain of environmental risks, 'immediate' can mean years.[37] In its Article 6(1) jurisprudence, the Court has applied a similar standard, requiring applicants to show that they are exposed to some 'imminent' danger for that right to be engaged; again, however, the Court has not been clear about exactly how 'imminent' such dangers must be before the applicant qualifies as a victim.[38] And although, in its Article 8 jurisprudence, the Court has never explicitly endorsed any temporal restriction, the fact that a health risk might materialise only in 'the long term', rather than being 'a short-term health risk', has formed part of the Court's reasoning for holding that Article 8 was inapplicable;[39]

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[30] *Kolyadenko and Ors. v Russia* 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05 (ECtHR, 28 February 2012), para 152

[31] See *Hatton* (n 20), para 96; *Dzemyuk* (n 26), para 77

[32] *Asselbourg and Ors. v Luxembourg* 29121/95 (ECtHR, 29 June 1999), para 1; see also *Luginbühl v Swirzerland* 42756/02 (ECtHR, 17 January 2006), para 3; *Kyrtatos v Greece* 41666/98 (ECtHR, 22 May 2003), paras 52-53; and *Çiçek and Ors. v Turkey* 44837/07 (ECtHR, 4 Feb 2020), para 32

[33] *Gorriaz Lizarraga and Ors. v Spain* 62543/00 (ECtHR, 27 April 2004), para 43

[34] See also *L, M and R v Switzerland* 30003/96 (ECmHR, 1 July 1996)

[35] Braig and Panov (n 13), p.270

[36] *Nicolae Virgiliu* (n 25), para 136

[37] Vladislava Stoyanova, 'Fault, knowledge and risk within the framework of positive obligations under the European Convention on Human Rights' (2020) 33 *LJIL* 601–620, pp.612-615; citing, in particular, *Öneryildiz v Turkey* [GC] 48939/99 (ECtHR, 30 November 2004), para 100; and *Fernandes de Oliveira v Portugal* [GC] 78103/14 (ECtHR, 31 January 2019), para 131

[38] See *Balmer-Schafroth v Switzerland* [GC] 67\1996\686\876 (ECtHR, 26 August 1997), para 40 and the dissenting opinion of Judge Pettiti, at p.15 and 17; *Athanassoglou and Ors. v Switzerland* [GC] 27644/95 (ECtHR, 6 April 2000), paras 45-55; and *Ivan Atanasov v Bulgaria* 12853/03 (ECtHR, 2 December 2010), para 92

[39] *Ivan Atanasov* (n 38), para 76

again, however, there is some ambiguity here about what constitutes the 'long term', as the Court has sometimes accepted that Article 8 might apply to the threat of environmental pollution even if it would materialise only in decades.[40]

1.5. Application to Climate Change Cases

Comparing this four-part test of victim-status derived from the pre-existing jurisprudence with the test applied to individual applicants in *KlimaSeniorinnen*, it is evident that the Court is seeking to preserve the basic logic of its previous environmental judgments – at least in relation to individual victims, if not associations. The four-part test is reflected in the Court's stipulation in *KlimaSeniorinnen* that there must be 'a pressing need to ensure the applicant's individual protection' from 'a high intensity of exposure' to significant and severe adverse consequences, and that the individual must be 'personally and directly affected by the impugned failures'. It is also reflected in the Court's stipulation that relevant factors would include, but not be limited to: 'the actuality/remoteness and/or probability of the adverse effects of climate change in time, the specific impact on the applicant's life, health or well-being, the magnitude and duration of the harmful effects, the scope of the risk (localised or general), and the nature of the applicant's vulnerability.'[41] All of this closely mirrors the pre-existing case law, much of which is cited with approval by the Court in *KlimaSeniorinnen*.[42] Indeed, Judge Eicke in his dissenting opinion noted that the test laid down by the majority 'while described … as 'especially high', does not, in fact, seem … to differ significantly (if at all) from the test summarised in *Asselbourg*', one of the leading cases which shows that harms must directly and specifically affect the applicant to engage Convention rights.[43]

Crucially, the Court in *KlimaSeniorinnen* did not develop its case law in order to reach similar conclusions to those reached in *Urgenda* – where the Dutch Court (a) dismissed the idea that there was any temporal restriction implied by the ECtHR jurisprudence (holding that '[the] term 'immediate' does not refer to imminence in the sense that the risk must materialise within a short period of time, but rather that the risk in question is directly threatening the persons involved'[44]) and (b) ignored the question of direct impacts on 'specific persons or a specific group of persons'[45] (holding that because 'the lives and welfare of Dutch residents could be seriously jeopardised' by the effects of climate change, and because 'the possible sharp rise in the sea level … could render part of the Netherlands uninhabitable', Articles 2 and 8 of the Convention were therefore engaged[46]). Instead, despite arguments for the '*Urgenda*-style' approach being made by the applicants and interveners in *KlimaSeniorinnen*,[47] the Court explicitly approved the 'real and imminent risk' threshold in the context of Article 2,[48] and more importantly, repeatedly emphasised the need for an individual applicant to show that they are 'personally and directly affected' in the context of Article 8.[49] Unlike the Dutch Court in *Urgenda*, the ECtHR recognised the danger of expanding the concept of victim-status to 'cover

[40] *Taşkin and Ors. v Turkey* 46117/99 (ECtHR, 10 November 2004), paras 107 and 111; see also and *Tătar v Romania* 67021/01 (ECtHR, 27 January 2009), paras 89-97
[41] *KlimaSeniorinnen* (n 1), paras 487-488
[42] Ibid, paras 460-472 and 507-520
[43] Ibid, dissenting opinion of Judge Eicke, para 41(b)
[44] *Urgenda* (n 11), para 5.2.2
[45] Ibid, para 5.6.2
[46] Ibid, para 5.6.2
[47] *KlimaSeniorinnen* (n 1), paras 313, 317, 341, and 376
[48] Ibid, paras 507-513
[49] Ibid, para 487 (see also paras 483 and 486)

virtually anybody' in the context of climate change.[50] What is clear, then, is that the four-part test of severity, comparative intensity, specificity, and temporal immediacy to be found in the pre-existing case law is coherent with the application of Convention rights to individuals in *KlimaSeniorinnen.*

Given the consistency between the pre-existing jurisprudence and this aspect of the Court's judgment in *KlimaSeniorinnen*, the four-part test of victim-status can provide important constraints on the Court's ambitions in relation to the victim-status of individual applicants in future climate change cases. Starting with the first part of the test, severity, those effects of climate change such as discomfort or fatigue from excessive heat, minor flood events, moderate water scarcity, or 'climate anxiety', would surely not be enough to reach the 'high threshold' set in *KlimaSeniorinnen* as understood in light of the pre-existing case law. By contrast, the Court in *KlimaSeniorinnen* indicated that a 'critical medical condition whose possible aggravation linked to heatwaves could not be alleviated by … reasonable measures of personal adaptation', would reach the necessary threshold.[51] Thus, it seems heatwaves causing severe and sustained impacts to quality of life, flooding which causes a threat to life or health or damages homes, or water scarcity which has sustained health impacts, might all reach the necessary threshold. Similarly, the second, comparative part of the four-part test would seem to exclude, for example, the application of Convention rights where there is merely an increase in the frequency of heatwaves in states which already experience heatwaves of a similar level. By contrast, heatwaves far exceeding the intensity and duration of anything before seen in a given state might be sufficiently serious to pass this comparative test.[52]

More stringent limits emerge from the last two parts of the four-part test for victim-status – the stipulation that environmental issues must pose a direct and specific threat to an applicant, and the stipulation that the threat must be temporally proximate. The Court in *KlimaSeniorinnen* emphasised the need for an individual applicant to show that they are 'personally and directly affected'.[53] Applying that approach to the case before them, the Court held that belonging to a *group* which experiences increases in mortality would not alone engage Article 8.[54] Rather, it is 'is necessary to establish, in each applicant's individual case, that the requirement of a particular level and severity of the adverse consequences affecting the applicant concerned is satisfied'.[55] These limitations deeply affect the scope of the Court's interventions, because the most significant impacts of climate change in terms of well-being, even for the citizens of Europe, will inevitably occur not through any change in the European climate itself, but rather, through flooding and desertification in regions of the global south (such as flood plains in Bangladesh) leading to mass migration, which may in turn precipitate economic damage, political turmoil, or even armed conflict.[56] Such effects are too indirect, unspecific, long-term,

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[50] Ibid, para 485
[51] Ibid, para 533
[52] It could, of course, be argued that because such heatwaves may soon become the norm, they might come to be seen as 'environmental hazards inherent to life in every modern city'. However, the Court did not accept such an argument in *KlimaSeniorinnen*. Judge Eicke raised the point; but the majority was not persuaded – no doubt because applying a comparative test to a harm that has itself changed the comparator would rob the Convention of its 'practical and effective' protection of rights (ibid, dissenting opinion of Judge Eicke, para 64)
[53] Ibid, para 487 (see also paras 483 and 486)
[54] Ibid, paras 529-530
[55] Ibid, para 531
[56] IOM, 'Migration and Climate Change', (2008) 31 *IOM Migration Research Series* <https://www.ipcc.ch/apps/njlite/srex/njlite_download.php?id=5866>, estimates 200 million refugees by 2050 (estimates between 25 million and 1 billion); see also Lea Raible, 'Priorities for Climate Litigation at the

and remote, to give rise to Convention obligations if the Court's pre-existing environmental jurisprudence is applied consistently. In short, if the Court wishes to maintain coherence with the four-part test of severity, comparative intensity, specific impact, and temporal immediacy running through its general environmental jurisprudence and its judgment in *KlimaSeniorinnen,* it will restrict the application of the Convention to specific, definite, and severe climate change harms to specific and definite individuals, rather than allowing the Convention to become a vehicle for addressing large-scale systemic harms.[57]

True, the Court adopted a very different approach for the standing of associations than for the victim-status of individuals in *KlimaSeniorinnen*. The Court held that associations could have standing in climate change cases – even if those whom they represent do not meet the criteria for individual applicants to qualify as victims – so long as the association: (a) is lawfully established in its jurisdiction, (b) is set up to pursue aims including the defence of the human rights of its members from the threat of climate change, and (c) represents 'affected individuals … who are subject to specific threats or adverse effects of climate change on their lives, health or well-being'.[58] There can be no doubt that this new view of associational standing in *KlimaSeniorinnen* is innovative and represents a departure from the four-part test inherent in the pre-existing environmental case law. But even in this new associational test, one can see elements which are congruent with and informed by the old case law. The Court did not simply give 'automatic' standing to all associations properly constituted with the requisite objectives. Crucially, an association must still act on behalf of persons who have victim-status because they are subject to '*specific threats or adverse effects* of climate change on their lives, health or well-being'.[59] This could, in theory, represent a form of victim-status test, albeit with a lower threshold than that applied for individual applicants – what we might call a 'victim-status-lite' test. It is true that the Court in *KlimaSeniorinnen* did not expand on the stringency of this 'victim-status-lite' test, leaving it to be developed further in future climate change cases. But it is also significant that the Court repeatedly emphasised the 'need to ensure … that the criteria for victim status do not slip into *de facto* admission of *actio popularis*', and insisted that it was respecting the *actio popularis* rule by making associational standing 'subject to certain conditions'.[60] If Judge Eicke is to be proved wrong when he opined that the majority had 'created exactly what the judgment repeatedly asserts it wishes to avoid, namely a basis for *actio popularis* type complaints', developing this 'victim-status-lite' threshold for associational standing offers a clear means for the Court, going forward, to restrict the class of associations which have standing in a way which is broadly congruent with (although less stringent than) the four-part victim-status test applied to individual applicants in its pre-existing environmental jurisprudence.[61] And it could achieve this degree of congruence, while also recognising and allowing for the special challenges of climate change litigation and the 'evolution in contemporary society as regards recognition of the importance of associations'.[62]

2. Limits on the Adoption of the Precautionary Principle

ECtHR' (EJIL Talk, 2 May 2024) <https://www.ejiltalk.org/priorities-for-climate-litigation-at-the-european-court-of-human-rights/>

[57] For similar observations in relation to tort law, see Douglas Kysar, 'The Public Life of Private Law: Tort Law as a Risk Regulation Mechanism' (2018) 9 *European Journal of Risk Regulation* 48

[58] *KlimaSeniorinnen* (n 1), para 502

[59] Ibid

[60] Ibid, paras 484 and 500

[61] Ibid, dissenting opinion of Judge Eicke, para 45

[62] Ibid, para 489 and 497

The second limit emerging from the ECtHR's environmental jurisprudence is that the Court cannot adopt a strong version of the precautionary principle in climate change cases. While the Court has explicitly endorsed the precautionary principle in one case,[63] and while its jurisprudence as a whole may be consistent with weak 'procedural' versions of the principle, I argue that the Court's jurisprudence is largely inconsistent with strong versions of the principle. Specifically, I argue that the Court's environmental jurisprudence is incompatible with at least three concepts associated with strong versions of the precautionary principle put forward by some environmentalists: (i) that the burden of proof rests with the creator of an environmental risk to show that the risk is acceptable; (ii) that a low standard of proof should obtain in relation to establishing risks of environmental damage; and (iii) that states are required by the precautionary principle to take specific and far-reaching precautionary measures. These three strong precautionary concepts are reflected both in claims made by applicants in climate change cases and in the discourse about these cases. However, I shall show that they are inconsistent not only with the Court's environmental jurisprudence but also with a proper understanding of the Court's more general non-environmental jurisprudence.

2.1. Burden of Proof

The notion that the burden of proof in environmental matters rests with the risk-creator is contained in formulations of the precautionary principle such as the Wingspread Statement and is reflected in the academic literature.[64] A wide range of environmental regulatory regimes are also based on this understanding of the precautionary principle, placing the onus on risk-creators to show that their activities will not adversely impact the environment.[65] While this aspect of the precautionary principle is more widely accepted in administrative than in adjudicative contexts, some have argued that it ought to be adopted in environmental adjudication. Foster, for example, argues that where a claimant makes 'a sufficiently well-supported assertion' that pollution is 'serious, and might have potentially irreversible consequences', the precautionary principle should lead courts to place the burden of proving there will not be environmental damage on the defendant.[66] Other academic commentators have applied the same argument to climate change cases in the ECtHR: Keller and Heri argue that the ECtHR should 'substitute the need for scientific certainty with an application of the precautionary principle' and that this should involve 'a precautionary reversal of the burden of proof';[67] and Wawerinke-Singh argues that 'in rights-based climate cases, shifting the burden of uncertainty from plaintiffs to state defendants helps to safeguard procedural fairness.'[68]

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[63] *Tătar* (n 40); but see also *Luginbühl* (n 32)

[64] Wingspread Statement on the Precautionary Principle (1998), Racine, WI, 26 Jan 1998; Marko Ahteensuu and Per Sandin, 'The Precautionary Principle', in *Handbook of Risk Theory*, S Roeser, R Hillerbrand, P Sandin, & M Peterson (eds), (Springer 2012), p.971; Ole Pedersen, 'From Abundance to Indeterminacy: The Precautionary Principle and Its Two Camps of Custom', (2014) 3(2) *Transnational Environmental Law* 323, p.331 (see footnote n 44); and Cass Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge University Press 2005), p.19

[65] For examples, see Caroline Foster, *Science and the Precautionary Principle in International Courts and Tribunals* (Cambridge University Press 2011), p.245-248

[66] Ibid, p.255; see also Monika Ambrus, 'The Precautionary Principle and a Fair Allocation of the Burden of Proof in International Environmental Law' (2012) 21(3) *RECIEL* 259-270

[67] Helen Keller and Corina Heri, 'The Future is Now: Climate Cases Before the ECtHR', (2022) 40(1) *Nordic Journal of Human Rights* 154, p.169

[68] Margaretha Wewerinke-Singh, 'Remedies for Human Rights Violations Caused by Climate Change' (2019) 9 *Climate Law* 224, p.236

This understanding of the precautionary principle as shifting the burden of proof to the risk-creator is, however, difficult to reconcile with the ECtHR's environmental jurisprudence. In none of the great number of existing environmental cases to date has the Court shifted the burden of proof to the respondents. Nor is the shifting of the burden of proof a regular feature of the Court's wider, non-environmental jurisprudence. While the ECtHR has avoided formulating strict rules about who bears the burden of proof, in practice the general principle applied by the ECtHR is that 'it falls to the applicant to show that there has been an interference with his/her rights'.[69] As Dembour observes: it is ordinarily the applicant who loses the case if they fail to prove their allegations; the Court's references in particular cases to 'shifting the burden of proof onto the state' make sense only if the burden of persuasion ordinarily rests with the applicant;[70] and 'the Court … remains reluctant to reverse the burden of proof, even in circumstances where one would have thought its shifting to be amply called for'.[71]

True, there are exceptions to the normal rule within the Court's wider, non-environmental jurisprudence. The Court has stated many times that 'a strict application of the principle … that the burden of proof in relation to an allegation lies on the party which makes it, is not possible',[72] and shifts of the burden of proof do sometimes occur in cases involving issues such as refugees, forced disappearances, deaths or mistreatment in custody, extraordinary rendition, or discrimination. While the Court has no definite criteria determining when such exceptions will apply, its general approach is that 'the distribution of the burden of proof' is 'intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake.'[73] The most common situation in which the Court shifts the burden of proof to the state is where the applicant can produce some *prima facie* evidence of a violation but has limited access to further evidence needed to substantiate their claim – for example, in cases where the applicant dies or is mistreated while in the control of the authorities (e.g. *Salman*,[74] *Taniş*,[75] *Bouyid*[76] or *Cazan*[77]) or in cases where the applicant would face the near-impossible task of proving the respondent's mental state or reasons for actions (e.g. *DH*[78] or *Baka*[79]). And in some other circumstances the Court has shifted the burden of proof to the respondents in more *ad hoc* fashion: in *El-Masri*, for example, the Court shifted the burden of proof to the respondents where there was very strong 'multi-layered' circumstantial evidence that the applicant had been part of a CIA extraordinary rendition programme;[80] and the Court has

[69] Michael O'Boyle, 'Proof: European Court of Human Rights' in *Max Planck Encyclopedias of International Law* (OUP 2018), para 36; see also Corina Heri, 'Evidence: European Court of Human Rights' in *Max Planck Encyclopedias of International Law* (OUP 2018) para 78

[70] Marie-Bénédicte Dembour, 'Beyond Reasonable Doubt at its Worst – But Also at its Potential Best: Dissecting Ireland v the United Kingdom's No-Torture Finding' (2023) 4 *ECLR* 375-425, p.390

[71] Marie-Bénédicte Dembour, 'The Evidentiary System of the European Court of Human Rights in Critical Perspective' (2023) 4 *ECLR* 363-374, p.365; citing Christopher Roberts, 'Reversing the burden of proof before human rights bodies' (2021) 25(10) *IJHR* 1682-1703

[72] E.g. *Merabishvili v Georgia* [GC] 72508/13 (ECtHR, 28 November 2017), para 311

[73] *El-Masri v Macedonia* [GC] 39630/09 (ECtHR, 13 December 2012), para 151

[74] *Salman v Turkey* [GC] 21986/93 (ECtHR, 27 June 2000)

[75] *Taniş v Turkey* 65899/01 (ECtHR, 2 August 2005)

[76] *Bouyid v Belgium* [GC] 23380/09 (ECtHR, 28 September 2015)

[77] *Cazan v Romania* 30050/12 (ECtHR, 5 April 2016)

[78] *DH v Czech Republic* [GC] 57325/00 (ECtHR, 13 November 2007), paras 177-180

[79] *Baka v Hungary* [GC] 20261/12 (ECtHR, 23 June 2016), para 149

[80] *El Masri* (n 73); see O'Boyle (n 69), para 54; however (as Bicknell notes) the circumstantial evidence here was so strong that it left 'almost no room for doubt', and thus (as Dembour comments) the Court's talk of shifting the burden of proof to the respondent was for all intents and purposes 'purely rhetorical' (Christine Bicknell, 'Uncertain Certainty?: Making Sense of the European Court of Human Rights' Standard of Proof' (2019) 8 *IHRLR* 155-187, p.181; and Dembour (n 70), p.410)

'lightened' the burden in some cases concerning interferences with the Article 2 or 3 rights of vulnerable migrants.[81]

None of these cases in which the ECtHR has exceptionally shifted the burden of proof to the respondent state share the salient features of climate change cases. All of them involve some sort of special 'aggravating' feature – such as a disparity of knowledge between the applicant and the respondent, exceptionally severe allegations under Articles 2, 3, or 14, or especially vulnerable applicants – which are not, by and large, present in climate change cases. In climate change cases, all of the information relevant will ordinarily be accessible to the applicants, so there is no knowledge disparity. Nor are the allegations especially severe, and nor, following *KlimaSeniorinnen*, are such claims likely to brought under Articles 2, 3, or 14; instead, they are most likely to be brought under Article 8, and the Court has never shifted the burden of proof in an Article 8 case. While it is true that the applicants in climate change cases are sometimes vulnerable,[82] such vulnerability has not previously been enough, taken alone, to convince the Court to reverse the burden of proof.[83] Accordingly, there is nothing either in the Court's previous environmental jurisprudence or in its wider non-environmental jurisprudence that would be consistent with a general reversal of the burden of proof in climate change cases.

2.2. Standard of Proof

Broadly the same points apply when we turn from the *burden* of proof to the *standard* of proof. Academic commentators who take a strong view of the precautionary principle often favour a low standard of proof for establishing risks of environmental damage – arguing that the precautionary principle implies taking 'no action unless you are *certain* that it will do no harm'[84] or that 'scientific proof is not a necessary condition for the application of precautionary measures';[85] and some scholars take it as settled that 'the precautionary principle has lowered the standard of proof'.[86] These ideas have also been applied by the EU in some contexts in which, before any action is taken, it must first be established, beyond reasonable doubt, that no risk of environmental damage exists.[87] Applying the same broad concept to climate change cases, Mayer notes that adopting the precautionary approach would justify 'consideration for the small risk of cataclysmic consequences, including runaway climate change and civilizational collapse.'[88] And this understanding of the precautionary principle was deployed

[81] See Moritz Baumgärtel, 'Facing the challenge of migratory vulnerability in the European Court of Human Rights' (2020) 38(1) *Netherlands Quarterly of Human Rights* 12–29, p.24; see also Grażyna Baranowska, 'Exposing Covert Border Enforcement: Why Failing to Shift the Burden of Proof in Pushback Cases is Wrong' (2023) 4 *ECLR* 473-494, pp.478-481

[82] C.f. Heri (n 14)

[83] In *M.S.S v Belgium* [GC] 30696/09 (ECtHR, 21 January 2011), for example, there were other aggravating factors present too.

[84] Julian Morris, 'Defining the precautionary principle' in *Rethinking Risk and the Precautionary Principle*, J Morris (ed), (Butterworth-Heinemann 2000) 1–21, p.1 [emphasis added]

[85] Ahteensuu and Sandin (n 64), p.971 [emphasis added]

[86] E.g. Aline Jaeckel, *The International Seabed Authority and the Precautionary Principle* (Brill 2017), p.55 (and the sources cited in footnote n 159)

[87] See, for example, Article 6(3) of Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Flora and Fauna, as interpreted in *Waddenzee v Staatssecretaris Van Landbouw, Natuurbeheer en Visserij* (Case C-127/02)) [2005] 2 C.M.L.R. 31, paragraphs 44, 58, 59, and 61 of the CJEU's judgment and paragraphs 107 and 108 of the Advocate General's opinion); for further examples and analysis, see Eloise Scotford, *Environmental Principles and the Evolution of Environmental Law* (Bloomsbury 2017), pp.147-157

[88] Benoit Mayer, 'Climate Change Mitigation as an Obligation under Customary International Law' (2023) 48 *Yale J Int'l L* 105, p.131

in *KlimaSeniorinnen* by one of the interveners, the Human Rights Centre of Ghent, which argued for amending the Court's approach to evidence to substitute the need for scientific certainty with an application of the precautionary principle.[89]

However, this understanding of the precautionary principle as implying a low standard of proof for establishing risks of environmental damage is difficult to reconcile with the ECtHR's environmental jurisprudence. In *Tătar*, for example, despite ostensibly endorsing the precautionary principle, the Court nonetheless applied a relatively high standard of proof.[90] The applicant argued that exposure to water polluted by cyanide had aggravated their asthma, relying on scientific studies showing that cyanide exposure could cause respiratory difficulties and on evidence from the local hospital showing that a rise in respiratory issues coincided with the cyanide pollution in the water. The Court noted that it could in theory 'indulge in probabilistic reasoning' in cases of 'scientific uncertainty accompanied by sufficient and convincing statistical evidence'.[91] However, the Court held that such 'sufficient and convincing statistical evidence' was not present in this case, that the evidence from the local hospital was 'not sufficient, on its own, to create a causal probability', and that the applicants had therefore 'failed to prove the existence of a sufficiently established causal link' between the cyanide and the asthma.[92] Although the Court ultimately found a breach of Article 8 on other grounds, it was not willing to endorse the asthma-related element of the claim. Another example of a similar approach is the *L.C.B.* case, where the applicant alleged that her leukaemia was caused by her father's pre-paternal exposure to radiation while working as a serviceman during nuclear testing on Christmas Island.[93] Though it was known that the father was exposed to radiation, there were no 'individual dose measurements' and it was therefore uncertain whether 'he was exposed to dangerous levels of radiation'.[94] The Court thus concluded that the 'causal link between the exposure of a father to radiation and leukaemia in a child' could not be established.[95]

True, there are some cases where, even in the absence of specific medical evidence showing a direct causal link between environmental pollution and impacts on the applicant's quality of life, the Court has been willing to infer such a causal link on the basis of 'sufficient and convincing statistical evidence'. In *Kotov*, for example, the Court was willing to infer from the statistical evidence 'that living in the area marked by pollution in clear excess of the applicable safety standards made [the applicant] more vulnerable to various illnesses' and that Article 8 was therefore engaged.[96] But such willingness to rely on 'sufficient and convincing statistical evidence' to provide sufficient certainty does not in any way contradict the basic observation that in an overwhelming majority of environmental cases the ECtHR continues to apply a high

[89] *KlimaSeniorinnen* (n 1), para 387; see also Nele Schuldt, 'Third-Party Intervention in Pending Climate Case: The Human Rights Centre of Ghent University Submits Comments In *Klimaseniorinnen V. Switzerland*' (Strasbourg Observers, 22 Oct 2021) <https://strasbourgobservers.com/2021/10/22/third-party-intervention-in-pending-climate-case-the-human-rights-centre-of-ghent-university-submits-leave-to-intervene-in-klimaseniorinnen-v-switzerland/>

[90] *Tătar* (n 40)

[91] Ibid, para 105

[92] Ibid, para 106

[93] *L.C.B. v the United Kingdom* 14/1997/798/1001 (ECtHR, 9 June 1998); a further example is *Noël Narvii Tauira and Ors. v France* 28204/95 (ECmHR, 4 December 1995)

[94] Ibid, para 37

[95] Ibid, para 39

[96] *Kotov and Ors. v Russia* 6142/18 and 13 others (ECtHR, 11 October 2022), para 107; see also *Pavlov and Ors. v Russia* 31612/09 (ECtHR, 11 October 2022)

standard of proof. Indeed, Ambrus' analysis reveals that the Court has generally applied the principle of prevention rather than precaution when considering the standard of proof in environmental cases. As she concludes: 'all in all, the future of the Court's risk dispositief is quite straightforward; states will be held responsible for clear-cut risks, but not for potential harms which include uncertainty.'[97]

As in relation to the burden of proof, the fact that Court's environmental jurisprudence avoids adopting a low standard of proof of the sort implied by a strong precautionary principle should be no surprise. Environmental cases in general lack the distinctive features – namely 'the specificity of the facts, the nature of the allegation made and the Convention rights at stake'[98] – which have sometimes led the Court to reduce standards of proof in its wider, non-environmental jurisprudence. Moreover, even when the Court does apply a reduced standard of proof under highly specific circumstances in its wider, non-environmental jurisprudence, it is still the case that a violation of the Convention must be proved to a standard much higher than the low standard implied by a strong version of the precautionary principle. Whether or not Erdal is right that in practical terms the nominal requirement for proof 'beyond reasonable doubt' has been abandoned by the Court in all but name,[99] it is still generally agreed that the applicable standard of proof in the Court's wider jurisprudence, even under exceptional circumstances, is nonetheless a high bar.[100] And this is especially so in light of the Court's self-limiting doctrine of deference to the findings of facts made by national courts, which makes the ECtHR reluctant to disturb a national court's approach to proof.[101] None of this is consistent with the adoption in climate change cases of the low standard of proof advocated by proponents of a strong version of the precautionary principle.

2.3. Specific Measures

In addition, the concept that states are required by the precautionary principle to take specific and far-reaching measures is inconsistent both with the Court's pre-existing environmental jurisprudence and with its wider, non-environmental judgments. Certainly, some academic commentators have promoted the idea that states are required by the precautionary principle to take specific and far-reaching precautionary environmental measures.[102] In the academic literature surrounding the climate change cases, for example, it has been argued that 'the precautionary principle … creates a strong pull towards more stringent targets within the range of fair shares'.[103] And this idea has had some practical traction – affecting the arguments made by applicants in environmental cases. Hence, it is unsurprising to find the applicants in *KlimaSeniorinnen* citing the precautionary principle as the basis for their argument that 'taking

[97] Mónika Ambrus, 'The European Court of Human Rights as Governor of Risk', in *Risk and the Regulation of Uncertainty in International Law*, M Ambrus et al. (eds), (OUP 2017), p.115
[98] O'Boyle (n 69), para 40
[99] Ugur Erdal 'Burden and standard of proof in proceedings under the European Convention' (2001) *European Law Review* 68, p.85
[100] O'Boyle (n 69), para 43; Philip Leach, 'Fact-Finding: European Court of Human Rights' in *Max Planck Encyclopedias of International Law* (OUP 2018), para 7
[101] *Klaas v Germany* 15473/89 (ECtHR, 22 September 1993), para 29; *Dzemyuk* (n 26), para 80; see also, *Jugheli* (n 21), para 63; and *Ledyayeva* (n 23), para 90
[102] See Ahteensuu & Sandin (n 64), p.971 (and the works cited therein)
[103] Lavanya Rajamani et al, 'National 'fair shares' in reducing greenhouse gas emissions within the principled framework of international environmental law' (2021) 21(8) *Climate Policy* 983-1004, p.993

the risk of non-compliance with the limits of 1.5°C and 'well below 2°C' is impermissible';[104] and it is equally unsurprising to see the UN Special Rapporteurs arguing that the precautionary principle provides 'a normative basis for ambitious climate action'.[105] However, this understanding of the precautionary principle as demanding specific measures or imposing specific targets in climate change cases is wholly incompatible with the way the ECtHR's principle of subsidiarity is applied to environmental cases – an issue I explore in more detail in section 4 of this article.

2.4. Application to Climate Change Cases

In summary, in order to maintain consistency both with its environmental jurisprudence and with its wider non-environmental judgments in future climate change cases, the Court should continue to reject all three of the concepts associated with a strong understanding of the precautionary principle. Neither the reversal of the burden of proof, nor the adoption of a low standard of proof, nor the insistence on the state taking specific measures that would flow from a strong understanding of the precautionary principle are compatible with that pre-existing jurisprudence.

It does not follow, of course, that the Court must also necessarily reject weaker, 'procedural' versions of the precautionary principle, such as that contained in the Rio formulation which states that 'lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation'.[106] Some of the claims made for the role of the precautionary principle in climate change cases may thus be capable of accommodation within the Court's jurisprudence. For example, there is nothing preventing the Court, in the future, from accepting the contention, made by the CIEL as interveners in *KlimaSeniorinnen*, that the precautionary principle precludes States from forgoing measures to reduce emissions 'in reliance on speculative technologies such as engineered carbon dioxide removal'.[107] Nor is there anything preventing the Court from accepting, as Maxwell et al. contend, that the precautionary principle implies that a 'State's emissions reduction targets should not rely heavily on … the deployment of so-called negative emissions technologies in the future'.[108] However, these relatively weak versions of the precautionary principle are altogether different from the kind of precautionary principle that would apply if the Court were to adopt the strong precautionary concepts of reversing the burden of proof, employing a low standard of proof, and insisting on the state taking specific measures.

These limits on the Court's capacity to adopt a strong version of the precautionary principle have important consequences for climate change litigation, given the many uncertainties inherent to such cases. True, at a very abstract level, applicants in climate change cases do not need to rely upon any version of the precautionary principle, since there is little scientific uncertainty about the general existence, causes, and risks of climate change.[109] However, as a

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[104] Paragraph 56 in the applicants' written submissions in *KlimaSeniorinnen.* Available at: <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20201126_Application-no.-5360020_application-1.pdf>

[105] *KlimaSeniorinnen* (n 1), para 371

[106] Principle 15, UNCED Rio Declaration on Environment and Development (United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992)

[107] *KlimaSeniorinnen* (n 1), para 405

[108] Maxwell et al (n 14), p.26

[109] E.g. IPCC, *Climate Change 2021: The Physical Science Basis*, Contribution of Working Group I to the Sixth Assessment Report (Cambridge University Press 2021)

wealth of scholars have noted, there nonetheless remain many important uncertainties about the precise impacts of climate change and about the precise impacts of various mitigation and adaptation strategies.[110] Thus, much still turns on whether the principle is accepted, and what version of it is accepted in climate change cases – as the attempts to rely on it by the applicants and interveners in *KlimaSeniorinnen* show. The inconsistency of the Court's jurisprudence with the strong precautionary concepts of reversing the burden of proof, lowering of the standard of proof, and insisting upon the adoption of specific measures, means that insofar as these important uncertainties affect future climate change cases, they are more likely to be resolved in favour of the respondent state than if a strong version of the precautionary principle were applied.

It is noteworthy that the Court in *KlimaSeniorinnen* maintained consistency with this aspect of its pre-existing jurisprudence. Despite the precautionary principle being mentioned by the applicants, the respondent, and no less than seven of the third-party interveners, the Court in *KlimaSeniorinnen* remained silent on the issue. The Court adopted its normal rules with respect to 'issues of proof', and found it unnecessary to refer to any previous case in which it had exceptionally reversed the burden of proof or lowered the standard of proof;[111] and the Court went on to apply this normal approach to proof in the summary fashion in which it dismissed the individual applicants' arguments that they were victims.[112] Nor is the deferential, subsidiarity-focused approach to emissions reduction targets evident *KlimaSeniorinnen* (which I explore in more detail in section 4 of this article) compatible with a conception of precaution as demanding specific measures.

3. Limiting the Duty to Meet Emissions Targets to Cases of State Passivity

The third limit is that a state should not be held culpable for a failure to meet emissions targets where it has taken appropriate measures to reduce emissions, and where the failure to meet the targets has arisen primarily as a result of private persons refusing to act in the way intended by the state rather than as a result of state inaction. This limit is grounded in the fact that, in both its general and environmental jurisprudence, the ECtHR treats the scope and content of positive obligations as being dependent on two concepts: (i) the extent of the state's causative role in creating an interference with a Convention right, and (ii) the reasonableness of any purported positive obligations (i.e. the degree to which the purported obligations would impose burdens on the state itself and the degree to which they would require intervention by the state in the lives of private individuals).

3.1. Causative Role

The fundamental importance of a state's causative role in creating an interference with a Convention right is evident in the Court's general jurisprudence – where it treats negative obligations as more demanding than positive obligations. For example, whereas the negative

[110] E.g. Jonathan Wiener, 'Precaution and Climate Change', in *The Oxford Handbook of International Climate Change Law*, Kevin R Gray et al. (eds), (OUP 2016); Jeroen Hopster, 'Climate Change, Uncertainty and Policy', in *Handbook of the Philosophy of Climate Change*, G Pellegrino & M Di Paolo (eds), (Springer 2021), p.977; Nicolas de Sadeleer, 'Climate change mitigation and the precautionary principle', in *Research Handbook on Climate Change Mitigation Law*, L Reins and J Verschuuren (eds), (Elgar 2022); Jeroen van der Sluijs and Wim Turkenburg, 'Climate Change and the Precautionary Principle', in *Implementing the Precautionary Principle*, E Fisher & J Jones & R Schomberg (eds), (Elgar 2006)

[111] *KlimaSeniorinnen* (n 1), paras 427-430

[112] *KlimaSeniorinnen* (n 1), paras 527-535

obligations arising from absolute rights are absolute, the positive obligations arising from the same absolute rights are not themselves absolute;[113] and negative obligations arising from qualified rights are subject to a narrower margin of appreciation than positive obligations arising from qualified rights.[114] In effect, the Court generally holds that where the state is itself the cause of the interference, the state has a stronger obligation to avoid the interference than where the state merely omits to prevent an interference by a non-state actor.

Moreover, in the Court's general jurisprudence, the scope and content of positive obligations is itself shaped by the level of state control. Stoyanova, for example, notes that the Court limits 'the responsibility of the state to circumstances where the state is engaged in the harm as an organization', and that 'control structures lines of proximity', such that the 'more control, the closer proximity may be expected between state conduct and harm, and accordingly, the positive obligations are more demanding'.[115] Similarly, Hakami notes that 'whether a state must protect someone from third-party harm depends on the state's relationship with the third party'.[116]

These general principles are carried through into the Court's specific environmental jurisprudence. In *Fadeyeva*, for example, the Court observed that because 'the Severstal steel plant was not owned, controlled, or operated by the State … the Russian Federation cannot be said to have directly interfered with the applicant's private life or home'. The Court therefore considered its task to be assessing 'whether the State could reasonably be expected to act so as to prevent or put an end to the alleged infringement of the applicant's rights'.[117] In finding that there was such a positive obligation, the Court considered it important that 'the Severstal steel plant was built by and initially belonged to the State', that following the plant's privatisation 'the State continued to exercise control over the plant's industrial activities by imposing certain operating conditions on the plant's owner and supervising their implementation', and that the 'plant was subjected to numerous inspections'.[118] The Court concluded that the 'combination of these factors shows a sufficient nexus between the pollutant emissions and the State to raise an issue of the State's positive obligation under Article 8.'[119]

Many other examples demonstrate the same basic points: state involvement in the creation of a hazard makes it more likely that the state will be held responsible, and a lack of state involvement will tend to exculpate the state. In *Lopez Ostra* the Court thought it important that 'the State subsidised the plant's construction'.[120] In *Öneryildiz* the Court held that 'the status of those involved in bringing about such circumstances, and whether the acts or omissions attributable to them were deliberate are … factors among others that must be taken into account

[113] See *Osman v the United Kingdom* [GC] 87/1997/871/1083 (ECtHR, 28 October 1998), para 116; *Öneryildiz* (n 37), para 107; and *Cevrioğlu v Turkey* 69546/12 (ECtHR, 4 October 2016), para 52

[114] See Matthias Klatt, 'Positive Obligations under the European Convention on Human Rights' (2011) 71 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 691-718, p.711; and Laurens Lavrysen, *Human Rights in a Positive State* (Cambridge University Press 2017), §3.7

[115] Vladislava Stoyanova, 'Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights' (2018) 18 *HRLR* 309–346, p.321; Stoyanova (n 37) p.619

[116] Monica Hakami,'State Bystander Responsibility' (2010) 21(2) *EJIL* 341-385, p.354; see also Dimitris Xenos, *The Positive Obligations of the State Under the European Convention of Human Rights* (Taylor & Francis 2011), p.79

[117] *Fadeyeva* (n 20), para 89

[118] Ibid, para 90

[119] Ibid, para 92

[120] *López Ostra* (n 20), para 52

in the examination of the merits of a particular case, with a view to determining the responsibility the State may bear under Article 2.'[121] In *Cordella*, it was central to the Court's reasoning that the state had 'repeatedly intervened … in order to guarantee the continuation of the production activity of the steelworks'.[122] In *Brincat*, the Court again placed emphasis on the fact that the workplace in issue 'was run by a public corporation owned and controlled by the Government'.[123] In *Cevrioğlu*, the Court displayed some reticence to impose positive obligations, as the issue was between the applicant and a private construction company.[124] And in *Budayeva*, the Court distinguished between matters 'regulated and controlled by the State' which were thus 'within its responsibility, and 'natural disasters, which are as such beyond human control, [and] do not call for the same extent of State involvement', concluding that the positive obligations in the latter case 'do not necessarily extend as far'.[125]

The clear implication of this jurisprudence for climate change cases is that, where a state has a weak causative role in a failure to meet emissions targets, the state should be less culpable for any resulting interference with Convention rights. And this, in turn, entails that where the third limiting principle applies, then the state's culpability will be much diminished, since, under such circumstances, the state's causative role in the failure will necessarily be weak (i.e. where a state has taken appropriate measures to reduce emissions, and where a failure to meet emissions targets has arisen primarily as a result of the conduct of private persons rather than state inaction). Hence, if the Court were to adopt this limiting principle in climate change cases, it would be acting consistently with its jurisprudence. However, to make the stronger claim that the Court would be acting *inconsistently* if it does *not* adopt this limit, we must turn to a second concept: reasonableness.

3.2. Reasonableness

Reasonableness in this context can be seen as a measure of how hard the state must try to prevent third parties creating an interference with Convention rights. Manifestly, the less the state has done to prevent third parties causing an interference with Convention rights, the more likely it is to be held responsible for any such interference, and vice versa. But the Court has frequently qualified this in environmental cases by stating that it expects state authorities only to do what could 'reasonably be expected of them',[126] and by demanding only 'reasonable and appropriate measures'.[127] This leads to what Stoyanova calls a 'major normative tension' in the Court's jurisprudence between 'the value of protection' (i.e. the protection provided by positive obligations) and 'the value of freedom from intrusiveness and distribution of resources for other purposes'.[128]

The notion that protective obligations must be balanced against the distribution of resources for other purposes is very well-established in the Court's jurisprudence. The Court has stated

[121] *Öneryildiz* (n 37), para 73 (citing *L.C.B. v UK* (n 93), paras 36-41); the Court also emphasised, in finding a violation of the Convention, that the Turkish authorities 'had set up the site and authorised its operation, which gave rise to the risk in question' (para 101)
[122] *Cordella and Ors. v Italy* 54414/13 and 54264/15 (ECtHR, 24 January 2019), para 169
[123] *Brincat and Ors. v Malta* 60908/11 (ECtHR, 24 July 2014), para 81
[124] *Cevrioğlu* (n 113)
[125] *Budayeva and Ors. v Russia* 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR, 20 March 2008), paras 173-174
[126] E.g. *Mastromatteo v Italy* [GC] 37703/97 (ECtHR, 24 Oct 2002), para 74
[127] E.g. *Kotov* (n 96) para 123
[128] Vladislava Stoyanova, *Positive Obligations Under the* ECHR (OUP 2023), p.74

many times, including in environmental cases, that positive obligations must not be construed so as to 'impose an excessive burden on the authorities'[129] and must be balanced against the 'operational choices which [states] must make in terms of priorities and resources'.[130] In relation to climate change, this implies that a state's obligation to enforce its own emissions targets should be treated as an obligation of conduct, not an obligation of result, and that the conduct required is only that which is reasonable given resource constraints and other priorities.[131]

Less well-established in the Court's jurisprudence is the notion that protective obligations must be balanced against the value of freedom from intrusiveness. True, the Court could be more explicit that risk avoidance must be balanced against non-intrusiveness, as many academic commentators have argued it ought to be.[132] However, there are certainly elements of the Court's general jurisprudence which show the Court's concern to avoid demanding action from states that would be overly intrusive – for example, the *Osman* test inherently constrains the scope of positive duties by reference to the negative rights of the potential object of those duties.[133] And freedom from intrusiveness is evidently an important element of the broad set of general public interests which the Court takes into account as part of the 'open ended' fair balance test applied in positive obligation cases.[134] This implies that the Court would be acting congruently with its jurisprudence if it were to limit a state's obligation to enforce its own emissions targets by reference to the potential intrusiveness of the enforcement measures required to ensure those targets are met.

3.3. Application to Climate Change Cases

The practical importance of these points about causation and reasonableness can be illustrated through a hypothetical. Let us imagine two High Contracting Parties – Ruritania and Latveria – of similar population, size, wealth, geography, and development. In both states there is a clear regulatory framework for climate change mitigation, but neither state has successfully achieved the GHG reduction targets set. However, there is an important difference between the states. In Ruritania, the majority of GHG emissions come from state-run enterprise, and the state is subsidising industries such as oil, gas, and other types of enterprise which emit large quantities of GHGs. In Latveria, by contrast, major enterprise is hardly a contributor to GHG emissions, and the state has in place strict regulations governing GHG emissions by large businesses. The majority of Latveria's GHG emissions result from the fact that (regardless of the intentions of the state) the populace despises the use of public transport, and has a penchant for driving classic cars, pickup trucks, and light aircraft. Even though the Latverian state has taken special measures to ensure the targets set are met, the citizens of Latveria remain undeterred and continue to engage in activities which emit large quantities of GHGs.

The Court would be acting coherently with its jurisprudence if it were to find that the Ruritanian state's involvement in creating GHG emissions was a factor which weighed heavily in favour

[129] E.g. *Cevrioğlu* (n 113), para 52
[130] E.g. *Öneryildiz* (n 37) para 107
[131] C.f. Benoit Mayer, 'Obligations of Conduct in the International Law on Climate Change: A Defence' (2018) 27 *RECIEL* 130–140
[132] See Liora Lazarus, 'Positive Obligations, Risk, and Coercive Overreach', in *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law Under the ECHR*, L Lavrysen & N Mavronicola (eds), (Bloomsbury 2020). N.b. this point is also reflected in many of the other contributions to the same collection.
[133] *Osman* (n 113), para 116; see also ibid, p.251-252
[134] See Laurens Lavrysen, 'Causation and Positive Obligations under the European Convention on Human Rights: A Reply to Vladislava Stoyanova' (2018) 18 *HRLR* 705, p.717; and Stoyanova (n 128), p.73

of finding a violation of the Convention. By contrast, that same jurisprudence implies that the citizens of Latveria will have a much more challenging time persuading the Court that the state has violated their Convention rights, even though their interests in protection from climate change are ultimately impacted just as severely as the those of the citizens of Ruritania. This is because the Latverian state's causative role in creating emissions is highly limited, and because requiring the state to achieve certain emissions reductions with no regard to what the state has, in good faith, attempted to achieve, would impose not only an excessive burden of cost on the state but also an excessive intrusion into the lives of its citizens.

What this implies for future climate change cases is that, if the Court wants to remain consistent with its existing environmental jurisprudence, the duty imposed on states in *KlimaSeniorinnen* to pay 'due regard to the need to … provide evidence showing whether they have duly complied, or are in the process of complying, with the relevant GHG reduction targets' should be limited by reference to the reasons *why* a state fails to meet its emissions reductions targets.[135] While it may not be possible to say exactly where the Court will draw the relevant lines here – i.e. what exactly constitutes appropriate measures, or when exactly emissions will be seen as primarily attributable to the acts of private individuals rather than the state – it nonetheless seems clear that consistency with the Court's jurisprudence would require limiting the culpability of the state to instances in which a failure to meet emissions targets is attributable to inaction by the state, rather than to the unwillingness of the populace to be guided by measures adopted by the state. Where a state has not been involved in the creation of emissions and has taken a range of measures to reduce emissions, but emissions reductions targets have nonetheless been missed as a result of the conduct of private persons, it would be inconsistent for the ECtHR to treat such a situation as a violation of the Convention.

All of this is, at least, not inconsistent with *KlimaSeniorinnen*, where the Court stated that the 'scope of positive obligations … will depend on the origin of the threat'.[136] True, the Court treated the Swiss state's failure to meet its emissions reduction targets as being alone enough to establish 'the insufficiency of the authorities' past action to take the necessary measures to address climate change',[137] and did not consider why the targets had been missed. However, the absence of any detailed examination of the reasons for missing the targets is explained by the fact that the Swiss state did not argue the point. While the Swiss Government argued that its targets had been missed only by a small margin and that the technical costs of reducing emissions were especially high in Switzerland,[138] the Government's arguments were predominantly focused on the question of whether a sufficient mitigation framework was in place. The Government did not, therefore, put forward any detailed evidence demonstrating the practical steps it had taken to meet emissions targets; nor did it put forward any evidence at all to suggest that the failure to meet the relevant targets was attributable to the conduct of private persons rather than to state inaction. Had it done so, consistency with its jurisprudence would have required the Court to take such evidence seriously.

There was, of course, a more fundamental causation issue in *KlimaSeniorinnen* – namely, the Court's rejection of the 'drop in the ocean' argument, and attribution of responsibility to the Swiss state notwithstanding the absence of any strict causal link between the state's emissions policies and the damage suffered the applicants. This fundamental issue is, however, separate from the question I have addressed in this section, which is about the causative role of the state

[135] *KlimaSeniorinnen* (n 1), para 550
[136] Ibid, para 538(g)
[137] Ibid, para 559
[138] Ibid, paras 87 and 358

in failures to meet domestic emissions targets, not about the causative role of the state in global climate change. So long as the Court continues to regard a failure to meet emissions targets as a potential interference with Convention rights, it will continue to be true that consistency with the Court's pre-existing jurisprudence implies limiting the attribution of state responsibility to those cases in which a breach of the emissions targets arises from a lack of state action rather than from the propensity of the state's citizens to ignore incentives to reduce emissions.

4. Construing Substantive Positive Obligations Narrowly in Climate Change Cases

The fourth limit is that substantive positive obligations in climate change cases should be construed narrowly. This limit is grounded in the fact that the Court, in its environmental jurisprudence, has consistently adopted stringent tests for applicants to show that states have failed to meet their substantive positive obligations, has found violations of the Convention only where there are serious breaches of the relevant duties, and has accorded states significant degrees of latitude. I argue that, if it wishes to maintain consistency with this jurisprudence in future climate change cases, the Court will continue to regard its role as being restricted to ensuring that states have taken a broadly conscientious, good faith approach to dealing with climate change.[139] In other words, the Court will maintain an attitude of 'proceduralism' in which it continues to regard the 'main obligation of the state as being one of due diligence',[140] and therefore applies a 'low-bar balancing approach'.[141]

In *KlimaSeniorinnen*, the Court set out key positive obligations: (i) to adopt a climate change mitigation and adaptation framework; (ii) to ensure that the framework meets certain minimum substantive thresholds; (iii) to enforce the framework effectively; and (iv) to inform the public and ensure that the public's views are taken into account. I argue that, if seen in the light of the pre-existing environmental jurisprudence, each of these obligations will need to be construed narrowly in future climate change cases.

4.1. Duty to Adopt a Comprehensive Climate Change Mitigation Framework

Before *KlimaSeniorinnen*, the Court had on many occasions articulated the basic requirements which must be met by environmental regulatory frameworks.[142] These '*Tătar* minimum requirements' (as Pedersen calls them) are well-known, and include obligations such as ensuring the framework is comprehensive and is geared to the activity in question.[143] However, the environmental jurisprudence clearly shows that a framework which is merely deficient in one respect will not, for that reason alone, violate the Convention. In *Vardosanidze*, for example, the applicant alleged that there was an inadequate framework with respect to the 'use of gas-operated household devices', which had ultimately led to her son's death.[144] The Court noted that, although the state did have in place a comprehensive system of safety regulation for such devices, 'deficiencies existed in respect of the regularity of safety checkups and the manner in which a violation of the safety rules was to be communicated to the individuals

[139] E.g. the Court's repeated assertions that its task is not 'to determine what exactly should have been done in the present situation to reduce pollution in a more efficient way', for example in *Fadeyeva* (n 20), para 128
[140] Pedersen (n 13), pp.19-20; see, for example, *Fadeveya* (n 20), para 128
[141] Heri (n 14), p.941-942
[142] E.g. *Cevrioğlu* (n 113), para 51; see also *Öneryıldız* (n 37), para 89-90; *Budayeva* (n 125), para 131-132
[143] *Tătar* (n 40), para 88; see Ole Pedersen, 'The European Court of Human Rights and International Environmental Law', in *The Human Right to a Healthy Environment*, J Knox & R Pejan (eds), (Cambridge University Press 2018), p.90
[144] *Vardosanidze v Georgia* 43881/10 (ECtHR, 7 May 2020), para 57

concerned'.[145] But the Court nonetheless took the view that these deficiencies were not so serious as to violate the applicant's Convention rights. Outside of the Court's environmental jurisprudence, other cases concerning the obligation to adopt a framework – such as *Fernandes De Oliveira*[146] – also demonstrate that small deficiencies in a framework will not constitute a violation of the Convention.[147]

By contrast, all of the environmental cases in which the Court has found the regulatory framework to be so deficient as to constitute a violation of the Convention involve either the near-complete absence of any framework, or at least the absence of some crucial features. In *Jugheli*, a case involving a natural gas plant, the Court said that 'the crux of the matter is the virtual absence of a regulatory framework applicable to the plant's dangerous activities', and noted that 'virtually no environmental regulation was applicable to the plant's activities'.[148] In *Budayeva*, the state knew about the relevant danger of mudslides, and knew what framework would be needed to tackle the danger, but had failed entirely to implement any such measures or to explain its failure to do so.[149] In *Cevrioğlu*, although the state did have a framework for regulating safety on construction sites, the inspection and enforcement mechanism for that framework was so opaque that 'even experts in the field and domestic courts could not agree' what it was,[150] and the Court concluded that there was no real 'supervisory mechanism that functioned effectively in practice to ensure compliance with the relevant safety measures'.[151] Moreover, the Court was keen to stress that the lack of such a mechanism posed an issue only because of special aggravating features present in this case, and was to be contrasted with other cases involving 'other activities *where the absence of a strict inspection mechanism may not pose a problem*'.[152] Similarly, in *Kolyadenko* the Court concluded that the state's response to flooding was inadequate only in circumstances where (a) the state authorities had 'failed to establish a clear legislative and administrative framework to enable them effectively to assess the risks', (b) 'there was no coherent supervisory system', and (c) there was no real 'coordination and cooperation between the various administrative authorities'.[153]

All of this suggests that if the Court wishes to maintain consistency with its jurisprudence in future climate change cases, it will treat only a serious deficiency in the coverage of a climate change framework as a breach of the Convention. There are, of course, many ways in which climate change mitigation frameworks could in future fail to meet the *Tătar* minimum requirements; for example, they could fail to address a major source of emissions, or fail to contain clear provision for the monitoring of emissions figures, or fail to impose clear obligations on state agents to ensure compliance. However, the clear implication of the pre-existing environmental jurisprudence is that none of these requirements should be construed as a counsel of perfection.

The *KlimaSeniorinnen* judgment itself is consistent with this narrow, non-perfectionist approach. True, in *KlimaSeniorinnen*, the Court imposed a duty on states to adopt a climate

[145] Ibid, para 61
[146] *Fernandes de Oliveira v Portugal* [GC] 78103/14 (ECtHR, 31 January 2019), para 19
[147] See Stoyanova (n 128), p.178
[148] *Jugheli* (n 21), paras 75 and 77
[149] *Budayeva* (n 125), especially paras 20-25, and 148-155
[150] *Cevrioğlu* (n 113), para 66
[151] Ibid, para 69
[152] Ibid, para 67, citing *Prilutskiy v Ukraine* 40429/08 (ECtHR, 26 February 2015), para 35 and *Tınarlıoğlu v Turkey* 3648/04 (ECtHR, 2 February 2016), paras 104-106 [emphasis added]
[153] *Kolyadenko* (n 30), para 185

change mitigation framework which contains certain features and meets certain qualitative standards – 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', with 'intermediate GHG emissions reduction targets and pathways' capable of meeting overall reduction goals, and with arrangements to keep the framework 'updated with due diligence … based on the best available evidence',[154] as well as arrangements to put adaptation measures in place.[155] But the Court stressed that its assessment of whether the requirements set out were met would be 'of an overall nature' and that 'a shortcoming in one particular respect alone' would not be enough to find a violation of the Convention.[156] Moreover, in *KlimaSeniorinnen*, the obligation imposed on states is not, in fact, framed as a duty *to adopt* a framework at all. Rather, it is framed as duty to 'have had due regard to the need to' adopt a framework, which implies a significant degree of latitude for states.[157] In addition, although it is true that, in *KlimaSeniorinnen*, a 'reduced margin of appreciation' applies to 'the State's commitment to the necessity of combating climate change and its adverse effects, and the setting of the requisite aims and objectives in this respect', this phrasing requires the state only to demonstrate commitment through the setting of a procedurally sufficient framework rather than requiring any form of perfection in the comprehensiveness, enforcement mechanisms, or quality of that framework.[158]

4.2. Minimal Substantive Requirements of Climate Change Mitigation Frameworks

As well as the requirement to adopt a framework containing certain features and meeting certain standards, the Court in *KlimaSeniorinnen* also tentatively set minimal substantive requirements for climate change frameworks. Mitigation targets must be set 'with a view to reaching net neutrality within, in principle, the next three decades' and must be 'in line with the overarching goal for national and/or global climate-change mitigation commitments';[159] and adaptation measures must be 'aimed at alleviating the most severe or imminent consequences of climate change'.[160]

However, the pre-existing environmental jurisprudence suggests that applicants will have a particularly difficult time challenging the adequacy of a climate change mitigation framework on substantive grounds. In the past, the Court has always restricted itself to demanding that there is 'an adequate policy',[161] that the state has taken 'reasonable and adequate steps to protect the right',[162] and that the state has avoided a 'manifest error' in its approach to balancing.[163] The cases have repeatedly shown that where such a policy is in place the Court will be slow to intervene on substantive grounds,[164] and the Court has repeatedly stated that its

[154] *Klimeseniorinnen* (n 1), para 550
[155] Ibid, para 552
[156] Ibid, para 551
[157] Ibid, para 550
[158] Ibid, para 543
[159] Ibid, paras 548-549
[160] Ibid, para 552
[161] *Dubetska and Ors. v Ukraine* 30499/03 (ECtHR, 10 February 2011), para 143
[162] *Di Sarno and Ors. v Italy* 30765/08 (ECtHR, 10 January 2012), para 110
[163] *Fadeyeva* (n 20), para 105 (emphasis added); see also *Hardy and Maile* (n 26), para 231; and *Dubetska* (n 161), para 142
[164] See *Powell and Rayner v the United Kingdom* 9310/81 (ECtHR, 21 February 1990); *Hatton* (n 20); and *Hardy and Maile* (n 26)

task is not to determine exactly what states should do.[165] The Court has almost always adopted a wide margin of appreciation in relation to the substance of environmental cases in the past,[166] and more specifically, the Court's approach has always been that in relation to matters 'of general policy … the role of the domestic policy-maker should be given special weight'.[167] Only where there is an egregious error – constituting what might be described as a 'crisis'[168] – has the Court been prepared to intervene.[169]

Except under the most egregious circumstances then, the Court's pre-existing environmental jurisprudence implies that climate change regulations which simply fail to set mitigation or adaptation targets 'high enough' would not, for that reason alone, violate the Convention. In other words, it would not be coherent for the Court to develop the substantive requirements set out in *KlimaSeniorinnen* into more demanding obligations in the future. Of course, one can imagine more extreme cases – of states adopting frameworks with such low targets as to constitute virtually the absence of any real framework – which might lead the Court to conclude that there had been a 'manifest error' in balancing. But the Court could not, without revolutionising its existing jurisprudence, hold that a state's good faith, conscientious, and considered decision to prioritise its economic well-being over strict adherence to the nationally determined contributions necessary to meet the Paris Agreement targets, or to prioritise adaptation over more stringent mitigation measures, was itself a violation of the Convention. Such a step as the Dutch Court took in *Urgenda* would therefore not be coherent with the ECtHR's pre-existing environmental case law.[170] In short, the Court's capacity to decide that a particular emissions policy violates the Convention does not imply that the Court also has the capacity to determine, for each of the High Contracting Parties, the minimum fair share of permissible emission reductions.

This narrow understanding of the substantive requirements for climate change mitigation frameworks is consistent with the judgment in *KlimaSeniorinnen*, where the Court recognised that climate change is 'a polycentric issue',[171] and gave states a wide margin of appreciation in relation to 'the choice of means designed to achieve' emissions reductions.[172] While holding that the Paris Agreement targets 'must inform the formulation of domestic policies', the Court specified no 'minimum fair share' of emissions reductions. The Court explicitly gave each Contracting Party discretion 'to define its own adequate pathway for reaching carbon neutrality, depending on the sources and levels of emissions and all other relevant factors within its jurisdiction'.[173]

4.3. Duty to Enforce Climate Change Mitigation Frameworks

It is certainly true that the Court in *KlimaSeniorinnen* held that mitigation frameworks must be properly enforced (as discussed in section 3 of this article), and that states must 'provide

[165] *Fadeyeva* (n 20), para 128
[166] E.g. see Eicke, 'Human Rights and Climate Change', (n 13), p.266-267; *Kolyadenko* (n 30), para 160; *Tătar* (n 40), para 108; *Taşkın* (n 40), para 116; however, for examples of a narrower margin, see *Cordella* (n 122), para 158 and *Kožul* (n 27), para 33
[167] *Hatton* (n 20), para 97
[168] See *Di Sarno* (n 162), para 112
[169] See also *Locascia and Ors v Italy* 35648/10 (ECtHR, 19 October 2023)
[170] *Urgenda* (n 11)
[171] *KlimaSeniorinnen* (n 1), para 419
[172] Ibid, para 543
[173] Ibid, para 547

evidence showing whether they have duly complied, or are in the process of complying, with the relevant GHG reduction targets', and 'act in good time and in an appropriate and consistent manner when devising and implementing the relevant legislation and measures'.[174]

It is also true that the ECtHR's pre-existing environmental jurisprudence adopts a stricter approach to the question of whether a framework has been properly enforced than to the question of whether a framework meets minimum substantive requirements. Failure of enforcement (if sufficiently serious) has been a frequent reason for the Court to find a breach of the Convention in environmental cases. In *Fadeyeva*, the Court commented that 'in all previous cases in which environmental questions gave rise to violations of the Convention, the violation was predicated on a failure by the national authorities to comply with some aspect of the domestic legal regime'.[175] And as the Court stated in *Cuenca Zarzoso*, regulations 'serve little purpose if they are not duly enforced and … the existence of a sanction system is not enough if it is not applied in a timely and effective manner'.[176]

However, even in relation to such failures of enforcement, the rule is far from being absolute, and both the environmental and the wider jurisprudence imply that a breach of the duty to enforce only leads to a violation of the Convention if the failure of enforcement is major. As Hilson notes, 'there has been a series of cases where the Court has ruled that domestic illegality alone is insufficient to ground a breach'.[177] Each of *Galev*,[178] *Furlepa*,[179] and *Darkowska*,[180] for example, 'involved the lack of domestic planning permission, building or other type of permit for particular operations or installations', and yet the Court held that such forms of minor domestic irregularity did not in themselves constitute violations of the Convention.[181] Similarly, in *Ivan Atanasov*, domestic regulations determined that ponds containing hazardous waste from mines should be more than 2km from urban areas, whereas the applicant's residence was only 1km from the pond; but this relatively minor breach of domestic regulations was not held to constitute a violation of the Convention.[182] Or in *Kapa*, traffic noise was beyond statutory maximum levels, but this alone did not constitute a violation.[183] Indeed, many other non-environmental cases illustrate the same point.[184] By contrast, those cases where the Court did find a violation – such as *Fadeyeva*,[185] *Jugheli*,[186] and *Dubetska*[187] – all involved major forms of domestic irregularity.

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[174] Ibid
[175] *Fadeyeva* (n 20), para 97
[176] *Cuenca Zarzoso v Spain* 23383/12 (ECtHR, 16 January 2018), para 51; cited in *KlimaSeniorinnen* (n 1), para 538(b)
[177] Chris Hilson, 'The margin of appreciation, domestic irregularity and domestic court rulings in ECHR environmental jurisprudence: Global legal pluralism in action' (2013) 2(2) *Global Constitutionalism* 262–286, p.274
[178] *Galev* (n 27)
[179] *Furlepa v Poland* 62101/00 (ECtHR, 18 March 2008)
[180] *Darkowska and Darkowski v Poland* 31339/04 (ECtHR, 15 November 2011)
[181] Hilson (n 177), p.275
[182] *Ivan Atanasov* (n 38); see also *Calancea v Moldova* 23225/05 (ECtHR, 6 February 2018), para 26
[183] *Kapa and Others v Poland* 75031/13 (ECtHR, 14 October 2021), para 153
[184] For further examples, see Stoyanova (n 128), pp.172 and 180
[185] *Fadeyeva* (n 20), where levels were 120% of maximum permissible limits (para 87)
[186] *Jugheli* (n 21), where there was a lack of enforcement, general passivity, and a deficient framework (para 77)
[187] *Dubetska* (n 161), where there was a total failure to function in compliance with domestic regulations and general passivity from authorities

The pre-existing jurisprudence thus implies that there should be significant latitude in the state's obligation to enforce emissions targets. Where a state abjectly fails to meet its own clearly established targets, the pre-existing jurisprudence implies that this will be a sufficiently serious form of domestic irregularity to constitute a *prima facie* violation of the Convention. However, here too, the Court has avoided any requirement for perfection: a state which merely falls short of its targets, has not, for that reason alone, been taken to have violated the Convention.

This limitation to cases involving major failures to comply with frameworks is also consistent with *KlimaSeniorinnen*, where the Court's judgment did not imply a need for perfection. The Court made clear, on the contrary, that its decision arose from the fact that the relevant targets had been missed by a large margin. Although the respondent state argued that Switzerland had only 'just barely' missed its target in 2020, with emissions at 19% below 1990 levels as opposed to the 20% target, the Court took the view that this figure did not give the true picture. The 2020 numbers had, as the Court noted, been artificially low due to both the mild winter and the coronavirus pandemic; in reality, the average emissions between 2013 and 2020 had been only 11% lower than 1990 levels – far short of the 20% reduction targeted.[188]

4.4. Procedural Duties in Relation to Climate Change Mitigation Frameworks

Finally, the Court in *KlimaSeniorinnen* outlined obligations to make relevant information available and to ensure the views of the public can be taken into account in decision-making.[189]

The Court's pre-existing general jurisprudence implies that a breach of this kind of procedural positive obligation will not, on its own, constitute a violation of the Convention. While the 'explicit' procedural obligations in the Convention are 'autonomous' and 'self-standing', the Court has made clear that 'implicit' procedural obligations of 'careful decision-making' are parasitic on the relevant substantive positive obligations.[190] As a wealth of academic commentators have pointed out, procedural obligations such as these are not invoked independently, but rather are 'taken into account by the Court in its substantive review' and are woven into that review.[191]

Moreover, the Court's pre-existing environmental jurisprudence implies that only particularly serious procedural deficiencies in relation to public information and public consultation will be seen as sufficiently important to feature even as a major factor in the reasoning in climate change cases. The Court has stated that 'sufficient studies' should be conducted to evaluate environmental risks, that there should be a degree of public participation in decision-making, and that the public should have access to information about risks.[192] However, the Court sees only egregious breaches of these obligations as tipping the scales in favour of the applicant. For example, in *Fadeyeva* – the Russian steel plant case – the state had completely 'failed to produce' any studies and failed to 'explain how they influenced policy'. Nor had the state even

[188] *KlimaSeniorinnen* (n 1), paras 87 and 559
[189] Ibid, para 554
[190] See Stoyanova (n 128), pp.197-200; Laurens Lavrysen, *Human Rights in a Positive State* (Intersentia 2016), pp.57 and 75-78
[191] Lavrysen (n 190), p.56; and the many sources cited both there, and in Stoyanova (n 128), pp.197-200
[192] *Hatton* (n 20), para 128; *Giacomelli v Italy* 59909/00 (ECtHR, 2 November 2006), para 86; *Dubetska* (n 161), para 143; *Tătar* (n 40), para 101; and *Fadeyeva* (n 20), para 128; see also Braig and Panov (n 13), p.275-276

provided ‘a copy of the plant's operating permit’ or specified ‘how the interests of the population residing around the steel plant were taken into account’.[193] The state had, in fact, ‘failed to show clearly what this policy consisted of’, and there was ‘no indication that the State designed or applied effective measures which would take into account the interests of the local population’.[194] *Fadayeva* can be contrasted with the case of *McGinley*, where – although the applicants were not provided with information about the relevant risks to their health – the Court found no violation of the Convention because that information was technically theoretically accessible had the applicants chosen to seek it out.[195]

It is therefore no surprise to find that, although the *KlimaSeniorinnen* judgment set out clear procedural safeguards for climate change cases, the Court avoided saying anything which implied that these procedural safeguards were either freestanding or especially stringent;[196] and the Court is unlikely to apply such procedural duties too stringently if it continues to act coherently with its jurisprudence in future climate change cases. This is especially true where a climate change mitigation framework takes the form of ‘primary legislation’ (or its equivalents).[197] The Court’s pre-existing environmental jurisprudence suggests that regulation made through administrative or executive decisions, rather than through primary legislation (or its equivalents), should meet somewhat more exacting procedural standards: a failure to base a climate change framework implemented through administrative or executive decisions on the best available science might fall foul of the requirements set out in *Fadeyeva*;[198] as might failures to engage in public consultation, or failures to ground the regulations in the results of that public consultation, or failures to show how the regulations take into account the interests of the public.[199] However, it is clear from the pre-existing environmental jurisprudence that even here – where the regulation is administrative rather than fully legislative – only a major procedural breach will be regarded by the Court as a significant factor militating in favour of finding a violation of the Convention.

5. Conclusion

When the *KlimaSeniorinnen* judgment was handed down there was, unsurprisingly, immediate backlash. In the UK, for example, some academic commentators called it ‘absurd’[200] and one ex-Supreme Court judge said that it made the ECtHR an ‘enemy of democratic decision-making’.[201] Moreover, the largest party in Switzerland immediately called for Switzerland’s departure from the ECHR.[202] And more recently, the Swiss Parliament adopted a memorandum

[193] *Fadeyeva* (n 20), para 128
[194] Ibid, paras 131 and 133
[195] *McGinley and Egan v the United Kingdom* 10/1997/794/995-996 (ECtHR, 9 June 1998), especially para 102; see also Eva Brems, ‘Procedural Protection: An Examination of Procedural Safeguards Read into Substantive Convention Rights’ in *Shaping Rights in the ECHR*, E Brems and J Gerards (eds), (Cambridge University Press 2014), p.158
[196] *KlimaSeniorinnen* (n 1), paras 553-554
[197] *Animal Defenders International v the United Kingdom* [GC] 48876/08 (ECtHR, 22 April 2013), para 116
[198] *Fadeyeva* (n 20), paras 128 and 129
[199] *Fadeyeva* (n 20), paras 131 and 133
[200] See Ekins (n 6)
[201] Jonathan Sumption, ‘ECHR’s climate change ruling is its boldest intrusion yet’ *The Times* (14 April 2024) <https://www.thetimes.com/article/echrs-climate-change-ruling-is-its-boldest-intrusion-yet-9zjgvjc0x>
[202] See Corina Heri, ‘Implementing *KlimaSeniorinnen*: Evaluating the Initial Swiss Response’, (Climate Law, 18 July 2024) <https://blogs.law.columbia.edu/climatechange/2024/07/18/guest-blog-implementing-klimaseniorinnen-evaluating-the-initial-swiss-response/#>

which stated that the Court had exceeded the limits of evolutive interpretation and argued that this called into question the Court's legitimacy.[203]

There are of course many reasons for this kind of backlash, but one obvious reason is the worry about where the trajectory set by the *KlimaSeniorinnen* judgment might lead. In other words, 'where does it all end?'. The four limits I have discussed give the Court at least a partial answer to that question. If applied consistently, they will restrict the Court's interventions in climate change cases in predictable and specific ways:

(1) If the four-part test of severity, comparative intensity, specificity, and temporal immediacy continues to be applied to individual applicants (and a less stringent version of the same test possibly applied to associations), this will have important consequences for future climate change cases: the Court's judgments will remain faithful to the idea that the Convention is designed to protect only part rather than the whole of justice; and the Court will refrain from attempting to tackle the most significant, general and systemic impacts of climate change.

(2) If the Court continues to apply its well-established jurisprudence on the burden of proof, the standard of proof, and subsidiarity, this will also have significant implications for climate change cases: the Court may coherently apply some weak procedural form of the precautionary principle; but it will not apply a strong form of the precautionary principle (since that would entail modifying the burden of proof or reducing the standard of proof); and the principle of subsidiarity will lead the Court to refrain from specifying the precautionary measures that states should take.

(3) If the Court acts consistently with its existing jurisprudence on the role of 'causation' and 'reasonableness' in shaping environmental positive obligations, then this, too, will prevent the Court from crossing important boundaries in climate change cases: the Court will not treat a state's failure to meet emissions targets as a violation of the Convention where the state has taken appropriate measures to reduce emissions, and where the failure to meet the targets has arisen primarily as a result of private persons refusing to act in the way intended by the state rather than as a result of state inaction.

(4) Finally, and perhaps most importantly, if the Court continues to construe the substantive positive obligations of the state as narrowly as it has done in its pre-existing environmental jurisprudence, then it will operate under definite constraints in climate change cases: the Court may intervene where states have grievously failed to adopt, implement, or enforce frameworks to deal with the threat of climate change, or where there have been major procedural failings; but the Court will not construe these obligations in a stringent manner; it will not act as the arbiter of states' minimum fair share of GHG emissions reductions, nor transform the Convention into a compliance mechanism for the specific undertakings of the Paris Agreement.

The resulting approach might be described as conservative, cautious, or incremental. It accords with the notion that the Convention is not an instrument of human rights unification, and the

[203] See Communication from Switzerland concerning the case of Verein KlimaSeniorinnen Schweiz <https://rm.coe.int/0900001680b1ddd9>; see also Corina Heri, '*KlimaSeniorinnen* and its Discontents: Climate Change at the European Court of Human Rights', (2024) 4 *EHRLR* 317-331

concept that, in the absence of an explicit right to a healthy environment, the Court can only set minimum standards for environmental protection based on existing Convention rights.[204] It thereby provides the Court with a way of navigating between the Scylla and Charybdis of the 'reformist' and 'sceptical' approaches adopted by different national courts in climate change cases. It still allows the Court an important role in policing the climate change action taken by states; but it sets real limits on that role.

If the Court sticks closely to the four limits implied by its existing jurisprudence and can in this way show that the obligations it imposes on states are grounded in its well-established case law, then – although it may continue to receive opprobrium – it is more likely to protect its overall authority and command increased respect, and thus to have a greater practical effect upon compliance by member states.[205]

[204] C.f. Theil (n 13)

[205] On the value of incrementalism in the rights context see Jeff King, *Judging Social Rights* (Cambridge University Press 2012), Part III