INTER-AMERICAN COURT OF HUMAN RIGHTS

REQUEST FOR AN ADVISORY OPINION

Presented by

The Republic of Colombia and the Republic of Chile

with regard to

'The Climate Emergency and Human Rights'

WRITTEN OBSERVATIONS OF LAW

Submitted by the

University College London

Public International Law Pro Bono Project

Pursuant to Article 73(3) of the

Rules of Procedure of the Inter-American Court of Human Rights

Submitted on behalf of the UCL PIL Pro Bono Project on 18 December 2023 by:

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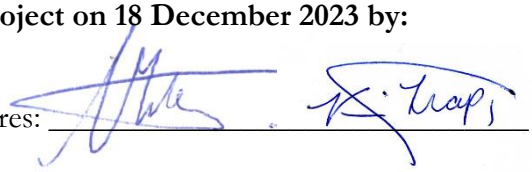
Signatures: 

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> "We have built up for ourselves and our fellow creatures, environmental problems of an unprecedented scale and complexity. One cause for hope is that […] we have the understanding or the means of understanding what is happening, and what we could do about it. On the science there is a remarkable degree of consensus. The problem is to translate that understanding into political action. Here above all we may find ourselves looking to the law to provide a bridge, and to the judges to offer at least some of the building blocks."[1]

1. Introduction

The UCL PIL Pro Bono Project ('the PILPBP') respectfully submits these written observations of law in response to the Request for an Advisory Opinion on 'Climate Emergency and Human Rights' ('the Request') submitted by the Republic of Colombia and the Republic of Chile on 9 January 2023, and in accordance with conventional and procedural rules governing third party interventions before the Inter-American Court of Human Rights (the 'Court') in the exercise of its advisory function.

Information about the PILPBP is set out in Annex 1. The details of the individuals who contributed to the preparation of these written observations are set out in Annex 2.

This submission begins with a note on the nature, scope and purpose of these written observations (Section 2), and a brief consideration of the questions of jurisdiction and admissibility (Section 3). It then provides an overview and explanation of the links between climate change and human rights law (Section 4). Section 5 provides a brief overview of the recognised obligations States have in regard to climate change under international environmental law and human rights law, and further details how the current mitigation and adaptation measures are not sufficient to adequately meet these obligations.

This submission then focuses on two aspects of the Request.

First, the submission focuses on the role of cooperation in the human rights response to climate change. Section 6 examines States' obligations to cooperate in the context of climate change. It argues that the meaning of these obligations can be informed by the law which has developed regarding cooperation in the context of transboundary environmental harm, which gives specific content to the general obligations to cooperate regarding regional and global environmental harm. However, it is important to note that this law requires some adaptation and is not as clearly established in the context of regional or global efforts to respond to climate change. The obligation to cooperate does, however, evidently include the sharing of information to develop global knowledge and understanding of climate change and its impacts, which supports the ongoing identification of a scientific consensus on the risks of climate change and the measures required to respond to those risks.

The second part of this submission concerns the role of this scientific consensus in the human rights response to climate change. Section 7 introduces the idea of scientific consensus and provides an overview of the sources of scientific consensus on climate change and their relevance to the legal questions posed to this Court. Section 8 then considers how scientific consensus comes

[1] Lord Carnwath, "Environmental law in a global society", 28th Sultan Azlan Shah Lecture at Kuala Lumpur (9 October 2014). Available at: http://www.bailii.org/uk/other/speeches/2014/141009.html.

into play when States discharge their human rights obligations, especially in the context of environmental damage. It identifies approaches and standards applicable to the climate change context to produce an analytical framework which seeks to (a) identify, in the context of States' approaches to the risks posed by climate change on human rights, where scientific consensus fits into the existing legal framework, and (b) consider how scientific consensus can inform an evaluation of States' chosen approaches to protecting human rights.

It is our overall submission that given the urgency of the climate crisis, and the limited scope of binding measures in international environmental law treaties, human rights law has a critical role to play alongside international environmental law in articulating the actions which states are required to take. We urge the Court to play its part in this important work, and hope this submission provides some assistance.

2. The Nature, Scope and Purpose of these Written Observations

The purpose of these written observations is to assist the Court, including by providing information about the practices of other human rights bodies and courts faced with similar questions under their respective legal instruments. It should be noted that the discussions on the links between climate change and human rights as well as the scope of States' obligations in regard to these are still recent, and could be considered novel legal issues.[2] Few international or regional courts or United Nations ('UN') treaty bodies have commented in detail on the matter. Though it is a growing and rapidly developing area of law,[3] a number of key legal questions remain to be clarified.[4] This presents an opportunity for the Court to provide clarity as to existing standards and practices, and also to provide guidance on the principles which should shape the law as it continues to develop.

Some of the material addressed in this submission is from international or other regional sources. It is our submission that this material may be relevant to the Request as both a formal and informal

[2] E Fisher, E Scotford, & E Barritt, "The Legally Disruptive Nature of Climate Change" (2017) 80 Modern Law Review. Available at: https://doi.org/10.1111/1468-2230.12251.

[3] See UN Human Rights Council, "Resolution on Human Rights and Climate Change", adopted on 12 July 2019, UN Doc A/HRC/RES/41/21 ("UN HRC Resolution on Human Rights and Climate Change 2019"). Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/223/65/PDF/G1922365.pdf?OpenElement; UN Human Rights Council, "Resolution on the Mandate of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change", adopted on 8 October 2021, UN Doc A/HRC/RES/48/14. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/223/65/PDF/G1922365.pdf?OpenElement; J Setzer and C Higham, "Global Trends in Climate Change Litigation: 2023 Snapshot" (2023) Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, Available at: https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/06/Global_trends_in_climate_change_litigation_2023_snapshot.pdf; J Peel and H M Osofsky, "A Rights Turn in Climate Change Litigation?" (2018) 7 Transnational Environmental Law 1. Available at: https://doi.org/10.1017/S2047102517000292.

[4] ICJ, Request for an Advisory Opinion transmitted to the Court pursuant to General Assembly Resolution 77/276 on Obligations of States in Respect of Climate Change, 29 March 2023. Available at: https://www.icj-cij.org/case/187/request-advisory-opinion; ITLOS, Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, 12 December 2022. Available at: https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/.

source, as explained immediately below. The PILPBP invites the Court to make use of the information contained in these observations in the manner it considers to be most appropriate.

2.1 Relevance of Other Practices as a Formal Source

United Nations human rights treaties have been held to fall within the category of 'other treaties concerning the protection of human rights in the American states' in Article 64(1) of the American Convention on Human Rights ('ACHR'/'the Convention'),[5] and thus fall within the scope of the Court's interpretive power in the exercise of its advisory jurisdiction.[6] The practice of UN human rights bodies is directly relevant to the interpretation of these treaties.

The Court also has the ability to take into account the practices of other bodies in its interpretation of provisions of the ACHR and other Inter-American human rights treaties. There are various formal ways in which this may occur. Under general international law, the principle of systemic integration, enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT), allows the Court to take account of other 'relevant rules of international law applicable in the relations between the parties' in its interpretation of the Convention.[7]

There are, moreover, specific provisions of treaties within the Inter-American system that refer to or incorporate international conventions and legal norms – in particular, those of the United Nations system – into the Inter-American system. The most significant such provision is to be found in Article 29 ACHR, which, under paragraphs b. and d. in particular, require the interpretation of ACHR rights to be not more restrictive than under international human rights law in general.[8]

2.2 Relevance of Other Practices as an Informal Source

The Court may also take account of the practices of other bodies in an *informal* way, where those bodies provide persuasive authority as to the content of international or regional human rights standards on similar questions. The practice of other human rights bodies may be examined by the Court for the purposes of identifying cogent and convincing reasoning and analysis, in much the same way as national courts may rely on non-binding foreign judgments as informal authorities.

It is, however, our submission that the practice of international or regional human rights bodies is of stronger relevance to the issues facing the Court in this Request than foreign judgments are to the work of domestic courts. Decisions of other bodies, even though not binding on the Court, may inform the Court as to the content of a general standard, either because they evidence a customary standard or as persuasive authority of a general principle. This point has been

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[5] American Convention on Human Rights, adopted 22 November 1969, entry into force 18 July 1978, 1144 UNTS 123. In this submission, the ACHR is occasionally referred to as the "American Convention" in quoted language or case names.

[6] *"Other Treaties" Subject to the Jurisdiction of the Court (Art. 64 American Convention on Human Rights)*, Advisory Opinion OC-1/82 of 24 September 1982, Ser A No 1*; The Right to Information on Consular Assistance in the Framework of Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99 of 1 October 1999, Ser A No 16.

[7] International Law Commission ("ILC"), "Report on Fragmentation of International Law" (13 April 2006), UN Doc A/CN.4/L.682, paras 410-480, especially paras 415, 462-472. See also, C McLachlan, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention" (2005) 54 ICLQ 279.

[8] See *Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples*, Advisory Opinion OC-24/17 of 24 November 2017, Ser A No 24, para 58.

recognised by the Court itself, and it has made use of UN and European Court of Human Rights ('ECtHR') authority in its previous judgments and advisory opinions[9] – a practice which, it is submitted, would be beneficial in relation to this Request.

3. Jurisdiction and Admissibility

3.1 Jurisdiction

There are two points which must be satisfied for the Court to have advisory jurisdiction—the subject matter must fall within its jurisdictional authority (jurisdiction *ratione materiae*), and the request must come from an entity with the standing to make such a request (jurisdiction *ratione personae*). It is uncontroversial that the Republic of Colombia and the Republic of Chile, as parties to the ACHR, have standing to submit the Request. The Court has advisory jurisdiction *ratione materiae* over (a) the ACHR and (b) other treaties concerned with human rights in the American States. The Request asks the Court to interpret various Articles of the ACHR, and thus clearly also falls within the Court's jurisdiction *ratione materiae*.

3.2 Admissibility

Article 70 of the Rules of Procedure requires that:

> 1. Requests for an advisory opinion under Article 64(1) of the Convention shall state with precision the specific questions on which the opinion of the Court is being sought.
> 2. Requests for an advisory opinion submitted by a Member State or by the Commission shall, in addition, identify the provisions to be interpreted, the considerations giving rise to the request, and the names and addresses of the Agent or the Delegates.

Although the issues raised by climate change are broad in nature, it is our submission that the Request identifies the matters to be addressed by the Court with sufficient focus and precision to satisfy the requirement for the Request to be admissible.

4. The Links between Climate Change and Human Rights Law

4.1 Overview

The link between climate change and human rights is well established at the international level. This nexus is evident in the preamble to the Paris Agreement, where State parties included language on human rights: when taking action to address climate change, States should "respect, promote and consider their respective obligations on human rights".[10] Human rights provide not merely a factor to be considered when addressing climate change, but one of the core motivations for taking action to respond to the climate crisis and the threat it poses to human life and wellbeing. This link between human rights and climate change has also been recognised by States through

[9] See e.g *Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples* (n 8).

[10] Paris Agreement - UN Framework Convention on Climate Change, adopted 12 December 2015, entry into force 4 November 2016, 3156 UNTS 79 ("Paris Agreement"), preamble.

resolutions in the UN General Assembly.[11] In the Organization of American States ('OAS') region, States have also acknowledged that "the adverse effects of climate change have a negative impact on the enjoyment of human rights".[12]

There is also significant consensus among international human rights bodies, including the Inter-American Commission on Human Rights ('the Commission', or 'IACmHR'), that States' obligations and the enjoyment of human rights are closely linked to – and impacted by – the climate crisis.[13] The UN Human Rights Council has noted that climate change has already had an adverse impact on the full and effective enjoyment of the human rights enshrined in the Universal Declaration of Human Rights and other international human rights instruments.[14] The link between climate change and human rights was also clearly set out in the Joint Statement on Human Rights and Climate Change, which was issued by five UN human rights treaty bodies in September 2019.[15] In this joint statement, the Committee on the Elimination of Discrimination Against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, the Committee on the Rights of the Child, and the Committee on the Rights of Persons with Disabilities refer to the findings of a Report from the Intergovernmental Panel on Climate Change ('IPCC') and note that climate change poses significant risks to the enjoyment of the human rights protected through the various international human rights treaties under which the Committees are established.[16]

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[11] UN General Assembly ('UNGA'), "The Human Right to a Clean, Healthy and Sustainable Environment", Resolution adopted at the Seventy-sixth session of the General Assembly held on 28 July 2022, UN Doc A/RES/76/300. Available at: https://digitallibrary.un.org/record/3983329

[12] OAS General Assembly, "Human Rights and Climate Change in the Americas," Resolution adopted at the Fourth plenary session held on 3 June 2008, AG/RES. 2429 (XXXVIIIO/08).

[13] The Commission has noted that the nexus between climate change and human rights is increasingly evident and its recognition at the international level has reached significant levels of consensus, not only in the legal regime pertaining to climate change, but also in the international human rights regime. IACmHR, "Climate Emergency: Scope of Inter-American Human Rights Obligations", Resolution 3/2021 adopted by the IACmHR on 31 December 2021 ("IACmHR Resolution on the Climate Emergency and Inter-American Human Rights Obligations"). Available at: https://www.oas.org/en/iachr/decisions/pdf/2021/resolucion_3-21_ENG.pdf.

[14] UN HRC Resolution on Human Rights and Climate Change 2019 (n 3); See also UN Human Rights Council, "Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights", presented to the UN Human Rights Council on their 10th Session held on 15 January 2009, UN Doc A/HRC/10/61, Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G09/103/44/PDF/G0910344.pdf?OpenElement; UN Human Rights Council, "Resolution on Human Rights and Climate Change" adopted at the 41st meeting held on 25 March 2009, UN Doc A/HRC/RES/10/4. Available at: https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_4.pdf; UN Human Rights Council, "Resolution on Human Rights and Climate Change" adopted at the 32nd session held on 18 July 2016, A/HRC/RES/32/33. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/157/72/PDF/G1615772.pdf?OpenElement.

[15] UN HRC Resolution on Human Rights and Climate Change 2019 (n 3); Committee on the Elimination of Discrimination Against Women, Committee on Economic, Social and Cultural Rights, Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, Committee on the Rights of the Child, Committee on the Rights of Persons with Disabilities, "Joint Statement on 'Human Rights and Climate Change'" (16 September 2019) UN Doc HRI/2019/1 ("UN Treaty Bodies Joint Statement on Human Rights and Climate Change"). Available at: https://www.ohchr.org/en/statements/2019/09/five-un-human-rights-treaty-bodies-issue-joint-statement-human-rights-and?LangID=E&NewsID=24998.

[16] These comprise the International Convention on the Elimination of all Forms of Discrimination Against Women, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Convention on the Rights of the Child, and the International Convention on the Rights of Persons with Disabilities.

This Court has also recognised the link between human rights and climate change, noting "the existence of an undeniable relationship between the protection of the environment and the realization of other human rights, in that environmental degradation and the adverse effects of climate change affect the real enjoyment of human rights".[17]

4.2 Specific Rights

There is strong consensus among both the scientific and international human rights communities that the adverse impacts of climate change have a range of implications for the effective enjoyment of human rights. By contributing to the increased frequency and intensity of both sudden-onset natural disasters and slow-onset events, climate change adversely affects (and risks further impacting) all human rights.[18]

Importantly, these include unqualified rights, such as the right to life, the right to physical integrity and the right to freedom from violence, sexual exploitation, trafficking and slavery.[19] As unqualified rights, these rights are not to be balanced against other interests or subject to due diligence standards as is the case with other (qualified) rights, including those set out below.

The adverse impacts of climate change also threaten a range of other rights, *inter alia*, the right to adequate food, the right to adequate housing, the right to the enjoyment of the highest attainable standard of physical and mental health, the right to safe drinking water and sanitation, the right to self-determination, the right to work, the right to development, and the right to a healthy environment.[20]

In its resolution adopted on 12 July 2019, the UN Human Rights Council recalled the Paris Agreement's acknowledgement that, when taking action to address climate change, State parties should respect, promote and consider their respective obligations on human rights, noting in particular the rights of indigenous peoples, local communities, migrants, persons with disabilities and people in vulnerable situations, as well as the right to development, gender equality, the empowerment of women and intergenerational equity.[21]

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[17] *Case of Kawas Fernández v. Honduras,* Judgment on Merits, Reparations and Costs of 3 April 2009, Ser C No 196, para 148, as quoted in, *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention*), Advisory Opinion OC-23/17 of 15 November 2017, Ser A No 23, ("Advisory Opinion OC-23/17 on the Environment and Human Rights"), para 47.

[18] UN HRC Resolution on Human Rights and Climate Change 2019 (n 3), para 1.

[19] UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change, 26 July 2022, UN Doc A/77/226, ("Report of the HRC Special Rapporteur on Human Rights and Climate Change"), para 88. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/438/51/PDF/N2243851.pdf?OpenElement.

[20] UN HRC Resolution on Human Rights and Climate Change 2019 (n 3); UN Treaty Bodies Joint Statement on Human Rights and Climate Change (n 15); Report of the HRC Special Rapporteur on Human Rights and Climate Change (n 19), para 10; IACmHR Resolution on the Climate Emergency and Inter-American Human Rights Obligations (n 13), page 5.

[21] UN HRC Resolution on Human Rights and Climate Change 2019 (n 3).

4.3 Intersectionality

The UN Human Rights Council's inclusion of these rights raises the importance of intersectionality when addressing the climate crisis in a human rights context.

While climate change impacts all people in the enjoyment of their rights, it does not impact everybody equally. Climate change aggravates existing inequalities: the negative impacts of failing to reduce greenhouse gas emissions are felt disproportionately by people and communities who are already in a disadvantaged position or who already face marginalisation and vulnerability. Additionally, these are groups of persons that are often excluded from decision-making processes.[22]

The adverse effects of climate change are felt most acutely by parts of the population that are in vulnerable situations due to factors like poverty, gender, age, indigenous or minority status, geography, national or social origin, birth or other status and disability.[23] The risks of harm are therefore particularly high for groups including women, persons with disabilities, children, indigenous peoples, migrant workers, people living in informal settlements, and people living in rural areas.[24]

When responding to climate change through mitigation and adaptation policies, States should adopt an intersectional approach that is comprehensive and integrated in recognition of the duties that States have to guarantee and protect the rights of individuals or groups who are in situations of vulnerability or who are particularly vulnerable.[25]

4.4 The Need for Urgent Global Action

Climate change is a global challenge that impacts all people in all regions: the emissions released in one particular place will have wide-ranging effects beyond that location. Wherever emissions originate, they add to the concentration in the atmosphere, thus contributing to global warming across the world. Similarly, extreme weather events caused by global warming may move from one region to another or have transnational knock-on effects.

The global nature of the climate crisis calls for global action – described by the UN Human Rights Council as the "widest possible cooperation by all countries and their participation in an effective and international response".[26] The United Nations Environment Programme ('UNEP') has stated that this "dire situation", resulting from "inadequate action on the global climate crisis" (especially due to the emissions gap among G20 States) necessitates "broad-based economy-wide

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[22] See IPCC, "Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change" [H. Lee and J. Romero (eds.)] ("IPCC AR6 Climate Change 2023: Synthesis Report"), page 51. Available at: https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_FullVolume.pdf; Report of the HRC Special Rapporteur on Human Rights and Climate Change (n 19), para 8; UN HRC Resolution on Human Rights and Climate Change 2019 (n 3), para 5; IACmHR Resolution on the Climate Emergency and Inter-American Human Rights Obligations (n 13), page 6.

[23] UN HRC Resolution on Human Rights and Climate Change 2019 (n 3).

[24] IACmHR Resolution on the Climate Emergency and Inter-American Human Rights Obligations (n 13), page 6.

[25] Ibid, preamble, paras 16, 17.

[26] UN HRC Resolution on Human Rights and Climate Change 2019 (n 3).

transformations".[27] Otherwise, the adverse human impacts of climate change are expected to worsen with every incremental increase of temperature; any further warming comes with the "further erosion of the ability to realise human rights".[28]

Not only must action to combat climate change be global in nature, it must also be delivered with urgency. The IPCC has called for "deep, rapid and sustained mitigation" and "accelerated implementation of adaptation" to reduce further risks and adverse impacts across the world,[29] underlining that there is little time left to take action that enables climate resilient development.[30]

This is particularly salient as scientists have identified climate "tipping points"; these are defined by the IPCC as "critical thresholds in a system that, when exceeded, can lead to a significant change in the state of the system, often with an understanding that the change is irreversible". [31] These tipping points include the thawing of the permafrost, the collapse of ice sheets, changes in ocean currents, strengthening of regional cyclonic activity, diebacks of forest like the Amazon, boreal and tundra forests, and changes in agricultural systems leading to large reductions of key staple crops like maize; some of these "[l]arge-scale singular events" are key "components of the global Earth system".[32] The IPCC notes the importance of understand these tipping points and assessing how risks across "physical, natural and human systems" can accumulate increased increments of warming result in higher likelihoods of passing these tipping points.

The IPCC has reiterated this message of urgency throughout its most recent report, noting that there is a "rapidly closing window of opportunity to secure a liveable and sustainable future for all",[33] as the impacts of climate change are not only increasing, but accelerating.

4.5 Impacts of Climate Change in the Latin American Context

Although climate change is a global phenomenon, as noted by the IPCC, it is also "a multiscale phenomenon from the local to the global", and thus "the assessment of climate risks and climate change impacts is strongly spatial, with a focus on regional climate change".[34] Some of the adverse

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[27] UNEP, "Emissions Gap Report 2022: The Closing Window – Climate crisis calls for rapid transformation of societies" (2022) ("UNEP Emissions Gap Report 2022"), page xvi. Available at: https://www.unep.org/emissions-gap-report-2022.

[28] UN Treaty Bodies Joint Statement on Human Rights and Climate Change (n 15).

[29] IPCC AR6 Climate Change 2023: Synthesis Report (n 22), pages 92-93.

[30] Ibid, page 95.

[31] IPCC, "Impacts of 1.5ºC Global Warming on Natural and Human Systems", Hoegh-Guldberg, O., D. Jacob, M. Taylor, M. Bindi, S. Brown, I. Camilloni, A. Diedhiou, R. Djalante, K.L. Ebi, F. Engelbrecht, J.Guiot, Y. Hijioka, S. Mehrotra, A. Payne, S.I. Seneviratne, A. Thomas, R. Warren, and G. Zhou. In: Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty [Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T.Maycock, M.Tignor, and T. Waterfield (eds.)], (CUP 2018), p. 262. Available at: https://doi.org/10.1017/9781009157940.005.

[32] Ibid, pages 257, 262-264.

[33] IPCC AR6 Climate Change 2023: Synthesis Report (n 22), pages 24, 88.

[34] IPCC, "Annex I: Global to Regional Atlas" [Pörtner, H.-O., A. Alegría, V. Möller, E.S. Poloczanska, K. Mintenbeck, S. Götze (eds.)]. In: Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of

effects of climate change are particularly impactful in the Americas, rendering the human rights dimension of climate change all the more relevant for consideration by this Court.[35] This has been observed by key regional and international bodies including the Economic Commission for Latin America and the Caribbean ('ECLAC') and the UN Office of the High Commissioner of Human Rights ('OHCHR').[36] The then ECLAC Executive Secretary, Alicia Bárcena, commented in 2019 that countries in the region have already been "heavily affected by climate variations, increased temperatures, the rising seas, ocean acidification, and the greater intensity and frequency of climate change-related catastrophes".[37]

Indeed, there are characteristics of Latin America and the Caribbean which render many people living in the region more vulnerable to the adverse impacts of climate change. The World Meteorological Organization ('WMO') highlighted as an exacerbating factor the high number of people living in medium and small urban areas, where 80% of climate-related disasters occur, paired with increasing poverty in the context and aftermath of the COVID-19 pandemic, high levels of income inequality and increasing food insecurity.[38] ECLAC found that the increased intensity and frequency of extreme weather events (tropical storms, hurricanes, and droughts) have affected the living patterns of people in the region, causing internal displacement as a result of loss of infrastructure and loss of opportunity.[39] In particular, the small island states in the Caribbean are expected to face increased vulnerability through food insecurity and climate-related migration.[40] On longer timescales, low-lying islands face the loss of national territory[41] with profound

Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.)]. (CUP 2022), ("IPCC AR6 Climate Change 2022 – Impacts, Adaptation and Vulnerability: Global to Regional Atlas"), page 2813. Available at: https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SOD_AnnexI-Atlas.pdf.

[35] IPCC, "Central and South America". [H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.)]. In: Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change" Castellanos, E., M.F. Lemos, L. Astigarraga, N. Chacón, N. Cuvi, C. Huggel, L. Miranda, M. Moncassim Vale, J.P. Ometto, P.L. Peri, J.C. Postigo, L. Ramajo, L. Roco, and M. Rusticucci, (CUP 2022), pages 1689–1816. Available at: https://report.ipcc.ch/ar6/wg2/IPCC_AR6_WGII_FullReport.pdf.

[36] UN Office of the High Commissioner of Human Rights ('OHCHR'), "Report: Impacts of climate change seriously compromising human rights", 23 December 2019 ("OHCHR Report on Human Rights and Climate Change"). Available at: https://www.ohchr.org/en/stories/2019/12/report-impacts-climate-change-seriously-compromising-human-rights; Economic Commission for Latin America and the Caribbean/United Nations High Commissioner for Human Rights (ECLAC/OHCHR), "Climate change and human rights: contributions by and for Latin America and the Caribbean" (2019), LC/TS.2019/94. Available at: https://www.ohchr.org/sites/default/files/S1900999_en.pdf.

[37] OHCHR Report on Human Rights and Climate Change (n 36).

[38] World Meteorological Organization, "State of the Climate in Latin America and the Caribbean: 2022" (2023) ("WMO Report on Climate in Latin America and the Caribbean"), page 20. Available at: https://library.wmo.int/doc_num.php?explnum_id=11701.

[39] IACmHR Resolution on the Climate Emergency and Inter-American Human Rights Obligations (n 13), page 7.

[40] WMO Report on Climate in Latin America and the Caribbean (n 38), page 20.

[41] IPCC, "Small islands". [Barros, V.R., C.B. Field, D.J. Dokken, M.D. Mastrandrea, K.J. Mach, T.E. Bilir, M. Chatterjee, K.L. Ebi, Y.O. Estrada, R.C. Genova, B. Girma, E.S. Kissel, A.N. Levy, S. MacCracken, P.R. Mastrandrea, and L.L.White (eds.)], In: Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, Nurse, L.A., R.F. McLean, J. Agard, L.P. Briguglio, V. Duvat-Magnan, N. Pelesikoti, E.

implications for human rights, including the right to culture.[42] Drought conditions in 2022 across the region contributed to reduced crop yields and damage to agriculture – affecting food security not only in the region but on a global scale given the importance of the region in producing food for export – and affected water supply in various urban centres across the region, including potable water, water for energy production, and low river levels that are usually used for transport.[43]

Noting the disproportionate distribution of the adverse effects of the climate crisis on certain parts of the population, the Commission warned that the wildfires in August 2019 which affected much of the Brazilian and Bolivian Amazon and the Chaco in Paraguay would impact indigenous people the most.[44] The Indigenous and rural populations of the Bolivian Andes were similarly impacted in particular by the drought conditions in the region during 2022.[45]

The adverse effects of climate change are a threat to the exercise of human rights for people in the Latin American and Caribbean regions now, and will continue to be for the foreseeable future, even if action to address the climate crisis is taken. The impact of climate change on the full enjoyment of human rights is therefore material to the Court – noting that the localised impacts of climate change are clearly adversely affecting people within the region and under the Court's jurisdiction.

5. State Obligations to Address the Climate Crisis – International Environmental Law and Human Rights Law

The global nature of the threats of climate change and the urgency with which action is needed necessitate concerted action, including from business enterprises, intergovernmental organisations and civil society alongside State actors.[46] Despite the plurality of actors whose contributions are required, States remain central in taking action to address the adverse impacts of climate change. The Commission has observed that the obligations of individual states to take effective action to protect human rights through mitigation and adaptation action "should not be neglected because of the multi-causal nature of the climate crisis".[47]

Tompkins, and A. Webb, (CUP 2014), pages 1613-1654. See also submissions made by the Commission of Small Island States on Climate Change and International Law (COSIS), which includes Caribbean nations, to ITLOS during proceedings for the request of an Advisory Opinion on Climate Change, summarised here: M A Tigre and K Silverman-Roati (eds.) "ITLOS Advisory Opinion on Climate Change: Summary of Briefs and Statements Submitted to the Tribunal" (Sabin Center for Climate Change Law, Columbia Law School, 2023). Available at: https://scholarship.law.columbia.edu/sabin_climate_change/208). See further work done by the ILC on the implications of sea-level rise in international law: ILC, "Report of the Study Group on Sea-Level Rise in Relation to International Law" (5 August 2022), UN Doc A/CN.4/L.97. Available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/G22/408/39/PDF/G2240839.pdf?OpenElement.

[42] HRC, Communication No 3624/2019 *Daniel Billy et al. v. Australia* (22 September 2022) UN Doc CCPR/C/135/D/3624/2019.

[43] WMO Report on Climate in Latin America and the Caribbean (n 38), pages 21-22.

[44] IACmHR Resolution on the Climate Emergency and Inter-American Human Rights Obligations (n 13), page 6; L Cushing and Jacob Kopas, "Cambio climático y derechos humanos en América Latina: Una crisis humana" (December 2011) Asociación Interamericana para la Defensa del Ambiente (AIDA), Available at: https://aida-americas.app.box.com/s/lkpqbhgfvdu3elgu4uaqxe99flad5djz.

[45] WMO Report on Climate in Latin America and the Caribbean (n 38).

[46] Report of the HRC Special Rapporteur on Human Rights and Climate Change (n 19), para 15.

[47] IACmHR Resolution on the Climate Emergency and Inter-American Human Rights Obligations (n 13), page 15.

5.1 States' Climate Change Agreement Obligations

States are the main actors in intergovernmental organisations and highly important in driving action in response to climate change.[48] However, State parties have relatively limited direct obligations under international agreements on climate change to take steps to address the climate crisis and to reduce their emissions. State parties are subject to legally binding obligations to "prepare, communicate and maintain" a nationally determined contribution ('NDC') and to "pursue domestic measures to achieve them".[49] Such legally binding obligations placed on State parties are important for accountability and enforcement, given that at the state level there may be effective mechanisms for holding governments accountable to the achievement of their internationally legally binding obligations. This can be, for example, a review or challenge of government policy or decisions, with the possibility of escalation to international courts in certain cases. It should be noted however, that this legally binding obligation falls short of a duty to achieve those NDCs, or indeed an obligation that those NDCs should meet a certain minimum threshold or meet minimum standards and lead to specific results and outcomes (e.g., achieve the full and effective protection of human rights[50]). Therefore, the obligations arising under climate change agreements alone are insufficient to ensure that sufficient and timely action is taken by States.

5.2 States' Human Rights Climate Change Obligations

Given the relatively limited nature of climate change agreement obligations, human rights law plays a crucial role in supplementing these obligations by imposing a range of further obligations to address the risks to human rights caused by climate change. States are subject to obligations in international human rights instruments and under customary international law that clearly require them to protect, promote and respect human rights.[51] These rights should also be read in light of relevant international environmental law obligations, following the principle of systemic integration,[52] but are not limited by the obligations agreed under climate change treaties. Climate change is a human rights issue, and States must take affirmative measures and action to mitigate and adapt to climate change in a way that meets their human rights obligations, preventing and addressing human rights violations caused by climate change.

The UN Human Rights Council has emphasised the urgency and importance of States addressing the adverse impacts of climate change as they relate to their human rights obligations.[53] A failure to take measures to prevent foreseeable harm to human rights caused by climate change, or to regulate the activities contributing to this harm could constitute a violation of a States' human rights obligations.[54] UN human rights bodies have issued clear decisions highlighting the potential

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[48] The IPCC have noted that "effective climate action requires political commitment, well-aligned multi-level governance and institutional frameworks, laws, policies and strategies [...], financing tools, cooperation across multiple policy domains and inclusive governance processes." These actions are within the realm of state-level as well as multilateral decision-making. IPCC AR6 Climate Change 2023: Synthesis Report (n 22), page 110.

[49] Paris Agreement (n 10), Article 4.

[50] UN Treaty Bodies Joint Statement on Human Rights and Climate Change (n 15); UN HRC Resolution on Human Rights and Climate Change 2019 (n 3), para 3.

[51] UN HRC Resolution on Human Rights and Climate Change 2019 (n 3), para 11.

[52] See the Court's own jurisprudence on this in *Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples* (n 8), para 58.

[53] UN HRC Resolution on Human Rights and Climate Change 2019 (n 3), para 2.

[54] UN Treaty Bodies Joint Statement on Human Rights and Climate Change (n 15).

significance of these forms of human rights violations.[55] On this issue, the Special Rapporteur on the promotion and protection of human rights in the context of climate change has called for States to take "substantive measures to limit the emissions of greenhouse gases and [to] mitigate climate change, including through regulatory measures, in order to protect all persons from human rights harms".[56]

The Request asks about States' "obligations to address [the human rights affected by the climate emergency] individually and collectively". There is indeed a collective as well as an individual dimension to States' obligations in regard to climate change, both under international environmental law and under human rights law. Although addressing climate change is a collective endeavour,[57] the need for a collective (and, as discussed below, cooperative) effort does not diminish each individual State's obligations to address climate change, appreciating that the obligations on States may also reflect their individual circumstances.[58]

5.3 Mitigation and Adaptation Measures

States' obligations to address the adverse effects of the climate crisis on the enjoyment of human rights include both negative and positive obligations to prevent violations and protect individuals and communities from the adverse effects of climate change, as well as putting in place measures to adapt to existing climate harms and future risks.[59] These measures can be broadly divided into mitigation and adaptation measures.

Mitigation actions, as defined by the IPCC, are "anthropogenic intervention[s] to reduce the sources or enhance the sinks of greenhouse gases";[60] these are actions that "broadly reduce the rate of climate change".[61] Mitigation efforts have formed a core part of the international climate change regime and States' obligations thereunder – for example, under the Paris Agreement's framework, State parties are legally obligated to create and submit progressively ambitious targets that limit their emissions through the use of Nationally Determined Contributions. The most important part of mitigation action involves limiting the emissions of greenhouse gases, namely by transitioning from the use of fossil fuels to renewable energies. However, the global response towards achievement of these reduction targets has remained "grossly inadequate"[62], with the Special Rapporteur on the promotion and protection of human rights in the context of climate

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[55] *Daniel Billy et al. v. Australia* (n 42); Committee on the Rights of the Child, *Sacchi et al. v. Argentina et al* (22 September 2021) UN Doc CRC/C/88/D/104/2019.

[56] Report of the HRC Special Rapporteur on Human Rights and Climate Change (n 19), para 15.

[57] Paris Agreement (n 10).

[58] L Rajamani, L Jeffery, N Höhne, F Hans, A Glass, G Ganti and A Geiges, "National 'fair shares' in reducing greenhouse gas emissions within the principled framework of international environmental law" (2021) 21 Climate Policy 8, pages 983-1004. Available at: https://doi.org/10.1080/14693062.2021.1970504.

[59] IACmHR Resolution on the Climate Emergency and Inter-American Human Rights Obligations (n 13), page 5.

[60] IPCC, "Climate Change 2001: Synthesis Report. A Contribution of Working Groups I, II, III to the Third Assessment Report of the Intergovernmental Panel on Climate Change", R.T. Watson and the Core Team, [eds.], (CUP 2001), ("IPCC AR3 Climate Change 2001: Synthesis Report"), page 398.

[61] IPCC, "Working Group III: Mitigation of Climate Change". Available at: https://www.ipcc.ch/working-group/wg3/.

[62] Report of the HRC Special Rapporteur on Human Rights and Climate Change (n 19), para 7.

change noting that by failing in their mitigation efforts, States are failing in their human rights obligations.[63]

Adaptation is defined as "the process of adjustment to actual or expected climate and its effects",[64] which "can moderate harm or exploit beneficial opportunities".[65] Adaptation typically works on the "scale of an impacted system", which can be regional but is mostly local.[66] This refers to changes in social, economic or ecological systems in response to existing (or anticipated) changes in the climate. As the second pillar of the international climate change regime, adaptation has received much attention.[67] An increase in adaptation measures aims to "strengthen resilience, and reduce vulnerabilities associated with climate change".[68] Some of the key adaptation measures implemented have included: improved cultivars and agronomic practices; changes in cropping pattern and crop systems; migration and off-farm diversification; water and soil moisture conservation; on-farm irrigation and water management; Indigenous knowledge and local knowledge-based adaptations; economic/financial incentives; agro-forestry and forestry interventions; urban water management; flood risk reduction measures; livestock and fishery-related interventions; and training and capacity-building.[69]

The IPCC has recognised the importance of both mitigation and adaptation measures being applied together, noting that "future climate related risks would be reduced by the upscaling and acceleration of far reaching, multilevel and cross-sectoral climate mitigation and by both incremental and transformational adaptation".[70] Mitigation and adaptation measures should be

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[63] Ibid, para 10.

[64] IPCC, "Annex II: Glossary" [Mach, K.J., S. Planton and C. von Stechow (eds.)]. In: Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, R.K. Pachauri and L.A. Meyer (eds.)]. (2014), page 118. Available at: https://www.ipcc.ch/site/assets/uploads/2019/01/SYRAR5-Glossary_en.pdf.

[65] IPCC AR3 Climate Change 2001: Synthesis Report (n 60), page 398.

[66] IPCC, "Inter-relationships between adaptation and mitigation", Klein, R.J.T., S. Huq, F. Denton, T.E. Downing, R.G. Richels, J.B. Robinson, F.L. Toth, In: Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, M.L. Parry, O.F. Canziani, J.P. Palutikof, P.J. van der Linden and C.E. Hanson, [eds.], (CUP 2007) ("IPCC AR4 Climate Change 2007 – Impacts, Adaptation and Vulnerability: Inter-relationships between adaptation and mitigation"), page 749. Available at: https://www.ipcc.ch/site/assets/uploads/2018/02/ar4-wg2-chapter18-1.pdf.

[67] See IPCC, "Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change" [H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.)]. (CUP 2022), page 3056. Available at: https://report.ipcc.ch/ar6/wg2/IPCC_AR6_WGII_FullReport.pdf; IPCC AR6 Climate Change 2022 – Impacts, Adaptation and Vulnerability: Global to Regional Atlas (n 34), page 2811–2896.

[68] UN Climate Change, "Adaptation and Resilience". Available at: https://unfccc.int/topics/adaptation-and-resilience/the-big-picture/introduction.

[69] IPCC AR6 Climate Change 2022 – Impacts, Adaptation and Vulnerability: Global to Regional Atlas (n 34), page 2884.

[70] IPCC, "Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty: Summary for Policymakers" [Masson Delmotte, V., P. Zhai, H.O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.)]. (CUP 2018), ("IPCC Special Report on 1.5°C: Summary for Policy Makers"), page 5. Available at: https://doi.org/ 10.1017/9781009157940.

moulded to fit regional and local impacts, and as stated by the IPCC, "may be motivated by local and regional priorities and interests, as well as global concerns".[71] As it stands, progress on mitigation and on adaptation – both in formulating adequate commitments and implementing existing commitments – is not sufficient to address the climate crisis, and thus adequately protect human rights.[72]

While this is not the focus of this submission, it is important to recognise loss and damage as the "third limb" of the international climate change regime. Following the agreements reached during COP27 and COP28 to fund loss and damage, States' obligations also entail the identification and compensation for harm and impacts on human rights that have already been felt in the countries most vulnerable to climate change.[73]

6. The Role of State Cooperation in Addressing the Climate Crisis

While States' international environmental law and human rights obligations cover a number of individual measures that must be taken to address local and national effects of climate change, as noted above the climate crisis is also a collective problem which requires a high level of cooperation. This section addresses the question of how the inter-State cooperation obligations found in Article 26 of the ACHR, as well as Articles 1, 12 and 14 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Right[74] should be interpreted. This section addresses the concrete obligations that may arise from the vaguely formulated duty to cooperate, and analyses how the principle of shared but differentiated responsibilities in the context of climate change may affect these cooperation obligations.

The first part of this section examines the nexus between human rights law and international environmental law obligations of cooperation, demonstrating that the interpretation of the obligations to cooperate in the Inter-American human rights context is reliant on analysing the formulation of cooperation in international environmental law instruments. The Request refers to Principle 24 of the Stockholm Declaration[75] as well as Principles 7 and 19 of the Rio Declaration.[76]

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[71] IPCC AR4 Climate Change 2007 – Impacts, Adaptation and Vulnerability: Inter-relationships between adaptation and mitigation (n 66), page 750.

[72] UNEP Emissions Gap Report 2022 (n 27); UNEP, "Adaptation Gap Report 2023: Underfinanced. Underprepared. Inadequate investment and planning on climate adaptation leaves world exposed" (2023). Available at: https://doi.org/10.59117/20.500.11822/43796.

[73] Paris Agreement (n 10), Article 8; United Nations Climate Change, "COP27 Reaches Breakthrough Agreement on New 'Loss and Damage' Fund for Vulnerable Countries" (20 November 2022), available at: https://unfccc.int/news/cop27-reaches-breakthrough-agreement-on-new-loss-and-damage-fund-for-vulnerable-countries; United Nations Climate Change, "COP28 Agreement Signals 'Beginning of the End' of the Fossil Fuel Era" (13 December 2023), available at: https://unfccc.int/news/cop28-agreement-signals-beginning-of-the-end-of-the-fossil-fuel-era.

[74] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, adopted 16 November 1988, entry into force 16 November 1999, OAS Treaty Series No. 69 ("Protocol of San Salvador").

[75] United Nations Conference on the Human Environment (5 to 16 June 1972) UN Doc A/CONF.48/14/Rev.1 ("Stockholm Declaration").

[76] Report of the United Nations Conference on Environment and Development (12 August 1992) UN Doc A/CONF.151/26 (vol. I) ("Rio Declaration").

This is appropriate given that the Rio Declaration holds an almost constitutional status for matters relating to sustainable development.[77]

The second part of this section discusses what cooperation entails in the transboundary context, an analysis that runs somewhat parallel with the Court's analysis in its Advisory Opinion on the Environment and Human Rights.[78] Cooperation is better defined in the transboundary context, given that transboundary environmental harm has historically been more prevalent, which in turn has led to more extensive codification and development of obligations. The Court's Advisory Opinion on the Environment and Human Rights – with the exception of brief discussion of certain duties to cooperate in the global context, such as in the UN Convention on the Law of the Sea,[79] or the UN Framework Convention on Climate Change[80] – largely dealt with cooperation in the transboundary context.[81]

The third part of this section analyses the extent to which the concretization of cooperation in the transboundary context can help in understanding its contours in the global context, which is of relevance to the cooperation obligations of States concerning climate change in the Inter-American context. A close analysis is required to determine the extent to which the duty to cooperate in the transboundary context informs the duty to cooperate in the multilateral or global context. It is for this reason that the reference in the Request to Principles 7 and 19 of the Rio Declaration together is not as straightforward as it first appears, even though both mention cooperation. Whereas Principle 7 of the Rio Declaration – along with Principle 27 not mentioned in the Request – concerns the global environment, Principle 19 of the Rio Declaration – along with Principle 18 – concerns environmental issues in transboundary contexts. Given that climate change demands coordinated action beyond the transboundary level of cooperation, it is necessary to look at how cooperation on the global level is formulated in international environmental law.

6.1 The Importance of the Human Rights and Environment Nexus in Interpreting Obligations of Cooperation

Recent developments at the UN level attest to the growing importance of both the linkage between human rights and environmental protection, and the principle of cooperation. The UN General Assembly Resolution that recognized the human right to a clean, healthy, and sustainable environment states that:

> "international cooperation has an essential role in assisting developing countries, including highly indebted poor countries, least developed countries, landlocked developing countries, small island developing States, as well as the specific challenges faced by middle-income countries, in strengthening their human, institutional and technological capacity."[82]

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[77] J Viñuales, "The Rio Declaration on Environment and Development" in J Viñuales (ed), *The Rio Declaration on Environment and Development: A Commentary* (OUP 2015), pages 1, 60.

[78] Advisory Opinion OC-23/17 on the Environment and Human Rights (n 17).

[79] United Nations Convention on the Law of the Sea, adopted 10 December 1982, entry into force November 16, 1994, 1833 UNTS 397 ("UNCLOS").

[80] United Nations Framework Convention on Climate Change, adopted 9 May 1992, entry into force 21 March 1994, 1771 UNTS 107 ("UNFCCC").

[81] Advisory Opinion OC-23/17 on the Environment and Human Rights (n 17), paras 181-210.

[82] UNGA, "Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms", (26 July 2022) UN Doc A/76/L.75.

Of course, this is not new for the Court. The link between human rights and the environment, and the key position of the principle of cooperation have long been recognized in the Inter-American context,[83] and the Court delivered an advisory opinion on the matter in 2017.[84] Knowing that this nexus is key does not address the challenges of interpreting cooperation. To do so, the Court needs to analyse the general meaning of the principle of cooperation, consider how that can contribute to the interpretation of cooperation provisions in the Inter-American context, and clarify the importance of the human rights and environment nexus in this context. These are important questions posed to the Court. As stated in Wolfrum's separate opinion in the *Mox Plant* case "the obligation to cooperate is the overriding principle of international environmental law, in particular when the interests of neighbouring States are at stake."[85] Despite its importance, Wolfrum – in his academic capacity – pointed out that cooperation remains largely undefined in international law,[86] a view shared by Cassese.[87] This is problematic as the degree of clarity to which legal principles are defined has a direct consequence on the potential of the principles to be utilized and implemented effectively.[88] Therefore, one potential task before the Court is giving concrete contours to the specific obligations of cooperation in human rights law, which in turn will increase the potential of the meaningful utilization and implementation of the principle of cooperation in the context of the climate emergency.

It has been observed that in analysing the human rights obligations of States in relational to environmental damage – in this context the obligation of cooperation as found in the Inter-American human rights instruments – environmental principles and obligations must be taken into account.[89] This is due to the interdependence of human rights and environmental protection, which has been recognized not only at the Inter-American level but also at the UN level, as discussed above. This interdependence supports the argument that the implementation of human rights can be fostered by the use of environmental instruments.[90]

This approach is indeed rooted in the principle of systemic integration, enshrined in Article 31(3) VCLT, which stipulates that other "relevant rules of international law applicable in the relations between the parties" shall be taken into account in interpreting a treaty. McLachlan, in his seminal work on the principle of systemic integration, observes that the principle is a part of the treaty interpretation process and not to be limited to where the meaning of treaties remains ambiguous.[91] This echoes the view of Koskenniemi, written in his capacity as a member of the ILC, that:

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[83] Protocol of San Salvador (n 74), Article 1.

[84] Advisory Opinion OC-23/17 on the Environment and Human Rights (n 17), para 41.

[85] ITLOS, *Mox Plant Case (Ireland v United Kingdom) (Order, Request for Provisional Measures)* [2001] ITLOS Rep 89, Separate Opinion of Judge Wolfrum, page 4.

[86] R Wolfrum, "International Law of Cooperation" (April 2010) in R Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (online edn), para 2. See also Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, adopted on 24 October 1970, UN Doc A/RES/2625(XXV) ("Friendly Relations Declaration").

[87] A Cassese, *International Law* (OUP 2005), page 47.

[88] J Viñuales, "A Concise Research Agenda for Environmental Law" (2018) Brill Open Law, page 4.

[89] E Cima, "The right to a healthy environment: Reconceptualizing human rights in the face of climate change" (2022) 31 RECIEL 1, pages 38, 39.

[90] P Dupuy and J Viñuales, *International Environmental Law* (CUP 2018), page 361.

[91] McLachlan (n 7), page 290.

> "legal interpretation, and thus legal reasoning, builds systemic relationships between rules and principles. Far from being merely an academic aspect of the legal craft, systemic thinking penetrates all legal reasoning, including the practice of law-application by judges and administrators."[92]

McLachlan observes that Article 31(3)(c) VCLT refers to rules of international law which may include custom, general principles or even other treaties, though these rules must be relevant and applicable between the parties.[93] Indeed, the Court's analysis of the same cooperation provisions – namely Article 26 ACHR as well as Articles 1, 12, and 14 of the Protocol of San Salvador – in the Advisory Opinion on the Environment and Human Rights also relied heavily on international environmental law, including the Stockholm Declaration, the Rio Declaration, many relevant multilateral environmental agreements and treaties, the jurisprudence of international courts and tribunals dealing with environmental disputes, and the work of the ILC.[94] The Court astutely considered that international environmental law makes a "decisive contribution to establishing the scope of the American Convention", and referred to the aforementioned principle of systemic interpretation to justify its use of international environmental instruments.[95]

Therefore, the Request is right in referring to the key environmental law documents of the Stockholm Declaration[96] and the Rio Declaration.[97] These documents recognize that human wellbeing is linked to the enjoyment of the right to life which is dependent on the well-being of the natural and man-made environment. They also outline the general contours of the principle of cooperation regarding environmental protection.[98] The overall analysis of the obligations of cooperation here relies not only on the Stockholm and Rio declarations, but also international environmental law more broadly.

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[92] ILC, "Study on the Function and Scope of the lex specialis rule and the question of self-contained regimes: Preliminary report by Mr. Martti Koskenniemi, Chairman of the Study Group" (7 May 2004), UN Doc A/CN.41/ILC(LVI)/SG/FIL/CRD.1 and Add 1, para 29.

[93] McLachlan (n 7), pages 290-291.

[94] Advisory Opinion OC-23/17 on the Environment and Human Rights (n 17), paras 181-210.

[95] Ibid, para 44.

[96] Stockholm Declaration (n 75).

[97] Rio Declaration (n 76).

[98] Principle 24 of the Stockholm Declaration (n 75) holds that "International matters concerning the protection and improvement of the environment should be handled in a co-operative spirit by all countries, big and small, on an equal footing. Co-operation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States". Principle 7 of the Rio Declaration (n 76) holds that "States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command." Principle 19 of the Rio Declaration holds that "States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith."

6.2 Fleshing out the Obligation of Cooperation in the Transboundary Context

As Principle 24 of the Stockholm Declaration shows, the prevention, control, and management of "adverse environmental effects" is the objective for environmental cooperation.[99] This goal is, naturally, shared between cooperation in the transboundary and global contexts. The ILC has, for example, observed in the transboundary context that "States concerned shall cooperate in good faith and, as necessary, seek the assistance of one or more competent international organizations in preventing significant transboundary harm or at any event in minimizing the risk thereof." [100]

Cooperation is, however, a procedural obligation, and it matters how these objectives are pursued. Looking to the general formulations of the duty to cooperate or its goals does not help in understanding how these objectives should be realised. As McCaffrey argues in the context of the international law of watercourses, and as the ILC commentary to Article 4 of Draft Articles on Prevention of Transboundary Harm from Hazardous Activities referred to above demonstrates, the general requirement of cooperation is considerably vague, and a more in-depth analysis is needed based on the specific obligations that fall under its normative umbrella.[101]

6.2.1 Categorizing corollary procedural obligations

There are several procedural obligations that flesh out the general duty to cooperate in the transboundary context. These can be divided into five categories: (1) implementation; (2) assessment of possible risks; (3) notification and information sharing; (4) consultation and negotiation; and (5) preparedness for emergencies. These categories are drawn from a variety of sources, including the ILC's Draft Articles on Prevention of Transboundary Harm from Hazardous Activities.[102] These obligations concretize cooperation in the transboundary context and are analysed in turn below. The categories chosen here differ somewhat with those categories previously identified by the Court, which included (1) the duty to notify; (2) the duty to consult and negotiate; and (3) sharing information.[103] The deviations from these categories will be explained below.

The first group of obligations that flesh out the general provision mandating cooperation relate to the domestic aspects of enabling cooperation, found under Articles 5 and 6 of the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities. Taking steps to ensure implementation (pursuant to Article 5) involves not only enacting legislation and taking administrative measures to ensure implementation of the obligations, but also the establishment of measures such as monitoring mechanisms.[104] This underlines the domestic steps necessary to

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[99] Stockholm Declaration (n 75), Principle 24. This was also recognized by the Court in Advisory Opinion OC-23/17 on the Environment and Human Rights (n 17), para 184.

[100] ILC, "Commentaries on the draft Articles on Prevention of Transboundary Harm from Hazardous Activities" (2001) YILC vol. II, Part Two (UN Doc A/56/10) ("ILC Commentaries on Draft Articles on Prevention of Transboundary Harm"), Article 4.

[101] See S McCaffrey, *The Law of International Watercourses* (OUP 2019).

[102] ILC Commentaries on Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (n 100).

[103] Advisory Opinion OC-23/17 on the Environment and Human Rights (n 17), para 186.

[104] Similar requirements as these are found elsewhere, for instance in the Convention on Environmental Impact Assessment in a Transboundary Context, adopted 25 February 1991, entry into force 10 September 1997, 1989 UNTS 309 ("Espoo Convention"), Article 2(2): Each Party shall take the necessary legal, administrative or other measures to implement the provisions of this Convention, including, with respect to proposed activities listed in

enable meaningful cooperation.[105] A subset to the provisions of Article 5, and yet separate from it, is the requirement of prior authorization for hazardous activities that may cause significant transboundary harm in Article 6.[106] This provision aims to ensure that States exercise their jurisdiction in controlling and managing hazardous activities. If authorization is granted but the activity does not conform to its contours, the State must react, including by terminating the authorization.[107] In its Advisory Opinion on the Environment and Human Rights, the Court put this category in the context of its analysis of the obligation of prevention.[108] However, these are also obligations of conduct that are key to successfully coordinate cooperation, and should also be included in the analysis of the obligation of cooperation.

The next type of obligation, under Article 7 of the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, is for States to conduct an assessment of a proposed activity to determine if there is a risk that the activity could cause significant transboundary harm. This obligation is reflected widely in international law, from Principle 17 of the Rio Declaration, to the Convention on Environmental Impact Assessment[109] and elsewhere.[110] Importantly, the wide acceptance of this requirement has led the International Court of Justice ('ICJ') to hold that the requirement is of customary nature in the transboundary context.[111] This obligation was also primarily identified as relevant to the obligation of prevention by the Court in its Advisory Opinion on the Environment and Human Rights.[112] However, in its analysis of the duty to notify which fell under the duty to cooperate, the Court accepted the reasoning of the ICJ that notification of possible harm must occur "as soon as it is in possession of a plan which is sufficiently developed [...] make the preliminary assessment [...] of whether the proposed works might cause significant damage to the other party."[113] Therefore, it is apparent that the conduct of an environmental impact assessment is key in performing the duty to cooperate, and should be analysed also when considering the meaning of the duty to cooperate.

A further category includes the obligation to notify under Article 8 and the obligation to exchange information under Article 12 of the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities. In terms of the obligation to notify, Article 8 essentially requires that

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Appendix I that are likely to cause significant adverse transboundary impact, the establishment of an environmental impact assessment procedure that permits public participation and preparation of the environmental impact assessment documentation described in Appendix II.

[105] ILC Commentaries on Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (n 100), Commentary to Article 5, para 1.

[106] Ibid, Commentary to Article 6, para 1.

[107] Ibid, Article 6(3).

[108] Advisory Opinion OC-23/17 on the Environment and Human Rights (n 17), para 146. This is in reference to the duty to regulate.

[109] Espoo Convention (n 104).

[110] UNCLOS (n 79), Articles 205 and 206; Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution, adopted 24 April 1978, entry into force 30 June 1979, 1140 UNTS 33, Article XI; Protocol on Environmental Protection to the Antarctic Treaty, adopted 4 October 1991, entry into force 14 January 1998, 2941 UNTS, Article 8.

[111] ICJ, *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment)* [2010] ICJ Rep 14, para 204; and ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica) (Judgment)* (2015) ICJ Rep 665, para 104.

[112] Advisory Opinion OC-23/17 on the Environment and Human Rights (n 17), para 156.

[113] Ibid, para 192; *Pulp Mills on the River Uruguay* (n 111), para 105.

if the information that is gained through the assessment of risks reveals a likely significant transboundary harm, the State is then under an obligation to notify the State that will likely be affected. There are a number of other multilateral treaties that contain an obligation to notify.[114] Principle 19 of the Rio Declaration holds that notification must be timely and include all the relevant information on the activity that may cause the harm.[115] Decisions regarding and authorization of the activity in question cannot precede the notification of the likely affected State as this would void the whole purpose of this obligation.[116] This requirement is reflected in a vast number of international instruments.[117] It almost goes without saying that the notification must include the technical information available, as it would otherwise not allow the potentially affected State to comprehend the risks fully.[118] The obligation to notify has been upheld repeatedly. For instance, the Espoo Committee upheld the requirement to notify the potentially affected neighbouring States of planned construction of nuclear reactors, despite the low risk of nuclear accidents.[119] The vast number of treaty obligations, the inclusion of the obligation in the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, the jurisprudence of the ICJ and decisions such as the one from the Espoo Committee seem to support the view that the obligation to notify is a customary obligation, at the very least in cases of cooperation concerning international waters.[120]

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[114] UNCLOS (n 79), Articles 197 and 200; Convention on Biological Diversity, adopted 22 May 1992, entry into force on 29 December 1993, 1760 UNTS 79 ("Convention on Biological Diversity"), Articles 14(1)I and 17; Convention on Wetlands of International Importance especially as Waterfowl Habitat, adopted 2 February 1971, entry into force 21 December 1975, 996 UNTS 245, Articles 3 and 5; Convention for the Prevention of Marine Pollution from Land-based Sources, adopted 4 June 1974, entry into force 6 May 1978, 1546 UNTS 103, Articles 9 and 10; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, adopted 22 March 1989, entry into force on 5 May 1992, 1673 UNTS 57, Articles 6 and 13; Vienna Convention for Protection of the Ozone Layer, adopted 22 March 1985, entry into force 22 September 1988, 1513 UNTS 293 ("Convention for Protection of the Ozone Layer"), Article 4; and Convention on the Law of the Non-Navigational Uses of International Watercourses, adopted 21 May 1997, entry into force 17 August 2014) 2999 UNTS ("UNWC"), preamble, Articles 8, 9, 11, 12-18.

[115] Rio Declaration (n 76), Principle 19.

[116] ILC Commentaries on Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (n 100), Article 8(2).

[117] Convention on Long-range Transboundary Air Pollution, adopted 13 November 1979, entry into force 16 March 1983, 1302 UNTS 217, Article 8(b) ("LRTAP Convention"); Espoo Convention (n 104), Article 3; Convention on the Transboundary Effects of Industrial Accidents, adopted 17 March 1992, entry into force 19 April 2000, 2105 UNTS 457, Articles 3 and 10; Convention on the Early Notification of a Nuclear Accident, adopted 26 September 1986, entry into force 27 October 1986, 1439 UNTS 275; UNWC (n 114), Articles 12-17.

[118] ILC Commentaries on Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (n 100), Commentary to Article 8, para 6.

[119] Espoo Convention Implementation Committee, "Findings and recommendations further to a Committee initiative concerning the United Kingdom of Great Britain and Northern Ireland" (EIA/IC/CI/5), para 59.

[120] Advisory Opinion OC-23/17 on the Environment and Human Rights (n 17), para 188; *Certain Activities* and *Construction of a Road* (n 111). See also, *inter alia*, Tribunal Arbitral, *Case of Lac Lanoux (France v. Spain).* Decision of 16 November 1957; ICJ, *Case concerning the Gabčikovo-Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 7; *Case of Pulp Mills on the River Uruguay* (n 111), and ICJ, *Corfu Channel Case (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 22. Leb makes this point regarding the obligation to notify in the context of international watercourses. See C Leb, *Cooperation in the Law of Transboundary Water Resources* (CUP 2013), page 133.

There are also many international instruments with provisions concerning exchange of information.[121] Article 12 of the Draft Articles requires that States provide information regarding the activity so as to allow the concerned States to have the necessary information to prevent transboundary harm. Exchange of information has a different emphasis in comparison with the duty to notify, as there is also a focus on scientific and technological knowledge. The Rio Declaration provides for cooperation for capacity building by exchanging scientific and technological knowledge and technology transfer,[122] an obligation which is of course quite relevant in the context of climate change. The State of origin and the State that may be affected also need to provide information to the public and consider the public's views.[123] The caveat is of course that States are able to withhold information that relates to their national security, or information that falls under industrial secrets.[124]

The fourth type of obligation is one of consultation and negotiation under Article 9 of the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, as also found in many other instruments.[125] Principle 19 of the Rio Declaration also holds that States are under an obligation to consult States that may be potentially affected by transboundary harm, in good faith.[126] This is a key obligation in fleshing out the meaning of cooperation. Consultation and negotiation must take place between the notified and notifying States following the notification about a possible harm,[127] in order to take into account each other's views to arrive at a solution that either avoids transboundary harm or minimizes its risk.[128] The commentaries to Article 9 refer to the ICJ's dictum that States are to negotiate in good faith, intending to reach an agreement without a mere show of formalities where parties only insist on their own positions.[129] It seems that obligations of consultation and negotiation are of a customary nature given the breadth of treaty obligations, ILC material and jurisprudence,[130] particularly so in regards with consultation which is required as a result of the notification of an activity that may cause significant transboundary harm.[131] Importantly, the consultations need to take into account the factors set out in Article 10 of the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities to balance the States interests equitably. These factors include the degree of risk of harm,

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[121] Convention on Biological Diversity (n 114), Article 17; Convention on the Physical Protection of Nuclear Material, adopted 3 March 1980, entry into force 8 February 1987, 1456 UNTS 101, Article 5; UNWC (n 114), Article 11.

[122] Rio Declaration (n 76), Principle 9.

[123] ILC Commentaries on Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (n 100), Commentary to Article 13.

[124] Ibid, Commentary to Article 14.

[125]UNWC (n 114), Article 17.

[126] Rio Declaration (n 76).

[127] Ibid, Principle 19.

[128] ILC Commentaries on Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (n 100), Article 9(1); similar provisions in other instruments include LRTAP Convention (n 117), Article 5.

[129] ICJ, *Fisheries Jurisdiction (United Kingdom v Iceland) (Merits)* [1974] ICJ Rep 33, para 78; ICJ, *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) (Judgment)* [1969] ICJ Rep 3, para 87; ILC Commentaries on Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (n 100), Article 9(3). See also *Lac Lanoux Arbitration* (n 120), page 32.

[130] Leb (n 120), pages 143-48. See also P Dupuy, G Le Moli and J Viñuales, "Customary International Law and the Environment" (December 2018) C-EENRG Working Papers 2018-2, pages 12-13.

[131] Leb (n 120), pages 140-41. The obligation of consultation and negotiation has been recognized as a part of the customary obligations by the ICJ. See *Construction of a Road in Costa Rica along the San Juan River* (n 111), para 104.

the availability of preventive measures, the importance of the activity (socially, economically, and technically), the risk of harm to the environment, and the economic viability of preventive measures.[132] In this way, consultation and negotiation demand more concrete action, despite technically remaining procedural obligations.

A fifth and final type of obligation is the obligation of preparedness for emergencies under Article 16 of the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities. The nature of emergencies means one cannot prepare detailed impact assessments as a preventative measure, and there is little to no opportunity to consult to prevent the transboundary harm. This obligation is particularly important concerning the consequences of climate change that may be increasing the frequency of natural disasters and emergencies. As Principle 18 of the Rio Declaration mandates, once an emergency – be that natural or otherwise – strikes, there is then an obligation to immediately notify those States that will likely be affected.[133] Given the immediate importance of notification in such contexts to uphold the no-harm principle, and given the customary nature of the no-harm principle, the duty to notify in cases of emergencies does not seem to be fully contingent upon treaty obligations alone and could be argued to possess a customary character. This obligation was also considered in the context of the prevention duty by the Court in its Advisory Opinion on the Environment and Human Rights.[134] However, the Court also observed the importance of the obligation of preparedness for emergencies in the cooperation context, as it observed that the duty of notification is also key in the case of environmental emergencies.[135] Indeed, given the increasing prevalence of environmental emergencies because of the effects of climate change, the way in which States plan to notify each other in case of emergencies will be key to cooperation in addressing the effects of climate change.

6.2.2 The limits of cooperation in the transboundary context

The Court has noted that obligations of cooperation do not mean that activities can only be implemented with the prior consent of the potentially affected States.[136] In the context of transboundary harm, the duty to cooperate generally does not give the State that is affected (or will likely be affected with significant harm) the ability to veto the activity that is proposed or is underway. As shown above, the requirement from the State of origin is one of taking into account the interests of the affected State, not gaining its consent. Indeed, UNGA Resolution 2995 – dealing with cooperation in the field of the environment – which endorsed the Stockholm Declaration, maintained quite clearly that good neighbourliness does not equate to an ability by the State affected/likely to be affected to delay or impede the proposed activities for the exploration and exploitation of a State's own natural resources.[137] This is due to the fundamental importance of the right of States to use their own territories under international law.[138] As Brunnée observed, *bon voisinage* not only entails a right not to suffer significant transboundary harm, but also

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[132] ILC Commentaries on Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (n 100), Article 10.

[133] UNWC (n 114), Article 17.

[134] Advisory Opinion OC-23/17 on the Environment and Human Rights (n 17), para 171.

[135] Ibid, para 190.

[136] Ibid, para 203.

[137] UNGA, "Resolution on Co-operation between States in the field of the environment" (1972) GA Res 2995 (XXVII) ("UNGA Resolution on Co-operation between States in the field of the environment").

[138] Permanent Court of Arbitration (PCA), *Island of Palmas (Netherlands v United States of America)* (1928) 2 RIAA 829.

entails a duty to "tolerate certain interferences".[139] As cooperation for preventing transboundary harm flows from the notion of good neighbourliness, it follows that the duty to cooperate will not be breached if there is a lack of consent so long as there is compliance with the obligations discussed above.

Knowing that cooperation does not equate to consent, the question becomes the degree to which the rights of States to use their territory are limited due to the interests of other States.[140] The obligation must be one of conduct, involving due diligence, as opposed to one of result. However, it is important to recall that it is not enough to merely negotiate in good faith, but there is a requirement to take into account the factors for balancing interests equitably while negotiating (as discussed, pursuant to Article 10 of the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities). Therefore, despite no specific results being required through the consent of the affected or likely affected States, there is a requirement for the outcome to be equitable based on the factors set out by the ILC. This is of course in addition to the link between the no-harm principle as the objective and the obligations of cooperation.

6.3 Cooperation in the Global Context

The Court in its Advisory Opinion on the Environment and Human Rights noted that the duty to cooperate in environmental matters and its customary nature have been recognized by arbitral tribunals.[141] The Court also expanded on the corollary obligations that inform the concrete conduct that is required as a result of the duty to cooperate. However, the statement about the customary nature of the duty to cooperate and the ensuing analysis was mostly based upon provisions and jurisprudence that concerned transboundary environmental harm and therefore transboundary cooperation.[142] The issue before the Court in this Request is whether its findings in its Advisory Opinion on the Environment and Human Rights can be automatically expanded to cooperation in the context of climate change. The provisions of the ACHR that the Court is asked to consider do not concern cooperation on a global level, but rather at a regional level. However, the meaning of the obligation of cooperation in the global context is still quite relevant for the purposes of the Court. Analysing how the obligations of cooperation are understood in the global context will assist the Court in going beyond the transboundary dynamic. This is necessary as climate action, even in the Inter-American context alone, will involve multi-lateral rather than bilateral dynamics, given the polycentric nature of the climate problem. Such multi-lateral dynamics which go beyond questions of transboundary harm are more analogous to the global context. However, as mentioned above, cooperation is more concretely defined in the transboundary context. It may thus be tempting to use the meaning of cooperation in the transboundary context in interpreting the obligation of cooperation in the American context as concerning climate change. This is understandable as the more concrete definition of legal obligations assists in increasing the implementation of the obligations. This section analyses the degree to which efforts towards the

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[139] J Brunnée, 'Sic utere tuo et alienum non laedas' (March 2010) in Wolfrum (n 86), para 4.

[140] *Corfu Channel* (n 120), page 22.

[141] Advisory Opinion OC-23/17 on the Environment and Human Rights (n 17), para 184; *Lac Lanoux Arbitration* (n 120), page 308.

[142] For instance, reference made by the Court to such disputes as the *Lac Lanoux Arbitration* (n 120); *Corfu Channel* (n 120); *Pulp Mills on the River Uruguay* (n 111); *Certain Activities* and *Construction of a road* (n 111); and *Gabčíkovo-Nagymaros Project* (n 120). These cases show the reliance on transboundary environmental disputes. Reliance on the many treaty provisions of cooperation in the transboundary context also affirm this approach.

concretization of cooperation in the global or multi-lateral context can be informed by the meaning of cooperation in the transboundary context.

6.3.1 Synergies between transboundary and global obligations to cooperate

Naturally, cooperation in the global context shares a similar goal to cooperation in the transboundary context. The UN General Assembly Resolution which endorsed the Stockholm Declaration in 1972 (UNGA Resolution 2995) maintained that States must not cause significant harm in areas beyond their jurisdiction when exploring, exploiting and developing their natural resources.[143] Since the ICJ's advisory opinion on the *Legality of Threat or Use of Nuclear Weapons*, the protection of the environment has been clearly established as a customary rule. The ICJ held that States were under an obligation to not only respect other States' environment but also the areas beyond national control.[144]

In relation to the protection of the global environment, Principle 24 of the Stockholm Declaration maintains that "International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing." [145] The Rio Declaration confirms as much, with Principle 27 holding that States are to "cooperate in good faith and in a spirit of partnership".[146] There are vast issues that may be thought to be under the ambit of "global commons" or "global public goods".[147] It almost goes without saying that the protection of the earth's atmosphere and addressing the challenges posed by climate change are the primary example of such global public goods.

However, when it comes to the protection of the atmosphere, there are fewer specific obligations that flesh out the obligation of cooperation to move towards the goals outlined above. There are similar – similar to the transboundary context that is – obligations of exchange of information as they apply to the ozone layer[148] and climate change.[149] The Kyoto Protocol requires parties to share their experiences and exchange information on measures as well as improving the comparability and transparency of their measures.[150] Of course, generally speaking, as global environmental concerns typically involve a multitude of interested States, the obligation to exchange information differs to the transboundary context in that it may involve the provision of the information to a relevant international organization.[151] The Vienna Convention on the Protection of the Ozone Layer further stipulates that cooperation in the context of the protection of the ozone layer includes the exchange of scientific, technical, socio economic, commercial and legal information, so that the acquisition of alternative technologies – and research for them – for the protection of

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[143] UNGA Resolution on Co-operation between States in the field of the environment (n 137).

[144] ICJ, *The Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, para 29.

[145] Stockholm Declaration (n 75), Principle 24.

[146] Rio Declaration (n 76).

[147] G Shaffer, "International Law and Global Public Goods in a Legal Pluralist World" (2012) 23 EJIL 3.

[148] Convention for Protection of the Ozone Layer (n 114), Article 5.

[149] UNFCCC (n 80), Article 4(1).

[150] Kyoto Protocol to the United Nations Framework Convention on Climate Change, adopted 11 December 1997, entry into force 16 February 2005, 2303 UNTS 162, Article 2(b).

[151] L Duvic-Paoli, *The Prevention Principle in International Environmental Law* (CUP 2018), page 221. See UNFCCC (n 80), Article 7(2)(1): Seek and utilize, where appropriate, the services and cooperation of, and information provided by, competent international organizations and intergovernmental and non-governmental bodies.

the ozone layer could be facilitated.[152] The issue of technology transfers and financial assistance, which forms a crucial aspect of the cooperative framework of the ozone regime, is further elaborated through the Montreal Protocol.[153] Technology transfer is also included in the Paris Agreement,[154] as well as cooperation over climate change education and awareness.[155]

Cooperation for tackling the issue of climate change inevitably involves scientific and technological questions. Therefore, in addition to the Intergovernmental Panel on Climate Change, the UN Framework Convention on Climate Change (UNFCCC) also contains a provision for a subsidiary body for scientific and technological advice to provide scientific assessments on climate change and its effects as well as advising on international cooperation for research and development related to the issue.[156] The obligation to cooperate thus also requires States to support the generation of scientific information in the context of climate change, which in turn (as discussed in sections 7 and 8 below) informs the content of relevant human rights obligations.

6.3.2 Possible divergence between transboundary and global obligations

Obligations to cooperate regarding the global environment may, however, differ from the transboundary harm context because of the varying obligations of States according to their backgrounds. While it is true that States, big or small, are required to cooperate and climate change is a common concern of humankind, Principle 7 of the Rio Declaration recognizes that States have varying historic responsibilities and respective capabilities. Therefore, Principle 7 – which is mentioned specifically in the Request – adopts the principle of common but differentiated responsibilities ('CBDR'), which gives international cooperation over the protection of the global environment a different flavour than cooperation for transboundary harm by recognizing that equity may at times mean that there is a degree of non-reciprocity.[157] In the context of the ozone layer, developing States are under the same structure of obligations, though their responsibility and capabilities are reflected in the different base-line level (obligations are set according to different capabilities) and respective deadlines (deadlines were set further back in accordance with different capabilities).[158] In the context of the issue of climate change, UNFCCC also stresses the importance of CBDR,[159] asking developed State parties to take the lead.[160] This overarching approach trickles down to the more specific obligations of cooperation. For instance, the exchange of information on measures taken will be dependent on the responsibilities and capabilities of the parties.[161] Also, when there is talk of coordination of measures by different parties, this coordination is also to occur with CBDR being taken into consideration.[162]

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[152] Convention for Protection of the Ozone Layer (n 114), Article 4.

[153] Montreal Protocol on Substances that Deplete the Ozone Layer, adopted 16 September 1987, entry into force 1 January 1989, 1522 UNTS 29 ("Montreal Protocol"), Article 10 and 10A.

[154] Paris Agreement, (n 10), Article 10

[155] Ibid, Article 12.

[156] UNFCCC (n 80), Article 9.

[157] See P Cullet, "Principle 7: Common but Differentiated Responsibilities" in Viñuales (n 77).

[158] Montreal Protocol (n 153), Articles 5(1), 5(3)(a) and 5(3)(c).

[159] UNFCCC (n 80), Article 3(1). d

[160] Naturally, the CBDR principle is reflected in the Kyoto Protocol and the Paris Agreement as well. See Kyoto Protocol (n 150), Article 10; Paris Agreement (n 10), Preamble, Article 2 and 4.

[161] UNFCCC (n 80) Article 7(2)(b).

[162] Ibid, Article 7(2)(c).

Having offered the above analysis, the degree to which CBDR shapes the obligation of cooperation in the Inter-American context may be less significant. CBDR most starkly differentiates between the obligations of the Global North and the Global South. This is due to the different and distinctive capabilities and resources of these countries. Seeing as the differences in the capabilities of the Member States in the Inter-American context are less stark, the CBDR principle may not be as consequential as it may be in considering the obligations of States in global climate action. Nevertheless, the obligations of American States need to be understood in a global context which recognizes that the responsibilities of States are affected by their capabilities.

There are, in addition, certain obligations that may not arise to the same extent in relation to the global environment as they do regarding the transboundary environmental harm context. For instance, as discussed earlier, the obligation to perform Environmental Impact Assessments (EIAs) is well established in the transboundary context, even to the degree that it is seen as a customary rule.[163] However, there is less evidence that EIA obligations can be applied to all areas beyond national jurisdiction for the protection of the global environment, including in respect of the atmosphere.[164] One relevant precedent that may prove useful in extending EIA obligations to the protection of the atmosphere comes from the International Tribunal for the Law of the Sea ('ITLOS'). In the Advisory Opinion on the Area, it was held by the ITLOS Seabed Chamber that the EIA obligation in relation to the Area is not only recognized under UNCLOS but is also of a customary character. Furthermore, the Chamber decided that the EIA, as a customary rule, is applicable to not only the Area, but to all areas beyond national jurisdiction.[165] The obligation to conduct an EIA is, however, less clearly established in relation to areas beyond national jurisdiction in comparison with the transboundary context.

The other area where obligations of cooperation differ in a global (rather than transboundary context) is the issue of notification and consultation. Regarding notification, even when the requirement exists regarding the protection of the global environment, it is – as Okowa observed in her study of the subject – predicated upon the activity that triggered it.[166] Transboundary activities clearly require stronger obligations of notification,[167] due to the proximity of the activity to the affected State and the potentiality of the seriousness and clarity of the source of the harm increasing with increased proximity. In fact, Okowa observes that determining the scope of the obligation to notify is inherently confused and complicated with regards to harm that may impact multiple States due to a more complex calculus of the harm.[168] The harm and source of harm is much clearer in the context of a dispute like the Trail Smelter Arbitration[169] than it is in relation to climate change. This is the reason why notification may be owed to an international organization in the global environmental context, in the same way that (as discussed above) international

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[163] *Pulp Mills on the River Uruguay* (n 111), para 204; and subsequently *Certain Activities and Construction of a Road* (n 111), para 104. Additional evidence of the customary nature is inclusion of EIA in ILC Commentaries on Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (n 100), Article 7.

[164] Reasonable commentators may disagree. For instance, Duvic-Paoli argues that the Chamber may have had persuasive grounds also based on custom codification efforts. See Duvic-Paoli (n 151), pages 214-15.

[165] ITLOS, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion)* [2011] ITLOS Rep 10, paras 145-8.

[166] P Okowa, "Procedural Obligations in International Environmental Agreements" (1996) 67 BYIL 275, page 289.

[167] Okowa (n 166), page 290; see also P Okowa, "Notification and Assistance in Case of Emergency" in Viñuales (n 77), page 471; and Duvic-Paoli (n 151), page 219.

[168] Okowa (n 166), page 291.

[169] *Trail Smelter Arbitration (USA v Canada)* (1938) 3 RIAA.

organizations may serve as a means for sharing information.[170] Indeed, the Paris Agreement reporting and information provision obligations can be seen as an instance of how the notification obligation takes shape concerning the climate emergency.[171]

While the principle of cooperation does not give rise as readily to specific obligations in the global context as it does in the transboundary context, there are many similarities. Therefore, while the Court will undoubtedly exercise a degree of caution in drawing on the meaning of cooperation in the transboundary context to inform the multi-lateral context, there are indeed many ways in which the Court can concretize cooperation in the multi-lateral context by analysing cooperation in the transboundary context.

7. Scientific Consensus: The Accepted Science on Climate Change and its Effects on Human Rights

As discussed above, the collective development of scientific knowledge is an important aspect of the global obligation to cooperate in response to concerns of climate change. This development has led to the emergence of an evolving scientific consensus, which in turn provides criteria that should inform the determination and assessment of States' human rights obligations. This section explains the role of scientific consensus in the analysis of human rights obligations in the context of climate change.

7.1 Explanation of Scientific Consensus

The "scientific consensus" on climate change refers to the "state of knowledge" on the effects, causes and impacts of climate change. It reflects the most up-to-date evidence and information available, as agreed amongst the scientific community. It can also identify where next steps and further research is needed.[172] The phrase "scientific consensus" is not universally used. Similar phrases include "consensus and best available science",[173] "best available science"[174], standards set by "science and international law", "informed by scientific knowledge",[175] "the state of science"[176]

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[170] Ibid, page 290.

[171] Paris Agreement (n 10), Article 13.

[172] IPCC, "The Intergovernmental Panel on Climate Change". Available at: https://www.ipcc.ch/.

[173] ECtHR, *Verein KlimaSeniorinnen and others v Switzerland* (Application no. 53600/20), "Applicants' submissions – Observations on the Law" (October 2021), paras 61, 63. Available at: https://klimaseniorinnen.ch/wp-content/uploads/2021/10/UL_53600_20_Observations_on_Law_and_Reply.pdf

[174] A number of international conventions use the phrase "best available science", including the Paris Agreement. See also L Maxwell, S Mead and S Van Berkel, "Standards for adjudicating the next generation of Urgenda-style climate cases" (2022) 13 Journal of Human Rights and the Environment 1. Available at https://www.ohchr.org/sites/default/files/documents/issues/climatechange/cfi-promotion-and-protection/non-states/2022-07-04/Climate%20Litigation%20Network%202-cfi-promotion-and-protection.pdf.

[175] The Supreme Court of the Netherlands, *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v. Stichting Urgenda,* (Judgment of 20 December 2019), ECLI:NL:HR:2019:2007. Available at: https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf; See also Maxwell, Mead and Van Berkel (n 174).

[176] Federal Court of Australia, *Minister for the Environment v Sharma* (Judgment of 15 March 2022) [2022] FCAFC 35, para 260. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20220315_VID-389-of-2021-2021-FCA-560-2021-FCA-774-2022-FCAFC-35-2022-FCAFC-65_decision.pdf

and others.[177] There has been an increased amount of rigorous and peer-reviewed expert-led research in the field of climate science and its many related disciplines. In the field of climate change, it is considered that scientific consensus is best reflected in the reports and assessments of the Intergovernmental Panel on Climate Change (discussed further below). As the IPCC publishes its report every few years, the scientific consensus on climate change may also be supplemented by more recent research where it is sufficiently established. The IPCC has also recognised that "Indigenous knowledge complements scientific evidence on climate change".[178] Indigenous Peoples, due to their unique relationship with their land and environment, have a wealth of observational knowledge on the changes and impacts brought by the climate crisis. An IPCC Working Group report has highlighted the role of oral traditions as "sources of information that enrich instrumental data". [179]

7.2 Relevance of Scientific Consensus to the Request

The Request acknowledges the scientific (and political) consensus on global warming: climate change is already impacting human rights, and if global temperatures continue to increase and reach 1.5°C above pre-industrial levels, this would constitute a "serious threat to human survival".

One aspect of the Request is therefore the question of how the scientific consensus on climate change informs a State's duties to prevent the harmful effects of climate change and guarantee the right to a healthy environment in light of its obligations under the Convention.[180] The Request also involves consideration of what measures States should take to minimise the impact of climate change and meet their obligations under the Convention, especially in relation to more vulnerable persons, as set out above. The Request also asks what a State should take into consideration when implementing these obligations, as well as which principles should inspire its measures responding to climate change. Furthermore, the Request asks how the scientific consensus on the particular vulnerabilities of children to climate change impacts the "nature and scope" of the obligation on a State to adopt "timely and effective" climate measures.[181]

Overall, the Request acknowledges that scientific consensus is an important factor when determining the scope and nature of States' obligations to protect human rights from the impacts of climate change, and asks for further articulation of the role played by the core and recognised understanding of climate science.

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[177] Oslo Principles on Global Climate Change Obligations (1 March 2015) ("Oslo Principles"). Available at: https://climateprinciplesforenterprises.files.wordpress.com/2017/12/osloprincipleswebpdf.pdf; B Mayer, "Climate Change as an Obligation under Human Rights Treaties?" (2021) 115 American Journal of International Law 3. Available at: https://doi.org/10.1017/ajil.2021.9

[178] International Work Group for Indigenous Affairs (IWGIA), "The Indigenous World 2023: The Intergovernmental Panel on Climate Change" (30 March 2023) ("Indigenous World 2023 Report"). Available at: https://www.iwgia.org/en/ip-i-iw/411-ipcc/5156-iw-2023-ipcc.html#:~:text=The%20main%20message%20of%20this,information%20that%20enrich%20instrumental%20data.

[179] IPCC, "Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change" [Masson-Delmotte, V., P. Zhai, A. Pirani, S.L. Connors, C. Péan, S. Berger, N. Caud, Y. Chen, L. Goldfarb, M.I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.B.R. Matthews, T.K. Maycock, T. Waterfield, O. Yelekçi, R. Yu, and B. Zhou (eds.)]. (CUP 2021) ("IPCC AR6 Climate Change 2021 – Physical Science Basis"). Available at: https://www.ipcc.ch/report/sixth-assessment-report-working-group-i/; Indigenous World 2023 Report (n 178).

[180] Page 8.

[181] Page 10.

7.3 Role of the IPCC

With 195 member states and an objective to "provide governments at all levels with scientific information that they can use to develop climate policies",[182] the IPCC plays an essential role in determining where there is international consensus on the latest climate science, and translating this science into a framework for national governments in a policy relevant manner. The IPCC does this by regularly preparing special reports and assessment reports across three Working Groups,[183] which are authored by volunteer experts from its member countries. The IPCC does not conduct its own research in preparing these outputs. Instead, experts assess the thousands of scientific papers published every year to provide a comprehensive summary of what is known about the drivers of climate change, impacts and future risks, and how mitigation and adaptation can reduce those risks. The IPCC identifies the strength of scientific agreement across its findings in different areas.[184] Each report contains a Summary for Policymakers which employs consensus decision-making: government representatives conduct a line-by-line review and approval of the draft Summary,[185] which is important in securing governmental buy-in and lending the final report democratic and political legitimacy.

This scientific consensus settled and communicated by the IPCC informs intergovernmental and domestic decision-making processes in relation to climate change. The UN Human Rights Council, for example, has noted "the importance of the work of the scientific community and the Intergovernmental Panel on Climate Change [...] in support of strengthening the global response to climate change, including considering the human dimension, and indigenous peoples' and local communities' knowledge."[186] Courts around the world have recognised the role of the IPCC as a key authority on climate science.[187]

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[182] IPCC, "About the IPCC". Available at: https://www.ipcc.ch/about/.

[183] Ibid.

[184] Ibid.

[185] IPCC, "Preparing Reports". Available at: https://www.ipcc.ch/about/preparingreports/.

[186] UN HRC Resolution on Human Rights and Climate Change 2019 (n 3).

[187] Supreme Court of Colombia, *Rodríguez Peña and others v Colombia (Future Generations v Colombia)* (Judgment of 5 April 2018) 11001 22 03 000 2018 00319 00. Available at https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2018/20180405_11001-22-03-000-2018-00319-00_decision-2.pdf; Supreme Court of the Netherlands, *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v. Stichting Urgenda*, (Judgment of 20 December 2019), ECLI:NL:HR:2019:2007. Available at: https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf.; Administrative Court of Berlin, *Family Farmers and Greenpeace Germany v. Germany* (Judgment of 31 October 2019), VG 10 K 412.18. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20211031_0027117R-SP_judgment-1.pdf; German Constitutional Court, *Neubauer et al v. Germany* (Judgment on 24 March 2021) BvR 2656/18. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210324_11817_order-1.pdf.; Superior Court of Justice of Ontario, *Mathur v Ontario* (Judgment of 11 December 2020) 2020 ONSC 6918. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20201112_CV-19-00631627_decision.pdf; Tribunal de première instance de Bruxelles, *VZW Klimaatzaak v Kingdom of Belgium & Others* (Judgment of 17 June 2021) 2015/4585/A. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210617_2660_judgment.pdf; Tribunal Administratif de Paris, *Notre Affaire à Tous and Others v France* (Judgment of 14 October 2021) N°s 1904967, 1904968, 1904972, 1904976/4-1. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20211014_NA_decision-1.pdf; Hague District Court, *Milieudefensie et al v Royal Dutch Shell* (Judgment of 26 May 2021) ECLI:NL:RBDHA:2021:5337. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf;

7.4 Key IPCC Findings on the Likely Effects of Climate Change

Through the IPCC's expert-driven and intergovernmental processes, settled scientific consensus has emerged in several key areas, including that climate change is already having negative impacts on peoples' lives and the full enjoyment of their human rights, that such impacts are not evenly distributed, and that the effects of the climate crisis increase with every increment of warming. There is consensus that immediate and urgent action is needed, and that an emphasis on mitigation and adaptation efforts now will help to avoid significant impacts and irreversible tipping points in the future, which will limit further possible adaptation opportunities. The IPCC's findings must also be read in the context that the lengthy review processes of the state of knowledge on climate change results in a lag of several years; the IPCC has found on several instances that its previous predictions on the impacts of climate change were conservative, or that the effects of climate change were occurring at a faster or higher rate than previously expected.[188]

The scientific consensus is unequivocal that human activities, principally through emissions of greenhouse gases, have caused global warming leading to a more turbulent climate. Human-caused climate change is already affecting weather and producing climate extremes across every region, with widespread adverse impacts on food and water security, human health, economies and societies, and related losses and damages to nature and people.[189] It is settled science that climate change has already caused substantial damages and increasingly irreversible losses in a number of ecosystems, has reduced food security and affected water security, has had adverse impacts on human physical and mental health and livelihoods, and is contributing to humanitarian crises where climate hazards interact with other vulnerabilities.[190] There is also consensus that climatic change (and the impact of extreme events) will intensify in the near term with increasing global warming and will result in cascading impacts that are more difficult to manage, while losses and damages will continue to increase.[191]

While extreme weather events (e.g. hurricanes, droughts, wildfires, or floods) pre-date anthropogenic climate change, the science is also very clear that greenhouse gas emissions have significantly increased the occurrence, strength and unpredictability of these events.[192] It is now even possible to determine the intensification of a weather event and calculate the additional harm caused because of climate change, or the likelihood that a certain event would have occurred were it not for climate change.[193] Through attribution science, the responsibility of States (or non-State actors) could be engaged for violations of human rights due to the impacts caused by climate

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[188] IPCC AR6 Climate Change 2023: Synthesis Report (n 22), page 14.

[189] Ibid, page 42.

[190] Ibid, page 50.

[191] Ibid, page 97.

[192] IPCC, "Weather and Climate Extreme Events in a Changing Climate", Seneviratne, S.I., X. Zhang, M. Adnan, W. Badi, C. Dereczynski, A. Di Luca, S. Ghosh, I. Iskandar, J. Kossin, S. Lewis, F. Otto, I. Pinto, M. Satoh, S.M. Vicente-Serrano, M. Wehner, and B. Zhou. In Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Masson-Delmotte, V., P. Zhai, A. Pirani, S.L. Connors, C. Péan, S. Berger, N. Caud, Y. Chen, L. Goldfarb, M.I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.B.R. Matthews, T.K. Maycock, T. Waterfield, O. Yelekçi, R. Yu, and B. Zhou (eds.)] (CUP 2021) ("IPCC AR6 Climate Change 2021 – Physical Science Basis: Weather and Climate Extreme Events in a Changing Climate"). Available at: https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_Chapter11.pdf.

[193] P Sjoukje et al, "A protocol for probabilistic extreme event attribution analyses" (2020) 6 Advances in Statistical Climatology, Meteorology and Oceanography 2. Available at: https://doi.org/10.5194/ascmo-6-177-2020.

change by determining, with quite a high degree of precision, the increased impacts due to that actor's greenhouse gas emissions.[194]

Discussions on the impacts of climate change and necessary measures are often tied to temperature targets for global warming. The Paris Agreement's long term temperature goal, reached through international political consensus,[195] is to hold global average temperature increase to "well below 2°C above pre industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels".[196] Scientific consensus has echoed the importance of limiting global warming, emphasising that every incremental increase in temperature results in additional and acute negative impacts, including adverse human rights impacts.

It is outside the scope of this submission to state definitively what target should be adhered to as a matter of scientific consensus. It should, however, be noted that climate change has already produced catastrophic impacts on human rights at our current level of warming (1.0°C-1.18°C[197]).

The most recent IPCC overview report, the Synthesis Report of the Sixth Assessment Report ('AR6 Synthesis Report')[198] published in 2023, stated, with high confidence, that "[e]very increment of global warming will intensify multiple and concurrent hazards in all regions of the world"[199] and with "every additional increment of global warming, changes in extremes continue to become larger". [200] This trend will also apply to regional changes, as "mean climate and extremes [would] become more widespread and pronounced". [201] In a previous Special Report on the impacts of global warming of 1.5°C (the '1.5°C Report'), the IPCC found that climate related risks to health, livelihoods and economic security, food security, water supply, human security and economic growth are already projected to increase with global warming of 1.5°C and even further under a 2°C forecast.[202] The AR6 Synthesis Report noted with high confidence that "[f]or any given future warming level, many climate-related risks are higher than [previously] assessed in AR5", and stated

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194 See this methodology as explained in R F Stuart-Smith et al, "Attribution science and litigation: facilitating effective legal arguments and strategies to manage climate change damages" (2021) Summary report for FILE Foundation. Available at: https://www.smithschool.ox.ac.uk/sites/default/files/2022-03/attribution-science-and-litigation.pdf; R F Stuart-Smith, F E L Otto, A I Saad et al, "Filling the evidentiary gap in climate litigation" (2021) 11 Nature Climate Change. Available at: https://doi.org/10.1038/s41558-021-01086-7; R Heede, "Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers" (2014) 122 Climatic Change. Available at: https://doi.org/10.1007/s10584-013-0986-y and used in the case District Court of Essen, *Lliuya v RWE* (Judgment of 15 December 2016) 2 O 285/15.

195 B Hare, "Turning up the heat: how the diplomatic push for 1.5℃ unfolded in Paris" (17 December 2015) Climate Analytics. Available at: https://climateanalytics.org/blog/2015/turning-up-the-heat-how-the-diplomatic-push-for-15-unfolded-in-paris/.

196 Paris Agreement (n 10), Article 2.

197 World Meteorological Organisation, "State of the Global Climate 2022" (2023), WMO-No. 1316, pages 3-4, 42-43. Available at: https://library.wmo.int/idurl/4/66214; European Environment Agency, "Global and European temperatures" (29 June 2023). Available at: https://www.eea.europa.eu/ims/global-and-european-temperatures.

198 IPCC synthesis reports are intended to provide an overview of the state of knowledge on the science of climate change, emphasising new results since the previous Assessment Report and providing an integrated view of climate change. The synthesis reports are based on the reports of the three working groups within the IPCC as well as the special reports published since the last Assessment Report.

199 IPCC AR6 Climate Change 2023: Synthesis Report (n 22), pages v, 12.

200 Ibid.

201 Ibid.

202 IPCC Special Report on 1.5°C: Summary for Policy Makers (n 70), page 9.

with very high confidence that "projected long-term impacts are up to multiple times higher than currently observed", given that "[r]isks and projected adverse impacts and related losses and damages from climate change escalate with every increment of global warming (very high confidence)". [203]

In the AR6 Synthesis Report, the IPCC highlighted that risks in the near-term include – but are not limited to – increased intensity and frequency of heat extremes with increased human mortality and morbidity, more intense and frequent extreme rainfall and associated flooding in many regions including coastal and low-lying cities, an increased proportion of intense tropical cyclones, high risks from dryland water scarcity and wildfire damage, increased frequency and magnitude of extreme sea level events encroaching on coastal human settlements and damaging coastal infrastructure, committing low-lying ecosystems to submergence and loss with cascading risks to livelihood, health, wellbeing, cultural values, food and water security, increasing ill health and premature deaths, increased disease risks and mental health challenges.[204]

The scientific consensus is clear that with every increment of global warming, harm will increase, and be particularly concentrated among vulnerable populations, and will become increasingly complex and more difficult to manage or avoid.[205] Indeed, the 1.5°C Report noted that populations at a disproportionately higher risk of adverse consequences with global warming of 1.5°C and beyond include, *inter alia*, disadvantaged and vulnerable populations, some Indigenous peoples, and local communities dependent on agriculture, and that such poverty and disadvantage is expected to increase as global warming increases.[206] The Commission has similarly observed that a trajectory towards a 2°C temperature increase would "have devastating consequences, especially for millions of people living in poverty, who even in the best of scenarios would face food insecurity, forced migration, disease and deaths."[207] Thus, the scientific consensus is clear that efforts to address climate change through mitigation or adaptation efforts must emphasise limiting warming well below 2°C, noting the catastrophic human impacts that every incremental decimal of a degree would have.

8. An Analytic Framework: How Scientific Consensus Informs States' Human Rights Obligations

According to Article 1(1) of the ACHR, States party to the Convention "undertake to respect the rights and freedoms recognised herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination [….]." To fulfil these State obligations to respect human rights and ensure all persons within their jurisdiction can exercise these rights,[208] States must adopt relevant measures to address and counter climate change and its effects on the rights to life, to health, and further rights identified above. To achieve this, States must first identify what risks are likely to arise, and then determine what steps to take to respond to those risks. It is submitted that scientific consensus should play a key role to inform

[203] IPCC AR6 Climate Change 2023: Synthesis Report (n 22), page 14.

[204] IPCC AR6 Climate Change 2023: Synthesis Report (n 22).

[205] ibid.

[206] IPCC Special Report on 1.5°C: Summary for Policy Makers (n 70), page 9.

[207] IACmHR Resolution on the Climate Emergency and Inter-American Human Rights Obligations (n 13), page 5.

[208] See also International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171 ("ICCPR"), Article 2(1).

both of these stages: a State's risk assessment and its determination of appropriate measures. Further, it is argued that scientific consensus can also be a tool that informs judicial scrutiny of a State's measures.

8.1 Overview and Purpose of Analytic Framework

The Request asks for guidance on what States' obligations should be in regard to rights protected by the ACHR in light of the scientific consensus on the cause, effects, and human rights impacts of climate change. It is well-evidenced (see Section 4) that human rights – including the rights to life, to integrity and to health, among others – are negatively impacted by climate change. Under Article 1(1) of the Convention, States have an obligation not just to respect but also to ensure the full and free exercise of human rights.[209] A State may fall short of these obligations and thereby commit an internationally wrongful act (engaging its State responsibility) either by its failure to protect rights,[210] or through a failure to refrain from breaching rights.[211]

Section 8.2, provides an analytic framework to help determine the role of scientific consensus in identifying the human rights obligations of States relating to climate change. This analytic framework is informed by the approach taken by this Court in its Advisory Opinion on the Environment and Human Rights; the issues and obligations that arose in that context are broadly similar to those which apply where climate change negatively impacts human rights. Section 8.3 considers the role of scientific consensus in the judicial assessment of States' human rights compliance.

8.2 How Scientific Consensus Fits into the Framework of Human Rights

This section sets out the different roles that scientific consensus can play in evaluating State compliance with human rights obligations in the context of climate change. It considers the role of scientific consensus in the identification of climate risks to human rights (Section 8.2.1), in the identification of appropriate measures to respond to those risks (Section 8.2.2), and in constraining actions by states which might increase those risks (Section 8.2.3).

8.2.1 Identifying the risks: assessments and investigations

Scientific consensus should play a central role and its use should be a key guiding principle in a State's risk assessment of climate harms and how these may infringe on individuals and peoples' human rights.

As examined in Section 5 above, under international environmental law risk assessments are part of the broader obligation to prevent transboundary harm. In this context, the ICJ has provided content to these obligations, as well as setting out the purpose and criteria that risk assessments must meet.[212] The identification and assessment of risks are key for States to prove they have

[209] ACHR (n 5), Article 1.

[210] UN Treaty Bodies Joint Statement on Human Rights and Climate Change (n 15).

[211] Advisory Opinion OC-23/17 on the Environment and Human Rights (n 17), para 117.

[212] ICJ, *Application of the Convention on the Protection and Punishment of the Crime of Genocide (Bosnia v Serbia)* (Judgment of 26 February 2007) ICJ Rep 1, paras 430-438, 461. See also ILC Commentaries on Draft Articles on Prevention of Transboundary Harm (n 100), Commentary to Art 3, page 154 para 7; International Law Association, "Study Group on Due Diligence in International Law First Report" (7 March 2014), page 2. Available at: https://olympereseauinternational.files.wordpress.com/2015/07/due_diligence_-_first_report_2014.pdf

discharged their obligations with due diligence. While due diligence is of a "contextual nature", as States undertake their due diligence obligations in accordance to their capabilities,[213] this does not equate to this standard being "subjective". Indeed, as argued by Brunnée, "States' particular circumstances are individual, but nonetheless objective".[214] It is submitted that States' obligations, including the need to identify and assess risks, should be determined and measured against an objective basis, namely the scientific consensus on climate change.

National courts have noted that the undeniable risks posed by climate change must be taken into account by States given their clear impacts on human rights, including the right to life. These "not purely hypothetical risks"[215] must first be identified and assessed to be appropriately addressed. The Netherlands Supreme Court, for example, has indicated that certain climate-induced risks are not acceptable in the context of States' measures to address climate change, using the language of "irresponsible risks".[216] It would follow, especially given the obligation to apply a precautionary approach to environmental matters,[217] that the minimisation or lack of consideration of such risks during an assessment process would run contrary to States' human rights obligations.

The need for risk assessments is expanded on in ECtHR jurisprudence, including in cases where environmental damage has resulted in human rights violations. As further State obligations flow from this initial risk assessment, the State must have "adopted an adequate regulatory framework in light of the risk of harm" and "taken all necessary measures to mitigate the risk of harm".[218]

In its recent General Comment on climate change, the UN Committee on Children's Rights also emphasised that "the availability of high-quality data is crucial for adequate protection against climate and environmental health risks". It highlighted the key role of science and the importance of undertaking research to identify the impacts of climate change and emerging environmental health.[219] It specifically set out that "States should ensure the collection of reliable, regularly updated and disaggregated data and research on environmental harm, including the risks and actual impacts of climate change-related harm on children's rights".[220]

Whilst data on climate impacts is available and should be taken into account during risk assessments, further investigations may be needed depending on the particular circumstances of

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213 *Activities in the Area (Advisory Opinion)* (n 165), para 131.

214 ITLOS, Proceedings for the Request for an Advisory Opinion on Climate Change and International Law, Oral submissions by Jutta Brunnée on behalf of COSIS (12 September 2023). Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_3_E.pdf

215 *VZW Klimaatzaak v Kingdom of Belgium & Others* (n 187), Section 1.2.

216 *Netherlands v Urgenda* (n 175), para 7.2.5.

217 Ibid.

218 See e.g. ECtHR, *López Ostra v Spain,* App No 1679890 (Judgment of 9 December 1994), para 186; ECtHR, *Jugheli v Georgia*, App No 38342/05 (Judgment of 13 July 2017), para 75; ECtHR, *Öneryildiz v Turkey* [GC], App No 48939/99 (Judgment of 30 November 2004), paras 89, 108; ECtHR, *Hatton and Others v the United Kingdom*, App No 36022/97 (Judgment of 8 July 2003), para 128; ECtHR, *Giacomelli v Italy*, App No 59909/00, (Judgment of 2 November 2006), para 86; *Tătar v Romania,* App No 67021/01 (Judgment of 27 January 2009), para 112; ECtHR, *Vilnes and others v Norway,* App nos. 52806/09 and 22703/10 (Judgment of 5 December 2013); ECtHR, *Taşkın v Turkey*, App No 46117/99 (Judgment of 10/11/2004), para 119.

219 UN Committee on the Rights of the Child, "General Comment No. 26 on Children's Rights and the Environment, with a Special Focus on Climate Change" (2023) UN Doc CRC/C/GC/26 ("CRC General Comment No. 26 on Children's Rights and Climate Change"), para 44.

220 Ibid, para 74.

potential human rights violations. In *Hatton v United Kingdom*[221], the ECtHR noted that the decision-making process regarding environmental and economic policy must involve appropriate investigations and studies to allow the State to carry out a fair balancing exercise between the privacy rights of the individual under Article 8 of the European Convention on Human Rights[222] and the community interest. The fact that the government decision featured in that case to carry on with night flights near Heathrow Airport had been preceded by a series of investigations and studies carried out over a long period of time was an important factor in finding that the State had not breached Article 8. Similarly, a comprehensive review of scientific studies and other investigations, relying on best available science and incorporating the conclusions of scientific knowledge, is likely a necessary step for States to effectively assess the risks posed by climate change and thus discharge their human rights obligations.

Such investigations must also be preventive in nature, and not just after the fact; in *Giacomelli v Italy*, the ECtHR emphasised that the obligation to undertake appropriate studies included an element of time, as the investigations needed to be actioned prior to carrying out activities that might damage the environment. The Court decided that "a governmental decision-making process concerning complex issues of environmental and economic policy must in the first place involve appropriate investigations and studies so that the effects of activities that might damage the environment and infringe individuals' rights may be predicted and evaluated in advance".[223] The State's omission to do so meant that it had breached the applicants' right to private life.[224] An effective investigation of risk would therefore include the consideration of scientific consensus not only after a climate harm has occurred, but also preventatively and in the identification of potential climate harms.

8.2.2 Identifying the appropriate measures to address the existing and likely impacts of climate change

States have a general obligation to "take *all appropriate measures* to protect and preserve the rights recognized in the Convention".[225] As the Court has advised, "States are bound to use *all the means at their disposal* to avoid activities under their jurisdiction causing significant harm to the environment",[226] which would include both mitigation and adaptation measures to protect persons from climate harms.[227] The Court's Advisory Opinion on the Environment and Human Rights states that "all those measures of a legal, political, administrative and cultural nature that promote the safeguard of human rights" must be considered in the determination of appropriate measures[228] to "achieve, progressively, the full effectiveness of the corresponding rights".[229] This language, "all appropriate measures" and "all means at their disposal", is reflective of a high standard. The global

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[221] *Hatton and Others v the United Kingdom* (n 218), para 128.

[222] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No 11 and 14, adopted 4 November 1950, entry into force 3 September 1953, 213 UNTS 221 ('ECHR')

[223] *Giacomelli v Italy* (n 218), para 83.

[224] Ibid, para 86.

[225] *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala*, (Judgment on Merits of 19 November 1999) Ser C No 63, para. 144; *Case of Luna López v. Honduras*, (Judgment on Merits, Reparations and Costs of 10 October 2013) Ser C No 269, para 118 (emphasis added).

[226] Advisory Opinion OC-23/17 on the Environment and Human Rights (n 17), para 142 (emphasis added).

[227] Report of the HRC Special Rapporteur on Human Rights and Climate Change (n 19), para 15.

[228] Advisory Opinion OC-23/17 on the Environment and Human Rights (n 17), para 118.

[229] Ibid, para 123.

and local impacts of the climate crisis mean that the failure by any State to adopt appropriate responsive measures is very likely to cause or at least risk harm to persons who fall within the jurisdiction of the State for human rights purposes. It is submitted that the determination of what constitutes appropriate responsive measures must be driven by scientific consensus.

What constitutes appropriate measures may be context-dependent: for example, the particular vulnerability of a population or a higher climate risk due to the environment would influence the measures a State must take.[230] It should again be emphasised, however, that the fact that the context in which these measures operate, including a State's capabilities, will inform their appropriateness, does not mean that the determination of measures is based on a subjective standard.[231] The determination of what constitute "all appropriate measures" and "all means" at a State's disposal should be objective – grounded on our best knowledge on climate change, as provided through scientific consensus. Scientific consensus is key in identifying which measures would or would not be appropriate; a causal link would be expected between the measure and the aim it seeks to achieve in the specific given context.[232]

Best available science, or scientific consensus, has already been used as a "key source" to inform States' obligations, and determine what appropriate measures should be.[233] The Dutch Supreme Court held in *Urgenda* that "broadly supported scientific insights and internationally accepted standards"[234] were key in substantiating the State's positive obligations under Article 2 and 8 of the ECHR (rights to life and private life, respectively).[235] In this way, the scientific consensus underpins the factual foundations of the Court's judgment. In *Neubauer*, the German Supreme Court also held that the legislator must stay abreast of developments in climate science when determining which overall temperature target to adhere to, in order to comply with fundamental rights.[236] In a first instance decision in a Belgian case, the Court found that "[i]nsofar as necessary, these same findings [ie. Those flowing from the current state of climate science] make it possible to consider that the four defendants have not, at present, taken all the necessary measures to prevent the effects of climate change on the life and privacy of the plaintiffs, as they are obliged to do under Articles 2 and 8 of the ECHR".[237]

Judicial acceptance of the role that scientific consensus plays in the determination of appropriate measures has also been applied outside the European region. In a preliminary decision regarding Ontario's climate targets for 2030 and whether their ambition (or lack thereof) breaches constitutional rights of youths and future generations, the Ontario Superior Court found that

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[230] Ibid, para 142.

[231] ITLOS Proceedings for the Request for an Advisory Opinion on Climate Change and International Law, Oral submissions by Catherine Amirfar on behalf of COSIS (12 September 2023). Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/ITLOS_PV23_C31_3_E.pdf.

[232] Inter-American Commission of Human Rights, "Guidelines for Preparation of Progress Indicators in the Areas of Economic, Social, and Cultural Rights" (19 July 2008) OEA/Ser.L/V/II.132 Doc 14 rev 1, paras 31-32. Available at: http://cidh.org/pdf%20files/guidelines%20final.pdf

[233] Maxwell, Mead and Van Berkel (n 174), page 48.

[234] *Netherlands v Urgenda* (n 175), page 5.

[235] Note that these are the provisions most commonly utilised by applicants in environmental cases before the ECtHR.

[236] *Neubauer et al v. Germany* (n 187), para 211.

[237] *VZW Klimaatzaak v Kingdom of Belgium & Others* (n 187), Section 2.3.1.

standards informed by scientific evidence exist.[238] Human rights treaty bodies have also adopted this view, with the UN Committee on the Rights of the Child emphasising that States should develop legislative, regulatory and institutional frameworks which effectively protect children's environmental health and are science-based.[239]

Academic commentary also argues that the scientific consensus on climate feeds into both the content of a State's duties in relation to climate change and the standards against which to assess that duty. Drawing on international climate law and best available science, Maxwell *et al.* delineate a "minimum standard of reasonableness"[240] against which States' mitigation efforts can be assessed for compliance with the duty of care and in human rights law. It is in this way that the scientific consensus on climate change – drawn from IPCC Reports, as well as other key sources of scientific information – is used to clarify the legal duties that States have with regard to mitigation efforts.

The need to take appropriate measures as informed by scientific consensus is reflected in the broader approach of the ECtHR, which has established in its jurisprudence that States must set up appropriate regulatory frameworks informed by investigations into the hazardous effects of relevant activities, "taking into account the technical aspects of the activity in question" and responding to previous warnings from relevant experts.[241]

States obligations under the ECHR, namely with respect to Articles 2 (right to life) and 8 (right to private life), can only be fulfilled if the State has discharged both substantive and procedural components of these obligations. These include a positive obligation for the State to safeguard life against real and immediate risk, including putting in place "a legislative and administrative framework designed to provide effective deterrence against threats to right to life".[242] In cases involving environmental issues under rights protected by the ECHR, the ECtHR has considered whether the State had consulted best available science during its decision-making. The Court has emphasised that "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"[243]. In *Jugheli v Georgia,*[244] the ECtHR identified the "absence of a regulatory framework applicable to the plant's dangerous activities" and the "failure to address the resultant air pollution that negatively affected the applicants' rights under Article 8" to be the most compelling reason that the State failed at its positive obligation under the ECHR. The negative health impacts of the activities concerned were confirmed by expert examinations that were notably commissioned by the domestic courts after the harm had occurred. In *Budayeva v Russia*, the respondent State had violated the right to life when it failed to implement land-planning and emergency relief policies in a hazardous area despite the "foreseeable exposure of residents … to mortal risk" from mudslides. The State neglected to take into account the number of warnings issued by a competent surveillance agency about an

[238] The Court was even able to find whether Canada was taking climate action to meet its fair "share" of emissions. *Mathur v Ontario* (n 187), paras 96-97.

[239] CRC General Comment No. 26 on Children's Rights and Climate Change (n 219) , paras 42 and 71.

[240] Maxwell, Mead and Van Berkel (n 174), page 40.

[241] ECtHR, *Budayeva v. Russia and 4 others*, App No 15339/02, Judgment of 29 September 2008, para 132.

[242] *Öneryildiz v Turkey* (n 218), para 89.

[243] Ibid, para 90.

[244] *Jugheli v Georgia* (n 218), paras 75-76.

imminent mudslide, which should have prompted the authorities to implement the appropriate measures.[245]

In the context of climate change, where a human rights violation has already occurred it may be unlikely that scientific consensus could help discern what the specific necessary measures to prevent harm should have been, but it may be very useful in determining whether the chosen measures had met a minimum reasonableness standard. This "minimum standard of reasonableness" is a useful standard proposed in academic commentary to assess a State's compliance with human rights obligations,[246] and has also been reflected when determining what the minimum appropriate measures a State must take are (e.g. a minimum target to adopt).[247]

The onus is on the State not only to identify but to justify, using detailed and rigorous data, its conduct and response in a situation in which certain individuals bear a heavy burden on behalf of the rest of the community.[248] As such, the State must be able to "substantiate or justify the reasonableness of its conduct".[249] Furthermore, this may be considered a dynamic or ongoing duty. States should adapt their measures to address climate change not just to scientific consensus, but to the "*latest* scientific developments and findings", and be able to justify their measures against the latest scientific developments.[250]

In climate cases, a key factor in finding that a State has not met its human rights obligations has been a failure to explain how climate targets could be met given a State's current chosen measures.[251] In *Neubauer*, for example, "the fact that the State was unable to explain how it would reach its long-term target of carbon neutrality was central to the court's determination that part of the Federal Climate Change Act was incompatible with fundamental rights".[252]

This approach, which demands that the State be able to substantiate its chosen measures, is also reflected in the ECtHR's jurisprudence. In *Jugheli v Georgia*, the State failed this test because it did not present any relevant environmental studies or documents informative of its policy toward a polluting plant close to a residential area and how air pollution emanating from it had affected the applicants.[253]

Scientific consensus would help in establishing a threshold standard for the "detailed and rigorous data" which the State would have had to use to justify its choice of measures. This translates to an obligation for the State to base its emissions reduction target on best available science.[254] This practice has been undertaken by some States, and is included in important recent legislation and treaties addressing climate change. The European Union's regulatory framework is a recent

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[245] *Budayeva v. Russia and 4 others* (n 241), paras 148-149.

[246] Maxwell, Mead and Van Berkel (n 174), page 8.

[247] *Netherlands v Urgenda* (n 175), para 7.5.1.

[248] ECtHR, *Fadeyeva v Russia*, App No 55723/00, Judgment of 9 June 2005, para 128.

[249] Maxwell, Mead and Van Berkel (n 174).

[250] *Neubauer et al v. Germany* (n 187), paras 48-49, 130, 132, 211 (emphasis added).

[251] *Netherlands v Urgenda* (n 175); *Neubauer et al v. Germany* (n 187).

[252] Maxwell, Mead and Van Berkel (n 174), page 50.

[253] *Jugheli v Georgia* (n 218), para 76.

[254] Maxwell, Mead and Van Berkel (n 174), page 50.

example of this. When preparing the policy on how to address climate change, the EU decided to explicitly consider scientific consensus in its decision-making process. Specifically, the initial 2019 Resolution mentions "having regard to the latest and most comprehensive scientific evidence on the damaging effects of climate change provided in the Intergovernmental Panel on Climate Change's (IPCC) special report entitled 'Global Warming of 1,5°C'".[255] The 2020 Green Deal Resolution stressed that "the Climate Law must reflect the best available science with the aim of limiting global warming to 1,5 C".[256] Additionally, it emphasised the need to keep the limit up to date, reflecting developments in the EU legal framework and the review cycle of the Paris Agreement.[257]

The European Climate Law, which serves as the EU's regulatory framework for managing climate change, expressly states that Member States must take into account scientific consensus when proposing their own regulations in fulfilment of their obligations under the instrument. Article 5(4) obliges Member States to "adopt and implement national adaptation strategies and plans, […] based on robust climate change and vulnerability analyses, progress assessments and indicators, and guided by the best available and most recent scientific evidence". [258] In addition to putting in place a Scientific Advisory Board (Art 3), the European Climate Law also committed to proposing its next (2040) climate target based on best available science and recent scientific evidence, including the latest reports of the IPCC and the Advisory Board (Art 4). There is a dynamic aspect to the determination of appropriate measures; this is illustrated by amendments only a few years after it was implemented. The measures will therefore change as time goes by and as scientific knowledge progresses.

Recent international agreements on environmental law have also embedded the concept of best available science or scientific consensus into provisions on States' obligations. Notably, the recently adopted agreement on Biodiversity Beyond National Jurisdiction or 'BBNJ'[259] (also known as the 'UN High Seas Treaty') requires parties to be guided by "the use of the best available science and scientific information" as well as "relevant traditional knowledge of Indigenous Peoples and local communities" to achieve the objectives of the Agreement. This Convention, which was adopted by over 100 States by consensus and received broad support in a UN General Assembly resolution,[260] featured multiple references to "the use of best available science and scientific information" across several provisions setting out hard obligations, possibly indicating its emerging

[255] European Parliament, "Resolution on the Climate and Environment Emergency of 28 November 2019", (P9TA(2019)0078). Available at https://www.europarl.europa.eu/doceo/document/TA-9-2019-0078_EN.html.

[256] Ibid.

[257] European Parliament, Resolution on the European Green Deal of 15 January 2020, (P9TA(2020)0005), preamble, para 112. Available at https://www.europarl.europa.eu/doceo/document/TA-9-2020-0005_EN.html.

[258] European Parliament and EU Council, "Regulation establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 of 30 June 2021" (2021/1119) ("European Climate Law"). Available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32021R1119.

[259] UNGA, Intergovernmental conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, "Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction", adopted on 19 June 2023, A/CONF.232/2023/4 ("BBNJ"), Article 7. Available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/N23/177/28/PDF/N2317728.pdf?OpenElement.

[260] ILC, "Draft Conclusions on Identification of Customary International Law" adopted by the ILC at its seventieth session, in 2018, and submitted to the General Assembly as a part of the ILC's report covering the work of that session (2018) UN Doc A/73/10, para 65 and Conclusion 10. Available at: https://legal.un.org/ilc/texts/instruments/english/draft_Articles/1_13_2018.pdf.

crystallisation as a principle of environmental law. Other soft law instruments, such as the Oslo Principles, have indicated that "[a]ll principles, laws, policies and practices, whether local, national or international, that may affect the environment and, in particular, the global climate must be based on scientific evidence".[261] The UN Committee of the Rights of the Child has also proposed that "States' mitigation objectives and measures should be based on the best available science" as well as being "regularly reviewed to ensure a net zero carbon emissions are achieved by 2050 in a way which prevents harm to children."[262]

These developments in environmental legislative tools, decisions of treaty bodies, and soft law show a real trend towards the inclusion of best available science or scientific consensus in States' obligations, including during their decision-making processes and determination of appropriate measures, and on an ongoing basis as measures are updated.

8.2.3 Constraints which might be imposed on actions by states which would increase the risks of climate change

In addition to the positive obligations examined above, States equally have negative obligations not to themselves harm (to respect) the human rights of those within their jurisdiction. Negative obligations of respect necessarily include a notion of restriction on the exercise of a State's powers. As articulated by the Court in its Advisory Opinion on the Environment and Human Rights, States must refrain from practice and activities that have a "negative impact on the conditions that permit a dignified life".[263] In the context of climate change, academic commentary has described this as an obligation to "refrain from harmful activities".[264] While not all activities with a negative climate impact may be prohibited, this would include, as argued by Applicants in a significant case currently before the ECtHR, "refraining from authorising activities or adopting policies leading to environmental impacts that violate the enjoyment of human rights".[265] The global impact of the climate crisis means that any State's adoption of measures which would be environmentally damaging is likely to cause or at least risk harm to persons who fall within the territorial jurisdiction of the State for human rights purposes; the harmful measures potentially adopted by each State within its territory are, in addition, within its effective control under the approach taken by the Court in its Advisory Opinion on the Environment and Human Rights.

Scientific consensus may be a useful tool in determining what activities or policies would rise to the level of breaching States' negative obligations to refrain from harmful activities. If the scientific community is in agreement about the unviability of certain activities (from a climate or human rights perspective), it would become very difficult for a State to maintain that their continued pursuit of that activity is compliant with human rights obligations. For example, it has been known

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[261] Oslo Principles (n 177), page 2.

[262] CRC General Comment No. 26 on Children's Rights and Climate Change (n 219), para 97.

[263] Advisory Opinion OC-23/17 on the Environment and Human Rights (n 17), para 117.

[264] J Setzer and A Savaresi, "A first global mapping of rights-based climate litigation reveals a need to explore just transition cases in more depth" (29 March 2022) Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science. Available at: https://www.lse.ac.uk/granthaminstitute/news/a-first-global-mapping-of-rights-based-climate-litigation-reveals-a-need-to-explore-just-transition-cases-in-more-depth/#:~:text=Substantive%20negative%20obligations%20include%20refraining,the%20Government%20of%20Norway).

[265] Ibid.

for decades that tar sands are some of the most highly polluting fossil fuels.[266] It would be particularly difficult to argue that the pursuit or prioritisation of these activities does not breach a State's negative obligations, if scientific consensus was clear on its highly polluting and consequently harmful nature. This would be especially true where the State or its agents have rejected scientific consensus and actively spread misinformation about the impact of its activities.[267]

If a State were to go against all scientific advice in its pursuit of an activity widely considered as harmful – especially where less harmful activities exist which might achieve the same objectives – this may not meet a minimum standard of reasonableness, and be considered unjustifiable.

8.3 Scientific Consensus as a Tool to Evaluate States' Human Rights Compliance through Judicial Scrutiny

A further important aspect of the analysis of links between scientific consensus and climate change concerns how scientific consensus affects judicial consideration of State compliance with the standards outlined in the previous sub-section. The main question concerns the scope of a doctrine known as the margin of appreciation, which is addressed generally in section 8.3.1. The submission then examines the role of consensus in determining the margin of appreciation and considers how the margin typically plays out in environmental cases. Though an analysis of existing authorities shows that in the ECHR system, States are generally afforded a wide margin of appreciation in environmental cases and those involving positive obligations, it is argued that cases involving climate change matters should be differentiated. We submit, as have others, that the margin of appreciation afforded to States in such cases should, accordingly, be narrow.[268]

This section draws heavily on the case law of the ECtHR and its established jurisprudence on the margin of appreciation. It is submitted, however, that it is nevertheless relevant to the American context. It is acknowledged that the Court has rarely employed the 'margin of appreciation' doctrine;[269] this doctrine has therefore not been used and developed in the same way as in the European system. In the Inter-American context, the Court has applied the articles of the Convention in a way which seeks greater homogeneity across the region, through conventionality control ("control de convencionalidad"). Nonetheless, the Court has also shown some judicial deference to the exercise of national discretion, illustrated through its analysis of proportionality when considering whether a States' actions were enough to prevent human rights violations.[270]

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[266] D Biello, "How Much Will Tar Sands Oil Add to Global Warming?" (23 January 2013) Scientific American. Available at: https://www.scientificamerican.com/Article/tar-sands-and-keystone-xl-pipeline-impact-on-global-warming/#:~:text=All%20told%2C%20producing%20and%20processing,%E2%80%93intensive%20melting%2Din%2Dplace.

[267] T J Haney, "Scientists don't care about truth anymore': the climate crisis and rejection of science in Canada's oil country" (2022) 8 Environmental Sociology 1, page 11. Available at: https://doi.org/10.1080/23251042.2021.1973656.

[268] See e.g., The European Network of National Human Rights Institutions (ENNHRI), "Written Observations in Application no. 53600/20 Verein KlimaSeniorinnen Schweiz et autres c. la Suisse" (December 2022) ("ENNHRI Written Observations in KlimaSeniorinnen v Switzerland"), para 20. Available at: https://ennhri.org/wp-content/uploads/2022/12/ENNHRI-3rd-party-intervention-_Klimaseniorinnen-v.-Switzerland.pdf.

[269] *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, Advisory Opinion OC-4/84 of 19 January 1984, Ser A No 4, page 62.

[270] P Contreras, "Control de Convencionalidad, Deferencia Internacional y Discreción Nacional en la Jurisprudencia de la Corte Interamericana de Derechos Humanos" (2014) 20 Ius et Praxis 2. Available at: https://dx.doi.org/10.4067/S0718-00122014000200007

Further, one of the rare uses of the margin of discretion by the Court was to justify why, in a freedom of expression case that concerned the alleged defamation of a politician, there should be decreased discretion afforded to the respondent State to avoid "restrictions on political debates or debates on matters of the public interest".[271] The Court noted that "[w]hile States have a margin of discretion in regulating the exercise of that remedy, they may not establish restrictions or requirements inimical to the very essence of the right".[272] Contreras argues that the "certain *latitude* in the broad debate on matters of public interest" that the Court deemed as essential to the protection of this right indicates that a corresponding *restriction* of the margin of appreciation is necessary.[273]

Here, it is argued that scientific consensus can similarly inform the standards to which States' can be held and that judicial scrutiny of the measures they take to protect human rights can rely on scientific consensus to narrow the State's margin of appreciation, or in other words limit their discretion. This also has the effect of increasing the justiciability of climate disputes, empowering not just human rights courts but also national courts to hold the State to account for its actions or inaction.

8.3.1 The margin of appreciation

The main analytical tool used by the ECtHR to determine the amount of discretion afforded to States when assessing whether they have complied with the Convention is the 'margin of appreciation'. A clear exposition of the doctrine is found in *Handyside v United Kingdom*[274] in the context of Article 10 of the ECHR, which protects freedom of expression:

> "The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights […] The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. […]
>
> By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them […]
>
> Nevertheless, [this] does not give the Contracting States an unlimited power of appreciation. The Court […] is responsible for ensuring the observance of those States' engagements (Article 19), is empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10... The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its "necessity"; it covers not only the basic legislation but also the decision applying it, even one given by an independent court"[275]

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[271] *Herrera Ulloa v. Costa Rica,* (Judgment on Preliminary Objections, Merits, Reparations and Costs of 2 July 2004) Ser C No 107, paras 127-128.

[272] Ibid, para 161.

[273] Contreras (n 270).

[274] ECtHR, *Handyside v United Kingdom,* App No 5493/72, Judgment of 7 December 1976.

[275] Ibid, paras 48ff.

The essence of the doctrine is that a "state is allowed a certain measure of discretion, subject to European supervision, when it takes legislative, administrative, or judicial action bearing on a Convention right."[276] It is rooted in constitutional deference to national authorities, as well as an understanding that those located within the state in question are better placed to design policies that are sensitive to local particularities.

As an analytical tool, it has typically been applied in the context of negative obligations and, in particular, at the stage of assessing whether an action by a State constitutes a proportionate limitation on a qualified right.[277] Nevertheless, the ECtHR also relies upon the margin of appreciation in the context of positive obligations when assessing whether a State has taken appropriate measures to comply with these obligations.[278] Regardless of the type of obligation, the ECtHR has clarified that "the principles regarding… the balance between the rights of an individual and the interests of the community as a whole are broadly similar".[279]

8.3.2 The role of consensus in determining the width of the margin of appreciation

The width of the margin of appreciation – the degree of discretion afforded to States – is informed by several factors. One factor that the ECtHR relies upon when determining the width of the margin of appreciation in cases involving Article 8 is whether there is a 'European consensus' on the "relative importance of the interest at stake or as to the best means of protecting it".[280] Where there is little consensus amongst States on this matter, the ECtHR will grant a State a wider margin of appreciation, thus affording the State greater discretion with regard to its decisions on the measures to be taken in pursuance of its human rights obligations. If, however, there is a strong degree of consensus amongst States, then the ECtHR will narrow the margin of appreciation, and consequently afford the State less discretion.[281] The width of the margin of appreciation will inform the intensity of scrutiny that the ECtHR will apply: a narrow margin of appreciation leads to a stricter review of State action and a wider margin of appreciation will generally lead to a 'lighter touch' review.

Consensus need not necessarily mean consensus in a legal or political sense, though this form of consensus is most regularly employed by the ECtHR in its reasoning. Dzehtsiarou outlines four types of consensus that are relevant to the ECtHR in its reasoning, the fourth of which is consensus among experts (including scientists).[282] Burke and Molitorisová similarly argue that

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[276] D Harris, M O'Boyle and C Warbrick, *Law of the European Convention on Human Rights*, (5th edn OUP 2018) page 15.

[277] Ibid, pages 12-17.

[278] D McGoldrick, "A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee" (2016) 65 ICLQ 1, pages 21, 23. McGoldrick argues thar the margin of appreciation doctrine "has assumed even more significance as the ECtHR, through its case law, has expanded the scope of ECHR rights through its interpretation of the ECHR as a 'living instrument' […] and thereby developed the scope of procedural […] **and positive obligations**" (emphasis added).

[279] *Fadeyeva v Russia* (n 248), para 94.

[280] ECtHR, *A, B and C v Ireland* (GC), App No 25579/05, Judgment of 16 December 2010, para 232.

[281] It should be noted here that the width of the margin of appreciation is not necessarily determinative of the question of breach. In other words, the Court may grant a state a wide margin of discretion in a particular case, but the state may still overstep this wide margin.

[282] K Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (CUP 2015), pages 39–56.

scientific knowledge may affect the margin of appreciation, with the degree of effect determined by the level of scientific consensus and confidence.[283]

According to Dzehtsiarou, the use of expert consensus in the ECtHR's reasoning use is rare; it is utilised principally when the ECtHR "has to assess scientific developments in Europe and worldwide."[284] For this reason, generally "such evidence is treated as supplementary and technical rather than decisive."[285] Nevertheless, it has appeared in the context of the margin of appreciation. In a case concerning compulsory childhood vaccination, for example, expert consensus was one of several types of consensus drawn on to determine the width of the margin of appreciation:

> "277. On the existence of a consensus, the [ECtHR] discerns two aspects. Firstly, there is a **general consensus** among the Contracting Parties, **strongly supported by the specialised international bodies**, that vaccination is one of the most successful and cost-effective health interventions and that each State should aim to achieve the highest possible level of vaccination among its population […]. Accordingly, there is no doubt about the relative importance of the interest at stake.
>
> 278. Secondly, when it comes to the best means of protecting the interest at stake, the [ECtHR] notes that there is no consensus over a single model. Rather, there exists, **among the Contracting Parties to the Convention, a spectrum of policies** on the vaccination of children, ranging from one based wholly on recommendation, through those that make one or more vaccinations compulsory, to those that make it a matter of legal duty to ensure the complete vaccination of children […]."[286]

As such, the existence of a scientific consensus on the measures to be adopted was a factor to be weighed in determining the breadth of the margin of appreciation, balanced against the lack of consensus on the best policy means of achieving those measures.[287]

8.3.3 The margin of appreciation in cases involving environmental issues

The ECtHR has typically afforded States a wide margin of appreciation in environmental cases[288] on the basis that they generally involve "difficult social and technical"[289] matters of "general policy… on which opinions within a democratic society may reasonably differ widely".[290] Indeed, although the Court reiterated in *Fadeyeva v. Russia* that environmental protection is an "increasingly

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[283] C Burke and A Molitorisová, "(Not) Proving the Public Good: Scientific Evidence and the Margin of Appreciation" (2019) 18 The Law & Practice of International Courts and Tribunals 2, pages 240, 252.

[284] Dzehtsiarou (n 282), page 55.

[285] Ibid, page 56.

[286] ECtHR, *Vavřička and Others v. The Czech Republic* (GC), App No 47621/13 and 5 other applications, Judgment of 8 April 2021, para 276 (emphasis added).

[287] See I Nugraha, J Regules and M Vrancken, "Vavřička and Others v. The Czech Republic" (2022) 116 American Journal of International Law 3.

[288] *Hatton and Others v United Kingdom* (n 218), para 100. See also *Budayeva v. Russia* (n 241).

[289] ECtHR, *Powell and Raynor v. United Kingdom*, App No 9310/81, Judgment of 21 February 1990, para 44.

[290] *Hatton and Others v United Kingdom* (n 218), para 103.

important consideration"[291] in today's society, it held that "the complexity of the issues involved with regard to environmental protection renders the Court's role primarily a subsidiary one."[292]

Furthermore, cases in the environmental context will regularly involve a State's positive obligations under the Convention. Compared to negative obligations, positive obligations usually attract a wider margin of appreciation, as there will often be several means of achieving compliance with a State's positive obligations (for example, to ensure respect for the right to private life).[293] A State will, in these circumstances, need to consider how best to secure compliance with the Convention whilst having "due regard to the needs and of the community and individuals".[294] As such, the ECtHR has typically limited its scrutiny of substantive measures in its environmental jurisprudence to whether there has been "manifest error of appreciation by the national authorities in striking a fair balance between the competing interests of different private actors".[295] Indeed, it is "only in exceptional circumstances may it go beyond this line and revise the material conclusions of the domestic authorities."[296]

Nevertheless, in two cases involving environmental issues, the ECtHR has referred to States as having a "certain"[297] (as opposed to wide) margin of appreciation, which is more limited. Speaking extra-judicially, ECtHR Judge Tim Eicke notes that "[w]hether this signifies a greater willingness on the part of the [ECtHR] to engage with national policy remains to be seen."[298]

It should be noted here that although the role of discretion is very different in Article 2 (right to life) versus Article 8 (right to private and family life),[299] the ECtHR has also been reluctant to assess "the choice of particular practical measures" where a State must take positive measures to remain in compliance with Article 2 in cases involving environmental protection.[300] It has typically allowed for such a matter to fall within the State's margin of appreciation.

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[291] *Fadeyeva v. Russia* (n 248), para 103, citing ECtHR *Fredin v. Sweden (no. 1)*, App No 12033/86, Judgment of 18 February 1991, para 48.

[292] *Fadeyeva v. Russia* (n 248), para 105.

[293] Ibid, para 96.

[294] ECtHR, *Abdulaziz v UK*, A. 9214/80, 9473/81, 9474/81 (1985) 7 EHRR 471, para 67.

[295] *Fadeyeva v. Russia* (n 248), para 105.

[296] Ibid.

[297] *López Ostra v. Spain* (n 218); ECtHR, *Cordella and others v. Italy*, App No 54414/13 and 1 other, Judgment of 24 June 2019.

[298] T Eicke, "Human Rights and Climate Change: What role for the European Court of Human Rights: Inaugural Annual Human Rights Lecture" (2021). Available at: https://rm.coe.int/human-rights-and-climate-change-judge-eicke-speech/1680a195d4#_ftn26.

[299] Article 2 is an unqualified right, which means that it cannot be balanced against other rights in the Convention or restricted by considerations such as national security or protection of health. States, therefore, do not have discretion when it comes to the 'end' (that is the right to life) when the right is engaged, though in circumstances where Article 2 requires the state to take positive obligations, the Court may allow for discretion as to the *means* by which a State fulfils its obligations under Article 2.

[300] See e.g., *Budayeva v. Russia* (n 241).

8.3.4 Why the margin of appreciation should be assessed differently in cases involving climate change issues

In *Budayeva v. Russia*, the ECtHR suggested that "dangerous activities of a man-made nature" could attract a narrower margin of appreciation compared to risks caused by natural, meteorological events, which are "beyond human control".[301] This is pertinent in the context of climate change, given that the scientific consensus expressed in the IPCC reports is that "[i]t is unequivocal that human influence has warmed the atmosphere, ocean and land since pre-industrial times".[302]

As discussed earlier in this submission, there is overwhelming scientific consensus on the need for action and on the type of action necessary to address the effects of climate change that pose a threat to the enjoyment of human rights. This factor, as will be demonstrated, narrows the margin of appreciation afforded to States when compared to other environmental cases. There is a scientific consensus that appropriate action must be taken to address these concerns, and courts are in a position to judge whether the measures adopted by States are actually sufficient to protect rights from future risks by requiring a clear causal relationship, informed by science, between means and goals. Therefore, scientific consensus should play a role in evaluating the contribution that State policies actually make to meeting their human rights obligations.

The ECtHR is generally not concerned with ensuring that States adopt the best possible measures to protect rights. It is instead concerned to see that rights are, in fact, protected; the Convention is intended to protect rights that are not "theoretical or illusory but rights that are practical and effective".[303] While States are afforded discretion as to the means that they choose to protect rights through the margin of appreciation, they must nonetheless result in the full protection and enjoyment of rights. As outlined above, consensus (including scientific consensus) impacts how much latitude States can be given to design their responses to climate risks that threaten human rights, taking account of their own particular moral or cultural circumstances, as well as their capabilities.

Indeed, for the Supreme Court in *Urgenda,* the Dutch State's human rights obligations manifested as a *de minimis* level of action to be taken with regard to cutting CO_2 emissions.[304] The Court held that it was in a position to impose a scientifically informed target for GHG emissions, whilst deferring to the political organs of the State to determine which measures would be most appropriate to achieve this overall target and comply with its Article 2 and Article 8 obligations. In other words, there was no margin afforded to the State in the overall emissions reductions rate to be achieved.

Furthermore, in two different third-party interventions submitted in climate cases before the ECtHR, intervenors have argued that the scientific consensus has narrowed the margin of appreciation afforded to States to such a point that there is no longer discretion regarding the overall climate target that must be met in order to comply with human rights obligations. Our Children's Trust, alongside three other organisations, for example, argued in a submission that:

> "where, as here, the scientific evidence is clear that the 350 ppm standard must be met in order to safeguard human life and health, the margin of appreciation available to States in

[301] Ibid, para 135.

[302] IPCC AR6 Climate Change 2021 – Physical Science Basis (n 179), page 425.

[303] ECtHR, *Airey v. Ireland*, App No 6289/73, Judgment of 7 July 1979, para 24.

[304] *Netherlands v Urgenda* (n 175).

> addressing their positive obligations must apply only to the means by which the standard is reached, not the standard itself, which is based on the unmovable law of physics. In other words, it is not open for States to depart from scientific consensus and set their own politically expedient standard, or to simply to fail to act in a manner which would meet the evidenced-based standard that scientists agree upon."[305]

Furthermore, the European Network of National Human Rights Institutions ('ENNHRI') submitted in their first set of written observations in the ongoing *KlimaSeniorinnen* case that "States should be afforded a margin of appreciation in the choice of means to reduce emissions, but not in the minimum rate of emission cuts necessary to avoid dangerous climate change."[306] ENNHRI expounds upon this position in a further written submission to the court in this case, explaining that:

> "The margin of appreciation should be narrow in the context of climate change […] the Court may review whether the State has a framework to due diligently cut emissions, at least in accordance with IPCC's reduction rates. In this assessment, the Court may rely on best available science, international norms, and emerging European consensus […] Best available science shows that emissions must be cut rapidly to limit warming to 1.5°C, to prevent "dangerous" interference with the climate system having "significant deleterious effects" on human life and welfare – the objective of UNFCCC art. 2 and the Paris Agreement art 2.1(a)."[307]

The scientific consensus is clear on the need to limit overall warming to avoid the worst effects of climate change. States are therefore limited in their discretion when it comes to setting targets that would be wholly out of accordance with the pathways set by the IPCC to meet this overarching global temperature target. Where a target set by a State is not in accordance with this overall goal, the Court is able to step in and assess a State's target for compliance with human rights. ENNHRI makes this point in their intervention in another significant ongoing climate case, *Carême v France*, explaining that "[i]n the event a […] State has cut or plans to cut less than [the] minimum [necessary to avoid dangerous climate change], the [ECtHR] may review whether its justification is 'relevant and sufficient', and if competing interests including the 'interest in living in a safe environment have been fairly balanced"'.[308] ENNHRI make the same point in its intervention in the *KlimaSeniorinnen* case: "[s]ince Articles 2 and 8 require that the legislative framework be 'effective'... the [ECtHR] may review whether the rate of GHG reductions is sufficiently specified and realistic to protect rights also in the longer term".[309] Its written submission to the ECtHR makes this point clear:

> "To determine the threshold for *dangerous* climate change and the *minimum rate of emission cuts* necessary to mitigate threats to protected rights, the Court may rely on best available

[305] Our Children's Trust, Oxfam, The Centre for Climate Repair at Cambridge and The Centre for Child Law at University of Pretoria, "Written Submission in Verein KlimaSeniorinnen Schweiz and Others v. Switzerland Application No. 53600/20, Duarte Agostinho and Others v Portugal and 32 Others Application No. 39371/20 and Carême v. France Application No. 7189/21", (5 December 2022) ("Our Children's Trust, Oxfam and Others' Written Observations in KlimaSeniorinnen, Duarte Agostinho and Carême"), p.20. Available here: https://static1.squarespace.com/static/571d109b04426270152febe0/t/638e005bbf762960a67b581c/1670250592879/2022.12.05+ECtHR+Interventions+FINAL.pdf.

[306] ENNHRI Written Observations in KlimaSeniorinnen v Switzerland (n 268), para 14 (citations omitted).

[307] ibid.

[308] ibid.

[309] Ibid, para 20.

> science and specialised international norms, binding or non-binding. The 'common ground' reflected in the IPCC reports and the 1992 UN Framework Convention on Climate Change (UNFCCC), including the 2015 Paris Agreement, therefore informs the obligations under the ECHR Articles 2 and 8."[310]

Taking this argument further, scientific consensus could, in certain circumstances, go as far as narrowing the State's margin of appreciation in such a way as to rule out certain forms of action or measures. If a State relies on measures that will not, on any accepted scientific assessment, help the State to meet its overarching climate target and comply with its human rights obligations, then a court is able to adjudge this as insufficient. For example, where scientific consensus is clear on the viability and sufficiency of certain types of measures, then a State will have very little discretion to choose such means, as they will bear no rational connection – a key standard, as identified above – with the intended outcome. In practical terms, if a State relies solely on negative emissions technology, for example, or has decided to only start implementing measures in 2045 to meet a target of net zero by 2050, these would be manifestly inappropriate in light of scientific consensus on the viability and sufficiency of these measures.[311]

This also ties into the phenomenon of tipping points, the understanding of which emphasises the need to act with particular urgency. Indeed, the intensity and irreversibility of climate impacts both increase the longer that States go without taking sufficient action. The conclusions of the IPCC (considered in detail under Section 7) state that "[t]he likelihood of abrupt and irreversible changes and their impacts increase with higher global warming levels", and with medium confidence that the "[r]isks associated with large-scale singular events or tipping points, such as ice sheet instability or ecosystem loss from tropical forests, transition to high risk between 1.5°C to 2.5°C".[312] Furthermore, the IPCC concluded, with confidence, that "[w]ith every increment of warming, climate change impacts and risks will become increasingly complex and more difficult to manage".[313] Our Children's Trust (and three other organisations) explain the legal significance of this scientific consensus in their third-party intervention into three climate cases before the ECtHR, aptly noting that:

> "[c]limate change is perhaps the only human rights violation that has a deadline, after which there can be no correction for the violation, and it becomes irreversible for generations of people. With every other threat to human rights, individuals may permanently be harmed, but the opportunity to still right the wrong for others will remain; not so with climate."[314]

In the academic commentary, whilst Eckes agrees that the "translation of science into legal obligations" is a different matter from the "precise measures" to be taken by a government in response to science on climate change, what may be considered as 'reasonable' action will change as time presses on.[315] In Eckes' words: "[t]ime in combination with inaction will, however, necessarily reduce political discretion. At some point, only very few actions may be justified as

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[310] ibid.

[311] See also *Neubauer et al v. Germany* (n 187), page 25.

[312] IPCC AR6 Climate Change 2023: Synthesis Report (n 22), page 77.

[313] Ibid, page 72.

[314] Our Children's Trust, Oxfam and Others' Written Observations in KlimaSeniorinnen, Duarte Agostingo and Carême (n 305), page 20.

[315] C Eckes, "Tackling the Climate Crisis with Counter-Majoritarian instruments: Judges Between Political Paralysis, Science and International Law" (2022) 6 European Papers 3, pages 1307, 1322.

reasonable."[316] What this suggests is that the margin of appreciation afforded to States in determining what kinds of measures they can take in light of climate science may become narrower over time, given that the science spells out the consequences of any delay in action.

9. Conclusion

Climate change is already having a negative impact on human life and human rights, and this will continue and, at least in the short term, worsen. States' obligations to protect human rights are engaged due to the serious effects of climate change; these include both obligations on individual States as well as obligations to cooperate with other States. They also include both positive and negative obligations around the identification of risks and the determination and implementation of all appropriate measures to protect human rights.

The meaning of obligations to cooperate can be informed by the law which has developed regarding cooperation in the context of transboundary environmental harm, which helps give specific content to the general obligations to cooperate regarding regional and global environmental harm. Although the content of obligations to cooperate in the transboundary context do not fully correspond to the content of the obligations in the regional or global contexts, there are synergies between each context, rooted in their shared goals to prevent harm and protect the environment. This is reflected in the similar content of the procedural obligations such as exchange of information. While there are divergences between the two contexts, particularly because of the need to identify differentiated responsibilities for States in the regional and global contexts, many principles may helpfully be adapted from the transboundary context. Obligations to cooperate in the global context, for example, clearly include obligations to share information, but potentially information should be shared with an international organisation rather than solely with a specific foreign state (as in the transboundary context). This information sharing contributes to the important development of scientific knowledge on the problem of climate change.

The scientific consensus on climate change which has been established is now clear and unequivocal. The state of scientific knowledge today allows us to know, with high confidence, the likely continued impacts of climate change, as well as the most (and least) effective mitigation and adaptation measures to address the climate crisis. Drawing on this scientific consensus, States are able to effectively identify the risks to human rights posed by climate change, as well as the mitigation and adaptation measures that would significantly improve the protection of human rights. Further, scientific consensus is an objective basis on which States' human rights obligations can be determined and assessed through judicial scrutiny. In the context of climate change, scientific consensus comes into play in the human rights framework in three ways: it must be considered by States during their decision-making and their assessment of risk to effectively discharge their human rights obligations; it feeds into a minimum standard of reasonableness to be met when States determine what actions and measures must be implemented to protect human rights; and, where it informs legal obligations, it can also be relied on by courts to evaluate States' compliance, following the general rule that the greater the scientific consensus on the actions needed, the smaller the State's discretion to diverge from these.

Through conventions and treaties on climate change in the field of international environmental law, States have only been able to agree on limited obligations concerned with climate change; these have not been sufficient to adequately and effectively protect human rights. The effects of

[316] Ibid.

climate change already affect the full enjoyment of rights, including the right to life, right to physical integrity, right to culture, and many more, especially of individuals and communities experiencing intersecting vulnerabilities – some of the most affected being persons living across Latin American and the Caribbean. Human rights law already possesses the tools to take into account the relevant principles and environmental obligations, and key criteria like the scientific consensus on climate change that inform States' obligations. The development of a human rights framed response to climate change, supplementing international environmental law, would allow the response to climate change to be rights-centric and more effective.

There is not just an opportunity but a necessity for human rights law to play a greater role in establishing the stronger obligations necessary to protect the rights of present and future generations, and we urge the Court to seize this moment.

Annex 1 – About the UCL Public International Law Pro Bono Project

The UCL Public International Law Pro Bono Project ('PILPBP') is a community of collaborative learning and practice based at University College London's Faculty of Laws, which operates in service of human rights protection – supporting members of civil society and international organisations in their important protective missions, while enhancing the educational experience of our students. We partner with leading international non-governmental and intergovernmental organisations, providing legal research, analysis and advice to help address some of the world's most pressing and difficult human rights challenges. We also contribute to the work of international courts and tribunals, such as the Inter-American Court of Human Rights, through the submission of amicus curiae briefs.

The PILPBP began as a PhD and LLM student initiative, inspired by public-spiritedness in an era of serial global crises. With Faculty support, it has become an innovative collaborative educational enterprise, connecting students with UCL Laws academic staff, enhancing the skills development of our students and putting them at the centre of research-based learning. But it remains, perhaps most importantly, an outward-facing project – driven by the highest traditions of public service in academia in striving to make a positive contribution to the world.

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