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Deputy Grand Chamber Registrar Søren Prebensen
Grand Chamber of the European Court of Human Rights
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Submission of written comments by third-party intervener in *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Application no. 53600/20)

Honourable Deputy Grand Chamber Registrar Prebensen,

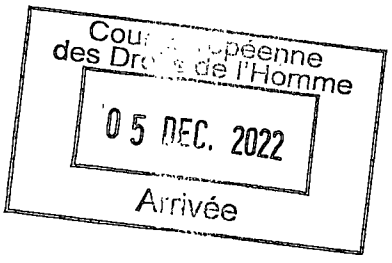
The Human Rights Centre of Ghent University hereby respectfully submits its written comments, by way of a third party intervention, in the case of *KlimaSeniorinnen Schweiz and Others v. Switzerland* (Application no. 53600/20), pursuant to leave granted on 24 October 2022, and in accordance with rule 44 §5 of the Rules of the Court. The address for correspondence is Human Rights Centre, Faculty of Law and Criminology, Ghent University, Universiteitstraat 4, 9000 Ghent, Belgium.

Yours sincerely,

Eva Brems	Marie-Bénédicte Dembour	Nele Schuldt	Anne-Katrin Speck
Senior Full Professor	*Senior Full Professor*	*PhD Researcher*	*PhD Researcher*

Verein KlimaSeniorinnen Schweiz and others v Switzerland

Application no. 53600/20



Third Party Intervention before the European Court of Human Rights

by the Human Rights Centre of Ghent University

TEAM

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UN Secretary General Guterres' statement that "[t]he climate crisis is the biggest threat to our survival as a species and is already threatening human rights around the world" sums up an "overwhelming consensus among experts"[1] that climate change directly and indirectly negatively affects human rights. Increasing temperatures, along with droughts, unstable weather, irregular rain and snowfall, melting glaciers, thawing permafrost, shrinking sea ice, increased ocean acidity and temperatures, and rising sea levels[2] have potentially dire impacts on, inter alia, the right to life and human health. These adverse impacts are projected to be particularly critical for the most vulnerable members of society.[3]

With this submission, we respectfully invite the Court to take the opportunity of this and other climate change-related applications to detail states parties' obligations under the ECHR with regard to the negative human rights impact of climate change. The ECHR is already playing a central role in climate litigation, as numerous national and supranational actors have referred to and applied the Court's case law regarding environmental harm in the climate change context. Those and other actors across Europe and the world are eagerly awaiting the Court's further guidance.

This contribution has three parts. The first section presents comparative materials to demonstrate the growing momentum amongst regional and domestic courts as well as UN treaty monitoring bodies for justiciable climate rights. Particularly at the European level, the emerging global trend is indicative of acknowledging that climate change threatens human rights. The second section focuses on the integration of this new topic into the Court's case law and reasoning. Finally, this contribution reflects on the central matter of evidence, emphasising, in particular, the importance of a fair distribution of the burden of proof and the relevance of the precautionary principle in the assessment of states' obligations vis-à-vis anthropogenic climate threats.

1. Emerging trend of climate change as a human rights challenge

1.1. Emerging trend in international law

The negative impact of climate change on human lives is increasingly recognised in international law as a human rights issue (1.1.1.). Judicial and quasi-judicial bodies have outlined states' human rights obligations in this regard (1.1.2.).

1.1.1. Recognising the human rights harm of climate change

Few supranational human rights bodies have been directly confronted with climate change-related human rights claims. Yet, when climate change issues have come before these bodies, they have been recognised as human rights issues.

UN Human Rights Treaty Bodies

In a *Joint Statement on "Human Rights and Climate Change"* in 2019, *five UN human rights treaty bodies* stated that 'climate change poses significant risks to the enjoyment of the human rights protected by the International Convention on the Elimination of all Forms of Discrimination Against Women, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Convention on the Rights of the Child, and the International Convention on the Rights of Persons with Disabilities.[4] They listed the right to life amongst those rights threatened by the adverse impacts of climate change, and emphasised that the risk of harm is particularly high for people in vulnerable situations, including women and persons with disabilities.

The *HRC's* 2020 Views in *Teitiota v New Zealand* concern the author's claim that the respondent state violated his right to life under the Covenant by removing him to Kiribati in September 2015. Whilst not finding in favour of the applicant, the HRC stated that "without robust national and international efforts, the effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant [...]. Furthermore, given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized."[5] The *Teitiota* decision

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[1] Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change, 'Understanding Human Rights and Climate Change', p. 13, <https://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf>, accessed 15 July 2021.

[2] European Commission, 'Climate Consequences', <https://ec.europa.eu/clima/change/consequences_en>, accessed 15 July 2021.

[3] See in particularly on elderly persons: Sarah Harper (2010), 'The Convergence of Population Ageing with Climate Change', 12 *Journal of Population Ageing* 401, 402-403.

[4] Committee on the Elimination of Discrimination Against Women, Committee on Economic, Social and Cultural Rights, Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, Committee on the Rights of the Child, Committee on the Rights of Persons with Disabilities, 'Joint Statement on "Human Rights and Climate Change"', 16 September 2019, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E>, accessed 18 August 2021.

[5] United Nations Human Rights Committee, *Ioane Teitiota* v *New Zealand*, 7 January 2020, CCPR/C/127/D/2728/2016, para. 9.11.

relies on the HRC's General Comment No. 36, which acknowledged that environmental degradation may fall within the scope of the right to life under Article 6 of the ICCPR.[6]

Building on *Teitiota*, the HRC went significantly further in the *Torres Straits Islanders Case*.[7] Eight Torres Strait Islander Peoples claimed Australia was wailing to adapt to climate change, thus leaving the islanders extremely vulnerable to, inter alia, food vulnerability and flooding. Crucially, the HRC acknowledged that the adverse impacts of climate change are already impacting the claimants' day-to-day lives, thus rejecting the notion that climate change is merely a future-looking scenario. The HRC found violations of the claimants' rights to family life and to culture, and awarded compensation. The minority further insisted that the Government had also violated the Islanders' right to life.

The implications of the HRC's Views in the *Torres Straits Islanders Case* are profound: first, the link between human rights law and climate change was made undeniably clear. Second, the HRC relied on other international documents to interpret the IPCC, and thus rejected Australia's submissions that the 2015 Paris Agreement and other international legal norms could not be taken into account. Third, it was a significant finding that states owe positive obligations towards climate-vulnerable people to prevent foreseeable climate-related harms, including damages to homes, family, private life and culture. Finally, the decision demonstrated that human rights law can be utilised to order compensation for those affected by high-emitting states.

Inter-American Court of Human Rights

In its 2017 *Advisory Opinion on the Environment*,[8] the Inter-American Court of Human Rights (Inter-American Court) affirmed "the existence of an undeniable relationship between the protection of the environment and the realization of other human rights, in that environmental degradation and the adverse effects of climate change affect the real enjoyment of human rights." (para. 47) The Court concluded that "rights that are particularly vulnerable to environmental impact include the rights to life, personal integrity, private life, health, water, food, housing, participation in cultural life, property, and the right to not be forcibly displaced (*references omitted*)." (para. 66)

In addition, the Inter-American Court emphasised the importance of access to justice in this field: "access to justice permits the individual to ensure that environmental standards are enforced and provides a means of redressing any human rights violations that may result from failure to comply with environmental standards, and includes remedies and reparation." (para. 233) This resonates with Principle 10 of the Rio Declaration 1992, stipulating that "access to judicial and administrative proceedings, including redress and remedy, shall be provided."[9] This is equally reiterated by Article 23 of the World Charter for Nature[10] and Article 8(3)(g) of the 2018 Escazú Agreement.[11]

1.1.2. Detailing states' human rights obligations

The above-mentioned *Joint Statement of UN treaty bodies* list states' obligations in this field: "[i]n order for States to comply with their human rights obligations, and to realise the objectives of the Paris Agreement, they must adopt and implement policies aimed at reducing emissions, which reflect the highest possible ambition, foster climate resilience and ensure that public and private investments are consistent with a pathway towards low carbon emissions and climate resilient development."[12] They further emphasise policies capable of contributing to "phasing out fossils [sic] fuels, promoting renewable energy and addressing emissions from the land sector, including by combating deforestation."[13] And they add, amongst others, that "(s)tates must regulate private actors, including by holding them accountable for harm they generate both domestically and extraterritorially."[14]

The *Inter-American Court* acknowledged in its Advisory Opinion that states' duties to 'respect' and 'ensure' the rights to life and personal integrity must be interpreted in the light of international environmental law (paras. 115-6). It drew on various principles of environmental international law, among those the duty to prevent environmental harm, the

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[6] *Ibid*, para. 9.4, citing United Nations Human Rights Committee, General Comment No. 36 of 3 September 2019, CCPR/C/GC/36, para. 62.
[7] UNHRC, Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 3624/2019, CCPR/C/135/D/3624/2019, 22 September 2022.
[8] Inter-American Court of Human Rights, *A Request for an Advisory Opinion from the Inter-American Court of Human Rights Concerning the Interpretation of Article 1(1), 4(1) and 5(1) of the American Convention on Human Rights* of 15 November 2017, OC-23/17 (2017 *Advisory* Opinion).
[9] UN Conference on Environment and Development: Rio Declaration on Environment and Development, A/CONF.151/26/Rev.I (Vol. I) (1992), Principle 10.
[10] UN General Assembly, *World Charter for Nature*, A/RES/37/7 (1982), Article 23.
[11] UN Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, 22 April 2021, No. 56654.
[12] See Joint Statement on Human Rights and Climate Change, *supra* note 4.
[13] *Ibid.*
[14] *Ibid.*

precautionary principle, and various procedural environmental rights. In light of the negative impacts of environmental damage, states owe both positive and negative obligations with regards to the rights to life and to personal integrity. A negative obligation, for example, flows from Article 1(1) ACHR, mandating states to "refrain from (i) any practice or activity that denies or restricts access, in equal conditions, to the requisites of a dignified life [...] and (iii) unlawfully polluting the environment in a way that has a negative impact on the conditions that permit a dignified life for the individual [...]'. (para. 117)

In addition, states owe a positive obligation to "take all appropriate steps to protect and preserve the rights to life and to integrity."(para. 118) This duty extends to states having to prevent third parties from interfering with individuals' human rights by taking "measures of legal, political, administrative and cultural nature [...]." (para. 118) Although it is acknowledged that states cannot and should not be held responsible for all potential human rights violations by third parties, they will be assessed on their compliance with their obligations based on the "particular circumstances of the case" and whether the state displayed a "failure to regulate, supervise or monitor the activities of those third parties that caused environmental damage." (para. 119) In detail, this entails the carrying out of environmental impact assessments (para. 170), the preparation of contingency plans to minimise risks of environmental disasters (para. 171), and efforts to mitigate any significant harm to the environment, according to the best available science (para. 172). To sum up, states must "demonstrate that every effort has been made to use all resources at [their] disposal in an effort to satisfy, as a matter of priority, those minimum obligations (para. 121)."

Similarly, the *Committee on the Elimination of Discrimination Against Women* mentioned in its Concluding Observations on Tuvalu the importance for states to develop "disaster management and mitigation plans".[15] Other human rights treaty bodies, including the *CESCR*[16] and the *CRC*[17] have adopted Concluding Observations in which emphasis was placed on the adoption of "legislation on climate protection giving effect to the 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change"[18], as well as states' human rights obligations in the context of climate change, specifically domestic emissions and the export of fossil fuels. In its Concluding Observations on the initial report of Cabo Verde, the *Human Rights Committee* mentioned the importance of meaningful and informed participation of all members of society: "The development of all projects that affect sustainable development and resilience to climate change should include the meaningful and informed participation of all populations."[19]

1.2. Emerging trend in the jurisprudence of states parties to the Convention

Domestic courts, too, are increasingly recognising the links between climate change and human rights. This can be observed in recent rulings from domestic courts in several states parties to the Convention, as well as in rulings from states outside of Europe, especially in the Global South.[20] Indeed, these past few years have seen a surge in complaints concerning climate change introduced before national courts. As of May 2022, around 2,000 climate change cases were pending or had been concluded before courts in 44 national jurisdictions and before 15 regional and international bodies.[21] The UN Environment Program similarly identifies a clear trend of litigation relying increasingly on human rights enshrined in international instruments and national constitutions to compel climate action.[22] Indeed, several pending cases make explicit reference to the rights enshrined in the European Convention, notably Articles 2, 8 and 14 ECHR.

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[15] CEDAW, *Concluding Observations on Tuvalu*, C/TUV/CO/2, 7 August 2009, para. 56; See also CEDAW's General Recommendation No. 37 on Gender-related dimensions of disaster risk reduction in the context of climate change, CCPR/C/GC/36, paras. 73, 78(a))

[16] *See,* for example, Concluding observations of the Committee on Economic, Social and Cultural Rights: Ukraine, E/C.12/UKR/CO/5, 4 January 2008; Concluding observations of the Committee on Economic, Social And Cultural Rights: Australia, E/C. 12/AUS/CO/4, 12 June 2009, para. 27; Concluding observations of the Committee on Economic, Social and Cultural Rights: Cambodia, E/C. 12/KHM/CO/1, 12 June 2009, para. 7.

[17] See, for example, CRC's Concluding Observations: Grenada, CRC/C/GRDCO/2, 22 June 2010, CRC's Concluding Observations: Japan (2010). Between 2008-2019, 23% of all States that underwent reviews by the CRC received recommendations on the topic of climate change; See Center for International Environmental Law' analysis on the CRC's recommendations, CIEL, 'States' Human Rights Obligations in the Context of Climate Change: CRC (2020 Update), p. 3 <https://www.ciel.org/wp-content/uploads/2020/03/CRC.pdf>, accessed 26 August 2021.

[18] Concluding observations of the Committee on Economic, Social and Cultural Rights: Ukraine, supra note 16, para. 4.

[19] UN Human Rights Committee, Concluding Observations: Cabo Verde, C/CPV/CO/1/Add.1. 3 December 2019, para. 18.

[20] For an overview of both decided and pending cases brought against governments, invoking human rights in the context of climate action, see <http://climatecasechart.com/climate-change-litigation/non-us-case-category/human-rights/>, accessed 11 September 2021.

[21] Setzer J., and Higham C., 'Global Trends in Climate Change Litigation: 2022 Snapshot' (2022) London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, p. 2.

[22] United Nations Environment Program (UNEP), Global Climate Litigation Report: 2020 Status Review, p. 13, <https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y>, accessed 8 September 2021.

1.2.1. Recognising the human rights harm of climate change

Domestic courts have recognised that a failure to adequately respond to the climate emergency would raise issues under states' human rights obligations, derived from national constitutions and international human rights treaties.

In February 2020, a group of young people challenged Germany's Federal Climate Protection Act (*Bundesklima-schutzgesetz*) before the Federal Constitutional Court (FCC) [23], arguing that, by prescribing insufficient greenhouse gas emission reduction targets, it violated their human rights enshrined in the Basic Law (GG, the country's constitution). In its March 2021 ruling, the FCC recognised both the effects of climate change and the impact of restrictions required to mitigate climate change as raising fundamental rights issues. It accepted, *inter alia*, that "[t]he protection of life and physical integrity under Art. 2(2) first sentence GG extends to protection against impairments caused by environmental pollution [and] includes protection against risks to human life and health caused by climate change" (para. 99). Besides, "a violation of the legislator's duty to protect property arising from Art. 14(1) GG is also a possibility"(ibid). The FCC added that "the fundamental freedoms of the complainants might have been violated on the grounds that the Federal Climate Change Act offloads significant portions of the greenhouse gas reduction burdens required under Art. 20a GG [which protects the natural foundations of life] onto the post-2030 period. Further mitigation efforts might then be necessary at extremely short notice, placing the complainants under enormous (additional) strain and comprehensively jeopardising their freedom protected by fundamental rights" (para. 117).

Leading climate cases in the Netherlands and Belgium moreover found states' human rights obligations directly in the ECHR. In the Dutch *Urgenda* case[24] (para. 2.3.2), as well as in the Belgian *Klimaatzaak* case[25] (C.1.2), violations were found of the state's positive obligations under Articles 2 and 8 ECHR.

1.2.2. Finding a causal link between a state's failure to reduce its emissions and human rights

Confronted with legal climate action, governments have sought to argue that, because climate change is caused by emissions across the globe, the impact of their own climate mitigation and adaptation policies was bound to be negligible, especially where other states failed to reduce their emissions. Governments have suggested that it should be for the claimants to establish causation between the alleged human rights violations and the impugned (lack of) measures by the state. This defence was rejected by courts in the Netherlands, Germany and Belgium, which have instead insisted that state responsibility should be established not on the basis of causality, but by means of the principles of attribution. This means that individual states are responsible, *pro rata*, for their own contribution to climate change, and that they must assume their share of the collective responsibility of all states to reduce global greenhouse gas emissions.

Thus, in the above-cited *Urgenda* judgment, the *Dutch Supreme Court* rejected "the assertion that a country's own share in global greenhouse gas emissions is very small (...)" (para. 5.7.7.) as a defence for inadequate climate action. It determined that "a country cannot escape its own share of the responsibility to take measures by arguing that compared to the rest of the world, its own emissions are relatively limited in scope and that a further reduction of its own emissions would have very little impact on a global scale. The State is therefore obliged to reduce greenhouse gas emissions from its territory in proportion to its share of the responsibility."[26] Similarly, the *German Constitutional Court* recognised Germany's responsibility, noting that the country was currently responsible for nearly 2% of annual global emissions.[27] In Belgium, the *Brussels Court of First Instance* ruled that "[t]he global dimension of the problem of dangerous climate heating does not absolve the Belgian authorities from their obligations deriving from articles 2 and 8 ECHR." (C.1.2)

The Court is invited to have due regard to domestic courts' rejection of challenges to climate change litigation based on alleged difficulties establishing a link between a country's emissions, its failure to adopt or implement adequate

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[23] BVerfG, Order of the First Senate of 24 March 2021 - 1 BvR 2656/18.

[24] Supreme Court of the Netherlands, 20 December 2019, *Urgenda v the Netherlands*

[25] Tribunal de première instance francophone de Bruxelles, Section Civile, 4ème chambre affaires civiles, Jugement N° 167, 17 July 2021

[26] *Urgenda* v the Netherlands, o.c., summary of the decision.

[27] The FCC noted: "It is true that climate change is a genuinely global phenomenon and could obviously not be stopped by the German state on its own. However, this does not render it impossible or superfluous for Germany to make its own contribution towards protecting the climate." BVerfG, Order of the First Senate, o.c., para 99. In comparison, Switzerland accounts for roughly 0.11% of the global population, see UN Department for Economic and Social Affairs (Population Division), *World Population Prospects 2019*, File POP/1-1: Total population (both sexes combined) by region, subregion and country, annually for 1950-2100 (thousands), <https://population.un.org/wpp/Download/Files/1_Indicators%20(Standard)/EXCEL_FILES/1_Population/WPP2019_POP_F01_1_TOTAL_POPULATION_BOTH_SEXES.xlsx>, accessed 9 September 2021. The country accounts for approximately 0.11% of global CO2 emissions, see <https://www.worldometers.info/co2-emissions/switzerland-co2-emissions/> (using data from the Emissions Database for Global Atmospheric Research (EDGAR)).

mitigation measures, and the resulting (human rights) impacts. It is further invited to reaffirm this consistent line of argument by domestic courts, according to which a state cannot escape responsibility for human rights violations due to insufficient efforts to curb emissions by reference to other states' failures to comply with their obligations.

1.2.3. Countering the 'cross-temporal challenge'[28]

Under the ECtHR's consistent case law, positive obligations to take reasonable and appropriate measures to protect individuals arise under Articles 2 and 8 ECHR where a state "knew or ought to have known" that there exists a "real and immediate risk"[29] (para. 101) to their lives or to their right to respect for private and family life. In proceedings before national courts, disagreements have ensued over the notion of 'imminence' in the context of climate change, given that the most devastating consequences of climate change will only materialise over time. The national courts have taken these particularities into account, finding that uncertainties as to when the invoked risk will materialise are not a barrier to states' positive obligations being engaged.

Thus, the *Supreme Court of the Netherlands* held that "[t]he 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." (para. 5.2.3.) In line with the precautionary principle, it concluded that "[t]he fact that this risk [of the possible sharp rise in the sea level] 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 [...] that Articles 2 and 8 ECHR offer no protection from this threat. [...] The mere existence of a sufficiently genuine possibility that this risk will materialise means that suitable measures must be taken."(para. 5.6.2.)

The *German FCC*, too, has embraced the precautionary principle. Its focus was on the human rights implications of considerable emission reduction burdens beyond 2030 that will arise if the transition towards climate neutrality is not initiated in good time. Uncertainties as to the exact impact of delayed climate action on people's future enjoyment of their fundamental rights were not accepted as justification for offloading emission reduction burdens onto the future. Pronouncing itself on the complainants' standing, and having regard to the "largely irreversible impact of CO2 emissions on the Earth's temperature" (para. 117), the FCC accepted that "the complainants are presently, individually and directly affected in their fundamental freedoms [...]" (para. 129), and held that:

> The described risk of future restrictions on freedom gives rise to fundamental rights being presently affected because this risk is built into the current legislation. (...) Since future impairments of fundamental rights could potentially be set into irreversible motion today, and given that lodging a constitutional complaint to address the ensuing restrictions on freedom might be futile by the time the impairments have arisen, the complainants already have standing to lodge a constitutional complaint at the present time. (para. 130)

1.2.4. Detailing states' human rights obligations

National courts addressing climate change claims have moreover ruled on the nature and extent of states' obligations regarding climate change mitigation.

On 31 July 2020, the *Supreme Court of Ireland*[30] struck down the government's National Mitigation Plan, the central element of the Irish government's climate mitigation policy. The court found the Plan lacked specificity as to how the "transition to a low carbon, climate resilient and environmentally sustainable economy by the end of the year 2050"[31] (Section 3(1)) was to be achieved, in contravention of Ireland's 2015 Climate Act. The court explained that "a compliant plan must be sufficiently specific as to policy over the whole period to 2050." (para. 9.2) The *German FCC* similarly held that there was a constitutional requirement to achieve climate neutrality (para. 255), and ordered the legislature to update the legal reduction targets for periods from 2031 by the end of 2022 (op. para. 4). The Dutch courts were even more prescriptive. The *District Court of The Hague* declared the Dutch emission target—a 20% reduction of greenhouse gas emissions as compared to 1990 levels, which is equivalent to the Swiss target—unlawful as incompatible with the state's duty of care. It further stipulated that the Dutch state was to reduce its greenhouse gas emissions by at least 25% below 1990 levels by 2020. The *Supreme Court* upheld this ruling in its landmark judgment of 20 December 2019, which made explicit reference to the state's direct obligations under Articles 2 and 8 ECHR. Courts in other contracting parties, too, have struck down inadequate climate legislation and ordered the legislature to further curb emissions. In France, the *Conseil d'Etat* upheld the complaint of the city of Grande-Synthe and environmental NGOs who challenged

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[28] Yoshida, K., and Setzer, J., 'The Trends and Challenges of Climate Change Litigation and Human Rights', 2 European Human Rights Law Review, (2020), pp. 161-173.

[29] *Öneryıldız v Turkey*, App no. 48939/99, 30 November 2004.

[30] *Friends of the Irish Environment CLG v The Government of Ireland, Ireland and the Attorney General* [2020] IESC 49.

[31] Republic of Ireland, *Climate Action and Low Carbon Development Act 2015*, Number 46 of 2015.

the state over insufficient climate action. Imposing a deadline of 3 March 2022, it ordered the Prime Minister to take all necessary measures to curb the curve of greenhouse gas emissions to ensure its compatibility with the greenhouse gas emission reduction targets set out in the relevant EU regulation (operative para. 2).[32]

1.2.5. Reading human rights in light of the Paris Agreement

Meanwhile, domestic courts have interpreted their human rights obligations to counter climate change in the light of climate science and corresponding duties assumed under international climate change treaties, in particular the Paris Agreement. Recognising that states parties to the latter have committed themselves to limit the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels, they have derived the emissions reduction targets from their duties assumed under this treaty.

In this connection, the *Dutch Supreme Court* referred to "a high degree of international consensus on the urgent need for Annex I countries [i.e. countries listed in Annex I to the Paris Agreement, including Switzerland] to reduce greenhouse emissions by at least 25-40% by 2020 compared to 1990 levels, in order to achieve at least the two-degree target [...]". Regarding this consensus as "common ground within the meaning of the ECHR case law [...], which [...] must be taken into account when interpreting and applying the ECHR", the Supreme Court concluded that Articles 2 and 8 ECHR oblige the state to reduce its emissions by at least 25% by 2020, a target that "can be regarded as an absolute minimum" (para. 7.5.1). In Germany, the Paris Agreement forms the basis of the Climate Change Act, which was challenged in the above-mentioned proceedings before the *FCC*. The FCC recognised an "obligation under Art. 20a GG [Basic Law] to take climate action, which the legislator has specified by formulating the target – now the relevant standard under constitutional law – of limiting global warming to well below 2°C and preferably to 1.5°C above pre-industrial levels." (para. 122)

Against the backdrop of this clear trend towards interpreting states' due diligence obligations in the light of international climate change agreements, the interveners respectfully submit that it would be in line with an integrated reading of international law if those agreements should inform the Court's interpretation of the Convention. This would require in particular reading the state's mitigation obligations under the ECHR in light of the temperature target prescribed by the Paris Agreement. In the interveners' view, any interference with Convention rights resulting from global warming exceeding this target cannot, therefore, be 'necessary in a democratic society'.

1.3. Summing up: a growing recognition of climate change as a human rights issue

Climate change is an extremely serious threat to the human rights of all individuals. As the human rights risks associated with climate change can, to an important degree, still be prevented, and as it is well known what types of measures governments can and must take to this effect, there is little doubt that governments failing to take sufficient preventive measures can be held responsible for human rights violations. The ECtHR is not the first judicial body to assess such human rights obligations (not even the first to assess them under the ECHR); it can benefit from the experience of other bodies, and consider how they have approached key issues. The two central learnings are that the recognition of climate change impact as a threat to, amongst others, the right to life and the right to the enjoyment of private and family life, has spread across national and supranational jurisdictions; and that the detailing of states' human rights obligations in this field is similarly well underway. Should the ECtHR decide to go against this trend, this may result in halting it across jurisdictions. Should the ECtHR, however, decide to join the emerging trend in this field, we submit that it may wish to borrow inspiration from developments in national and international jurisdictions, regarding issues such as establishing causality and addressing the 'cross-temporal challenge'.

2. Embedding the human rights impact from climate change in the ECtHR case law

The Court's extensive environmental case law (2.1), in conjunction with its case law on vulnerability (2.2), forms a solid foundation for adjudicating climate change cases.

2.1. A natural extension of the Court's environmental case law

As mentioned above, numerous domestic complaints in climate cases are framed in terms of Convention rights, and several domestic courts have found violations of Convention rights on account of state failure to take sufficient action to mitigate the human rights impact of climate change. Indeed, given that the Court has found Article 8 violations for a

[32] Conseil d'Etat (Section du contentieux, 6ème et 5ème chambres réunies), Commune de Grande-Sythe et autre, No 427301, 1 July 2021 (our translation).

number of environmental harm cases, as well as procedural Article 2 violations with respect to environmental disasters, outlining states' obligations under Articles 8 and 2 regarding climate change mitigation would be a logical next step.

There is a powerful *a fortiori* argument to be made in this regard: the Court's recognition of the potentially adverse impact on human rights of environmental disasters and degradation—of both anthropogenic and natural causes—should, *a priori*, be expanded to climate change because climate change represents a longer-lasting, more forceful and potentially graver harm than more isolated, local and situational environmental damages.

These ECtHR's of case law[33] has been referenced by national courts and other supranational human rights monitoring bodies. In its discussion on the infringement of the right to life and the right to respect for private life caused by climate change, the UN *Human Rights Committee* in *Teitiota* relied on case law concerning environmental damage of the ECtHR.[34] The *European Committee of Social Rights* (ECSR) also referred to the ECtHR case law (amongst other sources) to conclude that the right to the highest attainable standard of health included a right to a healthy environment (para. 196).[35] The ECSR moreover acknowledged that the right to the highest attainable standard of health pursuant to Article 11 of the European Social Charter serves in a complementary function to Articles 2, 3 and 8 ECHR (para. 51).[36]

Likewise, the *Inter-American Court* drew inspiration from the jurisprudence of the ECtHR to emphasise the link between environmental degradation and its potential of interfering with the well-being of an individual (para. 51). It further referred to documents from its own case law, the Organization of American States, the African Commission on Human and Peoples' Rights and expert reports from the United Nations Independent Expert on human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (*ibid*). A number of these sources[37] are equally pertinent to the European Convention system, given that the ECtHR has repeatedly affirmed that the Convention cannot be interpreted in a vacuum but should, as far as possible, be interpreted in harmony with other rules of international law of which it forms part.[38] Moreover, the Court has consistently reiterated that the Convention constitutes a "living instrument, which must be interpreted in the light of present-day conditions".[39] It is submitted that the increasingly dire effects of climate change are a prime example of the need to adjust the interpretation of the Convention to novel issues that have predominantly been experienced and scientifically ascertained in recent years.

The ECtHR has produced an impressive range of environmental case law, making visible the interconnectedness between human rights and a healthy environment. The Court is respectfully invited to also apply the Convention to the human rights risks associated with climate change. This is a mere acknowledgement of scientific facts documenting a threat to core Convention rights including the right to life and the right to respect for private and family life.

2.2. Vulnerability of elderly persons, and elderly women in particular

Similarly, the Court's vulnerability jurisprudence has shown a sensitivity towards the rights of the most marginalised, including the rights of elderly people. It would be in line with that case law for the Court to acknowledge the intersectional nature of the plight of vulnerable people in an increasingly hostile natural environment. While the human rights threat from climate change affects all individuals, some individuals are affected more seriously than others, on account of characteristics that render them particularly vulnerable to the effects of climate change. In the context of this intervention, it is relevant to highlight the particular vulnerability of elderly persons, and specifically elderly women.

On 6 September 2021, a global call from more than 200 medical journals urged states to limit global temperature increases, restore biodiversity and protect health. Specifically, they stated that "in the past 20 years, heat-related mortality among people aged over 65 has increased by more than 50%. Higher temperatures have brought increased

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[33] *López Ostra v Spain*, App no. 16798/90, 9 December 1994; *Budayeva and Others v Russia*, App nos. 15339/02 et al., 20 March 2008, *Öneryıldız v Turkey* [GC], App no. 48939/99, 30 November 2004; *M. Özel and Others v Turkey*, App nos. 14350/05 et al., 17 November 2015;

[34] See, for example, *Cordella and Others v Italy*, App no. 54414/13 et al., 24 January 2019, para. 157, *M. Özel and Others v Turkey*, o.c., paras. 170-1, 200, *Budayeva and Others v Russia*, o.c., paras. 128-130, 133 and 159; *Öneryıldız v Turkey*, o.c., paras. 71, 89-90, 118.

[35] European Committee of Social Rights, *Marangopoulos Foundation for Human Rights (MFHR) v Greece*, decision on the merits, Complaint No. 30/2005, 6 December 2006.

[36] European Committee of Social Rights, *International Federation for Human Rights (FIDH) v Greece*, decision on the merits, Complaint No. 72/2011, 23 January 2013.

[37] For example, the Views of UN treaty bodies, the Vienna Convention on the Law of Treaties, and case law from the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights are some of the most pertinent international sources that have equally been cited by the other two international human rights courts.

[38] *Al-Adsani v United Kingdom*, App no. 35763/97, 21 November 2001, para. 55.

[39] *Tyrer v United Kingdom*, App no. 5856/72, 25 April 1978, Series A no. 26, para. 31.

dehydration and renal function loss, (...) cardiovascular and pulmonary morbidity and mortality. Harms disproportionately affect the most vulnerable, including (...) older populations (...) (*footnotes omitted*)."[40]

The particular vulnerability of elderly persons to the health effects of climate change are documented in a range of scientific publications.[41] In its analytical study on the promotion and protection of the rights of older persons in the context of climate change,[42] the Office of the UN High Commissioner for Human Rights states that "age does not in itself make individuals more vulnerable to climate risks, but age is accompanied by a number of physical, political, economic and social factors that may do so" (para. 5). In particular,

> A number of climate change impacts disproportionately affect the lives and health of older persons, and policy responses have failed to account for these effects. Adults aged 65 and older are the most likely to die from heat exposure or during heatwaves, in extreme cold weather or winter storms, and in hurricanes and other natural hazards. Older persons experience higher rates of cardiovascular illness and diabetes, which are linked to heat-related morbidity and mortality. (para. 9)

In addition, air pollution, which is intimately linked to climate change, is a potential cause of dementia and has disproportionate health effects for older persons, who as a result experience "higher primary care and emergency room use, more frequent hospital admissions, restricted activity and an increase in prescription medication use". Climate change has also been linked to rising levels of a number of infectious diseases, which particularly impact older persons. (para. 10) Importantly, the UN study highlights the differential effects of climate change when it comes to gender. Among these are "disproportionate health risks [experienced by older women], including a greater likelihood of experiencing chronic diseases and air pollution harms, and (...) higher rates of mortality and other health complications from extreme heat events than any other demographic group."[43]

In its recent case law, the Court has operationalised the concept of vulnerability to determine the extent and the nature of state obligations under the Convention. The interveners submit that it is important for the Court to clarify its vulnerability reasoning in the context of preventive action against climate change impacts. In the first place, it is suggested that the Convention includes a procedural obligation for states to identify particularly vulnerable groups and to take their vulnerabilities duly into account in designing and implementing their policies.[44] In addition, it is suggested that the particular vulnerability of certain groups to very serious risks affects the nature and substance of the state's positive obligation.[45] It is submitted that preventive action toward a serious risk to health and life that affects the population as a whole does not comply with the Convention if the impact of those measures, while offering sufficient protection to a large part of the population, still leaves vulnerable groups exposed to an unacceptable risk. Finally, it is suggested, in line with the Court's case law, that the recognition of applicants' belonging to a particularly vulnerable group should lead to a narrow margin of appreciation for the state party.[46]

It is today widely recognised that international human rights law is not sufficiently responsive to the particular vulnerability to human rights violations of the elderly. The current case presents the Court with an opportunity to contribute to developing appropriate reasoning for strengthening the protection of the human rights of the elderly. under the Convention. In addition, by paying due attention to the particular vulnerability that arises at the intersection

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[40] Call for Emergency Action to Limit Global Temperature Increases, Restore Biodiversity, and Protect Health, New England Journal of Medicine and 199 other Journals, https://www.nejm.org/doi/full/10.1056/NEJMe2113200.

[41] See, among others, David Filiberto et al. (2008) 'Older People and Climate Change: Vulnerability and Health Effects', 33 *Generations* 19-25; Jonathon Taylor et al. (2015) 'Mapping the effects of urban heat island, housing, and age on excess heat-related mortality in London', 14 *Urban Climate* 517–528; Jason L Rhoades, James S Gruber, Bill Horton (2018) 'Developing an In-depth Understanding of Elderly Adult's Vulnerability to Climate Change', 58(3) *The Gerontologist* 567–577; Alvin Christopher et al. (2020) 'Future increase in elderly heat-related mortality of a rapidly growing Asian megacity', 10 *Scientific Reports* 9304.

[42] UN General Assembly A/HRC47/46, 30 April 2021, para. 35.

[43] *Ibid.*, para. 35.

[44] See *Chapman v United Kingdom* [GC], App no. 27238/95, 18 January 2001, para. 33.

[45] See Section 4.1 'Special positive obligations' in Lourdes Peroni & Alexandra Timmer (2013), 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law', 11(4) *I-CON* 1056–85.

[46] *Cînța v Romania*, App no. 3891/19, 18 February 2020, para. 41; *D.R. v Lithuania*, App no. 691/15, 26 June 2018, para. 88; *X v Russia*, App no. 3150/15, 20 February 2018, para. 32; *V.K. v Russia*, App no. 68059/13, 7 July 2017, para. 30; A-*M.V. v Finland*, App no. 53251/13, 23 March 2017, paras. 73 and 83; *Ruslan Makarov v Russia*, App no. 19129/13, 11 October 2016, para. 20; *A.N. v Lithuania*, App no. 17280/08, 31 May 2016, para. 125, *Novruk and Others v Russia*, App nos. 31039/11 et al., 15 March 2016, para. 100; *Guberina v Croatia*, App no. 23682/13, 22 March 2016, para. 73, *Mifobova v Russia*, App no. 5525/11, 5 February 2015, para. 54; *I.B. v Greece*, App no. 552/10, 3 October 2013, paras. 79-81; *Z.H. v Hungary*, App no. 28973/11, 8 November 2012, paras. 29 and 31, *Plesó v Hungary*, App no. 41242/08, 2 October 2012, para. 65; *Kiyutin v Russia*, App no. 2700/10, 10 March 2011, paras. 63-64, *Alajos Kiss v Hungary*, App no. 38832/06, 20 May 2010, para. 42.

of age and gender, the Court can contribute to the important work that several supranational human rights bodies are currently undertaking in terms of integrating insights on intersectionality in human rights law.[47]

3. Evidence as a key issue

Finally, the intervenors emphasise the advancement in science which has attributed higher morbidity rates to anthropogenic climate change (3.1). In assessing the evidence, a fair distribution of the burden of proof plays a pivotal role in acknowledging evidentiary difficulties in environmental cases (3.2). Additionally, in light of prevailing scientific uncertainty, a sensible approach to the standard of proof might require the use of the precautionary principle (3.3)

3.1. Causality, scientific uncertainty and attribution science

Prime among the evidentiary challenges that characterise rights-based climate change litigation is establishing a causal chain from inadequate government action to reduce greenhouse gas emissions, to climate change impacts such as extreme weather phenomena, to corresponding harm to individuals amounting to human rights violations. Proving causality is rendered difficult by some prevailing scientific uncertainty, the scope of which should, however, not be overestimated. Indeed, great strides have been made in attribution science in demonstrating ever more precisely the causal relationships between greenhouse gas emissions and climate-related events.[48] In a 2021 study, for example, a team of renowned researchers from Oxford and Washington were able to establish that 85% of warming in the Andes region of Peru was caused by human activity, leading to a glacial retreat which, in turn, gave rise to a risk of flooding. This study was critical before the *Higher Regional Court in Hamm*, Germany, to move a case against a greenhouse gas-emitting energy company to the evidentiary stage.[49] A recent study from Switzerland,[50] for its part, explored the heat-related human health impacts arising from climate change. It found that, globally, 37% of heat-related deaths during warm seasons result from human-made climate change; in Switzerland, the proportion of heat-related mortality attributed to anthropogenic climate change was 31%.[51] The Court is invited to take note of the available attribution science as a key source of evidence.

3.2. Fair distribution of the burden of proof

Although science has advanced significantly in terms of its potential to prove causality,[52] the outcome of climate change cases still hinges on the allocation of the burden of proof. The Court has recognised that in allocating the burden of proof, it will have regard to the disadvantageous position in which applicants may find themselves with regard to access to evidence.[53] The Court is respectfully invited to also recognise the specific evidentiary difficulties that applicants face in climate change cases. In principle, governments are better placed than individuals to commission relevant expert studies, and thus control much of the domestic production of evidence. Against this backdrop, it is submitted that the burden of proof should not rest solely on the applicants; where governments argue that their environmental policies are sufficient to protect individuals against the adverse effects of climate change, they should be required to substantiate these assertions.[54] Besides having regard to the evidence submitted by the parties, the Court is invited to give due weight to the abundance of scientific evidence produced by reputable organisations, and to consider making use of its fact-finding tools, which may include the appointment of experts. This is in keeping with its long-standing practice of having regard to "all the material before it, whether originating from (...) the Parties or other sources, and if necessary obtain[ing] material *proprio motu*."[55]

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[47] See amongst others CEDAW, General recommendation No. 28 on the core obligations of states parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women. CEDAW, *Alyne da Silva Pimentel Texeira v. Brazil*, 25 July 2011, no 17/2008, para. 7.7; *Cécilia Kell v. Canada*, 28 February 2012, no 19/2008, para. 10.2; *R. P. B. v. The Philippines*, 21 February 2014, no 34/2011, para. 8.3; IACtHR, *Case of Gonzales Lluy Et Al. V. Ecuador*, Judgment of 1 September 2015, para. 290. Also, Shreya Atrey (2020), 'Beyond Universality: An Intersectional Justification of Human Rights', in Shreya Atrey & Peter Dunne (eds), *Intersectionality and Human Rights Law* (Oxford: Hart Publishing), pp. 17-38.

[48] Marjanac, S., and Patton, L., 'Extreme Weather Event Attribution Science and Climate Change Litigation: An Essential Step in the Causal Chain?', Journal of Energy & Natural Resources Law, 36.3 (2018), pp. 265–98 .

[49] Higher Regional Court of Hamm in North-Rhine Westphalia, *Luciano Lliuya v RWE AG*, 13 November 2017 (Admissibility Decision).

[50] Vicedo-Cabrera, A.M. *et al.*, 'The burden of heat-related mortality attributable to recent human-induced climate change' 11 (2021) *Nat. Clim. Chang.* pp. 429-500.

[51] *Ibid.*, Supplementary Table 4.

[52] Stuart-Smith, R.F., Otto, F.E.L., Saad, A.I. *et al.* 'Filling the evidentiary gap in climate litigation' *Nat. Clim. Chang.* 11 (2021), pp. 651-5 .

[53] *Merabishvili v Georgia* [GC], App no. 72508/13, 2017, para. 311; *D.H. and Others v. the Czech Republic, (Application no. 57325/00)*, § 189.

[54] See *Urgenda* judgment, o.c., paras 7.4.1 et seqq., including 7.5.1, 7.5.2 and 7.5.3.

[55] *Ireland v United Kingdom*, 18 January 1978, App no. 5310/71, para. 160; see also *Nachova and others v Bulgaria,* 6 July 2005, *App nos 43577/98 and 43579/98*, para. 147.

3.3. The nexus between the beyond reasonable doubt standard and the precautionary principle

Having regard to growing scientific evidence on the harmful impacts of climate change, combined with a fair distribution of the burden of proof, as detailed above, will promote equality of arms between the parties and help ensure the proper administration of justice in climate change cases. To further the same goals, and given the inevitability of some degree of scientific uncertainty, the Court's approach to the standard of proof should be in line with the precautionary principle.

According to the UNFCCC, the precautionary principle stipulates that states "should take precautionary measures to anticipate, prevent, or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures [...]."[56] Similarly, Principle 15 of the Rio Declaration on Environment and Development calls for states to adopt a precautionary approach to environmental damage, especially in light of "threats of serious or irreversible damage",[57] despite the absence of full scientific certainty. The precautionary principle has been gradually consolidated in international environmental law, and, as expressed by the European Commission, "has become a full-fledged and general principle of international law."[58] Accordingly, when "there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the chosen level of protection... [t]he Commission affirms, in accordance with the case law of the Court[,] that requirements linked to the protection of public health should undoubtedly be given greater weight tha[n] economic considerations."[59] Evidently, the precautionary principle operates to lower the standard of proof for establishing serious risks even in the absence of full scientific proof.

Courts, too, have drawn on the precautionary principle in climate change cases. The *Inter-American Court* in its above-mentioned 2017 Advisory Opinion opined that the duty to uphold the rights to life and personal integrity requires the observance of due diligence obligations, one expression of which is for states to take precautionary measures to prevent serious or irreversible (environmental) harm (paras. 175-80). For its part, the *Dutch Supreme Court* in *Urgenda* explicitly derived the obligation to take precautionary measures from Articles 2 and 8 ECHR, in light of the 'real and immediate risk' posed by climate change (para. 5.6.2).

In sum, scientific evidence will inevitably carry with it a level of uncertainty, although climate researchers around the world have already been successful at plugging some of these knowledge gaps. Meanwhile, the immense and immediate threat of climate change requires drawing on the precautionary principle pursuant to which scientific uncertainty does not hinder adjudicatory bodies from finding the appropriate standard of proof to be satisfied.

4. Conclusion

The Court is faced with the momentous task of recognising the severity of the climate crisis and its incontrovertible impact on the enjoyment of Convention rights, particularly for the most vulnerable members of society. In doing so, the Court is invited to make use of the foundation it has built through its environmental case law, which, *a fortiori*, should be expanded to climate change cases. Several international human rights bodies and a growing number of courts in high contracting states are also sending a clear signal: climate change invariably impacts adversely on human rights, engaging state obligations. In addition, the interveners respectfully submit that the Court should recognise the specific vulnerability of elderly individuals—and the intersectional vulnerability of elderly women in particular—with regard to the human rights impact of climate change. In respect of evidence, the Court is invited to base its assessment on the best available science, including attribution studies and other peer-reviewed research. A fair distribution of the burden of proof should reflect that governments are better placed than applicants to produce evidence. The precautionary principle can further aid in setting the appropriate standard of proof. There has never existed a more pressing, and more widely impacting issue requiring the Court to interpret the Convention in the light of present-day conditions. In the words of Mireille Delmas-Marty: "the awakening could be very sudden if we wait for the dream to turn into a nightmare of direct confrontation between states and between human beings forced to live together, in ever greater numbers, on an ever less habitable planet."[60]

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[56] United Nations Framework Convention on Climate Change, FCCC/INFORMAL/84 (1992), Article 3.

[57] United Nations Conference on Environment and Development: Rio Declaration on Environment and Development, (1992), Principle 15.

[58] Communication from the Commission on the Precautionary Principle, COM/2000/0001 (2000).

[59] *Ibid.*

[60] Delmas-Marty M. (2019), *Sortir du pot au noir. L'humanisme juridique comme boussole*, Buchet/Chastel, Paris, p. 56.