'In Search for the Content of States' Positive Obligations under the European Convention on Human Rights: KlimaSeniorinnen and Climate Change'

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1. Introduction

The European Court of Human Rights' (ECtHR) initial steps into the field of climate change led to mixed results. *Duarte Agostinho and Others v Portugal and 32 Other States* and *Carême v France* were declared inadmissible.[1] In *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* all individual applications were dismissed.[2] Yet, it was the Swiss NGO Verein KlimaSeniorinnen's success that ultimately shaped the trajectory of this trio of cases and is likely to shape the future cases.

The reasoning in the three judgments is detailed. They synthesize a vast array of information on climate change and thoroughly address the arguments presented by the parties and interveners, which is commendable. The analysis of the victim status in *Verein KlimaSeniorinnen Schweiz* and the issue of extraterritoriality in *Duarte Agostinho and Others v Portugal* is particularly thorough. Notably, the Court showed a willingness to adapt its stance on the standing of associations in climate litigation under the European Convention on Human Rights (ECHR or the Convention). By modifying the standards under Article 34 of the Convention, the ECtHR could examine the substantive positive obligations under Article 8 of the Convention. By doing this modification, the Court acknowledged 'the special feature of climate change as a common concern of humankind and the necessity of promoting intergenerational burden-sharing in this context.'[3] No doubt, this new approach under Article 34 of the Convention will have serious implications for future litigation on the issue of climate change. In fact, it can have implications for many other areas characterised by *systemic* and *structural* harms with compound causes and complex causal connections. These would be generally areas where the causal links between causes and effects (understood as harms upon fundamental interests protected by human rights law) might be difficult to disentangle. This question can be an object of a separate investigation, which at its core concerns the relevance and the distinctiveness of human rights law as a body of law and as a tool for 'solving' complex social problems.

The question in this chapter is rather the following: What was the outcome of all these efforts by the Court in *Verein KlimaSeniorinnen Schweiz*? In other words, what substantive positive obligations did the Court formulate under Article 8 ECHR that can actually guide the future conduct of States?[4] To frame it even more specifically, what is the content of these positive obligations? More precisely, this content is clarified through the lens of the standard of causation. Causation is crucial because positive obligations in human rights law are grounded in the idea that, had the State acted (i.e., not failed/omitted to act), the fundamental interests protected by human rights law would have been better protected.[5] In this sense, the causal

[1] *Duarte Agostinho and Others v Portugal and 32 Others* [GC] 39371/20 (ECtHR, dec, 9 April 2024); *Carême v France* [GC] 7189/21 (ECtHR, dec, 9 April 2024).
[2] *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* [GC] 53600/20 (ECtHR, 9 April 2024).
[3] *KlimaSeniorinnen,* para 488.
[4] This chapter does not cover Article 6 ECHR (the right to fair trial).
[5] V Stoyanova, *Positive Obligations under the European Convention on Human Rights. Within and Beyond Boundaries* (OUP 2023); V Stoyanova, 'Causation: Why and How for Establishing Breach of Positive Obligations

inquiry is actually an inquiry about the interpretation of the content of the positive obligations.[6] In other words, causation is a tool for specifying the content of these obligations.

To answer these questions, the reasoning in the judgment is subjected to a detailed scrutiny so that the logical and analytical movies performed by the Court can be exposed and explained. This effort of exposing and explaining leads to a critical engagement with the Court's reasoning. The critique should not be accepted as a denial of any factual or normative propositions related to climate change. It should be rather accepted as an attempt to urge in favour of better analytical and logical clarity. After all, the importance of the problem and its urgency should not lead to analytically flimsy legal reasoning.

To engage with the above-mentioned questions, the following path will be followed. Section 2 will explain how the Court chose to structure its review in *Verein KlimaSeniorinnen Schweiz* with reference to the question of causation. The four causal links identified in the reasoning are explained. Section 3 enquires how these four causal links were of any relevance in the determination of the content of the positive obligations held by the respondent State and in the finding of breach. The main argument is that ultimately, these links did not matter much.

To advance this argument, Section 3.1. first revisits the victim status requirement to explain that given the absence of harm to individual interests (and thus the absence of individual victims and the absence of specified harm), the analysis of breach on the merits cannot but be based on diffuse and very abstract causal assumptions. In this sense, as Section 3.2. shows, the identification at very abstract level of some general measures (i.e. adoption of regulatory framework, actual application of the framework, having procedures for allowing access to information and national decision-making process of sufficient quality) as forming the content of the positive obligations under Article 8 was not that controversial and difficult. It was not since once the Court's review was allowed to proceed to the merits, the existence of positive obligations *articulated in very abstract terms*, could be easily accepted as a starting point.

Section 3.3 continues to show that the tailoring of the content of these obligations to the context of climate change could not lead to further specification of the obligations since causation was also sidestepped. This sidestepping was achieved in the following two ways: first, formulation of the obligation with reference to an abstract aim, and, second, the inclusion of procedural omissions in combination with substantive omissions, as relevant. Finally, Section 3.4. highlights that when the Court actually was meant to assess compliance, it never returned to the key the standards (i.e. the 'real prospect' causation standard and the 'disproportionate burden' standard) that it itself had identified initially in the very same judgment.

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under the European Convention on Human Rights?' in V Stoyanova and D McGrogan (eds) *From Protection to Coercion: The Limits of Positive Obligations in Human Rights Law* (forthcoming).

[6] V Stoyanova, 'Causation: Why and How for Establishing Breach of Positive Obligations under the European Convention on Human Rights?' in V Stoyanova and D McGrogan (eds) *From Protection to Coercion: The Limits of Positive Obligations in Human Rights Law* (forthcoming). See more generally Lord Hoffmann, 'Causation' in R Goldberg (ed) *Perspective on Causation* (Hart Publishing 2011) 3, 5: '[…] anyone is entitled to say that in treating X in some particular context as having caused Y, the courts are stretching the ordinary meaning of 'cause.' But this is *engaging in a legitimate argument over interpretation* and not introducing the concept of 'real' causation as a preliminary test which has to be satisfied before the question of interpretation arises.' See also L Green, 'Are There Dependable Rules on Causation?', 77(5) University of Pennsylvania Law Review (1929) 601.

In sum, the reasoning in *Verein KlimaSeniorinnen Schweiz* features a *disconnect* between the detailed discussions on causation and the content of any positive obligations. As a result, the obligations remained abstractly formulated and insufficiently specified. The categorical conclusion of breach might be celebrated; however, the search for the content of positive obligations, and as I will also suggest, the search for the role and the essence of human rights law, has just began.

2. Structure of the assessment and the vexed question(s) of causation

Verein KlimaSeniorinnen Schweiz was not the usual case where the Court first decided issues of admissibility, such as victim status, and then proceeded to the merits. Part C of the judgment entitled 'The Court's assessment' has rather four sections: 1. 'Preliminary points', 2. 'General considerations relating to climate-change cases', 3. 'Admissibility' and 4. 'Merits'. Since the question at the centre of this chapter is about the substantive positive obligations under the ECHR, the focus will be on 'Merits' (paragraphs 538-573). However, the formulation of any substantive positive obligations is related to the preliminary points, the general considerations and the arguments on admissibility. In addition, it is useful to more generally gain a better understanding of the logical structure of the whole judgment and the overall consistency of the arguments and points made in the different sections and subsections. As much importantly, the sections 'Preliminary points', 'General considerations relating to climate-change cases' and 'Admissibility' expose the Court's approach to the standard of causation, which is key for the formulation of any substantive positive obligations. For these reasons, the implications from these three sections of the judgment will be also explained here.

In 'Preliminary points' the ECtHR offered numerous broad observations on the nature of climate change and the responsibilities of various actors in addressing it. For instance, the Court stated that 'climate change is one of the most pressing issues of our times,'[7] signalling to the public that it regards the issue with utmost seriousness. The Court also made general remarks on the separation of powers and the judiciary's role: 'Judicial intervention, including by this Court, cannot replace or provide any substitute for the action which must be taken by the legislative and executive branches of government'.[8] These statements aim at alleviating concerns among States regarding potential judicial overreach.

The main objective of 'Preliminary points', however, seems to be *explaining the distinctiveness* of the climate chance case in comparison with previous judgments delivered by the Court. All these distinctiveness pertain to the question of causation as evidenced here:

> The Court's existing case-law in environmental matters concerns situations involving specific sources from which environmental harm emanates. Accordingly, those exposed to that particular harm can be localised and identified with a reasonable degree of certainty, and the *existence of a causal link* between an identifiable source of harm and the actual harmful effects on groups of individuals is generally determinable. Furthermore, the measures taken, or omitted, with a view to reducing the impugned harm emanating from a given source, whether at the regulatory level or in terms of implementation, can also be specifically identified. In short, *there is a nexus* between a source of harm and those affected by the harm,

[7] *KlimaSeniorinnen,* para 410.
[8] *KlimaSeniorinnen,* para 412.

> and the requisite mitigation measures may be identifiable and available to be applied at the source of the harm.[9]

The Court continues to identify six distinctiveness of the climate change case.[10] Only a brief overview is offered here. The first one concerns the multiple sources of GHG emissions. The second one concerns the fact that these emissions lead to harm only as 'a result of a complex chain of events'.[11] The third distinctive feature is related to the unpredictability in terms of time and place of the effects. Fourth, the emissions are produced by all activities within our societies and therefore, 'mitigation measures cannot generally be localized or limited to specific installations from which harmful effects emanate.'[12] Fifth, since the mitigation measures cannot be localised and limited to single sectors, individuals have to 'assume a share of responsibilities and burdens.'[13] Lastly, mitigation and adaptation measures 'may vary to some extent from one State to another'.[14]

On the basis of these six distinctiveness of the climate change case, the Court stated that it had to *tailor* its approach. While this tailoring seems to be quite clear on the victim status requirement, a point that I will revert to below in Section 3.1., it is not very clear how the content and the scope of the positive obligations and the specification of these obligations in Section 4 of the judgment entitled 'Merits', were tailored by these considerations. For example, it is not clear how the State's mitigation measures as the content of any positive obligations, were contingent upon and were to be balanced against individual 'responsibilities and burdens'. Similarly, it is not clear how the measures that form the content of any positive obligations, varied and were to balanced against any competing considerations specifically for the respondent State. I shall return to these points below in Section 3.4. in this chapter.

Neither is it clear how these six distinctive features identified in 'Preliminary points' in *Verein KlimaSeniorinnen Schweiz* are different from the points raised in Section 2 entitled 'General considerations relating to climate-change cases' in the same Part C. Rather in Section 2, the Court tried to be slightly more specific by linking these six distinctive features with certain standards established in its case law.

In particular, the 'general considerations relating to climate-change cases' are seven: (a) 'questions of causation'; (b) 'issues of proof'; (c) 'effects of climate change on the enjoyment of Convention right's; (d) 'the question of causation and positive obligations in the climate-change context'; (e) 'the issue of proportion of State responsibility'; (f) 'scope of the Court's assessment'; (g) 'relevant principles regarding the interpretation of the Convention'. A mere overview of the names given to these 'general considerations' reveals that the logical links between the 'considerations' might be difficult to see. In what follows I will try to reconstruct

[9] *KlimaSeniorinnen,* para 415.
[10] *KlimaSeniorinnen,* para 416 - 422.
[11] *KlimaSeniorinnen,* para 416. Here it should be also noted that the Court mixes different aspects, which makes the reasoning analytically confusing. For example, after noting that emissions lead to harm only as 'a result of a complex chain of events', it added that the emissions have no regard to national borders. However, this addition pertains to a separate question.
[12] *KlimaSeniorinnen,* para 418. This paragraph also manifests a mixture of two aspects: the cause and the harmful effects on the one hand, and the measures to mitigate the harmful effects, on the other.
[13] *KlimaSeniorinnen,* para 419-420. At this point, the Court also inserted some statements about 'intergenerational burden-sharing.'
[14] *KlimaSeniorinnen,* para 421.

these seven 'general considerations' to make them more understandable and to explain how they might relate to each other.

In subsection (a) 'questions of causation', the Court identified four dimensions of the causation question. Prior to explaining them, it should be highlighted that *KlimaSeniorinnen* is the first case in which the ECtHR dedicated entire sections to the issue of causation. As highlighted previously, causation has not traditionally been a focal point in the Court's case law, nor has it been systematically developed in relation to positive obligations under the ECHR.[15] In *KlimaSeniorinnen*, however, the Grand Chamber tackles causation directly, recognizing that the applicants' claims were unprecedented and called for a potential adjustment (or, more neutrally, evolution or development) of existing legal standards.[16]

To understand the four dimensions of the causation question, it is necessary to quote paragraph 425 from *KlimaSeniorinnen* in its entirety:

> The *first* dimension of the question of causation relates to the link between GHG emissions – and the resulting accumulation of GHG in the global atmosphere – and the various phenomena of climate change. *This is a matter of scientific knowledge and assessment.* The *second* relates to the link between the various adverse effects of the consequences of climate change, and the risks of such effects on the enjoyment of human rights at present and in the future. In general terms, this issue pertains to the *legal question* of how the scope of human rights protection is to be understood as regards the impacts arising for human beings from an existing degradation, or risk of degradation, in their living conditions. The *third* concerns the link, at the individual level, between a harm, or risk of harm, allegedly affecting specific persons or groups of persons, and the acts or omissions of State authorities against which a human rights-based complaint is directed. The *fourth* relates to the attributability of responsibility regarding the adverse effects arising from climate change claimed by individuals or groups against a particular State, given that multiple actors contribute to the aggregate amounts and effects of GHG emissions (emphasis added).

This paragraph reflects a conceptual quagmire since different concepts/expressions are used. It might be difficult to understanding what the different concepts mean and how they analytically relate to each other. These include 'enjoyment of human rights' and 'scope of human rights protection'. The first term appears to refer to the harms to fundamental interests that are protected by human rights.[17] As the text of paragraph 425 shows, it is not however the harms themselves that matter, but the *risk* of such harms. As to the 'scope of human rights protection', it might also refer to harms and adverse impacts upon fundamental interests; it seems however that the Court rather had in mind the scope of human rights *obligations* that might correspond

[15] V Stoyanova, *Positive Obligations under the European Convention on Human Rights. Within the Beyond Boundaries* (OUP 2023) 45.
[16] KlimaSeniorinnen and the Question(s) of Causation – Verfassungsblog
[17] Human rights are based on fundamental interests. See e.g. J Gerards, 'Fundamental Rights and Other Interests. Should it Really Make a Difference?' in E Brems (ed), Conflicts between Fundamental Rights (Intersentia 2008) 655–90.

to human rights. In then follows that the analytical distinctions between interests, rights and obligations, were all blurred.[18]

The term 'adverse effects' is also used. It is not clear whether this is used to mean the same as 'effects on the enjoyment of human rights', which would imply that the 'adverse effects' are covered by the definitional scope of the human rights and, in this sense, the 'effects' are actually harms to fundamental interests protected by human rights.

The expression 'attributability of responsibility' is similarly confusing. For any responsibility to arise there has to be first established that the State had violated an obligation. A prior analytical step is the establishment that the State was actually under an obligation.[19] If the conceptual framework of the ILC Articles is adopted, it is not responsibility that is 'attributed', but a conduct that might consist of an action or omission, that is attributed.

Let's set aside this conceptual quagmire for now and focus on reconstructing paragraph 425 and the following paragraphs in *'*General Considerations Relating to Climate-Change Cases*'*. The aim of such a reconstruction is to make them more accessible and easier to understand. To achieve this better understanding, it is very useful that these four dimensions of the causation question as enumerated in paragraph 425 of the judgment, were renamed and reframed in the actual text of the judgment as (b) 'issues of proof'; (c) 'effects of climate change on the enjoyment of Convention rights; (d) 'the question of causation and positive obligations in the climate-change context'; (e) 'the issue of proportion of State responsibility'. Prior to explaining this renaming and clarifications in the Court's reasoning, it is useful to clear our minds better as to what kind of causal links, the Court actually invoked in paragraph 425. For the sake of achieving this clarity, a table will be offered below with the things being linked referred to as 'A' and 'B'. 'A' is the cause and 'B' is the effect. The last row of the table indicates in which subsection the Court further clarified the link and how it chose to name it. The third row in the table indicates how the Court characterized the link in paragraph 425 of the judgment.

A (cause)	B (effect)	Characterisation of the causal link by the Court in para 425	Title of the subsection in the judgment where the causal link is further explained
(1) emissions	climate change	'matter of scientific knowledge and assessment'	b) 'issues of proof' para 427-430
(2) 'adverse effects of the consequences of climate change'	'the risks of such effects on the enjoyment of human rights at	legal question about the interpretation of the scope of human rights protection	(c) 'effects of climate change on the enjoyment of

[18] Rights are intermediaries between interests and obligations. Raz, 'On the Nature of Rights' (n 37) 194, 208: 'the interests are part of the justification of the rights which are part of the justification of the duties. Rights are intermediate conclusions in arguments from ultimate values to duties.' Thomas, *Public Rights, Private Relations* (Oxford University Press 2015) 149: 'The nature of rights . . . is coherently distinct from that of both interests and duties, and contains some analytical content that allows us to move from the former to the latter.'; S Besson, *The Morality of Conflict: Reasonable Disagreement and the Law* (Hart Publishing 2005) 423.

[19] J Crawford, *State Responsibility. The General Part* (CUP 2013) 218.

	present and in the future'		Convention rights' para 431-436
(3) 'acts or omissions of State authorities'	individual harm or 'risk of harm'		(d) 'the question of causation and positive obligations in the climate-change context' para 437-440
(4) conduct of a particular State	'adverse effects arising from climate change claimed by individuals or groups' in this particular State	'attributability of responsibility'	(e) 'the issue of proportion of State responsibility' para 441-444

2.1. First causal link: emissions cause climate change, presented as a matter of factual causation

The first causal link between emissions and climate change is characterised as a link reflecting factual causation since it pertains to issues about proof, which necessitates engagement with 'complex scientific evidence'.[20] Generally the Strasbourg case law features evidentiarily confusion: the questions how the Court approaches evidence and how well it does this, have been understudied.[21] As a starting point, the Court refers to the criminal law standard of 'beyond reasonable doubt'. However, flexibility is applied as to both the standard of proof and the burden of proof.[22]

This flexibility also implies that the Court uses proxies for 'scientific evidence.' These proxies include breaches of domestic regulations.[23] This means that if domestic legal standards have been adopted under the understanding/assumption that certain causes (A) factually lead to certain effects (B) and these effects are harmful, the Court will likely endorse this factual understanding/assumption. Similar endorsement can follow from assumptions underpinning international standards. In this sense, the evidence underpinning the domestic and the international regulatory standards are not likely to be questioned by the Court. It then follows that the Court does not really apply factual causation. It rather defers to preexisting standards where certain factual causal links are accepted. This deference is a *normative* acceptance of the casual links.

The same normative deference characterises the attachment of importance by the Court to 'the findings of the domestic courts and other competent authorities in establishing the factual circumstances of the case.'[24] The endorsement of the factual evidence discovered by the national institutions, is *normatively* justified. The reason is that this endorsement has nothing to do with the scientific methods for collecting this evidence, the quality of the methods or the

[20] *KlimaSeniorinnen,* para 427.
[21] See generally Marie-Bénédicte Dembour, 'The Evidentiary System of the European Court of Human Rights in Critical Perspective' 4 (2023) European Convention on Human Rights Law Review 363.
[22] T Thienel, 'The Burden and Standard of Proof in the European Court of Human Rights', (2007) 50 German Yearbook of International Law 543; J Kokott, *The Burden and Standard of Proof in Comparative and International Human Rights Law* (1998).
[23] *KlimaSeniorinnen,* para 428.
[24] *KlimaSeniorinnen,* para 430.

possible limitations of the methods and the factual findings. The endorsement is rather based on the normative justification related to the subsidiary role of the Court and that it is not a first-instance tribunal of fact.[25]

This deference, as justified by normative considerations that have little to do with facts and factual proofs, is also revealed by the following statements in *KlimaSeniorinnen:*

> As a general rule, where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and it is for the latter to establish the facts on the basis of the evidence before them. However, it reiterates in this connection that, while sensitive to the subsidiary nature of its role and cautious about taking on the role of a first-instance tribunal of fact, the Court is nevertheless not bound by the findings of domestic courts and may depart from them where this is rendered unavoidable by the circumstances of a particular case. It is the Court's function *to review the reasoning* adduced by domestic judicial authorities from the point of view of the Convention and to determine whether the national authorities *have struck a fair balance* between the competing interests at stake.[26]

The last sentence refers to reviewing the domestic courts' reasoning as to how these domestic courts have struck a fair balance between competing interests. In line with what was mentioned above, this review is of normative nature: it does not pertain to review of factual evidence and factual assumptions. This more generally relates to the role of the proportionality assessment in human rights law, where scientific/factual uncertainty does play a role.[27] Yet, it is only one element of the overall normative review that needs to be performed for reaching the conclusion whether competing interests have been fairly balanced. It then follows that by adding this last sentence from the above quotation in subsection (b) 'Issues of proof', the Court introduces analytical confusion by conflating factual questions, such as issues of proof, with normative considerations.[28]

In subsection (b) 'Issues of proof', there is however a whole paragraph that entirely pertains to factual evidence intended to scientifically prove the factual causal link between emissions and climate change:

> The Court also relies on studies and reports by relevant international bodies as regards the environmental impacts on individuals. As regards climate change, the Court points to the particular importance of the reports prepared by the IPCC, as the intergovernmental body of independent experts set up to review and assess the science related to climate change, which are based on comprehensive and rigorous methodology, including in relation to the choice of literature, the process of review and approval of its reports as well as the mechanisms for the investigation and, if

[25] *KlimaSeniorinnen,* para 430.
[26] *KlimaSeniorinnen,* para 430 (emphasis added).
[27] V Stoyanova, 'The Disjunctive Structure of Positive Rights under the ECHR' (2018) 87 Nordic Journal of International Law 344.
[28] On the distinction between factual and legal causation, see Ilias Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity' (2015) 26(2) European Journal of International Law 471; Vladyslav Lanovoy, 'Causation in the Law of State Responsibility' (2022) The British Yearbook of International Law 1.

> necessary, correction of possible errors in the published reports. These reports provide scientific guidance on climate change regionally and globally, its impact and future risks, and options for adaptation and mitigation.[29]

It follows from this paragraph that the Court accepted the factual causal link between emissions and climate change as proven by the IPCC reports. Yet, this factual causation was still mixed with normative evaluations given the references to domestic standards, international standards and balancing of interests in subsection (b) 'Issues of proof'.

2.2. Second causal link: climate change causes risks to human rights, presented as a matter of legal causation

The second causal link is the link between climate change and risks for human rights, which is characterised as a link reflecting a legal causation. To remind, the Court observed in paragraph 425 that this link pertains to the 'legal question of how the scope of human rights protection is to be understood.' In subsection (c) 'effects of climate change on the enjoyment of Convention rights' (paragraphs 431-436), the Court elaborated on this 'legal question'. Let's try to unpack subsection (c).

Subsection (c) is a conceptual quagmire on its own. In the first paragraph the Court shifts *from* climate change *to* 'protecting the environment, including in the context climate change' and to 'environmental degradation.'[30] This shift destabilises the reasoning – is the effects of climate change that matter or is the effects of the environmental degradation that matter? Then the Court immediately continues to make the unrelated assertion (or at least the relationship remained unaddressed) that the IPCC reports 'have not been challenged or called into doubt',[31] and that the responded State and other parties 'have not contested that there is a climate emergency.'[32] These considerations can be accepted as pertaining to legal causation in the sense that they reflect normative choices in terms of policy choices.[33] The interpretative tool of the 'living instrument' doctrine as traditionally used by the Court and as also added to the 'stew' in subsection (c), also reflects a normative choice.[34]

The harmful effects of climate change are thus translated into harmful effects on 'the enjoyment of Convention rights'. To support this translation the Court included risks as a relevant consideration. In other words, the effects on 'the enjoyment of Convention rights' were reframed in the reasoning as effects on the risks upon the enjoyment:

> As the Court has already recognised, Article 8 is capable of being engaged because of adverse effects not only on individuals' health but on their well-being and quality of life and not only because of actual adverse effects but also *sufficiently severe risks of such effects* on individuals. […] It has also held that the duty to regulate not only relates to actual harm arising from specific activities but extends to the *inherent risks involved*.[35]

[29] *KlimaSeniorinnen,* para 429 (referensers omitted).
[30] *KlimaSeniorinnen,* para 431.
[31] *KlimaSeniorinnen,* para 432.
[32] *KlimaSeniorinnen,* para 433.
[33] *KlimaSeniorinnen,* para 433: '[…] the general policy aims in the respondent State in terms of the urgency of addressing climate change and its adverse effects on the lives, health and well-being of individuals.'
[34] *KlimaSeniorinnen,* para 434.
[35] *KlimaSeniorinnen,* para 435 (references omitted) (emphasis added).

The recharacterization of the important interests (life, private life, family life etc.) that the Convention protects, as risks to such interests (i.e. risks to life, risks to private life), has been performed before in the case law.[36] It then follows that more generally risk has become an object of regulation even under the ECHR.[37] Notably, in its reasoning in *KlimaSeniorinnen,* the Court introduced a severity threshold: the risks have to be 'sufficiently severe.' It is not entirely clear whether this severity threshold refers to the high likelihood of the harm ('adverse effects') to occur or to the seriousness of the harm ('the effects') itself. In alternative, it might be an unclear combination of the two.[38] It is also relevant to note that in the concluding paragraph in subsection (c) instead of 'risks', the Court changed the language by referring to 'future threats to the enjoyment of human rights', in this way possibly conflating the concepts of 'risk' and 'threat'.[39]

The above quotation also refers to 'inherent risks', which raises questions as to the meaning and the scope of risks meant to be covered by the definitional scope of Article 8 ECHR. The concept of 'inherent risks' is problematic. 'Inherent risks' to what? Are these risks from any economic activity that emits? Then risks might be completely diluted since any human activity can be perceived as 'inherently risky'. Inherent risks might be also understood as risks that are possible to predict.

If the causal link at the heart of subsection (c) is the link between climate change and risks for human rights, the question of obligations should be irrelevant.[40] Put it otherwise, the normative determination that certain forms of harms (or risks of harms) to important interests should be covered by the definitional scope of Article 8, is separate from the question what conduct (in the form of obligations) States need to adopt to prevent and address these harms and risks. It then follows that the references to obligations in subsection (c) is confusing and analytically not necessary.[41] In other words, the Court mixes considerations pertaining to the definitional scope of Article 8 with considerations pertaining to the existence of positive obligations and their content and scope. Subsection (c) should have been limited to the harmful effects on the important interests protected by the Convention rights. The question of obligation is a separate

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[36] V Stoyanova, 'Fault, Knowledge and Risk within the Framework of Positive Obligations under the European Convention on Human Rights' (2020) 33 Leiden Journal of Internation Law 601; M Ambrus, 'The European Court of Human Rights as Governor or Risk' in M Ambrus, R Rayfuse and W Werner (eds.), *Risk and Regulation of Uncertainty in International Law* (2017) 99.

[37] See the chapter 'The Rise of Risk in Regulatory Governance' in K Yeung and S Ranchordas (eds), *An Introduction to Law and Regulation* (CUP 2024). Researchers in regulatory law have observed a growing emphasis on risk regulation over the past few decades, both at the domestic and international levels. This trend has been accompanied by a widespread use of risk-related terminology in legal and policy documents. See J Peel, *Science and Risk Regulation in International Law* (CUP 2010).

[38] Risk is generally defined by two components: first, a potential outcome that is harmful, undesirable, adverse, or hazardous, and second, an element of possibility, chance, probability, or likelihood that this outcome will occur in the future. See Jenny Steele and John E. Gardner, 'Introduction' in Jenny Steele and John E. Gardner (eds), *Risks and Legal Theory* (Hart 2004) 6; Matthew Dyson and Sandy Steel, 'Chapter 2 - Risk and English Tort Law' in Matthew Dyson (ed), *Regulating Risk through Private Law* (Intersentia 2018).

[39] *KlimaSeniorinnen,* para 435.

[40] The is based on the analytical distinction between, on the one hand, the definitional scope of Article 8, and the question of breach of any corresponding obligations. See generally J Gerards and E Brems, 'Introduction' in E Brems and J Gerards, *Shaping Rights in the ECHR* (CUP 2013) 1.

[41] *KlimaSeniorinnen,* para 435: 'In other words, issues of causation must always be regarded in the light of the factual nature of the alleged violation and the nature and scope of the legal obligations at issue.' See also para 436.

one and it is in fact addressed in the subsection (d) 'The question of causation and positive obligations in the climate-change context' of the judgment that will be scrutinized below.

2.3. Third causal link: omissions by States cause risk of harm

In the paragraphs included in subsection (d) of the *KlimaSeniorinnen* the Court clarified what considerations were pertinent for determining the content of the positive obligations (i.e. 'the measures to ensure effective protection') and what role causation played in this determination. The Court also acknowledged the need for adapting the considerations 'in the context of climate change'.

As to the pertinent considerations for determining the content of positive obligations, the context specific nature of these obligations was highlighted: the measures that form this content 'may vary considerably from case to case.'[42] The variation depended on the gravity of the harm, which was also reframed as risk that meets 'a certain threshold'.[43] The variation also depended on 'any burden' that the obligation might imply for the State.[44] The variation also depended on the causation between risks and omissions: '[t]here must be a relationship of causation between the risk and the alleged failure to fulfil positive obligations.'[45] Crucially, the Court did not identify in subsection (d) 'The question of causation and positive obligations in the climate-change context' any causation test that might address the question to what extend failures/omissions should have caused risks, so that these failures/omissions could be assessed as wrongful, and thus as being in breach of positive obligations.

In the paragraph that immediately follows, the Court acknowledged the need to adapt the relationship of causation.[46] As mentioned above, this relationship was not clear to begin with – a clearer legal standard of causation had not been initially established. Adapting a standard that had never been clearly delineated to a different context, might therefore come as strange.

What also comes as surprising is that the need for the adaptation of the causation standard had only one single justification in the reasoning of the Court. This justification pertains to the global nature of the emissions. Given this global nature, the emissions from the single State 'make up only part of the causes of the harm'.[47] The Court continues to state that:

> Accordingly, the causal link between the acts or omissions on the part of State authorities in one country, and the harm, or risk of harm, arising there, is necessarily *more tenuous and indirect* compared to that in the context of local sources of harmful pollution.[48]

This is factually correct; however, it does not solve the problem as to the legal standard of causation: in human rights law, how much an omission by the State should have contributed to the harm (or the risk of harm) so that this omission becomes *legally* relevant and thus a basis

[42] *KlimaSeniorinnen,* para 438.
[43] *KlimaSeniorinnen,* para 438.
[44] *KlimaSeniorinnen,* para 438.
[45] *KlimaSeniorinnen,* para 438.
[46] *KlimaSeniorinnen,* para 439.
[47] *KlimaSeniorinnen,* para 439.
[48] *KlimaSeniorinnen,* para 439.

for state responsibility? This is a normative question pertaining to the scope of the positive obligation.

In subsection (d) the Court did refer to a specific causation standard to make the point that this particular standard would *not* be applied as the legal standard in the case. In particular, it noted that the specific content of State obligations 'cannot be determined on the basis of a strict *condition sine qua non* requirement.'[49] This is a surprising statement since the Court has *never* applied this causation standard in its case law even in normal environmental cases or any other cases where breach of positive obligations have been adjudicated.[50] In fact, the Court has long time ago explicitly rejected the *condition sine qua non* standard.[51] In sum, the rejection of this legal standard is not helpful for understanding the actual standard that needs to be applied.

2.4. The fourth causal link: omissions by a particular State cause risk to specific individuals in this State

As noted above, one of the distinguishing features of the risk caused by climate change is that emissions are global and any causal link between these risks and conduct of a specific State is 'necessary more tenuous.[52]' This has been framed as the 'drop in the ocean' argument, to which the Court responded that

> […] in the context of a State's positive obligations under the Convention, the Court has consistently held that it need not be determined with certainty that matters would have turned out differently if the authorities had acted otherwise. The relevant test does not require it to be shown that "but for" the failing or omission of the authorities the harm would not have occurred. Rather, what is important, and sufficient to engage the responsibility of the State, is that reasonable measures which the domestic authorities failed to take could have had a *real prospect of altering the outcome or mitigating the harm*. In the context of climate change, this principle should also be understood in the light of Article 3 § 3 of the UNFCCC according to which States should take measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects.[53]

The rejection of the 'but for' test is a repetition of the above-mentioned rejection of the *condition sine qua non* standard. The 'real prospect' test is instead proposed. This test has been applied previously in the case law in judgments where breaches of positive obligations are invoked and where, importantly, no complications arising from global (or multiactorial) contributions have arisen.[54] Just as importantly, the 'real prospect' test has been applied in the case law without consistency, since it has not been uniformly used.[55]

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[49] *KlimaSeniorinnen,* para 439.
[50] V Stoyanova, 'Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights' (2018) 18 Human Rights Law Review 309.
[51] *E. and Others v United Kingdom* App no. 33218/96 (26 November 2002) para 99.
[52] *KlimaSeniorinnen,* para 439.
[53] *KlimaSeniorinnen,* para 444 (emphasis added) (references omitted).
[54] *O'Keeffe v. Ireland* [GC] App no 35810/09, para 149; *Bljakaj and Others v. Croatia*, App no 74448/12, 18 September 2014, para 124.
[55] V Stoyanova, 'Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights' (2018) 18 Human Rights Law Review 309.

The pivotal point, based on the paragraph referenced above, is whether the relevance of the 'real prospect' test is limited to rejecting the 'drop in the ocean' argument or whether it might have wider significance. In case the latter, 'real prospect' test would be actually the causation standard for delineating the content of positive obligations of the particular respondent State and finding breach. The next section in this chapter will revisit this issue to highlight that when the Court in *KlimaSeniorinnen* examined whether Switzerland breached its obligations, the 'real prospect' test was not mentioned — in fact, no test was applied at all.

3. The content of the positive obligation and the irrelevance of causation test

3.1. No harm to individual interests

As mentioned above, the Court's assessment in *KlimaSeniorinnen* had four sections: 'Preliminary points', 'General considerations relating to climate-change cases', 'Admissibility' and 'Merits'. Above, I already addressed the 'Preliminary points' and 'General considerations relating to climate-change cases' sections. Here I will briefly focus on the admissibility. Although the focus of this chapter is not on the preliminary procedural question of admissibility, it needs to be acknowledged that the admissibility requirement for victim status is not simply a procedural requirement. In fact, is has important substantive implications not only for the content of any positive obligations and therefore for the question of causation, but also for the distinctiveness of human rights law as a legal framework centred on the individual and on individual justice.[56]

To clarify the first implication regarding the content of positive obligations, it is essential to initially acknowledge that the determination of victim status also includes a causal inquiry. This is very obvious from the following paragraph: 'in any event, whether the victim is direct, indirect or potential, there must *be a link between the applicant and the harm* which he or she claims to have sustained *as a result of the alleged violation*.'[57] For direct victims, it needs to be demonstrated that the applicant 'has been personally and actually affected' of 'omissions of State authorities or private parties allegedly infringing the applicant's Convention rights.'[58] Very similarly, indirect victims have been also individually harmed or are individuals 'who would have a valid and *personal interest* in seeing it [the violation] brought to an end'.[59]

As to potential victims, two types could be identified in the case law. The first type refers to applicants who 'contend that a law violates their rights, in the absence of an individual measure of implementation, if they belong to a class of people who risk being directly affected by the legislation, or if they are required either to modify their conduct or risk being prosecuted.'[60] The second type of potential victims includes applicants who risk a future violation and who produce 'reasonable and convincing evidence of the likelihood that a violation affecting him or her personally will occur'.[61]

All these three conceptualisations of victim status (direct, indirect and potential) point in one direction: human rights law is premised on individual interests that ground the ECHR rights

[56] See generally J Christoffersen, 'Individual and Constitutional Justice: Can the Power Balance of Adjudication be Reversed?' in J Christoffersen and M Madsen (eds), *The European Court of Human Rights between Law and Politics* (OUP 2011) 181.
[57] *KlimaSeniorinnen,* para 463.
[58] *KlimaSeniorinnen,* para 465.
[59] *KlimaSeniorinnen,* para 468 (emphasis added).
[60] *KlimaSeniorinnen,* para 469.
[61] *KlimaSeniorinnen,* para 470.

and, accordingly, human rights law is premised on the idea of individual justice. If individual interests ground the ECHR rights, any obligations corresponding to these rights would also have to be grounded on individual interests. It then follows that any corresponding positive obligations are means to prevent *specified harms* suffered by individuals. If these fundamental premises of human rights law are followed, positive human rights obligations are not meant to prevent general harms to the population at large.[62]

The reasoning in *KlimaSeniorinnen* contains clear acknowledgements of these fundamental premises: 'The Court's case-law on victim status is premised on the existence of a *direct impact* of the impugned action or omission *on the applicant* or a real risk thereof.'[63] To claim victim status, 'an applicant needs to show that he or she was *personally and directly affected* by the impugned failures.'[64] Expectedly, when these requirements were applied in *KlimaSeniorinnen,* none of the individual applicants could fulfil the victim status criteria.[65] The wider point here is that since human rights law is premised on individual justice it is meant to be relevant when the fundamental individual interests of a specific human being, have been harmed. Human rights law is not meant to protect general interests, which justifies the procedural limitation of not allowing public interest litigation before the Court.[66] In fact, if the distinction between individual interests and general interests is ignored, human rights law as a distinctive body of law collapses.[67]

Mitigation measures for combating climate change 'appear to be a paradigm case of public interest',[68] in the sense that many can arguably benefit from the reduction of emissions and, if we fallow the accepted factual causal links by the Court, from the expected reduction of harms (or risks of harms). Certainly, public interests are relevant in human rights law since rights can be limited in service of public interests provided that such limitations meet certain conditions (i.e. legality and proportionality). In this sense, public interests can justify *limitations* of the rights. Public interests, however, do not justify the rights since the rights are justified by individual interests. Yet, if public interests are allowed to justify the rights, we might face a case of some serious revision of human rights law itself. We appear to be also in a situation of a collapse of the distinction between individual interests and public interests.

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[62] For detailed theoretical discussion, see V Stoyanova 'Positive Obligations as Coercive 'Rights' and Compulsory Vaccination under the European Convention on Human Rights' (forthcoming).
[63] *KlimaSeniorinnen,* para 483.
[64] *KlimaSeniorinnen,* para 487. In the same para the Court sets out the criteria for meeting this high threshold.
[65] *KlimaSeniorinnen,* para 527: 'Two key criteria have been set out for recognising the victim status of natural persons in the climate-change context: (a) high intensity of exposure of the applicant to the adverse effects of climate change; and (b) a pressing need to ensure the applicant's individual protection (see paragraphs 487-488 above). The threshold for fulfilling these criteria is especially high (see paragraph 488 above).'
[66] G Letsas, 'The European Court's Legitimacy after *KlimaSeniorinnen'* (2024) European Convention on Human Rights Law Review.
[67] R Alexy, 'Individual Rights and Collective Goods' in C Nino (ed) *Rights* (Dartmouth 1992) 163. See S Smet, *Resolving Conflicts between Human Rights. The Judge's Dilemma* (Routledge 2017), where the author tries to propose criteria for distinguishing general and individual interests.
[68] G Letsas, 'The European Court's Legitimacy after *KlimaSeniorinnen'* (2024) European Convention on Human Rights Law Review. Letsas also adds climate change is case of public interest 'at least in the sense that everybody benefits from reducing greenhouse gas emissions.' However, it might not be at all the case that everybody benefits. See generally Benoit Mayer, *International Law Obligations on Climate Change Mitigation* (Oxford University Press, 2022) and Benoit Mayer, 'Climate Change Mitigation as an Obligation under Human Rights Treaties?' (2021) 115 American Journal of International Law 409.

This distinction apparently collapsed when the Court accepted that the applicant association in *KlimaSeniorinnen* had standing, which allowed the Court make pronouncements about breach of positive obligations under Article 8.[69] The reason for the collapse is the following: no individual interests were affected (since no individual applicant was found to have victim status) and, relatedly, no specified harm could be identified, yet positive obligations corresponding to Article 8 were reviewed (and even found breached) since a collective body that serviced general interests had victim status. To put it bluntly, the Court's reasoning worked backwords, and it can therefore be assessed as a revision of human rights law itself.

To explain this, let me quote how the Court justified the standing of the association in the case:

> the special feature of climate change as a common concern of humankind and the necessity of promoting intergenerational burden-sharing in this context, speak in favour of recognising the standing of associations before the Court in climate-change cases. In view of the urgency of combating the adverse effects of climate change and the severity of its consequences, including the grave risk of their irreversibility, *States should take adequate action* notably through suitable general measures to secure not only the Convention rights of individuals who are currently affected by climate change, but also those individuals within their jurisdiction whose enjoyment of Convention rights may be severely and irreversibly affected in the future in the absence of timely action.[70]

The Court also developed a test for the standing of associations,[71] which does not need to detain us here. The applicant association was found to comply with the test and therefore was found to have standing, which allowed the Court to proceed to the question of obligations.[72]

Why is the reasoning in the above quoted paragraph backwards? It is not individual human rights that trigger corresponding obligations, that mattered. The Court's reasoning started *from* the premise that there were general interests to do something about a general and urgent problem and *then* it directly moved to the need that 'States should take adequate action', which was transformed into a positive obligation upon the State as demanded by a human rights treaty. Individual rights were basically lost. In this reasoning, individual interests and causality to individual interests were lost. In simple terms, the reasoning worked from obligations to 'rights';[73] not from rights to obligations.

The bypassing of individual interests and causality to individual interests was analytically inevitable, if the Court's reasoning is followed. As Mayer has observed, the problem is not

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[69] For an interesting attempt to save the ECHR from this collapse, see G Letsas, 'The European Court's Legitimacy after *KlimaSeniorinnen'* (2024) European Convention on Human Rights Law Review: '*Klimaseniorinnen* can then be seen as having brought a claim not in the public interest, or on behalf of its members, but on behalf of victims who are currently unable to do so. To be sure, the Court did not say this in the judgment. But it cannot be true both that the applicant association did not bring the claim on behalf of victims and that the Convention prohibits *actio popularis*.'

[70] *KlimaSeniorinnen,* para 499.

[71] *KlimaSeniorinnen,* para 502.

[72] *KlimaSeniorinnen,* para 526.

[73] I have placed the term 'rights' in inverted comma to communicate the message that analytically it is not correct to accept that there were individual rights at stake.

about some epistemological difficulty in identifying any individual victims.[74] The problem is rather a more fundamental and ontological: there *are* simply 'no victims in any meaningful sense of the word.'[75] Mayer has also added that 'the causal relation between a state's failure to take appropriate measures to mitigate climate change and an individual's enjoyment of her human right is far too remote to characterize someone as a 'victim' of the state's action in any meaningful sense of the term.'[76] All of this also comes down to the specification of the harm: if the harm remains unspecified and unindividualized, as it did in the Court's reasoning, the obligations (i.e. any measures for preventing the harm) have to necessarily also remain highly abstract. This was exactly what happened in *KlimaSeniorinnen* as the rest of this chapter will explain.

In sum, the procedural move by the Court in *KlimaSeniorinnen* is not a simply procedural technicality that we can easily brush aside. It affects the merits and the formulation of any corresponding positive obligations. There is a reason why more generally the substantive assessment of breach is preceded by the admissibility phase. The admissibility requirements once fulfilled allow and create the necessary conditions for performing the human rights law review on the merits. In this sense, this review is contingent upon and shaped by the admissibility filters.[77] If these filters are bypassed, problems emerge: How to apply the standards if there is no individual harm? How to apply human rights law if there is no individual harm? These questions concern more generally the role of human rights law as a distinctive body of law. The modification of the 'victim status' as an admissibility requirement implies by necessity *modification* of the reasoning and the standards on the merits. What is this modification and what does it do to human rights law as a distinctive body of law? As the text below will show, the modification implied diffuse and abstract causal assumptions, where general policy goals are framed.

3.2. Positive obligations with abstract and unspecified content

Having commented on the sections 'Preliminary points',' General considerations relating to climate-change cases' and 'Admissibility', I will now focus on the section in the judgment entitled 'Merits'. The section 'Merits' consisted of the following subsections: (a) 'General principles', (b) 'The States' positive obligations in the context of climate change' and (c) 'Application of the above principles to the present case'. The objective of subsection (a) was describing the general principles for identifying the content of State's positive obligations under Article 2 and 8 of the Convention. In the following subsection (b), these principles were specified given the particular context of climate change.

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[74] This has been, for example, the case of a surveillance regimes where data is collected about individuals without their knowledge. This clearly implicates the individual interest to private life, which means that they are victims, but they might not know or more generally it might be difficult to know who the victims are.

[75] Benoit Mayer, 'Is climate change mitigation within the scope of positive human rights obligations?' in V Stoyanova and D McGrogan (eds) *From Protection to Coercion: the Limits of Positive Obligations in Human Rights Law* (forthcoming).

[76] Benoit Mayer, 'Is climate change mitigation within the scope of positive human rights obligations?' in V Stoyanova and D McGrogan (eds) *From Protection to Coercion: the Limits of Positive Obligations in Human Rights Law* (forthcoming).

[77] On the interplay between the admissibility phase and the other phases in the Court's review, see generally J Gerards, A Buyse and M Andenas,''Heads and Tails': Admissibility and Remedies at the European Court of Human Rights' (2024) 3 European Convention on Human Rights Law Review 291.

Prior to examining with some care what the Court named 'general principles' for identifying the content of the State's positive obligations, it is relevant to clear our mind as to the meaning of the term 'content'. The content of the obligations are the measures that the State is required to perform.[78] The relevant question then is what measures the Court identified. These can be separated into substantive and procedural. As to the *substantive* measures, these were two. The first one was the adoption of effective 'legislative and administrative framework'; in other words, adoption of 'regulations geared to the specific features of the activity.'[79] The second substantive measure that formed of the content of the positive obligations was application of the adopted regulatory framework in practice.[80]

These two positive obligations have been well developed in the practice of the Court. As formulated at this abstract level in the reasoning in *KlimaSeniorinnen*, there was nothing controversial about them.[81] It is their specification, including the related causation link with the harm, that makes the positive obligations and the establishment of their breach more contentious; a point to which I will return below.

As to the *procedural* measures that form the content of the positive obligations, these were also two. The first one was providing 'access to essential information enabling individuals to assess risks to their health the lives', which has been also well-established in the case law.[82] The second procedural measure was having a national decision-making process of sufficient quality with sufficient procedural guarantees.[83] As to this second procedural measure, it is not entirely clear whether it formed the content of a separate independent procedural obligation or whether the national procedural guarantees were only a relevant consideration to be taken into account by the Court in determining the margin of appreciation. This ambiguous role of procedural guarantees is prevalent in the case law and, in this sense, the reasoning in *KlimaSeniorinnen* is not distinctive in comparison with other judgments.[84]

In addition to identifying the content of the positive obligations in the form of substantive and procedural measures at abstract level, the Court also noted *two principles* relevant for the determination of breach. These are *discretion* and *proportionality*. As to first one, States are free to choose the measures that form the content of the positive obligations in terms of substantive and procedural measures.[85] This means that while the Court might formulate in general and abstract terms, for example, the positive obligation of adopting effective regulatory framework, States have multiple options at their disposal how to concretize the measures in their regulatory frameworks.[86] This discretion should be analytically distinguished from the structural margin

[78] V Stoyanova, *Positive Obligations under the European Convention on Human Rights. Within and Beyond Boundaries* (OUP 2023).
[79] *KlimaSeniorinnen,* para 538(a).
[80] *KlimaSeniorinnen,* para 538(b).
[81] V Stoyanova, *Positive Obligations under the European Convention on Human Rights. Within and Beyond Boundaries* (OUP 2023).
[82] *KlimaSeniorinnen,* para 538(f).
[83] *KlimaSeniorinnen,* para 539.
[84] See J Gerards, 'Procedural Review by the European Court of Human Rights – a Typology of Functions for the Court's Reasoning', in D Harvey and X Groussot (eds), *Process Federalism in EU Law* (2024, EULawLive Publishing).
[85] *KlimaSeniorinnen,* para 538(d).
[86] See generally J Wibye, 'Beyond Acts and Omissions – Distinguishing Positive and Negative Duties at the European Court of Human Rights' (2022) Human Rights Review; M Klatt, 'Positive Obligations under the European Convention on Human Rights' (2011) Heidelberg Journal of International Law 691.

of appreciation understood as subsidiarity.[87] This discretion (understood as multiple options of measures to comply) makes the finding of a breach of the positive obligation analytically difficult since there is no initial standard against which breach can be assessed: there is no initial specification of the measures that should have been adopted, which can allow *a post factum* assessment whether these specific measures have been undertaken.[88] This analytical difficulty can be addressed by adopting a specific standard of causation to better define the required measures. In this context, causation plays a crucial role in specifying the content of positive obligations. The rationale is that the human rights review will include concrete examples of measures and an argument that if these measures were undertaken, this would have contributed to the prevention of the harm.[89] With this approach, the analytical operation of causally linking some concrete measures and the harm, stabilizes and strengthens the reasoning for establishing breach. As Section 3.4. below will emphasize, in *KlimaSeniorinnen* such analytical operation was not performed in the establishment of breach, as the Court did not attempt to apply 'real prospect' causation test.

In addition to discretion (i.e. affording multiple compliance options), the proportionality standard further complicates the assessment of breach of positive obligations. As the Court reiterated in *KlimaSeniorinnen,* the measures forming the content of positive obligations cannot impose 'an impossible or disproportionate burden' on the authorities. This means that authorities not only have the flexibility to choose between different measures, but must also weigh their priorities and resources when making those choices.[90] Similar to the issue of discretion, there is no predefined standard for determining what constitutes an impossible or disproportionate burden. In other words, no clear criteria exist for evaluating proportionality or suggesting which measures would impose a disproportionate burden. Once again, as noted earlier with regard to discretion, establishing a causal link between specific measures and the harm in question can aid in assessing proportionality. [91] Therefore, the process of analytically linking specific measures (that should have been implemented) to specific harms is crucial in this context as well.

In summary, in *KlimaSeniorinnen*, the Court broadly defined the content of positive obligations as including both substantive and procedural measures. These obligations were initially outlined in the 'General Principles' section at a highly abstract level. The real challenge lies in specifying and tailoring these measures, especially given the lack of clear baseline standards to guide this process.

3.3. Tailoring the content to the context of climate change

[87] S Besson, 'Subsidiarity in International Human Rights Law—What is Subsidiary about Human Rights' (2016) 61(1) The American Journal of Jurisprudence 69.
[88] V Stoyanova, 'Framing Positive Obligations under the European Convention on Human Rights Law: Mediating between the Abstract and the Concrete' (2023) 23 Human Rights Law Review 1.
[89] V Stoyanova, *Positive Obligations under the European Convention on Human Rights. Within and Beyond Boundaries* (OUP 2023).
[90] *KlimaSeniorinnen,* para 538(d).
[91] For elaboration how the standard of 'disproportionate burden' (also framed in the Court's case law as reasonableness) is related to the standard of causation in the content of adjudication of positive obligations, see V Stoyanova, *Positive Obligations under the European Convention on Human Rights. Within and Beyond Boundaries* (OUP 2023).

The above-described abstract positive obligations whose content was expected not to impose a disproportionate burden and, at the same time, was characterised by discretion, were tailored to the context of climate change. How did the Court perform this tailoring in *KlimaSeniorinnen*?

3.3.1. The 'considerable weight' standard

On the standard of disproportionate burden, the Court noted the following: 'the Court finds it justified to consider that climate protection should carry *considerable weight* in the weighing-up of any competing considerations.'[92] Three arguments were advanced in support of this 'considerable weight'. The first one can be summarized as the scientific evidence that demonstrates the urgency and severity of climate change and that also demonstrates the 'link between the adverse effects of climate change and the enjoyment of (various aspects of) human rights.'[93] The second argument was the global nature of the effects of the emissions. The third argument was 'the States' generally inadequate track record.'[94]

Notably, any competing considerations were not even mentioned here. Even if climate protection is given 'considerable weight', what considerations is it going to be weighed against? 'Considerable weight' in comparison to what and in relationship to what? These questions were left out of the reasoning.

3.3.2. Differentiated scope of the margin

After determining that 'climate protection should carry *considerable weight* in the weighing-up of any competing considerations,' the Court proceeded to consider the margin of appreciation.[95] In simple terms, what the Court determined was the States could not choose not to have a commitment (i.e. the general aim to combat climate chance). However, States can have multiple choices as to the means for achieving this aim. The fundamental distinction here was therefore between aims and means. The problem is that this distinction is not that stable since the means (the more specific measures that might form the content of the positive obligations) can be framed with different levels of abstractness.[96] The more abstract the framing is, the more they resemble aims, such as the general commitment to combat climate change. It then follows that the more abstract the positive obligations are articulated, which can make them resemble more general aim/commitments, the easier it is for the Court to find a violation. The reason is that the analysis remains at an abstract level, which allows overlooking causal links, difficult questions about degrees of causal contribution and about disproportionate burdens. This will be better explained in the text section.

3.3.3. Specification of the obligation

As the Court held, Article 8 of the ECHR required that 'each Contracting State undertake measures for the substantial and progressive reduction of their respective GHG emission levels, with a view to reaching *net neutrality* within, in principle, the next three decades.'[97] The positive

[92] *KlimaSeniorinnen,* para 542 (emphasis added).
[93] *KlimaSeniorinnen,* para 542.
[94] *KlimaSeniorinnen,* para 542.
[95] *KlimaSeniorinnen,* para 543.
[96] V Stoyanova, 'Framing Positive Obligations under the European Convention on Human Rights Law: Mediating between the Abstract and the Concrete' (2023) 23 Human Rights Law Review 1.
[97] *KlimaSeniorinnen,* para 548.

obligation was therefore articulated in terms of the aim that needs to be achieved and the timeframe.

In paragraph 550 of *KlimaSeniorinnen*, the Court outlined various mitigation measures. It is worth reproducing the entire paragraph here:

> When assessing whether a State has remained within its margin of appreciation, the Court *will examine* whether the competent domestic authorities, be it at the legislative, executive or judicial level, have had *due regard* to the need to:
>
> (a) adopt general measures specifying a target timeline for achieving carbon neutrality and the overall remaining carbon budget for the same time frame, or another equivalent method of quantification of future GHG emissions, in line with the overarching goal for national and/or global climate-change mitigation commitments;
>
> (b) set out intermediate GHG emissions reduction targets and pathways (by sector or other relevant methodologies) that are deemed capable, in principle, of meeting the overall national GHG reduction goals within the relevant time frames undertaken in national policies;
>
> (c) provide evidence showing whether they have duly complied, or are in the process of complying, with the relevant GHG reduction targets (see sub-paragraphs (a)-(b) above);
>
> (d) keep the relevant GHG reduction targets updated with due diligence, and based on the best available evidence; and
>
> (e) act in good time and in an appropriate and consistent manner when devising and implementing the relevant legislation and measures.[98]

What is notable is the mixture of procedural and substantive review for determining breach. The Court observed that it would 'examine whether the competent domestic authorities, [] have had *due regard* to the need to […].' This suggests a procedural review by the Court. In other words, the Court approached its task as one of examining what the national authorities had had regard to. Put it differently, the task of the Court was not to examine whether the measures themselves were proportionate and contribute to achieving the aim. There was an additional procedural twist. The Court suggested that it would review the domestic review (double procedure review). In other words, the Court suggested that it would review whether the domestic authorities had a review.[99]

In summary, the abstract framing of the obligation (i.e. 'reaching *net neutrality*'), combined with procedural twists, allowed the Court's reasoning to sidestep the causation standard. The Court avoided examining precisely how the omission (or potential future omissions) to achieve carbon neutrality within the set timeframe caused harm. This was initially possible because no

[98] Adaptation measures were also added. At para 555 the Court clarified that the mitigation measures have autonomous standing: failure to comply with them suffices for finding a breach of Article 8.
[99] *KlimaSeniorinnen,* para 554.

harm to individual interests was possible to identify in the first place, as discussed in Section 3.1 of this chapter. Additionally, the procedural twists in the reasoning diluted any specific causal links between procedural failures and harm.[100]

3.4. Assessing compliance without specification

Having explained the reasoning on the merits, regarding 'General principles' and 'The States' positive obligations in the context of climate change', here I will focus on the subsection in the judgment addressing the 'Application of the above principles to the present case'. The review of this application, which involved assessing whether the respondent State fulfilled its positive obligations, was covered in just four and a half pages. The reasoning is highly technical, with frequent references to scientific evidence. The main omissions that were the basis for finding breach of the positive obligation under Article 8 ECHR can be summarized as failure to adopt regulatory framework (i.e. 'legislative lacuna'),[101] failure to quantify national emission limitations and failure to meet previous emission reduction targets.

The omissions were framed in a general fashion. The specific measures that form the content of the obligations were not specified and prescribed. This is not a distinctive feature of the *KlimaSeniorinnen* case. In general, the binary conclusion that a State has breached is positive obligations under the ECHR, does not have much prescriptive value.[102] The conclusion of a violation, however, has to be read in light of 'the spirit of the Court judgment',[103] understood as in light of the reasoning in the judgment. This is a suggestion that the reasoning might give some indications as to what could have been done differently or what will need to be done in the future. Yet, indications do they remain, not prescriptions.

The lack of concrete measures specified in the operative part of the judgment—or the impossibility of specifying them—should not, in principle, prevent a judgment on the merits. However, this absence of specific prescriptions heightens the importance of the Court's reasoning and any indications of concrete measures. For the respondent State to understand how to remedy the omissions and effectively implement the judgment, the reasoning should offer clear guidance. Likewise, the Committee of Ministers requires this guidance to properly oversee the judgment's execution

How useful and how analytically robust was however the reasoning? To engage with this question, I will limit myself to two aspects: to wit, the related standards of causation and 'disproportionate burden' that were already mentioned and explained in Section 3.3 above.

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[100] This is an observation of general nature not pertaining specifically to *KlimaSeniorinnen.* The Court uses procedural failures as proxies for causation. See V Stoyanova, 'Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights' (2018) 18 Human Rights Law Review 309.

[101] *KlimaSeniorinnen,* para 561.

[102] V Stoyanova, 'Correlativity Between Human Rights and Positive Obligations and Its Role for the Execution of Judgments Delivered by the European Court of Human Rights' 2024 European Convention on Human Rights Law Review.

[103] *KlimaSeniorinnen,* para 656: 'The Court further points out that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its obligation under Article 46 of the Convention, *provided that such means are compatible with the conclusions and spirit of the Court's judgment*. (emphasis added)'

3.4.1. The causation standard was not relevant

As previously noted, the Court referred to the 'real prospect' causation test. However, this test was absent in the actual determination of breach. This highlights a clear disconnect between the sections of the judgment where the Court outlines general standards and the brief, four-page reasoning that led to the finding of a breach. This is not a call for a longer judgment but rather an observation that the breach of positive obligations was determined without engaging in a causation analysis or applying any causation standard.

3.4.2. The 'disproportionate burden' standard was not relevant

The same omission can be identified regarding the 'disproportionate burden' standard. If the Court were to adhere even remotely to the 'disproportionate burden' standard, it would have to consider the costs and negative consequences of mitigation measures. The proposition that such measures are invariably beneficial, including for individual interests protected by human rights law, is unsustainable.[104] Such measures might require overhaul of economic and social systems, which can be costly. This was disregarded. There is no even acknowledgement of the challenges. This also reveals the disconnect in the Court reasoning between the formulation of general principles such as 'disproportionate burden' and their actual application for the finding of breach.

4. Conclusion

Causation is an essential element of any analysis of legal responsibility. It underpins every legal inquiry into responsibility and the resulting consequences once responsibility is established. [105] At the same time, defining causation has proven challenging, particularly when the inquiry focuses on omissions as causal factors.[106]

This chapter offered a critical assessment as to how the Court framed the standard of causation and how it applied it *Verein KlimaSeniorinnen Schweiz*. Although the Court in abstract terms addressed causation upfront by devoting multiple paragraphs to this very question in the judgment, causal links had little role in the actual determination of breach. This determination featured casual assumptions in very abstract terms with little regard to the 'real prospect' and the 'disproportionate burden' standards. This feature was in way inevitable in the absence of specific harm and therefore harm to individual interests, which justified the denial of victim status to the individual applicants.

The breach analysis on the merits relied on diffuse and highly abstract causal assumptions, which easily underpinned the existence of broadly defined positive obligations. The tailoring

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[104] Benoit Mayer, 'Is climate change mitigation within the scope of positive human rights obligations?' in V Stoyanova and D McGrogan (eds) *From Protection to Coercion: The Limits of Positive Obligations in Human Rights Law* (forthcoming).

[105] AM Honoré, 'Causation and Remoteness of Damage' in A Tunc (ed), International Encyclopaedia of Comparative Law: Torts, vol 11, ch 7 (Mohr 1983) 1–156, 21–22.

[106] T Honoré, *Responsibility and Fault* 41 (Hart Publishing2002); Sartorio, 'How to Be Responsible for Something without Causing It' 18(1) Philosophical Perspectives (2004) 315; M.S. Moore, *Causation and Responsibility: An Essay on Law, Morals, and Metaphysics* (2009) 129–130; Schaffer, 'Causes Need Not Be Physically Connected to Their Effects: The Case for Negative Causation', in C.R. Hitchcock (ed.), *Contemporary Debates in Philosophy of Science* (2004) 197.

of these obligations to the climate change context did not lead to greater specificity because the issue of causation was sidestepped. This was achieved by framing the obligation in terms of an abstract goal and by combining procedural omissions with substantive ones. When the Court assessed breach, it did not revisit the key standards of 'real prospect' and 'disproportionate burden'. There was therefore a disconnect between the abstract discussion about causation and the determination of breach.

Although the definitive finding of a breach may be well-received, the work of defining the scope of positive obligations—and, more generally, understanding the role and core principles of human rights law—has only just started. The revision of human rights law as a body of law designed to also protect *general* interests, which was allowed by granting the applicant association victim status, must inevitably have implications that are yet to be better understood and articulated. This chapter clarified at least two things in this context. First, human rights law has been shifted away from more robust causal inquires. Second, human rights law has been shifted away from its historical origins that demand sensitivity and certain level of reservation to the idea that state interventions (framed as demanded by positive human rights law obligation) are necessary positive and beneficial.[107]

[107] See generally D McGrogan, *Critical Theory and Human Rights: From Compassion to Coercion* (Manchester University Press 2021).