

IN THE EUROPEAN COURT OF HUMAN RIGHTS (THIRD SECTION)

VERIN KLIMASENIORINNEN SCHWEIZ & OTHERS V. SWITZERLAND, APPLICATION NO. 53600/20

WRITTEN SUBMISSIONS ON BEHALF OF THE GLOBAL JUSTICE CLINIC (GJC), THE CLIMATE LITIGATION ACCELERATOR (CLX), AND PROFESSOR CHRISTINA VOIGT

September 15, 2021



1. These submissions are made by the Global Justice Clinic (“GJC”) and the Climate Litigation Accelerator (“CLX”) at New York University School of Law as well as Christina Voigt, Professor of Law at the University of Oslo, Department of Public and International Law, Norway and Chair of the IUCN World Commission on Environmental Law (collectively, the “Interveners”), pursuant to the leave to intervene granted by the President of the Third Section on July 20, 2021 in accordance with Rule 44 §3 of the Rules of Court.
2. Since 2015, there have been more than eighty human rights-based climate change cases filed in courts around the world. Though these cases vary in the exact substance of their claims, there are certain issues that recur and present especially complex challenges for courts adjudicating them. Two of these issues are victim status and the substantive human rights obligations states have in light of their commitments under international climate law.
3. As a result, the Interveners present, in these written submissions, an analysis of victim status in climate cases – in particular for the elderly – under the jurisprudence of the European Court of Human Rights (“the Court”) as well as an analysis of states’ substantive obligations under international climate law, particularly the Paris Agreement.
4. Ultimately, the Interveners conclude that recognizing the elderly as victims in climate cases is appropriate under the jurisprudence of this Court. Moreover, the Interveners also conclude that in order to comply with their human rights obligations informed by international climate law, states must adopt greenhouse gas (“GHG”) mitigation targets as well as regulatory frameworks that are consistent with the temperature goals of the Paris Agreement, reflect their highest possible ambition, and comply with their due diligence obligations.

**I. Older Adults Are – as a Group – Especially Vulnerable to the Impacts of Climate Change**

5. Pursuant to this Court’s jurisprudence on victim status and given the particular vulnerability of older adults,<sup>1</sup> older adults (or, the elderly) can appropriately be considered both direct and potential victims in climate cases. Below, several sections lay out the climate impacts – in particular, heat, flooding and other extreme weather events, and disease – that place the elderly at increased risk of suffering grievous harms, including serious bodily injury and death. The following sections examine the Court’s jurisprudence on victim status and its application to older adults as a group in climate cases.

*A. Heat: As Temperatures Increase and Heat Waves Become More Common, the Elderly Face a Markedly Increased Risk of Injury or Death Relative to the Rest of the Population*

<sup>1</sup> Generally identified as adults sixty-five years or older. See also OHCHR, *Analytical Study on the promotion and protection of the rights of older persons in the context of climate change*, A/HRC/47/46, 30 April 2021.

6. Heatwaves dramatically exacerbated by climate change have already hit Europe and will continue to intensify.<sup>2</sup> Indeed, today, every heat wave that occurs in Europe is “made more likely and more intense by human-induced climate change.”<sup>3</sup> The record-breaking heatwave that hit France<sup>4</sup> in 2019, for example, was made five times more likely by climate change.<sup>5</sup> 1,435 people died in France as a result of that heatwave – about half of whom were over the age of 75.<sup>6</sup>
7. Excessive heat will only become more frequent and more intense as global average temperatures increase. At 1.5 degrees Celsius of warming, the *annual* likelihood of an “unprecedented” heatwave in Europe is a striking forty-seven percent.<sup>7</sup> At two degrees Celsius, that annual likelihood jumps to sixty-seven percent.<sup>8</sup>
8. The poorer thermoregulation<sup>9</sup> and higher disease burden<sup>10</sup> that is characteristic of the elderly as a group put them at increased risk of serious bodily harm and death due to heat waves.<sup>11</sup> Historical heat waves have borne out this heightened vulnerability – in Europe and beyond. A 2019 heat wave in the Netherlands, for example, resulted in 400 more deaths than usual – the majority of whom were 80 years old or older.<sup>12</sup> Individuals over the age of 75 comprised eighty percent of the deaths that resulted from the extreme heat wave that hit France in 2003.<sup>13</sup>

*B. Flooding and Other Extreme Weather Events: The Elderly Are Among the Least Equipped to Cope with the Extreme Weather Events Made More Likely by Climate Change*

9. Intense flooding and other extreme weather events, like wildfires, have and will continue to become more frequent across Europe and beyond as climate change intensifies.<sup>14</sup> The elderly, for a host of physiological, social, and psychological reasons, are more likely to be injured or die as a result of extreme weather events than the general population.<sup>15</sup>
10. To start, the elderly are substantially more likely than the general population to have one or more disability.<sup>16</sup> This includes physical disabilities – like impaired mobility, poor oxygen saturation levels,

<sup>2</sup> See *Heatwave*, WORLD WEATHER ATTRIBUTION (last visited Sept. 7, 2021), <https://www.worldweatherattribution.org/analysis/heatwave/>.

<sup>3</sup> Greet Jan van Oldenborgh et al., *Human contribution to the record-breaking June 2019 heat wave in France*, WORLD WEATHER ATTRIBUTION 1 (2019).

<sup>4</sup> The heatwave also hit Switzerland, among other European countries.

<sup>5</sup> *Human contribution to the record-breaking June 2019 heat wave in France*, *supra* note 3, at 23.

<sup>6</sup> See *Summer heat killed nearly 1,500 in France, officials say*, BBC (Sept. 9, 2019).

<sup>7</sup> Rosamund Pearce et al., *The Impacts of Climate Change at 1.5C, 2C and Beyond*, CARBON BRIEF (October 4, 2018) (referencing the “Europe” sub-section).

<sup>8</sup> See *id.*

<sup>9</sup> Older adults are less capable of maintaining thermal homeostasis. As a result, as temperatures increase, the elderly are at a greater risk of dangerously high internal core temperatures, which can lead to heat-related illnesses like heat stroke. Cite.

<sup>10</sup> Older adults are substantially more likely than the general public to have one or more chronic conditions – like diabetes, congestive heart failure, and certain kidney diseases. Many of these diseases or the medications taken to manage them increase sensitivity to heat, putting the elderly at risk of serious complications, including heart attack and heat stroke. Bruce A. Carnes et al., *Impacts of Climate Change on Elder Health*, 69 J. Gerontology Series A 1087, 1089 (2014).

<sup>11</sup> “The elderly are most at risk of heat-related mortality for a range of physiological reasons.” R. Sari Kovats & Kristie L. Ebi, *Heatwaves and Public Health in Europe*, 16 EUR. J. PUB. HEALTH 592, 592 (2006).

<sup>12</sup> See *More Deaths During Recent Heat Wave*, STATISTICS NETHERLANDS (CBS) (Aug. 16, 2019).

<sup>13</sup> See Kirk R. Smith et al., “Chapter 11 – Human Health: Impacts, Adaptation, Co-Benefits,” in *Climate Change 2014: Impacts, Adaptation, and Vulnerability* 709, 721, IPCC (2014).

<sup>14</sup> See Richard P. Allan et al., “Summary for Policymakers,” in *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* 1, figure SPM-12 (2021).

<sup>15</sup> See William Donner & Havidán Rodríguez, *Population Composition, Migration and Inequality: The Influence of Demographic Changes on Disaster Risk and Vulnerability*, 87 SOCIAL FORCES 1089, 1104 (2008).

<sup>16</sup> See *Ageing and Disability*, UN DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS (last visited Sept. 8, 2021).

and those resulting from degenerative diseases – and cognitive impairments – including poor memory, diminished understanding, and others that result from diseases like Alzheimer’s.<sup>17</sup>

11. As a result of these physical and cognitive impediments, the elderly are significantly less likely to be mobile and may have a diminished awareness of external events.<sup>18</sup> The elderly are also more socially isolated, as a group, than the general population, and many live alone.<sup>19</sup> The cumulative effect of these conditions is that the elderly are less likely to be able to get out of harm’s way in the event of sudden-onset events, like flooding, or to obtain help in the aftermath of such events.<sup>20</sup> Indeed, most of those who drown in their homes during extreme flooding are elderly.<sup>21</sup>
12. The elderly are also at an increased risk of injury or death from the secondary effects of climate-induced extreme weather events.<sup>22</sup> Given the higher disease incidence among the elderly, they are at increased risk of injury relative to the general population when extreme weather events cut off access to medical supplies and attention.<sup>23</sup>

*C. Disease: As Climate Change Increases the Incidence of Certain Diseases and Health Conditions, the Elderly Will Continue to Be Disproportionately Impacted*

13. The elderly, as a group, are especially vulnerable to toxins, noxious agents, infectious diseases, and environmental changes, reducing their capacity to tolerate bodily stress.<sup>24</sup> When the elderly are exposed to additional bodily stress, they are more likely than their younger counterparts to be injured or to die.<sup>25</sup>
14. Climate change has and is expected to exacerbate preexisting conditions by diminishing air quality.<sup>26</sup> Poor air quality is a source of bodily stress and, given the elderly’s diminished ability to tolerate additional stress relative to the general population, they are more likely to suffer serious health consequences – even death – as a result of climate-induced deteriorations in air quality.<sup>27</sup>
15. Climate change is also expected to increase the incidence of water-borne and food-borne diseases, including gastrointestinal diseases.<sup>28</sup> The elderly are particularly vulnerable to gastrointestinal diseases, meaning that the elderly will comprise a disproportionate share of injury from climate-induced or exacerbated gastrointestinal disease.<sup>29</sup>

## II. Victim Status under the Jurisprudence of the European Court of Human Rights, the Elderly, and Climate Change

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<sup>17</sup> See *Climate Change and the Health of Older Adults*, U.S. ENVTL. PROTECTION AGENCY 1 (May 2016).

<sup>18</sup> See Sandra C. Webber, *Mobility in Older Adults: A Comprehensive Framework*, 50 THE GERONTOLOGIST 443 (2010).

<sup>19</sup> See Béatrice d’Hombres et al., *Loneliness – An Unequally Shared Burden in Europe*, EUROPEAN COMMISSION (2018).

<sup>20</sup> See Lauren S. Fernandez et al., *Frail Elderly as Disaster Victims: Emergency Management Strategies*, 17 PREHOSPITAL AND DISASTER MEDICINE 67, 69 (2002).

<sup>21</sup> See Mike Ahern et al., *Global Health Impacts of Floods*, 27 EPIDEMIOLOGIC REVIEWS 36, 37 (2005).

<sup>22</sup> See Lauren S. Fernandez et al., *supra* note 20, 69 – 70.

<sup>23</sup> See Lauren S. Fernandez et al., *supra* note 20, 69 – 70.

<sup>24</sup> See Bruce A. Carnes et al., *supra* note 10, 1089.

<sup>25</sup> See Bruce A. Carnes et al., *supra* note 10, 1089 – 90.

<sup>26</sup> See Bruce A. Carnes et al., *supra* note 10, 1088.

<sup>27</sup> See David Filiberto et al., *Older People and Climate Change: Vulnerability and Health Effects*, 33 GENERATIONS 19, 21 – 23 (2009 – 2010); see also Kirk R. Smith et al., *supra* note 13, at 718.

<sup>28</sup> See Kirk R. Smith et al., *supra* note 13, at 726 – 27.

<sup>29</sup> See Bruce A. Carnes et al., *supra* note 10, 1090; See also Charles P. Gerba et al., *Sensitive populations: who is at greatest risk?*, 30 INT’L J. FOOD MICROBIOLOGY 113, 117 – 18 (1996).

16. Article 34 of the European Convention on Human Rights (“the Convention” or “ECHR”) provides that two preliminary requirements must be met before an applicant may advance a claim before the Court. First, the applicant must be an individual, a group of individuals, or a non-governmental organization. European Convention on Human Rights, Article 34. Second, the applicant must be a “victim of a violation” of the Convention – in other words, the applicant must have victim status. *Id.*

A. *The Elderly Satisfy the Criteria to Be Considered Direct and Potential Victims of Convention Violations Due to Climate Harms*

17. Under Convention Article 34 (previously Article 25), victim “denotes the person directly affected by the act or omission which is in issue.”<sup>30</sup> At this stage, the violation alleged need only be “conceivable,”<sup>31</sup> though the link between “the applicant and the harm which they consider they have sustained on account of the alleged violation” must be sufficiently direct.<sup>32</sup> The act or omission at issue must also be attributable to the respondent government.<sup>33</sup> Applicants who obtain victim status by alleging a past or present violation to themselves directly are considered direct victims.
18. As outlined above, the elderly have already been injured and have even died as a result of climate change. They are presently experiencing harms generated or exacerbated by climate change. These harms clearly implicate their rights to life and to a healthy environment guaranteed under the Convention. Climate change, moreover, is indisputably driven largely by the emission of greenhouse gases. States have the power to limit the emission of greenhouse gases but often fail to do so in a manner that would prevent deleterious warming. The elderly thus can be considered direct victims, as there is – at minimum – a conceivable violation of the Convention attributable to states’ failure to sufficiently regulate greenhouse gas emissions.
19. The Court has also, at times, recognized applicants as victims “owing to the risk of a future violation.”<sup>34</sup> “[I]n order to be able to claim to be a victim in such a situation, an applicant must produce reasonable and convincing evidence of the likelihood that a violation affecting him personally will occur; mere suspicion or conjecture is insufficient.”<sup>35</sup> Applicants who satisfy these criteria are considered potential victims.<sup>36</sup>
20. The elderly can also be considered potential victims, given that the international scientific consensus establishes that climate change will worsen as more greenhouse gases are emitted and the elderly will continue to face disproportionate harms if business continues as usual.<sup>37</sup> This consensus around future climate impacts – established by authoritative bodies like the Intergovernmental Panel on Climate Change (“IPCC”) – provides far more than “reasonable and convincing evidence” of the likelihood of a future violation of the elderly’s rights.
21. Whether the violation alleged is rooted in the past, present, or even future, it’s fundamental that the “personal interests” of the applicant have or will be impacted.<sup>38</sup> The Court does not consider cases *in*

<sup>30</sup> *Eckle v. Germany* [GC], no. 8130/78, § 66, 5 EHRR 1; *Vatan v. Russia*, no. 47978/99, § 48, 7 October 2004 [preliminary objection].

<sup>31</sup> *Eckle*, *supra* note 30, § 66.

<sup>32</sup> *Gorraiz Lizarraga & Others v. Spain*, no. 62543/00, § 35, 27 April 2004. *See also Taura & Others v. France*, no. 28204/95, p. 130, 4 December 1995 [decision on admissibility].

<sup>33</sup> *Taura & Others*, *supra* note 31, p. 130.

<sup>34</sup> *Taura & Others*, *supra* note 31, p. 130.

<sup>35</sup> *Skender v. the Former Yugoslav Republic of Macedonia*, no. 62059/00, p. 8, 10 March 2005 [decision on admissibility].

<sup>36</sup> *See, e.g., Senator Lines GmbH v. Austria et al.* [GC], no. 56672/00, p. 9, 10 March 2004 [decision on admissibility] for a discussion of cases with potential victims.

<sup>37</sup> *See* Richard P. Allan et al., *supra* note 14.

<sup>38</sup> *See, e.g., Agrotexim & Others v. Greece*, no. 15/1994/462/543, § 59, 26 September 1995.

*abstracto (actio popularis)*.<sup>39</sup> Here, it is worth reiterating that the harms the elderly face are not in the far off and uncertain future; they are here, now, and they constitute concrete bodily injuries.

B. *NGOs Can Appropriately Be Considered Victims of Convention Violations Due to Climate Change If They Demonstrate That Their Personal Interests Have Been Directly Impacted*

22. In addition to individuals and groups of individuals, non-governmental organizations (“NGOs”) – including associations – have been recognized as victims by this Court. Like individuals, NGOs must allege a violation under the Convention and demonstrate that their personal interests have been directly impacted.<sup>40</sup>
23. Though an NGO may not experience a rights violation like an individual, that does not by itself mean that NGOs are excluded from the protection offered by a given Article of the Convention. This Court has stated as much in, for example, *Association for European Integration and Human Rights & Ekimdzhiev v. Bulgaria*, finding that the “applicant association is. . . not wholly deprived of the protection of Article 8 by the mere fact that it is a legal person.”<sup>41</sup> The Court then found that, at the very least, NGOs are covered by the “notion of ‘correspondence,’” entitling them “to the protection afforded by Article 8.”<sup>42</sup> The applicant association was considered a victim by this Court, given the “sufficiently direct link between the association as such and the alleged breaches of the Convention.”<sup>43</sup>
24. *Gorraiz Lizarraga & Others v. Spain* and *L’Erablière A.S.B.L. v. Belgium* likewise affirm that NGOs can, in spite of differences in how real persons and NGOs exist and experience harm, invoke specific protections of the Convention – albeit this time in reference to Article 6. In practice, this means that NGOs can appropriately be considered victims of Convention violations due to climate change if they can demonstrate their personal interests have been directly impacted by the harms alleged to violate the Convention.

C. *This Court has Emphasized the Need to Approach Victim Status with Flexibility*

25. This Court has repeatedly affirmed that the criteria for victim status under Article 34 are not “to be applied in a rigid, mechanical and inflexible way throughout the proceedings.”<sup>44</sup> That is because “[a]ny other, excessively formalistic interpretation [] of that concept would make protection of the rights guaranteed by the Convention ineffectual and illusory.”<sup>45</sup> Indeed, according to the case law of this Court, “the term ‘victim’ in Article 34 must be interpreted in an evolutive manner in light of the conditions in contemporary society.”<sup>46</sup>

D. *The Jurisprudence of This Court Indicates that the Mere Fact that the Challenged Act or Omission May Affect Large Swaths – or Even All – of a Given Population Does Not By Itself Disqualify Petitioners from Obtaining Victim Status*

<sup>39</sup> See, e.g., *Klass v. Germany*, no. 5029/71, § 33, 6 September 1978; *Skender*, *supra* note 35, p. 7.

<sup>40</sup> See, e.g., *Meltex Ltd. & Mesrop Mouseyan v. Armenia*, no. 32283/04, §§ 66 – 68, 17 June 2008.

<sup>41</sup> *Association for European Integration and Human Rights & Ekimdzhiev v. Bulgaria*, no. 62540/00, § 60, 28 June 2007.

<sup>42</sup> *Association for European Integration and Human Rights & Ekimdzhiev*, *supra* note 41, § 60.

<sup>43</sup> *Id.* § 61.

<sup>44</sup> *Roman Zakharov v. Russia* [GC], no. 47143/06, § 164, 4 December 2015. See also, e.g., *Karner v. Austria*, no. 40016/98, § 25, 24 July 2003; see also *Aksu v. Turkey* [GC], nos. 4149/04 & 41029/04, § 51, 15 March 2012; see also *Bursa Barosu Baskinligi v. Turkey*, no. 25680/05, § 109, 19 June 2018.

<sup>45</sup> *Gorraiz Lizarraga & Others*, *supra* note 32, § 38.

<sup>46</sup> *Gorraiz Lizarraga & Others*, *supra* note 32, § 38.

26. In previous cases, the mere fact that the challenged act or omission implicated a large swath of the population – or even virtually all of the population – did not stop the Court from recognizing victim status and assessing the merits of the case.
27. In *Klass v. Germany*, the Court outright acknowledged that the surveillance scheme at issue “directly affects all users or potential users of the postal and telecommunication services in the Federal Republic of Germany,” and, given that the scheme “restrict[s] free communication through the postal and telecommunication services,” directly interferes with the right guaranteed by Article 8 of “all users or potential users.”<sup>47</sup>
28. Despite the fact that the challenged scheme directly affected the substantial majority of the population, the Court nonetheless recognized the applicant as a direct victim because the nature of the scheme – its secrecy – prevented the applicant from identifying concrete measures that specifically affected him. The Court did so because it recognized that finding otherwise would “materially weaken[]” the “efficiency of the Convention’s enforcement machinery.”<sup>48</sup>
29. In other words, excluding the examination of claims that by their very nature make it difficult to prove some formal element of victim status but which raise issues that may personally affect applicants in a consequential way would undermine the effectiveness of the Convention system. For this reason, the Court has not proclaimed that issues that are by their very nature widespread or difficult to assess under more rigid interpretations of victim status criteria cannot, for this reason alone, be examined by the Court.
30. In *Roman Zakharov v. Russia*, this Court affirmed that it will approach assessing victim status so as to ensure that the rights protected under the Convention don’t “risk [] being nullified,”<sup>49</sup> as would happen if measures by their very nature (in that case, their secrecy) are rendered “effectively unchallengeable and outside the supervision of the national judicial authorities and the Court.”<sup>50</sup>
31. To reiterate, this Court has assessed victim status in a context-dependent manner and has not found that claims should be excluded merely because they invoke issues that may impact substantial portions of the population. This, in turn, goes to the very operation of the Convention as well as the Court’s role. “Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States.”<sup>51</sup> As a result, the Court has taken more expansive and context-dependent approaches to assessing victim status, in order to ensure the continued examination of cases involving “important question[s] of general interest,” in line with the “moral dimension” of human rights cases brought before the Court.<sup>52</sup>
32. Applying this rationale, there is nothing about the widespread nature of climate change that automatically prevents groups particularly affected from obtaining victim status under the Convention.
33. Moreover, preventing groups particularly impacted by climate change from pursuing claims would effectively render states’ contributions to the rights violations associated with climate change unreviewable, diminishing the efficacy of the Convention system and risking the nullification of

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<sup>47</sup> *Klass*, *supra* note 39, § 37.

<sup>48</sup> *Klass*, *supra* note 39, § 34.

<sup>49</sup> *Roman Zakharov*, *supra* note 44, § 165 (citing *Klass v. Germany*).

<sup>50</sup> *Roman Zakharov*, *supra* note 44, § 169.

<sup>51</sup> *Karner v. Austria*, no. 40016/98, § 26, 24 July 2003.

<sup>52</sup> *Karner v. Austria*, *supra* note 51, § 25.

Convention protections. Given that climate change is one of the gravest threats to human rights in the twenty-first century, this would undermine the protection and promotion of human rights throughout Europe.

### III. Interpreting State Parties' Duties under Articles 2 and 8 of the European Convention on Human Rights in Light of the Long-Term Temperature Goals in Article 2, Paragraph 1(a) and the Due Diligence Obligation Contained in Article 4, Paragraph 3 of the Paris Agreement

34. In interpreting Articles 2 and 8 of the ECHR, the provisions of the Paris Agreement, especially its Article 2, paragraph 1 and Article 4, paragraph 3 are relevant and shed light on the Articles' scope.

#### *E. Article 2, Paragraph 1(a) of the Paris Agreement: Establishing the Collective Temperature Goal*

35. Article 2, paragraph 1 (a) of the Paris Agreement establishes the goal of holding increases in average temperature to well below 2 degrees Celsius compared to pre-industrial levels, while pursuing efforts to limit increases to 1.5 degrees Celsius. This establishes an international standard, which carries significant legal implications.<sup>53</sup>

36. In order to achieve this long-term temperature goal, parties to the Paris Agreement have collectively committed to globally peaking greenhouse gas emissions as soon as possible, recognizing that this might take longer for developing countries, and undertaking rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions generated by sources and the removal of greenhouse gases by sinks in the second half of this century (Article 4, paragraph 1), so-called "climate neutrality" or "net-zero emissions."

37. The goal included in Article 2, paragraph 1 (a) and Article 4, paragraph 1 is informed by best available science, which is aggregated and assessed by the Intergovernmental Panel on Climate Change (IPCC). The IPCC 2018 "Special Report on 1.5°C Global Warming" and its Sixth Assessment Report (2021) state that pathways consistent with holding temperature increases to 1.5 degrees Celsius need to achieve *at least global net-zero CO<sub>2</sub> emissions* around 2050.<sup>54</sup> For holding increases to well below two degrees Celsius, the timeframe is slightly longer: net-zero CO<sub>2</sub> emissions need to be achieved around 2070. For both pathways, emissions need to stay *negative* thereafter until the end of this century.

38. This requires strong, rapid, and sustained reductions of CO<sub>2</sub> emissions as well as all other greenhouse gasses and practically a full and irreversible decarbonization of the global economy in the course of less than thirty years. This, in turn, requires "rapid and far-reaching transitions in energy, land, urban and infrastructure (including transport and buildings), and industrial systems."<sup>55</sup> Without immediate and rapid emission reductions, the temperature overshoot would require the use of negative emissions technologies at scale (which would come with its own set of problems) to avoid dangerous climate change.

#### *F. Article 4, Paragraph 3 of the Paris Agreement: Pursuing the "Highest Possible Ambition"*

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<sup>53</sup> See Brian Preston, *The Influence of the Paris Agreement on Climate Litigation: Legal Obligations and Norms (Part I)*, 33 J. ENVTL. L. 1 (2020).

<sup>54</sup> See Richard P. Allan et al., *supra* note 14., para D.1.1; see also Myles Allen et al., "Summary for Policymakers," in *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* 12, para. C.1, IPCC (2018).

<sup>55</sup> Myles Allen et al., *supra* note 54, 15, para. C.2. See also Ricardo Barra, *Making Peace with Nature: A scientific blueprint to tackle the climate, biodiversity and pollution emergencies*, UN Environment Programme (2021).

39. Parties to the Paris Agreement have an obligation to prepare, communicate, and maintain successive nationally determined contributions (“NDCs”) which they intend to achieve and to pursue domestic measures with the aim of achieving the objective of their NDCs (Article 4, paragraph 2). Importantly, the nationally determined contributions under the Paris Agreement will reflect each party’s “highest possible ambition” (Article 4, paragraph 3).
40. The “highest possible ambition” provision in Article 4, paragraph 3 expresses an obligation of conduct: each party is obligated to deploy its best efforts in setting its national mitigation target in its NDC and in pursuing domestic measures to achieve it. This paragraph establishes for each party a *due diligence standard* to attain its highest possible ambition in a manner that reflects its national circumstances, i.e., its responsibilities and capabilities. An obligation of due diligence means that a state party must deploy all reasonable and appropriate means to exercise best possible efforts – or, more simply put, to do its utmost to contribute to the global effort to mitigate climate change.
41. Acting with due diligence also requires governments to act in proportion to the risk at stake and with foresight.<sup>56</sup> In the *Pulp Mills* case, the ICJ pointed out “that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory.”<sup>57</sup> The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, in its *Seabed Mining Advisory Opinion*, emphasised that precaution is, in effect, part of due diligence<sup>58</sup> and recognized that “due diligence” may impose more rigorous requirements for riskier activities. It also means taking all appropriate and necessary measures to address private behaviour, including adopting, monitoring, and enforcing necessary regulatory measures.<sup>59</sup> In the face of the existential risk of climate change, governments must take measures commensurate with that risk.
42. It has been noted that the standard of due diligence requires “nothing more *nor less* than the reasonable measures which a well-administered government could be expected to adopt under similar circumstances.”<sup>60</sup> The standard of due diligence must be determined on a case-by-case basis with regard to a country’s obligation to reduce the risk of environmental harm under national circumstances compared to the best conduct expected of a state in similar circumstances. It also implies that states with greater capabilities are required to do more to decarbonize their economies and reduce emissions.
43. The due diligence standard expressed in Article 4, paragraph 3 of the Paris Agreement establishes an *obligation of conduct* requiring state parties to set their climate change mitigation targets at the highest possible level – i.e., at the level that is not disproportionately burdensome or impossible to achieve. Such a target needs to be comprehensive and cover all sectors, set in light of the overall long-term temperature goals of the Agreement and based on a *thorough assessment of all* mitigation options and potential in all relevant sectors.<sup>61</sup> Based on that assessment, the target needs to be set at the highest end of the scale of options. At minimum, the target needs to be in line with best available science. A party needs to deploy all its political, legal, socioeconomic, financial, and institutional capacities and

<sup>56</sup> See Int’l Law Comm. [ILC], *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries 2001*, Art. 3(7) (2005).

<sup>57</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, ¶ 101 (2010).

<sup>58</sup> Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, advisory opinion, 1 February 2011, ITLS Report 2011.

<sup>59</sup> See *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *supra* note 57, 14, 77, para 187; see also Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, *supra* note 58, 10.

<sup>60</sup> Alwyn V. Freeman, *Responsibility of States for Unlawful Acts of their Armed Forces*, in Hague Academy, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 263, 277-278 (Hague Academy of International Law, 1955).

<sup>61</sup> See Christina Voigt, *The Paris Agreement: What is the Standard of Conduct for Parties?*, QUESTIONS OF INTERNATIONAL LAW, Mar. 24, 2016, at 17, 26; see also Christina Voigt & Felipe Ferreira, “Dynamic Differentiation”: *The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement*, 5 TRANSNAT’L ENVTL. L. 2, 285 – 303 (2016); see also JUTTA BRUNNÉE, PROCEDURE AND SUBSTANCE IN INTERNATIONAL ENVIRONMENTAL LAW 174-175 (2020).



possibilities in defining its mitigation target. The obligation of conduct also requires states to have domestic measures in place that are necessary, meaningful, and, indeed, effective to achieve that target.<sup>62</sup>

In light of science, this implies taking all measures that are not disproportionately burdensome with the objective of rapidly reducing GHG emissions, so as to achieve *global net zero emissions* by 2050. This already requires deep reductions in *this* decade to ensure that the achievement of global net zero emissions around mid-century remains possible. In this context, the IPCC indicates the need for emission reductions of fifty percent by 2030.

44. In order to achieve global net zero emissions, those state parties that are in a position to do so according to their responsibilities and capabilities will need to reach net-zero targets *much earlier* than 2050, in order to enable parties that might need longer to get there around 2050. This means that states with high capacity would need to cut much earlier and much deeper in order to ensure the global goal remains achievable. A long-term plan to achieve net-zero emissions does not mean delaying ambitious and rapid actions *now*. The IPCC warns that a “world that is consistent with holding warming to 1.5°C would see greenhouse gas emissions rapidly decline in the coming decade ... delayed action, limited international cooperation, and weak or fragmented policies that lead to stagnating or increasing greenhouse gas emissions would put the possibility of limiting global temperature rise to 1.5°C above pre-industrial levels out of reach.”<sup>63</sup>
45. The ECHR member states also must ensure that public and private investments and actions are consistent with a pathway toward low carbon emissions and climate resilient development, according to Article 2, paragraph 1 (c) of the Paris Agreement. In their regulatory frameworks, these states need to ensure that their own “carbon neutrality” measures do not lead to rising emissions in other parts of the world, due to “exported” emissions or so-called “leakage.” This occurs when the production processes of goods that are consumed within the territory of one state are outsourced to other states and lead to increasing emissions in those other states. It also occurs through the export of fossil fuels or fossil fuel-products, such as plastics, which increase GHG emissions in third party states when combusted or incinerated.
46. Parties to the Paris Agreement need to be explicit about their choice of mitigation target and why it is at the level of highest possible ambition (or not). The “Rulebook” for the effective implementation of the Paris Agreement requires that parties include information in their NDCs on how they addressed Article 4.3 of the Agreement.<sup>64</sup>
47. In order to secure the rights protected under Articles 2 and 8 ECHR, state parties must approach their climate policies with due diligence. This means that they must have in place an ambitious short-term goal for rapid, deep emissions reductions by 2030 reflecting their “highest possible ambition” and a long-term plan of reaching net-zero emissions well *before* 2050, as well as corresponding and effective implementation measures.
48. This is in line with a 2019 joint statement by five UN human rights treaty bodies, which emphasized that states, “[i]n order ... to comply with their human rights obligations, and to realize the objectives of the Paris Agreement, [] must adopt and implement policies aimed at reducing emissions, which reflect the *highest possible ambition [article 4.3]*, foster climate resilience and ensure that public and private

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<sup>62</sup> *See id.*

<sup>63</sup> Myles Allen et al., “Frequently Asked Questions,” in *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* 9, IPCC (2018).

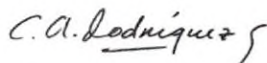
<sup>64</sup> Decision 4/CMA.1, Annex, paragraph 6 (c).

investments are consistent with a pathway towards low carbon emissions and climate resilient development.”<sup>65</sup> In other words, Articles 2 and 4, paragraph 3 of the Paris Agreement have to be used together to determine the substance of human rights obligations with respect to climate change. In this statement, treaty bodies further refer to an earlier (2018) statement by the Committee on Economic, Social, and Cultural Rights, which observed that “human rights mechanisms have an important role to play in ensuring that States avoid taking measures that could accelerate climate change, and that they dedicate the *maximum available resources* to the adoption of measures aimed at mitigating climate change.”<sup>66</sup>

49. To comply with their human rights obligations, ECHR member states must pursue *drastically accelerated* climate action, at the level of each state’s highest possible ambition. By not adopting targets and reducing emissions at that level of ambition, states fail to prevent foreseeable human rights harms caused by climate change – and thereby violate their obligations.
50. This does not mean that the Court should be prescriptive in what each and every state has to do or the exact type of measures it has to adopt. The Court will, however, need to determine whether the measures were adopted with *due diligence*, i.e. whether they are reasonable and adequate to prevent risk to the enjoyment human rights from climate change. The test question for this is: are the climate measures at the level of the highest possible ambition and aimed at and effective for achieving rapid and deep reductions of greenhouse gas emissions so as to achieve a *global* net phaseout of GHG emissions around 2050, in line with Article 2, paragraph 1, lit. a and Article 4, paragraphs 1 and 3 of the Paris Agreement?
51. This is in line with the Court’s decision in *Cordella v. Italy*, where it underscored the potential importance of this approach: “The Court notes that, while it is not for it to determine precisely what measures should have been taken in the present case in order to reduce the level of pollution more effectively, it is undoubtedly for it to determine whether the national authorities approached the question with *due diligence*.”<sup>67</sup>
52. If the Court finds that a given state did not set its climate targets with the diligence required, it should request that the state revisit its domestic policies and plans and regulatory and administrative framework so that they are consistent with the state doing *its utmost* to effectively address climate change in line with the goals of the Paris Agreement.

#### IV. Conclusion

53. To conclude, the Interveners in these written submissions have sought to clarify victim status as well as states’ substantive ECHR obligations in light of international climate law, in particular the Paris Agreement. The analysis put forth in this submission has ultimately aimed to demonstrate that recognizing the elderly as victims under this Court’s jurisprudence is appropriate and that state parties to the Convention and the Paris Agreement have an obligation to pursue climate policies consistent with due diligence at the level of their highest possible ambition.



**César Rodríguez-Garavito**  
Director, CHRJ & CLX



**Christina Voigt**  
Professor of Law, University of Oslo, Norway



**Margaret L. Satterthwaite**  
Director, CHRJ & GJC  
Professor of Clinical Law, NYU

<sup>65</sup> Committee on the Elimination of Discrimination Against Women et al., *Joint Statement on ‘Human Rights and Climate Change’* (Sept. 16, 2019) at § 11 (emphasis added).

<sup>66</sup> *Id.* § 7 (emphasis added).

<sup>67</sup> *Cordella et al. v. Italy*, Judgment, nos. 54414/13 & 54624/15, §161, 24 January 2019.