BEFORE THE THIRD SECTION
EUROPEAN COURT ON HUMAN RIGHTS

Verein KlimaSeniorinnen Schweiz and Others v. Switzerland

Application no. 53600/20

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERNATIONAL COMMISSION OF JURISTS (ICJ) AND THE SWISS SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS (ICJ-CH)

INTERVENER

pursuant to the Registrar's notifications dated 20 July 2021 that the Court had granted permission under Rule 44 § 3 of the Rules of the European Court of Human Rights

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21 September 2021

INTRODUCTION

This joint third-party intervention is submitted by the International Commission of Jurists (ICJ) and the Swiss Section of the International Commission of Jurists (ICJ-CH) ("the interveners") pursuant to leave granted by the President of the Third Section of the European Court of Human Rights in letters dated 20 July 2021 and in accordance with Rule 44(1) of the Rules of the Court.

The present submission will deal with four principal matters, namely (1) the notion of direct and indirect victims (Art. 34 ECHR) and the victim status of associations and NGOs; (2) the right of access to court (Art. 6(1) ECHR), subsidiarily the right to an effective remedy (Art. 13 ECHR); (3) the substantive rights affected by climate change (Arts 2 and 8 ECHR), and (4) the positive obligations of States resulting from those substantive rights, in light of principles of international environmental law to be taken into account. We respectfully submit that this case provides an important opportunity for the Court to clarify its standards regarding these questions, and to ensure access to justice and the practical and effective protection of Convention rights as the impacts of climate change on the enjoyment of Convention rights intensify. This case also represents a key opportunity to set the course for future applications in climate-related cases.

1. Victim Status

a. Individual Applicants

In climate-related cases, individual applicants to the Court typically will face a significant procedural barrier regarding their 'victim status'.[1] This is because climate claims also pursue a public interest in environmental protection, and because they often at least partially concern the future, although the effects will be inevitable and irremediable absent immediate action.[2]

In the past, the Court has held that potential victims 'must produce reasonable and convincing evidence of the likelihood that a violation affecting them personally will occur; mere suspicion or conjecture is insufficient in this respect.'[3] When it comes to environmental damage, including climate change, applicants are at a particular disadvantage to prove that they are 'directly concerned by the situation and have a legitimate personal interest in seeing it brought to an end'[4] because it is difficult to distinguish their interests from general ones. While any environmental interest will be relevant to the wider public, members of which will also benefit from a timely and adequate response to environmental harm, this need not qualify a given case as an *actio popularis*, nor does it imply that the rights engaged are collective, rather than individual rights. In fact, congruence between public and individual interests is inherent to environmental human rights claims, to which category climate change cases belong.[5] In the past, the Court has allowed claims from applicants who were rendered more vulnerable to negative health impacts due to pollution, despite noting that environmental degradation *as such* does not raise an issue under the Convention absent impacts on individual rights.[6] Thus, in *Cordella v. Italy*, the Court rightly found that the pollution in question not only endangered the health of the 180 applicants in the case, but of the entire population living in the affected area, and it accepted that the applicants had

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[1] See, in this regard, R Pavoni, 'Public Interest Environmental Litigation and the European Court of Human Rights: No Love at First Sight', in *International Law for Common Goods*, F Lenzerini and AF Vrdolak (eds), (Hart Publishing 2014) 331, 334-337. The affectedness requirement has been discussed for example in *Monnat v. Switzerland*, Application no. 73604/01, Judgment of 21 September 2006, ECHR 2006-X, para 33; *Brumărescu v. Romania,* Application no. 28342/95, Judgment [GC] of 28 October 1999, Reports 1999-VII, para 50.

[2] On the projected impacts of anthropogenic climate change absent immediate emissions reductions measures, see United Nations Environment Programme (UNEP), *Emissions Gap Report 2020* (2020); International Panel on Climate Change (IPCC), 'Climate Change 2021: The Physical Science Basis' (2021), https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_Full_Report.pdf.

[3] *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, Application no. 47848/08, Judgment [GC] of 17 July 2014, Reports 2014, para. 101, citing among others *Monnat v. Switzerland*, *supra* n 1, paras. 31-32. On potential victimhood, see *Klass and Others v. Germany*, Application no. 5029/71, Judgment of 6 September 1978, Series A No. 28; *Soering v. the United Kingdom*, Application no. 14038/88, Judgment of 7 July 1989, Series A No. 161; *Dudgeon v. the United Kingdom*, Application no. 7525/76, Judgment of 22 October 1981, Series A, No. 45; *Roman Zakharov v.* Russia, no. 47143/06, Judgment [GC] of 4 December 2015, Reports 2015, paras. 173-178.

[4] *Vallianatos and Others v. Greece*, Application nos. 29381/09, 32684/09, Judgment [GC] of 7 November, Reports 2013 (extracts), para. 49.

[5] As implied by *Tătar v. Romania*, Application no. 67021/01, Judgment of 27 January 2009, para. 124, and *Di Sarno et Autres c. Italie*, Application no. 30765/08, Judgment of 10 January 2012 (French version, paragraph omitted from the English version of judgment), para. 81.

[6] *Cordella and Others v. Italy*, Application nos. 54414/13 and 54264/15, Judgment of 24 January 2019, paras. 100-109. See also *Fadeyeva v. Russia*, Application no. 55723/00, Judgment of 9 June 2005, ECHR 2005-IV, para. 88.

victim status despite the broader effects of the pollution in question.[7] This approach, it is submitted here, is necessary to render individual rights practical and effective in the context of climate change.[8]

On this basis, we respectfully invite the Court to use this opportunity to clarify its standards on potential victimhood in a manner that ensures that Convention rights can be effectively protected and the fact that rights of large number of victims may be engaged does not serve to nullify the right to effective remedies. The interveners note that the Court has used slightly different approaches to interpret when a certain situation had an adverse impact on the applicants. In *Cordella* and in the earlier *Di Sarno and Others v. Italy* case,[9] the Court did not require the applicants to demonstrate that they had suffered a health or other harm that could be proven to have been exclusively caused by environmental pollution, while in *Caron and Others v. France*,[10] the Court mentioned the need to prove a more direct effect detrimental to applicants based on the proximity of GMO crops. The present case provides the Court with an important opportunity to clarify its standards concerning potential, indirect and direct victims, in the particular context of the threat posed by climate change.

Lastly, we would like to draw the Court's attention to the fact that, in climate-related cases, the question of whether the applicants are sufficiently affected by policy failures regarding the mitigation of and adaptation to climate change requires an assessment of the documented risks and scientific evidence at stake. The issue of victim status is thus closely linked to the substance of the applicants' complaints, and we invite the Court to reflect this in its assessment.[11]

b. **Victim Status of Associations and NGOs before the Court**

The Court has historically been reluctant to hear cases filed by organisations rather than by individual applicants. However, environmental organisations are uniquely positioned to bring claims regarding climate change, as this type of litigation is particularly demanding in terms of the costs and scientific evidence involved. Recognizing the victim status of environmental associations is thus crucial for individuals seeking access to justice in environmental cases.

We note that the Court's past case-law has demonstrated a recognition of the potential value of such organizational representation. It has held that 'in modern-day societies recourse to collective bodies such as associations is one of the accessible means, sometimes the only means, available to the citizens whereby they can defend their particular interests effectively.'[12] In addition, 'the standing of associations to bring legal proceedings in defence of their members' interests is recognised by the legislation of most European countries'.[13] To cite the Court, '[a]ny other, excessively formalistic, conclusion would make protection of the rights guaranteed by the Convention ineffectual and illusory.'[14]

At the same time, the Court has applied variable standards when associations have lodged applications before it. Thus, it granted victim status to the applicant associations in the *Gorraiz Lizarraga, Collectif stop Melox* and *L'Erablière* cases, but took a different stance in *Sdružení Jihočeské Matky v. the Czech Republic* and *Bursa Barosu Başkanlığı and Others v. Turkey*.[15] In *Bursa Barosu Başkanlığı*, the Court

[7] *Cordella and Others v. Italy*, *supra* n 6, para. 172.
[8] *Öneryıldız v. Turkey*, Application no. 48939/99, Judgment [GC] of 30 November 2004, Reports 2004-XII, para. 69.
[9] *Di Sarno and Others v. Italy*, Application no. 30765/08, Judgment of 10 January 2012.
[10] *Caron and Others v. France*, Application no. 48629/08, Decision of 29 June 2010, para. 1.
[11] *Selahattin Demirtaş v. Turkey (No. 2),* Application no. 14305/17, Judgment [GC] of 22 December 2020, para. 240: *Regner v. the Czech Republic*, Application no. 35289/11, Judgment [GC] of 19 September 2017, Reports 2017, para. 98; *Siliadin v. France*, Application no. 73316/01, Judgment of 26 July 2005, Reports 2005-VII, para. 63; *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Judgment [GC] of 23 February 2012, Reports 2012, para. 111.
[12] *Beizaras and Levickas v. Lithuania*, Application no. 41288/15, Judgment of 14 January 2020, para. 81.
[13] *Ibid.*, citing *Gorraiz Lizarraga and Others v. Spain*, Application no. 62543/00, Judgment of 27 April 2004, Reports 2004-III, paras. 37-39, see also, *mutatis mutandis*, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, *supra* n 3, paras. 101, 103 and 112.
[14] *Beizaras and Levickas v. Lithuania*, Application no. 41288/15, Judgment of 14 January 2020, para. 81.
[15] *Gorraiz Lizarraga and Others v. Spain*, *supra* n 13; *Collectif national d'information et d'opposition à l'usine Melox – Collectif stop Melox et Mox v. France*, Application no. 75218/01, Judgment of 12 June 2007, and *L'Erablière A.S.B.L. v. Belgium*, Application no. 49230/07, Judgment of 24 February 2009, Reports 2009 (extracts), in contrast with *Bursa Barosu Başkanliği and Others v. Turkey*, Application no.

linked its own assessment of victim status under Art. 34 ECHR to the domestic rules on *locus standi*, and denied victim status to applicants who could not challenge an administrative act at the domestic level.[16] This seems to contradict the Court's power to autonomously evaluate victim status under Art. 34 ECHR.[17] The *Verein Klimaseniorinnen* case, where the Swiss Federal Supreme Court left the question of the applicant association's standing open,[18] represents an opportunity for the Court to resolve the tension resulting from the fact that applicants from some countries may bring cases to the Court through organisations where domestic law allows this, and others may not.[19]

Secondly, the interveners consider that the direct interests of an organisation may be at stake when it comes to the protection of Art. 6(1) ECHR. As the Court has confirmed in the past, an association that was party to a purportedly unfair domestic lawsuit *ipso facto* qualifies as a victim of an Article 6 violation, regardless of whether that lawsuit may be categorized as public interest litigation.[20]

There is therefore a strong need to clarify and tailor the Court's approach to the victim status of organisations in climate change cases. The challenge posed by climate change is a question that is only recently coming to the Court, and there is a strong need to clarify how victim status requirements respond to this new challenge in a way that allows for effective protection of Convention rights before the irreparable harms at stake have fully manifested. The Court has an opportunity here to set the course for how it will respond to climate cases in the future, and to ensure access to justice for applicants whether they bring their cases individually or whether they band together in associations. The Court's notion of victim status is up to this challenge: it is capable of evolution, and should not be applied with excessive formalism or rigidity.[21]

2. Article 6 ECHR and access to justice for climate change

As the Commissioner for Human Rights noted in her third-party intervention in the *Duarte Agostinho v. 33 Member States* case, the response to climate change raises important questions about individual access to justice.[22] Rejecting individual applicants in deference to the outcomes of potential future domestic political processes does not ensure adequate and effective protection of applicants' rights in this context, nor does it entail adequate consideration for the urgency of climate action, if serious human rights violations are to be avoided or at least minimized.[23] Declaring that climate policy is exclusively a political question – a concept that has up to now fortunately not been adopted by the Court - means entirely exempting it from human rights-based review. This concern is made more acute by the increasing recognition of the right to a healthy environment in many national constitutions.

In light of the principle of subsidiarity and the interest in upholding the Court's standards at the national level, access to court is also key for allowing individuals to claim their rights under Arts 2, 3, 8 and 10 and 11 in relation to climate change. Moreover, the Convention must be interpreted in accordance with the relevant norms and principles of international law[24] and access to justice is one such important principle in respect of international environmental law. It has been included in Principle 10 of the Rio Declaration on Environment and Development and further elaborated in Art. 9 of the Aarhus

25680/05, Judgment of 19 June 2018, paras. 22, 114-116 and *Sdružení Jihočeské Matky v. the Czech Republic,* Application no. 19101/03, Decision of 10 July 2006.

[16] See *Bursa Barosu Başkanliği and Others v. Turkey*, *supra* n 15, paras 22, 114-116.

[17] *Gorraiz Lizarraga and Others v. Spain*, *supra* n 13, para. 35, *Vallianatos and Others v. Greece*, *supra* n 4, para. 47.

[18] BGE 146 I 145, E. 1.

[19] *Kósa v. Hungary*, Application no. 53461/15, Decision of 21 November 2017, para. 56.

[20] *Gorraiz Lizarraga and Others v. Spain*, *supra* n 13, para. 36; *Collectif stop Melox et Mox v. France*, *supra* n 15, *passim*.

[21] *Monnat v. Switzerland*, *supra* n 1, paras. 30-33; *Gorraiz Lizarraga and Others v. Spain*, *supra* n 13, para. 38; *Stukus and Others v. Poland*, Application no. 12534/03, Judgment of 1 April 2008, para. 35; *Ziętal v. Poland*, Application no. 64972/01, Judgment of 12 May 2009, paras. 54-59.

[22] *Duarte Agostinho and Others v. Portugal and 32 other States*, third-party intervention by the Council of Europe Commissioner for Human Rights, para. 37.

[23] For a recent and authoritative analysis of the best available climate science, and an urgent call to action, see IPCC, *supra* n 2.

[24] *Al-Dulimi and Montana Management Inc. v. Switzerland*, Application no. 5809/08, Judgment of 21 June 2016, paras. 134-136; *Loizidou v. Turkey* (merits), 18 December 1996, § 43, *Reports* 1996-VI.

Convention.[25] The Court has built on the principles enshrined in the latter in its case law concerning Art. 8,[26] and we encourage the Court to consider these instruments also in its case law on Art. 6.

The present case provides the Court with an opportunity to adapt its extensive case law in environmental matters to climate change. More specifically, we see the need to adjust the Court's 'proximity element' regarding the application of Art. 6 (1). The Court's requirement of a 'direct link' between the right invoked and the disputed domestic proceedings should be reassessed in light of the particular nature of the threat posed by climate change.[27] Whereas in several earlier cases the link between the right invoked and the disputed domestic proceedings was considered 'too tenuous and remote' for Art. 6 to apply,[28] this jurisprudence subsequently evolved in *Taşkın and Others v. Turkey* and *Okyay and Others v. Turkey*.[29] The interveners encourage the Court to follow its approach in these two cases, where it held that extensive environmental risks and the proceedings concerning them can be considered an issue of civil rights for the purposes of Art. 6.[30] Significantly, this Court's posture in *Taşkın* helped support the Inter-American Court of Human Rights in its affirmation that access to justice is a key element of human rights in the environmental context as individuals 'must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process'.[31]

In order to adapt the Court's jurisprudence to environmental harm, the Court has construed the 'proximity element' expansively enough to cover situations of wide environmental impact. In *Okyay*, contrary to *Taşkın*, the applicants' homes were at a considerable distance from the source of pollution. However, in the former case, one of the studies included in the records of the domestic proceedings showed that the hazardous emissions in question might extend to the area where the applicants were living. The Court thus held that 'this brings into play their right to the protection of their physical integrity, despite the fact that the risk which they run is not as serious, specific and imminent as that run by those living in the immediate vicinity of the plants.'[32] While the Court has not entirely embraced this approach in *Sdružení Jihočeské Matky v. the Czech Republic (dec.)*, *Ivan Atanasov v. Bulgaria* and *Association Greenpeace France v. France (dec.)*,[33] finding that Art. 6 was not applicable in these cases, we encourage the Court to follow the *Okyay* approach with regard to climate change where the 'proximity element' should be considered to be *ipso facto* satisfied. We thus encourage the Court to seize this opportunity to adopt clear standards for applying Art. 6 in climate change cases, thereby setting a consistent course for the future and ensuring that domestic courts deal with such cases on the merits.

In addition, if the Court finds that Art. 6 is not applicable, Art. 13 ECHR under which individuals with an arguable case that their rights have been violated, have the right to an effective remedy at the national level, nevertheless remains engaged.[34] Such remedy must be effective, impartial and independent and be capable of reviewing and overturning the decision.[35] Judicial bodies should in principle be

[25] Rio Declaration on Environment and Development, Report of the United Nations Conference on Environment and Development, 14 June 1992, UN Doc A/CONF.151/26 (Vol. I); Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), 25 June 1998, U.N.T.S. 2161, 447. Switzerland has ratified the Aarhus Convention in 2014.
[26] Even where the respondent State was not a party to the Aarhus Convention: see *Taşkın and Others v. Turkey*, Application no. 46117/99, Judgment of 10 November 2004, Reports 2004-X, paras. 99 and 119; *Grimkovskaya v. Ukraine*, Application no. 38182/03, Judgment of 21 July 2011, para. 72.
[27] First introduced in *Balmer-Schafroth and Others v. Switzerland*, Application no. 22110/93, Judgment of 26 August 1997, Reports 1997-IV.
[28] *Balmer-Schafroth and Others v. Switzerland*, *supra* n 27; *Athanassoglou and Others v. Switzerland, Application* no. 27644/95, Judgment [GC] of 6 April 2000, Reports 2000-IV*; Gorraiz Lizarraga and Others v. Spain*, *supra* n 13.
[29] *Taşkın and Others v. Turkey*, *supra* n 26, para. 119; *Okyay and Others v. Turkey*, Application no. 36220/97, Judgment of 12 July 2005, Reports 2005-VI.
[30] *Ibid*., para. 133.
[31] IACtHR, Advisory Opinion OC-23/17 on the Right to a Healthy Environment, issued on 7 February 2018, citing *Taşkın and Others v. Turkey*, *supra* n 26, para. 119.
[32] *Okyay and Others v. Turkey*, *supra* n 29, para. 66.
[33] *Sdružení Jihočeské Matky v. the Czech Republic, supra* n 15; *Ivan Atanasov v. Bulgaria*, Application no. 12853/03, Judgment of 2 December 2010; *Association Greenpeace France v. France,* Application no. 55243/10, Decision of 13 December 2011.
[34] Art. 8 UDHR; Art. 2.3 ICCPR; Art. 8.2 CPED; Art. 13 ECHR; Art. 25 ACHR; Art. 25 *Protocol to the ACHPR on the Rights of Women in Africa*. See also Arts 2 and 3 of the UN Basic Principles and Guidelines on the right to a remedy and reparation.
[35] *Alzery v Sweden*, CCPR, Communication no. 1416/2005, Views of 10 November 2006, para. 11.8. In the same case, the Committee did not find a violation of Art. 13 ICCPR, therefore demonstrating the more extended guarantees provided to by the principle of *non-refoulement*. See also, *Zhakhongir Maksudov and Others v Kyrgyzstan*, CCPR, Communications nos. 1461-1462-1476-1477/2006, Views of 31 July 2008, para.

empowered to provide an effective remedy in all such cases, and in any event any remedy-granting body must fulfil the requirements set out above if it is to qualify as effective - i.e. the power to bring about cessation of the violation and appropriate reparation, including, where relevant, restitution – and of impartiality and independence.[36] The remedy must be prompt and effective in practice as well as in law, and must not be unjustifiably hindered by the acts of State authorities.[37]

The right to an effective remedy for violations of the Convention's rights applies also for violations ensuing from a lack of respect of obligations under international environmental law when these materialise in violations of human rights obligations, including positive ones.[38] Under international environmental instruments, Principle 10 of the Rio Declaration states: "Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

The Framework Principles on human rights and the environment of the UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment in its, which are reflective of existing human rights obligations in the environmental context, affirm that 'States should provide for access to effective remedies for violations of human rights and domestic laws relating to the environment' (Principle 10).[39] A mapping exercise conducted by the Rapporteur on universal and regional human rights sources showed the existence of certain procedural obligations in relation to environmental protection, including the duty of States to 'provide access to remedies for harm. These obligations have bases in civil and political rights, but they have been clarified and extended in the environmental context on the basis of the entire range of human rights at risk from environmental harm'[40].

As the Office of the UN High Commissioner for Human Rights has affirmed, 'States should be held accountable to rights holders for their contributions to climate change, including for failure to adequately regulate the emissions of businesses under their jurisdiction regardless of where such emissions or their harms actually occur.'[41]

A judicial or other independent remedy to appreciate a human rights violation linked to climate change, may be expected to rely at least in part on international expert standards, namely the IPCCC findings and the States' commitments undertaken under the Nationally Determined Contributions (NDCs) under the Paris Agreement, as this Court and other authorities do with water pollution or health and WHO standards.[42] Other relevant factors to assess the failure to uphold positive obligations can be the retrogressive effect of measures undertaken in respect to the goal to limit or reverse climate change[43] or

12.7; *Agiza v Sweden*, CAT, Communication no. 233/2003, Views of 24 May 2005, para. 13.7; *Shamayev and Others v Georgia and Russia*, ECtHR, no. 36378, Judgment of 12 April 2005, para. 460*; M.S.S. v Belgium and Greece*, ECtHR [GC], Application no. 30696/09, Judgment of 21 January 2011, para. 293; *C.G. and Others v Bulgaria*, ECtHR, Application no. 1365/07, Judgment of 24 April 2008, para. 56 (Right to a remedy where right to respect for family life under Art. 8 ECHR was in issue); *Čonka v Belgium*, ECtHR, Application no. 51564/99, Judgment of 5 February 2002, paras.77-85 (right to a remedy in case of alleged collective expulsion under Art. 4 Protocol 4 ECHR). For the Inter-American system, *inter alia*, *Ximenes-Lopes v Brazil*, IACtHR, Series C No. 149, Judgment of 4 July 2006, para. 175. A thorough analysis of the right to a remedy is to be found in, ICJ, *Practitioners' Guide No. 2*.

[36] See, ICJ, *Practitioners' Guide No.2*, *supra* n. 36, pp. 49-54; General Comment No. 4 on the implementation of article 3 of the Convention in the context of article 22, CAT, UN Doc. CAT/C/GC/4, 4 September 2018, para. 13.

[37] *Muminov v Russia*, ECtHR, Application no. 42502/06, Judgment of 11 December 2008, para. 100; *Isakov v Russia*, ECtHR, Application no. 14049/08, Judgment of 8 July 2010, para. 136; *Yuldashev v Russia*, ECtHR, Application no. 1248/09, Judgment of 8 July 2010, paras. 110-111; *Garayev v Azerbaijan*, ECtHR, Application no. 53688/08, Judgment of 10 June 2010, paras. 82 and 84.

[38] See, *Di Sarno and Others v Italy*, *supra* n. 9, para. 117. See also, paras 86 and 87.

[39] *Report of the UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc. A/HRC/37/59, 24 January 2018, p. 13.

[40] *Report of the UN Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc. A/HRC/25/53, 30 December 2013, para. 9.

[41] OHCHR, Factsheet no. 38, 2021, available at https://www.ohchr.org/Documents/Publications/FSheet38_FAQ_HR_CC_EN.pdf , p. 32.

[42] See, *Report of the UN Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc. A/HRC/25/53, 30 December 2013, para. 54, referring to *International Federation for Human Rights (FIDH) v. Greece*, No. 72/2011, 23 January 2013, paras. 42–44, 148 and, for example, *Dubetska and others v. Ukraine*, Application No. 30499/03, 10 May 2011, para. 107 (national standards); *Fägerskiöld v. Sweden*, Application No. 37664/04, 26 February 2008 (WHO standards).

[43] *Ibid.*, para. 55

the 'failure to adopt reasonable measures to mobilize available resources to prevent foreseeable human rights harms caused by climate change.'[44]

3. Climate change engages rights under Articles 2 and 8 ECHR

It is the settled jurisprudence of this Court that damage to the environment by either state or non-state actors may engage Convention rights, [45] including under Arts 2 and 8,[46] where it is foreseeable that it will cause harm to the life, health, or enjoyment of private or family life or of the home of people within the State's jurisdiction.[47]

The interveners submit that the scale, intensity and imminence of the environmental damage posed by human-induced climate change are such as to engage rights under Arts 2 and 8 ECHR, in the same way as other more localised forms of environmental harm. First, the extent of the actual and potential harm has been authoritatively established: most recently, amongst many other sources, the 2021 report of the International Panel on Climate Change (IPCC) found that multiple changes in the climate are taking place in direct relationship to global warming, including heatwaves, heavy precipitation, and droughts[48] with effects that are irreversible for centuries.[49] It projected that, with every increase in global warming, every region will experience further changes in climatic impact-drivers and extreme weather events.[50]

Second, climate change entails severe risks to lives, health and wellbeing on a global scale. Numerous international human rights bodies have attested to the severity of the actual and potential damaging impact of climate change on the enjoyment of human rights.[51] Specifically, it is clear that heatwaves, wildfires, flooding, storms and other extreme weather events, as well as indirect impacts on the environment caused by climate change, pose a threat to lives, health and wellbeing of people in all jurisdictions.[52] The OHCHR has found six effects on health, including on the right to life: heat-related deaths, air pollution, extreme weather events and natural disasters, expanding disease vectors, nutrition, mental health.[53] The WHO has estimated that, globally, 250,000 additional deaths will take place each year between 2030-2050 due to climate change.[54] The UN Human Rights Committee, the supervisory body for the International Covenant on Civil and Political Rights to which all ECHR Contracting Parties are also a Party, recognized, in *Ioane Teitiota v New Zealand*,[55] that 'environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.'[56] It founds that, consequently, the effects of climate change may expose individuals to violations of their right to life as well as their freedom from cruel, inhuman or degrading treatment.[57] There is also ample expert opinion to attest to

[44] OHCHR, Factsheet, *supra* n. 41, p. 32.
[45] *Tatar and Tatar v Romania*, Application no. 67021/01, Judgment of 5 July 2007, para. 87.
[46] It is also established that other Convention rights may be engaged by environmental harm, including under Art. 3 and Art. 1 of Protocol 1.
[47] On Art. 2, see for example, *Oneryildiz v Turkey*, *supra* n.8, *LCB v UK*, Application No.14/1997/798/1001, Judgment of 9 June 1998; on Art. 8, see for example *Hatton v UK*, [GC] Application No.36022/97, Judgment of 8 July 2003; *Lopez Ostra v Spain*, Application No.16798/90, Judgment of 9 December 1994., *Guerra v Italy*, Application No.14967/89, Judgment of 19 February 1998.
[48] IPCC, Climate Change 2021, *The Physical Science Basis, Summary for Policymakers*, *supra* n.2, paras.B.2.1 – B.2.2.
[49] *Ibid.*, para.B.5.1 – B.5.4.
[50] *Ibid.*, para.C.2.1 – c.2.7
[51] See for example, UN Human Rights Council, Resolution 47/19, July 2021. Preamble: "Recognizing that climate change poses an existential threat for some countries, and recognizing also that it has already had an adverse impact on the full and effective enjoyment of the human rights enshrined in the Universal Declaration of Human Rights and other international human rights instruments."
[52] see. E.g. OHCHR, Joint Statement on Human Rights and Climate Change, 16 September 2019: para.1; OHCHR, *Analytical study on the relationship between climate change and the human right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/HRC/32/23, 6 May 2016*, paras.15-17
[53] In addition to these six areas, "As a threat multiplier, climate change has more impacts on health than can be addressed in the present report. It has, for example, been linked to displacement, forced migration, insecurity and violent conflict, all of which pose substantial health risks. Declining biodiversity as a result of climate change also has an impact on the development of new medicines and access to medicines. Ecosystem damage has far-ranging implications for health, infrastructure, ecosystem services and traditional livelihoods. Climate change and associated natural disasters further increase burdens on Governments struggling to allocate limited resources to fulfil human rights obligations ». https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/092/02/PDF/G1609202.pdf?OpenElement
[54] World Health Organisation (WHO) Climate Change and Health: Key Facts, 1 February 2018, https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health
[55] UN Doc. CCPR/C/127/D/2738/2016, 7 January 2020.
[56] Ibid., para.9.4.
[57] Ibid., para.9.11 (in the context of non-refoulement).

the unequal impact of this risk to life and health, with particular impacts on the elderly,[58] those living in poverty, and women.[59]

Third, the causal link between these impacts and human action is clear, as is the capacity for action by State authorities to prevent further damage.[60] The responsibility of all States, including Member States of the Council of Europe, has been established in international instruments, and targets and frameworks for national action have been established under international environmental law.[61] Both the causes of climate change, rooted in certain human activities, and the consequences, risks and increasing imminence of these risks are clearly documented and well known to all States and public authorities, including through mechanisms established under international environmental law. It is submitted that this foreseeable impact has clear consequences for States' positive obligations under the Convention, including under Arts 2 and 8 ECHR.

Finally, the global nature of climate change does not detract from the fact that its impacts in any jurisdiction can only be prevented and mitigated by effective national action in multiple jurisdictions. The nature of climate change means that failures in prevention in one State contribute to damage to the global climate, which in turn leads, inter alia, to impacts on human rights within that State's jurisdiction. Therefore, protecting the Convention rights of those within the jurisdiction requires national contributions to global efforts in co-operation with other States, irrespective of questions of States' extra-territorial obligations on climate change under the Convention or other international legal instruments.

4. Nature of positive obligations in the context of climate change

a. Under Article 2 ECHR

Positive obligations to protect the right to life as guaranteed by Art. 2 ECHR[62] apply, inter alia, in the context of activities harmful to the environment, where the harm is sufficiently severe to endanger life and is foreseeable. [63] In such circumstances, the State is required to do all that could reasonably be required of it to prevent life being avoidably put at risk,[64] including though legislation, administrative regulation and practical enforcement measures.[65] In a series of cases applying Art. 2 to environmental harm, the Court has held that dangerous activities - such as processes creating toxic emissions, or giving rise to risks of flooding or nuclear tests – engage the responsibility of the State to take preventative action to avert threats to life.[66]

The interveners submit that activities which can be foreseen, in light of current scientific knowledge, to contribute significantly to climate change and, therefore, to the risk to life of persons within the jurisdiction of the State, constitute such dangerous activities. They therefore entail the State's positive

[58] e.g. UN HRC Res 44/7, 2020, A/HRC/RES/44/7, para.4 called on states to "support the resilience and adaptive capacities of older persons … to respond to the adverse impact of climate change".
[59] CEDAW, *General Recommendation no. 37 on Gender-related dimensions of disaster risk reduction in the context of climate change*, UN Doc. CEDAW/C/GC/37, 7 February 2018. See also, rights of women and climate change, especially women facing multiple discrimination, including older women, in CEDAW, Concluding Observations to the Philippines, UN Doc. CEDAW/C/PHL/CO/7-8 2016, paras. 47-48; Concluding Observations to Jamaica, UN Doc. CEDAW/C/JAM/CO/6-7 2012, paras. 31-32.
[60] IPCC *Climate Change 2021, the Physical Science Basis: summary for policymakers*, *supra*.n.2, para A.1.1 to A.1.8 and para.D.1. 1.-D.1.8
[61] *United Nations Framework Convention on Climate Change* (UNFCCC) (1992); Paris Agreement (2015)
[62] This obligation is also reflected in respect of Art. 5 ICCPR, on which the Human Rights Committee has indicated that 'States also have obligations under international law not to aid or assist activities undertaken by other States and non-State actors that violate the right to life.' See UNHRC, General Comment No.36 on the Right to Life, 30 October 2018, CCPR/C/GC/36 para 63.
[63] *LBC v UK supra* n.47, para.36; *Oneryildiz v Turkey*, *supra* n.8, para.71. See, UN Human Rights Council, Resolution 47/19.
[64] *LCB v UK, supra* n.47, para.36.
[65] *Oneryildiz v Turkey, supra* n.8 paras.70, 89-91; *Kolyadenko v Russia, Application No.17423/05, Judgment of 28 February 2012* para.157-160
[66] *LCB v UK*, *supra* n 47 para.36; *Kolyadenko v Russia, supra n.65*, para.164, *Oneryildiz v Turkey*, *supra* n.8 para.71 "The Court considers that this obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and a fortiori in the case of industrial activities, which by their very nature are dangerous, such as the operation of waste-collection sites ..." This caselaw draws on international environmental law regarding "dangerous activities, including the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (ETS no. 150 – Lugano, 21 June 1993) and the Convention on the Protection of the Environment through Criminal Law (ETS no. 172 – Strasbourg, 4 November 1998)

obligation to take steps to prevent and redress this harm, including through legislation, administrative regulation and enforcement aimed at reducing activities within the jurisdiction of the State that contribute to climate change; countering and redressing the impact of such activities, as well as through international co-operative efforts to prevent climate change and mitigate its impact.

The existence of such obligations under Art. 2 ECHR reflects equivalent obligations under Art. 6 of the ICCPR as affirmed by the UN Human Rights Committee's General Comment No.36 on the right to life (2018), which specifically recognised the existence of positive obligations to protect life from the threats posed by climate change:

> *"Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors. States parties should therefore ensure sustainable use of natural resources, develop and implement substantive environmental standards, […] provide appropriate access to information on environmental hazards and pay due regard to the precautionary approach".*[67]

b. Under Article 8 ECHR

Similar positive obligations of prevention, established in respect of the right to respect for private and family life, the home and correspondence under Art. 8 ECHR, are also applicable to harm caused by climate change. Where it is foreseeable that environmentally hazardous activities will adversely affect an individual's health, well-being or enjoyment of their homes.[68] there is an obligation to take 'reasonable and adequate steps' to protect Art. 8 rights, including through legislation, administrative frameworks and practical enforcement.[69] In *Di Sarno v Italy* for example, in the context of collection, treatment and disposal or waste, this Court held that 'the State was under a positive obligation to take reasonable and adequate steps to protect the right of the people concerned to respect for their homes and their private life and, more generally, to live in a safe and healthy environment.'[70]

In the context of dangerous activities affecting the environment, positive measures to be taken include regulations adapted to address the special features of the activity in question, with regard to the level of potential risk involved. Such regulations must require those concerned to take practical measures to ensure effective protection of Article 8 rights.[71] These obligations should, it is submitted, apply mutatis mutandis in respect of the State's responsibility to minimise, regulate and mitigate activities contributing to climate change, that impacts on the heath, wellbeing and enjoyment of private and family life, and the home, of persons within the jurisdiction of the State.

c. Relevant principles of international environmental law

Positive obligations in respect of climate change arising from Convention rights fall to be interpreted and applied in light of international environmental law, binding on States parties to the Convention, in accordance with the principle of interpretation of the Convention in harmony with other international instruments. This is a cardinal principle of general international treaty interpretation under Art. 31(3)(c) of the Vienna Convention on the Law of Treaties.

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[67] UN Human Rights Committee, General Comment No.36 on the right to life (2018), CCPR/C/GC/36 , 30 October 2018, para. 62
[68] *Lopez-Ostra v Spain, supra* n.47, para. 51; *Hatton v UK, supra* n.47, para.96; *Guerra v Italy, supra* n.47 para.57; *Di Sarno v Italy supra* n.9, para.108.
[69] *Di Sarno v Italy, supra* n.9. para.110 ; *Brincat v Malta*, Application. No.60908/11, paras.101-2, 116; *Tatar v Romania, supra* n.45, para.107
[70] *Di Sarno v Italy, supra* n.9, para.110
[71] *Di Sarno v Italy, supra* n.9 para.106

Indeed, this Court has previously relied on international environmental law in the interpretation of Convention obligations.[72] The specific need to interpret and apply international human rights law in accordance with other international law and standards concerning climate change has also been recognised by UN treaty bodies, which have supported integration of human rights obligations with the UN Framework Convention on Climate Change (UNFCCC) and related instruments, and with relevant provisions of the Sustainable Development Goals.[73] For example, the UN Human Rights Committee, in its General Comment 36 on the Right to Life, considered that: '[t]he obligations of States parties under international environmental law should thus inform the content of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law."[74]

In particular, positive obligations under the Convention should be considered in light of the Paris Agreement (2015), by which States have identified a common goal of holding global average temperature rise to well below two degrees above pre-industrial levels and pursuing efforts to keep it below 1.5 degrees. (Art. 2.1.a). In pursuit of this aim, they have agreed to aim to reach global peaking of greenhouse gas emissions as soon as possible, and to undertake rapid reductions thereafter (Art. 4.1). This is to be achieved through States parties preparing 5-yearly nationally determined contributions (NDCs) (Art. 4.3) which will reflect each state party's 'highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.' States have further agreed to 'strive to formulate and communicate long-term low greenhouse gas emission development strategies' towards the goals of the Agreement (Art. 4.19). Furthermore it is recognised that developed, industrialised countries have heightened responsibilities to take action to reduce emissions.[75]

The negative effects of climate change are scientifically proven. Nevertheless, in applying Convention positive obligations to climate change, account should be taken of the precautionary principle, developed under international environmental law, which provides that where there is a risk of grave or irreversible damage, a lack of scientific certainty should not delay or prevent preventive action from being taken. Art. 3(3) of the United Nations Framework Convention on Climate Change states that 'parties 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.' A similar principle is set out in Art. 15 of the Rio Declaration on the Environment and Development (1992).

In *Tatar v Romania* [76] the Court relied on the precautionary principle as set out in the Rio Declaration to reinforce the positive obligation of the State to take preventative measures to prevent grave and irreversible damage to the environment, even in the absence of scientific certainty.[77]

The principle was also applied by the InterAmerican Court of Human Rights, in its advisory opinion on human rights and the environment, where it found that: 'States must act in keeping with the precautionary principle in order to protect the rights to life and to personal integrity in cases where there are plausible indications that an activity could result in severe and irreversible damage to the environment, even in the absence of scientific certainty. Consequently, States must act with due caution to prevent possible damage. Thus, in the context of the protection of the rights to life and to personal

[72] See e.g. *Tatar v Romania*, *supra* n.45 paras 112, 118.
[73] See e.g. Committee on Economic, Social and Cultural Rights (CESCR), Concluding Observations on the Sixth Periodic Report of Germany, 27 November 2018, E/C.12/DEU/CO/6, paras.18-19; Commitee on the Elimination of Discrimination against Women (CEDAW), General Ecommendation No.37 on the gender-related dimensions of disaster risk reduction in the context of climate change, 13 March 2018, CEDAW/C/GC/37; CEDAW, Concluding Observations on the combined sixth and seventh reports of Luxembourg , 14 March 2018, CEDAW/C/LUX/CO/6-7
[74] CCPR, *General Comment No. 36 on article 5 of the International Covenant on Civil and Political Right, on the right to life*, UN Doc. CCPR/C/GC/36, 30 October 2018, para 62
[75] *Paris Agreement*, Art. 4.4, *United Nations Framework Convention on Climate Change* (UNFCCC) (1992) Art. 3.1; Kyoto Protocol to the UNFCCC (1998)

[76] *Tatar v Romania*, *supra* n.45
[77] Ibid., paras 109, 120.

integrity, the Court considers that States must act in keeping with the precautionary principle. Therefore, even in the absence of scientific certainty, they must take "effective" measures to prevent severe or irreversible damage.'[78]

d. Conclusions

The ICJ and the ICJ-CH submit that the risk posed by climate change to rights under Arts 2 and 8 ECHR is severe, imminent and foreseeable. It therefore in principle engages States' positive obligations of prevention under these provisions. This is the case in respect of all those within the jurisdiction, but rights of certain groups, including elderly people, are particularly affected.

The precautionary principle, applied in conjunction with Arts 2 and 8, means that even in the absence of scientific certainty as to the precise impacts within a State's jurisdiction, there is an obligation to take preventive action.

States' margin of appreciation in this field should be constrained by their international environmental law undertakings, requiring them to prepare and implement ambitious and effective Nationally Determined Contributions (NDCs) and long-term strategies for reducing emissions, under the UNFCCC and the Paris Agreement. Furthermore, the Convention's positive obligations to protect Arts 2 and 8 ECHR rights from foreseeable harm should be interpreted and applied in light of the goals established by the Paris Agreement if they are to constitute reasonable steps within the capacity of the State

The ICJ and ICJ-CH submit that the Court should adapt its jurisprudence on victim status and Art. 6(1) ECHR to the challenges of climate change. This involves clarifying its standards concerning potential, indirect and direct victims, and concerning victim status of organisations, tailoring them to the particular challenges of environmental and climate change threats to Convention rights.

The interveners also recommend that the Court, when considering the applicability of Art. 6(1), to construe the "proximity element" expansively or, alternatively, reconsider it entirely, given the nature of the threat and the ubiquitous effects of human activity that brings about climate impacts.

States should in any event provide effective remedies and reparation under Art. 13 ECHR to enable people to ask for redress for violations of their rights under the Convention, including Arts 2 and 8 ECHR, stemming from lack of implementation of positive measures, such as international environmental law undertakings, requiring them to prepare and implement effective Nationally Determined Contributions (NDCs) and long term strategies for reducing emissions, under the UNFCCC and the Paris Agreement.

[78] IACtHR, Advisory Opinion OC-23/17 on the Right to a Healthy Environment *supra* fn.31., para. 180.