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European Court of Human Rights, *Verein KlimaSeniorinnen* and others v. Switzerland (Application no. 53600/20)

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Third party intervention under article 44(3) of the Rules of Court

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Summary:

- The main matter in dispute is an alleged omission. The applicants invoke an omission by state organs who have allegedly failed to take sufficient measures. The attributable facts concern this omission, not the effects of the omission occurring abroad.
- The invocation of a violation – which is the first step in assessing victim status – must inevitably involve an analysis of the positive obligation. International law on the responsibility of states for internationally wrongful acts confirms that an allegation of a violation by omission is evaluated by comparing the measures taken with those required by an international obligation. The impact on the claimants of the omission is assessed in a second step (see § 20ff) and the extent of the obligations must be assessed in light of the principles of precaution and prevention.
- The Court has already been called to evaluate measures adopted by domestic legislators or to interpret the rights protected under the ECHR in the light to other international instruments. In this respect, the peculiarities of the Swiss constitutional system (semi-direct democracy) do not affect the scope of the subsidiarity principle, nor the potential indication of general measures with regard to Art. 46 ECHR.

1. On 24 October 2022, the President of the Grand Chamber granted us leave to submit observations before the Court. We are professors at Lausanne University, express our own views and write in a personal capacity.[1]
2. Our intervention will address three topics: Part I is dedicated to the scope of the case and jurisdiction. Part II describes the interconnection between questions concerning admissibility and those concerning the material scope of articles 8 and 2 of the Convention and their interpretation in light of prevention and precautionary principles. Part III aims to establish if the peculiarities of a semi-direct democracy can have an impact on subsidiarity and on potential general measures.

I. The scope of the case, attribution, and jurisdiction

3. Regarding arts. 2 and 8 ECHR, the subject of the dispute is the alleged failure to comply with the positive obligation to put in place a legislative and administrative framework to protect against climate threats. The facts attributable to the state concern an alleged omission by state organs, in particular the legislator – and not the effects of this omission (see § 16). These facts fall within the Swiss territorial jurisdiction. The arguments raised by the applicants in October 2021 on emissions generated abroad illustrate that the current regulatory framework of the respondent State involves a very significant footprint, but it does

[1] For further details on our research and publications, see www.unil.ch/unisciences/evelyneschmid, www.unil.ch/unisciences/veroniqueboillet.

not seem necessary to address the issue of extraterritorial jurisdiction since the alleged weaknesses in the regulatory framework emanate from the Swiss legislature and threaten individuals on Swiss territory.

II. The scope of the obligation at stake and its consequences on admissibility

4. The complex relationship between the acknowledgement of positive obligations and the possibility of invoking them before courts calls for an analysis of whether the obligation to protect against large-scale threats has consequences on the analysis of admissibility conditions under the ECHR. In its questions to the parties, the Court asked two distinct questions on the victim status (question 3) and on the applicability of the Convention provisions (question 4).

5. The analysis of the victim status raises conceptual questions in relation to the destabilization of the climate. In particular, the nature of the violations alleged by the applicants makes it difficult to strictly separate the questions related to victim status and the applicability of the Convention provisions. Under customary international law on the responsibility of States for internationally wrongful acts, the identification of a violation by omission necessary implies a comparison between the conduct of the State and the international obligation. It is only afterwards that the personal – direct or potential – impact on the applicants' well-being can be addressed.

A. Positive obligations in the ECHR and their classification

6. The ECHR contains positive obligations that the Court and the legal doctrine had the opportunity to analyze. On a general level, positive obligations are those that 'require [member States] to take action'.[2] They are relevant when there is (1) a foreseeable and significant risk concerning the enjoyment of a right, (2) and a possibility for the State to prevent or limit a risk or remedy its consequences. A preliminary and necessary condition is that the State knew, or ought to have known,[3] of the existence of a real and immediate risk to a significant legal value.[4] In the *Balmer-Schafroth and others c. Switzerland* case, the Grand Chamber referred to a 'danger that was not only serious but also specific and, above all, imminent'.[5] In the *Di Sarno and others v. Italy* case, the Court underlined that 'the crucial element (…) is the existence of a harmful effect on a person's private or family sphere and not simply the general deterioration of the environment'.[6] We will address the intensity and time horizon of the threat, as well as the issue of the effects on the applicants, in section II.E. below.

[2] This simple definition was given in Judge Martens' Dissenting Opinion, *Gül v. Switzerland*, 1996, §7.

[3] ECtHR, *Osman v. United Kingdom* (GC), 1998, § 116: It 'must be established (…) that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.'

[4] Ibid, § 116, 'real and immediate risk'. ECtHR, *Opuz v. Turkey*, 2009, § 131: 'real and immediate risk to life'.

[5] ECtHR, *Balmer-Schafroth and others v. Switzerland* (GC), 1997, § 40. The expression 'above all, imminent' recurs in ECtHR, *Athanassoglou and others v. Switzerland* (GC), § 51.

[6] ECtHR, *Di Sarno and others v. Italy*, 2012, § 80. Quoting ECtHR, *Kyrtatos v. Greece*, 2003, § 52 ('the existence of a harmful effect on a person's private or family sphere'); and ECtHR *Fadeïeva v. Russia*, 2005, § 68, 'the interference must directly affect the applicant's home, family or private life').

7. The State must be *factually*[7] and *legally*[8] capable of influencing the risk. It is not essential to know if a State can, or not, eradicate the consequences that climate change has on the applicants: the question is whether the State can *influence* the risk.[9]
8. The Court and the legal doctrine have suggested several categories for positive obligations (e.g. procedural, preventive or corrective positive obligations). The present case primarily concerns preventive positive obligations under articles 2 and 8 ECHR: the applicants complain of the lack of measures against climate change, and of the present and future effects of such inaction.[10] Among preventive positive obligations, it is possible to discern two sub-categories: the *one-time* positive obligations to intervene, and the positive obligations to *limit and prevent* damages on a wider scale. A considerable number of cases concern obligations of the first kind. This is, for instance, the situation of a non-State actor threatening another person, e.g. in the context of domestic violence. If the State has knowledge of the threat and has the means to avoid it, then it has the obligation to intervene (e.g. through police measures).
9. The second kind of preventive positive obligation – the obligation to prevent harm on a wider scale – is also acknowledged by the Court's case law. The Court refers to a 'primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence' against threats.[11] The protection by law, or the obligation to put in place a legislative framework designed to effectively protect Convention rights, has even been referred to as 'the first and foremost positive obligation'.[12] The protection by law means that States develop legislation (in the wider meaning) in a way that allows to prevent and remedy threats to the enjoyment of rights. In this scenario, danger is less specific, more diffuse, it does not derive necessarily from a single non-State actor, and it potentially manifests itself within a longer timeframe. Therefore, it has been acknowledged that States must, for instance, adopt measures against discrimination,[13] criminalise certain behaviours in order to prevent them,[14] or protect through 'reasonable and appropriate measures' inhabitants against environmental pollution.[15] It is not only an obligation to intervene in specific incidents against ongoing non-State violations, but also an obligation to regulate, in order to avoid and prevent risks that might affect the enjoyment of rights protected under the ECHR.
10. The case *Bevacqua and others v. Bulgaria*, dealing with domestic violence, is interesting in this regard as it provides a description of preventive obligations of both kind: the Court not only identifies the obligation

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[7] *Osman v. United Kingdom* (GC), 1998, § 116: 'in a manner which fully respects the due process and other guarantees'.

[8] International Court of Justice (ICJ), Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007, § 430: 'The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law.'

[9] *Osman v. United Kingdom* (GC), 1998, § 116 (the Court uses the verb 'pallier le risque' in French / 'avoid the risk' in English). The International Court of Justice used the terms 'capacity to influence', 'so far as possible': ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro,* merits, (supra n. 8, § 430.

[10] And of corrective obligations concerning the current effects on climate change.

[11] ECtHR, *Öneryıldız c. Turkey*, GC, 2004, § 89.

[12] Laurens Lavrysen, "Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect ECHR Rights," in *Human Rights and Civil Liberties in the 21st Century*, ed. Yves Haeck and Eva Brems (Dortrecht: Springer, 2014), 69-129: p. 85. Referring to Keir Starmer, "Positive Obligations under the Convention," in *Understanding Human Rights Principles*, ed. Jeffrey Jowell and Jonathan Cooper (Oxford: Hart, 2001), 139-59: p. 152.

[13] ECtHR, *Marckx v. Belgium*, 1979, § 31.

[14] ECtHR, Söderman v. Sweden (GC), 2013, § 85 ('to maintain and apply in practice an adequate legal framework affording protection').

[15] ECtHR *Fadeïeva c. Russie*, 2005, § 89. v. aussi ECtHR, *Powell and Rayner v. United Kingdom*, 1990, § 41; *Guerra and others v. Italy*, 1998, § 58.

to intervene in the specific incident through police forces, but it also reminds to the respondent State its positive obligation to put in place an adequate legislative and administrative framework against domestic violence – i.e. an obligation of the second kind – for instance by adopting measures indicated in a recommendation elaborated at the intergovernmental level.[16]

11. While the distinction between the two categories is not clear-cut, it is nonetheless useful, as it allows to pinpoint the difficulties that the examination of a violation implies in respect of the establishment of the victim status. For the first sub-category – the *one-time* positive obligations – there is a physical and temporal closeness between the person and the threat, and this allows to tackle the issue of the victim status more easily than for the second category. The case of obligations to protect against threats requiring more than one-time intervention is examined below.

B. Victim status: The starting point

12. The Court may receive applications from any person 'claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention of the Protocols thereto' (art. 34 ECHR). The Court verifies whether an applicant was 'directly affected' by the measure complained of (direct victim)[17] and/or if he or she is member of a group who risks 'being directly affected' by the legislation complained of (potential victim).[18]

C. Victim status in case of disputed omissions

13. It is impossible to determine whether a person can be considered as the victim of a violation without preliminary establishing the scope of the invoked international obligation. The same is true in cases of alleged interferences (and thus negative obligations), where the examination of the victim status requires equally, at least implicitly, a preliminary examination of the scope of protection of the invoked rights.

14. Rigidly separating the analysis of the victim status from that of the invoked obligation entails the risk that the nature of the obligation at stake determines the issue of admissibility: this is not desirable under article 1 of the Convention and the effective protection of 'rights that are not theoretical or illusory but rights that are practical and effective.'[19] Admittedly, the positive obligations at issue in the present case are addressed to the legislator (and they thus interest political institutions),[20] but their nature cannot have the consequence of rendering any application inadmissible for procedural reasons.[21] If such an approach was adopted, a two-speed protection would be put in place: the allegations concerning interference or violation of *one-time* positive obligations would benefit of a more favourable treatment than the allegations concerning violations of obligations to protect against potentially severe threats on a larger scale. The Court can avoid this gap by considering that the allegation concerns an alleged omission of protection against a diffuse threat, requiring more than one-time intervention. Such an approach is justified also in respect of the general international law of States responsibility for omissions.

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[16] ECtHR, *Bevacqua and others v. Bulgaria*, 2008, § 83. Quoted in Nesa Zimmermann, "Legislating for the Vulnerable? Special Duties under the European Convention on Human Rights," *Swiss Review International and European Law* (2015) 539-62: p. 554.

[17] ECtHR, *Roman Zakharov v. Russia* (GC), 2017, § 164.

[18] See below, part II.E.

[19] ECtHR, *Airey c. United Kingdom*, 1979, § 24.

[20] Federal Supreme Court ruling of May 5, 2020, 1C_37/2019, [Verein KlimaSeniorinnen Schweiz et al. gegen Eidgenössisches Departement für Umwelt, Verkehr, Energie und Kommunikation (UVEK)], consideration 4.3.

[21] See also Johannes Reich, "Bundesgericht, I. öffentlich-rechtliche Abteilung, 1C_37/2019, 5. Mai 2020 [Verein KlimaSeniorinnen Schweiz et al. gegen Eidgenössisches Departement für Umwelt, Verkehr, Energie und Kommunikation (UVEK)]," *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht* 121, no. 9 (2020) 489-507: 503, qui argumente qu'il n'est pas pertinent de vouloir séparer « le droit » de « la politique » par le biais du droit procédural.

D. Customary international law: identifying a violation requires a comparison of the State conduct with the international obligation

15. About twenty years ago, the United Nations International Law Commission (ILC) adopted the Articles on the Responsibility of States for Internationally Wrongful Acts ("ILC Articles").[22] The ECtHR has quoted the ILC Articles repeatedly, in light of their relevance under general international law.[23] The responsibility of a State is engaged: if an act or omission[24] can be attributed to it; if there is violation of an international obligation; and if no circumstance preclude wrongfulness. In the present case, the ILC Articles help analyzing the alleged omission and identifying a potential violation for the purpose of interpreting art. 34 ECHR.

16. The question of attribution poses no difficulty in the present case, as the alleged omission emanates from State organs (which, according to the applicants, should have acted more).[25] The facts to attribute concern the omission by the state, not the effects thereof.

17. In order to examine the second condition for responsibility, i.e. to establish if the omission constitutes a violation of an international obligation of the respondent State, art. 12 of the Articles establishes that '[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character'. The Commentary points out that '[i]n the terms of article 12, the breach of an international obligation consists in the disconformity between the conduct required of the State by that obligation, and the conduct actually adopted by the State—i.e. between the requirements of international law and the facts of the matter.'[26] In order to interpret the wording of art. 34 ECHR ('claiming to be the victim of a violation') when an unlawful omission is alleged, the ILC Articles impose to evaluate the measures adopted by the State against what is required under the international obligation – in the present case, articles 2 and 8 of the Convention, interpreted in the light of present-day conditions as determined in accordance with 'best available science'[27] and 'any relevant rules of international law applicable in the relations between the parties'[28] (question 5.3).

18. Ultimately, the ILC Articles and the case law of the International Court of Justice[29] uphold the idea that the Court, when interpreting art. 34 ECHR, must necessarily compare the positive obligations under

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[22] ILC Articles on the Responsibility of States for Internationally Wrongful Acts, annexed to the General Assembly resolution 56/83, 12 December 2001.

[23] For recent overviews, see e.g. Helen Keller etReto Walther, "Evasion of the International Law of State Responsibility? The ECtHR's Jurisprudence on Positive and Preventive Obligations Under Article 3," *The International Journal of Human Rights* 24, no. 7 (2020) 957-78.

[24] ILC Articles concern acts and omissions, ILC Articles, art. 2.

[25] ILC Articles, art. 4. See also Margaretha Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights Under International Law* (Oxford: Hart, 2020), 88 ; Pierre d'Argent etAlexia de Vaucleroy, "Le contenu de l'omission illicite : la non utilisation de moyens raisonnables," in *Le standard de due diligence et la responsabilité internationale : Journée d'études du Mans*, ed. Sarah Cassella (Paris: Pedone, 2018), 255-78: 260.

[26] Commentary to ILC Articles, *Yearbook of the International Law Commission, 2001,* vol. II(2), p. 54 (§2 commentary to art. 12).

[27] Paris Agreement, art. 4(1). Needless to say, the Paris Agreement is relevant for the interpretation of the respondent State's obligations under the ECHR as regards climate issues.

[28] Vienna Convention on the Law of Treaties 1969, art. 31(3)c.

[29] The International Court of Justice has confirmed that identifying the violation by omission requires evaluating measures taken against those that are required under the primary obligation. See e.g. in its very first judgment: International Court of Justice, Corfu Channel case (*United Kingdom of Britain and Northern Ireland v. Albania*), judgment on the merits of 9 April 1949, p. 23.

articles 2 and 8 against the measures adopted by the respondent State. The link between the alleged omission and the applicants is to be evaluated afterwards.

E. Are the applicants 'directly affected' by the alleged unlawful omission?

19. If the Court finds a potential disconformity between the measures adopted by the respondent State and articles 2 and 8 of the Convention, then, under article 34, it must be verified if the applicants can claim to be victims. To claim to be victim of a violation, an applicant must be able to show that he or she was 'directly affected' by the measure complained of,[30] i.e., in the present case, the allegedly omitted adoption of sufficient measures notwithstanding an international obligation binding upon Switzerland. The Court has pointed out that article 34 concerns persons 'who would have a valid and personal interest in seeing it [the violation] brought to an end'.[31] A person can claim to be a potential victim if he/she risks 'being directly affected' by a certain conduct (active or passive), e.g. because he/she is a member of a group who risk being prejudiced by the measure complained of.[32] This criterion, which rules out any *actio popularis*, imposes an analysis of the situation of the applicants and their peculiar vulnerability (here: as elderly women but importantly also the association required to represent individuals confronted with particularly complex legal problems[33]).

20. Three questions arise on the link between the alleged omission and the applicants (relevant to questions 3 to 5 of the Court): a) Does the necessary link between the applicants and the omission complained of require evidence of a prejudice?; b) What is the time-frame within which the effects of an omission must occur in order to grant the status of potential victim ?; c) What is the necessary degree of intensity?

1. Absence of the prejudice

21. Article 34 ECHR requires that the person be, or risks being, 'directly affected by the act or omission in issue'. However, the existence of a violation of the Convention is conceivable even in the absence of prejudice, as the latter 'is relevant only in the context of [just satisfaction]'[34] and – after Protocol 14 – in the context of art. 35 § 3 b ECHR. The Convention does not require that the omission causes prejudice in order to grant victim status. It is necessary that the applicants are, or risk being, 'directly affected'.

2. Time-frame

22. In respect of positive obligations, the risk of being directly affected must be real and – according to the Court in *Osman v. United Kingdom* and other cases – *immediate*.[35] However, several authors have pointed out that this requirement is not systematically dealt with in the case law: it implies sometimes that the

[30] ECtHR, *Tănase v. Moldova* (GC), 2010, § 104; *Burden v. United Kingdom* (GC), 2008, § 33; *Lambert and others v. France* (GC), 2015, § 89.
[31] ECtHR, *Vallianatos and others v. Greece* (GC), 2013, § 47; quoting *Defalque v. Belgium*, 2006, § 46; *Tourkiki Enosi Xanthis and others v. Greece*, 2008, § 38.
[32] E.g. ECtHR, *Open Door and Dublin Well Woman v. Ireland*, 1992, § 44: In this case, two applicants were not pregnant, but they could claim to be victims of the prohibition to distribute to pregnant women information about abortion because they were part of a group risking to be directly prejudiced by the measure complained of. See also *Burden v. United Kingdom* (GC), 2008, § 35.
[33] ECtHR, *Gorraiz Lizarraga v. Spain,* 2004, § 38.
[34] ECtHR, *Amuur v. France*, 1996, § 36; ECtHR, *Balmer-Schafroth and others v. Switzerland* (GC), 1997, § 26; ECtHR, *Brumărescu v. Romania* (GC), 1999, § 50.
[35] ECtHR, *Osman v. United Kingdom* (GC), 1998, § 116.

harm is imminent, sometimes that it is foreseeable.[36] The notion of foreseeability must be apprehended, in environmental matters, by the principles of prevention and precaution.[37]

23. On the basis of these considerations, it appears that the temporary requirement must be interpreted, in climate matters, in the light of the principles of prevention and precaution. Specifically, the question is whether the lack of measures to reduce climate risks threatens the health and lives of the applicants in a way that is sufficiently foreseeable to admit their victim status. In this regard, the Court has acknowledged that account must be taken of the special features of the activity in question, 'particularly with regard to the level of the potential risk'.[38]

3. Intensity

24. To grant victim status, the Court requires a 'level of severity' in environment cases[39] or a 'degree of probability' between the threat and individuals' well-being.[40] In the decision on admissibility in the case *Ouardiri v. Switzerland,* the majority quotes a phrase recurring in three other decisions on admissibility, and in the judgment *Gorraiz Lizarraga and others v. Spain,* according to which there must be a 'sufficiently direct link between the applicant and the prejudice which they consider they have sustained on account of the alleged violation'. In *Ouardiri* the Chamber adds the term 'whether the victim is direct, indirect or potential'.[41] However, these wordings do not seem compatible with the very idea of potential victims,[42] nor with the above-mentioned case law on the prejudice criterion.

25. Nevertheless, it must be noted that a certain intensity of the threat is required under art. 34 ECHR. In the *Cordella v. Italy* judgment, the Court has accepted that an individual is 'personally affected' by the measure complained of if he/she finds him/herself in a situation 'of high environmental risk', in which the environmental threat 'becomes potentially dangerous for the health and well-being of those who are exposed to it'.[43]

F. Conclusions on victim status: the Court cannot avoid pronouncing itself on substantive questions

26. When the Court will examine article 34 ECHR, it will need to pronounce itself on substantive issues. We have seen that the analysis of the victim status in case of alleged omission against extended (or 'non-one-time') threats inevitably requires an evaluation of the behavior of the respondent State against the

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[36] See notably these three articles. The authors conclude that the test of a 'real and imminent risk' is not adequate for positive obligations to prevent harm on a wide scale. Vladislava Stoyanova, "Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights," *Human Rights Law Review* 18, no. 2 (2018) 309-46: 341 ; Justine Bell-James and Briana Collins, "Human Rights and Climate Change Litigation: Should Temporal Imminence Form Part of Positive Rights Obligations?," *Journal of Human Rights and the Environment* 13, no. 1 (2022) 212-37: 219 ; Franz Christian Ebert etRomina I. Sijniensky, "Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems: From the Osman Test to a Coherent Doctrine on Risk Prevention?," *Human Rights Law Review* 15, no. 2 (2015) 343-68: 365ff.

[37] Principle 15 of the Rio Declaration, read together with the other instruments mentioned in question 5.3.2 of the Court (see also § 31f).

[38] ECtHR, *Öneryıldız v. Turkey* (GC), 2004, § 90.

[39] ECtHR, *Fadeïeva v. Russia*, 2005, § 70.

[40] ECtHR, *Balmer-Schafroth and others v. Switzerland* (GC), 1997, § 40.

[41] ECtHR, *Ouardiri v. Switzerland* (admissibility decision), 2012, § 1 (our translation), quoting (adding potential victims) the following decisions: Commission, *Taurira and others v. France*, 1995; *Association des amis de Saint-Raphaël et de Fréjus and others v. France*, 1998; *Comité des médecins à diplômes étrangers and others v. France* 1999; ECtHR, *Gorraiz Lizarraga v. Spain* 2004, § 35.

[42] ECtHR, *Taşkın and Others v. Turkey*, 2004, §111-113 (speaking of a threat which 'may affect' applicants, rather than a threat which 'has affected').

[43] ECtHR, *Cordella and others v. Italy*, 2019, § 100-109.

primary obligation (that is to say, the obligations under articles 2 and 8 ECHR). In the event of a wrongful omission, an applicant can 'claim to be victim' of a violation of the ECHR is she/he is, or risk being, directly affected by said omission.

III. What is the role of semi-direct democracy?

27. The Court asked, inter alia, whether Switzerland has complied with the positive obligations imposed under articles 2 and 8 ECHR, particularly with regard to its margin of appreciation, and to what extent international environmental law should be considered (question 5.3). This section points out that the Court has already had to assess Swiss legislation in the past. Considering the subsidiary nature of the ECtHR's jurisdiction, and that the obligations invoked by the applicants in the present case are mainly addressed to the domestic legislator, the question arises whether – and at what extent – the Court is called to reduce the width of the freedom enjoyed by the democratically elected legislator. In order to answer these questions, we suggest comparing the issues at stake in the present case with another case which the Court has had to face in the past, and to examine the extent to which the instruments of Swiss semi-direct democracy must be taken into account by the Court (questions 5.3 and 8).

A. The national legislator before the ECHR

28. As is evident from questions 5.2 and 5.3, it is important to remind that the Convention binds all State organs, including the legislator.[44] More specifically, the Court requires the adoption of measures – notably, legislative ones – whenever it ascertains the presence of lacunae determining a violation of the Convention.[45] As the Court noted already in 1979, there is no room to distinguish between acts and omissions: States cannot limit themselves to 'remain passive', because the Convention is not limited to 'primarily negative undertakings' but requires from the States the adoption of 'positive measures'.[46]
29. Switzerland has already made legislative amendments following a judgment from the Court. For example, Switzerland was held responsible by the ECtHR in 1994 because of its legislation that did not grant the same rights to husband and wife as regards their name.[47] The parliamentary works are interesting in this respect. They allow to describe the impact that a judgment can have on the legislator: conscious of their obligation to render legislation compatible with the ECHR, members of the Federal Assembly forwarded their draft to the Commission for legal affairs 'with the assignment of limiting itself to the mere modifications that are absolutely necessary in light of the judgment issued by the [ECtHR] in the Burghartz v. Switzerland case'.[48] As demonstrated by the scope of the assignment given to the Commission for legal affairs, the National Council clearly understood that, if the Swiss legislator is free as regards the choice and identification of the measures that need to be adopted, it is however limited as to their content, because the legislative review must comply with the standards of the ECHR.
30. To conclude, it emerges from this example that the ECtHR already intervened to evaluate Switzerland's alleged shortcomings to its obligations to adopt measures aiming at granting compliance with the Convention, and that the judgments had an impact on the Swiss legislator.

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[44] Cf. art. 46 ECHR, Zimmermann (supra n. 16), p. 545; Almut Wittling-Vogel, "The Role of the Legislative Branch in the Implementation of Judgments of the ECtHR," in *Judgments of the European Court of Human Rights: Effects and Implementation*, ed. Anja Seibert-Fohr and Mark E. Villiger (Baden-Baden: Nomos, 2015), 59-74.

[45] Zimmermann (supra n. 16), p. 547.

[46] ECtHR, *Airey v. Ireland*, 1979, § 25 and e.g. also ECtHR, *Marckx v. Belgium*, 1979, § 31.

[47] ECtHR, *Burghartz v. Switzerland*, 1994. See also ECtHR, Affaire *Verein gegen Tierfabriken Schweiz (VGT) v. Switzerland (n° 2)*, 2009, (GC), § 78 ss.

[48] Parliamentary initiative 'Nom et droit de cité des époux. Egalité', Report of the Commission on Legal Affairs of the National Council, Federal Gazette 2009 6843, 6845.

B. The Swiss legislator's margin of appreciation in environmental matters

31. When translating these findings in the field of environment, it is important to remember that positive obligations imply a duty of care both in respect of art. 8 ECHR[49] and 2 ECHR.[50] According to the Court, States have a 'primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against damages to the environment and to human health'.[51] As to the role played by international environmental law in the interpretation of the ECHR by the Court (question 5.3.2), it must be reminded that the Court has already had the opportunity to clarify the scope of the duty of care by reference to the Stockholm and Rio Declarations.[52] In this regard, it is accepted that a certain 'synergy of sources' is present in the ECtHR case law, pertaining to a 'normative densification'.[53] The ratifications of the Paris Agreement, the massive support of the UN General Assembly resolution A/76/L.75 of 26 July 2022 and the contribution of States to the reports of the Intergovernmental Panel on Climate Change (IPCC) are part of State practice within the meaning of Article 31(3) of the Vienna Convention on the Law of Treaties. Through this practice, States admit to limiting their margin of appreciation regarding climate risks and the implementation of positive obligations under the ECHR.

C. Peculiarities of the Swiss democratic system: can the instruments of semi-direct democracy influence the analysis?

32. As previously noted, Switzerland has already been required to amend its legislation in the past. In this respect, it is worth recalling that the availability of democratic instruments does not increase the margin of appreciation (question 5.3.1) and does not allow a State to exempt itself from its obligations. This is valid both in respect of referendums and in respect of popular initiatives.

33. As for the referendum, it is certainly susceptible of threaten a legislative reform (see art. 140 al. 1 let. a Federal Constitution). This was the case of the federal legislative draft on Co2 in June 2021.[54] However, a State cannot exempt itself from its international obligation by invoking its own domestic law. This rule derives from art. 27 of the Vienna Convention on the Law of Treaties,[55] and the ECtHR has already had the opportunity to remind the rule[56] in connection with the Convention obligations.

34. As for the popular initiative, typical instrument of Swiss democracy, does it represent – as claimed by the Federal Supreme Court in the contested judgment[57] or the Swiss government in its response (ch. 4) – a sufficient alternative, allowing the applicants to assert their rights?

35. It is necessary to underline that, notwithstanding the clear interest of these instruments, neither the Convention nor the Federal Constitution make the enjoyment of a right conditional upon previous use of the instrument of semi-direct democracy.

36. In addition to requiring the holding of political rights – which implies the exclusion of minors, foreigners and persons with diminished legal capacity (see art. 136 al. 1 Federal Constitution) – it will be

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[49] ECtHR, *Tătar v. Romania*, 2009, § 88.
[50] ECtHR, *Öneryildiz v. Turkey*, 2004, § 90.
[51] ECtHR, *Tătar v. Romania*, 2009, § 88 and references quoted therein.
[52] See e.g. ECtHR, *Tătar v. Romania*, 2009, § 111 and 120.
[53] Paul Baumann, *Le droit à un environnement sain et la Convention européenne des droits de l'homme (Thèse Nantes)* (Paris: LGDJ, 2021), p. 212 s. See also the references indicated in footnotes n. 324 and 337. By way of example, see also ECtHR, *Nada v. Switzerland*, 2012 (GC), § 169.
[54] Swiss Federal Chancellery, Popular vote of June 13, 2021, Provisional official result, https://www.bk.admin.ch/ch/f/pore/va/20210613/can644.html.
[55] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, art. 27.
[56] E.g. ECtHR, *N.D. and N.T. v. Spain* (GC), 2020, § 109.
[57] Judgment of the Swiss Federal Supreme Court 146 I 145, consideration 4.3.

demonstrated that the popular initiative is not a tool that can guarantee the implementation of Switzerland's obligations to protect the applicants' fundamental rights.[58]

37. First of all, it is important to remind that, if initiatives are frequently used, they are however rarely accepted by people and cantons in Switzerland.[59] In addition, when they are accepted, the implementation of the new constitutional provision is everything but automatic.

38. Very few initiatives have led to the adoption of directly applicable constitutional provisions,[60] and even when this is the case, their effect is limited by reason of a peculiarity of the Swiss constitutional system, i.e. art. 190 of the Federal Constitution. This provision prevents the declaration of invalidity of federal laws even if they are unconstitutional. In practice, this means that, if a popular initiative on the protection of environment is accepted, it will not prevent the adoption of federal laws having negative effects on the environment, as their unconstitutionality cannot be remedied by the Federal Supreme Court.[61]

39. A popular initiative mandating the Federal Assembly to legislate along certain guidelines does not have more chances of granting respect for fundamental rights. Constitutional provisions of this kind can certainly prompt the legislative procedure on a specific topic, but they do not grant conformity. If the Parliament does not follow – or does not follow entirely – the substantive constitutional guidelines to which it is bound and adopts an insufficient law, no domestic legal instrument allows the declaration of invalidity of its choice. The above-mentioned peculiarity of the Swiss legal system is contained in the immunity clause under art. 190 Federal Constitution, according to which 'the Federal Supreme Court and the other judicial authorities apply the federal acts and international law', and article 189 al. 4 Federal Constitution (like art. 82 of the federal Act on the Federal Supreme Court *a contrario*) excluding any control *in abstracto* of federal normative acts. The consequence is that, even if a popular initiative leads to the adoption of a constitutional provision mandating the legislator to adopt a regulation aiming at reducing Co2 emissions, no domestic legal procedure can guarantee that the legislator will act.[62] Furthermore, in cases where an initiative prompts the Federal Assembly to draw up a counter-proposal (direct or indirect), the said draft then proposes a less ambitious version compared to the initial objectives of the initiative.[63] In light of the above, the peculiarities of the Swiss democratic system do not allow a specific interpretation of the subsidiarity principle in respect of Switzerland.

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[58] Cf. Véronique Boillet, "Direct Democracy or Climate Litigation ? On the Swiss Right of Initiative as a Tool Against Climate Change", https://verfassungsblog.de/direct-democracy-or-climate-litigation/.

[59] Swiss Federal Chancellery, Provisional voting results of 13 June 2021, https://www.bk.admin.ch/ch/f/pore/va/20210613/can644.html. It should also be noted that the new project developed as an indirect counterproposal to the 'Glacier Initiative' is also the subject of a request for a referendum (referendum deadline 19 January 2023), FF 2022 2403).

[60] Nagihan Musliu, *Die Umsetzung eidgenössischer Volksinitiativen (Thèse Zurich)* (Zurich: Dike, 2019), p. 27.

[61] Art. 190 of the Federal Swiss Constitution, *a contrario*; art. 82 let. b of the Federal Act of the Federal Supreme Court, RS 173.110.

[62] René A. Rhinow, "Der Bundesrat als Ersatzgesetzgeber?," *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht* 116, no. 7 (2015) 345-46.

[63] This is the case, for example, of the indirect counterproposal that led to the conditional withdrawal of the 'Glacier Initiative', which, in contrast to the initiative, refrains from enshrining a ban on of fossil fuels. FF 2022 2403.