

Analysis

Request for an Advisory Opinion from the
International Court of Justice on the Obligations
of States in Respect of Climate Change

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I. Introduction & Background

1. On 29 March 2023, the United Nations General Assembly adopted, by consensus, a resolution to request an advisory opinion from the International Court of Justice (ICJ) on the following:

Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment,

(a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emission of greenhouse gases for States and for present and future generations?

(b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:

(i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specifically affected by or particularly vulnerable to the adverse effects of climate change?

(ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?

2. To briefly summarise: the questions before the ICJ are twofold and seek to determine: one, what obligations the international legal framework places on States in relation to the harms caused by anthropogenic greenhouse gas (GHG) emissions; and two, what legal consequences arise for States where their acts or omissions in relation to those GHG emissions have caused significant harm to the climate system and other parts of the environment.
3. ClientEarth hereby respectfully presents its legal analysis on the issues before the Court. ClientEarth is an international environmental law organisation. Of particular relevance to these advisory proceedings, ClientEarth possesses in-depth experience and expertise in international environmental and human rights law. ClientEarth has observer status to the United Nations Framework Convention on Climate Change (UNFCCC), has participated in Conferences of the Parties to both the UNFCCC and the Convention on Biological Diversity and supported or led legal interventions in national and international courts and tribunals, including acting for the claimants in the UN Human Rights Committee's (UN HRC) ground-breaking decision in *Daniel Billy and Others*

v Australia ('Billy'), further discussed below.¹ ClientEarth has also intervened in proceedings before the European Court of Human Rights (ECtHR), including in one of its first cases on the relationship between climate change and State obligations,² and in the written and oral phase of the advisory proceedings before the Inter-American Court of Human Rights (IACtHR) on the climate emergency.³

4. The questions referred to the ICJ in the context of the current advisory proceedings are broad and cover wide and diversified areas of international law. ClientEarth's contribution to these proceedings does not intend to cover all of these areas. This submission will focus on the following: the unequivocal status of scientific evidence concerning climate change and its role in establishing significant harm; State obligations arising under international human rights law (IHRL) and international climate change law and the co-applicability and complementarity of the two regimes; and finally the legal consequences resulting from the causation of significant harm.
5. Before engaging with the legal frameworks, ClientEarth wishes to offer some preliminary observations on scientific evidence, noting that the ECtHR has established that scientific research and generally accepted scientific standards must be taken into consideration in the interpretation and application of the European Convention on Human Rights (ECHR).⁴

II. Preliminary Remarks on the Scientific Evidence

A. The Intergovernmental Scientific Process

6. Reports by the Intergovernmental Panel on Climate Change (IPCC) inform the basis of much of the global response to climate change, including the legal framework.⁵ The IPCC is the United Nations (UN) body tasked with assessing the science on climate change with the aim of informing governments and introducing scientific knowledge into policy development.⁶ The experts of the IPCC do not conduct their own research, but

¹ United Nations Human Rights Committee, Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 3624/2019, *Billy et al. v Australia*, CCPR/C/135/D/3624/2019 (22 September 2022) (*Billy et al.*, views adopted).

² ClientEarth Third Party Intervention, *Verein KlimaSeniorinnen Schweiz and Others v Switzerland*, Application no. 53600/20 (December 2022), available at: <https://www.clientearth.org/latest/documents/clientearth-s-intervention-in-case-verein-klimasenioren-schweiz-and-others-v-switzerland-application-no-53600-20/> (CE Intervention KlimaSeniorinnen); see also: *Greenpeace Nordic and Others v Norway*, Application no. 34068/21, Third Party Intervention Submitted by ClientEarth (May 2022), available at: [clientearth-third-party-intervention-amicus-in-greenpeace-nordic-and-others-v-norway-3-5-2022.pdf](https://www.clientearth.org/latest/documents/clientearth-third-party-intervention-amicus-in-greenpeace-nordic-and-others-v-norway-3-5-2022.pdf).

³ ClientEarth Observations, *Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile* (December 2023), available at: https://corteidh.or.cr/sitios/observaciones/OC-32/6_clientearth.pdf (CE Observations IACtHR).

⁴ ECtHR, *KlimaSeniorinnen Schweiz and Others v Switzerland*, Application no. 53600/20 (December 2022), paras. 103-120; 431-436; ECtHR, *Bosphorus Hava Yollar Turim*, application no. 45036/98 (2005), paras. 100, 150; ECtHR, *Rees v the United Kingdom*, application no. 9532/81 (1986), para. 47; ECtHR, *Öneriyildiz v Turkey*, application no. 48939/99 (2004), paras. 59, 93; ECtHR, *Oluić v Croatia*, application no. 61260/08 (2010), paras. 29–31, 60-62; Margaretha Wewerinke-Singh and Ashleigh McCoach, "The State of the Netherlands v Urgenda Foundation: Distilling best practice and lessons learnt for future rights-based climate litigation", 30(2) Review of European, Comparative & International Environmental Law: The Amazon Rainforest (July 2021).

⁵ IPCC, "About: Structure of the IPCC", available at: <https://www.ipcc.ch/about/structure/>.

⁶ IPCC, "About the IPCC", available at: <https://www.ipcc.ch/about/>.

systematically review and assess thousands of scientific papers published every year, creating an extensive synthesis of the findings of the global scientific community.⁷

7. The IPCC categorises its findings by reference to levels of confidence based on strength of evidence and agreement in the scientific community (very low, low, medium, high and very high).⁸ The IPCC also evaluates the likelihood of these findings, categorising these from exceptionally unlikely (0-1%) to virtually certain (99-100%).⁹
8. The IPCC's draft reports are shared with governments for their review. Thereby, the final IPCC reports do not only present the consensus of the scientific community but also that of the 195 participating States.¹⁰ By way of example, the drafting of the IPCC's Sixth Assessment Report, its most recent, involved a team of 231 lead authors, 39 reviewing authors and 675 contributing authors.¹¹ The draft was subject to formal review and revision as well as government comments. Additionally, 62,418 review comments from over 1,600 individual expert reviewers were submitted for consideration.¹² The Summary for Policymakers, which is added to each Assessment Report, was approved by member State representatives line by line.¹³ No doubt can thus exist as to State agreement to the validity of the IPCC's findings and scientific conclusions.
9. However, this lengthy and thorough review process, combined with the consensus-based approach, means that some of the IPCC's conclusions can be based on scientific data from several years ago. Consequently, projections may not always reflect the most recent and/or extreme findings on the accelerating adverse impacts of climate change.¹⁴

Preliminary Remarks on Climate Change

10. Climate change is defined as the “change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere” beyond the “natural climate variability observed over comparable time periods.”¹⁵

⁷ *Ibid.*

⁸ IPCC, “Technical Summary“ (IPCC AR6 WGII TS), 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* (IPCC AR6 WGII Full Report) [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.)]. Cambridge University Press. Cambridge University Press, Cambridge, UK and New York, NY, USA, pg. 41.

⁹ *Ibid.*

¹⁰ Commission of Small Island States on Climate Change and International Law (COSIS), Statement at the oral proceedings before the International Tribunal for the Law of the Sea (ITLOS) concerning the Request for an Advisory Opinion on Climate Change and International Law (COSIS Oral Statement), public sitting held on Tuesday, 12 September 2023, at 10 a.m., ITLOS/PV.23/C31/3, pg. 26, ln. 33-36.

¹¹ IPCC AR6 WGII Full Report (n8), pg. ix-x.

¹² *Ibid.*, pg. x.

¹³ *Ibid.*

¹⁴ COSIS Oral Statement (n10), p. 29, ln. 4-9; International Union for Conservation of Nature and Natural Resources - World Commission on Environmental Law, Ocean Law Specialist Group, written statement on the Request for Advisory Opinion submitted to the Tribunal, 23 June 2023, paras. 81, 158; see also: Gavin Schmidt, “Climate models can’t explain 2023’s huge heat anomaly – we could be in uncharted territory” *Nature* 627, 467 (2024).

¹⁵ United Nations Framework Convention on Climate Change (UNFCCC), art. 1(2).

11. Climate change is directly linked to the increase in the concentration of GHG emissions in the atmosphere – including the most significant three, i.e. carbon dioxide (CO₂), methane (CH₄) and nitrous oxide (N₂O). The dominant source of this increase is the burning of fossil fuels.¹⁶ The accumulation of GHG emissions in the atmosphere traps “more of the Sun’s energy in the Earth system,” thereby causing an increase in Earth’s global mean temperature, also referred to as global warming.¹⁷
12. This warming of the atmosphere, ocean and land has and will continue to result in fundamental, widespread and rapid changes in the atmosphere, ocean, cryosphere, and biosphere, impacting climate and weather patterns, including increases in extreme weather events, sea-level rise and ocean acidification.¹⁸ Without implementation of effective adaptation and mitigation methods, projected long-term impacts are significantly higher than currently observed.¹⁹ This is confirmed by extensive scientific evidence as well as testimonies of affected communities.
13. Over the last decade, fossil fuels are estimated to have accounted for 86% of anthropogenic GHG emissions.²⁰ There is thus a clear causal relationship between the two, with fossil fuels having been defined as “the heart of the climate challenge.”²¹
14. In 2023, the IPCC determined that: “[t]here is a rapidly closing window of opportunity to secure a liveable and sustainable future for all (very high confidence).”²² Substantial reductions in the overall use of fossil fuels are thus required.²³ In effect, this means “that most of the world’s proven fossil fuel reserves must be left

¹⁶ IPCC, “2022: Summary for Policymakers” (IPCC AR6 WGIII SPM) [P.R. Shukla, J. Skea, A. Reisinger, R. Slade, R. Fradera, M. Pathak, A. Al Khourdajie, M. Belkacemi, R. van Diemen, A. Hasija, G. Lisboa, S. Luz, J. Malley, D. McCollum, S. Some, P. Vyas, (eds.)], in: *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC AR6 WGIII Full Report) [P.R. Shukla, J. Skea, R. Slade, A. Al Khourdajie, R. van Diemen, D. McCollum, M. Pathak, S. Some, P. Vyas, R. Fradera, M. Belkacemi, A. Hasija, G. Lisboa, S. Luz, J. Malley, (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, B.1.4.

¹⁷ NASA, “Evidence”, available at: <https://climate.nasa.gov/evidence/>.

¹⁸ *Ibid.*

¹⁹ IPCC AR6 WGII Full Report (n8), pg. 9.

²⁰ IPCC, “*Technical Summary*” (IPCC AR6 WGI TS) Arias, P.A., N. Bellouin, E. Coppola, R.G. Jones, G. Krinner, J. Marotzke, V. Naik, M.D. Palmer, G.-K. Plattner, J. Rogelj, M. Rojas, J. Sillmann, T. Storelvmo, P.W. Thorne, B. Trewin, K. Achuta Rao, B. Adhikary, R.P. Allan, K. Armour, G. Bala, R. Barimalala, S. Berger, J.G. Canadell, C. Cassou, A. Cherchi, W. Collins, W.D. Collins, S.L. Connors, S. Corti, F. Cruz, F.J. Dentener, C. Dereczynski, A. Di Luca, A. Diongue Niang, F.J. Doblas-Reyes, A. Dosio, H. Douville, F. Engelbrecht, V. Eyring, E. Fischer, P. Forster, B. Fox-Kemper, J.S. Fuglested, J.C. Fyfe, N.P. Gillett, L. Goldfarb, I. Gorodetskaya, J.M. Gutierrez, R. Hamdi, E. Hawkins, H.T. Hewitt, P. Hope, A.S. Islam, C. Jones, D.S. Kaufman, R.E. Kopp, Y. Kosaka, J. Kossin, S. Krakovska, J.-Y. Lee, J. Li, T. Mauritsen, T.K. Maycock, M. Meinshausen, S.-K. Min, P.M.S. Monteiro, T. Ngo-Duc, F. Otto, I. Pinto, A. Pirani, K. Raghavan, R. Ranasinghe, A.C. Ruane, L. Ruiz, J.-B. Sallée, B.H. Samset, S. Sathyendranath, S.I. Seneviratne, A.A. Sörensson, S. Szopa, I. Takayabu, A.-M. Tréguier, B. van den Hurk, R. Vautard, K. von Schuckmann, S. Zaehle, X. Zhang, and K. Zickfeld. 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* (IPCC AR6 WGI Full Report) [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.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, pp. 33–144), pg. 80.

²¹ UNEP, “The Production Gap: The discrepancy between countries’ planned fossil fuel production and global production levels consistent with limiting warming to 1.5°C or 2°C” (2019), pg. 8.

²² IPCC, “2023: Summary for Policymakers” (IPCC AR6 SYR SPM), in: *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* [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, para. C.1.

²³ *Ibid.*, para. C.3.2.

unburned.”²⁴ Specifically, the emissions deriving from existing and under-construction oil and gas fields and coal mines are 60% larger than the remaining carbon budget for pursuing efforts to limit warming to 1.5°C, and exhaust 95% of the budget for limiting warming to 2°C.²⁵

15. Despite all this, a 2023 UN Environment Programme report found that in 2030 governments were planning to produce more than twice the amount of fossil fuels than would be consistent with even a 1.5°C pathway.²⁶ This problem is highly concentrated, as over half of global emissions connected to fossil fuels are linked to just 25 fossil fuel businesses.²⁷
16. Before turning to Question 1, five key characteristics of the scientific evidence on climate change will be briefly highlighted. ClientEarth submits that these provide important factual context to the legal analysis that follows and must inform the Court’s determinations on the nature, scope and consequences of State obligations on this subject.
17. Importantly, these characteristics also emphasise the foreseeability of the adverse impacts of the climate crisis that have already occurred and will continue to occur. The first binding treaty addressing the problem of GHG emissions came into effect in 1992, and yet since then, emissions have continued to rise at a sharp rate. The failure of political efforts to stem these emissions and their negative impacts risks catastrophic consequences for the world and all peoples.

B. Key Findings of the International Scientific Consensus on Climate Change

18. One: the warming effect of CO₂ emissions is cumulative. GHG emissions accumulate and persist in the atmosphere for periods of thousands of years.²⁸ As a consequence, warming is driven by the (increasing) stock of CO₂ emissions in the atmosphere, rather than the rate of annual global emissions.²⁹ To slow or stop global temperature increase, it is thus necessary to cease adding to the stock of CO₂ and other GHG emissions, by reducing emissions until remaining small amounts of emissions are balanced against CO₂ removals, for example

²⁴ *Ibid.*

²⁵ Kelly Trout *et al.*, “Existing fossil fuel extraction would warm the world beyond 1.5°C”, *Environmental Research Letters* (2022), vol. 17, no. 6: The carbon budgets referenced in the article are those for a 50% chance at 1.5°C and an 83% chance at 2°C, to reflect the Paris Agreement wording. Further, lifetime emissions from existing and currently planned fossil fuel-consuming infrastructure (e.g. power stations) also exceeds the 1.5°C budget by a significant amount, and are approximately equal to the budget for 2°C, in: IPCC AR6 WGIII SPM (n16), para. B.7.

²⁶ UNEP, “The Production Gap: Phasing down or phasing up? Top fossil fuel producers plan even more extraction despite climate promises” (2023) (UNEP Production Gap Report 2023), pg. 2.

²⁷ Working Group on the issue of human rights and transnational corporations and other business enterprises *et al.*, letter of concern to Saudi Aramco, 26 June 2023 (Letter to Saudi Aramco), pg. 2, available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=28085>.

²⁸ IPCC, “2018: 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” (IPCC SR 1.5 Full Report) [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.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, p. 64; ClientEarth Intervention, *KlimaSeniorinnen* (n2), para. 12.

²⁹ ClientEarth Intervention *KlimaSeniorinnen* (n2), para. 12.

through their absorption by the ocean or forests – this is also known as ‘net zero’ CO₂ emissions.³⁰ According to the IPCC, “[r]eaching net zero GHG emissions primarily requires deep reductions in CO₂, methane and other GHG emissions, and implies net negative CO₂ emissions” (high confidence).³¹ To do so requires determining the permissible remaining scope to emit CO₂ emissions, i.e. a finite ‘global carbon budget’.³² The estimated carbon budget for (even) a 50% chance at limiting average warming to 1.5°C has been nearly exhausted and is dwindling rapidly. The urgency of such deep reduction is underscored by the fact that the rate of CO₂ emissions has drastically increased in recent decades to a very high level: 42% of all CO₂ emissions since 1850 were emitted in the past three decades since 1990.³³

19. Two: the level at which climate change is currently progressing risks triggering ‘tipping points’ and increases with further global warming (high confidence).³⁴ Tipping points are critical thresholds, beyond which the climate “system reorganizes, often abruptly and/or irreversibly” and include ice sheet collapse, abrupt ocean circulation changes and forest dieback.³⁵ The IPCC has emphasised that “even a return to pre-threshold surface temperatures or to atmospheric carbon dioxide concentrations does not guarantee that the tipping elements return to their pre-threshold state.”³⁶ Recent research has demonstrated that current warming beyond 1°C engages the risk of triggering tipping points and that “significant” likelihood exists of those threats multiplying at higher mean global temperatures of 1.5°C and above. The IPCC assesses that the risk/impact of such “large scale singular events” is currently “moderate.” If warming reaches 2°C, the risk/impact is assessed at “high.”³⁷ The IPCC warns that ice-sheet collapse, abrupt ocean circulation changes, compound extreme weather (heatwaves, flood, fire) events and warming substantially larger than that forecast cannot be ruled out and “are part of risk assessment.”³⁸ This escalating risk of non-linear warming – particularly in light of unexpectedly high 2023 warming – provides a strong evidentiary basis for ambitious action to limit global warming as fast and as much as possible.³⁹
20. Three: impacts are long-lasting, unavoidable and irreversible. Significant risks are associated with exceeding temperatures of more than 1.5°C (also known as overshooting), for example it “will result in irreversible adverse impacts on certain ecosystems with low resilience” (high confidence).⁴⁰ The IPCC has established that the likelihood of irreversible impacts will increase with higher global temperatures (high confidence).⁴¹ Further, “[a]s warming levels increase, so do the risks of species extinction or irreversible loss of biodiversity in ecosystems such as forests (medium confidence), coral reefs (very high confidence) and in Arctic regions (high

³⁰ UN, “For a liveable climate: Net-zero commitments must be backed by credible action”, available at: <https://www.un.org/en/climatechange/net-zero-coalition>.

³¹ IPCC AR6 SYR SPM (n22), para. B.5.1.

³² ClientEarth Intervention *KlimaSeniorinnen* (n3), para. 15.

³³ IPCC AR6 WGIII SPM (n16), para. B.1.3.

³⁴ IPCC AR6 SYR SPM (n22), para. B.3.2.

³⁵ IPCC, “Summary for Policymakers” (IPCC AR6 WGI SPM), in: IPCC AR6 WGI Full Report (n20), para. B.5.2, fn. 34.

³⁶ IPCC AR6 WGI TS (n8), pg. 106.

³⁷ *Ibid.*, para B.4.7.

³⁸ *Ibid.*, para C.3.

³⁹ David I. Armstrong *et al.*, “Exceeding 1.5°C could trigger multiple climate tipping points”, *Science* 377, 1171 (2022).

⁴⁰ IPCC AR6 SYR SPM (n22), para. B.7.2.

⁴¹ IPCC, IPCC, “2023: Sections” (IPCC AR6 SYR Longer Report), in IPCC AR6 SYR SPM (n22), para. 3.1.3.

confidence).⁴² At the same time, certain impacts such as sea level rise are unavoidable, as the deep ocean continues to warm and ice sheets continue to melt, leading to centuries or millennia of elevated sea levels (high confidence).⁴³ While previous emissions mean that future changes and impacts are unavoidable and/or irreversible, the IPCC has also confirmed that these “can be limited by deep, rapid, and sustained global greenhouse gas emissions reduction” (high confidence), requiring “immediate and unprecedented” efforts to reduce global GHG emissions.⁴⁴ To have a more than 50% chance to limit warming to 1.5°C with no or limited overshoot, rapid, deep and in most cases immediate GHG emissions reductions are required. More concretely: GHG emissions have to be reduced by at least 43% by 2030, 60% by 2035, 69% by 2040 and 84% by 2050 as compared to 2019 levels.⁴⁵

21. Four: due to inertia in both geophysical and socio-economic systems, there is a delay (lagging effect) between GHG emissions and the impacts felt. This means that the damage evident today does not reflect the damage that has already been done. An example of geophysical system inertia includes slower rates of permafrost thaw, with the effects lagging behind emissions by decades.⁴⁶ Due to this lagging effect, the negative impacts of the climate crisis will continue to worsen, even if current levels of GHG emissions and CO₂ concentrations in the atmosphere remained the same. Lags in relation to socio-economic systems refer to the length of time required to transition and decarbonise elements such as infrastructure or transport systems, deeply intertwined with the functioning of societal and economical systems.⁴⁷ The IPCC has emphasised this concept of ‘carbon lock-in’: “delaying GHG emissions reductions over the coming years also leads to economic and institutional lock-in into carbon-intensive infrastructure, that is, the continued investment in and use of carbon-intensive technologies that are difficult or costly to phase-out once deployed.”⁴⁸ This can result in low-carbon alternatives being ‘locked out’, i.e. excluded.⁴⁹
22. Five: a ‘whole systems’ approach to emissions reductions is required. The IPCC has concluded that “[a]ll relevant companies, industries and stakeholders” need to be involved for a transition towards low emissions pathways to stand a chance.⁵⁰ There are just 100 fossil fuel and cement companies (both investor and state-owned) that produced 71% of all industrial GHG emissions between 1988 and 2017, the so-called ‘Carbon Majors’.⁵¹ Consequently, it is (in)action by such companies that has a significant impact on whether politically agreed limits of average global temperature rise are respected and met. It is evident that corporate agents are thus indispensable

⁴² *Ibid.*, para. 3.1.3.

⁴³ *Ibid.*

⁴⁴ IPCC SR 1.5 Full Report (n28), pg. 276.

⁴⁵ IPCC AR6 SYR SPM (n22), pg. 21, table SPM.1. As discussed in COSIS Oral Statement (n10), pg. 28, ln. 23-29.

⁴⁶ IPCC SR 1.5 Full Report (n28), p. 271; ClientEarth Intervention, *KlimaSeniorinnen* (n2), para. 29; with further reference to: IPCC AR6 WGI Full Report (n20), pg. 775, FAQ 5.3, Figure 1.

⁴⁷ ClientEarth *KlimaSeniorinnen* Intervention (n2), para. 28.

⁴⁸ IPCC SR 1.5 Full Report (n28), pg. 126.

⁴⁹ UNEP, “The Production Gap Report 2020: Special Report”, pg. v: “The tendency for certain carbon-intensive technological systems to persist over time, ‘locking out’ lower-carbon alternatives, owing to a combination of linked technical, economic, and institutional factors.”

⁵⁰ IPCC SR 1.5 Full Report (n28), pg. 392.

⁵¹ OHCHR, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, A/74/161 (15 July 2019) (A/74/161), para. 13, fn. 12.

to curbing the most severe impacts of the climate crisis. The IPCC notes that corporate agents play a key role in the mitigation of climate change, working as both a barrier to and accelerator of decarbonisation, through emissions reductions, research and investment and via marketing and public relations efforts. The fossil fuel industry “epitomises a barrier” and corporate agents have attempted to derail climate mitigation by targeted lobbying and doubt-inducing media strategies.⁵² This transition to low emissions pathways includes the creation of political, social and cultural conditions paving the way for public awareness and acceptability of necessary changes.⁵³

23. These five key scientific aspects underline the necessity to act. Nonetheless, current policies around the world are projected to lead to global warming of 2.8°C or more.⁵⁴ It is this universally accepted scientific evidence on the necessity of emissions reductions that forms the basis of State obligations in international law.

⁵² IPCC AR6 WGIII Full Report (n16), pg. 557.

⁵³ A/74/161 (n51), para. 64.

⁵⁴ UNEP, “Emissions Gap Report 2022: The Closing Window – Climate crisis calls for rapid transformation of societies”, pg. XVI.

III. Question 1 – Legal Obligations on States in Relation to Climate Harms

24. ClientEarth’s submission in response to Question 1 focuses first on the substance of States’ obligations under the international climate change framework (A), before addressing States’ climate-related obligations under IHRL, briefly setting out the scientific evidence linking climate change to adverse impacts on human rights, followed by an overview of recognition of the applicability of IHRL by UN treaty bodies, regional bodies and national courts (B). This discussion under sections (A) and (B) clearly demonstrates the co-applicability of the international climate and IHRL regimes. We then address the practical implications for States of their obligations under these complementary regimes (C), before providing a concluding summary of our submission on this question (D).

A. State Obligations under the International Climate Change Framework

25. The international approach to the reduction of GHG emissions (mitigation) and the adaptation to unavoidable changes is provided for under the UNFCCC and its subsequent instruments, including the 2015 Paris Agreement. The objective of the UNFCCC is the “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system” as a means “to protect the climate system for present and future generations.”⁵⁵

26. Article 3 UNFCCC provides that in achieving and implementing the objective of the Convention – i.e. the prevention of dangerous anthropogenic interference with the climate system – States Parties shall be guided by the following:

1. The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.

2. The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration.

27. Recognising the principles of equity and common but differentiated responsibilities and respective capabilities (CBDR-RC), the UNFCCC thus established a framework for differentiated obligations on ‘developed country’ and ‘developing country’ States Parties, acknowledging and accounting for the historic link between GHG emissions and economic development.

⁵⁵ UNFCCC, art. 2.

28. The principle of CBDR-RC reflects the fundamental notion of equity and embodies the reality that while all States are responsible for the protection of the environment, not all States are equally responsible for the environmental harm caused, nor able to respond and address the harm in equal terms. The process of apportioning emissions reduction obligations among individual countries is often referred to as ‘burden sharing’ (sometimes also ‘effort sharing’).⁵⁶ The principles of equity, CBDR-RC and burden-sharing have since guided subsequent instruments under the UNFCCC and have also been addressed in IPCC reports where it was examined how these considerations have been operationalised in the scientific literature and reflected in approaches to quantifying countries’ fair shares.⁵⁷
29. The UNFCCC established a distinction between ‘developed country’ States Parties (Annex 1) and ‘developing country’ States Parties (non-Annex 1). Under this distinction, Annex I countries committed to absolute emission reduction or limitation targets, while non-Annex I countries did not have those same obligations. At the same time the Convention recognised financial assistance obligations on developed country Parties, e.g. to assist developing country Parties in adapting to adverse effects of climate change.⁵⁸
30. In order to achieve the overall objective of the UNFCCC, the Parties to the Convention met in Paris in 2015 and agreed to the overarching temperature limit contained in article 2(1)(a) of the Paris Agreement, which sets out that the increase in global average temperature should be limited “to well below 2°C”. Under this provision, States Parties commit to “pursuing efforts to limit the temperature increase to 1.5°C” above pre-industrial levels “recognizing that this would significantly reduce the risks and impacts of climate change.”
31. 1.5°C thus represents a politically agreed-on limit, legally enshrined in the Paris Agreement, to reduce the most severe risks induced by climate change, albeit recognising that harm (and adverse effects on human rights across the world) are already occurring at current levels below 1.5°C.⁵⁹ Further, as the IPCC’s Special Report on Global Warming of 1.5°C has made abundantly clear, the difference in the scale of impacts between 2°C and 1.5°C is

⁵⁶ IPCC, 2014: Climate Change 2014: Mitigation of Climate Change. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Edenhofer, O., R. Pichs-Madruga, Y. Sokona, E. Farahani, S. Kadner, K. Seyboth, A. Adler, I. Baum, S. Brunner, P. Eickemeier, B. Kriemann, J. Savolainen, S. Schlömer, C. von Stechow, T. Zwickel and J.C. Minx (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA (IPCC AR 5 WGIII Full Report): The IPCC’s AR5 WGIII report provides an extensive analysis of the issue of burden sharing in Chapter 3 (Social, Economic, and Ethical Concepts and Methods) and Chapter 4 (Sustainable Development and Equity).

⁵⁷ IPCC AR5 WGIII Full Report (n56) considered approaches to quantifying countries’ fair shares considering: responsibility (using historical emissions to derive emissions goals and relate contributions to climate change to responsibility for addressing the harms); capability (looking at countries’ *de facto* capacity to tackle climate change, including financial, technological, institutional and human resources); equality (taking into account the fundamental principles that “*each human being has equal moral worth and thus should have equal rights*” reflected in the Paris Agreement approach requiring ‘developing’ countries to pass a specific threshold before moving towards emission reductions); responsibility, capability and need (combining historical responsibility and capability with the need for sustainable development); equal cumulative per capita emissions (combining equality with responsibility); and staged approaches (reflecting the idea that these approaches can be applied over multiple phases).

⁵⁸ UNFCCC, art. 4.

⁵⁹ In 2022, the average global mean surface temperature was about 1.15°C above pre-industrial levels.

significant and “neither 1.5°C or 2°C can be considered as safe targets for warming.”⁶⁰ The implications of these conclusions for State duties under IHRL will be discussed further below.

32. The Paris Agreement also elaborated on the principles of equity and CBDR-RC. It introduced a revised approach to the previously tiered distinction of emissions reduction obligations. Article 2(2) stipulates that: “[t]his agreement will be implemented to reflect equity and the principle of CBDR-RC, in light of different national circumstances.”
33. It thereby provides that equity and CBDR-RC are to inform actions taken under the Agreement. In order to achieve the over-arching temperature goal, the Paris Agreement creates an architecture of reporting, monitoring and peer review through the submission of national targets and plans of action, the global stocktake,⁶¹ and compliance procedures. The obligations it places on States to mitigate GHG emissions include, *inter alia*:
- Article 3: the obligation to undertake and communicate ambitious efforts (as defined in articles 4, 7, 9, 10, 11 and 13) with a view to achieving the warming limit set out in article 2;
 - Article 4(1): the obligation to aim to reach global peaking of GHG emissions as soon as possible, to reach net zero in the second half of the century and to undertake rapid reductions in accordance with the best available science;
 - Article 4(2): the obligation to prepare, communicate and maintain successive Nationally Determined Contributions (NDCs) and to pursue domestic mitigation measures with the aim of achieving the objectives of the NDCs, to be communicated every five years (article 4(9));
 - Article 4(3): the obligation that each NDC must represent a progression beyond the previous one(s) and reflect a State Party’s “highest possible ambition,” taking account of States’ CBDR-RC.
34. Departing from the previously tiered approach, the Paris Agreement introduced a self-differentiation approach, whereby countries assess their own responsibilities and capabilities under their NDC obligation. NDCs reflect countries’ intended contributions based on notions of ‘progression’ and ‘highest possible ambition.’⁶²
35. Despite this new approach, the principles of equity and CBDR-RC remain relevant to the assessment of a States’ “highest possible ambition”. NDCs are necessarily determined by reference to the emissions reductions envisaged by the ‘no or limited overshoot’ 1.5°C pathways, but in order to reflect an equitable approach to burden sharing each country must take into account the above principles in determining contributions. Moreover, if every

⁶⁰ David R. Boyd, UN Special Rapporteur on Human Rights and Environment, Statement on the human rights obligations related to climate change, with a particular focus on the right to life (25 October) (Statement SR October 2018), para. 19, available at: <https://www.ohchr.org/sites/default/files/Documents/Issues/Environment/FriendsIrishEnvironment25Oct2018.pdf>.

⁶¹ Paris Agreement, art. 14.

⁶² *Ibid.*, art. 4(3).

country adopts NDCs reflecting the lower end of the fair share range applicable to it, global targets will not be met.⁶³ Put simply, an equitable approach is imperative because if ‘developed’ countries choose approaches which reflect their interests and developing countries do likewise, it will not be possible to remain within the collectively agreed limits of the Paris Agreement. Therefore, those States with greater historical responsibility for emissions and capacity must do more than those with lesser responsibility and capabilities. ClientEarth submits that highest possible ambition in this context means that States must deploy all reasonable and appropriate means, exercise best possible efforts, or simply contribute a ‘fair share’ to mitigate climate change.⁶³ Beyond these individualised mitigation obligations, the Paris Agreement also places on States the obligation to cooperate, and particularly to strengthen the capacity of developing countries to implement the Agreement.

36. Article 7 of the Paris Agreement sets out ways to strengthen global adaptation efforts, for example, through means of national planning processes, international cooperation and international support for developing States Parties. The text of article 7 recognises “that greater levels of mitigation can reduce the need for additional adaptation efforts,” thereby reinforcing the temperature limit stipulated under article 2.

37. Article 7 also reinforces language around the centrality of human rights and science in State measures, as:

“adaptation action should follow a country-driven, gender-responsive, participatory and fully transparent approach, taking into consideration vulnerable groups, communities and ecosystems, and should be based on and guided by the best available science and, as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems, with a view to integrating adaptation into relevant socioeconomic and environmental policies and actions, where appropriate.”

38. In article 8, States Parties “recognize the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change.” While mitigation and adaptation address averting and minimising climate harms respectively, the language on addressing loss and damage represents a third essential element (often described as the third pillar) of the global response to climate change, i.e. providing assistance where climate-related loss and damage has occurred.

39. The elements of finance, technology and capacity building are developed under articles 9, 10 and 11. These reaffirm that developed States Parties “shall” provide financial resources for both mitigation and adaptation efforts of developing States Parties; to realise the development and transfer of technologies; and to strengthen and build the capacity of small and vulnerable States to take climate action. These provisions once again reflect the differentiated approach between States and reflect the fundamental principle of equity as between those States whose emissions have caused climate change, and those who will bear the brunt of its effects.

⁶³ Will Donaldson, “The Meaning of ‘Fair Share’ in Climate Ambition Litigation under the Paris Agreement,” Climate Law – A Sabin Center Blog (29 September 2022), available at: <https://blogs.law.columbia.edu/climatechange/2022/09/29/guest-commentary-the-meaning-of-fair-share-in-climate-ambition-litigation-under-the-paris-agreement/>.

40. In summary, under the Paris Agreement, States Parties owe obligations to ensure the protection of the climate system and other parts of the environment from anthropogenic GHG emissions.

B. State Obligations under International Human Rights Law

41. Before turning to the obligations on States arising under IHRL in relation to climate change, a brief overview will be given of some of the significant scientific findings evidencing the adverse effects of climate change on the full enjoyment and realisation of human rights, as protected under various international legal instruments. The following findings are all categorised by the IPCC between high confidence and very high confidence, thereby representing a high level of agreement amongst the scientific community.

i. The Scientific Evidence Clearly Links Climate Change to Adverse Impacts on Human Life and Well-Being

42. The IPCC has classified climate change as a “threat to human well-being” (very high confidence).⁶⁴ The negative impacts detailed here occur at current levels of warming and will continue to intensify, as any increase in warming is “projected to affect human health, with primarily negative consequences (high confidence).”⁶⁵

- Adverse impacts on mortality, physical and mental health: Globally, climate change related extreme heat events have resulted in human mortality and morbidity (very high confidence). In the near- to long-term, climate change will drastically impact health and cause premature deaths (high confidence).⁶⁶ Climate change has also increased food- and water-borne diseases (very high confidence) and the incidence of vector-borne diseases (high confidence).⁶⁷ According to estimates by the World Health Organization, between 2030 and 2050, climate change will lead to around 250,000 additional deaths per year, “from undernutrition, malaria, diarrhoea and heat stress alone.”⁶⁸
- Reduction in food and water security (high confidence): Food insecurity has increased, as climate-related shifts in temperature have affected the productivity of the agricultural, forestry and fishery sectors.⁶⁹ Particularly: “[i]ncreasing weather and climate extreme events have exposed millions of people to acute food insecurity and reduced water security.”⁷⁰

⁶⁴ IPCC AR6 SYR SPM (n22), para. C.1.

⁶⁵ IPCC, “2018: Summary for Policymakers” (IPCC SR 1.5 SPM), in: IPCC SR 1.5 Full Report (n28), para. B.5.2.

⁶⁶ IPCC, “2022: Summary for Policymakers” (IPCC AR6 WGII SPM) [H.-O. Pörtner, D.C. Roberts, E.S. Poloczanska, K. Mintenbeck, M. Tignor, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem (eds.)], in: IPCC AR6 WGII Full Report (n8), paras. B.1.4. and B.4.4.

⁶⁷ IPCC AR6 WGII TS (n8), pg. 50-51.

⁶⁸ World Health Organization, “Climate Change” (12 October 2023), available at: <https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health>.

⁶⁹ IPCC AR6 WGII TS (n8), pg. 48.

⁷⁰ IPCC AR6 WGII SPM (n66), para. B.1.3.

- Climate migration will increase continuously (high confidence):⁷¹ This is due to extreme and slow-onset climatic events, as well as the negative impacts of climate change on daily life and livelihoods. Necessary/unavoidable relocation of communities by governments will increase.⁷² Existing examples of relocated communities highlight financial and emotional distress as, for example, cultural and religious bonds to native homes and livelihoods are disrupted (high confidence).⁷³
- Climate risks have a disproportionate effect on marginalised groups (high confidence):⁷⁴ This includes, in particular, women and children from low-income households, indigenous peoples, and minority groups. Climate change is a “threat multiplier,” as it compounds pre-existing social and economic issues and imbalances.⁷⁵ Observed mortality and losses due to floods, droughts and storms are greater in regions where such groups are marginalised on the basis of historical, political and socioeconomic inequities (high confidence).⁷⁶

43. It is clear from this scientific evidence of the adverse impacts of the climate crisis on human life and health that it causes demonstrable risks to internationally protected human rights. In 2018, the IPCC noted that: “[w]arming of 1.5°C is not considered ‘safe’ for most nations, communities, ecosystems and sectors and poses significant risks to natural and human systems as compared to the current warming of 1°C (high confidence).”⁷⁷

ii. Legal Recognition of the Adverse Impacts of Climate Change on Human Rights

44. The adverse impacts of environmental degradation and the climate crisis on the enjoyment and realisation of fundamental human rights has been recognised in the international climate change framework itself, as well as through the practice of courts and tribunals, UN (treaty) bodies and UN special procedures.⁷⁸

International Climate Framework

45. Since its inception, the UNFCCC regime itself has been concerned with climate change’s adverse effects on all “humankind.” As has been evidenced above, since at least 1992 – when the UNFCCC entered into force – the threat posed by the collapse of the climate system to human life, health and well-being has become ever more clear.⁷⁹ Meanwhile, human rights fora have clarified and enforced States’ human rights obligations in the

⁷¹ *Ibid.*, pgs. 52, 64.

⁷² IPCC, 2019: *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* (IPCC SROCC Full Report) [H.-O. Pörtner, D.C. Roberts, V. Masson-Delmotte, P. Zhai, M. Tignor, E. Poloczanska, K. Mintenbeck, A. Alegría, M. Nicolai, A. Okem, J. Petzold, B. Rama, N.M. Weyer (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, pg. 666.

⁷³ IPCC AR6 WGII TS (n8), pg. 52

⁷⁴ IPCC AR6 WGII SPM (n66), para. B.2.

⁷⁵ IPCC AR6 WGII Full Report (n8), pg. 286.

⁷⁶ IPCC AR6 WGII TS (n8), pg. 50.

⁷⁷ IPCC SR 1.5 Full Report (n28), pg. 44; see also Statement SR October 2018 (n60).

⁷⁸ UN Reports on human rights and climate change are available at: <https://www.ohchr.org/en/climate-change/reports-human-rights-and-climate-change>.

⁷⁹ Lavanya Rajamani, ‘The Increasing Currency and Relevance of Rights-based Perspectives in the International Negotiations on Climate Change’ *Journal of Environmental Law*, 22 (3), 2010,391–429 (2010), pg.393: “[i]t is axiomatic that the documented impacts of climate

environmental arena more generally,⁸⁰ thus affirming the link between human rights and the environment.⁸¹ These parallel developments have led to the inclusion of increasingly explicit references to human rights in more recent instruments under the UNFCCC regime. For example, the 2010 Cancun Agreement cites Resolution 10/4 of the UN Human Rights Council on human rights and climate change, which “recognizes that the adverse effects of climate change have a range of direct and indirect implications for the effective enjoyment of human rights” and highlights how climate change disproportionately affects people who are “already vulnerable owing to geography, gender, age, indigenous or minority status, or disability.”⁸²

46. The Paris Agreement expanded on this link between the climate crisis and fundamental human rights in its Preamble as well as its operative provisions. The importance of the inclusion of explicit references to States’ human rights obligations in a multilateral environmental agreement cannot be overestimated.⁸³ While it does not create any self-standing human rights-related obligations, it is a clear recognition by the States Parties that human rights are an integral consideration of any climate change-related actions under the Paris Agreement.⁸⁴ As commentators have noted, discussions around human rights in the lead up to the Paris negotiations led not only to inclusion of this human rights language in the Preamble, but also generated “increased awareness of the human rights dimensions of climate policies and the relevance of human rights norms to climate governance.”⁸⁵

International Practice

47. The international climate change framework briefly outlined above, and the growing recognition of the link between human rights and climate change, establishes the context for the actions and decisions of UN treaty bodies set out below.
48. The UN Human Rights Council, the UN’s main intergovernmental human rights body, has since 2008 adopted a number of resolutions on human rights and climate change which have included requests to the Office of the

change are likely to undermine the realisation of a range of protected human rights, civil and political as well as economic, social and cultural. The right to life and to health provide useful examples.”

⁸⁰ See for example, *KlimaSeniorinnen* application (n2), para. 436; ECtHR *Tatar v Romania*, application no. 67021/01 (2009); and ECtHR *Lopez Ostra v Spain*, application no. 16798/90 (1994).

⁸¹ The nature of the link between the environment and human rights has been well understood and recognised internationally since the 1970s, see e.g. Stockholm Declaration (1972): “Both aspects of man’s environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights - even the right to life itself.”

⁸² UNFCCC, Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010, FCCC/CP/2010/7/Add.1 (15 March 2011). See also recognition that “climate change has obvious implications for the enjoyment of human rights” in the Report on the relationship between climate change and human rights, A/HRC/10/61 (15 January 2009), para 70; and identification of states’ procedural obligations, substantive obligations and obligations to vulnerable groups relating to environmental harm which impacts on human rights (including foreseeable adverse effects of climate change) in the Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/25/53 (30 December 2013).

⁸³ See for example: Ben Boer, “The Preamble”, in Geert Van Calster and Leonie Reins (eds), *The Paris Agreement on Climate Change: A Commentary* (2021), para 54: “[P]reambular paragraph 11 embodies the will of the negotiating parties that it be used as a guide for the implementation of the Agreement and, as such, breaks new ground”, citing to María Pía Carazo, “Contextual Provisions (Preamble and Article 1)”, in Daniel Klein *et al.* (eds), *The Paris Agreement on Climate Change - Analysis and Commentary* (2017), pg.114, which notes that it was the first multilateral environmental agreement to incorporate references to human rights, and that the word “should” imposes a soft obligation which is unusual in a Preamble.

⁸⁴ Benoit Mayer, “Human Rights in the Paris Agreement” (2016) *Climate Law*, 6(1-2), pg. 114.

⁸⁵ Sébastien Duyck, “Delivering on the Paris Promises? Review of the Paris Agreement’s Implementing Guidelines from a Human Rights Perspective” (2019) *Climate Law*, 9(3), pg. 207.

High Commissioner of Human Rights to prepare studies and reports on topics such as the full realisation of the right to food,⁸⁶ gender-responsive climate action for the full and effective enjoyment of the rights of women,⁸⁷ the relationship between climate change and the full and effective enjoyment of the rights of the child,⁸⁸ or the relationship between climate change and the human right of everyone to the highest attainable standard of physical and mental health.⁸⁹ The Human Rights Council has thereby dedicated significant time and resources to understanding and underscoring the links between human rights and climate change and acknowledged its adverse impacts on a multitude of internationally recognised and protected human rights.

49. The recognition that protection against climate harms falls within the IHRL framework is further provided for in the 2022 UN General Assembly resolution on the right to a clean, healthy and sustainable environment.⁹⁰ The preamble definitively links the resolution to existing climate legal instruments,⁹¹ and highlights the negative impact of climate change on the enjoyment of a clean, healthy and sustainable environment and its implications for the effective enjoyment of all human rights.⁹² The resolution enjoyed near unanimous adoption by States with no State voting against it. This consensus stands testament to the widespread determination of States to recognise the rights to both a healthy environment and a safe climate as fundamental human rights.
50. The UN HRC provided further recognition of the link between human rights and the impact of climate change when it adopted its General Comment No. 36 in October 2018 on the right to life, finding that: “[e]nvironmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.”⁹³ Citing the preamble of the Paris Agreement, the UN HRC concluded that “[t]he obligations of States parties under international environmental law” should inform the content of article 6 of the International Covenant on Civil and Political Rights (ICCPR) while at the same time “the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law.”⁹⁴ In so finding, the UN HRC confirmed the complementarity of these different international legal regimes and respective obligations on States. According to the UN HRC, the obligations on States in relation to the right to life include, “measures taken by States parties

⁸⁶ A/HRC/53/47.

⁸⁷ A/HRC/41/26.

⁸⁸ A/HRC/35/13.

⁸⁹ A/HRC/32/23.

⁹⁰ Resolution adopted by the General Assembly, Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms, A/RES/76/300 (2022).

⁹¹ *Ibid.*, pg. 2: “Recalling States’ obligations and commitments under multilateral environmental instruments and agreements, including on climate change.”

⁹² *Ibid.*: “Recognizing also that ... the impact of climate change [and other environmental harms] interfere with the enjoyment of a clean, healthy and sustainable environment and that environmental damage has negative implications, both direct and indirect, for the effective enjoyment of all human rights.”

⁹³ UN HRC, “General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life” (UN HRC GC 36), UN Doc. CCPR/C/GC/36 (15 October 2018), para. 62.

⁹⁴ *Ibid.*

to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors.”⁹⁵

51. In *Billy*, mentioned at paragraph 3 above, one of the first international decisions to consider climate change and its effects on human rights, the UN HRC was called on to consider whether, under the ICCPR, States were required to address the impacts of the climate crisis.⁹⁶
52. In the case, eight indigenous individuals from the low-lying Torres Strait Islands, an archipelago of small islands between Australia's northern Cape York Peninsula and the island of Papua New Guinea which mostly form part of the Australian State of Queensland, brought a claim to the UN HRC. They asked the Committee to apply the ICCPR to climate change harms such as rising sea levels, coral bleaching, biodiversity loss, flooding of their homes and burial sites, and sea water contamination of agricultural land,⁹⁷ which they submitted resulted from Australia's failure to implement adaptation and mitigation measures to combat adverse climate change impacts within its territory.
53. In its decision, the UN HRC found that with respect to adaptation measures, the rights invoked by the claimants entailed positive State obligations to ensure the protection of individuals under its jurisdiction from violations as a result of climate change impacts.⁹⁸ In so finding, the Committee concluded that States have a positive obligation to implement timely and adequate adaptation measures to protect people's homes, and private and family life.
54. The Committee determined:

*“[w]hen climate change impacts – including environmental degradation on traditional [indigenous] lands in communities where subsistence is highly dependent on available natural resources and where alternative means of subsistence and humanitarian aid are unavailable – have direct repercussions on the right to one's home, and the adverse consequences of those impacts are serious because of their intensity or duration and the physical or mental harm that they cause, then the degradation of the environment may adversely affect the well-being of individuals and constitute foreseeable and serious violations of private and family life and the home. The Committee concludes that the information made available to it indicates that by failing to discharge its positive obligation to implement adequate adaptation measures to protect the authors' home, private life and family, the State party violated the authors' rights under article 17 of the Covenant.”*⁹⁹
55. This marked the first time the UN HRC found a State responsible for failing to protect human rights from climate change impacts. The Committee thereby confirmed the basic applicability of IHRL to climate change and State responses thereto.

⁹⁵ *Ibid.*

⁹⁶ *Billy et al.*, views adopted (n1).

⁹⁷ *Ibid.*, paras. 2.3-2.5.

⁹⁸ *Ibid.*, para. 7.7.

⁹⁹ *Ibid.*, para. 8.12.

56. On the Australian government's argument that the Committee lacked jurisdiction to address climate harms, as these were covered by the international climate change framework (rather than the ICCPR), the UN HRC disagreed and declared the case admissible on the following grounds:

“The Committee takes note of the State party's argument that the authors' claims under other international treaties are inadmissible ratione materiae because they lie outside the scope of the Covenant. The Committee observes that it is not competent to determine compliance with other international treaties or agreements. However, to the extent that the authors are not seeking relief for violations of the other treaties before the Committee but rather refer to them in interpreting the State party's obligations under the Covenant, the Committee considers that the appropriateness of such interpretations relates to the merits of the authors' claims under the Covenant.”¹⁰⁰

57. The UN HRC disconnected the origin of the harm, e.g. GHG emissions at levels harmful to human life and well-being, from the obligation on States to respect and protect the human rights of people in their jurisdiction. In so doing, it clarified that all States are under an obligation to protect against climate harms, as such harms are clearly foreseeable (see Section II above on the scientific evidence which demonstrates the foreseeability of climate impacts) and have an undeniable impact on the enjoyment and realisation of human rights everywhere.

58. The *Billy* case also marked the first time the UN HRC recognised that climate change puts indigenous peoples' culture at risk. The Committee found that Australia, in the face of reasonably foreseeable risk of climate harms, had failed to adopt “timely adequate adaptation measures to protect the authors' collective ability to maintain their traditional way of life, to transmit to their children and future generations their culture and traditions and use of land and sea resources“ in violation of its positive obligation to protect the authors' right to enjoy their minority culture under article 27 ICCPR.¹⁰¹

59. With respect to the right to life under article 6 ICCPR, the UN HRC stated that adverse climate change impacts constitute “some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life” and that States may be in violation of the right to life even if such threats and situations do not result in the loss of life.¹⁰²

60. In relation to mitigation, the UN HRC considered that Australia's position “among the countries in which large amounts of greenhouse gas emissions have been produced” and its high rank “on world economic and human development indicators,” provided a relevant basis for the Committee to scrutinise Australia's mitigation measures.¹⁰³

¹⁰⁰ *Billy et al.*, views adopted (n1), para. 7.3.

¹⁰¹ *Ibid.*, para. 8.14.

¹⁰² *Ibid.*, para. 8.3.

¹⁰³ *Ibid.*, para. 7.8.

61. Another human rights impact of the climate crisis that has been examined by the UN HRC, is climate displacement. In *Teitiota v New Zealand*, the UN HRC considered that “due to the impact of climate change and associated sea level rise on the habitability of Kiribati and on the security situation on the islands” the complainant, a rejected asylum seeker awaiting removal, could have faced a real risk of impairment of his right to life as a result of New Zealand’s decision to remove him to Kiribati – a Pacific Island State.¹⁰⁴ These findings on admissibility reinforce the applicability of the IHRL framework to climate change impacts.
62. Similarly to the UN HRC, the UN Committee on the Rights of the Child has affirmed the applicability of IHRL, namely the Convention on the Rights of the Child (CRC), to the climate crisis and State responses thereto.¹⁰⁵ Relying on evidence such as “rising temperatures caused by climate change” increasing “the risk of vector-borne and zoonotic diseases and concentrations of air pollutants that stunt brain and lung development and exacerbate respiratory conditions” the Committee established that climate change poses a risk to children’s right to health, protected under article 24 CRC,¹⁰⁶ and that children are entitled to protection “from infringements of their rights stemming from environmental harm.”¹⁰⁷
63. The Committee on the Rights of the Child considered that the challenges presented by the climate crisis require a dynamic interpretation of the obligations under the CRC, including a recognition that the duty of protection extends to “the children constantly arriving” as they are “also entitled to the realization of their human rights to the maximum extent.”¹⁰⁸
64. The Committee also considered that children: “are particularly impacted by the effects of climate change, both in terms of the manner in which they experience such effects as well as the potential of climate change to affect them throughout their lifetime, in particular if immediate action is not taken.” It is because of this “particular impact on children, and the recognition by States parties to the Convention that children are entitled to special safeguards, including appropriate legal protection, States have heightened obligations to protect children from foreseeable harm.”¹⁰⁹ These considerations must inform the content of State obligations as well as the legal consequences of their breach.
65. In March 2018, the UN Committee on the Elimination of Discrimination Against Women in its General Recommendation No. 37 noted that: “obligations of States parties to effectively mitigate and adapt to the adverse

¹⁰⁴ UN HRC, Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2728/2016, *Teitiota v. New Zealand*, UN Doc. CCPR/C/127/D/2728/2016 (7 January 2020), para. 8.6.

¹⁰⁵ UN Committee on the Rights of the Child (UN CRC), Decision adopted under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 104/2019, *Sacchi et al. v Argentina et al.*, UN Doc. CRC/C/88/D/1047/2019 (8 October 2021) (*Sacchi et al.*, decision adopted). See also UN CRC, General comment No. 26 (2023) on children’s rights and the environment, with a special focus on climate change, UN Doc. CRC/C/GC/26 (22 August 2023) (UN CRC GC 26).

¹⁰⁶ UN CRC GC 26 (n105), para. 39.

¹⁰⁷ *Ibid*, para. 7.

¹⁰⁸ *Ibid*, para. 11.

¹⁰⁹ *Sacchi et al.*, decision adopted (n105), para. 10.13.

effects of climate change, in order to reduce the increased disaster risk, have been recognized by international human rights mechanisms.”¹¹⁰ On necessary State measures, it noted that:

*“[l]imiting fossil fuel use and greenhouse gas emissions and the harmful environmental effects of extractive industries such as mining and fracking, and the allocation of climate financing, are regarded as crucial steps in mitigating the negative human rights impacts of climate change and disasters. Any mitigation or adaptation measures should be designed and implemented in accordance with the human rights principles of substantive equality and non-discrimination, participation and empowerment, accountability and access to justice, transparency and the rule of law.”*¹¹¹

66. Similarly, in October 2018, the UN Committee on Economic, Social and Cultural Rights (UN CESCR) noted that the obligation to “respect, protect and fulfil all human rights for all” could be breached by “a failure to prevent foreseeable harm to human rights caused by climate change, or a failure to mobilize the maximum available resources in an effort to do so.”¹¹² The inclusion of ‘maximum available resources’ clarifies that IHRL places a duty of due diligence, or a standard of ‘responsible government’, on States, requiring them to take all reasonable and necessary steps to prevent climate harms, at the same time also recognising that the extent of ‘maximum available resources’ varies between States.

67. In a May 2020 joint statement five UN treaty bodies expanded on the content and due diligence nature of the obligations concerned, noting that:

*“[i]n order for States to comply with their human rights obligations and to realize the objectives of the Paris Agreement, they must adopt and implement policies aimed at reducing emissions. These policies must reflect the highest possible ambition, foster climate resilience and ensure that public and private investments are consistent with a pathway towards low carbon emissions and climate resilient development.”*¹¹³

Regional practice

68. As well as the UN treaty bodies discussed above, the issue of responsibility for the human rights impacts of climate change has also arisen in questions before regional bodies. In its April 2024 judgment on the *KlimaSeniorinnen* case, the ECtHR for the first time considered the impact of climate change on the human rights obligations of States under the ECHR. The case was brought by four Swiss senior women and a Swiss association

¹¹⁰ Committee on the Elimination of Discrimination against Women, General recommendation No. 37 (2018) on the gender-related dimensions of disaster risk reduction in the context of climate change, 13 March 2018, CEDAW/C/GC/37, para. 14.

¹¹¹ *Ibid.*

¹¹² UN Committee on Economic, Social and Cultural Rights Statement on “Climate Change and the International Covenant on Economic, Social and Cultural Rights”, 31 October 2018, E/C.12/2018/1 (UN CESCR 2018 Statement), para. 6.

¹¹³ OHCHR, “Five UN human rights treaty bodies issue a joint statement on human rights and climate change” (16 September 2019) (OHCHR joint statement 2019), para. 11, available at: <https://www.ohchr.org/en/statements/2019/09/five-un-human-rights-treaty-bodies-issue-joint-statement-human-rights-and>.

of senior women concerned about the consequences of global warming on their life and health. The applicants argued that the Swiss authorities were not taking sufficient action to mitigate the effects of climate change.

69. In finding for the claimants, the ECtHR confirmed the clear link between the adverse impacts of climate change and human rights. In the Court's decision, this link forms the basis for crystallising a positive obligation on the part of States to mitigate the impacts of climate change on individuals. The Court held that "the State's primary duty is to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change."¹¹⁴ Specifically, States are required to "undertake measures for the substantial and progressive reduction of their respective GHG emission levels, with a view to reaching net neutrality within, in principle, the next three decades," providing guardrails to States' margin of appreciation.¹¹⁵

70. While the Court recognised States' margin of appreciation regarding the means adopted to ensure such reductions, it emphasised the urgency of adopting appropriate measures:

*"immediate action needs to be taken and adequate intermediate reduction goals must be set for the period leading to net neutrality. Such measures should, in the first place, be incorporated into a binding regulatory framework at the national level, followed by adequate implementation. The relevant targets and timelines must form an integral part of the domestic regulatory framework, as a basis for general and sectoral mitigation measures..."*¹¹⁶

71. Expanding on this, the Court spelled out considerations that would inform its assessment of whether a State had remained within its margin of appreciation, including whether States had specified a target timeline in line with a carbon budget approach; set out intermediate GHG emissions reduction targets and sectoral pathways; updated targets with due diligence and on the basis of the best available science; and provided evidence of being in the process of meeting targets. It made clear that States were also required to "act in good time and in an appropriate and consistent manner when devising and implementing the relevant legislation and measures" meaning that States must act without delay and implement measures consistent with and capable of meeting their targets.¹¹⁷

72. Further, the Court's decision establishes a number of procedural obligations to assess whether a State has remained within its margin of appreciation in exercising its discretion on means.¹¹⁸ Namely, a State must ensure that information relating to relevant regulations and measures to tackle climate change must be made publicly available, and that there are adequate consultation processes to take into account the views of the public, particularly those directly impacted by any such measures, in the decision-making process.

¹¹⁴ *KlimaSeniorinnen* judgment (n2), para. 545.

¹¹⁵ *Ibid.*, para. 548.

¹¹⁶ *Ibid.*, para. 549.

¹¹⁷ *Ibid.*, para. 550.

¹¹⁸ *Ibid.*, para. 554.

73. The Court explicitly held that “an effective regulatory framework concerning climate change could [not] be put in place without quantifying, through a carbon budget or otherwise, national GHG emissions limitations”, rejecting the State’s argument that there was no established methodology to determine a country’s carbon budget.¹¹⁹ Referring to the IPCC’s emphasis on carbon budgets and policies for net-zero emissions and the reasoning of the German Federal Constitutional Court (described at para. 80 below), the Court pointed to the principle of CBDR-RC under the UNFCCC and the Paris Agreement, whereby State Parties have effectively endorsed the principle that they should act on the basis of equity and in accordance with their own respective capabilities.¹²⁰
74. Importantly, the decision in *KlimaSeniorinnen* also establishes a positive obligation to supplement mitigation measures with effective adaptation measures to protect the rights of individuals.¹²¹ Such adaptation measures must be “aimed at alleviating the most severe or imminent consequences of climate change, taking into account any relevant particular needs for protection,” and also “must be put in place and effectively applied in accordance with the best available evidence.”¹²²
75. This recognition of the human rights implications of States’ failures to comply with their obligations to mitigate and adapt – i.e., to take action to adjust policy and practice with due regard to climate change – is a significant step by the Court. The cases, decisions and statements above are significant for this Court’s consideration of the request for an advisory opinion, in that – irrespective of the particular situation of the specific individuals concerned – they establish beyond doubt the applicability of the IHRL regime to climate change impacts, illustrate its application and inform the content of States’ positive and negative obligations. Similar application can be found in national practice. While the Law of the Sea is not considered in this analysis, it is worth noting that the International Tribunal for the Law of the Sea (ITLOS), in its recent advisory opinion on climate change, confirmed that concurrent and separate obligations to address climate change may arise under separate international legal regimes.¹²³

National Practice

76. Litigation in national courts has become an increasingly common way of challenging inaction or insufficient action on climate change by States and corporates alike. According to the most recent review of the data from the London School of Economics’ Grantham Institute, at least 2,341 cases, filed in at least 51 countries in every region of the world, had been captured in the Sabin Center’s climate litigation database as of 31 May 2023.¹²⁴ In

¹¹⁹ *Ibid.*, para. 570.

¹²⁰ *Ibid.*, para. 571.

¹²¹ *Ibid.*, para. 552.

¹²² *Ibid.*

¹²³ ITLOS, *Case No. 31 - Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion (21 May 2024) (ITLOS COSIS AO), para. 223.

¹²⁴ Joana Setzer and Catherine Higham, ‘Global trends in climate change litigation: 2023 snapshot’ (29 June 2023), pg. 13-14, available at: https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/06/Global_trends_in_climate_change_litigation_2023_snapshot.pdf.

this manner, national courts have begun clarifying States’ obligations in relation to climate change as these arise under various legal frameworks.

77. In 2019, Dutch courts – through to the Supreme Court – confirmed that an obligation to reduce GHG emissions arose under human rights law, namely the ECHR. The courts relied on the best available science and scientific consensus on climate change, the duty of due diligence and international law as sources informing the content of the State’s human rights obligations.¹²⁵ The Dutch courts considered that the obligations arising under articles 2 and 8 ECHR (right to life and right to private and family life) required each State Party to take action and reduce its GHG emissions in “proportion to its share of the responsibility.”¹²⁶
78. The Dutch Supreme Court held that the provisions of the ECHR oblige “a contracting state (...) to take suitable measures if a real and immediate risk to people’s lives or welfare exists and the state is aware of that risk.” Importantly, the Supreme Court also emphasised that “[t]he obligation to take suitable measures also applies when it comes to environmental hazards that threaten large groups or the population as a whole, even if the hazards will only materialise over the long term.”¹²⁷
79. The Court held that: “the Netherlands is obliged to do ‘its part’ in order to prevent dangerous climate change, even if it is a global problem.”¹²⁸ In doing so, the Court drew on the UNFCCC and Paris Agreement recognition of differentiation in State responsibility while providing for common responsibility.¹²⁹
80. Similarly, a case before the German Constitutional Court challenged provisions of the national climate framework, implementing Germany’s obligations under the Paris Agreement.¹³⁰ Here too, the Court followed the science in assessing and interpreting the German State’s conduct and ambition on climate change, ultimately concluding that the State was not taking sufficient steps to protect fundamental human rights. Specifically, the Court considered that insufficient measures in the present represented a unilateral offloading of significant reduction obligations in the future, which would amount to a disproportionate burden and restriction on the full realisation of the fundamental rights and freedoms of future generations.¹³¹
81. A recent November 2023 judgment by the Belgian Court of Appeal also made significant findings on the obligation incumbent upon States to reduce GHG emissions. The Court held that Belgium’s failure to meet its climate targets amounted to a violation of human rights. The claimants had submitted that the national climate

¹²⁵ *The State of The Netherlands v Urgenda*, Case No. 19/00135, Dutch Supreme Court Judgment of 20 December 2019 (*Urgenda*, Supreme Court).

¹²⁶ *Ibid.*, English summary, pg.4.

¹²⁷ *Ibid.*

¹²⁸ *Urgenda*, Supreme Court (n125), paras 5.6.3, 5.7.1. See also, *Neubauer et al. v Federal Republic of Germany* (Case No. 1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20), Federal Constitutional Court of Germany Order of 24 March 2021 (*Neubauer et al.*), para. 149; *Rikki Held et al., v. State of Montana et al.*, Montana First Judicial District Court, Findings of Fact, Conclusions of Law, and Order (Cause No. CDV-2020-307) (14 August 2023), paras. 91, 237; *Michael John Smith v Fonterra Co-Operative Group Limited et al.* (SC 149/2021 [2024] NZSC 5) Supreme Court of New Zealand Judgment of 7 February 2024, para. 165ff. For the international practice example, see *Sacchi, et al.*, decision adopted (n105), paras. 10.8-10.10.

¹²⁹ *Urgenda*, Supreme Court (n125), para 5.7.9.

¹³⁰ *Neubauer et al.* (n128).

¹³¹ *Ibid.*, paras. 117, 183.

policy was insufficient to adequately protect Belgian citizens from the dangerous effects of climate change, in violation of both the State's general duty of care under domestic law as well as the right to life and the right to private and family life as guaranteed under articles 2 and 8 ECHR.

82. The Belgian Court of Appeal rejected the government's argument that its climate action, when considered in isolation, would necessarily remain insufficient to avert dangerous climate change. Instead, the Court found that even a limited contribution to the overall, global volume of emissions did not absolve governments from fulfilling their positive human rights obligations.¹³² The Court held that the human rights regime obliges each country to contribute its 'fair share' to mitigating the climate crisis. It is worth underlining that the Court referenced the rulings of the Dutch Supreme Court and the German Constitutional Court mentioned above, to reinforce its findings.¹³³

83. The Court held that:

“The fact that Belgian climate governance complies with European Union and international standards on GHG reduction targets does not absolve the Belgian authorities concerned of any blame... it is a fact that these standards were, as far as the GHG emission reduction targets assigned were concerned, insufficient to meet the risk of dangerous global warming.”¹³⁴

“[...], the injunction to take sufficient and appropriate measures to achieve a certain objective of reducing GHG emissions from Belgian territory is perfectly consistent with the breaches of articles 2 and 8 of the ECHR noted above. The pursuit and practical implementation of this objective will make it possible to limit as far as possible the risk of dangerous global warming, will put an end to the breaches identified above and is the only way to ensure effective protection of the fundamental rights guaranteed at international level.”¹³⁵

Concluding Observations

84. National and international decisions amount to a clear consensus that IHRL applies to State responses to climate change. They also underline that the international law on climate change and IHRL both play a vital role in delineating State responsibility for the impact of climate change on human rights. These legal regimes are co-applicable and complementary, ensuring effectiveness and avoiding gaps in effective human rights protection. This has been and will continue to be clarified through the practice of courts and other supervisory bodies, ensuring that these regimes, together with other relevant international law, achieve their common purpose of protecting human life and well-being from the most severe impacts of climate change.

¹³² Judgement of the Brussels Court of Appeal of 30 November 2023 (*Brussels Court of Appeal*) 2021/AR/1589, 2022/AR/737 and 2022/AR/891, unofficial English translation, para. 160.

¹³³ The Flemish Government has since filed an appeal.

¹³⁴ *Brussels Court of Appeal* (n132), para. 239.

¹³⁵ *Ibid.*, para. 282.

85. Further, developments in legal standards, as well as global scientific consensus and evolving social and political attitudes, recognise that (i) climate change is a clear and undeniable threat to human health, well-being and quality of life, and (ii) climate change is primarily caused by the burning of fossil fuels. This brings the emission of GHG squarely within the scope of State responsibility under IHRL and also means that in order for State measures to be capable of being effective, they need to effectively address fossil fuel production and demand. The practical implications of this for the obligations on States will be considered next.

C. Practical Implications for State Obligations

86. The international climate change framework and IHRL regimes described above, combined with the facts of climate change, entail clear international legal obligations on States. For the purposes of this brief, ClientEarth will focus on the following three practical implications of States' international legal obligations.

- a. State obligation to phase out fossil fuels;
- b. State obligation to regulate non-state actors;
- c. State obligation to avoid unlawful reliance on false technological solutions.

87. This list is not intended to be exhaustive and further criteria to be met by States in fulfilling their international legal obligations are included in the footnote.¹³⁶

i. Preliminary Remarks

88. State obligations under the international climate framework and IHRL in the context of the climate crisis require the prevention of foreseeable harms to individuals by implementation of appropriate mitigation, adaptation and

¹³⁶ ClientEarth Observations IACtHR (n3), para. 170: (i) early action on the rapid reduction of emissions, avoiding the development of loopholes that could allow for delay or reliance on harmful or unreliable practices, including high-risk technologies and offsetting/net accounting; (ii) a credible long-term emissions trajectory that avoids a disproportionate or impossibly steep future fall in emissions, thereby protecting the rights and freedoms of future generation and taking account of the principle of non-discrimination; (iii) the protection of human rights and ecosystems when consenting and planning for new infrastructure and projects, whether they are proposed as purported climate solutions or otherwise; (iv) credible, specific and effective action, based on binding near-term and long-term targets that are based on the best available science and IHRL and reflect the objectives of the international legal framework to significantly reduce the risk of climate harms, as well as the principles of CBDR-RC and equity; (v) a 'whole-systems' approach that recognises the need for action at all levels of government and in all sectors of the economy, and that many actions are interdependent; (vi) a holistic and coordinated approach to transition and energy planning, based on human rights taking into consideration the special protection obligations that exist in relation to marginalised groups; (vii) clear frameworks on what is expected of business enterprises domiciled or operating under a State's jurisdiction, including, but not limited to, addressing the entirety of the value chain and requiring comprehensive disclosure by businesses including Scope 1, 2, and 3 emissions; (viii) independent expert advisory bodies to allow for effective scrutiny of the adequacy of targets and progress and inclusion of Indigenous and other voices; (ix) transparency regarding the negotiation, development and implementation of government plans and progress on climate change, to allow for civil society participation and scrutiny with a clear allocation of responsibilities within government to allow for accountability (including legal accountability through recourse to the courts for rights-holders); (x) the safety and protection of environment defenders, particularly where they contribute to the development of such frameworks; (xi) reflection of the right to free, prior and informed consent of Indigenous Peoples and/or local communities in all aspects of law and policy that affect the environmental and human rights of their communities and beyond. This includes consideration of mitigation measures such as the designation of lands as protected areas, or the expansion of renewable energies; (xii) collaboration and cooperation with other States to collectively address climate change, in reflection of CBDR-RC, thereby ensuring that adaptation capacity is built for developing countries and small island states, technology is transferred, and funding is provided.

other measures.¹³⁷ Such measures must (i) reflect the best available science; (ii) be effective; and (iii) align with the precautionary principle, as explained further below.

89. (i) Best available science: The science clearly evidences the need for rapid global decarbonisation. It has been established that anthropogenic GHG emissions are the main cause of the adverse climate-related impacts on the enjoyment and full realisation of human rights as well as on the environment, and the IPCC has confirmed with a “high degree of confidence” that “[e]very increment of global warming will intensify multiple and concurrent hazards.”¹³⁸ Similarly, the IPCC confirmed in its 2023 assessment that: “[t]here is a rapidly closing window of opportunity to secure a liveable and sustainable future for all (very high confidence).”¹³⁹
90. These are the accepted facts to which the law must be applied. ClientEarth therefore submits that in accordance with the principle of due diligence the best available science must be considered in the assessment of the content of States’ international legal obligations.¹⁴⁰ Moreover, measures adopted by States in line with best available science must be regularly reviewed, representing progressively greater protection of human rights.¹⁴¹ This is reflected in recent findings of ITLOS, as the Tribunal determined that due to the severity of negative effects on the marine environment associated with exceeding 1.5°C, the standard of due diligence duty is a ‘stringent’ one.¹⁴²
91. (ii) Effectiveness of measures: Measures taken by States to address climate change must be effective in practice, i.e. they must be (at least) capable of achieving the mitigation and adaptation goals – a factual question.¹⁴³ To that end, the Office of the High Commissioner for Human Rights has stated that “States (duty-bearers) have an affirmative obligation to take effective measures to prevent and redress these climate impacts, and therefore, to mitigate climate change and to ensure that all human beings (rights-holders) have the necessary capacity to adapt to the climate crisis.”¹⁴⁴ Measures must also cover all emissions impacts of activities within a State’s jurisdiction, including, for example, extraterritorial embedded emissions (further discussed at para. 112 below).¹⁴⁵
92. The obligation to take effective measures has been repeatedly affirmed and applied by courts in a variety of contexts. Human rights courts and bodies have dealt with violations of this obligation and have reviewed the

¹³⁷ This obligation to prevent climate harms can be linked also to the international environmental law principle of prevention, according to which action should be taken to protect the environment at an early stage on the basis that preventing environmental damage is cheaper and less environmentally dangerous than repairing damage after it has occurred.

¹³⁸ IPCC AR6 SYR SPM (n22), para. B.1.

¹³⁹ *Ibid*, para. C.1.

¹⁴⁰ This is in line with the right to science, which mandates the enjoyment of the benefits of scientific progress, as guaranteed under the Universal Declaration of Human Rights and Article 15 of the International Covenant on Economic, Social and Cultural Rights.

¹⁴¹ UN CRC GC 26 (n105), paras. 42, 71, 96; UN CESCR, General Comment no. 25 (2020) on article 15: science and economic, social and cultural rights, 30 April 2020, E/C.12/GC/25.

¹⁴² ITLOS COSIS AO (n123), paras. 241, 243.

¹⁴³ IACtHR, Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia (IACtHR AO OC-23/17), paras. 115, 123, 146; IACtHR, Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina. Merits, reparations and costs. Judgement of February 6, 2020, Series C No. 400, para. 208 (*Lhaka Honhat v. Argentina*), paras. 116, 287; *Billy et al.*, views adopted (n1), para. 13; ECtHR, *Pavlov and Others v Russia*, (Application no. 31612/09) (October 2022), paras. 85-93.

¹⁴⁴ OHCHR, Understanding Human Rights and Climate Change, Submission to the 21st Conference of the Parties to the UNFCCC (2015) (OHCHR submission COP 2015), available at: <https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/COP21.pdf>; OHCHR, Human Rights and Climate Change Key Messages (OHCHR Key Messages), available at:

<https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/materials/KMClimateChange.pdf>.

¹⁴⁵ *KlimaSeniorinnen* judgment (n2), para. 280.

sufficiency of the measures States take. For example, government flood prevention measures have been examined in several human rights cases,¹⁴⁶ as well as fossil fuel pollution dangerous to health.¹⁴⁷

93. This approach is supported through the *Billy* decision of the UN HRC, where the concurring opinion of a Committee member found that:

“[...] States are under a positive obligation to take all appropriate measures to ensure the protection of human rights. In this context, the due diligence standard requires States to set their national climate mitigation targets at the level of their highest possible ambition and to pursue effective domestic mitigation measures with the aim of achieving those targets. (...) States should act with due diligence when taking mitigation and adaptation action, based on the best science. [...] A higher standard of due diligence applies in respect of those States with significant total emissions or very high per capita emissions (whether these are past or current emissions), given the greater burden that their emissions place on the global climate system, as well as to States with higher capacities to take high ambitious mitigation action.”¹⁴⁸

94. In the 2024 *KlimaSeniorinnen* decision, the ECtHR held that a State’s primary duty includes the adoption of appropriate regulation and measures addressing climate change.¹⁴⁹ It held that such legislative and administrative frameworks must be designed in a manner that provides “effective protection of human health and life.”¹⁵⁰ The Court also considered that beyond the implementation of a framework, effectiveness was also required as regards the application of such measures and demonstrate that the measures in place are adequate to meet the overall targets set.¹⁵¹

95. (iii) The precautionary principle: This principle mandates a preventive and pre-emptive approach to environmental protection and management even where scientific uncertainty on potential risks and harms exists – which, as demonstrated above, is not the case for the climate crisis.¹⁵² The precautionary principle has been recognised as central to the protection of human rights and the realisation of States’ human rights obligations.¹⁵³

96. These three overarching preliminary points – best available science, effectiveness, and the precautionary principle – must be borne in mind when considering the obligations of States under each of the headings below.

¹⁴⁶ See for example: ECtHR, *Budayeva and Others v Russia*, Applications nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (March 2008).

¹⁴⁷ See for example: ECtHR *Pavlov* (n143).

¹⁴⁸ *Billy et al.*, views adopted (n1), Individual Opinion by Committee Member Gentian Zyberi, pg. 20-21.

¹⁴⁹ *KlimaSeniorinnen* judgment (n2), para. 545.

¹⁵⁰ *Ibid.*, para. 538.

¹⁵¹ *Ibid.*

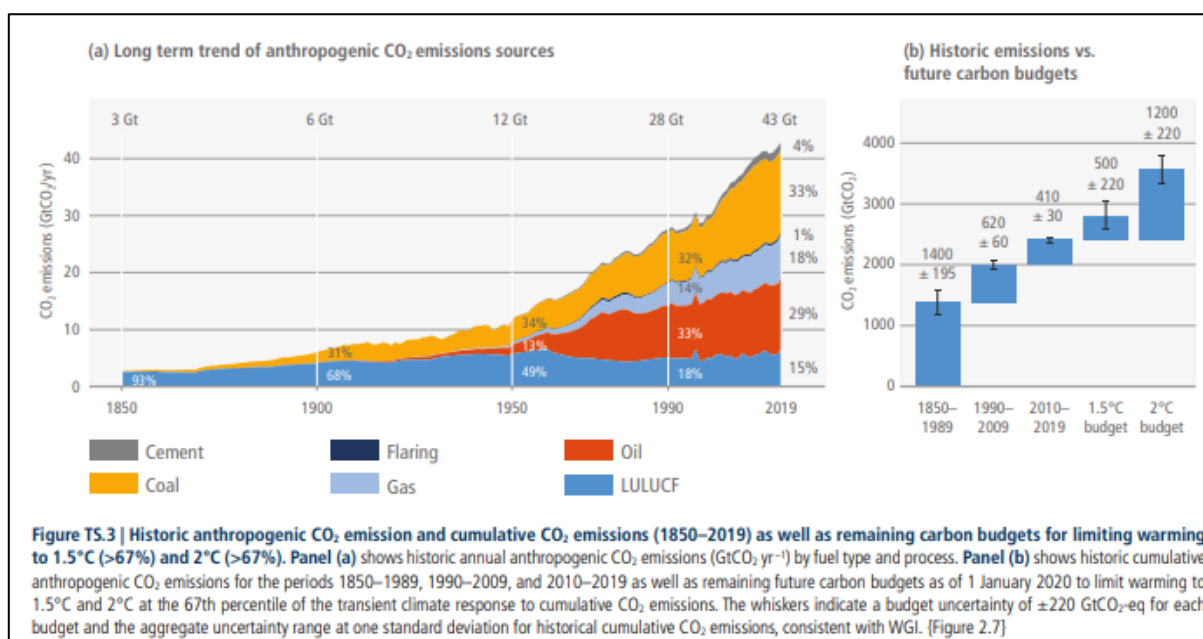
¹⁵² Rio Declaration, principle 15; UNFCCC, art. 3(3); United Nations, Stockholm Convention on Persistent Organic pollutants, revised in 2019, art. 1]; United Nations, Convention on Biological Diversity, adopted by the Intergovernmental Negotiating Committee for a Convention on Biological Diversity, 29 December 1993, preamble.

¹⁵³ UN HRC GC 36 (n93), para. 62; Committee on Economic, Social and Cultural Rights, General Comment No. 25 (2020) on science and economic, social and cultural rights (article 15(1)(b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/25 (30 April 2020), para. 56.

ii. The Obligation to Phase-Out Fossil Fuels

97. IPCC findings tell us that measures to mitigate climate change pursuant to States’ positive obligations must meet certain fundamental criteria to be effective. The science evidences that deep and rapid decarbonisation is critical, meaning it simply cannot be disregarded in favour of reliance on unproven and/or harmful solutions which manifestly fail the effectiveness requirement to be (at least) reasonably capable of delivering the agreed upon limit of 1.5°C (see further Section III.C.iv below).¹⁵⁴

98. It is recognised that climate change is mainly driven by fossil fuels, which account for an estimated 86% of all anthropogenic GHG emissions over the last decade.¹⁵⁵ The steep increase in the consumption of fossil fuels from 1950 onwards has exhausted the majority of the carbon budget.¹⁵⁶ The effect of the rapid rise in fossil fuels and consequent CO₂ emissions (represented by all the colours except ‘LULUCF’, or land use) on dwindling carbon budgets is illustrated in the below IPCC chart.¹⁵⁷



99. For the future, it is established beyond any doubt that continued fossil fuel production will breach climate goals. The IPCC concludes that “[e]stimates of future CO₂ emissions from existing fossil fuel infrastructures already exceed remaining cumulative net CO₂ emissions in pathways limiting warming to 1.5°C (>50% [chance]).”

¹⁵⁴ See further *Neubauer et al.* (n128), para 130, where the German Constitutional Court also emphasised the need for and prioritisation of rapid emissions reductions, as “no method is currently known for removing CO₂ emissions from the Earth’s atmosphere on a large scale.”

¹⁵⁵ IPCC AR6 WGI TS (n20).

¹⁵⁶ IPCC AR6 WGIII SPM (n16), B.1.2: “Growth in anthropogenic emissions has persisted across all major groups of greenhouse gases since 1990, albeit at different rates. By 2019, the largest growth in absolute emissions occurred in CO₂ from fossil fuels and industry”; B.1.3: “Historical cumulative net CO₂ emissions from 1850 to 2019 were 2400 ± 240 GtCO₂ (high confidence). Of these, more than half (58%) occurred between 1850 and 1989 [1400 ± 195 GtCO₂], and about 42% between 1990 and 2019 [1000 ± 90 GtCO₂].”

¹⁵⁷ M. Pathak, R. Slade, P.R. Shukla, J. Skea, R. Pichs-Madruga, D. Üрге-Vorsatz, 2022: Technical Summary (IPCC AR6 WGIII TS), figure TS.3, pg. 62, in: IPCC AR6 WGIII Full Report (n16).

Similarly, the UN Environment Programme Production Gap report looks at government plans and assesses the global fossil fuel production gap – “the difference between governments’ planned fossil fuel production and global production levels consistent with limiting global warming to 1.5°C or 2°C”. The production gap is large and growing: governments presently plan on producing around 110% more fossil fuels in 2030 than is consistent with 1.5°C, and 69% more than 2°C pathways.¹⁵⁸

100. As a matter of scientific consensus, it is not feasible to limit warming to even 1.5°C or 2°C without significant reductions in fossil fuel production and use by 2030. At the same time, the IPCC has previously stated that even “[w]arming of 1.5°C is not considered ‘safe’ for most nations, communities, ecosystems and sectors and poses significant risks to natural and human systems as compared to the current warming of 1°C (high confidence).”¹⁵⁹
101. The IPCC highlights this conclusion on significant reductions in fossil fuel production and use as a key element of its findings. It states that: “[i]n modelled pathways that limit warming to 1.5°C (>50%) with no or limited overshoot, the global use of coal, oil and gas in 2050 is projected to decline with median values of about 95%, 60% and 45% respectively, compared to 2019.”¹⁶⁰ Therefore, the IPCC finds that “a substantial reduction in overall fossil fuel use” is necessary to deliver the requisite “rapid and deep and in most cases immediate GHG emission reductions in all sectors”.¹⁶¹ The International Energy Agency (IEA) reaches the same conclusion in its projected ‘Net Zero by 2050’ scenario, which sees fossil fuels cut by more than 25% by 2030 and 80% by 2050.¹⁶²
102. Summarising the wealth of research and observations on the topic, the IPCC finds furthermore that the necessary reductions in fossil fuels are feasible – a conclusion noted explicitly by States in the COP28 Global Stocktake agreement and adopted “as a matter of fact” by the ECtHR.¹⁶³ The IPCC sets out in detail how this is achieved in modelled pathways, across sectors – as does the IEA in its periodically updated ‘Net Zero by 2050’ scenario.¹⁶⁴
103. The fundamental necessity to significantly reduce fossil fuels in order to limit warming to 1.5°C or 2°C is recognised by States through their acceptance of IPCC reports, and is also enshrined in international agreements. The 2021 COP26 Glasgow Pact thus called upon States Parties to accelerate “efforts towards the phasedown of

¹⁵⁸ UNEP Production Gap Report 2023, pg. 4.

¹⁵⁹ IPCC SR 1.5 Full Report (n28), pg. 44.

¹⁶⁰ IPCC AR6 WGIII SPM (n16), C.3.2: the reductions will be greater if CCS fails to be implemented at scale.

¹⁶¹ *Ibid.*, at C.4.1 and C.3.

¹⁶² International Energy Agency, “Net Zero Roadmap: A Global Pathway to Keep the 1.5°C Goal in Reach – 2023 Update” (IEA Net Zero Roadmap), pg. 17: “Stringent and effective policies in the NZE Scenario spur clean energy deployment and cut fossil fuel demand by more than 25% by 2030 and 80% in 2050 [...] No new long-lead time upstream oil and gas projects are needed [...], neither are new coal mines, mine extensions or new unabated coal plants.”

¹⁶³ UNFCCC, Outcome of the first global stocktake – Draft decision –/CMA.5 (FCCC/PA/CMA/2023/L.17) (13 December 2023) (Outcome of first GST – Draft Decision), para. 16(c); *KlimaSeniorinnen* judgment (n2) para. 436: “the Court will proceed with its assessment of the issues arising in the present case by taking it as a matter of fact that [...] States are aware of [climate change] and capable of taking measures to effectively address it,” see also paras. 115,120; IPCC AR6 WGIII SPM (n16), C.43: “Electricity systems powered predominantly by renewables are becoming increasingly viable. Electricity systems in some countries and regions are already predominantly powered by renewables”; IPCC AR 6 WGIII TS (n157): “Large shares of variable solar PV and wind power can be incorporated in electricity grids through batteries, hydrogen, and other forms of storage; transmission; flexible non-renewable generation; advanced controls; and greater demand-side responses.”

¹⁶⁴ IPCC AR6 WGIII SPM (n16), C.4. to C.8, C.10; IEA Net Zero Roadmap (n162).

unabated coal power.”¹⁶⁵ And the 2023 Global Stocktake decision agreed at COP28 called on States parties to contribute to:

*“[t]ransitioning away from fossil fuels in energy systems in a just, orderly and equitable manner, accelerating action in this critical decade, so as to achieve net zero by 2050 in keeping with the science.”*¹⁶⁶

104. States can continue to grow fossil fuel production or they can achieve climate goals. They cannot do both. Implementing significant reductions in fossil fuel production and use by 2030, toward a fossil fuel phase out and with a view toward global net neutrality by 2050, is an indispensable element of compliance with States’ obligations under IHRL and the international climate regime. Furthermore, this can only be achieved through the effective regulation of business actors, due to their significant role in and contribution to climate change.

iii. The Obligation to Regulate Non-State Actors

105. Effective climate legislation must provide for effective regulation of business.¹⁶⁷ The State duty under the IHRL framework to protect individuals from human rights violations – through the adoption and implementation of effective measures – requires States to protect from human rights harms by private/non-state actors, including by business enterprises.¹⁶⁸ This requirement is supported by multiple sources including the UN human rights treaty bodies, the works of various UN Special Rapporteurs, the UN Guiding Principles on Business and Human Rights (UNGPs), the UN Working Group on Business and Human Rights (UNWG) and the jurisprudence of the IACtHR.¹⁶⁹

106. Article 6 ICCPR (right to life) has been interpreted as requiring State Parties to take appropriate measures where the activities of corporate entities based in their territory or under their jurisdiction have “a direct and

¹⁶⁵ UNFCCC, Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on its third session, held in Glasgow from 31 October to 13 November 2023 (8 March 2022) (FCCC/PA/CMA/2021/10/Add.1, para. 36.

¹⁶⁶ Outcome of first GST – Draft Decision (n63), para. 28(d); see also UN High Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities, “Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and Regions” (2022) (UN High Level Expert Report), pg. 23: the report called for defined phase out dates for fossil fuels and found that “[a]ll net zero pledges should include specific targets aimed at ending the use of and/or support for fossil fuels in line with IPCC and IEA net zero greenhouse gas emissions modelled pathways that limit warming to 1.5°C”, in tandem with a dramatic scale-up of renewable energy.

¹⁶⁷ A/78/255, para. 69(h); *Lhaka Honhat v. Argentina* (n143), paras. 207, 208.

¹⁶⁸ Commission on Human Rights of the Philippines, National Inquiry on Climate Change Report, December 2022 (Report Commission of the Philippines), pg. 64, available at: https://chr.gov.ph/wp-content/uploads/2022/12/CHRP_National-Inquiry-on-Climate-Change-Report.pdf; discussing UN HRC, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/ Rev.1/Add.13 (2004), para. 8.

¹⁶⁹ OHCHR joint statement 2019 (n113); OHCHR, “Committee releases statement on climate change and the Covenant” (8 October 2018), available at: <https://www.ohchr.org/en/statements/2018/10/committee-releases-statement-climate-change-and-covenant>; A/HRC/31/52, para. 66; United Nations, *Information Note on Climate Change and the Guiding Principles on Business and Human Rights*, Working Group on the issue of human rights and transnational corporations and other business enterprises (June 2023) (UN Info Note Climate Change and UNGPs), available at: <https://www.ohchr.org/sites/default/files/documents/issues/business/workinggroupbusiness/Information-Note-Climate-Change-and-UNGPs.pdf>; Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises - Letter to Saudi Arabia of 26 June 2023 (AL SAU 3/2023), available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=28085>; Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises – Letter to Saudi Aramco (26 June 2023) (AL OTH 53/2023), available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=28094>; Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises – Letter to Goldman Sachs (27 June 2023) (AL OTH 83/2023), available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=28198>.

reasonably foreseeable impact on the right to life of individuals outside their territory.”¹⁷⁰ In 2017, the UN CESCR stated that the obligation to protect economic, social and cultural rights under the International Covenant on Economic, Social and Cultural Rights required States to adopt “legislative, administrative, educational and other appropriate measures, to ensure effective protection against Covenant rights violations to business activities,” and to “provide victims of such corporate abuses with access to effective remedies.”¹⁷¹

107. In the joint statement by five UN Human Rights treaty bodies mentioned at paragraph 67 above, it was confirmed that the “[f]ailure to take measures to prevent foreseeable harm caused by climate change, or to **regulate activities contributing to such harm**, could constitute a violation of States’ human rights obligations” [emphasis added].¹⁷²

108. A report by the UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, confirmed that the substantive obligations of States include the duty to regulate private actors to protect from human rights abuses linked to environmental harms.¹⁷³ Such regulation of private actors must include the effective enforcement of environmental laws and policies vis-à-vis business actors and provide for redress.¹⁷⁴

109. Principles of international environmental law reinforce these human rights obligations. The no-harm rule mandates that polluting activities occurring within the territory or under the control of one State may not cause harm to the people or environment of another State or to areas beyond national jurisdiction.¹⁷⁵

110. Given the foreseeable nature of the irreversible and severe adverse impacts of the climate crisis on human rights, States must therefore also take measures to regulate business conduct, due to the significant contributions of business actors to global GHG emissions, and such measures must be effective.

Effective Measures Regulating Business Conduct Must Include Extra-Territorial Corporate Activities and the Entire Corporate Value Chain

111. The UN CESCR has stated that nothing in the Covenant provides that the obligations arising thereunder are restricted to territory or jurisdiction.¹⁷⁶ It concluded that extraterritorial obligations arise “when a State party may influence situations located outside its territory, consistent with the limits imposed by international law, by

¹⁷⁰ UN HRC GC 36 (n93), para. 22.

¹⁷¹ UN CESCR, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017, E/C.12/GC/24 (UN CESCR GC 24), para. 14.

¹⁷² OHCHR joint statement 2019 (n113), para. 10.

¹⁷³ OHCHR, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, A/HRC/37/59 (24 January 2018), paras. 3, 34.

¹⁷⁴ *Ibid.*, para. 28; *KlimaSeniorinnen* judgment (n2) para. 549, emphasises the importance of effective regulation at the domestic level: “Moreover, in order for this to be genuinely feasible, and to avoid a disproportionate burden on future generations, immediate action needs to be taken and adequate intermediate reduction goals must be set for the period leading to net neutrality. Such measures should, in the first place, be incorporated into a binding regulatory framework at the national level, followed by adequate implementation. The relevant targets and timelines must form an integral part of the domestic regulatory framework, as a basis for general and sectoral mitigation measures...”

¹⁷⁵ Rio Declaration, principle 6.

¹⁷⁶ UN CESCR GC 24 (n171), para. 27.

controlling the activities of corporations domiciled in its territory and/or under its jurisdiction, and thus may contribute to the effective enjoyment of economic, social and cultural rights outside its national territory.”¹⁷⁷ Such jurisdiction, the Committee found, included corporations incorporated under a State’s laws, or with its statutory seat, central administration or principal place of business on the State’s national territory.¹⁷⁸ Similar findings were made by the Committee on the Rights of the Child in *Saachi v Argentina*,¹⁷⁹ related to the impacts of climate change on the human rights of children, and by the Oslo District Court in a case where permits to develop oil and gas fields were found unlawful for a failure to conduct impact assessments regarding the downstream (combustion) emissions of extracted fossil fuels, which would take place outside Norwegian jurisdiction.¹⁸⁰

112. This approach was recently followed by the ECtHR in its decision in *KlimaSeniorinnen*. The applicants submitted evidence that included analysis of the emissions created in the production of products consumed in Switzerland. This was disputed by the State, which claimed that it could not be held responsible for emissions outside its borders, and that considering these ‘embedded’ emissions would violate the principle of territoriality. The Court rejected Switzerland’s submission, finding that as the claimants were clearly within Swiss territory the issue was not jurisdiction but rather attribution of acts and omissions to the State, and Switzerland’s responsibility for the effects of the ‘embedded’ emissions on protected rights. The Court said that:

*“It would be difficult, if not impossible, to discuss Switzerland’s responsibility for the effects of its GHG emissions on the applicants’ rights without taking into account the emissions generated through the import of goods and their consumption.”*¹⁸¹

113. This approach is consistent with the UNGPs, which are the authoritative global standard of business practice in relation to human rights and have been unanimously adopted by States at the Human Rights Council. They codify existing State and corporate standards and practices.¹⁸² Principle 1 of the UNGPs sets out the State obligation that “States must protect against human rights abuses within their territory and/or jurisdiction by third

¹⁷⁷ *Ibid.*, para. 28.

¹⁷⁸ *Ibid.*, para. 31.

¹⁷⁹ *Sacchi et al.*, decision adopted (n105), para.10.7: “...when transboundary harm occurs, [victims] are under the jurisdiction of the State on whose territory the emissions originated...if there is a causal link between the acts or omissions of the State in question and the negative impact on the rights of children ... when the State of origin exercises **effective control over the sources** of the emissions in question. The Committee further considers that while the required elements to establish the responsibility of the State are rather a matter of merits, **the alleged harm suffered by the victims needs to have been reasonably foreseeable** to the State party at the time of its acts or omissions even for the purpose of establishing jurisdiction” (emphasis added).

¹⁸⁰ *Greenpeace Nordic and Nature & Youth v. Energy Ministry (The North Sea Fields Case)* 23-099330TVI-TOSL/05, (18 January 2024).

¹⁸¹ *KlimaSeniorinnen* judgment (n2), para. 280.

¹⁸² UN Guiding Principles on Business and Human Rights (UNGPs), HR/PUB/11/04 (2011); Report Commission of the Philippines (n168), p. 80; several States in their NAPs have confirmed this understanding of the UNGPs, see e.g.: Switzerland, Swiss National Action Plan 2020–23 (15 January 2020), pg. 7, available at: https://www.ohchr.org/sites/default/files/Documents/Issues/Business/NationalPlans/Beilage01PrincipesdirecteursdeONUrelatifsauentrepris esdroitshomme_Suisse.pdf; Belgium, Plan d’action national Entreprises et Droits de l’Homme (23 June 2017) (French only), pg. 6, available at: <https://globalnaps.org/wp-content/uploads/2017/11/belgium-nap-french.pdf>; Chile, National Action Plan on Business and Human Rights Chile (21 August 2017), pg. 15, available at: <https://globalnaps.org/wp-content/uploads/2017/11/national-action-plan-on-business-and-human-rights.pdf>.

parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.”¹⁸³ The UNGPs particularise this State obligation with respect to various State regulatory, commercial and policy functions, including State-owned or controlled business enterprises.¹⁸⁴

114. Furthermore, States’ publication of their National Action Plans (NAPs) demonstrate that the UNGPs are already explicitly recognised and implemented at national level. The broad acceptance of the UNGPs reflects, the “common international understanding of business and human rights, and the corresponding duties of the State.”¹⁸⁵

115. In 2023, the UNWG issued an Information Note on Climate Change, which stated that in order to comply with the UNGPs States must enact climate change due diligence laws that cover the entire value chain (i.e. the full range of activities required to bring a product or service from conception, through production, to delivery to consumers, and final disposal after use).¹⁸⁶ The UNWG’s statement aligns with landmark judicial findings on the UNGPs and the climate crisis in the Dutch *Milieudefensie v Royal Dutch Shell* case, where a Dutch District Court ordered Shell to reduce its Scope 1, 2, and 3 emissions across its entire energy portfolio by 45% by 2030, relative to 2019 emission levels.¹⁸⁷

116. In August 2023, the UNWG also sent communications to Saudi Arabia, the national oil company Saudi Aramco and several banks providing financial services to the company, requesting information on how each actor had complied with its duties under the UNGPs, to limit the human rights impacts of climate change. Applying Guiding Principle No 4, they said that for States controlling oil companies:

*“States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies.”*¹⁸⁸

¹⁸³ The UNGPs are the authoritative global standard of business practice in relation to human rights, codifying existing State and corporate standards and practices, as recognised and applied by regional IHRL courts and national human rights bodies. See: IACtHR, *Case of the Kalina and Lokon Peoples v. Suriname*, Merits, Reparations and Costs, Judgement of November 25, 2015, Series C No. 309, para. 224; The UNGPs have been unanimously affirmed by the UN Human Rights Council. Furthermore, States’ publication of their National Action Plans (NAPs) demonstrate that the UNGPs are already explicitly recognised and implemented at national level. Over 20 States out of the 26 States that published their NAPs, had taken policy or legislative measures implementing the UNGPs at national level, thereby affirming that they reflect IHRL duties on States.

¹⁸⁴ The UNGPs contain specific principles (Principles 2 – 10) regarding: general State policy and regulatory functions; State-owned, controlled or supported business enterprises; State contracting and transacting with business enterprises; the need for policy coherence across State government functions which shape business practice; investment treaties and membership of multilateral institutions dealing with business related issues.

¹⁸⁵ Switzerland, Report on the Swiss strategy for the implementation of the UN Guiding Principles on Business and Human Rights (9 December 2016), pg. 5, available at:

https://www.ohchr.org/sites/default/files/Documents/Issues/Business/NationalPlans/Switzerland_NAP_EN.pdf.

¹⁸⁶ UN Info Note on Climate Change and the UNGPs (n169).

¹⁸⁷ *Milieudefensie et al. v. Royal Dutch Shell plc.*, Case no. C/09/571932, Hague District Court Judgment of 26 May 2021; Green Gas Protocol, FAQs, available at: https://ghgprotocol.org/sites/default/files/standards_supporting/FAQ.pdf, under the Greenhouse Gas Protocol, the global accounting standard, Scope 1 emissions are defined as “direct emissions from owned or controlled sources”; Scope 2 emissions are “indirect emissions from the generation of purchased energy;” and Scope 3 emissions are “all indirect emissions that occur in the value chain of the reporting company, including both upstream and downstream emissions.”

¹⁸⁸ AL SAU 3/2023 (n169); AL OTH 53/2023 (n169); AL OTH 83/2023 (n169).

117. Requirements on States to regulate business conduct include the obligation to create laws, policies and regulations that ensure that human rights are respected,¹⁸⁹ and to set out the requirements on business actors clearly,¹⁹⁰ addressing elements such as corporate climate change impacts and responsible participation in climate mitigation and adaptation efforts.¹⁹¹ In addition to general regulation of business enterprises, the UNGPs set out specific obligations on States in their other interactions with businesses, both where private actors are State-owned or controlled, or where business enterprises receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies.¹⁹²

118. Globally, many companies have voluntarily adopted emission reduction targets and claim to be aligned or supportive of the goals of the Paris Agreement, often set out in corporate transition plans. There is now a clear movement in Europe (which is expected to spread to other jurisdictions) to move towards mandatory transition plan disclosure and implementation. The European Union (EU) recently enacted the Corporate Sustainability Due Diligence Directive providing in article 15 for all large companies operating in the EU to:

“adopt and put into effect a transition plan for climate change mitigation which aims to ensure, through best efforts, that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C.”¹⁹³

119. ClientEarth therefore submits that effective regulation of corporate conduct is not only consistent with but is categorically mandated by the obligations of States to protect fundamental human rights. In light of this, the fundamental UNGP ‘value chain’ principle should apply, in particular to ‘exported emissions’ or scope 3 emissions that are generated by companies either:

- a. domiciled in a State, and hence under its control;
- b. in respect of emissions from the extraction of fossil fuels within the State’s territory that are sold onto the global market, and therefore under the State’s effective control; and
- c. financed by the State itself or by financial institutions domiciled within the State.

¹⁸⁹ Report Commission of the Philippines (n168), pg. 65; referencing to: UNGPs, Commentary on Principle 1 (n182).

¹⁹⁰ UN Info Note on Climate Change and the UNGPs (n169), para. 8(c).

¹⁹¹ OHCHR Key messages (n113); OHCHR Submission to COP 2015 (n113), para. 8.

¹⁹² AL OTH 53/2023 (n199).

¹⁹³ European Parliament legislative resolution of 24 April 2024 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (P9_TA(2024)0329), Article 22 provides that: “[t]he design of the transition plan for climate change referred to in the first subparagraph shall contain: (a) time-bound targets related to climate change for 2030 and in five-year steps up to 2050 based on conclusive scientific evidence and, where appropriate, absolute emission reduction targets for greenhouse gas for scope 1, scope 2 and scope 3 greenhouse gas emissions for each significant category; (b) a description of decarbonisation levers identified and key actions planned to reach targets referred to in point (a), including where appropriate, changes in the product and service portfolio of the company and the adoption of new technologies; (c) an explanation and quantification of the investments and funding supporting the implementation of the transition plan for climate change mitigation; and (d) a description of the role of the administrative, management and supervisory bodies with regard to the transition plan for climate change mitigation.”

120. It is ClientEarth’s submission that, in line with the scientific consensus set out above, States must take a precautionary approach to the regulation of corporate activities that emit GHG by passing laws that are consistent and aligned with the temperature goal of the Paris Agreement and that:
- a. regulate all companies domiciled in their territory;
 - b. regulate all companies operating within their territory that extract and export fossil fuel products, including where those fossil fuels are sold outside the territory; and
 - c. regulate, or mandate central banks to regulate, financial institutions and export credit agencies that provide financial services to fossil fuel companies or projects within or outside the State’s territory.
121. Effective measures may include passing laws that require the adoption and implementation of mandatory transition plans for climate change mitigation that include requirements for all companies to:
- a. set an objective to achieve net zero GHG emissions across all operations, and throughout the value chain, by 2050;
 - b. set GHG reduction targets, in 5-yearly periods up to 2050, that are aligned with the 1.5 degree temperature goal of the Paris Agreement, based on credible decarbonisation pathways that reflect the best available science;
 - c. do not rely on the use of carbon credits in place of emissions reductions; and
 - d. include a description of how the business strategy will change in order to achieve the necessary reductions, and how the company will fund the plan, including the alignment of capital investment and executive remuneration with the plan.
122. This finding would also be aligned with Recommendation 2 of the UN Secretary General’s High-Level Expert Group Report ‘Integrity Matters’.¹⁹⁴

iv. The Obligation to Avoid Unlawful Reliance on False Technological Solutions

123. The criteria for effective transition plans outlined above cannot be met by relying on carbon credits as ‘offsets’. In order to comply with international law, States must take a credible and holistic approach to decarbonisation and one that does not rely heavily on uncertain and high-risk solutions.¹⁹⁵ This point is particularly salient in light of the outcome of the first global stocktake which, albeit providing for the inescapably necessary step of “transitioning away from fossil fuels”, also included reference to various ‘alternatives’ which involve continued use of fossil fuels and perpetuate carbon lock-in, such as “zero- and low emission

¹⁹⁴ UN High Level Expert Report (n165).

¹⁹⁵ Rupert Stuart-Smith *et al.*, “Legal Limits to the use of CO2 removal” *Science*, 382, 6672 (16 November 2023).

- technologies” including “abatement and removal technologies such as carbon capture and utilization and storage.”¹⁹⁶
124. Despite clear international recognition of the global ‘emissions gap’ – between current emissions trajectories and emission levels in line with a 1.5°C pathway – many governments and companies have sought to rely on false or high-risk solutions, such as carbon ‘offsetting’, the large-scale deployment of hydrogen¹⁹⁷ or carbon capture-based technologies,¹⁹⁸ and geoengineering.¹⁹⁹
125. Two main categories of geoengineering technologies are solar radiation modification (SRM) and carbon dioxide removal (CDR).²⁰⁰ In relation to SRM technologies, the IPCC has identified “large uncertainties and knowledge gaps as well as substantial risks.”²⁰¹ SRM measures are therefore not considered in the IPCC pathways.²⁰²
126. CDR measures on the other hand are included in some of the IPCC’s emissions reductions pathways. CDR “refers to anthropogenic activities that remove CO₂ from the atmosphere and store it durably in geological, terrestrial, or ocean reservoirs, or in products.”²⁰³ Methods include bioenergy with carbon capture and storage (BECCS), direct air carbon capture and storage (DACCS) and reforestation.²⁰⁴
127. Nonetheless, the IPCC has also made clear that broad uncertainty exists in relation to, for example, the “maturity, potentials, costs, risks, co-benefits and trade-offs (high confidence)” of CDR technologies.²⁰⁵ It has

¹⁹⁶Outcome of first GST – Draft Decision (n63).

¹⁹⁷ IPCC AR6 WGIII Full Report (n16), pg. 1315: “*The IAM scenarios imply a modest role played by hydrogen, with some scenarios featuring higher levels of penetration. The consumption of hydrogen is projected to increase by 2050 and onwards in scenarios likely limiting global warming to 2°C or below, and the median share of hydrogen in total final energy consumption is 2.1% in 2050 and 5.1% in 2100 (Box 12.4, Figure 1) (Numbers are based on the AR6 scenarios database). There is large variety in hydrogen shares, but the values of 10% and more of final energy use that occur in many roadmaps are only rarely reached in the scenarios. Hydrogen is predominantly used in the industry and transportation sectors. In the scenarios, hydrogen is produced mostly by electrolysis and by biomass energy conversion with CCS (Box 12.5, Figure 1). Natural gas with CCS is expected to play only a modest role; here a distinct difference between the roadmaps quoted before and the IAM results is observed.*”; *Ibid.*, pg. 442: “*Though even that modest role may be an overestimate: “Most models and studies fail to address system impacts of widespread new technology deployment, for example: (i) material and resources needed for hydrogen production or additional emissions and energy required to transport hydrogen; or (ii) materials, resources, grid integration, and generation capacity expansion limits of a largely decarbonised power sector and electrified transport sector. These impacts could limit regional and national scale-ups.*”

¹⁹⁸ *Ibid.*, pg. 642-643: “CO₂ capture costs present a key challenge, remaining higher than USD50 tCO₂-1 for most technologies and regions; novel technologies could help reduce some costs (high confidence). The capital cost of a coal or gas electricity generation facility with CCS is almost double that of one without CCS (Rubin et al. 2015; Zhai and Rubin 2016; Bui et al. 2018). Additionally, the energy penalty increases the fuel requirement for electricity generation by 13–44%, leading to further cost increases (Table 6.3). ... In general, low support has been reported for CCS technologies (Allen and Chatterton 2013; Demski et al. 2017). ... CCS requires considerable increases in some resources and chemicals, most notably water. Power plants with CCS could shut down periodically due to water scarcity. In several cases, water withdrawals for CCS are 25–200% higher than plants without CCS (Rosa et al. 2020b; Yang et al. 2020) due to energy penalty and cooling duty.”

¹⁹⁹ Philippe Sands & Kate Cook, “Joint Opinion: The Restriction of Geoengineering under International Law” (26 March 2021) (Sands & Cook), para. 10, available at: <https://www.ohchr.org/sites/default/files/2022-06/Annex-SubmissionCIEL-ETC-HBF-TWN-Geoengineering-Opinion.pdf>.

²⁰⁰ IPCC SR 1.5 Full Report (n28), Glossary, pg. 544, 558.

²⁰¹ IPCC SR 1.5 SPM (n65), para. C.1.4.

²⁰² Sands & Cook (n199), para. 85, citing IPCC SR 1.5 SPM (n65), para. C.1.4.

²⁰³ IPCC AR6 WGIII SPM (n16), para. C.11.1.

²⁰⁴ ClientEarth Intervention *KlimaSeniorinnen* (n2), para. 21.

²⁰⁵ Sands & Cook (n199), para. 11; citing to IPCC SR 1.5 SPM (n65), para. C.3.1.

further underlined that “[m]ost CDR technologies remain largely unproven to date and raise substantial concerns about adverse side-effects on environmental and social sustainability.”²⁰⁶ It warns that “CDR deployed at scale is unproven, and reliance on such technology is a major risk in the ability to limit warming to 1.5°C.”²⁰⁷

128. For technologies that are unproven at scale, it is also the case that they cannot currently be relied on to have a negative emissions impact, “*as they all increase carbon dioxide in the system if the overall emissions produced by constructing and operating the relevant facilities is taken into account.*”²⁰⁸
129. Many of the proposed CDR technologies and solutions thus remain unproven, unavailable, and/or unfeasible at anything like the scale which would be required to serve as an alternative to the necessary “substantial reductions in fossil fuel consumption”. At the same time, they have the potential to “introduce a widespread range of new risks to people and ecosystems, which are not well understood.”²⁰⁹
130. As stated above, the same considerations apply to reliance on deployment of hydrogen or carbon capture-based technologies at a large-scale, let alone the scale sufficient to significantly mitigate climate change, given the scientific consensus on the costs, challenges, risks and negative impacts that such deployment would present. Ultimately, reliance on such solutions can prevent “deep, rapid and sustained” emissions reductions being realised through a transition away from fossil fuels and simultaneously increases energy and resource use, which in and of themselves can lead to human rights violations and severe environmental harms.²¹⁰
131. Since the hypothetical benefits of these technologies and solutions are still to be practically and/or scientifically proven, they must be considered “speculative.”²¹¹ A human-rights based approach in line with the precautionary principle mandates rapid action on mitigation and adaptation, and provides arguments against risk-taking.²¹²
132. Reliance on unproven and/or potentially harmful technologies risks undermining the required rapid and deep reductions in GHG emissions.²¹³ The risks of ‘mitigation deterrence’ are exacerbated by the demonstrated

²⁰⁶ *Ibid.*, citing to IPCC SR 1.5 Full Report (n28), pg. 121.

²⁰⁷ *Ibid.*, para. 130; citing to IPCC, “Technical Summary” (IPCC SR 1.5 TS), in: IPCC, SR 1.5 Full Report (n28); see also Rupert F. Stuart-Smith et al., “Legal limits to the use of CO₂ removal”, *Science* 382,772-774 (2023).

²⁰⁸ UN Human Rights Council, Report of the Human Rights Council Advisory Committee, “Impact of new technologies intended for climate protection on the enjoyment of human rights” (A/HRC/54/47) 10 August 2023, para. 10.

²⁰⁹ *Ibid.*, para. 15, fn. 12; citing to IPCC AR6 SYR Longer Report (n41), pg. 37.

²¹⁰ IPCC AR6 SYR SPM (n22), B.3.1.

²¹¹ A/HRC/54/47 (n208), para. 10; see also CIEL, “Fuel to the Fire: How Geoengineering Threatens to Entrench Fossil Fuels and Accelerate the Climate Crisis” (13 February 2019), available at: <https://www.ciel.org/news/fuel-to-the-fire-how-geoengineering-threatens-to-entrench-fossil-fuels-and-accelerate-the-climate-crisis/>.

²¹² Stuart-Smith et al., (n207).

²¹³ Sands & Cook (n199), para. 5; see also paras 92ff: “there is evidence that the use of such technologies may undermine actions to cut emissions, lock in dependency on fossil fuels and/or have an adverse impact on the protection of sinks and reservoirs, it is strongly arguable that the deployment of such technologies runs counter to the aims and purposes” of the international climate regime.

existence of corporate lobbying and media strategies which seek to delay decarbonisation, in particular by the fossil fuel industry.²¹⁴

133. The non-feasibility of such technologies mean that undue reliance on them runs contrary to the principles of international legal obligations on States as discussed throughout this analysis, i.e., it is not based on the best available science, not effective and not in line with the precautionary principle.²¹⁵

Offsetting

134. In addition to over-reliance on unproven and risky technologies, over-reliance on ‘offsetting’ in place of near-term emissions reductions represents a further false solution. ‘Offsetting’ describes the ‘net accounting’ practice where specific actors (States or corporates) ‘counterbalance’ and thus notionally ‘compensate’ CO₂ emissions by funding land-based carbon sinks/removals. The lack of guardrails on this practice has led to wholly unrealistic demands on land use, which is improperly treated as a substitute for emissions reductions, delaying and undermining urgently necessary climate mitigation. The IPCC observed in that respect that land-use related “mitigation options, when sustainably implemented, can deliver large-scale GHG emission reductions and enhanced removals, but cannot fully compensate for delayed action in other sectors.”²¹⁶
135. Through over-reliance on such ‘offsetting’, States and companies have adopted climate mitigation plans which are not only unachievable, but also come at the expense of indispensable near-term emissions and fossil fuels reductions, thus exacerbating climate impacts and wasting what the IPCC concludes is a “rapidly closing window of opportunity to secure a liveable and sustainable future for all (very high confidence).”²¹⁷

²¹⁴ IPCC AR6 WGIII Full Report (n16), pg. 557: “Business models and strategies work both as a barrier to and an accelerator of decarbonisation. Still existing locked in infrastructures and business models advantages fossil fuel industry over renewable and energy efficient end use industry (Klitkou et al. 2015). The fossil fuel energy generation and delivery system therefore epitomises a barrier to the acceptance and implementation of new and cleaner renewable energy technologies (Kariuki 2018). A good number of corporate agents have attempted to derail climate change mitigation by targeted lobbying and doubt inducing media strategies (Oreskes and Conway 2011). A number of corporations that are involved in both upstream and downstream supply chains of fossil fuel companies make up the majority of organisations opposed to climate action (*Dunlap and McCright 2015; Brulle 2019; Cory et al. 2021*) corporate advertisement and brand-building strategies also attempt to deflect corporate responsibility to individuals, and/or to appropriate climate care sentiments in their own brand building; climate change mitigation is uniquely framed through choice of products and consumption, avoiding the notion of the political collective action sphere (*Doyle 2011; Doyle et al. 2019*).”

²¹⁵ A/HRC/54/47 (n208), para. 36.; *Urgenda*, Supreme Court (n125), para. 7.2.5: “AR5 does contain new scenarios to achieve by 2050 and 2100 the reductions in greenhouse gas concentrations deemed necessary. These are largely based on the premise that there will not be a sufficient reduction in greenhouse gas emissions and that the concentration of greenhouse gases will therefore have to be reduced by taking measures to remove these gases from the atmosphere (see 2.1(12) above). It is certain, however, that at the moment there is no technology that allows this to take place on a sufficiently large scale. Therefore, as the Court of Appeal held in para. 49, these new scenarios cannot be taken as a starting point for policy at this time without taking irresponsible risks by doing so. Taking such risks would run counter to the precautionary principle that must be observed when applying Articles 2 and 8 ECHR and Article 3(3) UNFCCC (see 5.3.2 and 5.7.3 above).”

²¹⁶ IPCC AR6 WGIII SPM (n16), para. C.9.

²¹⁷ IPCC AR6 SYR SPM (n22), para. C.1.

D. Conclusions under this Section

136. The science on climate change, combined with the international legal frameworks, rights and obligations discussed above, provide clear guidance on the content of States' obligations in relation to climate change, whether States have complied with these, and whether legal consequences arise where breaches have occurred.
137. Specifically, ClientEarth submits that States' obligations under international law to ensure the protection of the climate system and the environment from anthropogenic emissions of GHG must entail the implementation of legislative and administrative measures that are based on best available science, that are effective, and that are in line with relevant international legal principles, in order to achieve States' whole-of economy emission reduction targets, including:²¹⁸
- a. a commitment to phase out fossil fuels over time;
 - b. a duty to regulate the emitting activity of non-state actors; and
 - c. avoiding the development of loopholes that could allow for delay or reliance on harmful or unreliable practices, including high-risk technologies and offsetting/net accounting and without reliance on "false" or non-feasible technological solutions.
138. Complying with these obligations, as required by the co-applicable regimes of the international climate framework and IHRL, is critical to the realisation of a credible long-term emissions trajectory that avoids a disproportionate or impossibly steep future fall in emissions, thereby protecting the rights and freedoms of future generations and taking account of the principle of non-discrimination.

²¹⁸ IACtHR AO OC-23/17 (n143), para. 146, with further reference to: IACtHR, *Case of Vélez Loor v. Panama*, Preliminary objections, merits, reparations and costs. Judgment of November 23, 2010. Series C No. 218, para. 286; *Lhaka Honhat v. Argentina* (n143), para. 116.

IV. Question 2 – Legal Consequences

139. The second question before the Court asks about the legal consequences under the obligations referred to in Question 1, where States have caused significant harm to the climate system and other parts of the environment, vis-à-vis States on the one hand and peoples and individuals on the other.
140. Therefore, a response to Question 2 first calls for clarification of the concept of “significant harm to the climate system and other parts of the environment” (A). The legal consequences for States of causing such harm will then be discussed, with particular attention being paid to the issues of causation and breach (B), the obligation of cessation and non-repetition (C) and the obligation to provide full reparation (D). Finally, the issue of legal consequences for peoples and individuals will also be addressed (E).
141. ClientEarth’s response to Question 1 demonstrates that the obligations incumbent upon States to ensure the protection of the climate system and other parts of the environment from anthropogenic GHG emissions derive from a variety of international legal instruments and principles. The conclusion reached under Question 1 above (that States have international legal obligations to take certain necessary measures to address climate change) and the language used by the General Assembly in Question 2 (specifically the mention of “significant harm to the climate system” caused by the “acts or omissions” of States) point to the applicability of a more general set of rules: those governing the responsibility of States for internationally wrongful acts.
142. It is therefore ClientEarth’s submission that the response to Question 2 should be based on the rules regarding the “content of the responsibility of a State” which have been identified by the UN’s International Law Commission (ILC) in its Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) adopted in 2001. It is generally accepted that the ARSIWA reflect customary international law.²¹⁹

A. Significant Harm to the Climate System and Other Parts of the Environment

143. The principle of prevention of significant harm to the environment forms part of customary international law.²²⁰ Generally speaking, this requires States to prevent, reduce and control environmental harm from activities occurring in their territory, or in areas under their jurisdiction, to other States and areas beyond national control.²²¹
144. There is no uniform definition of environmental damage, or of significant harm to the climate system. However, definitions of ‘adverse effects of climate change’, such as under article 1(1) UNFCCC are instructive

²¹⁹ Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011 (Request for Advisory Opinion Submitted to the Seabed Disputes Chamber), para. 183.

²²⁰ ICJ, *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997), para. 140; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* Judgment [2010] ICJ Rep 14 para. 101; *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] (II) ICJ Rep 706, para. 104; *Dispute over the Status and Use of the Waters of the Silala (Chile v Bolivia)* Judgment [2022] ICJ Rep 614, paras. 83, 99.

²²¹ Margaretha Wewerinke-Sing, Ayan Garg & Jacques Hartmann, “The advisory proceedings on climate change before the International Court of Justice”, *Questions of International Law* (30 November 2023), available at: <https://www.qil-qdi.org/the-advisory-proceedings-on-climate-change-before-the-international-court-of-justice/>.

in determining legal definitions of environmental damage in the context of climate change, as well as the threshold of ‘significance’ that may then trigger liability.²²² To recall, article 1(1) UNFCCC defines the adverse effects of climate changes as:

“changes in the physical environment resulting from climate change which have significant deleterious effects on the continued resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on health and welfare.”

145. As demonstrated above at para. 42, significant deleterious effects on the environment are already occurring at current levels of warming and are having clear and documented negative effects on, amongst others, human health and welfare.
146. As levels of global warming increase, these deleterious effects will continue to intensify, often in quasi-exponential ways.²²³ Although risks and impacts from climate change are frequently non-linear, due to, *inter alia*, the limited resilience of natural systems and the risk of passing tipping points, also discussed above at para. 19, quantification of the contributions of States to the current levels of warming and therefore harm is possible, using accepted scientific methods.²²⁴ This is due to both the fungibility²²⁵ of GHG emissions,²²⁶ and due to developments in scientific methods that are termed “source attribution” in the literature,²²⁷ whereby scientists can assign historic responsibility for certain extreme weather events,²²⁸ as well as increments of global warming, to States.²²⁹ For example, a recent study makes an important contribution by collating datasets of emissions of all GHG from 1851-2021 and, applying the latest accepted scientific methods, attributes the different contributions to each State, finding that emissions from developed nations (Annex I countries,¹⁴ and OECD countries) have contributed most significantly to warming since the industrial revolution.²³⁰ These findings are unsurprising, as discussed at para. 18 on the key findings of the scientific evidence that the warming effect of CO₂ emissions is cumulative, meaning GHGs accumulate and persist in the atmosphere for period of thousands of years, and that the warming effect is determined by total concentrations of GHG.
147. The scientific evidence, including the IPCC, is clear on the fact that countries have not contributed equally to climate change, nor are they equally affected.²³¹ This, too, has been recognised in the legal response to climate

²²² Philippe Sands *et al.*, *Principles of International Environmental Law* (4th ed. Cambridge 2018).

²²³ Luke J. Harrington & Friederike E.L. Otto, “Attributable damage liability in a non-linear climate” *Climatic Change* 153, 15–20 (2019).

²²⁴ *Ibid.*

²²⁵ That is, greenhouse gas emissions are mutually interchangeable in their environmental impact and their effect on the atmosphere, as it is the overall concentration of greenhouse gases in the atmosphere that ultimately determines the extent of atmospheric warming (taking account of the latent warming impact of those gases), see also IPCC AR5 Synthesis Report (n56), Figure 2.3 at 63 and Table 2.2 at 64.

²²⁶ See further explanation of this concept in Sophie Marjanac & Lindene Patton, “Extreme weather event attribution science and climate change litigation: an essential step in the causal chain?” *Journal of Energy & Natural Resources Law*, 36(3), 265–298 (2018).

²²⁷ Michael Burger *et al.*, “The Law and Science of Climate Change Attribution” 51 *Environmental Law Reports* 10646 (2021).

²²⁸ Friederike E.L. Otto *et al.*, “Assigning historic responsibility for extreme weather events” 7 *Nature Climate Change* 757–759 (2017).

²²⁹ Matthew W. Jones *et al.*, “National contributions to climate change due to historical emissions of carbon dioxide, methane, and nitrous oxide since 1850” 20 *Scientific Data* 155 (2023).

²³⁰ *Ibid.*

²³¹ IPCC AR6 WGII SPM (n66).

change in the form of the originally tiered approach to emissions reduction obligations under the UNFCCC, the principles of equity and CBDR-RC discussed in more detail above.

148. The IPCC reports demonstrate that the scientific evidence also acknowledges and provides for a differentiated approach to States' contribution to and responsibility for climate change that ClientEarth submits is essential in determining whether a State's acts or omissions have caused 'significant harm' to the environment. For example, different mitigation pathways calculated under the IPCC demonstrate how socio-economic considerations and trends are accounted for in the scientific evidence. These include considerations of equity and sustainable development. These pathways were developed with the explicit intention to enable climate policy and broaden understanding of socioeconomic challenges for mitigation and adaptation action.²³²

149. All these foregoing considerations illustrate the critical point that scientific methods and tools exist to allow the assessment of the contribution of each State to global warming and necessary determinations on 'significant harm', and hence to current harm (loss and damage) and financial cost, to be considered further below.

B. Causation and Breach

150. Article 1 ARSIWA provides that: "[e]very internationally wrongful act of a State entails the international responsibility of that State." Article 2 stipulates that an internationally wrongful act can be an action or omission that must (a) under international law, be attributable to the State in question; and (b) constitute a breach of that State's international obligation(s).²³³

151. To discuss the legal consequences on States for climate harms, it must first be established that conduct can be attributed to a State and that breach of an international obligation can be established. Articles 4-11 ARSIWA lay down the rules on attribution, with Article 4(1) spelling out the general rule of attribution:

"The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State."

152. As the ILC commentary to article 4 provides, it is understood that a State incurs international responsibility as a result of "any failure on the part of its organs to carry out the international obligations of the State."²³⁴ An internationally wrongful act can therefore arise as a consequence of a breach of an international treaty obligation (for example IHRL, the United Nations Convention on the Law of the Sea, the UNFCCC or the Paris Agreement),

²³² IPCC AR6 WGII Full Report (n16), pg. 136.; Keywan Riahi *et al.*, "The Shared Socioeconomic Pathways and their energy, land use, and greenhouse gas emissions implications: An overview" *Global Environmental Change* 42 (2017) 153-168.

²³³ See also: *Corfu Channel UK v. Albania*, Meris, Judgment, I.C.J. Reports 1949, pg. 23; *Hungary/Slovakia* (n221), para. 47.

²³⁴ International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries (2001) (ARSIWA commentary), commentary to article 4, para (4), citing to Yearbook of the United Nations 1956, vol. II, p. 225, Document A/CN.4/96, Annex 3.

or of customary international law.²³⁵ Whether a breach has occurred depends on the exact content and requirements of the obligation in question.

153. The discussion at Section III above on IHRL and the Paris Agreement (together with international customary law and the international law of the sea, not discussed in this submission) provide that each of these international legal frameworks place legal obligations on States, to (i) mitigate their GHG emissions; (ii) regulate business conduct; and (iii) avoid unlawful reliance on technological solutions that are high-risk or unproven.
154. In the context of climate change, the international obligations on States include those under article 4 of the Paris Agreement, to prepare, maintain and communicate their respective NDCs. Article 13 of the Paris Agreement places further reporting obligations on States, including on financial and other support provided, such as technology development and transfer.²³⁶ The information submitted by States themselves under these requirements is therefore an important indicator of conduct that can be attributed to a State,²³⁷ and whether a breach of an international obligation may be established.
155. More general examples of acts that may be attributed to States could include measures that run contrary to obligations under the international climate regime, such as continued expansion of, authorisation of and/or subsidies for fossil fuels. Commentators have noted that attributable conduct could also include the failure to enforce national law, including judicial decisions, “or to uphold international standards related to environment protection or international cooperation and assistance.”²³⁸
156. By way of example, article 6(1) ICCPR discussed above at paras. 50, 59 and 106, places a positive obligation on States to protect the right to life, including through legislative measures. A breach could potentially then be established when a State has not put in place an appropriate legislative framework on climate change, i.e., a framework that ensures that mitigation pathways reflect their highest possible ambition and the best available science and take account of CBDR-RC and the precautionary principle.
157. ClientEarth submits that, in effect, the risk of such a breach could in theory materialise when a State fails to establish effective measures to address the critical elements set out in Section III.C above, namely (i) committing to phase out fossil fuels; (ii) complying with the duty to regulate the emitting activity of non-state actors, and (iii) avoiding reliance on unproven technologies.
158. A breach might also be established where a State fails to adopt or give effect to its international obligations at the national level. The above considerations on equity, burden sharing and CBDR-RC can and must form part

²³⁵ Christina Voigt, “State responsibility for damages associated with climate change”, in *Research Handbook on Climate Change Law and Loss & Damage*, Meinhard Doelle and Sara L. Seck (eds.) (Edward Elgar Publishing 2021), pg. 169.

²³⁶ Margaretha Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights Under International Law* (Hart Publishing 2019), Ch. 6.

²³⁷ *Ibid.*

²³⁸ *Ibid.*

of the assessment whether a State's conduct amounts to a breach, as it is State's cumulative contribution to global levels of GHG that is indicative of when the harm caused has been significant. A breach of the requirement that measures taken by States to prevent foreseeable harms must be effective may, for example, be established on the basis of the extensive scientific evidence presented by the IPCC reports that has demonstrated the foreseeable harmful effects of climate change for decades. To recall, the IPCC reports represent both scientific as well as governmental consensus.

159. Similarly, a breach of other international obligations that arise under the ICCPR may be established, where a State fails to provide adequate adaptation (see discussion on *Billy* in paras. 51-60 above).
160. The fact that climate change is not the consequence of the actions or omissions of one State alone does not constitute an obstacle to the invocation of the responsibility of each State that has failed to comply with its obligations in this area. To this end, article 47 ARSIWA provides that “[w]here several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.” The commentary to the Articles emphasises that: “[e]ach State is separately responsible for the conduct attributable to it, and that responsibility is not diminished or reduced by the fact that one or more States are also responsible for the same act.”²³⁹
161. In the *Billy* case, this reasoning was accepted by the UN HRC. The Committee clarified that all States are obliged to prevent the interference of environmental damage with the human rights of individuals under their jurisdiction, where the interference is serious and foreseeable.²⁴⁰ This obligation also extends to situations where such serious and foreseeable interference is “not attributable to the State.”²⁴¹
162. In so finding, the UN HRC set aside the submissions made by the Australian Government that, due to its global character, climate change is “not the sole responsibility of the Australian Government or any other single State”;²⁴² that “it is not possible under the rules of State responsibility under international law, to attribute climate change to Australia”²⁴³ as it is impossible “to trace causal links between Australia’s contributions to climate change, Australia’s efforts to address climate change and the alleged effects of climate change on the Authors’ enjoyment of human rights,”²⁴⁴ and that “[t]here are multiple causes of climate change, such that it is not caused by actions of any one country.”²⁴⁵

²³⁹ ARSIWA with commentary (n234), pg.124.

²⁴⁰ *Billy et al.*, views adopted (n1), paras. 8.9, 8.12 etc.

²⁴¹ *Ibid.*, para. 8.9.

²⁴² UN HRC Communication No. 3624/2019 Submitted on Behalf of *Billy et al.*, Australian Government Submission on Admissibility and Merits (29 May 2020), available at: <https://ourislandsourhome.com.au/wp-content/uploads/sites/92/2021/03/200529-Final-Submissions-on-Admissibility-and-Merits-CCPR-Communicat....pdf>, para. 26.

²⁴³ *Ibid.*

²⁴⁴ *Ibid.*, para. 38; UN HRC Communication No. 3624/2019 Submitted on Behalf of *Billy et al.*, Australian Government Response to the Additional Submissions for the Authors (5 August 2021), available at: <https://ourislandsourhome.com.au/wp-content/uploads/sites/92/2021/03/210805-Final-Response-Submissions-CCPR-Communication-No.-36242019-....pdf>, para. 19.

²⁴⁵ Australian Government Response (n244), para. 5d.

163. The UN HRC thereby affirmed the principle according to which each State may be held individually responsible for the breach of its international obligations in relation to climate change.²⁴⁶ This was affirmed by the ECtHR in its *KlimaSeniorinnen* decision, where the Court explicitly rejected the so-called “drop in the ocean” argument (i.e. that multiple causes obviate individual responsibility) and acknowledged that its approach in cases involving concurrent State responsibility where “each State can be held accountable for its share of the responsibility for the breach in question” was consistent with the ARSIWA, and should “be understood in the light of Article 3 § 3 of the UNFCCC according to which States should take measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects.”²⁴⁷
164. To conclude, where (i) a breach (such as, for the purpose of this submission, a failure to meet obligations in respect of mitigation or adaptation), and (ii) attribution have been established, legal consequences arise. The ARSIWA provide that where an internationally wrongful act occurs, two general consequences arise.²⁴⁸ States are under the legal obligation, first to cease and not repeat the wrongful conduct,²⁴⁹ and, second, to make full reparation for injury.²⁵⁰ Reparation can take the form of restitution, compensation or satisfaction either individually or in combination.²⁵¹

C. Cessation and Non-Repetition

165. The ICJ has held that: “[t]he obligation of a State responsible for an internationally wrongful act to put an end to that act is well established in general international law, and the Court has on a number of occasions confirmed the existence of that obligation.”²⁵² It is therefore acknowledged that “[c]essation of conduct in breach of an international obligation is the first requirement in elimination of the consequences of wrongful conduct.”²⁵³ Cessation of a wrongful act serves to protect the interest of the injured State(s) and the international community as a whole.
166. Taking into consideration the scientific evidence discussed throughout this analysis, as well as the longstanding international consensus on the need to address climate change discussed under Question 1 (Section III.B.ii) above, it is clear that climate harms and their current and future adverse impacts have been clearly foreseeable for a very long time.²⁵⁴ Cessation in order to restore compliance with international obligations could

²⁴⁶ See e.g. ICJ, *Certain Phosphate Land in Nauru (Nauru v. Australia)*, *Preliminary Objections, Judgment*, ICJ Reps. 1992, p. 252, para. 56.

²⁴⁷ *KlimaSeniorinnen* judgment (n2), para. 443-444.

²⁴⁸ ARSIWA with commentary (n234), commentary art. 30, para. (4).

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*, the commentary to art. 31 provides that the function of reparation is to re-establish “of the situation affected by the breach.”

²⁵¹ *Ibid.*, arts. 34-37.

²⁵² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, para. 150.

²⁵³ ARSIWA with commentary (n234), commentary art. 30, para. (4).

²⁵⁴ On this point see *Sacchi et al.*, decision adopted (n105), para. 10.11: “Regarding the foreseeability element, the Committee notes the authors’ uncontested argument that the State party has known about the harmful effects of its contributions to climate change for decades and that it signed the United Nations Framework Convention on Climate Change in 1992 as well as the Paris Agreement in 2016. In light of existing scientific evidence showing the impact of the cumulative effect of carbon emissions on the enjoyment of human rights, including

require that a State introduce or improve legal and administrative frameworks to phase out fossil fuels, to appropriately regulate business conduct to prevent significant climate harm, and/or to ensure that funding for mitigation, adaptation and capacity-building in ‘developing States’ is scaled-up.²⁵⁵ Based on the considerations discussed under Section III.C, ClientEarth also submits that administrative and legal frameworks must focus on rapid and deep decarbonisation, as the reliance on high-risk or unproven technologies runs counter to the obligation of effectiveness of measures.

D. The Obligation to Provide Full Reparation for Injury

167. The function of reparation is to re-establish the situation affected by the breach,²⁵⁶ and the forms of reparation – restitution, compensation, satisfaction – are all designed to reach this aim.²⁵⁷ While this section will only address restitution and compensation, ClientEarth wishes to underline the general importance of satisfaction, as it embodies the understanding that not all injuries are financially assessable, and additional remedies may consist of an acknowledgment, an expression of regret, or a formal apology.²⁵⁸

Restitution

168. Restitution is the primary form of reparation and involves the re-establishment of the situation that would exist if the wrongful act had not been committed.²⁵⁹ Restitution can take many different forms, including ‘juridical restitution’ which has been described as “the modification of a legal situation either within the legal system of the responsible State or in its legal relations with the injured State.”²⁶⁰ Restitution has to both be possible and proportionate and requires these factors to be balanced against the benefit to be gained by the injured State. Considering the effects of climate change on small island states with regards to their territory, continued statehood and the significant economic impact of climate change and environmental disasters, it should be highlighted that: “[t]he balance will invariably favour the injured State in any case where the failure to provide restitution would jeopardize its political independence or economic stability.”²⁶¹

169. Restitution may however not always be possible or adequate. This is particularly true in respect of the effects of climate change. For instance, in many situations, such as sea-level rise, salination of agricultural land or massive droughts, returning the environment to the pre-existing state does not always appear to be materially possible.

rights under the Convention, the Committee considers that the potential harm of the State party’s acts or omissions regarding the carbon emissions originating in its territory was reasonably foreseeable to the State party.”

²⁵⁵ Wewerinke-Singh, State Responsibility (n236), Ch.8

²⁵⁶ ARSIWA with commentary (n234), commentary art. 31, paras. (2)-(3).

²⁵⁷ *Ibid.*, art. 34, para. (5).

²⁵⁸ *Ibid.*, art. 37, para. (3).

²⁵⁹ *Ibid.*, art. 35, para. (3).

²⁶⁰ *Ibid.*, art. 35, para. (5).

²⁶¹ *Ibid.*, art. 35, para. (11).

Compensation

170. In accordance with article 36 ARSIWA, compensation will then have to be provided by the responsible State “insofar as [the] damage is not made good by restitution.” The damage must be financially assessable, though where agreed, it can take other forms of value. Recognised examples of types of damage that may be financially assessed and thus includes environmental damage and the depletion of natural resources. The ILC commentary notes that “where compensation has been awarded or agreed following an internationally wrongful act that causes or threatens environmental damage, payments have been directed to reimbursing the injured State for expenses reasonably incurred in preventing or remedying pollution (...). However, environmental damage will often extend beyond that which can be readily quantified in terms of clean-up costs or property devaluation. Damage to such environmental values (biodiversity, amenity, etc. – sometimes referred to as ‘non-use values’) is, as a matter of principle, no less real and compensable than damage to property, though it may be difficult to quantify.”²⁶² Compensation also covers non-material damage including personal injury to individuals, also common practice amongst human rights bodies, emphasising how the compensation considerations of human rights bodies mirror principles of reparation as established under general international law.²⁶³
171. The jurisprudence of the ICJ has confirmed that “damage to the environment, and the consequent impairment or loss of the ability of the environment to provide goods and services, is compensable under international law.”²⁶⁴ There is thus a legal basis for financial claims flowing from climate harms.
172. As has been demonstrated throughout this submission, concurrent obligations on States in relation to climate harms arise from various international legal sources. The same is true of remedies. For example, in the *Billy* case, the Australian Government was obliged to provide full reparation, including compensation for the losses and damages suffered and to continue and increase the implementation of adaptation measures, to comply with its human rights obligations arising under the ICCPR.²⁶⁵

Loss and Damage

173. Under the international climate regime, loss and damage is understood as the negative impacts of the climate crisis that occur despite both mitigation and adaptation. This includes both economic and quantifiable impacts as well as non-economic impacts, including, for example, loss of culture or displacement. The latter are often more irreparable and irreversible.²⁶⁶

²⁶² *Ibid.*, art. 36, paras. (7), (14)-(15).

²⁶³ *Ibid.*, art. 36, para. (19).

²⁶⁴ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation, Judgment, I.C.J. Reports 2018, para. 42.

²⁶⁵ *Billy et al.*, views adopted (n1), para. 11.

²⁶⁶ UNEP, “About Loss and Damage”, available at: <https://www.unep.org/topics/climate-action/loss-and-damage/about-loss-and-damage>.

174. To date, the IPCC's Sixth Assessment Report represents the scientific body's most in-depth engagement with loss and damage (both economic and non-economic) and thus provides evidentiary support for addressing loss and damage through legal means and structures.²⁶⁷
175. Under article 8 of the Paris Agreement, Parties acknowledge the importance of "averting, minimising and addressing" loss and damage. As can be seen from this language, it is not designed to address situations where State conduct is in breach of an international obligation and has led to significant harm to the environment. COP Decision 1/CP.21 – the decision on the adoption of the Paris Agreement – specifies that article 8 does not "involve or provide a basis for any liability of compensation"; notably however, it does not preclude the applicability of other regimes on liability.²⁶⁸ This is supported through the statements made by several States upon the adoption of the text.²⁶⁹
176. The Loss and Damage Fund set up in 2023 at COP 27 has the aim of providing financial assistance to the States and populations which are most severely affected by climate change impacts. As the language of "financial assistance/support" makes clear, the Fund is not framed as a means for compensation,²⁷⁰ and financial pledges made under it are voluntary in nature. As of March 2024, these voluntary pledges amounted to around 661 million USD. At the same time some research has quantified the necessary funding for loss and damage at 400 billion USD a year.²⁷¹
177. While the Loss and Damage Fund, if adequately funded, might thus represent one element of the means necessary to address the compensation obligation, it is evident that it does not and cannot address, or displace the liability for harms caused arising from the breach of other, co-applicable international legal obligations.²⁷²

Calculation of Economic Costs

178. It must also be highlighted that scientific methodologies exist and continue to be strengthened to calculate the economic costs associated with climate change harms. For example, a 2020 study assessed the economic costs of Hurricane Harvey – described as one of the costliest tropical cyclones in history – that could be attributed to climate change. Averaging financial information on the total damage as provided by national institutions,

²⁶⁷ Sabin Center for Climate Change Law, Amicus Brief submitted to the IACtHR on its Advisory Opinion on the Climate Emergency and Human Rights, available at: https://corteidh.or.cr/sitios/observaciones/OC-32/4_sabin_center_columbia.pdf, pg. 60.; Adelle Thomas, "What does the IPCC say on losses and damages?" *Climate Analytics* (2 June 2022), available at: <https://climateanalytics.org/comment/what-does-the-ipcc-say-on-losses-and-damages>.

²⁶⁸ UNFCCC, Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015 (29 January 2016) (FCCC/CP/2015/10/Add.1), para. 51; Center for International Environmental Law, Memorandum on the Legal Consequences for States of Internationally Wrongful Acts Causing Harm to the Climate System, Written Statement Submitted to the ICJ on its Advisory Opinion on the Obligations of States in respect of Climate Change Advisory Opinion (20 March 2024) (CIEL Written Submission), available at: [Amicus-Brief-ICJ-Defining-States-Climate-Obligations-Reparations-Climate-Harm.pdf \(ciel.org\)](#), para. 147.

²⁶⁹ Wewerinke-Singh, State Responsibility (n236), pg. 68-69.

²⁷⁰ UNFCCC Decision -/CP.27 -/CMA.4, para. 2.; CIEL Written Submission (n268), para. 170.

²⁷¹ Liane Schalatek and Julie-Anne Richards, "The Loss and Damage Fund Board: Getting It Right from the Start" Heinrich Böll Stiftung (18 March 2024), available at: <https://us.boell.org/en/2024/03/18/loss-and-damage-fund-board-getting-it-right-start>.

²⁷² Wewerinke-Singh, State Responsibility (n236), pg. 68-69.

reinsurance companies and others, the research found that of the \$90 billion (bn) of the “direct economic costs (...) that are attributable to anthropogenic influences on the climate to *likely* be in the range of US\$30bn to US\$72bn, with a best estimate of US\$67bn.”²⁷³

179. This conclusion was reached by considering the “fraction of attributable risk” – that is the fraction of the risk attributable to human influence – as it related to the extreme precipitation changes caused by the cyclone and the subsequent economic damage. Importantly, the study concluded that it only quantified “the direct damage that can be easily monetized. It does not include mortality, morbidity, and temporary and permanent dislocations that are typically associated with hurricanes such as Harvey.”²⁷⁴
180. Beyond examples of the calculation and quantification of economic costs associated with climate change, commentators have also highlighted the existence of multilateral international funding arrangements and the guidance these may provide as practical examples of dispersion and funding structures. Such arrangements include the United Nations Compensation Commission established in 1991 to process and award claims related to Iraq’s unlawful invasion and occupation of Kuwait. Out of the roughly 1.5 million successful claims, all except one claim were paid in full.²⁷⁵ Another example are the two International Oil Pollution Compensation Funds – intergovernmental organisations established to provide compensation for damage resulting from oil spills.²⁷⁶
181. Taken together, the above demonstrates the availability of scientific knowledge and methodology, as well as practical examples to address and inform the legal consequences that arise with respect to other States where significant harm to the climate system and other parts of the environment has been caused.

E. Legal Consequences for Peoples and Individuals

182. This section addresses the question of the legal consequences, vis-à-vis peoples and individuals both within and outside their territories or jurisdiction, for States “who cause significant harm to the climate system and other parts of the environment.” This section does not address the legal consequences in respect of peoples or individuals for States that have not caused significant harm, as this is outside the scope of the question before the Court. We therefore make no submissions on the content and nature of any legal consequences that may arise for such States, nor should any implication regarding such be drawn from this submission.
183. Legal consequences arising from the internationally wrongful acts or omissions of States that have caused significant harm as described in para. 42 above arise for peoples and individuals primarily under IHRL. Those obligations and remedies will accordingly be the focus of this section.

²⁷³ David J. Frame et al., “The economic costs of Hurricane Harvey attributable to climate change” *Climate Change* 160, 271-281 (2020).

²⁷⁴ *Ibid.*

²⁷⁵ CIEL Written Submission (n268), pg. 169, Mojtaba Kazazi, “United Nations Compensation Commission and Liability for Use of Force” *Heidelberg Journal of International Law* 78(3), 2018, pg. 603-607.

²⁷⁶ CIEL Written Submission (n269), pg. 169; The International Oil Pollution Compensation Funds, available at: <https://iopcfunds.org/>.

184. IHRL provides an international framework for State liability for harms to human rights. It is well established that the human rights obligations on States include the provision of an effective remedy for people whose rights and freedoms have been violated.²⁷⁷ The interconnectedness of the ILC ARSIWA and the international human rights regime is not only confirmed through this similar language and legal considerations on liability, but also through the references to jurisprudence of international human rights courts and bodies in the commentaries to the ILC Articles, and the reliance on the Articles in the practice of international human rights bodies.²⁷⁸ While the individuals affected by the breach of an international obligation are to be understood as the primary beneficiaries, the commentary on article 33(1) ARSIWA provides that: “a State’s responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty.” The below observations may therefore also apply to breaches occurring as between States.
185. As noted above, the UN HRC’s decision in *Billy* may offer some insights on how questions of legal consequences have been addressed in a climate change context. In its decision, the UN HRC confirmed that the ICCPR imposed an obligation on States to provide effective remedies. In the words of the UN HRC, “[t]his requires it to make full reparation to individuals whose Covenant rights have been violated.”²⁷⁹ In this instance this included: (i) providing adequate compensation for the harm suffered; (ii) engaging in meaningful consultations in order to conduct a needs assessment; (iii) continuing to implement, monitor and review the effectiveness of the measures necessary to allow for the communities’ continued safe existence, which includes adequate and timely adaptation measures; (iv) monitoring and reviewing the effectiveness of the measures implemented and resolve any deficiencies as soon as practicable; and (v) taking “steps to prevent similar violations from occurring in the future.”²⁸⁰ The obligation to take steps to prevent similar violations in the future overlaps with the positive obligations under IHRL to prevent foreseeable climate harms on fundamental rights as described above. States must promptly take effective preventive measures, failing which they will continue being in breach of IHRL law.
186. Liability for harms to human rights is also relevant in the business context. As has been demonstrated throughout this analysis, fossil fuel expansion is inconsistent with the business responsibility to respect human rights as set out in the UNGPs.²⁸¹ Therefore, the provision of remedial compensation through the regulation of business, through ‘polluter pays’ levies on highly polluting fossil fuel business enterprises, would also align with the State obligation, as set out in the UNGP 25, to “take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when [business-related human rights] abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.” The UNWG has confirmed that these obligations apply in regard to human rights and environmental impacts related to climate

²⁷⁷ ICCPR, art. 2(3)(a); ECHR art. 13.

²⁷⁸ Wewerinke-Singh, *State Responsibility* (n236) pg. 65.

²⁷⁹ *Billy et al.*, views adopted (n1), para. 11.

²⁸⁰ *Ibid.*

²⁸¹ UN Info Note on Climate Change and UNGPs (n169), para. 19.b.

change, and that States must therefore “[p]rovide for effective access to remedies for rightsholders in relation to all climate change-related impacts on human rights and the environment”, ensuring access to remedies is responsive to victims’ vulnerabilities.²⁸²

187. This is a clear indication that legal consequences arise on States with respect to peoples and individuals affected by the adverse effects of climate change.

F. Conclusions under this Section

188. The foregoing discussion under Question 2 demonstrates that there is both a scientific and a legal basis for a differentiated consideration of the legal consequences for anthropogenic harm caused to the climate system and other parts of the environment. Such consequences include full reparation for injury, the adequacy of which (as this Court has previously noted) depends on the “concrete circumstances surrounding each case and the precise nature and scope of the injury.”²⁸³ The critical point emphasised by ClientEarth’s response to Question 2 is that scientific methods and tools, as well as practical examples and precedent, exist to support the findings and conclusions of this analysis. These methods and tools may provide guidance for determining compliance with and implementation of international obligations, including legal consequences, both vis-à-vis States and peoples and individuals.

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²⁸² *Ibid.*, paras. 23-24.

²⁸³ *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004 (I), p.59, para. 119) as cited in *Pulp Mills* (n220), para. 274.