

Verein KlimaSeniorinnen and Others v Switzerland
(Application no. 53600/20)

REVISED APPLICANTS' DRAFT SPEECH FOR THE ORAL HEARING OF 29 MARCH 2023
(FOR THE COURT'S INTERPRETERS)

Ms. Simor KC to speak:

INTRODUCTION

1. Madame President, Members of the Court,

*"The world has never seen a threat to **human rights** of the scope presented by climate change. This is not a situation where any country, any institution, any policy-maker can stand on the side-lines. The economies of all nations; the institutional, political, social and cultural fabric of every State; and the rights of all ... people – and future generations – will be impacted."*

2. Members of the Court, these are not our words; they are the words of the UN Commissioner for Human Rights, Madame Michelle Bachelet.¹ She chose her words carefully. Language is inadequate to express – to render "real" – the dangers we face: their imminence, their severity, and their irreversibility. Madame Bachelet wanted to emphasise that faced with this existential threat, we must respond to the scientific facts with action. Weariness – 'defeatism'; neither is an option: every country, institution and policy maker must meet their responsibility to do all that is necessary to mitigate the impending harm.
3. We all know the near-linear relationship between global temperature increases and concentrations of human-induced greenhouse gases in the Earth's atmosphere.² As the IPCC

¹ Opening statement by UN High Commissioner for Human Rights Michelle Bachelet, at the opening session of 42nd UN Human Rights Council in 2019 Geneva, 9 Sept. 2019 ([link](#)).

² IPCC AR6 WGI, SPM B.2.2., p. 19-24, 35 and 41 ([link](#)).

recalled in its synthesis report released in Switzerland last week: “[e]very increment of global warming will intensify multiple and concurrent hazards.”³ As temperatures rise, tipping points or “critical threshold[s] beyond which [the earth’s] system reorganises, often abruptly and/or irreversibly” may take place.⁴ The IPCC put it as follows: “The cumulative scientific evidence is unequivocal: Climate change is a threat to human well-being and planetary health. Any further delay in concerted anticipatory global action on adaptation and mitigation will miss a brief and rapidly closing window of opportunity to secure a liveable and sustainable future for all.” It emphasised that “reductions this decade largely determine whether warming can be limited to 1.5°C or 2°C.”⁵

Summary of submissions

4. Members of the Court, our submissions will proceed as follows:
5. **First**, we touch on the failure of the Swiss Courts to determine the Applicants’ case at all, that is, their complaints under Articles 6 and 13.
6. **Secondly**, we address victim status and positive obligations explaining the direct effect on the Applicants of the Respondent’s ongoing failures.
7. **Thirdly**, we consider Switzerland’s obligations under the Convention and its failure to take even plausibly adequate steps to mitigate climate change.
8. **Fourthly**, we explain what we say Articles 1, 2 and 8 require Switzerland to do, to contribute its fair share of global emissions reductions and respond to the Court’s question 1.
9. **Finally**, we address Switzerland’s overall defences and relief.

³ IPCC AR6 SYR B.1. ([link](#)).

⁴ BVerfG, [Neubauer and Others v. Germany](#), 1 BvR 2656/18, 24 March 2021, §21, 161; Dutch Supreme Court, [Urgenda v. The Netherlands](#), ECLI:NL:HR:2019:2007, 20 Dec. 2019, §4.2.

⁵ IPCC AR6 SYR B.5. ([link](#)).

ISSUE 1: ARTICLES 6 AND 13

10. Dealing first with Article 6 and 13, the Applicants are here because the Swiss Courts refused to determine their claims, finding that there was still time before the Paris Agreement temperature thresholds were reached and that accordingly the Applicants could not yet claim that their rights were affected.⁶ The Swiss Courts ignored the real effect on the Applicants today. To suggest that until one reaches the moment of catastrophe, one's rights are not affected is to ignore the reality. It undermines the entire object and purpose of effective protection of Convention rights – and indeed climate mitigation measures. The very essence of the Applicants' right of access to court was impaired. The same applies in relation to Article 13.⁷

ISSUE 2: VICTIM AND ENGAGEMENT OF POSITIVE OBLIGATION UNDER ARTS 2/8

11. Turning then to victim status and positive obligations. Members of the Court, the Applicants before you today are already suffering from the effects of climate change.⁸ As elderly women, the excessive and sustained high temperatures of increasingly frequent and severe heatwaves pose an extremely serious threat, not just to their health and well-being, but to their very existence.⁹ No one before this Court disputes that heat kills and that women over 65 are at real risk not only of severe physical and mental impairment from heat-induced illness, but of death.

⁶ Swiss Supreme Court, [BGE 146 I 145](#) E. 5.3-5.4 (KlimaSeniorinnen); *see also* Respondent's Observations of 5 Dec. 2022, §§142-145.

⁷ *See* Applicants' Observations of 2 Dec. 2022, §§168-186.

⁸ ClientEarth, TPI 2022, §§34-39; Group of Academics from the University of Bern, TPI 2022, p. 3; Prof. Dr. Sonia Seneviratne & Prof. Dr. Andreas Fischlin, ETH Zurich, TPI 2022, p. 3; Prof Dr. Christina Voigt and New York University School of Law, TPI 2021, §§13, 18.

⁹ ENNHRI, TPI 2022, §8; Group of Academics from the University of Bern, TPI 2022, p. 1-3.

12. Switzerland has already experienced an average temperature increase of 2.1 degrees, which is twice the global average. In the past 20 years, it had the five most extreme heatwaves ever recorded, with four in the last 8 years. In summer 2003 there were 975 premature deaths; 800 in summer 2015; and 521 in summer 2019.¹⁰ During the 2003 heatwave, 80% of premature deaths were in persons older than 75, in August 2018 nearly 90% of heat-related mortality was in people older than 75.¹¹ IPCC AR6 finds *“every additional 0.5°C of global warming causes clearly discernible increases in the intensity and frequency of hot extremes, including heatwaves ...”*¹² These are virtually certain to increase in every region in Europe with *“[h]eat stress due to both high temperature and humidity, affecting morbidity [and] mortality ...”*¹³
13. A report commissioned by the Swiss Federal Office of Public Health concluded that on average, day-time temperatures above 33°C increase the risk of mortality by 25% compared with day-time temperatures of 22°C – this overwhelmingly affects the elderly.¹⁴
14. But Members of the Court, death is but one measure of heat impact. Exposure to extreme heat increases the risk of acute kidney injury, heat stroke, asthma attacks, respiratory, cardiovascular, immune and nervous system diseases and disorders.¹⁵ Heat illness causes serious symptoms that are particularly acute in elderly people – and specifically in elderly

¹⁰ Applicants’ Observations of 2 Dec. 2022, §§9 & 11; *see also* FOEN, La canicule et la sécheresse de l’été 2018, Bern 2019, p. 8 ([link](#)); FOEN, Hitze und Trockenheit im Sommer 2018, Bern 2019, p. 8 ([link](#)) (Annex to Applicants’ Observations of 2 Dec. 2022, *doc.* 25); Watts et al., The 2018 report of the Lancet Countdown on health and climate change, Dec. 2018, pp. 2484 f. ([link](#)). The 2022 report of the Lancet Countdown on health and climate change: health at the mercy of fossil fuels, 25 Oct. 2022, pp. 1624 f. ([link](#)); FOPH and FOEN, Schutz bei Hitzewelle, Bern 2007, pp. 1, 3 ([link](#)) (Annex to Applicants’ Observations of 2 Dec. 2022, *doc.* 27); FOEN et al., Management Summary, p. 9, figure 5 ([link](#)) (Annex to Applicants’ Observations of 2 Dec. 2022, *doc.* 24).

¹¹ Respondent’s Observations of 5 Dec. 2022, §75.

¹² IPCC AR6 WGI, SPM B2.2 ([link](#)) (Annex to Applicants’ Observations of 2 Dec. 2022, *doc.* 23).

¹³ IPCC AR6 WGI, Ch. 12, p. 1821 ([link](#)) (Annex to Applicants’ Observations of 2 Dec. 2022, *doc.* 23). IPCC AR6 WGII, p. 1044 ff. ([link](#)); SPM B.4.4 ([link](#)) (Annex to Applicants’ Observations of 2 Dec. 2022, *doc.* 22); Prof. Dr. Sonia Seneviratne & Prof. Dr. Andreas Fischlin, ETH Zurich, TPI 2022, p. 3. *See also* Evan de Schrijver, Sidharth Sivaraj, Christoph C. Raible et al., Nationwide projections of heat- and cold-related mortality impacts under climate change and population development scenarios in Switzerland, 08 March 2023, PREPRINT (Version 1), p. 6 f. ([link](#)).

¹⁴ Swiss Tropical and Public Health Institute (“TPH”), Projekt A.06, Hitze und Gesundheit, Synthese of 22 Sep. 2022, p. 3, Tabelle 1 ([link](#)) (Annex to Applicants’ Observations of 2 Dec. 2022, *doc.* 33).

¹⁵ ENNHRI, TPI 2022, §4.

women.¹⁶ This is because as we age, our body's ability to regulate its temperature becomes less effective. None of this is disputed by the Respondent. Indeed, its own public health agency warns its citizens of these effects.¹⁷

15. **As regards the first Applicant**, Switzerland accepts that each member of the Verein KlimaSeniorinnen belongs to a group that is at serious risk from heat but argues their claim must be rejected as an *actio popularis*.¹⁸ This is wrong. The first Applicant is a 'group of individuals', each one of whom is directly affected, and which Article 34 of the Convention expressly includes as a 'victim'. When we refer today, therefore, to the Applicants, we are referring to all 2038 individuals, which includes the four named Applicants (Applicants 2-5).¹⁹

16. **As to the second to fifth Applicants:** Mesdames Volkoff, Molinari and Budry are highly vulnerable during heatwaves; Madame Volkoff suffering cardio-vascular disease and Mesdames Molinari and Budry, respiratory diseases and chronic obstructive pulmonary disease, putting them at a particularly high risk of death on hot summer days.²⁰ The Court has before it, four medical reports concerning the situation of Madame Volkoff, who provides an example of the kind of suffering at issue.²¹

17. The Respondent accepts that heat significantly aggravates the Applicants' conditions and renders these individuals at risk of death. Moreover, Switzerland accepts that the effect of

¹⁶ Human Rights Centre of Ghent University, TPI 2022, p. 9. *See also* Ana Vicedo-Cabrera, Evan de Schrijver, Dominik L. Schumacher et al., The footprint of human-induced climate change on heat-related deaths in the summer of 2022 in Switzerland, 10 March 2023, PREPRINT (Version 1), p. 5 and figure 1 p. 16 ([link](#)).

¹⁷ Federal Office for the Environment ("FOEN"), Hitze und Trockenheit im Sommer 2018, Bern 2019, p. 27, 32 ([link](#)) (Annex to Applicants' Observations of 2 Dec. 2022, *doc.* 25); FOEN et al., Management Summary: Climate Change in Switzerland, Indicators of driving forces, impact and response, Bern 2020 ("Management Summary"), p. 9 ([link](#)) (Annex to Applicants' Observations of 2 Dec. 2022, *doc.* 24); Federal Office of Public Health ("FOPH") and FOEN, Schutz bei Hitzewelle, Bern 2007 ([link](#)) (Annex to Applicants' Observations of 2 Dec. 2022, *doc.* 27); FOEN, Hitze und Trockenheit im Sommer 2015, Bern 2016, p. 84 ([link](#)); *see also* Applicants' Observations of 2 Dec. 2022, §18 with reference to Swiss TPH, Projekt A.06, Hitze und Gesundheit, Synthese of 22 Sep. 2022 ([link](#)) (Annex to Applicants' Observations of 2 Dec. 2022, *doc.* 33).

¹⁸ Respondent's Observations of 5 Dec. 2022, §§42, 49.

¹⁹ *See* Applicant's Observations of 5 Dec. 2022, footnote 165.

²⁰ Applicants' Observations of 2 Dec. 2022, §§18 & 23-26, 70-75; *see also* Swiss TPH, Projekt A.06, Hitze und Gesundheit, Synthese of 22 Sept. 2022 ([link](#)) (Annex to Applicants' Observations of 2 Dec. 2022, *doc.* 33).

²¹ Annex to Applicants' Observations of 2 Dec. 2022, *docs.* 9-12.

heatwaves is sufficient potentially to engage its obligations under Article 8²² and that “*it is beyond question that there is a need to act now*”.²³ It is difficult then to see why it does not also accept that Article 2 is potentially engaged, and that the Applicants meet the victim requirement under Article 34.

18. Switzerland argues in line with the Federal Supreme Court, that the Applicants cannot be victims until the global average temperature exceeds 1.5°/2.0°C, saying that only then will the harm suffered be sufficiently serious;²⁴ that the third to fifth Applicants cannot be victims because they are unlikely still to be alive by the time global temperatures increase by 1.5°C,²⁵ and that the Applicants are asserting “*subjective sensitivities*”.²⁶
19. The Court should unequivocally reject those arguments.
20. On current trajectories, announced by the IPCC last week, 1.5 degrees will be reached by the first half of the 2030s, or even late-2020s.²⁷ All 2038 Applicants hope and expect to be alive at that time.
21. More relevantly, neither victim status, nor the engagement of Articles 2 or 8 depends on whether the harm or real risk to life could be even more serious in the future. Decisive is whether the individual is detrimentally affected or at real risk today from a failure to act now. This, the Respondent largely accepts.²⁸
22. The risks faced by the Applicants are current and real. They are comparable to, and potentially greater than, those with which the Court has been faced to date.²⁹

²² Respondent’s Observations of 5 Dec. 2022, §§74 & 77.

²³ Respondent’s Observations of 5 Dec. 2022, §55, see further: §§48, 49, 50, 57, 74.

²⁴ Respondent’s Observations of 5 Dec. 2022, §§55 & 56, 68.

²⁵ Respondent’s Observations of 5 Dec. 2022, §56.

²⁶ Respondent’s Observations of 5 Dec. 2022, §§50 and 75.

²⁷ IPCC AR6 SYR B1.1 and footnote 29 ([link](#)).

²⁸ Respondent’s Observations of 5 Dec. 2022, §55, see further: §§48, 49, 50, 57, 74.

²⁹ Applicants’ Observations of 2 Dec. 2022, §111.

23. Following the Court's case law, the Dutch Supreme Court correctly held in the case of Urgenda that the State's positive obligations under Articles 2 and 8 apply to activities, whether public or private, which contribute to climate change on the basis that climate change is known to involve a "*real and immediate*" threat to human life and well-being; that is, a risk that was both genuine and imminent.³⁰
24. The Court will be aware of the international scientific consensus on the risk to life and harm of climate change, as well as the international legal consensus that these harms fall within the corpus of human rights protection.³¹
25. To conclude on this part of our submissions: this is the first time that the Court has been asked to determine the duties of Contracting States under the Convention to safeguard life, health and well-being from the consequences of climate change.³²
26. It is not, however, the first time this question has been considered. Contracting State Courts, applying this Court's jurisprudence,³³ have already held that their governments must, in line with their international commitments, do all that is necessary to prevent climate change, in order to guarantee effective protection for individuals' rights. They saw no need for recourse to the 'living instrument' doctrine; the principles were sufficiently clear and well-established. Nor did they consider that the particular legal challenges of causation and attribution, which

³⁰ Urgenda v. The Netherlands, §§5.2.2-5.2.3, referred to in Applicants' Observations of 2 Dec. 2022, footnote 198.

³¹ Applicants' Observations §§138-155. See also Center for International Environmental Law (CIEL) and Dr Margaretha Wewerinke-Singh, TPI 2022, p. 12; ENNHRI, TPI 2022, §12; Prof. Evelyne Schmid and Prof. Véronique Boillet, University of Lausanne, TPI 2022, §31. See also UN High Commissioner for Human Rights, TPI 2021, §2; Human Rights Centre of Ghent University, TPI 2022, §1.2.5; ClientEarth, TPI 2022, §§7, 11-19; Group of Academics from the University of Bern, TPI 2022, p. 8; UN Special Rapporteurs, TPI 2021, §8.

³² See ClientEarth, TPI 2022, §1; Sabin Center for Climate Change Law, Columbia Law School, TPI 2022, §§17, 31.

³³ See Urgenda v. The Netherlands, §§ 5.1-5.6.2; Neubauer and Others v. Germany, §99, 147 and the ECtHR key case law, including Öneryıldız v. Turkey [GC], no. 48939/99 §89], Budayeva and Others v. Russia, no. 15339/02 §129] and Brincat and Others v. Malta, no. 60908/11 §101]. See also Human Rights Centre of Ghent University, TPI 2022, §§ 1.2-1.3; ENNHRI, TPI 2022, §13; ClientEarth, TPI 2022, §§50-52, United Nations High Commissioner for Human Rights, TPI 2021, §9 .

arise in the context of climate change, provided any basis for disapplying the existing jurisprudence.

27. We submit that this Court should in the same way hold that, pursuant to Articles 1, 2 and 8, Switzerland is under a positive obligation to take the necessary steps to guarantee effective protection for the Applicants' lives, health and well-being. The retrogressive impact of a ruling that undermined those judgments would be extreme. And the impact would not be confined to the Contracting States.

ISSUE 3: FAILURE TO TAKE ADEQUATE ACTION TO PROTECT THE APPLICANTS' RIGHTS

28. We now turn to our third issue: Switzerland's failure to take mitigation measures.

29. Switzerland rightly accepts that in interpreting its obligations under the Convention, the Court can and should take into account relevant rules and principles of international law applicable between the parties.³⁴ Switzerland also agrees that its commitments under the Paris Agreement, in its words, are "*positive obligations and standards of conduct...which are likely to shed some light on the reasonable and appropriate measures*" that it "*must take to effectively protect the rights set out in Articles 2 and 8*".³⁵

30. Switzerland is correct to make those concessions. The Paris Agreement is an international treaty adopted by the parties to prevent dangerous climate change and all the breaches of human rights that entails. Far from negating, removing or replacing human rights protections, it constitutes international recognition of the necessity of – and attendant obligation on – States to take urgent, significant coordinated measures. This is underlined by the eleventh recital of the Paris Agreement,³⁶ which states that parties are expected to take human rights implications into consideration, including the rights of those in vulnerable situations (such as

³⁴ Respondent's Observations of 5 Dec. 2022, §§93 and 98-99.

³⁵ Respondent's Observations of 5 Dec. 2022, §99, last bullet. Note also that at §132 the Respondent accepts that the precautionary principle can also shed some light on positive obligation but says that it is too vague to help in relation to actual decision-making.

³⁶ 11th recital of the preamble read with Arts. 2, 3, 4(1) and 4(3).

the Applicants), in setting the level of ambition. Further, in numerous international resolutions, States have recognised that the consequence of climate change is potentially to negate all rights, including the right to life.³⁷

31. Again, Switzerland’s accepts this. It states that as a party to the Paris Agreement it has “*a duty of due diligence and, in order to act swiftly, must take all appropriate measures to progressively achieve the protection of the interest or rights concerned*”.³⁸
32. Nonetheless, to avoid the consequences of those important concessions, Switzerland then mischaracterises the Applicants’ case. It says that the Applicants are asking the Court to apply not the Convention, but rather, “*norms of international law*”.³⁹ Indeed, it says that the Applicants are trying to “*circumvent*” the Paris Agreement by seeking to construct an international judicial review of its climate measures.⁴⁰ It then argues that the Court cannot do that because that would involve it assigning to itself the role of: “*supreme environmental court*”.⁴¹
33. Members of the Court. You are not being asked to determine whether Switzerland is in breach of any of its commitments under the Paris Agreement. You are being asked to rule only on whether Switzerland has violated the Applicants’ rights under the Convention.
34. Applying the Court’s normal interpretative approach, we say that to protect the rights of the Applicants, the Respondent must “*do everything in its power to do its share to prevent a global temperature increase of more than 1.5 degrees above pre-industrial levels*”.⁴² This

³⁷ Respondent’s Observations of 5 Dec. 2022, §§151-155. See also ICJ, TPI 2022, p. 9; ClientEarth, TPI 2022, §§ 46-49; Center for International Environmental Law (CIEL) and Dr Margaretha Wewerinke-Singh, TPI 2022, p.5; UN Special Rapporteurs, TPI 2021, §18.

³⁸ Respondent’s Observations of 5 Dec. 2022, §99, 7th bullet.

³⁹ Respondent’s Observations of 5 Dec. 2022, §94.

⁴⁰ Respondent’s Observations of 5 Dec. 2022, §95.

⁴¹ Respondent’s Observations of 5 Dec. 2022, §99.

⁴² Applicants’ Observations of 2 Dec. 2022, §§ 58, 111, 112, 116. See also Group of Academics from the University of Bern, TPI 2022, §10. See also UN Special Rapporteurs, TPI 2021, §39; Prof. Dr. Christina Voigt and the New York University School of Law, TPI 2021, § 43.

necessarily means the adoption of a legislative and administrative framework to achieve that objective.⁴³

35. Switzerland's actions come nowhere close:

- a. **First**, Switzerland failed to legislate for the minimum possible requisite emissions reduction targets for 2020, and then failed to meet that inadequate emissions reduction target.
- b. **Secondly**, Switzerland 2030 proposed target is manifestly inadequate and has not even been given legislative effect.
- c. **Thirdly**, Switzerland's 2050 proposed target is inadequate in so far as it does not commit Switzerland to net zero domestic emissions and this too, has not yet even been given legislative effect.

36. **Dealing first with the 2020 target**, the 2007 IPCC synthesis report AR4 provided that countries should reduce domestic emissions by a minimum of between **25 and 40% below 1990 levels by 2020**⁴⁴ – at that time, of course, with a 2-degree limit in mind. Despite the Government expressly stating in 2009, by reference to new studies that industrialised States needed to reduce emissions by at least 40% by 2020 and 95% by 2050,⁴⁵ Switzerland, one of the wealthiest and most developed countries in the world, then, in its 2011 Climate Act, provided only for a **20% reduction by 2020**, that is, only half of what Switzerland had itself recognised was necessary.

⁴³ Applicants' Observations of 2 Dec. 2022, §§109-112. See also Prof. Evelyne Schmid and Prof. Véronique Boillet, University of Lausanne, TPI 2022, §9.

⁴⁴ Applicants' Observations of 2 Dec. 2022, §31.

⁴⁵ BBI 2009 7433, section 1.5 p. 6738 ([link](#)): *"Dans les pays industrialisés, ces réductions devront être d'au moins 40 % d'ici à 2020 et d'au moins 95 % d'ici à 2050. Ces trajectoires de réduction drastiques sont nécessaires dans la mesure où une réduction effective de la concentration atmosphérique de gaz à effet de serre ne peut être obtenue que lorsque le système naturel (océans, forêts, sols, etc.) absorbe plus de gaz à effet de serre que les activités anthropiques n'en libèrent dans l'atmosphère"*.

37. Switzerland accepts before this Court that it did not, therefore, meet the minimum obligation, saying that *“the Federal Council was aware that greater reduction efforts were needed”*.⁴⁶ Members of the Court, the 2011 Act gave the Federal Council the power to raise the target to 40%;⁴⁷ they chose not to use that power.⁴⁸
38. Switzerland then failed even to meet that inadequate 20% reduction target, achieving only a 19% reduction in 2020 and only because of the mild winter and covid.⁴⁹
39. **Turning then to our second point: the 2030 reduction target.** In its 2014 synthesis report (AR5), the IPCC provided that for the average of all burden-sharing methods, the average domestic emissions reduction required was approximately **50% of 1990 levels**⁵⁰ – again at that time to prevent a 2-degree limit from being exceeded. Significantly, the IPCC concluded that to reflect responsibility,⁵¹ capability,⁵² and need⁵³ OECD countries such as Switzerland, needed to meet negative emissions targets; they had to reduce emissions by **between – 106% and up to – 128% below 1990 levels by 2030**.⁵⁴ One means of meeting negative emission

⁴⁶ Respondent’s Observations on the facts of 5 Dec. 2022, sec. 1.2.1.

⁴⁷ The Respondent argues in its Observations on the facts of 5 Dec. 2022, sec. 1.2.1, that it would have had the power to raise its targets up to 30%. In fact the applicable provision of the CO₂ Act, in force until 31. Dec. 2021, gave the Federal Council even the possibility to raise the target *up to 40%* according to international conventions, see Art. 3 Abs. 2 CO₂ Act of 23 Dec. 2011, status as of 1 Jan. 2020 ([link](#)).

⁴⁸ Respondent’s Observations on the facts of 5 Dec. 2022, sec. 1.2.1.

⁴⁹ Respondent’s Observations on the facts of 5 Dec. 2022, sec. 1.2.1 (p. 3/14).

⁵⁰ IPCC AR5 WGIII, pp. 459, 460, figure 6.28, SPM p. 13, table SPM.1 ([link](#)) (Annex to Applicants’ Observations of 2 Dec. 2022, doc. 39). This is the same as 2010 levels for Switzerland.

⁵¹ *“The concept to use historical emissions to derive emission goals was first directly proposed by Brazil in the run-up of the Kyoto negotiations (UNFCCC, 1997), without allocations. Allowances based only on this principle were quantified by only a few studies”*: IPCC AR5 WGIII, p. 458 ([link](#)).

⁵² *“Frequently used for allocation relating reduction goals or reduction costs to GDP or human development index (HDI). This includes also approaches that are focused exclusively on basic needs”*: IPCC AR5 WGIII, p. 458 ([link](#)).

⁵³ *“A multitude of studies provide allocations based on immediate or converging per capita emissions”*: IPCC AR5 WGIII, p. 458 ([link](#)).

⁵⁴ This was for a 66% likelihood of the now outdated 2-degree temperature limit not being exceeded. See footnote 71 of the Applicants’ Observations of 2 Dec. 2022; IPCC AR5 WGIII, p. 460 figure 6.28, p. 13 table SPM.1 ([link](#)) (Annex to Applicants’ Observations of 2 Dec. 2022, doc. 39). Note that fig. 6.28 of p. 460 states in its explanation: *“For the OECD-1990 in the category ‘responsibility, capability, need’ the emission allowances in 2030 is – 106% to – 128% (20th to 80th percentile) below 2010 level (therefore not shown here)”*.

targets would be to assist other countries to reduce emissions for example through finance or renewables projects.

40. It did not do so. Instead, it did two things:

- a. First, in November 2017, three years after AR5, it confirmed under the Paris Agreement its 2015 commitment to reduce emissions by **50% of 1990 levels by 2030** but stated that it would do so also by purchasing foreign emission reductions. It did not therefore commit even to a full 50% reduction in domestic emissions by 2030, let alone to an overall negative emissions reduction to reflect equity.
- b. Secondly, in December 2017 the Federal Council proposed a new Climate Act to give effect to that commitment. However, that provided only for a **30% reduction in domestic emissions** by 2030. Staggeringly, this was still 10% lower than what Switzerland had in 2009 said industrialised countries needed to achieve by 2020 to stay within the now outdated 2°C limit. Even now, eight years later, no legislation has been enacted.
- c. Moreover, after 2018, Switzerland should have redetermined its emissions reduction targets, having regard to a fair share approach, to meet the steeper emissions pathway required by the 1.5-degree temperature limit. There is no evidence that it ever did so. Indeed, its 2030 target remained unchanged. Against this background, its current intention is a woeful 34% domestic emissions reduction, by way of extensions of the 2011 Act.

41. Switzerland's failure is particularly stark when viewed in the light of the EU position, which provides for an EU-wide domestic reduction of net GHG emissions of at least 55% by 2030.⁵⁵

⁵⁵ Respondent's Observations of 5 Dec. 2022, §155.

42. **Finally, turning to the 2050 target.** Switzerland has committed to net zero in its NDC but not to net zero domestically and has failed even to give that commitment legislative effect.
43. In summary, Switzerland has failed to adopt sufficient emissions reduction targets to meet even the outdated 2°C limit. It necessarily follows that Switzerland’s climate policy is not in line with the 1.5°C limit. Indeed Switzerland has carried out no studies or due diligence in relation to 1.5 degrees, and has not attempted to argue compliance, simply expressing a *“willingness to be within the range”* and that *“it is fully aware that it needs to take action swiftly to ensure climate change protection.”*⁵⁶ Professors Seneviratne and Fischlin, both renowned IPCC authors, state in their intervention that *“... it appears obvious that Switzerland is currently not contributing sufficiently to limit global warming to 1.5°C.”*⁵⁷ The same point is made by renowned academics from the University of Bern.⁵⁸
44. Switzerland has no answer to its failures. Instead, it falls back on the fact that it has taken adaptation measures⁵⁹ and pleads for a wide *“margin of appreciation”*.
45. The Applicants agree that adaptation is crucial. It is not an answer, however, to what Switzerland should have done to mitigate climate change. Moreover, even with adaptation measures, there will overall be increases in heat-related mortality,⁶⁰ and with increasing temperatures, the potential for adaptation is increasingly limited.⁶¹
46. As to margin of appreciation, Switzerland says that the unprecedented and complex issues and challenges of climate change, as well as Switzerland’s democratic system warrant it being

⁵⁶ Respondent’s Observations of 5 Dec. 2022, §117.

⁵⁷ Prof. Dr. Sonia Seneviratne & Prof. Dr. Andreas Fischlin, ETH Zurich, TPI 2022, p. 8.

⁵⁸ Group of Academics from the University of Bern, TPI 2022, p. 6. *See also* United Nations High Commissioner for Human Rights, TPI 2021, §4, citing the Committee on Economic, Social and Cultural Rights, *Concluding Observations on the Fourth Periodic Review of Switzerland*, 2019, §§ 18-19 ([link](#)).

⁵⁹ Respondent’s Observations of 5 Dec. 2022, §§ 111, 120-124, 134.

⁶⁰ IPCC AR6 WGII, Chapter 7, p. 1092 ([link](#)). *See* Rupert Stuart-Smith, Ana Vicedo-Cabrera, Sihan Li et al., Quantifying heat-related mortality attributable to human-induced climate change, 16 March 2023, PREPRINT (Version 1), p. 6 and figure 2c p. 17 ([link](#)).

⁶¹ IPCC AR6 WGII, SPM, figure SPM.3, p. 16 ([link](#)).

granted an “*ample margin of appreciation*”.⁶² We accept that it is for Switzerland to decide what measures to take to give effect to targets; to that extent it has a margin of appreciation. But no such margin exists in relation to the fixing of the targets themselves, nor the need for legislation to give them practical effect. This is because there is only one way to prevent the 1.5-degree limit from being breached and that is for global emissions not to exceed the remaining carbon budget. That budget must be fairly shared between States, which Mr. Willers will now address.

Mr. Willers KC to speak:

ISSUE 4: SWITZERLAND’S OBLIGATION TO PROTECT THE APPLICANTS

47. Members of the Court, I’m now going to address your question 1 and the Respondent’s duty to protect the applicant. In relation to your question 1(a), for a 67% chance of the average global temperature increase not exceeding 1.5°C, the remaining carbon budget is 400 GTCO₂. Distributing this remaining carbon budget on a per capita basis from 2020 onwards, Switzerland will use up its remaining share by 2034 on its current proposed approach.⁶³ It follows that Switzerland cannot have assessed a budget compatible with 1.5 degrees – and we note that in its written pleadings it does not argue that it has done so.

48. We say the Swiss budgetary position is even more egregious if the remaining global carbon budget is distributed fairly on the basis of the principles of international environmental law, such as common but differentiated responsibilities and respective capabilities.⁶⁴ On that basis, Switzerland is already using other countries’ shares of the small remaining global carbon budget.⁶⁵ This is carbon theft.

⁶² Respondent’s Observations of 5 Dec. 2022, §§90-92, 117.

⁶³ Applicants’ Observations of 2 Dec. 2022, §38.

⁶⁴ See Germanwatch, Greenpeace Germany and Scientists for Future, TPI 2022, p. 5. See also UN Special Rapporteurs, TPI 2021, §§13, 37.

⁶⁵ Prof. Dr. Sonia Seneviratne & Prof. Dr. Andreas Fischlin, ETH Zurich, TPI 2022, pp. 7-8.

49. Switzerland claims to agree to a fair share approach. It says it is important that “*efforts to combat global climate change [should be] shared in a fair and equitable manner,*” and that “*the effort to reduce greenhouse gas emissions must be differentiated according to a Party’s responsibility and capacity.*”⁶⁶ Further, before you it states that “*the concept of the highest possible level of ambition*” in the Paris Agreement reflects “*a standard of conduct that the parties must comply with*” and that this entails a “*duty of due diligence in designing the NDCs*”.⁶⁷
50. In answer to the Court’s question 1(b), we say that Switzerland has an obligation pursuant to Articles 2 and 8 to reduce its emissions beyond 100% of 2010 levels by 2030. This means that it must, in addition to domestic reductions, achieve emissions reductions abroad, for example through financial support. We based this on a fair share approach to emissions reduction, which derives from principles of international environmental law as we explain in §§39 and 41-46 of our Observations.⁶⁸ Specifically, we rely on two globally recognised studies, which assess the full scope of the scientific literature on the application of fair share principles: Rajamani and Climate Action Tracker.
51. These studies present the scientific “common ground” on the calculation of countries’ ‘fair share’ emission reduction contributions. There is a small difference between the emission reduction requirements for Switzerland in 2030; the CAT requires a reduction of between 160% to 200% from 2010 levels. Rajamani requires a reduction of 198% from 2010 levels. As we said earlier, IPCC AR5 in 2017 required a reduction of between 106% to 128% of 2010 emissions from OECD countries for a 2-degree temperature limit. It is on this basis that we seek an order requiring Switzerland to achieve at least net negative emissions by 2030.

⁶⁶ Switzerland’s First Nationally Determined Contribution (NDC) updated submission, 17 Dec. 2021, p. 13. ([link](#)).

⁶⁷ Respondent’s Observations of 5 Dec. 2022, §99 7th bullet.

⁶⁸ Applicants’ Observations of 2 Dec. 2022, §§39, 41-46 citing Lavanya Rajamani et al, National ‘fair shares’ in reducing greenhouse gas emissions within the principled framework of international environmental law, Climate Policy 21:8, pp. 983–1004, 2021 ([link](#)) (Annex to Applicants’ Observations of 2 Dec. 2022, doc. 43) and supplementary material 3 ([link](#)).

52. A minimum quantity of reductions must be made domestically. We refer the Court to paragraph 46 of our Observations, Climate Analytics and Climate Action Tracker, which sets out the analysis of this issue.

53. Accordingly, we say:⁶⁹

54. **First**, that Switzerland must, as a minimum, reduce its domestic emissions by more than 60% by 2030 and achieve net zero domestically by 2050 as compared with 1990 levels and that it must not purchase emissions reductions from abroad in order to do so.⁷⁰

55. **Secondly**, to discharge its global mitigation burden, Switzerland's overall emissions reduction from 2030 should be net negative.⁷¹

ISSUE 5: SWITZERLAND'S DENIAL OF RESPONSIBILITY TO PROTECT THE APPLICANTS' RIGHTS

56. I turn now to address our fifth issue, Switzerland's overall defences.

57. **First**, the Respondent says that its actions alone will not prevent or avoid the risks that climate change poses to the Applicants and that its failures cannot therefore be considered causative of the relevant harm and risk.⁷²

58. Members of the Court, this argument has been roundly rejected by Contracting State Courts, including the Dutch Supreme Court in *Urgenda*, for very obvious reasons. It is common sense that the temperature goal in the Paris Agreement cannot be achieved without mutual trust between Contracting States.⁷³ If a State as rich and technically advanced as Switzerland does not do its fair share – taking the lead as well as pursuing its highest possible ambition – then

⁶⁹ Applicants' Observations of 2 Dec. 2022, §46 and 113.

⁷⁰ Applicants' Observations of 2 Dec. 2022, §47.

⁷¹ Notably, this was set out by the IPCC in AR5 in the context of the 2-degree limit and in subsequent studies outlined in the Applicants' Observations of 2 Dec. 2022, §§37-44 and 113-114.

⁷² Respondent's Observations of 5 Dec. 2022, §§62-64.

⁷³ International Commission of Jurists (ICJ) and Swiss Section (ICJ-CH), TPI 2022, p. 9; Germanwatch, Greenpeace Germany and Scientists for Future, TPI 2022, p. 4 §(g).

other States will also fail to do so.⁷⁴ It follows that when a State such as Switzerland fails to do its share to meet the objectives of that agreement, it directly increases emissions and it also discourages other States from doing their share.⁷⁵

59. Moreover, it should not be forgotten that every degree – indeed every fraction of a degree of temperature increase – matters.⁷⁶ Even today’s global temperature increase of 1.13°C is causing enormous damage, and a 1.5°C global temperature increase will exacerbate that harm.

60. **Secondly**, Switzerland argues that it cannot be held responsible for its failures because the 2020 Climate Law was rejected in a referendum.⁷⁷ This is plainly a bad argument.

61. Switzerland is responsible for its Convention violations irrespective of how they came about.⁷⁸ As the Swiss Federal Court has itself said, legislation adopted by a popular vote can itself violate the Convention.⁷⁹ Contracting States are not subject to different Convention obligations depending on the technical operation of their democratic system.⁸⁰ Moreover, the level of ambition foreseen in the rejected 2020 Climate Act would have violated the Applicants’ rights under the Convention had it been enacted.

CONCLUSION/RELIEF

62. The Applicants submit at this late stage the finding of a violation alone will not be sufficient to remedy the breach. The actions to date have been woefully inadequate and there are no signs that this will change. For the adoption of the requisite climate mitigation measures,

⁷⁴ Prof. Dr. Sonia Seneviratne & Prof. Dr. Andreas Fischlin, ETH Zurich, TPI 2022, p. 6.

⁷⁵ International Commission of Jurists (ICJ) and Swiss Section (ICJ-CH), TPI 2022, p. 9.

⁷⁶ See IPCC SR 1.5 sec. 7.2.10 and [Urgenda v. The Netherlands](#) §4.4 and §5.7.8, referring to the judgment of the U.S. Supreme Court in the case of [Massachusetts v. EPA](#), 549 U.S. 497 (2007), pp. 22-23, which made precisely this point. See also [Neubauer and Others v. Germany](#), §§32, 119, 122.

⁷⁷ Prof. Evelyn Schmid and Prof. Véronique Boillet, University of Lausanne, TPI 2022, §§33-39.

⁷⁸ Prof. Evelyn Schmid and Prof. Véronique Boillet, University of Lausanne, TPI 2022, §36.

⁷⁹ See for example Swiss Supreme Court, [BGE 139 I 16](#) E. 5 (Ausschaffungsinitiative).

⁸⁰ Prof. Evelyn Schmid and Prof. Véronique Boillet, University of Lausanne, TPI 2022, §39; Group of Academics from the University of Bern, TPI 2022, p. 10.

2030 is imminent. We respectfully say that in light of the failures to date, it is essential that this Court, as other Courts have done, order Switzerland to take the necessary measures. This includes concrete emission reductions, as requested.

63. Members of the Court, there is no time left; dangerous climate change is with us; the Applicants are suffering and fear the future. Switzerland has no excuse for its failures to protect the Applicants' rights. It has known the harm that inadequate action would cause and, despite that knowledge, it has failed to act with sufficient urgency and application, undermining global efforts and mutual trust. If a country as rich and technologically advanced as Switzerland cannot do its fair share – I go further, does not even take the trouble to assess what its fair share should be – what hope is there that other countries will step up to the challenge we face?
64. The case before you is of momentous importance. The Applicants respectfully request that you grant the relief they seek.