Verein KlimaSeniorinnen Schweiz and others v Switzerland

Application no. 53600/20

Third Party Intervention before the European Court of Human Rights

by the Human Rights Centre of Ghent University

TEAM

Eva Brems, Senior Full Professor, Head of the Human Rights Centre

Anne-Katrin Speck, PhD Researcher, DISSECT project (ERC Advanced Grant of Marie-Bénédicte Dembour)

Nele Schuldt, PhD Researcher, FWO Fellow and DISSECT project affiliate

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

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

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

1. Emerging trend of environmental harm as a human rights challenge encompassing the notion of climate change

1.1. Emerging trend in international law

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

1.1.1. Recognising the human rights harm of climate change

Most supranational human rights bodies have not yet been directly confronted with climate change related human rights claims. Yet, when such claims have been brought before these bodies, they have recognised them as human rights issues. The UN human rights treaty bodies have moreover taken the initiative to address this matter in a joint statement, thus recognising the matter as one of great importance and priority.

UN Human Rights Treaty Bodies

The *Human Rights Committee's* (HRC's) 2020 decision of *Teitiota v New Zealand* concerns the author's claim that the respondent state violated his right to life under the Covenant by removing him to Kiribati in September 2015. Whilst not finding in favour of the applicant, the HRC stated that "without robust national and international efforts, the effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant […]. Furthermore, given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized."[4] The *Teitiota* decision relies on the HRC's General Comment No. 36, which acknowledged that environmental degradation may fall within the scope of the right to life under Article 6 of the ICCPR.[5]

In a *Joint Statement on "Human Rights and Climate Change"* in 2019, *five UN human rights treaty bodies* stated that 'climate change poses significant risks to the enjoyment of the human rights protected by the International Convention on the Elimination of all Forms of Discrimination Against Women, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Convention on the Rights of the Child, and the International Convention on the Rights of Persons

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

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

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

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

[5] *Ibid*, para. 9.4, citing United Nations Human Rights Committee, General Comment No. 36 of 3 September 2019, CCPR/C/GC/36, para. 62.

with Disabilities.[6] They listed the right to life amongst those rights threatened by the adverse impacts of climate change, and emphasised that the risk of harm is particularly high for people in vulnerable situations, including women and persons with disabilities.

Inter-American Court of Human Rights

In its 2017 *Advisory Opinion on the Environment*,[7] the Inter-American Court of Human Rights (Inter-American Court) affirmed "the existence of an undeniable relationship between the protection of the environment and the realization of other human rights, in that environmental degradation and the adverse effects of climate change affect the real enjoyment of human rights." (para. 47) The Court concluded that "rights that are particularly vulnerable to environmental impact include the rights to life, personal integrity, private life, health, water, food, housing, participation in cultural life, property, and the right to not be forcibly displaced (*references omitted*)." (para. 66)

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

1.1.2. Detailing states' human rights obligations

The above-mentioned *Joint Statement of UN treaty bodies* list states' obligations in this field: "[i]n order for States to comply with their human rights obligations, and to realise the objectives of the Paris Agreement, they must adopt and implement policies aimed at reducing emissions, which reflect the highest possible ambition, foster climate resilience and ensure that public and private investments are consistent with a pathway towards low carbon emissions and climate resilient development."[10] They further emphasise policies capable of contributing to "phasing out fossils [sic] fuels, promoting renewable energy and addressing emissions from the land sector, including by combating deforestation."[11] And they add amongst others that "(s)tates must regulate private actors, including by holding them accountable for harm they generate both domestically and extraterritorially."

The *Inter-American Court* acknowledged in its Advisory Opinion that states' duties to 'respect' and 'ensure' the rights to life and personal integrity must be interpreted in the light of international environmental law (paras. 115-6). It further referred to a number of principles of environmental international law, among those the duty to prevent environmental harm, the precautionary principle, and various procedural environmental rights. Accordingly, in light of the negative impacts of environmental damage, states have been found to owe both positive and negative obligations with regards to the rights to life and to personal integrity. A negative obligation, for example, flows from Article 1(1) ACHR, mandating states to "refrain from (i) any practice or activity that denies or restricts access, in equal conditions, to the requisites of a dignified life […] and (iii) unlawfully polluting the environment in a way that has a negative impact on the conditions that permit a dignified life for the individual […]'. (para. 117)

In addition, states owe a positive obligation to "take all appropriate steps to protect and preserve the rights to life and to integrity."(para. 118) This duty extends to regulating third parties interfering with the protected rights in the private sphere. Specifically, states must prevent third parties from interfering with individuals' human rights by taking "measures of legal, political, administrative and cultural nature […]." (para. 118) Although it is acknowledged that states cannot and should not be held responsible for all potential human rights violations of individuals by third parties, they will be assessed on their compliance with their obligations based on the "particular circumstances of the case" and whether the state displayed a "failure to regulate, supervise or monitor the activities of those third parties that caused environmental damage." (para. 119) In detail, this entails the carrying out of environmental impact assessments (para.

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

[7] Inter-American Court of Human Rights, *A Request for an Advisory Opinion from the Inter-American Court of Human Rights Concerning the Interpretation of Article 1(1), 4(1) and 5(1) of the American Convention on Human Rights* of 15 November 2017, OC-23/17 (2017 *Advisory* Opinion).

[8] UN Conference on Environment and Development: Rio Declaration on Environment and Development, A/CONF.151/26/Rev.l (Vol. l) (1992), Principle 10.

[9] UN General Assembly, *World Charter for Nature*, A/RES/37/7 (1982), Article 23.

[10] See Joint Statement on Human Rights and Climate Change, *supra* note 6.

[11] *Ibid.*

170), the preparation of contingency plans to minimise risks of environmental disasters (para. 171), and efforts to mitigate any significant harm to the environment, according to the best available science (para. 172). To sum up, states must "demonstrate that every effort has been made to use all resources at [their] disposal in an effort to satisfy, as a matter of priority, those minimum obligations (para. 121)."

Similarly, the *Committee on the Elimination of Discrimination Against Women* mentioned in its Concluding Observations on Tuvalu the importance for states to develop "disaster management and mitigation plans".[12] Other human rights treaty bodies, including the *CESCR*[13] and the *CRC*[14] have adopted Concluding Observations in which emphasis was placed on the adoption of "legislation on climate protection giving effect to the 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change"[15], as well as states' human rights obligations in the context of climate change, specifically domestic emissions and the export of fossil fuels. In its Concluding Observations on the initial report of Cabo Verde, the *Human Rights Committee* mentioned the importance of meaningful and informed participation of all members of society: "The development of all projects that affect sustainable development and resilience to climate change should include the meaningful and informed participation of all populations."[16]

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

Domestic courts, too, are increasingly recognising the links between climate change and human rights. This can be observed in recent rulings from domestic courts in several states parties to the Convention, as well as in rulings from states outside of Europe, especially in the Global South.[17] Indeed, these past few years have seen a surge in complaints concerning climate change introduced before national courts. As of 1 July 2020, around 1,550 climate change cases were pending before courts in 38 jurisdictions, according to the United Nations Environment Program (UNEP).[18] The UNEP identifies a clear trend of litigation relying increasingly on human rights enshrined in international instruments and national constitutions to compel climate action. Indeed, several of these pending cases make explicit reference to the rights enshrined in the European Convention, and notably Article 2, 8 and 14 ECHR.

1.2.1. Recognising the human rights harm of climate change

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

In February 2020, a group of young people challenged Germany's Federal Climate Protection Act (*Bundesklimaschutzgesetz*) before the Federal Constitutional Court (FCC), arguing that, by prescribing insufficient greenhouse gas emission reduction targets, it violated their human rights enshrined in the Basic Law (the country's constitution). In its March 2021 ruling on this and three additional constitutional complaints, the FCC recognised both the effects of climate change and the impact of restrictions required to mitigate climate change as raising fundamental rights issues. It accepted, *inter alia*, that "[t]he protection of life and physical integrity under Art. 2(2) first sentence GG [Basic Law] extends to protection against impairments caused by environmental pollution [and] includes protection against risks to human life and health caused by climate change."[19] Besides, "a violation of the legislator's duty to protect property arising from Art. 14(1) GG is also a possibility"(ibid). The FCC added that "the fundamental freedoms of the complainants might have been violated on the grounds that the Federal Climate Change Act offloads significant portions of the greenhouse gas reduction burdens required under Art. 20a GG [which protects the natural foundations of life]

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

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

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

[15] Concluding observations of the Committee on Economic, Social and Cultural Rights: Ukraine, supra note 13, para. 4.

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

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

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

[19] BVerfG, Order of the First Senate of 24 March 2021 - 1 BvR 2656/18, para 99.

onto the post-2030 period. Further mitigation efforts might then be necessary at extremely short notice, placing the complainants under enormous (additional) strain and comprehensively jeopardising their freedom protected by fundamental rights" (para. 117).

Leading climate cases in the Netherlands and Belgium moreover found states' human rights obligations directly in the ECHR. In the Dutch *Urgenda* case, as well as in the Belgian *Klimaatzaak* case, violations were found of the state's positive obligations under Articles 2 and 8 ECHR.[20]

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

Confronted with legal climate action, governments have sought to argue that, because climate change is caused by emissions across the globe, the impact of their own climate mitigation and adaptation policies was bound to be negligible, especially where other states failed to reduce their emissions. As a corollary of this line of argument, governments have suggested (sometimes implicitly) that it should be for the claimants to establish causation between the alleged human rights violations and the impugned measures taken (or not taken) by the state. This defence was rejected by courts in the Netherlands, Germany and Belgium, which have instead insisted that state responsibility should be established not on the basis of causality, but by means of the principles of attribution. This means that individual states are responsible, *pro rata*, for their own contribution to climate change, and that they must assume their share of the collective responsibility of all states to reduce global greenhouse gas emissions. They must, in other words, "cut 'their part' of global emissions to protect their own residents."[21]

Thus, in the above cited *Urgenda* judgment, the *Dutch Supreme Court* rejected "the assertion that a country's own share in global greenhouse gas emissions is very small and that reducing emission from one's own territory makes little difference on a global scale" (para. 5.7.7.) as a defence for inadequate climate action. Instead, it determined that "a country cannot escape its own share of the responsibility to take measures by arguing that compared to the rest of the world, its own emissions are relatively limited in scope and that a further reduction of its own emissions would have very little impact on a global scale. The State is therefore obliged to reduce greenhouse gas emissions from its territory in proportion to its share of the responsibility."[22] Following the same logic, the *German Constitutional Court* recognised that the country's responsibility for the effects of climate change was engaged, despite climate change being a global phenomenon stemming from the cumulative effect of all emissions across the globe. The German Constitutional Court also acknowledged explicitly that today's industrial nations had accounted for more than half of the global emissions since the beginning of industrialisation, and that Germany was currently responsible for nearly 2% of annual global emissions, despite only accounting for roughly 1.1% of the global population.[23] In Belgium, the *Court of First Instance in Brussels* ruled that "[t]he global dimension of the problem of dangerous climate heating does not absolve the Belgian authorities from their obligations deriving from articles 2 and 8 ECHR."[24]

The Court is invited to have due regard to domestic courts' rejection of challenges to climate change litigation based on alleged difficulties establishing a link between a country's emissions, its failure to adopt or implement adequate mitigation measures, and the resulting (human rights) impacts. It is further invited to reaffirm this consistent line of argument by domestic courts, according to which a state cannot escape responsibility for human rights violations stemming from insufficient efforts to curb emissions by reference to other states' failures to comply with their obligations in this field.

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[20] Supreme Court of the Netherlands, 20 December 2019, *Urgenda v the Netherlands*, para. 2.3.2. Tribunal de première instance francophone de Bruxelles, Section Civile, 4ème chambre affaires civiles, Jugement N° 167, 17 July 2021.

[21] Jenny Sandvig, Peter Dawson and Marit Tjelmeland, 'Can the ECHR Encompass the Transnational and Intertemporal Dimensions of Climate Harm?' *EJIL:Talk!* (23 June 2021).

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

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

[24] Tribunal de première instance francophone de Bruxelles, Jugement N° 167, o.c., p. 61 (our translation).

1.2.3. Countering the 'cross-temporal challenge'[25]

Under the ECtHR's consistent case law, positive obligations to take reasonable and appropriate measures to protect individuals arise under Articles 2 and 8 ECHR where a state "knew or ought to have known" that there is a "real and immediate' risk"[26] to their lives or to their right to respect for private and family life. In proceedings before national courts, disagreements have ensued over the notion of 'imminence' in the context of climate change, given that the most devastating consequences of climate change will only materialise over time. The national courts have taken these particularities into account, with the result that uncertainties as to when the invoked risk will materialise are not a barrier to states' positive obligations being engaged.

Thus, the *Supreme Court of the Netherlands* held that "[t]he term 'immediate' does not refer to imminence in the sense that the risk must materialise within a short period of time, but rather that the risk in question is directly threatening the persons involved." (para. 5.2.3.) In line with the precautionary principle, it concluded that "[t]he fact that this risk [of the possible sharp rise in the sea level] will only be able to materialise a few decades from now and that it will not impact specific persons or a specific group of persons but large parts of the population does not mean […] that Articles 2 and 8 ECHR offer no protection from this threat. […] The mere existence of a sufficiently genuine possibility that this risk will materialise means that suitable measures must be taken."(para. 5.6.2.)

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

> The described risk of future restrictions on freedom gives rise to fundamental rights being presently affected because this risk is built into the current legislation. Any exercise of freedom directly or indirectly involving CO2 emissions after 2030 is jeopardised precisely because § 3(1) second sentence and § 4(1) third sentence KSG [Climate Change Act] in conjunction with Annex 2 allow possibly excessive amounts of greenhouse gas emissions until 2030. Insofar as this causes the remaining CO2 budget to be used up, the effect is irreversible because no method is currently known for removing CO2 emissions from the Earth's atmosphere on a large scale. Since future impairments of fundamental rights could potentially be set into irreversible motion today, and given that lodging a constitutional complaint to address the ensuing restrictions on freedom might be futile by the time the impairments have arisen, the complainants already have standing to lodge a constitutional complaint at the present time. (para. 130)

1.2.4. Detailing states' human rights obligations

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

On 31 July 2020, the *Supreme Court of Ireland* handed down a judgment[27] striking down the government's National Mitigation Plan, the central element of the Irish government's climate mitigation policy. The court held that that the Plan lacked specificity as to how the national transition objective—a "transition to a low carbon, climate resilient and environmentally sustainable economy by the end of the year 2050"[28]—was to be achieved, in contravention of Ireland's 2015 Climate Act. The Court determined that the Plan falls short of the sort of specificity that the Act requires because a reasonable reader of the Plan would not understand how Ireland will achieve its 2050 goals. The court explained that "a compliant plan must be sufficiently specific as to policy over the whole period to 2050." (para. 9.2)

The German FCC similarly held that there was a constitutional requirement to achieve climate neutrality (para. 255), and ordered the legislature to update the legal reduction targets for periods from 2031 by the end of 2022 (op. para. 4).

The Dutch courts were even more prescriptive. The District Court of The Hague declared the Dutch emission target—a 20% reduction of greenhouse gas emissions as compared to 1990 levels, which is equivalent to the Swiss target—unlawful as incompatible with the state's duty of care. It further stipulated that the Dutch state was to reduce its greenhouse gas emissions by at least 25% below 1990 levels by 2020. The Supreme Court upheld this ruling in its

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[25] Keina Yoshida and Joana Setzer (2020), 'The Trends and Challenges of Climate Change Litigation and Human Rights', 2 *European Human Rights Law Review* 161-173.

[26] *Öneryıldız v Turkey*, App no. 48939/99, 30 November 2004, para. 101.

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

[28] Republic of Ireland, *Climate Action and Low Carbon Development Act 2015*, Number 46 of 2015, Section 3(1).

landmark judgment of 20 December 2019, which made explicit reference to the state's direct obligations under Articles 2 and 8 ECHR.

Courts in other contracting parties, too, have struck down inadequate climate legislation and ordered the legislature to further curb emissions. In France, the Conseil d'Etat upheld the complaint of the city of Grande-Sythe and environmental NGOs who had challenged the state over insufficient climate action. Imposing a deadline of 3 March 2022, it ordered the Prime Minister to take all necessary measures to curb the curve of greenhouse gas emissions to ensure its compatibility with the greenhouse gas emission reduction targets set out in the relevant EU regulation.[29]

1.2.5. Reading human rights in light of the Paris Agreement

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

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

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

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

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

[29] Conseil d'Etat (Section du contentieux, 6ème et 5 ème chambres réunies), Commune de Grande-Sythe et autre, No 427301, 1 July 2021, operative para. 2 (our translation).

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

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

As mentioned *supra*, numerous domestic complaints in climate cases are framed in terms of Convention rights, and several domestic courts have found violations of Convention rights on account of state failure to take sufficient action to mitigate the human rights impact of climate change. Indeed, given that the Court has found Article 8 violations for a number of environmental harm cases, as well as procedural Article 2 violations with respect to environmental disasters, outlining states' obligations under Articles 8 and 2 regarding climate change mitigation would be a logical next step.

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

Since *López Ostra v Spain*, the Court has recognised the potential adverse impact of environmental degradation on the right to respect for private and family life.[30] The Court equally found an infringement of the right to life as a result of states' failure to observe their procedural obligations in the face of environmental disasters.[31] Most notably, in *Tătar v Romania*, the Court recognised the adverse impact of pollution on the applicant's private and family life, emphasising the state's duty to regulate the authorising, setting-up, operating, safety and monitoring of industrial activities, *a priori* in instances where both the environment and human health could be at risk.

These lines of case law have been referenced by national courts (amongst others in the above-cited cases) as well as by other supranational human rights monitoring bodies.

In its discussions on the infringement of the right to life and the right to respect for private life caused by climate change, the UN *Human Rights Committee* in *Teitiota* relied on case law concerning environmental damage of the ECtHR.[32] The *European Committee of Social Rights* (ECSR) also referred to the ECtHR case law (amongst other sources) when it concluded that the right to the highest attainable standard of health included a right to a healthy environment.[33] The ECSR moreover acknowledged that the right to the highest attainable standard of health pursuant to Article 11 of the European Social Charter serves in a complementary function to Articles 2, 3 and 8 ECHR.[34]

Likewise, the *Inter-American Court* drew inspiration from the jurisprudence of the ECtHR to emphasise the link between environmental degradation and its potential of interfering with the well-being of an individual.[35]

The Inter-American Court further referred to documents from its own case law, the Organization of American States, the African Commission on Human and Peoples Rights and expert reports from the United Nations Independent Expert on human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.[36] A number of these sources[37] are equally pertinent to the European Convention system, given that the ECtHR has repeatedly affirmed that the Convention cannot be interpreted in a vacuum but should, as far as possible, be interpreted in harmony with other rules of international law of which it forms part.[38] Moreover, the Court has consistently reiterated that the Convention constitutes a "living instrument, which must be interpreted in the light of present-day conditions".[39] It is submitted that the relatively novel and increasingly dire effects of climate change are a prime example for the need to adjust the interpretation of the Convention to issues that have predominantly been experienced and scientifically ascertained in in recent years.

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[30] *López Ostra v Spain*, App no. 16798/90, 9 December 1994, para. 51.

[31] *See*, for example, *Budayeva and Others v Russia*, App nos. 15339/02 et al., 20 March 2008, *Öneryıldız v Turkey*, o.c., *M. Özel and Others v Turkey*, App nos. 14350/05 et al., 17 November 2015.

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

[33] European Committee of Social Rights, *Marangopoulos Foundation for Human Rights (MFHR) v Greece*, decision on the merits, Complaint No. 30/2005, 6 December 2006, para. 196.

[34] European Committee of Social Rights, *International Federation for Human Rights (FIDH) v Greece*, decision on the merits, Complaint No. 72/2011, 23 January 2013, para. 51.

[35] IACtHR, Advisory Opinion, *supra* note 7, para. 51.

[36] *Ibid*.

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

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

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

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

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

Similarly, the Court's vulnerability jurisprudence has shown a sensitivity towards the rights of the most marginalised, including the rights of elderly people. It would therefore be in line with that case law for the Court to acknowledge the intersectional nature of the plight of vulnerable people in an increasingly hostile natural environment.

While the human rights threat from climate change affects all individuals, some individuals are affected more seriously than others, on account of characteristics that render them particularly vulnerable to the effects of climate change. In the context of the present intervention, it is relevant to highlight the particular vulnerability of elderly persons, and specifically of elderly women.

On 6 September 2021, a global call from more than 200 medical journals urged states to limit global temperature increases, restore biodiversity and protect health. Specifically, they stated that "in the past 20 years, heat related mortality among people aged over 65 has increased by more than 50%. Higher temperatures have brought increased dehydration and renal function loss, dermatological malignancies, tropical infections, adverse mental health outcomes, pregnancy complications, allergies and cardiovascular and pulmonary morbidity and mortality. Harms disproportionately affect the most vulnerable, including (…) older populations (…) (*footnotes omitted*)."[40]

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

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

In addition, air pollution, which is intimately linked to climate change, is a potential cause of dementia and has disproportionate health effects for older persons, who as a result experience "higher primary care and emergency room use, more frequent hospital admissions, restricted activity and an increase in prescription medication use". Climate change has also been linked to rising levels of a number of infectious diseases, which particularly impact older persons, as illustrated by the COVID-19 pandemic. (para. 10) Importantly, the UN study highlights the differential effects of climate change when it comes to gender. Among these figure "disproportionate health risks [experienced by older women], including a greater likelihood of experiencing chronic diseases and air pollution harms, and [...] higher rates of mortality and other health complications from extreme heat events than any other demographic group."[43]

In its recent case law, the Court has operationalised the concept of vulnerability to determine the extent and the nature of state obligations under the Convention. The interveners submit that it is important for the Court to clarify its vulnerability reasoning in the context of preventive action against climate change impact.

In the first place, it is suggested that the Convention includes a procedural obligation for states to identify particularly vulnerable groups and to take their vulnerabilities duly into account in designing and implementing their policies.[44] In addition, it is suggested that particular vulnerability of certain groups to very serious risks affects the nature and

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

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

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

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

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

substance of the state's positive obligation.[45] It is submitted that preventive action toward a serious risk to health and life that affects the population as a whole does not comply with the Convention if the impact of those measures, while offering sufficient protection to a large part of the population, still leaves vulnerable groups exposed to an unacceptable risk. Finally, it is suggested, in line with the Court's case law, that the recognition of applicants' belonging to a particularly vulnerable group should lead to a narrow margin of appreciation for the state party.[46]

It is today widely recognised that international human rights law is not sufficiently responsive to the particular vulnerability to human rights violations of the elderly. The COVID pandemic has highlighted the urgency of closing this gap in human rights protection. It is submitted that the current case presents the Court with an opportunity to contribute to developing appropriate reasoning for strengthening the protection of the human rights of the elderly under the Convention. In addition, by paying due attention to the particular vulnerability that arises at the intersection of age and gender, the Court can contribute to the important work that several supranational human rights bodies are currently undertaking in terms of integrating insights on intersectionality in human rights law.[47]

3. Evidence as a key issue

Finally, the intervenors would like to emphasise the importance of the approach to evidence in regard to environmental and climate change litigation.

Evidence naturally constitutes a cornerstone of environmental—and, by extension, climate change—litigation. Recently, the ECtHR has found that the use of the precautionary principle in this regard may be essential in assessing whether effective and proportionate measures have been adopted to prevent the risk of serious and irreversible harm, even in the absence of absolute scientific certainty.[48] The precautionary principle should result in a significantly lower burden of proof on the applicant, although the applicant may still have to establish a causal link between the risks and effects of a certain activity (or inactivity) and the alleged violation of their human rights. Because this is inherently difficult to prove, as stated by the Court in *Tătar* (paras. 103-7), a lowered burden of proof should ensure that this task does not become impossible. Indeed, the Intergovernmental Panel on Climate Change has unequivocally affirmed the anthropogenic nature of climate change.[49] In other words: greenhouse gas emissions produced from human activity is the primary factor in the current climate crisis. These insights have occurred despite a fundamental difference in how climate scientists approach evidence for their hypotheses—namely by striving to make it 100% conclusive—as opposed to how courts approach evidence—namely by requiring, for the most part, a standard 'beyond reasonable doubt.'[50]

In light of the overwhelming scientific evidence, it naturally falls on a state defendant to prove that the non-observance of preventive measures capable of reducing greenhouse gases below the minimum requirements is justified.[51] The remainder of this section will elaborate how the precautionary principle could be utilised in this regard.

According to the UNFCCC, the precautionary principle stipulates that "[t]he 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

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

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

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

[48] See *Tătar v Romania*, o.c., para. 109; See further the case law of the European Court of Justice (to which the ECtHR referred in *Tătar v Romania*): *United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities* [1998] ECJ C-190/96; *The Queen v Intervention Board for Agricultural Produce* [1998] ECJ C-263/97.

[49] IPCC (2013), 'Climate Change 2013: The Physical Science Basis', Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (edited by Thomas F. Stocker et al. (Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA), p. 121.

[50] Elisabeth A. Lloyd et al. (2021), 'Climate scientists set the bar of proof too high' 165 *Climatic Change* 55.

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

such measures […]."[52] Similarly, Principle 15 of the Rio Declaration on Environment and Development calls for states to adopt a precautionary approach to environmental damage, especially in light of "threats of serious or irreversible damage",[53] despite the absence of full scientific certainty. The precautionary principle has been gradually consolidated in international environmental law, and, as expressed by the European Commission, "has become a full-fledged and general principle of international law."[54] Accordingly, when "there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the chosen level of protection… [t]he Commission affirms, in accordance with the case law of the Court[,] that requirements linked to the protection of public health should undoubtedly be given greater weight tha[n] economic considerations."[55]

The precautionary principle thus serves as an anchor in questions of climate change: scientific evidence on the dangerous effects of climate change on human rights is incontrovertible. The precise causal links, not least because of the number of contributors to greenhouse gas emissions and other forms of environmental degradation, may fall under the scope of constituting a threat with an uncertainty degree concerning its source and its level of threat. Nevertheless, the potential—and actual—danger of climate change should animate states sufficiently to act in accordance with the principle of precaution. This has been reflected in several judicial decisions, including the Dutch Supreme Court's judgment in *Urgenda*,[56] and the Inter-American Advisory Opinion.[57]

Summing up the Inter-American Court's view, the duty to uphold the rights to life and personal integrity requires the observance of the principle of due diligence. Accordingly, even in the absence of scientific certainty, states must observe the precautionary principle and put in place measures capable of preventing serious or irreversible (environmental) harm.[58] According to these cases, the standard of proof occurs to rely on the probability of occurrence of a certain grave environmental harm. The Office of the United Nations High Commissioner of Human Rights has equally voiced its opinion that the precautionary principle is closely interconnected with human rights.[59]

In a different context, the ECtHR had the opportunity to reflect on causal probability in *Tătar v Romania*, where it found that, despite the absence of causal probability, the existence of a serious and substantial risk to the applicant's health and well-being created a positive obligation on part of the state to protect the applicants' rights to respect for private life, as well as, the enjoyment of a healthy and protected environment.[60] It is submitted that this offers a solid meeting point between the ECtHR case law and developments on the precautionary principle in broader international law, and that this can be operationalised as such in ECtHR climate cases.

4. Conclusion

The Strasbourg Court is faced with the momentous task of recognising the severity of the climate crisis and its incontrovertible impact on the enjoyment of rights protected under the Convention, particularly for the most vulnerable members of society. In doing so, the Court is invited to make use of the foundation it has built through its environmental degradation case law, which, *a fortiori*, should be expanded to climate change cases. Several international human rights bodies and a growing number of courts in states parties to the Convention are also sending a clear signal: climate change invariably impacts adversely on human rights, creating state obligations that ought to be set out more clearly. In this respect, the Court is invited to rely on the precautionary principle to further guide states in satisfying their obligations under the Convention, interpreted in the light of international climate agreements. In addition, the interveners respectfully submit that the Court should recognise the specific vulnerability of elderly individuals—and the intersectional vulnerability of elderly women in particular—with regard to the human rights impact of climate change. There has never existed a more pressing, and more widely impacting issue requiring the Court to interpret the Convention in the light of present-day conditions. In the words of Mireille Delmas-Marty: "the awakening could be very sudden if we wait for the dream to turn into a nightmare of direct confrontation between states and between human beings forced to live together, in ever greater numbers, on an ever less habitable planet."[61]

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[52] United Nations Framework Convention on Climate Change, FCCC/INFORMAL/84 (1992), Article 3.
[53] United Nations Conference on Environment and Development: Rio Declaration on Environment and Development, (1992), Principle 15.
[54] Communication from the Commission on the Precautionary Principle, COM/2000/0001 (2000).
[55] *Ibid*.
[56] See *Urgenda* judgment, o.c., para. 4.90.
[57] See IACtHR, Advisory Opinion, o.c., paras. 175-80.
[58] *Ibid*.
[59] United Nations Human Rights Office of the High Commissioner, Fact Sheet No. 38, p. 38.
[60] See *Tătar v Romania*, o.c., paras. 109-111.
[61] Delmas-Marty M. (2019), *Sortir du pot au noir. L'humanisme juridique comme boussole*, Buchet/Chastel, Paris, p. 56.