

## Written observations in application no. 53600/20

### *Verein Klimaseniorinnen Schweiz et autres c. la Suisse*

#### I. Introduction

1. These third-party observations address the Court’s questions on jurisdiction (B), victim status (C), and applicability of Articles 2 and 8 (D). ENNHRI’s view on Articles 6 and 13 in climate cases is maintained by reference to our earlier intervention in this case before the Chamber of the Court.<sup>1</sup> To avoid duplication, we refer to ENNHRI’s observations in *Duarte* [hereinafter EOD]<sup>2</sup> on jurisdiction and *Carême* [hereinafter EOC]<sup>3</sup> on the obligations of Articles 2 and 8, and Article 46.

#### II. General Statistical Data

2. Since it is often difficult to quantify the negative effects of environmental pollution “in each individual case”, applicants need not prove a direct causal link between an environmental issue and its effect on them.<sup>4</sup> Rather, causality can be proved on the basis of statistical evidence.<sup>5</sup> Moreover, the Court may evaluate “the entirety of the material submitted”, including studies in scientific journals.<sup>6</sup> The Court attaches particular weight to scientific standards of international organisations.<sup>7</sup> The reports of the Intergovernmental Panel on Climate Change (IPCC) should accordingly carry particular weight.<sup>8</sup>
3. According to the IPCC, climate change induced by greenhouse gas (GHG) emissions has already caused a significant increase in heatwave frequency, intensity and duration in Europe, and this is projected to worsen if warming exceeds 1.5°C, particularly in Central European cities.<sup>9</sup> In addition, event attribution studies have found that several heatwaves in Europe over the past 20 years would have been extremely unlikely to occur without human-induced climate change.<sup>10</sup> Climate change made the 2003 heatwave,

<sup>1</sup> Available at: [https://ennhri.org/wp-content/uploads/2021/09/Third-Party-Intervention-Klimaseniorinnen\\_-\\_website.pdf](https://ennhri.org/wp-content/uploads/2021/09/Third-Party-Intervention-Klimaseniorinnen_-_website.pdf)

<sup>2</sup> Available at: [ennhri.org/wp-content/uploads/2022/12/ENNHRI-3rd-party-intervention-Duarte-v.-Portugal-others.pdf](https://ennhri.org/wp-content/uploads/2022/12/ENNHRI-3rd-party-intervention-Duarte-v.-Portugal-others.pdf)

<sup>3</sup> Available at: [ennhri.org/wp-content/uploads/2022/12/ENNHRI-3rd-party-intervention-Careme-v.-France.pdf](https://ennhri.org/wp-content/uploads/2022/12/ENNHRI-3rd-party-intervention-Careme-v.-France.pdf)

<sup>4</sup> *Pavlov et al. v. Russia* (31613/09) 11.10.2022 § 61; *Jugheli et al. v. Georgia* (38342/05) 13.07.2017 § 63.

<sup>5</sup> E.g. *Pavlov* §§ 68-69; *Cordella et al. c. Italie* (5441/13 etc.) 24.01.2019 § 106; *Dubetska et al. v. Ukraine* (30499/03) 10.02.2011 §§ 111, 123 with further references.

<sup>6</sup> *Pavlov* §§ 62, 76, 87, 91; *Cordella* §§ 15–31, 150-156, 162.

<sup>7</sup> *Oluic v. Croatia* (61260/08) 20.05.2010 § 29; *Brincat et al. v. Malta* (60908/11 etc.) 24.07.2014 § 38.

<sup>8</sup> IPCC, *IPCC Factsheet – How does the IPCC approve reports?*, revised July 2021.

<sup>9</sup> IPCC, Sixth Assessment Report (AR6) Working Group I (WGI) *The Physical Science Basis*, 2021, 2021, p. 1548-1557, Fig. SPM.3, Table 11.16; Guerreiro et al., “Future heatwaves, droughts and floods in 571 European cities,” *Environ. Res. Lett.* 13, no. 3 (2018); Junk et al., “Future Heat Waves in Different European Capitals Based on Climate Change Indicators,” *Int. J. Environ. Res. Public Health* 16, no. 20 (2019).

<sup>10</sup> IPCC, *AR6 WGI* (2021), p. 1553; Vautard et al., “Human Contribution to the record-breaking June and July 2019 heatwaves in Western Europe,” *Environ. Res. Lett.* 15, no. 9 (2020); Christidis et al., “Dramatically increasing chance of extremely hot summers since the 2003 European heatwave,” *Nat. Clim. Change* 5, no.1 (2015).

which resulted in 70,000 excess deaths in Europe, at least hundreds of times more likely to occur.<sup>11</sup> The temperatures reached during the heatwave would have occurred once every several thousand years without human-induced climate change, but are now projected to be “commonplace” by the 2040s.<sup>12</sup> At a global level, the probability of an extreme heat event that occurs once every 20 years in the current climate will increase by 130% with 1.5°C of warming and by 340% with 2.0°C of warming.<sup>13</sup>

4. The negative impacts of heatwaves on mortality and morbidity are well-documented and are projected to worsen with every incremental increase in warming.<sup>14</sup> There is an “exponential increase in mortality with increasing temperatures”.<sup>15</sup> Climate-attributed heat mortality is thus “one of the clearest and impactful fingerprints of a changing climate”.<sup>16</sup> Exposure to extreme heat increases the risk of acute kidney injury, heatstroke, asthma attacks, disrupted sleep, poor mental health, as well as respiratory, cardiovascular, immune and nervous-system diseases and disorders, which in some cases can be fatal.<sup>17</sup> In Switzerland, between 1991 and 2018, 31.3% of heat-related deaths were attributable to human-induced climate change, with elderly women and infants being particularly affected.<sup>18</sup> Older persons, especially those living in urban areas, are particularly vulnerable to heatwaves due to both social and physiological factors.<sup>19</sup> Annual excess heat-related deaths of people aged over 65 in Switzerland have increased by more than 200%, from 58 in 1969–78 to 176 in 2009–17.<sup>20</sup> The increase has been even more dramatic for people over 75 years of age and this is projected to worsen in the future. Women over 75 years old have the highest risk of heat-related health impacts in Switzerland.<sup>21</sup>

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<sup>11</sup> Christidis et al. (2015) updating original estimate in Peter Stott et al., “Human contribution to the European heatwave of 2003,” *Nature* 432 (2004); Robine et al., “Death toll exceeded 70,000 in Europe during the summer of 2003,” *Comptes Rendus Biologies*. 331, no. 2 (2008).

<sup>12</sup> Christidis et al. (2015), abstract, p. 48.

<sup>13</sup> Kharin et al., “Risks from Climate Extremes Change Differently from 1.5°C to 2.0°C Depending on Rarity,” *Earth’s Future* 6, no. 5 (2018); Li et al., “Changes in Annual Extremes of Daily Temperature and Precipitation in CMIP6 Models,” *Journal of Climate* 34, no. 9 (2021).

<sup>14</sup> IPCC, *AR6 WGII Impacts, Adaptation and Vulnerability*, 2022, pp. 1045, 1046, 1071, 1072 and 1092.

<sup>15</sup> Mitchell, *Climate attribution of heat mortality*. Nat. Clim. Chang. 11, 467–468 (2021).

<sup>16</sup> Mitchell (2021).

<sup>17</sup> Romanello et al., “The 2022 report of the Lancet Countdown on health and climate change: health at the mercy of fossil fuels,” *The Lancet* 400, no. 10363 (2022); Howard et al., “How hot weather kills: the rising public health dangers of extreme heat,” *Br. Med. J.* 2022;378:o1741.

<sup>18</sup> Vicedo-Cabrera et al., “The burden of heat-related mortality attributable to recent human-induced climate change,” *Nat. Clim. Change* 11, no. 6 (2021), Supplementary Table 4.

<sup>19</sup> IPCC, *AR6 WGII* (2022), pp. 1092 and 1053; Bunker et al., “Effects of air temperature on climate-sensitive mortality and morbidity outcomes in the elderly; a systematic review and meta-analysis of epidemiological evidence,” *EBioMedicine* 6 (2016); UN OHCHR, *Analytical study on the promotion and protection of the rights of older persons in the context of climate change*, UN Doc. A/CCPR/47/46, 2021.

<sup>20</sup> Schrijver et al., “Nationwide Analysis of the Heat- and Cold-Related Mortality Trends in Switzerland between 1969 and 2017: The Role of Population Aging,” *Environmental Health Perspectives* 130, no. 3 (2022); For global figures, see Romanello et al. (2022), indicator I.1.5.

<sup>21</sup> Ragettli et al, *Hitzebedingte Sterblichkeit im Sommer 2019*, Primary and Hospital Care 2021;21(03):90-95, 3 March 2021; Saucy et al. *The role of extreme temperature in cause-specific acute cardiovascular mortality in Switzerland: A case-crossover study*, Science of The Total Environment, Vol. 790, 10 October 2021; Federal Office for the Environment (FOEN) *Management Summary: Climate Change in Switzerland, Indicators of driving forces, impact and response*, Bern 2020, p. 9.

### III. Jurisdiction (question B)

5. The fact that climate change is caused by cumulative, global emissions, does not absolve individual States from responsibility for the conduct attributable to them [see EOD paras. 6-7]. State responsibility under Article 2, for instance, merely requires that the Contracting State had a “real prospect of [...] mitigating the harm”, even in instances where the harm could have occurred regardless.<sup>22</sup> According to the IPCC, every tonne of GHG not emitted decreases the risk of climate related harm, including the risk of triggering tipping points.<sup>23</sup> Accordingly, there is an emerging jurisprudence from Europe and beyond that individual States have jurisdiction for contributing to climate harm, at least on its territory.<sup>24</sup>
6. Since GHG emissions cause territorial harm no matter where in the world they are combusted, a Contracting State’s jurisdiction for the purposes of Article 1 would naturally encompass all emissions under its *effective control* [EOD paras. 8–11]. Emerging jurisprudence confirms that a State can be held legally responsible for emissions under its effective control, at least from exported fossil fuels.<sup>25</sup> For instance, the Norwegian Supreme Court has held that territorial climate harm caused by enterprises abroad is constitutionally relevant insofar the State may “influence directly or take measures against” the activities.<sup>26</sup> A similar finding under the ECHR would be consistent with the object and purpose of international climate law, which is to prevent dangerous interference with the climate system by limiting global warming to 1.5°C, and at the very least, well below 2°C,<sup>27</sup> as well as Article 2.1c of the Paris Agreement.

### IV. Victim status (question C)

#### A. Individuals

7. Article 34 does not allow *actio popularis*. However, this does not mean that potential violations will be excluded from judicial review simply because of their prevalence. As evidenced by the Court’s approach in *Ukraine v. Russia (X)*, and as noted by the German Constitutional Court, “[t]he mere fact that very large numbers of people are affected does not exclude persons from being individually affected in their

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<sup>22</sup> *Bljakaj et al. v. Croatia* (74448/12) 18.09.2014 § 124 with further references.

<sup>23</sup> IPCC, *AR6 WGI*, 2021, *Summary for Policymakers (SPM)*, 2021, para. B.2.2, pp. 19–24, 35, 41; *Full report*, para. 11.3.5.

<sup>24</sup> *Urgenda v. the Netherlands*, ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands), 20.12.2019, paras. 5.7.1, 5.7.7-5.7.8; *Neubauer et al. v. Germany*, BvR 2656/18 (German Constitutional Court), 24.03.2021, paras. 149, 202-204; *Notre Affaire à Tous et al. v. France*, no. 1904967, 1904968, 1904972, 1904976/4-1 (Administrative Court of Paris), 3.2.2021, para 34; *Commune de Grande-Synthe v. France* (“Grande-Synthe I”), no. 427301, (Le Council d’Etat) 19.11.2020 para 12; *VZW Klimaatzaak v. Belgium et al.*, no. 2015/4585/A (First Instance Court of Brussels), 17.6.2021, p. 61 (appealed). For non-European case-law, see EOD para. 6 (n) 26.

<sup>25</sup> *CRC, Sacchi et al. v. Germany* (dec.), 22.09.2021, CRC/C/88/D/107/2019 para 9.9; *Waratah* §§ 25, 26, 695, 717; *Royal Dutch Shell*, ECLI:NL:RBDHA:2021:5339 (The Hague District Court), 26.05.2021, para. 4.4.19 (appealed), 4.4.25; *Ctr. for Biological Diversity v. Bernhardt (Liberty)*, 982 F.3d 723 (9th Cir. 2020), p. 19–23; *Sovereign Inupiat for a Living Arctic et al v. Bureau of Land Management et al. (Willow)*, p. 28–31., District Court of Alaska; *Friends of the Earth et al. v. Debra A. Haaland et al. Civil Action*, No.: 21-2317 (RC), District Court of Columbia, 27.01.2022, p. 23–40, *Gloucester Resources Ltd v. Minister for Planning* (2019) 234 LGERA 257, paras 499–513.

<sup>26</sup> *Greenpeace Nordic Ass. et al. v. Norway*, HR-2020-2472-P (Supreme Court of Norway), 22.12.2020 para. 149, ref. 155.

<sup>27</sup> As confirmed in *Waratah* §§ 674–682, ref. 695, it would be contrary to the purpose and system of the Paris Agreement art. 2.1a), 4, 9, 10 and 11 to disregard exported combustion emissions (scope 3 emissions).

own fundamental rights”.<sup>28</sup> Accordingly, the Court has accepted complaints of a general nature from (i) individuals residing in large cities (~0.5 million inhabitants) or regions where all residents were equally exposed to pollution; (ii) individuals enduring living conditions affecting “a large number” on a “large scale”; or (iii) applicants fearing secret surveillance measures that could potentially affect entire populations of States.<sup>29</sup> Similarly, individuals should not be denied standing simply because dangerous climate change may affect entire populations. Hence, courts in Canada, Pakistan, Nepal, Germany, Colombia, Belgium, the Netherlands, France, and the United States have granted standing to i) individuals, ii) associations or iii) regional entities *regardless of the prevalence of climate risks*.<sup>30</sup>

8. To qualify as a victim, a person must normally be directly affected by the alleged violation. Climate harm at the current level of 1.2°C of warming is directly affecting individuals.<sup>31</sup> As substantiated in para 4, human exposure to heat is an “immediate and direct impact of climate change”, which has already led to increased mortality and morbidity rates in Switzerland, particularly for elderly women.<sup>32</sup>
9. In addition, the Court exceptionally allows complaints over *potential violations* if there is “reasonable and convincing evidence of the probability of the occurrence of a violation”.<sup>33</sup> Potential victimhood in climate cases could follow *a fortiori* from the Court’s implicit acceptance of potential victimhood in cases where the alleged environmental harm would only hypothetically materialise in the future.<sup>34</sup> In contrast, the risk of climate harm is not hypothetical but already existing. As noted by the IPCC, GHG-induced climate change is “unequivocal”, with a “near-linear relationship between cumulative anthropogenic CO<sub>2</sub> emissions and the global warming they cause”.<sup>35</sup> Hence, the UN Human Rights Committee (CCPR) has granted standing in climate cases, noting that the “risk of being affected is more than a theoretical possibility”; it is a “real predicament”.<sup>36</sup> Similar conclusions have been drawn by national courts regarding the risk of dangerous climate change affecting potentially any inhabitant,

<sup>28</sup> *Ukraine v. Russia (X)* (11055/22) granting urgent interim measures 01.03.2022; *Neubauer* paras. 110 and 131.

<sup>29</sup> *i)* *Pavlov; Cordella* §§ 100–109; *A.A. et al. c. Italie* (37277/16) 04.05.2022, *Perelli et al. c. Italie* (45242/17) 05.05.2022; *Di Sarno et al. c. Italie* (30765/08) 10.01.2012 § 108; *Okay et al. v. Turkey* (36220/97) 12.07.2005 § 66; *ii)* *M.S.S. v. Belgium and Greece* [GC] (30696/09) 21.01.2011 § 255; *iii)* *Centrum for Rättvisa v. Sweden* [GC] (35252/08) 25.05.2021 §§ 166–167; *Big Brother Watch et al. v. the UK* [GC] (58170/13 etc.) 25.05.2021 §§ 467–472 with further references.

<sup>30</sup> *i)* *Mathur v. Ontario*, 2020 ONSC 6918 (Superior Court of Justice – Ontario, Canada), 12.11.2020 para. 244; *Leghari v. Federation of Pakistan*, W.P. No. 25501/201 (Lahore High Court, Pakistan), 04.09.2015; *Shrestha v. Office of the Prime Minister et al.*, no. 10210, Order no. 074-WO-0283 (Supreme Court of Nepal), 25.12.2018; *Neubauer* paras. 110 and 131; *ii)* *Future Generations v. Ministry of the Environment et al.*, STC4360-2018 (Supreme Court of Colombia), 05.04.2018; *VZW Klimaatzaak* pp. 50–51 (appealed), *Urgenda vpara.* 5.9.2; *Shell*, paras. 4.2.4–5 (appealed); *Notre Affaire à Tous* paras. 12–15; *iii)* *Grande-Synthe I* para. 3; *Massachusetts v. EPA*, 549 U.S. 497 (Supreme Court of the United States), 02.04.2007 pp. 23–25, note 24, citing 412 U. S. 669 (“To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody”).

<sup>31</sup> IPCC, AR6 WGI (SPM) (2021) paras. A.1 and A.1.2 and IPCC, *Special Report on Global Warming of 1.5°C*, 2018, pp. 4.

<sup>32</sup> *Vicedo-Cabrera et al.* (2021) p. 1 and Supplementary table 4 ; *Robine et al.* (2008) pp. 174–176 ; *Christidis et al.* (2015) p. 48.

<sup>33</sup> *Asselbourg et autres c. le Luxembourg (dec.)* (29121/95) 29.06.1999 with further references.

<sup>34</sup> *Taşkin et al. v. Turkey* (46117/99) 10.11.2004 § 113; *Tătar* §§ 85–87; *Hardy and Maile v. the UK* (31965/07) 14.02.2012 § 187–191 with further references; ECtHR, *Guide sur l’environnement*, 31.08.2022, § 67. Potential victimhood can be inferred from the ECtHR’s review of the merits in these cases, without an assessment *ex officio* of the applicants’ victim status.

<sup>35</sup> IPCC, AR6 WGI (SPM) (2021) pp. 5 and 36.

<sup>36</sup> CCPR, *Teitiota v. New Zealand*, CCPR/C/127/D/2728/2016, 07.01.2020, para. 8.4–8.6. See also *Massachusetts*, p. 23 (“The risk of catastrophic harm, though remote, is nevertheless real.”).

future generations or indeed residents abroad.<sup>37</sup> Given the probability of widespread climate harm, any person within the jurisdiction of the Contracting States is “potentially at risk”.<sup>38</sup> At the very least, persons belonging to a “class of people who risk being directly affected” would qualify as potential victims.<sup>39</sup> It is well established that i) children, ii) indigenous people, iii) the elderly, and iv) women, are particularly vulnerable to premature death and health impacts due to climate change.<sup>40</sup> Elderly women are particularly at risk from climate-attributed heat (see para. 4 above).

10. To avoid “ineffectual and illusory” rights,<sup>41</sup> the Court has accepted potential victimhood where i) the alleged risk of suffering is of a “serious and irreparable nature”,<sup>42</sup> or ii) where features of the alleged violation would make it impossible to demonstrate being directly affected and render violations “effectively unchallengeable”.<sup>43</sup> Similarly, while excess mortality attributed to climate change may readily be established already, features of climate change may make it difficult to demonstrate a personalised risk from equally “serious and irreparable” impacts in time. The delayed effects of CO<sub>2</sub> emissions on global average temperatures<sup>44</sup> and system inertia<sup>45</sup> mean that the mitigation pathways pursued *today* determine whether limiting warming to 1.5°C or even 2°C is within reach. Exceeding 1.5°C risks triggering cascading tipping points, which may greatly accelerate global warming and lead to abrupt and irreversible changes in the Earth’s climate system.<sup>46</sup> Potential victimhood would ensure that individuals are not deprived of the Convention’s enforcement machinery while future climate impacts on their rights can still be prevented.<sup>47</sup>

## B. Environmental associations

11. In general, associations may only bring a complaint in their own name if the rights of the association itself are directly affected. Hence, associations may invoke Articles 6 and 10, or procedural rights to

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<sup>37</sup> *Urgenda*, para. 5.6.2; *Shell* (appealed) para. 4.2.4; *VZW Klimaatzaak* (appealed) pp. 50–51; *Neubauer* paras. 96–102, 108–110.

<sup>38</sup> *Mutatis mutandis*, *Centrum for Rättvisa* [GC] § 167 with further references.

<sup>39</sup> *Open Door et al. v. Ireland* [Plenary] (14234/88) 29.10.1992 § 44; *Burden v. the UK* [GC] (13378/05) 29.04.2004 § 34.

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

<sup>41</sup> *Aksu v. Turkey* [GC] (4149/04 and 41029/04) 1.03.2012 § 51 with further references.

<sup>42</sup> *Soering v. the UK* [Plenary] (14038/88) 07.07.1989 §§ 90–91.

<sup>43</sup> *Centrum for Rättvisa* [GC] §§ 166–169 with further references.

<sup>44</sup> IPCC, AR6 WGI (2021) pp. 5–88, 4–91 ff. and 5–120; IPCC, AR6 WGI (FAQ) (2021) FAQ 4.2, 4.6.

<sup>45</sup> IPCC, AR6 WGIII (SPM) (2022) paras. C.1.2, C.1.3 and B.7; IPCC, AR6 WGI (SPM) (2021) para. B.1 and pp. 17–18.

<sup>46</sup> A tipping point is a critical threshold beyond which a system reorganises, often abruptly and/or irreversibly”, see IPCC, AR6 WGI (2021) p. 21, IPCC, *1.5°C Report* (2018) pp. 262–264; IPCC, AR6 (SPM) (2021) para. C.3.2 and table SPM.1 at p.18; McKay et al. *Exceeding 1.5°C global warming could trigger multiple climate tipping points* in *Science* Vol 377, Issue 6611, 9.9.2022. See also *Neubauer*, paras. 21, 161; *Sharma*, paras. 51, 249.

<sup>47</sup> *Mutatis mutandis*, *Urgenda*, para. 5.7.9 with respect to ECHR Article 13.

information under Article 8, but not inherently personal rights under Articles 2 and 8.<sup>48</sup> An underlying premise is that an association’s individual members are “adult persons with full legal capacity to act” and better placed to “lodge complaints with the Court in their own name”.<sup>49</sup> However, in cases where this premise does not hold, associations have exceptionally been permitted. In climate cases, individuals may similarly suffer “from a vulnerability that prevented them” from bringing personal complaints.<sup>50</sup> *Firstly*, climate harm such as climate-attributed heat disparately affects young children and infants without legal capacity to act and vulnerable older persons whose age-specific interest is perishable. *Secondly*, GHG emissions lock in harmful effects for individuals even *before* they reach an age where they will be particularly affected. Effective protection of an individual’s long-term “interest in living in a safe environment”<sup>51</sup> may thus depend on environmental associations being able to bring complaints to protect against irreversible climate harm while there is still time to prevent it. Where a lack of representation would prevent serious rights violations from being examined and allow States to “escape accountability under the Convention”, representative complaints have otherwise been permitted.<sup>52</sup>

12. Prohibiting lawfully recognised environmental associations from bringing representative complaints is “in no way necessary in order to avoid *actio popularis*”, according to the Grand Chamber of the CJEU.<sup>53</sup> Rather, it could allow the Court to strike a balance<sup>54</sup> between, on the one hand, the need to limit the pool of potential applicants and on the other, the requirement of the Convention system to “determine issues on public-policy grounds in the common interest” and identify violations of a “structural character”.<sup>55</sup> Indeed, the Court has recognised that “recourse to collective bodies such as associations is one of the accessible means, sometimes the only means, available to [individuals] whereby they can defend their particular interests effectively”.<sup>56</sup> Representative actions by associations are also common ground in Europe, “recognised by the legislation of most European countries.”<sup>57</sup> The essential role played by environmental associations is emphasised in Article 9 § 3 of the 1998 Aarhus Convention on access to information, public participation and justice in environmental matters.<sup>58</sup> It prohibits States from

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<sup>48</sup> *Association BURESTOP 55 et al c. France* (56176/18 etc.) 01.07.2021, §§ 54, 75; *Yusufeli İlçesini Güzelleştirme Yaşatma Kültür Varlıklarını Koruma Derneği v. Turkey* (dec.) (37857/14) 07.12.2021 § 38; *Aly Bernard et 47 autres personnes physiques ainsi que par l’association Greenpeace- Luxembourg v. Luxembourg* (dec.) (29197/95) 29.06.1999; *Greenpeace E.V. et al. v. Germany* (dec.) (18215/06) 12.05.2009, p. 4.

<sup>49</sup> *Identoba et al. v. Georgia* (73235/12) 12.05.2015 § 45 with further references.

<sup>50</sup> *Mutatis mutandis, Yusufeli* (dec.) § 42.

<sup>51</sup> *Pavlov* § 85.

<sup>52</sup> *Centre for Legal Resources on Behalf of Valentin Câmpeanu* [GC] (47848/08) 17.07.2014 § 112.

<sup>53</sup> C-873/19 *Deutsche Umwelthilfe v. Germany* [GC] 8.12.2022 para. 74; see a contrario *Yusufeli* § 38.

<sup>54</sup> See on this point Advocate General’s Opinion in C-873/19, ECLI:EU:C:2022:857, point 73; see also the Advocate General’s Opinion in C-664/15, EU:C:2017:760, point 81.

<sup>55</sup> *Konstantin Markin v. Russia* [GC], (30078/06) 22.03.2012 § 89; *Stoyanova v. Bugaria* (56070/18) 14.06.2022 §§ 77-79; *Broniowski v. Polen* [GC] (31443/96) 25.09.2005 § 190. The protection of common interests is reflected in the ECHR Preamble recital 5 and Articles 33 and 37 § 1 *in fine*. See also Tulkens, *Le temps de l’action*, 2021, available here: <https://www.nhri.no/en/2021/le-temps-de-laction/>.

<sup>56</sup> *Gorraiz Lizarraga et al. v. Spain* (62543/00) 27.04.2004 § 38.

<sup>57</sup> *Ibid.*

<sup>58</sup> The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998) is adopted by all but six ECHR-parties. *Tătar* §§ 111, 118 and *Association Burestop 55* § 54.

introducing criteria which excessively restrict access to justice for environmental associations.<sup>59</sup> As a result, the CJEU now requires national courts to interpret procedural rules “to the fullest extent possible” to “enable an environmental association” to bring court actions.<sup>60</sup> The standing requirements under domestic law in the Dutch and Belgian climate cases have already been interpreted to acknowledge the standing of NGOs, whereas some other courts have granted NGOs standing to challenge GHG emissions policies on the basis of current and projected climate harm.<sup>61</sup> These judgements, and the fact that long-term structural climate harm might otherwise escape the Court’s supervision, support interpreting the “victim” requirement “in an evolutive manner”<sup>62</sup> to allow representative complaints from environmental associations in this particular context.

## V. Applicability of art. 2 and 8 (question D.4)

### A. Article 2

13. The primary positive obligation under Article 2, to adopt a framework providing effective deterrence against threats to the right to life, applies to any activity in which the right to life “may be at stake”, and *a fortiori* in the context of inherently dangerous activities.<sup>63</sup> GHG-induced climate change is inherently dangerous. 161 States, echoing UN Treaty Bodies, have warned that climate change poses one of the “most pressing and serious threats” to the right to life.<sup>64</sup> Apex courts in the Netherlands, Ireland, Norway, Germany, France, the US, Canada, Colombia, Nepal and Australia consider climate change a real and serious threat to human lives.<sup>65</sup>
14. The secondary obligation, to take preventive operational measures, requires that the risk to life is “serious” or “real and immediate”.<sup>66</sup> This includes risks that may only materialise in the longer term.<sup>67</sup> The term “immediate” is applied in a “flexible manner”, taking into account whether the risk is

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<sup>59</sup> See United Nations Economic Commission for Europe Implementation, *The Aarhus Convention: An Implementation Guide*, 14, pp. 58 and 194 ff and e.g. Aarhus Compliance Committee, 16 June 2006, Communication ACCC/C/2005/11 UN Doc. EPE/MP.PP/C.1/2006/4/Add.2, paras. 34-40.

<sup>60</sup> C-873/19, para. 74.

<sup>61</sup> i) *Urgenda*, para. 5.9.2. VZW *Klimaatzaak* (appealed), p. 53-55; *Klimatická žaloba ČR v. Czech Republic*, no. 14A 101/2021 (Municipal Court in Prague) 15.06.2022 (appealed) para 162-65, ii) *Greenpeace Nordic Ass.* para. 165; *Urgenda*, para. 5.9.3; *Shell* (appealed), para. 4.2.5; *Notre Affaire à Tous* paras. 10–15; *Grande-Synthe I*, para. 6. Conversely, *Friends of the Irish Environment v. Ireland*, Appeal No: 205/19 (Supreme Court of Ireland) 31.07.2020 paras. 7.6, 7.21–7.24 (NGO standing allowed based on domestic law, denied with respect to ECHR law); *Neubauer*, para. 136.

<sup>62</sup> *Mutatis mutandis*, *Gorraiz Lizarraga* § 38.

<sup>63</sup> *Brincat* § 80; *Nicolae Virgiliu Tănase v. Romania* [GC] (41720/13) 25.06.2019 § 135 with further references.

<sup>64</sup> A/76/L.75, 26.07.2022 preamble recital 13; CCPR, *General Comment No. 36 on Article 6 Right to Life*, 2018, para. 62; Joint Statement by CESCR, CEDAW, CMW, CRC and CRPD, *Human Rights and Climate Change*, UN Doc. HRI/2019/1, para. 3; CRC, *General Comment No. 15*, UN Doc. CRC/C/GC/15, para. 50.

<sup>65</sup> *Urgenda*, para. 5.6.2; *Friends of the Irish Environment* paras. 1, 3.6; *Greenpeace Nordic Ass.* paras. 45–55, 167; *Neubauer* paras. 147–148; *Grande-Synthe I*, para. 3; *Notre Affaire à Tous* paras. 16 ff.; *Massachusetts*, p. 23; *Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 (Supreme Court of Canada), 25.03.2021, para. 171; *Future Generations*, p. 34; *Shrestha*, pp. 5, 11; *Sharma*, paras. 247, 257.

<sup>66</sup> *Nicolae Virgiliu Tănase* § 136; *Brincat* § 82 (“serious”); *Budayeva et al. v. Russia* (15339/02 etc.) 20.03.2008 § 146 (“threat to their physical integrity”); ECtHR, *Guide sur l’environnement*, p. 8.

<sup>67</sup> *Öneriyıldız v. Turquie* [GC] (48939/99) 30.11.2004 §§ 98–101; *Budayeva* §§ 147–158; *Kolyadenko et al. v. Russia* (17423/05 etc.) 28.02.2012 § 171; *Brincat* §§ 103–117.

“foreseeable”.<sup>68</sup> In the context of Article 15, the ECtHR has noted that “[t]he requirement of imminence cannot be interpreted so narrowly as to require a State to wait for disaster to strike before taking measures to deal with it.”<sup>69</sup> Similarly, the ICJ has observed that “a ‘peril’ appearing in the long term might be held to be ‘imminent’ as soon as it is established”, because “the realisation of that peril, however far off it might be, is not thereby any less certain and inevitable”.<sup>70</sup>

15. *Firstly*, dangerous climate change *already* poses a serious, real, and immediate risk to life, particularly for vulnerable individuals.<sup>71</sup> Recent attribution studies confirm that “human exposure to high outdoor temperatures, which is associated with morbidity and an increased risk of premature death” is an “immediate and direct impact of climate change”.<sup>72</sup> As established above in Part II, 31.3% of warm-season heat-related deaths in Switzerland during 1991-2018 were caused by climate change. For instance, during the climate-attributed 2003 heatwave, excess mortality in Switzerland reached 26.7% in the second week of August 2003, averaging 9.8% in August overall.<sup>73</sup> There were “major distortions in the death’s age and gender structure”.<sup>74</sup> Numbers from France suggest that the share of 75+ deaths and female deaths increased by 16.5% and 21%, respectively.<sup>75</sup> Overall, 65% of those who died were female.<sup>76</sup> It follows from previous case-law that where an environmental situation “had a direct influence on morbidity rates”, it is not necessary to prove individual causality.<sup>77</sup>
16. *Secondly*, every incremental increase in emissions leads to further warming, with a certain and exponential increase in heat mortality.<sup>78</sup> This means that at higher levels of warming even small increases in temperature have increasingly large impacts. All likely Representative Concentration Pathways (RCPs) indicate that summers as hot as 2003 will be “very common” by the 2040s.<sup>79</sup> If emissions go largely unchecked (RCP6.0 and RCP8.5), the 2003 summer “will be deemed an extremely cold event by the end of the century”.<sup>80</sup> The severity of these risks thus depends on the rate at which States reduce their GHG emissions now. In addition, recent studies show that exceeding the 1.5°C limit could trigger multiple tipping points, including abrupt thaw of boreal permafrost and the collapse of ice sheets, which may lead to self-reinforcing warming and a possible “tipping cascade” irreversibly amplifying global warming.<sup>81</sup> Unless there are “immediate, rapid, and large-scale reductions” in GHG emissions, limiting warming to 1.5°C will be beyond reach, with this temperature threshold likely to be

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<sup>68</sup> *Kurt v. Austria* [GC] (62903/15) 15.06.2021 §§ 175–176.

<sup>69</sup> *A et al. v. the UK* [GC] (3455/05) 19.02.2009 § 177.

<sup>70</sup> ICJ, *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, 25.09.1997, para. 54.

<sup>71</sup> IPCC, *AR5 WGII Impacts, Adaptation, and Vulnerability*, 2014, p. 721 and references in footnote 24.

<sup>72</sup> Vicedo-Cabrera et al. (2021) p. 1.

<sup>73</sup> Robine et al. (2008) pp. 174, 176.

<sup>74</sup> Robine et al. (2008) p. 176.

<sup>75</sup> Robine et al. (2008) p. 176.

<sup>76</sup> Robine et al. (2008) p. 174.

<sup>77</sup> *Pavlov* §§ 68-69 ; *Jugheli* § 63; *Cordella* (§ 106); *Fadeyeva v. Russia* (55723/00) 09.06.2005 (§ 85); *Dubetska; Tătar* §§ 102-106.

<sup>78</sup> Mitchell (2021).

<sup>79</sup> Robine et al. (2008) pp. 174, 176; Christidis et al. (2015) p. 48.

<sup>80</sup> Christidis et al. (2015) p. 48.

<sup>81</sup> McKay et al. *Exceeding 1.5°C global warming could trigger multiple climate tipping points* in *Science* Vol 377, Issue 6611, 9.9.2022; Steffen et al. *Trajectories of the Earth System in the Anthropocene* in *PNAS* 2018 115 (33) pp. 8252-8259.

exceeded by 2030 even under moderate emissions scenarios.<sup>82</sup> Since States are under a *preventive obligation* to “safeguard the lives” of those within their jurisdiction, this duty logically refers to a point in time when these dangers can be prevented – not materialised.

17. These insights are reflected in emerging jurisprudence.<sup>83</sup> For instance, the CCPR has applied the ICCPR Article 6 to “reasonably foreseeable threats to life” from climate change, noting that the risk of a country becoming submerged by water is so “extreme” that the right may be impaired “before the risk is realised.”<sup>84</sup> The Dutch Supreme Court has held that dangerous climate change constitutes a real and immediate risk such that “the lives and welfare of Dutch residents could be seriously jeopardised”, even if the risk will only materialise a few decades from now.<sup>85</sup> The German Constitutional Court has, based on ECtHR case-law, held that Germany has an obligation *ex nunc* “to protect life and health” of current and future generations against “the risks posed by climate change” above 1.5°C to well below 2°C, given that “irreversible processes are at stake”.<sup>86</sup> Similar conclusions are drawn by courts in Belgium and the Czech Republic.<sup>87</sup> A proposition that the risk of heatwaves does not pose an immediate risk because global warming will not exceed 1.5°C before 2040, or that there is still time to prevent warming above 2°C, is thus unsupported by comparative case law, and at odds with the findings of the IPCC.

## B. Article 8

18. Article 8 applies not only to “direct and immediate” or “serious and substantial” risks of pollution or nuisance, but also to exposure of future environmental risks with a “sufficiently close link” to the enjoyment of home, private or family life.<sup>88</sup> Hence, Article 8 has been applied to foreseeable hypothetical risks that “might materialise only in twenty to fifty years”, as well as risks of a sudden deterioration.<sup>89</sup> For the reasons stated above, these conditions may readily be fulfilled with respect to climate-attributed heat morbidity, and at the very least, heat mortality.<sup>90</sup> It is of no consequence that these impacts are not local. Geographical vicinity between an applicant’s home and the dangerous activity is not a decisive criterion for the applicability of Article 8.<sup>91</sup> Previous delimitations against “environmental hazards inherent in life in every modern city” or a “general deterioration of the environment” do not preclude applicability of Article 8 either. The risk of premature death or morbidity caused by climate-attributed heat, and climate harm in general, is neither negligible nor inherent, it is existential and preventable.

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<sup>82</sup> IPCC AR6 PPT SPM, p. 3; IPCC, AR6 WGI (SPM) (2021) para. B.1 ff., p. 18; IPCC, *1.5°C Report* (2018) para. B.1.

<sup>83</sup> *Grande-Synthe I*, para. 3 and Conclusions, M. Hoynck, rapporteur public, p. 18; *Massachusetts*, p. 18 (“EPA’s steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both ‘actual’ and ‘imminent.’”); *Future Generations*, p. 34 (“un perjuicio inminente y grave”); *Shrestha*, pp. 5, 11.

<sup>84</sup> *Teitiota*, para. 9.11; CCPR, *General comment no. 36*, paras. 18, 62.

<sup>85</sup> *Urgenda*, paras. 5.2.2. and 5.6.2.

<sup>86</sup> *Neubauer*, paras. 146, 148, 163, 165, 108.

<sup>87</sup> *VZW Klimaatzaak* (appealed) pp. 59–62, *Klimatická* (appealed) paras. 201–225.

<sup>88</sup> *Hardy and Maile* §§ 188–189 with further references.

<sup>89</sup> *Taşkin* §§ 107, 111–114; *Tătar*, §§ 197, 111 (“prévisible”).

<sup>90</sup> *Pavlov* § 68 (“direct influence on morbidity rates”).

<sup>91</sup> *Pavlov* § 63 (“proximity of the applicants’ homes to the sources of pollution was one of the factors taken into account”); *Vilnes et al. v. Norway* (52806/09, 22703/10) 05.12.2013, §§ 9, 14, 20, 233, 273.

## VI. Obligations under art. 2 and 8 (question E.5.1 – E.5.3.3)

19. As substantiated in EOC para. 8, Articles 2 and 8 oblige States to take “appropriate measures” to protect the right to life and private life, including adopting an effective “legislative and administrative framework”. Since the only appropriate measure to avert exponential increases of climate-attributed heat mortality and morbidity is to cut GHG emissions rapidly to net zero, States are required to *mitigate emissions*. Indeed, mitigation is expected to have a “strong effect” on hot extremes in Europe.<sup>92</sup>
20. The *margin of appreciation* should be narrow in the context of climate change [EOC para. 9]. It is an existential, “man-made” risk “susceptible of mitigation”,<sup>93</sup> where unfettered majoritarianism may curtail future rights and freedoms of younger generations.<sup>94</sup> Therefore, the Court may review whether the State has a framework to due diligently cut emissions, at least in accordance with IPCC’s reduction rates.<sup>95</sup> In this assessment, the Court may rely on best available science, international norms, and emerging European consensus [EOC paras. 10-13]. Best available science shows that emissions must be cut rapidly to limit warming to 1,5°C, to prevent “dangerous” interference with the climate system having “significant deleterious effects” on human life and welfare – the objective of UNFCCC art. 2 and the Paris Agreement art 2.1a). Since Articles 2 and 8 require that the legislative framework be “effective”,<sup>96</sup> and the applicable principles with respect to positive and negative obligations are “broadly similar”,<sup>97</sup> the Court may review whether the rate of GHG reductions is sufficiently specified and realistic to protect rights also in the longer term.
21. This duty to mitigate emissions cannot be replaced by adaptation. As noted by domestic courts, adaption measures alone will not suffice to protect the rights to life, home and private life [EOC para. 19].<sup>98</sup> Indeed, widespread breaching of adaptation limits is expected if the planet warms beyond 1.5°C. The IPCC estimates that even with adaptation there will overall be increases in heat-related mortality.<sup>99</sup> Moreover, adaptations measures such as air conditioning can effectively aggravate climate harm due to “high demands on energy and associated heat emissions”.<sup>100</sup> Such maladaptation risks undermining the duty to mitigate and protect children and younger generations in the long term.

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<sup>92</sup> IPCC, AR6 WGI (2021) Chapter 12, pp. 12-68.

<sup>93</sup> *Budayeva* §§ 135, 137.

<sup>94</sup> *Neubauer* paras. 146, 183, 192, 205-206.

<sup>95</sup> *Mutatis mutandis*, *Pavlov* §§ §§ 85, 86, 90, 91.

<sup>96</sup> *Smiljanić v. Croatia* (35983/14) 25.3.2021 § 66 with further references.

<sup>97</sup> *Pavlov* § 75; *Hatton* [GC] § 98.

<sup>98</sup> *Neubauer*, para. 157; *Urgenda*, para. 7.5.2.

<sup>99</sup> IPCC, AR6 WGII (2022) Chapter 7, p. 1092.

<sup>100</sup> *Ibid*, pp. 1096, 1108.