

Verein Klimaseniorinnen and Others v. Switzerland – 53600/20 - Intervention by Germanwatch, Greenpeace Germany and Scientists for Future

The Interveners are grateful to be able to submit the following thoughts and organise their observations according to the questions of the Court, concentrating first on questions D and E and then question B.

D. Applicability of the Convention provisions

Before assessing whether particular fundamental rights are violated it is useful to clarify how this could be reasoned legally. Interference of the Respondent State with fundamental rights can be construed in four different ways, to be captured as follows:

- 'interference by emissions by the state' (1)
- 'interference by omission' (2)
- 'anticipatory prevention of future interference' (3)
- 'interference by allocation of emission rights' (4)

(1) 'Interference by emissions by the state' only covers emissions from public services such as, for instance, a state run airport or power generation installation. This public share in overall emissions is small and the related doctrinal construct not characteristic for the present case.

(2) The construct 'interference by omission' builds on the fact that the bulk of greenhouse gases is emitted from private sources. It is familiar from the Court's case law. From this perspective, fundamental rights are construed as 'positive obligations'.

(3) The 'anticipatory prevention of future interference' is an unfamiliar concept that was developed by the German Federal Constitutional Court (BVerfG) in its order of 24 March 2021 (ECLI:DE:BVerfG:2021:rs20210324.1bvr265618 = BVerfGE 157, 30 para 183). This construct relies on fundamental rights as negative obligations. It argues that if emissions are not reduced sufficiently in the present, life conditions will emerge in future which will force the state to drastically restrict energy use and thus – justifiably – encroach on fundamental rights. These expected future restrictions have the legal effect of urging the state to reduce emissions now in order to prevent restrictions in future.

This switch from positive to negative obligations is of importance in the German fundamental rights doctrine, since, according to the BVerfG, fundamental rights as negative obligations invite rather dense or strict scrutiny of state conduct while fundamental rights as positive obligations implicate a broader margin of discretion of the state. According to the German constitutional court, this is because in the first case one specific measure is under scrutiny, allowing the judge to clearly approve or quash it, while in the second case a multitude of options are possible among which the judge should not make a choice due to the principle of separation of powers.

In contrast, in the ECtHR's case law this difference is of not much importance (e.g. *Hatton et al. v. UK*, no. 36022/97, § 98). Therefore, in terms of density/standard of court review, the BVerfG construct would not result in any changes. Moreover, the insistence of the BVerfG to anticipate future drastic restrictions and from there derive direction for present governments could also be integrated into the Court's construct of positive obligations. The construct "anticipatory prevention of future unavoidable interference" is flexible enough to alert present day obligations to future life conditions and their regulation.

Moreover, the construct has consequences for the transboundary scope of fundamental rights. According to the BVerfG, the fact that future restrictions by a state must be prevented implies that only the inhabitants of that state can apply for prevention because persons living abroad are not subject to the

jurisdiction of that state (BVerfGE 157, 30 § 132). If the Court refrains from incorporating the BVerfG construct, its implication for jurisdictional reach would be void.

- (4) As a fourth approach, the Interveners submit 'interference through allocation of emission rights'. We contend that this construct is a better fit to climate related issues than the other two constructs. It draws on the fact that states have moved from protecting victims of 'horizontal' emissions to managing and actively allowing (private) emissions, most visibly if they allocate emission rights to emitters. This new role of states implies that the states take responsibility for these emissions. Allowing emissions generally under a legal regime and in particular allocating emission rights thus constitutes an interference with the victims' fundamental rights. For instance, the Respondent State introduced an Emissions Trading System (ETS) for certain industries which implies that the State allocates emission rights to private actors through auctions and partly for free. Such rights can be used or, if not used, sold on the market (Arts. 15-21 of the Swiss CO₂-Act). Allowable emissions as a concept is also entrenched in the levy on the production and importation of fossil fuels (Arts. 29, 30 CO₂-Act) as well as various offsetting possibilities which make the State a negotiator and manager of emissions (Arts. 31-32 CO₂-Act.) From a more theoretical viewpoint: as the possibility of emissions has become extremely limited, the related budgets must be managed and allocated by states which makes the states responsible for the effects on victims. The state is obliged not only to command emitters to reduce emissions but also and even more importantly to economize on allocating allowances or emissions themselves.

E. Merits

6.1 - 6.3 Fulfilment of obligations to safeguard rights under Articles 2 and 8

The Interveners concentrate here on

- how to construe the causality of interferences with the invoked fundamental rights (1)
- how to identify the level of ambition of obligations to reduce emissions (2)

(1) Causality

Considering that environmental cases brought to this Court have largely been concerned with linear causality in neighbourhood constellations, there will be a need to develop an approach that addresses the systemic nature of causation. The causal chain encompasses the whole cycle from the allocation of emission rights and actual GHG emissions, to (global and local) temperature increase, to changes in the thermohaline system resulting in weather disturbances and finally to damage to the health and environmental conditions of the plaintiffs. The Interveners submit that the common criteria, such as 'direct', 'immediate' etc. used by the Court must be adjusted. Causality as a legal concept must reflect the factual complexity of climate change. Clarity can be achieved if seven dimensions of causality are addressed. They are:

- (a) Certainty: the causal nexus must be 'proven' in factual terms, ruling out abstract statements or hypotheses. Yet, probabilistic research results (dose-response analyses) have and are to be accepted, as for instance in *Tatar v Romania*, 67021/01, § 102 on asthma caused by sodium cyanide. The Interveners submit that the IPCC reports on climate change do meet this standard. They establish that climate change and its effects are not only likely but in fact uncontested with the highest confidence.
- (b) Individualisation: Applicants must be personally affected. An *actio popularis* which would allow the representation of other individual or collective interests is not accepted (Caron et al. v. France (dec.), no. 48629/08). However, the number of applicants should not be a precondition neither of *locus standi* nor of the substance of fundamental rights. The *Plaumann test* applied by the CJEU which requires uniqueness of concern even in relation to climate protection cases (*Carvalho et al. v. EP and Council*, CJEU C-565/19) does not apply in the ECHR system, nor is there a legal wording comparable to Art. 263 (4) AEUV in the Convention.

- (c) Intensity: The interference with a right must be severe, ruling out superficial harm (López Ostra v Spain, no. 16798/90 § 51). This criterion is certainly also applicable in relation to climate change causality. Two aspects should be distinguished here: The severity of effects on human health and the environment as collective goods on one side and as individual goods on the other. In the climate context, individual harm is an effect of harm to the global climate as a collective good. Individual effects have already become reality (farmers who have suffered from droughts or flooding, the individual applicant's suffering due to higher temperatures), but sometimes individual harm it is only stochastically predictable (future life shortening effects of increased temperature and heat waves).

Considering this nexus, the Interveners submit that the level of severity that represents an interference with fundamental rights must first and foremost be determined concerning effects on human health and the environment as collective goods. Undoubtedly, the catastrophic effects that have been observed and are predicted with utmost confidence are severe also in the legal sense. There is no need to quantify the threshold of interference in terms of the Paris Agreement, nor can the Agreement (if interpreted to allow more emissions) be regarded as lowering the protective ambition of fundamental rights. Interference is there – full stop. How this materialises in interference with the individual Applicants has been set out by their counsel.

- (d) Time: The interference with a right has been required to be 'present', or 'imminent', or 'immediate'. In this respect, an application to interferences that are caused today but have full effect only in the future is legally needed. The Court has by implication accepted this, for instance, in *Aly Bernard et al. v. Luxembourg (déc)*, no. 29197/95, ch. en droit § 2 holding that while the mere invocation of risks does not suffice there must be some degree of probability of occurrence of damage. As shown by the IPCC reports this requirement is met in the present case, taking also in account that the causation process is irreversible due to the longevity of CO₂ in the atmosphere. This was very clearly advocated by the BVerfG (BVerfGE 157, 30, para 37).
- (e) Interdependence with the environment 'as such': nearly 20 years ago, the Court rejected an understanding of Arts. 2 or 8 as entailing a general right to a healthy environment (*Hatton et al. v. UK*, no. 36022/97 § 96). This decision might be re-evaluated against the backdrop of the UN General Assembly accepting the notion of a right to a clean and healthy environment. Regardless, this jurisprudence does not exclude a link between the protected rights – human health and private life – and the environment as such. Insofar as human health and private life depends on environmental conditions, these conditions are within the scope of fundamental rights. This has been recognised since the first judgments of the Court on environmental issues, and notably in cases of air pollution which were concerned with, for instance, keeping the air clean as a condition for good health (*Cordella et al. v. Italy*, nos. 54414/13, 54264/15, §§ 157-160). The same applies to climate change effects. They are within the scope of fundamental rights not 'as such' but insofar as they result in harm to right holders.

- (f) Attribution to a state:

A distinction should be made between attribution of

- emissions from the territory of a state impacting on the same
- emissions from the territory of a state impacting abroad
- external emissions from originating in /resulting from human activities in the pertinent state, (so called scope 3 emissions)

Concerning the first category, attribution to a state follows from the general objectives and powers of the state to ensure the well-being of its inhabitants, including to reduce emissions and protect the global climate. Such basic attribution then transforms into positive obligations in relation to private emitters, and of negative obligations if the state takes responsibility for private emissions such as by allocating emission rights (see above D (1) – (4)).

Concerning the second category, attribution follows from an interpretation of fundamental rights in the light of the international customary no harm rule that requires a state not to harm the territory of other states. This case is not of importance in the present case because no external applicants are involved.

Concerning the third category, attribution is not well settled in jurisprudence. The Interveners submit that attribution to the state in this case can be based on emerging principles of international law as well as on authorisation systems. This is explained further below in section E.

- (g) "Drop in the ocean" or shared contributions: It has been argued by the responding state that a small contribution to global emissions does not qualify as the cause of the alleged effects. Indeed, a very small emission quantity may be of very low and undiscernible effect. Many courts including the Dutch Hoge Raad, the Brussels Court of First Instance and the German BVerfG have rejected the argument, but with only weak attempts of doctrinal construction. A conceptual approach is needed for interferences in cases of cumulative effect, given that causality is not only a matter of facts but also a normative concept. The situation is familiar in environmental law. For instance, operators of installations emitting sulphur dioxide have argued that their individual contribution to air pollution is negligible, a so-called *de minimis* allegation. The German Federal Administrative Court (BVerwG) rejected this plea holding that if there is an overall 'concept' of reducing emissions any contribution is of relevance (BVerwG, Order of 17th. February 1984, 7 C 8/82, BVerwGE 69, 37). The Interveners submit that this 'concept requirement' (*Konzeptgebot*) is also applicable in climate law. International law requires all states to jointly reduce emissions. This 'concept' renders emission reductions of all states a relevant component, including states with relatively small overall shares. Even these small emitters are obliged to reduce emissions. This obligation then shapes the content of the fundamental rights of the state's citizens. They can stipulate that their state fulfils its obligation, even though this is only a small contribution to the necessary global effort.

The *de minimis* argument also raises a question of legal logic. Legal rules must be shaped to be generally applicable. If small polluters are to be exempted from the generalised concept of responsibility, the legal rule itself is put into question – which would in turn challenge the fundamental principles of law.

(2) Identifying the level of ambition of obligations

Once causality and an interference with fundamental rights is accepted, the level of ambition of obligations of states must be determined. This is first of all a question of how to conceive the effectiveness of protection which Arts. 2, and 8 require. Concerning Art. 8 it is, alternatively, a question of justifiability of the interference as being necessary in the public interest (Article 8 (2)). In any respect, the Interveners submit that three criteria could be applied to determine the level of ambition of emission reduction necessary to abide by the fundamental rights:

- Fair shares (a)
- Modelled emission pathways (b) and (c)
- Technical, economic and social capability (d)

(a) Fair shares

The calculation of fair shares of a state in the global emissions budget proceeds in two steps: determination of the global budget (i) and allocation of shares to states (ii).

(i) Temperature limits and the global budget

The global budget is calculated on the basis of upper limits of temperature increase. Such limit could be derived from fundamental rights themselves, which would set the present temperature increase of 1.1°C as a limit since the current warming is already causing harm.

Some more leeway would result if the interpretation was aligned with the Paris Agreement (PA), and the binding temperature limits are determined to set a standard for fundamental rights. The Interveners that the Paris 1.5°C limit has become a binding yardstick. Although Art. 2 PA only requires 'efforts' to stay below 1.5°C, any discretionary margin of states that might be granted by that clause must be regarded as having shrunk to zero considering the state of emergency of climate change, as it was abundantly proven by the IPCC report SR1.5°C. It should also be noted that the 'Glasgow Climate Pact' which was concluded at COP 26 'resolves to pursue efforts to limit the temperature increase to 1.5 °C' and 'recognizes that limiting global warming to 1.5 °C requires rapid, deep and sustained reductions in global greenhouse gas emissions [...]'. This can be regarded as 'subsequent agreement' in the sense of Art. 31 (3) (a) of the Vienna Convention. In addition, it should be noted that the PA has not overruled the customary no harm-rule. The International Court of Justice (ICJ) has repeatedly established that a state must prevent significant harm caused in another state from activities which originates in its territory and for which the state is responsible. The IPCC report SR 1.5°C on the effects of a 1.5°C temperature increase proves sufficiently that the resulting damage is significant in the legal sense, and even catastrophic, considering natural tipping points.

Should the Court not accept 1.1 or 1.5°C as a binding limit it may seek to revert to 'well below 2°C' as laid out by Art. 2 PA. This could be read as meaning 1.75°C as set out by the BVerfG (BVerfGE 157, 30, § 36), reflecting a proposal by the German Environmental Scientific Advisory Board (SRU) on the basis that, during the Paris negotiations, 2°C was chosen on the basis of 66% confidence and 'well below' was added to indicate that a higher confidence should be required. The budgets calculated on the basis of 1.1 or 1.5°C are of course minute, but those calculated on from 1.75 or even 2°C equally so. Neither allows the Respondent State to cause as many emissions as their actual or planned measures envisage.

(ii) Allocation of budgets to states

As a second step, the global budget must be allocated amongst states. The PA does not set binding criteria of allocation, but offers and propagates a number of them, including equity, common but differentiated responsibility, and respective capabilities. The Interveners commend the concept of the Climate Action Tracker (CAT) which is to define fairness along equity criteria such as responsibility for past emissions, capability in terms of GDP, and equal per capita, but excluding grandfathering, because this one-sidedly privileges the large emitters, and cost effectiveness, because that is a criterion for modelled emission pathways rather than equity. The resulting budgets for developed states like the Respondent are very small necessitating, if spent by linear yearly degression, to include negative emissions as of 2030.

As suggested as a possibility by several Responding States in the *Duarte* proceedings and the BVerfG in its climate order of March 2021 (BVerfGE 157, 30 para 225), the Court may also wish to use equal per capita, a concept arguably based on both the international equity principle and the fundamental right to equal treatment (Art. 14 ECHR). If imposed on all states including the Respondent state in this procedure, it actually calls for similarly stringent measures like those resulting from the application of the CAT mixture of criteria. . For illustrative purposes the Court could draw on the quantitative reasoning employed by the German Constitutional Court (BVerfGE 157, 30, § 219 et seq.) Moreover, equal treatment concerning availability of emission possibilities would need to include responsibility for past emissions, which would press for even more restrictive measures.

(b) Modelled emission pathways

'Modelled emission pathways' are derived from scenarios of measures that are (in sum) consistent with upper temperature limits. Like with fair shares, the temperature limits for modelled pathways are based legally on the protective scope of fundamental rights as interpreted in the light of the limits set by the Paris Agreement (see above sub (a)i).

Modelled pathways result from a reasoning in two steps. First, on a global scale, scenarios are compiled that combine various cost-effective sectoral and cross-cutting emission reduction measures, all complying with certain upper temperature limits (IPCC AR 6 WG III). The pathway ensuring compliance with the 1.5°C limit at no or limited overshoot above 1.5°C and minimising carbon dioxide removal (CDR) is chosen as yardstick. Second, this effective global pathway is downscaled to national pathways considering the capabilities (e.g. GDP) and conditions (e.g. population) of the states. The pathway of a state corresponding to the limit 1.5°C can then be represented as a curve that shows the decrease of emissions from a base year to a year by which a level of net zero emissions must be reached. Against this curve the actual performance of a state can be measured. If a state's actual measures describe a national curve exceeding the modelled curve, the state qualifies as having violated the pertinent fundamental rights.

(c) Differing budgets and the question of financial compensation

Applied to a state, reduction obligations using a fair share methodology versus using modelled emission pathways may differ. In industrialised states, fair shares will normally impose stronger burdens than modelled pathways. This is because, on the one side, fair shares take past emissions into account which are deducted from industrialised states' budgets, while, on the other side, modelled emission pathways shift reductions burdens to developing states considering that they can realize reduction at lower cost per tonne avoided emission than developed states. In such a situation, the fair share budget is smaller than the budget for modelled pathways for the Respondent State.

The question then arises what budget shall be decisive. Precaution would command that this is the smaller one. However, CAT recommends that the gap should be closed by compensation payments from developed to developing states enabling the latter to bear the costs of investments. The Interveners submit that this might not be compatible with fundamental rights. Fundamental rights protection means protection in kind, not in cash. The state must ensure that the activity causing the human rights infringement is ceased, i.e. emissions are reduced sufficiently towards zero. Buying itself out of this obligation does not guarantee that the forgone reduction is truly realized elsewhere. Therefore, if offsets are at all regarded to be compatible with fundamental rights protection, they should only be allowed under strict and supervised conditions of additionality, i. e. only if the subsidised reduction in a foreign country is realised in addition to what the country was planning or legally obliged to do anyway. Even such application is highly problematic given the negative experience with the clean development mechanism (CDM) in the Kyoto Protocol system which mainly supported projects in emerging economies that could and should have afforded them anyway.

(d) Exploitation of the technical, economic and social capabilities

As an alternative, should the Court not deem acceptable the standards for determining ambition as suggested above, the Interveners submit that the respondent state should be regarded to at least have the obligation to do whatever is technically, economically and socially feasible, in particular since at 1,1°C global temperature rise, human rights are already affected today by climate change. As explained above (E (2) chapeau), such an obligation is already enshrined in the requirement of effectiveness of protection in Articles 2 and 8. Concerning Art. 8, the legal basis can also be found in Art. 8 (2) which allows for an interference with the right to private life, but only if this is "necessary" in the public interest. In addition, by harmonious interpretation with

international law, the obligation can be conceived to rely on the criterion 'respective capabilities' that is set out in Art. 2 PA. The elements of the obligation are as follows:

- i. The obligation entails that all technically, socially and economically feasible means to minimize GHG emissions must be taken.
- ii. Like in a framing of fair shares and modelled pathways the measures to be taken must be measures in kind, not in cash. Therefore, financial support for other states, be they for 'loss and damages' or as assistance for adaptation or mitigation measures cannot be counted as offsets for measures in kind the Respondent State must realize at home. Once again, the only exception can be if the offset is made under strict conditions of additionality.
- iii. In terms of procedure "appropriate investigations and studies" must be made (Budayeva v. Russia, no. 11 673/02, § 136) that are based on "detailed and rigorous data" (Fadeyeva v. Russia, no. 55723/00, § 128). This would require that the Respondent State systematically screens the studies related to it in order to identify and implement the most stringent feasible emission reductions.
- iv. Such screening is different from what states normally do, namely to concentrate on normative documents such as
 - summaries of measures taken
 - programmes of measures planned
 - impact assessments of measures plannedDocuments of this sort describe and explain what shall be done but not what can be done. The level of climate protection they envisage is based on political decision rather than on an objective search for best possible solutions.
- v. Such process to identify best possible solutions must be guided by a heuristic list of problems, an exercise practiced by the IPCC WG III in earlier reports and notably its recent 6th report. Drawing on the topics raised by the IPCC and somewhat complementing them the Interveners suggest the following problems which should be addressed:
 - the methodology of how to identify and evaluate what is technically, economically and socially feasible; for instance,
 - o how to explore effects of reduction measures on the GDP and employment rates of a state, and if negative effects must be expected, to what extent they can be accepted in view of avoided climate change damage
 - o how to calculate costs of climate change damage and compare them with mitigation costs
 - o how to relate monetarised and qualitative assessments of effects
 - o what discount rates to apply to future costs and benefits
 - measures to incite co-benefits and avoid corollary damage on other environmental goods of emission reduction measures
 - measures to promote and regulate sufficiency, including restriction of emission intensive luxury goods and services
 - measures to accelerate renewable energy production
 - measures to phase out generation of electricity based from fossil fuels
 - measures to enhance energy efficiency and the saving of energy
 - measures to reduce GHG emissions from automobiles, aircraft and vessels
 - measures to promote and regulate emissions neutrality of buildings, including of existing buildings
 - measures to reduce emissions from agriculture, especially non-CO2 emissions from intensive animal husbandry and artificial fertilizers

- measures to establish standards of energy saving for a circular economy of products
- measures to establish standards of energy saving for services, including electronic communication
- measures to reduce emissions from waste disposal, in particular through capturing of methane emissions
- measures to reduce emissions from international marine transportation departing from or landing in a state that go further than the weak standards envisaged by MARPOL
- measures to reduce emissions from international air transportation departing from or landing in a state that go further than the weak standards envisaged by ICAO
- measures to phase out the exploitation of fossil fuels
- measures to regulating the emissions produced in the course of the supply chain of imported products
- measures regulating transboundary emissions of entities based within the Respondent State's jurisdiction

A simple question illustrates the urgency and simplicity of identifying reduction potentials: May states allow the market trend towards "Sports Utility Vehicles" (SUVs) if balanced against the additional CO₂-emissions from SUV production and use compared to other vehicles?

Expert studies of the sort the Respondent State could have consulted and committed itself to include, for example, Catalogue of measures Climate Policy 2030 for a climate-friendly Switzerland (2016),¹ Energy [r]evolution (2020),² and Climate Action Plan 2021.³ All of these studies show that the Respondent State could have taken much more radical measures than actually realised or planned, and would as a result already have lowered its carbon emissions substantially.

B. Jurisdiction concerning scope 3 emissions

Assuming that the answer to question A (coverage by the original application) is affirmative the Interveners allege that attribution of external emissions to the Respondent State ("carbon footprint") must be clarified (1) before asking whether such emissions need to and do fall within the jurisdiction of the same (2).

(1) Attribution

The Interveners submit that it is overdue to apply fundamental rights in situations where emissions are not only caused in the applicant's state's territory but also abroad. De facto, there is no doubt that these emissions have a significant causal effect on individual right holders, no matter if these live within or outside the responsible state. Each ton of CO₂ or other greenhouse gases, emitted wherever on this earth, contribute to climate change. Nevertheless, harmful effects must be attributable to a state if interference shall be established in the legal sense. A state's sovereign constitutional objectives and powers to ensure the well-being of people is first of all related to the state's citizens and inhabitants. But it extends to people living abroad by dint of international law, and more precisely by the customary duty to prevent

¹ Catalogue of measures Climate Policy 2030 for a climate-friendly Switzerland (2016), available at: <https://www.econcept.ch/de/>

² ENERGY [R]EVOLUTION: 100% Renewable Energy for Switzerland, 2020, available at: <https://www.greenpeace.ch/static/planet4-switzerland-stateless/2022/01/97c288c0-switzerland-energy-report-2021.pdf>

³ Climate Action Plan, 2021 available at: https://admin.climatestrike.ch/uploads/Climate_Action_Plan_1_0_7ba47e3b16.pdf

damage. This has traditionally been accepted and fortified by international treaties (such as the UNECE treaties on long-range transboundary air pollution). The step that is now to be taken is to extend this responsibility to scope 3 emissions to capture the actual carbon footprint of the respondent state. Attribution to the state of origin can be based on a wide understanding of the no-harm rule that covers extraterritorial emissions. Arguing *a maiore ad minus* if the transboundary effects are covered, scope 3 emissions must be captured even more readily because the latter are much larger than the former. If that is not acceptable as a customary rule it can nevertheless be conceived as a general principle of international law. Such general principle also reflects the principle of polluter pays, or more precisely of rectification at source. As these principles have been adopted by the EU (Art. 192 TFEU and ECJ C-127/16 (Türkevej teitermelö Kft) para 47) and many European states⁴ it should be regarded as a (regional European) principle of international law. Harmonious interpretation would then influence the related understanding of attribution of interferences with fundamental rights. The Intervenor suggests to the Court to take a bold step in that direction.

In addition, it is submitted that such attribution of emissions to a state arises from the fact that most of the emitting activities are subject to authorisation regimes of states. The authorisation on the one side imposes certain restrictions on the operator, but on the other side enables the operator to act. This has already been accepted by the Norwegian Supreme Court in its Barents Sea judgement where it held: "Constitution does not generally protect against acts and effects outside the Kingdom of Norway. But if activities abroad that Norwegian authorities have directly influenced or could take measures against cause harm in Norway, this must be capable of being included through the use of Article 112. One example is combustion abroad of oil or gas produced in Norway, when it leads to harm in Norway as well (Supreme Court Judgment of 22 Dec. 2020. HR-2020-2472-P, unoff. English translation, para 149).

In the Respondent State, multinational industrial and finance enterprises are of particular importance. Extraterritorial emissions caused by those enterprises are enabled by the pertinent licensing by the State. Taxes drawn from these activities are a major revenue of the State. The direction and financing by Swiss multinationals of emission intensive activities abroad is a core business model that permeates and supports the Respondent State. From this fact flows the responsibility of the State for such external emissions. Responsibility means that the state bears positive obligations to protect victims. As seen above (D (3), such conduct even constitutes active interference by the state and is thus subject to negative obligations (see above below E (3).

(2) Jurisdiction

There are two possibilities to cope with Art. 1 in this case: develop a refined category of jurisdiction (a) or, more basically, deny the applicability of Art. 1 if negative obligations are under consideration (b).

(1) A refined category of jurisdiction

The Interveners suggest to the Court to consider a further category of territorial jurisdiction. This is based on a 'qualified de facto regime causing transboundary injury', i.e. an existing legal regime that originates in and can be controlled by the responsible state having transboundary effects that are serious, lasting and foreseeable, and from which the suffering state cannot shield itself. Such a concept of jurisdiction could be recognised as a component of the 'legal space' ('espace juridique') of the Convention and its 'European public order'. This binds the Convention States, including the Respondent State, to more stringent obligations to each other than to states that are not party to the

⁴ Member States' national legislation transposing EU Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage; for the codification as a general principle see e.g. Poland: Art. 7 Environmental Protection Act; Flanders: Art. 1.2.1 [2] Decree on Environmental Policy; Netherlands: Art. 1.1a Law on Environmental Policy; Czech Republic: Art. 17 [1], Art. 19 Environmental Protection Act; Wallonia: Art. D 3 no. 2 Environmental Protection Act

Convention (Cyprus v. Turkey [GC] appl. no. 25781/94 § 78; Bankovich v. Belgium, appl. No. 52207/99 § 42). Considering judge Chanturia's convincing pleading that peace is an element of the 'European public order' (Diss. Opinion in Georgia v. Russia, appl. no. 38263/08, § 53-54) the Court should conceive a global climate enabling and supporting human life as another core component of the European legal space.

(2) Inapplicability of Art. 1

Alternatively, the Interveners submit that Art. 1 may be read to only require jurisdiction if positive obligations, but not if negative obligations are under consideration. This was reflected by judge Serghides in his Dissenting Opinion in Georgia v. Russia, appl. no. 38263/08. Judge Serghides suggests to read the wording in Art. 1 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention' to only speak of obligations to protect, not of obligations to refrain from interferences. This is also implied by wording of the stipulations on the rights themselves as well as the by institutional provisions of the ECHR which are not limited by territorial jurisdiction. Referring to a hypothetical case of murderous bombing of a Convention state by another state (which has currently become a reality in Ukraine) judge Serghides suggests that such interference cannot rightly escape the scope of the Convention fundamental rights. Indeed, it is more in line with fundamental rights reasoning to detect their transnational scope from the very wording of the legal stipulation itself. This is also the conception of the German Federal Constitutional Court (see again BVerfGE 157, 30 para 175). Viewed from this perspective, the pertinent articles do not limit their scope territorially.

Of course, such reasoning would presuppose a construct of negative obligations. Negative obligations exist in this setting, this is the suggestion of the interveners, in an "unlawful interference by allocation of emission rights". This concept is explained above sub D (3).

The Interveners would be honoured to participate in the hearing scheduled for March 2023 and herewith

apply

to be included to participate.

Prof. Dr. Gerd Winter

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Signed due to physical absence:
Rechtsanwalt John Peters