Verein KlimaSeniorinnen and others v Switzerland (Application no. 53600/20)

Observations on the Law

Reply to the Respondent's observations on the law

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1. Relevant legal framework and practice

1.1. Relevant domestic and international law (complement to the Respondent's observations)

1 The Respondent submitted an overview of the relevant domestic and international law in its observations (section III.A. and III.B.). The Applicants complement this overview as follows:

1.1.1. Federal Constitution of the Swiss Confederation of 18 April 1999[1]

Art. 141 Fakultatives Referendum *(English translation below)*

[1] Verlangen es 50 000 Stimmberechtigte oder acht Kantone innerhalb von 100 Tagen seit der amtlichen Veröffentlichung des Erlasses, so werden dem Volk zur Abstimmung vorgelegt:

a. Bundesgesetze;

b. dringlich erklärte Bundesgesetze, deren Geltungsdauer ein Jahr übersteigt;

c. Bundesbeschlüsse, soweit Verfassung oder Gesetz dies vorsehen;

d. völkerrechtliche Verträge, die:

1. unbefristet und unkündbar sind,

2. den Beitritt zu einer internationalen Organisation vorsehen,

3. wichtige rechtsetzende Bestimmungen enthalten oder deren Umsetzung den Erlass von Bundesgesetzen erfordert.

[2] ...

Art. 141 Optional referendum *(translation by the Swiss Government)*

[1] If within 100 days of the official publication of the enactment any 50,000 persons eligible to vote or any eight Cantons request it, the following shall be submitted to a vote of the People:

a. federal acts;

b. emergency federal acts whose term of validity exceeds one year;

c. federal decrees, provided the Constitution or an act so requires;

d. international treaties that:

[1] SR 101.

1. are of unlimited duration and may not be terminated,

2. provide for accession to an international organisation,

3. contain important legislative provisions or whose implementation requires the enactment of federal legislation.

[2] ...

1.1.2. Federal Act on the Reduction of CO_2 Emissions of 23 December 2011 (CO_2 Act)[2]

Artikel 9 *(English translation below)*

[1] Die Kantone sorgen dafür, dass die CO_2-Emissionen aus Gebäuden, die mit fossilen Energieträgern beheizt werden, zielkonform vermindert werden. Dafür erlassen sie Gebäudestandards für Neu- und Altbauten aufgrund des aktuellen Stands der Technik.

[2] Die Kantone erstatten dem Bund jährlich Bericht über die getroffenen Massnahmen.

Artikel 10 Grundsatz *(English translation below)*

[1] Die CO_2-Emissionen von Personenwagen, die erstmals in Verkehr gesetzt werden, sind bis Ende 2015 auf durchschnittlich 130 g CO_2/km und bis Ende 2020 auf durchschnittlich 95 g CO_2/km zu vermindern.

[2] Die CO_2-Emissionen von Lieferwagen und Sattelschleppern mit einem Gesamtgewicht von bis zu 3,50 t (leichte Sattelschlepper), die erstmals in Verkehr gesetzt werden, sind bis Ende 2020 auf durchschnittlich 147 g CO_2/km zu vermindern.

[3] Zu diesem Zweck hat jeder Importeur oder Hersteller von Fahrzeugen nach den Absätzen 1 und 2 (nachfolgend Fahrzeuge) die durchschnittlichen CO_2-Emissionen der von ihm eingeführten oder in der Schweiz hergestellten Fahrzeuge, die im jeweiligen Jahr erstmals in Verkehr gesetzt werden, gemäss seiner individuellen Zielvorgabe (Art. 11) zu vermindern.

[4] Die Zielwerte nach den Absätzen 1 und 2 basieren auf den bisher üblichen Messmethoden. Bei einer Änderung der Messmethoden legt der Bundesrat in den Ausführungsbestimmungen die Zielwerte fest, welche den Zielwerten

[2] SR 641.71.

nach diesen Absätzen entsprechen. Er bezeichnet die anwendbaren Messmethoden und berücksichtigt die Regelungen der Europäischen Union

Art. 13 Sanktion bei Überschreiten der individuellen Zielvorgabe *(English translation below)*

[1] Überschreiten die durchschnittlichen CO_2-Emissionen der Neuwagenflotte eines Importeurs oder Herstellers die individuelle Zielvorgabe, so muss der Hersteller oder Importeur dem Bund pro im jeweiligen Kalenderjahr erstmals in Verkehr gesetztes Fahrzeug folgende Beträge entrichten:

a. für die Jahre 2017–2018:

1. für das erste Gramm CO_2/km über der individuellen Zielvorgabe: zwischen 5.00 und 8.00 Franken,

2. für das zweite Gramm CO_2/km über der individuellen Zielvorgabe: zwischen 15.00 und 24.00 Franken,

3. für das dritte Gramm CO_2/km über der individuellen Zielvorgabe: zwischen 25.00 und 40.00 Franken,

4. für das vierte und jedes weitere Gramm CO_2/km über der individuellen Zielvorgabe: zwischen 95.00 und 152.00 Franken;

b. ab dem 1. Januar 2019: für jedes Gramm CO_2/km über der individuellen Zielvorgabe: zwischen 95.00 und 152.00 Franken.

Article 9 *(translation by Swiss Government)*

[1] The cantons ensure that the CO_2 emissions from buildings that are heated with fossil fuels are reduced in compliance with the targets. Accordingly, they issue building standards for new and older buildings based on the current state of the art.

[2] The cantons submit a report each year to the Confederation on the measures taken.

Article 10 Principle *(translation by Swiss Government)*

[1] The CO_2 emissions from passenger cars that are registered for the first time must be reduced to an average of 130 g CO_2/km by the end of 2015 and to an average of 95 g CO_2/km by the end of 2020.

[2] The CO_2 emissions from vans and articulated vehicles with a total weight of no more than 3.50 t (light articulated vehicles) that are registered for the first time must be reduced to an average of 147 g CO_2/km by the end of 2020.

[3] For this purpose, any importer or manufacturer of vehicles under paragraphs 1 and 2 (referred to below as "vehicles") must reduce the average CO_2 emissions of the vehicles that it imports into or manufactures in Switzerland that are registered for the first time in the reference year in accordance with its individual target (Art. 11).

[4] The targets in paragraphs 1 and 2 are based on the current customary measurement methods. In the event of a change in the measurement methods, the Federal Council shall specify in the implementing provisions the targets that correspond to the targets in these paragraphs. It shall indicate the applicable measurement methods, taking account of the European Union regulations.

Article 13 Penalty for exceeding the individual target *(translation by Swiss Government)*

[1] If the average CO_2 emissions from the new vehicle fleet of an importer or manufacturer exceed the individual target, the manufacturer or the importer must pay the Confederation the following amounts for each vehicle registered for the first time in the relevant calendar year:

a. for 2013–2018:

1. for the first gram of CO_2/km over the individual target: between 5.00 and 8.00 francs,

2. for the second gram of CO_2/km over the individual target: between 15.00 and 24.00 francs,

3. for the third gram of CO_2/km over the individual target: between 25.00 and 40.00 francs,

4. for the fourth and every further gram of CO_2/km over the individual target: between 95.00 and 152.00 francs;

b. from 1 January 2019:

for each gram of CO_2/km over the individual target between 95.00 and 152.00 francs.

(...)

1.1.3. Ordinance on the Reduction of CO_2 Emissions of 30 November 2012 (CO_2 Ordinance)[3]

Artikel 17*b* Anwendbare Prüf- und Korrelationsverfahren und Zielwerte nach Artikel 10 Absätze 1 und 2 des CO_2-Gesetzes *(English translation below)*

1 Für die Bestimmung der Zielwerte nach Artikel 10 Absätze 1 und 2 des CO_2-Gesetzes werden folgende Prüf- und Korrelationsverfahren angewendet:

a. das weltweit harmonisierte Prüfverfahren für leichte Nutzfahrzeuge gemäss Anhang XXI der Verordnung (EU) 2017/1151 (WLTP);

b. die Prüf- und Korrelationsverfahren gemäss Anhang I der Durchführungsverordnung (EU) 2017/1152;

c. die Prüf- und Korrelationsverfahren gemäss Anhang I der Durchführungsverordnung 2017/1153.

2 In Anwendung der Prüf- und Korrelationsverfahren nach Absatz 1 entsprechen die folgenden Zielwerte jenen nach Artikel 10 Absätze 1 und 2 des CO_2-Gesetzes:

a. für Personenwagen: 118 Gramm CO_2/km;

b. für Lieferwagen und leichte Sattelschlepper: 186 Gramm CO_2/km.

Article 17*b* Applicable test and correlation procedures and target values in accordance with Article 10 paragraphs 1 and 2 of the CO_2 Act *(translation by Swiss Government)*

1 The following test and correlation procedures are used to determine the target values under Article 10 paragraphs 1 and 2 of the CO_2 Act:

a. the worldwide harmonised test procedure for light-duty vehicles in accordance with Annex XXI of Regulation (EU) 2017/1151 (WLTP);

b. the test and correlation procedures in accordance with Annex I of Implementing Regulation (EU) 2017/1152;

c. the test and correlation procedures in accordance with Annex I of Implementing Regulation 2017/1153.

[3] SR 641.711.

2 Pursuant to the test and correlation procedures in accordance with paragraph 1, the following target values correspond to those under Article 10 paragraphs 1 and 2 of the CO_2 Act:

a. for cars: 118 grams CO_2/km;

b. for vans and light articulated vehicles: 186 grams CO_2/km.

1.1.4. United Nations Framework Convention on Climate Change (UNFCCC)[4]

Preamble

The Parties to this Convention

Acknowledging that change in the Earth's climate and its adverse effects are a common concern of humankind,

Concerned that human activities have been substantially increasing the atmospheric concentrations of greenhouse gases, that these increases enhance the natural greenhouse effect, and that this will result on average in an additional warming of the Earth's surface and atmosphere and may adversely affect natural ecosystems and humankind,

(…)

Acknowledging that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions,

(…)

Recalling also that States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction,

(…)

Affirming that responses to climate change should be coordinated with social and economic development in an integrated manner with a view to avoiding

[4] SR 0.814.01.

adverse impacts on the latter, taking into full account the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty,

(…)

Art. 1

Definitions

For the purposes of this Convention:

1. "Adverse effects of climate change" means changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare.

(…)

Art. 4

1. All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall:

(…)

(f) Take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example impact assessments, formulated and determined nationally, with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change;

(…)

7. The extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty

eradication are the first and overriding priorities of the developing country Parties.

(…)

1.1.5. Paris Climate Agreement (Paris Agreement)[5]

Preamble

The Parties to this Agreement,

(…)

Recognizing the need for an effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge,

Also recognizing the specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, as provided for in the Convention,

Taking full account of the specific needs and special situations of the least developed countries with regard to funding and transfer of technology,

(…)

Emphasizing the intrinsic relationship that climate change actions, responses and impacts have with equitable access to sustainable development and eradication of poverty,

(…)

Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity,

(…)

[5] SR 0.814.012.

Art. 4

(…)

4. Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances.

(…)

Art. 6

1. Parties recognize that some Parties choose to pursue voluntary cooperation in the implementation of their nationally determined contributions to allow for higher ambition in their mitigation and adaptation actions and to promote sustainable development and environmental integrity.

2. Parties shall, where engaging on a voluntary basis in cooperative approaches that involve the use of internationally transferred mitigation outcomes towards nationally determined contributions, promote sustainable development and ensure environmental integrity and transparency, including in governance, and shall apply robust accounting to ensure, inter alia, the avoidance of double counting, consistent with guidance adopted by the Conference of the Parties serving as the meeting of the Parties to this Agreement.

3. The use of internationally transferred mitigation outcomes to achieve nationally determined contributions under this Agreement shall be voluntary and authorized by participating Parties.

4. A mechanism to contribute to the mitigation of greenhouse gas emissions and support sustainable development is hereby established under the authority and guidance of the Conference of the Parties serving as the meeting of the Parties to this Agreement for use by Parties on a voluntary basis. It shall be supervised by a body designated by the Conference of the Parties serving as the meeting of the Parties to this Agreement, and shall aim:

(a) To promote the mitigation of greenhouse gas emissions while fostering sustainable development;

(b) To incentivize and facilitate participation in the mitigation of greenhouse gas emissions by public and private entities authorized by a Party;

(c) To contribute to the reduction of emission levels in the host Party, which will benefit from mitigation activities resulting in emission reductions that can also be used by another Party to fulfil its nationally determined contribution; and

(d) To deliver an overall mitigation in global emissions.

5. Emission reductions resulting from the mechanism referred to in paragraph 4 of this Article shall not be used to demonstrate achievement of the host Party's nationally determined contribution if used by another Party to demonstrate achievement of its nationally determined contribution.

6. The Conference of the Parties serving as the meeting of the Parties to this Agreement shall ensure that a share of the proceeds from activities under the mechanism referred to in paragraph 4 of this Article is used to cover administrative expenses as well as to assist developing country Parties that are particularly vulnerable to the adverse effects of climate change to meet the costs of adaptation.

7. The Conference of the Parties serving as the meeting of the Parties to this Agreement shall adopt rules, modalities and procedures for the mechanism referred to in paragraph 4 of this Article at its first session.

8. Parties recognize the importance of integrated, holistic and balanced non-market approaches being available to Parties to assist in the implementation of their nationally determined contributions, in the context of sustainable development and poverty eradication, in a coordinated and effective manner, including through, inter alia, mitigation, adaptation, finance, technology transfer and capacity-building, as appropriate. These approaches shall aim to:

(a) Promote mitigation and adaptation ambition;

(b) Enhance public and private sector participation in the implementation of nationally determined contributions; and

(c) Enable opportunities for coordination across instruments and relevant institutional arrangements.

9. A framework for non-market approaches to sustainable development is hereby defined to promote the non-market approaches referred to in paragraph 8 of this Article.

Art. 8

1. Parties recognize the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of loss and damage.

(…)

1.1.6. Draft Articles on Responsibility of States for Internationally Wrongful Acts[6]

Article 2 Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(a) is attributable to the State under international law; and

(b) constitutes a breach of an international obligation of the State.

1.1.7. Guiding Principles on Shared Responsibility in International Law[7]

Principle 4

Shared responsibility arising from multiple internationally wrongful acts

International persons share responsibility for multiple internationally wrongful acts when each of them engages in separate conduct consisting of an action or omission that:

a) is attributable to each of them separately; and

b) constitutes a breach of an international obligation for each of those international persons; and

c) contributes to the indivisible injury of another person.

[6] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp. IV.E.1.
[7] NOLLKAEMPER ET AL., Guiding Principles on Shared Responsibility in International Law, European Journal of International Law Volume 31 (1), 7 Aug. 2020, pp. 15-72.

1.1.8. Rio Declaration[8]

Principle 3

The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

Principle 6

The special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority. International actions in the field of environment and development should also address the interests and needs of all countries.

Principle 15

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

1.2. Preparatory work regarding the reduction of greenhouse gas emissions

1.2.1. Excerpts from the Dispatch on Swiss climate policy after 2012 *(translated from German original)*[9]

"1.5 Need for action

The United Nations Climate Convention of 1992 commits the international community to stabilise greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. This convention forms the cornerstone of international climate policy and has so far been ratified by 192 states.

The fourth report of the IPCC shows that the atmospheric greenhouse gas concentration must be stabilised at a level of 445-490ppm CO2eq in order to prevent dangerous climate change. In this way, it should be possible to limit the increase in global average temperature to between 2° and 2.4° C compared to pre-industrial times. In order to achieve this goal, global

[8] Rio Declaration on Environment and Development, August 1992, A/CONF.151/26, vol. I.
[9] BBl 2009 7433.

greenhouse gas emissions must be reduced from 5.8 tonnes today to a maximum of 1-1.5 tonnes of CO2eq per capita, depending on population development. Such a target requires a reduction of global greenhouse gas emissions by at least 50 to 85 per cent by 2050 and, in relation to the emissions of industrialised countries, a reduction of 80 per cent to 95 per cent compared to 1990. Accordingly, the industrialised countries should reduce their emissions by 25 to 40% by 2020 compared to 1990. Emerging and developing countries, for their part, should significantly decouple their emissions path from the current trend. In order to prevent emissions-intensive production from simply being shifted to countries with less stringent climate protection requirements, all major emitters must be included in the international climate protection agreement after 2012.

However, the latest scientific findings, published after the fourth report of the IPCC show that climate change is occurring faster than previously assumed. For this reason, the stabilisation of atmospheric greenhouse gas concentrations at a lower level of 400 ppm CO2eq24 should be aimed for. To achieve this goal, global greenhouse gas emissions would have to reach their maximum by 2015 and be reduced by more than 85% by 2050. The reduction of the industrialised countries would have to be at least 40% by 2020 and at least 95% by 2050. These strong reduction paths are necessary because the greenhouse gas concentration in the atmosphere can only be effectively reduced when more greenhouse gases are absorbed by the natural system (oceans, forests, soils, etc.) than are emitted into the atmosphere by human activities.

(…)

4.1.1 Reduction target by 2020

In setting future reduction targets for Switzerland, the Federal Council relies on the scientific findings of the IPCC and the principle of common but differentiated responsibility in international negotiations (cf. section 1.5). The objective is also based on the EC, Switzerland's largest and most important trading partner.

From 2013, all greenhouse gases relevant to the international climate regime after 2012 are to be included. For the year 2020, a reduction in total greenhouse gas emissions of at least minus 20% compared to 1990 is

targeted. Based on the achievement of the Kyoto commitment of minus 8% compared to 1990, an indicative, linear reduction path between 2010 and 2020 can be derived. This reduction path serves as a guideline for the Federal Council when adapting and introducing measures under this Act. It may set interim targets for this purpose.

To achieve the target, the buildings, industry and transport sectors are to contribute to a comparable extent and reduce their emissions by around 25%. The three sectors must contribute more than minus 20%, since for the time being no binding emission-reducing government instruments are envisaged for the remaining greenhouse gases and their emissions are expected to be reduced by only about 5.4% by 2020. The technical reduction potential in agriculture is assessed as low according to the latest model calculations and is associated with high costs (cf. para. 1.7.3).

This reduction target applies regardless of the outcome of the international negotiations on the post-2012 climate regime. Switzerland thus supports the position of the EU, which has committed itself to reducing greenhouse gas emissions by minus 20% by 2020 compared to 1990, regardless of the decision of other countries.

If Switzerland wants to fulfil the mandate of the Climate Convention, emissions must be continuously reduced to such an extent that per capita emissions will only amount to 1-1.5 tonnes CO2eq at the end of the century. However, the targeted reduction path, which leads to a reduction of minus 20% in 2020, is not sufficient to achieve this long-term goal. Efforts would have to be massively intensified after 2020. Because greenhouse gases remain in the atmosphere for a long time, emissions should be reduced as quickly as possible. According to the IPCC, global greenhouse gas emissions should have reached their maximum by 2015 at the latest, so that the global temperature increase can be stabilised at a safe level. A more ambitious reduction target can be justified on the basis of the need for climate policy action, but above all, from a global perspective, it makes sense if the larger emitters commit themselves to comparable emission efforts. In this case, the Federal Council wants to increase Switzerland's reduction target to minus 30% by 2020 compared to 1990 (see section 4.5)."

1.2.2. Excerpts from the Dispatch on the total revision of the CO_2 Act after 2020[10] *(translated from German original)*

"1.1.1 Scientific context

The Intergovernmental Panel on Climate Change (IPCC), established in 1988 to summarise the state of research on climate change and its possible consequences for the environment, society and the economy, states in its Fifth Assessment Report from 2014 that the warming of the climate system is clearly demonstrable and the influence of humans is clear. If greenhouse gas emissions continue, the planet will continue to warm, increasing the likelihood of severe, widespread and irreversible impacts from tipping points. Tipping points are irreversible environmental phenomena that lead to feedback effects. They cause changes in the Earth's climate system and their effects are unpredictable.

The 1992 United Nations Framework Convention on Climate Change (UNFCCC) aims to stabilise greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous interference with the climate system. The critical threshold above which unmanageable impacts and even tipping effects could occur is considered to be a global temperature increase of significantly less than 2 degrees Celsius compared to pre-industrial levels. In 2012, the Conference of the Parties to the UNFCCC gave the mandate to examine whether the 2-degree target meets the requirement of preventing a dangerous disruption of the climate system. The Structured Expert Dialogue initiated by the UNFCCC showed that global warming of 2 degrees Celsius entails considerable risks for humans and ecosystems, and that a limit of less than 1.5 degrees Celsius offers considerably more assurance. At present, global greenhouse gas emissions are developing along a path that leads to global warming of 3 to 4 degrees Celsius, which would result in almost twice as much temperature increase for Switzerland due to its geographical location.

With a so-called budget approach, it can be measured how much CO_2eq the global community may still emit in order not to exceed a certain level of warming. Each warming limit is thus linked to a certain CO_2eq budget. Two-thirds of the budget to meet the 2-degree target has already been used up. It is therefore also crucial that global greenhouse gas emissions reach their

[10] BBl 2018 247.

maximum as soon as possible and then decline massively and rapidly. Due to the longevity of carbon dioxide (CO_2) - the most significant greenhouse gas - in the atmosphere (100-200 years), emissions must be stabilised at net zero in the second half of this century, so that greenhouse gas emissions are offset by corresponding sink services. In addition to reducing emissions, this CO_2 neutrality requires, among other things, the development of storage technologies for carbon capture and storage.

In 1996, the consultative body on climate change (Organe consultatif sur le Changement Climatique, OcCC) was established in Switzerland. The mandate was renewed and refocused in 2013 and 2017: away from the provision of scientific foundations towards the early identification of new thematic areas relevant to the shaping of future climate policy. In its strategic recommendations of 15 December 2015, the OcCC emphasises the importance of a societal discourse to ensure that the necessary transformation of the economic and social system succeeds. Because the climate problem permeates all levels of society, it must be communicated in a comprehensible and solution-oriented manner. Spatial planning and transport policy are areas that have so far received little attention and require a great deal of action. The aim should be a consistent financial burden on CO_2 emissions. A consistent climate impact assessment is recommended for infrastructure and construction projects.

1.3.1 Reduction target by 2030

Switzerland's future reduction targets are based on the findings of science (cf. Section 1.1.1) and the international objective set out in the Paris Agreement to limit the increase in average global temperature to well below 2 degrees Celsius and, if possible, below 1.5 degrees Celsius above pre-industrial levels.

The level of the overall target of 50% by 2030 and the average target of 35% were approved by Parliament when it approved the Paris Agreement. Both minority motions with a higher overall target and those with a lower one were discussed and rejected.

In the consultation process, almost 80% of the participants were in favour of the proposed overall target or a stricter one, while 20% called for a lower overall target. The domestic target of minus 30% by 2030 compared to 1990 and the associated average target of minus 25% were also supported by the

majority in the consultation: 40% of the participants were in favour of a higher domestic target, 20% agreed with the proposal. 36% wanted to do without a statutory domestic target. The remaining participants called for a lower, but still mandatory domestic target.

The Federal Council considers a domestic target of at least 30% to be appropriate in view of the Paris Agreement's goal of reducing emissions to net zero by the second half of this century and the obligation to take measures at home to achieve this and to continuously increase reduction efforts. Without a quantified target, an important anchor point for the design of the individual measures is missing, especially in the case of subsidiary instruments such as the CO_2 levy, CO_2 limits for buildings or the CO_2 compensation obligation. Compared to the current CO_2 law, which requires a reduction of domestic greenhouse gas emissions by 20% below 1990 levels by 2020, the proposed target implies a much lower rate of 1% per year compared to the current reduction path. Some flattening is justified by rising marginal abatement costs and the time needed to account for investment cycles. If the target of minus 20% by 2020 is missed, the missing reduction performance would have to be made up domestically by 2030 (cf. Section 1.1.3). This is possible with the proposed mix of measures.

A less pronounced decline in domestic emissions shifts the reduction requirement into the future. In addition, the willingness of other countries to transfer emission reductions is likely to be limited with increasingly ambitious targets. Furthermore, raising the foreign share would mean that the importers of fossil fuels, who are assigned the emission reduction abroad as part of the compensation obligation, would have to compensate for over 100% of the CO_2 emissions from transport. Alternatively, other sectors (e.g. industry) could be obliged to make emission reductions abroad. Alternatively, the Confederation could provide the corresponding financial resources - either from the general federal budget or through a partial earmarking of the CO_2 levy; the former is not opportune in view of the strained situation of federal finances and the latter is not compatible with the Federal Council's efforts to design the CO_2 levy as a pure incentive tax and to abolish the partial earmarking in the medium term.

The objective is also oriented towards the EU, Switzerland's most important trading partner. Despite this proximity to Europe, however, the starting

position is different. In contrast to the EU, Switzerland produces hardly any fossil-based electricity and has a significantly smaller share of emissions-intensive industry. In the EU, on the other hand, there is still great potential for cost-effective CO_2 reduction in these areas. On the other hand, Switzerland has a high proportion of grey emissions in an international comparison. For this reason, it seems appropriate to set the overall target higher than the EU (minus 50% compared to minus 40% in the EU), but in contrast to the EU, to allow additional measures abroad.

In the EU, the overall reduction target is allocated to the individual member states according to their economic strength (per capita income) and reduction potential (so-called burden sharing or effort sharing). According to the proposal of the European Commission, countries that are structurally comparable to Switzerland, such as Sweden (40%), Denmark (39%), Finland (39%) and Germany (38%), must reduce their emissions more strongly by 2030 compared to 2005. The service-oriented economy of Luxembourg must also contribute a high reduction of 40%.

5.1 Constitutionality

The constitutional basis for the totally revised CO_2 Act is provided by Articles 74 (environmental protection) and 89 (energy policy) of the Federal Constitution (FC). Article 74 of the Federal Constitution obliges the Confederation to enact regulations on the protection of man and his natural environment from harmful or nuisance effects. Article 89 paragraph 3 of the Federal Constitution obliges the Confederation in particular to issue regulations on the energy consumption of installations, vehicles and equipment. In doing so, it must promote the development of energy technologies, particularly in the areas of energy conservation and renewable energies.

(…)”

1.2.3. Excerpts from the Dispatch on the counter-proposal the popular initiative "For a healthy climate (Glacier Initiative)"[11] *(translated from German original)*

"2.1 Political context

(…)

According to Article 4(1) of the Climate Convention, limiting global warming to 1.5 degrees Celsius requires that global greenhouse gas emissions be offset by appropriate sinks by the second half of the century. The principle of equity and the best available scientific knowledge are to be taken into account.

At the climate conference in Paris at the end of 2015, the international community commissioned the Intergovernmental Panel on Climate Change (IPCC) to examine the significance of limiting global warming to 1.5 degrees Celsius compared to pre-industrial times. The special report, published in October 2018, makes it clear that the balanced emissions of net zero must be achieved much earlier, i.e. for CO_2 emissions worldwide as early as around 2050, with a simultaneous rapid reduction in other greenhouse gas emissions such as methane, nitrous oxide and various synthetic gases. According to this report, the global CO_2 emissions path must be net negative by the end of the century in most of the cases examined. This means that, at the end of the day, permanent CO_2 removals from the atmosphere (negative emissions, cf. 2.3.2) must be greater than CO_2 emissions. Based on these findings, the Federal Council decided on 28 August 2019 to reduce Switzerland's greenhouse gas emissions to net zero by 2050. Together with the targets for 2030, Switzerland has also officially submitted this target to the international climate negotiations (UNFCCC).

(…)

6.6.2 Compatibility of the direct counter-proposal with Switzerland's international obligations

The Federal Council's direct counter-proposal to the Glacier Initiative is compatible with all of Switzerland's international commitments.

[11] BBl 2021 1972.

With the net zero target by 2050, Switzerland is making its contribution to limiting global warming below the critical threshold of 1.5 degrees and fulfilling the climate policy mandate of the Paris Climate Agreement.

(…)

6.5.3 Impacts on the national economy

The reduction of emissions to net zero by 2050 requires that investments are already geared towards this goal today. If the renewal cycles are used consistently to replace plants, vehicles and heating systems with lower-CO_2 technologies, operating costs can be saved in many cases and expensive misinvestments can be avoided. Various renewable alternatives are already competitive today, for example in the area of electromobility or heat generation.

(…)

Overall, the longer-term benefits of consistent climate protection measures exceed the necessary investments as well as the economic impacts - very likely already in the middle of the century, but certainly in the long term."

1.3. Emission reduction targets in the member States of the Council of Europe

2 The most up-to-date overview of the emission reduction targets in the member States of the Council of Europe, including an assessment in the light of the 1.5°C limit, is provided for by the Climate Action Tracker.[12]

1.4. Relevant case law in the member States of the Council of Europe

3 Domestic courts of the Council of Europe Member States have recognised the need to implement and enact rapid measures to limit warming to 1.5ºC or below by 2030, *inter alia* based on civil, constitutional and human rights obligations and to protect the rights of future generations.[13]

4 Domestic courts in the Council of State Member States have recognised the *victim status of individuals and organisations* to bring claims based on constitutional or human rights violations due to climate change. The German

[12] See Climate Action Tracker, available at https://climateactiontracker.org/.
[13] Dutch Supreme Court, *Urgenda v. The Netherlands*, ECLI:NL:HR:2019:2007, 20 Dec. 2019, § 2.1; Paris Administrative Court, *Association Oxfam France et al. v. France*, 3 Feb. 2021; Brussels Court of First Instance, *ABSL Klimatzaak v. Belgium*, 2015/4585/A, 17 June 2021; German Federal Constitutional Court, *Neubauer and others v. Germany,* 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1, 29 Apr. 2021.

Constitutional Court recognised the standing of eight young individuals to contest Germany's climate policy;[14] apex courts in Norway and the Netherlands allowed for the organisational plaintiffs to plead violations of Arts. 2 and 8 ECHR in climate cases;[15] and the French Conseil d'État granted standing to a municipality.[16] The first instance court of Brussels recognized the standing of an NGO plaintiff (considering the protected role of environmental NGOs under the Aarhus Convention particularly) and of individual plaintiffs.[17]

5 There is also a recognition by domestic courts that greenhouse gas (GHG) emissions will most likely exceed the limit of 1.5°C in the next few years if current levels of emissions are maintained or exceeded, and that harms are already occurring now at current levels of warming. Courts have recognised that future harms are certain due to the irrevocable and multiplying effects of historical and current GHG emissions. For example, the Administrative Supreme Court of France held that, even if the most severe consequences of climate change shall not manifest before 2030 or 2040, due to their inevitability there is an urgent need to act without delay.[18] The Irish Supreme Court similarly stated that the consequences of failing to address climate change are "very severe with potential significant risks both to life and health".[19]

6 Domestic courts have also found governments in breach of their domestic human rights obligations as interpreted in light of Arts. 2 and 8 ECHR because of inadequate climate policy or inadequate implementation of climate policy. The Supreme Court of the Netherlands held that the State had positive obligations to reduce GHG emissions because climate change poses a "real and immediate risk", and that "[t]he fact that this risk will only be able to materialise a few decades from now and that it will not impact specific persons or a specific group of persons but large parts of the population does not mean – contrary to the State's assertions – that Arts. 2 and 8 ECHR offer no protection from this threat.[20] The German Constitutional Court,

[14] *Neubauer* (n 13), §§ 96-112.
[15] Supreme Court of Norway, *Nature and Youth Norway and others v. Norway*, HR-2020-2472-P; *Urgenda* (n 13).
[16] Conseil d'État, *Grande Synthe v. France*, no. 427301, 1 Jan. 2021.
[17] *ABSL Klimatzaak* (n 13), p. 46-52.
[18] *Association Oxfam France et al.* (n 13), § 3.1.
[19] Irish Supreme Court, *Friends of the Irish Environment v. Ireland,* 31 Jul. 2020, § 3.6.
[20] *Urgenda* (n 13), §§ 5.2.2 and 5.6.2.

considering the freedoms of future generations, ordered the government to reconsider its targets and clarify its emission reduction targets from 2031 onwards by the end of 2022.[21]

7 Domestic courts have further emphasised that measures should prioritise near-term action over uncertain and unproven negative emissions technologies. The Dutch Supreme Court rejected the State's reliance on drastic measures to remove GHGs from the atmosphere at a later stage, noting that "there is no technology that allows this to take place on a sufficiently large scale" and stating that taking such risks would be contrary to the precautionary principle enshrined in international law and the Convention.[22] The German Constitutional Tribunal similarly ruled that the German State cannot delay action as it would transfer a disproportionate mitigation burden onto future generations.[23] It also held that the German State cannot rely on negative emissions technologies, as their large-scale deployment is not yet certain.[24] Two apex courts in France have rejected the notion that the government's pursuit of mid-term or long-term targets could excuse its failure to meet its near-term target, given the cumulative, lasting effects of current emissions and the real risk that it would be impossible to implement the drastic GHG cuts needed if climate action is delayed.[25] The Supreme Court of Ireland decided that the country's mitigation plan was too reliant on unproven technologies.[26]

8 There is also increased judicial recognition that developed countries have a greater role in preventing dangerous climate change. In its application of Arts. 2 and 8, the Dutch Supreme Court rejected the argument that because all States are jointly responsible for climate change, no individual State can be held responsible. It also rejected the argument that the impact of the reduction of emissions sought by the plaintiff would be insignificant in light of the other States' ongoing emissions, over which the Netherlands has no control. Instead, it held that the Netherlands must "do their part" to prevent dangerous climate change, maintaining that "each country is responsible for

[21] *Neubauer* (n 13), §§ 99, 151, 184.
[22] *Urgenda* (n 13), § 7.2.5.
[23] *Neubauer* (n 13), §§ 144 and 182.
[24] Ibid., § 227.
[25] *Association Oxfam France et al.* (n 13); Paris Administrative Court, *Association Notre Affaire à Tous* and Others, 3 Feb. 2021, § 33; *Grande-Synthe* (n 16), § 15.
[26] *Friends of the Irish Environment* (n 19), §§ 6.18, 6.46, 6.47.

its part and can therefore be called to account in that respect", in line with "what is adopted in national and international practice in the event of unlawful acts that give rise to only part of the cause of the damage".[27] The German Constitutional court also held that Germany must reduce its share of emissions and enhance international cooperation by adopting adequate national measures.[28] Further, as stated by the German Constitutional Court, States cannot use emissions reductions achieved in other jurisdictions to "offset" large-scale inaction in their required domestic emission reductions.[29]

1.5. Relevant recommendations by international human rights bodies

1.5.1. Climate change threatens human rights

9 In the Joint Statement on Climate Change and Human Rights, the Committee on the Elimination of all forms of Discrimination against Women (CEDAW), the Committee on Economic, Social and Cultural Rights (CESCR) and the Committee on the Rights of Persons with Disabilities – among others (together, "the Committees")–,[30] welcomed the IPCC findings, recognising that the adverse impacts of climate change were threatening a wide range of human rights, including the rights to life, health and cultural rights.[31] This has also been recognised by the Human Rights Council on several occasions, emphasizing climate change's wide range of implications for the effective enjoyment of human rights, including the rights to life, health, housing and self-determination.[32]

10 According to the UN Special Rapporteur on human rights and the environment, even at current levels of warming – i.e. 1.2°C[33] – climate

[27] *Urgenda* (n 13), §§ 5.7.5 and 5.7.6.
[28] *Neubauer* (n 13), §§ 149, 202-204.
[29] Ibid., § 226.
[30] OHCHR, Joint statement by five UN human rights treaty bodies on human rights and climate change, 16 Sep. 2019, UN Doc. HRI/2019/1, https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E, § 7.
[31] Ibid., § 3.
[32] Human Rights Council, Resolution 35 entitled "Human rights and climate change", 19 Jun. 2017, UN Doc. A/HRC/35/L.32; Human Rights Council, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 1 Feb. 2016, UN Doc. A/HRC/31/52, paras. 9 and 23; Human Rights Council, Report of the OHCHR on the relationship between climate change and human rights, 15 Jan. 2009, UN Doc. A/HRC/10/61, paras. 18 and 24; Human Rights Council, Analytical study of the relationship between human rights and the environment, Report of the United Nations High Commissioner for Human Rights, 16 Dec. 2001, UN Doc. A/HRC/19/34, para. 7.
[33] World Meteorological Organization (WMO), State of the Global Climate 2020, WMO-No. 1264, 20 Apr. 2021, p. 6; see also National Oceanic and Atmospheric Administration, 2020 was Earth's Second Hottest year, just behind 2016, 14 Jan. 2021, available at

change impacts on human rights are not only visible but significant, and factors such as gender, age and disability increase people's vulnerability to climate change.[34] These vulnerabilities "intersect to amplify the impacts" of climate change.[35] International bodies have recognized that climate change affects women in a disproportionate way as they experience greater risks and impacts on their health and safety and therefore have encouraged states to confront these vulnerabilities based on the principles of equality and non-discrimination.[36]

11 Other international treaty bodies[37] and the Council of Europe Commissioner for Human Rights[38] have also recognised the link between human rights and climate change. Council of Europe members have all committed in principle to the protection of human rights that are inextricably linked with the right to a healthy environment, which is considered to include a right to a safe and stable climate.[39] On 29 September 2021, the Parliamentary Assembly held an all-day debate on the recognition of the human right to a healthy

https://www.noaa.gov/news/2020-was-earth-s-2nd-hottest-year-just-behind-2016 (last visited on 11 October 2021).

[34] UN Special Rapporteur on human rights and the environment, Safe climate, 15 Jun. 2019, UN Doc. A/74/161, paras. 1, 6-11, 45.

[35] Third party intervention by the UN Special Rapporteur on Human Rights and the Environment and UN Special Rapporteur on Toxics and Human Rights in *Agostinho and others v. Portugal and 32 other States*, no. 39371/20, 5 May 2021.

[36] Inter-American Court of Human Rights, *Advisory Opinion OC-23/17,* (ser. A) No. 23, 15 Nov. 2017, para. 67; OAS General Assembly, Resolution entitled "*Human Rights and Climate Change in the Americas,"* AG/RES. 2429 (XXXVIIIO/08), 3 Jun. 2008.

[37] Joint statement (n 30); *see also* Human Rights Committee, General Comment No. 36 on Article 6 of the ICCPR, on the right to life", 30 Oct. 2018; Committee on the Elimination of Discrimination against Women, General Recommendation No. 37 on Gender-related dimensions of disaster risk reduction in the context of climate change, 7 Feb. 2018; Committee on the Rights of the Child, General comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health (Art. 24), 17 Apr. 2013; Committee on Economic, Social and Cultural Rights, General Comment No. 15 on the right to water (Arts. 11 and 12), 20 Jan. 2003, https://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HumanRightsMechanisms.aspx.

[38] Third party intervention by the Council of Europe Commissioner for Human Rights in *Agostinho and others v. Portugal and 32 other States*, no. 39371/20, 5 May 2021, https://rm.coe.int/third-party-intervention-by-the-council-of-europe-commissioner-for-hum/1680a26105.

[39] UN Special Rapporteur on human rights and the environment, Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 19 Jul. 2018, UN Doc. 1/73/188, para. 59, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/231/04/PDF/N1823104.pdf?OpenElement; Statement by UN High Commissioner for Human Rights, Human Rights for the Planet – high-level international conference on human rights and environmental protection, 5 Oct. 2020, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26343&LangID=E.

environment, and unanimously adopted a Resolution recommending the drafting of a new protocol to the ECHR recognizing this right.[40]

1.5.2. Protection of those most vulnerable

12 In the Joint Statement on Climate Change and Human Rights, the Committees determined that States' current commitments under the Paris Agreement are insufficient to limit global warming to 1.5°C, and that many States are not on track to meeting even these insufficient goals. To avoid the risk of irreversible and large-scale impacts, the Committees emphasized the need for urgent and decisive climate action in line with the best available science[41] and human rights. To comply with this, special attention must be paid to the protection of the rights of those most vulnerable to the adverse effects of climate change.[42]

13 The CEDAW has pointed out, for example, that older women may face discriminatory restrictions that impede their participation in political and decision-making processes, such as having their participation in associations to advocate for their rights limited.[43] In light of these considerations, the CEDAW has emphasised that climate-change reduction measures should be gender-responsive and sensitive to the needs and vulnerabilities of older women.[44] It urged States to train and sensitise their judiciary, public authorities and institutions on the rights of older women and the interaction of gender and age, so effective remedies and reparation are equally available and accessible to older women with disabilities.[45] Moreover, it determined that States "should enable older women to seek redress for and resolve infringements of their rights and ensure that older women are not deprived of their legal capacity on arbitrary or discriminatory grounds."[46]

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[40] Council of Europe Parliamentary Assembly, Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe, Provisional Version, Resolution 2396, 29 Sep. 2021.
[41] Committee on Economic, Social and Cultural Rights, General comment No. 25 on science and economic, social and cultural rights (Article 15 (1) (b), (2), (3) and (4)), para. 86.
[42] Office of the UN High Commissioner for Human Rights, Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the UNFCCC, December 2015; Joint Statement (n 30), paras. 6 and 26; Human Rights Committeee, General Comment No. 36 (n 37) para. 62.
[43] Committee on the Elimination of Discrimination Against Women, General recommendation No. 27 on older women and protection of their human rights, 16 Dec. 2010, CEDAW/C/GC/27, para. 25.
[44] Ibid. para. 35.
[45] Ibid. para. 33.
[46] Ibid. para. 34.

14 In the United Nations Principles for Older Persons, the United Nations General Assembly acknowledged that older persons should be able to live in safe environments that are adaptable to their personal preferences and changing capacities.[47]

15 Art. 6 of the International Covenant on Civil and Political Rights has been interpreted to include the right to a decent existence,[48] including the right to a good quality of life, a life with dignity and a right to health in the context of climate change.[49]

16 According to the UNGA Resolution on Older Persons, the exercise of this right by older people entails an ability to remain integrated into society.[50] Where older people are unable to integrate into society due to heat-wave-induced climate change, States are required to take steps to prevent and address the impacts of climate change.[51]

1.5.3. State's responsibility in the face of environmental degradation caused by third parties

17 In the *Inter-American Court of Human Rights (IACtHR)'s Advisory Opinion on the Environment and Human Rights*,[52] the IACtHR held that a State's responsibility also arises in the face of environmental degradation caused by third parties, like corporations, that are operating or are registered in that State's territory or under its effective control.[53] This obligation requires States to take appropriate measures to prevent, investigate, punish and redress such abuse by third parties through effective policies, legislation, regulations and adjudication.[54]

[47] UN Principles for Older Persons, adopted by General Assembly resolution 46/91 of 16 Dec. 1991 (Older Persons UNGA Resolution), Art. 5.
[48] Inter-American Court of Human Rights, *Xakmok Kasek Indigenous Community Case v. Paraguay*, 24 Aug. 2010, paras. 183-187.
[49] Human Rights Committee, General Comment No. 36 (n 37).
[50] Older Persons UNGA Resolution (n 47) Art 7.
[51] Ibid. Art 16.
[52] Inter-American Court of Human Rights, Advisory Opinion OC-23/17 (n 36).
[53] Ibid. paras. 153-155.
[54] Ibid. paras. 141-174.

2. The law

2.1. Ad Compliance with the time-limit

18 The Respondent claims that the Applicants did not comply with the six-month deadline (para. 26 ff.). The Applicants submit that they complied with the time limit granted by the Court due to the COVID-19 pandemic.[55]

2.2. Question 1: Can the Applicant association (first Applicant) and Applicants Nos 2 to 5 (natural persons) be considered current or potential victims, within the meaning of Art. 34 ECHR as interpreted by the Court, of a violation of one of the Convention rights invoked in this case due to the failure of the Swiss authorities to have effectively protected them against the effects of global warming? In particular, have the Applicants suffered, directly or indirectly and seriously, the alleged consequences of insufficient action or inaction by the Respondent State?

2.2.1. Answer to the Court's question

19 The Applicants submitted in the Application (Additional Submission, hereinafter "AS", section 2.1) that they can be considered direct (AS para. 33 and 35 f.) and potential (AS para. 34) victims, within the meaning of Art. 34 ECHR as interpreted by the Court, of a violation of Arts. 2 and 8 ECHR due to the Respondent's failure to effectively protect them against the effects of global warming. The Applicants recall the statements made in the Application.

20 The Applicants submit that at this stage (the Court's question 1), the extent and nature of the alleged omissions are not yet established. However, in their view, only if the *scope of the Respondent's obligation to protect* in terms of Article 2 and 8 and *the Respondent's deviation from that obligation* is established (see the Court's questions 2.2 and 2.3), i.e. a *wrongful omission,*[56] is it possible to assess whether a person is directly affected *by this wrongful omission*. Against this background, the Applicant submit that Question 1 should be joined to and examined together with the merits of the case.[57]

21 Generally, to be considered a victim, the applicant must be able to show that they were "directly affected by the impugned measures", which the

[55] Application submitted on 26 November 2020 within the deadline established by the Court as part of the exceptional COVID-19 pandemic measures. See: https://www.coe.int/en/web/portal/-/coronavirus-exceptional-measures-at-the-european-court-of-human-rights.
[56] Cf. customary rules of public international law on the responsibility of States for internationally wrongful acts.
[57] For a similar approach see *Siliadin v. France*, no. 73316/01, § 63; *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 111.

Applicants submit that they are.[58] The Court has held, as submitted in the Application, that the term "victim" ought to be interpreted in an "evolutive manner"[59] and not applied in a rigid, mechanical, or inflexible way.[60] To that regard, the Applicants reiterate: If they, as members of a most vulnerable group, were denied victim status, it is questionable who would then be entitled to this status in connection with the imminently diffuse and complex phenomenon of global warming, which clearly has significant impacts on human rights. As a result, acts and failures by states in fighting climate change would remain outside the scope of human rights law – an inacceptable consequence in the light of the Court's practice in comparable environmental law cases.

2.2.1.1. Applicant association (first Applicant's) victim status in respect of Arts. 2 and 8 ECHR

22 The Applicants submitted in the Application that there are several reasons why the Court should recognise the Applicant association's (first Applicant's) standing. The Applicants fully uphold the statements made in the Application (AS para. 33 and 35 f.) and offer the following as additional support.

23 Generally, the wording of Art. 34 ECHR is very open; there is nothing in the text of the Article itself that precludes a group from bringing a claim. An applicant must fall into one of the categories of petitioners mentioned in Art. 34 ECHR,[61] which is "any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention." A flexible interpretation of standing requirements ensures access to justice.

24 As expressed in the Application (AS footnote 62), in *Gorraiz Lizarraga and Others v. Spain*, the Court considered the Coordinadora de Itoiz association to have victim status, noting that:

"like the other provisions of the Convention, the term 'victim' in Art. 34 ECHR must also be interpreted in an evolutive manner in the light of conditions in contemporary society. And indeed, in modern-day societies,

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[58] *Tănase v. Moldova* [GC], no. 7/08, § 104; *Burden v. the United Kingdom* [GC], no. 13378/05, § 33.
[59] *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, § 38. See also Thirdparty intervention by the Council of Europe Commissioner for Human Rights (n 38) §§ 38, 45-48.
[60] *Micallef v. Malta* [GC], no. 17056/06, § 45; *Karner v. Austria*, no. 40016/98, § 25; *Aksu v. Turkey* [GC], nos. 4149/04 and 41029/04, § 51.
[61] *Gorraiz Lizarraga* (n 59), § 35.

when citizens are confronted with particularly complex administrative decisions, recourse to collective bodies such as associations is one of the accessible means, sometimes the only means, available to them whereby they can defend their particular interests effectively. Moreover, the standing of associations to bring legal proceedings in defence of their members' interests is recognised by the legislation of most European countries. That is precisely the situation that obtained in the present case. The Court cannot disregard that fact when interpreting the concept of "victim". Any other, excessively formalistic, interpretation of that concept would make protection of the rights guaranteed by the Convention ineffectual and illusory."[62]

25 Similar to the association in *Gorraiz Lizarraga and Others v. Spain*,[63] Applicant 1 was set up for the specific purpose of defending its members' interests before the courts (Application doc. 2 section 3). Its members, as part of a most vulnerable group, are directly concerned by the Respondent's omissions regarding climate protection (Observations on the Facts, hereinafter "OF", sections 2.5 and 2.6; AS sections 1.1. and 1.2).

26 Applicant 1 enables a particularly vulnerable group to exercise its rights in the long term, regardless of the natural age-related retirement of some of its members. The exact membership of the 1st Applicant may change, but the vulnerability of its members will always continue to exist, and their particular interests will continue to be defended by the association, as long as it exists. This is of particular importance since the average age of the members of Applicant 1 is currently 73 years, and 648 of its 1,956 members are 75 years old or older (Application doc. 3, updated). Since the beginning of the proceedings in 2016, 33 members of Applicant 1 have become deceased, as well as Applicant 2. Applicant 1's nature as an association existing independently of its members is key to its effective advocacy of the particular interest of the members of a vulnerable group. Allowing Applicant 1 to claim victim status means ensuring that particular groups are able to exercise their rights in the long term. Proceedings before domestic courts and the Court can, in some instances, take up to a decade to conclude. As established by the Court in *Nencheva and Others v. Bulgaria*, in the interest of justice and to genuinely protect individual rights and freedoms, exceptional measures may

[62] Ibid. § 38.
[63] Ibid. § 39.

be taken to ensure the public participation and representation of victims who are not in a position to defend themselves.[64]

27 Further, Applicant 1 offers many of its members the only viable way to defend their rights effectively. The present case is complex, without any precedents, and therefore associated with a large expenditure of time and costs. The Applicants refer here to their request for just satisfaction, costs and expenses. Applicant 1 submits that bringing a standalone case of this dimension through the domestic courts in Switzerland before approaching the European Court of Human Rights would have been prohibitively expensive for most individuals. The significant costs would have deterred the members of Applicant 1 from seeking legal redress, were it not for Applicant 1's ability to pool resources. For the Court to refuse to grant Applicant 1 victim status would be to impose a particular burden on those who have the courage to bring a case of such complexity and novelty. Applicants 2–5 would not have been able to bring the case through the domestic courts and to submit an Application to the Court if Applicant 1 would not have led the case and taken over all of the costs. Besides that, Applicant 1 can bring in many more resources in terms of expertise and litigation experience than any individual can muster on their own.

28 Also, the Respondent is preventing Applicant 1 from furthering its purpose, which is to defend the interests of its members in particular by taking legal action (Application doc. 2 section 3).[65]

29 Not surprisingly, environmental groups, which have played an increasingly significant role in climate litigation in recent years,[66] have been more successful than individual plaintiffs in bringing environmental cases. In Switzerland, the ratio of successes to losses in cases brought by environmental groups is nearly three times higher than for cases brought by private individuals.[67]

30 It is worth mentioning that not every case that is brought by a group is an *actio popularis*. Applicants may be victims within the meaning of the

[64] *Nencheva and Others v. Bulgaria,* no. 48609/06, § 93.
[65] *Rossi v. Italy*, no. 55185/08, "The applicant associations".
[66] SETZER/BYRNES, Global Trends in Climate Change Litigation, 2019 Snapshot, 4 Jul. 2019; SETZER/BYRNES, Global Trends in Climate Change Litigation, 2020 Snapshot, 3 Jul. 2020.
[67] TANQUEREL ET AL., Droit de recours des organisations écologistes - Statistiques actualisées (2008) relatives aux recours de droit administratif et aux recours en matière de droit public (55 LPE/12 LPN/14 LCPR), Octobre 2008.

Convention even if their interests align with the interests of the general public.

2.2.1.2. Applicants Nos 2 to 5 (natural persons)'s victim status in respect of Art. 2 and 8 ECHR

31 The Applicants fully uphold the statements made regarding the Applicants' victim status in respect of Art. 2 and 8 ECHR in the Application, AS section 2.1.

32 To complement the statements presented in the Application (AS para. 33 and the relating facts in section 2.1), the Applicants submitted new evidence on their personal suffering from heat-related afflictions (OF section 2.6) and on the fact that they were, are and will increasingly continue to be, at a real and serious risk of mortality and morbidity greater than that of the general population (OF section 2.5).

2.2.1.3. Applicants' victim status in respect of Arts. 6 and 13 ECHR

33 The Applicants fully uphold the statements made regarding the Applicants' victim status in respect of Art. 6 and 13 ECHR in the Application, AS section 2.2.

2.2.2. Reply to the Respondent's arguments

2.2.2.1. Ad V.A. Overview of the relevant principles

34 The Respondent's citations only represent a partial account of the Court's case law. For the cases and decision points which the Applicants consider as relevant to the present case, they refer in full to their Application (Application, AS section 2).

2.2.2.2. *Ad* V.B.a) Causation not a precondition for victim status

35 The Respondent argues that the Applicants did not establish a "causal link" between the alleged omissions of Switzerland and the interference with the rights guaranteed by Arts. 2 and 8 ECHR (para. 39).

36 The Applicants submit that as long as they make an arguable claim that they are likely to suffer harm, as they did (see OF sections 2.5 and 2.6 and AS sections 1.1, 1.2 and 1.5), the Court should accept the application as admissible. All other considerations, particularly the question of a causal link between the Respondent's omissions and the Applicants' harm, should be

joined with and examined on the merits.[68] Accordingly, the Applicants provide their reply on the question of causality below, section 2.3.2.

37 As stated in the Application (AS para. 38 with further references) there is a sufficient close connection between the Applicants' harm on the one hand and the Respondent's impugned conduct on the other hand. The existence of an increased risk of mortality and the health problems for the Applicants during heatwaves is based on scientific evidence and is therefore foreseeable and severe or irreversible in its effect.

2.2.2.3. *Ad* V.B.b) Applicant association (first Applicant's) victim status in respect of Arts. 2 and 8 ECHR

38 The Respondent states that the domestic courts left open the question of whether Applicant 1 has the right to submit the request to DETEC and subsequently had the right of appeal (para. 42).

39 The Applicants submit that the domestic courts left the question open *not* because there was doubt about Applicant 1's standing but because there were individual plaintiffs and thus – in terms of procedural economy ("Verfahrensökonomie") *no need* to examine this question (see for Federal Administrative Court Application doc. 17 section 1.2 and for Federal Supreme Court Application doc. 19 section 1). The Federal Supreme Court held in this regard that the recognition of the individual applicants' standing made it unnecessary to consider the standing of the first Applicant under domestic rules on the 'egoistische Verbandsbeschwerde' (i.e. an appeal brought by an association in its own name but in the interests of its members), but it did not make any findings to the effect that Applicant 1 lacked standing (Application doc. 19 section 1). In any event, this does not alter the fact that Applicant 1 was indeed a party to the domestic proceedings, as documented in the respective first pages of the domestic decisions.

40 The Respondent further states that the decision of the Federal Supreme Court would not prevent Applicant 1 from working towards achieving its objectives (para. 45). However, to reiterate the argument in the Application (AS para. 35), given that the association's purpose is to prevent health hazards

[68] In cases where questions on the merits are at the very heart of the admissibility issues, these are examined joined to the merits, see *Pálic v. Bosnia and Herzegovina*, no. 4704/04, § 59; *Denisov v. Ukraine [GC],* no. 76639/11, § 93; *Studio Monitori and Others v. Georgia,* nos. 44920/09 and 8942/10, § 32 regarding Art. 10 ECHR.

caused by *dangerous* climate change, Applicant 1 is directly affected by the Respondent's failure to do its share to limit GHG emissions to at most 1.5°C of warming. Further, Applicant 1 is a direct victim under the Association's second purpose: to defend the interests of its members; here, the Applicants refer to the above said (section 2.2.1.1). Contrary to the Respondent's claim (para. 44), the members of Applicant 1 do have the status of victims as regards Arts. 2 and 8 ECHR (see above section 2.2.1.2 with further references, and the following considerations in section 2.2.2.4).

2.2.2.4. *Ad* V.B.c) Applicants Nos 2 to 5 (natural persons)'s victim status in respect of Arts. 2 and 8 ECHR

41 The Respondent alleges that the question before the Federal Supreme Court was not whether the Respondent sufficiently protected the Applicants from global warming *to this day*, but concerned its failure to take additional preventive measures (para. 48).

42 The Applicants submit that the Respondent does not provide any source for this claim, and that this claim is also incorrect. Indeed, the Applicants claimed in the domestic proceedings that they had not been sufficiently protected by the Respondent due to the *ongoing* failure to take the necessary measures to reduce GHG emissions in line with the overall target to prevent a dangerous anthropogenic interference with the climate system (see Application doc. 14 and herein the request for legal remedy and e.g. section 4.3.6).

43 As the Respondent correctly submits (para. 48), the Applicants did not claim financial compensation in the domestic proceedings. However, the Applicants point out that this question is irrelevant in terms of victim status. Correctly, the Respondent did not claim that the domestic remedies had not been exhausted.[69] Finally, the references that the Respondent has provided (paras 133-134 of the Respondent's submission) relate to the applicability of Art. 6 ECHR, and not to victim status.

44 Clearly, financial compensation cannot be an *effective* remedy against the *risk* of heat-related mortality as well as the future impairments of the Applicants' health, as it does *not lead to the elimination of the unlawful situation or the*

[69] Cf. *Di Sarno and Others v. Italy*, no. 30765/08, § 87.

risks to the Applicants.[70] With regard to *past and current* impairments of the Applicants' health and well-being, which have accelerated in the course of the proceedings since 2016, the Applicants submit in their request for just satisfaction (Art. 41 ECHR) that compensation for non-pecuniary damage regarding their mental or physical suffering be awarded.

45 It is worth mentioning that there is no legal obligation to claim compensation under Swiss law. On the contrary: as stated in the 2016 request (Application doc. 14 para. 206), according to Swiss legal doctrine, a person affected by a real act may indeed *even be required* to submit a request for a ruling under Art. 25*a* APA in order to not be held responsible in later state liability proceedings *for not complying with his or her duty to limit damages*.[71]

46 The Respondent further claims that the Applicants, as well as the overall demographic of women over the age of 75, are not the only population group affected by the effects of climate change, but that climate change (also) affects (other) humans, animals, and plants (para. 51).

47 Indeed, climate change, including rising temperatures, is "the biggest threat to security that modern humans have ever faced."[72] The Applicants submit, however, that they are both *personally,* and as members of the *particularly vulnerable group* of women aged above 75, *especially* affected by the effects of rising temperatures in comparison with the general public. *In contrast to the rest of the general population,*

– *they* have suffered and continue to suffer *personally* from severe heat-related afflictions (AS para. 33, paras. 7-11 and docs. 4, 5 6 and 7; OF section 2.6);

– *they* were and continue to be at a real and serious risk of mortality and morbidity with every heatwave, i.e. a severe risk of premature loss of life and severe impairment of health and quality of life because they are women above the age of 75, whereas the risk to Applicants 4 and 5 is

[70] KELLER/CIRIGLIANO, Grundrechtliche Ansprüche an den Service Public: Am Beispiel der italienischen Abfallkrise [Basic legal requirements for the Service Public: the example of the Italian waste crisis], URP 2012, p. 831-853, 844; *Di Sarno and Others* (n 69) § 87.
[71] KIENER/RÜTSCHE/KUHN, Öffentliches Verfahrensrecht [Public procedural law], 2nd edition 2015, N 436.
[72] Sir David Attenborough in his address to the UN Security Council on 23 February 2021, available at https://www.gov.uk/government/speeches/pm-boris-johnsons-address-to-the-un-security-council-on-climate-and- security-23-february-2021.

even higher due to their respiratory illnesses (AS para. 33 and paras. 4 f. and 12 f.; OF section 2.5).

48 These are facts, and clearly evidenced by medical certificates, scientific and epidemiological data, as provided for in the Application and the OF. The objectivity of these facts cannot be called into doubt. In view of the thousands of deaths globally that can already be attributed to global warming today (OF para. 26), and the hundreds of deaths to mourn during every heatwave in Switzerland, as the Respondent Government (particularly the Federal Office for the Environment FOEN) itself recognizes (AS para. 2), the Respondent's statement that the Applicants were asserting some "subjective sensitivities" (para. 51) seems rather cynical. Respondent has not demonstrated that it takes the threat caused by climate change to older women seriously.

49 Art. 8 ECHR also applies to situations where *mental well-being* is at stake,[73] and where an individual's well-being may be negatively impacted by unsafe or disruptive environmental conditions.[74] If many people are negatively impacted in their mental well-being during climate-change induced heatwaves, as the Respondent states (para. 51), that does not mean that there is no impact at all. Quite the opposite: it indicates that the negative impact of heatwaves on mental well-being is indeed an objective fact, and must be all the more significant for the Applicants, who are particularly vulnerable due to their personal affliction and because they belong, due to their age and gender, to a particularly vulnerable group. It is worth mentioning that the Court has recognised the reality of intersecting vulnerabilities in the context of discrimination.[75]

50 Overall, the Applicants submit that the evidence before the Court shows that climate change-induced heatwaves make those exposed to it, like Applicants 2-5, more vulnerable in terms of life and health. The Applicants submit that, to evaluate the risk of climate change-induced heatwaves, epidemiological data, scientific evidence and medical certificates must be taken into account instead of spatial proximity in order to do justice to the special features of the

[73] See e.g. *V.C. v. Slovakia*, no. 18968/07, § 106.
[74] *Cordella and Others v. Italy*, no. 54414/13, § 157-160.
[75] See *Carvalho Pinto de Sousa Morais v. Portugal*, no. 17484/15; *S.A.S. v. France* [GC], no. 43835/11; *B.S. v. Spain*, no. 47159/08.

phenomenon of climate change, where no spatial proximity can exist from the outset.[76]

51 The Respondent goes on to question the medical certificates submitted by the Applicants 2 and 3 (para. 52 and 53). The Applicants submit that it is beyond reasonable doubt that the *risk* posed by climate change induced-heatwaves to the particularly vulnerable group of older women, which the Respondent Government acknowledges (OF para. 99, AS para. 2-4), *also materializes* in *individual cases.* In such a case, the burden of proof lies with the Respondent to show that the Applicants' health afflictions were *not* caused by excessive heat, contrary to the medical evidence provided by the Applicants 2 and 3.[77] As additional support, the Applicants submitted new medical certificates and further personal statements with the Observations on the Facts (see OF section 2.6 and accompanying documents).

52 Furthermore, the Respondent repeatedly asserts that the health impairments claimed were not the result of its alleged omissions and inadequate actions (para. 52-54, 59). The Applicants provide their reply on the question of causality between the Respondent's conduct and the harms suffered by the Applicants below, section 2.3.2.

53 On the Respondent's *incorrect* submission that there is still time for the Respondent to act to combat dangerous climate change (para. 55 and 57), the Applicants refer to their Observations on the Facts (OF section 3.3.9) and to their Application (AS para. 47).

54 In terms of *potential* victimhood (the Respondent, para. 56), extensive scientific evidence shows beyond doubt that there is more than "mere suspicion or conjecture", but rather "reasonable and convincing evidence of

[76] Cf. mutatis mutandis *Cordella and Others* (n 74), §§ 104-107. See also the arguments put forward by Third Party Interveners in the *Agostinho* case regarding the uniqueness of climate change and its impact on the Court's approach to jurisdiction, admissibility, the vulnerability of certain groups and other questions. Interveners argued the unique nature of climate change called for the Court to adjust its approach to environmental cases, as these "unique issues of transboundary harm and common concern [have] not previously come before the Court", see third party intervention by the ETO Consortium in *Agostinho and Others* (n 35), §§ 2 and 14). These facts are well summarised by the Council of Europe Commissioner on Human Rights: "The Commissioner is of the opinion that the extraordinary nature of climate change, and the resulting human rights challenges, create a need to adapt the protection offered by the Convention. In particular, a state's failure to take concrete measures to prevent the adverse effects of climate change raises an issue under several rights guaranteed by the Convention", see third party intervention by the Council of Europe Commissioner for Human Rights (n 38), §§ 39 and 43). See also: Third party intervention by the UN Special Rapporteur (n 35), §§ 8 and 13; Third party intervention by Save the Children, in *Agostinho and Others* (n 35), § 28.

[77] Cf. *Grimkovskaya v. Ukraine*, no. 38182/03, § 59 and 61.

the likelihood" that a violation affecting the Applicants personally will occur.[78] As laid down in the OF, the intensity and frequency of heatwaves increases with every additional increment of global warming (OF section 2.4) and it is beyond doubt that *climate change-induced heatwaves* have caused, are causing and *will cause further deaths and illnesses to older women like the Applicants* (OF section 2.4). Also, it is sufficient that an applicant is specifically likely to be affected by the impugned act/measure; or that the measure potentially affects everyone.[79]

55 The Respondent further alleges that the argument that elderly women die from heatwaves or suffer illness related to heatwaves would concern a certain section of the population, but not themselves as individuals (para. 60). First, it should be noted that the Respondent *does not contest* that elderly women die from heatwaves or suffer illness related to heatwaves. Applicants reiterate that *they* have suffered and continue to suffer *personally* from severe heat-related afflictions (AS para. 33 and paras. 7-11, docs. 4–13; OF section 2.6); in addition to that, *they* were and continue to be at a *real and serious risk* of mortality and morbidity with every heatwave, because they are, due to their age and gender, members of a particularly vulnerable group[80] (AS para. 33, paras. 4 f. and 12 f.; OF section 2.5).

56 The Respondent claims that the Applicants requested general and abstract and not individual measures (para. 60). Since the prevention of climate change concerns individuals and the public at large, it is not possible to distinguish between "individual" and "abstract" measures. The best way to protect, fulfill and respect the Applicants' rights is for the Respondent to do its share to limit global warming to 1.5°C, which would also benefit the general public. However, the Applicants must not be denied victim status simply because a general public interest co-exists with their particular interest (see AS para. 39).

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[78] *Senator Lines GMBH v. Austria*, no. 56672/00, pp. 11-12.
[79] *Mustafa Sezgin Tanrıkulu v. Turkey*, no. 27473/06, § 45; *Zakharov v. Russia*, no. 47143/06, § 171; *Kennedy v. the United Kingdom*, no. 26839/05, §§ 124 and 128; *Parrillo v. Italy*, no. 46470/11, §§ 117-119; *Dudgeon v. the United Kingdom*, no. 7525/76; *Soering v. the United Kingdom*, no. 14038/88; *Klass and Others v. Germany*, no. 5029/71.
[80] *Bursa Barosu Başkanlığı and Others v. Turkey*, no. 25680/05, § 128; *Di Sarno and Others* (n 69), § 81; *Tâtar v. Romania*, no. 67021/01, § 24; *Aksu v. Turkey* [GC], no. 4149/04, §§ 50, 53-54; *L'Erablière A.S.B.L. v. Belgium*, no. 49230/07; *Micallef v. Malta* [GC], no. 17056/06, § 45; *Karner v. Austria*, no. 40016/98, § 25; *Gorraiz Lizarraga* (n 59), § 38.

57 The Respondent concludes that "[r]ecognising them (the Applicant 2-5) as direct or potential victims in this case would in fact mean that it would be very difficult, if not impossible, in future to deny anyone the right, at any time, to obtain judicial review of the measures taken to combat global warming" (para. 61). The Applicants submit that, first, they provided extensive evidence proving that they face a real and serious risk of mortality and morbidity with every heatwave, a risk that has partially already materialized in the past, and therefore are more affected than the general population. They are not just "anyone". Second, the Applicants submit that it is still in the Respondent's margin of appreciation to determine the *measures* with which to fulfil its duty to protect. The impugned conduct concerns the Respondent's failure to do its share to stay within the 1.5°C limit (see AS para. 58). Third, *global warming has clearly significant impacts on human rights*. If victim status were denied to Applicants 2-5, as members of a most vulnerable group due to their age and gender facing clearly evidenced impacts, it is questionable who would then be entitled to this status. If acts and failures by states in fighting climate change remain outside the scope of human rights law, this would be an unacceptable consequence in light of the Court's practice in comparable environmental law cases.

2.2.2.5. Ad V.C. the *Respondent's* Conclusion

58 The Respondent claims that the Applicants would attempt to "circumvent the Paris Agreement by seeking to construct an international judicial review of the measures adopted by Switzerland to limit greenhouse gases" (para. 65-67), and that the Paris Agreement is purposefully set up not to have any binding mechanism for monitoring the commitments of the States (para. 66).

59 The character of the Paris Agreement does not prevent the Respondent from having independent human rights obligations under the Convention. Applicants have never requested for this Court to monitor the Respondent's commitments under the Paris Agreement. Instead, the Applicants ask the Court to assess whether the Respondent's failure to protect them from climate-induced heatwaves violates the Convention. Furthermore, the interpretation of Preamble 11 of the Paris Agreement, read in light of the Paris Agreement as a whole[81] and in light of customary human rights law,

[81] Especially Paris Agreement Arts, 2, 3, 4.1 and 4.3.

indicates that the parties are indeed *expected to take human rights implications into consideration* when deciding the *level of ambition of their contributions* to the global response to climate change.[82] Thus, the Paris Agreement intends to *strengthen* and not weaken human rights, as the Respondent asserts.

60 Also, the Applicant's Convention rights are violated by the Respondent's omissions in climate protection, and *that would be the case even in absence of the Paris Agreement*. The Paris Agreement is one of the factors determining the scope of the Respondent's obligation to protect in terms of the Convention, besides *inter alia* the precautionary principle, best available science, evolving norms of national and international law and consensus emerging from specialised international instruments and from the practice of the Contracting States (see AS para. 56 with further references and below para. 123).

61 Furthermore, the Applicants claim that *human rights protection goes beyond the Paris Agreement*. The scientific consensus on the impacts of climate change shows that, to protect the Applicants' rights effectively, the Respondent must, at a minimum, do its share to prevent a global temperature increase of *more than 1.5°C* above pre-industrial level (see below section 2.3.4.1).

62 Lastly, as all the parties to the Paris Agreement belong to at least one human rights treaty, "they must ensure that all of their actions comply with their human rights obligations. That includes their actions relating to climate change."[83] Against that background, Preamble 11 of the Paris Agreement explicitly refers to the need for States to "*respect*, promote and consider their respective *obligations* on *human rights*" when "taking action to address climate change" (emphasis added). The preambular language of the Paris Agreement regarding human rights refers to *existing* human rights obligations that parties have entered into previously. Clearly, the Paris Agreement was *not* intended to be the *only* applicable legal basis in the field of climate

[82] CARAZO in: KLEIN/CARAZO/DOELLE/BULMER/HIGHAM (eds.), The Paris Agreement on Climate Change, Analysis and Commentary, Oxford 2017, p. 116 with further references.
[83] OHCHR, COP21: "States' human rights obligations encompass climate change" – UN expert, 3 Dec. 2015, available at https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?Newsid=16836&Langid=E (last visited on 11 October 2021).

change[84] or to abolish existing human rights obligations. Instead, climate action must be carried out at the national level in a manner that is *coherent with existing obligations related to human rights*. Against that background, judicial review of human rights violations in the context of climate change is not against "the clearly expressed will of states," as the Respondent alleges.

63 Overall, it is not about compliance with the Paris Agreement, but *compliance with the Convention obligations*, interpreted in terms of its scope in light of environmental standards and principles as well as existing and evolving international law, consensus and best available science (see AS para. 56), which all indicate that the Respondent has to do its share to prevent a global temperature increase of more than 1.5°C above pre-industrial levels as a minimum to protect the Applicants effectively. As noted below, the Convention does not exist in a legal vacuum, but must be interpreted in light of the other international law obligations of the Member States.[85]

64 In its NDC, the Respondent Government expressly acknowledges:

"Switzerland recognizes the need for an effective and progressive response to the urgent threat of climate change, in line with the best available scientific knowledge. Switzerland fully subscribes to the view that Parties should, when taking action to address climate change, *respect, promote, and consider their respective human rights obligations*, including due consideration for gender equality and gender sensitive policies, intergenerational equity, and *the needs of particularly vulnerable groups*"[86] (emphasis added).

65 It is worth mentioning that the UN Human Rights Council made the following recommendation for States and other stakeholders in a recent *study on the promotion and protection of the rights of older persons in the context of climate change*, without relying on the Paris Agreement:

"Take urgent, meaningful and ambitious action to mitigate and adapt to climate change that protects the human rights of all, *including the human*

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[84] Conference of the Parties, Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015, FCCC/CP/2015/10/Add.1, 29 Jan. 2016, preambular para. 11.
[85] *Al-Dulimi and Montana Management Inc. v. Switzerland (GC)*, no. 5809/08, §§ 134-136; *Naït-Liman v. Switzerland (GC),* no. 51357/07, § 174.
[86] Switzerland's information necessary for clarity, transparency and understanding in accordance with decision 1/CP.21 of its updated and enhanced Nationally Determined Contribution (NDC) under the Paris Agreement (221-2030; hereinafter "Updated NDC", p. 6, available at https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Switzerland%20First/Switzerland_Full%20NDC%20Communication%202021-2030%20incl%20ICTU.pdf (last visited on 11 October 2021).

rights of older persons, through the following actions: (a) *Prepare, commit to and implement ambitious climate action plans to limit global warming to no more than 1.5°C, including by taking immediate action* to reduce dependency on fossil fuels, and to address the negative human rights impacts that are already occurring (…)"[87] (emphasis added).

2.3. Question 2: If question no. 1 is answered in the affirmative, has there been a violation of Arts. 2 and 8 ECHR in this case?

2.3.1. Answer to the Court's question

66 The Applicants submitted in the Application (AS section 3.2) that there is a violation of Arts. 2 and 8 ECHR because the Respondent fails to adopt all necessary and appropriate measures to effectively protect the Applicants from the risk of harm posed by climate induced heatwaves. The Applicants fully uphold the statements made in the Application.

2.3.2. Ad V.B.a) and VI.B. Causation

67 The Respondent argues that the Applicants did not establish a "causal link" between the alleged omissions of the Respondent and the interference with the Applicant's rights guaranteed by Arts. 2 and 8 ECHR (para. 39, 59 and 71). The Respondent repeatedly asserts that the health impairments and behavior changes during heatwaves are not the result of the Respondent's alleged omissions and inadequate actions (para. 52-54, 59). The Respondent reiterates that climate change is a global phenomenon and that GHG emissions are caused by the community of states. Switzerland allegedly has a low greenhouse gas intensity today, which is why the Respondent's omissions are not of such magnitude as to cause, on their own, the suffering claimed by the Applicants (para. 39).

A causal link is established

68 In their Observations on the Facts, the Applicants have proven the complex yet direct causal link between the Swiss State's omissions contributing to climate change and the physical and psychological effects on the Applicants, based on extensive scientific evidence:

[87] UN Human Rights Council, Analytical study on the promotion and protection of the rights of older persons in the context of climate change, Report of the OHCHR, A/HRC/47/46, 30 Apr. 2021, para. 68.

– that *human influence* is causing climate change, including global warming (OF section 2.1),

– that *the Respondent contributed* and is still *contributing* to global warming in excess of its share of emissions (OF section 2.2),

– that one of the *main impacts* of *human-induced* global warming are *more frequent and more intense heatwaves* (OF section 2.3),

– that intensity and frequency of heatwaves *increases with every additional increment of global warming* (OF section 2.4),

– that heatwaves have caused, are causing and will cause further *deaths and illnesses to older women* (probability resp. risk, OF section 2.5),

– that heatwaves have already caused illnesses to the Applicants in the past (OF section 2.6).

69 Although this causal chain is long and complex, the Applicants submit that it can nevertheless be regarded as direct in the legal sense. In light of the scientific evidence (OF section 2.1-2.6), the causal link between GHG emissions and harmful effects on the Applicants as members of a particular vulnerable group is established beyond reasonable doubt. The causality between man-made GHG emissions and harmful effects particularly on older women is not expressly denied by the Respondent. In addition, the contribution by multiple states to the causation of greenhouse gas emissions and, accordingly, to climate change does not preclude the Court from establishing that the Respondent bears responsibility for its part in this. After all, recent efforts have clarified the bases for shared, concurrent or joint responsibility under international law.[88] More concretely, the Court itself has previously held that two or more states can be responsible for a given situation.[89] The issue of shared or partial responsibility will be discussed in more detail below.

70 However, the Respondent claims that given its "low greenhouse gas intensity today", *its omissions* are not of such magnitude as to cause, *on their own*, the harmful effects on the Applicants, because climate change is a global

[88] NOLLKAEMPER ET AL. (n 7) pp. 15-72, who deem that climate change is falling under Principle 4 of the Guiding Principles.
[89] As pointed out by Judge Yudkivska in her concurring opinion to the case of *Sargysan v. Azerbaijan* [GC], no. 40167/06, citing among others *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, *Furman v. Slovenia and Austria*, no. 16608/09, and *Rantsev v. Cyprus and Russia*, no. 25965/04.

phenomenon and GHG emissions are caused by the community of states (para. 39). The Respondent's arguments on the lack of causal link are flawed. The Applicants' reply to this as follows:

It is incorrect that Switzerland has low GHG intensity today

71 It is wrong to claim that Switzerland has a low GHG intensity today. In the global ranking of countries, Switzerland ranks 9th in terms of CO_2 emissions of consumption per capita, and if emissions from aviation and indirect emissions from the finance sector are taken into account, the Respondent's contribution to climate change is even greater (see for details on the Respondents' contribution to global warming OF section 2.2).

The Respondent is using the wrong causal test

72 It is no defence to assert that, given the Respondent's allegedly low emissions, its omissions are not of such magnitude as to cause, taken in isolation, the suffering claimed by the Applicants. The Respondent is misinterpreting the concept of causation, and how it is applied by the Court, as well as by national and international courts (para. 79 ff.). The causal test is whether there is *individual partial or joint responsibility to contribute to the fight against dangerous climate change.* Partial responsibility arises from partial causation, even if a single State cannot prevent its outcome on its own (see below para. 79 ff.).

73 The Court typically does not use a strict notion of causation by omission; instead, it differentiates between the positive and negative obligations of states. The Court has *explicitly rejected the 'but for' test* in the context of the positive obligation to protect in the cases of *E. and Others*[90] and *O'Keeffe v Ireland*[91] and adopts a more flexible notion between the harm and the State's omission, such as the "real prospect of altering the outcome or mitigating the harm"[92] standard.

74 In *O'Keeffe v Ireland*, the Court noted that

"(…) it is not necessary to show that 'but for' the State omission the ill-treatment would not have happened. A failure to take reasonably available

[90] *E. and Others v. the United Kingdom*, no. 33218/96, § 99.
[91] *O'Keeffe v Ireland*, no. 35810/09, § 149.
[92] Ibid., § 149.

measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State."[93]

75 Thus, the "test for a legally significant breach"[94] is whether a State had reasonable preventive measures with a real prospect of mitigating the harm that were available and not taken.[95]

76 To that regard, the Applicants have proven in their Observations on the Facts

– that the risk of heat-related excess mortality and morbidity could be significantly reduced by limiting global warming to 1.5°C above pre-industrial levels (OF section 2.7),

– that the Respondent does not do its share to prevent a global temperature increase of more than 1.5°C above pre-industrial levels (OF section 2.10) and that it failed to implement and enforce measures to meet its inadequate 2020 target (OF section 2.11) and

– that the Respondent is able to do its share, i.e. to reduce the risk of heat-related excess mortality and morbidity (OF section 2.12).

77 Thus, reasonable preventive measures with a real prospect of mitigating the harm are available and not taken by the Respondent as part of its duty to "do everything in its power" – i.e. to take all necessary measures – to protect the Applicants (see AS para. 57). Despite climate change being a global phenomenon, if states won't do their fair share and instead shift responsibility to other States, who also allow emissions to continue, climate change would go on unabated and without effective solution.[96]

78 This outcome is consistent both with the approach taken by the national courts of Council of Europe member states, specifically regarding causation in relation to interferences by climate change, and with the approach taken by the International Court of Justice in the *Bosnian Genocide* case (para. 86), as will be shown in the following.

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[93] Ibid., with reference to *E. and Others* (n 90), § 99.
[94] See also MAXWELL/MEAD/VAN BERKEL, Standards for adjudicating the next generation of *Urgenda*-style climate cases, in: ALABRESE/SAVARESI/SCOTT (eds.), Special Issue, Climate Change Litigation and Human Rights: Stocktaking and a Look at the Future, Journal of Human Rights and the Environment, *forthcoming:* "[T]he test for determining a legally significant breach is whether a State has failed to adopt reasonable and appropriate measures in light of a foreseeable risk of harm, or failed to take 'sufficient measures' that ensure 'adequate and effective' protection."
[95] See, for example, *Kiliç v. Turkey*, no. 22492/93, § 76.
[96] See on this also Third Party Intervention by Climate Action Network Europe in *Agostinho and Others* (n 35) p. 3.

Not a defence to claim own emissions are not significant enough

79 *National courts of Council of Europe member States* have refused to accept the baseless arguments as put forward by the Respondent that deny responsibility for the consequences of climate change by arguing they are only a small contributing cause (the so-called "drop-in-the-ocean argument"). National courts have found that a State's comparatively small contribution to global GHG emissions does not absolve said State of responsibility. While courts have recognised that a single State's actions or inaction are contributing causal factors among others, judicial decisions have also consistently found that a State is nonetheless individually partially responsible, as every reduction is beneficial. In fact, "despite attempts of States to rely on the well-known 'drop in the ocean' defence, *no national court has accepted this argument*".[97]

80 The German Constitutional Court noted in *Neubauer and Others v Germany*, a constitutional complaint against the Federal Climate Change Act, the following on causality:

"There is a *direct causal link* between anthropogenic climate change and concentrations of human-induced greenhouse gases in the Earth's atmosphere (…). CO_2 emissions are particularly significant in this regard. Once they have entered the Earth's atmosphere, they are virtually impossible to remove as things currently stand. This means that anthropogenic global warming and climate change resulting from earlier periods cannot be reversed at some later date. At the same time, *with every amount of CO_2 emitted over and above a small climate-neutral quantity, the Earth's temperature rises further along its irreversible trajectory and climate change also undergoes an irreversible progression*. If global warming is to be halted at a specific temperature limit, nothing more than the amount of CO_2 corresponding to this limit may be emitted. The world has a so-called remaining CO_2 budget. If emissions go beyond this remaining budget, the temperature limit will be exceeded"[98] (emphasis added).

The German Federal Constitutional Court also discussed the problem of diffuse or shared responsibility, and found that this was not a barrier to the applicants' claims. It held that, "[e]ither way, the *obligation to take national*

[97] MAXWELL ET AL. (n 94).
[98] *Neubauer* (n 13), § 119.

climate action cannot be invalidated by arguing that such action would be incapable of stopping climate change. It is true that Germany would not be capable of preventing climate change on its own. Its isolated activity is clearly not the only causal factor determining the progression of climate change and the effectiveness of climate action. *Climate change can only be stopped if climate neutrality is achieved worldwide*. In view of the global reduction requirements, Germany's 2% share of worldwide CO_2 emissions (…) is only a small factor, but if Germany's climate action measures are embedded within global efforts, they are *capable of playing a part in the overall drive to bring climate change to a halt* ([...])" (emphasis added).[99]

"The *state may not evade its responsibility here by pointing to greenhouse gas emissions in other states*.[100] On the contrary, *the particular reliance on the international community gives rise to a constitutional necessity to actually implement one's own climate action measures at the national level – in international agreement wherever possible*. It is precisely because the state is dependent on international cooperation in order to effectively carry out its obligation to take climate action under Art. 20a GG that it must avoid creating incentives for other states to undermine this cooperation. Its own activities should serve to strengthen international confidence in the fact that climate action – particularly the pursuit of treaty-based climate targets – can be successful while safeguarding decent living conditions, including in terms of fundamental freedoms. *In practice, resolving the global climate problem is thus largely dependent on the existence of mutual trust that others will also strive to achieve the targets*"[101] (emphasis added).

81 The Supreme Court in the Netherlands stated in *Urgenda v. The Netherlands*:

"Partly in view of the serious consequences of dangerous climate change as referred to in 4.2 above, the defence that a state does not have to take responsibility because other countries do not comply with their partial responsibility, cannot be accepted. *Nor can the assertion that a country's own share in global greenhouse gas emissions is very small and that reducing*

[99] Ibid., § 202.
[100] Here, the court quoted the following cases: VG Berlin, Judgment of 31 October 2019, 10 K 412.18, para. 74; also BVerwG, Judgment of 30 Jun. 2005, 7 C 26/04, para. 35 f.; High Court of New Zealand, Judgment of 2 Nov. 2017, CIV 2015-485-919 [2017] NZHC 733, para. 133 f.; Gerechtshof Den Haag, Judgment of 9 Oct. 2018, 200.178.245/01, no. 64; Hoge Raad of the Netherlands, Judgment of 20 Dec. 2019, 19/00135, no. 5.7.7; United States Court of Appeals for the Ninth Circuit, Judgment of 17 Jan. 2020, no. 18-36082, p. 19 f.
[101] *Neubauer* (n 13), § 203.

emissions from one's own territory makes little difference on a global scale, be accepted as a defence. Indeed, *acceptance of these defences would mean that a country could easily evade its partial responsibility by pointing out other countries or its own small share*. If, on the other hand, this defence is ruled out, *each country can be effectively called to account for its share of emissions and the chance of all countries actually making their contribution will be greatest*, in accordance with the principles laid down in the preamble to the UNFCCC (…)" (emphasis added).[102]

"Also important in this context is that, as has been considered (…) about the carbon budget, *each reduction of greenhouse gas emissions has a positive effect on combating dangerous climate change, as every reduction means that more room remains in the carbon budget*. The defence that a duty to reduce greenhouse gas emissions on the part of the individual states does not help because other countries will continue their emissions cannot be accepted for this reason either: *no reduction is negligible*" (emphasis added).[103]

82 In *Milieudefensie et al. v. Shell*, the District Court of The Hague stated in another climate case based on tort law:

"There is a *direct, linear link between man-made greenhouse gas emissions*, in part caused by the burning of fossil fuels, and *global warming*"[104] (emphasis added).

"In answering the question what can be expected of RDS [Royal Dutch Shell], the court considers that an important characteristic of the imminent environmental damage in the Netherlands and the Wadden region at issue here is that *every emission of CO_2 and other greenhouse gases, anywhere in the world and caused in whatever manner, contributes to this damage and its increase*. It is an established fact that – apart from its own limited CO_2 emissions – RDS does not actually caus[e] the Scope 1 through to 3 emissions of the Shell group by itself. However, this circumstance and the not-disputed circumstance that RDS is not the only partly responsible for tackling dangerous climate change in the Netherlands and the Wadden region *does not absolve RDS of its individual partial responsibility to contribute to the*

[102] *Urgenda* (n 13), § 5.7.7.
[103] Ibid., § 5.7.8.
[104] District Court of The Hague, *Milieudefensie et al. v. Shell*, C/09/571932 / HA ZA 19-379, 26 May 2021 (English version), not yet final, § 2.3.2.

fight against dangerous climate change according to its ability"[105] (emphasis added).

"RDS argues that the reduction obligation will have no effect (…). Even if this were true, it will not benefit RDS. Due to the compelling interests which are served with the reduction obligation, *this argument cannot justify assuming beforehand there is no need for RDS to not meet this obligation*. It is also important here that *each reduction of greenhouse gas emissions has a positive effect on countering dangerous climate change*. After all, each reduction means that there is more room in the carbon budget. The court acknowledges that RDS *cannot solve this global problem on its own*. However, this does *not absolve RDS of its individual partial responsibility to do its part* regarding the emissions of the Shell group, which it can control and influence"[106] (emphasis added).

83 In Belgium, the Court of first instance found that:

"The *global dimension of the problem of dangerous global warming does not exempt the Belgian public authorities from their pre-described obligation under Arts. 2 and 8 of the ECHR*. In this respect, the Court agrees with the view of the Dutch Supreme Court in the Urgenda case. Therefore, in the present case, the applicants are right to argue that Arts. 2 and 8 of the ECHR impose a positive obligation on public authorities to take the necessary measures to remedy and prevent the adverse consequences of dangerous global warming on their lives and their private and family lives."[107]

84 Similarly, in *Lliuya v. RWE*, another climate case based in tort law, the Higher Court of Hamm held in an interlocutory decision that "the fact that multiple parties have caused the interference ('disturbers') does not necessarily mean that eliminating that interference would be impossible. On the contrary, the established interpretation is that, in the case of multiple 'disturbers', each participant must eliminate its own contribution".[108] As such, the presence of multiple 'disturbers' does not absolve each individual contributor from its

[105] *Milieudefensie et al.* (n 104), § 4.4.37.
[106] Ibid. § 4.4.49.
[107] Brussels Court of First Instance, *VZW Klimaatzaak v. Kingdom of Belgium & Others*, 17 Jun. 2021 (unofficial translation), p. 61.
[108] Higher Regional Court of Hamm, Interlocutory Decision of 1 February 2018, I-5U 15/17, translation from the original German, p. 4.

own (partial) responsibility 'to do its part'.[109] The French court in *L'Affaire du Siècle*[110] came to the same conclusion.

85 *International courts* have also recognised that partial responsibility arises from partial causation, where a State's action or inaction contributed to an event, even if a single State cannot prevent its outcome on its own.

86 The International Court of Justice held in the *Bosnian Genocide case* as follows:

> "(…) it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result […] which the efforts of only one State were insufficient to produce."[111]

87 In an analogous context on a question of tort law, the UN Commission on International Trade Law (UNCITRAL) found it sufficient that the respondent party was "a cause" and not "the cause" of the harm in question.[112]

A direct causal link exists even if some of the irreversible impacts have not yet materialised

88 Overall, in addition to the harm that the Applicants are already suffering, the Applicants submit that their right to life and right to private and family life is at serious risk, even if such a risk has not yet materialised and there is no complete certainty that it will do so. Because of the global nature of the problem, Applicants cannot ascertain the responsibility of the Respondent's omissions in *isolation*, contrary to the Court's case law on noxious polluting emissions. However, based on the best available science, there is no uncertainty that the Applicant's rights are at serious risk due to global

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[109] Ibid.
[110] The French court found the State liable for its contribution to climate change pursuant to the tort of ecological damage, even though the State was only responsible for one part ("une partie") of the damage, *Notre Affaire à Tous and Others* (n 25), p. 34.
[111] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43, § 430.
[112] UNCITRAL, *CME Czech Republic BV v. The Czech Republic*, Partial Award on Merits, 13 Sep. 2001, p. 113 § 582.

warming (OF section 2.5), and that this risk is increasing with every additional increment of global warming (OF section 2.4).

89 It is important to hold States to account despite a lack of complete certainty that a certain event will occur, as this Court has done before.[113] Because of the peculiarities of the phenomenon of global warming, Switzerland could otherwise easily evade its responsibility by pointing out the responsibility of other states, or its own small share in global emissions. This is why the courts cited above have ruled out this defence and have held that *each* state must do its fair share. Any other approach would condone warming of more than 1.5°C, with the associated infringements on the rights of the Applicants.

90 It is worth mentioning that in the domestic proceedings, the issue of causality was never raised:

- Neither by the DETEC in its function as ruling authority (Application doc. 15),
- nor by the DETEC in its function as a party to the domestic court proceedings where it has always refrained from submitting comments (Application docs. 17 and 19),
- nor by the domestic courts itself (see Application docs. 17 and 19).

2.3.3. Question 2.1: Were these provisions applicable to the case at hand?

2.3.3.1. Answer to the Court's question

91 The Applicants submitted in the Application (AS, paras. 49-55) that Arts. 2 and 8 ECHR are applicable in the case at hand. The Applicants fully uphold the statements made in the Application.

2.3.3.2. Reply to the Respondent's arguments

2.3.3.2.1. Ad VI.C.a) Overview of the relevant principles

92 In its "Overview of the relevant principles", the Respondent refers to the case of *Öneryıldız v. Turkey,* § 90, and findings of the Court herein regarding the

[113] The Court has established that there can be a violation of a Convention right where there is a serious risk of suffering or breach, even if this has not yet materialised. In regard to Art. 2 ECHR, there can be a violation of the right to life where a State's actions put the Applicant's life at risk, even if the latter survives, see *Makaratzis v. Greece* [GC], no. 50385/99, § 55, *Soare and Others v. Romania*, no. 24329/02, §§ 108-109 and *Trévalec v. Belgium*, no. 30812/07, §§ 55-61. In the environmental context, the Court has found that Art. 2 ECHR applies where the State's actions or omissions are related to activities dangerous by their very nature, which puts peoples' lives at real and imminent risk, see *Kolyadenko and Others v. Russia*, nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, § 155.

procedural aspect of Art. 2 ECHR (para. 73 and 78). However, Applicants claim that Art. 2 ECHR is infringed in its substantive aspect (see AS section 3.2). *Öneryıldız v. Turkey* reads as follows:

"The positive obligation to take all appropriate steps to safeguard life for the purposes of Art. 2 (…) entails *above all* a primary duty on the State to put in place a *legislative and administrative framework* designed to provide *effective deterrence against threats to the right to life*"[114] (emphasis added).

93 For the cases and decision points which the Applicants consider as relevant to the present case, they refer in full to their Application (AS section 3.2).

2.3.3.2.2. Ad VI.C.b) Application of these principles to the present case

94 Relying on *Öneryildiz v. Turkey*, § 100, the Respondent alleges that Art. 2 ECHR is not applicable in the present case because the Applicants have not succeeded in demonstrating the existence of an 'immediate' danger to their lives (para. 79).

95 First, the Applicants submit that the 'real and immediate risk' test was applied as a precondition of an *operational duty* to prevent harm and not as a precondition to the *systemic duty* to adopt an appropriate legislative and administrative framework or the related obligation to implement such a framework.[115]

96 The 'real and immediate risk' test under Art. 2 ECHR was originally developed by the Court in the criminal justice context. For example, in *Osman v. the United Kingdom*, the Court indicated that this test was appropriate given the "unpredictability of human conduct and the *operational* choices which must be made in terms of priorities and resources".[116]

97 In *Öneryildiz v. Turkey*[117], the Court has applied the 'real and immediate risk' test in its environmental jurisprudence in relation to the *operational duty:*

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[114] *Öneryildiz v. Turkey* [GC], no. 48939/99, § 89; see also *Budayeva and Others v. Russia*, no. 15339/02, § 129.
[115] See European Court of Human Rights, Guide on Article 2 of the European Convention on Human Rights, Right to life, p. 8, about the nature of the positive obligation of the State, which has, in broad terms, two aspects: a) the duty to provide a regulatory framework, and b) the obligation to take preventive *operative* measures. Art. 2 ECHR's positive *operational* obligation applies to *factual circumstances* e.g. the need for planning to protect life in counter-terrorism operations (*McCann v UK,* no. 18984/91) or the need for steps to prevent the recurrence of natural disasters *(Budayeva and Others* [n 114]). In *Stoyanovi v Bulgaria*, the Court has set framework for Art. 2 ECHR's positive obligations: first establish a framework of laws and procedures to protect life, and second take preventive operational measures (see *Stoyanovi v. Bulgaria*, no. 42980/04, § 59).
[116] *Osman v. the United Kingdom*, no. 23452/94, §§ 115 f.
[117] *Öneryildiz* (n 114).

– At § 101, it stated that the authorities knew or ought to have known that there was a "real and immediate risk" to a number of persons, and that the authorities consequently had a positive obligation under Art. 2 ECHR to "take such preventive *operational* measures as were necessary and sufficient to protect those individuals" *(operational duty)*.

– In contrast, at § 89, the Court stated that the positive obligation to take all appropriate steps to safeguard life for the purposes of Art. 2 ECHR entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life *(obligation to establish a legislative and administrative framework)*. The Court then goes on stating that where lives have been lost in circumstances potentially engaging the responsibility of the State, Art. 2 ECHR entails a duty for the State to ensure, by all means at its disposal, an adequate response so that the legislative and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are repressed and punished *(obligation to implement)*. Here, the Court made no reference to the 'real and immediate risk' test.

98 Also e.g. in the environmental cases of *Budayeva and Others v. Russia*[118] and *Zammit Maempel and Others v. Malta*[119], the Court did not refer to the 'real and immediate risk' test in relation to a *systemic* duty, but in relation to *operational* questions.

99 Second, the Applicants submit that the Court has not uniformly applied the 'real and immediate risk' test in its environmental jurisprudence. Rather, the Court has applied a range of tests that consider, *inter alia,* whether the risk of harm is sufficiently 'real' and whether the harm is sufficiently 'serious' or severe (referred to in the AS, para. 54, as the 'real and serious risk' test).[120]

100 In the event that the Court is of the view that the 'real and immediate risk' test must be applied to the present case for the purpose of Art. 2 ECHR, the Applicants submit, third, that 'immediacy' should be read, in light of the precautionary principle[121], to encompass the concepts of directness,

[118] *Budayeva and Others* (n 114), § 129.
[119] *Zammit Maempel and Others v. Malta,* no. 24202/10, § 67.
[120] *Tâtar* (n 80), § 107; *Brincat and Others v. Malta*, no. 60908/11, § 82; *Jugheli and Others v. Georgia*, no. 38342, § 67; *Cordella* (n 74), § 169.
[121] *Tâtar* (n 80), § 120.

inevitability and irreversibility. This is consistent with the principle that the ECHR cannot be interpreted in a vacuum.[122] The Dutch Supreme Court adopted this interpretation of 'immediacy' in *Urgenda v. the Netherlands*, where it was noted with reference to the case law of the Court that:

"The term 'immediate' does not refer to imminence in the sense that the risk must materialise within a short period of time, but rather that the risk in question is directly threatening the persons involved. The protection of Art. 2 ECHR also regards risks that may only materialise in the longer term."[123]

101 With regard to Art. 8 ECHR, the Respondent is of the opinion that this provision may apply in the context of climate change (para. 80). However, the Respondent claims that in light of the behavioural adjustments ('Mediterranean living') of the Applicants 2-5, the 'minimum severity threshold' has not been reached, which is why the Respondent is "not convinced" that Art. 8 ECHR applies in the present case (para. 81).

102 The Applicants submit that the "minimum severity threshold" has been reached. In *Tâtar v. Romania*[124], *Jugheli Others v. Georgia*[125] and *Taşkin and Others v. Turkey,*[126] the Court determined that the threshold test for Art. 8 ECHR was satisfied due to the *risk of harm* to the applicants' quality of life and well-being.[127] The Court has indicated that, to trigger a Contracting State's obligations under Art. 8 ECHR, the risk of harm must be "serious" and

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[122] *Demir and Baykara v. Turkey*, no. 345039, § 85.
[123] *Urgenda* (n 13) § 5.2.2, referencing the following judgments in which the Court held that the requirements set out in § 5.2.2 were met: *Öneryildiz* (n 114), §§ 98-101 (gas explosion at landfill; the risk of this occurring at any time had existed for years and had been known to the authorities for years); *Budayeva and Others* (n 114), §§ 147-158 (life-threatening mudslide; the authorities were aware of the danger of mudslides there and of the possibility that they might occur at some point on the scale it actually did) and *Kolyadenko* (n 113), no. 17423/05, §§ 165 and 174-180 (necessary outflow from the reservoir because of exceptionally heavy rains; the authorities knew that in the event of exceptionally heavy rains evacuation might be necessary).
[124] *Tâtar* (n 80).
[125] *Jugheli and Others* (n 120).
[126] *Taşkin and Others v. Turkey*, no. 46117/99.
[127] In *Tâtar*, the Court found that Art. 8 ECHR was engaged due to the "danger" of pollution (§ 96) that "could" cause a deterioration in the residents' quality of life and well-being (§ 97). The Court's determination was primarily based on expert reports that indicated that pollution levels were exceeded, even though these did not establish a causal link between the pollution and the impacts on health (§ 93). In *Jugheli,* the Court concluded "that even assuming that the air pollution did not cause any quantifiable harm to the applicants' health, it may have made them more vulnerable to various illnesses … Moreover, there can be no doubt that it adversely affected their quality of life at home … The Court therefore finds that there has been an interference with the applicants' rights that reached a sufficient level of severity to bring it within the scope of Article 8 of the Convention" (§ 71). In *Taşkin,* the Court noted that a "likely" risk of exposure to "dangerous effects" of an activity, without requiring serious endangerment of health, is sufficient to meet the threshold for Art. 8 ECHR (§ 113).

more than “negligible in comparison to the environmental hazards inherent to life in every modern city.”[128]

103 The Applicants submit that there is a serious threat to the Applicants’ well-being and quality of life posed by dangerous climate change that goes far beyond common behavioural adjustments to heat, as laid down in the personal statements (Application docs. 4, 5, 6 and 7). Furthermore, there is evidence of the serious risk presented to the Applicants’ life and health by ongoing climate-induced heatwaves and proof that the Applicants have already been harmed (cf. AS section 1.1 and 1.2, further evidenced in OF section 2.5 and 2.6). This suffices to trigger the Respondent’s positive obligations under Art. 8(1) ECHR.

104 The Applicants further emphasize the “cumulative effect” of all the consequences they already experience and will experience. In the case of *Grimkovskaya v. Russia*, the Court considered "that the cumulative effect of noise, vibration and air and soil pollution generated by the M04 motorway significantly deterred the applicant from enjoying her rights guaranteed by Art. 8 ECHR. Art. 8 ECHR is therefore applicable in the present case”.[129] Certainly, the cumulative effect of all the consequences of heatwaves (health consequences, change of lifestyle, fear, being confined at home during heatwaves, real and serious risk to life and health) show that the required threshold has been reached.

105 Contrary to what the Respondent asserts (para. 81), the present case cannot be compared with *Calancea et al. v. Republic of Moldova*.[130] In the present case, there is evidence of the serious risk presented to the Applicants’ life, health, well-being and quality of life by ongoing climate-induced heatwaves and proof that the Applicants have already been harmed, while in *Calancea et al. v. Republic of Moldova,* there was no evidence that due to the exposure to electromagnetic fields generated by high-voltage line there was a serious risk to the Applicants' health. Contrary to *Calancea et al. v. Republic of Moldova,* where the measurements recorded were far below the World Health Organisation’s limits for electric fields,[131] in the present case numerous international scientific bodies have pointed out the life and health risks

[128] *Fadeyeva v. Russia*, no. 55723/00, § 69; *Dubetska et al. v. Ukraine*, no. 30499/03, § 105.
[129] *Grimkovskaya* (n 77), § 62. See also *Fadeyeva* (n 128), § 88.
[130] *Calancea and Others v. the Republic of Moldova*, no. 23225/05.
[131] Ibid*., §§ 29.*

associated with increased heatwaves as a result of global warming (OF section 2.5), and the Respondent does not do its share to prevent a global temperature increase of more than 1.5°C above pre-industrial levels.[132]

106 Likewise, the Respondent cannot defend itself by differentiating the present case from *Dubetska et al. v. Ukraine* (para. 81). On the contrary: Like in *Dubetska et al. v. Ukraine,* the intensity and duration of the harm posed by ongoing climate-induced heatwaves and the effects on the Applicants' life, health and quality of life far exceeds the "environmental hazards inherent in life in every modern city".[133]

2.3.4. Questions 2.2 and 2.3: Has the Respondent State failed to fulfil its positive obligations to effectively protect life (Art. 2 ECHR) and/or to respect the Applicants' private and family life, including their home (Art. 8 ECHR)? In particular, given its margin of appreciation in environmental matters, has the Respondent State fulfilled its obligations under the Convention guarantees being relied upon here, read in the light of the relevant provisions and principles, such as the principles of precaution and intergenerational equity, which are contained in international environmental law? In this context, has it adopted appropriate regulations and implemented them by means of adequate and sufficient measures to achieve the targets for combating global warming (see, for example, Tătar v. Romania, no. 67021/01, para. 109 and 120, 27 January 2009, and Greenpeace E.V. et al. v. Germany (decision), no. 18215/06, 19 May 2009)?

2.3.4.1. Answer to the Court's question

107 The Applicants submitted in the Application and complemented in their Observations on the Facts:

- that the Respondent failed to fulfil its positive obligations to effectively protect life (Art. 2 ECHR) and to respect the Applicants' private and family life, including their home (Art. 8 ECHR), because the Respondent has not adopted appropriate regulations and implemented them by means of adequate and sufficient measures to do its share to prevent a global temperature increase of more than 1.5°C above pre-industrial levels (AS paras. 56-57 and section 1.3 and 1.4; OF section 2.9, 2.10 and 2.11);
- that in the present case the Respondent's margin of appreciation is limited to determining the measures with which to do its share to

[132] Ibid., §§ 28 f.
[133] Cf. *Dubetska et al.* (n 128), §§ 105 and 119.

prevent a global temperature increase of more than 1.5°C above pre-industrial levels, but that there is no discretion as to the level of ambition, ie the necessity of keeping temperatures within the 1.5°C limit; nor is there discretion regarding the emissions reductions necessary to achieve this limit (AS para. 58). There is, in other words, no margin of appreciation regarding the obligation to take action in line with the 1.5°C limit, even if states do have discretion about the concrete type or types of action that they will take to comply with this obligation.

108 The Applicants fully uphold the statements made in the Application. In the following, particularly with a view to their requests to the Court, they complement their statements on the law regarding the *scope of the Respondent's obligation to protect.*

Scope of the Respondent's obligation to protect

109 The Applicants submitted in the Application that to comply with its positive obligation, the Respondent has to put in place all necessary measures to protect the Applicants effectively, which is to do "everything in its power" – i.e. take all necessary measures – to do its share to prevent a global temperature increase of more than 1.5°C above pre-industrial level (AS para. 56-57).

110 The Applicants have laid down in the OF the reasons why the Respondent does not do its share to prevent a global temperature increase of more than 1.5°C above pre-industrial level: the Respondent has failed to set any domestically binding climate targets for 2030 and 2050 (OF section 2.9); its climate strategy is not in line with the 1.5°C limit (OF section 2.10); and the Respondent failed to implement and enforce measures to meet its (inadequate) 2020 climate target (OF section 2.11).

111 In these sections, the Applicants have also laid down what the Respondent must do to *remedy these omissions*, resp. to fulfil its obligation to protect the Applicants effectively. In their *requests to the Court*, the Applicants submit that the Respondent must adopt the necessary legislative and administrative framework to do its share to prevent a global temperature increase of more than 1.5°C above pre-industrial levels, which requires the Respondent:

(1) to have a greenhouse gas emission level in 2030 as compared to the emissions in 1990 that is net-negative as its 'fair share' of the global mitigation burden (see OF section 2.10.1);

(2) to reduce the domestic emissions by 61% below 1990 levels by 2030 and to net-zero by 2050 as the domestic component of (1) (see OF section 2.10.2);

(3) to prevent and reduce any emissions occurring abroad that are directly or indirectly attributable to the Respondent in line with a 1.5°C above pre-industrial levels limit (see OF section 2.10.3 and below, paras. 113 ff.);

(4) permanently removing greenhouse gas emissions from the atmosphere and storing them in *safe, ecologically and socially sound greenhouse gas sinks,* if, despite (1), (2) and (3), any greenhouse gas emissions continue to occur within the control of the Respondent, or the concentration of greenhouse gases in the atmosphere is exceeding the level corresponding to the 1.5°C above pre-industrial levels limit (see OF section 2.10.4 and below, para. 120).

112 The Applicants have laid down points (1) and (2) of para. 111 as part of the obligation to protect in the Application (AS para. 56-57) and in the Observations on the Facts (OF section 2.10.1 and 2.10.2). With regard to (1) of para. 111, the Applicants further submit that despite the ambiguity around the Respondent's exact 'fair share' of the global mitigation effort required to prevent a global temperature increase of more than 1.5°C above pre-industrial level, the Climate Action Tracker, RAJAMANI ET AL. and Climate Analytics came, in recent assessments, all to the same conclusion: Namely, that Respondent has to have a greenhouse gas emission level in 2030 as compared to the emissions in 1990 that is net-negative as its 'fair share' of the global burden mitigation climate change. Interpreting Switzerland's fair share in line with the Climate Action Tracker and RAJAMANI ET AL. methodologies is consistent with the principle that "[i]n the event of any ambiguity in the terms of a [provision of international law], the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations."[134] Both

[134] *Al-Jedda v. UK*, no. 27021/08, § 102.

methodologies involve a "directional pull" (in the words of RAJAMANI ET AL.[135]) towards more stringent measures of fairness. This is necessary to ensure the effective protection of the Applicants' rights because if all States choose less stringent measures of their fair share, the right to live in a world where global warming has not exceeded 1.5C would become "theoretical and illusory". Resolving the ambiguity around the meaning of equity/CBDRRC-NC[136] in this way is therefore also entirely consistent with the object and purpose of the Paris Agreement.

Scope of the Respondent's obligation to protect extends to emissions occurring abroad directly or indirectly attributable to the Respondent

113 With regard to (3) of para. 111 the Applicants submit that to comply with its positive obligation to protect their rights effectively, the Respondent has to put in place not only all the necessary measures to do its share to prevent a global temperature increase of more than 1.5°C above pre-industrial level in terms of *domestic* emissions, but also to prevent and reduce any *emissions occurring abroad that are within the control of the Respondent and thus directly or indirectly attributable to it,* which go well beyond the domestic emissions (see OF section 2.10.3).

114 First, this is needed to protect the Applicants *effectively*. Considering that climate change impacts will ultimately affect the rights of the Applicants *whether the emissions occur domestically or abroad, addressing all emissions that are directly or indirectly attributable to the Respondent is part of its obligation* "to do everything in its power to do its share to prevent a global temperature increase of more than 1.5°C above pre-industrial level" as stated in AS para. 57.

115 Second, the Respondent Government seems to agree that Switzerland has an obligation to reduce emissions occurring abroad that are directly or indirectly attributable to the Respondent, as laid down in the Observations on the Facts section 2.10.3.

116 Third, when interpreting the obligation to protect under the Convention, the Court should also consider the fact that the Paris Agreement also refers to

[135] RAJAMANI ET AL., National 'fair shares' in reducing greenhouse gas emissions within the principled framework of international environmental law, Climate Policy Volume 21 Issue 8, pp. 983–1004, 7 September 2021, p. 985, available at https://doi.org/10.1080/14693062.2021.1970504.
[136] Common but differentiated responsibilities and respective capabilities, in the light of different national circumstances (Art. 2(2) Paris Agreement).

emissions occurring abroad that are attributable to States. The Parties to the Paris Agreement recognized that *sustainable lifestyles and sustainable patterns of consumption and production*, with *developed country Parties taking the lead*, play an *important role in addressing climate change* (Preamble, Paragraph 16). This is also mentioned in the Cancún Agreements in the context of the required paradigm shift towards building a low-carbon society.[137] Also, the Paris Agreement's *temperature goal* to limit the temperature increase to 1.5°C above pre-industrial levels and the target to *make finance flows consistent with this temperature goal* (Art. 2(1a) and (1c)) are independent of the source of the emission, i.e. the distinction between domestic emissions and emissions occurring abroad, as well as between direct and indirect emissions.

117 Fourth, including emissions that occur abroad and attributable to the Respondent is in line with the *precautionary principle,* as this entails the full range of preventive measures (see AS para. 56). All emissions attributable to the Respondent matter with regard to the protection of the Applicants.

118 Fifth, this is in line also with evolving norms of international law and the practice of the Contracting States which inform the scope of the obligation to protect (see AS para. 56). The 2015 Oslo Principles on Global Climate Change Obligations,[138] hold that as part of the "Obligation of States, every state is required to "reduce the GHG emissions *within its jurisdiction or control* to the permissible quantum within the shortest time feasible" (Art. II.B.13) and that "States must regulate GHG emissions *in their jurisdictions or under their control* to meet their obligations set forth in these Principles" (Art. II.B.24). The customary rules of public international law on the Responsibility of States for Internationally Wrongful Acts refer to acts or omissions that are "attributable" to the State (Art. 2).[139] In *Milieudefensie at al. v. Shell*, the District Court of The Hague ordered Royal Dutch Shell to reduce the

[137] Decision 1/CP.16, The Cancún Agreements: Outcome of the work of the AWG-LCA, FCCC/CP/2010/ 7/Add.1, 15 March 2011, para. 10.
[138] These principles, drafted by experts from courts, academia, and organizations around the world, attempt to define the scope of legal obligations according to which all states and enterprises have 'to defend and protect the Earth's climate': Expert Group on Global Climate Obligations, Oslo Principles on Global Climate Change Obligations, The Hague 2015.
[139] See also decisions of international courts *(Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [n 111], § 430; *CME Czech Republic BV* [n 112], § 582) and national courts *(Neubauer* [n 13], §§ 119 and 202-203; *Urgenda* [n 13], §§ 5.7.7-5.7.8; *VZW Klimaatzaak* [n 107], p. 61; *Interlocutory Decision* [n 108], p. 4; *Notre Affaire à Tous and Others* [n 25], § 34) supporting this argument.

aggregate volume of all CO_2 emissions attributable to the Shell Group, no matter whether they occurred in the Netherlands, including indirect emissions resulting from consumers.[140]

Emissions occurring abroad are within the Court's jurisdiction

119 The *emissions occurring abroad that are directly or indirectly attributable to and within the control of the Respondent* should not be treated as extraterritorial jurisdiction, because the impugned conduct is taking place within the borders of the Respondent, even if the effects are being felt in whole or in part abroad.[141]

Scope of the Respondent's obligation to protect includes the reduction of any greenhouse gas emissions within the control of the Respondent in line with the 1.5°C limit. If despite all measures to reduce emissions still further emissions occur, those need to be leveled out with safe, ecologically and socially sound carbon sinks.

120 With regard to (4) of para. 111 the Applicants submit that the Respondent's positive obligation to protect entails also an obligation to permanently removing greenhouse gas emissions from the atmosphere and storing them in safe, ecologically and socially sound greenhouse gas sinks, if, despite (1), (2) and (3) of para. 111, any greenhouse gas emissions continue to occur within the control of the Respondent. The same applies if the concentration of greenhouse gases in the atmosphere is exceeding the level corresponding to the 1.5ºC above pre-industrial levels limit. Also hereto, the Respondent has to do its share (see OF section 2.10.4). It is important to note that these are necessary measures to do its share to prevent a global temperature increase of more than 1.5°C above pre-industrial levels but does not absolve the Respondent of its obligations to prioritise emissions reduction.

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[140] *Milieudefensie et al.* (n 104), §§ 2.5.4 and 5.3.

[141] See e.g. *Ilascu v. Moldova and Russia*, no. 48787/99, where it stated, at § 317: "A State's responsibility may also be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction"; *Chigarov and Others v. Armenia*, no. 13216/05, § 167: "While a state's jurisdictional competence is primarily territorial, the concept of jurisdiction within the meaning of Article 1 of the Convention is not restricted to the national territory of the High Contracting Parties and the state's responsibility can be involved because of acts and omissions of their authorities producing effects outside their own territory"; *Nada v. Switzerland*, no. 10593/08, §§ 117-123; see also TILMANN ALTWICKER, Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts, European Journal of International Law Volume 29 (2), July 2018, p. 592.

2.3.4.2. Reply to the Respondent's arguments

2.3.4.2.1. Ad. VI.D.b) The legal nature of the Paris Agreement

121 The Respondent alleges that merely Arts. 4(2) first sentence, 4(8), 4(9), 4(13) and 13(7) of the Paris Agreement would set out legally binding obligations for the State Parties (para. 85). The general objective of the Agrfeement (Art. 2(1)a) would not impose quantitative restrictions on GHG emissions or a global carbon budget (para. 92). Art. 4(2) first sentence would be of strictly procedural nature and would not require State Parties to actually implement their NDCs (para. 87), and Art. 4(2) second sentence and Art. 4(3) would merely express standards of conduct and not of result (para. 89 and 90).

122 The Applicants submit that the legal nature of the specific provisions of the Paris Agreement is not decisive in determining the scope of the obligation to protect under Arts. 2 and 8 ECHR. It is worth noting here that the Respondent does not demonstrate, nor does it claim, that the legal status of the specific provisions of the Paris Agreement (i.e. the question whether they are binding in substance or not) is relevant in the Court's case law.

123 All provisions of the Paris Agreement are *part of the international law basis* that can be taken into account when determining the scope of the obligation of protect in terms of Arts. 2 and 8 ECHR. As will be shown below, based on the Court's case law, this would be the *case even if the Respondent had not signed or ratified the Paris Agreement or if the Paris Agreement in its entirety was non-binding.*

124 It is established case law that:

> "when the Court considers the object and purpose of the Convention provisions, it also takes into account the international law background to the legal question before it. Being made up of a set of rules and principles that are accepted by the vast majority of States, the common international or domestic law standards of European States reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty."[142]

[142] See e.g. *Saadi v. the United Kingdom* [GC], no. 13229/03, § 63; *Demir and Baykara* (n 122), § 76.

125 The Court in searching for common ground among the norms of international law has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State.[143]

126 Also, in the cases of *Christine Goodwin v. the United Kingdom,*[144] *Vilho Eskelinen and Others v. Finland,*[145] and Sørensen and Rasmussen v. Denmark,[146] the Court was guided by the European Union's Charter of Fundamental Rights, *even though this instrument was not binding*.

127 Certainly, in the light of the rules set out in the Vienna Convention on the Law of Treaties of 23 May 1969, Art. 31 § 3 (c), the Court had always taken into account, where necessary, "any relevant rules and principles of international law applicable in the relations between the parties."[147] The Paris Agreement is a treaty within the meaning of the Vienna Convention, and contains relevant rules of international law applicable in the relations between the parties to the Convention. The Convention should be interpreted in harmony with these rules of international law.[148]

128 The Applicants stress that the Paris Agreement expressly states that the states must strive to limit warming to 1.5°C, which, together with best available science and the precautionary principle (see AS para. 56), builds a *great degree of consensus* that must be taken into consideration when interpreting and applying Arts. 2 and 8 ECHR.[149]

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[143] See *Demir and Baykara* (n 122), § 78, with reference to *Marckx v. Belgium*, no. 6833/74, §§ 20 and 41. E.g. in the cases of *McElhinney v. Ireland*, *Al-Adsani v. the United Kingdom*, and *Fogarty v. the United Kingdom*, the Court took note of the European Convention on State Immunity, which had only been ratified at the time by eight member States. In its *Glass v. the United Kingdom* judgment, the Court took account, in interpreting Art. 8 ECHR, of the standards enshrined in the Oviedo Convention on Human Rights and Biomedicine of 4 April 1997, even though that instrument had not been ratified by all the States Parties to the Convention. In *Öneryıldız* (n 114), the Court referred to the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment and the Convention on the Protection of the Environment through Criminal Law in order to determine the criteria for State responsibility under Article 2 of the Convention in respect of dangerous activities, although the majority of member States, including Turkey, had neither signed nor ratified these two conventions, see *McElhinney v. Ireland* [GC], no. 31253/96; *Al-Adsani v. the United Kingdom* [GC], no. 35763/97; *Fogarty v. the United Kingdom* [GC], no. 37112/97; *Glass v. the United Kingdom*, no. 61827/00, § 75; *Öneryıldız* (n 114), § 59.

[144] *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95.

[145] *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00.

[146] *Sørensen and Rasmussen v. Denmark* [GC], nos. 52562/99 and 52620/99.

[147] *Demir and Baykara* (n 122), § 67; *Al Adsani* (n 143), § 55; *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 150.

[148] *Al Adsani* (n 143), § 55; *Nada* (n 141).

[149] Cf. *Urgenda* (n 13), Summary of the Decision, What, specifically, does the State's obligation to do 'its part' entail?

129 The Respondent further alleges that the Court should not assume the task to assess the individual performance of a State Party to the Paris Agreement, as the Parties to the Paris Agreement deliberately opted not to introduce such a mechanism (para. 93).

130 The Applicants refer to section 2.2.2.5 above, where they have laid down that the Paris Agreement was *not* intended to be the *only* applicable legal basis in the field of climate change and to abolish existing human rights obligations. Instead, climate action must be carried out at the national level in a manner that is *coherent with existing obligations related to human rights*. From the perspective of the Paris Agreement, Parties are *also expected to take human rights implications into consideration* when deciding the *level of ambition of their contributions* to the global response to climate change.[150] Thus, the Paris Agreement intends to *strengthen*, not weaken human rights, as the Respondent asserts. Finally, as stated in section 2.2.2.5 above, the Applicant's request is not for the Court's enforcement of the Respondent's obligations under the Paris Agreement, but an assessment of the Respondent's acts and omissions violating Applicant's Convention rights.

2.3.4.2.2. Ad VI.D.c) Legislative and administrative framework established by Switzerland

131 Regarding the Respondent statements on the legislative and administrative framework established by Switzerland, the Applicants refer to their OF (OF section 2.10, 2.11, 3.3.1–3.3.4, 3.3.8).

2.3.4.2.3. Ad V.D.d) Compatibility of Switzerland's commitments with 1.5°C limit

132 In light of its updated NDC, the Respondent is of the view that given Switzerland's low GHG intensity today and the high costs of reducing emissions, its climate strategy is compatible with the objective of the Paris Agreement to limit global warming to 1.5°C and reflects the highest level of ambition (para. 99-106). The Respondent also alleges that its climate policy is not "rigid" and can adapt to new scientific recommendations (para. 100) and that despite the referendum on the new CO_2 Act, the objective in the NDC will not change (para. 103-106).

133 This again shows the Respondent's confusion of its independent human rights obligations under the Convention with its obligations under the Paris

[150] CARAZO (n 82), p. 116 with further references.

Agreement. The Applicants have never requested for this Court to monitor the Respondent's commitments under the Paris Agreement. Instead, the Applicants ask the Court to assess whether the Respondent's failure to protect them from climate-induced heatwaves violates the Convention obligations (see above, section 2.2.2.5).

134 The Applicants laid down in their Observations on the Facts and in their Application that Switzerland's climate strategy has never been and is not planned to be in line with the 1.5°C limit. They laid down the following:

- the reasons why, in light of the best available science and international environmental law and principles, the Respondent's NDC as well as its long-term climate strategy are inadequate to stay on a pathway compatible with the 1.5°C limit (OF section 2.10). Notably, what the Respondent refers to in para. 101 and in its updated NDC are *global* emission reduction pathways (see OF para. 49) and not its fair share towards the global mitigation burden (see OF para. 56 ff), and the Respondent's NDC does not even comply with this global pathway (AS para. 17 f.; OF para. 55);
- The Respondent's contribution to climate change is excessively high (OF section 3.2.2), contrary to what the Respondent claims in para. 105 and in its updated NDC. Even if there would be below average per capita emissions in Switzerland, this would not be a relevant consideration in determining its fair share (OF para. 59); [151]
- the mitigation potential in Switzerland remains largely unused, partly without any justification (e.g. in the financial and agricultural sector), partly on the justification of high costs, for which the Respondent does not submit any evidence. However, this is contradictory, as the Respondent Government states it is strongly in Switzerland's own *financial* interests that global warming is limited to 1.5°C (OF section 3.3.6); and even if there would be high costs, this is not a relevant consideration in determining its fair share (OF para. 59);[152]
- the Respondent failed to implement and enforce measures to meet its (inadequate) 2020 target (AS section 1.4; OF section 2.11);

[151] RAJAMANI ET AL. (n 135), p. 991.
[152] Ibid.

- the Respondent failed to set any domestically binding climate targets for 2030 and 2050 (OF section 2.9);
- the level of climate protection is not based on scientific studies but on assumed majority opinions (OF section 3.3.8);
- the Respondent has merely vague ideas how to proceed after the rejection of the new CO_2 Act (OF section 3.3.5) and
- new solutions are likely to be too weak and too late for the Respondent to do its share to limit global warming to 1.5°C (OF section 3.3.3).

135 Regarding the Respondent's reference to the democratic system of Switzerland (para. 103) it should be noted that national difficulties in taking measures are legally irrelevant. A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty (Art. 27 Vienna Convention). With respect, the Convention cannot therefore be undermined with reference to democracy and the Optional referendum in Art. 141 of the Swiss Constitution. Notably, all domestic law emerges within the Swiss democratic system. Without doubt, this does not mean that domestic law prevails over the Convention. The Court regularly sees violations of Convention rights due to domestic law that is not compatible with the Convention rights.[153]

136 Overall, Switzerland's commitments are not compatible with the 1.5°C limit.

2.3.4.2.4. Ad V.D.e) Compatibility of Switzerland's commitments with Arts. 2 and 8 ECHR

137 The Respondent considers that Switzerland has put in place measures to reduce CO_2 emissions that are compatible with the objective of the Paris Agreement, which is why it has not exceeded and will not exceed its margin of appreciation in environmental matters, as the choice of means to combat climate change falls within the margin of appreciation of the state and that there would still be time to make this choice (para. 108-110).

138 The Applicants submit that from this, it appears that the Respondent shares the view of the Applicants on the margin of appreciation as laid down in the Application (AS para. 58, with references): the Respondent's margin of appreciation is limited to *determining the measures* with which to fulfil its

[153] See e.g. *Howald Moor and others v. Switzerland*, no. 52067/10 and 41072/11; *B. v. Switzerland*, no. 78630/12; *Ryser v. Switzerland*, no. 23040/13.

duty to protect, provided they are actually implemented and are appropriate for achieving the objective. There is *no discretion as to the level of ambition, namely to do its share to stay within the 1.5°C limit*.

139 The Applicants laid down in detail and provided best available scientific evidence that contrary to the Respondent, Switzerland's climate strategy is not in line with the 1.5°C limit (see above, para. 134 with further references). The Respondent has thus failed to take adequate action, which falls outside of its margin of appreciation to choose the adequate means for combatting climate change.

140 It should be stressed that in environmental cases, the Court has found that, once an Applicant has raised a *prima facie* case of breach of the State's obligations, "the onus is on the State to justify, using detailed and rigorous data, a situation in which certain individuals bear a heavy burden for the rest of the community".[154] Until this day, as shown in detail in the Observations on the Facts, the Respondent did not explain *that* and *how* it would reach its existing 2020 climate target, its NDC for 2030 and 2050, let alone its fair share to the global mitigation burden.[155]

141 On the point that there would be still time to combat climate change, as the Respondent alleges (para. 110), which is wrong, the Applicants refer to their Observations on the fact, section 3.3.9.

142 On the point that the Respondent's NDC would not significantly differ from what the Applicants have requested in 2016 (para. 111), which is wrong, the Applicants refer to their Observations on the fact, section 3.3.7.

143 The Respondent further claims that the precautionary principle and its possible implications for human rights are not consolidated in the case law of the Court and that the precautionary principle is too vague and too general to give specific directions (para. 112-113). Also, the Respondent is of the view that it fully complied with the precautionary principle (para. 114).

144 The precautionary principle is a general principle of international environmental law[156] that informs the scope of the State's positive obligations.

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[154] *Jugheli and Others* (n 120), § 76 and *Fadeyeva* (n 128), § 128; see also *Dubetska and Others* (n 128), § 155; *Cordella and Others* (n 74), § 161; *Öneryildiz* (n 114), § 89; *Budayeva and Others* (n 114), § 132; *Brincat and Others* (n 120), § 110. The Dutch Supreme Court adopted this approach in *Urgenda* (n 13), §§ 5.3.3 and 6.5.
[155] Cf. *Neubauer* (n 13), §§ 239-241.
[156] See e.g. Rio Declaration (n 8) Principle 15; Art. 3(3) UNFCCC; MEINHARD SCHRÖDER, Precautionary Approach/Principle, Max Planck Encyclopedia of Public International Law, March 2014; International

In *Tătar v. Romania*, the Court held that "the precautionary principle recommends that States *should not delay taking effective and proportionate measures* to *prevent a risk of serious and irreversible damage* to the environment in the absence of scientific or technical certainty", and the Court recalled "the importance of the precautionary principle (first enshrined in the Rio Declaration), which 'is intended to be applied with a view to ensuring a high level of protection of health, consumer safety and the environment in all Community activities'"[157] (emphasis added). Like in *Tătar v. Romania*, in the present case, the risk posed by climate change-induced heatwaves had partly already materialized in the past. There have been around 2,000 heat-related deaths since 2003 in Switzerland, and there has been heat-related morbidity and infringements in well-being, the latter two being experienced by the Applicants (see AS section 1.1 and 1.2; OF section 2.6). There is overwhelming scientific certainty on the causes and consequences of climate change.

145 Against that background, and in line with *Tătar v. Romania*, § 120, the Respondent's positive obligation to prevent irreversible and serious harm to the earth climate and to the Applicants caused by excessive GHG emissions applies *with even more force* for the period from now on. Taking the risk of non-compliance with the limit of 1.5°C and delaying taking the necessary measures, as the Respondent does, is impermissible in terms of the precautionary principle.

146 Notably, the principle also applies if the actual materialization of the risk to the Applicants' life and health would be deemed to be uncertain. The Applicants have demonstrated with best available scientific evidence that *staying within the limit of 1.5°C would significantly reduce the risk of heat-related excess mortality and morbidity* (AS section 1.5; OF section 2.7). There

Tribunal for the Law of the Sea, *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan),* Provisional measures, Order, 27 August 1999. See also Art 191 TFEU: "Union policy on the environment … shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and the polluter should pay." From the European Court of Justice, see for example Case C-236/01, *Monsanto Agricoltura Italia SpA v. Presidenza del Consiglio dei Ministri* [2003] ECR I8105. On the related preventative principle, derived from State due diligence obligations, see International Court of Justice, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Report 2010, p. 14 § 101.

[157] *Tătar* (n 80) § 109.

is sufficient clarity on this, and this informs the content of the precautionary principle and herewith the scope of the obligation to protect in its substance.

147 It is worth mentioning that in their deliberations on the appropriate level of action for a state to take, many national courts have invoked the precautionary principle in climate cases.[158] In Switzerland, the precautionary principle is enshrined in the Swiss Constitution, Art. 74(2), and has a justiciable content in cases "in which the answer to a legal question can be linked neither to a specific legal concretization of the precautionary principle nor to another norm."[159] In these cases, the precautionary principle itself is the relevant, directly applicable legal principle that leads to the answer of the legal question.[160] Thus, also in domestic law, the precautionary principle is not deemed to be "too vague" for it to be able to direct decision-making in substance.

148 The Respondent argued in its Reply (paras. 115-116) that the principle of intergenerational equity is not an established rule of international law. However, this is not correct; this principle, as well the principle of intragenerational equity, has in fact been accepted by states as a norm of international law, reflected in many international instruments,[161] court decisions[162] and comments from human rights treaty bodies[163].[164] The

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158 Federal Court of Australia, *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [FCA 560], 27 May 2021, para. 254-257; *Neubauer* (n 13); High Court of New Zealand, *Sarah Thomson v. The Minister for Climate Change Issues*, 2 November 2017, CIV 2015-485-919, NZHC 733, para. 88-94; Supreme Court of Colombia, *Future Generations v. Ministry of the Environment and Others,* 5 April 2018, STC4360-2018, para. 11.1; Dutch Supreme Court, *Urgenda* (n 13), para. 5.7.3, 7.2.5, 7.2.10.

159 GRIFFEL/RAUSCH/ADLER, Kommentar zum Umweltschutzgesetz, Ergänzungsband zur 2. Auflage, Zürich 2011, Art. 1 N 21, translated from German.

160 Ibid.

161 UN Charter (1945), Preamble; Statute of the Council of Europe (1949), Preamble; Rio Declaration (n 8) Principle 3; Stockholm Declaration (1972), Principle 1; International Whaling Convention (1946), Preamble; African Nature Convention (1968), Preamble; World Heritage Convention (1972), Article 4; Paris Agreement, Preamble; UNFCCC, Article 3.

162 International Court of Justice, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226, § 29; International Court of Justice, *Gabčíkovo–Nagymaros Project*, ICJ Reports 1997, p. 7 § 53; Permanent Court of Arbitration, *Arbitration regarding the Iron Rhine Railway*, Belgium v. the Netherlands, PCA (2005), ICGJ 373, § 58.

163 Human Rights Committee, General Comment No. 36 (n 37), para. 62; Joint Statement (n 30), § 9.

164 For further arguments establishing the recognition of the principle of intergenerational equity, intragenerational equity and sustainable development in academic commentary, see SANDS ET AL., Principles of International Environmental Law, Cambridge 2018 (4th ed.), pp. 218-221; ELOISE SCOTFORD, Environmental Principles Across Jurisdictions: Legal Connectors and Catalysts, in EMMA LEES AND JORGE E. VIÑUALES (eds.), The Oxford Handbook of Comparative Environmental Law, Oxford 2019, p. 656.

principles of intergenerational equity and intragenerational equity[165] are two concepts at the core of the principle of sustainable development.[166]

149 Intergenerational equity aims to ensure future generations are able to enjoy natural resources, and in this case a safe and stable climate. Intragenerational equity requires an equitable environment, use of resources and approach to climate change measures which are fair to and among *present* generations; present generations include the Applicants, who have suffered and continue to suffer from the effects of climate change. Indeed, the principle of sustainable development seeks to ensure economic development with the protection of the environment by considering the "developmental and environmental needs" of *both "*present and future generations" of humankind.[167]

150 The Respondent has an obligation towards the Applicants to protect them against threats to their life, health and well-being posed by dangerous climate change, which is also based on the need to achieve intragenerational equity and pursue sustainable development. The Applicants are due to their age and gender particularly vulnerable to heatwaves and have a higher risk of mortality and morbidity than the rest of the population due to their age and gender. These vulnerabilities "intersect to amplify the impacts" of climate change.[168] Intragenerational equity aims to ensure justice among individuals alive today, especially towards individuals living in the most "environmentally vulnerable" context,[169] including those affected by the consequences of climate change like heatwaves. In addition, one of the objectives of Applicant 1 is to protect the interests of current senior women *and future senior women*, as well as protecting the climate for the interests of future generations (Art. 2 statutes, see Application doc. 2).

151 As such, the Respondent cannot dismiss the principle of intergenerational equity, nor could it ignore the principle of intragenerational equity applicable to the Applicants; these are important norms of international law by which

[165] Report of the World Commission on Environment and Development, Our Common Future ("Brundtland Report"), 1987, § 3 ("sustainability implies a concern for social equity between generations, a concern that must logically be extended to equity within each generation").
[166] SANDS ET AL. (n 164), pp. 218, 221.
[167] *Gabčíkovo–Nagymaros Project* (n 162), § 140.
[168] Third party intervention by the UN Special Rapporteur (n 35).
[169] Rio Declaration (n 8), Principle 6.

the Respondent is bound and which informs its obligations under the Convention.

152 The Respondent eventually refers to its adaptation measures (para. 117). The Applicants submit that the risk of non-compliance with the limit of 1.5°C and delaying taking the necessary *mitigation* measures *is impermissible in terms of the precautionary principle.* Adaptation measures cannot replace mitigation measures, but have to *complement* them since harm to the Applicants caused by climate change is occurring today and will increasingly continue to occur also if warming would be limited to 1.5°C, but to a significant lesser extent since there is an *exponential* increase in mortality with increasing temperatures (OF para. 40). This understanding should also shape the margin of appreciation granted to the Respondent in choosing the appropriate measures to respond to the threat of climate change.

2.3.4.2.5. Ad V.D.f) Conducting appropriate surveys and studies and effective public participation

153 The Respondent states that the Court requires the States to carry out appropriate investigations and studies where complex environmental and economic policy issues exist (para. 119), and that it would be essential that decisions are based on best scientific knowledge (para. 120).

154 However, as stated in detail in the OF, the level of climate protection in Switzerland is *not based on scientific studies* (which FOEN confirmed after a request according to the FOIA) but on assumed majority opinions (see OF section 3.3.8). Already due to this failure, the Respondent violated the Applicant's Convention rights.[170]

155 Clearly, participation in a consultation procedure (the Respondent, para. 121) as well as transparency and openness of the legislative and decision-making process (the Respondent, para. 123) do not replace effective protection of the human rights of the Applicants.

2.4. Question 3: Has there been a violation of the right of access to an impartial tribunal within the meaning of Art. 6 ECHR?

156 The Applicants submitted in the Application (AS section 3.1) that there has been a violation of Art. 6 ECHR because the Respondent's courts failed to

[170] See e.g. Tătar (n 80), § 118.

adequately examine the merits of the Applicants' allegations. The Applicants fully uphold the statements made in the Application.

157 Access to court in the sense of Art. 6 ECHR (and access to a remedy in the sense of Art. 13 in combination with Arts. 2 and 8 ECHR) are crucial in climate cases. However, a finding by this Court that only Arts. 6 and/or 13 ECHR have been violated would mean losing crucial years in view of the *extreme urgency of the case* (see AS section 1.8). Each additional tonne of CO_2 emitted further increases the concentration of CO_2 in the atmosphere and worsens climate impacts, including the severity and frequency of heatwaves, in a practically irreversible manner. There is a *near-linear relationship between cumulative anthropogenic CO_2 emissions and the global warming they cause (OF section 2.4); there is an exponential increase in mortality with increasing temperatures (OF section 2.5 and 2.7).* In other words, access to court is crucial in climate-related cases, but the Applicants also draw the Court's attention to the urgency of climate action, as documented by the relevant scientific evidence. This urgency means that requiring another set of domestic proceedings compliant with the Applicants' procedural rights would be pejorative for the protection of the Applicants from the harms at stake.

158 Thus, the Applicants respectfully submit that the best way to protect them from the risk of harm posed by dangerous climate change would be for the Court to establish all of the Convention violations at issue. This would mean, on the one hand, declaring that the Respondent failed to protect, in substance, the Applicants' right to life and private life under Art. 2 and 8 ECHR (by failing to adopt the necessary legislative and administrative framework to do its share to prevent a global temperature increase of more than 1.5°C above pre-industrial levels), *and*, on the other hand, recognizing a violation of their rights under Arts. 6 and 13 ECHR.

2.4.1. Question 3.1: Is this provision applicable in the civil context?

2.4.1.1. Answer to the Court's question

159 The Applicants submitted in the Application (AS para. 42-44) that Art. 6 ECHR is applicable. The Applicants fully uphold the statements made in the Application and assert that Art. 6 ECHR is applicable in its civil limb.

2.4.1.2. Reply to the Respondent's arguments

160 The Respondent does not contest the 'civil' nature of the rights at stake – this went uncontested in the domestic proceedings as well (Application doc. 19 section 6.1 and 6.2) – but does contest that there is an 'arguable claim' under domestic law. It argues that the Federal Supreme Court held that Art. 10(1) of the Swiss Constitution and Arts. 2 and 8 ECHR were not affected with the necessary degree of intensity (para. 127).

161 According to the case law of the Court, the applicability of the civil limb of Art. 6 ECHR means that there must be a 'dispute' regarding a 'right' which can be said, at least on arguable grounds, to be recognised under domestic law.[171] The substantive right relied on by the applicant in the national courts must have a legal basis in the State concerned; the dispute in question must be genuine and serious and the outcome of the relevant proceedings must be directly decisive for that right.[172] Where there was a genuine and serious dispute about the existence of such a right at the outset of the proceedings, the fact that the domestic courts concluded that the right in question did not exist cannot retrospectively deprive an applicant's complaint of its arguability.[173]

162 Art. 10 of the Swiss Constitution and Arts. 2 and 8 ECHR[174] are subjective rights which have a legal basis in domestic law. These rights are, at least on arguable grounds, recognised under domestic law, as there was a dispute regarding the scope of these rights. The fact that the domestic courts denied the Applicants their rights – notably in an arbitrary manner (see AS, para. 45 and 47) – does not deprive the Applicant's complaint of its arguability.

163 Based on the reasoning of the Federal Administrative Court that the "requests of the Applicants" would not contribute to the "reduction of GHG emissions in Switzerland", the Respondent further contests the existence of a genuine and serious dispute and a decisive outcome for the rights in question (para. 128 f.).

164 The Applicants submit that they have laid down in detail, in the domestic proceedings before the Federal Administrative Court, why a decisive outcome

[171] *Denisov* (n 68), § 44; *Boulois v. Luxembourg* [GC], no. 37575/04, § 90.
[172] *Károly Nagy v. Hungary* [GC], no. 56665/09, §§ 60-61; *Roche v. the United Kingdom* [GC], no. 32555/96, § 119; *Boulois* (n 171), § 91.
[173] *Z and Others v. the United Kingdom* [GC], no. 29392/95, §§ 88-89.
[174] Cf. *Naït-Liman* (n 85), § 108.

for the rights in question exists (doc. 14 section 6.1.2.3 and doc. 16 section 2.4.4.3). However, the Federal Administrative Court did not go into the Applicants' statements on the link between the outcome of the proceedings and their rights as recognized under domestic law. Nor did it review the domestic law presented (the state's obligation to protect in terms of Art. 10 Swiss Constitution and Arts. 2 and 8 ECHR), which is relevant for assessing Art. 6 ECHR (see doc. 17 section 8.3 and 8.4). Instead, the Federal Administrative Court reviewed the "sufficiently close connection" required for the application of Art. 6 ECHR in light of the wrong parameters. In particular, it did not examine the connection between a *right* recognized under domestic law and the *outcome of the proceedings*, which is required by the case law on Art. 6 ECHR. Instead, the Federal Administrative Court considered the connection between the actions of the state in terms of the *Applicants' demands in the request* and the *reduction of greenhouse gas emissions following from them*. However, both of these points belong to the parameter "outcome of the proceedings", which for its part would have had to be contrasted with the domestic right invoked (see in detail doc. 18 section 2.6.2.1.a).

165 Before the Federal Supreme Court, the Applicants have laid down in detail the "outcome of the proceedings" that would be expected if their 2016 legal requests were approved (doc. 18 section 2.6.2.1.b). They contrasted this outcome of the proceedings with their rights recognized under domestic law (doc. 18 section 2.6.2.1.c) and demonstrated that the outcome of the proceedings is directly decisive for the rights in question (doc. 18 section 2.6.2.1.d). The Applicants fully refer to these statements and uphold these.

166 Regarding the Respondent's claim on causation and immediacy (para. 129), the Applicants point to section 2.3.2 and para. 95 ff. above. Also, in their request to the Respondent Government (see doc. 14 section 4.4) as well as in their appeals to the Federal Administrative Court (doc. 16 section 2.1.2) and the Federal Supreme Court (doc. 18 section 2.3.3), the Applicants always pointed to *concrete health risks from excessive GHG emissions* for them as members of a particularly vulnerable group that have also partly materialized amongst the Applicants. They did not merely complain about hypothetical consequences for the environment and human health.[175]

[175] Contrast *Ivan Atanasov v. Bulgaria*, no. 12853/03, § 92.

The reduction of GHG emissions is directly decisive for the right to life and right to private and family life invoked by the Applicants.

167 The Applicants fully uphold that the present dispute is genuine and serious, and the result of the proceedings is directly decisive for the rights in question (see AS para. 44).

168 Regarding the Respondent's allegations that there is no right of access to a court having jurisdiction to invalidate or override a law emanating from the legislative authority (para. 130), the Applicants submit that first, they have not sought access to an alternative court,[176] but sought the available domestic courts to adequately examine the merits of their allegations, and second, that they did not request the CO_2 Act to be invalidated or overridden in the domestic proceedings, but requested the Respondent Government to stop omissions in climate protection and to take all necessary actions within its competence to reduce GHG emissions to protect the Applicant's rights (cf. Application doc. 14).

169 The Respondent further claims that the subject of the dispute is a general interest in climate protection, and not the civil rights of the Applicants (para. 130). The Applicants submit that there is a dispute over Art. 10 of the Swiss Constitution as well as over Arts. 2 and 8 ECHR, and this is not altered by the fact that their individual rights and associated positive obligations may *additionally* lead to a general protection of societal interests (see AS para. 52 with references to the Court's case law).

2.4.2. Question 3.2: Did the Applicants have effective legal remedies at their disposal to assert their civil rights (see, for example, Naït- Liman v. Switzerland [GC], no. 51357/07, para. 113, 15 March 2018)?

2.4.2.1. Answer to the Court's question

170 The Applicants submitted in the Application (AS para. 45-48) that they did not have an effective legal remedy at their disposal to assert their civil rights. The Applicants fully uphold the statements made in the Application.

[176] Cf. *Posti and Rahko v. Finland*, no. 27824/95, § 52, where the applicants complained that they had no access to a tribunal within the meaning of Article 6 § 1 of the Convention in order to challenge the fishing restriction imposed by governmental decree.

2.4.2.2. Reply to the Respondent's arguments

171 The Respondent alleges that the application under Art. 6 ECHR is a fourth instance complaint (para. 138), that the requirements entailed in Art. 25*a* APA serve to ensure the proper administration of justice and prevent applications that constitute an *actio popularis* (para. 140-143), and that there is still some time to prevent global warming and to achieve the Applicant's objectives by political means (para. 144). The Respondent argues that since the judgements of the Federal Administrative Court and Federal Supreme Court are neither arbitrary nor manifestly unreasonable, it is not up to the Court to challenge their conclusions (para. 145).

172 The Applicants do not contest the limitations to the right of access to the courts entailed in Art. 25*a* APA itself. But their application under Art. 6 does not fall under the general ban on 'fourth instance' complaints. The domestic courts applied the standing requirements *arbitrarily*,[177] impairing the essence of the Applicants' rights[178] under Art. 10 of the Swiss Constitution and Arts. 2 and 8 ECHR. The Applicants also submit that they applied these requirements disproportionately given their duty to consider the nature of the rights at stake, as laid down in detail in the Application (AS para. 45-47).

173 To reiterate, the Federal Administrative Court and the Federal Supreme Court both *arbitrarily* came to the conclusion that the Applicants' appeals constitute an *actio popularis,* each with a different, likewise arbitrary argument. The assessment of the FAC that the Applicants were not "particularly" affected by the impacts of climate change (Application doc. 17 section 7.4.2 and 7.4.2) is in clear contrast with best available scientific evidence and the medical certificates submitted by the Applicants (see Application doc. 16, section 2.1.2). Equally contrary to any scientific evidence was the finding by the Federal Supreme Court that there was still time to wait to combat dangerous climate change. On this basis, the Federal Supreme Court found that the Applicants would not be affected in their rights with sufficient intensity, and accordingly it held that their claims aimed at an abstract examination of the domestic climate measures (Application doc. 19 section 5.5). As laid down again in the OF, there is no time left over to take the necessary measures if global warming is to be limited to 1.5°C (OF section 3.3.9).

[177] See e.g. *García Ruiz v. Spain* [GC], no. 30544/96, §§ 28-29; *Naït- Liman* (n 85), § 116.
[178] See e.g. *Ashingdane v. United Kingdom,* no. 8225/78, § 57; *Naït- Liman* (n 85), § 114.

174 Undoubtedly, the protection of individual human rights is a matter for the courts. The Convention is designed to protect the rights of all individuals, including vulnerable persons and groups. The individual human rights of the members of a vulnerable group, or vulnerable individual applicants, can hardly be effectively protected by democratic means, given that democratic decisions are made by the majority principle (see also OF section 3.1).

175 The protection of individual human rights is also a matter for the Swiss courts (cf. the Respondent, para. 142). Art. 190 of the Swiss Constitution does not stand in the way of judicial review of Convention rights. In the so-called PKK-judgment,[179] the Federal Supreme Court resolved the problems posed by Swiss courts' lack of constitutional jurisdiction in a case where Convention rights were at issue. There, the Federal Supreme Court found that if there is a conflict between federal acts and a Convention right, it will apply the ECHR. Thus, regarding Convention rights, the Federal Supreme Court undertakes constitutional review, even though this is not foreseen by the Constitution.[180] Also, upon request by Appellants, the Federal Supreme Court has to review federal laws in view of their compatibility with the Swiss Constitution and can declare that federal law is unconstitutional.[181] Art. 190 of the Swiss Constitution, in other words, does not prevent the courts from examining the constitutionality of federal laws, but only enjoins them to apply such laws irrespective of their constitutionality.[182] It has been argued that, in the event of a finding of unconstitutionality, Parliament is eventually obliged to amend the federal law accordingly; certainly, in general, Parliament reacts to such declarations.[183] Furthermore, a *positive obligation to protect* can lead to an *enforceable* claim for protection if the necessary measures can be defined without concretization in a federal law.[184]

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[179] Swiss Federal Supreme Court, BGE 125 II 417 E.4.d.
[180] KELLER/WEBER, Folgen für den Grundrechtsschutz und verfassungsrechtliche Gültigkeit der "Selbstbestimmungsinitiative" [Consequences for the protection of fundamental rights and constitutional validity of the "Self-determination Initiative"], Aktuelle Juristische Praxis 8/2016, p. 1010.
[181] EPINEY, Art. 190 BV, in: WALDMANN/BELSER/EPINEY (eds.), Bundesverfassung, Basel 2015, Art. 190 N 35.
[182] BBl 2010 2188, Stärkung der präventiven Rechtskontrolle, Report of the Swiss Federal Council, 5 Mar. 2010, citing Swiss Federal Supreme Court BGE 128 II 249 E. 5.4, S. 263; BGE 123 V 310 E. 6b/bb, S. 322; BGE 123 II 11 E. 2; BGE 117 Ib 367 E. 2f, S. 373.
[183] EPINEY (n 181), Art. 190 N 36.
[184] WALDMANN, Art. 35 BV, in: WALDMANN/BELSER/EPINEY (eds.), Bundesverfassung, Basel 2015, Art. 35 N 50 with further references.

2.5. Question 4: Did the Applicants have an effective remedy at their disposal within the meaning of Art. 13 ECHR concerning the alleged violations of Arts. 2 and 8?

2.5.1. Answer to the Court's question

176 The Applicants submitted in the Application (AS section 3.3) that they did not have an effective remedy at their disposal within the meaning of Art. 13 ECHR concerning the alleged violations of Arts. 2 and 8 ECHR. The Applicants fully uphold the statements made in the Application.

2.5.2. Reply to the Respondent's arguments

177 The Respondent alleges that the Applicants challenge the CO_2 Act (para. 149).

178 The Applicants submit that this is not the case. Their 2016 request to the Respondent Government was a request to stop *omissions in climate protection* and to issue a ruling pursuant to Art. 25*a* APA (and Art. 6 para. 1 and 13 ECHR, see Application doc. 14, and AS section 1.6). The Applicants demanded that to put an end to the unlawful omissions (i.e. "real acts" in terms Art. 25*a* APA), the Respondent Government shall undertake effective and preventive actions to protect them from the effects of increasing temperatures, i.e. more frequent and stronger heatwaves. During the domestic proceedings, neither the Respondent Government nor the domestic courts contested that the omissions in climate protection can be considered as *real acts* in terms of Art. 25*a* APA (see Application doc. 15, section 1.1; doc. 17, section 6.2; doc. 19, section 4.2). All such acts of government or of the executive fall within the scope of Art. 13 ECHR.[185]

179 The Respondent further alleges that since Art. 6 ECHR is not applicable, Art. 13 ECHR is not applicable either (para. 150).

180 The Applicants submit that Art. 6 ECHR is applicable (see above, section 2.4.1). They submit further that if the Court were to declare that Art. 6 ECHR is not applicable, this would not render it unnecessary to examine Art. 13 ECHR, since Art. 6 ECHR is deemed to be a *lex specialis* vis-à-vis Art. 13 ECHR.[186]

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[185] *Al-Nashif v. Bulgaria*, no. 50963/99, § 137; *Wille v. Liechtenstein* [GC], no. 28396/95, §§ 76-78.
[186] European Court of Human Rights, Guide on Article 13, 30 Apr. 2021, § 140.

181 Contrary to the Respondent's claims (para. 152), the possibility to make an appeal is not in itself an effective remedy. As stated above, the Applicant's complaints were not examined in substance because the domestic courts applied the standing requirements in an arbitrary manner (see above, para. 173). Art. 13 ECHR guarantees the availability at national level of a remedy to enforce the *substance* of Convention rights in whatever form they might happen to be secured in the domestic legal order.[187] It requires the provision of a domestic remedy allowing the "competent national authority" both to deal with the substance of the relevant Convention complaint and to grant appropriate relief. The remedy must be "effective" in practice as well as in law.[188] And, importantly, such a remedy must be available as soon as there is an "arguable" complaint or grievance under the Convention.[189] An "arguable claim" can be based on, but does not require, a finding that the Convention has been violated.[190] In this case, given the nature of the complaints made under Arts. 2, 6 and 8 ECHR, the Applicants respectfully submit that there is such an "arguable complaint", and that the Respondent was accordingly under an obligation to ensure that the Applicants had access to an effective remedy.

182 The Respondent further points to the possibility of bringing liability proceedings against the Respondent and of seeking compensation for harm the Applicants have suffered (para. 153).

183 Hereto, it should be noted that the Court observed that the State's positive obligation to take appropriate measures to ensure the Applicant's right to respect for family life *risked becoming illusory* if the interested parties *only had at their disposal a compensatory remedy*, which could only lead to an *a posteriori award for monetary compensation.*[191]

184 In the present case, clearly, the Applicant's right to life and right to respect for private and family life risk becoming illusory if they (or indeed, their descendants) could only claim for *a posteriori* financial compensation for harm to their life and health they have suffered due to excessive GHG emissions, especially considering the irreversible nature climate change (see

[187] *Rotaru v. Romania* [GC], no. 28341/95, § 67.
[188] See *Wille* (n 185), § 75.
[189] *Rotaru* (n 187), § 67; *Mugemangango v. Belgium* [GC], no. 310/15, § 130.
[190] *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 118.
[191] *Macready v. the Czech Republic*, nos. 4824/06 and 15512/08, § 48.

AS para. 31). In state liability cases, courts may award only damage compensation, but not provide for elimination of an unlawful situation.[192]

185 Furthermore, Swiss doctrine points out that a person affected by a real act may indeed *even be required* to submit a request under Art. 25*a* APA in order to not be held responsible in a later state liability procedure for not complying with his or her duty to limit damages.[193]

186 In any effect, the Respondent did not show that the Applicants would have had any chance of success by pursuing that remedy in domestic courts.[194]

3. Conclusion

187 The adverse impacts of climate change are threatening the rights to life and health of the Applicants as members of a particularly vulnerable group. It is the Respondent's human rights obligation towards the Applicants to take urgent, meaningful and ambitious action to mitigate climate change, through preparing, commiting and implementing ambitious climate action plans to limit global warming to no more than 1.5°C.

188 Undoubtedly, the protection of individual human rights is a matter for the courts. The Convention is designed to protect the rights of all individuals, including vulnerable persons and groups. The individual human rights of the members of a vulnerable group, or vulnerable individual applicants, can hardly be effectively protected by democratic means, given that democratic decisions are made by the majority principle. Furthermore, the Applicants respectfully submit that the Convention cannot be undermined with reference to democracy.

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[192] KELLER/CIRIGLIANO (n 70), p. 844; *Di Sarno and Others* (n 69), § 87.
[193] KIENER/RÜTSCHE/KUHN (n 71), N 436.
[194] See *Di Sarno and Others* (n 69), § 87.

4. Requests to the Court

On the basis of the Application, the Observations on the Facts and the above considerations, the Applicants hereby respectfully request the Court to declare that:

(1) All of the Applicants are recognised as having victim status, and that each of their claims is admissible under Arts. 34 and 35 ECHR, respectively.

(2) The Respondent failed to protect the Applicants' rights to life and private life under Arts. 2 and 8 ECHR, by failing to adopt the necessary legislative and administrative framework to do its share to prevent a global temperature increase of more than 1.5°C above pre-industrial levels. This includes:

   a. ensuring a greenhouse gas emission level in 2030 that is net-negative as compared to the emissions in 1990;

   b. reducing domestic emissions by 61% below 1990 levels by 2030, and to net-zero by 2050, as the domestic component of *a.*;

   c. preventing and reducing any emissions occurring abroad that are directly or indirectly attributable to the Respondent, in line with the 1.5°C above pre-industrial levels limit;

   d. permanently removing greenhouse gas emissions from the atmosphere and storing them in safe, ecologically and socially sound greenhouse gas sinks*,* if, despite *a., b., c.*, any greenhouse gas emissions continue to occur within the control of the Respondent, or the concentration of greenhouse gases in the atmosphere is exceeding the level corresponding to the 1.5ºC above pre-industrial levels limit*.*

(3) The Applicants' right of access to court under Art. 6 ECHR, and their right to an effective remedy under Art. 13 in conjunction with Art. 2 and 8 ECHR, have been violated.

5. Procedural requests

Against the background of the Application, the OF and the above considerations, the Applicants hereby respectfully submit the following procedural requests to the Court:

(1) Request for an oral hearing on the admissibility and merits of the case, which we ask would include the delivery of a presentation through PowerPoint slides.

(2) Request that, in accordance with Rule 34.4(a) of the Rules of the Court, the President of the Chamber grants the Applicants leave to use the German language for its oral submissions.

(3) Request that experts nominated by both Parties and by the Court, should it wish to do so, be given the opportunity to provide oral submissions during the hearing on the admissibility and the merits of the case.

Zurich, 13 October 2021

Yours faithfully,

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