

Case number: BJ-E-26.09.2022/31



Schweizerische Eidgenossenschaft  
Swiss Confederation  
Confederazione Svizzera  
Confederaziun svizra

Federal Department of Justice and Police FDJP

**Federal Office of Justice (FOJ)**

Representation of Switzerland before the ECHR, the CAT, the  
CEDAW, the CERD and the CRC

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Case number: BJ-E-26.09.2022/31  
Your reference: ECHR-LF21.10G (mod.) KKM/elf  
Our reference: F.2021/3  
**Bern, 5 December 2022**

**Application No. 53600/20 – Verein KlimaSeniorinnen Schweiz and Others v. Switzerland  
Memorandum of the Government of Switzerland to the Grand Chamber**

To the Deputy Registrar of the Grand Chamber,

In your letter dated 28 April 2022, you informed us that the Chamber with jurisdiction to deal with the above-referenced matter had relinquished its jurisdiction in favour of the Grand Chamber and that the matter would henceforth be dealt with by the Grand Chamber. By letter dated 12 September 2022, you informed us that the parties were invited to submit a memorandum on the admissibility and the merits of the case by the deadline of 5 December 2022, which should in particular address the issues set out in the document attached to your letter. By letter of 27 September 2022, you gave us the opportunity to append a separate statement of facts to our memorandum.

Within the time limit set by the Court, the Government of Switzerland hereby submits its comments as follows:

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<b>I.</b>	<b>Preliminary comments</b>	
1.	This memorandum reiterates the main line of argument developed by the Government in its comments on admissibility and the merits of 16 July 2021 (hereinafter:	

”Observations of 16.07.2021”) and in its Additional Observations and on the request for just satisfaction of 18 November 2021 (hereinafter: “Observations of 18.11.2021”), summarising the same and supplementing certain points, while incorporating the replies to the eight questions asked by the Court.

2. By way of introduction, the Government stresses that global warming is a global phenomenon that undoubtedly constitutes one of the greatest challenges facing humanity. Its effects are already being felt in many parts of the world and will be more noticeable in the coming years and decades. Given the seriousness of the current situation and the worrying prospects for the future, there is a real urgency to the need to adopt and implement a series of effective measures to combat this phenomenon and to minimise its effects. Only resolute action by all states, combined with changes in behaviour by private actors and by all citizens, will enable us to find lasting solutions to this immense challenge.
3. Switzerland has long recognised the importance of the problem of global warming and has committed itself to combatting it at different levels and in different ways. As an Alpine country, Switzerland is particularly affected by climate change. The Swiss Federal Council and Parliament have shown their determination to reduce Switzerland’s greenhouse gas emissions by means of a revision of the CO<sub>2</sub> Act and a series of measures (see Statement of facts in Annex).
4. The Swiss Government is aware that, in any democratic society, it is perfectly legitimate for members of the public to call on states to do more to combat global warming or for criticism to be directed at authorities suspected of inaction in this area. This can only enrich the debate, help to find solutions and, ultimately, lead authorities towards identifying the best balance in defining the measures to be taken. However, the Convention system, of which the right of individual application is the cornerstone, is not intended to become the place where national policies to combat global warming are decided, in accordance with the principle of subsidiarity introduced in the preamble to the Convention following the entry into force, on 1 August 2021, of Article 1 of Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 213). Defining and choosing the measures to be taken is indeed a matter for the Government, Parliament and people of Switzerland.
5. The Swiss political system, with its democratic mechanisms, offers sufficient options for accommodating such demands. A “judicialisation” of these processes, in which rulings of an international court would prescribe higher targets or stronger measures for the Government, Parliament or even the Swiss people when they vote in a referendum, as was the case with the complete revision of the CO<sub>2</sub> Act (see Statement of facts in Annex), could only create tensions from the perspective of the separation of powers and the principle of subsidiarity. It would also run the risk of circumventing the democratic debate and complicating the search for politically acceptable solutions. Finally, it should be recognised that the Court is not intended to act as the supreme court of environmental or climate disputes and is not competent to enforce compliance with international treaties or obligations other than the Convention.

6. The Government also points out that the present case, by its nature, is not suitable for an examination on the merits by the Court of the Convention's substantive safeguards in respect of climate change. It deals with technical procedural issues, since no domestic court has ruled on the merits of the allegations of violation of Articles 2 and 8 of the Convention. In accordance with the principle of subsidiarity, it is therefore not for the Court, in place of the domestic authorities, to rule on the substantive obligations under the Convention relating to climate change and to assume the role of a *de facto* court of first instance. This is all the more true if one takes into account the evidentiary difficulties usually encountered in environmental cases (cf. *Pavlov and Others v. Russia*, 11 October 2022, no. 31612/09, para. 62) and the need to base the decision on sound scientific knowledge. The preceding recitals also raise questions about the legitimacy of judicial decisions.

## II. Statement of facts

7. The Government refers to the separate Statement of Facts prepared at the express request of the Court (Annex to the memorandum).
8. The Government takes the view that the factual situation to be taken into account in the present case is, in principle, the factual situation existing at the time of the decision of the Federal Administrative Court (hereafter: FAC) of 27 November 2018. The facts occurring up to that point have been taken into account in full *ex officio* by the FAC in its decision and have thus been the subject of a full judicial review (cf. FAC decision [A-2992/2017](#) of 27 November 2018, Annex 17 to the Application). If one takes into account the fact that the Federal Supreme Court (hereinafter: FSC) has limited jurisdiction to depart from the facts established by the FAC (cf. Art. 105 of the Federal Supreme Court Act [FSCA]<sup>1</sup>), it is possible to adopt the date of the FSC's decision of 5 May 2020 as decisive (cf. FSC's decision of 5 May 2020, published in [SCD 146 I 145](#), Annex 19 to the Application). It is in any event certain that the facts which occurred after 5 May 2020 could not have been examined by the Swiss courts. This also applies to the development of scientific knowledge since the decisions of the Federal Administrative Court and the Federal Supreme Court, respectively: It would indeed be unfair to accuse Switzerland of breaches of the Convention on account of the consequences of greenhouse gas emissions revealed by scientific studies published after the aforementioned decisions.

## III. Domestic law and practice

### A. International Law

#### a) *United Nations Framework Convention on Climate Change (UNFCCC)*<sup>2</sup>

9. The United Nations Framework Convention on Climate Change, concluded in New York on 9 May 1992, was approved by the Swiss parliament on 23 September 1993 and the instrument of ratification was deposited by Switzerland on 10 December 1993. The UNFCCC entered into force for Switzerland on 21 March 1994. Reference is made in particular to Articles 2 (Objective), 3 (Principles) and 4 (Commitments) of the UNFCCC.

<sup>1</sup> [SR 173.110 – Federal Supreme Court Act of 17 June 2005 \(FSCA\) \(admin.ch\)](#)

<sup>2</sup> [SR 0.814.01 – United Nations Framework Convention on Climate Change of 9 May 1992 \(with Annexes\) \(admin.ch\)](#)

b) *Paris Climate Agreement (Paris Agreement)*<sup>3</sup>

10. The Climate Agreement, concluded in Paris on 12 December 2015, was approved by the Swiss parliament on 16 June 2017 and the instrument of ratification was deposited by Switzerland on 6 October 2017. The Paris Agreement entered into force for Switzerland on 5 November 2017. Reference is made in particular to Articles 2, 3, 4, 14 and 15 of the Paris Agreement.

c) *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)*<sup>4</sup>

11. The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, concluded in Aarhus on 25 June 1998, was approved by the Swiss parliament on 27 September 2013 and the instrument of ratification was deposited by Switzerland on 3 March 2014. It entered into force for Switzerland on 1 June 2014. Its purpose is to guarantee the rights of access to environmental information, public participation in decision-making and access to justice in environmental matters (Article 1). States Parties undertake to take the necessary legislative, regulatory or other measures for public participation and access to justice, as well as proper enforcement measures, to establish a clear, transparent and consistent framework (Art. 3, para. 1).

B. Domestic law

a) *Federal Constitution of the Swiss Confederation of 18 April 1999 (Swiss Const.)*<sup>5</sup>

12. Neither the Constitution nor federal law in general contain provisions establishing a right to a healthy environment. However, the Constitution contains a number of fundamental rights which play a role in the protection of the environment. It also lays down the principle of sustainable development, grants the Swiss Confederation comprehensive competences in the area of environmental protection and defines the objectives of Switzerland's energy policy. In addition, it provides for political rights that facilitate very broad participation of citizens in public debate and in the development of environmental policies: Reference is made, inter alia, to Articles 10 (Right to life and personal freedom), 13 (Right to privacy), 29a (Guarantee of access to the courts), 33 (Right of petition), 34 (Political rights), 73 (Sustainable development), 74 (Protection of the environment), 89 (Energy policy), 136 (Political rights), 138 (Popular initiative for the complete revision of the Constitution), 139 (Popular initiative requesting a partial revision of the Constitution), 160 (Right to submit initiatives and motions) and 190 (Applicable law) of the Constitution.

b) *Federal Act of 20 December 1968 on Administrative Procedure (APA)*<sup>6</sup>

13. The APA applies to the procedure in administrative matters that are to be dealt with by decisions of federal administrative authorities of first instance or on appeal (Art. 1 (1) APA). In particular, it provides as follows:

<sup>3</sup> [SR 0.814.012 – Paris Agreement of 12 December 2015 \(Climate Agreement\) \(admin.ch\)](#)

<sup>4</sup> [SR 0.814.07 – Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters \(Aarhus Convention\) \(admin.ch\)](#)

<sup>5</sup> [SR 101 – Federal Constitution of the Swiss Confederation of 18 April 1999 \(admin.ch\)](#)

<sup>6</sup> [SR 172.021 – Federal Act on Administrative Procedure \(APA\) \(admin.ch\)](#)

*Art. 25a Ruling on real acts*

- <sup>1</sup> Any person who has an interest that is worthy of protection may request from the authority that is responsible for acts that are based on federal public law and which affect rights or obligations that it:
  - a. refrains from, discontinues or revokes unlawful acts;
  - b. rectifies the consequences of unlawful acts;
  - c. confirms the illegality of such acts.
- <sup>2</sup> The authority shall decide by way of a ruling.

*Art. 44 Principle*

Any ruling shall be subject to an appeal.

*Art. 48 Right of appeal*

- <sup>1</sup> A right of appeal shall be accorded to anyone who:
  - a. has participated or has been refused the opportunity to participate in proceedings before the lower instance;
  - b. has been specifically affected by the contested ruling; and
  - c. has an interest that is worthy of protection in the revocation or amendment of the ruling.
- <sup>2</sup> Persons, organisations and authorities who are granted a right of appeal by another federal act shall also be entitled to appeal.

c) *Federal Act on the Consultation Procedure of 18 March 2005 (CPA)*<sup>7</sup>

14. The CPA regulates the main aspects of the consultation procedure. It applies to consultation procedures initiated by the Federal Council, a department, the Federal Chancellery, a unit of the Federal Administration or a parliamentary committee (Art. 1 CPA). Reference is made in particular to Art. 2 (Purpose of the consultation procedure), Art. 3 (Subject matter of the consultation procedure), Art. 4 (Participation), Art. 8 (Procedure for opinions) and Art. 9 (Transparency) CPA.

d) *Federal Supreme Court Act of 17 June 2005 (FSCA)*<sup>8</sup>

15. The FSCA governs in particular the procedure before the FSC. In particular, it provides as follows:

*Art. 82 Principle*

- The Federal Supreme Court shall decide on appeals:
- a. against rulings in cases governed by public law;
  - b. (...)
  - c. (...)

*Art. 86 Lower courts in general*

- <sup>1</sup> An appeal is admissible against rulings:
  - a. of the Federal Administrative Court;
  - b. (...)
  - c. (...)
  - d. the cantonal authorities of last instance, provided an appeal to the Federal Administrative Court is not possible.
- <sup>2</sup> The cantons shall appoint higher courts to act as authorities immediately preceding the Federal Supreme Court, unless another federal act provides that

<sup>7</sup> [SR 172.061 – Federal Act of 18 March 2005 on the Consultation Procedure \(Consultation Procedure Act, CPA\) \(admin.ch\)](#)  
<sup>8</sup> [SR 173.110 – Federal Supreme Court Act of 17 June 2005 \(FSCA\) \(admin.ch\)](#)



an appeal may be lodged with the Federal Supreme Court against a decision of another judicial authority.

*Art. 89 Right of appeal*

<sup>1</sup> Any person may lodge an appeal in matters of public law who:

- a. took part in the proceedings before the lower authority or was deprived of the opportunity to do so;
- b. is particularly affected by the contested decision or enactment; and
- c. has an interest that is worthy of protection in the revocation or amendment of the ruling.

<sup>2</sup> The following are also entitled to appeal:

- a. the Federal Chancellery, the Federal Departments or, to the extent provided by federal law, their subordinate units if the contested act is apt to violate federal legislation within their area of responsibility;
- b. the competent body of the Federal Assembly in matters of employment of federal personnel;
- c. municipalities and other public law bodies that invoke the violation of guarantees recognised by the cantonal or federal constitution;
- d. persons, organisations and authorities to whom another federal act grants a right of appeal.

<sup>3</sup> In matters relating to political rights (Art. 82 let. c), any person who has the right to vote in the matter in question is entitled to appeal.

*Art. 95 Swiss law*

An appeal may be filed for violation of:

- a. Swiss law;
- b. international law
- c. (...)
- d. (...)
- e. (...)

*Art. 106 Application of the law*

<sup>1</sup> The Federal Supreme Court applies the law ex officio.

<sup>2</sup> It shall only examine a violation of fundamental rights and provisions of cantonal and intercantonal law if the appellant has invoked and substantiated this objection.

- e) *Federal Act of 23 December 2011 on the Reduction of CO<sub>2</sub> Emissions (CO<sub>2</sub> Act)<sup>9</sup> (Status as of 1 January 2022)*

*Art. 1 Aim*

<sup>1</sup> This Act is intended to reduce greenhouse gas emissions and in particular CO<sub>2</sub> emissions that are attributable to the use of fossil fuels (thermal and motor fuels) as energy sources with the aim of contributing to limiting the global rise in temperature to less than 2 degrees Celsius.

<sup>2</sup> The Federal Council designates the greenhouse gases.

*Art. 3 Reduction target*

<sup>1</sup> Domestic greenhouse gas emissions must be reduced overall by 20 per cent as compared with 1990 levels, by 2020. The Federal Council may set sector-specific interim targets.

<sup>1bis</sup> Greenhouse gas emissions must be reduced by a further 1.5 per cent annually by 2024 compared with 1990 levels. The Federal Council may specify sectoral interim targets.

<sup>1ter</sup> At least 75 per cent of the reduction in greenhouse gas emissions in accordance with paragraph 1<sup>bis</sup> must be achieved through domestic measures.

<sup>2</sup> ...

<sup>3</sup> The total volume of greenhouse gas emissions is calculated on the basis of the greenhouse gases emitted in Switzerland. Emissions from the use of aviation fuel on international flights are not taken into account.

<sup>3bis</sup> The Federal Council shall determine the extent to which emission allowances from states or communities of states with ETSs recognised by the Federal Council shall be taken into account in order to achieve the reduction target in accordance with paragraph 1.

<sup>4</sup> The Federal Council may set reduction targets for individual economic sectors by agreement with the parties concerned.

<sup>5</sup> It shall at the due time submit proposals to the Federal Assembly on the reduction targets for the period after 2020. It shall consult the parties concerned beforehand.

#### *Art. 4 Measures*

<sup>1</sup> The reduction target should in the first instance be achieved through measures under this Act.

<sup>2</sup> Measures that reduce greenhouse gas emissions in accordance with other legislation should also contribute to achieving the reduction target. These measures in particular include those in the fields of environment and energy, agriculture, forestry and timber industry, road traffic and the taxation of mineral oil, as well as voluntary measures.

<sup>3</sup> Voluntary measures also include undertakings by consumers of fossil thermal and motor fuels voluntarily to limit their CO<sub>2</sub> emissions.

<sup>4</sup> The Federal Council may assign suitable organisations to support and carry out voluntary measures.

#### *Art. 5 Counting emission reductions achieved abroad*

The Federal Council may take appropriate account of reductions in greenhouse gas emissions that have been achieved abroad when calculating emissions under this Act.

#### *Article 39 Enforcement*

<sup>1</sup> The Federal Council shall implement this Act and issue the implementing provisions. Before doing so, it shall consult the cantons and interested groups.

<sup>1bis</sup> (...)

<sup>2</sup> (...)

<sup>3</sup> (...)

<sup>4</sup> (...)

<sup>5</sup> (...)

#### *Article 40 Evaluation*

<sup>1</sup> The Federal Council periodically evaluates:

- a. the effectiveness of the measures under this Act;
- b. the necessity of additional measures.

<sup>2</sup> In doing so, it also considers climate-relevant factors such as demographic, economic and traffic growth.



- <sup>3</sup> It bases its assessment on statistical surveys.
- <sup>4</sup> It submits regular reports to the Federal Assembly.

16. The main measures under the current CO<sub>2</sub> legislation are as follows<sup>10</sup>:

- The CO<sub>2</sub> levy (Art. 29 et seq.)
- The Buildings Programme (Art. 9 and 34)
- The Emissions Trading Scheme (Art. 15 et seq.)
- CO<sub>2</sub> emissions regulations for new passenger cars (Art. 10 et seq.)
- Obligation for importers of motor fuels to compensate for their CO<sub>2</sub> emissions (Art. 26 et seq.)
- Technology Fund (art. 35)
- The Climate Programme – Training and Communication (art. 41)

17. With regard to the national climate legislation up to the end of 2020 and on the basis of the two federal decisions, reference is made to the Statement of facts in the Annex, sections 1.2.1 and 2.1.

### C. Domestic practice

18. Under 25a APA, any person who has an interest that is worthy of protection may request from the authority that is responsible for acts that are based on federal public law and which affect rights or obligations that it refrains from, discontinues or revokes unlawful acts, rectifies the consequences of unlawful acts or confirms the illegality of such acts (paragraph 1). The authority shall decide by way of a ruling (paragraph 2). In [SCD 146 I 145](#), relied upon before the Court, the FSC noted the following (recorded):

"The concept of acts within the meaning of Art. 25a APA must be interpreted broadly and includes the real acts not only where they are individual and concrete, but also where they are general and abstract (at 4.2). Beyond the wording of the law, omissions by the authorities may also be contested (at 4.1). Despite the broad understanding of this term, the question may arise as to whether – as in the present case – a series of state measures may be required on a specific issue on the basis of Art. 25a APA. According to Swiss constitutional law, requests to give a specific form to current policy areas are generally made through democratic mechanisms (at 4.3). The existence of rights under Art. 25a APA presupposes that the personal legal sphere of the Applicant is affected to a certain extent (at 4.1 and 4.4). "

19. As a general rule, any person may at any time apply to a Swiss authority to make a request and obtain a decision from the authority concerned. In Switzerland, the Federal Office for the Environment (hereinafter: FOEN) and the Swiss Federal Office of Energy (hereinafter: SFOE) are responsible for the development and preparation of legislative and other measures within the framework of Switzerland's Long-Term Climate Strategy. Both offices are attached to the Federal Department of the Environment, Transport, Energy and Communications (hereinafter: DETEC). As a general rule, any request for information or for a decision, any suggestion or, more broadly, any correspondence concerning environmental protection and, in particular, global warming, must be addressed to DETEC. The latter must issue a decision within the meaning of Article 5 APA, if applicable in conjunction with Article 25a APA. Such decisions may then be the subject

<sup>10</sup> For more detailed information see the CO<sub>2</sub> Act or [Climate: In brief \(admin.ch\)](#)

of an appeal to the Federal Administrative Court pursuant to Article 31 of the Act on the Federal Administrative Court of 17 June 2005 (FACA)<sup>11</sup>. Decisions handed down by the Federal Administrative Court in this area may then be appealed to the Federal Supreme Court pursuant to Articles 82 (a) and 86 (1) (a) FSCA.

20. As the Government will demonstrate in its subsequent comments (see section 140 below), appeals from individuals or associations are regularly brought before the Swiss courts on issues relating to risks to the environment arising from human activities. They have thus had the opportunity to express their views on such issues on several occasions.

#### **IV. Subject matter of the dispute: Greenhouse Gas Emissions Abroad (Reply to Question 1)**

21. According to the Court's established case-law, "the international system of protection established by the Convention functions on the basis of applications, be they governmental or individual, alleging violations of the Convention, and therefore does not enable the Court to either take up a matter irrespective of the manner in which it came to its knowledge or even, in the context of pending proceedings, to seize on facts that have not been adduced by the applicant – be it a State or an individual – and to examine those facts for compatibility with the Convention (...). That finding reflects one of the fundamental principles of procedure under international and domestic (civil and administrative) law: *ne eat iudex ultra et extra petita partium* ("not beyond the request"), it being understood that the *petitum* is the complaint submitted by the applicant. This finding suggests that the scope of a case "referred to" the Court in the exercise of the right of individual application is determined by the applicant's complaint or "claim" – which is the term used in Article 34. (*Radomilja and Others v. Croatia* of 20 March 2018 [Grand Chamber], no. 37685/10 and 22768/12, paras. 108 and 109).
22. The petition and the submissions of the Applicant in the domestic proceedings clearly state that they are limited to emissions in Switzerland. There is no initial omission or obscurity to be removed by the Applicant in this regard (see the judgment in *Radomilja and Others v. Croatia*, *supra*, para. 122).
23. In this regard, the Government emphasises that the Applicant never raised any argument concerning emissions abroad in its initial application of 26 November 2020 (see Application Form, p. 6 and 7, No. 8, 9 10 ["domestic GHG emissions"]; Supplementary Submission, section 17 ["domestic emissions"]). It is only in its Additional Observations of 13 October 2021 (Observations on the law, paras. 113 et seq. and 119 et seq.; Observations on the facts, section 2.10.3) that it relied on these emissions.
24. In addition, the procedure at the national level related to the domestic reduction targets and measures at the national level (see Request for the issuance of a ruling dated 25 November 2016, sections 1.b, 3.a and 4 of the prayers for relief and figures in para. 3, 10, 44, 85, 121, 131, 272, 321, 324, Annex 14 to the Application; cf. DETEC decision of 25 April 2017, letter B, Annex 15 to the Application; FAC decision [A-2992/2017](#) of 27 November 2018, at 5.2, Annex 17 to the Application; FSC decision of 5 May 2020, letter A, published in [SCD 146 I 145](#), Annex 19 to the Application). In addition, the Appellant explicitly argued that Switzerland should

<sup>11</sup> [SR 173.32 – Federal Administrative Court Act of 17 June 2005 \(FACA\)](#)

reduce its own emissions within its territory in order to be able to contribute to the overall reduction in emissions (see Request for the issuance of a ruling dated 25 November 2016, para. 48, Annex 14 to the Application).

25. The Government also notes that much of the Applicant's argument is based on the provisions of the Paris Agreement on Climate Change (Paris Agreement)<sup>12</sup>, which deals with domestic contributions and domestic measures (cf. Art. 4.2 of the Paris Agreement; cf. ch. 33 *infra*).
26. In view of the foregoing, the Government considers that emissions abroad are not the subject of this dispute. It raises an objection of inadmissibility in this respect and asks the Court not to take these arguments into account, since they were neither raised in the domestic proceedings (failure to exhaust remedies) nor raised before the Court within the six-month time limit then applicable under Article 35 of the Convention (failure to comply with the six-month time limit).

## V. Admissibility

### A. Failure to comply with the six-month time limit

27. This application was filed on 26 November 2021, i.e. more than 6 months after the FSC's decision of 5 May 2020. It is true that, in the context of the COVID-19 pandemic, the Court published a statement on its website stating that any applicant would have nine months from the date of the final domestic decision to lodge an application where the six-month period begins, runs or expires between 16 March 2020 and 15 June 2020 (see Annex 1 to the Application). However, the Government recalls that the six-month period provided for in Article 35 (1) of the Convention is a statutory period, expressly provided for by the Convention, which cannot generally be extended by judicial means. Moreover, the Applicants, represented by lawyers, were in no way confronted with a situation of *force majeure* in Switzerland during the period in question and that they were perfectly capable of referring the matter to the Court within the statutory period of 6 months. The Government maintains the arguments presented in its Observations of 16 July 2021 (paras. 26 to 30) and invites the Court to declare the Application inadmissible for failure to comply with the six-month time limit.

### B. Jurisdiction and Accountability (Reply to Question 2)

28. It follows from what has been set out above that greenhouse gas emissions abroad are not the subject of this dispute (cf. section 21 *et seq. supra*). Should the Court nevertheless decide that these emissions form part of the present dispute, the Government would argue as follows on the question of jurisdiction:
29. The jurisdiction of a State, within the meaning of Article 1 of the Convention, is primarily territorial (see, for example, *Bankovic and Others v. Belgium and 16 Other States* of 12 December 2001 [Grand Chamber], no. 52207/99, para. 59-61 and 67). To date, the Court has accepted two main cases in which circumstances might lead to the Contracting State exercising its jurisdiction outside its own borders. These are, first, "the authority and control of a state agent" and, second, "effective control over an area" (*M.N. and Others v. Belgium* of 5 March 2020 [Grand Chamber], no. 3599/18, para. 103-105 and the cited references; *Al Skeini and Others v. United Kingdom* of 7 July 2011 [Grand Chamber],

<sup>12</sup> [SR 0.814.012 – Paris Agreement of 12 December 2015 \(Climate Agreement\) \(admin.ch\)](#)

no. 55721/07, paras. 131 to 140; *H.F. and Others v. France* of 14 September 2022 [Grand Chamber], no. 24384/19 and 44234/20, paras. 186-187). In addition to these two main theories, the Court has also recognised that the jurisdiction of a State party may arise from the acts or omissions of its diplomatic or consular officials, but also that special procedural circumstances may justify the application of the Convention outside the respondent State's territory (*M.N. and Others v. Belgium*, supra, paras. 106-107 and references cited; *H.F. and Others v. France*, supra, para. 188). Finally, “[t]he mere fact that decisions taken at national level had an impact on the situation of persons resident abroad is also not such as to establish the jurisdiction of the State concerned over those persons outside its territory” (*Bankovic and Others*, cited above, para. 75). (*M.N. and Others v. Belgium* of 5 March 2020 [Grand Chamber], no. 3599/18, para. 112; *H.F. and Others v. France*, supra, para. 200). Article 1 of the Convention and the case-law of the Court do not accept the concept of “cause and effect” jurisdiction.

30. In the present case, the Government considers that the criteria developed for exceptional recognition of the existence of extraterritorial jurisdiction by Switzerland have not been met. Firstly, Switzerland obviously does not exercise any effective control over the territory of third countries where greenhouse gas emissions, which are allegedly attributable to Switzerland, occur. Emissions abroad take place on the territory of third countries over which Switzerland has no influence, due to the sovereignty of these countries under public international law. Secondly and thirdly, it is not a case of the authority and control of a State official or of the acts or omissions of its diplomatic or consular agents. Fourthly, the Government does not see any particular procedural circumstances that would justify the application of the Convention to Switzerland in relation to greenhouse gas emissions produced abroad. Therefore, the Government considers that emissions abroad do not fall under the jurisdiction of Switzerland.
31. The only question that may possibly arise here is whether the Court has jurisdiction to examine whether Switzerland has complied with any obligations it may have to take measures within its own jurisdiction and powers to reduce greenhouse gas emissions abroad (cf. *Rantsev v. Cyprus and Russia*, judgment of 7 January 2010, no 25965/04, para. 207). However, it should be borne in mind that the Court does not accept a “cause and effect” notion of jurisdiction (*M.N. and Others v. Belgium*, supra, para. 112). It held that the mere reliance on the capacity of a State to act does not suffice to constitute a special feature capable of triggering an extraterritorial jurisdictional link. (cf. *H.F. and Others v. France*, cited above, para. 199). Moreover, in *Soering v. United Kingdom*, the Court pointed out that “the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States. (...) In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.” (*Soering v. United Kingdom* judgment of 7 July 1989, no. 14038/88, paras. 86 and 91; *Sanchez-Sanchez v. the United Kingdom* of 3 November 2022 [Grand Chamber], no. 22854/20, para. 85). The former Commission, for example, decided that an injury caused by an Italian mine acquired by Iraq and placed on Iraqi territory “can not be seen as a direct consequence of the failure of the Italian authorities to legislate on arms transfers. [...] It follows that the ‘adverse consequences’ [...] are ‘too remote’ to attract the Italian responsibility” (cf. Commission decision *Tugar v. Italy* of 18 October 1995, No 22869/93).

32. In view of the foregoing, the Government considers that emissions occurring abroad cannot be regarded as a direct consequence of the alleged omissions of the Swiss authorities. The Swiss authorities do not have direct control over sources and emissions. The acts of the states in which the source of these emissions originate, as well as the acts of private actors, constitute the direct and decisive cause of the emissions complained of by the Applicants. It is therefore up to these states to take appropriate measures to reduce these emissions. Therefore, the adverse consequences of Switzerland's alleged omissions are too remote to engage Switzerland's responsibility (see *Tugar v. Italy*, supra). Moreover, there is not a sufficient nexus present for an issue to arise from the perspective of positive obligations under the Convention (cf. *e contrario* in *Fadeyeva v. Russia* of 9 June 2005, no. 55723/00, para. 92).
33. More generally, the Government recalls that the regime of the UNFCCC, the Kyoto Protocol and the Paris Agreement is based on the principle of territoriality and holds countries responsible only for emissions occurring within their own territory. It does not include emissions abroad, whether grey emissions introduced into products or emissions due to investments abroad. The application of the principle of territoriality in international instruments to combat global warming also ensures that emissions are counted only once.
34. Even if the grey emissions introduced into products and the emissions caused by investments abroad cannot be attributed to Switzerland, Switzerland nevertheless also strives to reduce these emissions. Climate compatibility tests known as PACTA (Paris Agreement Capital Transition Assessments) enable financial institutions, for example, to see the level of emissions their money generates in Switzerland and abroad and then to reduce them in a targeted manner.<sup>13</sup> Sustainable consumption and purchasing decisions made by private and public stakeholders make it possible to significantly reduce the environmental and climate impact in Switzerland and abroad. Important topics of the Federal Council's Sustainable Development Strategy include, for example, the transformation towards sustainable food systems in Switzerland and abroad, promoting the circular economy and corporate responsibility in Switzerland and abroad. The Confederation is actively involved in the development of this strategy and thus in promoting the circular economy and resource efficiency.<sup>14</sup>
35. The obligation of importers of fuels to compensate for CO<sub>2</sub> emissions should also be mentioned.<sup>15</sup> They are required to compensate for a certain proportion of the CO<sub>2</sub> emissions generated by transport. They can do so by carrying out their own projects or by purchasing certificates. Compensation may be carried out through compensation projects in Switzerland and abroad. At present, there are 10 international treaties in respect of this. In addition, Switzerland also tries to indirectly reduce emissions abroad by offering incentives. Switzerland is thus far from inactive in this area, but this subject-matter does not fall within the scope of the Convention.
36. In view of the above, and in reply to question 2, the Government considers that greenhouse gas emissions abroad do not fall within the jurisdiction of

<sup>13</sup> Cf. [Testing for climate goal alignment \(admin.ch\)](#)

<sup>14</sup> Cf. [Sustainable Development Strategy \(admin.ch\)](#)

<sup>15</sup> Cf. [CO<sub>2</sub> Compensation \(admin.ch\)](#) and [Obligation of importers of motor fuels to compensate for CO<sub>2</sub> emissions \(admin.ch\)](#)



Switzerland and are not attributable to Switzerland. They cannot therefore engage Switzerland's responsibility under the Convention. The adverse consequences of Switzerland's alleged omissions are too remote to engage Switzerland's responsibility. There is not enough of a nexus for an issue to arise in terms of positive obligations under the Convention. For the avoidance of any ambiguity, the Government recalls that it does not dispute that Switzerland has jurisdiction in the Applicants' case over emissions produced on Swiss territory.

37. With regard to a possible development of case law to take account of the particularities of climate change (question 2.1), it should be borne in mind that Article 1 of the Convention is not subject to interpretation in accordance with the doctrine of the "living instrument" (cf. *Bankovic and Others v. Belgium and 16 Other States*, supra, para. 63-66). The Government considers that the wording of Article 1 of the Convention cannot be interpreted in such a way as to extend jurisdiction to greenhouse gas emissions abroad. Such an interpretation would be too broad and would clearly go beyond the intent of the High Contracting Parties to the Convention. It would also create problems with regard to the principle of state sovereignty and the role of the Court. While acknowledging the urgency of combating global warming and the immense challenges it poses, the limitations of the Convention's system cannot be ignored.
- C. Victim status (Reply to question 3)
  - a) "*Victim*" status of the Applicant association (first Applicant)
38. By invoking Articles 2 and 8 of the Convention, the Applicant association claims that it is a direct victim under Article 34 of the Convention (Additional Submission, para. 35 et seq.). With regard to Articles 6 and 13 of the Convention, the Applicant association argues that it was a party to the national proceedings and that it is therefore clearly a victim in this context (cf. Additional Submission, para. 41).
39. According to the settled case-law of the Court, associations are normally recognised as victims only if they have been directly affected by the measure in question. The Convention does not envisage the possibility of an *actio popularis*. The cases in which the Court granted victim status to associations concerned Article 6 para. 1 of the Convention. Certain rights of the Convention (e.g. Articles 2, 3 and 5) are not, by their nature, capable of being exercised by an association, but only by its members (cf. *Yusufeli İlçesini Güzelleştirme Yaçatma Kültür Varlıklarını Koruma Derneği v. Turkey* of 7 December 2021, no. 37857/14, para. 36-41). An association is not, in principle, in a situation where it may invoke health reasons to allege a violation of Article 8 of the Convention (cf. *Greenpeace E.V. and Others v. Germany* of 12 May 2009, No. 18215/06).
40. The Government emphasises that in the present case, the FAC left open the question of whether the applicant association has the right to submit the request to DETEC and subsequently to lodge an appeal (cf. FAC decisions A-2992/2017 of 27 November 2018, at 1.2, Annex 17 to the Application). Similarly, the FSC left open the question of whether the Applicant association had the right of appeal (cf. FSC decision 1C\_37/2019 of 5 May 2020, para. 1, Annex 19 to the Application).
41. The Government recalls that the Applicant association is a legal entity. Because of that nature, it cannot claim to be itself the victim of a violation



of the right to life (Art. 2 ECHR) or of the right to respect for private and family life (Art. 8 ECHR). In particular, it may not invoke health problems (cf. *Greenpeace e. V. and Others v. Germany*, *supra*; *Aly Bernard and 47 others as well as Greenpeace- Luxembourg v. Luxembourg* of 27 June 1999, no. 29197/95, observations on the law, para. 1). In view of the above, the Applicant association is likewise unable to claim to have been the victim of a violation of Articles 6 and 13 of the Convention.

42. In fact, the Applicant association is not relying on its own rights, but on the rights of its members under Articles 2 and 8 of the Convention. In addition, it should be noted that all women of pensionable age (i.e. those over 64 years of age) can become members of the association and that the average age of the members is 73 (cf. Additional Observations of 13.10.2022, Observations on the Law, para. 26). However, not all people of retirement age are particularly at risk in relation to heatwaves, but specifically those over the age of 75 (see section 48 *infra*).
43. The Government emphasises that the FSC's decision in no way prevents the Applicant association from working towards achieving its objectives (cf. *Ordre des avocats défenseurs et avocats près la Cour d'appel de Monaco v. Monaco* of 21 May 2013, no. 34118/11, para. 58 with reference; *Nencheva and Others v. Bulgaria* of 18 June 2013, no. 48609/06, para. 92).
44. In view of the above, the Applicant association is not personally injured nor is it a "victim" within the meaning of Article 34 of the Convention. It itself did not suffer the alleged consequences, either directly or indirectly, or seriously, of the omissions of which Switzerland is accused. Accordingly, the Government invites the Court to declare the complaints of the Applicant association incompatible *ratione personae* with the provisions of the Convention and to declare this part of the application inadmissible pursuant to Article 35 (3) (a) and 4 of the Convention.

b) "Victim" status of the Applicants 2 to 5  
Articles 2 and 8 of the Convention

45. According to the case-law of the Court "... the supervisory mechanism of the Convention cannot allow *actio popularis* (...). Moreover, neither Article 8 nor any other provision of the Convention specifically guarantees general protection of the environment as such (...). According to the jurisprudence of the Court, the crucial factor in determining whether, in the circumstances of a case, environmental damage has resulted in a violation of any of the rights guaranteed by Article 8, paragraph 1, is the existence of an adverse effect on a person's private or family sphere, and not simply the general degradation of the environment (...)." (judgment *Di Sarno and Others v. Italy* of 10 January 2021, no. 30765/08, para. 80 with references).
46. Referring to Articles 2 and 8 of the Convention, the Applicants 2 to 5 claim that they are direct and potential victims of a violation of these Articles (cf. Additional Submission, para. 33 and 34). In support of their status as "direct victims", they claim that they have been suffering and continue to suffer from the effects of heat. They allege that at each heatwave they were and continue to be exposed to a real and serious risk of mortality and morbidity which is higher than the general population (see Additional Submission, para. 33). In support of their status as "potential victims", they argue that failure to reduce greenhouse gases in accordance with the limits of the

Paris Agreement will significantly increase their risk of heat-related mortality and morbidity (cf. Additional Submission, para. 34).

47. In the present case, the Federal Supreme Court held in May 2020 that the Applicants – like the rest of the population – have not suffered effects on their rights under Articles 2 and 8 of the Convention with the necessary degree of intensity as a result of the alleged omissions. It considered that their request should be classified as an *actio popularis* and that it is therefore inadmissible under Article 25a APA, which only guarantees the protection of individual rights. It also concluded that they do not have the status of victim within the meaning of Article 34 of the Convention (cf. [SCD 146 I 145](#), at 5.4 and 5.5). In support of this conclusion, the Federal Supreme Court relied on the scientific knowledge available at the time (cf. IPCC Special Report “Global warming of 1.5°”) and stressed that it must be assumed that the Paris Agreement value of “well below 2 degrees Celsius” will not be exceeded in the near future (cf. [SCD 146 I 145](#), at 5.3 and 5.4). In view of the above, the alleged omissions do not affect the Applicants 2-5 with the intensity required to qualify them as direct victims of the alleged violations of Articles 2 and 8 of the Convention. The mere possibility that this value may be exceeded in the more distant future is not in fact sufficient (cf. [SCD 146 I 145](#), at 5.4). In reaching this conclusion, the FSC took into account the case law of the Court and explicitly referred to various judgments (*Ouardiri v. Switzerland* of 28 June 2011, no. 65840/09; *Kolyadenko and Others v. Russia* of 28 February 2012, nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05; *Di Sarno and Others v. Italy*; supra; *Hardy and Maile v. the United Kingdom* of 14 February 2012, no. 31965/07).
48. The Government notes that heatwaves (temperatures above 30°C for several days and not falling below 20°C at night) may pose a health risk and may even be fatal for the elderly or those suffering from (chronic) diseases, pregnant women or young children (Federal Office of Public Health FOPH > Healthy Living > Environment & Health > [Heat](#) [last visit 03.11.2022]; See also FOEN, [The heatwave and the drought of summer 2018](#)). Another study shows that excess mortality in summer 2019 was highest in the group of people aged 85 and over. This study includes persons aged 75 years and older as being at risk. The study also mentions that various studies in Switzerland and abroad show that preventive measures have helped to reduce the risk of heat-related mortality (cf. Martina S. Ragettli/Martin Roosli, [Health effects of heatwaves in Switzerland and the significance of preventive measures - heatwave-related fatalities in the summer heatwave of 2019 – and a comparison with the summer heatwaves of 2003, 2015/2018](#), Final Report, July 2020). It should be borne in mind, however, that not all heat-related deaths can be attributed to global warming. One study reveals, for example, that about one third of heat-related deaths can be attributed to anthropogenic climate change (cf. Vicedo-Cabrera, A.M., Scovronick, N., Sera, F. et al. The burden of heat-related mortality attributable to recent human-induced climate change. *Nat. Clim. Chang.* 11, 492-500 (2021). <https://doi.org/10.1038/s41558-021-01058-x>).
49. In view of the above, the Government considers that the Applicants belong to a group of the population that, like other groups (e.g. pregnant women, young children or people with chronic diseases), is more at risk from the effects of heatwaves. However, it is important to

note that, in the category of older persons, development of risk is age-sensitive, so that it is incorrect to assume that all people of retirement age are automatically more at risk. Moreover, older women do not appear to be significantly more at risk than men of the same age. In this context, the Government recalls that the Applicants must demonstrate that they themselves, as individuals, are directly affected by the alleged violations (no *actio popularis*). With regard to the alleged adverse effects invoked by the Applicants 2 to 5 (cf. Additional Submission, para. 7 et seq., para. 33), the intensity of these effects must first be taken into account:

50. In their personal statements (cf. Annexes 4-7 to the Application), the Applicants claim that they have adapted their lifestyle to heat (“Mediterranean living”, cf. Statement of Applicant 5, annex 7 to the Application). For example, in the event of high temperatures, they would remain at home, use the air conditioner or fan, lower the blinds, avoid outdoor activities (see annexes 4-7 to the Application). The Government stresses that such behavioural adjustments during the warmest days of the year are very common phenomena. It is well known that a large proportion of the population takes similar measures in the event of high temperatures. The fact that Applicants 2-5 may themselves be more sensitive to this situation than other persons of the same age in the same situation does nothing to change this fact. Moreover, the Applicants, as well as all women over the age of 75, are not the only population group affected by the consequences of climate change. These consequences affect humans, animals and plants, even if not every person necessarily reacts in the same way (cf. FAC decisions A-2992/2017 of 27 November 2018, para. 7.4.2 and 7.4.3, Annex 17 to the Application). However, it cannot be ruled out that climate change impacts other than heatwaves – such as the occurrence of a natural hazard such as a landslide or flood – may particularly affect some people.
51. Applicant 2 claims to wear a pacemaker and to have fainted once in the summer of 2015 due to the heat (cf. Additional Submission, para. 8; medical certificate of 15 November 2016, Annex 8 to the Application). However, she does not claim that her wearing of a pacemaker was the result of the alleged omissions and inadequate actions. In addition, it follows from the medical certificate that heat was only one of the triggers of her syncope.
52. Applicant 3 asserts that she suffers from cardiovascular problems, that she is profoundly impaired in her physical capacity by the heatwaves, that she is confined to her home during periods of high temperatures and that she needs medication (cf. Additional Submission, para. 9; medical certificate of 19 October 2016 and 11 February 2019, Annex 9 and 10 to the Application). medical certificate of 23 September 2021, annex 5 to the observations of 13 October 2021, which did not yet exist at the time of the proceedings at national level). However, she does not claim that her cardiovascular problems are the result of the alleged omissions and inadequate actions. In addition, her alleged impairment of physical capacity and required medication are formulated in very vague terms.
53. Applicants 4 and 5 allege that they suffer from respiratory diseases (cf. Additional Submission, para. 33). However, they do not argue that the respiratory diseases that they already claim to suffer from are due to alleged omissions and inadequate actions. Applicant 4 argues that the heatwaves aggravate her symptoms

(cf. Additional Submission, para. 10), but does not demonstrate to what extent this aggravation is the result of the alleged omissions and insufficient actions.

54. With regard to the status of “potential victim”, it should be recalled that the Court has held that only in exceptional circumstances may the risk of a future violation confer on an individual Applicant the status of “victim”, but that this is subject to submission of reasonable and convincing evidence of the likelihood of a violation occurring which relates to him personally; mere suspicions or conjectures are insufficient in this regard (*Aly Bernard and 47 others as well as Greenpeace-Luxembourg v. Luxembourg*, supra, Observations on the Law, para. 1).
55. In this case, it should be recalled that according to the Intergovernmental Panel on Climate Change (IPCC), global warming is likely to reach 1.5 °C between 2030 and 2052 if it continues to increase at the current rate (high confidence level). More specifically, the IPCC expects global warming to reach 1.5 °C around 2040 if it continues to increase at the current rate.<sup>16</sup> Global warming of 2 °C would occur even later. The Paris Agreement, as well as the international climate protection system, are therefore based on forecasts that the value of “well below 2 degrees Celsius” will not be exceeded in the near future. It is thus accepted, at the time when the domestic courts handed down their decisions, that there is a certain period of time to prevent global warming exceeding this value (cf. in particular Articles 3 and 4 of the Paris Agreement). However, it is beyond question that there is need to act now, and that is precisely what the Federal Council and Parliament are doing (see Statement of facts in Annex). The IPCC’s Sixth Assessment Report (AR6), which was issued in 2021/22, and thus after the domestic court rulings, does not change these findings, but clarifies: In order to meet the 1.5°C target, global CO<sub>2</sub> emissions must be reduced by 48% by 2030 compared to 2019 and by 80% by 2040. By the early 2050s, greenhouse gas emissions are expected to reach net zero in all sectors and regions. In addition, it emphasises decisive measures such as the transformation of the energy system towards 100% renewable energy, the end of subsidies for fossil fuels and the reduction of emissions in industry and construction. The report also indicates that differences in per capita greenhouse gas emissions reflect income inequalities across regions of the world and among private households. The richest 10% of private households contribute between 34% and 45% of greenhouse gas emissions.
56. In view of the above, there is no real risk for Applicants 2-5 that, in the near future, their rights under Articles 2 and 8 of the Convention will be violated. Applicants no. 2-5 have not produced any evidence or even plausible and convincing indications of the likelihood of a violation of which they would personally suffer the effects such that they would be considered potential victims. Recognising potential risks for the future creates uncertainty and raises the question of whether the Applicants, who are women already over the age of 80 (years of birth: 1931 (Applicant 2 is deceased), 1937, 1941, 1942), will themselves be individually affected by the effects invoked at such time as

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<sup>16</sup> IPCC Special Report“ Global warming of 1.5°”, 2018, p. 4 and 81.

global warming reaches 1.5°C in 2040, as predicted above. The more distant the date on which damage occurs, the more uncertain the occurrence of the damage and its impact on the affected persons.

57. Although the Government appreciates the suffering that the Applicants may experience, it considers that the present Application is manifestly an *actio popularis* and that Applicants 2-5 cannot be considered victims, within the meaning of Article 34, of the alleged violations. Recognising them as direct or potential victims in this case would make it very difficult, if not impossible, in future to deny any person belonging to one of the many categories of people most at risk the right to obtain, at any time, judicial review of the measures taken to combat global warming. Consequently, the Government invites the Court to declare the Applications of the Applicants 2-5 concerning Articles 2 and 8 of the Convention incompatible *ratione personae* with the provisions of the Convention and to declare that part of the Application inadmissible pursuant to Article 35 para. 3 (a) and 4 of the Convention.

Articles 6 and 13 of the Convention

58. Referring to Articles 6 and 13 of the Convention, Applicants 2-5 argue that they were parties to the domestic proceedings and that, therefore, they are clearly victims in this context (cf. Additional Submission, para. 41).
59. The Government accepts that the Applicants 2-5 were parties to the domestic proceedings. It therefore considers that they may be considered victims, within the meaning of Article 34 of the Convention, in the context of the alleged violations of Articles 6 and 13 of the Convention (cf. *Gorraiz Lizarraga and Others v. Spain*, supra, para. 36, concerning Article 6 of the Convention).
60. It should be recalled, however, that according to the case law of the Court, the affirmation of the status of victim does not entail the applicability of Articles 6 and 13 of the Convention. This question must be examined separately (cf. *Gorraiz Lizarraga and Others v. Spain*, supra, para. 33 et seq. and 40 ff.; *Balmer-Schafroth and Others v. Switzerland* of 26 August 1997 [Grand Chamber], no. 67/1996/686/876, para. 24 et seq. and 42).

c) *Conclusion*

61. In view of the above, the Government considers that the Applicant association (Applicant 1) cannot be considered a victim of a violation of the Convention and that that part of the Application must be declared inadmissible. With regard to the Applicants 2-5, they likewise cannot be considered victims of a violation of Articles 2 and 8 of the Convention. That part of the Application must therefore also be declared inadmissible. On the other hand, the Applicants 2-5 may claim to be victims of a violation of Articles 6 and 13 of the Convention. Consequently, only this part of the Application is admissible, subject to the objection of inadmissibility *ratione temporis* raised by the Government (cf. section 27 supra).



D. Applicability of the provisions of the Convention (reply to question 4)

a) *Applicability of Articles 2 and 8 of the Convention*

Lack of sufficient causal link

62. With regard to the interference with the rights guaranteed by Articles 2 and 8 of the Convention, the Applicants argue that they have suffered and continue to suffer from the effects of heat and that they run a real and serious risk of mortality and morbidity with each heatwave (see Additional Submission, para. 33).
63. The Government considers that the Applicants have not established a causal link between the alleged omissions of Switzerland and the aforementioned interference. It points out that global warming is a global phenomenon and that only resolute action by all States, combined with changes in behaviour on the part of private actors and all citizens, will make it possible to find lasting solutions to this immense challenge. Greenhouse gas emissions are caused by the community of states. In addition, states emit different quantities of greenhouse gases. Given Switzerland's low greenhouse gas intensity today (cf. Statement of facts in the Annex, section 1.2.3; the omissions of which Switzerland is accused are not of such a nature as to cause, on their own, the suffering claimed by the Applicants and to have serious consequences for their private and family life (but see, *Fadeyeva v. Russia*, supra, para. 92). The Government maintains that additional measures by Switzerland to reduce its greenhouse gas emissions would not have a "real prospect of altering [global warming] or mitigating the harm [caused by global warming]" within the meaning of the aforementioned case law of the Court (cf. *O'Keefe v. Ireland* of 28 January 2014 [Grand Chamber], no. 35810/09, para. 149 with reference).
64. Thus, there is no sufficient link between pollutant emissions and the State to raise the issue of Switzerland's positive obligation under Articles 2 and 8 of the Convention.

Applicability of Article 2 of the Convention denied

65. The Court reaffirmed that Article 2 of the Convention concerns not only cases of human death resulting from the use of force by state officials, but also imposes, in the first sentence of the first paragraph, a positive obligation on states to take all necessary measures to protect the lives of persons under their jurisdiction. According to the Court, that obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and *a fortiori* in the case of industrial activities, which by their very nature are dangerous, such as the operation of waste-collection sites (*Öneryildiz v. Turkey*, no. 48939/99, 30 November 2004 [Grand Chamber], para. 71). *Brincat and Others v. Malta* of 24 July 2014, no 60908/11 and 4 Others, para. 80).
66. The State's duty to safeguard the lives of persons under its jurisdiction has been interpreted to include both the substantive and procedural aspects and, in particular, the positive obligation to adopt regulatory measures and to adequately inform the public of any life-threatening situation and to ensure that all circumstances of such deaths are investigated by the courts (*Öneryildiz*, supra, paras. 89-118). With regard to the substantive aspect, the Court held that,



in the particular context of dangerous activities, special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks. Among these preventive measures, particular emphasis should be placed on the public's right to information, as established in the case-law of the Convention institutions. In any event, the relevant regulations must also provide for appropriate procedures, taking into account the technical aspects of the activity in question, for identifying shortcomings in the processes concerned and any errors committed by those responsible at different levels (*Öneryildiz*, supra, paras. 89-90; *Budayeva and Others v Russia*, no 15339/02, 20 March 2008, para. 130).

67. Where the victim has survived and does not allege any intention of the perpetrator to kill, the test to be applied to a claim under the procedural aspect of Article 2 of the Convention is to determine, "firstly, whether the person was the victim of an activity, whether public or private, which by its very nature put his or her life at real and imminent risk and, secondly, whether he or she has suffered injuries that appear life-threatening as they occur. Other factors ... may also come into play (...)." (*Nicolae Virgiliu Tanase v. Romania* of 25 June 2019 [Grand Chamber], no. 41720/13, para. 140). "Where the real and imminent risk of death stemming from the nature of an activity is not evident, the level of the injuries sustained by the applicant takes on greater prominence. In such cases a complaint falls only to be examined under Article 2 where the level of the injuries was such that the victim's life was put in serious danger" (*ibid.*, para. 142).
68. In the present case, the Government considers that, although the reality of the dangers associated with global warming is clear, the Applicants have nevertheless failed to demonstrate the existence of an "immediate" risk to their lives (cf. *Öneryildiz*, supra, para. 100). The severity of the negative effects of global warming on the Applicants (cf. section 51 et seq. supra; e.g. being confined to the home, health problems) does not reach the level of intensity required to render Article 2 of the Convention applicable. The Government therefore considers that Article 2 of the Convention is not applicable in this case (cf. [SCD 146 I 145](#), at 5).

*Applicability of Article 8 of the Convention left open*

69. The Court has already had occasion to point out that Article 8 of the Convention does not apply whenever a deterioration of the environment occurs: no right to nature preservation is included as such among the rights and freedoms guaranteed by the Convention or its Protocols (*Ivan Atanasov v. Bulgaria* of 2 December 2010, no. 12853/03, para. 66). This fact has been noted several times by the Parliamentary Assembly of the Council of Europe, which has asked the Committee of Ministers to consider the possibility of supplementing the Convention in this respect (cf. *Ivan Atanasov v. Bulgaria*, supra, para. 66; most recently by [Recommendation 2211 \(2021\)](#) "Anchoring the Right to a Healthy Environment: need for enhanced action by the Council of Europe").
70. According to the case-law of the Court, the obligations arising from Article 8 of the Convention apply only if there is a direct and immediate link between the disputed situation and the applicant's home or private or family life. The first question is whether the environmental pollution complained of by the applicant can be regarded as

affecting adversely, to a sufficient extent, the enjoyment of the amenities of his home and the quality of his private and family life (cf. *Ivan Atanasov v. Bulgaria* supra, para. 66; see also *Hatton and Others v. the United Kingdom* judgment of 8 July 2003 [Grand Chamber], no. 36022/97, para. 96; *Greenpeace e.V. and Others v. Germany*, supra).

71. The Court stressed that “[...] the adverse effects of environmental pollution must attain a certain minimum level if they are to fall within the scope of Article 8 of the Convention (...). The assessment of that minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance, and its physical or mental effects. The general context of the environment should also be taken into account. There would be no arguable claim under Article 8 if the detriment complained of was negligible in comparison to the environmental hazards inherent to life in every modern city. (cf. *Fadeyeva v. Russia*, supra, para. 69; *Dubetska and Others v. Ukraine* of 10 February 2011, no 30499/03, para. 105, and *Grimkovskaya v. Ukraine* of 21 July 2011, no 38182/03, para. 58; *Cordella and Others v. Italy* of 24 January 2019, no. 54414/13 and 54264/15, para. 157).
72. Taking into account the evidentiary difficulties typically encountered in environmental cases, the Court has paid particular, but not exclusive, attention to the findings of domestic courts and other competent authorities in establishing the factual circumstances of the case, analysing domestic legal provisions assessing hazardous pollution levels and conducting environmental studies commissioned by the authorities. The Court has also stressed that it cannot rely blindly on the decisions of national authorities, especially when they are manifestly inconsistent or contradictory. In such a situation, it must assess the evidence as a whole. The Court has also taken into account domestic legal provisions assessing hazardous pollution levels and environmental studies commissioned by the authorities. Further sources of evidence for consideration in addition to the applicant’s personal accounts of events, will include, for example, his medical certificates as well as relevant reports, statements or studies made by private entities (cf. *Pavlov and Others v. Russia*, supra, para. 62; *Dubetska and Others v. Ukraine*, supra, para. 107).
73. In a number of cases where it found that Article 8 of the Convention was applicable, the Court considered the proximity of the applicants' homes to pollution sources as one of the factors (cf. *Pavlov and Others v. Russia*, supra, para. 63).
74. In the present case, since the Court has recognised that serious environmental harm may affect a person’s well-being and deprive him or her of the enjoyment of his or her home in such a way as to harm his or her private and family life, the Government is of the opinion that Article 8 of the Convention may, in principle, apply in the context of climate change. It is a well-known fact that accelerating global warming is an extremely worrying phenomenon for mankind and that it results from man-made CO<sub>2</sub> emissions. Global warming is undoubtedly likely to affect the quality of life of individuals, even if their health would not be seriously endangered.
75. In the present case, and in light of the changes in behaviour made by the Applicants 2-5 (“Mediterranean living”), the Government considers, however, that

global warming has not reached a level sufficient to have a tangible effect on the private and family lives of the Applicants. The minimum severity threshold required to be able to consider that Article 8 of the Convention is applicable has not been reached (cf. *Calancea and Others v. Republic of Moldova* (Dec.), 6 February 2018, no 23225/05, para. 27 and 32; *e contrario Dubetska and Others v. Ukraine*, supra, para. 119). In addition, the Applicants 2-5 fail to demonstrate that the heatwaves have an impact on their psychological state which reaches the minimum threshold of severity (cf. Additional Observations dated 13.10.2022, Observations on the law, para. 48).

76. Contrary to the cases concerning air pollution (see e.g. *Pavlov and Others v. Russia*, supra, para. 58-71), the Applicants in the present case do not argue that greenhouse gas emissions and the concentration of greenhouse gases in the air are directly harmful to their health. They argue that these emissions are causing global warming and heatwaves which, in turn, are harmful to their health. Unlike the Applicants in the *Pavlov* case, who were exposed to high levels of air pollution on a daily basis and for a long period of time, the Applicants are not exposed to heatwaves on a daily basis, even if the number of heatwave days increases (cf. Federal Statistical Office, [Climate Data: winter days, frost days, summer days, tropical days, tropical nights and days of precipitation, 1959-2021](#)). The Applicants are thus not being constantly affected in their daily lives. In addition, preventive measures, which can significantly reduce the risk of mortality during heatwaves, are simple and do not reach the threshold of severity required to render Article 8 of the Convention applicable (cf. section 48 supra).

77. The Government is therefore not convinced that Article 8 of the Convention applies in this case, but considers that the matter may be left open in the light of subsequent developments.

(b) *Applicability of Article 6 of the Convention*

78. According to the case law of the Court, "(...) for Article 6 § 1 in its "civil" limb to be applicable, there must be a dispute ("contestation" in the French text) over a "civil right" which can be said, at least on arguable grounds, to be recognised under domestic law. The "dispute" must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise. The outcome of the proceedings must be directly decisive for the right in question; tenuous connections or remote consequences are not sufficient to bring Article 6 § 1 into play (...)" (*Taşkin*, supra, para. 130; *Balmer-Schafroth and Others v. Switzerland*, supra, para. 32).

79. In the present case, the Federal Supreme Court noted that the Applicants relied on the right to life pursuant to Article 10 (1) of the Swiss Constitution in order to derive a subjective claim to have the alleged omissions of the State stopped and to implement the measures requested by them. The Federal Supreme Court held that the Applicants' constitutional right was not affected in a legally relevant manner by the alleged omissions ([SCD 146 I 145](#) at 6.2). Indeed, the Applicants' rights are not affected with the degree of intensity required arising from Article 10 (1) Swiss Const. and Articles 2 and 8 of the Convention. They do not have the status of victim within the meaning of Article 34 of the Convention (cf. [SCD 146 I 145](#), at 5.4). Their application must be classified as an *actio popularis* and is inadmissible pursuant to Article 25a APA, which only guarantees the protection of individual rights (cf. [SCD 146 I 145](#), at 5.5). In view of the foregoing, the Government considers that the Applicants cannot arguably claim that there is a dispute over a right recognised under domestic law. Consequently,

they cannot infer the above-referenced claim from Article 10(1) Const. and have no subjective right to a finding of the alleged illegality of the alleged omissions (cf. [SCD 146 I 145](#), at 6.2).

80. Furthermore, the Federal Administrative Court considered that the actions and other measures requested by the Applicants, such as the opening of the preliminary phase of the legislative procedure and the provision of information to the public, are not such as to contribute immediately to the reduction of CO<sub>2</sub> emissions in Switzerland. The actions and other measures requested by the Applicants are therefore not capable of reducing extreme heatwaves. Under these circumstances, it cannot be said that the dispute before DETEC was genuine and serious and that the outcome of the proceedings would have been directly relevant to the law in question. Consequently, DETEC was not required to consider the Applicants' request pursuant to Article 6 para. 1 of the Convention (cf. FAC decision A-2992/2017 of 27 November 2018, para. 8.3 and 8.4, Annex 17 to the Application).
  81. The Government supports the decisions and considerations of the domestic courts. It further emphasises that the Applicants have not established a sufficient link between the alleged omissions and the rights invoked. Moreover, they have not identified or demonstrated that there is a serious and, above all, immediate threat to the rights they have invoked. Furthermore, the actions requested are not such as to contribute immediately to the reduction of CO<sub>2</sub> emissions in Switzerland. Consequently, neither the threat nor the actions sought present the degree of probability which makes the outcome of the dispute directly decisive for the rights invoked by the Applicants. The link between the alleged omissions and the rights invoked by the Applicants is therefore too tenuous and remote.
  82. It should also be pointed out that neither the Federal Constitution of the Swiss Confederation of 18 April 1999 (SR 101)<sup>17</sup> nor Swiss federal legislation provides for an individual right to a clean, healthy and sustainable environment.
  83. Moreover, Article 6 of the Convention does not guarantee a right of access to a court having jurisdiction to invalidate or replace a law emanating from the legislature (Guide to Article 6 of the European Convention on Human Rights, Right to a Fair Trial [civil aspect], 31 December 2020, para. 90). In the present case, the Applicants are in fact seeking to obtain the replacement of the CO<sub>2</sub> Act by a law providing for stricter measures. It is therefore the general interest of climate protection that is the subject and issue of the dispute and not a dispute over a civil right of the Applicants (cf. *Association Greenpeace France v. France* (Dec.), no 55243/10, 13 December 2011).
  84. In view of the above, the Government considers that Article 6 of the Convention is not applicable in the present case. It therefore calls on the Court to declare this application inadmissible.
- (c) *Applicability of Article 13 of the Convention*
85. The Court interprets Article 13 of the Convention as requiring a remedy only for claims which may be considered “arguable” under the Convention (see *Hatton and Others v. the United Kingdom*, supra, para. 137).

<sup>17</sup> [SR 101 – Federal Constitution of the Swiss Confederation of 18 April 1999 \(admin.ch\)](#)

86. The Government notes that the measures requested by the Applicants are largely similar to the preliminary work under the legislative procedure (cf. [SCD 146 I 145](#), at 4.3.). In fact, the Applicants are seeking to have the CO<sub>2</sub> Act replaced by a new law providing for stricter measures. In this context, the Government recalls that Article 13 of the Convention does not go so far as to require States to put in place an appellate remedy whereby individuals may denounce, before a national authority, the laws of a Contracting State as being contrary to the Convention or contrary to equivalent national legal standards (Guide on Article 13 of the European Convention on Human Rights, Right to an effective remedy, 30 April 2021, para. 66). Nor does Article 13 of the Convention allow a general policy to be challenged as such (*Hatton and Others v. the United Kingdom*, supra, para. 138).
87. In addition, the Government refers to the considerations concerning the applicability of Article 6 of the Convention (section 79 et seq. supra). It emphasises that the Applicants cannot defensibly claim that there is a dispute over a right recognised under domestic law. They have not demonstrated that there is a serious and, above all, immediate threat to the rights invoked. Their rights under Articles 2 and 8 of the Convention are not affected in a legally relevant manner. Furthermore, the actions requested are not such as to contribute immediately to the reduction of CO<sub>2</sub> emissions in Switzerland. Consequently, neither the threat nor the actions sought present the degree of probability which makes the outcome of the dispute directly decisive for the rights invoked by the Applicants. The link between the alleged omissions and the rights invoked by the Applicants is therefore too tenuous and remote. Therefore, Article 13 of the Convention is not applicable in this case. Thus, the Government invites the Court to declare the complaint concerning Article 13 of the Convention inadmissible.
- d) *Conclusion as to the applicability of the provisions of the Convention*
88. In summary, the Government considers that Article 2 of the Convention is not applicable and that the question of the applicability of Article 8 of the Convention may be left open. As to the applicability of Articles 6 and 13 of the Convention, the Government considers that these Articles are not applicable in the present case.

## VI. Merits

### A. Articles 2 and 8 of the Convention (reply to question 5)

89. If the Court were to decide that Articles 2 and 8 of the Convention were applicable, the Government would express its views on the merits as follows:
- a) *State discretion and factors to be taken into account*
90. In environmental and industrial matters, the Court has repeatedly stressed that it is not entitled to substitute its own point of view for that of the local authorities as to the best policy to adopt, so that it has always given States a “broad” margin of appreciation, particularly in difficult social and technical areas (*Hatton and Others*, supra, para. 100-101; *Tătar v. Romania* of 27 January 2009, no. 67021/01, para. 108; *Zammit Maempel v. Malta* of 22 November 2011, no. 24202/10, para. 66). It was in the light of that wide discretion that the Court confined itself, in certain cases, to verifying that the national authorities had not committed a ‘manifest error of appreciation in choosing



means of achieving a fair balance between competing interests (*Hardy and Maile v. United Kingdom*, supra, para. 222 and 231; *Fadeyeva*, supra, para. 102 and 105). As for the choice of measures, “an impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources” (*Budayeva v. Russia*, supra, para. 135). Moreover, the Court has always held that, where the State is required to take positive measures, the choice of means is in principle a matter of the margin of appreciation of the Contracting State. There are different avenues to ensure Convention rights, and even if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means (*Kolyadenko and Others v. Russia*, supra, para. 160; *Brincat and Others v. Malta*, supra, para. 101). According to the case-law of the Court, the extent of the margin of appreciation is not the same in each case. It varies depending on the context. As regards the positive obligations deriving from Article 8 para. 1 of the Convention, in striking the required balance the aims mentioned in the second paragraph may be of a certain relevance (*Pavlov and Others v. Russia*, supra, para. 75).

91. As to the factors to be taken into account, it should be stressed that global warming poses unprecedented and highly complex issues and challenges. The problem includes difficult social and technical issues. Its treatment requires the study of scientific data and a risk assessment. Choosing the best ways to combat global warming is a delicate matter and must take into account many different and even conflicting interests. Measures to protect the climate may also restrict fundamental rights and individual freedoms. It is therefore necessary to find the most appropriate solutions after balancing all the interests involved. Operational choices require prioritisation, including the allocation of resources. In accordance with the principle of subsidiarity, the wide range of measures to be taken is a matter for national governments and parliaments and, in the case of Switzerland, which has a system of direct democracy, it is also a matter for the people.
92. In the light of the foregoing, the Government considers that the State should be given an ample margin of appreciation in the present case.
  - b) *Relevance of the concept of harmonious interpretation of the Convention with other norms of international law*
93. The Court has already clarified that it “(...) has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein. On the contrary, it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties (...). The Court further observes that it has always referred to the “living” nature of the Convention, which must be interpreted in the light of present-day conditions, and that it has taken account of evolving norms of national and international law in its interpretation of Convention provisions (...)” (*Demir and Baykara v. Turkey* of 12 November 2008 [Grand Chamber], no. 34503/97, paras. 67-68).
94. It should be stressed, however, that the role of the Court is to apply and interpret the Convention and not other norms of international law (see Articles 19 and 32 para. 1 of the Convention). The Convention does not guarantee a right to a healthy environment, and the instruments enumerated by the Court do not provide any legal basis for the extension of the Convention guarantees as requested by the Applicants.



95. The concept of harmonious interpretation cannot be used to fill an alleged gap in the international legal framework on climate. In this regard, the Government is of the opinion that the main objective of the application is, in fact, to attempt to circumvent the Paris Agreement by seeking to construct an international judicial review of the measures adopted by Switzerland to limit greenhouse gases. However, the fact is that during the negotiations on the Paris Agreement, the Parties indeed considered the possibility of providing the Agreement with a binding mechanism for individual monitoring of the commitments of the States, but ultimately decided not to do so. In accordance with Article 14 of the Agreement, they have in fact entrusted the Conference of the States Parties with the task of carrying out a periodic global review in order to assess the collective progress achieved. They have also opted for the establishment of a facilitation-oriented implementation monitoring mechanism that operates in a transparent, non-accusatory and non-punitive manner as provided for in Article 15 of the Agreement.
96. In the light of the principles of international law, it is thus clear that the monitoring mechanism set up by the Paris Agreement cannot be replaced by a contradictory and punitive judicial mechanism based on another treaty, namely the Convention. In addition, most of the States Parties would escape such a judicial mechanism as they are not parties to the Convention, which would, at the very least, be inequitable. The Court itself, moreover, very recently recalled, in the context of the Convention on the Rights of Persons with Disabilities, that its task is to ensure that the text of the European Convention on Human Rights is complied with. It is the Convention which the Court can interpret and apply; it does not have authority to ensure respect for international treaties or obligations other than the Convention (*Caamaño Valle v. Spain*, no 43564/17, 11 May 2021, para. 53-54).
97. In view of the above, and generally speaking, the Government believes that there are other instruments that are more likely to deal with environmental protection and related issues.
98. While the Court should take the listed instruments into account when interpreting the guarantees of the Convention, the following should be borne in mind:
99. The international legal framework on climate is the result of negotiations between sovereign states. It provides for a collective objective and individual obligations, leaving various elements to the discretion of states:
- The objective of the UNFCCC is to “stabilize greenhouse gas concentrations in the atmosphere at a level that prevents dangerous anthropogenic interference with the climate system.” ([International climate policy: the Climate Change Convention\(admin.ch\)](#)). The UNFCCC does not impose global or country-specific emission reduction targets.
  - The general objective of the Paris Agreement (Article 2.1(a)) is a temperature target, i.e. a general objective that does not impose any explicit quantitative restrictions on greenhouse gas emissions or a global carbon budget.
  - The Paris Agreement established a number of legally binding obligations for the parties (see Article 4.2, first sentence, 4.8, 4.9, 4.13 and 13.7). However, most of these obligations are procedural in nature and require parties to submit certain types of information at certain times or

regular intervals or to report or rendering an accounting in accordance with the agreed rules. Moreover, there is no doubt that the Paris Agreement does not create any subjective rights that individuals may invoke, but that the obligations set out therein are addressed only to the High Contracting Parties that have ratified this instrument.

- Having said that, it should not be forgotten that not all the provisions of the Paris Agreement necessarily set out legally binding obligations for the States Parties. For example, a number of substantive mitigation provisions are formulated as recommendations and not as legal obligations<sup>18</sup>. Nor does the Paris Agreement establish an autonomous monitoring mechanism, and all of its provisions are not necessarily suitable for judicial review by the courts<sup>19</sup>. As the Parties to this Agreement have not reached agreement on these issues during the negotiations, there is some uncertainty as to the exact legal scope of certain provisions, including amongst commentators.
- By way of example, the central obligation of the Paris Agreement set out in Article 4.2, first sentence, provides that "Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve." This is the only legally binding mitigation obligation ("*mitigation*") and is of a strictly procedural nature. In other words, it does not require States Parties to implement their NDCs. In this respect, it is interesting to note that during the negotiation of the Paris Agreement, a proposal for wording requiring the States Parties to "*achieve*" their objectives was rejected<sup>20</sup>.
- Article 4.2, 2<sup>nd</sup> sentence, for its part, simply requires the Parties pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions. The potentially binding nature of the second sentence of Article 4.2, which provides that "the Parties (and not "each Party") shall pursue domestic mitigation measures with the aim of achieving the objectives of such contributions", is far from established and remains controversial. For one sub-section of legal scholars, this sentence only establishes a code of conduct, but its implementation itself is not legally binding, nor has the Party obliged itself to achieve the objective. The States Parties are, however, not entirely free to determine their measures as they are required to design measures that enable them to achieve this objective<sup>21</sup>. This means, in particular, that the States Parties must engage in legislative and political processes with a view to establishing, administering and implementing such measures. Whether or not this provision is binding, it appears that it can only constitute a standard of conduct and not an obligation to achieve results<sup>22</sup>. In the opinion of the Swiss Government, Article 4.2, 2<sup>nd</sup> sentence thus expresses a certain standard of conduct (or due diligence), which corresponds to what a responsible State should do under normal conditions, in a given situation, with the best available and feasible means. If a State fails to do so, e.g. by refusing to initiate (or stopping) a legislative

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<sup>18</sup> DANIEL BODANSKY, The Legal Character of the Paris Agreement, p. 6.

<sup>19</sup> BODANSKY, *supra*, p. 1-2.

<sup>20</sup> BODANSKY, *supra*, p. 1-2.

<sup>21</sup> BODANSKY, *supra*, p. 7-8.

<sup>22</sup> Cf. JULIA HÄNNI, Menschenrechtlicher Schutz infolge Klimawandels - Voraussetzungen und Herausforderungen / Dargestellt am Beispiel der EMRK, in EuGRZ 2019, vol. 1-6, p. 4.

and political process intended to establish and implement those mitigation measures, this could constitute a breach of its duty of care.

- The Government considers that standards of conduct such as those contained in articles 4.2, 2<sup>nd</sup> sentence and 4.3 of the Paris Agreement are not legal rules that require specific or specific means or measures to achieve a particular objective. The concept of “the highest possible level of ambition” on the other hand reflects a standard of conduct that the parties must comply with. This duty of due diligence in designing the NDCs is a means of assisting the Parties in structuring their respective responsibilities. In order to act swiftly, States must therefore take all appropriate measures in accordance with their capacities to progressively achieve the protection of the interests or rights concerned. In other words, each successive NDC must embody the highest level of ambition of one party – it must do its utmost to progressively achieve the objective of the Paris Agreement, i.e. to keep the global temperature rise well below 2 °C and to continue efforts to limit this rise to 1.5 °C.
- In addition to the standards of conduct set out in the Paris Agreement, the standards of conduct resulting from the IPCC scientific reports should be taken into account<sup>23</sup>. The IPCC, or *Intergovernmental Panel on Climate Change*, which is based in Geneva and currently has 195 member states, is the United Nations body responsible for assessing the scientific aspect of climate change. The IPCC reports provide the scientific data necessary for States to be able to determine their mitigation measures so that the objective set out in Article 2 (a) of the Paris Agreement can be achieved<sup>24</sup>. The performance of States Parties to the UNFCCC is measured on the basis of those IPCC reports. The Committee has already established six of them.
- In summary, it should be acknowledged that, by ratifying the Paris Agreement, Switzerland has undertaken to meet a number of formal commitments (see supra). These are positive obligations and standards of conduct which, in the opinion of the Government, are likely to shed some light on the reasonable and appropriate measures that Switzerland must take to effectively protect the rights set out in Articles 2 and 8 of the Convention. However, Switzerland has not undertaken that the NDCs it has established and updated will be subject to international judicial review. The Paris Agreement does not contain any legally binding obligations to this effect. Article 14 limits itself to establishing every five years a global implementation review by the Conference of States Parties in order to assess the collective progress made in achieving its purpose and long-term goals, but does not create any external evaluation mechanism to assess the individual performance of each State Party. Thus, the Court cannot assign itself such a role – in a way establishing itself as a supreme environmental court – where the States Parties to the Paris Agreement have deliberately opted not to introduce one.

100. With regard to the other instruments listed by the Court, the following should be noted:

- The International Law Commission’s draft articles on prevention of transboundary harm from hazardous activities (2001) address harm

<sup>23</sup> <https://www.ipcc.ch/languages-2/english/>

<sup>24</sup> See HÄNNI, supra, p. 10 and 12.

across borders. It is not transboundary harm that is at the heart of this case, but the alleged harm that the Applicants claim in Switzerland due to greenhouse gas generating activities taking place on Swiss territory.

- With regard to Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 (“European Climate Act”), it should be noted that Switzerland is not a member state of the European Union. In addition, the regulation is dated 30 June 2021. It is therefore subsequent to the assessment of the case by the FAC and the FSC.
- The UN General Assembly Resolution “Right to a Clean, Healthy and Sustainable Environment”, A/76/L.75, 26 July 2022 is not legally binding. In that resolution, “[t]he international community has reaffirmed that a healthy environment is an essential prerequisite for the full enjoyment of human rights, thus sending a strong political signal. (...) Although the UN General Assembly’s resolution is not legally binding, it is expected to set positive developments in motion, such as greater commitment at political level to environmental issues, the stricter accountability of states, and coherent policy making in environmental and human rights matters. ” ([Switzerland’s contribution to recognising the human right to a clean, healthy and sustainable environment \(admin.ch\)](#)).

101. It should also be noted that the [CM/Rec\(2022\)20](#) Recommendation was adopted by the Committee of Ministers on 27 September 2022. In this non-binding instrument, the Committee of Ministers recommends that governments of member states “reflect on the nature, content and implications of the right to a clean, healthy and sustainable environment and, on that basis, actively consider recognising at the national level this right as a human right that is important for the enjoyment of human rights and is related to other rights and existing international law” (OP 1). Within the Council of Europe, the CDDH Drafting Group on Human Rights and the Environment (CDDH-ENV) is currently examining the need for and feasibility of an additional instrument or instruments in the field of human rights and the environment.

102. The Resolution of the UN General Assembly and the Recommendation of the Committee of Ministers of the Council of Europe show that the debate on the subject is progressing and that the subject of human rights and the environment is being developed. However, there are still many open issues on which there is no consensus. In this context, the Government recalls once again that the Convention does not guarantee a right to a healthy environment and the instruments listed by the Court in question 5.3.2 do not provide any legal basis for extending the guarantees of the Convention as requested by the Applicants.

c) *Doctrine of the living instrument and the need to combat climate change*

103. The Court has always referred to the “living” nature of the Convention, which must be interpreted in the light of present-day conditions, and that it has taken account of evolving norms of national and international law in its interpretation of Convention provisions (*Demir and Baykara v. Turkey*, supra, para. 68). However, Article 1 of the Convention is not subject to interpretation in accordance with the doctrine on the living instrument (cf. section 37 supra).

104. While acknowledging the urgency and the great challenges posed by global warming, the limitations of the Convention's system cannot be ignored. The Convention did not guarantee a right to a healthy environment and such a right cannot be created without a new protocol to the Convention. The jurisdiction of the Court is limited to interpreting and applying the rights guaranteed by the provisions of the Convention and its Protocols (cf. Article 32 para. 1 of the Convention; *Pavlov and Others v. Russia*, supra, concurring opinion of Judge Serghides, para. 18). Moreover, the doctrine of the living instrument does not allow the Convention's guarantees to be interpreted in a way that undermines the basic principles of the system, such as the principle of subsidiarity. Lastly, the doctrine of the living instrument cannot be invoked to justify a radical change in the Court's jurisprudence that would ignore the situation prevailing in the High Contracting Parties.
105. In addition, Council of Europe member states are aware that the Convention does not guarantee a right to a healthy environment and are addressing the issue. They are currently examining the need for and feasibility of an additional instrument or instruments in the field of human rights and the environment within the CDDH-ENV (see supra).
106. The developments in the interpretation of fundamental rights at national level referred to by the Court concern the Netherlands and Germany and not Switzerland. Moreover, they concern only two States Parties to the Convention. Moreover, the jurisprudence of the national courts on this issue is divergent and there is no consensus on the matter. For example, the Swiss Federal Supreme Court upheld DETEC's decision not to proceed in this case. The Constitutional Court of Austria rejected the application of *Greenpeace and Others* as inadmissible.<sup>25</sup> On the other hand, the higher courts of the Netherlands<sup>26</sup>, Ireland<sup>27</sup>, France<sup>28</sup> and Germany<sup>29</sup> have ordered their respective governments to take new or intensify measures to urgently and significantly reduce their emissions in order to protect people from the effects of global warming. A number of other States have not yet developed domestic jurisprudence on the subject. Finally, the situations in the different States differ and the recitals of the courts of one State cannot be transposed as such to other States.
107. The need to combat climate change does not justify ignoring the limitations of the Convention system. It is relevant only if an issue relating to the right to life and to private and family life arises.
- d) *Compatibility of Switzerland's commitments with Articles 2 and 8 of the Convention*
108. In the present case, the Applicants accuse Switzerland of failing to take sufficient preventive measures to contain global warming. In particular, they complain about the failure of Switzerland to comply with its positive obligations under Articles 2 and 8 of the Convention read in the light of the

<sup>25</sup> Judgment of the Austrian Constitutional Court in the case of *Greenpeace and Others v. Austria*, 20 September 2020, available at [Austrian Const.Ct. Decision G 144 2020 of 30. September 2020.pdf](#)

<sup>26</sup> Judgment of the Supreme Court of the Netherlands in *Urgenda*, no. 19/00135, 20 December 2019; <https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf> English translation available at

<sup>27</sup> Judgment of the Supreme Court of Ireland in *Friends of the Irish Environment v. The Government of Ireland and Others*, no. [2020] IESC 49, 31 July 2020; Available at [https://www.courts.ie/view/judgments/681\\_b8633-3f57-41b5-9362-8cbc8e7d9215/981c098a-462b-4a9a-9941-5d601903c9af/2020\\_IESC\\_49.pdf/pdf](https://www.courts.ie/view/judgments/681_b8633-3f57-41b5-9362-8cbc8e7d9215/981c098a-462b-4a9a-9941-5d601903c9af/2020_IESC_49.pdf/pdf).

<sup>28</sup> Judgment of the Paris Administrative Court, nos. 1904967, 1904968, 1904972 to 1904976/4-1,3 February 2021; available at <http://paris.tribunal-administratif.fr/content/download/179360/1759761/version/1/file/1904967190496819049721904976.pdf>.

<sup>29</sup> Judgment of the German Constitutional Court, no. 1 BvR 2656/18, 24 March 2021; press release available in English at <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvq21-031.html>



commitments made under the Paris Agreement, the precautionary principle, the best scientific evidence available, the evolving standards of national and international law and the emerging consensus (cf. Additional Submission, para. 56). Under these obligations, Switzerland should do its utmost to make its contribution to avoiding that the global temperature does not exceed the target of 1.5 °C increase in warming (see Additional Submission, para. 57). According to the Applicants, Switzerland has failed to take the necessary measures to effectively protect them against the risks arising from climate change (see Additional Submission, para. 59).

109. The Government refers to the case law of the Court, which states that the case is addressed from the perspective of a positive obligation on the State to take reasonable and appropriate measures to protect the rights of the Applicants under Article 8 (1) of the Convention, or from the perspective of interference by a public authority to be justified under paragraph 2, the applicable principles are relatively close to each other. (*Tătar v. Romania*, supra, para. 87). "In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in any case the State enjoys a certain margin of appreciation." (*Cordella and Others v. Italy*, supra, para. 158; *Lopez Ostra v. Spain*, supra, para. 51).
110. The positive obligation to take all reasonable and adequate measures to protect the rights which the Applicants derive from Articles 2 and 8 of the Convention implies, first and foremost, the primary duty of States to put in place a legislative and administrative framework aimed at effectively preventing damage to the environment and human health (c, supra, para. 129-132; *Tătar v. Romania*, supra, para. 88). When it comes to dealing with complex environmental and economic policy issues for a State, in addition, special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk which may result from this. This obligation must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks (*Oneryildiz v. Turkey*, supra, para. 90). It should also be pointed out that a governmental decision-making process concerning complex issues of environmental and economic policy must necessarily involve appropriate investigations and studies in order to allow them to strike a fair balance between the various conflicting interests at stake (*Hatton and Others*, supra, para. 128). There is no doubt about the importance of public access to the findings of these studies as well as to information to assess the danger to which it is exposed (see, *mutatis mutandis*, *Guerra* supra, para. 60, and *McGinley and Egan* supra para. 97). Finally, the individuals concerned must also be able to appeal to the courts against any decision, action or omission if they consider that their interests or observations have not been sufficiently taken into account in the decision-making process (*Tătar*, supra, para. 88; *Hatton*, supra, para. 128; *Taşkin and Others v. Turkey* of 10 November 2004, no. 46117/99, paras. 118-119; *Ökçan and Others v. Turkey*, 28 March 2006, no 46771/99, para. 43).
111. In the present case, it is necessary to determine whether the State, in guaranteeing the Applicants' rights, has struck, within the limits of its discretion, a fair balance



between the competing interests of the Applicants and the community as a whole, as required by Article 8 (2) of the Convention (cf. *Pavlov and Others v. Russia*, supra, para. 78). In assessing whether the respondent State had complied with the positive obligation under Art. 2 of the Convention, the Court must consider the particular circumstances of the case, regard being had, among other elements, to the domestic legality of the authorities' acts or omissions, the domestic decision-making process, including the appropriate investigations and studies, and the complexity of the issue, especially where conflicting Convention interests are involved (*Boudayeva v. Russia*, supra, para. 136). In this assessment, not only *mitigation* measures but also adaptation measures should be taken into account.

112. The Government emphasises that Switzerland has put in place a legislative and administrative framework aimed at reducing CO<sub>2</sub> emissions and is endeavouring to adapt it to the development of scientific knowledge and political and legal circumstances. Under Swiss law, there is thus a range of measures to reduce CO<sub>2</sub> emissions and these measures are compatible with the objective of the Paris Agreement (see Statement of facts in Annex).
113. In summary, under the sole legally binding obligation of the Paris Agreement on mitigation, Switzerland is complying with its commitment by submitting its NDC within the given deadline. At the level of standards of conduct, including those resulting from the IPCC reports, it has, on the one hand, made every effort to integrate its NDC into its national legislation (Art. 4.2, 2<sup>nd</sup> sentence) and to revise its objective in time to reflect its highest level of ambition (Art. 4.3). In its recent communication, it stated that, domestically, its emission reductions by 2030 will mainly be achieved, which will further strengthen Switzerland's transition to a low-carbon economy. Given Switzerland's low greenhouse gas intensity today, the NDC represents a high level of ambition for 2030. In this respect, it should be borne in mind that Switzerland's greenhouse gas emissions account for around 0.1% of global emissions and that Switzerland's per capita emissions (2020: 5.04 tonnes CO<sub>2</sub>eq per inhabitant) are below the global average (see Statement of facts in Annex, section 2.1.6).
114. The facts set out above and in the Statement of facts in the Annex clearly show that Swiss climate policy is not rigid, but that it is able to adapt to new scientific recommendations and constantly increase the level of its ambitions. This dynamic thus meets the requirement of "progression" expected from States (cf. Art. 3 and Art. 4.3 of the Paris Agreement). Moreover, the actions taken by Switzerland demonstrate a willingness to be within the range indicated by the IPCC to contribute to stabilisation at 1.5 °C.
115. In 2019, Switzerland also strengthened its long-term climate target in order to comply with the IPCC recommendations to keep the temperature increase below 1.5 °C by 2100. The Federal Council has decided that, by 2050, Switzerland must no longer be emitting more greenhouse gases into the atmosphere than can be absorbed by natural and artificial reservoirs.<sup>30</sup> This target of net zero by 2050 serves as the starting point for Switzerland's long-term climate strategy, which was approved by the Federal Council on 27 January 2021.<sup>31</sup>

<sup>30</sup> Federal Council Press release of 28 August 2019, [Federal Council aims for a climate-neutral Switzerland by 2050 \(admin.ch\)](#)  
<sup>31</sup> [Long-term Climate Strategy to 2050 \(admin.ch\)](#)

116. With regard to the rejection of the new CO<sub>2</sub> Act by the vote of 13 June 2021, it should first be recalled that democracy, the rule of law and human rights are important pillars of the state. The rejection of the new CO<sub>2</sub> Act does not mean that the Swiss people do not want to fight climate change resolutely. Rather, the tools provided for in the draft of the new law are what voters have rejected. Despite the negative result of the referendum on the new CO<sub>2</sub> Act, the Swiss climate target set in the Swiss NDC remains unchanged. Only the measures aimed at implementing the objective will need to be reviewed.<sup>32</sup> The Federal Council therefore quickly looked for new solutions and presented a revised CO<sub>2</sub> Act (see statement of facts in Annex).
117. The Government considers that the range of mitigation measures to reduce CO<sub>2</sub> emissions, as derived mainly from the CO<sub>2</sub> Act currently in force (including the extension, following the vote on 13 June 2021, of certain measures and the greenhouse gas emission reduction target until the end of 2024), as well as the new solutions to be found for the period after 2024 (see Statement of Facts in the Annex, section 1.2.1, 2.1.1 et seq.), fall within Switzerland's margin of appreciation. In view of the complexity of the task, the choice of means to combat global warming is difficult and must respond to many different interests. Measures to protect the climate may restrict the freedoms of individuals, have an impact on the economic well-being of the country, and the most sensible solutions need to be found after balancing all the interests involved. Switzerland and its people are better placed than the Court to make that choice. The Government is fully aware that it needs to act swiftly to ensure climate protection.<sup>33</sup> However, it is not too late and there is still time to make this choice (cf. [SCD 146 I 145](#) at 5). Since Switzerland has fulfilled and undertakes to fully fulfil the commitments it undertook when ratifying the Paris Agreement, it has not exceeded and will not exceed its margin of appreciation. There would be no justification for the Court to substitute its view for that of the Swiss Government, Parliament and people on the choice of means to combat global warming.
118. In addition, the measures taken by Switzerland to reduce CO<sub>2</sub> emissions are effective and emissions in Switzerland have decreased (see statement of facts in Annex).
- International target (under the Kyoto Protocol): "Within the framework of the Kyoto Protocol, industrialised countries, including Switzerland, have committed themselves to an international climate target. Thus, Switzerland must reduce its emissions between 2013 and 2020 by an average of 15.8% compared to 1990. This objective has been achieved. On the one hand, emissions fell by an average of 11% over this period. On the other hand, under the Kyoto Protocol, short-falls in reductions can be achieved through climate protection projects abroad. The Confederation receives the necessary reduction certificates from the Climate Cent Foundation. The performance of carbon sinks may also be taken into account to achieve this objective."<sup>34</sup> It should be noted, however, that the final statement at the international level

<sup>32</sup> Federal Council Press Conference of 13 June 2021, Federal Councillor Simonetta Sommaruga, [13.06.2021 – Press conference of the Federal Council – YouTube](#)

<sup>33</sup> Federal Council Press Conference of 13 June 2021, Federal Councillor Simonetta Sommaruga, [13.06.2021 – Press conference of the Federal Council – YouTube](#)

<sup>34</sup> [Greenhouse Gas Inventory 2020: Switzerland narrowly misses its climate target \(admin.ch\)](#)

will be established following the review of the April 2022 Greenhouse Gas Inventory by an international panel of experts of the United Nations.<sup>35</sup>

- National reduction target (under the CO<sub>2</sub> Act): At the national level, Switzerland's greenhouse gas emissions were to be reduced by 20% by 2020 compared to 1990. This current CO<sub>2</sub> Act target was only marginally missed, with a reduction of 19% achieved according to the 2020 Greenhouse Gas Inventory published by the FOEN. In order to reduce emissions, climate protection measures must be strengthened in all sectors<sup>36</sup>.

119. In this context, it should be borne in mind that the costs of preventing CO<sub>2</sub> emissions in Switzerland are high due to the limited availability of cost-effective measures in the short term. Energy production in Switzerland is practically carbon-free and there are very few heavy industries. The potential for reducing emissions lies mainly in the housing and transport sectors. This remaining potential, however, has long conversion periods (see Statement of facts in Annex, section 1.2.3). However, for reasons of fairness, it is important to recognise past efforts and reward pioneering countries.
120. Moreover, the Court recalled that even where national authorities have failed to comply with certain aspects of the domestic legal regime, domestic legality is one of the factors, but not the main one, to be taken into account in assessing whether the State has fulfilled its positive obligation; the state may choose other means it deems appropriate to ensure "respect for private life". (*Pavlov and Others v. Russia*, supra, para. 92). In this context, the Government stresses that not only *mitigation measures* but also *adaptation measures* should be taken into account.
121. The Federal Council recognised the need to adapt to the effects of climate change at an early stage and took measures (see Statement of facts in Annex, section 1.2.2; see also [Adaptation to climate change \(admin.ch\)](#)). Various studies in Switzerland and abroad show that measures to prevent the adverse effects of heat on health have helped to reduce the risk of heat-related mortality. In Switzerland, heat-related excess mortality in 2018 and 2019 was significantly lower than in the summers of 2003 and 2015. This indicates that government action and public awareness of heat-related health risks have improved the situation<sup>37</sup>, although there is still untapped potential in this area.
122. The cantons are responsible for protecting the population against heat. The cantons of Geneva, Vaud, Valais, Fribourg, Neuchâtel and Ticino have drawn up heatwave plans for this purpose, which they can activate before a heatwave. The other cantons are also taking measures as necessary, but have not developed specific heatwave plans (see Statement of facts in Annex, section 1.2.2).

<sup>35</sup> [2020 target achievement review \(for the years 2013 to 2020\) \(admin.ch\)](#)

<sup>36</sup> [Greenhouse Gas Inventory 2020: Switzerland narrowly misses its climate target \(admin.ch\)](#) (last visited 14 November 2022)

<sup>37</sup> Martina S. Ragettli & Martin Roosli, *Hitze-Massnahmen-Toolbox 2021. Ein Massnahmenkatalog für den Schutz der menschlichen Gesundheit vor Hitze*. 2021, SwissTPH, Basel. Im Auftrag des BAG, p. 5 (accessible at [https://www.bag.admin.ch/dam/bag/it/dokument/nat-gesundheitspolitik/klimawandel/hitzewelle/tipp/Massnahmenkatalog%20Beh%C3%B6rden%20.pdf.download.pdf/Massnahmenkatalog\\_fuer\\_Behoerden.pdf](https://www.bag.admin.ch/dam/bag/it/dokument/nat-gesundheitspolitik/klimawandel/hitzewelle/tipp/Massnahmenkatalog%20Beh%C3%B6rden%20.pdf.download.pdf/Massnahmenkatalog_fuer_Behoerden.pdf))

123. The Federal Office of Public Health (hereinafter: FOPH) lists three golden rules for action during heat waves: 1) Avoid physical exertion; 2) Avoid the heat – cool down 3) drink a lot – eat light (cf [Protection against heatwaves – three golden rules to follow in the event of a heatwave \(Flyer\) \(admin.ch\)](#)). These rules and the measures invoked by the Applicants (e.g. staying at home, using the air conditioner or fan, lowering the blinds, avoiding outdoor activities, cf. Annexes 4-7 to the Application) apply only during heatwaves and not every day of the year. Moreover, the severity of these measures is limited.
124. Adaptation measures are important because there are consequences of climate change that can no longer be avoided. They are also important because Switzerland cannot stop global warming on its own. If other countries do not also contribute, global warming will continue and adaptation measures will become even more important for Switzerland, whose greenhouse gas emissions account for only about 0.1 percent of global emissions.
125. The Government is of the opinion that the legislative and decision-making process that led to Switzerland's measures to reduce greenhouse gas emissions is characterised by a very high degree of openness and full transparency. It also allows for the systematic inclusion of scientific surveys and studies as well as a very broad participation of all interested parties. The organisation of the referendum on 13 June 2021 enabled the Swiss people to vote on the new CO<sub>2</sub> Act. Since then, the Federal Council has re-examined the issue in order to take account of the will of the people and propose measures that are perceived as less punitive in order to achieve the emission reduction targets, which remain unchanged. A fair balance has thus been constantly sought between the different competing interests at stake, in accordance with the requirements arising from the relevant case law of the Court in the light, in particular, of the principles set out in the Aarhus Convention.
126. The Government notes, however, that the Aarhus Convention does not specifically provide for the inclusion of scientific studies as part of public participation. It also recalls that the Aarhus Convention only entered into force for Switzerland on 1 June 2014. Thus, Switzerland was not yet bound by the provisions of the Aarhus Convention at the time when the current CO<sub>2</sub> Act and its implementing provisions entered into force.
127. In Switzerland, the legislative and decision-making process is closely monitored by the competent Federal Offices. This is also the case in the area of combating global warming, where it is essential that decisions are based on the best scientific knowledge. In particular, the existing procedure ensures that specialised experts are integrated into the legislative process. In practice, this involves drafting the legal provisions on the basis of specialist sources: The Federal Council Dispatch of 1 December 2017 on the complete revision of the CO<sub>2</sub> Act for the period after 2020 and the [Explanatory Report on the Ordinance on the Reduction of CO<sub>2</sub> Emissions](#)<sup>38</sup> refer in particular to the IPCC reports of 2014 and 2018, the reports of the Organisation for Economic Co-operation and Development (OECD) in connection with the use and provision of financial resources for climate protection purposes, and

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<sup>38</sup> [SR 641.711 – Ordinance of 30 November 2012 on the Reduction of CO<sub>2</sub> Emissions \(CO<sub>2</sub> Ordinance\) \(admin.ch\)](#)

the strategic recommendations of "[Advisory body on climate change\(OcCC\)](#). The OcCC was established in 1996 by DETEC and the Federal Department of the Interior. Its mandate was renewed in 2018 and ended at the end of 2021<sup>39</sup>. Its main task is to make recommendations of a strategic nature on climate change issues and Swiss climate policy from a scientific point of view to politicians and the administration. In addition, the above-referenced Federal Council Dispatch refers to the data and information provided by the [National Centre for Climate Services \(NCCS\)](#). The NCCS develops and provides climate services, such as the provision of data, information and options for action, as well as support for their use and interpretation. All documents, declarations or expert opinions must be made available to the general public if they are mentioned in the above-referenced explanatory report.

128. More generally, there are other ways in Switzerland for the public to participate in the legislative process, in particular through the CPA. The CPA provides for broad public participation in decision-making procedures (Art. 3 CPA). The consultation procedure applies in particular to amendments to the Federal Constitution as well as draft legislation or ordinances. Dispensing with the consultation procedure is only possible in special cases and if it is objectively justified (Art. 3a CPA). Anyone and any organisation may participate in a consultation procedure and submit an opinion. Scientific studies and contributions may also be submitted. The competent authority must assess the results of the consultation and summarise them in a report (Art. 8 para. 2 CPA). It is then made available to the public (Art. 9 CPA).
129. Furthermore, according to the principle of transparency enshrined in art. 6 (1) of the Federal Act of 17 December 2004 on the Freedom of Information in the Administration (FOIA)<sup>40</sup>, any person has the right to inspect official documents and to obtain information about the content of official documents. Thus, all studies and other surveys on climate issues produced or held by the Federal Administration are in principle available to the public upon request.
130. The Government does not share the Applicant's argument that the rights of vulnerable groups can hardly be protected by democratic means because democratic decisions are taken in accordance with the majority principle (cf. observations of the Applicant on the legal aspects of 13 October 2021, para. 174). In that regard, he recalled that minorities, whether linguistic, religious, cultural, political or social, enjoyed extensive protection under the Swiss legal system. In Switzerland, therefore, democracy is not conceived as a system that merely imposes rule by the majority, but as a requirement for the integration and respect of minorities. In this context, the importance of the triad of human rights, democracy and the rule of law, as well as the separation of powers and the principle of subsidiarity should be borne in mind. Excessive "judicialisation" could create tensions with regard to these values and principles (cf. Observations of the Swiss Government dated 16 July 2021, para. 4). More generally, the Government considers that courts, whether national or international, have neither the competence nor the technical expertise to formulate a climate policy or formulate concrete measures to combat

<sup>39</sup> Cf. [OcCC – Advisory Body on Climate Change](#)

<sup>40</sup> [SR 152.3 – Federal Act of 17 December 2004 on Freedom of Information in the Administration \(Freedom of Information Act, FOIA\)](#)



greenhouse gas emissions. This task falls to the constitutionally competent authorities, which are obliged to adopt legal rules in accordance with the legislative procedures in force and the administrative, budgetary and other measures necessary to achieve the emission reduction targets to which the State has subscribed. In Switzerland, it is also the case that the optional referendum provided for in Article 141 of the Constitution allows the people, under certain conditions, to vote on legislative measures drawn up by the Government and adopted by Parliament, including measures to combat CO<sub>2</sub> emissions. These constitutional realities are inescapable and must be taken into account by the courts.

131. The Applicant also relies on the precautionary principle in its arguments. In this regard, it should be noted that the status of this principle in international law is not clear and whether the principle is established as a rule of international law or not is controversial. Moreover, even if the Court refers to this in some judgments (cf. *Tătar v. Romania*, supra, para. 109 on the precautionary principle), this principle and its possible implications for human rights are not consolidated in the case law of the Court in application of the Convention (in this sense, see dissent of Judge Pettiti and six colleagues, final paragraph, in *Balmer-Schafroth and Others v. Switzerland*, supra). The reference to the precautionary principle in the *Tătar* judgment was thus very clearly linked to the fact that the respondent state failed to take measures after the environmental accident of 30 January 2000. It should also be recalled that in the *Hardy and Maile* case, the Court disregarded the precautionary principle even though the Applicants had expressly requested that Article 8 of the Convention be interpreted in the light of this principle (*Hardy and Maile* supra, para. 186).
132. The Government believes that the precautionary principle can shed some light on the positive obligation of States under Articles 2 and 8 of the Convention. However, it is too vague for it to be able to really direct decision-making in substance. For example, the level of risk of serious or irreversible disturbances or the recommended threshold for determining whether there is absolute scientific certainty are not established with sufficient clarity, even by using the precautionary principle. In addition, the precautionary principle is not sufficient to give specific contours to the obligation of states not to delay the adoption of measures, as it is too general for this. If the Court should nevertheless take the precautionary principle into account in the present case, the Government is of the opinion that Switzerland has fully complied with the requirements of this principle. It has taken precautionary measures to predict, prevent or mitigate the causes of climate change and to limit its adverse effects. It has never used the lack of absolute scientific certainty as a pretext for delaying the adoption of such measures. It has anticipated the foreseeable consequences of climate change at an early stage and regularly adapts its targets in line with the latest scientific data (see Statement of facts in Annex).
133. With regard to the principle of intergenerational equity, the Government stresses that it is not established as a rule of international law. Moreover, the Applicants have not themselves invoked that principle, which also concerns the interests of future generations. It notes that the Applicants are a part of the present generation. They are not entitled to assert the rights of future generations before the Court, nor are they able to do so. The status of victim can only belong to existing people and not to future generations. In addition, these proceedings concern the issue of whether the Applicants' Convention rights



have been violated. The Government considers that the principle of intergenerational equity cannot help to answer this question, such that it is irrelevant in the present case. If the Court should nevertheless take into account the principle of intergenerational equity in the present case, the Government is of the opinion that Switzerland has fully complied with its requirements. The measures taken by Switzerland to protect the climate respect the interests of present and future generations in an equitable manner.

134. It follows from the above that Switzerland has fulfilled its obligations under the guarantees of the Convention invoked by the Applicants. It has adopted appropriate regulations and enacted adequate and sufficient measures to achieve the objectives for combating global warming (see Statement of facts in Annex). It has also put in place effective adaptation measures. Consequently, the Government invites the Court to declare the objection concerning Articles 2 and/or 8 of the Convention inadmissible on the grounds that it is manifestly unfounded.

B. Article 6 para. 1 of the Convention (reply to question 6)

135. If the Court is of the opinion that Article 6 of the Convention is applicable, the Government takes the following position on the merits:

136. The right to a fair trial, guaranteed by Article 6 para. 1 of the Convention, must be interpreted in the light of the principle of the rule of law, which requires the existence of an effective judicial remedy allowing civil rights to be asserted (see, *inter alia*, *Ali Riza v. Switzerland* of 13 July 2021, no. 74989/11, para. 72; *Al-Dulimi and Montana Management Inc. v. Switzerland* [Grand Chamber] of 21 June 2016, no. 5809/08, para. 126, ECHR 2016, *Eşim v. Turkey* of 17 September 2013, no. 59601/09, para. 18, and *Běleš and Others v. Czech Republic* of 12 November 2002, no. 47273/99, para. 49, ECHR 2002- IX). Every person is entitled to have a court hear any dispute relating to their civil rights and obligations. Thus, Article 6 para. 1 of the Convention enshrines the right to a court, of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only (see, *inter alia*, *Howald Moor and others v. Switzerland*, nos. 52067/10 and 41072/11, para. 70, 11 March 2014, and *Golder v. United Kingdom*, 21 February 1975, para. 36, no 18).

137. However, the right of access to a court is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State, which enjoys a certain margin of appreciation in this regard. That being stated, those limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired. In addition, such limitations will not be compatible with Article 6 para. 1 if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (*Nait-Liman v. Suisse* [GC], no. 51357/07, 15 March 2018, para. 114 and 115; *Ali Riza*, *supra*, para. 73 and cited references). Furthermore, the limitations applied are only compatible with Article 6 para. 1 of the Convention if they pursue a legitimate purpose and if there is a reasonable proportionality between the means employed and the intended purpose (*Ali Riza*, *supra*, para. 74 and cited references).

138. In the present case, the Applicants allege that Article 6 of the Convention has been violated because the domestic courts have upheld the decision of DETEC not to hear the case and have not examined the merits of the case (cf. Additional Submission, para. 42 et seq.).

139. The Government points out, first of all, that the Applicants benefited from two judicial proceedings. They appealed to the FAC and the FSC, both of which carefully examined the case and issued duly reasoned decision (cf. FAC decision [A-2992/2017](#) of 27 November 2018, Annex 17 to the Application; FSC decision of 5 May 2020, published in [SCD 146 I 145](#), Annex 19 to the Application).
140. As a general matter, it should be noted that the Swiss courts are regularly seized of appeals from individuals or associations concerning issues related to risks to the environment arising from human activities (for nuclear energy, see e.g. FAC [139 II 185](#), FAC [140 II 315](#), FSC [2C 206/2019](#) of 25 March 2021 or further FAC decision [A-5762/2012](#) of 7 February 2013; for air protection, see e.g. [FAC 2009/1](#)). It should be noted that federal administrative procedure is not particularly formalistic. Pursuant to Article 12 APA, it is mainly governed by the investigative principle, according to which the authorities establish the relevant facts *ex officio*. It also requires the authorities to apply the law *ex officio* (cf. art. 62 (4) APA).
141. In order for an authority to consider a request made on the basis of Article 25a APA, several conditions must be met. According to that provision, any person who has an interest that is worthy of protection may request from the authority that is responsible for acts that are based on federal public law and which affect rights or obligations that it refrains from, discontinues or revokes unlawful acts, rectifies the consequences of unlawful acts or confirms the illegality of such acts (para. 1). The authority shall decide by way of a ruling (paragraph 2). According to the Federal Supreme Court, the concept of real act (*Realakt*) within the meaning of Article 25a APA must be interpreted broadly. It includes not only individual and specific acts, but also general and abstract acts (cf. [SCD 146 I 145](#) at 4.2). In addition to the wording of Article 25a APA, the omissions of the authorities may also be challenged. An omission by state authorities may only be unlawful if there is a specific obligation for the authorities to act. The right to obtain a decision pursuant to Article 25a APA does not exist if the legislator has intentionally excluded legal protection against a real act or if sufficient legal protection is possible by other means (*subsidiarity*). Delineation from the *actio popularis* requires a careful analysis of whether the Applicant is more affected than the population in general (cf. [SCD 146 I 145](#) at 4.1 with references). The existence of rights under Article 25a APA presupposes that the person making the request is to a certain extent affected in his or her personal legal sphere. In order to do so, the infringement of personal rights must be of a minimum intensity (cf. [SCD 146 I 145](#), at 4.1 and 4.4 with references). Article 25a APA defines the interest in legal protection specific to the dispute (*streitlagenspezifisches Rechtsschutzinteresse*) by an objective and a subjective standard: on the one hand, in objective terms, the real act must affect rights and obligations; on the other, in subjective terms, the Applicant must assert a legitimate interest in the decision being issued. The two criteria, even if they point in the same direction, must be carefully distinguished (cf. [SCD 146 I 145](#) at 4.4 with references).
142. The Government points out that, even in the absence of a formal decision and thus of an act subject to legal challenge, the Swiss legal system provides for the possibility of bringing an action before the courts on the basis of substantive documents and of obtaining a review of the merits, provided that the conditions for admissibility are met. This option works in practice, including in environmental litigation, and must therefore be regarded as an effective means. A case in point is [SCD 140 II 315](#), which concerns a

decision on physical acts under the supervision of the Swiss Federal Nuclear Safety Inspectorate IFSN (Accident Prevention, Mühleberg Nuclear Power Plant). In that case, the FSC concluded that the admissibility conditions, namely the interest worthy of protection and the fact that one's rights or obligations were affected, were met. Another example in which the Federal Supreme Court found that the admissibility requirements were met is [SCD 143 I 336](#), which concerned legal protections against the closure of a refuse collection point of a municipal subdivision. Moreover, even when the FSC refused to consider the case or dismissed the appeal, it almost always sought to explain which legal remedies were available in practice or should have been followed by the Appellants. Other relevant decisions of the Federal Supreme Court include [SCD 97 I 591](#), [SCD 121 I 87](#), [SCD 128 II 156](#) and [SCD 130 I 369](#). There is thus a long-standing practice which attests to the real and effective nature of the ability of citizens to bring proceedings before the courts for the purpose of verifying the legality of a material act, sometimes referred to as an "act without legal effect".

143. Generally speaking, the requirements laid down by procedural law for an authority to enter into proceedings serve to ensure the proper administration of justice. The requirement that the Applicant's personal legal sphere must be affected to a certain extent arises from the fact that Article 25a APA is a means of individual legal protection. This allows a delimitation from an *actio popularis*. This requirement is widely acknowledged and is also applied by the Court. It also contributes to respect for the separation of powers (see *infra*). It cannot be considered that it restricts access to a court in such a way that the substance of the individual's right to a court would be affected. In addition, there is a reasonable relationship of proportionality between this requirement and the objectives pursued.
144. Despite the broad interpretation of the notion of a real act within the meaning of Article 25a APA, the question may arise as to whether – as in the present case – a series of state measures may be required in a specific area on the basis of Article 25a APA. According to Swiss constitutional law, requests to give a specific form to current policy areas are generally made through democratic mechanisms (at 4.3). ([SCD 146 I 145](#), at 4.3). The political rights pursuant to Articles 34 and 136 of the Federal Constitution are available to citizens for this purpose. These rights include the right to initiate a popular initiative for a total or partial revision of the Federal Constitution (Art. 138 et seq. Swiss const.) and the right of petition (Art. 33 Swiss const.). In addition, any member of the Federal Assembly, any parliamentary group, any parliamentary committee or any canton may submit an initiative to the Federal Assembly (Art. 160 para. 1 Swiss const.). In addition, the members of both Councils and those of the Federal Council may submit motions relating to an item of business under discussion (Art. 160 para. 2 Swiss const.).
145. In view of the above, it must be assumed that the requirement that the person submitting a motion must be affected to a certain extent in his or her personal legal sphere contributes to compliance with the separation of powers and the principle of subsidiarity. In Switzerland, it is not up to the judiciary to make political decisions. This task resides with the legislative and executive powers. By virtue of Article 190 Const., the Federal Supreme Court cannot, in any event, order a correction or tightening of the requirements laid down by the legislator in the CO<sub>2</sub> Act or emission-reduction measures. As we saw in the vote of 13 June 2021, the issue of climate policy and the necessary implementing measures is

complex and it is difficult to find the balance needed to achieve majority agreement.

146. The careful examination carried out by the FSC with regard to the formal criterion of the interest in legal protection, as well as the characteristics of Switzerland's own political system, show that courts cannot play a decisive role in the issue of climate change. It is certainly not up to the courts themselves to decide what measures to take. In the opinion of the Government, it was therefore rightly the view of the Federal Supreme Court that the Applicants' concerns should not be addressed by judicial, but rather by political means. Their appeal did not serve the purpose of individual legal protection, but was aimed at obtaining an abstract review of the current climate protection measures and those planned for the period up to 2030. This factor led the FSC in particular to classify the appeal as an *actio popularis*, which is incompatible with the means of individual legal protection (cf. [SCD 146 I 145](#) at 5.5 and 8). Contrary to the Applicants' allegations (cf. Additional Observations of 13 October 2021, Observations on the Law, para. 173), this conclusion is not arbitrary.
147. Article 25a APA allows individuals in particular to challenge the omissions of the authorities, which also constitute a real act, provided, of course, that the conditions set out in this provision are met. Those conditions serve legitimate purposes, namely the proper administration of justice, the effectiveness of domestic judicial decisions by preventing *actio popularis* and guaranteeing individual legal protection, or indeed the separation of powers. However, the conditions have not been satisfied in the present case. Since the decisions of the FAC and the FSC are neither arbitrary nor manifestly unreasonable, it is not up to the Court to challenge their conclusions.
148. The conditions set out in Article 25a APA limit access to a court only to the extent necessary to achieve the legitimate aims. There is therefore a reasonable relationship of proportionality between the means employed and the legitimate aims pursued. The right of access to a court has not been restricted in substance.
149. In view of the above, the Government considers that the Applicants had at their disposal an effective legal remedy enabling them to assert their civil rights. It therefore invites the Court to declare the Application concerning Article 6 of the Convention inadmissible on the grounds that it is manifestly ill-founded.

C. Article 13 of the Convention (reply to question 7)

150. If the Court is of the opinion that Article 13 of the Convention is applicable, the Government takes the following position on the merits:
151. "According to the consistent case law of the Court, Article 13 requires an domestic remedy only for applications which can be considered "arguable" under the Convention (...). (*Athanassoglou and Others v. Switzerland* of 6 April 2000 [Grand Chamber], no. 27644/95, para. 58). In the *Athanassoglou and Others v. Switzerland* case, the Court found that "[t]he applicants' complaint under Article 13, like that under Article 6 § 1, was directed against the denial under Swiss law of a judicial remedy to challenge the Federal Council's decision. The Court has found that the connection between that decision and the domestic-law rights to protection of life, physical integrity and property invoked by the applicants was too tenuous and remote to attract the application of Article 6 § 1 (.). The reasons for that finding likewise lead to the conclusion, on grounds of remoteness, that in relation to the Federal Council's decision as such no arguable claim of violation of Article-2 or Article 8 of the Convention and, consequently, no entitlement to a remedy under Article 13 have been made out by the applicants.

In sum, as in the *Balmer-Schafroth and Others* case the Court finds Article 13 to be inapplicable." *Athanassoglou and Others v Switzerland*, supra, para. 59).

152. The Court also recalled that the safeguards of Article 6 para. 1 are in principle stricter than, and absorb, those of Article 13 (cf. *Ullens de Schooten and Rezabek v Belgium*, nos. 3989/07 and 38353/07, 20 September 2011, para. 52).
153. In the present case, the Applicants allege that their right to an effective remedy has been violated because the national authorities have not examined the merits of their appeal (see Application Form, p. 9).
154. The Government recalls that the Applicants had the opportunity to appeal to the Federal Administrative Court and the Federal Supreme Court and that they thus benefited from two levels of appellate review. It also emphasises that states may provide rules governing the conditions of admissibility of an appeal. In this case, the statutory requirement that the Applicants' rights must be affected with a certain degree of intensity does not render their appeal ineffective (see section 140 et seq. supra). The requirement of an effective remedy does not imply that the appellate body must necessarily consider the merits of the claim, let alone grant the Appellant's prayers for relief.
155. The Applicants also had - and still have - the possibility of bringing liability proceedings against the Swiss Confederation on the basis of the Federal Act on the Liability of the Confederation, the members of its Authorities and Civil Servants (FALC)<sup>41</sup> and of seeking, in this context, compensation for the harm they believe they have suffered as a result of the global warming allegedly caused by the authorities' failure to act. This legal remedy would have enabled them – and would still allow them now – to obtain a possible negative decision that would have been – or might be – issued by the competent authority examined by the FAC and then, if necessary, by the Federal Supreme Court. In the context of such liability proceedings, complaints of violations of the Convention may be formulated and submitted to the courts for consideration.
156. By way of example, reference is made to the decision of the Federal Supreme Court (FSC) of 11 April 2006 ([SCD 132 II 305](#)) concerning the responsibility of the Confederation for its management of the so-called “mad cow” crisis. Admittedly, the FSC ultimately did not find the alleged omissions to be unlawful with regard to the precautionary principle, but the decision shows that liability proceedings, with a serious examination of the merits, are possible under the FALC where there is an alleged inaction by the authorities with regard to the precautionary principle and the scientific knowledge available at the time.
157. In view of the above, the Government considers that the Applicants had at their disposal, by means of a combination of existing remedies, an effective remedy within the meaning of Article 13 of the Convention concerning the alleged violations of Articles 2 and 8 of the Convention. Thus, it invites the Court to declare the complaint concerning Article 13 of the Convention inadmissible on the grounds that it is manifestly ill-founded.

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<sup>41</sup> [SR 170.32 – Federal Act of 14 March 1958 on the Liability of the Confederation, its Authorities and its Civil Servants \(Liability Act, FALC\) \(admin.ch\)](#)



## VII. Just Satisfaction

### A. Non-pecuniary harm

158. The Applicant association does not claim compensation for non-pecuniary damages. Applicants 2-5 each request CHF 10,000 for non-pecuniary damages (see para. 2-5 of the Request for Just Satisfaction of 13 October 2021).
159. With regard to possible non-pecuniary damages under Articles 2 and 8 of the Convention, the Government recalls that greenhouse gas emissions are caused by the community of States. The distribution of greenhouse gas emissions among States must therefore also be taken into account when calculating compensation for a possible violation of Articles 2 and 8 of the Convention. Given the low intensity of the greenhouse gases produced by Switzerland today, the omissions of which Switzerland is accused are not such as to cause the non-pecuniary harm claimed by the Applicants under Articles 2 and 8 of the Convention. There is therefore no sufficient causal link between the violation found and the non-pecuniary harm alleged by the Applicants, and Switzerland cannot therefore be required to pay compensation under Articles 2 and 8 of the Convention.
160. Furthermore, the Government denies that the Applicants were left in uncertainty and without adequate protection. The national courts have examined the actions brought by the Applicants and dismissed them on the basis of detailed decisions. In addition, Switzerland has taken many measures to protect the population from heat.
161. With regard to non-pecuniary damages under Articles 6 and 13 of the Convention, the Government notes that the proceedings took a total of approximately three and a half years (filing of the application with DETEC on 25 November 2016 and final decision of the Federal Supreme Court on 5 May 2020), which does not represent an excessive length of time in view of the fact that two judicial bodies issued decisions following DETEC's decision. Moreover, Applicants 2-5 were not alone in these proceedings. They were assisted by the Applicant Association and Greenpeace Switzerland, which supports the Association and its members and guarantees the procedural costs, so that they do not incur any financial risk to themselves (see [KlimaSeniorinnen – \(ainees-climat.ch\)](#), last visit on 17 November 2021). Greenpeace also initiated and helped implement the Senior Women for Climate Protection project. It also engages in substantial dialogue with them (see [Climate Justice – Greenpeace](#), last visit on 28 November 2022).
162. In view of the above, as well as various relevant factors, such as the age of the Applicants 2-5, the state of health of the Applicants 2-5, the duration of the situation at issue (see enumeration of these factors in *Fadeyeva v. Russia*, supra, para. 138), the seriousness of the alleged damage, Switzerland's low greenhouse gas intensity, the number of periods of heat as well as the measures taken by Switzerland to protect the population from heat, the Government considers that, in the present case, a finding of a violation of the Convention would – if necessary – constitute sufficient compensation for the non-pecuniary harm suffered by the Applicants (cf. *Cordella and Others v. Italy*, supra, para. 187; *Tătar v. Romania*, supra, para. 132; *Di Sarno and Others v. Italy*, supra, para. 122; see also *Pavlov and Others v. Russia*, supra, dissenting opinion of Judges Elosegui and Roosma).



B. Pecuniary damages

163. The Applicant does not seek compensation for pecuniary damages. Therefore, the Government invites the Court not to award any amount in this regard.

C. Costs and Expenses

164. Before the Chamber, the Applicant is claiming a total amount of CHF 324,249.25.- (incl. VAT) for costs and expenses of proceedings at national level and before the Court.

165. The Swiss Government refers to the case law of the Court pursuant to which, to be awarded costs and expenses the injured party must have incurred them in order to seek prevention or rectification of a violation of the Convention, to have the same established by the Court and to obtain redress therefor (*F.R. v. Switzerland* of 28 June 2001, No. 37292/97, para. 49). It must also be shown that the costs were actually and necessarily incurred and that they are reasonable as to quantum (*Philis v. Greece (No. 1)* of 27 August 1991, No. 12750/87, 13780/88, 14003/88, Series A No. 209, p. 25, para. 74). In order to determine the reasonableness of the costs claimed, the Court bases itself on the number of hours worked and the rate claimed (*Iatridis v. Greece* of 8 July 1999, No. 31107/96, ECHR 2000-XI, para. 57; *Iza” Ltd. and Makrakhidze v. Georgia* of 27 December 2005, no. 28537/02, paras. 67-68.).

166. Rule 60 of the Rules of Court thus provides that the applicant must submit itemised particulars of all claims, together with any relevant supporting documents, within the time-limit fixed for the submission of the applicant’s observations on the merits unless the President of the Chamber directs otherwise (para. 2) If the applicant fails to comply with the requirements set out in the preceding paragraphs the Chamber may reject the claims in whole or in part (para. 3).

167. With regard to the costs of representation, while the Applicant attached a fee note (without an address) to its request for just satisfaction of 13 October 2021, it has not provided an invoice or other document showing that it was in fact invoiced for the amount in question and that it therefore effectively incurred those costs. Similarly, it has not shown that it paid the costs of the proceedings itself. It follows from the request for just satisfaction only that the costs and expenses contained in the fee note were or will be invoiced in accordance with the contractual obligations between the Applicant party and the attorneys (see para. 13), but the invoices or contractual obligations were not submitted to the Court. Indeed, it is clear from the website of KlimaSeniorinnen that “Greenpeace Switzerland supports us and guarantees the procedural costs, so that there is no financial risk for the association and its members. (see [KlimaSeniorinnen – \(ainees-climat.ch\)](https://www.klimaseniorinnen.ch/), last visit 17 November 2021). Similarly, Greenpeace’s website states that the organisation “launched the Senior Women for Climate Protection Project and helped set it up. We also engage in a lot of dialogue and guarantee financing for climate action. (see [Climate Justice – Greenpeace](https://www.greenpeace.org/uk/campaigns/climate-justice/), last visit on 28 November 2022). It was also Greenpeace that, following the success of the Dutch foundation Urgenda in 2015, commissioned a law firm to examine Swiss law and the feasibility of taking legal action (see [Climate Justice – Greenpeace](https://www.greenpeace.org/uk/campaigns/climate-justice/), last visit on 17 November 2021). In view of the foregoing, and in the absence of any evidence showing that the Applicant has actually borne the costs and expenses in question, the Government invites the Court not to award the applicant any amount for costs and expenses.

168. In the event that the Court should, contrary to all expectations, find that the Applicants' claims meet the requirements of Rule 60 of the Rules of Court, the Government of Switzerland considers that the amount claimed by the Applicant is manifestly excessive. According to the fee note, the attorneys spent more than 278 hours (CHF 77,980: CHF 280 = 278.5 hours) for proceedings before the federal administrative authorities. In addition, the attorneys spent more than 104 hours (CHF 29,176: CHF 280 = 104.2 hours) for the proceedings before the FAC even though they were already largely familiar with the subject matter of the proceedings. The attorneys also spent more than 126 hours (CHF 35,532: CHF 280 = 126.9 hours) for the proceedings before the FSC. Finally, the attorneys spent more than 534 hours (CHF 149,730: CHF 280 = 534.75 hours) for the proceedings before the Court. The Government notes that although the issues raised in the present case may be complex – as argued by the Applicant's lawyers – it can be assumed that they, having spent more than 500 hours on the case at the national level, had detailed knowledge of the case and the issues raised concerning the Convention. The Government considers that the number of hours spent throughout the proceedings is manifestly excessive.
169. In addition, the Government disputes the need for the Applicant to be represented by two lawyers.
170. In view of these considerations, the Government considers, in the alternative, that an amount of CHF 13,000.00 would be appropriate to cover all costs and expenses incurred at national level and before the Court. Should the Court grant only part of the application, the Government invites the Court to reduce that amount appropriately.

#### **VIII. Article 46 of the Convention (reply to question 8)**

171. The Applicant requests the Court to order Switzerland to adopt the necessary legislative and administrative framework to do its share to prevent a global temperature increase of more than 1.5 °C above pre-industrial levels and to set a binding deadline for Switzerland to implement such a framework (cf. Request for Just Satisfaction dated 13 October 2021, para. 19 and 20).
172. As a matter of principle, it is for the State in question to choose, under the supervision of the Committee of Ministers, the general measures to be adopted in its domestic legal order in order to put an end to the violation found by the Court and to remediate its consequences as far as possible. Alternatively and exceptionally, the Court may indicate the type of general measures which the State in question could take to put an end to the established situation (cf. *Cordella and Others v. Italy*, supra, para. 179 with references).
173. In the present case, the Government considers that there are no special circumstances which would justify the indication of general measures by the Court. In view of all the circumstances of the case, and in particular the complexity and democratic legitimacy of the measures required to reduce greenhouse gas emissions, it is not appropriate to provide the Government with detailed prescriptive recommendations as requested by the Applicants. In addition to the technical complexity of the issues at stake, the delicate balance to be struck between the various interests at stake in order to achieve the objectives of climate and environmental protection also justifies the granting of a wide margin of appreciation to the Swiss Government (cf. section 90 et seq.) and should, in the final analysis, also lead

the Court to refrain from indicating general measures in order to comply with the principle of subsidiarity. Finally, the present case does not suggest that there are structural problems or systemic deficiencies in Switzerland.

174. In the alternative, and in the event that the Court nevertheless wishes to indicate detailed recommendations, the Government considers that these recommendations should be limited to access to justice, that is to say, the procedural framework that Switzerland should establish to enable domestic courts to consider complaints of violations of the Convention made by individuals. The Convention system is not intended to become the venue where national policies to combat global warming are decided (cf. section 95 supra). Under no circumstances is it for the Court to set targets for reducing greenhouse gas emissions, to indicate concrete mitigation measures or a deadline for adopting a legislative and administrative framework. The setting of reduction targets and concrete mitigation measures requires specific knowledge and is not within the competence of the Court. Moreover, scientific knowledge may change over time so that the reduction target set by the Court would no longer be relevant. A prudent approach limited to indicating the minimum procedural framework would also avoid placing the Committee of Ministers in a difficult position when supervising the enforcement process.
175. In light of the foregoing, the Government considers, first of all, that it is not for the Court to address the general instructions requested by the Applicant to the Swiss Government. Should the Court nevertheless decide to indicate general measures in the form of prescriptive instructions, these should be strictly limited to the procedural aspects of the case.

## IX. Conclusions

On the basis of the above considerations, the Government of Switzerland invites the Court to:

- declare application no. 53600/20 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* inadmissible as a matter of principle
  - for failure to comply with the six-month period;
  - for incompatibility *ratione personae* due to the Applicant association's lack of victim status;
  - for incompatibility *ratione personae* due to lack of victim status of the Applicants nos. 2-5 with regard to their complaints concerning Articles 2 and 8 of the Convention;
  - for incompatibility *ratione materiae* with the provisions of the Convention;
  - because it is manifestly ill-founded.
- In the alternative, to find that there has been no breach of the guarantees invoked by the Applicants.
- In the event of a finding of a violation of the Convention, not to award any amount to the requesting party as just satisfaction and not to indicate general measures to Switzerland. If the Court should nevertheless choose to award the applicant an amount for costs and expenses, the Government invites the Court to award it a maximum total amount

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of CHF 13,000.00 in this regard, which amount would have to be reduced if only part of the request were allowed.

Yours faithfully,

Federal Office of Justice (FOJ)



Alain Chablais  
Agent of the Swiss Government

Annex: Statement of facts