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Right to a Safe, Clean, Healthy and Sustainable Environment Under the European Convention of Human Rights: Is an Additional Protocol Required for Effective Protection of Environmental Rights?

ABSTRACT: *The right to a safe, clean, healthy, and sustainable environment as a human right is not new to legal scholarship or the international community. This area is dynamically evolving and new challenges to the protection of environmental rights are emerging. Adoption of a new additional protocol to the European Convention of Human Rights on the right to a safe, clean, healthy, and sustainable environment is considered the most effective way to protect environmental rights and ensure a unified approach to combating the environmental crisis from a human rights perspective. However, this approach forces us to analyse the notions of margin of appreciation, victim status, and positive obligations of states once again. New challenges questioning such an anthropocentric approach, the limits of positive obligations, and the margin of appreciation may arise even upon the adoption of the protocol. The economic and financial status of states may vary and this may negatively affect protocol implementation. The uncertainty that arises in defining the boundaries of such obligations under the protection of environmental rights is especially concerning. In terms of positive obligations, the European Court of Human Rights Court tends to allow a certain margin of appreciation to contracting parties in this area of legal protection. Nevertheless, in light of the recent decision regarding climate change, the protocol is not guaranteed to provide an adequate response to the problem. The desire to be at the forefront of the fight against environmental pollution and climate change has further pushed the Court to take unconventional decisions that differ from previous case law. This article discusses the need to adopt an additional protocol; it focuses on the role of the protocol in defining the Court's renewed approach to the margin of appreciation and the scope of states' obligations under the Convention.*

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https://doi.org/10.47078/2024.2.9-32

■ **KEYWORDS:** climate change, margin of appreciation, anthropocentric approach, right to a safe, clean, healthy and sustainable environment, victim status, ECtHR

1. Introduction

The right to a safe, clean, healthy, and sustainable environment as a human right is not new to legal scholarship or the international community. The United Nations has adopted a landmark resolution recognising the human right to a healthy environment.[1] Environmental protection is pivotal to the realisation of the sustainable development goals. This area is dynamically evolving and new challenges to the protection of environmental rights are emerging.

To protect environmental rights and ensure a unified approach to combating the environmental crisis from a human rights perspective, Amnesty International, together with more than 200 non-governmental organisations, recently appealed to the international community in the form of Foreign Ministers and Permanent Representatives of Council of Europe (CoE) member states in an open letter, calling on member states of the organisation to take specific measures, namely to prepare and adopt a new additional protocol to the European Convention on Human Rights (from here on 'the Convention') on the right to a clean, healthy, and sustainable environment.[2] However, the adoption of a new protocol to the Convention and consideration of the obligations of states from a human rights perspective forces us to analyse the positive obligations of states once again – not simply from the perspective of the civil and political rights provided for by the Convention but from the point of view of the right to a safe, clean, healthy, and sustainable environment. We must also consider the necessity of adopting an additional protocol for the effective protection of the right to a safe, clean, healthy, and sustainable environment.

Positive obligations towards civil and political rights are incumbent on member states of the CoE, and they require countries to protect and fulfil human rights. It is important to note that at the time of elaboration of the Convention, the environment was not regarded as a threat to human rights; therefore, the founding fathers of the Convention did not embed any provision on the right to a safe, clean, healthy, and sustainable environment. Nevertheless, the Convention is a living instrument, and therefore, the human rights enshrined therein have been interpreted as including positive obligations for the protection of the right to a

1 UNGA, The human right to a clean, healthy and sustainable environment, A/RES/76/300 (28 July 2022).

2 *Call for the adoption of an additional Protocol to the European Convention on Human Rights on the right to a clean, healthy, and sustainable environment, 2024.*

safe, clean, healthy, and sustainable environment. The European Court of Human Rights (from here on 'the Court') has developed its case law in environmental matters because the exercise of certain Convention rights may be undermined by environmental harm and exposure to associated risks.[3] The Court's history is replete with cases that to one degree or another relate to environmental rights. However, they were considered under existing articles, such as the right to life, the right to respect for private and family life, etc.[4]

The interconnection between human rights and the environment is not contested. The Court recognises that, in today's society, the protection of the environment warrants greater consideration.[5] It has referred to rights included in the Convention on which issues such as noise disturbance, industrial pollution, town planning and construction, waste management, water contamination, and human-caused and natural disasters had an undeniable impact.[6] The recognition of the prevalence of environmental aspects in human rights law, therefore, may guarantee the coercivity of these considerations, and environmental aspects may thus form an inevitable part of the interpretation of certain human rights.[7]

The adoption of a separate protocol poses new challenges in determining the limits of positive obligations since obligations of this type also envisage financial consequences. The economic and financial status of states may vary and this may negatively affect protocol implementation. One key issue is the uncertainty surrounding the boundaries of such obligations under the protection of environmental rights. If one examines the positive obligations covered by the Convention, it becomes evident that the Court tends to allow a certain margin of appreciation to contracting parties in this area of legal protection. The latter decision concerning climate change[8] has provided a platform for the Court to delve into unprecedented issues. The particular nature of the problems arising from climate change, in terms of the issues raised by the Convention, has not so far been addressed in the Court's case law.[9] While the Court's environmental case law to date can offer modest guidance, important differences exist between the legal questions raised by climate change and those addressed so far.[10] The evolving case law relating to climate change has raised new questions and offered new approaches to the question of causation, issues of proof, the effect of climate

3 European Court of Human Rights, 2024.
4 Ibid.
5 *Fredin v. Sweden (No. 1) (*Application no. 12033/86), Judgment, 18 February 1991, para. 48.
6 Council of Europe, Manual on Human Rights and the Environment (3rd edition) (Council of Europe, 2022), para. 20.
7 Raisz and Krajnyák, 2022, p. 76.
8 *Verein Klimaseniorinnen Schweiz and Others v. Switzerland,* (Application no. 53600/20), Judgment, 9 April 2024.
9 Ibid., para. 414.
10 Ibid.

change on the enjoyment of Convention rights, positive obligations, and the proportion of state responsibility.

The ongoing evolution of the case law, along with the potential adoption of an additional protocol to the Convention on the right to a safe, clean, healthy, and sustainable environment, could result in the recognition of a wide range of substantive and procedural rights. These rights would strongly emphasise the intrinsic value of nature and ecosystems, highlighting the profound interrelationship between human societies and nature. However, this may compromise the Court's anthropocentric and individualistic approach. In light of these factors, the main research focus of this article is related to the recent case law of the Court and its impact on the necessity of adopting an additional protocol.

The first part of the article involves the established practice of the Court regarding the right to a safe, clean, healthy, and sustainable environment covering negative and positive obligations under the Convention. The second part is devoted to the recent case law of the Court on climate change. Finally, in the third part, the article focuses on possible advantages and disadvantages arising from adopting the new protocol.

2. Established practice of the Court on the right to a safe, clean, healthy, and sustainable environment

The Convention does not contain any provision entailing the right to a safe, clean, healthy, and sustainable environment. As a 'living instrument', its interpretation of rights and freedoms is not fixed but can take account of the social context and changes in society.[11] The Convention could not be a living instrument if its interpretation remained static.[12] Thus, the Court has developed a significant case law that recognised the violation of different human rights embedded in the Convention as a result of the environmental risks and harm stemming from actions or inactions of state parties. This part is devoted to an overview of key general principles established by the Court for the examination of environmental cases.

Foundational for environmental human rights is the principle conceived by the Court nearly 30 years ago: severe environmental harm that adversely and seriously affects individuals' well-being can be considered as an interference with the right to respect for private and family life or home.[13]

Given that environmental issues may give rise to discussions of matters of a scientific-technical character, the Court recognises a wide margin of appreciation of national authorities when it comes to rendering decisions on environmental

11 Council of Europe, Manual on Human Rights and the Environment (3rd edition) (Council of Europe, 2022), para.34.
12 Rainey, Wicks and Ovey, 2014, p. 74.
13 Kobylarz, 2022, p. 364.

issues. The choice of the specific measures is, in principle, a matter that falls within the State's margin of appreciation.[14] In this respect, the Court acknowledges that an impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices that they must make in terms of priorities and resources; this results from the wide margin of appreciation States enjoy in difficult social and technical spheres.[15] As seen, the margin of appreciation is closely linked to the notion that no disproportionate burden should be imposed on the State concerned. The Court referred to the idea of margin of appreciation not merely in cases concerning hazardous activities of a man-made nature but also meteorological events. This consideration must be afforded even greater weight in the sphere of emergency relief about a meteorological event, which is as such beyond human control, than in the sphere of dangerous activities of a man-made nature.[16]

However, in the recent decision rendered by the Court on climate change, the Court has adopted a wholly different and rather perplexing approach concerning the margin of appreciation.[17] We will thoroughly discuss it in the following chapter.

■ *2.1. Negative obligations under the Convention*

Negative obligations place a duty on state authorities to refrain from acting in a way that unjustifiably interferes with Convention rights.[18] All the rights enshrined in the Convention include, in one way or another, both negative and positive obligations. While the Court seeks to establish whether a fair balance has been struck between competing rights by assessing positive obligations, negative obligations from an environmental perspective are not subject to such scrutiny. Notably, states' negative obligations have been most explored by the Court under art. 8.[19] In many cases, negative obligations go hand in hand with positive commitments. For instance, the case of *Dzemyuk v. Ukraine* concerns the local authority's decision to locate a cemetery just 38 metres from the applicant's home in breach of domestic regulations plus the state's failure to act in securing compliance with the domestic environmental standards.[20] The principles applicable to an assessment of the state's responsibility under art. 8 in environmental cases are broadly similar, regardless of whether the case is to be analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights

14 Guide to the case-law of the European Court of Human Rights, Environment, 2024.
15 *Öneryıldız v. Turkey,* (Application no. 48939/99), Judgment, 30 November 2004, para. 107.
16 *Budayeva and Others v. Russia,* (Application nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02), Judgment, 20 March 2008, para.135.
17 *Verein Klimaseniorinnen Schweiz and Others v. Switzerland,* (Application no. 53600/20), Judgment, 9 April 2024 para.543.
18 *Toolkit Some definitions,* 2024.
19 Guide to the case-law of the European Court of Human Rights, Environment, 2024.
20 *Dzemyuk v. Ukraine,* (Application 42488/02), Judgment, 4 September 2014, para. 88.

under art. 8 para. 1 or in terms of an 'interference by a public authority' to be justified by art. 8 para. 2.[21] In that specific case, the cemetery was built in breach of domestic regulations, meaning that the state infringed its negative obligations. However, violation of positive obligations has also been confirmed since binding judicial decisions were never enforced and the health and environmental dangers inherent in water pollution were not acted upon.[22]

In the cases concerning noise caused by the operation of public civil airports, the Court has relied on the 'economic well-being of the country' and has not explicitly assessed this case concerning negative obligations.[23] Finally, it is incumbent on the Court to assess whether the interference was proportionate to the legitimate aim pursued.

■ *2.2. Positive obligations under the Convention*

Under the notion of positive obligations, states' human rights responsibility comes to an effect where environmental harm stems from activities carried out by private parties or even from the effects of natural occurrences insofar as this ought to be effectively regulated, monitored or mitigated by public authorities.[24]

Notably, the Court has developed the doctrine of positive obligations within the scope of art. 2. That is, public authorities can also be held responsible for the actions of third parties. In the context of the environment, art. 2 has been applied where certain activities endangering the environment are so dangerous that they also endanger human life.[25] Since the scope of the positive obligations under art. 2 largely overlaps with those under art. 8, the principles developed in the Court's case law relating to planning and environmental matters affecting private life and home may also be relied on for the protection of the right to life.[26] There is no exhaustive list of circumstances triggering the State's obligation to act. In a nutshell, states must take all the necessary measures to protect the rights enshrined in art. 8. Those positive obligations may involve the authorities' adopting measures to protect those rights even in the sphere of the relations of individuals between themselves.[27] Nevertheless, for a state to be in line with its positive obligations, it should not only have national legislation providing punishment for polluters in place. This legislation should also be applied in a timely and effective manner. This approach has been acknowledged in the case of *Bor v. Hungary* (2013) where

21 Ibid., para. 89.
22 Ibid., para. 92.
23 Guide to the case-law of the European Court of Human Rights, Environment, 2024.
24 Kobylarz, 2022, p. 364.
25 Council of Europe, Manual on Human Rights and the Environment (3rd edition) (Council of Europe, 2022), para. 38.
26 Guide to the case-law of the European Court of Human Rights, Environment, 2024; cited in *Budayeva and Others v. Russia*, (Application nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02), Judgment, 20 March 2008, para. 133.
27 Ibid, para. 109.

the Court found a violation of art. 8 of the Court as the domestic courts failed to determine any enforceable measures to assure that the applicant would not suffer any disproportionate individual burden for some sixteen years.[28] States should punish polluters who have caused damage to the environment. The Court therefore recognised a principle of international environmental law, the polluter pays principle.[29]

States are expected to strike a fair balance between competing rights. e.g., the Court does not find a violation of the right to property in cases of restrictions on activities imposed by public authorities to protect endangered ecosystems or species unless the measures in question are unforeseeable or disproportionate.[30] Moreover, in cases under art. 8 where a state is faced with complex environmental and economic policy issues, particularly cases involving dangerous activities, the Court has emphasised that the state must, in addition, set in place regulations geared to the special features of the activity in question, particularly concerning the level of risk potentially involved.[31]

In addition to the above rights, one of the main rights of individuals exposed to the negative effects of environmental hazards is the right to receive and impart information on hazardous activities that may have adverse consequences on health. Nevertheless, access to information has been given effective, albeit not automatic or unqualified, recognition under arts. 2, 8, and 10 of the Convention.[32] The state must take measures to provide individuals with information enabling them to assess the risks they might run as a result of the choices they have made.[33]

In addition to the foregoing, the Court has recognised states' environmental obligations guaranteeing the right to a fair trial both for individuals and their associations. Art. 6 can be invoked by an environmental interest organisation where the claim concerns the interests that the organisation defends.[34] Decisions such as *Okyay and others v. Turkey* and *Taşkin v. Turkey* focused on the right to access justice as part of the right to a fair trial.[35]

In summary, states abide by the positive obligations to protect numerous civil and political rights embedded in the Convention from the viewpoint of environmental protection. As part of those positive obligations, the Court has recognised some of the most essential standards of international environmental law, such as the polluter pays principle, the precautionary principle, and the duty

28 *Bor v. Hungary* (Application No. 50474/08), Judgment, 18 June 2013, para. 27.
29 Sands and Peel, 2018, p 240.
30 Kobylarz, 2022, p. 365.
31 Guide to the case-law of the European Court of Human Rights, Environment, 2024.
32 Kobylarz, 2022, p. 365.
33 *Öneryıldız v. Turkey,* (Application no. 48939/99), Judgment, 30 November 2004, para. 108.
34 Peters, B. 2020, '3.1. Individuals or their associations' section, p. 8 cited in *Affaire collectif national d'information et d'opposition à l'usine Melox – Collectif stop Melox et Mox c. France*, (Application no. 75218/01), 12 June 2006, para. 4.
35 Ibid., '4.3.1.2. Procedural environmental obligations' section, p. 14.

to conduct an environmental impact assessment.[36] Positive obligations established in the Court's case law are deemed to be procedural environmental obligations.

3. Recent Court case law regarding climate change: a step closer to an additional protocol on the right to a clean, healthy, and sustainable environment?

It is interesting to see how recent case law from the Court regarding climate change may potentially lead to the development of an additional protocol on the right to a safe, clean, healthy, and sustainable environment. This could have far-reaching implications for environmental protection and human rights across Europe and beyond.

The Case of *Verein Klimaseniorinnen Schweiz and Others v. Switzerland* showcases a slight inclination of the Court to the approach of other regional mechanisms. The Inter-American Court of Human Rights interpreted the right to not only oblige States to protect the life and health of their citizens but also to oblige State parties to protect the environment for the sake of all organisms that live on this planet.[37] Notably, the American Convention on Human Rights (hereafter, ACHR)[38] does not contain explicit provisions on the right to a safe, clean, healthy, and sustainable environment. Nevertheless, art. 11 of the San Salvador protocol of the ACHR grants the right to a healthy environment and the duties of the states to grant it.[39]

The term 'margin of appreciation' refers to the space for manoeuvre that the Strasbourg organs are willing to grant national authorities in fulfilling their obligations under the European Convention.[40] However, the margin of appreciation goes hand in hand with Court supervision. Such supervision concerns both the aim of the measure challenged and its 'necessity'; it covers not only the basic legislation but also the decision applying it, even one given by an independent court.[41] Environmental protection should be taken into consideration by States in acting within their margin of appreciation and by the Court in its review of that margin, but it would not be appropriate for the Court to adopt a special approach in this respect by reference to a special status of environmental human rights.[42]

36 Ibid.
37 Ibid., p. 4, cited in Inter-American Court of Human Rights, The Environment and Human Rights, Advisory Opinion OC-23/17, para. 62, 2017.
38 American Convention on Human Rights (San José, 23 May 1969).
39 Marinkás, 2020, p. 137.
40 Council of Europe The Lisbon Network, 2009.
41 Ibid.
42 *Hatton and Others v. the United Kingdom*, (Application no. 36022/97), Judgment, 8 July 2003, para. 122.

In the present case, the Court applies the reduced margin of appreciation as regards the State's commitment to combating climate change, its adverse effects, and the setting of aims and objectives in this respect. As regards the State's commitment to the necessity of combating climate change and its adverse effects, the nature and gravity of the threat, and the consensus as to the stakes involved in ensuring the overarching goal of effective climate protection through overall greenhouse gas (GHG) reduction targets by the Contracting Parties' accepted commitments to achieve carbon neutrality, call for a reduced margin of appreciation for the States.[43] The State should be accorded a wide margin of appreciation as to the choice of means designed to achieve those objectives.[44] Establishing a reduced margin of appreciation regarding the state's commitment to combat climate change would run counter to the settled practice and approach adhered to by the Court since the margin of appreciation is used only in relation to states' obligations under the Convention. As it is observed, there is no such obligation to combat climate change overtly envisaged in the Convention or implied by the founding fathers in travaux préparatoires. The evolutive interpretation, even if applied, has limits. The Court cannot, using an evolutive interpretation, create a new right apart from those recognised by the Convention or it creates a new 'exception' or 'justification' which is not expressly recognised in the Convention.[45]

By taking such an approach, the Court is at risk of exceeding its authority and putting itself in the position of a body supervising the implementation of obligations undertaken by states under other international legal instruments. A reduced margin of appreciation means that the Court is entitled to wider powers to control the state's adherence to international commitments regarding combating climate change. In light of the facts of the case, specific implementing measures can be scrutinised. Nevertheless, the Court must decide whether the interference was proportionate to the legitimate aim pursued, and in particular whether, having regard to the State's broad margin of appreciation in the environmental sphere, a fair balance was struck between the competing interests.[46] Again, the primary is the choice of means designed to achieve proportionality between the aim pursued and the interference and to strike a fair balance between competing interests. Those competing interests are the rights and freedoms enshrined in the Convention and not climate change taken apart as an independent phenomenon in international relations.

43 *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, (Application no. 53600/20), Judgment, 9 April 2024, para. 543.

44 Ibid.

45 *Austin and Others v. the United Kingdom* (Application nos. 39692/09, 40713/09 and 41008/09), Judgment, 15 March 2012, para. 53.

46 Guide to the case-law of the European Court of Human Rights, Environment, 2024, cited in *Flamenbaum and Others v. France*, (Application nos. 3675/04 et 23264/04), Judgment, 13 December 2012, para. 150.

Moreover, one of the interpretation principles is effective protection. This principle states that, since the overriding function of the Convention is the effective protection of human rights rather than the enforcement of mutual obligations between States, its provisions should not be interpreted restrictively in deference to national sovereignty.[47] In the case of *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, the Court overrides the previous case law and takes on the role of an institution that monitors compliance with states' commitments to reduce carbon emissions. This approach is explicitly mentioned in the case:

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 measure 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;
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 appropriately and consistently when devising and implementing the relevant legislation and measures.[48]

Thus, all issues raised in paragraph A will be examined by the Court to assess whether a state has not exceeded its margin of appreciation. It is hard to disagree with Judge Eicke's partly concurring partly dissenting opinion, where he claims that the approach applied in this case goes against the Court's traditional approach about 'difficult social and technical spheres' developed in the context of, arguably, (much) less complex spheres than the fight against anthropogenic climate change.[49] Furthermore, the Court is ill-equipped and ill-suited to assess the issues listed above.[50]

The new approach to the margin of appreciation in cases concerning climate change is justified on different grounds, namely the nature and gravity of

47 Council of Europe The Lisbon Network, 2009, cited in Dijk and Hoof, 1998, p. 74.
48 *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, (Application no. 53600/20), Judgment, 9 April 2024, para. 550.
49 Eicke, 2024, para. 66.
50 Ibid., para. 67.

the threat and the consensus as to the stakes involved in ensuring the overarching goal of effective climate protection through overall GHG reduction targets by the Contracting Parties' accepted commitments to achieve carbon neutrality.[51] Again, a question arises as to what extent the Court is entitled to assess the Contracting Parties' commitments accepted before other international and regional organisations, if those commitments do not directly impact and breach the rights enshrined in the Convention. By establishing a reduced margin of appreciation for states, the Court acts beyond its powers. Additionally, the nature and gravity of the threat directly affecting the applicants, to my mind, have not been established successfully.

Hence, this case goes beyond the approach over which the consensus has been achieved. In the case of *Hatton and others v. the United Kingdom* (2003), the Court considered that in cases, involving State decisions affecting environmental issues, there are two aspects to the inquiry that may be carried out by the Court: first, the Court may assess the substantive merits of the government's decision, to ensure that it is compatible with art. 8; and second, it may scrutinise the decision-making process to ensure that due weight has been accorded to the interests of the individual.[52] Concerning the substantive aspect, the Court has held that the State must be allowed a wide margin of appreciation.[53] Achieving carbon neutrality and keeping the relevant GHG reduction targets updated with due diligence certainly relate to substantive aspects of the inquiry, rather than an assessment of whether the interests of the individual have been considered. Therefore, the state should enjoy a wider margin of appreciation than a reduced one. It is certainly for the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this difficult social and technical sphere; this is an area where the Contracting States are to be recognised as enjoying a wide margin of appreciation.[54] Although a margin of appreciation is left to the national authorities, their decision remains subject to review by the Court for conformity with the requirements of the Convention.[55] In the case of Verein *Klimaseniorinnen Schweiz and Others v. Switzerland*, the decisions of national courts have been scrutinised not mainly from the viewpoint of their conformity with the requirements of the Convention, but rather from the perspective of the nature and gravity of the threat and the consensus as to the stakes involved in ensuring the overarching goal of effective climate protection.

51 *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, (Application no. 53600/20), Judgment, 9 April 2024, para. 543.

52 *Hatton and Others v. the United Kingdom*, (Application no. 36022/97), Judgment, 8 July 2003, para. 99.

53 Ibid., para. 100.

54 Ibid.

55 *Buckley v. the United Kingdom* (Application no.20348/92), Judgment, 29 September 1996, para. 74.

In addition to the aspects mentioned above, this case also deviates from the established approach in terms of severity threshold. The Court has repeatedly noted in several cases that no article is specifically designed to offer protection of the environment as such.

> The Court reiterates at the outset that Article 8 is not violated every time environmental pollution occurs. There is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8 (.....). Furthermore, the adverse effects of environmental pollution must attain a certain minimum level if they are to fall within the scope of Article 8 (...). 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 (...).[56]

Referring to the facts of the case, one cannot completely be convinced that the severity threshold has been met in this specific case. Climate change undoubtedly and adversely affects the quality of private life of the applicants, but there is no fact in the case that makes us assume that the discomfort exercised by them reached the minimum level of severity. The facts of the case do not indicate the direct negative effects of climate change on the well-being of applicants.

It is, of course, one of the characteristics of climate change that its effects have become – at least by reference to any comparators within the respondent State – 'environmental hazards inherent to life in every modern city' and, as such, no applicability of art. 8 is capable of being derived from such a comparison which, in the Court's case-law, tended to be tied to or triggered by an identified source of (potential) pollution within the geographical vicinity.[57] The Court's approach in environmental matters generally relies on the establishment of a causal link between specific sources of harm and the actual harmful effects on applicants. 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.[58] In that specific case concerning climate change, it is scarcely possible to identify a specific source from which environmental harm stems. As it comes to climate change, the Court isolates it from other environmental issues. It acknowledges that there is no single or specific source of harm:

56 *Jugheli and Others v. Georgia*, (Application no. 38342/05), Judgment, 13 July 2017, para. 62.
57 Eicke, 2024, para. 64.
58 *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, (Application no. 53600/20), Judgment, 9 April 2024 para. 415.

> In the context of climate change, the ley characteristics and circumstances are significantly different. [...] GHG emissions arise from a multitude of sources. The harm derives from aggregate levels of such emissions. Secondly, CO_2 – the primary GHG – is not toxic per se at ordinary concentrations. The emissions produce harmful consequences as a result of a complex chain of effects. These emissions have no regard for national borders.[59]

The Court emphasises that it is impossible to identify the source of the harm regarding climate change. Following that logic, one can also argue that it is barely possible to determine where the sources of emissions in a complex chain that produces harmful consequences are located. In the above quote, the Court admits that emissions have no regard for national borders. One of the third-party interveners has also pointed to the fact that '... it was clear that no solely science-based set of criteria could be used to determine precisely and quantitatively what a country's ultimate fair share to limit global warming consisted of'.[60] If so, how does the Court intend to determine the level and limits of a country's responsibility and declare that the GHG emitted into the atmosphere on its territory, and not those of neighbouring states, have caused climate change adversely affecting the rights of citizens protected under the Convention? The Court will exceed its powers once it decides to engage in substantive assessment of environmental policy, instead of moving on with the procedural assessment of the decision-making process. Even though the Court takes on the role of a regional body monitoring climate change issues, its expertise in this specific field is under question. The Court offers a legal assessment of factual elements that emerge from the material available to it. Nevertheless, when a case concerns serious matters of scientific-technical character, all possible reports or assessments in any other form officially published by bodies established for monitoring due implementation of states' obligations about combating climate change should be scrutinised. In the week of 29 January and 2 February 2024, i.e. shortly before this judgment was adopted, an expert review team[61] of the Subsidiary Body for Implementation, set up to assist the governing bodies of the UNFCCC, the Kyoto Protocol and the Paris Agreement, was due to review Switzerland's Eight National Communication and Fifth Biennial Report under the UNFCCC/Fifth National Communication under the Kyoto Protocol to the

59 Ibid., para. 416.

60 Ibid., para. 393.

61 The expert review team which considered and reported on Switzerland's previous (2022) Submissions consisted of 21 experts from different Contracting Parties covering six specialist review areas – 'Generalist', 'Energy', 'IPPU' (industrial processes and product use), 'Agriculture', 'LULUCF and KP-LULUCF' (land use, land-use change, and forestry; and activities under Article 3, paragraphs 3–4, of the Kyoto Protocol) and 'Waste' – with two lead reviewers.

UNFCCC, of 16 September 2022.[62] This report,[63] which runs to 297 densely typed pages, covers inter alia detailed evidence concerning Switzerland's compliance with the quantified emissions limitations and reduction commitments incumbent upon it as an Annex I Party to the Kyoto Protocol.[64] This example once again showcases that the willingness to fight climate change is not sufficient for stepping beyond the permissible limits of evolutive interpretation and such a radical shift in the approaches used by the Court.

Considering the clash between the previous case law of the Court and the international documents on climate change on the one hand, and this case on the other, I agree with the view of the government of Ireland, that this application sought to create a far-reaching expansion of the Court's case law on the admissibility and merits of Articles 2 and 8, that it sought to bypass the democratic process through which climate action should take place if it was to be legitimate and effective and that the application was inconsistent with the dedicated international framework governing climate change to which the Contracting Parties were committed.[65]The foregoing judgment against Switzerland contributed to new currents in environmental human rights challenging various aspects of established jurisprudence.

Finally, we focus on the Court's controversial assessment regarding a victim's status. Since the Court has unanimously declared the complaints of applicants nos. 2–5 under art. 8 of the Convention inadmissible, we will analyse the victim status of the association. According to the well-established practice of the Court, one has to have been 'directly affected' in person by the violation in question.[66] For art. 34 the word 'victim' means the person directly affected by the act or omission in issue.[67]

In that specific case, recognising the association as a victim of a violation contributes to the deviation from the established case law of the Court. The reason why an association may not be considered to be a direct victim is the prohibition on the bringing of an *actio popularis* under the Convention system; that is, an applicant cannot lodge a claim in the public or general interest if the impugned measure or act does not affect him or her directly.[68] For an applicant to be able to argue that he is a victim, he must produce reasonable and convincing evidence of

62 Eicke, 2024, para. 12.
63 Report on the individual review of the annual submission of Switzerland submitted in 2022 (FCCC/ARR/2022/CHE of 24 February 2023).
64 Eicke, 2024, para. 12.
65 *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, (Application no. 53600/20), Judgment, 9 April 2024, para. 369.
66 Guide to the case-law of the European Court of Human Rights, Environment, 2024.
67 *Balmer-Schafroth and Others v. Switzerland* (Application no.67\1996\686\876), Judgment, 26 August 1997, para. 26.
68 *Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği v. Turkey* (Application no. 37857/14), Decision, 7 December 2021, para. 41.

the likelihood that a violation affecting him personally will occur; mere suspicion or conjecture is insufficient in this respect.[69] The mere mention of the pollution risks is not enough to justify the applicants' assertion that they are the victims of a violation of the Convention. The mere reference to risks stemming from climate change without its direct impact on an applicant does not suffice for an application to be successful.

Under the Convention, the Court may receive applications from any person, non-governmental organisation, or group of individuals claiming to be the victim of a violation by one of the high contracting parties of the rights outlined in the Convention or the Protocols thereto.[70] Hence, for applicants to raise a successful complaint before the Court, they must prove the personal impact of a state's action or inaction on their rights. This is true even where individuals or NGOs may wish to use the rights-based approach to give realisation to a duty to protect nature.[71] Moreover, the 'direct victim requirement' also implies that the Court will not entertain applications in which a legal entity relies on a Convention right that is inherently attributable to natural persons only – such as the right to respect for private life or home.[72] However, this approach is challenged by the argument that environmental law protects not only individual interests but everyone and the environment itself.[73] This argument can be a slippery slope leading to *actio popularis*. As previously mentioned in the second part of this article, in the case of *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, the Court took a very controversial position by granting victim status to an NGO in a case related to the violation of art. 8 of the Convention.

The Court notes that certain Convention rights, such as those under arts. 2, 3, and 5, by their nature, are not susceptible of being exercised by an association, but only by its members.[74] This approach entails the impossibility of associations claiming victim status in respect of a violation of the Convention arising from environmental problems encountered by natural persons. For the Court to deviate from its classic approach on victim status there should be highly exceptional circumstances.[75] Nothing in the facts of the current case points to a real threat faced by the association and the existence of highly exceptional circumstances.

Moreover, an NGO cannot claim to be the victim of measures that, on account of environmental pollution or disturbances, have allegedly infringed rights granted by the Convention to the NGO's members.[76] However, in the current case, the Court has reached quite the opposite inference. Associations

69 Ibid.
70 The Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.
71 Kobylarz, 2022, p. 370.
72 Kobylarz, 2020, p. 22.
73 A Legal Guide on Access to Justice in Environmental Matters, 2021.
74 Ibid.
75 Eicke, 2024, para. 35.
76 Guide to the case-law of the European Court of Human Rights, Environment, 2024.

are nevertheless now granted the broadest standing to seek the protection of the human rights of those affected, as well as those at risk of being affected, by the adverse effects of climate change.[77] Nonetheless, affected individuals do not by default mean to be victims.

As a ground, the Court referred to 'future risks' and recognised that in the climate-change context, everyone may be, one way or another and to some degree, directly affected, or at a real risk of being directly affected, by the adverse effects of climate change. Leaving aside the issue of jurisdiction, the fact remains that potentially a huge number of persons could claim victim status under the Convention on this basis.[78] Again, I would like to draw readers' attention to the conclusion of Judge Eicke, where he states that there is no basis for drawing any enforceable obligation from the current text of the Convention to combat 'future risk' in respect of the applicants before the Court and even less to combat a 'future risk' in respect of 'future generations', i.e. by or on behalf of individuals who are, by definition, not even before the Court.[79]

As seen from the Court's assessment, the extract from which has been cited above, no legal grounds justifying a drastic change in approach have been substantiated in the judgment. The mere wish to draw attention to the problem of climate change, to my mind, cannot be sufficient for introducing such an interpretation of a victim status which is very similar to *actio popularis*. In my opinion, this Swiss NGO has no standing, because it is not a direct victim of the results of inactions of the state.

Thus, we should acknowledge that the Court has stood for a completely new approach, diverse from the one applied to other environmental cases. The aspiration to contribute to combatting climate change is welcome; nevertheless, it should not lead to exceeding the powers of the Court resulting in a frivolous interpretation of the Convention as a living instrument.

4. Possible advantages and disadvantages arising from adopting the new protocol

In the previous parts of this article, we reviewed the Court's case law on environmental matters and the Court's new approach regarding the obligation of states to combat climate change. In the current situation, in light of the analysis of the foregoing topics, we will attempt to answer the question of whether the adoption of an additional protocol to the Convention would contribute to better protection of the right to a safe, clean, healthy, and sustainable environment.

77 *Verein Klimaseniorinnen Schweiz and Others v. Switzerland,* (Application no. 53600/20), Judgment, 9 April 2024, para. 499.
78 Ibid, para. 483.
79 Eicke, 2024, para. 42.

The climate crisis is triggering unprecedented heat waves, flooding, prolonged droughts, sea-level rise, and wildfires. Natural disasters occur in all corners of the globe. The world's population is suffering the consequences of irreversible loss of biodiversity, disrupted drinking water supplies, and deteriorating air quality. Climate change also threatens food security. These crises have direct health implications, exacerbate existing inequalities, and negatively affect the human rights of marginalised groups.

This section will analyse emerging trends and the current situation in the field of protection of environmental rights. Among other things, the feasibility pros and cons of adopting a separate protocol to the Convention will be examined.

Adoption of a new protocol on the right to a safe, clean, healthy and sustainable environment could have both pros and cons. On the one hand, the protocol could provide a legally binding framework to protect the environment and ensure that measures are taken to mitigate climate change. It could also contribute to greater international cooperation and promote accountability to protect the environment. On the other hand, there may exist impediments hindering the adoption of the protocol. The idea can be received coldly by states since it establishes new obligations and duties on states in terms of the protection of the environment.

In most states of the CoE, environmental rights are legally enforceable and the environment is recognised as a public concern.[80] In forty-two of the forty-six CoE Member States, the right to a safe, clean, healthy, and sustainable environment is already enshrined in and protected through constitutions and national legislation.[81] Nevertheless, the increasing and undeniable impact of climate change on everyday life has forced the international community to recognise the global nature of this problem, which served as a basis for the adoption of various conventions and programs to combat the negative effects of environmental pollution and climate change. Since the primary focus of this article is to analyse the approach of the Court to this issue, we avoid delving into the consideration of other international mechanisms, however, will focus on the approach of the CoE.

Despite the indication of the right to a safe, clean, healthy and sustainable environment in the main legislative acts of most CoE countries, the Committee of Ministers decided to adopt a recommendation on human rights and the protection of the environment.[82] This recommendation reaffirms human rights standards concerning environmental issues established in previous international documents, both binding and non-binding. It contains elements that may have different legal statuses as regards different member states: from standards based

80 For more information, please see: Council of Europe, Manual on Human Rights and the Environment, 2022, pp. 213- 219.

81 *Call for the adoption of an additional Protocol to the European Convention on Human Rights on the right to a clean, healthy, and sustainable environment*, 2024.

82 Council of Europe. Recommendation CM/Rec(2022)20, R*ecommendation on human rights and the protection of the environment (*Strasbourg: Council of Europe Publishing, 2022).

on the Convention, which is legally binding for all member states through treaty-based standards that are legally binding only for those states that have ratified the treaty in question (f/ex: European Social Charter, the CoE Convention on Access to Official Documents (Tromsø Convention), or the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention); to standards based on non-binding instruments.[83] The present Recommendation does not have any effect on the legal nature of the instruments on which it is based, or on the extent of States' existing legal obligations; nor does it seek to establish new standards or obligations.[84] This document recommends that the governments of the member states consider nationally recognising this right as a human right that is important for the enjoyment of human rights and is related to other rights and existing international law, as well as ensure that national legislation and practice are consistent with the recommendations, principles (no harm principle, the principle of prevention and precaution, the polluter pays principle), and guidance.[85]

The Recommendation alludes to ensuring by states, without discrimination, the effective enjoyment of the rights and freedoms outlined in the Convention including regarding the environment.[86] Specific measures may be required to ensure effective implementation of the Convention in the environmental context.[87] This provision reaffirms the commitment of states to apply the Convention rights to environmental matters. Special attention is paid to access to information and justice in environmental matters, participation in decision-making, and environmental education.[88] Additionally, human rights should be considered at all stages of the environmental decision-making process.[89]

This recommendation does not offer anything radically new. It has already been noted above that the vast majority of CoE countries already recognise the right to a safe, clean, healthy, and sustainable environment. The importance of this document lies in the fact that it defines the content and scope of this right by setting out the main principles of environmental law. By bringing their domestic legislation up to the minimum standards delineated in this Recommendation, a consensus will emerge on several issues in the European region, which may in

83 Council of Europe. Explanatory Memorandum to Recommendation CM/Rec(2022)20, Human rights and the protection of the environment, (Strasbourg: Council of Europe Publishing, 2022), para .2.

84 Ibid.

85 Council of Europe. RecommendationCM/Rec(2022)20, R*ecommendation on human rights and the protection of the environment (*Strasbourg: Council of Europe Publishing, 2022), p. 3.

86 Ibid.

87 Council of Europe. Explanatory Memorandum to Recommendation CM/Rec (2022)20, Human rights and the protection of the environment, (Strasbourg: Council of Europe Publishing, 2022), para. 14.

88 Ibid.

89 Ibid.

the future serve to modify and deepen the approach of the Court in environmental cases.

As has already become clear from the second part of this article, the relationship between environmental rights and human rights also includes matters related to the state's obligation to combat climate change. It is also worth considering the dynamics of climate lawsuits submitted to the various international bodies with jurisdiction to hear individual complaints. As of the end of April 2024, 150 cases out of 798 suits against governments have referenced human rights.[90] The growing popularity of human rights instruments to address climate claims is directly linked to the inadequacy of the international oversight mechanism for the implementation of States' climate action commitments. According to Savaresi and Setzer, these rights-based lawsuits aim to fill the accountability and enforcement gaps left by international and national climate change law by typically seeking to hold public authorities and private sectors accountable for not taking adequate climate action.[91] States' human rights obligations associated with climate change cover both positive and negative substantive obligations along with procedural obligations. These cases form part of the 'human rights turn' in climate litigation, with numerous persons turning to human rights law to support their arguments concerning climate-related litigation.[92] Scholars predict that in the future, more rights-based litigation is likely to focus on the enforcement of climate legislation and the protection of procedural rights associated with it.[93] In parallel, human rights cases with a specific focus on climate change may cause a backlash in the form of so-called 'just transition litigation'. These cases rely on human rights law to challenge initiatives (projects or laws) adopted for energy transition.[94] Both the UK and the EU have been found to breach their obligations under the Aarhus Convention, for adopting renewable energy law and policies without adequate public participation.[95]

As has been repeatedly pointed out, the protection of environmental rights is not new to the Court. Over the past decades, the Court has issued numerous decisions on the subject. The Convention should reflect the realities and values of modern society and regulate relations that have already arisen. In this sense, to keep up with changing social conditions without losing consistency, an additional protocol to the Convention could be adopted covering the right to a safe, clean, healthy, and sustainable environment and the obligations of states to combat climate change, thereby defining both the rights of applicants and the framework of state obligations.

90 *Global Climate Change Litigation*, 2024.
91 Savaresi and Setzer, 2022, p. 8.
92 Yoshida and Setzer, 2020, p. 140.
93 Savaresi and Setzer, 2022, p. 31.
94 Tigre and Urzola, 2023.
95 Savaresi and Setzer, 2022, p. 30.

Nonetheless, recognising a right to a safe, clean, healthy, and sustainable environment as a separate right in an additional protocol is fraught with some semantic risks. It is worth emphasising once again that at the moment the Court considers and evaluates this right from the prism of civil rights specified in the Convention. By adopting the right to a safe, clean, healthy, and sustainable environment as a separate and independent right, the Convention will expand its scope to include collective and socio-economic rights. By adopting an additional protocol, the Court is likely to turn to the established approaches of various international and regional mechanisms to enrich its case law. It can be noted that the Inter-American Court of Human Rights (IACHR) has outlined a far-reaching approach to this topic. In its Advisory Opinion OC-23/17, the IACHR noted the following:

> The Court considers it important to stress that, as an autonomous right, the right to a healthy environment, unlike other rights, protects the components of the environment, such as forests, rivers, and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals. This means that it protects nature and the environment, not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as health, life, or personal integrity, but because of their importance to the other living organisms with which we share the planet that also merit protection in their own right. In this regard, the Court notes a tendency, not only in court judgments, but also in Constitutions, to recognise legal personality, and, consequently, rights to nature.[96]

As understood in this way, this approach leads to the recognition of the rights of nature as separate legal entities claiming protection. The automatic transfer of the IACHR's approach to the Court's case law is under question unless a separate right to a safe, clean, healthy, and sustainable environment is enshrined in a new additional protocol. Considering the unprecedented decision of the Court in the case of *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, this option for the development of case law should not be dismissed. Copying this approach and applying it to the case law of the Court could negatively affect the anthropocentricity[97] of the Convention. Some scholars claim that the interpretation of the Convention in an anthropocentric manner makes the Court system ill-suited for questions of general environmental degradation, climate change, and the loss of

96 Inter-American Court of Human Rights, The Environment and Human Rights, Advisory Opinion OC-23/17, para. 62.

97 Anthropocentricity places human beings and their human rights at the center of protection provided by a relevant legal mechanism.

biodiversity.[98] Nevertheless, in my view, deviation from anthropocentrism may call into question the well-established approach to the victim status and the scope of States' obligations, etc.

Having said all that, I do not mean to diminish the importance of adopting an additional protocol – quite the reverse. The adoption of a protocol could help to delineate the positive obligations of states. Recognising a convention right to a safe, clean, healthy and sustainable environment would consolidate public authorities' environmental human rights obligations, promoting legal certainty, the effective implementation of Convention rights, and effective public administration.[99] I believe that it is not the protocol's adoption but its content that should be the subject of legal discussion. Whatever the case, the wording must be such as not to depart from the anthropocentric course of the Convention.

5. Conclusion

Undoubtedly, environmental pollution as well as climate change, depending on the intensity, directly affect the quality of life and human rights. Referring to the doctrine of the living instrument, the Court has created a rather rich case law covering different articles of the Convention, in one way or another related to complaints about the actions/inactions of states in the field of environment. Despite the absence of a separate right to a safe, clean, healthy, and sustainable environment, the Court has built a consistent position and thus, responded to the challenges of the last decades related to environmental pollution.

Meanwhile, environmental complaints cover an increasingly wide range of issues that have not been legally assessed in previous Court judgments. This is particularly the case concerning states' positive obligations to combat climate change and the limits of the Court's discretion. Responsibility for climate change, unlike responsibility for other environmental problems, is difficult to determine because it is not easy to establish a direct link between a particular act or omission of the state and the harm caused.

However, in the case of *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, the Court reviewed its case law and adopted a revolutionary approach in the case. Even though international civil society organisations have supported the approach of the Court in the aforementioned case,[100] the court's judgment risks opening Pandora's box. The Court's determination to be at the forefront of the fight against climate change urges it to focus on the intention itself rather than on justifying changes to its legal approach, overshadowing legal points such as the

98 Peters, 2020, '1. Introduction: the environment before the European Court of Human Rights' section, p. 2.
99 Balfour-Lynn and Willman, 2022, p. 4.
100 Bharadwaj, 2024.

Court's jurisdiction, the positive obligations of States, the victim status of NGOs under Art. 8, and the issue of causation, etc.

The environment should be deemed as a source of threat to the classic civil and political rights of people, rather than a collective and social right under the Convention. Nevertheless, the adoption of a new additional protocol can also be considered as an option. In light of the above, the importance of adopting an additional protocol increases to determine the limits of the right to a safe, clean, healthy and sustainable environment, the margin of appreciation of states, the competence of the Court, etc. The adoption of an additional protocol would help bring consistency to the Court's decisions. Nevertheless, it is important to endeavour not to depart from the anthropocentricity inherent in the spirit of the Convention.

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