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22 September 2021

Verein Klimaseniorinnen Schweiz and others v. Switzerland (53600/02)

Dear President,

Hereby I submit our attached observations as third party intervener in the proceedings Verein Klimaseniorinnen Schweiz and others v. Switzerland (53600/02).

These written observations are prepared and submitted by the European Network of National Human Rights Institutions (ENNHRI), pursuant to leave granted by the President of the Third Section of the European Court of Human Rights (ECtHR).

ENNHRI is a registered association representing National Human Rights Institutions ('NHRIs') within the Council of Europe region. ENNHRI membership currently comprises 47 NHRIs from 41 countries across wider Europe of which 39 are accredited with 'A' or 'B' status under the United Nations 'Paris Principles'. As NHRIs, ENNHRI members are institutions independent from both government and civil society organisations with a broad constitutional or legal mandate to promote and protect human rights.

Given the delay sometimes experienced in receiving post, ENNHRI would be most grateful if the Court's response could be sent in addition by fax to +32 (0)2 212 3175 and/or email to

Yours sincerely,

Leena Leikas
Chair
Legal Working Group
European Network of National Human Rights Institutions (ENNHRI)

Written observations in application no. 53600/02 *Verein Klimasenioren Schweiz et autres c. la Suisse*

1. State responsibility for climate change

1. While climate change is caused by cumulative, global emissions, this does not absolve individual States of responsibility for the conduct attributable to them. Under international law, a State's responsibility for an internationally unlawful act is not diminished or reduced by the fact that other States are also responsible for the same act.¹ A violation under the European Convention on Human Rights (ECHR) may also be attributable to more than one State and factors that are partly outside the State's jurisdiction.² State responsibility under Article 2, for instance, merely requires that the State had a "real prospect of [...] mitigating the harm", even in instances where the harm could have occurred regardless.³ In relation to climate change, there is an emerging jurisprudence from **Europe**, the **Americas**, **Asia** and **Australia** that individual States may be held accountable for the harm caused by their emissions or policies contributing to the accumulation of atmospheric concentrations of greenhouse gases (GHG).⁴ For instance, the **German Constitutional Court** has held that even though Germany is "incapable of halting climate change on its own", it cannot "evade its responsibility" by pointing to GHG emissions in other States.⁵ The **Federal Court of Australia** has concluded that the facilitation of 100 Mt of CO₂ emissions constitutes a "reasonably foreseeable" risk of death or personal injury to Australian children alive today, since "even an infinitesimal increase in global average surface temperature" above 2°C could set off a catastrophic "tipping cascade" triggering a 4°C warmer "hothouse Earth".⁶ This is consistent with the Intergovernmental Panel on Climate Change's (IPCC) findings that "every tonne of CO₂ emissions adds to global warming", and with "every additional increment of global warming, changes in extremes continue to become larger" and the risk of tipping points increases.⁷ Conversely, all incremental decreases in the rate of GHG emissions count. A decrease in the rate of CO₂

¹ Articles on State Responsibility for International Wrongful Acts UN Doc. A/RES/56/83, 2002, art. 47; *Corfu Channel Case (UK and Northern Ireland v. Albania)*, 09.04.1949, ICJ Reports 1949, p. 23.

² *Andrejeva v. Latvia* [GC] (55707/00), 08.02.2009 § 56 with further references; William Schabas, *The European Convention on Human Rights – A Commentary* (Oxford University Press, 2015) p. 93.

³ *Bljakaj et al. v. Croatia* (74448/12) 18.09.2014 § 124 with further references.

⁴ *Urgenda v. the Netherlands*, ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands), 20.12.2019, paras. 5.7.1, 5.7.7–5.7.8; *Neubauer and others v. Germany*, BvR 2656/18 (Federal Constitutional Court of Germany), 24.03.2021, paras. 149, 202–204; *Natre Affaire à Tous and Others v. France*, no. 1904967, 1904968, 1904972, 1904976/4–1 (Administrative Court of Paris), 03.02.2021, para 34; *Commune de Grande-Synthe v. France* ("Grande-Synthe I"), no. 427301, (Le Council d'Etat) 19.11.2020 para 12; *VZW Klimaatzaak v. Belgium et al.*, no. 2015/4585/A (First Instance Court of Brussels), 17.06.2021, p. 61; *Massachusetts v. EPA*, 549 U.S. 497 (Supreme Court of the United States), 02.04.2007, p. 23; *Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 (Supreme Court of Canada), 25.03.2021, paras. 188–190; *Mathur v. Ontario*, 2020 ONSC 6918 (Superior Court of Justice – Ontario, Canada), 12.11.2020; *Future Generations v. Ministry of the Environment and Others*, STC4360–2018 (Supreme Court of Colombia), 05.04.2018; *Shrestha v. Office of the Prime Minister et al.*, no. 10210, Order no. 074-WO-0283 (Supreme Court of Nepal), 25.12.2018; *Leghari v. Federation of Pakistan*, W.P. No. 25501/201 (Lahore High Court, Pakistan), 04.09.2015; *Sharma and others v. Minister for the Environment* (Federal Court of Australia) [2021] FCA 774, 08.07.2021 paras. 86–88, 253, 257.

⁵ *Neubauer*, paras. 149, 202. See also *Urgenda*, paras. 5.7.7, 5.7.8; *Massachusetts*, p. 23 ("A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere").

⁶ *Sharma* paras. 84, 88, 247, 253, 257; Steffen et al. "Trajectories of the Earth System in the Anthropocene" In *PNAS* 2018 115 (33) pp. 8252–8259. For an explanation of tipping points, see footnote 28.

⁷ IPCC, *AR6 Climate Change 2021 The Physical Science Basis: Summary for Policymakers (SPM)*, 2021, para. B.2.2, pp. 19–24, 35, 41; IPCC, *AR6 Climate Change 2021 The Physical Science Basis: Full report*, 2021, para. 11.3.5.

emissions would for example slow down global surface warming within a decade.⁸ Mitigation is also expected to have a “strong effect” on the risks related to hot extremes in Europe.⁹

2. Actual and potential victims under the ECHR Art. 34

2.1 Individuals

2. Article 34 does not allow *actio popularis*. However, this does not mean that potential violations will be excluded from judicial review simply because of their prevalence. Indeed, the ECtHR has reviewed complaints of a general nature from (i) individuals residing in regions where all residents were equally exposed to pollution, even though the risk was not specified at the individual level, (ii) individuals exposed to living conditions that would also affect “a large number of asylum seekers” on a “large scale”, and (iii) applicants concerned about secret surveillance measures that would potentially affect entire populations of States.¹⁰ It follows that specific applicants should not be denied standing in climate cases simply because the dangers of climate change will affect entire populations. As noted by the **German Constitutional Court**, “[t]he mere fact that very large numbers of people are affected does not exclude persons from being individually affected in their own fundamental rights”.¹¹ Courts in **Canada, Pakistan, Nepal, Colombia, Belgium, the Netherlands, France, and the United States** have similarly granted standing to i) individuals, ii) associations or iii) regional entities despite the prevalence of climate risks.¹²

3. To qualify as a victim for the purposes of Article 34, a person must normally be *directly affected* by the alleged violation. Climate harm is already occurring at the current level of 1.1°C of warming.¹³ According to the IPCC, GHG emissions have already increased the frequency and intensity of weather and climate extremes, including heatwaves, droughts, fire weather, heavy precipitation and flooding, both world-wide and in Europe.¹⁴ The heatwaves in Western Europe in July 2019, for instance, “would have had an extremely small probability to occur” without climate change”.¹⁵ The IPCC notes that “the frequency and intensity of hot extremes” in Europe “have increased in recent decades and are projected to keep increasing”.¹⁶

4. In addition, the ECtHR exceptionally allows complaints over *potential violations* if there is “reasonable and convincing evidence of the probability of the occurrence of a violation”, as opposed to “mere suspicions or conjectures”.¹⁷ In recent environmental cases where the alleged danger would only hypothetically materialise

⁸ IPCC, *AR6 Climate Change 2021 The Physical Science Basis: FAQs*, 2021, pp. 4-103, FAQ 4.2.

⁹ IPCC, *AR6 Full Report*, 2021, Chapter 12, pp. 12-68.

¹⁰ i) *Cordella et al. c. Italie* (54414/13 etc.) 24.09.2019 §§ 100-109; *Di Sarno et al. c. Italie* (30765/08) 10.01.2012 § 81 with further references; *Okay et al. v. Turkey* (36220/97) 12.07.2005 § 86; ii) *M.S.S. v. Belgium and Greece* [GC] (30696/09) 21.01.2011 § 255; iii) *Centrum for Rättvisa v. Sweden* [GC] (35252/08) 25.05.2021 §§ 166-167; *Big Brother Watch et al. v. the United Kingdom* [GC] (58170/13 etc.) 25.05.2021 §§ 467-472 with further references.

¹¹ *Neubauer* paras. 110 and 131.

¹² i) *Mathur*, para. 244; *Leghari/ Shrestha*; ii) *Future Generations*; *VZW Klimaatzaak*, pp. 50-51, *Urgenda*, para. 5.9.2; *Milieudefensie v. Royal Dutch Shell*, ECLI:NL:RBDHA:2021:5339 (The Hague District Court), 26.05.2021, paras. 4.2.4-5; *Notre Affaire à Tous* paras. 12-15; iii) *Grande-Synthe I*, para. 3; *Massachusetts*, pp. 23-25, note 24, citing 412 U. S. 669 (“To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody”).

¹³ IPCC, *AR6 SPM*, 2021 paras. A.1 and A.1.2 and IPCC, *Special Report on Global Warming of 1.5°C*, 2018, pp. 4.

¹⁴ IPCC, *AR6 SPM*, 2021 paras. A.3.3 ff.; IPCC, *AR6 Climate Change 2021 The Physical Science Basis: Regional fact sheet – Europe*.

¹⁵ Robert Vautard et al., ‘Human Contribution to the record-breaking June and July 2019 heatwaves in Western Europe’, *Environmental Research Letters*, 2020, 15 (094077).

¹⁶ IPCC, *AR6 Regional fact sheet – Europe*, 2021.

¹⁷ *Asselbourg et al. v. Luxembourg (dec.)* (29121/95) 29/06/1999 with further references.

in the future, such potential victimhood can be inferred from the ECtHR's review of the merits, without an assessment *ex officio* of the individual applicants' victim status.¹⁸ The latent future risk of climate harm is not hypothetical but already existing. As noted by the IPCC, GHG-induced climate change is "unequivocal", with a "near-linear relationship between cumulative anthropogenic CO₂ emissions and the global warming they cause".¹⁹ Hence, the HRC has recognised the standing of an individual whose life was allegedly at risk upon return to an island threatened by GHG-induced sea-level rise, since the "risk of being affected is more than a theoretical possibility"; it is a "real predicament", not "hypothetical".²⁰ Similar conclusions have been drawn by national courts regarding the risk of dangerous climate change affecting potentially any inhabitant, future generations or indeed residents abroad.²¹ Given the probability of widespread climate harm, any person within the jurisdiction of the Contracting States is "potentially at risk".²² At the very least, persons belonging to a "class of people who risk being directly affected" would qualify as potential victims.²³ It is well established that i) children, ii) indigenous people, iii) the elderly, and iv) women, are particularly vulnerable to premature death and health impacts due to climate change.²⁴

5. Furthermore, the ECtHR has accepted potential victimhood where i) the alleged risk of suffering is of a "serious and irreparable nature", or ii) where traits of the alleged violation itself, such as the secrecy of surveillance measures, would make it impossible to demonstrate being directly affected and render violations "effectively unchallengeable".²⁵ Similarly, defining traits of climate change make it difficult to demonstrate a personalised risk posed by current emissions. It is recalled that CO₂ emissions have a delayed effect on the global average temperature increase, with a lag of 10 years or longer.²⁶ Hence, some future warming is already locked in due to past emissions. With the current temperature increase at 1.1°C, the GHGs emitted today determine whether the 1.5°C or 2°C (well below) targets are within reach.²⁷ Exceeding 1.5°C risks triggering cascading tipping points, such as permafrost thawing or changes in major ocean currents, which will greatly accelerate global warming and lead to abrupt and irreversible changes in the Earth's climate system.²⁸ Hence, it is only today, when individualised risks may be difficult to demonstrate, that "serious and irreparable" harm above this critical threshold may be prevented.
6. The ECtHR has noted that the victim requirement is not to be applied in a "rigid and inflexible way", as an "excessively formalistic" interpretation would make rights protection "ineffectual and illusory".²⁹ In climate

¹⁸ *Taşkın et al. v. Turkey* (46117/99) 10.11.2004 § 113; *Tötör c. Roumanie* (67021/01) 27.01.2009 §§ 85–87; *Hardy and Maile v. the United Kingdom* (31965/07) 14.02.2012 § 187–191 with further references; ECtHR, *Guide sur l'environnement*, 31.08.2021, § 67.

¹⁹ IPCC, *AR6 SPM*, 2021, pp. 5 and 36.

²⁰ HRC, *Teitlota v. New Zealand*, CCPR/C/127/D/2728/2016, 07.01.2020, para. 8.4–8.6. See also *Massachusetts*, p. 23 ("The risk of catastrophic harm, though remote, is nevertheless real.")

²¹ *Urgenda*, para. 5.6.2; *Milieudefensie*, para. 4.2.4; *VZW Klimaatzaak*, pp. 50–51; *Neubauer* paras. 96–99, 101–102, 108–110; *Sharma* paras. 4, 297, 488.

²² *Mutatis mutandis*, *Centrum for Rättvisa* [GC] § 167 with further references.

²³ *Open Door et al. v. Ireland* [Plenary] (14234/88) 29.10.1992 § 44; *Burden v. the United Kingdom* [GC] (13378/05) § 34.

²⁴ i) UNICEF, *The climate crisis is a child rights crisis*, 2021; *Sharma* §§ 289 ff. ii) Human Rights Council, *Human Rights and Climate Change*, Res. 29/15 22.07.2015, p. 2. iii) OHCHR, *Analytical study on the promotion and protection of the rights of older persons in the context of climate change*, 2021. iv) Basu, *High ambient temperature and mortality: a review of epidemiologic studies from 2001 to 2008*, *Environmental Health*, Vol. 8, 16.09.2009, 40.

²⁵ i) *Soering v. the United Kingdom* [Plenary] (14038/88) §§ 90–91, ii) *Centrum for Rättvisa* [GC] §§ 166–169 with further references.

²⁶ IPCC, *AR6 Full Report*, 2021, pp. 5–8B, 4–91 ff. and 5–120; IPCC, *AR6 FAQ*, 2021 FAQ 4.2, 4.6.

²⁷ IPCC, *AR6 SPM*, 2021, para. B.1 and pp. 17–18.

²⁸ Tipping points are "critical thresholds in a system that, when exceeded, can lead to a significant change in the state of the system, often with an understanding that the change is irreversible", see IPCC, *1.5°C Report*, 2018, pp. 262–264; IPCC, *AR6 SPM* 2021, para. C.3.2 and table SPM.1 at p. 18. See also *Neubauer*, paras. 21, 161; *Sharma*, paras. 51, 249.

²⁹ *Aksu v. Turkey* [GC] (4149/04, 41029/04) § 51 with further references.

cases, a rigid application of the “directly affected” criterion could deprive individuals of the Convention’s enforcement machinery when the human rights effects of excess GHG emissions can still be prevented, leaving them without an effective remedy once the remaining carbon budget is exceeded and dangerous climate change is irreversibly locked in.³⁰ In summary, potential victimhood in climate cases would align with the reasons underlying the Court’s established exceptions and ensure effective rights protection.

2.2 Representative complaints

7. In general, associations may represent the personal rights of their members if instructed to do so but may only bring a complaint in their own name if the rights of the association itself are directly affected. This is because individual members “who themselves are adult persons with full legal capacity to act” can “lodge complaints with the Court in their own name”.³¹ This premise does not necessarily hold in climate cases. The effects of GHG emissions are long-term, affecting children and future generations who do not have legal capacity to act, as well as older persons whose age-specific interest is perishable. Their structural interests are nonetheless safeguarded by the Convention system, which shall also “determine issues on public-policy grounds in the common interest”.³² Representative complaints might be the only practical way to ensure effective rights protection against the long-term irreversible climate harm affecting these groups. It is recalled that where a lack of representation would prevent serious rights violations from being examined, and States might escape accountability under the Convention, representative complaints may be allowed.³³
8. While environmental organisations have not previously been allowed to represent their members’ interests under Articles 2 and 8, the ECtHR did not conclusively rule out the possibility in *Greenpeace E.V.*³⁴ In *Gorraiz Lizarraga*, the ECtHR emphasised the importance of interpreting the term “victim” in an “evolutive manner in the light of conditions in contemporary society”, where “recourse to collective bodies such as associations is one of the accessible means, sometimes the only means, available to them whereby they can defend their particular interests effectively”.³⁵ Representative actions by associations are common ground in Europe, “recognised by the legislation of most European countries”.³⁶ The essential role played by associations is also recognised in Article 9 § 3 of the 1998 Aarhus Convention on access to information, public participation and justice in environmental matters.³⁷ It prohibits States from introducing criteria which excessively restrict access to justice for environmental associations.³⁸ The standing requirements under domestic law in the **Belgian and Dutch** climate cases were thus interpreted to acknowledge the standing of NGOs.³⁹ Similarly, other courts have granted NGOs standing to challenge GHG emissions policies on the basis of current and

³⁰ *Urgenda*, para. 5.7.9 with respect to ECHR Article 13.

³¹ *Identoba et al. v. Georgia* (73235/12) 12.05.2015 § 45 with further references.

³² *Konstantin Markin v. Russia* [GC], (30078/06) § 89. The protection of common interests is reflected in the ECHR Preamble recital 5 and Articles 33 and 37 § 1 *in fine*. See also Tulken, *Le temps de l’action*, 2021, available here: <https://www.nhri.no/en/2021/le-temps-de-laction/>

³³ *Centre for Legal Resources on Behalf of Valentin Câmpeanu* [GC] (47848/08) 17.07.2014 § 112. See also the ECHR Article 37 § 1 *In fine*.

³⁴ *Greenpeace E.V. et al. v. Germany* (dec.) (18215/06) 12.05.2009, p. 4.

³⁵ *Gorraiz Lizarraga et al. V. Spain* (62543/00) 27.04.2004 § 38.

³⁶ *Ibid.*, § 38.

³⁷ The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998) is adopted by all but six parties to the ECHR. See *Tătar* §§ 111, 118 and *Association Burestap 55 et al. v. France* (56176/18 etc.) 01.07.2021 § 54.

³⁸ See United Nations Economic Commission for Europe Implementation, *The Aarhus Convention: An Implementation Guide*, 2014, pp. 58 and 194 ff and e.g. Aarhus Compliance Committee, 16 June 2006, *Communication ACCC/C/2005/11* UN Doc. EPE/MP.PP/C.1/2006/4/Add.2, paras. 34-40.

³⁹ *VZW Klimaatzaak*, p. 53-55; *Urgenda*, para. 5.9.2.

projected climate harm.⁴⁰ This emerging jurisprudence, and the fact that long-term structural climate harm might otherwise escape the Court's supervision, support representative complaints in this particular context.

3. The right to life and the right to private life, family life and home

3.1 Applicability of Art. 2 and 8

9. The primary positive obligation under Article 2, to adopt a framework providing effective deterrence against threats to the right to life, applies to any activity in which the right to life "may be at stake", and *a fortiori* in the context of inherently dangerous activities.⁴¹ GHG-induced climate change is inherently dangerous. **UN Treaty Bodies** warn that climate change poses one of the "most pressing and serious threats" to the right to life.⁴² Apex courts in the **Netherlands, Ireland, Norway, Germany, France, the US, Canada, Colombia, Nepal** and **Australia** consider climate change a real and serious threat to human lives.⁴³
10. The secondary obligation, to take preventive operational measures, requires that the risk to life is "serious" or "real and immediate".⁴⁴ This includes risks that may only materialise in the longer term.⁴⁵ The ECtHR has noted that the term "immediate" is applied in a flexible manner, taking into account whether the risk is foreseeable.⁴⁶ In the context of Article 15, the ECtHR has noted that "[t]he requirement of imminence cannot be interpreted so narrowly as to require a State to wait for disaster to strike before taking measures to deal with it."⁴⁷ Similarly, the ICJ has observed that "a 'peril' appearing in the long term might be held to be 'imminent' as soon as it is established", because "the realisation of that peril, however far off it might be, is not thereby any less certain and inevitable".⁴⁸ Similarly, Article 8 applies not only to "direct and immediate" or "serious and substantial" risks of pollution or nuisance, but also to exposure of future environmental risks with a "sufficiently close link" to the enjoyment of home, private or family life.⁴⁹ Hence, Article 8 has been applied to foreseeable hypothetical risks that "might materialise only in twenty to fifty years", as well as risks of a sudden deterioration.⁵⁰
11. It is undeniable that the risk of dangerous climate change above 1.5 or 2°C is serious, real and immediate. Climate change poses an actual, latent and potential risk to life and physical integrity, particularly for

⁴⁰ *Greenpeace Nordic Ass. Et al. v. Norway*, HR-2020-2472-P (Supreme Court of Norway), 22.12.2020, para. 165; *Urgenda*, para. 5.9.3; *Milieudefensie*, para. 4.2.5; *VZW Klimaatzaak*, p. 54; *Notre Affaire à Tous* paras. 10–15; *Grande-Synthe I*, para. 6. Conversely, *Neubauer*, para. 136; *Friends of the Irish Environment* paras. 7.6, 7.21–7.24.

⁴¹ *Nicolae Virgiliu Tănase v. Romania* [GC] (41720/13) 25.06.2019 § 135 with further references.

⁴² HRC, *General Comment No. 36 on Article 6 Right to Life*, 2018, para. 62; Joint Statement by CESCR, CEDAW, CMW, CRC and CRPD, *Human Rights and Climate Change*, UN Doc. HRI/2019/1, para. 3; CRC, *General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health*, UN Doc. CRC/C/GC/15, para. 50.

⁴³ *Urgenda*, para. 5.6.2; *Friends of the Irish Environment v. Ireland* Appeal No: 205/19 (Supreme Court of Ireland) 31.07.2021 paras. 1, 3.6; *Greenpeace Nordic Ass.* paras. 45–55, 167; *Neubauer* paras. 147–148; *Grande-Synthe I*, para. 3; *Notre Affaire à Tous* paras. 16 ff.; *Massachusetts*, p. 23; *Greenhouse Gas Pollution Pricing Act*, para. 171; *Future Generations*, p. 34; *Shrestha*, pp. 5, 11; *Sharma*, paras. 247, 257.

⁴⁴ *Nicolae Virgiliu Tănase* § 136; *Brincat* § 82 ("serious"); *Budayeva* § 146 ("threat to their physical integrity"); ECtHR, *Guide sur l'environnement*, p. 8.

⁴⁵ *Öneriyildiz v. Turquie* [GC] (48939/99) 30.11.2004 §§ 98–101; *Budayeva et al. v. Russia* (15339/02 etc.) 20.03.2008 §§ 147–158; *Kolyadenka et al. v. Russia* (17423/05 etc.) 28.02.2012 § 171; *Brincat et al. v. Malta*, (60908/11 etc.) 24.07.2014 §§ 103–117.

⁴⁶ *Kurt v. Austria* [GC] (62903/15) 15.06.2021 §§ 175–176.

⁴⁷ *A et al. v. the United Kingdom* [GC] (3455/05) 19.02.2009 § 177.

⁴⁸ ICJ, *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, 25.09.1997, para. 54.

⁴⁹ *Hardy and Maile* §§ 188–189 with further references. ECtHR, *Guide sur l'environnement*, para. 67.

⁵⁰ *Ibid.*, § 73; *Taşkın* §§ 107, 111–114; *Tatar*, §§ 197, 111 («prévisible»).

vulnerable individuals.⁵¹ First, *actual* levels of GHG-induced warming (1.1°C) represent a serious threat to life and welfare. Second, the risk of exceeding 1.5°C already *latently* exists, due to the inertia between CO₂ emissions and their warming effect in the future. Third, every incremental increase in emissions aggravates the *potential* risk of warming above 1.5 or 2°C and the triggering of tipping points. The severity of these risks depends on the rate at which States reduce their GHG emissions now. Unless there are “immediate, rapid, and large-scale reductions” in GHG emissions, limiting warming to 1.5°C will be beyond reach, with this temperature threshold likely to be exceeded by 2030 even under moderate emissions scenarios.⁵² Since States are under a *preventive obligation* to “safeguard the lives” of those within their jurisdiction, their duty logically refers to a point in time when the danger – emissions exceeding the 1.5°C, or alternatively the 2°C (well below) thresholds – can be prevented. Postponing mitigation would render this duty devoid of purpose.

12. These insights are reflected in emerging jurisprudence. The HRC has applied ICCPR Article 6 to “reasonably foreseeable threats to life” from climate change, noting that the risk of a country becoming submerged by water is so “extreme” that the right may be impaired “before the risk is realised.”⁵³ The **Dutch Supreme Court** has held that dangerous climate change constitutes a real and immediate risk that “the lives and welfare of Dutch residents could be seriously jeopardised”, even if the risk will only materialise a few decades from now.⁵⁴ Similarly, the **German Constitutional Court** has held that Germany has an obligation *ex nunc* “to protect life and health” of current and future generations against “the risks posed by climate change” above 1.5 to well below 2°C, given that “irreversible processes are at stake”.⁵⁵ The **French Conseil d’Etat** has also recognised that, even if the severe consequences of climate change will not manifest before 2030 or 2040, there is an urgent need to act without delay due to their inevitability in the absence of effective preventative measures today.⁵⁶ A proposition that the risk of heat waves does not pose an immediate risk because global warming will not exceed 1.5°C before 2040, or that there is still time to prevent warming above 2°C, is thus unsupported by comparative case law, and at odds with the consistent findings of the IPCC.

3.2 Positive obligations under Art. 2 and 8

13. Article 2 obliges States to adopt an effective “legislative and administrative framework” and to implement “appropriate measures” to “protect the public”. This duty must be viewed “in light of the level of the potential risk to human lives”.⁵⁷ The extent of the positive obligations depends on the risks concerned and the possibilities of mitigating them.⁵⁸ Likewise, Article 8 obliges States to take “reasonable and appropriate measures” to protect the right to private and family life.⁵⁹ The onus lies on the State to explain how it has provided effective protection using detailed and rigorous data.⁶⁰ The preventive nature of these duties is

⁵¹ IPCC, *AR5 Climate Change: Impacts, Adaptation, and Vulnerability*, 2014, p. 721 and references in footnote 24.

⁵² IPCC, *AR6 PPT SPM*, p. 3; IPCC, *AR6 SPM*, 2021, para. B.1 ff., p. 18; IPCC, *1.5°C Report*, 2018, para. B.1.

⁵³ HRC, General comment no. 36, paras. 18, 62; *Teitiota*, para. 9.11.

⁵⁴ *Urgenda*, paras. 5.2.2. and 5.6.2.

⁵⁵ *Neubauer*, paras. 146, 148, 108.

⁵⁶ *Grande-Synthe I*, para. 3 and Conclusions. M. Hoyneck, rapporteur public, p. 18. See also *Massachusetts*, p. 18 (“EPA’s steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both ‘actual’ and ‘imminent.’”)

⁵⁷ *Kotilainen et al. v. Finland* (62439/12) 17.09.2020 § 67 with further references. See also HRC, *General Comment No. 36* para. 18 and the Inter-American Court on Human Rights, *Advisory Opinion (OC-23/17)* para. 149.

⁵⁸ *Kotilainen* § 67 with further references.

⁵⁹ *Hotton et al. v. The United Kingdom* [GC] (36022/97) 08.07.2003 § 98 with further references.

⁶⁰ *Öneryıldız* § 89; *Budayeva*, § 132; *Cordella* §§ 161, 173; *Dubetsko et al. v. Ukraine* (30499/03) 12.02.2011 §§ 145, 155; *Jugheli et al. v. Georgia* (38342/05) 13.07.2017 § 76 with further references. Similarly, *Urgenda*, para. 5.3.3.

underscored by the ECtHR's reliance on the principle of precaution in e.g. *Asselbourg and Tatar*.⁶¹ Since the only "appropriate measure" to avert dangerous climate change is to cut GHG emissions rapidly to net zero, States are under a duty to *mitigate* emissions. In addition, States may have a duty to *adapt* to unpreventable or incurred climate change, but it would be "completely inadequate" to rely on adaptation alone.⁶²

14. States are afforded a margin of appreciation in environmental cases.⁶³ However, this margin is arguably narrower in the context of climate change due to four factors: (i) climate change is an *existential threat to human civilisation*,⁶⁴ (ii) the risk is "man-made" and "susceptible to mitigation",⁶⁵ (iii) the *principle of precaution* calls for precautionary measures even without full scientific certainty to prevent serious and irreversible climate change,⁶⁶ and (iv) the *principle of intergenerational equity* requires that current generations cannot irreversibly offload a drastic obligation to cut emissions onto future generations.⁶⁷ Indeed, as noted by the **Venice Commission**, judicial control in climate cases is required because the democratic political process cannot adequately safeguard the long-term interests of future generations in a viable environment.⁶⁸ In addition, the Court's reservation against imposing an "impossible or disproportionate burden" on the Contracting States might in fact favour stringent mitigation requirements today, since depletion of the remaining carbon budget would inevitably impose an increasingly impossible or disproportionate burden to cut emissions in the future. Hence, as pointed out by the **Dutch Supreme Court** and the **German Constitutional Court**, States should be afforded a margin of appreciation in the *choice of means* to reduce emissions, but not in the *minimum rate of emission cuts* necessary to avoid *dangerous* climate change.⁶⁹
15. To determine the threshold for *dangerous* climate change and the *minimum rate of emission cuts* necessary to mitigate threats to protected rights, the Court may rely on best available science⁷⁰ and specialised international norms, binding or non-binding.⁷¹ The "common ground" reflected in the IPCC reports and the 1992 UN Framework Convention on Climate Change (UNFCCC), including the 2015 Paris Agreement,⁷² therefore informs the obligations under the ECHR Articles 2 and 8.⁷³
16. Based on the best available science, 1.5°C is the critical temperature threshold to prevent *dangerous* climate change for the right to life and physical integrity. This is reflected in the Paris Agreement Article 2.1a, where States Parties agreed to "pursue efforts to limit" the global temperature increase to 1.5°C, with a maximum

⁶¹ *Asselbourg* (dec.), p. 7; *Tatar* §§ 109, 112.

⁶² *Neubauer*, para. 157; *Urgenda*, para. 7.5.2.

⁶³ *Hutton* § 101 from 2004 describes the margin of appreciation as "wide", while *Cordella* § 158 from 2019 describes it as narrower ("certaine").

⁶⁴ The "preservation of human society and civilisation" is the ultimate objective of the Council of Europe (Statutes, preamble, recital 1; ECHR, preamble, recital 3). *Mutatis mutandis*, *Evans v. the United Kingdom* [GC] (6339/05) 10.04.2007 § 77.

⁶⁵ *Budayeva* §§ 135 and 137. See also *Sharma*, para. 293 ("none of this is the fault of nature itself") and IPCC, *AR6 SPM 2021*, pp. 5 and 36.

⁶⁶ The precautionary principle is recognised in, *inter alia*, UNFCCC Art. 3.3, Principle 15 of the Rio Declaration and TFEU Art. 191(2). Domestic climate judgements have also taken the principle into account, see e.g. *Neubauer*, para. 229, *Urgenda* paras. 5.3.2 and 5.6.2, *Sharma* paras. 254–256.

⁶⁷ *ICJ, Whaling in the Antarctic (Australia v. Japan)*, 06/02/2014 Rep. 226, Separate Opinion by Judge Trindade, para. 47; Paris Agreement Preamble recital 11; *Neubauer* paras. 146, 183, 192 and 205; *Sharma*, para. 293; *Leghari*, para. 13; *Shrestha*, p. 11; *Future Generations*, p. 34.

⁶⁸ Venice Commission, *Opinion No. 997/2020*, 09/10/2020, para. 114. Similarly, *Neubauer*, paras. 146, 183, 192, 205–206.

⁶⁹ *Urgenda*, para. 8.2.7 and *Neubauer* paras. 207, 229 and 249. See *mutatis mutandis*, *Budayeva* §§ 134, 135; *Önerildiz* § 107; *Greenpeace E.V.*, p. 4.

⁷⁰ See e.g. *Brincat* § 112; *Cossey v. the United Kingdom*, (10843/84) 27.09.1990 § 40 with further references; *Fretté v. France*, (36515/97) 26.02.2002 § 42; *S.H. & Ors v. Austria* [GC] (57813/00) 03.11.2011 §§ 97–118.

⁷¹ *Demir and Baykara v. Turkey* [GC] (34503/97) 12.11.2008 §§ 69–86 with further references. In an environmental context, see *Tatar* § 112.

⁷² All State Parties to the ECHR are also parties to the UNFCCC, and all but Turkey have ratified the Paris Agreement.

⁷³ *Urgenda*, paras. 7.2.1–7.2.11; *Greenpeace Nordic Ass.* paras. 56–60; *Grande-Synthe I* paras. 9, 12; *Neubauer* paras. 3–10, 158 ff., 209–210.

increase to “well below 2°C”. New insights in the IPCC 2018 report, confirmed in the IPCC 2021 report, establish that limiting the temperature increase to 1.5°C instead of 2°C would substantially reduce the risks for humans.⁷⁴ These reports are shifting the political and legal consensus, where 1.5°C is increasingly referred to as the target necessary to protect human lives and health.⁷⁵ The 1.5°C target thus reflects updated scientific consensus to prevent “dangerous” climate change having “significant deleterious effects” on humankind, which is the objective of the UNFCCC Article 2 and the Paris Agreement.

17. In relation to the *minimum rate of emissions cuts* necessary, the IPCC has identified a 25–40% minimum reduction in GHG emissions from 1990 levels by 2020 for industrialised countries to limit global warming to 2°C. The **Dutch Supreme Court**, implicitly confirmed in **German** jurisprudence, considered the State’s minimum obligation to cut emissions by 2020 to be at the lower end of this range.⁷⁶ The IPCC has further identified a 45% *global* reduction in GHG emissions from 2010 levels by 2030 and net zero emissions by 2050 to limit warming to 1.5°C.⁷⁷ However, since States have “common but differentiated responsibilities and respective capabilities” (CBDR-RC), developed countries must cut at a *higher rate* than this global average.⁷⁸ A collaborative study suggests that, when adjusting for historic responsibility for climate change and GDP per capita, developed States should reach net zero emissions by 2030 in order to stay within their remaining part of the 1.5°C global carbon budget.⁷⁹ The remaining global carbon budget to limit warming to 1.5°C is 400 GtCO₂ (67% chance) or 500 GtCO₂ (50% chance).⁸⁰ These budgets are rapidly depleted. Even if all current national contributions under the Paris Agreement were implemented, 89% of the 500 GtCO₂ carbon budget would still be exhausted before 2030, leaving just one year (55 GtCO₂) for post-2030 emissions.⁸¹
18. Moreover, a goal of GHG neutrality by a specific year and intermediate reduction targets would not be sufficient in themselves because, as noted by the **German Constitutional Court**, “there would be nothing to specify how much GHG may be emitted in the intervening period”.⁸² It is recalled that the ECtHR requires States to “ensure the effective functioning of the regulatory framework adopted” for the protection of life and private life.⁸³ Similar efficiency considerations have led national courts to review whether the *rate of planned GHG reductions* is sufficiently *specified and realistic* in view of national carbon budgets. The **German Constitutional Court** found that the German *per capita* carbon budget was likely to be exceeded by 2030 at the expense of future freedoms, obliging the State to design and implement a specified reduction pathway to climate neutrality within the remaining carbon budget.⁸⁴ Similarly, the **Irish Supreme Court** and **French Courts** have held that domestic plans for emissions cuts were not sufficiently specific to allow for judicial

⁷⁴ IPCC, *1.5°C Report*, 2018, pp. 177–181, IPCC, *AR6 SPM 2021*, pp. 19–24.

⁷⁵ *Milieudefensie* paras. 2.3.3, 4.4.27; *Urgenda*, para. 4.3; *Friends of the Irish Environment*, para. 3.4; Regulation (EU) 2021/1119, 09.07.2021 (European Climate Law) preamble recital 3; Climate Change Act (2020) [Denmark] art. 1.2; Prop. 182 L (2020–2021) [Norway], p. 3.

⁷⁶ *Urgenda*, para. 8.2.7; *Family Farmers v. Germany*, VG Berlin, 31.10.2019 – 10 K 412.18, pp. 25 and 27; *Neubauer*, paras. 137, 154–170.

⁷⁷ IPCC, *1.5°C Report*, 2018, pp. 11–12.

⁷⁸ UNFCCC, Art 3.1, Art 4.1; Paris Agreement, Preamble, Art 2.1, 4.1, 4.2, 4.3 and 4.4.

⁷⁹ Rajamani et al. “National ‘fair shares’ In reducing greenhouse gas emissions within the principled framework of international environmental law” in *Climate Policy*, 2021, p. 17. Similarly, the Climate Action Tracker (CAT) has developed a methodology for determining the ‘fair share’ of a country, available at https://climateactiontracker.org/documents/874/CAT_2021-09_RatingMethodology_FullDescriptionNewSystem.pdf.

⁸⁰ IPCC, *AR6 SPM 2021*, p. 38.

⁸¹ UNFCCC, *Nationally determined contributions under the Paris Agreement*, FCCC/PA/CMA/2021/8, 17.09.2021, para. 14; *Neubauer* paras. 233, 234.

⁸² *Neubauer* paras. 155, 156.

⁸³ *Smiljanić v. Croatia* (35983/14) 25.03.2021 § 66 with further references.

⁸⁴ *Neubauer* paras. 183, 214–225, 229, 232–234, 243, 255.

review or failed to meet domestic climate targets.⁸⁵ The **Administrative Court of Paris** has also noted that future targets must be scrutinised where the State has failed to meet previous targets, since cumulative emissions lags inevitably deplete the remaining carbon budget.⁸⁶ Furthermore, independent expert climate councils, as a basis for effective judicial control, could be required under Article 8 to ensure the effective functioning of climate change frameworks, enabling citizens to “predict and evaluate in advance the effects” of mitigation efforts.⁸⁷ Finally, the precautionary principle, as noted by the **Dutch Supreme Court** and the **German Constitutional Court**, implies that States cannot rely on negative-emission technologies to remove CO₂ from the atmosphere, many of which do not yet exist or are still at early stages of development.⁸⁸ Reliance on these technologies “is a major risk in the ability to limit warming to 1.5°C”, and a “dangerous, high-risk approach”.⁸⁹

19. Based on the above, it is respectfully submitted that States, considering the CBDR-RC principle, must adopt and implement a realistic and specified reduction pathway in accordance with the IPCC’s reduction rates to limit global warming to 1.5°C, reaching carbon neutrality as soon as possible.

4. Access to justice in climate cases under the ECHR Art. 6

20. Article 6 § 1 is *applicable* when there is a “genuine and serious” dispute over a “civil right” that, at least on arguable grounds, is recognised by domestic law. It is well established that national provisions aiming to protect the right to life or physical integrity of citizens have a “civil” character.⁹⁰ Moreover, the result of the proceedings must be “directly decisive” for the right in question; mere “tenuous connections or remote consequences” are insufficient.⁹¹ In environmental protection cases brought by organisations, these criteria must be applied with “souplesse” (flexibility).⁹² As opposed to the hypothetical risks of nuclear accidents,⁹³ climate change is already materialising in ways that are affecting individuals. As every GHG reduction has a positive effect on combating dangerous climate change, the mitigation policies of States are “directly decisive” for the life and health of its population.⁹⁴ Indeed, courts in **France**, **Germany**, the **Netherlands** and **Belgium** have heard cases challenging the overall efforts of States to cut emissions to protect, *inter alia*, the right to life and physical integrity.⁹⁵ The fact that such proceedings also relate to general environmental harm, does not exclude them from being “directly decisive” for civil rights.⁹⁶

21. In order to *comply* with Article 6, the right of access to court must be “practical and effective”, not “illusory”.⁹⁷

⁸⁵ *Friends of the Irish Environment* paras. 9.2 and 9.3, *Commune de Grande-Synthe v. France* (“Grande-Synthe II”), no. 427301, (Le Council d’Etat) 01.07.2021 paras. 3–6; *Notre Affaire à Tous* paras. 30–34, Article 4.

⁸⁶ *Notre Affaire à Tous* paras. 30–31 and Article 4.

⁸⁷ *Hardy and Maïle* § 220 with further references. Implicitly, *Neubauer*, para. 220; *Friends of the Irish Environment* paras. 6.40–6.49 ff.; *Notre Affaire à Tous*, para. 30; *Grande-Synthe II*, para. 4. See also *Leghari*, para. 8.iii; CNCDH, A-2021-6, p. 29, no. 20.

⁸⁸ *Neubauer*, para. 33 and *Urgenda*, para. 7.2.5. See also, *mutatis mutandis*, *Sharma*, para. 256.

⁸⁹ IPCC, *1.5°C Report* 2018, pp. 96, 121; IPCC, *AR6 FAQ* 2021 FAQ 5.3, DNV’s *Energy Transition Outlook* 2021 (65 p. 4).

⁹⁰ *Athanassoglou et al. v. Switzerland* [GC] (27644/95) 06.04.2000 § 44 with further references.

⁹¹ *Athanassoglou* § 43. See also *Okyay v. Turkey* (36220/97) 12.07.2005 § 66–69.

⁹² *Association Burestop* 55, § 54 with further references.

⁹³ *Athanassoglou* § 51 with further references.

⁹⁴ *Urgenda*, para. 5.7.8; *Massachusetts*, p. 23.

⁹⁵ *Notre Affaire à Tous*; *Grande-Synthe I and II*; *Neubauer*; *Urgenda*; *VZW Klimatzaak*.

⁹⁶ See e.g. *Gornalz* §§ 45–47; *Taskin* § 133.

⁹⁷ *Zubac v. Croatia* [GC] (40160/12) 05.04.2019 §§ 76–79 with further references.