Annex 84

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Organization of American States

REPORT Nº 86/99
CASE 11.589
ARMANDO ALEJANDRE JR., CARLOS COSTA,
MARIO DE LA PEÑA, AND PABLO MORALES
CUBA
September 29, 1999

I. SUMMARY

1. On 25 February 1996, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") received several complaints brought against the Republic of Cuba (hereinafter "the State," "the Cuban State," or "Cuba") according to which a MiG-29 military aircraft belonging to the Cuban Air Force (FAC) downed two unarmed civilian light airplanes belonging to the organization "Brothers to the Rescue."[1] According to a report issued by the International Civil Aviation Organization (ICAO), the incidents occurred on 24 February 1996 at 3:21 p.m. and 3:27 p.m., respectively, in international airspace. The air-to-air missiles fired by the MiG-29 destroyed the civilian light aircraft, immediately killing Armando Alejandre Jr. (45 years old), Carlos Alberto Costa (29), Mario Manuel de la Peña (24), and Pablo Morales (29). The complaint concludes with the Commission being requested to begin proceedings in accordance with Articles 32 *et seq.* of its Regulations and to declare Cuba responsible for failing to comply with its international obligations contained in the American Declaration of the Rights and Duties of Man (hereinafter "the Declaration" or "the American Declaration") for violating the right to life and the right to a fair trial as set forth in Articles I and XVIII of said international instrument.

2. After receiving several complaints regarding the same incident and persons, the Commission combined them, as provided for in Article 40(2) of its Regulations, as file Nº 11.589. [2] Thus, the petitioners in the case at hand are the direct relatives of the victims (Marlene Alejandre, Marlene Victoria Alejandre, Mirta Costa, Osvaldo Costa, Miriam de la Peña, Mario de la Peña, and Eva Barbas), Dr. Haydeé Marín (Institute of Human and Labor Rights at Florida International University), Dr. Claudio Benedí (Cuban Patriotic Council), and Mr. José J. Basulto (Brothers to the Rescue).

3. Since the start of proceedings in this case on 7 March 1996, the Cuban State has not replied to the Commission's repeated requests for information regarding the admissibility and merits of the matter. Therefore, based on an exhaustive analysis of the legal and factual grounds and in accordance with Article 42 of its Regulations,[3] the Commission believes that the complaint meets the formal requirements for admissibility as set forth in the Regulations and concludes that the Cuban State is responsible for violating the rights enshrined in the American Declaration as reported by the petitioners in their complaint of 25 February 1996.[4]. Based on the analysis and conclusions of this report, the Commission recommends that the Cuban State conduct an exhaustive investigation into the incidents in question, prosecute and punish the individuals responsible for the different violations described herein, and make adequate and timely amends to the victims' direct relatives, including the payment of fair compensatory indemnification.

II. PROCEEDINGS BEFORE THE COMMISSION

4. The Commission, by means of a note dated 7 March 1996, began proceedings in this case, asking the Cuban State to provide the relevant information on the incidents described in that note, along with any evidence indicating whether or not the remedies available under domestic law had been exhausted. Following that date the case has been processed in accordance with Article 32 *et seq.* of the Commission's Regulations. As stated above, at no time between the start of proceedings and the present did Cuba reply to the requests for information, in spite of being warned on repeated occasions and being informed about the application of Article 42 of the Commission's Regulations. In fact, the Cuban State was notified on 7 March and

19 April 1996; 4 February and 25 September 1997; 21 and 30 January 1998; and 12 June 1998. At its meeting Nº 1432, on May 5, 1999, during the 103rd session, the Commission adopted Report Nº 81/99, pertaining to this case, in accordance with Article 53, paragraphs 1 and 2, of its Regulations. In a note dated May 19,1999, the Commission transmitted the report to the Cuban State, granting it a period of two months in which to implement the report's recommendations. On July 19, 1999, when that period expired, the Cuban State had not presented any observations on the Commission's report.

III. POSITIONS OF THE PARTIES

A. The petitioners

5. THE INCIDENT. Alejandre, Costa, De la Peña, and Morales were members of the "Brothers to the Rescue" organization, based in the city of Miami, Florida, United States of America. On the morning of 24 February 1996, two of the Brothers to the Rescue Cessna 337 airplanes departed Opa Locka airport in south Florida.[5] Costa was flying one airplane, and he was accompanied by Pablo Morales, a Cuban citizen who had fled the country on a raft. De la Peña was at the controls of the second plane, with Alejandre as his passenger. Before departing, the two aircraft notified air traffic controllers in both Miami and Havana of their flight plans, which were to take them south of the 24th parallel.

6. Parallel 24 is located a good distance to the north of Cuba's 12-mile territorial waters and it serves as the northernmost limit of the Havana Flight Information Region. Commercial and civilian aircraft routinely fly in this area, and aviation practice requires that they notify Havana air traffic control when they move south of parallel 24. Both Brothers to the Rescue airplanes complied with this custom by communicating with Havana, identifying themselves, and giving their position and altitude.

7. While the two aircraft were still north of the 24th parallel, the Cuban Air Force ordered the scrambling of two military aircraft, a MiG-29 and a MiG-23, operating under the control of a military station on Cuban soil. The MiGs were carrying artillery, short-range missiles, bombs, and rockets, and they were flown by members of the FAC. Extracts from the radio communications between the MiG-29 and the military control tower in Havana detail what transpired next:

MIG-29: OK, the objective is in sight; the objective is in sight. It is a small airplane. Copied; small airplane in sight.

MIG-29: OK, we have it in sight, we have it in sight.

MIG-29: The objective is in sight.

Military Control: Go ahead.

MIG-29: The objective is in sight.

Military Control: Airplane in sight.

MIG-29: Is it coming again?

MIG-29: It is a small airplane, a small airplane.

MIG-29: It is white; white.

Military Control: Color and registration of the airplane?

Military Control: Buddy.

MIG-29: Hey, the registration as well?

Military Control: What type and color?

MiG-29: It is white and blue.

MIG-29: White and blue, at low altitude, a small airplane.

MIG-29: Give me instructions.

MIG-29: Instructions!

MIG-29: Hey, give me authorization . . .

MIG-29: If we overfly it, things are going to get complicated. Let's overfly it. There are some vessels coming that way, so I'm going to overfly it.

MIG-29: Talk to me; talk to me.

MIG-29: I've got a lock; I've got a lock.

MIG-29: We're locked on. Give us the authorization.

MIG-29: It's a Cessna 337. That one, that one. Hell, give us the authorization.

Military Control: Fire.

MIG-29: Hell, give us the authorization! We got it!

Military Control: Authorized to destroy.

MIG-29: We copy. We copy.

Military Control: Authorized to destroy.

MIG-29: Understood; I had already received it. Leave us alone for a minute.

Military Control: Don't lose him.

MIG-29: First shot.

MIG-29: We blew his balls off! We blew his balls off!

MIG-29: Wait; look and see where he went down.

MIG-29: Yes! Yes! Shit, we hit him! Jesus!

MIG-29: Mark the place where we took him down.

MIG-29: We're on top of him. He won't give us any more fucking trouble.

Military Control: Congratulations to the pair of you.

MIG-29: Mark the place.

. . .

MIG-29: We are climbing and coming home.

Military Control: Stay there, circling above.

MIG-29: Above the objective?

Military Control: Correct.
MIG-29: Jesus, we told you, buddy.

Military Control: Correct; the objective is marked.

MIG-29: Go ahead.

Military Control: OK, climb to 3200, 4000 meters above the destroyed objective and keep a low speed.

MIG-29: Go ahead.

Military Control: I need you to stay . . . there. What direction did you fire in?

MIG-29: I have another aircraft in sight.

MIG-29: We have another aircraft.

Military Control: Follow it. Do not lose the other small aircraft.

MIG-29: We have another aircraft in sight. It is in the area where [the first plane] came down. It's in the area where it came down.

MIG-29: We have sight of the airplane.

Military Control: Stay there.

MIG-29: Buddy, it's in the incident area, where the objective came down. They are going to give us authorization.

MIG-29: Hey, SAR isn't necessary. There's nothing left. Nothing.

Military Control: Correct, follow the plane. You are going to remain above it.

MIG-29: We are above it.

Military Control: Correct . . .

MIG-29: What for?

MIG-29: Is the other one authorized?

Military Control: Correct.

MIG-29: Marvelous. Let's at it, Alberto.

MIG-29: Understood; we are now going to destroy it.

Military Control: Do you still have it in sight?

MIG-29: We have it, we have it; we are working. Let us do our job.

MIG-29: The other one is destroyed; the other one is destroyed. Homeland or death, you bastards! The other one is also down.[6]

8. The MiG-29's air-to-air missiles disintegrated the Brothers to the Rescue airplanes, killing their occupants instantaneously and leaving almost no recoverable remains. Only a broad slick of oil marked the place where the planes were downed. At no time did the FAC notify or warn the civilian airplanes, try to use other interception methods, or give them an opportunity to land. The MiGs' first and only response was the intentional destruction of the civilian airplanes and their four occupants. This actions were a clear violation of established international rules, which require all measures to be exhausted before resorting to aggression against any airplanes and utterly forbid the use of force against civilian craft.[7] In addition, agents of the Cuban State violated several basic human rights set forth in the American Declaration of the Rights and Duties of Man.

9. *THE VICTIMS.* Armando Alejandre was 45 years old at the time of his death. Although born in Cuba, Alejandre made Miami, Florida his home at an early age and became a naturalized U.S. citizen. Alejandre served an eight-month tour of duty in the Vietnam War, completed his college education at Florida International University, and worked as a consultant to the Metro-Dade Transit Authority. He was survived by his wife of 21 years, Marlene Alejandre, and his daughter Marlene, a university student.

10. Carlos Alberto Costa was born in the United States in 1966 and lived in Miami. He was only 29 years old. Always interested in aviation and hoping to someday oversee the operations of a major airport, Costa earned his bachelor's degree at Embry-Riddle Aeronautical University and worked as a Training Specialist for the Dade County Aviation Department. He was survived by his parents Mirta Costa and Osvaldo Costa and by his sister, Mirta Méndez.

11. Mario Manuel De la Peña was also born in the United States and was 24 years old at the time of his death. De la Peña was in his last semester at Embry-Riddle Aeronautical University, working toward his goal of being an airline pilot, when he was killed. During that semester he had obtained a coveted and highly competitive position with American Airlines. The university granted De la Peña a posthumous bachelor's degree in professional aeronautics. He was survived by a younger brother, Michael De La Peña, and by his parents Mario T. De la Peña and Miriam De la Peña.

12. Pablo Morales was born in Havana, Cuba, on 16 May 1966. On 5 August 1992 he fled the island on a raft and was rescued by the Brothers to the Rescue organization. As a result, he joined the organization as a volunteer and flew as copilot. Morales studied cartography and graduated as a geodesist.

13. According to the petitioners, the responsibility of the Cuban State lies, first, in that the unprovoked firing of deadly rockets at a defenseless, unarmed civilian aircraft undoubtedly comes within the scope of "extrajudicial execution." That term is defined in reference to its use in the Torture Victim Protection Act (TVPA), which states that the term "extrajudicial execution" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees set forth in international human rights instruments and, in particular, in the American Declaration of the Rights and Duties of Man. Cuba's actions in this case come within that definition. The occupants of the two unarmed civilian planes received no warning of any type regarding their imminent destruction.

14. The FAC was acting as an agent of Cuba when it committed the killings.[8] The evidence presented shows how the pilots of the Cuban MiGs obtained authorization from state officials prior to downing each plane and received hearty congratulations from those officials after the planes were destroyed.

15. The incidents in which the victims were killed occurred in international airspace. The ICAO concluded that the aircraft were over international waters when they were shot down. The first plane was 18 miles off the Cuban coast when it was destroyed by FAC missiles; the second was 30.5 miles away from Cuba. These numbers place the airplanes a good distance from the 12 miles of territorial waters Cuba is allowed under international law.[9] Furthermore, the evidence provided by the crew and passengers of the *Majesty of the Seas,* a cruise ship that was in the vicinity, and of the *Tri-Liner*, a private fishing vessel, indicated that the civilian aircraft were flying in international airspace toward Florida and away from Cuba when they were destroyed by the agents of the Cuban State.

16. The practice of summary execution has been roundly condemned by the global community. Many international human rights conventions and declarations enshrine the right of all individuals to freedom from arbitrary or unjustifiable deprivation of life.[10] The consensus against extrajudicial executions is so extended that each instrument or agreement that has tried to define the scope of international human rights law has enshrined the right of due process for protecting that right. The forbidding of extrajudicial executions thus raises to the level of imperative law a provision of international law that is so basic that it is binding on all members of the international community. The human rights rules that have been generally accepted and that therefore have been incorporated into national law cover such basic rights as the right not to be murdered, tortured, or in any way submitted to cruel, inhuman, or degrading punishment and the right of freedom from arbitrary arrest. The ban on summary executions is universal and binding on states. A state violates international human rights law if, as state policy, it practices, encourages, or condones murder or allows the disappearance of individuals. Consequently, the extrajudicial killings of De la Peña, Costa, Alejandre, and Morales committed by agents of the Cuban State make that State's internationally responsible for violating the right to life set forth in Article I of the American Declaration of the Rights and Duties of Man. And by refusing justice, the Cuban State is responsible for ignoring the right to a fair trial enshrined in Article XVIII of that international instrument.

B. The State

17. The Cuban State did not reply to the Commission's repeated requests for information and for its comments on the admissibility and merits of the complaint. The Commission also notes that to date the State has not disputed the facts set forth in the complaint, in spite of the series of notes asking it to do so. Consequently, the period of time allowed in the Commission's Regulations for the State to provide information on the case at hand has expired by a wide margin.

IV. ANALYSIS

A. Competence of the Commission and formal requirements for admissibility

18. The Commission is competent *ratione materiae* to hear the case at hand since it involves violations of rights enshrined in the American Declaration of the Rights and Duties of Man. Its competence stems from provisions of its Statute and Regulations and of the OAS Charter. Under the Charter, all member states pledge to respect the essential rights of individuals. In the case of states not parties to the Convention, the rights in question are those established in the American Declaration, which is a source of international obligations.[11] In its Statute, the Commission is instructed to place special emphasis on the observance of the human rights recognized in that Declaration's Article I (life, liberty, and personal security), Article II (equality before law), Article III (freedom of religion and worship), Article IV (freedom of investigation, opinion, expression, and dissemination), Article XVIII (fair trial), Article XXV (protection from arbitrary arrest), and Article XXVI (due process of law).

19. The Commission has processed this case in compliance with the provisions of Chapter III of its Regulations and Articles 1, 18, and 20 of its Statute. Article 51 of the IACHR Regulations states that the Commission "shall receive and examine any petition that contains a denunciation of alleged violations of the human rights set forth in the American Declaration of the Rights and Duties of Man, concerning the member states of the Organization that are not parties to the American Convention on Human Rights."

20. The procedure applied to this case was the one set forth in Article 52 of the Commission's Regulations, to wit: "The procedure applicable to petitions concerning member states of the Organization that are not parties to the American Convention on Human Rights shall be that

provided for in the General Provisions included in Chapter I of Title II, in Articles 32 to 43 of these Regulations, and in the articles indicated below."

21. The presentation of the petition meets the formal requirements for admissibility contained in Article 32 of the Commission's Regulations, in that the procedure described in its Article 34 has been exhausted. Moreover, the claim is not pending any other international settlement procedure, nor does it reproduce any other petition that the Commission has previously examined.

22. The Commission is also competent *ratione personae*, since Article 26 of its Regulations provides that "[a]ny person or group of persons or nongovernmental entity legally recognized in one or more of the member states of the Organization may submit petitions to the Commission, in accordance with these Regulations, on one's own behalf or on behalf of third persons, with regard to alleged violations of a human right recognized, as the case may be, in the American Convention on Human Rights or in the American Declaration of the Rights and Duties of Man." In this context, the Commission must reiterate that the Cuban State's failure to respond in these proceedings is a breach of its international legal obligation to provide information in response to petitions and other communications containing allegations of human rights violations. The Commission has already stated on numerous occasions that the intent of the Organization of American States in its "Exclusion of the Present Government of Cuba from Participation in the Inter-American System"[12] was not to leave the Cuban people without protection. The exclusion of that government from the regional system in no way means that it can fail to meet its international obligations in matters of human rights. Consequently, the Commission bases its analysis on the evidence at its disposal and on Article 42 of its Regulations.

23. In terms of its competence *ratione loci*, clearly the Commission is competent with respect to human rights violations that occur within the territory of OAS member states, whether or not they are parties to the Convention. It should be specified, however, that under certain circumstances the Commission is competent to consider reports alleging that agents of an OAS member state have violated human rights protected in the inter-American system, even when the events take place outside the territory of that state. In fact, the Commission would point out that, in certain cases, the exercise of its jurisdiction over extraterritorial events is not only consistent with but required by the applicable rules. The essential rights of the individual are proclaimed in the Americas on the basis of equality and nondiscrimination, "without distinction as to race, nationality, creed, or sex."[13] Because individual rights are inherent to the human being, all the American states are obligated to respect the protected rights of any person subject to their jurisdiction. Although this usually refers to persons who are within the territory of a state, in certain instances it can refer to extraterritorial actions, when the person is present in the territory of a state but subject to the control of another state, generally through the actions of that state's agents abroad.[14] In principle, the investigation refers not to the nationality of the alleged victim or his presence in a particular geographic area, but to whether, in those specific circumstances, the state observed the rights of a person subject to its authority and control.[15]

24. The European Commission on Human Rights has ruled on this matter in the case brought by Cyprus against Turkey following the Turkish invasion of that island. In its complaint, Cyprus alleged that the European Convention had been violated in the part of its territory occupied by Turkish forces. Turkey, for its part, maintained that, under Article 1 of the European Convention, the competence of the Commission was limited to the examination of actions allegedly committed by a state party in its own national territory and that Turkey could not be found to have violated the Convention since it had not extended its jurisdiction to Cyprus. The European Commission rejected that argument, as follows:

> In Article 1 of the Convention, the High Contracting Parties undertake to secure the rights and freedoms defined in Section 1 to everyone "within their jurisdiction" (in the French text: "relevant de leur jurisdiction"). The Commission finds that this term is not, as submitted by the respondent Government, equivalent to or limited to the national territory of the High contracting Party concerned. It is clear from the language, in particular of the French text, and the object of this article, and from the purpose of the Convention as a whole, that the High contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad.[16]

25. In the case *sub lite,* the petitioners stated that their allegations were guided by the provisions of the American Declaration of the Rights and Duties of Man. The Commission has examined the evidence and finds that the victims died as a consequence of direct actions taken by agents of the Cuban State in international airspace. The fact that the events took place outside Cuban jurisdiction does not limit the Commission's competence *ratione loci*, because, as previously stated, when agents of a state, whether military or civilian, exercise power and authority over persons outside national territory, the state's obligation to respect human rights continues--in this case the rights enshrined in the American Declaration. The Commission finds conclusive evidence that agents of the Cuban State, although outside their territory, placed the civilian pilots of the "Brothers to the Rescue" organization under their authority. Consequently, the Commission is competent *ratione loci* to apply the American Convention extraterritorially to the Cuban State in connection with the events that took place in international airspace on February 24, 1996.

26. As regards the requirement that domestic remedies be exhausted, Article 37(1) of the Commission's Regulations states that "for a petition to be admitted by the Commission, the remedies under domestic jurisdiction must have been invoked and exhausted in accordance with the general principles of international law." In this regard, the Inter-American Court of Human Rights has stated that:

> Generally recognized principles of international law indicate, first, that this is a rule that may be waived, either expressly or by implication, by the State having the right to invoke it, as this Court has already recognized (see Viviana Gallardo *et al.*, Judgment of November 13, 1981, Nº G 101/81. Series A, para. 26). Second, the objection asserting the non-exhaustion of domestic remedies, to be timely, must be made at an early stage of the proceedings by the State entitled to make it, lest a waiver of the requirement be presumed.[17]

27. In the present case, the Cuban State made no objection asserting that domestic remedies had not been exhausted upon receiving formal notification of the petition and thus opposing its admissibility; neither did it respond to the Commission's repeated requests for information during processing of the case. In consideration of this, and with no evidence other than that contained in the case documents, the Commission concludes that the Cuban State has tacitly declined to make an objection asserting the nonexhaustion of domestic remedies.

B. Evidence in the case at hand

28. The Commission will now present the documents and other evidence, which have been thoroughly examined and which provide indications for reaching a decision regarding the events of the afternoon of 24 February 1996, when the four civilian pilots from Brothers to the Rescue lost their lives, allegedly as a result of actions taken by agents of the Cuban State. Thus, the documents and other evidence submitted to the Commission — which it has carefully processed, analyzed, and assessed — include: (1) the report of the International Civil Aviation Authority (ICAO) of 28 June 1996; (2) a descriptive summary of the incident drawn up by the victims' relatives; (3) a written transcript of the testimony given to the IACHR by the victims' relatives on 3 March 1997; (4) a leaflet with biographies and photographs of the four dead pilots, along with other general information; (5) the report of the United Nations Special Rapporteur for Cuba; (6) the final judgment against the Republic of Cuba handed down in a civil suit by Judge King of the United States District Court, South Florida; (7) the testimony given by Capt. Charles F. Leonard, aviation expert, during the civil trial in the U.S. courts; (8) the testimony given by Prof. Stephen J. Schnably, expert in international law, during the civil trial in the U.S. courts; (9) a copy of the USA's 1996 Anti-Terrorism and Effective Death Penalty Act; (10) a copy of the USA's 1976 Foreign Sovereign Immunities Act; (11) an article from *Times* magazine, 11 March 1996, titled "The Cold War is Back"; (12) EFE newswire, dated 5 March 1996: *Decisión de derribo se tomó para evitar nueva humillación* [Decision to shoot down taken to prevent further humiliation]; (13) EFE newswire, dated 5 March 1996: *Piloto admite que exclamó frase despectiva en el derribo* [Pilot admits to exclaiming derogative phrase during downing]; (14) transcriptions of interviews with Gen. Rubén Martínez Puente, commanding officer of the Cuban Antiair Defense Force, broadcast by Cubavisión, Havana, on 6 March 1996; (15) audio tape of the flightdeck recorder from aircraft 2506, 24 February 1996; and (16) scale models of the Cessnas and MiGs involved in the shootdown.

C. Analysis of the evidence with regard to the material perpetrators of the incident

29. After assessing the evidence, the Commission must analyze the events of 24 February 1996 and determine whether they cause the Cuban State to incur in international responsibility for the alleged violation of rights enshrined in the American Declaration of the Rights and Duties of Man. In other words, the Commission must ascertain whether the Cuban State is responsible for the death of the four civilian pilots and, consequently, whether the three elements that cause a State to be internationally responsible are present, namely (i) whether there existed an action or a failure to act that violated an obligation enshrined in a rule of international law currently in force, which in this case would be the American Declaration; (ii) whether that action or a failure to act can be attributed to the State in its capacity as a juridical person, and (iii) whether harm or damage was caused as a result of the illicit act.

30. One of the pieces of evidence that casts light on the substance of the complaint is the report by the International Civil Aviation Organization (ICAO), which is included in the file on this case. Following the incident, during its 147th session on 6 March 1996 the ICAO Council adopted a resolution regarding the downing of two private U.S.-registered civilian aircraft by Cuban military airplanes on 24 February 1996. The ICAO studied this issue in response to a request made by the United Nations Security Council on 27 February 1996 and in consideration of the requests made by the governments of the USA and Cuba for an exhaustive investigation of the incident to be conducted. In compliance with that request, on 28 June 1996 the ICAO presented the Security Council with a report titled "Report of the Investigation into the Shooting Down of Two U.S.-Registered Private Aircraft by a Cuban Military Plane on 24 February 1996".

31. With regard to the events, the ICAO report establishes that the Brothers to the Rescue pilots and followers met at a hangar at Opa Locka airport, located in south Florida, in the morning of 24 February 1996, and that at 9:12 a.m. the pilot of the Cessna 337C, registration N2456S, who was the organization's flight operations chief, began presentation of the flight plans according to visual flight rules (VFR) prior to conducting a rafter rescue flight. However, due to other commitments on the part of some of the pilots, the flight did not leave at 10:15 a.m. as had been planned. The pilots returned to the hangar after 11:00 a.m. and decided to have lunch before taking off. At 1:01 p.m. the three Cessna 337 aircraft — registration numbers N2506 (José Basulto, Arnaldo Iglesias, Andrés and Silvia Iriondo), N2456S (Carlos Costa and Pablo Morales), and N5485S (Mario De La Peña and Armando Alejandre) — took off to the west at 1:11, 1:12, and 1:13 p.m., respectively. Once in the air, the three Cessnas contacted Miami AIFSS (call sign Miami Radio) to activate their flight plans. At 2:39 p.m. Cuban air defense radar detected aircraft to the north of Parallel 24N. At 2:43 p.m. two military interception airplanes were immediately prepared at the San Antonio de los Baños airbase. These airplanes — a two-man MiG-29 UB and a MiG-23 ML — were armed with heat-seeking air-to-air missiles and machineguns. They took off at 2:55 p.m. to patrol around 15 to 20 km north of the coast at altitudes of between 200 and 500 meters. [18] The ICAO then concluded, *inter alia,* the following:

> - At 15:21 hours on 24 February 1996, N2456S was destroyed by an air-to-air missile fired by a Cuban MiG-29 military aircraft.
>
> - At 15:27 hours on 24 February 1996, N5485S was destroyed by an air-to-air missile fired by a Cuban MiG-29 military aircraft.
>
> - The recorded positions and track of the *Majesty of the Seas,* the observations by its crew and passengers, the position of the *Tri-Liner* relative to the *Majesty of the Seas,* and the resulting estimated locations of the shootdowns were considered to be the most reliable position estimates.
>
> - No corroborative evidence of the position of the *Majesty of the Seas* was obtained. With this qualification and based on the recorded positions of the *Majesty of the Seas,* N2456S was shot down approximately at position 23°29N 082°28W, 9 NM outside Cuban territorial airspace and N5485S was shot down approximately at position 23°30.1N 082°28.6W, 10 NM outside Cuban territorial airspace (emphasis added).
>
> - Means other than interception were available to Cuba, such as radio communication, but had not been utilized. This conflicted with the ICAO principle that interception of civil aircraft should be undertaken only as a last resort.
>
> - During the interceptions, no attempt was made to direct N2456S and N5485S beyond the boundaries of national airspace, guide them away from a prohibited, restricted or danger area or instruct them to effect a landing at a designated aerodrome.

- In executing the interception, the standard procedures for maneuvering and signals by the military interceptor aircraft, in accordance with ICAO provisions and as published in AIP Cuba, were not followed.
- The Protocol introducing Article 3-bis into the Chicago Convention had not entered into force. Neither Cuba nor the United States had ratified it.[19]

- The rule of customary international law that States must refrain from resorting to the use of weapons against civil aircraft applies irrespective of whether or not such aircraft is within the territorial airspace of that State.[20]

32. The ICAO also notes: "There were several eyewitnesses to the event. Personnel and passengers on board the *Majesty of the Seas* and the crew of the fishing boat *Tri-Liner* observed the destruction of an aircraft (N2456S) as well as the later destruction of another aircraft (N5485S). An observer on duty in an observation post on shore in Havana and the yachtsman on the sailing boat heard and saw one event, but neither of them was able to tell whether he saw the destruction of the first or the second aircraft." [21] According to ICAO, the Majesty of the Seas had an automatic system for recording the time, position, velocity, direction, relative wind, and depth every five minutes, based on an international system for determining position (GPS) and other sensors.[22]

33. Regarding the witnesses, the ICAO states that the watchkeeping staff on the bridge of the Majesty of the Seas, at 15:23 hours, observed an explosion in the air and the debris that fell into the sea. Several passengers and other members of the crew also saw the explosion and the falling debris. The occurrence was recorded in the ship's log. The ICAO further notes that a crewman of the fishing boat *Tri-Liner* heard and saw the explosion directly overhead and called the master, who was below deck. Both observed the aircraft fall into the sea in flames, from 200 to 400 yards astern of their vessel. In addition, a military-type aircraft was seen. The fishing boat turned around, approached the place of the impact, and observed some small debris and an oil slick. A 1.5 ft square orange-colored box or float, with a yellow line attached, was seen but not recovered. The boat remained on the scene for about 10 minutes; no other items came to the surface. The *Tri-Liner* then resumed its course to the north. The master later estimated the time of the explosion as 15:15 hours and the position as 23 30N 082 17W. [23]

34. The Commission has also been able to verify that the extracts from the radio communications exchanged by the MiG-29 and the military control tower in Havana, as supplied by the petitioners, agree with those contained in the ICAO report, as do the adjectives used by the FAC pilots before shooting down the civilian aircraft and the orders they received from their superiors in Havana, Cuba.

35. The International Civil Aviation Organization described the damage done to the civilian pilots and their aircraft in the following terms:

> The pilot and the other occupant of the Cessna 337C, N2456S [Carlos Costa and Pablo Morales], are missing and presumed fatally injured. The pilot was a citizen of the United States, and the other occupant was a legal resident of the United States.
>
> The pilot and the other occupant of the Cessna 337B, N5485S [Mario De La Peña and Armando Alejandre], are missing and presumed fatally injured. Both occupants were citizens of the United States.
>
> The Cessna 337C, N3456S, and the Cessna B, N5485S, were each destroyed by one air-to-air missile fired from a Cuban MiG-29 military aircraft. Both Cessna aircraft broke up in the air from the explosions of the missiles, the wreckage impacted the sea and sank.[24]

36. As regards the pilots of the Cuban Air Force MiGs that were involved in the 24 February 1996 incident, the ICAO noted the following:

> **Pilot of the MiG-29**. The pilot of the MiG-29 was qualified in accordance with existing Cuban Anti-Aircraft Defense/Air Force regulations. The pilot, male, 44 years of age, held the rank of Lieutenant Colonel. His total flying experience was over 1,000 hours, of which about 500 hours were in MiG-29

aircraft. He had been flying MiG aircraft for 19 years and had participated in three international assignments, including 74 combat missions.

Co-pilot of the MiG-29. The co-pilot of the MiG-29 was qualified in accordance with existing Cuban Anti-Aircraft Defense/Air Force regulations. The co-pilot, male, 44 years of age, held the rank of Lieutenant Colonel. His total flying experience was over 1,800 hours. He had been flying for 26 years and had participated in international assignments, including over 30 combat missions.

Pilot of the MiG-23. The pilot of the MiG-23 was qualified in accordance with existing Cuban Anti-Aircraft Defense/Air Force Regulations. The pilot, male, 35 years of age, held the rank of Major. His total flying experience was over 800 hours. He had been flying MiG aircraft for 15 years, and had participated in two international assignments, including some combat missions. [25]

37. The Inter-American Commission, based on the above considerations and on the evidence made available to it, offers the following clarifications regarding the events of 24 February 1996:

i. The incidents described in the petitioners' complaint, together with the evidence they provided, agree in full with the investigations conducted by the International Civil Aviation Organization (ICAO) in their factual description of the events and of the persons directly behind them.

ii. The destruction of the two civilian aircraft in international airspace and the death of their four occupants at the hands of agents of the Cuban Air Force constitute flagrant violations of the right to life.

iii. The fact that weapons of war and combat-trained pilots were used against unarmed civilians shows not only how disproportionate the use of force was, but also the intent to end the lives of those individuals. Moreover, the extracts from the radio communications between the MiG-29 pilots and the military control tower indicate that they acted from a superior position and showed malice and scorn toward the human dignity of the victims.

iv. There is abundant evidence in this case to indicate the presence of the three elements that would make the Cuban State internationally responsible for the deaths of the four pilots in the afternoon of 24 February 1996.

D. The international responsibility of the cuban state

EXISTENCE OF AN ACTION OR FAILURE TO ACT THAT VIOLATES AN OBLIGATION ENSHRINED IN A PROVISION OF CURRENT INTERNATIONAL LAW

38. RIGHT TO LIFE: The first article of the American Declaration of the Rights and Duties of Man enshrines the right to life by stating that "every human being has the right to life, liberty and the security of his person." In addition, the Inter-American Commission has also ruled that the right to life is "the foundation and basis of all other rights,"[26] adding that:

> It can never be suspended. Governments may not use, under any circumstances, illegal or summary execution . . . This type of measures proscribed by the Constitutions of the states and is the international instruments that protect the fundamental rights of persons.[27]

39. The Commission has also stated that "the obligation of respecting and protecting human rights is an obligation *erga omnes,* i.e., one that the Cuban State must assume--like all other member states of the OAS, whether or not they are signatories of the American Convention on Human Rights--toward the inter-American community as a whole, and toward all individuals subject to its jurisdiction, as direct beneficiaries of the human rights recognized by the American Declaration of the Rights and Duties of Man."[28] In this regard, the Inter-American Court of Human Rights has indicated that for the states "the American Declaration is a source of

international obligations. The fact that the Declaration is not a treaty should not lead one to conclude that it has no legal effect…".[29]

40. Furthermore, the public law doctrine regarding international human rights law is very broad in analyzing states' obligations of ensuring respect for the right to life. For example, Héctor Faúndez Ledesma, a Venezuelan jurist and professor at the Central University of Venezuela, has stated that:

> Substantively, the right to life seeks to protect the citizen from the capricious act by one who has state power and who, abusing that power, may feel the temptation to dispose of those who may disturb him . . .
>
> . . . it should be observed that the right to life implies two distinct obligations on the state: first, the obvious consequence is that the state authorities, and in particular the police and military forces, should abstain from causing arbitrary deaths; and second, this guarantee implies the state's duty to protect persons from acts of private persons that may constitute an arbitrary attack on their life, punishing them so as to deter or prevent such attacks.[30]

41. In this regard, the Commission believes that in this case the presence of the first element giving rise to the international responsibility of the Cuban State has been adequately proven: the existence of actions originating with its agents that violated the first obligation set forth in the American Declaration--the right to life of Carlos Costa, Pablo Morales, Mario De La Peña, and Armando Alejandre in the course of the events of 24 February 1996.

42. Neither can the Commission fail to refer to the ICAO's conclusions that the agents of the Cuban State made no effort to use means other than lethal force to guide the aircraft out of the restricted or danger area. The Commission believes that the indiscriminate use of force, and particularly the use of firearms, is an affront to the right to life and personal integrity. In this particular case, the military airplanes acted irregularly: without prior warning, without evidence that their actions were necessary, without keeping things in their correct proportion, and without the existence of due motivation.

43. The United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has stated that "if an agent of the services of repression uses force in excess of that necessary to attain his legitimate goal and a person is killed, that would equate to an arbitrary execution."[31] In the case at hand, the pilots of the civilian light aircraft posed no danger to Cuba's national security, to the Cuban people, or to the military pilots. Regarding the disproportionate use of force and the arbitrary taking of lives, the Inter-American Court of Human Rights has stated that:

> Without question, the State has the right and duty to guarantee its security. It is also indisputable that all societies suffer some deficiencies in their legal orders. However, regardless of the seriousness of certain actions, the power of the State is not unlimited, nor may the State resort to any means to attain its ends. The State is subject to law and morality. Disrespect for human dignity cannot serve as the basis for any State action.[32]

44. In the same regard, the European Court of Human Rights has stated that:

> . . . soldiers [trained] to continue shooting once they opened fire until the suspect was dead. . . . Against this background, the authorities were bound by their obligation to respect the right to life of the suspects to exercise the greatest of care in evaluating the information at their disposal before transmitting it to soldiers whose use of firearms automatically involved shooting to kill.[33]

45. From the circumstances surrounding the events of 24 February 1996, from the disproportionate and indiscriminate use of lethal force applied to the civilian aircraft, from the intensity of that force, and from the way in which the authorities at the Havana military control tower congratulated the MiG-29 pilots after they had carried out their orders, the Commission finds sufficient evidence that Carlos Costa, Pablo Morales, Mario De La Peña, and Armando Alejandre were arbitrarily or extrajudicially executed at the hands of agents of the Cuban State.[34] Consequently, the Cuban State is responsible for violating the right to life, as enshrined in Article I of the American Declaration of the Rights and Duties of Man.

46. RIGHT TO A FAIR TRIAL: The American Declaration sets forth the remedies to which all individuals who believe their rights to have been violated by state authorities shall have access. Thus, Article XVIII stipulates that: "Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights."

47. In the case documents there is no evidence to indicate that the victims' families attempted to exhaust domestic Cuban law in order to secure the prosecution and punishment of the perpetrators of the incident at hand. Nevertheless, the Inter-American Commission has always maintained that in the case of crimes of public action, and even in those which may be prosecuted by a private actor, it is not valid to demand exhaustion of domestic remedies of the victim or the victim's relatives, for the state has a duty to maintain public order, and therefore it has an obligation to set the criminal law system into motion and to process the matter until the end. In other words, the obligation to investigate, prosecute, and punish the persons liable for human rights violations is a non-delegable duty of the state. One consequence is that public employees, unlike private persons, have a legal obligation to denounce all crimes of public action that they come to learn of in performing their duties. The preceding statement is confirmed in those procedural regimes that deny the victim or victim's relatives any standing, as the state monopolizes the ability to press criminal charges. And where such standing is provided for, its exercise is not compulsory, but optional for the person who has suffered harm, and does not take the place of state action.

48. Neither do the documents contain any evidence to indicate that the Cuban State, since 24 February 1996, has made any effort to investigate the incident, identify responsibilities, and punish either the air force pilots who executed the victims or the authorities who authorized the use of lethal force against defenseless civilian aircraft. In this regard, the European Court of Human Rights has stated that:

> A general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the [European] Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios,* agents of the State.[35]

49. The fact that in more than three years no exhaustive investigation was begun under Cuba's domestic laws to study the legitimacy of the force used against the civilian aircraft, that neither the perpetrators nor the individuals who gave the orders from the military control tower have been brought to trial, and that fair reparations have not been made to the relatives of the victims makes the Cuban State responsible for violating the right to a fair trial as set forth in Article XVIII of the American Declaration. The Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the United Nations Commission on Human Rights, Theo Van Boven, analyzed the question of impunity in the following terms:

> Perpetrators of human rights violations, whether civilian or military, become all the more irresponsible if they are not held to account before a court of law.... It may therefore be concluded that in a social and political climate where impunity prevails, the right to reparation for victims of gross violations of human rights and fundamental freedoms is likely to become illusory. It is hard to perceive that a system of justice that cares for the rights of victims can remain at the same time indifferent and inert towards gross misconduct of perpetrators.[36]

ATTRIBUTION OF THE ACTION OR FAILURE TO ACT TO THE STATE

50. After showing that the first element causing the international responsibility of the Cuban State--the actions that violated the American Declaration of the Rights and Duties of Man--was present in the case at hand, the Commission also believes it has been clearly proven that those illicit actions were attributable to the State, in that the responsible agents were officers of the Cuban Air Force and were thus acting in performance of official functions. This is confirmed by the eye-witnesses' reports, the International Civil Aviation Organization's investigation, and the transcript of the radio exchanges between the Havana control tower and the aircraft pilots who

perpetrated the actions. Consequently, the events of 24 February 1996 are attributable to the Cuban State.

THE DAMAGE CAUSED BY THE ILLICIT ACTIONS

51. The final element giving rise to the international responsibility of the Cuban State is the damage caused as a result of the illicit actions carried out by its agents on the afternoon of 24 February 1996. In the Commission's opinion, the damage caused by the illicit actions of the Cuban State involved the following: (a) irreparable physical damage, consisting of the deaths of the four occupants of the civilian aircraft; (b) moral and psychological damage inflicted on the victims' relatives, consisting of emotional suffering over the loss of their loved ones, the trauma arising from the incident and from the impossibility of recovering the bodies to give them a decent burial, combined with the knowledge that justice has not been served--in other words, that the deaths caused by the agents of the Cuban State remain unpunished; and (c) material damage, consisting of loss of earnings and consequential damages.

52. The Inter-American Commission therefore believes that the Cuban State is obliged to: (i) investigate the incident, (ii) take appropriate steps in this regard, (iii) begin proceedings against the State agents and/or other authorities responsible for the incident, and (iv) provide the victims' families with adequate reparations.

V. CONCLUSIONS

53. Cuba is responsible for violating the right to life (Article I of the American Declaration of the Rights and Duties of Man) to the detriment of Carlos Costa, Pablo Morales, Mario De La Peña, and Armando Alejandre, who died as a result of the direct actions of its agents on the afternoon of 24 February 1996 while flying through international airspace.

54. Cuba is responsible for violating the right to a fair trial (Article XVIII of the American Declaration of the Rights and Duties of Man) to the detriment of the relatives of Carlos Costa, Pablo Morales, Mario De La Peña, and Armando Alejandre, in that to date the Cuban authorities have not conducted an exhaustive investigation with a view toward prosecuting and punishing the perpetrators and have not indemnified those same relatives for the damage they suffered as a result of those illicit acts.

VI. RECOMMENDATIONS

Based on the analysis and conclusions contained in this report, the Inter-American Commission on Human Rights recommends that the Cuban State:

1. Conduct a complete, impartial, and effective investigation to identify, prosecute, and punish the agents of the State responsible for the deaths of Carlos Costa, Pablo Morales, Mario De La Peña, and Armando Alejandre in the incident occurring in international airspace on 24 February 1996.

2. Ratify the Protocol to the International Civil Aviation Convention (Article 3-bis), an international instrument of which Cuba has been a signatory since 7 December 1944.

3. Take the steps necessary to ensure that the victims' families receive adequate and timely compensation, including full satisfaction for the human rights violations described herein and payment of fair compensatory indemnification for the monetary and nonmonetary damages suffered, including moral damages.

VII. PUBLICATION

In a note dated May 19, 1999, the Commission transmitted to the Cuban State its Report Nº 81/99, pertaining to this case, and granted it a period of two months in which to implement the recommendations contained therein, pursuant to Article 53, subparagraphs 1 and 2, of its Regulations.

The Cuban State neither presented any observations nor implemented the Commission's recommendations.

On the basis of those considerations, and pursuant to Article 53, subparagraphs 3 and 4, of its Regulations, the Commission has decided to reiterate the conclusions and recommendations set

forth in this report, to publicize it, and to include it in the Commission's Annual Report to the OAS General Assembly. In fulfillment of its mandate, the Commission will continue to evaluate the measures taken by the Cuban State regarding those recommendations, until they have been fully implemented.

The Commission has decided to transmit this report to the State of Cuba and to the petitioners, pursuant to 53(4) of the Regulations.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., on September 29, 1999. (Signed): Robert K. Goldman, Chairman; Hélio Bicudo, First Vice-Chairman; Claudio Grossman, Second Vice- Chairman; Commissioners Jean Joseph Exumé, Alvaro Tirado Mejía and Carlos Ayala Corao.

[Table of Contents | Previous | Next]

---

[1] "Brothers to the Rescue," also known as *Hermanos al Rescate,* is a nonprofit organization founded by citizens, mainly civilian pilots, on 12 May 1991, and registered as a not-for-profit corporation in the public records of the State of Florida, United States of America. For more than eight years they have been patrolling the Straits of Florida to assist the "rafters" (boat people).

[2] Article 40(2): Separation and Combination of Cases. When two petitions deal with the same facts and persons, they shall be combined and processed in a single file.

[3] Article 42: The facts reported in the petition whose pertinent parts have been transmitted to the government of the State in reference shall be presumed to be true if, during the maximum period set by the Commission under the provisions of Article 34 paragraph 5, the government has not provided the pertinent information, as long as other evidence does not lead to a different conclusion.

[4] See first paragraph of this report.

[5] A third Brothers to the Rescue Cessna 337 also left on this mission. This aircraft returned unharmed.

[6] See Transcripts of Cuban Military Radio Communications, International Civil Aviation Organization (ICAO), *Report on the shooting down of two U.S.-registered private civil aircraft by Cuban military aircraft on 24 February 1996*, C-WP/10441, June 20, 1996, pp. 35 ff., United Nations, Security Council, S/1996/509, July 1, 1996.

[7] These rules have been set forth in several international documents. See, for example, the International Civil Aviation Convention, 7 December 1944, 61 Stat. 1180, 15 U.N.T.S. 295 (both the USA and Cuba are parties to this convention). The ban on the use of force against civilian aircraft applies even if they have entered the airspace of a foreign country. See, for example, Kay Hailbronner, *Freedom of the Air and the Convention on the Law of the Sea,* 77 Am. J. Int'l. L. 490, 514 (1983), ("Even if an order to land is deliberately disregarded, a civil unarmed aircraft that intrudes into foreign airspace may not be fired upon."). Common sense dictates that the insignificant threat that civil airplanes may pose does not justify a potential loss of life.

[8] The Cuban Air Force is clearly an agent of the Cuban state, as it acts on Cuba's behalf and is subject to Cuba's control. See Archer v. Trans/American Servs., Ltd., 834 F. 2d 1570, 1573 (11no. Cir. 1988); Redefinition (Second) of Agency & 1 (1958) (defining the relationship between agencies).

[9] The rules governing territorial waters and their permissible limits can be found in the United Nations Convention on the Law of the Sea, 7 October 1982, Art. 3, U.N. Doc. A/CONF 62/122 (1981), reprinted in 21 I.L.M. 1261 (1982).

[10] The many international human rights instruments that forbid extrajudicial executions include the following: the Universal Declaration of Human Rights, 10 December 1948, Art. 3, G.A. Res. 217A (III), U.N. Doc. A/810; the International Covenant on Civil and Political Rights, 16 December 1966, Art. 6(1), G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. a/6316, 999 U.N.T.S. 171; American Declaration of the Rights and Duties of Man, 2 May 1948, Art. I, OEA/ser.L/V/II.23, doc.21, rev. 6 (1979). Moreover, the international community's commitment to resolving disputes peacefully is a fundamental part of the structure of the United Nations Charter and of other international instruments. U.N. Charter, Articles 1, 2, 33, 39; see also Charter of the Organization of American States, Articles 24-27, 3 paragraph I.

[11] Inter-American Court of Human Rights, Advisory Opinion OC-10/89, July 14, 1989, *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, paragraphs 43 to 46.

[12] Third operative paragraph of resolution VI of the Eighth Meeting of Consultation of Ministers of Foreign Affairs of the OAS, Punta del Este, Uruguay, OEA/Ser.F/II.8, doc. 68, pages 14-15.

[13] Charter, Article 3.k. See American Declaration, Article II. See also Inter-American Conference on Problems of War and Peace, Resolution XL (1945), which indicates that one of the aims of instituting a regional human rights system was to eliminate violations of the principle of "equality between nationals and aliens."

[14] For example, "Where agents of the state, whether military or civilian, exercise power and authority (jurisdiction or *de facto* jurisdiction) over persons outside national territory, the presumption should be that the state's obligation to respect the pertinent human rights continues." Theodor Meron, in *Extraterritoriality of Human Rights Treaties,* 89 A.J.I.L. 78 (1995) 78, 81. See also n. 7, citing T. Buergenthal, "To Respect and Ensure: State Obligations and Permissible Derogations," in *The International Bill of Rights: The Covenant on Civil and Political Rights* 72, 74 (Louis Henkin ed. 1981).

[15] Instances in which the Commission has dealt with extraterritorial actions of a state, under the terms of its Statute and the American Declaration, can be found in IACHR, Report on the Situation of Human Rights in Chile, OEA Ser.L/V/II.66, doc. 17, 1985 (referring to the murder of Letelier in Washington, D.C.); Second Report on the Situation of Human Rights in Suriname, OEA Ser.L/V/II.66, doc. 21, rev. 1, 1985 (on allegations that Surinamese residents of Holland have been harassed and/or assaulted by agents of Suriname); Case 1.983 (opened on the basis of allegations of extraterritorial actions; set aside for another reason); Report on case 9.239, United States, published in the 1986-87 Annual Report of the IACHR, OEA Ser. L/V/II.71, doc. 9 rev. 1, September 22, 1987, p. 184 (in which the case pertaining to actions by United States forces in Grenada is found admissible; case settled, see Report 3/96, published in the 1995 Annual Report of the IACHR, OEA/Ser.L/V/II.91, doc. 7 rev., February 28, 1996, p. 201); Report 31/93, Case 10.573, United States, published in 1993 Annual Report of the IACHR, OEA/Ser.L/V/II.85, doc. 9, rev., February 11, 1994, p. 312 (in which the case pertaining to actions by United States forces in Panama is found admissible).

[16] European Court Human Rights, *Lozidou v. Turkey* A 310 paragraphs 56-64 (1995). European Commission of Human Rights *X v. UK* No. 7547/76, 12 DR 73 (1977); *Bertrand Russell Peace Foundation Ltd. v. UK*, No. 7597/76, 14 DR 117 at 124 (1978); *Mrs. W v. UK* No. 9348/81, 32 DR 190 (1983).

[17] Inter-Am.Ct.H.R., Velásquez Rodríguez Case, Preliminary Objections, Judgment of 26 June 1987, Series C, No. 1, OAS, p. 38, paragraph 88.

[18] According to the ICAO report, Page 13, footnote 18: According to the ICAO report: "The MiG-29 UB is a two-seat combat trainer that has been in production since 1982. It is powered by two Tumansky R-33D turbo-fan engines. It has one 30 mm gun, infra-red sensor, laser rangefinder and underwing pylons for six close-range air-to-air missiles. Maximum speed is Mach 2.3, service ceiling 17,000 m, take-off distance 240 m and landing distance 600 m. The MiG-29 carried six R-73 air-to-air missiles. The R-73 is a close-range solid propellant air-to-air missile with infra-red homing guidance. It has a canard configuration with small cruciform control surfaces in tandem with nose foreplanes and cruciform rear mounted wings. This configuration provides high manoeuvrability with a minimum range of under 500 m. The R-73 missile is 2.90 m long, 17 cm in diameter, has a mass of 105 kg and a maximum range of 20 km. The missile has both a contact and a proximity fuse. It has a 7.4 kg explosive charge that creates a ring shape of shrapnel that moves forward and outwards. The MiG-23 ML is a single-seat variable geometry air combat fighter that was in production from 1973 to the mid-1980s. It is powered by one Tumansky R-35F-300 turbojet with afterburner. It has one 23 mm gun; J band multi-mode radar; head-up display; pylons for air-to-air missiles, bombs, rocket packs or other external stores. Maximum speed is Mach 2.35, service ceiling 18,000 m, take-off distance 500 m and landing distance 750 m." International Civil Aviation Organization (ICAO), *Report on the shooting down of two U.S.-registered private civil aircraft by Cuban military aircraft on 24 February 1996*, C-WP/10441, June 20, 1996, p. 18, paragraphs 1.6.6.1, 1.6.6.2, and 1.6.7.1, in United Nations, Security Council, S/1996/509, July 1, 1996.

[19] Both Cuba and the USA are parties to the International Civil Aviation Convention (Chicago, 7 December 1944). On 10 May 1984, the ICAO Assembly, attended by 107 states parties, including Cuba and the United States, unanimously adopted a Protocol regarding an amendment of the International Civil Aviation Convention [Article 3-bis]. This Protocol reads as follows: "[a] The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations. [b] The contracting States recognize that every State, in the exercise of its sovereignty, is entitled to require the landing at some designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of this Convention; it may also give such aircraft any other instructions to put an end to such violations. For this purpose, the contracting States may resort to any appropriate means consistent with relevant rules of international law, including the relevant provisions of this Convention, specifically paragraph (a) of this Article. Each contracting State agrees to publish its regulations in force regarding the interception of civil aircraft. [c] Every civil aircraft shall comply with an order given in conformity with paragraph (b) of this Article. To this end each contracting State shall establish all necessary provisions in its national laws or regulations to make such compliance mandatory for any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State. Each contracting State shall make any violation of such applicable laws or regulations punishable by severe penalties and shall submit the case to its competent authorities in accordance with its laws or regulations. [d] Each contracting State shall take appropriate measures to prohibit the deliberate use of any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State for any purpose inconsistent with the aims of this Convention. This provision shall not affect paragraph (a) or derogate from paragraphs (b) and (c) of this Article."

[20] United Nations, Security Council, ICAO Report, *op. cit.,* pp. 92–93, S/1996/509, 1 July 1996.

[21] United Nations, ICAO Report, *op. cit.*, p. 10, paragraph 1130.

[22] *Ibid.,* p. 8, paragraph 1118.

[23] *Ibid.,* pp. 10–12, paragraphs 1131 and 1132.

[24] United Nations, ICAO Report, *op. cit.,* p. 15, paragraphs 122, 123, and 131.

[25] *Ibid.,* p. 16, paragraphs 154, 155, and 156.

[26] IACHR, Ten Years of Activities 1971–1981, General Secretariat of the Organization of American States, Washington D.C., 1982, p. 331.

[27] *Ibid.*

[28] IACHR, Report No. 47/96, Case 11.476, Victims of the Tugboat "13 de Marzo" vs. Republic of Cuba, OEA/Ser.L/V/II.93, Doc. 32, 16 October 1996, p. 20, paragraph 77.

[29] Inter-American Court of Human Rights, Advisory Opinion OC-10/89, July 14, 1989, Series A: Judgments and Opinions, *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, paragraphs 45 and 47.

[30] Héctor Faúndez Ledesma, *Administración de Justicia y Derecho Internacional de los Derechos Humanos (El Derecho a un Juicio Justo),* Central University of Venezuela, Faculty of Legal and Political Sciences, 1992, pp. 61–62.

[31] Quoted in O'Donell, Daniel, *Protección Internacional de los Derechos Humanos*, Andean Commission of Jurists, Lima, Peru, 1983, p. 52.

[32] Inter-Am.Ct.H.R., Neira Alegría *et al.* vs. Republic of Peru, Judgment of 19 January 1995, paragraph 75.

[33] European Court of Human Rights, Strasbourg, Decisions and Reports, Judgment of 27 September 1995, No. 17/1994/464/545, McCann and Others vs. The United Kingdom, p. 263.

[34] In his report for the year in which the incident occurred, the United Nations Rapporteur for Cuba at the time stated that "the shooting down of these aircraft was a premeditated act and that it constituted a violation of the right to life . . . the manner in which the events took place, particularly the fact that approximately six minutes elapsed between the shooting down of one aircraft and that of the other, irrefutably indicates that the act did not represent the reflex of some confused pilots, but that there had been enough time for them to receive precise orders to act as they did." (United Nations, General Assembly, Report on the Situation of Human Rights in Cuba, A/51/460, 7 October 1996, p. 13, paragraph 32.) Similarly, the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has defined arbitrary executions as "the arbitrary deprivation of life as a result of the killing of persons carried out by the order of a government or with its complicity or tolerance or acquiescence without any judicial or legal process". (United Nations, Doc. E/CN.4/1983/16, paragraph 66.)

[35] European Court of Human Rights, McCann and Others vs. United Kingdom, *op. cit.*, p. 56, paragraph 161.

[36] United Nations, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45th session, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms,* Final Report submitted by Mr. Theo Van Boven, Special Rapporteur, paragraph 130, p. 58, E/CN.4/Sub.2/1993/8, 2 July 1993.

Annex 85

INTER-AMERICAN COURT OF HUMAN RIGHTS

ADVISORY OPINION OC-23/17
OF NOVEMBER 15, 2017
REQUESTED BY THE REPUBLIC OF COLOMBIA

THE ENVIRONMENT AND HUMAN RIGHTS

(STATE OBLIGATIONS IN RELATION TO THE ENVIRONMENT IN THE CONTEXT OF THE PROTECTION AND GUARANTEE OF THE RIGHTS TO LIFE AND TO PERSONAL INTEGRITY: INTERPRETATION AND SCOPE OF ARTICLES 4(1) AND 5(1) IN RELATION TO ARTICLES 1(1) AND 2 OF THE AMERICAN CONVENTION ON HUMAN RIGHTS)

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court"), composed of the following judges:

Roberto F. Caldas, President
Eduardo Ferrer Mac-Gregor Poisot, Vice President
Eduardo Vio Grossi, Judge
Humberto Antonio Sierra Porto Judge
Elizabeth Odio Benito, Judge
Eugenio Raúl Zaffaroni, Judge, and
L. Patricio Pazmiño Freire, Judge

also present,

Pablo Saavedra Alessandri, Secretary, and
Emilia Segares Rodríguez, Deputy Secretary,

pursuant to Article 64(1) of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") and Articles 70 to 75 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), issues the following advisory opinion, structured as follows:

TABLE OF CONTENTS

I. PRESENTATION OF THE REQUEST 4

II. PROCEEDING BEFORE THE COURT 6

III. JURISDICTION AND ADMISSIBILITY 10

A. The Court's advisory jurisdiction in relation to this request 11

B. Requirements for the admissibility of the request 12

IV. GENERAL CONSIDERATIONS 15

A. The purpose and scope of this Advisory Opinion and the terms of the questions raised by the requesting State 15

B. The structure of this Advisory Opinion 17

V. INTERPRETATION CRITERIA 18

VI. ENVIRONMENTAL PROTECTION AND THE HUMAN RIGHTS RECOGNIZED IN THE AMERICAN CONVENTION 20

A. The interrelationship between human rights and the environment 20

B. Human rights affected by environmental degradation, including the right to a healthy environment 24

VII. THE WORD "JURISDICTION" IN ARTICLE 1(1) OF THE AMERICAN CONVENTION IN ORDER TO DETERMINE STATE OBLIGATIONS IN RELATION TO ENVIRONMENTAL PROTECTION 32

A. Scope of the word "jurisdiction" in Article 1(1) of the American Convention in order to determine State obligations 32

B. State obligations under special environmental protection regimes.....35

C. Obligations regarding transboundary damage 40

D. Conclusion 43

VIII. DUTIES DERIVED FROM THE OBLIGATIONS TO RESPECT AND TO ENSURE THE RIGHTS TO LIFE AND TO PERSONAL INTEGRITY, IN THE CONTEXT OF ENVIRONMENTAL PROTECTION44

A. The rights to life and to personal integrity in relation to environmental protection 44

A.1 Meaning and scope of the rights to life and to personal integrity in the face of potential environmental damage 44

A.2. Obligations to respect and to ensure the rights to life and to personal integrity in the face of potential environmental damage 47

B. State obligations in the face of potential environmental damage in order to respect and to ensure the rights to life and to personal integrity 49

B.1 Obligation of prevention 51

B.1.a Sphere of application of the obligation of prevention 53

B.1.b Type of damage to be prevented 53

B.1.c Measures States must take to comply with the obligation of prevention 55

i) Duty to regulate.....56

ii) Duty to supervise and monitor.....59

iii) Duty to require and approve environmental impact assessments.....60

iv) Duty to prepare a contingency plan 66

v) Duty to mitigate if environmental damage occurs 67
B.1.d Conclusion regarding the obligation of prevention 68
B.2 The precautionary principle 68
B.3 Obligation of cooperation 71
B.3.a Duty to notify 72
i) Moment of notification 74
ii) Content of the notification 75
iii) Conclusion with regard to the duty of notification 76
B.3.b Duty to consult and negotiate with potentially affected States 76
i) Moment and form of the consultation 77
ii) Duty to consult and negotiate in good faith 78
iii) Conclusion regarding the duty to consult and negotiate 79
B.3.c Exchange of information 79
B.3.d Conclusion with regard to the obligation of cooperation 80
B.4 Procedural obligations to ensure the rights to life and to personal integrity in the context of environmental protection 81
B.4.a Access to information 81
i) Meaning and scope of this obligation in relation to the environment 84
ii) Restrictions to access to information 85
iii) Conclusion regarding access to information 86
B.4.b Public participation 86
B.4.c Access to justice 88
i) Access to justice in cases of transboundary harm 89
B.4.d Conclusion regarding procedural obligations 90
B.5 Conclusions with regard to State obligations 90
IX. OPINION 91

I
PRESENTATION OF THE REQUEST

1. On March 14, 2016, the Republic of Colombia (hereinafter "Colombia" or "the requesting State") presented a request for an advisory opinion based on Article 64(1)[1] of the American Convention and Article 70(1) and 70(2)[2] of the Rules of Procedure concerning State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity (hereinafter "the request"). The Court was asked to determine "how the Pact of San José should be interpreted when there is a danger that the construction and operation of major new infrastructure projects may have severe effects on the marine environment in the Wider Caribbean Region and, consequently, on the human habitat that is essential for the full enjoyment and exercise of the rights of the inhabitants of the coasts and/or islands of a State Party to the Pact, in light of the environmental standards recognized in international customary law and the treaties applicable among the respective States." In addition, the requesting State asked the Court to determine "how the Pact of San José should be interpreted in relation to other treaties concerning the environment that seek to protect specific areas, such as the Convention for the Protection and Development of the Marine Environment in the Wider Caribbean Region, in the context of the construction of major infrastructure projects in States that are party to such treaties, as well as the respective international obligations concerning prevention, precaution, mitigation of damage, and cooperation between the States potentially affected."[3]

2. Colombia explained the considerations that led to the request and indicated that:

> [According to Colombia, t]he situation that led to the presentation of this request for an advisory opinion relates to the severe degradation of the marine and human environment in the Wider Caribbean Region that may result from the acts and/or omissions of States that border the Caribbean Sea in the context of the construction of major new infrastructure projects.
>
> In particular, this request for an advisory opinion is the result of the development of major new infrastructure projects in the Wider Caribbean Region that, owing to their dimensions and permanence, may cause significant harm to the marine environment and, consequently, to the inhabitants of the coastal areas and islands located in this region who depend on this environment for their subsistence and development. […]
>
> [The requesting State indicated that] this problem is of interest not only to the States of the Wider Caribbean Region – whose coastal and island population may be directly affected by any environmental damage suffered by this region – but also to the international community. This is because, nowadays, major infrastructure projects are frequently constructed and operated in maritime areas that have effects which may go

---

[1] Article 64 of the American Convention: "1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court. 2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments."

[2] The relevant parts of Article 70 of the Court's Rules of Procedure establish that: "1. Requests for an advisory opinion under Article 64(1) of the Convention shall state with precision the specific questions on which the opinion of the Court is being sought. 2. Requests for an advisory opinion submitted by a Member State or by the Commission shall, in addition, identify the provisions to be interpreted, the considerations giving rise to the request, and the names and addresses of the Agent or the Delegates."

[3] The complete text of the request [in Spanish only] can be consulted on the Court's website at the following link: http://www.corteidh.or.cr/solicitudoc/solicitud_14_03_16_esp.pdf.

beyond state borders and ultimately have negative repercussions on the quality of life and personal integrity of those who depend on the marine environment for their subsistence and development. […]

The protection of the human rights of the inhabitants of the islands of the Wider Caribbean Region and, consequently, the prevention and mitigation of environmental damage in this area, is an issue of particular interest to Colombia, because part of its population lives on the islands that form part of the Archipelago of San Andrés, Providencia and Santa Catalina and they therefore depend on the marine environment for their survival, and economic, social and cultural development. […]

Owing to the ecological and oceanographic interconnectedness of the Wider Caribbean Region – a well-documented situation – it is vitally important that the problems of the marine environment be dealt with taking into consideration the effects on relevant areas and the ecosystem as a whole, with the cooperation of the other States that could be affected. […]

The construction, maintenance and operation of major infrastructure projects may have a severe impact on the environment and, therefore, on the populations that inhabit the areas that may be directly or indirectly affected as a result of such projects. […]

The increased levels of sediment in the Wider Caribbean Region, and specifically in the Caribbean Sea, could cause a wide range of irreparable harm to the marine ecosystem […]. In addition, the maritime traffic generated or increased by the development of major new infrastructure projects in the Caribbean would also increase the risk of pollution of the marine environment on which the habitat of the inhabitants of the Colombian islands and the populations of other coastal States depends. […]

The pollution of the marine environment of the Wider Caribbean Region that may result from […] the above-mentioned causes may have long-lasting and, at times, irreparable effects on the marine flora and fauna and, consequently, on the (already fragile) capacity of the ecosystem to provide an income from tourism and fishing for the inhabitants of the Region's coasts and islands. Furthermore, it should be underlined that this type of damage to the marine environment not only subsists over time, but tends to worsen, affecting both present and future generations. […]

Based on the foregoing, there can be no doubt that the construction and operation of major new infrastructure projects in the Wider Caribbean Region may have a negative and irreparable effect on a decent life, and also on the quality of life, of the inhabitants of the coasts and, particularly, of the islands located in this region, and also on their possibilities of economic, social and cultural development and on their physical, mental and moral integrity. These factual circumstances and, therefore, the need to implement appropriate and effective projects to prevent and mitigate environmental damage when developing major new infrastructure projects in the Wider Caribbean Region – with the cooperation of the States potentially affected – comprise the factual context that forms the basis for this request for an advisory opinion.

3. Accordingly, Colombia submitted the following specific questions to the Court:

I. Based on the provisions of Article 1(1) of the Pact of San José, should it be considered that a person, even if he or she is not in the territory of a State Party, is subject to the jurisdiction of that State in the specific case in which, the four conditions described below are met cumulatively?

1. that the person resides in, or is inside, an area delimited and protected by the environmental protection regime of a treaty to which that State is a party;
2. that the said treaty-based regime establishes an area of functional jurisdiction, such as the one established in the Convention for the Protection and Development of the Marine Environment in the Wider Caribbean Region;

3. that, in this area of functional jurisdiction, the States parties have the obligation to prevent, reduce and control pollution as the result of a series of general and/or specific obligations, and
4. that, as a result of damage to the environment or the risk of environmental damage in the area protected by the respective convention that can be attributed to the State party – to that convention and to the Pact of San José – the human rights of the person in question have been violated or are threatened.

II. Are the measures and conducts that, owing to an act and/or omission of one of the States parties, have effects which may cause serious damage to the marine environment – which constitutes the living environment and an essential source of the livelihood of the inhabitants of the coast and/or islands of another State party – compatible with the obligations set out in Articles 4(1) and 5(1), read in relation to Article 1(1) of the Pact of San José? Or any other permanent provision?

III. Should we interpret, and to what extent, the provisions establishing the obligation to respect and to ensure the rights and freedoms set out in Articles 4(1) and 5(1) of the Pact, in the sense that these provisions give rise to the obligation of the States Parties to the Pact to respect the provisions of international environmental law which seek to prevent environmental damage that could limit the effective enjoyment of the rights to life and to personal integrity, or make this impossible, and that one of the ways to comply with this obligation is by making environmental impact assessments in areas protected by international law, and by cooperation among the States that are affected? If applicable, what general parameters should be considered when making environmental impact assessments in the Wider Caribbean Region, and what should their minimum content be?

4. Colombia appointed Ricardo Abello Galvis as its Agent.

II
PROCEEDING BEFORE THE COURT

5. In notes of May 18, 2016, the Secretariat of the Court (hereinafter "the Secretariat"), pursuant to the provisions of Article 73(1)[4] of the Rules of Procedure, forwarded the request to the other Member States of the Organization of American States (hereinafter "the OAS"), the OAS Secretary General, the President of the OAS Permanent Council, the President of the Inter-American Juridical Committee, and the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission"). In these notes, the Secretariat advised that the President of the Court, in consultation with the other judges, had established September 19, 2016, as the time limit for presenting written observations on the said request. Also, on the instructions of the President and as established in Article 73(3)[5] of the said Rules of Procedure, in notes of May 18, 2016, the Secretariat invited various civil society and international organizations as well as academic establishments in the region to forward their written opinion on the questions submitted to the Court within the aforementioned time frame. Lastly, an open invitation was issued on the Inter-American Court's website to all those interested in presenting their

[4] Article 73(1) of the Court's Rules of Procedure establishes that: "Upon receipt of a request for an advisory opinion, the Secretary shall transmit copies thereof to all of the Member States, the Commission, the Permanent Council through its Presidency, the Secretary General, and, if applicable, to the OAS organs whose sphere of competence is referred to in the request."

[5] Article 73(3) of the Court's Rules of Procedure stipulates that: "The Presidency may invite or authorize any interested party to submit a written opinion on the issues covered by the request. If the request is governed by Article 64(2) of the Convention, the Presidency may do so after prior consultation with the Agent."

written opinion on the questions submitted to the Court. The original time limit was extended until January 19, 2017; those interested had around eight months to forward their submissions.

6. At the expiry of the time frame, the Secretariat had received additional observations from the requesting State and also the following briefs with observations:[6]

Written observations presented by OAS Member States:

1. Argentine Republic (hereinafter "Argentina")
2. Plurinational State of Bolivia (hereinafter "Bolivia")
3. Republic of Honduras (hereinafter "Honduras")
4. Republic of Panama (hereinafter "Panama);

Written observations presented by OAS organs:

5. Inter-American Commission on Human Rights
6. The representative of the OAS General Secretariat and the World Commission on Environmental Law of the International Union for Conservation of Nature;[7]

Written observations presented by international organizations:

7. International Maritime Organization;

Written observations presented by State agencies, national and international associations, non-governmental organizations and academic establishments:

8. Interamerican Association for Environmental Defense
9. Center for International Environmental Law and Vermont Law School Center for Applied Human Rights
10. Human Rights Center of the Law School at the Universidad de Buenos Aires
11. Center for Human Rights Studies of the Universidad Autónoma de Yucatán
12. International Center for Comparative Environmental Law
13. Centro Mexicano de Derecho Ambiental A.C.
14. Human Rights Legal Clinic at the Pontificia Universidad Javeriana, Cali campus
15. Human Rights Commission of the Federal District of Mexico
16. National Human Rights Commission of Mexico
17. Conservation Clinic & Costa Rica Program on Sustainable Development, Law, Policy & Professional Practice at the University of Florida Levin College of Law
18. Environmental Law Alliance Worldwide
19. Law School at the Universidad EAFIT
20. Law School at the Universidad Sergio Arboleda, Colombia
21. European Center for Constitutional and Human Rights
22. Law School at the Universidad Católica del Uruguay
23. Biosphere Foundation
24. Public Action Group of the Jurisprudence Faculty at the Universidad del Rosario

---

[6] The observations on the request for an advisory opinion presented by Colombia can be consulted on the Court's website at the following link: http://www.corteidh.or.cr/cf/jurisprudencia2/observaciones_oc.cfm?nId_oc=1650.

[7] The brief was presented on behalf of the World Commission on Environmental Law of the International Union for Conservation of Nature. During the public hearing, the representative of the OAS General Secretariat, Claudia S. De Windt, explained that the OAS General Secretariat made this presentation "jointly" with the World Commission on Environmental Law "of which the General Secretariat is a member, in addition to being on the Board of the World Commission on Environmental Law."

25. Group of students from the Escuela Libre de Derecho;
26. Environmental Law and Policy Research Group at the Universidad Nacional de Colombia
27. Public Interest and Litigation Group at the Universidad del Norte
28. Democracy and Human Rights Institute at the Pontificia Universidad Católica del Peru
29. Office for Raizal Ethnic Affairs of the Archipelago of San Andrés, Providencia and Santa Catalina
30. Rede Amazônica de Clínicas de Direitos Humanos
31. Universidad Centroamericana José Simeón Cañas

Written observations presented by members of civil society:

32. Ana María Mondragón Duque and Karina G. Carpintero
33. Alberto Madero Rincón, Sebastián Rubiano-Groot, Daniela María Rojas García, Nicolás Ramos Calderón and Nicolás Caballero Hernández
34. Alejandra Gonza, Adam Hayne and Michelle Sue
35. Alejandra Gutiérrez Vélez and Laura Castellanos
36. Alfredo Ortega Franco
37. Antonio José Rengifo Lozano
38. Belén Olmos Giupponi, Cristián Delpiano Lira and Christian Rojas Calderón
39. Benjamín Benítez Jerezano, Gina Larissa Reyes Vásquez, Luis Ovidio Chinchilla Fuentes and Nadia Stefania Mejía Amaya
40. Christoph Schwarte
41. Eduardo Biacchi Gomes, Danielle Anne Pamplona, Adrian Mohamed Nunes Amaral, Ane Elise Brandalise Gonçalves, Amanda Carolina Buttendorff, Aníbal Alejandro Rojas Hernandez, Bruna Werlang Paim, Juliane Tedesco Andretta, Mariana Kaipper de Azevedo, Lincoln Machado Domingues, Henrique Alef Burkinsky Pereira, Luis Alexandre Carta Winter, João Paulo Josbiak Dresch and Simone dos Reis Bieleski Marques
42. Hermilo de Jesús Lares Contreras
43. Jorge Alberto Pérez Tolentino
44. Jorge E. Viñuales
45. José Manuel Pérez Guerra
46. Judith Ponce Ruelas, José Benjamín González Mauricio and Rafael Ríos Nuño
47. Matías Nicolás Kuret, Rodrigo Carlos Méndez Martino, Nicolás Mariano Toum and María Agostina Biritos
48. Noemí Sanín Posada and Miguel Ceballos Arévalo
49. Pedro Gonsalves de Alcântara Formiga
50. Santiago Díaz-Cediel, Ignacio F. Grazioso and Simon C. Milnes
51. Silvana Insignares Cera, Meylin Ortiz Torres, Juan Miguel Cortés and Orlando De la Hoz Orozco.

7. Following the conclusion of the written procedure, and pursuant to Article 73(4) of the Rules of Procedure,[8] on February 10, 2017, the President of the Court issued an order calling for a public hearing,[9] and invited the OAS Member States, the OAS Secretary General, the President of the OAS Permanent Council, the President of the Inter-American

[8] Article 73(4) of the Court's Rules of Procedure: "[a]t the conclusion of the written proceedings, the Court shall decide whether oral proceedings should take place and shall establish the date for a hearing, unless it delegates the latter task to the Presidency. Prior consultation with the Agent is required in cases governed by Article 64(2) of the Convention."

[9] Available at: http://www.corteidh.or.cr/docs/asuntos/solicitud_10_02_17_esp.pdf.

Juridical Committee, the Inter-American Commission, and members of various organizations, civil society and academic establishments, as well as individuals who had submitted written observations, to present their oral comments on the request made to the Court.

8. The public hearing was held on March 22, 2017, during the fifty-seventh special session of the Inter-American Court of Human Rights held in Guatemala City, Guatemala.

9. The following persons appeared before the Court:[10]

1. For the Republic of Colombia: Ricardo Abello Galvis, Colombia's Agent before the Inter-American Court of Human Rights and Head of Delegation; Carlos Manuel Pulido Collazos, Ambassador of Colombia to Guatemala and Alternate Head of Delegation; Andrés Villegas Jaramillo, Adviser to the Colombian Ministry of Foreign Affairs; César Felipe González Hernández, Minister Plenipotentiary of the Colombian Embassy in Guatemala; Juan Manuel Morales Caicedo, Adviser to the Colombian Ministry of Foreign Affairs; Jenny Sharyne Bowie Wilches, Third Secretary of the Colombian Ministry of Foreign Affairs, and Juan-Marc Thouvenin, International consultant;

2. For the Republic of Guatemala: Wendy Cuellar Arrecis, Director, Unit to Monitor International Human Rights Cases; Andrés Uban, Nidia Juárez, Lesbia Contreras, Steffany Rebeca Vásquez and Francisca Marroquín, members of the Presidential Commission to Coordinate the Executive's Human Rights Policy (COPREDEH); Carlos Hugo Ávila, Director for Human Rights of the Ministry of Foreign Affairs;

3. For the Argentine Republic: Javier Salgado;

4. Por the Republic of Honduras: Ricardo Lara Watson, Assistant Attorney General of the Republic, Deputy Agent for the State of Honduras and Head of the Delegation; Olbín Mejía Cambar, Human Rights Office of the Office of the Attorney General, and Luis Ovidio Chinchilla Fuentes, Officer responsible for Human Rights Conventions and Monitoring of the Secretary of State for Human Rights, Justice, Governance and Decentralization;

5. For the Plurinational State of Bolivia: Ernesto Rosell Arteaga from the Office of the Attorney General;

6. For the Inter-American Commission on Human Rights: Jorge H. Meza Flores, consultant;

7. For the OAS General Secretariat: Claudia S. de Windt, and for the World Commission on Environmental Law of the International Union for Conservation of Nature: María L. Banda;

8. For the Law School of the Universidad Sergio Arboleda: Andrés Sarmiento;

9. For the Mexican Center for Environmental Law: Anaid Velasco;

10. Nadia Stefanía Mejía Amaya;

11. Silvana Insignares Cera;

12. Simon Milnes, Santiago Díaz-Cediel and Ignacio Grazioso;

13. For the Office for Raizal Ethnic Affairs of the Archipelago of San Andrés, Providencia and

[10] The video of the hearing and the interventions of participating delegations and individuals is available at: https://vimeo.com/album/4520997.

Santa Catalina: Walt Hayes Bryan, Endis Livingston Bernard and Ofelia Livingston de Barker;

14. For the Human Rights Legal Clinic at the Pontificia Universidad Javeriana, Cali campus: Raúl Fernando Núñez Marín, Santiago Botero Giraldo and Estuardo Rivera;

15. For the Public Interest and Litigation Group at the Universidad del Norte: Shirley Llain Arenilla;

16. Nicolás Eduardo Ramos Calderón;

17. For the group of students from the Escuela Libre de Derecho: Luis M. Díaz Mirón, Elí Rodríguez Martínez, Juan Pablo Vásquez Calvo, Manuel Mansilla Moya, Carmen Andrea Guerrero Rincón, Adriana Méndez Martínez, José Emiliano González Aranda and Agustín Roberto Guerrero Rodríguez;

18. For the Human Rights Research Center at the Universidad Autónoma de Yucatán: María de los Ángeles Cruz Rosel and Arturo Carballo Madrigal;

19. For the Mexican National Human Rights Commission: Jorge Ulises Carmona Tinoco and Edmundo Estefan Fuentes;

20. For the Rede Amazônica de Clínicas de Direitos Humanos: Sílvia Maria da Silveira Loureiro, Caio Henrique Faustino da Silva and Victoria Braga Brasil;

21. For the Interamerican Association for Environmental Defense (AIDA): Astrid Puentes Riaño;

22. For the Law School at the Universidad EAFIT: Catalina Becerra Trujillo, Ana Carolina Arias Arcila and José Alberto Toro Valencia;

23. For the Environmental Law and Policy Research Group at the Universidad Nacional de Colombia: Catalina Toro Pérez;

24. Alfredo Ortega Franco;

25. Alejandra Gonza and Adam Hayne, and

26. For the Biosphere Foundation: Jorge Casal and Horacio P. de Beláustegui.

10. Following the hearing, supplementary briefs were received from: (1) the Office for Raizal Ethnic Affairs of the Archipelago of San Andrés, Providencia and Santa Catalina, and (2) the Republic of Colombia.

11. When answering this request for an advisory opinion, the Court examined and took into account the fifty-two briefs and interventions by States, OAS organs, international organizations, State agencies, non-governmental organizations, academic establishments, and members of civil society (*supra* paras. 6 and 10). The Court expresses its appreciation for these valuable contributions that, when issuing this Advisory Opinion, provided it with insight on the different questions raised.

12. The Court began deliberation of this Advisory Opinion on November 14, 2017.

III
JURISDICTION AND ADMISSIBILITY

13. In this chapter, the Court will examine the scope of its competence to issue advisory opinions, as well as its jurisdiction, and the admissibility and validity of ruling on the request for an advisory opinion presented By Colombia.

A. The Court's advisory jurisdiction in relation to this request

14. The request was submitted to the Court by Colombia on the basis of Article 64(1) of the American Convention. Colombia is a Member State of the OAS and, therefore, has the right to request the Inter-American Court to issue advisory opinions on the interpretation of this treaty or of other treaties concerning the protection of human rights in the American States.

15. In this regard, the Court considers that, as an organ with jurisdictional and advisory functions, it has the inherent authority to determine the scope of its own competence (*compétence de la compétence/Kompetenz-Kompetenz*) when exercising its advisory function pursuant to Article 64(1) of the Convention.[11] And this is so, in particular, because the mere fact of having recourse to the Court supposes that the State or States who present a request recognize the Court's right to determine the scope of its competence in that regard.

16. The Court's advisory function allows it to interpret any article of the American Convention, and no part or aspect of this instrument is excluded from such interpretation. Thus, it is evident that, since the Court is the "ultimate interpreter of the American Convention,"[12] it has full authority and competence to interpret all the provisions of the Convention, even those of a procedural nature.[13]

17. In addition, the Court has considered that, when referring to its authority to provide an opinion on "other treaties concerning the protection of human rights in the States of the Americas," Article 64(1) of the Convention is broad and non-restrictive. In general, the advisory jurisdiction of the Court can be exercised with regard to any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, whether it be bilateral or multilateral, whatever the principal purpose of such a treaty, and whether or not non-Member States of the inter-American system are or have the right to become parties thereto.[14] Consequently, when interpreting the Convention

---

[11] *Cf. Case of the Constitutional Court v. Peru. Jurisdiction.* Judgment of September 24, 1999. Series C No. 55, para. 33; *Reports of the Inter-American Commission on Human Rights (Art. 51 American Convention on Human Rights)*. Advisory Opinion OC-15/97 of November 14, 1997. Series A No. 15, para. 5, and *Entitlement of Legal Entities to hold Rights under the Inter-American System of Human Rights (Interpretation and scope of Article 1(2), in relation to Articles 1(1), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46, and 62(3) of the American Convention on Human Rights, as well as Article 8(1) A and B of the Protocol of San Salvador)*. Advisory Opinion OC-22/16 of February 26, 2016. Series A No. 22, para. 14.

[12] *Case of Almonacid Arellano et al. v. Chile. Preliminary objections, merits, reparations and costs.* Judgment of September 26, 2006. Series C No. 154, para. 124; Advisory Opinion OC-22/16, *supra*, para. 16, and *Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of February 29, 2016. Series C No. 312, para. 242.

[13] *Cf. Article 55 of the American Convention on Human Rights.* Advisory Opinion OC-20/09 of September 29, 2009. Series A No. 20, para. 18; Advisory Opinion OC-22/16, *supra*, para. 16.

[14] *Cf. "Other Treaties" Subject to the Advisory Function of the Court* (Art. 64 American Convention on Human Rights). Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, first operative paragraph; Advisory Opinion OC-22/16, *supra*, para. 17.

within the framework of its advisory function and in the terms of Article 29(d) of the Convention, the Court may invoke the Convention or other treaties concerning the protection of human rights in the American States.[15]

B. Requirements for the admissibility of the request

18. The Court must now determine whether the request for an advisory opinion presented by Colombia meets the formal and substantive requirements for admissibility, so that it may issue an opinion in this case.

19. First, the Court finds that the request presented by Colombia complies formally with the requirements described in Articles 70[16] and 71[17] of the Rules of Procedure, according to which, for the Court to consider a request, the questions must be formulated precisely, specifying the provisions to be interpreted, indicating the considerations that gave rise to the request, and providing the name and address of the agent.

20. Regarding the substantive requirements, the Court recalls that, on numerous occasions, it has indicated that compliance with the regulatory requirements to submit a request does not mean that the Court is obliged to respond to it.[18] To determine the validity of the request, the Court must bear in mind considerations that exceed matters of mere form and that relate to the characteristics it has recognized for the exercise of its advisory function.[19] It must go beyond the formalism that might prevent it from considering questions that have a legal interest for the protection and promotion of human rights.[20] Also, the Court's advisory jurisdiction should not, in principle, be used for abstract speculations with no foreseeable application to specific situations that would justify the issue of an advisory opinion.[21]

21. In its request, Colombia stated that "[t]he Court's opinion will have great relevance for effective compliance with international human rights obligations by the agents and organs of the States of the Wider Caribbean Region, as well as for reinforcing global awareness, by clarifying the scope of the environmental protection obligations under the Pact and, in particular, the importance that should be accorded to social and environmental

---

15 *Cf. Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights.* Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 10, sole operative paragraph, and Advisory Opinion OC-22/16, *supra*, para. 18.

16 Article 70 of the Court's Rules of Procedure: "Interpretation of the Convention: 1. Requests for an advisory opinion under Article 64(1) of the Convention shall state with precision the specific questions on which the opinion of the Court is being sought. 2. Requests for an advisory opinion submitted by a Member State or by the Commission shall, in addition, identify the provisions to be interpreted, the considerations giving rise to the request, and the names and addresses of the Agent or the Delegates. […]"

17 Article 71 of the Court's Rules of Procedure: "Interpretation of Other Treaties: 1. If, as provided for in Article 64(1) of the Convention, the interpretation requested refers to other treaties concerning the protection of human rights in the American States, the request shall indicate the name of the treaty and parties thereto, the specific questions on which the opinion of the Court is being sought, and the considerations giving rise to the request. […]"

18 *Cf.* Advisory Opinion OC-15/97, *supra*, para. 31, and Advisory Opinion OC-22/16, *supra*, para. 21.

19 *Cf.* Advisory Opinion OC-1/82, para. 31; Advisory Opinion OC-15/97, para. 31, and Advisory Opinion OC-20/09, *supra*, para. 14.

20 *Cf.* Advisory Opinion OC-1/82, para. 25, and *Control of Due Process in the Exercise of the Powers of the Inter-American Commission on Human Rights* (Arts. 41 and 44 to 51 American Convention on Human Rights). Advisory Opinion OC-19/05 of November 28, 2005, Series A No. 19, para. 17.

21 *Cf. Judicial Guarantees in States of Emergency* (Arts. 27.2, 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 16**,** and Advisory Opinion OC-22/16, para. 21.

impact assessments, projects to prevent and mitigate environmental harm, and cooperation between States that could be affected by damage to the environment – in the context of the construction and operation of mega-projects that, once initiated, may have an irreversible negative impact on the marine environment."

22. The OAS General Assembly has "underscore[d] the importance of studying the link that may exist between the environment and human rights, recognizing the need to promote environmental protection and the effective enjoyment of all human rights."[22] Also, the OAS Member States indicated in the Inter-American Democratic Charter that it was essential that "the States of the hemisphere implement policies and strategies to protect the environment, including application of various treaties and conventions, to achieve sustainable development for the benefit of future generations."[23] Furthermore, they have adopted the Inter-American Program for Sustainable Development 2016-2021, which recognizes the three dimensions of sustainable development: "the economic, social and environmental," which are "integrated and indivisible" "to support development, eradicate poverty, and promote equality, fairness and social inclusion."[24]

23. When recalling that the advisory function represents "a service that the Court is able to provide to all the members of the inter-American system in order to help them comply with their international commitments [concerning human rights],"[25] the Court considers that, based on the interpretation of the relevant provisions, its response to the request will be of real value for the countries of the region because it will identify, clearly and systematically, the State obligations in relation to the protection of the environment within the framework of their obligation to respect and to ensure the human rights of every persons subject to their jurisdiction. This will lead the Court to determine the principles and the specific obligations that States must comply with in relation to environmental protection in order to respect and to ensure the human rights of the persons subject to their jurisdiction, and so that they may take appropriate and pertinent measures.

24. The Court reiterates, as it has on other occasions,[26] that the task of interpretation it performs in the exercise of its advisory function not only clarifies the meaning, purpose and

---

22 OAS, General Assembly Resolution entitled: "*Human Rights and the Environment," adopted at the third plenary session held on June 5,* 2001, OEA/Ser.P AG/ RES. 1819 (XXXI-O/01), first operative paragraph. Also, in the Resolution entitled "*Human Rights and the Environment in the Americas*," the OAS General Assembly acknowledged "a growing awareness of the need to manage the environment in a sustainable manner to promote human dignity and well-being," and decided "[t]o continue to encourage institutional cooperation in the area of human rights and the environment in the framework of the Organization, in particular between the Inter-American Commission on Human Rights (IACHR) and the Unit for Sustainable Development and Environment." OAS, General Assembly Resolution entitled "*Human Rights and the Environment in the Americas*," adopted at the fourth plenary session held on June 10, 2003, AG/RES. 1926 (XXXIII-O/03), preamble and second operative paragraph.

23 Inter-American Democratic Charter, adopted at the first plenary session of the OAS General Assembly held on September 11, 2001, during the twenty-eighth period of sessions, art. 15.

24 The Inter-American Program for Sustainable Development 2016-2021 was adopted on June 14, 2016, and sets out strategic actions to ensure that the work of the OAS General Secretariat in the area of sustainable development is aligned with the implementation of Agenda 2030 for Sustainable Development (Resolution A/RES/70/1 of the United Nations General Assembly, October 21, 2015) and the Paris Agreement on Climate Change in the hemisphere, and that its objectives and results are guided by the new global Sustainable Development Goals (SDG) adopted by the Members States and that will contribute to achieving them. *Cf.* OAS, General Assembly Resolution entitled "Inter-American Program for Sustainable Development," AG/RES. 2882 (XLVI-O/16), June 14, 2016.

25 *Cf.* Advisory Opinion OC-1/82, *supra*, para. 39, and Advisory Opinion OC-22/16, *supra*, para. 23.

26 *Cf.* Advisory Opinion OC-1/82, *supra*, para. 25, and *Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21, para 29.*

reasons for international human rights norms, but also, above all, assists OAS Member States and organs to comply fully and effectively with their relevant international obligations, and to define and implement public policies to protect human rights. Thus, its interpretations help strengthen the system for the protection of human rights.

25. That said, the Court notes that, in its request for an advisory opinion, Colombia refers "to the construction, maintenance and expansions of canals for maritime traffic," among other activities that represent threats to the Wider Caribbean Region. In this regard, Guatemala, in its intervention during the public hearing, noted that "a comprehensive analysis of the context and specific situation [of the Wider Caribbean Region and the request for interpretation] also involves citing the case of Nicaragua versus Colombia before the International Court of Justice in The Hague, [although] the State of Colombia has not mentioned those proceedings, or even the State of Nicaragua in its request." According to Guatemala, it was necessary "to consider, within this request, the possible implication of the State of Nicaragua even though this is not expressly indicated in any part of the document," and also that "the interpretation provided in answer to the request should accord with what has been indicated in the course of these proceedings between Colombia and Nicaragua; always respecting the human rights and the sovereignty of the States that may be concerned." The Court also notes that the Inter-American Commission advised that it is currently examining petition 912/14 with regard to the State of Nicaragua at the admissibility stage, which "relates to alleged violations of the American Convention in the context of the project for the construction of the Grand Interoceanic Canal of Nicaragua."

26. The Court recalls, as it has in the context of other advisory procedures, that the mere fact that petitions exist before the Commission related to the subject matter of the request is not sufficient reason for the Court to abstain from responding to the questions submitted to it.[27] Moreover, it notes that the Commission has not yet admitted the petition mentioned. In addition, it reiterates that, given that the Court is an autonomous judicial organ, the exercise of its advisory function "cannot be restricted by contentious cases filed before the International Court of Justice."[28] The task of interpretation that the Court must perform in the exercise of its advisory function differs from its contentious competence because there is no litigation to be decided.[29] The central purpose of the advisory function is to obtain a judicial interpretation of one or several provisions of the Convention or of other treaties concerning the protection of human rights in the American States.[30]

27. Furthermore, the Court considers that it is not necessarily restricted to the literal terms of the requests submitted to it. The citing of examples in the request for an advisory opinion serves the purpose of referring to a specific context and illustrating the different situations that may arise in relation to the legal issue that is the purpose of the advisory opinion, without this meaning that the Court is issuing a legal ruling on the situations described in such examples.[31] In the following section, the Court will include the pertinent considerations with regard to the scope of this request and the terms of the questions (*infra* paras. 32 to 38).

---

27 *Cf. The Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process of Law.* Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, paras. 45 to 65, and *Juridical Status and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, paras. 62 to 66.

28 *Cf.* Advisory Opinion OC-16/99, *supra*, para. 61.

29 *Cf.* Advisory Opinion OC-15/97, *supra*, paras. 25 and 26, and Advisory Opinion OC-22/16, *supra*, para. 26.

30 *Cf. Restrictions to the Death Penalty (Arts. 4.2 and 4.4 American Convention on Human Rights).* Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para. 22, and Advisory Opinion OC-22/16, *supra*, para. 26.

31 *Cf.* Advisory Opinion OC-16/99, *supra*, para. 49, and Advisory Opinion OC-18/03, *supra*, para. 65.

28. The Court also finds it necessary to recall that, under international law, when a State is a party to an international treaty, such as the American Convention, this treaty is binding for all its organs, including the Judiciary and the Legislature,[32] so that a violation by any of these organs gives rise to the international responsibility of the State.[33] Accordingly, the Court considers that the different organs of the State must carry out the corresponding control of conformity with the Convention to ensure the protection of all human rights.[34] This is also based on the Court's considerations in exercise of its non-contentious or advisory jurisdiction, which undeniably shares with its contentious jurisdiction the purpose of the inter-American human rights system, which is "the protection of the fundamental rights of the human being."[35]

29. In addition, the interpretation given to a provision of the Convention[36] through the issue of an advisory opinion provides all the organs of the OAS Member States, including those that are not parties to the Convention but have undertaken to respect human rights under the Charter of the OAS (Article 3(l)) and the Inter-American Democratic Charter (Articles 3, 7, 8 and 9), with a source that, by its very nature, also contributes, especially in a preventive manner, to achieving the effective respect and guarantee of human rights. In particular, it can provide guidance when deciding matters relating to the respect and guarantee of human rights in the context of the protection of the environment and thus avoid possible human rights violations.[37]

30. Given the broad scope of the Court's advisory function, which, as previously indicated, encompasses not only the States Parties to the American Convention, everything indicated in this Advisory Opinion also has legal relevance for all OAS Member States,[38] as well as for the OAS organs whose sphere of competence relates to the matter that is the subject of the request.

31. Based on the foregoing considerations, the Court finds that it has jurisdiction to rule on the questions raised by Colombia, even though they may be reformulated (*infra* para. 36). Moreover, the Court does not find in this request any reason to abstain from answering it; it therefore admits the request and proceeds to respond to it, notwithstanding the clarifications made below concerning the object and scope of the request.

IV
GENERAL CONSIDERATIONS

A. The purpose and scope of this Advisory Opinion and the terms of the

---

32 *Cf. Case of Fontevecchia and D`Amico v. Argentina. Merits, reparations and costs.* Judgment of November 29, 2011. Series C No. 238, para. 93, and Advisory Opinion OC-21/14, *supra*, para. 31.

33 *Cf. Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 164, and Advisory Opinion OC-21/14, para. 31.

34 *Cf. Case of Almonacid Arellano et al. v. Chile*, para. 124, and OC-21/14, para. 31.

35 *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights.* Advisory Opinion OC-2/82 of September 24, 1982. Series A No. 2, para. 29, and Advisory Opinion OC-21/14, para. 31.

36 *Cf. Case of Cabrera García and Montiel Flores v. Mexico. Preliminary* objection, merits, reparations and costs. Judgment of November 26, 2010. Series C No. 220, para.79; *Case of Gelman v. Uruguay. Monitoring compliance with judgment.* Order of the Inter-American Court of Human Rights of March 20, 2013, *consideranda* 65 to 90, and Advisory Opinion OC-21/14, para. 31.

37 *Cf.* Advisory Opinion OC-21/14, para. 31.

38 *Cf.* Advisory Opinion OC-18/03*, supra,* para. 60**,** and OC-22/16, para. 25.

questions raised by the requesting State

32. The Court notes that, in its request for an advisory opinion, Colombia referred to the "marine environment in the Wider Caribbean Region," and asked the Court to interpret "how the Pact of San José should be interpreted in relation to other environmental treaties that seek to protect specific areas, as is the case of the Convention for the Protection and Development of the Marine Environment in the Wider Caribbean Region" (hereinafter "the Cartagena Convention")[39] (*supra* para. 1). Thus, the first question posed by Colombia was worded as follows:

> I. Based on the provisions of Article 1(1) of the Pact of San José, should it be considered that a person, even if he or she is not in the territory of a State Party, is subject to the jurisdiction of that State in the specific case in which, the four conditions described below are met cumulatively?
>
> 1. that the person resides in, or is inside, an area delimited and protected by the environmental protection regime of a treaty to which that State is a party;
> 2. that the said treaty-based regime establishes an area of functional jurisdiction, such as the one established in the Convention for the Protection and Development of the Marine Environment in the Wider Caribbean Region;
> 3. that, in this area of functional jurisdiction, the States parties have the obligation to prevent, reduce and control pollution as the result of a series of general and/or specific obligations, and
> 4. that, as a result of damage to the environment or the risk of environmental damage in the area protected by the respective convention that can be attributed to the State party – to the convention and to the Pact of San José – the human rights of the person in question have been violated or are threatened.

33. Accordingly, the requesting State's first question was subject to four conditions that, it asserted, could be present in a specific geographical region owing to a specific treaty. This was reaffirmed by Colombia when, in answer to a request for clarification of this first question made by Judge Eduardo Ferrer Mac-Gregor Poisot during the hearing, it indicated that "[t]he Republic of Colombia circumscribes the object of its request for an advisory opinion to the "functional jurisdiction" created by the Cartagena Convention, owing to the particular human, environmental and legal characteristics of the Wider Caribbean Region."

34. In this regard, the Court reiterates that it is not limited by the literal wording of the questions posed when exercising its advisory function (*supra* para. 27). Thus, it understands that the purpose of the first question raised by the requesting State is for the Court to interpret the scope of Article 1(1) of the American Convention in relation to the area of application of the Cartagena Convention.[40] Currently, there are 25 States parties to that convention;[41] 22 of these are members of the OAS and 10 are parties to the American Convention.

---

[39] *Cf.* Convention for the Protection and Development of the Marine Environment in the Wider Caribbean Region (Cartagena Convention), entered into force on October 11, 1986.

[40] The text of this treaty can be consulted at the following link: http://www.cep.unep.org/cartagena-convention/text-of-the-cartagena-convention.

[41] (1) Antigua and Barbuda, (2) Bahamas, (3) Barbados, (4) Belize, (5) Colombia, (6) Costa Rica, (7) Cuba, (8) Dominica, (9) Dominican Republic, (10) France, (11) Grenada, (12) Guatemala, (13) Guyana, (14) Jamaica, (15) Mexico, (16) Nicaragua, (17) The Netherlands on behalf of the Netherlands Antilles and Aruba, (18) Panama, (19) Saint Kitts and Nevis, (20) Saint Vincent and the Grenadines, (21) Saint Lucia, (22) Trinidad and Tobago, (23) United Kingdom of Great Britain and Northern Ireland, (24) United States of America and (25) Venezuela.

35. This Court has indicated that, owing to the general interest of its advisory opinions, their scope should not be restricted to specific States.[42] The questions raised in the request go beyond the interests of the States parties to the Cartagena Convention and are important for all the States of the planet. Therefore, the Court considers that it should not limit is response to the scope of application of the Cartagena Convention. Also, taking into account the relevance of the environment as a whole for the protection of human rights, it does not find it pertinent to restrict its response to the marine environment. In this Opinion, the Court will rule on the State obligations with regard to the environment that are most closely related to the protection of human rights, which is the main function of this Court. Consequently, it will refer to the environmental obligations arising from the obligations to respect and to ensure human rights.

36. The Court has established that, in exercise of its powers inherent in the jurisdiction granted by Article 64 of the Convention, it is able to define or clarify and, in certain cases, reformulate the questions posed to it; particularly, when, as in this case, the Court's opinion is sought on a matter that, it considers, falls within its competence.[43] Based on the considerations in the preceding paragraph, the Court does not find it necessary or pertinent to examine the four conditions that Colombia has included in its first question in order to respond to the question posed by Colombia on the exercise of jurisdiction by a State outside its territory. Therefore, the Court decides to reformulate the first question posed by Colombia as follows:

> Based on the provisions of Article 1(1) of the Pact of San José, should it be considered that a person, even if he or she is not in the territory of a State Party, may be subject to the jurisdiction of that State in the context of compliance with obligations relating to the environment?

37. In addition, regarding the second and third questions, the Court understands that they both refer, concurrently, to the State obligations concerning the duty to respect and to ensure the rights to life and to personal integrity in relation to damage to the environment. In the second question, Colombia is asking whether State "measures and conducts" that could cause "serious damage to the […] environment [are] compatible with the obligations [of the States arising from] Articles 4(1) and 5(1)" of the Convention (*supra* para. 3). While, in the third question, Colombia is asking the Court to define the obligations derived from "the obligations to respect and to ensure the rights and freedoms set out in Articles 4(1) and 5(1)" of the Convention, in relation to "the provisions of international environmental law which seek to prevent environmental damage that could limit the effective enjoyment of the rights to life and to personal integrity" (*supra* para. 3). In this regard, Colombia indicated that it sought definition of "the scope of the obligations under the Pact, particularly those contained in Articles 4(1) and 5(1), in relation to the protection of the environment," as well as clarification of "international obligations concerning prevention, precaution, mitigation of damage, and cooperation between the States that could be affected."

38. Therefore, the Court understands that, with its second and third questions, Colombia is consulting the Court about the obligations of the States Parties to the Convention in relation to environmental protection in order to respect and to ensure the rights to life and to personal integrity in the case of damage that occurs within their territory and also in the

---

42 Similarly, see, Advisory Opinion OC-16/99, *supra*, para. 41.

43 *Cf. Enforceability of the Right of Reply or Rectification (Arts. 14.1, 1.1 and 2 American Convention on Human Rights).* Advisory Opinion OC-7/86 of August 29, 1986. Series A No. 7, para. 12, and Advisory Opinion OC-16/99, *supra*, para. 42.

case of damage that goes beyond their borders. Consequently, the Court decides to combine its considerations on these questions in order to define, jointly, the State obligations derived from the obligations to respect and to ensure the rights to life and to personal integrity in relation to damage to the environment. It should be understood that the environmental obligations that the Court notes in Chapter VIII in response to both questions are applicable to both internal and international environmental protection. The Court will structure its Opinion based on these considerations as described below.

B. The structure of this Advisory Opinion

39. Based on the above, to provide an appropriate response to the questions raised, the Court has decided to structure this Opinion as follows: (1) Chapter V will set out the interpretation criteria to be used by the Court to issue this Opinion; (2) Chapter VI will contain introductory considerations on the interrelationship between human rights and the environment, and the human rights that are affected by environmental degradation, in order to offer a general legal framework for the State obligations established in this Opinion in response to the requesting State's questions; (3) Chapter VII responds to Colombia's first question, interpreting the scope of the term "jurisdiction" in Article 1(1) of the American Convention, particularly in relation to environmental obligations, and (4) Chapter VIII responds to the second and third questions posed by Colombia, interpreting and establishing the environmental obligations of States with regard to prevention, precaution, cooperation and procedure derived from the obligations to respect and to ensure the rights to life and to personal integrity under the American Convention.

V
INTERPRETATION CRITERIA

40. To issue its opinion on the interpretation of the legal provisions cited in the request, the Court will have recourse to the Vienna Convention on the Law of Treaties, which contains the general and customary rules for the interpretation of international treaties.[44] This involves the simultaneous and joint application of the criteria of good faith, and the analysis of the ordinary meaning to be given to the terms of the treaty in question "in their context and in the light of its object and purpose." Accordingly, the Court will use the methods set out in Articles 31[45] and 32[46] of the Vienna Convention to make this

---

[44] *Cf.* Advisory Opinion OC-21/14, para. 52, and Advisory Opinion OC-22/16, para. 35. See also, International Court of Justice (hereinafter ÏCJ"), *Case concerning the sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, Judgment of December 17, 2002, para. 37, and ICJ, *Avena and Other Mexican Nationals (Mexico v. the United States of America)*, Judgment of March 31, 2004, para. 83.

[45] *Cf.* Article 31 (General rule of interpretation) of the Vienna Convention on the Law of Treaties stipulates that: "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended." Vienna Convention on the Law of Treaties, U.N. Doc A/CONF.39/27 (1969), 1155 U.N.T.S. 331, signed at Vienna on May 23, 1969, entered into force January 27, 1980.

[46] Article 32 (Supplementary means of interpretation) of the Vienna Convention on the Law of Treaties establishes that: "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application

interpretation.

41. In the specific case of the American Convention, the object and purpose of this treaty is "the protection of the fundamental rights of the human being"[47] and, to this end, it was designed to protect the human rights of individuals, regardless of their nationality, before their own State or any other State.[48] In this regard, it is essential to recall the specificity of human rights treaties which create a legal system under which States assume obligations towards the persons subject to their jurisdiction,[49] and complaints may be filed for the violation of such treaties by those persons and by all the States Parties to the Convention by the lodging of a petition before the Commission,[50] and even before the Court,[51] all of which signifies that the provisions must also be interpreted using a model based on the values that the inter-American system seeks to safeguard, from the "best perspective" for the protection of the individual.[52]

42. Hence, the American Convention expressly contains specific interpretation standards in its Article 29,[53] including the *pro persona* principle, which means that no provision of the Convention shall be interpreted as restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said States is a party, or excluding or limiting the effects that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

43. In addition, the Court has repeatedly indicated that human rights treaties are living instruments, the interpretation of which must evolve with the times and contemporary conditions.[54] This evolutive interpretation is consequent with the general rules of interpretation set out in Article 29 of the American Convention, as well as those established by the Vienna Convention on the Law of Treaties.[55]

---

of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."

47 Advisory Opinion OC-2/82, *supra*, para. 29, and Advisory Opinion OC-21/14, *supra*, para. 53.

48 *Cf.* Advisory Opinion OC-2/82, *supra*, para. 33, and Advisory Opinion OC-21/14, *supra*, para. 53.

49 *Cf.* Advisory Opinion OC-2/82, *supra*, para. 29, and Advisory Opinion OC-21/14, *supra*, para. 53.

50 *Cf.* Articles 43 and 44 of the American Convention.

51 *Cf.* Article 61 of the American Convention

52 *Cf. Case of González et al. ("Cotton Field") v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 16, 2009. Series C No. 205, para. 33, and Advisory Opinion OC-21/14, *supra*, para. 53.

53 Article 29 of the American Convention establishes that: "Restrictions regarding Interpretation: No provision of this Convention shall be interpreted as: (a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention o to restrict them to a greater extent than is provided for herein; (b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; (c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or (d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have."

54 See, *inter alia*, *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits.* Judgment of November 19, 1999. Series C No. 63, para. 193; Advisory Opinion OC-16/99, *supra*, para. 114; *Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of November 28, 2012. Series C No. 257, para. 245; Advisory Opinion OC-22/16, *supra*, para. 49, and *Case of the Hacienda Brasil Verde Workers v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of October 20, 2016. Series C No. 318, para. 245.

55 *Cf.* Advisory Opinion OC-16/99*, supra*, para. 114, and Advisory Opinion OC-22/16, *supra*, para. 49.

44. Furthermore, it is necessary to consider that the purpose of this advisory opinion is to interpret the effect of the obligations derived from environmental law on the obligations to respect and to ensure the human rights established in the American Convention. An extensive *corpus iuris* of environmental law exists. According to the systematic interpretation established in the Vienna Convention on the Law of Treaties, "the provisions must be interpreted as part of a whole, the significance and scope of which must be established based on the legal system to which it belongs."[56] The Court finds that, in application of these rules, it must take international law on environmental protection into consideration when defining the meaning and scope of the obligations assumed by the States under the American Convention, in particular, when specifying the measures that the States must take.[57] In this Advisory Opinion, the Court wishes to underline that, although it is not for the Court to issue a direct interpretation of the different instruments on environmental law, it is evident that the principles, rights and obligations contained therein make a decisive contribution to establishing the scope of the American Convention. Owing to the matter submitted to its consideration, the Court will take into account, as additional sources of international law, other relevant conventions in order to make a harmonious interpretation of the international obligations in the terms of the provision cited. Also, the Court will consider the applicable obligations and the relevant jurisprudence and decisions, as well as the resolutions, rulings and declarations on the issue that have been adopted at the international level.

45. In short, when responding to the present request, the Court acts as a human rights court, guided by the norms that regulate its advisory jurisdiction, and proceeds to make a strictly legal analysis of the questions raised, pursuant to international human rights law, taking into account the relevant sources of international law.[58] In this regard, it should be clarified that the *corpus juris* of international human rights law consists of a series of rules expressly established in international treaties, or to be found in international customary law as evidence of a practice generally accepted as law, as well as of the general principles of law and a series of norms of a general nature or soft law, which provide guidance on the interpretation of the former, because they give greater precision to the basic content established in the treaties.[59] The Court will also base its opinion on its own jurisprudence.

VI
ENVIRONMENTAL PROTECTION AND THE HUMAN RIGHTS RECOGNIZED IN THE AMERICAN CONVENTION

46. This Opinion constitutes one of the first opportunities that the Court has had to refer extensively to the State obligations arising from the need to protect the environment under the American Convention (*supra* para. 23). Even though the object of the request made by Colombia, as previously defined (*supra* paras. 32 to 38), refers specifically to the State obligations derived from the rights to life and to personal integrity, the Court finds it

---

56 *Case of González et al. ("Cotton Field") v. Mexico*, para. 43, and Advisory Opinion OC-22/16, *supra*, para. 56.

57 In this regard, in the *Kaliña and Lokono Peoples case*, the Court had already referred to the Rio Declaration and Convention on Biological Diversity when ruling on the compatibility of the rights of indigenous peoples with the protection of the environment. *Cf. Case of the Kaliña and Lokono Peoples v. Suriname. Merits, reparations and costs*. Judgment of November 25, 2015. Series C No. 309, paras. 177 to 179.

58 *Cf. International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 American Convention on Human Rights)*. Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14**,** para. 60**,** and Advisory Opinion OC-22/16, para. 29.

59 *Cf.* Advisory Opinion OC-14/94, *supra*, para. 60**,** and Advisory Opinion OC-22/16, *supra*, para. 29.

pertinent to include some initial and introductory considerations on: (A) the interrelationship between human rights and the environment, and (b) the human rights affected by environmental degradation, including the right to a healthy environment. The purpose of the considerations in this chapter is to provide a context and a general background to the answers to the specific questions posed by Colombia that follow.

A. The interrelationship between human rights and the environment

47. This Court has recognized the existence of an undeniable relationship between the protection of the environment and the realization of other human rights, in that environmental degradation and the adverse effects of climate change affect the real enjoyment of human rights.[60] In addition, the preamble to the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (hereinafter "Protocol of San Salvador"), emphasizes the close relationship between the exercise of economic, social and cultural rights – which include the right to a healthy environment – and of civil and political rights, and indicates that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human being. They therefore require permanent promotion and protection in order to ensure their full applicability; moreover, the violation of some rights in order to ensure the exercise of others can never be justified.[61]

48. Specifically, in cases concerning the territorial rights of indigenous and tribal peoples, the Court has referred to the relationship between a healthy environment and the protection of human rights, considering that these peoples' right to collective ownership is linked to the protection of, and access to, the resources to be found in their territories, because those natural resources are necessary for the very survival, development and continuity of their way of life.[62] The Court has also recognized the close links that exist between the right to a dignified life and the protection of ancestral territory and natural resources. In this regard, the Court has determined that, because indigenous and tribal peoples are in a situation of special vulnerability, States must take positive measures to ensure that the members of these peoples have access to a dignified life – which includes the protection of their close relationship with the land – and to their life project, in both its individual and collective dimension.[63] The Court has also emphasized that the lack of access to the corresponding territories and natural resources may expose indigenous communities to precarious and subhuman living conditions and increased vulnerability to disease and epidemics, and subject them to situations of extreme neglect that may result in various violations of their human rights in addition to causing them suffering and undermining the preservation of

---

60 *Cf. Case of Kawas Fernández v. Honduras. Merits, reparations and costs*. Judgment of April 3, 2009. Series C No. 196. para. 148.

61 *Cf.* Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"), entered into force November 16, 1999, Preamble. The following OAS Member States have ratified the Protocol of San Salvador to date: (1) Argentina, (2) Bolivia, (3) Brazil, (4) Colombia, (5) Costa Rica, (6) Ecuador, (7) El Salvador, (8) Guatemala, (9) Honduras, (10) Mexico, (11) Nicaragua, (12) Panama, (13) Paraguay, (14) Peru, (15) Suriname and (16) Uruguay.

62 See, *inter alia, Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs*. Judgment of June 17, 2005. Series C No. 125, para. 137; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, reparations and costs*. Judgment of March 29, 2006. Series C No. 146, para. 118; *Case of the Saramaka People v. Suriname. Preliminary objections, merits, reparations and costs*. Judgment of November 28, 2007. Series C No. 172, paras. 121 and 122, and *Case of the Kaliña and Lokono Peoples v. Suriname, supra*, para. 173.

63 *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*, *supra*, para. 163, and *Case of the Kaliña and Lokono Peoples v. Suriname, supra*, para. 181.

their way of life, customs and language.[64]

49. Meanwhile, the Inter-American Commission has stressed that "several fundamental rights require, as a necessary precondition for their enjoyment, a minimum environmental quality, and are profoundly affected by the degradation of natural resources."[65] Likewise, the OAS General Assembly has recognized the close relationship between the protection of the environment and human rights (*supra* para. 22) and emphasized that "the adverse effects of climate change have a negative impact on the enjoyment of human rights."[66]

50. In the European sphere, the European Court of Human Rights has recognized that severe environmental degradation may affect the well-being of the individual and, consequently, give rise to violations of human rights, such as the rights to life,[67] to respect for private and family life,[68] and to property.[69] Similarly, the African Commission on Human and Peoples' Rights has indicated that the right to "satisfactory living conditions and development" is "closely linked to economic and social rights insofar as the environment affects the quality of life and the safety of the individual."[70]

51. Furthermore, the United Nations Independent Expert on human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (now Special Rapporteur[71]) has stated that "[h]uman rights and environmental protection are

---

64 *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*, *supra*, para. 164; *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits, reparations and costs.* Judgment of June 27, 2012. Series C No. 245, para. 147 and *Case of the Afrodescendant Communities displaced from the Rio Cacarica Basin (Operation Genesis) v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of November 20, 2013. Series C No. 270, para. 354.

65 *Cf.* IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources – Norms and jurisprudence of the inter-American human rights system, December 30, 2009, OEA/Ser.L/V/II. Doc. 56/09, para. 190.

66 *Cf.* OAS General Assembly, Resolution entitled "*Human Rights and Climate Change in the Americas,"* adopted at the fourth plenary session held on June 3*,* 2008, AG/RES. 2429 (XXXVIIIO/08).

67 See, *inter alia*, ECHR, *Case of Öneryildiz v. Turkey* [GS], No. 48939/99. Judgment of November 30, 2004, paras. 71, 89, 90 and 118; ECHR, *Case of Budayeva and Others v. Russia*, No. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02. Judgment of March 20, 2008, paras. 128 to 130, 133 and 159, and ECHR, *Case of M. Özel and Others v. Turkey*, No. 14350/05, 15245/05 and 16051/05. Judgment of November 17, 2015, paras. 170, 171 and 200.

68 See, *inter alia*, ECHR, *Case of López Ostra v. Spain*, No. 16798/90. Judgment of December 6, 1994, paras. 51, 55 and 58; ECHR, *Case of Guerra and Others v. Italy* [GS]*,* No. 14967/89. Judgment of February 19, 1998, paras. 57, 58 and 60; ECHR, *Case of Hatton and Others v. The United Kingdom* [GS], No. 36022/97. Judgment of July 8, 2003, paras. 96, 98, 104, 118 and 129; ECHR, *Case of Taşkin and Others v. Turkey*, No. 46117/99. Judgment of November 10, 2004, paras. 113, 116, 117, 119 and 126; ECHR, *Case of Fadeyeva v. Russia*, No. 55723/00. Judgment of June 9, 2005, paras. 68 to 70. 89, 92 and 134; ECHR, *Case of Roche v. The United Kingdom* [GS], No. 32555/96. Judgment of October 19, 2005, paras. 159, 160 and 169; ECHR, *Case of Giacomelli v. Italy*, No. 59909/00. Judgment of November 2, 2006, paras. 76 to 82, 97 and 98; ECHR, *Case of Tătar v. Romania*, No. 67021/01. Judgment of January 27, 2009, paras. 85 to 88, 97, 107, 113 and 125, and ECHR, *Case of Di Sarno and Others v. Italy*, No. 30765/08. Judgment of January 10, 2012, paras. 104 to 110 and 113.

69 See, *inter alia*, ECHR, *Case of Papastavrou and Others v. Greece*, No. 46372/99. Judgment of April 10, 2003, paras. 33 and 36 to 39; ECHR, *Case of Öneryildiz v. Turkey* [GS], No. 48939/99. Judgment of November 30, 2004, paras. 124 to 129, 134 to 136 and 138, and ECHR, *Case of Turgut and Others v. Turkey*, No. 1411/03. Judgment of July 8, 2008, paras. 86 and 90 to 93.

70 *Cf.* African Commission on Human and Peoples' Rights, *Social and Economic Rights Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*. Communication 155/96. Decision of October 27, 2001, para. 51.

71 In March 2012, the Human Rights Council appointed an independent expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment to a three-year term. His mandate was extended in 2015 for another three years as a Special Rapporteur on human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. *Cf.* Human Rights Council,

inherently interdependent," because:

> Human rights are grounded in respect for fundamental human attributes such as dignity, equality and liberty. The realization of these attributes depends on an environment that allows them to flourish. At the same time, effective environmental protection often depends on the exercise of human rights that are vital to informed, transparent and responsive policymaking.[72]

52. In addition, there is extensive recognition of the interdependent relationship between protection of the environment, sustainable development, and human rights in international law. This interrelationship has been asserted since the Stockholm Declaration on the Human Environment (hereinafter "Stockholm Declaration") which established that "[e]conomic and social development is essential for ensuring a favourable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life,"[73] and asserting the need to balance development with protection of the human environment.[74] Subsequently, in the Rio Declaration on Environment and Development (hereinafter "the Rio Declaration"), the States recognized that "[h]uman beings are at the centre of concerns for sustainable development, "and also underlined that "[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process."[75] Following this, the Johannesburg Declaration on Sustainable Development established three pillars of sustainable development: economic development, social development and environmental protection.[76] Also, in the corresponding Plan of Implementation of the World Summit on Sustainable Development, the States "acknowledge[d] the consideration being given to the possible relationship between environment and human rights, including the right to development."[77]

53. In addition, when adopting the Agenda 2030 for Sustainable Development, the General Assembly of the United Nations recognized that the scope of the human rights of everyone depends on achieving the three dimensions of sustainable development: the economic, the social and the environmental.[78] Similarly, several inter-American instruments have referred to the protection of the environment and sustainable development, including

---

Resolution 19/10 entitled "Human rights and the environment," adopted on March 22, 2012. UN Doc. A/HRC/RES/19/10, and Human Rights Council, Resolution 28/11 entitled "Human rights and the environment," adopted on March 26, 2015. UN Doc. A/HRC/RES/28/11.

72 Human Rights Council, Preliminary report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, December 24, 2012, UN Doc. A/HRC/22/43, para. 10. Similarly, some instruments that regulate the protection of the environment refer to human rights law. See: the Rio Declaration on Environment and Development. United Nations Conference on Environment and Development, Río de Janeiro, June 3 to 14, 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. 1), and Stockholm Declaration on the Human Environment, United Nations Conference on the Human Environment, Stockholm, June 5 to 16, 1972, UN Doc. A/CONF.48/14/Rev.1.

73 Stockholm Declaration on the Human Environment, United Nations Conference on the Human Environment, Stockholm, June 5 to 16, 1972, UN Doc. A/CONF.48/14/Rev.1, Principle 8.

74 *Cf.* Stockholm Declaration on the Human Environment, United Nations Conference on the Human Environment, Stockholm, June 5 to 16, 1972, UN Doc. A/CONF.48/14/Rev.1, Principle 13.

75 Rio Declaration on Environment and Development. United Nations Conference on Environment and Development, Río de Janeiro, June 3 to 14, 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. 1), Principles 1 and 4.

76 *Cf.* Johannesburg Declaration on Sustainable Development adopted at the United Nations World Summit on Sustainable Development, Johannesburg, September 4, 2002, UN Doc. A/CONF. 199/20, para. 5.

77 *Cf.* Plan of Implementation of the World Summit on Sustainable Development, adopted at the World Summit on Sustainable Development, Johannesburg, September 4, 2002, UN Doc. A/CONF.199/20, para. 5.

78 *Cf.* United Nations General Assembly, Resolution 70/1 entitled "*Transforming our world: the 2030 Agenda for Sustainable Development,"* September 25, 2015, UN Doc. A/RES/70/1, preamble and paras. 3, 8, 9, 10, 33, 35 and 67.

the Inter-American Democratic Charter which stipulates that "[t]he exercise of democracy promotes the preservation and good stewardship of the environment. It is essential that the States of the hemisphere implement policies and strategies to protect the environment, including application of various treaties and conventions, to achieve sustainable development for the benefit of future generations."[79]

54. Numerous points of interconnection arise from this relationship of interdependence and indivisibility between human rights, the environment, and sustainable development owing to which, as indicated by the Independent Expert, "all human rights are vulnerable to environmental degradation, in that the full enjoyment of all human rights depends on a supportive environment."[80] In this regard, the Human Rights Council has identified environmental threats that may affect, directly or indirectly, the effective enjoyment of specific human rights, affirming that: (i) illicit traffic in, and improper management and disposal of, hazardous substances and wastes constitute a serious threat to a range of rights, including the rights to life and health;[81] (ii) climate change has a wide range of implications for the effective enjoyment of human rights, including the rights to life, health, food, water, housing and self-determination,[82] and (iii) "environmental degradation, desertification and global climate change are exacerbating destitution and desperation, causing a negative impact on the realization of the right to food, in particular in developing countries."[83]

55. Owing to the close connection between environmental protection, sustainable development and human rights (*supra* paras. 47 to 55), currently (i) numerous human

---

79 Inter-American Democratic Charter, adopted at the first plenary session of the OAS General Assembly on September 11, 2001, during the twenty-eighth period of sessions, Art. 15.

80 Human Rights Council, Preliminary report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, December 24, 2012, UN Doc. A/HRC/22/43, para. 19. Similarly, the International Court of Justice has emphasized that "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn." *Cf.* ICJ, *Legality of the threat or use of nuclear weapons*. Advisory Opinion of July 8, 1996, para. 29, and ICJ, *Case concerning the Gabčikovo-Nagymaros Project (Hungary v. Slovakia)*. Judgment of September 25, 1997, para. 112.

81 *Cf.* Commission on Human Rights, Resolution 2005/15, entitled "Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights," adopted on April 14, 2005, UN Doc. E/CN.4/RES/2005/15; Human Rights Council, Resolution 9/1 "Mandate of the Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights," September 24, 2008, UN Doc. A/HRC/RES/9/1; Human Rights Council, Resolution 18/11 "Mandate of the Special Rapporteur on the human rights obligations related to environmentally sound management and disposal of hazardous substances and wastes," adopted on September 27, 2011, A/HRC/18/L.6. See also, the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on June 25, 1993, para. 11.

82 *Cf.* Human Rights Council, Resolution 35, entitled "Human rights and climate change," adopted on June 19, 2017, UN Doc. A/HRC/35/L.32; Human Rights Council, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, February 1, 2016, UN Doc. A/HRC/31/52, paras. 9 and 23; Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, January 15, 2009, UN Doc. A/HRC/10/61, paras. 18 and 24, and Human Rights Council, Analytical study of the relationship between human rights and the environment, Report of the United Nations High Commissioner for Human Rights Report of the United Nations High Commissioner for Human Rights, December 16, 2001, UN Doc. A/HRC/19/34, para. 7.

83 *Cf.* Human Rights Council, Resolution 7/14, "The right to food", adopted on March 27, 2008, A/HRC/7/L.6; Human Rights Council, Resolution 10/12, entitled "The right to food", adopted on March 26, 2009, A/HRC/RES/10/12, and Human Rights Council, Resolution 13/4, entitled "The right to food", adopted on March 24, 2010, A/HRC/RES/13/4. Human Rights Council, Analytical study of the relationship between human rights and the environment, Report of the United Nations High Commissioner for Human Rights, adopted on December 16, 2001, UN Doc. A/HRC/19/34, para. 49.

rights protection systems recognize the right to a healthy environment as a right in itself, particularly the Inter-American human rights system, while it is evident that (ii) numerous other human rights are vulnerable to environmental degradation, all of which results in a series of environmental obligations for States to comply with their duty to respect and to ensure those rights. Specifically, another consequence of the interdependence and indivisibility of human rights and environmental protection is that, when determining these State obligations, the Court may avail itself of the principles, rights and obligations of international environmental law, which, as part of the international *corpus iuris* make a decisive contribution to establishing the scope of the obligations under the American Convention in this regard (*supra* paras. 43 to 45).

B. Human rights affected by environmental degradation, including the right to a healthy environment

56. Under the inter-American human rights system, the right to a healthy environment is established expressly in Article 11 of the Protocol of San Salvador:

> 1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.
>
> 2. The States Parties shall promote the protection, preservation, and improvement of the environment.

57. It should also be considered that this right is included among the economic, social and cultural rights protected by Article 26[84] of the American Convention, because this norm protects the rights derived from the economic, social, educational, scientific and cultural provisions of the OAS Charter,[85] the American Declaration of the Rights and Duties of Man (to the extent that the latter "contains and defines the essential human rights referred to in the Charter") and those resulting from an interpretation of the Convention that accords with the criteria established in its Article 29[86] (*supra* para. 42). The Court reiterates the interdependence and indivisibility of the civil and political rights, and the economic, social and cultural rights, because they should be understood integrally and comprehensively as human rights, with no order of precedence, that are enforceable in all cases before the competent authorities. [87]

---

[84] This article establishes that: "The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires."

[85] In this regard, Articles 30, 31, 33 and 34 of the Charter establish an obligation for the States to achieve the "integral development" of their peoples. "Integral development" has been defined by the OAS Executive Secretariat for Integral Development (SEDI) as "the general name given to a series of policies that work together to promote sustainable development." As mentioned previously, one of the dimensions of sustainable development is the environmental sphere (*supra* paras. 52 and 53). *Cf.* Charter of the Organization of American States entered into force on December 13, 1951, Arts. 30, 31, 33 and 34.

[86] In the *Case of Lagos del Campo v. Peru*, the Court established that, as in the case of the other rights established in the American Convention, Article 26 is subject to the general obligations contained in Articles 1(1) and 2 of Chapter I (General Obligations) of the Convention, as are Articles 3 to 25 included in Chapter II (Civil and Political Rights), and protects the rights derived from the OAS Charter, the American Declaration of the Rights and Duties of Man and those resulting from "other international instruments of the same nature," based on Article 29(d) of the Convention. *Cf. Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2017. Series C No. 340, paras. 142 to 144. See also, *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller") v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2009. Series C No. 198, para. 100.

[87] *Cf. Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller") v.*

58. The Court underscores that the right to a healthy environment is recognized explicitly in the domestic laws of several States of the region,[88] as well as in some provisions of the international *corpus iuris*, in addition to the aforementioned Protocol of San Salvador (*supra* para. 56), such as the American Declaration on the Rights of Indigenous Peoples;[89] the African Charter on Human and Peoples' Rights;[90] the ASEAN Human Rights Declaration,[91] and the Arab Charter on Human Rights.[92]

59. The human right to a healthy environment has been understood as a right that has both individual and also collective connotations. In its collective dimension, the right to a healthy environment constitutes a universal value that is owed to both present and future generations. That said, the right to a healthy environment also has an individual dimension insofar as its violation may have a direct and an indirect impact on the individual owing to its connectivity to other rights, such as the rights to health, personal integrity, and life. Environmental degradation may cause irreparable harm to human beings; thus, a healthy environment is a fundamental right for the existence of humankind.

Peru, supra, para. 101, and *Case of Lagos del Campo v. Peru, supra*, para. 141.

88 The Constitutions of the following States establish the right to a healthy environment: (1) Constitution of the Argentine Nation, art. 41; (2) Constitution of the State of Bolivia, art. 33; (3) Constitution of the Federative Republic of Brazil, art. 225; (4) Constitution of the Republic of Chile, art. 19; (5) Constitution of Colombia, art. 79; (6) Constitution of Costa Rica, art. 50; (7) Constitution of the Republic of Ecuador, art. 14; (8) Constitution of the Republic of El Salvador, art. 117; (9) Constitution of the Republic of Guatemala, art. 97; (10) Constitution of the United Mexican States, art. 4; (11) Constitution of Nicaragua, art. 60; (12) Constitution of the Republic of Panama, arts. 118 and 119; (13) Constitution of the Republic of Paraguay, art. 7; (14) Constitution of Peru, art. 2; (15) Constitution of the Dominican Republic, arts. 66 and 67, and (16) Constitution of the Bolivarian Republic of Venezuela, art. 127.

89 Article 19 of this Declaration provides for the protection of a healthy environment establishing that indigenous peoples "have the right to live in harmony with nature and to a healthy, safe, and sustainable environment, essential conditions for the full enjoyment of the right to life, to their spirituality, worldview and to collective well-being." American Declaration on the Rights of Indigenous Peoples, adopted at the third plenary session of the OAS General Assembly held on June 15, 2016, AG/RES. 2888 (XLVI-O/16). Also, the preamble to the Social Charter of the Americas "recognize[s] that a safe environment is essential to integral development." Also, the relevant part of its article 18 establishes that: "[…] Member states affirm their commitment to promote healthy lifestyles and to strengthen their capacity to prevent, detect, and respond to chronic non-communicable diseases, current and emerging infectious diseases, and environmental health concerns." Article 22 establishes that: "Natural and man-made disasters affect populations, economies, and the environment. Reducing the vulnerabilities of countries to these disasters, with particular attention to the most vulnerable regions and communities, including the poorest segments of society, is essential to ensuring nations' progress and the pursuit of a better quality of life. Member states commit to improving regional cooperation and to strengthening their national, technical, and institutional capacity for disaster prevention, preparedness and response, rehabilitation, resilience, risk reduction, impact mitigation, and evaluation. Member states also commit to face the impact of climate variability, including the *El Niño* and *La Niña* phenomena, and the adverse effects of climate change that represent a risk increase in all countries of the Hemisphere, particularly for developing countries." Social Charter of the Americas, adopted by the OAS General Assembly on June 4, 2012, OAS Doc. AG/doc.5242/12 rev. 2, preamble and arts. 17 and 22.

90 Article 24 of the Charter establishes that "[a]ll peoples shall have the right to a general satisfactory environment favourable to their development." African Charter on Human and Peoples' Rights, entered into force on October 21, 1986, OAU Doc. O/LEG/67/3 rev.

91 Article 28(f) of this Declaration establishes that: "Every person has the right to an adequate standard of living for himself or herself and his or her family including: [...] f. The right to a safe, clean and sustainable environment." *Cf.* ASEAN Human Rights Declaration, adopted on November 18, 2012.

92 Article 38 of this Charter stipulates that: "Every person has the right to an adequate standard of living for himself and his family, which ensures their well-being and a decent life, including food, clothing, housing, services and the right to a healthy environment. The States parties shall take the necessary measures commensurate with their resources to guarantee these rights." *Cf.* Arab Charter of Human Rights, League of Arab States, entered into force on March 15, 2008.

60. The Working Group on the Protocol of San Salvador[93] indicated that the right to a healthy environment, as established in this instrument, involved the following five State obligations: (a) guaranteeing everyone, without any discrimination, a healthy environment in which to live; (b) guaranteeing everyone, without any discrimination, basic public services; (c) promoting environmental protection; (d) promoting environmental conservation, and (e) promoting improvement of the environment.[94] It also established that the exercise of the right to a healthy environment must be governed by the criteria of availability, accessibility, sustainability, acceptability and adaptability,[95] as in the case of other economic, social and cultural rights.[96] In order to examine the State reports under the Protocol of San Salvador, in 2014, the OAS General Assembly adopted specific progress indicators to evaluate the status of the environment based on: (a) atmospheric conditions; (b) quality and sufficiency of water sources; (c) air quality; (d) soil quality; (e) biodiversity; (f) production of pollutant waste and its management; (g) energy resources, and (h) status of forestry resources.[97]

61. In this regard, the African Commission on Human and Peoples' Rights underscored that the right to a healthy environment imposed on States the obligation to take reasonable measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources, as well as to monitor projects that could affect the environment.[98]

---

93 The Working Group to examine the periodic reports of the States Parties established in the Protocol of San Salvador (hereinafter "the Working Group" or "the "GTPSS") was installed in May 2010 to examine the reports presented by the States Parties and to forward its recommendations and comments on the situation in the States as regards compliance with the provisions of the Protocol of San Salvador. On June 8, 2010, the OAS General Assembly, in Resolution AG/RES. 2582 (XL-O/10) entrusted the Working Group with preparing progress indicators on the rights included in the Protocol of San Salvador; (previously, the Inter-American Commission, also at the request of the OAS General Assembly, had prepared a first document on "Guidelines for Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights," CP/doc.4250 corr. 1). To this end, the Working Group divided the rights established in the Protocol of San Salvador into two groups, and the right to a healthy environment was included in the second group. The progress indicators for this second group were finalized in November 2013 and adopted by the OAS General Assembly in June 2014. *Cf.* OAS General Assembly, Resolution AG/RES. 2823 (XLIV-O/14) "Adoption of the monitoring mechanism for implementation of the Protocol of San Salvador," adopted on June 4, 2014, and GTPSS, "Progress Indicators: Second Group of Rights," November 5, 2013, OEA/Ser.L/XXV.2.1, GT/PSS/doc.9/13

94 *Cf.* GTPSS, "Progress Indicators: Second Group of Rights," November 5, 2013, OEA/Ser.L/XXV.2.1, GT/PSS/doc.9/13, para. 26.

95 Regarding this specific characteristic, the Working Group emphasized that, the right to a healthy environment refers to the quality of the environment, "because the qualifier 'healthy' requires that the constituent elements of the environment (such as water, air or soil) have technical conditions of quality that make them acceptable, in line with international standards. This means that the quality of the elements of the environment must not become an obstacle to persons to live their lives in their vital spaces." GTPSS, "Progress Indicators: Second Group of Rights," November 5, 2013, OEA/Ser.L/XXV.2.1, GT/PSS/doc.9/13, para. 33.

96 *Cf.* GTPSS, "Progress Indicators: Second Group of Rights," November 5, 2013, OEA/Ser.L/XXV.2.1, GT/PSS/doc.9/13, para. 29. See, similarly, but in relation to other rights, *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 1, 2015. Series C No. 298, para. 235, and *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*. Judgment of November 30, 2016. Series C No. 329, para. 164.

97 *Cf.* GTPSS, "Progress Indicators: Second Group of Rights," November 5, 2013, OEA/Ser.L/XXV.2.1, GT/PSS/doc.9/13, para. 38. In its resolution approving this document, the OAS General Assembly indicated that these progress indicators "were standards and criteria for the States Parties, which will be able to adapt them to their available sources of information to comply with the provisions of the Protocol [of San Salvador]." OAS General Assembly, Resolution AG/RES. 2823 (XLIV-O/14) "Monitoring Mechanism for implementation of the Protocol of San Salvador," adopted on June 4, 2014.

98 *Cf.* African Commission on Human and Peoples' Rights, *Case of the Social and Economic Rights Center (SERAC) and Center for Economic and Social Rights (CESR*) *v. Nigeria*. Communication 155/96. Decision of October 27, 2001, paras. 52 and 53.

62. The Court considers it important to stress that, as an autonomous right, the right to a healthy environment, unlike other rights, protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals. This means that it protects nature and the environment, not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as health, life or personal integrity, but because of their importance to the other living organisms with which we share the planet that also merit protection in their own right.[99] In this regard, the Court notes a tendency, not only in court judgments,[100] but also in Constitutions[101], to recognize legal personality and, consequently, rights to nature.

63. Thus, the right to a healthy environment as an autonomous right differs from the environmental content that arises from the protection of other rights, such as the right to life or the right to personal integrity.

64. That said and as previously mentioned, in addition to the right to a healthy environment, damage to the environment may affect all human rights, in the sense that the full enjoyment of all human rights depends on a suitable environment. Nevertheless, some human rights are more susceptible than others to certain types of environmental damage[102] (*supra* paras. 47 to 55). The rights especially linked to the environment have been classified into two groups: (i) rights whose enjoyment is particularly vulnerable to environmental degradation, also identified as substantive rights (for example, the rights to life, personal integrity, health or property), and (ii) rights whose exercise supports better environmental policymaking, also identified as procedural rights (such as the rights to freedom of expression and association, to information, to participation in decision-making, and to an effective remedy).[103]

---

99 In this regard, see, *inter alia*, International Union for Conservation of Nature (IUCN), the World Declaration on the Environmental Rule of Law of the International Union for Conservation of Nature adopted at the IUCN World Environmental Law Congress, held in Rio de Janeiro from April 26 to 29, 2016, Principles 1 and 2.

100 See, for example, Constitutional Court of Colombia, Judgment T-622-16 of November 10, 2016, paras. 9.27 to 9.31; Constitutional Court of Ecuador, Judgment No. 218-15-SEP-CC of July 9, 2015, pp. 9 and 10, and High Court of Uttarakhand At Naintal of India, Decision of March 30, 2017. Petition (PIL) No. 140 of 2015, pp. 61 to 63.

101 The preamble to the Constitution of the State of Bolivia stipulates that: "In ancient times, mountains arose, rivers were displaced, and lakes were formed. Our Amazon, our Chaco, our highlands and our lowlands and valleys were covered in greenery and flowers. We populated the sacred earth with a variety of faces, and since then we have understood the plurality that exist in all things and our diversity as human beings and cultures." Article 33 of the Constitution establishes that: "People have a right to a healthy, protected and balanced environment. The exercise of this right should allow individuals and collectivities of present and future generations, and also other living beings, to develop normally and permanently." In addition, article 71 of the Constitution of the Republic of Ecuador establishes that: "Nature or *Pacha Mama*, in which life is reproduced and realized, has the right to comprehensive respect for its existence, and the continuity and regeneration of its vital cycles, structure, functions and evolutionary processes. Every person, community, people or nationality may require public authorities to respect the rights of nature. The relevant principles established in the Constitution shall be observed to apply and interpret these rights. The State shall encourage natural and legal persons, and collectivities, to protect nature and shall promote respect for all the elements that form an ecosystem."

102 *Cf.* Human Rights Council, Preliminary report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, December 24, 2012, UN Doc. A/HRC/22/43, para. 19, and Human Rights Council, Mapping report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, of December 30, 2013, UN Doc. A/HRC/25/53, para. 17.

103 *Cf.* Human Rights Council, Preliminary report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, December 24, 2012, UN Doc. A/HRC/22/43, para. 17. Regarding the substantive rights, this Court has referred to both the right to life, in particular with regard to the definition of a decent life, and also to the rights to personal integrity, property, and health. See*, inter alia*, *Case of the Yakye Axa Indigenous Community v. Paraguay*, *supra*, para. 163; *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, supra*, paras. 145, 232 and 249; *Case of*

65. Several human rights bodies have examined issues relating to the environment with regard to various particularly vulnerable rights. For example, the European Court of Human Rights has introduced environmental protection through the guarantee of other rights,[104] such as the rights to life, to respect for private and family life, and to property (*supra* para. 50). Thus, for example, the European Court has indicated that States have the obligation to evaluate the risks associated with activities that involve danger to the environment, such as mining, and to take adequate measures to protect the right to respect for private and family life, and to allow the enjoyment of a healthy and protected environment.[105]

66. The Court considers that the rights that are particularly vulnerable to environmental impact include the rights to life,[106] personal integrity,[107] private life,[108] health,[109] water,[110] food,[111] housing,[112] participation in cultural life,[113] property,[114] and the right to not be

---

the Kuna Indigenous People of Madungandí and Emberá Indigenous People of Bayano and their members v. Panama. Preliminary objections, merits, reparations and costs. Judgment of October 14, 2014. Series C No. 284, para. 111, and *Case of the Kaliña and Lokono Peoples v. Suriname, supra*, para. 172. The Court has also ruled on procedural rights in relation to the environmental impact of a forestry industrialization project, referring both to access to information and to public participation. *Cf. Case of Claude Reyes et al. v. Chile. Merits, reparations and costs*. Judgment of September 19, 2006. Series C No. 151, para. 86.

104 The European human rights system does not establish the right to a healthy environment as an autonomous right in the European Convention on Human Rights and its Protocols. Under the European Union system, article 37 of the Charter of Fundamental Rights of the European Union establishes that "[a] high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development." Charter of Fundamental Rights of the European Union proclaimed on December 7, 2000, amended by the Treaty of Lisbon of December 1, 2009, 2012/C 326/02

105 *Cf.* ECHR, *Case of Tătar v. Romania*, No. 67021/01. Judgment of January 27, 2009, para. 107. Also, regarding the economic well-being of a State, it has underlined that it is necessary "to strike a fair balance between the interest of the State or a town's economic well-being and the effective enjoyment by individuals of their right to respect for their home and their private and family life." *Cf.* ECHR, *Case of Hatton and Others v. The United Kingdom* [GS], No. 36022/97. Judgment of July 8, 2003, paras. 121 to 123, 126 and 129, and ECHR, *Case of López Ostra v.* Spain, No. 16798/90. Judgment of December 9, 1994, para. 58.

106 *Cf.* ECHR, *Case of Öneryldiz v. Turkey* [GS], No. 48939/99. Judgment of November 30, 2004, paras. 89 and 90.

107 See, for example, African Commission on Human and Peoples' Rights, Resolution 153 on climate change and human rights and the need to study its impact in Africa. November 25, 2009.

108 See, for example, ECHR, *Case of Moreno Gomez v. Spain*, No. 4143/02. Judgment of November 16, 2004, paras. 53 to 55; ECHR, *Case of Borysiewicz v. Poland*, No. 71146/01. Judgment of July 1, 2008, para. 48; ECHR, *Case of Giacomelli v. Italy*, No. 59909/00. Judgment of November 2, 2006, para. 76; ECHR, *Case of Hatton and Others v. The United Kingdom* [GS], No. 360022/97. Judgment of July 8. 2003, para. 96; ECHR, *Case of Lopez Ostra v. Spain,* No. 16798/90. Judgment of December 9, 1994, para. 51, and ECHR, *Case of Taşkin and Others v. Turkey*, No. 46117/99. Judgment of November 10, 2004, para. 113.

109 On this point, the Committee on Economic, Social and Cultural Rights has indicated that the obligation to respect the right to health means that "States should […] refrain from unlawfully polluting air, water and soil, e.g. through industrial waste from State-owned facilities, from using or testing nuclear, biological or chemical weapons if such testing results in the release of substances harmful to human health." Committee on Economic, Social and Cultural Rights (hereinafter "ESCR Committee"), General Comment No. 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights). UN Doc. E/C.12/2000/4, August 11, 2000, para. 34. See, also, African Commission on Human and Peoples' Rights, *Social and Economic Rights Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*. Communication 155/96. Decision of October 27, 2001, paras. 51 and 52.

110 See, for example, ESCR Committee, General Comment No. 15: The right to water (articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2002/11, January 20, 2003, paras. 8 and 10.

111 See, for example, ESCR Committee, Concluding observations: Russian Federation, May 20, 1997, UN Doc. E/C.12/Add.13, paras. 24 and 38.

112 See, for example, ESCR Committee, General Comment No. 4: The right to adequate housing (article 11(1)

forcibly displaced.[115] Without prejudice to the foregoing, according to Article 29 of the Convention,[116] other rights are also vulnerable and their violation may affect the rights to life, liberty and security of the individual,[117] and infringe on the obligation of all persons to conduct themselves fraternally,[118] such as the right to peace, because displacements caused by environmental deterioration frequently unleash violent conflicts between the displaced population and the population settled on the territory to which it is displaced. Some of these conflicts are massive and thus extremely grave.

67. The Court also bears in mind that the effects on these rights may be felt with greater intensity by certain groups in vulnerable situations. It has been recognized that environmental damage "will be experienced with greater force in the sectors of the population that are already in a vulnerable situation";[119] hence, based on "international human rights law, States are legally obliged to confront these vulnerabilities based on the principle of equality and non-discrimination."[120] Various human rights bodies have recognized that indigenous peoples,[121] children,[122] people living in extreme poverty,

---

of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/1992/23, December 13, 1991, para. 8.f.

113 See, for example, ESCR Committee, Concluding observations: Madagascar, December 16, 2009, UN Doc. E/C.12/MDG/CO/2, para. 33, and ESCR Committee, General Comment No. 21: Right of everyone to take part in cultural life (article 15(1)(a), of the International Covenant on Economic, Social and Cultural Rights) May 17, 2010, UN Doc. E/C.12/GC/21/Rev.1, para. 36.

114 See, for example, Human Rights Council, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries and indigenous peoples, UN Doc. A/HRC/24/41, July 1, 2013, para. 16; African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya.* Communication No. 276/03, November 25, 2009, para. 186, and African Commission on Human and Peoples' Rights, *Social and Economic Rights Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*. Communication 155/96. Decision of October 27, 2001, paras. 54 and 55.

115 See, for example, Commission on Human Rights, Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39. Addendum: Guiding Principles on Internal Displacement, Principle 6. UN Doc. E/CN.4/1998/53/Add.2, February 11, 1998, and with regard to climate change, Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, January 15, 2009, UN Doc. A/HRC/10/61, para. 56.

116 See Article 29(b), (c) and (d) of the American Convention, which establish that: "No provision of this Convention shall be interpreted as: […] (b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; (c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government, or (d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have."

117 In this regard, Article I of the American Declaration of the Rights and Duties of Man stipulates that: "Every human being has the right to life, liberty and the security of his person."

118 In this regard, see the Preamble to the American Declaration of the Rights and Duties of Man, which indicates that: "All men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another."

119 Human Rights Council, Resolution 16/11, "Human rights and the environment," 12 April 2011, UN Doc. A/HRC/RES/16/11, preamble, and Human Rights Council, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, February 1, 2016, UN Doc. A/HRC/31/52, para. 81.

120 Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, January 15, 2009, UN Doc. A/HRC/10/61, para. 42, and Human Rights Council, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, February 1, 2016, UN Doc. A/HRC/31/52, para. 81.

121 Indigenous peoples are particularly vulnerable to environmental degradation, not only due to their special spiritual and cultural relationship with their ancestral territories, but also due to their economic dependence on environmental resources and because they "often live in marginal lands and fragile ecosystems which are

minorities, and people with disabilities, among others,[123] are groups that are especially vulnerable to environmental damage, and have also recognized the differentiated impact that it has on women.[124] In addition, the groups that are especially vulnerable to environmental degradation include communities that, essentially, depend economically or for their survival on environmental resources from the marine environment, forested areas and river basins,[125] or run a special risk of being affected owing to their geographical location, such as coastal and small island communities.[126] In many cases, the special

---

particularly sensitive to alterations in the physical environment." Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, January 15, 2009, UN Doc. A/HRC/10/61, para. 51. See also: Human Rights Council, Preliminary report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, December 24, 2012, UN Doc. A/HRC/22/43, para. 45, and Human Rights Council, Mapping report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, of December 30, 2013, UN Doc. A/HRC/25/53, paras. 76 to 78.

122 Environmental degradation exacerbates health risks and undermines support structures that protect children from harm. This is particularly evident in the case of children in the developing world. "For example, extreme weather events and increased water stress already constitute leading causes of malnutrition and infant and child mortality and morbidity. Likewise, increased stress on livelihoods will make it more difficult for children to attend school. Girls will be particularly affected as traditional household chores, such as collecting firewood and water, require more time and energy when supplies are scarce. Moreover, like women, children have a higher mortality rate as a result of weather-related disasters." Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, January 15, 2009, UN Doc. A/HRC/10/61, para. 48. See also: Human Rights Council, Mapping report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, of December 30, 2013, UN Doc. A/HRC/25/53, paras. 73 to 75.

123 *Cf.* Human Rights Council, Human Rights Council, Preliminary report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, December 24, 2012, UN Doc. A/HRC/22/43, para. 44; Human Rights Council, Mapping report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, of December 30, 2013, UN Doc. A/HRC/25/53, paras. 69 to 78. See also, Report of the Independent Expert on the question of human rights and extreme poverty, UN Doc. A/65/259, August 9, 2010, paras. 17 and 37 to 42; Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, January 15, 2009, UN Doc. A/HRC/10/61, paras. 42 to 45, and Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, February 9, 2009, UN Doc. A/HRC/10/13, para. 22.

124 According to the United Nations High Commissioner for Human Rights, "[w]omen are especially exposed to climate change-related risks due to existing gender discrimination, inequality and inhibiting gender roles. It is established that women, particularly elderly women and girls, are affected more severely and are more at risk during all phases of weather-related disasters […]. The death rate of women is markedly higher than that of men during natural disasters (often linked to reasons such as: women are more likely to be looking after children, to be wearing clothes which inhibit movement and are less likely to be able to swim). […] Vulnerability is exacerbated by factors such as unequal rights to property, exclusion from decision-making and difficulties in accessing information and financial services." Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, January 15, 2009, UN Doc. A/HRC/10/61, para. 45. See also: Human Rights Council, Mapping report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, of December 30, 2013, UN Doc. A/HRC/25/53, paras. 70 to 72.

125 See, *inter alia,* United Nations General Assembly, Resolution 66/288, "The future we want," July 27, 2012, UN Doc. A/RES/66/288, para. 30; United Nations General Assembly, Resolution 64/255, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, August 6, 2009, UN Doc. A/64/255, paras. 26, 27 and 30 to 34, and Convention on Biological Diversity, entered into force on December 29, 1993, preamble.

126 In particular, the effects of climate change may result in saltwater flooding, desertification, hurricanes, erosion and landslides, leading to scarcity of water supplies and affecting food production from agriculture and fishing, as well as destroying land and housing. See*, inter alia*, United Nations General Assembly, Development and International Cooperation: Environment, Report of the World Commission on Environment and Development, August 4, 1987, UN Doc. A/42/427, p. 47, 148 and 204; United Nations General Assembly, Resolution 44/206, "Possible adverse effects of sea-level rise on islands and coastal areas, particularly low-lying coastal areas," December 22, 1989, UN Doc. A/RES/44/206; United Nations General Assembly, Resolution 64/255, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the

vulnerability of these groups has led to their relocation or internal displacement.[127]

68. The Court will rule below on the specific environmental obligations in relation to indigenous communities (*infra* paras. 113, 138, 152, 156, 164, 166 and 169). However, in general, the Court stresses the permanent need for States to evaluate and execute the obligations described in Chapter VIII of this Opinion taking into account the differentiated impact that such obligations could have on certain sectors of the population in order to respect and to ensure the enjoyment and exercise of the rights established in the Convention without any discrimination.

69. In Chapter VIII of this Advisory Opinion, the Court will rule on the substantive and procedural obligations of States with regard to environmental protection that are derived from the obligations to respect and to ensure the rights to life and to personal integrity, since these are the rights regarding which Colombia consulted the Court. However, as can be inferred from the foregoing considerations, many other rights may be affected by failure to comply with these obligations, including the economic, social, cultural and environmental rights protected by the Protocol of San Salvador, the American Convention, and other treaties and instruments; specifically, the right to a healthy environment.

70. Following this introductory framework, the Court will now respond to the questions raised by Colombia in its request for an advisory opinion.

VII
THE WORD "JURISDICTION" IN ARTICLE 1(1) OF THE AMERICAN CONVENTION IN ORDER TO DETERMINE STATE OBLIGATIONS IN RELATION TO ENVIRONMENTAL PROTECTION

71. In this chapter, the Court will respond to the first question raised by Colombia in its request for an advisory opinion. To this end, it will rule on (A) the scope of the word "jurisdiction" in the American Convention; (B) State obligations within the framework of special environmental protection regimes, and (C) State obligations in the face of transboundary damage.

A. Scope of the word "jurisdiction" in Article 1(1) of the American Convention in order to determine State obligations

72. Article 1(1) of the America Convention establishes that the States Parties "undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms." Thus, violations of

---

right to non-discrimination in this context, August 6, 2009, UN Doc. A/64/255, paras. 30 to 34; United Nations General Assembly, Resolution 66/288, "The future we want," July 27, 2012, UN Doc. A/RES/66/288, paras. 158, 165, 166, 175, 178 and 190, and United Nations Framework Convention on Climate Change, entered into force on March 21, 1994, preamble and art. 4.8.

[127] The Representative of the Secretary-General on the human rights of internally displaced persons underlined five situations related to climate change and environmental degradation that triggered displacement: (a) increased hydro-meteorological disasters such as hurricanes, flooding or mudslides; (b) gradual environmental degradation and slow onset disasters, such as desertification, sinking of coastal zones, or increased salinization of groundwater and soil; (c) the "sinking" of small island States; (d) forced relocation of people from high-risk zones; and (e) violence and armed conflict triggered by the increasing scarcity of necessary resources such as water or inhabitable land. *Cf.* Human Rights Council, Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, February 9, 2009, UN Doc. A/HRC/10/13, para. 22, and Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, January 15, 2009, UN Doc. A/HRC/10/61, paras. 51 and 56.

the human rights recognized in the American Convention may entail the responsibility of the State, provided that the person concerned is subject to their jurisdiction. Therefore, the exercise of this jurisdiction is a necessary precondition for a State to incur responsibility for any conduct that may be attributed to it that allegedly violates any of the rights under the Convention.[128] In other words, for the State to be considered responsible for a violation of the American Convention, it is first necessary to establish that it was exercising its "jurisdiction" in relation to the person or persons who allege that they have been victims of the State's conduct.

73. In this regard, the Inter-American Court has indicated that the use of the word "jurisdiction" in Article 1(1) of the American Convention signifies that the State obligation to respect and to ensure human rights applies to every person who is within the State's territory or who is in any way subject to its authority, responsibility or control.[129]

74. The Court recalls that the fact that a person in subject to the jurisdiction of a State does not mean that he or she is in its territory.[130] According to the rules for the interpretation of treaties, as well as the specific rules of the American Convention (*supra* paras. 40 to 42), the ordinary meaning of the word "jurisdiction," interpreted in good faith and taking into account the context, object and purpose of the American Convention, signifies that it is not limited to the concept of national territory, but covers a broader concept that includes certain ways of exercising jurisdiction beyond the territory of the State in question.

75. This interpretation coincides with the sense that the Inter-American Commission has given to the word "jurisdiction in Article 1(1) of the Convention in its decisions.[131] In this regard, the Commission has stated that:

> In international law, the bases of jurisdiction are not exclusively territorial, but may be exercised on several other bases as well. In this sense, […] "under certain circumstances, the exercise of its jurisdiction over acts with an extraterritorial locus will not only be consistent with but required by the norms which pertain." Thus, although jurisdiction usually refers to authority over persons who are within the territory of a State, human rights are inherent in all human beings and are not based on their citizenship or location. Under inter-American human rights law, each American State is obligated therefore to respect the rights of all persons within its territory and of those present in the territory of another State but subject to the control of its agents.[132]

76. In keeping with the rule of interpretation under Article 31 of the Vienna Convention, unless the parties have had the intention of giving it a special meaning, the word

---

128 Similarly, see, *inter alia*, ECHR, *Ilaşcu and Others v. Moldavia and Russia* [GS], No. 48787/99. Judgment of July 8, 2004, para. 311; ECHR, *Al-Skeini and Others v. The United Kingdom* [GS], No. 55721/07. Judgment of July 7, 2011, para. 130, and ECHR, *Chiragov and Others v. Armenia* [GS], No. 13216/05, Judgment of June 16, 2015, para. 168.

129 *Cf.* Advisory Opinion OC-21/14, *supra*, para. 61.

130 *Cf.* Advisory Opinion OC-21/14, *supra*, para. 219.

131 *Cf.* IACHR, *Franklin Guillermo Aisalla Molina (Ecuador v. Colombia),* Admissibility Report No. 112/10 of October 21 2011, para. 91; IACHR, *Saldaño v. Argentina*, Inadmissibility Report No. 38/99 of May 11, 1999, paras. 15 to 20; IACHR, *Case of Armando Alejandre Jr. et al. v. Cuba,* Merits Report No. 86/99 of September 29, 1999, paras. 23 to 25, and IACHR, *Case of Coard et al. v. United States*, Merits Report No. 109/99 of September 29, 1999, para. 37.

132 IACHR, *Franklin Guillermo Aisalla Molina (Ecuador v. Colombia),* Admissibility Report No. 112/10 of October 21, 2011, para. 91, and IACHR, *Case of Coard et al. v. United States*, Merits Report No. 109/99 of September 29, 1999, para. 37.

"jurisdiction" should be given its ordinary meaning, interpreted in good faith and taking into account the context, object and purpose of the American Convention.

77. The Court notes that the *travaux préparatoires* of the American Convention reveal that the initial text of Article 1(1) established that: "[t]he States Parties undertake to respect the rights and freedoms recognized in this Convention and to ensure their free and full exercise to all persons who are in their territory and subject to their jurisdiction"[133] (underlining added). When adopting the American Convention, the Inter-American Specialized Conference on Human Rights eliminated the reference to "territory" and established the obligation of the States Parties to the Convention, embodied in Article 1(1) of this treaty, to respect and to ensure the rights recognized therein "to all persons subject to their jurisdiction" (*supra* para. 72). Accordingly, the margin of protection for the rights recognized in the American Convention was expanded insofar as the States Parties' obligations are not restricted to the geographical space corresponding to their territory, but encompass those situations where, even outside a State's territory, a person is subject to its jurisdiction. In other words, States may not only be found internationally responsible for acts or omissions attributed to them within their territory, but also for those acts or omissions committed outside their territory, but under their jurisdiction.[134]

78. Therefore, the "jurisdiction" referred to in Article 1(1) of the American Convention is not limited to the national territory of a State but contemplates circumstances in which the extraterritorial conduct of a State constitutes an exercise of its jurisdiction.

79. International human rights law has recognized different situations in which the extraterritorial conduct of a State entails the exercise of its jurisdiction. The European Court of Human Rights has indicated that, under the European Convention on Human Rights, the exercise of jurisdiction outside the territory of a State requires that a State Party to that Convention exercise effective control over an area outside its territory, or over persons who are either lawfully or unlawfully in the territory of another State,[135] or that, based on the consent, invitation or acquiescence of the Government of the other territory, it exercises all or some of the public powers that it would normally exercise.[136] Thus, the European Court has recognized situations of effective control and, consequently, of extraterritorial exercise of jurisdiction in cases of military occupation or military interventions,[137] based on the

---

133 Draft Inter-American Convention for the Protection of Human Rights, adopted by the Council of the Organization of American States in the session held on October 2, 1968, in *Actas y Documentos* of the Inter-American Specialized Conference on Human Rights, 1966, OAS, Washington D.C., p. 14.

134 *Cf.* Minutes of the first session of Committee I on November 10, 1969, in *Actas y Documentos* of the Inter-American Specialized Conference on Human Rights, 1966, OAS, Washington D.C., pp. 145 and 147, and Minutes of the second session of Committee I on November 10, 1969, in *Actas y Documentos* of the Inter-American Specialized Conference on Human Rights, 1966, OAS, Washington D.C., pp. 156 and 157. The Inter-American Commission on Human Rights has also consistently given this interpretation to the *travaux préparatoires* of the Convention as regards the use of the word "jurisdiction" in the American Convention.

135 *Cf.* ECHR, *Case of Loizidou v. Turkey* (Preliminary objections), No. 15318/89. Judgment of March 23, 1995, para. 62; ECHR, *Case of Al-Skeini and Others v. The United Kingdom* [GS], No. 55721/07. Judgment of July 7, 2011, para. 138, and ECHR, *Case of Catan and Others v. Moldova and Russia* [GS], Nos. 43370/04, 8252/05 and 18454/06. Judgment of October 19, 2012, para. 311.

136 See, for example, ECHR, *Case of Chiragov and Others v. Armenia* [GS], No. 13216/05. Judgment of June 16, 2015, para. 168, and ECHR, *Case of Banković and Others v. Belgium* [GS], No. 52207/99. Decision on admissibility of December 12, 2001, para. 71.

137 See, for example, ECHR, *Case of Loizidou v. Turkey* (Preliminary objections), No. 15318/89. Judgment of March 23, 1995, para. 62; ECHR, *Case of Cyprus v. Turkey* [GS], No. 25781/94. Judgment of May 10, 2001, para. 77; ECHR, *Case of Manitaras and Others v. Turkey*, No. 54591/00. Decision of June 3, 2008, paras. 25 to 29, and ECHR, *Case of Pisari v. Republic of Moldova and Russia*, No. 42139/12. Judgment of April 21, 2015, paras. 33 to 36.

actions abroad of a State's security forces,[138] or military, political and economic influence.[139] Similarly, the United Nations Human Rights Committee has recognized the existence of extraterritorial conducts of States that entail the exercise of their jurisdiction over another territory or over persons outside their territory.[140] Meanwhile, the Inter-American Commission has indicated that, in certain instances, the exercise of jurisdiction may refer to extraterritorial actions, "when the person is present in the territory of a State but is subject to the control of another State, generally through the actions of that State's agents abroad,"[141] and has therefore recognized the exercise of extraterritorial jurisdiction, also, in cases relating to military interventions,[142] military operations in international air space[143] and in the territory of another State,[144] as well as in military facilities outside a State's territory.[145]

80. Most of these situations involve military actions or actions by State security forces that indicate "control", "power" or "authority" in the execution of the extraterritorial conduct. However, these are not the situations described by the requesting State and do not correspond to the specific context of environmental obligations referred to in this request for an advisory opinion.

81. The Court notes that the situations in which the extraterritorial conduct of a State constitutes the exercise of its jurisdiction are exceptional and, as such, should be interpreted restrictively.[146] To examine the possibility of extraterritorial exercise of jurisdiction in the context of compliance with environmental obligations, the obligations derived from the American Convention must be analyzed in light of the State obligations in that regard. In addition, the possible grounds for jurisdiction that arise from this systematic

---

138 See, for example, ECHR, *Case of Öcalan v. Turkey* [GS], No. 46221/99. Judgment of May 12, 2005, para. 91.

139 See, for example, ECHR, *Case of Ilaşcu and Others v. Republic of Moldova and Russia*, No. 48787/99. Judgment of July 8, 2004, paras. 314 to 316; ECHR, *Case of Ivanţoc and Others v. Republic of Moldova and Russia*, No. 23687/05. Judgment of November 15, 2011, paras. 105 and 106; ECHR, *Case of Catan and Others v. Republic of Moldova and Russia* [GS], Nos. 43370/04, 8252/05 and 18454/06. Judgment of October 19, 2012, paras. 103 to 106, and ECHR, *Case of Mozer v. Republic of Moldova and Russia* [GS], No. 11138/10. Judgment of February 23, 2016, paras. 97 and 98.

140 *Cf.* Human Rights Committee, Communication No. 56/1979, *Lilian Celiberti de Casariego v. Uruguay*, CCPR/C/13/D/56/1979, 29 July 1981, para. 10.3, and Human Rights Committee, Communication No. 106/1981, *Mabel Pereira Montero v. Uruguay,* CCPR/C/18/D/106/1981, March 31, 1983, para. 5.

141 IACHR, *Case of Armando Alejandre Jr. et al. v. Cuba*. Merits Report No. 86/99 of September 29, 1999, para. 23.

142 *Cf.* IACHR, *Case of Salas et al. v. United States.* Admissibility Report No. 31/93 of October 14, 1993, paras. 14, 15 and 17, and IACHR, *Case of Coard et al. v. United States*. Merits Report No. 109/99 of September 29, 1999, para. 37.

143 *Cf.* IACHR, *Case of Armando Alejandre Jr. et al. v. Cuba*. Merits Report No. 86/99 of September 29, 1999, para. 23.

144 *Cf.* IACHR, *Franklin Guillermo Aisalla Molina (Ecuador v. Colombia)*, Admissibility Report No. 112/10 of October 21, 2010, para. 98.

145 *Cf.* IACHR, *Djamel Ameziane v. United States*. Admissibility Report No. 17/12 of March 20, 2012, para. 35.

146 In this regard, the European Court of Human Rights has interpreted that, although a State's jurisdiction is above all territorial, there are "a number of exceptional circumstances that may give rise to the exercise of jurisdiction by a contracting State outside its own territorial limits." See, *inter alia,* ECHR, *Case of Al-Skeini and Others v. The United Kingdom* [GS], No. 55721/07. Judgment of July 7, 2011, paras. 131 and 133 to 139; ECHR, *Case of Ilaşcu and Others v. Republic of Moldova and Russia* [GS], No. 48787/99. Judgment of July 8, 2004, paras. 311 to 319; ECHR, *Case of Catan and Others v. Republic of Moldova and Russia* [GS], Nos. 43370/04, 8252/05 and 18454/06. Judgment of October 19, 2012, para. 105; ECHR, *Case of Chiragov and Others v. Armenia*, [GS], No. 13216/05. Judgment of June 16, 2015, para. 168, and ECHR, *Case of Banković and Others v. Belgium* [GS], Decision on admissibility of December 12, 2001, para. 66.

interpretation must be justified based on the particular circumstances of the specific case.[147] The Inter-American Court finds that a person is subject to the "jurisdiction" of a State in relation to an act committed outside the territory of that State (extraterritorial action) or with effects beyond this territory, when the said State is exercising authority over that person or when that person is under its effective control, either within or outside its territory.[148]

82. Having established that the exercise of jurisdiction by a State under Article 1(1) of the Convention may encompass extraterritorial conduct and that such circumstances must be examined in each specific case in order to verify the existence of an effective control over the persons concerned, the Court must now examine the situations of extraterritorial conduct that have been presented to it in the context of this advisory proceeding in order to determine whether they could entail the exercise of jurisdiction by a State. On this basis, the Court will now examine: (1) whether compliance by the States with extraterritorial obligations, in the context of special environmental protection regimes, could constitute an exercise of jurisdiction under the American Convention, and (2) whether State obligations in the case of transboundary damage may entail the exercise of a State's jurisdiction beyond its territory.

B. State obligations under special environmental protection regimes

83. In 1974, the United Nations Environmental Programme (hereinafter "UNEP") launched the Regional Seas Programme in order to tackle the accelerated degradation of the world's oceans and coastal areas using a shared seas approach and, in particular, involving neighboring countries in the adoption of specific comprehensive measures to protect their common marine environment.[149] At the present time, the program covers 18 regions of the world and involves more than 143 States,[150] through regional seas conventions and action plans for the management and sustainable use of the marine and coastal environment.[151]

84. In the context of this program, and in relation to the Caribbean Sea, the States of the region adopted the Cartagena Convention referred to by Colombia in its request for an advisory opinion, the purpose of which is to cover all the different aspects of environmental degradation and to meet the special needs of the region (*supra* paras. 32 to 34). To this end, the Cartagena Convention establishes that:

---

147 The European Court of Human Rights has ruled similarly. See, for example, ECHR, *Case of Banković and Others v. Belgium* [GS], No. 52207/99. Decision on admissibility of December 12, 2001, para. 61; ECHR, *Case of Al-Skeini and Others v. The United Kingdom* [GS], No. 55721/07. Judgment of July 7, 2011, paras. 133 to 139, and ECHR, *Case of Chiragov and Others v. Armenia*, [GS], No. 13216/05. Judgment of June 16, 2015, para. 168.

148 Regarding the principle of non-refoulement, see Advisory Opinion OC-21/14, *supra*, para. 219.

149 The information on the Regional Seas Programme of the United Nations Environmental Programme can be found at the following link: https://www.unenvironment.org/explore-topics/oceans-seas/what-we-do/working-regional-seas/why-does-working-regional-seas-matter.

150 Specifically, it covers the following regions: (1) the Antarctic Ocean; (2) the Arctic Ocean; (3) the Baltic Sea; (4) the Black Sea; (5) the Caspian Sea; (6) East Africa; (7) the East Asian Seas; (8) the Mediterranean; (9) the North-East Atlantic; (10) the North-East Pacific; (11) the North-West Pacific; (12) the Pacific West; (13) the Red Sea and the Gulf of Aden; (14) the Regional Organization for the Protection of the Marine Environment (ROPME) Sea Area (Bahrein, Iran, Irak, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates); (15) the South Asian Seas; (16) the South-East Pacific; (17) West, Central and South Africa, and (18) the Wider Caribbean. *Cf.* UNEP, *Realizing Integrated Regional Oceans Governance – Summary of case studies on regional cross-sectoral institutional cooperation and policy coherence, Regional Seas Reports and Studies No. 199,* 2017, p. 8.

151 The program is implemented by conventions and action plans aimed at protecting a specific marine area in which several States converge. *Cf.* United Nations Environmental Programme, *Why does working regional seas matter?* Available at: https://www.unenvironment.org/explore-topics/oceans-seas/what-we-do/working-regional-seas/why-does-working-regional-seas-matter.

> Article 4 General Obligations:
>
> 1. The Contracting Parties shall, individually or jointly, take all appropriate measures in conformity with international law and in accordance with this Convention and those of its protocols in force to which they are parties to prevent, reduce and control pollution of the Convention area[152] and to ensure sound environmental management, using for this purpose the best practicable means at their disposal and in accordance with their capabilities.
>
> 2. The Contracting Parties shall, in taking the measures referred to in paragraph 1, ensure that the implementation of those measures does not cause pollution of the marine environment outside the Convention area.
>
> 3. The Contracting Parties shall co-operate in the formulation and adoption of protocols or other agreements to facilitate the effective implementation of this Convention.
>
> 4. The Contracting Parties shall take appropriate measures, in conformity with international law, for the effective discharge of the obligations prescribed in this Convention and its protocols and shall endeavour to harmonize their policies in this regard.
>
> 5. The Contracting Parties shall co-operate with the competent international, regional and subregional organizations for the effective implementation of this Convention and its protocols. They shall assist each other in fulfilling their obligations under this Convention and its protocols.[153] (Underlining added)

85. Based on these and other obligations, particularly those established in article 4(1) of the Cartagena Convention, Colombia proposed that "an area of functional jurisdiction be established [in the Convention area], located outside the borders of the States parties, within which they are obliged to comply with certain obligations to protect the marine environment of the whole region."

86. That said, the Court notes that this type of provision can also be found in other treaties, particularly those that form part of the Regional Seas Programme mentioned above (para. 83), such as: (i) the Nairobi Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Western Indian Ocean (Nairobi Convention);[154] (ii) the Barcelona Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona Convention);[155] (iii) the Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region (Abidjan Convention);[156] (iv) the Framework Convention for the Protection of the Marine Environment of the Caspian Sea (Tehran Convention);[157] (v) the Convention on the Protection of the Black Sea against Pollution;[158]

---

[152] The Convention area is "the marine environment of the Gulf of Mexico, the Caribbean Sea and the areas of the Atlantic Ocean adjacent thereto, south of 300 north latitude and within 200 nautical miles of the Atlantic coasts of the States referred to in article 25 of the Convention." Convention for the Protection and Development of the Marine Environment in the Wider Caribbean Region (Cartagena Convention), entered into force on October 11, 1986, art. 2.1.

[153] Convention for the Protection and Development of the Marine Environment in the Wider Caribbean Region (Cartagena Convention), entered into force on October 11, 1986, art. 4.

[154] *Cf.* Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Western Indian Ocean (Nairobi Convention, entered into force on May 30, 1996, art. 4(1).

[155] *Cf.* Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona Convention), entered into force on February 12, 1978, art. 4(1).

[156] *Cf.* Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region (Abidjan Convention), entered into force on August 5, 1984, art. 4.

[157] *Cf.* Framework Convention for the Protection of the Marine Environment of the Caspian Sea (Tehran Convention), entered into force on August 12, 2006, art. 4.a.

(vi) the Convention for the Protection of the Marine Environment and Coastal Area of the South-East Pacific (Lima Convention;[159] (vii) the Convention for the Protection of Natural Resources and Environment of the South Pacific Region (Noumea Convention);[160] (viii) the Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment (Jeddah Convention);[161] (ix) the Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution;[162] (x) the Convention for the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Convention),[163] and (xi) the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR).[164]

87. All these treaties establish special regimes to prevent, reduce and control pollution in each treaty's area of application (*supra* paras. 84 and 86). Consequently, they ascribe particular functions and attributes to their States parties in specific geographical spaces. As in the case of other jurisdictions under the law of the sea, these regimes depend on the specific functions for which they were designed and agreed.[165] The areas of application of these environmental protection treaties cover jurisdictional areas of the States, including their exclusive economic zones where the bordering States exercise jurisdiction, rights and obligations in accordance with their "economic" purpose and taking into account the corresponding rights and obligations of the other States in the same area.[166]

---

158 *Cf.* Convention on the Protection of the Black Sea against Pollution entered into force on January 15, 1994, art. V.2.

159 *Cf.* Convention for the Protection of the Marine Environment and Coastal Area of the South-East Pacific (Lima Convention), entered into force on May 19, 1986, art. 3.1. The Permanent Commission for the South Pacific (CPPS), an inter-governmental body created in 1952, in Santiago de Chile, by the Governments of Chile, Ecuador and Peru, acts as the Executive Secretariat for this Convention and its Protocols, and for the Action Plan for the Protection of the Marine Environment and the Coastal Areas of the South-East Pacific. *Cf.* History and work of the Permanent Commission for the South Pacific. Available at: http://cpps-int.org/index.php/home/cpps-historia

160 *Cf.* Convention for the Protection of Natural Resources and Environment of the South Pacific Region (Noumea Convention), entered into force on August 22, 1990, art. 5(1).

161 *Cf.* Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment (Jeddah Convention), entered into force on August 19, 1985, art. III.1

162 *Cf.* Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution, entered into force on June 30, 1979, art. III.a.

163 *Cf.* Convention for the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Convention), entered into force on January 17, 2000, art. 3(1).

164 *Cf.* Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR), entered into force on March 25, 1998, art. 2.1(a).

165 Functional jurisdiction is the expression used in the law of the sea to refer to the limited jurisdiction of coastal States over the activities in "their" maritime zones (the territorial sea, the contiguous zone, the exclusive economic zone, and the continental shelf). See, for example, the different regimes in the United Nations Convention on the Law of the Sea. The jurisdiction is functional because it is exercised based on the purpose of the activity. For example, in an exclusive economic zone, the jurisdiction, rights and obligations attributed to both the coastal States and to the other States is exercised in keeping with its "economic" objective and taking into account the corresponding rights and obligations of the other States in the same zone. *Cf.* United Nations Convention on the Law of the Sea (hereinafter "UNCLOS"), entered into force on November 16, 1994, arts. 55 to 75.

166 In this regard, Articles 55 and 56 of the Convention on the Law of the Sea establish that: "Article 55: Specific legal regime of the exclusive economic zone. The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention. Article 56. Rights, jurisdiction and duties of the coastal State in the exclusive zone. 1. In the exclusive economic zone, the coastal State has: (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to: (i) the establishment and use of artificial islands, installations and structures; (ii) marine scientific research; (iii) the protection and preservation of

88. The request presented by Colombia suggests the possibility of equating the environmental obligations imposed under these regimes to human rights obligations so that the State's conduct in the area of application of these regimes is considered an exercise of the State's jurisdiction under the American Convention. However, first, the Court notes that the exercise of jurisdiction by a State under the American Convention does not depend on the State's conduct taking place in a specific geographical area. As previously established, the exercise of jurisdiction by a State under the American Convention depends on a State exercising authority over a person or when a person is subject to the effective control of that State (*supra* para. 81). Second, the Court underlines that the geographical areas that constitute the areas of application of this type of treaty were delimited with the specific purpose of compliance with the obligations established in those treaties to prevent, reduce and control pollution. Even though compliance with environmental obligations may contribute to the protection of human rights, this does not equate to the establishment of a special jurisdiction common to the States parties to those treaties in which it is understood that any action of a State in compliance with the treaty obligations constitutes an exercise of the jurisdiction of that State under the American Convention.

89. In addition, the Court understands that Colombia's request also suggests the possibility that these treaties extend the jurisdiction of a State beyond the borders of its territory. The Court notes that a State's jurisdiction can certainly extend over the territorial limits of another State when the latter expresses, through an agreement, its consent to restrict its own sovereignty.[167] The issue that must be decided by this Court, in relation to the question posed by Colombia, is whether these treaty-based regimes designed to protect the environment may involve this relinquishment of sovereignty.

90. In this regard, the Court notes that compliance with human rights or environmental obligations does not justify failing to comply with other norms of international law, including the principle of non-intervention. The American Convention must be interpreted in keeping with other principles of international law,[168] because the obligations to respect and to ensure human rights does not authorize States to act in violation of the Charter of the United Nations or international law in general. While international law does not exclude a State's exercise of jurisdiction extraterritorially, the suggested bases for such jurisdiction are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States.[169] Consequently, territorial sovereignty imposes limits on the scope of the States' obligation to contribute to the global realization of human rights.[170] In the same manner,

---

the marine environment; (c) other rights and duties provided for in this Convention. 2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention. 3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI." *Cf.* UNCLOS, arts. 55 and 56.

167 *Cf.* European Commission on Human Rights. *Case of X.Y. v. Switzerland.* Nos. 7289/75 and 7349/76. Decision of July 14, 1977, pp. 71 to 73.

168 Similarly, see, ECHR, *Al-Adsani v. The United Kingdom* [GS], No. 35763/97, Judgment of November 21, 2001, paras. 60 to 67, and ECHR, *Case of Banković and Others v. Belgium* [GS], No. 52207/99. Decision on admissibility of December 12, 2001, para. 57

169 *Cf.* ECHR, *Case of Banković and Others v. Belgium* [GS], No. 52207/99. Decision on admissibility of December 12, 2001, para. 59, and *Case of Markovic and Others v. Italy*, [GS], No. 1398/03. Judgment of December 14, 2006, para. 49.

170 Similarly, the European Court of Human Rights has indicated that "a State's competence to exercise its jurisdiction over its own nationals abroad is subordinate to that State's and other States' territorial competence." ECHR, *Case of Banković and Others v. Belgium* [GS], No. 52207/99. Decision on admissibility of December 12, 2001, para. 60.

States' rights and duties in relation to maritime areas must always be executed with due respect for the rights and duties of the other States concerned.[171]

91. In this regard, the Court emphasizes that the Cartagena Convention itself limits the scope of the provisions of this instrument, so that they should not be interpreted in a sense that "prejudice[s] the present or future claims or the legal views of any Contracting Party concerning the nature and extent of maritime jurisdiction."[172] This type of limitation can also be found in similar treaties such as: (i) the Nairobi Convention;[173] (ii) the Barcelona Convention;[174] (iii) the Abidjan Convention;[175] (iv) the Tehran Convention;[176] (v) the Convention on the Protection of the Black Sea against Pollution;[177] (vi) the Lima Convention;[178] (vii) the Noumea Convention;[179] (viii) the Jeddah Convention;[180] (ix) the Kuwait Regional Convention for Cooperation on the Protection of the Marine against Pollution,[181] and (x) the Helsinki Convention.[182]

92. Consequently, it cannot be concluded that special environmental protection regimes, such as the one established in the Cartagena Convention, extend by themselves the jurisdiction of the States Parties for the purposes of their obligations under the American Convention.

93. The Court reiterates that, to determine whether a person is subject to the jurisdiction of a State under the American Convention, it is not sufficient that this person be located in a specific geographical area, such as the area of application of an environmental protection treaty. A determination must be made, based on the factual and legal circumstances of each specific case, that exceptional circumstances exist which reveal a situation of effective control or that a person was subject to the authority of a State (*supra* para. 81). In each case, it will be necessary to determine whether, owing to a State's extraterritorial conduct,

---

171 *See, for example,* UNCLOS, arts. 56.2 (Rights, jurisdiction and duties of the coastal State in the exclusive economic zone), and 78 (Legal status of the superjacent waters and air space and the rights and freedoms of other States). *See also,* International Tribunal for the Law of the Sea (ITLOS), *Request for an advisory opinion submitted by the Subregional Fisheries Commission (SRFC).* Advisory Opinion of April 2, 2015, para. 216.

172 Convention for the Protection and Development of the Marine Environment in the Wider Caribbean Region (Cartagena Convention), entered into force on October 11, 1986, art. 3.3.

173 *Cf.* Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Western Indian Ocean (Nairobi Convention), entered into force on May 30, 1996, art. 3.3.

174 *Cf.* Barcelona Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona Convention), entered into force on February 12, 1978, art. 3.

175 *Cf.* Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region (Abidjan Convention), entered into force on August 5, 1984, art. 3.

176 *Cf.* Framework Convention for the Protection of the Marine Environment of the Caspian Sea (Tehran Convention), entered into force on August 12, 2006, art. 37.

177 *Cf.* Convention on the Protection of the Black Sea against Pollution, entered into force on January 15, 1994, art. V. 1

178 *Cf.* Convention for the Protection of the Marine Environment and Coastal Area of the South-East Pacific (Lima Convention), entered into force on May 19, 1986, art. 3.4.

179 *Cf.* Convention for the Protection of Natural Resources and Environment of the South Pacific Region (Noumea Convention), entered into force on August 22, 1990, art. 4.4.

180 *Cf.* Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment (Jeddah Convention), entered into force on August 19, 1985, art. XV.

181 *Cf.* Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution entered into force on June 30, 1979, art. XV.

182 *Cf.* Convention for the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Convention), entered into force on January 17, 2000, art. 4.

a person can be considered under its jurisdiction for the purposes of the American Convention.

94. Notwithstanding the above, the Court recalls that the *pacta sunt servanda* principle requires the parties to a treaty to apply it "in a reasonable way and in such a manner that its purpose can be realized."[183] Consequently, the States Parties to the American Convention should not act in a way that hinders other States Parties from complying with their obligations under this treaty. This is important not only with regard to acts and omissions outside its territory, but also with regard to those acts and omissions within its territory that could have effects on the territory or inhabitants of another State, as will be examined below.

C. Obligations regarding transboundary damage

95. As previously established, the jurisdiction of a State is not limited to its territorial space (para. 74). The word "jurisdiction," for the purposes of the human rights obligations under the American Convention as well as extraterritorial conducts may encompass a State's activities that cause effects outside its territory[184] (*supra* para 81).

96. Many environmental problems involve transboundary damage or harm. "One country's pollution can become another country's human and environmental rights problem, particularly where the polluting media, like air and water, are capable of easily crossing boundaries."[185] The prevention and regulation of transboundary environmental pollution has resulted in much of international environmental law, through bilateral, regional or multilateral agreements that deal with global environmental problems such as ozone depletion and climate change.[186]

97. International law requires States to meet a series of obligations relating to the possibility of environmental damage crossing the borders of a specific State. The International Court of Justice has repeatedly established that States have the obligation not

---

183 ICJ, *Case concerning the Gabčikovo-Nagymaros Project (Hungary c. Slovakia).* Judgment of September 25, 1997, para. 142.

184 The European Court has established that a State's responsibility may be generated by acts of its authorities that produce effects outside its territory. In this regard, it has indicated that "acts of the Contracting Parties performed or producing effects outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1, only in exceptional cases." *Cf.* ECHR. *Case of Al-Skeini and Others* v. *The United Kingdom,* judgment of July 7, 2011, para. 131; *Case of Banković and Others v. Belgium* [GS], No. 52207/99, Decision on admissibility of December 12, 2001, para. 67; *Case of Drozd and Janousek vs. France and Spain*, Judgment of June 26, 1992, para. 91; *Case of Soering v. The United Kingdom*, No. 14038/88, Judgment of July 7, 1989, para. 86 to 88; *Case of Issa and Others v. Turkey,* No. 31821/96. Judgment of November 16, 2004, paras. 68 and 71. *See also*, IACHR, *Franklin Guillermo Aisalla Molina (Ecuador v. Colombia)*, Admissibility Report No. 112/10 of October 21, 2010, para. 98.

185 *Cf.* Human Rights Council, Preliminary report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, December 24, 2012, UN Doc. A/HRC/22/43, para. 47 and 48, and ESCR Committee, General Comment No. 15: The right to water (articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2002/11, January 20, 2003, para. 31, and Human Rights Council, Analytical study of the relationship between human rights and the environment, Report of the United Nations High Commissioner for Human Rights, adopted on December 16, 2011, UN Doc. A/HRC/19/34, paras. 65, 70 and 72.

186 *Cf.* Human Rights Council, Preliminary report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, December 24, 2012, UN Doc. A/HRC/22/43, para. 47 and 48, and Commission on Human Rights, Analytical study of the relationship between human rights and the environment, Report of the United Nations High Commissioner for Human Rights, adopted on December 16, 2001, UN Doc. A/HRC/19/34, paras. 65, 70 and 72.

to allow their territory to be used for acts contrary to the rights of other States.[187] In application of this principle, that court has also indicated that States must ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of their jurisdiction,[188] and that States are obliged to use all available means to avoid activities in their territory, or in any area under their jurisdiction, causing significant damage to the environment of another State.[189]

98. This obligation was included in the Stockholm Declaration,[190] and in the Rio Declaration. The latter establishes that:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[191] (Underlining added.)

99. In addition, it was codified in the United Nations Convention on the Law of the Sea, which establishes that:

> States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.[192]

100. Most treaties, agreements or other international instruments on environmental law refer to transboundary environmental damage and require or demand international cooperation to deal with this matter.[193]

---

187 *Cf.* ICJ, *Corfu Channel case (The United Kingdom v. Albania).* Judgment of April 9, 1949, p. 22. *See also, Trail Smelter Case* in which that Court indicated that, "under the principles of international law, no State has the right to use or permit the use of its territory in such a manner as to cause injury in or to the territory of another State." *Cf.* Court of Arbitration, *Trail Smelter Case (United States v. Canada)*. Decision of April 16, 1938, and March 11, 1941, p. 1965.

188 *Cf.* ICJ, *Legality of the threat or use of nuclear weapons.* Advisory Opinion of July 8, 1996, para. 29.

189 *Cf.* ICJ, *Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay).* Judgment of April 20, 2010, paras. 101 and 204; also, ICJ, *Certain activities carried out by Nicaragua in the border area (Costa Rica v. Nicaragua)* and *Construction of a road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica).* Judgment of December 16, 2015, paras. 104 and 118.

190 *Cf.* Stockholm Declaration on the Human Environment, United Nations Conference on the Human Environment, Stockholm, June 5 to 16, 1972, UN Doc. A /CONF.48/14/Rev.1, Principle 21. This Principle establishes that: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

191 Rio Declaration on Environment and Development. United Nations Conference on Environment and Development, Río de Janeiro, June 3 to 14, 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. 1), Principle 2. This principle was also recognized in the preamble to the United Nations Framework Convention on Climate Change: "Recalling also that States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." United Nations Framework Convention on Climate Change, entered into force on March 21, 1994

192 UNCLOS, art. 194.2.

193 *Cf.* Office of the United Nations High Commissioner for Human Rights, Compilation report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable

101. The obligations to respect and to ensure human rights require that States abstain from preventing or hindering other States Parties from complying with the obligations derived from the Convention[194] (*supra* para. 94). Activities undertaken within the jurisdiction of a State Party should not deprive another State of the ability to ensure that the persons within its jurisdiction may enjoy and exercise their rights under the Convention. The Court considers that States have the obligation to avoid transboundary environmental damage that can affect the human rights of individuals outside their territory. For the purposes of the American Convention, when transboundary damage occurs that effects treaty-based rights, it is understood that the persons whose rights have been violated are under the jurisdiction of the State of origin,[195] if there is a causal link between the act that originated in its territory and the infringement of the human rights of persons outside its territory.

102. In cases of transboundary damage, the exercise of jurisdiction by a State of origin is based on the understanding that it is the State in whose territory or under whose jurisdiction the activities were carried out that has the effective control over them and is in a position to prevent them from causing transboundary harm that impacts the enjoyment of human rights of persons outside its territory. The potential victims of the negative consequences of such activities are under the jurisdiction of the State of origin for the purposes of the possible responsibility of that State for failing to comply with its obligation to prevent transboundary damage. That said, not every negative impact gives rise to this responsibility. The limits and characteristics of this obligation are explained in greater detail in Chapter VIII of this Opinion.

103. Accordingly, it can be concluded that the obligation to prevent transboundary environmental damage or harm is an obligation recognized by international environmental law, under which States may be held responsible for any significant damage caused to persons outside their borders by activities originating in their territory or under their effective control or authority. It is important to stress that this obligation does not depend on the lawful or unlawful nature of the conduct that generates the damage, because States must provide prompt, adequate and effective redress to the persons and States that are victims of transboundary harm resulting from activities carried out in their territory or under their jurisdiction, even if the action which caused this damage is not prohibited by international law.[196] That said, there must always be a causal link between the damage caused and the act or omission of the State of origin in relation to activities in its territory or under its jurisdiction or control.[197] Chapter VIII of this Opinion will describe the content,

---

environment, John H. Knox, of December 2013. Individual report No. 9 on global and regional environmental agreements. December 2013, paras. 147 and 149.

194 See, similarly, regarding economic, social and cultural rights: ESCR Committee, General Comment No. 15: The right to water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2002/11, January 20, 2003, para. 31. The ESCR Committee has also indicated that: "[t]o comply with their international obligations […], States parties have to respect the enjoyment of the [economic, social and cultural rights] in other countries." ESCR Committee, General Comment No. 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights). UN Doc. E/C.12/2000/4, August 11, 2000, para. 39.

195 For the purposes of this Advisory Opinion "State of origin" refers to the State under whose jurisdiction or control the activity that caused environmental damage originated, could originate, or was implemented.

196 *Cf. Articles on Prevention of transboundary harm from hazardous activities*, adopted by the International Law Commission in 2001 and annexed to UN General Assembly Resolution 62/68 of December 6, 2007, UN Doc. A/RES/62/68.

197 Similarly, see: International Tribunal for the Law of the Sea (ITLS), *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the area.* Advisory Opinion of February 1, 2011, paras. 181 to 184, and IACHR, *Franklin Guillermo Aisalla Molina (Ecuador v. Colombia)*, Admissibility Report No. 112/10 of

scope, terms and characteristics of these obligations (*infra* paras. 123 to 242).

D. Conclusion

104. Based on the above considerations, in conformity with paragraphs 72 to 103, and in response to the requesting State's first question, the Court is of the opinion that:

a. The States Parties to the American Convention have the obligations to respect and to ensure the rights recognized in this instrument to all persons subject to their jurisdiction.

b. A State's exercise of jurisdiction entails its responsibility for the actions that may be attributed to it and that are alleged to violate the rights recognized in the American Convention.

c. The jurisdiction of the States, in relation to the protection of human rights under the American Convention, is not limited to their territorial space. The word "jurisdiction" in the American Convention is more extensive than the territory of a State and includes situations beyond its territorial limits. States are obliged to respect and to ensure the human rights of all persons subject to their jurisdiction, even though such persons are not within their territory.

d. The exercise of jurisdiction under Article 1(1) of the American Convention outside the territory of a State is an exceptional situation that must be examined in each specific case and restrictively.

e. The concept of jurisdiction under Article 1(1) of the American Convention encompasses any situation in which a State exercises effective control or authority over a person or persons, either within or outside its territory.

f. States must ensure that their territory is not used in such a way as to cause significant damage to the environment of other States or of areas beyond the limits of their territory. Consequently, States have the obligation to avoid causing transboundary damage or harm.

g. States are obliged to take all necessary measures to avoid activities implemented in their territory or under their control affecting the rights of persons within or outside their territory.

h. When transboundary harm or damage occurs, a person is under the jurisdiction of the State of origin if there is a causal link between the action that occurred within its territory and the negative impact on the human rights of persons outside its territory. The exercise of jurisdiction arises when the State of origin exercises effective control over the activities that caused the damage and the consequent human rights violation.

VIII
DUTIES DERIVED FROM THE OBLIGATIONS TO RESPECT AND TO ENSURE THE RIGHTS TO LIFE AND TO PERSONAL INTEGRITY IN THE CONTEXT OF ENVIRONMENTAL PROTECTION

October 21, 2011, para. 99.

105. As explained previously, the purpose of Colombia's second and third questions is for the Court to determine State duties related to the obligations to respect and to ensure the rights to life and to personal integrity in relation to environmental damage (*supra* paras. 37 and 38). To answer these questions, the Court will rule, first, on the rights to life and to personal integrity and the relationship of these rights to environmental protection. It will then define the specific duties of the State that arise in this context.

106. The Court notes that, in its request, Colombia consulted the Court specifically with regard to the environmental obligations of prevention, precaution, mitigation of the damage, and cooperation (*supra* paras. 1 and 37). It also notes that, to ensure compliance with these obligations, international human rights law imposes certain procedural obligations on States in relation to environmental protection,[198] such as access to information, public participation, and access to justice. To define the environmental obligations derived from the obligations to respect and to ensure the rights to life and to personal integrity in response to the questions raised by Colombia, the Court will examine and rule on all these State obligations and duties.

107. Accordingly, the Court's response to the issues raised by Colombia in its second and third questions will be structured as follows: in section A, the Court will rule on the meaning and scope of the rights to life and to personal integrity, and the corresponding obligations to respect and to ensure these rights in the face of potential environmental damage, and in section B, the Court will rule on the specific environmental obligations of prevention, precaution, cooperation and procedure derived from the general obligations to respect and to ensure the rights to life and to personal integrity under the American Convention.

A. The rights to life and to personal integrity in relation to environmental protection

A.1 Meaning and scope of the rights to life and to personal integrity in the face of potential environmental damage

108. The Court has affirmed repeatedly that the right to life in the American Convention is essential because the realization of the other rights depends on its protection.[199] Accordingly, States are obliged to ensure the creation of the necessary conditions for the full enjoyment and exercise of this right.[200] In its consistent case law, the Court has indicated that compliance with the obligations imposed by Article 4 of the American Convention, related to Article 1(1) of this instrument, not only presupposes that no person may be deprived of his or her life arbitrarily (negative obligation) but also, in light of the obligation to ensure the free and full exercise of human rights, it requires States to take all appropriate measures to protect and preserve the right to life (positive obligation)[201] of all

---

198 See, *inter alia*, Human Rights Council, Mapping report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, of December 30, 2013, UN Doc. A/HRC/25/53, para. 29, and Human Rights Council, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, February 1, 2016, UN Doc. A/HRC/31/52, para. 50.

199 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits, supra*, para. 144*, and Case of Ortiz Hernández et al. v. Venezuela. Merits, reparations and costs*. Judgment of August 22, 2017. Series C No. 338, para. 100.

200 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits, supra*, para. 144, and *Case of Chinchilla Sandoval et al. v. Guatemala, supra,* para. 166.

201 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits, supra*, para. 144, and *Case of Ortiz Hernández et al. v. Venezuela, supra*, para. 100

persons subject to their jurisdiction.[202]

109. In addition, States must take the necessary measures to create an appropriate legal framework to deter any threat to the right to life; establish an effective system of justice capable of investigating, punishing and providing redress for any deprivation of life by State agents or private individuals,[203] and safeguard the right of access to the conditions that ensure a decent life,[204] which includes adopting positive measure to prevent the violation of this right.[205] Based on the foregoing, exceptional circumstances have arisen that allowed the Court to establish and examine the violation of Article 4 of the Convention in relation to individuals who did not die as a result of the actions that violated this instrument.[206] Among the conditions required for a decent life, the Court has referred to access to, and the quality of, water, food and health, and the content has been defined in the Court's case law,[207] indicating that these conditions have a significant impact on the right to a decent existence and the basic conditions for the exercise of other human rights.[208] The Court has also included environmental protection as a condition for a decent life.[209]

110. Among these conditions, it should be underlined that health requires certain essential elements to ensure a healthy life;[210] hence, it is directly related to access to food and

---

202 *Cf. Case of Juan Humberto Sánchez v. Honduras. Preliminary objection, merits, reparations and costs.* Judgment of June 7, 2003. Series C No. 99, para. 110, and *Case of Ortiz Hernández et al. v. Venezuela, supra*, para. 100.

203 *Cf. Case of the Pueblo Bello Massacre.* Judgment of January 31, 2006. Series C No. 140, para. 120, and *Case of Cruz Sánchez et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of April 17, 2015. Series C No. 292, para. 260.

204 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits, supra*, para. 144, and *Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica, supra*, para. 172.

205 *Cf. Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra*, para. 153, and *Case of Ortiz Hernández et al. v. Venezuela, supra*, para. 110.

206 Thus, for example, in the *case of the Yakye Axa Indigenous Community v. Paraguay,* the Court declared that the State was responsible for violating the right to life considering that, by failing to ensure the right to communal property, the State had deprived the victims of the possibility of acceding to their traditional means of subsistence, as well as of the use and enjoyment of the natural resources needed to obtain clean water and for the practice of traditional medicine to prevent and cure illnesses, in addition to failing to take the necessary positive measures to guarantee them living conditions compatible with their dignity. *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay, supra*, para. 158(d) and 158(e). *See also, Case of the "Juvenile Re-education Institute" v. Paraguay. Preliminary objections, merits, reparations and costs.* Judgment of September 2, 2004. Series C No. 112, para. 176; *Case of the La Rochela Massacre v. Colombia. Merits, reparations and costs.* Judgment of May 11, 2007. Series C No. 163, paras. 124, 125, 127 and 128; *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, supra*, para. 244, and *Case of Gonzales Lluy et al. v. Ecuador, supra*, para. 191. Likewise, it is worth mentioning that the European Court of Human Rights has declared the violation of the right to life with regard to individuals who did not die as a result of the acts that violated the respective convention. In this regard, see, ECHR, *Case of Acar and Others v. Turkey*, Nos. 36088/97 and 38417/97. Judgment of May 24, 2005, paras. 77 and 110, and ECHR, *Case of Makaratzis v. Greece* [GS], No. 50385/99. Judgment of December 20, 2004, paras. 51 and 55.

207 *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay, supra,* para. 167, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra*, paras. 156 to 178, and *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment August 24, 2010. Series C No. 214, paras. 195 to 213.

208 *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay, supra,* para. 163, and *Case of Chinchilla Sandoval et al. v. Guatemala, supra*, para. 168.

209 *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay, supra,* para. 163, *Case of the Xákmok Kásek Indigenous Community v. Paraguay, supra*, para. 187, and *Case of the Kaliña and Lokono Peoples v. Suriname, supra*, para. 172.

210 These essentials include food and nutrition, housing, access to clean potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment. *Cf.* ESCR Committee, General Comment No. 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights). UN Doc. E/C.12/2000/4, August 11, 2000, para. 4. See also, European Committee of Social

water.[211] In this regard, the Court has indicated that health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.[212] Thus, environmental pollution may affect an individual's health.[213]

111. In addition, access to food and water may be affected if pollution limits their availability in sufficient amounts or affects their quality.[214] It should be stressed that access to water includes access "for personal and domestic use," and this includes "consumption, sanitation, laundry, food preparation, and personal and domestic hygiene," and for some individuals and groups it will also include "additional water resources based on health, climate and working conditions."[215] Access to water, food and health are obligations to be realized progressively; however, States have immediate obligations, such as ensuring these rights without discrimination and taking measures to achieve their full realization.[216]

112. Regarding the right to personal integrity, the Court reiterate that the violation of an individual's right to physical and mental integrity has various connotations of degree and ranges from torture to other types of ill-treatment or cruel, inhuman or degrading treatment, the physical and mental effects of which vary in intensity according to endogenous and exogenous factors (such as duration of the treatment, age, sex, health, context and vulnerability) that must be examined in each specific situation.[217]

113. Furthermore, in the specific case of indigenous and tribal communities, the Court has ruled on the obligation to protect their ancestral territories owing to the relationship that such lands have with their cultural identity, a fundamental human right of a collective nature that must be respected in a multicultural, pluralist and democratic society.[218]

Rights, *Collective complaint No. 30/2005, Marangopoulos Foundation for Human Rights v. Greece* (Merits). Decision of December 6, 2006, para. 195.

211 *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay, supra*, para. 167, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra*, paras. 156 to 178, and *Case of the Xákmok Kásek Indigenous Community v. Paraguay, supra*, paras. 195 to 213.

212 *Cf. Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica, supra*, para. 148, citing the Constitution of the World Health Organization, adopted by the International Health Conference held in New York from June 19 to July 22, 1946, signed on July 22, 1946 by the representatives of 61 States and entered into force on April 7, 1948.

213 In this regard, for example, the ESCR Committee has indicated that the obligation to respect the right to health means that States should "refrain from unlawfully polluting air, water and soil, e.g. through industrial waste from State-owned facilities, from using or testing nuclear, biological or chemical weapons if such testing results in the release of substances harmful to human health." ESCR Committee, General Comment No. 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights). UN Doc. E/C.12/2000/4, August 11, 2000, para. 34.

214 *Cf. Case of the Saramaka People v. Suriname. Preliminary objections, merits, reparations and costs, supra*, para. 126; *Case of the Xákmok Kásek Indigenous Community v. Paraguay, supra*, paras. 195 and 198; ESCR Committee, General Comment No. 12: The right to adequate food (art. 11 of the International Covenant on Economic, Social and Cultural Rights), May 12, 1999, UN Doc. E/C.12/1999/5, paras. 7 and 8, and ESCR Committee, General Comment No. 15: The right to water (articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2002/11, January 20, 2003, paras. 10 and 12.

215 ESCR Committee, General Comment No. 15: The right to water (articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2002/11, January 20, 2003, para. 12. See also, *Case of the Xákmok Kásek Indigenous Community v. Paraguay, supra*, para. 195.

216 *Cf.* ESCR Committee, General Comment No. 15: The right to water (articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2002/11, January 20, 2003, para. 21.

217 *Cf. Case of Loayza Tamayo v. Peru. Merits.* Judgment of September 17, 1997. Series C No. 33, paras. 57 and 58, and *Case of Ortiz Hernández et al. v. Venezuela, supra*, para. 102.

218 *Mutatis mutandi, Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, supra*, para. 217, and *Case of the Río Negro Massacres v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of September 4, 2012. Series C No. 250, para. 160.

114. The Court notes that although each right contained in the Convention has its own sphere, meaning and scope,[219] there is a close relationship between the right to life and the right to personal integrity. Thus, there are times when the lack of access to conditions that ensure a dignified life may also constitute a violation of the right to personal integrity;[220] for example, in cases involving human health.[221] Moreover, the Court has recognized that certain projects and interventions in the environment in which people live can constitute a risk to their life and personal integrity.[222] Therefore, the Court considers it pertinent to examine jointly the State obligations in relation to the rights to life and to personal integrity that may be affected by environmental damage. Consequently, the Court will now establish and reaffirm the meaning and scope of the general obligations to respect and to ensure the rights to life and to personal integrity (*infra* paras. 115 to 121) and will then establish the specific environmental obligations derived from this general obligation (*infra* paras. 123 to 242), as solicited by Colombia in its request for an advisory opinion.

A.2. Obligations to respect and to ensure the rights to life and to personal integrity in the face of potential environmental damage

115. This Court has maintained that, in application of Article 1(1) of the American Convention, States have the obligation *erga omnes* to respect and guarantee protection standards and to ensure the effectiveness of human rights.[223] In this regard, the Court recalls that the general obligations to respect and to ensure rights established in Article 1(1) of the Convention give rise to special duties that can be determined based on the particular needs for protection of the subject of law, due to either their personal conditions or specific situation.[224]

116. The Court will now set out the general meaning and scope of the obligations to respect and to ensure the rights to life and to personal integrity in relation to the negative impact of environmental damage. These obligations must be interpreted taking into account the environmental obligations and principles set out in section B below (*infra* paras. 123 to 242).

117. The Court has asserted that the first obligation assumed by States Parties under Article 1(1) of the Convention is to "respect the rights and freedoms" recognized in this treaty. Thus, when protecting human rights, this obligation of respect necessarily includes the notion of a restriction on the exercise of the State's powers.[225] Therefore States must

---

219 *Cf. Case of Manuel Cepeda Vargas v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of May 26, 2010. Series C No. 213, para. 171, and *Case of Mohamed v. Argentina. Preliminary objection, merits, reparations and costs*. Judgment of November 23, 2012. Series C No. 255, para. 119.

220 *Mutatis mutandi, Case of the "Juvenile Re-education Institute" v. Paraguay, supra*, para. 170, and *Case of Chinchilla Sandoval v. Guatemala, supra*, paras. 168 and 169.

221 *Cf. Case of Albán Cornejo et al. v. Ecuador. Merits, reparations and costs.* Judgment of November 22, 2007. Series C No. 171, para. 117, and *Case of Chinchilla Sandoval v. Guatemala, supra*, para. 170.

222 *Cf. Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, supra*, para. 249, and *Case of the Kaliña and Lokono Peoples v. Suriname, supra*, para. 222.

223 *Cf. Case of the "Mapiripán Massacre" v. Colombia.* Judgment of September 15, 2005. Series C No. 134, para. 111, and *Case of Gonzales Lluy et al. v. Ecuador, supra*, para. 168.

224 *Cf. Case of the Pueblo Bello Massacre v. Colombia, supra,* para. 111, and *Case of I.V. v. Bolivia, supra*, para. 206

225 *Cf. The Word "Laws" in Article 30 of the American Convention on Human Rights,* Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, para. 21, and *Case of the Massacres of El Mozote and neighboring places v. El Salvador. Merits, reparations and costs*. Judgment of October 25, 2012. Series C No. 252, para. 143.

refrain from: (i) any practice or activity that denies or restricts access, in equal conditions, to the requisites of a dignified life, such as adequate food and water, and (ii) unlawfully polluting the environment in a way that has a negative impact on the conditions that permit a dignified life for the individual; for example, by dumping waste from State-owned facilities in ways that affect access to or the quality of potable water and/or sources of food.[226]

118. The second obligation, the obligation to ensure rights, means that States must take all appropriate steps to protect and preserve the rights to life and to integrity.[227] In this regard, the obligation to ensure rights is projected beyond the relationship between State agents and the persons subject to the State's jurisdiction, and encompasses the duty to prevent third parties from violating the protected rights in the private sphere.[228] This duty of prevention includes all those measures of a legal, political, administrative and cultural nature that promote the safeguard of human rights and ensure that eventual violations of those rights are examined and dealt with as wrongful acts that, as such, are susceptible to result in punishment for those who commit them, together with the obligation to compensate the victims for the negative consequences.[229] Furthermore, it is plain that the obligation to prevent is an obligation of means or behavior and non-compliance is not proved by the mere fact that a right has been violated.[230]

119. The Court has indicated that a State cannot be held responsible for every human rights violation committed by individuals within its jurisdiction. The *erga omnes* nature of the treaty-based obligation for States to ensure rights does not entail unlimited State responsibility in the case of every act or deed of a private individual because, even though an act, omission or deed of a private individual has the legal consequence of violating certain human rights of another private individual, this cannot automatically be attributed to the State; rather, the particular circumstances of the case must be examined and whether the obligation to ensure those rights has been met.[231] In the context of environmental protection, the State's international responsibility derived from the conduct of third parties may result from a failure to regulate, supervise or monitor the activities of those third parties that caused environmental damage. These obligations are explained in detail in the following section (*infra* paras. 146 to 170).

120. In addition, bearing in mind the difficulties involved in the planning and adoption of public policies, and the operational choices that must be made based on priorities and resources, the State's positive obligations must be interpreted in a way that does not impose an impossible or disproportionate burden on the authorities. For this positive

---

226 *Cf.* ESCR Committee, General Comment No. 15: The right to water (articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2002/11, January 20, 2003, paras. 17 to 19, and ESCR Committee, General Comment No. 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights). UN Doc. E/C.12/2000/4, August 11, 2000, para. 34.

227 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits, supra*, para. 144, and *Case of Luna López v. Honduras. Merits, reparations and costs.* Judgment of October 10, 2013. Series C No. 269, para. 118.

228 *Cf. Case of the "Mapiripán Massacre" v. Colombia, supra*, para. 111, and *Case of Gonzales Lluy et al. v. Ecuador, supra*, para. 170.

229 *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 175; *Case of González et al. ("Cotton Field") v. Mexico, supra*, para. 252, and *Case of the Kaliña and Lokono Peoples v. Suriname*, *supra*, paras. 221 and 222.

230 *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra,* para. 166, and *Case of I.V. v. Bolivia, supra*, para. 208.

231 *Cf. Case of the "Mapiripán Massacre" v. Colombia, supra*, para. 123, and *Case of Gonzales Lluy et al. v. Ecuador, supra*, para. 170.

obligation to arise, it must be established that: (i) at the time of the facts the authorities knew or should have known of the existence of a situation of real and imminent danger for the life of a specific individual or group of individuals and failed to take the necessary measures within their area of responsibility that could reasonably be expected to prevent or to avoid that danger, and (ii) that there was a causal link between the impact on life and integrity and the significant damage caused to the environment.

121. In addition, the obligation to ensure rights also means that States must take positive measures to permit as well as to help private individuals exercise their rights. Thus, States must take steps to disseminate information on the use and protection of water and sources of adequate food (*infra* paras. 213 to 225).[232] Also, in specific cases of individuals or groups of individuals who are unable to access water and adequate food by themselves for reasons beyond their control, States must guarantee the essential minimum of food and water.[233] If a State does not have the resources to comply with this obligation, it must "demonstrate that every effort has been made to use all resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations."[234]

122. Having established the meaning and scope of the rights to life and to personal integrity in relation to environmental protection, the Court will now examine and determine the specific environmental obligations of States derived from the general obligations to respect and to ensure those rights.

B. State obligations in the face of potential environmental damage in order to respect and to ensure the rights to life and to personal integrity

123. States are bound to comply with their obligations under the American Convention with due diligence. The general concept of due diligence in international law is typically associated with the possible responsibility of a State in relation to obligations with respect to its conduct or behavior, as opposed to obligations requiring results that entail the achievement of a specific objective.[235] The duty of a State to act with due diligence is a concept whose meaning has been determined by international law and has been used in diverse fields, including international humanitarian law,[236] the law of the sea,[237] and international environmental law.[238] In international human rights law, the duty to act with

---

232 *Cf.* ESCR Committee, General Comment No. 15: The right to water (articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2002/11, January 20, 2003, para. 25, and ESCR Committee, General Comment No. 12: The right to adequate food (art. 11 of the International Covenant on Economic, Social and Cultural Rights), May 12, 1999, UN Doc. E/C.12/1999/5, para. 6.

233 *Cf.* ESCR Committee, General Comment No. 12: The right to adequate food (art. 11 of the International Covenant on Economic, Social and Cultural Rights), May 12, 1999, UN Doc. E/C.12/1999/5, para. 17.

234 ESCR Committee, General Comment No. 12: The right to adequate food (art. 11 of the International Covenant on Economic, Social and Cultural Rights), May 12, 1999, UN Doc. E/C.12/1999/5, para. 17.

235 *Cf.* ICJ, *Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay).* Judgment of April 20, 2010, para. 197. *See also*, International Law Commission, *Commentaries on the draft Articles on prevention of transboundary harm from hazardous activities*, Yearbook of the International Law Commission 2001, vol. II, Part Two (A/56/10), art. 3, para. 8.

236 *Cf.* Article 1 common to the 1949 Geneva Conventions, and ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of February 26, 2007, para. 430.

237 *Cf.* ITLOS, *Request for an advisory opinion submitted by the Subregional Fisheries Commission (SRFC).* Advisory Opinion of April 22015, paras. 128 and 129, and ITLOS, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area.* Advisory Opinion of February 1, 2011, paras. 110 to 120.

238 See*, inter alia*, Stockholm Declaration, adopted on June 16, 1972, Principle 7; ICJ, *Certain activities carried out by Nicaragua in the border area (Costa Rica v. Nicaragua)* and *Construction of a road in Costa Rica along the*

due diligence has been examined in relation to economic, social and cultural rights, regarding which States commit to take "all appropriate measures" to achieve, progressively, the full effectiveness of the corresponding rights.[239] In addition, as this Court has emphasized, the duty to act with due diligence also corresponds, in general, to the State obligation to ensure the free and full exercise of the rights recognized in the American Convention to all persons subject to their jurisdiction, according to which States must take all appropriate measures to protect and preserve the rights recognized in the Convention, and to organize all the structures through which public authority is exercised so that they are able to ensure, legally, the free and full exercise of human rights[240] (*supra* para. 118).

124. Most environmental obligations are based on this duty of due diligence. The Court reiterates that an adequate protection of the environment is essential for human well-being, and also for the enjoyment of numerous human rights, particularly the rights to life, personal integrity and health, as well as the right to a healthy environment itself (*supra* paras. 47 to 69).

125. To comply with the obligations to respect and ensure the rights to life and personal integrity, in the context of environmental protection, States must fulfill a series of obligations with regard to both damage that has occurred within their territory and transboundary damage. In this section, the Court will examine: (1) the obligation of prevention; (2) the precautionary principle; (3) the obligation of cooperation, and (4) the procedural obligations relating to environmental protection in order to establish and determine the State obligations derived from the systematic interpretation of these provisions together with the obligations to respect and to ensure the rights to life and personal integrity established in the American Convention. The purpose of this analysis is to respond to Colombia's second and third questions concerning the specific environmental obligations that arise from respecting and ensuring the rights to life and to personal integrity under the American Convention. Even though compliance with these obligations may also be necessary to ensure other rights in cases of the possible negative impact of environmental harm, in this section the Court will refer, in particular, to these obligations in relation to protection of the rights to life and to personal integrity, since these are the rights that Colombia indicated in its request for an advisory opinion (*supra* paras. 37, 38 and 64 to 69).

126. The Court notes that international environmental law contains numerous specific obligations, for example, those that refer to the type of damage, such as conventions, agreements and protocols on oil spills, on the management of toxic substances, on climate change, and on greenhouse gases;[241] on the activity being regulated, such as conventions and agreements on inland waterway and maritime transportation;[242] or on the aspect or

---

San Juan River (Nicaragua v. Costa Rica). Judgment of December 16, 2015, para. 104. *See also*, ICJ, *Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay)*. Judgment of April 20, 2010, para. 101.

239 *Cf.* ESCR Committee, General Comment No. 3: The nature of States Parties' obligations (art. 2, para. 1, of the Covenant) UN Doc. E/1991/23, December 14, 1990, paras. 2 and 3, and ESCR Committee, General Comment No. 15: The right to water (articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2002/11, January 20, 2003, paras. 40 to 44.

240 See*, inter alia*, *Case of Velásquez Rodríguez v. Honduras*. *Merits, supra,* para. 166; *Case of Gonzales Lluy et al. v. Ecuador, supra*, para. 168, and *Case of Ortiz Hernández et al. v. Venezuela, supra*, paras. 100 and 101.

241 See, *inter alia*, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, entered into force on May 5, 1992, article 4; International Convention relating to Intervention on the High Seas in cases of Oil Pollution Casualties, entered into force on May 6, 1975, article 1; United Nations Framework Convention on Climate Change, entered into force on March 21, 1994, article 3, and Vienna Convention for Protection of the Ozone Layer, entered into force on September 22, 1988, article 2.

242 See, *inter alia*, International Convention for the Prevention of Pollution from Ships (MARPOL), entered into

element of the environment being protected, such as treaties and conventions on maritime law, biodiversity, and the protection of ecosystems or conservation of certain species.[243] There are also treaties that seek to ensure a reinforced protection in specific geographical areas,[244] such as the Cartagena Convention referred to by Colombia in its request, owing to which the obligations established in this Opinion must be complied with more rigorously. However, it is not the intention of this Advisory Opinion to describe exhaustively or in great detail all the specific obligations that States have under said provisions. The Court will now describe the general environmental obligations that States must fulfill in order to respect and ensure human rights under the American Convention. These are general obligations because States must comply with them whatever the activity, geographical area or component of the environment that is affected. Nevertheless, nothing in this Opinion should be understood to prejudice the more specific obligations that States may have assumed for the protection of the environment.

B.1 Obligation of prevention

127. The obligation to ensure the rights recognized in the American Convention entails the duty of States to prevent violations of these rights (*supra* para. 118). As previously mentioned, this obligation of prevention encompasses all the diverse measures that promote the safeguard of human rights and ensure that eventual violations of these rights are taken into account and may result in sanctions as well as compensation for their negative consequences (*supra* para. 118).

128. Under environmental law, the principle of prevention has meant that States have the "responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."[245] This principle was explicitly established in the Stockholm and Rio Declarations on the environment and is linked to the international obligation to exercise due diligence so as not to cause or permit damage to other States[246] (*supra* paras. 95 to 103).

129. The principle of prevention of environmental damage forms part of international customary law.[247] This protection encompasses not only the land, water and atmosphere,

---

force on October 2, 1983, article 1.

[243] See, *inter alia*, UNCLOS, article 194; Convention on Biodiversity, entered into force on December 29, 1993, article 1; Convention on Wetlands of International Importance especially as Waterfowl Habitat (RAMSAR Convention), entered into force on December 21, 1975, article 3; Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of December 10, 1982, relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, entered into force on December 11, 2001, article 2.

[244] See, *inter alia*, Convention for the Protection and Development of the Marine Environment in the Wider Caribbean Region (Cartagena Convention), entered into force on October 11, 1986, art. 4, and Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona Convention), entered into force on February 12, 1978, article 4.

[245] Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, Río de Janeiro, June 3 to 14 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. 1), Principle 2, and Stockholm Declaration on the Human Environment, United Nations Conference on the Human Environment, Stockholm, June 5 to 16, 1972, UN Doc. A/CONF.48/14/Rev.1, Principle 21.

[246] *Cf.* ICJ, *Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay).* Judgment of April 20, 2010, para. 101. *See also*, Court of Arbitration, *Trail Smelter Case (United States v. Canada)*. Decision of April 16, 1938, and March 11, 1941, p. 1965, and ICJ, *Corfu Channel case (The United Kingdom v. Albania).* Judgment of April 9, 1949, p. 22.

[247] The customary nature of the principle of prevention has been recognized by the International Court of Justice. *Cf.* ICJ, *Legality of the threat or use of nuclear weapons, Advisory opinion*, July 8, 1996, para. 29; ICJ, *Case concerning the Gabčikovo-Nagymaros Project (Hungary v. Slovakia)*. Judgment of September 25, 1997, para.

but also includes flora and fauna.[248] Specifically, in relation to State obligations with regard to the sea, the United Nations Convention on the Law of the Sea establishes that "States have the obligation to protect and preserve the marine environment,"[249] and imposes a specific obligation "to prevent, reduce and control pollution of the marine environment."[250] The Cartagena Convention that Colombia mentions in its request also establishes this obligation.[251]

130. Bearing in mind that, frequently, it is not possible to restore the situation that existed before environmental damage occurred, prevention should be the main policy as

---

140; ICJ, *Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay),* Judgment of April 20, 2010, para. 101; and ICJ, *Certain activities carried out by Nicaragua in the border area (Costa Rica v. Nicaragua)* and *Construction of a road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica).* Judgment of December 16, 2015, para. 104. The International Tribunal for the Law of the Sea (ITLOS) and the Permanent Court of Arbitration (PCA) have also indicated this. *Cf.* ITLOS, *Dispute concerning delimitation of the maritime boundary between Ghana and Cote d'Ivoire in the Atlantic Ocean (Ghana v. Cote d'Ivoire).* Case No. 23, Order for provisional measures of April 25, 2015, para. 71; PCA, *Iron Rhine Arbitration (Belgium v. The Netherlands).* Award of May 24, 2005, para. 222; PCA, *Kishanganga River Hydroelectric Power Plant Arbitration (Pakistan v. India).* Partial award of February 18, 2013, paras. 448 to 450 and Final award of December 20, 2013, para. 112, and PCA, *South China Sea Arbitration) (Philippines v. China).* Award of July 12, 2016, para. 941.

248 *Cf.* ICJ, *Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay).* Judgment of April 20, 2010, para. 262.

249 UNCLOS, art. 192. The following OAS Member States have ratified the United Nations Convention on the Law of the Sea: Ecuador (September 24, 2012), Dominican Republic (July 10, 2009), Canada (November 7, 2003), Nicaragua (May 3, 2000), Suriname (July 9, 1998), Chile (August 25, 1997), Guatemala (February 11, 1997), Haiti (July 31, 1996), Panama (July 1, 1996), Argentina (December 1, 1995), Bolivia (April 28, 1995), Guyana (November 16, 1993), Barbados (October 12, 1993), Honduras (October 5, 1993), Saint Vincent and the Grenadines (October 1, 1993), Saint Kitts and Nevis (January 7, 1993), Uruguay (December 10, 1992), Costa Rica (September 21, 1992), Dominica (October 24, 1991), Grenada (April 25, 1991), Antigua and Barbuda (February 2, 1989), Brazil (December 22, 1988), Paraguay (September 26, 1986), Trinidad and Tobago (April 25, 1986), Saint Lucia (March 27, 1985), Cuba (August 15, 1984), Belize (August 25, 1983), Bahamas (July 29, 1983), Jamaica (March 21, 1983) and Mexico (March 18, 1983). The following OAS Member States have not ratified the United Nations Convention on the Law of the Sea: Colombia, El Salvador, Peru, United States of America and Venezuela.

250 In particular, article 194 of the Convention establishes that: "1. States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection. 2. States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention. 3. The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment. These measures shall include, *inter alia*, those designed to minimize to the fullest possible extent: (a) the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping; (b) pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels; (c) pollution from installations and devices used in exploration or exploitation of the natural resources of the seabed and subsoil, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices; (d) pollution from other installations and devices operating in the marine environment, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices. 4. In taking measures to prevent, reduce or control pollution of the marine environment, States shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention. 5. The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life." UNCLOS, art. 194.

251 *Cf.* Convention for the Protection and Development of the Marine Environment in the Wider Caribbean Region (Cartagena Convention), entered into force on October 11, 1986, arts. 4 to 9.

regards environmental protection.[252] The Court will now examine: (1) the sphere of application of the principle of prevention; (2) the type of damage that must be prevented, and (3) the measures States must take to comply with this obligation.

B.1.a Sphere of application of the obligation of prevention

131. Under environmental law, the principle of prevention is applicable with regard to activities which take place in a State's territory, or in any area under its jurisdiction, that cause damage to the environment of another State,[253] or in relation to damage that may occur in areas that are not part of the territory of any specific State,[254] such as on the high seas.[255]

132. Regarding maritime waters, the United Nations Convention on the Law of the Sea establishes a general obligation "to protect and preserve the marine environment," without limiting its sphere of application.[256] In this regard, the Permanent Court of Arbitration has indicated that this provision should be interpreted as a duty to protect and preserve the marine environment applicable both within and outside national jurisdictions.[257]

133. The American Convention obliges States to take actions to prevent eventual human rights violations (*supra* para. 118). In this regard, although the principle of prevention in relation to the environment was established within the framework of inter-State relations, the obligations that it imposes are similar to the general duty to prevent human rights violations. Therefore, the Court reiterates that the obligation of prevention applies to damage that may occur within or outside the territory of the State of origin (*supra* para. 103).

B.1.b Type of damage to be prevented

134. The wording of the obligation of prevention established in the Stockholm and Rio Declarations does not describe the type of environmental damage that should be prevented. However, many treaties that include an obligation to prevent environmental damage do condition this obligation to a certain degree of severity of the harm that could be caused. Thus, for example, the Convention on the Law of the Non-Navigational Uses of International Watercourses,[258] the Vienna Convention for Protection of the Ozone Layer,[259] the United

---

252 *Cf.* ICJ, *Case concerning the Gabčikovo-Nagymaros Project (Hungary v. Slovakia)*. Judgment of September 25, 1997, para. 140, and International Law Commission, *Commentaries on the draft Articles on prevention of transboundary harm from hazardous activities,* Yearbook of the International Law Commission 2001, vol. II, Part Two (A/56/10), General Commentaries, paras. 1 to 5.

253 *Cf.* ICJ, *Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay).* Judgment of April 20, 2010, para. 101.

254 *Cf.* ICJ, *Legality of the threat or use of nuclear weapons*. Advisory Opinion of July 8, 1996, para. 29.

255 *Cf.* UNCLOS, arts. 116 to 118 and 192.

256 *Cf.* UNCLOS, art. 192.

257 *Cf.* PCA, *South China Sea Arbitration (Philippines v. China)*, Award of July 12, 2016, para. 940.

258 *Cf.* Convention on the Law of the Non-Navigational Uses of International Watercourses entered into force on August 17, 2014, art. 7.

259 This Convention refers to the obligation to prevent "adverse effects." In this regard, it indicates that "'adverse effects' means changes in the physical environment or biota, including changes in climate, which have significant deleterious effects on human health or on the composition, resilience and productivity of nature and managed ecosystems, or on material useful to mankind. Vienna Convention for Protection of the Ozone Layer entered into force on September 22, 1988, arts. 1.2 and 2 (underlining added).

Nations Framework Convention on Climate Change,[260] and the Protocol to the Antarctic Treaty on Environmental Protection[261] establish the obligation to prevent significant damage. Similarly, the Convention on Biological Diversity indicates an obligation to prevent "significant adverse effects on biological diversity."[262] In Europe, the Convention on Environmental Impact Assessment in a Transboundary Context establishes as a standard the prevention of "significant adverse transboundary environmental impact,"[263] and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes establishes the obligation to prevent "any significant adverse effect."[264]

135. The International Court of Justice has indicated that the obligation of prevention arises when there is risk of "significant damage."[265] According to this Court, the significant nature of a risk may be determined based on the nature and size of the project and the context in which it is implemented.[266]

136. Similarly, the International Law Commission's draft articles on prevention of transboundary harm from hazardous activities only refer to those activities that may involve significant transboundary harm.[267] Thus, the ILC indicated that "the term 'significant' was not without ambiguity and a determination ha[d] to be made in each specific case. […] It [should] be understood that '*significant' is something more than 'detectable' but need not be at the level of 'serious' or 'substantial*.' The harm must lead to a real detrimental effect on matters such as, for example, human health, industry, property, environment or agriculture in other States. Such detrimental effects must be susceptible of being measured by factual and objective standards" [italics in original].[268] In addition, the International Law Commission indicated that a State of origin is not responsible for preventing risks that are not foreseeable. However, it also noted that States have the continuing obligation to identify activities which involve significant risk.[269]

---

260 This Convention establishes the obligation "to anticipate, prevent or minimize the causes of climate change and to mitigate its adverse effects." To this end, it defines "adverse effects" as "changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare. United Nations Framework Convention on Climate Change entered into force on March 21, 1994, arts. 1 and 3 (underlining added)

261 *Cf.* Protocol to the Antarctic Treaty on Environmental Protection (Madrid Protocol), entered into force on January 14, 1998, art. 3.2.b.

262 Convention on Biological Diversity entered into force on December 29, 1993, art. 14(1)(a).

263 Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), entered into force on September 10, 1997, art. 2.1.

264 Convention on the Protection and Use of Transboundary Watercourses and International Lakes of the Economic Commission for Europe (ECE), entered into force on October 6, 1996, arts. 1.2 and 2.1.

265 *Cf.* ICJ, *Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay).* Judgment of April 20, 2010, para. 101, and ICJ, *Certain activities carried out by Nicaragua in the border area (Costa Rica v. Nicaragua)* and *Construction of a road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica).* Judgment of December 16, 2015, para. 153. *See also,* PCA, *Kishanganga River Hydroelectric Power Plant Arbitration (Pakistan v. India).* Partial award of February 18, 2013, para. 451 and Final award of December 20, 2013, para. 112.

266 *Cf.* ICJ, *Certain activities carried out by Nicaragua in the border area (Costa Rica v. Nicaragua)* and *Construction of a road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica).* Judgment of December 16, 2015, para. 155.

267 *Cf. Articles on prevention of transboundary harm from hazardous activities*, prepared by the International Law Commission and annexed to United Nations General Assembly Resolution 62/68 of December 6, 2007, UN Doc. A/RES/62/68, art. 1.

268 *Cf.* International Law Commission, *Commentaries on the draft articles on prevention of transboundary harm from hazardous activities,* Yearbook of the International Law Commission 2001, vol. II, Part II (A/56/10), art. 2, para. 4.

269 *Cf.* International Law Commission, *Commentaries on the draft articles on prevention of transboundary harm*

137. Accordingly, there is consensus in international environmental provisions that the obligation of prevention requires that the harm or damage attain a certain level.

138. At the same time, in the context of human rights, the Inter-American Court has indicated that the American Convention cannot be interpreted in a way that prevents a State from issuing any type of concession for the exploration for natural resources or their extraction.[270] In this regard, it has indicated that the acceptable level of impact, revealed by environmental impact assessments, that would allow a State to grant a concession in indigenous territory may differ in each case, without it ever being permissible to negate the ability of members of indigenous and tribal peoples to ensure their own survival.[271]

139. The European Court of Human Rights, when examining cases of alleged interference in private life caused by pollution, has indicated that the European Convention is not violated every time that environmental degradation occurs, insofar as the European Convention does not include a right to a healthy environment[272] (*supra* para. 65). Consequently, the adverse effects of the environmental pollution must attain a certain minimum level if they are to be considered a violation of the European Convention.[273] "The assessment of that minimum level is relative and depends on the circumstances of the case, such as the intensity and duration of the nuisance and its physical and mental effects. The general context of the environment must also be taken into account." In other words, "if the detriment complained of was negligible in comparison to the environmental hazards inherent to life in every modern city," the effects would be insignificant.[274] Thus, the European Court has examined the impact of the environmental harm on the individual, rather than the risk that exists for the environment or the level of environmental degradation.

140. Based on the above, the Court concludes that States must take measures to prevent significant harm or damage to the environment, within or outside their territory. In the Court's opinion, any harm to the environment that may involve a violation of the rights to life and to personal integrity, in accordance with the meaning and scope of those rights as previously defined (*supra* paras. 108 to 114) must be considered significant harm. The existence of significant harm in these terms is something that must be determined in each specific case, based on the particular circumstances.

B.1.c Measures States must take to comply with the obligation of prevention

141. The Court has indicated that there are certain activities that involve significant risks

---

from hazardous activities, Yearbook of the International Law Commission 2001, vol. II, Part II (A/56/10), art. 3, para. 5.

270 *Cf. Case of the Saramaka People v. Suriname. Preliminary objections, merits, reparations and costs, supra*, para. 126

271 *Cf. Case of the Saramaka People v. Suriname. Interpretation of the judgment on preliminary objections, merits, reparations and costs.* Judgment of August 12, 2008. Series C No. 185, para. 42, and *Case of the Kaliña and Lokono Peoples v. Suriname*, *supra*, para. 214.

272 *Cf.* ECHR, *Case of Fadeyeva v. Russia,* No. 55723/00. Judgment of June 9, 2005, para. 68, and ECHR, *Case of Dubetska and Others v. Ukraine*, No. 30499/03. Judgment of February 10, 2011, para. 105.

273 *Cf.* ECHR, *Case of Fadeyeva v. Russia,* No. 55723/00. Judgment of June 9, 2005, para. 69; ECHR, *Case of Leon and Agnieszka Kania v. Poland,* No. 12605/03. Judgment of July 21, 2009, para. 100, and, *mutatis mutandi*, ECHR, *Case of Hatton and Others v. The United Kingdom*, No. 36022/97. Judgment of July 8, 2003, para. 118.

274 *Cf.* ECHR, *Case of Fadeyeva v. Russia,* No. 55723/00. Judgment of June 9, 2005, para. 69, and ECHR, *Case of Dubetska and Others v. Ukraine*, No. 30499/03. Judgment of February 10, 2011, para. 105.

to the health of the individual and, therefore, States have the specific obligation to regulate them, including the introduction of monitoring and oversight mechanisms.[275] The African Commission has indicated this also in relation to threats to the environment.[276]

142. Likewise, based on the obligation of prevention in environmental law, States are bound to use all the means at their disposal to avoid activities under their jurisdiction causing significant harm to the environment[277] (*supra* paras. 127 to 140). This obligation must be fulfilled in keeping with the standard of due diligence, which must be appropriate and proportionate to the level of risk of environmental harm.[278] In this way, the measures that a State must take to conserve fragile ecosystems will be greater and different from those it must take to deal with the risk of environmental damage to other components of the environment.[279] Moreover, the measures to meet this standard may change over time, for example, in light of new scientific or technological knowledge.[280] However, the existence of this obligation does not depend on the level of development; in other words, the obligation of prevention applies equally to both developed and developing States.[281]

143. The Court has stressed that the general obligation to prevent human rights violations is an obligation of means or behavior rather than of results, so that non-compliance is not proved by the mere fact that a right may have been violated (*supra* paras. 118 to 121). Similarly, the obligation of prevention established in environmental law is an obligation of means and not of results.[282]

144. It is not possible to enumerate all the measures that could be adopted to comply with the obligation of prevention, because they will vary according to the right in question and according to conditions in each State party.[283] However, certain minimum measures can be defined that States must take within their general obligation to take appropriate measures to prevent human rights violations as a result of damage to the environment.

---

275 See, *inter alia*, *Case of Ximenes Lopes v. Brazil*. *Merits, reparations and costs.* Judgment of July 4, 2006. Series C No. 149, paras. 89 and 90; *Case of Gonzales Lluy et al. v. Ecuador, supra*, paras. 178 and 183, and *Case of I.V. v. Bolivia, supra*, paras. 154 and 208.

276 *Cf.* African Commission on Human and Peoples' Rights, *Social and Economic Rights Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*. Communication 155/96. Decision of October 27, 2001, para. 53.

277 *Cf.* ICJ, *Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay).* Judgment of April 20, 2010, para. 101

278 *Cf.* ITLOS, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area.* Advisory Opinion of February 1, 2011, para. 117, and International Law Commission, *Commentaries on the draft articles on prevention of transboundary harm from hazardous activities*, Yearbook of the International Law Commission 2001, vol. II, Part Two (A/56/10), art. 3, para. 11.

279 Fragile ecosystems are important systems, with unique features and resources that generally extend beyond national borders. They include deserts, semi-arid lands, mountains, wetlands, small islands and certain coastal areas. *Cf.* Chapters 12 and 13 of Agenda 21 on managing fragile ecosystems: combating desertification and drought, and sustainable mountain development. Agenda 21 adopted at the United Nations Conference on Environment and Development, Río de Janeiro, June 14, 1992, UN Doc. A/Conf.151/26 (Vol. II), para. 12.1.

280 *Cf.* ITLOS, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area.* Advisory Opinion of February 1, 2011, para. 117.

281 *Cf.* ITLOS, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area.* Advisory Opinion of February 1, 2011, para. 158.

282 *Cf.* ITLOS, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area.* Advisory Opinion of February 1, 2011, para. 110, and ITLOS, *Request for an advisory opinion submitted by the Subregional Fisheries Commission (SRFC).* Advisory Opinion of April 2, 2015, para. 129.

283 *Cf. Case of Velásquez Rodríguez v. Honduras*. *Merits, supra,* para. 175, and *Case of the "Five Pensioners" v. Peru. Merits, reparations and costs.* Judgment of February 28, 2003. Series C No. 98, para. 126

145. The specific measures States must take include the obligations to: (i) regulate; (ii) supervise and monitor; (iii) require and approve environmental impact assessments; (iv) establish contingency plans, and (v) mitigate, when environmental damage has occurred.

i) Duty to regulate

146. Article 2 of the American Convention obliges States Parties to adopt, in accordance with their constitutional processes and the provisions of this instrument, such legislative or other measures as may be necessary to give effect to the rights or freedoms protected therein.[284] In this regard, the State obligation to adapt domestic laws to the provisions of the Convention is not limited to the constitutional or legislative text, but must extend to all legal provisions of a regulatory nature and result in effective practical implementation.[285]

147. Given the relationship between protection of the environment and human rights (*supra* paras. 47 to 55), all States must regulate this matter and take other similar measures to prevent significant damage to the environment. This obligation has been expressly included in international instruments on environmental protection, without making a distinction between damage caused within or outside the territory of the State of origin.[286] The Convention on the Law of the Sea establishes the obligation to adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources,[287] from seabed activities subject to national jurisdiction,[288] from dumping[289] and from or through the atmosphere,[290] among other matters.[291] Likewise, the Cartagena Convention, referred to by Colombia in its request, establishes that "the Contracting Parties undertake to develop technical and other guidelines to assist in the planning of their major development projects in such a way as to prevent or minimize harmful impacts on the Convention area."[292] Other treaties of this nature contain similar provisions.[293]

---

284 *Cf. Case of Albán Cornejo et al. v. Ecuador, supra*, para. 118, and *Case of Valencia Hinojosa et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of November 29, 2016. Series C No. 327, para. 118.

285 *Cf. Case of Vélez Loor v. Panama. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2010. Series C No. 218, para. 286, and Advisory Opinion OC-21/14, *supra*, para. 65

286 In this regard, Principle 11 of the Rio Declaration on Environment and Development establishes that: "States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries." Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, Río de Janeiro, June 3 to 14 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. 1), Principle 11. *See also,* Stockholm Declaration on the Human Environment, United Nations Conference on the Human Environment, Stockholm, June 5 to 16, 1972, UN Doc. A/CONF.48/14/Rev.1, paras. 5 and 7 of the preamble and Principle 23.

287 *Cf.* UNCLOS, art. 207.

288 *Cf.* UNCLOS, art. 208.

289 *Cf.* UNCLOS, art. 210.

290 *Cf.* UNCLOS, art. 212.

291 *Cf.* UNCLOS, art. 209 (Pollution from activities in the Area), and art. 211 (Pollution from vessels).

292 Convention for the Protection and Development of the Marine Environment in the Wider Caribbean Region (Cartagena Convention), entered into force on October 11, 1986, art. 12.1.

293 See, *inter alia,* Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Western Indian Ocean (Nairobi Convention, entered into force on May 30, 1996, art. 14(1); Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region (Abidjan Convention), entered into force on August 5, 1984, art. 4; Framework Convention for the Protection of the Marine Environment of the Caspian Sea (Tehran Convention), entered into force on August 12, 2006, arts. 15, 18 and 19.4; Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and contiguous Atlantic area (ACCOBAMS), entered into force on June 1, 2001, art. II.3;

148. The European Court of Human Rights has indicated that States must regulate dangerous activities taking into account "the level of the potential risk to human lives."[294] In this regard, States "must govern the licensing, setting up, operation, security and supervision of the activity in question, and must make it obligatory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks."[295] Furthermore, "the relevant regulations must also provide for appropriate procedures, taking into account the technical aspects of the activity in question, for identifying shortcomings in the processes concerned and any errors committed by those responsible at different levels."[296]

149. Therefore, this Court considers that States, taking into account the existing level of risk, must regulate activities that could cause significant environmental damage in a way that reduces any threat to the rights to life and to personal integrity.

150. Specifically, with regard to environmental impact assessments, which will be examined in greater detail below (paras. 156 to 170), this regulation must be clear, at least as regards: (i) the proposed activities and the impact that must be assessed (areas and aspects to be covered); (ii) the process for making an environmental impact assessment (requirements and procedures); (iii) the responsibilities and duties of project proponents, competent authorities and decision-making bodies (responsibilities and duties); (iv) how the environmental impact assessment process will be used in approval of the proposed actions (relationship to decision-making), and (v) the steps and measures that are to be taken in the event that due procedure is not followed in carrying out the environmental impact assessment or implementing the terms and conditions of approval (compliance and implementation).[297]

151. In addition, in the case of companies registered in one State that develop activities outside that State's territory, the Court notes that a tendency exists towards the regulation of such activities by the State where such companies are registered. Thus, the Committee on Economic, Social and Cultural Rights has indicated that "the States Parties must […] prevent third parties from violating [economic, social and cultural rights] in other countries, provided they can influence such third parties by legal or political means, pursuant to the Charter of the United Nations and the applicable international law."[298] Also, the Committee

---

Convention for the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Convention), entered into force on January 17, 2000, arts. 3.1, 6.2 and 16.1.a, and Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR), entered into force on March 25, 1998, art. 22(a).

294 *Cf.* ECHR, *Case of Öneryildiz v. Turkey* [GS], No. 48939/99. Judgment of November 30, 2004, para. 90.

295 *Cf.* ECHR, *Case of Öneryildiz v. Turkey* [GS], No. 48939/99. Judgment of November 30, 2004, para. 90, and ECHR, *Case of Budayeva and Others v. Russia,* Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02. Judgment of March 20, 2008, para. 132.

296 *Cf.* ECHR, *Case of Öneryildiz v. Turkey* [GS], No. 48939/99. Judgment of November 30, 2004, para. 90, and ECHR, *Case of Budayeva and Others v. Russia,* Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02. Judgment of March 20, 2008, para. 132.

297 *Cf.* UNEP, *Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach,* 2004, p. 18. Available at: https://unep.ch/etu/publications/textONUBr.pdf. *See also*, UNEP, Resolution 14/25 of June 17, 1987, adopting the Goals and Principles of Environmental Impact Assessment, UN Doc. UNEP/WG.152/4 Annex, Principle 2. Regarding these principles, the International Court of Justice has indicated that although they are not binding, States should take them into account as guidelines issued by an international organ. ICJ, *Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay).* Judgment of April 20, 2010, para. 205.

298 ESCR Committee, General Comment No. 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights). UN Doc. E/C.12/2000/4, August 11, 2000, para. 39. See also, similarly, ESCR Committee, General Comment No. 15: The right to water (articles 11 and

on the Elimination of Racial Discrimination has encouraged States to take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in a State which negatively impact the human rights of individuals outside its territory.[299] The Court takes note of these developments, and considers them to be a positive trend that would allow States to ensure the human rights of persons outside their territory.

ii) Duty to supervise and monitor

152. The Court has indicated that, at times, States have the duty to establish appropriate mechanisms to supervise and monitor certain activities in order to guarantee human rights, protecting them from the actions of public entities and private individuals.[300] Also, specifically in relation to the environment, in the *case of the Kaliña and Lokono Peoples*, the Court indicated that the obligation to protect the nature reserve areas and the territories of the indigenous communities entailed a duty of monitoring and oversight.[301]

153. Furthermore, in the context of inter-State relations, the International Court of Justice has indicated that, as part of the obligation of prevention, States must ensure compliance and implementation of their environmental protection laws and regulations, as well as exercise some form of administrative control over public and private agents, for example, by monitoring their activities.[302] That Court has also indicated that the control that a State must exercise does not end with the environmental impact assessment; rather, States must continuously monitor the environmental impact of a project or activity.[303]

154. In this regard, the Inter-American Court considers that States have an obligation to supervise and monitor activities within their jurisdiction that may cause significant damage to the environment. Accordingly, States must develop and implement adequate independent monitoring and accountability mechanisms.[304] These mechanisms must not only include preventive measures, but also appropriate measures to investigate, punish and redress possible abuse through effective policies, regulations and adjudication.[305] The level of

---

12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2002/11, January 20, 2003, para. 33.

299 *Cf.* Committee on the Elimination of Racial Discrimination. Concluding observations of the Committee with regard to the United States of America, CERD/C/USA/CO/6, May 8, 2008, para. 30.

300 See, *inter alia, Case of Ximenes Lopes v. Brazil, supra*, paras. 89 and 90; *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, supra*, para. 167; *Case of I.V. v. Bolivia, supra*, paras. 154 and 208.

301 *Cf. Case of the Kaliña and Lokono Peoples v. Suriname*, *supra*, paras. 221 and 222.

302 *Cf.* ICJ, *Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay).* Judgment of April 20, 2010, para. 197. *See also*, UNCLOS, arts. 204 and 213

303 *Cf.* ICJ, *Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay).* Judgment of April 20, 2010, para. 205, and ICJ, *Certain activities carried out by Nicaragua in the border area (Costa Rica v. Nicaragua)* and *Construction of a road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica).* Judgment of December 16, 2015, para. 161.

304 *Cf.* UN, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Doc. A/HRC/17/31, March 21, 2011, Principle 5. The United Nations Human Rights Council adopted these principles and set up a working group to promote their dissemination and effective application, among other matters. *Cf.* Human Rights Council, Resolution 17/4, UN Doc. A/HRC/RES/17/4, July 6, 2011. Similarly, the OAS General Assembly resolved to promote the application of the said principles among OAS Member States. *Cf.* OAS General Assembly, Resolution AG/RES. 2840 (XLIV-O/14), "Promotion and protection of human rights in business," adopted at the second plenary session held on June 4, 2014.

305 *Cf. Case of the Kaliña and Lokono Peoples v. Suriname*, *supra*, para. 224, citing, UN, Guiding Principles on

monitoring and oversight necessary will depend on the level of risk that the activities or conduct involves.

155. Notwithstanding the State obligation to supervise and monitor activities that could cause significant harm to the environment, the Court takes note that, according to the "Guiding Principles on Business and Human Rights," business enterprises should respect and protect human rights, and prevent, mitigate and assume responsibility for the adverse human rights impacts of their activities.[306]

iii) Duty to require and approve environmental impact assessments

156. To date, the Inter-American Court has only ruled on the obligation to carry out environmental impact assessments in relation to activities implemented in the territory of indigenous communities. In this regard, it has established that an environmental impact assessment constitutes a safeguard to ensure that the restrictions imposed on indigenous or tribal peoples in relation to the right to ownership of their lands, owing to the issue of concessions within their territory, does not entail a denial of their survival as a people.[307] The purpose of such assessments is not merely to have an objective measurement of the possible impact on the land and peoples, but also to ensure that the members of these peoples are aware of the possible risks, including the environmental and health risks, so that they can evaluate, in full knowledge and voluntarily, whether or not to accept the proposed development or investment plan.[308]

157. However, the Court notes that the obligation to make an environmental impact assessment also exists in relation to any activity that may cause significant environmental damage. In this regard, the Rio Declaration established that "[e]nvironmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority."[309] This obligation has also been recognized by the laws

---

Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Doc. A/HRC/17/31, March 21, 2011, Principle 1.

306 *Cf. Case of the Kaliña and Lokono Peoples v. Suriname*, *supra*, para. 224, citing, UN, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Doc. A/HRC/17/31, March 21, 2011, Principles 11 to 15, 17, 18, 22 and 25.

307 See*, inter alia, Case of the Saramaka People v. Suriname. Preliminary objections, merits, reparations and costs*, *supra*, para. 129; *Case of the Saramaka People v. Suriname. Interpretation of the judgment on preliminary objections, merits, reparations and costs*, *supra*, paras. 31 to 39; *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, supra*, para. 205; *Case of the Triunfo de la Cruz Garifuna Community and its members v. Honduras. Merits, reparations and costs.* Judgment of October 8, 2015. Series C No. 305, para. 156, and *Case of the Kaliña and Lokono Peoples v. Suriname*, *supra*, paras. 214 and 215.

308 *Cf. Case of the Saramaka People v. Suriname. Interpretation of the judgment on preliminary objections. Merits, reparations and costs, supra*, para. 40, and *Case of the Kaliña and Lokono Peoples v. Suriname*, *supra*, para. 214.

309 Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, Río de Janeiro, June 3 to 14 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. 1), Principle 17. Similarly, see, *inter alia*, UNCLOS, art. 204; Convention on Biodiversity entered into force on December 29, 1993, art. 14; United Nations Framework Convention on Climate Change, entered into force on March 21, 1994, art. 4(1)(f); Convention for the Protection and Development of the Marine Environment in the Wider Caribbean Region (Cartagena Convention), entered into force on October 11, 1986, art. 12.2; Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Western Indian Ocean (Nairobi Convention), entered into force on May 30, 1996, art. 14.2; Protocol to the Antarctic Treaty on Environmental Protection[309] (Madrid Protocol), entered into force on January 14, 1998, art. 8; Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region

of numerous OAS Member States, including, Antigua and Barbuda,[310] Argentina,[311] Belize,[312] Bolivia,[313] Brazil,[314] Canada,[315] Chile,[316] Colombia,[317] Costa Rica,[318] Cuba,[319] Ecuador,[320] United States of America,[321] El Salvador,[322] Guatemala,[323] Guyana,[324] Honduras,[325] Jamaica,[326] Mexico,[327] Panama,[328] Paraguay,[329] Peru,[330] Dominican Republic,[331] Trinidad and Tobago,[332] Uruguay[333] and Venezuela.[334]

158. Similarly, the International Court of Justice has indicated that the obligation of due

---

(Abidjan Convention), entered into force on August 5, 1984, art. 13.2; Convention for the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Convention), entered into force on January 17, 2000, art. 7, and Framework Convention for the Protection of the Marine Environment of the Caspian Sea (Tehran Convention), entered into force on August 12, 2006, art. 17.

310 *Cf.* Environmental Protection and Management Act of Antigua and Barbuda, September 24, 2015, Part VI, section 38.

311 *Cf.* General Environment Act of Argentina, Law No. 25,675 of November 27, 2002, art. 11.

312 *Cf.* Environmental Protection Act of Belize, December 31, 2000, Chapter 328, Part V, section 20.1.

313 *Cf.* Constitution of the State of Bolivia, art. 345.2, and Environment Act of Bolivia, Law No. 1333 of April 27, 1992, art. 25.

314 *Cf.* Federal Constitution of Brazil, art. 225(1) (IV).

315 *Cf.* Canadian Environmental Assessment Act, S.C. 1999, c. 33, September 24, 1999, with subsequent amendments, art. 13.

316 *Cf.* General Environmental Standards Act of Chile, No. 19,300 of March 1, 1994, art. 10.

317 *Cf.* Law No. 1753 of Colombia, National Development Plan 2014-2018 "All together for a new country," of June 9, 2015, art. 178, and Law No. 99 of Colombia, creating the Ministry of the Environment among other matters, of December 22, 1993, art. 57.

318 *Cf.* General Environment Law of Costa Rica, Law No. 7554 of September 28, 1995, art. 17.

319 *Cf.* Environment Act of Cuba, Law No. 81 of July 11, 1997, art. 28.

320 *Cf.* General Environmental Code of Ecuador of April 12, 2017, art. 179.

321 *Cf.* 1969 National Environmental Policy Act (NEPA) of the United States of America, Sec. 102 [42 USC § 4332].

322 *Cf.* Environment Act of El Salvador of May 4, 1998, with amendments at 2012, art. 19

323 *Cf.* Environmental Protection and Improvement Act of Guatemala, Decree No. 68-86 of November 28, 1986, art. 8.

324 *Cf.* Environmental Protection Act of Guyana of June 5, 1996, Part IV, sections 11 to 15.

325 *Cf.* General Environment Act of Honduras, Decree No. 104-93 of June 8, 1993, arts. 5 and 78

326 *Cf.* The Natural Resources Conservation Authority Act of Jamaica of July 5, 1991, section 10.

327 *Cf.* General Law on Ecological Balance and Environmental Protection of the United Mexican States of January 28, 1988, art. 28.

328 *Cf.* General Environment Act of the Republic of Panama, Law No. 41 of July 1, 1998, art. 21, and Executive Decree No. 59 of March 16, 2000, adopting the Regulations for the Environmental Impact Assessment Procedure, art. 3.

329 *Cf.* Environmental Impact Assessment Act of Paraguay, Law No. 294/93 of December 31, 1993, art. 1.

330 *Cf.* Law on the Environmental Impact Assessment System of Peru, Law No. 27,446 of April 20, 2001, and its amendments under Legislative Decree No. 1078, arts. 2 and 3.

331 *Cf.* General Environmental and Natural Resources Act of the Dominican Republic, Law No. 64-00 of August 18, 2000, art. 38.

332 *Cf.* Environmental Management Act of Trinidad and Tobago of March 13, 2000, Part V, sections 35 to 40.

333 *Cf.* Environment Act of Uruguay, Law No. 16,466 of January 19, 1994, arts. 6 and 7, and Decree No 349/2005 of September 21, 2005, adopting the Regulations for Environmental Impact Assessment and Environmental Authorizations, art. 25.

334 *Cf.* Constitution of the Bolivarian Republic of Venezuela, art. 129.

diligence involves making an environmental impact assessment when there is a risk that a proposed activity may have a significant adverse transboundary impact and, particularly, when it involves shared resources.[335] This obligation rests with the State that plans to implement the activity or under whose jurisdiction it will be implemented.[336] Thus, the International Court of Justice has explained that, before initiating any activity with the potential to affect the environment, States must determine whether there is a risk of significant transboundary harm and, if so, make an environmental impact assessment.[337]

159. The European Court of Human Rights has indicated that when States must determine complex issues of environmental and economic policy, the decision-making process must firstly involve appropriate investigations and studies in order to allow them to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals' rights and to enable the rights of private individuals and allow them to strike a fair balance between the various conflicting interests at stake.[338] However, specifically with regard to environmental impact assessments, the European Court has only analyzed their obligatory nature and requirements when such assessments are established in the domestic law of a defendant State.[339]

160. Without prejudice to other obligations arising under international law,[340] this Court considers that, when it is determined that an activity involves a risk of significant damage, an environmental impact assessment must be carried out. The initial determination may be made by an initial environmental impact assessment,[341] for example, or because domestic law or any other regulation defines activities for which it is compulsory to require an environmental impact assessment.[342] In any case, the obligation to carry out an

---

335 *Cf.* ICJ, *Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay).* Judgment of April 20, 2010, para. 204, and ICJ, *Certain activities carried out by Nicaragua in the border area (Costa Rica v. Nicaragua)* and *Construction of a road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica).* Judgment of December 16, 2015, para. 104. Similarly, ITLOS, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area.* Advisory Opinion of February 1, 2011, para. 145.

336 *Cf.* ICJ, *Certain activities carried out by Nicaragua in the border area (Costa Rica v. Nicaragua)* and *Construction of a road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica).* Judgment of December 16, 2015, para. 153.

337 *Cf.* ICJ, *Certain activities carried out by Nicaragua in the border area (Costa Rica v. Nicaragua)* and *Construction of a road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica).* Judgment of December 16, 2015, para. 104.

338 *Cf.* ECHR, *Case of Hatton and Others v. The United Kingdom* [GS], No. 36022/97. Judgment of July 8, 2003, para. 128, and ECHR, *Case of Taşkin and Others v. Turkey*, No. 46117/99. Judgment of November 10, 2004, para. 119.

339 *See, for example,* ECHR, *Case of Giacomelli v. Italy*, No. 59909/00. Judgment of November 2, 2006, paras. 86 to 96.

340 In this regard, see, for example, the obligation to make an environmental impact assessment for activities on territories of indigenous peoples or communities, which do not depend on the existence of a risk of significant damage (*supra* para. 156).

341 The Protocol to the Antarctic Treaty on Environmental Protection establishes the obligation to prepare an "Initial Environmental Evaluation," to determine whether a proposed activity may have more than a minor or transitory impact, in which case a "Comprehensive Environmental Evaluation" should be prepared. *Cf.* Annex 1 to the Protocol to the Antarctic Treaty on Environmental Protection[341] (Madrid Protocol), entered into force on January 14, 1998, arts. 2 and 3.

342 This type of regulation exists, for example, in Brazil, Chile, Cuba, Dominican Republic, El Salvador, Mexico, Panama, Paraguay and Uruguay. *Cf.* (Brazil) Resolution 001/86 of the Environmental Council (CONAMA) of January 23, 1986, establishing the basic criteria and general guidelines for environmental impact assessments, art. 2; (Chile) General Environmental Standards Act, No. 19,300 of March 1, 1994, art. 10; (Cuba) Environment Act, Law No. 81 of July 11, 1997, art. 28; (El Salvador) Environment Act, of May 4, 1998, with amendments at 2012, art. 21; (Mexico) General Law on Ecological Balance and Environmental Protection of January 28, 1988, art. 29; (Paraguay) Environmental Impact Assessment Act, Law No. 294/93 of December 31, 1993, art. 7; (Panama)

environmental impact assessment when there is a risk of significant harm is independent of whether a project is being implemented directly by the State or by private individuals.

161. The Court has already indicated that environmental impact assessments must be made pursuant to the relevant international standards and best practice and has indicated certain conditions that environmental impact assessments must meet.[343] Despite that the foregoing related to activities implemented in territories of indigenous communities, the Court considers that such conditions are also applicable to any environmental impact assessment; they are as follows:

a. The assessment must be made before the activity is carried out

162. The environmental impact assessment must be concluded before the activity is carried out or before the permits required for its implementation have been granted.[344] The State must ensure that no activity related to project execution is undertaken until the environmental impact assessment has been approved by the competent State authority.[345] Making the environmental impact assessment during the initial stages of project discussion allows alternatives to the proposal to be explored and that such alternatives can be taken into account.[346] Preferably, environmental impact assessments should be made before the project location and design have been decided in order to avoid financial losses should changes be required.[347] When the concession, license or authorization to execute an activity has been granted without an environmental impact assessment, this should be made before the project is executed.[348]

b. It must be carried out by independent entities under the State's supervision

163. The Court considers that the environmental impact assessment must be carried out by an independent entity with the relevant technical capacity, under the State's supervision.[349] Environmental impact assessments can be carried out by the State itself or

---

Executive Decree No. 59 of March 16, 2000, adopting the Regulations for the Environmental Impact Assessment Procedure, art. 3; (Dominican Republic) General Environmental and Natural Resources Act, Law No. 64-00 of August 18, 2000, art. 41, and (Uruguay) Decree No 349/2005 of September 21, 2005, adopting the Regulations for Environmental Impact Assessment and Environmental Authorizations, art. 2.

343 *Cf. Case of the Saramaka People v. Suriname. Interpretation of the judgment on preliminary objections, merits, reparations and costs*, *supra*, para. 41; *Case of the Triunfo de la Cruz Garifuna Community and its members v. Honduras*, *supra*, para. 180, and *Case of the Kaliña and Lokono Peoples v. Suriname*, *supra*, para. 216.

344 *Cf. Case of the Saramaka People v. Suriname. Interpretation of the judgment on preliminary objections, merits, reparations and costs, supra*, para. 41, and *Case of the Triunfo de la Cruz Garifuna Community and its members v. Honduras, supra*, para. 180. In this regard, the ESCR Committee has indicated that comprehensive environmental impact assessments should be carried out prior to the execution of projects or to the granting of licenses to companies. *Cf.* ESCR Committee, Concluding observations: Peru, UN Doc. E/C.12/PER/CO/2-4, May 30, 2012, para. 22.

345 *Cf. Case of the Saramaka People v. Suriname. Preliminary objections, merits, reparations and costs*, *supra*, para. 129, and *Case of the Kaliña and Lokono Peoples v. Suriname*, *supra*, para. 201.

346 *Cf.* UNEP, Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach, 2004, p. 40. Available at: https://unep.ch/etu/publications/textONUBr.pdf.

347 *Cf.* UNEP, Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach, 2004, p. 41. Available at: https://unep.ch/etu/publications/textONUBr.pdf.

348 *Cf. Case of the Kaliña and Lokono Peoples v. Suriname*, *supra*, paras. 207 and 215.

349 *Cf. Case of the Saramaka People v. Suriname. Interpretation of the judgment on preliminary objections, merits, reparations and costs, supra*, para. 41, and *Case of the Kaliña and Lokono Peoples v. Suriname*, *supra*, para. 201.

by a private entity. However, in both cases, it is the State, in the context of its monitoring and oversight duty, that must ensure that the assessment is carried out correctly.[350] If assessments are made by private entities, the State must take steps to ensure their independence.[351]

164. During the process for approval of an environmental impact assessment, the State must analyze whether execution of the project is compatible with its international obligations. In this regard, it must take into account the impact that the project may have on its human rights obligations. In cases involving indigenous communities, the Court has indicated that the environmental impact assessment should include an evaluation of the potential social impact of the project.[352] The Court notes that if the environmental impact assessment does not include a social analysis,[353] the State must make this analysis while supervising the assessment.

c. It must include the cumulative impact

165. The Court has indicated that the environmental impact assessment must examine the cumulative impact of existing projects and proposed projects.[354] In this regard, if a proposed project is linked to another project, as in the case of the construction of an access road, for example, the environmental impact assessment should take into account the impact of both the main project and the associated projects.[355] In addition, the impact of other existing projects should be taken into account.[356] This analysis will allow a more accurate conclusion to be reached on whether the individual and cumulative effects of existing and future activities involve a risk of significant harm.[357]

d. Participation of interested parties

166. The Court has not ruled on the participation in environmental impact assessments of interested parties when this is not related to the protection of the rights of indigenous communities. In the case of projects that may affect indigenous and tribal territories, the Court has indicated that the community should be allowed to take part in the environmental

---

350 *Cf. Case of the Kaliña and Lokono Peoples v. Suriname*, *supra*, paras. 216 and 221. *See also,* Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, Río de Janeiro, June 3 to 14 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. 1), Principle 17.

351 *Mutatis mutandi, Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, supra*, para. 207, and *Case of the Kaliña and Lokono Peoples v. Suriname*, *supra*, para. 216.

352 *Cf. Case of the Saramaka People. v. Suriname. Preliminary objections, merits, reparations and costs, supra*, para. 129, and *Case of the Kaliña and Lokono Peoples v. Suriname*, *supra*, paras. 213 to 226.

353 In this regard, the ESCR Committee has indicated that, in addition to the environmental impact, States should also assess the impact on human rights of the projects or activities submitted for their approval. *Cf.* ESCR Committee, Statement in the context of the Rio+20 Conference on "the green economy in the context of sustainable development and poverty eradication," June 4, 2012, UN Doc. E/C.12/2012/1, para. 7. See also, *Cf.* UNEP, Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach, 2004, p. 52. Available at: https://unep.ch/etu/publications/textONUBr.pdf.

354 *Cf. Case of the Saramaka People v. Suriname. Interpretation of the judgment on preliminary objections, merits, reparations and costs, supra*, para. 41, and *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, supra*, para. 206.

355 *Cf.* UNEP, Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach, 2004, p. 52. Available at: https://unep.ch/etu/publications/textONUBr.pdf.

356 *Cf.* UNEP, Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach, 2004, p. 52. Available at: https://unep.ch/etu/publications/textONUBr.pdf.

357 *Cf. Case of the Saramaka People v. Suriname. Interpretation of the judgment on preliminary objections, merits, reparations and costs, supra*, para. 41.

impact assessment process through consultation.[358] The right to participate in matters that could affect the environment is dealt with, in general, in the section on procedural obligations below (paras. 226 to 232).

167. However, regarding the participation of interested parties in environmental impact assessments, the Court notes that in 1987, the United Nations Environmental Programme adopted the Goals and Principles of Environmental Impact Assessments, which established that States should permit experts and interested groups to comment on environmental impact assessments.[359] Even though the principles are not binding, they are recommendations by an international technical body that States should take into account.[360] The Court also notes that the domestic laws of Argentina,[361] Belize,[362] Brazil,[363] Canada,[364] Chile,[365] Colombia,[366] Ecuador,[367] El Salvador,[368] Guatemala,[369] Peru,[370] Dominican Republic,[371] Trinidad and Tobago[372] and Venezuela[373] include provisions that establish public participation in environmental impact assessments while, in general, Bolivia,[374] Costa Rica,[375] Cuba,[376] Honduras[377] and Mexico[378] promote public participation in decisions relating to the environment.

---

358 See*, inter alia, Case of the Saramaka People v. Suriname. Preliminary objections, merits, reparations and costs, supra*, para. 129 and 130; *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, supra*, para. 206, and *Case of the Kaliña and Lokono Peoples v. Suriname*, *supra*, para. 215.

359 *Cf.* UNEP, Resolution 14/25 of June 17 1987, adopting the Goals and Principles of Environmental Impact Assessment. UN Doc. UNEP/WG.152/4 Annex, Principles 7 and 8.

360 Regarding these Principles, see *supra* footnote 297 and ICJ, *Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay).* Judgment of April 20, 2010, para. 205.

361 *Cf.* General Environment Act of Argentina, Law No. 25,675 of November 27, 2002, art. 21.

362 *Cf.* Environmental Protection Act of Belize, December 31, 2000, Chapter 328, Part V, section 20.5

363 *Cf.* Resolution 001/86 of the Environmental Council (CONAMA) of January 23, 1986, establishing the basic criteria and general guidelines for environmental impact assessments, art. 11.2.

364 *Cf.* Canadian Environmental Assessment Act, S.C. 1999, c. 33, September 24, 1999, with subsequent amendments, art. 19.1,

365 *Cf.* General Environmental Standards Act of Chile, No. 19,300 of March 1, 1994, art. 10. art. 30 (bis)

366 *Cf.* Constitutional Court of Colombia, Judgment T-348/12, of May 15, 2012, section. 2.3.2.3.

367 *Cf.* General Environmental Code of Ecuador of April 12, 2017, art. 179, and Regulations for implementation of the social participation mechanisms established in the Environmental Management Act of Ecuador, Decree No. 1040 of April 22, 2008, art. 6.

368 *Cf.* Environment Act of El Salvador of May 4, 1998, with amendments to 2012, arts. 24 and 25.

369 *Cf.* Regulation of Environmental Assessment, Control and Monitoring of Guatemala, Decision No. 137-2016 of July 11, 2016, art. 43.d.

370 *Cf.* Law on the Environmental Impact Assessment System of Peru, Law No. 27,446 of April 20, 2001, and its amendments under Legislative Decree No. 1078, art. 14.c.

371 *Cf.* General Environmental and Natural Resources Act of the Dominican Republic, Law No. 64-00 of August 18, 2000, art. 43.

372 *Cf.* Environmental Management Act of Trinidad and Tobago of March 13, 2000, Part V, section 35.5.

373 *Cf.* General Environment Law of Venezuela of December 22, 2006, arts. 39 and 40, and 90, and Rules for environmental assessment of activities susceptible of degrading the environment, Decree No. 1257 of March 13, 1996, art. 26.

374 *Cf.* Constitution of the State of Bolivia, art. 352.

375 *Cf.* General Environment Law of Costa Rica, Law No. 7554 of September 28, 1995, art. 6.

376 *Cf.* Environment Act of Cuba, Law No. 81 of July 11, 1997, art. 4(i) and 4(m).

377 *Cf.* General Environment Act of Honduras, Decree No. 104-93 of June 8, 1993, art. 9.e.

378 *Cf.* General Law on Ecological Balance and Environmental Protection of the United Mexican States of January 28, 1988, art. 9, paragraph C.V.

168. The Court considers that, in general, the participation of the interested public allows a more complete assessment of the possible impact of a project or activity and whether it will affect human rights. Thus, it is recommendable that States allow those who could be affected or, in general, any interested person, to have the opportunity to present their opinions or comments on a project or activity before it is approved, while it is being implemented, and after the environmental impact assessment has been issued.

e. Respect for the traditions and culture of indigenous peoples

169. In the case of projects that may affect the territory of indigenous communities, social and environmental impact assessments must respect the traditions and culture of the indigenous peoples.[379] In this regard, the intrinsic connection between indigenous and tribal peoples and their territory must be taken into account. The connection between the territory and the natural resources that have been used traditionally and that are necessary for the physical and cultural survival of these peoples and for the development and continuity of their world view must be protected to ensure that they can continue their traditional way of life and that their cultural identity, social structure, economic system, and distinctive customs, beliefs and traditions are respected, guaranteed and protected by States.[380]

f. Content of environmental impact assessments

170. The content of the environmental impact assessment will depend on the specific circumstances of each case and the level of risk of the proposed activity.[381] Both the International Court of Justice and the International Law Commission have indicated that each State should determine in its laws the content of the environmental impact assessment required in each case.[382] The Inter-American Court finds that States should determine and define, by law or by the project authorization process, the specific content required of an environmental impact assessment, taking into account the nature and size of the project and its potential impact on the environment.

iv) Duty to prepare a contingency plan

171. The United Nations Convention on the Law of the Sea establishes that States shall together prepare and promote emergency plans to deal with incidents of pollution of the marine environment.[383] The same obligation is included in the Convention on the Law of the

---

379 *Cf. Case of the Saramaka People v. Suriname. Interpretation of the judgment on preliminary objections, merits, reparations and costs, supra*, para. 41, and *Case of the Kaliña and Lokono Peoples v. Suriname*, *supra*, para. 164.

380 See*, inter alia, Case of the Yakye Axa Indigenous Community v. Paraguay, supra,* paras. 124, 135 and 137; *Case of the Kuna Indigenous Peoples of Madungandí and the Emberá Indigenous Peoples of Bayano and their members v. Panama, supra*, para. 112; *Case of the Punta Piedra Garifuna Community and its members v. Honduras. Preliminary objections, merits, reparations and costs.* Judgment of October 8, 2015. Series C No. 304, para. 167, and *Case of the Kaliña and Lokono Peoples v. Suriname*, *supra*, para. 164.

381 *Cf.* UNEP, Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach, 2004, p. 44. Available at: https://unep.ch/etu/publications/textONUBr.pdf, and UNEP, Resolution 14/25 of June 17 1987, adopting the Goals and Principles of environmental impact assessment. UN Doc. UNEP/WG.152/4 Annex, Principle 5.

382 *Cf.* ICJ, *Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay).* Judgment of April 20, 2010, para. 205; ICJ, *Certain activities carried out by Nicaragua in the border area (Costa Rica v. Nicaragua)* and *Construction of a road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica).* Judgment of December 16, 2015, para. 104, and International Law Commission, *Commentaries on the draft articles on prevention of transboundary harm from hazardous activities*. UN Doc. A/RES/56/82, art. 7 para. 9.

383 *Cf.* UNCLOS, art. 199.

Non-Navigational Uses of International Watercourses.[384] In this regard, the Court considers that the State of origin should have a contingency plan to respond to environmental emergencies or disasters[385] that includes safety measures and procedures to minimize the consequences of such disasters. Even though the State of origin is the main entity responsible for the contingency plan, when appropriate, the plan should be implemented in cooperation with other States that are potentially affected, and also competent international organizations[386] (*infra* para. 189).

v) Duty to mitigate if environmental damage occurs

172. The State must mitigate significant environmental damage if it occurs.[387] Even if the incident occurs despite all the required preventive measures having been taken, the State of origin must ensure that appropriate measures are adopted to mitigate the damage and, to this end, should rely upon the best available scientific data and technology.[388] Such measures should be taken immediately, even if the origin of the pollution is unknown.[389] Some of the measures that States should take are: (i) clean-up and restoration within the jurisdiction of the State of origin; (ii) containment of the geographical range of the damage to prevent it from affecting other States; (iii) collection of all necessary information about the incident and the existing risk of damage;[390] (iv) in cases of emergency in relation to an activity that could produce significant damage to the environment of another State, the State of origin should, immediately and as rapidly as possible, notify the States that are likely to be affected by the damage[391] (*infra* para. 190); (v) once notified, the affected or

---

384 *Cf.* Convention on the Law of the Non-Navigational Uses of International Watercourses entered into force on August 17, 2014, art. 28.

385 *Cf. Articles on prevention of transboundary harm from hazardous activities*, adopted by the International Law Commission in 2001 and annexed to United Nations General Assembly Resolution 62/68 of December 6, 2007, UN Doc. A/RES/62/68, art. 16, and International Law Commission, *Commentaries on the draft articles on prevention of transboundary harm from hazardous activities.* Yearbook of the International Law Commission 2001, vol. II, Part Two (A/56/10), art. 16, paras. 1 to 3.

386 *Cf.* International Law Commissio*n, Commentaries on the draft Articles on prevention of transboundary harm from hazardous activities,* Yearbook of the International Law Commission 2001, vol. II, Part Two (A/56/10), art. 16, para. 2.

387 *Cf.* PCA, *Iron Rhine Arbitration (Belgium v. The Netherlands).* Award of May 24, 2005, para. 59; PCA, *Kishanganga River Hydroelectric Power Plant Arbitration (Pakistan v. India).* Partial award of February 18, 2013, para. 451 and Final Award of December 20, 2013, para. 112.

388 *Cf.* International Law Commission, *Draft Principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities*, Yearbook of the International Law Commission 2006, vol. II, Part Two (A/61/10), Principle 5.b.

389 *Cf.* International Law Commission, *Commentaries on the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities*, Yearbook of the International Law Commission 2006, vol. II, Part Two (A/61/10), Principle 5, para. 6.

390 *Cf.* International Law Commission, *Commentaries on the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities*, Yearbook of the International Law Commission 2006, vol. II, Part Two (A/61/10), Principle 5, paras. 1, 2 and 5.

391 *Cf.* UNCLOS, art. 198; Convention on Biodiversity entered into force on December 29, 1993, art. 14(1).d); Convention on the Law of the Non-Navigational Uses of International Watercourses entered into force on August 17, 2014, art. 28.2; Convention on Early Notification of a Nuclear Accident, entered into force on October 27, 1986, art. 2; Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, Río de Janeiro, June 3 to 14 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. 1), Principle 18, and *Articles on Prevention of transboundary harm from hazardous activities*, adopted by the International Law Commission in 2001 and annexed to UN General Assembly Resolution 62/68 of December 6, 2007, UN Doc. A/RES/62/68, art. 17. This notification should be made, even if the incident occurs despite all preventive measures having been taken. *Cf.* International Law Commission, *Commentaries on the Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities*, Yearbook of the International Law Commission 2006, vol. II, Part Two (A/61/10), preamble and Principle 1, para. 7.

potentially affected States should take all possible steps to mitigate and, if possible, eliminate the consequences of the damage,[392] and (vi) in case of emergency, any persons who could be affected should also be informed.[393]

173. In addition, as explained below, the State of origin and the States potentially affected have the obligation to cooperate in order to take all possible measures to mitigate the effects of the damage[394] (*infra* paras. 181 to 210).

B.1.d Conclusion regarding the obligation of prevention

174. In order to ensure the rights to life and integrity, States have the obligation to prevent significant environmental damage within and outside their territory, as established in paragraphs 127 to 173 of this Opinion. In order to comply with this obligation, States must: (i) regulate activities that could cause significant harm to the environment in order to reduce the risk to human rights, as indicated in paragraphs 146 to 151 of this Opinion; (ii) supervise and monitor activities under their jurisdiction that could produce significant environmental damage and, to this end, implement adequate and independent monitoring and accountability mechanisms that include measures of prevention and also of sanction and redress, as indicated in paragraphs 152 to 155 of this Opinion; (iii) require an environmental impact assessment when there is a risk of significant environmental harm, regardless of whether the activity or project will be carried out by a State or by private persons. These assessments must be made by independent entities with State oversight prior to implementation of the activity or project, include the cumulative impact, respect the traditions and culture of any indigenous peoples who could be affected, and the content of such assessments must be determined and defined by law or within the framework of the project authorization process, taking into account the nature and size of the project and its potential impact on the environment, as indicated in paragraphs 156 to 170 of this Opinion; (iv) institute a contingency plan in order to establish safety measures and procedures to minimize the possibility of major environmental accidents in keeping with paragraph 171 of this Opinion, and (v) mitigate significant environmental damage, even when it has occurred despite the State's preventive actions, using the best scientific knowledge and technology available, in accordance with paragraph 172 of this Opinion.

B.2 The precautionary principle

175. In environmental matters, the precautionary principle refers to the measures that must be taken in cases where there is no scientific certainty about the impact that an activity could have on the environment.[395] In this regard, the Rio Declaration establishes that:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible

---

392 *Cf.* International Law Commission, *Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities*, Yearbook of the International Law Commission 2006, vol. II, Part Two (A/61/10), Principle 5.d.

393 *Cf.* ECHR, *Case of Budayeva and Others v. Russia*, No. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02. Judgment of March 20, 2008, para. 131.

394 *Cf.* International Law Commission, *Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities*, Yearbook of the International Law Commission 2006, vol. II, Part Two (A/61/10), Principle 5.c and 5.d.

395 The Court notes that some of these instruments refer to the "precautionary principle" and others to the precautionary "approach" or "criterion". The Court will use the terms in keeping with the source cited.

damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[396]

176. In addition, the precautionary principle or approach has been included in various international treaties on environmental protection in different spheres.[397] Among these, the following should be underscored: the United Nations Framework Convention on Climate Change, which has been ratified by all OAS Member States,[398] the Stockholm Convention on Persistent Organic Pollutants ratified by 32 OAS Member States,[399] and the Biological Diversity Convention ratified by 45 OAS Member States.[400] It has also been included in regional treaties or instruments of Europe,[401] Africa,[402] the North East Atlantic Ocean,[403] the Baltic Sea,[404] the Caspian Sea,[405] the North Sea,[406] the Mediterranean Sea,[407] the River Danube,[408] and the Rhine.[409]

---

396 Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, Río de Janeiro, June 3 to 14 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. 1), Principle 15.

397 *Cf.* United Nations Framework Convention on Climate Change, entered into force on March 21, 1994, art. 3.3; Stockholm Convention on Persistent Organic Pollutants, amended in 2009, entered into force on May 17, 2004, art. 1; Convention on Biodiversity entered into force on December 29, 1993, preamble; Protocol to the Convention on the Prevention of Marine Pollution from Dumping of Wastes and Other Matter (with its 2006 amendments), entered into force on March 24, 2006, preamble and art. 3.1; International Convention on Control of Harmful Anti-fouling Systems on Ships, entered into force on September 17, 2008, preamble; Cartagena Protocol on Biosafety to the Convention on Biodiversity entered into force on September 11, 2003, preamble and arts. 1, 10.6 and 11.8; Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of December 10, 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, entered into force on December 11, 2001, art. 6, and Vienna Convention for Protection of the Ozone Layer, entered into force on September 22, 1988, preamble.

398 Ratified by Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Saint Lucia, Suriname, Trinidad and Tobago, United States of America, Uruguay and Venezuela.

399 Ratified by Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Saint Lucia, Suriname, Trinidad and Tobago, Uruguay and Venezuela.

400 Ratified by Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Saint Lucia, Suriname, Trinidad and Tobago, Uruguay and Venezuela.

401 *Cf.* Convention on the Protection and Use of Transboundary Watercourses and International Lakes of the Economic Commission for Europe (ECE), entered into force on October 6, 1996, article 2.5.a), and Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, entered into force on May 1, 1999, article 174.2. *See also,* ECHR, *Tătar v. Romania*, No. 6702/01. Judgment of January 27, 2009, paras. 109 and 120.

402 *Cf.* Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, entered into force on April 22, 1998, art. 4.3.f.

403 *Cf.* Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR), entered into force on March 25, 1998, art. 2.2.a)

404 *Cf.* Convention for the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Convention), entered into force on January 17, 2000, art. 3.2.

405 *Cf.* Framework Convention for the Protection of the Marine Environment of the Caspian Sea (Tehran Convention), entered into force on August 12, 2006, art. 5.

406 *Cf.* Ministerial Declaration of the International Conference on the Protection of the North Sea, November 1, 1984, conclusion A.7.

407 *Cf.* Protocol for the Protection of the Mediterranean Sea against Pollution from Land-based Sources entered into force on June 17, 1983, preamble.

408 *Cf.* Convention on Cooperation for the Protection and Sustainable Use of the Danube River (Danube River Protection Convention), entered into force on October 22, 1998, art. 2.4.

177. In the *Case of Pulp Mills on the River Uruguay*, the International Court of Justice indicated that "a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute" being interpreted in that case.[410] However, the International Court of Justice did not refer expressly to the application of the precautionary principle beyond indicating that it would not reverse the burden of proof. Meanwhile, the International Court on the Law of Sea has indicated that a trend has been initiated towards making the precautionary approach part of customary international law.[411] It has also indicated that the precautionary approach is an integral part of the general obligation of due diligence which obliges States of origin to take all appropriate measures to prevent any damage that might result from their activities. "This obligation applies in situations where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient, but where there are plausible indications of potential risks."[412]

178. The precautionary principle has been incorporated into the domestic law and the case law of the highest courts of several OAS Member States. Thus, it has been explicitly incorporated into the laws of States such as Antigua and Barbuda,[413] Argentina,[414] Canada,[415] Colombia,[416] Cuba,[417] Ecuador,[418] Mexico,[419] Peru,[420] Dominican Republic[421] and Uruguay.[422] Likewise, the high courts of Chile[423] and Panama[424] have recognized the applicability and obligatory nature of the precautionary principle.

179. The Court notes that several international treaties contain the precautionary principle in relation to different matters (*supra* para. 176). Also, some States of this region have included the precautionary principle in their laws or it has been recognized in case law

---

409 *Cf.* Convention on the Protection of the Rhine, entered into force on January 1, 2003, art. 4.a.

410 *Cf.* ICJ, *Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay)*. Judgment of April 20, 2010, para. 164.

411 *Cf.* ITLOS, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area.* Advisory Opinion of February 1, 2011, para. 135. *See also,* ITLOS, *Southern Bluefin Tuna cases (New Zealand v. Japan; Australia v. Japan)*. Order on provisional measures of August 27, 1999, paras. 73 to 80.

412 *Cf.* ITLOS, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area.* Advisory Opinion of February 1, 2011, para. 131.

413 *Cf.* Environmental Protection and Management Act of Antigua and Barbuda, September 24, 2015, Part II, section 7.5.b.

414 *Cf.* General Environment Act of Argentina, Law No. 25,675 of November 27, 2002, art. 4.

415 *Cf.* Canadian Environmental Assessment Act, S.C. 1999, c. 33, September 24, 1999, with subsequent amendments, art. 2.1.a.

416 *Cf.* Act No. 1523 of Colombia, adopting the national policy for disaster risk management, establishing the national system of disaster risk management, and ordering other provisions, of April 24, 2012, art. 3.8

417 *Cf.* Environment Act of Cuba, Law No. 81 of July 11, 1997, art. 4.b.

418 *Cf.* Constitution of the Republic of Ecuador, art. 73, 313, 396 and 397.5.

419 *Cf.* General Law on Climate Change of the United Mexican States of June 6, 2012, art. 26.III.

420 *Cf.* Framework Law of the National Environmental Management System of Peru, Law No. 28245 of June 10, 2004, art. 5.k.

421 *Cf.* General Environmental and Natural Resources Act of the Dominican Republic, Law No. 64-00 of August 18, 2000, arts. 8 and 12.

422 *Cf.* Environmental Protection Act of Uruguay, Law No. 17,283 of December 12, 2000, art. 6.b.

423 *Cf.* Supreme Court of Chile, Third Chamber, Case No. 14.209-2013. Judgment of June 2, 2014, *considerandum* 10.

424 *Cf.* Supreme Court of Justice of Panama, Plenary. File 910-08. Judgment of February 24, 2010.

(*supra* para. 178). The content of the precautionary principle varies depending on the instrument that establishes it.

180. Notwithstanding the above, the general obligation to ensure the rights to life and to personal integrity means that States must act diligently to prevent harm to these rights (*supra* para. 118). Also, when interpreting the Convention, as requested in this case, the Court must always seek the "best perspective" for the protection of the individual (*supra* para. 41). Therefore, the Court understands that States must act in keeping with the precautionary principle in order to protect the rights to life and to personal integrity in cases where there are plausible indications that an activity could result in severe and irreversible damage to the environment, even in the absence of scientific certainty. Consequently, States must act with due caution to prevent possible damage. Thus, in the context of the protection of the rights to life and to personal integrity, the Court considers that States must act in keeping with the precautionary principle. Therefore, even in the absence of scientific certainty, they must take "effective"[425] measures to prevent severe or irreversible damage.[426]

B.3 Obligation of cooperation

181. Article 26 of the American Convention establishes the obligation of international cooperation with a view to the development and protection of economic, social and cultural rights.[427] Several articles of the Protocol of San Salvador also refer to cooperation between States.[428]

182. In the specific case of activities, projects or incidents that could cause significant transboundary environmental harm, the potentially affected State or States require the cooperation of the State of origin and *vice versa* in order to take the measures of prevention and mitigation needed to ensure the human rights of the persons subject to their jurisdiction (*supra* paras. 127 to 174). In addition, compliance by the State of origin with its duty to cooperate is an important element in the evaluation of its obligation to respect and to ensure the human rights of the persons outside its territory who may be affected by activities executed within its territory (*supra* paras. 95 to 103).

---

[425] According to the most usual wording in the most relevant international instruments and the domestic laws of the region, the precautionary approach usually makes the necessary measures dependent on being "cost-effective," so that the level of measures required may be stricter for developed countries or depend on the technical and scientific capabilities available in the State. *Cf.* ITLOS, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area.* Advisory Opinion of February 1, 2011, para. 128. See also, United Nations Framework Convention on Climate Change, entered into force on March 21, 1994, article 3.3, and Peruvian legislation (*supra* para. 178).

[426] The content of the precautionary principle varies depending on the source. However, according to the most usual wording in the most relevant international instruments and the domestic laws of the region, the precautionary principle is applicable when there is a danger of severe or irreversible damage, but where no absolute scientific certainty exists. Thus, it requires a higher level of damage than the standard applicable to the obligation of prevention, which requires a risk of significant damage (*supra* paras. 134 to 140). *Cf.* Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, Río de Janeiro, June 3 to 14 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. 1), Principle 15, and United Nations Framework Convention on Climate Change, entered into force on March 21, 1994, article 3.3. *See also,* the laws of Antigua and Barbuda, Canada, Colombia, Ecuador, Mexico and Peru (*supra* para. 178).

[427] The relevant part of Article 26 of the Convention stipulates that: "The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively […] the full realization of [economic, social and cultural] rights" (underlining added).

[428] See, the preamble to the Protocol of San Salvador, and Articles 1, 12 and 14 of this treaty.

183. Under international environmental law, the duty to cooperate has been reflected in the Declaration of Stockholm,[429] and the Declaration of Rio which establishes that "States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem,"[430] as well as in numerous international treaties.[431]

184. This duty to cooperate in environmental matters and its customary nature have been recognized by arbitral tribunals,[432] the International Tribunal for the Law of the Sea and the International Court of Justice. According to the latter, the duty to cooperate is derived from the principle of good faith in international relations,[433] is essential for protection of the environment,[434] and allows States jointly to manage and prevent risks of environmental damage that could result from projects undertaken by one of the parties.[435] Meanwhile, the International Tribunal for the Law of the Sea has determined that "the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under […] general international law."[436]

185. Consequently, this Court considers that States have a duty to cooperate in good faith to ensure protection against environmental damage. This duty to cooperate is especially important in the case of shared resources, the development and use of which should be carried out in an equitable and reasonable manner in keeping with the rights of the other States that have jurisdiction over such resources.[437]

---

[429] Principle 24 of the Stockholm Declaration stipulates that "[i]nternational matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing. Cooperation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States." Stockholm Declaration on the Human Environment, United Nations Conference on the Human Environment, Stockholm, June 5 to 16, 1972, UN Doc. A /CONF.48/14/Rev.1.

[430] Rio Declaration on Environment and Development, adopted at the United Nations Conference on Environment and Development, Río de Janeiro, June 14, 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. 1), Principles 7 and 19.

[431] See, *inter alia*, United Nations Framework Convention on Climate Change, entered into force on March 21, 1994, preamble and arts. 3.3 and 5, 4(1).c) a i), 5.c) and 6.b); International Plant Protection Convention, revised text, entered into force on October 2, 2005, art. VIII; Framework Convention for the Protection of the Environment of the Caspian Sea, entered into force on August 12, 2006, articles 4.d) and 6, and Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD), entered into force on October 5, 1978, art. V.1. In Europe, the duty of cooperation is established in Article 8 of the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), entered into force on September 10, 1997.

[432] *Cf.* Arbitral Tribunal, *Lake Lanoux Arbitration (France v. Spain).* Decision of November 16, 1957, p. 308.

[433] *Cf.* ICJ, *Nuclear Tests cases (Australia v. France) (New Zealand v. France).* Judgments of December 20, 1974, paras. 46 and 49 respectively*; Legality of the threat or use of nuclear weapons.* Advisory Opinion of July 8, 1996, para. 102, and *Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay).* Judgment of April 20, 2010, para. 145.

[434] *Cf.* ICJ, *Case concerning the Gabčikovo-Nagymaros Project (Hungary v. Slovakia)*. Judgment of September 25, 1997, paras. 17 and 140.

[435] *Cf.* ICJ, *Case of Pulp Mills on the River Uruguay* (Argentina v. Uruguay). Judgment of April 20, 2010, para. 77.

[436] *Cf.* ITLOS, *The MOX Plant case (Ireland v. The United Kingdom)*. Order on provisional measures of December 3, 2001, para. 82.

[437] Regarding shared resources, the Charter of Economic Rights and Duties of States establishes that: "[i]n the exploitation of natural resources shared by two or more countries, each State must co-operate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others." Charter of Economic Rights and Duties of States adopted by the United Nations General Assembly on December 12, 1974, in Resolution 3281 (XXIX), UN Doc. A/RES/29/3281, art. 3. See also, Convention on the Law of the Non-Navigational Uses of International Watercourses, entered into force on August 17, 2014, arts. 5 and 8, and Draft articles on the law of transboundary aquifers, article 7, prepared by

186. Contrary to the environmental obligations described to date, the duty to cooperate is an obligation between States. International law has defined the following specific duties that are required of States in relation to environmental matters in order to comply with this obligation: (1) the duty to notify, and (2) the duty to consult and negotiate with potentially affected States. The Court will now examine these duties, as well as (3) the possibility of sharing information established in numerous international environmental instruments.

B.3.a Duty to notify

187. The duty of notification involves the obligation to notify States that may potentially be affected by possible significant environmental damage as a result of activities carried out within a State's jurisdiction. This duty requires official and public knowledge to be provided "relating to work to be carried out by States within their national jurisdiction, with a view to avoiding significant harm that may occur in the environment of the adjacent area."[438] The duty of notification was established in the Rio Declaration as follows:

> States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.[439]

188. This obligation has been reflected in numerous multilateral[440] and bilateral[441] treaties and has been recognized in international jurisprudence as an obligation of customary international law in cases involving the joint use and protection of international waters.[442]

189. This Court understands that the duty of notifying States potentially affected by

---

the International Law Commission and annexed to United Nations General Assembly Resolution 68/118 of December 19, 2013, UN Doc. A/RES/68/118.

438 *Cf.* United Nations General Assembly Resolution 2995 (XXVII) on Cooperation between States in the Field of Environment, December 15, 1972, See also, Report of the World Commission on Environment and Development "Our Common Future" (Brundtland Report), adopted in Nairobi on June 16, 1987, Annex to UN Doc. A/42/427, Principle 16.

439 Rio Declaration on Environment and Development, adopted at the United Nations Conference on Environment and Development, Rio de Janeiro, June 14, 1992, UN Doc. A/CONF.151/26 (Vol. I), Principle 19

440 See, for example, UNCLOS, arts. 197 and 200; Convention on Biodiversity entered into force on December 29, 1993, arts. 14(1).c and 17; Convention on Wetlands of International Importance especially as Waterfowl Habitat (RAMSAR Convention), entered into force on December 21, 1975, arts. 3.2 and 5; Convention for the Prevention of Marine Pollution from Land-based Sources, entered into force on 6 May 1978, arts. 9 and 10; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, entered into force on May 5, 1992, arts. 6 and 13; Vienna Convention for Protection of the Ozone Layer, entered into force on September 22, 1988, art. 4; Convention on the Law of the Non-Navigational Uses of International Watercourses, entered into force on August 17, 2014, preamble and articles 8, 9, 11 and 12 to 18, and Protocol to the Antarctic Treaty on Environmental Protection, entered into force on January 14, 1998, art. 6.

441 See, for example, Act of Santiago concerning Hydrologic Basins, signed on June 26, 1971, by Argentina and Chile, art. 5; Statute of the River Uruguay, signed on February 26, 1975, by Argentina and Uruguay, arts. 7 to 12; Treaty between Uruguay and Argentina concerning the Rio de la Plata and the Corresponding Maritime Boundary, signed on November 19, 1973, by Argentina and Uruguay, art. 17, and Treaty between the United States and Great Britain relating to Boundary Waters, and Questions arising between the United States and Canada, signed on May 5, 1910, arts. III and IV.

442 ICJ, *Certain activities carried out by Nicaragua in the border area (Costa Rica v. Nicaragua)* and *Construction of a road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica).* Judgment of December 16, 2015, para. 104. See also, *inter alia*, Tribunal Arbitral, *Case of Lac Lanoux (France v. Spain).* Decision of November 16, 1957; ICJ, *Case concerning the Gabčikovo-Nagymaros Project (Hungary v. Slovakia)*. Judgment of September 25, 1997; *Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay)*. Judgment of April 20, 2010, and *Corfu Channel case (The United Kingdom v. Albania).* Judgment of April 9, 1949, p. 22.

activities implemented within the jurisdiction of another State is a duty that extends to every case in which there is a possibility of significant transboundary environmental harm (*supra* paras. 95 to 103), as a result of activities planned by a State or by private individuals with State authorization.[443] In such cases, notification is usually the first step towards facilitating cooperation and also permits compliance with the duty of prevention.[444]

190. Additionally, the duty of notification exists in the case of environmental emergencies, also known as natural disasters.[445] Environmental emergencies are those situations which produce or entail a sudden and imminent risk of negative or adverse environmental effects,[446] due either to natural causes or human conduct.[447] In cases of environmental emergencies, notification must be given promptly,[448] which means that the State of origin must notify potentially affected States as soon as it becomes aware of the situation.[449]

i) Moment of notification

191. The purpose of the duty to notify is to create the conditions for successful cooperation between the parties, which is necessary to avoid the potential harm that a project may cause and, thus, comply with the duty of prevention.[450] Consequently, it is

---

[443] *Cf.* International Law Commission, *Commentaries on the draft Articles on prevention of transboundary harm from hazardous activities,* Yearbook of the International Law Commission 2001, vol. II, Part Two (A/56/10), art. 8, para. 2.

[444] *Cf.* ICJ, *Corfu Channel case (The United Kingdom v. Albania).* Judgment of April 9, 1949, p. 22, and *Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay)*. Judgment of April 20, 2010, para. 102.

[445] *Cf.* Rio Declaration on Environment and Development, adopted at the United Nations Conference on Environment and Development, Rio de Janeiro, June 14, 1992, UN Doc. A/CONF.151/26 (Vol. I), Principle 18.

[446] See, for example, Cartagena Protocol on Biosafety to the Convention on Biodiversity entered into force on September 11, 2003, art. 17; Rio Declaration on Environment and Development, adopted at the United Nations Conference on Environment and Development, Rio de Janeiro, June 14, 1992, UN Doc. A/CONF.151/26 (Vol. I), Principle 18; Convention on the Protection and Use of Transboundary Watercourses and International Lakes of the Economic Commission for Europe (ECE), entered into force on October 6, 1996, arts. 1 and 14, and Framework Convention for the Protection of the Marine Environment of the Caspian Sea (Tehran Convention), entered into force on August 12, 2006, art. 1.

[447] See, for example, International Law Commission, *Commentaries on the draft articles on prevention of transboundary harm from hazardous activities,* Yearbook of the International Law Commission 2001, vol. II, Part Two, (A/56/10), art. 17, para. 3; Convention on the Law of the Non-Navigational Uses of International Watercourses, entered into force on August 17, 2014, art. 28.1, and Framework Convention for the Protection of the Marine Environment of the Caspian Sea (Tehran Convention), entered into force on August 12, 2006, arts. 1 and 13.1

[448] See, for example, Convention on the Law of the Non-Navigational Uses of International Watercourses, entered into force on August 17, 2014, art. 28.1; Convention on the Protection and Use of Transboundary Watercourses and International Lakes of the Economic Commission for Europe (ECE), entered into force on October 6, 1996, art. 14, and *Articles on prevention of transboundary harm from hazardous activities,* adopted by the International Law Commission in 2001 and annexed to the United Nations General Assembly Resolution 62/68 of December 6, 2007, UN Doc. A/RES/62/68, art. 17. Some international treaties use the term "immediately" or "forthwith" when referring the moment of notification. The Court understands this within the broader term of "promptly" or "as rapidly as possible" mentioned above. See, for example, UNCLOS, art. 198; Rio Declaration on Environment and Development, adopted at the United Nations Conference on Environment and Development, Rio de Janeiro, June 14, 1992, UN Doc. A/CONF.151/26 (Vol. I), Principle 18; Protocol concerning Cooperation in Combatting Oil Spills in the Wider Caribbean Region, entered into force on 11 October 1986, art. 5, and Convention on the Early Notification of a Nuclear Accident, entered into force on October 27, 1986, art. 2.

[449] *Cf.* Cartagena Protocol on Biosafety to the Convention on Biodiversity entered into force on September 11, 2003, art. 17, and International Law Commission, *Commentaries on the draft Articles on prevention of transboundary harm from hazardous activities,* Yearbook of the International Law Commission 2001, vol. II, Part Two (A/56/10), art. 17, para. 2.

[450] *Cf.* ICJ, *Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay).* Judgment of April 20, 2010, paras. 102 and 113.

understood that States must provide "prior and timely notification."[451]

192. The proper moment arises when the State of origin becomes aware or determines that an activity implemented within its jurisdiction entails or could entail a potential risk of significant transboundary environmental harm. In this regard, the International Court of Justice has emphasized that the State within whose jurisdiction the activities are planned must notify the other State "as soon as it is in possession of a plan which is sufficiently developed to […] make the preliminary assessment […] of whether the proposed works might cause significant damage to the other party."[452] This preliminary evaluation could be made before the environmental impact assessment has been completed, because this would allow potentially affected States to take part in the environmental impact assessment process or to make their own assessment.[453] In any case, the duty of notification clearly arises as soon as an environmental impact assessment concludes or indicates that there is a risk of significant transboundary harm,[454] and must be complied with before the State of origin takes a decision on the environmental viability of the project,[455] and prior to execution of the planned activities.[456]

193. Consequently, this Court considers that a State must notify States potentially affected by possible significant transboundary environmental harm as soon as it becomes aware of the possibility of that risk. In some cases, this will be before an environmental impact assessment has been made; for example, as the result of a preliminary study or owing to the type of activity (*supra* para. 160) and, in other cases, it will only occur following a determination made by an environmental impact assessment.

ii) Content of the notification

194. Numerous international instruments require the notification to be accompanied by "pertinent information."[457] Although this frequently refers to technical data,[458] the Court

---

451 *Cf.* Rio Declaration on Environment and Development, adopted at the United Nations Conference on Environment and Development, Rio de Janeiro, June 14, 1992, UN Doc. A/CONF.151/26 (Vol. I), Principle 19.

452 *Cf.* ICJ, *Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay).* Judgment of April 20, 2010, para. 105.

453 See, in this regard, Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), entered into force on September 10, 1997, art. 3; Framework Convention for the Protection of the Marine Environment of the Caspian Sea (Tehran Convention), entered into force on August 12, 2006, art. 13.2, and Protocol on Integrated Coastal Management in the Mediterranean, entered into force on March 24, 2011, art. 29.1.

454 *Cf.* ICJ, *Certain activities carried out by Nicaragua in the border area (Costa Rica v. Nicaragua)* and *Construction of a road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica).* Judgment of December 16, 2015, para. 104. Similarly, see also, PCA, *South China Sea Arbitration (Philippines v. China).* Award of July 12, 2016, para. 988. *Articles on prevention of transboundary harm from hazardous activities,* adopted by the International Law Commission in 2001 and annexed to the United Nations General Assembly Resolution 62/68 of December 6, 2007, UN Doc. A/RES/62/68, art. 8, and UNEP, Resolution 14/25 of June 17 1987, adopting the Goals and Principles of environmental impact assessment. UN Doc. UNEP/WG.152/4 Annex, Principle 12; International Law Commission, *Commentaries on the draft articles on the law of transboundary aquifers*, Yearbook of the International Law Commission, 2008, vol. II, Part Two (A/63/10), art. 15.2, para. 5.

455 *Cf.* ICJ, *Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay).* Judgment of April 20, 2010, para. 120.

456 See, for example, Convention on the Law of the Non-Navigational Uses of International Watercourses, entered into force on August 17, 2014, art. 12, and *Draft articles on the law of transboundary aquifers*, article 15.2, prepared by the International Law Commission and annexed to United Nations General Assembly Resolution 68/118 of December 19, 2013, UN Doc. A/RES/68/118.

457 See, for example, United Nations General Assembly Resolution 2995 (XXVII) on Cooperation between States in the field of the environment, December 15, 1972, UN Doc. A/RES/2995(XXVII); Convention on the Law of the Non-Navigational Uses of International Watercourses, entered into force on August 17, 2014, art. 12; *Draft articles on the law of transboundary aquifers*, article 15.2, prepared by the International Law Commission and annexed to

understands that it refers to sufficient and adequate information for the potentially affected States to study and evaluate the possible effect of the planned activities; thus, the purpose of the notification is met. In other words, the notification should be accompanied by elements that facilitate an informed determination of the effects of the planned activities.

195. This does not signify that there is an obligation to attach the documentation relating to the environmental impact assessment in cases of notification prior to the assessment (*supra* paras. 191 to 193). In this regard, the International Court of Justice has indicated that, prior to the environmental impact assessment, the information provided with the notification "will not necessarily consist of a full assessment of the environmental impact of the project, which will often require further time and resources."[459] Nevertheless, in different international instruments, there is a growing practice of expressly incorporating the requirement to include the environmental impact assessment as one of the elements of the notification.[460] However, it should be stressed that the foregoing should not be understood to undermine the obligation to make an environmental impact assessment in cases where there is a significant risk of transboundary harm (*supra* paras. 156 to 170) and to inform potentially affected States of the results.[461]

iii) Conclusion with regard to the duty of notification

196. Consequently, the Court concludes that States have the obligation to notify other potentially affected States when they become aware that an activity planned within their jurisdiction could result in a risk of significant transboundary harm. This notice must be timely, before the planned activity is carried out, and must include all relevant information. This duty arises when the State of origin becomes aware of the potential risk, either before or as a result of the environmental impact assessment. Carrying out environmental impact assessments requires time and resources, so in order to ensure that potentially affected

---

the United Nations General Assembly Resolution 68/118 of December 19, 2013, UN Doc. A/RES/68/118. In the European sphere, see, Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), entered into force on September 10, 1997, article 2.4 and Appendix III. In 2014, this Convention was opened to accession by all United Nations Member States; however, under the treaty rules, 13 more ratifications are required in order for the Meeting of the Parties to consider or approve the accession of a State that is not part of the Economic Commission for Europe.

458 In this regard, the International Law Commission has indicated that, in general, the technical data and other relevant information is revealed during the environmental impact assessment and that this information "includes not only what might be called raw data, namely fact sheets, statistics, etc., but also the analysis of the information which was used by the State of origin itself to make the determination regarding the risk of transboundary harm." *Cf.* International Law Commission, *Commentaries on the draft articles on prevention of transboundary harm from hazardous activities,* Yearbook of the International Law Commission 2001, vol. II, Part Two (A/56/10), art. 8, para. 6.

459 *Cf.* ICJ, *Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay).* Judgment of April 20, 2010, para. 105.

460 See, for example, Convention on the Law of the Non-Navigational Uses of International Watercourses, entered into force on August 17, 2014, art. 12; Charter of Waters of the Senegal River, signed on May 28, 2002, by the Republic of Mali, the Islamic Republic of Mauritania, and he Republic of Senegal, art. 24; Articles on prevention of transboundary harm from hazardous activities, adopted by the International Law Commission in 2001 and annexed to the United Nations General Assembly Resolution 62/68 of December 6, 2007, UN Doc. A/RES/62/68, art. 8; UNEP, Resolution 14/25 of June 17 1987, adopting the Goals and Principles of environmental impact assessment. UN Doc. UNEP/WG.152/4 Annex, Principle 12, and International Law Commission, *Commentaries on the draft articles on the law of transboundary aquifers*, Yearbook of the International Law Commission, 2008, vol. II, Part Two (A/63/10), art. 15.2, para. 5.

461 *Cf.* ICJ, *Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay).* Judgment of April 20, 2010, paras. 204 and 119, and ICJ, *Certain activities carried out by Nicaragua in the border area (Costa Rica v. Nicaragua)* and *Construction of a road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica).* Judgment of December 16, 2015, para. 104. See also, Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), entered into force on September 10, 1997, arts. 3.2, 3.5 and 4.2.

States are able to take the appropriate steps, States of origin are required to give this notification as soon as possible, without prejudice to the information transmitted being completed with the results of the environmental impact assessment when this has been concluded. In addition, there is a duty of notification in cases of environmental emergencies, in which case States must notify potentially affected States, without delay, of the environmental disasters originated within their jurisdiction.

B.3.b Duty to consult and negotiate with potentially affected States

197. The duty to consult and negotiate with potentially affected States is a form of cooperation to prevent or to mitigate transboundary harm. Various international instruments and treaties establish that the duty of notification incorporates the duty to consult and, when appropriate, to negotiate with States potentially affected by activities that could entail significant transboundary harm.[462] In this regard, the International Court of Justice has emphasized that the obligation to notify is an essential part of the process leading the parties to consult and negotiate possible changes in the project to eliminate or minimize the risks.[463] This inter-State duty to consult and negotiate with potentially affected States differs from the State duty to consult indigenous and tribal communities during environmental impact assessment processes (*supra* para. 166).

i) Moment and form of the consultation

198. The consultation of the potentially affected State or States should be carried out in a timely manner and in good faith. In this regard, the Rio Declaration establishes that "States […] shall consult with [potentially affected] States at an early stage and in good faith."[464]

199. Regarding the meaning of good faith consultations, in the *Case of Lake Lanoux*, the Arbitral Tribunal determined that this meant that the consultation mechanism could not "be confined to purely formal requirements, such as taking note of complaints, protests or representations" made by the potentially affected State. According to the Arbitral Tribunal, in this case the rules of good faith obliged the State of origin "to take into consideration the various interests involved, to seek to give them every satisfaction compatible with the pursuit of its own interests, and to show that in this regard it is genuinely concerned to reconcile the interests of the other […] States with its own."[465] Similarly, the International

---

462 *See, for example,* Convention on the Law of the Non-Navigational Uses of International Watercourses, entered into force on August 17, 2014, arts. 11 and 17; Convention on the Transboundary Effects of Industrial Accidents, entered into force on April 19, 2000, art. 4.2; Convention on the Physical Protection of Nuclear Material, entered into force on February 8, 1987, art. 5.3; Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD), entered into force on October 5, 1978, art. III.2, and *Commentaries on the draft articles on the law of transboundary aquifers*, article 15.3, prepared by the International Law Commission and annexed to United Nations General Assembly Resolution 68/118 of December 19, 2013, UN Doc. A/RES/68/118.

463 *Cf.* ICJ, *Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay).* Judgment of April 20, 2010, para. 115.

464 Rio Declaration on Environment and Development, adopted at the United Nations Conference on Environment and Development, Rio de Janeiro, June 14, 1992, UN Doc. A/CONF.151/26 (Vol. I), Principle 19. *See also,* Convention on the Law of the Non-Navigational Uses of International Watercourses, entered into force on August 17, 2014, art. 17.2. Regarding shared resources, the Charter of Economic Rights and Duties of States establishes that: "In the exploitation of natural resources shared by two or more countries, each State must co-operate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others.". *Cf.* Charter of Economic Rights and Duties of States, art. 3, adopted by the United Nations General Assembly on December 12, 1974 in Resolution 3281 (XXIX), UN Doc. A/RES/29/3281.

465 *Cf.* Arbitral Tribunal, *Lake Lanoux Arbitration (France v. Spain).* Decision of November 16, 1957, p. 32. Similarly, see Convention on the Law of the Non-Navigational Uses of International Watercourses, entered into

Court of Justice has indicated that the consultation and negotiation process calls for the mutual willingness of the States to discuss in good faith actual and potential environmental risks.[466] It has also stressed that States are under the obligation to conduct meaningful negotiations, which will not be the case when either party insists upon its own position without contemplating any modification of this.[467]

200. The International Court of Justice has also indicated that States must find an agreed solution that takes into account the norms of international environmental law, as well as other provisions, in a joint and integrated way.[468] Similarly, the Articles on prevention of transboundary harm from hazardous activities establish that States must "enter into consultations with a view to achieving acceptable solutions regarding measures to be adopted to prevent significant transboundary harm or, at any event, to minimize the risk thereof."[469]

ii) Duty to consult and negotiate in good faith

201. That said, the fact that the consultation must be carried out in good faith does not mean that this process "enable[s] each State to delay or impede the programmes and projects of exploration, exploitation and development of the natural resources of the States in whose territories such programmes and projects are carried out."[470] However, the principle of good faith in consultations and negotiations does establish restrictions regarding the implementation of such activities. In particular, it is understood that States must not authorize or execute the activities in question while the parties are in the process of consultation and negotiation.[471]

202. The International Court of Justice recognized this duty in the *Case of Pulp Mills on the River Uruguay*, when it indicated that "as long as the procedural mechanism for cooperation between the parties to prevent significant damage to one of them is taking its course, the State initiating the planned activity is obliged not to authorize such work and, *a fortiori*, not to carry it out"; to the contrary, "there would be no point in the cooperation mechanism [… and] the negotiations between the parties would no longer have any purpose."[472]

---

force on August 17, 2014, art. 17.2.

466 *Cf.* ICJ, *Case concerning the Gabčikovo-Nagymaros Project (Hungary v. Slovakia)*. Judgment of September 25, 1997, para. 112.

467 *Cf.* ICJ, *Case of the North Sea Continental Shelf (Germany v. Denmark).* Judgment of February 20, 1969, para. 85, and *Case concerning the Gabčikovo-Nagymaros Project (Hungary v. Slovakia)*. Judgment of September 25, 1997, para. 141.

468 *Cf.* ICJ, *Case concerning the Gabčikovo-Nagymaros Project (Hungary v. Slovakia)*. Judgment of September 25, 1997, para. 141.

469 These Articles also establish that these consultations shall be carried out "on a reasonable time frame" agreed by the States concerned. *Cf.* Articles on prevention of transboundary harm from hazardous activities, adopted by the International Law Commission in 2001 and annexed to the United Nations General Assembly Resolution 62/68 of December 6, 2007, UN Doc. A/RES/62/68, art. 9.

470 United Nations General Assembly Resolution 2995 (XXVII) on Cooperation between States in the Field of Environment, December 15, 1972, UN Doc. A/RES/2995(XXVII), para. 3. *See also,* Convention on Biodiversity entered into force on December 29, 1993, art. 3.

471 *See, for example,* Convention on the Law of the Non-Navigational Uses of International Watercourses, entered into force on August 17, 2014, art. 14; Articles on prevention of transboundary harm from hazardous activities, adopted by the International Law Commission in 2001 and annexed to the United Nations General Assembly Resolution 62/68 of December 6, 2007, UN Doc. A/RES/62/68, art. 8.2, and Statute of the River Uruguay, signed by Argentina and Uruguay on February 26, 1975, art. 9.

472 *Cf.* ICJ, *Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay).* Judgment of April 20, 2010, paras.

203. Nevertheless, the Court notes that this prohibition does not mean that the activities can only be implemented with the prior consent of the potentially affected States.[473] In the *Case of Lake Lanoux*, the Arbitral Tribunal determined that the prior consent of the potentially affected States could not be "established as a custom, even less as a general principle of law"; rather it could only be understood as a requirement that could be claimed if it were established in a treaty.[474] The International Court of Justice, also, has underscored that the obligation to negotiate does not entail the obligation to reach an agreement and, once the negotiating period has ended, the State can go forward with the construction at its own risk.[475] Therefore, this Court considers that, although States have a duty to conduct consultation and negotiation procedures as forms of cooperation in the face of possible transboundary harm, they do not necessarily have to reach an agreement, nor is the prior consent of the potentially affected States required in order to initiate the execution of a project, unless this obligation is explicitly established in a treaty applicable to the matter in question.

204. When States fail to reach an agreement on the activities in question through consultation and negotiation, several treaties establish that the parties may have recourse to diplomatic dispute settlement mechanisms such as negotiation, or judicial mechanisms such as submitting the dispute to the consideration of the International Court of Justice or an arbitral tribunal.[476] Under the American Convention, they would also be able to submit the dispute to the inter-American human rights system if a State Party alleges that another State Party has violated the rights established in the Convention,[477] bearing in mind, among other matters, the standards and obligations established in this Opinion. In this context, it should be recalled that the Rio Declaration stipulates that "States shall resolve all their environmental disputes peacefully and by appropriate means in accordance with the Charter of the United Nations."[478]

---

144 and 147

473 See, for example, Convention on the Law of the Non-Navigational Uses of International Watercourses, entered into force on August 17, 2014, art. 16.

474 *Cf.* Arbitral Tribunal, *Lake Lanoux Arbitration (France v. Spain).* Decision of November 16, 1957, para. 13.

475 *Cf.* ICJ, *Case of Pulp Mill on the River Uruguay (Argentina v. Uruguay)*. Judgment of April 20, 2010, paras. 150 and 154. It should be mentioned that this decision referred to the interpretation of a specific treaty in force between the parties – in particular article 7 of the 1975 Statute of the River Uruguay cited above – without establishing whether the said obligations already formed part of customary international law.

476 See, for example, Convention on the Law of the Non-Navigational Uses of International Watercourses, entered into force on August 17, 2014, arts. 33.2 and 33.10; Statute of the River Uruguay, signed on February 26, 1975, by Argentina and Uruguay, art. 60; Treaty between Uruguay and Argentina concerning the Rio de la Plata and the Corresponding Maritime Boundary, signed on November 19, 1973, by Argentina and Uruguay, art. 87; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, entered into force on May 5, 1992, art. 20.2; Convention on Cooperation for the Protection and Sustainable Use of the Danube River (Danube River Protection Convention), entered into force on October 22, 1998, art. 24.2.a; Vienna Convention for Protection of the Ozone Layer, entered into force on September 22, 1988, art. 11.1 to 11.3, and Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), entered into force on September 10, 1997, art. 15.

477 Article 45(1) of the American Convention establishes: "Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention."

478 Rio Declaration on Environment and Development, adopted at the United Nations Conference on Environment and Development, Rio de Janeiro, June 14, 1992, UN Doc. A/CONF.151/26 (Vol. I), Principle 26. *See also*, Agenda 21, adopted at the United Nations Conference on Environment and Development, Rio de Janeiro, June 14, 1992, UN Doc. A/CONF.151/26 (Vol. I), para. 39.10.

iii) Conclusion regarding the duty to consult and negotiate

205. Accordingly, this Court concludes that States have the duty to consult and negotiate with States potentially affected by significant transboundary damage. Such consultations must be conducted in a timely manner and in good faith. Consequently, this is not merely a formal procedure, but involves the mutual willingness of the States concerned to enter into a genuine discussion on actual and potential environmental risks, because the purpose of such consultations is the prevention or mitigation of transboundary harm. Also, by virtue of the principle of good faith, during the consultation and negotiation process, States must refrain from authorizing or executing the activities in question. However, this does not mean that the activities require the prior consent of other potentially affected States, unless this has been established in a specific treaty between the parties concerned. The obligation to negotiate does not entail the obligation to reach an agreement. If the parties fail to reach agreement, they should resort to peaceful diplomatic or judicial dispute settlement mechanisms.

B.3.c. Exchange of information

206. In addition to the duties of notification, consultation and negotiation in relation to projects that could entail the risk of transboundary damage, the Court notes that, as part of the duty of cooperation, several international instruments contain provisions aimed at "facilitating," "promoting" or ensuring the exchange of information between States[479] concerning "scientific and technological knowledge,"[480] among other matters. In this way, numerous international instruments have established an inter-State exchange of information that differs from the information that should be provided as part of the duty of notification (*supra* paras. 187 to 196).

207. The exchange of information could be of particular importance in situations of potential significant transboundary harm in order to comply with the obligation of prevention. In this regard, the International Tribunal for the Law of the Sea has indicated that prudence and caution require cooperation in exchanging information concerning risks or effects of industrial projects.[481]

208. The Court notes, however, that the incorporation of this type of cooperation into some international instruments does not constitute sufficient evidence of a customary obligation in this regard that would go beyond the specific treaties and instruments establishing it. Nevertheless, the Court considers that it constitutes a positive trend and a

---

[479] See, for example, United Nations Framework Convention on Climate Change, entered into force on March 21, 1994, art. 4(1).h); Convention on Biodiversity entered into force on December 29, 1993, art. 17.1; Convention on the Physical Protection of Nuclear Material, entered into force on February 8, 1987, art. 5.2.b), and Convention on the Law of the Non-Navigational Uses of International Watercourses, entered into force on August 17, 2014, art. 11.

[480] In this regard, the Rio Declaration establishes that "States should co-operate to strengthen endogenous capacity-building for sustainable development by improving scientific understanding through exchanges of scientific and technological knowledge, and by enhancing the development, adaptation, diffusion and transfer of technologies, including new and innovative technologies." Also, the Stockholm Declaration stipulates that "the free flow of up-to-date scientific information and transfer of experience must be supported and assisted to facilitate the solution of environmental problems." *Cf.* Rio Declaration on Environment and Development, adopted at the United Nations Conference on Environment and Development, Rio de Janeiro, June 14, 1992, UN Doc. A/CONF.151/26 (Vol. I), Principle 9, and Stockholm Declaration on the Human Environment, adopted at the United Nations Conference on the Human Environment, Stockholm, June 5 to 16, 1972, UN Doc. A /CONF.48/14/Rev.1, Principle 20

[481] *Cf.* ITLOS, *The MOX Plant case (Ireland v. The United Kingdom)*. Case No. 10. Order on provisional measures of December 3, 2001, paras. 84 and 89.

concrete form of achieving compliance with the duty of cooperation (*supra* para. 185).

B.3.d. Conclusion with regard to the obligation of cooperation

209. The obligation of cooperation involves a series of inter-State duties. Although these are duties between States, as mentioned previously, the obligations to respect and to ensure human rights require that States abstain from impeding or obstructing other States from complying with the obligations derived from the Convention (*supra* para. 94). The object and purpose of the Convention requires ensuring that States are in the best position to comply with these obligations, in particular when compliance depends, *inter alia,* on the cooperation of other States.

210. Consequently, in order to ensure the rights to life and to personal integrity, States have the obligation to cooperate in good faith to ensure protection against environmental damage, as established in paragraphs 181 to 205 of this Opinion. In order to comply with this obligation, States must: (i) notify the other potentially affected States in a timely and prior manner when they become aware that a planned activity within their jurisdiction could result in a risk of significant transboundary harm, accompanied by the relevant information as indicated in paragraphs 187 to 196 of this Opinion and, in cases of environmental emergencies, as indicated in paragraphs 190 and 196 of this Opinion, and (ii) consult and negotiate with States potentially affected by significant transboundary harm, in a timely manner and in good faith, as indicated in paragraphs 197 to 205 of this Opinion. These specific duties are established without detriment to others that may be agreed between the parties or that arise from obligations that the States have previously assumed.

B.4 Procedural obligations to ensure the rights to life and to personal integrity in the context of environmental protection

211. As mentioned previously, a series of procedural obligations exist with regard to environmental matters; so-called because they support the elaboration of improved environmental policies (*supra* para. 64). In this regard, inter-American jurisprudence has recognized the instrumental nature of certain rights established in the American Convention, such as the right of access to information, insofar as they allow for the realization of other treaty-based rights, including the rights to health, life and personal integrity.[482] The Court will now describe the State obligations of an instrumental or procedural nature that arise from certain rights under the American Convention in order to ensure the rights to life and to personal integrity in the context of possible environmental damage, as part of the response to Colombia's second and third questions concerning the environmental obbligatos derived from those rights.

212. In particular, the Court will refer to obligations related to: (1) access to information; (2) public participation, and (3) access to justice, all in relation to the States' environmental protection obligations.

B.4.a Access to information

213. This Court has indicated that Article 13 of the Convention, which expressly stipulates the right to seek and receive information, protects the right of the individual to request access to information held by the State, with the exceptions permitted under the

---

[482] *Cf. Case of Furlan and family members v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2012. Series C No. 246, para. 294, and *Case of I.V. v. Bolivia, supra*, paras. 156 and 163.

Convention's regime of restrictions.[483] State's actions should be governed by the principles of disclosure and transparency in public administration that enable all persons subject to the State's jurisdiction to exercise the democratic control of those actions, and question, investigate and consider whether public functions are being performed adequately.[484] Access to State-held information of public interest can permit participation in public administration by means of the social control that can be exercised through such access.[485] It also fosters transparency in the State's activities and promotes the accountability of its officials in the performance of their duties.[486]

214. Regarding activities that could affect the environment, the Court has emphasized that access to information on activities and projects that could have an impact on the environment is a matter of evident public interest. The Court has considered that information on activities relating to exploration and exploitation of natural resources in the territory of indigenous communities,[487] and implementation of a forestry industrialization project[488] is of public interest.

215. Furthermore, the European Court of Human Rights has indicated that authorities who engage in hazardous activities that could involve consequences to the health of the individual have the positive obligation to establish an effective and accessible procedure so that members of the public can access all relevant and appropriate information and are enabled to assess the danger to which they are exposed.[489] The African Commission on Human and Peoples' Rights has also recognized the obligation to provide access to information on activities that are hazardous to health and the environment, in the understanding that this gives communities exposed to a specific risk the opportunity to take part in the decision-making that affects them.[490]

216. Under international environmental law, the specific obligation to provide access to information on matters relating to the environment is established in Principle 10 of the Rio

---

483 *Cf. Case of Claude Reyes et al. v. Chile, supra*, para. 77; *Case of the Kaliña and Lokono Peoples v. Suriname*, *supra*, para. 261, and *Case of I.V. v. Bolivia, supra*, para. 156.

484 *Cf. Case of Claude Reyes et al. v. Chile, supra*, para. 86.

485 *Cf. Case of Claude Reyes et al. v. Chile, supra*, para. 86.

486 *Cf. Case of Palamara Iribarne v. Chile. Merits, reparations and costs.* Judgment of November 22, 2005. Series C No. 135, para. 83, and *Case of Claude Reyes et al. v. Chile, supra*, para. 87.

487 *Cf. Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, supra*, para. 230.

488 *Cf. Case of Claude Reyes et al. v. Chile, supra*, para. 73.

489 *Cf.* ECHR, *Case of Guerra and Others v. Italy* [GS], No. 14967/89. Judgment of February 19, 1998, para. 60; ECHR, *Case of McGinley and Egan v. The United Kingdom*, No. 21825/93 and 23414/94. Judgment of July 9, 1998, para. 101; ECHR, *Case of Taşkin and Others v. Turkey*, No. 46117/99. Judgment of November 10, 2004, para. 119, and ECHR, *Case of Roche v. The United Kingdom*, No. 32555/96. Judgment of October 19, 2005, para. 162. In addition, applying the Aarhus Convention (Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters), the European Court has established that States must ensure that "in the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or to mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected." *Cf.* ECHR, *Case of Di Sarno and Others v. Italy*, No. 30765/08. Judgment of January 10, 2012, para. 107, and Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), entered into force on October 30, 2001, art. 5.

490 *Cf.* African Commission on Human and Peoples' Rights, *Social and Economic Rights Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*. Communication 155/96. Decision of October 27, 2001, para. 53 and operative paragraphs.

Declaration.[491] In addition, numerous universal[492] and regional[493] treaties exist that include the obligation to provide access to information on environmental matters.

217. In addition, the Court observes that access to information also forms the basis for the exercise of other rights. In particular, access to information has an intrinsic relationship to public participation with regard to sustainable development and environmental protection. The right of access to information has been incorporated into numerous sustainable development projects and agendas, such as Agenda 21 adopted by the United Nations Conference on Environment and Development.[494] In the inter-American sphere, it has been incorporated into the 2000 Inter-American Strategy for the Promotion of Public Participation in Decision-making on Sustainable Development,[495] and the Declaration on the Application of Principle 10 of the Rio Declaration on Environment and Development adopted during the 2012 United Nations Conference on Sustainable Development,[496] and its Plan of

---

491 In this regard, the Rio Declaration established that "[a]t the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes." Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, Río de Janeiro, June 3 to 14 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. 1), Principle 10. *See also,* International Law Commission, *Commentaries on the draft Articles on prevention of transboundary harm from hazardous activities,* Yearbook of the International Law Commission 2001, vol. II, Part Two (A/56/10), art. 13, para. 3 to 5.

492 See*, inter alia*, United Nations Framework Convention on Climate Change, entered into force on March 21, 1994, art. 6.a.ii; Convention on Biodiversity entered into force on December 29, 1993, art. 14(1).a; Kyoto Protocol to the United Nations Framework Convention on Climate Change, entered into force on February 16, 2005, art. 10.e; United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, entered into force on December 26, 1996, arts. 16.f and 19.3.b; Convention on Nuclear Safety, entered into force on 24 October 1996, art. 16.2; Minamata Convention on Mercury, entered into force on August 16, 2017, art. 18.1, and Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, entered into force on February 24 2004, art. 15.2.

493 See*, inter alia*, North American Agreement on Environmental Cooperation, adopted on September 14, 1993, by the Governments of Canada, the United Mexican States and the United States of America, entered into force on January 1, 1994, art. 4; Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), entered into force on September 10, 1997, arts. 2.6 and 4.2; Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context, entered into force on July 11, 2010, art. 8; Framework Convention for the Protection of the Marine Environment of the Caspian Sea (Tehran Convention), entered into force on August 12, 2006, art. 21.2; Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) of the Economic Commission for Europe, entered into force on October 30, 2001, art. 1; Convention on the Protection and Use of Transboundary Watercourses and International Lakes of the Economic Commission for Europe (ECE), entered into force on October 6, 1996, art. 16, and African Convention on the Conservation of Nature and Natural Resources (revised in 1968), entered into force in July 2016, art. XVI.

494 *Cf.* Agenda 21, adopted at the United Nations Conference on Environment and Development, Rio de Janeiro, June 14, 1992, UN Doc. A/CONF.151/26 (Vol. I), para. 23.2. See also, for example, Guidelines for Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (Bali Guidelines) adopted in Bali on February 26, 2010, by the UNEP Governing Council, Decision SS.XI/5, part A, Guideline 10, and Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR), entered into force on March 25, 1998, art. 9.2.

495 *Cf.* Inter-American Strategy for the Promotion of Public Participation in Decision-making on Sustainable Development, adopted in Washington in April 2000 by the Inter-American Committee on Sustainable Development, OEA/Ser.W/II.5, CIDI/doc. 25/00 (April 20, 2000), pp. 19, 20, 24 and 25.

496 *Cf.* Declaration on the application of Principle 10 of the Rio Declaration on Environment and Development, submitted in annex to the *note verbale* dated June 27, 2012, from the Permanent Mission of Chile to the United Nations addressed to the Secretary-General of the United Nations Conference on Sustainable Development, UN Doc. A/CONF.216/13. This Declaration was issued with the support of the Economic Commission for Latin America and the Caribbean (ECLAC) as Technical Secretariat. Currently it has been signed by 23 countries and is open to accession by all the countries of Latin America and the Caribbean, information available at: http://negociacionp10.cepal.org/6/es/antecedentes.

Action to 2014.[497]

218. The Court takes note that, within the framework of these plans and declarations, the States of Latin America and the Caribbean have commenced a process towards the adoption of a regional instrument on access to information, public participation, and access to justice in environmental matters.[498] According to information publicly available, this process is currently at the stage of negotiation and review.[499] The Court welcomes this initiative as a positive measure to ensure the right of access to information in this matter.

i) Meaning and scope of this obligation in relation to the environment

219. This Court has indicated that, under this obligation, information must be handed over without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied.[500]

220. Regarding the characteristics of this obligation, the Bali Guidelines[501] and other international instruments[502] establish that access to environmental information should be affordable, effective and timely.

221. In addition, as the Court has recognized, the right of the individual to obtain

---

497 *Cf.* Plan of Action to 2014 for the implementation of the declaration on the application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean and its road map, adopted in Guadalajara (Mexico) on April 17, 2013, by the Economic Commission for Latin America and the Caribbean (ECLAC).

498 *Cf.* Lima Vision for a regional instrument on access rights relating to the environment, adopted in Lima on October 31, 2013, by ECLAC during the Third Meeting of the Focal Points appointed by the Governments of the signatory countries of the Declaration on the application of Principle 10 in Latin America and the Caribbean, and Training Workshop on application of Principle 10, LC/L.3780, Available at: http://repositorio.cepal.org/bitstream/handle/ 11362/38733/1/S2013913_es.pdf; San José content for the regional instrument, adopted in Santiago on November 6, 2014, by ECLAC, during the Fourth Meeting of the Focal Points appointed by the Governments of the signatory countries of the Declaration on the application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean, LC/L.3970, available at: http://repositorio.cepal.org/bitstream/handle/11362/38988/S1500157_es.pdf?sequence=1&isAllowed=y, and Santiago decision, adopted in Santiago on November 6, 2014, by ECLAC, during the Fourth Meeting of the Focal Points appointed by the Governments of the signatory countries of the Declaration on the application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean, available at: http://repositorio.cepal.org/bitstream/handle/11362/37213/S1420708_es.pdf? sequence=1&isAllowed=y.

499 Between 2012 and 2017, Governments of the signatory countries of the Declaration on the application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean held eight meetings to negotiate and revise the text of the regional instrument on access to information, public participation and justice in environmental matters. The seventh version of the text compiled by the committee includes the text proposed by the countries for the preliminary document of the regional agreement on access to information, public participation and access to justice in environmental matters in Latin America and the Caribbean, published on September 6, 2017, LC/L.4059/Rev.6, available at: http://repositorio.cepal.org/bitstream/handle/11362/39050/S1700797_es.pdf?sequence=34&isAllowed=y.

500 *Cf. Case of Claude Reyes et al. v. Chile, supra*, para. 77, and *Case of the Kaliña and Lokono Peoples v. Suriname*, *supra*, para. 261.

501 *Cf.* Guidelines for Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (Bali Guidelines) adopted in Bali on February 26, 2010, by the UNEP Governing Council, Decision SS.XI/5, part A, Guideline 1.

502 See, for example, Convention on the Protection and Use of Transboundary Watercourses and International Lakes of the Economic Commission for Europe (ECE), entered into force on October 6, 1996, art. 16.2; Convention for the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Convention), entered into force on January 17, 2000, art. 17.2, and Inter-American Strategy for the Promotion of Public Participation in Decision-making on Sustainable Development, adopted in Washington in April 2000 by the Inter-American Committee on Sustainable Development, OEA/Ser.W/II.5, CIDI/doc. 25/00 (April 20, 2000), pp. 19 and 20, Available at: https://www.oas.org/dsd/PDF_files/ispspanish.pdf.

information is complemented by a correlative positive obligation of the State to provide the information requested, so that the individual may have access to it in order to examine and assess it.[503] In this regard, the State obligation to provide information, *ex officio*, the so-called "obligation of active transparency," imposes on States the obligation to provide the necessary information for individuals to be able to exercise other rights, and this is particularly relevant in relation to the rights to life, personal integrity and health.[504] Moreover, this Court has indicated that the obligation of active transparency imposes on States the obligation to provide the public with as much information as possible on an informal basis.[505] This information should be complete, understandable, in an accessible language, and current, and be provided in a way that is helpful to the different sectors of the population.[506]

222. In the specific sphere of environmental law, numerous international instruments establish the duty of the State to prepare and disseminate, distribute or publish,[507] in some cases periodically, updated information on the situation of the environment in general or on the specific area covered by the instrument in question.

223. The Court understands that in the case of activities that could affect other rights (*supra* para. 221), the obligation of active transparency encompasses the duty of States to publish, *ex officio*, relevant and necessary information on the environment in order to ensure the human rights under the Convention. This includes information on environmental quality, environmental impact on health and the factors that influence this, and also information on legislation and policies, as well as assistance on how to obtain such information. The Court also notes that this obligation is particularly important in cases of environmental emergencies that require relevant and necessary information to be disseminated immediately and without delay to comply with the duty of prevention.

---

503 *Cf. Case of Claude Reyes et al. v. Chile, supra*, para. 77, and *Case of I.V. v. Bolivia, supra*, para. 156.

504 *Cf. Case of Furlan and family members v. Argentina, supra*, para. 294, and *Case of I.V. v. Bolivia, supra*, paras. 156 and 163.

505 *Cf. Case of Furlan and family members v. Argentina, supra*, para. 294. In compliance with this obligation, States must act in good faith so that their actions ensure the satisfaction of the general interest and do not betray the individual's confidence in the State's administration. Therefore, it should deliver information that is clear, complete, timely, true and up-to-date.

506 *Cf. Case of Furlan and family members v. Argentina, supra*, para. 294. Also, the scope of this obligation has been defined in the resolution of the Inter-American Juridical Committee on the "Principles on the Right of Access to Information," which establish that "[p]ublic bodies should disseminate information about their functions and activities – including, but not limited to, their policies, opportunities for consultation, activities which affect members of the public, their budget, and subsidies, benefits and contracts – on a routine and proactive basis, even in the absence of a specific request, and in a manner which ensures that the information is accessible and understandable." Inter-American Juridical Committee, *Principles on the Right of Access to Information*, 73rd regular session, August 7, 2008, OEA/Ser.Q CJI/RES.147 (LXXIII-O/08), fourth operative paragraph

507 *See, for example*, UNCLOS, art. 244(1); Guidelines for Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (Bali Guidelines) adopted in Bali on February 26, 2010, by the UNEP Governing Council, Decision SS.XI/5, part A, Guideline 5; Inter-American Strategy for the Promotion of Public Participation in Decision-making on Sustainable Development, adopted in Washington in April 2000 by the Inter-American Committee on Sustainable Development, OEA/Ser.W/II.5, CIDI/doc. 25/00 (April 20, 2000), pp. 19 and 20; Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), entered into force on October 30, 2001, art. 5; Convention for the strengthening of the Inter-American Tropical Tuna Commission established by the 1949 Convention between the United States of America and the Republic of Costa Rica (Antigua Convention), entered into force on August 27, 2010, art. XVI.1.a); North American Agreement on Environmental Cooperation, entered into force on January 1, 1994, art. 4, and Articles on prevention of transboundary harm from hazardous activities, adopted by the International Law Commission in 2001 and annexed to the United Nations General Assembly Resolution 62/68 of December 6, 2007, UN Doc. A/RES/62/68Doc. A/RES/62/68, art. 13.

ii) Restrictions to access to information

224. The Court reiterates that the right of access to information held by the State admits restrictions, provided these have been established previously by law, respond to a purpose permitted by the American Convention ("respect for the rights or reputation of others" or "the protection of national security, public order, or public health or morals"), and are necessary and proportionate in a democratic society, which will depend on whether such restrictions are designed to meet an essential public interest.[508] Consequently, the principle of maximum disclosure is applicable, based on the presumption that all information is accessible, subject to a limited system of exceptions.[509] Accordingly, the burden of proof to justify any denial of access to information must be borne by the entity from whom the information was requested.[510] If it is necessary to refuse to provide the requested information, the State must justify this refusal in a way that allows the reasons and rules on which it has based the decision not to deliver the information to be known.[511] In the absence of a reasoned response from the State, the decision is arbitrary.[512]

iii) Conclusion regarding access to information

225. Consequently, this Court considers that States have the obligation to respect and ensure access to information concerning possible environmental impacts. This obligation must be ensured to every person subject to their jurisdiction, in an accessible, effective and timely manner, without the person requesting the information having to prove a specific interest. Furthermore, in the context of environmental protection, this obligation involves both providing mechanisms and procedures for individuals to request information, and also the active compilation and dissemination of information by the State. This right is not absolute, and therefore admits restrictions, provided these have been established previously by law, respond to a purpose permitted by the American Convention, and are necessary and proportionate to respond to objectives of general interest in a democratic society.

B.4.b Public participation

226. Public participation is one of the fundamental pillars of instrumental or procedural rights, because it is through participation that the individual exercises democratic control of the State's activities and is able to question, investigate and assess compliance with public functions. In this regard, public participation allows the individual to become part of the decision-making process and have his or her opinion heard. In particular, public participation enables communities to require accountability from public authorities when

---

508 *Cf. Case of Claude Reyes et al. v. Chile, supra*, paras. 88 to 91, and *Case of the Kaliña and Lokono Peoples v. Suriname*, *supra*, paras. 261 and 262. In relation to international environmental law, it has frequently been understood that the protection of the rights of others includes the rights to privacy and to intellectual property, the protection of business confidentiality and of criminal investigations, among other matters. See, *inter alia*, Convention for the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Convention), entered into force on January 17, 2000, arts. 17 and 18; Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), entered into force on October 30, 2001, art. 4, and International Law Commission, *Commentaries on the draft Articles on prevention of transboundary harm from hazardous activities*, Yearbook of the International Law Commission 2001, vol. II, Part Two (A/56/10), art. 14, para. 1 to 3.

509 *Cf. Case of Claude Reyes et al. v. Chile, supra*, para. 92.

510 *Cf. Case of the Kaliña and Lokono Peoples v. Suriname*, *supra*, para. 262.

511 *Cf. Case of Claude Reyes et al. v. Chile, supra*, para. 77, and *Case of the Kaliña and Lokono Peoples v. Suriname*, *supra*, para. 262

512 *Cf. Case of Claude Reyes et al. v. Chile, supra*, paras. 98 and 120, and *Case of the Kaliña and Lokono Peoples v. Suriname*, *supra*, para. 262.

taking decisions and, also, improves the efficiency and credibility of government processes. As mentioned on previous occasions, public participation requires implementation of the principles of disclosure and transparency and, above all, should be supported by access to information that permits social control through effective and responsible participation.[513]

227. The right of the public to take part in the management of public affairs is established in Article 23(1)(a) of the American Convention.[514] In the context of indigenous communities, this Court has determined that the State must ensure the rights to consultation and to participation at all stages of the planning and implementation of a project or measure that could have an impact on the territory of an indigenous or tribal community, or on other rights that are essential for their survival as a people[515] in keeping with their customs and traditions.[516] This means that, in addition to receiving and providing information, the State must make sure that members of the community are aware of the possible risks, including health and environmental risks, so that they can provide a voluntary and informed opinion about any project that could have an impact on their territory within the consultation process.[517] The State must, therefore, create sustained, effective and trustworthy channels for dialogue with the indigenous peoples, through their representative institutions, in the consultation and participation procedures.[518]

228. In the case of environmental matters, participation is a mechanism for integrating public concerns and knowledge into public policy decisions affecting the environment.[519] Moreover, participation in decision-making makes Governments better able to respond promptly to public concerns and demands, build consensus, and secure increased acceptance of and compliance with environmental decisions.[520]

229. The European Court of Human Rights has underlined the importance of public participation in environmental decision-making as a procedural guarantee of the right to private and family life.[521] It has also stressed that an essential element of this procedural guarantee is the ability of individuals to challenge official acts or omissions that affect their

---

513 *Cf. Case of Claude Reyes et al. v. Chile, supra*, para. 86. *See also*, Inter-American Strategy for the Promotion of Public Participation in Decision-making on Sustainable Development, adopted in Washington in April 2000 by the Inter-American Committee on Sustainable Development, OEA/Ser.W/II.5, CIDI/doc. 25/00 (April 20, 2000), p. 19.

514 Article 23(1)(a) of the American Convention establishes that "[e]very citizen shall enjoy the following rights and opportunities: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives."

515 *Cf. Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, supra*, para. 167, and *Case of the Triunfo de la Cruz Garifuna Community and its members v. Honduras, supra*, para. 215.

516 *Cf. Case of the Saramaka People v. Suriname. Preliminary objections, merits, reparations and costs, supra*, para. 133, and *Case of the Kaliña and Lokono Peoples v. Suriname*, *supra*, para. 214.

517 *Cf. Case of the Saramaka People v. Suriname. Interpretation of the judgment on preliminary objections, merits, reparations and costs, supra*, para. 40, and *Case of the Kaliña and Lokono Peoples v. Suriname*, *supra*, para. 214.

518 *Cf. Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, supra*, para. 166, and *Case of the Triunfo de la Cruz Garifuna Community and its members v. Honduras, supra*, para. 159.

519 *Cf.* Economic Commission for Latin America and the Caribbean (ECLAC), *Access to information, participation and justice in environmental matters in Latin America and the Caribbean: towards achievement of the 2030 Agenda for Sustainable Development* (LC/TS.2017/83), Santiago de Chile, October 2018, p.13, Available at: https://repositorio.cepal.org/bitstream/handle/11362/43302/1/S1701020_en.pdf.

520 *Cf.* Economic Commission for Latin America and the Caribbean (ECLAC), *Access to information, participation and justice in environmental matters in Latin America and the Caribbean: towards achievement of the 2030 Agenda for Sustainable Development* (LC/TS.2017/83), Santiago de Chile, October 2018, p.13, Available at: https://repositorio.cepal.org/bitstream/handle/11362/43302/1/S1701020_en.pdf.

521 *Cf.* ECHR, *Case of Grimkovskaya v. Ukraine*, No. 38182/03. Judgment of July 21, 2011, para. 69.

rights before an independent authority,[522] and to play an active role in the planning procedures for activities and projects by expressing their opinions.[523]

230. The right of public participation is also reflected in various regional and international instruments relating to the environment and sustainable development,[524] the Declarations of Stockholm[525] and Rio,[526] and the World Charter for Nature which establishes:

> All persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation.[527]

231. Therefore, this Court considers that the State obligation to ensure the participation of persons subject to their jurisdiction in decision-making and policies that could affect the environment, without discrimination and in a fair, significant and transparent manner, is derived from the right to participate in public affairs and, to this end, States must have previously ensured access to the necessary information.[528]

232. As regards the moment of the public participation, the State must ensure that there are opportunities for effective participation from the initial stages of the decision-making process, and inform the public about these opportunities for participation.[529] Lastly, different

---

[522] *Cf.* ECHR, *Case of Dubetska and Others v. Ukraine*, No. 30499/03. Judgment of February 10, 2011, para. 143; ECHR, *Case of Grimkovskaya v. Ukraine*, No. 38182/03. Judgment of July 21, 2011, para. 69, and ECHR, *Case of Taşkin and Others v. Turkey*, No. 46117/99. Judgment of November 10, 2004, para. 119.

[523] *Cf.* ECHR, *Case of Eckenbrecht v. Germany*, No. 25330/10. Decision of June 10, 2014, para. 42.

[524] See, for example, United Nations Framework Convention on Climate Change, entered into force on March 21, 1994, art. 6.a.iii; Inter-American Strategy for the Promotion of Public Participation in Decision-making on Sustainable Development, adopted in Washington in April 2000 by the Inter-American Committee on Sustainable Development, OEA/Ser.W/II.5, CIDI/doc. 25/00 (April 20, 2000), pp. 46 and 47; Report of the World Commission on Environment and Development "Our Common Future" (Brundtland Report), adopted in Nairobi on June 16, 1987, Annex to UN Doc. A/42/427, Principle 20, and Agenda 21, adopted at the United Nations Conference on Environment and Development, Rio de Janeiro, June 14, 1992, UN Doc. A/CONF.151/26 (Vol. I), paras. 8.3.c, 8.4.f, 8.21.f and 23.2.

[525] *Cf.* Stockholm Declaration on the Human Environment, United Nations Conference on the Human Environment, Stockholm, June 5 to 16, 1972, UN Doc. A/CONF.48/14/Rev.1, preamble.

[526] *Cf.* Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, Río de Janeiro, June 3 to 14 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. 1), Principle 10, and Guidelines for Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (Bali Guidelines) adopted in Bali on February 26, 2010, by the UNEP Governing Council, Decision SS.XI/5, part A.

[527] World Charter for Nature, adopted by the General Assembly of the United Nations in Resolution 37/7 of October 28, 1982, UN Doc. A/RES/37/7, para. 23.

[528] See, for example, in the European sphere, article 1 of the Aarhus Convention explicitly establishes "the rights of access to information, public participation in decision-making, and access to justice in environmental matters." Regarding public participation, article 7 establishes: "[e]ach Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment within a transparent and fair framework, having provided the necessary information to the public." *Cf.* Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), entered into force on October 30, 2001, arts. 1 and 7.

[529] *See, for example,* Guidelines for Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (Bali Guidelines) adopted in Bali on February 26, 2010, by the UNEP Governing Council, Decision SS.XI/5, Part A, Guideline 8; Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), entered into force on October 30, 2001, art. 6, and International Law Commission, *Commentaries on the draft Articles on prevention of transboundary harm from hazardous activities,* Yearbook of the International Law Commission 2001, vol. II, Part Two (A/56/10), art. 13, paras. 1 and 3.

mechanisms exist for public participation in environmental matters including public hearings, notification and consultations, as well as participation in the elaboration and enforcement of laws; there are also mechanisms for judicial review.[530]

B.4.c Access to justice

233. The Court has indicated that access to justice is a peremptory norm of international law.[531] In general, the Court has maintained that States Parties to the American Convention are obliged to provide effective judicial remedies to the victims of human rights violations (Article 25), remedies that must be substantiated in accordance with the rules of due process of law (Article 8(1)), all within the general obligation of these States to ensure the free and full exercise of the rights recognized in the Convention to all persons subject to their jurisdiction (Article 1(1)).[532]

234. In the context of environmental protection, access to justice permits the individual to ensure that environmental standards are enforced and provides a means of redressing any human rights violations that may result from failure to comply with environmental standards, and includes remedies and reparation. This also implies that access to justice guarantees the full realization of the rights to public participation and access to information, through the corresponding judicial mechanisms.

235. The European Court of Human Rights has also referred to protection of the rights of access to information and public participation through access to justice. In particular, as previously mentioned, the European Court has emphasized the positive obligation to establish an effective and accessible procedure for individuals to have access to all relevant and appropriate information to evaluate the risks from hazardous activities (*supra* para. 215). Also, with regard to public participation, it has stressed that "the individuals concerned must be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process."[533]

236. Under international environmental law, several international instruments expressly establish the obligation to guarantee access to justice in environmental contexts, even in the case of transboundary harm.[534] Principle 10 of the Rio Declaration stipulates that

---

530 Several such mechanisms have been established in the domestic legal systems of various OAS Member States. See, for example: (Argentina) General Environment Act of Argentina, Law No. 25,675 of November 27, 2002, arts. 19 and 20); (Bolivia) Constitution of the State of Bolivia, art. 343; (Ecuador) General Environmental Code of Ecuador of April 12, 2017, art. 184; (Guatemala) Regulations on Environmental Assessment, Control and Monitoring of Guatemala, Decision No. 137-2016 of July 11, 2016, art. 43; (Mexico) General Law on Ecological Balance and Environmental Protection of the United Mexican States of January 28, 1988, art. 20 bis 5, and (Uruguay) Environmental Protection Act No. 17,283 of December 12, 2000, arts. 6 and 7 and Environment Act No. 16.466 of January 19, 1994, arts. 14.

531 *Cf. Case of Goiburú et al. v. Paraguay. Merits, reparations and costs*. Judgment of September 11, 2006. Series C No. 153, para. 131, and *Case of La Cantuta v. Peru. Merits, reparations and costs.* Judgment of November 29, 2006. Series C No. 162, para. 160

532 *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections.* Judgment of June 26, 1987. Series C No. 1, para. 91, and *Case of Favela Nova Brasília v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of February 16, 2017. Series C No. 333, para. 174.

533 *Cf.* ECHR, *Case of Taşkin and Others v. Turkey*, No. 46117/99. Judgment of November 10, 2004, para. 119.

534 *See, for example,* Report of the World Commission on Environment and Development "Our Common Future" (Brundtland Report), adopted in Nairobi on June 16, 1987, Annex to UN Doc. A/42/427, Principle 20, and Agenda 21, adopted at the United Nations Conference on Environment and Development, Rio de Janeiro, June 14, 1992, UN Doc. A/CONF.151/26 (Vol. I), para. 20*;* Code of Conduct on Accidental Pollution of Transboundary Inland Waters, adopted in 1990 by the Economic Commission for Europe, arts. VI.1, VI.4 and VII.3; Convention on the

"access to judicial and administrative proceedings, including redress and remedy, shall be provided."[535] Also, legal redress to obtain compensation for environmental damage is established in article 23 of the World Charter for Nature[536] and in Agenda 21.[537]

237. Based on the above, the Court establishes that States have the obligation to guarantee access to justice in relation to the State environmental protection obligations described in this Opinion. Accordingly, States must guarantee that the public have access to remedies conducted in accordance with due process of law to contest any provision, decision, act or omission of the public authorities that violates or could violate obligations under environmental law; to ensure the full realization of the other procedural rights (that is, the right of access to information and to public participation), and to redress any violation of their rights as a result of failure to comply with obligations under environmental law.

i) Access to justice in cases of transboundary harm

238. The Court has established that, in the case of transboundary harm, it is understood that a person is under the jurisdiction of the State of origin when there is a causal link between the project or activity that has been or will be executed in its territory and the effects on the human rights of persons outside its territory (*supra* paras. 95 to 103). Therefore, States have the obligation to guarantee access to justice to anyone potentially affected by transboundary harm originated in their territory.

239. Additionally, owing to the general obligation of non-discrimination, States must ensure access to justice to persons affected by transboundary harm originated in their territory without any discrimination on the basis of nationality or residence or place where the harm occurred. In this regard, several international treaties and instruments establish the non-discriminatory application of access to judicial and administrative procedures for persons potentially affected who are not in the territory of the State of origin.[538]

240. Consequently, the Court clarifies that States must ensure access to justice, without discrimination, to persons affected by environmental damage originating in their territory, even when such persons live or are outside this territory.

B.4.d. Conclusion regarding procedural obligations

241. Based on all the above, the Court concludes that in order to ensure the rights to life

---

Transboundary Effects of Industrial Accidents, entered into force on April 19, 2000, art. 9.3, and Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), entered into force on October 30, 2001.

535 *Cf.* Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, Río de Janeiro, June 3 to 14 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. 1), Principle 10

536 *Cf.* World Charter for Nature, adopted by the General Assembly of the United Nations in Resolution 37/7 of October 28, 1982, UN Doc. A/RES/37/7, para. 23.

537 *Cf.* Agenda 21, adopted at the United Nations Conference on Environment and Development, Rio de Janeiro, June 14, 1992, UN Doc. A/CONF.151/26 (Vol. I), para. 8.18.

538 *See, for example,* Convention on the Law of the Non-Navigational Uses of International Watercourses, entered into force on August 17, 2014, art. 32; Convention on the Transboundary Effects of Industrial Accidents, entered into force on April 19, 2000, art. 9.3, and Report of the World Commission on Environment and Development "Our Common Future" (Brundtland Report), adopted in Nairobi on June 16, 1987, Annex to UN Doc. A/42/427, Principles 6, 13 and 20. *See also,* Human Rights Council, Mapping report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, of December 30, 2013, UN Doc. A/HRC/25/53, paras. 69 and 81.

and to personal integrity, as well as any other right affected, States have the obligation to guarantee: (i) the right of access to information related to potential environmental harm, established in Article 13 of the American Convention, in accordance with paragraphs 213 to 225 of this Opinion; (ii) the right to public participation of the persons subject to their jurisdiction, established in Article 23(1)(a) of the American Convention, in policies and decision-making that may affect the environment, in accordance with paragraphs 226 to 232 of this Opinion, and (iii) access to justice, established in Articles 8 and 25 of the American Convention, in relation to the State obligations with regard to protection of the environment described previously, in accordance with paragraphs 233 to 240 of this Opinion.

B.5 Conclusions with regard to State obligations

242. Based on the above, in response to the second and third questions of the requesting State, it is the Court's opinion that, in order to respect and to ensure the rights to life and to personal integrity:

a. States have the obligation to prevent significant environmental damage within or outside their territory, in accordance with paragraphs 127 to 174 of this Opinion.

b. To comply with the obligation of prevention, States must regulate, supervise and monitor the activities within their jurisdiction that could produce significant environmental damage; conduct environmental impact assessments when there is a risk of significant environmental damage; prepare a contingency plan to establish safety measures and procedures to minimize the possibility of major environmental accidents, and mitigate any significant environmental damage that may have occurred, even when it has happened despite the State's preventive actions, in accordance with paragraph 141 to 174 of this Opinion.

c. States must act in keeping with the precautionary principle in order to protect the rights to life and to personal integrity in the case of potential serious or irreversible damage to the environment, even in the absence of scientific certainty, in accordance with paragraph 180 of this Opinion.

d. States have the obligation to cooperate, in good faith, to protect against environmental damage, in accordance with paragraphs 181 to 210 of this Opinion.

e. To comply with the obligation of cooperation, States must notify other potentially affected States when they become aware that an activity planned under their jurisdiction could result in a risk of significant transboundary harm and also in cases of environmental emergencies, and consult and negotiate in good faith with States potentially affected by significant transboundary harm, in accordance with paragraphs 187 to 210 of this Opinion.

f. States have the obligation to ensure the right of access to information, established in Article 13 of the American Convention, concerning potential environmental impacts, in accordance with paragraphs 213 to 225 of this Opinion;

g. States have the obligation to ensure the right to public participation of the persons subject to their jurisdiction established in Article 23(1)(a) of the American Convention, in policies and decision-making that could affect the environment, in accordance with paragraphs 226 to 232 of this Opinion, and

h. States have the obligation to ensure access to justice in relation to the State obligations with regard to protection of the environment set out in this Opinion, in accordance with paragraphs 233 to 240 of this Opinion.

243. The obligations described above have been developed in relation to the general obligations to respect and to ensure the rights to life and to personal integrity, because these were the rights that the State referred to in its request (*supra* paras. 37, 38, 46 and 69). However, this does not mean that the said obligations do not exist with regard to the other rights mentioned in this Opinion as being particularly vulnerable in the case of environmental degradation (*supra* paras. 56 to 69).

IX
OPINION

244. For the above reasons, in interpretation of Articles 1(1), 2, 4 and 5 of the American Convention on Human Rights,

THE COURT

DECIDES

unanimously, that:

1. It is competent to issue this Advisory Opinion.

AND IS OF THE OPINION,

unanimously that:

2. The concept of jurisdiction under Article 1(1) of the American Convention encompasses any situation in which a State exercises authority or effective control over an individual, either within or outside its territory, in accordance with paragraphs 72 to 81 of this Opinion.

3. To determine the circumstances that reveal a State's exercise of jurisdiction, the specific factual and legal circumstances of each particular case must be examined, and it is not sufficient that a person be located in a specific geographical area, such as the area of application of an environmental protection treaty, in accordance with paragraphs 83 to 94 of this Opinion.

4. For the purposes of Article 1(1) of the American Convention, it is understood that individuals whose rights under the Convention have been violated owing to transboundary harm are subject to the jurisdiction of the State of origin of the harm, because that State exercises effective control over the activities carried out in its territory or under its jurisdiction, in accordance with paragraphs 95 to 103 of this Opinion.

5. To respect and to ensure the rights to life and to personal integrity of the persons subject to their jurisdiction, States have the obligation to prevent significant environmental damage within or outside their territory and, to this end, must regulate, supervise and monitor activities within their jurisdiction that could produce significant environmental damage; conduct environmental impact assessments when there is a risk of significant environmental damage; prepare a contingency plan to establish safety measures and

procedures to minimize the possibility of major environmental accidents, and mitigate any significant environmental damage that may have occurred, in accordance with paragraphs 127 and 174 of this Opinion.

6. States must act in accordance with the precautionary principle to protect the rights to life and to personal integrity in cases where there are plausible indications that an activity could result in serious or irreversible environmental damage, even in the absence of scientific certainty, in accordance with paragraph 180 of this Opinion.

7. To respect and to ensure the rights to life and to integrity of the persons subject to their jurisdiction, States have the obligation to cooperate, in good faith, to ensure protection against significant transboundary harm to the environment. To comply with this obligation, States must notify other potentially affected States when they become aware that an activity planned under their jurisdiction could cause significant transboundary harm and also in cases of environmental emergencies, and must consult and negotiate in good faith with States potentially affected by significant transboundary harm, in accordance with paragraphs 181 to 210 of this Opinion.

8. To ensure the rights to life and to integrity of the persons subject to their jurisdiction in relation to environmental protection, States have the obligation to ensure the right of access to information concerning potential environmental damage, the right to public participation of persons subject to their jurisdiction in policies and decision-making that could affect the environment, and also the right of access to justice in relation to the State environmental obligations set out in this Opinion, in accordance with paragraphs 211 to 241 of this Opinion.

Done at San José, Costa Rica, in the Spanish language, on November 15, 2017.

Judges Eduardo Vio Grossi and Humberto Antonio Sierra Porto informed the Court of their concurring opinions, which are attached to this Advisory Opinion.

Inter-American Court of Human Rights. Advisory Opinion OC-23/17 of November 15, 2017. Requested by the Republic of Colombia.

Roberto F. Caldas
President

Eduardo Ferrer Mac-Gregor Poisot

Eduardo Vio Grossi

Humberto Antonio Sierra Porto

Elizabeth Odio Benito

Eugenio Raúl Zaffaroni

L. Patricio Pazmiño Freire

Pablo Saavedra Alessandri
Secretary

So ordered,

Roberto F. Caldas
President

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION OF JUDGE EDUARDO VIO GROSSI
INTER-AMERICAN COURT OF HUMAN RIGHTS
ADVISORY OPINION OC-23/17
OF NOVEMBER 15, 2017
REQUESTED BY THE REPUBLIC OF COLOMBIA

THE ENVIRONMENT AND HUMAN RIGHTS

(STATE OBLIGATIONS IN RELATION TO THE ENVIRONMENT IN THE CONTEXT OF THE PROTECTION AND GUARANTEE OF THE RIGHTS TO LIFE AND TO PERSONAL INTEGRITY: INTERPRETATION AND SCOPE OF ARTICLES 4(1) AND 5(1) IN RELATION TO ARTICLES 1(1) AND 2 OF THE AMERICAN CONVENTION ON HUMAN RIGHTS)

INTRODUCTION

1. This separate opinion is issued with regard to the reference made by the Inter-American Court of Human Rights[1] in the above Advisory Opinion[2] to Article 26 of the American Convention on Human Rights.[3]

2. And it is a concurring opinion,[4] because the undersigned does not dissent from what was decided in the Advisory Opinion, but merely disagrees with the said reference as one of the grounds cited for the decisions, which he considers is not essential for this purpose.

DISCREPANCY

Paragraph 57 of the Advisory Opinion[5] alludes to Article 26 of the Convention[6] because it refers to the economic, social and cultural rights as if they were protected by the latter

---

1 Hereinafter, "the Court."

2 Hereinafter, "the Advisory Opinion."

3 Hereinafter, "the Convention."

4 Art. 24(3) of the Court's Statute: "The decisions, judgments and opinions of the Court shall be delivered in public session, and the parties shall be given written notification thereof. In addition, the decisions, judgments and opinions shall be published, along with judges' individual votes and opinions and with such other data or background information that the Court may deem appropriate."

Art. 75(3) of the Rules of Procedure of the Inter-American Court of Human Rights*:* "Any judge who has taken part in the delivery of an advisory opinion is entitled to append a separate reasoned opinion, concurring or dissenting, to that of the Court. These opinions shall be submitted within a time limit to be fixed by the Presidency, so that the other Judges can take cognizance thereof before the advisory opinion is served. Advisory opinions shall be published in accordance with Article 32(1)(a) of these Rules*."*

5 Paragraph 57 indicates that: "It should also be considered that this right is included among the economic, social and cultural rights protected by Article 26 of the American Convention, because this norm protects the rights derived from the economic, social, educational, scientific and cultural provisions of the OAS Charter, the American Declaration of the Rights and Duties of Man (to the extent that the latter "contains and defines the essential human rights referred to in the Charter") and those resulting from an interpretation of the Convention that accords with the criteria established in its Article 29 (*supra* para. 42). The Court reiterates the interdependence and indivisibility of the civil and political rights, and the economic, social and cultural rights, because they should be understood integrally and comprehensively as human rights, with no order of precedence, that are enforceable in all cases before the competent authorities."

6 Art. 26 of the American Convention establishes: "Progressive Development. The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical

and, consequently, susceptible to adjudication by the Court. Accordingly, and bearing in mind that, in the *case of Lagos del Campo v. Peru*, the undersigned issued a separate opinion on the matter,[7] which he reiterated in another opinion in relation to the judgment in the *case of the Dismissed Employees of Petroperu et al. v. Peru,*[8] it should be considered that these opinions are reproduced in this document.

3. Among other considerations, these separate opinions assert that the only rights susceptible of being subject to the system of protection established in the Convention are those "*recognized*" in it; that Article 26 of the Convention does not refer to such rights, but to the *rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States*"; that what the said Article 26 establishes is the obligation of States to adopt measures with a view to achieving progressively the full realization of such rights, and to do this taking into account available resources and, finally, and in consequence, that although these rights exist, they cannot be adjudicated before the Court unless this is established in a treaty as, for example, in the case of the Protocol of San Salvador, but only with regard to the right to organize and join unions, and the right to education.

4. Incidentally, to all this it should be added that, on the one hand, the rights in question may be adjudicated before the domestic courts of the States Parties to the Convention if this is established in their respective domestic laws and, on the other, when interpreting the Convention an effort should be made not to leave any margin for the possible perception that the principle that no State can be taken before an international court without its consent would be altered.

CONCLUSION

5. Therefore, the undersigned reiterates that, based on the reasons set out in the above-mentioned separate opinions and, in particular, that the rights mentioned are not included or contained in the Convention and, consequently, cannot be the object of the protection system that it establishes, he is unable to agree with paragraph 57 of the Advisory Opinion.

Eduardo Vio Grossi
Judge

Pablo Saavedra Alessandri
Secretary

---

nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires."

[7] *Partially dissenting opinion of Judge Eduardo Vio Grossi. Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2017. Series C No. 340**.**

[8] *Separate opinion of Judge Eduardo Vio Grossi. Case of the Dismissed Employees of Petroperu et al. v. Peru*. *Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2017. Series C No. 344.

CONCURRING OPINION OF
JUDGE HUMBERTO ANTONIO SIERRA PORTO

INTER-AMERICAN COURT OF HUMAN RIGHTS
ADVISORY OPINION OC-23/17
OF NOVEMBER 15, 2017
REQUESTED BY THE REPUBLIC OF COLOMBIA

THE ENVIRONMENT AND HUMAN RIGHTS

1. With my usual respect for the decisions of the Court, I present the following concurring opinion to the Advisory Opinion in reference.

2. The purpose of this concurring opinion is to set out the arguments based on which, even though in general I agree with the majority decision in the said Advisory Opinion, I differ with regard to certain considerations included in the text by the majority, particularly with regard to the justiciability before the Inter-American Court of the right to a healthy environment based on Article 26 of the American Convention.

3. First, this Advisory Opinion was not the occasion to issue a ruling on the possibility of claiming eventual violations of economic, social and cultural rights directly under Article 26 of the American Convention.

4. In the Advisory Opinion that is the subject of this opinion, when referring to the legal provisions that protect the right to a healthy environment under the inter-American system, the majority indicated that:

> […] this right is included among the economic, social and cultural rights protected by Article 26 of the American Convention, because this norm protects the rights derived from the economic, social, educational, scientific and cultural provisions of the OAS Charter, the American Declaration of the Rights and Duties of Man (to the extent that the latter "contains and defines the essential human rights referred to in the Charter") and those resulting from an interpretation of the Convention that accords with the criteria established in its Article 29 (*supra* para. 42). The Court reiterates the interdependence and indivisibility of the civil and political rights, and the economic, social and cultural rights, because they should be understood integrally and comprehensively as human rights, with no order of precedence, that are enforceable in all cases before the competent authorities.[1]

[1] Advisory Opinion No. 23, para. 57.

5. Thus, it can be seen that, in the paragraph cited, the majority seek to conclude that the right to a healthy environment, autonomously, is directly justiciable in contentious cases before the organs of the inter-American human rights system under Article 26 of the Convention.

6. Despite this, the questions raised by the State of Colombia were limited to the interpretation of the provisions concerning the State obligations to respect and to ensure the rights to life (Article 4) and to personal integrity (Article 5) of the American Convention, in environmental matters.

7. By incorporating considerations on the direct justiciability of the right to a healthy environment, in particular, and of economic, social and cultural rights, in general, the majority exceed the purpose of the Advisory Opinion, without granting those intervening in the processing of the Advisory Opinion any opportunity to present arguments for or against this position.

8. Consequently, I dissent from the above-mentioned position on the direct justiciability before the inter-American system of the right to a healthy environment because it exceeds the Court's competence in this specific case.

9. I also wish to reiterate my arguments on the non-existence of the direct justiciability of the economic, social and cultural rights under Article 26 of the American Convention.

10. The considerations included in the said paragraph of the Advisory Opinion were based on the considerations in paragraphs 141 to 144 of the judgment in the *case of Lagos del Campo v. Peru*, where the Court understood as incorporated within Article 26 of the Convention, and therefore directly justiciable, those rights derived from the OAS Charter, the American Declaration of the Rights and Duties of Man, and "other international acts of the same nature" based on Article 29(d) of the American Convention.

11. In this regard, I reiterate all aspects of the considerations set out in my concurring opinion in the *case of Gonzales Lluy et al. v. Ecuador* and in my partially dissenting opinion in the *case of Lagos del Campo v. Peru*, in which I gave the reasons why I consider that the very broad interpretation given to Article 26 of the American Convention exceeds the scope of this article. Added to this, I insist on the shortcomings in the arguments, which I identified in my opinion in the *case of Lagos del Campo*, because on subsequent occasions when the Court has ruled on or referred to Article 26 of the Convention, it has done so reiterating the groundless precedent of the above case.

Humberto Antonio Sierra Porto
Judge

Pablo Saavedra Alessandri
Secretary

Annex 86

United Nations CCPR/C/120/D/2285/2013

International Covenant on Civil and Political Rights

Distr.: General
7 December 2017

Original: English

Human Rights Committee

Decision adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2285/2013*, **, ***

Submitted by:	Basem Ahmed Issa Yassin et al. (represented by counsels Bret Thiele, Michael Sfard and Emily Schaeffer)
Alleged victims:	The authors
State party:	Canada
Date of communication:	28 February 2013 (initial submission)
Document references:	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 27 August 2013 (not issued in document form)
Date of adoption of decision:	26 July 2017
Subject matter:	Responsibility of the State for activities of private enterprises
Procedural issues:	Lack of standing; incompatibility with provisions of the Covenant; non-substantiation of claims
Substantive issues:	Restrictions to freedom of movement; unlawful interference with the home; deprivation of the right to enjoy one's own culture
Articles of the Covenant:	7, 12 (1), 17 and 27
Articles of the Optional Protocol:	1 and 2

1. The authors of the communication are Basem Ahmed Issa Yassin, born in 1977 in the Palestinian village of Bil'in; Maysaa Ahmed Issa Yassin, born in 1978 in Bil'in; Lamyaa Ahmed Issa Yassin, born in 1982 in Jerusalem; Nora Ahmed Issa Yassin, born in 1983 in Jerusalem; Tagreed Ahmed Issa Yassin, born in 1985 in Bil'in; Mohammed Ahmed Issa Yassin, born in 1989 in Bil'in; Abdullah Ahmed Issa Yassin, born in 1991 in Bil'in;

* Adopted by the Committee at its 120th session (3–28 July 2017).

** The following members of the Committee participated in the examination of the present communication: Tania Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Ahmed Fathalla, Olivier de Frouville, Christof Heyns, Yuji Iwasawa, Bamariam Koita, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais and Margo Waterval.

*** A joint opinion by Committee members Olivier de Frouville and Yadh Ben Achour (concurring) is annexed to the present decision.

GE.17-21900(E) 050118 050118

1721900

Esraa Ahmed Issa Yassin, born in 1987 in Bil'in; Yosra Youcef Mohammed Yassin, born in 1957 in Bil'in; Mazen Ahmed Issa Yassin, born in 1980 in Bil'in; the estate of the late Ahmed Issa Abdallah Yassin; and Mohammed Ibrahim Ahmed Abu Rahma, Vice-Chair of the Bil'in Village Council, on behalf of the Bil'in Village Council. The authors claim to be victims of violations by Canada of their rights under articles 2, 7, 12, 17 and 27 of the Covenant. The authors are represented by counsel. The Optional Protocol entered into force for Canada on 19 August 1976.

The facts as submitted by the authors

2.1 The Palestinian village of Bil'in is located north of Jerusalem and west of Ramallah, in the West Bank, occupied Palestinian territory. Its municipal lands are adjacent to the 1967 border with Israel proper, also known as the Green Line. In 1991, land formerly considered private and/or under Bil'in municipal jurisdiction was determined by Israeli authorities to be "State land". The land thus expropriated was subsequently used to construct part of the settlement known as the Modi'in Illit settlement bloc.

2.2 Construction on parts of the expropriated land began in 2001, and construction of the settlement neighbourhood of East Mattityahu, which sits squarely on the authors' land, began around 2003. The neighbourhood constitutes approximately 25 per cent of the village's historical municipal lands (approximately 700 dunams, or 70 hectares). Green Park International, Inc. and Green Mount International, Inc., transnational corporations based in Canada, were among the main corporations involved in building the neighbourhood and marketing the purchase of condominiums among the Israeli population.

2.3 Until expropriated, these lands had been used by the authors for livelihood purposes, including for olive groves and the grazing of sheep and goats. In addition to limiting their livelihood, barring Bil'in residents from access to their land denies them the ability to enjoy it, including to experience and express their culture on their land and to engage in recreational activities on it. For instance, olive groves are a symbolic and traditional element in Palestinian culture and their harvesting is a community activity. Many of the olive trees uprooted to construct the settlement were 50 to 100 or more years old and were planted by the parents and grandparents of Bil'in residents, and thus had a familial value.

2.4 While Israel is responsible for depriving the authors of their rights over the lands in question, it was Green Park International and Green Mount International that made the construction of the settlement possible and profited from it. Accountability mechanisms in Israel have failed to provide the authors with an effective remedy. Four related petitions were submitted to the Supreme Court of Israel, sitting as the High Court of Justice, against the Government of Israel and the Israeli Defence Forces commander in the West Bank, among other respondents.

2.5 The first petition was filed on 5 September 2005 by the Chair of the Bil'in Village Council, Ahmed Issa Abdallah Yassin. Based on Israeli jurisprudence on the matter, the petition challenged the route of the separation barrier ("the wall") on Bil'in land, cutting off the village from over half of its municipal land. The decision on this petition was handed down on 4 September 2007. The Court accepted the authors' argument that the route was chosen to support the construction of the new neighbourhood rather than for security reasons, and ordered the Government and the West Bank commander to present an alternative route for the security barrier that would be less harmful to the residents of Bil'in. As a result of the decision, in July 2011 the barrier was transferred to a route closer to the Modi'in Illit settlement and about 25 per cent of Bil'in's land was returned to it. Some 25 per cent of Bil'in's land remains behind the barrier.

2.6 The second petition was filed on 4 January 2006 and challenged the legality of the building permits and construction work carried out to build the settlement. This petition was based on Jordanian planning and construction law as enshrined in Israeli military orders applied to the occupied Palestinian territories.[1] During the deliberations on this petition, an interim injunction was issued ordering all construction of the new

[1] In the first and second petitions, Green Park International and Green Mount International requested, and were approved, to be joined as respondents.

neighbourhood to be halted. The Israeli Civil Administration launched a replanning process, as a result of which new building permits were issued that were in conformity with the actual construction that had already begun. The petition was thus dismissed.

2.7 A third petition, against the new planning process, was dismissed on 5 September 2007. A fourth petition was filed in an attempt to repeal retroactively the 1991 declaration of part of Bil'in's land as "State land". The petition was dismissed on 9 November 2006. Despite the fact that during the litigation of the first petition the authors learned that the land declaration was based on false purchase claims — a fact that was concealed from them at the time of declaration — the Court held that although the authors' claims might be justified, the matter could not be adjudicated so many years after the declaration.

2.8 Following the legal actions taken in Israel, the authors sought to hold Green Park International and Green Mount International accountable for their actions on Bil'in lands and sought remedies before the Canadian judicial system. In formulating their complaints the authors relied on international law and claimed violations related to freedom of movement and denial of access to, use of and control over land that was used historically for livelihood purposes. They also claimed accountability by the two corporations for aiding and abetting in the commission of the war crime of transferring, directly or indirectly, the population of the occupying Power to the occupied territories.

2.9 Thus, in July 2008, a civil action was filed before the Superior Court of Quebec by the Bil'in Village Council and Ahmed Issa Abdallah Yassin.[2] On 18 September 2009, the Court dismissed the case, declining jurisdiction on account of *forum non conveniens*. In October 2009, the authors appealed to the Quebec Court of Appeal, which confirmed the Superior Court's decision on 11 August 2010. On 6 October 2010, the authors filed an application for leave to appeal to the Supreme Court of Canada, which was dismissed on 3 March 2011. The Supreme Court's dismissal was consistent with its previous decision not to review the case of *Canadian Association Against Impunity v. Anvil Mining Ltd.*, in which the Quebec Court of Appeal held that Canadian courts lacked jurisdiction over actions by Canadian corporations acting abroad. Plaintiffs in that case sought to hold Anvil Mining Ltd., a corporation incorporated in Quebec, accountable for complicity in massacres carried out in the Democratic Republic of the Congo. The Court of Appeal held that Canadian courts lacked jurisdiction when there is no link to activities that occurred within Canadian territory.

The complaint

3.1 The authors claim to be victims of violation of their rights under article 12 of the Covenant. Since 1996, military orders issued by the Israeli military commander of the occupied West Bank have prohibited entry of Palestinians into settlement areas and instituted a permit regime for Palestinians who work in settlements. In 2002, the commander issued an order prohibiting Palestinians from entering the settlement of Modi'in Illit without a permit. The movement restrictions were enforced when the two Canadian corporations began construction.

3.2 The freedom of movement of the authors has been violated because they can no longer access their lands, which they used for generations for agriculture, grazing and other livelihood purposes, because of the unlawful settlements constructed by the two corporations. Consequently, Canada violated its extraterritorial obligation to ensure respect for article 12 (1) of the Covenant by failing to provide the authors with effective remedies in holding the two corporations accountable for the violation and by failing to adequately regulate the corporations to ensure that their activities did not violate the Covenant.

3.3 The authors also claim to be victims of violations of articles 17 and 7. The settlement of Modi'in Illit resulted in their forced eviction from land which is closely tied to housing and integral to the functioning of each household, and should thus fall within the scope of the definition of "home". The authors, like Palestinian villagers generally, consider

[2] After Mr. Yassin's death in 2009, his heirs continued the suit on his behalf and were added to the action as "plaintiffs in continuance of suit". Most of those heirs are authors in the present communication.

agricultural lands near their houses to be part of their home. The agricultural land used by the authors as the primary means of livelihood or occupation falls under the scope of article 17. Furthermore, the authors were subjected to unlawful interference with their rights under article 17. The building, marketing and selling of housing units to Israeli settlers by the two corporations are activities prohibited by international law, including the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) and therefore are unlawful within the meaning of article 17. Furthermore, the Committee has held that the protections under this article apply to "interferences and attacks whether they emanate from State authorities or from natural or legal persons",[3] and that States parties are under a duty themselves not to engage in interferences inconsistent with article 17 and to provide the legislative framework prohibiting such acts by natural or legal persons.[4]

3.4 The two corporations engaged in activities that have resulted in violations of articles 17 and 7 of the Covenant by means of unlawful and arbitrary interference with the authors' homes. Therefore, Canada violated its extraterritorial obligation to guarantee these provisions by not providing effective remedies for the authors to hold the two corporations accountable for the violations and by not adequately regulating the corporations to ensure that their activities did not violate these provisions.

3.5 The authors further claim to be victims of violations of article 27. While they are not members of an ethnic minority per se, they are members of the indigenous Palestinian population and their culture, including agricultural production and related close connection with the land, is being destroyed in order to construct the illegal settlements, to which they have no access. Because the two corporations are complicit in the violation of article 27 by Israel, Canada violated its extraterritorial obligation to guarantee article 27 by not providing to the authors effective remedies to hold the two corporations accountable for these violations and by not regulating the corporations adequately to ensure that their activities did not violate article 27.

3.6 The authors cite international norms and pronouncements which, in their view, make clear that Canada has extraterritorial obligations under the Covenant, including the obligation to protect or to ensure Covenant rights by regulating the activities of Canadian corporations for activities undertaken abroad, and to investigate and appropriately sanction any activities that violate human rights and ensure that remedies are available to victims of those violations. Thus, under article 16 of the draft articles on responsibility of States for internationally wrongful acts, responsibility may be shared between two States for an internationally wrongful act. Furthermore, the Committee has implied that even where a person is located outside a State's territory, jurisdiction or effective control, States retain their obligation to respect and ensure the rights in the Covenant. The authors cite the Committee's concluding observations on the sixth periodic report of Germany, wherein the Committee stated:

> While welcoming measures taken by the State party to provide remedies against German companies acting abroad allegedly in contravention of relevant human rights standards, the Committee is concerned that such remedies may not be sufficient in all cases (art. 2, para. 2). The State party is encouraged to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations. It is also encouraged to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad.[5]

3.7 The authors also quote the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, adopted in 2011 by leading international human rights experts. While the Principles focus on economic, social and cultural rights, the principle of indivisibility and interrelatedness of rights means that they

[3] See general comment No. 16 (1988) on the right to privacy, para. 1.
[4] Ibid., para. 9.
[5] See CCPR/C/DEU/CO/6, para. 16.

are relevant to the International Covenant on Civil and Political Rights as well. Principle 3 states: "All States have obligations to respect, protect and fulfil human rights, including civil, cultural, economic, political and social rights, both within their territories and extraterritorially". The Principles include the obligation to ensure protection of human rights from violation by non-State actors, including corporations. Thus, according to principle 24: "All States must take necessary measures to ensure that non-State actors which they are in a position to regulate, as set out in Principle 25, such as private individuals and organisations, and transnational corporations and other business enterprises, do not nullify or impair the enjoyment of economic, social and cultural rights. These include administrative, legislative, investigative, adjudicatory and other measures. All other States have a duty to refrain from nullifying or impairing the discharge of this obligation to protect". Principle 25 states: "States must adopt and enforce measures to protect economic, social and cultural rights through legal and other means, including diplomatic means, in each of the following circumstances: … (b) where the non-State actor has the nationality of the State concerned; (c) as regards business enterprises, where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned". Principle 27, inter alia, elaborates on the general obligation to provide an effective remedy: "All States must cooperate to ensure that non-State actors do not impair the enjoyment of the economic, social and cultural rights of any persons. This obligation includes measures to prevent human rights abuses by non-State actors, to hold them to account for any such abuses, and to ensure an effective remedy for those affected".

3.8 Principle 26 of the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework stipulates that "States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedies". Such legal barriers can include "where claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim".[6]

3.9 Given the dismissal of their claims in Canada on the ground of *forum non conveniens*, the authors never had the opportunity to be fully heard and have their case decided on the merits. Consequently, they were denied access to any effective remedy.

3.10 The extraterritorial obligation to protect or ensure human rights also entails regulating corporations incorporated under a State's jurisdiction. Since the two corporations are incorporated in Canada, the State party has an obligation to ensure that they do not violate human rights at home or abroad, including human rights protected by the Covenant.

3.11 Absent exceptional circumstances, only the conduct of the organs of the State may be attributable to the State and thus engage its responsibility. However, such conduct includes the failure of the State to adopt regulations, or to implement them effectively, where such a failure is in violation of the human rights undertakings of the State. This principle has been affirmed by human rights bodies, including the Committee.[7] The authors

[6] See A/HRC/17/31, commentary to principle 26.

[7] The authors cite paragraph 8 of general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, according to which "the positive obligations on States parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights insofar as they are amenable to application between private persons or entities". The authors also cite the concluding observations on Canada of the Committee on the Elimination of Racial Discrimination in 2007, in which the Committee called upon Canada to "take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada", recommending in particular that the State party "explore ways to hold transnational corporations registered in Canada accountable" (see CERD/C/CAN/CO/18, para. 17). In its concluding observations on the United States of America in 2008, the same Committee encouraged the State party "to take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in the

also refer to the report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem, submitted to the Human Rights Council in 2013, in which the mission recommended that "private companies must assess the human rights impact of their activities and take all necessary steps — including by terminating their business interests in the settlements — to ensure that they do not have an adverse impact on the human rights of the Palestinian people, in conformity with international law as well as the Guiding Principles on Business and Human Rights". The mission called upon Member States "to take appropriate measures to ensure that business enterprises domiciled in their territory and/or under their jurisdiction, including those owned or controlled by them, that conduct activities in or related to the settlements respect human rights throughout their operations".[8]

3.12 Consequently, the Committee should find that the State party has violated its extraterritorial obligation to ensure the authors' rights under the Covenant by failing to regulate and hold Green Park International and Green Mount International accountable for their activities in the occupied Palestinian territory which violate the Covenant.

3.13 Based on the foregoing, the State party has violated its extraterritorial obligation to ensure articles 2, 7, 12, 17 and 27 of the Covenant by failing to regulate the activities of the two corporations so as to prevent human rights violations in the occupied Palestinian territory.

3.14 With respect to remedies, the authors request that the State party ensure, in law and in practice, that victims of violations of the extraterritorial obligation to ensure respect for Covenant rights have effective judicial remedies available within the Canadian legal system. Furthermore, the State party should set out clearly its expectation that all business enterprises domiciled in its territory and/or in its jurisdiction will respect human rights standards in accordance with the Covenant throughout their operations, including by taking appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact the enjoyment of Covenant rights in territories outside Canada. The Committee should call upon Canada to take measures to stop Green Park International and Green Mount International from undertaking activities or being complicit in activities that violate the Covenant, and levy sanctions on them in the event of failure to end such activities. The Committee should call upon the State party to ensure that effective remedies are available to the authors, including an appeal before the Supreme Court of Canada.

State party's observations on admissibility and the merits

4.1 The State party provided observations on admissibility and the merits on 17 June 2014. The State party argues that the communication is inadmissible on three grounds. First, the authors do not have standing to bring the communication before the Committee. Second, the articles of the Covenant invoked by the authors do not have extraterritorial effect. Third, the communication contains no objective evidence and is therefore manifestly unfounded. Should the Committee consider it admissible, the State party requests, on the basis of its submission, that the communication be found without merit.

4.2 On the facts, the State party indicates that Green Park International and Green Mount International are legally incorporated and domiciled in the jurisdiction of the Province of Quebec. Both corporations were registered on 6 July 2004. The registry information, publicly available, provides the name of the person who is both president and secretary for both corporations. His address is in the city of Herzliya, Israel. Regarding judicial proceedings in Israel, the State party indicates that the four petitions were made on behalf of Ahmed Issa Abdallah Yassin, then Chair of the Bil'in Village Council. It is unclear to what extent the individual authors of the communication were directly involved

State party which negatively impact on the enjoyment of rights of indigenous peoples in territories outside the United States. In particular, the Committee [recommended] that the State party explore ways to hold transnational corporations registered in the United States accountable" (see CERD/C/USA/CO/6, para. 30).

[8] See A/HRC/22/63, para. 117.

in the petitions. The respondents included the Government of Israel, various high-level public officials in that Government and various corporate entities, including Green Park International and Green Mount International.

4.3 Regarding proceedings in Canada, the State party explains that the basis of the civil action was the plaintiffs' allegation that by constructing and selling condominium residences in the Modi'in Illit settlement, the two corporations were assisting Israel in transferring part of its civilian population to territory in the West Bank. The corporations had therefore assisted in the perpetration of war crimes contrary to various international and domestic legal instruments, making them civilly liable to the plaintiffs under the Civil Code of Quebec. The remedies sought by the plaintiffs included declarations as to the illegality of the defendants' conduct and punitive damages.

4.4 Green Park International and Green Mount International filed motions arguing, inter alia, that the issues raised by the plaintiffs had already been decided by the Israeli Supreme Court and that recognizing the latter's decisions should lead to dismissal of the action. The Superior Court chose to recognize three of the decisions of the Supreme Court; however, it concluded that such recognition did not settle all the issues raised in the Canadian court and, consequently, there was no *res judicata*.

4.5 Green Park International and Green Mount International also argued that the Superior Court should decline to exercise jurisdiction on the basis of *forum non conveniens*. The Court accepted this argument and decided that the courts of Israel were in a better position to adjudicate on the claims contained in the action, such that the Superior Court should exercise its exceptional power to decline jurisdiction. This decision was taken pursuant to article 3135 of the Civil Code of Quebec, according to which: "Even though a Québec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide". The decision to decline jurisdiction was based on the following considerations.

4.6 First, there appeared to be little connection between Quebec and the persons involved. All the plaintiffs and witnesses resided in Israel or the West Bank. Furthermore, although Green Park International and Green Mount International were legally incorporated in Quebec, this was essentially their only link to Canada. According to an affidavit filed by their president, the corporations had been incorporated in Canada for domestic Israeli tax reasons only; they acted as alter egos for and on behalf of a corporation which was not a resident of Canada and did not have any assets in Canada, and they themselves had no assets whatsoever in Canada.

4.7 Second, there appeared to be little, if any, connection between Quebec and the facts at issue. All injurious acts allegedly occurred in the West Bank; any relevant contracts would have been entered into in the West Bank or Israel, and were likely to be written in Hebrew or Arabic; any material evidence was likely to be situated in Israel or the West Bank; and the action could be expected to involve little to no evidence of events in Quebec.

4.8 Third, the orders requested by the plaintiffs would require enforcement by the courts of Israel, rather than those of Quebec. Even if the defendants were being sued for punitive damages, the corporations have no assets in Quebec. Their assets, if any, would appear to be located in the West Bank, where the buildings in dispute are situated. Furthermore, the plaintiffs were seeking injunctive relief from Quebec courts with respect to the corporations' activities in the West Bank, and the enforcement of any such orders would therefore require a further application by the plaintiffs in the appropriate courts in Israel. This additional procedure would be unnecessary if the action were brought before the Israeli High Court of Justice.

4.9 Fourth, the applicable law in determining the plaintiff's action would be the law applicable in the West Bank. Expertise in such law would be possessed by judicial authorities in Israel rather than Quebec.

4.10 Fifth, although the plaintiffs' choice of a Quebec forum for their action might have some significant advantages for them, this factor had little weight because the plaintiffs

engaged in "forum shopping", selecting a forum simply to gain a juridical advantage rather than by reason of a real and substantial connection to that forum.

4.11 Sixth, it would be in the interest of parties and in the broader interest of justice for the action to be tried in Israel. For the parties, adjudicating the action in Quebec would be impractical and would impede the impartial, prompt and efficient adjudication of the action on the basis of the best evidence available. With respect to the broader interests of justice, the action, as framed, could hardly lead to a just result. The plaintiffs had only turned to Canadian courts after some of their claims had been considered and rejected by judicial authorities in Israel.

4.12 Accordingly, the action was dismissed by the Superior Court after it exercised its exceptional discretionary power to decline to exercise adjudicative jurisdiction on the basis of *forum non conveniens*. Subsequently, the Court of Appeal of Quebec dismissed the plaintiffs' appeal and upheld the Superior Court's decision. The leave application to the Supreme Court was also dismissed and communicated to the plaintiffs through an order without reasons.

Lack of standing

4.13 The State party argues that the communication is inconsistent in terms of how the authors are identified. At times, it appears that two legal entities (the estate of the late Ahmed Issa Abdallah Yassin and the Bil'in Village Council) are identified, and one of the individual authors, Mohamed Ibrahim Ahmed Abu Rahma, seems to be acting on behalf of the Bil'in Village Council. In circumstances where an individual is deceased, it is possible for that individual's heirs to submit a communication directly on his or her behalf, but that individual's estate cannot, in and of itself, be the author of a communication. Furthermore, the Committee has indicated that an individual who is the leader of an organization or other legal entity cannot act on that entity's behalf in submitting a communication.[9] Accordingly, the State party argues that the communication is inadmissible on the grounds of incompatibility with the Optional Protocol, to the extent that it is being made on behalf of the above-mentioned legal entities.

4.14 The communication is also inadmissible to the extent it is being made on behalf of Mohamed Ibrahim Ahmed Abu Rahma because his power of attorney document states that he is acting on behalf of the Council and not in his own personal capacity.

4.15 The State party argues that none of the authors has standing to bring this communication because they were not subject to Canada's jurisdiction at the time of the alleged violations of the Covenant. The communication is therefore incompatible with the communications procedure established by article 1 of the Optional Protocol and inadmissible. Canada does not exercise jurisdiction of any kind over individuals living in the village of Bil'in or elsewhere in the West Bank. The facts alleged by the authors do not involve, in any way, the extraterritorial conduct of any Canadian State actors. The only connection between Canada and the facts alleged is a tenuous and indirect one: the alleged involvement of two legal entities that are incorporated in Quebec but, in fact, have no other meaningful connection to that province. Furthermore, the alleged activities of Green Park International and Green Mount International that are the focus of the present communication (expropriation of land and building of housing) were not governed by Canadian laws. Furthermore, since Canadian courts declined to exercise adjudicative jurisdiction over the civil action, none of the authors was actually subject to Canada's adjudicative jurisdiction for the underlying facts that were alleged in the civil action and which are the focus of the present communication.

Incompatibility with the provisions of the Covenant

4.16 The State party argues that the authors' allegations of violations of articles 7, 12, 17 and 27, in conjunction with the obligations under article 2 (1) to ensure the Covenant's rights and under article 2 (3) to provide an effective remedy, fall outside the scope of the

[9] The State party cites in this respect communication No. 40/1978, *Hartikainen v. Finland*, Views adopted on 9 April 1981.

State party's obligations under the Covenant and are therefore incompatible with its provisions. The State party argues that Canada had no article 2 (1) obligation in relation to the authors to ensure their Covenant rights for the following reasons. The authors have not alleged that Canadian State actors, whether inside or outside Canada, committed violations of the State party's obligations to respect the rights set out in the Covenant. The only connection between Canada and the extraterritorial events alleged by the authors is the fact that Green Park International and Green Mount International were incorporated in a Canadian jurisdiction. Aside from this, the authors have not alleged that either of these two non-State actors has any connection to any level of government in Canada. The link of the two corporations with Canada did not create a situation in which the authors were subject to Canada's jurisdiction at the relevant time.

4.17 At the time of the events in question, the authors were neither within Canada's territory nor subject to its jurisdiction, and therefore Canada could not have had obligations to ensure their Covenant rights. Furthermore, the authors have been explicit that these events, and thus the affected authors themselves, were extraterritorial to Canada at the time of the alleged violations. Canada's obligation to ensure the Covenant rights cannot apply to individuals outside of Canadian territory because of the mere fact that two legal entities technically incorporated in Canada were allegedly involved in activities that affected those individuals. Such an interpretative approach would be outside the scope of the Covenant. The Guiding Principles on Business and Human Rights recall in this respect that "at present, States are not generally required under international human rights law to regulate the extraterritorial activities of business domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis".[10] The authors' reliance on concluding observations on States parties' reports by the Committee and other treaty bodies to establish novel extraterritorial obligations is mistaken. The State party understands that in making such comments the Committee and other treaty bodies have been encouraging certain States parties to choose to exercise their permissive prescriptive jurisdiction and regulate certain extraterritorial activities of corporations domiciled in their territory or jurisdiction. The comments by treaty bodies are carefully qualified to recognize that the scope of any existing extraterritorial prescriptive jurisdiction is significantly constrained by general principles of public international law. The comments do not appear to be making the assertion that States parties to the Covenant or other international human rights instruments are actually obligated to exercise that prescriptive jurisdiction.

4.18 As to other materials cited by the authors, the State party contends that the reference to the draft articles on State responsibility of the International Law Commission is irrelevant, as the authors do not allege that certain actions of another State should be attributed to Canada for the purpose of the obligation to respect under article 2 (1) of the Covenant. As to the Maastricht Principles, they are a statement by prominent scholars conveying their view of how extraterritorial obligations should be interpreted in relation to economic, social and cultural rights, and they are highly limited in their persuasive value for the interpretation of the Covenant.

4.19 As to the authors' claims that Canada failed to provide them with an effective remedy, the State party argues that in the absence of any arguable violations by Canada of substantive Covenant rights, Canada cannot have an obligation under article 2 (3) to provide an effective remedy. Even if the authors had substantiated that they are victims of violations of their substantive rights, those violations would not engage Canada's responsibility under article 2 (1), as explained above, and therefore any obligation under article 2 (3) to provide an effective remedy would not apply to Canada.

4.20 That said, the State party understands the human rights and other concerns that can be raised by the transnational activities of business enterprises; recognizes that action is required and works with a range of interlocutors to promote corporate social responsibility; and promotes international standards on business and human rights in a number of multilateral forums.

[10] See A/HRC/17/31, commentary to principle 2.

Allegations manifestly unfounded

4.21 The State party argues that the communication is manifestly unfounded. The authors' submissions consist almost entirely of legal pleadings on the interpretation of the Covenant, mainly on article 2, with some very general factual assertions. They do not include any specific information, let alone objective corroborating evidence, about the personal experiences of the individual authors. There is no specific substantiation to establish the effect on the individual authors of the alleged activities on the lands surrounding the village.

4.22 No evidence is provided that the individual authors actually experienced a restriction on their right to liberty of movement and freedom to choose residence under article 12 (1), and no evidence that such a restriction failed to meet the requirements of legality, necessity and proportionality under article 12 (3).

4.23 Regarding their claims under articles 7 and 17, the authors have provided no evidence to establish that they actually experienced, as they claim, forced eviction from land that is closely tied to housing and integral to the functioning of each household. For example, the authors provided no evidence to substantiate that the alleged evictions from agricultural land actually occurred, or that the individual authors were affected by such evictions. Such evidence would be crucial to substantiate the cultural significance they attach to the alleged evictions and to substantiate the existence of an article 7 violation.

4.24 As to the allegations under article 27, the rights under this provision turn on highly personal facts about the cultural and community experiences of individuals. Allegations without any personal substantiation are thus clearly manifestly unfounded.

4.25 The authors have failed to provide sufficient substantiation in factual support of their pleadings regarding article 2 of the Covenant. They have provided no evidence to substantiate the involvement of Green Park International and Green Mount International in any of the activities at issue and to establish any meaningful connection between Canada and the activities of the two corporations. Furthermore, their claim under article 2 (3) is not based on any particular procedural unfairness; they are simply dissatisfied with the outcome of their proceedings. It is essential that the right to an effective remedy be interpreted in a way that recognizes the continued relevance of the private international law principles governing the jurisdiction of domestic courts in a transnational context.

Authors' comments on the State party's observations

5.1 The authors provided comments on the State party's observations on 30 September 2014. They argue that the case should be declared admissible and examined on the merits.

5.2 On the issue of standing before the Committee, the authors argue that the communication is brought by the individual authors but also by the Bil'in Village Council, which is the body representing the individuals residing in Bil'in who were affected by the violations of the Covenant. The village itself suffered damages as a result of the construction of the settlement. Mohamed Ibrahim Ahmed Abu Rahme was the duly elected representative of the Council, and is included as author because of his capacity to represent the interests of the village. As to the estate of the late Ahmed Issa Abdallah Yassin, it is not included in the communication as a legal entity per se, but rather as a means of representing an individual who is now deceased. The losses he suffered as a result of violations of the Covenant are now acknowledged by his estate.

5.3 The reason the Bil'in Village Council is named as one of the authors is due in part to the collective nature of the relationship between Bil'in village and its land, and thus to ensure that remedies provided through the present communication will include all those individuals suffering a detrimental impact as a result of the violations caused by the two corporations. A majority of the village suffered both economic and cultural damage. The former was caused by the reduced agricultural yield, particularly of olives and olive oil, and the latter by the inability to use the land as a place of community gathering. Furthermore, although the construction began only in February 2005, the Bil'in residents were barred from accessing the land in question beginning 1997, when it was declared "State land" and the authors were evicted from it.

5.4 On the issue of jurisdiction, the authors reiterate that the State party had effective control of the two corporate entities, and therefore they fell within the jurisdiction of the State party for the purpose of the Optional Protocol and the Covenant. Furthermore, the question of jurisdiction is related to the concept of responsibility. Given the universal nature of human rights, if a State party can prevent or remedy a human rights violation, it has the responsibility to do so. In its statement on the implication of the Guiding Principles on Business and Human Rights in the context of Israeli settlements in the occupied Palestinian territory, the Working Group on the issue of human rights and transnational corporations and other business enterprises has indicated that where transnational corporations are involved in conflict-affected areas, their home States have crucial roles to play in assisting both those corporations and host States to ensure that businesses are not involved with human rights abuse, and that home States as well as host States should review their policies, legislation, regulations and enforcement measures to ensure that they effectively serve to prevent and address the heightened risk of business involvement in abuses in conflict situations.[11] The Working Group also held that while according to guiding principle 2 there is no general obligation to regulate the extraterritorial activities of a State's natural or legal persons, specific obligations exist in relation to particular issues.[12] As for the Maastricht Principles, their adoption was not intended to be a new source of law but rather a restatement of the current state of international law regarding extraterritorial obligations. The commentary to the Principles points out that principle 25 (c) makes it clear that, based on the active personality principle, a State may regulate an enterprise which is registered or domiciled on the territory. Finally, the authors argue that the issue under the draft articles on responsibility of States is whether the violation can be attributed to a State party, not whether a State's actions are attributable to another State.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

6.2 The authors claim to be victims of violations of their rights under articles 2, 7, 12, 17 and 27 as a result of the eviction from their land and the construction on it of an Israeli settlement. They claim that the State party is responsible for those violations to the extent that it violated its extraterritorial obligation to guarantee the authors' rights under the foregoing provisions by: (a) not providing them with effective remedies by failing to hold the two building corporations accountable for the violations; and (b) not adequately regulating the two corporations to ensure that their activities do not violate the provisions. The State party has challenged the admissibility of the authors' claims on the grounds that the authors do not have standing before the Committee, that the articles invoked do not have extraterritorial effect and that the allegations are manifestly unfounded.

6.3 The State party argues that two of the authors (the estate of the late Ahmed Issa Abdallah Yassin and the Bil'in Village Council, represented by its Vice-Chair) are legal entities and, therefore, cannot be considered as victims under the Covenant and the Optional Protocol. The Committee recalls its jurisprudence according to which, under article 1 of the Optional Protocol, only individuals have the right to submit a communication. As the estate and the Village Council are not individuals, the Committee considers that they do not meet the criterion of *ratione personae* enabling them to submit the communication. Accordingly, the communication is declared inadmissible with respect to them, under article 1 of the Optional Protocol, because of lack of personal standing.[13]

6.4 The Committee further notes the State party's argument that the communication is incompatible with the communications procedure as the authors do not fall under the State party's jurisdiction. The Committee recalls that under article 1 of the Optional Protocol, it is allowed to receive and consider communications from individuals subject to the

[11] See www.ohchr.org/Documents/Issues/Business/OPTStatement6June2014.pdf.

[12] Ibid., footnote 26.

[13] See communications No. 163/1984, *C et al. v. Italy*, decision adopted on 10 April 1984, para. 5; and No. 104/1981, *J.R.T. and the W.G. Party v. Canada*, decision adopted on 6 April 1983, para. 8.

jurisdiction of States parties. It also recalls that in paragraph 10 of its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, it stated that

> States parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party. As indicated in general comment 15 [on the position of aliens under the Covenant] adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons who may find themselves in the territory or subject to the jurisdiction of the State party. This principle also applies to those within the power or effective control of the forces of a State party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State party assigned to an international peacekeeping or peace-enforcement operation.

6.5 In the present case the Committee notes that since 2004, Green Park International and Green Mount International have been registered and domiciled in Canada, where they pay taxes. The companies themselves accordingly are within the State party's territory and jurisdiction. While the human rights obligations of a State on its own territory cannot be equated in all respects with its obligations outside its territory, the Committee considers that there are situations where a State party has an obligation to ensure that rights under the Covenant are not impaired by extraterritorial activities conducted by enterprises under its jurisdiction.[14] That is particularly the case where violations of human rights that are as serious in nature as the ones raised in this communication are at stake.

6.6 The Committee notes the State party's submission that the address of the president and secretary of both corporations is in the city of Herzliya, Israel, and that the only connection between Canada and the facts alleged is the alleged involvement of two legal entities that are incorporated in Quebec but have no other meaningful connection to that province or to the State party. The Committee also notes that the Superior Court of Quebec declined jurisdiction on the discretionary grounds of *forum non conveniens*, as indicated in paragraphs 4.6–4.11, because, inter alia: (a) there appeared to be little connection between Quebec and the persons involved in the claim before the Court, as all the plaintiffs and witnesses resided in Israel or the West Bank; (b) the corporations had been incorporated in Canada for domestic Israeli tax reasons only and acted as alter egos for and on behalf of a corporation which was not a resident of Canada and did not have any assets in Canada; (c) Green Park International and Green Mount International themselves had no assets in Canada. Their assets, if any, would appear to be located in the West Bank, where the buildings in dispute were situated; and (d) the plaintiffs had only turned to Canadian courts after some of their claims had been considered and rejected by judicial authorities in Israel.

6.7 Taking into consideration the elements of connection with the State party set out in paragraphs 6.5 and 6.6 above, the Committee also considers that, in the present case, the authors have not provided the Committee with sufficient information about the extent to which Canada could be considered responsible as a result of a failure to exercise reasonable due diligence over the relevant extraterritorial activities of the two corporations. This includes, for example, a lack of information regarding the existing regulations in place in the State party governing the corporations' activities and the State party's capacity to effectively regulate the activities at issue; the specific nature of the corporations' role in the construction of the settlement and the impact of their actions on the rights of the authors; and the information reasonably available to the State party regarding these activities, including the foreseeability of their consequences. On the basis of the information provided

[14] See communications No. 1539/2006, *Munaf v. Romania*, Views adopted on 30 July 2009, para. 14.2; and No. 2005/2010, *Hicks v. Australia*, Views adopted on 5 November 2015, paras. 4.4–4.6. See also CCPR/C/CAN/CO/6, para. 6; CCPR/C/DEU/CO/6, para. 6; and general comment No. 31, para. 8.

by the parties, the Committee considers that the nexus between the State party's obligations under the Covenant, the actions of Green Park International and Green Mount International and the alleged violation of the authors' rights is not sufficiently substantiated to render the case admissible.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That the present decision shall be transmitted to the authors and the State party.

Annex

[Original: French/English]

Concurring opinion of Committee members Olivier de Frouville and Yadh Ben Achour

1. We agree with the Committee in respect of the inadmissibility of the communication on the grounds that the authors have not sufficiently substantiated their claims. That conclusion implies that, in the future, if a communication were sufficiently substantiated, the Committee could consider it admissible. However, we consider that the Committee perhaps did not make sufficiently clear the criteria on the basis of which it would assert jurisdiction.

2. This is the first time that the Committee has been seized, in the context of its functions under the Optional Protocol, of the issue of the responsibility of a State party in connection with acts committed by commercial corporations that fall under its jurisdiction in the territory of another State.

3. The Committee has, however, already addressed this issue in the context of its review of States parties' periodic reports.[1] In particular, with regard to Canada, and in respect of article 2 of the Covenant, the Committee expressed concern that the victims of such violations did not have access to remedies and that no "legal framework that would facilitate such complaints" had been established. In so doing, the Committee seems to have implicitly recognized that victims of such acts could fall under the "jurisdiction" of the State party, in the sense of article 2 (1) of the Covenant and article 1 of the Optional Protocol, but does not explain why. The present communication could offer the Committee an opportunity to clarify its jurisprudence.

4. In paragraph 6.4 of the present decision, the Committee recalls the text of article 1 of the Optional Protocol, as well as its jurisprudence on the concept of "jurisdiction", including as summarized in its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant. In that document, the Committee established the general principle that a State party has an obligation to respect and ensure the rights laid down in the Covenant to anyone *within its power or effective control*, even if not situated within the territory of the State party. It could therefore have been expected that, in paragraph 6.5 of the present decision, the Committee would explain its interpretation of the terms "power or effective control" in the specific factual context of the communication. Unfortunately, paragraph 6.5 sheds no light in this respect.

5. The Committee has developed "an obligation to ensure that rights under the Covenant are not impaired by extraterritorial activities conducted by enterprises under its jurisdiction" and "particularly […] where violations of human rights that are as serious in nature as the ones raised in this communication are at stake" (para. 6.5). However, even if such an obligation exists under the Covenant, it does not imply that persons who are affected by activities of Canadian corporations operating abroad fall under the jurisdiction of the State party. The statements made in paragraph 6.7 might be more helpful: the Committee reproaches the authors for not having provided sufficient information to substantiate the "nexus between the State party's obligations under the Covenant, the actions [of the corporations concerned] and the alleged violation of the authors' rights". While the wording is far from clear, it has the merit of attempting to address the State party's objections that it had no "jurisdiction of any kind over individuals living in the village of Bil'in" (para. 4.15) and, in support of this claim, states that, firstly, there is no connection between the alleged violations and the extraterritorial activities of any Canadian State actors and, secondly, that the "only connection between Canada and the facts alleged

[1] See the Committee's concluding observations on: the sixth periodic report of Germany (CCPR/C/DEU/CO/6), para. 16; the sixth periodic report of Canada (CCPR/C/CAN/CO/6), para. 6; and the fourth periodic report of the Republic of Korea (CCPR/C/KOR/CO/4), paras. 10 and 11.

is a tenuous and indirect one: the alleged involvement of two legal entities that are incorporated in Quebec but, in fact, have no other meaningful connection to that province" (para. 4.15).

6. As the State party suggests, the fundamental criterion for jurisdiction is the existence of a sufficient "connection"[2] or "nexus" between the acts or omissions of the State party and the alleged violations. In other words, an author falls under the power or effective control of a State party, and therefore under its jurisdiction, when it is possible to establish factually a sufficient connection between acts or omissions attributable to the State party and allegations of violations of Covenant rights that the author claims to have suffered. The connection is generally considered to be "sufficient" when the person concerned is under the physical control of an official body of the State party.[3] This is the most common hypothesis for a direct connection in which the State, through its bodies, exercises power or effective physical control.

7. However, the Committee was also able to recognize that there was an indirect connection, based on the sufficient influence exercised by one State party over another State or other entity exercising its power or effective control over a person.[4] In the case of *Munaf v. Romania*, while the context was certainly somewhat different, the Committee laid down a principle that could, it would seem, be drawn on in the context of the present communication: "a State party may be responsible for extraterritorial violations of the Covenant if it is a link in the causal chain that would make possible violations in another jurisdiction. Thus, the risk of an extraterritorial violation must be a necessary and foreseeable consequence and must be judged on the knowledge the State party had at the time".[5]

8. The present decision clearly follows on from that jurisprudence, since it recognizes that, if it can be determined that the State has sufficient influence over a corporation, then the State exercises, even indirectly, power and effective control over persons who are affected by the activities of the corporation in another country.

9. There is in this case a clear development compared to previous jurisprudence, in that the third party directly responsible for the violation is not a State but a private actor. But, in fact, this development is also in line with the Committee's jurisprudence, which has long recognized that States parties can only meet their positive obligations under the Covenant "if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities."[6] Furthermore, in its consideration of reports, the Committee has previously recognized that a State can establish jurisdiction and incur responsibility in connection with acts performed by armed groups or self-proclaimed entities on the territory of another State.[7]

10. The Committee's decision in the present case is in line with the way that general international law on the matter is developing. It is true that, as the State party notes, the

[2] See paragraph 10.2 of communication No. 56/1979, *Celiberti de Casariego v. Uruguay*, Views adopted on 29 July 1981, in which the Committee explains that the idea of "jurisdiction" in article 1 of the Optional Protocol refers "not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred". See also paragraph 12.2 of communication No. 52/1979, *Lopez Burgos v. Uruguay*, Views adopted on 29 July 1981.

[3] In the words of paragraph 10 of the Committee's general comment No. 31, "This principle […] applies to those within the power or effective control of the forces of a State party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State party assigned to an international peacekeeping or peace-enforcement operation."

[4] See, specifically, communication No. 2005/2010, *Hicks v. Australia*, Views adopted on 5 November 2015, paras. 4.4 and 4.5.

[5] Communication No. 1539/2006, *Munaf v. Romania*, Views adopted on 30 July 2009, para. 14.2.

[6] General comment No. 31, para. 8.

[7] In the Committee's concluding observations on the seventh periodic report of the Russian Federation (CCPR/C/RUS/CO/7), see paragraph 6 in respect of the Donbas region (Ukraine) and the South Ossetia region (Georgia): "to the extent that it already exercises influence over these groups and authorities which amounts to effective control over their activities".

Guiding Principles on Business and Human Rights state that "States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction".[8] However, this does not mean that States do not have *any obligations* under the human rights treaties in connection with the activities of businesses operating abroad or that their responsibility in that respect can never be incurred.[9] With regard to the Covenant, such obligations may exist where a jurisdictional link is established with persons affected by such activities. Such a link of jurisdiction may be established, as the Committee suggests in this case, on the basis of: (a) the effective capacity of the State to regulate the activities of the businesses concerned and (b) the actual knowledge that the State had of those activities and their necessary and foreseeable consequences in terms of violations of human rights recognized in the Covenant.

11. Once the issue of "jurisdiction" is resolved, other issues are raised. It must be determined, in particular, whether the authors are "victims" within the meaning of article 1 of the Optional Protocol.[10] It must then be determined on the merits whether, in the present case, the State party has respected its obligations under the Covenant towards persons affected by extraterritorial activities of corporations and, specifically, whether it has taken the necessary positive measures, in terms of either legislative framework or remedies, to ensure rights. This question raises another set of issues, which, following on from its jurisprudence on the responsibility of States in connection with acts committed by private persons,[11] the Committee seems to wish to resolve by referring to the standard of "due diligence". We cannot, within the necessarily limited framework of this opinion, address these issues which, in our view, are distinct from that of competence/jurisdiction. It is undoubtedly a shortcoming of the decision that the Committee that could not or did not wish to make those distinctions clearer.

[8] See the commentary to principle 2, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework.

[9] See, for example, in the framework of the International Covenant on Economic, Social and Cultural Rights, general comment No. 24 (2017), paras. 25 ff., adopted shortly before the Human Rights Committee considered the present communication. Other committees tend towards similar conclusions, although we cannot cite all the references because of the word limit imposed by the United Nations for the total length of decisions.

[10] See, finally, communication No. 2124/2011, *Rabbae, A.B.S. and N.A. v. the Netherlands*, Views adopted on 14 July 2016, para. 9.6.

[11] See in particular general comment No. 31, para. 8, as above.

Annex 87

United Nations CCPR/C/DEU/CO/6

International Covenant on Civil and Political Rights

Distr.: General
12 November 2012

Original: English

Human Rights Committee

Concluding observations on the sixth periodic report of Germany, adopted by the Committee at its 106th session (15 October - 2 November 2012)

1. The Committee considered the sixth periodic report submitted by Germany (CCPR/C/DEU/6) at its 2930th and 2931st meetings (CCPR/C/SR.2930 and 2931, held on 18 and 19 October 2012. At its 2944th and 2945th meetings (CCPR/C/SR 2944 and 2945), held on 30 and 31 October 2012, it adopted the following concluding observations.

A. Introduction

2. The Committee welcomes the submission of the sixth periodic report of Germany which was drafted in line with the new reporting guidelines. It expresses appreciation for the constructive dialogue with the State party's delegation on the measures that the State party has taken during the reporting period to implement the provisions of the Covenant. The Committee is grateful to the State party for its written replies to the list of issues (CCPR/DEU/Q/6/Add.1) which were supplemented by the oral responses provided by the delegation and for the supplementary information provided to it in writing.

B. Positive aspects

3. The Committee welcomes the following legislative and other steps taken by the State party:

(a) The adoption of the General Equal Treatment Act, on 18 August 2006;

(b) The many legal and practical measures taken to address problems in nursing homes;

(c) The measures taken in 2009 to include information on criminal offenses committed by police officers into the criminal statistics.

4. The Committee welcomes the ratification by the State party of the following international instruments:

(a) The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, on 13 December 2004;

(b) The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, on 4 December 2008;

(c) The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, on 15 July 2009;

(d) The Convention on the Rights of Persons with Disabilities, on 24 February 2009;

(e) The Optional Protocol to the Convention on the Rights of Persons with Disabilities, on 24 February 2009;

(f) The International Convention for the Protection of All Persons from Enforced Disappearance, on 24 September 2009.

C. Principal matters of concern and recommendations

5. The Committee regrets that the State party, despite its indicated willingness to consider withdrawing its reservation to article 15, paragraph 1 of the Covenant, as set out in paragraph 114 of its sixth periodic report (CCPR/C/DEU/6), has not yet taken the necessary steps to do so. The Committee is concerned about the State party's reservation to article 5, paragraph 2 (a) of the Optional Protocol to the Covenant which restricts the Committee's competence with regard to article 26 of the Covenant and which the State party has ratified without any reservation (art. 2).

The State party should give further consideration to withdrawing its reservations, in particular those to article 15, paragraph 1, and to article 5, paragraph 2(a) of the Optional Protocol to the Covenant.

6. While welcoming the adoption of the General Equal Treatment Act in 2006, the Committee is concerned at the fact that the mandate of the Federal Anti-Discrimination Agency established by the Act is limited to public relations, research activities, advice and assistance to alleged victims of discrimination but does not encompass the possibility to deal with complaints, which limits its efficiency (arts. 2 and 26).

The State party should extend the mandate of the Federal Anti-Discrimination Agency including the power to investigate complaints brought to its attention and to bring proceedings before the courts, so as to enable it to increase its efficiency.

7. While noting the explanations provided by the State party on the aim of the provision on housing enshrined in Section 19, subsection 3, of the General Equal Treatment Act of 2006, which is to facilitate the integration of migrants by avoiding wherever possible the formation of closed and ethnically homogeneous residential areas, the Committee is concerned that the wording of its Section 19, subsection 3, may be interpreted as allowing discrimination against people with immigrant backgrounds in housing by private landlords (arts. 2 and 26).

The State party should take the necessary steps to clarify the wording of Section 19, subsection 3, of the General Equal Treatment Act of 2006 and ensure that it is not used abusively by landlords to discriminate against people with immigrant backgrounds on the basis of their ethnic origin when renting housing.

8. While noting progress made by the State party to promote equality between women and men, such as in Parliament and the Judiciary, the Committee is concerned that the representation of women in leading positions in the private sector remains low. It is also concerned at the persistent wage gap between women and men in the State party (arts. 2, 3, and 26).

The State party should firmly strengthen its efforts aimed at promoting women in leading positions in the private sector including by closely monitoring the implementation by companies of the German Corporate Governance Code of 2010. The State party should also take concrete measures to reduce the wage gap which persists between women and men and address all causes which widen such a gap. The State party should further promote the enhancement of women's careers including by strictly applying the Federal Act on Gender Equality and the General Equal Treatment Act.

9. While welcoming the State party's various efforts to combat violence against women and girls at legislative and policy levels, such as initiatives and projects carried out under the Second Plan to Combat Violence against Women of 2007, the Committee is concerned about the persistent violence against women in the State party. The Committee is concerned about the high level of violence faced by women with immigration backgrounds, in particular those of Turkish and Russian origin, despite various measures taken by the State party to prevent and combat such violence (arts. 3 and 7).

The State party should continue to strengthen its efforts to combat violence against women and girls and, in particular, increase measures to protect women of Turkish and Russian origin. It should continue to facilitate access to existing counselling and support services for particularly vulnerable and marginalized women victims of violence, and to investigate allegations of cases of such violence, prosecute and, if convicted, punish those responsible. Moreover, the State party should improve the coordination between the Federation and the *Länder* on this issue and regularly evaluate the impact of its initiatives.

10. The Committee is concerned about allegations of ill-treatment by police and prison officers of the State party. The Committee is also concerned that most complaints on ill-treatment are dismissed and that the State party has not yet set up independent complaint bodies to deal with complaints on police misconduct. The Committee is further concerned about the existing disparities between *Länder* with regard to measures to ensure that police officers can be identified (arts. 7 and 10).

The State party should ensure that (a) all allegations of ill-treatment by police and prison officers are assessed, promptly, thoroughly and impartially investigated, (b) those responsible are punished accordingly, and (c) victims are provided with compensation; The State party should also ensure that victims of ill-treatment by police and prison officers are aware of their rights and can lodge complaints without fear of reprisals. The State party should further set up independent complaint bodies to deal with police allegations of ill-treatment, as previously recommended by the Committee. In addition, the State party should encourage its *Länder* to take measures to facilitate the identification of police officers when they are carrying out their function in order to hold them responsible for misconduct when implicated in ill-treatment.

11. While noting that the transfers of asylum seekers under the Dublin II Regulation have been suspended to Greece until January 2013 due to difficult reception conditions, the Committee is concerned that despite rulings by the German Constitutional Court, the European Court of Human Rights and the European Court of Justice, Section 34a, subsection 2, of the Asylum Procedure Act, excluding provisional legal protection in the case of transfers to safe third States and to Member States of the European Union and other European States bound by the Dublin II Regulation, remains in force and continues to be applied by certain domestic courts(arts. 7 and 13).

The State party should revise its Asylum Procedure Act to allow suspensive orders in case of transfers of asylum seekers to any State bound by the Dublin II Regulation. The State party should also inform the Committee whether it will extend the suspension of transfers of asylum seekers to Greece beyond January 2013.

12. While noting information provided by the State party, the Committee is also concerned that the practice by the State party to request diplomatic assurances in cases of extradition may expose affected persons to the risk of torture, cruel and degrading treatment and punishment in the requesting State (art. 7).

The State party should ensure that no individuals, including those suspected of terrorism, are exposed to the danger of torture or cruel, inhuman or degrading treatment or punishment when extradited or deported. It should further recognize

that the more systematic the practice of torture, the less likely it will be that a real risk of such treatment can be avoided by diplomatic assurances, however stringent any agreed follow-up procedure may be. Moreover, the State party should exercise the utmost care in the use of such assurances and adopt clear and transparent procedures allowing review by adequate judicial mechanisms before individuals are deported or extradited, as well as effective means to monitor the fate of affected individuals.

13. While noting the various measures taken by the State party to combat trafficking in persons, in particular for sexual exploitation and forced labour purposes, the Committee is concerned about the persistence of such a phenomenon in the State party (art. 8).

The State party should systematically and vigorously investigate allegations of trafficking in persons, prosecute and, if convicted, punish those responsible and provide compensation. The State party should also strengthen its support and protection measures at the Federal and *Länder* levels to victims and witnesses, including rehabilitation. It should further facilitate access to justice for victims of trafficking without fear of retaliation and regularly evaluate the impact of all initiatives and measures taken to counter trafficking in persons.

14. While welcoming the steps taken by the State party to revise its legislation and practice on post-conviction preventive detention in accordance with human rights standards and noting information that a draft bill addressing the issue is currently before parliament, the Committee is concerned about the number of persons who are still detained in such detention in the State party. It is also concerned about the duration of such a detention in some cases as well as the fact that conditions of detention have not been in line with human rights requirements in the past (arts. 9 and 10).

The State party should take necessary measures to use the post-conviction preventive detention as a measure of last resort and create detention conditions for detainees, which are distinct from the treatment of convicted prisoners serving their sentence and only aimed at their rehabilitation and reintegration into society. The State party should include in the Bill under consideration, all legal guarantees to preserve the rights of those detained, including periodic psychological assessment of their situation which can result in their release or the shortening of the period of their detention.

15. The Committee is concerned about the reported incidences of physical restraints applied, in particular, to dementia sufferers in residential homes, including being tied to a bed or kept behind closed doors, are applied in contravention of applicable legal provisions limiting the use of such measures (arts. 7, 9 and 10).

The State party should take effective measures to ensure full implementation of legal provisions related to the use, in compliance with the Covenant, of physical restraint measures in residential homes, including by improving training of staff, regular monitoring, investigations and appropriate sanctions for those responsible.

16. While welcoming measures taken by the State party to provide remedies against German companies acting abroad allegedly in contravention of relevant human rights standards, the Committee is concerned that such remedies may not be sufficient in all cases (art. 2, para. 2).

The State party is encouraged to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations. It is also encouraged to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad.

17. While noting the various measures taken by the State party to combat racism, the Committee is concerned at the persistence of racially-motivated incidents against members

of the Jewish and Sinti and Roma communities as well as Germans of foreign origin and asylum seekers in the State party. The Committee is concerned about the persistent discrimination faced by members of the Sinti and Roma communities regarding access to housing, education, employment and health care (arts. 2, 18, 20, and 26).

The State party should take concrete measures to increase the effectiveness of its legislation and to investigate all allegations of racially-motivated acts and to prosecute and punish those responsible. The State party should also strengthen its efforts to integrate members of the Sinti and Roma communities in Germany by firmly promoting their access to education, housing, employment and health care. The State party should further pursue its awareness-raising campaigns and promote tolerance between communities.

18. The Committee is concerned at continued allegations of hate speech and racist propaganda on the Internet including from right-wing extremism, despite awareness-raising efforts and judicial measures taken on the basis of Sections 86 and 130 of its Criminal Code (arts. 2, 18, and 26).

The State party should take the necessary steps to effectively prohibit and prevent hate speech and racist propaganda in particular through the Internet. It should increase its awareness at federal and at *Länder* levels with regard to racist propaganda and speech, in particular from extreme right-wing associations or groups.

19. The State party should widely disseminate the Covenant, the two Optional Protocols to the Covenant, the text of the sixth periodic report, the written responses it has provided in response to the list of issues drawn up by the Committee, and the present concluding observations so as to increase awareness among the judicial, legislative and administrative authorities, civil society and non-governmental organizations operating in the country, as well as the general public. The Committee also suggests that the report and the concluding observations be translated into the official language of the State party. The Committee also requests the State party, when preparing its seventh periodic report, to broadly consult with civil society and non-governmental organizations.

20. In accordance with rule 71, paragraph 5, of the Committee's rules of procedure, the State party should provide, within one year, relevant information on its implementation of the Committee's recommendations made in paragraphs 11, 14 and 15 above.

21. The Committee requests the State party, in its next periodic report, due to be submitted on 31 October 2018, to provide, specific, up-to-date information on all its recommendations and on the Covenant as a whole.

Annex 88

United Nations CCPR/C/GC/36

International Covenant on Civil and Political Rights

Distr.: General
3 September 2019

Original: English

Human Rights Committee

General comment No. 36

Article 6: right to life*, **

I. General remarks

1. This general comment replaces general comments No. 6, adopted by the Committee at its sixteenth session (1982), and No. 14, adopted by the Committee at its twenty-third session (1984).

2. Article 6 of the International Covenant on Civil and Political Rights recognizes and protects the right to life of all human beings. The right to life is the supreme right from which no derogation is permitted, even in situations of armed conflict and other public emergencies that threaten the life of the nation.[1] The right to life has crucial importance both for individuals and for society as a whole. It is most precious for its own sake as a right that inheres in every human being, but it also constitutes a fundamental right,[2] the effective protection of which is the prerequisite for the enjoyment of all other human rights and the content of which can be informed by other human rights.

3. The right to life is a right that should not be interpreted narrowly. It concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity. Article 6 of the Covenant guarantees this right for all human beings, without distinction of any kind, including for persons suspected or convicted of even the most serious crimes.

4. Paragraph 1 of article 6 of the Covenant provides that no one shall be arbitrarily deprived of life and that this right shall be protected by law. It lays the foundation for the obligation of States parties to respect and ensure the right to life, to give effect to it through legislative and other measures, and to provide effective remedies and reparation to all victims of violations of the right to life.

5. Paragraphs 2, 4, 5 and 6 of article 6 of the Covenant set out specific safeguards to ensure that in States parties that have not yet abolished the death penalty, death sentences are not applied except for the most serious crimes, and then only in the most exceptional cases and under the strictest limits (see part IV below). The prohibition on arbitrary deprivation of life contained in article 6 (1) further limits the ability of States parties to apply the death penalty. The provisions in paragraph 3 regulate specifically the relationship between article 6 of the Covenant and the Convention on the Prevention and Punishment of the Crime of Genocide.

* Adopted by the Committee at its 124th session (8 October–2 November 2018).

** The endnotes are reproduced in the language of submission only.

GE.19-15012(E)

1915012

6. Deprivation of life involves intentional[3] or otherwise foreseeable and preventable life-terminating harm or injury, caused by an act or omission. It goes beyond injury to bodily or mental integrity or a threat thereto.[4]

7. States parties must respect the right to life. This entails the duty to refrain from engaging in conduct resulting in arbitrary deprivation of life. States parties must also ensure the right to life and exercise due diligence to protect the lives of individuals against deprivations caused by persons or entities whose conduct is not attributable to the State.[5] The obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life. States parties may be in violation of article 6 even if such threats and situations do not result in loss of life.[6]

8. Although States parties may adopt measures designed to regulate voluntary termination of pregnancy, those measures must not result in violation of the right to life of a pregnant woman or girl, or her other rights under the Covenant. Thus, restrictions on the ability of women or girls to seek abortion must not, inter alia, jeopardize their lives, subject them to physical or mental pain or suffering that violates article 7 of the Covenant, discriminate against them or arbitrarily interfere with their privacy. States parties must provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or where the pregnancy is not viable.[7] In addition, States parties may not regulate pregnancy or abortion in all other cases in a manner that runs contrary to their duty to ensure that women and girls do not have to resort to unsafe abortions, and they should revise their abortion laws accordingly.[8] For example, they should not take measures such as criminalizing pregnancy of unmarried women or applying criminal sanctions to women and girls who undergo abortion[9] or to medical service providers who assist them in doing so, since taking such measures compels women and girls to resort to unsafe abortion. States parties should remove existing barriers[10] to effective access by women and girls to safe and legal abortion,[11] including barriers caused as a result of the exercise of conscientious objection by individual medical providers,[12] and should not introduce new barriers. States parties should also effectively protect the lives of women and girls against the mental and physical health risks associated with unsafe abortions. In particular, they should ensure access for women and men, and especially girls and boys,[13] to quality and evidence-based information and education on sexual and reproductive health[14] and to a wide range of affordable contraceptive methods,[15] and prevent the stigmatization of women and girls who seek abortion.[16] States parties should ensure the availability of, and effective access to, quality prenatal and post-abortion health care for women and girls,[17] in all circumstances and on a confidential basis.[18]

9. While acknowledging the central importance to human dignity of personal autonomy, States should take adequate measures, without violating their other Covenant obligations, to prevent suicides, especially among individuals in particularly vulnerable situations,[19] including individuals deprived of their liberty. States parties that allow medical professionals to provide medical treatment or the medical means to facilitate the termination of life of afflicted adults, such as the terminally ill, who experience severe physical or mental pain and suffering and wish to die with dignity,[20] must ensure the existence of robust legal and institutional safeguards to verify that medical professionals are complying with the free, informed, explicit and unambiguous decision of their patients, with a view to protecting patients from pressure and abuse.[21]

II. Prohibition against arbitrary deprivation of life

10. Although it inheres in every human being,[22] the right to life is not absolute. While the Covenant does not enumerate the permissible grounds for deprivation of life, by requiring that deprivations of life must not be arbitrary, article 6 (1) implicitly recognizes that some deprivations of life may be non-arbitrary. For example, the use of lethal force in self-defence, under the conditions specified in paragraph 12 below, would not constitute an arbitrary deprivation of life. Even those exceptional measures leading to deprivations of life that are not arbitrary per se must be applied in a manner that is not arbitrary in fact. Such exceptional

measures should be established by law and accompanied by effective institutional safeguards designed to prevent arbitrary deprivations of life. Furthermore, States that have not abolished the death penalty and that are not parties to the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, or other treaties providing for the abolition of the death penalty can apply the death penalty only in a non-arbitrary manner, for the most serious crimes and subject to a number of strict conditions elaborated in part IV below.

11. The second sentence of article 6 (1) requires that the right to life be protected by law, while the third sentence requires that no one be arbitrarily deprived of life. The two requirements partly overlap in that a deprivation of life that lacks a legal basis or is otherwise inconsistent with life-protecting laws and procedures is, as a rule, arbitrary in nature. For example, a death sentence issued following legal proceedings conducted in violation of domestic laws of criminal procedure or evidence will generally be both unlawful and arbitrary.

12. Deprivation of life is, as a rule, arbitrary if it is inconsistent with international law or domestic law.[23] A deprivation of life may, nevertheless, be authorized by domestic law and still be arbitrary. The notion of "arbitrariness" is not to be fully equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law,[24] as well as elements of reasonableness, necessity and proportionality. In order not to be qualified as arbitrary under article 6, the application of potentially lethal force by a private person acting in self-defence, or by another person coming to his or her defence, must be strictly necessary in view of the threat posed by the attacker; it must represent a method of last resort after other alternatives have been exhausted or deemed inadequate;[25] the amount of force applied cannot exceed the amount strictly needed for responding to the threat;[26] the force applied must be carefully directed, only against the attacker; and the threat responded to must involve imminent death or serious injury.[27] The use of potentially lethal force for law enforcement purposes is an extreme measure[28] that should be resorted to only when strictly necessary in order to protect life or prevent serious injury from an imminent threat.[29] It cannot be used, for example, in order to prevent the escape from custody of a suspected criminal or a convict who does not pose a serious and imminent threat to the lives or bodily integrity of others.[30] The intentional taking of life by any means is permissible only if it is strictly necessary in order to protect life from an imminent threat.[31]

13. States parties are expected to take all necessary measures to prevent arbitrary deprivation of life by their law enforcement officials, including soldiers charged with law enforcement missions. These measures include putting in place appropriate legislation controlling the use of lethal force by law enforcement officials, procedures designed to ensure that law enforcement actions are adequately planned in a manner consistent with the need to minimize the risk they pose to human life,[32] mandatory reporting, review and investigation of lethal incidents and other life-threatening incidents, and supplying forces responsible for crowd control with effective, less-lethal means and adequate protective equipment in order to obviate their need to resort to lethal force (see also para. 14 below).[33] In particular, all operations of law enforcement officials should comply with relevant international standards, including the Code of Conduct for Law Enforcement Officials and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,[34] and law enforcement officials should undergo appropriate training designed to inculcate these standards[35] so as to ensure, in all circumstances, the fullest respect for the right to life.

14. While preferable to more lethal weapons, States parties should ensure that less-lethal weapons are subject to strict independent testing and evaluate and monitor the impact on the right to life of weapons such as electro-muscular disruption devices (Tasers),[36] rubber or foam bullets, and other attenuating energy projectiles,[37] which are designed for use or are actually used by law enforcement officials, including soldiers charged with law enforcement missions.[38] The use of such weapons must be restricted to law enforcement officials who have undergone appropriate training, and must be strictly regulated in accordance with applicable international standards, including the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.[39] Furthermore, less-lethal weapons must be employed only subject to strict requirements of necessity and proportionality, in situations in which other less harmful measures have proven to be or clearly are ineffective to address the

threat.[40] States parties should not resort to less-lethal weapons in situations of crowd control that can be addressed through less harmful means,[41] especially situations involving the exercise of the right to peaceful assembly.

15. When private individuals or entities are empowered or authorized by a State party to employ force with potentially lethal consequences, the State party is under an obligation to ensure that such employment of force actually complies with article 6 and the State party remains responsible for any failure to comply.[42] Among other things, a State party must rigorously limit the powers afforded to private actors and ensure that strict and effective measures of monitoring and control, as well as adequate training, are in place in order to guarantee, inter alia, that the powers granted are not misused and do not lead to arbitrary deprivation of life. For example, a State party must take adequate measures to ensure that persons who were involved or are currently involved in serious human rights violations or abuses are excluded from private security entities empowered or authorized to employ force.[43] It must also ensure that victims of arbitrary deprivation of life by private individuals or entities empowered or authorized by the State party are granted an effective remedy.[44]

16. Paragraphs 2, 4 and 5 of article 6 implicitly recognize that countries that have not abolished the death penalty and have not ratified the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, are not legally barred under the Covenant from applying the death penalty with regard to the most serious crimes, subject to a number of strict conditions. Other procedures regulating activity that may result in deprivation of life, such as protocols for administering new drugs, must be established by law, accompanied by effective institutional safeguards designed to prevent arbitrary deprivation of life, and must be compatible with other provisions of the Covenant.

17. The deprivation of life of individuals through acts or omissions that violate provisions of the Covenant other than article 6 is, as a rule, arbitrary in nature. This includes, for example, the use of force resulting in the death of demonstrators exercising their right to freedom of assembly[45] and the passing of a death sentence following a trial that failed to meet the due process requirements of article 14 of the Covenant.[46]

III. Duty to protect life

18. The second sentence of article 6 (1) provides that the right to life "shall be protected by law". This implies that States parties must establish a legal framework to ensure the full enjoyment of the right to life by all individuals as may be necessary to give effect to the right to life. The duty to protect the right to life by law also includes an obligation for States parties to adopt any appropriate laws or other measures in order to protect life from all reasonably foreseeable threats, including from threats emanating from private persons and entities.

19. The duty to protect by law the right to life requires that any substantive ground for deprivation of life must be prescribed by law and must be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application.[47] Since deprivation of life by the authorities of the State is a matter of the utmost gravity, the law must strictly control and limit the circumstances in which a person may be deprived of his or her life by those authorities,[48] and States parties must ensure full compliance with all of the relevant legal provisions. The duty to protect by law the right to life also requires States parties to organize all State organs and governance structures through which public authority is exercised in a manner consistent with the need to respect and ensure the right to life,[49] including establishing by law adequate institutions and procedures for preventing deprivation of life, investigating and prosecuting potential cases of unlawful deprivation of life, meting out punishment and providing full reparation.

20. States parties must enact a protective legal framework that includes effective criminal prohibitions on all manifestations of violence or incitement to violence that are likely to result in deprivation of life, such as intentional and negligent homicide, unnecessary or disproportionate use of firearms,[50] infanticide,[51] "honour" killings,[52] lynching,[53] violent hate crimes,[54] blood feuds,[55] ritual killings,[56] death threats and terrorist attacks. The criminal sanctions attached to these crimes must be commensurate with their gravity,[57] while remaining compatible with all the provisions of the Covenant.

21. The duty to take positive measures to protect the right to life derives from the general duty to ensure the rights recognized in the Covenant, which is articulated in article 2 (1) when read in conjunction with article 6, as well as from the specific duty to protect the right to life by law, which is articulated in the second sentence of article 6. States parties are thus under a due diligence obligation to take reasonable, positive measures that do not impose disproportionate burdens on them[58] in response to reasonably foreseeable threats to life originating from private persons and entities whose conduct is not attributable to the State.[59] Hence, States parties are obliged to take adequate preventive measures in order to protect individuals against reasonably foreseen threats of being murdered or killed by criminals and organized crime or militia groups, including armed or terrorist groups (see also para. 23 below).[60] States parties should also disband irregular armed groups, such as private armies and vigilante groups, that are responsible for deprivations of life[61] and reduce the proliferation of potentially lethal weapons to unauthorized individuals.[62] States parties must further take adequate measures of protection, including continuous supervision,[63] in order to prevent, investigate, punish and remedy arbitrary deprivation of life by private entities, such as private transportation companies, private hospitals[64] and private security firms.

22. States parties must take appropriate measures to protect individuals against deprivation of life by other States, international organizations and foreign corporations operating within their territory[65] or in other areas subject to their jurisdiction. They must also take appropriate legislative and other measures to ensure that all activities taking place in whole or in part within their territory and in other places subject to their jurisdiction, but having a direct and reasonably foreseeable impact on the right to life of individuals outside their territory, including activities undertaken by corporate entities based in their territory or subject to their jurisdiction,[66] are consistent with article 6, taking due account of related international standards of corporate responsibility[67] and of the right of victims to obtain an effective remedy.

23. The duty to protect the right to life requires States parties to take special measures of protection towards persons in vulnerable situations whose lives have been placed at particular risk because of specific threats[68] or pre-existing patterns of violence. Such persons include human rights defenders (see also para. 53 below),[69] officials fighting corruption and organized crime, humanitarian workers, journalists,[70] prominent public figures, witnesses to crime[71] and victims of domestic and gender-based violence and human trafficking. They may also include children,[72] especially children in street situations, unaccompanied migrant children and children in situations of armed conflict, members of ethnic and religious minorities,[73] indigenous peoples,[74] lesbian, gay, bisexual, transgender and intersex persons,[75] persons with albinism,[76] alleged witches,[77] displaced persons, asylum seekers, refugees[78] and stateless persons. States parties must respond urgently and effectively in order to protect individuals who find themselves under a specific threat, by adopting special measures such as the assignment of around-the-clock police protection, the issuance of protection and restraining orders against potential aggressors and, in exceptional cases, and only with the free and informed consent of the threatened individual, protective custody.

24. Persons with disabilities, including psychosocial or intellectual disabilities, are also entitled to specific measures of protection so as to ensure their effective enjoyment of the right to life on an equal basis with others.[79] Such measures of protection must include the provision of reasonable accommodation when necessary to ensure the right to life, such as ensuring access of persons with disabilities to essential facilities and services,[80] and specific measures designed to prevent unwarranted use of force by law enforcement agents against persons with disabilities.[81]

25. States parties also have a heightened duty of care to take any necessary measures to protect the lives of individuals deprived of their liberty by the State,[82] since by arresting, detaining, imprisoning or otherwise depriving individuals of their liberty, States parties assume the responsibility to care for their lives[83] and bodily integrity, and they may not rely on lack of financial resources or other logistical problems to reduce this responsibility.[84] The same heightened duty of care attaches to individuals held in private incarceration facilities operating pursuant to an authorization by the State. The duty to protect the life of all detained individuals includes providing them with the necessary medical care and appropriate regular monitoring of their health,[85] shielding them from inter-prisoner violence,[86] preventing

suicides and providing reasonable accommodation for persons with disabilities.[87] A heightened duty to protect the right to life also applies to individuals quartered in liberty-restricting State-run facilities, such as mental health facilities,[88] military camps,[89] refugee camps and camps for internally displaced persons,[90] juvenile institutions and orphanages.

26. The duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity. These general conditions may include high levels of criminal and gun violence,[91] pervasive traffic and industrial accidents,[92] degradation of the environment (see also para. 62 below),[93] deprivation of indigenous peoples' land, territories and resources,[94] the prevalence of life-threatening diseases, such as AIDS, tuberculosis and malaria,[95] extensive substance abuse, widespread hunger and malnutrition and extreme poverty and homelessness.[96] The measures called for to address adequate conditions for protecting the right to life include, where necessary, measures designed to ensure access without delay by individuals to essential goods and services such as food,[97] water, shelter, health care,[98] electricity and sanitation, and other measures designed to promote and facilitate adequate general conditions, such as the bolstering of effective emergency health services, emergency response operations (including firefighters, ambulance services and police forces) and social housing programmes. States parties should also develop strategic plans for advancing the enjoyment of the right to life, which may comprise measures to fight the stigmatization associated with disabilities and diseases, including sexually transmitted diseases, which hamper access to medical care;[99] detailed plans to promote education for non-violence; and campaigns for raising awareness of gender-based violence[100] and harmful practices,[101] and for improving access to medical examinations and treatments designed to reduce maternal and infant mortality.[102] Furthermore, States parties should also develop, when necessary, contingency plans and disaster management plans designed to increase preparedness and address natural and man-made disasters that may adversely affect enjoyment of the right to life, such as hurricanes, tsunamis, earthquakes, radioactive accidents and massive cyberattacks resulting in disruption of essential services.

27. An important element of the protection afforded to the right to life by the Covenant is the obligation on the States parties, where they know or should have known of potentially unlawful deprivations of life, to investigate and, where appropriate, prosecute the perpetrators of such incidents, including incidents involving allegations of excessive use of force with lethal consequences (see also para. 64 below).[103] The duty to investigate also arises in circumstances in which a serious risk of deprivation of life was caused by the use of potentially lethal force, even if the risk did not materialize (see also para. 7 above). This obligation is implicit in the obligation to protect and is reinforced by the general duty to ensure the rights recognized in the Covenant, which is articulated in article 2 (1), when read in conjunction with article 6 (1), and the duty to provide an effective remedy to victims of human rights violations[104] and their relatives,[105] which is articulated in article 2 (3) of the Covenant, when read in conjunction with article 6 (1). Investigations and prosecutions of potentially unlawful deprivations of life should be undertaken in accordance with relevant international standards, including the Minnesota Protocol on the Investigation of Potentially Unlawful Death, and must be aimed at ensuring that those responsible are brought to justice,[106] at promoting accountability and preventing impunity,[107] at avoiding denial of justice[108] and at drawing necessary lessons for revising practices and policies with a view to avoiding repeated violations.[109] Investigations should explore, inter alia, the legal responsibility of superior officials with regard to violations of the right to life committed by their subordinates.[110] Given the importance of the right to life, States parties must generally refrain from addressing violations of article 6 merely through administrative or disciplinary measures, and a criminal investigation is normally required, which should lead, if enough incriminating evidence is gathered, to a criminal prosecution.[111] Immunities and amnesties provided to perpetrators of intentional killings and to their superiors, and comparable measures leading to de facto or de jure impunity, are, as a rule, incompatible with the duty to respect and ensure the right to life, and to provide victims with an effective remedy.[112]

28. Investigations into allegations of violations of article 6 must always be independent,[113] impartial,[114] prompt,[115] thorough,[116] effective,[117] credible[118] and transparent (see also para. 64 below).[119] In the event that a violation is found, full reparation must be provided, including,

in view of the particular circumstances of the case, adequate measures of compensation, rehabilitation and satisfaction.[120] States parties are also under an obligation to take steps to prevent the occurrence of similar violations in the future.[121] Where relevant, the investigation should include an autopsy of the victim's body,[122] whenever possible, in the presence of a representative of the victim's relatives.[123] States parties need to take, among other things, appropriate measures to establish the truth relating to the events leading to the deprivation of life, including the reasons and legal basis for targeting certain individuals and the procedures employed by State forces before, during and after the time at which the deprivation occurred,[124] and identify the bodies of the individuals who have lost their lives.[125] States parties should also disclose relevant details about the investigation to the victim's next of kin,[126] allow the next of kin to present new evidence, afford the next of kin legal standing in the investigation,[127] and make public information about the investigative steps taken and the findings, conclusions and recommendations emanating from the investigation,[128] subject to absolutely necessary redactions justified by a compelling need to protect the public interest or the privacy and other legal rights of directly affected individuals. States parties must also take the necessary steps to protect witnesses, victims and their relatives and persons conducting the investigation from threats, attacks and any act of retaliation. An investigation into violations of the right to life should commence when appropriate ex officio.[129] States should support and cooperate in good faith with international mechanisms of investigation and prosecutions addressing possible violations of article 6.[130]

29. Loss of life occurring in custody, in unnatural circumstances, creates a presumption of arbitrary deprivation of life by State authorities, which can only be rebutted on the basis of a proper investigation that establishes the State's compliance with its obligations under article 6.[131] States parties also have a particular duty to investigate allegations of violations of article 6 whenever State authorities have used or appear to have used firearms or other potentially lethal force outside the immediate context of an armed conflict, for example, when live fire has been used against demonstrators,[132] or when civilians have been found dead in circumstances fitting a pattern of alleged violations of the right to life by State authorities.[133]

30. The duty to respect and ensure the right to life requires States parties to refrain from deporting, extraditing or otherwise transferring individuals to countries in which there are substantial grounds for believing that a real risk exists that their right to life under article 6 of the Covenant would be violated.[134] Such a risk must be personal in nature[135] and cannot derive merely from the general conditions in the receiving State, except in the most extreme cases.[136] For example, as explained in paragraph 34 below, it would be contrary to article 6 to extradite an individual from a country that had abolished the death penalty to a country in which he or she might face the death penalty.[137] Similarly, it would be inconsistent with article 6 to deport an individual to a country in which a fatwa had been issued against him or her by local religious authorities, without verifying that the fatwa was not likely to be followed;[138] or to deport an individual to an extremely violent country in which he or she had never lived, had no social or family contacts and could not speak the local language.[139] In cases involving allegations of risk to the life of the removed individual emanating from the authorities of the receiving State, the situation of the removed individual and the conditions in the receiving States need to be assessed, inter alia, based on the intent of the authorities of the receiving State, the pattern of conduct they have shown in similar cases,[140] and the availability of credible and effective assurances about their intentions. When the alleged risk to life emanates from non-State actors or foreign States operating in the territory of the receiving State, credible and effective assurances for protection by the authorities of the receiving State may be sought and internal flight options could be explored. When relying upon assurances from the receiving State of treatment upon removal, the removing State should put in place adequate mechanisms for ensuring compliance with the issued assurances from the moment of removal onwards.[141]

31. The obligation not to extradite, deport or otherwise transfer, pursuant to article 6 of the Covenant, may be broader than the scope of the principle of non-refoulement under international refugee law, since it may also require the protection of aliens not entitled to refugee status. States parties must, however, allow all asylum seekers claiming a real risk of a violation of their right to life in the State of origin access to refugee or other individualized or group status determination procedures that could offer them protection against refoulement.[142]

IV. Imposition of the death penalty

32. Paragraphs 2, 4, 5 and 6 of article 6 regulate the imposition of the death penalty by those countries that have not yet abolished it.

33. Paragraph 2 of article 6 strictly limits the application of the death penalty, firstly, to States parties that have not abolished the death penalty, and secondly, to the most serious crimes. Given the anomalous nature of regulating the application of the death penalty in an instrument enshrining the right to life, the contents of paragraph 2 have to be narrowly construed.[143]

34. States parties to the Covenant that have abolished the death penalty, through amending their domestic laws, becoming parties to the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, or adopting another international instrument obligating them to abolish the death penalty, are barred from reintroducing it. Like the Covenant, the Second Optional Protocol does not contain termination provisions and States parties cannot denounce it. Abolition of the death penalty is therefore legally irrevocable. Furthermore, States parties may not transform into a capital offence any offence that, upon ratification of the Covenant or at any time thereafter, did not entail the death penalty. Nor can they remove legal conditions from an existing offence with the result of permitting the imposition of the death penalty in circumstances in which it was not possible to impose it before. States parties that have abolished the death penalty cannot deport, extradite or otherwise transfer persons to a country in which they are facing criminal charges that carry the death penalty, unless credible and effective assurances against the imposition of the death penalty have been obtained.[144] In the same vein, the obligation not to reintroduce the death penalty for any specific crime requires States parties not to deport, extradite or otherwise transfer an individual to a country in which he or she is expected to stand trial for a capital offence, if the same offence does not carry the death penalty in the removing State, unless credible and effective assurances against exposing the individual to the death penalty have been obtained.

35. The term "the most serious crimes" must be read restrictively[145] and appertain only to crimes of extreme gravity[146] involving intentional killing.[147] Crimes not resulting directly and intentionally in death,[148] such as attempted murder,[149] corruption and other economic and political crimes,[150] armed robbery,[151] piracy,[152] abduction,[153] drug[154] and sexual offences, although serious in nature, can never serve as the basis, within the framework of article 6, for the imposition of the death penalty. In the same vein, a limited degree of involvement or of complicity in the commission of even the most serious crimes, such as providing the physical means for the commission of murder, cannot justify the imposition of the death penalty. States parties are under an obligation to review their criminal laws so as to ensure that the death penalty is not imposed for crimes that do not qualify as the most serious crimes.[155] They should also revoke death sentences issued for crimes not qualifying as the most serious crimes and pursue the necessary legal procedures to resentence those convicted for such crimes.

36. Under no circumstances can the death penalty ever be applied as a sanction against conduct the very criminalization of which violates the Covenant, including adultery, homosexuality, apostasy,[156] establishing political opposition groups[157] or offending a head of State.[158] States parties that retain the death penalty for such offences commit a violation of their obligations under article 6, read alone and in conjunction with article 2 (2) of the Covenant, as well as of other provisions of the Covenant.

37. In all cases involving the application of the death penalty, the personal circumstances of the offender and the particular circumstances of the offence, including its specific attenuating elements,[159] must be considered by the sentencing court. Hence, mandatory death sentences that leave domestic courts with no discretion as to whether to designate the offence as a crime warranting the death penalty, and whether to issue the death sentence in the particular circumstances of the offender, are arbitrary in nature.[160] The availability of a right to seek pardon or commutation on the basis of the special circumstances of the case or the accused is not an adequate substitute for the need for judicial discretion in the application of the death penalty.[161]

38. Article 6 (2) also requires States parties to ensure that any death sentence would be "in accordance with the law in force at the time of the commission of the crime". This application of the principle of legality complements and reaffirms the application of the principle of *nulla poena sine lege* found in article 15 (1) of the Covenant. As a result, the death penalty can never be imposed if it was not provided by law for the offence at the time of its commission. Nor can the imposition of the death penalty be based on vaguely defined criminal provisions,[162] whose application to the convicted individual depend on subjective or discretionary considerations,[163] the application of which is not reasonably foreseeable.[164] On the other hand, the abolition of the death penalty should apply retroactively to individuals charged or convicted of a capital offence in accordance with the retroactive leniency (*lex mitior*) principle, which finds partial expression in the third sentence of article 15 (1), requiring States parties to grant offenders the benefit of lighter penalties adopted after the commission of the offence. The retroactive application of the abolition of the death penalty to all individuals charged or convicted of a capital crime also derives from the fact that the need for applying the death penalty cannot be justified once it has been abolished.

39. Article 6 (3) reminds all States parties that are also parties to the Convention on the Prevention and Punishment of the Crime of Genocide of their obligations to prevent and punish the crime of genocide, which include the obligation to prevent and punish all deprivations of life, which constitute part of a crime of genocide. Under no circumstances can the death penalty be imposed as part of a policy of genocide against members of a national, ethnic, racial or religious group.

40. States parties that have not abolished the death penalty must respect article 7 of the Covenant, which prohibits certain methods of execution. Failure to respect article 7 would inevitably render the execution arbitrary in nature and thus also in violation of article 6. The Committee has already opined that stoning,[165] injection of untested lethal drugs,[166] gas chambers,[167] burning and burying alive[168] and public executions[169] are contrary to article 7. For similar reasons, other painful and humiliating methods of execution are also unlawful under the Covenant. Failure to provide individuals on death row with timely notification about the date of their execution constitutes, as a rule, a form of ill-treatment, which renders the subsequent execution contrary to article 7 of the Covenant.[170] Extreme delays in the implementation of a death penalty sentence that exceed any reasonable period of time necessary to exhaust all legal remedies[171] may also entail the violation of article 7 of the Covenant, especially when the long time on death row exposes sentenced persons to harsh[172] or stressful conditions, including solitary confinement,[173] and when sentenced persons are particularly vulnerable due to factors such as age, health or mental state.[174]

41. Violation of the fair trial guarantees provided for in article 14 of the Covenant in proceedings resulting in the imposition of the death penalty would render the sentence arbitrary in nature, and in violation of article 6 of the Covenant.[175] Such violations might involve the use of forced confessions;[176] the inability of the accused to question relevant witnesses;[177] lack of effective representation involving confidential attorney-client meetings during all stages of the criminal proceedings,[178] including criminal interrogation,[179] preliminary hearings,[180] trial[181] and appeal;[182] failure to respect the presumption of innocence, which may manifest itself in the accused being placed in a cage or being handcuffed during the trial;[183] lack of an effective right of appeal;[184] lack of adequate time and facilities for the preparation of the defence, including the inability to access legal documents essential for conducting the legal defence or appeal, such as official prosecutorial applications to the court,[185] the court's judgment[186] or the trial transcript; lack of suitable interpretation;[187] failure to provide accessible documents and procedural accommodation for persons with disabilities; excessive and unjustified delays in the trial[188] or the appeal process;[189] and general lack of fairness of the criminal process,[190] or lack of independence or impartiality of the trial or appeal court.

42. Other serious procedural flaws not explicitly covered by article 14 of the Covenant may nonetheless render the imposition of the death penalty contrary to article 6. For example, a failure to promptly inform detained foreign nationals of their right to consular notification pursuant to the Vienna Convention on Consular Relations, resulting in the imposition of the death penalty,[191] and failure to afford individuals about to be deported to a country in which

their lives are claimed to be at real risk the opportunity to avail themselves of available appeal procedures[192] would violate article 6 (1) of the Covenant.

43. The execution of sentenced persons whose guilt has not been established beyond reasonable doubt also constitutes an arbitrary deprivation of life. States parties must therefore take all feasible measures in order to avoid wrongful convictions in death penalty cases,[193] to review procedural barriers to reconsideration of convictions and to re-examine past convictions on the basis of new evidence, including new DNA evidence. States parties should also consider the implications for the evaluation of evidence presented in capital cases of new reliable studies, including studies suggesting the prevalence of false confessions and the unreliability of eyewitness testimony.

44. The death penalty must not be imposed in a discriminatory manner contrary to the requirements of articles 2 (1) and 26 of the Covenant. Data suggesting that members of religious, racial or ethnic minorities, indigent persons or foreign nationals are disproportionately likely to face the death penalty may indicate an unequal application of the death penalty, which raises concerns under article 2 (1) read in conjunction with article 6, as well as under article 26.[194]

45. According to the last sentence of article 6 (2), the death penalty can only be carried out pursuant to a judgment of a competent court. Such a court must be established by law within the judiciary, be independent of the executive and legislative branches and be impartial.[195] It should be established before the commission of the offence. As a rule, civilians must not be tried for capital crimes before military tribunals[196] and military personnel can be tried for offences carrying the death penalty only before a tribunal affording all fair trial guarantees. Furthermore, the Committee does not consider courts of customary justice to constitute judicial institutions offering sufficient fair trial guarantees to enable them to try capital crimes. The issuance of a death penalty without any trial, for example in the form of a religious edict[197] or military order that the State plans to carry out or allows to be carried out, violates both articles 6 and 14 of the Covenant.

46. Any penalty of death can be carried out only pursuant to a final judgment, after an opportunity to resort to all judicial appeal procedures has been provided to the sentenced person, and after petitions to all other available non-judicial avenues have been resolved, including supervisory review by prosecutors or courts, and consideration of requests for official or private pardon. Furthermore, death sentences must not be carried out as long as international interim measures requiring a stay of execution are in place. Such interim measures are designed to allow review of the sentence before international courts, human rights courts and commissions, and international monitoring bodies, such as the United Nations treaty bodies. Failure to implement such interim measures is incompatible with the obligation to respect in good faith the procedures established under the specific treaties governing the work of the relevant international bodies.[198]

47. States parties are required pursuant to article 6 (4) to allow individuals sentenced to death to seek pardon or commutation, to ensure that amnesties, pardons and commutation can be granted to them in appropriate circumstances, and to ensure that sentences are not carried out before requests for pardon or commutation have been meaningfully considered and conclusively decided upon according to applicable procedures.[199] No category of sentenced persons can be a priori excluded from such measures of relief, nor should the conditions for attainment of relief be ineffective, unnecessarily burdensome, discriminatory in nature or applied in an arbitrary manner.[200] Article 6 (4) does not prescribe a particular procedure for the exercise of the right to seek pardon or commutation and States parties consequently retain discretion in spelling out the relevant procedures.[201] Still, such procedures should be specified in domestic legislation,[202] and they should not afford the families of victims of crime a preponderant role in determining whether the death sentence should be carried out.[203] Furthermore, pardon or commutation procedures must offer certain essential guarantees, including certainty about the processes followed and the substantive criteria applied and the rights for individuals sentenced to death to initiate pardon or commutation procedures and to make representations about their personal or other relevant circumstances, to be informed in advance when the request will be considered, and to be informed promptly about the outcome of the procedure.[204]

48. Article 6 (5) prohibits the imposition of the death penalty for crimes committed by persons below the age of 18 at the time of the offence.[205] This necessarily implies that such persons can never face the death penalty for that offence, regardless of their age at the time of sentencing or at the time foreseen for carrying out the sentence.[206] If there is no reliable and conclusive proof that the person was not below the age of 18 at the time the crime was committed, he or she will have the right to the benefit of the doubt and the death penalty cannot be imposed.[207] Article 6 (5) also prohibits States parties from carrying out the death penalty on pregnant women.

49. States parties must refrain from imposing the death penalty on individuals who face special barriers in defending themselves on an equal basis with others, such as persons whose serious psychosocial or intellectual disabilities impede their effective defence,[208] and on persons who have limited moral culpability. They should also refrain from executing persons who have a diminished ability to understand the reasons for their sentence, and persons whose execution would be exceptionally cruel or would lead to exceptionally harsh results for them and their families, such as persons of advanced age,[209] parents of very young or dependent children, and individuals who have suffered serious human rights violations in the past.[210]

50. Article 6 (6) reaffirms the position that States parties that are not yet totally abolitionist should be on an irrevocable path towards complete eradication of the death penalty, de facto and de jure, in the foreseeable future. The death penalty cannot be reconciled with full respect for the right to life, and abolition of the death penalty is both desirable[211] and necessary for the enhancement of human dignity and progressive development of human rights.[212] It is contrary to the object and purpose of article 6 for States parties to take steps to increase de facto the rate of use of and the extent to which they resort to the death penalty,[213] or to reduce the number of pardons and commutations they grant.

51. Although the allusion to the conditions for application of the death penalty in article 6 (2) suggests that when drafting the Covenant, the States parties did not universally regard the death penalty as a cruel, inhuman or degrading punishment per se,[214] subsequent agreements by the States parties or subsequent practice establishing such agreements may ultimately lead to the conclusion that the death penalty is contrary to article 7 of the Covenant under all circumstances.[215] The increasing number of States parties to the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, other international instruments prohibiting the imposition or carrying out of the death penalty, and the growing number of non-abolitionist States that have nonetheless introduced a de facto moratorium on the exercise of the death penalty, suggest that considerable progress may have been made towards establishing an agreement among the States parties to consider the death penalty as a cruel, inhuman or degrading form of punishment.[216] Such a legal development is consistent with the pro-abolitionist spirit of the Covenant, which manifests itself, inter alia, in the texts of article 6 (6) and the Second Optional Protocol.

V. Relationship of article 6 with other articles of the Covenant and other legal regimes

52. The standards and guarantees of article 6 both overlap and interact with other provisions of the Covenant. Some forms of conduct simultaneously violate both article 6 and another article. For example, applying the death penalty in response to a crime that does not constitute a most serious crime (see also para. 35 above) would violate both article 6 (2) and, in light of the extreme nature of the punishment, article 7.[217] At other times, the contents of article 6 (1) are informed by the contents of other articles. For example, application of the death penalty may amount to an arbitrary deprivation of life under article 6 by virtue of the fact that it represents a punishment for exercising freedom of expression, in violation of article 19.

53. Article 6 also reinforces the obligations of States parties under the Covenant and the Optional Protocol to protect individuals against reprisals for promoting and striving to protect and realize human rights, including through cooperation or communication with the Committee.[218] States parties must take the necessary measures to respond to death threats and

to provide adequate protection to human rights defenders,[219] including the creation and maintenance of a safe and enabling environment for defending human rights.

54. Torture and ill-treatment, which may seriously affect the physical and mental health of the mistreated individual, could also generate the risk of deprivation of life. Furthermore, criminal convictions resulting in the death penalty that are based on information procured by torture or cruel, inhuman or degrading treatment of interrogated persons would violate articles 7 and 14 (3) (g) of the Covenant, as well as article 6 (see also para. 41 above).[220]

55. Returning individuals to countries where there are substantial grounds for believing that they face a real risk to their lives violates articles 6 and 7 of the Covenant (see also para. 31 above).[221] In addition, making an individual who has been sentenced to death believe that the sentence has been commuted only to inform him or her later that it has not, [222] and placing an individual on death row pursuant to a death sentence that is void ab initio,[223] would run contrary to both articles 6 and 7.

56. The arbitrary deprivation of life of an individual may cause his or her relatives mental suffering, which could amount to a violation of their own rights under article 7 of the Covenant. Furthermore, even when the deprivation of life is not arbitrary, failure to provide relatives with information on the circumstances of the death of an individual may violate their rights under article 7,[224] as could failure to inform them of the location of the body,[225] and, where the death penalty is applied, of the date on which the State party plans to carry out the death penalty.[226] Relatives of individuals deprived of their life by the State must be able to receive the remains, if they so wish.[227]

57. The right to life guaranteed by article 6 of the Covenant, including the right to protection of life under article 6 (1), may overlap with the right to security of person guaranteed by article 9 (1). Extreme forms of arbitrary detention that are themselves life-threatening, in particular enforced disappearances, violate the right to personal liberty and personal security and are incompatible with the right to life (see also para. 58 below).[228] Failure to respect the procedural guarantees found in article 9 (3) and (4), designed inter alia to prevent disappearances, could also result in a violation of article 6.[229]

58. Enforced disappearance constitutes a unique and integrated series of acts and omissions representing a grave threat to life.[230] The deprivation of liberty, followed by a refusal to acknowledge that deprivation of liberty or by concealment of the fate of the disappeared person, in effect removes that person from the protection of the law and places his or her life at serious and constant risk, for which the State is accountable.[231] It thus results in a violation of the right to life as well as other rights recognized in the Covenant, in particular, article 7 (prohibition of torture or cruel, inhuman or degrading treatment or punishment), article 9 (liberty and security of person) and article 16 (right to recognition as a person before the law). States parties must take adequate measures to prevent the enforced disappearance of individuals, and conduct an effective and speedy inquiry to establish the fate and whereabouts of persons who may have been subject to enforced disappearance. States parties should also ensure that the enforced disappearance of persons is punished with appropriate criminal sanctions, and introduce prompt and effective procedures for cases of disappearance to be investigated thoroughly by independent and impartial bodies[232] that operate, as a rule, within the ordinary criminal justice system. They should bring to justice the perpetrators of such acts and omissions and ensure that victims of enforced disappearance and their relatives are informed about the outcome of the investigation and are provided with full reparation. [233] Under no circumstances should families of victims of enforced disappearance be obliged to declare them dead in order to be eligible for reparation.[234] States parties should also provide families of victims of disappeared persons with the means to regularize their legal status in relation to the disappeared persons after an appropriate period of time.[235]

59. A particular connection exists between article 6 and article 20, which prohibits any propaganda for war and certain forms of advocacy constituting incitement to discrimination, hostility or violence. Failure to comply with these obligations under article 20 may also constitute a failure to take the necessary measures to protect the right to life under article 6.[236]

60. Article 24 (1) of the Covenant entitles every child to such measures of protection as are required by his or her status as a minor, on the part of his or her family, society and the

State. This article requires adoption of special measures designed to protect the life of every child, in addition to the general measures required by article 6 for protecting the lives of all individuals.[237] When taking special measures of protection, States parties should be guided by the best interests of the child,[238] and by the need to ensure all children's survival, development[239] and well-being.[240]

61. The right to life must be respected and ensured without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or any other status, including caste,[241] ethnicity, membership of an indigenous group, sexual orientation or gender identity,[242] disability,[243] socioeconomic status,[244] albinism[245] and age.[246] Legal protections for the right to life must apply equally to all individuals and provide them with effective guarantees against all forms of discrimination, including multiple and intersectional forms of discrimination.[247] Any deprivation of life based on discrimination in law or in fact is ipso facto arbitrary in nature. Femicide, which constitutes an extreme form of gender-based violence that is directed against girls and women, is a particularly grave form of assault on the right to life.[248]

62. Environmental 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.[249] The obligations of States parties under international environmental law should thus inform the content of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law.[250] Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors. States parties should therefore ensure sustainable use of natural resources, develop and implement substantive environmental standards, conduct environmental impact assessments and consult with relevant States about activities likely to have a significant impact on the environment, provide notification to other States concerned about natural disasters and emergencies and cooperate with them, provide appropriate access to information on environmental hazards and pay due regard to the precautionary approach.[251]

63. In light of article 2 (1) of the Covenant, a State party has an obligation to respect and ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control.[252] This includes persons located outside any territory effectively controlled by the State whose right to life is nonetheless affected by its military or other activities in a direct and reasonably foreseeable manner (see para. 22 above).[253] States also have obligations under international law not to aid or assist activities undertaken by other States and non-State actors that violate the right to life.[254] Furthermore, States parties must respect and protect the lives of individuals located in places that are under their effective control, such as occupied territories, and in territories over which they have assumed an international obligation to apply the Covenant. States parties are also required to respect and protect the lives of all individuals located on marine vessels and aircraft registered by them or flying their flag, and of those individuals who find themselves in a situation of distress at sea, in accordance with their international obligations on rescue at sea.[255] Given that the deprivation of liberty brings a person within a State's effective control, States parties must respect and protect the right to life of all individuals arrested or detained by them, even if held outside their territory.[256]

64. Like the rest of the Covenant, article 6 continues to apply also in situations of armed conflict to which the rules of international humanitarian law are applicable, including to the conduct of hostilities.[257] While rules of international humanitarian law may be relevant for the interpretation and application of article 6 when the situation calls for their application, both spheres of law are complementary, not mutually exclusive.[258] Use of lethal force consistent with international humanitarian law and other applicable international law norms is, in general, not arbitrary. By contrast, practices inconsistent with international humanitarian law, entailing a risk to the lives of civilians and other persons protected by international humanitarian law, including the targeting of civilians, civilian objects and objects indispensable to the survival of the civilian population, indiscriminate attacks, failure

to apply the principles of precaution and proportionality, and the use of human shields would also violate article 6 of the Covenant.[259] States parties should, in general, disclose the criteria for attacking with lethal force individuals or objects whose targeting is expected to result in deprivation of life, including the legal basis for specific attacks, the process of identification of military targets and combatants or persons taking a direct part in hostilities, the circumstances in which relevant means and methods of warfare have been used,[260] and whether less harmful alternatives were considered. They must also investigate alleged or suspected violations of article 6 in situations of armed conflict in accordance with the relevant international standards (see paras. 27–28 above).[261]

65. States parties engaged in the deployment, use, sale or purchase of existing weapons and in the study, development, acquisition or adoption of weapons, and means or methods of warfare, must always consider their impact on the right to life.[262] For example, the development of autonomous weapon systems lacking in human compassion and judgment raises difficult legal and ethical questions concerning the right to life, including questions relating to legal responsibility for their use. The Committee is therefore of the view that such weapon systems should not be developed and put into operation, either in times of war or in times of peace, unless it has been established that their use conforms with article 6 and other relevant norms of international law.[263]

66. The threat or use of weapons of mass destruction, in particular nuclear weapons, which are indiscriminate in effect and are of a nature to cause destruction of human life on a catastrophic scale, is incompatible with respect for the right to life and may amount to a crime under international law. States parties must take all necessary measures to stop the proliferation of weapons of mass destruction, including measures to prevent their acquisition by non-State actors, to refrain from developing, producing, testing, acquiring, stockpiling, selling, transferring and using them, to destroy existing stockpiles, and to take adequate measures of protection against accidental use, all in accordance with their international obligations.[264] They must also respect their international obligations to pursue in good faith negotiations in order to achieve the aim of nuclear disarmament under strict and effective international control,[265] and to afford adequate reparation to victims whose right to life has been or is being adversely affected by the testing or use of weapons of mass destruction, in accordance with principles of international responsibility.[266]

67. Article 6 is included in the list of non-derogable rights in article 4 (2) of the Covenant. Hence, the guarantees against arbitrary deprivation of life contained in article 6 continue to apply in all circumstances, including in situations of armed conflict and other public emergencies.[267] The existence and nature of a public emergency that threatens the life of the nation may, however, be relevant to a determination of whether a particular act or omission leading to deprivation of life is arbitrary and to a determination of the scope of the positive measures that States parties must take. Although some Covenant rights other than the right to life may be subject to derogation, derogable rights that support the application of article 6 must not be diminished by measures of derogation.[268] Such rights include procedural guarantees, such as the right to fair trial in death penalty cases, and accessible and effective measures to vindicate rights, such as the duty to take appropriate measures to investigate, prosecute, punish and remedy violations of the right to life.

68. Reservations with respect to the peremptory and non-derogable obligations set out in article 6 are incompatible with the object and purpose of the Covenant. In particular, no reservation is permitted to the prohibition against arbitrary deprivation of life of persons and to the strict limits provided in article 6 with respect to the application of the death penalty.[269]

69. Wars and other acts of mass violence continue to be a scourge of humanity resulting in the loss of many thousands of lives every year.[270] Efforts to avert the risks of war and any other armed conflict, and to strengthen international peace and security, are among the most important safeguards of the right to life.[271]

70. States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate ipso facto article 6 of the Covenant. At the same time, all States are reminded of their responsibility as members of the international community to protect lives and to oppose widespread or systematic attacks on the right to life,[272] including acts of aggression, international terrorism, genocide, crimes against humanity and war crimes, while

respecting all of their obligations under international law. States parties that fail to take all reasonable measures to settle their international disputes by peaceful means might fall short of complying with their positive obligation to ensure the right to life.

Notes

[1] International Covenant on Civil and Political Rights, art. 4; Human Rights Committee, general comment No. 6 (1982) on the right to life, para. 1; general comment No. 14 (1984) on the right to life, para. 1; *Camargo v. Colombia*, communication No. 45/1979, para. 13.1; *Baboeram-Adhin et al. v. Suriname*, communications Nos. 146/1983 and 148–154/1983, para. 14.3.
[2] Universal Declaration of Human Rights, preamble.
[3] *Camargo v. Colombia*, para. 13.2.
[4] Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, paras. 9 and 55.
[5] Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 8. See also European Court of Human Rights, *Osman v. United Kingdom* (case No. 87/1997/871/1083), judgment of 28 October 1998, para. 116.
[6] *Chongwe v. Zambia* (CCPR/C/70/D/821/1998), para. 5.2. See also European Court of Human Rights, *İlhan v. Turkey* (application No. 22277/93), judgment of 27 June 2000, paras. 75–76; Inter-American Court of Human Rights, *Rochela massacre v. Colombia*, judgment of 11 May 2007, para. 127.
[7] *Mellet v. Ireland* (CCPR/C/116/D/2324/2013), paras. 7.4–7.8; CCPR/C/IRL/CO/4, para. 9.
[8] Human Rights Committee, general comment No. 28 (2000) on the equality of rights between men and women, para. 10. See also, e.g., CCPR/C/ARG/CO/4, para. 13; CCPR/C/JAM/CO/3, para. 14; CCPR/C/MDG/CO/3, para. 14.
[9] CCPR/C/79/Add.97, para. 15.
[10] See, e.g., CCPR/CO/79/GNQ, para. 9; CCPR/C/ZMB/CO/3, para. 18; CCPR/C/COL/CO/7, para. 21; CCPR/C/MAR/CO/6, para. 22; CCPR/C/CMR/CO/5, para. 22.
[11] See, e.g., CCPR/C/PAN/CO/3, para. 9; CCPR/C/MKD/CO/3, para. 11. See also World Health Organization, *Safe abortion: technical and policy guidance for health systems*, 2nd ed. (Geneva, 2012), pp. 96–97.
[12] CCPR/C/POL/CO/7, para. 24; CCPR/C/COL/CO/7, para. 21.
[13] CCPR/C/CHL/CO/6, para. 15; CCPR/C/KAZ/CO/1, para. 11; CCPR/C/ROU/CO/5, para. 26.
[14] CCPR/C/LKA/CO/5, para. 10; CCPR/C/MWI/CO/1/Add.1, para. 9; CCPR/C/ARG/CO/5, para. 12.
[15] CCPR/C/POL/CO/6, para. 12; CCPR/C/COD/CO/4, para. 22.
[16] CCPR/C/PAK/CO/1, para. 16; CCPR/C/BFA/CO/1, para. 20; CCPR/C/NAM/CO/2, para. 16.
[17] CCPR/C/PAK/CO/1, para. 16.
[18] Committee on the Rights of the Child, general comment No. 4 (2003) on adolescent health and development in the context of the Convention, para. 11.
[19] CCPR/C/79/Add.92, para. 11.
[20] Committee on Economic, Social and Cultural Rights' general comment No. 14 (2000) on the right to the highest attainable standard of health, para. 25.
[21] CCPR/C/NLD/CO/4, para. 7.
[22] Universal Declaration of Human Rights, preamble.
[23] African Commission on Human and Peoples' Rights, *General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)* (2015), para. 12.
[24] *Gorji-Dinka v. Cameroon* (CCPR/C/83/D/1134/2002), para. 5.1; *Van Alphen v. Netherlands*, communication No. 305/1988, para. 5.8.
[25] *Camargo v. Colombia*, para. 13.2.
[26] Ibid., paras. 13.2–13.3.
[27] A/HRC/17/28, para. 60.
[28] Code of Conduct for Law Enforcement Officials, commentary to art. 3.
[29] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, para. 9.
[30] African Commission on Human and Peoples' Rights, *Kazingachire et al v. Zimbabwe* (communication No. 295/04), decision of 12 October 2013, paras. 118–120.
[31] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, para. 9.
[32] European Court of Human Rights, *McCann and others v. United Kingdom* (application No. 18984/91), judgment of 27 September 1995, para. 150.
[33] A/HRC/31/66, para. 54.
[34] CCPR/C/NPL/CO/2, para. 10; CCPR/CO/81/LIE, para. 10.
[35] CCPR/C/KEN/CO/3, para. 11; CCPR/C/CAF/CO/2, para. 12.
[36] CCPR/C/USA/CO/4, para. 11; CCPR/C/USA/CO/3/Rev.1, para. 30.
[37] CCPR/C/GBR/CO/6, para. 11.
[38] Code of Conduct for Law Enforcement Officials, commentary to art. 1.

[39] A/HRC/31/66, para. 55.
[40] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990), para. 14.
[41] CCPR/CO/74/SWE, para. 10.
[42] See, in the context of armed conflicts, the Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict (A/63/467-S/2008/636, annex).
[43] CCPR/C/GTM/CO/3, para. 16.
[44] Ibid.; Human Rights Committee, general comment No. 31, para. 15.
[45] A/HRC/26/36, para. 75.
[46] See, e.g., *Burdyko v. Belarus* (CCPR/C/114/D/2017/2010), para. 8.6.
[47] Human Rights Committee, general comment No. 35, para. 22.
[48] Human Rights Committee, general comment No. 6, para. 3; *Camargo v. Colombia*, para. 13.1.
[49] Inter-American Court of Human Rights, *González et al. ("Cotton Field") v. Mexico*, judgment of 16 November 2009, para. 236.
[50] CCPR/CO/81/LIE, para. 10.
[51] CCPR/C/MDG/CO/3, para. 17.
[52] CCPR/C/TUR/CO/1, para. 13.
[53] CCPR/C/MOZ/CO/1, para. 12; CCPR/C/GTM/CO/3, para. 18.
[54] CCPR/C/IDN/CO/1, para. 17; CCPR/C/RUS/CO/6 and Corr.1, para. 11.
[55] CCPR/C/ALB/CO/2, para. 10.
[56] A/HRC/24/57, para. 31.
[57] CCPR/C/RUS/CO/6 and Corr.1, para. 14.
[58] Inter-American Court of Human Rights, *Sawhoyamaxa Indigenous Community v. Paraguay*, judgment of 29 March 2006, para. 155.
[59] *Peiris et al. v. Sri Lanka* (CCPR/C/103/D/1862/2009), para. 7.2.
[60] CCPR/C/79/Add.93, para. 17.
[61] CCPR/C/PHL/CO/4, para. 14.
[62] CCPR/C/AGO/CO/1, para. 12; CCPR/C/USA/CO/4, para. 10.
[63] Inter-American Court of Human Rights, *Ximenes-Lopes v. Brazil*, judgment of 4 July 2006, para. 96.
[64] *Da Silva Pimentel v. Brazil* (CEDAW/C/49/D/17/2008), para. 7.5; European Court of Human Rights, *Nitecki v. Poland* (application No. 65653/01), admissibility decision of 21 March 2002, and *Calvelli and Ciglio v. Italy* (application No. 32967/96), judgment of 17 January 2002, para. 49.
[65] CCPR/C/POL/CO/6, para. 15.
[66] *Yassin et al. v. Canada* (CCPR/C/120/D/2285/2013), para. 6.5; CCPR/C/CAN/CO/6, para. 6; CCPR/C/DEU/CO/6, para. 16; CCPR/C/KOR/CO/4, para. 10.
[67] Guiding Principles on Business and Human Rights, principle 2.
[68] Inter-American Court of Human Rights, *Barrios Family v. Venezuela*, judgment of 24 November 2011, para. 124.
[69] CCPR/C/PRY/CO/3, para. 15.
[70] CCPR/C/SRB/CO/2, para. 21; A/HRC/20/22 and Corr.1, para. 105.
[71] CCPR/C/COL/CO/6, para. 14.
[72] CCPR/C/HND/CO/1, para. 9.
[73] CCPR/C/FRA/CO/4, para. 24.
[74] Inter-American Court of Human Rights, *Yakye Axa Indigenous Community v. Paraguay*, judgment of 17 June 2005, para. 167.
[75] CCPR/C/COL/CO/6, para. 12.
[76] CCPR/C/TZA/CO/4, para. 15.
[77] A/HRC/11/2, para. 68.
[78] CCPR/C/KEN/CO/3, para. 12.
[79] Convention on the Rights of Persons with Disabilities, art. 10.
[80] Ibid., arts. 5 (3) and 9.
[81] CCPR/C/AUS/CO/5, para. 21.
[82] *Leach v. Jamaica* (CCPR/C/57/D/546/1993), para. 9.5.
[83] *Zhumbaeva v. Kyrgyzstan* (CCPR/C/102/D/1756/2008), para. 8.6; Human Rights Committee, *Dermit Barbato v. Uruguay*, communication No. 84/1981, para. 9.2.
[84] *Lantsova v. Russian Federation* (CCPR/C/74/D/763/1997), para. 9.2.
[85] Ibid.
[86] European Court of Human Rights, *Edwards v. United Kingdom* (application No. 46477/99), judgment of 14 June 2002, para. 60.
[87] Convention on the Rights of Persons with Disabilities, art. 14.
[88] European Court of Human Rights, *Câmpeanu v. Romania* (application No. 47848/08), judgment of 17 July 2014, para. 131.
[89] CCPR/C/ARM/CO/2, para. 15.
[90] CCPR/C/UNK/CO/1, para. 14.

[91] CCPR/C/USA/CO/4, para. 10.
[92] European Court of Human Rights, *Öneryildiz v. Turkey* (application No. 48939/00), judgment of 30 November 2004, para. 71.
[93] African Commission on Human and Peoples' Rights, *Social and Economic Rights Centre (SERAC) and Centre for Economic and Social Rights (CESR) v. Nigeria* (communication No. 155/96), decision of 27 October 2001, para. 67.
[94] Inter-Agency Support Group on Indigenous Peoples' Issues, "Lands, territories and resources", thematic paper towards the preparation of the 2014 World Conference on Indigenous Peoples, 22–23 September 2014, p. 4.
[95] CCPR/C/KEN/CO/3, para. 9.
[96] Human Rights Committee, general comment No. 6, para. 5; CCPR/C/79/Add.105, para. 12.
[97] CCPR/CO/72/PRK, para. 12.
[98] *Toussaint v. Canada* (CCPR/C/123/D/2348/2014), para. 11.3. See also CCPR/C/ISR/CO/4, para. 12.
[99] CCPR/C/JAM/CO/3, para. 9.
[100] CCPR/CO/71/UZB, para. 19.
[101] Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2014) on harmful practices, para. 56.
[102] Human Rights Committee, general comment No. 6, para. 5; CCPR/C/COD/CO/3, para. 14.
[103] CCPR/C/KGZ/CO/2, para. 13.
[104] Human Rights Committee, general comment No. 31, paras. 15 and 19; *Pestaño and Pestaño v. Philippines* (CCPR/C/98/D/1619/2007), para. 7.2; *González v. Argentina* (CCPR/C/101/D/1458/2006), para. 9.4; CCPR/C/JAM/CO/3, para. 16. See also European Court of Human Rights, *Calvelli and Ciglio v. Italy*, para. 51.
[105] CCPR/C/ISR/CO/3, para. 12.
[106] *Sathasivam and Saraswathi v. Sri Lanka* (CCPR/C/93/D/1436/2005), para. 6.4; *Amirov v. Russian Federation* (CCPR/C/95/D/1447/2006), para. 11.2. See also Human Rights Committee, general comment No. 31, paras. 16 and 18.
[107] CCPR/C/AGO/CO/1, para. 14.
[108] *Marcellana and Gumanjoy v. Philippines* (CCPR/C/94/D/1560/2007), para. 7.4.
[109] E/CN.4/2006/53, para. 41.
[110] A/HRC/26/36, para. 81.
[111] *Andreu v. Colombia* (CCPR/C/55/D/563/1993), para. 8.2; *Marcellana and Gumanjoy v. Philippines*, para. 7.2.
[112] Human Rights Committee, general comment No. 31, para. 18; Inter-American Court of Human Rights, *Barrios Altos v. Peru*, judgment of 14 March 2001, para. 43.
[113] CCPR/C/CMR/CO/4, para. 15.
[114] CCPR/C/BOL/CO/3, para. 15.
[115] *Novaković and Novaković v. Serbia* (CCPR/C/100/D/1556/2007), para. 7.3; CCPR/C/RUS/CO/6 and Corr.1, para. 14.
[116] CCPR/C/MRT/CO/1, para. 13.
[117] CCPR/C/GBR/CO/7, para. 8.
[118] CCPR/C/ISR/CO/3, para. 9.
[119] CCPR/C/GBR/CO/7, para. 8.
[120] *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)* (United Nations publication, Sales No. E.17.XIV.3), para. 10.
[121] *Camargo v. Colombia*, para. 15.
[122] *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*, para. 25; Inter-American Court of Human Rights, *Kawas-Fernández v. Honduras*, judgment of 3 April 2009, para. 102.
[123] *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*, para. 37.
[124] A/HRC/14/24/Add.6, para. 93.
[125] A/HRC/19/58/Rev.1, para. 59.
[126] European Court of Human Rights, *Oğur v. Turkey* (application No. 21594/93), judgment of 20 May 1999, para. 92.
[127] *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*, para. 35.
[128] Ibid., para. 13; European Court of Human Rights, *Ramsahai and others v. Netherlands* (application No. 52391/99), judgment of 15 May 2007, para. 353 (requiring sufficient public scrutiny of inquiry proceedings).
[129] European Court of Human Rights, *Tanrikulu v. Turkey* (application No. 23763/94), judgment of 8 July 1999, para. 103.
[130] CCPR/C/KEN/CO/3, para. 13.
[131] *Eshonov v. Uzbekistan* (CCPR/C/99/D/1225/2003), para. 9.2; *Zhumbaeva v. Kyrgyzstan*, para. 8.8; *Khadzhiyev v. Turkmenistan* (CCPR/C/122/D/2252/2013), para. 7.3.

[132] *Umetaliev and Tashtanbekova v. Kyrgyzstan* (CCPR/C/94/D/1275/2004), para. 9.4; *Olmedo v. Paraguay* (CCPR/C/104/D/1828/2008), para. 7.5.
[133] *Amirov v. Russian Federation*, para. 11.4.
[134] *Kindler v. Canada* (CCPR/C/48/D/470/1991), paras. 13.1–13.2.
[135] *Dauphin v. Canada* (CCPR/C/96/D/1792/2008), para. 7.4.
[136] European Court of Human Rights, *N.A. v. United Kingdom* (application No. 25904/07), judgment of 17 July 2008, para. 115.
[137] *Yin Fong v. Australia* (CCPR/C/97/D/1442/2005), para. 9.7.
[138] *Shakeel v. Canada* (CCPR/C/108/D/1881/2009), para. 8.5.
[139] *Warsame v. Canada* (CCPR/C/102/D/1959/2010), para. 8.3.
[140] *T. v. Australia* (CCPR/C/61/D/706/1996), para. 8.4; *A.R.J. v. Australia* (CCPR/C/60/D/692/1996), para. 6.12; *Israil v. Kazakhstan* (CCPR/C/103/D/2024/2011), para. 9.5.
[141] CCPR/CO/74/SWE, para. 12; *Alzery v. Sweden* (CCPR/C/88/D/1416/2005), para. 11.5.
[142] CCPR/C/TJK/CO/2, para. 11; CCPR/CO/77/EST, para. 13.
[143] *Judge v. Canada* (CCPR/C/78/D/829/1998), para. 10.5.
[144] Ibid., para. 10.6; *Yin Fong v. Australia*, para. 9.7.
[145] *Chisanga v. Zambia* (CCPR/C/85/D/1132/2002), para. 7.4.
[146] Safeguards guaranteeing protection of the rights of those facing the death penalty, para. 1.
[147] *Kindler v. Canada*, para. 14.3; A/67/275, para. 35.
[148] CCPR/C/79/Add.25, para. 8.
[149] *Chisanga v. Zambia*, paras. 2.2 and 7.4.
[150] CCPR/C/79/Add.101, para. 8; CCPR/C/79/Add.25, para. 8; CCPR/C/79/Add.85, para. 8.
[151] *Chisanga v. Zambia*, para. 7.4; *Lubuto v. Zambia* (CCPR/C/55/D/390/1990/Rev.1), para. 7.2; *Johnson v. Ghana* (CCPR/C/110/D/2177/2012), para. 7.3.
[152] CCPR/CO/73/UK-CCPR/CO/73/UKOT, para. 37.
[153] CCPR/CO/72/GTM, para. 17.
[154] CCPR/CO/84/THA, para. 14.
[155] Human Rights Committee, general comment No. 6, para. 6.
[156] CCPR/C/MRT/CO/1, para. 21.
[157] CCPR/C/LBY/CO/4, para. 24.
[158] CCPR/C/79/Add.84, para. 16.
[159] *Lubuto v. Zambia*, para. 7.2.
[160] *Chisanga v. Zambia*, para. 7.4; *Larrañaga v. Philippines* (CCPR/C/87/D/1421/2005), para. 7.2; *Carpo et al. v. Philippines* (CCPR/C/77/D/1077/2002), para. 8.3.
[161] *Thompson v. Saint Vincent and the Grenadines* (CCPR/C/70/D/806/1998), para. 8.2; *Kennedy v. Trinidad and Tobago* (CCPR/C/74/D/845/1998), para. 7.3.
[162] CCPR/C/DZA/CO/3, para. 17; CCPR/C/79/Add.116, para. 14.
[163] CCPR/CO/72/PRK, para. 13.
[164] European Court of Human Rights, *S.W. v. United Kingdom* (application No. 20166/92), judgment of 22 November 1995, para. 36.
[165] CCPR/C/IRN/CO/3, para. 12.
[166] CCPR/C/USA/CO/4, para. 8.
[167] *Ng v. Canada* (CCPR/C/49/D/469/1991), para. 16.4.
[168] African Commission on Human and Peoples' Rights, *Malawi African Association and others v. Mauritania*, 11 May 2000, para. 120.
[169] CCPR/CO/72/PRK, para. 13.
[170] CCPR/C/JPN/CO/6, para. 13.
[171] *Johnson v. Jamaica* (CCPR/C/56/D/588/1994), para. 8.5; *Kindler v. Canada*, para. 15.2; *Martin v. Jamaica* (CCPR/C/47/D/317/1988), para. 12.2.
[172] *Brown v. Jamaica* (CCPR/C/65/D/775/1997), para. 6.13.
[173] CCPR/C/JPN/CO/6, para. 13.
[174] *Kindler v. Canada*, para. 15.3.
[175] *Kurbanov v. Tajikistan* (CCPR/C/79/D/1096/2002), para. 7.7.
[176] *Gunan v. Kyrgyzstan* (CCPR/C/102/D/1545/2007), para. 6.2; *Chikunova v. Uzbekistan* (CCPR/C/89/D/1043/2002), paras. 7.2 and 7.5; *Yuzepchuk v. Belarus* (CCPR/C/112/D/1906/2009), paras. 8.2 and 8.6.
[177] *Yuzepchuk v. Belarus*, paras. 8.4 and 8.6.
[178] *Chikunova v. Uzbekistan*, paras. 7.4 and 7.5.
[179] *Gunan v. Kyrgyzstan*, para. 6.3.
[180] *Levy v. Jamaica* (CCPR/C/64/D/719/1996), paras. 7.2–7.3.
[181] *Brown v. Jamaica*, para. 6.15.
[182] *Leach v. Jamaica*, para. 9.4.
[183] *Kovaleva and Kozyar v. Belarus* (CCPR/C/106/D/2120/2011), para. 11.4; *Grishkovtsov v. Belarus* (CCPR/C/113/D/2013/2010), para. 8.4.

[184] *Judge v. Canada*, paras. 10.8–10.9.
[185] *Gunan v. Kyrgyzstan*, para. 6.3.
[186] *Champagnie et al. v. Jamaica* (CCPR/C/51/D/445/1991), paras. 7.3–7.4.
[187] Safeguards guaranteeing protection of the rights of those facing the death penalty, para. 4; *Ambaryan v. Kyrgyzstan* (CCPR/C/120/D/2162/2012), para. 9.2.
[188] *Francis v. Jamaica* (CCPR/C/54/D/606/1994), para. 9.3.
[189] *Kamoyo v. Zambia* (CCPR/C/104/D/1859/2009), paras. 6.3–6.4.
[190] *Yuzepchuk v. Belarus*, paras. 8.5–8.6.
[191] Vienna Convention on Consular Relations, art. 36 (1) (b). See also Inter-American Court of Human Rights, The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, 1 October 1999, para. 137.
[192] *Judge v. Canada*, para. 10.9.
[193] CCPR/C/USA/CO/4, para. 8.
[194] Ibid.
[195] African Commission on Human and Peoples' Rights, *Egyptian Initiative for Personal Rights and Interights v. Egypt* (communication No. 334/06), decision of 1 March 2011, para. 204; International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *Prosecutor v. Furundžija* (case No. IT-95-17/1-A), Appeals Chamber, judgment of 21 July 2000, para. 189.
[196] Human Rights Committee, general comment No. 35, para. 45.
[197] Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 22; CCPR/C/MDG/CO/3, para. 16; CCPR/C/79/Add.25, para. 9.
[198] Human Rights Committee, general comment No. 33 (2008) on the obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights, para. 19.
[199] *Chikunova v. Uzbekistan*, para. 7.6.
[200] *Chisanga v. Zambia*, para. 7.5.
[201] *Kennedy v. Trinidad and Tobago*, para. 7.4.
[202] CCPR/CO/72/GTM, para. 18.
[203] CCPR/CO/84/YEM, para. 15.
[204] A/HRC/8/3 and Corr.1, para. 67.
[205] CCPR/C/YEM/CO/5, para. 14.
[206] Committee on the Rights of the Child, general comment No. 10 (2007) on children's rights in juvenile justice, para. 75.
[207] Ibid., paras. 35 and 39.
[208] CCPR/C/JPN/CO/6, para. 13. See also *R.S. v. Trinidad and Tobago* (CCPR/C/74/D/684/1996), para. 7.2.
[209] CCPR/C/JPN/CO/5, para. 16.
[210] CCPR/C/35/D/210/1986, para. 15.
[211] Human Rights Committee, general comment No. 6, para. 6.
[212] Second Additional Protocol to the Covenant, aiming at the abolition of the death penalty, preamble.
[213] CCPR/C/TCD/CO/1, para. 19.
[214] *Kindler v. Canada*, para. 15.1.
[215] *Ng v. Canada*, para. 16.2; European Court of Human Rights, *Öcalan v. Turkey* (application No. 46221/99), judgment of 12 May 2005, paras. 163–165.
[216] *Judge v. Canada*, para. 10.3; A/HRC/36/27, para. 48; African Commission on Human and Peoples' Rights, *General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)*, para. 22.
[217] Human Rights Committee, general comment No. 20 (1992) on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, para. 5; European Court of Human Rights, *Gatt v. Malta* (application No. 28221/09), judgment of 27 July 2010, para. 29.
[218] Human Rights Committee, general comment No. 33, para. 4; *Birindwa and Tshisekedi v. Zaire*, communications Nos. 241 and 242/1987, para. 12.5; CCPR/C/MDV/CO/1, para. 26; Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, art. 9 (4).
[219] Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, art. 12 (2).
[220] *Aboufaied v. Libya* (CCPR/C/104/D/1782/2008), paras. 7.4 and 7.6; *El-Megreisi v. Libyan Arab Jamahiriya* (CCPR/C/50/D/440/1990), para. 5.4.
[221] Human Rights Committee, general comment No. 31, para. 12.
[222] *Chisanga v. Zambia*, para. 7.3.
[223] *Johnson v. Jamaica* (CCPR/C/64/D/592/1994), para. 10.4.
[224] *Eshonov v. Uzbekistan*, para. 9.10.
[225] *Kovaleva and Kozyar v. Belarus*, para. 11.10.
[226] CCPR/C/JPN/CO/6, para. 13.

[227] CCPR/C/BWA/CO/1, para. 13.
[228] *Mojica v. Dominican Republic* (CCPR/C/51/D/449/1991), para. 5.4; *Guezout et al. v. Algeria* (CCPR/C/105/D/1753/2008), paras. 8.4 and 8.7.
[229] Human Rights Committee, general comment No. 35, para. 58.
[230] *Bousroual v. Algeria* (CCPR/C/86/D/992/2001), para. 9.2; *Katwal v. Nepal* (CCPR/C/113/D/2000/2010), para. 11.3.
[231] *El Boathi v. Algeria* (CCPR/C/119/D/2259/2013), para. 7.5.
[232] Human Rights Committee, *Herrera Rubio v. Colombia*, communication No. 161/1983, para. 10.3; general comment No. 6, para. 4.
[233] International Convention for the Protection of All Persons from Enforced Disappearance, art. 24.
[234] *Prutina et al. v. Bosnia and Herzegovina* (CCPR/C/107/D/1917/2009,1918/2009,1925/2009 and 1953/2010), para. 9.6.
[235] International Convention for the Protection of All Persons from Enforced Disappearance, art. 24.
[236] International Criminal Tribunal for Rwanda, *Prosecutor v. Ruggiu* (case No. ICTR-97-32-1), Trial Chamber, judgment of 1 June 2000, para. 22.
[237] See Human Rights Committee, general comments No. 17 (1989) on the rights of the child, para. 1, and No. 32, paras. 42–44; *Prutina et al. v. Bosnia and Herzegovina*, para. 9.8.
[238] Convention on the Rights of the Child, art. 3 (1).
[239] Ibid., art. 6 (2).
[240] Ibid., art. 3 (2).
[241] CCPR/C/79/Add.81, para. 15.
[242] CCPR/C/IRN/CO/3, para. 10.
[243] CCPR/CO/72/NET, para. 6.
[244] *Whelan v. Ireland* (CCPR/C/119/D/2425/2014), para. 7.12.
[245] E/C.12/COD/CO/4, para. 19.
[246] Inter-American Court of Human Rights, *Yakye Axa Indigenous Community v. Paraguay*, para. 175.
[247] CCPR/C/USA/CO/4, para. 8.
[248] A/HRC/20/16, para. 21.
[249] Declaration of the United Nations Conference on the Human Environment, para. 1; Rio Declaration on Environment and Development, principle 1; United Nations Framework Convention on Climate Change, preamble.
[250] Paris Agreement, preamble.
[251] Rio Declaration on Environment and Development, principles 1–2, 11, 15 and 17–18; Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.
[252] Human Rights Committee, general comment No. 31, para. 10; CCPR/C/GBR/CO/6, para. 14.
[253] CCPR/C/USA/CO/4, para. 9.
[254] Responsibility of States for internationally wrongful acts, art. 16; International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, judgment of 26 February 2007, para. 420.
[255] CCPR/C/MLT/CO/2, para. 17; United Nations Convention on the Law of the Sea, art. 98; International Convention for the Safety of Life at Sea, chap. V, regulation 10.
[256] Human Rights Committee, general comment No. 31, para. 10; *Saldías de López v. Uruguay*, communication No. R.12/52, paras. 12.1–13; *Celiberti de Casariego v. Uruguay*, communication No. R.13/56, paras. 10.1–11; *Domukovsky v. Georgia* (CCPR/C/62/D/623/1995, 624/1995, 626/1995 and 627/1995), para. 18.2.
[257] Human Rights Committee, general comments No. 31, para. 11, and No. 29 (2001) on derogations from provisions of the Covenant during a state of emergency, para. 3.
[258] Human Rights Committee, general comments No. 31, para. 11, and No. 29, paras. 3, 12 and 16.
[259] CCPR/C/ISR/CO/3, paras. 9–10.
[260] CCPR/C/USA/CO/4, para. 9.
[261] *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*, paras. 20–22.
[262] Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), art. 36.
[263] A/HRC/23/47, paras. 113–114.
[264] See Treaty on the Non-Proliferation of Nuclear Weapons; Comprehensive Nuclear-Test-Ban Treaty; Treaty on the Prohibition of Nuclear Weapons (not yet in force); Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction.
[265] Human Rights Committee, general comment No. 14, para. 7; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996 of the International Court of Justice.
[266] CCPR/C/FRA/CO/5, para. 21.
[267] Human Rights Committee, general comment No. 29, para. 7.

[268] Ibid., para. 16.
[269] Human Rights Committee, general comment No. 24 (1994) on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to the declarations under article 41 of the Covenant, para. 8.
[270] Human Rights Committee, general comment No. 14, para. 2.
[271] Human Rights Committee, general comment No. 6, para. 2.
[272] General Assembly resolution 60/1, paras. 138–139.

Annex 89

United Nations E/C.12/GC/24

Economic and Social Council

Distr.: General
10 August 2017

Original: English

Committee on Economic, Social and Cultural Rights

General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*

I. Introduction

1. Businesses play an important role in the realization of economic, social and cultural rights, inter alia by contributing to the creation of employment opportunities and — through private investment — to development. However, the Committee on Economic, Social and Cultural Rights has been regularly presented with situations in which, as a result of States' failure to ensure compliance, under their jurisdiction, with internationally recognized human rights norms and standards, corporate activities have negatively affected economic, social and cultural rights. The present general comment seeks to clarify the duties of States parties to the International Covenant on Economic, Social and Cultural Rights in such situations, with a view to preventing and addressing the adverse impacts of business activities on human rights.

2. The Committee has previously considered the growing impact of business activities on the enjoyment of specific Covenant rights relating to health,[1] housing,[2] food,[3] water,[4] social security,[5] the right to work,[6] the right to just and favourable conditions of work[7] and the right to form and join trade unions.[8] In addition, the Committee has addressed the issue in concluding observations[9] on States parties' reports, and in its first decision on an individual communication.[10] In 2011, it adopted a statement on State obligations related to corporate responsibilities in the context of the Covenant rights.[11] The present general comment should be read together with these earlier contributions. It also takes into account

* Adopted by the Committee on Economic, Social and Cultural Rights at its sixty-first session (29 May-23 June 2017).

1 See the Committee's general comment No. 14 (2000) on the right to the highest attainable standard of health, paras. 26 and 35.

2 See the Committee's general comment No. 4 (1991) on the right to adequate housing, para. 14.

3 See the Committee's general comment No. 12 (1999) on the right to adequate food, paras. 19 and 20.

4 See the Committee's general comment No. 15 (2002) on the right to water, para. 49.

5 See the Committee's general comment No. 19 (2007) on the right to social security, paras. 45, 46 and 71.

6 See the Committee's general comment No. 18 (2005) on the right to work, para. 52.

7 See the Committee's general comment No. 23 (2016) on the right to just and favourable conditions of work, paras. 74 and 75.

8 See E/C.12/AZE/CO/3, para. 15.

9 See E/C.12/CAN/CO/6, paras. 15 and 16; E/C.12/VNM/CO/2-4, paras. 22 and 29; and E/C.12/DEU/CO/5, paras. 9-11.

10 Communication No. 2/2014, *I.D.G. v. Spain*, Views adopted on 17 June 2015.

11 See E/C.12/2011/1, para. 7.

GE.17-13760(E)

1713760

advances within the International Labour Organization[12] and within regional organizations such as the Council of Europe.[13] In adopting the present general comment, the Committee has considered the Guiding Principles on Business and Human Rights endorsed by the Human Rights Council in 2011,[14] as well as the contributions made to this issue by human rights treaty bodies and various special procedures.[15]

II. Context and scope

3. For the purposes of the present general comment, business activities include all activities of business entities, whether they operate transnationally or their activities are purely domestic, whether they are fully privately owned or State-owned, and regardless of their size, sector, location, ownership and structure.

4. In certain jurisdictions, individuals enjoy direct recourse against business entities for violations of economic, social and cultural rights, whether in order to impose on such private entities (negative) duties to refrain from certain courses of conduct or to impose (positive) duties to adopt certain measures or to contribute to the fulfilment of such rights.[16] There are also a large number of domestic laws designed to protect specific economic, social and cultural rights, that apply directly to business entities, such as in the areas of non-discrimination, health-care provision, education, the environment, employment relations and consumer safety.

5. In addition, under international standards, business entities are expected to respect Covenant rights regardless of whether domestic laws exist or are fully enforced in practice.[17] The present general comment therefore also seeks to assist the corporate sector in discharging their human rights obligations and assuming their responsibilities, thus mitigating any reputational risks that may be associated with violations of Covenant rights within their sphere of influence.

6. The present general comment could also assist workers' organizations and employers in the context of collective bargaining. A large number of States parties require workplace procedures for the examination of grievances brought by workers, individually or collectively, without threat of reprisal.[18] Social dialogue and the availability of grievance mechanisms for workers could be more systematically relied upon, particularly for the implementation of articles 6 and 7 of the Covenant.

III. Obligations of States parties under the Covenant

A. Obligations of non-discrimination

7. The Committee has previously underlined that discrimination in the exercise of economic, social and cultural rights is frequently found in private spheres, including in

[12] The International Labour Organization (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, initially adopted in 1977 and last revised in 2017, encourages positive contributions by enterprises to society for implementation of the principles underlying international labour standards.

[13] See recommendation CM/Rec(2016)3 of the Committee of Ministers of the Council of Europe, on human rights and business, adopted on 2 March 2016 at the 1249th meeting of the Ministers' Deputies.

[14] See A/HRC/17/31, endorsed by the Human Rights Council in its resolution 17/4.

[15] See A/HRC/4/35/Add.1.

[16] See, for example, the Constitutional Court of South Africa, *Daniels v. Scribante and others*, case CCT 50/16, judgment of 11 May 2017, paras. 37-39 (leading judgment by J. Madlanga) (positive duties imposed on the owner to ensure the right to security of tenure in conditions that comply with the requirements of human dignity).

[17] Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, principle 11 and commentary.

[18] See the ILO Examination of Grievances Recommendation, 1967 (No. 130).

workplaces and the labour market[19] and in the housing and lending sectors.[20] Under articles 2 and 3 of the Covenant, States parties have the obligation to guarantee the enjoyment of Covenant rights to all without discrimination.[21] The requirement to eliminate formal as well as substantive forms of discrimination[22] includes a duty to prohibit discrimination by non-State entities in the exercise of economic, social and cultural rights.

8. Among the groups that are often disproportionately affected by the adverse impact of business activities are women, children, indigenous peoples, particularly in relation to the development, utilization or exploitation of lands and natural resources,[23] peasants, fisherfolk and other people working in rural areas, and ethnic or religious minorities where these minorities are politically disempowered. Persons with disabilities are also often disproportionately affected by the negative impacts of business activities, in particular because they face particular barriers in accessing accountability and remedy mechanisms. As noted by the Committee on previous occasions, asylum seekers and undocumented migrants are at particular risk of facing discrimination in the enjoyment of Covenant rights due to their precarious situation, and under article 7 of the Covenant, migrant workers are particularly vulnerable to exploitation, long working hours, unfair wages and dangerous and unhealthy working environments.[24]

9. Certain segments of the population face a greater risk of suffering intersectional and multiple discrimination.[25] For instance, investment-linked evictions and displacements often result in physical and sexual violence against, and inadequate compensation and additional burdens related to resettlement for, women and girls.[26] In the course of such investment-linked evictions and displacements, indigenous women and girls face discrimination both due to their gender and because they identify as indigenous people. In addition, women are overrepresented in the informal economy and are less likely to enjoy labour-related and social security protections.[27] Furthermore, despite some improvement, women continue to be underrepresented in corporate decision-making processes worldwide.[28] The Committee therefore recommends that States parties address the specific impacts of business activities on women and girls, including indigenous women and girls, and incorporate a gender perspective into all measures to regulate business activities that may adversely affect economic, social and cultural rights, including by consulting the Guidance on National Action Plans on Business and Human Rights.[29] States parties should also take appropriate steps, including through temporary special measures, to improve women's representation in the labour market, including at the upper echelons of the corporate hierarchy.

[19] See, for example, the Committee's general comment No. 18, paras. 13 and 14; the Committee's general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights, para. 32; the Committee's general comment No. 6 (1995) on the economic, social and cultural rights of older persons, para. 22; and the Committee's general comment No. 4, para. 8 (e).

[20] See the Committee's general comment No. 4, para. 17; and general comment No. 20, para. 11.

[21] See the Committee's general comment No. 20, paras. 7 and 8.

[22] Ibid., paras. 8 and 11.

[23] See the United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295, annex, art. 32 (2)).

[24] See E/C.12/2017/1 for the Committee's statement on the duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights; and the Committee's general comment No. 23, para. 47 (e).

[25] See the Committee's general comment No. 20, para. 17.

[26] Office of the United Nations High Commissioner for Human Rights (OHCHR) and United Nations Human Settlements Programme (UN-Habitat), *Forced Evictions*, Fact Sheet No. 25/Rev.1 (2014), p. 16.

[27] See A/HRC/26/39, paras. 48-50. See also the guidance to States on how to adopt measures to promote workers' rights and social protection in the informal economy while encouraging a transition to the formal economy, provided in the ILO Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204).

[28] See A/HRC/26/39, paras. 57-62.

[29] By the Working Group on the issue of human rights and transnational corporations and other business enterprises (Working Group on Business and Human Rights) (November 2016).

B. Obligations to respect, to protect and to fulfil

10. The Covenant establishes specific obligations of States parties at three levels — to respect, to protect and to fulfil. These obligations apply both with respect to situations on the State's national territory, and outside the national territory in situations over which States parties may exercise control. The extraterritorial components of the obligations are addressed separately in subsection III. C below. That section clarifies the content of States' obligations, focusing on their duties to protect, which are the most relevant in the context of business activities.

11. The present general comment addresses the States parties to the Covenant, and in that context it only deals with the conduct of private actors — including business entities — indirectly. In accordance with international law, however, States parties may be held directly responsible for the action or inaction of business entities: (a) if the entity concerned is in fact acting on that State party's instructions or is under its control or direction in carrying out the particular conduct at issue,[30] as may be the case in the context of public contracts;[31] (b) when a business entity is empowered under the State party's legislation to exercise elements of governmental authority[32] or if the circumstances call for such exercise of governmental functions in the absence or default of the official authorities;[33] or (c) if and to the extent that the State party acknowledges and adopts the conduct as its own.[34]

1. Obligation to respect

12. The obligation to respect economic, social and cultural rights is violated when States parties prioritize the interests of business entities over Covenant rights without adequate justification, or when they pursue policies that negatively affect such rights. This may occur for instance when forced evictions are ordered in the context of investment projects.[35] Indigenous peoples' cultural values and rights associated with their ancestral lands are particularly at risk.[36] States parties and businesses should respect the principle of free, prior and informed consent of indigenous peoples in relation to all matters that could affect their rights, including their lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired.[37]

13. States parties should identify any potential conflict between their obligations under the Covenant and under trade or investment treaties, and refrain from entering into such treaties where such conflicts are found to exist,[38] as required under the principle of the binding character of treaties.[39] The conclusion of such treaties should therefore be preceded by human rights impact assessments that take into account both the positive and negative human rights impacts of trade and investment treaties, including the contribution of such treaties to the realization of the right to development. Such impacts on human rights of the implementation of the agreements should be regularly assessed, to allow for the adoption of

[30] See A/56/10 for articles on responsibility of States for internationally wrongful acts, with commentaries adopted by the International Law Commission, art. 8. See also General Assembly resolutions 56/83, 59/35, 62/61, 65/19 and 68/104.

[31] In particular, the responsibility of the State may be engaged if it fails to include labour clauses in public contracts to ensure the appropriate protection of workers employed by private contractors awarded such contracts. In this regard, States are referred to the ILO Labour Clauses (Public Contracts) Convention, 1949 (No. 94) and the ILO Labour Clauses (Public Contracts) Recommendation, 1949 (No. 84).

[32] Articles on responsibility of States for internationally wrongful acts, art. 5.

[33] Ibid., art. 9.

[34] Ibid., art. 11.

[35] See the Committee's general comment No. 7 (1997) on forced evictions, paras. 7 and 18; and OHCHR and UN-Habitat, *Forced Evictions*, Fact Sheet No. 25/Rev.1, pp. 28 and 29. See also, for example, A/HRC/25/54/Add.1, paras. 55 and 59-63.

[36] See the Committee's general comment No. 21 (2009) on the right of everyone to take part in cultural life, para. 36. See also the United Nations Declaration on the Rights of Indigenous Peoples, art. 26.

[37] See the United Nations Declaration on the Rights of Indigenous Peoples, arts. 10, 19, 28, 29 and 32.

[38] See A/HRC/19/59/Add.5. See also recommendation CM/Rec(2016)3 of the Committee of Ministers of the Council of Europe, appendix, para. 23.

[39] See the Vienna Convention on the Law of Treaties, arts. 26 and 30 (4) (b).

any corrective measures that may be required. The interpretation of trade and investment treaties currently in force should take into account the human rights obligations of the State, consistent with Article 103 of the Charter of the United Nations and with the specific nature of human rights obligations.[40] States parties cannot derogate from the obligations under the Covenant in trade and investment treaties that they may conclude. They are encouraged to insert, in future treaties, a provision explicitly referring to their human rights obligations, and to ensure that mechanisms for the settlement of investor-State disputes take human rights into account in the interpretation of investment treaties or of investment chapters in trade agreements.

2. Obligation to protect

14. The obligation to protect means that States parties must prevent effectively infringements of economic, social and cultural rights in the context of business activities. This requires that States parties adopt legislative, administrative, educational and other appropriate measures, to ensure effective protection against Covenant rights violations linked to business activities, and that they provide victims of such corporate abuses with access to effective remedies.

15. States parties should consider imposing criminal or administrative sanctions and penalties, as appropriate, where business activities result in abuses of Covenant rights or where a failure to act with due diligence to mitigate risks allows such infringements to occur; enable civil suits and other effective means of claiming reparations by victims of rights violations against corporate perpetrators, in particular by lowering the costs to victims and by allowing forms of collective redress; revoke business licences and subsidies, if and to the extent necessary, from offenders; and revise relevant tax codes, public procurement contracts,[41] export credits and other forms of State support, privileges and advantages in case of human rights violations, thus aligning business incentives with human rights responsibilities. States parties should regularly review the adequacy of laws and identify and address compliance and information gaps, as well as emerging problems.[42]

16. The obligation to protect entails a positive duty to adopt a legal framework requiring business entities to exercise human rights due diligence in order to identify, prevent and mitigate the risks of violations of Covenant rights, to avoid such rights being abused, and to account for the negative impacts caused or contributed to by their decisions and operations and those of entities they control on the enjoyment of Covenant rights.[43] States should adopt measures such as imposing due diligence requirements to prevent abuses of Covenant rights in a business entity's supply chain and by subcontractors, suppliers, franchisees, or other business partners.

17. States parties should ensure that, where appropriate, the impacts of business activities on indigenous peoples specifically (in particular, actual or potential adverse impacts on indigenous peoples' rights to land, resources, territories, cultural heritage, traditional knowledge and culture) are incorporated into human rights impact assessments.[44] In exercising human rights due diligence, businesses should consult and cooperate in good faith with the indigenous peoples concerned through indigenous peoples' own representative institutions in order to obtain their free, prior and informed consent before

[40] Inter-American Court of Human Rights, *Sawhoyamaxa Indigenous Community v. Paraguay* (judgment of 29 March 2006, Series C No. 146), para. 140.

[41] See the conclusions attached to the resolution concerning decent work in global supply chains, adopted by the General Conference of the International Labour Organization at its 105th session, para. 16 (c).

[42] Guiding Principles on Business and Human Rights, principle 17 (c). See A/HRC/32/19.Add.1, para. 5, for the model terms of reference for a review of the coverage and effectiveness of laws relevant to business-related human rights abuses; and A/HRC/32/19, annex, for the guidance to improve corporate accountability and access to judicial remedy for business-related human rights abuse. See also Human Rights Council resolution 32/10.

[43] Guiding Principles on Business and Human Rights, principles 15 and 17.

[44] See A/68/279, para. 31; A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples, p. 15; A/HRC/33/42; and A/66/288, paras. 92-102.

the commencement of activities.[45] Such consultations should allow for identification of the potentially negative impact of the activities and of the measures to mitigate and compensate for such impact. They should also lead to design mechanisms for sharing the benefits derived from the activities, since companies are bound by their duty to respect indigenous rights to establish mechanisms that ensure that indigenous peoples share in the benefits generated by the activities developed on their traditional territories.[46]

18. States would violate their duty to protect Covenant rights, for instance, by failing to prevent or to counter conduct by businesses that leads to such rights being abused, or that has the foreseeable effect of leading to such rights being abused, for instance through lowering the criteria for approving new medicines,[47] by failing to incorporate a requirement linked to reasonable accommodation of persons with disabilities in public contracts, by granting exploration and exploitation permits for natural resources without giving due consideration to the potential adverse impacts of such activities on the individual and on communities' enjoyment of Covenant rights, by exempting certain projects or certain geographical areas from the application of laws that protect Covenant rights, or by failing to regulate the real estate market and the financial actors operating on that market so as to ensure access to affordable and adequate housing for all.[48] Such violations are facilitated where insufficient safeguards exist to address corruption of public officials or private-to-private corruption, or where, as a result of corruption of judges, human rights abuses are left unremedied.

19. The obligation to protect sometimes necessitates direct regulation and intervention. States parties should consider measures such as restricting marketing and advertising of certain goods and services in order to protect public health,[49] such as of tobacco products, in line with the Framework Convention on Tobacco Control,[50] and of breast-milk substitutes, in accordance with the 1981 International Code of Marketing of Breast-milk Substitutes and subsequent resolutions of the World Health Assembly; [51] combating gender role stereotyping and discrimination;[52] exercising rent control in the private housing market as required for the protection of everyone's right to adequate housing; [53] establishing a minimum wage consistent with a living wage and a fair remuneration;[54] regulating other business activities concerning the Covenant rights to education, employment and reproductive health, in order to combat gender discrimination effectively;[55] and gradually eliminating informal or "non-standard" (i.e. precarious) forms of employment, which often result in denying the workers concerned the protection of labour laws and social security.

20. Corruption constitutes one of the major obstacles to the effective promotion and protection of human rights, particularly as regards the activities of businesses.[56] It also undermines a State's ability to mobilize resources for the delivery of services essential for the realization of economic, social and cultural rights. It leads to discriminatory access to public services in favour of those able to influence authorities, including by offering bribes

[45] A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples, p. 16; and the United Nations Declaration on the Rights of Indigenous Peoples, art. 19.

[46] See A/66/288, para. 102.

[47] See A/63/263 and A/HRC/11/12.

[48] See A/HRC/34/51, paras. 62-66.

[49] See the Convention on the Rights of the Child; Committee on the Rights of the Child, general comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, paras. 14, 19, 20, 56 and 57; World Health Organization, *Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children* (2010); and World Health Organization, *A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children* (2012).

[50] Of the World Health Organization.

[51] See A/HRC/19/59, para. 16.

[52] See the Convention on the Elimination of All Forms of Discrimination against Women, art. 5.

[53] See the Committee's general comment No. 4, para. 8 (c).

[54] See the Committee's general comment No. 23, paras. 10-16 and 19-24.

[55] See the Convention on the Elimination of All Forms of Discrimination against Women, general recommendation No. 28 (2010) on the core obligations of States parties under article 2 of the Convention, para. 13.

[56] See Human Rights Council resolution 23/9 and General Assembly resolution A/RES/69/199.

or resorting to political pressure. Therefore, whistle-blowers should be protected,[57] and specialized mechanisms against corruption should be established, their independence should be guaranteed and they should be sufficiently well resourced.

21. The increased role and impact of private actors in traditionally public sectors, such as the health or education sector, pose new challenges for States parties in complying with their obligations under the Covenant. Privatization is not per se prohibited by the Covenant, even in areas such as the provision of water or electricity, education or health care where the role of the public sector has traditionally been strong. Private providers should, however, be subject to strict regulations that impose on them so-called "public service obligations": in the provision of water or electricity, this may include requirements concerning universality of coverage and continuity of service, pricing policies, quality requirements, and user participation.[58] Similarly, private health-care providers should be prohibited from denying access to affordable and adequate services, treatments or information. For instance, where health practitioners are allowed to invoke conscientious objection to refuse to provide certain sexual and reproductive health services, including abortion, they should refer the women or girls seeking such services to another practitioner within reasonable geographical reach who is willing to provide such services.[59]

22. The Committee is particularly concerned that goods and services that are necessary for the enjoyment of basic economic, social and cultural rights may become less affordable as a result of such goods and services being provided by the private sector, or that quality may be sacrificed for the sake of increasing profits. The provision by private actors of goods and services essential for the enjoyment of Covenant rights should not lead the enjoyment of Covenant rights to be made conditional on the ability to pay, which would create new forms of socioeconomic segregation. The privatization of education illustrates such a risk, where private educational institutions lead to high-quality education being made a privilege affordable only to the wealthiest segments of society, or where such institutions are insufficiently regulated, providing a form of education that does not meet minimum educational standards while giving a convenient excuse for States parties not to discharge their own duties towards the fulfilment of the right to education.[60] Nor should privatization result in excluding certain groups that historically have been marginalized, such as persons with disabilities. States thus retain at all times the obligation to regulate private actors to ensure that the services they provide are accessible to all, are adequate, are regularly assessed in order to meet the changing needs of the public and are adapted to those needs. Since privatization of the delivery of goods or services essential to the enjoyment of Covenant rights may result in a lack of accountability, measures should be adopted to ensure the right of individuals to participate in assessing the adequacy of the provision of such goods and services.

3. Obligation to fulfil

23. The obligation to fulfil requires States parties to take necessary steps, to the maximum of their available resources, to facilitate and promote the enjoyment of Covenant rights, and, in certain cases, to directly provide goods and services essential to such enjoyment. Discharging such duties may require the mobilization of resources by the State,

[57] See the conclusions attached to the resolution concerning decent work in global supply chains, adopted by the General Conference of the International Labour Organization at its 105th session, para. 16 (g).

[58] See, for example, Human Rights Council resolution 15/9.

[59] See the Committee's general comment No. 22 (2016) on the right to sexual and reproductive health, paras. 14, 42, 43 and 60.

[60] See, for example, E/C.12/CHL/CO/4, para. 30; and A/69/402. Of course, important though it is, appropriate regulation of the providers of educational services should respect academic freedom and "the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions" (art. 13 (3) of the Covenant). As regards primary education, States parties must ensure not only that it is affordable, but that it is free, as required by arts. 13 (2) (a) and 14 of the Covenant.

including by enforcing progressive taxation schemes. It may require seeking business cooperation and support to implement the Covenant rights and comply with other human rights standards and principles.

24. This obligation also requires directing the efforts of business entities towards the fulfilment of Covenant rights. In designing a framework on intellectual property rights, for instance, that is consistent with the Universal Declaration of Human Rights and with the right to enjoy the benefits of scientific progress stipulated in article 15 of the Covenant, States parties should ensure that intellectual property rights do not lead to denial or restriction of everyone's access to essential medicines necessary for the enjoyment of the right to health,[61] or to productive resources such as seeds, access to which is crucial to the right to food and to farmers' rights.[62] States parties should also recognize and protect the right of indigenous peoples to control the intellectual property over their cultural heritage, traditional knowledge and traditional cultural expressions.[63] In supporting research and development for new products and services, States parties should aim at the fulfilment of Covenant rights, for instance by supporting the development of universally designed goods, services, equipment and facilities, to advance the inclusion of persons with disabilities.

C. Extraterritorial obligations

25. The past thirty years have witnessed a significant increase of activities of transnational corporations, growing investment and trade flows between countries, and the emergence of global supply chains. In addition, major development projects have increasingly involved private investments, often in the form of public-private partnerships between State agencies and foreign private investors. These developments give particular significance to the question of extraterritorial human rights obligations of States.

26. In its 2011 statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights, the Committee reiterated that States parties' obligations under the Covenant did not stop at their territorial borders. States parties were required to take the steps necessary to prevent human rights violations abroad by corporations domiciled in their territory and/or jurisdiction (whether they were incorporated under their laws, or had their statutory seat, central administration or principal place of business on the national territory), without infringing the sovereignty or diminishing the obligations of the host States under the Covenant.[64] The Committee has also addressed specific extraterritorial obligations of States parties concerning business activities in its previous general comments relating to the right to water,[65] the right to work,[66] the right to social security,[67] and the right to just and favourable conditions of work,[68] as well as in its examination of States' periodic reports.

27. Such extraterritorial obligations of States under the Covenant follow from the fact that the obligations of the Covenant are expressed without any restriction linked to territory or jurisdiction. Although article 14 of the Covenant does refer to compulsory primary education having to be provided by a State "in its metropolitan territory or other territories under its jurisdiction", such a reference is absent from the other provisions of the Covenant. Moreover, article 2 (1) refers to international assistance and cooperation as a means of fulfilling economic, social and cultural rights. It would be contradictory to such a reference to allow a State to remain passive where an actor domiciled in its territory and/or under its

[61] See also A/HRC/23/42, para. 3 (recognizing the obligation to provide essential medicines as an immediate obligation for all States parties).

[62] See A/64/170, paras. 5 and 7; and the International Treaty on Plant Genetic Resources for Food and Agriculture (resolution 3/2001, adopted on 3 November 2001, FAO Conference, thirty-first session), art. 9.

[63] See the United Nations Declaration on the Rights of Indigenous Peoples, arts. 24 and 31; and the Committee's general comment No. 21, para. 37.

[64] See E/C.12/2011/1, paras. 5 and 6.

[65] See the Committee's general comment No. 15, paras. 31 and 33.

[66] See the Committee's general comment No. 18, para. 52.

[67] See the Committee's general comment No. 19, para. 54.

[68] See the Committee's general comment No. 23, para. 70.

jurisdiction, and thus under its control or authority, harmed the rights of others in other States, or where conduct by such an actor may lead to foreseeable harm being caused. Indeed, the Members of the United Nations have pledged "to take joint and separate action in cooperation with the Organization" to achieve the purposes set forth in article 55 of the Charter, including "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".[69] This duty is expressed without any territorial limitation, and should be taken into account when addressing the scope of States' obligations under human rights treaties. Also in line with the Charter, the International Court of Justice has acknowledged the extraterritorial scope of core human rights treaties, focusing on their object and purpose, their legislative history and the lack of territorial limitation provisions in the text.[70] Customary international law also prohibits a State from allowing its territory to be used to cause damage on the territory of another State, a requirement that has gained particular relevance in international environmental law.[71] The Human Rights Council has confirmed that such prohibition extends to human rights law, when it endorsed the guiding principles on extreme poverty and human rights, in its resolution 21/11.[72]

28. Extraterritorial obligations arise when a State party may influence situations located outside its territory, consistent with the limits imposed by international law, by 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.[73] In that regard, the Committee also takes note of general comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, of the Committee on the Rights of the Child,[74] as well as of the positions adopted by other human rights treaty bodies.[75]

1. Extraterritorial obligation to respect

29. The extraterritorial obligation to respect requires States parties to refrain from interfering directly or indirectly with the enjoyment of the Covenant rights by persons outside their territories. As part of that obligation, States parties must ensure that they do

[69] Charter of the United Nations, Article 56.

[70] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports (2004)*, paras. 109-112.

[71] *Trail Smelter* case *(United States of America v. Canada), Reports of International Arbitral Awards*, vol. 3 (1941), p. 1965; International Court of Justice, *Corfu Channel* case *(United Kingdom of Great Britain and Northern Ireland v. Albania) (Merits), I.C.J. Reports*, vol. 4 (9 April 1949), para. 22; and International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports* (8 July 1996), para. 29. See also A/61/10, draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, adopted at the fifty-eighth session of the International Law Commission, in 2006 (in particular principle 4, stipulating that "each State should take all necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities located within its territory or otherwise under its jurisdiction or control"). The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, adopted by a range of academics, research institutes and human rights non-governmental organizations in 2011, provide a restatement of the current state of international human rights law on this topic, contributing to its progressive development.

[72] Resolution 21/11 endorsed the final draft of the guiding principles on extreme poverty and human rights (see A/HRC/21/39), which provide, in para. 92, that "as part of international cooperation and assistance, States have an obligation to respect and protect the enjoyment of human rights, which involves avoiding conduct that would create a foreseeable risk of impairing the enjoyment of human rights by persons living in poverty beyond their borders, and conducting assessments of the extraterritorial impacts of laws, policies and practices".

[73] See the Committee's general comment No. 12, para. 36; general comment No. 14, para. 39; or general comment No. 15, paras. 31-33; the Committee's general comment No. 19, para. 54; general comment No. 20, para. 14; and general comment No. 23, paras. 69 and 70; and E/C.12/2011/1, para. 5.

[74] See paras. 43 and 44.

[75] See, for example, CERD/C/NOR/CO/19-20, para. 17; and CCPR/C/DEU/CO/6, para. 16.

not obstruct another State from complying with its obligations under the Covenant.[76] This duty is particularly relevant to the negotiation and conclusion of trade and investment agreements or of financial and tax treaties,[77] as well as to judicial cooperation.

2. Extraterritorial obligation to protect

30. The extraterritorial obligation to protect requires States parties to take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control, especially in cases where the remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective.

31. This obligation extends to any business entities over which States parties may exercise control, in accordance with the Charter of the United Nations and applicable international law.[78] Consistent with the admissible scope of jurisdiction under general international law, States may seek to regulate corporations that are domiciled in their territory and/or jurisdiction: this includes corporations incorporated under their laws, or which have their statutory seat, central administration or principal place of business on their national territory.[79] States parties may also utilize incentives short of the direct imposition of obligations, such as provisions in public contracts favouring business entities that have put in place robust and effective human rights due diligence mechanisms, in order to contribute to the protection of economic, social and cultural rights at home and abroad.

32. Whereas States parties would not normally be held directly internationally responsible for a violation of economic, social and cultural rights caused by a private entity's conduct (except in the three scenarios recalled in para. 11 of the present general comment), a State party would be in breach of its obligations under the Covenant where the violation reveals a failure by the State to take reasonable measures that could have prevented the occurrence of the event. The responsibility of the State can be engaged in such circumstances even if other causes have also contributed to the occurrence of the violation,[80] and even if the State had not foreseen that a violation would occur, provided such a violation was reasonably foreseeable.[81] For instance, considering the well-documented risks associated with the extractive industry, particular due diligence is required with respect to mining-related projects and oil development projects.[82]

33. In discharging their duty to protect, States parties should also require corporations to deploy their best efforts to ensure that entities whose conduct those corporations may influence, such as subsidiaries (including all business entities in which they have invested, whether registered under the State party's laws or under the laws of another State) or business partners (including suppliers, franchisees and subcontractors), respect Covenant rights. Corporations domiciled in the territory and/or jurisdiction of States parties should be required to act with due diligence to identify, prevent and address abuses to Covenant rights

[76] See the Committee's general comment No. 8 (1997) on the relationship between economic sanctions and respect for economic, social and cultural rights; and articles on responsibility of States for internationally wrongful acts, art. 50 (countermeasures by a State or group of States in response to an internationally wrongful act by another State may not affect "obligations for the protection of fundamental human rights").

[77] See A/HRC/19/59/Add.5.

[78] See, for example, the Committee's general comment No. 14, para. 39; or general comment No. 15, paras. 31-33. The Maastricht Principles were the subject of explanatory commentaries; see Olivier De Schutter and others, "Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights", *Human Rights Quarterly*, vol. 34 (2012), pp. 1084-1171.

[79] See recommendation CM/Rec(2016)3 of the Committee of Ministers of the Council of Europe, appendix, para. 13.

[80] International Court of Justice, *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (judgment of 26 February 2007), *I.C.J. Reports*, paras. 430 and 461.

[81] Articles on responsibility of States for internationally wrongful acts, art. 23, commentary.

[82] See A/HRC/8/5/Add.2.

by such subsidiaries and business partners, wherever they may be located.[83] The Committee underlines that, although the imposition of such due diligence obligations does have impacts on situations located outside these States' national territories since potential violations of Covenant rights in global supply chains or in multinational groups of companies should be prevented or addressed, this does not imply the exercise of extraterritorial jurisdiction by the States concerned. Appropriate monitoring and accountability procedures must be put in place to ensure effective prevention and enforcement. Such procedures may include imposing a duty on companies to report on their policies and procedures to ensure respect for human rights, and providing effective means of accountability and redress for abuses of Covenant rights.

34. In transnational cases, effective accountability and access to remedy requires international cooperation. The Committee refers in this regard to the recommendation included in the report on accountability and access to remedy for victims of business-related human rights abuse, prepared by the Office of the United Nations High Commissioner for Human Rights at the request of the Human Rights Council,[84] that States should "take steps, using the guidance" (annexed to that report) "to improve the effectiveness of cross-border cooperation between State agencies and judicial bodies, with respect to both public and private law enforcement of domestic legal regimes".[85] The use of direct communication between law enforcement agencies for mutual assistance should be encouraged in order to provide for swifter action, particularly in the prosecution of criminal offences.

35. Improved international cooperation should reduce the risks of positive and negative conflicts of jurisdiction, which may result in legal uncertainty and in forum-shopping by litigants, or in an inability for victims to obtain redress. The Committee welcomes, in this regard, any efforts at the adoption of international instruments that could strengthen the duty of States to cooperate in order to improve accountability and access to remedies for victims of violations of Covenant rights in transnational cases. Inspiration can be found in instruments such as the International Labour Organization (ILO) Maritime Labour Convention, 2006, in force since 2013, which establishes a system of harmonized national legislation and inspections both by flag States and by port States upon complaints of seafarers on board ship when the ship comes into a foreign port; or in the ILO Domestic Workers Convention, 2011 (No. 189) and the ILO Domestic Workers Recommendation, 2011 (No. 201).

3. Extraterritorial obligation to fulfil

36. Article 2 (1) of the Covenant sets out the expectation that States parties will take collective action, including through international cooperation, in order to help fulfil the economic, social and cultural rights of persons outside of their national territories.[86]

37. Consistent with article 28 of the Universal Declaration of Human Rights,[87] this obligation to fulfil requires States parties to contribute to creating an international environment that enables the fulfilment of the Covenant rights. To that end, States parties must take the necessary steps in their legislation and policies, including diplomatic and foreign relations measures, to promote and help create such an environment. States parties should also encourage business actors whose conduct they are in a position to influence to ensure that they do not undermine the efforts of the States in which they operate to fully realize the Covenant rights — for instance by resorting to tax evasion or tax avoidance strategies in the countries concerned. To combat abusive tax practices by transnational

[83] Guiding Principles on Business and Human Rights, principle 13.

[84] See the Council's resolution 26/22.

[85] See A/HRC/32/19, paras. 24-28; and the annex to that report, for the guidance to improve corporate accountability and access to judicial remedy for business-related human rights abuse, paras. 9.1-9.7 and 10.1, and paras. 17.1-17.5 (for public law enforcement) and 18.1 and 18.2 (for private law enforcement).

[86] Olivier De Schutter and others, "Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights".

[87] See General Assembly resolution 217 (III) A.

corporations, States should combat transfer pricing practices and deepen international tax cooperation, and explore the possibility to tax multinational groups of companies as single firms, with developed countries imposing a minimum corporate income tax rate during a period of transition. Lowering the rates of corporate tax solely with a view to attracting investors encourages a race to the bottom that ultimately undermines the ability of all States to mobilize resources domestically to realize Covenant rights. As such, this practice is inconsistent with the duties of the States parties to the Covenant. Providing excessive protection for bank secrecy and permissive rules on corporate tax may affect the ability of States where economic activities are taking place to meet their obligation to mobilize the maximum available resources for the implementation of economic, social and cultural rights.[88]

IV. Remedies

38. In discharging their duty to protect, States parties should both create appropriate regulatory and policy frameworks and enforce such frameworks. Therefore, effective monitoring, investigation and accountability mechanisms must be put in place to ensure accountability and access to remedies, preferably judicial remedies, for those whose Covenant rights have been violated in the context of business activities. States parties should inform individuals and groups of their rights and the remedies accessible to them pertaining to the Covenant rights in the context of business activities, ensuring specifically that information and guidance, including human rights impact assessments, are accessible to indigenous peoples.[89] They also should provide businesses with relevant information, training and support, ensuring that they are made aware of the duties of the State under the Covenant.[90]

A. General principles

39. States parties must provide appropriate means of redress to aggrieved individuals or groups and ensure corporate accountability.[91] This should preferably take the form of ensuring access to independent and impartial judicial bodies: the Committee has underlined that "other means [of ensuring accountability] used could be rendered ineffective if they are not reinforced or complemented by judicial remedies".[92]

40. The guidelines on remedies for victims of gross violations of international human rights law and serious violations of international humanitarian law[93] provide useful indications as to the obligations that follow for States from the general obligation to provide access to effective remedies. In particular, States should: take all measures necessary to prevent rights violations; where such preventative measures fail, thoroughly investigate violations and take appropriate actions against alleged offenders; provide victims with effective access to justice, irrespective of who may ultimately be the bearer of responsibility for the violation; and provide effective remedies to victims, including reparation.

41. It is imperative for the full realization of the Covenant rights that remedies be available, effective and expeditious. This requires that victims seeking redress must have prompt access to an independent public authority, which must have the power to determine

[88] See E/C.12/GBR/CO/6, paras. 16 and 17; and CEDAW/C/CHE/CO/4-5, para. 41.

[89] See the United Nations Declaration on the Rights of Indigenous Peoples, art. 14; A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples, pp. 30 and 31; and A/68/279, para. 56 (d).

[90] Guiding Principles on Business and Human Rights, principle 8.

[91] See the Committee's general comment No. 9 (1998) on the domestic application of the Covenant, para. 2.

[92] Ibid., para. 3. See also *I.D.G. v. Spain*, paras. 14 and 15.

[93] See General Assembly resolution 60/147, for the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law), art. 3 (a)-(d).

whether a violation has taken place and to order cessation of the violation and reparation to redress the harm done. Reparation can be in the form of restitution, compensation, rehabilitation, satisfaction, and guarantee of non-repetition,[94] and must take the views of those affected into account. To ensure non-repetition, an effective remedy may require improvements to legislation and policies that have proven ineffective in preventing the abuses.

42. Because of how corporate groups are organized, business entities routinely escape liability by hiding behind the so-called corporate veil, as the parent company seeks to avoid liability for the acts of the subsidiary even when it would have been in a position to influence its conduct. Other barriers to effective access to remedies for victims of human rights violations by business entities include the difficulty of accessing information and evidence to substantiate claims, much of which is often in the hands of the corporate defendant; the unavailability of collective redress mechanisms where violations are widespread and diffuse; and the lack of legal aid and other funding arrangements to make claims financially viable.

43. Victims of transnational corporate abuses face specific obstacles in accessing effective remedies. In addition to the difficulty of proving the damage or establishing the causal link between the conduct of the defendant corporation located in one jurisdiction and the resulting violation in another, transnational litigation is often prohibitively expensive and time-consuming, and in the absence of strong mechanisms for mutual legal assistance, the collection of evidence and the execution in one State of judgments delivered in another State present specific challenges. In some jurisdictions, the *forum non conveniens* doctrine, according to which a court may decline to exercise jurisdiction if another forum is available to victims, may in effect constitute a barrier to the ability of victims residing in one State to seek redress before the courts of the State where the defendant business is domiciled. Practice shows that claims are often dismissed under this doctrine in favour of another jurisdiction without necessarily ensuring that victims have access to effective remedies in the alternative jurisdiction.

44. States parties have the duty to take necessary steps to address these challenges in order to prevent a denial of justice and ensure the right to effective remedy and reparation. This requires States parties to remove substantive, procedural and practical barriers to remedies, including by establishing parent company or group liability regimes, providing legal aid and other funding schemes to claimants, enabling human rights-related class actions and public interest litigation, facilitating access to relevant information and the collection of evidence abroad, including witness testimony, and allowing such evidence to be presented in judicial proceedings. The extent to which an effective remedy is available and realistic in the alternative jurisdiction should be an overriding consideration in judicial decisions relying on *forum non conveniens* considerations.[95] The introduction by corporations of actions to discourage individuals or groups from exercising remedies, for instance by alleging damage to a corporation's reputation, should not be abused to create a chilling effect on the legitimate exercise of such remedies.

45. States parties should facilitate access to relevant information through mandatory disclosure laws and by introducing procedural rules allowing victims to obtain the disclosure of evidence held by the defendant. Shifting the burden of proof may be justified where the facts and events relevant for resolving a claim lie wholly or in part within the exclusive knowledge of the corporate defendant.[96] The conditions under which the protection of trade secrets and other grounds for refusing disclosure may be invoked should be defined restrictively, without jeopardizing the right of all parties to a fair trial. Furthermore, States parties and their judicial and enforcement agencies have a duty to

[94] Ibid., part IX, "Reparation for harm suffered".

[95] See also recommendation CM/Rec(2016)3 of the Committee of Ministers of the Council of Europe, appendix, para. 34.

[96] As already noted by the Committee in the specific context of actions alleging discrimination: see the Committee's general comment No. 20, para. 40. See also A/HRC/32/19, annex, para. 12.5 (in relation to civil cases) and para. 1.7 (in relation to criminal and quasi-criminal cases).

cooperate with one another in order to promote information-sharing and transparency and prevent the denial of justice.

46. States parties should ensure that indigenous peoples have access to effective remedies, both judicial and non-judicial, for all infringements of their individual and collective rights. These remedies should be sensitive to indigenous cultures and accessible to indigenous peoples.[97]

47. The Committee recalls that all government branches and agencies of States parties, including the judiciary and law enforcement agencies, are bound by the obligations under the Covenant. States parties should ensure that the judiciary, in particular judges and lawyers, are well informed of the obligations under the Covenant linked to business activities, and that they can exercise their functions in complete independence.

48. Finally, the Committee draws the attention of States parties to the challenges facing human rights defenders.[98] The Committee has regularly come across accounts of threats and attacks aimed at those seeking to protect their own or others' Covenant rights, particularly in the context of extractive and development projects.[99] In addition, trade union leaders, leaders of peasant movements, indigenous leaders and anti-corruption activists are often subject to the risk of harassment. States parties should take all measures necessary to protect human rights advocates and their work. They should refrain from resorting to criminal prosecution to hinder their work, or from otherwise obstructing their work.

B. Types of remedies

49. Ensuring corporate accountability for violations of Covenant rights requires reliance on various tools. The most serious violations of the Covenant should give rise to criminal liability of corporations and/or of the individuals responsible. Prosecuting authorities may have to be made aware of their role in upholding Covenant rights. Victims of violations of Covenant rights should have access to reparations where Covenant rights are at stake and whether or not criminal liability is engaged.[100]

50. States parties should also consider the use of administrative sanctions to discourage conduct by business entities that leads, or may lead, to violations of the rights under the Covenant. For instance, in their public procurement regimes, States could deny the awarding of public contracts to companies that have not provided information on the social or environmental impacts of their activities or that have not put in place measures to ensure that they act with due diligence to avoid or mitigate any negative impacts on the rights under the Covenant. Access to export credit and other forms of State support may also be denied in such circumstances, and in transnational contexts, investment treaties may deny protection to foreign investors of the other party that have engaged in conduct leading to a violation of Covenant rights.[101]

[97] See A/68/279, paras. 50-53; and A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples, p. 81.

[98] See E/C.12/2016/2 for the Committee's statement on human rights defenders and economic, social and cultural rights. See also Human Rights Council resolution 31/32; and General Assembly resolution 53/144, for the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.

[99] See, for example, E/C.12/VNM/CO/2-4, para. 11; E/C.12/1/Add.44, para. 19; E/C.12/IND/CO/5, paras. 12 and 50; E/C.12/PHL/CO/4, para. 15; E/C.12/COD/CO/4, para. 12; E/C.12/LKA/CO/2-4, para. 10; and E/C.12/IDN/CO/1, para. 28.

[100] See A/HRC/32/19, annex, for the guidance to improve corporate accountability and access to judicial remedy for business-related human rights abuse (see, in particular, policy objectives 4-8 of the guidance), as well as the Corporate Crimes Principles, developed in October 2016 by the Independent Commission of Experts established by the International Corporate Accountability Roundtable and Amnesty International.

[101] See, for example, International Centre for Settlement of Investment Disputes case No. ARB/07/26, *Urbaser S.A. and others v. Argentina* (award of 8 December 2016), paras. 1194 and 1195.

1. Judicial remedies

51. Violations of Covenant rights will often be remedied by an individual claim against the State, whether on the basis of the Covenant itself or on the basis of domestic constitutional or legislative provisions that incorporate the guarantees of the Covenant. However, where the violation is directly attributable to a business entity, victims should be able to sue such an entity either directly on the basis of the Covenant in jurisdictions which consider that the Covenant imposes self-executing obligations on private actors, or on the basis of domestic legislation incorporating the Covenant in the national legal order. In this regard, civil remedies play an important role in ensuring access to justice for victims of violations of Covenant rights.

52. Effective access to justice for indigenous peoples may require States parties to recognize the customary laws, traditions and practices of indigenous peoples and customary ownership over their lands and natural resources in judicial proceedings.[102] States parties should also ensure the use of indigenous languages and/or interpreters in courts and the availability of legal services and information on remedies in indigenous languages,[103] as well as providing training to court officials on indigenous history, legal traditions and customs.

2. Non-judicial remedies

53. While they generally should not be seen as a substitute for judicial mechanisms (which often remain indispensable for effective protection against certain violations of Covenant rights), non-judicial remedies may contribute to providing effective remedy to victims whose Covenant rights have been violated by business actors and ensuring accountability for such violations. These alternative mechanisms should be adequately coordinated with available judicial mechanisms, both in relation to the sanction and to the compensation for victims.

54. States parties should make use of a wide range of administrative and quasi-judicial mechanisms, many of which already regulate and adjudicate aspects of business activity in many States parties, such as labour inspectorates and tribunals, consumer and environmental protection agencies and financial supervision authorities. States parties should explore options for extending the mandate of these bodies or creating new ones, with the capacity to receive and resolve complaints of alleged corporate abuse of certain Covenant rights, to investigate allegations, to impose sanctions and to provide for and enforce reparations for the victims. National human rights institutions should be encouraged to establish appropriate structures within their organizations in order to monitor States' obligations with regard to business and human rights, and they could be empowered to receive claims from victims of corporate conduct.

55. State-based non-judicial mechanisms should provide effective protection for victims' rights. Where such alternative non-judicial mechanisms are established, they should also possess a number of characteristics ensuring that they are credible and can contribute effectively to the prevention of and reparation for violations;[104] their decisions should be enforceable, and such mechanisms should be accessible to all.

56. Non-judicial mechanisms for indigenous victims should be developed with the indigenous peoples concerned through their own representative institutions. As with judicial remedies, States parties should address barriers to indigenous peoples accessing the mechanism, including language barriers.[105]

---

[102] See A/68/279, para. 34; and Committee on the Elimination of Racial Discrimination, general recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, para. 5 (e).

[103] A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples, p. 47; and Committee on the Elimination of Racial Discrimination, general recommendation No. 31, para. 30.

[104] See Guiding Principles on Business and Human Rights, principle 31.

[105] See A/68/279, para. 36.

57. Furthermore, non-judicial remedies should also be available in transnational settings. Examples include access by victims located outside the State's territory to that State's human rights institutions or ombudspersons as well as to complaints mechanisms established under international organizations, such as the national contact points operating under the OECD Guidelines for Multinational Enterprises.

V. Implementation

58. Ensuring that business activities are pursued in line with the requirements of the Covenant requires an ongoing effort from States parties. To support this, the national action plans or strategies that States parties are expected to adopt to ensure full realization of the Covenant rights should specifically address the question of the role of business entities in the progressive realization of Covenant rights.

59. Following the adoption of the Guiding Principles on Business and Human Rights, many States or regional organizations have adopted action plans on business and human rights.[106] This is a welcome development, particularly if such action plans set specific and concrete targets, allocate responsibilities across actors, and define the time frame and necessary means for their adoption. Action plans on business and human rights should incorporate human rights principles, including effective and meaningful participation, non-discrimination and gender equality, and accountability and transparency. Progress in implementing such action plans should be monitored, and such plans should place equal emphasis on all categories of human rights, including economic, social and cultural rights. As regards the requirement of participation in the design of such plans, the Committee recalls the fundamental role that national human rights institutions and civil society organizations can and should play in achieving the full realization of Covenant rights in the context of business activities.

[106] See recommendation CM/Rec(2016)3 of the Committee of Ministers of the Council of Europe, appendix, paras. 10-12.

Annex 90

UNITED NATIONS **E**

Economic and Social Council

Distr.
GENERAL

E/C.12/2002/11
20 January 2003

Original: ENGLISH

COMMITTEE ON ECONOMIC, SOCIAL
AND CULTURAL RIGHTS
Twenty-ninth session
Geneva, 11-29 November 2002
Agenda item 3

SUBSTANTIVE ISSUES ARISING IN THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

General Comment No. 15 (2002)

The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)

I. INTRODUCTION

1. Water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights. The Committee has been confronted continually with the widespread denial of the right to water in developing as well as developed countries. Over one billion persons lack access to a basic water supply, while several billion do not have access to adequate sanitation, which is the primary cause of water contamination and diseases linked to water.[1] The

[1] In 2000, the World Health Organization estimated that 1.1 billion persons did not have access to an improved water supply (80 per cent of them rural dwellers) able to provide at least 20 litres of safe water per person a day; 2.4 billion persons were estimated to be without sanitation. (See WHO, *The Global Water Supply and Sanitation Assessment 2000*, Geneva, 2000, p.1.) Further, 2.3 billion persons each year suffer from diseases linked to water: see United Nations, Commission on Sustainable Development, *Comprehensive Assessment of the Freshwater Resources of the World*, New York, 1997, p. 39.

continuing contamination, depletion and unequal distribution of water is exacerbating existing poverty. States parties have to adopt effective measures to realize, without discrimination, the right to water, as set out in this general comment.

The legal bases of the right to water

2. The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.

3. Article 11, paragraph 1, of the Covenant specifies a number of rights emanating from, and indispensable for, the realization of the right to an adequate standard of living "including adequate food, clothing and housing". The use of the word "including" indicates that this catalogue of rights was not intended to be exhaustive. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival. Moreover, the Committee has previously recognized that water is a human right contained in article 11, paragraph 1, (see General Comment No. 6 (1995)).[2] The right to water is also inextricably related to the right to the highest attainable standard of health (art. 12, para. 1)[3] and the rights to adequate housing and adequate food (art. 11, para. 1).[4] The right should also be seen in conjunction with other rights enshrined in the International Bill of Human Rights, foremost amongst them the right to life and human dignity.

4. The right to water has been recognized in a wide range of international documents, including treaties, declarations and other standards.[5] For instance, Article

---

[2] See paras. 5 and 32 of the Committee's General Comment No. 6 (1995) on the economic, social and cultural rights of older persons.

[3] See General Comment No. 14 (2000) on the right to the highest attainable standard of health, paragraphs 11, 12 (*a*), (*b*) and (*d*), 15, 34, 36, 40, 43 and 51.

[4] See para. 8 (*b*) of General Comment No. 4 (1991). See also the report by Commission on Human Rights' Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Mr. Miloon Kothari (E.CN.4/2002/59), submitted in accordance with Commission resolution 2001/28 of 20 April 2001. In relation to the right to adequate food, see the report by the Special Rapporteur of the Commission on the right to food, Mr. Jean Ziegler (E/CN.4/2002/58), submitted in accordance with Commission resolution 2001/25 of 20 April 2001.

[5] See art. 14, para. 2 (*h*), Convention on the Elimination of All Forms of Discrimination Against Women; art. 24, para. 2 (*c*), Convention on the Rights of the Child; arts. 20, 26, 29 and 46 of the Geneva Convention relative to the Treatment of Prisoners of War, of 1949; arts. 85, 89 and 127 of the Geneva Convention relative to the Treatment of Civilian Persons in Time of War, of 1949; arts. 54 and 55 of Additional Protocol I thereto of 1977; arts. 5 and 14 Additional Protocol II of 1977; preamble, Mar Del

14, paragraph 2, of the Convention on the Elimination of All Forms of Discrimination Against Women stipulates that States parties shall ensure to women the right to "enjoy adequate living conditions, particularly in relation to […] water supply". Article 24, paragraph 2, of the Convention on the Rights of the Child requires States parties to combat disease and malnutrition "through the provision of adequate nutritious foods and clean drinking-water".

5. The right to water has been consistently addressed by the Committee during its consideration of States parties' reports**,** in accordance with its revised general guidelines regarding the form and content of reports to be submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, and its general comments.

6. Water is required for a range of different purposes, besides personal and domestic uses, to realize many of the Covenant rights. For instance, water is necessary to produce food (right to adequate food) and ensure environmental hygiene (right to health). Water is essential for securing livelihoods (right to gain a living by work) and enjoying certain cultural practices (right to take part in cultural life). Nevertheless, priority in the allocation of water must be given to the right to water for personal and domestic uses. Priority should also be given to the water resources required to prevent starvation and disease, as well as water required to meet the core obligations of each of the Covenant rights. [6]

Water and Covenant rights

7. The Committee notes the importance of ensuring sustainable access to water resources for agriculture to realize the right to adequate food (see General Comment

---

Plata Action Plan of the United Nations Water Conference; see para. 18.47 of Agenda 21, *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (A/CONF.151/26/Rev.1 (Vol. I and Vol. I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1) (United Nations publication, Sales No. E.93.I.8), vol I: *Resolutions adopted by the Conference*, resolution 1, annex II; Principle No. 3, The Dublin Statement on Water and Sustainable Development, International Conference on Water and the Environment (A/CONF.151/PC/112); Principle No. 2, Programme of Action, *Report of the United Nations International Conference on Population and Development, Cairo, 5-13 September 1994* (United Nations publication, Sales No. E.95.XIII.18), chap. I, resolution 1, annex; paras. 5 and 19, Recommendation (2001) 14 of the Committee of Ministers to Member States on the European Charter on Water Resources; resolution 2002/6 of the United Nations Sub-Commission on the Promotion and Protection of Human Rights on the promotion of the realization of the right to drinking water. See also the report on the relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation (E/CN.4/Sub.2/2002/10) submitted by the Special Rapporteur of the Sub-Commission on the right to drinking water supply and sanitation, Mr. El Hadji Guissé.

[6] See also World Summit on Sustainable Development, Plan of Implementation 2002, paragraph 25 (*c*).

No.12 (1999)).[7] Attention should be given to ensuring that disadvantaged and marginalized farmers, including women farmers, have equitable access to water and water management systems, including sustainable rain harvesting and irrigation technology. Taking note of the duty in article 1, paragraph 2, of the Covenant, which provides that a people may not "be deprived of its means of subsistence", States parties should ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples.[8]

8. Environmental hygiene, as an aspect of the right to health under article 12, paragraph 2 (*b*), of the Covenant, encompasses taking steps on a non-discriminatory basis to prevent threats to health from unsafe and toxic water conditions.[9] For example, States parties should ensure that natural water resources are protected from contamination by harmful substances and pathogenic microbes. Likewise, States parties should monitor and combat situations where aquatic eco-systems serve as a habitat for vectors of diseases wherever they pose a risk to human living environments.[10]

9. With a view to assisting States parties' implementation of the Covenant and the fulfilment of their reporting obligations, this General Comment focuses in Part II on the normative content of the right to water in articles 11, paragraph 1, and 12, on States parties' obligations (Part III), on violations (Part IV) and on implementation at the national level (Part V), while the obligations of actors other than States parties are addressed in Part VI.

II. NORMATIVE CONTENT OF THE RIGHT TO WATER

10. The right to water contains both freedoms and entitlements. The freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies. By contrast, the entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.

---

[7] This relates to both *availability* and to *accessibility* of the right to adequate food (see General Comment No. 12 (1999), paras. 12 and 13).

[8] See also the Statement of Understanding accompanying the United Nations Convention on the Law of Non-Navigational Uses of Watercourses (A/51/869 of 11 April 1997), which declared that, in determining vital human needs in the event of conflicts over the use of watercourses "special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation"..

[9] See also para. 15, General Comment No. 14.

[10] According to the WHO definition, vector-borne diseases include diseases transmitted by insects (malaria, filariasis, dengue, Japanese encephalitis and yellow fever), diseases for which aquatic snails serve as intermediate hosts (schistosomiasis) and zoonoses with vertebrates as reservoir hosts.

11. The elements of the right to water must be *adequate* for human dignity, life and health, in accordance with articles 11, paragraph 1, and 12. The adequacy of water should not be interpreted narrowly, by mere reference to volumetric quantities and technologies. Water should be treated as a social and cultural good, and not primarily as an economic good. The manner of the realization of the right to water must also be sustainable, ensuring that the right can be realized for present and future generations.[11]

12. While the adequacy of water required for the right to water may vary according to different conditions, the following factors apply in all circumstances:

(*a*) *Availability.* The water supply for each person must be sufficient and continuous for personal and domestic uses.[12] These uses ordinarily include drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene.[13] The quantity of water available for each person should correspond to World Health Organization (WHO) guidelines.[14] Some individuals and groups may also require additional water due to health, climate, and work conditions;

(*b*) *Quality.* The water required for each personal or domestic use must be safe, therefore free from micro-organisms, chemical substances and radiologi*c*al *hazards* that constitute a threat to a person's health.[15] Furthermore, water should be of an acceptable colour, odour and taste for each personal or domestic use.

---

[11] For a definition of sustainability, see the *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 1992*, Declaration on Environment and Development, principles 1, 8, 9, 10, 12 and 15; and Agenda 21, in particular principles 5.3, 7.27, 7.28, 7.35, 7.39, 7.41, 18.3, 18.8, 18.35, 18.40, 18.48, 18.50, 18.59 and 18.68.

[12] "Continuous" means that the regularity of the water supply is sufficient for personal and domestic uses.

[13] In this context, "drinking" means water for consumption through beverages and foodstuffs. "Personal sanitation" means disposal of human excreta. Water is necessary for personal sanitation where water-based means are adopted. "Food preparation" includes food hygiene and preparation of food stuffs, whether water is incorporated into, or comes into contact with, food. "Personal and household hygiene" means personal cleanliness and hygiene of the household environment.

[14] See J. Bartram and G. Howard, "Domestic water quantity, service level and health: what should be the goal for water and health sectors", WHO, 2002. See also P.H. Gleick, (1996) "Basic water requirements for human activities: meeting basic needs", *Water International,* 21, pp. 83-92.

[15] The Committee refers States parties to WHO, *Guidelines for drinking-water quality,* 2nd edition, vols. 1-3 (Geneva, 1993) that are "intended to be used as a basis for the development of national standards that, if properly implemented, will ensure the safety of drinking water supplies through the elimination of, or reduction to a

(*c*) *Accessibility.* Water and water facilities and services have to be accessible to *everyone* without discrimination, within the jurisdiction of the State party. Accessibility has four overlapping dimensions:

(i) *Physical accessibility*: water, and adequate water facilities and services, must be within safe physical reach for all sections of the population. Sufficient, safe and acceptable water must be accessible within, or in the immediate vicinity, of each household, educational institution and workplace.[16] All water facilities and services must be of sufficient quality, culturally appropriate and sensitive to gender, life-cycle and privacy requirements. Physical security should not be threatened during access to water facilities and services;

(ii) *Economic accessibility*: Water, and water facilities and services, must be affordable for all. The direct and indirect costs and charges associated with securing water must be affordable, and must not compromise or threaten the realization of other Covenant rights;

(iii) *Non-discrimination*: Water and water facilities and services must be accessible to all, including the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds; and

(iv) *Information accessibility*: accessibility includes the right to seek, receive and impart information concerning water issues.[17]

Special topics of broad application

Non-discrimination and equality

13. The obligation of States parties to guarantee that the right to water is enjoyed without discrimination (art. 2, para. 2), and equally between men and women (art. 3), pervades all of the Covenant obligations. The Covenant thus proscribes any discrimination on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to water. The Committee recalls paragraph 12 of General Comment No. 3 (1990), which states that even in times of severe resource

---

minimum concentration, of constituents of water that are known to be hazardous to health."

[16] See also General Comment No. 4 (1991), para. 8 (*b*), General Comment No. 13 (1999) para. 6 (*a*) and General Comment No. 14 (2000) paras. 8 (*a*) and (b). Household includes a permanent or semi-permanent dwelling, or a temporary halting site.

[17] See para. 48 of this General Comment.

constraints, the vulnerable members of society must be protected by the adoption of relatively low-cost targeted programmes.

14. States parties should take steps to remove de facto discrimination on prohibited grounds, where individuals and groups are deprived of the means or entitlements necessary for achieving the right to water. States parties should ensure that the allocation of water resources, and investments in water, facilitate access to water for all members of society. Inappropriate resource allocation can lead to discrimination that may not be overt. For example, investments should not disproportionately favour expensive water supply services and facilities that are often accessible only to a small, privileged fraction of the population, rather than investing in services and facilities that benefit a far larger part of the population.

15. With respect to the right to water, States parties have a special obligation to provide those who do not have sufficient means with the necessary water and water facilities and to prevent any discrimination on internationally prohibited grounds in the provision of water and water services.

16. Whereas the right to water applies to everyone, States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including women, children, minority groups, indigenous peoples, refugees, asylum seekers, internally displaced persons, migrant workers, prisoners and detainees. In particular, States parties should take steps to ensure that:

(*a*) Women are not excluded from decision-making processes concerning water resources and entitlements. The disproportionate burden women bear in the collection of water should be alleviated;

(*b*) Children are not prevented from enjoying their human rights due to the lack of adequate water in educational institutions and households or through the burden of collecting water. Provision of adequate water to educational institutions currently without adequate drinking water should be addressed as a matter of urgency;

(*c*) Rural and deprived urban areas have access to properly maintained water facilities. Access to traditional water sources in rural areas should be protected from unlawful encroachment and pollution. Deprived urban areas, including informal human settlements, and homeless persons, should have access to properly maintained water facilities. No household should be denied the right to water on the grounds of their housing or land status;

(*d*) Indigenous peoples' access to water resources on their ancestral lands is protected from encroachment and unlawful pollution. States should provide resources for indigenous peoples to design, deliver and control their access to water;

(*e*) Nomadic and traveller communities have access to adequate water at traditional and designated halting sites;

(*f*) Refugees, asylum-seekers, internally displaced persons and returnees have access to adequate water whether they stay in camps or in urban and rural areas.

Refugees and asylum-seekers should be granted the right to water on the same conditions as granted to nationals;

(*g*) Prisoners and detainees are provided with sufficient and safe water for their daily individual requirements, taking note of the requirements of international humanitarian law and the United Nations Standard Minimum Rules for the Treatment of Prisoners;[18]

(*h*) Groups facing difficulties with physical access to water, such as older persons, persons with disabilities, victims of natural disasters, persons living in disaster-prone areas, and those living in arid and semi-arid areas, or on small islands are provided with safe and sufficient water.

III. STATES PARTIES' OBLIGATIONS

General legal obligations

17. While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States parties various obligations which are of immediate effect. States parties have immediate obligations in relation to the right to water, such as the guarantee that the right will be exercised without discrimination of any kind (art. 2, para. 2) and the obligation to take steps (art. 2, para.1) towards the full realization of articles 11, paragraph 1, and 12. Such steps must be deliberate, concrete and targeted towards the full realization of the right to water.

18. States parties have a constant and continuing duty under the Covenant to move as expeditiously and effectively as possible towards the full realization of the right to water. Realization of the right should be feasible and practicable, since all States parties exercise control over a broad range of resources, including water, technology, financial resources and international assistance, as with all other rights in the Covenant.

19. There is a strong presumption that retrogressive measures taken in relation to the right to water are prohibited under the Covenant.[19] If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party's maximum available resources.

---

[18] See arts. 20, 26, 29 and 46 of the third Geneva Convention of 12 August 1949; arts. 85, 89 and 127 of the fourth Geneva Convention of 12 August 1949; arts. 15 and 20, para. 2, United Nations Standard Minimum Rules for the Treatment of Prisoners, in *Human Rights: A Compilation of International Instruments* (United Nations publication, Sales No. E.88.XIV.1).

[19] See General Comment No. 3 (1990), para. 9.

Specific legal obligations

20. The right to water, like any human right, imposes three types of obligations on States parties: obligations to *respect*, obligations to *protect* and obligations to *fulfil*.

(*a*) *Obligations to respect*

21. The obligation to *respect* requires that States parties refrain from interfering directly or indirectly with the enjoyment of the right to water. The obligation includes, inter alia, refraining from engaging in any practice or activity that denies or limits equal access to adequate water; arbitrarily interfering with customary or traditional arrangements for water allocation; unlawfully diminishing or polluting water, for example through waste from State-owned facilities or through use and testing of weapons; and limiting access to, or destroying, water services and infrastructure as a punitive measure, for example, during armed conflicts in violation of international humanitarian law.

22. The Committee notes that during armed conflicts, emergency situations and natural disasters, the right to water embraces those obligations by which States parties are bound under international humanitarian law.[20] This includes protection of objects indispensable for survival of the civilian population, including drinking water installations and supplies and irrigation works, protection of the natural environment against widespread, long-term and severe damage and ensuring that civilians, internees and prisoners have access to adequate water.[21]

(*b*) *Obligations to protect*

23. The obligation to *protect* requires State parties to prevent third parties from interfering in any way with the enjoyment of the right to water. Third parties include individuals, groups, corporations and other entities as well as agents acting under their authority. The obligation includes, inter alia, adopting the necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to adequate water; and polluting and inequitably extracting from water resources, including natural sources, wells and other water distribution systems.

24. Where water services (such as piped water networks, water tankers, access to rivers and wells) are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water. To prevent such abuses an effective regulatory system must be established, in conformity with the Covenant and this General Comment, which

---

[20] For the interrelationship of human rights law and humanitarian law, the Committee notes the conclusions of the International Court of Justice in *Legality of the Threat or Use of Nuclear Weapons (Request by the General Assembly), ICJ Reports (1996)* p. 226, para. 25.

[21] See arts. 54 and 56, Additional Protocol I to the Geneva Conventions (1977), art. 54, Additional Protocol II (1977), arts. 20 and 46 of the third Geneva Convention of 12 August 1949, and common article 3 of the Geneva Conventions of 12 August 1949.

includes independent monitoring, genuine public participation and imposition of penalties for non-compliance.

(*c*) *Obligations to fulfil*

25. The obligation to *fulfil* can be disaggregated into the obligations to facilitate, promote and provide. The obligation to facilitate requires the State to take positive measures to assist individuals and communities to enjoy the right. The obligation to promote obliges the State party to take steps to ensure that there is appropriate education concerning the hygienic use of water, protection of water sources and methods to minimize water wastage. States parties are also obliged to fulfil (provide) the right when individuals or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal.

26. The obligation to fulfil requires States parties to adopt the necessary measures directed towards the full realization of the right to water. The obligation includes, inter alia, according sufficient recognition of this right within the national political and legal systems, preferably by way of legislative implementation; adopting a national water strategy and plan of action to realize this right; ensuring that water is affordable for everyone; and facilitating improved and sustainable access to water, particularly in rural and deprived urban areas.

27. To ensure that water is affordable, States parties must adopt the necessary measures that may include, inter alia: (*a*) use of a range of appropriate low-cost techniques and technologies; (*b*) appropriate pricing policies such as free or low-cost water; and (*c*) income supplements. Any payment for water services has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households.

28. States parties should adopt comprehensive and integrated strategies and programmes to ensure that there is sufficient and safe water for present and future generations.[22] Such strategies and programmes may include: (*a*) reducing depletion of water resources through unsustainable extraction, diversion and damming; (*b*) reducing and eliminating contamination of watersheds and water-related eco-systems by substances such as radiation, harmful chemicals and human excreta; (*c*) monitoring water reserves; (*d*) ensuring that proposed developments do not interfere with access to adequate water; (*e*) assessing the impacts of actions that may impinge upon water availability and natural-ecosystems watersheds, such as climate changes, desertification and increased soil salinity, deforestation and loss of biodiversity;[23] (*f*)

---

[22] See footnote 5 above, Agenda 21, chaps. 5 ,7 and 18; and the World Summit on Sustainable Development, Plan of Implementation (2002), paras. 6 (*a*), (*l*) and (*m*), 7, 36 and 38.

[23] See the Convention on Biological Diversity, the Convention to Combat Desertification, the United Nations Framework Convention on Climate Change, and subsequent protocols.

increasing the efficient use of water by end-users; (*g*) reducing water wastage in its distribution; (*h*) response mechanisms for emergency situations; (*i*) and establishing competent institutions and appropriate institutional arrangements to carry out the strategies and programmes.

29. Ensuring that everyone has access to adequate sanitation is not only fundamental for human dignity and privacy, but is one of the principal mechanisms for protecting the quality of drinking water supplies and resources.[24] In accordance with the rights to health and adequate housing (see General Comments No. 4 (1991) and 14 (2000)) States parties have an obligation to progressively extend safe sanitation services, particularly to rural and deprived urban areas, taking into account the needs of women and children.

International obligations

30. Article 2, paragraph 1, and articles 11, paragraph 1, and 23 of the Covenant require that States parties recognize the essential role of international cooperation and assistance and take joint and separate action to achieve the full realization of the right to water.

31. To comply with their international obligations in relation to the right to water, States parties have to respect the enjoyment of the right in other countries. International cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. Any activities undertaken within the State party's jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction.[25]

32. States parties should refrain at all times from imposing embargoes or similar measures, that prevent the supply of water, as well as goods and services essential for securing the right to water.[26] Water should never be used as an instrument of political

---

[24] Article 14, para. 2, of the Convention on the Elimination of All Forms of Discrimination Against Women stipulates States parties shall ensure to women the right to "adequate living conditions, particularly in relation to […] sanitation". Article 24, para. 2, of the Convention on the Rights of the Child requires States parties to "To ensure that all segments of society […] have access to education and are supported in the use of basic knowledge of […] the advantages of […] hygiene and environmental sanitation."

[25] The Committee notes that the United Nations Convention on the Law of Non-Navigational Uses of Watercourses requires that social and human needs be taken into account in determining the equitable utilization of watercourses, that States parties take measures to prevent significant harm being caused, and, in the event of conflict, special regard must be given to the requirements of vital human needs: see arts. 5, 7 and 10 of the Convention.

[26] In General Comment No. 8 (1997), the Committee noted the disruptive effect of sanctions upon sanitation supplies and clean drinking water, and that sanctions regimes should provide for repairs to infrastructure essential to provide clean water.

and economic pressure. In this regard, the Committee recalls its position, stated in its General Comment No. 8 (1997), on the relationship between economic sanctions and respect for economic, social and cultural rights.

33. Steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries. Where States parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law.

34. Depending on the availability of resources, States should facilitate realization of the right to water in other countries, for example through provision of water resources, financial and technical assistance, and provide the necessary aid when required. In disaster relief and emergency assistance, including assistance to refugees and displaced persons, priority should be given to Covenant rights, including the provision of adequate water. International assistance should be provided in a manner that is consistent with the Covenant and other human rights standards, and sustainable and culturally appropriate. The economically developed States parties have a special responsibility and interest to assist the poorer developing States in this regard.

35. States parties should ensure that the right to water is given due attention in international agreements and, to that end, should consider the development of further legal instruments. With regard to the conclusion and implementation of other international and regional agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to water. Agreements concerning trade liberalization should not curtail or inhibit a country's capacity to ensure the full realization of the right to water.

36. States parties should ensure that their actions as members of international organizations take due account of the right to water. Accordingly, States parties that are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should take steps to ensure that the right to water is taken into account in their lending policies, credit agreements and other international measures.

Core obligations

37. In General Comment No. 3 (1990), the Committee confirms that States parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant. In the Committee's view, at least a number of core obligations in relation to the right to water can be identified, which are of immediate effect:

(*a*) To ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease;

(*b*) To ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups;

(*c*) To ensure physical access to water facilities or services that provide sufficient, safe and regular water; that have a sufficient number of water outlets to avoid prohibitive waiting times; and that are at a reasonable distance from the household;

(*d*) To ensure personal security is not threatened when having to physically access to water;

(*e*) To ensure equitable distribution of all available water facilities and services;

(*f*) To adopt and implement a national water strategy and plan of action addressing the whole population; the strategy and plan of action should be devised, and periodically reviewed, on the basis of a participatory and transparent process; it should include methods, such as right to water indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all disadvantaged or marginalized groups;

(*g*) To monitor the extent of the realization, or the non-realization, of the right to water;

(*h*) To adopt relatively low-cost targeted water programmes to protect vulnerable and marginalized groups;

(*i*) To take measures to prevent, treat and control diseases linked to water, in particular ensuring access to adequate sanitation;

38. For the avoidance of any doubt, the Committee wishes to emphasize that it is particularly incumbent on States parties, and other actors in a position to assist, to provide international assistance and cooperation, especially economic and technical which enables developing countries to fulfil their core obligations indicated in paragraph 37 above.

IV. VIOLATIONS

39. When the normative content of the right to water (see Part II) is applied to the obligations of States parties (Part III), a process is set in motion, which facilitates identification of violations of the right to water. The following paragraphs provide illustrations of violations of the right to water.

40. To demonstrate compliance with their general and specific obligations, States parties must establish that they have taken the necessary and feasible steps towards the realization of the right to water. In accordance with international law, a failure to act in good faith to take such steps amounts to a violation of the right. It should be stressed that a State party cannot justify its non-compliance with the core obligations set out in paragraph 37 above, which are non-derogable.

41. In determining which actions or omissions amount to a violation of the right to water, it is important to distinguish the inability from the unwillingness of a State

party to comply with its obligations in relation to the right to water. This follows from articles 11, paragraph 1, and 12, which speak of the right to an adequate standard of living and the right to health, as well as from article 2, paragraph 1, of the Covenant, which obliges each State party to take the necessary steps to the maximum of its available resources. A State which is unwilling to use the maximum of its available resources for the realization of the right to water is in violation of its obligations under the Covenant. If resource constraints render it impossible for a State party to comply fully with its Covenant obligations, it has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy, as a matter of priority, the obligations outlined above.

42. Violations of the right to water can occur through *acts of commission*, the direct actions of States parties or other entities insufficiently regulated by States. Violations include, for example, the adoption of retrogressive measures incompatible with the core obligations (outlined in para. 37 above), the formal repeal or suspension of legislation necessary for the continued enjoyment of the right to water, or the adoption of legislation or policies which are manifestly incompatible with pre-existing domestic or international legal obligations in relation to the right to water.

43. Violations through *acts of omission* include the failure to take appropriate steps towards the full realization of everyone's right to water, the failure to have a national policy on water, and the failure to enforce relevant laws.

44. While it is not possible to specify a complete list of violations in advance, a number of typical examples relating to the levels of obligations, emanating from the Committee's work, may be identified:

(*a*) Violations of the obligation to respect follow from the State party's interference with the right to water. This includes, inter alia: (i) arbitrary or unjustified disconnection or exclusion from water services or facilities; (ii) discriminatory or unaffordable increases in the price of water; and (iii) pollution and diminution of water resources affecting human health;

(*b*) Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to water by third parties.[27] This includes, inter alia: (i) failure to enact or enforce laws to prevent the contamination and inequitable extraction of water; (ii) failure to effectively regulate and control water services providers; (iv) failure to protect water distribution systems (e.g., piped networks and wells) from interference, damage and destruction; and

(*c*) Violations of the obligation to fulfil occur through the failure of States parties to take all necessary steps to ensure the realization of the right to water. Examples includes, inter alia: (i) failure to adopt or implement a national water policy designed to ensure the right to water for everyone; (ii) insufficient expenditure or misallocation of public resources which results in the non-enjoyment of the right to water by individuals or groups, particularly the vulnerable or marginalized; (iii) failure to monitor the realization of the right to water at the national level, for example

[27] See para. 23 for a definition of "third parties".

by identifying right-to-water indicators and benchmarks; (iv) failure to take measures to reduce the inequitable distribution of water facilities and services; (v) failure to adopt mechanisms for emergency relief; (vi) failure to ensure that the minimum essential level of the right is enjoyed by everyone (vii) failure of a State to take into account its international legal obligations regarding the right to water when entering into agreements with other States or with international organizations.

V. IMPLEMENTATION AT THE NATIONAL LEVEL

45. In accordance with article 2, paragraph 1, of the Covenant, States parties are required to utilize "all appropriate means, including particularly the adoption of legislative measures" in the implementation of their Covenant obligations. Every State party has a margin of discretion in assessing which measures are most suitable to meet its specific circumstances. The Covenant, however, clearly imposes a duty on each State party to take whatever steps are necessary to ensure that everyone enjoys the right to water, as soon as possible. Any national measures designed to realize the right to water should not interfere with the enjoyment of other human rights.

Legislation, strategies and policies

46. Existing legislation, strategies and policies should be reviewed to ensure that they are compatible with obligations arising from the right to water, and should be repealed, amended or changed if inconsistent with Covenant requirements.

47. The duty to take steps clearly imposes on States parties an obligation to adopt a national strategy or plan of action to realize the right to water. The strategy must: (*a*) be based upon human rights law and principles; (*b*) cover all aspects of the right to water and the corresponding obligations of States parties; (*c*) define clear objectives; (*d*) set targets or goals to be achieved and the time-frame for their achievement; (*e*) formulate adequate policies and corresponding benchmarks and indicators. The strategy should also establish institutional responsibility for the process; identify resources available to attain the objectives, targets and goals; allocate resources appropriately according to institutional responsibility; and establish accountability mechanisms to ensure the implementation of the strategy. When formulating and implementing their right to water national strategies, States parties should avail themselves of technical assistance and cooperation of the United Nations specialized agencies (see Part VI below).

48. The formulation and implementation of national water strategies and plans of action should respect, inter alia, the principles of non-discrimination and people's participation. The right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to water must be an integral part of any policy, programme or strategy concerning water. Individuals and groups should be given full and equal access to information concerning water, water services and the environment, held by public authorities or third parties.

49. The national water strategy and plan of action should also be based on the principles of accountability, transparency and independence of the judiciary, since good governance is essential to the effective implementation of all human rights, including the realization of the right to water. In order to create a favourable climate

for the realization of the right, States parties should take appropriate steps to ensure that the private business sector and civil society are aware of, and consider the importance of, the right to water in pursuing their activities.

50. States parties may find it advantageous to adopt framework legislation to operationalize their right to water strategy. Such legislation should include: (*a*) targets or goals to be attained and the time-frame for their achievement; (*b*) the means by which the purpose could be achieved; (*c*) the intended collaboration with civil society, private sector and international organizations; (*d*) institutional responsibility for the process; (*e*) national mechanisms for its monitoring; and (*f*) remedies and recourse procedures.

51. Steps should be taken to ensure there is sufficient coordination between the national ministries, regional and local authorities in order to reconcile water-related policies. Where implementation of the right to water has been delegated to regional or local authorities, the State party still retains the responsibility to comply with its Covenant obligations, and therefore should ensure that these authorities have at their disposal sufficient resources to maintain and extend the necessary water services and facilities. The States parties must further ensure that such authorities do not deny access to services on a discriminatory basis.

52. States parties are obliged to monitor effectively the realization of the right to water. In monitoring progress towards the realization of the right to water, States parties should identify the factors and difficulties affecting implementation of their obligations.

Indicators and benchmarks

53. To assist the monitoring process, right to water indicators should be identified in the national water strategies or plans of action. The indicators should be designed to monitor, at the national and international levels, the State party's obligations under articles 11, paragraph 1, and 12. Indicators should address the different components of adequate water (such as sufficiency, safety and acceptability, affordability and physical accessibility), be disaggregated by the prohibited grounds of discrimination, and cover all persons residing in the State party's territorial jurisdiction or under their control. States parties may obtain guidance on appropriate indicators from the ongoing work of WHO, the Food and Agriculture Organization of the United Nations (FAO), the United Nations Centre for Human Settlements (Habitat), the International Labour Organization (ILO), the United Nations Children's Fund (UNICEF), the United Nations Environment Programme (UNEP), the United Nations Development Programme (UNDP) and the United Nations Commission on Human Rights.

54. Having identified appropriate right to water indicators, States parties are invited to set appropriate national benchmarks in relation to each indicator.[28] During

[28] See E. Riedel, "New bearings to the State reporting procedure: practical ways to operationalize economic, social and cultural rights – The example of the right to health", in S. von Schorlemer (ed.), *Praxishandbuch UNO*, 2002, pp. 345-358. The

the periodic reporting procedure, the Committee will engage in a process of "scoping" with the State party. Scoping involves the joint consideration by the State party and the Committee of the indicators and national benchmarks which will then provide the targets to be achieved during the next reporting period. In the following five years, the State party will use these national benchmarks to help monitor its implementation of the right to water. Thereafter, in the subsequent reporting process, the State party and the Committee will consider whether or not the benchmarks have been achieved, and the reasons for any difficulties that may have been encountered (see General Comment No.14 (2000), para. 58). Further, when setting benchmarks and preparing their reports, States parties should utilize the extensive information and advisory services of specialized agencies with regard to data collection and disaggregation.

Remedies and accountability

55. Any persons or groups who have been denied their right to water should have access to effective judicial or other appropriate remedies at both national and international levels (see General Comment No. 9 (1998), para. 4, and Principle 10 of the Rio Declaration on Environment and Development).[29] The Committee notes that the right has been constitutionally entrenched by a number of States and has been subject to litigation before national courts. All victims of violations of the right to water should be entitled to adequate reparation, including restitution, compensation, satisfaction or guarantees of non-repetition. National ombudsmen, human rights commissions, and similar institutions should be permitted to address violations of the right.

56. Before any action that interferes with an individual's right to water is carried out by the State party, or by any other third party, the relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the Covenant, and that comprises: (*a*) opportunity for genuine consultation with those affected; (*b*) timely and full disclosure of information on the proposed measures; (*c*) reasonable notice of proposed actions; (*d*) legal recourse and remedies for those affected; and (*e*) legal assistance for obtaining legal remedies (see also General Comments No. 4 (1991) and No. 7 (1997)). Where such action is based on a person's failure to pay for water their capacity to pay must be taken into account. Under no circumstances shall an individual be deprived of the minimum essential level of water.

57. The incorporation in the domestic legal order of international instruments recognizing the right to water can significantly enhance the scope and effectiveness of

---

Committee notes, for example, the commitment in the 2002 World Summit on Sustainable Development Plan of Implementation to halve, by the year 2015, the proportion of people who are unable to reach or to afford safe drinking water (as outlined in the Millennium Declaration) and the proportion of people who do not have access to basic sanitation.

[29] Principle 10 of the Rio Declaration on Environment and Development (*Report of the United Nations Conference on Environment and Development,* see footnote 5 above), states with respect to environmental issues that "effective access to judicial and administrative proceedings, including remedy and redress, shall be provided".

remedial measures and should be encouraged in all cases. Incorporation enables courts to adjudicate violations of the right to water, or at least the core obligations, by direct reference to the Covenant.

58. Judges, adjudicators and members of the legal profession should be encouraged by States parties to pay greater attention to violations of the right to water in the exercise of their functions.

59. States parties should respect, protect, facilitate and promote the work of human rights advocates and other members of civil society with a view to assisting vulnerable or marginalized groups in the realization of their right to water.

VI. OBLIGATIONS OF ACTORS OTHER THAN STATES

60. United Nations agencies and other international organizations concerned with water, such as WHO, FAO, UNICEF, UNEP, UN-Habitat, ILO, UNDP, the International Fund for Agricultural Development (IFAD), as well as international organizations concerned with trade such as the World Trade Organization (WTO), should cooperate effectively with States parties, building on their respective expertise, in relation to the implementation of the right to water at the national level. The international financial institutions, notably the International Monetary Fund and the World Bank, should take into account the right to water in their lending policies, credit agreements, structural adjustment programmes and other development projects (see General Comment No. 2 (1990)), so that the enjoyment of the right to water is promoted. When examining the reports of States parties and their ability to meet the obligations to realize the right to water, the Committee will consider the effects of the assistance provided by all other actors. The incorporation of human rights law and principles in the programmes and policies by international organizations will greatly facilitate implementation of the right to water. The role of the International Federation of the Red Cross and Red Crescent Societies, International Committee of the Red Cross, the Office of the United Nations High Commissioner for Refugees (UNHCR), WHO and UNICEF, as well as non-governmental organizations and other associations, is of particular importance in relation to disaster relief and humanitarian assistance in times of emergencies. Priority in the provision of aid, distribution and management of water and water facilities should be given to the most vulnerable or marginalized groups of the population.

Annex 91

UNITED NATIONS

E

Distr.GENERAL

Economic and Social Council

E/C.12/GC/186 February 2006

Original: ENGLISH

COMMITTEE ON ECONOMIC, SOCIALAND CULTURAL RIGHTS

Thirty-fifth session

Geneva, 7-25 November 2005

Item 3 of the provisional agenda

THE RIGHT TO WORK

General comment No. 18

Adopted on 24 November 2005

Article 6 of the International Covenant on Economic, Social and Cultural Rights

GE.06 -40313 (E) 080206

I. Introduction and Basic Premises

1.The right to work is a fundamental right, recognized in several international legal instruments. The International Covenant on Economic, Social and Cultural Rights (ICESCR), as laid down in article 6, deals more comprehensively than any other instrument with this right. The right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity. Every individual has the right to be able to work, allowing him/her to live in dignity. The right to work contributes at the same time to the survival of the individual and to that of his/her family, and insofar as work is freely chosen or accepted, to his/her development and recognition within the community.

2.The ICESCR proclaims the right to work in a general sense in its article 6 and explicitly develops the individual dimension of the right to work through the recognition in article 7 of the right of everyone to the enjoyment of just and favourable conditions of work, in particular the right to safe working conditions. The collective dimension of the right to work is addressed in article 8, which enunciates the right of everyone to form trade unions and join the trade union of his/her choice as well as the right of trade unions to function freely. When drafting article 6 of the Covenant, the Commission on Human Rights affirmed the need to recognize the right to work in a broad sense by laying down specific legal obligations rather than a simple philosophical principle. Article 6 defines the right to work in a general and non-exhaustive manner. In article 6, paragraph 1, States parties recognize “the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right”. In paragraph 2, States parties recognize that “to achieve the full realization of this right” the steps to be taken “shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment, under conditions safeguarding fundamental political and economic freedoms to the individual”.

3.These objectives reflect the fundamental purposes and principles of the United Nations as defined in article 1, paragraph 3, of the Charter of the United Nations. The essence of these objectives is also reflected in article 23, paragraph 1, of the Universal Declaration of Human Rights. Since the adoption of the Covenant by the General Assembly in 1966, several universal and regional human rights instruments have recognized the right to work. At the universal level, the right to work is contained in article 8, paragraph 3 (a), of the International Covenant on Civil and Political Civil Rights (ICCPR); in article 5, paragraph (e) (i), of the International Convention on the Elimination of All Forms of Racial Discrimination; in article 11, paragraph 1 (a), of the Convention on the Elimination of All Forms of Discrimination against Women; in article 32 of the Convention on the Rights of the Child; and in articles 11, 25, 26, 40, 52 and 54 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Several regional instruments recognize the right to work in its general dimension, including the European Social Charter of 1961 and the Revised European Social Charter of 1996 (Part II, art. 1), the African Charter on Human and Peoples’ Rights (art. 15) and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (art. 6), and affirm the principle that respect for the right to work imposes on States parties an obligation to take measures aimed at the realization of full employment. Similarly, the right to work has been proclaimed by the United Nations General Assembly in the Declaration on Social Progress and Development, in its resolution 2542 (XXIV) of 11 December 1969 (art. 6).

4.The right to work, as guaranteed in the ICESCR, affirms the obligation of States parties to assure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly. This definition underlines the fact that respect for the individual and his dignity is expressed through the freedom of the individual regarding the choice to work, while emphasizing the importance of work for personal development as well as for social and economic inclusion. International Labour Organization Convention No. 122 concerning Employment Policy (1964) speaks of “full, productive

and freely chosen employment", linking the obligation of States parties to create the conditions for full employment with the obligation to ensure the absence of forced labour. Nevertheless, for millions of human beings throughout the world, full enjoyment of the right to freely chosen or accepted work remains a remote prospect. The Committee recognizes the existence of structural and other obstacles arising from international factors beyond the control of States which hinder the full enjoyment of article 6 in many States parties.

5.With the aim of helping States parties to implement the Covenant and discharge their reporting obligations, this general comment deals with the normative content of article 6 (chap. II), the obligations of States parties (chap. III), violations (chap. IV), and implementation at the national level (chap. V), while the obligations of actors other than States parties are covered in chapter VI. The general comment is based on the experience gained by the Committee over many years in its consideration of reports of States parties.

II. Normative Content OF THE RIGHT TO WORK

6.The right to work is an individual right that belongs to each person and is at the same time a collective right. It encompasses all forms of work, whether independent work or dependent wage-paid work. The right to work should not be understood as an absolute and unconditional right to obtain employment. Article 6, paragraph 1, contains a definition of the right to work and paragraph 2 cites, by way of illustration and in a non-exhaustive manner, examples of obligations incumbent upon States parties. It includes the right of every human being to decide freely to accept or choose work. This implies not being forced in any way whatsoever to exercise or engage in employment and the right of access to a system of protection guaranteeing each worker access to employment. It also implies the right not to be unfairly deprived of employment.

7.Work as specified in article 6 of the Covenant must be *decent work*. This is work that respects the fundamental rights of the human person as well as the rights of workers in terms of conditions of work safety and remuneration. It also provides an income allowing workers to support themselves and their families as highlighted in article 7 of the Covenant. These fundamental rights also include respect for the physical and mental integrity of the worker in the exercise of his/her employment.

8.Articles 6, 7 and 8 of the Covenant are interdependent. The characterization of work as decent presupposes that it respects the fundamental rights of the worker. Although articles 7 and 8 are closely linked to article 6, they will be dealt with in separate general comments. Reference to articles 7 and 8 will therefore only be made whenever the indivisibility of these rights so requires.

9.The International Labour Organization defines forced labour as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily". The Committee reaffirms the need for States parties to abolish, forbid and counter all forms of forced labour as enunciated in article 4 of the Universal Declaration of Human Rights, article 5 of the Slavery Convention and article 8 of the ICCPR.

10.High unemployment and the lack of secure employment are causes that induce workers to seek employment in the informal sector of the economy. States parties must take the requisite measures, legislative or otherwise, to reduce to the fullest extent possible the number of workers outside the formal economy, workers who as a result of that situation have no protection. These measures would compel employers to respect labour legislation and declare their employees, thus enabling the latter to enjoy all the rights of workers, in particular those provided for in articles 6, 7 and 8 of the Covenant. These measures must reflect the fact that people living in an informal economy do so for the most part because of the need to survive, rather than as a matter of choice. Moreover, domestic and agricultural work must be properly regulated by national legislation so that domestic and agricultural workers enjoy the same level of protection as other workers.

11.ILO Convention No. 158 concerning Termination of Employment (1982) defines the lawfulness of dismissal in its article 4 and in particular imposes the requirement to provide valid grounds for dismissal as well as the right to legal and other redress in the case of unjustified dismissal.

12.The exercise of work in all its forms and at all levels requires the existence of the following interdependent and essential elements, implementation of which will depend on the conditions present in each State party:

(a)*Availability*. States parties must have specialized services to assist and support individuals in order to enable them to identify and find available employment;

(b)*Accessibility*. The labour market must be open to everyone under the jurisdiction of States parties. Accessibility comprises three dimensions:

Under its article 2, paragraph 2, and article 3, the Covenant prohibits any discrimination in access to and maintenance of employment on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation, or civil, political, social or other status, which has the intention or effect of impairing or nullifying exercise of the right to work on a basis of equality. According to article 2 of ILO Convention No. 111, States parties should "declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof". Many measures, such as most strategies and programmes designed to eliminate employment-related discrimination, as emphasized in paragraph 18 of general comment No. 14 (2000) on the right to the highest attainable standard of health, can be pursued with minimum resource implications through the adoption, modification or abrogation of legislation or the dissemination of information. The Committee recalls that, even in times of severe resource constraints, disadvantaged and marginalized individuals and groups must be protected by the adoption of relatively low-cost targeted programmes;

Physical accessibility is one dimension of accessibility to employment as explained in paragraph 22 of general comment No. 5 on persons with disabilities;

Accessibility includes the right to seek, obtain and impart information on the means of gaining access to employment through the establishment of data networks on the employment market at the local, regional, national and international levels;

(c)*Acceptability and quality*. Protection of the right to work has several components, notably the right of the worker to just and favourable conditions of work, in particular to safe working conditions, the right to form trade unions and the right freely to choose and accept work.

Special topics of broad application

Women and the right to work

13.Article 3 of the Covenant prescribes that States parties undertake to "ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights". The Committee underlines the need for a comprehensive system of protection to combat gender discrimination and to ensure equal opportunities and treatment between men and women in relation to their right to work by ensuring equal pay for work of equal value. In particular, pregnancies must not constitute an obstacle to employment and should not constitute justification for loss of employment. Lastly, emphasis should be placed on the link between the fact that women often have less access to education than men and certain traditional cultures which compromise the opportunities for the employment and advancement of women.

Young persons and the right to work

14.Access to a first job constitutes an opportunity for economic self-reliance and in many cases a means to escape poverty. Young persons, particularly young women, generally have great difficulties in finding initial employment. National policies relating to adequate education and vocational training should be adopted and implemented to promote and support access to employment opportunities for young persons, in particular young women.

Child labour and the right to work

15.The protection of children is covered by article 10 of the Covenant. The Committee recalls its general comment No. 14 (2000) and in particular paragraphs 22 and 23 on children's right to health, and emphasizes the need to protect children from all forms of work that are likely to interfere with their development or physical or mental health. The Committee reaffirms the need to protect children from economic exploitation, to enable them to pursue their full development and acquire technical and vocational education as indicated in article 6, paragraph 2. The Committee also recalls its general comment No. 13 (1999), in particular the definition of technical and vocational education (paras. 15 and 16) as a component of general education. Several international human rights instruments adopted after the ICESCR, such as the Convention on the Rights of the Child, expressly recognize the need to protect children and young people against any form of economic exploitation or forced labour.

Older persons and the right to work

16.The Committee recalls its general comment No. 6 (1995) on the economic, social and cultural rights of older persons and in particular the need to take measures to prevent discrimination on grounds of age in employment and occupation.

Persons with disabilities and the right to work

17.The Committee recalls the principle of non-discrimination in access to employment by persons with disabilities enunciated in its general comment No. 5 (1994) on persons with disabilities. "The 'right of everyone to the opportunity to gain his living by work which he freely chooses or accepts' is not realized where the only real opportunity open to disabled workers is to work in so-called 'sheltered' facilities under substandard conditions." States parties must take measures enabling persons with disabilities to secure and retain appropriate employment and to progress in their occupational field, thus facilitating their integration or reintegration into society.

Migrant workers and the right to work

18.The principle of non-discrimination as set out in article 2.2 of the Covenant and in article 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families should apply in relation to employment opportunities for migrant workers and their families. In this regard the Committee underlines the need for national plans of action to be devised to respect and promote such principles by all appropriate measures, legislative or otherwise.

III. States parties' obligations

General legal obligations

19.The principal obligation of States parties is to ensure the progressive realization of the exercise of the right to work. States parties must therefore adopt, as quickly as possible, measures aiming at achieving full employment. While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States parties various obligations which are of immediate effect. States parties have immediate obligations in relation to the right to work, such as the obligation to "guarantee" that it will be exercised "without discrimination of any kind" (art. 2, para. 2) and the obligation "to take steps" (art. 2, para. 1) towards the full realization of article 6. Such steps must be deliberate, concrete and targeted towards the full realization of the right to work.

20.The fact that realization of the right to work is progressive and takes place over a period of time should not be interpreted as depriving States parties' obligations of all meaningful content. It means that States parties have a specific and continuing

obligation “to move as expeditiously and effectively as possible” towards the full realization of article 6.

21.As with all other rights in the Covenant, retrogressive measures should in principle not be taken in relation to the right to work. If any deliberately retrogressive steps are taken, States parties have the burden of proving that they have been introduced after consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the States parties’ maximum available resources.

22.Like all human rights, the right to work imposes three types or levels of obligations on States parties: the obligations to *respect*, *protect* and *fulfil*. The obligation to *respect* the right to work requires States parties to refrain from interfering directly or indirectly with the enjoyment of that right. The obligation to *protect* requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right to work. The obligation to *fulfil* includes the obligations to provide, facilitate and promote that right. It implies that States parties should adopt appropriate legislative, administrative, budgetary, judicial and other measures to ensure its full realization.

Specific legal obligations

23.States parties are under the obligation to *respect* the right to work by, inter alia, prohibiting forced or compulsory labour and refraining from denying or limiting equal access to decent work for all persons, especially disadvantaged and marginalized individuals and groups, including prisoners or detainees, members of minorities and migrant workers. In particular, States parties are bound by the obligation to respect the right of women and young persons to have access to decent work and thus to take measures to combat discrimination and to promote equal access and opportunities.

24.With regard to the obligations of States parties relating to child labour as set out in article 10 of the Covenant, States parties must take effective measures, in particular legislative measures, to prohibit labour of children under the age of 16. Further, they have to prohibit all forms of economic exploitation and forced labour of children. States parties must adopt effective measures to ensure that the prohibition of child labour will be fully respected.

25.Obligations to *protect* the right to work include, inter alia, the duties of States parties to adopt legislation or to take other measures ensuring equal access to work and training and to ensure that privatization measures do not undermine workers’ rights. Specific measures to increase the flexibility of labour markets must not render work less stable or reduce the social protection of the worker. The obligation to protect the right to work includes the responsibility of States parties to prohibit forced or compulsory labour by non-State actors.

26.States parties are obliged to *fulfil (provide)* the right to work when individuals or groups are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal. This obligation includes, inter alia, the obligation to recognize the right to work in national legal systems and to adopt a national policy on the right to work as well as a detailed plan for its realization. The right to work requires formulation and implementation by States parties of an employment policy with a view to “stimulating economic growth and development, raising levels of living, meeting manpower requirements and overcoming unemployment and underemployment”. It is in this context that effective measures to increase the resources allocated to reducing the unemployment rate, in particular among women, the disadvantaged and marginalized, should be taken by States parties. The Committee emphasizes the need to establish a compensation mechanism in the event of loss of employment, as well as the obligation to take appropriate measures for the establishment of employment services (public or private) at the national and local levels. Further, the obligation to fulfil (provide) the right to work includes the implementation by States parties of plans to counter unemployment.

27.The obligation to *fulfil (facilitate)* the right to work requires States parties, inter alia, to take positive measures to enable and assist individuals to enjoy the right to work and to implement technical and vocational education plans to facilitate access to employment.

28.The obligation to *fulfil (promote)* the right to work requires States parties to undertake, for example, educational and informational programmes to instil public awareness on the right to work.

International obligations

29.In its general comment No. 3 (1990) the Committee draws attention to the obligation of all States parties to take steps individually and through international assistance and cooperation, especially economic and technical, towards the full realization of the rights recognized in the Covenant. In the spirit of Article 56 of the Charter of the United Nations and specific provisions of the Covenant (arts. 2.1, 6, 22 and 23), States parties should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to work. States parties should, through international agreements where appropriate, ensure that the right to work as set forth in articles 6, 7 and 8 of the Covenant is given due attention.

30.To comply with their international obligations in relation to article 6, States parties should endeavour to promote the right to work in other countries as well as in bilateral and multilateral negotiations. In negotiations with international financial institutions, States parties should ensure protection of the right to work of their population. States parties that are members of international financial institutions, in particular the International Monetary Fund, the World Bank and regional development banks, should pay greater attention to the protection of the right to work in influencing the lending policies, credit agreements, structural adjustment programmes and international measures of these institutions. The strategies, programmes and policies adopted by States parties under structural adjustment programmes should not interfere with their core obligations in relation to the right to work and impact negatively on the right to work of women, young persons and the disadvantaged and marginalized individuals and groups.

Core obligations

31.In general comment No. 3 (1990) the Committee confirms that States parties have a core obligation to ensure the satisfaction of minimum essential levels of each of the rights covered by the Covenant. In the context of article 6, this “core obligation” encompasses the obligation to ensure non-discrimination and equal protection of employment. Discrimination in

the field of employment comprises a broad cluster of violations affecting all stages of life, from basic education to retirement, and can have a considerable impact on the work situation of individuals and groups. Accordingly, these core obligations include at least the following requirements:

(a)To ensure the right of access to employment, especially for disadvantaged and marginalized individuals and groups, permitting them to live a life of dignity;

(b)To avoid any measure that results in discrimination and unequal treatment in the private and public sectors of disadvantaged and marginalized individuals and groups or in weakening mechanisms for the protection of such individuals andgroups;

(c)To adopt and implement a national employment strategy and plan of action based on and addressing the concerns of all workers on the basis of a participatory and transparent process that includes employers' and workers' organizations. Such an employment strategy and plan of action should target disadvantaged and marginalized individuals and groups in particular and include indicators and benchmarks by which progress in relation to the right to work can be measured and periodically reviewed.

iV. VIOLATIONS

32.A distinction should be drawn between the inability and the unwillingness of States parties to comply with their obligations under article 6. This follows from article 6, paragraph 1, which guarantees the right of everyone to the opportunity to gain his living by work that he freely chooses or accepts, and article 2, paragraph 1, which places an obligation on each State party to undertake the necessary measures "to the maximum of its available resources". The obligations of States parties must be interpreted in the light of these two articles. States parties that are unwilling to use the maximum of their available resources for the realization of the right to work are in violation of their obligations under article 6. Nevertheless, resource constraints may explain the difficulties a State party may encounter in fully guaranteeing the right to work, to the extent that the State party demonstrates that it has used all available resources at its disposal in order to fulfil, as a matter of priority, the obligations outlined above. Violations of the right to work can occur through the direct action of States or State entities, or through the lack of adequate measures to promote employment. Violations through *acts of omission* occur, for example, when States parties do not regulate the activities of individuals or groups to prevent them from impeding the right of others to work. Violations through *acts of commission* include forced labour; the formal repeal or suspension of legislation necessary for continued enjoyment of the right to work; denial of access to work to particular individuals or groups, whether such discrimination is based on legislation or practice; and the adoption of legislation or policies which are manifestly incompatible with international obligations in relation to the right to work.

Violations of the obligation to respect

33.Violations of the obligation to respect the right to work include laws, policies and actions that contravene the standards laid down in article 6 of the Covenant. In particular, any discrimination in access to the labour market or to means and entitlements for obtaining employment on the grounds of race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth or any other situation with the aim of impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant. The principle of non-discrimination mentioned in article 2, paragraph 2, of the Covenant is immediately applicable and is neither subject to progressive implementation nor dependent on available resources. It is directly applicable to all aspects of the right to work. The failure of States parties to take into account their legal obligations regarding the right to work when entering into bilateral or multilateral agreements with other States, international organizations and other entities such as multinational entities constitutes a violation of their obligation to respect the right to work.

34.As for all other rights in the Covenant, there is a strong presumption that retrogressive measures taken in relation to the right to work are not permissible. Such retrogressive measures include, inter alia, denial of access to employment to particular individuals or groups, whether such discrimination is based on legislation or practice, abrogation or suspension of the legislation necessary for the exercise of the right to work or the adoption of laws or policies that are manifestly incompatible with international legal obligations relating to the right to work. An example would be the institution of forced labour or the abrogation of legislation protecting the employee against unlawful dismissal. Such measures would constitute a violation of States parties' obligation to respect the right to work.

Violations of the obligation to protect

35.Violations of the obligation to protect follow from the failure of States parties to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to work by third parties. They include omissions such as the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to work of others; or the failure to protect workers against unlawful dismissal.

Violations of the obligation to fulfil

36.Violations of the obligation to fulfil occur through the failure of States parties to take all necessary steps to ensure the realization of the right to work. Examples include the failure to adopt or implement a national employment policy designed to ensure the right to work for everyone; insufficient expenditure or misallocation of public funds which results in the non-enjoyment of the right to work by individuals or groups, particularly the disadvantaged and marginalized; the failure to monitor the realization of the right to work at the national level, for example, by identifying right-to-work indicators and benchmarks; and the failure to implement technical and vocational training programmes.

V. implementation at the national level

37.In accordance with article 2, paragraph 1, of the Covenant, States parties are required to utilize "all appropriate means, including particularly the adoption of legislative measures" for the implementation of their Covenant obligations. Every

State party has a margin of discretion in assessing which measures are most suitable to meet its specific circumstances. The Covenant, however, clearly imposes a duty on each State party to take whatever steps are necessary to ensure that everyone is protected from unemployment and insecurity in employment and can enjoy the right to work as soon as possible.

Legislation, strategies and policies

38.States parties should consider the adoption of specific legislative measures for the implementation of the right to work. Those measures should (a) establish national mechanisms to monitor implementation of employment strategies and national plans of action and (b) contain provisions on numerical targets and a time frame for implementation. They should also provide (c) means of ensuring compliance with the benchmarks established at the national level and (d) the involvement of civil society, including experts on labour issues, the private sector and international organizations. In monitoring progress on realization of the right to work, States parties should identify the factors and difficulties affecting the fulfilment of their obligations.

39. Collective bargaining is a tool of fundamental importance in the formulation of employment policies.

40.United Nations agencies and programmes should, upon States parties' request, assist in drafting and reviewing relevant legislation. The ILO, for example, has considerable expertise and accumulated knowledge concerning legislation in the field of employment.

41.States parties should adopt a national strategy, based on human rights principles aimed at progressively ensuring full employment for all. Such a national strategy also imposes a requirement to identify the resources available to States parties for achieving their objectives as well as the most cost-effective ways of using them.

42.The formulation and implementation of a national employment strategy should involve full respect for the principles of accountability, transparency, and participation by interested groups. The right of individuals and groups to participate in decision-making should be an integral part of all policies, programmes and strategies intended to implement the obligations of States parties under article 6. The promotion of employment also requires effective involvement of the community and, more specifically, of associations for the protection and promotion of the rights of workers and trade unions in the definition of priorities, decision-making, planning, implementation and evaluation of the strategy to promote employment.

43.To create conditions favourable to the enjoyment of the right to work, States parties must also take appropriate measures to ensure that both the private and public sectors reflect an awareness of the right to work in their activities.

44.The national employment strategy must take particular account of the need to eliminate discrimination in access to employment. It must ensure equal access to economic resources and to technical and vocational training, particularly for women, disadvantaged and marginalized individuals and groups, and should respect and protect self-employment as well as employment with remuneration that enables workers and their families to enjoy an adequate standard of living as stipulated in article 7 (a) (ii) of the Covenant.

45.States parties should develop and maintain mechanisms to monitor progress towards the realization of the right to freely chosen or accepted employment, to identify the factors and difficulties affecting the degree of compliance with their obligations and to facilitate the adoption of corrective legislative and administrative measures, including measures to implement their obligations under articles 2.1 and 23 of the Covenant.

Indicators and benchmarks

46.A national employment strategy must define indicators on the right to work. The indicators should be designed to monitor effectively, at the national level, the compliance by States parties with their obligations under article 6 and should be based on ILO indicators such as the rate of unemployment, underemployment and the ratio of formal to informal work. Indicators developed by the ILO that apply to the preparation of labour statistics may be useful in the preparation of a national employment plan.

47.Having identified appropriate right to work indicators, States parties are invited to set appropriate national benchmarks in relation to each indicator. During the periodic reporting procedure the Committee will engage in a process of "scoping" with the State party. Scoping involves the joint consideration by the State party and the Committee of the indicators and national benchmarks which will then provide the targets to be achieved during the next reporting period. During the following five years the State party will use thesenational benchmarks to help monitor its implementation of the right to work. Thereafter, in the subsequent reporting process, the State party and the Committee will consider whether or not the benchmarks have been achieved and the reasons for any difficulties that may have been encountered. Further, when setting benchmarks and preparing their reports States parties should utilize the extensive information and advisory services of specialized agencies with regard to data collection and disaggregation.

Remedies and accountability

48. Any person or group who is a victim of a violation of the right to work should have access to effective judicial or other appropriate remedies at the national level. At the national level trade unions and human rights commissions should play an important role in defending the right to work. All victims of such violations are entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or a guarantee of non -repetition.

49. Incorporation of international instruments setting forth the right to work into the domestic legal order, in particular the relevant ILO conventions, should strengthen the effectiveness of measures taken to guarantee the right to work and is encouraged. The incorporation of international instruments recognizing the right to work into the domestic legal order, or the recognition of their direct

applicability, significantly enhances the scope and effectiveness of remedial measures and is encouraged in all cases. Courts would then be empowered to adjudicate violations of the core content of the right to work by directly applying obligations under the Covenant.

50.Judges and other law enforcement authorities are invited to pay greater attention to violations of the right to work in the exercise of their functions.

51.States parties should respect and protect the work of human rights defenders and other members of civil society, in particular the trade unions, who assist disadvantaged and marginalized individuals and groups in the realization of their right to work.

vi. Obligations of actors other than States parties

52.While only States are parties to the Covenant and are thus ultimately accountable for compliance with it, all members of society - individuals, local communities, trade unions, civil society and private sector organizations - have responsibilities regarding the realization of the right to work. States parties should provide an environment facilitating the discharge of these obligations. Private enterprises - national and multinational - while not bound by the Covenant, have a particular role to play in job creation, hiring policies and non-discriminatory access to work. They should conduct their activities on the basis of legislation, administrative measures, codes of conduct and other appropriate measures promoting respect for the right to work, agreed between the government and civil society. Such measures should recognize the labour standards elaborated by the ILO and aim at increasing the awareness and responsibility of enterprises in the realization of the right to work.

53.The role of the United Nations agencies and programmes, and in particular the key function of the ILO in protecting and implementing the right to work at the international, regional and national levels, is of particular importance. Regional institutions and instruments, where they exist, also play an important role in ensuring the right to work. When formulating and implementing their national employment strategies, States parties should avail themselves of the technical assistance and cooperation offered by the ILO. When preparing their reports, States parties should also use the extensive information and advisory services provided by the ILO for data collection and disaggregation as well as the development of indicators and benchmarks. In conformity with articles 22 and 23 of the Covenant, the ILO and the other specialized agencies of the United Nations, the World Bank, regional development banks, the International Monetary Fund, the World Trade Organization and other relevant bodies within the United Nations system should cooperate effectively with States parties to implement the right to work at the national level, bearing in mind their own mandates. International financial institutions should pay greater attention to the protection of the right to work in their lending policies and credit agreements. In accordance with paragraph 9 of general comment No. 2 (1990), particular efforts should be made to ensure that the right to work is protected in all structural adjustment programmes. When examining the reports of States parties and their ability to meet their obligations under article 6, the Committee will consider the effects of the assistance provided by actors other than States parties.

54.Trade unions play a fundamental role in ensuring respect for the right to work at the local and national levels and in assisting States parties to comply with their obligations under article 6. The role of trade unions is fundamental and will continue to be considered by the Committee in its consideration of the reports of States parties.

Notes

Annex 92

UNITED NATIONS **E**

Economic and Social Council

Distr.
GENERAL

E/C.12/2000/4
11 August 2000

Original: ENGLISH

COMMITTEE ON ECONOMIC, SOCIAL
AND CULTURAL RIGHTS
Twenty-second session
Geneva, 25 April-12 May 2000
Agenda item 3

SUBSTANTIVE ISSUES ARISING IN THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

General Comment No. 14 (2000)

The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)

1. Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity. The realization of the right to health may be pursued through numerous, complementary approaches, such as the formulation of health policies, or the implementation of health programmes developed by the World Health Organization (WHO), or the adoption of specific legal instruments. Moreover, the right to health includes certain components which are legally enforceable.[1]

2. The human right to health is recognized in numerous international instruments. Article 25.1 of the Universal Declaration of Human Rights affirms: "Everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services". The International Covenant on Economic, Social and Cultural Rights provides the most comprehensive article on the right to

health in international human rights law. In accordance with article 12.1 of the Covenant, States parties recognize "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health", while article 12.2 enumerates, by way of illustration, a number of "steps to be taken by the States parties ... to achieve the full realization of this right". Additionally, the right to health is recognized, *inter alia*, in article 5 (e) (iv) of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, in articles 11.1 (f) and 12 of the Convention on the Elimination of All Forms of Discrimination against Women of 1979 and in article 24 of the Convention on the Rights of the Child of 1989. Several regional human rights instruments also recognize the right to health, such as the European Social Charter of 1961 as revised (art. 11), the African Charter on Human and Peoples' Rights of 1981 (art. 16) and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 (art. 10). Similarly, the right to health has been proclaimed by the Commission on Human Rights,[2] as well as in the Vienna Declaration and Programme of Action of 1993 and other international instruments.[3]

3. The right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health.

4. In drafting article 12 of the Covenant, the Third Committee of the United Nations General Assembly did not adopt the definition of health contained in the preamble to the Constitution of WHO, which conceptualizes health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity". However, the reference in article 12.1 of the Covenant to "the highest attainable standard of physical and mental health" is not confined to the right to health care. On the contrary, the drafting history and the express wording of article 12.2 acknowledge that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.

5. The Committee is aware that, for millions of people throughout the world, the full enjoyment of the right to health still remains a distant goal. Moreover, in many cases, especially for those living in poverty, this goal is becoming increasingly remote. The Committee recognizes the formidable structural and other obstacles resulting from international and other factors beyond the control of States that impede the full realization of article 12 in many States parties.

6. With a view to assisting States parties' implementation of the Covenant and the fulfilment of their reporting obligations, this General Comment focuses on the normative content of article 12 (Part I), States parties' obligations (Part II), violations (Part III) and implementation

at the national level (Part IV), while the obligations of actors other than States parties are addressed in Part V. The General Comment is based on the Committee's experience in examining States parties' reports over many years.

I. NORMATIVE CONTENT OF ARTICLE 12

7. Article 12.1 provides a definition of the right to health, while article 12.2 enumerates illustrative, non-exhaustive examples of States parties' obligations.

8. The right to health is not to be understood as a right to be *healthy*. The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.

9. The notion of "the highest attainable standard of health" in article 12.1 takes into account both the individual's biological and socio-economic preconditions and a State's available resources. There are a number of aspects which cannot be addressed solely within the relationship between States and individuals; in particular, good health cannot be ensured by a State, nor can States provide protection against every possible cause of human ill health. Thus, genetic factors, individual susceptibility to ill health and the adoption of unhealthy or risky lifestyles may play an important role with respect to an individual's health. Consequently, the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health.

10. Since the adoption of the two International Covenants in 1966 the world health situation has changed dramatically and the notion of health has undergone substantial changes and has also widened in scope. More determinants of health are being taken into consideration, such as resource distribution and gender differences. A wider definition of health also takes into account such socially-related concerns as violence and armed conflict.[4] Moreover, formerly unknown diseases, such as Human Immunodeficiency Virus and Acquired Immunodeficiency Syndrome (HIV/AIDS), and others that have become more widespread, such as cancer, as well as the rapid growth of the world population, have created new obstacles for the realization of the right to health which need to be taken into account when interpreting article 12.

11. The Committee interprets the right to health, as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels.

12. The right to health in all its forms and at all levels contains the following interrelated and essential elements, the precise application of which will depend on the conditions prevailing in a particular State party:

(a) *Availability*. Functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State party. The precise nature of the facilities, goods and services will vary depending on numerous factors, including the State party's developmental level. They will include, however, the underlying determinants of health, such as safe and potable drinking water and adequate sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel receiving domestically competitive salaries, and essential drugs, as defined by the WHO Action Programme on Essential Drugs.[5]

(b) *Accessibility*. Health facilities, goods and services[6] have to be accessible to everyone without discrimination, within the jurisdiction of the State party. Accessibility has four overlapping dimensions:

(i) Non-discrimination: health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds.[7]

(ii) Physical accessibility: health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities and persons with HIV/AIDS. Accessibility also implies that medical services and underlying determinants of health, such as safe and potable water and adequate sanitation facilities, are within safe physical reach, including in rural areas. Accessibility further includes adequate access to buildings for persons with disabilities.

(iii) Economic accessibility (affordability): health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households.

(iv) Information accessibility: accessibility includes the right to seek, receive and impart information and ideas[8] concerning health issues. However, accessibility of information should not impair the right to have personal health data treated with confidentiality.

(c) *Acceptability.* All health facilities, goods and services must be respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned.

(d) *Quality.* As well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality. This requires, *inter alia*, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.

13. The non-exhaustive catalogue of examples in article 12.2 provides guidance in defining the action to be taken by States. It gives specific generic examples of measures arising from the broad definition of the right to health contained in article 12.1, thereby illustrating the content of that right, as exemplified in the following paragraphs.[9]

Article 12.2 (a). The right to maternal, child and reproductive health

14. "The provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child" (art. 12.2 (a))[10] may be understood as requiring measures to improve child and maternal health, sexual and reproductive health services, including access to family planning, pre- and post-natal care,[11] emergency obstetric services and access to information, as well as to resources necessary to act on that information.[12]

Article 12.2 (b). The right to healthy natural and workplace environments

15. "The improvement of all aspects of environmental and industrial hygiene" (art. 12.2 (b)) comprises, *inter alia*, preventive measures in respect of occupational accidents and diseases; the requirement to ensure an adequate supply of safe and potable water and basic sanitation; the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health.[13] Furthermore, industrial hygiene refers to the minimization, so far as is reasonably practicable, of the causes of health hazards inherent in the working environment.[14] Article 12.2 (b) also embraces adequate housing and safe and hygienic working conditions, an adequate supply of food and proper nutrition, and discourages the abuse of alcohol, and the use of tobacco, drugs and other harmful substances.

Article 12.2 (c). The right to prevention, treatment and control of diseases

16. "The prevention, treatment and control of epidemic, endemic, occupational and other diseases" (art. 12.2 (c)) requires the establishment of prevention and education programmes for behaviour-related health concerns such as sexually transmitted diseases, in particular HIV/AIDS, and those adversely affecting sexual and reproductive health, and the promotion of social determinants of good health, such as environmental safety, education, economic development and gender equity. The right to treatment includes the creation of a system of urgent medical care in cases of accidents, epidemics and similar health hazards, and the provision of disaster relief and humanitarian assistance in emergency situations. The control of diseases refers to States' individual and joint efforts to, *inter alia*, make available relevant technologies, using and

improving epidemiological surveillance and data collection on a disaggregated basis, the implementation or enhancement of immunization programmes and other strategies of infectious disease control.

Article 12.2 (d). The right to health facilities, goods and services[15]

17. "The creation of conditions which would assure to all medical service and medical attention in the event of sickness" (art. 12.2 (d)), both physical and mental, includes the provision of equal and timely access to basic preventive, curative, rehabilitative health services and health education; regular screening programmes; appropriate treatment of prevalent diseases, illnesses, injuries and disabilities, preferably at community level; the provision of essential drugs; and appropriate mental health treatment and care. A further important aspect is the improvement and furtherance of participation of the population in the provision of preventive and curative health services, such as the organization of the health sector, the insurance system and, in particular, participation in political decisions relating to the right to health taken at both the community and national levels.

Article 12. Special topics of broad application

Non-discrimination and equal treatment

18. By virtue of article 2.2 and article 3, the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health. The Committee stresses that many measures, such as most strategies and programmes designed to eliminate health-related discrimination, can be pursued with minimum resource implications through the adoption, modification or abrogation of legislation or the dissemination of information. The Committee recalls General Comment No. 3, paragraph 12, which states that even in times of severe resource constraints, the vulnerable members of society must be protected by the adoption of relatively low-cost targeted programmes.

19. With respect to the right to health, equality of access to health care and health services has to be emphasized. States have a special obligation to provide those who do not have sufficient means with the necessary health insurance and health-care facilities, and to prevent any discrimination on internationally prohibited grounds in the provision of health care and health services, especially with respect to the core obligations of the right to health.[16] Inappropriate health resource allocation can lead to discrimination that may not be overt. For example, investments should not disproportionately favour expensive curative health services which are often accessible only to a small, privileged fraction of the population, rather than primary and preventive health care benefiting a far larger part of the population.

Gender perspective

20. The Committee recommends that States integrate a gender perspective in their health-related policies, planning, programmes and research in order to promote better health for both women and men. A gender-based approach recognizes that biological and socio-cultural factors play a significant role in influencing the health of men and women. The disaggregation of health and socio-economic data according to sex is essential for identifying and remedying inequalities in health.

Women and the right to health

21. To eliminate discrimination against women, there is a need to develop and implement a comprehensive national strategy for promoting women's right to health throughout their life span. Such a strategy should include interventions aimed at the prevention and treatment of diseases affecting women, as well as policies to provide access to a full range of high quality and affordable health care, including sexual and reproductive services. A major goal should be reducing women's health risks, particularly lowering rates of maternal mortality and protecting women from domestic violence. The realization of women's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health. It is also important to undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights.

Children and adolescents

22. Article 12.2 (a) outlines the need to take measures to reduce infant mortality and promote the healthy development of infants and children. Subsequent international human rights instruments recognize that children and adolescents have the right to the enjoyment of the highest standard of health and access to facilities for the treatment of illness.[17] The Convention on the Rights of the Child directs States to ensure access to essential health services for the child and his or her family, including pre- and post-natal care for mothers. The Convention links these goals with ensuring access to child-friendly information about preventive and health-promoting behaviour and support to families and communities in implementing these practices. Implementation of the principle of non-discrimination requires that girls, as well as boys, have equal access to adequate nutrition, safe environments, and physical as well as mental health services. There is a need to adopt effective and appropriate measures to abolish harmful traditional practices affecting the health of children, particularly girls, including early marriage, female genital mutilation, preferential feeding and care of male children.[18] Children with disabilities should be given the opportunity to enjoy a fulfilling and decent life and to participate within their community.

23. States parties should provide a safe and supportive environment for adolescents, that ensures the opportunity to participate in decisions affecting their health, to build life-skills, to acquire appropriate information, to receive counselling and to negotiate the health-behaviour choices they make. The realization of the right to health of adolescents is dependent on the development of youth-friendly health care, which respects confidentiality and privacy and includes appropriate sexual and reproductive health services.

24. In all policies and programmes aimed at guaranteeing the right to health of children and adolescents their best interests shall be a primary consideration.

Older persons

25. With regard to the realization of the right to health of older persons, the Committee, in accordance with paragraphs 34 and 35 of General Comment No. 6 (1995), reaffirms the importance of an integrated approach, combining elements of preventive, curative and rehabilitative health treatment. Such measures should be based on periodical check-ups for both sexes; physical as well as psychological rehabilitative measures aimed at maintaining the functionality and autonomy of older persons; and attention and care for chronically and terminally ill persons, sparing them avoidable pain and enabling them to die with dignity.

Persons with disabilities

26. The Committee reaffirms paragraph 34 of its General Comment No. 5, which addresses the issue of persons with disabilities in the context of the right to physical and mental health. Moreover, the Committee stresses the need to ensure that not only the public health sector but also private providers of health services and facilities comply with the principle of non-discrimination in relation to persons with disabilities.

Indigenous peoples

27. In the light of emerging international law and practice and the recent measures taken by States in relation to indigenous peoples,[19] the Committee deems it useful to identify elements that would help to define indigenous peoples' right to health in order better to enable States with indigenous peoples to implement the provisions contained in article 12 of the Covenant. The Committee considers that indigenous peoples have the right to specific measures to improve their access to health services and care. These health services should be culturally appropriate, taking into account traditional preventive care, healing practices and medicines. States should provide resources for indigenous peoples to design, deliver and control such services so that they may enjoy the highest attainable standard of physical and mental health. The vital medicinal plants, animals and minerals necessary to the full enjoyment of health of indigenous peoples should also be protected. The Committee notes that, in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this respect, the Committee considers that development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.

Limitations

28. Issues of public health are sometimes used by States as grounds for limiting the exercise of other fundamental rights. The Committee wishes to emphasize that the Covenant's limitation clause, article 4, is primarily intended to protect the rights of individuals rather than to permit the imposition of limitations by States. Consequently a State party which, for example, restricts the movement of, or incarcerates, persons with transmissible diseases such as HIV/AIDS, refuses to

allow doctors to treat persons believed to be opposed to a government, or fails to provide immunization against the community's major infectious diseases, on grounds such as national security or the preservation of public order, has the burden of justifying such serious measures in relation to each of the elements identified in article 4. Such restrictions must be in accordance with the law, including international human rights standards, compatible with the nature of the rights protected by the Covenant, in the interest of legitimate aims pursued, and strictly necessary for the promotion of the general welfare in a democratic society.

29. In line with article 5.1, such limitations must be proportional, i.e. the least restrictive alternative must be adopted where several types of limitations are available. Even where such limitations on grounds of protecting public health are basically permitted, they should be of limited duration and subject to review.

II. STATES PARTIES' OBLIGATIONS

General legal obligations

30. While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States parties various obligations which are of immediate effect. States parties have immediate obligations in relation to the right to health, such as the guarantee that the right will be exercised without discrimination of any kind (art. 2.2) and the obligation to take steps (art. 2.1) towards the full realization of article 12. Such steps must be deliberate, concrete and targeted towards the full realization of the right to health.[20]

31. The progressive realization of the right to health over a period of time should not be interpreted as depriving States parties' obligations of all meaningful content. Rather, progressive realization means that States parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization of article 12.[21]

32. As with all other rights in the Covenant, there is a strong presumption that retrogressive measures taken in relation to the right to health are not permissible. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party's maximum available resources.[22]

33. The right to health, like all human rights, imposes three types or levels of obligations on States parties: the obligations to *respect*, *protect* and *fulfil*. In turn, the obligation to fulfil contains obligations to facilitate, provide and promote.[23] The obligation to *respect* requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. The obligation to *protect* requires States to take measures that prevent third parties from interfering with article 12 guarantees. Finally, the obligation to *fulfil* requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health.

Specific legal obligations

34. In particular, States are under the obligation to *respect* the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a State policy; and abstaining from imposing discriminatory practices relating to women's health status and needs. Furthermore, obligations to respect include a State's obligation to refrain from prohibiting or impeding traditional preventive care, healing practices and medicines, from marketing unsafe drugs and from applying coercive medical treatments, unless on an exceptional basis for the treatment of mental illness or the prevention and control of communicable diseases. Such exceptional cases should be subject to specific and restrictive conditions, respecting best practices and applicable international standards, including the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care.[24] In addition, States should refrain from limiting access to contraceptives and other means of maintaining sexual and reproductive health, from censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information, as well as from preventing people's participation in health-related matters. States should also refrain from unlawfully polluting air, water and soil, e.g. through industrial waste from State-owned facilities, from using or testing nuclear, biological or chemical weapons if such testing results in the release of substances harmful to human health, and from limiting access to health services as a punitive measure, e.g. during armed conflicts in violation of international humanitarian law.

35. Obligations to *protect* include, *inter alia*, the duties of States to adopt legislation or to take other measures ensuring equal access to health care and health-related services provided by third parties; to ensure that privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services; to control the marketing of medical equipment and medicines by third parties; and to ensure that medical practitioners and other health professionals meet appropriate standards of education, skill and ethical codes of conduct. States are also obliged to ensure that harmful social or traditional practices do not interfere with access to pre- and post-natal care and family-planning; to prevent third parties from coercing women to undergo traditional practices, e.g. female genital mutilation; and to take measures to protect all vulnerable or marginalized groups of society, in particular women, children, adolescents and older persons, in the light of gender-based expressions of violence. States should also ensure that third parties do not limit people's access to health-related information and services.

36. The obligation to *fulfil* requires States parties, *inter alia*, to give sufficient recognition to the right to health in the national political and legal systems, preferably by way of legislative implementation, and to adopt a national health policy with a detailed plan for realizing the right to health. States must ensure provision of health care, including immunization programmes against the major infectious diseases, and ensure equal access for all to the underlying determinants of health, such as nutritiously safe food and potable drinking water, basic sanitation and adequate housing and living conditions. Public health infrastructures should provide for sexual and reproductive health services, including safe motherhood, particularly in rural areas. States have to ensure the appropriate training of doctors and other medical personnel, the provision of a sufficient number of hospitals, clinics and other health-related facilities, and the

promotion and support of the establishment of institutions providing counselling and mental health services, with due regard to equitable distribution throughout the country. Further obligations include the provision of a public, private or mixed health insurance system which is affordable for all, the promotion of medical research and health education, as well as information campaigns, in particular with respect to HIV/AIDS, sexual and reproductive health, traditional practices, domestic violence, the abuse of alcohol and the use of cigarettes, drugs and other harmful substances. States are also required to adopt measures against environmental and occupational health hazards and against any other threat as demonstrated by epidemiological data. For this purpose they should formulate and implement national policies aimed at reducing and eliminating pollution of air, water and soil, including pollution by heavy metals such as lead from gasoline. Furthermore, States parties are required to formulate, implement and periodically review a coherent national policy to minimize the risk of occupational accidents and diseases, as well as to provide a coherent national policy on occupational safety and health services.[25]

37. The obligation to *fulfil (facilitate)* requires States *inter alia* to take positive measures that enable and assist individuals and communities to enjoy the right to health. States parties are also obliged to *fulfil (provide)* a specific right contained in the Covenant when individuals or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal. The obligation to *fulfil (promote)* the right to health requires States to undertake actions that create, maintain and restore the health of the population. Such obligations include: (i) fostering recognition of factors favouring positive health results, e.g. research and provision of information; (ii) ensuring that health services are culturally appropriate and that health care staff are trained to recognize and respond to the specific needs of vulnerable or marginalized groups; (iii) ensuring that the State meets its obligations in the dissemination of appropriate information relating to healthy lifestyles and nutrition, harmful traditional practices and the availability of services; (iv) supporting people in making informed choices about their health.

International obligations

38. In its General Comment No. 3, the Committee drew attention to the obligation of all States parties to take steps, individually and through international assistance and cooperation, especially economic and technical, towards the full realization of the rights recognized in the Covenant, such as the right to health. In the spirit of article 56 of the Charter of the United Nations, the specific provisions of the Covenant (articles 12, 2.1, 22 and 23) and the Alma-Ata Declaration on primary health care, States parties should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to health. In this regard, States parties are referred to the Alma-Ata Declaration which proclaims that the existing gross inequality in the health status of the people, particularly between developed and developing countries, as well as within countries, is politically, socially and economically unacceptable and is, therefore, of common concern to all countries.[26]

39. To comply with their international obligations in relation to article 12, States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law. Depending on the availability of resources, States should facilitate access to

essential health facilities, goods and services in other countries, wherever possible and provide the necessary aid when required.[27] States parties should ensure that the right to health is given due attention in international agreements and, to that end, should consider the development of further legal instruments. In relation to the conclusion of other international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to health. Similarly, States parties have an obligation to ensure that their actions as members of international organizations take due account of the right to health. Accordingly, States parties which are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should pay greater attention to the protection of the right to health in influencing the lending policies, credit agreements and international measures of these institutions.

40. States parties have a joint and individual responsibility, in accordance with the Charter of the United Nations and relevant resolutions of the United Nations General Assembly and of the World Health Assembly, to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons. Each State should contribute to this task to the maximum of its capacities. Priority in the provision of international medical aid, distribution and management of resources, such as safe and potable water, food and medical supplies, and financial aid should be given to the most vulnerable or marginalized groups of the population. Moreover, given that some diseases are easily transmissible beyond the frontiers of a State, the international community has a collective responsibility to address this problem. The economically developed States parties have a special responsibility and interest to assist the poorer developing States in this regard.

41. States parties should refrain at all times from imposing embargoes or similar measures restricting the supply of another State with adequate medicines and medical equipment. Restrictions on such goods should never be used as an instrument of political and economic pressure. In this regard, the Committee recalls its position, stated in General Comment No. 8, on the relationship between economic sanctions and respect for economic, social and cultural rights.

42. While only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society - individuals, including health professionals, families, local communities, intergovernmental and non-governmental organizations, civil society organizations, as well as the private business sector - have responsibilities regarding the realization of the right to health. State parties should therefore provide an environment which facilitates the discharge of these responsibilities.

Core obligations

43. In General Comment No. 3, the Committee confirms that States parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant, including essential primary health care. Read in conjunction with more contemporary instruments, such as the Programme of Action of the International Conference on Population and Development,[28] the Alma-Ata Declaration provides compelling guidance on the core obligations arising from article 12. Accordingly, in the Committee's view, these core obligations include at least the following obligations:

(a) To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;

(b) To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;

(c) To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;

(d) To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;

(e) To ensure equitable distribution of all health facilities, goods and services;

(f) To adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalized groups.

44. The Committee also confirms that the following are obligations of comparable priority:

(a) To ensure reproductive, maternal (pre-natal as well as post-natal) and child health care;

(b) To provide immunization against the major infectious diseases occurring in the community;

(c) To take measures to prevent, treat and control epidemic and endemic diseases;

(d) To provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them;

(e) To provide appropriate training for health personnel, including education on health and human rights.

45. For the avoidance of any doubt, the Committee wishes to emphasize that it is particularly incumbent on States parties and other actors in a position to assist, to provide "international assistance and cooperation, especially economic and technical"[29] which enable developing countries to fulfil their core and other obligations indicated in paragraphs 43 and 44 above.

III. VIOLATIONS

46. When the normative content of article 12 (Part I) is applied to the obligations of States parties (Part II), a dynamic process is set in motion which facilitates identification of violations of the right to health. The following paragraphs provide illustrations of violations of article 12.

47. In determining which actions or omissions amount to a violation of the right to health, it is important to distinguish the inability from the unwillingness of a State party to comply with its obligations under article 12. This follows from article 12.1, which speaks of the highest attainable standard of health, as well as from article 2.1 of the Covenant, which obliges each State party to take the necessary steps to the maximum of its available resources. A State which is unwilling to use the maximum of its available resources for the realization of the right to health is in violation of its obligations under article 12. If resource constraints render it impossible for a State to comply fully with its Covenant obligations, it has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy, as a matter of priority, the obligations outlined above. It should be stressed, however, that a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations set out in paragraph 43 above, which are non-derogable.

48. Violations of the right to health can occur through the direct action of States or other entities insufficiently regulated by States. The adoption of any retrogressive measures incompatible with the core obligations under the right to health, outlined in paragraph 43 above, constitutes a violation of the right to health. Violations through *acts of commission* include the formal repeal or suspension of legislation necessary for the continued enjoyment of the right to health or the adoption of legislation or policies which are manifestly incompatible with pre-existing domestic or international legal obligations in relation to the right to health.

49. Violations of the right to health can also occur through the omission or failure of States to take necessary measures arising from legal obligations. Violations through *acts of omission* include the failure to take appropriate steps towards the full realization of everyone's right to the enjoyment of the highest attainable standard of physical and mental health, the failure to have a national policy on occupational safety and health as well as occupational health services, and the failure to enforce relevant laws.

Violations of the obligation to respect

50. Violations of the obligation to respect are those State actions, policies or laws that contravene the standards set out in article 12 of the Covenant and are likely to result in bodily harm, unnecessary morbidity and preventable mortality. Examples include the denial of access to health facilities, goods and services to particular individuals or groups as a result of de jure or de facto discrimination; the deliberate withholding or misrepresentation of information vital to health protection or treatment; the suspension of legislation or the adoption of laws or policies that interfere with the enjoyment of any of the components of the right to health; and the failure of the State to take into account its legal obligations regarding the right to health when entering into bilateral or multilateral agreements with other States, international organizations and other entities, such as multinational corporations.

Violations of the obligation to protect

51. Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties. This category includes such omissions as the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others; the failure to protect consumers and workers from practices detrimental to health, e.g. by employers and manufacturers of medicines or food; the failure to discourage production, marketing and consumption of tobacco, narcotics and other harmful substances; the failure to protect women against violence or to prosecute perpetrators; the failure to discourage the continued observance of harmful traditional medical or cultural practices; and the failure to enact or enforce laws to prevent the pollution of water, air and soil by extractive and manufacturing industries.

Violations of the obligation to fulfil

52. Violations of the obligation to fulfil occur through the failure of States parties to take all necessary steps to ensure the realization of the right to health. Examples include the failure to adopt or implement a national health policy designed to ensure the right to health for everyone; insufficient expenditure or misallocation of public resources which results in the non-enjoyment of the right to health by individuals or groups, particularly the vulnerable or marginalized; the failure to monitor the realization of the right to health at the national level, for example by identifying right to health indicators and benchmarks; the failure to take measures to reduce the inequitable distribution of health facilities, goods and services; the failure to adopt a gender-sensitive approach to health; and the failure to reduce infant and maternal mortality rates.

IV. IMPLEMENTATION AT THE NATIONAL LEVEL

Framework legislation

53. The most appropriate feasible measures to implement the right to health will vary significantly from one State to another. Every State has a margin of discretion in assessing which measures are most suitable to meet its specific circumstances. The Covenant, however, clearly imposes a duty on each State to take whatever steps are necessary to ensure that everyone has access to health facilities, goods and services so that they can enjoy, as soon as possible, the highest attainable standard of physical and mental health. This requires the adoption of a national strategy to ensure to all the enjoyment of the right to health, based on human rights principles which define the objectives of that strategy, and the formulation of policies and corresponding right to health indicators and benchmarks. The national health strategy should also identify the resources available to attain defined objectives, as well as the most cost-effective way of using those resources.

54. The formulation and implementation of national health strategies and plans of action should respect, *inter alia*, the principles of non-discrimination and people's participation. In particular, the right of individuals and groups to participate in decision-making processes, which may affect their development, must be an integral component of any policy, programme or strategy developed to discharge governmental obligations under article 12. Promoting health

must involve effective community action in setting priorities, making decisions, planning, implementing and evaluating strategies to achieve better health. Effective provision of health services can only be assured if people's participation is secured by States.

55. The national health strategy and plan of action should also be based on the principles of accountability, transparency and independence of the judiciary, since good governance is essential to the effective implementation of all human rights, including the realization of the right to health. In order to create a favourable climate for the realization of the right, States parties should take appropriate steps to ensure that the private business sector and civil society are aware of, and consider the importance of, the right to health in pursuing their activities.

56. States should consider adopting a framework law to operationalize their right to health national strategy. The framework law should establish national mechanisms for monitoring the implementation of national health strategies and plans of action. It should include provisions on the targets to be achieved and the time-frame for their achievement; the means by which right to health benchmarks could be achieved; the intended collaboration with civil society, including health experts, the private sector and international organizations; institutional responsibility for the implementation of the right to health national strategy and plan of action; and possible recourse procedures. In monitoring progress towards the realization of the right to health, States parties should identify the factors and difficulties affecting implementation of their obligations.

Right to health indicators and benchmarks

57. National health strategies should identify appropriate right to health indicators and benchmarks. The indicators should be designed to monitor, at the national and international levels, the State party's obligations under article 12. States may obtain guidance on appropriate right to health indicators, which should address different aspects of the right to health, from the ongoing work of WHO and the United Nations Children's Fund (UNICEF) in this field. Right to health indicators require disaggregation on the prohibited grounds of discrimination.

58. Having identified appropriate right to health indicators, States parties are invited to set appropriate national benchmarks in relation to each indicator. During the periodic reporting procedure the Committee will engage in a process of scoping with the State party. Scoping involves the joint consideration by the State party and the Committee of the indicators and national benchmarks which will then provide the targets to be achieved during the next reporting period. In the following five years, the State party will use these national benchmarks to help monitor its implementation of article 12. Thereafter, in the subsequent reporting process, the State party and the Committee will consider whether or not the benchmarks have been achieved, and the reasons for any difficulties that may have been encountered.

Remedies and accountability

59. Any person or group victim of a violation of the right to health should have access to effective judicial or other appropriate remedies at both national and international levels.[30] All victims of such violations should be entitled to adequate reparation, which may take the form of

restitution, compensation, satisfaction or guarantees of non-repetition. National ombudsmen, human rights commissions, consumer forums, patients' rights associations or similar institutions should address violations of the right to health.

60. The incorporation in the domestic legal order of international instruments recognizing the right to health can significantly enhance the scope and effectiveness of remedial measures and should be encouraged in all cases.[31] Incorporation enables courts to adjudicate violations of the right to health, or at least its core obligations, by direct reference to the Covenant.

61. Judges and members of the legal profession should be encouraged by States parties to pay greater attention to violations of the right to health in the exercise of their functions.

62. States parties should respect, protect, facilitate and promote the work of human rights advocates and other members of civil society with a view to assisting vulnerable or marginalized groups in the realization of their right to health.

V. OBLIGATIONS OF ACTORS OTHER THAN STATES PARTIES

63. The role of the United Nations agencies and programmes, and in particular the key function assigned to WHO in realizing the right to health at the international, regional and country levels, is of particular importance, as is the function of UNICEF in relation to the right to health of children. When formulating and implementing their right to health national strategies, States parties should avail themselves of technical assistance and cooperation of WHO. Further, when preparing their reports, States parties should utilize the extensive information and advisory services of WHO with regard to data collection, disaggregation, and the development of right to health indicators and benchmarks.

64. Moreover, coordinated efforts for the realization of the right to health should be maintained to enhance the interaction among all the actors concerned, including the various components of civil society. In conformity with articles 22 and 23 of the Covenant, WHO, The International Labour Organization, the United Nations Development Programme, UNICEF, the United Nations Population Fund, the World Bank, regional development banks, the International Monetary Fund, the World Trade Organization and other relevant bodies within the United Nations system, should cooperate effectively with States parties, building on their respective expertise, in relation to the implementation of the right to health at the national level, with due respect to their individual mandates. In particular, the international financial institutions, notably the World Bank and the International Monetary Fund, should pay greater attention to the protection of the right to health in their lending policies, credit agreements and structural adjustment programmes. When examining the reports of States parties and their ability to meet the obligations under article 12, the Committee will consider the effects of the assistance provided by all other actors. The adoption of a human rights-based approach by United Nations specialized agencies, programmes and bodies will greatly facilitate implementation of the right to health. In the course of its examination of States parties' reports, the Committee will also consider the role of health professional associations and other non-governmental organizations in relation to the States' obligations under article 12.

65. The role of WHO, the Office of the United Nations High Commissioner for Refugees, the International Committee of the Red Cross/Red Crescent and UNICEF, as well as non governmental organizations and national medical associations, is of particular importance in relation to disaster relief and humanitarian assistance in times of emergencies, including assistance to refugees and internally displaced persons. Priority in the provision of international medical aid, distribution and management of resources, such as safe and potable water, food and medical supplies, and financial aid should be given to the most vulnerable or marginalized groups of the population.

Adopted on 11 May 2000.

Notes

[1] For example, the principle of non-discrimination in relation to health facilities, goods and services is legally enforceable in numerous national jurisdictions.

[2] In its resolution 1989/11.

[3] The Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care adopted by the United Nations General Assembly in 1991 (resolution 46/119) and the Committee's General Comment No. 5 on persons with disabilities apply to persons with mental illness; the Programme of Action of the International Conference on Population and Development held at Cairo in 1994, as well as the Declaration and Programme for Action of the Fourth World Conference on Women held in Beijing in 1995 contain definitions of reproductive health and women's health, respectively.

[4] Common article 3 of the Geneva Conventions for the protection of war victims (1949); Additional Protocol I (1977) relating to the Protection of Victims of International Armed Conflicts, art. 75 (2) (a); Additional Protocol II (1977) relating to the Protection of Victims of Non-International Armed Conflicts, art. 4 (a).

[5] See WHO Model List of Essential Drugs, revised December 1999, WHO Drug Information, vol. 13, No. 4, 1999.

[6] Unless expressly provided otherwise, any reference in this General Comment to health facilities, goods and services includes the underlying determinants of health outlined in paras. 11 and 12 (a) of this General Comment.

[7] See paras. 18 and 19 of this General Comment.

[8] See article 19.2 of the International Covenant on Civil and Political Rights. This General Comment gives particular emphasis to access to information because of the special importance of this issue in relation to health.

[9] In the literature and practice concerning the right to health, three levels of health care are frequently referred to*: primary health care* typically deals with common and relatively minor

illnesses and is provided by health professionals and/or generally trained doctors working within the community at relatively low cost; *secondary health care* is provided in centres, usually hospitals, and typically deals with relatively common minor or serious illnesses that cannot be managed at community level, using specialty-trained health professionals and doctors, special equipment and sometimes in-patient care at comparatively higher cost; *tertiary health care* is provided in relatively few centres, typically deals with small numbers of minor or serious illnesses requiring specialty-trained health professionals and doctors and special equipment, and is often relatively expensive. Since forms of primary, secondary and tertiary health care frequently overlap and often interact, the use of this typology does not always provide sufficient distinguishing criteria to be helpful for assessing which levels of health care States parties must provide, and is therefore of limited assistance in relation to the normative understanding of article 12.

[10] According to WHO, the stillbirth rate is no longer commonly used, infant and under-five mortality rates being measured instead.

[11] *Prenatal* denotes existing or occurring before birth; *perinatal* refers to the period shortly before and after birth (in medical statistics the period begins with the completion of 28 weeks of gestation and is variously defined as ending one to four weeks after birth); *neonatal*, by contrast, covers the period pertaining to the first four weeks after birth; while *post-natal* denotes occurrence after birth. In this General Comment, the more generic terms pre- and post-natal are exclusively employed.

[12] Reproductive health means that women and men have the freedom to decide if and when to reproduce and the right to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice as well as the right of access to appropriate health-care services that will, for example, enable women to go safely through pregnancy and childbirth.

[13] The Committee takes note, in this regard, of Principle 1 of the Stockholm Declaration of 1972 which states: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being", as well as of recent developments in international law, including General Assembly resolution 45/94 on the need to ensure a healthy environment for the well-being of individuals; Principle 1 of the Rio Declaration; and regional human rights instruments such as article 10 of the San Salvador Protocol to the American Convention on Human Rights.

[14] ILO Convention No. 155, art. 4.2.

[15] See para. 12 (b) and note 8 above.

[16] For the core obligations, see paras. 43 and 44 of the present General Comments.

[17] Article 24.1 of the Convention on the Rights of the Child.

[18] See World Health Assembly resolution WHA47.10, 1994, entitled "Maternal and child health and family planning: traditional practices harmful to the health of women and children".

[19] Recent emerging international norms relevant to indigenous peoples include the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989); articles 29 (c) and (d) and 30 of the Convention on the Rights of the Child (1989); article 8 (j) of the Convention on Biological Diversity (1992), recommending that States respect, preserve and maintain knowledge, innovation and practices of indigenous communities; Agenda 21 of the United Nations Conference on Environment and Development (1992), in particular chapter 26; and Part I, paragraph 20, of the Vienna Declaration and Programme of Action (1993), stating that States should take concerted positive steps to ensure respect for all human rights of indigenous people, on the basis of non-discrimination. See also the preamble and article 3 of the United Nations Framework Convention on Climate Change (1992); and article 10 (2) (e) of the United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (1994). During recent years an increasing number of States have changed their constitutions and introduced legislation recognizing specific rights of indigenous peoples.

[20] See General Comment No. 13, para. 43.

[21] See General Comment No. 3, para. 9; General Comment No. 13, para. 44.

[22] See General Comment No. 3, para. 9; General Comment No. 13, para. 45.

[23] According to General Comments Nos. 12 and 13, the obligation to fulfil incorporates an obligation to *facilitate* and an obligation to *provide*. In the present General Comment, the obligation to fulfil also incorporates an obligation to *promote* because of the critical importance of health promotion in the work of WHO and elsewhere.

[24] General Assembly resolution 46/119 (1991).

[25] Elements of such a policy are the identification, determination, authorization and control of dangerous materials, equipment, substances, agents and work processes; the provision of health information to workers and the provision, if needed, of adequate protective clothing and equipment; the enforcement of laws and regulations through adequate inspection; the requirement of notification of occupational accidents and diseases, the conduct of inquiries into serious accidents and diseases, and the production of annual statistics; the protection of workers and their representatives from disciplinary measures for actions properly taken by them in conformity with such a policy; and the provision of occupational health services with essentially preventive functions. See ILO Occupational Safety and Health Convention, 1981 (No. 155) and Occupational Health Services Convention, 1985 (No. 161).

[26] Article II, Alma-Ata Declaration, Report of the International Conference on Primary Health Care, Alma-Ata, 6-12 September 1978, in: World Health Organization, "Health for All" Series, No. 1, WHO, Geneva, 1978.

[27] See para. 45 of this General Comment.

[28] Report of the International Conference on Population and Development, Cairo, 5-13 September 1994 (United Nations publication, Sales No. E.95.XIII.18), chap. I, resolution 1, annex, chaps. VII and VIII.

[29] Covenant, art. 2.1.

[30] Regardless of whether groups as such can seek remedies as distinct holders of rights, States parties are bound by both the collective and individual dimensions of article 12. Collective rights are critical in the field of health; modern public health policy relies heavily on prevention and promotion which are approaches directed primarily to groups.

[31] See General Comment No. 2, para. 9.

Annex 93

Committee on Economic, Social and Cultural Rights, General Comment 8, The relationship between economic sanctions and respect for economic, social and cultural rights (Seventeenth session, 1997), U.N. Doc. E/C.12/1997/8 (1997), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 50 (2003).

IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

General Comment No. 8 (1997) */

The relationship between economic sanctions and respect for economic, social and cultural rights

1. Economic sanctions are being imposed with increasing frequency, both internationally, regionally and unilaterally. The purpose of this general comment is to emphasize that, whatever the circumstances, such sanctions should always take full account of the provisions of the International Covenant on Economic, Social and Cultural Rights. The Committee does not in any way call into question the necessity for the imposition of sanctions in appropriate cases in accordance with Chapter VII of the Charter of the United Nations or other applicable international law. But those provisions of the Charter that relate to human rights (Articles 1, 55 and 56) must still be considered to be fully applicable in such cases.

2. During the 1990s the Security Council has imposed sanctions of varying kind and duration in relation to South Africa, Iraq/Kuwait, parts of the former Yugoslavia, Somalia, the Libyan Arab Jamahiriya, Liberia, Haiti, Angola, Rwanda and the Sudan. The impact of sanctions upon the enjoyment of economic, social and cultural rights has been brought to the Committee's attention in a number of cases involving States parties to the Covenant, some of which have reported regularly, thereby giving the Committee the opportunity to examine the situation carefully.

3. While the impact of sanctions varies from one case to another, the Committee is aware that they almost always have a dramatic impact on the rights recognized in the Covenant. Thus, for example, they often cause significant disruption in the distribution of food, pharmaceuticals and sanitation supplies, jeopardize the quality of food and the availability of clean drinking water, severely interfere with the functioning of basic health and education systems, and undermine the right to work. In addition, their unintended consequences can include reinforcement of the power of oppressive élites, the emergence, almost invariably, of a black market and the generation of huge windfall profits for the privileged élites which manage it, enhancement of the control of the governing élites over the population at large, and restriction of opportunities to seek asylum or to manifest political opposition. While the phenomena mentioned in the preceding sentence are essentially political in nature, they also have a m jor additional impact on the enjoyment of economic, social and cultural rights.

4. In considering sanctions, it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing élite of the country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country. For that reason, the sanctions regimes established by the Security Council now include humanitarian exemptions designed to permit the flow of essential goods and services destined for humanitarian purposes. It is commonly assumed that these exemptions ensure basic respect for economic, social and cultural rights within the targeted country.

5. However, a number of recent United Nations and other studies which have analysed the impact of sanctions have concluded that these exemptions do not have this effect. Moreover, the exemptions are very limited in scope. They do not address, for example, the question of access to primary education, nor do they provide for repairs to infrastructures which are essential to provide clean water, adequate health care etc. The Secretary-General suggested in 1995 that there is a need to assess the potential impact of sanctions before they are imposed and to enhance arrangements for the provision of humanitarian assistance to vulnerable groups.[1/] In the following year, a major study prepared for the General Assembly by Ms Graça Machel, on the impact of armed conflict on children, stated that "humanitarian exemptions tend to be ambiguous and are interpreted rbitrarily and inconsistently. ... Delays, confusion and the denial of requests to import essential humanitarian goods cause resource shortages. ...[Their effects] inevitably fall most heavily on the poor".[2/] Most recently, an October 1997 United Nations report concluded that the review procedures established under the various sanctions committees established by the Security Council "remain cumbersome and aid agencies still encounter difficulties in obtaining approval for exempted supplies. ... [The] committees neglect larger problems of commercial and governmental violations in the form of black-marketing, illicit trade, and corruption."[3/]

6. It is thus clear, on the basis of an impressive array of both country-specific and general studies, that insufficient attention is being paid to the impact of sanctions on vulnerable groups. Nevertheless, for various reasons, these studies have not examined specifically the nefarious consequences that ensue for the enjoyment of economic, social and cultural rights, per se. It is in fact apparent that in most, if not all, cases, those consequences have either not been taken into account at all or not given the serious consideration they deserve. There is thus a need to inject a human rights dimension into deliberations on this issue.

7. The Committee considers that the provisions of the Covenant, virtually all of which are also reflected in a range of other human rights treaties as well as the Universal Declaration of Human Rights, cannot be considered to be inoperative, or in any way inapplicable, solely because a decision has been taken that considerations of international peace and security warrant the imposition of sanctions. Just as the international community insists that any targeted State must respect the civil and political rights of its citizens, so too must that State and the international community itself do everything possible to protect at least the core content of the economic, social and cultural rights of the affected peoples of that State (see also General Comment 3 (1990), paragraph 10).

8. While this obligation of every State is derived from the commitment in the Charter of the United Nations to promote respect for all human rights, it should also be recalled that every permanent member of the Security Council has signed the Covenant, although two (China and the United States) have yet to ratify it. Most of the non-permanent members at any given time are parties. Each of these States has undertaken, in conformity with article 2, paragraph 1, of the Covenant to "take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means ...." When the affected State is also a State party, it is doubly incumbent upon other States to respect and take account of the relevant obligations. To the extent that sanctions are imposed on States which are not parties to the Covenant, the same principles would in any event apply given the status of the economic, social and cultural rights of vulnerable groups as part of general international law, as evidenced, for example, by the near-universal ratification of the Convention on the Rights of the Child and the status of the Universal Declaration of Human Rights.

9. Although the Committee has no role to play in relation to decisions to impose or not to impose sanctions, it does, however, have a responsibility to monitor compliance by all States parties with the Covenant. When measures are taken which inhibit the ability of a State party to meet its obligations under the Covenant, the

terms of sanctions and the manner in which they are implemented become appropriate matters for concern for the Committee.

10. The Committee believes that two sets of obligations flow from these considerations. The first set relates to the affected State. The imposition of sanctions does not in any way nullify or diminish the relevant obligations of that State party. As in other comparable situations, those obligations assume greater practical importance in times of particular hardship. The Committee is thus called upon to scrutinize very carefully the extent to which the State concerned has taken steps "to the maximum of its available resources" to provide the greatest possible protection for the economic, social and cultural rights of each individual living within its jurisdiction. While sanctions will inevitably diminish the capacity of the affected State to fund or support some of the necessary measures, the State remains under an obligation to ensure the absence of discrimination in relation to the enjoyment of these rights, and to take all possible measures, including negotiations with other States and the internat onal community, to reduce to a minimum the negative impact upon the rights of vulnerable groups within the society.

11. The second set of obligations relates to the party or parties responsible for the imposition, maintenance or implementation of the sanctions, whether it be the international community, an international or regional organization, or a State or group of States. In this respect, the Committee considers that there are three conclusions which follow logically from the recognition of economic, social and cultural human rights.

12. First, these rights must be taken fully into account when designing an appropriate sanctions regime. Without endorsing any particular measures in this regard, the Committee notes proposals such as those calling for the creation of a United Nations mechanism for anticipating and tracking sanctions impacts, the elaboration of a more transparent set of agreed principles and procedures based on respect for human rights, the identification of a wider range of exempt goods and services, the authorization of agreed technical agencies to determine necessary exemptions, the creation of a better resourced set of sanctions committees, more precise targeting of the vulnerabilities of those whose behaviour the international community wishes to change, and the introduction of greater overall flexibility.

13. Second, effective monitoring, which is always required under the terms of the Covenant, should be undertaken throughout the period that sanctions are in force. When an external party takes upon itself even partial responsibility for the situation within a country (whether under Chapter VII of the Charter or otherwise), it also unavoidably assumes a responsibility to do all within its power to protect the economic, social and cultural rights of the affected population.

14. Third, the external entity has an obligation "to take steps, individually and through international assistance and cooperation, especially economic and technical" in order to respond to any disproportionate suffering experienced by vulnerable groups within the targeted country.

15. In anticipating the objection that sanctions must, almost by definition, result in the grave violations of economic, social and cultural rights if they are to achieve their objectives, the Committee notes the conclusion of a major United Nations study to the effect that "decisions to reduce the suffering of children or minimize other adverse consequences can be taken without jeopardizing the policy aim of sanctions".[4] This applies equally to the situation of all vulnerable groups.

16. In adopting this general comment the sole aim of the Committee is to draw attention to the fact that the inhabitants of a given country do not forfeit their basic economic, social and cultural rights by virtue of any determination that their leaders have violated norms relating to international peace and security. The aim is not to give support or encouragement to such leaders, nor is it to undermine the legitimate interests of the international community in enforcing respect for the provisions of the Charter of the United Nations and the general principles of international law. Rather, it is to insist that lawlessness of one kind should not be met by lawlessness of another kind which pays no heed to the fundamental rights that underlie and give legitimacy to any such collective action.

Adopted on 4 December 1997

Notes

* Contained in document E/1998/22.

1/ Supplement to an Agenda for Peace, (A/50/60-S/1995/1), paras. 66 to 76.

2/ Impact of Armed Conflict on Children: Note by the Secretary-General, (A/51/306, annex) (1996), para. 128.

3/ L. Minear, et al., Toward More Humane and Effective Sanctions Management: Enhancing the Capacity of the United Nations System, Executive Summary. Study prepared at the request of the United Nations Department of Humanitarian Affairs on behalf of the Inter-Agency Standing Committee, 6 October 1997.

4/ Ibid.

Annex 94

Sacchi, et al. v. Argentina, et al.

Filing Date: 2019

Reporter Info: Communication No. 104/2019 (Argentina), Communication No. 105/2019 (Brazil), Communication No. 106/2019 (France), Communication No. 107/2019 (Germany), Communication No. 108/2019 (Turkey)

Status: Decided

Case Categories:

Jurisdictions: United Nations > United Nations Committee on the Rights of the Child

Principal Laws: UNFCCC > Paris Agreement
United Nations Convention on the Rights of the Child

Summary:

Sixteen children filed a petition alleging that Argentina, Brazil, France, Germany and Turkey violated their rights under the United Nations Convention on the Rights of the Child ("the Convention") by making insufficient cuts to greenhouse gases and failing to encourage the world's biggest emitters to curb carbon pollution. The children ask the United Nations Committee on the Rights of the Child ("the Committee") to declare that respondents violated their rights by perpetuating climate change, and to recommend actions for respondents to address climate change mitigation and adaptation.

Petitioners claim that climate change has led to violations of their rights under the Convention, including the rights to life, health, and the prioritization of the child's best interest, as well as the cultural rights of petitioners from indigenous communities. For example, Deborah Adegbile of Nigeria asserts that she has been repeatedly hospitalized for asthma attacks triggered by rising temperatures and exacerbated smog. Ellen-Anne of Sweden alleges that climate change imperils her indigenous community's traditional reliance on reindeer husbandry and herding. David Ackley III, Litokne Kabua, and Ranton Anjain of the Marshall Islands similarly claim that sea-level rise poses an existential threat to their culture.

Each respondent has ratified the Convention. All five have signed the Paris Agreement but, according to petitioners, none have made or kept commitments that align with keeping temperature rise under 2 degrees Celsius. The petition asserts that respondents have four related obligations under the Convention: (i) to prevent foreseeable domestic and extraterritorial human rights violations resulting from climate change; (ii) to cooperate internationally in the face of the global climate emergency; (iii) to apply the precautionary principle to prevent deadly consequences even in the face of uncertainty; and (iv) to ensure intergenerational justice for children and posterity. Petitioners allege that respondents have failed to prevent foreseeable human rights harms caused by climate change by making insufficient reductions to greenhouse gas emissions. Petitioners further claim that as members of the G20, respondents have failed to use available legal, diplomatic, and economic tools to protect children from the greenhouse gas pollution of major emitters including China, the United Stations, the European Union and India.

The children request that the Committee make findings including that climate change is a children's rights crisis, and that each respondent has caused and is perpetuating climate change by knowingly acting in disregard of available scientific evidence. They also ask the Committee to recommend that the respondents review, and where necessary, amend their laws and policies to ensure that mitigation and adaptation efforts are accelerated; initiate cooperative international action to establish binding and enforceable climate measures; and ensure children's right to be heard in all efforts to mitigate or adapt to the climate crisis. The Committee must determine if the petition is actionable before making findings or recommendations.

Brazil, France and Germany responded to the petition, arguing that it was not admissible on three grounds: 1) the Committee lacks jurisdiction; 2) the petition is manifestly ill-founded or unsubstantiated; and 3) petitioners have not exhausted domestic remedies. On May 4, 2020, the petitioners filed a reply asserting that the petition is admissible. They argue: 1) that the Committee has jurisdiction because the children are "directly and foreseeably injured by greenhouse gas emissions originating in Respondents' territory;" 2) the claims are manifestly well-founded because the children are suffering direct and personal harms now and will continue to in the foreseeable future; and 3) that pursuing domestic remedies would be futile.

On October 12, 2021, the CRC rejected the claim as inadmissible. The Committee accepted the claimant's arguments that States are legally responsible for the harmful effects of emissions originating in their territory on children outside their borders. The fact that all states are causing climate change does not absolve states of individual responsibility to reduce their own share of emissions. The Committee also found that the youth are victims of foreseeable threats to their rights to life, health, and culture.

Following the reasoning of the Inter-American Court of Human Rights (IACtHR)' 2017 advisory opinion, the CRC found that countries have extraterritorial responsibilities related to carbon pollution. Using the IACtHR's test for jurisdiction, the Committee found that when transboundary harm occurs, children 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 located outside its territory, when the State of origin exercises effective control over the sources of the emissions in question.

While the Committee said that the children had shown, for jurisdictional purposes, that the impairment of their rights as a result of the State party's acts or omissions regarding the carbon emissions originating within its territory was reasonably foreseeable, it held that the complaint was inadmissible for a failure to exhaust local remedies.
At Issue: Whether respondents violated children's rights under international law by making insufficient cuts to greenhouse gas emissions and failing to use available tools to protect children from carbon pollution by the world's major emitters.

Case Documents:

FILING DATE	TYPE	FILE	SUMMARY
09/23/2019	Petition	Download	Petition
09/23/2019	Not Available	Download	Appendix to Petition Part 1
09/23/2019	Not Available	Download	Appendix to Petition Part 2
05/04/2020	Reply	Download	No summary available.

FILING DATE	TYPE	FILE	SUMMARY
10/08/2021	Decision	Download	Decision adopted by the CRC (Argentina).
10/08/2021	Decision	Download	Decision adopted by the CRC (Brazil).
10/08/2021	Decision	Download	Decision adopted by the CRC (France).
10/08/2021	Decision	Download	Decision adopted by the CRC (Germany).
10/08/2021	Decision	Download	Decision adopted by the CRC (Turkey).
09/01/2021	Not Available	Download	Amicus brief on admissibility (special rapporteurs on human rights and the environment)
09/01/2021	Not Available	Download	Amicus brief on merits (special rapporteurs on human rights and the environment)

Annex 95

United Nations A/78/255

General Assembly

Distr.: General
28 July 2023

Original: English

Seventy-eighth session
Item 73 (b) of the provisional agenda*
Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Promotion and protection of human rights in the context of climate change

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change, Ian Fry, in accordance with Human Rights Council resolution 48/14.

* A/78/150.

23-14777 (E) 280823

Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change, Ian Fry

Exploring approaches to enhance climate change legislation, supporting climate change litigation and advancing the principle of intergenerational justice

Summary

In the present report, the Special Rapporteur on the promotion and protection of human rights in the context of climate change, Ian Fry, reviews current efforts by Governments to include human rights considerations in climate change-related legislation and reflect them in constitutions. He also reviews the application of human rights obligations in climate change litigation and explores the various limitations of litigation owing to substantive and procedural blockages. In the report, he notes the critical role of litigation in placing obligations on Governments, corporations and society as a whole to take decisive action to address climate change and the respective human rights obligations that underpin their corresponding responsibilities. Lastly, he explores the application of the principle of intergenerational equity and how it is evolving into intergenerational justice. The present report is a snapshot of current trends with respect to legislation, litigation and intergenerational justice. It is aimed at providing direction on incorporating human rights considerations into those three elements and is not intended to be a comprehensive review of those elements.

I. Introduction

1. In recognition of their responsibilities under the United Nations Framework Convention on Climate Change and the Paris Agreement, countries around the world have enacted laws and adopted policies that prescribe national and international responses to climate change. The linkage between taking action to address climate change and respecting, promoting and considering human rights obligations is stipulated in the preamble of the Paris Agreement. Prior to these two treaties, climate change had been considered a common concern for the world when, in 1988, the General Assembly adopted its resolution 43/53, entitled "Protection of global climate for present and future generations of mankind".

2. There is a growing body of work linking responsibilities on climate change to human rights treaties. Nevertheless, many countries have yet to make the link between climate change and human rights, even though they have clear obligations under international law that must be guaranteed in both of those legal fields. As such, States cannot ignore their human rights responsibilities when addressing climate change; this is of critical importance given the impacts that climate change is having on the rights and freedoms of people across the globe. As the Special Rapporteur stated in his previous thematic report, entitled "Promotion and protection of human rights in the context of climate change mitigation, loss and damage and participation" (A/77/226), the world is faced with a global crisis in the name of climate change. Climate change is negatively affecting and violating the rights of individuals, including their rights to life, water and sanitation, health, food, housing, a healthy environment and development, among many others. Furthermore, the climate change has a disproportionate impact on the poor, women and children, persons with disabilities, Indigenous Peoples and other disadvantaged rights holders. The impacts of climate change intersect with other factors, such as race, gender, age and socioeconomic status.

3. As the impacts of climate change on the rights of individuals continue to intensify, a rise in community frustration at the lack of urgency of Governments and corporations to take action to address climate change is being witnessed, including through various forms of public protest. In response, an increase in suppression of public dissent by Governments is also being observed. This has led to the arrest, imprisonment and extrajudicial killing of environmental rights defenders in various parts of the world, in developed and developing countries alike. This crackdown on dissent tends to create further frustration and escalate expressions of dissent. Article 19 of the International Covenant on Civil and Political Rights clearly states that people have the right to freedom of expression. This right must be respected.

4. In preparing the present report, the Special Rapporteur on the promotion and protection of human rights in the context of climate change, Ian Fry, held extensive consultations online and in-person with Governments, United Nations entities and civil society organizations. These consultations were complemented by a call for inputs, to which the Special Rapporteur received more than 60 submissions. The Special Rapporteur would like to thank all those who made submissions or participated in the consultations.

II. Considerations with regard to climate change and human rights in national constitutions

5. In many countries, the constitution outlines the structure and powers of the Government and provides the basis for national laws. Some constitutions have evolved quite rapidly and integrated new international and national legal norms. In

recent times, a number of countries have incorporated the right to a healthy environment in their constitutions. More than 150 countries have taken action on environmental constitutionalism. In addition, the following 11 jurisdictions have included a dedicated constitutional provision on climate, or "climate clauses": Algeria, Bolivia (Plurinational State of), Côte d'Ivoire, Cuba, Dominican Republic, Ecuador, Thailand, Tunisia, Venezuela (Bolivarian Republic of), Viet Nam and Zambia.[1] In the Constitution of Zambia, for example, it is stated that: "The State shall, in the utilisation of natural resources and management of the environment … establish and implement mechanisms that address climate change".[2]

6. The Constitution of Zambia also establishes a number of human rights obligations, including the protection of young persons from exploitation, the right to life and the protection of the right to personal liberty. The Constitution of Cuba stipulates that the Government of Cuba will respond to climate change, given the threat that it poses to humans, while recognizing, among other things, the common but differentiated responsibilities principle.[3] It is further stated that all persons are equal before the law, receive the same protection and treatment from the authorities and enjoy the same rights, freedoms and opportunities, without discrimination of any kind on grounds of sex, gender, sexual orientation, gender identity, age, ethnic origin, skin colour, religious belief, disability, national or regional origin, or any other personal condition or circumstance that implies a distinction detrimental to human dignity.

7. In Latin America, some 45 per cent of countries and, in Africa, about 36 per cent of countries have a climate clause, while, in Europe and North America, there are none.[4] Nevertheless, no constitution directly recognizes the right to a stable climate per se or fully reflects the temperature targets of the Paris Agreement or reports of the Intergovernmental Panel on Climate Change.[5] While there are emerging trends in constitutional reform to integrate climate change considerations, the link between climate change and human rights obligations appears to be lacking in many countries. All countries, notably developed countries, need to review and amend their constitutions to encompass rights-based approaches to climate change and the protection of individuals against the impacts of climate change.

III. Human rights in climate change legislation

8. Making the link between climate change and human rights considerations in domestic legislation is a relatively new phenomenon. A number of countries refer to human rights or the special considerations of rights holders in their legislation, although the coverage is not widespread or systematic. Many countries have indicated that their climate change legislation is for the purposes of meeting their obligations under the Paris Agreement. This connection is made in the National Climate Change Act, 2021 of Uganda, for example.[6] By referring to the Paris Agreement, the linkage between climate change and human rights is strengthened, thereby allowing for better implementation of human rights obligations in the context of climate change.

[1] Karla Martínez Toral and others, "The 11 nations heralding a new dawn of climate constitutionalism", Grantham Research Institute on Climate Change and the Environment, 2 December 2021. Available at www.lse.ac.uk/granthaminstitute/news/the-11-nations-heralding-a-new-dawn-of-climate-constitutionalism/.

[2] See https://climate-laws.org/documents/constitution-of-zambia_7667.

[3] Available at http://cuba.cu/gobierno/NuevaConstitucion.pdf (in Spanish).

[4] Karla Martínez Toral and others, "The 11 nations".

[5] Ibid.

[6] Available at https://cdn.climatepolicyradar.org/navigator/UGA/2021/national-climate-change-act-2021_54d82dea4d1d85dca314a17cba045210.pdf.

9. Much of the climate change legislation drafted by countries is focused on the implementation of nationally determined contributions. In this regard, a large percentage of the legislation reviewed is based on mitigation outcomes. Some countries have gone further by establishing systems of carbon markets. For example through its Climate Change and Carbon Market Initiatives Act, 2022,[7] the Bahamas has created a carbon market, while India has introduced a domestic carbon market through its Energy Conservation (Amendment) Act, 2022.[8]

10. According to the Grantham Research Institute on Climate Change and the Environment, at least 27 countries have passed domestic laws enshrining economy-wide net-zero commitments,[9] most of them on the basis of a 2050 target. The Climate Change Act of Nigeria, for example, contains an overarching objective of achieving net-zero emissions between 2050 and 2070.[10] Of particular note, is the Federal Act of Switzerland on climate protection goals, innovation and strengthening energy security,[11] by which all companies are required to become net zero in terms of direct and indirect emissions by 2050. Exceptions to the 2050 targets include the Federal Climate Change Act, 2019 of Germany, in which a net-zero target date of 2045 is set,[12] and the Climate Change Act, 2022 of Finland, establishing a "carbon neutral" target date of 2035.[13] Each of these net-zero or carbon-neutral targets are, at best, aspirational, as no Government currently in office will be in power in 2050, 2045 or 2035 and thus will not have the opportunity to enforce or witness the achievement of those targets. Such aspirational target-setting has already been called into question. For instance, the Government of Australia has described the target set by the previous Government as a "fantasy".[14]

11. While setting clear mitigation outcomes relating to a 1.5 degree Celsius target, is important in order to achieve overall human rights benefits by reducing the impacts of climate change, very few specifics have been provided on how mitigation technologies may have an impact on human rights and how such impacts would be addressed. The impact of mitigation technologies has been noted by the Special Rapporteur in his previous report to the General Assembly (see A/77/226). One exception to this lack of action is Decree No. 9,571/2018 of Brazil, establishing national guidelines on business and human rights for medium-sized and large companies, including multinational companies conducting activities in Brazil.[15] The guidelines create corporate responsibility for protecting human rights in business activities and a responsibility to reduce greenhouse gas emissions. The European Union has proposed a directive on framing business decisions in terms of human rights, climate and environmental impact, as well as in terms of the company's

[7] Available at www.ilo.org/dyn/natlex/docs/ELECTRONIC/113259/141905/F-1761943569/BHS113259.pdf.

[8] Available at https://beeindia.gov.in/sites/default/files/2023-05/EC%20Act%2C%202022.pdf.

[9] Tiffanie Chan and Catherine Higham, "Evolving regulation of companies in climate change framework laws", Grantham Research Institute on Climate Change and the Environment, 21 February 2023. Available at www.lse.ac.uk/granthaminstitute/news/evolving-regulation-of-companies-in-climate-change-framework-laws/.

[10] Available at https://cdn.climatepolicyradar.org/navigator/NGA/2021/explanatory-memorandum-on-nigeria-s-climate-change-acr_6c83884695bbf609fcd795a49d196e89.pdf.

[11] Available at www.fedlex.admin.ch/eli/fga/2022/2403/fr (in French).

[12] Available at www.gesetze-im-internet.de/englisch_ksg/englisch_ksg.html.

[13] Available at https://ym.fi/en/climate-change-legislation.

[14] Giles Parkinson, "Bowen unveils sector by sector decarbonisation plan, but says no to 2035 net zero target", Renew Economy, 18 July 2023. Available at https://reneweconomy.com.au/bowen-unveils-sector-by-sector-decarbonisation-plan-but-says-no-to-2035-net-zero-target/.

[15] Available at www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/decreto/D9571.htm (in Portuguese).

resilience in the longer term.[16] The directive is aimed at fostering the contribution of businesses to ensure respect for human rights and the environment in their own operations and through their value chains.

12. There appears to be less of a focus on adaptation, capacity-building and education needs and even less on procedures for addressing loss and damage. Each of these thematic issues should also incorporate a human rights focus. In particular, gender considerations and the rights of young people and children, Indigenous Peoples, persons with disabilities and other rights holders mentioned in the preamble of the Paris Agreement are not well covered in domestic legislation. An exception to this is the Climate Change and Carbon Market Initiatives Act of the Bahamas, in which the preamble of the Paris Agreement has been explicitly drawn from in order to reference particular rights holders.[17]

13. Very few countries have considered the issue of climate change displacement. Fiji is an exception; under its Climate Change Act of 2021[18] a task force on the relocation and displacement of communities vulnerable to the impacts of climate change has been established so as to respond to people being displaced by climate change events. The framework law No. 98/2021, on climate, of Portugal and the Climate Change (Management) Act 2015 of Papua New Guinea both include references to concerns about climate change-induced migration.[19]

14. The right to information on climate change is an important element in any consideration of the rights-based application of domestic legislation. In Viet Nam, the Law on Environmental Protection of 2014 states, in article 46, that the community "shall be vested with the right to provide and request the provision of information about climate change issues, exclusive of information specified in the list of state secret information".[20]

15. A significant omission in most climate change legislation is any reference to loss and damage and how it can be addressed, although there are a few exceptions. In Azerbaijan, pursuant to article 6 of a 2001 law on protection of atmospheric air all legal entities and physical persons in Azerbaijan have the same right to compensation for damage caused to them as a result of air pollution.[21] While it is not directly related to climate change, most air pollution is caused by the burning of fossil fuels. In the Climate Change Act of Fiji it is specified that, as part of their duty to act with reasonable care and diligence under the Companies Act, directors must consider and evaluate climate change risks and opportunities to the extent that they are foreseeable and intersect with the interests of the company.

16. There are limited references to obligations to protect the human rights of various rights holders in climate change legislation, with some exceptions. In the National Climate Change Act 2021 of Uganda it is stated that gender and human rights issues must be taken into account; in Supreme Decree No. 003-2022-MINAM of Peru, on declaring the climate emergency as a matter of national interest, human rights and climate justice are identified as priority areas; the framework law No. 98/2021, on

[16] European Commission, proposal for a directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937, document COM(2022) 71 final, 23 February 2022. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071.

[17] Available at https://laws.bahamas.gov.bs/cms/images/LEGISLATION/PRINCIPAL/2022/2022-0015/ClimateChangeandCarbonMarketInitiativesAct2022_1.pdf.

[18] Available at https://laws.gov.fj/Acts/DisplayAct/3290.

[19] Submission by the Grantham Research Institute on Climate Change and the Environment.

[20] See https://climate-laws.org/documents/law-on-environmental-protection-no-55-2014-qh13_cca6?q=%22human+rights%22&c=Legislation&o=10.

[21] Submission by the Government of Azerbaijan.

climate, of Portugal contains a core objective to guarantee climate justice, respect for human rights, equality and collective rights over commons;[22] and Act No. 2019-40 of Benin, amending the Constitution, contains provisions devoted to the rights and duties of human beings.[23]

17. Few national climate change laws make reference to the rights of Indigenous Peoples or adherence to obligations under the United Nations Declaration on the Rights of Indigenous Peoples. One exception is the new Climate Change Act, introduced by Finland, establishing the Sámi Climate Council, which supports the preparation of climate change policy plans and identifies key issues with regard to the rights of the Sámi people. In the United States of America, the President has issued an executive order aimed at advancing environmental justice by, inter alia, addressing climate change and its effects, including in areas within the boundaries of "Tribal Nations".[24] The inclusion of Indigenous Peoples is noteworthy given that the United States had originally opposed the adoption of the United Nations Declaration on the Rights of Indigenous Peoples and has now lent its tacit support to the Declaration, with a number of interpretative caveats.

18. Civil society organizations are working on a climate change bill in Poland that will include the right to a healthy environment and the right to safe climate.[25] The Special Rapporteur highly commends this initiative as an important example of engagement by civil society.

19. Overall, the incorporation of human rights obligations in climate change legislation throughout the world appears to be a relatively recent development. For the majority of countries, however, many factors appear to be missing. The Special Rapporteur is proposing guidance for countries on incorporating human rights obligations in climate change legislation. Countries should incorporate substantive and procedural elements in the development of climate change legislation and are therefore encouraged to revise their climate change legislation so as to incorporate this guidance.

IV. Climate change litigation

20. Consideration of climate change litigation is important, as it is a means of analysing how Governments, corporations and members of the public are implementing obligations with respect to climate change and human rights. Climate change litigation can potentially drive legislative and policy changes in mitigation, adaptation, finance, and loss and damage efforts and positively influence future responses to climate change. Climate change litigation is expanding rapidly around the world. Courts are now starting to play a key role in defining appropriate climate change governance and thus directing regulatory decision-making, corporate behaviour and public understanding of the climate crisis. Domestic and transnational litigation has advanced the goals of the global climate framework, successfully raised awareness of the devastating effects of climate change and enhanced the visibility of marginalized groups.[26] The following section of the present report is focused

[22] Submission by the Grantham Research Institute on Climate Change and the Environment.

[23] Submission by the Government of Benin.

[24] United States of America, Executive Order on Revitalizing Our Nation's Commitment to Environmental Justice for All, 21 April 2023. Available at www.whitehouse.gov/briefing-room/presidential-actions/2023/04/21/executive-order-on-revitalizing-our-nations-commitment-to-environmental-justice-for-all/.

[25] Submission by a civil society organization in Poland.

[26] Maria Antonia Tigre, Natalia Urzola and Alexandra Goodman, "Climate litigation in Latin America: is the region quietly leading a revolution?", *Journal of Human Rights and the Environment*, vol. 14, No. 1 (March 2023), pp. 67–93, p. 68.

primarily on how human rights obligations have been incorporated into climate change litigation. The Special Rapporteur also reviews the barriers to litigation and explores future trends.

21. In 2021, 266 new climate litigation cases were filed. The United States continues to be the country with the highest number of documented climate litigation cases, with 1,590 in total, followed by Australia, where 130 cases have been identified, and the United Kingdom of Great Britain and Northern Ireland, with 102. In addition, 67 cases have been filed before the Court of Justice of the European Union. Relatively high numbers of cases have also been documented in Germany (59), Brazil (40) and Canada (35).[27]

22. Climate change litigation is starting to influence corporate behaviour and shareholder responses to litigation. For instance, in a working paper of the London School of Economics and Political Science over 100 climate-related lawsuits from between 2005 and 2021 were examined. It was found that the filing of a climate-based litigation claim or corresponding unfavourable court decision reduced the market capitalization of the defendant company by about 0.41 per cent, on average. The study found that the mere filing of a climate-related lawsuit could decrease a company's market valuation by 0.35 per cent, while an actual court decision finding of liability on the part of the company reduced the defendant company's market capitalization by 0.99 per cent.[28] The Secretary-General has suggested that litigation is important to challenge "climate-wrecking corporations" such as fossil-fuel producers.[29]

23. The United Nations Environment Programme indicates that the climate cases that have been brought to date generally fall into one or more of the following six categories: (a) climate rights; (b) domestic enforcement; (c) keeping fossil fuels in the ground; (d) corporate liability and responsibility; (e) failure to adapt and the impacts of adaptation; and (f) climate disclosures and "greenwashing". The Global Climate Change Litigation Database lists cases under the following two categories: (a) "suits against Governments", which encompasses lawsuits on issues such as just transition, energy and power, environmental crimes, trade and investment, greenhouse gas emissions reduction and trading, access to information, environmental assessment and permitting, human rights, failure to adapt, protecting biodiversity and ecosystems, public assembly, and public trust; and (b) "suits against corporations, individuals", which involves lawsuits against corporations, protesters and others.[30] The evolution of climate change litigation may be considered as occurring in "three waves", the first wave being cases brought under administrative tort law, the second under human rights law and the third under commercial law, generating over 2,000 pro-climate cases in more than 40 countries and in nine international tribunals since 1986.[31]

---

[27] Ibid.

[28] Misato Sato and others, "Impacts of climate litigation on firm value", (2023) Centre for Climate Change Economics and Policy Working Paper No. 421/Grantham Research Institute on Climate Change and the Environment Working Paper No. 397 (London, London School of Economics and Political Science, 2023). Available at www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/05/working-paper-397_-Sato-Gostlow-Higham-Setzer-Venmans.pdf.

[29] Jamey Keaten, "UN chief slams 'climate-wrecking' firms at human rights body", AP News, 27 February 2023. Available at https://apnews.com/article/russia-ukraine-politics-new-york-city-climate-and-environment-antonio-guterres-eae595bc528caad4fa8b7da6fe3796f4.

[30] Sabin Center for Climate Change Law, Global Climate Change Litigation database. Available at http://climatecasechart.com/non-us-climate-change-litigation/.

[31] Lauren Croft, "'Many clouds remain' in climate litigation cases'", *Lawyers Weekly*, 14 April 2023, Available at www.lawyersweekly.com.au/biglaw/37101-many-clouds-remain-in-climate-litigation-cases.

Human rights invoked in climate change litigation

24. The consideration of human rights violations in climate change litigation is a growing trend, albeit a relatively nascent one. The Sabin Center lists over 125 climate change cases that are linked to human rights issues.[32] What follows is a selection of these cases for the purpose of highlighting the growing body of jurisprudence with respect to human rights and climate change and the procedural difficulties that litigants face in taking their concerns to the courts. The human rights at stake in this selection of cases include the rights to life, freedom, dignity, property, safe drinking water, food, health and an adequate standard of living (energy).

25. In 2015, 21 individual plaintiffs, all aged 19 years and under, filed a lawsuit, *Juliana v. the United States of America*, in the federal district court of the District of Oregon against the United States, the President and various federal officials and agencies.[33] The plaintiffs alleged that the "nation's climate system" was critical to their rights to life, liberty and property and that the defendants had violated their substantive due process rights by allowing fossil-fuel production, consumption and combustion at "dangerous levels".[34] The case has gone through numerous judicial processes and appeals and, at the time of writing the present report, had not been resolved. The case also highlights the extensive procedural blockages (discussed later in the present report) that respondents can leverage to deny access to justice by complainants who allege that their human rights have been violated. In the *Leghari v. Federation of Pakistan* case of 2015, Ashar Leghari, a Pakistan farmer sued the Federal Government of Pakistan, claiming that it should pursue climate mitigation or adaptation efforts and alleging that the Government's failure to meet its climate change adaptation targets had resulted in immediate impacts on the water, food and energy security of Pakistan. Such impacts offended his fundamental right to life. The case is notable for the fact that the Lahore High Court, in its final order, nominated "climate justice" as the successor to "environmental justice" and was based on a human-centred approach and noted that "water justice" as a human right to access clean water and a subconcept of climate justice.[35] As a consequence, the Court ordered the establishment of the Climate Change Commission. Also in 2015, in *Urgenda Foundation v. State of the Netherlands*, a Dutch environmental group, the Urgenda Foundation, and 900 Dutch citizens sued the Government of the Kingdom of the Netherlands, seeking for it to do more to prevent global climate change. The court found in favour of the plaintiffs citing, inter alia, principles under the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights), the "no harm" principle of international law, the doctrine of hazardous negligence, the principle of fairness and the precautionary principle.[36]

26. In 2016, in China, the environmental non-governmental organization (NGO), the All-China Environment Federation brought a case against Dzhou Jinghua Group Zhenhua Decoration Glass Co. Ltd. The Federation claimed that Zhenhua should pay compensation for damage to public environmental interests caused by its excessive emissions of air pollutants. The court found for the plaintiff and ordered the company

[32] See http://climatecasechart.com/non-us-case-category/human-rights/.

[33] United States District Court, District of Oregon, *Juliana et al v. the United States of America et al.*, Case No. 6:15-cv-01517-TC, complaint, 12 August 2015. Available at https://static1.squarespace.com/static/571d109b04426270152febe0/t/57a35ac5ebbd1ac03847eece/1470323398409/YouthAmendedComplaintAgainstUS.pdf.

[34] See http://climatecasechart.com/case/juliana-v-united-states/.

[35] See http://climatecasechart.com/non-us-case/ashgar-leghari-v-federation-of-pakistan/.

[36] See http://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/.

to pay compensation.[37] While it was not directly related to climate change, it could be considered that the right to a healthy environment was upheld by the court. Nevertheless, it is contended that the majority of climate change litigation cases in China target companies that are mostly carbon emitters. However, instead of addressing climate change-related concerns per se, these cases are contract-based civil disputes and the plaintiffs are companies rather than individuals or NGOs.[38]

27. In 2018, in *Future Generations v. Ministry of the Environment and Sustainable Development and Others*, the Supreme Court of Colombia ruled in favour of a group of 25 children and young people, recognizing that their fundamental rights to life, health, a minimum standard of living, freedom and human dignity are substantially linked to and determined by the environment and the ecosystem.[39]

28. In 2019, a group of eight Australian nationals, all of them Torres Strait Islanders, and six of their children submitted a complaint against the Government of Australia to the Human Rights Committee. In *Billy et al. v. Australia*, the Torres Strait Islanders alleged that changes in weather patterns have direct harmful consequences on their livelihoods, their culture and their traditional ways of life. In 2020, the Government of Australia asked the Committee to dismiss the petition on the ground of inadmissibility. This request was rejected, and the Human Rights Committee found that the failure of the Government of Australia to adequately protect the Indigenous Torres Strait Islanders against the adverse impacts of climate change violated their rights to enjoy their culture and be free of arbitrary interferences with their private lives, their family and home. The Committee requested the Government of Australia to provide adequate compensation to the members of the Indigenous community for the harm suffered, engage in meaningful consultations with their communities to assess their needs and take measures to continue to secure the communities' safe existence on their respective islands.[40] In 2019, in *Milieudefensie et al. v. Royal Dutch Shell Plc*, the NGO Milieudefensie/Friends of the Earth Netherlands and its co-plaintiffs served Royal Dutch Shell a court summons alleging that Shell's contributions to climate change violated its duty of care under Dutch law and its human rights obligations. In its findings, the Hague District Court ordered Shell to reduce its emissions by a net 45 per cent from emissions from its own operations and those from the use of the oil it produces. The Court made its decision provisionally enforceable, meaning that Shell would be required to meet its reduction obligations even as the case is being appealed. During the case, the plaintiffs had argued that, stemming from this duty of care, Shell had an obligation to prevent dangerous climate change through its policies, and the Court applied the duty of care to the company's policies, emissions, the consequences of its emissions and its human rights and international and regional legal obligations.[41]

29. In 2020, a group of German young people filed a legal challenge in the Federal Constitutional Court against the Federal Climate Change Act of Germany, arguing that the target contained in the Act of reducing greenhouse gas emissions by 55 per cent from 1990 levels by 2030 was insufficient. The complainants alleged that the Act therefore violated their human rights, as protected under the Basic Law of Germany. The Court notably found that the legislature had not proportionally distributed the budget between current and future generations, noting that "one generation must not

[37] Yue Zhao, Shuang Lyu and Zhu Wang, "Prospects for climate change litigation in China", *Transnational Environmental Law*, vol. 8, No. 2 (July 2019), pp. 349–377.

[38] Ibid.

[39] Supreme Court of Colombia, *Future Generations v. Ministry of the Environment and Sustainable Development and others*, STC No. 4360-2018, judgment, 5 April 2018. See http://climatecasechart.com/non-us-case/future-generation-v-ministry-environment-others/.

[40] CCPR/C/135/D/3624/2019.

[41] See http://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/.

be allowed to consume large portions of the [carbon dioxide emissions] CO_2 budget while bearing a relatively minor share of the reduction effort, if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to serious losses of freedom".[42]

30. In 2022, the Federal Supreme Court of Brazil issued a ruling in the case *PSB et al. v. Brazil* brought by certain political parties, alleging that the Brazilian Federal Administration had not taken appropriate measures to ensure the allocation and use of funds from the Brazilian Climate Change Fund. By a majority, the Court found in the plaintiffs' favour and ruled that the Paris Agreement was a human rights treaty, becoming the first court in the world to accord such status to the Paris Agreement, thereby setting an important precedent for Brazil and other countries.[43]

31. It can be seen from the examples provided above that the rise in climate change litigation associated with human rights violations has been primarily focused on the actions of Governments (or lack thereof), although some more recent cases have been brought against corporations. More attention is also being turned to financial institutions and their role in underwriting financing for the fossil-fuel industry.

V. Barriers to climate change litigation

32. While climate change litigation is seen by many to advance action on climate change and address human rights violations, many barriers exist to accessing the courts in various parts of the world. From a legal standpoint, barriers can either be procedural (e.g. lack of standing to file a complaint) or material (e.g. the absence of cogent domestic norms on climate change).[44] Some of these procedural and material barriers are explored below. A lack of access to judicial processes denies individuals their right of redress against actions taken by Governments or corporations. It denies them the right to judicial remedy enshrined in the International Covenant on Civil and Political Rights.

A. Standing

33. The ability of an individual or a group to have the right or capacity to bring an action or to appear in court, a concept known as standing, or *locus standi*, often constitutes a challenge in a number of jurisdictions and represents a significant barrier to litigation. Courts often require there to be a direct connection between the plaintiff and the harm suffered, thereby making it difficult for individuals or communities to demonstrate eligibility to bring a lawsuit. In Japan, for instance, environmental NGOs are not granted the right to initiate legal proceedings.[45] In Namibia, legal standing is limited to individuals with a "direct and substantial interest" in a matter.[46] In the General Court of the European Union, applicants must be "distinctively concerned".[47] Only a quarter of countries guarantee the right of the child to be heard in legal proceedings.[48] In contrast, article 52 of the Constitution of Portugal provides for the

[42] See http://climatecasechart.com/non-us-case/neubauer-et-al-v-germany/.

[43] Federal Supreme Court of Brazil, PSB et al. v. Brazil, Case No. ADPF 708, Judgment, 4 July 2022. Available at www.escr-net.org/sites/default/files/caselaw/final_judgement_portuguese.pdf (in Portuguese).

[44] Submission by the Climate Change Law Specialist Group, World Commission on Environmental Law of the International Union for the Conservation of Nature and Natural Resources.

[45] Submission by the Kiko Network.

[46] Vanessa Boesak and Camelot Brinkman, "The growing tide of ESG litigation: what's in store for Namibia?" ENS Africa, 1 June 2023.

[47] Submission by Gred Winter.

[48] Submission by Child Rights International Network.

right of *actio popularis*, or public action, recognizing that some damages (including environmental damages) are so diffuse that any person should have the right to request a judge to check the legality and the merits of the case.[49]

B. Procedural delays and hinderances

34. Procedural delays and hinderances often stall litigation. Large corporations and powerful economic sectors often attempt to hinder or delay legal proceedings by investing significant resources in lobbying, political influence and legal challenges.[50] These tactics can be used by respondents in the hope that the plaintiff will give up or will have exhausted the funds to support the case. For instance, *Ali v. Federation of Pakistan* is a case that has been pending before the Supreme Court of Pakistan since 2016. In this case, a young girl filed a public interest petition seeking an injunction against the development of the Thar coalfield and coal-fired power plants.[51] Ali maintained that exploiting the coalfield would further destabilize the climate system and infringe citizens' constitutional rights to life, liberty, dignity, information, equal protection before the law, among others.

C. High costs of litigation

35. The costs of legal representation, expert witnesses, research and evidence-gathering, and a lack of access to or the absence of legal aid, can impede individuals, the poor or marginalized communities from pursuing legal action. High court fees may also represent a significant barrier; bringing a case in the United States, for example, can be very expensive. In many countries, the lack of access to legal aid is a significant barrier. In the global South, litigants may be barred from meeting participation requirements if they do not have a bank account or a tax declaration.[52] In some countries, such as Switzerland, there is a lack of a pro bono culture, making it difficult for people to gain access to legal support.[53]

36. Furthermore, defendants may resort to procedural delays, such as motions, injunctions, extensions to the commencement date and other procedurally onerous processes (in particular, the expensive and resource-intensive discovery or disclosure process) to impose heavy burdens on activists and civil society organizations which, in turn, creates higher costs for proceedings. This appears to be the case in *Suncor Energy (USA) Inc., et al. v. Board of County Commissioners of Boulder, et al.*, as the respondents sought leave for the suit to be removed to federal court on the ground that their state-law claims should be recharacterized as claims arising under federal common law.[54] This type of "procedural jurisdiction jumping" appears to be a common tactic, in particular in the United States.

37. It has been noted that some courts impose very high limits on liability, meaning that litigants may fear bringing a case for fear of high costs being awarded against them.[55]

---

[49] Portugal, Constitution, seventh revision (2005).

[50] Submission by the climate justice working group of the Latin American Climate Lawyers Initiative for Mobilizing Action, or LACLIMA.

[51] See http://climatecasechart.com/non-us-case/ali-v-federation-of-pakistan-2/.

[52] Submission by HEKS/EPER.

[53] Ibid.

[54] Supreme Court of the United States of America, *Suncor Energy (USA) Inc., et al. v. Board of County Commissioners of Boulder, et al.*, No. 21-150.

[55] Submission by Child Rights International Network.

D. Burden of proof and causal link

38. Climate change litigation relies on scientific evidence, which can be complex and technical, thereby posing difficulties in terms of making it accessible and understandable to the courts. Litigants face the challenge of providing strong evidence to demonstrate harm, defendant responsibility and the causal link between actions and impacts, in particular considering the long-term and diffuse nature of climate change.[56] In *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*, the case was rejected by the Swiss courts because it was argued that the applicants' rights had not been individually and sufficiently affected, as they were not the only ones being affected by climate change.[57]

E. Language barriers

39. In testimonies received by the Special Rapporteur a number of Indigenous Peoples' groups expressed concern that they were not able to gain access to courts in a language that they understood. In general, courts use complex legal language and proceedings are often conducted in colonial languages. This makes it difficult for Indigenous Peoples to engage in the court system. The same is true for linguistic minorities or people who have not been educated in colonial languages. In many cases, the courts are unable to take testimonies in languages that are not common to the court system. There are related aspects of intersectionality that limit access to courts. In Brazil, for example, certain regions are more vulnerable to the impacts of climate change and yet those regions are poorly represented in climate change litigation cases.[58]

F. Fear of counter claims

40. Another limitation with regard to access to justice is the fear of counter claims. Such counter claims often materialize as strategic lawsuits against public participation, which generally refers to litigation brought by a corporation against private individuals or NGOs on a substantive issue of some political interest or social significance. The aim of this type of litigation is to shut down critical speech by intimidating critics into silence and draining their resources. Strategic lawsuits against public participation can also have personal and collective consequences, since they can deter organizations from carrying out their human rights-related work. Such lawsuits are often filed after defenders have expressed criticism of business actors by publishing a report, participating in an event or interview, launching a campaign, organizing a demonstration or posting on social media. Strategic lawsuits against public participation can have a "chilling effect" on the exercise of freedom of expression if others are afraid to speak out for fear of being sued. Such lawsuits also put significant pressure on public resources and cause judicial systems to waste time on superfluous legal processes. Companies use these strategic lawsuits to target a wide range of dissenting voices in order to suppress criticism. In many instances, the defendants are Indigenous leaders or community members protecting their lands and territories from large-scale projects, such as mining or oil pipelines, or even journalists covering the harmful activities of companies. Strategic lawsuits against

[56] Submission by Group Development Pakistan.
[57] Submission by World's Youth for Climate Justice.
[58] Submission by the climate justice working group of the Latin American Climate Lawyers Initiative for Mobilizing Action, or LACLIMA.

public participation generally include exorbitant claims for damages and allegations designed to smear, harass and overwhelm the campaigners.[59]

41. In April 2022, the European Commission unveiled a draft directive that would require States members of the European Union to put protections in place to guard against strategic lawsuits against public participation. The draft directive includes measures to allow defendants to ask for such lawsuits to be thrown out of court at an early stage, sanction those who engage in the use of strategic lawsuits against public participation and minimize the damage caused to lawsuit victims.[60] The Special Rapporteur highly commends the European Commission for its action on these types of lawsuits. He also takes notes of and supports the recommendations made by the Working Group on the issue of human rights and transnational corporations and other business enterprises in its report on guidance on ensuring respect for human rights defenders (A/HRC/47/39/Add.2).

G. Judicial biases

42. Issues around judicial biases come in many forms. For example, concerns have been expressed to the Special Rapporteur that judges in Japan tend towards showing deference to the Government, rather than representing the public interest. Furthermore, there appears to be a regular rotation of judges and prosecutors who represent the Government in administrative litigation cases.[61] In Indonesia, it is claimed that the judiciary is reluctant to engage with human rights-related arguments. The judiciary in such cases claim that these issues are political, not legal.[62] Judicial biases may be derived from economic and political questions that adversely affect a country's litigation culture and undermine the effectiveness of access to climate change justice.[63] Authoritarian regimes may also create judicial biases, making it difficult for people to pursue climate change justice.[64] Furthermore, the fact that judges are elected in some jurisdictions, notably the United States, may give rise to questions regarding the appearance of independence, including potential perceptions of corruption or political bias.

H. Other barriers

43. Many other barriers make it difficult for individuals to seek climate change justice, such as low levels of climate change literacy, a lack of training by the judiciary on climate change and human rights matters, a lack of available magistrates, a limited number of environmental lawyers, a lack of legislation and limited jurisprudence on climate change matters.

44. It is critically important that countries strive to overcome these barriers and allow for greater access to the court system by all individuals, irrespective of their

[59] Submission received by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression for her thematic report on gender justice and the right to freedom of opinion and expression (A/76/258), submitted by the Indigenous Human Rights Defenders and Corporate Accountability Programme of the Water Protector Legal Collective and the Business and Human Rights Resource Centre, 14 June 2021.

[60] European Parliament, "Strategic lawsuits against public participation", briefing note, 2023. Available at www.europarl.europa.eu/RegData/etudes/BRIE/2022/733668/EPRS_BRI(2022)733668_EN.pdf.

[61] Submission by the Kiko Network.

[62] Submission by the Indonesia Center for Environmental Law.

[63] Submission by the Climate Change Law Specialist Group, World Commission on Environmental Law of the International Union for the Conservation of Nature and Natural Resources.

[64] Submission by J. R. Walsh.

race, gender, Indigenous origin or identity, age, religious beliefs or socioeconomic status. Some recommendations on how to overcome the barriers outlined above and ensure access to justice for all are provided in the present report.

VI. Recent litigation trends and future directions

45. Over the past year, climate litigation has begun to evolve and cases have been directed towards financial institutions that underwrite the use of fossil fuels. Litigation has also been directed at actions taken by corporations. The legal community is seeing greater attention being paid to the liability and responsibility of corporate actors to take decisive action on climate change. While corporations face greater pressure to take climate change action, false claims of action, known as "greenwashing" or "climate-washing", are also being witnessed. Cases are now being brought as a means of questioning the use of such tactics. The scope of litigation is also expanding as litigants explore extraterritorial harm; advisory opinions are being sought in a number of international jurisdictions to explore the obligations of States in that regard. Consideration is also being given to criminal liability for lack of action on climate change. These elements are discussed below.

A. Actions against banks

46. Banks have become the target of climate change litigation for funding projects that are not consistent with reducing greenhouse gas emissions. In 2022, a Brazilian NGO, Conectas Direitos Humanos, filed a claim against the Brazilian National Bank for Economic and Social Development and BNDESPAR, its investment arm, which is responsible for managing the Bank's shareholdings in various Brazilian companies. Conectas Direitos Humanos has asked the court to require the Bank and BNDESPAR to adopt transparency measures and to present, within 90 days, a plan establishing rules and mechanisms to commit their investments and divestments to the reduction of greenhouse gas emissions by the companies they finance.[65]

47. In 2023, the NGOs Oxfam France, Friends of the Earth France and Notre Affaire à Tous filed a lawsuit before the Judicial Court of Paris alleging that BNP Paribas, the largest bank in the eurozone, had violated the Act of 2017 on duty of care of parent and subcontracting companies, which was incorporated into articles L. 225-102-4 and L. 225-102-5 of the French Commercial Code.[66] The Act on duty of care provides that specific companies of a certain size must establish a plan to prevent human rights violations and environmental damage that may occur in the course of their business operations. In the summons sent to BNP Paribas multiple violations of the law are alleged, including that the plan established by BNP Paribas does not identify with sufficient clarity the climate risks derived from its activities. The plaintiffs are particularly concerned about the huge "carbon majors" that BNP Paribas has as clients, such as TotalEnergies, Chevron, ExxonMobil, Shell, BP, Eni, Repsol and Equinor. These companies are involved in more than 200 new fossil-fuel projects, scheduled for approval by 2025, which would collectively produce about 8.6 billion tons of carbon dioxide.

48. The above are two examples in which banks and financial institutions have been brought before the courts to account for their investments in the fossil-fuel industry and the resultant human rights violations. The Special Rapporteur believes this will be a growing area of litigation, as various Governments are creating disclosure

[65] See http://climatecasechart.com/non-us-case/conectas-direitos-humanos-v-bndes-and-bndespar/.

[66] See http://climatecasechart.com/non-us-case/notre-affaire-a-tous-les-amis-de-la-terre-and-oxfam-france-v-bnp-paribas/.

mechanisms to reveal where banks and other financial institutions are investing their money. Corporate accountability will be the subject of the Special Rapporteur's next report to the Human Rights Council, in 2024.

B. Greenwashing and climate-washing

49. Another growing trend in climate change litigation relates to the issue of "greenwashing", or "climate-washing". Greenwashing is the practice of misrepresenting how sustainable or environmentally friendly a fund's or a company's practices are. According to a study conducted by the Grantham Research Institute on Climate Change and the Environment in early 2023, 26 climate-washing cases had been filed, in 2022. These cases are challenging various types of misinformation, such as the accuracy of corporate climate commitments or claims about product attributes, overstated investments or support for climate action, and failure to disclose climate risks.[67] In the past few years, there has been a significant increase in climate-washing cases being filed before the courts and administrative bodies, such as consumer protection agencies.

50. In early 2023, an individual brought a class action against Delta Air Lines Inc. in the United States District Court, Central District of California, alleging that Delta's carbon neutrality claim was demonstrably false, as it relied heavily on "junk carbon offsets" that did nothing to counteract the climate crisis. It was further alleged that customers would have purchased Delta tickets believing that they had no impact on the environment and that many would not have bought the tickets without the carbon neutrality claim.[68] The class action has links to a nine-month investigation conducted by *The Guardian*, the German weekly *Die Zeit* and the investigative group SourceMaterial, which found that, according to independent studies, the Verra rainforest credits used by Disney, Shell, Gucci and other big corporations were largely worthless and were often based on stopping the destruction of rainforests that were not threatened.[69] While the present report is focused primarily on false accounting, it is worth noting that numerous Indigenous Peoples' groups have expressed their concerns to the Special Rapporteur about the use of carbon offsetting in carbon markets and the impact that such schemes have on their human rights to life, food, water and housing.[70]

51. As a result of similar greenwashing behaviour in Europe, in 2021, the European Commission and national consumer authorities released the results of a screening ("sweep") of websites, an exercise carried out each year to identify breaches of European Union consumer law with regard to online markets. It was the first time that the sweep had been focused on greenwashing.[71]

52. In 2023, the Australian Securities and Investment Commission released a statement announcing that it had launched its first proceedings in the Federal Court against Mercer Superannuation (Australia) Ltd for allegedly "making misleading statements about the sustainable nature and characteristics of some of its

[67] See www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2023-snapshot/.

[68] See www.courthousenews.com/wp-content/uploads/2023/05/berrin-vs-delta.pdf.

[69] Patrick Greenfield, "Delta Air Lines faces lawsuit over $1bn carbon neutrality claim", *The Guardian*, 30 May 2023. Available at www.theguardian.com/environment/2023/may/30/delta-air-lines-lawsuit-carbon-neutrality-aoe.

[70] Testimonies received by the Special Rapporteur from Indigenous Peoples' groups.

[71] PubAffairs Bruxelles, "Screening of websites for 'greenwashing': half of green claims lack evidence", 28 January 2021. Available at www.pubaffairsbruxelles.eu/eu-institution-news/screening-of-websites-for-greenwashing-half-of-green-claims-lack-evidence/.

superannuation investment options".[72] The Commission has alleged that, in spite of the representations made about the "Sustainable Plus" investment options, Mercer had investments in industries that it had said were excluded from its portfolio. Those investments included 15 companies involved in the extraction or sale of carbon-intensive fossil fuels.[73] The Commission has categorized such actions as greenwashing, which it has defined as "the practice of misrepresenting the extent to which a financial product or investment strategy is environmentally friendly, sustainable or ethical".[74]

C. Extraterritorial harm

53. There is growing interest in climate change litigation associated with transboundary harm. Transboundary environmental harm is not a new phenomenon. In the *Trail Smelter* case of 1938, it was established by special arbitration that fumes discharged from a smelter in Canada had caused damage in the state of Washington in the United States. The arbitration ruling ordered that Canada pay the United States the sum of $350,000 for damages.[75] Transboundary climate change harm is currently being contested in *Luciano Lliuya v. RWE AG*, a complaint filed in 2015 by a Peruvian farmer who filed claims for declaratory judgment and damages in the District Court of Essen, Germany, against RWE, the largest electricity producer in Germany. The court dismissed the plaintiff's requests for declaratory and injunctive relief, as well as his request for damages. However, in 2017, on appeal, the Higher Regional Court of Hamm declared the complaint admissible, thereby allowing the case to move into the evidentiary phase.[76]

54. The international community is also witnessing extraterritorial claims of liability for environmental, social and human rights-related concerns being brought before courts in the United Kingdom where there are allegations that a United Kingdom company owes a duty to those affected by other parties. In *Okpabi and others v. Royal Dutch Shell Plc and another*, in 2021, the Supreme Court of the United Kingdom reaffirmed that a British parent company may, in certain circumstances, owe a duty of care, for purposes of liability in a suit for negligence, towards persons affected by the operations of a foreign subsidiary. Specifically, the Court found a real issue to be tried as to whether Shell owed a duty of care to persons affected by spills from its subsidiary's oil pipeline in Nigeria.[77] While the case was related to an oil spill, there is a potential that such obligations may also apply to greenhouse gas emissions.

[72] Australian Securities and Investments Commission, "ASIC launches first court proceedings alleging greenwashing", 28 February 2023.

[73] Ibid.

[74] Australian Securities and Investment Commission, "How to avoid greenwashing when offering or promoting sustainability-related products", information sheet No. 271, June 2022. Available at https://asic.gov.au/regulatory-resources/financial-services/how-to-avoid-greenwashing-when-offering-or-promoting-sustainability-related-products/.

[75] *Trail Smelter case (United States, Canada)*, Award of 16 April 1938 and 11 March 1941, Reports of International Arbitral Awards, vol. III, pp. 1905–1982. Available at https://legal.un.org/riaa/cases/vol_III/1905-1982.pdf.

[76] See http://climatecasechart.com/non-us-case/lliuya-v-rwe-ag/.

[77] Supreme Court of the United Kingdom, *Okpabi and others v. Royal Dutch Shell Plc and another*, [2021] UKSC 3. Available at www.supremecourt.uk/cases/uksc-2018-0068.html.

D. Advisory opinions

55. A number of advisory opinions are being sought in various jurisdictions to test States' obligations with respect to transboundary climate change harm. One case that has been resolved is the advisory opinion of the Inter-American Court of Human Rights, requested by Colombia, concerning State obligations in relation to the environment. The Inter-American Court found "that States must ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of their jurisdiction, and that States are obliged to use all available means to avoid activities in their territory, or in any area under their jurisdiction, causing significant damage to the environment of another State".[78] The Inter-American Court drew from the advisory opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons.[79] The Inter-American Court's rationale regarding extraterritorial responsibility was adopted, in 2021, by the Committee on the Rights of the Child, in five cases – *Sacchi et al. v. Argentina, Brazil, France, Germany and Turkey*, respectively – although the Committee declared the cases inadmissible for failure to exhaust domestic remedies.[80]

56. A number of advisory opinions have been sought to clarify the legal obligations of States with respect to climate change, including from the International Tribunal for the Law of the Sea,[81] the Inter-American Court of Human Rights[82] and the International Court of Justice, with the latter possibly being the most notable of those three. The request for an advisory opinion of the International Court of Justice was spearheaded by the Government of Vanuatu and adopted by consensus by the General Assembly in its resolution 77/276 requesting an advisory opinion of the International Court of Justice on the obligations of States inter alia in respect of climate change.

57. There are clear principles and international and national jurisprudence which the International Court of Justice and others can draw upon in making their determinations. The international legal principle of *sic utere tuo ut alienum non leadas* (use your own property in such a way that you do not to harm that of another) and the notion of international "good neighbourliness" found in Article 74 of the Charter of the United Nations are core principles of international law to which the International Court of Justice could give considerable weight in its deliberations. Furthermore, there are various international cases, such as the *Trail Smelter* case, which addresses transboundary harm. The *Corfu Channel* case[83] has also been cited with respect to transboundary obligations and environmental protection. Another more recent case in which transboundary environmental damage has been cited is the

[78] Inter-American Court of Human Rights, "The environment and human rights", Advisory Opinion No. OC-23/17, 15 November 2017. Available at www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf.

[79] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, para. 29.

[80] See https://climaterightsdatabase.com/2021/09/22/crc-sacchi-et-al-v-argentina-et-al/. See also *Sacchi et al. v. Argentina* (CRC/C/88/D/104/2019), *Sacchi et al. v. Brazil* (CRC/C/88/D/105/2019), *Sacchi et al. v. France* (CRC/C/88/D/106/2019), *Sacchi et al. v. Germany* (CRC/C/88/D/107/2019) and *Sacchi et al. v. Turkey* (CRC/C/88/D/108/2019).

[81] International Tribunal for the Law of the Sea, *Request for an advisory opinion submitted by the Commission of Small Island States on Climate Change and International Law*, No. 31, December 2022. Available at www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/.

[82] Request for an advisory opinion of the Inter-American Court of Human Rights on the scope of the obligations of State in respect of responding to the climate emergency, submitted by Chile and Colombia, 9 January 2023. See http://climatecasechart.com/non-us-case/request-for-an-advisory-opinion-on-the-scope-of-the-state-obligations-for-responding-to-the-climate-emergency/.

[83] *Corfu Channel case*, Judgment of 9 April 1949, I.C.J. Reports 1949, p. 4.

judgment of 1997 in the *Gabčíkovo-Nagymaros Project* case.[84] The Special Rapporteur firmly believes that States have a distinct legal and moral responsibility to ensure that greenhouse gas emissions produced in one State do not harm another State. As this form of transnational harm is already occurring, it is inevitable that the "no harm" principle will be a key point of litigation now and in the future, with jurisprudence on this principle developing quite rapidly.

E. Crimes against humanity

58. In 2021, the General Assembly adopted resolution 76/114, on crimes against humanity, triggering a process of at least two years of debate and discussion by the Sixth Committee on the draft articles on prevention and punishment of crimes against humanity adopted by the International Law Commission at its seventy-first session in 2019 (see A/74/10). At the current time, the draft articles do not include any reference to impacts on humanity owing to climate change. Nevertheless, there have been various calls to include climate change harm within the definition of ecocide, something to which the Special Rapporteur referred in his previous report to the Assembly, in 2022 (see A/77/226). Around the globe, many people are being denied the right to life as a consequence of climate change. This is due to direct impacts, such as floods, droughts, storm surges, heat stress, hurricanes, typhoons and cyclones, and indirect effects, such as being displaced from their homes owing to such events and having to confront the perils of migration, which may result in death.

VII. Intergenerational equity and the rights of future generations

59. In the consideration of climate change justice, it is vitally important that the international community not only addresses the fate of current generations, but also protects the rights of future generations. The greenhouse gas pollutants that the global community is currently injecting into the atmosphere will have significant implications for many generations to come. The need to give consideration to future generations is embodied in the concept of intergenerational equity. This concept was first incorporated into treaty law in the preamble of the International Convention for the Regulation of Whaling of 1946, in which the importance of safeguarding for future generations the great natural resources represented by the whale stocks is highlighted. The concept was later incorporated into the Declaration of the United Nations Conference on the Human Environment (the Stockholm Declaration) of 1972 and the preamble of the Paris Agreement.

60. There have been some notable court cases reaffirming the notion of protecting the rights of future generations. In *Future Generations v. Ministry of the Environment and Sustainable Development and others*, 25 youth plaintiffs brought a case for constitutional protection against the Government of Colombia and several corporations. The plaintiffs asserted that the Government's failure to comply with its international commitment to ensure net-zero deforestation in the Amazon rainforest by 2020 was a violation of their human rights. The Supreme Court of Colombia recognized that there was a substantial link between the Government's commitment to reduce deforestation and greenhouse gas emissions and fundamental and constitutional rights, such as the rights to life, health, human dignity and a healthy environment.[85] It has been argued that the *Future Generations* case has opened the door to youth climate lawsuits by substantially expanding constitutional provisions

[84] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7.

[85] Supreme Court of Colombia, *Future Generations v. Ministry of the Environment and Sustainable Development and others*.

to future generations, including by creating an "intergenerational pact" to reduce deforestation and greenhouse gas emissions.[86] Analogous to the *Future Generations* case, the petitioners in the *Álvarez et al. v. Peru* case of 2019 argued that intergenerational equity was embedded within the principle of sustainable development.[87]

61. From the few examples outlined above, it can be seen that there is a growing body of jurisprudence on intergenerational equity and justice. Nevertheless, a clear expression of the rights of future generations is generally missing at the international level. In an effort to bridge that gap, a group of legal experts produced the Maastricht Principles on the Human Rights of Future Generations. The authors state that the aim of the Maastricht Principles is to "clarify the present state of international law" as it applies to the human rights of future generations,[88] although it may be argued that the Principles are more prescriptive than clarificatory. Nevertheless, they provide a very useful basis for giving further consideration to how to develop legal norms on intergenerational equity at the international level. The General Assembly should give due consideration to the Maastricht Principles and explore how they could be incorporated into the Summit of the Future, to be held in 2024.

VIII. Conclusions and recommendations

62. **In recognition of their responsibilities under the United Nations Framework Convention on Climate Change and the Paris Agreement, countries around the world have enacted laws and adopted policies in which they describe national and international responses to climate change. Despite such efforts, there are significant material and procedural barriers to undertaking decisive legal action on climate change. These barriers relate to inadequate climate change legislation, significant limitations with regard to pursuing climate change litigation and limited efforts to enshrine the concept of intergenerational equity at the international level. The Special Rapporteur proposes the set of recommendations outlined below for focused attention by the General Assembly and Member States.**

63. **The General Assembly is encouraged to give full and proper consideration to the Maastricht Principles on the Human Rights of Future Generations and prepare a resolution reflecting key elements of these Principles at its seventy-eighth session.**

64. **The United Nations Environment Programme, in collaboration with the World Commission on Environmental Law of the International Union for the Conservation of Nature and Natural Resources, is encouraged to develop simple and accessible multilingual training manuals and training programmes for judges on the linkages between climate change and human rights. It is also encouraged to develop simple and accessible multilingual guidebooks for judges on the science of climate change.**

65. **All countries that have yet to do so should revise their constitutions to incorporate recognition of the need to address climate change, the human rights implications of climate change and the right to a healthy environment.**

[86] Maria Antonia Tigre, Natalia Urzola and Alexandra Goodman, "Climate litigation in Latin America".
[87] See http://climatecasechart.com/non-us-case/alvarez-et-al-v-peru/.
[88] See www.ciel.org/issue/the-maastricht-principles-on-the-rights-of-future-generations/.

66. **All countries are strongly urged to develop legislation to allow for improved access to the courts undertaking cases related to climate change and human rights. Such access should overcome the barriers identified in the present report.**

67. **All countries are strongly encouraged to develop new climate change legislation on the basis of the detailed guidance outlined below.**

General principles

68. **New climate change legislation should incorporate general principles with a view to:**

(a) **Ensuring the equal participation of women in all aspects of climate change decision-making;**

(b) **Respecting the rights of children and ensuring that the concept of intergenerational justice is enshrined in legislation;**

(c) **Providing opportunities for young people and children to engage in climate change decision-making;**

(d) **Guaranteeing to every individual in the country the right to life, food, water and sanitation, housing and other fundamental rights, irrespective of gender, race, religious belief or socioeconomic status;**

(e) **Respecting the concept of common but differentiated responsibilities and respective capabilities;**

(f) **Fully recognizing the precautionary principle and ensuring that this principle is applied in the context of causality in climate change litigation;**

(g) **Accepting the polluter pays principle;**

(h) **Guaranteeing the right to a safe, healthy and sustainable environment, a right that should be incorporated into national constitutions;**

(i) **Guaranteeing the right of every individual to have access to the courts at minimal cost;**

(j) **Establishing education and training programmes for businesses so that they can recognize their responsibilities with respect to human rights and climate change;**

(k) **Respecting the rights of Indigenous Peoples in accordance with the United Nations Declaration on the Rights of Indigenous Peoples, including by ensuring the incorporation of provisions on free, prior and informed consent.**

Mitigation

69. **With respect to mitigation, it should be ensured that new climate legislation:**

(a) **Incorporates women's knowledge as a basis for decision-making in mitigation planning and implementation;**

(b) **Establishes provisions on prior and informed consent with regard to Indigenous Peoples;**

(c) **Ensures that businesses, corporations and financial institutions undertake environmental and human rights impact assessments of all mitigation projects;**

(d) **Ensures that science and Indigenous knowledge are given primacy in decision-making processes associated with climate change mitigation actions;**

(e) Ensures that mitigation target-setting is based on the best available opportunity to reduce emissions, taking into consideration the concept of common but differentiated responsibilities and respective capabilities;

(f) Ensures that all mitigation target-setting is based on a progression towards low targets within short turnaround time frames so as to make the best opportunity of advancing technologies and knowledge. New targets could be set by subordinate legislation using executive orders;

(g) Ensures access to environmental information, including through the use of full disclosure procedures regarding climate change mitigation decision-making, including information on economic modelling associated with such decisions;

(h) Removes subsidies for fossil fuels and tax avoidance schemes for major greenhouse gas emitting industries;

(i) Ensures that all significant greenhouse gas emitting enterprises produce climate change transition plans;

(j) Provides incentives for businesses, corporations and financial institutions to transition to renewable energy and energy efficiency activities;

(k) Ensures that climate change transition plans allow for a just transition and protects the labour rights of workers in high greenhouse gas emitting industries.

Adaptation

70. **With respect to adaptation, new climate change legislation should:**

(a) Provide for meaningful consultation and engagement in adaptation planning processes for those who are most vulnerable to the impacts of climate change, in particular people living in poverty, Indigenous Peoples, persons with disabilities, women and children;

(b) Ensure that persons in vulnerable situations are given priority with respect to adaptation plans and are given priority support to build their resilience to the impacts of climate change;

(c) Create early warning systems for climate change events. Such early warning systems should be designed to be accessible to people living in poverty or in remote communities.

Right to information

71. **With respect to the right to information, new climate change legislation should:**

(a) Ensure that all individuals have the right to information, consultation and participation in decision-making associated with matters related to climate change;

(b) Establish advisory committees constituted by vulnerable communities, Indigenous Peoples and other disadvantaged communities.

Loss and damage

72. **With respect to loss and damage, new climate change legislation should:**

(a) **Support processes for international cooperation on loss and damage based on the principle of solidarity entailing a duty of assistance without expectation of reciprocity;**

(b) **Create provisions for compensation, liability and reparations to ensure that major greenhouse gas polluters – countries and corporations alike – pay for the harm they are causing. This should include domestic and transnational liability;**

(c) **Ensure that individuals are granted freedom of movement and given full legal rights as though they were refugees if they are displaced across international borders as a consequence of climate change;**

(d) **Develop affordable insurance and risk-pooling mechanisms to assist the most vulnerable;**

(e) **Create mechanisms to assess, quantify and compensate for loss and damage for economic and non-economic losses, including human rights impacts;**

(f) **Support the establishment of an international mechanism for processing loss and damage claims in an expedited manner.**

Climate change finance

73. **With respect to climate change finance, new climate change legislation should:**

(a) **Facilitate easy access to international funds for mitigation, adaptation and loss and damage;**

(b) **Ensure that compensation funding is provided to victims of climate change impacts;**

(c) **Ensure that direct access to climate change finance is provided for communities and individuals.**

Corporate accountability

74. **With respect to corporate accountability, new climate change legislation should:**

(a) **Ensure that businesses, corporations and financial institutions (including insurance and reinsurance companies) provide full disclosure of their investments in greenhouse gas intensive industries;**

(b) **Ensure that businesses, corporations and financial institutions provide full disclosure of their exposure to climate change risks associated with climate change impacts;**

(c) **Establish direct personal criminal liability for directors and chief executive officers of businesses, corporations and financial institutions for failing to address the life-cycle climate change impacts of their respective activities;**

(d) **Ensure that businesses, corporations and financial institutions provide full details of any claims of climate neutrality or net-zero emissions and provide regular updates on progress towards achieving those claims.**

Access to justice

75. **With respect to access to justice, new climate change legislation should:**

(a) **Ensure that all individuals or groups of individuals have access to justice without legal hurdles, including any age restrictions on access to courts or limitations on standing;**

(b) **Ensure that adequate provision is made to allow all individuals access to court systems, including provisions for language services, limitation of costs and legal representation;**

(c) **Eliminate strategic lawsuits against public participation;**

(d) **Create provisions on civil liability for loss and damage that have domestic and transnational applicability and are therefore without jurisdictional limitations.**

Freedom of expression

76. **New climate change legislation should ensure that all individuals can enjoy their right to freedom of expression with respect to actions or lack of action by Governments or businesses on climate change. In that regard, States should provide a safe and enabling environment in which individuals, groups and organs of society that work on human rights or environmental issues can operate free from threats, harassment, intimidation and violence.**[89]

[89] See A/HRC/37/59, annex, framework principle 4.

Annex 96

United Nations HRI/2019/1

International Human Rights Instruments

Distr.: General
14 May 2020

Original: English

Statement on human rights and climate change

Joint statement by the Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities

1. The Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities welcome the convening of the Climate Action Summit by the United Nations Secretary-General in September 2019, to mobilize more ambitious emissions reduction plans and actions. The Committees urge all States to take into consideration their human rights obligations as they review their climate commitments.

2. The Committees also welcome the work of the international scientific community to further understand the implications of climate change and the solutions that could contribute to avoiding the most dangerous impacts of climate change. The Committees welcome in particular the report released in 2018 by the Intergovernmental Panel on Climate Change on global warming of 1.5°C above pre-industrial levels.[1]

3. That report confirms that climate change poses significant risks to the enjoyment of the human rights protected in the Convention on the Elimination of All Forms of Discrimination against Women, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities. The adverse impacts identified in the report threaten, among others, the rights to life, to adequate food, to adequate housing, to health and to water, and cultural rights. These negative impacts are also illustrated in the damage suffered by ecosystems, which in turn affect the enjoyment of human rights.[2] The risk of harm is particularly high for those sectors of the population that are already marginalized or in vulnerable situations or that, owing to discrimination and pre-existing inequalities, have limited access to decision-making or resources, such as women, children, persons with disabilities, indigenous peoples and persons living in rural areas.[3] Children are

[1] See www.ipcc.ch/sr15/.

[2] See the report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment on the human rights obligations relating to the conservation and sustainable use of biological diversity (A/HRC/34/49).

[3] See the analytical study conducted by the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and the full and effective enjoyment of the rights of the child (A/HRC/35/13).

at a particularly heightened risk of harm to their health, owing to the immaturity of their body systems.[4]

4. As reflected by the Committee on the Elimination of Discrimination against Women in its general recommendation No. 37 (2018) on the gender-related dimensions of disaster risk reduction in the context of climate change, climate change and disasters affect women and men, girls and boys differently, with many women and girls facing disproportionate risks and impacts on their health, safety and livelihoods. Situations of crisis exacerbate pre-existing gender inequalities and compound the intersecting forms of discrimination that disproportionately affect disadvantaged groups of women and girls, particularly those with disabilities. Moreover, climate change and disasters, including pandemics, influence the prevalence, distribution and severity of new and re-emerging diseases. The susceptibility of women and girls to disease is heightened as a result of inequalities in access to food, nutrition and health care and the social expectations that women will act as primary caregivers for children, the elderly and the sick.

5. Such adverse impacts on human rights are already occurring with 1°C of global warming; every additional increase in temperature will further undermine the realization of rights. The report of the Intergovernmental Panel on Climate Change makes it clear that, in order to avoid the risk of irreversible and large-scale systemic impacts, urgent and decisive climate action is required.

6. The report of the Intergovernmental Panel on Climate Change also highlights the fact that adequate action to mitigate climate change would have significant social, environmental and economic benefits. The Panel warns of the risk of social and environmental damage resulting from poorly designed climate measures, thereby highlighting the importance for human rights norms to be applied at every stage of the decision-making process of climate policies.

7. As emphasized by the Committee on Economic, Social and Cultural Rights in its 2018 statement on climate change and the International Covenant on Economic, Social and Cultural Rights, human rights mechanisms have an essential role to play in ensuring that States avoid taking measures that could accelerate climate change, and that they dedicate the maximum available resources to the adoption of measures aimed at mitigating climate change. In its statement, the Committee also welcomed the fact that national judiciary and human rights institutions are increasingly engaged in ensuring that States comply with their duties under existing human rights instruments to combat climate change.

Agency and climate action

8. Women, children and other persons, such as persons with disabilities, should not be seen only as victims or in terms of vulnerability. They should be recognized as agents of change and essential partners in local, national and international efforts to tackle climate change.[5] The Committees emphasize that States must guarantee these individuals' human right to participate[6] in climate policymaking and that, given the scale and complexity of the climate challenge, States must ensure that they take an inclusive multi-stakeholder approach that harnesses the ideas, energy and ingenuity of all stakeholders.

9. The Committees welcome international cooperation to tackle climate change under the auspices of the United Nations Framework Convention on Climate Change and the Paris Agreement, and the national commitments and contributions made by all individual States to mitigate climate change. They also welcome the mobilization by civil society, particularly women, children and young people, to urge Governments to take more

[4] See Fiona Stanley and Brad Farrant, "Climate change and children's health: a commentary", *Children*, vol. 2, No. 4 (October 2015); and Council on Environmental Health, "Global climate change and children's health", *Pediatrics*, vol. 136, No. 5 (November 2015).

[5] Committee on the Elimination of Discrimination against Women, general recommendation No. 37, paras. 7–8.

[6] Ibid., paras. 32–36; Convention on the Elimination of All Forms of Discrimination against Women, arts. 7, 8 and 14; Convention on the Rights of the Child, art. 12; Universal Declaration of Human Rights, art. 21; International Covenant on Civil and Political Rights, art. 25; and Convention on the Rights of Persons with Disabilities, arts. 4 (3), 29 and 33 (3).

ambitious climate action. However, the Committees note with great concern that States' current commitments under the Paris Agreement are insufficient to limit global warming to 1.5°C above pre-industrial levels,[7] and that many States are not on track to meet their commitments. Consequently, States are exposing their populations and future generations to the significant threats to human rights associated with greater temperature increases.

States' human rights obligations

10. Under the Convention on the Elimination of All Forms of Discrimination against Women, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities, States parties have obligations, including extraterritorial obligations, to respect, protect and fulfil all human rights of all peoples.[8] Failure to take measures to prevent foreseeable harm to human rights caused by climate change, or to regulate activities contributing to such harm, could constitute a violation of States' human rights obligations.[9]

11. In 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.[10]

12. In their efforts to reduce emissions, States parties should contribute effectively to phasing out fossils fuels, promoting renewable energy and addressing emissions from the land sector, including by combating deforestation.[11] In addition, States must regulate private actors, including by holding them accountable for harm they generate both domestically and extraterritorially.[12] States should also discontinue financial incentives or investments in activities and infrastructure that are not consistent with low greenhouse gas emissions pathways, whether undertaken by public or private actors, as a mitigation measure to prevent further damage and risk.

13. When reducing emissions and adapting to climate impacts, States must seek to address all forms of discrimination and inequality, including advancing substantive gender equality, protecting the rights of indigenous peoples and of persons with disabilities, and taking into consideration the best interests of the child.

14. A growing number of people are are forced to migrate because their States of origin cannot ensure the enjoyment of adequate living conditions, owing to the increase in hydrometeorological disasters, evacuations of areas at high risk of disasters, environmental

[7] See www.ipcc.ch/sr15/.

[8] In this context, see also the Charter of the United Nations, Arts. 55–56; Committee on Economic, Social and Cultural Rights, general comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, paras. 26–28; E/C.12/AUS/CO/5, paras. 11–12; E/C.12/ARG/CO/4, paras. 13–14; CRC/C/NOR/CO/5-6, para. 27; CRC/C/JPN/CO/4-5, para. 37; Committee on the Elimination of Discrimination against Women, general recommendation No. 37, paras. 43–46; CEDAW/C/AUS/CO/8, paras. 29–30; and CEDAW/C/NOR/CO/9, paras. 14–15.

[9] CRC/C/ESP/CO/5-6, para. 36; CRC/C/GBR/CO/5 and Corr.1, paras. 68–69; Committee on Economic, Social and Cultural Rights, statement on climate change and the International Covenant on Economic, Social and Cultural Rights; E/C.12/AUS/CO/5; Committee on the Elimination of Discrimination against Women, general recommendation No. 37, para. 14; and CEDAW/C/NOR/CO/9.

[10] Paris Agreement, art. 2.1.

[11] Committee on the Elimination of Discrimination against Women, general recommendation No. 37; CEDAW/C/AUS/CO/8; CRC/C/NER/CO/3-5; Committee on Economic, Social and Cultural Rights, statement on climate change and the International Covenant on Economic, Social and Cultural Rights; and E/C.12/ARG/CO/4.

[12] Committee on Economic, Social and Cultural Rights, statement on climate change and the International Covenant on Economic, Social and Cultural Rights; Committee on the Elimination of Discrimination against Women, general recommendation No. 37; CEDAW/C/FJI/CO/5; and CRC/C/ESP/CO/5-6.

degradation and slow-moving disasters, the disappearance of small island States as a result of rising sea levels, and even the occurrence of conflicts over access to resources. Migration is a normal human adaptation strategy in the face of the effects of climate change and natural disasters, and the only option for entire communities. Climate change-related migration has to be addressed by the United Nations and by States as an emerging form of migration and internal displacement.

15. States must therefore address the effects of climate change, environmental degradation and natural disasters as drivers of migration and ensure that such factors do not hinder the enjoyment of the human rights of migrants and their families. In addition, States should offer migrant workers displaced across international borders in the context of climate change or disasters and who cannot return to their countries complementary protection mechanisms and temporary protection or stay arrangements.

16. In the design and implementation of climate policies, States must also respect, protect and fulfil the rights of all, including by mandating human rights due diligence and ensuring access to education, awareness-raising and environmental information, and public participation in decision-making. In particular, States have the responsibility to protect and defend effectively the rights of environmental human rights defenders, including women, indigenous and child environmental defenders.

International cooperation

17. As part of international assistance and cooperation towards the realization of human rights, high-income States should support adaptation and mitigation efforts in developing countries by facilitating transfers of green technologies and by contributing to financing climate mitigation and adaptation. In addition, States must cooperate in good faith in the establishment of global responses addressing climate-related loss and damage suffered by the most vulnerable countries, paying particular attention to safeguarding the rights of those who are at particular risk of climate harm and addressing the devastating impact of climate disruptions, including on women, children, persons with disabilities and indigenous peoples.

Role of the Committees

18. In their future work, the Committees will continue to keep under review the impacts of climate change and climate-induced disasters on the rights holders protected under their respective treaties. They will also continue to provide States parties with guidance on how they can meet their obligations under these instruments in relation to mitigation and adaptation to climate change.

Annex 97

United Nations CCPR/C/135/D/3624/2019

International Covenant on Civil and Political Rights

Distr.: General
18 September 2023

Original: English

Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019*, **, ***

Communication submitted by:	Daniel Billy and others (represented by counsel, ClientEarth)
Alleged victims:	The authors and six of their children
State party:	Australia
Date of communication:	13 May 2019 (initial submission)
Document reference:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 18 June 2019 (not issued in document form)
Date of adoption of Views:	21 July 2022
Subject matter:	Failure to take mitigation and adaptation measures to combat the effects of climate change
Procedural issues:	Admissibility: incompatibility; manifestly ill-founded; *ratione materiae*; victim status
Substantive issues:	Arbitrary/unlawful interference; children's rights; effective remedy; family rights; home; Indigenous Peoples; minorities' right to enjoy own culture; privacy; right to life
Articles of the Covenant:	2, read alone and in conjunction with 6, 17, 24 (1) and 27; 24 (1), read alone and in conjunction with 6, 17 and 27; and 6, 17 and 27, each read alone
Articles of the Optional Protocol:	1, 2 and 3

* Adopted by the Committee at its 135th session (27 June–27 July 2022).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Furuya Shuichi, Carlos Gómez Martínez, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Soh Changrok, Kobauyah Tchamdja Kpatcha, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi.

*** Individual opinions by Committee members Carlos Gómez Martínez (dissenting), Duncan Laki Muhumuza (dissenting), Hernán Quezada Cabrera (partially dissenting) and Gentian Zyberi (concurring) and a joint opinion by Committee members Arif Bulkan, Marcia V.J. Kran and Vasilka Sancin (partially dissenting) are annexed to the present Views and are circulated in the languages of submission only.

1.1 The eight authors of the communication are Daniel Billy, Ted Billy, Nazareth Fauid, Stanley Marama, Yessie Mosby, Keith Pabai, Kabay Tamu and Nazareth Warria, born in 1983, 1957, 1965, 1967, 1982, 1964, 1991 and 1973, respectively. They are nationals of Australia and residents of the Torres Strait region. They act in their own names and on behalf of five children of Yessie Mosby[1] and the son of Kabay Tamu.[2] The authors claim that the State party has violated their rights under article 2 of the Covenant, read alone and in conjunction with articles 6, 17 and 27; and articles 6, 17 and 27, each read alone. They also claim violations of the rights of the six children under article 24 (1), read alone and in conjunction with articles 6, 17 and 27 of the Covenant. The Optional Protocol entered into force for the State party on 25 September 1991. The authors are represented by counsel.

1.2 Out of four requests received from third parties to submit interventions, the Committee granted two requests and denied two requests as out of time.[3]

The facts as submitted by the authors

2.1 The authors belong to the Indigenous minority group of the Torres Strait islands and live on the four islands of Boigu (Stanley Marama and Keith Pabai), Masig (Yessie, Genia, Ikasa, Awara, Santoi and Baimop Mosby and Nazareth Warria), Warraber (Daniel and Ted Billy and Kabay and Tyrique Tamu) and Poruma (Nazareth Fauid).[4] The Indigenous People of the Torres Strait islands, especially the authors who reside in low-lying islands, are among the populations most vulnerable to the impact of climate change.

2.2 The Torres Strait Regional Authority, a government body, has stated that "the effects of climate change threaten the islands themselves as well as marine and coastal ecosystems and resources, and therefore the life, livelihoods and unique culture of Torres Strait Islanders". The Regional Authority also noted that "even small increases in sea level due to climate change will have an immense impact on Torres Strait communities, potentially threatening their viability" and that "large increases would result in several Torres Strait islands being completely inundated and uninhabitable".[5]

2.3 Sea-level rise has already caused flooding and erosion on the authors' islands, and higher temperature and ocean acidification has produced coral bleaching, reef death and the decline of seagrass beds and other nutritionally and culturally important marine species. According to the Torres Strait Regional Authority, in the Torres Strait region, sea level has risen at the rate of approximately 0.6 cm per year from 1993 to 2010 (compared with the global average of 3.2 mm per year).

2.4 With respect to the impact of climate change on the islands, the village on Boigu, one of five communities particularly vulnerable to inundation, is flooded each year. Erosion has caused the shoreline to advance and has detached a small area from the island. On Masig in March 2019, a cyclone caused severe flooding and erosion and destroyed buildings. The cyclone resulted in the loss of three metres of shoreline. Approximately one metre of land is lost every year. In addition, in recent years a tidal surge has destroyed family graves, scattering human remains. On Warraber, high tides and strong winds cause seawater to flood the village centre every two to three years. On Poruma, erosion has washed away much of the island's sand over the past few decades.

2.5 Sea-level rise has caused saltwater to penetrate the soil of the islands, with the result that areas previously used for traditional gardening can no longer be cultivated. On Masig, rising sea level has caused coconut trees to become diseased, so that they do not produce fruits or coconut water, which are part of the authors' traditional diet. Such changes make the

[1] Genia, Ikasa, Awara, Santoi and Baimop Mosby (born in 2010, 2012, 2014, 2015 and 2017, respectively).

[2] Tyrique Tamu (born in 2010).

[3] Requests from Martin Scheinin and David R. Boyd and John H. Knox were granted; requests from Christina Voigt and Olivier de Frouville and Nadia Seqat were denied.

[4] The authors state that, while Torres Strait islanders constitute 0.14 per cent of the total population of Australia, they represent almost the totality of the settled population of the Torres Strait region. Each island has its own distinctive culture.

[5] Torres Strait Regional Authority, "Torres Strait Climate Change Strategy 2014-2018: Building community adaptive capacity and resilience", July 2014, p. iii.

authors reliant on expensive imported goods, which they often cannot afford. Seasonal and wind patterns play a key role in ensuring the authors' livelihoods and subsistence, but are no longer predictable. Precipitation, temperature and monsoon seasons have been subject to change, making it harder for the authors to pass on their traditional ecological knowledge. Seagrass beds and dependent species have disappeared. While crayfish is a fundamental source of food and income for the authors, they no longer find crayfish in areas where coral bleaching has occurred.

2.6 Referring to the Torres Strait Regional Authority report, the authors predict that the severe impacts on their traditional ways of life, subsistence and culturally important living resources will present significant social, cultural and economic challenges, have effects on infrastructure, housing, land-based food production systems and marine industries, and cause health-related problems such as an increased incidence of disease and heat-related illness.

2.7 The State party has failed to implement an adaptation programme to ensure the long-term habitability of the islands. Despite numerous requests for assistance and funding made to the State and federal authorities by or on behalf of the islanders, the State party has not responded promptly or adequately. Although some works were carried out on Boigu and Poruma between 2017 and 2018, many of the priority actions identified in the Torres Strait regional adaptation and resilience plan 2016–2021 remain unfunded. At present, no further government funding has been confirmed. Local authorities have taken a triage approach to saving homes and infrastructure, while residents of Warraber and Masig have taken matters into their own hands, using green waste and debris to secure fragile coastal ecosystems from erosion.

2.8 The State party has failed to mitigate the impact of climate change. In 2017, the State party's per capita greenhouse gas emissions were the second highest in the world. Those emissions increased by 30.72 per cent between 1990 and 2016. The State party ranked forty-third among 45 developed countries in reducing its greenhouse gas emissions during that period. Since 1990, the State party has actively pursued policies that have increased emissions by promoting the extraction and use of fossil fuels, in particular thermal coal for electricity generation.

2.9 There are no available or effective domestic remedies to enforce the rights of Torres Strait islanders under articles 2, 6, 17, 24 and 27 of the Covenant. The authors' rights under the Covenant are not protected in the Constitution or any other legislation applicable to the federal Government. The High Court of Australia has ruled that State organs do not owe a duty of care for failing to regulate environmental harm.[6]

Complaint

3.1 The authors claim that the State party has violated their rights under articles 2, read alone and in conjunction with articles 6, 17 and 27; and articles 6, 17 and 27, each read alone. They also claim violations of the rights of their children identified above under article 24 (1), read alone and in conjunction with articles 6, 17 and 27 of the Covenant. The State party has failed to adopt adaptation measures (infrastructure to protect the lives of the authors and their way of life, homes and culture against the impacts of climate change, especially sea-level rise). The State party has also failed to adopt mitigation measures to reduce greenhouse gas emissions and stop the promotion of fossil fuel extraction and use. As indicated in the Committee's general comment No. 36 (2018) on the right to life (para. 62), climate change is a matter of fundamental human rights.

3.2 The State party's obligations under international climate change treaties constitute part of the overarching system that is relevant to the examination of its violations under the Covenant.[7]

[6] High Court of Australia, *Graham Barclay Oysters Pty Ltd v. Ryan*, 2002.

[7] Vienna Convention on the Law of Treaties, art. 31.

Article 2

3.3 The State party has failed to adopt laws or other measures necessary to give effect to the authors' Covenant rights, including those under articles 6, 17, 24 and 27 of the Covenant.

Article 6

3.4 In violation of article 6 (1) of the Covenant, the State party has failed to prevent a foreseeable loss of life from the impacts of climate change,[8] and to protect the authors' right to life with dignity. The State party has not taken adaptation and mitigation measures, has not provided resources to adopt measures identified as necessary by the Torres Strait Island Regional Council and the Torres Strait Regional Authority, and has not met its obligations under the Paris Agreement. The State party has failed to respect the authors' right to a healthy environment, which is part of the right to life.[9] The State party must devote maximum available resources and all appropriate means to reducing emissions in order to comply with its obligations under article 6 of the Covenant.

Article 27

3.5 The authors' minority culture depends on the continued existence and habitability of their islands and on the ecological health of the surrounding seas.[10] Climate change already compromises the authors' traditional way of life and threatens to displace them from their islands. Such displacement would result in the infliction of egregious and irreparable harm with respect to their ability to enjoy their culture.

Article 17

3.6 Climate change already affects the private, family and home life of the authors, who face the prospect of having to abandon their homes within the lifetime of community members who are currently alive (including the authors). The State party has failed to take any or adequate adaptation and mitigation measures. When climate change threatens disruption to privacy, family and the home, States must prevent serious interference with the privacy, family and home of individuals under their jurisdiction.

Article 24 (1)

3.7 The State party has failed to take adequate steps to protect the rights of future generations of the authors' community, including the six above-mentioned children, who are the most vulnerable and affected by climate change. The future of their survival and culture is uncertain. Future generations, including the children named in the complaint, have a fundamental right to a stable climate system capable of sustaining human life, based on children's right to a healthy environment. Yessie Mosby fears that his children will have to live on another person's land and will not have anything reserved for themselves or their children, as the Masigalgal culture will be extinct.

State party's observations on admissibility and the merits

4.1 In its submission of 29 May 2020, the State party maintains that the communication is inadmissible. The alleged violations of international climate change treaties such as the Paris Agreement and other international treaties such as the International Covenant on Economic, Social and Cultural Rights are inadmissible, *ratione materiae*, because they are outside the scope of the present Covenant. Moreover, there is no basis for the authors' argument that international climate change treaties are relevant to the interpretation of the Covenant, because there are stark and significant differences between the Paris Agreement and the Covenant. The two instruments have different aims and scopes. Sixteen States that have signed the Agreement have not signed the Covenant. Accordingly, interpreting the Covenant through the Paris Agreement would be contrary to the fundamental principles of

[8] The Hague Court of Appeal, *Urgenda Foundation v. The State of the Netherlands*, Case No. 200.178.245/01, Judgment, 9 October 2018.

[9] Inter-American Court of Human Rights, Advisory Opinion OC-23/17, 15 February 2017, para. 59.

[10] For example, *Lubicon Lake Band v. Canada* (CCPR/C/38/D/167/1984), paras. 32.2 and 33.

international law.[11] The ordinary meaning of one treaty cannot be used to override the clear language of the Covenant.[12]

4.2 The authors have not substantiated their claim that they are victims of violations within the meaning of article 1 of the Optional Protocol.[13] There is no evidence that the authors face any current or imminent threat of a violation of any of the rights they have invoked.[14] Moreover, the authors have not shown any meaningful causation or connection between the alleged violations of their rights and the State party's measures or alleged failure to take measures. To demonstrate victim status, the authors must show that an act or omission by the State party has already adversely affected their enjoyment of a right under the Covenant or that such an effect is imminent. By their own admission, the authors have not met that test. It is not possible, under the rules of State responsibility under international law, to attribute climate change to Australia. Relying on the Committee's position in *Teitiota v. New Zealand*, the State party asserts that the authors invoke a risk that has not yet materialized.[15]

4.3 The authors' claims are also without merit. None of the alleged failures to take mitigation measures fall within the scope of the Covenant. It is not possible under international human rights law to attribute climate change to the State party.[16] It is not possible as a legal matter to trace causal links between the State party's contribution to climate change, its efforts to address climate change and the alleged effects of climate change on the enjoyment of the authors' rights. The Office of the United Nations High Commissioner for Human Rights has stated that "it is virtually impossible to disentangle the complex causal relationships linking historical greenhouse gas emissions of a particular country with a specific climate change-related effect, let alone with the range of direct and indirect implications for human rights" and that "it is often impossible to establish the extent to which a concrete climate change-related event with implications for human rights is attributable to global warming".[17]

4.4 The authors' claims with respect to adaptation measures are also without merit, as the authors have yet to suffer the alleged adverse effects of climate change, if at all, and such alleged violations are not imminent.

4.5 The State party describes in detail the adaptation and mitigation measures it is taking with respect to climate change.[18] The Torres Strait Regional Authority coordinates climate change programmes and policies for the benefit of the region and its communities. It consists of both an elected arm of 20 Torres Strait islanders and Aboriginal representatives from the region and an administrative arm comprising a chief executive officer and staff who implement and manage Regional Authority programmes. To respond to coastal management and climate change issues in the Torres Strait, the Regional Authority established a committee from 2006 to 2013, which included representatives from the communities worst affected by coastal erosion and inundation, including Boigu, Warraber, Masig and Poruma, State and federal agencies and various research institutions. The committee enabled a whole-of-government coordinated response to coastal and climate change issues in the Torres Strait region and secured funds to progress identified priority coastal works. The State party describes in detail the Torres Strait Climate Strategy 2014–2018, and the Torres Strait Regional Adaptation and Resilience Plan 2016–2021. The Regional Authority continues to

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

[12] Ibid.

[13] The State party argues both that the communication is insufficiently substantiated and that the authors lack victim status.

[14] For example, *E.W. et al. v. Netherlands* (CCPR/C/47/D/429/1990), para. 6.4.

[15] *Teitiota v. New Zealand* (CCPR/C/127/D/2728/2016), para. 9.12.

[16] See the report of the International Law Commission on the work of its fifty-third session (*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10)), draft articles on responsibility of States for internationally wrongful acts, article 4 (chap. IV.E.1).

[17] A/HRC/10/61, para. 70.

[18] The State party provides extensive information in its submission regarding its efforts to reduce greenhouse gas emissions.

be directly involved with communities in the Torres Strait to enable them to respond to climate change impacts.

4.6 The Torres Strait Regional Authority also played a lead role in securing the information and funding to progress the construction of a new sea wall for the low-lying island of Saibai. The Regional Authority is working with local councils to progress a more detailed assessment of coastal hazards that would inform coastal adaptation measures and actively seeks opportunities to reduce the region's carbon footprint through the uptake of clean energy technologies.

Article 6

4.7 Article 6 (1) of the Covenant requires States to protect against arbitrary deprivation of life for persons within its jurisdiction, but does not require States to protect those persons from the general effects of climate change.[19] The authors do not claim that they have been arbitrarily deprived of their lives. The *Urgenda* case was based on negligence provisions in the Dutch Civil Code.[20] Establishing factual causation under international law is a nearly impossible barrier to such tort claims. As in the *Teitiota* case, the State party is taking adaptation measures in the Torres Strait, thus rendering the harm invoked by the authors too remote to demonstrate a violation of the right to life.

4.8 The authors have failed to demonstrate that article 6 (1) of the Covenant includes a generalized right of protection against the effects of climate change and that relevant domestic legislation is manifestly insufficient or lacking altogether.[21] The extension of article 6 (1) of the Covenant to a right to life with dignity, although a laudable policy objective shared by the State party, is unsupported by the rules of treaty interpretation, the ordinary meaning of article 6 (1) and any relevant jurisprudence.

4.9 Alternatively, if the Committee maintains the right to a life with dignity, it should only be recognized in limited and particular circumstances. In contrast to the situation in the Committee's recent Views on *Portillo Cáceres et al. v. Paraguay*,[22] the actions in the present case were not attributable to the State party, which did not fail to enforce domestic law or infringe any domestic laws. The authors in the present case have not suffered any poor health, let alone poisoning or death.

Article 27

4.10 The State party has enacted laws to protect the survival and continued development of the Torres Strait islanders' cultural identity. The authors merely assert future hypothetical violations of this right. All of the cases in which the Committee has found violations of this right relate to existing, not future violations. Article 27 of the Covenant was never intended to protect against the effects of climate change.

Article 17

4.11 The authors focus entirely on the future disruptions to family life that climate change may cause. The authors have not made any claim that their families (including relatives in extended families) have experienced arbitrary or unlawful interference by the State party. The interference prohibited under article 17 of the Covenant must be real and effective, not potential or future, and must emanate from State authorities or natural or legal persons authorized by the State. The authors' allegation that they could be relocated in the future is speculative.

[19] General comment No. 36 (2018), para. 20.

[20] Supreme Court of the Netherlands, *State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v. Urgenda Foundation*, Case No. 19/00135, Judgment, 20 December 2019.

[21] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd revised ed. (N.P. Engel, Kehl am Rhein, 2005), p. 123.

[22] CCPR/C/126/D/2751/2016.

Article 24

4.12 The authors have not demonstrated that the wide range of legislative and other measures put in place by the State party to protect Australian children fail to comply with the obligation under article 24 (1) of the Covenant. In article 24 (1), which measures of protection are required are not specified; States parties have broad discretion in this regard.

Authors' comments on the State party's observations on admissibility and the merits

5.1 In their comments submitted on 29 September 2020, the authors maintain that the State party did not challenge their arguments regarding several issues, including the science of climate change and its current and future impacts on the islands on which they live; and the interdependency between the authors' unique and vulnerable culture and the surrounding ecosystem of the islands.

5.2 The State party erred in asserting that the authors have yet to suffer the adverse effects of climate change, if at all. This contradicts the evidence that the authors already provided and the reports of the Torres Strait Regional Authority, a State agency. Moreover, the State party has already violated its duty to avert devastating and future irreversible impacts on rights protected by the Covenant, including impacts caused by existing greenhouse gas emissions. Protective measures must be initiated today.[23] Climate change is a slow-onset process. Thus, a State party may violate its obligations before the worst effects occur. The authors' claims are based on both current violations and an imminent threat of violations. They already experience severe impacts arising from climate change, including damage to their homes and disruption of their family life. In their combined statements, the authors describe experiencing the following problems: flooding and inundation of villages; flooding and inundation of ancestral burial lands; loss by erosion of their traditional lands, including plantations and gardens; destruction or withering of traditional gardens through salinification caused by flooding or seawater ingress; decline of nutritionally and culturally important marine species caused by climate change, and associated coral bleaching (reef death) and ocean acidification; and a reduced ability to practise their traditional culture and pass it on to the next generation. They also experience anxiety and distress owing to erosion which is approaching some homes in the community. For six of the authors, upkeep of ancestral graveyards and visiting and feeling communion with deceased relatives is at the heart of their cultures and the most important ceremonies (such as coming-of-age and initiation ceremonies) are culturally meaningful only if performed on the native lands of the community observing the ceremony.

5.3 The authors living on Boigu and Masig face a real prospect of displacement and loss of culture within the next 10 years unless urgent and significant action is taken to enable the islands to withstand expected sea-level rise. The authors living on Warraber and Poruma face such a prospect within their lifetimes unless urgent action is taken within 10 to 15 years. Such displacement can be prevented with reasonable adaptation and mitigation measures. If the State party's interpretation of imminence were followed, the authors would be forced to wait until their culture and their land were lost in order to submit a claim under the Covenant.

5.4 The authors have identified specific acts and omissions by the State party (relating to adaptation and mitigation) instead of relying on abstract arguments. Those acts and omissions have already impaired and will continue to impair the authors' rights in ways that will worsen over time, because of the latent and/or irreversible nature of climate change.

5.5 The State party is responsible for its own emissions contribution, lack of due diligence and failure to take adaptation measures to protect the authors' rights and fulfil its obligation to reduce emissions. The protection of the right to life requires States to review their energy policies and prevent the dangerous emission of greenhouse gases.

[23] According to land and sea profiles published in 2015 and 2016, the Torres Strait Regional Authority assigned to the four islands where the authors live ratings of either high vulnerability to sea-level rise (Masig, Poruma and Warraber) or very high vulnerability (Boigu) and considered them to have low (Masig and Warraber), very low (Boigu) or medium (Poruma) sea-level rise response options.

5.6 International environmental legal obligations of States are indeed relevant to interpreting the scope of their duties under the Covenant. Treaties should be interpreted in the context of their normative environment.

5.7 The State party has not so far taken any adequate concrete measures to prevent the authors' islands from becoming uninhabitable or to address the real and foreseeable threat of the complete loss of the authors' cultures. The Committee's jurisprudence supports the notion that environmental harm can lead to violations of fundamental human rights, given the dependence of Indigenous minority cultures on a healthy environment and the strong cultural and spiritual link between Indigenous Peoples and their traditional lands.

5.8 With respect to article 24 of the Covenant, the principle of intergenerational equity places a duty on current generations to act as responsible stewards of the planet and ensure the rights of future generations to meet their developmental and environmental needs. The remedies requested by the authors are reasonable and proportionate.

State party's additional observations

6.1 In its additional observations, submitted on 5 August 2021, the State party maintains that the authors' allegations (changes to seasonal patterns; erosion of ancestral land; saltwater intrusion; and damage to cultural practices, species and homes) represent possible impacts of climate change but not existing or imminent violations of Covenant rights caused by the State party, either through act or omission. Those impacts only suggest that current adverse effects may, subject to contingencies, worsen in the future. The possible impacts of a slow-onset process do not confer victim status on the authors.

6.2 The authors acknowledge that there is still a window of time in which adaptation measures can be planned and implemented. The authors themselves contemplate the consequences that might arise if and when their islands become unviable for habitation.

6.3 Climate change is a global phenomenon attributable to the actions of many States. Unlike other environmental issues previously considered by the Committee, it requires global action. The general effects of climate change and the effectiveness of any mitigation or adaptation measures to address those effects are not within the complete control of any State.[24]

6.4 The State party's position is not, as the authors allege, that they must simply wait and suffer increasingly severe climate impacts. The international community has sought to address climate change primarily, and rightly, as a matter requiring international cooperation under international environmental agreements. Notwithstanding the authors' dissatisfaction with the pace and nature of the State party's efforts, this does not mean that the State party's response to the threat of climate change, and consequently the response of many other States, amounts to a violation of the Covenant.

6.5 In applying the principle of systemic integration described by the International Law Commission, relevant rules for the purpose set out in article 31 (3) (c) of the Vienna Convention on the Law of Treaties must concern the subject matter of the treaty term at issue.[25] Climate change treaties do not provide evidence of the object and purpose of the Covenant or the meaning of its terms.

6.6 Regarding the exhaustion of domestic remedies, States parties to the Covenant are not required to make available a domestic remedy for the purposes under article 2 (3) of the Covenant where: (a) the alleged violations are outside the scope of the Covenant (as is the case here, since the allegations relate to the compliance of Australia with international climate change treaties); or (b) there is no breach of rights recognized by the Covenant as properly understood, as is the case for the allegations in the present communication.

6.7 The obligation to respect under article 2 (1) of the Covenant is a positive obligation of non-interference with Covenant rights that extends only to real risks against which a State

[24] See *Poma Poma v. Perú* (CCPR/C/95/D/1457/2006).

[25] Report of the International Law Commission on the work of its fifty-eighth session (A/61/10), pp. 180 and 413.

party can offer protection.[26] The alleged threat to the authors' rights is a global phenomenon arising from myriad acts committed by innumerable private and State entities over decades which, unquestionably, are beyond the jurisdiction and control of the State party. It would be perverse if, to ensure that climate change does not impair the authors' rights, the Covenant were to impose a duty or obligation on the State party that the State party could not hope to fulfil. Moreover, the authors acknowledge the multiplicity of global causes of climate change, and that there is still the opportunity for mitigating factors at the national and global levels to intervene in order to allay the threat posed by its future impacts.

6.8 Any positive obligation that arises under the Covenant is limited principally to the threat posed by the acts of private persons or entities within a State party's jurisdiction and control. This could also extend to positive obligations in respect of environmental issues that pose a direct, specific and objective threat to the enjoyment of Covenant rights, such as the use of pesticides (as in *Portillo Cáceres et al. v. Paraguay*), where it is within the scope of a State's power to avert that risk. It does not, however, create an obligation to protect generally against the future effects of climate change, which, as a matter of international law, extend well beyond the scope of a single State party's jurisdiction and control.

6.9 Academic scholars have noted that "causal pathways involving anthropogenic climate change, and especially its impacts, are intricate and diffuse" and that human rights law "cannot actually address the depth and breadth of the causes and impacts of climate change".[27] A threat that is not attributable to a State cannot be ensured or protected against by that State in cases where such protection cannot be achieved by the State alone.

6.10 Positive obligations under the Covenant do not require the maximum deployment of possible resources or the realization of the highest possible ambition. To adopt such an unprecedented test would not only place an impossible burden on States but also displace reasonable policy choices made in good faith by States as they assess a range of threats and challenges that have an impact on the enjoyment of human rights under the Covenant and decide how to distribute limited resources to address them.

6.11 It would be both inappropriate and unfounded for the Committee to interpret the Covenant in such a way as to allow it to remake the informed, good faith and difficult policy decisions of a democratically elected Government which inherently involve compromises, trade-offs and the allocation of limited resources across the range of challenges to the full enjoyment of human rights. In urging the Committee to adopt an unduly broad interpretation of a positive obligation, the authors invite the Committee to disregard States' discretion in making relevant decisions, even if exercised in good faith. Fulfilment of positive obligations under the Covenant must recognize competing challenges to limited State resources.

6.12 The authors' claims under article 27 of the Covenant are both factually and legally incorrect. The State party is taking measures to prevent the islands from becoming unviable for habitation through the adaptation and mitigation measures described at length in its observations. The State party provides detailed information on legislation, policies and practices designed to protect the cultural rights of Torres Strait islanders. Such measures include the Torres Strait Islander Cultural Heritage Act 2003 (Qld), the Torres Strait Islander Traditional Child Rearing Practice Act 2020 (Qld), the Traditional Ecological Knowledge Project of the Torres Strait Regional Authority, the declaration of three Indigenous protected areas in the Torres Strait region, the use of Torres Strait infrastructure and housing, Indigenous land-use agreements, and the Local Thriving Communities programme. As a matter of international law, article 27 of the Covenant does not involve any positive obligation to prevent slow-onset risks that might arise in the future. A breach of article 27 of the Covenant arises only at the time of any denial; it does not convert a risk of future denial into a present breach. Even if the Committee were to admit an intergenerational element of

[26] The State party provided detailed information in its submission on the measures it has taken to address the harmful effects of climate change.

[27] For example, Fanny Thornton, "The absurdity of relying on human rights law to go after emitters", in *Debating Climate Law*, Benoit Mayer and Alexander Zahar, eds. (Cambridge, United Kingdom, Cambridge University Press, 2021), p. 159.

cultural transmission, there is nothing to suggest that the State party has directly interfered in or failed to protect the authors' ability to transmit their culture across generations.

6.13 Article 24 (1) of the Covenant does not itself set out the rights of children but refers to necessary measures of protection for children. Instead of identifying any measures specifically sought by the authors to obtain such protection for children, their comments only describe climate change impacts that affect the Torres Strait population generally, adults and children alike. The special measures warranted by article 24 of the Covenant seek to protect children because of their status as minors. The effects of climate change do not depend upon a person's status as a minor.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

7.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 The Committee recalls the requirement under article 5 (2) (b) of the Optional Protocol that the author of a communication must exhaust all judicial or administrative domestic remedies, insofar as such remedies offer a reasonable prospect of redress and are de facto available to the author.[28] The Committee recalls that for the purpose of article 5 (2) (b) of the Optional Protocol, authors must make use only of all those avenues that offer them a reasonable prospect of redress, that relate to the alleged violation and that offer redress that would be proportionate to the harm done.[29] In this regard, the Committee notes the authors' uncontested statement that the highest court in Australia has ruled that State organs do not owe a duty of care for failing to regulate environmental harm. The Committee takes note of the State party's position that States parties to the Covenant are not required to make available domestic remedies in cases where, as in the present case, there is no breach of rights recognized by the Covenant as properly understood. With due regard for its remaining findings on admissibility in the paragraphs below, the Committee considers that the issue of whether the authors' Covenant rights were breached cannot be dissociated from the merits of the case. In the above circumstances, and in the absence of information from the State party indicating that effective and available domestic remedies existed at the relevant time for the authors to raise the alleged Covenant violations before competent State bodies, the Committee considers that article 5 (2) (b) of the Covenant does not preclude it from examining the communication.

7.4 The Committee notes the authors' claims under article 2, read alone and in conjunction with articles 6, 17, 24 (1) and 27 of the Covenant. The Committee recalls that according to its jurisprudence, the provisions of article 2 of the Covenant lay down a general obligation for States parties and do not give rise, when invoked separately, to a claim in a communication under the Optional Protocol. Furthermore, article 2 of the Covenant may not be invoked in a claim in a communication under the Optional Protocol in conjunction with other provisions of the Covenant, except when the failure by the State party to observe its obligations under article 2 is the proximate cause of a distinct violation of the Covenant directly affecting the individual claiming to be a victim.[30] In the present case, the Committee observes that the authors' claims under article 2, read in conjunction with articles 6, 17, 24 (1) and 27 of the Covenant lie in the alleged failure of the State party's policies to give effect to their rights in relation to life, private life, family, home and culture. The Committee notes, however, that the authors have already alleged violations of their rights under articles 6, 17, 24 (1) and 27, resulting from alleged defects in the legislative and policy framework and

[28] For example, *D.G. et al. v. Philippines* (CCPR/C/128/D/2568/2015), para. 6.3.
[29] *Portillo Cáceres et al. v. Paraguay*, para. 6.5.
[30] For example, *Devi Maya Nepal v. Nepal* (CCPR/C/132/D/2615/2015), para. 6.6.

practices of the State party regarding causes, effects and responses relating to climate change. The Committee considers that an examination of whether the State party violated its general obligations under article 2 of the Covenant, read in conjunction with articles 6, 17, 24 (1) or 27 of the Covenant would not be distinct from the examination of the violation of the authors' rights under articles 6, 17, 24 (1) or 27 of the Covenant. The Committee therefore considers that the authors' claims under article 2, read alone and in conjunction with articles 6, 17, 24 (1) and 27 of the Covenant are inadmissible under article 3 of the Optional Protocol.

7.5 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. Accordingly, the Committee considers that in this respect, article 3 of the Optional Protocol does not constitute an obstacle to the admissibility of the communication.

7.6 The Committee notes the State party's position that the communication is inadmissible under articles 1 and 2 of the Optional Protocol because the State party cannot be held responsible, as a legal or practical matter, for the climate change impacts that the authors allege in their communication. The arguments raised by the parties require the Committee to contemplate whether, under article 1 of the Optional Protocol, a State party may be considered to have committed a violation of the rights of an individual under the Covenant, where the harm to the individual allegedly resulted from the failure of the State party to implement adaptation and/or mitigation measures to combat adverse climate change impacts within its territory.

7.7 With respect to adaptation measures, the Committee recalls that the authors in the present communication have invoked articles 6, 17, 24 (1) and 27, each of which entails positive obligations of States parties to ensure the protection of individuals under their jurisdiction against violations of those provisions.[31]

7.8 With respect to mitigation measures, although the parties differ as to the amount of greenhouse gases emitted within the State party's territory and as to whether those emissions are significantly decreasing or increasing, the information provided by both parties indicates that the State party is and has been in recent decades among the countries in which large amounts of greenhouse gas emissions have been produced. The Committee notes that the State party ranks high on world economic and human development indicators. In view of the above, the Committee considers that the alleged actions and omissions fall under the State party's jurisdiction under articles 1 or 2 of the Optional Protocol and therefore that it is not precluded from examining the present communication.

7.9 The Committee notes the State party's position that the communication is inadmissible under articles 1 and 2 of the Optional Protocol because the authors invoke potential future harms and have not sufficiently substantiated their claim that they are victims of a past or existing violation or imminent threat of a violation of their rights by the State party. The Committee recalls its jurisprudence in which it stated that a person can claim to be a victim in the sense of article 1 of the Optional Protocol only if he or she is actually affected. How concretely that requirement should be met is a matter of degree. Individuals claiming to be a victim of a violation of a right protected under the Covenant must demonstrate, however, either that a State party has, by act or omission, already impaired the exercise of their right or that such impairment is imminent, basing their arguments for example on legislation in force or on a judicial or administrative decision or practice. If the law or practice has not already been concretely applied to the detriment of such an individual,

[31] General comments No. 36 (2018), para. 21; No. 16 (1988), para. 1; No. 17 (1989), para. 1; and No. 23 (1994), para. 6.1; and *Abdoellaevna and Y v. Netherlands* (CCPR/C/125/D/2498/2014), para. 7.3.

it must in any event be applicable in such a way as to indicate that the individual's risk of being affected is more than a theoretical possibility.[32]

7.10 The Committee notes that the authors presented in their communication information indicating the existence of real predicaments that they have experienced personally and actually owing to disruptive climate events and slow-onset processes such as flooding and erosion. The authors argue in part that those predicaments have already compromised their ability to maintain their livelihoods, subsistence and culture. While noting the State party's argument that the authors have not substantiated that present and future climate change impacts and the State party's role in mitigating those impacts have violated the authors' rights under the Covenant, the Committee observes that the authors, as members of peoples who are the long-standing inhabitants of traditional lands consisting of small, low-lying islands which presumably offer scant opportunities for safe internal relocation, are highly exposed to adverse climate change impacts. It is uncontested that the authors' lives and cultures are highly dependent on the availability of the limited natural resources to which they have access and on the predictability of the natural phenomena that surround them. The Committee observes that in the light of their limited resources and location, the authors would be unlikely to be able to finance adequate adaptation measures themselves, on an individual or community level, to adjust to actual or expected climate change and its effects in order to moderate harm. The Committee therefore considers that the authors are among those who are extremely vulnerable to experiencing severely disruptive climate change impacts intensely. The Committee considers, based on the information provided by the authors, that the risk of impairment of those rights, owing to alleged serious adverse impacts that have already occurred and are ongoing, is more than a theoretical possibility. The Committee accordingly considers that articles 1 and 2 of the Optional Protocol do not constitute an obstacle to the admissibility of the claims under articles 6, 17, 24 (1) and 27 of the Covenant.

7.11 The Committee therefore declares the authors' claims under articles 6, 17, 24 (1) and 27 of the Covenant admissible and proceeds to examine them on the merits.

Consideration of the merits

8.1 The Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5 (1) of the Optional Protocol.

8.2 The Committee notes the authors' claim that, by failing to implement adequate mitigation and adaptation measures to prevent negative climate change impacts on the authors and the islands where they live, the State party has violated their rights under the Covenant.

Article 6

8.3 The Committee notes the authors' claim that the events in this case constitute a violation by act and omission of their right to a life with dignity under article 6 of the Covenant, owing to the State party's failure to perform its duty to provide adaptation and mitigation measures to address climate change impacts that adversely affect their lives, including their way of life. With respect to the State party's position that article 6 (1) of the Covenant does not obligate it to prevent foreseeable loss of life from climate change, the Committee recalls that the right to life cannot be properly understood if it is interpreted in a restrictive manner and that the protection of that right requires States parties to adopt positive measures to protect the right to life.[33] The Committee also recalls its general comment No. 36 (2018) on the right to life, in which it established that the right to life also includes the right of individuals to enjoy a life with dignity and to be free from acts or omissions that would cause their unnatural or premature death (para. 3).[34] The Committee further recalls that the obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life.[35] States parties

[32] For example, *Teitiota v. New Zealand*, para. 8.4.

[33] For example, *Teitiota v. New Zealand*, para. 9.4; and *Toussaint v. Canada* (CCPR/C/123/D/2348/2014), para. 11.3.

[34] See also *Portillo Cáceres et al. v. Paraguay*, para. 7.3.

[35] *Toussaint v. Canada*, para. 11.3; and *Portillo Cáceres et al. v. Paraguay*, para. 7.5.

may be in violation of article 6 of the Covenant even if such threats and situations do not result in the loss of life.[36] The Committee considers that such threats may include adverse climate change impacts and recalls that environmental 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.[37] The Committee recalls that States parties should take all appropriate measures to address the general conditions in society that may give rise to direct threats to the right to life or prevent individuals from enjoying their right to life with dignity.[38]

8.4 The Committee takes note of the State party's position that the extension of article 6 (1) of the Covenant to a right to life with dignity through general comment No. 36 (2108) is unsupported by the rules of treaty interpretation, with reference to article 31 of the Vienna Convention on the Law of Treaties (1969). However, the Committee is of the view that the language at issue is compatible with the latter provision, which requires that a treaty be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. In this regard, the Committee notes that under article 31 of the Convention, the context for interpretation of a treaty includes in the first place the text of the treaty, including its preamble and annexes. In the preamble of the Covenant, it is recognized initially that the inherent dignity and the equal and inalienable rights of all members of the human family are the foundation of freedom, justice and peace in the world and it is also recognized that those rights derive from the inherent dignity of the human person. While the State party notes that socioeconomic entitlements are protected under a separate Covenant, the Committee observes that the preamble of the present Covenant recognizes that the ideal of free human beings enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy their civil and political rights, as well as their economic, social and cultural rights.

8.5 The Committee observes that both it and regional human rights tribunals have established that environmental degradation can compromise effective enjoyment of the right to life and that severe environmental degradation can adversely affect an individual's well-being and lead to a violation of the right to life.[39] In the present case, the Committee notes that the Torres Strait Regional Administration, a government agency, recognized in its report entitled "Torres Strait Climate Change Strategy 2014–2018" the vulnerability of the Torres Strait islands to significant and adverse climate change impacts that affect ecosystems and the livelihoods of the islands' inhabitants.[40] The Committee also notes the authors' claims regarding their islands' exposure to flood-related damage, sea wall breaches, coral bleaching, increasing temperatures, erosion, reduction of the number of coconut trees and marine life used for food and cultural purposes, and a lack of rain and its effect on crop cultivation (paras. 2.3–2.5 and 5.2).

8.6 The Committee recalls that in certain places, the lack of alternatives to subsistence livelihoods may place individuals at a heightened risk of vulnerability to the adverse effects of climate change.[41] The Committee takes into account the authors' argument that the health of their islands is closely tied to their own lives. The Committee notes, however, that while the authors attest to feelings of insecurity engendered by a loss of predictability of seasonal weather patterns, seasonal timing, tides and availability of traditional and culturally important food sources, they have not indicated that they have faced or currently face adverse impacts on their own health or a real and reasonably foreseeable risk of being exposed to a situation of physical endangerment or extreme precarity that could threaten their right to life, including their right to a life with dignity. The Committee also notes that the authors' claims under article 6 of the Covenant relate mainly to their ability to maintain their culture, which falls under the scope of article 27 of the Covenant.

[36] General comment No. 36 (2018), para. 7.

[37] Ibid., para. 62.

[38] Ibid., para. 26.

[39] *Portillo Cáceres et al. v. Paraguay*, para. 7.4 and footnotes 45 and 46.

[40] Land and Sea Management Unit, Torres Strait Regional Authority, *Torres Strait Climate Change Strategy 2014–2018*, July 2014.

[41] *Teitiota v. New Zealand*, para. 9.9.

8.7 Regarding the authors' assertion that their islands will become uninhabitable in 10 years (Boigu and Masig) or in 10 to 15 years (Poruma and Warraber) in the absence of urgent action, the Committee recalls that without robust national and international efforts, the effects of climate change may expose individuals to a violation of their rights under article 6 of the Covenant.[42] Furthermore, given that the risk of an entire country's becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized.[43] The Committee notes that, under the Torres Strait sea walls programme (2019–2023), multiple infrastructures will be constructed and upgraded to address ongoing coastal erosion and storm surge impacts on Poruma, Warraber, Masig, Boigu and Iama. The Committee notes that by 2022, several coastal mitigation works had been completed on Boigu with funding of $A 15 million: the construction of a 1,022 metre-long wave return wall, the raising and extension of an existing bund wall to 450 metres and the upgrading of stormwater drainage infrastructure. The Committee observes that under the programme, coastal mitigation works on Poruma, Warraber and Masig were scheduled to begin in 2021 or 2022 and to be completed by 2023. The Committee takes note of the other adaptation and mitigation measures mentioned by the State party. The Committee considers that the time frame of 10 to 15 years, as suggested by the authors, could allow for intervening acts by the State party involving taking affirmative measures to protect and, where necessary, relocate the alleged victims. The Committee also considers that the information provided by the State party indicates that it is taking adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms on the islands. Based on the information made available to it, the Committee is not in a position to conclude that the adaptation measures taken by the State party would be insufficient and therefore represent a direct threat to the authors' right to life with dignity.

8.8 In view of the foregoing, the Committee considers that the information before it does not disclose a violation by the State party of the authors' rights under article 6 of the Covenant.

Article 17

8.9 The Committee notes the authors' claims that climate change already affects their private, family and home life, as they face the prospect of having to abandon their homes. The Committee also notes that the erosion of their islands causes the authors significant distress and that flooding occurs on the islands. The Committee further notes the allegation of Stanley Marama that his home was destroyed owing to flooding in 2010. The Committee recalls that States parties must prevent interference with a person's privacy, family or home that arises from conduct not attributable to the State, at least where such interference is foreseeable and serious.[44] Thus, when environmental damage threatens disruption to privacy, family and the home, States parties must prevent serious interference with the privacy, family and home of individuals under their jurisdiction.

8.10 The Committee recalls that the authors depend on fish, other marine resources, land crops and trees for their subsistence and livelihoods and depend on the health of their surrounding ecosystems for their own well-being. The State party has not contested the authors' assertions in that regard. The Committee considers that the aforementioned elements constitute components of the traditional Indigenous way of life of the authors, who enjoy a special relationship with their territory, and that these elements can be considered to fall within the scope of protection under article 17 of the Covenant.[45] In addition, the Committee considers that the application of article 17 should be understood not as being limited to the act of refraining from arbitrary interference; but rather as also obligating States parties to adopt positive measures that are needed to ensure the effective exercise of the rights under

[42] Ibid., para. 9.11.
[43] Ibid.
[44] General comment No. 16 (1988), paras. 1 and 9.
[45] *Benito Oliveira et al. v. Paraguay* (CCPR/C/132/D/2552/2015), para. 8.3; and *Portillo Cáceres et al. v. Paraguay*, para. 7.8.

article 17 in the presence of interference by the State authorities and physical or legal persons.[46]

8.11 The Committee takes note of the State party's extensive and detailed information that it has taken numerous actions to address adverse impacts caused by climate change and carbon emissions generated within its territory. Those actions include, with relevance to the authors' claims, release of the Torres Strait Regional Adaptation and Resilience Plan 2016–2021, which focused both on climate impacts and reducing vulnerability through resilience; direct involvement of the Regional Authority with communities in the region to enable them to respond to climate change impacts; community heat mapping to monitor and reduce heat risk; installation of monitoring sites relating to tides, sea level, temperature and rainfall; commitment of over $A 15 billion for country-wide natural resource management, water infrastructure, drought and disaster resilience and recovery funding; investment of $A 100 million for management of ocean habitats and coastal environments; provision of regional and global climate finance of $A 1.4 billion (2015–2020) and $A 1.5 billion (2020–2025), with a strong focus on achieving adaptation outcomes; reduction of its carbon emissions by 20.1 per cent (from 2005 to 2020) and by 46.7 per cent per person (from 1990 to 2020); investment of an estimated $A 20 billion in low emissions technologies (2020–2030) and $A 3.5 billion in the Emissions Reduction Fund; initiation or completion of 58 actions identified in the Torres Strait Regional Adaptation and Resilience Plan 2016–2021; development of local adaptation and resilience plans for the 14 outer island communities; development by the Torres Strait Regional Authority of a draft regional resilience framework to help build greater local and regional resilience to climate change impacts, informed by discussions with community representatives; ongoing assessment of climate change impacts for Torres Strait communities; coastal mapping on the Torres Strait islands to inform coastal adaptation planning; continuation of coastal protection initiatives by the Regional Authority to address erosion and storm surge impacts on local communities; and investment of $A 40 million in stage 2 of the Torres Strait sea walls programme (2019–2023). The Committee recalls the information contained in paragraph 8.7 concerning the State party's completed and ongoing efforts to build new or updated sea walls on the islands where the authors live and notes that the sea walls are all expected to be completed by 2023.

8.12 However, the Committee notes that the State party has not specifically commented on the authors' allegations that they attempted to request the construction of adaptation measures, in particular upgraded sea walls, at various points over the last decades. While welcoming the new construction of sea walls on the four islands at issue, the Committee observes that the State party has not explained the delay in sea wall construction with respect to the islands where the authors live. It has not contested the factual allegations set forth by the authors concerning the concrete climate change impacts on their home, private life and family. The Committee notes that the State party has not provided alternative explanations concerning the reduction of marine resources used for food and the loss of crops and fruit trees on the land on which the authors live and grow crops, elements that constitute components of the authors' private life, family and home. The Committee also notes the authors' specific descriptions of the ways in which their lives have been adversely affected by flooding and inundation of their villages and ancestral burial lands; destruction or withering of their traditional gardens through salinification caused by flooding or seawater ingress; and decline of nutritionally and culturally important marine species and associated coral bleaching and ocean acidification. The Committee further notes the authors' allegations that they experience anxiety and distress owing to erosion that is encroaching on some homes in their communities and that the upkeep and visiting of ancestral graveyards is associated with the very heart of their culture, which requires experiencing feelings of communion with deceased relatives. The Committee notes the authors' statement that their most important cultural ceremonies are meaningful only if performed on native community lands. The Committee considers that when 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

[46] General comment No. 16 (1988), para. 1.

physical or mental harm that they cause, the degradation of the environment may then adversely affect the well-being of individuals and constitute foreseeable and serious violations of private and family life and the home.[47] 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.

Article 27

8.13 The Committee recalls that article 27 establishes and recognizes a right which is conferred on individuals belonging to minority Indigenous groups and which is distinct from, and additional to, the other rights that all persons are entitled to enjoy under the Covenant.[48] The Committee also recalls that, in the case of Indigenous Peoples, the enjoyment of culture may relate to a way of life which is closely associated with territory and the use of its resources, including such traditional activities as fishing or hunting.[49] Thus, the protection of this right is directed towards ensuring the survival and continued development of cultural identity.[50] The Committee further recalls that article 27 of the Covenant, interpreted in the light of the United Nations Declaration on the Rights of Indigenous Peoples, enshrines the inalienable right of Indigenous Peoples to enjoy the territories and natural resources that they have traditionally used for their subsistence and cultural identity. Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion.[51]

8.14 The Committee notes the authors' assertion that their ability to maintain their culture has already been impaired by the reduced viability of their islands and the surrounding seas, owing to climate change impacts. The Committee also notes the authors' claim that those impacts have eroded their traditional lands and natural resources that they use for traditional fishing and farming and for cultural ceremonies that can be performed only on the islands. The Committee further notes their claim that the health of their land and the surrounding seas is closely linked to their cultural integrity. The Committee notes that the State party has not refuted the authors' arguments that they could not practise their culture on mainland Australia, where they would not have land that would allow them to maintain their traditional way of life. The Committee considers that the climate impacts mentioned by the authors represent a threat that could have reasonably been foreseen by the State party, as the authors' community members began raising the issue in the 1990s. While noting the completed and ongoing sea wall construction on the islands where the authors live, the Committee considers that the delay in initiating these projects indicates an inadequate response by the State party to the threat faced by the authors. With reference to its findings in paragraph 8.14, the Committee considers that the information made available to it indicates that the State party's failure to adopt timely adequate adaptation measures to protect the authors' collective ability to maintain their traditional way of life and to transmit to their children and future generations their culture and traditions and use of land and sea resources discloses a violation of the State party's positive obligation to protect the authors' right to enjoy their minority culture. Accordingly, the Committee considers that the facts before it amount to a violation of the authors' rights under article 27 of the Covenant.

9. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of articles 17 and 27 of the Covenant.

10. Having found a violation of articles 17 and 27, the Committee does not deem it necessary to examine the authors' remaining claims under article 24 (1) of the Covenant.

11. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is

[47] See, mutatis mutandis, *Benito Oliveira et al. v. Paraguay* (CCPR/C/132/D/2552/2015); and general comment No. 23 (1994).
[48] General comment No. 23 (1994), paras. 1 and 6.1.
[49] *Benito Oliveira et al. v. Paraguay*, para. 8.6.
[50] Ibid., para. 8.3.
[51] *Käkkäläjärvi et al. v. Finland* (CCPR/C/124/D/2950/2017), para. 9.9.

obligated, inter alia, to provide adequate compensation to the authors for the harm that they have suffered; engage in meaningful consultations with the authors' communities in order to conduct needs assessments; continue its implementation of measures necessary to secure the communities' continued safe existence on their respective islands; and monitor and review the effectiveness of the measures implemented and resolve any deficiencies as soon as practicable. The State party is also under an obligation to take steps to prevent similar violations from occurring in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them widely in the official language of the State party.

Annex I

[Spanish only]

Voto individual (disidente) de Carlos Gómez Martínez, miembro del Comité

1. El calentamiento global coloca en situación de grave riesgo la vida familiar de los autores (artículo 17 del Pacto) y también la supervivencia de las comunidades indígenas a las que pertenecen (artículo 27 del Pacto), dada la circunstancia de que habitan islas de muy escasa altitud en el estrecho de Torres, fácilmente inundables por la subida del nivel del mar. Este hecho evidencia su extrema vulnerabilidad y les sitúa como víctimas potenciales de violación de los derechos humanos apenas mencionados y de los que son titulares.

2. Sin embargo, la evitación total del riesgo y de los daños derivados del cambio climático está fuera del alcance de la actuación aislada del Estado parte, dado que el calentamiento de la tierra es un fenómeno global al que solo se puede dar respuesta mundial en una lucha en la que han de implicarse todos o, al menos, una parte significativa de los Estados del planeta. Por ello no puede concluirse que el Estado parte haya violado los derechos de los autores por no haber evitado los riesgos o no haber eliminado totalmente los daños que puedan sufrir, derivados del cambio climático.

3. Por esta razón, el Comité se centra en las medidas de adaptación al cambio climático. El Comité admite, en los párrafos 8.7 y 8.11 de su dictamen, que el Estado parte ha llevado a cabo acciones concretas para la adaptación de la vida de los autores al nuevo entorno que traerá consigo el cambio climático, siendo de especial relevancia la construcción de muros de contención de las aguas del mar, obras ya iniciadas y cuya finalización se espera en 2023.

4. Cuestión distinta es si las medidas de adaptación son o no las exigibles hasta el punto de que, por no ser suficientes, puedan suponer la violación de los derechos humanos de los autores. La adaptación al cambio climático es un concepto indeterminado que puede ir desde una leve acomodación hasta la drástica configuración de un nuevo entorno plenamente resiliente que permita la vida en plenitud de los autores en las nuevas circunstancias climáticas. En cualquier caso, corresponde al Estado parte decidir el curso de acción que debe emprender para adaptar su país al cambio climático atendiendo a los intereses de toda la ciudanía y a la posible opción por políticas tanto ambientales, como la reforestación con especies resistentes o la facilitación de la transición energética, como de otra índole, como la reducción de la pobreza, que también tiene importante repercusión en el disfrute de los derechos humanos.

5. En el propio dictamen se señala, en el párrafo 8.7, que el Comité no está en condiciones de concluir que las medidas de adaptación adoptadas por el Estado parte sean insuficientes para representar una amenaza directa al derecho de los autores a una vida digna, por lo que se excluye la violación del artículo 6 del Pacto. Si ello es así, no se entiende cómo el Comité sí se considera en condiciones de concluir que las medidas de adaptación emprendidas por el Estado parte sean insuficientes a los efectos de apreciar una violación de los artículos 17 y 27 del Pacto. No se explica por qué el juicio de suficiencia no es válido a unos efectos (no violación del artículo 6) y sí lo es a otros (violación de los artículos 17 y 27).

6. En definitiva, en el dictamen no se explica la razón por la cual el Comité considera que las medidas de adaptación llevadas a cabo por el Estado parte —la construcción de diques de contención del agua del mar—, o el retraso en ejecutarlas —iniciadas en 2017 y 2018 en los malecones de Boigu y Poruma (véase el párr. 2.7)—, han sido insuficientes hasta el punto de constituir una violación de los artículos 17 y 27 del Pacto. Asimismo, tampoco se explica qué otra actuación suplementaria hubiera sido exigible al Estado parte para poder concluir que no se produjo dicha violación.

Annex II

[English only]

Individual opinion of Committee member Duncan Laki Muhumuza (dissenting)

1. The Committee found that there was no violation of article 6 of the Covenant based on the information provided by the State party.

2. I have comprehensively perused the information provided by both the authors and the State party and I am convinced that there is a violation of article 6 of the Covenant, which states that: "Every human being has the inherent right to life … protected by law. No one shall be arbitrarily deprived of his life."

3. The Committee found that there was no violation of article 6 by the State party based on the information provided by the State party. The Committee considered the information provided by the State party insofar as adaptative measures were put in place to reduce the existing vulnerabilities and build resilience to climate change-related harms to the islands and it was on those grounds that the Committee found that there was no violation of article 6.

4. I am cognizant of the adaptive measures that the State party has taken under the Torres Strait sea walls programme (2019–2023), and, in this regard, that:

(a) Multiple infrastructures will be constructed and upgraded to address ongoing coastal erosion and storm surge impacts on Poruma, Warraber, Masig, Boigu and Iama;

(b) By 2022, several coastal mitigation works had been completed on Boigu with funding of $A 15 million, as well as the construction of a 1,022 metre-long wave return wall, the raising and extension of an existing bund wall to 450 metres and the upgrading of stormwater drainage infrastructure;

(c) Coastal mitigation works on Poruma, Warraber and Masig were scheduled to begin in 2021 or 2022 and to be completed by 2023.

5. While these efforts and measures taken and/or yet to be taken are commendable and appreciated, there has been an outcry from the authors that has not been addressed and hence the authors' right to life will continue, appallingly, to be violated and their lives endangered.

6. I am of the considered view that the State party has failed to prevent a foreseeable loss of life from the impact of climate change. As highlighted by the *Urgenda Foundation v. the State of Netherlands* case,[1] the State party is tasked with an obligation to prevent a foreseeable loss of life from the impacts of climate change, and to protect the authors' right to life with dignity.

7. In the instant case, the State party has not taken any measures to reduce greenhouse gas emissions and cease the promotion of fossil fuel extraction and use, which continue to affect the authors and other islanders and endanger their livelihood, resulting in the violation of their rights under article 6 of the Covenant.

8. The citizens of the Torres Strait islands have also lost their livelihoods on the islands owing to ongoing climate changes and the State party has not taken any measures to mitigate this factor. As a result of the rise in the sea level, saltwater has penetrated the soils of the islands and as a result lands previously used for traditional gardening can no longer be cultivated. The coral bleaching that occurred has led to the disappearance of crayfish which are a fundamental source of food and income for the authors.

9. These factors combined point to the imminent danger or threat posed to people's lives, which is already affecting their lives; yet, while the State party is aware, it has not taken effective protective measures to enable the people to adapt to climate change.

[1] The Hague Court of Appeal, *Urgenda Foundation v. The State of the Netherlands*, Case No. 200.178.245/01, Judgment, 9 October 2018.

10. In the *Urgenda* case, The Hague Court of Appeal characterized climate change as "a real and imminent threat" requiring the State to "take precautionary measures to prevent infringement of rights as far as possible" (para. 43).

11. The Court further held that "it is appropriate to speak of a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life" (para. 45).

12. The authors have ably informed the Committee that the current state of affairs and existence in the Torres Strait islands is under imminent threat owing to ongoing climate change and therefore the State party should take immediate adaptive precautionary measures to thwart climate changes and preserve the lives of the islanders, including their health and livelihood. Any further delays or non-action by the State party will continue to put the lives of the citizens at risk, which is a blatant violation of article 6 (1) of the Covenant.

13. Accordingly, I find that there is a violation of article 6 and as a Committee, we should implore the State party to take immediate measures to protect and preserve the lives of the people of the Torres Strait islands. In order to uphold the right to life, States must take effective measures (which cannot be taken individually) to mitigate and adapt to climate change and prevent foreseeable loss of life.

Annex III

[Spanish only]

Voto individual (parcialmente disidente) de Hernán Quezada Cabrera, miembro del Comité

1. Respecto de la comunicación núm. 3624/2019, comparto la decisión del Comité en el sentido de que los hechos examinados ponen de manifiesto una violación de los derechos de los autores en virtud de los artículos 17 y 27 del Pacto, al no cumplir el Estado parte con su obligación de aplicar medidas adecuadas para proteger el hogar, la vida privada y la familia de los autores, y para proteger el derecho de los autores a disfrutar de su cultura minoritaria.

2. Sin embargo, en lo relativo al derecho a la vida, lamento no poder unirme a la mayoría del Comité, la cual concluyó que la información disponible no revela una violación por el Estado parte de los derechos de los autores en virtud del artículo 6 del Pacto.

3. El propio Comité entiende (véase el párr. 8.3) que el derecho a la vida no debe interpretarse de forma restrictiva y que su protección requiere de la adopción de medidas positivas[1]. En este sentido el Comité ha establecido en su observación general núm. 36 (2018) que las amenazas al derecho a la vida pueden incluir los efectos adversos del cambio climático, lo que obliga a los Estados partes a "adoptar medidas apropiadas para abordar las condiciones generales en la sociedad que puedan suponer amenazas directas a la vida o impedir a las personas disfrutar con dignidad de su derecho a la vida"[2]. Al respecto, debe tenerse presente que el Estado parte es y ha sido, durante las últimas décadas, uno de los países que han producido grandes cantidades de emisiones de gases de efecto invernadero (véase el párr. 7.8).

4. Según los hechos denunciados, y no rebatidos por el Estado parte, los autores han experimentado y experimentan una serie de problemas derivados de los efectos del cambio climático que afectan sus vidas y la existencia misma de las islas que habitan: la inundación de aldeas y de tierras funerarias ancestrales; la pérdida por erosión de sus tierras tradicionales, incluidas las plantaciones y los jardines; la destrucción o marchitamiento de los jardines tradicionales por la salinización causada por las inundaciones o la entrada de agua de mar; la disminución de especies marinas de importancia nutricional y cultural; la decoloración de los corales, y la acidificación de los océanos, entre otros. A todo ello se suma el riesgo de inhabitabilidad de sus islas debido al persistente aumento del nivel del mar.

5. Si bien el Estado parte ha adoptado en los últimos años diversas medidas para hacer frente a los efectos adversos del cambio climático y las emisiones de carbono generadas en su territorio, dichas medidas son aún insuficientes para garantizar a los autores el disfrute de una vida digna en las islas que habitan en el estrecho de Torres. En efecto, el Comité ha constatado (véase el párr. 8.12) que el Estado parte no ha respondido a varias alegaciones de los autores en este sentido, en particular a la no construcción de medidas de adaptación para mejorar los malecones y el retraso en la construcción de diques, así como tampoco ha dado explicaciones alternativas sobre la reducción de los recursos marinos necesarios para la alimentación y la pérdida de cultivos y árboles frutales. Aun cuando dichas constataciones del Comité están relacionadas con la violación del artículo 17 del Pacto, la falta o la insuficiencia de medidas de adaptación para enfrentar las consecuencias adversas del cambio climático ha repercutido negativamente en las condiciones de vida de los autores. Por lo demás, las amenazas que se ciernen sobre sus medios de subsistencia y sobre la existencia misma de las islas han creado una situación de incertidumbre y, en consecuencia, afectan su salud mental y su bienestar, impidiendo el derecho a disfrutar de una vida digna[3]. En este

[1] *Portillo Cáceres y otros c. Paraguay* (CCPR/C/126/D/2751/2016), párr. 7.3.

[2] Observación general núm. 36 (2018), párrs. 26 y 62.

[3] Según el Comité en su observación general núm. 36 (2018), el derecho a la vida es "el derecho a no ser objeto de acciones u omisiones que causen o puedan causar una muerte no natural o prematura y a disfrutar de una vida digna" (párr. 3).

contexto, los autores y sus familias ya han sufrido y aún sufren una violación del derecho a la vida, en el sentido de "vida digna", lo que es una realidad concreta que requiere reparación, independientemente de las futuras mejoras que puedan lograrse con las medidas de mitigación y adaptación que el Estado parte ha comenzado a implementar en los últimos años o que estarían por iniciarse, según la información obtenida por el Comité (véase el párr. 8.7).

6. Con respecto al calendario de adopción de medidas, cabe tener presente que la comunicación de los autores (presentación inicial) es de fecha 13 de mayo de 2019, cuando los efectos adversos del cambio climático en las islas del Estrecho de Torres ya habían producido, durante largo tiempo, serios impactos negativos en sus vidas. Sin embargo, la mayor parte de las obras de mitigación costera emprendidas por el Estado parte, según lo constatado por el Comité, estaban programadas para comenzar recién en 2021 o 2022 y estar terminadas en 2023 (islas Masig, Poruma y Warraber). Solamente en la costa de una de las islas (Boigu) se habían completado en 2022 varias obras de mitigación.

Annex IV

[English only]

Individual opinion of Committee member Gentian Zyberi (concurring)

1. I am generally in agreement with the Committee's findings.[1] In this individual opinion, I explain my position on adaptation and mitigation measures, the law on international responsibility for countering climate change effects and adequate measures, and the violation of article 27.

2. After having acknowledged climate change as a common concern of humankind in the preamble to the 2015 Paris Agreement, the Conference of the Parties to the United Nations Framework Convention on Climate Change address mitigation and adaptation under, respectively, articles 4 and 7 of the Agreement. Mitigation efforts are aimed at addressing the causes of climate change by preventing or reducing the emission of greenhouse gases into the atmosphere. Adaptation efforts are aimed towards adjusting to the current and future effects of climate change. Both types of measures are intrinsically connected and require action by States (and non-State actors), individually and jointly through international cooperation.

3. The State party in this case has taken both mitigation and adaptation measures. When it comes to mitigation measures, assessing the nationally determined contributions taken by States parties to the International Protocol on Civil and Political Rights under the 2015 Paris Agreement, when the State is party to both treaties, is an important starting point. 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.[2] When a State is found to not have fulfilled these commitments, such a finding should constitute grounds for satisfaction for the complainants, while the State concerned should be required to step up its efforts and prevent similar violations in the future. The requirement of due diligence applies also to adaptation measures.

4. It has been 30 years since, at the 1992 United Nations Conference on Environment and Development (Earth Summit) States recognized climate change as a cause for common concern and action, but despite important developments in the context of the 1992 United Nations Framework Convention on Climate Change , the 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change and the 2015 Paris Agreement, individual and joint State efforts at addressing the climate crisis remain insufficient.[3] Over the years, the law on international responsibility on climate change has developed progressively.[4]

5. A clear limitation of the law on international responsibility in cases of climate change and related litigation is the difficulty involved in addressing what constitutes shared responsibility.[5] Since it is the atmospheric accumulation of carbon dioxide and other

[1] On article 6, the Committee follows largely its reasoning in *Teitiota v. New Zealand* (CCPR/C/127/D/2728/2016), para. 9.12.

[2] Paris Agreement, arts. 4 (3) and 4 (2).

[3] For more information on the United Nations Framework Convention on Climate Change and related documents and activities, see https://unfccc.int.

[4] See, e.g., Christina Voigt, "State responsibility for damages associated with climate change", in *Research Handbook on Climate Change Law and Loss & Damage*, Meinhard Douelle and Sara L. Seck, eds. (Cheltenham, Edward Elgar Publishing, 2021).

[5] See, e.g., article 47 of the draft articles on responsibility of States for internationally wrongful acts and related commentary, adopted by the International Law Commission at its fifty-third session (2001); and André Nollkaemper and others, "Guiding principles on shared responsibility in

greenhouse gases that gives rise over time to global warming and climate change,[6] States should act with due diligence based on the best science when taking mitigation and adaptation action. This is an individual responsibility of the State, relative to the risk at stake and its capacity to address it. 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 in respect of States with higher capacities for taking highly ambitious mitigation action.[7] This higher standard applies to the State party in this case.

6. The Committee has significant practice on article 27 of the Covenant, with much of its case law concerning the rights of Indigenous Peoples.[8] In this case, it has found a violation because of the State party's failure to adopt timely adequate adaptation measures to protect the authors' right to enjoy their minority culture under article 27. In my view, the Committee should have linked the State obligation to "protect the authors' collective ability to maintain their traditional way of life and to transmit to their children and future generations their culture and traditions and use of land and sea resources" (para. 8.14 of the Views) more clearly to mitigation measures, based on national commitments and international cooperation, as it is mitigation actions which are aimed at addressing the root cause of the problem and not just remedying the effects. If no effective mitigation actions are taken in a timely manner, adaptation will eventually become impossible. Such land and sea resources will not be available for Indigenous Peoples or even for humanity more generally, without diligent national efforts, as well as joint and concerted mitigation actions of the organized international community.

7. Climate change concerns have been addressed over the years by the Committee and other United Nations human rights treaty bodies,[9] the special procedures of the Human Rights Council[10] and more generally by the United Nations.[11] This case shows the possibilities and limitations of human rights-based litigation. That said, alongside other general or specific institutional arrangements addressing climate change issues, the Committee provides a suitable venue for addressing some concerns, especially under articles 6, 7, 17 and 27, both under the Optional Protocol and under article 41 of the Covenant.

international law", *European Journal of International Law*, vol. 31, No. 1 (February 2020), (see principles 2, 4, 10, 11 and 14).

[6] Jacqueline Peel, "Climate change", in *The Practice of Shared Responsibility in International Law*, André Nollkaemper and Ilias Plakokefalos, eds. (Cheltenham, Cambridge University Press, 2017), p. 1031.

[7] Ibid., p. 1035.

[8] For example, William A. Schabas, *Nowak's CCPR Commentary*, 3rd revised ed. (Kehl am Rhein, N.P. Engel, 2019), pp. 809–812.

[9] *Teitiota v. New Zealand*, E/C.12/2018/1 and HRI/2019/1. See also *M.K.A.H. v. Switzerland* (CRC/C/88/D/95/2019), *Sacchi et al. v. Argentina* (CRC/C/88/D/104/2019), *Sacchi et al. v. Brazil* (CRC/C/88/D/105/2019), *Sacchi et al. v. France* (CRC/C/88/D/106/2019), *Sacchi et al. v. Germany* (CRC/C/88/D/107/2019) and *Sacchi et al. v. Turkey* (CRC/C/88/D/108/2019).

[10] See A/70/287, A/74/161, A/HRC/40/55, A/HRC/41/39, A/HRC/43/53 and Human Rights Council resolution 48/14.

[11] See www.un.org/en/climatechange. See also A/HRC/50/57.

Annex V

[English only]

Joint opinion of Committee members Arif Bulkan, Marcia V.J. Kran and Vasilka Sancin (partially dissenting)

1. In addition to a violation of articles 17 and 27 found by the majority of the Committee, we would also find a violation of the right to life under article 6 of the Covenant.

2. The majority opinion correctly states that article 6 should not be interpreted in a restrictive manner (see para 8.3 of the Views).[1] Yet, the "real and foreseeable risk" standard employed by the majority interprets article 6 restrictively and was borrowed from the dissimilar context of refugee cases.[2] In *Teitiota v. New Zealand*, the Committee concluded that, owing to insufficient information from the author, climate change was not a real or foreseeable enough risk to require the State party to grant him refugee status. In contrast, here the primary question is whether the alleged violations of article 6 themselves ensue from inadequate mitigation and/or adaptation measures on climate change by the State party. Using a more accurate standard, from a factually similar case relating to environmental damage by pesticides, the question becomes whether there is "a reasonably foreseeable threat" to the authors' right to life.[3] The authors detail flood-related damage, water temperature increases and loss of food sources and, most importantly, they explain that the islands they live on will become uninhabitable in a mere 10 to 15 years, according to the Torres Strait Regional Authority, a governmental body. Together, this provides evidence of a reasonably foreseeable threat, constituting a violation of article 6.

3. Using the "real and foreseeable risk" standard, the majority opinion requires adverse health impacts to demonstrate an article 6 violation. Not finding such impacts, the majority fails to find a violation of article 6. Nonetheless, the authors detail real and foreseeable risks to their lives resulting from the flooding of the Torres Strait islands. First, the authors provide evidence of significant loss of food sources on which they rely to sustain themselves and their families. The crops lost include sweet potato, coconut and banana, which are required food sources and livelihood for the authors. The authors demonstrate that flooding has caused land erosion, making food production impossible. They also explain that warmer waters resulting from climate change reduced the availability of crayfish, another primary food source. Second, the authors detail repeated damage to their homes, including significant water damage to the foundation of one author's home. Thus, the authors have demonstrated real and foreseeable risks to their lives through significant loss of food sources, livelihood and shelter.

4. In the majority opinion, article 6 is interpreted restrictively and it is observed that the authors conflate violations of the guarantee under article 27 of the rights of persons belonging to minorities to enjoy their own culture with violations of the guarantee under article 6 of every human being's inherent right to life (see para. 8.6). Accordingly, the majority finds a violation of article 27, but not of article 6. While the authors do discuss these violations as related, citing similar facts, the Committee's jurisprudence does not require that facts relating to different violations arise from different sets of facts. The risks to the authors' right to life are independent and qualitatively different from the risks to their right to enjoy their culture. Consequently, we are unable to agree that a violation of article 27 sufficiently addresses the authors' claims.

5. We endorse the view that integral to article 6 is the right to live with dignity (see paras. 8.3 and 8.4). It is critical, however, to do more than simply reference the Committee's jurisprudence: it must also be used progressively, based on current realities. This

[1] William A. Schabas, *Nowak's CCPR Commentary*, 3rd revised ed. (Kehl am Rhein, N.P. Engel, 2019), p 122.

[2] *Teitiota v. New Zealand* (CCPR/C/127/D/2728/2016), para. 8.4.

[3] *Portillo Cáceres et al. v. Paraguay* (CCPR/C/126/D/2751/2016), para. 7.5.

jurisprudence unequivocally notes that no derogation is permitted from article 6.[4] Moreover, it clarifies the direct connection between environmental harms, the right to life and the right to live with dignity;[5] and that State parties must duly consider the precautionary approach on climate change.[6] Given the urgency and permanence of climate change, the need to adhere to the precautionary approach is imperative. In addition, the singular focus on the future obscures consideration of the harms being experienced by the authors, which negatively impact their right to a life with dignity in the present. The unfortunate outcome is that the Committee's jurisprudence promises far more than the majority delivers.

6. While we agree that the State party is not solely responsible for climate change, the main question before the Committee is significantly narrower: has the State party violated the Covenant by failing to implement adaptation and/or mitigation measures to combat the adverse impacts of climate change within its territory, resulting in harms to the authors? The majority opinion relies on projects initiated by the State party since 2019, which might be completed by 2023 (see para. 8.7). While these measures help build climate change resilience, the majority does not sufficiently consider the violations of article 6 that had already occurred at the time of the filing of this communication. Indeed, promises of future projects are insufficient remedies, as they have not yet occurred, whereas damage to the foundation of the authors' homes has already occurred. Soil where the authors grow food for subsistence has already been eroded, and crops have been lost. These violations are a direct result of flooding which could have been prevented by adaptation measures, including the timely construction of a sea wall to protect the islands where the authors live. Indeed, in its 2014 report, the Torres Strait Regional Authority concluded that Australia had yet to take any steps on 33 out of the 34 adaptation measures suggested.

7. The State party has a positive obligation to minimize "reasonably foreseeable threats to life"[7] and should remedy these violations by implementing adaptation measures including those identified by the Torres Strait Regional Authority in 2019. Despite multiple requests and knowledge of the ongoing impacts on the lives of the authors, the State party did not take adaptation measures in a timely manner. Consequently, we would find that the State party violated the authors' right to life under article 6 of the Covenant in addition to being responsible for the violations found by the majority.

[4] General comment No. 36 (2108), para. 2.
[5] Ibid., para. 62.
[6] Ibid., paras. 62 and 64.
[7] Ibid., para. 21.

Annex 98.i

Urgenda Foundation v. State of the Netherlands

Filing Date: 2015

Reporter Info: [2015] HAZA C/09/00456689

Status: Decided

Case Categories: Suits against governments > GHG emissions reduction and trading > Other

Jurisdictions: Netherlands > The Hague > Court of Appeals
Netherlands > The Hague > District Court

Principal Laws: Netherlands > Constitution
European Convention on Human Rights

Summary:

A Dutch environmental group, the Urgenda Foundation, and 900 Dutch citizens sued the Dutch government to require it to do more to prevent global climate change. The court in the Hague ordered the Dutch state to limit GHG emissions to 25% below 1990 levels by 2020, finding the government's existing pledge to reduce emissions by 17% insufficient to meet the state's fair contribution toward the UN goal of keeping global temperature increases within two degrees Celsius of pre-industrial conditions. The court concluded that the state has a duty to take climate change mitigation measures due to the "severity of the consequences of climate change and the great risk of climate change occurring." In reaching this conclusion, the court cited (without directly applying) Article 21 of the Dutch Constitution; EU emissions reduction targets; principles under the European Convention on Human Rights; the "no harm" principle of international law; the doctrine of hazardous negligence; the principle of fairness, the precautionary principle, and the sustainability principle embodied in the UN Framework Convention on Climate Change; and the principle of a high protection level, the precautionary principle, and the prevention principle embodied in the European climate policy. The court did not specify how the government should meet the reduction mandate, but offered several suggestions, including em

trading or tax measures. This is the first decision by any court in the world ordering states to limit greenhouse gas emissions for reasons other than statutory mandates.

The Dutch government submitted 29 grounds of appeal. Urgenda submitted a cross-appeal, contesting the court's decision that Urgenda cannot directly invoke Articles 2 & 8 of the European Convention on Human Rights (ECHR) in these proceedings.

On Oct 9, 2018, the Hague Court of Appeal upheld the District Court's ruling, concluding that by failing to reduce greenhouse gas emissions by at least 25% by end-2020, the Dutch government is acting unlawfully in contravention of its duty of care under Articles 2 and 8 of the ECHR. The court recognized Urgenda's claim under Article 2 of the ECHR, which protects a right to life, and Article 8 of the ECHR, which protects the right to private life, family life, home, and correspondence. The court determined that the Dutch government has an obligation under the ECHR to protect these rights from the real threat of climate change. The court rejected the government's argument that the lower court decision constitutes "an order to create legislation" or violation of trias politica and the role of courts under the Dutch constitution. In response to these appeals, the court affirmed its obligation to apply provisions with direct effect of treaties to which the Netherlands is party, including Articles 2 and 8 of the ECHR. Further, the court found nothing in Article 193 of the Treaty on the Functioning of the European Union that prohibits a member state from taking more ambitious climate action than the E.U. as a whole, nor that adaptation measures can compensate for the government's duty of care to mitigate greenhouse gas emissions, nor that the global nature of the problem excuses the Dutch government from action.

The Dutch government appealed the decision, and the Netherlands' Supreme Court heard the appeal on May 24, 2019. On September 13 the Advocate and Procurator General, independent judicial officers, issued a formal opinion recommending that the Supreme Court uphold the decision.

On December 20, 2019, the Supreme Court of the Netherlands upheld the decision under Articles 2 and 8 of the ECHR.

At Issue: Seeking declaratory judgment and injunction to compel the Dutch government to reduce GHG emissions

Case Documents:

FILING DATE	TYPE	FILE	SUMMARY
06/24/2015	Decision	Download	No summary available.
10/09/2018	Decision	Download	Official Decision in Dutch.
10/09/2018	Decision	Download	Unofficial English Translation from the Court.
01/08/2019	Appeal	Download	Government Appeal to Supreme Court (in Dutch).
04/12/2019	Appeal	Download	Urgenda Reply to Government Appeal to Supreme Court (in Dutch).
09/13/2019	Opinion	Download	Opinion of Advocate and Procurator General (Dutch)
09/13/2019	Opinion	Download	Opinion of Advocate and Procurator General (unofficial English translation)
12/20/2019	Judgment	Download	Supreme Court Judgment in Dutch
01/13/2020	Judgment	Download	Supreme Court judgment in English.

Annex 98.ii

ECLI:NL:HR:2019:2007

Instantie

Hoge Raad

Datum uitspraak

20-12-2019

Datum publicatie

13-01-2020

Zaaknummer

19/00135 (Engels)

Rechtsgebieden

Civiel recht

Bijzondere kenmerken

Cassatie

Inhoudsindicatie

Klimaatzaak Urgenda. Mensenrechten. EVRM. VN-Klimaatverdrag. Bevel aan Staat om maatregelen te nemen tegen klimaatverandering. Gevaar klimaatverandering. Beschermingsomvang art. 2 en 8 EVRM; positieve verplichtingen. Effectieve rechtsbescherming art. 13 EVRM. Deelverantwoordelijkheid staten. Art. 3:305a BW en art. 34 EVRM. Doelstelling van 25-40% reductie van de uitstoot van broeikasgassen en de noodzaak daarvan. Internationaal draagvlak daarvoor. Binding Nederland aan deze doelsteling. Verantwoord beleid en de onderbouwing daarvan. Is sprake van ontoelaatbaar bevel tot wetgeving? Politiek domein. (English version)

Vindplaatsen

Rechtspraak.nl

Uitspraak

SUPREME COURT OF THE NETHERLANDS

CIVIL DIVISION

Number 19/00135

Date 20 December 2019

JUDGMENT

In the matter between:

THE STATE OF THE NETHERLANDS (MINISTRY OF ECONOMIC AFFAIRS AND CLIMATE POLICY),
seated in The Hague,
CLAIMANT in cassation,
referred to hereinafter as: 'the State',
counsel: attorneys K. Teuben, M.W. Scheltema and J.W.H. van Wijk,

and

STICHTING URGENDA,
having its office in Amsterdam,
RESPONDENT in cassation,
referred to hereinafter as: 'Urgenda',
counsel: attorney F.E. Vermeulen.

Summary of the Decision

The issue in this case is whether the Dutch State is obliged to reduce, by the end of 2020, the emission of greenhouse gases originating from Dutch soil by at least 25% compared to 1990, and whether the courts can order the State to do so.

Urgenda's claim and the opinions of the District Court and the Court of Appeal

Urgenda sought a court order directing the State to reduce the emission of greenhouse gases so that, by the end of 2020, those emissions will have been reduced by 40%, or in any case at by at least 25%, compared to 1990.

In 2015, the District Court allowed Urgenda's claim, in the sense that the State was ordered to reduce emissions by the end of 2020 by at least 25% compared to 1990.

In 2018, the Court of Appeal confirmed the District Court's judgment.

Appeal in cassation

The State instituted an appeal in cassation in respect of the Court of Appeal's decision, asserting a large number of objections to that decision.

The deputy Procurator General and the Advocate General advised the Supreme Court to reject the State's appeal and thus to allow the Court of Appeal's decision to stand.

Opinion of the Supreme Court

The Supreme Court concludes that the State's appeal in cassation must be rejected. That means that the order which the District Court issued to the State and which was confirmed by the Court of Appeal, directing the State to reduce greenhouse gases by the end of 2020 by at least 25% compared to 1990, will stand as a final order.

The Supreme Court's opinion rests on the facts and assumptions which were established by the Court of Appeal and which were not disputed by the State or Urgenda in cassation. In cassation, the Supreme Court determines whether the Court of Appeal properly applied the law and whether, based on the facts that may be taken into consideration, the Court of Appeal's opinion is comprehensible and adequately substantiated.

The grounds for the Supreme Court's judgment are laid down below in sections 4-8 of the judgment. These grounds will be summarised below. This summary does not supersede the grounds for this judgment and does not fully reflect the Supreme Court's opinion.

Dangerous climate change

(see paras. 4.1-4.8, below)

Urgenda and the State both endorse the view of climate science that a genuine threat exists that the climate will undergo a dangerous change in the coming decades. There is a great deal of agreement on the presence of that threat in climate science and the international community. In that respect and briefly put, this comes down to the following.

The emission of greenhouse gases, including CO2, is leading to a higher concentration of those gases in the atmosphere. These greenhouse gases retain the heat radiated by the earth. Because over the last century and a half since the start of the industrial revolution, an ever-increasing volume of greenhouse gases is being emitted, the earth is becoming warmer and warmer. In that period, the earth has warmed by approximately 1.1oC, the largest part of which (0.7oC) has occurred in the last forty years. Climate science and the international community largely agree on the premise that the warming of the earth must be limited to no more than 2oC, and according to more recent insights to no more than 1.5oC. The warming of the earth beyond that temperature limit may have

extremely dire consequences, such as extreme heat, extreme drought, extreme precipitation, a disruption of ecosystems that could jeopardise the food supply, among other things, and a rise in the sea level resulting from the melting of glaciers and the polar ice caps. That warming may also result in tipping points, as a result of which the climate on earth or in particular regions of earth changes abruptly and comprehensively. All of this will jeopardise the lives, welfare and living environment of many people all over the world, including in the Netherlands. Some of these consequences are already happening right now.

Protection of human rights based on the ECHR

(see paras. 5.2.1-5.5.3, below)

The European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) requires the states which are parties to the convention to protect the rights and freedoms established in the convention for their inhabitants. Article 2 ECHR protects the right to life, and Article 8 ECHR protects the right to respect for private and family life. According to the case law of the European Court of Human Rights (ECtHR), a contracting state is obliged by these provisions 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.

The 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. While Articles 2 and 8 ECHR are not permitted to result in an impossible or disproportionate burden being imposed on a state, those provisions do oblige the state to take measures that are actually suitable to avert the imminent hazard as much as reasonably possible. Pursuant to Article 13 ECHR, national law must offer an effective legal remedy against a violation or imminent violation of the rights that are safeguarded by the ECHR. This means that the national courts must be able to provide effective legal protection.

Global problem and national responsibility

(see paras. 5.6.1-5.8, below)

The risk of dangerous climate change is global in nature: greenhouse gases are emitted not just from Dutch territory, but around the world. The consequences of those emissions are also experienced around the world.

The Netherlands is a party to the United Nations Framework Convention on Climate Change (UNFCCC). The objective of that convention is to keep the concentration of greenhouse gases in the atmosphere to a level at which a disruption of the climate system through human action can be prevented. The UNFCCC is based on the premise that all member countries must take measures to prevent climate change, in accordance with their specific responsibilities and options.

Each country is thus responsible for its own share. That means that a country cannot escape its own share of the responsibility to take measures by arguing that compared to the rest of the world, its own emissions are relatively limited in scope and that a reduction of its own emissions would have very little impact on a global scale. The State is therefore obliged to reduce greenhouse gas emissions from its territory in proportion to its share of the

responsibility. This obligation of the State to do 'its part' is based on Articles 2 and 8 ECHR, because there is a grave risk that dangerous climate change will occur that will endanger the lives and welfare of many people in the Netherlands.

What, specifically, does the State's obligation to do 'its part' entail?

(see paras. 6.1-7.3.6, below)

When giving substance to the positive obligations imposed on the State pursuant to Articles 2 and 8 ECHR, one must take into account broadly supported scientific insights and internationally accepted standards. Important in this respect are, among other things, the reports from the IPCC. The IPCC is a scientific body and intergovernmental organisation that was set up in the context of the United Nations to handle climatological studies and developments. The IPCC's 2007 report contained a scenario in which the warming of the earth could reasonably be expected to be limited to a maximum of 2oC. In order to achieve this target, the Annex I countries (these being the developed countries, including the Netherlands) would have to reduce their emissions in 2020 by 25-40%, and in 2050 by 80-95%, compared to 1990.

At the annual climate conferences held in the context of the UNFCCC since 2007, virtually every country has regularly pointed out the necessity of acting in accordance with the scenario of the IPCC and achieving a 25-40% reduction of greenhouse gas emissions in 2020. The scientifically supported necessity of reducing emissions by 30% in 2020 compared to 1990 has been expressed on multiple occasions by and in the EU.

Furthermore, since 2007, a broadly supported insight has arisen that, to be safe, the warming of the earth must remain limited to 1.5oC, rather than 2oC. The Paris Agreement of 2015 therefore expressly states that the states must strive to limit warming to 1.5oC. That will require an even greater emissions reduction than was previously assumed.

All in all, there is a great degree of consensus on the urgent necessity for the Annex I countries to reduce greenhouse gas emissions by at least 25-40% in 2020. The consensus on this target must be taken into consideration when interpreting and applying Articles 2 and 8 ECHR. The urgent necessity for a reduction of 25-40% in 2020 also applies to the Netherlands on an individual basis.

The policy of the State

(see paras. 7.4.1-7.5.3, below)

The State and Urgenda are both of the opinion that it is necessary to limit the concentration of greenhouse gases in the atmosphere in order to in order to achieve either the 2oC target or the 1.5oC target. Their views differ, however, with regard to the speed at which greenhouse gas emissions must be reduced.

Until 2011, the State's policy was aimed at achieving an emissions reduction in 2020 of 30% compared to 1990. According to the State, that was necessary to stay on a credible pathway to keep the 2oC target within reach.

After 2011, however, the State's reduction target for 2020 was lowered from a 30% reduction by the Netherlands to a 20% reduction in an EU context. After the reduction in 2020, the State intends to accelerate the reduction to 49% in 2030 and 95% in 2050. Those targets for 2030 and 2050 have since been laid down in the Dutch Climate Act.

The State has not explained, however, that – and why – a reduction of just 20% in 2020 is considered responsible in an EU context, in contrast to the 25-40% reduction in 2020, which is internationally broadly supported and is considered necessary.

There is a broad consensus within climate science and the international community that the longer reduction measures to achieve the envisaged final target are postponed, the more comprehensive and more expensive they will become. Postponement also creates a greater risk of an abrupt climate change occurring as the result of a tipping point being reached. In light of that generally endorsed insight, it was up to the State to explain that the proposed acceleration of the reduction after 2020 would be feasible and sufficiently effective to meet the targets for 2030 and 2050, and thus to keep the 2oC target and the 1.5oC target within reach. The State did not do this, however.

The Court of Appeal was thus entitled to rule that the State must comply with the target, considered necessary by the international community, of a reduction by at least 25% in 2020.

The courts and the political domain

(see paras. 8.1-8.3.5, below)

The State has asserted that it is not for the courts to undertake the political considerations necessary for a decision on the reduction of greenhouse gas emissions.

In the Dutch system of government, the decision-making on greenhouse gas emissions belongs to the government and parliament. They have a large degree of discretion to make the political considerations that are necessary in this regard. It is up to the courts to decide whether, in taking their decisions, the government and parliament have remained within the limits of the law by which they are bound. Those limits ensue from the ECHR, among other things. The Dutch Constitution requires the Dutch courts to apply the provisions of this convention, and they must do so in accordance with the ECtHR's interpretation of these provisions. This mandate to the courts to offer legal protection, even against the government, is an essential component of a democratic state under the rule of law.

The Court of Appeal's judgment is consistent with the foregoing, as the Court of Appeal held that the State's policy regarding greenhouse gas reduction is obviously not meeting the requirements pursuant to Articles 2 and 8 ECHR to take suitable measures to protect the residents of the Netherlands from dangerous climate change. Furthermore, the order which the Court of Appeal issued to the State was limited to the lower limit (25%) of the internationally endorsed, minimum necessary reduction of 25-40% in 2020.

The order that was issued leaves it up to the State to determine which specific measures it will take to comply with that order. If legislative measures are required to achieve such compliance, it is up to the State to determine which specific legislation is desirable and necessary.

Conclusion

In short, the essence of the Supreme Court's judgment is that the order which the District Court issued to the State and which was confirmed by the Court of Appeal, directing the State to reduce greenhouse gases by the end of 2020 by at least 25% compared to 1990, will be allowed to stand. Pursuant to Articles 2 and 8 ECHR, the Court of

Appeal can and may conclude that the State is obliged to achieve that reduction, due to the risk of dangerous climate change that could have a severe impact on the lives and welfare of the residents of the Netherlands.

Table of contents

1. Course of the proceedings

2. Assumptions and facts (2.1-2.3.2)

(a) Facts (2.1)

(b) Urgenda's claim and the State's defence (2.2.1-2.2.3)

(c) Opinion of the District Court (2.3.1)

(d) Opinion of the Court of Appeal (2.3.2)

3. The State's complaints in cassation; the manner of addressing those complaints (3.1-3.6)

4. Assumptions regarding the danger and consequences of climate change (4.1-4.8)

5. Do Articles 2 and 8 ECHR oblige the State to take measures? (5.1-5.10)

(a) The meaning of Articles 1, 2 and 8 ECHR; positive treaty obligations (5.2.1-5.3.4)

(b) Interpretation standards for the ECHR; 'common ground' (5.4.1-5.4.3)

(c) Article 13 ECHR (5.5.1-5.5.3)

(d) Do Articles 2 and 8 ECHR apply to the global problem of the danger of climate change? (5.6.1-5.6.4)

(e) Joint responsibility of the states and partial responsibility of individual states (5.7.1-5.8)

(f) Can this obligation pursuant to Articles 2 and 8 ECHR also be relied upon in a case involving a claim pursuant to Article 3:305a DCC? (5.9.1-5.9.3)

(g) Assessment of the complaints in cassation (5.10)

6. Assumptions in answering the question of what specific obligation on the part of the State results from the foregoing (6.1-6.6)

7. The 25-40% target for Annex I countries (7.1-7.6.2)

(a) The degree of international consensus regarding the 25-40% target (7.2.1-7.2.11)

(b) The 25-40% target for the Netherlands individually (7.3.1-7.3.6)

(c) The State's policy regarding measures to counter climate change (7.4.1-7.4.6)

(d) Must the State adhere to the 25-40% target? (7.5.1-7.5.3)

(e) Assessment of the complaints in cassation (7.6.1-7.6.2)

8. Permissibility of the order issued; political domain (8.1-8.4)

(a) Order to legislate (8.2.1-8.2.7)

(b) Political domain (8.3.1-8.3.5)

(c) Assessment of the complaints in cassation (8.4)

9. Decision

Appendix: list of abbreviations used

1 Course of the proceedings

For the course of the proceedings in the fact-finding instances, the Supreme Court refers to:

a. the judgment in case C/09/456689/HA ZA 13-1396 rendered by The Hague District Court on 24 June 2015, ECLI:NL:RBDHA:2015:7145;
b. the judgment in case 200.178.245/01 rendered by The Hague Court of Appeal on 9 October 2018, ECLI:NL:GHDHA:2018:2591.

The State has instituted an appeal in cassation against the judgment of the Court of Appeal. Urgenda has submitted a statement of defence seeking dismissal of the appeal in cassation.

The case for the State was argued orally and in writing by its counsel, with the oral arguments being handled in part by attorney E.H.P. Brans, who practises law in The Hague. The case for Urgenda was argued orally by its counsel, with the oral arguments being handled in part by attorney J.M. van den Berg, who practises law in Amsterdam. The State's counsel submitted a reply, and Urgenda's counsel submitted a rejoinder.

The State objected to the size of Urgenda's rejoinder. The Supreme Court sees no reason in this case to set the rejoinder aside. The rejoinder does not contain any elements that are new to the debate between the parties, and largely comprises the partial repetition and elaboration of the arguments Urgenda made previously in its statement of defence in cassation. In that statement of defence, and prior to the oral and written arguments, Urgenda extensively discussed the complaints in cassation, which the cassation procedural rules do not require it to do in a case that originates with a claim. The written arguments and the State's memorandum of oral arguments provide a partial response to that statement of defence. Given all of this, adequate justice has been done to the parties' right to be heard and the scope of the rejoinder does not cause an imbalance in the debate.

The Opinion of deputy Procurator General F.F. Langemeijer and Advocate General M.H. Wissink is that the appeal in cassation must be rejected.

The State's counsel submitted a written response to that Opinion.

2 Assumptions and facts

(a) Facts

2.1 In this case, according to para. 2 of the Court of Appeal's judgment, the facts established by the District Court's in paras. 2.1-2.78 of its judgment,[1] as well as the facts established by the Court of Appeal in paras. 3.1-3.26 and 44 of its judgment can be taken as a starting point.[2] The parties do not dispute these facts in cassation. The Supreme Court will therefore base its judgment on those facts (Article 419(3) DCCP). The most relevant of these are the following.

Climate change and its consequences

- Since the beginning of the industrial revolution, mankind has consumed energy on a large scale. This energy has predominantly been generated by the combustion of fossil fuels (coal, oil and natural gas). This releases carbon dioxide. This compound of carbon and oxygen is referred to by its chemical formula: CO2. Part of the CO2 that is released is emitted into the atmosphere, where it remains for hundreds of years or more and is partly absorbed by the ecosystems in forests and oceans. This absorption capacity is dropping continuously due to deforestation and the warming of the sea water.
- CO2 is the most significant greenhouse gas and, in tandem with other greenhouse gases, it retains the heat radiated by our planet in the atmosphere. This is called the 'greenhouse effect'. The greenhouse effect increases as more CO2 is emitted into the atmosphere, which in turn exacerbates global warming. The climate is slow to respond to the emission of greenhouse gases: the full warming effect of the greenhouse gases being emitted today will not be felt for another thirty to forty years. Other greenhouse gases include methane, nitrous oxide and fluorinated gases.
- Concentrations of greenhouse gases in the atmosphere are expressed in parts per million (hereinafter: ppm). The term ‘ppm CO2 equivalent’ is used to express the total concentration of all greenhouse gases, in which respect the concentration of all of the other, non-CO2 greenhouse gases is converted into CO2 equivalents based on the warming effect.
- There is a direct, linear connection between the greenhouse gas emissions caused by humans, which are partly caused by the burning of fossil fuels, and the warming of the planet. The planet is already approximately 1.1°C warmer than it was at the start of the industrial revolution. The Court of Appeal assumed that the concentration of greenhouse gases in the atmosphere stood at 401 ppm at the time it rendered its judgment. In recent decades, worldwide emissions of CO2 have increased by 2% annually.
- The rise in the planet's temperature can be prevented or reduced by ensuring that fewer greenhouse gases are emitted into the atmosphere. This is referred to as ‘mitigation’. Measures can also be taken to anticipate the effects of climate change, such as raising dikes in low-lying areas. The taking of such measures is referred to as ‘adaptation’.
- There has long been a consensus in climate science – the science that studies climate and climate change – and in the international community that the average temperature on earth may not rise by more than 2°C compared to the average temperature in the pre-industrial era. According to climate scientists, if the concentration of greenhouse gases in the atmosphere has not risen above 450 ppm by the year 2100, there is a reasonable chance that this objective (hereinafter: “the two-degree target”) will be achieved. In recent years, new insights have shown that the temperature can only safely rise by no more than 1.5°C, which translates into a greenhouse gas concentration level of no more than 430 ppm in the year 2100.

- When viewed in light of the maximum concentration level of 430 or 450 ppm in the year 2100 and the current concentration level of greenhouse gases (401 ppm), it is clear that the world has very little leeway left when it comes to the emission of greenhouse gases. The total worldwide leeway that now remains for emitting greenhouse gases is referred to as the 'carbon budget'. In the meantime, the chance that the warming of the earth can be limited to a maximum temperature increase of 1.5oC has become extremely slim.
- If the earth warms by substantially more than 2°C compared to the pre-industrial era, this would cause, *inter alia*: flooding as a result of sea level rise; heat stress as a result of more intense and longer-lasting heat waves, increases in respiratory ailments associated with deteriorating air quality resulting from periods of drought (with severe forest fires), increased spread of infectious diseases, severe flooding as a result of torrential rainfall, and disruptions of the production of food and the supply of drinking water. Ecosystems, flora and fauna will be eroded and there will be a loss of biodiversity. An inadequate climate policy will, in the second half of this century, result in hundreds of thousands of victims in Western Europe alone.
- It is not just the consequences that become more severe as global warming progresses. The accumulation of CO2 in the atmosphere may cause the climate change process to reach a tipping point, which may result in abrupt climate change, for which neither mankind nor nature can properly prepare. The risk of reaching such a tipping point increases at a steepening rate upon a rise in temperature of between 1°C and 2°C.

The IPCC reports

- The Intergovernmental Panel on Climate Change (IPCC) was created in 1988 under the auspices of the United Nations by the World Meteorological Organization (WMO) and the United Nations Environment Programme (UNEP). The IPCC's objective is to obtain insight into all aspects of climate change through scientific research. The IPCC does not conduct research itself, but studies and assesses, *inter alia*, the most recent scientific and technological information that becomes available around the world. The IPCC is not just a scientific organisation, but an intergovernmental organisation as well. It has 195 members, including the Netherlands. Since its inception, the IPCC has published five Assessment Reports and accompanying sub-reports about the state of climate science and climatological developments. Particularly relevant to these proceedings are the fourth report from 2007 and the fifth report from 2013-2014.
- The Fourth IPCC Assessment Report (hereinafter: AR4) from 2004 indicates that a temperature increase of 2°C above the level of the pre-industrial era entails the risk of a dangerous, irreversible change in the climate. After an analysis of various reduction scenarios, this report states that to be able to achieve a maximum volume of 450 ppm in the year 2100, the emissions of greenhouse gases by the countries listed in Annex I to the UNFCCC (including the Netherlands) must be 25% to 40% lower in the year 2020 than they were in the year 1990.
- The IPCC published its Fifth Assessment Report in 2013-2014 (hereinafter: AR5). This report established, *inter alia*, that the planet is warming as a result of the increase in the concentration of CO2 in the atmosphere since the beginning of the industrial revolution, and that this is being caused by human activities, in particular by the burning of oil, gas and coal and by deforestation. In AR5, the IPCC concluded that if the concentration of greenhouse gases in the atmosphere stabilises at around 450 ppm in the year 2100, the chance that the global temperature increase would remain under 2°C was “likely”, that is, higher than 66%. In 87% of the scenarios for achieving this target detailed in AR5, assumptions are made regarding 'negative emissions': in other words, the extraction of CO2 from the atmosphere.

The UNFCCC and the climate conferences

(13) The United Nations Framework Convention on Climate Change (UNFCCC) was ratified in 1992.[3] The purpose of this convention is to promote the stabilisation of the concentration of greenhouse gases in the atmosphere at a level at which would prevent dangerous anthropogenic interference (i.e.: interference caused by humans) with the climate system. The parties to the UNFCCC are referred to as Annex I countries and non-Annex I countries. The Annex I countries are the developed countries, including the Netherlands. According to Article 4(2) of the convention, the Annex I countries must take the lead, in an international context, in counteracting climate change and its negative consequences. They have committed themselves to reducing greenhouse gas emissions. They must periodically report on the measures they have taken. The objective is to return the level of emissions to the level in 1990.

- Article 7 UNFCCC provides for the Conference of the Parties (hereinafter: "COP"). The COP is the highest decision-making body within the UNFCCC. Resolutions passed by the COP are generally not legally binding. The COP meets annually at climate conferences.
- At the climate conference in Kyoto in 1997 (COP-3), the Kyoto Protocol was agreed upon between a number of Annex I countries, including the Netherlands. This protocol records the reduction targets for the period 2008-2012. According this protocol, the then-Member States of the EU were obliged to achieve a reduction target of 8% compared to 1990.
- The Bali Action Plan was adopted at the climate conference in Bali in 2007 (COP-13). The Bali Action Plan, citing the AR4 referred to in (11), above, acknowledged the need for drastic emissions reductions. This reference regards, *inter alia*, the part of AR4 which states that if the Annex I countries wish to achieve the 450 ppm scenario by the year 2100, they would have to reduce their emissions of greenhouse gases by 2020 by 25-40% compared to 1990.
- No agreement could be reached at the climate conference in Copenhagen in 2009 (COP-15) regarding a successor to, or an extension of, the Kyoto Protocol.
- At the next climate conference in Cancún in 2010 (COP-16), the parties involved acknowledged in the Cancún Agreements the long-term target of maximising the rise in temperature at 2°C compared to the average temperature in the pre-industrial era – along with the possibility of a more stringent target of a maximum of 1.5°C. In the preamble they refer to the urgency of a major reduction in admissions.
- In Cancún, the parties to the Kyoto Protocol stated that the Annex I countries had to continue to take the lead in counteracting climate change and that, given AR4, this "would require Annex I Parties as a group to reduce emissions in a range of 25-40 per cent below 1990 levels by 2020". The parties to the Kyoto Protocol have urged the Annex I countries to raise their level of ambition in relation to the commitments they already made, with a view to the 25-40% range referred to in AR4. In the 'Cancun Pledges', the EU countries as a group declared themselves prepared to achieve a 20% reduction by 2020 compared to 1990, and offered to achieve a 30% reduction on the condition that other countries were to undertake the achievement of similar reduction targets.
- At the climate conference in Doha in 2012 (COP-18), all Annex I countries were called on to raise their reduction targets to at least 25-40% in 2020. An amendment to the Kyoto Protocol was adopted, in which the EU committed to a reduction of 20% in 2020 compared to 1990, and offered to reduce emissions by 30% if other countries were to undertake the achievement of similar reduction targets. This condition was not met. The Doha Amendment did not enter into force.

The Paris Agreement

(21) The Paris Agreement was concluded at the climate conference in Paris in 2015 (COP-21).[4] This convention calls on each contracting state to account for its own responsibilities. The convention stipulates that global warming must be kept "well below 2°C" as compared to the average pre-industrial levels, striving to limit the temperature increase to 1.5°C. The parties must prepare ambitious national climate plans and of which the level of ambition must increase with each new plan.

The UNEP reports of 2013 and 2017

- Since 2010, UNEP (referred to in (10), above) has been reporting annually on the difference between the desired emissions level and the reduction targets to which the parties have committed: this is referred to as the 'emissions gap'. In the 2013 annual report, UNEP noted, for the third time running, that the contracting states' commitments were falling short and greenhouse gases emissions were increasing rather than decreasing. UNEP also notes that the Annex I countries fail to meet their joint emissions targets to achieve a 25-40% reduction in 2020, as laid down in the AR4 referred to above in (11). UNEP concludes that it is becoming increasingly improbable that emissions will be low enough in 2020 to achieve the 2°C target at the lowest possible cost. Although later reduction actions could ultimately lead to the same temperature targets, according to UNEP these would be more difficult, costlier and riskier.
- UNEP's 2017 annual report states that, in light of the Paris Agreement, an enhanced pre-2020 mitigation action is more urgent than ever. UNEP notes that if the emissions gap that has been observed is not bridged by 2030, then it will be extremely improbable that the 2°C target can still be achieved. This was why, according to UNEP, the targets for 2020 need to be more ambitious.

European climate policy

- Article 191 TFEU sets out the EU's environmental targets. The EU formulated directives to implement its environmental policy. The ETS Directive is one of these. 'ETS' stands for 'Emissions Trading System'. This system entails that companies in the ETS sector may only emit greenhouse gases in exchange for the surrender of emissions rights. These emissions rights may be bought, sold or retained. The total volume of greenhouse gases which ETS companies may emit in the period 2013-2020 decreases by 1.74% annually until, in 2020, a 21% reduction is achieved compared to the year 2005.
- The Council determined that the EU must reduce greenhouse gas emissions by at least 20% in 2020, 40% in 2030, and 80%-95% in 2050, measured in each case compared to emissions in 1990. Based on the Effort Sharing Decision[5], it has been determined within the EU that the reduction target of 20% in 2020 for the non-ETS sector means that the Netherlands will have to achieve an emissions reduction of 16% compared to emissions in 2005.

(26) According to the expectations that existed when the Court of Appeal's judgment was rendered, the EU as a whole would achieve an actual emissions reduction in 2020 of 26-27% compared to 1990.

Dutch climate policy and the results of that policy

(27) Based on a 2007 programme entitled *'Schoon en zuinig'* [English approximation: 'Clean and economical'], the Netherlands was working from the premise of a 30% reduction target in 2020 compared to 1990. In a letter of 12 October 2009, the then-Minister of Housing, Spatial Planning and the Environment (*Volkshuisvesting,*

Ruimtelijke Ordening en Milieubeheer - "VROM") informed the Dutch House of Representatives about the Netherlands' negotiation objective in the context of the climate conference in Copenhagen in 2009 (COP-15). This letter stated, *inter alia*:

"The total of emission reductions proposed by the developed countries so far is insufficient to achieve the 25%-40% reduction in 2020, which is necessary to stay on a credible track to keep the 2-degree target within reach."

- After 2011, the Dutch reduction target was adjusted to the EU-level reduction of 20% in 2020; in other words, for the Netherlands (a) a reduction of 16% in the non-ETS sector and 21% in the ETS sector, each time in comparison to emissions in 2005, and (b) a reduction of at least 40% in 2030, and 80-95% in 2050, in each case compared to 1990.
- In the Government Agreement from 2017, the government announced that it would strive to achieve an emissions reduction of at least 49% in 2030 compared to 1990. According to the Government Agreement, the EU reduction target of 40% in 2030 was not sufficient to achieve the two-degree target, let alone the 1.5°C ambition laid down in the Paris Agreement.
- Dutch CO2 emissions per capita of the population are relatively high compared to other industrialised countries. In terms of emissions, the Netherlands was ranked 34th out of 208 countries when the Court of Appeal rendered its judgment. Of the 33 countries with even higher emissions, only 9 had higher per capita emissions, none of which were EU Member States. Of the total volume of Dutch greenhouse gas emissions, 85% consists of CO2. Dutch CO2 emissions have barely decreased since 1990 and have even risen in recent years (up until the Court of Appeal's judgment). In the 2008-2012 period, the Netherlands achieved a 6.4% reduction in CO2-equivalent emissions. The reduction is attributable to greenhouse gases other than CO2. In that same period, the fifteen largest EU Member States achieved an emissions reduction of 11.8%, and the EU as a whole achieved a reduction of 19.2%. Moreover, 30-50% of the reduction in the 2008-2012 period was due to the economic crisis. Had this crisis not occurred, emissions for this period would have been substantially higher (and the reduction substantially lower).
- When the Court of Appeal rendered its judgment, it was expected that the Netherlands would achieve a reduction of 23% in 2020, and taking into account a margin for uncertainty, of 19-27%. The District Court refers to a substantially lower expectation in its judgment. The difference is largely attributable to a new calculation method (which is more consistent with that used by the IPCC, but) as a result of which the theoretical reduction percentage is achieved earlier even though the situation is actually more serious. The difference can largely be explained by the fact that the emissions calculation in the base year of 1990 was retrospectively adjusted upwards.

(b) Urgenda's claim and the State's defence

2.2.1 Urgenda ('Urgent Agenda') is engaged in developing plans and measures to prevent climate change. Urgenda's legal form is that of a foundation under Dutch law (*stichting*). Its object according to its Articles is to stimulate and accelerate transition processes towards a more sustainable society, starting in the Netherlands.

Urgenda's view is that the State is doing too little to prevent dangerous climate change. In these proceedings, to the extent relevant in cassation, it is requesting an order instructing the State to limit the volume of greenhouse gas emissions in the Netherlands such that this volume would be reduced by 40% at the end of the year 2020, or at least by a minimum of 25%, compared to the volume in the year 1990.

It institutes its claim pursuant to Article 3:305a DCC, which enables interest organisations to bring class action suits. It is pursuing its claim, to the extent relevant in cassation, on behalf of the interests of the current residents of the Netherlands (the inhabitants of the Netherlands) who are being threatened with dangerous climate change.

2.2.2 Urgenda has, briefly put, asserted the following grounds for its claims. The greenhouse gas emissions from the Netherlands are contributing to a dangerous change in the climate. The Netherlands' share of worldwide emissions is excessive, speaking both absolutely and relatively (per capita of the population). This means that Dutch emissions, for which the State as a sovereign power has systemic responsibility, are unlawful, since they violate the due care which is part of the State's duty of care to those whose interests Urgenda represents (Article 6:162(2) DCC), as well as Articles 2 and 8 ECHR. Under both national and international law, the State is obliged, in order to prevent dangerous climate change, to ensure the reduction of the Dutch emissions level. This duty of care entails that, in 2020, the Netherlands must achieve a reduction in greenhouse gas emissions of 25-40% compared to emissions in 1990, in accordance with the target referred to in AR4 (see para. 2.1(11), above). A reduction of this magnitude is necessary in order to maintain the prospect of achieving the 2°C target. This is also the most cost-effective option.

2.2.3 The defences asserted by the State include the following. The requirements of neither Article 3:296 DCC (court order) nor Article 6:162 DCC (unlawful act) have been met. There is no basis in either national or international law for a duty that legally requires the State to take measures in order to achieve the reduction target as sought. The target laid down in AR4 is not a legally binding standard. Articles 2 and 8 ECHR do not imply an obligation for State to take mitigating or other measures to counter climate change. Granting the reduction order being sought would also essentially come down to an impermissible order to create legislation and would contravene the political freedom accruing to the government and parliament and, thus, the system of separation of powers.

(c) Judgment of the District Court

2.3.1 The District Court ordered the State to limit the combined volume of Dutch annual greenhouse gas emissions, or cause them to be limited, so that this will have been reduced by at least 25% at the end of 2020 compared to the level of the year 1990. The District Court's findings on this point included the following.

The legal obligation of the State towards Urgenda cannot be derived from Article 21 of the Dutch Constitution, the 'no harm' principle, the UNFCCC with associated protocols, Article 191 TFEU, or the ETS Directive and Effort Sharing Decision based on Article 191 TFEU. (paras. 4.36-4.44 and 4.52)

Urgenda cannot be considered a direct or indirect victim as meant in Article 34 ECHR. Therefore, Urgenda cannot directly rely on Articles 2 and 8 ECHR. (para. 4.45)

The State may act unlawfully by violating its duty of care to prevent dangerous climate change. (paras. 4.52-4.53) The criteria laid down in the *Kelderluik* judgment[6] are relevant to interpreting that duty of care, as are the provisions, principles and rules previously referred to by the District Court. (paras. 4.54 -4.63)

Given the severity of the impact from climate change and the significant chance that – unless mitigating measures are taken – dangerous climate change will occur, the State has a duty of care to take mitigating measures. This duty is not diminished by the fact that the Dutch contribution to the present global greenhouse gas emissions is currently quite minor. Given that at least the 450 ppm scenario is required to prevent hazardous climate change, the Netherlands should take measures to ensure that this scenario can be achieved. (paras. 4.64-4.83)

Postponing the mitigation as advocated by the State – a less stringent reduction between now and 2030 and a sharp reduction starting in 2030 – will in fact significantly contribute to the risk of dangerous climate change and therefore cannot be deemed a sufficient and acceptable alternative to the scientifically proven and acknowledged higher reduction path of 25-40% in 2020. (para. 4.85)

The State did not argue that a reduction order of 25-40% would result in an undue burden for the Netherlands. On the contrary: the State also argues that a higher reduction target is one of the possibilities. If the reduction is less than 25-40%, the State is failing to fulfil its duty of care and is therefore acting unlawfully. Imposing an obligation of higher than 25% is not allowable due to the State's discretionary power. (para. 4.86)

The reduction order sought by Urgenda does not constitute an order to the State to take certain legislative or policy-making measures. If the claim is allowed, the State will retain full discretion, which is pre-eminently vested in it, to determine how to comply with that order. (para. 4.101)

In a general sense, the aspects that relate to the *trias politica* do not preclude allowing the order being sought. The restraint which the court should exercise does not result in a further limitation than that ensuing from the State’s aforementioned discretionary power. (para. 4.102)

(d) Judgment of the Court of Appeal

2.3.2 The Court of Appeal confirmed the District Court's judgment. In so doing, the Court of Appeal held as follows.

Urgenda's standing

Dutch law determines who is permitted access to the Dutch courts, including, in the case of Urgenda in these proceedings, Article 3:305a DCC, which provides for class actions brought by interest groups. Since individuals who fall under the State’s jurisdiction may rely on Articles 2 and 8 ECHR, which have direct effect in the Netherlands, Urgenda may also do so on behalf of these individuals, pursuant to Article 3:305a DCC. (para. 36)

The parties do not dispute that Urgenda has standing to pursue its claim to the extent it is acting on behalf of the current generation of Dutch nationals against the emission of greenhouse gases in Dutch territory. It is entirely plausible that the current generation of Dutch nationals, in particular but not limited to the younger individuals in this group, will have to deal with the adverse effects of climate change in their lifetime if global emissions of greenhouse gases are not adequately reduced. (para. 37) Their interests lend themselves to consolidation as is required for instituting a claim pursuant to Article 3:305a DCC. (para. 38)

Articles 2 and 8 ECHR

The State has a positive obligation pursuant to Article 2 ECHR to protect the lives of citizens within its jurisdiction, while Article 8 ECHR obliges the State to protect their right to their home life and private life. This obligation applies to all activities, public and non-public, which could jeopardise the rights protected in these articles, and certainly in the face of industrial activities which by their very nature are dangerous. If the government knows that there is a real and imminent threat, the State must take precautionary measures to prevent infringement as far as possible. (paras. 39-43)

Genuine threat of dangerous climate change

The established facts and circumstances imply that there is a real threat of dangerous climate change, resulting in the serious risk that the current generation of Dutch inhabitants will be confronted with losing their lives or having their family lives disrupted. Articles 2 and 8 ECHR imply that the State has a duty to protect against this genuine threat. (paras. 44-45)

Is the State acting unlawfully by not reducing by at least 25% by the end of 2020?

The end goal is clear and is not disputed between the parties. By the year 2100, global greenhouse gas emissions must have ceased entirely. Nor do the parties hold differing opinions as to the required interim target of 80-95% reduction relative to 1990 by 2050, and Urgenda endorses the reduction target of 49% relative to 1990 by 2030, as established by the government. The dispute between the parties specifically concerns the question of whether the State can be required to achieve a reduction of at least 25% relative to 1990 by the end of 2020. (para. 46)

A significant effort will have to be made between now and 2030 to reach the 49% target in 2030; more efforts than the limited efforts the Netherlands has undertaken so far. It has also been established that it would be advisable to start the reduction efforts at as early a stage as possible to limit the total emissions in this period. Delaying the reduction will lead to greater risks for the climate. A delay would, after all, allow greenhouse gas emissions to continue in the meantime; greenhouse gases which would linger in the atmosphere for a very long time and further contribute to global warming. An even distribution of reduction efforts over the period up to 2030 would mean that the State should achieve a substantially higher reduction in 2020 than 20%. An even distribution is also the starting point of the State for its reduction target of 49% by 2030, which has been derived in a linear fashion from the 95% target for 2050. If extrapolated to the present, this would result in a 28% reduction by 2020, as confirmed by the State in answering the Court of Appeal's questions." (para. 47)

In AR4, the IPCC concluded that a concentration level not exceeding 450 ppm in 2100 is permissible to keep the two-degree target within reach. Following an analysis of the various reduction scenarios, the IPCC concluded that in order to reach this concentration level, the total greenhouse gas emissions in 2020 of Annex I countries, of which the Netherlands is one, must be 25-40% lower than 1990 levels. In AR5, the IPCC also assumed that a concentration level of 450 ppm may not be exceeded in order to achieve the two-degree target. (para. 48)

It is highly uncertain whether it will be possible – as AR5 assumes – to use certain technologies to extract CO_2 from the atmosphere. Given the current state of affairs, climate scenarios based on such technologies bear little resemblance to reality. AR5 might thus have painted too rosy a picture, and it cannot be assumed outright, as the State does, that the 'multiple mitigation pathways' listed by the IPCC in AR5 could, as a practical matter, lead to the achievement of the two-degree target. Furthermore, it is plausible

that no reduction percentages as of 2020 were included in AR5, because, in 2014, the IPCC's focus was on targets for 2030. Therefore, the AR5 report does not give cause to assume that the reduction scenario laid down in AR4 has been superseded and that a reduction of less than 25-40% by 2020 would now be sufficient to achieve the two-degree target. In order to assess whether the State has met its duty of care, the Court of Appeal will take as a starting point that an emission reduction of 25-40% in 2020 is required to achieve the two-degree target. (para. 49)

The 450 ppm scenario and the related necessity to reduce CO2 emissions by 25-40% by 2020 are absolutely not overly pessimistic starting points to use as a basis for determining the State's duty of care. It is not certain whether the two-degree target can be achieved with this scenario. Furthermore, climate science has now acknowledged that a temperature rise of 1.5oC is much more likely to be safe than a rise of 2oC. (para. 50)

The IPCC report which states that a reduction of 25-45% by the end of 2020 is needed to achieve the two-degree target (AR4) dates all the way back to 2007. Since that time, virtually all COPs (in Bali, Cancún, Durban, Doha and Warsaw) have referred to this 25-40% standard and Annex I countries have been urged to align their reduction targets accordingly. This may not have established a legal standard with a direct effect, but it does confirm the fact that a reduction of at least 25-40% in CO2 emissions is needed to prevent dangerous climate change. (para. 51)

Until 2011, the Netherlands assumed its own reduction target to be 30% in 2020. A letter dated 12 October 2009 from the Minister of VROM shows that the State itself was convinced that a scenario with a reduction of less than 25%-40% in 2020 would lack credibility to keep the two-degree target within reach. The Dutch reduction target for 2020 was subsequently adjusted downwards. But a substantiation based on climate science was never given, while it is an established fact that postponing reductions in the meantime will cause continued emissions of CO2, which in turn will contribute to further global warming. More specifically, the State failed to give reasons why a reduction of only 20% by 2020 (at the EU level) should currently be regarded as credible, for instance by presenting a scenario which proves how – in concert with the efforts of other countries – the currently proposed postponed reduction could still lead to achieving the two-degree target. The EU itself also deemed a reduction of 30% for 2030 necessary to prevent dangerous climate change. (para. 52)

The State's Defences

The State asserts that a 'waterbed effect' would result if the Netherlands takes measures to reduce greenhouse gas emissions that fall within the scope of the ETS. Specifically, those measures would create leeway for other EU countries to emit more greenhouse gases. Therefore, according to the State, national measures to reduce greenhouse gas emissions within the framework of the ETS are pointless. This argument does not hold. Just like the Netherlands, other EU countries bear their own responsibility for reducing CO_2 emissions as much as possible. It cannot automatically be assumed that the other Member States will take less far-reaching measures than the Netherlands. On the contrary, compared to Member States such as Germany, the United Kingdom, Denmark, Sweden and France, Dutch reduction efforts are lagging far behind. (paras. 55 and 56)

The State also pointed out the risk of 'carbon leakage', which the State understands to be the risk that companies will move their production to other countries with less strict greenhouse gas reduction obligations. The State has failed to substantiate that this risk will actually occur if the Netherlands were to

increase its efforts to reduce greenhouse gas emissions before the end of 2020. (para. 57)

The State has also argued that adaptation and mitigation are complementary strategies to limit the risks of climate change and that Urgenda has failed to appreciate the adaptation measures that the State has taken or will take. This argument also fails. Although it is true that the consequences of climate change can be cushioned by adaptation, it has not been made clear or plausible that the potentially disastrous consequences of excessive global warming can be adequately prevented with adaptation. So while it is certainly logical for the State also to take adaptation measures, this does not diminish its obligation to reduce CO2 emissions quicker than it has planned. (para. 59)

The State has furthermore argued that the emission reduction percentage of 25-40% in 2020 is intended for the Annex I countries as a whole, and that this percentage can therefore not be taken as a starting point for the emission reduction an individual Annex I country, such as the Netherlands, should achieve. The State has failed to provide substantiation for why a lower emission reduction percentage should apply to the Netherlands than to the Annex I countries as a whole. That is not obvious, considering a distribution in proportion to the per capita GDP, which *inter alia* has been taken as a starting point in the EU's Effort Sharing Decision for distributing the EU emission reductions among the Member States. It can be assumed that the Netherlands has one of the highest per capita GDPs of the Annex I countries and the per capita GDP in any case is far above the average of those countries. That is also evident from Appendix II of the Effort Sharing Decision, in which the Netherlands is allocated a reduction percentage (16% relative to 2005) that is among the highest of the EU Member States. It is therefore reasonable to assume that what applies to the Annex I countries as a whole should at least also apply to the Netherlands. (para. 60)

The State has also asserted that Dutch greenhouse gas emissions, in absolute terms and compared with global emissions, are minimal, that the State cannot solve the problem on its own, that the worldwide community must cooperate. These arguments are not such that they warrant the absence of more ambitious, genuine action. The Court of Appeal, too, acknowledges that this is a global problem and that the State cannot solve this problem on its own. However, this does not release the State from its obligation to take measures in/on its territory, within its capabilities, which in concert with the efforts of other states provide protection from the hazards of dangerous climate change. (paras. 61 and 62)

The fact that full scientific certainty regarding the efficacy of the ordered reduction scenario is lacking does not mean, given the due observance of the precautionary principle, that the State is entitled to refrain from taking measures. The high degree of plausibility of that efficacy is sufficient. (para. 63)

The existence of a real risk of the danger for which measures have to be taken is sufficient to issue an order. It has been established that this is the case. Moreover, if the opinion of the State were to be followed, an effective legal remedy for a global problem as complex as this one would be lacking. After all, each state held accountable would then be able to argue that it does not have to take measures if other states do not do so either. That is a consequence that cannot be accepted, also because Urgenda does not have the option to summon all eligible states to appear in a Dutch court. (para. 64)

Regarding the plea of a lack of the required relativity as meant in Article 6:163 DCC, the Court of Appeal notes at the outset that these proceedings constitute an action for an order and not an action for damages. The standards that have been violated (Articles 2 and 8 ECHR) do seek to protect Urgenda (or those it represents). (para. 65)

The State argues that the system of the separation of powers should not be interfered with because it is not the courts, but the democratically legitimised government, that is the appropriate body to make the attendant policy choices. This argument is rejected in this case, also because the State violates human rights, which calls for the provision of measures, while at the same time the order to reduce emissions gives the State sufficient room to decide how it can comply with the order. (para. 67)

The District Court correctly held that Urgenda's claim is not intended to create legislation, either by parliament or by lower government bodies, and that the State retains complete freedom to determine how it will comply with the order. The order also will in no way prescribe the substance which this legislation must have. For this reason alone, the order is not an 'order to enact legislation'. Moreover, the State has failed to substantiate why compliance with the order can only be achieved through creating legislation by parliament or by lower government bodies. (para. 68)

Conclusion of the Court of Appeal

The foregoing implies that, up to now, the State has done too little to prevent dangerous climate change and is doing too little to catch up, at least in the short term (up to the end of 2020). Targets for 2030 and beyond do not diminish the fact that a dangerous situation is imminent which requires intervention right now. In addition to the risks in that context, the social costs also come into play. The later reduction actions are taken, the sooner the available carbon budget will be depleted, which in turn would require considerably more ambitious measures to be taken at a later stage, as is acknowledged by the State, to ultimately achieve the desired level of 95% reduction by 2050. (para. 71)

The State cannot hide behind the reduction target of 20% by 2020 at EU level. First of all, also the EU deems a greater reduction in 2020 necessary from a climate science perspective. In addition, the EU as a whole is expected to achieve a reduction of 26-27% in 2020; much higher than the agreed 20%. Also taken into consideration is the fact that, in the past, the Netherlands, as an Annex I country, acknowledged the severity of the climate situation time and again and, mainly based on climate scientific arguments, for years premised its policy on a reduction of 25-40% by 2020, with a concrete policy target of 30% by then. After 2011, this policy objective was adjusted downwards to 20% by 2020 at EU level, without any scientific substantiation and despite the fact that more and more was becoming known about the serious consequences of greenhouse gas emissions for global warming. (para. 72)

Based on this, the Court of Appeal held that the State was failing to fulfil its duty of care pursuant to Articles 2 and 8 ECHR by not wanting to reduce emissions by at least 25% by the end of 2020. A reduction of 25% should be considered a minimum, in connection with which recent insights about an even more ambitious reduction in connection with the 1.5°C target have not even been taken into consideration. There is a genuine chance that the reduction by 2020 will prove to be (substantially) lower than 25%. Such a margin of uncertainty is unacceptable. Since there also are clear indications that the current measures will be insufficient to prevent dangerous climate change, even leaving aside the question of whether the current policy will actually be implemented, measures have to be chosen, also in view of the precautionary principle, that are safe, or at least as safe as possible. The very serious dangers, not contested by the State, associated with a temperature rise of 2°C or 1.5°C – let alone higher – also preclude such a margin of uncertainty. (para. 73)

3. The State's complaints in cassation; the manner of addressing those complaints

3.1 The State has put forward nine grounds for cassation, each of which contains multiple complaints in cassation. Briefly put, the complaints assert the following.

3.2 Grounds for cassation 1 and 2 are aimed at the Court of Appeal's interpretation of Articles 2 and 8 ECHR. According to the State, there are various reasons why no protection can be derived from these provisions in this case, or at any rate the Court of Appeal failed to provide adequate grounds for its holding that such protection can indeed be derived. According to ground for cassation 1, the Court of Appeal also failed to recognise that the ECtHR leaves the national states a margin of appreciation in the application of these provisions.

3.3 Ground for cassation 3 asserts that the rights under Articles 2 and 8 ECHR do not lend themselves to being combined as is required in order to be able to institute a claim pursuant to Article 3:305a DCC. The Court of Appeal should therefore have dismissed Urgenda's claim for lack of standing to the extent it was based on Articles 2 and 8 ECHR. According to this ground for cassation, those provisions only guarantee individual rights and do not protect society as a whole.

3.4 Grounds for cassation 4-8 assert the following. The State is not legally bound to a reduction target of 25% in 2020. The State did not agree to this reduction target, nor is it an internationally accepted standard. The State is, however, bound in both an international and European context to a target of 20% in 2020 by the EU as a whole. The EU will easily surpass this percentage (specifically, by a reduction of between 26% and 27%).

The reduction target of 25% in 2020 is, moreover, not actually necessary to meeting the two-degree target. That necessity is not implied by the IPCC reports. The recommended extra reduction for the Netherlands in 2020 will have no measurable effect on the global rise in temperature.

Furthermore, the reduction target of 25% in 2020 was once proposed as an overall target for a group of wealthy countries as a whole (the Annex I countries, of which the Netherlands is one) and not as a target for an individual country like the Netherlands. The Netherlands cannot solve the global climate problem on its own. In addition, the 25% reduction target in 2020 has been superseded by AR5, as well as the distinction between Annex I countries and other countries.

The Court of Appeal either failed to recognise this or neglected to take it into proper account. Moreover, the Court of Appeal failed to appreciate that it is up to the State to determine which reduction pathway it follows. The Court of Appeal wrongfully impinged on the discretionary leeway to which the State is entitled.

3.5 In conclusion, ground for cassation 9 raises two issues. First, the State complains that the District Court order that was confirmed by the Court of Appeal was tantamount to an order to create legislation, which is impermissible under Supreme Court case law. This ground for cassation also asserts that the Court of Appeal failed to recognise that it is not for the courts to make the political considerations necessary for a decision on the reduction of greenhouse gas emissions.

3.6 The substance of the aforementioned ground raises various issues. Those issues will be dealt with below, as follows. First, by way of an introduction, the danger and consequences of climate change established by the Court of Appeal will be discussed in more detail (see 4.1-4.8). Subsequently, an answer is provided to the question of whether, as the Court of Appeal held, Articles 2 and 8 ECHR oblige the State to take measures to counter that threat (see 5.1-5.8). Next is discussed which specific obligations on the part of the State that this

may imply (see 6.1-6.6). Afterwards, it is discussed whether the State is bound by the 25-40% target stated in AR4, as the Court of Appeal found (see 7.1-7.5.3). Finally, the permissibility of the District Court order confirmed by the Court of Appeal will be discussed (see 8.1-8.35).

4 Assumptions regarding the danger and consequences of climate change

4.1 Given the widely accepted, on climate science derived insights established by the Court of Appeal which the parties do not dispute, the findings of fact regarding the danger and consequences of climate change are, briefly and in essence, the following.

4.2 The emission of greenhouse gases, which are the partial result of burning of fossil fuels and the resultant release of the greenhouse gas CO2, is leading to an ever-higher concentration of those gases in the atmosphere. This is warming the planet, which is resulting in a variety of hazardous consequences. This may result in local areas of extreme heat, extreme drought, extreme precipitation, or other extreme weather. It is also causing both glacial ice and the ice in and near the polar regions to melt, which is raising the sea level. Some of these consequences are already happening right now. That warming may also result in tipping points, as a result of which the climate on earth or in particular regions of earth changes abruptly and comprehensively. This will result in, among other things, the significant erosion of ecosystems which will, example, jeopardise the food supply, result in the loss of territory and habitable areas, endanger health, and cost human lives.

4.3 Climate science long ago reached a high degree of consensus that the warming of the earth must be limited to no more than 2°C and that this means that the concentration of greenhouse gases in the atmosphere must remain limited to a maximum of 450 ppm. Climate science has since arrived at the insight that a safe warming of the earth must not exceed 1.5°C and that this means that the concentration of greenhouse gases in the atmosphere must remain limited to a maximum of 430 ppm. Exceeding these concentrations would involve a serious degree of danger that the consequences referred to in 4.2 will materialise on a large scale. Below, for brevity's sake, the materialisation of this danger will be referred to below as 'dangerous climate change', as it was in the Court of Appeal's judgment.

4.4 If the emission of greenhouse gases is not sufficiently reduced, the possibility that dangerous climate change will materialise in the foreseeable future cannot be excluded. According to the AR5 “Synthesis Report” AR5, which the IPCC published in 2014 as part of the AR5 report referred to above in para. 2.1(12), there is a danger that the tipping points referred to above in para. 4.2 will occur at a steepening rate once there is a warming between 1°C and 2°C.

4.5 As is clear from the facts stated above in para. 2.1 in (13) *et seq.*, this has been recognised at international level. The UNFCCC, which was concluded in 1992, states that its objective is to reduce the emission of greenhouse gases. Since then, annual climate conferences have been held by the COP, the highest body under that convention, which comprises representatives of the contracting states. At each of those conferences, the point is emphasised that reducing greenhouse gas emissions is urgent and the contracting states are called on

to make that reduction a reality. At several conferences, specific agreements have also been made about that reduction. The insight referred to above in para. 4.3 – that the warming of the earth must remain limited to a maximum of 2°C and that the concentration of greenhouse gases in the atmosphere must be limited to a maximum of 450 ppm in order to prevent dangerous climate change – has been endorsed by the IPCC and the COP. The insight that a safe warming is limited to a maximum of 1.5°C, and that this means that the concentration of greenhouse gases in the atmosphere must be limited to a maximum of 430 ppm, was included in the Paris Agreement of 2015, which was based on the UNFCCC and which was signed by more than 190 countries, including the Netherlands.

4.6 The need to reduce greenhouse gas emissions is becoming ever more urgent. Every emission of greenhouse gases leads to an increase in the concentration of greenhouse gases in the atmosphere, and thus contributes to reaching the critical limits of 450 ppm and 430 ppm. In any case, the limited remaining carbon budget (see above in para. 2.1(7)) means that each postponement of a reduction in greenhouse gas emissions will require a future reduction to be more stringent in order to stay within the confines of the remaining carbon budget.

In its annual reports, the UNEP reports on the emissions gap, which is the difference between emissions based on the emissions-reduction target which countries reported to the UN – in which respect the assumption is that these targets have been achieved – and the desired emissions (see above in para. 2.1(22)). The 2017 UNEP report states that, in light of the Paris Agreement, the reduction of greenhouse gas emissions is more urgent than ever. The UNEP also remarks that if the emissions gap is not bridged by 2030, achieving the target of a maximum warming of 2°C is extremely unlikely.

4.7 Based on the aforementioned facts, the Court of Appeal concluded, quite understandably, in para. 45 that there was “a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life”. The Court of Appeal also held, in para. 37, that it was "clearly plausible that the current generation of Dutch nationals, in particular but not limited to the younger individuals in this group, will have to deal with the adverse effects of climate change in their lifetime if global emissions of greenhouse gases are not adequately reduced."

4.8 The Netherlands is a party to the UNFCCC and to the Paris Agreement, and the State acknowledges the facts stated above. The State does not challenge the Court of Appeal's conclusion, as referred to above in para. 4.7, and acknowledges the urgent need to take measures to reduce greenhouse gas emissions. The State also does not dispute that it is required to contribute to that emissions reduction. What the State does challenge is that Articles 2 and 8 ECHR oblige it to take these measures, as the Court of Appeal held, and that it is obliged based on those provisions to ensure that the volume of greenhouse gases being emitted at the end of 2020 is 25% less than it was in 1990.

5 Do Articles 2 and 8 ECHR oblige the State to take measures?

5.1 According to the State, Articles 2 and 8 ECHR do not oblige it to offer protection from the genuine threat of dangerous climate change. The State asserts that this danger is not specific enough to fall within the scope of protection afforded by Articles 1, 2 and 8 ECHR. To that end, the State asserts that the threat is global in

nature; in other words, that it is global in both cause and scope, and that it relates to the environment, which the State argues is not protected as such by the ECHR.

(a) The meaning of Articles 1, 2 and 8 ECHR; positive treaty obligations

5.2.1 Article 1 ECHR provides that the contracting parties must secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the ECHR. In other words, ECHR protection is afforded to the persons who fall within the states' jurisdiction. In the Netherlands this regards, primarily and to the extent relevant in this case, the residents of the Netherlands.

5.2.2 Article 2 ECHR protects the right to life. According to established ECtHR case law, this provision also encompasses a contracting state's positive obligation to take appropriate steps to safeguard the lives of those within its jurisdiction.[7] According to that case law, this obligation applies, *inter alia*, if the situation in question entails hazardous industrial activities, regardless of whether these are conducted by the government itself or by others, and also in situations involving natural disasters. The ECtHR has on multiple occasions found that Article 2 ECHR was violated with regard to a state's acts or omissions in relation to a natural or environmental disaster.[8] It is obliged to take appropriate steps if there is a real and immediate risk to persons and the state in question is aware of that risk. In this context, the term 'real and immediate risk' must be understood to refer to a risk that is both genuine and imminent. The term 'immediate' does not refer to imminence in the sense that the risk must materialise within a short period of time, but rather that the risk in question is directly threatening the persons involved. The protection of Article 2 ECHR also regards risks that may only materialise in the longer term.[9]

5.2.3 Article 8 ECHR protects the right to respect for private and family life. This provision also relates to environmental issues. The ECHR may not entail a right to protection of the living environment, but according to established ECtHR case law, protection may be derived from Article 8 ECHR in cases in which the materialisation of environmental hazards may have direct consequences for a person's private lives and are sufficiently serious, even if that person's health is not in jeopardy. According to that case law, when it comes to environmental issues, Article 8 ECHR encompasses the positive obligation to take reasonable and appropriate measures to protect individuals against possible serious damage to their environment. The ECtHR has found that Article 8 ECHR was violated in various cases involving environmental harm.[10] The obligation to take measures exists if there is a risk that serious environmental contamination may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely. That risk need not exist in the short term.[11]

5.2.4 According to the ECtHR, when it comes to activities that are hazardous to the environment, the positive obligation implied by Article 8 ECHR largely overlaps with the obligation implied by Article 2 ECHR. The case law regarding the former obligation therefore applies to the latter obligation.[12] In the case of environmentally hazardous activities, the state is expected to take the same measures pursuant to Article 8 ECHR that it would have to take pursuant to Article 2 ECHR.[13] Therefore, the obligations pursuant to Articles 2 and 8 ECHR will be referred to collectively below.

5.3.1 The protection afforded by Articles 2 and 8 ECHR is not limited to specific persons, but to society or the population as a whole.[14] The latter is for instance the case with environmental hazards.[15] In the case of environmental hazards that endanger an entire region, Articles 2 and 8 ECHR offer protection to the residents of that region.

5.3.2 The obligation to take appropriate steps pursuant to Articles 2 and 8 ECHR also encompasses the duty of the state to take preventive measures to counter the danger, even if the materialisation of that danger is uncertain.[16] This is consistent with the precautionary principle.[17] If it is clear that the real and immediate risk referred to above in paras. 5.2.2 and 5.2.3 exists, states are obliged to take appropriates steps without having a margin of appreciation. The states do have discretion in choosing the steps to be taken, although these must actually be reasonable and suitable.[18]

The obligation pursuant to Articles 2 and 8 ECHR to take appropriate steps to counter an imminent threat may encompass both mitigation measures (measures to prevent the threat from materialising) or adaptation measures (measures to lessen or soften the impact of that materialisation). According to ECtHR case law, which measures are suitable in a given case depends on the circumstances of that case.[19]

5.3.3 The court may determine whether the measures taken by a state are reasonable and suitable. The policy a state implements when taking measures must be consistent and the state must take measures in good time. A state must take due diligence into account in its policy.[20] The court can determine whether the policy implemented satisfies these requirements. In many instances found in ECtHR case law, a state's policy has been found to be inadequate, or a state has failed to provide sufficient substantiation that its policy is not inadequate.[21] In its judgment in *Jugheli et al./Georgia*[22], for example, the ECtHR held as follows:

"76. The Court reiterates that it is not its task to determine what exactly should have been done in the present situation to reduce the impact of the plant's activities upon the applicants in a more efficient way. However, it is within the Court's jurisdiction to assess whether the Government approached the problem with due diligence and gave consideration to all the competing interests. In this respect the Court reiterates that the onus is on the State to justify, using detailed and rigorous data, a situation in which certain individuals bear a heavy burden on behalf of the rest of the community (see Fadeyeva, cited above, § 128). Looking at the present case from this perspective, the Court notes that the Government did not present to the Court any relevant environmental studies or documents informative of their policy towards the plant and the air pollution emanating therefrom that had been affecting the applicants during the period concerned."

5.3.4 Articles 2 and 8 ECHR must not result in an impossible or under the given circumstances disproportionate burden being imposed on a state.[23] If a state has taken reasonable and suitable measures, the mere fact that those measures were unable to deter the hazard does not mean that the state failed to meet the obligation that had been imposed on it. The obligations ensuing from Articles 2 and 8 ECHR regard measures to be taken by a state, not the achievement, or guarantee of the achievement, of the envisaged result.[24]

(b) Interpretation standards for the ECHR; 'common ground'

5.4.1 According to established ECtHR case law, the provisions of the ECHR must be interpreted and applied so as to make its safeguards practical and effective. According to the ECtHR, this 'effectiveness principle' ensues from "the object and purpose of the Convention as an instrument for the protection of individual human beings".[25] This also regards the application of Article 31(1) of the Vienna Convention on the Law of Treaties,[26] which stipulates that a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in the light of its object and purpose.

5.4.2 According to ECtHR case law, an interpretation of the ECHR must also take into account the relevant rules of international law referred to in Article 31(3)(c) of the Vienna Convention on the Law of Treaties. For example, in its judgment in *Nada/Switzerland*, the ECtHR held as follows:[27]

"169. Moreover, the Court reiterates that the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken, as indicated in Article 31 § 3 (c) of the 1969 Vienna Convention on the Law of Treaties, of "any relevant rules of international law applicable in the relations between the parties", and in particular the rules concerning the international protection of human rights (…)."

Furthermore, in accordance with Article 31(3), opening words and paragraph (b), of the Vienna Convention on the Law of Treaties, an interpretation of treaty provisions must take the Member States' application practice into account.

The ECtHR's holding in the *Demir and Baykara/Turkey*[28] judgment was consistent with the foregoing:

"85. The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.

86. In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies (…)."

In this context, is spoken of the common-ground method of interpreting the ECHR, in accordance with the last section of the findings cited above.

5.4.3 According to ECtHR case law, an interpretation and application of the ECHR must also take scientific insights and generally accepted standards into account.[29]

(c) Article 13 ECHR

5.5.1 Article 13 ECHR is also relevant to the interpretation of Articles 2 and 8 ECHR; Article 13 provides that if the rights and freedoms under the ECHR are violated, there exists the right to an effective remedy before a national authority. According to ECtHR case law, this provision guarantees the existence of a remedy at national level to compel the observance of these rights and freedoms. In cases involving an arguable complaint regarding the violation of those rights and freedoms, national law must therefore offer a remedy that leads to obtaining appropriate relief. The scope of this obligation depends on the nature of the violation. The remedy must be both practically and legally effective.[30]

5.5.2 A remedy is considered effective as meant in Article 13 ECHR if it will prevent or end the violation or if the remedy offers adequate redress for a violation that has already occurred. In the case of more serious violations, the available remedies must provide for both: the prevention or end of the violation as well as redress.[31] National states are thus required to provide remedies that can effectively prevent more serious violations.

5.5.3 The remedy must ensure that a national court determines whether the rights and freedoms ensuing from the ECHR have been violated and that this court does so in accordance with the rules of the ECHR and the interpretation of those rules by the ECtHR.[32] In short: the remedy must offer effective legal protection from possible violations of the rights and freedoms ensuing from the ECHR.

(d) Do Articles 2 and 8 ECHR apply to the global problem of the danger of climate change?

5.6.1 Pursuant to Articles 93 and 94 of the Dutch Constitution, Dutch courts must apply every provision of the ECHR that is binding on all persons. Because the ECHR also subjects the Netherlands to the jurisdiction of the ECtHR (Article 32 ECHR), Dutch courts must interpret those provisions as the ECtHR has, or interpret them premised on the same interpretation standards used by the ECtHR.[33] This means that the findings above in paras. 5.2.1-5.5.3 must also be used as a premise by the Dutch courts.

5.6.2 Pursuant to the findings above in paras. 5.2.1-5.3.4, no other conclusion can be drawn but that the State is required pursuant to Articles 2 and 8 ECHR to take measures to counter the genuine threat of dangerous climate change if this were merely a national problem. Given the findings above in paras. 4.2-4.7, after all, this constitutes a 'real and immediate risk' as referred to above in para. 5.2.2 and it entails the risk that the lives and welfare of Dutch residents could be seriously jeopardised. The same applies to, *inter alia*, the possible sharp rise in the sea level, which could render part of the Netherlands uninhabitable. The fact that this risk will only be able to materialise a few decades from now and that it will not impact specific persons or a specific group of persons but large parts of the population does not mean – contrary to the State's assertions – that Articles 2 and 8 ECHR offer no protection from this threat (see above in para. 5.3.1 and the conclusion of paras. 5.2.2 and 5.2.3). This is consistent with the precautionary principle (see para. 5.3.2, above). The mere existence of a sufficiently genuine possibility that this risk will materialise means that suitable measures must be taken.

5.6.3 As the State has asserted, the ECtHR has not yet issued any judgments regarding climate change or decided any cases that bear the hallmarks that are particular to issues of climate change. Those hallmarks are, briefly put, the dangers presented by a globally occurring activity – the emission of greenhouse gases all over the world, and not just from Dutch territory – whose consequences will have a worldwide impact, including in the Netherlands. The question is whether the global nature of the emissions and the consequences thereof entail that no protection can be derived from Articles 2 and 8 ECHR, such that those provisions impose no obligation on the State in this case.

5.6.4 The Supreme Court considers the answer to this question to be sufficiently clear. It will therefore give the answer to this question itself and will not submit it to the ECtHR for an advisory opinion, as is possible but not compulsory under Protocol no. 16 to the ECHR, which entered into effect on 1 June 2019. In addition, both parties have asked the Supreme Court to hand down its judgment before the end of 2019, in view of the time to which the District Court's order, upheld by the Court of Appeal, relates, which is the end of 2020.

(e) Joint responsibility of the states and partial responsibility of individual states

5.7.1 The answer to the question referred to in 5.6.3 above is in the opinion of the Supreme Court, that, under Articles 2 and 8 ECHR, the Netherlands is obliged to do 'its part' in order to prevent dangerous climate change, even if it is a global problem. This is based on the following grounds.

5.7.2 The UNFCCC is based on the idea that climate change is a global problem that needs to be solved globally. Where emissions of greenhouse gases take place from the territories of all countries and all countries are affected, measures will have to be taken by all countries. Therefore, all countries will have to do the necessary. The preamble to this convention states, among other things, the following in this context:

"Acknowledging that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions, (…).

Recalling also that States have (…) the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

5.7.3 The objective of the UNFCCC is to stabilise greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous human induced interference with the climate system (Article 2). Article 3 contains various principles to achieve this objective. For instance, Article 3(1) provides that 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". Article 3(3) provides that the parties "should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects". And Article 4

provides, put succinctly, that all parties will take measures and develop policy in this area. It follows from these provisions that each state has an obligation to take the necessary measures in accordance with its specific responsibilities and possibilities.

5.7.4 At the annual climate change conferences held on the basis of the UNFCCC since 1992, the provisions mentioned above in 5.7.3 have been further developed in various COP decisions. In each case these are based first and foremost on an acknowledgement of the above understanding: all countries will have to do the necessary. Articles 3 et seq. of the 2015 Paris Agreement reiterates this in so many words.

5.7.5 This understanding corresponds to what is commonly referred to as the 'no harm principle', a generally accepted principle of international law which entails that countries must not cause each other harm. This is also referred to in the preamble to the UNFCCC (in the section cited in 5.7.2 above). Countries can be called to account for the duty arising from this principle. Applied to greenhouse gas emissions, this means that they can be called upon to make their contribution to reducing greenhouse gas emissions. This approach justifies partial responsibility: each country is responsible for its part and can therefore be called to account in that respect.

5.7.6 This partial responsibility is in line with what is adopted in national and international practice in the event of unlawful acts that give rise to only part of the cause of the damage. Partial responsibility is in line with, inter alia, the Draft Articles on Responsibility of States for Internationally Wrongful Acts, as proposed by the UN International Law Commission and adopted by the UN General Assembly. This is apparent, for example, in the explanatory notes to Article 47(1) thereof, in which the following is remarked:[34]

"6. According to paragraph 1 of article 47, where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act. The general rule in international law is that of separate responsibility of a State for its own wrongful acts and paragraph 1 reflects this general rule. (…)

8. Article 47 only addresses the situation of a plurality of responsible States in relation to the same internationally wrongful act. The identification of such an act will depend on the particular primary obligation, and cannot be prescribed in the abstract. Of course, situations can also arise where several States by separate internationally wrongful conduct have contributed to causing the same damage. For example, several States might contribute to polluting a river by the separate discharge of pollutants. (…) In such cases, the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations."

Many countries have corresponding rules in their liability law system.[35]

It is true that Article 3(1) UNFCCC referred to in 5.6.3 above entails that the distribution of the measures to be taken against climate change must not be based solely on the basis of responsibility for past emissions by a country, and that consideration must also be given to the possibilities for countries to reduce their emissions. But that does not detract from the fact that the underlying principle of these widely accepted rules is always that, in short, 'partial fault' also justifies partial responsibility.

5.7.7 Partly in view of the serious consequences of dangerous climate change as referred to in 4.2 above, the defence that a state does not have to take responsibility because other countries do not comply with their partial responsibility, cannot be accepted. Nor can the assertion that a country's own share in global greenhouse gas emissions is very small and that reducing emissions from one's own territory makes little difference on a global scale, be accepted as a defence. Indeed, acceptance of these defences would mean that a country could easily evade its partial responsibility by pointing out other countries or its own small share. If, on the other hand, this defence is ruled out, each country can be effectively called to account for its share of emissions and the chance of all countries actually making their contribution will be greatest, in accordance with the principles laid down in the preamble to the UNFCCC cited above in 5.7.2.

5.7.8 Also important in this context is that, as has been considered in 4.6 above about the carbon budget, each reduction of greenhouse gas emissions has a positive effect on combating dangerous climate change, as every reduction means that more room remains in the carbon budget. The defence that a duty to reduce greenhouse gas emissions on the part of the individual states does not help because other countries will continue their emissions cannot be accepted for this reason either: no reduction is negligible.[36]

5.7.9 Climate change threatens human rights, as follows from what has been considered in 5.6.2 above. This is also recognised internationally outside the context of the Council of Europe.[37] In order to ensure adequate protection from the threat to those rights resulting from climate change, it should be possible to invoke those rights against individual states, also with regard to the aforementioned partial responsibility. This is in line with the principle of effective interpretation, referred to in 5.4.1 above, that the ECtHR applies when interpreting the ECHR and also with the right to effective legal protection guaranteed by Article 13 ECHR, referred to 5.5.1-5.5.3 above.

5.8 In view of the considerations in 5.7.2-5.7.9 above, the Supreme Court finds that Articles 2 and 8 ECHR relating to the risk of climate change should be interpreted in such a way that these provisions oblige the contracting states to do 'their part' to counter that danger. In light both of the facts set out in 4.2-4.7 and of the individual responsibility of the contracting states, this constitutes an interpretation of the positive obligations laid down in those provisions that corresponds to its substance and purport as mentioned in 5.2.1-5.3.3 above. This interpretation is in accordance with the standards set out in 5.4.1-5.4.3 that the ECtHR applies when interpreting the ECHR and that the Supreme Court must also apply when interpreting the ECHR.

(f) Can this obligation pursuant to Articles 2 and 8 ECHR also be relied upon in a case involving a claim pursuant to Article 3:305a DCC?

5.9.1 It follows from the above that, as the Court of Appeal has ruled, the State is obliged on the basis of Articles 2 and 8 ECHR to take appropriate measures against the threat of dangerous climate change, in accordance with its share as referred to in 5.8 above.

5.9.2 Urgenda, which in this case, on the basis of Article 3:305a DCC, represents the interests of the residents of the Netherlands with respect to whom the obligation referred to in 5.9.1 above applies, can invoke this obligation. After all, the interests of those residents are sufficiently similar and therefore lend themselves to being pooled, so as to promote efficient and effective legal protection for their benefit.[38] Especially in

cases involving environmental interests, such as the present case, legal protection through the pooling of interests is highly efficient and effective.[39] This is also in line with Article 9(3) in conjunction with Article 2(5) of the Aarhus Convention,[40] which guarantees interest groups access to justice in order to challenge violations of environmental law, and in line with Article 13 ECHR (see 5.5.1-5.5.3 above).

5.9.3 As the Court of Appeal rightly held in para. 35, the fact that Urgenda does not have a right to complain to the ECtHR on the basis of Article 34 ECHR, because it is not itself a potential victim of the threatened violation of Articles 2 and 8 ECHR, does not detract from Urgenda's right to institute proceedings. After all, this does not deprive Urgenda of the power to institute a claim under Dutch law in accordance with Article 3:305a DCC on behalf of residents who are in fact such victims.

(g) Assessment of the complaints in cassation

5.10 The complaints of grounds for cassation 1-3 fail on the basis of the above. The same applies to the complaints of grounds for cassation 4-8 insofar as these relate to the Court of Appeal's opinion that Articles 2 and 8 ECHR subject the State to the duty to take measures to counter dangerous climate change.

6. Assumptions in answering the question of what specific obligation on the part of the State results from the foregoing

6.1 As considered above, pursuant to Articles 2 and 8 ECHR the State is obliged towards the residents of the Netherlands, in accordance with its share as referred to above in 5.8, to take adequate measures to reduce greenhouse gas emissions from Dutch territory. However, this does not yet answer the question of what this obligation on the part of the State means in concrete terms.

6.2 The answer to this question belongs, in principle, to the political domain, both internationally and nationally. States will have to agree among themselves on their respective individual share in reducing greenhouse gas emissions and make the necessary choices and considerations in this regard. Such agreements have been made, in the UNFCCC, but only in the form of the general obligations mentioned in 5.7.3 above and principles set out in Articles 3 and 4 of the UNFCCC. These general obligations and principles mean that a fair distribution must take place, taking into account the responsibility and state of development of the individual countries. For obvious political reasons, international or otherwise, some which relating to negotiation strategy, the emission reduction agreements made at the various climate conferences are not legally binding in themselves.

6.3 In the Dutch constitutional system, making the agreement referred to in 6.2 above falls within the competence of the government, which is subject to parliamentary oversight. The Netherlands can also decide to reduce greenhouse gas emissions from its territory without binding or non-binding international agreements. The Netherlands is also obliged to do so, as has been considered in 5.9.1 above. Although determining the share to be contributed by the Netherlands in the reduction of greenhouse gas emissions is, in that context too, in principle, a matter for the government and parliament, the courts can assess whether the measures taken by the State are too little in view of what is clearly the lower limit of its share in the measures to be taken

worldwide against dangerous climate change. It is clear, for example, in view of what has been considered above in 5.7.2-5.8, that the State cannot at any rate do nothing at all and that the courts can rule that the State is in breach of its obligation referred to in 5.9.1 above if it does nothing.

Under certain circumstances, there may also be such clear views, agreements and/or consensus in an international context about the distribution of measures among countries that the courts can establish what – in accordance with the widely supported view of states and international organisations, which view is also based on the insights of climate science – can in any case be regarded as the State's minimum fair share. On the basis of the standards referred to above in 5.4.2 and 5.4.3 (including the common ground method), which the Dutch courts are obliged to apply when interpreting the ECHR (see above in 5.6.1), the courts are then obliged to proceed to establishing such and to attach consequences to it in their judgment on the extent of the State's positive obligations. It follows from the ECtHR case law referred to above in 5.4.2 that, under certain circumstances, agreements and rules that are not binding in and of themselves may also be meaningful in relation to such establishment. This may be the case if those rules and agreements are the expression of a very widely supported view or insight and are therefore important for the interpretation and application of the State's positive obligations under Articles 2 and 8 ECHR.

6.4 The right to effective legal protection under Article 13 ECHR mentioned above in 5.5.1-5.5.3 entails, in a case such as this, that the courts must examine whether it is possible to grant effective legal protection by examining whether there are sufficient objective grounds from which a concrete standard can be derived in the case in question.

6.5 In addition, the courts can assess whether the State, with regard to the threat of a dangerous climate change, is complying with its duty mentioned above in 5.5.3 under Articles 2 and 8 ECHR to observe due diligence and pursue good governance. Under certain circumstances, the obligation to take measures of a certain scope or quality may arise from this duty. Furthermore, this duty implies that, under certain circumstances, the State must properly substantiate that the policy it pursues meets the requirements to be imposed, i.e. that it pursues a policy through which it remains above the lower limit of its fair share.

6.6 In determining the State's minimum obligations, the courts must observe restraint, especially if rules or agreements are involved that are not binding in themselves. It is therefore only in clear-cut cases that the courts can rule, on the grounds referred to above in 6.3-6.5, that the State has a legal obligation to take measures.

7 The 25-40% target for Annex I countries

7.1 The first question to be addressed in these proceedings is whether the 25% to 40% reduction in greenhouse gas emissions in 2020 compared to 1990, which is based on AR4 (hereinafter: 'the 25-40% target'), formulated as a target for the Annex I countries, represents a corresponding obligation for the state. The State rightly argues that this target is not a binding rule or agreement in and of itself. The question is therefore whether this target nevertheless binds the State on one or more of the grounds mentioned above in 6.3-6.5.

The first question that needs to be answered in this context is (a) to what extent there is support within the international community for the 25-40% target. This question will be dealt with in 7.2.1-7.2.11 below. The next question is (b) whether this target also applies to the Netherlands as an individual country. This question will be dealt with in 7.3.1-7.3.6 below. After that (c) the State's policy to combat dangerous climate change is discussed in 7.4.1-7.4.6. Lastly (d) in 7.5.1-7.5.3 the question is answered whether it follows from all this that the Netherlands is obliged to meet the 25-40% target, as ruled by the District Court and Court of Appeal.

This is based on the facts established by the Court of Appeal.

(a) The degree of international consensus regarding the 25-40% target

7.2.1 The 25-40% target is part of an IPCC scenario in AR4 from 2007 for a global reduction in greenhouse gas emissions.[41] This scenario provides for Annex I countries to reduce greenhouse gas emissions by 25% to 40% in 2020 and by 80% to 95% in 2050, both compared to 1990 emissions. The distribution of measures between Annex I countries and other countries in this scenario is based on the principles of Articles 3 and 4 UNFCCC. The scenario was written for the target of a maximum concentration of greenhouse gases in the atmosphere of 450 ppm by 2100. This is the concentration at which global warming is reasonably expected to be limited to a maximum of 2°C. AR4 was established on the assumption that this is probably the critical limit above which there is risk of dangerous climate change. The scenario offers a good chance of not exceeding the limit of warming of more than 2°C.

7.2.2 The Bali Action Plan, established at the Bali Climate Change Conference in 2007 (COP-13) endorses the need for far-reaching reductions in greenhouse gas emissions to prevent dangerous climate change. In this respect, reference was made to, among other things, the scenario referred to in 7.2.1. It bears noting here that at climate change conferences decisions are often made on the basis of consensus.

7.2.3 At the Cancún Climate Change Conference in 2010 (COP-16), the countries that are parties to the Kyoto Protocol passed a resolution, the preamble to which expresses, among other things, that, taking into account the findings in AR4, the Annex I countries as a group should reduce their greenhouse gas emissions by 25% to 40% by 2020 compared to 1990:

"Also recognizing that the contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, Climate Change 2007: Mitigation of Climate Change, indicates that achieving the lowest levels assessed by the Intergovernmental Panel on Climate Change to date and its corresponding potential damage limitation would require Annex I Parties as a group to reduce emissions in a range of 25–40 per cent below 1990 levels by 2020, through means that may be available to these Parties to reach their emission reduction targets, (…)"

In the same resolution, the parties to the Kyoto Protocol urged Annex I countries to raise their level of ambition to meet the AR4 target individually or as a group:

"4. Urges Annex I Parties to raise the level of ambition of the emission reductions to be achieved by them individually or jointly, with a view to reducing their aggregate level of emissions of greenhouse gases in accordance with the range indicated by Working Group III to the Fourth Assessment Report of the

Intergovernmental Panel on Climate Change, Climate Change 2007: Mitigation of Climate Change, and taking into account the quantitative implications of the use of land use, land-use change and forestry activities, emissions trading and project-based mechanism and the carry-over of units from the first to the second commitment period; (…).”

At the Durban Climate Change Conference in 2011 (COP-17), these countries passed another resolution, the preamble to which explicitly states that the target for Annex I countries is to reduce their total emissions by at least 25% to 40% compared to 1990 levels:

“Aiming to ensure that aggregate emissions of greenhouse gases by Parties included in Annex I are reduced by at least 25–40 per cent below 1990 levels by 2020, noting in this regard the relevance of the review referred to in chapter V of decision 1/CP.16 to be concluded by 2015, (…)”

The need for a reduction of this magnitude was also expressed at the Doha Climate Change Conference in 2012 (COP-18) in a resolution passed by the COP of countries party to the Kyoto Protocol. For the first time, the countries themselves stated in a resolution that, “in order to increase the ambition of its commitment”, the Annex I countries should strive to achieve at least a 25-40% reduction in greenhouse gas emissions by 2020 compared to 1990 levels.

The need for a reduction of this magnitude was also expressed at the climate change conferences in Warsaw, Lima and Paris in 2013, 2014 and 2015, respectively (COP-19, COP-20 and COP-21). At these conferences, this need has been endorsed again and again in resolutions, by reference either to the Doha Amendment or to resolutions passed at previous conferences. The preamble to the COP decision to adopt the Paris Agreement stresses the urgency of achieving this reduction.

Climate change conferences after 2015 no longer explicitly addressed or referred to the reduction target of 25-40% by 2020. At those conferences, however, the need for sufficient reductions in greenhouse gas emissions before and by 2020 has always been stressed.

7.2.4 As the Court of Appeal established in para. 49, the 25-40% target has not been superseded by the 2013-2014 AR5, contrary to what the State suggests. This report, too, is based on the target of a maximum concentration of greenhouse gases in the atmosphere of 450 ppm by 2100 as part of the objective that global warming not exceed 2oC. AR5 no longer discusses 2020. Indeed, this report focuses on later years, i.e. 2030 and in particular 2050 and 2100, and no longer contains targets for 2020. The 2014 and 2015 COP resolutions mentioned above in 7.2.3, which date from after AR5, still refer to the need for Annex I countries to reduce their greenhouse gas emissions by 25% to 40% by 2020 in accordance with AR4.

The distinction made in UNFCCC between Annex I countries and other countries was dropped in AR5, because by that time countries other than Annex I countries had to be deemed developed countries as well. It emerges from the above, however, that, contrary to what the State argues, this does not mean that AR4’s reduction scenario for 2020 has become outdated.

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). It does not appear, therefore, that these new scenarios have been taken as a starting point for subsequent decisions at climate change conferences.

The Court of Appeal's finding that the 25-40% target has not been superseded by AR5 is therefore understandable and serves as a starting point in cassation.

7.2.6 The EU also took as a starting point the need for the AR4 scenario mentioned above in 7.2.1. Several EU bodies – the Council, the Commission and the Parliament – expressed the scientifically supported necessity of reducing emissions by 30% in 2020 in comparison to 1990. At the Cancún Climate Change Conference in 2010, the EU offered to commit itself to reducing its emissions by this percentage by 2020 if, among other things, the other developed countries would commit themselves to comparable reductions. The following has been noted on behalf of the EU:[42]

"10. The EU and its 27 member States wished to reconfirm their commitment to a negotiating process aimed at achieving the strategic objective of limiting the increase in global average temperature to below 2°C above pre-industrial levels. Meeting that objective requires the level of global GHG emissions to peak by 2020 at the latest, to be reduced by at least 50 per cent compared with 1990 levels by 2050 and to continue to decline thereafter. To this end, and in accordance with the findings of the Intergovernmental Panel on Climate Change, developed countries as a group should reduce their GHG emissions to below 1990 levels through domestic and complementary international efforts by 25 to 40 per cent by 2020 and by 80 to 95 per cent by 2050, while developing countries as a group should achieve a substantial deviation below the currently predicted rate of growth in emissions, in the order of 15 to 30 per cent by 2020. The EU and its 27 member States are fully committed to continuing to negotiate with the other Parties, with a view to concluding as soon as possible within the United Nations framework a legally binding international agreement for the period commencing 1 January 2013."

In case this condition would not be met – which has proved to be the case – the EU has committed itself to a 20% reduction by 2020. However, by 2020 the EU is expected to achieve a reduction of 26-27% compared to 1990.

7.2.7 It follows from the above that there is a high degree of consensus in the international community on the need for in any case the Annex I countries to reduce greenhouse gas emissions by 25% to 40% by 2020, in order to reduce global warming to the maximum of 2°C deemed responsible at the time of AR4.

7.2.8 After 2007, when AR4 came into being, a high degree of consensus on the need for even greater reductions was reached in the climate science community and the international community. As mentioned in 4.3 above, it has been recognised for some years that global warming should not be limited to a maximum of 2°C to prevent dangerous climate change, but to a maximum of 1.5°C. Therefore, the 2015

Paris Agreement explicitly stipulates that the states will endeavour to limit warming to 1.5°C, "recognising that this would significantly reduce the risks and impacts of climate change" (Article 2(1), opening words and (a), of the Agreement). This necessitates a greater reduction in greenhouse gas emissions than is necessary for a target of no more than 2°C.

7.2.9 The UNEP's 2017 annual report, referring to the carbon budget and the emissions gap described in 4.6 above, therefore states that, in light of the Paris Agreement, the reduction of greenhouse gas emissions is more urgent than ever. The UNEP also remarks that if the emissions gap is not bridged by 2030, achieving the two-degree target is extremely unlikely. Even if the reduction targets underlying the Paris Agreement are fully achieved, 80% of the carbon budget corresponding with the two-degree target will be used up by 2030. Starting from a 1.5°C target, the carbon budget will even have been completely exhausted by then. That is why even more ambitious reduction targets are needed for the year 2020, according to the UNEP. The UNEP concludes that "later-action scenarios may not be feasible in practice and, as a result, temperature targets could be missed" and that "later-action scenarios pose greater risks of climate impacts".[43]

7.2.10 With regard to the above, it must be taken into account that, as the Court of Appeal established in para. 63 without being disputed in cassation, that the maximum targets of 1.5°C or 2°C and the related concentrations of a maximum of 430 or 450 ppm are based on estimates. It is therefore possible that dangerous climate change will occur even with less global warming and a lower concentration of greenhouse gases, for example because a tipping point is reached or because ice melts at a higher rate (see 4.4 above). The precautionary principle therefore means that more far-reaching measures should be taken to reduce greenhouse gas emissions, rather than less far-reaching measures.

7.2.11 From what has been considered above in 7.2.8-7.2.10, it follows once again that there is a high degree of international consensus on the urgent need for the Annex I countries to reduce greenhouse emissions by at least 25-40% by 2020 compared to 1990 levels, in order to achieve at least the two-degree target, which is the maximum target to be deemed responsible. This high degree of consensus can be regarded as common ground within the meaning of the ECtHR case law referred to above in 5.4.2, which according to that case law must be taken into account when interpreting and applying the ECHR.

(b) The 25-40% target for the Netherlands individually

7.3.1 The State has argued that the 25-40% target only applies to the Annex I countries as a group and not to each of them individually. Therefore, according to the State, this objective allegedly does not apply to it individually. In addition, the State has argued that the EU as a whole is committed to a 20% reduction in greenhouse gas emissions by 2020 (see 7.2.6 above) and that it was agreed at EU level that the Netherlands would contribute to this by reducing its greenhouse gas emissions in 2020 by 21% for the ETS sector and by 16% for the non-ETS sector, both compared to 2005 levels. According to the State, it complies with all its obligations by making these contributions.

7.3.2 In and of itself, it is correct that the 25-40% target in AR4 was included for the Annex I countries as a group. However, as shown by the considerations in 5.7.3 and 5.7.4 above, the UNFCCC and the Paris Agreement are both based on the individual responsibility of states. Therefore, in principle, the target from AR4 also applies to the individual states within the group of Annex I countries. As will become clear in 7.4.1, the State itself interpreted this target in the same way. Both the UNFCCC and the Paris Agreement provide for states to cooperate and conclude an agreement whereby they jointly reduce their emissions and whereby one may do more than the other (Article 4(2)(a), last sentence, UNFCCC and Article 4(16) and 4(17) Paris agreement). The State has not argued, however, that such an agreement was concluded by it in relation to the 25-40% target of AR4.

7.3.3 The purport of the State's reference to the agreements at EU level as mentioned in 7.3.1 above is not that such an agreement was reached at EU level. The State refers to those agreements only because, in its view, they are only standards that oblige it to achieve a certain concrete reduction in greenhouse gas emissions. However, this argument fails to recognise that, as considered in 5.8 and 6.3-6.5 above, the State may also be obliged to make such a reduction on the basis of Articles 2 and 8 ECHR, in which regard the consensus mentioned above in 7.2.11 is important.

Incidentally, as far as the present case has shown, the said agreements at EU level are not intended to replace the obligations of the individual EU Member States under the UNFCCC. At the Cancún Climate Change Conference in 2020, the EU formulated its own reduction target as it is a party to the UNFCCC on its own. By virtue of the agreements made within the EU on the distribution of measures necessary to enable the EU to achieve this reduction target, the Netherlands is subject to the reduction obligations set out in 7.3.1 above. However, these agreements are without prejudice to the individual responsibility of the EU Member States by any other virtue. The Effort Sharing Decision therefore states in consideration 17 of the preamble that this decision does not preclude more stringent national objectives. This also follows from Article 193 TFEU.

In addition, the EU itself expressed the need for 30% reduction by 2020 and the EU as a whole is expected to achieve a 26-27% reduction by 2020 compared to 1990, which is above the minimum target of 25% of the AR4 scenario and significantly more than the 20% reduction undertaken by the EU at the Cancún Climate Change Conference in 2010.

7.3.4 Moreover, the Court of Appeal rightly held in para. 60 that it would not be obvious for a lower reduction rate to apply to the Netherlands as an Annex I country than to the Annex I countries as a whole. As the Court of Appeal considered in para. 66, the Netherlands is one of the countries with very high per capita emissions of greenhouse gases. In the above agreements at EU level, the reduction percentage agreed upon for the Netherlands is, accordingly, one of the highest reduction percentages applicable to the EU Member States (Annex II to the Effort Sharing Decision). It can be assumed that this high percentage corresponds to the possibilities and responsibilities of the Netherlands. As the Court of Appeal established in para. 60, the State has not substantiated why a lower percentage should apply.

7.3.5 In ground for cassation 8.2.3, the State complains that the Court of Appeal ignored the State’s argument that it was contributing to reducing global greenhouse gas emissions by providing knowledge and financial resources to developing countries, with which those countries could take mitigation and adaptation

measures. However, it did not elaborate on this assertion. The State did, amongst other things, not put forward that this contribution realises a reduction of greenhouse gas emissions and that this should be taken into account when answering the question as to which target applies to the State and whether the State achieves the target applicable to it.[44] This complaint therefore fails.

7.3.6 In view of the foregoing, the Court of Appeal rightly ruled that the urgent need for a 25-40% reduction by 2020 also applies to the Netherlands individually.

(c) The State's policy regarding measures to counter climate change

7.4.1 As considered in 4.8 above, the State acknowledges the need of the target of a maximum concentration of greenhouse gases in the atmosphere of 430 or 450 ppm by 2100, with global warming reasonably expected to be limited to no more than 1.5°C or 2°C. In this context, the State also endorsed the targets set out in the AR4 scenario. As regards that scenario's targets of 80% to 95% reduction by 2050 and of 450 ppm by 2100 (now 430 ppm by 2100), it still endorses them. For the year 2020, the State assumed a reduction target of 30% until 2011. According to the letter from the Minister of Housing, Spatial Planning and the Environment dated 12 October 2009 cited above in 2.1(27), the State, like the EU (see 7.2.6 and 7.3.3 above), was at the time of the opinion that a reduction of 25% to 40% by 2020 was necessary to stay on a credible track to keep the 2°C target within reach.

7.4.2 After 2011, the State adjusted its target for 2020 downwards to the 20% reduction at EU level as referred to in 7.3.1 above. In these proceedings, the State argues that, on closer inspection, achieving a 25% to 40% reduction by 2020 is not necessary, because the same result can be achieved by accelerating the reduction of greenhouse gas emissions in the Netherlands after 2020. The State argues that it intends to have this accelerated reduction take place after 2020 and that it prefers this reduction path over the AR4 scenario. The question, however, is whether an accelerated reduction of greenhouse gas emissions in the Netherlands after 2020 can indeed achieve the same result. In this context, the following facts taken into account by the Court of Appeal are relevant.

7.4.3 All greenhouse gas emissions lead to a reduction in the carbon budget still available (see also 4.6 above). Any postponement of the reduction of emissions therefore means that emissions in the future will have to be reduced on an increasingly large scale in order to make up for the postponement in terms of both of time and size. This means that, in principle, for each postponement of emissions reductions, the reduction measures to be taken at a later date will have to be increasingly far-reaching and costly in order to achieve the intended result, and it will also be riskier. The UNEP already warned about this in its 2013 annual report (see 2.1(22) above).

7.4.4 Following AR4, it became clear that in order to prevent dangerous climate change even greater reductions of greenhouse gas emissions are actually needed in the short term and that this need is becoming increasingly urgent, both before 2020 and in the subsequent period up to 2030 (see also 7.2.8-7.2.9 above). Also according to the Netherlands Environmental Assessment Agency (*Planbureau voor de Leefomgeving*) (the PBL) – which is an independent research institute that is part of the Ministry of

Infrastructure and the Environment – a policy is needed, in view of the Paris Agreement, that goes far beyond the current policies of the countries in question. According to the PBL in a 2016 report, the Dutch policy should be tightened in the short time in order to align it with the Paris Agreement.

7.4.5 The State acknowledges the fact referred to in 7.4.3 above (para. 71 of the Court of Appeal's judgments) and does not contest the facts mentioned in 7.4.4 above. Moreover, it has meanwhile formulated a reduction target for 2030 of 49% and for 2050 of 95% (these targets have been laid down in the Dutch Climate Act after the date of the Court of Appeal's judgment[45]). The target of 49% for 2030 was derived linearly from the target of 95% for 2050. On request, the State informed the Court of Appeal that if this line were extended to 2020 this would result in a target of 28% for that year (para. 47).

7.4.6 In view of the considerations in 7.4.3-7.4.5 above, there may be serious doubts as to whether, with the 20% reduction envisaged by the State at EU level by 2020, the overall reduction over the next few decades, which the State itself believes to be necessary in any case, is still feasible. After all, the need for this reduction requires the State to aim for a reduction in greenhouse gas emissions by more than 25% by 2020, rather than a reduction that is lower. The State has not explained that and why, despite the above and taking into account the precautionary principle applicable in this context, a policy aimed at 20% reduction by 2020 can still be considered responsible. The State has not provided any insight into which measures it intends to take in the coming years, let alone why these measures, in spite of the above, would be both practically feasible and sufficient to contribute to the prevention of dangerous climate change to a sufficient extent in line with the Netherlands' share. The State has confined itself to asserting that there "are certainly possibilities" in this context.

(d) Must the State adhere to the 25-40% target?

7.5.1 In view of the above, the Court of Appeal was allowed to rule in para. 52 that the State has insufficiently substantiated that it would be possible for a responsible policy to prevent dangerous climate change to include a greenhouse gas emissions reduction target of less than at least 25% by 2020. Therefore, in accordance with the foregoing considerations in 6.3-6.5, there is reason to come to the conclusion that the State should in any event adhere to the target of at least 25% reduction by 2020. As stated above, there is a large degree of consensus in the international community and climate science that at least this reduction by the Annex I countries, including the Netherlands, is urgently needed (see 7.2.11 and 7.3.6 above). Proper legal protection means that this consensus can be invoked when implementing the positive obligations incumbent on the State pursuant to Articles 2 and 8 ECHR. The target of achieving a reduction of at least 25% by 2020 is also in line with what the State itself considers necessary for other years (2030, 2050 and 2100 (see 7.4.1-7.4.5 above). In the context of the positive obligation on the State under Articles 2 and 8 ECHR to take appropriate measures to prevent dangerous climate change, this target can therefore be regarded as an absolute minimum. As the State has not been able to provide a proper substantiation of its claim that deviating from that target is nevertheless responsible (see 7.4.6 above), it must adhere to the target of 25%. It should therefore strive to achieve at least this reduction by 2020, as the Court of Appeal rightly held in para. 53.

7.5.2 The State has also argued, in ground for cassation 8.2, that it meets its obligations under Articles 2 and 8 ECHR by taking adaptation measures, whether or not in combination with mitigation measures already taken and proposed, and that it therefore does not have to meet the 25-40% target. In para. 59, however, the Court of Appeal established fully comprehensibly that although it is correct that the consequences of climate change can be mitigated by taking adaptation measures, it has not been demonstrated or made plausible that the potentially disastrous consequences of excessive global warming can be adequately prevented by such measures. This finding also implies that even if account is taken of the fact that the State is taking adaptation measures, mitigation measures that reduce emissions by at least 25% by 2020 are urgently needed, also for the Netherlands. The State's aforementioned argument therefore does not hold.

7.5.3 It should also be noted that the Court of Appeal's judgment implies in paras. 57 and 66 that the State has not sufficiently substantiated that the reduction of at least 25% by 2020 is an impossible or disproportionate burden, as referred to in 5.3.4 above. In this context, the State only referred to the short time remaining until the end of 2020 and to the impairment of the level playing field of the Dutch business community in an international context. In connection with the first argument, the Court of Appeal took into account that the District Court's order to the State dates back to 2015, i.e. has been in force since then, and that the State has moreover been aware of the seriousness of the climate problem for some time and initially pursued a policy aimed at a 30% reduction by 2020 (para. 66). With respect to the second argument, the Court of Appeal took into account that other EU countries pursue much stricter climate policies and that the State has not explained this argument in more detail (para. 57). By doing so, the Court of Appeal has comprehensibly rejected the State's assertion that there would be an impossible or disproportionate burden. Ground for cassation 8.4, which accuses the Court of Appeal of not having investigated this assertion, is therefore unfounded.

(e) Assessment of complaints in cassation

7.6.1 The complaints referred to in 4.237-4.248 of the Opinion proffered by the deputy Procurator General and the Advocate General cannot lead to cassation for the reasons stated there.

7.6.2 Insofar as complaints from grounds for cassation 4-8 have not been dealt with in the foregoing, these cannot lead to cassation either. With regard to Article 81(1) DJOA, this does not require any further substantiation since the complaints do not require answers to legal questions in the interest of unity of law or legal development.

8 Permissibility of the order issued; political domain

8.1 The State argues in ground for cassation 9 that the District Court's order to reduce Dutch greenhouse gas emissions by at least 25% in 2020 compared to 1990 levels, which was upheld by the Court of Appeal, is impermissible for two reasons. The first reason is that the order amounts to an order to create legislation,

which according to Supreme Court case law is not permissible. The second reason is, briefly put, that it is not for the courts to make the political considerations necessary for a decision on the reduction of greenhouse gas emissions. The following is considered in response to these arguments.

(a) Order to create legislation

8.2.1 If the government is obliged to do something, it may be ordered to do so by the courts, as anyone may be, at the request of the entitled party (Article 3:296 DCC). This is a fundamental rule of constitutional democracy, which has been enshrined in our legal order. As far as the rights and freedoms set out in the ECHR are concerned, this rule is consistent with the right to effective legal protection laid down in Article 13 ECHR referred to above in 5.5.1-5.5.3. Partly in connection with this fundamental rule, the Dutch Constitution stipulates that civil courts have jurisdiction over all claims, so that they can always grant legal protection if no legal protection is offered by another court.[46]

8.2.2 It follows from the considerations in 5.1.7-6.2 above that, in this case, the State has a legal duty by virtue of the protection it must provide to residents of the Netherlands on the basis of Articles 2 and 8 ECHR in order to protect their right to life and their right to private and family life. It may therefore be ordered to comply with this duty by the courts, unless there are grounds for an exception in accordance with Article 3:296 DCC. Under that provision, an exception arises if the law so provides or if it follows from the nature of the obligation or the legal act. The Supreme Court case law relating to orders to create legislation constitutes an application of this exception.[47]

8.2.3 This case law is based on two considerations. First of all, there is the consideration that the courts should not intervene in the political decision-making process involved in the creation of legislation. Secondly, there is the consideration that such an order should create an arrangement that also applies to parties other than the parties to the proceedings.[48]

8.2.4 The first consideration does not mean that courts cannot enter the field of political decision-making at all. In the case law referred to above, therefore, the earlier case law of the Supreme Court has been reiterated, which dictates that, on the basis of Article 94 of the Dutch Constitution, the courts must disapply legislation if any binding provisions of treaties entail such.[49] It has also been decided in that case law that the courts may issue a declaratory decision to the effect that the public body in question is acting unlawfully by failing to enact legislation with a particular content.[50]

The first consideration on which the case law referred to in 8.2.2 is based must therefore be understood to mean that the courts should not interfere in the political decision-making process regarding the expediency of creating legislation with a specific, concretely defined content by issuing an order to create legislation. In view of the constitutional relationships, it is solely for the legislator concerned to determine for itself whether legislation with a particular content will be enacted. Therefore, the courts cannot order the legislator to create legislation with a particular content.

8.2.5 The second consideration on which the case law referred to in 8.2.2 above is based relates to the circumstance that the civil courts only pronounce binding decisions between the parties to the dispute (cf. Article 236 DCCP). The courts do not have the power to decide in a manner binding on everyone how a

statutory provision should read. An order to create legislation is therefore subject to the objection that third parties, which are not involved in the proceedings and are therefore not bound by the judgment, would still be bound (indirectly) by that order by virtue of the fact that that legislation would also apply to them. This objection does not arise in the case of an order not to apply statutory provisions, which applies only to a particular claimant, or in the case of a declaratory decision. The same applies to a general order to take measures, while respecting the legislator's freedom, as referred to in the second paragraph of 8.2.4 above, to create or not to create legislation with a particular content. After all, the courts in that case do not determine the content of the statutory provision by issuing their order; this determination is still reserved to the legislator in question.

8.2.6 It follows from the above that the courts are only not permitted to issue an order to create legislation with a particular, specific content. After all, only then do the objections arise which are raised in the consideration on which the case law referred to in 8.2.2 above is based. Therefore, the courts are not prevented to issue a declaratory decision to the effect that the omission of legislation is unlawful (see 8.2.4 above). They may also order the public body in question to take measures in order to achieve a certain goal, as long as that order does not amount to an order to create legislation with a particular content. In the Supreme Court judgment of 9 April 2010 (SGP), the impermissibility of courts issuing an order to create legislation is for that reason limited to this case.[51]

8.2.7 In light of the foregoing, the District Court's order, upheld by the Court of Appeal, constitutes an application of the main rule of Article 3:296 DCC. Indeed, this order does not amount to an order to take specific legislative measures, but leaves the State free to choose the measures to be taken in order to achieve a 25% reduction in greenhouse gas emissions by 2020. This is not altered by the fact that many of the possible measures to be taken will require legislation, as argued by the State. After all, it remains for the State to determine what measures will be taken and what legislation will be enacted to achieve that reduction. The exception to Article 3:296 DCC made in the case law referred to in 8.2.2 above therefore does not apply in this case.

(b) Political domain

8.3.1 This brings the Supreme Court to the assessment of the State's more general argument that it is not for the courts to make the political considerations necessary for a decision on the reduction of greenhouse gas emissions.

8.3.2 As considered in 6.3 above, in the Dutch constitutional system of decision-making on the reduction of greenhouse gas emissions is a power of the government and parliament. They have a large degree of discretion to make the political considerations that are necessary in this regard. It is up to the courts to decide whether, in availing themselves of this discretion, the government and parliament have remained within the limits of the law by which they are bound.

8.3.3 The limits referred to in 8.3.2 above include those for the State arising from the ECHR. As considered in 5.6.1 above, the Netherlands is bound by the ECHR and the Dutch courts are obliged under Articles 93 and 94 of the Dutch Constitution to apply its provisions in accordance with the interpretation of the

ECtHR. The protection of human rights it provides is an essential component of a democratic state under the rule of law.

8.3.4 This case involves an exceptional situation. After all, there is the threat of dangerous climate change and it is clear that measures are urgently needed, as the District Court and Court of Appeal have established and the State acknowledges as well (see 4.2-4.8 above). The State is obliged to do 'its part' in this context (see 5.7.1-5.7.9 above). Towards the residents of the Netherlands, whose interests Urgenda is defending in this case, that duty follows from Articles 2 and 8 ECHR, on the basis of which the State is obliged to protect the right to life and the right to private and family life of its residents (see 5.1-5.6.4 and 5.8-5.9.2 above). The fact that Annex I countries, including the Netherlands, will need to reduce their emissions by at least 25% by 2020 follows from the view generally held in climate science and in the international community, which view has been established by the District Court and the Court of Appeal (see 7.2.1-7.3.6 above). The policy that the State pursues since 2011 and intends to pursue in the future (see 7.4.2 above), whereby measures are postponed for a prolonged period of time, is clearly not in accordance with this, as the Court of Appeal has established. At least the State has failed to make it clear that its policy is in fact in accordance with the above (see 7.4.6 and 7.5.1 above).

8.3.5 In this case, therefore, the Court of Appeal was allowed to rule that the State is in any case obliged to achieve the aforementioned reduction of at least 25% by 2020.

(c) Assessment of the complaints in cassation

8.4 Ground for cassation 9 therefore cannot lead to cassation either.

9 Decision

The Supreme Court:

- rejects the appeal;

- orders the State to pay the costs of the proceedings in cassation, up to this decision estimated on the part of Urgenda at EUR 882.34 in disbursements and EUR 2,200 in fees.

This judgment rendered by Vice President C.A. Streefkerk as chairman and justices G. Snijders, M.V. Polak, T.H. Tanja-van den Broek and H.M. Wattendorff, and pronounced in open court by Vice President C.A. Streefkerk on 20 December 2019.

Appendix

List of abbreviations used

AR4 The Fourth IPCC Assessment Report (2007)

AR5 The Fifth IPCC Assessment Report (2013– 2014)

oC degrees Celsius

Cf. compare

CO2 carbon dioxide

COP Conference of the Parties to the UNFCCC

DCC Dutch Civil Code (*Burgerlijk Wetboek*)

DCCP Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*)

DJOA Dutch Judiciary Organisation Act (*Wet op de Rechterlijke Organisatie*)

ECHR European Convention on the Protection of Human Rights and Fundamental Freedoms

ECtHR European Court of Human Rights

et al. and other(s)

ETS Emissions Trading System

EU The European Union

GDP gross domestic product

GHG greenhouse gases

IPCC Intergovernmental Panel on Climate Change

no. or nos. number or numbers

p. or pp. page or pages

para. paragraph

PBL The Netherlands Environmental Assessment Agency (*Planbureau voor de Leefomgeving*)

ppm parts per million

Stb. The Dutch Bulletin of Acts and Decrees (*Staatsblad)*

Supreme Court The Supreme Court of the Netherlands

TFEU Treaty on the Functioning of the European Union

Trb. The Dutch Bulletin of Treaties (*Tractatenblad)*

UN United Nations

UNEP United Nations Environment Program

UNFCCC The United Nations Framework Convention on Climate Change

Vol. Volume

VROM Ministry of Public Health, Spatial Planning and the Environment

WMO World Meteorological Organization

---

1 The Hague District Court 24 June 2015, ECLI:NL:RBDHA:2015:7145. English translation ECLI:NL:RBDHA:2015:7196.

2 The Hague Court of Appeal 9 October 2018, ECLI:NL:GHDHA:2018:2591. English translation ECLI:NL:GHDHA:2018:2610.

3 United Nations Framework Convention on Climate Change, New York, 9 May 1992, Trb. 1992, 189, entered into force in the Netherlands on 21 March 1994 (Trb. 1994, 63).

4 Paris Agreement, 12 December 2015, Trb. 2016, 94 (rectification in Trb. 2016, 127), entered into force in the Netherlands on 27 August 2017 (Trb. 2017, 141).

5 Decision 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020.

6 Supreme Court 5 November 1965, ECLI:NL:HR:1965:AB7079.

7 See, inter alia, ECtHR 28 March 2000, no. 22492/93 (Kiliç/Turkey), para. 62, and ECtHR 17 July 2014, no. 47848/08 (Centre for Legal Resources on behalf of Valentin Câmpeanu/Romania), para. 130.

8 Cf. ECHR, Guide on Article 2 of the European Convention on Human Rights (version 31 August 2019), nos. 9, 10 and 31-37 and the ECtHR judgments mentioned there.

9 Cf., inter alia, the following judgments in which the ECtHR held that the requirements set out here were met: ECtHR 30 November 2004, no. 48939/99 (Öneryildiz/Turkey), paras 98-101 (gas explosion at landfill; the risk of this occurring at any time had existed for years and had been known to the authorities for years), ECtHR 20 March 2008, no. 15339/02 (Budayeva et al./Russia), paras. 147-158 (life-threatening mudslide; the authorities were aware of the danger of mudslides there and of the possibility that they might occur at some point on the scale it actually did) and ECtHR 28 February 2012, no. 17423/05 (Kolyadenko et al./Russia), paras. 165 and 174-180 (necessary outflow from the reservoir because of exceptionally heavy rains; the authorities knew that in the event of exceptionally heavy rains evacuation might be necessary). See in this sense also Administrative Jurisdiction Division of the Council of State 18 November 2015,ECLI:NL:RVS:2015:3578 (Gas extraction in Groningen), para. 39.3.

10 Cf. ECtHR, Guide on Article 8 of the European Convention on Human Rights (version dated 31 August 2019), nos. 119-127, 420-435 and 438-439 and the ECtHR judgments mentioned there.

11 Cf. ECtHR 10 November 2004, no. 46117/99 (Taşkin et al./Turkey), paras. 107 and 111-114 (Article 8 ECHR also applies to the threat of environmental pollution that might materialise only in twenty to fifty years), and ECtHR 27 January 2009, no. 67021/01 (Tătar/Romania), paras. 89-97 (possible longer-term health risks from heavy metal emissions from gold mining).

12 ECtHR 20 March 2008, no. 15339/02 (Budayeva et al./Russia), para. 133.

13 ECtHR 24 July 2014, no. 60908/11 (Brincat et al./Malta), para. 102.

14 With regard to Article 2 ECHR, see, inter alia, ECtHR 12 January 2012, no. 36146/05 (Gorovenky and Bugara/Ukraine), para. 32, and ECtHR 13 April 2017, no. 26562/07 (Tagayeva et al./Russia), para. 482. With regard to Article 8 ECHR, see, inter alia, ECtHR 26 July 2011, no. 9718/03 (Stoicescu/Romania), para. 59.

15 See ECtHR 10 January 2012, no. 30765/08 (Di Sarno et al./Italy), para. 110 and ECtHR 24 January 2019, no. 54414/13 (Cordella et al./Italy), para. 172.

16 See, inter alia, the judgments cited in 5.2.2 and 5.2.3 above.

17 With regard to Article 8 ECHR, see: ECtHR 27 January 2009, no. 67021/01 (Tătar/ Romania), para. 120.

18 With regard to Article 2 ECHR, see, inter alia, ECtHR 20 March 2008, no. 15339/02 (Budayeva et al./Russia), para. 134, and ECtHR 24 July 2014, no. 60908/11 (Brincat et al./Malta), para. 101. With regard to Article 8 ECHR, see, inter alia, ECtHR 9 June 2005, no. 55723/00 (Fadeyeva/Russia), para. 96.

19 See again the judgments cited in 5.2.2 and 5.2.3, above.

20 See, inter alia, ECtHR 30 November 2004, nr. 48939/99 (Öneryildiz/Turkey), para. 128, ECtHR 9 June 2005, no. 55723/00 (Fadeyeva/Russia), para. 128, and ECtHR 26 July 2011, no. 9718/03 (Stoicescu/Romania), para. 59

21 See ECtHR 9 June 2005, no. 55723/00 (Fadeyeva/Russia), paras. 124-134, ECtHR 20 March 2008, no. 15339/02 (Budayeva et al./Russia), paras. 156-158, ECtHR 24 January 2019, no. 54414/13 (Cordella et al./Italy), paras. 161-174, ECtHR 10 February 2011, no. 30499/03 (Dubetska et al./Ukraine), paras. 150-156, and ECtHR 13 July 2017, no. 38342/05 (Jugheli et al./Georgia), paras. 76-78.

22 ECtHR 13 July 2017, no. 38342/05 ECtHR 13 July 2017, no. 2017/190 (Jugheli et al./Georgia).

23 See ECtHR 20 March 2008, no. 15339/02 (Budayeva et al./Russia), para. 135, and ECtHR 24 July 2014, no. 60908/11 (Brincat et al./Malta), para. 101.

24 See ECtHR 26 July 2011, no. 9718/03 (Stoicescu/Romania), para. 59.

25 See, inter alia, ECtHR 7 July 1989, no. 14038/88 (Soering/United Kingdom), para. 87.

26 Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, Trb. 1972, 51 and 1985, 79.

27 ECtHR 12 September 2012, no. 10593/08 (Nada/Switzerland).

28 ECtHR 12 November 2008, no. 34503/97 (Demir and Baykara/Turkey). For an example, see ECtHR 27 January 2009, no. 67021/01 (Tătar/Romania), para. 120 (reference to the Rio Declaration).

29 See, inter alia, ECtHR 17 October 1986, no. 9532/81 (Rees), para. 47, ECtHR 30 November 2004, no. 48939/99 (Öneryildiz/Turkey), paras. 59, 71, 90 and 93 (meaning 'dangerous activities'), and ECtHR 20 May 2010, no. 61260/08 (Oluić/Croatia), paras. 29-31, 49, 60 and 62 (WHO noise standards).

30 See ECtHR 26 October 2000, no. 30210/96 (Kudla/Poland), para. 157, ECtHR 27 January 2015, no. 36925/10 (Neshkov et al./Bulgaria), paras. 180 and 181, and ECtHR 31 October 2019, no. 21613/16 (Ulemek/Croatia), para. 71.

31 See, inter alia, ECtHR 15 January 2015, no. 62198/11 (Kuppinger/Germany), paras. 136 and 137, with regard to a violation of Article 8 ECHR, and ECtHR 27 January 2015, no. 36925/10 (Neshkov et al./Bulgaria), para. 181, and ECtHR 31 October 2019, no. 21613/16 (Ulemek/Croatia), para. 71, with regard to a violation of Article 3 ECHR.

32 See ECtHR 27 January 2015, no. 36925/10 (Neshkov et al./Bulgaria), paras.186 and 187, and ECtHR 31 October 2019, no. 21613/16 (Ulemek/Croatia), para. 71.

33 Cf. Supreme Court 16 December 2016, ECLI:NL:HR:2016:2888, para. 3.3.3, first paragraph.

34 Yearbook of the International Law Commission 2001, Vol. II, Part Two, p. 125, right-hand column.

35 Cf. the overview at A.M. Honoré, Causation and Remoteness of Damage, International Encyclopedia of Comparative Law, Vol. XI, Torts Chapter 7, no. 112, and A.J. Akkermans, WPNR 6043. Cf. also Article 3:105 of Principles of European Tort Law. For the Netherlands, see: Supreme Court 23 September 1988, ECLI:NL:HR:1988:AD5713 (Kalimijnen), para. 3.5.1, third paragraph.

36 See in this sense also the judgment of the Supreme Court of United States in the case Massachusetts et al. v. Environmental Protection Agency et al., 2 April 2007, 549 U.S. 497 (2007), pp. 22-23.

37 Cf., inter alia, the data mentioned in 2.79-2.80 of the Opinion proffered by the deputy Procurator General and the Advocate General.

38 Cf., inter alia, Parliamentary Papers II, 1991/92, 22 486, no. 3, pp. 7 and 21-22, Supreme Court 27 June 1986, ECLI:NL:HR:1986:AD3741 (de Nieuwe Meer), para. 3.2, and Supreme Court 9 April 2010, ECLI:NL:HR:2010:BK4549 (SGP), para. 4.3.2.

39 Supreme Court 27 June 1986, ECLI:NL:HR:1986:AD3741 (de Nieuwe Meer), para. 3.2, and Parliamentary Papers II, 1991/92, 22 486, no. 3, pp. 22-23.

40 Convention on access to information, public participation in decision-making and access to justice in environmental matters, 25 June 1998, Trb. 1998, 289, entered into force in the Netherlands on 29 March 2005, Trb. 2005, 22.

41 See box 13.7 from the Working Group III report that forms part of AR4.

42 United Nations Framework Convention on Climate Change, Compilation of economy-wide emission reduction targets to be implemented by Parties included in Annex I to the Convention, 7 June 2011, FCCC/SB/2011/INF.1/Rev.1, p. 4-5.

43 UNEP Emission Gap Report 2013, executive summary, under 6. According to the glossary of the report, 'later-action scenarios' refer to scenarios where emissions in the period 2020 to 2030 are higher than in the corresponding least-cost scenarios.

44 Cf. the provisions in 4.222 of the Opinion proffered by the deputy Procurator General and the Advocate General.

45 Act of 2 July 2019, Stb. 2019, 253.

46 Cf., inter alia, Supreme Court 28 September 2018, ECLI:NL:HR:2018:1806, para. 3.5.2, Parliamentary Papers II, 1979/80, 16 162, no. 3, pp. 6 and 10, and Parliamentary Papers II, 1991/92, 22 495, no. 3, pp. 83-84.

47 Supreme Court 21 March 2003, ECLI:NL:HR:2003:AE8462 (Waterpakt), para. 3.5, second paragraph.

48 See Supreme Court 21 March 2003, ECLI:NL:HR:2003:AE8462 (Waterpakt), para. 3.5, Supreme Court 1 October 2004, ECLI:NL:HR:2004:AO8913 (Faunabescherming/Fryslân), paras. 3.3.4 and 3.3.5, Supreme Court 9 April 2010, ECLI:NL:HR:2010:BK4549 (SGP), para. 4.6.2, and Supreme Court 7 March 2014, ECLI:NL:HR:2014:523 (State/Norma et al.), para. 4.6.2.

49 See Supreme Court 21 March 2003, ECLI:NL:HR:2003:AE8462 (Waterpakt), para. 3.5, third paragraph, and Supreme Court 1 October 2004, ECLI:NL:HR:2004:AO8913 (Faunabescherming/Fryslân), para. 3.3.4, third paragraph.

50 See the judgments Supreme Court 9 April 2010, ECLI:NL:HR:2010:BK4549 (SGP), paras. 4.6.1-4.6.2, which involved a similar declaratory decision and Supreme Court 7 March 2014, ECLI:NL:HR:2014:523 (State/Norma et al.), para. 4.6.2.

51 See Supreme Court 9 April 2010, ECLI:NL:HR:2010:BK4549 (SGP), para. 4.6.2.

Annex 98.iii

ECLI:NL:GHDHA:2018:2610

Instantie	Gerechtshof Den Haag
Datum uitspraak	09-10-2018
Datum publicatie	09-10-2018
Zaaknummer	200.178.245/01 (Engelse vertaling)
Formele relaties	Eerste aanleg: ECLI:NL:RBDHA:2015:7196, Bekrachtiging/bevestiging
Rechtsgebieden	Civiel recht
Bijzondere kenmerken	Hoger beroep
Inhoudsindicatie	Disclaimer: The translation of this judgment on appeal is solely intended to provide information. The text of the translation is an unofficial translation. Liability cannot be claimed for possible errors and/or omissions in this translation. The Dutch text of the judgment is the only authentic and formal text (ECLI-number: ECLI:NL:GHDHA:2018:2591) Climate case Urgenda. Duty of care under Articles 2 and 8 ECHR. Reduction greenhouse gas emissions.
Vindplaatsen	Rechtspraak.nl

Uitspraak

THE HAGUE COURT OF APPEAL
Civil-law Division

Case number : 200.178.245/01

Case/cause list number : C/09/456689/ HA ZA 13-1396

Ruling of 9 October 2018

in the case with the aforementioned case number of:

THE STATE OF THE NETHERLANDS (Ministry of Infrastructure and the Environment),

seated in The Hague,
appellant in the appeal on the main issue,

respondent in the cross-appeal,

hereinafter referred to as: the State,

counsel: *mr.* G.J.H. Houtzagers of The Hague,

versus:

URGENDA FOUNDATION,

established in Amsterdam,

respondent in the appeal on the main issue,

appellant in the cross-appeal,

hereinafter referred to as: Urgenda,

counsel: *mr.* J.M. van den Berg of Amsterdam.

THE PROCEEDINGS

By bailiff's notification of 23 September 2015, the State instituted an appeal against the judgment in the case between the parties delivered by The Hague District Court on 24 June 2015 (ECLI:NL:RBDHA: 2015:7145). In its Statement of Appeal (with Exhibits) of 12 April 2016, the State submitted 29 grounds of appeal. In its defence on appeal (with Exhibits) of 18 April 2017, Urgenda contested the grounds of appeal and filed a cross-appeal by submitting a ground of appeal. The State responded in its defence on appeal in the cross-appeal of 27 June 2017. In a letter dated 30 April 2018, the Court submitted several questions to the parties, requesting them to focus on these questions in their counsels' oral arguments of 28 May 2018. At the hearing, Urgenda filed a 'Document containing answers to the Court of Appeal's questions and submission of additional Exhibits for the oral arguments', sent in advance to both the Court and the State, while at the same hearing the State submitted a document to the Court, entitled 'Answers to questions in letter dated 30 April 2018'. Although both parties did not act entirely in accordance with the Court of Appeal's request, neither party has objected to this course of events, so that the Court shall regard the answers to its questions as procedural documents. On 28 May 2018, the parties had their cases pleaded by their counsels, *mrs.* G.J.H. Houtzagers and E.H.P. Brans (for the State) and *mrs.* J.M. van den Berg and M.E. Kingma (for Urgenda) , based on the submitted written pleadings. Prior to the oral arguments, the State submitted Exhibits 75 through to 79 to the Court, while Urgenda submitted Exhibits 145 through to 165. On 28 May 2018, the Court directed that these documents be entered into the records. A court record has been drawn up of the hearing of the oral arguments, after which the ruling was scheduled.

ASSESSMENT OF THE APPEAL

Introduction of the dispute and the factual framework

1. In brief, the proceedings on appeal in this climate case concern Urgenda's claim to order the State to achieve a level of reduction of greenhouse gas emissions by end-2020 that is more ambitious than envisioned by the State in its policy.

2. As the facts established by the district court in legal grounds 2.1 through to 2.78 of the contested judgment (hereinafter: the judgment) are not disputed between the parties, the Court shall also take them as starting points. However, it should be noted that the parties disagree about the weighting of several of these facts, and specifically the conclusions that can be drawn from them in light of the claim. The Court shall discuss this further below.

3. The assessment starts with an introduction of the dispute and the factual framework (legal ground 3), followed by a brief description of the treaties, international agreements, policy proposals and the actual situation at the global, EU and Dutch level (legal grounds 4 through to 26), for which the Court takes as a starting point the developments up to the oral arguments of 28 May 2018 (i.e., the moment when the debate was closed and the ruling was scheduled).

(3.1) Urgenda ('Urgent Agenda') is a citizens' platform with members from various domains in society. The platform is involved in the development of plans and measures to prevent climate change. Urgenda is a foundation whose purpose, according to its by-laws, is to stimulate and accelerate the transition processes to a more sustainable society, beginning in the Netherlands.

(3.2) Since the beginning of the Industrial Revolution, mankind has consumed energy on a large scale. This energy has predominantly been generated by the combustion of fossil fuels (coal, oil, natural gas). The combustion process produces CO2 (carbon dioxide), some of which is released into the atmosphere – and stays there for hundreds of years or longer – and some of which is absorbed by the oceanic and forest ecosystems. Incidentally, this absorption capacity is declining due to deforestation and rising sea water temperatures.

(3.3) CO2 is the main greenhouse gas which, together with the other greenhouse gases, traps the heat emitted by the Earth in the atmosphere (the so-called greenhouse effect). The greenhouse effect increases the more CO2 is emitted into the atmosphere, which in turns exacerbates global warming. It is important to note that the climate system shows a delayed response to the emission of greenhouse gases, meaning that the full, warming effect of the greenhouse gases that are emitted today will only become apparent in 30 to 40 years from now. There are other greenhouse gases besides CO2, such as methane, nitrous oxide and fluorinated gases, which have a less pronounced warming effect and degrade at another rate.

(3.4) The concentration of greenhouse gases in the atmosphere is indicated with the unit/abbreviation 'ppm' (parts per million). The abbreviation 'ppm CO2-eq' (parts per million CO2 equivalent) is used to indicate the concentration of all greenhouse gases combined, with the amount of greenhouse gases other than CO2 being converted into CO2 in terms of warming effect. Like the district court (in legal ground 2.14 of the contested judgment), the Court shall henceforth in this ruling use the abbreviation 'ppm', even if 'ppm CO2–eq' is meant. Should the Court wish to indicate something else with ppm, this shall be stated specifically.

(3.5) The current level of global warming is at about 1.1º C warmer relative to the beginning of the Industrial Revolution. The current concentration of greenhouse gases amounts to approximately 401 ppm. Human-induced CO2 emissions continue on a global level and over the past decades, the global CO2 emissions have increased by 2% annually, which is why global warming continues unabated. There has been a general consensus in the climate science community and the world community for some time that the global temperature should not exceed 2º C. If the concentration of greenhouse gases has not exceeded 450 ppm in the year 2100, there is a reasonable chance that this 2º C target will be achieved. However, the insight has developed over the past few years that a safe temperature rise should not exceed 1.5º C, which comes with a lower ppm level, namely 430 ppm. With these starting points in mind, there is limited room ('budget') for greenhouse gas emissions, and particularly for CO2 emissions. This budget is also referred to as the 'carbon budget', 'CO2 budget' or 'carbon dioxide budget'.

(3.6) It follows from the above that the worldwide community acknowledges that something needs to be done to reduce the emission of greenhouse gases and of CO2 in particular. However, the urgency of this is assessed differently within the global community. In this context, various treaties, agreements and arrangements have been drawn up in the UN context, within the EU and by the Netherlands, the principal of which are extensively formulated in the contested judgment in legal grounds 2.34 through to 2.78. Global warming can be prevented or reduced by ensuring that less greenhouse gases are emitted into the atmosphere. This is known as 'mitigation'. In addition, measures can be taken to counter the consequences of climate change, including raising dikes to protect low-lying areas. This is called 'adaptation'.

(3.7) The State supports the goal of drastically reducing CO2 emissions and, eventually, ending such emissions entirely. The European Council has decided that the EU must achieve a reduction of greenhouse gas emissions of 20% by 2020, of at least 40% in 2030 and 80-95% in 2050, *each relative to 1990*. For the Netherlands, this translates to a minimum reduction target of 16% for the non-ETS sector and 21% for the ETS sector by 2020 (ETS = European Emissions Trading System), see legal ground 4.26 of the contested judgment and legal ground 17 of this ruling. During the plea hearing in the first instance, the State declared that it expected both sectors to have achieved a reduction of 14% to 17% by 2020, relative to 1990. In its most recent Coalition Agreement (2017), the State announced to pursue a national emission reduction of at least 49% in 2030 relative to 1990. In 2017, CO2 emissions in the Netherlands had declined by 13% relative to 1990.

(3.8) Urgenda is of the opinion that the reduction efforts, at least those covering the period up to 2020, are not ambitious enough and claimed in the first instance – among other things – that the State be ordered to achieve a reduction so that the cumulative volume of the greenhouse gas emissions will have been reduced by 40%, or at least by 25%, by end-2020, relative to 1990.

(3.9) In brief, the district court ordered a reduction of at least 25% as of end-2020 relative to 1990 and rejected all other claims of Urgenda. Urgenda did not put forward grounds of appeal against the rejection of the other claims nor against the rejection of a reduction of more than 25%. This means that in these appeal proceedings, a reduction of more than at least 25% by 2020 cannot be awarded and that the other claims of Urgenda are no longer in dispute.

Treaties, international agreements, policy proposals and actual situation

Global level

Background

4. In 1972, the United Nations Conference on the Human Environment was held in Stockholm, which culminated into the Declaration of the United Nations Conference on the Human Environment, which laid down the basic principles of international environmental policy and environmental law. As a result of this conference, the United Nations Environment Program (UNEP) was established. The UNEP and the World Meteorological Organisation (WMO) set up the Intergovernmental Panel on Climate Change(IPCC) in 1988, under the auspices of the UN. The IPCC aims to gain insight into the various aspects of climate change based on published scientific research. The IPCC publishes a report on current climate science and climate developments. The Court shall discuss two IPCC reports, AR4 and AR5, below.

The UN Framework Convention on Climate Change

5. In 1992, the United Nations Framework Convention on Climate Change was concluded, which has since entered into force and has been ratified by the majority of the worldwide community, including the Netherlands. The Convention seeks to protect the Earth's eco-systems and mankind and envisions a sustainable development for the protection of current and future generations. The preamble contains the following underlying consideration, among other things: "Determined to protect the climate system for present and future generations".

6. Article 2 of this Convention reads as follows:
"The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner."

7. Article 3 mentions several principles (the principle of equity, the precautionary principle and the sustainability principle) by which the parties are guided in achieving this objective.

8. In brief, the parties to the convention undertake:
• to protect the climate system, also in the interest of future generations, based on the principle of equity and in accordance with their responsibilities and capabilities, giving full consideration to developing countries that are particularly vulnerable to climate change or that would have to bear a disproportionate burden under the Convention;
• to take precautionary measures to anticipate the causes of climate change and to prevent these causes as much as possible, and not to postpone such measures citing a lack of full scientific certainty as a reason.

9. In Article 4, the Convention parties are divided into two groups, the so-called Annex I countries (the developed countries, including the Netherlands) and the Annex II countries (the developing countries). Taking into account their per capita emissions, the long history of their emissions and their resource bases, the Annex I countries must take the lead in fighting climate change and its adverse effects. They have committed to reducing greenhouse gas emissions. They must periodically report on the measures they have taken with which they aim to return, either individually or jointly, to the 1990 level of greenhouse gas emissions. A group of independent experts shall judge these reports.

10. In Article 7, the Conference of the Parties (hereinafter: COP) is established, which generally convenes every year (the so-called Climate Conference). The COP is the supreme decision-making body of the Convention, although the COP decisions are not always legally binding.

11. Several COPs (Climate Conferences) have been held, such as:

* in 1997 in **Kyoto** (COP 3), during which the Kyoto Protocol was adopted, an agreement between a number of Annex I countries, including all then EU Member States (**Kyoto Protocol**), containing, among other things, the agreed on emission reductions for each Annex I country for the period up to 2012;
* in 2007 in **Bali** (COP 13), during which the **Bali Action Plan** was adopted which laid the basis for agreements relating to mitigation, adaptation, technological cooperation and financial support. The plan recognises the need for drastic reductions for the Annex I countries with detailed references to AR4, including to a table which states that the Annex I countries have to achieve an emission reduction of 25-40% by 2020 relative to 1990 in order to stay below the 2° C warming target;
* in 2009 in **Copenhagen** (COP 15), during which no agreement could be reached about a follow up to or continuation of the Kyoto Protocol;
* in 2010 in **Cancún** (COP 16), which included a recognition based on the scientific findings in the IPCC reports – including, among other things, a reference in the preamble to the urgency of a drastic emission reduction – of the long-term target for global warming not exceeding 2º C, with a possible strengthening of the goal to 1.5 °C. The COP also expressed that the Annex I countries should continue to lead the way in fighting climate change and that this requires Annex I countries to reduce their greenhouse gas emissions, *en groupe*, by 25-40% in 2020 relative to 1990. The COP also urged the Annex I countries to step up their level of ambition, either individually or jointly, relative to the earlier commitments of the Annex I countries *(*the so-called **Cancún pledges**). For the EU, the Cancún pledges signified a reduction of 20% by 2020 relative to 1990, with the offer to achieve a reduction target of 30% if the other developed countries would commit to similar reduction targets, among other things.
* in 2011 in **Durban** (COP 17) with a joint statement about the substantial difference between mitigation plans of the countries involved and about scenarios with a 'likely' (> 66%) chance of achieving the 2° C/1.5° C target and an agreement to conclude a new, legally binding climate treaty or protocol no later than in 2015, making *inter alia* a reference to the desired reductions for Annex I countries by 2020 of 25-40% .
* in 2012 in **Doha** (COP 18), during which Annex I countries were called upon to increase their reduction targets to at least 25-40% for 2020. During this COP, the **Doha Amendment** was adopted, as a follow-up to the Kyoto Protocol, with emission reduction obligations up to 2020. The EU once again committed to a reduction of 20% by 2020, with the offer to achieve a reduction target of 30% by 2020 provided that – in brief – the other developed countries do the same. This condition has not been met and the Doha Amendment has not entered into force (yet);
* in 2013: in **Warsaw** (COP 19), with a call to raise the target in the period up to 2020, and for Annex I countries to align their reduction targets with the target of 25-40% by 2020 as reconfirmed in Doha;
* in 2015: in **Paris** (COP 21) (the Paris Climate Conference), which led to the **Paris Agreement** (see also legal ground 15);
* in 2016: in **Marrakech**, with a call for more ambition and a more intensive cooperation to close the gap between the current emission targets and the Paris Agreement targets as well as for further climate actions well before 2020;
* in 2017: in **Bonn** (COP 23), where the need for 'enhanced action' in the period up to 2020 was acknowledged.

The IPCC

12. In the context of these proceedings, the following IPCC reports are particularly important:

AR4 (IPCC Fourth Assessment Report, 2007):
This report describes that global warming of more than 2º C results in a dangerous and irreversible climate change. To have a chance of more than 50% ('more likely than not') that the 2º C threshold is not exceeded, the report states that the concentration of greenhouse gases in the atmosphere must stabilise at a level of about 450 ppm in 2100 (hereinafter: the '450 scenario'). Following an analysis of several reduction scenarios, the IPCC arrives at the

conclusion in this report (see Box 13.7) that in order to achieve the 450 scenario, the total emission of greenhouse gases by Annex I countries, including the Netherlands, in 2020 must be 25-40% lower than in 1990. This report also describes that mitigation is generally better than adaptation.

AR5 (IPCC Fifth Assessment Report, 2013-2014):
According to this report, there is a 'likely' (> 66%) chance that the rise of the global temperature can stay below 2° C when the concentration of greenhouse gases in the atmosphere in 2100 stabilises at about 450 ppm. This scenario seems more advantageous than the projection of AR4, in which the chances of achieving the 2° C target at a concentration level of 450 ppm is assessed at 'more likely than not' (> 50%). However, it should be noted that in 87% of the scenarios included in the AR5 assessment assumptions have been included with respect to negative emissions, that is to say the extraction of CO2 from the atmosphere. AR4 does not assume negative emissions. Stabilisation at about 500 ppm in 2100 gives a more than 50% chance ('more likely than not') to achieve the 2° C target. Only a limited number of studies has looked at scenarios that lead to a limitation of global warming to 1.5º C. Such scenarios assume concentrations of less than 430 ppm in 2100.

The UNEP

13. Since 2010, the UNEP has issued annual reports about the so-called 'emissions gap', the difference between the desired emission level in a certain year and the reduction targets to which the countries concerned committed. In the 2013 report, UNEP notes, for the third time running, that commitments are falling short and that the emission of greenhouse gases increases rather than decreases. The UNEP concludes that the emission targets of the Annex I countries combined are not enough to achieve the 25-40% reduction in 2020, deemed necessary in AR4, and that therefore it is becoming less likely that by 2020 the emissions will be low enough to achieve the 2º C target at the least cost. Although later reduction actions might be enough to eventually achieve the same temperature targets, they would at least be more difficult, more expensive and more risky, according to the UNEP (see quotes in the judgment, legal grounds 2.29 through to 2.31).

14. The 2017 UNEP report states that, in light of the Paris Agreement, increased pre-2020 mitigation actions are more urgent than ever. The UNEP also remarks that if the emissions gap is not bridged by 2030, achieving the 2° C target is extremely unlikely. Even if the reduction targets underlying the Paris Agreement are fully implemented, 80% of the carbon budget corresponding with the 2° C target will be used up by 2030. Starting from a 1.5 ° C target means that the carbon budget will be completely used up by then, which is why the UNEP calls for more ambitious targets for 2020.

The Paris Agreement

15. The Paris Agreement, which was signed on 22 April 2016 and entered into force on 4 November 2016 and covering the period from 2020 onwards, applies another system than the UN Climate Change Convention. Each country is brought to account regarding their individual responsibility (bottom-up approach). The Convention parties no longer strive to conclude global emission agreements. In brief, the following was laid down:
- Global warming must remain well below the 2° C limit relative to pre-industrial levels, while aiming for a limit of 1.5 ° C.
- The parties have to draw up national climate plans, or nationally determined contributions (NDCs), which have to be ambitious and whose ambition level must be raised with each new plan.
- The parties have expressed grave concerns that the current NDCs are insufficient to limit the average temperature rise to 2° C relative to pre-industrial levels.
- The parties call for an intensification and strengthening of reduction efforts up to 2020 in order to achieve the 2030 targets (40% reduction).
- The use of fossil fuels must be ceased soon, as this is a major cause of excessive CO2 emissions.
- Rich countries are expected to financially support developing countries in reducing their emissions.
- From 2020 onwards, there will no longer be a distinction between Annex I and Annex II countries.

The European Union (EU)

16. Article 191 TFEU contains the environmental objectives of the EU (cited in legal ground 2.53 of the judgment). In order to implement its environmental policy, the EU has established many directives, including the so-called 2003 ETS Directive (Directive 2003/87/EC), subsequently amended (see legal ground 2.58 ff. of the contested judgment).

17. When the ETS Directive was amended in 2009, the European Council communicated its objective of achieving *"an overall reduction of more than 20%, in particular in view of the European Council's objective of a 30% reduction* [Court: of EU emissions of greenhouse gases relative to 1990] *by 2020, which is considered scientifically necessary to avoid dangerous climate change (…)"*. This objective is detailed in the Directive, in which the reduction commitment of 30% by 2020 is linked to the condition – put briefly – that other countries join in.
In broad terms, the ETS system can be described as follows. Companies in the EU that fall under the ETS system, meaning energy-intensive companies such as those in the energy sector, may only emit greenhouse gases if they surrender emission allowances. Such allowances may be purchased, sold or stored. The total amount of greenhouse gases ETS companies are permitted to emit in the 2013-2020 period will decrease annually by 1.74% until a reduction of 21% has been achieved by 2020, relative to 2005.

18. Since then, the EU has committed to an emission reduction of 20% for 2020, of at least 40% for 2030 and of 80-95% for 2050, each relative to 1990, as has also been found in legal ground 3.7. The EU has decided, based on the 2009 Effort Sharing Decision (Decision 406/2009/EC), that the 20% reduction for 2020 has the effect for the non-ETS sectors that the Netherlands will have to achieve an emission reduction of 16% relative to 2005. As has been noted, the ETS sector must adhere to the EU-wide reduction of 21% relative to 2005. According to the current forecasts, the EU as a whole is expected to achieve an emissionreduction of 26-27% in 2020, relative to 1990.

The situation in the Netherlands

19. Up to the year 2011, the Netherlands, being an Annex I country, started from a reduction target of 30% for 2020 relative to 1990 (see also legal ground 2.71 in the contested judgment, with a reference to the 2007 'clean and sustainable' *(schoon en zuinig*) work programme of the Balkenende government). In a letter dated 12 October 2009 the Minister of Housing, Spatial Planning and the Environment informed the House of Representatives about the Dutch objectives in the negotiations in Copenhagen (COP 15): *"The total of emission reductions proposed by the developed countries so far is insufficient to achieve the 25-40% reduction in 2020, which is necessary to stay on a credible track to keep the 2 degrees objective within reach.*

20. Thereafter (after 2011) the Dutch reduction target was adjusted (see also legal ground 3.7 of this ruling) to align with the EU-wide reduction of 20% for 2020 – which for the Netherlands translates to a minimum reduction of 16% for the non-ETS sector and 21% for the ETS sector, each relative to 2005 – of at least 40% for 2030 and 80-95% for 2050, each relative to 1990. On 6 September 2013, the Energy Agreement for Sustainable Growth (hereinafter: the Energy Agreement) was established, which aims to reduce energy consumption and increase the share of sustainable energy.

21. In the district court's judgment, it was still assumed that the Netherlands would achieve a total CO2 reduction of 14-17% in 2020 relative to 1990, based on current and proposed policy. That is currently 23% (19-27%, taking account of the margin of uncertainty). The difference can largely be explained by the fact that the CO2 emissions in the base year of 1990 were retrospectively adjusted (raised). The National Energy Outlook (*Nationale Energieverkenning* - NEV), an annual report of the Energy Research Centre of the Netherlands (*Energieonderzoek Centrum Nederland* – ECN), the PBL Netherlands Environmental Assessment Agency (*Planbureau voor de leefomgeving* - PBL), Statistics Netherlands (*Centraal Bureau voor de Statistiek* - CBS) and the Netherlands Enterprise Agency (*Rijksdienst voor Ondernemend Nederland* - RVO), wrote the following about this in 2015:
*"**Developments since the 2014 NEV***
(….)Another change in relation to the previous NEV relates to the method for determining greenhouse gas

emissions. The present NEV uses the most recent IPCC guidelines (2006), whereas the NEO 2014 was still based on older IPCC guidelines (1996). As a result of this and of changes to the method for determining methane levels in agriculture (expressed as CO2 equivalents), emissions have been adjusted upwards across the board (1990-2013). (….)The changes are also having an upward effect on estimates for the period after 2013."
In a press release issued by the ECN on 18 October 2016, the research centre states the following: "*All in all, these changes result in a stronger relative reduction of greenhouse gas emissions than expected previously. That sounds like good news. However, upon closer inspection it appears that only a small part of the change can rightly be labelled as good news. The total emissions from 1990-2020 added together are at a much higher level than presumed in the 2014 NEV. And that is eventually what matters for the climate. (….) At first glance, the adjustment seems like good news, but for the climate the current scenario of a 23% reduction is actually worse than the scenario of 17% from the 2014 NEV."*

Urgenda has acknowledged that the new calculation method is more in line with the methodology of the IPCC.

22. In response to the Paris Agreement, the PBL described in its report of 18 November 2016 the tightness of the carbon budget and the need for a strict climate policy on a global scale, a policy that should be much more ambitious than the current policy of the countries involved. According to the PBL, the Dutch policy should be tightened in the short time in order to align it with the Paris Agreement.

23. The 2016 NEV states the following, among other things:
"***Greenhouse gas emissions from 1990-2020 almost reduced to level imposed by judicial ruling***
Given the upwardly adjusted emissions in 1990 and the new estimates, the national level of greenhouse gas emissions will have decreased between 1990 and 2020 by 23 percent (20-26 percent) in the 'proposed policies' scenario. The projection value of 23 percent thereby comes close to the 25 percent reduction imposed on the Dutch state by the court in 2015. The calculated bandwidth of 20 to 26 percent, however, indicates that there is a lot of uncertainty."

24. According to the National Institute for Public Health and Environmental Protection (*Rijksinstituut voor Volksgezondheid en Milieu* – RIVM), the CO2-eq emissions in the Netherlands in 2017 dropped by 13% relative to 1990. The 2017 NEV states the following, among other things:
"***Expected reduction of greenhouse gas emissions will remain at 23 per cent in 202, but great uncertainty***
(….)The expected reduction of greenhouse gas emissions between 1990 and 2020 levels will therefore be 23 per cent as in the previous NEV. That is not enough to comply with the court ruling in the Urgenda case. However, there is still considerable margin of uncertainty of 19 to 27 per cent, which depends to a large degree on uncertainty about the use of conventional coal-fired power plants."

25. In the Coalition Agreement (2017) the government announced a Climate Agreement, indicating its intention to reduce the emission of greenhouse gas emissions by at least 49% in 2030. This intention was repeated in the letter from the Minister of Economic Affairs dated 23 February 2018 (Exhibit: S75). The minister announced his plan to close all coal-fired power plants by 2030. In its Coalition Agreement, the government writes that it is the duty of the Netherlands to do everything in its power to achieve the Paris goal, for which reason the Netherlands has raised the bar higher than the EU, since the 40% reduction in 2030 is not enough to achieve the 2° C target, let alone the ambition of 1.5 ° C target.

26. The Netherlands has a relatively high per capita CO2 emission compared to other industrialised countries. In terms of emissions, the Netherlands currently ranks 34th of 208 countries. Of the 33 countries with even higher emissions, only nine have a higher per capita emission, and not a single one is an EU Member State. Of the total of greenhouse gas emissions in the Netherlands, 85% are CO2 emissions, largely generated by the energy sector. CO2 emissions have hardly dropped in the Netherlands since 1990, and have even increased over the past few years. The reduction is due to the drop in the emission of other greenhouse gases. In the 2008-2012 period, the Netherlands achieved an emission reduction in CO2-eq of 6.4%, while in the same period the 15 biggest EU

Member States achieved an 11.8% reduction and the EU as a whole a reduction of 19.2%. Moreover, 30-50% of the reduction in the 2008-2012 period was due to the crisis. Without the economic crisis, emissions would have been substantially higher in that period and the reduction would have been lower.

Urgenda's claim and its basis (in brief)

27. As has been considered above in legal grounds 3.8 and 3.9, the appeal proceedings concern Urgenda's claim, allowed by the district court, that the State be ordered to achieve a reduction so that the cumulative volume of Dutch greenhouse gas emissions will have been reduced by at least 25% by end-2020, relative to the year 1990 (the Kyoto base year).

28. Urgenda largely agrees with the court's judgment. Urgenda believes that the State is doing too little to limit greenhouse gas emissions and that it should assume its responsibility. Urgenda believes that much is at stake (dangerous climate change) and that without swift intervention the world is headed for a planet that will largely be inhabitable for a substantial portion of the world population, and which cannot or hardly be made inhabitable due to inertia in the climate system. In this context, Urgenda refers to authoritative publications, mainly AR4 and AR5 of the IPCC, which have been extensively set out in the judgment.
Urgenda acknowledges that this is a global problem, that the State can only intervene in the emissions from Dutch territory and that in absolute terms the Dutch emissions are minor and that the reduction it has claimed represents a drop in the ocean on a global scale, considering that the climate problem is a worldwide issue. On the other hand, or so Urgenda continues to argue, the Netherlands is a rich and developed country, an Annex I country in terms of the UN Climate Convention, that has profited from the use of fossil energy sources since the Industrial Revolution, and continues to profit from them today, that the Netherlands is one of the countries with the highest per capita greenhouse gas emissions in the world — mainly of dangerous CO2, which lingers long in the atmosphere — and that the signing and ratification of the UN Climate Convention by the Netherlands should not be a mere formality. For reasons of equity, the Convention stipulates that the developed countries should take the lead (Article 3) at a national level. Furthermore, Urgenda points out that up to 2011 the Netherlands had taken as a starting point its own formulated reduction target of 30% by end-2020. This was then reduced to an – EU-wide – reduction target of only 20% by end-2020, apparently due to tough political decision-making. However, the State failed to specify any scientific (climate science) arguments for this reduction. Meanwhile, the Paris Agreement has been established, in which the Netherlands has committed to achieve a reduction of greenhouse gas emissions in order to stay well below the 2° C limit for global warming. The Netherlands also expressed its intention to aim for a global warming limit of 1.5° C and called for a strengthening of reduction efforts up to 2020. The State cannot shirk its responsibility with the argument that in absolute terms its emissions are minor. Considering the major risks associated with uncontrollable climate change, the duty of care of the State requires it to take measures forthwith.

29. In view of all of the above, and particularly the State's 'procrastination', meaning its failure to commit to a greater emission reduction by end-2020, Urgenda is of the opinion that the State has acted unlawfully towards it, because such conduct violates proper social conduct and is contrary to the positive and negative duty of care expressed in Articles 2 (the right to life) and 8 ECHR (the right to family life, which also covers the right to be protected from harmful environmental influences of a nature and scope this serious).

The defence of the State (in brief)

30. The State acknowledges the climate problem as well as the need to reduce greenhouse gas emissions to ensure that global warming stays below 2° C. The Netherlands has made a serious commitment in this context by agreeing to an EU-wide minimum reduction of 40% for 2030 and of 80-95% for 2050. Moreover, the State has even agreed on a national commitment to a 49% reduction for 2030. But climate scientists have also agreed that different reduction paths are available. There is no absolute need to reduce emissions by 25-40% by end-2020. The State's scope for policymaking includes, after considering all interests involved, such as those of the industry, finances,

energy-provision, healthcare, education and defence, to choose the most appropriate reduction path. This is a political question. The *trias politica* prohibits judges from making such decisions. The State emphasises that it adheres to all convention obligations and international agreements, while at the same time the State is concerned about negative effects such as the 'waterbed effect' and 'carbon leakage' and points out that measures should not be at the expense of the level playing field. Furthermore, the State is bound to the European ETS system and cannot do more than is permitted in the context of that system. The State asserts that it is very much relevant that the Dutch emissions are minor in absolute terms and that the Netherlands cannot solve the global problem of climate change on its own. The State draws particular attention to the circumstance that, scientifically speaking, there are many uncertainties regarding both the seriousness of the climate issue and the possible solutions. The IPCC has also flagged numerous uncertainties. The reduction scenarios (representative concentration pathways – RCPs) cover a huge bandwidth – the 450 scenario is not the only eligible scenario, and it is also not up to the IPCC to make decisions on the scenarios – and furthermore are not aimed at individual countries, but rather at the worldwide community (all countries together). Urgenda also underestimates the possibilities of adaptation.

Finally, the State points out that by now it is expected that, based on the currently adopted and proposed policy, a reduction of 19-27% will be achieved by end-2020, taking account of the new calculation method of the NEV, although this may possibly not be entirely sufficient to comply with the judgment.

The grounds of appeal of the State in the appeal on the main issue and the grounds of appeal of Urgenda in the cross-appeal

31. The State disagrees with the judgment and has lodged its appeal within the time limit. With its 29 grounds of appeal in the appeal on the main issue, the State seeks to submit the dispute to the Court in its entirety.

32. In its ground of appeal in the cross-appeal, Urgenda complains about the district court's opinion that Urgenda, considering Article 34 ECHR, cannot rely on Articles 2 and 8 ECHR in these proceedings.

33. In light of the grounds of appeal of both parties, the Court shall re-assess the dispute in its entirety with the proviso that, as has been noted above, the Court cannot allow a reduction further than at least 25% by 2020.

Assessment:
Articles 2 and 8 ECHR and the State's plea of (partial) inadmissibility

34. The Court shall first assess Urgenda's ground of appeal in the cross-appeal. In conjunction with this, the Court shall also consider the State's plea of Urgenda's inadmissibility, explained in ground of appeal 1 in the appeal on the main issue, insofar as Urgenda also acts on behalf of individuals and future generations outside the Netherlands. Both issues are related to the extent that their assessment relies on regulations of a predominately procedural nature, namely Article 34 ECHR and Book 3 Section 305a of the Dutch Civil Code, respectively.

35. Like the State, the district court derived from Article 34 ECHR that Urgenda cannot directly invoke Articles 2 and 8 ECHR. In doing so, the district court fails to acknowledge that Article 34 ECHR (only) concerns access to the European Court of Human Rights (ECtHR). As is evident from this article, citizens, NGOs and groups of individuals have access to the European Court of Human Rights in Strasbourg – insofar as they claim violation of their rights enshrined in the ECHR. The ECtHR has explained this article as follows (in brief), namely that 'public interest actions' are not permitted and that only the claimant whose interest has been affected has access to the ECtHR . The ECtHR has not given a definite answer about access to the Dutch courts. This is not possible, as this falls within the scope of the Dutch judges. This means that Article 34 ECHR cannot serve as a basis for denying Urgenda the possibility to rely on Articles 2 and 8 ECHR in these proceedings.

36. Dutch law is decisive in determining access to the Dutch courts – in the case of Urgenda in these proceedings Book 3 Section 305a of the Dutch Civil Code in particular, which provides for class actions of interest groups. As individuals who fall under the State's jurisdiction may invoke Articles 2 and 8 ECHR in court, which have direct effect, Urgenda may also do so on their behalf under Book 3 Section 305a of the Dutch Civil Code. Urgenda's ground of appeal in the cross-appeal is therefore well-founded.

37. It is not disputed between the parties that the claim of Urgenda, insofar as acting on behalf of the current generation of Dutch nationals against the emission of greenhouse gases on Dutch territory, is admissible. However, the State argued, as understood by the Court, that Urgenda cannot act on behalf of future generations of Dutch nationals nor of current and future generations of foreigners. The State does not have an interest in this ground of appeal, because Urgenda's claim is already admissible insofar as Urgenda acts on behalf of the interests of the current generation of Dutch nationals and individuals subject to the State's jurisdiction within the meaning of Article 1 ECHR, respectively. After all, it is without a doubt plausible that the current generation of Dutch nationals, in particular but not limited to the younger individuals in this group, will have to deal with the adverse effects of climate change in their lifetime if global emissions of greenhouse gases are not adequately reduced. Therefore, the Court does not have to consider the questions raised by the State in this ground of appeal.

38. The Court furthermore deems that Urgenda has sufficient interest in its claim. Contrary to what the State argued in its oral arguments, Urgenda's interest was made sufficiently clear in its extensively explicated assertions that there is a real threat of dangerous climate change, not only today but certainly also in the near future. There is no need for Urgenda to prove these assertions in advance in order to commence proceedings, if that was the State's intention of its argument. The defence of the State that these proceedings also involve individuals who may not even want to be represented by Urgenda is refuted by the following quote from the legislative history of Book 3 Section 305a of the Dutch Civil Code, in which the legislator specifically acknowledged this issue (Parliamentary Papers II, 1991/92, 22 486, no.3, p. 22): *"The interests that are suitable for a grouping in a class action may be financial interests, but also more idealistic interests. A class action may protect interests that directly affect people, or that people want to advocate out of a particular conviction. In the case of idealistic interests, it is irrelevant whether each member of society attaches the same value to these interests. It is even possible that the interests that are sought to be protected in the proceedings conflict with the ideas and opinions of other groups in society. This alone shall not stand in the way of a class action. (...) It does not have to concern the interests of a clearly defined group of others. It may also concern the interests of an indeterminable, very large group of individuals. (…)"*

Assessment:
The asserted unlawfulness

39. Urgenda has based its assertion that the State has acted unlawfully towards it on Book 6 Section 162 of the Dutch Civil Code and Articles 2 and 8 ECHR. The Court shall first assess Urgenda's invocation of Articles 2 and 8 ECHR.

Articles 2 and 8 ECHR

40. The interest protected by Article 2 ECHR is the right to life, which includes environment-related situations that affect or threaten to affect the right to life. Article 8 ECHR protects the right to private life, family life, home and correspondence. Article 8 ECHR may also apply in environment-related situations. The latter is relevant if (1) an act or omission has an adverse effect on the home and/or private life of a citizen and (2) if that adverse effect has reached a certain minimum level of severity.

41. Under Articles 2 and 8 ECHR, the government has both positive and negative obligations relating to the interests protected by these articles, including the positive obligation to take concrete actions to prevent a future violation of these interests (in short: a duty of care). A future infringement of one or more of these interests is

deemed to exist if the interest concerned has not yet been affected, but is in danger of being affected as a result of an act/activity or natural event. As regards an impending violation of an interest protected under Article 8 ECHR, it is required that the concrete infringement will exceed the minimum level of severity (see, among other examples, *Öneryildiz/Turkey* (ECtHR 30 November 2004, no. 48939/99), *Budayeva et al./Russia* (ECtHR 20 March 2008, nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02), *Kolyadenko et al./Russia* (ECtHR 28 February 2012, nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05), and *Fadeyeva/ Russia* (ECtHR 9 June 2005, no. 55723/00).

42. Regarding the positive obligation to take concrete actions to prevent future infringements – which according to the claim is applicable here – the European Court of Human Rights has considered that Articles 2 and 8 ECHR have to be explained in a way that does not place an 'impossible or disproportionate burden' on the government. This general limitation of the positive obligation, which applies here, has been made concrete by the European Court of Human Rights by ruling that the government only has to take concrete actions which are reasonable and for which it is authorised in the case of a real and imminent threat, which the government knew or ought to have known. The nature of the (imminent) infringement is relevant in this. An effective protection demands that the infringement is to be prevented as much as possible through early intervention of the government. The government has a 'wide margin of appreciation' in choosing its measures.

43. In short, the State has a positive obligation to protect the lives of citizens within its jurisdiction under Article 2 ECHR, while Article 8 ECHR creates the obligation to protect the right to home and private life. This obligation applies to all activities, public and non-public, which could endanger the rights protected in these articles, and certainly in the face of industrial activities which by their very nature are dangerous. If the government knows that there is a real and imminent threat, the State must take precautionary measures to prevent infringement as far as possible. In light of this, the Court shall assess the asserted (imminent) climate dangers.

Dangerous climate change? Severity of the situation.

44. The Court takes as a starting point the facts and circumstances, some of which detailed above, established in the proceedings. For the sake of clarity, the Court lists the most important elements below:
• There is a direct, linear link between anthropogenic emissions of greenhouse gases, partially caused by combusting fossil fuels, and global warming. Emitted CO2 lingers in the atmosphere for hundreds of years, if not longer.
• Since pre-industrial times, the Earth has warmed by about 1.1º C. Between 1850 and 1980, the level of global warming was about 0.4º C. Since then and in under 40 years' time, the Earth has warmed further by 0.7 º C, reaching the current level of 1.1º C (see the diagram 'Global warming 1880-2017 (NASA)', the third slide shown by Urgenda during its oral arguments). This global warming is expected to accelerate further, mainly because emitted greenhouse gases reach their full warming effect only after 30 or 40 years.
• If the Earth warms by a temperature of substantially more than 2° C, this will cause more flooding due to rising sea levels, heat stress due to more intensive and longer periods of heat, increasing prevalence of respiratory diseases due to worsened air quality, droughts (accompanied by forest fires), increasing spread of infectious diseases and severe flooding as a result of heavy rainfall, disruption in the food production and potable water supply. Ecosystems, flora and fauna will also be affected, and biodiversity loss will occur. The State failed to challenge Urgenda's assertions (by stating reasons) regarding these issues nor did it contest Urgenda's assertion that an inadequate climate policy in the second half of this century will lead to hundreds of thousands of victims in Western Europe alone.
• As global warming continues, not only the severity of its consequences will increase. The accumulation of CO2 in the atmosphere may cause the climate change process to reach a 'tipping point', which may result in abrupt climate change, for which neither mankind nor nature can properly prepare. The risk of reaching such 'tipping points' increases 'at a steepening rate' with a temperature rise of between 1 and 2 °C (AR5 p. 72).

• On a global scale, greenhouse gas emissions continue to rise. See, among other things, slide 2 shown by Urgenda during its oral arguments: European Database for Global Atmospheric Research (EDGAR) 2017, '*Global greenhouse gas emissions, per type of gas and sources, including LULUCF*').

• The emission of CO2 in the Netherlands also remains as high as ever. The slight decline in greenhouse gas emissions in the Netherlands can only be attributed to the drop in emissions of other, less harmful, greenhouse gases (see slide 16 shown by Urgenda in its oral arguments). CO2 is the main greenhouse gas and is responsible for 85% of all greenhouse gas emissions in the Netherlands.
• Even between the parties there is a consensus that the global temperature rise must at least be kept well below 2º C while a 'safe' temperature rise should not exceed 1.5º C, each relative to pre-industrial levels.
• In order to achieve the 2º C target, the concentration of greenhouse gases in the atmosphere may not exceed 450 ppm. To achieve the 1.5º C target (as set in the Paris Agreement), the global concentration of greenhouse gases must be substantially lower, namely less than 430 ppm. The current concentration is about 401 ppm. This means that the concentration of greenhouse gases in the atmosphere may only rise slightly. Chances of reaching the 1.5º C target are now slim. Keeping global warming to well below 2º C, to which the Netherlands has also committed with the signing of the Paris Agreement, will at least require a considerable amount of effort.
• The longer it takes to achieve the necessary emission reduction, the greater the total amount of emitted CO2 and the sooner the remaining carbon budget will have been used up (see also legal ground 4.32 of the contested judgement and the diagrams contained therein).

45. As is evident from the above, the Court believes that it is appropriate to speak of a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life. As has been considered above by the Court, it follows from Articles 2 and 8 ECHR that the State has a duty to protect against this real threat.

Is the State acting unlawfully by not reducing by at least 25% by end-2020?

46. The end goal is clear and is not disputed between the parties. By the year 2100, global greenhouse gas emissions must have ceased entirely. Nor do the parties hold differing opinions as to the required interim target of 80-95% reduction relative to 1990 by 2050. And Urgenda endorses the reduction target of 49% relative to 1990 by 2030, as established by the government. The dispute between the parties focuses on the question if the State can be required to achieve a reduction of at least 25% relative to 1990 by end-2020. Urgenda is of the opinion that such a reduction is necessary to protect the citizens of the Netherlands against the real and imminent threats of climate change. But the State does not want to commit to more than the 20% reduction relative to 1990 by 2020, as agreed at the EU level. It has to be examined whether the State is acting unlawfully towards Urgenda by not reducing by at least 25% by end-2020 despite the real and imminent threats mentioned above. The following considerations are relevant in this context.

47. In the first place, the Court takes as a point of departure that the emission of all greenhouse gases combined in the Netherlands had dropped by 13%, relative to 1990, in 2017. Even if the new calculation method was not used for this (see legal ground 21 of this ruling), a significant effort will have to be made between now and 2030 to reach the 49% target in 2030; much more efforts than the limited efforts the Netherlands has undertaken so far. It is also an established fact that it is desirable to start the reduction efforts at as early a stage as possible in order to limit the total emissions in this period. Delaying the reduction will lead to greater risks for the climate. A delay would, after all, allow greenhouse gas emissions to continue in the meantime; greenhouse gases which linger in the atmosphere for a very long time and further contribute to global warming. In that context, the Court would like to point out to the warnings issued by the UNEP, cited in legal grounds 2.29 through to 2.31 of the judgment. See also the report of the PBL of 9 October 2017 (Exhibit 77 of the State) p. 60, where the PBL remarks that achieving the climate targets of the Paris Agreement not necessarily concerns achieving a low emission level in 2050, but rather and particularly achieving low cumulative emissions, considering the fact that each megaton of CO2 which is emitted into the atmosphere in the short term contributes to global warming. An even distribution of reduction efforts over the period up to 2030 would mean that the State should achieve a substantially higher reduction in

2020 than 20%. An even distribution is also the starting point of the State for its reduction target of 49% by 2030, which has been derived in a linear fashion from the 95% target for 2050. If extrapolated to the present, this would result in a 28% reduction by 2020, as confirmed by the State in answering the Court's questions.

48. In AR4, the IPCC concluded that a concentration level not exceeding 450 ppm in 2100 is admissible to keep the 2º C target within reach. The IPCC then concluded, following an analysis of the various reduction scenarios (in Box 13.7), that in order to reach this concentration level, the total greenhouse gas emissions in 2020 of Annex I countries, of which the Netherlands is one, must be 25-40% lower than 1990 levels. In AR5, the IPCC also assumes that a concentration level of 450 ppm may not be exceeded in order to achieve the 2º C target.

49. The State has argued that in AR5 multiple emission reduction pathways are presented with which this target may be reached. Based on this, the State is of the opinion that the district court was wrong to take a 25-40% reduction by 2020, as mentioned in AR4, as a starting point.
The Court does not endorse the position of the State in this. As has been stated above by the Court (see legal ground 12), 87% of the scenarios presented in AR5 are based on the existence of negative emissions. In the report of the European Academies Science Advisory Council ('Negative emission technologies: What role in meeting Paris Agreement targets?'), entered into evidence by Urgenda as Exhibit 164, the following is noted about negative emissions:
"(…)We conclude that these technologies [Court: negative emission technologies, or NETs] *offer only limited realistic potential to remove carbon from the atmosphere and not at the scale envisaged in some climate scenarios (…)"* (p. 1)*"Figure 1 shows not only the dramatic reductions required, but also that there remains the challenge of reducing sources that are particularly difficult to avoid (these include air and marine transport, and continued emissions from agriculture). Many scenarios to achieve Paris Agreement targets have thus had to hypothesise that there will be future technologies which are capable of removing CO2 from the atmosphere."* (p. 5)
"*(…) the inclusion of CDR* [Court: removal of CO2 from the atmosphere] *in scenarios is merely a projection of what would happen if such technologies existed. It does not imply that such technologies would either be available, or would work at the levels assumed in the scenario calculations. As such, it is easy to misinterpret these scenarios as including some judgment on the likelihood of such technologies being available in the future."* (p. 5)
The State has failed to contest this by not providing adequate substantiation. Therefore, the Court assumes that the option to remove CO2 from the atmosphere with certain technologies in the future is highly uncertain and that the climate scenarios based on such technologies are not very realistic considering the current state of affairs. AR5 might thus have painted too rosy a picture, and it cannot be assumed outright that the 'multiple mitigation pathways' listed by the IPCC in AR5 (p. 20) can lead to the 2º C target. Furthermore, as asserted by Urgenda and not contested by the State by stating reasons, it is plausible that no reduction percentages as of 2020 were included in AR5, because in 2014 the focus of the IPCC was on targets for 2030. In this respect too, the report does not give cause to assume that the reduction scenario in AR4, which does not take account of negative emissions, is superseded and that today a reduction of less than 25-40% by 2020 would be sufficient to achieve the 2º C target. In order to assess whether the State has met its duty of care, the Court shall take as a starting point that an emission reduction of 25-40% in 2020 is required to achieve the 2º C target.

50. Incidentally, the 450-scenario only offers a more than 50% ('more likely than not') chance to achieve the 2º C target. A real risk remains, also with this scenario, that this target cannot be achieved. It should also be noted here that climate science has meanwhile acknowledged that a safe temperature rise is 1.5º C rather than 2º C. This consensus has also been expressed in the Paris Agreement, in which it was agreed that global warming should be limited to well below 2º C, with an aim for 1.5º C. The ppm level corresponding with the latter target is 430, which is lower than the level of 450 ppm of the 2º C target. The 450-scenario and the identified need to reduce CO2 emissions by 25-40% by 2020 are therefore not overly pessimistic starting points when establishing the State's duty of care.

51. The State has known about the reduction target of 25-40% for a long time. The IPCC report which states that such a reduction by end-2020 is needed to achieve the 2º C target (AR4) dates back to 2007. Since that time, virtually all COPs (in Bali, Cancun, Durban, Doha and Warsaw) have referred to this 25-40% standard and Annex I

countries have been urged to align their reduction targets accordingly. This may not have established a legal standard with a direct effect, but the Court believes that it confirms the fact that at least a 25-40% reduction of CO2 emissions as of 2020 is required to prevent dangerous climate change.

52. Finally, it is relevant noting that up to 2011 the Netherlands had adopted as its own target a reduction of 30% in 2020 (see legal ground 19 of this ruling). That was, as evidenced by the letter from the Minister of Housing, Spatial Planning and the Environment dated 12 October 2009, because the 25-40% reduction was necessary '*to stay on a credible track to keep the 2 degrees objective within reach*'. No other conclusion can be drawn from this than that the State itself was convinced that a scenario in which less than that would be reduced by 2020 was not feasible. The Dutch reduction target for 2020 was subsequently adjusted downwards. But a substantiation based on climate science was never given, while it is an established fact that postponing (higher) interim reductions will cause continued emissions of CO2, which in turn contributes to further global warming. More specifically, the State failed to give reasons why a reduction of only 20% by 2020 (at the EU level) should currently be regarded as credible, for instance by presenting a scenario which proves how – in concert with the efforts of other countries – the currently proposed postponed reduction could still lead to achieving the 2º C target. The EU itself also deemed a reduction of 30% for 2030 necessary to prevent dangerous climate change (see legal ground 17 of this ruling).

53. The Court is of the opinion that a reduction obligation of at least 25% by end-2020, as ordered by the district court, is in line with the State's duty of care. However, the State has put forward several arguments – almost all of which are summarised in legal ground 30 of this ruling – based on which it is of the opinion that it is nevertheless not obliged to take further reduction measures other than those it currently proposes. Insofar as not discussed above, the Court shall now assess these arguments.

Defences of the State

54. The argument of the State that the ETS system stands in the way of the Netherlands taking measures to further reduce CO2 emissions fails. The starting point is that Article 193 TFEU states that protective measures adopted under Article 192 TFEU do not prevent a Member State from maintaining and adopting more ambitious protection measures, provided that such measures are in line with the Treaties. This means that measures that reduce CO2 emissions further than those ensuing from the ETS are permitted provided that these measures do not interfere with the functioning and the system of the ETS in an unacceptable manner. That this is bound to be the case due to the order imposed by the district court has not been substantiated by the State and is furthermore implausible.

55. According the State, a 'waterbed effect' will occur if the Netherlands takes a measure which reduces greenhouse gas emissions falling under the ETS system. The State argues that this will occur because the emissions cap established for the ETS sector applies to the EU as a whole. Less emissions in the Netherlands thus creates room for more emissions elsewhere in the EU. Therefore, national measures to reduce greenhouse gas emission within the framework of the ETS are pointless, or so the State argues .

56. This argument falsely assumes that other EU Member States will make maximum use of the available emission allocation under the ETS system. Like the Netherlands, the other EU Member States have an individual responsibility to limit CO2 emissions as far as possible. It cannot be assumed beforehand that other Member States will take less far-reaching measures than the Netherlands. On the contrary, compared to Member States such as Germany, the United Kingdom, Denmark, Sweden and France the Dutch reduction efforts are lagging far behind. Moreover, Urgenda has argued, supported by reasons and on submission of various reports, including a report of the Danish Council on Climate Change (Exhibit U131), that it is impossible for a waterbed effect to occur before 2050 owing to the surplus of ETS allowances and the dampening effect over time of the 'market stability reserve'. The State has failed to provide reasoning to contest these reports.

57. The State also pointed out the risk of 'carbon leakage', which the State understands to be the risk that companies will move their production to other countries with less strict greenhouse gas reduction obligations. The State has failed to substantiate that this risk will actually occur if the Netherlands were to increase its efforts to

reduce greenhouse gas emissions before 2020. The same applies to the related assertion of the State that more ambitious emission reductions will undermine the 'level playing field' for Dutch companies. The State should have provided substantiation for these assertions, especially considering that other EU Member States are pursuing a stricter climate policy (see legal ground 26). Moreover, in light of among other things Article 193 TFEU, it is difficult to envisage without further substantiation, which is lacking, that not maintaining a 'level playing field' for Dutch companies would constitute a violation of a particular legal rule.

58. In this context, it is worth noting that the State itself has committed to reduce emissions by 49% in 2030, in other words, by a higher percentage than the one to which the EU has committed, for which these arguments are apparently not decisive.

59. The State has also argued that adaptation and mitigation are complementary strategies to limit the risks of climate change and that Urgenda has failed to appreciate the adaptation measures that the State has taken or will take. This argument also fails. Although it is true that the consequences of climate change can be cushioned by adaptation, but it has not been made clear or plausible that the potentially disastrous consequences of excessive global warming can be adequately prevented with adaptation. So while it is certainly logical for the State to also take adaptation measures, this does not take away from its obligation to reduce CO2 emissions quicker than it has planned.

60. The State has furthermore argued that the emission reduction percentage of 25-40% in 2020 is intended for the Annex I countries *as a whole*, and that this percentage can therefore not be taken as a starting point for the emission reduction an *individual* Annex I country, such as the Netherlands, should achieve. The State has failed to provide substantiation why a *lower* emission reduction percentage should apply to the Netherlands than for the Annex I countries as a whole. That is not obvious, considering a distribution in proportion to the per capita GDP, which *inter alia* has been taken as a starting point in the EU's Effort Sharing Decision for distributing the EU emission reductions among the Member States. There is reason to believe that the Netherlands has one of the highest per capita GDP of the Annex I countries and in any case is far above the average of those countries. That is also evident from Appendix II of the Effort Sharing Decision, in which the Netherlands is allocated a reduction percentage (16% relative to 2005) that is among the highest of the EU Member States. It is therefore reasonable to assume that what applies to the Annex I countries as a whole should at least also apply to the Netherlands.

61. The State has also put forward that the Dutch greenhouse gas emissions, in absolute terms and compared with global emissions, are minimal, that the State cannot solve the problem on its own, that the worldwide community has to cooperate, that the State cannot be deemed the party liable/causer ('primary offender') but as secondary injuring party ('secondary offender'), and this concerns complex decisions for which much depends on negotiations.

62. These arguments are not such that they warrant the absence of more ambitious, real actions. The Court, too, acknowledges that this is a global problem and that the State cannot solve this problem on its own. However, this does not release the State from its obligation to take measures in its territory, within its capabilities, which in concert with the efforts of other states provide protection from the hazards of dangerous climate change.

63. The precautionary principle, a generally accepted principle in international law included in the United Nations Framework Convention on Climate Change and confirmed in the case-law of the European Court of Human Rights (*Tătar/Romania*, ECtHR 27 January 2009, no. 67021/01 section 120), precludes the State from pleading that it has to take account of the uncertainties of climate change and other uncertainties (for instance in ground of appeal 8). Those uncertainties could after all imply that, due to the occurrence of a 'tipping point' for instance, the situation could become much worse than currently envisioned. The circumstance that full scientific certainty regarding the efficacy of the ordered reduction scenario is lacking therefore does not mean that the State is entitled to refrain from taking further measures. High plausibility, as described above, suffices.

64. The State's defence of the lack of a causal link also fails. First of all, these proceedings concern a claim for imposing an order and not a claim for damages, so that causality only plays a limited role. In order to give an order it suffices (in brief) that there is a real risk of the danger for which measures have to be taken. It has been

established that this is the case. Moreover, if the opinion of the State were to be followed, an effective legal remedy for a global problem as complex as this one would be lacking. After all, each state held accountable would then be able to argue that it does not have to take measures if other states do not so either. That is a consequence that cannot be accepted, also because Urgenda does not have the option to summon all eligible states to appear in a Dutch court.

65. Regarding the plea of a lack of the required relativity within the meaning of Book 6 Section 163 of the Dutch Civil Code, the Court states first and foremost that these proceedings constitute an action for an order and not an action for damages. The violated standards (Articles 2 and 8 ECHR) do seek to protect Urgenda and its supporters. For this reason alone, the plea is dismissed.

66. Insofar as the State wanted to assert that the remaining available time (until end-2020) is very short, this argument is rejected. Not only is the judgment (declared provisionally enforceable) over three years old, but the foregoing has shown that the State has known about the severity of the climate problem for a long time and that up to 2011 the State had focused its policy on a reduction of 30%. In this respect, it deserves further attention that the Netherlands, as a highly developed country, has profited from fossil fuels for a long time and still ranks among the countries with the highest per capita greenhouse gas emissions in the world. It is partly for this reason that the State should assume its responsibility, a sentiment that was also expressed in the United Nations Framework Convention on Climate Change and the Paris Agreement.

67. Incidentally, the Court acknowledges that, especially in our industrialised society, measures to reduce CO2 emissions are drastic and require financial and other sacrifices but there is also much at stake: the risk of irreversible changes to the worldwide ecosystems and liveability of our planet. The State argues that for this reason the system of the separation of powers should not be interfered with, because it is not up to the courts but to the democratically legitimised government as the appropriate body to make the attendant policy choices. This argument is rejected in this case, also because the State violates human rights, which calls for the provision of measures, while at the same time the order to reduce emissions gives the State sufficient room to decide how it can comply with the order.

68. In this context, the State also argues that limiting the cumulated volume of Dutch emissions, as ordered by the district court, can only be achieved by adopting legislation, by parliament or lower government bodies, , that this means that from a substantive point of view the order constitutes an order to create legislation and that the court is not in the position to impose such an order on the State. However, the district court correctly considered that Urgenda's claim is not intended to create legislation, either by parliament or lower government bodies, and that the State retains complete freedom to determine how it will comply with the order. Even if it were correct to hold that compliance with the order can only be achieved through creating legislation by parliament or lower government bodies, the order in no way prescribes the content of such legislation. For this reason alone, the order is not an 'order to create legislation'. Moreover, the State has failed to substantiate, supported by reasons, why compliance with the order can only be achieved through creating legislation by parliament or lower government bodies. Urgenda has argued, by pointing out the Climate Agreement (to be established) among other things, that there are many options to achieve the intended result under the order that do not require the creation of legislation by parliament or lower government bodies . The State has failed to refute this argument with sufficient substantiation.

69. The State also relied on the *trias politica* and on the role of the courts in our constitution. The State believes that the role of the court stands in the way of imposing an order on the State, as was done by the district court. This defence does not hold water. The Court is obliged to apply provisions with direct effect of treaties to which the Netherlands is party, including Articles 2 and 8 ECHR. After all, such provisions form part of the Dutch jurisdiction and even take precedence over Dutch laws that deviate from them.

70. In short, the Court finds the defences of the State unconvincing.

Conclusion

71. To summarise, from the foregoing it follows that up till now the State has done too little to prevent a dangerous climate change and is doing too little to catch up, or at least in the short term (up to end-2020). Targets for 2030 and beyond do not take away from the fact that a dangerous situation is imminent, which requires interventions being taken now. In addition to the risks in that context, the social costs also come into play. The later actions are taken to reduce, the quicker the available carbon budget will diminish, which in turn would require taking considerably more ambitious measures at a later stage, as is acknowledged by the State (Statement of Appeal 5.28), to eventually achieve the desired level of 95% reduction by 2050. In this context, the following excerpt from AR5 (cited in legal ground 2.19 of the judgment) is also worth noting: *"(…) Delaying mitigation efforts beyond those in place today through 2030 is estimated to substantially increase the difficulty of transition to low-longer-term emissions levels and narrow the range of options consistent with maintaining temperature change below 2º C relative to pre-industrial levels."*

72. Neither can the State hide behind the reduction target of 20% by 2020 at the EU level. First of all, also the EU deems a greater reduction in 2020 necessary from a climate science point of view. In addition, the EU as a whole is expected to achieve a reduction of 26-27% in 2020; substantially more than the agreed on 20%. The Court has also taken into consideration that in the past the Netherlands, as an Annex I country, acknowledged the severity of the climate situation time and again and, mainly based on arguments from climate science, for years assumed a reduction of 20-45% by 2020, with a concrete policy objective of 30% by that year. After 2011, this policy objective was adjusted downwards to 20% by 2020 at the EU level, without any scientific substantiation and despite the fact that more and more became known about the serious consequences of greenhouse gas emissions for global warming.

73. Based on this, the Court is of the opinion that the State fails to fulfil its duty of care pursuant to Articles 2 and 8 ECHR by not wanting to reduce emissions by at least 25% by end-2020. A reduction of 25% should be considered a minimum, in connection with which recent insights about an even more ambitious reduction in connection with the 1.5° C target have not even been taken into consideration. In forming this opinion, the Court has taken into consideration that based on the current proposed policy the Netherlands will have reduced 23% by 2020. That is not far from 25%, but a margin of uncertainty of 19-27% applies. This margin of uncertainty means that there is real chance that the reduction will be (substantially) lower than 25%. Such a margin of uncertainty is unacceptable. Since moreover there are clear indications that the current measures will be insufficient to prevent a dangerous climate change, even leaving aside the question whether the current policy will actually be implemented, measures have to be chosen, also based on the precautionary principle, that are safe, or at least as safe as possible. The very serious dangers, not contested by the State, associated with a temperature rise of 2° C or 1.5° C – let alone higher – also preclude such a margin of uncertainty. Incidentally, the percentage of 23% has become more favourable because of the new calculation method of the 2015 NEV, which assumes higher greenhouse gas emissions in 1990 than those which the district court has taken into consideration. This means that the theoretical reduction percentage can be achieved sooner, although in reality the situation is much more serious (see also legal ground 21 of this ruling).

74. On these grounds, the State's reliance on its wide 'margin of appreciation' also fails. The Court furthermore points out that the State does have this margin in choosing the measures it takes to achieve the target of a minimum reduction of 25% in 2020.

75. The other defences of the State need not be discussed. As has been considered above in legal ground 3.9, a reduction of more than at least 25% by 2020 cannot be awarded, so that the Court shall leave it at this.

Final statement

76. All of the above leads to the conclusion that the State is acting unlawfully (because in contravention of the duty of care under Articles 2 and 8 ECHR) by failing to pursue a more ambitious reduction as of end-2020, and that the State should reduce emissions by at least 25% by end-2020. The State's grounds of appeal pertaining to the district court's opinion about the hazardous negligence doctrine need no discussion under these state of affairs. The judgment is hereby upheld. The grounds of appeal in the appeal on the main issue need no separate discussion. They have been discussed in the foregoing insofar as these grounds of appeal are relevant to the assessment of the cross-appeal. As the unsuccessful party in the appeal, the State is ordered to pay the costs of the appeal on the main issue as well as of the cross-appeal.

DECISION

The Court:

- upholds the judgment of The Hague District Court of 24 June 2015 delivered in the case between the parties;

- orders the State to pay the costs of the proceedings in the appeal on the main issue and of the cross-appeal, on the part of Urgenda estimated up to this ruling at € 711 in court fees, € 16,503 in attorney fees in the appeal on the main issue and € 8,256 in attorney fees in the cross-appeal, and orders the State to pay these costs within fourteen days following this ruling, failing which statutory interest within the meaning of Book 6 Section 119 of the Dutch Civil Code is payable as at the end of the aforementioned term until the date on which payment is made in full;

- declares this judgment provisionally enforceable.

This judgment was passed by *mrs.* M.A.F. Tan-de Sonnaville, S.A. Boele and P. Glazener and pronounced in open court on 9 October 2018 in the presence of the court clerk.

Annex 99.i

Summary of the arguments put forward

The subject of the lawsuit

1. The lawsuit filed by the non-profit organisation Klimaatzaak has two legal grounds: the defendants' breach of Civil Code articles 1382 and 1383 and their breach of articles 2 and 8 of the European Convention on Human Rights and of articles 6 and 24 of the UN Convention on the Rights of the Child.

   The liability suit based on Civil Code articles 1382 and 1383 refers to inappropriate conduct. This legal ground is purely national, invoking the classic regime of the non-contractual liability of public authorities.

   The defendants – the Belgian State, the Brussels-Capital Region, the Flemish Region and the Walloon Region – have neglected their duty to exercise due caution and diligence. In developing their climate policy, they have not behaved as public authorities should do, guided by caution and diligence. Their negligence is not only contributing to global warming, but also to an acceleration towards a dangerous level thereof. This negligence is harming the legitimate interests of the claimants. Given that it is within the power of the defendants – both technically and financially – to adequately do their part - and, moreover, that it is reasonable for them to do such, the claimants call on the court to hand down injunctions to this effect.

   Through their negligence, the defendants are also violating the claimants' right to life and their right to private and family life – rights protected by the ECHR and the UN Convention on the Rights of the Child. As the defendants have the obligation to uphold these fundamental rights, the claimants call on the court to similarly hand down injunctions to this effect.

   The requested injunctions are for emissions of greenhouse gases ('GHGs') to be reduced, with targets set for 2025, 2030 and 2050.

2. The claimants develop their case in several stages, dedicated to the facts (**Facts Section**), the admissibility of the case (**Admissibility Section**), the argumentation (**Grounds Section**) and the requested injunctions (**Injunctions Section**).

The relevant facts

3. The section on the facts relevant to the case has two strands: the first concerns global warming (**Chapter 1. Global Warming**), while the second lists Belgium's climate-related commitments and failures (**Chapter 2. Belgium's commitments and failures**).

   Though the section listing the facts is long, the information contained therein is indispensable. Indispensable for establishing the case's admissibility, from the perspective of both Klimaatsaak and the co-claimants; indispensable, when demonstrating the violation of Civil Code articles 1382 and 1383, for establishing the gross negligence of the defendants, the damage caused, and the causal link between the two; indispensable for demonstrating the violation of fundamental rights; and, last but not least, indispensable for justifying the requested injunctions.

Global warming

4. A presentation on the Intergovernmental Panel on Climate Change ('IPCC') – its creation and structure, its *modus operandi*, its reports and the language used in them – introduces the chapter dedicated to global warming. It has a key role to play in proving the vast majority of data subsequently reported.

5. Following the IPCC presentation we find further information essential for understanding global warming: the greenhouse phenomenon; the role played by GHGs; the increase in the concentration of GHGs in the atmosphere due to anthropogenic GHG emissions; the properties of the various GHGs, and in particular those of carbon dioxide (CO_2); the continuing global warming and the time it takes for the climate system to react to the increase in the concentration of GHGs in the atmosphere; the need for rapid and decisive action. We are currently experiencing global warming of 1°C. If the past level of GHG emissions is maintained, we are heading towards 4°C in 2100.

   Three facts need to be highlighted:
   - The longevity of CO_2 in the atmosphere: CO_2 is the only GHG that persists for centuries, if not millennia. This characteristic is leading to increasingly high concentrations of this GHG in the atmosphere, thus causing global warming.
   - The virtually linear relationship between increases in the concentration of CO_2 in the atmosphere and global warming. This relationship makes it possible to set budgets.
   - GHG emissions cause creeping and latent damage: month after month, year after year, the damage progressively follows the increase, itself progressive, in the concentration of GHGs in the atmosphere, with a time lag of around 40 years between the emissions and the resultant damage; current warming is the result of GHG emissions produced between 1750 and 1980.

6. The notion of dangerous anthropogenic global warming is also examined. This notion is at the heart of the United Nations Framework Convention on Climate Change ('UNFCCC') adopted on 9 May 1992 in New York, a convention aimed above all at preventing such warming (cf. Art. 2 of the UNFCCC) and a cornerstone of the policies fighting global warming.

   For several decades, climate science and the diplomatic consensus based on this science have defined a global warming level endangering all life on our planet as that exceeding 2°C, with 1990 as the base year. Since 2007, however, this threshold has been questioned. The 2015 Paris Agreement sets it 1.5°C. It is now considered that, to avoid global warming endangering life on our planet, 1.5°C must not be exceeded globally.

7. The consequences of dangerous global warming are to a large extent known. They have been studied in various scenarios in which the 2°C and 1.5°C thresholds are surpassed in 2100. The results were published in a special report by the IPCC in October 2018. This report contains a clear message: above 1.5°C, all dangers caused by global warming will increase substantially. We are compiling a picture of these consequences at global, European and Belgian levels. It turns out that they affect all aspects of daily life and that the impacts in other regions and other countries will also have negative effects here. Due to the time it takes for the climate system to react, the consequences currently being observed are those caused by GHG emissions up to 1980. The damage already incurred is much more serious: in the period between 1980 and now, GHG emissions have increased greatly. One consequence of global warming between 1°C and 2°C is alarming: the increasing probability of '*tipping points*' being reached. Once these points are reached, their effects will uncontrollably and irreversibly impact all life on our planet.

Belgium is already suffering and is set to suffer even more from the direct and indirect consequences of global warming.

Belgium's commitments and failures

8. The chapter on Belgium's commitments and failures looks at three levels: the international, European and national levels.

These commitments are examined in light of the two grounds stated. The claimants point out that the possible violation of a standard belonging to the international legal regime governing the climate or of an obligation of European law is not part of the arguments raised.

9. At international level, the claimants look at Belgium's involvement in the international climate regime (the 1992 UNFCCC, the 1997 Kyoto Protocol with its 2012 Doha amendment, the 2015 Paris Agreement) and in the decision-making processes and declarations at the various '*Conferences of the parties*' (COPs') in which the concept of dangerous global warming was defined. What commitments has the country entered into? When did this occur? What are the implications of its status as a UNFCCC Annex I and Annex II country? What did the Belgian State, the Brussels-Capital Region, the Flemish Region and the Walloon Region know at what time about the 'dangerous' global warming threshold? What have we recognised as a critical danger? When did this occur? On the basis of this analysis, it also seems that the defendants have been well aware of the climate problem for decades and are committed to fighting it, taking on a *leadership* role. The UNFCCC provides for an individual national responsibility for all Annex I countries to achieve its ultimate goal: to prevent dangerous anthropogenic global warming.

10. Turning to the European level, the analysis is limited to the EU's climate policy of the last twelve years, with its 2020, 2030 and 2050 GHG reduction targets.

It is demonstrated that the EU, as a party to the UNFCCC, decided in 2007 and in 2011-2014 on targets respectively for 2020 and 2030. Even at the time of taking these decisions, the EU itself stated that the targets were insufficient for preventing dangerous global warming, understood as warming exceeding .... 2°C. As stated above, this threshold has been revised downwards and now stands at 1.5°C. The European targets are thus doubly insufficient.

In relation to other Member States, Belgium is dragging its heels when it comes to fulfilling the binding obligations incumbent on the country by virtue of the legislation adopted to achieve these doubly insufficient targets. According to the European institutions, Belgium is gravely ignoring all these obligations. Contrasting Belgium's performance with that of the other Member States reveals that the latter are not only fulfilling their European obligations but also going further.

Belgium's laggard performance in this European context is thus a contributory factor in establishing the country's climate negligence, its failure to fulfil its duty of acting with care, incumbent on it on the basis of Civil Code articles 1382 and 1383 and the violation of the fundamental rights of the claimants.

11. Looking at the national level, the claimants basically analyse climate governance within Belgium.

In each country, climate governance must take account of the cross-competence character of the issue, cutting through the majority of traditional fields: from industry to town planning and international relations, via mobility, energy, housing, agriculture, teaching and many more. In Belgium itself, further account must be taken of the division of powers in the country's federal

set-up. To clarify the situation, the claimants start by taking a quick look at the division of climate-governance-related powers between the federal and devolved levels. Belgian climate governance is an extremely shared competence.

The claimants then go on to examine how climate governance is organised within Belgium.

They find that a widely shared consensus exists among politicians and socio-economic players as to the need to reform the institutional framework established in 2002, as it has proved to be low-performing. They also note that, to this day, nothing has been done in this field, despite the many strong signals confirming not only the system's lack of effective performance over the years, but also despite the drafting – as of 2016 – at European level, of EU Regulation 2018/1999 on the Governance of the Energy Union and Climate Action. In force since the end of 2018, this regulation requires much more intense collaboration between the State and the devolved levels than was previously the case.

They further note that the defendants have abstained from concluding within a reasonable period of time the cooperation agreements indispensable for the country's climate governance. The claimants cite as an example of this low performance the cooperation agreement which was supposed to implement the second commitment period under the Kyoto Protocol for the period 2012-2020 ... but which was only concluded and became operational in July 2018.

A third strand of analysis looks at the binding European target of reducing GHGs in non-ETS sectors, i.e. sectors not covered by the European Emissions Trading System. This European obligation allows a country's climate performance to be measured. Indeed, the reduction of GHG emissions is at the heart of global climate policy. The claimants go on to analyse the findings of the European and Belgian institutions on how Belgium is fulfilling this obligation. Even back in 2011, these were negative, leading to calls to invest more effort and to better coordinate the efforts of the various authorities concerned. The competent Belgian authorities have received a string of warnings to this effect.

The claimants end with a very negative finding: the failure, knowingly, to do what is necessary to play their part to avoid dangerous global warming and, moreover, the failure to meet European obligations which themselves are totally insufficient to prevent this warming, are crowned by a failure to improve the deficient intra-Belgian governance where it was known that it was urgent and possible to do so.

Admissibility

12. The case brought by Klimaatzaak and the co-claimants is admissible. Both have the interest required by law. The claimants refer to the norms of international law (the Aarhus Convention) and of domestic law, as well as to the latest case law which has strengthened access to the courts, especially on environmental issues.

The grounds: 1
Violation of the duty to act with due care and diligence, as enshrined in Civil Code articles 1382 and 1383

13. The argumentation of the violation of Civil Code articles 1382 and 1383 is borrowed from the common law of civil liability, as applied to the public authorities in the latest case law. The three criteria for establishing liability, i.e. negligence, damage and the causal link between the two, are met in this case.

The claimants use five strands of argumentation to justify the facts leading them to conclude that, in their climate governance, the defendants have not behaved with due care and diligence and continue not to do so. Backed by abundant evidence, these facts are as follows:

1) The threat of dangerous global warming is a very serious threat;
2) The defendants are well aware of this threat and, in fact, have known it for a long time;
3) There is an extremely high probability that the threat will materialise, as known by the defendants for a long time;
4) It is possible to take effective preventive measures – measures which are reasonable in light of the danger;
5) However, the defendants have taken no action, have not done what is necessary.

The damage being caused to Klimatzaak and the co-claimants through the defendants' negligible behaviour is sufficiently grounded in law. It is backed by increasingly informed and precise scientific literature, referred to in the Facts section, in particular the IPCC reports but also those of other reputable sources in the fields of economics and health. This damage is partly in the future and certain to happen.

Finally, the causal link between the negligence claimed by the claimants and the damage caused by the defendants is established.

The grounds: 2
Violation of ECHR articles 2 and 8 and of articles 6 and 24 of the UN Convention on the Rights of the Child

14. Protecting the right to life, ECHR article 2 applies to threats to the environment at a level of severity constituting a danger for the lives of individuals. The threat to life is real and identifiable. The protective measures which people under the jurisdiction of a state are entitled to expect are dependent on the context in which they are adopted. Backed by the case law of the European Court of Human Rights and by the case facts, the claimants establish that the defendants are violating their right to life.

15. Protecting the right to respect for private and family life, ECHR article 8 applies to threats to the environment at a level of severity likely to harm the private and family life of individuals. The absence of quantifiable damage is no obstacle to recognising a sufficient level of severity. The authorities must take sufficient measures necessary to protect this right. Backed by the case law of the European Court of Human Rights and by the case facts, the claimants establish that the defendants are similarly violating this fundamental right.

16. It is indisputable that young children and adolescents will disproportionately bear the brunt of the consequences of dangerous warming. Without GHG emissions being urgently and decisively reduced, they will experience the transition from 1°C warming to 4°C warming within their lifespans, something that has never happened before in the history of the planet as documented for the past 800,000 years. The violations of their right to life and of their right to respect for private and family life thus receive particular attention. We make the link between respect of ECHR articles 2 and 8 and articles 6 and 24 of the UN Convention on the Rights of the Child, as children's rights in particular are being violated by the defendants.

The injunctions requested

17. The power of a judge to establish the responsibility of the public authorities and the violation of fundamental rights guaranteed by the ECHR and the UN Convention on the Rights of the Child

entails the power to formulate the injunctions on what to do and what not to do in this respect, provided that he respects their discretionary power.

The claimants request an injunction covering the obligations to reduce GHG emissions originating on Belgian territory by 2025, 2030 and 2050. More particularly, the request is to order the defendants to take or have taken the necessary measures to reduce the net emissions originating on Belgian territory:

- by 48% (at least 42%) compared to 1990 by 2025
- by 65% (at least 55%) compared to 1990 by 2030
- with zero net emissions reached in 2050.

18. The claimants establish why such injunctions are compatible with the principle of the separation of powers. They motivate the desired changes to the injunctions requested in the 2015 citation in light of the best available state of science and diplomatic consensus, *inter alia* expressed by the defendants themselves. In particular, they demonstrate that European climate policy is no obstacle to a Belgian climate policy more ambitious than the European one, a policy which the EU itself has admitted to be too little ambitious with regard to the current targets for 2020 and 2030. Several EU Member States, including Germany, Denmark, Sweden and the United Kingdom, have for years pursued national climate policies going beyond the EU targets, in both ETS and non-ETS sectors, while maintaining their economic performance. Denmark has just adopted a target of reducing GHG emissions by 70% compared to 1990 by 2030.

19. Given the sustained inertia, the persistent unwillingness of the defendants and the severity and urgency of the threat, the request for injunctions is supplemented by a reasoned request for penalty payments.

Annex 99.ii

VZW Klimaatzaak v. Kingdom of Belgium & Others

Filing Date: 2014

Status: Pending

Case Categories: Suits against governments > Human Rights > Other
Suits against governments > GHG emissions reduction and trading > Other

Jurisdictions: Belgium > Brussels > Court of First Instance

Principal Laws: Belgium > Article 1382 of the Civil Code
European Convention on Human Rights
International Human Rights Law

Summary:
Similar to the Urgenda case in the Netherlands, the Klimaatzaak -- "climate case" -- was brought by an organization of concerned citizens, and 58,000 citizen co-plaintiffs, arguing that Belgian law requires the Belgian government's approach to reducing greenhouse gas emissions to be more aggressive. The suit named the Belgian State, the Walloon Region, the Flemish Region, and the Brussels-Capital Region as defendants. Specifically, plaintiffs called for reductions of 40% below 1990 levels by 2020 and 87.5% below 1990 levels by 2050.

From February 2019 through March 2020, the parties submitted their main conclusions and final conclusions. In their main conclusions, the plaintiffs seek a Court injunction directing the government to reduce emissions 42 to 48% in 2025 and at least 55 to 65% in 2030. Oral arguments were heard from March 16 to 26, 2021.

On June 17, 2021, the Brussels Court of First Instance held that the Belgium government breached its duty of care by failing to take necessary measures to prevent the harmful effects of climate change, but declined to set specific reduction targets on separa powers grounds.

The Court first analyzed whether the claim was admissible, and, in doing so, whether the plaintiffs established that the proceedings would provide a benefit to them. Article 17 of the Judicial Code excludes actions brought in the general interest that only indirectly benefit the plaintiff. The Court found that both the 58,000 co-plaintiffs and the Klimaatzaak organization have a personal interest in the action. The citizen co-plaintiffs have a direct, personal interest because they seek to hold Belgian authorities responsible for the climate consequences on their daily lives, and the fact that other Belgian citizens may also suffer damages does not transform their interest into a general one. The Klimaatzaak organization has a direct, personal interest in part because environmental organizations have a privileged status to sue to defend the environmental from harm.

The Court found the federal state and the three regions jointly and individually in breach of their duty of care for failing to enact good climate governance. The Court found that despite being aware of the certain risk of dangerous climate change to the country's population, the authorities failed to take necessary action, meaning that they failed to act with prudence and diligence under Article 1382 of the Civil Code. Further, by failing to take sufficient climate action to protect the life and privacy of the plaintiffs, the defendants were in breach of their obligations under Articles 2 and 8 of the European Convention on Human Rights.

However, the Court declined to issue an injunction ordering the government to set the specific emission reduction targets requested by the plaintiffs. The Court found that the separation of powers doctrine limited the Court's ability to set such targets, and doing so would contravene legislative or administrative authority. Neither European nor international law required the specific reduction targets requested by the plaintiffs, and that the scientific report that they relied on, while scientifically meritorious, was not legally binding. The specific targets, therefore, were a matter for the legislative and executive bodies to decide.

On November 17, 2021, Klimaatzaak appealed the judgment of the Brussels Court of First Instance. The appeal is primarily aimed at the Tribunal's refusal to set specific binding targets related to the reduction of greenhouse gas emissions over time. Klimaatzaak notably argues that the Brussels Court of First Instance has confused two distinct sources of liability in its analysis of Article 1382 of the Belgian Civil Code in that it confined itself to taking as a reference only the emission reduction targets laid down by rules of positive

international, European and Belgian law, and refrained from analyzing the authorities' conduct in the light of their knowledge of the danger and of what needed to be done to help prevent or limit it. Klimaatzaak also asks the Court of Appeal to repeal and correct what they argue are factual or legal errors in the judgment of June 17, 2021. The defending Governments are expected to reply to this petition and the Brussels Court of Appeal will review the factual and the legal components of the case in the course of the appeal procedure.

After a written round of conclusions that will take sixteen months, the case was heard from September 14 to October 6, 2023.

The Court of Appeal of Brussels handed down its decision on November 30, 2023. The Court confirmed the finding of breaches established at first instance (except in the case of the Walloon Region), but in addition, ordered the condemned authorities to reduce their GHG emissions. Unlike the judge at first instance, the Court therefore considers that using its power of injunction against public authorities does not necessarily infringe the principle of separation of powers, provided that the judge does not take the place of the authorities in choosing the means to remedy violations. Competent Belgian public authorities (the Federal State, Flemish Region and the Brussels-Capital Region) have been ordered to reduce their GHG emissions of 55% compared to the 1990 level by 2030. The grounds of this decision are based on the breach of human rights (articles 2 and 8 of the ECHR) and civil liability rules (articles 1382 and 1383 of the (Former) Civil Code).

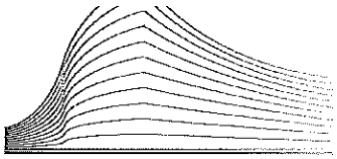
However, the Court reformed the first instance judgment towards the Walloon Region by establishing that this authority is already playing its role in the fight against climate change. Therefore, the Court observes that there is no breach of human rights or civil liability rules on the part of the Walloon Region. The Court suspended its ruling on the question of the penalty payment and the production of the GHG emissions reports, depending on the official figures to be produced for the period 2020-2024 by the convicted authorities. The parties have 3 months to lodge a final recourse with the Court of Cassation.

At Issue: Compel federal and regional governments to reduce greenhouse gas emissions

Case Documents:

FILING DATE	TYPE	FILE	SUMMARY
12/01/2014	Summons	Download	In French
12/01/2014	Summons	Download	In Dutch
02/01/2019	Not Available	Download	Main Conclusions of the Brussels-Capital Regional Government (in French)
02/01/2019	Not Available	Download	Main Conclusions of the Walloon Regional Government (in French)
06/28/2019	Not Available	Download	Main Conclusions of the plaintiffs (in French)
12/16/2019	Not Available	Download	Final synthesis conclusions of the plaintiffs (in French)
12/16/2019	Not Available	Download	Unofficial English summary of plaintiff's arguments
03/16/2020	Not Available	Download	Final synthesis conclusions of the Brussels-Capital Regional Government (in French)
03/16/2020	Not Available	Download	Final synthesis conclusions of the Walloon Regional Government (in French)
06/17/2021	Judgment	Download	Brussels Court of First Instance Judgment (in French)
06/17/2021	Judgment	Download	Brussels Court of First Instance Judgment (unofficial English translation by the Climate Litigation Network using DeepL Translate)
11/17/2021	Petition	Download	Appeal (in French)
11/17/2021	Appeal	Download	Appeal (unofficial translation in English)
11/30/2023	Judgment	Download	Court of Appeal decision (in Dutch)
11/30/2023	Judgment	Download	Court of Appeal decision (in French)
11/30/2023	Judgment	Download	Court of Appeal decision (Unofficial English Translation)

Annex 99.iii



directory number	shipping		
2021/	issued to the € BUR	issued to the € BUR	issued to the € BUR
date of pronouncement 17/06/2021			
rò!e number 2015/4585/A			

D not to present to the inspector

JUG-JGC

N° 167

French-speaking Court of First Instance of Brussels, Civil Section

Judgement

4th chamber

civil cases

presented [e
do not record

Final judgement Contradictory
Public authorities' responsibility - Environment
4 Annexes : Annex A, Annex B, Annex C and Annex D

IN CONNECTION WITH:

ASBL Klimaatzaak, whose registered office is located at Rue de Fiennes 77, 1070 Brussels, registered with the ECB under number 0567.926.684;
And all the persons mentioned in Annex A (8,422 persons); all of whom have elected domicile in this case at the Equal-Partners office, Piace Flagey, 18, 1050 Brussels;

Applicants ;

Represented by Eric GILLET, Carole BILLIET, Luc DEPRÉ, Audrey BAEYENS and Linli Pan-Van de MEULEBROEKE, lawyers, whose office is located at Piace Flagey, 18, 1050 Brussels, and Roger H. J. COX, lawyer, whose office is located at Sint Pieterskade 26B, 6212 AD Maastricht, The Netherlands,
E-mails: eric.gillet@equal-partners.eu; luc.depre@equal-partners.eu; audrey.baeyens@equal partners.eu

AGAINST:

1. **The BELGIAN STATE,** represented by its Government, under the authority of the Minister of Energy, Environment and Sustainable Development, whose offices are located at 1060 BRUSSELS, avenue de la Toison d'Or, 87, bte 1;

First defendant ;

With Nathalie VAN DAMME, Nicolas CELIS, Xheni ZENELI and Thomas MERGNY, lawyers, whose offices are located at 4020 LIEGE 2, Piace des Nations unies 7, to whose offices an address for service is given for the purposes of the present proceedings, and Guy BLOCK and Kris WAUTERS, lawyers, whose offices are located at 1050 Chaussée de La Hulpe 187;
E-mails: n.vandamme@elegis.be; b.decocqueau@elegis.be

2. **The WALLONNE REGION,** represented by its Government, pursued by the Minister for Climate, Energy and Mobility, whose offices are located at 5000 NAMUR, rue d'Harscamp, 22;

Second defendant ;

Represented by Pierre MOERYNCK, Aurélie VANDENBERGHE, Julien LAURENT and Charlotte MATHIEU, lawyers, whose office is established in 1040 BRUSSELS, avenue de Tervueren, 34/27;
E-mail: pm@moerynck.be;

3. **The FLEMISH REGION,** represented by the Flemish Government in the person of the Flemish Minister for the Environment, Spatial Planning, Nature and Agriculture, whose offices are located at Boulevard du Roi Albert II, 20 bte 1, 1000 BRUSSELS;

Third defendant ;

Represented by Maltres Guillaume VYNCKE and Marie-Louise RICKER loco Me Steve RONSE, lawyers, whose office is established at 8500 COURTRAI, Beneluxpark, 27B,
E-mail: sronse@publius.be; jurgen.vanpraet@prator.be;

4. **The BRUSSELS-CAPITAL REGION,** represented by its Government, under the authority of the Minister of the Government of the Brussels-Capital Region, responsible for Climate Transition, Environment, Energy and Participatory Democracy, whose office is located at Boulevard Saint-Lazare, 10 (11th floor), 1210 BRUSSELS:

Fourth defendant ;

Represented by Maltres Ivan-Serge BROUHNS, Guillaume POSSOZ and Vladimir THUNIS, lawyers, whose office is established in 1170 BRUSSELS, Chaussée de la Hulpe, 185;
E-mail: ivanserge.brouhns@sphere.be;

IN THE PRESENCE OF :

1. **BORDEAL AULN** and all **81 OTHER TREES** mentioned in the application for voluntary action (Annex C);

First responders;

With Hendrik SCHOUKENS and Gwijde VERMEIRE, lawyers, whose offices are respectively located at 1750 LENNIK, Dorp 12 b2 and 9000 GHENT, Voskenslaan 301; not appearing;
E-mails: hendrikschoukens@hotmail.com; vermeire.gwijde@telenet.be;

2. **Mrs. Inge DE VRIENDT,** residing at 9300 AALST, Wijngaardstraat, 55, and all the persons mentioned in Annex B (50,164 persons); all of whom have elected domicile in this case at the Equal-Partners office, Piace Flagey, 18, 1050 Brussels;

Second intervening parties;

Represented by Carole BILLIET, Eric GILLET, Audrey BAEYEN and Luc DEPRE, Unii Pan-Van de MEULEBROEKE , lawyers, whose office is located at 1050 BRUSSELS, Piace Flagey, 18, and Roger H.J.COX, lawyer, whose office is located at Sint Pierterskade 26B, 6212 AD MAASTRICHT, the NETHERLANDS;
E-mails ;eric.gillet@equal-partners.eu;luc.depre@equal-partners.eu; audrey.baeyens@equal-partners.eu;

** ** **

In this case, held under advisement on March 26, 2021, the Tribunal pronounces the following

judgment: Having regard to the documents in the proceedings and in particular :

the summons to institute proceedings served on 2 June 2015;
the judgment of the French-speaking Court of First Instance of Brussels of the 1st chamber of 25 September 2015;
the judgment of the French and Dutch-speaking district courts of Brussels, delivered on 8 February 2016;
the judgement C.16.0185.F of the Belgian Court of Cassation of 20 April 2018;
the joint application for the setting of procedural time limits and the setting of oral hearings based on Article 747 of the Judicial Code of 29 August 2018;
the order setting out the timetable for the preparation of the case for January 2019;
the application for voluntary intervention of Mr Hendrik SCHOUKENS and Mr Gwijde VERMEIRE of 3 May 2019 on behalf of the trees;

- the application for voluntary intervention of 3 July 2019 of Mrs. Inge DE VRIENDT et al;
- summary submissions for the plaintiffs filed at the registry on 16 December 2019;
- the summary conclusions for the Walloon Region filed at the Registry on 13 March 2020; the summary conclusions for the Brussels-Capital Region filed at the Registry on 16 March 2020; the summary conclusions for the Flemish Region filed at the Registry on 16 March 2020;
- the summary conclusions for the State beige filed at the registry on 16 March 2020;
- files of exhibits and notes filed before and during the hearings;

Heard counsel for the parties in their submissions at the public hearings on 16, 17, 18, 19, 22, 23, 24, 25 and 26 March 2021;

******

TABLE OF CONTENTS

I. FACTUAL BACKGROUND OF THE DISPUTE BEFORE THE COURT6
II. PURPOSE OF THE APPLICATION42
III. DISCUSSION45
A. REGARDING THE JURISDICTIONARY POWERS OF THE COURT 45
B. REGARDING THE RECEIPT OF THE MAIN APPLICATION AND THE APPLICATIONS IN PROGRESS !VOLUNTARY INTERVENTION 45
I. On the direct and personal interest of the applicant SMEs48
1.1. On the personal interest in acting of natural persons48
1.2. On the personal and direct interest of Klimaatzaak51
2. On the born and actual interest and the action *adfi1t11r11111* of the plaintiffs55
3. On the standing of the trees listed in the deed filed on 3 May 201956
C. AS TO THE BASIS OF THE CLAIM 56
I. Applicable principles57
1.1. On the liability of public authorities in beige law57
1.2. On the scope of Articles 2 and 8 ECHR59
1.3. On the application of Articles 6 and 24 of the Convention on the Rights of the Child62
2. Application in this case63
2.1. Background63
2.2. Three findings65
2.2.1. Beige commitments and results65
a) Period 2008-201265
b) Period 2013-202066
e) Period 2020-2030 and 205072
2.2.2. Climate governance and beige federalism73
2.2.3. EU Monitoring79
2.3. Conclusion79
2.3.1. Finding of a breach of the general duty of care79
2.3.2. Separation of powers and limits to the tribune's power of injunction 80
3. Expenses83
IV. DECISION83

I. FACTUAL BACKGROUND OF THE DISPUTE SUBMITTED TO THE COURT

On 6 December 1988, the United Nations General Assembly adopted Resolution 43/53 on the protection of global climate for present and future generations. In this resolution, for the first time, the United Nations recognised climate change as a global problem.
This is a "*common concern of mankind*".

At the same time, the World Meteorological Organisation (WMO) and the United Nations Environment Programme (hereinafter "UNEP") established the Intergovernmental Panel on Climate Change (IPCC), an intergovernmental and scientific body, to review and assess the latest scientific, technical and socio-economic information
published around the world that are relevant to the understanding of climate change, with a view to to be made available to policy makers.

Since 1990, the IPCC has issued five assessment reports, often referred to by the following acronyms:

1. FAR *(First Assessment Report)* for the first report (1990)
2. SAR *(Second Assessment Report)* for the second report (1995)
3. TAR *(Third Assessment Report)* for the third report (2001)
4. AR4 *(4th Assessment Report)* for the fourth report (2007)
5. AR5 *(5th Assessment Report)* for the fifth report (2014)

In addition to these reports, the IPCC also published special reports in 2011, 2018 and 20191.

1990-1992

In 1990, the IPCC's first assessment report, without making any categorical statements, nevertheless stated that "*emissions from human activities are significantly increasing the concentration of the greenhouse gases carbon dioxide, methane, chlorofluorocarbons (CFCs) and nitrous oxide in the atmosphere*".

On 9 May 1992, the United Nations Framework Convention on Climate Change (hereafter, the 'UNFCCC') was adopted in New York. To date, it has been signed by 196 states and one regional organisation, the European Union. It entered into force on 21 March 1994. Belgium signed the UNFCCC on 4 June 1992 and ratified it on 16 January 1996. The European Union signed on 13 June 1992 and approved on 15 December 1993.

The objective of the Convention is to prevent dangerous human-induced climate change.

Article 2 of the UNFCCC states that:

> "The *ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to stabilise, in accordance with the relevant provisions*

[1] See below,

Canventian, / greenhouse gas concentrations in the atmosphere to a level that would prevent dangerous anthropogenic interference with the climate system".

Article 3 of the UNFCCC sets out the guiding principles for the measures to be taken by each Party to achieve the objective of the Convention, including

the principle of common but differentiated responsibilities, taking into account in particular the respective capacities of the Parties, and which requires developed countries, including Belgium, to

[2] "*the vanguard of the fight against climate change and its adverse effects*";

the precautionary principle, according to which lack of full scientific certainty shall not be used as a reason for postponing preventive measures3.

The UNFCCC also sets out the commitments of the Parties, distinguishing between the obligations of the States listed in Annexes I and II and those of the States not listed there.

Annex I to the Convention groups together the "*developed countries*", i.e. the industrialised countries that were members of the OECD in 1992, as well as countries whose economies are in transition towards a market economy, notably Russia and several Eastern European countries. 43 countries are included in this annex, including Belgium, out of the 196 States Parties to the UNFCCC.

Annex II includes only OECD members, including Belgium, i.e. 24 of the 43 so-called
This is a "*developed country*" approach.

The principle of common but differentiated responsibilities is based on this distinction. Indeed, the obligations under the UNFCCC - and then under subsequent treaties - are more binding on these developed countries than on non-Annex countries.

Belgium's obligations under the UNFCCC can therefore be summarised as follows:

a. The obligations common to all parties, namely :

establish, periodically update, publish and make available to the COP national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases (hereinafter "GHGs") (Art. 4.la);

establish, publish and regularly update national programmes and, where appropriate (Art. 4.lc); encourage and support through cooperation the development, application and diffusion (...) of technologies, practices and processes (Art. 4.lc);

encourage the sound management and conservation and, where appropriate, enhancement of sinks and reservoirs of all GHGs (Art. 4.ld);

prepare, in cooperation, for adaptation to the impact of climate change (art. 4.1);

take into account, as far as possible, climate change considerations in its social, economic and environmental policies and actions (Art. 4.lf); encourage and support through its cooperation scientific, technological, technical, socio-economic and other research (...) (Art. 4.lh);

2 Article 3.1 of the UNCAC.
3 Article 3.2 of the UNCAC.

encourage and support through its cooperation the exchange of scientific, technological, technical, socio-economic and legal data (...) (art. 4.1h);
encourage and support through its cooperation education, training and public awareness in the field of climate change (art. 4.Ii);

b. Obligations specific to Annex I and II parties (developed countries), namely: to take the lead in combating climate change and its adverse effects, by adopting national policies and taking appropriate measures to mitigate climate change by limiting their anthropogenic GHG emissions and protecting and enhancing their GHG sinks and reservoirs (...) (Art. 4.2a)
submit their policies and measures to the Conference of the Parties every six months This includes the assessment of the GHG emissions of companies and the resulting projections of their GHG emissions with a view to reducing these emissions to 1990 levels (Art. 4.2b);
provide new and additional financial resources to cover the full agreed costs incurred by developing countries as a result of their reporting and communication obligations (Art. 4.3);
to help developing countries cope with the cost of adapting to the effects of climate change climate change (Art. 4.4);
take all practicable measures to encourage, facilitate and finance, as appropriate, the transfer of or access to environmentally sound technologies and know-how to other parties (Art. 4.5).

Finally, Article 7 of the UNFCCC establishes the Conference of the Parties hereafter the "COP" as the supreme body of the Convention. Its role is to monitor the implementation of the UNFCCC, to determine whether the measures taken are sufficient to achieve the ultimate objective of the Convention, namely the prevention of dangerous climate change, and, within its mandate, to take the necessary decisions to promote the effective implementation of the Convention. For decision-making within the COPs, the consensus rule is applied as a priority [4].

1995

The first COP, COP-1, took place in Berlin in 1995. On that occasion, the majority of the States Parties considered that the commitments foreseen for developed countries were not sufficient to achieve the objectives of the UNFCCC. A negotiation process was therefore set up to redefine the commitments of these countries. This process led to the adoption of the Kyoto Protocol in 1997.

Furthermore, in its second report finalised in December 1995, the IPCC has already indicated that, applying the 'most likely value' of climate sensitivity, '*the models result in an increase in global average surface temperature of about 2* -e *between 1990 and 2100*,,s.

1996

In 1996, the European Union acknowledged the 2-c upper limit by stating: "*In view of the serious risks associated with a temperature increase of this magnitude and in particular the rapidity of*

4 Article 15.3 of the UNFCCC.
5 IPCC, 2nd Assessment Report, Synthesis, p.5.

The Council considers that global temperatures should not exceed 2 degrees above pre-industrial levels (...) the Council notes that, according to the [IPCC], significant reductions in greenhouse gas emissions are technically possible and economically feasible. It further notes that there is ample scope for "no-regrets" solutions and that the potential risk justifies going beyond the implementation of "no-regrets" solutions at the level of Annex I Parties "[6].

1997

On 11 December 1997, at the COP-3 meeting in Kyoto, a Protocol was signed and added to the UNFCCC: the Kyoto Protocol. In it, the Annex I countries, including Belgium, committed themselves to reducing their GHG emissions over a period of five years, from 2008 to 2012.

Article 3.1 of the Protocol thus provides that:

> *"The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation* and *reduction commitments inscribed in Annex B* and in *accordance with the provisions of this Article, with a view to reducing their total emissions of such gases by at least* 5% *below 1990 levels in the commitment period 2008 to 2012*.

The Kyoto Protocol also provides for two so-called "flexibility" mechanisms. The first mechanism consists of the purchase and sale of "carbon credits" between developed countries, allowing those who do not use all their quotas to transfer "rights to pollute" to those who, on the contrary, plan to exceed their allocated quotas [7]. The second mechanism, known as "clean development", consists of The second mechanism, known as the "clean development" mechanism, consists of developed countries that have made commitments to reduce their emissions financing emission reduction activities in developing countries in order to obtain "certified emission reductions" in exchange for being able to fulfil part of their own reduction commitments8.

Belgium has been a party to the Kyoto Protocol since 29 April 1998, as has the European Union. However, the Kyoto Protocol only entered into force on 16 February 2005.

On the domestic front, the Kyoto Protocol has been the subject of a law of assent at both federal and regional level9.

---

[6] **European Commission, Press Release 96/188, "*EU Climate Change Strategy - Council Conclusions*", pt.6, p.12, Applicants' Exhibit G.l.**

7 Article 6 of the Protocol. s Article 12 of the Protocol.

9 See the law of 26 September 2001 approving the Kyoto Protocol to the **United** Nations Framework Convention **on Climate Change, and Annexes A and B; the decree of the Brussels-Capital Region of** 19 July 2001 approving the Kyoto Protocol to the United Nations Framework Convention on Climate Change, and Annexes A and B; the decree of the Flemish Region of 22 February 2002 approving the Kyoto Protocol to the United Nations Framework Convention on Climate Change, and Annexes A and B, and the decree of the **Brussels-Capital Region of 22 February 2002 approving the Kyoto Protocol to the Convention.The decree of the** Flemish Region of 22 February 2002 **approving the Kyoto Protocol to the United Nations Framework Convention on Climate Change, and Annexes** A and B, and the decree of the Walloon Region of 21 March 2002 approving the **Kyoto** Protocol **to the United Nations Framework Convention on Climate Change, and Annexes A and B.**

Annex B of the Protocol set the beige target at -8% GHG emissions by 2012 compared to the 1990 base year. Annex B set the same target for the European Union at -8% below 1990 levels by 2012.

2002

The EU has made use of the possibility provided for in Article 4 of the Kyoto Protocol, which allows Parties to jointly meet their reduction targets.

It therefore adopted Decision 2002/358/EC10 , which set an overall GHG reduction target of 8% below 1990 levels for 2012, while the beige target for the period 2008-2012 was reduced to 7.5% of its GHG emissions. This target replaces, for Belgium, the 8% target of the Kyoto Protocol, as stated in article 4.5. of the Protocol. In accordance with Article 4.6. of the Protocol, only if the joint EU target was not reached would Belgium become responsible for its emissions under the Protocol.

On 14 November 2002, a cooperation agreement was concluded between the Federal State, the Flemish Region, the Walloon Region and the Brussels-Capital Region (hereinafter referred to as the "CBR") concerning the establishment, implementation and monitoring of a National Climate Plan, as well as the preparation of reports, within the framework of the UNFCCC and the Kyoto Protocol11 .

This cooperation agreement lays the foundation for beige climate governance through :

- the creation of the National Climate Commission (art. 3) as well as the determination of its attribution, its role, its functioning (art. 6) and the frequency of its meetings (art. 8);
- the obligation to establish, implement and monitor a National Climate Plan (Art. 14).

On 13 October 2003, Directive 2003/87/EC1 [2] of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the European Union was adopted.

Unlike international mechanisms, the European system distinguishes the way GHG emissions are managed according to the sector of activity.

For example, in the sectors mainly targeting large industry, the European Union has created a mechanism for trading GHG emission allowances, known as the "Emission Trading System" or "ETS", by which companies are allocated emission rights (or allowances) that they can trade. The aim of the scheme is to reward the environmental efforts of these companies, which can sell their unused allowances.

---

10 Council Decision 2002/358/EC of 25 April 2002 concerning the approval of the **Kyoto Protocol to the United Nations Framework Convention on Climate Change and** the joint fulfilment of commitments thereunder, *OJ L 130,* 15.5.2002, p. 1-3.

[11] MB 27 June 2003, entered into force 13 November 2003.

12 *O.J.* L. 275, 25 October 2003,

In the sectors not included in this trading system, or "non-ETS" sectors (transport, buildings, agriculture and part of energy and industry), each Member State is given an emissions quota which it cannot exceed.

2004

On 8 March 2004, on the internal piano beige, the Concertation Committee adopted an agreement on burden sharing between the Regions and the federal authorities in the framework of Belgium's obligations under the Kyoto Protocol.

This political agreement stipulated, among other things, that "*the Regions are responsible for depositing emission rights for a quantity equal to the greenhouse gas emissions on their territory during the period 2008-2012 and are granted emission rights up to five times the emissions of the reference year, reduced by 7.5% for the Walloon Region, reduced by 5.2% for the Flemish Region, and increased by 3.475% for the Brussels-Capital Region. In the mid-term decision, the Federal Authority commits to acquire additional emission rights up to 2.46 million emission rights per year for the first commitment period and to take a series of complementary measures whose emission reduction impact during the first commitment period will be at least 4.8 million tonnes CO2-eq*[13]

2005

Following a meeting on 22-23 March 2005, the European Council adopted its conclusions and stated

> *"The European Council recognises that climate change is likely to have major negative global environmental, economic and social impacts. It confirms that, in order to achieve the ultimate objective of the United Nations Framework Convention on Climate Change, the increase in global annual mean surface temperature must not exceed 2°C above pre-industrial levels.*
> (…)
> *The European Council underlines the EU's strong commitment to give new impetus to the international negotiations. To this end, it should:*
> *(...) develop an EU medium and long-term strategy to combat climate change that is consistent with the 2ºC objective. In view of the global emission reductions required, joint efforts will be needed by all countries in the coming decades in view of their common but differentiated responsibilities and respective co-ownership, with all economically more developed countries in particular being called upon to substantially increase their cumulative reduction efforts.*
> *(...) the EU* considers *that, in this respect, reduction profiles in the order of* 15-30% *by 2020 compared to the Kyoto Protocol baseline and beyond, in the spirit of the Council conclusions, should be considered for the group of developed countries*
> *{Environment) "*[14]

[13] Commitment included in the preamble of the cooperation agreement of 19 February 2007, *Monit.b.,* 12 February 2008,
p. 9 I 79 et seq.
[14] Council of the EU, 7619/05, Chapter IV, pp. 15-16.

2007

On 19 February 2007, the federal state and the three regions adopted a new cooperation agreement [15] including :

a system for sharing the burden of Belgium's commitments through the transfer and sale of Kyoto units in the event of GHG emissions being exceeded by any of the regions;
a possibility to carry over Kyoto units to the next commitment period.

In its preamble, the cooperation agreement also recalled that Belgium, as a Contracting Party to the Kyoto Protocol, is committed to using the flexibility mechanisms only as a complement to domestic policies and measures to achieve its GHG emission reduction target.

Also at the beginning of 2007, the IPCC published its Fourth Assessment Report on climate change in which the experts noted, among other things, that :

"The warming of the climate system is unequivocal "[16] ;
"Most of the observed decrease in global average temperature since the mid-twentieth century is most likely due to the observed increase in concentrations of onthropic greenhouse gases;
"Continued greenhouse gas emissions at or above the current rate would cause further warming and lead to many changes in the global climate system over the course of the twentieth century that would most likely be greater than those observed during the twentieth century;
Global warming can only reasonably be limited to between 2°C and 2.4°C if the concentration of GHGs in the atmosphere is stabilised at between 445 and 490 ppm co2-eq19 , which implies, for Annex I countries, a collective reduction in GHG emissions of 25% to 40% below 1990 levels by 202020 ;
"Human-induced global warming and sea level rise would continue for centuries due to the time scales associated with climate processes and feedbacks, even if greenhouse gas concentrations were stabilised

In March 2007, the European Council made a political commitment to set clear and legally binding targets, including :

---

[15] Cooperation Agreement between the Federal Authority, the Flemish Region, the Walloon Region and the **Brussels Capital** Region **on the implementation of certain provisions of the Kyoto Protocol, concluded in Brussels** on 19 February 2007, *Monit.b.,* 12 February 2008, p. 9179 et seq.
16 IPCC, Fourth Assessment Report, Summary for Policymakers, p.2, Exhibit B. I o **of the applicants.**
17 *Ibid,* p.5, Claimants' Exhibit B.1O. 18
Ibid, p.7, Claimants' Exhibit B.10.
19 IPCC, 4th Report, Working Group III, p. 229, Claimant's Exhibit B. 8. The unit [11part]**s is used per million" (ppm) to indicate the concentration of greenhouse gases in the atmosphere. The designation** [11ppmC0 2-] **eq11 is used to indicate the concentration of all** greenhouse **gases together,** with **the concentration** of non-CO
20 *Ibid,* p.776, Claimants' Exhibit B.8. 21
Ibid, p.16.

reduce GHG emissions by at least 20% by 2020 compared to 1990, it being understood that the contribution of each member country will be determined taking into account its characteristics;
to increase the share of renewable energy in the EU's energy consumption to 20% by 2020.

This political decision will be the starting point for the development of a set of European legislation called the "Energy and Climate Package", adopted in 2009.

Meanwhile, at the end of its 4th session in Vienna in August 2007, the "*Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol"* issued a report stating inter alia that

"The Task Force noted the usefulness of the ranges mentioned in the fourth report assessment (IPCC). *Recognising the findings of the Troika's contribution on impacts, vulnerability and adaptation, (...) /Annex I Parties should, by 2020, collectively reduce their emissions to between 25% and 40% below 1990 levels by*
The Parties agree that the means that may be available to them to achieve these targets. (...}if Annex I Parties were to achieve these reduction targets, they would make a significant contribution to the global efforts required to achieve the ultimate objective of the Convention as set out in its Article 2.

At COP-13 in December 2007 in Bali, the UNFCCC Parties adopted the Bali Action Plan, whose preamble explicitly recognises the need for deep cuts in GHG emissions to meet the ultimate objective of the UNFCCC and stresses the urgency with which this should be done, with reference to the findings of the IPCC's 4th Assessment Report "*that warming of the climate system is unquestionable and that any delay in reducing emissions is likely to lead to a significant increase in greenhouse gas emissions.*
emissions significantly reduces the possibilities of achieving the stabilisation of emissions at lower levels
The Bali Action Plan also refers to the tables in the 4th IPCC report which, in order to maintain a GHG concentration of 450 ppm CO' eq. in the atmosphere, prescribes a collective emission reduction of 25-40% by 2020.

In 2008, the National Climate Commission (hereinafter the "NCC") adopted a first draft of the National Climate Plan for Belgium. In its opinion of 19 February 2009, however, the Minaraad24 underlined the limited and unclear nature of the National Climate Plan and insisted on the need for a better coordinated and concerted strategy between the federal and federated entities25 .

2009

In March 2009, the UN Human Rights Council recognised climate change as a threat to human rights, "*noting that /the effects of climate change have a range of implications, both direct and indirect, for the effective enjoyment of human rights".*

[22] Report, p. 5, no. 19, Claimants' Exhibit H.6.
[23] Decision 1/CP13, p.3, Claimants' Exhibit H.5.
[24] This is the Flemish Council for the Environment and Nature.
[25] Claimants' Exhibit F.l l.

human rights, including the right to life, the right to adequate food, the right to the enjoyment of the highest attainable standard of health, the right to adequate housing, the right to self-determination and obligations in relation to human rights concerning access to safe drinking water and sanitation, and recalling that in no case may a people be deprived of its own means of subsistence "[26]

On 23 April 2009, the European Union introduced a package of legislation commonly referred to as the 'Climate and Energy Package' with the objective of reducing GHG emissions by 20% compared to 1990 by 2020, or 14% compared to 2005. To this end, it has adopted :

Directive 2009/29/EC27 , which sets the European Union's effort for the ETS sector at a 21% reduction of its GHG emissions by 2020 compared to 2005. In contrast to the
Directive 2009/29/EC sets a single EU-wide cap on GHG emissions from the relevant sectors in order to increase the predictability and transparency of the system. There are therefore no longer any National Allocation Plans per Member State for the period 2013-2020 in the ETS sectors.

Decision 406/2009/EC28 , which sets a GHG emissions reduction target for the non-ETS sector of 10% below 2005 levels by 2020 for the European Union as a whole. This European target is broken down into binding targets for each Member State. The national targets are differentiated according to Gross Domestic Product (GDP) per capita. Belgium's target is a 15% reduction in GHG emissions in the non-ETS sector by 2020 compared to 2005.

Directive 2009/28/EC29 , commonly referred to as the "Renewable Energy Directive", which aims to increase the share of renewable energy in the EU's gross final energy consumption to 20% by 2020. To achieve this objective, binding targets are imposed on the Member States. For Belgium, the share of renewable energy in the national energy consumption must reach 13% in 2020.

Directive 2009/31/EC30 , which provides a framework for the storage of CO_2 underground as a transitional technology that contributes to climate change mitigation.

---

[26] Resolution 10/4 of 25 March 2009 "Human rights and climate change", Exhibit H.27 of the **applicants.**
27 Directive 2009/29/C of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC **so as to improve and extend the greenhouse gas emission allowance trading system of the Community.**
Member States to reduce their greenhouse gas emissions in order to meet their EU commitments. **Community in reducing these emissions until 2020.**
29Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and repealing Directives 2001/77/EC and 2003/30/EC.
30 Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on geological storage and amending Council Directive 85/337/EEC, Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC and 2008/1/EC and Regulation (EC) No 1013/2006 of the European Parliament and of the Council.

On the internal front, in its report of 20 May 2009 on federal climate policy, transmitted to In the House of Representatives in June 2009, the Court of Auditors pointed out that :

The EU's Kyoto Protocol states that "*Belgium can only emit an average of 134.8 million tonnes of* C02 *equivalent per year during the Kyoto period.*

The beige burden sharing agreement shares the Kyoto efforts between the regions and the federal state. The federal commitment in the agreement is twofold. The federal authorities want to reduce emissions by 24 million tonnes (on average 4.8 million tonnes per year). At the same time, they want to buy 12.2 Mtonnes of emission rights (on average 2.44 Mtonnes per year).

This audit examined the planning and evaluation of federal climate policy and assessed the extent to which the sixteen most important federal measures have been implemented and whether their effects are known. Various ministers and public administrations are involved in this audit. The conclusions and recommendations of the Court of Audit are as follows.

There is no federal environmental plan. There is no precise description of the measures and their costs. C02 *reduction targets are not justified or are missing. Reporting is insufficient and no evaluation of the federal climate policy has been carried out so far. Information about some measures is partial, but there is no summary of the costs, level of implementation and effects of the federal climate policy.*

This makes it difficult {1} to judge whether the federal authorities are properly executing their part of the burden-sharing agreement; (2) to correct the policy if necessary; and {3} to inform Parliament in a transparent manner.

(...)

A review of policy shows that the government is not currently in a position to meet the reduction commitment made in the Beige burden sharing agreement. The Court of Auditors found the following shortcomings:

(...) (follows a list of 11 breachesJ

The purchase of emission rights via the flexibility mechanisms is not optimal: there is no link between the investment in the flexibility mechanisms and the national reduction policy, nor is there any consistency between the investment in these mechanisms and the reduction in greenhouse gas emissions planned by the Federal Office of the Environment in May 2008.

The Court of Auditors therefore recommends critically evaluating the whole package of measures in terms of its internal coherence, including the role of flexibility mechanisms in the climate policy and, if necessary, correcting it "[31].

In its Walloon regional policy declaration of 16 July 2009, the Walloon Parliament stated that:

"In view of the pessimistic outlook of the scientific community, including the work of the

According to the Intergovernmental Panel on Climate Change (IPCC) and the most recent studies, the EU's targets for reducing greenhouse gas emissions by 20% by 2020 (or 30% if there is an international agreement) compared to 1990 levels are laudable but insufficient. Europe must do more, and so must Belgium and Finland! In case of an international agreement, the government will ask Belgium to defend the European objective of 40%. At least three quarters of this target should be achieved by measures taken within the EU. In this context, the Government commits itself to take an active part in the Copenhagen climate negotiations, in particular with regard to North-South financing and the fight against deforestation, in order to stay below the limit of a temperature increase of 2°C. *The*

[31] See extract from the report, Exhibit C.4 of the applicants.

The Government will ensure that shipping and international aviation are involved in GHG reduction efforts.
the Dutch Government is committed to pursuing, within the dynamics initiated by the Pian Air-Climat and the Pian for sustainable energy management, a strategy that will enable us to reduce our emissions by 30% by 2020 and by 80 to 95% by 2050. This must be inserted, in a concerted manner, in a beige and European approach "[32]

At the federal level, the House of Representatives passed a resolution on 3 December 2009 in the *run-up* to the COP in Copenhagen, in which it called on the federal government to support internationally and at the European level that, among other things

the targets to be adopted must take into account the recommendations of the 4th IPCC report, namely the collective reduction by industrialised countries of their GHGs by 25-40% by 2020 and 80% by 2050;

the European Union can take the decision to move from 20% to 30% if the efforts of other developed countries are comparable and the contributions of developing countries are adequate

On 9 December 2009, the Flemish Parliament adopted a resolution stating that "*the precautionary principle implies that for the group of developed countries reduction targets of 25-40% are needed in 2020 compared to 1990 and at least 80-95% in 2050 compared to 1990*"[34].

This resolution was based, among other things, on a Minaraad opinion of 26 November 2009, which called for a reduction in GHG emissions to a level that would limit the temperature increase to 2°C, which implies an overall reduction of 40% compared to 1990 levels by 2020 and a reduction of 80% to 95% by 205035.

In December 2009, at COP-15, the States Parties signed the Copenhagen Accord, which confirms that "*in order to achieve the ultimate objective of the Convention to stabilise greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system, we intend, taking into account the scientific view that the global temperature increase should be limited to* 2°C, *to strengthen our long-term cooperative action to address climate change, on the basis of equity and sustainable development*".[36]

This agreement refers to the recommendations of the 4th IPCC assessment report updated in 2009 specifically for the COP in Copenhagen. The update of this report states that
"recent observations show that societies and ecosystems are extremely vulnerable to even modest climate change {...}. temperatures above 2°C *will be difficult to*

---

[32] Pari. Wallon, extr. sess. 2009, 8/1, p.60, plaintiffs' exhibit F.7.
[33] *Parl. Doc.,* House, sess 2009-2010, No. 52- 2263/l, pp.4-5, plaintiffs' Exhibit F.8.
[34] Flemish *Parl.* Pari. 2009-10, 282/3, Resolution of 9 December 2009 of the Flemish Parliament on the **new Copenhagen climate convention, uncontested free translation, Exhibit F.9 of the applications.**
[35] **Advies van de Milieu- en Natuurraad van Vlaanderen over de Klimaattop in Kopenhagen, *Doc.parl.* Parliament** Flemish, 2009-10, 61/l, Claimants' Exhibit C.5. 36
Decision l/CP.15, p. 5, Claimants' Exhibit H.7.

This is a major challenge for contemporary societies and has the potential to cause major socio-environmental disruptions in the rest of the world in this century and beyond "[37].

In light of the IPCC findings, Member States participating in COP-15 therefore suggested that "*the implementation of this agreement should be subject to further development by 2015, particularly in the light of the ultimate objective of the Convention. This would include consideration of strengthening the long-term objective taking into account various elements of scientific work, in particular with regard to a temperature increase of 1.5°C.* "[38]

2010

In 2010, at COP-16, the Member States adopted the Cancun Agreements [39] in which, referring to the scientific findings of the IPCC, the Bali Action Plan and the Copenhagen Accord, the Parties to the COP agreed to say

> that climate change has an impact on the effective enjoyment of human rights, particularly on the most vulnerable groups;
>
> that they recognise that deep GHG reductions are needed, as documented in the IPCC 4th Assessment Report, to keep warming below 2°C and that parties to the COP must take urgent action to achieve this long-term goal;
>
> that they recognise the need to consider strengthening the long-term global goal, including by considering a maximum warming of 1.S°C as the objective of Article 2 of the Convention.

By a law of 30 July 2010, the beige state inserted the following provision into the law of 5 May 1997 on the coordination of federal sustainable development policy:

> *"Art. 2/1. The King shall determine, after parliamentary debate and with organised civil society, the strategic vision*
>
> *The federal long-term vision for sustainable development, hereinafter referred to as "the long-term vision", by a decree adopted by the Council of Ministers.*
>
> *(...) This long-term vision is aimed in particular at meeting Belgium's commitments at international and European level (...)*".

2011

In 2011, at COP-17 in Durban, UNFCCC member states agreed to:

> recognise that climate change is "*an immediate and potentially irreversible threat to human societies and the planet*" and that all parties "*must therefore address it as a matter of urgency*
>
> note with "*deep concern*" that there is a "*significant gap between, on the one hand, /the reductions promised by each country for 2020 and, on the other hand, what is really needed at the global level in terms of emission reductions to maintain global warming*
>
> *"This is the first* time that a company has gone *below 2°C or 1.5°C above pre-industrial levels*[40] *- and the second time that a company has gone below 2°C or 1.5°C above pre-industrial levels.*

37 IPCC 2009, AR4 SYR, p. 6, Exhibit B. IO of the applicants, free translation not contested.
38 Decision l/CP.15, p. 7, Claimants' Exhibit H.7.
39 Decision l/CP.16, pp.2-3, Claimants' Exhibit H.9.
40 Decision l/CP.17, p. 2, Claimants' Exhibit H.12.

Also in 2011, the European Commission produced two discussion papers that sought to develop a perspective for climate policy up to 2050. The first was entitled "*Roadmap to a competitive low-carbon economy by 2050*"[41], the other was entitled "*Energy Roadmap to 2050*"[42]. The first document set out the milestones for the reduction of emissions from the EU itself ('domestic emissions'): in 2050 a reduction of 80% compared to 1990 would be achieved through a reduction of 40% in 2030 and 60% in 2040.

In June 2011, the European Commission indicated in its 2011 report for Belgium that, despite the influence of the economic crisis, the recent trend in greenhouse gas emissions was not towards the national Europe 2020 target {15% reduction from 2005 levels) and that the National Reduction Plan did not provide a quantitative assessment of existing or proposed emission reduction measures to achieve the *2020 targets*[43] .

In December 2011, the institutional agreement on the 6th state reform was reached, in which three commitments were made regarding climate policy in Belgium:

optimising the CNC's r61e;
the establishment of a climate accountability mechanism;
the introduction of a right of substitution for the federal state in the event of non-compliance by a region or a community with the international obligations arising from the UNCAC.

These commitments will be formalised in January 201444-.

2012

In a recommendation to Belgium of 30 May 2012, the Council of the European Union noted that:

"Although emissions have decreased by 1% up to 2010 (compared to 2005), they are expected to increase again in the coming years.
*increase by 0.*3% *by 2020 (again compared to 2005) according to the latest Belgian projections, which represents a negative deviation of 15.3 percentage points from the target.*
(...) although Belgium is on track to meet the objective of increasing the share of renewable energy in its economy, the prospects for achieving the 15% greenhouse gas reduction target {GHG} in the sectors not covered by the ETS are

---

[41] **Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Roadmap to a competitive low-carbon economy by** 2050, COM (2011) 112 final, Brussels, 8 March 2011, 15 p., applicants' exhibit G.12.

[42] **Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee** and the Committee of the Regions, Energy Road Map to 2050, COM (2011) 885 final, Brussels, 15 December 2011, 24 p., applicants' Exhibit G.13.

[43] **Council Recommendation on the National Reform Programme of Belgium for 2011 and** Opinion of the Council on the Stability Programme of Belgium, 2011-2014, SEC(201 l) 802 final, p. 17, available at https://ec.curopa.eu/info/sites/default/files/file import/swp belgium en 0.pdf

[44] **See below.**

practically non-existent. Belgium has not taken sufficient measures or policy initiatives in 2011 to remedy this *situation "*[45].

The Council therefore invited Belgium to "*take measures to address the lack of progress in achieving the target of reducing greenhouse gas emissions from activities not covered by the EU ETS, in particular by ensuring a significant contribution from transport to the achievement of* this *target "*[46].

In December 2012, at COP-18 in Doha, an expert dialogue process was launched in preparation for the Paris Climate Summit (or 'COP-21') in 2015, called the Structured Expert Dialogue, or 'SED'.

The objective of the SED was, inter alia, to examine whether, in view of the ultimate objective of the Convention, i.e. the prevention of dangerous climate change, the goal of limiting global warming to less than 2°C was sufficient, especially in the light of the discussions on the need to limit global warming to 1.5°C that have already taken place in Copenhagen (2009) and Cancun (2010).

At the end of the COP in Doha on 8 December 2012, the Parties to the Kyoto Protocol adopted an amendment to the Protocol that sets a second commitment period from 2013 to 2020 to achieve a total reduction of GHG emissions from Annex I Parties of 18% below 1990 levels by 202047 .

This amendment also sets Belgium's target for 2020 to reduce its GHG emissions by 20% compared to 1990.

The federal state and the three regions gave their assent to the amendment[48] and Belgium signed it on 14 November 2017. The European Union signed it on 21 December 201749 . However, the amendment did not enter into force until 30 December 2020, failing to reach the required number of ratifications earlier.

---

[45] **Council Recommendation on Belgium's National Reform Programme for 2012 and** Council Opinion on Belgium's Stability Programme, 2012-2015, COM(2012) 314 fitial, pp.5 and 8, Applicants' Exhibit G.14.

[46] **Council Recommendation on the National Reform Programme of Belgium for 2012 and** Opinion of the Council on the Stability Programme of Belgium for the period 2012-2015, COM(2012) 314 final, p.7, Applicants' Exhibit G.14.

[47] Decision 1/CMP.8, Claimants' Exhibit H.16.

[48] Law of 13 June 2014 assenting to the amendment to the Kyoto Protocol, *Monit.b.,* 30 August 2018; Decree of assent of the Flemish Parliament of 14 March 2014, *Monil. b,* 16 May 2014, Decree of the Walloon Region of 12 March 2015 *Mani/. b.,* 24 March 2015), Ordinance of the Brussels Capital Region of 23 April 2015 *Monil. b.,* 7 May 2015.

[49] Council Decision (EU) 2015/1339 of 13 July 2015 concerning the conclusion, on behalf of the European Union, of the Doha Amendment to the Kyoto Protocol.

2013

Meanwhile, in May 2013, the European Commission again stated that: "*Belgium does not seem to be on track to meet its 2020 greenhouse gas emission reduction target. According to the projections, the country expects to miss this target by 11 percentage points (pp). There is currently a lack of coordination and sharing of efforts between the different authorities involved*

»[50] "If we look at the forecast for greenhouse gas emissions in 2020, Belgium will lack

11 percentage points its target of a 15% *reduction in such emissions. However, it remains unclear how the isolated initiatives taken by the various authorities will ensure that the collective target is met·*

On 28 June 2013, the Flemish Region adopted the Flemish Climate Policy Plan 2013-2020, which consists of two separate parts: the GHG emission reduction plan (or Vlaams Mitigatieplan) and the climate change adaptation plan52 .
! waiting for the conclusion of a distribution agreement with the other Regions and the Federal State.

On 18 July 2013, the Beige State adopted the Royal Decree establishing the federal strategic vision long-term sustainable development53-.

This Royal Decree sets out the long-term objectives referred to in Article 2/1, second paragraph, of the Act of 5
May 1997 on the coordination of federal sustainable development policy54 , including the

here:

"A society that preserves its environment

By 2050, the goal of a healthy environment will have been achieved. Belgium will have made a fair transition to a low-carbon and resource-efficient society. It will have taken the necessary measures to prevent or, failing that, correct the environmental impacts of human activities: global warming will have been limited and will remain limited to 1.5 to 2°C in the long term, water and air pollution will be under control and will no longer have a significant impact on health, biodiversity and *ecosystems. Ecosystem goods* and *services will be restored, valued and used in a careful* and *sustainable manner, thus contributing to the preservation of biodiversity. Biodiversity itself will thus be valued, conserved, protected and restored and will fully contribute to sustainable prosperity* while *promoting economic, territorial and social cohesion and safeguarding our cultural heritage.*

Climate change

31. Greenhouse gas emissions will be reduced domestically by at least 80% *at* 95% *in 2050 compared to its 1990 level.*

32. Belgium will be adapted to the direct and *indirect impact of the consequences of climate change.*

(…).

Outdoor and indoor air

---

[50] Belgium Report 2013, European Commission Communication, 29 May 2013, SWD(2013) 351 **Final, p. 5, Claimants' Exhibit G.15.**
[51] *Ibid,* p. 33.
[52] Part I of the Flemish Region.
[53] *Monit.b.,* 8 October 2013.
[54] **Quoted above.**

35. Emissions of pollutants such as nitrogen oxides, fine particles, persistent organic pollutants, heavy metals, nitrotes and phosphates will be significantly reduced and the pollution of air (indoor and outdoor), water and soils will no longer have a significant direct or indirect impact on health or the environment.

The report to the King specifies in particular that "*This long-term vision aims to meet the commitments made by Belgium at international and European level. Moreover, it only fits within the competences of the federal state. By the same token, it is understood that the proposed objectives are in line with the European and international context.*
Finally, the proposed objectives attempt to present the desired state of affairs by 2050 for the sustainable developing beige society. The 1/s have been conceived as a coherent whole requiring joint implementation. 1/s have been proposed if it has been established that the federal state has the means to contribute to their realisation. The proposed indicators already exist, but can be reviewed or refined at any time. 1/s are either directly related to the objective or a close value that partially captures the state of the desired situation.

In November 2013, the Climate Change Department of the FPS Health, Food Safety and Environment published a report "*Scenarios for a low-carbon Belgium by 2050*", in which it is stated that reducing GHGs by 80-95% compared to 1990 in 2050 is possible and represents a major challenge55.

2014

In January 2014, the climate policy component of the 5th State Reform was formalised.

Thus, Article 39 of the special law of 6 January 2014 on the sixth reform of the state inserted a fourth paragraph into Article 16 of the special law of 8 August 1980 on institutional reforms, which allows the state to '*substitute itself for the community or region cancerned for the adoption of the measures that are necessary to put an end to the non-compliance with the international obligations provided for by the Framework Convention*' in the area of climate change. Various conditions are provided for, including a finding of non-compliance by the body established by or under the UNFCCC or its protocols or a reasoned opinion by the European Commission in the context of a formal infringement procedure.

In addition, the Belgian State has inserted an article *65quater* in the special law of 16 January 1989, which sets a multi-annual trajectory of GHG emission reduction targets for buildings in the residential and tertiary sectors for each region. The annex to the special law sets the reduction target for 2030 at approximately 21% for the Flemish Region, 19% for the Walloon Region and 19% for the Brussels Region.
de Bruxe lles-Capitale56.

This article also provides for a financial compensation mechanism (or "bonus-malus principle") in the event of deviations between actual emissions and the targets set, using in particular the federal share of the revenue from the auctioning of emission allowances. This mechanism is implemented in

[55] **pp. 7-8, Claimants' Exhibit C.8.**
[56] **Special Act of 6 January 2014 reforming the financing of the Communities and Regions, extending the fiscal autonomy of the Regions and financing new competences, *A1onit.b.*, 31 January 2014.**

the ordinary law of 6 January 2014 on the climate accountability mechanism and applies only to Regions and not to Communities.

On 20 February 2014, the Walloon regional parliament adopted a "Clima! "[57] providing for a GHG reduction target, all sectors combined, of 30% in 2020 compared to 1990 and 95% in 2050 compared to 1990, following a climate study finalised on 30 December 2011 which concluded that these targets were achievable58 .

The decree also provides for the development of emission budgets, i.e. the quantities of GHGs that can be emitted during a given period. Emission budgets are therefore intermediate targets and are established for five-year periods.

The issue budgets are set by the Government, with the exception of the overall issue budgets with maturities of 2022 and 2052, which have been set directly in Article 9 of the Decree as follows:

> For the budget period 2018-2022, the overall issue budget is set at 191 817 kilotonnes of CO_2-equivalent
>
> For the budget period 2048-2052, the overall issue budget is set at 13,701 to 54,805 kilotonnes of CO_2-equivalent.

The decree still requires annual monitoring of compliance with annual emission budgets {Article 17). On the basis of the reports drawn up in the framework of this monitoring, a committee of experts issues an opinion in which it determines whether the overall emission budget has been respected {Article 21). Corrective measures may, if necessary, be proposed to the Walloon Parliament {Article 22).

In 2014, at the request of the Secretary of State for the Environment, Energy, Mobility and Institutional Reforms, eight advisory bodies belonging to both the federal state and one of the regions issued *an* "*opinion on Belgium's transition to a low-carbon society by 2050*"[59] -.
The notice states, inter alia, that :

> *"The Councils wish to begin by recalling the governance challenges that will need to be addressed in order to successfully transition to a low-carbon society in Belgium:*
>
> *A long-term perspective with 2050 as the horizon is needed, as a framework for short-term policies;*
>
> It *is necessary to achieve a strong interaction between the levels of power and between the different fields of action;*

---

[57] *Monit.b.,* IO March 2014.
[58] Elude carried out by Climact, part D.2 of the Walloon Region.
[59] Federal Council for Sustainable Development (approval of the opinion on 27/05/2014), Economic and Social Council of the Bmxelles-Capital Region (approval of the opinion on 15/05/2014), Environmental Council of the Bmxelles-Capital Region (approval of the opinion on 14/05/2014), and Council of the Bmxelles-Capital Region (approval of the opinion on 15/05/2014), Environment Council of the Bmxelles-Capital Region (approval of the opinion on 14/05/2014), Milieu- en Natuurraad van Vlaanderen (approval of the opinion on 22/05/2014), Sociaal-Economische Raad van Vlaanderen (approval of the opinion on 12/05/2014), Economic and Socia! de Wallonie (approval of the opinion on 12/05/2014), Conseil wallon de l'Environnement pour le Développement durable (approval of the opinion on 3/06/2014); the opinion is available at www.frdo-cfdd.be.

A holistic approach focusing on all components of the energy system and integrating the three dimensions of sustainable development is needed (systemic approach, see § [3] below);
The policy must be based on sound foundations (including science) and a transparent dialogue with stakeholders;
a stable /ega/ framework is needed;
/government commitments at national level and international commitments must be respected "[60]

In terms of general recommendations, the Councils highlight :

"that coordination between the various Belgian federal and regional authorities is essential to ensure greater coherence of the transition policy, to define together the actions to be taken and to build a coordinated and long-term vision for the "climate and energy" policies and for a low-carbon society";
that this coordination must *be "permanent"*, based on "the *application of the principle of mutuality, whereby each level of power seeks to act in such a way as to enhance the effectiveness of all other levels of power*" and accompanied by "*the development of better governance within each entity involved (horizontal policy coordination)*";
"The need for Belgium to play an active role at the international level. In order to do so, our country must be coherent in its internal policy in order to establish its legitimacy at this ***level***;
that this strategy must be accompanied by a "*regular evaluation to measure (...)*
the concrete results of the measures adopted, accompanied by corrective measures if necessary "[61].

Also in 2014, the Federal Minister of Energy, Environment and Sustainable Development recognised the importance and scope of this opinion, stating that the fact that it "*was produced jointly by the FRDO-CFDD and the regional councils, (...) reinforces the scope of this opinion, and makes it all the more important to follow it up.*

In the autumn of 2014, the IPCC published its 5th, synthesis report in which it states, among other things, that:

The warming of the climate system is unequivocal and, since the 1950s, many of the observed changes are unprecedented in decades or even millennia. The atmosphere and ocean have warmed, snow and ice cover has decreased, sea levels have risen[63] ;
Anthropogenic GHG emissions, which have increased since pre-industrial times largely due to economic and population growth, are currently higher than ever before, resulting in atmospheric concentrations of carbon dioxide, methane and nitrous oxide that are unprecedented in at least 800,000 years. Their effects, together with those of other anthropogenic factors, have been detected throughout the

[60] Opinion 2014, p.2.
[61] Opinion 20 I 4, pp.2-3.
[62] Claimants' Exhibit F.16, p. 6.
[63] IPPC 2014, AR5 SYR, p.2, Claimants' Exhibit B.21.

It is extremely likely that they have been the main cause of the warming observed since the middle of the 20th century64 ;

the human influence on the climate system is clear and today, human-induced GHG emissions are the highest ever recorded [65] ;

the causal link between human activities and climate change is unquestionable. For example, the influence of human activities on the climate system can be seen in the warming of the atmosphere and the ocean, changes in the global water cycle, the retreat of snow and ice, and the rise in global average sea level, and is extremely likely to be the main cause of the warming observed since the mid-twentieth century66 ;

continued GHG emissions will lead to further warming and long-term changes in all components of the climate system, increasing the likelihood of severe, widespread and irreversible consequences for people and ecosystems. Limiting the extent of climate change would require deep and sustained reductions in GHG emissions, which, together with adaptation, can limit the risks associated with climate change67 ;

Many aspects of climate change and its impacts will continue for centuries, even if anthropogenic GHG emissions are halted. The risks of abrupt or irreversible changes increase as warming increases [68] ;

without mitigation measures other than those in place today, and even if adaptation measures are taken, the risk of severe, widespread and irreversible global consequences will be high to very high by the end of the 20th century due to warming69.

Finally, on 24 October 2014, the Council of the European Union adopted a first '*2030 Climate and Energy Package*' setting four general targets for 2030:

a binding EU reduction target of at least 40% below 1990 levels for concerns GHG emissions within the EU;

a binding EU target of at least 27% for the share of renewables in final energy consumption by 2030; this target is to be achieved collectively and is not divided between Member States;

an indicative EU target of at least a 27% reduction in energy use by 2030 compared to the baseline, to be reviewed in 2030 with a view to a 30% reduction; this is not translated into binding targets at national level

a 15% interconnection target in the electricity sector.

---

[64] IPPC 2014, AR5 SYR, p.4, Claimants' Exhibit B.21. [65] IPPC 2014, AR5 SYR, p.40, Claimants' Exhibit B.21. [66] IPPC 2014, AR5 SYR, p.47, Claimants' Exhibit B.21.

[67] IPPC 2014, AR5 SYR, p.8, Claimants' Exhibit B.21.

[68] IPPC 2014, AR5 SYR, p.16, Claimants' Exhibit B.21.

[69] IPPC 2014, AR5 SYR, p.17, Claimants' Exhibit B.21.

2015

In 2015, the SED submitted its final report based on the findings of the IPCC 5th report. This report states in particular:

> *"Limiting global warming to less than 2°C requires a radical transition (a*
> *This is not just an adjustment of current trends*" (*p.15).*
> *"The impacts of climate change are hitting our planet. Significant climate impacts are already occurring in terms of global warming* and the *increase in global average temperature will only increase the risk of severe, generalised* and *irreversible impacts. Therefore, the concept of a 'guardrail', which implies a warming limit that guarantees* total *protection against dangerous anthropogenic interference, no longer works" (p.18).*
> *"The concept of a 'guardrail*', i.*e.* 2°C *of warming* being *considered safe,* is *inadequate and would be better seen as an upper limit, a defensive line that must be rigorously defended, although less warming would be preferred*" *(p.33).*
> *"Limiting global warming to 1.5°C would provide a safer 'guardrail'. It would avoid or reduce risks, especially to food production or unique* and *threatened systems* such *as coral reefs or many parts of the cryosphere, including the risk of sea level rise [...] Parties could decide to take a more conservative approach by limiting global warming to below* 2°C*, reaffirming the notion of a defensive line or buffer zone keeping warming well below* 2°C*" (p.11)7.*

In March 2015, the European Commission noted in relation to Belgium's targets: "*Without additional measures or the use of flexibility mechanisms, Belgium would miss its greenhouse gas emission reduction target by 11 pp, according to its own projections. The remaining effort* is *therefore among the largest of all Member States "*[71]

Also in March 2015, the Federal Pian Bureau published a summary of the legal opinions on the climate accountability mechanism introduced by the aforementioned special law of 6 January 201472- The IBGE states that, in its opinion, the climate accountability mechanism, on the one hand, contains numerous technical inaccuracies that make its application difficult and subject to challenge, and on the other hand, unreasonably and unjustifiably encroaches on regional environmental competences and does not respect the constitutional principle of equality [73-] The FPS Environment states that "*there are many obstacles to implementation of the law,* both because of *its drafting and the errors it contains and because of the technical aspects it raises "*[74-].

---

[70] Excerpts from UNFCCC 2015, Report on the Structured Expert Dialogue on the 2013-2015 review, available at https://unfccc.int/sites/dcfault/files/resource/docs/2015/sb/eng/infOI .pdf.
[71] 2015 Report for Belgium, Communication from the European Commission, 18 March 2015, SWD(2015) 21 final/2, p. 79, Applicants' Exhibit G.20.
[72] Exhibit ll.1.6 of the Beige State filed on 22 March 2021.
[73] *Ibid,* p.22.
[74] *Ibid,* p.30.

In June 2015, Klimaatzaak vzw and the persons mentioned in Annex A initiated the present procedure.

On 4 December 2015, the federal government and the Regions reached a political agreement on the intra-Belgian distribution of the climate effort (or *burden sharing),* and more specifically on the distribution of the GHG reduction obligations in the non-ETS sectors for the period 2013-2020.

On 12 December 2015, at COP-21 in Paris, the member states of the UNFCCC adopted the Paris Agreement, which amended the UNFCCC once again.

The federal State and the three Regions gave their assent to this Paris Agreement, which was signed by Belgium and the European Union on 22 April 2016. This agreement entered into force on 4 November 2016.

Article 2 of the Paris Agreement includes measures "*to strengthen the global response to the threat of climate change*", such as

> *to* contain "*the increase in global* average *temperature to well below 2°C above pre-industrial levels and continuing* efforts *to limit the increase in temperature to 1.5°C above pre-industrial levels,* while recognising *that this would significantly reduce the risks and impacts of climate change*";
>
> strengthening "*capacities to adapt to the adverse effects of climate change and promoting resilience to climate change and low greenhouse gas emission development, in a manner that does not* threaten *food production*";
>
> make "*financial flows compatible with a low greenhouse gas emission and climate change resilient development pathway*".

Under Article 4 of the agreement, the Parties undertake, with a view to achieving the temperature objective in the long term, to :

> to reach their global GHG emission targets "as soon as possible";
>
> rapidly reduce GHG emissions in line with the scientific indications of the temperature target, with the ultimate goal of global carbon neutrality in the second half of this century;
>
> formulate and communicate, by 2020 at the latest, long-term strategies for low-carbon development;
>
> determine their nationally determined contributions (NDCs) on a voluntary basis.

The agreement does not establish a mandatory emission reduction quota and allows countries to define their own level of ambition in terms of GHG emission reductions. The agreement

---

[75] Law of 25 December 2016 assenting to the Paris Agreement, *Monit.b.,* 26 April 20l 7; Decree of the Walloon Parliament of 24 November 2016 assenting to the Paris Agreement, *Monit.b.,* 5 December 2016; Decree of the **Flemish Parliament of 25 November 2016 assenting to the Paris Agreement, *A1onit.b.,* 21 December 2016;** Order of the Brussels Parliament of 16 February 2017 assenting to the Paris Agreement, *Monit.b.,* l O March 2017.

The report also repeatedly mentions that developed countries must take the lead and play an important role in addressing climate change76.

These contributions must be revised upwards every 5 years on the basis of periodic analysis (at the global level) of the deviation from a trajectory that will limit warming to 2°C or I ,S0C.

Belgium's national contribution will be notified by the European Union, which will submit a contribution for all its members, including the European objective for reducing all GHG emissions across all sectors and the national objective of each Member State for the non-ETS sector.

It is also expected that each party will regularly provide the following information:

a national inventory report on anthropogenic emissions by sources and removals by sinks of greenhouse gases;

the information necessary to monitor the progress of each party in implementing and achieving its nationally determined contribution.

Decision l/CP.21 annexed to the Paris agreement stated from the outset that the national contributions (NDCs) submitted by countries are not sufficient to achieve the ultimate objective of the agreement and the UNFCCC, i.e. the prevention of dangerous climate change and thus of global warming well below 2°C and preferably limited to 1°C.77

Thus, the Conference of the Parties :

"notes with concern that the levels of global greenhouse gas emissions in 2025 and 2030 estimated on the basis of projected nationally determined contributions are not consistent with least-cost *scenarios of a* 2°C *temperature increase, but result in a projected level of emissions of 55 gigatonnes in 2030,* and *also notes that much greater emission reduction efforts than those associated with the projected nationally determined contributions will be required to keep global temperature rise below 2°C above pre-industry levels by reducing emissions to 40 gigatonnes or below 1.5°C above pre-industry levels by reducing emissions to 40 gigatonnes.*

emissions at a level to be defined in the special report referred to in paragraph 21 above ***afterwards "***[78]

The decision also called on the IPCC to present a special report in 2018 on the consequences of global warming above 1.5°C above pre-industrial levels and the associated global GHG emission patterns.

---

[76] See the last recital of the preamble and Articles 4.4, 9, 11.3 and 13.9 of the Paris Agreement.

[77] **Decision 1/CP.21, Preamble:** ***"Emphasizing with deep concern the urgent need to close the significant gap between the global effect of the mitigation commitments made by Parties in terms of annual global emissions of greenhouse gases up to 2020 and the global emissions pathways consistent with the prospect of containing global average temperature increase significantly.(e.g. greenhouse gas emissions up to 2020*** *and* ***global emissions pathways consistent with the prospect of containing global average temperature increase to well below 2°C above pre-industrial levels and continuing efforts to limit temperature increase to*** **J.5°C** ***above pre-industrial levels),*** **Exhibit H.22 of the applicants.**

[78] Decision l/CP.21, p.4/40, §17.

After the Paris agreement, two COPs took place, in 2016 in Marrakech (COP-22) and in 2017 in Bonn (COP-23).

2016

In 2016, the European Commission again pointed out that: "*If it does not change its policies and use suspicious mechanisms, Belgium will not achieve its target of reducing greenhouse gas emissions by 6 percentage points in 2020 (compared to 2005)*
»79,

On 21 April 2016, the Walloon Government adopted its Pian Air-Climat Energie (or "PACE") 2016- 2022 containing, among other things, a hundred or so measures to reduce GHG emissions.

In July 2016, the Federal Council for Sustainable Development published a new opinion on beige climate governance. In it, it underlines its concern about the unclear interpretations and the many options open after the political agreement on the distribution of the climate effort reached in the Paris Agreement of December 2015. It notes that this agreement "*must be translated into a cooperation agreement "*[80]. The FRDO-CFDD also urges *the* federal state and the regions to "*intensify negotiations to set out these options and clarify these aspects of the cooperation agreement as soon as possible*
quickly, as the deadlines announced in the political agreement on burden sharing (February 2016, i.e. 2 months
after the signing of the agreement) are largely outdated "[81]

On 12 October 2016, the ad hoc "Burden sharing" working group, composed of representatives of the Federal State and the three Regions, adopted a draft cooperation agreement between the Federal State, the Flemish Region, the Walloon Region and the Brussels-Capital Region on the distribution of Belgium's climate and energy objectives for the period 2013-2020.

2017

In January 2017, the Senate published an own-initiative "*Information report on the intra-Belgian decision-making process regarding the distribution of the climate effort with regard to the climate objectives"*>82.
The Senate's initiative was explained in particular by the fact that "*the intra-Belgian decision-making process on this burden sharing has, in recent years, required a disproportionate investment of time and energy. In Belgium, there is no hierarchy of norms and the agreement between the federal authority and the Regions concerned was reached on the edge. This is why the plenary assembly of the Senate considered it desirable to devote an information report to this process and to examine whether it could formulate recommendations to improve it and to avoid in the future that discussions on future federal agreements also drag on for several years.*

---

[79] Belgium Report 2016, European Commission Conunication, 26 February 2016, SWD(2016) 71 final, p. 69, Applicants' Exhibit G.21.
[80] Opinion on Governance on Climate Policy, Brussels, FRDO-CFDD, 4 July 2016, p.3, Claimants' Exhibit F.18.
[81] *Ibid.*
[82] Belgian Senate, Information report on the intra-Belgian decision-making process on the distribution of the climate effort with regard to climate objectives, *Doc.* Senate, 2016-2017, no. 6-253/4.
[83] *Doc.* Senate, 2016-2017, no. 6-253/2, p.4.

After noting that 'it was *only on 4 December 2015, after six years of negotiations, that an intra-Belgian climate agreement was reached*'[84], the Senate drew up a timeline detailing the stages of the negotiations on climate effort sharing.

Finally, this information report made numerous recommendations on beige climate governance, including

general climate policy :

- the development of a climate strategy beyond 2030, i.e. with a longer time horizon, by the federal and regional authorities in consultation with their respective parliaments (Recommendation 1);
- the implementation of an ambitious climate policy to comply with the Paris Agreement, with the joint determination of actions to be undertaken by all federal and regional authorities in all relevant policy areas to achieve a low-carbon society with a coordinated vision (R. 2);

The establishment of maximum cooperation and coherence between the federal state and the regions, notably through the application of the principle of mutuality. This principle "means that they systematically check the possible impact of a measure on the climate policy of another entity and try to act in such a way as to strengthen the effectiveness of the measures of all the other levels of power" (R. No. 3);

strengthening the continuous dialogue between the federal State and the Regions through the National Climate Commission, including during periods of government formation and current affairs (R. No. 4);

- the strengthening of instruments and means, in particular the administrations of the different levels of power (R. no. 5).

future targets, accountability mechanism and contribution to the climate effort:

- an anticipation of the intra-Belgian distribution of the 2030 targets (R. n° 6);
- a contribution by each entity according to its specificities to the climate effort, in order to obtain the most favourable result in terms of climate for all entities (R. n° 8).

the methodology :

- improving the systematic monitoring of the intra-Belgian climate policy {R. no. 10);
- the establishment of a single coherent monitoring and reporting system across all levels of government to measure greenhouse gas emissions and to assess the impact of policy orientations and measures taken (R. No. 11).

strengthening the role of the Coordination Committee upstream and downstream of the National Climate Commission as a political oversight body and a meeting place for governments (R. No. 12).

the National Climate Commission :

+ ensure compliance with the cooperation agreement of 14 November {R. no. 13), and more specifically with art. 8 of the cooperation agreement, which obliges the holding of meetings of the National Climate Commission at least twice a year {R. no. 18) and art. 6, § 1 of the

[84] *Ibid,* p.7.

the Cooperation Agreement of 14 November 2002, which requires an annual report on the activities of the National Climate Commission, including compliance with each government's annual GHG emission reduction trajectories and any climate targets (R. No. 19);

- the full execution of the tasks devolved to the National Climate Commission as defined by the cooperation agreement of 14 November 2002 (R. no. 14)
- the adoption of a work programme by the chair of the National Climate Commission on the occasion of each new presidency (R. No. 15)
- strengthening the role, effectiveness and functioning of the National Climate Commission (R. No. 16)
- the accelerated development of a new, updated national climate plan, following on from the one covering the period before 2012, with a clear overview of the policy actions undertaken, envisaged and their expected effects, in line with the existing plans of the federated entities;
- setting binding targets beyond the legislature in line with the binding EU targets and the Paris Accorci targets for 2030 and then 2050;
- Increasing the transparency of the work of the National Climate Commission, with documents and reports of the meetings being made available online (R. No. 22).

the creation of a parliamentary consultation body (R. No. 23).

In March 2017, the European Commission raised the point that: "*Belgium is expected to miss its greenhouse gas emission reduction target for 2020 by 5 percentage points compared to 2005 (...) It is of utmost importance to implement the internal climate agreement by 2020, to review the existing policies in the light of this agreement and to develop a long-term vision* [85].

In May 2017, the Office of the United Nations High Commissioner for Human Rights conducted an in-depth analytical study on the relationship between climate change and the full enjoyment of children's rights.

Its report states in particular:

> *"The importance of children's rights in the context of climate change is explicitly recognised in the Paris Agreement under the United Nations Framework Convention on Climate Change (UNFCCC), where States are required to take action to protect all children from the real and foreseeable adverse effects of climate change. The importance of children's rights in the context of climate change* is *explicitly recognised in the Paris Agreement under the United Nations Framework Convention on Climate Change, where States are called upon, in taking action to address climate change, to respect, promote and take into account their respective obligations regarding, inter alia, children's rights and intergenerational equity.*
>
> *"The human rights obligations and responsibilities contained in the Convention on the Rights of the Child, the Paris Agreement* and *other international human rights instruments require States, along with other actors to whom they are accountable, to*

[85] Belgium Report 2017, Communication from the European Commission, 1 March 2017, SWD(2017) 67 final/2, p. 63.

obligations, including corporate obligations, to act to protect the rights and best interests of the child against the harmful effects of climate change (...).

53. Human rights, climate change, development and risk mitigation

Climate change and disaster risk reduction, including through relevant international instruments and processes, are inextricably linked. Climate change mitigation and adaptation must be based on human rights, given the overlap between these different areas and human rights obligations. Therefore, States have a concrete obligation to respect, protect, promote and fulfil the human rights of all children, and to integrate these rights into all policies and measures adopted to mitigate climate change.

54. The child rights approach is based on the following key elements:

(a) Ambitious mitigation measures to reduce, to the greatest extent possible, the future adverse effects of climate change on children by limiting temperature increases to 1.5°C above pre-industrial levels, in accordance with the Paris Agreement;

b} Adaptation measures that focus on protecting children who are more vulnerable to climate change;

(c) Mitigation and adaptation measures resulting from participatory and evidence-based processes that take into account the views and best interests of children

[86] - "I am not going to say that I am not going to say that I am not going to say it.

Also in 2017, the Walloon Air and Climate Agency issued its PACE monitoring report, in which it underlines: "*In 2015, the level of emissions reached almost 36 million tonnes of CO2 equivalent, which is below the maximum global budget set for the years 2015 to 2022. As far as the sectoral budgets are concerned, they are almost all respected with the exception of non-ETS industry, transport and agriculture. In each of these sectors, the difference is less than one percent. These deviations can, for the time being, be considered as being within the uncertainty range of the sectoral emission estimation calculations. As stated in the section devoted to the analysis of the inventories, the emissions of the non-ETS industry and agriculture sectors are constantly decreasing, 55% and 15% respectively between 1990 and 2015. However, for transport, they increased by 32% between 1990 and 2015.*

At this stage, corrective measures are not envisaged given the very small differences in the sectoral budgets, but it will be necessary to remain attentive to these differences in the future. It should also be noted that the overall budgets are largely respected and that a new plan for 2030 is currently being prepared.

On 28 September 2017, the Walloon Parliament adopted a resolution on the implementation of a Walloon climate policy[88]. This resolution asks the Walloon Government, among other things, to pursue an ambitious policy to meet the objective of reducing GHG emissions by 95% compared to 1990 by 2050.

Also in 2017, the Federal Pian Bureau stressed that: "*in the exploratory scenarios considered above, the quantitative targets from the SDGs and the VLT OD [Federal Strategic Long-Term Development Vision*

[86] Claimants' Exhibit H.33.
[87] Exhibit D.6 of the Walloon Region.
[88] *Doc.parl.* Walloon Parliament, session 2016-2017, Doc. 11°886/9, room D.8 of the Walloon Region.

In the EU2030+ scenario, the energy and GHG emission targets are not met in 2030 and 2050, except for the objective of reducing energy dependency. Current policies, as well as those planned to reach the European targets set for 2030 (EU2030 and EU2030+ scenarios), while going in the right direction, are not sufficient to reach the SDGs and the LTV SD targets.

The "*Interfederal Beige Energy Pact, a common vision for the transition*", initially planned for December 2015, was finalised by the four Energy Ministers in December 2017. This pact was approved in December 2017 by the Walloon and Brussels governments. The federal and Flemish governments will approve it some time later.
The pact confirms that nuclear power will be phased out by 2025, but a monitoring committee will be set up, including the industry, to check that the price of electricity remains affordable and that security of supply is guaranteed.

2018

On 12 February 2018, a cooperation agreement was concluded between the federal state and the regions, which translates into legal terms the distribution of the climate effort over the period 2013-202090.

This cooperation agreement provides for:

1°) the determination of the contribution of each Contracting Party to achieving the greenhouse gas emission reduction target imposed on Belgium for the compliance period in accordance with Decision No 406/2009/EC, including the use of the margins of manoeuvre provided for in Articles 3 and 5 of that Decision;
2°) the determination of the contribution of each contracting party in order to achieve the objectives imposed on Belgium with regard to energy produced from renewable sources in accordance with Directive 2009/28/EC;
3°) the sharing, between the Contracting Parties, of revenues from the auctioning of emission allowances for the period 2013 to 2020 inclusive, under Directive 2003/87/EC;
4°) the determination of the mandatory contribution of each Contracting Party to international climate finance for the period 2016 to 2020 inclusive.

Article 3 of the cooperation agreement sets the Regions' GHG reduction targets in the non-ETS sectors as follows:

for the Flemish Region: -15.7%; for
the Walloon Region: -14.7%;
for the Brussels-Capital Region: -8.8%.

---

[89] December 2017 Federal Pian Office Report, "Achieving the Global Goals of **Sustainable Development", available at www.plan.be, Applicants' Exhibit F.20.**

[90] Cooperation agreement between the Federal State, the Flemish Region, the Walloon Region and the Brussels Capital Region on sharing the Belgian climate and energy objectives for the period 2013-2020, *Monit.b.*, 12 July 2018.

The cooperation agreement also distributes the beige target of 13% (or 4.224 Mtoe) of renewable energy production91 between the three Regions and the Federal State as follows:

2.156 Mtoe for the Flemish Region;
1.277 Mtoe for the Walloon Region;
0.073 Mtoe for the Brussels-Capital Region;
O.718 Mtoe for the Federal State.

Finally, article 46 of the cooperation agreement specifies that it takes effect on 4 December 2015. On 22 July 2018, the agreement was approved by the four parliaments involved: the federal, Brussels, Flemish and Walloon parliaments. It entered into force on the same day.

In its 2018 report for Belgium, the European Commission found that :

> *"Although Belgium's environmental and climate policies are working well in some areas, they are still not effective enough in tackling local air pollution and greenhouse gas emissions. Belgium is not sufficiently exploiting its potential to become a champion of low-carbon innovation*;
> "According to *national projections for 2017 based on existing measures, the greenhouse gas emissions reduction target of* 15% *in 2020 compared to 2005 is not expected to be met, with non-ETS emissions only 11.5% lower in 2020 than in 2005*.

In its October 2018 report to the Parliament, the European Commission also noted that 8 Member States, including Belgium, could fail to meet their 2020 and 2030 targets "*on the basis of existing measures* "[94] - The report further states that Belgium would be the 5th Member State with the largest gap between the 2030 targets and projected emissions95 .

In November 2018, a broad dialogue was organised at the initiative of the FPS Public Health and universities in the country, the final report of which states, among other things, that:

> *"The central question is* whether *the federal structure in Belgium is adapted to meet this gigantic climate challenge, which requires a radical transformation of our society. The observation that the current governance framework is inadequate for the climate challenge persists in the scientific analyses. The governance framework is inadequate, given the climate emergency, the necessary decarbonisation of the economy, new European governance requirements and citizen pressure. Despite the existence of external drivers, which stem from European and international law in particular, an internal driver is missing in federal Belgium. [...]*

---

[91] Objective set by Directive 2009/28/EC of 23 April 2009 on the promotion of the use of energy **produced from renewable sources.**

[92] Belgium Report 2018, Communication from the European Commission, 7 March 2018, SWD(2018) 200 **Final, p. 4, Claimants' Exhibit G.24.**

[93] Belgium Report 2018, Communication from the European Commission, 7 March 2018, SWD(2018) 200 film! at 59, Claimants' Exhibit G.24.

[94] European Commission Report 2018: The EU and the Paris Agreement on Climate Change: Progress to date The EU and the Paris Agreement: taking stock of progress to the COP in Katowice, 26 October 2018, COM(2018) 716 final, p. 10, Applicants' Exhibit G.25.

[95] European Commission Report 2018: The EU and the Paris Agreement on Climate Change: Taking stock of progress at the Katowice COP, 26 October 2018, COM(20l8) 716 final, p. 9, Applicants' Exhibit G.25.

We need a common long-term vision that provides legal certainty for the different policies and levels of power and is sustainable. {...] In addition to the need for accountability, prioritisation and focus, there is also a need to depa/itise and objectify climate policy. Decision-making power must be at the highest level, where decisions can be made most effectively. In a context of constant political bungling that hinders the implementation of an effective climate policy, a discussion on the relevance of changing specific aspects of climate policy (e.g. mobility) in the allocation of competences is useful. However, given the urgency of climate change, other urgent and pragmatic solutions must be considered. Within the existing institutional structure our country has several legal (constitutional) solutions to strengthen the cooperation between the different levels of power and policy areas "[96].

Also in October 2018, the IPCC tabled a new special report97 which states, among other things, that:

A warming of more than 1.5°C will cause very significant damage and the difference between the effects of climate change at 1.5°C and 2°C is significant;

to limit global warming to 1.5°C, global emissions will have to be (far) below 35 Gt *co-eq* by 2030; the IPCC also points out that half of the models used show that, by 2030, global emissions must already be reduced to 25 Gt and 30 Gt *co-eq;*

On this basis, and still with the objective of limiting global warming to 1.5°C, it is necessary to reduce global *coi* emissions by 45% net in 2030 (between 40 and 60%) and in 2050 by 100% net (for the period 2045-2055);

from 2050 onwards (for the period 2045-2055), there should be no further emissions of *coi;*

if this emission reduction pathway is followed and zero emissions are reached in 2050, the probability of staying below 1.5°C is 50% or more and the probability of staying below 2°C is 85% (in other words, even with this strong emission reduction for 2030 and even if zero CO2 emissions are reached in 2050, there is still a 50% chance that the 1.5°C threshold will be exceeded and a 15% chance that warming will exceed 2°C);

the commitments made in the national contributions of the Paris Agreement countries by 2030 will be far from sufficient to achieve the Paris objectives.

The IPCC Report's calculations show that even if states were to meet all of their commitments, the NDCs, global warming would reach 3°C this century and only increase thereafter: "*Scenarios that reflect the currently stated reduction ambitions*
for 2030 generally correspond with co0t-efficiency scenarios that lead to a

[96] **Dialogue on 'Climate Governance in Belgium', main conclusions, including** concrete **proposals** for improving climate governance in a federal Belgium, 27 November 2018, pp. 2 et seq., available online at hltps://climat.be/doc/Main conclusions Climate Governance Dialogue.pdf, quoted by G. ROLLAND and C. ROMAINVILLE, "Journey to the heart of the notion of 'special law' - proposals for a special climate law", *A.P.T,* 2020/2, p.289.
[97] Claimants' Exhibits B.23 and B.24.

warming of about 3°C in 2100, with continued warming thereafter (mayenne canfiance) "
[98]

This report was presented at COP-24 in Katowice in December 2018 but was not adopted as such by the Conference of the Parties, which only "*invited /the Parties to use /the information in the report*".

Also in 2018, the European Union adopted the following legislative acts to implement the Clean Energy for All Europeans (2030) package:

Regulation (EU) 2018/84299 which concerns non-ETS sectors and imposes binding annual GHG emission reductions on Member States, in principle linear, which must result in a prescribed reduction amount by 2030. For Belgium, the reduction to be achieved in 2030 is -35% compared to the 2005 level (Annex I of the Regulation). This Effort Sharing Regulation (ESR) provides for various forms of flexibility for Member States to achieve their targets in the period 2021-2030 if they

have insufficient allowances themselves. In addition to maintaining some forms of flexibility (saving, borrowing and emissions trading) from the 2013-2020 period, some mechanisms have been removed (CDM and JI project purchase rights) and new mechanisms have been created (ETS flexibility and LULUCF). The use of different flexible instruments is quantitatively limited. The distribution of access between the Regions

to these forms of flexibility is part of the intra-Belgian burden sharing exercise of the climate targets for 2030.

Directive (EU) 2018/2001100 which concerns the share of energy from renewable sources in the Union's gross final consumption of energy. From 1 January 2021, this share of energy in the gross final consumption of energy of each Member State may not be lower than its target for 2020, i.e. 13% for Belgium (Art. 3(4) at Annex I, part A of the Directive).

Governance Regulation 2018/ 1999101, in force since 24 December 2018, which requires each of the EU member states to have climate governance based on integrated national energy and climate plans (or "INECPs").

On 28 November 2018, the European Commission called for Europe's accession to the carbon neutrality by 2050[102] .

---

[98] **uncontested free translation**

[99] Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by !Member States from 2021 to 2030 contributing to climate action to meet !commitments under the Pars Agreement and amending Regulation (EU) No 525/2013.

[100] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion **the use of energy from renewable sources.**

[101] Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the governance of the Energy and Climate Action Union, amending !Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, !Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 20 I0/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, !Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council

[102] Press release of 28 November 2018, Claimants' Exhibit G.37.

On 31 December 2018, Belgium notified its National Integrated Energy-Climate Plan 2021-2030 (NIPEC 2021-2030) to the European Commission, pursuant to Article 3 of the above-mentioned Governance Regulation 2018/1999.

2019

In its 2019 report for Belgium, the European Commission again found, among other things, that:

> *"In the absence of additional measures, it is likely that Belgium will not achieve its objectives. emissions by 2020 and 2030. Emissions from the non-ETS sectors in 2020 are expected to be only* 12% *below 2005 levels, compared to the 15% reduction target. The gap is expected to widen further by 2030, with emissions projected to be only* 14% *below 2005 levels, compared to the* 35% *reduction target.*
>
> *>)103;*
>
> *"Some progress* has been *made in the development and implementation of climate* and *energy policies by different levels of government, but overall effectiveness* is *compromised by the complexity of the evolving division of powers. In the past, this has considerably delayed the definition of coordinated action, such as an internal distribution of efforts towards the achievement of the 2020 climate* and *energy targets, a long-term vision for energy transition, or the completion of important infrastructure projects such as the RER around Brussels "*[104].

In the course of February 2019, two special climate bills were submitted for parliamentary discussion105 - The main difference between the two bills concerned the thresholds for reducing GHG emissions: at least 95% compared to 1990 by 2050 for one, at least 65% compared to 1990 by 2050 for the other.

The Legislation Section of the Council of State issued an opinion in chambers in which the Council of State approved the use of a special law for the organisation of a coherent exercise of the climate competences of the federal state and the federated entities. However, it considered that the introduction of emission reduction targets for 2050 and 2038 and the inclusion of

The Council of State considered that the special legislator did not have a general power to establish the general principles and objectives in the matters he assigns. In this sense, the Council of State considered that the special legislator did not have a general power to establish general principles and objectives in the matters it assigned. The opinion therefore suggested

---

'" 2019 Report for Belgium, European Commission Conununication, 27 February 2019, SWD(2018) 200 final, p. 66, Applicants' Exhibit G.32.

'" 2019 Report for Belgium, European Commission Conununication, 27 February 2019, SWD(2018) 200 final, p. 67, Applicants' Exhibit G.32.

[105] Proposal for a special law of 6 February 2019 coordinating the policy of the federal authority, the Communities **and the Regions on climate change and setting general long-term objectives, *Doc.*** Chamber**,** 2018-2019, no. 54-3517/001. See also Proposal for a special law of 6 February 2019 coordinating **the climate change policy of the federal authority, the Communities and the Regions and setting** general long-term objectives, *Doc*. House, 2018-2019, no. 54-3520/001, which repeats the same **proposal with other GHG emission reduction targets.**

six alternatives for setting the general principles and objectives of climate policy, including amending Article *7a* of the Constitution [106].

The amendment of Article *7bis* of the Constituti on[107], which was initially the chosen option, was however rejected by the House of Representatives in the plenary session of 28 March 2019, due to the lack of a qualified majority needed for its adoption. The special law proposals have since lapsed.

On 18 June 2019, the European Commission published its assessment of the Belgian NECP 2021-2030[108], together with the related recommendations [109] and a factsheet [110-]

In its assessment, the Commission stated, inter alia, that

> *"Belgium's 2030 target for greenhouse gas (GHG) emissions from sectors not covered by the EU Emissions Trading Scheme (non-EU ETS) is a* 35% *reduction from 2005 levels, as set out in the Effort Sharing Regulation (ESR)2 . The adopted policies would lead to reductions of* 13% *and the draft NECP aims to achieve a* 35% *reduction at national level. The final version of the NAP would therefore benefit from including additional information on the scope, timing and expected impacts of the necessary policies and measures, including in the building and transport sectors, as well as on the planned use of flexibility under the EU ETS. »*[111] ;
>
> *"The division of competences between the different federated entities in Belgium is a challenge to achieve an integrated NECP. When finalising the NECP, additional coordination efforts will be needed to present an integrated national vision on how to achieve the objectives of the energy union by 2030, while ensuring overall consistency and coherence with federal and regional plans "*[112] ;
>
> *"In general, there is often insufficient information on which policies and measures are included in the scenario with additional measures, their specific contribution to the GHG reduction target and their exact scope, status and timing. This creates doubts about the feasibility of the binding national targets and indicative sectoral GHG reduction targets included in the draft NECP on the basis of the defined policies and measures. It is important that the policies and measures are described in sufficient detail to understand their exact nature and expected impact, and it is appropriate to*

---

[106] Proposal of 13 March 2019 to revise Article ?bis of the Constitution in order to anchor climate objectives and principles, Pari. House, 2018-2019, 54-3642-001.

[107] The **text of which read as follows**: "***i/s cooperate in particular on an effective climate policy, in accordance with the objectives, principles and modalities established by a law adopted by the majority provided for in Article 4, last paragraph***.

[108] Assessment of the draft national energy and climate plan in Belgium, 18 June 2019, SWD(2019) 211 forni, Claimants' Exhibit G.33.

[109] Commission Recommendations of 18 June 2019 on the draft integrated national energy plan and climate policy of Belgium covering the period 2021-2030, C(2019) 4401 final, applicants' exhibit G.34.

[110] Belgium factsheet- summary of the Commission assessment ofthe draft National Energy and Climate Pian 2021- 2030, available at https:1/ec.europa.eulenergylsiteslener/files/documentslnecp_fctsheet_be_final.pdf. [111] Assessment of the draft national energy and climate yawp in Belgium, 18 June 2019, SWD(2019) 211 fitrnl, p.2, Applicants' Exhibit G.33.

[112] Evaluation of the draft national energy and climate pian in Belgium, 18 June 2019, SWD(2019) 211 final, p.3, Applicants' Exhibit G.33.

to specify for each of them whether it is simply a description of a potential lead or a measure actually proposed and confirmed "[113] *;*
"The draft NECP refers to the Interfederal Energy Pact which sets out Belgium's ambition for 2030 and 2050. A common vision document agreed at ministerial level and endorsed by the respective governments can be seen as a logical starting point for achieving an integrated NECP in the Belgian context. However, the draft NECP is not fully consistent with the ambitions set out in the Pact. For example, the sectoral targets for renewable energy (...) have not been fully retained, which seems strange if
The scenario with additional measures is considered to exceed these targets "[114] *;*
"In its current state, the draft NECP often presents a summary of the information contained in
In addition, this approach leads to a lack of coherence between the proposed elements, for example on hydrogen.19 In addition, the report does not show how the different elements presented are combined in a common vision on how to ensure the transition to a low-carbon society in Belgium. Moreover, this approach leads to a lack of coherence between the proposed elements, for example on hydrogen19. It also results in unexploited possibilities for synergies (...). Substantial efforts and political will are therefore needed to achieve a more integrated national energy and climate plan, which in turn would be a useful tool to foster cooperation between the different authorities in achieving the climate and energy transition.

The European Commission went on to state that the recommendations arising from its assessment *"Member States should also ensure that their integrated national energy and climate plans take into account the latest country-specific recommendations issued in the framework of the European Semester. Member States should also ensure that their integrated national energy and climate plans take into account the latest country-specific recommendations of the European Semester "*[116] *.*

It also stated that *"(...) the final version of the National Energy and Climate Plan must contain all the elements required by the Regulation, including all the information needed to assess the proposed levels of ambition and the adequacy of the plan to achieve them, including a comprehensive overview of policies and measures and an accompanying impact assessment. Considerable effort and political will are needed to achieve a more integrated national energy and climate policy* "[117] .

Therefore, with regard to Belgium's share of GHG emission reductions, it recommended *to* "*complete information on the policies and measures necessary to achieve the 2030 target of a* 35% *reduction in greenhouse gas emissions from 2005 levels for sectors not covered by the emissions trading scheme*

---

[113] Evaluation of the draft national energy and climate plan in Belgium, 18 June 2019, SWD(2019) 211 final, p.7, Applicants' Exhibit G.33.
[114] Evaluation of the draft national energy and climate plan in Belgium, 18 June 2019, SWD(2019) 211 final, p.14, Applicants' Exhibit G.33
[115] Evaluation of the draft national energy and climate plan in Belgium, 18 June 2019, SWD(2019) 211 final, p.14, Applicants' Exhibit G.33.
[116] **Commission recommendations of 18 June 2019 on the draft integrated national energy plan**
and climate plan for Belgium covering the period 2021-2030, C(2019) 4401 final p.3, Exhibit G.34 of the requests. [117] Commission Recommendations of 18 June 2019 on Belgium's draft integrated national energy and climate plan covering the period 2021-2030, C(2019) 4401 final p.3, Applicants' Exhibit G.34.

the EU, including the building and transport sectors, where most of the reductions will have to be made, with details of their scope and timing, as well as the expected impacts (...) "[118].

In the meantime, the European Parliament adopted a resolution on 14 March 2019 urging the Member States and the European Commission to increase the EU's 2030 reduction target from 40% to 55%119 - Like the European Commission, the European Parliament also considered it necessary to change the EU's 2050 target from 80-95% to a new target of zero (net) emissions by 2050 at the latest12 [0] - The European Council will also endorse the EU's goal of carbon neutrality by 205012

In its regional policy statement of September 2019, the Walloon Region declared that it wanted to achieve the objectives set by the European Union, i.e. a 55% reduction in greenhouse gases, by 2030. The Region is aiming for carbon neutrality by 2050 at the latest (including a 95% reduction in GHG emissions compared to 1990), based on a progressive GHG emissions reduction trajectory with an intermediate stage of 55% reduction in GHG emissions compared to 1990 by 2030. The intention is to contribute to the global effort to contain the increase in global average temperature to well below 2°C above pre-industrial levels and to continue efforts to limit warming to 1.5°C, in line with the Paris climate agreement.

In its July 2019 policy statement, the CBR stated that it would have a long-term strategy based on binding targets and an evaluation framework with a
"The "*Brussels Climate Ordinance*", so that the CBR commits itself to becoming a low-carbon region ». This will involve, according to the declaration, strengthening the interim commitments and measures currently included in the Brussels contribution to the National Energy and Climate Plan (NECP), in order to achieve, by 2030, at least a 40% reduction in GHG emissions compared to 2005 and to contribute as much as possible to raising the European Union's targets by that date.

In October 2019, the latest annual report "*Trends and projections in Europe 2019*", published by the European Environment Agency, indicated that in 2017, Belgium was among the eighteen Member States that met their reduction targets in 2017 without making use of flexibility mechanisms. The report also indicated that, compared to initial estimates for 2018, Belgium was just 0.4% above its 2020 target, but was expected to retain a surplus of 14.6 million tonnes of allowances in 2018122 . The report also indicated that Belgium has planned additional measures which, if implemented, should enable it to meet its 2020123 targets.

---

[118] Commission Recommendations of 18 June 2019 on Belgium's draft integrated national energy and climate change plan covering the period 2021-2030, C(2019) 440 I final p. 4, applicants' Exhibit G.34. [119] European Parliament resolution of 14 March 2019 on climate change, point 23, **Applicants**' Exhibit G.36.
[120] *Ibid*, point 5.
[121] Notes of the meetings of 12 December 2019, Claimant's Exhibit G.40.
[122] Report N°15/2019 of 31/10/2019, pages 19, 32, 33 and 34: hltps://www.eea.europa.eu/publications/trends and-projections-in-europe-l.
[123] *Ibid*, p.35.

The report also stated that, for 2030, existing measures in Belgium can only lead to a 15% reduction in emissions in 2030 instead of the 35% expected. Additional measures (or 'MAPs') are therefore expected from Belgium to reach its 2030 targets12 .

On 18 December 2019, the final PNIEC 2020-2030 was adopted by the Consultation Committee, taking into account the recommendations and criticisms of the European Commission. The following GHG emission reduction targets have been set:

Flemish Region: -35% of GHG emissions in the non-ETS sector in 2030 compared to 2005 (p.48), it being understood that to achieve this, the Flemish Region will have to take additional measures and make use of the flexibility mechanisms at its disposal;

Walloon Region: -37% of GHG emissions from non-ETS sectors in 2030 compared to 2005 (p.55);

Brussels-Capital Region: -40% of GHG emissions in 2030 compared to 2005 (p.56); The federal government commits to continue the internal policies and measures in force, to implement the measures recommended in the PNIEC and to take new measures that contribute to achieving the GHG reduction targets (p.48).

The PNIEC also includes a contribution of 17.4% of renewable energy to gross final energy consumption and a contribution to the European energy efficiency target of 15% in primary energy and 12% in final energy.

The NECP was communicated to the European Commission on 31 December 2019.

In December 2019, at COP 25 in Madrid, the COP recognised "*the role of the IPCC in providing scientific input to inform the strengthening of the global response to the threat of climate change*" but did not adopt the findings of its 2018 special report. Parties also reaffirmed: "*the urgent need to close the large gap between the g/oba/ effect of Parties' mitigation efforts in terms of annual global greenhouse gas emissions by 2020 and aggregate emission pathways consistent with a increase in global average temperature to well below 2°* e *above the levels of the past and continue efforts to limit the temperature increase to* 1.5°C *above pre-industrial levels "*[125].

Also in December 2019, the European Union recognised the objective of limiting the temperature increase to 1.5 Cand translated it, in its '*European Green Dea/'*, into a target of reducing GHG emissions by 55% compared to 1990 by 2030 and becoming carbon neutral by 2050.

2020

On 19 February 2020, the Consultation Committee adopted the "*Long-term strategy for Belgium*" in accordance with Article 15 of EU Regulation 2018/1999, which includes regional strategies for reducing GHG emissions for 2050. This Long-term Strategy

[124] *Ibid*, pp. 36-37.

[125] Decision l/CP25, available at https://unfccc.int/sites/default/files/resource/cp2019 13a0IF.pdf

states, among other things, that "*Belgium could reduce its GHG emissions by about* 95% *compared to 1990 and offset the remaining gap with negative emissions, thus achieving climate neutrality "*[126]

-

In its 2020 report for Belgium, the European Commission again found that :

> *"Belgium is not on track to meet its 2020 climate change target. In sectors not covered by the EU ETS, reductions have been limited to 10%. They are expected to decrease by a further 2-3 percentage points, but still fall short of the 2020 target of a 15% reduction compared to 2005 levels;*
>
> *According to the 2017 data, Belgium has reached a share of 9.1% of energy from renewable sources in gross consumption. The policies currently implemented and the initiatives already planned are insufficient to achieve the required volumes of renewable energy on a purely national level "*[12-7]

On 30 September 2020, the new federal government adopted its government agreement in which it "*sets itself the target of a 55% reduction in greenhouse gas emissions by 2030*" and supports the EU's ambitions of at least a 55% reduction in GHGs by 2030 and carbon neutrality by 2050128-.

On 14 October 2020, the European Commission published its assessment of the final NECP of the Belgiad129 - This opinion can be summarised as follows:

> Although the final plan is an improvement on the draft plan, the Commission considers that it is not yet an integrated and coherent plan based on a common vision. Belgium is therefore encouraged to ensure greater coordination and integration of regional plans in order to achieve synergies
>
> between the different measures.
>
> As regards the reduction of greenhouse gas emissions, the Commission notes that Belgium will barely reach its target of -35% in 2030 compared to 2005 in the non-ETS sectors, since a gap of 0.6% will remain despite the numerous additional measures announced in the NECP. The Commission also notes that the targets are different for each region and that Fiandre has been allocated a target below 35% which it will have to close by using the flexibility mechanisms. The Commission draws Belgium's attention to the fact that there is no clear correspondence between the estimates (35%) and the measures described in the NIP, and that the reliability of the estimates also varies considerably from one entity to another. The Commission also notes that the PNIEC does not include any data on emissions in the LULUCF sectors, which means that no conclusions can be drawn on targets for 2030 in these sectors. The contribution of renewables in the final IP is lower than in the draft IP: the ambition level of 17.5% of renewables in the gross final energy consumption in 2030 is considered by the Commission as unambitious.

---

[126] Exhibit Ill.B.8 of the Beige State.

[127] Belgium 2020 Report, Communication from the European Commission, 26 February 2020, SWD(2020) 500 final, Applicants' Exhibit G.41.

[128] **Supplementary Exhibit 11°3 of the Beige State.**

[129] Evaluation of the final national energy and climate plan in Belgium, 14 October 2020, SWD(2020) 900 forni, available at climate.be.

Commission. It also asks for clarification on how Belgium will reach its 13% target by 2020. The Commission therefore proposes to explore cooperation mechanisms with Member States and a European financing scheme to reach the target and accelerate the implementation of measures in the field of transport and heating and cooling of buildings.

In the field of energy efficiency, the Commission considers that Belgium's contribution to the EU target is too low. It advises Belgium to implement additional policies and to develop a clear framework to achieve the expected results and the required financing. The Commission highlights

the importance of building renovation as a lever for energy savings in the context of the post-COVID economic recovery.

On energy supply, the Commission highlights a lack of clear targets and indicators on the resilience of the system. Import dependency will increase from 71% in 2020 to 86% in 2030. The internal energy market lacks clear targets and measures to increase flexibility, especially with regard to the contribution of renewables, storage, demand management, aggregation and smart grids in the energy market. Interconnection capacity should be 33%.

In the area of research, innovation and competitiveness, the Commission also calls for clear monitoring indicators.

The Ypres would benefit from a more coherent, robust and systemic approach to national investment needs.

The aspects of a just and equitable transition are present, but gaps remain in job creation, training, reaching the poorest groups in society, and efforts to reduce energy poverty.

However, the country has been praised for its "good practice" approach to cross-border cooperation (including in the reform of the Pentalateral Energy Forum).

Finally, on 15 January 2021, Belgium communicated to the European Commission its preliminary national GHG emissions inventory 2021, (covering 1990-2019 emissions), in accordance with Regulation (EU) n°525/2013.

It. PURPOSE OF THE APPLICATION

The plaintiffs request the Tribunal to :

1°) **Finds** that the defendants have not, by 2020 at the latest, reduced the overall volume of annual greenhouse gas emissions from the beige territory by 40%, or at least by 25%, compared to the level in 1990;

2°) **Finds** that the defendants are in breach of Articles 1382 and 1383 of the Civil Code in that they are not behaving like good fathers in pursuing their climate policy and are thus damaging the interests of the plaintiffs;

3°) **Finds that** in pursuing their climate policy the defendants violate the fundamental rights of the plaintiffs, and more specifically Articles 2 and 8 of the ECHR and Articles 6 and 24 of the International Convention on the Rights of the Child;

4°) **Orders** the defendants to take the necessary measures to induce Belgium to reduce or cause to be reduced the overall volume of annual greenhouse gas emissions from the Belgian territory so as to achieve :

in 2025, a reduction of 48%, or at least 42%, compared to the 1990 level;
in 2030, a reduction of 65%, or at least 55%, compared to 1990 levels;
in 2050, a net zero emission;

5°) Continues the case in order to verify whether the defendants have achieved the objectives imposed for the deadlines of 2025 and 2030;

To this end, let him :

orders the defendants to provide it and the plaintiffs with the greenhouse gas emission reports for 2025 and 2030 submitted to the UNFCCC Secretariat on the same day that they are submitted to that body in 2026 and 2031 respectively;

already sets the case three months after each of these communications, with instructions to the parties to file their submissions in relation to the findings of the greenhouse gas emission report for the year concerned:

- for requesting parties: 1 month from the receipt of the 2025 and 2030 greenhouse gas emission report submitted to the UNFCCC Secretariat;
- for the defendants: 1 month from receipt of the claimants' submissions.

orders the defendants, jointly and severally or in default of each other, to pay a penalty of €10,000 per day of delay to the first plaintiff, Klimaatzaak vzw, if it fails to communicate the greenhouse gas emission report to Your Tribunal and to the plaintiffs within ten days of 15 April of the reporting year in question;

6°) **Orders** the defendants *jointly and severally,* or one in default of the other, to pay to the first plaintiff, Klimaatzaak vzw, with a penalty payment of EUR 1,000,000 per month of delay in reaching the target imposed for 2025 and the target imposed for 2030, starting on the first of January of the year following the deadlines;

7°) **Acknowledges** that Klimaatzaak vzw undertakes to fully allocate the accrued penalty payments in accordance with its corporate purpose.

Voluntary interveners associate themselves with the requests made by the plaintiffs.

All the defendants conclude that the claim is inadmissible and unfounded, as well as the voluntary interventions.

The three regions conclude that the court of first instance has no jurisdiction.

In the alternative, and as a preliminary point of law, the beige State asks the court to ask:

to the Constitutional Court for a preliminary ruling on the following questions

- *"Does Article 1382 of the Civil Code, interpreted in the sense that a sentence in so/idum may be pronounced against debtors without regard to their power and competence, as defined by the Constitution and the laws in force, to enforce such a sentence, violate Articles 10 and 11 of the Constitution in that it treats debtors who are in incomparable situations in an identical manner?*
  ?));
- *"Does Article 1382 of the Civil Code violate Article 23 of the Constitution if it gives the court the power to impose on a legislator a measure limiting his discretion?* »;

the following questions to the Benelux Court of Justice for a preliminary ruling:

- *"Can an astreinte be imposed when the purpose of the request is to ask Parliament for a legislative change in violation of the separation of powers?*

Can a penalty be imposed where the request is to ask Parliament for a legislative change in violation of the separation of powers?

- *"Is the obligation to provide financial resources to the State by means of a budget included in the concept of an obligation to do something involving a sum of money and is therefore covered by the exception in Article 1385bis, paragraph 1, of the Judicial Code?* ».

In the alternative and before the law is applied, the Walloon Region asks the Court to refer the following questions to the Constitutional Court for a preliminary ruling:

"Does Article 1382 of the Civil Code violate Articles 10 and 11 of the Constitution insofar as it is interpreted as precluding a legal person which has been created and acts in defence of a collective interest, such as the protection of the environment or certain elements thereof, from receiving, for the infringement of the collective interest for which it has been created, anything other than compensation by way of pecuniary equivalent, apart from compensation for the damage caused to the environment, to receive, for the infringement of the collective interest for which it was established, anything other than compensation by way of pecuniary equivalent, apart from compensation in kind for the actual ecological damage from which the said infringement of the collective interest arose? » ;

"Does Article 1382 of the Civil Code violate Articles 10 and 11 of the Constitution in the interpretation in which it allows the condemnation of certain persons responsible for the damage, to the exclusion of others, with the consequence that the damage will not be repaired in any way, not even in part, and that the victim will therefore not benefit from it? »

In the alternative, the Flemish Region asks the Court to refer the following question to the Court of Justice of the European Union for a preliminary ruling:

Is the "Directive 2003/87/EC of the European Parliament and of the Council of*Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC" {EU ETS) and "Regulation (EU) 2018/842 of the European Parliament and of the Council of Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action in order to meet their commitments under the Paris Agreement and amending Regulation (EU) No 525/2013", violate Articles 2 (right to life), 7 {right to respect for private and family life} and 24 {rights of the child} of the Charter of Fundamental Rights.*

What are the fundamental rights of the European Union because these texts contain insufficient greenhouse gas reduction targets? ».

Iii. DISCUSSION

A, AS TO THE COURT'S JURISDICTION

The Regions raise an objection based on the lack of jurisdiction of the court of first instance to hear the claim, in that it would lead the court to substitute itself for the legislative and executive powers of the defendants.

The Walloon Region argues in this respect that the requests for injunction, continuation and reporting, if granted by the tribunal would infringe the principle of separation of powers.

In fact, the purpose of the application is to establish that the federal State and the three Regions have failed to implement their climate policy and to hear them condemned to prevent the harmful consequences that this policy will have for the plaintiffs.

It is a given that the judiciary is competent to prevent or remedy any wrongful infringement of a subjective right by a public authority in the exercise of its discretionary power.

It is also accepted that Article 1382 of the Civil Code recognises a subjective right to compensation for damage caused by the fault of others.

Thus, the court has the power of jurisdiction to assess whether or not the conditions for the civil liability of a public authority exist on the basis of Article 1382 of the Civil Code.

In so doing, the judicial judge exercises a control over the legality and not the appropriateness of the behaviour adopted by the public authority.

Therefore, the court of first instance has jurisdiction to hear an action to decide the dispute as to whether or not the State and the three Regions have engaged in wrongful conduct.

The question of the scope of the measures that the judge may impose on the public authority to repair or prevent the damage claimed by the plaintiffs is a matter for the examination of the merits of the case.

B. THE ADMISSIBILITY OF THE MAIN APPLICATION AND THE APPLICATIONS FOR VOLUNTARY INTERVENTION

Concerning access to justice in environmental protection matters, Belgium ratified the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters on 21 January 2003.

Access to Justice in Environmental Matters, done at Aarhus on 25 June 1998130

Article 9 of the Convention, entitled "Access to Justice", provides in part that

« (...) 2. Each Party shall ensure, within the framework of its national legislation, that members of the public concerned :

a) having sufficient interest to act

or, if not,

b} infringing a right, where a Party's administrative procedural code sets a condition,

(a) The right to appeal to a court of law and/or another independent and impartial body established by it against the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where provided for under national law and without prejudice to paragraph 3 below, other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the provisions of national law and the objective of providing the public concerned with broad access to justice under this Convention. For this purpose, the interest of any non-governmental organisation meeting the requirements of article 2, paragraph 5, shall be deemed sufficient for the purposes of subparagraph (a) above. Such organizations shall also be deemed to have rights which could be impaired within the meaning of subparagraph (b) above. (...).

3. In addition, and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that members of the public who meet the criteria, if any, laid down in its national law have access to administrative or judicial procedures to challenge acts or omissions by private persons or public authorities which contravene provisions of national law relating to the environment.

4. In addition, and without prejudice to paragraph 1, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief where appropriate, and shall be objective, fair and expeditious without being prohibitively expensive. Decisions under this article shall be made or recorded in writing. Decisions of the courts and, as far as possible, of other bodies shall be publicly available.

5. In order to further enhance the effectiveness of the provisions of this article, each Party shall ensure that the public is informed of the possibility of initiating administrative or judicial review procedures, and shall consider the establishment of appropriate assistance mechanisms aimed at removing or reducing financial or other barriers to access to justice.

the plaintiffs consider that the present action is covered by Article 9, paragraph 3 of the Aarhus Convention.

the reference to "*national environmental law"* does not have the limited scope given to it by the CBR, but rather refers to the whole range of norms relating to the environment, including international and European norms that have been received in the domestic order and which, by virtue of this reception, form part of the law applicable in Belgium.

---

[130] The Aarhus Convention was incorporated into the domestic legal order by the Act of 17 December 2002 **approving the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters and Annexes I and II, done at Aarhus on 25 June 1998 (1.B., 24 April** 2003, p. 22128).

In addition, Article 1382 of the Civil Code is one of the domestic law bases for the environmental liability of public authorities131 and as such forms part of the "*national environmental law*" referred to in Article 9, paragraph 3 above.

In other words, insofar as the issue in this case is to assess the existence of a fault required by Articles 1382 and 1383 of the Civil Code with regard to the obligations of the public authorities in environmental matters, the present dispute does fall within the scope of Article 9, paragraph 3, cited above.

Furthermore, the "*possible criteria provided for by domestic law"* referred to in Article 9, paragraph 3, above, refer in particular to the conditions of admissibility provided for by domestic law.

The admissibility of the application lodged by Klimaatzaak vzw and almost 58,000 natural persons must therefore be examined in the light of Articles 17 and 18 of the Judicial Code.

In its version applicable at the time of the present action, Article 17 of the Judicial Code provided that "*the action cannot* be *admitted if the plaintiff does not have the right* and *interest to bring it"*.[132] *The Court of Cassation also provided that "the claimant must be able to prove that he has the right and interest to bring the action.*

Legal interest" *consists of* any *material or moral advantage - actual but not theoretical*
- that the claimant can withdraw from the claim he is bringing at the time he brings it, even if the recognition of the right, the analysis or the seriousness of the damage are established only at the time of the pronouncement of the judgment "[133] .

The interest must be personal and direct, i.e. the proceedings must provide a benefit to the plaintiff. Thus, Article 17 of the Judicial Code excludes an action brought in the general interest which does not benefit the plaintiff at all or only indirectly.

It is therefore up to the plaintiffs to establish that their interest in the action is distinct from the popular action.

Article 18 of the Judicial Code states that "*the interest must be born and* actual. *The action may* be *admitted when it* is *brought, even* as *a precautionary measure, to prevent the violation of a seriously threatened right*".

Finally, the interest to act is assessed at the time the application is made13 4-

---

[131] **See in this sense CARETTE A., "Milicuaansprake1ijkheid", in *Bijzondere overeenkomsten. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer, IV. Commentaar Verbintenissenrecht,* Titel III, Hfdst.** 13, Afd. 4, 11°40 and the cited case law.

[132] Polli' memory, paragraph 2 of the aforementioned Article 17 will only be introduced by the law of 21 December 2018 *(Monit.b.,*
31 December 2018).

[133] Ch. Van Reepinghen, "Rapport SUI' la réforme judiciaire", t.1, Brussels, *Moniteur beige,* 1964, p. 39.

[134] Cass. 24 April 2003, *Pas.* 2003, p. 854.

1. On the direct and personal interest of the plaintiffs

1.1. On the personal interest to act of the natural persons

In accordance with the above principles, the action of natural persons is admissible only insofar as each of them demonstrates an individual interest in the action.

In this case, the plaintiffs refer in particular to the impacts of climate change on the global yawl described by the IPCC in its 2018 special report.

This special report identifies and analyses the following consequences of global warming: average and extreme regional land temperatures;
temperature levels and circulation of seas and oceans; droughts and water shortages;
increased average and extreme precipitation and storms; increased risk of flooding;
melting ice ;
sea level rise and its impact on coastal and low-lying areas; the chemical composition of the oceans and the reduction of their capacity to absorb CO_2; the disruption of terrestrial and marine fauna and flora;
degradation of human health; food insecurity;
climate migration;
poverty.

On the European level, the European Commission also presented a Green Paper in 2007 which examined, among other things, the effects of climate change already observed at that time and their impact on the economy135 - the first time that the European Commission has ever presented a Green Paper on climate change.

In particular, the plaintiffs cite the following extract:

"the effects of climate change in Europe (...) are already significant and measurable. (...)
In Europe, the climate has warmed by almost 1°C over the last century, faster than the global average. (...)
the most vulnerable areas in Europe are (...):
* *In the coastal areas, due to the rise in sea level, there is an increased risk of storms;*
* *In densely populated alluvial areas, due to the increased risk of storms, heavy rainfall and flash floods causing severe damage to protected areas and the environment.*
infrastructure;
* *(...)*
Many economic sectors are highly dependent on climate change.

---

135 **Green Paper from the Commission to the Council, the European Parliament, the** European **Economic and Social Committee** and the Committee of the Regions. Adapting to climate change in Europe: options for EU action, Brussels, 29 June 2007, COM(2007) 354 final, p.5, ('EC, Green Paper Clima! 2007'), attachment G.3 of applicants.

climate change. These include agriculture, forestry, fisheries, beach tourism, winter sports and health. Water scarcity, wind damage, rising temperatures, increased bush fires and increased disease pressure will result in a deterioration of forest conditions. Increased frequency and intensity of extreme events such as storms, heavy precipitation, coastal floods and flash floods, droughts, forest fires and landslides will cause damage to buildings, transport and industrial infrastructure and indirectly affect the financial services and insurance sectors. (...)

Changing climatic conditions will affect the energy sector and energy consumption patterns in several ways:

** In regions with reduced precipitation or more frequent dry summers, there will be less water to cool thermal and nuclear power plants and to generate hydroelectricity. The cooling capacity of water will be reduced due to its general warming: exceeding discharge thresholds cannot be excluded;*

** River flows will change as a result of altered precipitation patterns and, in mountainous areas, as a result of reduced ice and snow cover. Siltation of hydroelectric dams could accelerate due to increased erosion risks;*

* *Heating demand will be reduced, but the risk of power cuts will increase with increased demand for air conditioning due to summer heat, which will increase the demand for electricity;*

* *Increased risk of storms and flooding could jeopardise infrastructure energy.*

Major transport infrastructures with a long life span, such as motorways, railways, inland waterways, airports, ports and railway stations, their proper functioning and the means of transport concerned are sensitive to weather conditions and climate effects, so that they are influenced by climate change. For example:

* *The protective effect of breakwaters and quay walls is reduced by the rise of the sea level;*

* *The risks of damage and disruption from storms and floods and from Heat waves, fires and landslides are expected to increase in general.*

It is clear that, even if there are some benefits from changing climatic conditions (e.g. agricultural production in some limited parts of Europe), the negative effects will largely outweigh the positive effects.

More recently, the 2017 European Environment Agency (or "EEA") study analyses the vulnerability of the European Union and its members to the impacts of global climate change, particularly in terms of :

trade in agricultural and non-agricultural products;
infrastructure and energy supply; geopolitical risk and security;
of human migration;

[136] European Commission, Climate Green Paper 2007, *op.cii.,* pp. 5-7, plaintiffs' exhibit G.3.

of the financial sector and insurance system137 .

Belgium, including its inhabitants, is not immune to the predicted global and European consequences of climate change.

The plaintiffs also refer to several undisputed sources to describe the direct consequences of global warming already observed in Belgium138 . It can be deduced from this that Belgium is already experiencing the direct impact of this climate change on the basis of the following findings:

- an increase in average annual and seasonal temperatures (constant increase of +0.4°C per decade since the 1980s);
- an increase in the number of extreme heat days and in the number, length and intensity of heat waves;
- an increase in average annual precipitation with an increase in seasonality and extremes, leading to flooding and flooding;
- an increase in periods of drought, leading to a drop in the water table and the scarcity of certain tree varieties;
- economic losses due mainly to damage caused by storms, tempests and floods {destruction of buildings, decimation of livestock, etc.).

Climate projections for Belgium by 2100 indicate an intensification of the consequences already observed and described above, as well as a concrete threat to the territorial integrity of the country, and more specifically of Fiandre exposed to sea level rise, and to human and animal health [139] -. Consequently, the diplomatic consensus based on the most authoritative climate science leaves no room for doubt that a real threat of dangerous climate change exists. This threat poses a serious risk to current and future generations living in Belgium and elsewhere that their daily lives will be profoundly disrupted.

In this case, the plaintiffs intend to hold the Belgian public authorities partly responsible for the present and future adverse consequences of climate change on their daily lives.

In so doing, each of them has a direct and personal interest in the liability action they have brought.

---

[137] EUROPEAN ENVJRONMENTAL AGENCY, *Clima/e change, impacts andvulnerability in Europe 2016. An indicator-based* report, Copenhagen, 2017, pp. 289-293 ('EEA (2017)'), Claimants' Exhibit D.5.

[138] See all sources cited in footnotes 261-271, pp.93-97 of the summary conclusions **of applicants.**

[139] See not. E. BRJTS et al, *Clima/e change and health. Set-up ofmoniloring ofpolenlial ejfecls of clima/e change* ***on human health and on the health of animals in Belgium,*** **Scientific Institute of Public Health, 2010, 54 p.,** plaintiffs' exhibit C.3; D. MINTEN, "Diagnose: klimaatziek. Bchandeling: urgent. Bijna 1.000 artsen vragen dat ons land zijn klimaatinspanningen dringend verhoogt. 'De klimaatverandering zal de gezondheidskosten doen toenemen"', *De Standaard,* IO oktober 2019, p.4, exhibit K.13 of the applicants.

The fact that other Belgian citizens may also suffer their own damage, in whole or in part comparable to that of the plaintiffs as individuals, is not sufficient to reclassify the personal interest of each of them as a general interest.

Insofar as necessary, the teaching of the CJEU's *Carvalho et al* [140] judgment is not relevant in the present case, insofar as in that judgment the Court, and the European Union Court before it, ruled on the admissibility of an action for annulment of Directive 2018/410 and Regulations 2018/841 and 2018/842 brought by private persons on the basis of Article 263 TFEU.

Indeed, the conditions of admissibility of an action for extra-contractual liability under beige law may validly differ from the conditions of admissibility of an action brought within the framework of a system of remedies and procedures designed to ensure the review of the legality of the acts of the European institutions by the Union courts. This difference results from the autonomous interpretation of the conditions of admissibility by courts acting within their own spheres of competence141 -.

Finally, contrary to what the defendants maintain, the requirement of a personal interest to act is not the same as the proof of the existence of an own damage. The question of the reality and extent of the material, physical and/or moral damage suffered by each of the claimants is a matter for examination of the basis of the claim and not its admissibility.

1.2. On the direct personal interest of the osb/ Klimaatzaak

Traditionally, the proper interest of a legal person includes only that which concerns the existence of the legal person, its patrimonial assets and moral rights, especially its patrimony, honour and reputation [142] - The mere fact that a legal person pursues an aim, even if it is statutory, does not give rise to a proper interest in bringing legal proceedings.

However, environmental organisations are given a privileged status by the Aarhus Convention mentioned above.

Indeed, when questioned in 2005 about Belgium's compliance with the Convention, the Compliance Committee specified the situation of environmental associations by indicating that the aforementioned Article 9 paragraph 3 should be read in conjunction with Articles 1 to 3 of the Convention and the principle set out in its preamble according to which *"the public, including organisations,* (have) *access to effective judicial mechanisms to ensure that their legitimate interests are protected and the law is respected".*[143]

[1,10] Court of Justice of the European Union, Judgment No. C-565/19 of 25 March 2021.

[1,11] The formula is taken from the Constitutional Court assessing the difference between the interpretation of Articles 17 and 18 of the Judicial Code and Article 2, 2° of the Special Act of 6 January 1989 on the Constitutional Court, in its judgment No. 133/2013 of 10 October 2013.

[1,12] see not. Cass. 19 September 1996, *R.C.J.B.,* 1997, p. 105.

[143] ACCC/C/2005/11 (Compliance Committee), "Conclusions and recommendations on communication ACCC/C/2005/11 concerning compliance by Belgium with the provisions of the Convention".

Thus, Article 3 of the Convention provides, inter alia, that:

> *" 4. Each Party shall give due recognition and support to associations, organisations or groups which have as their objective the protection of the environment and shall ensure that its national legal system is compatible with this obligation.*

The Compliance Committee of the Aarhus Convention regularly recalls that *"while Parties have discretion to define criteria for the application of Article 9(3) of the Convention, this discretion does not entitle them to prevent all NGOs acting solely for the purpose of promoting environmental protection from seeking remedies "*[144].

In other words, by referring to *"possible criteria under domestic law",* Article 9, paragraph 3 of the Aarhus Convention leaves States with a broad power to define the associations benefiting from access to justice, without, however, allowing these criteria to prevent the majority of associations from bringing cases before the courts, since access to the courts is the principle, the presumption and not the exception145 .
Before the CJEU, Advocate General Sharpston stated that this privileged status granted to these associations is "*a counterbalance to the decision not to introduce compulsory popular action on environmental matters "*[146].

It is true that Article 9 of the Aarhus Convention has no direct effect [147] - According to the CJEU, "*it must be recalled that neither paragraph 3 nor paragraph 4 of Article 9 of the Aarhus Convention contains an unconditional and sufficiently precise obligation capable of directly governing the legal position of individuals* "[148] - The Court of Justice of the European Communities has held that the Aarhus Convention does not contain any such obligation.

However, the CJEU also stated that it was for the national court, *"in order to ensure effective judicial protection in the fields covered by Union environmental law, to give an interpretation of its national law which, as far as possible, is in conformity with the objectives set out in Article 9(3) of the Aarhus Convention "*[149].

---

obligations under the Aarhus Convention with regard to the right of environmental organisations to access to justice", 16 June 2006, pt 34.

[144] **ACCC (Compliance Committee), "Conclusions and Recommendations to the**
Regarding Communication ACCC/C/2008/32 (Part II) on EU Compliance", 17 March 2017, p.16, pt 73 *infine,* Claimants' Exhibit 1-1.37.

[145] See in this sense ACCC/2005/11 (Compliance Committee), "Conclusions
and recommendations concerning communication ACCC/C/2005/11 on Belgium's compliance with its obligations under the Aarhus Convention with regard to the right of environmental associations to access to justice", 16 June 2006, points 35 and 36, quoted by M. PÀQUES and S. Cl-lARLIER,
"**Access to justice for environmental NGOs guaranteed by the Aarhus Convention and the interest to act in the Council** d'Etat", in *l'Europe auprésent !,* Brussels, Bruylant, 2018, p.584; see also V. KOESTER "The **Compliance** Committee **of the Alarhus Convention: an overview of procedures and case law", *Revue Européenne de Droit de l'Environnement,* 2007/3, p.272.**

[146] Conci. av. gen. E. SI-IARPTON, 16 December 2010, *Bund fiir Umwelt und Naturschutz Deu/schland, Landesverband Nordrhein-Westfalen,* Case C-115/09, pt. 52.

[147] M. PRIEUR, Droit de l'environnement, SE edition, Paris, Dalloz, 2019, point 1373.

[148] CJEU, C-470/16 of 15 March 2018, judgment *North East Pylon Pressure Campagn.*

[149] **CJEU, 8 March 2011, *Lesoochranàrske zoskupenie VLK* judgment, § 50.**

Taking note of this injunction of the CJEU, the Court of Cassation deduced from Articles 2(4), 3(4) and 9(3) of the Aarhus Convention that "*Belgium has undertaken to guarantee associations whose objective is the protection of the environment access to justice in the event that they wish to challenge acts contrary to the provisions of national environmental law and negligence on the part of private persons* and *public authorities, provided that they satisfy the criteria laid down by national law. These criteria cannot be described or interpreted in such a way that in such a situation these associations would not have access to justice. The court may interpret the criteria established by national law in accordance with the objectives of Article 9.3 of the Aarhus Convention. (...)*
If an action (brought by a civil party in a criminal case) is brought by a legal person which, by virtue of its articles of association, *has as its objective the protection of the environment* and *seeks to challenge*
In the case of a legal person who has been found to have acted or *failed to act in a manner contrary to the provisions of national environmental law, that legal person satisfies* the *condition of admissibility relating to the interest in bringing an action "*[150]

In a judgment of 21 January 2016, the Constitutional Court also admitted the specific legal standing of an association whose object is the protection of the environment in an action based on Article 1382 of the Civil Code, distinguishing it from that of a natural person as follows:

> *« B.8.1. Although every citizen has, as a legal person, the purpose of*
> *In the case of an interest in the conservation of nature, in this case the conservation of the wild bird population, there is an essential difference between the citizen and an association when it comes to bringing a civil action for compensation for damage to elements of the environment which do not belong to anyone.*
> *Since the elements of the environment do not belong to anyone, the ordinary citizen will in principle have no direct and personal interest in bringing an action for compensation for the injury of this interest. On the other hand, a legal person which has been established with the specific purpose of protecting the environment may, as indicated in B.4, actually suffer moral damage* and *bring an action "*[151]

Thus, "*it follows from articles 2.4, 3.4 and 9.3 of the Aarhus Convention that Belgium has undertaken to ensure access to the courts for environmental associations when they wish to challenge acts and omissions contrary to environmental law by public persons and bodies, provided that they meet the criteria laid down by national law. The personal interest of an environmental association must be understood as the moral advantage that is obtained when the judicial decision is in accordance with the realisation of the association's objectives "*[152].

Finally, on the occasion of the subsequent adoption of paragraph 2 of Article 17 of the Judicial Code, the 2018 legislator endorsed the position of the Court of Cassation on the scope of the Aarhus Convention by stating that:

---

[150] Cass. 11 June 2013, R.G. n° P.12.1389.N, p.3.
[151] CC, judgment no. 07/2016 of 21 January 2016.
[152] Civ. Brussels, 31 January 2020, *T.M.R.,* 2020, book 3, 364; see also Antwerp, 12 October 20 I 6, TBBR 2018, afl. 8, 440.

"In view of the developments in the case law of the Court of Cassation, it seems preferable not to make any explicit legal provision for environmental associations which, in accordance with the Aarhus Convention, should always be able to benefit from effective access. Indeed, according to the case law of the Court of Cassation, environmental associations that meet the requirements of the Aarhus Convention already have effective access to justice. Thus, in its judgment of 11 June 2013, the Court considered that it follows from Articles 3.4, 9.3 and 2.4 of the Convention that Belgium has undertaken to guarantee associations whose objective is the protection of the environment access to justice in the event that they wish to challenge actions contrary to the provisions of national environmental law and the negligence of private persons and public authorities, provided that they satisfy the criteria established by national law. These criteria cannot be described or interpreted in such a way that in such a case these associations would not have access to justice. "The judge may interpret the criteria established by national law in accordance with the objectives of Article 9.3 of the Aarhus Convention. For the rest, /environmental protection associations that do not meet the requirements of the Aarhus Convention may, if necessary, bring a collective interest action under ordinary law

Consequently, an environmental protection association has the personal and direct interest required by Article 17 of the Judicial Code to file a claim for compensation on the basis of Article 1382 of the Civil Code, if it considers that damage has been caused to the environment whose defence it has set itself as its statutory object. The personal interest of such an association is to seek compensation for its own moral damage deduced from the damage to the collective interests for which it was founded and which it aims to protect[154].

In this case, according to article 3 of its statutes, the object of Klimaatzaak vzw is the following:

"The aim of the association is to protect current and future generations from man-made climate change and biodiversity loss. The association wants to achieve this goal by obtaining the support of the population and the authorities. The association can achieve this aim by means of the following (non-limiting) means, among others:

1- *Take legal action, both in Belgium and abroad, to combat climate change and/or mitigate its effects.*

2° *Encourage policy or actions aimed at the full participation of citizens or environmental associations, as well as actions aimed at adequate access to justice for them, both in Belgium and abroad;*

3° *Carry out other actions, judicial or otherwise, in connection with specific or general issues relating to climate, the environment, nature conservation or biodiversity "*[155]

The action taken by Klimaatzaak vzw in this case falls within the framework of its social object aimed at combating climate change, so that it can justify a personal and direct interest in acting.

[153] *Doc.parl.* House, sess. 2017-2018, 11° 54-3303/001, p.99.
[154] Antwerp, 12 October 2016, *R.G.D.C.*, 2018/8, p.440.
[155] Claimants' Exhibit P.7.

For the rest, the lesson of the Constitutional Court's judgment no. 133/2013156 referred to by the defendants is not relevant in the present case insofar as, in that judgment, the Court examined the situation of legal persons who wished to take action corresponding to their statutory purpose and aimed at the protection of fundamental freedoms, but to which the Aarhus Convention is not applicable.

Finally, as the Walloon Region points out, this is not an action to prevent or repair ecological damage in the strict sense. Indeed, this damage caused directly to the environment independently of its repercussions on people and property is not, in beige law, the subject of jurisdictional protection, unlike, for example, French law [157] -.

In this case, the moral damage claimed by the Klimaatzaak vzw because of the harm done to the collective interest for the defence of which it was set up does not coincide with the ecological damage understood as the harm done to nature and which affects society as a whole158 .

In other words, Klimaatzaak vzw can claim an interest of its own in acting in accordance with its corporate purpose, which is specifically aimed at combating climate change and not at defending the general interest without further specification.

2. <u>On the born and present interest and the action *ad futurum* of the plaintiffs</u>

The beige State concludes that the action is inadmissible for lack of a real and present interest on the part of the plaintiffs.
Article 18 paragraph 1 of the Judicial Code effectively states that "*the interest must be born and granted*".

Derogating from the condition of topicality of the interest, Article 18 paragraph 2 of the Judicial Code authorises, in particular, an action "*brought, even as a declaratory action, to prevent the violation of a seriously threatened right*".

In the present case, the applicants seek an order that the public authorities take the necessary measures to prevent future damage, the risk of which is real and not hypothetical. In this respect, they rightly claim to have an interest in bringing proceedings within the meaning of Article 18, paragraph 2, above.

---

[156] e.g. Judgment No. 133/2013 of 10 October 2013, see mainly submissions B.10 and B.11.
[157] **According to Article 1246 of the French Civil Code, "*any person responsible for ecological damage is required to compensate for it*". Article 1248 of the French Civil Code provides that "*the action for compensation for ecological damage is open to any person having the capacity and right to act, such as (...) associations approved or created at least five years ago on the date of the institution of the proceedings, the object of which is the protection of nature and the defence of the environment*.**
[158] See judgment e.g. No. 07/2016 of 21 January 2016, recital B.8.3.

Indeed, as soon as the action was brought, in June 2015, the plaintiffs were aware of this real risk of harm to their living conditions159 as well as of the risk that Belgium would not fulfil its obligations to reduce GHG emissions in the non-ETS sectors160 , which allows them to justify the interest required by the aforementioned Article 18, paragraph 2.

It follows from all the above considerations that the action of Klimaatzaak vzw and the natural persons who are the main claimants is admissible.

By the same reasoning as for the natural person plaintiffs, the voluntary intervention of the natural persons listed in Annex B will also be declared admissible.

For the sake of clarity, all of the above parties will be referred to as "the claimants" in the following.

3. On the standing of the trees listed in the deed filed on 3 May 2019

On 3 May 2019, a deed of voluntary intervention for 82 'life span' trees was filed with the registry.

In the state of positive beige law, trees are not "subjects of rights", i.e. beings capable of having and exercising rights and obligations.

With the exception of legal persons who are expressly granted legal personality by law, only the human being has this capacity, and only his interests are subject to the regulations established by law.

In the absence of legal personality, trees have no standing to bring a claim. Their voluntary intervention will therefore be declared inadmissible.

C. OMMENDATIONS ON THE APPLICATION PROCESS

The plaintiffs base their claim on Article 1382 of the Civil Code and seek compensation for the damage caused by the wrongful conduct of the Federal State and the three Regions.

They complain that the defendants have failed to adopt appropriate measures, whether legislative or executive, to prevent dangerous global warming and its consequences for fundamental rights.

---

159 See in particular the documents cited above: the IPCC's 51ₘ ' report of 2014, lPPC 2014, AR5 SYP, Claimants' Exhibit B.21; the European Commission's Climate Green Paper of 2007, Claimants' Exhibit G.3; the Scientific Institute of Public Health's study of 2010, Claimants' Exhibit C.3

160 See noi. the European Commission's reports for Belgium for the years 2012, 2013 and 2015, Claimants' exhibits G.14, G.15 and G.20.

According to the plaintiffs, the behaviour adopted for several years by the federal State and the Regions has therefore :

on the one hand, constituted an error of conduct that a normally careful and prudent authority in the same circumstances would not have committed;
violated Articles 2 and 8 of the European Convention on Human Rights (ECHR) and Articles 6 and 24 of the Convention on the Rights of the Child.

1. Applicable principles

1.1. On the responsibility of public authorities in beige law

Concerning the question of the responsibility of the State in its regulatory and executive function, the Court of Cassation recalled in its judgment of 25 October 2004 that *"the fault of the administrative authority, which may on the basis of Articles 1382 and 1383 of the Civil Code engage its responsibility, consists of a behaviour which, either is analysed as an error of conduct to be assessed according to the criterion of the administrative authority normally careful and prudent in the circumstances, or, subject to an invincible error or another cause of justification, violates a norm of national law or an international treaty having effects in the internal legal order, imposes a duty on the State to respect and protect the rights of the citizens.the same conditions, or, subject to an unintentional error or other cause of justification, violates a norm of national law or of an international treaty having effect in the internal legal order, requiring that authority to refrain from or to act in a certain manner* "[161].

The principle of the liability of the legislative power has been established by the Court of Cassation since 2006.

In the Ferrara judgment, the high court set out the application of Article 1382 of the Civil Code to the legislator in these terms:

> *"The principle of the separation of powers, which tends to achieve a balance between the different powers of the State, does not imply that the State is generally exempt from the obligation to compensate for damage caused to others by its own fault or that of its organs in the exercise of the legislative function.*
> *Neither this principle nor Articles 33, 36 and 42 of the Constitution preclude a court of law from finding such a fault and ordering the State to compensate for its harmful consequences.*
> *In assessing the wrongfulness of the legislature's harmful conduct, this tribune does not interfere with the legislative function and the political process of law-making, but complies with the judiciary's task of protecting civil rights.*
> *In the case of a claim for compensation for damage caused by a wrongful infringement of a right enshrined in a higher norm imposing an obligation on the State, a court of law has the power to review whether the legislature has legislated adequately or sufficiently to enable the State to comply with that obligation, even though the norm which prescribes it leaves the legislature with a discretionary power as to the means of ensuring compliance".*[162]

In his conclusions preceding the judgment of 28 September 2006, First Advocate General Leclercq stated

---

[161] Cass. 25 October 2004, *JL.M.B.*, 2005, pp. 638.
[162] Cass. 28 September 2006, *JL.MB.*, 2006, p. 1549.

> *"It seems to me* that it *can be said that a legislator who fails to act when there is* a *risk is not acting as a good father. I am thinking in particular of failure to act when the country* is *threatened by risks to safety, public health, hygiene, the environment, etc. I would go further* and *say, in the same vein, that the legislator who* fails to *take the necessary measures to guarantee his subjects the constitutional rights* and *freedoms and the rights* and *freedoms of the European Convention on Human Rights {27) is not behaving in the way one would expect of a legislator acting as a good father.*

A few years later, the Court of Cassation also stated that :

> *"The State may, as a rule, be held responsible for a wrongful intervention or omission. It is for the judge to examine whether the State has acted as an ordinarily prudent* and *diligent legislator would do "*[164]

For the rest, the aforementioned judgment of 10 September 2010 sets aside the idea of unity between the unconstitutionality of a law and extra-contractual fault by inviting the liability judge to assess *in concreto* the existence of fault in the event of prior censure of a law by the Constitutional Court.

Consequently, and contrary to what the Walloon and Brussels Regions maintain, the Court of Cassation does not limit the liability of the legislator to the sole hypothesis of a violation of a higher norm imposing a specific behaviour.

The defendants also wrongly argue that failure to comply with a norm of international law can give rise to civil liability on the part of the public authorities only where that norm has direct effect. In this respect, they give the judgment of the Court of Cassation of 9 February 2017165 a scope that it does not have.

In this judgment, the Court of Cassation simply recalled that "*the fault of the administrative authority which may, on the basis of Articles 1382* and *1383 of the Civil Code, engage its liability consists of a behaviour which, either is analysed as an error of conduct to be assessed according to the criterion of the normally careful and prudent authority, placed in the same conditions, or, subject to an invincible error or other cause of justification, violates a norm of national law or of an international* treaty *having direct effects in the internal order which requires* that *authority to refrain from or to act in a certain manner"* [166]

This judgment therefore does not exclude the hypothesis that the violation of an international norm without direct effect may infringe the general standard of care, but only establishes the principle of unity between the violation of an international norm with direct effect and the civil fault. Only in the latter case does the Court of Cassation remove any possibility of counteraction from the liability judge, who, in its view, can only establish fault in the case of a breach of an international norm with direct effect.

---

[163] Conclusions of the First Advocate General J.-F. LECLERCQ preceding Cass. 28 September 2006, *J T.*, 2006, p.599.
[164] Cass. judgment F.09.0042.N of 10 September 2010, p. 2, available at www.juridat.be
[165] *J T.*, 2019, p.33 ff.
[166] Cass. 9 February 2017, *.J.T.*, 2019, p.35.

On the other hand, disregard of norms without direct effect will constitute a fault if the claimant demonstrates a breach of the general duty of care[167].

Moreover, if the traditional criterion for assessing the direct effect of a rule, namely its degree of precision and completeness, were to be retained, the Court takes the view that the precision of a rule, and hence its "direct effect", is not a function of its wording or of the qualification of the obligation that derives from it, but rather of the margin of appreciation that it grants or does not grant to the judge responsible for applying it[168]. The direct effect of a rule is then defined "*as the capacity of this rule, in the context where its application is claimed, to provide the judge whose application is requested with the solution of his judgment* "[169]

Insofar as necessary, the tribuna! notes that international acts, such as the Kyoto agreements, the Doha amendment and the Paris agreements, have all been approved by the federal and state parliaments and are therefore received in the domestic order in which they are likely to produce effects, whether direct or indirect.

In any case, and in accordance with the principle of separation of powers, the judge of liability must exercise a necessarily marginal control, thus avoiding substituting his assessment for that of the legislator[170].

The examination of the present action must therefore be carried out within the guidelines laid down by the case law of the Court of Cassation.

Finally, climate science is evolving, as demonstrated by successive IPCC reports. It is therefore in the light of the scientific knowledge available at a given moment that the degree of knowledge of the risks is assessed, and hence the behaviour of the public authorities with regard to these risks.

1.2. On the scope of Articles 2 and 8 of the ECHR

Article 2 of the ECHR reads as follows:

> *« 1. The right of every person to life is protected by law. Death may not be inflicted on any person intentionally, except in execution of a sentence of death pronounced by a court of law if the offence is punishable by law.*

---

[167] See for an analysis in this respect of the judgment of 9 February 2017: F. AUVRAY, ,Is the violation of a treaty a fault? incidence de l'absence d'effet direct sur la responsabilité extracontractuelle de l'Etat", J.T., 2019, p.26.

[168] **See in this sense, J. PIERET, "Pinfluence dujuge belge sur l'effectivité de la Convention: retour doctrinal et jurisprudentiel sur -1e concept d'effet direct", in *Entre ombres et lumières: cinquante ans de application de la European Convention on Human Rights in Belgiumi* Brussels, Bruylant, 2008, pp.83-143.**

[169] **O. DE SCHUTTER, *Function dejuger et droitsfondamentaux. Transformation of judicial control in the* European and American legal orders**, Brussels, Bruylant, 1999, p.134, quoted by J. PIERET, *Ibid.*

[170] see not. S. VAN DROOGHENBROECK, "La responsabilité extracontractuelle du fait de légiférer, vue d'ensemble", *in La responsabi/ité des pouvoirs pub/ics*, Brussels, Bruylant, 2016, p.380 and the **doctrinal** references **cited.**

2. *Death shall not be considered as inflicted in violation of this article in cases where it results from the use of farce made absolutely necessary:*
(a) to ensure the defence of all persons against unlawful violence;
b} to effect a lawful arrest or to prevent the escape of a person lawfully detained;
(c) to suppress, in accordance with the law, a riot or insurrection.

The right to life is about :

the positive obligation of the State to take all necessary measures to protect the lives of persons;

or the negative obligation of the State not to inflict death, except in cases of death resulting directly from the acts of State agents.

In terms of the positive obligation invoked by the plaintiffs, the State must take preventive measures in the event of dangerous activities or disasters
the right to life and of which the authorities were aware171 The Court .
In contrast, the European Court of Human Rights has made it clear that the choice of appropriate measures is within the broad discretion of the State.[172]

Article 8 of the ECHR provides as follows:

"Everyone has the right to respect for his or her private and family life, home and correspondence.
2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.*

In its *Lopez Ostra* judgment, the European Court of Human Rights made the link between environmental damage and damage to private life protected by Article 8. Thus, it states that *"//it is self-evident that serious environmental damage may affect the well-being of a person and deprive him of the enjoyment of his home in such a way as to adversely affect his private and family life, without however seriously endangering his health "*[173].

In *Tàtar* v. *Romania,* the Court stated that "*the existence of a serious and substantial risk to the applicants' health and well-being placed a positive obligation on the State to adopt reasonable and adequate measures capable of protecting the rights of the persons concerned to respect for their private life and home and, more generally, to the enjoyment of a healthy and protected environment".*[174]

---

[171] **European Court of Human Rights, judgment *6ne1J,ifdiz v. Turkey,* 30 November 2004, § 90; European Court of Human Rights, judgment *Boudai'eva and others***
c. Russia, 20 March 2008, §130.
[172] See ECHR, *Guide on Article 2 of the European Convention on Human Rights -Righi lo /ife,* December 2020, p. 12 and the case references cited.
[173] European Court of Human Rights, judgment *Lopez Ostra v. Spain,* 9 December 1994, §51.
[174] European Court of Human Rights, judgment in *Tàtar v. Romania,* 27 January 2009, §107.

Furthermore, with regard to environmental protection, Articles 2 and 8 of the ECHR may overlap in certain circumstances. For this reason, the principles developed under Article 8 can also be applied to Article 2. The European Court of Human Rights has stated: "*It has been found that, in the field of dangerous activities, the scope of the positive obligations under Article 2 of the Convention broadly overlaps with that of the positive obligations imposed under Article 8 (Onery1/d1z, cited above, §§ 90 and 160). Consequently, the principles developed by the Court in its case law on the environment or town and country planning may also be invoked for the protection of the right to life where privacy and the home are infringed* "[175].

In order to determine whether a state is meeting its positive obligations under Articles 2 and 8 of the ECHR, the victim must be able to invoke a direct, clearly identifiable and locally specific interference.

Thus, in the *Cordella and others* v. *Italy* judgment, the European Court of Human Rights recalled that the ECHR does not contain a general right to environmental protection and that popular actions are prohibited. The Court recalls that *"the control mechanism of the Convention cannot admit actia popularis (Perez v. France [GC], no. 47287/99, § 70 ECHR 2004-1, and Di Sarno and Others v. Italy, no. 30765/08, § 80, 10 January 2012). However, neither Article 8 nor any other provision of the Convention specifically guarantees general protection of the environment as a human right (Kyrtatos v. Greece, no. 41666/98, § 52, ECHR 2003-V (extracts)). {101}. According to the Court's case-law,* the *crucial factor in determining whether, in the circumstances of a case, environmental damage has resulted in a violation of one of the rights guaranteed by Article 8(1) is the existence of an adverse effect on a person's private or family sphere, and not merely the general deterioration of the environment (Fadei'eva v. Russia, no. 55723/00, § 88, ECHR 2005-IV} „115_*

In the current state of climate science, as briefly *mentioned* above, there can no longer be any doubt that there is a real threat of dangerous climate change with a direct negative effect on the daily lives of current and future generations of Belgium's inhabitants. The not purely hypothetical risks of rising North Sea levels or increasing health problems are examples of this.

The global dimension of the problem of dangerous global warming does not exempt the Belgian public authorities from their pre-described obligation under Articles 2 and 8 of the ECHR. In this respect, the Court agrees with the *view of the* Dutch Supreme Court in the *Urge nda177* case.

Therefore, in the present case, the applicants are right to argue that Articles 2 and 8 of the ECHR impose a positive obligation on public authorities to take the necessary measures to remedy and prevent the adverse consequences of dangerous global warming on their lives and their private and family lives.

---

[175] ECtHR *Budayeva and Others v Russia,* 20 March 2008, § 133; ECtHR, *One1J,ildizllì1rq11ie,* 18 June 2002, §§ 90 and 160.
[176] ECtHR, judgment in *Cordella and csrts v. Italy,* 24 January 2019, § 100-101.
[177] Arrilt of 20 December 2019, pt 5.7.1. to 5.8, Claimants' Exhibit 0.12.

Appropriate measures can be of two kinds: either so-called mitigation measures that aim to prevent the hazard from materialising, or so-called adaptation measures that aim to cushion or mitigate its effects. Measures to reduce GHG emissions are mitigation measures, while measures to protect the territory against sea level rise are an example of adaptation measures.

Finally, the obligations arising from Articles 2 and 8 of the ECHR relate to the measures to be taken by the public authorities and not to the result to be achieved. Such so-called behavioural obligations are therefore subject to the marginal review of the judge of responsibility.

Moreover, the European Court of Human Rights has insisted, in various judgments relating to the problem of the environment in connection with Article 8 of the ECHR, on the margin of appreciation available to the Member States178 .

1.3 On the scope of Articles 6 and 24 of the Convention on the Rights of the Child

Article 6 of the International Convention on the Rights of the Child, hereinafter the "CRC", states that :

« 1. States Parties recognise that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 24 of the CRC states:

« 1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment and rehabilitation of illness. 1/ States Parties shall strive to ensure that no child is deprived of the right of access to such services.
2. States Parties shall strive for the full realization of the above right and, in particular, shall take appropriate steps to: (a) To reduce infant and child mortality; (b) To ensure the provision of necessary medical assistance and health care to all children, with particular emphasis on the development of primary health care; (e) To combat disease and malnutrition, including in the context of primary health care, through, inter alia, the use of readily available technology and *the provision of nutritious foods and clean drinking water, taking into account the dangers and risks of environmental pollution; (d) to ensure appropriate prenatal and post-natal care for mothers (e) to ensure that all groups in society, in particular parents and children, are provided with information on child health and nutrition, the benefits of breastfeeding, environmental health and safety, and the prevention of accidents, and are assisted in making use of* that *information (f) develop preventive health care, parental guidance and education, and family planning services.*
3. States Parties shall take all appropriate effective measures to abolish traditional practices that are harmful to children's health.

"8 See in particular. European Court of Human Rights *Budayeva and Others v. Russia,* 20 March 2008, *§§* 134-135; European Court of Human Rights, *Fadeyeva !Russia,* 9 June 2005, §96.

4. States Parties undertake to promote and encourage international cooperation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular regard shall be paid to the needs of developing countries.

As the applicant rightly points out, unlike Articles 2 and 8 of the ECHR, it is not possible to deduce from Articles 6 and 24 a positive obligation on the part of the signatory States, as the text of these provisions leaves them free to meet the objective they set out.

With regard to other provisions of the International Convention on the Rights of the Child, which are as broadly worded as Articles 6 and 24 above, both the Cour de cassation[179] and the Conseil d'Etat[180] have found that they create obligations only for States Parties and cannot be directly invoked by individuals before the domestic courts.

The same is true of Articles 6 and 24, which, while recognising the rights of the child, leave signatory States a great deal of freedom as to how they intend to give effect to these rights. This maximum margin of manoeuvre rules out the possibility of these provisions being invoked directly by the applicants in support of their application in this case.

2. Application in this case

2.1. Background

In this case, neither party disputes the existence and seriousness of the threat of dangerous global warming.

On the basis of successive IPCC reports, a diplomatic consensus has developed among the Parties to the UNFCCC on the notion of dangerous global warming and the thresholds of warming that should not be exceeded.

The main stages of this development on the international scene can be briefly recalled as follows:

In 2009, the IPCC 4th Assessment Report update refers to the 2°C threshold as the limit that should not be exceeded, with the understanding that to reach this threshold, the maximum concentration of GHGs in the atmosphere must be 450 ppm CO

In the same year, the Copenhagen Accord acknowledged the 2°C threshold and already envisaged a reduction to 1°C;

In 2010, the Cancún agreement confirms the need to stay below 2°C and to consider a new global warming target limited to 1°C;

In 2011, the Durban COP recognised that climate change is an immediate and potentially irreversible threat and noted the significant gap between the

[179] Cass. 31 March 1999, *J.L.M.B.,* 1999/33, p. 1430.

[180] e.E., judgment no. 237.821 of 28 March 2017.

reductions promised by Member States for 2020 and the reductions needed to keep global warming below 2°C or 1.5°C;
In 2015, the SED report called 2°C the "ultimate threshold" and 1.5°C the "ultimate threshold". "The prudent course is to limit global warming to below 2°C;
In the same year, the Paris agreements confirmed the need to keep global warming below 2°C in order to reach 1.5°C;
In 2018, the IPCC special report concludes that global warming must be limited to 1.s-c, which implies a reduction in GHG emissions of 45% by 2030 and 100% by 2050. This report was presented at COP-24 in Ottawa;
Also in 2018, UNEP presents an assessment of ongoing national mitigation efforts and ambitions presented by countries in their Nationally Determined Contributions (or NDCs) which are the basis of the Paris Agreement. It states that
"The current commitments expressed in the NDCs are insufficient to close the gap between /the need and the prospects for reducing emissions by 2030"[181].
The UNEP report of 2019182 states that:

- The gap between emission reduction needs and prospects is large. By 2030, annual emissions will need to be 15 Gt CO 2eq below current unconditional NDCs to meet the 2°C target, and 32 Gt CO 2eq to meet the 1.5°C target;
- NDCs need to be significantly strengthened in 2020. Countries need to triple the level of ambition of their NDCs to reach the target of well below 2°C, and they need to more than quintuple that level to reach the 1.5°C target.

The scientific community agrees on the need to contain the concentration of GHGs to 450 ppm by 2100, whereas currently the concentration of GHGs is already above 400 ppm.

At the European level, as early as 1996, the Council of the European Union also adopted the threshold of 2°C to be reached to mitigate the serious consequences of global warming. In March 2005, the Council stressed the need to limit global warming to 2°C.
In 2019, in its *European Green Dea/,* the European Union has included the objective of limiting the global temperature rise to 1.5°C, not 2°C.

Finally, it is a fact that the four defendants had knowledge of each other for several years:
the danger of exceeding the 2°C or even 1.5°C warming threshold;
of the real risk of exceeding this threshold before the end of the 20th century;
the inadequacy of current NDCs to prevent dangerous global warming.

[18,] UNEP, Emissions Reduction Needs and Opportunities Gap Report, 2018, Executive Summary, Exhibit 11.B.l of the Beige State.
[182] **UNEP, Emissions Reduction Needs and Opportunities Gap Report, 2018,**
Executive Summary, Exhibit 11.B.2 of the Beige Statement.

Indeed, the Federal State and the three Regions have participated in the successive COPs, given their assent to the international acts, thus enabling them to be incorporated into domestic law, and marked their support for the IPCC's conclusions by expressly referring to them in their own legal or political acts.

2.2. *Three findings*

In the context described above, the Beige State and the three federated entities have, jointly and each in its own right, adopted acts of legislative, regulatory, political and technical value, with a view to adapting their GHG reduction efforts to the evolution of climate science.

The factual data submitted to the Tribuna! allows the following findings to be made.

2.2.1. Beige reports and summaries

At the outset, the court noted that the defendants had stated that they were not in a position to provide final GHG emission figures for 2019 and 2020 until the case was taken under advisement.

In their updates under discussion, the Federal State, the Walloon Region and the CBR have submitted provisional figures for 2019, while the Flemish Region has submitted provisional figures for 2019 and 2020.

It is therefore impossible for the court to make a definitive statement on the development of GHG emissions up to 2020 from the beige territory. The request for such a finding will therefore not be granted.

Nevertheless, the following can be deduced from the partial data provided.

a) Period 2008-2012

According to Article 2 and Annex II of Decision 2002/358/EC[183], Belgium had to reduce its GHG emissions by 7.5% from the 1990 level by 2012.
It is neither disputed nor disputable that Belgium has met its GHG emission reduction commitments of 7.5% below 1990 levels in 2012[184], including a specific GHG reduction of 14% in the non-ETS sector, both through net GHG emission reductions and through the purchase of additional emission rights.

---

[183] Council Decision 2002/358/EC of 25 April 2002 on the approval, for the 110111 Community
from the Kyoto Protocol to the United Nations Framework Convention on Climate Change.
[184] Report on the individual review of the report upon expiration of the additional period for fulfilling commitments for the first commitment period of the Kyoto Protocol from Belgium, UN, 24 March 2016, Exhibit IV.D. l. of the State beige.

b) Period 2013-2020

International obliquities

Article 3 of the Kyoto Protocol states that :

> *« 1. The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic emissions (') do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex 8.*

The Doha amendment replaces Annex B and changes Belgium's assigned amount from 92% to 80% of GHG emissions, but does not change the scope of the obligation as defined in Article 3 of the original Protocol.

Belgium had therefore committed itself to reducing its GHG emissions by 20% compared to 1990 by 2020.

Insofar as necessary, the Court notes that the range of 25% to 40% of emission reductions mentioned by the plaintiffs was not imposed as such on Belgium.

It is true that since 2007 and the 4th IPCC report, there has been a broad scientific and diplomatic consensus on the need for all Annex I countries (or Annex I countries "*as a group") to* reduce GHG emissions by 25% to 40% below 1990 levels by 2020 in order to limit global warming to 2°C.

This scenario aimed to maintain the maximum concentration of GHGs in the atmosphere at 450 ppm by 2100.

It is also agreed that, as of 2015, the international community agrees that, to avoid dangerous global warming, the temperature increase should be less than 2°C and no more than 1.5°C.

However, despite political declarations on the need to reduce global GHG emissions by 25% to 40%, it is clear that the States Parties to the UNFCCC and the Kyoto Protocol have not been willing to make any binding commitments, either collectively or individually, in this regard.

On the contrary, the Doha Amendment to Annex B of the Kyoto Protocol requires the vast majority of Annex I countries, including Belgium, to reduce their GHG emissions by 20% by 2020, not 25% or 40%. The European Union is no exception as it has formally committed itself to a 20% reduction in GHG emissions by 2020, although it has expressed the need to reduce its emissions by 30% and has, according to the latest estimates, achieved a 26-27% reduction by 2020.

These binding individual targets, which fall short of the global targets proposed by the IPCC, were not challenged after the 5th IPCC report and the 2015 Paris agreements, even though at COP-21 the States Parties agreed that efforts should be made to limit global warming

climate at 1.5-C. This 1.5-C maximum implies a maximum concentration of GHGs in the atmosphere of 430 ppm by 2100.

Therefore, the only binding target for Belgium for 2020 is a 20% reduction in GHG emissions.

Results

According to the national beige inventory of 15 April 2020 submitted by the federal government, in 2018 Belgium achieved a GHG emission reduction threshold of 17.97% (including the LULUCF185 sector). The provisional percentage for 2019 is 18.8% (including the LULUCF sector).

In their figures, the defendants exclude emissions from the LULUCF sector on the grounds that these would be fully offset by credits (or carbon storage) from certain categories of use within this sector, as Belgium is bound by the 'neutral or positive balance' rule.

Indeed, the target applicable to all Member States for the period 2021-2030 is the so-called 'no-debit rule'[4]this rule means that, in this sector, carbon stocks as a whole cannot decrease. To this end, it is possible, inter alia, to use credits (carbon storage) from a certain land use category to offset a debit (carbon emission) in another land use category.
However, there are no figures or other concrete elements to substantiate this claim of perfect compensation, while in its latest report of October 2020187 , the European Commission itself indicates that the task of compiling an accurate inventory of LULUCF emissions is also part of Belgium's *reporting* obligations. The Commission also underlines the fact that no conclusions can therefore be drawn on Belgium's commitments in this particular sector.

In the absence of figures on the existence and extent of carbon offsetting, there is no reason to exclude the results set out in the LULUCF sector.

In any case, the tribuna! can only note that in 2019, the overall volume of annual GHG emissions from the beige territory had not decreased by 20% compared to the 1990 level.

---

ts [5] **Land use, land-use change, and forestry (LULUCF) is a sector that covers the emission and storage (inunission, capture, sequestration) of GHGs from land use, land-use change and forestry activities.**

[186] Article 4 of Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of **greenhouse gas emissions and removals from land use, land-use change and forestry in the** 2030 **climate and energy policy framework**, and amending Regulation (EU) 110 525/2013 and Decision (EU) 110 529/2013

[187] **Evaluation of the final national energy and climate plan in Belgium, 14 October 2020,**
SWD(2020) 900 forni, p.8, available on the climat.be website.

European bonds

Article 3 of Decision 406/2009/EC, entitled "*Emission levels for the period 2013-2020*
indicates in particular:

"Each Member State shall, by 2020, limit its greenhouse gas emissions to at least the percentage specified for that Member State in Annex II to this Decision in relation to its 2005 emissions.

2. *Subject to paragraphs 3, 4 and 5 of this Article and to Article 5, each Member State with a negative limit under Annex II shall ensure that its greenhouse gas emissions in 2013 do not exceed its average annual greenhouse gas emissions during the period*
The Commission shall submit to the European Parliament and to the Council a report on the implementation of Directive 2003/87/EC and Decision No 280/2004/EC for the years 2008, 2009 and 2010, as declared and verified under Directive 2003/87/EC and Decision No 280/2004/EC, including the use of the margins of manoeuvre provided for in this Decision.

(...) each Member State with a positive limit under Annex II shall ensure that its greenhouse gas emissions in 2013 do not exceed a level defined on a linear trajectory, starting in 2009 with its average annual greenhouse gas emissions during 2008, 2009 and 2010, as reported and verified pursuant to Directive 2003/87/EC and Decision No 280/2004/EC, and ending in 2020 at the limit for that Member State set out in Annex II, including by using the flexibility margins provided for in this Decision.

Subject to paragraphs 3, 4 and 5 of this Article(...), each Member State shall annually limit its greenhouse gas emissions in a linear manner to ensure that they do not exceed the limit for 2020, as specified in Annex II, including by using the implementation measures set out in this Decision. (...)

3. During the period 2013 to 2019, a Member State may carry forward from the following year up to 5 % of its annual emission allocation. If a Member State's greenhouse gas emissions are lower than its annual emission allocation after taking into account the use of the flexibility periods provided for in this paragraph and paragraphs 4 and 5, it may carry over the part of its annual emission allocation for a given year that exceeds its greenhouse gas emissions for that year to subsequent years until 2020.
A Member State may apply for a 5 % higher carry-over rate in 2013 and 2014 in the case of extreme weather conditions that led to a substantial increase in greenhouse gas emissions in those years compared to years with normal weather conditions. To this end, the Member State concerned shall submit a report to the Commission substantiating its request. Within three months, the Commission shall decide whether a further postponement can be granted.
4. A Member State may transfer up to 5 % of its annual emission quota for a given year to other Member States. The receiving Member State may use that quantity for the implementation of its obligation under this Article for that year or a subsequent year until 2020. A Member State may not transfer any part of its annual emission allocation if, at the time of the transfer, that Member State does not comply with the requirements of this Decision.

Article 5 entitled "*Use of funds resulting from project activities*" provides, inter alia, that

> *« 1. Member States may use the following greenhouse gas emission reduction credits In order to fulfil its obligations under Article 3, the Commission shall*
> *(...)*
> *4. The annual use of credits by each Member State in accordance with paragraphs 1, 2 and 3 shall not exceed a quantity equal to* 3% *of its 2005 greenhouse gas emissions plus any quantity transferred in accordance with paragraph 6.*

Finally, Article 7 provides for a process of corrective action in the event that the annual emission allowances provided for in Article 3.2 are exceeded in a linear manner.

Furthermore, the cooperation agreement of 12 February 2018 states that "*the federal State and the Regions undertake to achieve the objectives assigned to Belgium in terms of reducing greenhouse gas emissions from sectors not covered by Directive 2003/87/EC* (i.e. non-ETS sectors) *and in terms of renewable energy sources*".

Results

The table "*non-ETS greenhouse gas emission reduction balance 2013-2020*" submitted by the federal government, supplemented or corrected by the figures provided by the Flemish Region in the *Mitigatieplan,* by the Walloon Region and by the RBe, is as follows

		2013	2014	2015	2016	2017	2018	2019	2020
Region Flemish	01ss E"'g SA190 se191	48,05 45,99 2,06 2,06	46,96 43,27 3,69 5,75	45,87 45,12 0,75 6,50	44,48 46,07 -1,29 5,21	43,02 43,58 -0,56 4,65	42,06 45,71 -3,65 1,00	41,11 45,1 -4 -3	40,16 41,9 -1,7 -4,7
Region Walloon	O E SA go to	26,30 24,28 1,75 1,75	25,62 23,21 2,42 4,16	25,22 23,89 1,33 5,49	24,81 24,15 0,67 6,16	25,22 23,56 1,66 7,82	24,80 24,88 -0,08 7,74	24,38 24,33 0,05 7,79	23,96
RBC	O E SA go to	4,30 4,17 0,13 0,13	4,27 3,58 0,69 0,82	4,23 3,80 0,43 1,25	4,20 3,84 0,36 1,61	4,25 3,70 0,55 2,16	4,21 3,66 0,55 2,71	4,17 3,51 0,51 3,22	4,13
Belgium	O E SA go to	78,38 74,26 4,12 4,12	76,85 70,05 6,80 10,91	75,32 72,72 2,60 13,51	73,79 74,06 -0,27 13,24	72,49 70,82 1,66 14,91	71,07 74,25 -3,18 11,73	69,99 72,94/74,3 - 3,28/-4,6 *8,45/7,*[1192]	

[188] Targets expressed in millions of tonnes of CO_2 equivalent
[189] Actual emissions.
[190] Annual Salde.
[191] Cumulative Salde.
[192] The figures in italics are taken from the November 2020 report, *Kick-starting the journey towards a climate-11e11tral Europe by 2050-EU Clima/e Action Progress Report,* submitted by the Federal Government on 19 March 2021.

The non-ETS GHG emission reduction balance sheet therefore indicates that in 2018 and 2019 the annual target was not met:

emissions in 2018 were 74.25 Mt CO eq instead of 71.07 Mt CO eq;
while the provisional figures provided for 2019 indicate that 72.94 MtCO2e or 74.3 MtCO2e were emitted instead of 69.66 MtCO2e.

In October 2019, the latest annual report "*Trends and projections in Europe 2019*", published by the European Environment Agency, indicated that in 2017, Belgium was among the eighteen Member States which, in 2017, met their reduction targets without making use of the flexibility mechanisms. The report also indicated that, based on initial estimates for 2018, Belgium is just 0.4% above its 2020 target but is expected to retain a surplus of 14.6 million tonnes of allowances in 2018193 . The report also indicated that Belgium has planned additional measures which, if implemented, should enable it to meet its 20201 targets94 .

However, the updated figures submitted by the defendants and set out in the above-mentioned table indicate that in 2019, the surplus available to Belgium was only 8.45 million tonnes of allowances, or 7.1 million tonnes [195] . At the hearing on 22 March 2021, the Beige State filed an updated table that confirms that the balance available to cover the possible deficit in 2020 is 7.1 Mt. Eq CO'.

The European Commission's 2020 report on Belgium also notes that "*Belgium is not on track to meet its 2020 climate change target. In*
In sectors not covered by the EU ETS, reductions have been limited to 10%. They are expected to decrease by 2-3 percentage points, but will still fall short of the 2020 target of a 15% reduction compared to 2005 levels "[196] .

The European Commission's report of 14 October 2020 on the final NECP indicates that, according to the latest data received, Belgium has only achieved an 11% reduction on its 15% target compared to 2005.

The above table also shows that the principle of linear emission reduction dictated by the above-mentioned Decision 406/2009/EC has not been respected for all non-ETS GHG emissions in the country, with the trend having been reversed since 2014.

Finally, the Federal Government states that in terms of renewable energy, offshore wind farms generated 0.293 Mtoe in 2018 and that according to projections and the commissioning of two new wind farms, the Federal Government will produce around 0.687 Mtoe out of a target of 0.718 Mtoe.

---

[193] Report N°15/2019 of 31/10/2019, pages 19, 32, 33 and 34: https:l/www.eea.europa.eu/publications/trends-and projections-in-europe-l.
[194] *Ibid,* p.35.
[195] **Subject to the November 2020 report, *Kick-starting the journey towardsY a climate-neutral Europe by 2050-EU Clima/e Action Progress Report,*** submitted by the Federal Government on 19 March 2021.
[196] *Op.cii.,* tract G.41 of the applicants.

However, the European Commission's 2020 report on Belgium states that "Based *on 2017 data, Belgium has achieved a 9.1% share of energy from renewable sources in gross consumption. Current policies* and *planned initiatives are insufficient to achieve the required volumes of renewable energy in purely national level "*[197]-

Internal ob/igations

In accordance with the cooperation agreement of 12 February 2018, with regard to the reduction of GHG emissions in the non-ETS sectors, the intra-Belgian allocation provides for:

a reduction of 15.7% for Fiandre; a
reduction of 14.7% for Wallonia;
a reduction of 8.8% for Brussels-Capital.

The quantified target for maximum GHG emissions in the non-ETS sectors for the period 2013-2020 is :

for the Flemish Region: 352,000,905 tCO2eq (corresponding to -15.7%) for the Walloon Region: 200,049,040 tCO2eq (corresponding to -14.7%) for the RBC: 33,765,680 tCO2eq (corresponding to -8.8%).

The Federal State has committed itself to pursue existing domestic policies and measures that will allow a total reduction of GHG emissions, all sectors combined, of 15,250 ktonnes CO2e (Article 9§1 of the cooperation agreement) and to adopt and implement new policies and measures that will allow a complementary reduction of GHG emissions.
7,000 ktonnes CO2e for the period 2016-2020 (Article 9§2 of the cooperation agreement).

Resu/stats

The only assessable result for 2020 is that of the Flemish Region which, with a cumulative balance of - 4.7 MtCO2eq, would have exceeded its emissions quota by about 1.3%.

Noting that the 2020 targets will not be met, the Vlaams Mitigatieplan provides for the use of the only suitable flexibility mechanism, i.e. the use of credits from project activities198 .

The table above gives an overview of past results for the other two regions, subject to (in)validation of provisional figures.

---

[197] *lbid.*

[198] This mechanism provides for the annual use of credits for a quantity limited to 3% of GHG emissions, increased by 1% under conditions (Article 5 of Decision (EC) 406/2009 of 23 April 2009); see also Policy Paper 2019-2024, *Doc. parl.,* Flemish Parliament, sess. 2019-2020, doc. no. 134/1, p. 9, Exhibit 15 of the Flemish Region, **free translation not contested.**

The federal government submits a report from the FPS Public Health indicating that, according to the last two studies on the impact of federal policies and measures,[199] the impact of the existing policies and measures listed in Annex 5 of the cooperation agreement for the period 2013-2020 would be between 32,541 and 35,742 kilotonnes of COAccording to the same estimation methodology, the impact of the new policies and measures would be estimated at 14,878 kilotonnes of CO_2 eq.

e) Period 2020-2030 and 2050

Objectives

As mentioned above, Regulation (EU) 2018/842 requires Belgium to reduce GHG emissions in the non-ETS sectors by 35% compared to 2005 by 2030. The linear reduction principle is also applicable for the 2030 targets.

In order to fulfil Belgium's European commitments, the final PNIEC sets regional GHG emission reduction targets for the non-ETS sectors as follows:

for CBR: 40% by 2030 and carbon neutrality by 2050;
for the Flemish Region: 35% in 2030200 and 85% in 2050;
for the Walloon Region: 37% compared to 2005 in 2030 and 80% to 95% in 2050 compared to 1990.

In the LULUCF sector, the PNIEC also states that the Walloon and Flemish Regions aim to comply with the no-flow rule in the period 2021-2030 [201].

In addition, the federal government has set itself the target of reducing Belgian GHG emissions, all sectors combined, by at least 80% to 95% compared to 1990 by 2050202 .
Finally, in its September 2020 statement, the federal government indicated that it was setting a target of a 55% reduction in GHG emissions from all sectors by 2030.

Resume/State Proiection

The PNIEC 2021-2030 includes an analytical part which makes projections to 2030 in two scenarios: a scenario with existing policies (WEM scenario) and a scenario with additional policies described in the Pian (WAM scenario).

---

[199] VITO/Econotec, 2015 and !CEDO, 2017,
[200] Under the NECP, the 35% reduction target is based on upwardly calculated 2005 non-ETS emissions and in reality corresponds to an indicative reduction target of 32.6% by 2030 compared to actual 2005 non-ETS emissions.
[201] Belgium is committed at European level to enforce this no-flow rule in accordance with Article 4 of the Regulation (EU) 2018/841,
[202] See the Royal Decree of 18 July 2013 establishing the federal long-term strategic vision for sustainable development.

In the WEM scenario, while total GHG emissions decreased between 2005 and 2015, they are expected to increase between 2015 and 2030. This increase is mainly linked to the origin of the energy consumed and is considered as a consequence of the closure of nuclear power plants and the increased use of natural gas power plants203 .

In the WAM scenario, total GHG emissions decrease between 2015 and 2030 from 145.3 Mt CO_{2e} to 112 Mt CO_{2e} - this is equivalent to a 23% reduction compared to 2005.

Emissions from the non-ETS sector would decrease from 78.9 Mt CO_{2e} to 52.7 Mt CO_{2e}, which is a reduction of GHG emissions in the non-ETS sector by 34.4%. This scenario results in a regional emission reduction of 32.6% for the Flemish Region, 36.8% for the Walloon Region and 39.4% for the RBC, compared to 2005204.

According to these projections, the European non-ETS emission reduction targets will not be met, even in a WAM scenario.

The PNIEC states that in this case Belgium will be able to use the flexibility mechanisms to fill the gap. In particular, the Flemish Region states that "*as a guarantee system to reach the imposed target, we rely on the flexibility available in accordance with Article 6 of the European effort sharing regulation. This is a specific form of flexibility, reserved for Member States facing a significant difference between their non-EU 2030 target and their co0t-reduction potential. This flexibility mechanism allows for an annual amount of additional emission allowances for the non-EU ETS sectors in the period 2021-2030, subject to a limited cancellation of EU ETS allowances that would otherwise be auctioned. It goes without saying that, in order to limit the use of this flexibility as much as possible, Fiandre will continue to focus on taking measures that will further reduce non-EU ETS emissions over the next 10* ***years***.

Furthermore, the scientific report published by the Expert Group on Climate and Sustainable Development indicates that the GHG emission reduction scenario for 2030 proposed in the PNIEC clearly does not make it possible to achieve the objective of carbon neutrality in 2050 on a linear basis and would require radical, even unrealistic, measures from 2030 onwards in order to achieve carbon neutrality in 2050206.

2.2.2. Climate governance and beige federalism

In Belgium, climate policy is not assigned as such and exclusively to the federal state or to one of the federated entities of the country. Each entity, federal or federated, is competent to carry out a climate policy within the framework of its own competences

---

203 PNEC, Section B, p.1-2, Exhibit Ill.B.3bis of the Beige State.
204 PNEC, Section B, p.15, Exhibit III.B.3bis of the Beige State.
205 Final Flemish Climate and Energy Plan 2021-2030, approved on 9 December 2019, part 12 of the Region **Flemish, uncontested free translation.**
206 Panel on Climate and Sustainable Development, "Systemic Change is **Urgently** Needed to **Effectively Address Climate Change and the Ecosystem Crisis", 14 May** 2019, Plaintiffs' Exhibit C. I, p.120.

granted by the special law on institutional reforms of 8 August 1980 and the special law of 12 January 1989 on the Brussels institutions.

In the current state of constitutional law, the "*climate change policy*" is not a *matter of national law.* is therefore a shared competence207-.

It is true that the implementation of climate policy, which is necessarily transversal in nature, is a real challenge in a state structure such as Belgium, in which the distribution of competences functions according to a logic of enumeration of matters attributed to the federated entities or reserved to the federal authority, and not on the basis of a distribution of public policy objectives between the different entities [208-.]

However, the federal structure does not exempt the federal state or the federated entities from their obligations, be they internal, European or international.

Moreover, in order to function, this federal structure requires the implementation of cooperation mechanisms between the different entities. This necessary cooperation is mainly institutionalised by the special law on institutional reforms of 8 August 1980 and the special law on the financing of the Regions and Communities of 16 January 1989.

In certain areas of shared or overlapping competences between the national and European levels, the Legislation Section of the Council of State has deduced from this overlap an obligation to exercise competences in good cooperation, whether by the conclusion of a cooperation agreement, the adoption of a special law or the approval of a conc ertation committee [209-.]

In the cases concerning the regulation of GHGs emitted by aviation activities, the Constitutional Court also held that "*in this case, the competences of the federal State and the regions have become so intertwined as a result, on the one hand, of the need under European law to have only one responsible authority per aviation operator.the competences of the Federal State and the regions have become so intertwined, as a result, on the one hand, of the need under European law to have only one responsible authority per aircraft operator* and, on the *other hand, of the predominantly trans-regional nature of the emissions caused during their entire journey by aircraft landing in or taking off from a region, that they can only be exercised within the framework of cooperation "*[210].

Climate policy is a shared responsibility par excellence and should therefore normally be exercised in the context of sound and loyal cooperation.

---

[207] Opinion of the Legislation Section EC 11°65.404/AG and 11°65.405/AG of 4 March 2019 on the proposals for special laws on the coordination of the policy of the federal authority, the Communities and the Regions on climate change and setting its long-term objectives.

[208] See "Clima! constitution and distribution of competences", Report of the academic seminar of 22 April 2018', available online SUr: at https://climat. be/doc/KlimGov_Sl_Rapport_EN.pdf.

[209] See e.g. the opinion of the EC Legislation Section No. 50.003/4 of 4 September 201 I, *Doc.parl.*, Ch., sess.2011-2012, doc. 53 2143/001, pp. 170-173, quoted by G. ROLLANO and C. ROMAINVILLE, "Voyagc au cceur de la notion de "loi spéciale". Proposals for a special "clima! law", *A.P.T.,* 2020/2, p.295.

[21°] C. const, 2 March 20 I I, 11° 33/2011, B.10.2. and C. const. 12 June 20 I 2, 11° 76/2012, B. 9.1 and B.9.2, cited by G. ROLLANO and C. ROMAINVILLE, *op.cii,* p.296.

The context before the court, in particular the climate emergency and international and European commitments, gives this natural obligation211 of cooperation between the different entities of the country a stronger normative scope in such a way that it can be integrated into the general duty of care imposed on each of the four defendants.

In this case, the federal state states that it has exercised its organisational competences to combat climate change in a number of ways:

- the signing of five cooperation agreements to ensure coordination between the different entities in the country212 ;
- the creation of internal consultation structures, such as the International Environment Policy Coordination Committee (or "IPCC"), the National Climate Commission (or "NCC") or the State-Regions Energy Consultation Unit (or "ECEC"). (or "CNC") or the Cellule de Concertation sur ! Energie Etat-Régions (or (E.G., "CONCERE");
- the preparation of the National Integrated Energy and Climate Plan (the "NICEP") required by Regulation (EU) 2018/1999 and the Interfederal Energy Pact beige 2030-2050;
- the adoption of Long Term Strategies for Belgium;
- the introduction, during the 6th State reform, of an incentive bonus/malus mechanism (known as "accountability") for the Regions for buildings in the residential and tertiary sectors and a mechanism for the substitution of the federal State for the Regions in the event of a finding of non-compliance by the body set up by or under the UNFCCC or its protocols or a reasoned opinion from the European Commission in the context of a formal infringement procedure.

The special law proposals of February 2019 were intended to define Belgium's overall climate policy objectives and to improve the way in which the federal authority and the federated entities coordinate their competences213 - However, this attempt by the special legislator to improve beige climate governance was not successful.

For their part, the Regions set out their climate change policies in the following planning instruments:

For the Walloon Region :

- the Walloon Kyoto Fund created in 2004;

---

211 This is generally opposed to the term "legal obligation".

212 - cooperation agreement of 5 April 1995 between the Federal State, the Flemish Region, the Walloon Region and the Region **of Brussels-Capital on international environmental policy;**

- Cooperation agreement of 14 November 2002 between the Federal State, the Flemish Region, the Walloon Region and the Brussels-Capital Region concerning the establishment, implementation and monitoring of a national climate plan, as well as the establishment of reports, within the framework of the United Nations Framework Convention on Climate Change and the Kyoto Protocol, concluded in Brussels;
- Cooperation agreement of 19 February 2007 between the Federal State, the Flemish Region, the Walloon Region and the Brussels-Capital Region on the implementation of certain provisions of the Kyoto Protocol;
- Cooperation agreement of 17 July 2015 between the Federal State, the Flemish Region, the Walloon Region and the Brussels-Capital Region on the transfer of units allocated to the regions for the period 2008-2012;
- Cooperation agreement of 12 February 2018 between the Federal State, the Flemish Region, the Walloon Region and the Brussels-Capital Region on the sharing of the Belgian climate and energy objectives for the period 2013-2020.

213 Article 3 of the proposed climate bill, House *Doc.* 2018-2019, No. 54-3571/001, p.14.

the Pian Air Climat Energie ("the PACE") 2016-2022, as provided for in the Climate Decree;
the Walloon Energy and Climate Plan ("the PWEC") 2030 which constitutes the Walloon contribution to the PNIEC 2021-2030;
PACE 2030, which is a popularisation of the PWEC and integrates the "quality of life" dimension into the
the air";
the Walloon Long Term Strategy 2050;

For CBR:

the PACE 2016-2025 as foreseen by CoBRACE;
the Brussels Pian Energie Climat 2030 which is the Walloon contribution to the PNIEC 2021-2030; the pian Good Move ;
the implementation of the ILL system;

For the Flemish Region :

the Vlaams Klimaatbeleidsplan (or 'VKP') 2013-2020, consisting of three parts: the general framework, the Flemish mitigation plan ('het Vlaams Mitigatieplan') and the Flemish adaptation plan ('het Vlaams Adaptatieplan');
the Flemish Climate and Energy Plan 2021-2030, which is the Flemish contribution to the PNIEC 2021-2030.

This catalogue of measures taken by each of the four entities mentioned does not, however, respond to the failure of climate governance, which has been noted by the public authorities themselves for several years.

Indeed, at the end of 2008, the Federal Council for Sustainable Development (FCSD) already stated that, in its opinion, "*one of the difficulties encountered by Belgium in terms of its climate policy (...) lies in the problems of harmonisation, integration and coordination between the climate policies pursued by the various Belgian political bodies. Moreover, within the federal government, climate policy is not sufficiently integrated with the various areas of public authority. As a result, there is no integrated climate policy, but rather a juxtaposition of measures taken by the different levels of government and the different departments.*
The FRDO-CFDD is composed of representatives of each federal minister or secretary of state as well as representatives of each region and each community.

In 2009, the Minaraad, a consultative body of the Flemish Region whose members are appointed by the Flemish Government,[216] also insisted on the need for a better coordinated and concerted beige strategy between the federal State and the Regions217 .

[214] FRDO-CFDD, "Opinion on the document "Draft National Climate Plan 2009-2012 for Belgium - Inventory of measures and state of play as of 31 December 2008", www.frdo-cfdd.be/sites/default/files/content/download/files/2009a03e.pdf, p. 3.
[215] Article 12 of the Act of 5 May 1997 on the coordination of federal sustainable development policy.
[216] Article 11.3.2 of the Decree of the Flemish Parliament containing general provisions concerning the **of 5 April 1995.**
[217] Claimants' Exhibit F. I I.

Other state bodies were quick to point out the ineffectiveness and even uselessness of the NCC, as well as its lack of transparency and political accountability218 .

Moreover, when the first climate plan for 2009-2012 was drawn up, its authors were criticised for not producing a real plan, i.e. the articulation of measures around clearly identified objectives, but a simple addition of three regional reports on measures already adopted in this area[219] .

Also in 2009, the Court of Auditors noted the lack of a federal climate plan and evaluation of climate policy as well as the lack of internal coherence220.

In 2014, the opinion issued by advisory bodies of the federal state and the regions themselves on Belgium's transition to a low-carbon society by 2050 stressed the necessity and essential nature of permanent coordination between the various federal and regional bodies [22].

In the same year, the Federal Minister of Energy, Environment and Sustainable Development acknowledged the shortcomings in the coordination of climate policies by stating *"I am aware of the existing shortcomings in the coherence and coordination of the policies carried out by the different levels of power, and of the need to improve cooperation via the different institutions in place, such as the National Climate Commission {NC}"*[2]

---

[218] See in particular the 2013 report of the "Climate Change" Service of the FPS Public Health, "Analyse du raie **et du fonctionnement de la Conunission nationale climat", April 2013, www.klimaat.be/** files/7113/8253/0696/l 30426_ Evaluation_CNC_web.pdf; Belgian Senate, Rapport d' infonnation sur le processus décisionnel intra-belge en matière de répartition de l'effort élimatique au regard des objectifs climatiques, *Doc.* Senate, 2016-2017, 11°6-253/4; Opinion SLCE 11° 42.387/VR, Senate, 2006-2007, 11°2411/l; M. DEKLEERMAKER, "Une histoire beige : La coopération en matière environnementale et climatique et la COP2 l", *Fédéralisme Régionalisme,* voi. 18, 2018, available online at: https://popups.uliege. be:443/l374-3864/index.php?id I792 The author writes that '*[...] it is more than troubling that all of the* ***consultation mechanisms presented above, which multiply the number of meeting places between officials and***

The opacity of the work of all these commissions does not allow us to know whether they have also experienced political blockages within them, thus preventing the emergence of a consensus between the parties, or whether these consultation institutions have simply not met to discuss this issue *[...].* ***The beige cooperative federalism in climate policy is characterised by a lack of inclusion of this policy in the system of distribution of competences and by a real injlation of the instruments of cooperation which unfortunately did not serve to prevent the political crisis related to COP21***".

[219] See the report of the Flemish Socio-Economic Council (or 'SERV') and the Minaraad, 'Advies Nationale Klimaatplan van Belgie 2009-2012: stand van zaken", SERV/Minaraad, 18 February 2009, available at www.serv.be/sites/default/files/ documenten/pdfpublicaties/1468.pdf. 52; see also the hearing of Mr Peter Wittoeck, Head of the "Climate Change" department of the FPS Public Health, *Doc.parl.,* Senate, 2016-2017, 11° 6-253/3, pp. 13 and 15, both cited by M. EL BERHOUMI and C. NENNEN, *op.cii,* p.66.

[220] See Claimants' Exhibit C.4.

[221] Notice available at www.frdo-cfdd.be.

[222] Claimants' Exhibit F.16, p.6.

The measures adopted during the 6th State reform have also been criticised, whether it be the cumbersomeness and unsuitability to the political reality of the substitution mechanism [223] or the lack of ambition or real incentive effect of the bonus/malus mechanism known as "accountability "[224] .

In 2015, the FPS Environment and the IBGE were also critical from a technical and legal point of view of the climate accountability mechanism introduced by the special law of 6 January 2014.

In its 2017 report225 , the Senate noted the disproportionately slow intra-Belgian decision-making process on climate effort allocation and made numerous recommendations to improve Belgian climate governance.

In 2018, the report of the "Dialogue on climate governance in Belgium" initiated by the FPS Public Health concluded lapidary that:

> *"The central question is whether the federated structure in Belgium is adapted to meet the needs of the population.*
> *This gigantic climate challenge requires a radical transformation of our society. The inadequacy of the current governance framework with the climate challenge persists in scientific analyses. The governance framework is inappropriate, given the climate emergency, the necessary decarbonisation of* the *economy, the new European governance requirements and citizen pressure. Despite the existence of external drivers, notably from European and international law, an internal driver is missing in federated Belgium. {...] We need a common long-term vision that guarantees legal security for the different policies and levels of power and is sustainable. {...] In addition to the need for accountability, prioritisation and centralisation, there is also a need to depoliticise and objectify climate policy. Decision-making power must be at the highest level, where decisions can be made most effectively·*

The draft PNIEC submitted to the European Commission on 31 December 2018 was again subject to criticism at both national [227] and European [228] level, in particular on its

---

[223] See M. EL BERHOUMI and C. NENNEN, "le changement climatiquc à l'éprcuve du fédéralisme", *Amén, 2018/4* and the doctrinal references cited, p.68.

[22,1] *lbid*, pp.68-69.

[225] **Belgian Senate, Information report on the intra-Belgian decision-making process regarding the distribution of** climate effort in the light of climate objectives, *Doc.* Senate, 2016-2017, no. 6-253/4.

[226] **Dialogue on 'climate governance in Belgium', main conclusions, including** concrete **proposals** for improving climate governance in a federal Belgium, 27 November 2018, pp. 2 et seq. ROMAlNVILLE, "Journey to the heart of the notion of "special law". Proposals for a special "climate" law", *A.P.T*, 2020/2, p.289.

[227] See FRDO-CFDD, Avis sur le projet de Pian National Energie Clima! 2030 (PNEC), 10 May 2019, available at https://www.frdo-cfdd.be/fr/publications/advices/avis-du-cfdd-sur-le-projet-de-plan-national-energie-climat-2030-pnec; FRDO-CFDD, CCEI, CESE Wallonie - Pòle environnement- Pòle énergie, SERV, Minaraad, CESRBC, CERBC, Avis commun sur le projet dc Pian National Energie Clima! 2030 (PNEC), IO May 2019, available at https://www.frdo-cfdd.be/sites/default/files/content/ download/ti les/2019a03f.pdf

[228] **European Commission, Recommendation on the draft integrated national energy and transport plan** clima! of Belgium covering the period 2021-2030, 18 June 2019, C(2019) 4401 forni; European Commission, Assessment of the draft National Energy and Climate Pian of Belgium, 18 June 2018, SWD(2019) 211 forni.

climate governance. The European Commission's opinion of 14 October 2020 on the final PNIEC also remains critical, particularly with regard to the lack of coordination and integration of regional plans and the projected results in relation to the objectives set.

In adopting Belgium's Long Term Strategy in February 2020, the Consensus Building Committee further recognised that "*as the scope of the different regional strategies varies (not all of them include the ETS), it is not possible to aggregate the regional ambition levels in order to obtain a global beige target for greenhouse gas emission reductions*".[229] The Committee's report on the implementation of the Long Term Strategy is based on the findings of the European Commission's Greenhouse Gas Action Plan.

In short, cooperation between the federal authority and the federated entities is, by the admission of various state bodies, deficient to date, which leads some authors to consider the climate governance framework to be fundamentally inadequate[230].

2.2.3. European Union Monitoring

As mentioned in the factual statement above, every year since 2011 the European Union has highlighted Belgium's difficulties in achieving its climate targets and in defining coordinated action between all entities.

The systematic and almost repetitive nature of the remarks and warnings issued by the European authorities to Belgium for almost ten years is thus clear.

2.3. Conclusion

2.3.1. Finding of a breach of the duty of care

The combination of the three above-mentioned findings, i.e.: the mixed results in terms of figures ;
the lack of good climate governance;
repeated warnings from the European Union;
and this in a context where the Belgian public authorities were fully aware of the certain risk of dangerous climate change for the country's population in particular, makes it possible to establish that neither the federal State nor any of the three Regions acted with prudence and diligence within the meaning of Article 1382 of the Civil Code.

Insofar as necessary, these same findings make it possible to consider that the four defendants have not, at present, taken all the necessary measures to prevent the effects of climate change on the life and privacy of the plaintiffs, as they are obliged to do under Articles 2 and 8 of the ECHR.

---

[229] Belgium's long-term strategy, p.4, Federal State Exhibit 111.B.8.
[230] See V. DAVIO, "la lai clima: une errance législative face à l'urgence? "*Amén,* 2021/1, p.8 and references **cited by the author.**

Contrary to what the defendants maintain, beige federalism is not an obstacle to a finding of concurrent fault by the four entities cited in this case.

On the contrary, it is precisely the cooperative federal structure of Belgium that leads to the conclusion that both the federal state and each of the three regions are individually responsible for the lack of climate governance outlined above.

2.3.2. Separation of powers and limitation of the tribune's power of action

The plaintiffs ask the court to order the defendants to take the necessary measures to bring Belgium to reduce the overall volume of GHG emissions from the Belgian territory:

> in 2025, by 48%, or at least 42%, of the 1990 level; in 2030, by 65%, or at least 55%, of the 1990 level; by 2050, to achieve zero net emissions.

However, this request for an injunction cannot be granted without infringing the principle of the separation of powers.

Indeed, the judge cannot determine the content of the obligations of a public authority and thus deprive it of its discretionary power.

In other words, if the judiciary is competent to establish the fault committed by the public authority, even in the exercise of its discretionary power, it cannot, on this occasion, deprive the latter of its political freedom nor substitute itself for it [231] - The judiciary cannot assess the appropriateness of the action of the public authority when the latter is exercising its competence nor exercise itself the discretionary power which belongs to this public authority232-.

It is therefore necessary to check whether the injunction requested does not tend to lead the tribuna! to substitute itself for the legislative or administrative authority in the exercise of its discretionary competence.

In the present case, neither international nor European law directly requires Belgium to reduce its GHG emissions by the various percentages referred to by the plaintiffs in their application:

> Thus, the parties to the UNFCCC failed to agree on successor commitments to the Kyoto Protocol for 2012. The Paris agreement does not provide for quantified and individualised emission reduction targets. It merely states that
> *"Parties seek to achieve a global cap on greenhouse gas emissions*

[231] See in particular Cass., 3 January 2008, RG No. C.06.0322.N; see also Cass., 24 September 2010, RG No. 08.0429.N.

[232] See not. Brussels, 12 September 2014, *A.P. T.,* 2016, p.433 and the note by M. JOASSART, "le Juge civil et la séparation des pouvoirs", *A.P. T.,* 2016, pp.435-447.

...and to make early reductions thereafter in accordance with the best available science so as to achieve a balance between anthropogenic emissions by sources and anthropogenic removals by sinks of greenhouse gases
during the second half of the century [...]"[233]*", a formula whose normativity is clearly minimum"* [234] -

International law is therefore limited to setting a common objective, i.e. to keep the increase in average global temperature "well below" 2°C below pre-industrial levels and the commitment to "pursue efforts" to limit it to 1.5°C, while leaving *it* to the States concerned to determine the means of contributing to it, "*which would appear to be non-binding, even soft-law "*[23-5]

On the European level, the only legally binding commitments for Belgium are found in Regulation (EU) 2018/842, which requires it to reduce its GHG emissions in the non-ETS sectors by 35% compared to 2005 by 2030236 , and in Directive (EU) 2018/2001, which requires it to provide 13% of its gross final energy consumption to be renewable.

Furthermore, the fact that the European Union has committed itself to GHG emission reduction targets of 55% below 1990 levels by 2030 and carbon neutrality by 2050, on its territory including that of Belgium, does not allow the country to be legally committed to such targets.

Moreover, with regard to the Union itself, its "European Green deal" is a letter of intent rather than a unilateral commitment with binding force.

In Belgium, in their respective declarations, the federal and reg1onal governments acknowledge the relevance of the European GHG emission reduction targets.

In addition to the regional objectives collated in the PNIEC, each region has also defined its long-term strategy as follows:

The Walloon long-term strategy aims to achieve carbon neutrality by 2050 through a 95% reduction in GHG emissions compared to 1990, complemented by measures relating to carbon capture and use and negative emissions;

The Flemish long-term strategy aims to reduce GHG emissions from non-ETS sectors by 85% by 2050 compared to 2005, with the ambition to move towards total climate neutrality. As far as the ETS sectors are concerned, the Flemish Region follows the EU context for these sectors with a decreasing emission quota;

---

[233] Article 4, § I, of the Paris Agreement.
[234] P.THIEFFRY, *Traité de droit européen de l'e11viro1111ement et du clima/,* 17/09/2020, Brussels, Bruylant, pp. 204-205.
[235] P. THIEFFRY, *op.cii,* p.205.
[236] For European criticism of Belgium's ability to achieve this goal, see above.

CBR's long-term strategy sets the objective of moving towards the EU target of carbon neutrality by 2050 by reducing its GHG emissions by 40% from 2005 levels by 2030.

However, neither the governmental declarations nor the various plans or other strategic documents are in themselves a source of legally binding obligations for the Belgian public authorities.

In fact, the plaintiffs are essentially basing themselves on the report of the Expert Group on Climate and Sustainable Development237 to determine the GHG emission reduction targets they are asking the Tribuna! to impose collectively on the Federal State and the Regions.

This report by the Belgian expert group, whose scientific merit is certainly not disputed, argues that the total volume of Belgian GHGs needs to be reduced by about 65% compared to 1990 by 2030 and to reach carbon neutrality by 2050, for Belgium to effectively contribute to the Paris agreement's objective of limiting warming to 1.5°C and preventing dangerous climate change. The report also suggests an intermediate range of 42% to 48% reduction for 2025 to ensure the 2030 target.

However, this scientific report does not constitute a legally binding source of obligation for the public authorities. It is an expert opinion that can assist the public authorities in implementing their climate policy, but it is not binding on the defendants or the court.

Therefore, and subject only to the commitments made as a result of Regulation (EU) 2018/842 and Directive (EU) 2018/2001 mentioned above, the way in which Belgium will participate in the global GHG emissions reduction target is currently a matter for its legislative and executive bodies to decide.

The extent and pace of Belgium's GHG emission reductions and the internal distribution of the efforts to be made in this direction are and will be the result of political arbitration in which the judiciary cannot interfere.

Thus, it is not for the judge to determine the quantified GHG emission reduction targets for all sectors that Belgium should meet in order to "do its part" in preventing dangerous global warming.

In other words, while it is within the remit of the tribuna! to note a failure on the part of the federal state and the three regions, this does not authorise it, by virtue of the principle of separation of powers, to itself set targets for reducing Belgium's GHG emissions.

The plaintiffs' request for an injunction will therefore be declared unfounded.

---

[237] **Exhibit C. l of the claimants.**

3. Expenses

Under Article 1017 of the Judicial Code, any final judgment shall order the payment of costs against the unsuccessful party or parties or, where appropriate, the compensation of costs if the parties are unsuccessful on any ground.

In the present case, in view of the admissibility and partial merits of the claim, the costs should be set off, each party bearing its own costs and neither party owing any procedural damages to the other.

IV. DECISION

Having regard to the law of 15 June 1935 on the use of languages in judicial matters;

In view of the reasons set out above, the Court, ruling in the presence of both parties, hereby

Takes note of the withdrawal of the proceedings of the persons listed in appendix (D) as well as the death of Mr. Jozef Castermans for whom no notice of withdrawal has been filed;

Declares the main claim admissible;

Declares the voluntary intervention of the persons listed in Annex (B) admissible;

Declares inadmissible the voluntary intervention formulated in the name and on behalf of the trees listed in the deed of 3 May 2019 (Annex C);

Holds that, in pursuing their climate policy, the defendants do not behave as normally prudent and diligent authorities, which constitutes a fault within the meaning of Article 1382 of the Civil Code;

Holds that, in pursuing their climate policy, the defendants infringe the fundamental rights of the plaintiffs, and more specifically Articles 2 and 8 of the ECHR, by failing to take all necessary measures to prevent the effects of climate change on the plaintiffs' life and privacy;

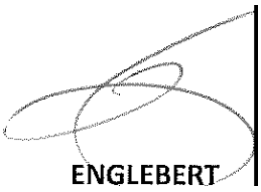
Dismisses the remainder of the plaintiffs' claim;

Orders full compensation of costs so that each party shall bear its own costs and neither party shall be liable to the other, or others, for any procedural damages;

So ruled by :

Ms Sabine MALENGREAU, Judge presiding over the
Chamber Ms Valérie ENGLEBERT, Vice-President
Mr. Luc Jean VAN DEN BROECK, Deputy Judge

VAN DEN BROECK



ENGLEBERT

MALENGREAU

And delivered at the extraordinary public hearing of the 4th chamber of the French-speaking court of first instance of Brussels on **17 June 2021;**

Where were present and seated :

Ms Sabine MALENGREAU, Presiding Judge, Ms Leila
KHALED, Registrar,

l<HALED

MALENGREAU

Annex 99.iv

APPEAL

FOR : 1. **Klimaatzaak ASBL**, with registered office at rue Joseph II 20, 1070 Brussels, registered with the ECB under number 0567.926.684,

2. All **persons** who are listed in Appendix A attached to the citation[1],

Appellants ;

all with advice from

1. Maîtres Carole M. BILLIET (carole.billiet@equal-partners.eu), Luc DEPRÉ (luc.depre@equal-partners.eu), Audrey BAEYENS (audrey.baeyens@equal-partners.eu), Linli-Sophie PAN-VAN DE MEULEBROEKE (Linli.PanVandeMeulebroeke@equal-partners.eu), Camille DE BUEGER (camille.debueger@equal-partners.eu) and Gautier ROLLAND (gautier.rolland@equal-partners.eu), whose offices are at Place Flagey, 18, 1050 Brussels, and
2. Mr. Roger H. J. COX (r.cox@paulussen.nl) , whose office is established Sint-Pieterskade 26B, 6212 AD Maastricht, The Netherlands,

electing all domicile in this cause at the office of Equal Partners, in 1050 Brussels, Place Flagey, 18.

AGAINST: 1. **The Belgian State**, represented by its Government in the person of the Minister for Climate, Environment, Sustainable Development and the *Green Deal*, whose offices are located at 1000 Brussels, Boulevard du Jardin Botanique, 50 (FINTO), bte 51,

First Respondent ;

with the advice of

[1] Of the Schedule A, attached to the trial citation, several individuals withdrew or died. There were also some duplicates. This was communicated to the Court of First Instance for the oral argument hearings. We return to the updated Appendix A, for which reason numbers 901, 1755, 2086, 2798, 2849, 4489, 4652 and 7716 have been deleted. We have taken this approach in order to facilitate comparison of the Appendices filed at trial and on appeal.

1. Nathalie VAN DAMME, lawyer, whose office is located at 4020 LIEGE 2, Place des Nations Unies 7 a ;
2. Maîtres Guy BLOCK and Kris WAUTERS, lawyers, whose office is located at 1050 Chaussée de La Hulpe 187 ;

2. **The Walloon Region,** represented by its Government in the person of the Minister for Climate, Energy and Mobility, whose offices are established at 5000 Namur, rue d'Harscamp 22, Second Respondent ;

represented by Pierre MOËRYNCK, lawyer, 1040 Brussels, avenue de Tervueren, 34/27;

3. **The Flemish Region**, represented by the Flemish Government in the person of the Flemish Minister for Justice and Maintenance, the Environment, Energy and Tourism, whose offices are established at Boulevard du Roi Albert II, 7, 1210 Brussels, Third respondent;

represented by Mr Steve RONSE, lawyer, whose office is located at 8500 Kortrijk, Beneluxpark, 27B;

4. **The Brussels-Capital Region**, represented by its Government in the person of the Minister of the Government of the Brussels-Capital Region, responsible for Climate Transition, the Environment, Energy and Participatory Democracy, whose office is established in 1210 Brussels, Boulevard Saint-Lazare 10, Fourth party respondent ;

represented by Ivan-Serge BROUHNS and Guillaume POSSOZ, lawyers, established in 1170 Brussels, chaussée de la Hulpe, 185.

Judgement undertaken

The judgment of 17 June 2021 (R.G. 2015/4585/A) by the Fourth[e] Chamber of the French-speaking Court of First Instance of Brussels, Civil Section (hereinafter "the judgment of 17 June 2021" or "the judgment under appeal").

Court of Appeal

The [_____] Chamber of the Court of Appeal of Brussels

Place of appearance

At the said Brussels Court of Appeal, 1000 Brussels, Place Poelaert 1, sitting in its usual place of business [_____].

Date of appearance

On [_____] at [_____] hours

General roll number

Table of Contents

I. As a preliminary matter 5

II. Statement of Basic Facts: Part I 8

Global warming: the inadequacy and insufficiency of the binding obligations imposed on Belgium by 2020 8

II.1 The common thread: knowledge of the danger and the measures to be taken to prevent or limit it 8

II.1.1 The IPCC as an undisputed scientific reference, recognized by the international community 8

II.1.2 Global warming and CO_2 12

II.1.3 The key concept: dangerous global warming 20

II.1.4 The carbon budget: the GHG emission reductions required to avoid the dangerous global warming 22

II.2 Respondents' explicit recognition of the need to reduce GHG emissions by at least 25% to 40% by 2020 28

II.3 The inadequacy and insufficiency of international and European positive law standards for 2020 30

II.3.1. The objectives set by the European Union 31

II.3.2 The 1997 Kyoto Protocol, as amended by the 2012 Doha Amendment 33

III. Statement of Basic Facts: Part II 35

On the importance of a minimally linear pathway for GHG reductions 35

IV. Statement of Basic Facts: Part III 37

As for the climate emergency and the need to rule as quickly as possible on the present case 37

V. Subject of the call 38

V.1 First complaint: the emission reduction targets imposed by the standard of conduct within the meaning of Articles 2 and 8 of the ECHR and Article 1382 of the Civil Code must be determined in the light of the authorities' knowledge of the danger threatening their populations and the measures to be taken to help prevent or limit it 38

V.1.1 Reminder and criticism of the judgment 38

V.1.2 In light of the knowledge of the hazard and the measures to be taken to avoid or mitigate it, what is the standard of behaviour required of authorities under the 2 and 8 of the ECHR and Article 1382 of the Civil Code? 40

V.2 Second grievance: 54

V.2.1 Reminder and criticism of the judgment 55

V.2.2 The applicable principles..... 56

V.2.3 Application in this case ..... 59 V.3 Other objections 61

V.3.1 The UNFCCC has not been amended by the Kyoto Protocol and the Paris Agreement; its original wording remains unchanged 61

V.3.2 The court erred in considering that it was required to exercise only marginal control over the authorities' compliance with the standard of conduct imposed by Articles 2 and 8 of the ECHR and by Article 1382 of the Civil Code 62

V.3.3 The court wrongly considered that mitigation and adaptation are both adequate responses to global warming and that 450 ppm of GHGs is a limit that should not be exceeded before 2100 63

VI. On call 65

VII. On costs 66

VIII. Device 67

IX. List of diagrams 69

X. Inventory of parts 69

I. As a preliminary remark

1. The purpose of this appeal is to **partially** reverse the judgment of 17 June 2021 (R.G. 2015/4585/A) by the 4th[e] Chamber of the French-speaking Court of First Instance of Brussels, Civil Section (hereinafter "the judgment of 17 June 2021" or "the judgment under appeal").

2. The judgment of 17 June 2021 **rightly** decided that the main claim was admissible both in respect of Klimaatzaak vzw and in respect of the co-plaintiffs mentioned in the annex (Annex A) to the summons to institute proceedings of 2 June 2015.

The judgment under appeal also **rightly** decided that the voluntary intervention of Mrs Inge De Vriendt and the persons mentioned in the annex to the application for voluntary intervention of 12 June 2019 (Annex B) was admissible.

It is also **rightly** that the judgment in question "ruled that, in pursuing their climate policy, the defendants did not behave like normally prudent and diligent authorities, which constitutes a fault within the meaning of Article 1382 of the Civil Code".

It is still **rightly** that the judgment of 17 June 2021 "held that, in pursuing their climate policy, the defendants infringe the fundamental rights of the plaintiffs, and more specifically Articles 2 and 8 of the ECHR, by failing to take all necessary measures to prevent the effects of climate change affecting the plaintiffs' lives and privacy".

This is clearly right. The consequences of global warming that lead to a violation of Articles 2 and 8 of the ECHR include extreme heat, extreme droughts, extreme precipitation, disruption of ecosystems such that food security is endangered, rising sea levels due to melting ice caps and glaciers, floods etc. Warming may also lead to the passing of tipping points, which implies drastic and irreversible changes in the global climate, with no chance of a return to the previous situation. As a result, the lives, well-being and living environment of all the world's inhabitants are at risk. These consequences of global warming have been occurring all over the world for years. In Belgium, too, we have been experiencing them for years, with, among other things, repeated lethal heat waves over the past few decades and, this summer, the destructive floods in Wallonia, causing deaths, enormous damage to homes and essential infrastructure, and trauma to the people who experienced the violence of these extreme weather circumstances and are now still suffering the misery.

In this respect, specifically for Belgium and its inhabitants, the judgment in question considers: "*The climate projections for Belgium by 2100 indicate consequences that have already been observed (...) as well as a concrete threat to the territorial integrity of the country, and more particularly of Flanders exposed to rising sea levels, and to human and animal health. Consequently, the diplomatic consensus based on the most authoritative climate science leaves no* ***room for doubt that a real threat of dangerous climate change exists****. This threat poses a serious risk to* ***current and future generations living in Belgium in particular*** *that their daily lives will be profoundly disrupted.* » [2]

3. On the other hand, the judgment under appeal wrongly decided to dismiss the plaintiffs "*for the remainder of their claim*", including first and foremost the **refusal to impose the requested greenhouse gas (GHG) reductions on the defendants**, on the **principal ground that the separation of powers** would preclude it. (1) Since GHG emission reductions are **the only** effective **remedy for the** violation of the rights of the defendants and interveners found, that refusal **deprives** them **of an effective legal remedy**. In so doing, the judgment infringes Article 13 of the European Convention on Human Rights (ECHR) and Article 9(4) of the Convention of 25 June 1998 on Access to Information, Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). (2) In addition, the **minimum** amount of GHG emission reductions required at the national level is determined on the basis of the universally recognised limit of dangerous warming, i.e. well below 2°C and continuing to 1.5°C, and on the basis of the residual global carbon budget that this limit implies, **without any margin of appreciation for the defendants**. (3) Finally, by issuing such injunctions, the judge would be imposing only the goal to be achieved, while leaving the defendants **entirely free to** determine the **means** to achieve that goal.

The judgment of 17 June 2021 was also **wrong to** assess the obligation of conduct imposed by Articles 2 and 8 of the ECHR and by Article 1382 of the Civil Code exclusively in the light of the binding obligations of the defendants under international, European and national intra-Belgian climate law. This standard of conduct must be assessed in the light of the **universally recognised limit of dangerous warming**, initially understood as a limit of 2°C and subsequently understood as a limit significantly below 2°C and pursuing 1.5°C, a factual fact enshrined in December 2015 in the Paris Agreement. As this is a **factual fact universally recognized** by the global scientific and political community, the binding or non-binding quality of the texts in which it is enshrined is irrelevant to the resolution of the dispute in this case.

4. Finally, it is always **wrongly** that the judgement undertaken advances:

[2] Judgement undertaken, p. 50.

- that the United Nations Framework Convention on Climate Change (UNFCCC) (1992) has been amended by the Kyoto Protocol (2007) and the Paris Agreement (2015);
- that the court exercises marginal control over the compliance of public authorities with Articles 2 and 8 of the ECHR and the standard of conduct imposed by Article 1382 of the Civil Code; and
- that mitigation and adaptation are two adequate responses to global warming and that a concentration of 450ppm of GHGs cannot be exceeded before 2100.

II. Statement of basic facts: part one

Global warming: the inadequacy and insufficiency of the binding obligations imposed on Belgium by 2020

5. This first part of the presentation of the essential facts of the case focuses, firstly, on the red thread of scientific knowledge (1) of the danger posed by global warming and (2) of the measures to be taken to prevent or limit it. This scientific knowledge, which is an undisputed and unquestioned reference within the international community, has played a major role in the development of policies to combat global warming. A statement of this scientific knowledge is crucial since it forms the basis of the standard of care that is imposed on the Respondents.

6. Secondly, it will be shown that Belgium has explicitly recognised, on numerous occasions, the need to reduce GHG emissions by at least 25% to 40% by 2020 in order to avoid a global warming of 2°C.

7. In the third part, the concluding remarks will put the norms of positive law (international and European) in their context, in order to highlight their total inadequacy and insufficiency with regard to scientific knowledge and the international consensus on this knowledge.

8. For the rest, the Respondents refer to the chronological statement of facts established by the Court of First Instance, on pages 6 to 42 of the judgment under appeal, with the exception of the points contradicted in the objections. The Respondents also refer to the statement of facts contained in their summary submissions of 16 December 2019, which they attach as an exhibit to this application[3], specifically at pages 27 to 182, nos. 25 to 337.

II.1 The common thread: knowledge of the danger and the measures to be taken to prevent it or limit it

II.1.1 The IPCC as an indisputable scientific reference, recognised by the international community

A. The IPCC

9. The Intergovernmental Panel on Climate Change (IPCC) is an intergovernmental organization established in 1988 by the World Meteorological Organization (WMO) and the United Nations Environment Programme (UNEP)[4], which reviews and assesses the latest scientific, technical and socio-economic data from around the world relevant to understanding climate change.

10. The IPCC is open to all Member countries of the United Nations and the WMO, and currently has 195 Member countries, including Belgium. It meets at least once a year in plenary sessions at which governments are represented and at which major decisions on the organization's

[3] Exhibit P.27.

[4] *For* example, the organization's website: https://www.ipcc.ch/about/history/. The initial task described in Resolution 43/53 approved by the United Nations General Assembly on December 6, 1988, was to provide "*internationally coordinated scientific assessments of the magnitude, timing and potential effects of climate change on the environment and on socio-economic conditions*" and to formulate "*realistic strategies for dealing with these effects*".

work programme are taken, and the members and chair of the Bureau are elected[5]. Government representatives also participate in the outline of the reports that the IPCC prepares, in the appointment of authors of these reports and in the review process of reports under preparation, and they accept, adopt and approve the reports at plenary sessions.

The importance of the role of government representatives is reflected in a document entitled "Principles for the Work of the IPCC"[6], which includes the following principles.

Principle 3e provides as follows:

> *"The review process is of paramount importance to the work of the IPCC. As the Panel is an intergovernmental body, its documents must be subject to scientific peer review and government review*.

Principle 4e dictates that major decisions of the IPCC are taken at plenary meetings. Principle 11efurther states that:

> *"Until accepted by the full Panel, the conclusions reached by the IPCC working groups and any task forces do not represent the official view of the IPCC.*

11. The IPCC calls itself "*the leading international body for assessing climate change*"[7]. This status is confirmed in that the 195 Member countries take (or at least should take) the IPCC reports as a starting point for their climate policy and that the IPCC reports have a special place in the 1992 UNFCCC, which will be discussed below.

12. The IPCC is therefore an **emanation of the States**. By subscribing to the IPCC reports, the governments of the Member States, including the Belgian State, recognise the legitimacy of their scientific content.

The IPCC reports for policy makers are the gold standard for global warming.

B. <u>The IPCC reports</u>

13. Since 1990, the IPCC has issued five assessment reports, each consisting of four components, often referred to by the following acronyms:

1. FAR (First Assessment Report) for the first report (1990)
2. SAR (Second Assessment Report) for the second report (1995)
3. TAR (Third Assessment Report) for the third report (2001)
4. AR4 (4th Assessment Report) for the fourth report (2007)
5. AR5 (5th Assessment Report) for the fifth report (2014)

[5] https://www.ipcc.ch/about/structure/

[6] Exhibit B.3 . Principles Governing IPCC Work.

See https://www.ipcc.ch/documentation/procedures/, https://www.ipcc.ch/site/assets/uploads/2018/09/ipcc principles.pdf

[7] See https://www.ipcc.ch/about/structure/ .

Regarding the AR6 (6th Assessment Report), the first part (WG I report[8]) was published in August 2021, the other three parts are expected in 2022[9].

In addition to these assessment reports, the IPCC also publishes thematic reports, known as special reports (SRs). The October 2018 Special Report is particularly important. It focuses on the consequences of a global warming of 1.5°C[10], highlighting the difference between a warming of 1.5°C and 2°C (SR 1.5°C).

14. The IPCC reports are the **most comprehensive scientific reports** on global warming in the world.

Thousands of scientists from around the world contribute to the work of the IPCC on a voluntary basis as authors, contributors and reviewers. The author teams critically evaluate information for inclusion in the report, regardless of the source.

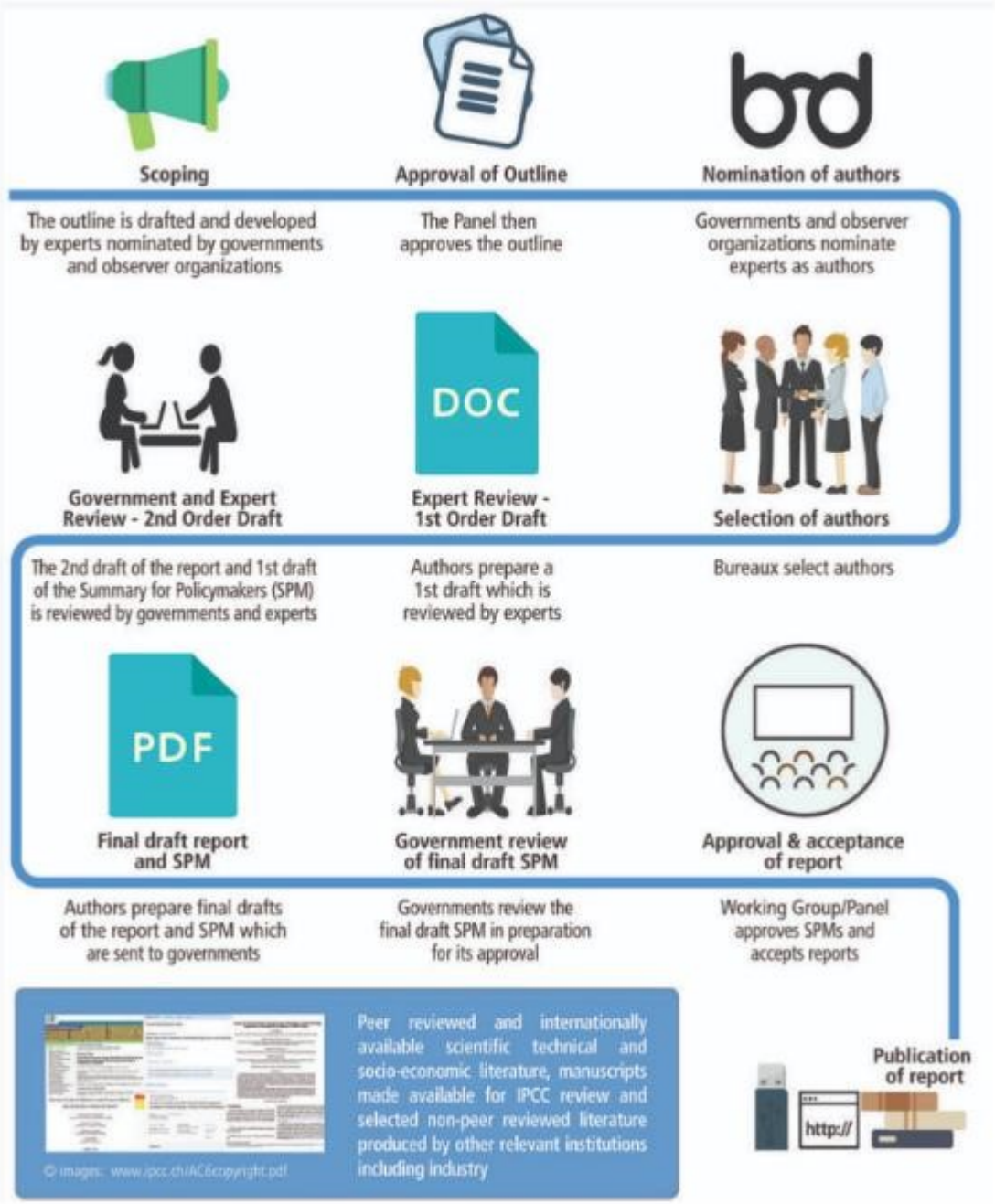
The reports are drawn up according to a specific procedure, which respects a double adversarial principle.

The procedure is described by the IPCC itself as follows:

[8] "*Climate Change 2021: The Physical Science Basis*," published August 6, 2021 in English. Exhibit B.29, IPCC 2021, AR6 WG I, and Exhibit B.30, IPCC 2021, AR6 WG I, SPM.

[9] "AR6 WG II - Impacts, Adaptation and Vulnerability" to be published in February 2022; "AR6 WG III - Mitigation of Climate Change" to be published in March 2022; "AR6 Synthesis Report: Climate Change 2022" to be published in September 2022.

[10] IPCC 2018, SR 1.5°C, Exhibit B.23; IPCC 2018, SR 1.5°C, SPM, Exhibit B.24.



The preparation of an IPCC report begins with a scoping meeting at which experts nominated by governments and observer organizations draft a work plan. This plan must be approved by the Panel.

The observer governments and organizations then nominate experts to author the report. The authors prepare a first draft of the report. This first draft is reviewed by external experts and results in a second draft. The second draft is submitted to governments and other experts for review.

This gives member countries the opportunity to comment throughout the conceptualization phase of the report.

The IPCC analyses these observations and comments and adapts the report if necessary. The final report and the Summary for Policy Makers (SPM) are sent to governments. Governments

review the final report and SPM for approval. It is only after this lengthy process that IPCC reports and their SPMs are approved.

15. The reports we use most frequently in this query are the 2007 [11](AR4), 2014 [12](AR5) and 2021 [13](AR6.I) Assessment Reports and the October 2018 [14]Special Report (SR 1.5°C).

    Like 194 other countries, Belgium is a member of the IPCC[15]. This means that since the preparation of the first report in 1990, it has been involved in the preparation of each report and in their approval in plenary session[16]. Since 1990, it has therefore been systematically kept abreast of developments in scientific, technical and socio-economic knowledge relating to climate change.

16. In conclusion, the IPCC reports represent **the best available science** at the global level. The specific process of preparation and approval of the IPCC reports makes them an unquestionable and undisputed scientific reference within the international community. In this case, **the science is not in dispute**. All States Parties to the UNFCCC share the same scientific data and recognize its authority in developing their policies to combat global warming.

    The above process ensures a **comprehensive, objective and transparent** assessment of the current state of scientific knowledge on global warming. The resulting reports are **highly authoritative**.

17. It should also be noted that, with regard to the process of preparing and approving the reports, they are systematically on the **"conservative" side**, given that certain countries producing harmful energy sources carry a great deal of weight in the above-mentioned process. [17]

II.1.2 Global warming and CO_2

18. The respondents do not go back to basic facts such as the explanation of the greenhouse effect and the impact of anthropogenic greenhouse gas (GHG) emissions. These facts have not been disputed by the Respondents or by the judgment under appeal.

19. To summarize, the warming of the earth that causes global warming is mainly caused by human use of fossil fuels. The scientific community agrees that anthropogenic GHG emissions are the main cause of global warming.

A. The anthropogenic origin of global warming

20. This graph summarizes the evolution of CO concentrations in the $_2$atmosphere over 800,000 years. It shows that, **over 800,000 years,** these concentrations have fluctuated **between 180 ppm and 300 ppm**. So over the last 800,000 years, the concentration of CO_2 was 180 ppm during the coldest glacial periods and 300 ppm during the warmest interglacial periods. Then,

[11] IPCC 2007, AR4 , Exhibits B.4 to B.11.

[12] IPCC 2014, AR5, Exhibits B.15 to B.22,.

[13]IPCC 2021, AR6 - WG I, Parts B.29 and B.30.

[14] IPCC 2018, SR 1.5°C, Exhibits B.23 and B.24.

[15] *Supra*, no. 10.

[16] *Supra*, *ibid*.

[17] See. December 16, 2019 Summary Findings, No. 38, Exhibit P.27.

suddenly, they increased dramatically, exceeding 400 ppm in a few hundred years, to reach 405 ppm in 2017.

This spectacular and rapid increase in CO concentrations$_2$ in the atmosphere coincides with the industrial revolution - which began around 1750 - and its subsequent evolution, and particularly with one aspect of this revolution: the demand for energy, specifically the use of fossil fuels (coal, oil, gas, lignite...).

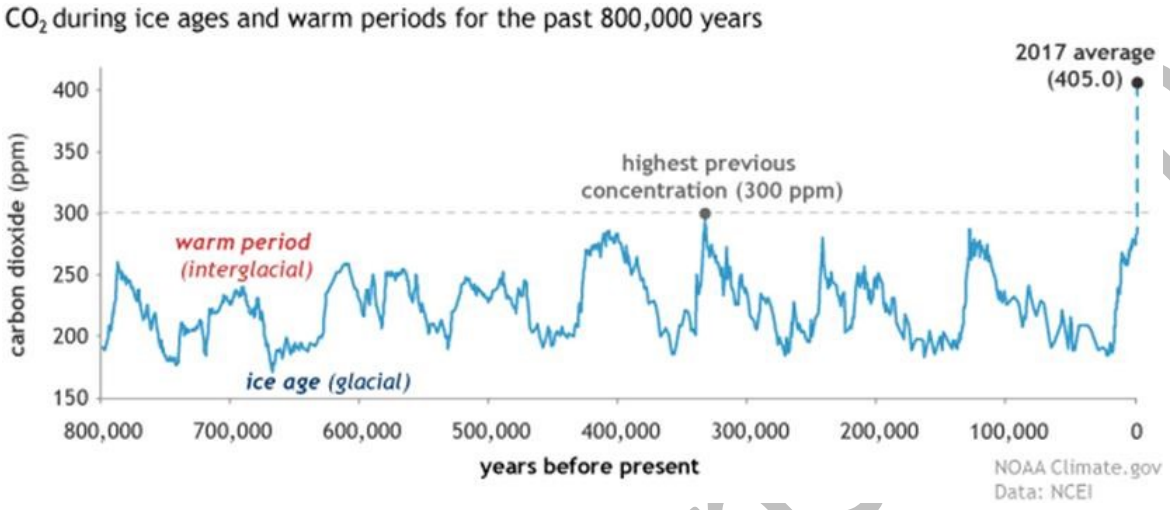


Figure 1. CO concentrations $_2$ in the atmosphere over the past 800,000 years

21. **Today,** the concentration of CO_2 in the atmosphere continues to increase at a high rate. If in 2017, we counted 405 ppm, we are at the beginning of November 2021 at **413.77 ppm**[18] . The current concentration of CO_2 is therefore already 113 ppm higher than the concentration during the **warmest** interglacial periods. For 800,000 years, a difference of 120 ppm has made the difference between the coldest ice ages (180 ppm) and the warmest interglacial periods (300 ppm). In the light of this data alone, it is immediately clear what extraordinary global warming and climate changes await us in the future as a result of the concentration already reached of 113 ppm. There is a direct link between increasing CO concentrations $_2$and increasing global temperature.

22. The first part of the AR6 provides a very illustrative graph also for the last 2000 years[19]:

[18]https://www.co2.earth/daily-co2

[19]IPCC 2021, AR6 WG I - SPM, p. 7, Exhibit B.30.

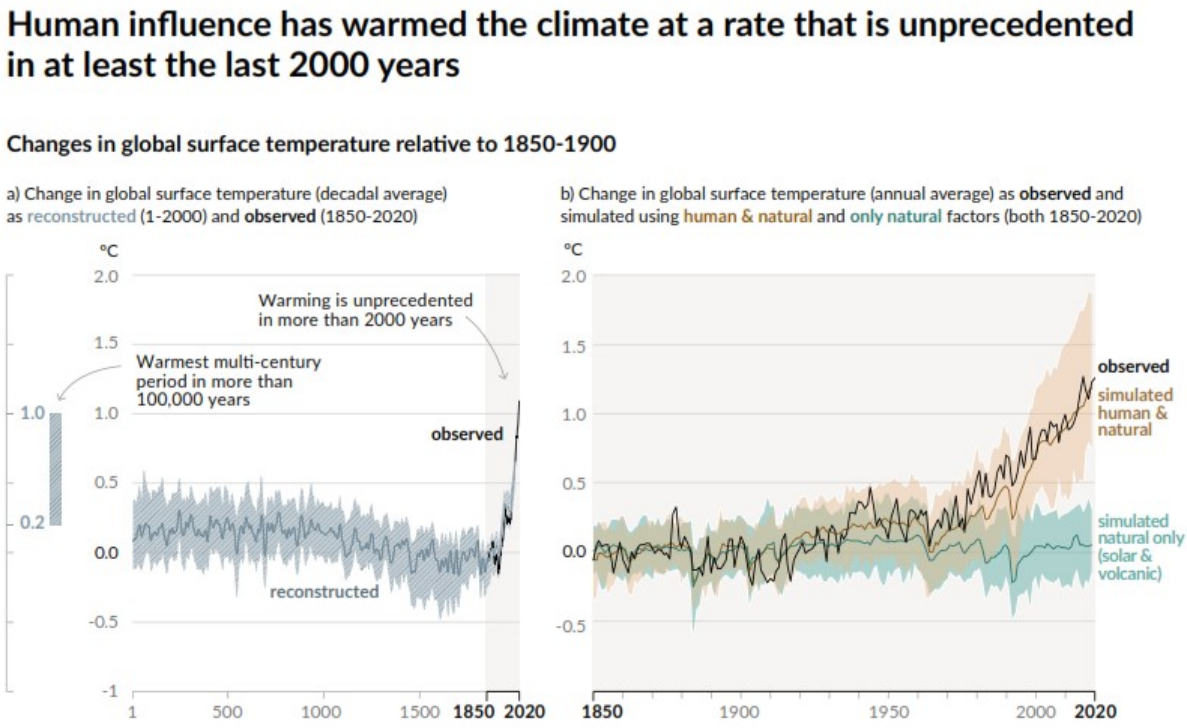


Figure 2. Global warming is due to human activity and has been increasing drastically since 1850, especially 1970

23. It will be argued in the following paragraphs that the best available science agrees that it is imperative to keep CO concentration $_2$below 430 ppm CO $_2$eq. to avoid dangerous global warming. The "window of opportunity", in other words "the space in which it is still possible to act", is extremely narrow.

The decade 2020-2030 will be decisive. We will come back to this.

B. Why is CO_2 particularly dangerous?

a Because of its quantitative importance

24. Of the major GHGs (carbon dioxide or CO $_2$, methane or CH $_4$, nitrous oxide or N $_2$O and ozone or O $_3$) it is clear that CO emissions $_2$ are **quantitatively** the most important:

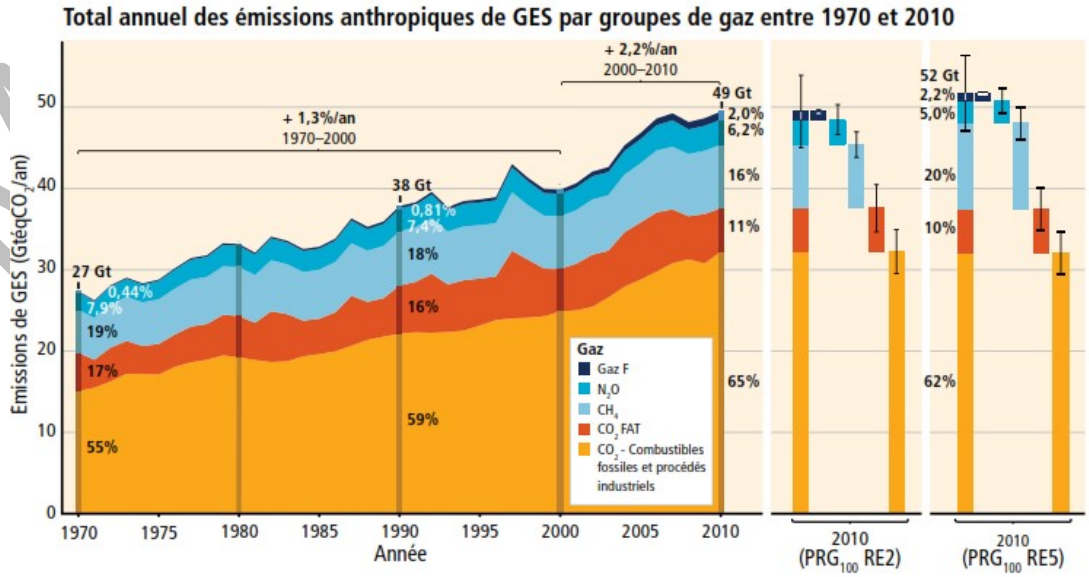


Figure 3. Total annual anthropogenic GHG emissions by gas group from 1970 to 2010

25. In particular, anthropogenic CO emissions$_2$ **have increased steadily** between 1750 and 2011, with an exponential acceleration from the 1970s.

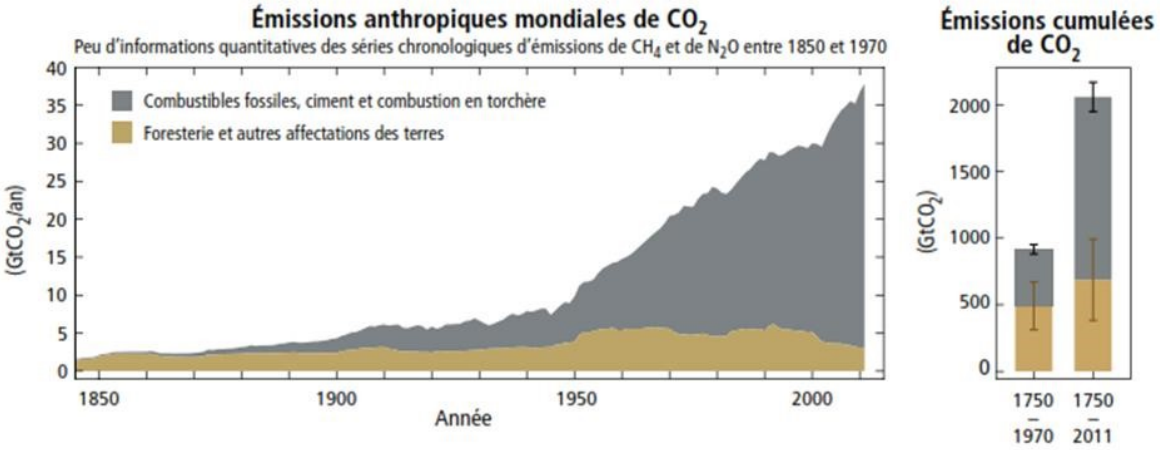


Figure 4. 1750-2011: Cumulative CO $_2$

b <u>Because of its longevity</u>

26. Furthermore, CO_2 is considered the most dangerous GHG because of its **longevity**. Once in the atmosphere, CO molecules $_2$disappear only after several hundred years and in some cases even after millennia, retaining their warming properties in the meantime.

The $_2$current CO concentration in the atmosphere therefore contains an **accumulation of** $_2$anthropogenic CO **emissions** from 1750 to the present day. Anthropogenic CO_2 emissions have increased the concentration level of this GHG in the atmosphere by 40% since 1750 and have thus drastically changed the physico-chemical composition of the atmosphere[20].

27. Since CO_2 is the most important part of the emissions, in quantitative as well as qualitative terms, the impact of other GHGs on global warming is expressed in equivalents of the warming value of CO_2 . Thus, the warming values of non-CO GHGs$_2$, such as methane, are commonly expressed in "CO-equivalents$_2$"$_2$[21]. For a good understanding of the following, more technical part, it is good to know this.

It is important to distinguish between scientific statements and standards expressed in CO concentrations$_2$and those expressed in CO eq. concentrations $_2$because the values in ppm (parts per million) are not the same, which can lead to confusion when reading IPCC reports. In the same vein, we must be careful about the specific meaning of the unit "ppm CO eq$_2$". The unit 'ppm' means 'parts per million'. For example, 300 ppm of CO $_2$means that out of every million molecules in the atmosphere, 300 are CO $_2$. When the unit "ppm CO $_2$eq" is used, it is to describe the concentration of GHGs all together, where the concentration of non-CO GHGs $_2$is reduced to a concentration of CO $_2$based on their warming effect[22].

[20]IPCC 2014, AR5 SYR, p. 47, Exhibit B.21.

[21] According to the IPCC, the CO_2 equivalent emission (CO $_2$-eq) is the "*amount of carbon dioxide (CO $_2$) emitted that would cause the same integrated radiative forcing, for a given time horizon, as an amount emitted from a single or multiple greenhouse gases (GHGs). The CO equivalent emission$_2$obtained by multiplying the emission of a GHG by its global warming potential (GWP) for the time horizon considered.* […]».

[22]Conclusie Procureur-Generaal bij de Hoge Raad 2019 (Urgenda), pt 1.2, Exhibit O.9.

As a reminder, we are currently at a concentration of 413.77 ppm of CO_2in the atmosphere.

c <u>Because of the linear relationship between increasing CO concentration $_2$ and global warming</u>

28. The relationship between the increase in the concentration of CO_2 in the atmosphere and the increase in temperature on earth is **linear**[23]. This relationship is shown in the diagram below. The CO concentrations $_2$(ppm CO_2) are shown in pink, with margins that take into account different modelling. The ovals indicate ranges of GHG concentrations for all scenarios (ppm CO eq.$_2$). It is clear that the increase in CO emissions $_2$ (horizontal axis of the diagram) goes hand in hand with an increase in global average temperature (vertical axis of the diagram).

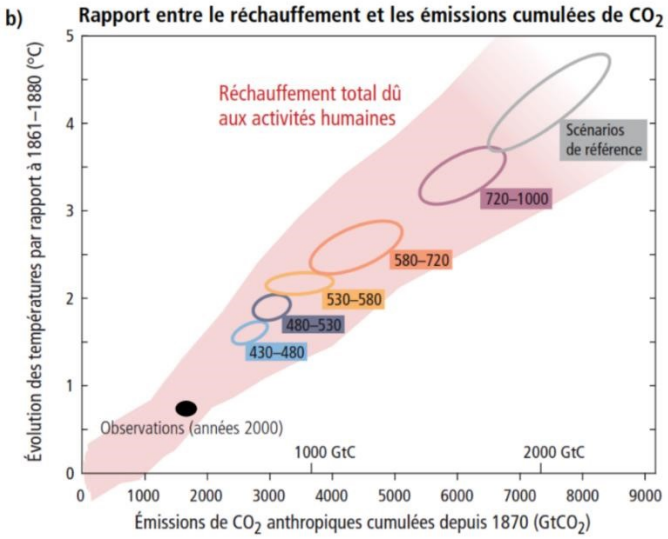


Figure 5: Relationship between global warming and cumulative $CO_2$and GHG emissions

[23] IPCC 2013, AR5 WG I, p. 1033, Exhibit B.15, "*The principal driver of long-term warming is total emissions of* CO_2 *and the two quantities are approximately linearly related*"; p.1113, "*the near linear relationship between cumulative* CO_2 *emissions and peak global mean temperature is well established in the literature...*" and its free translation: p. 1033, "*The principal driver of long-term warming is total emissions of CO $_2$and the two quantities are approximately linearly related*"*;* p.1113*,* "*the near linear relationship between cumulative CO emissions $_2$and peak global mean temperature is well established in the literature...*"

See also IPCC 2013, AR5 WG I, SPM, p. 25, Exhibit B.16 and IPCC 2014, AR5 SYR, p. 8, Exhibit B.21

29. AR6, part one, provides a very illustrative diagram in this regard as well[24].

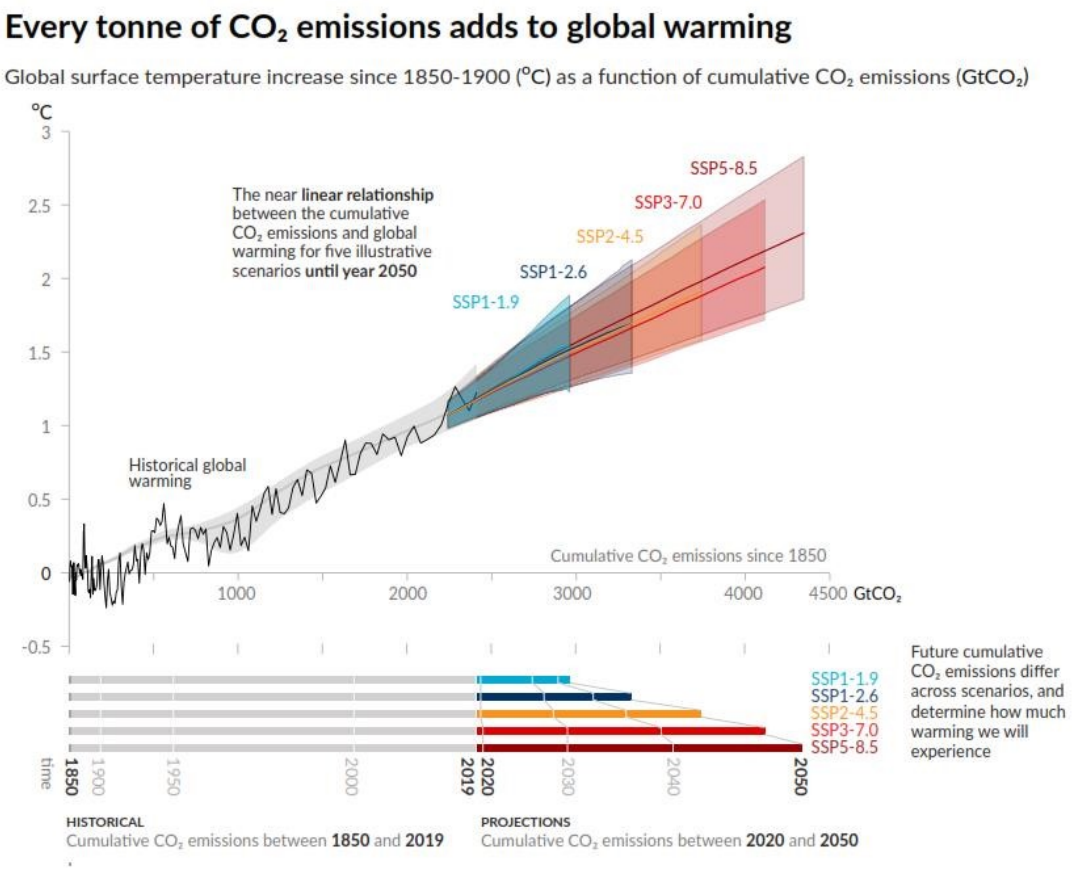


Figure SPM.10: Near-linear relationship between cumulative CO2 emissions and the increase in global surface temperature.

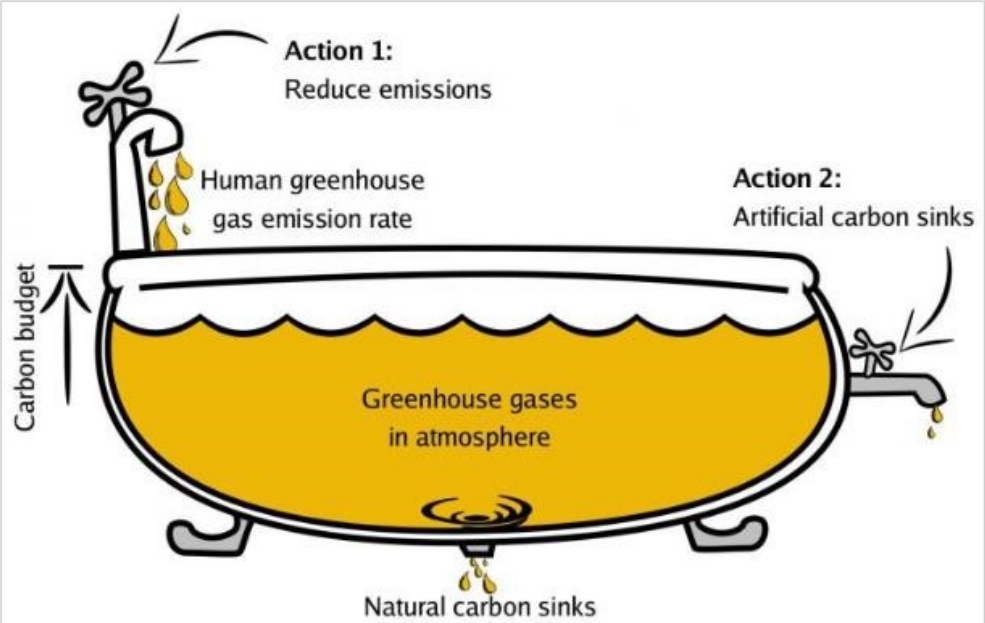
Figure 6. Relationship between global warming and cumulative CO_2

This linear relationship between cumulative CO emissions$_2$ and global warming forms the basis of the **carbon budget concept** in climate science. The carbon budget represents the total amount of CO_2that can be present in the atmosphere and that must not be exceeded if we want to stay below a certain global temperature threshold. This allows reasoning along the lines of: "*We want to limit global warming to 3°C **so** we must limit CO emissions $_2$to that much*".

30. The **residual carbon budget** is the amount of CO **that** $_2$can still be emitted.

31. These notions can be illustrated with the image of the bathtub:

[24] IPCC 2021, AR6 - WG I, SPM, p. 37, Exhibit B.30.



The atmosphere can be compared to a bathtub that can only be filled to its rim if global warming is to be limited to a certain level. We could create another small outward flow with negative emissions. However, there is no way around turning off the tap. CREDIT M. May/HZB

Figure 7 - Illustrative diagram of the 'bathtub

32. If the edge of the bath is the maximum desired temperature, the carbon budget is the entire bath. The residual carbon budget is the margin/space available between the volume already in the bath (yellow) and the edge of the bath.

    The importance of these two concepts, carbon budget and residual carbon budget, deserves to be emphasized. They are one of the **key elements of** global, regional and local **climate governance.**

33. We will see that the IPCC has been working to determine the carbon budget and the residual carbon budget (in ppm) for what should be considered **dangerous warming**. The threshold for dangerous warming was initially set at 2°C, but was later abandoned in favour of 1.5°C.

C. <u>Progressive and latent damage</u> :

34. A specific feature of climate cause data is the gradual and latent nature of the effects caused by GHG emissions.

35. *Progressive* because the damage from global warming does not occur fully at any one time, but increases progressively as a result of the **cumulative effects** of concentrations.

36. *Latent* because global warming, which causes climate change and damage, takes place with a time lag of about 40 years compared to the emissions that cause it[25].

[25] IPCC 2018, SR 1.5°C, SPM, p. 5, Exhibit B.24 "*Warming from anthropogenic emissions from the pre-industrial period to the present will persist for centuries to millennia and will continue to cause further long-term changes in the climate system, such as sea level rise, with associated impacts (high confidence), ...*", free translation: "*Warming by anthropogenic emissions from the pre-industrial period to the present will persist for centuries to millennia and will continue to cause further long-term changes in the climate system, such as sea level rise, with associated impacts (high confidence).*"

The current global warming of more than 1°C is therefore mainly the consequence of the GHG emissions produced between 1750 and 1980. If global GHG emissions stop abruptly today, the global temperature will continue to rise exponentially for decades before stabilizing[26], especially in view of the meteoric rise in CO emissions $_2$in the period from 1980 to now[27].

II.1.3 The key concept: dangerous global warming

37. The ultimate objective of the UNFCCC is to "*stabilize (...) concentrations of GHGs in the atmosphere at a level that would prevent **dangerous** anthropogenic interference with the climate system*".

The 197 Parties to the UNFCCC - 196 countries including Belgium and the European Union - have therefore committed themselves to taking dangerous global warming as a reference point. The crucial question is at what point does the increase in the average global temperature imply dangerous warming.

Since 1990, various scientific studies have identified the threshold of **2°C compared to** pre-industrial levels as the ultimate threshold that must not be exceeded.

An unquestionable consensus has emerged within the international community around the threshold of 2°C, then progressively **1.5°C**, in light of the evolution of scientific knowledge.

To summarize:

- The dangerous threshold of 2°C was first proposed in 2007 at the Bali Conference of the Parties ([28]COP).
- In the Copenhagen Accord (COP-15, 2009), states recognized the need to limit the temperature increase to 2°C and considered the possibility of strengthening the long-term objective towards a threshold of 1.5°C[29];
- The objective of limiting the temperature increase to 2°C, and the need to consider strengthening the threshold with reference to 1.5°C, was reiterated at the Cancún Conference (COP-16, 2010)[30];
- At the Doha Conference (COP-18, 2012), a "Structured Dialogue among experts" was launched to adjust the 2°C threshold downwards. It concluded that the 2°C target should no longer be considered conservative, that the 2°C threshold had become inadequate to avoid dangerous global warming, and that limiting warming below 1.5°C would be safer[30];

[26] IPCC 2018, SR 1.5°C, SPM, p. 4, Exhibit 24.

[27] *Supra*, nos. 24-25.

[28] Decision 1/CP.13, Exhibit H.5.

[29] Decision 1/CP.15, p. 5 and p. 8, Exhibit H.7 : "*In order to achieve **the ultimate objective of the Convention** to stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system, we intend, taking into account **the scientific view** that **global temperature increase should be limited to 2°C**, to enhance our long-term cooperative action to combat climate change, on the basis of equity and with a view to sustainable development*"; "*We call for an assessment of the implementation of this agreement by 2015 **in light of the ultimate objective of the Convention**. This would include consideration of strengthening the long-term goal taking into account various elements of **scientific work, in particular with regard** to a temperature increase of **1.5°C.***"

[30] Exhibit H.32: "*The **2°C** threshold should be seen as an ultimate threshold [...] The concept of a 'guardrail', where 2°C of warming is considered safe, is **inadequate** and would be better seen as an upper limit, a defensive line that must be rigorously defended, although less warming would be preferable" (...) and "Limiting global warming to below **1.5°C** would imply a number of benefits that would approach a safer 'guardrail'. It would avoid or reduce risks, particularly to food production or unique and threatened systems such as coral reefs or many parts of the cryosphere, including the risk of sea level rise [...] Parties could decide to choose a more conservative path by limiting global warming as far below 2°C as possible, reaffirming the notion of a defensive line or even a buffer zone keeping warming well below 2°C.* The last sentence is a free translation of : "*L]imiting global warming to below 1.5°C would*

- The Paris Agreement (COP-21, 2015) set a goal of holding the increase in global average temperature "***well below 2°C above*** *pre-industrial levels*" and continuing efforts to limit the temperature increase to **1.5°C** [31];

38. None of the respondents has disputed that, as Belgium is a party to the UNFCCC and therefore to the COP, it has adopted by consensus the various decisions that this body has taken over the years, from meeting to meeting, from the 2007 COP to the 2015 COP, and that, in so doing, the country and therefore all the respondents were necessarily fully informed of these decisions.

[30] Decision 1/CP.16, preamble and p. 3, point 4, Exhibit H.9 *:*

"Recalling its decisions 1/CP.13 (Bali Action Plan) and 1/CP.15, [...]

Noting UN Human Rights Council resolution 10/4 on human rights and climate change, [...]

come with several advantages in terms of coming closer to a safer 'guardrail'. It would avoid or reduce risks, for example, to food production or unique and threatened systems such as coral reefs or many parts of the cryosphere, including the risk of sea level rise [...] Parties may wish to take a precautionary route by aiming for limiting global warming as far below 2°C as possible, reaffirming the notion of a defense line or even a buffer zone keeping warming well below 2°C.

[31] Article 2.1.a of the Paris Agreement, Exhibit H.21: *"1. This Agreement ... aims to strengthen the global response to the threat of climate change ... including by ... containing the increase in global average temperature to* ***well below 2°C above*** *pre-industrial levels and continuing action to limit the increase in temperature to* ***1.5°C above*** *pre-industrial levels, with the understanding that this would significantly reduce the risks and impacts of climate change;"*

39. The 2018 IPCC Special Report summarizes the differences between the consequences of 1.5°C and 2°C warming in a striking figure, which we reproduce below. A crucial finding of the IPCC study is that with warming **above 1.5°C, all the dangers generated by induced climate change increase substantially**. The following figure summarizes this: all relevant risks in relation to climate change become 'High' to 'Very high' at a warming between 1.5°C and 2°C. [32]

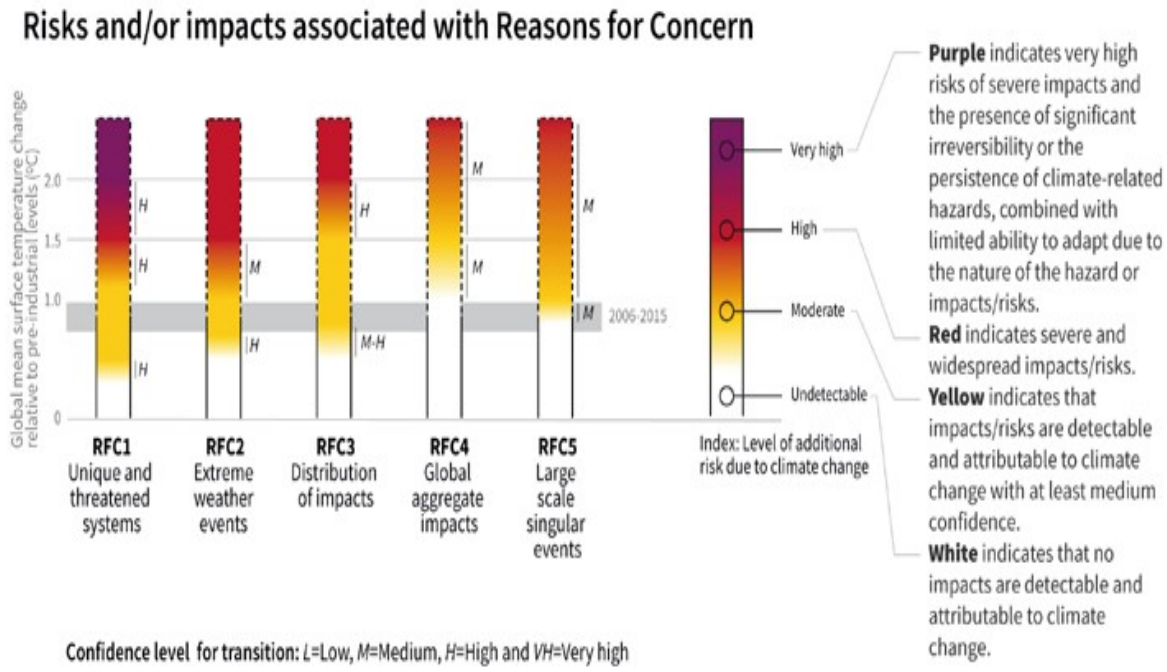


Figure 8. Warming of 1.5°C to 2°C and more: low to very high risk of consequences

Note that the risk of reaching these tipping points ('*Large scale singular events*') with irreversible changes is already close and becomes substantially higher above 1.5°C.

However, it should be remembered that there is **no linear relationship between warming and the consequences of warming**; such a linear relationship exists only between GHG concentrations and warming[33]. The **tipping point** phenomenon is a perfect example.

II.1.4 <u>The carbon budget: the GHG emission reductions required to avoid global warming hazardous climate</u>

40. Belgium therefore adhered by consensus to the COP decisions, setting the threshold for dangerous warming at 2°C first, then towards 1.5°C.

The question is to know what carbon budget this corresponds to. It is therefore a question of determining how much we should limit the concentration of GHGs in the atmosphere in order to limit the rise in temperature to 2°C or even 1.5°C.

[32] IPCC 2018, SR 1.5°C, p. 254, Exhibit B.23.

[33] Summary Findings 2019, no. 54, Exhibit P.27.

A. <u>2°C - 450 ppm CO_2 -eq. - at least 25 to 40% reduction in GHG emissions by 2020 - at least 85 to 90% by 2050 a</u> ***<u>The carbon budget: 450 ppm CO_2-eq. to limit to 2°C</u>***

41. Within the global climate governance established by the UNFCCC, the idea of quantifying the limit of dangerous warming, the threshold of average global temperature increase not to be exceeded, appeared for the first time in 2007, during the COP-13 in Bali. Chronologically, the approach comes a decade after the 1997 Kyoto Protocol (which entered into force in 2005), which, although it provides for GHG reduction commitments for State Parties, did not give concrete form to the notion of "*dangerous global warming*".

42. The preamble to the Bali Action Plan [34]explicitly recognizes the following:

> *"The Conference of the Parties,*
>
> *Determined to strengthen the implementation of the Convention as a matter of urgency in order to achieve its ultimate objective in full compliance with the principles and commitments of the Convention, (...)*
>
> *Recognizing that* ***deep cuts in global emissions will be required to achieve the ultimate objective of the Convention*** *and stressing the* ***urgency of addressing*** *climate change, as stated in the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (...)"*[35].

In the word "urgent" there is a footnote. This footnote refers to the following table:

Category	Additional radiative forcing (W/m^2)	CO_2 concentration (ppm)	CO_2-eq concentration (ppm)	Global mean temperature increase above pre-industrial at equilibrium, using "best estimate" climate sensitivity[a]), [b]) (ºC)	Peaking year for CO_2 emissions[c])	Change in global CO_2 emissions in 2050 (% of 2000 emissions)[c])	No. of assessed scenarios
I	2.5-3.0	350-400	445-490	2.0-2.4	2000 - 2015	-85 to -50	6
II	3.0-3.5	400-440	490-535	2.4-2.8	2000 - 2020	-60 to -30	18
III	3.5-4.0	440-485	535-590	2.8-3.2	2010 - 2030	-30 to +5	21
IV	4.0-5.0	485-570	590-710	3.2-4.0	2020 - 2060	+10 to +60	118
V	5.0-6.0	570-660	710-855	4.0-4.9	2050 - 2080	+25 to +85	9
VI	6.0-7.5	660-790	855-1130	4.9-6.1	2060 - 2090	+90 to +140	5
Total							177

Figure 9: IPCC 2007 Assessment Report: The 2°C Limit

In this table, the IPCC has provided extremely clear information on the concentration limits (in ppm CO_2-eq) that must not be exceeded to stay below a certain global temperature.

Thus, the information under "Category I" shows that in order to limit warming to between 2°C and 2.4°C, the concentration of GHGs in the atmosphere must be stabilized at a level between 445 and 490 ppm CO_2-eq.

Note that this hypothesis assumes that the ceiling for global CO emissions $_2$("*Peaking year for CO_2 emissions*") is reached between 2000 and 2015 and that these emissions then decrease, which has not been the case. And in 2007, at COP-13, we already knew that from 2000 to 2007

[34]Decision 1/CP.13, Exhibit H.5.

[35]Decision 1/CP.13, preamble, Exhibit H.5; emphasis added.

these global emissions had continued to increase year after year and that the limit concentrations put forward were therefore too optimistic. We will come back to this later. Moreover, the ceiling on global CO emissions $_2$has still not been reached.

The IPCC, on the basis of the table reproduced above, including the premise of a CO2 emissions cap between 2000 and 2015, concludes that the temperature rise can only reasonably be limited to 2°C if the concentration of GHGs in the atmosphere stabilizes at a maximum of about **450 ppm CO $_2$-eq** :

> "*Limiting the temperature increase to 2°C above pre-industrial levels can only be achieved at the lower limit of the concentration range indicated in the Category I scenario (i.e., about 450 ppm CO equivalent $_2$based on "best estimate" assumptions)*. [36]

In summary, as early as 2007, the Respondents **knew** that in order not to exceed the **2°C** threshold, which corresponds to dangerous global warming, GHG concentrations had to be limited to **450 ppm CO $_2$-eq.**

b <u>Measures to be taken to limit GHG concentrations to 450 ppm CO $_2$-eq: emission reductions of at least -25 to -40% by 2020</u>

43. The question remained: **what actions** should be taken to limit GHG concentrations to 450 ppm CO $_2$-eq? The answer to this question leads us to visit some principles enshrined in the UNFCCC.

44. Article 3 of the UNFCCC sets out the guiding principles for action by each Party to achieve the Convention's objective of avoiding dangerous warming, including

> *the principle of common but differentiated responsibilities, taking into account in particular the respective capacities of the Parties, and which places the developed countries, including Belgium, at the "forefront of the fight against climate change and its harmful effects";*
>
> *the precautionary principle, which states that lack of full scientific certainty shall not be used as a reason for postponing preventive measures.*

The UNFCCC also sets out the commitments of the Parties, distinguishing between the obligations of the States listed in Annexes I and II and those of the States not listed.

Annex I to the Convention groups together the "developed countries", i.e. the industrialised countries that were members of the OECD in 1992, as well as countries whose economies were in transition towards a market economy, in particular Russia and several Eastern European countries. 43 countries are included in this annex, including Belgium, out of the 196 States Parties to the UNFCCC.

Annex II includes some of the Annex I countries, i.e. only the members of the OECD, i.e. 24 of the 43 so-called "developed countries". It is therefore the hard core of Annex I and Belgium is part of it.

For example, Bulgaria, one of the poorest countries in Europe, is still included in Annex I as a developed country. However, it is not included in Annex II. **Annex II countries therefore have a very special status**.

[36] *Limiting temperature increases to 2°C above pre-industrial levels can only be achieved at the lowest end of the concentration interval found in the scenarios of category I (i.e. about 450 ppm CO $_2$-eq using "best estimate" assumptions)*", in: IPCC 2007, AR4 WG III, p. 229, Exhibit B.8.

The **principle of common but differentiated responsibilities** is based on this classification. Indeed, the obligations under the UNFCCC - and then under subsequent treaties - are more binding for these developed countries than for non-developed countries and not listed in the annexes.

As an Annex I country, coupled with Annex II status, Belgium is one of the richest countries in the global community and has a **leadership** responsibility in climate governance.

45. Even before the adoption of the Bali Plan in December 2007, Annex I countries to the UNFCCC recognized the need to reduce their emissions by **25-40% by 2020 compared to** 1990 levels. This is reflected in the August 2007 Report of the "*Ad Hoc Working Group on Further Commitments for Annex I Countries under the Kyoto Protocol*", which refers to the IPCC Fourth Assessment Report:

> *" The AWG-KP noted the usefulness of the ranges referred to in the Fourth Assessment Report [AR4, IPCC]. Recognizing the findings of the contribution of Working Group II on impacts, vulnerability and adaptation, (...)* ***Annex I Parties should collectively reduce their emissions*** *to between* ***25 and 40 per cent below 1990 levels by 2020*** *through the means that may be available to them to achieve these targets. These ranges are taken from Box 13.7 of the Working Group III report.* ***They would also be much higher if only Annex I parties were to reduce their emissions****. The AWG-KP noted that the ranges of the IPCC do not take into account possible lifestyle changes that could increase the ranges. The AWG-KP further recognizes that, if Annex I Parties were to achieve these reduction targets, they would make a significant contribution to the global efforts required to achieve the ultimate objective of the Convention, as set out in its Article 2*[37].

Thus, this Working Group of Annex I parties, of which Belgium is a member, recognised - even before COP-13 (Bali, 2007) - that a reduction of 25 to 40% by 2020 is necessary and that this range could even be revised upwards.

46. Box 13.7 of the IPCC AR4, to which the above quote from the Ad Hoc Working Group of Annex I countries to the Kyoto Protocol refers, is as follows. It clearly indicates the percentage of GHG emission reductions that Annex I countries must achieve in 2020 (25-40%) and in 2050 (80-95%) to meet the 450 ppm CO_2-eq limit. This would make it possible to avoid dangerous warming exceeding **2°C**. Let us recall that this 2007 IPCC report considered that global emissions would stabilize between 2000 and 2015, and then decrease, an assumption that ran counter to the realities observed at the time it was written and approved. Let us note the impact of this over-optimistic assumption on the reductions required to meet the 450 ppm CO_2-eq limit. As the accumulation of GHGs in the atmosphere has simply continued to increase instead of stabilizing and then decreasing, the required reduction percentages for 2020 and 2050 have necessarily slipped towards the top of the range: towards 40% and 95%. Indeed, there is a communicating vase effect: the higher the GHG emissions in the atmosphere, the higher the percentage of emission reductions that will allow us not to exceed the 450 ppm limit.

[37] Report of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol on its fourth session, held in Vienna from 27 to 31 August 2007, p. 5, No. 19, Exhibit H.6.

Box 13.7 The range of the difference between emissions in 1990 and emission allowances in 2020/2050 for various GHG concentration levels for Annex I and non-Annex I countries as a group[a]

Scenario category	Region	2020	2050
A-450 ppm CO_2-eq[b]	Annex I	–25% to –40%	–80% to –95%
	Non-Annex I	Substantial deviation from baseline in Latin America, Middle East, East Asia and Centrally-Planned Asia	Substantial deviation from baseline in all regions
B-550 ppm CO_2-eq	Annex I	-10% to -30%	-40% to -90%
	Non-Annex I	Deviation from baseline in Latin America and Middle East, East Asia	Deviation from baseline in most regions, especially in Latin America and Middle East
C-650 ppm CO_2-eq	Annex I	0% to -25%	-30% to -80%
	Non-Annex I	Baseline	Deviation from baseline in Latin America and MIddle East, East Asia

Notes:

[a] The aggregate range is based on multiple approaches to apportion emissions between regions (contraction and convergence, multistage, Triptych and intensity targets, among others). Each approach makes different assumptions about the pathway, specific national efforts and other variables. Additional extreme cases – in which Annex I undertakes all reductions, or non-Annex I undertakes all reductions – are not included. The ranges presented here do not imply political feasibility, nor do the results reflect cost variances.

[b] Only the studies aiming at stabilization at 450 ppm CO_2-eq assume a (temporary) overshoot of about 50 ppm (See Den Elzen and Meinshausen, 2006).

Source: See references listed in first paragraph of Section 13.3.3.3

Figure 10 - IPCC - 2007 Assessment Report (AR4): the necessary percentages of global GHG emission reductions to stay below the 2°C threshold.

In summary, as early as 2007, respondents knew that to avoid the dangerous **2°C** warming, **Annex I** parties had to reduce their GHG emissions by **at least 25-40%** by 2020, and by at least 80-95% by 2050 (compared to 1990 levels). This is based on the assumption that global GHG emissions would stabilize between 2000 and 2015, and then decline**.**

47. The need for **Annex I Parties to** reduce their emissions by **at least** 25-40% by 2020 has been repeated from COP to COP:

- COP-15 (2009) Copenhagen[38];
- COP-16 (2010) Cancun[39]; - COP-17 (2011) Durban[40];
- COP-18 (2012) Doha[41];

[38] Report of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol, p. 18, no. 9, Exhibit H.8.

[39] Preamble to Decision 1/CMP.6, Exhibit H.11: "*also recognizing that the contribution of WGIII to the 4th Assessment Report of the IPCC, 2007: Mitigation Climate Change, indicates that achieving the lowest levels assessed by the IPCC to date and its corresponding potential damage limitation would require Annex I Parties as a group to reduce emission in a range of **25-40%** below 1990 levels by 2020, through means that may be available to these parties to reach their emission reduction targets*.

[40] Decision 1/CMP.7, preamble, Exhibit H.14: "*Aiming to ensure that aggregate emissions of greenhouse gases by Parties included in **Annex I** are reduced by **at least 25-40** per cent below 1990 levels by 2020, noting in this regard the relevance of the review referred to in chapter V of decision 1/CP.16 to be concluded by 2015*.

[41] Report of the CMP.8, held in Doha from 26 November to 8 December 2012, p. 3, No. 7, Exhibit H.17: "*Decides that each Party included in Annex I will revisit its quantified emission limitation and reduction commitment for the second commitment period at the latest by 2014. In order to increase the ambition of its commitment , such Party may decrease the percentage inscribed in the third column of Annex B of its quantified emission limitation and reduction commitment, in line with an aggregate reduction of greenhouse gas emissions not controlled by the Montreal Protocol by Parties included in **Annex I** of **at least 25 to 40** per cent below 1990 levels by 2020.*"

- COP-19 (2013) Warsaw; - [42] COP-20 (2014) Lima; - [43] COP-21 (2015) Paris[44].

48. It appears from the above that from COP-13 in Bali in 2007 to COP-21 in Paris in 2015, it has been agreed and re-agreed each year that, to avoid dangerous warming understood as **2°C**, **Annex I countries** should reduce their GHG emissions by **at least 25-40%** by 2020.

The Party countries themselves, including Belgium, have therefore not only determined, on the basis of the best available and universally accepted science, what the threshold of dangerous warming is, but they have also determined what measures should be taken to avoid exceeding this threshold. This factual finding is very important. We will come back to it later.

B. 1.5°C - 430 ppm CO_2-eq. - necessarily more than 25 to 40% reduction in GHG emissions by 2020

49. The international consensus has gradually formed around abandoning the 2°C threshold and moving towards the 1.5°C target.

[42] Decision 1/CP.19, Report of COP-19, held in Warsaw from 11 to 23 November 2013, p. 5, paragraph 4.c, Exhibit H.18.

[43] Decision 1/CP.20, Report of the COP-20, held in Lima from 1 to 14 December 2014, p. 4, No. 18, Exhibit H.20 (cross-referencing Doha Decision 1/CMP.8 by cross-referencing paragraph 4.c of Warsaw Decision 1/CP.19).

[44] Decision 1/CP.21, p. 15, No. 105(c), Exhibit H.21 (same approach: reference to Doha Decision 1/CMP.8 by reference to paragraph 4(c) of Warsaw Decision 1/CP.19).

50. In its AR4, the IPCC indicates that limiting the temperature increase to **1.5°C** implies a global carbon budget of **430 ppm CO_2-eq** [45].

51. **What actions** were needed to limit GHG concentrations to 430 ppm CO_2-eq?

It is clear that if Annex I Parties were to reduce their emissions by at least 25-40% by 2020 to avoid exceeding 450 ppm CO_2-eq (and by 80-95% in 2050), they would necessarily have to **reduce even more by** 2020 to avoid exceeding 430 ppm CO_2-eq.

Thus, just because the 430 ppm CO_2-eq target was not explicitly translated into new emission reduction percentages in successive COPs does not mean that reductions were not needed. States Parties were well aware of what they had to do to avoid dangerous warming.

II.2 The explicit recognition by the respondents of the need to reduce the GHG emissions by at least 25% to 40% by 2020

52. It follows from the above that it is **impossible that** the Respondents were not aware of the percentages of emission reductions since 2007:

- As a member of the IPCC, Belgium followed the elaboration and conclusion of the AR4 of 2007, which played a pivotal role in the knowledge and dissemination of the reduction percentages required to avoid dangerous warming understood as a warming of 2°C;

- As a Party to the UNFCCC and more specifically as an Annex I Party to the UNFCCC, Belgium was present at the COP and MOP decisions in Bali (2007), Poznan (2008), Copenhagen (2009), Cancun (2010), Durban (2011), Doha (2012), Warsaw (2013), Lima (2014) and Paris (2015) where the need for these reductions for Annex I countries was made explicit and the respondents were involved in these diplomatic meetings.

53. Not only were the respondents aware of the mitigation measures to be taken, but they **expressly** acknowledged the scientific need for them.

54. This is evidenced by official documents of the time. These documents show that the Respondents were aware of their heightened responsibility as an Annex I developed country.

For example, in view of the COP-15 in Copenhagen, the Belgian Parliament requested, in a resolution of 3 December 2009, that the federal government advocate, on an international scale, a reduction of greenhouse gases by 25-40% by 2020 and 80-95% by 2050[46].

As far as the Flemish Region is concerned, we can report the following documents.

An opinion of the Minaraad (Flemish Council for the Environment and Nature) to the Flemish Parliament of 4 December 2009 [47]states the following with regard to 2020:

> "*According to the Fourth Assessment Report, the group of developed countries needs to reduce its emissions by 25-40% below 1990 levels by 2020 in order to limit the temperature increase to 2-2.4°C. The Minaraad emphasizes that* ***the emission reductions***

[45]IPCC 2007, AR4 WG III, H.3 pp. 227 and 229 (Table 3.10), Exhibit B.8

[46] Resolution of 3 December 2009 in view of the UN Climate Change Conference in Copenhagen from 7 to 18 December 2009, House of Representatives, *Doc. Parl.* No. 52 2263/002, p. 4, Exhibit F.13.

[47]See http://docs.vlaamsparlement.be/pfile?id=103030580.

needed for developed countries will have to be at the higher end of this range (25-40%)" [48](emphasis added)

With regard to 2050, the Minaraad, again in 2009, clarifies the following:

"*That emissions should be reduced by 80-95% by 2050 compared to 1990 levels. Minaraad... points out that there are more recent studies that indicate that global reductions* ***should be greater than those projected by the IPCC*** *in its latest report (+50%)*" [49](emphasis added).

On the basis of these findings, the Flemish Parliament adopted a resolution on 9 December 2009 in which the necessary reduction percentages for 2020 and 2050 were included:

"*The* ***precautionary principle*** *implies that for the group of developed countries reduction targets of 25-40% are needed in 2020 compared to 1990 and at least 80-95% in 2050 compared to 1990*" [50](emphasis added).

In addition, the Flemish Environment Report ("Milieurapport") concluded in 2009 that the current traditional policy instruments are insufficient to initiate and accelerate the transition to a sustainable low-carbon economy[51].

Finally, it should be noted that the Flemish Parliament already stated in 2009 that "*the total greenhouse gas reduction percentages put forward by Annex I countries are* ***insufficient to come*** *close to the 2°C objective*" [52](emphasis added).

In Wallonia, the regional parliament adopted on 20 February 2014 a Climate Decree providing for a reduction target of 30% in 2020 and 80-95% in 2050, following a Climact study finalised on 30 December 2011 [53].

II.3 The inadequacy and insufficiency of the norms of positive international law and for 2020

55. We have just traced the path of the authorities' knowledge of the danger of global warming, but above all of the measures to be taken by the States Parties to the UNFCCC to prevent this danger from occurring. It is clear from the foregoing that Belgium, and therefore the

[48] Minaraad, Advies van 26 november 2009 over de Klimaattop in Kopenhagen, p.5, Exhibit C.5: "*Volgens het vierde evaluatierapport moeten de groep ontwikkelde landen hun emissies in 2020 met 25 à 40% teruggedrongen hebben ten opzichte van 1990 om de temperatuurstijging te beperken tot 2 à 2,4°C. De Minaraad...wijst erop dat de benodigde emissiereducties voor de ontwikkelde landen zich eerder aan het hoogste einde van deze range (25 à 40%) zullen bevinden*".

[49] Minaraad, Advies van 26 november 2009 over de Klimaattop in Kopenhagen, p.5, Exhibit C.5: "[*D]at de emissies in 2050 met 80 à 95% verminderd moeten zijn in vergelijking met de niveaus van 1990. De Minaraad...wijst erop dat er recentere studies zijn die aangeven dat men op wereldvlak meer zou moeten reduceren dan wat het IPCC in zijn laatste rapport heeft voorspeld (+50%)*".

[50] Resolutie betreffende het nieuwe klimaatverdrag van Kopenhagen, 9 december 2009, Vlaams Parl*. Doc,* 20092010, No. 282/3*,* p. 2, 8°, Exhibit 9, free translation: *"het voorzorgsprincipe, wat inhoudt dat voor de groep van ontwikkelde landen reductiedoelstellingen nodig zijn van 25% tot 40% in 2020 ten opzichte van 1990 en ten minste 80% tot 95% in 2050 ten opzichte van 1990, [...];"*

[51] MIRA, "Milieuverkenning 2030", November 2009, p. 373, Exhibit C.3, free translation: "*Nogmaals: een transitie staat of valt niet met een overheid alleen. Maar om transities bewust te versnellen en in de richting van duurzaamheid te sturen, is de rol van de overheid wel cruciaal. Als de maatschappij het erover eens is dat transities noodzakelijk zijn, mag van de overheid verwacht worden dat ze de kennis en capaciteit mobiliseert om inhoudelijk en procesmatig leiderschap te tonen*."

[52] Resolutie betreffende het nieuwe klimaatverdrag van Kopenhagen, 9 december 2009, Vlaams Parl*. Doc,* 20092010, No. 282/3*,* Exhibit 9,

[53] February 20, 2014 "Climate" Order, *MB* March 10, 2014, Exhibit F.3.

respondents, knew as early as 2007 precisely what they had to do to help avoid dangerous global warming. They **knew** that in order to avoid a warming of 2°C, the Annex I Parties, of which Belgium was a part, had to reduce their emissions by at least 25% to 40% by 2020, and 80 to 95% by 2050. They **knew** that in view of their historical responsibility and leadership in climate policy, their share of emission reductions was at the high end of the range and closer to 40% than to 25%. They **knew** that the assumption of a global emissions ceiling between 2000 and 2015, on which the percentages of emissions reductions were based, was contradicted by the facts, also pushing the effort towards 40%. Finally, they were necessarily **aware** that in order to move towards the 1.5°C threshold, the target of at least 25% to 40% was itself out of date, so that even more reductions were needed.

56. Any normally diligent authority under the same conditions - having therefore followed all the IPCC work and contributed to all the COP decisions - should have deduced that, in order to move towards the 1.5°C threshold to avoid dangerous warming, it had to move towards a 40% emissions reduction by 2020. Countries such as Germany, Denmark, the UK and Sweden, for example, strengthened their climate policies in the years after COP-15 (2009) in Copenhagen, adopting a 40% reduction in GHG emissions by 2020 as a cornerstone of that policy.

57. The understanding of the facts of the case may be somewhat confused by the adoption of binding targets enshrined in Belgian positive law, namely on the one hand the targets resulting from the Kyoto Protocol, and on the other hand the targets imposed by the European Union.

It should be noted from the outset that these binding targets are largely insufficient and simply do not prevent dangerous warming. They have the merit of existing, but they are not sufficient to define the standard of behaviour that is required of the authorities.

The authors insist that **these binding objectives cannot constitute the reference for defining the standard of conduct imposed by Articles 2 and 8 ECHR and by Article 1382 of the Civil Code, since they do not make it possible to avoid dangerous warming**. The aim is to determine the conduct of an authority faced with the imminence of a serious danger threatening its population. It will be recalled, if necessary, that a normally diligent authority takes adequate and necessary measures.
A normally diligent authority does not refrain from taking measures by taking refuge behind obligations cast in the form of norms of positive law in the full knowledge that these are not adequate to protect its population from the danger.

58. In this case, two norms of positive law must be cited. In the following lines, the Court will endeavour to clarify whether they are inadequate and insufficient to prevent dangerous global warming, and therefore irrelevant for the determination of the standard of conduct to be imposed on the Respondents.

II.3.1 <u>The objectives set by the European Union</u>

59. On the basis of political decisions dating back to 2007, on 23 April 2009 the European Union introduced a set of laws commonly referred to as the "Climate and Energy Package", with the objective of reducing GHG emissions by 20% by 2020 compared to 1990, or 14% compared to 2005, it being understood that the contribution of each member country will be determined taking into account its characteristics.

For Belgium, this has resulted in the following target: **21% reduction of** its GHG emissions compared to 2005, for 2020.

60. Given the evidence of scientific knowledge and the international consensus that has formed around the range of at least 25% to 40% reduction, it is clear that the EU target of 20% for 2020 was **far from sufficient** to avoid dangerous warming.

61. A 2007 Communication from the European Commission[54], which forms the basis of European legislation for 2020, has a telling title: "*Limiting Global Warming to 2 degrees Celsius. The road ahead to 2020 and beyond*". It invokes "*irrefutable scientific facts*"[55].

It is therefore interesting to read in the same Communication the following:

> *"This Communication proposes that the EU should set a target in the international negotiations to reduce greenhouse gas (GHG) emissions from developed countries by **30% (compared to 1990 levels) by 2020**. This effort is **necessary to limit the increase in global temperatures to 2 degrees Celsius***" [56](emphasis added).

Indeed, while it is estimated that the EU should reduce its GHG emissions to -30% below 1990 levels in order to limit the rise in global temperatures to 2°C, the objective adopted was, as we have explained above, to reduce emissions by 20% by 2020. An insufficient target according to the European Commission itself.

62. Furthermore, in the wake of the Bali COP, the European Parliament also clearly stated in a resolution of 31 January 2008 that :

> *"Parliament welcomes the decision by the parties at the Bali Conference to launch a formal negotiation process to reach an international climate agreement for the period after 2012. (...) However, MEPs welcome the fact that the **parties to** the Kyoto Protocol **recognise the need** for **industrialised countries to reduce emissions by 25-40% by 2020 (compared to 1990 levels)***" [57](emphasis added).

The inadequacy of the 20% target has in fact been explicitly recognised by the European institutions:

- A 28 January 2010 letter from the European Union to the UNFCCC Executive Secretary states that, in light of the IPCC findings, developed countries should reduce their GHG emissions by **25-40% by 2020 compared to** 1990 levels to meet the 2°C warming [58]limit.

- Like the European Commission in 2010, the European Council also concluded as early as 2009 that the EU's 20% target for 2020 was far from sufficient on scientific grounds and would have to be significantly revised to avoid 2°C warming. This is reflected in the preamble to Directive 2009/29/EC, which amends the ETS Directive 2003/87/EC. This preamble considers, among other things, the following:
  > *"(6) In order to increase the degree of certainty and predictability of the Community scheme, it is appropriate to make provisions to enhance the contribution of the Community scheme to the achievement of an overall*

[54] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Limiting Global Climate Change to 2 degrees Celsius. The way ahead for 2020 and beyond*, COM(2007) 2 final, Brussels, 10 January 2007, Annex G.2.

[55] *Ibid.* , p. 4.

[56] *Ibid.* at 2-3.

[57] European Parliament resolution of 31 January 2008 on the outcome of the Bali Conference on Climate Change (COP 13 and COP/MOP 3), Exhibit G.4; emphasis added.

[58] The original text of the letter is included in the 2019 Summary Findings, p. 56, No. 85, Exhibit P.27.

*reduction of **more than 20%,** in particular in view of the **30%** target **by 2020** set by the European Council, this being the level considered scientifically necessary to avoid dangerous climate change*.

- With these positions, the European Commission and the European Council are aligning themselves with an opinion of the European Economic and Social Committee (EESC) of 3 February 2009 addressed to them. The EESC had also concluded that the EU's 20% target for 2020 was not adequate in view of what the 196 UNFCCC Parties had decided in the 2007 Bali Action Plan:

  *"In this context, it should be noted that **the EU's target of a** 20% reduction in greenhouse gas emissions by 2020 compared to 1990 levels (...) **is aimed at a lower level than the 25-40% reduction** for industrialised countries that the EU called for at the Bali climate conference in December 2007 (...) The EESC concludes that, in view of the growing evidence of climate change, **the targets should be adjusted to achieve deeper cuts in greenhouse gas emissions***[59].

However, the 20% target for 2020 has never been adjusted.

63. In conclusion, it is clear that European climate policies for 2020 are insufficient to avoid dangerous warming, which was determined at the time to be 2°C, not 1.5°C.

64. Another observation, in addition to the first, is that the European institutions know that their policies are insufficient and do not hesitate to communicate this in official documents.

65. In view of the above, it must be concluded that the reduction target imposed on Belgium by the European Union for 2020 is not a relevant reference for defining the standard of behaviour which is binding on Belgium under Articles 2 and 8 of the ECHR and Article 1382 of the Civil Code.

While it is not disputed that this is a binding objective to which Belgium has committed itself, this is not such as to impede the analysis of the conduct of the Belgian authorities in the light of their knowledge of the danger and the measures to be taken to avoid it. Indeed, the Belgian authorities' conduct in taking refuge behind the European objectives, which they knew to be largely inadequate in the light of their knowledge of the measures to be taken to avoid dangerous warming, is incompatible with the standard of conduct imposed both by Articles 2 and 8 of the ECHR and by Article 1382 of the Civil Code.

II.3.2 <u>The 1997 Kyoto Protocol, as amended by the 2012 Doha Amendment</u>

66. Article 3 of the Kyoto Protocol states that:

"The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic emissions (...) do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B."

The Doha Amendment amended Annex B of the Kyoto Protocol. In its amended version, it sets a GHG emission reduction target for Belgium of **20% below** 1990 levels by 2020.

Again, in view of the scientific knowledge and the international consensus that formed as early as 2007 around the 25-40% reduction range, it is clear that the 20% target for 2020 was largely insufficient to avoid dangerous warming.

[59] https://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:52008AE1201&from=MT

67. Moreover, it should be recalled that the Kyoto Protocol (1997) was concluded at a time when the 2°C threshold was not yet formally the subject of an international consensus, although reference had already been made, notably by the European Commission, to the 2°C threshold to avoid dangerous warming as early as 1996. The 1997 reduction targets were set without any reference to the 2°C threshold not to be exceeded. The wording of Article 3 of the Kyoto Protocol must therefore be read in the light of the context in which it was drafted. The political consensus on the effort needed to avoid dangerous global warming - a consensus based on the IPCC reports - has become much clearer since then.

68. The amendment to the Kyoto Protocol was adopted at the end of the 2012 COP in Doha. It should be remembered that the reduction target of at least 25-40% for Annex I countries had been repeated successively from COP to COP, year after year, since 2007. The Doha amendment was therefore clearly an outdated target even before it came into force. It is all the more interesting to note that the Doha amendment entered into force on 31 December 2020. The amendment imposed a 20% reduction target for the 2013-2020 commitment period. It therefore entered into force **on the day it expired**: a stillbirth.

69. In view of the above, it must be concluded that the reduction target imposed on Belgium by the Doha Amendment is not a relevant reference for defining the standard of conduct imposed on the respondents by both Articles 2 and 8 of the ECHR and by Article 1382 of the Civil Code.

III. Statement of Basic Facts: Part II

On the importance of a minimally linear pathway for GHG reductions

70. In its judgment of 26 June 2015 in the Urgenda case, the Court of First Instance in The Hague addresses the link between the GHG emissions reduction trajectory towards a given target over 2050, on the one hand, and the volume of GHG emissions produced in pursuit of that target, on the other[60]. In time, the judgment is before the Paris Agreement. The objective for 2050 is a reduction in GHG emissions of 80-95%, as put forward by the IPCC since 2007. The judgement uses the following diagram presented by Urgenda:

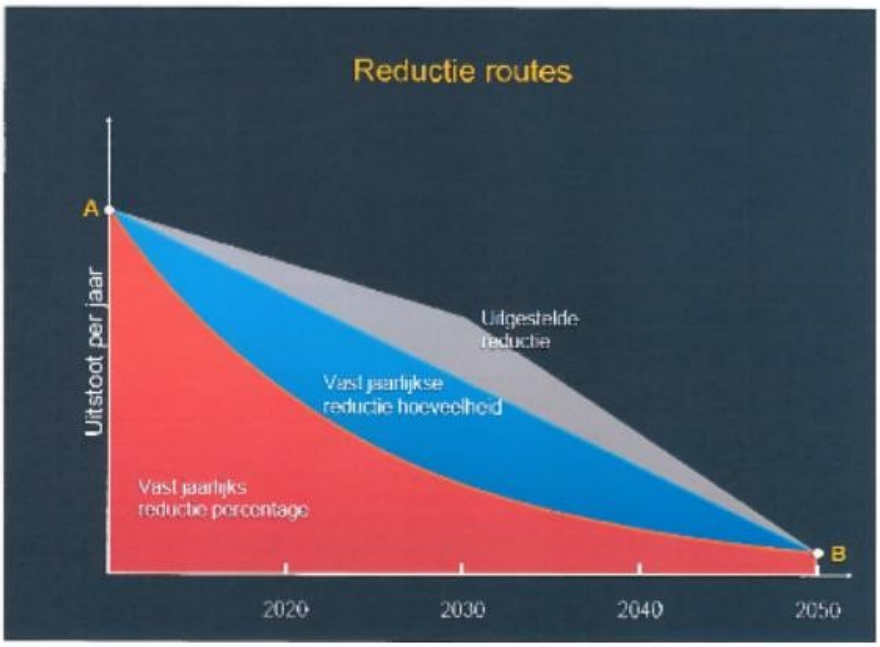


Diagram 11. Scheme used in the judgment of 26 June 2015 in the Urgenda case

The red area below the **concave** line connecting point A to point B indicates the total volume of GHG emissions assuming a concave GHG emissions reduction pathway is followed to achieve the 2050 target.

The red and blue areas below the **straight** line that connects point A to point B show the total volume of GHG emissions under the assumption that a linear GHG emissions reduction pathway is followed to reach the same target over 2050. The total volume of emissions is higher here than in the previous scenario because the volume of emissions in blue is added to the volume of emissions in red.

The sum of the red, blue and grey areas indicates the total volume of GHG emissions under the assumption that a **deferred** GHG emissions reduction pathway is followed until 2030, and then accelerated to reach the 2050 target. The total volume of emissions is significantly higher than in the two previous assumptions. Indeed, to the red and blue emission volumes, the grey emission volume is added.

The Tribunal's considerations in relation to this scheme are twofold. First, they refer to the impact of the reduction path followed on the total volume of emissions. Second, they point to the impact of the path followed on the chances of achieving the objective pursued.

[60]Rechtbank Den Haag (2015), Urgenda, Exhibit O.3.

*"According to Urgenda, the first diagram (...) shows that a **deferred reduction pathway** results in **higher emissions** than choosing an equal distribution of reduction effort over the entire period to 2050 or a linear approach. It argues that the diagram also shows that **deferring reductions** (reducing less until 2030 and more from that year onwards) results in higher emissions overall and therefore increases the likelihood of exceeding the remaining 'budget'. Urgenda also argues that it is **more cost-effective to act now**. This is based on the IPCC's Fifth Report, which states that scenarios in which deep cuts are postponed to the period between 2030 and 2050 lead to a greater reliance on CO_2 However, according to the same report, these technologies are not yet sufficiently developed to be able to contribute substantially to the reduction[61].*

71. We shall return to the importance of the GHG emission reduction trajectory adopted to achieve the objective. We will apply this to the current Belgian situation.

The main thing at this stage is to understand that **the reduction trajectory** followed towards a reduction target is **not a neutral data**. The choice of trajectory can guarantee the respect of a certain available **emissions budget** or, on the contrary, ensure that it is not respected. It can also, from a socio-economic point of view, give more **chances to reach the target** or, on the contrary, decrease these chances.

It should also be noted that the convex reduction pathway is the one that consumes the most GHG budget and leads to severe reduction efforts at the end of the journey.

IV. Statement of Basic Facts: Part III

As for the climate emergency and the need to rule as quickly as possible on this case

72. Since the 2015 Paris Agreement, the scientific and internationally recognized consensus enshrined in the Agreement explicitly states that to avoid dangerous warming, the target must be "**well below 2°C**" and move **towards 1.5°C**.

According to **the AR6.I** of August 2021 a global residual carbon budget **at 500 $GtCO_2$** gives a **one in two chance** (50% chance of success) of meeting the dangerous warming limit. To have **two chances out of three** to respect this limit (67% chance of success), the global residual carbon budget has **400 $GtCO_2$** . However, to date, GHG emissions have still not reached their ceiling ('*peaking')*. On the contrary, they continue to increase year after year. [62] CO emissions are $_2$currently around 40$GtCO_2$ per year[63]. At this rate, we have a decade or even a dozen years

[61] Rechtbank Den Haag (2015), Urgenda, point 4.32, Exhibit O.3: "*De eerste figuur - nader uitgewerkt in de tweede en derde figuur - toont volgens Urgenda aan dat bij een uitgestelde reductieroute **meer wordt uitgestoten** dan bij een keuze voor een gelijkmatige verdeling van de te leveren reductie-inspanning over de gehele periode tot aan 2050 of voor een ligneaire aanpak. I would like to point out that the figure shows that a reduction in the total amount of emissions (to a lower level in 2030 and beyond) will result in a large amount of emissions and that the overshoot in the budget will have to be reduced. Urgenda points out that the **cost-efficiency of the budget** does not mean that it is not possible to make decisions. It is based on the AR5/2013, in which it is stated that the scenarios in which the reduction of greenhouse gases is set for the period between 2030 and 2050 are based on a **major change in the technologies used to** $_2$reduce greenhouse gases. Volgens ditzelfde rapport zijn deze technieken echter **nog niet** zo **ver ontwikkeld** dat zij een substantiële bijdrage aan de reductie kunnen leveren (zie 2.19).*"

[62] UNEP, *Emissions Gap Report 2020 - Executive Summary*, Nairobi, UNEP, IV-V, in particular Figure ES.1. See https://www.unep.org/emissions-gap-report-2020 .

[63] *Ibid.* See also the Shell judgment of 26 May 2021, no. 3.4. Also the Shell judgment of 26 May 2021, no. 3.4: Rechtbank Den Haag, 26 mei 2021, *Vereniging Milieudefensie, Stichting Greenpeace Nederland, Stichting ter bevordering van*

left to do what is necessary. It is therefore a **global emergency**. It is **also urgent for this country**. The global residual carbon budget is a common good for humanity and all life on the planet. No country has the right to monopolize it too much, developed countries and Annex II countries much less than others. Belgium is such a country. The global emergency **brings with it an emergency at the level of the countries**, **particularly the developed countries**. In order to meet our share of the budget, an urgent effort on the part of the respondents is required. We will detail this later.

73. Global warming that is not significantly below 2°C is a major danger for all of humanity, without exception. Everyone will be affected in some way by the effects of such warming. The first part of the AR6 is again unequivocal on this point[64].

74. In view of this exceptional situation and the urgency described, it is **absolutely necessary for Your Court to rule** on this case **as soon as possible.**

V. Purpose of the call

75. The present appeal seeks to reverse in part the judgment under appeal insofar as it held:
- That, for the year 2020, the results obtained by the respondents had to be measured exclusively against the binding GHG emission reduction target enshrined in the Doha Amendment (international level), the binding GHG emission reduction obligations in non-ETS sectors enshrined in Decision 406/2009/EC (European level) and the intra-Belgian GHG emission reduction obligations enshrined in the cooperation agreement of 12 February 2018 (national level) by refraining from measuring them against the standard of behaviour imposed by Articles 2 and 8 of the ECHR and Article 1382 of the Civil Code with regard to the authorities' knowledge of the danger threatening their populations and the measures to be taken to help prevent or limit it;
- That the principle of separation of powers would preclude the Tribunal from imposing GHG emission reductions on the respondents;
- That the UNFCCC has been amended by the Kyoto Protocol and the Paris Agreement;
- That the judge must exercise marginal control over the compliance of the respondents with the standard of conduct imposed by Articles 2 and 8 of the ECHR and by Article 1382 of the Civil Code;
- That adaptation, like mitigation, is an appropriate measure against global warming and that the scientific community agrees on the need to contain the concentration of GHGs at 450 ppm by 2100.

V.1 First complaint: the emission reduction targets imposed by the standard of conduct within the meaning of Articles 2 and 8 of the ECHR and Article 1382 of the Civil Code must be determined in the light of the authorities' knowledge of the danger threatening their populations and the measures to be taken to help prevent or limit it

de Fossiel-vrij beweging, Landelijke Vereniging tot Behoud van de Waddenzee, Stichting Both ENDS, vereniging Jongeren Milieu-Actief en Stichting Action Aid t. Royal Dutch Shell PLC, ECLI:NL:RBDHA:2021:5337.

[64] IPCC 2021, AR6 WG I, SPM, pp. 10 ff, and specifically point "*A.3 Human-induced climate change is already affecting many weather and climate extremes in every region across the globe. Evidence of observed changes in extremes such as heatwaves, heavy precipitation, droughts, and tropical cyclones, and, in particular, their attribution to human influence, has strengthened since AR5*", Exhibit B.30.

V.1.1 <u>Reminder and criticism of the judgment</u>

76. The major difficulty in this case lies in the distinction between, on the one hand, scientific knowledge and the recognition by the international community of the measures to be taken to avoid the danger of dangerous global warming, and, on the other hand, the tangle of international and European law standards, known as positive law standards, which have been reflected in intra-Belgian national positive law (cooperation agreements), the quantified objectives of which do not coincide with the measures that are necessary in the light of this scientific knowledge.

77. The present action is based on the recognition of fault on the part of the Respondents, not on the basis of the violation of a norm of international or European climatic law, but on the basis of the **standard of conduct imposed by both Articles 2 and 8 of the ECHR and Article 1382 of the Civil Code**.

The conclusion is that the standard of behaviour of the authorities should be defined in terms of their **knowledge of the danger of** global warming, its severity, **and what needs to be done** to help prevent it, or at least limit it.

It is not a question of debating whether the respondents have fulfilled their obligations under international, European or Belgian positive climate law.

The Court's task is to determine whether, in the light of the authorities' knowledge of the danger and of the urgent measures to be taken to help prevent or limit it, they complied with their positive obligations under Articles 2 and 8 of the ECHR and acted as normally prudent and diligent authorities within the meaning of Article 1382 of the Civil Code.

78. This clarification is necessary since the judgment seems to have confused the two - yet distinct - sources of fault within the meaning of Article 1382 of the Civil Code. In fact, in order to establish fault, the Court of First Instance considered that, with regard to the period elapsing in 2020, :

- At the international level, "the only binding target for Belgium for 2020 is the 20% reduction in GHG emissions" [66]included in the Doha amendment;

- At European level, the only GHG emission reduction obligations to be met by 2020 are those set out in Decision 406/2009/EC, which concern non-ETS sectors[67];

- at the domestic level, the only GHG emission reduction obligations to be met by 2020 are those set out in the cooperation agreement of 12 February 2018 [68].

These standards of international, European and national climate law have been considered to the **exclusion of** the standard of conduct deriving from Articles 2 and 8 of the ECHR and Article 1382 of the Civil Code with regard to the authorities' knowledge of the danger and the urgent measures to be taken to help prevent or limit it.

79. The respondents wish to **limit** this appeal **strictly.**

Indeed, the judgment under review concluded that there was a fault based on a triple finding:

- the poor results in terms of figures, assessed exclusively in relation to the obligations set out in international, European and national positive climate law;

- the lack of good climate governance; and repeated warnings from the European Union.

The findings do not call into question the Tribunal's findings of poor performance, lack of good governance and repeated warnings from the European Union.

What they challenge is the assertion that **only** objectives enshrined in positive international, European and national domestic climate law standards are binding. Indeed, such an assertion amounts to **confusing** the fault by failure to comply with the norm of behaviour with the fault by failure to comply with the norm of positive law.

[66] Judgement undertaken, p.

67 *Ibid*[67], pp. 68-69.

[68] *Ibid*, p. 71.

However, the judgment under review itself recalled the principle established by the Court of Cassation in its judgment of 25 October 2004, according to which fault has its origin in two distinct sources:

> *"The fault of the administrative authority, which may, on the basis of articles 1382 and 1383 of the Civil Code, engage its liability, consists of conduct which **either** amounts to an error of conduct to be assessed according to the criterion of the normally careful and prudent administrative authority placed in the same conditions, **or** (...) violates a norm of international law or of an international treaty having effects in the internal legal order, requiring that authority to refrain from or to act in a specific manner"*[65].

It follows from the foregoing that the standard of conduct is not the same as the obligations of positive law. It is analysed in the light of a standard of conduct, defined both in the light of existing norms of positive law and in the light of all the particular circumstances of the case.

By confining itself to taking as a reference only the emission reduction targets laid down by the rules of positive international, European and Belgian law, and consequently refraining from analysing the authorities' conduct in the light of their knowledge of the danger and of what needed to be done to help prevent or limit it, the Court of First **Instance erred in law.**

This is all the more so since the Tribunal itself has acknowledged the following: "*Finally, science evolves, as demonstrated in particular by the successive IPCC reports. It is therefore in the light of the scientific knowledge available at a given time that the degree of knowledge of the risks is assessed, and hence the conduct of the public authorities in relation to those risks*"[70], a consideration which is typically endorsed by the standard of conduct.

80. Although the respondents were successful in finding fault *in the end*, the correction of this error in law is fundamental, since it is also the source of the Tribunal's erroneous reasoning with regard to injunctions. Indeed, if the Tribunal had found the existence of a fault by determining the standard of conduct in the light of scientific knowledge, recognized by the international community as a whole, of the danger and of the measures to be taken to avoid or limit it, there was no reason why the Tribunal could not order the authorities to take appropriate measures in the light of that same knowledge. This will be demonstrated below.

[65] Judgement undertaken, p. 57.

[70] Judgement undertaken, p. 59.

V.1.2 In the light of the knowledge of the danger and the measures to be taken to avoid or limit it, what is the standard of behaviour which is binding on the authorities under Articles 2 and 8 of the ECHR and Article 1382 of the Civil Code?

81. The question at the heart of this case is the following: what can be expected of a public authority that has knowledge of a danger that seriously threatens the life and living environment of its population, and of the measures to be taken to help avoid or limit it?

The question arises under Article 1382 of the Civil Code: in the light of the specific circumstances of the case, what can be expected of a normally prudent and diligent public authority placed in the same conditions?

The question also arises with regard to Articles 2 and 8 of the ECHR, since global warming threatens the right to life and respect for private and family life and the home of individuals: what positive obligations do Articles 2 and 8 of the ECHR impose on public authorities?

A. Knowledge of the danger and the measures to be taken

82. Parties agree on the climate science understanding that there is a real threat of dangerous global warming in the coming decades. Within climate science and the international community, there is a broad consensus on this threat. In short, it is as follows.

Emissions of GHGs, and in particular CO_2 due to its longevity and accumulation, are leading to an increasing concentration of GHGs in the atmosphere. These GHGs are responsible for the increasing warming of the earth. Since the beginning of the industrial revolution, the warming has been about 1.1°C. As early as 2007, a broad consensus in climate science and within the international community was formed around the need to limit warming to 2°C. From 2009 onwards, this limit was progressively abandoned, and the threshold of 1.5°C was reached. This evolution was formally enshrined in Article 2.1 of the Paris Agreement (2015).

The effects of a warming climate described as "dangerous" are: extreme heat, extreme drought, extreme precipitation, disruption of ecosystems threatening, among other things, food supply, rising sea levels due to melting glaciers and polar ice caps, floods, etc. Warming can also lead to breaking points, known as tipping points, involving abrupt and drastic changes in the climate, with no return to the initial state. As a result, the lives, well-being and living environment of all the world's inhabitants are threatened. Some of these consequences are already occurring today.

83. According to the 2007 IPCC AR4, in order to keep the current warming to 2°C, it is imperative to limit the total presence of GHGs in the atmosphere to 450 ppm CO2-eq. The more recently recognized 1.5°C target requires a GHG concentration level of 430 ppm CO2-eq.

84. As early as 2007, it was therefore recognized by climate science and the international community that the objective of keeping warming below a certain threshold necessarily implied a drastic reduction in all GHG emissions.

85. Referring to the 2007 IPCC AR4 report, Parties recognized and accepted the need for Annex I Parties to collectively reduce their emissions by at least 25% to 40% by 2020 and by at least 80% to 95% by 2050, in order to limit global warming to 2°C.

86. It has been formally agreed since the Paris Agreement (2015) that warming must be kept "well below 2°C" and should preferably be limited to 1.5°C.

87. Currently, we are at 413.77 ppm CO_2 in the atmosphere[66]. This leaves very little room for GHG emissions to be emitted worldwide. All states
Parties, including Belgium, are well aware that each additional issue issued at

From its territory contributes to reduce the remaining carbon budget, and brings us closer to the limit that must not be exceeded to avoid a dangerous warming for humanity.

B. <u>Which standard of behaviour was required for Belgium in the past (2020) and which one is required for the future (2030)?</u>

88. The purpose of this point is to define **the standard of behaviour that** Belgium must meet, both for the past (2020) and for the future (2030), with regard to the specific characteristics of the global warming problem.

89. As a reminder, for the purposes of the application of Article 1382 of the Civil Code, this is the standard of behaviour that can be expected from a prudent and diligent public authority in the same circumstances.

When faced with a danger to people's lives and their general living environment, it goes without saying that the authorities are expected to act to avoid the danger, or at least to limit it.

Add to this the fact that the public authorities in question have been aware of the danger for several decades, follow year after year the scientific developments on the issue, participate year after year in the work of an international convention specially dedicated to the problem.

What can be expected of a normally prudent and diligent authority that not only knows the danger that threatens its population, and the world's population, but also knows the measures to be taken to avoid or limit it? It is self-evident that such an authority is expected to take the measures in question. This is irrespective of whether or not such measures have been enshrined in normative texts.

Articles 2 and 8 of the ECHR are to the same effect. These provisions require the authorities, when faced with a serious threat of a violation of the rights enshrined in these provisions, to take appropriate measures to protect those rights.

90. The difficulty lies in the question of **what kind of measures are** required with regard to the Belgian authorities.

91. A number of preliminary observations must be made with regard to the specific nature of the climate problem:

- Climate science is the only valid reference. The **best available science**, which summarizes the entirety of the world's knowledge on the subject, is contained in the **IPCC** reports. This IPCC science is not in dispute.
- There is an **international diplomatic consensus** on the climate science contained in the **IPCC** reports. The Parties to the UNFCCC, including Belgium, are actively involved in the preparation and approval of the IPCC reports, with governments present throughout the process. The IPCC science is therefore the **reference for all** climate policy **makers.**
- Given the political context in which they are set, the IPCC reports are extremely moderate in their conclusions and recommendations. Nevertheless, they are very alarming.

[66]https://www.co2.earth/daily-co2

- Two types of measures can be distinguished: mitigation measures (aiming at releasing less GHGs into the atmosphere) and adaptation measures (aiming at facing the consequences of global warming). Only mitigation measures are likely to achieve the objective of limiting the global warming threshold. Only the latter are therefore worth considering.

92. Specifically, it is a question of determining **the GHG emissions reduction trajectory** that can be demanded of a normally prudent and diligent authority faced with the grave danger of global warming, and which knows that every additional emission into the atmosphere brings us closer to that danger.

We explained the crucial importance of the GHG emissions reduction pathway above. So what GHG emissions reduction pathway is required of the Belgian authorities?

93. We are looking at the 2020 and 2030 levels of reduction in succession. Both are very important in this case. One is about the past and finding **fault**; the other is about the future and **preventing future violations.**

94. Let us emphasize once again that any emission, emitted from any territory, contributes to the global concentration of GHG in the atmosphere. Each country must therefore do its part, by taking the necessary measures to reduce its emissions. Most recently, the Committee on the Rights of the Child under the UN Convention on the Rights of the Child confirmed this individual responsibility of each State in the following words: *"In accordance with the principle of common but differentiated responsibility (...), the Committee establishes that the collective nature of the cause of climate change does not absolve a State Party from the individual responsibility that arises from the harm that emissions from its territory may cause to children, wherever they are located*. [67]

<u>For the past: 2020</u>

95. As already mentioned in the background paper, the IPCC suggested as early as 2007 that **Annex I countries should** collectively reduce their GHG emissions **by at least 25% to 40%** by **2020**. This objective was aimed at not exceeding the 2°C threshold.

96. The IPCC statements contain a range. Three factual data impact the positioning of Belgium in the range for 2020:
- its status as an Annex I **and II** country,
- The 2007 IPCC statement assumed that emissions would peak between 2000 (25%) and 2015 (40%) but this peak was not reached in 2000 and not in 2015 either and the whole world community knew it, Belgium included;
- the statement concerned a 2°C limit, which **as early as 2009** moved **towards 1.5°C,** to be formally anchored at this level in 2015 (Paris Agreement).

All three of these data converge to place Belgium's share towards a reduction of **40%** and at **least 30°C**. We develop below.

[67] CRC, Decision *Chiara Sacchi and Ramin Pejan et al v. Argentina,* 8 October 2021, CRC/C/88/D/104/2019, No. 10.10; CRC, Decision *Chiara Sacchi and Ramin Pejan et al v. Brazil,* 8 October 2021, CRC/C/88/D/105/2019, No. 10.10; CRC, Decision *Chiara Sacchi and Ramin Pejan et al v. France,* 8 October 2021, CRC/C/88/D/106/2019, No. 10.10; CRC, Decision *Chiara Sacchi and Ramin Pejan et al v. Germany,* 8 October 2021, CRC/C/88/D/107/2019, No. 9.10; CRC, Decision *Chiara Sacchi and Ramin Pejan et al v. Turkey,* 8 October 2021, CRC/C/88/D/108/2019, No. 9.10.

97. The UNFCCC enshrines the principle of common but differentiated responsibilities. Each country must therefore act according to its capabilities, in accordance with its social and economic conditions, as well as the historical responsibility it bears.

In this respect, Belgium, as an Annex I Party which combines this status with that of an Annex II country, is among the richest countries in the world community. In addition to its historical responsibility for the accumulation of CO emissions in the $_2$atmosphere, it therefore bears a particular responsibility to lead and set an example in the fight against global warming.

For these reasons, not only was the target of **at least 25% to 40% by 2020** individually binding on Belgium, but also, by virtue of the principle of common but differentiated responsibilities, Belgium's obligations were at the top end of the range, i.e. **40%** rather than the strict minimum of 25% **by 2020**.

98. Furthermore, the target of a minimum of 25% to 40% by 2020 for Annex I countries was set by the IPCC on the premise that the peak of GHG emissions would be reached between 2000 and 2015. If peak emissions were reached in 2000, a 25% emission reduction could more easily be considered. Conversely, if peak emissions were reached in 2015, an emission reduction of 40% would be required. [68]However, contrary to what was projected at the time, the peak in GHG emissions has not yet been reached. It is still to come. In view of this, it must be understood that even a 40% reduction from 2015 would not have been enough to "do our part" to avoid dangerous warming - estimated at 2°C at the time.

99. Finally, should we recall that the objective of at least 25% to 40% by 2020 was based on avoiding a warming of 2°C? However, it has been pointed out on numerous occasions that **since 2009**, year after year, from COP to COP, this 2°C threshold has been progressively abandoned in order to **move towards 1.5°C.** The international consensus on this point is explicitly **formalised** in the **2015** Paris Agreement. Consequently, it goes without saying that the target of at least 25% to 40% for **2020** was itself no longer adequate in view of the shift of the cursor towards a 1.5°C threshold. Respondents were well aware of this.

100. It must therefore be concluded that in this range of 25% to 40% by 2020, in view of all the facts of the case, which were fully known to the respondents, the standard of conduct imposed by Articles 2 and 8 of the ECHR and Article 1382 of the Civil Code certainly obliged them to be on the side of the 40% reduction by 2020, and certainly not at 25%.

If the authorities were to be given some leeway, the behavioural standard must in any case be interpreted as meaning that a reduction of at **least 30%** in GHG emissions by 2020 was a bare minimum.

101. This threshold was mentioned by the European Commission in a 2007 Communication[69], which forms the basis of European legislation for 2020, and which has a telling title: "*Limiting Global Warming to 2 degrees Celsius. A roadmap to 2020 and beyond*". It invokes "*irrefutable scientific facts*" [70]and states the following:

> *"This Communication proposes that the EU should set a target in the international negotiations to reduce greenhouse gas (GHG) emissions from developed countries by*

[68] *Supra*, no. 42 and no. 46.

[69] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Limiting Global Climate Change to 2 degrees Celsius. The way ahead for 2020 and beyond*, COM(2007) 2 final, Brussels, 10 January 2007, Annex G.2.

[70] *Ibid.* , p. 4.

30% (compared to 1990 levels) by 2020**. This effort is **necessary to limit the increase in global temperatures to 2 degrees Celsius" [71](emphasis added).

On the basis of the data in this case, the behavioural standard required the respondents to achieve or cause to be achieved a reduction in GHG emissions of at **least 30% (from 1990 levels) by 2020.**
This 30% threshold is indeed a *minimum minimorum* for Belgium to "do its part" in the measures to be taken to avoid dangerous global warming.
Given the impact of the reduction trajectory on the volume of GHGs emitted, this reduction of at least 30% should be achieved by following at least a **linear trajectory, if not a concave one, to the exclusion of a convex one**.

<u>For the future: 2030, with a view to net zero by 2050</u>

102. The Paris Agreement, adopted on 12 December 2015 at COP-21 in Paris, enshrines in its Article 2.1a a rise in global average temperature "*well below 2°C above pre-industrial levels*" and preferably than "*1.5°C above pre-industrial levels*" as threshold limits to avoid dangerous global warming.

In doing so, Article 2.1a of the Paris Agreement formally adheres to the abandonment of 2°C warming as an acceptable threshold limit, in favour of a lower threshold. As noted above, this shift has been underway since 2009. The revised threshold put forward since then is 1.5°C.

These thresholds are established by science and adopted by the international political community, including Belgium. This is a factual fact that we mention as such.

103. The Paris Agreement abandoned the Annex I countries - other countries approach and reverted to a developed countries - non-developed countries approach. As a result, the IPCC has no longer put forward reduction targets for Annex I countries. It did, however, put forward global residual carbon budgets in **2018 and 2021,** which allow Parties to the UNFCCC and the Agreement to establish their share.

104. In its **2018** Special Report **(SR 1.5°C)** [72], the **IPCC** establishes that the **global residual carbon budget** to meet the 1.5°C warming limit is 420-580 $GtCO_2$[73] . One of the tables where the Special Report expresses this scientific fact is attached below (Figure 12). Note that the global residual carbon budget of **580 $GtCO_2$** comes with the precision that it gives one chance in two of meeting the dangerous warming limit (percentile 50). The global residual carbon budget of **420 $GtCO_2$**, gives two chances out of three to respect this limit (percentile 67). This implies that meeting the 580 GtCO carbon budget also $_2$contains a one in two chance of exceeding the dangerous warming limit, and that meeting the 420 GtCO limit$_2$ still contains a one in three chance of exceeding the dangerous warming limit. These reduction scenarios therefore still contain major risks of transgressing the dangerous global warming threshold, which threatens the survival of humanity and all life on the planet as we know it today. This suggests that the only residual carbon budget that can reasonably be considered is 420 $GtCO_2$, which gives a two in three chance of being on the right side.

[71] *Ibid.* at 2-3.

[72] Exhibits B.23 and B.24.

[73]IPCC 2018, SR 1.5°C, Chapter II, p. 108, Tables 2.4 and 2.2, Exhibit B.23.

Table 2.2 | The assessed remaining carbon budget and its uncertainties. Shaded blue horizontal bands illustrate the uncertainty in historical temperature increase from the 1850–1900 base period until the 2006–2015 period as estimated from global near-surface air temperatures, which impacts the additional warming until a specific temperature limit like 1.5°C or 2°C relative to the 1850–1900 period. Shaded grey cells indicate values for when historical temperature increase is estimated from a blend of near-surface air temperatures over land and sea ice regions and sea-surface temperatures over oceans.

Additional Warming since 2006–2015 [°C]*(1)	Approximate Warming since 1850–1900 [°C]*(1)	Remaining Carbon Budget (Excluding Additional Earth System Feedbacks*(5)) [$GtCO_2$ from 1.1.2018]*(2)			Key Uncertainties and Variations*(4)					
		Percentiles of TCRE *(3)			Earth System Feedbacks *(5)	Non-CO_2 scenario variation *(6)	Non-CO_2 forcing and response uncertainty	TCRE distribution uncertainty *(7)	Historical temperature uncertainty *(1)	Recent emissions uncertainty *(8)
		33rd	*50th*	*67th*	*[$GtCO_2$]*	*[$GtCO_2$]*	*[$GtCO_2$]*	*[$GtCO_2$]*	*[$GtCO_2$]*	*[$GtCO_2$]*
0.3		290	160	80	Budgets on the left are reduced by about –100 on centennial time scales	±250	–400 to +200	+100 to +200	±250	±20
0.4		530	350	230						
0.5		770	530	380						
0.53	**~1.5°C**	**840**	**580**	**420**						
0.6		1010	710	530						
0.63		1080	770	570						
0.7		1240	900	680						
0.78		1440	1040	800						
0.8		1480	1080	830						
0.9		1720	1260	980						
1		1960	1450	1130						
1.03	**~2°C**	2030	1500	1170						
1.1		2200	1630	1280						
1.13		2270	1690	1320						
1.2		2440	1820	1430						

Notes:

*(1) Chapter 1 has assessed historical warming between the 1850–1900 and 2006–2015 periods to be 0.87°C with a ±0.12°C *likely* (1-standard deviation) range, and global near-surface air temperature to be 0.97°C. The temperature changes from the 2006–2015 period are expressed in changes of global near-surface air temperature.

*(2) Historical CO_2 emissions since the middle of the 1850–1900 historical base period (mid-1875) are estimated at 1940 $GtCO_2$ (1640–2240 GtCO2, one standard deviation range) until end 2010. Since 1 January 2011, an additional 290 $GtCO_2$ (270–310 $GtCO_2$, one sigma range) has been emitted until the end of 2017 (Le Quéré et al., 2018).

*(3) TCRE: transient climate response to cumulative emissions of carbon, assessed by AR5 to fall *likely* between 0.8–2.5°C/1000 PgC (Collins et al., 2013), considering a normal distribution consistent with AR5 (Stocker et al., 2013). Values are rounded to the nearest 10 $GtCO_2$.

*(4) Focussing on the impact of various key uncertainties on median budgets for 0.53°C of additional warming.

*(5) Earth system feedbacks include CO_2 released by permafrost thawing or methane released by wetlands, see main text.

*(6) Variations due to different scenario assumptions related to the future evolution of non-CO_2 emissions.

*(7) The distribution of TCRE is not precisely defined. Here the influence of assuming a lognormal instead of a normal distribution shown.

*(8) Historical emissions uncertainty reflects the uncertainty in historical emissions since 1 January 2011.

Figure 12. Overall residual carbon budgets as of 1erJanuary 2018

105. Already now, the 2018 data for the overall residual carbon budget is outdated. Indeed, **the AR6.I** of August **2021** has **revised** them downwards. This is shown in the following table (Figure 13). It appears that in order to have one chance out of two (50% chance of success) to respect the limit of dangerous warming, the global residual carbon budget of 580 $GtCO_2$ has been **revised to 500 $GtCO_2$** . To have a two out of three chance of meeting the dangerous warming limit (67% chance of success), the global residual carbon budget of 420 $GtCO_2$was **lowered to 400 $GtCO_2$.**

Table SPM.2: Estimates of historical CO_2 emissions and remaining carbon budgets. Estimated remaining carbon budgets are calculated from the beginning of 2020 and extend until global net zero CO_2 emissions are reached. They refer to CO_2 emissions, while accounting for the global warming effect of non-CO_2 emissions. Global warming in this table refers to human-induced global surface temperature increase, which excludes the impact of natural variability on global temperatures in individual years. {Table TS.3, Table 3.1, Table 5.1, Table 5.7, Table 5.8, 5.5.1, 5.5.2, Box 5.2}

Global warming between 1850–1900 and 2010–2019 *(°C)*	Historical cumulative CO_2 emissions from 1850 to 2019 *($GtCO_2$)*
1.07 (0.8–1.3; *likely* range)	2390 (± 240; *likely* range)

Approximate global warming relative to 1850–1900 until temperature limit *(°C)**(1)	Additional global warming relative to 2010–2019 until temperature limit *(°C)*	Estimated remaining carbon budgets from the beginning of 2020 *($GtCO_2$)* — *Likelihood of limiting global warming to temperature limit*(2)*					Variations in reductions in non-CO_2 emissions*(3)
		17%	*33%*	*50%*	*67%*	*83%*	
1.5	0.43	900	650	500	400	300	Higher or lower reductions in accompanying non-CO_2 emissions can increase or decrease the values on the left by 220 $GtCO_2$ or more
1.7	0.63	1450	1050	850	700	550	
2.0	0.93	2300	1700	1350	1150	900	

*(1) Values at each 0.1°C increment of warming are available in Tables TS.3 and 5.8.
*(2) This likelihood is based on the uncertainty in transient climate response to cumulative CO_2 emissions (TCRE) and additional Earth system feedbacks, and provides the probability that global warming will not exceed the temperature levels provided in the two left columns. Uncertainties related to historical warming (±550 $GtCO_2$) and non-CO_2 forcing and response (±220 $GtCO_2$) are partially addressed by the assessed uncertainty in TCRE, but uncertainties in recent emissions since 2015 (±20 $GtCO_2$) and the climate response after net zero CO_2 emissions are reached (±420 $GtCO_2$) are separate.
*(3) Remaining carbon budget estimates consider the warming from non-CO_2 drivers as implied by the scenarios assessed in SR1.5. The Working Group III Contribution to AR6 will assess mitigation of non-CO_2 emissions.

Figure 13. Overall residual carbon budgets at the beginning of 2020.

106. This residual global carbon budget is a common good for all humanity[74].

In order to respect the share of others, one must specify one's own.

Since the overall residual carbon budget is a figure, there is a way to do this sharing. In fact, any quantified data can be shared. The only requirement is to choose a distribution key, to justify the choice, and to communicate with total transparency in this regard so that the choice and its justification can be verified by others.

107. In order to establish Belgium's share, the conclusion is based on the data of the IPCC Special Report of **2018**, **not** the AR6.I of 2021**.** The sharing of the residual global carbon budget indicated therein was done by a group of experts working under the direction of Mr. Jean-Pascal van Ypersele, Professor of Climatology at UCLouvain and Vice-Chair of the IPCC from

[74] See Ch. Ch. KREUTER-KIRCHHOF, "Atmosphere, International Protection", in *Max Planck Encyclopedias of International Law - Max Planck Encyclopedia of Public International Law*, Update March 2011, nos. 8-9.

2008 to 2015. Their work is available in a scientific report dated May 2019, attached to the present request (Exhibit C.11).

108. Based on the global residual carbon budget of the IPCC Special Report 2018, "*between 420 and 570 GtCO $_2$*[75], this group of experts calculated the Belgian residual carbon budget by trying two allocation keys.

Let us look at the relevant passages in the report.

Mr. van Ypersele's team first sought to divide the overall residual carbon budget in terms of **inhabitants** (Exhibit C.1, p. 120). We quote, "*Given an equal split per capita (based on population), we obtain a residual budget of between 630 and 850 MtCO$_2$ for Belgium as of 2018 (6 to 9 times our current $_2$annual CO emissions level).*" The budget obtained with this first distribution key, would have been 'eaten up in 2024, or even 2027, if nothing changes quickly.

Another sharing criterion was considered. We quote again: "*Taking into account a distribution **based** on **current emissions** (countries with more polluting infrastructures are allocated a higher percentage in order to avoid losing more fixed assets), we obtain a residual budget of between 990 and 1340 MtCO$_2$ for Belgium from 2018 onwards (10 to 14 times our current level of $_2$annual CO emissions)*" The budget obtained with this second distribution key, which gives more to those who are already taking a lot, will be 'eaten up' in 2028, or even 2031, if nothing changes quickly.

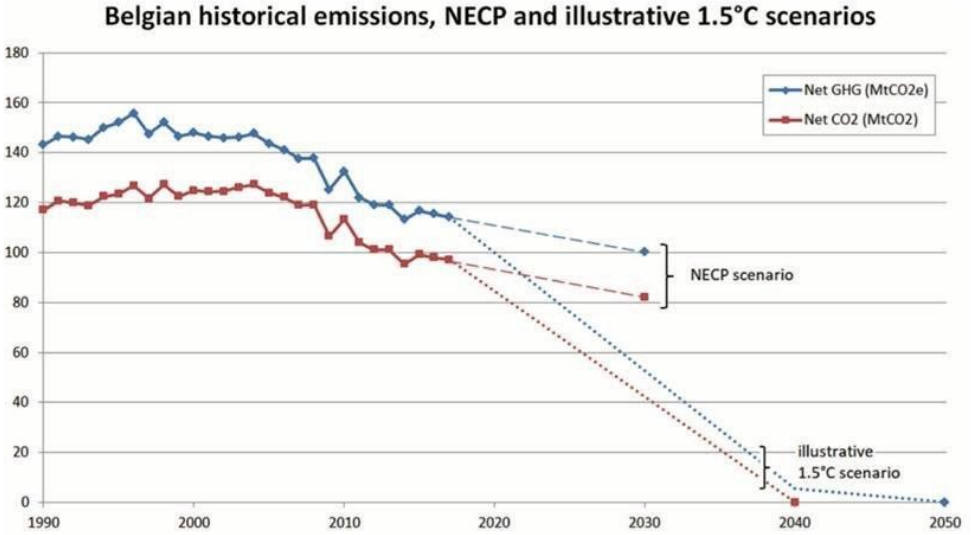
It is **the second distribution key** that has been retained. It leads to a **Belgian residual carbon budget** that is not equitable from a global development point of view because it is not aligned with the principle of common but differentiated responsibilities. From this **overly generous** budget, the lower limit was retained: **990 MtCO $_2$**[76]

We have stressed that it is essential to be transparent about the distribution key used. The report quoted **is so**.

109. With **this Belgian residual carbon budget in mind**, the Expert Group then checked which CO emission reduction trajectory would $_2$allow it to be met, starting from the country's emission level in 2018 as established by the competent federal state administration. The following graph shows their results. In passing, they compare these results with the emission reduction trajectories foreseen in the draft Integrated National Energy and Climate Plan prepared at the beginning of 2019 to meet the requirements of the European Union's Governance Regulation 2018/1999. The gap is huge.

[75] Report, p. 120, Exhibit C.11.

[76] Report, p. 120, Exhibit C.11.



[Belgische emissies in het NECP scenario en in een illustratief 1.5°C scenario (zie annex voor de details); NECP scenario: Nationaal Energie- en Klimaatplan dat België maakte op vraag van de EU; GHG=broeikasgassen]
Voor toelichting bij deze grafiek, die speciaal voor dit rapport gemaakt werd, zie achteraan dit rapport.

Figure 14. Belgian emission reductions.

They point out that this reduction scenario, which leads to zero net CO emissions$_2$in 2040, allows for a residual carbon budget *of* "*about 1,000* MtCO $_2$[77]

110. Their results imply that by **2030,** a **65%** reduction in CO_2 must be achieved, in accordance with a linear reduction trajectory. This can be seen in the graph below:

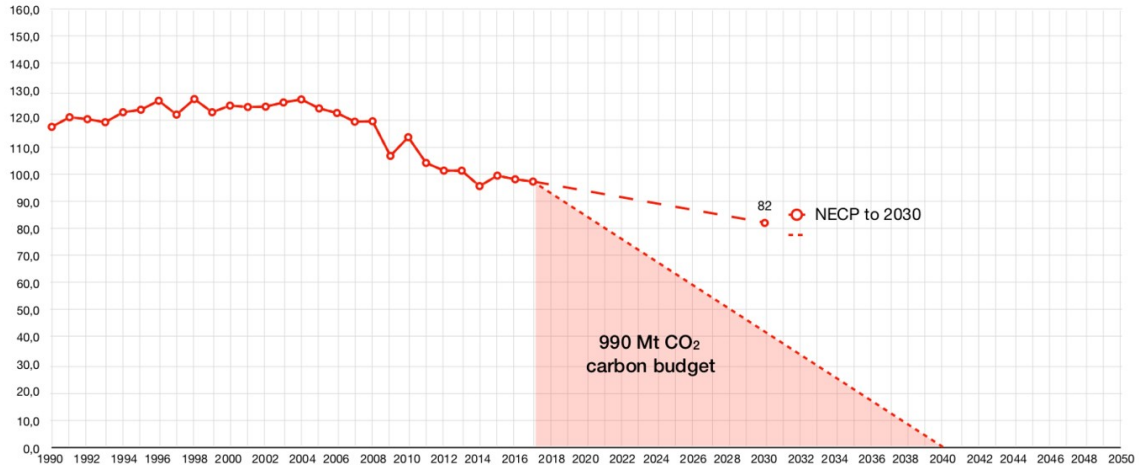


Figure 15. Belgium's residual carbon budget: linear reduction path

111. The 65% reduction in CO emissions$_2$ by 2030 is **extremely reasonable** and should be understood as a bare minimum for the country to do its part.

Indeed:

1/ The global residual carbon budget on which the Belgian residual carbon budget and emission reduction pathway are based is the global residual carbon budget put forward by the **IPCC** in **2018**. However, in its AR6.I of **2021,** the IPCC **revised** this budget **downwards**. The national

[77] Report, p. 120, Exhibit C.11.

residual carbon budget is currently smaller than the one used to establish the emissions reduction trajectory and the resulting 65% reduction in 2030.

2/ The % of 65% in 2030 put forward by the Expert Group is based on a Belgian residual carbon budget that was calculated on the basis of a **distribution key that ignores the principle of common but differentiated responsibility** enshrined in the UNFCCC and confirmed by the Paris Agreement. On the basis of this distribution key, Belgium's share is **too generous**.

On the basis of the factual data, established by the IPCC and recognised by the international world community, that the limit of dangerous warming is "*well below 2°C*" and must be understood as 1.5°C, and of the resulting residual global and Belgian carbon budgets, a 65% reduction in CO emissions$_2$from the Belgian territory over 2030 is truly **a strict minimum**

112. Several European countries have already adopted similar or more stringent emission reduction targets.
- Finland aims for **zero** net GHG emissions by 2035 (Exhibit P.14) ;
- Denmark's Climate Law of December 6, 2019 calls for a **70%** reduction in GHG emissions over 2030 (Exhibit L.22) ;
- The UK has revised upwards the 57% GHG emission reduction target for 2030 in its *Climate Change Act*. The revised percentage in the Act is a reduction of at least **78%** by 2035[83];
- Following the recent judgment of the *Bundesverfassungsgericht*, which pinpointed the disregard of the intergenerational dimension of climate policy by the federal climate law ('*Bundesklimaschutzgesetz*')[84], Germany has revised upwards the percentage of GHG emissions reduction for 2030 inscribed in this law. At the end of August 2021, this percentage increased from 55% to at **least 65%**. [85]

113. Given the critical importance of the **linearity of** the emissions reduction pathway, explained above, it is useful to specify the percentages of emissions reductions from now to 2030 that correspond to this linearity. We draw these from the GHG emission reduction series that are part of the Expert Panel's graph. They tell us in MtCO amounts $_2$and percent reductions relative to 1990 what the Expert Panel's graph visually communicates.

[83] See https://www.gov.uk/government/news/uk-enshrines-new-target-in-law-to-slash-emissions-by-78-by-2035 . See also https://www.gov.uk/government/news/uk-sets-ambitious-new-climate-target-ahead-of-un summit

[84] *Bundesverfassungsgericht*, Order of 24 March 2021. See https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html . See also https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21 031.html

[85] See also https://www.reuters.com/business/environment/germany-raise-2030-co2-emissions-reduction-target-65 spiegel-2021-05-05/

Reduction milestones (% reduction vs. 1990)

		2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
Route 1	**GHG emissions** (Mton CO2e)	114,3	109,3	104,3	99,4	94,4	89,4	84,5	79,5	74,5	69,6	64,6	59,6	54,7	49,7
	Reduction vs. 1990 (%)	20%	24%	27%	31%	34%	**38%**	41%	45%	**48%**	51%	55%	58%	62%	**65%**

Figure 16. Table of reductions by 2030 with a 65% cap in 2030

Adding this milestone of 48% in 2025 to the reduction target of 65% over 2030, offers a guarantee for the linearity of the reduction trajectory over 2030. As already mentioned, this

linearity is essential for respecting the Belgian residual carbon budget. Moreover, a reduction of GHG emissions of at least 48% by 2025 simply offers a guarantee of the possibility to reach a reduction of at least 65% by 2030.

114. The 2030 reduction target is essential in that it includes a guarantee that the goal of zero net emissions can be achieved in time. We will return to this later.

115. In conclusion, **the standard of behaviour that should be applied** in the **future** by the respondents in order to comply with Articles 2 and 8 of the ECHR and Article 1382 of the Civil Code is the following:

> to reduce or cause to be reduced the overall volume of annual greenhouse gas emissions from the Belgian territory in such a way as to achieve by 2025 a reduction of at least 48% compared to the level in 1990;
>
> to reduce or cause to be reduced the overall volume of annual greenhouse gas emissions from the Belgian territory in such a way as to achieve in 2030 a reduction of at least 65% compared to the level in 1990.

116. Already in 2019, on the basis of the IPCC Special Report SR1.5°C of 2018, the above-mentioned Expert Group estimates that "*in order to reach the 1.5°C limit, Belgium **and Europe** must aim for zero net CO2 emissions by **2040***[78]"[79].$_2$ As CO emissions $_2$are only increasing, even in 2021, the global residual budget that allows us to respect with a useful probability the threshold of 1.5° or even the threshold "*well below*" 2°C, is decreasing more and more rapidly. Thus, the moment when zero net CO emissions will have to be reached $_2$is getting closer and closer. As a result, the conclusion is that zero net GHG emissions in 2050 is not a standard of behaviour under Articles 2 and 8 of the ECHR and Article 1382 of the Civil Code. It is highly likely that this time horizon will be reviewed, in favour of a stricter time horizon. However, the 48% and 65% reductions to be achieved at least by 2025 and 2030 are still absolutely essential to preserve the chance of reaching zero net emissions in due course. This is one more reason why they are, without doubt, a *minimum minimorum* to be achieved.

117. As a complement, we add a graph showing the CO consumption$_2$ of Belgium in the hypothesis that we would pursue a linear trajectory of emissions reduction over 2030 and 2050 similar to the one adopted by the European Union in its Climate Law of June 30, 2021[80], i.e. -55% in 2030 and net zero in 2050. It appears unequivocally that, under this trajectory, even if linear, the country's residual carbon budget will be largely exceeded.

[78] Report, p. 119, Exhibit C.11.

[79] IPCC 2021, AR6 WG I, SPM, 41, *sub* D.1, Exhibit B.30: "*From a physical science perspective, limiting human-induced global warming to a specific level requires limiting cumulative CO2 emissions, reaching at least net zero CO2emissions, along with strong reductions in other greenhouse gas emissions.*"

[80] Regulation (EU) 2021/1119 of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ("European Climate Act")

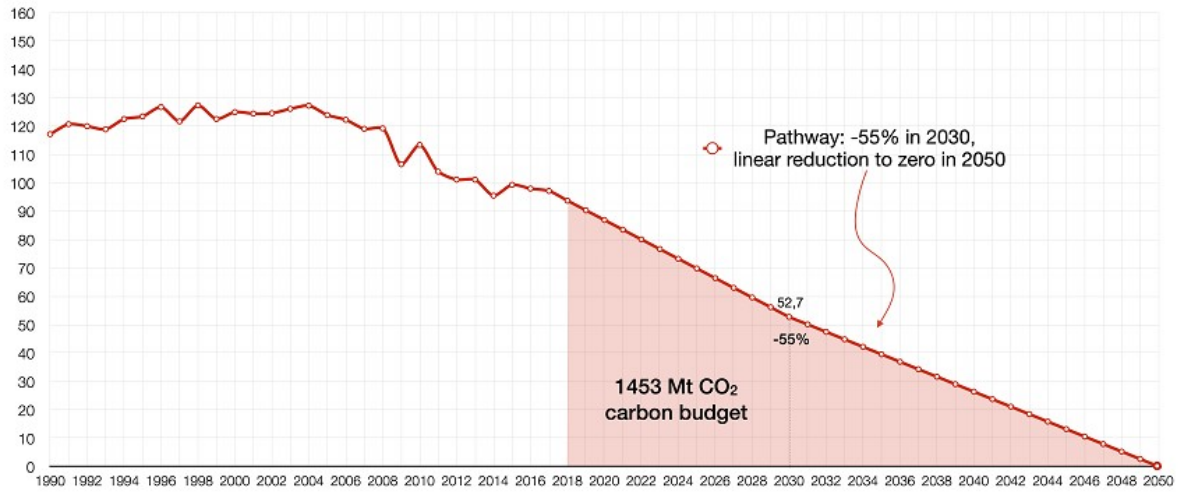


Figure 17. Assumption of a linear reduction trajectory of 55% in 2030 and net zero in 2050

C. <u>In concreto, what has been the conduct of the Respondents? For the past: 2020</u>

118. Based on the GHG emission inventories that Belgium submits annually to the UNFCCC secretariat, the country's GHG emission reductions can be summarised as follows

- 2010 : -7,5%
- 2011 : -16,4% - 2012 : -19%
- 2014 : -23,5%
- 2015 : -19,7%
- 2016 : -19,2%
- 2017 : -21,9% - 2018 : -17,9% - 2019 : -18,8%. 119. Since 2007, Belgium, which has participated in and contributed to all the COP work and decisions, has known that a 25% reduction by 2020 was a **strict minimum for Annex I countries in general** in the light of knowledge at the time. It also knew that in the 25-40% range, its "share" was more in the 40% range, for the reasons mentioned above.

Far from doing so, Belgium has systematically placed itself on the side of mediocrity. The figures bear this out.

Worse still, it has constantly taken refuge behind the targets that the European Union has set for 2020. This was despite the fact that the European Union itself recognised the inadequacy of its targets. All the States Parties to the UNFCCC knew that these targets did not make it possible to achieve the ultimate goal of 2050. It was up to them, **individually,** to take the necessary measures to achieve it.

The figures also show that the emission reduction trajectory followed is not linear. On this point too, Belgium has placed itself on the side of mediocrity.

The Belgian climate policy for 2020 is therefore in clear violation of the standard of conduct imposed by Articles 2 and 8 of the ECHR and Article 1382 of the Civil Code.

120. The judgment under appeal found that the Belgian authorities were at fault, basing themselves exclusively on the binding obligations to reduce GHG emissions enshrined in international, European and national/intra-Belgian climate law.

In so doing, the Court of First Instance erred in law. The standard of conduct binding on the Belgian authorities is not the same as the standards of climate law referred to. It is defined in the light of the respondents' knowledge, for too long already, of the danger and of the concrete measures to be taken to avoid or limit that danger.

This knowledge is based on the best scientific knowledge on the subject, which has been included in the IPCC reports and has been explicitly adopted, supported and repeated by the world political community, including Belgium.

This climate science is not in dispute. On the contrary, it is the subject of a particularly broad and established consensus within the international community and is the reference for all policy makers.

121. The climate emergency is here. Every additional particle of GHG in the atmosphere brings us closer to dangerous global warming, with points of no return. The behaviour of the parties involved must be analysed in the light of the serious danger that the inhabitants of Belgium, like the rest of humanity, are facing and the urgent need to act.

<u>For the future: 2030</u>

122. The behavioural standard based on the global residual CO budget $_2$established by the **IPCC** on the basis of the threshold of dangerous warming anchored in the **Paris Agreement**, requires Belgium to reduce its GHG emissions by at least 65% by 2030, along a minimally linear trajectory, and this to preserve the possibility of reaching net zero emissions in due course, most likely before 2050.

However, as things stand, there is no indication that the Respondents have taken steps to achieve this. On the contrary. There are serious and unequivocal indications that they are threatening to disregard the standard of conduct required of them under Articles 2 and 8 of the ECHR and Article 1382 of the Civil Code.

At the level of political will, the following elements should be noted.

- The **Flemish Region** has committed itself to a reduction of GHG emissions of 32.5% (compared to 1990) by 2030 within the framework of the outdated EU targets and the competent minister, Ms Demir, declared shortly before the Glasgow Summit (COP26, 31 October - 12 November 2021) that for Flanders, 35% would be the reduction target for 2030[81]. This position was qualified shortly afterwards, in the middle of the Summit. The Flemish Government will aim for a **40%** reduction of GHG emissions **by 2030**. [82]
- The **Walloon** government is pursuing a **55%** reduction in GHG emissions (compared to 1990) by 2030. [83] The plan is being developed in two stages, the second of which will only be ready by the end of 2022. At the moment, the results that can already be envisaged amount to a reduction of **37% by 2030**. [84]

[81] T. VANHESTE, "COP 26: Vlaanderen verpest de positie van België", *Knack* 27 oktober 2021, (21) 34-36.

[82] W. WINCKELMANS, " Belgisch klimaatakkoord is voor een andere keer", *De Standaard* 10-11 november 2021, 8.

[83] Walloon Regional Policy Statement 2019-2014, p. 6 no. 54, Exhibit F.21.

[84] W. WINCKELMANS, " Belgisch klimaatakkoord is voor een andere keer", *De Standaard* 10-11 november 2021, 8.

- The **Brussels-Capital** Region committed itself in 2019 to reducing its emissions by at least **40%** (compared to 1990) **by 2030**. [85] This objective has been maintained to date. [86]

  In terms of factual forecasts, we can only mention a recent report by the **Federal Planning Bureau**. This report sheds light on the temporary impact (2023-2026) of gas-fired power plants that will have to take over, to a certain extent, from the nuclear power plants that will be gradually closed. It projects that the country's GHG emissions will have decreased by **17% from** their 1990 level **by 2026**. [87]**How do we** get from there to **65% by 2030?**

In conclusion

123. It follows from the above that the respondents have not only violated the standard of conduct imposed by Articles 2 and 8 of the ECHR and Article 1382 of the Civil Code with respect to the **2020** reduction targets, but that there is also no indication that they have taken and will take steps to remedy the situation **by 2030**.

V.2 Second grievance:

In the present case, the judge can impose the requested emission reduction orders without violating the principle of separation of powers

V.2.1 Reminder and criticism of the judgment

124. The Tribunal stated at page 45 of the judgment *a quo*:

> *The Court of Appeal has held that "it is settled that the judiciary has jurisdiction to prevent or remedy any wrongful infringement of a subjective right by a public authority in the exercise of its discretionary power".*

It should be noted that the Tribunal did not challenge the principle of its power to issue injunctions. This point in the judgment under review must be retained.

On the other hand, it was with regard to the **principle of the separation of powers** that the Court of First Instance considered that the application for an injunction could not be granted.

125. In fact, to justify its rejection of the application for injunctions, the Court of First Instance relied on the premise that "the judge cannot determine the content of the obligations of a public authority and thus deprive it of its discretion" without "infringing the principle of the separation of powers. [88]And again: "In other words, if the judiciary is competent to establish the fault committed by the public authority, even in the exercise of its discretionary power, it cannot, on this occasion, deprive the latter of its political freedom or substitute itself for it. The judiciary may not assess the appropriateness of the action of the public authority in the

[85] Joint Policy Statement to the Government of the Brussels-Capital Region and the assembled College of the Joint Community Commission 2019-2024, p. 4, Exhibit F.22.

[86] W. WINCKELMANS, " Belgisch klimaatakkoord is voor een andere keer", *De Standaard* 10-11 november 2021, 8.

[87] Federal Planning Bureau, *Economic Outlook 2021-2026*, June 2021, p. 16, available online. See. https://www.plan.be/publications/publication-2148-en-regional_economic_forecasts_2021_2026

[88] Judgement undertaken, p. 80.

exercise of its jurisdiction, nor may it itself exercise the discretionary power that belongs to that public authority." [89]

126. Having set out that premise, the Tribunal undertakes to ascertain whether the injunctions sought do not lead it to substitute itself for the authorities in the exercise of a discretionary power and, in so doing, to violate the principle of the separation of powers[90].

First, the Court of First Instance examines whether binding obligations under international, European or national climate law directly require Belgium to reduce GHG emissions from Belgian territory to the extent of the percentages covered by the injunctions sought. This is not the case.

Second, the Tribunal considers the scientific argument that supports the requested injunctions, namely the Panel's report already mentioned in this application. The IPCC basis for this report, which roots it in the best available climate science validated by the entire world community, is not noted. On the other hand, the judgment insists that such a report does not constitute "*a source of legally binding obligation*". [91]

The conclusion that concludes all of the developments is that there is a discretionary power at issue in which the judiciary cannot interfere. The Court concludes: "*The request for an injunction formulated by the plaintiffs will therefore be declared unfounded*"[92].

127. The appellants consider that, in the present **case,** the principle of the separation of powers has been wrongly invoked; that the Tribunal should have declared itself competent to impose the injunctions sought. Indeed, contrary to the Tribunal's finding, these injunctions **do not violate the principle of separation of powers, as** will be demonstrated below.

The appellants therefore ask the Court to remedy the wrongful infringement of their subjective rights and, consequently, to impose injunctions to reduce the GHG emissions emitted from Belgian territory.

V.2.2 <u>The applicable principles</u>

128. It will be explained in the following lines that the constitutional principle of the separation of powers does not interfere with the injunctive power of the judge insofar as :

(A) The authorities have no discretion as to the principle of conduct, the measure imposed being the only one that can be taken to put an end to their illegal conduct;

(B) The injunction merely imposes the principle of the conduct to be adopted, the public authority remaining free in the choice of enforcement measures;

(C) The injunction is intended to provide an effective remedy for the violation of fundamental rights enshrined in the ECHR and for the violation of rights protected by the Aarhus Convention.

[89] Judgement undertaken, p. 80.

[90] Judgement undertaken, pp. 80-82.

[91] Judgement undertaken, p. 82.

[92] Judgment undertaken, 82.

A. <u>The principle of separation of powers is not violated where the authorities have no discretion as to the principle of conduct to be adopted, the measure imposed being the only one that can be taken to put an end to their illegal conduct</u>

129. In a judgment of 29 January 2021, the Dutch-speaking Court of First Instance in Brussels ruled as follows

> *"The constitutional principle of separation of powers prohibits a judge from compelling the administration to take a certain action if it does not appear that this action is **the only one that can be taken** to remedy the injury in kind without violating the law."* (free translation - emphasis added)[93].

Already this court had ruled in the same direction. In a decision of October 10, 2018, it indeed held that:

> *"The freedom of action of the regulatory authority must be respected, which means that the judge cannot oblige the authority to take (or not to take) a particular measure if it appears that this measure is not **the only way for** the authority **to achieve legality**"* (free translation - emphasis added) [94].

130. These judgments echo the case law of the Court of Cassation.

Thus, the Court held in a September 4, 2014 ruling that:

> *"(...) when **several legal solutions** are possible to achieve reparation in kind, the judge **cannot decide for the** authority **which** of these solutions should be adopted; it is not for the judiciary to assess the desirability of adopting one of these solutions rather than the other; (...)*"[103].

B. <u>The principle of separation of powers is not violated when the judge imposes the principle of a behaviour to be adopted without specifying the measures of execution</u>

131. The doctrine emphasizes that the existence of a discretionary power on the part of the public authority "does not absolutely prevent an injunction from being issued. The latter may concern **only the principle** of a behaviour to be adopted, the condemned administration determining **the modalities of execution**"[104].

132. Indeed, it is established case law of the Court of Cassation that the principle of the separation of powers would be violated where the judge requires the legislative/executive power to take certain measures**, specifying what type of measures they are and what their content should be**.

133. Thus, in a decision of 4 March 2004, the Court of Cassation explained the violation of the principle of the separation of powers by the precision and detail with which the judge condemned the public authorities to act:

---

[93] Nederlandstalige rechtbank van eerste aanleg te Brussel, L. Craeynest *et al*. v. Brussels Hoofdstedelijk Gewest en Leefmilieu Brussel, 29 January 2021, RG 2016/3659/A: "*Het grondwettelijk beginsel van de scheiding der machten de rechter verbiedt het bestuur te verplichten om een bepaalde maatregel te nemen, wanneer niet blijkt dat dit de enige maatregel is die zonder schending van de wet kan worden genomen om de schade in natura te herstellen.* " See https://www.politico.eu/wp-content/uploads/2021/01/29/Brussels-Air-pollution-judgement_29_January-2021.pdf .

[94] Nederlandstalige rechtbank van eerste aanleg te Brussel, vzw Greenpeace Belgium v. Vlaams Gewest, 10 October 2018, *Tijdschrift voor Milieurecht* 2018, 706-724: "*De beleidsvrijheid van de regelgevende overheid moet worden geëerbiedigd, wat wil zeggen in de rechter de overheid niet mag verplichten deze of geen maatregel (niet) te*

*"...] **by determining in a precise and technically detailed manner in the operative part of the decision in which the public authorities can avoid infringement of the defendants' subjective rights**, the judges of appeal substituted themselves for the executive power and thus violated the constitutional principle of the separation of powers*[105].

The Cour de Cassation (French Supreme Court) agrees with this in a decision dated 3 January 2008:

"*The judiciary has no business interfering in the assessment of the appropriateness of the administrative decision on the dispersal of aircraft flights, nor in substituting its own decision for that of the authorities.*
***By ordering the authorities to intervene in this case and by laying down the criteria on the basis of which that intervention should take place**, the appeal judges unlawfully substituted their assessment for that of the applicant.*
***In determining the manner in which the authorities are to intervene in order to determine the policy relating to the national airport**, the judgment under appeal infringes the general legal principle of the separation of powers and all the provisions relied on in the plea*[106].

nemen wanneer blijkt dat die maatregel niet de enige wijze is waarmee de overheid de wettelijkheid kan realiseren ".

[103] Cass. C.12.0535.F of 4 September 2014 available at http://jure.juridat.just.fgov.be

[104] B. JADOT, "Les pouvoirs du juge judiciaire à l'égard de l'administration: le pouvoir d'injonction et la réparation en nature" in *La responsabilité des pouvoirs publics*, Brussels, Bruylant, 1991, pp.450 and 452.

[105] Cass. (1st ch.), 4 March 2004, R.G. n° C.03.0346.N;C.03.0448.N.

[106] Cass. 3 January 2008, R.G. n° C.06.0322.N.

In a judgment of 27 October 2006[95], the Court held that the judiciary may order the executive to make good damage caused by its negligence without depriving the executive of its freedom of appreciation as to the measures to be adopted to make good the damage.

134. The lower courts and tribunals follow this jurisprudence. The Court of First Instance of Liège, for example, ruling on the overcrowding of the Lantin prison, retained the same premises in its judgment of 9 October 2018[96]:

*The Court of Appeal has held that "**while the State may be required to take measures** to reduce (such overcrowding), it is **for the State to decide what measures** it will adopt to that end. In a somewhat caricatured but nonetheless real way, there is nothing that allows a court to impose on the State, in order to achieve this, legislative changes tending to reduce the number of prisoners rather than to increase the capacity of prison establishments".*

C. <u>Injunctions are intended to provide an effective remedy for the violation of fundamental rights enshrined in the ECHR and for the violation of rights protected by the Aarhus Convention</u>

[95] Cass. (1st ch.), 27 October 2006, R.G. n° C.03.0584.N.

[96] Civ. Liège, 9 October 2018, *J.L.M.B.,* 2018, pp. 1917-1933.

135. In the present case, the judgment *a quo* found that the applicants' fundamental rights, in particular Articles 2 and 8 of the ECHR, were violated.
It should be recalled that Article 1er of the ECHR provides that "*States shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention*".

There is no doubt that national judges are the primary guarantors of respect for the rights enshrined in the ECHR. According to the European Court of Human Rights, "*the courts must examine rigorously the pleas relating to the 'rights and freedoms' guaranteed by the Convention before them and this is a corollary of the principle of subsidiarity*"[97].

The Belgian doctrine recalls in this sense that :

> *"The national judge, because of his geographical proximity, is best placed to offer the most adequate protection of the fundamental rights at issue before him. G. Rosoux argues that ''national protection must thus precede international protection''*[98].

136. We should also recall Article 13 of the ECHR, which enshrines the "*Right to an effective remedy*" in the following terms: *"**Everyone whose rights and freedoms as set forth in this Convention are violated** shall be **entitled to an effective remedy before a national authority notwithstanding that** the violation has been committed by persons acting in an official capacity.*"

137. Thus, in the event of a violation of fundamental rights enshrined in the European Convention on Human Rights, the national court is necessarily empowered to order the authorities to take appropriate measures. The effectiveness of the protection of the rights guaranteed by the ECHR depends on this.

138. Also relevant to the violation of the standard of care in Article 1382 of the Civil Code is Article 9.4 of the Aarhus Convention, which also emphasizes the need for an effective remedy: *"In addition, and without prejudice to paragraph 1, the [judicial] procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and **effective remedies**, **including injunctive relief where appropriate**, and shall be objective, fair and expeditious and not prohibitively expensive*.

V.2.3 <u>Application in this case</u>

139. The concluding parties consider that the constitutional principle of separation of powers allows them to ask your Court to oblige the respondents to reduce their GHG emissions in a certain way. Indeed:

- In the present case, the respondents have no discretion as to the principle of conduct to be adopted, the GES injunctions sought being the only means for the authorities to achieve legality (A),

- Respondents remain free to choose the means to achieve the requested GHG emission reductions (B), and

[97] Eur. Court of Human Rights, *Fabris v. France* judgment, 7 February 2013, § 72.

[98] S. VAN DROOGHENBROECK *et al*, "Urgenda: what lessons for Belgium", *A.P.T.* 2021/1, p. 23-24.

- injunctions are the only effective remedy for the violation of fundamental rights guaranteed by Articles 2 and 8 of the ECHR (C) and for the violation of rights protected by the Aarhus Convention.

A. <u>There is no margin of appreciation in this case: these injunctions are the only measures enabling the authorities to achieve legality</u>

140. As a reminder, the injunctions sought on appeal are the following two injunctions:

- to reduce or cause to be reduced the overall volume of annual greenhouse gas emissions from the Belgian territory in such a way as to achieve by 2025 a reduction of at least 48% compared to the level in 1990;

- to reduce or cause to be reduced the overall volume of annual greenhouse gas emissions from the Belgian territory in such a way as to achieve in 2030 a reduction of at least 65% compared to the level in 1990.

141. As demonstrated above, in establishing the standard of behaviour imposed by Articles 2 and 8 of the ECHR and by Article 1383 of the Civil Code, **the injunctions requested** correspond to **a minimum *minimorum*** for the country to do its part to prevent and effectively limit dangerous warming, understood as warming "*well below 2°*" and tending towards 1.5°C. This threshold not to be exceeded was specified by the IPCC and was formally enshrined in 2015 by the Paris Agreement

In light of the current climate emergency and the very limited overall residual carbon budget, there is simply no **discretion** left to determine **minimum** GHG reduction **targets for** respondents.

Only appropriate GHG emission reductions can prevent dangerous global warming. There is no other way to stop the violations of Articles 2 and 8 ECHR and Article 1382 of the Civil Code that the Respondents have committed in pursuing their climate policies and, in all likelihood, will continue to commit.

B. <u>Respondents remain free to choose the means to achieve GHG emission reductions</u>

142. As a reminder, the requested injunction concerns a **minimum** result to be achieved in order to avoid the violation of human rights and the respect of the standard of conduct set out in Article 1382 of the Civil Code. This result takes the form of minimum thresholds for reducing GHG emissions within a certain period of time. The judge is not being asked to impose the precise means of achieving these reduction thresholds. The respondents retain complete freedom to choose the means to be implemented and the methods of implementation.

C. <u>Failure to issue an injunction would result in a violation of the right to an effective remedy</u>

143. By deciding that the respondents had violated Articles 2 and 8 of the ECHR and had also committed a fault within the meaning of Article 1382 of the Civil Code, but by refusing to impose the requested injunctions for the future, the judgment under appeal not only misapplied the principle of the separation of powers but also infringed the right to an effective remedy, guaranteed by Article 13 of the ECHR and Article 9.4 of the Aarhus Convention.

144. Pursuant to Article 13 of the ECHR and Article 9.4 of the Aarhus Convention, this Court must offer on appeal the most adequate protection of the subjective rights at issue before it, and

the only way to do so is to impose the injunctions sought and thus to order the respondents to reduce their GHG emissions as developed by the appellants

145. In the present case, the injunctions sought are essential to respect the subjective rights of the appellants in the light of the particularly negligent attitude of the respondents, both in the past and in the follow-up to the judgment under appeal.

146. As a reminder, Belgium's GHG emission reductions over 2020 can be summarized as follows:

- 2010 : -7,5%
- 2011 : -16,4% - 2012 : -19%
- 2014 : -23,5%
- 2015 : -19,7%
- 2016 : -19,2%
- 2017 : -21,9%
- 2018 : -17,9% - 2019 : -18,8%.

It is clear that emission reductions have stagnated since 2011, with no significant progress, and remain well below what the behavioural standard required. As regards the 2030 horizon, no concrete response to the challenges has been made following the judgment of 17 June 2021. Contrast this with Germany, where a 24 March 2021 ruling by the *Bundesverfassungsgericht* found that a federal climate law that mandated a 55% reduction in GHG emissions by 2030 was unconstitutional in that it violated the right to life and physical integrity and the right to property of young people and future generations by postponing too many emission reductions until the future[111]. **In response to this finding of violation of fundamental rights**, the federal government tabled **within two weeks** an amendment to the law that provides for an increase in the GHG reduction by 2030 from 55% to 65% and, in addition, zero net emissions in 2045. This amendment came into force on August 31, 2021. [112]

148. The disturbing attitude of the Respondents in view of the seriousness and urgency of the situation underlines the need for injunctions to ensure that the Appellants' remedy is an effective one. In this case, the injunctions sought are the only measure that provides an effective remedy.

V.3 Other grievances

V.3.1 The UNFCCC has not been amended by the Kyoto Protocol and the Paris Agreement; its original wording remains unchanged

A. Review and criticism of the judgment under review

149. In its statement of the factual background to the dispute, the judgment under review refers to the UNFCCC (1992), the Kyoto Protocol (1997) and the Paris Agreement (2015). In situating the Paris Agreement, the judgment characterizes it as an amendment to the UNFCCC, more specifically a second amendment to the UNFCCC, the previous one being logically the Kyoto Protocol: "*On 12 December 2015, at COP-21 held in Paris, the member states of the Framework Convention adopted the Paris Agreement* ***by which the UNFCCC was once again amended***." [113]

This understanding of the Kyoto Protocol and the Paris Agreement is **legally flawed**. The text of the Framework Convention is unchanged to this day, especially with regard to its Article 2, which states the ultimate goal of the Framework Convention: to prevent dangerous anthropogenic global warming.

The error in law committed is such as to diminish the importance of the UNFCCC, in particular its Article 2, and to emphasize the commitments embodied in the Protocol and the Agreement. The Appellants therefore consider that it is detrimental to their case in that it is likely to facilitate the error in law committed by the Tribunal when it exclusively took into account binding obligations under international and other climate law as a reference for assessing the legality of the Respondents' conduct,

[111] *Bundesverfassungsgericht*, Order of 24 March 2021.

See https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html .

See also https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html.

See[112] [113]https://www.bundesregierung.de/breg-de/themen/klimaschutz/climate-change-act-2021-1936846

Judgement undertaken, p. 26.

confusing the standard of behaviour imposed by Articles 2 and 8 of the ECHR and by Article 1382 of the Civil Code with positive law.

B. Applicable principles and their application in this case

150. International public law characterizes the UNFCCC, the Kyoto Protocol and the Paris Agreement as three separate treaties, which coexist on an equal footing even though the Kyoto Protocol and the Paris Agreement align with the UNFCCC by referring to it in their preambles and provisions. Their formal legal relationship is not like that of successive national laws where the most recent one modifies the previous one. Nor is it to be understood as that between a law and an implementing order.

With regard to the Kyoto Protocol in particular, it should be stressed that it is not a modifying protocol like, for example, the 1996 Protocol to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter[99], which, in its Article 23, states that it modifies the 1972 Convention for those States Parties to the Protocol that are also Parties to the Convention.

151. In this case, Article 2 of the UNFCCC remains unchanged as the basis for international climate governance. The notion of dangerous warming is at the heart of the work of the IPCC and the COPs. The knowledge of the threshold of a dangerous warming and the knowledge of the measures to avoid and limit such a warming determine the standard of care of national authorities worldwide and also in Belgium.

V.3.2 The court was wrong to consider that it was required to exercise only marginal control over the authorities' compliance with the standard of conduct imposed by Articles 2 and 8 of the ECHR and by Article 1382 of the Civil Code

A. Review and criticism of the judgment under review

[99] See https://fr.wikipedia.org/wiki/Convention_sur_la_pr%C3%A9vention_de_la_pollution_des_mers_r%C3%A9sultant_of_the_27immersion_of_C3%A9chets#The_1996_Protocol [115]Judgment Undertaken, at 59.

152. In specifying the legal framework within which it must assess the responsibility of the public authorities, the court considered that it must exercise "*a necessarily **marginal** control*" thus avoiding "*substituting its assessment for that of the legislator*", respecting "*the guidelines laid down by the case law of the Court of Cassation*". [115]

153. Similarly, the judgment in question characterizes its review of the public authorities' compliance with the obligations arising from Articles 2 and 8 of the ECHR as a "*marginal review*"[100].

154. Both with regard to the standard of conduct laid down in article 1382 of the Civil Code and with regard to the standard of conduct imposed by articles 2 and 8 of the ECHR, this view constitutes an error in law which is detrimental to the appellants' case. Indeed, the appellants are entitled to a judicial review of a different quality, which goes further and is more comprehensive than a marginal review.

B. <u>Applicable principles and their application in this case</u>

155. The key criterion for the extra-contractual liability of public authorities in Belgian law, enshrined in the case law of the Court of Cassation, is that of an **ordinarily prudent and diligent public authority in the same circumstances of time and place.** [101] This is the criterion to be applied, the extent of the control to be carried out. It does not impose a 'marginal control' style restriction. The test is applied in the light of the circumstances of the case and that control is fully exercised.

156. The very idea that the judge would exercise marginal control over the right to life enshrined in Article 2 of the ECHR is shocking. Even at the level of the control exercised by the European Court of Human Rights, this fundamental right escapes the theory of the margin of appreciation which the Court imposes on itself and which allows the States Parties to the ECHR to apply certain rights according to local circumstances. Like the prohibition of torture and slavery, it is one of the so-called '*Notstandsfeste'* rights, which are so fundamental that no margin of appreciation is allowed. [102]

The fundamental right enshrined in Article 8 of the ECHR, on the other hand, is one of the fundamental rights for which the European Court of Human Rights uses the theory of the margin of appreciation of the States Parties[103] in its own case law. However, this theory **does not apply** to the **national judge**, who is the first judge to ensure that the rights enshrined in the ECHR are respected; it is specific to the control exercised by the European Court. According to the European Court, "*the courts must examine rigorously the pleas relating to the "rights and freedoms" guaranteed by the Convention before them and that this is a corollary of the principle of subsidiarity*"[104]. According to the Court, "*The theory of the margin of appreciation has always been seen as a means of defining the relationship between the domestic authorities and the Court. This theory does not apply in the same way to the relationship between the*

[100] Judgement undertaken, p. 62.

[101] See e.g. Cass. 25 October 2004, *JLMB* 2005, p. 638, Exhibit M.11 and Cass. 10 September 2010, *Pas.* 2010, no. 508, p. 2229, Exhibit M.16.

[102] J. VANDE LANOTTE and Y. HAECK, *Handboek EVRM. Deel 1 Algemene beginselen*, Antwerpen-Oxford, Intersentia, 2005, p. 204 f.s., specifically p. 214-215.

[103] *Ibid.* , p. 211.

[104] Eur. Court of Human Rights, *Fabris v. France* judgment, 7 February 2013, § 72.

organs of the State at the domestic level"[105]. There is no question at the level of national courts and tribunals of a review that would in principle be only marginal.

V.3.3 The court wrongly considered that mitigation and adaptation are two adequate responses to global warming and that 450 ppm of GHGs is a limit that should not be exceeded before 2100

157. In examining the obligations arising from Articles 2 and 8 of the ECHR in relation to the measures to be taken, the Court considers that "*appropriate*" measures may "*be of two kinds: either so-called mitigating measures, which are designed to prevent the danger from materialising, or so-called adaptation measures, which are designed to cushion or attenuate its effects*".

Where this consideration equates mitigation and adaptation, it is factually incorrect. As the IPCC's work has shown for many years, the only measures that make a real difference are mitigation measures: reductions in GHG emissions, primarily CO_2

158. Furthermore, a statement in the judgment concerning the acceptable limit of GHG concentration in the atmosphere is also factually incorrect. This is the following passage: "*The scientific community agrees on the need to contain the concentration of GHGs at 450 ppm by 2100, whereas currently the concentration of GHGs is already above 400 ppm.*" [106] As mentioned in the narrative, the 450 ppm limit relates to a warming of 2°C [107], a threshold formally abandoned in the Paris Agreement (2015), following a gradual pathway in that direction from 2009 [108]. The threshold of "*well below 2°C*" and moving towards 1.5°C enshrined in the Paris Agreement comes with a maximum concentration of **430 ppm** and the residual CO_2 budgets that follow, as explained above. This factual error is along the same lines as the above error: it gives the impression that there is not so much urgency when in truth there is.

159. The standard of conduct imposed by Articles 2 and 8 of the ECHR and Article 1382 of the Civil Code is typically assessed in the light of the circumstances of the case. By the distortion they create of the measures to be considered and of the *window of opportunity* still available in time to do what is necessary, two key aspects of the case submitted to the Tribunal, the errors of fact noted have a negative impact on the appellants' case.

Both of those errors of fact are also such as to have facilitated the erroneous position that the injunctions sought could not be imposed in the light of the separation of powers, in particular in the light of the margin of discretion alleged to exist.

Therefore, the appellants consider that they have been prejudiced.

VI. On-call duty

160. Given the extreme urgency of the requested GHG emission reductions that allow the country to do its part to avoid or limit dangerous global warming, and in light of the grossly inadequate governance that the Respondents have demonstrated for decades, the Appellants request that the injunctions be imposed under penalty. More specifically, they request that the respondents be ordered *jointly and severally*, or in default of each other, to pay to the first appellant, Klimaatzaak vzw, a penalty of €1,000,000 per month of delay in reaching the objective imposed

[105] Quoted by S. Van Drooghenbroeck *et al* : S. VAN DROOGHENBROECK *et al*, "Urgenda: what lessons for Belgium?", *A.P.T.* 2021/1, p. 23, where the authors examine the proper use of the national margin of appreciation.

[106] Judgement undertaken, p. 64.

[107] *Supra*, no. 41-42.

[108] *Supra*, no. 37.

for 2025 and the objective imposed for 2030, starting on 1 erAugust of the year following the deadlines (i.e., in 2026 and 2031). The choice of the erAugust 1 date is explained below.

161. The amount of the periodic penalty payments requested is reasonable. As is well explained in a Dutch academic article dealing with the question of imposing a penalty payment on the Dutch State in the Urgenda case, the amount of the penalty payment must make non-compliance more onerous for the condemned party than compliance. Compliance then becomes the only economically rational option. The authors of this publication estimate at 10 million US dollars the "*reasonable*" annual amount that could "*induce*" the Dutch State to comply with the Urgenda judgment, and also emphasize that this amount would not constitute "*a serious burden on the State budget*"[109]. The penalty payments requested by the appellants to support the enforcement of the injunctions ordering GHG emission reductions over 2025 and 2030 are in a similar range.

162. In this case, we request that the annual reporting of Belgium's GHG emissions to the European Commission be used to monitor compliance with the injunctions. This reporting is done automatically every year, by 31 July at the latest, in accordance with Article 26.2 of Regulation (EU) 2018/1999. This reporting mechanism allows the EU to meet its annual reporting obligation on GHG emissions as a party to the UNFCCC.

    Article 26.2 of Regulation (EU) 2018/1999 reads as follows:

    > *« 2. By 31 July 2021, and every year thereafter (year X), Member States shall submit to the Commission their proxy greenhouse gas inventories for year X-1.*
    >
    > *(…)»*

    The reports must be submitted to the first appellant, Klimaatzaak vzw, on the same day that they are submitted to the European Commission. In the event that the respondents do not communicate these emission reports by 31 July 2026 (for 2025) and/or by 31 July 2031 (for 2030) at the latest, the appellants request that they be ordered, *jointly and severally* or in default of each other, to pay a penalty of €10,000 per day of delay in communication.

163. The appellants also request that you declare that Klimaatzaak vzw undertakes to allocate the accrued penalty payments in full in accordance with its corporate purpose.

VII. <u>Costs</u>

164. The appellants request that the respondents be ordered to pay the procedural costs of the first instance and of the appeal in the amount of €3,120 (€1,560 x 2), consisting of the procedural costs which cannot be valued in money and which will be adjusted on 1 erJune 2021[110].

[109] G. BOOGAARD & R. J. B. SCHUTGENS, "Na ons de zondvloed," *JCDI*, 12 Juni 2019, p. 7, Exhibit J.3.

[110] Royal Decree of 26 October 2007 fixing the tariff of procedural allowances referred to in Article 1022 of the Judicial Code and fixing the date of entry into force of Articles 1erto 13 of the Act of 21 April 2007 on the repeatability of lawyers' fees and costs.

VIII. Device

FOR THESE REASONS

WITHOUT PREJUDICE TO ANY GENERAL RESERVATIONS AND WITHOUT PREJUDICIAL RECOGNITION

PLEASES THE BRUSSELS COURT OF APPEAL to declare

the present appeal admissible and well-founded and

thus :

1° - Partially amend the judgment under appeal, except for :

- the judgment that the action is admissible in respect of Klimaatzaak vzw and the natural persons who are the principal claimants, listed in Annex A;
- the judgment which finds that the voluntary intervention of the natural persons listed in Annex B is also admissible;
- the pronouncement that, "*in pursuing their climate policy, the respondents did not behave like normally prudent and diligent authorities, which constitutes a fault within the meaning of Article 1382 of the Civil Code*";
- the pronouncement that, "*in pursuing their climate policy, the respondents infringe the fundamental rights of the appellants, and more specifically Articles 2 and 8 of the ECHR, by failing to take all necessary measures to prevent the effects of climate change on the lives and privacy of the appellants*";

2° - Declare that the standard of conduct imposed by Articles 2 and 8 of the ECHR and Article 1382 of the Civil Code requires the respondents to have reduced the overall volume of annual GHG emissions from Belgian territory by at least 30% by 2020, compared to 1990 levels;

3°- Find that the respondents have not reduced the overall volume of annual GHG emissions from Belgian territory by at least 30% by 2020, compared to the 1990 level;

4°- To confirm that, in pursuing their climate policy over 2020, the Respondents have violated the standard of conduct imposed by Articles 2 and 8 of the ECHR and Article 1382 of the Civil Code;

5°- To rule that the standard of conduct imposed by Articles 2 and 8 of the ECHR and Article 1382 of the Civil Code requires the Respondents to have reduced the overall volume of annual GHG emissions from the Belgian territory by at least 48% by 2025 and by at least 65% by 2030, compared to the 1990 level

6°- Find that there are serious and unequivocal indications that, in pursuing their climate policy for 2030, the Respondents risk disregarding the standard of conduct imposed by Articles 2 and 8 of the ECHR and Article 1382 of the Civil Code;

7°- Consequently, order the respondents to take the necessary measures to reduce or cause to be reduced the overall volume of annual GHG emissions from the Belgian territory so as to reach :

- At least 48% by 2025;
- At least 65% by 2030;

8°- Order the respondents to communicate to the first appellant, Klimaatzaak vzw, the GHG emission reports for 2025 and 2030 on the same day that they are communicated to the European Commission in 2026 and 2031;

9° Order the respondents, *in solidum* or one in default of the other, to pay to the first appellant, Klimaatzaak vzw, a penalty of €10,000 per day of delay in communicating the GHG emissions report for 2025 and the GHG emissions report for 2030;

10°- Order the Respondents *jointly and severally*, or one in default of the other, to pay to the first appellant, Klimaatzaak vzw, a penalty of 1,000,000 EUR per month of delay in reaching the objective imposed for 2025 and the objective imposed for 2030, and this, as from 1 erAugust of the year 2026 respectively 2031;

11°- Act that Klimaatzaak vzw undertakes to allocate the accrued penalty payments in full in accordance with its corporate purpose;

In any case

1° Declare the judgment to be provisionally enforceable;

2° Order the Respondents to pay all costs and expenses of the two proceedings, including the procedural damages in the amount of 2 x EUR 1,560, i.e. EUR 3,120.

For the appellants,

November 17, 2021,

Their advice,

Carole Billiet Luc Depré Audrey Baeyens

Linli Pan-Van de Meulebroeke Camille de Bueger Gautier Rolland

IX. List of diagrams 4

Figure 1. CO concentrations$_2$ in the atmosphere over the past 800,000 years 12
Figure 2. Global warming is due to human activity and has been increasing drastically since 1850, especially 1970 13
Figure 3. Total annual anthropogenic GHG emissions by gas group from 1970 to 2010 14
Figure 4. 1750-2011: Cumulative CO $_2$ 14
Figure 5: Relationship between global warming and cumulative $CO_2$and GHG emissions 15

Figure 6. Relationship between global warming and cumulative CO_2 16
Figure 7 - Illustrative diagram of the 'bathtub 17
Figure 8. Warming of 1.5°C to 2°C and more: low to very high risk of consequences..... 20
Figure 9: IPCC 2007 Assessment Report: The 2°C Limit 21
Figure 10 - IPCC - 2007 Assessment Report (AR4): the necessary percentages of global GHG emission reductions to stay below the 2°C threshold 24
Diagram 11. Scheme used in the judgment of 26 June 2015 in the Urgenda case..... 32
Figure 12. Overall residual carbon budgets as of 1erJanuary 2018 42
Figure 13. Overall residual carbon budgets at the beginning of 2020..... 43
Figure 14. Belgian emission reductions 45
Figure 15. Belgium's residual carbon budget: linear reduction path..... 45
Figure 16. Table of reductions by 2030 with a 65% cap in 2030..... 46
Figure 17. Assuming a linear reduction trajectory of 55% in 2030 and net zero in 2050 48

X. Inventory of parts

A. Correspondence		
	Date	**Description**
A.1	2014	Official notice of 1er December 2014 from the Belgian State
A.2	2014	Official notice of 1er December 2014 from the Flemish Region
A.3	2014	Official notice of 1er December 2014 from the Brussels Region Capital
A.4	2015	Official notice of 2 January 2015 from the Walloon Region
A.5	2014	Official response 19 December 2014 from the Flemish Region
A.6	2015	Official response of 9 January 2015 from the Brussels-Capital Region
A.7	2015	Official response from the Walloon Region on 23 February
A.8	2015	Letter from Minister Marie-Christine Marghem (invitation to ministerial meeting) of 29 January 2015
A.9	2015	Letter to the Belgian State of 13 April 2015
A.10	2015	Letter to the Walloon Region of 13 April 2015
A.11	2015	Letter to the Brussels-Capital Region of 13 April 2015
A.12	2015	Letter to the Flemish Region of 13 April 2015
A.13	2015	Response from the Flemish Region of 20 April 2015
A.14	2015	Response from the Brussels-Capital Region of 5 May 2015
A.15	2015	Response from the Walloon Region of 8 May 2015

B. IPCC

	Date	Description
B.1		Confidence and scientific probability terminology used by the IPCC (AR4, Working Group I ("WGI"), p. 22 and AR5 Working Group I ("WGI"), p. 36)
B.2	1990	The First Assessment Report ('AR1') (IPCC 1990, AR1)
B.3	1998	Principles governing the work of the IPCC, 01.10.1998
B.4	2007	The Fourth Assessment Report ('AR4') - Working Group 1 (update 2009) (IPCC 2007, AR4 WGI)
B.5	2007	The Fourth Assessment Report ('AR4') - Working Group 1 - Summary for Decision Makers - (update 2009) (IPCC 2007, AR4 WGI, SPM)
B.6	2007	The Fourth Assessment Report ('AR4') - Working Group 2 (update 2009) (IPCC 2007, AR4 WGII)
B.7	2007	The Fourth Assessment Report ('AR4') - Working Group 2 - Summary for Policymakers (update 2009) (IPCC 2007, AR4 WGII, SPM)
B.8	2007	The Fourth Assessment Report ('AR4') - Working Group 3 (update 2009) (IPCC 2007, AR4 WGIII)
B.9	2007	The Fourth Assessment Report ('AR4') - Working Group 3 - Summary for Policymakers (update 2009) (IPCC 2007, AR4 WGIII, SPM)
B.10	2007	The Fourth Evaluation Report ('AR4') - Synthesis Report (update 2009) (IPCC 2007, AR4 SYR)
B.11	2007	The Fourth Assessment Report ('AR4') - Synthesis Report - Summary for Decision Makers (update 2009) (IPCC 2007, AR4 SYR, SPM)
B.12	2010	MASTANDREA (M.D.) *et al*, *Guidance Note for Lead Authors of the IPCC Fifth Assessment Report on Consistent Treatment of Uncertainties*, Geneva, Intergovernmental Panel on Climate Change, 2010.
B.13	2011	Special Report on Renewable Energy, April 2011 (IPCC 2011, SR Renewable Energy)
B.14	2011	Special Report on Renewable Energy, April 2011 - Summary for Policy Makers (IPCC 2011, SR Renewable Energy, SPM)
B.15	2013	The Fifth Assessment Report ('AR5') - Working Group 1 (IPCC 2013, AR5 WG I)

B.16	2013	The Fifth Assessment Report ('AR5') - Working Group 1 - Summary for Policymakers (IPCC 2013, AR5 WG I, SPM)
B.17	2014	The Fifth Assessment Report ('AR5') - Working Group 2 (IPCC 2014, AR5 WG II)
B.18	2014	The Fifth Assessment Report ('AR5') - Working Group 2 - Summary for Policymakers (IPCC 2014, AR5 WG II, SPM)
B.19	2014	The Fifth Assessment Report ('AR5') - Working Group 3 (IPCC 2014, AR5 WG III)
B.20	2014	The Fifth Assessment Report ('AR5') - Working Group 3 - Summary for Policymakers (IPCC 2014, AR5 WG III, SPM)
B.21	2014	The Fifth Evaluation Report (AR5) - Summary Report (IPCC 2014, AR5 SYR)
B.22	2014	The Fifth Assessment Report (AR5) - Synthesis Report - Summary for Decision Makers (IPCC 2014, AR5 SYR, SPM).
B.23	2018	Special report on the impacts of global warming of more than 1.5°C, October 2018 (IPCC 2018, SR 1.5°C)
B.24	2018	Special report on the impacts of global warming of more than 1.5°C, October 2018 - Summary for Policymakers (IPCC 2018, SR 1.5°C, SPM)
B.25	2019	Special Report on Oceans, September 2019 (IPCC 2019, SR Ocean)
B.26	2019	Special Report on Oceans, September 2019 - Summary for Policymakers (IPCC 2019, SR Ocean, SPM)
B.27	2019	Special Report on Land, August 2019 (IPCC 2019, SR land)
B.28	2019	Special Report on Land, August 2019 - Summary for Decision Makers (IPCC 2019, SR land, SPM)
B.29	2021	The Sixth Assessment Report ('AR6') - Working Group 1 (IPCC 2021, AR6 WG I)
B.30	2021	The Sixth Assessment Report ('AR6') - Working Group 1 - Summary for Policymakers (IPCC 2021, AR6 WG I, SPM)

C. Belgian scientific literature

	Date	Description
C.1		CLIMATE AND SUSTAINABILITY EXPERT GROUP, "Systemic change is urgently needed if climate change and the ecosystem crisis are to be effectively addressed," May 14, 2019
C.2	2004	VAN YPERSELE (J.P.) & MARBAIX (Ph.), *Impact van de klimaatverandering in België*, UCLouvain - Greenpeace, 2004, 42p.
C.3	2009	Mira, Milieuverkenning 2030, November 2009
C.4	2009	Court of Audit, "Federal Climate Policy - Implementation of the Kyoto Protocol" (without annexes), June 2009
C.5	2009	MIRA, *Advies over de Klimaattop in Kopenhagen*, Brussel, 26 november 2009
C.6	2010	E. BRITS *et al*, *Climate change and health. Set-up of monitoring of potential effects of climate change on human health and on the health of animals in Belgium*, Brussels, Scientific Institute of Public Health, 2010
C.7	2013	Scenarios for a low-carbon Belgium by 2050 - Summary, November 2013
C.8	2013	CORNET (M.) *et. al*, *Scenarios for a Low Carbon Belgium by 2050. Final Report*, Brussels, Federal Public Service Health, Food Chain Safety and Environment - Climate Change Section, November 2013, 122 p.
C.9	2017	NATIONAL CLIMATE COMMISSION, *Belgium's seventh national communication and third biennial report on climate change under the United Nations Framework Convention on Climate Change*, Brussels, Federal Service Public Health, Food Chain Safety and Environment, December 2017
C.10	2017	NATIONAL CLIMATE COMMISSION, *Seventh National Communication on Climate Change under the United Nations Framework Convention on Climate Change*, Brussels, Federal Public Service Public Health, Food Chain Safety and Environment, 2017/12, 16 p. (French summary of Exhibit C.9)
C.11	2019	Panel on Climate and Sustainable Development, '*Systemic change is urgently needed if climate change and the ecosystem crisis are to be effectively addressed*', 14 May 2019
C.12	2019	WALLONIAN IPCC PLATFORM, Oceans and Cryosphere, letter 15, November 2019

D. European scientific documentation

	Date	Description

D.1	2006	European Environmental Agency, *The changing faces of Europe's coastal areas*, Copenhagen, EEA Report no. 6/2006, 2006
D.2	2013	European Environmental Agency, *Trends and projections 2013*, 9 October 2013
D.3	2014	European Environmental Agency, *Trends and projections in Europe 2014*, 28 October 2014
D.4	2014	European Commission, *Report to the European Parliament and the Council. Progress towards achieving the Kyoto Protocol targets and the Union's 2020 target*, 28 October 2014
D.5	2017	European Environmental Agency, *Climate change, impacts and vulnerability in Europe 2016. An indicator-based report*, Copenhagen, 2017
D.6	2018	CLIMACT, Net zero by 2050: from whether to how. Zero emission pathways for the Europe we want, September 2018

E. International scientific literature

	Date	Description
E.1	1990	F.R. RIJSBERMAN and R.J. SWART (eds.), *Targets and Indicators of Climatic Change. Report of Working Group II of the Advisory Group on Greenhouse Gases*, Stockholm, Stockholm Environment Institute, 1990
E.2	2006	N. Stern, *the Economics of Climate Change - The Stern Review*, Cambridge, 2006
E.3	2009	Environmental Protection Agency (EPA) "Endangement and Cause or Contribute Findings for Greenhouse Gases Under Section 2020(a) of the Clean Air Act; Final Rule", 15 December 2009
E.4	2009	International Energy Agency, Energy Policies of IEA Countries - Belgium (excerpt)
E.5	2009	R. Lindsey, 'Climate change: Atmospheric Carbon Dioxide', *NOAA, climate.gov,* 19 September 2019
E.6	2010	UNEP, *The Emissions Gap Report*, executive summary, 2010
E.7	2011	International Energy Agency, World Energy Outlook (summary), November 2011
E.8	2011	UNEP, *The Emissions Gap Report*, executive summary, 2011
E.9	2012	World Bank, Turning Down the Heat (Executive Summary), November 2012

E.10	2012	PricewaterhouseCoopers (PwC), Too late for two degrees? Low Carbon Economy Index 2012, November 2012
E.11	2013	International Energy Agency, Redefining the contours of the energy-climate debate (summary), June 2013
E.12	2014	World Bank, State and Trends of Carbon Pricing (Figure 4), May 2014
E.13	2014	PNEU, Emissions Reduction Needs and Opportunities Gap Report, Figure ES.1 (Carbon Neutrality), November 2014.
E.14	2016	International Energy Agency, *CO $_2$Emissions from Fuel Combustion: Key CO $_2$ Emissions Trends,* 2016
E.15	2017	International Organization for Migration, Extreme heat and migration
E.16	2018	WMO State of the World Climate 2018 statement
E.17	2018	N. WATTS *et al*, "The 2018 report of the Lancet Countdown on health and climate change: shaping the health of nations for centuries to come, Executive Summary", *The Lancet*, 2018
E.18	2018	International Organization for Migration, *Global migration indicators for 2018*
E.19	2018	UNEP, *The Emissions Gap Report*, executive summary, 2018
E.20	2019	UNEP, *The Emissions Gap Report*, executive summary, 2019
E.21	2019	J. CHRISTENSEN & A. OLHOFF, *Lessons from a decade of emissions gap assessments*, Nairobi, UNEP, 2019
E.22	2019	Report of The Lancet Countdown on health and climate change, "*ensuring that the health of a child born today is not defined by a changing climate*," 13 November 2019, Cited in findings as: 'The Lancet Countdown 2019'

F. Belgian legal documentation

Legislation

	Date	Description
F.1	2002	Cooperation agreement of 14 November 2002 between the Federal State, the Flemish Region, the Walloon Region and the Brussels-Capital Region on the establishment, implementation and monitoring of a National Climate Plan, as well as the preparation of reports, in the framework of the United Nations Framework Convention on Climate Change United Nations Framework Convention on Climate Change and the Kyoto Protocol
F.2	2013	Royal Decree establishing the federal long-term strategic vision for sustainable development, 18 July 2013
F.3	2014	Walloon Region, "Climate" Decree, 20 February 2014

F.4	2018	Cooperation agreement between the Federal State, the Flemish Region, the Walloon Region and the Brussels-Capital Region on sharing the Belgian climate and energy objectives for the period 2013-2020, M.B., 12 July 2018
F.5	2019	Proposal for a special law of 6 February 2019 coordinating the policy of the federal authority, the Communities and the Regions on climate change and setting general long-term objectives. Opinion of the Council of State No. 65.404/AG of 4 March 2019, Chamber of Representatives, *Doc. Parl.* sess. 2018-2019, no. 54-3517/004
F.6	2019	March 13, 2019 proposal to revise Article 7bis of the Constitution to entrench climate goals and principles, House of Reps, *Doc.* No. 54-3642-001
Other		
	Date	**Description**
F.7	2009	Declaration of the Walloon regional policy, "Shared energy for a sustainable, humane and caring society" (extract), 16 July 2009
F.8	2009	Belgian House of Representatives, Resolution in view of the United Nations Climate Change Conference in Copenhagen from 7 to 18 December 2009
F.9	2009	Flemish Parliament, Resolutie betreffende het nieuwe klimaatverdrag van Kopenhagen, 9 December 2009
F.10	2009	Court of Audit, "Federal Climate Policy - Implementation of the Kyoto Protocol" (without annexes), June 2009
F.11	2009	Minaraad, Nationaal Klimaatplan van België 2009 - 2012: stand van zaken, 19 February 2009
F.12	2009	Minaraad, Advies van 26 november 2009 over de Klimaattop in Kopenhagen, 26 November 2009
F.13	2009	Resolution of 3 December 2009 in view of the UN Climate Change Conference in Copenhagen from 7 to 18 December 2009, House of Representatives, Parl. Ord. sess. 2009-2010, No. 52 2263/002
F.14	2010	Minaraad, Advies over de klimaattop in Cancún, 28 October 2010
F.15	2011	Institutional Agreement on the Sixth State Reform, 11 October 2011
F.16	2014	Federal Council for Sustainable Development, Follow-up to the 2014 opinions, 31 December 2014
F.17	2014	Federal Council for Sustainable Development, Opinion on making Belgium's transition to a low-carbon society a reality in 2050, 3 June 2014
F.18	2016	Federal Council for Sustainable Development, Opinion on governance in climate policy, 4 July 2016
F.19	2017	Belgian Senate, Information report on the intra-Belgian decision-making process regarding the distribution of the climate effort with regard to climate objectives, 23 January 2007

F.20	2017	Federal Planning Bureau, December 2017 Federal Report "Making the Global Sustainable Development Goals a Reality."
F.21	2019	Declaration of the Walloon regional policy 2019-2024
F.22	2019	Joint policy statement of the Government of the Brussels-Capital Region and the College of the Joint Community Commission 2019-2024
F.23	2019	Flanders Regeerakkoord 2019-2024
F.24	2019	Proposal of 19 December 2019 for a resolution to reposition Belgium in the climate debate, House of Representatives, *Doc. Parl*, Ord. sess. 2018-2019, no. 54 3416/006
F.25	2019	Walloon Policy Statement 2019-2024, 9 September 2019

G. European legal documentation

	Date	Description
G.1	1996	European Commission, Press Release, "EU Climate Change Strategy - Council Conclusions", 1996
G.2	2007	Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Limiting Global Climate Change to 2 degrees Celsius. The way ahead for 2020 and beyond, COM (2007) 2 final, Brussels, 10 January 2007
G.3	2007	European Commission, *Green Paper presented by the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. Adapting to climate change in Europe: options for EU action*, Brussels, 29 June 2007, COM(2007) 354 final, cited as 'EC, Green Paper Climate 2007
G.4	2008	European Parliament, Resolution of 31 January 2008 on the assessment of the Bali Climate Change Conference
G.5	2008	European Economic and Social Committee, Opinion on the Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading system of the Community, July 2008
G.6	2009	Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions ("ESD": "Effort Sharing Decision")
G.7	2009	European Parliament, Resolution of 4 February 2009 on "2050: The future begins today - recommendations for a future integrated EU climate change policy (2008/2105(INI))

G.8	2009	European Commission, White Paper on Adaptation to Climate Change: towards a European framework for action, 1 erApril 2009

G.9	2009	Directive 2009/28/EC
G.10	2010	Communication from the Commission to the Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Analysis of options for moving beyond the 20% greenhouse gas reduction target and assessment of the risk of carbon leakage, No. Com(2010) 265, 26 May 2010
G.11	2011	European Commission, Communication from the European Commission, 2011 Report for Belgium, 7 June 2011, SEC(2011) 710 final
G.12	2011	Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Roadmap to a competitive low carbon economy by 2010 2050, COM (2011) 112 final, Brussels, 8 March 2011
G.13	2011	Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Energy Road Map to 2050, COM (2011) 885 final, Brussels, 15 December 2011
G.14	2012	European Commission, Communication from the European Commission, 2012 Report for Belgium, 30 May 2012, SWD(2012) 314 final
G.15	2013	European Commission, Communication from the European Commission, Report 2013 for Belgium, 29 May 2013, SWD(2013) 351 final
G.16	2014	European Commission, Communication from the European Commission, 2014 Report for Belgium, 5 March 2014, SWD(2014) 75 final
G.17	2014	Regulation (EU) No 662/2014 of the European Parliament and of the Council of 15 May 2014 amending Regulation (EU) No 525/2013 as regards the technical implementation of the Kyoto Protocol to the United Nations Framework Convention on Climate Change
G.18	2014	Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A framework for climate and energy action 2020-2030, COM (2014) 15 final, Brussels, 22 January 2014
G.19	2014	Commission staff working document. Executive summary of the impact assessment accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A policy framework for climate and energy in the period from 2020 up to 2030, SWD(2014) 16 final, Brussels, 22 January 2014
G.20	2015	European Commission, Communication from the European Commission, Report 2015 for Belgium, 18 March 2015, SWD(2015) 21 final/2
G.21	2016	European Commission, Communication from the European Commission, Report 2016 for Belgium, 26 February 2016, SWD(2016) 71 final

G.22	2017	European Commission, Communication from the European Commission, Report 2017 for Belgium, 1 March 2017, SWD(2017) 67 final/2

G.23	2018	Ciscar K.C., Feyen L., Ibaretta D., & Soria A. (coord.), *Climate impacts in Europe: final report of the JRC PESETA III project* (European Commission 2018).
G.24	2018	European Commission, Communication from the European Commission, Report 2018 for Belgium, 7 March 2018, SWD(2018) 200 final
G.25	2018	European Commission, European Commission Report 2018, "The EU and the Paris Climate Agreement: taking stock of progress at the COP in Katowice", 26 October 2018, COM(2018) 716 final
G.26	2018	Eurostat, Report "Smarter, greener, more inclusive? Indicators to support the Europe 2020 Strategy", Luxemburg, European Union, 2018
G.27	2018	European Commission, Commission Staff Working Document. Report 2019 for Belgium, Brussels, 27 February 2019, SWD (2019) 1000 final
G.28	2018	Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A clean planet for all. A strategic long-term European vision for a prosperous, modern, competitive and climate-neutral economy, COM (2018) 773 final, Brussels, 28 November 2018
G.29	2018	Regulation 2018/842
G.30	2018	Governance Regulation 2018/1999
G.31	2018	Directive 2018/2001
G.32	2019	European Commission, Communication from the European Commission, Report 2019 for Belgium, 27 February 2019, SWD(2018) 200 final
G.33	2019	European Commission, "Assessment of the draft National Energy and Climate Plan of Belgium", 18 June 2019, SWD(2019) 211 final
G.34	2019	European Commission, Commission recommendations of 18 June 2019 on Belgium's draft integrated national energy and climate plan covering the period 2021-2030, C(2019) 4401 final, SWD(2019) 211 final
G.35	2019	EUROFOUND, Energy scenario: Employment implications of the Paris Climate Agreement, Luxemburg, Publication office of the European Union, 2019
G.36	2019	European Parliament, Resolution of 14 March 2019 on climate change - A long-term strategic European vision for a prosperous, modern, competitive and climate-neutral economy in line with the Paris Agreement (2019/2582 (RSP))
G.37	2018	European Commission press release of 28 November 2018: "The Commission calls for a climate neutral Europe by 2050"
G.38	2019	European Parliament, Resolution of 28 November 2019 "on the climate and environment emergency" (2019/2930(RSP))

G.39	2019	European Commission, Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *The European Green deal*, Brussels, 11 December 2019, COM(2019) 640 final,
G.40	2019	EUROPEAN COUNCIL, Notes of the meetings of 12 December 2019

H. International legal documentation

UNFCCC

	Date	Description
H.1	1992	United Nations Framework Convention on Climate Change
H.2	1995	Berlin - Decision 3/CP.1
H.3	1997	Kyoto Protocol to the United Nations Framework Convention on Climate Change Climate Change
H.4	1999	Bonn - Decision 3/CP.5
H.5	2007	Bali Action Plan - Decision 1/CP.13
H.6	2007	Report of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol on its fourth session, held in Vienna from 27 to 31 August 2007
H.7	2009	Copenhagen Accord - Decision 1/CP.15
H.8	2009	Report of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol on its seventh session, held in Bonn from 29 March to 8 April 2009
H.9	2010	The Cancun Agreements - Decision 1/CP.16
H.10	2010	Cancun - Decision 9/CP.16
H.11	2010	The Cancun Agreements - Decision 1/CMP.6
H.12	2011	Durban - Decision 1/CP.17
H.13	2011	Durban - Decision 2/CP.17
H.14	2011	Durban - Decision 1/CMP.7
H.15	2011	Decision FCCC/SB/2011/INF.1
H.16	2012	Doha - Decision 1/CMP.8
H.17	2012	Report of the CMP.8, held in Doha from 26 November to 8 December 2012
H.18	2013	Warsaw - Decision 1/CP.19
H.19	2013	Warsaw - Decision 24/CP.19
H.20	2014	Lima - Decision 1/CP.20
H.21	2015	Paris Agreement

H.22	2015	Paris - Decision 1/CP.21
H.23	2018	Katowice - Decision 1/CP.24
Other		
	Date	**Description**
H.24	1969	Vienna Convention of 23 May 1969 on the Law of Treaties
H.25	1988	United Nations General Assembly, Resolution 43/53, Resolution on the Protection of Global Climate for Present and Future Generations, 6 December 1988
H.26	2007	Supreme Court of the US, Massachusetts vs EPA, 549 U.S. 497 (2007) - 02.04.2007
H.27	2009	Human Rights Council, Tenth session, Resolution 10/4, Resolution on Human Rights and Climate Change, 25 March 2009
H.28	2009	Human Rights Council General Assembly, Report of the Human Rights Council on its tenth session, 2009
H.29	2013	Committee on the Rights of the Child, General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), CRC/C/GC/15, 17 April 2013
H.30	2015	Oslo Principles 01.03.2015
H.31	2015	Oslo Principles 01.03.2015- Comment
H.32	2015	UNFCCC 2015, *Report on the Structured Expert Dialogue on the 2013-2015 review*
H.33	2017	Report of the Office of the United Nations High Commissioner for Human Rights, "Analytical study on the relationship between climate change and the full enjoyment of the rights of the child", A/HRC/35/13, 4 May 2017
H.34	2018	Report of the Special Rapporteur of the Human Rights Council, "*Report of the Special Rapporteur on the issue of human rights obligations relating to the means of enjoying a safe, clean, healthy and sustainable environment*", A/HRC/37/59, 24 January 2018
H.35	2019	Opening statement by Michelle Bachelet, United Nations High Commissioner for Human Rights, Forty-second session of the Human Rights Council, 9 September 2019

I. Belgian doctrine

	Date	**Description**
I.1	1998	Mahieu (M.) and van Drooghenbroeck (S.) , "La responsabilité de l'Etat législateur", *J.T.* , 1998

I.2	2009	L. LAVRYSEN, "Belgian federalism and environmental policy : consultation, cooperation and ... acting each for himself in a European context", *Rev. Dr. ULB*, 2009
I.3	2016	B. DEBECKER, "Morele schadevergoeding voor vereniging mag meer bedragen dan 1 euro", *De Juristenkrant,* 1 februari 2016
I.4	2016	J.F. PUTZ, "Quand le juge constitutionnel se prononcer sur le dommage moral d'une association environnementale. Observations under C.C. 21 January 2016, No. 7/2016", *Amén.*, 2016
I.5	2017	P. GILLAERTS, "De vergoeding van morele schade bij een collectief belang: ieder vogeltje zingt zoals het gebekt is?", *TBBR/RGDC*, 2017
I.6	2017	F. VANRYKEL, "Belgian climate policy, between autonomy and cooperation. What place for a common vision on a national scale?", R.B.D.C., 2017
I.7	2018	VAN YPERSELE (J.P.), *In het oog van de klimaatstorm*, Berchem, EPO, 2018.
I.8	2018	H. SCHOUKENS & A. SOETE, "Climate change litigation against states after 'Urgenda': the times they are a-changing?", *Amén.-Envir*, 2018/4-Special issue.
I.9	2018	M. EL BERHOUMI & C. NENNEN, "Climate change and federalism", *Amén*. 2018
I.10	2019	AUVRAY (F.), "Is the violation of a treaty a fault?", *J.T.*, 2019, n° 6756

J. International doctrine

	Date	Description
J.1	2013	A. ANCYGIER, "Poland and the European Climate Policy: an uneasy Relationship, ResearchGate, November 2013
J.2	2018	STEFFEN (W.) *et al*, "Trajectories of the Earth System in the Anthropocene," *Proceedings of the National Academy of Sciences of the United States of America (PNAS),* 14 August 2018.
J.3	2019	G. BOOGAARD & R. J. . SCHUTGENS, "Na ons de zondvloed," *JCDI*, 12 Juni 2019.

K. Belgian press

	Date	**Description**

K.1	2016	X, "In Belgium, the regionalization of the climate was a mistake," L'Echo, January 27, 2016, p. 9.
K.2	2018	J.P. van Ypersele, "De Vlaamse kust zal niet overleven zoals ze nu is. (interview)", *De Tijd*, 2 May 2018.
K.3	2018	S. DEVILLERS, "Climate targets torpedoed by Belgium: 'Stupefying and distressing', denounce NGOs", *La Libre*, 24 September 2018
K.4	2019	L. DE ROY, "Groen: "Elke dag een voetbalveld aan bos gekapt in Vlaanderen", VRT News, 11 Apr 2019.

K.5	2019	D. VAN REYBROUCK, 'Laatste kans voor de Klimaatwet', De Standaard, 20 March 2019, p. 34.
K.6	2019	X, "Climate: Belgium risks being flunked in the second sess' by Europe", *Le Soir*, 4 February 2019
K.7	2019	X, "Belgium will miss its climate targets," L'Echo, March 5, 2019
K.8	2019	X, "Nieuwe Klimaatminister Zuhal Demir (N-VA) bekent: Vlaanderen haalt klimaatdoelen niet", *De Morgen*, 9 October 2019
K.9	2019	M. MOORS, "Wie redt de beuk?", *Vrt Nws* 10 November 2019
K.10	2019	X., 'Hittegolf veroorzaakt hogere dierensterfte en terugval melk- en vleesproductie', Belga, 8 August 2019
K.11	2019	X., "Stijging zeeniveau bedreigt Belgische kust: 'Vlaanderen zal komende jaren moeilijke keuzes moeten maken'", *Knack,* 27 September 2019
K.12	2019	X., "Part of Belgium flooded by 2050?", *La Libre,* 30 October 2019, with update 31 October 2019
K.13	2019	D. MINTEN, "Diagnose: klimaatziek. Behandeling: urgent. Bijna 1.000 artsen vragen dat ons land zijn klimaatinspanningen dringend verhoogt. 'De klimaatverandering zal de gezondheidskosten doen toenemen.'", *De Standaard,* 10 oktober 2019
K.14	2019	D. BAERT, "België bij de slechte leerlingen voor hernieuwbare energie in Europa", *VRT*, 12 February 2019
K.15	2019	L. PAUWELS, "Belgische werkgelegenheid profiteert het meest van het Parijse klimaatakkoord", *VRT*, 13 February 2019
K.16	2019	W. De MAESENEER, "1.000 Belgische artsen waarschuwen in open brief voor gevolgen van klimaatopwarming", VRT, 10 October 2019

K.17	2019	X., "Sociaal-Economische Raad Vlaanderen: 'Schuif de klimaatpatat niet door'", Knack, 3 November 2019
K.18	2019	W. WINCKELMANS, "Vlaams klimaatplan kost tot 7 miljard euro per jaar", De Standaard, 10 december 2019
K.19	2019	A. DE GREEF, 'Getuigenverslag van een klimaatmisdaad. Schuldig verzuim of hoe het klimaat in 1989 niet gered werd', De Standaard Weekend Magazine 2019/19
K.20	2019	W. WINCKELMANS, "Vlaams klimaatplan kost tot 7 miljard euro per jaar", De Standaard, 10 december 2019
K.21	2019	A. WYNS, "Dit is wat de wereld beloofde op de New York Klimaattop", *MO* Magazine*, 4 oktober 2019
K.22	2019	M. de Meulenaere, 'Global warming: the planet is tipping towards an irreversible disaster, scientists warn', *Le Soir*, 28 November 2019

L. International press		
	Date	**Description**
L.1	2007	X., "Bush aide says warming man-made", *BBC,* 15 july 2007
L.2	2007	McKIBBEN(B.), "Warning on Warming", *The New York Review of Books,* 54 (4), 15 March 2007
L.3	2012	D. KEATING, "Poland block's EU's low carbon roadmap", Politico, 3 October 2012
L.4	2013	X., "Nicolas Stern: 'I got it wrong on climate change - it's far, far worse'", *The Guardian*, 26 Jan 2013
L.5	2016	A. Nelsen, "Norway pledges to become climate neutral by 2030", *The Guardian*, 15 june 2016
L.6	2017	P.T. BROWN & K. CALDEIRA, "Greater future global warming inferred from Earth's recent energy budget," *Nature*, 7 December 2017.
L.7	2018	X., "Grande-Synthe mayor Damien Carême attacks the state for inaction against climate change", *Le Parisien* 21 November 2018
L.8	2019	SCHERER (G.), "Climate Science Predictions Prove Too Conservative. Checking 20 years' worth of projections shows that the Intergovernmental Panel on Climate Change has consistently underestimated the pace and impacts of global warming," *Scientific American,* October 26, 2019 (originally published in *The Daily Climate*, December 6, 2012).

L.9	2019	X., "Oil and politics play a role in final wording of U.N. climate change report," *CBS News,* September 24, 2019
L.10	2019	X, "Alexandria Ocasio-Cortez: ''So they knew!'', *le Monde*, 1 erDecember 2019
L.11	2019	F. HARVEY, "*Latest data show steep rises in CO 2for seventh year. Readings from Hawaii observatory bring threshold of 450 ppm closer sooner than had been anticipated*", *The Guardian,* 4 June 2019
L.12	2019	D. Carrington, 'Climate crisis seriously damaging human health, report finds', *The Guardian*, 3 June 2019
L.13	2019	X., "Scientists shocked by Arctic permafrost thawing 70 years sooner than predicted. Ice blocks frozen solid for thousands of years destabilized. 'The
		climate is now warmer than at any time in last 5,000 years'", *The Guardian*, 18 June 2019
L.14	2019	T. EDWARDS *et al* , "Revisiting Antarctic ice loss due to marine ice-cliff instability", *Nature,* 2019
L.15	2019	S.A. KULP & B.H. STRASS, "New elevation data triple estimates of global vulnerability to sea-level rise and coastal flooding", *Nature,* 29 October 2019
L.16	2019	D. CARRINGTON, "Climate crisis: 11,000 scientists warn of 'untold suffering'", *The Guardian*, 5 November 2019
L.17	2019	X., "Parliament votes 55% emissions cut for 2030", *euractiv*, 18 March 2019
L.18	2019	C. Farand, "Guterres asks all countries to plan for carbon neutrality by 2050", Climate Home News, 22 July 2019
L.19	2019	B. DONMEZ, "UN: More than 60 nations vow to be carbón-free by 2050", *AA*, 23 September 2019
L.20	2019	X., "UN chief urges action to make Earth carbon neutral by 2050", *Indian Times*, 21 September 2019
L.21	2019	B. Lahn, "Climate neutrality the Norwegian way: Carbon trading?", *Cicero*, 17 September 2019
L.22	2019	J. TIMPERLEY, "Demark passes climate law to cut emissions 70% by 2030", *Climate Change News,* 6 December 2019

M. Belgian case law

	Date	Description
M.1	1987	C.E., asbl Inter-Environnement Wallonie, n° 27.955 of 20 May 1987
M.2	1997	C.E., asbl Front commun des Groupements de Défense de la Nature, n° 67.535 of 18 July 1997
M.3	1998	C.E., asbl Front commun des Groupements de Défense de la Nature, n° 74.635 of 25 June 1998
M.4	1998	C.E., asbl R.A.D.L.E.S., n° 71.253 of 28 January 1998
M.5	1998	C.E., asbl R.A.D.L.E.S., n° 74.719 of 29 June 1998
M.6	2000	C.C., judgment no. 76/2000 of 21 June 2000
M.7	2001	E.C., Bond Beter Leefmilieu vzw, n° 96.101 of 5 June 2001
M.8	2002	C.E., asbl Inter-Environnement Wallonie, n° 107.820 of 13 June 2002
M.9	2003	E.C., Bond Beter Leefmilieu vzw, n° 117.681 of 28 March 2003
M.10	2004	Cass. (1st ch.), March 4, 2004, R.G. C.03.0346.N and C.03.0448.N.
M.11	2004	Cass. 25 October 2004, *J.L.M.B., 2005*
M.12	2006	Cass. 28 September 2006, C.020570.F
M.13	2008	EC, Coomans and others, no. 187.998 of 17 November 2008
M.14	2008	Cass., 3 January 2008, R.G. n° C.06.0322.N
M.15	2010	E.C., judgment no. 203.430 of 29 April 2010
M.16	2010	Cass. 10 September 2010, *Pas.* 2010, No. 508
M.17	2012	Cass. 5 May 2011, *R.C.J.B.*, 2012, n°3
M.18	2013	C. Const. n°133/2013 of 10 October 2013
M.19	2014	Cass. 4 September 2014, C.12.0535.F
M.20	2017	Mons, 27 June 2017, J.L.M.B., 2018/9
M.21	2018	E.C., vzw bond beter leefmilieu Vlaanderen & co, no 241.048 of 20 March 2018
M.22	2018	C.E., asbl Greenpeace Belgium, n° 242.874 of 8 November 2018

M.23	2018	Ghent Court of Appeal, 22 March 2018, *T.M.R.*, 2019/2
M.24	2019	Civ. Brussels (4th ch.), 9 January 2019, J.L.M.B., 2019/9
M.25	2019	C. Const, 28 February 2019, n°37/2019

N. European case law

Case law of the Court of Justice of the European Union

	Date	Description
N.1	2009	CJEU, *Horvath* judgment (Grand Chamber), C-428/07, 16 July 2009,
N.2	2019	CJEU, Judgment C-636/18 (Commission v. France), 24 October 2019

Case law of the European Court of Human Rights

N.3	1994	Eur. D.H., *Lopez Ostra v. Spain* judgment, 9 December 1994
N.4	1998	Eur. D.H., judgment in *L.C.B. v. United Kingdom*, 9 June 1998
N.5	1998	Eur. D.H., *Osman v. the United Kingdom*, 28 October 1998
N.6	1998	Eur. D.H., judgment in *Guerra and Others v. Italy*, 19 February 1998
N.7	2004	Eur. D.H., *Taskin and others v. Turkey* judgment, 10 November 2004
N.8	2005	Eur. D.H., *Okyay v. Turkey* judgment, 12 July 2005
N.9	2005	Eur. D.H., *Fadeyeva v. Russia* judgment, 9 June 2005
N.10	2006	Eur. D.H., *Giacomelli v. Italy* judgment, 2 November 2006
N.11	2006	Eur. D.H., judgment in *Murillo Saldias and Others v. Spain*, 28 November 2006
N.12	2008	Eur. D.H., *Budayeva and Others v. Russia* judgment, 20 March 2008
N.13	2009	Eur. D. H., judgment *asbl Erablière v. Belgium*, 24 February 2009
N.14	2009	Eur. D.H., judgment in *Tatar v. Romania*, 27 January 2009

N.15	2009	Eur. D.H., *Branduse v. Romania*, 7 April 2009
N.16	2010	Eur. D.H., judgment in *Deés v. Hungary*, 9 November 2010
N.17	2011	Eur. D.H., *Oneryildiz v. Turkey* judgment, 30 November 2011
N.18	2011	Eur. D.H., judgment *Georgel and Georgeta Stoicescu v. Romania*, 26 July 2011
N.19	2011	Eur. D.H., judgment in *Dubetska and Others v. Ukraine*, 10 February 2011
N.20	2012	Eur. D. H., judgment in *Poirot v. France*, 15 March 2012
N.21	2012	Eur. D.H., judgment in *Di Sarno and Others v. Italy*, 10 January 2012
N.22	2012	Eur. D.H., judgment in *Kolyadenko and Others v. Russia*, 28 February 2012
N.23	2013	Eur. D.H., *Fabris v. France* judgment, 7 February 2013
N.24	2015	Eur. D.H., *Özel and others v. Turkey* judgment, 17 November 2015
N.25	2015	Eur. D.H., *Smaltini v. Italy* judgment, 24 March 2015
N.26	2019	Eur. D.H., *Cordella and others v. Italy* judgment, 24 January 2019

O. International jurisprudence

	Date	**Description**
O.1	1997	ICJ, Gabcikovo judgment, 25 Sept. 1997
O.2	2007	Supreme Court of the United States, Massachusetts et al. v. Environmental Protection Agency et al.
O.3	2015	Rechtbank Den Haag 24 juni 2015, Stichting Urgenda t. Staat der Nederlanden Cited as "Rechtbank Den Haag 2015 (Urgenda)"
O.4	2018	Case T-330/18 Carvalho and Others v Parliament and Council, lodged on 23 May 2018
O.5	2018	Gerechtshof Den Haag 9 oktober 2018, Staat der Nederlanden t. Stichting Urgenda Cited as "Gerechtshof Den Haag 2018 (Urgenda)"
O.6	2018	Judgment of the Supreme Court of Colombia of 5 April 2018
O.7	2018	Lahore High Court Green Bench, Ashgar Leghari v. Federation of Pakistan, 25 January 2018

O.8	2019	Land and Environment Court New South Wales, 8 February 2019, Gloucester Resourced Limited v. Minister for Planning
O.9	2019	Parket bij de Hoge Raad der Nederlanden 13 september 2019, Conclusie van de Procureur-Generaal, Staat der Nederlanden t. Stichting Urgenda Cited as "Conclusie Procureur-Generaal bij de Hoge Raad 2019 (Urgenda)"
O.10	2018	United States Court of Appeals for the Ninth Circuit, Juliana et al. v. USA, No. 17-71692 D.C. No. 6:15-cv-01517- TC-AA Opinion, March 7, 2018 Quoted as "US Court of Appeals for the 9th Circuit, *Juliana."*
O.11	2019	French Court of Cassation, judgment n°643 of 5 April 2019 (18-17.442)
O.12	2019	Hoge Raad Den Haag, 20 december 2019, Staat der Nederlanden t. Stichting Urgenda Cited as "Hoge Raad Den Haag 2019 (Urgenda)."

P. Miscellaneous

	Date	Description
P.1	1983	UN Documents, *Our Common Future, Gathering a Body of Global Agreements*, 1983
P.2	2011	US Energy Information - Carbon dioxide emissions from energy use per capita (metric tons of carbon dioxide per person) (current as of 2011)
P.3	2012	US Energy Information - Total Carbon Dioxide Emissions from Energy Use (millions of metric tons) (updated 2012)
P.4	2012	Germany, The National Sustainable Development Strategy - 2012 Progress Report (excerpt) of 7 June 2012
P.5	2013	Denmark, The Danish Climate Policy Plan - Towards a low carbon society (extract) of August 2013
P.6	2013	United Kingdom, Analysis of EU 2030 GHG Targets, 18 October 2013
P.7	2014	Statutes Klimaatzaak vzw 2014
P.8	2014	FPS Public Health, Safety of the Food Chain and Environment, Climate Survey 2013 (findings), May 2014

P.9	2015	UK Committee on Climate Change, Carbon Budgets and targets
P.10	2016	PBL, *Opties voor energie- en klimaatbeleid*, 2016
P.11	2016	FEDERAL MINISTRY FOR THE ENVIRONMENT, NATURE CONSERVATION, BUILDING AND NUCLEAR SAFETY (BMUB), Climate Action Plan 2050 - Principles and goals of the German Government's climate policy, Berlin, November 2016
P.12	2017	The Swedish climate policy framework, June 2017
P.13	2017	VVD, CDA, D66 & CHRISTEN-UNIE, *Vertrouwen in de toekomst - Regeerakkoord 2017-2021*, 10 oktober 2017
P.14	2019	FINNISH GOVERNMENT, *Inclusive and competent Finland - A socially, economically and ecologically sustainable society - Programme of Prime Minister Antti Rinne's Government 2019*, 6 June 2019
P.15	2019	Age distribution of co-applicants
P.16	2019	X., *De hete patat in het klimaatdebat. Aanbevelingsnota Stroomgroep Financiering*, Brussel, SERV, 16 oktober 2019
P.17	2019	X., *De hete patat doorgesneden. Achtergrondrapport - Financiering van de energie- en klimaattransitie*, Brussel, SERV, 16 oktober 2019
P.18	2019	National Inventory Report of Germany 2019 (period 1990-2017)
P.19	2019	UK National Inventory Report 2019 (period 1990-2017)
P.20	2019	Sweden's National Inventory Report 2019 (period 1990-2017)
P.21	2019	Denmark's National Inventory Report 2019 (period 1990-2017)
P.22	2019	COMMITTEE ON CLIMATE CHANGE, *Net Zero. The UK's contribution to stopping global warming*, London, May 2019
P.23	2019	'UK government commits to net zero CO2 emissions by 2050', *Tyndall Center*, 23 June 2019
P.24	2019	Non paper on Climate for the future of Europe, by France, Belgium, Denmark, Luxemburg, Netherlands, Portugal, Spain, Sweden, May 2019
P.25	2019	X., "German parliament approves climate protection plan", Reuters 9 December 2019
P.26	2019	CCPI (Climate Change Performance Index) Results 2019

P.27	2019	Summary conclusions of 16 December 2019 for Klimaatzaak vzw and co-applicants (Synthesis conclusions 2019)
P.28	2020	Statutes Klimaatzaak vzw 2020

Annex 99.v

Shipping

Délivrée à | Délivrée à | Délivrée à

le
€
CIV

le
€
CIV

le
€
CIV

Directory number

2023 / 8411

Date of pronouncement

30/11/2023

Role number

2021/AR/15gs
2022/AR/737
2022/AR/891

☐ Not available to recipient

6 court of appeal Brussels

Verdict

2^"e room F
civil affairs

Presented on

Not recordable

Because of

"The original plaintiffs", in the sense agreed between the parties in their conclusions of October 18, 2023, referred to below;

with advice from

1. [redacted] whose offices are at [redacted] and
2. [redacted]

all electing domicile in this cause at [redacted]

represented at the pleadings by [redacted]

Counter

"The original defendants" in the sense agreed between the parties in their submissions of October 18, 2023, referred to below, namely:

The BELGIAN STATE, represented by its Government, represented by the Minister of Energy, Environment and Sustainable Development, whose offices are located at 1060 BRUSSELS, avenue de la Toison d'Or, 87, bte 1,

respondent in cause 2021/AR/1589, appellant in cause 2022/AR/737,

represented by [redacted]

LA REGION WALLONE, represented by its Government, pursued and diligences of Mr Philippe HENRY, Vice-President and Minister of Climate, Energy, Mobility and Infrastructures and Mobility, whose offices are established at 5000 NAMUR, rue d'Harscamp, 22,

respondent in cause 2021/AR/1589, appellant in cause 2022/AR/891,

represented by [redacted]

THE FLEMISH REGION, represented by the Flemish Government, in the person of the Flemish Minister of Justice and Maintenance, Environment, Energy and Tourism, whose offices are located at 1210 BRUSSELS, Boulevard du Roi Albert ll 7,

respondent in case 2021/AR/1589,

represented by [redacted]

THE BRUSSELS-CAPITAL REGION, represented by its Government, represented by Mr Alain Maron, Minister of the Brussels-Capital Region Government, responsible for Climate Transition, Environment, Energy and Participatory Democracy, whose office is located at 1210 BRUSSELS, Boulevard Saint-Lazare, 10 (11th floor),

respondent in case 2021/AR/1589,

represented [redacted]

Having regard to the documents relating to the proceedings, and in particular

the judgment under appeal, delivered by the French-speaking Court of First Instance of Brussels on June 17, 2021, of which no writ of service has been produced;
the appeal petitions filed with the court clerk's office on November 17, 2021 for the ASBL Klimaatzaak (hereinafter "Klimaatzaak") and the persons mentioned in Appendix A to said petition (cause 2021/AR/1589), on May 30, 2022 for the Belgian State (cause 2022/AR/737) and on June 30, 2022 for the Walloon Region (cause 2022/AR/891); the order issued under article *1o9bis* of the Judicial Code on November 24, 2021, assigning the case to a chamber composed of three councillors;
the minutes of the hearing of January 13, 2022 in case 2021/AR/1589, which contain a pre-trial order based on article 747, § 2 of the Judicial Code;
the application for voluntary intervention filed on January 10, 2022 in the cause 2021/AR/1589 ;

the judgment delivered by the court on September 22, 2022, joining the cases entered on the general roll under numbers 2021/AR/1589, 2022/AR/737 and 2022/AR/891 and setting the schedule for preparation;
the rectifying judgment of September 22, 2022 delivered on September 29, 2022;
the summary submissions filed with the court clerk's office on March 31, 2023 for Klimaatzaak and all the persons listed i n Appendix A (hereinafter "the appellants in the main proceedings"), on March 31, 2023 for [redacted] on May 30, 2023 for the Belgian State, on June 29, 2023 for the Flemish Region, on June 30, 2023 for the Walloon Region and on June 30, 2023 for the Brussels-Capital Region. Patteuw, on May 30, 2023 for the Belgian State, on June 29, 2023 for the Flemish Region, on June 30, 2023 for the Walloon Region and on June 30, 2023 for the Brussels-Capital Region;
the parties' exhibit files.

TABLE OF CONTENTS

I. FACTS AND BACKGROUNDp . 7
A. Global warming: a brief review of current basic data p 7
B. Scientific reports used in the international fight a g a i n s t global warming p. 9
C. Developments in international commitments and in Belgium's domestic and European legal order as knowledge becomes available p. 11
1. Introductionp . 11
2. Commitment period 2008-2012p . 12
a) State of scientific knowledge at the time . 12
b) COP contributions between 2007 and 2012 p. 13
c) International and European commitments since the UNCAC Kyoto Protocol (1997) p. 15
d) Internal translation of commitments and results achieved p. 18
3. Commitment period from 2013 to 2020p . 20
a) State of scientific knowledge at the timep . 20
b) COP contributions between 2013 and 2020p . 22
c) International and European commitments p. 24
1) Doha Amendment p. 24
2) Paris Agreement p. 24
3) Translating these commitments at European level p. 25

d) Translating these commitments into Belgian domestic law and the results achievedp. 26

4. Commitment period after 2020 and up to 2050 p. 31
a) State of scientific knowledge at that timep . 31
1) The Sixth IPCC Report p. 31
2) UNEP reports p. 32
3) WMO reports p. 32
b) COP 26 and 27 contributionsp . 32
c) European commitmentsp . 33
d) Translation of objectives into internal order and expected results p. 35
1) *Measures taken at federal level* p. 35
2) Measures taken in5 the Brussels-Capital Region p. 37
3) Measures taken in the Flemish Region p. 38
4) Measures *taken in the Walloon Region* p. 38

N. THE PROCEDURE p.39
A. Retroactive effects of the procedure and demanzjes before *the* first judge p. 39
B. The corporate decision p. 44
C. The requests for degree of appeal, the interlocutory judgment of September 22, 2022 and the judgment of Corrigendum of September 29, 2022 p. 44

III. DISCUSSION AND DECISION OF THE COURT p. 54
A. Identifying the parties involved p. 54
B. Questions of admissibility and jurisdiction p. 56
1. Admissibility of appeals p. 56
2. Admissibility of voluntary interventions at appeal level p. 59
3. Power of jurisdiction p. 60
4. Admissibility of original actions p. 63
a) Principles applicable to the admissibility of jlegal action p. 64
b) Admissibility of Klimaatzaakp's claim . 65
c) Admissibility of applications from individualsp . 69

C. Examination of the means p. 71
1. The first plea: violation of articles 2 and 8 of the ECHR p. 71
a) The application of Articles 2 and 8 of the ECHR, particularly in environmental mattersp . 71
1) Article 2 of the ECHR p. 72
2) *Article 8 of the ECHR* p. 73
b) National judicial control, subsidiarity and margin of appreciation p. 75

c) The direct effect of Articles 2 and 8 of the ECHR and the separation of powers p. 78

d) A ca ion to the case in point p. 83
1ÿ *Preliminary remarks* p. 83
2ÿ Compliance with article 2 of the ECHR p, 86
- The risk involved p. 86
- Risk awareness p. 87
- The 2013-2020 period p. 88
- the 2021-2030 period p. 99
3) Compliance with article 8 of the ECHR p. 111

2. The second plea: violation of articles 1382 and 1383 of the former French Civil Code p. 112
p. 112

Introduction

a) principles applicable to civil liability p. 113
1) Fault, damage and a causal link p. 113
2) The victim's behavior p. 115
3) *The aquilian responsibility of public authorities* p. 116

b) Examination of alleged faults p. 119
1) *As for identifying the powers involved* p. 120
2) *On Belgium's limited capacity to fight global warming* p. 121
3) *The 2013-2020 period* p. 122
4) The 2021-2O30 period p.125
5) For both periods combined p. 128
6) Individualizing faults p. 129
7) Conclusion p. 131
c) As for the damage p. 132
d) As for the causal link p. 137
e) As for the appellants' conduct p. 140

D. Injunctions p. 141
1. Applicable principlesp . 141
a) Injunction and separation of powerssp . 141
b) Inionction and prohibition on the judge ruling by way of general provisionp . 144
c) Inionction and respect for the division of powers between the Federal State and the Regionsp . 144
d) iLon onction as a sanction for violation of articles 2 and 8 of the ECHRp . 146

e) Ini nct|on, as eration in kind of the damage causally linked to the faults committed and as a preventive measure against the occurrence of future damagep . 146
1) Introduction p. 146
2) The distinction between reparation in kind, cessation of unlawful action and preventive actionp . 147
2. Application of the principles to the case of espècep . 149

E. Requests for standby duty and document productionp . 151
1. As for the request for astreintes ancillary to the injunctionp . 151
2. As for the request to produce a document under penalty of a fine p. 155
F. Costs p. 155

I. FACTS AND BACKGROUND!

A. Global warming climate:brief reminder ofbasic datacurrently known

1. Human activities disrupt the climate through the emission of greenhouse gases (hereinafter referred to as "GHGs").
"GHGs come mainly from the combustion of fossil fuels (coal, oil, natural gas).

These GHGs accumulate in the atmosphere and re-emit the infrared radiation they emit towards the earth's surface, resulting in global warming, i.e. a gradual increase in the average annual temperature at the earth's surface.

The emissions of all GHGs are converted into CO2 equivalents according to their radiative effect and lifetime, so that they can be compared. For example, the warming power of methane is around 80 times greater than that of CO , over twenty years, but only 30 times greater over a hundred years, because it degrades more rapidly (its lifetime is around 12 years, whereas CO2 takes hundreds of years to dissipate).

[1] The court established this part on the basis of the exhibits filed by the parties and, where applicable, the translations proposed by them and not contested by the others.

The ocean, soils and vegetation absorb almost half of anthropogenic CO emissions, and these "carbon sinks" limit the greenhouse effect and global warming.

2. The link between GHG emissions and global average temperature warming and climate change has been gradually established by the Intergovernmental Panel on Climate Change (hereinafter "IPCC", see *below).*

   There is a linear relationship between the level of COM concentration in the atmosphere and the increase in temperature on Earth. The concentration of COM in the atmosphere is indicated by the abbreviation "ppm" (particles per million). COM concentration in the atmosphere has risen from 280 ppm in the 1950s to a current level of 419.47 ppm.

   This makes it possible to determine what is known as the *global* carbon budget*,* i.e. the total quantity of CO2 that can be present in the atmosphere in order not to exceed a certain global temperature threshold.

   The *residual* carbon budget takes into account the quantity of CO2 already present in the atmosphere and corresponds to the quantity of CO2 that can still be emitted to avoid exceeding a certain warming threshold.

   At present, average global warming has reached 1.1°C. This current warming is due to past GHG accumulations. The effects of current GHG emissions will be felt several decades from now.

   Beyond a certain threshold of warming, said to be dangerous, ecosystems can no longer adapt, food security disappears and sustainable economic development is no longer possible.

   It is now accepted that, in order to reduce the risks associated with climate change, average global warming should be kept below 1.5°C (with no or limited overshoot). Limiting global warming means limiting total cumulative anthropogenic CO2 emissions since pre-industrial times, i.e. staying within a total carbon budget.

   The IPCC's special report on warming limited to 1.5°C (discussed below, point 30) estimates the residual carbon budget at 420 GtCO/ (billion tonnes of COM, for a 2 in 3 chance of staying below 1.5°C) or 580 GtCO2 (for a 1 in 2 chance of staying below 1.5°C). In the latest IPCC report (AR6), this budget is revised downwards to 500 GtCOt for a 1-in-2 chance of staying below 1.5°C. In a scenario with two chances out of three, this budget would be, according to the appellants in the main proceedings, who are not disputed on this point, 400 GtCOt[2] .

3. Global warming is having an impact on the climate that varies from region to region. While average global warming is currently 1.1°C, it is around 1.9°C in Europe.

The court did not find this assessment in the AR6 synthesis, nor in the summary intended for political decision-makers.

In Europe, for example, we are already seeing an intensification of fires, droughts, heatwaves, extreme rainfall, storms (and floods), melting glaciers and rising sea levels.

Every rise in temperature presents aggravated risks and potential cascading effects. A warmer atmosphere may contain more water vapour, which also increases the greenhouse effect; similarly, fires destroy forests, which no longer play their role as carbon sinks.

Beyond a certain level of warming, tipping points may occur, i.e. phenomena involving abrupt and irreversible upheavals, themselves triggering cascading reactions that reinforce warming. Among the tipping points identified by the IPCC are the following:

the disappearance of the Greenland ice cap,
the disruption of major ocean currents, including the shutdown of the North Atlantic subpolar current that guarantees our temperate climate;
the disappearance of Arctic summer ice;

- the thawing of the permafrost layer at the bottom of tundra zones and the melting of permafrost layers on the seabed, where large quantities of methane (GHG) are stored, which will thus be released into the atmosphere;
the death of Arctic and warm-water coral reefs;
the desiccation of the Amazon region, which implies that the tropical forests of this area will be able to absorb less CO2and may even become a source of CO2 emissions.

As climate science progresses, it is becoming clear that the changes are faster and more severe than previously thought.

B. Scientific reports used in the international fight against global warming

4. On December 6, 1988, the United Nations General Assembly adopted Resolution 43/53 on the protection of global climate for present and future generations. In this resolution, the United Nations considered climate change to be a "*common concern of mankind",* and agreed that "*timely action* should *be taken to address climate change within a global framework*".

At the same time, the World Meteorological Organization (hereinafter "WMO") and the United Nations Environment Programme (hereinafter "UNEP") set up the Intergovernmental Panel on Climate Change (IPCC), a scientific intergovernmental body open to all members of the United Nations (hereinafter "UN") and WMO.

5. At regular intervals (every five to seven years), the IPCC produces reports assessing the state of knowledge on climate change. They are the main scientific input to the international climate negotiations taking place under the aegis of the United Nations Framework Convention on Climate Change (hereinafter "UNFCCC", discussed below in point 9).

The IPCC's mission is to examine and evaluate the most recent scientific, technical and socio-economic data published worldwide and useful for understanding climate change, with a view to making them available to policy-makers. According to the undisputed data provided by the Belgian State and the parties appealing in the main proceedings, the IPCC currently has 195 member states, including Belgium.

According to the parties' joint explanations, the preparation of each report begins with a so-called "scoping" meeting, during which the appointed experts prepare a work plan, which is then submitted to a "Panel" that decides, among other things, on the appointment of the experts who will be the authors of the report. These experts draw up a first version, which is then submitted to government representatives and other experts for review, as a report requires several readings before its final adoption.

Since 1990, the IPCC has published six assessment reports, each with three basic components (a component devoted to the physical principles of climate change, a component studying the impacts, vulnerability and adaptation to climate change of both socio-economic and natural systems, and a component dealing with ways of mitigating climate change).

These six reports are referred to by the following acronyms

- FAR *(First Assessment Report)* for the first report of 1990;
- SAR *(Second Assessment Report)* for the second report in 1995 ;
- TAR *(Third Assessment Peport)* for the third report in 2001;
- AR4 *\4th Assessment Report)* for the fourth report of 2007 ;
- AR5 *(Sth Assessment Report)* for the fifth report of 2013-2014 ;
- AR6 *(6th Assessment Report)* for the sixth report from 2021-2023.

The synthesis of the 6 "e evaluation cycle, with a summary for policy-makers, was recently published on March 20, 2023.

In addition to these reports, the IPCC also published special reports (SRs) in 2018 and 2019. On October g, 2018, the IPCC published a special report on the consequences of global warming of 1.5°C, to which the Court will return (see point 30 below).

6. For its part, UNEP has been tasked with drawing up annual reports on the gap between needs and prospects for reducing GHG emissions.

7. The WMO also publishes annual reports on the state of GHGs in the atmosphere.

C. Developments in international commitments and in the European and Belgian domestic order in line with the state of the art

1. Introduction

8. In addition to the UNFCCC, global climate governance is essentially based on the

1997 Kyoto Protocol;
Doha Amendment to the Kyoto Protocol (2012); Paris Agreement (2015).

In view of the timeframes set out in these texts, Belgium's international commitments can be divided into three chronological periods: from 2008 to 2012, from 2013 to 2020, and from 2021 to 2050.

For each of these commitment periods, the Court will successively examine the state of scientific knowledge on global warming, the contributions of the various Conferences of the Parties (hereinafter, "COPs") - i.e. the international *political* community's consideration of the climate problem, the *legal* (but not necessarily binding) commitments binding on Belgium at international and European level, and, finally, their implementation in our legal system and the results obtained, insofar as they are available.

First of all, we should briefly mention the convention that forms the basis of this climate governance, namely the UNFCCC.

9. The UNFCCC was signed at the Rio Earth Summit on May 9, 1992. It came into force on March 21, 1994 and, according to the appellants in the main proceedings, 197 States (196 countries and the European Union) are currently party to it. Belgium signed on June 4, 1992 and ratified on January 16, 1996.

The objective of the Convention is "to *stabilize, in accordance with the relevant provisions of the Convention, concentrations of GHGs in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system*" (Article 2).

Article 3 of the UNFCCC lays down the guiding principles for the measures to be taken by each Party to achieve the objective of the Convention, and in particular :

- the principle of common but differentiated responsibilities (PRCD), which takes into account the respective capacities of the Parties, and places developed countries in a position to
It is "*at the forefront of the fight against climate change and its harmful effects*" (article 3.1.);

- the precautionary principle, whereby lack of full scientific certainty is no excuse for postponing preventive measures (article 3.3).

This convention also establishes the publication of national inventories of anthropogenic emissions by sources and removals by sinks of all GHGs (article 4).

Under Article 4, the UNFCCC also sets out the commitments of the Parties, distinguishing between the obligations of States listed in Annexes I and II and those of States not listed. Annex I to the Convention groups together the "*developed countries*", i.e. the industrialized countries that were members of the OECD in 1992, as well as countries whose economies are in transition towards a market economy, notably Russia and several Eastern European countries. Belgium is included in this Annex I, as well as in Annex II, which groups together some of the members of Annex I, i.e. OECD members only.

Finally, Article 7 of the UNFCCC establishes the Conference of the Parties or "COP" as the supreme body of the Convention. Its role is to monitor the implementation of the UNFCCC, to determine whether the measures taken are sufficient to achieve the ultimate objective of the Convention, namely the prevention of dangerous climate change, and, within its mandate, to take the necessary decisions to promote the effective implementation of the Convention. For decision-making within the COPs, the consensus rule is applied as a matter of priority (article 15.3).

2. Commitment period from 2008 to 2012

a) <u>State of scientific knowledge at that time</u>

10. The IPCC reports of 1990 and 1995 revealed that there was still some uncertainty about the precise links between GHG emissions from human activities and the rise in global mean surface temperature.

In its 1990 report, the IPCC noted that emissions from human activities were significantly increasing the atmospheric concentration of GHGs: carbon dioxide (CO2), methane (CH4), chlorofluorocarbons (CFCs) and nitrous oxide (N20), but that, due to insufficient knowledge, its forecasts were subject to many uncertainties, particularly as regards the pace, scale and regional configuration of the predicted changes.

On page 5 of its 1995 (synthesis) report, the IPCC stated that, having noted clear signs of regional changes in certain extreme conditions and indicators of climate variability, it had not yet been possible to establish an unambiguous link between these changes and human activities.

11. Since 2001, the link between climate change and human activity has been clearly established.

In its 2001 synthesis report, the IPCC noted that, since the time of the

In the pre-industrial era, human activities increased atmospheric GHG concentrations, and most of the warming observed over the last fifty years is due to human activities (p. 4).

12. The 4th[e] IPCC report of 2007 marks a turning point in the evolution of knowledge on climate change. On page 5 et seq. of its synthesis report, the IPCC concluded that :

"Most of the rise in global average temperature observed since the middle of the 20th century is very probably attributable to the increase in anthropogenic GHG concentrations. It is likely that all continents, with the exception of Antarctica, have generally experienced marked anthropogenic warming over the past fifty years".

In particular, it is noted that human activities have *"very probably contributed to sea level rise in the second half of the 20th century", and* that "the rise in sea level in the second half of the 20th century is very probably due to human activities".
"These changes have "*led to an increase in the temperature of extremely hot and cold nights and extremely cold days",* have *"undoubtedly increased the risk of heat waves, the progression of drought since the 1970s and the frequency of episodes of heavy precipitation",* and that *"it is likely that anthropogenic warming over the last thirty years has played a significant role on a global scale in the observed evolution of many physical and biological systems*".

The report also stated that "*GHG emissions must peak and then decline for atmospheric concentrations of these gases to stabilize. The lower the stabilization level targeted, the faster the peak must be reached*" (p. 20: table).

This fourth report also set out scenarios for limiting the global rise in temperature, and in particular that, to limit warming to between 2°C and 2.4°C, the concentration of GHGs in the atmosphere must stabilize at a level of between 445 and 490 ppm CO2-eq, assuming that emissions peak between 2000 and 2015.

Finally, in the section on mitigating climate change, it is stated that, in order to limit GHG concentrations to 450 ppm CO2-eq., Annex I countries (including Belgium) should reduce their GHG emissions by 25 to 40% by 2020 (ch. 13, p. 776).

b) COP contributions between 2007 and 2012

13. As explained above, the COPs meet periodically and are responsible for monitoring the founding international treaty, the UNFCCC, by bringing together the States and the European Union that have ratified it (see V. LEFEBVE, "L'Affaire climat (Klimaatzaak). LEFEBVE, "L'Affaire climat (Klimaatzaak). Une mobilisation sociale en droit, science et politique", *Courrier Hebdomadaire,* CRISP, n° 2553-2554, 2022, p. 16).

14. At COP 13 in Bali in December 2007, the States Parties to the UNFCCC adopted the Bali Action Plan, whose preamble explicitly recognizes the need to reduce greenhouse gas emissions.

emissions to meet the UNFCCC's ultimate objective, and stresses the urgency with which this should be done, with reference to the conclusions of the IPCC's 4th"e assessment report "*that warming of the climate system is unquestionable, and that any delay in reducing emissions significantly reduces the chances of stabilizing emissions at lower levels and increases the risk of more severe climate change inCidences".*

The Bali Action Plan also refers, in a footnote, to ch. 13, p. 776, of the 4th"e IPCC report (i.e. that of 2007) which, in order to maintain a GHG concentration of 450 ppm CO2 eq. in the atmosphere, necessary to prevent warming of more than 2°C, prescribes a GHG emissions reduction of 25 to 40% by 2020 for Annex I countries.

In this respect, the Court notes that, in its earlier report of September 17, 2007, the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol on the work of its fourth session, held in Vienna from August 27 to 31, 2007, had already stressed that, "*to achieve the lowest stabilization level assessed under the work of the Intergovernmental Panel on Climate Change to date, and to limit potential damage accordingly, Annex I Parties should, by 2020, collectively reduce their emissions to between 25% and 40% below 1990 levels by the means that may be available to them to achieve these targets".*

15. Since 2009, there has been a growing awareness at international level of the need to move away from the objective of limiting global warming to 2º C towards one of limiting it to 1.5°.

16. In December 2009, at COP 15, the States Parties signed the Copenhagen Accord, which confirms that, *"in view of the scientific view that the global temperature increase should* be *limited to 2°C, we* need to *strengthen our long-term concerted action to combat climate change, on the basis of equity and with a view to sustainable development*".

This agreement refers to the recommendations of the 4th"e IPCC assessment report, updated in 2009, and calls for *"the implementation of this agreement to be subject to an assessment by ÎCÎ Ô 2015, particularly in the light of the ultimate objective of the Convention"*, thereby
"This would mean considering strengthening the long-term objective, taking into account the various elements provided by scientific research, particularly with regard to a temperature rise of 1.5°C".

17. In 2010, at COP 16, the member states adopted the Cancûn Agreements in which, with reference to the scientific conclusions of the IPCC, the Bali Action Plan and the Copenhagen Accord, the parties to the COP agreed that

- climate change has an impact on the effective exercise of human rights, particularly for the most vulnerable groups;

- According to scientific data, a sharp reduction in global GHG emissions is essential to keep the rise in average global temperature below 2°C compared with pre-industrial levels;
- it is necessary to consider reinforcing the global long-term objective in line with the most reliable scientific knowledge, particularly with regard to a global average temperature rise of 1.5°C.

In the same decision, the parties to the Kyoto Protocol recognized that the contribution of Working Group III of the 4th"e IPCC Assessment Report indicated that achieving the minimum levels determined by the International Panel on Climate Change required Annex 1 countries as a group to achieve GHG emission reductions of -25-40% by 2020 compared to 1990 (Preamble to Decision 1/CMP.6, p. 3).

18. COP 17 in Durban in 2011 noted *the "serious concern"* of States over "the *significant gap between the combined effect of the Parties' mitigation commitments for annual global GHG emissions by 2020 and the global emissions profiles that provide a reasonable prospect of containing the rise in global average temperature to below 2°C or 1.5°C above pre-industrial levels".*

The preamble to this COP expressly states that the objective of Annex I countries is to reduce their total emissions by at least 25-40% below 1990 levels by 2020 (Preamble to decision 1/CMP.7, p. 2).

At the end of this COP, it was decided to launch a process to develop a protocol, other legal instrument or mutually agreed text with legal force under the UNFCCC, to be carried out within the framework of a subsidiary body under the Convention known as the Ad Hoc Working Group of the Durban Platform for Enhanced Action.

c) The commitments made at international and European level since UNFCCC

- *The Kyoto Protocol (1997)*

19. At the first meeting of the Conference of the Parties in Berlin in 1995, the representatives of over 120 countries that had already ratified the UNFCCC felt that the commitments set out in Article 4.2a and b were not sufficient to achieve the objectives set by the UNFCCC. A negotiation process was therefore set in motion, culminating in the adoption in 1997 of the Kyoto Protocol, which was signed at COP 3 on December 11, 1997, but did not come into force until February 16, 2005.

In it, the Annex I countries, including Belgium, committed to reducing their GHG emissions over a five-year period, from 2008 to 2012.

Article 3.1 of the Protocol provides that

"The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the GHGs listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their total emissions of these GHGs by at least 5% below 1990 levels in the commitment period 2008 to 2012.

Article 4 of the Protocol provides for the possibility of the Parties jointly fulfilling the commitments set out in Article 3.

To ensure a degree of flexibility, so-called flexibility mechanisms have been introduced, including the possibility for countries with reduction targets to participate in emissions trading to meet their commitments under Article 3 (Article 17).

20. Belgium has been a party to the Kyoto Protocol since April 29, 1998, as has the European Union.

    On the domestic front, the Kyoto Protocol has been the subject of assent legislation at both federal and regional level[3] .

    Annex B of the Protocol set the Belgian target at -8% GHG emissions by 2012, compared with the 1990 reference year. Annex B set the same target for the European Union at -8% below 1990 levels by 2012.

21. The European Union, making use of the option provided for in Articles 3.1 and 4 of the Kyoto Protocol, adopted Decision 2002/358/EC, which set a global GHG emissions reduction target of 8% below 1990 levels by 2012, while Belgium's target for the 2008-2012 period was reduced to -7.5%. This target has replaced, for Belgium, the 8% target set out in the Kyoto Protocol, as stated in article 4.5 of the said Protocol. In accordance with article 4.6 of the Protocol, only if the European Union's joint target is not reached does Belgium again become responsible for the level of its emissions set by the Protocol.

22. On October 13, 2003, Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the European Union was adopted.

Cf. the Law of September 26, 2001 assenting to the Kyoto Protocol to the United Nations Framework Convention on Climate Change, and Annexes A and B, done at Kyoto on December 11, 1997; the Ordinance of the Brussels-Capital Region of July 19, 2001 assenting to the Kyoto Protocol to the United Nations Framework Convention on Climate Change, and Annexes A and B, done at Kyoto on December 11, 1997; the decree of the Flemish Region of February 22, 2002 assenting to the Kyoto Protocol to the United Nations Framework Convention on Climate Change, a n d to Annexes A and B, done at Kyoto on December 11, 1997; the decree of the Walloon Region of March 21, 2002 assenting to the Kyoto Protocol to the United Nations Framework Convention on Climate Change, and to Annexes A and B, done at Kyoto on December 11, 1997.

Unlike international mechanisms, the European system distinguishes between the management of GHG emissions by sector of activity.

For example, the European Union has set up a GHG emissions trading scheme, known as the Emission Trading System (ETS), under which companies are allocated emission rights (or allowances) that they can trade with each other. The aim of this system is to reward the environmental efforts of these companies, which can sell their unused allowances.

In the sectors not included in this trading system, or "non-ETS" sectors (transport, construction, agriculture and part of the energy and industry sectors), each member state has an emissions quota which it cannot exceed.

In its communication of January 10, 2007, the European Commission proposed that "*the EU* should *set itself the objective, within the framework of international negotiations, of reducing greenhouse gas (GHG) emissions from developed countries by 30% (compared with their 1990 levels) by 2020",* such an effort being considered "*necessary to limit the rise in global temperatures to 2 degrees Celsius "*.*

In 2007, the European Union made a commitment to reduce its GHG emissions by 20% below 1990 levels by 2020 (Presidency conclusions of the Brussels European Council of March 8-9, 2007, point 32). The European Union also proposed a 30% reduction in GHG emissions from 1990 levels by 2020, "*provided that other developed countries commit themselves to comparable emission reductions and that economically more advanced developing countries contribute adequately according to their responsibilities and respective capabilities" (Ibid.,* point 31).

On January 31, 2008, the European Parliament adopted a resolution which "*recalls that industrialized countries, including those which have not yet ratified the K y o t o Protocol, have a leading role to play in the global fight against climate change and must commit to reducing their emissions by at least 30% by 2020 and between 60% and 80% by 2050 compared to 1990*" (Resolution of January 31, 2008 on the outcome of the Bali Conference on Climate Change (COP 13 and COP/MOP 3, OJ C 68 E of 21.3.2009, p. 13).

On December 17, 2008, the European Parliament adopted the 2013-2020 Climate and Energy Package, which aims to enable the European Union[5] to reduce its GHG emissions by 20% compared to 1990 levels by 2020 (this reduction could rise to 30% in the event of an international agreement).

4 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Limiting Global Climate Change to 2 degrees Celsius. The way ahead for 2020 and beyond, COM(2007) 2 final, Brussels, January 10, 2007.

As was the case for the first commitment period, the European Union and the Member States have chosen to jointly meet their quantified GHG emission limitation or reduction commitments for the second commitment period.

To this end, the European Union has adopted .

- Directive 2009/29/EC amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading system of the Community, setting the European Union's effort at a -21%[6] reduction in its greenhouse gas emissions in 2020 compared with 2005, for the ETS sector; paragraph 6 of the preamble to this Directive reads as follows: "*In order to increase the degree of certainty and predictability of the Community scheme, it is appropriate to adopt provisions aimed at increasing the contribution of the Community scheme to the achievement of an overall reduction of more than 20%, in particular with a view to the target of 30% by 2020 set by the European Council, this level of reduction being the one considered scientifically necessary to avoid dangerous climate change*";
- the decision on effort sharing between member states (non-ETS) (decision 406/2009/EC); this decision defines national targets for 2020 for reducing GHG emissions in non-ETS sectors; for Belgium, the target is -15%.
  % in 2020 compared to 2005 levels.

d) Internal translation of commitments and results achieved

23. In Belgium's internal legal system, the distribution of climatic competencies is apprehended through multiple exclusive competencies, under the responsibility of different authorities.

    In order to guarantee compliance with Belgium's climate commitments and to articulate cooperation between the federated authorities, multiple forms of cooperation have been organized, notably through cooperation agreements, whether mandatory or concluded on an optional basis, or through concertation and cooperation bodies in climate matters (see C. ROMAINVILLE, "Le fédéralisme coopératif belge et sa pratique en matière climatique", *Revue belge de droit constitutionnel*, 2022/1-2, spec. p. 91).

24. Article 92bis §§2 to 4undecies of the Special Act on Institutional Reform sets out the areas (some of which are climate-related) in which a cooperation agreement must be concluded. However, the Special Act contains no specific obligation to cooperate in the fight against climate change. However, in a ruling dated June 14, 2012 (no. 76/2012), the Constitutional Court completed this list of mandatory cooperation agreements by adding cooperation on greenhouse gas emissions linked to air navigation. A number of structures have been set up to promote practical cooperation between the various levels of government.

[6] Recital 5) states that: "*In order for the Community to meet its commitment to reduce GHG emissions by at least 20% below 1990 levels in economically acceptable conditions, the emission allowances allocated to these installations should be 21% below their 2005 emission levels by 2020".*

Pursuant to article 141 of the Constitution, article 31 of the Ordinary Act of August 9, 1980 on institutional reforms established a Consultation Committee, responsible for consultation between the various levels of government. Pursuant to article 31b/s of the same Act, this Committee has set up a number of interministerial conferences, each dealing with a specific policy area, including the Conférence Interministérielle pour l'Environnement (CIE), to promote consultation and cooperation between the State, the Communities and the Regions.

On the climate front, the National Climate Commission (CNC) was set up to ensure that Belgium's commitments to reduce GHG emissions at European and international level are met. Organized by the cooperation agreement of November 14, 2002 between the Federal State, the Flemish Region, the Walloon Region and the Brussels-Capital Region, supplemented by a cooperation agreement of February 19, 2007 between the federal authority and the Regions on the implementation of certain provisions of the Kyoto Protocol, the CNC's mission includes preparing a National Climate Plan (NCP), submitting it to the CIE (see *above)* and monitoring its implementation.

25. During the first commitment period, climate policy was the subject of several cooperation agreements, including that of November 14, 2002 between the Federal State, the Flemish Region, the Walloon Region and the Brussels-Capital Region concerning the establishment, implementation and monitoring of a National Climate Plan, as well as the preparation of reports, within the framework of the UNFCCC and the Kyoto Protocol.

26. In December 2008, following the work of the CNC, a National Climate Plan 2009-2012 was drawn up. This Plan is based on policies and measures developed by each of the four decision-making bodies.

The National Climate Plan has been the subject of fierce criticism. In its opinion of February 19, 2009, Minaraad (the Flemish Council for the Environment and Nature) stressed the limited and unclear nature of the National Climate Plan, and insisted on the need for a more coordinated and concerted Belgian strategy between the federal and federated entities (Exhibit F.11 of the appellants in the main proceedings).

In a report adopted on May 20, 2009 and transmitted to the House of Representatives in June 2009, the Court of Audit noted that the National Climate Plan "does *not meet the standards of a plan, is not a political tool"* and that "[i]*t is a rod//icor/on of regional climate plans, COmplëtëe par des mesures fédérales*", adding that "*no guiding character emanates from the plan"* (Exhibit C.4 of the appellants in the main proceedings; on the criticism of this report, see also F. VANRYKEL, "La politique belge en matière de climat, entre autonomie et coopération. Quelle place pour une vision commune à l'échelle nationale", *R.B.D.C.,* 2017, p. 238).

27. Subsequently, the Belgian federal and regional authorities declared that they would take more ambitious binding measures than those resulting from the Kyoto Protocol.

In its declaration of Walloon regional policy on July 16, 2009, the Walloon Parliament stated that "*the objectives set by the European Union to reduce greenhouse gas emissions by 20% by 2020 (or by 30% in the event of an international agreement) compared with 1990 levels are commendable but insufficient;* that Europe *'must look further ahead, and so must Belgium and Wallonia' ;* that, "*in the event of an international agreement, the Government will ask Belgium to advocate that the European target be raised to 40%*"; and that the Walloon Government *"undertakes to pursue, in the dynamic initiated by the Air-Climate Plan and the Plan for Sustainable Energy Management, a strategy that will enable us to reduce our emissions by 30% by 2020 and by 80-95% by 2050. This must be part of a concerted Belgian and European approach.*

At federal level, on December 3, 2009, the House of Representatives passed a resolution in the run-up to the Copenhagen COP, calling on the federal government to support, at international and European level, the fact that the targets to be adopted must take account of the recommendations of the 4th IPCC report, namely that industrialized countries should collectively reduce their GHG emissions by 25-40% by 2020 and by 80% by 2050, and that the European Union could decide to move from 20% to 30% if the efforts of other developed countries were comparable and the contributions of developing countries were adequate.

On December 9, 2009, the Flemish Parliament passed a resolution stating that "*the precautionary principle implies that for the group of developed countries, reduction targets of 25-40% by 2020 compared to 1990 and at least 80-95% by 2050 compared to 1990 are necessary*".

28. As explained above, the Belgian target for the period 2008-2012 was to reduce GHG emissions by 7.5% compared to 1990 levels. This commitment was to reduce GHG emissions from 145.729 Mt CO2 eq. in 1990 to 134.799 MT as an annual average for the period 2008-2012.

However, it is undisputed that, taking into account data for the five years of the commitment period (2008 to 2012), Belgium has reduced its emissions by an average of 14% (on an annual basis) compared with the 1990 baseline[7] , so that its targets, as defined at European level and in application of the Kyoto Protocol, have been met.

3. Commitment period from 2013 to 2020

a) <u>State of scientific knowledge at that time</u>

[7] The GHG emission reduction figures cited by the Belgian government can be found on p. 13 of Belgium's Greenhouse Gas Inventory (1990-2012) dated April 1S, 2014.

29. In its fifth report of 2013-2014 (p. 17 and 20 of the Summary for Policymakers), the IPCC noted that "*the influence of human activities has been detected in the warming of the atmosphere and ocean, changes in the global water cycle, the retreat of snow and ice, the rise in global mean sea level, and changes in certain climate extremes";* that there was *"greater certainty on this subject since the Fourth Assessment Report", and* that it was "*extremely likely that human influence is the main cause of the warming observed since the middle of the 20th century*". According to the IPCC, by the end of the 21st century, global surface temperatures will probably have risen by more than 1.5°C compared with the period between 1850 and 1900 in most scenarios, and by more than 2°C in some scenarios.

    He concludes: *'Most of the characteristics of climate change will persist for many centuries even if CO2 emissions are stopped. The inertia of climate change is considerable, on the order of several centuries, and is due to past, present and future Co2 emissions".*

30. As mentioned above, on October 8, 2018, the IPCC published a special report on global warming limited to 1.5 ° C, whose conclusions are essentially as follows:
    - Human activities have already caused global warming of approximately 1º C above pre-industrial levels;
    - Anthropogenic global warming is currently increasing by 0.2° C per decade due to past and current emissions;
    - At current rates, global warming is likely to reach 1.5°C between 2030 and 2052;
    - the warming caused by anthropogenic emissions from the pre-industrial period to the present day will persist for centuries, if not millennia;
    - Anthropogenic emissions to date are unlikely to cause global warming of 1.5°C on their own;
    - climate-related risks are greater for global warming of 1.5°C than for current warming, but less than for global warming of 2°C.

    The 2018 special report concludes that limiting global warming to 1.5°C (with no or minimal overshoot) implies reducing global GHG emissions by around 45% (between 40% and 60%) by 2030 compared with 2010, and reaching net zero emissions around 2050. It also concludes that, to limit warming to 2º C, global GHG emissions need to fall by around 25% (between 10 and 30%) by 2030 and reach net zero emissions by 2070.

    The IPCC also points out in its special report that meeting the commitments made under the Paris Agreement will not be enough to limit global warming to 1.5°C. Thus, it points out, to avoid overruns and dependence on future large-scale deployment of atmospheric CO2 absorption, global CO2 emissions must begin to decline well before 2030.

The IPCC has also published a special report on land use and another on the ocean, cryosphere and climate change in 2019.

31. During the period under review, UNEP also produced a number of reports examining the gap between needs and prospects for reducing GHG emissions.

In its 2018 report (executive summary, p. 1), UNEP noted that the current commitments expressed in the NDCs (Nationally Determined Contributions) are insufficient ; that, if the ambitions of the NDCs are not raised before 2030, it will become impossible to meet the 1.5°C target and that, for the countries of the world to be able to limit global warming to 2º C and 1.5° C by following a least-cost evolution profile, global GHG emissions in 2030 must be around 25 and 55 percent lower respectively than in 2017.

In its 2019 report, UNEP noted that "*GHG emissions continue to rise despite warnings from the scientific community and commitments from governments*" (p. 4); that "*it is necessary to significantly strengthen the NDCs in 2020. Countries need to triple the level of ambition of their NDCs to reach the target of well below 2°C, and they need to more than quintuple this level to reach the target of 1.5°C*", and that *"strengthened action by G20 members will be essential t o the global effort to reduce emissions"* (p. 10).

32. In its 2020 report, UNEP also noted that, "*although the COVID- 19 pandemic will lead to a drop in emissions in 2020, this will not bring the world closer to the Paris Agreement target of limiting global warming to well below 2º C* and *continuing to aim for a 1.5° C increase over the course of this century*".

33. The WMO also issued several reports during this period. Its reports indicate a continuing rise in the concentration of CO2 in the atmosphere (the higher the concentration, the greater the risks associated with climate change, see point 2 above): from a level of 405.5 +- 0.1 ppm in 2017, we have moved on to a level, in 2020, of 413.2 +- 0.2 ppm.

b) <u>COP contributions between 2013 and 2020</u>

34. At the COP in Doha in 2012 (COP 18), the Kyoto Protocol was amended: the new year B provided for GHG reductions for the EU of 20% by 2020 compared with 1990, with a commitment to increase this target to -30% if other developed countries commit to doing the same. It was also decided that each Annex I Party would revise upwards its commitments for the period 2013-2020 no later than 2014, it being specified that the Party concerned may lower the percentage listed in Annex B for its quantified emission limitation and reduction commitment, with a view to achieving an overall reduction in GHG emissions by Annex I Parties of at least 25% to 40% below 1990 levels by 2020 (Preamble to decision 1/CMP.8, p. 3, §7).

In Warsaw in 2013 (COP 19), it was noted that warming of the climate system was unequivocal and that, since the 1950s, many of the changes observed were unprecedented over decades, even millennia. The Parties warned that "*climate change represents an urgent and* potentially *irreversible threat to human societies, future generations and the planet, that continued GHG emissions will lead to further warming and changes in all components of the climate system, and that limiting global warming will require substantial and sustained reductions in GHG emissions*".

35. The need for a 25-40% reduction in GHG emissions by 2020 compared with 1990 was reiterated.

36. In Lima in 2014 (COP 20), the States once again expressed their "*deep concern*" about the significant gap between the cumulative effect of the Parties' GHG mitigation commitments for 2020 and a "*reasonable prospect of containing the rise in global average temperature to below 2°C or 1.5°C above pre-industrial levels*". The target of a 25-40% reduction in GHG emissions by 2020 compared with 1990 levels was again reiterated at[9] .

37. An expert dialogue process has also been launched in preparation for the Paris Climate Summit (or "COP-21") in 2015, called the Structured Expert Dialogue, or "SED".

In this regard, the SED report of May 4, 2015 stated in particular (according to the uncontested free translation of the appellants in the main proceedings; footnote 236; p. 83 of Iheir summary conclusions) that the threshold of 2º C was to be considered "*as an ultimate threshold*" ;
This is "a defensive line that must be rigorously defended, although less warming would be preferable", while limiting global warming to below 1.5°C *"would imply several benefits approaching a safer guardrail",* avoiding or reducing *"risks, notably to food production or to unique and threatened systems such as coral reefs or many parts of the cryosphere, including the risks of sea-level rise".*

38. The court will detail below the adoption, at the COP 21 held in Paris, of the Paris Agreement, which came into force on November 4, 2016. It should be noted, however, that the Bali Plan target (-25-40%) was ratified[10] . COP 21 also invited the IPCC to present the special report referred to above on the consequences of global warming in excess of 1.5°C above pre-industrial levels and related profiles.

---

[8] Decision 1/CP.19, §4, c) which invites each country to the Kyoto Protocol to review its quantified emission limitation or reduction commitment for the second commitment period in accordance with §7 of decision 1/CMP.g, which itself refers to the -25-40% reduction of the Bali Plan.
Decision 1/CP.20, p. 4, §18, which refers to Doha Decision 1/CMP.8 by reference to §4 of Warsaw Decision 1/CP.19.
[1] Decision 1/CP.21, p. 17, no. 105, c), which refers to Doha Decision 1/CMP.8 by reference to § 4 of Warsaw Decision 1/CP.19.

39. Following the Paris AccoFd, at COP 24 in Katowice in December 2018, the Conference of the Parties adopted the "Paris Rulebook", i.e. the guide to practical implementation of the Paris Agreement.

40. On September 23, 2019, a climate summit was held in New York. On this occasion, 59 countries (out of the 195 signatories to the Paris Agreement) pledged to raise their GHG emissions reduction targets for 2020. In addition, 66 countries (including Belgium) pledged to achieve "net zero emissions" by 2050.

41. At COP 25 in Madrid (December 2019), the Parties recognized the role of the IPCC in providing scientific input to inform the Parties in strengthening the global response to the threat of climate change. There, they also reaffirmed "*the urgent need to close the significant gap between the global effect of Parties' mitigation efforts in terms of annual global GHG emissions by 2020 and aggregated emission pathways consistent with an increase in global average temperature well below 2º C above pre-industrial levels, and to continue efforts to limit temperature increase to 1.5° C above pre-industrial levels".*

c) International and European commitments

1) Doha Amendment

42. At the close of COP 18 in Doha on December 8, 2012, the Parties to the Kyoto Protocol adopted an amendment to the Protocol that sets a second commitment period from 2013 to 2020 to achieve a total reduction in GHG emissions from Annex I Parties of 18% below 1990 levels by 2020.

This amendment also sets Belgium's target at a 20% reduction in GHG emissions compared with 1990 by 2020. The federal state and the three regions gave their assent to this amendment and Belgium signed it on November 14, 2017. The European Union signed on December 21, 2017.

However, the amendment did not enter into force until December 31, 2020, unless the required number of ratifications was reached earlier.

2) Paris Agreement

43. During the second commitment period, COP 21 was held on December 12, 2015 in Paris. The member states of the UNFCCC adopted the Paris Agreement, which came into force on November 4, 2016. This text is not simply a supplement to the UNFCCC but a fully-fledged international treaty, which has profoundly renewed the terms of the international community's climate commitments (on this treaty, see.

V. LEFEBVE, "L'Affaire climat (Klimaatzaak). Une mobilisation sociale entre droit, science et politique", *op. cit.* p. 16; D. MISONNE, "L'ambition de l'Accord de Paris sur le changement climatique. Ou comment, par convention, réguler la température de l'atmosphère terrestre?", *Amén.,* 2018, liv. 4, pp.11 and 12).

This agreement was signed by Belgium and the European Union on April 22, 2016. As this is a mixed treaty, once the assent of the Community, Regional and Federal Parliaments had been obtained, Belgium was able to deposit its ratification with the UN on April 6, 2017 (see B. GORS, M. KAROLiNsKi and F. DE MUYNCK, "Title 2. L'atmosphère et le climat", in *Memento de l'environnement (Régions wallonne et bruxelloise),* 2023, p. 673).

Article 2 of the Paris Agreement includes measures "*to strengthen the global response to the threat of climate change"*, such as containing "*the increase in global average temperature to well below 2°C above pre-industrial levels, and continuing efforts to limit the increase in temperature to 1.5°C above pre-industrial levels, on the understanding that this would significantly reduce the risks and impacts of climate change".*

Under Article 4 of the Agreement, the Parties undertake, with a view to achieving the long-term temperature objective set out in Article 2, in particular to seek to reach the global cap on GHG emissions as soon as possible ; to rapidly reduce peak GHG emissions *'in accordance with the best available scientific information, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of GHGs in the second half of the century, on the basis of equity, and in the context of sustainable development and poverty alleviation*', and to determine individually and voluntarily their Nationally Determined Contributions (NDCs).

The agreement does not therefore set any mandatory emission reduction quotas, and allows countries to define their own level of ambition. However, as noted by the first judges, decision 1/CP.21 annexed to the Paris Agreement (p. 4/40, § 17) stated that "*emission reduction efforts significantly beyond those associated with the projected nationally determined contributions will be required to contain the global temperature increase below 2°C compared to pre-industrial levels by reducing emissions to 40 gigatonnes, or below 1.5°C compared to pre-industrial levels by reducing emissions to a level to be defined in the special report referred to in paragraph 21 below".*

3) Translating these commitments at European level

44. In addition to the arrangements described above (points 21 to 22), the Court notes that in 2011, the European Commission produced two discussion papers which sought to develop a perspective for climate policy up to 2050 ("Roadmap to a competitive low-carbon economy by 2050" and "Energy roadmap to 2050"). The first document laid the groundwork for a

emissions from the European Union: by 2050, a reduction of 80 % compared to 1990 would be achieved by a reduction of 40% in 2030 and 60% in 2040.

On October 24, 2014, the Council of the European Union adopted an initial "Energy-Climate Package 2030" setting four general objectives for 2030, including in particular a binding reduction target for the European Union of at least 40% compared to 1990 for GHG emissions within the territory of the European Union. These targets have been translated into various legal instruments, as follows

- ETS sectors: -43% (versus 2005) ;
- non-ETS sectors: - 30% (compared to 2005).

In addition, to implement the "Clean Energy for All Europeans (2030)" package, the European Union has adopted the following measures

- Regulation (EU) 2018/842[11] , which concerns non-ETS sectors and imposes binding annual GHG emission reductions on member states, in principle linear, which must result in a set reduction amount by 2030; for Belgium, the reduction to be achieved by 2030 was -35% compared with 2005 levels (Annex I of the Regulation);
- Regulation (EU) 2018/1999[12] of the European Parliament and of the Council of December 11, 2018 on the governance of the energy union and climate action, which came into force on December 24, 2018 and requires each of the Union's member states to implement climate governance based on integrated national energy and climate plans (INECPs).

On December 31, 2018, Belgium sent the European Commission its draft National Energy-Climate Plan (2021-2030) (hereinafter, "the NECP") and submitted its final NECP on December 31, 2019 (see points 64-65 below). It follows from the judgment under review that this plan was the subject of a critical opinion issued by the European Commission on October 14, 2020.

d) <u>The translation of these commitments into Belgian domestic law and the results obtained</u>

45. The special law of January 16, 1989 on the financing of the Communities and Regions was amended in 2012 to provide that a Royal Decree deliberated by the Council of Ministers, after agreement by the governments of the Regions and on the basis of a proposal from the National Climate Commission, will define a multi-year trajectory of GHG emission reduction targets for buildings in the residential and tertiary sectors, regardless of whether they are

---

Regulation (EU) 2018/842 of the European Parliament and of the Council of May 30, 2018 on binding annual reductions of GHG emissions by Member States from 2021 to 2030 contributing to climate action to meet their commitments under the Paris Agreement and amending Regulation (EU) No 525/2013, entered into force on July 9, 2018.

[12] Regulation (EU) 2018/1999 of the European Parliament and of the Council of December 11, 2018 on the governance of the energy union and climate action, which entered into force on December 24, 2018.

their size. In the absence of a royal decree setting the said trajectory, it was specified that the trajectories for the period from iejranvier 2015 to december 31, 2030 would be those set in accordance with
in the schedule to the Ioi (article 65qooter - inserted by an Ioi dated July 19, 2012 and repealed by an Ioi dated July 19, 2012 and repealed by an Ioi dated July 19, 2012).
Law of June 11, 2023[13] of the special law of January 16, 1989).

The aforementioned annex to the special law set the target for reducing GHG emissions in residential and tertiary sector buildings by 2030 at around 21% for the Flemish Region, 19% for the Walloon Region and 19% for the Brussels-Capital Region, compared with the 2015 reference year.

Article 65qUoter also introduces a bonus/malus system. A Region receives a bonus or pays a penalty depending on whether or not it achieves its target for the year in question. The bonuses are financed by the federal government's share of the proceeds from the auctioning of GHG quotas, while the malus collected will be used exclusively for any expenditure aimed at reducing GHG emissions (summary conclusions of the Belgian government, p. 102). However, the preparatory work for the Special Act of June 11, 2023, which repealed this mechanism, shows that, in view of a series of technical and legal obstacles, it was not possible to implement it. The ordinary Ioi of January 6, 2014[14] , which implemented this mechanism, was also repealed *[1]

46. On July 18, 2013, the Belgian state adopted the Royal Decree setting out the federal long-term strategic vision for sustainable development.

This Royal Decree sets out Belgium's long-term objectives, in particular that of achieving a healthy environment by 2050, after taking "*the necessary measures to prevent or, failing that, correct the environmental impacts caused by human activities: global warming will have been limited and will remain limited to 1.5 to 2°C in the long term, water and air pollution will be controlled and will no longer have a significant impact on health, biodiversity and ecosystems*". It is also expected that "*Belgian GHG emissions will be reduced domestically by at least 80% to 95% by 2050 compared to their 1990 level*".

47. The Special Law of January 6, 2014 on the Sixth Reform of the State also inserted a fourth paragraph into Article 16 of the Special Law of August 8, 1980 on institutional reforms. This provision authorizes the State to *' take the place of the community or region concerned for the adoption of measures that are necessary to put an end to the non-compliance with international obligations'* subscribed to in relation to climate change. Various conditions are laid down, including a finding of non-compliance by the body established by

[13] Special law of June 11, 2023 repealing article 65qUoter and the appendix to the special law of January 16, 1989 on the financing of the Communities and Regions.

[14]4Loi du 6 janvier 2014 relative au mécanisme de base responsabilisation climat.

[1]* Draft special law repealing article 6Squorer and the appendix to the special law of January 16, 1989 on the financing of Communities and Regions (I), *House of Representatives,* Doc. parl.n° S5 3139/001 and 55 3140/001,

sess.ord., 2022/2023, p. 6.

or under the UNFCCC or its protocols, or a reasoned opinion from the European Commission as part of a formal infringement procedure.

48. In 2014, and at the request of the Secretary of State for the Environment, Energy, Mobility and Institutional Reforms, eight advisory bodies belonging to both the federal state and the Regions, issued an "*opinion on Belgium's transition to a low-carbon soCiety by hOri on 2020*". This opinion emphasized the need for "strong interaction between the different levels of government and between the different areas of action", as well as the essential need for coordination between the various Belgian federal and regional bodies.

49. On December 4, 2015, the Belgian State and the three Regions reached a political agreement on the
"burden sharing" for the period 2013-2020. This agreement was formalized in the cooperation agreement of February 12, 2018 on the sharing of Belgian climate and energy targets for the period 2013-2020, which provided in particular for the setting of each contracting party's contribution to achieving the GHG emissions reduction target imposed on Belgium for the compliance period in accordance with Decision no. 406/2009/EC, including the use of the margins for maneuver provided for in Articles 3 and 5 of the said decision.

Article 3 of the cooperation agreement sets the Regions' GHG reduction targets for non-ETS sectors as follows:

- for the Flemish Region: -15.7%;
- for the Walloon Region: -14.7%;
- for the Brussels-Capital Region: -8.8%.

The cooperation agreement entered into force retroactively on December 4, 2015 (article 46).

50. Over the period 2013-2020, the following measures, without claiming to be exhaustive, have been taken by the Regions involved.

51. The Court thus notes that, on February 20, 2014, the Walloon Region adopted a "Climate" decree (see below point 68) providing for a GHG reduction target, all sectors combined, of 30% in 2020 compared with 1990 and 80% to 95% in 2050 compared with 1990.

On April 21, 2016, the Walloon Government adopted its Plan Air-Climat Energie (or PACE) for the period 2016-2022 containing around 100 measures to reduce GHG emissions.

On September 28, 2017, the Walloon Parliament adopted a resolution on the implementation of a Walloon climate policy, calling on the Walloon Government to pursue an ambitious policy and strategy for the development of renewable energies and

to meet the target of reducing GHG emissions to 95% below 1990 levels by 2050.

On November 7, 2018, the Walloon Parliament adopted an intra-parliamentary resolution on climate policy in Belgium, calling on the federal, regional and community governments, in particular, to "*subscribe to the recently reinforced European 2030 targets for renewable energies and energy efficiency, and voluntarily advocate a GHG reduction target more ambitious than the 40*
% by 2030", as well as *"to take into account the IPCC special report published in October 2018 and to consider a reassessment of Belgian ambitions based on the conclusions of this report".*

December 19, 2018, the Walloon Parliament adopted a resolution aimed at repositioning Belgium in the climate debate, in which it called on the Government, among other things, "*to advocate within the relevant international and European bodies and at the relevant meetings*" for Belgium to "*join the coalition of countries coalition of countries in favor of an immediate increase in European GHG reduction targets for 2030*" and to "*defend at European level a GHG emissions reduction target of at least 55% by 2030 and at least* 95% *by 2050, compared with 1990 emissions*".

In its September 2019 regional policy statement, the Walloon Region said it wanted to achieve the targets set by the European Union, i.e. a 55% reduction in GHGs by 2030. It also announced that it was aiming for carbon neutrality by 2050 at the latest.

52. As far as the Brussels-Capital Region is concerned, the Court notes the adoption of the ordinance of May 2, 2013 establishing the Code Bruxellois de l'Air, du Climat et de la Maîtrise de l'Energie (or COBRACE), known as the climate ordinance, which is intended to bring together all the provisions, formerly contained in separate ordinances, relating to energy efficiency, the development of renewable energy sources, transport, air quality and climate (see *below).* \\ *It does* not, however, contain any GHG reduction targets for 2020.

The court also noted that, on June 2, 2016, the Government of the Brussels-Capital Region approved the Regional Air-Climate-Energy Plan (or PRACE), at the end of which it undertook to reduce its GHG emissions by 30% by 2025 compared with 1990 emissions.

In its joint general policy statement for the 2019-2024 legislature (its Exhibit 5), it is stated that "*the Region will equip itself with a long-term strategy based on binding targets and an Evaluation Framework enCadré par une Ordonnance bruxelloise pour le Climat ', so that Brussels commits itself as a 'low-carbon' Region"* and that "*this will involve reinforcing the intermediate commitments and measures currently included in Brussels' contribution to the National Energy-Climate Plan (PNEC) to achieve, by 2030, at least a 40% reduction in GHG emissions compared with 2005, and to contribute as much as possible to raising the European Union's targets by this deadline*".

53. On June 28, 2013, the Flemish Region adopted the Flemish Climate Policy Plan 2013-2020 comprising, on the one hand, a GHG emissions reduction plan (or Vlaams Mitigatieplan) and, on the other, the climate change adaptation plan. The Mitigatieplan envisaged a 15% reduction in non-ETS GHG emissions, this scenario being provisional pending the conclusion of a sharing agreement with the other Regions and the Federal State.

On July 20, 2018, the Flemish Government approved a preliminary draft of the Flemish Climate and Energy Plan for 2021-2030 (Het Vlaams Energie- en Klimaatplan 2021-2030 or VEKP). Its final version was approved on December 9, 2019.

In particular, VEKP has set a target of reducing Flemish GHG emissions in non-ETS sectors by 35% by 2030, compared with 2005, and the Flemish Region emphasizes, in p. 40 of its summary conclusions, that during the evaluation of the National Energy and Climate Plan (in which the VEKP was included), the Commission declared that the said National Plan complied with the European obligation for Belgium.

On December 20, 2019, the Flemish Government approved the Flemish Climate Strategy 2050 (Vlaamse Klimaatstrategie 2050) (its Exhibit 12), which sets an 85% emissions reduction for non-ETS sectors by 2050 and the ambition to move closer to climate neutrality.

54. During the period 2013-2020, the European authorities issued a number of reminders to Belgium to comply with its commitments. These reminders are listed in the judgment under appeal, to which the Court refers.

What's more, concluding cooperation agreements between the federal state and the federated entities has proved extremely laborious, and has exposed Belgium to further criticism (notably the "Information report on the intra-Belgian decision-making process regarding compensation for climate effort with regard to climate objectives", pp. 28-30 of the judgment under appeal).

Be that as it may, Belgium ended up meeting the targets set by the European Union, a new element compared with the data known at the time the judgment under appeal was handed down. As a reminder, these targets included a 15% reduction in GHG emissions from the non-ETS sector.

Thus, the Belgian State asserts, without being contradicted on these points, that

> In 2019, the overall reduction in GHG emissions is 19.95% compared with 1990 or 20.89% compared with the reference year (including the LULUCF sector) *[6] or 18.81% compared with 1990 and 19.78% compared with the reference year (excluding the LULUCF sector);

[1]Land use, land-use change, and forestry (LULUCF), a category that groups together GHG emissions and removals resulting from human activities related to land use, land-use change and forestry.

The European Environment Agency has stated that Belgium has met its GHG emission reduction targets for 2016, 2017, 2018 and 2019;
in 2020, total GHG emissions in Belgium (excluding the LULUCF sector) amounted to 106.4 Mt Co2 eq., representing a 26.9% decrease compared with 1990

Belgium has achieved its GHG emission reduction targets in the non-ETS sector; both the Belgian State and the Regions have reached the target set by the cooperation agreement of February 12, 2018.

4. Commitment period after 2020 and up to 2050

a) State of scientific knowledge at that time

55. The most recent data are abundant and accurate. In addition to the IPCC's special report on global warming limited to 1.5°C (see point 30 above) and the UNEP reports mentioned above (points 31 and 32), the court points out the following elements:

1) The sixth IPCC report

56. In the first volume of the 6th"e report (published on August 9, 2021), the IPCC found, in essence, that many changes due to past and future GHG emissions are irreversible on the scale of centuries to millennia, in particular changes concerning the ocean, ice caps and sea levels on a global scale (p. 23 of the summary for policymakers).

The report also stated that :

"Equilibrium climate sensitivity is an important physical quantity, used to quantify climate response to radiative *forcing. Based on multiple lines of evidence, the very likely range of equilibrium climate sensitivity is between 2°C (high confidence) and 5°C (medium confidence). The best estimate resulting from the AR6 assessment is 3°C, with a likely range of 2.5°C to 4°C (degrë of*

high confidence), versus 1.5°C to 4.5°C in AR5, which provided no better estimate." (p. 12).

The 2nd"e volume of the 6th"e rappoFt, published on February 28, 2022, confirmed the accelerating consequences of climate change and reminded us that there are limits to the capacity of ecosystems and human societies to adapt.

The 3rd"e volume of the 6th"e report, published on April 4, 2022, examined solutions for reducing GHG emissions, sector by sector. In particular, it reiterates the need for rapid action to limit global warming to 1.5° or 2º C.

In its summary report of the 6th"e assessment cycle, published on March 20, 2023, the IPCC noted a global temperature increase of 1.1°C compared with the reference period of 1850 to 1900. It indicates that, without reinforcement of strategies, a global warming of 3.2 (2.2 to 3.5) ° C is estimated in 2100 (p. 11 of the summary for decision-makers). Furthermore, in order to limit warming to +1.5°C, a 48% reduction in CO2 emissions by 2030, compared with 2019 levels, is required.

2) UNEP reports

57. The 2021 report pointed out that, after an exceptional 5.4% drop in 2020, global carbon dioxide emissions have started to rise again, with the result that GHG concentrations in the atmosphere continue to increase. The report highlights the inadequacy of the commitments made by countries, and indicates that by the end of the century, global warming is likely to reach 2.7° C if all the unconditional commitments made by 2030 are fully implemented, or 2.6° C if all the conditional commitments are also implemented. If commitments to net zero emissions are also fully implemented, this estimate is reduced to around 2.2° C.

S8. The 2022 report also noted that, in order to embark on the least costly path to limiting global warming to 2°C and 1.5°C, GHG emission reduction percentages must reach 30% and 45% respectively by 2030.

3) WMO reports

59. The 2021 WMO report indicates that CO2 concentration in 2021 reached 415.7 +- 0.2 ppm. This compares with 280 ppm in the 1950s.

b) <u>Input from COP 26 and 27</u>

60. COP 26 , held in Glasgow from October 31 to November 13, 2021, resulted in the adoption of a final decision, entitled the "Glasgow Climate Pact", which reiterates the determination of all States to limit global warming to 1.5°C above pre-industrial levels and, in any case, well below 2°C. Glasgow is thus in direct continuity with the Paris Agreement - adopted on December 12, 2015 at the terms of COP 21 - by taking up the temperature mitigation objectives enshrined in its Article 2.

    The "Glasgow Climate Pact" recognizes that the consequences of climate change will be much more moderate at 1.5° C than at 2º C - thus explicitly relying on the conclusions of the recent IPCC report - and calls for continued efforts to keep temperatures below this low target. All parties were called upon to raise the level of ambition of their nationally determined contributions and to present long-term strategies, in both cases in line with the 1.5° C target. In order to limit global warming to 1.5° C, it proposes, among other things, to reduce carbon dioxide emissions by 45% by 2030 compared with 2010 levels, and to bring them down to zero by mid-century, suggests deep cuts in other GHGs, and stresses the need for accelerated action during this critical decade.

61. COP 27 took place in November 2022 in Sharm El-Sheik.

    At this conference, the focus was on compensation for losses and damage suffered by developing countries.

c) <u>The en a e e ents supported at European level</u>

62. As explained above (see points 21 to 22 and 44 above), the first strategies developed by the European Union to combat global warming predate the 2015 Paris Agreement. Subsequently, the European Commission proposed to revise its ambitions upwards.

63. On December 11, 2019, the European Commission presented its draft "European Green Deal" (or Green Pact for Europe) in which it proposes to raise the European Union's GHG reduction target to

    - by 2030, to at least 50% and aim for 55% of 1990 levels;
    - to carbon neutrality by 2050.

    On March 5, 2020, the Council of the European Union adopted the long-term low-GHG development strategy for the European Union and its member states, which takes up the objective of a climate-neutral Union by 2050. This long-term strategy has

has been transmitted to the UNFCCC and constitutes the European Union's new commitment under the Paris Agreement.

On September 17, 2020, the European Commission drew up an impact report from which it emerged that the goal of climate neutrality for 2050 implies revising the previous -40% GHG target for 2030 upwards, to a target of 50 or 55%.

The European Climate Act of June 30, 2021 (regulation no. 2021/1119 published on July 9, 2021 and effective as of July 21, 2021) provides for climate governance objectives set out in its articles 2.1 ("*The balance between emissions and removals of GHGs regulated in Union law at Union level shall be achieved in the Union by 2050 at the latest, thereby reducing net emissions to zero by that date, and the Union shall strive to achieve negative emissions thereafter. "*) and 4.1 ("*In order to achieve the objective of climate neutrality set out in Article 2(1), the Union's binding climate objective for 2030 shall be a reduction of net GHG emissions (emissions net of removals) in the Union of at least 55% by 2030 compared to 1990 levels.*

Articles 6 and 7 provide for an assessment by 30 September 2023 at the latest and every five years thereafter of the progress made collectively and at national level by the Member States towards achieving the objective of climate neutrality and adaptation to climate change, as well as of the consistency of the Union's measures with regard to the objective of climate neutrality and the ability of the Union's measures to ensure improved adaptation to climate change.

Following the adoption of the European Climate Law, the following breakdown now applies throughout the Union

> HTA sectors: -62% (vs. 2005)[17] Non-HTA sectors: -40% (vs. 2005)[1] .

Regulation 2023/857 of April 19, 2023 amended Regulation 2018/842 in order to set GHG emission reduction targets for Member States in line with the 2050 climate neutrality objective set out in Regulation 2021/1119.

In accordance with the new Annex 1 of Regulation 2018/842, Belgium's new GHG emissions reduction target (excluding ETS or SEQE) for 2030 is now set at -47%.

---

[17] Directive (EU) 2023/959 of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 on the establishment and operation of a market stability reserve for the scheme, JOL, 130/134.
[18] Article 1er ' of the European Climate Act.

On June 15, 2023, the European Union's Advisory Council issued a report (to which the Court will return at a later date) concluding that the EU's target of at least a 55% reduction in GHGs compared with 1990 makes it possible to achieve the recommended target for 2040 and keep post-2030 emissions within the recommended budget.

d) Translation of objectives into internal order and expected results

64. As mentioned above (point 44), Belgium has submitted its first definitive National Energy-Climate Plan, dated December 31, 2019. The NECP 2021-2030 sets out Belgium's objectives and has been designed in line with the EU's previous target of a 3S% GHG reduction by 2030 for non-ETS sectors.

This results in the following GHG emission reduction targets for non-ETS sectors in 2030 compared to 2005: 35% for the Flemish Region, 37% for the Walloon Region and -40% for the Brussels-Capital Region.

1) Measures taken at federal level

65. The government agreement of September 30, 2020 stipulates in particular that the federal government *"sets itself the target of a 55% reduction in GHG emissions by 2030 and takes measures within its sphere of competence in this direction*" and *"undertakes to adapt its contribution to the National Energy and Climate Plan (PNEC) in this direction through an action plan*".

Article 14 of EU Regulation 2018/1999 stipulates that by June 30, 2023, each Member State must submit to the Commission a draft update of the latest notified version of the integrated national energy and climate plan, or provide the Commission with a justification that the plan does not require updating.

The current NECP contains projections to 2030 of the results expected from implementing the measures it contains, based on two assumptions: a scenario with existing policies (WEM scenario - With Existing Measures) and a scenario with additional policies, as described in the NECP (WAM scenario - With Additional Measures).
In the WAM scenario, total GHG emissions fall between 2005 and 2030, from 145.3 Mt CO eq to 112 Mt CO eq. This is equivalent to a 23% reduction compared to 2005. Emissions from the non-ETS sector would fall from 78.9 Mt CO eq to 52.7 Mt CO eq, representing a 34.4% reduction in GHG emissions from the non-ETS sector.

These assumptions therefore do not take into account the additional measures to be decided and implemented following the increase, since April 2023, of the target assigned to the

Belgium to -47% in non-ETS sectors (instead of -35%) and therefore confirm that this PNEC needs to be updated.

In its decisions of April 2, 2021 and October 8, 2021, the Council of Ministers undertook to implement federal policies and measures (PAMs) aimed at reducing GHG emissions as quickly as possible. Roadmaps have been drawn up by the various federal ministers, and it has been decided to monitor the implementation of the various measures. It also confirmed the commitment to revise the contribution to the NECP through an action plan in line with the target of reducing GHG emissions by 55% by 2030 compared with 1990.

At the same time, on December 17, 2021, the federal government decided to set up a Belgian Knowledge Center for Complex Climate Risks. In addition, climate roundtables have been set up to provide input for updating the PNEC.

On March 18, 2022, the government agreed to implement an energy transition plan that calls for around 30% of electricity consumption to come from renewable sources by 2030. A 15% reduction in current fossil fuel consumption is also sought. Various measures are envisaged in this context, including: a 6% VAT reduction on heat pumps and photovoltaic panels; the abolition of non-LED lighting in government and SNCB buildings; charging stations for electric vehicles in SNCB parking lots; and the installation of solar panels on the appropriate roofs of government and SNCB stations. The government is also aiming to quadruple electricity production from offshore wind power, and to create a platform for the exchange of wind-generated electricity in Europe.

In February 2023, all the country's strategic councils issued a joint opinion on the climate governance of the country's federated entities, the gist of which was that serious shortcomings remained in the form and content of the PNEC. These councils
We therefore explicitly call on the governments concerned at the different levels of power to achieve a coherent, joint and integrated NECP that respects the framework imposed and the new climate ambitions that are necessary, and that is also more readable", and call on the governments of the country's different levels of power to work together more effectively, in particular by setting up a concrete cooperation program and concrete agreements to achieve an integrated systemic vision and short-term cooperation projects*:* "*There is no objective reason why it should not be possible to achieve a solid PNEC, supported by the governments of the different levels of power, which can respond to the energy and climate challenges and is fully in line with the direCtrices drawn up by the Commission*".

On April 14, 2023, Belgium submitted its national GHG emissions inventory (2023, covering 1990-2021 emissions) to the European Commission, under Article 26 of Regulation (EU) no. 1999/2018. It is undisputed that, according to these data, Belgium

is 69,541 kt CO eq* for non-ETS sectors in 2021, i.e. below the non-binding intermediate target of 71,142 kt CO eq*. This target will remain unchanged after these allowances have been updated in line with the new -47% target for non-ETS sectors, with allowances being revised downwards from 2023 only.

On April 21, 2023, the Council of Ministers took note of the draft federal contribution to the draft Integrated National Energy and Climate Plan (2021-2030).

At the time of writing, however, the PNEC 2021-2030 had not yet been updated.

2) Measures taken in the Brussels-Capital Region

66. As a reminder, the PNEC 2021-2030 sets the Brussels-Capital Region's contribution to a 40% reduction in CO* emissions in 2030 compared to 2005.

The relevant provisions are contained in COBRACE, as amended by the Climate Ordinance of June 17, 2021, which sets out the following objectives

at least -40% GHG reduction compared to 2005 by 2030
- at least - 67% GHG emissions compared to 2005 by 2040
- at least -90% below 2005 levels by 2050.

COBRACE calls for the adoption of a regional Air-Climate-Energy plan (or PRACE) by March 30, 2023, September 30, 2027 and every five years thereafter. An increased target of 47% for 2030 has since been adopted by the Brussels government on May 5, 2022. The Brussels-Capital Region produced its recent Air-Climate-Energy plan for debate (plan dated April 27, 2023), which implements these objectives and forecasts a 47% reduction in GHG emissions by 2030 compared to 2005.

Among the measures set out in the plan, the Brussels-Capital Region cites the setting of what it considers to be an ambitious energy target (150 kWh/m2/year for renovation projects) for 2023, support for grouped renovation and the development of a dynamic for grouped renovation of buildings by district for 2024, the end of fossil fuel heating for new buildings for 2025, and a ban on diesel vehicles for 2030.

COBRACE also provides a methodological framework for reducing indirect GHG emissions (article 1.2.3).

It establishes a permanent "Committee of Climate Experts" responsible for drawing up an annual report, including an assessment of Brussels' climate policy and the formulation of recommendations in this area. The Committee's first report, entitled "Rapport préliminaire 2023 État des lieux 2023 et évaluation de l'apport des politiques publiques aux objectifs climatiques", has been submitted, and contains a series of recommendations for Brussels decision-makers[1] '.

In its conclusions, the Brussels-Capital Region details the measures taken with regard to energy performance requirements for buildings (points 237 to 242 of its conclusions) and the Good-Moove plan for the transport sector (points 245 to 248).

3) Measures taken in the Flemish Region

67. The Flemish Climate and Energy Plan 2021-2030 (VEKP) sets a GHG reduction target of - 35% by 2030 compared with 2005. VEKP is also the subject of an annual progress report. The most recent progress report is dated October 28, 2022*.

On May 12, 2023, the Flemish Government approved the draft update of the Flemish Energy and Climate Plan (VEKP) 2021-2030. In this plan, a target has been set to reduce Flemish non-ETS emissions by 40% by 2030 compared to 2005.

On pp. 40-42 of its conclusions, the Flemish Region describes the recent measures it has taken to meet its climate ambitions, as part of a policy it considers ambitious but also "realistic" (its conclusions, p. 123). It also describes the latest measures taken in the buildings, transport and industry sectors (pp. 43 and 44).

It also refers to the Flemish Government's Recovery Plan, de Vlaamse Veerkracht, presented in September 2022 by the Minister-President, which focuses in particular on climate and sustainability, with investments planned for Flemish ports in COM capture and recycling, the climate aspects of agriculture, transport, renovation incentives, the circular economy and green heat. Also mentioned are policies to stimulate solar energy (Vlaamse Zonneplan 2025), wind energy (Vlaamse Windplan 2025) and the transition to sustainable heating (Warmteplan 2025).

4) Measures taken in the Walloon Region

68. As a reminder, the Walloon climate decree of February 20, 2014 defined the following objectives:

[9] *Available on the BruPartners website: https://www.brupartners.brussels/fr/comite-dexperts-climat-bruxellois https://assets.vlaanderen.be/image/upload/v1667911S72/VEKP-voortgangsrapportering 2022 sriioI.pdf.

- 30% COC equivalents below 1990 levels by 2020 ;
- 80-95% CO2 equivalents below 1990 levels by 2050.

Article 8 of the decree provides for the adoption by the Government of emission b u d g e t s enabling GHG reduction targets to be planned every five years.

The decree also sets up a Committee of Experts to monitor compliance with emission budgets on an annual basis. Article 13 of the decree stipulates that the Government is to draw up an Air Climate Energy Plan in which it "*sets out the measures it intends to take to comply with emission budgets for the current and subsequent budget periods, including the one for which an emission budget is to be set, and to ensure compliance with energy and air quality objectives".*

The Plan Air Climat Energie 2030 was definitively adopted by the Walloon Government on March 21, 2023.

As part of the revision of the NECP, pending a decision on Belgian *burden sharing*, the Walloon Region considers the beige target of -47% (2005) as the Walloon target (instead of the current -37%). For the ETS sector, PACE adopts the European target of -62% by 2030 compared with 2005. It explains that the combination of these two objectives will enable the total GHG reduction target of -55% by 2030 compared with 1990 to be met (p. 20 of the PACE).

In addition, the Climate Decree is currently being updated; on March 30, 2023, the Government adopted on first reading a preliminary draft "carbon neutrality" decree, which was subsequently submitted to various bodies for their opinion. Article 5 of this decree notably sets a target of reducing GHG emissions by 55% by 2030 compared with 1990 "taking into account the objectives assigned to the European GHG emission allowance trading scheme by the European Union". According to counsel, the bill had been approved on second reading and was, at the time of the pleadings, being submitted to the Legislation Section of the Conseil d'Etat.

11. THE PROCEDURE

A. Retroactive effects of the procedure and requests to the first judge

69. By exploit dv ieF,uin 2015, Klimaatzaak and 8,422 individuals (listed in an Appendix A) summoned the Beige State, the Walloon Region, the Flemish Region and the Brussels-Capital Region before the French-speaking Court of First Instance in Brussels.

Klimaatzaak et al. requested that the parties be ordered to reduce the overall volume of annual Belgian GHG emissions in the following proportions:

by 2020: 40% or at least 25% compared to 1990 levels;

- in 2030: from 55% to at least 40%; in 2050: from 87.5% to at least 80%.

70. At a hearing on June 29, 2015, the Flemish Region requested that the case be referred to the Dutch-speaking Court of First Instance in Brussels. In submissions filed at the same hearing, the Flemish Region also claimed that the summons to institute proceedings was null and void.

By judgment of September 25, 2015, the French-speaking Court of First Instance of Brussels ruled that there was no reason to refer the case back to the Dutch-speaking Court of First Instance of Brussels, nor was there any reason to declare the summons to institute proceedings null and void pursuant to article 40 of the law of June 15, 1935.

Appealing against this decision on October 26, 2015, the Flemish Region sought to have the judgment reversed insofar as it dismissed its request for a change of language. In a judgment of February 8, 2016, the French- and Dutch-speaking District Court of Brussels (in a joint session) accepted the appeal, declared it unfounded and ordered the Flemish Region to pay the costs, which were not liquidated in the absence of a statement. In a ruling dated April 20, 2018, the Court of Cassation dismissed the appeal against this judgment.

71. By a deed dated August 29, 2018, the parties filed a joint motion to set procedural deadlines and schedule oral argument hearings on the basis of Article 747 of the Judicial Code. In an order dated January 11, 2019, the court set the pre-trial schedule.

72. On May 3, 2019, Mr. Schoukens and Mr. Vermeire filed a petition for voluntary intervention on behalf of a corded-leaf alder and 81 other trees (which will be listed in Appendix C of the judgment under appeal).

In a document dated July 3, 2019, Mrs De Vriendt and 50,164 persons listed in Appendix B also intervened voluntarily. They stated that they were referring to the conclusions of the plaintiffs and that they accepted in their entirety the statement of facts and the pleas in law developed therein.

73. In their summary submissions filed with the first judge on December 16, 2019, Klimaatzaak and the parties listed in Appendix A to the judgment under appeal requested that the following be heard

declare that the defendants had not, by 2020 at the latest, reduced the overall volume of annual GHG emissions from Belgian territory by 40%, or at least by 25%, compared with 1990 levels;

- rule that the defendants were in breach of articles 1382 and 1383 of the former Civil Code in that they had not behaved like good fathers in pursuing their climate policy and were thus harming the interests of Klimaatzaak and all the persons mentioned in appendix A;
- rule that, in pursuing their climate policy, the defendants violated the fundamental rights of Klimaatzaak and all the persons mentioned in Appendix A, and more specifically articles 2 and 8 of the ECHR and articles 6 and 24 of the International Convention on the Rights of the Child;
  order the defendants to take the necessary measures to induce Belgium to reduce or cause to be reduced the overall volume of annual GHG emissions from Belgian territory so as to achieve :
  - o by 2025, a reduction of 48%, or at least 42%, compared to 1990 levels;
  - o by 2030, a reduction of 65%, or at least 55%, compared to 1990 levels;
  - o in 2050, zero net emissions ;

  to continue the case in order to verify whether the defendants had met the targets imposed for the 2025 and 2030 timeframes and, to this end, to order the defendants to communicate the GHG emission reports for 2025 and 2030 communicated to the UNFCCC Secretariat in 2026 and 2031, and to have the case set after these communications;
  order the defendants, *in solidum* or one in default of the other, to pay a penalty of €10,000 per day of delay to Klimaatzaak in default of communicating the GHG emission report to the court and to the plaintiffs within ten days of April 15 of the year in which the report was filed;
- order the defendants *jointly and severally,* or in the absence of each other, to pay Klimaatzaak a penalty of €1,000,000 per month of delay to be reached
  the target set for 2025 and the target set for 2030, starting on the first day of the year. January of the year following the due date;
- record that Klimaatzaak undertook to allocate all accrued penalty payments in accordance with its corporate purpose;
- order the defendants to pay the costs, liquidated at €1,320 for a case that cannot be valued in money.

74. Before the first judge, the Belgian State claimed that the main action and the actions in intervention were inadmissible, and at the very least that the action brought by Klimaatzaak and the persons mentioned in Appendix A was unfounded. The Belgian State sought an order to pay all the costs, liquidated at €12,000.

    More specifically, the Belgian State concluded that the application for voluntary intervention by the trees was inadmissible and that the application for voluntary intervention by Mrs De Vriendt et al. was unfounded.

In the alternative, the Belgian State requested a preliminary ruling from the Constitutional Court and the Benelux Court of Justice.

In the further alternative, the Belgian State requested that it should not be *jointly and severally* condemned with the other defendants, that the condemnations against it should not be accompanied by a penalty payment, that the request for a continuation should not be granted, and that the request to impose a GHG emissions reduction target for 2025 on the defendants should not be granted.

The Belgian State also requested that the penalty attached to its sentence be limited to €1,000/month of delay both for the communication of GHG emission reports to the court and for the quantified GHG emission reduction targets determined by the court.

The Belgian State requested that it not be ordered *in solidum* with the other defendants to pay astreintes.

In any event, the Belgian State postulated that it would be reserved to rule on :

- the sharing of responsibilities;
- their contribution to the debt;
- the guarantee to be provided by the other defendants to the Belgian State against any monetary penalties (including any penalty payments) in excess of its own share of liability.

75. The Flemish Region, for its part, concluded that the action was inadmissible, or at the very least unfounded.

It was also seeking a declaration that its policy was in line with European regulations and that, consequently, it did not constitute a fault within the meaning of articles 1382 and 1383 of the former Civil Code, and that it could not be contrary to the right to life, the right to respect for private and family life and the rights of the child as guaranteed by articles 2 and 8 of the ECHR and articles 6 and 24 of the International Convention on the Rights of the Child.

In the alternative, insofar as the Court did not declare the action inadmissible or unfounded, the Flemish Region requested that the following question be referred to the European Court of Justice for a preliminary ruling:

> *"Is the "Directive 2003/87/EC of the European Parliament and of the Council of October 13, 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC" (ETS) and the "Regulation (EU) 2018/842 of the European Parliament and of the Council of May 30, 2018 on binding annual5 GHG emission rédUCtions by the States*

The Commission considers that the texts "amending Regulation (EU) No 525/2013", "amending Regulation (EU) No 525/2013", "amending Regulation (EU) No 525/2013" and "amending Regulation (EU) No 525/2013", violate Articles 2 (right to life), 8 (right to respect for private and family life) and 24 (rights of the child) of the Charter of Fundamental Rights of the European Union on the grounds that these texts contain insufficient GHG reduction targets".

The Flemish Region claimed that Klimaatzaak and all the persons mentioned in Appendix A should be ordered to pay costs and a procedural indemnity valued at 1,440C.

76. The Walloon Region argued, firstly, that the court had no jurisdiction and, secondly, that the actions were inadmissible or, at the very least, unfounded.

In the alternative, she asked that the following questions be referred to the Constitutional Court for a preliminary ruling:

"Does article 1382 of the Civil Code violate articles 10 and 11 of the Constitution in the interpretation according to which it precludes a more/e *person who has been created and acts with a view to defending a collective interest, such as the protection of the environment or certain elements thereof, from receiving, for the infringement of the collective interest for which it has been constituted, anything other than reparation by pecuniary equivalent, to the exclusion of reparation in kind of the actual ecological damage from which the said infringement of the collective interest proceeds?"*

"Does article 1382 of the Civil Code violate articles 10 and 11 of the Constitution if it is interpreted as allowing the condemnation of certain responsible parties who have contributed to the damage, to the exclusion of other responsible parties, with the consequence that the damage will not be repaired in any way, not even in part, and that the victim will therefore derive no benefit from it?".

Finally, the Walloon Region requested that, in any event, it be informed that it reserved all rights and actions in respect of the voluntary intervention of Mr. Schoukens and Mr. Vermeire on May 3, 2019, claiming to act on behalf of trees. Vermeire of May 3, 2019, claiming to act on behalf of arbres, and requested that Klimaatzaak, all the persons mentioned in Appendix A and the interveners be ordered to pay all costs, including procedural damages, jointly and *severally,* or in *solidum,* failing each other.

77. The Brussels-Capital Region asked the court to decline jurisdiction.

Failing this, the Brussels-Capital Region concluded that the claims of Klimaatzaak, all the persons mentioned in Appendix A and the interveners were inadmissible, and at the very least that Klimaatzaak's action was unfounded.

In the alternative, the Brussels-Capital Region requested that at the very least the request for a penalty payment be rejected and that Klimaatzaak and all the persons mentioned in Appendix A be ordered to pay the costs, liquidated at €1,440.

B. The decision

78. By judgment of June 17, 2021, the French-speaking Court of First Instance of Brussels :

- noted the withdrawal of the persons listed in appendix (D) and the death of Mr. Jozef Castermans, for whom no notice of withdrawal had been filed;
- declared the principal claim admissible;
- declared the voluntary intervention of the persons listed in Appendix (B) admissible;
- declared inadmissible the voluntary intervention formulated in the name and on behalf of the trees listed in the deed of May 3, 2019 (Appendix C);
- ruled that, in pursuing their climate policy, the Belgian State, the Flemish Region, the Walloon Region and the Brussels-Capital Region did not behave as normally prudent and diligent authorities, which constituted a fault within the meaning of article 1382 of the Civil Code;
- Declares that, in pursuing their climate policy, the defendants infringed the fundamental rights of the plaintiffs, and more specifically articles 2 and 8 of the ECHR, by failing to take all necessary measures to prevent the effects of climate change on the plaintiffs' life and privacy;
- dismissed the remainder of the plaintiffs' claim;
- pronounced full compensation of costs, so that each party would bear its own costs and neither party would owe any procedural indemnity to the other(s).

C. The requests for appeal, the interlocutory judgment of September 22, 2022 and the corrective judgment of September 29, 2022

79. On November 17, 2021, the appellants in the main proceedings filed an appeal. This appeal was registered under roll number 2021/AR/1589.

The Belgian State and the three Regions were summoned. In particular, they asked for an order that the respondents take the necessary measures to diminish

or reduce the overall volume of annual GHG emissions from the Belgian territory so as to achieve

- at least 48% by 2025;
- at least 65% by 2030.

80. In support of their summary submissions, the appellants in the main proceedings seek partial reversal of the judgment under appeal. They request
    - the inadmissibility of the "cross-appeal" lodged by the Belgian State insofar as it concludes that *"a main appeal lodged by the parties referred to in Appendix A to the application for appeal, who were not mentioned in Appendix A, lodged at first instance, is* inadmissible" and, for the remainder, concludes that the Belgian State's cross-appeal is unfounded,
    - the Brussels-Capital Region's cross-appeal is unfounded,
    - the lack of merit of the Flemish Region's cross-appeal,
    - that the "cross-appeal" lodged by the Walloon Region is inadmissible, or at the very least unfounded, insofar as it concerns "*the parties referred to in Appendix A attached to the appeal petition, which did not appear in Appendix A, attached to the judgment of June 17, 2021, appeared in Appendix C or D attached to the judgment under appeal lodged at first instance*" and for the remainder conclude that the cross-appeal lodged by the Walloon Region is unfounded.

The appellants in the main action seek confirmation of the judgment insofar as it held :

- the action is admissible on its own behalf and on behalf of the volunteers listed in Appendix B;

- that the Belgian State, the Flemish Region, the Walloon Region and the Brussels-Capital Region, in pursuing their climate policy

    - did not behave as normally prudent and diligent authorities, which constitutes a fault within the meaning of article 1382 of the Civil Code;
    - infringed the fundamental rights of the original plaintiffs, and more specifically articles 2 and 8 of the ECHR, by failing to take all necessary measures to prevent climate change affecting life and privacy.

The appellants in the main proceedings seek a declaration that, in pursuing their climate policy for 2020 and 2030, the respondents have violated and continue to violate articles 2 and 8 of the ECHR and have committed and continue to commit a fault within the meaning of articles 1382 and 1383 of the former Civil Code.

The appellants in the main proceedings ask the court to find that there are serious and unequivocal indications that, in pursuing their climate policy for 2030, the respondents will continue to violate articles 2 and 8 of the ECHR and commit a fault within the meaning of articles 1382 and 1383 of the former Civil Code.

They are asking the Court to order them to take sufficient measures to reduce by 2030 the overall volume of annual GHG emissions from Belgian territory so as to put an end to the infringement of their rights, and consequently to achieve a reduction in these emissions of at least 61% by 2030 compared with 1990, on pain of a penalty payment of €1,000,000 per month of delay in achieving the objective imposed for 2030, and this on pain of a penalty payment of €1,000,000 per month of delay in achieving the objective imposed for 2030, and this on pain of a penalty payment of €1,000,000 per month of delay in achieving the objective imposed for 2030.
From ierbeat 2031.

To this end, the appellants in the main proceedings request that the respondents be ordered to communicate to Klimaatzaak the GHG emissions report for 2030 on the same day that it is communicated to the European Commission in 2031, and to pay a penalty of €10,000 per day of delay in communicating the GHG emissions report for 2030.

In addition, the appellants in the main proceedings request that it be recorded that Klimaatzaak undertakes to fully allocate the astreintes due in accordance with its corporate purpose.

Lastly, the appellants requested the court to record the death of Mr. J. Clauwaert (Appendix A, no. 1030). At the hearing on September 21, 2023, the appellants in the main proceedings also asked the Court to record the deaths of Ms. Jeanne Okonsky (Appendix B, no. 427), Mr. Patrick Wechuyzen (Appendix B, no. 50138), Mr. Leo Van Riel (Appendix A, no. 7115) and Mr. Piet Hardeman (Appendix A, no. 3297).

Finally, the appellants in the main proceedings seek an order that the respondents pay all the costs.

81. On January 10, 2022, Mrs De Vriendt and the parties listed in Appendix B (numbering 50,164) to this petition filed a petition for voluntary intervention based on article 813 of the Judicial Code. These parties requested that their petition be declared admissible and well-founded and specified that, for the development of their arguments in greater detail, they were referring to the appeal petition of November 17, 2021 filed by the appellants in the main proceedings.

In their summary submissions, also filed on behalf of Ms Nicolas, Ms Haelvoet and Mr Patteeuw (parties who had intervened voluntarily before the first judge but who did not intervene voluntarily on appeal and were therefore not included in Appendix B to the application to intervene of January 10, 2022, and who have been summoned by the Belgian State and the Walloon Region), these parties ask the Court to declare admissible and well-founded the voluntary protective intervention of the parties referred to in Appendix B to the application to intervene of January 10, 2022, and who have been summoned by the Belgian State and the Walloon Region.

request of January 10, 2022 and to grant Klimaatzaak and the parties listed in Appendix A the benefit of their submissions. As regards the main appeals lodged by the Belgian State and the Walloon Region, they conclude that they are inadmissible (except in the case of Ms Nicolas, Ms Haelvoet and Mr Patteeuw) or at least unfounded.

82. On May 30, 2022 (registered under number 2022/AR/737), the Belgian State lodged an appeal. This appeal is directed against

- Mrs De Vriendt and all the persons mentioned in appendix B of the judgment under appeal, with the exception of those mentioned in appendix D of the same judgment and for whom a discontinuance of proceedings was recorded by the first judge, and with the exception of the person whose death was recorded by the first judge (i.e. Mr Castermans);
- the parties referred to in Appendix A as attached to the judgment under appeal and not included in Appendix A attached to the request for appeal (RG 2021/AR/1589).

83. In its summary submissions on appeal, the Belgian State concludes that the appeal lodged by the appellants in the main proceedings is unfounded. It also concludes, insofar as necessary, that the main appeal lodged by the parties referred to in appendix A to the request for appeal, who were not mentioned in appendix A, lodged at first instance, is inadmissible.

The Belgian State also concludes that the application for voluntary intervention lodged on January 10, 2022 by Mrs De Vriendt and all the persons mentioned in Appendix B to their application is inadmissible or at least unfounded.

In addition, the Belgian State seeks a declaration that its main appeal (case 2022/AR/737) and its cross-appeal (case 2021/AR/1589) are admissible and well-founded.

As its principal claim, the Belgian State seeks a declaration that it has not violated article 1382 of the former Civil Code, or articles 2 and 8 of the ECHR.

In the alternative, should the Court find that the Belgian State has violated article 1382 of the former Civil Code and/or articles 2 and 8 of the ECHR, it asks that the Court rule that these violations do not justify ordering the injunction sought by the appellants in the main proceedings and Mrs De Vriendt et al. for the year 2030.

In the infinitely alternative, should the Court find that the Belgian State has breached article 1382 of the Civil Code and/or articles 2 and 8 of the ECHR and order it to comply with the injunction sought by the appellants in the main proceedings, the Belgian State requests that this order not be accompanied by penalty payments.

In any event, the Belgian State requests that the appellants in the main proceedings and Mrs De Vriendt et al. be ordered to pay all the costs of the two sets of proceedings, liquidated as follows

as follows: indemnity for proceedings at first instance (€14,000), indemnity for proceedings on appeal (€15,000) and costs of scheduling the appeal (€22).

84. By a request for appeal dated June 30, 2022 (registered under roll number 2022/AR/891), the Walloon Region summoned

- Ms. De Vriendt et al, listed in Appendix B of the judgment under appeal (Appendix A.4 of her appeal petition; parties who withdrew before the first judge) except :
    - o the persons whose names appear in Appendix D attached to the judgment under appeal (Appendix A.6 to the motion for appeal; parties who withdrew before the first judge);
    - o Mr. Castermans, whose death is recorded *in* the o *quo* judgment, without a deed of resumption having been filed;
- the persons listed in appendix A attached to the judgment under appeal (appendix A.3 to his request for appeal); plaintiffs before the first judge, except for the persons listed in appendix A attached to the request for appeal of the appellants in the main proceedings (2021/AR/1589; appendix A.1 to his request for appeal).

In its appeal, the Walloon Region sought to join the cases registered under docket numbers 2021/AR/1589 and 2022/AR/737.

It sought to have the judgment set aside and, in particular, to have the original actions declared inadmissible or at least unfounded and, in the latter case, to rule that the Walloon Region had violated neither article 1382 of the former Civil Code nor articles 2 and 8 of the ECHR.

85. In its appeal summary conclusions, the Walloon Region concludes that the main appeal lodged by the parties listed in Appendix A attached to the appeal request is inadmissible.

- would not appear in the ring attached to the judgment under appeal;
- are shown in Appendix C attached to the same judgment;
- are shown in Appendix D attached to the same judgment.

The Walloon Region concludes, insofar as it is admissible, that the appeal lodged by the other appellants in the main proceedings referred to in Appendix A to the request for appeal is unfounded.

The Walloon Region also concludes that the application for voluntary intervention lodged on January 10, 2022 by Mrs De Vriendt and all the persons mentioned in Appendix B to their application is inadmissible, or at least unfounded.

As its principal claim, and as a cross-appeal, the Walloon Region requests that the Court decline jurisdiction or declare the original actions inadmissible or at least unfounded and, in the latter case, rule that the Walloon Region has violated neither article 1382 of the former Civil Code nor articles 2 and 8 of the ECHR.

In the alternative, with regard to the interest of Klimaatzaak, the Walloon Region requests that the following question be put to the Constitutional Court

> *"Article 17 of the Judicial Code, as it applies to the present case, read alone or in conjunction with article 1382 of the Civil Code, does or does not* violate *articles 10 and 11 of the Constitution in the interpretation according to which a legal person which has been constituted and acts to defend a collective interest, such as the protection of the environment or certain elements thereof, is without interest or standing to claim anything other than for the infringement of the collective interest for which it has been constituted, such as the protection of the environment or some of its components,* is *without interest or standing to claim anything other than pecuniary compensation for any non-material damage it may suffer as a result of the infringement of the collective interest for which it was formed?"*

In the further alternative, should the Court find that the Walloon Region has violated Article 1382 of the former Civil Code or Articles 2 and 8 of the ECHR, the Walloon Region requests that the following questions be referred to the Constitutional Court for a preliminary ruling:

> *"Does OrtiCle 1382 of the Civil Code violate Articles 10 and 11 of the Constitution in the interpretation according to which it allows the COndemnation of certain responsible parties who have contributed to the damage, to the exclusion of other responsible parties, with the consequence that the damage will not be repaired in any way, not even in part, and that the victim will therefore derive no benefit?"*
> *"Does article 1382 of the French Civil Code violate articles 10 and 11 of the French Constitution insofar as it is interpreted to mean that a legal entity that has been set up and acts to defend a collective interest, such as the protection of the environment or of certain elements of the environment, cannot in principle claim anything other than pecuniary compensation for* any *moral prejudice it* may *suffer as a result of the infringement of the collective interest for which it has been set up?*

In the further alternative, the Walloon Region seeks a declaration that there are no grounds for condemning it together with the Belgian State, the Flemish Region and the Brussels-Capital Region or for ordering any injunction whatsoever and, confirming the judgment *a quo* on this point*, to* dismiss the remainder of the claim of Klimaatzaak et al. and Mrs Devriendt et al.

Finally, the Walloon Region requests that the following question be referred to the Constitutional Court for a preliminary ruling, should the Court consider condemning it together with the Belgian State, the Flemish Region or the Brussels-Capital Region:

"Does article 1382 of the Civil Code, if interpreted as permitting the joint condemnation, in solidum or in any other way, of the federal State and one or more regions for fault or faulty default in the exercise of their respective competences, violate the Constitution or the provisions adopted pursuant thereto which determine the respective competences of the federal State, the communities and the regions, or articles 10 and 11 of the Constitution in that it treats debtors in different situations in the same way?
incomparable?"

Should the Court consider ordering an injunction, the Walloon Region asks that the request for a penalty payment be rejected or, failing that, that the following question be referred for a preliminary ruling

"Does article 1385bis of the Judicial Code, interpreted as meaning that an order to pay astreintes together, in solidum or by other means, may be made against debtors without regard to their power and competence, as defined by the Constitution and the laws enacted in implementation thereof, violate articles 10, 11 and 134 of the Constitution in that it treats debtors in incomparable situations in an identical manner?"

In addition, the Walloon Region is calling for the amount of penalty payments to be reduced to a strict minimum, and either capped at a maximum total amount, or limited in time.

The Walloon Region requests that the Belgian State be acknowledged as having withdrawn its recourse action.

The Court already notes that it can only observe that the Belgian State, in the context of the present proceedings, is no longer asking the Court to record reservations on the question of the sharing of liability and the warranty claims that it could bring (cf. point 74 above), and that in point 69 of its conclusions, the Belgian State expressly waives its warranty claim, which should indeed be acknowledged.

Finally, the Walloon Region requests that Klimaatzaak et al. and Mrs De Vriendt et al. be ordered to pay all the costs of both sets of proceedings.

86. In its summary opinion, the Flemish Region concludes that the appeal lodged by the appellants in the main proceedings is inadmissible, or at least unfounded.

The Flemish Region requests that its cross-appeal against the judgment be noted, that it be declared admissible and well-founded, and that it be declared that its policy falls within the framework of European regulations and that, consequently, it is not subject to the provisions of European law.

does not constitute a fault within the meaning of articles 1382 and 1383 of the former Civil Code, and cannot be contrary to the right to life and the right to privacy.

In the alternative, insofar as the Court should not declare the appellants' action inadmissible or unfounded, the Flemish Region requests that the following question be referred to the European Court of Justice for a preliminary ruling.

> *"Is thethat "Directive 2003/87/EC of the European Parliament and of the Council of October 13, 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC))) (EU ETS) and "Regulation (EU) 2018/842 of the European Parliament and of the Council of May 30, 2018 on binding annual reductions of GHG emissions by Member States from 2021 to 2030 contributing to climate action to meet their commitments under the Paris Agreement and amending Regulation (EU) No 525/2013", violates articles 2 (right to life), 8 (right to respect for private and family life) and 24 (rights of the child) of the Charter of Fundamental Rights of the European Union on the grounds that these texts contain insufficient GHG reduction targets? ".*

Lastly, the Flemish Region seeks an order that the appellants pay all costs and expenses of both sets of proceedings, including procedural damages of 2 x €1,800.

87. The Brussels-Capital Region concludes that the appeal lodged by Klimaatzaak and the persons referred to in Appendix A to the request for appeal and also in Appendix A filed at first instance is unfounded and concludes, insofar as necessary, that the main appeal lodged by the parties referred to in Appendix A to the request for appeal, who were not mentioned in Appendix A filed at first instance, is inadmissible.

The Brussels-Capital Region concludes that the application for voluntary intervention lodged on January 10, 2022 by Mrs. De Vriendt and all the persons mentioned in Appendix B of their application is inadmissible or at least unfounded.

The Brussels-Capital Region lodged a cross-appeal in which it sought a declaration that it had not violated articles 1382 and 1383 of the former Civil Code, or articles 2 and 8 of the ECHR, and to dismiss all the claims of Klimaatzaak et al. and Mrs. De Vriendt et al.

In the alternative, should the Court consider that the Brussels-Capital Region has violated articles 1382 and 1383 of the former Civil Code and/or articles 2 and 8 of the ECHR, it requests that the requests for an injunction and a penalty payment made by the appellants in the main proceedings be dismissed.

Lastly, the Brussels-Capital Region seeks an order that Klimaatzaak et al. and Mrs De Vriendt et al. pay all the costs of both sets of proceedings, which have not yet been settled.

88. In an interlocutory judgment of September 22, 2022, the court joined the cases entered in the general roll under numbers 2021/AR/1589, 2022/AR/737 and 2022/AR/891.

In a ruling dated September 29, 2022, the court, on the basis of articles 794/1 to 801 of the Judicial Code, rectified its ruling of September 22, 2022 and corrected a clerical error concerning the setting of the hearing for October 6, 2023 (and not October 6, 2022).

89. On October 18, 2023, the parties to the case filed consented pleadings relating to the issue of facilitating the identification of all parties on appeal due to the difficulty of harvesting the appendices attached to the June 17, 2021 judgment from the appendices of the various pleadings filed in the present appeal proceedings.

The Court addresses this issue in paragraphs 91 et seq. below.

The parties' agreement reads as follows:

"Article F . Mai "tres Carole BILLIET, Audrey BAEYENS, Roger H.J.COX and fin/i *PAN-VAN DE MEULEBROEKE, ayyrment represent:*

1. ASBL KLIMAATZAAK,

2. the persons listed i n Appendix A to the judgment of June 17, 2021 (RG n°2015/4585/A)

3. Mrs Inge DE VRIENDT,

4. all persons mentioned i n appendix B to the judgment of June 17, 2021 (RG n°2015/4585/A),

5. with the exception of :

a) the persons listed i n appendix D of the same judgment whose action has been withdrawn,

b) of the person whose death is recorded in the same judgment,

6. the persons listed i n Appendix A attached to the appeal i n case 2021/AR/1589,

7. the persons listed i n Appendix B attached to the motion to intervene dated January 10, 2022,

8. the respondents to the Belgian State's appeal of May 30, 2022 in the case of 2022/AR/737,

9. the respondents to the Walloon Region's appeal of June 30, 2022 in case 2022/AR/891.

Article 2. In view of the difficulty of collecting the appendices attached to the judgment of June 17, 2021 and to the various pleadings referred to in Article 1, and in order to ensure the regularity of the proceedings, the parties agree that, in one way or another, all the parties will

present in the first instance are present in the appeal proceedings, thus assuming the status of parties to these appeal proceedings, with the exception, however, of the persons referred to in article 1, 5º, and with the exception of parties whose death the Court may record without resumption of proceedings.
This agreement on the status of the parties to the appeal proceedings does not extend to, and is without prejudice to, objections to the inadmissibility of the action, particularly with regard to the parties' interest in bringing the action.
Article 3. The persons referred to in Article 2 are conventionally referred to as the "original plaintiffs". The Belgian State, the Walloon Region, the Flemish Region and the Brussels-Capital Region are conventionally referred to as 'original defendants'."

III. DISCUSSION AND DECISION OF THE COURT

90. After identifying the parties to the case on appeal (A), the court will successively examine questions of admissibility and jurisdiction (B), the basis of the pleas (C), requests for injunctions (D) and penalty payments (E) and costs (F).

A. Identifying the parties involved

91. With regard to the natural persons who were at issue before the first judge, the judgment under appeal identifies them by reference to an appendix for the original plaintiffs, i.e. 8,422 persons, and for the intervening parties other than Mrs De Vriendt, to an appendix B comprising 50,164 persons.

The judgment under appeal takes note of the death of one of the parties, Mr Jozef Castermans, for whom no notice of resumption of proceedings had been filed.

92. The notice of appeal registered under roll number 2021/AR/1589 identifies the natural persons who are appellants in the main proceedings by reference to appendix A attached to the summons to institute proceedings, it being specified in a footnote that "*several Se persons have withdrawn or are decided. There were also a few duplicates. This was communicated to the Court of First Instance for the pleadings hearings. We have reproduced the updated Appendix A, for which reason numbers go1, 1755, 2086, 2798, 2849, 4489, 4652 and 7716 have been deleted. We have taken this approach in order to facilitate comparison of the appendices filed at first i n s t a n c e and on appeal*".

An appendix A attached to the appeal petition of November 17, 2021 was indeed updated as announced (numbers 901, namely Mr. Castermans, 1755, 2086, 2798, 2849, 4489, 4652 and 7716, i.e. the 7 duplicates have been removed).

The application for voluntary intervention was filed on January 10, 2022 for Mrs De Vriendt and all the persons mentioned in Appendix B, which was attached to the said application. The persons are numbered from 1 to 50.164.

The judgment of September 22, 2022 joining the appeals entered in the general roll under numbers 2021/AR/1589, 2022/AR/737 and 2022/AR/891 refers to these same annexes.

93. On September 8, 2023, the appellants in the main proceedings and the interveners filed documents updating the data concerning the natural persons involved in the appeal proceedings, namely :

- a document listing 4 deaths (with extracts from the national register);

- a list of minors who have reached the age of majority - Appendix AU; a list of changes of address for individuals - Appendix A; a list of changes of address for individuals - Appendix B.

94. In their pleadings filed on October 18, 2023, the parties expressly agreed that the Belgian State, the Walloon Region, the Flemish Region and the Brussels-Capital Region should be referred to as the "original defendants" and that the persons referred to in article 2 of the pleadings should be referred to as the "original plaintiffs" (including in the present judgment):

- Klimaatzaak,
- the persons mentioned in appendix A to the judgment of June 17, 2021 (RG n°2015/4585/A), Mrs De Vriendt and all the persons mentioned in appendix B to the judgment of June 17, 2021 (RG n°2015/4585/A),
- with the exception of the persons mentioned in appendix D of the same judgment whose withdrawal from the proceedings has been recorded and the person whose death is recorded by the same judgment,
- the persons listed in Appendix A attached to the appeal in case 2021/AR/1589,
- the persons listed in Appendix B attached to the motion to intervene dated January 10, 2022,
- the respondents to the Belgian State's appeal of May 30, 2022 in case 2022/AR/737,
- the respondents to the Walloon Region's appeal of June 30, 2022 in case 2022/AR/891.

Article 2 of the agreement specifies that it "*does not extend to and is without prejudice to objections to the inadmissibility of the action, in particular with regard to the parties' interest in bringing the action".*

The parties hereby acknowledge their agreement to this.

95. In the absence of certainty as to the scope to be given to the terms "objections to admissibility", the court will examine all objections to admissibility raised by the parties.

96. The appellants in the main proceedings and the interveners further request the Court to record the deaths of Mr. Julius Clauwaert (Appendix A, no. 1030), Ms. Jeanne Okonsky (Appendix B, no. 427), Mr. Patrick Wechuyzen (Appendix B, no. 50138), Mr. Leo Van Riel (Appendix A, no. 7115) and Mr. Piet Hardeman (Appendix A, no. 3297) (minutes of the hearing of September 21, 2023 and appendix).

[2]*In this respect, the court points out that the fact that a minor has reached the age of majority does not call for the resumption of proceedings (A. FETTWEIS, *Manuel de procédure civile,* 2e"[e] éd., Liège, Faculté de droit, d'économie et de sciences sociales de Liège, 1985, 453).

The question of the impact of these deaths on the present proceedings was put to the parties, and their counsel spoke on this point at the hearing on October 19, 2023. Counsel for the original plaintiffs take the view that, in the absence of proper notification of these deaths, the proceedings are not interrupted. The other parties refer the matter to the courts.

In accordance with article 815 of the French Judicial Code, in cases where the closure of debates has not been pronounced, the death of a party remains without effect until notification has been made, this notification being made by the deposit and communication of a written document emanating from a successor in title. A declaration by the deceased's lawyer that he is no longer involved does not interrupt the proceedings (D. MOUGENOT, *La jurisprudence du Code judiciaire commentée*
L instanCe, Tome ll a, Brugge, La Charte, 2013, p. 273), nor a notification made by an heir of the deceased party who has renounced the succession (Cass., November 8, 2013, *Pas.,* I, n°2193).

In the present case, the above-mentioned deaths have not been notified by the filing and communication of a writing from a successor in title, and counsel for the original plaintiffs do not claim to have a mandate from the successors in title of the deceased parties, so that the proceedings have not been interrupted, which does not prevent the deaths from being recorded as requested.

Assuming that the notification of the deaths is in order, the Court considers that, since no deed of resumption of proceedings has been filed by the heirs of the deceased before the close of the debates, nor have they been summoned by the original defendants for the resumption of forced proceedings, even though they have been informed of the deaths since at least September 21, 2023, it can be concluded that both the heirs of the deceased and the original defendants have implicitly but definitely waived the resumption of proceedings, it can be concluded that both the successors in title of the deceased and the original defendants have implicitly but definitely waived the resumption of proceedings. Julius Clauwaert, Ms Jeanne Okonsky, Mr Patrick Wechuyzen and Mr Leo Van Riel.

B. Questions of admissibility and jurisdiction

97. Below, the court will examine the admissibility of appeals (1) and voluntary interventions on appeal (2), the court's power of jurisdiction (3), and the admissibility of original actions (4).

1. Admissibility of appeals

98. The Belgian State, the Walloon Region and, as the case may be, the Brussels-Capital Region*[2] conclude that the appeal lodged by the parties referred to in Appendix A is inadmissible.

[22] In the operative part of its conclusions, the Brussels-Capital Region asks the Court, "*insofar as necessary, to declare inadmissible the main appeal lodged by the parties referred to in Appendix A of the request for appeal, which*

in appeal that were not mentioned in Appendix A, or that appear in Appendices C or D, filed in the first instance.

99. The appellants in the main proceedings assert that the persons listed in Appendix A on appeal are the same as those listed in Appendix A attached to the judgment, the only difference being in the numbering of the persons. They explain that the summons initiating proceedings in the first instance had been filed with an Appendix A containing 8,429 persons, whereas the Appendix A attached to the judgment contains 8,422 persons, the difference being explained by the fact that 7 persons (whose names are specified in their conclusions) were included twice in the first. In view of the elimination of duplicates, the appellants in the main proceedings explain, an automatic renumbering has been carried out at the level of the registry of first instance in appendix A to which the judgment refers, and which still includes Mr. Castermans, who has since died. Finally, they point out that, in Appendix A attached to their appeal request, the duplicates have been deleted along with the corresponding numbers, and that automatic numbering has been deactivated, which would explain why the numbers corresponding to the duplicates and to Mr. Castermans are missing and why the last person on the list, Mr. Zwysen, still bears number 8.429.

100. It is undisputed that only parties who were involved in the case at first instance may lodge an appeal, on pain of inadmissibility (A. DECRoEs, "Receivability of an appeal: quality and interest", note under Cass., April 24, 2003, *R.C.J.B.*, 2004, pp. 371-372 and references cited).

Insofar as some of the parties listed in Appendix A filed an appeal, even though they were not parties to the case at first instance, their appeal would be inadmissible.

However, in view of the explanations given by the original plaintiffs, there is nothing to indicate that persons who were not or were no longer involved in the case at first instance would have joined the appellants on appeal, so this objection of inadmissibility must be rejected. In any event, the Court notes that this question has no bearing on the outcome of the dispute.

101. In their operative part, the appellants in the main proceedings claim that the :

- *the cross-appeal lodged by the Belgian State by way of its main submissions containing a cross-appeal of May 30, 2022, insofar as it concerns the inadmissibility of a "cross-appeal".*

---

would not have been *mentioned in Appendix A, filed at first instance*". On p. 16 of its conclusions, the Brussels-Capital Region uses the following heading: "*ACCEPTABILITY OF THE APPEAL BY MADAME DE VRIENDT AND CONSOPTS*". The developments under this heading relate, however, to the admissibility of *the intervention* of Mrs. De Vriendt and the other persons listed in Appendix B to the application of January 10, 2022, and not to the admissibility of the main appeal lodged by the parties listed in Appendix A.

main appeal lodged by the parties referred to in appendix A of the appeal request, which would not have been mentioned in appendix A, lodged at first instance'",

- *"the cross-appeal lodged by the Walloon Region by way of its Conclusion of Appeal containing a cross-appeal insofar as it concerns 'the parties referred to in Appendix A attached to the request for appeal and who, as the case may be … are not included in Appendix A attached to the judgment o quo of June 17, 2021; are included in Appendix D attached to the judgment a quo; are included in Appendix C attached to the judgment a quo'".*

This objection to admissibility is not clearly developed in their conclusions.

The Court also notes that the objection of inadmissibility raised by the Belgian State and the Walloon Region, which is examined above, cannot be analysed as a cross-appeal, since it does not seek to set aside the judgment under appeal, but to have the Court declare the main appeal inadmissible insofar as it was lodged by parties who were not involved in the case at first instance. However, it is not possible to raise an objection of inadmissibility against an objection of inadmissibility.

102. In the body of their conclusions (p. 168), the appellants in the main proceedings argue that the appeals lodged by the Belgian State and the Walloon Region in cases 2022/AR/737 and 2022/AR/891 are inadmissible insofar as they are directed against the persons listed in appendix A to the judgment under appeal and all these parties are appellants[23] . Similarly, the parties intervening voluntarily in the appeal proceedings conclude that the appeals lodged against Mrs De Vriendt and all the persons mentioned in appendix B of their application to intervene are inadmissible, on the grounds that appendices B to the judgment and to the application to intervene voluntarily in the appeal proceedings are the same, with the exception of three persons, Mrs Delphine Nicolas (no. 18246), Mrs Nele Haelvoet (no. 23973) and Mr Luc Patteeuw (no. 3322), who did not wish to appear in the appeal proceedings.

103. Insofar as the persons listed in appendices A of the judgment under appeal and of the request for appeal registered under the docket number RG n°2021/AR/1589 are the same (with the exception of the late Mr. Castermans), the appeals of the Belgian State and the Walloon Region insofar as they concern "*the parties referred to in appendix A, as attached to the judgment under appeal of June 17, 2021 (RG n°2015/4585/A - exhibit 0.1), not included in appendix A attached to the appeal petition filed with the Brussels Court of Appeal (RG n°2021/AR/1589 - exhibit 0.3)*" would not, however, be inadmissible, but would be deprived of purpose.

However, in view of the explanations provided by the appellants in case 2021/AR/1589, there is nothing to indicate that, apart from the deceased, there are any persons referred to in appendix A of the judgment under appeal who have not lodged an appeal. Consequently, the Court declares the appeals of the Belgian State and the Walloon Region to be without object, insofar as they are directed against "*the parties referred to in Annex A, as attached to the judgment".*

[23] For the record, these appeals were lodged by the Belgian State and the Walloon Region to ensure that all those present in the first instance were also present on appeal.

including appeal of June 17, 2021 (RG n°2015/4585/A - exhibit 0.1), not included in appendix A attached to the appeal petition filed with the Brussels Court of Appeal (RG n°2021/AR/1589 exhibit 0.3)".

On the other hand, whether or not the Annexes B of the judgment under appeal and the application for voluntary intervention in the appeal coincide (subject to the three persons mentioned above and the deceased), the appeals of the Belgian State and the Walloon Region, insofar as they are directed against these persons, remain relevant, since these persons are not appellants, but voluntary interveners in the appeal and, moreover, the admissibility of this intervention is rightly challenged (hereinafter, paragraph 105).

104. The Flemish Region asks the Court to declare the main appeal inadmissible.

However, it does not raise any specific plea of inadmissibility of the appeal in its conclusions. On p. 52, the Flemish Region does indeed invoke the "inadmissibility of the application", but it does not appear that it is referring in this way to the appeal filed by the appellants. The developments that follow seem to be more akin to a declinatory of jurisdiction (hereinafter paragraphs 108 to 116), a plea of inadmissibility of the original actions (hereinafter paragraphs 117 to 136) or a debate on the merits (hereinafter paragraphs 137 et seq.).

If the Flemish Region fails to clearly state a possible ground for inadmissibility of the appeal, the court is not obliged to respond.

2. Admissibility of voluntary interventions at appeal level

105. The Belgian State, the Brussels-Capital Region and the Walloon Region conclude that the application for voluntary intervention filed on January 10, 2022 by the parties listed in Appendix B to the said application is inadmissible.

According to the Belgian State (and the Brussels-Capital Region), insofar as these persons are the same as those who had already intervened at first instance, their petition is inadmissible. The Belgian State points out that, insofar as these persons are not the same as those who had already intervened at first instance, their petition is inadmissible, and must therefore be reclassified as an aggressive intervention prohibited on appeal.

106. However, there is nothing to suggest that there are any parties in this appendix B to the motion to intervene of January 10, 2022 who were not included in appendix B to the judgment under appeal. The parties concerned explain that Appendix B to the aforementioned motion is the same as that filed in first instance, with the exception of three persons: Ms Nicolas, Ms Haelvoet and Mr Patteeuw, who did not wish to be included in the appeal. They point out that number 615 has been removed because it mentioned Mr Stocké in

double. The court concluded that, subject to these clarifications, the parts of the two appendices B are the same.

107. If, by virtue of article 812, aiia+s 1eFof the Judicial Code, intervention can take place before all courts, a motion to intervene filed on appeal by a party who was present, called or represented at first instance is inadmissible (in this sense, see Cass., October 23, 2015, *Pas.*, I, liv. 10, 2395). The circumstance, invoked by Ms. De Vriendt and the parties listed in Appendix B in the degree of appeal, that the Dutch translation of the aforementioned judgment of October 23, 2015 would allow a different teaching to be inferred is irrelevant since it concerns a decision originally handed down by a French-speaking chamber. Moreover, the Court cannot follow them when they consider that this judgment was aimed at a particular situation: its teaching is gérteFal, and the Court agrees with it.

As a result, the motion to intervene filed on January 10, 2022 by parties who had already intervened at first instance is inadmissible.

That being said, the Court notes, like Mrs De Vriendt et al, that the stakes are relative, to say the least, given that all the parties listed in appendix B of the judgment under appeal are respondents by the Walloon Region and the Belgian State, so that they are all regularly involved in the case on appeal as respondents.

3. The power of jurisdiction

108. In its operative part, the Région wal(onne asks the court to "*decline jurisdiction*". It points out that the elements which enable "*the act of jurisdiction to be recognized*" must concern a dispute or a finding relating to a subjective right (art. 144 of the Constitution). In this case, she points out, "*the subjective right relied on by Klimaatzaak et crts. is the subjective right established by articles 1382 and 1383 of the Civil Code or, but this is disputed, articles 2 and 8 ECHR*" (her conclusions, p. 91).

It does not dispute that articles 1382 and 1383 of the former Civil Code enshrine a subjective right, but it considers that the action "*must relate to an entire subjective right*", whereas the action brought by the appellants in the main proceedings seeks only "to *establish an alleged fault, without in any way seeking reparation for any damage that might be linked to this alleged fault by a causal link*" (Idem).

As far as Articles 2 and 8 of the ECHR are concerned, she considers that they "*cannot constitute an autonomous basis for action in domestic law*" (her conclusions, p. 48). These provisions "*contain nothing more than standards of conduct",* they do not provide for the sanction of their violation, this sanction residing "*in domestic law, from which the national judge draws his jurisdictional power and finds at his disposal a variety of ways and means to implement, depending on the applicable national provisions*" (p. 104). This thesis would be confirmed by a "*rapid overview of the rulings of the Cour de ca5sation*".

which would testify *"to the fact that the provisions of the ECHR are not invoked autonomously, but in combination with domestic law" (Idem). In* her view, it follows that the appellants *"invoke rights which they expressly deprive the judge of the power to sanction under national law",* so that the court should "*declare itself without jurisdiction" (Ibid.,* p. 105). Lastly, without explicitly indicating that this is an element that should lead the court to declare itself without jurisdiction, it states that individuals can "*invoke violations of international provisions before the national court only if they can rely on a subjective right conferred by such provisions",* that the *"source of this subjective right depends on the direct effect of the provision of international law invoked"*, and that no direct effect can be recognized for positive obligations incumbent on States *(Idem).*

109. With regard to articles 1382 et seq. of the former Civil Code, however, the Walloon Region's argument is lacking in both law and fact.

110. In law, the fact that a plaintiff fails to invoke one of the conditions for the existence of a subjective right, or is mistaken as to what can be obtained in court by invoking such a right, does not deprive the judiciary of its power of jurisdiction. Moreover, article 18, paragraph 2, of the Judicial Code authorizes an action, even on a declaratory basis, to prevent the violation of a right that is seriously threatened. Since such a claim, relating to future damage, can be deemed admissible, it must o *fortiori* be deduced that the judiciary has jurisdiction to hear such a claim.

111. In fact, the appellants' claim in the main proceedings is not limited to requesting a finding of fault without alleging the existence of damage causally linked to that fault. In fact, the appellants repeatedly refer to damage that has already occurred (for which they seek compensation in kind) and justify their requests for injunctive relief by the desire to avoid aggravation of that damage (see, in particular, p. 156 of their conclusions: *"It is not pecuniary reparation that interests the appellants, but rather the granting of an injunction, which under the guise of reparation in kind, may relate both to the reparation of damage that has already occurred and to the prevention of further damage*"; see also p. 26, p. 146, pp. 154-156 and
pp. 163-164). This is a question of substance, not admissibility.

112. With regard to Articles 2 and 8 of the ECHR, it should be remembered that, under Articles 144 and 145 of the Constitution, disputes concerning civil and political rights fall within the jurisdiction of the courts, except in the case of political rights, where the exceptions provided for in the Law apply.

113. It is settled case law that the jurisdiction of the judiciary (in reality, its power of jurisdiction) is determined by the real and direct object of the dispute (Cass., September 24, 2010, *Pas.,* I, p. 2375, concl. by Advocate General Vandewal; Cass., March 8, 2013,

Pas, I, p. 601 and concl. by Advocate General Werquin) and that, when the object of the dispute relates to an administrative act, it is necessary to verify whether a subjective right is at stake.

According to the Cour de cassation's definition, the existence of a subjective right presupposes a "*specific legal obligation that a rule of objective law directly imposes on a third party and in the performance of which that party has an interest"* and, for a *"party to be able to rely on such a right vis-à-vis the administrative authority, the jurisdiction of that* authority *must be linked*" (Cass., March 8, 2013, *Pas.,* I, p. 601; see also Cass., December 20, 2007, *R.C.J.B.,* 2009, p. 419). The authority has bound jurisdiction when its legal obligation derives from a norm of objective law that leaves it no choice in deciding how to apply it to the concrete case: if the conditions laid down by the Ioi are met, the authority has no room for manoeuvre and must apply the norm (conclusions of Advocate General Vandewal before Cass., September 24, 2010, *Pas.,* I, p. 2374).

Admittedly, it could be deduced from this definition of the subjective right that the positive obligations imposed on States by Articles 2 and 8 of the ECHR (see points 139 and 141 below) do not have the character of a "*specific"* legal obligation (at least until they are sufficiently clarified by the case law of the European Court of Human Rights). Such a definition, which concerns the specific dispute over the actual subject matter of the claim, is however too simplistic and does not suffice to delimit the notion of "specific".
"civil law" as referred to in Article 144 of the Constitution and which, along with that of
"(B. BLERO, "L'article 145 de la Constitution comme solution aux conflits de compétence entre le juge de l'excès de pouvoir et le juge judiciaire", in *Le Conseil d'État de Belgique* cinquante *ans après sa création (1946- 1996),* Brussels, Bruylant, 1999, p. 202).

Indeed, equally consistent case law rightly points out that the judiciary has *"the power both to prevent and to remedy any unlawful infringement of subjective rights by authorities in the exercise of their diSCFetional power (...)*" (Cass., January 3 2008, *Pas.,* I, n°4; see also Cass., November 24 2006, *Pas.,* I, n°599; Cass., December 26 2014, *Pas.,* \, p. 3037). It follows that the notion of subjective right, insofar as it enables the judicial power's jurisdictional power to be determined, cannot be limited to the notion of linked jurisdiction. This is all the more the case given that, while it is no longer in doubt since the *La Flandria* judgment (discussed below, point 225) that the extra-contractual liability of the administration towards private individuals falls within the remit of the judiciary insofar as it involves "civil rights" within the meaning of article 144 of the Constitution, the fault of the public authority does not consist solely in the violation of a rule requiring it to abstain or to act in a certain way, but can also be analysed as an error of conduct to be assessed according to the criterion of the normally careful and prudent authority, placed in the same conditions (see. Hereinafter, paragraph 220). However, it seems difficult to assert, without rendering this distinction or its meaning meaning meaningless, that the obligation to behave as a normally careful and diligent authority constitutes a *"specific legal obligation*" within the meaning of the aforementioned definition of the law.

subjective. Indeed, while it is accepted that every subject of law has a subjective right to compensation for damage caused by a public authority's breach of its duty of care, it is difficult to limit the notion of subjective right to the *specific* legal obligation that a rule of objective law imposes directly on a third party.

114. As a result, the judiciary has the power to rule on disputes relating to the various rights set out in the European Convention on Human Rights, without it being necessary at this stage to rule on the question of their direct effect (on this subject, see points 150 et seq. below). For example, the Cour de cassation rightly overturned a judgment which had deduced from the discretionary power of the authorities to grant a foreigner a residence permit on the grounds of exceptional circumstances the absence of any subjective right to obtain such a permit, whereas the plaintiffs in the appeal invoked an infringement of several of their fundamental rights, in particular the right to private and family life, guaranteed by article 8 of the ECHR (Cass., March 26, 2009, *Pas,* I, 799) or the decision by which an appeal judge had declared himself without jurisdiction even though the plaintiffs were "*asserting their civil right to respect for their physical integrity and to the prohibition of inhuman and degrading treatment, guaranteed by Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms" and this, "without verifying whether the physical integrity of the plaintiffs was threatened (...) '* (Cass., April 15, 2016, *J.L.M.B.,* 2017, liv. 17, p. 810; see also the conclusions of Advocate General Werquin prior to this judgment:
"When the real and direct object of the request of the foreigner, who wishes to stay on the territory within the framework of a family reunification, tends to obtain the protection of the right to life or the right not to be subjected to inhuman and degrading treatment, the courts and tribunals are competent to know about it when they are the only ones able to ensure this protection; if it is established that these civil 5ubjeCtive rights are threatened, this foreigner has a subjective right to obtain a measure which tends to protect these civil rights").

115. The Court concludes that it has jurisdiction to hear the action of the appellants in the main proceedings.

116. As indicated above, the Flemish Region's conclusions are as follows:
"Irrecevabilité du requête : dëclinatoire de compétence . pas de pouvoir pour la Cour d'imposer des objectifs de réduction d'émissions, ou du moins, pas de fondement juridique pour pouvoir imposer les objectifs de redUCtion sollicités par les appelantes" (p. 52). In her opinion, the Court had no jurisdiction to rule on the appellants' action.

Insofar as the arguments of the Flemish Region are to be analyzed as a declinatory of jurisdiction, the Court refers to the foregoing developments, which respond to the pleas of the Walloon Region.

4. Admissibility of originating actions

117. The Flemish Region and the Walloon Region contest the admissibility of the actions brought by both Klimaatzaak and the natural persons already present at first instance (i.e. those listed in Appendix A of the first instance).

After recalling the principles applicable to any legal action (1), the court will examine the admissibility of the action brought by Klimaatzaak (2) and by these individuals (3).

118. However, it should be remembered from the outset that the admissibility of the legal action must be assessed in the light of the legal requirements of Belgian law, and not in the light of those governing actions for annulment brought by individuals before the Court of Justice within the meaning of Article 263(4) of the Treaty on the Functioning of the European Union. The Flemish Region's reference to the European Court of First Instance's *Carvalho* case (T-330/18) is therefore irrelevant (its conclusions, pp. 69 et seq.), as is the Belgian State's reference, in its pleadings, to the concept of victim within the meaning of Article 34 of the ECHR and to the European Court of Human Rights' decision in *Le Mailloux v. France* (application no. 18108/20).

For the rest, and as indicated above (paragraph 104), the Flemish Region invokes, on pp. S2 to 68 of its pleadings, the inadmissibility of the application, without it being possible to determine the exact nature of its objection. Insofar as this objection should be qualified as a plea of inadmissibility (it would then be a question of challenging the admissibility of the appellants' initial "request", and therefore of their action), it should be noted that, since it essentially concerns complaints based on the principle of separation of powers, it is not a question of admissibility but, where appropriate, of jurisdiction (see above, paragraphs 108 to 116) or of substance (see below, paragraphs 137 et seq.).

a) Principles applicable to the admissibility of legal action

119. Pursuant to article 17, para. ieF of the Judicial Code, the action cannot be admitted if the plaintiff has no interest in bringing it.

Article 18 of the same code stipulates that the interest "*must be born and present*", but specifies that the action "*may be admitted when it has been brought, even on a declaratory basis, in order to* prevent *the violation of a seriously threatened right*". Recourse to the preventive action requires the plaintiff to demonstrate, on the one hand, the existence of a serious and grave threat likely to create, from the outset of the action, a specific disturbance and, on the other hand, that the requested decision presents a concrete utility for him (C. DE BOE, "Le défaut d'intérêt né et actuel", *A.D.L.,* 2006/1-2, p. 129). This action implies that the claimant is the holder, at the time he invokes it, of the right he says is threatened (Cass., December 5, 2018, RG n°P.18.0208.F, www.|uportal.be). The trial judge is free to assess whether a right is seriously threatened (Cass., December 3 1984, *Pas.,* 1985, p. 414). In addition, a party to proceedings who claims to be the holder of a subjective right has, even if that right is contested, the requisite standing to have his claim heard within the meaning of article 17 of the Judicial Code.

the existence and scope of the subjective right that this party invokes is not a matter of admissibility but of the basis of the claim (Cass., January 26, 2017, *J.L.M.B.,* 2017, p. 1557; Cass., October 29, 2015, *Pas.,* I, n° 632; Cass., February 23, 2012, *Pas.,* I, n° 130; Cass., February 16, 2012, Pas.
November 2007, *Pas.,* I, no. 558).

The interest to act referred to in articles 17 and 18 of the Judicial Code, which conditions the admissibility of an action, is assessed according to the time at which the claim is lodged (Cass., April 24, 2003, *Pas.,* 2003/4, p. 854; see also Cass., December 4, 1989, *Pas.,* 1990, p. 414; Cass., June 13, 2014, *Rev.* not. *b.,* 2015, liv. 3094, p. 198; Cass., May 29, 2015, *R.A.B.G.,* 2015, liv. 15, 1047).

Unless there is a legal exception, a claim lodged by a natural or legal person cannot be admitted unless the claimant has a personal and direct interest, i.e. an interest of his or her own. The proper interest of a legal entity includes only that which concerns the existence of the legal entity, its patrimonial assets and moral rights, especially its honor and reputation, and the mere fact that a legal entity pursues a goal, even if it is statutory, does not give rise to a proper interest (Cass., September 19, 1996, *Pas.,* I, p. 830; Cass., December 13, 2018, RG n°C.15.0405.F).

The result is that, subject to legal exceptions, neither *actio popularis* nor even collective interest actions are admissible in principle (N. BERNARD, S. V N DROOGHENBROECK, l. HACHEZ, C. JADOT, A, DAVID, A. PICQUÉ, C. LANGLois and B. GOMES, "Urgenda: Quelles leçons pour la Belgique?", *A.P.T.,* 2021/1, p. 7 and references cited). Collective interest action can be defined as *"legal action brought by a group (...) to protect the purpose for which it was formed"* (O. DE SCHUTTER, "Action d'intérêt collectif,
remède collectif, cause significative", note under Cass., September 19, 1996, *R.C.1.B.,* 1997, p.. 113) whereas a popular action is an action brought with the sole aim of demanding respect for the Ioi and defending the general interest, regardless of any personal link between the plaintiff and the facts underlying his action (in this regard, see. R. DELFORGE, "L'intérêt à agir des associations dans le contentieux environnemental et climatique et le cas de Klimaatzaak", *A.D.L.,* 2021/1, p. 199 and references cited).

b) The admissibility of Klimaatzaak's request

120. The Walloon Region contests the admissibility of Klimaatzaak's action on the grounds, in substance, that it is exercising a popular action (which is prohibited), that it is acting to prevent pure ecological damage whereas it can only claim compensation for moral damage, and that it does not have a personal, direct, certain, born and present interest.

The Flemish Region also denounces the absence of a born and present, personal and direct interest on the part of the appellants in the main proceedings (and therefore of Klimaatzaak) and the fact that the action brought before the court would be a popular action.

121. It is worth recalling the specific nature of litigation relating to environmental law, while bearing in mind that it is not disputed that article 17, para. 2 of the Judicial Code, as inserted by the Ioi of December 21, 2018, is not applicable to the present case, which was filed prior to its entry into force.

122. Article 3.4 of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (hereinafter the "Aarhus Convention") stipulates that each party to this Convention shall give "*due recognition and support to associations, organizations or groups which have as their objective the protection of the environment, and shall ensure that its national legal system is compatible with this obligation*".

Article 9.3 of this convention also requires parties to ensure "*that members of the public who meet the criteria, if any, laid down in its domestic law may institute administrative or judicial proceedings to challenge acts or omissions by private persons or public authorities which contravene provisions of national law relating to the environment".* Article 2.4 defines the term "public" as "*one or more natural or legal persons and, in accordance with the legislation or custom of the country, the asSOCiations, organizations or groups constituted by such persons".*

123. It follows from these provisions that Belgium has undertaken to guarantee associations whose aim is to protect the environment access to justice when they wish to challenge acts contrary to the provisions of national environmental law and negligence on the part of private individuals and public bodies, provided they meet the criteria laid down by national law.

The judge may therefore interpret the criteria laid down by national law in accordance with the objectives of article 9.3 of the Aarhus Convention (even if this provision has no direct effect) and, in any event, may not interpret them in a way that would deprive the aforementioned associations of access to justice (see, regarding the requirement of a direct and personal interest required by article 3 of the law of April 17, 1878 containing the preliminary title of the Code of Criminal Procedure, Cass., June 11, 2013, *Pas.,* I, 1299). The "circumspection" of the doctrine as to the scope of this judgment invoked by the Walloon Region (its conclusions, p. 53) concerns only - and rightly so - the fact that its teaching can be transposed to legal action by ASBLs constituted for collective interests other than environmental protection (C. DE BoE and R. VAN MELSEN, "Vers une action d'intérêt collectif devant les juridictions de l'ordre judiciaire?", *A.P.T.,* 2014/3, p. 390) In this sense, this teaching - which must be seen as a legal exception - is not intended to call into question the principle of the prohibition of popular action.

124. The result is that, at least for actions brought before the entry into force of the law of December 21, 2018, the restrictive interpretation of the notion of interest limited to that of an "interest" is no longer applicable.

own interest, which is not explicitly imposed by the legal text of articles 17 and 18 of the Judicial Code, must give way to a broader interpretation in the case of an action brought by an association which, as in the case[24] , has as its objective the protection of the environment and intends to challenge the inaction of the public authorities in this field, which is deemed to be wrongful or contrary to fundamental rights. In this context, the fact that an association's corporate object does not contain a "*material or geographical limit"* or is not pursued "*in a lasting and effective manner*" (conclusions of the Walloon Region, p. 55) is irrelevant.

125. As the first judges rightly considered, the concept of "*national environmental law"* cannot be understood restrictively as referring solely to rules adopted by national authorities, but as including all rules forming part of the Belgian legal order. It follows that, insofar as Klimaatzaak invokes, on the one hand, the violation of articles 2 and 8 of the ECHR in that the rights enshrined in these provisions would be affected by the inaction of the public authorities with regard to global warming and, on the other hand, articles 1382 and 1383 of the former Civil Code, in that this inaction would be wrongful and would have caused it or would be likely to cause it damage, it has an interest within the meaning of articles 17 and 18 of the Judicial Code (examination of the existence and scope of the rights thus invoked is not a matter of admissibility but of the basis of the claim).

126. It is true, however, that the admissibility of Klimaatzaak's action could, in the current state of positive law and although the question is controversial (see C. BARTHELEMY, "Le préjudice écologique consacré par la jurisprudence : Winston Churchill ou Neville Chamberlain ?", *J.L.M.B.,* 2022/8, pp. 350-355), to be called into question insofar as it would denounce only pure ecological damage (defined, according to the doctrine cited by the Walloon Region, as *"any damage caused directly to the environment taken* as such*, independently of its repercussions on people and property").*

    It has to be said, however, that Klimaatzaak does not denounce (or at least not only) pure ecological damage, but also - if not mainly - individual ecological damage (on this distinction, see in particular N. DE SADELEER, "De la réparation du dommage environnemental individuel à celle du dommage collectif. Quelques réflexions sur des arrêts récents", in C. Delforge (ed.), *Responsabilité, risques et progrès,* Bruxelles, Larcier, 2021, pp. 7-25), some of which have already been realized. It is therefore inaccurate to assert, as the Walloon Region does on p. 59 of its conclusions, that the notion of *"individual ecological damage"* is *"not otherwise identified in legislation, in doCtrine* oo *in jurisprudence*". The mere fact that the astreintes are claimed for the exclusive benefit of Klimaatzaak is not sufficient to demonstrate that the harm suffered by Klimaatzaak has been caused to the environment.

[4] *The articles of association of Klimaatzaak ASBL state that it was formed to protect present and future generations against man-made climate change and the reduction of biodiversity, by taking legal action and encouraging the participation of civil society in the development of policy and action in these areas, but also to protect the environment within the meaning of the law of January 12, 1993 concerning a right of action for the protection of the environment.

is purely ecological: it is merely a means of pressure designed to ensure that the respondent parties put an end to the infringement of their rights deemed unlawful by the appellants in the main proceedings.

127. In any case, Klimaatzaak at least has an interest in suing for moral damages in the event of environmental damage. As the Constitutional Court points out, there is an "*essential difference between the environmental association and the citizen in an action for compensation for damage to an element of the environment that belongs to no one", since* while the latter *"will in principle have no direct and personal interest in bringing an action for compensation for the injury to that interest", on the* other hand, "*a legal person that has been incorporated with the specific object of protecting the environment can (...) effectively Suffer moral damage and bring such an action*" (C.C., January 21, 2016, n° 7/2016, *Amén.,* 2016, n° 3, p. 194, pt. B.8.1).

In this respect, even considering that an association such as Klimaatzaak could only claim non-material damage in the event of environmental infringement (a reading not required by the aforementioned judgment of January 21, 2016), it does not follow that it could only claim pecuniary compensation for this non-material damage and not, in the context of a preventive action and subject to the requirements specific to such action, an injunction aimed at putting an end to an unlawful infringement of its rights or preventing the worsening of existing damage, in the context of a preventive action and subject to the requirements specific to such an action, an injunction aimed at putting an end to an unlawful infringement of its rights or preventing the worsening of an existing damage. There is therefore no point in asking the Constitutional Court the question suggested by the Walloon Region on p. 66 of its conclusions[25] , which is based on this premise.

128. The Walloon Region also concludes that Klimaatzaak's action is inadmissible on the grounds that its interest is not personal, direct, certain, born and present.

However, it should be noted that, as mentioned above (paragraph 126), Klimaatzaak is claiming damage that has already begun to occur, and that the action was brought to prevent global warming deemed dangerous (art. 18, para. 2 of the Judicial Code). The fact that the dangerous threshold is not expected to be crossed for several decades is irrelevant, since there is a scientific consensus that, in the absence of appropriate action, this crossing would be the almost inevitable consequence of an accumulation of GHGs in the atmosphere, already underway, caused or at least aggravated by human activities, and that it can only be prevented by the taking of significant and immediate measures by the public authorities.

---

[25] Conclusions, p. 66: "*A* r/rre *subsidiaire, il y a lieu de poser à la Cour Constitutionnelle la question préjudicielle suivante: Does article 17 of the Judicial Code in its wording applicable to the present case, read alone or in conjunction with article 1382 of the Civil Code, violate articles 10 and 11 of the Constitution in the interpretation according to which a legal person which has been formed and acts to defend a collective interest, such as the protection of the environment or certain elements thereof, has no interest or standing to claim anything other than pecuniary compensation for any non-material damage it may suffer as a result of the infringement of the collective interest for which it was formed?' ".*

With regard to the personal nature of the interest, the Court refers to the preceding developments. As for the certainty of this interest, it is sufficiently clear from the elements set out by the Court in Part I of this judgment (Facts and context).

129. It follows that, as the first judges rightly decided, Klimaatzaak's action is admissible.

c) Admissibility of applications from individuals

130. The Walloon Region considers that the action of natural persons is inadmissible if it concerns pure ecological damage, if they cannot act in the collective interest and if they do not establish that they have a personal, direct, certain, born and present interest.

The Flemish Region also denounces the absence of a born and present, personal and direct interest on the part of the appellants in the main proceedings in general (and therefore of the natural persons in particular) and the fact that the action brought before the court would be a popular action.

131. The potential impact of global warming on the lives and private and family lives of every individual on the planet has been sufficiently demonstrated. The first judges also rightly noted the direct consequences of global warming already observed in Belgium, as well as the climate projections for Belgium by 2100 (p. 50 of the judgment under appeal, to which the Court refers).

As pointed out by the first judges, the fact that persons other than those who brought the present proceedings may suffer the same damage or violations of their fundamental rights is not sufficient to transform the interest of each individual appellant into a general interest, which is not simply the sum of individual interests.

132. The Walloon Region is also wrong to assert that the individuals in this case are claiming pure ecological damage, when they are clearly claiming individual damage, including problems with food and water supplies, damage to infrastructure and human settlements, and increased morbidity and mortality, impacts on physical health (increase in infectious diseases and non-communicable diseases such as allergies, worsening of symptoms of pre-existing cardiovascular and respiratory diseases) and mental health (including anxiety-related harm), not to mention risks to life or physical integrity resulting from extreme events such as storms, floods, avalanches and landslides (their conclusions, p. 165).

133. The Walloon Region considers that the action by individuals "*could be admissible only insofar as each of these parties demonstrates its individual interest in*

However, it must be noted that Klimaat aak and crts. do not provide any information specific to their respective situations; they do not provide any personal supporting documents; they confine themselves to general and abstract considerations, valid for all and even valid for everyone; these considerations do not make it possible to distinguish the action of natural persons from a popular action; consequently, the action of these natural persons is inadmissible" (his conclusions, p. 62)[26] .

However, the extent of the consequences of global warming and the scale of the risks it entails mean that it can be considered, with sufficient judicial certainty, that each of the natural persons who are validly involved in the case has an interest of their own in obtaining the convictions that are sought against the public authorities.

This is all the more the case given the European Court's observation that it is "*often impossible to quantify the effects of significant industrial pollution in each individual situation and to distinguish the influence of other factors, such as, for example, age and occupation*", and that *"the same* applies to *the deterioration in quality of life resulting from industrial pollution", "quality of life*" being "*a highly subjective concept which does not lend itself to precise definition"* (Eur. Ct. D.H., *Cordella v. Italy* judgment, January 24, 2019, §160).

In addition, given that the same claims have been made by all the appellants in the main proceedings, that no claim for compensation has been made by them *(a fortiori* on an individual basis), that a single procedural indemnity has been claimed for all these parties and that Klimaatzaak's action is in any case admissible, it would be contrary to the proper administration of justice to resort to pre-trial proceedings on this issue, which would force all parties to the case to debate the individual interests of several thousand people, when there is no doubt that at least the bulk of these parties have such an interest.

134. With regard to the certain, born and present nature of the interest of the natural persons, the Court refers to the above developments concerning the admissibility of Klimaatzaak's action (in particular with regard to the existence of already existing damage and art. 18, para. 2 of the Judicial Code). In any event, it should be noted that the individuals consider that the respondents have violated articles 2 and 8 of the ECHR and articles 1382 and 1383 of the former Civil Code insofar as they are concerned, and have done so for several years, by failing to do their part in terms of the necessary measures to limit global warming so as to prevent it from eventually crossing the threshold deemed dangerous for life and likely to seriously affect their private and family life.

As mentioned above, the fact that the dangerous threshold is not expected to be crossed for several decades is irrelevant as long as there is a consensus that

---

On p. 84 of its conclusions, the Brussels-Capital Region, which does not explicitly question the admissibility of the original claim, considers in the same vein that *"the interest of the appellants is not sufficiently individualized in that it relates in general to the right to a healthy environment".*

that this will be the almost inevitable consequence (with unchanged policies) of an accumulation of GHGs in the atmosphere, caused or at least aggravated by human activities, and that it can only be prevented by significant and immediate action on the part of public authorities.

135. For the rest, the Court points out that the question of whether or not the rights invoked by the appellants have been violated by the public authorities is a question of substance and not of admissibility.

The lower courts were therefore right to rule that the actions brought by the natural persons were admissible, a solution which is all the more necessary in view of the need to interpret domestic admissibility criteria in the light of article 9.3 of the Aarhus Convention.

136. For the same reasons, the Court considers that the parties listed in Appendix B, who are being challenged by the Belgian State and the Walloon Region, had an interest in intervening in the case.

The judgment will also be confirmed on this point.

C. Examination of the means

137. The appellants in the main proceedings level a twofold reproach at the respondents:

- their part in the global effort to reduce GHG emissions and avoid dangerous global warming;
- the absence of the healthy and loyal cooperation needed to develop good climate governance at national level.

In their view, these elements constitute both a violation of articles 2 and 8 of the ECHR (first plea) and a fault within the meaning of articles 1382 and 1383 of the former French Civil Code (second plea).

The Court will examine the arguments put forward by the appellants in the main proceedings in the order they have invoked them, despite the invitations of certain respondents to proceed differently.

1. The first plea: violation of articles 2 and 8 of the ECHR

a) The scope of Articles 2 and 8 of the ECHR, particularly in environmental matters 138

The ECHR does not enshrine as such a right to a healthy environment (Cour eur. D.H., *Ivan Atanasov v. Bulgaria,* December 2, 2010, § 66). The European Court, which favors a teleological and evolutionary approach by considering the convention as a

The "*living instrument*" principle (Eur. Court of Human Rights, *EB v. France,* January 22, 2008, §92) has, however, developed a significant body of case law concerning rights that may be violated "*par ricochet*" as a result of environmental damage (N. BERNARD, S. VAN DROOGHENBROECK, I. HACHEZ, Ü. JADOT, A. DAVID, A. PICQUÉ, C. LANGLois and B. GOMES, *op. cit.* p. 12). This applies in particular to
– and above all - articles 2 and 8, which are invoked by the appellants in the main proceedings.

1) Article 2 of the ECHR

139. Article 2 enshrines the right to life of the persons protected by the Convention. This provision imposes on each State the obligation to "*refrain from causing death voluntarily and wantonly*" (negative obligation), but also the positive obligation to "*take the5 necessary measures to protect the lives of persons under its jurisdiction"* (European Court of Human Rights, *Kurt v. Austria* judgment*,* June 15, 2021, §157). While the European Court accepts that *"any presumed threat to life does not oblige the authorities, under the Convention, to take concrete measures to prevent it",* it considers that "*this is not the case, in particular, where it is established that the said authorities knew or ought to have known at the time that one or more individuals were under real and immediate threat to their lives, and that they did not take, within the scope of their powers, the necessary and sufficient measures to mitigate that risk*" (Cour eur. D.H., *Oneryildiz v. Turkey* judgment*,* June 18, 2002*,*
§63; see also Cour eur. D.H., judgment in *Zammit Moempel v. Malta,* November 22, 2011, §67). As far as environmental issues are concerned, violation of the right to life is conceivable in all *"areas likely to give rise to a serious risk to life or the various aspects of the right to life"* (Cour eur. D.H., *Oneryildiz v. Turkey* judgment*,* June 18, 2002, §64).

In other words, in order to assess the existence of a positive obligation on the part of a State under Article 2, it is first necessary to verify the existence of a real and immediate risk to life. In this respect, the requirement of an "*immediate*" risk *does* not imply that there should be an "immediate" risk to life.
"In other *words, the "protection offered by Article 2 also covers dangers which may arise in the long term"* (N. BERNARD, S. VAN DROOGHENBROECK, I. HACHEZ, C. JADOT, A. DAVID, A. PICQUÉ, C. LANGLois and B. GOMES, op. cit. GOMES, *op. cit.* p. 15 and
ref. cited).

It must then be ascertained whether the public authority knew or ought to have known that this risk existed, and whether it took the necessary and sufficient measures (or appropriate measures, according to other Court rulings) to mitigate this risk. By definition, the protection of the right to life as a positive obligation implies the adoption of preventive measures. This is no different in environmental matters (see Cour eur. D.H. (GC), *Oneryildiz v. Turkey* judgment*,* November 30, 2004, §101: "*It follows that the Turkish authorities, at several levels, knew or were supposed to know that several individuals living in the vicinity of the Ümraniye municipal landfill were under real and imminent threat. Consequently, they*

had, under article 2 of the Convention, a positive obligation to take effective, necessary and sufficient measures to protect them (...)" (emphasis added).

The obligation under Article 2 to take preventive operational measures is an obligation of means and not of result[27] . According to the Court, "*where the competent authorities have become aware of the existence of a real and immediate risk to the life of others such as to give rise to an obligation on them to act, and where, faced with the risk identified, they have taken appropriate measures within the scope of their powers, the fact that such measures may nevertheless fail to produce the desired result is not in itself such as to justify a finding that the State has failed to fulfil its obligation under Article 2 to take preventive operational measures*" (Cour eur. D.H., *Kurt v. Austria* [GC] judgment, June 15, 2021, § 159). States' margin of appreciation as regards the measures to be taken is, in principle, greater when environmental damage is beyond human control than when it results from "*dangerous activities of human origin*" (Eur. Court HR, *Bouda "i'eva v. Romania* judgment*,* March 20, 2008, §135). Finally, an impossible or disproportionate burden cannot be imposed on States without taking into account the operational choices they have to make in terms of priorities and resources (Cour eur. D.H., *Budayeva and others v. Russia* judgment*,* March 20 2008, § 135; Cour eur. D.H., *Brincat and others v. Malta judgment,* July 24, 2014, § 101).

Moreover, Article 2 of the ECHR, as interpreted by the European Court of Human Rights, does not impose any requirement of "*characterized* inaction" (conclusions of the Belgian State, p. 207 et seq.) distinct from the aforementioned requirements.

2) Article 8 of the ECHR

140. Article 8 of the ECHR states that everyone has the right to respect for his private and family life. home and correspondence. It follows from Article 8 §2 of the ECHR that state interference with the right guaranteed by Article 8 §9 must meet three conditions
These requirements are cumulative: they must be provided for by law, pursue a legitimate aim and be proportionate. In particular, to assess the proportionality of an interference with the exercise of protected fundamental rights in relation to the legitimate aim pursued (article 8§2), it is necessary to take into account the measures taken by the State, in parallel with this interference, to protect the fundamental rights of individuals. These protective measures help to restore the balance between competing interests.

141. The European Court of Human Rights accepts that serious environmental nuisances - and not just pollution as invoked by the Walloon Region (p. 110 of its conclusions) or nuisances resulting from "specific" activities as written by the Brussels-Capital Region (its conclusions, p. 79) - can constitute an infringement of the right to respect for the environment.

[27] However, the distinction drawn in Belgian civil law between obligations of means and obligations of result should not be applied to the interpretation of this provision.

of private and family life (e.g. Cour eur. D.H., *Powell and Rayner v. United Kingdom,* February 21 1990, Lopez Ostra v. Spain, December 9 1994, Guerra v. Italy, February 19 1998). Nor is it required, for there to be a violation of Article 8 of the ECHR, that the situation be "*in one way or another unlawful independently of the violation"* of that provision, as the Brussels-Capital Region suggests (its conclusions, p. 77). A

An "arguable grievance" in this area *"may be denied if an environmental risk reaches a level of seriousness that significantly diminishes the applicant's ability to enjoy his home or his private or family life",* the assessment of this minimum level being relative and dependent "*on all the facts of the case, in particular the intensity and duration of the* nuisance *and its physical or psychological consequences on the health or quality of life of the person concerned*" (Eur. Ct. D.H., *Cordella v. li:alie* judgment*,* January 24, 2019, §157). To benefit from the protection of Article 8 of the ECHR, the applicant must therefore establish that there has been interference in his private sphere due to the environmental situation complained of, and that this interference has

reaches a minimum level of seriousness (S. VAN DROOGHENBROECK, C. JADOT and C. DE BUEGER, "Environnement, climat et droits fondamentaUK 'î, in *Actualités choisies des droits fondamentaux,* C.U.P., Limal, Anthemis, 2021, §10). On the other hand, it is not necessary, as the Flemish Region claims, for this interference to be "*specifically linked locally*" (its conclusions, p. 113).

Article 8 can be applied in environmental cases, whether the environmental damage is directly caused by the State, or whether the State's responsibility stems from the absence of adequate regulation of private industry (J. BODART, "La protection de l'environnement par le biais du droit au respect de la vie privée et familiale et du domicile", *Amén.,* 2003/4, no. 8, p. 215). Whether one approaches a case from the angle of a positive obligation on the State to adopt appropriate and reasonable measures to protect the rights guaranteed in the first paragraph of Article 8, or from that of interference by a public authority (negative obligation) to be justified from the angle of its second paragraph, the applicable principles are, in the words of the European Court of Human Rights, "*quite similar*" (Eur. Court HR, *Tatar v. Romania* judgment*,* January 27 2009, § 87). Thus, in both cases, the State must strike a fair balance between the competing interests of the individual and of society as a whole, as the objectives listed in paragraph 2 may

play a role in striking this balance, even in the case of positive obligations resulting from paragraph [ieF] (see in particular Cour eur. D.H., judgment in *Flamenbaum v. France,* 13 December 2012, §134). In this respect, the State enjoys, in principle, a wide margin of appreciation to determine the measures to be taken to ensure compliance with the Convention, no special status being reserved for human environmental rights (Cour eur. D.H. [GC], judgment in *Hatton and Others v. United Kingdom,* July 8, 2003, §122).

142. As in the case of the right to life, the existence of a serious and imminent risk is not excluded by the fact that the feared impacts are remote in time (0. DE SCHUTTER, "Climate change and human rights: the Urgenda case", *Rev. Trim. D.H.,* 2020/123, p. 594). In *Taskin v. Turkey*, the European Court of Human Rights rejected the Turkish government's argument that Article 8 was inapplicable as of the date on which the decision was handed down.

While the risk to which the applicants referred was "*hypothetical, as it can only occur within a period of twenty to fifty years"*, it could not have constituted an "*imminent and serious risk*" (Cour eur. D.H., *Taskin and others v. Turkey,* November 10, 2004, §107-114).

143. The European Court of Human Rights has also reiterated on several occasions that, with regard to activities dangerous to I enviFonnement, the principles developed in the context of the positive obligations deriving from Article 8 also apply to Article 2 (Cour eur. D.H., *Budayeva and Others v. Russia* judgment, 20 March 2008, § 133; Cour eur. D.H., *Brincat and Others v. Malta* judgment, 24 July 2014, § 102).

b) National iuge control, subsidiarity and margin of appreciation

144. The appellants in the main proceedings consider "*that the margin of appreciation granted by the Court of Human Rights to the Contracting States in application of the principle of subsidiarity does not apply to national judges, who are the guarantors of the effective protection of fundamental rights within their own system*" and whose control is therefore "*full and complete*", so that the
The "*notion of a margin of appreciation, as set out in the case law of the European Court of Human Rights and invoked by the respondents, is not such as to limit the* Court's *review of the respondents' action"* (their conclusions, p. 278).

This argument cannot be followed according to the Belgian State, which insists that the "*principle of subsidiarity, which applies (...) to the control exercised by the European Court of Human Rights in relation to that exercised by the national courts, is completely unrelated to the margin of appreciation enjoyed by the Member States in implementing respect for human rights".) to the control exercised by the European Court of Human Rights in relation to that exercised by national courts, is completely unrelated to the margin of discretion enjoyed by Member States in implementing respect for the fundamental rights protected by the ECHR*", so that it could not "*lead to the elimination of the discretion enjoyed by Member States in the adoption and implementation of their climate policy".* And he concludes that "*this discretionary power of the States remains full and complete, which implies that the control of the judicial judge is a marginal control"* (his conclusions, p. 214). The Walloon Region agrees with the Belgian State. The Brussels-Capital Region also considers that the margin of appreciation granted to States applies to the control exercised by national judges (its conclusions, p. 76). The Flemish Region insists on the wide margin of discretion granted to States, without however examining its link with the principle of subsidiarity (its conclusions, p. 114 et seq.).

145. Article 1 of the ECHR requires States to secure to everyone within their jurisdiction the rights and freedoms defined therein, from which it can be deduced that the Convention entrusts "in the *first place to each of the Contracting States the duty of securing the enjoyment of the rights and freedoms enshrined therein*" (European Court of Human Rights, *Handyside v. United Kingdom* judgment, December 7, 1976, §48). The resulting principle of subsidiarity embodies "*the essence of a rule on the distribution of COiTipétences between the Court and the member States*", the ultimate aim of which is to
"to "*secure to everyone within the jurisdiction of a State the rights and freedoms set forth in the Convention"* (Eur. Court of Human Rights, *Kavala v. Turkey* judgment, December 10, 2019, §99).

It is based both on an imperative *to ensure* the *effectiveness* of the rights enshrined (the angle favored by the appellants in the main proceedings) and on a concern to respect the *legitimacy* of national sovereignties (a consideration at the heart of the respondents' arguments).

146. From the point of view of *effectiveness,* subsidiarity *"is expressed in Articles 13 and 35 §1 of the Convention*" (Cour eur. D.H. [GC], *Kudla v. Poland* judgment*,* October 26 2000, §158). Article 13 confers on anyone whose rights and freedoms protected by the Convention have been violated an effective remedy before a national court, whereas Article 35 requires the applicant not only to have mobilized the procedural avenues available in his State, but also to have put forward, before the national courts, pleas based on the ECHR. The purpose of the rule enshrined in Article 35 is to give States the opportunity to prevent or "*remedy alleged breaches*" (Cour eur. D.H., *Van Oosterwij "ck v. Belgium* judgment*,* November 6 1980, §34) and it "*is based on the assumption - the object of Article 13 of the Convention, with which it has close affinities - that the domestic order* provides *an effective remedy for the alleged violation*" (Eur. Court HR [GC], *Mifsud v. France* judgment*,* September 11 2002, §15). The criterion of effectiveness permeates all the case law of the European Court of Human Rights, which insists that the Convention is *"intended to protect rights that are not theoretical or illusory, but concrete and effective*" (Eur. Court HR, *Airey v. Ireland* judgment*,* October 9 1979, §25). In certain areas, such as the application of Article 6 of the ECHR, the Court has held that *"the best remedy in absolute terms is, as in many areas, prevention*" (Cour eur. D.H., *Olivieri et al. v. Italie,* 2016, § 45).

Thus, although, as the Walloon Region in particular points out (its conclusions, p. 104), Articles 2 and 8 ECHR do not explicitly provide for a sanction in the event of a violation of the obligations enshrined therein, such a sanction may be deduced from the right to an effective remedy enshrined in Article 13 ECHR, which must make it possible not only to obtain reparation for the damage caused by the violation of the other rights enshrined in the Convention, but also to put an end to such violation, and ideally to prevent it (S. VAN DROOGHENBROECK, "Flandria, Anca, Ferrara .... Urgenda? Entre réparation et prévention, de l'indemnisation à l'injonction", 1.7., 2020/36, p. 750). In environmental matters, a comparable requirement for an effective remedy arises from Article 9.4 of the Aarhus Convention, which stipulates that judicial procedures "*shall provide adequate and effective remedies, including injunctive relief where appropriate, and shall be objective, fair and expeditious without being prohibitively expensive ... '".*

147. From the point of view of *legitimacy,* the European Court of Human Rights is keen to respect the diversity of national solutions to human rights issues in terms of the democratic stakes involved. In its /-lotion judgment of July 8, 2003, the Court explained the link between subsidiarity and democratic legitimacy: "*The Court recalls at the same time the fundamentally subsidiary role of the Convention mechanism. The national authorities enjoy direct democratic legitimacy and, as the Court has repeatedly affirmed, are in principle in a better position than the international judge to take action on their own behalf.*

local needs and contexts. (...) When questions of general policy are at stake, on which profound divergences may reasonably exist in a democratic State, particular importance must be attached to the role of the national decision-maker" (Cour eur. D.H. *DGC)*, *Hatton and others v. United Kingdom,* July 8, 2003, §97).

This "*partiCUl importance*" that the Court believes should be accorded "*to the role of the national decision-maker*" is embodied in the concept of the national margin of appreciation, incorporated into the ECHR preamble by Protocol no. 15 and presented as "*the praetorian expression*" (Fr. SuDRE, *Droit européen et international des droits de l'homme,* Paris, P.U.F., 1989, p. 228) or the "*corollary*" (G. MALINVERNI, "Le Protocole n°15 à la Convention européenne des droits de l'homme", *Rev. trim. dr. h.,* 2015, p. 54) of the principle of subsidiarity. As summarized by the European Court of Human Rights: "*In accordance with the principle of subsidiarity, it is primarily for the Contracting Parties to ensure respect for the rights and freedoms defined in the Convention and its Protocols, and in doing so they enjoy a margin of appreciation subject to the Court's control"* (Eur. Court D.H. [GC], *Correia de Matos v. Portugal* judgment*,* April 4, 2018, §116). This margin of appreciation will generally be wider in ethically, politically or even economically sensitive areas, particularly in the absence of a European consensus (see Fr. TuLKEHs and L. DONNAY, "L'usage de la marge d'appréciation par la CouF européenne des droits de l'homme. Paravent juridique superflu ou mécanisme indispensable par nature?", *Revue de science criminelle et de droit pénal comparé,* vol. 1, 2006, p. 12 et seq.) This is particularly true in environmental matters, where the Court considers that, given the complexity of the issues involved, its role can only be marginal, as the "*choice of means*" concerning environmental issues falls mainly within the national margin of appreciation (Cour eur. D.H., décision *Greenpeace e.V. et autres c. Allemagne,* May 2, 2009).

While in principle this margin of appreciation should not apply in the context of Article 2 of the ECHR, given the absolute nature of the protection conferred on the right to life, it is clear that this concept now seems to apply to the positive obligations imposed on States (Fr. TULKrNs and L. DONNAY, *op. cit.* pp. 15-20 and references cited; Cour eur. D.H. [GC], *Garib v. Netherlands* judgment*,* November 6, 2017, §137; see also 0. Dr SCHUTTER, ' Changements climatiques et droits humains : l'affaire Urgenda ", *op. cit.,* p. 594 :
"The question therefore arises as to the degree of intensity of judicial review, on the spectrum that ranges from a marginal review, limited to the censure of manifest error of assessment, to a more advanced review, which checks the appropriateness of the measures adopted by asking whether, with regard to all the measures likely to contribute to the objective sought, the authorities have taken the most appropriate measures").

148. The link between the principle of subsidiarity and the margin of appreciation cannot therefore be denied. The Belgian State, which asserts that the *"principle of subsidiarity (...) has nothing to do with the margin of appreciation*", itself admits, in the same breath, that the "*corollary of the principle of subsidiarity is that the Member States are granted a margin of appreciation in the implementation of this control*" (its conclusions, no. 380, p. 215).

The appellants in the main proceedings are also right to assert that the margin of appreciation relates solely to relations between the European Court of Human Rights and the national authorities. It is therefore "*not trans5posable into domestic national relations and, consequently, before the national judge*" (N. BERNARD, S. VAN DROOGHENBROECK, I. HACHEZ, C. JADOT, A. DAVID, A. PiCQUÉ, C. LANGLois and B. GOMES, *op. cit.* p. 23). Contrary to what the Brussels-Capital Region maintains (its conclusions, p. 176), the reference to the concept of "*national decision-maker*" and to the latitude of the national legislator in the *Hatton* judgment (see point 147 above) does not contradict this assertion. Indeed, in the same paragraph of the judgment, the European Court of Human Rights states that it is the "*national authorities*" (defined more broadly, therefore, than the legislature) that "*are in principle in a better position than the international judge to rule on local needs and contexts*".

149. This being said, while the margin of appreciation within the meaning of the ECHR does not apply to the judiciary when it reviews the action of the legislative and executive powers, it is nonetheless subject to the principle of the separation of powers, which requires it, albeit by virtue of this constitutional principle and not a Strasbourg principle, to limit itself to a marginal review in the event of discretionary competence on the part of the other two powers. It is in this sense that the Belgian State denounces the fact that to follow the argument of the appellants in the main proceedings with regard to the control to be exercised by the national judge over the executive and legislative powers, would be to operate "*a shift such as to violate head-on the constitutional principle of the separation of powers, prohibiting the judicial judge from substituting his own assessment for that of the legislator*" (its conclusions, pp. 214-215). However, as explained below, this question cannot be dissociated from that of the direct effect of Articles 2 and 8 of the ECHR.

c) <u>The direct effect of Articles 2 and 8 of the ECHR and the separation of powers</u>

150. The Walloon Region (in its opinion, pp. 105 et seq.) and the Brussels-Capital Region (in its opinion, pp. 67 et seq.) consider that the appellants could not rely on the positive obligations imposed by Articles 2 and 8 of the ECHR, since these provisions would not have direct effect in the positive sense. These provisions could not therefore constitute autonomous grounds for their claim.

151. Although eminent judges have suggested that "it *would never occur to anyone to contest the direct effect of the European Convention on Human Rights*" (Conclusions of Advocate General De Koster preceding Cass., June 2 2006, *Pas.,* I, p. 1324, § 133), it has to be said that the issue is more complex. In a judgment of March 6, 1986, the French Supreme Court held that Article 8 of the ECHR, insofar as it lays down positive obligations, was not sufficiently precise and complete to constitute a source of subjective rights for individuals, and that the direct effects of this provision were therefore limited to the negative obligations it lays down (Cass., March 6, 1986, *Pas..,*

1986, I, p. 433; *R,C.J.B.,* 1987 and note Fr. RiGAUx; see also Cass. 10 mai 1985, *Rev. Not. 8.* 1986, p. 438). The view that the direct effect of the rights enshrined in the ECHR is limited to the negative obligations imposed on States has since been widely endorsed (see in particular the references cited by J. PIERET, "L'influence du juge belge sur l'effectivité de la convention : retour doctrinal et jurisprudentiel sur le concept d'effet direct", in *Entre ombres et lumières : cinquante ans d'application de la Convention européenne des droits de l'homme en Belgique,* V. Chapaux, J. Pieret and A. Schaus (eds.), Bruxelles. Schaus (eds.), Brussels, Bruylant, 2008, p. 108).

Advocate General Werquin recently wrote that "*a clear treaty norm, legally complete, which requires contracting States either to abstain or to act in a specific manner, and which is likely to be invoked as the source of a right of its own by persons subject* to *the jurisdiction of those States or to subject persons to obligations, or a norm of domestic law which requires subjects of law to abstain or to act in a specific manner,* has *direct effects in the national legal order"* (his conclusions before Cass, 15
December 2022, RG n° C.21.0003.F, www iuportal.be). The reasoning behind the traditional position on diFect effect is that the negative obligation (e.g., for Article 2 of the ECHR, to refrain from causing death in a wilful and irregular manner) imposes a sufficiently determined course of conduct, unlike the positive obligation (e.g., for the same provision, to take appropriate and reasonable measures to protect the lives of persons under its jurisdiction in the event of a real and immediate threat).

152. Authoritative doctrine has, however, demonstrated the limits of a binary approach, confined to the distinction between positive and negative obligations, particularly in view of the reversible nature of an obligation (0. Dr SCHUTTER, *Fonction de juger et droits fondamentaux : transformation du contrôle juridictionnel dans les ordres juridiques américains et européens,* Brussels, Bruylant, 1999, pp. 142-159) and the open texture of legal norms, particularly in the field of fundamental rights (J. PIERET, *Op. cit,* p. 108), in favor of a contextualized and gradual approach to direct effect, articulated with the closely related principle of the separation of powers (on this question, see. I. HACHEZ, " Précision et droits de l'homme dans l'ordre juridique belge : focus sur la notion polysémique d'effet direct ", Rev. *Dr. H.,* 2015, p. 2 et seq. ; see also 0. Dr SCHUTTER, *Fonction de juger et droits fondamentaux, op. cit,* p. 154: *'What is at stake in direct applicability is not, as is claimed, the precision and completeness of the international rule: it is the powers of the judge who is asked to apply the international rule*').

The Court also considers that the clear and precise nature of norms such as Articles 2 and 8 of the ECHR should not be assessed *in abstFaCto,* by examining the text alone, but by taking into account both the interpretation given to it by its authorized interpreters (notably the European Court of Human Rights) and the context (national but not exclusively) in which the provision finds application. On the national level, the question is to determine whether the *"reception structures*" of the Belgian legal system allow the judge to give effect to the norm concerned "*without profound normative modification"* (I. Hachez, *op. cit.*

cit. p. 5; see also J. PIERET, *Op. cit.* p. 29). Taking into account the international context makes it possible, as does the European Court of Human Rights, to make
reference, for the purposes of interpreting the Convention, to European and international 'consensuses' revealed by 'sources external' to the Convention itself, whether they be found in instruments with (hard law) or without (soft law) intrinsic legal efficacy, or even in scientific studies or the conclusions of expert c o m m i t t e e s " (N. BERNARD, .
VAN DROOGHENBROECK, l. HACHEZ, C. JADOT, A. DAVID, A. PicaUE, C. LANGLois and B. GOMEs, *Op. cit,* §12).

Indeed, as indicated above, the ECHR is a living instrument that must be interpreted in the light of current conditions, which may involve taking into account non-binding sources of law (Cour eur. D.H. (GC), judgment in Demir & *Baykara v. Turkey,* November 12, 2008, §76 et seq.; in particular Article 7b/s of the Constitution, Article 3, 1º of the UNFCCC and the Preamble to the Aarhus Convention, which emphasize the need to protect future generations), or even factual elements such as scientific studies on which there is unanimous agreement, or political consensus at international, European or national level. This is particularly true in a matter as complex as global warming: it is impossible to determine whether the public authority knew or ought to have known of the existence of a risk, and whether it took the necessary and sufficient measures to mitigate that risk, without referring to the knowledge of experts in the field. In this sense, the fact can inform the law, without, as the Walloon Region fears, creating or abolishing it. Only such an approach can guarantee the effectiveness of the rights enshrined in the ECHR. To deprive these rights of any direct effect in all circumstances, in their "positive obligations" aspect, would be tantamount to preventing their holders from gaining access to the courts, and would run counter to the "effectiveness" aspect of the subsidiarity principle referred to above.

153. However, it should be borne in mind that, as mentioned above, the principle of subsidiarity is also, and rightly so, closely associated with the question of national democratic *legitimacy.* In Belgian law, this concern is embodied in respect for the principle of separation of powers, which requires the judge not to make a political choice, but to confine his review to compliance by the legislative and executive powers with rights which, in their positive aspect, impose on the public authority an obligation to act (or to refrain from acting) that is sufficiently determined with regard to the aforementioned context. The judge must ask himself the following question: "*Would he be inconsiderately stepping outside the role assigned to him by the separation of powers if he himself gave effect to the conventional norm invoked before him?" (*\. HACHEZ, *op. cit.,* p. 5).

154. When it comes to climate policy, the issue is highly complex, and both the first judges and the respondents emphasized the need for caution on the part of the judiciary. The judgment under appeal thus states that "(T)*he extent and pace of the reduction of GHG emissions by Belgium, as well as the internal distribution of the efforts to be made in this direction, are and will be the result of political arbitration in which the judiciary cannot interfere*" (p. 82). The Flemish Region, for its part, specifies that *drastic measures*

such as banning fossil fuel vehicles or closing the port of Antwerp", if they are likely t o have a positive impact on GHG emissions,
"will also have catastrophic socio-economic consequences" when
"Some people would find themselves socially isolated, as they would no longer be able to move around as they wish, employment would be seriously affected, with collateral damage to social security and prosperity in general, etc." (her conclusions, p. 57). In her view, in establishing a climate policy, it is not only the right to pFotection of a healthy environment that needs to be taken into account, but also other rights such as the right to work, the right to social security, the right to property or freedom of trade and enterprise, which implies "*an examination between these different environmental, social and economic components" (Ibid.,* p. 58). The Brussels-Capital Region concurs, pointing out that "*reducing GHG emissions to the proportions sought by the appellants necessarily implies changes in the organization of life in society, with major repercussions on the way o f life of the inhabitants of the Brussels-Capital Region",* such changes requiring "*the mobilization of substantial financial and budgetary resources and major trade-offs with regard to the current use of public resources*" (its conclusions, p. 114). The Climate Ordinance thus expresses "*the need, in drawing up Brussels' climate policy, to ensure that balances (socio-economic, institutional, democratic and environmental) are maintained, which implies carrying out assessments and making trade-offs when adopting measures relating to climate policy" (Ibid.,* p. 120). The Belgian government points out that *"climate policies, conducted at international, European and Belgian level, are conceived in consideration of more global issues*", both in material and spatial terms. On the material level, climate policy is determined, at international and European level, by "*major geostrategic stakes*" that are not necessarily illegitimate (such as the demand from developing countries to be able to increase their GHG emissions in order to improve the well-being of their inhabitants, or the demand from industrialized countries to organize a transition that will avoid major inequality between citizens), and the COPs "*are the fruit of negotiations and political balances"* (his conclusions, p. 171). On the spatial level, the Belgian State points out that "*climate policy is part of a global dialogue with all the complexity and nuance that this necessarily implies*" and that the balance to be struck is global, so that it is "*not unreasonable for a State to be part of the concert of nations in determining its climate policy" (Ibid.,* p. 172). It also stresses that the legislature has broad discretionary powers in implementing its climate policy, which "*cannot be pursued in disregard of any other consideration of social cohesion, economic development or other aspects of the environment, for example*" *(Ibid.,* p. 165). Finally, the Walloon Region points out that achieving GHG emission reduction targets "*does not depend entirely on the public authorities*", whose means of action are not unlimited (its conclusions, p. 86).

155. The question of whether a judge can impose global warming mitigation measures on a state without taking a position on a political issue which, given

of the balance of issues at stake (and in particular of the impact on other fundamental rights), should fall exclusively to the other powers, is bitterly debated by the doctrine (on the subject, see in particular J. ALLARD, ï' La justice, pouvoir et contre-pouvoir démocratique ", E-legal, *Revue de droit et criminologie de l'ULB,* vol. 7, 2023, February 2023 ; V. LEFEBVE, " Témoin impuissant, acteur militant ou aiguilleur politique ? Le rôle du juge en démocratie à la lumière de I' 'affaire climat'", E-legal, *Revue de droit et criminologie de l'ULB,* vol. 7, 2023, February 2023). Thus, while some believe that "*determining the appropriate level of emissions reduction is* a *political issue that should be based on a democratic decision taken by parliamentary assemblies"* and that it *"should not depend on a decision by courts and tribunals that do not have the same legitimacy*" (B. DUBUISSON, "Responsabilité civile et changement climatique. Libres propos sur le jugement rendu dans l'affaire 'Klimaatzaak'", in *Liber amicorum Xavier Thunis,* Bruxelles, Larcier, 2022, p. 261) or point out that the negative effects of global warming mitigation measures by a State are "*often more direct and immediate than their positive effect"* and that, *"while the positive effects are global, these adverse effects often take place in the State's territories, where these measures are implemented"* (B. MAYER, "Is climate change mitigation a human rights treaty obligation?*", J.E.D.H.,* 2022/1, p. 12), others relativize the aforementioned threat to other fundamental rights in the short term, insist on the contrary on the threat posed by climate change to these other rights in the longer term** or on the fact that it is not a question of depoliticizing issues that are by nature political, but of politicizing them in a different way by focusing *' attention on the human dimension of politics, by focusing on the concrete consequences of political decisions on people's living conditions, and by paying particular attention to situations of vulnerability and the most marginalized"* (O. DE FROUVILLE, "Les droits de l'homme au service de l'urgence climatique?", *J.E.D.H.,* 2022/1, pp. 171-174; in the same vein, see. M. PETEL, "Droits humains et contentieux climatique: une alliance prometteuse contre l'inertie politique", *J.E.D.H.,* 2021, n°2, pp. 143-175; 0. DE SCHUTTER, "Changements climatiques et droits humains: l'affaire Urgenda", *op. cit,* pp. 604-605, who suggests that "*the issue of climate change is, arguably par excellence, one that traditional political mechanisms are ill-equipped to handle: the impacts of the accumulation of GHGs in the atmosphere are, for the most part, remote, both in time and space; because of the considerable time lag, of several decades, between emissions and their impacts, the political system, which often operates in the short term according to the imfTlediate preOCcUpations of the electorate, is not in a position to respond adequately to the dëfi ; finally, powerful and well-organized economic players, capable of blocking political decision-making, tend to oppose any significant change in direction that the situation calls for* (...) ").

In its judgment of March 24, 2021, the German Constitutional Court also pointed out that insufficient climate ambition at present would result in fundamental rights being restricted far more radically in the future (Federal Constitutional Court of Germany, Neubauer judgment of March 24, 2021, no. 1 BvR 2656/18, filed as Exhibits 0.13 (German version) and 0.14 (French translation) in the appellants' main proceedings).

156. Finally, on p. 175, the appellants cite Professor H. Dumont. Dumont, according to whom "*democracy is in danger when it is reduced to the majority will of voters and elected representatives, forgetting the requirements of the rule of law*" (H. DUMONT, "La démocratie, moteur des mutations de l'Etat de droit et vice-versa", in *Liber Amicorum André Alen,* Intersentia, Anvers, 2020, p. 91). The Belgian State retorts (p. 150 of its conclusions) that the same author goes on to specify that "*democracy is also in danger when it tends to confuse the necessary subordination of political power to law with 'the utopia of the overcoming of politics by law', via the subtraction of certain rules, decisions and political options that are decisive for the life of the collecCtivite OR national parliamentary, social and media debates, in favor of a fragmentation of deliberation forums that are certainly framed by law, but increasingly technical and disconnected from one another"* (H. DUMONT, *Op. cit,* p. 92).

The Court, for its part, states in the same text that *"the ideals of the rule of law and democracy must adjust to each other in simultaneous awareness of the places that unite them and the tension that may oppose them"* (H. DUMONT, *Op. cit.,* p. 91). It infers from the foregoing that, in matters of climate change, the judiciary can only find a violation of Articles 2 and 8 of the ECHR if it can be shown that the public authorities failed to take appropriate and reasonable measures, at least in the light of the best scientific knowledge at the time (and therefore without any discretionary power), to enable them to prevent it, to the extent of their powers, the crossing of a threshold dangerous to life and likely to seriously undermine respect for the private and family life of natural persons under their jurisdiction[29] .

d) Application to the case in point

157. In the past, the appellants in the main proceedings criticize the respondents for not having adopted and implemented climate governance that would have led to a reduction in GHG emissions *of "significantly more than 40% compared with 1990*" (their conclusions, p. 177).

For the present and the future, the appellants in the main proceedings consider that the respondents should have put in place a climate policy enabling them to achieve a GHG emissions reduction of -81% by 2030 compared with 1990.

After making a few preliminary remarks, the Court will examine compliance with Articles 2 and 8 of the ECHR in turn.

1) Preliminary remarks

In the same vein, see. Hoge Raad, Urgenda, December 20, 2019, ECLI : NL :HR :2019 :2006, §6.3.

158. It should be noted at the outset that Klimaatzaak does not invoke - and *a fortiori* does not demonstrate
- is itself the holder of the rights enshrined in articles 2 and 8 of the ECHR[30] . It follows that the judgment under appeal was wrong to conclude that these provisions had been violated in respect of the "plaintiffs" without distinction, and therefore including Klimaatzaak.

159. As regards Article 2 of the ECHR, the Belgian State does not *"contest that global warming is liable to endanger, even seriously, the lives of the natural persons who are parties to the proceedings*", but considers that *"the relevant question to be asked in order to determine whether the respondents are in breach of Article 2 of the ECHR in the present case is whether the lives of the natural persons who are parties to the proceedings are seriously endangered by global warming, as a result of the climate policy implemented by the Belgian State"* (its conclusions, p. 205). With regard to Article 8, he states that, from the point of view of positive obligations, it is a question of demonstrating "*that global warming, as a result of the policy implemented by Belgium and the Belgian State, is likely to have a current, visible and measurable impact on their private lives and their homes"* (his conclusions, p. 220).

The Court cannot follow this analysis. The question is not whether the lives of the natural persons involved in the proceedings are endangered or whether there is a risk of serious interference with their right to respect for private and family life as a result of global warming caused by the climate policy implemented by the Belgian State, but whether, because of this global warming (and not because of the Belgian climate policy), there is a real and immediate risk that requires the public authorities to act, admittedly within the scope of their powers and capabilities, to prevent this danger or to put a stop to an infringement that has already begun. In other words, it must be ascertained whether the respondent parties have done and continue to do their part in the fight against global warming, in order to prevent a dangerous threshold from being crossed.

160. Furthermore, the fact that the measures adopted by the respondent parties would not suffice, taken in isolation, to prevent dangerous global warming, cannot relieve them of their positive obligations. As O. De Schutter, "*for the obligation to prevent the occurrence of an event which, if it were to occur, might constitute a violation of international law, it is not necessary to prove that the adoption of preventive measures would necessarily have made it possible to avoid the occurrence of the said event: it is sufficient to show that these measures* are *likely to reduce its probability*" (0. Dr SCHUTTER, "Changements climatiques et droits humains: l'affaire Urgenda", *op. cit.,* p. 602). Yet, he rightly continues, *"any effort to reduce net GHG emissions, wherever that effort is made, has a global climate change mitigation effect"* and *"this effect is certain rather than purely hypothetical*" *(Idem).* In the same vein, the German Constitutional Court has rightly held that a State "*cannot in this respect disengage itself from its*

[3]* The question of whether it can invoke the violation of these provisions in relation to natural persons, who may not be parties to the case, was raised in the pleadings but not developed by the parties in their conclusions. The answer to this question is not, however, decisive in deciding the case in point, given the admissibility of the action brought by the individuals and the developments that follow.

responsibility by highlighting the GHG emissions produced by other States" but that, on the contrary, it follows "*from this particular dependence of the international community a constitutional imperative to actually take own, and if possible internationally agreed, measures to protect the climate '* (*Neubauer* judgment cited above, §203, according to the uncontested translation of the appellants in the main proceedings). The Dutch Supreme Court has also concluded that States are individually responsible for climate issues, despite the globaldimension of thephenomenon (HogeRaad, *Urgenda,* December 20, 2019, ECLI NL :HR :2019 :2006, §§5.7.1-5.8).

161. Nor can the fact that there is a binding framework at European Union level allow the Belgian State and the Regions to hide behind the provisions it sets out: indeed, these are minimum requirements, and it cannot in theory be ruled out that the ECHR would impose more ambitious GHG reductions. It is therefore not correct to assert that the Belgian State's mere compliance with the obligations imposed on it by the European Union would lead to the conclusion that Articles 2 and 8 of the ECHR have been complied with (conclusions of the Belgian State, p. 224; conclusions of the Flemish Region, p. 123, where the latter points out that *"the respondents have fulfilled their European emission reduction targets";* see also conclusions of the Brussels-Capital Region, p. 91). For the same reasons, no conclusion can be drawn from the fact that no action for failure to fulfil obligations has been brought against the Belgian State by the European Commission (conclusions of the Belgian State, p. 163). As these are minimum requirements which do not prevent EU Member States from pursuing a more ambitious objective, the question raised by the Flemish Region and the Belgian State as to whether European climate legislation complies with the right to life and the right to respect for family life as enshrined in the Charter of Fundamental Rights of the European Union does not arise in the present case. It arises all the less because the European Union is not, to date, a party to the ECHR, even though it follows from Articles 2 and 8 of the Treaty on European Union, from the Court of Justice's recognition of fundamental rights as general principles of law, and from the Charter of Fundamental Rights, that the right to life is protected within this legal order.

162. Furthermore, it is not correct to assert that, if the Court were to find that the respondents (or some of them) had violated Articles 2 and 8 of the ECHR, this would be tantamount to sweeping aside the measures put in place by the respondents (conclusions of the Walloon Region, p. 79 et seq.). A finding of such an infringement would merely point to their inadequacy. Furthermore, it should be remembered that, by virtue of the principle of primacy of international law having direct effect on domestic law, the judge must disregard the latter if it contravenes the former (Cass., May 27 1971, *Pas.,* 1971, I, p. 886, with the conclusions of Mr. Attorney General W.J. Ganshof van der Meersch; Cass., November 9 2004 and November 16 2004, *R.C.J.B.,* 2007, pp. 211 et seq.) In this sense, and contrary to what the Brussels-Capital Region maintains, there is nothing to prevent "*articles 2 and 8 of the ECHR from allowing the appellants to free themselves from the Conditions applicable under Belgian law in order to obtain reparation or prevention of damage*" (its conclusions, p. 126) insofar as the

repair or prevention of such damage would constitute an effective remedy for a breach of these provisions.

163. Moreover, the fact that the appellants in the main proceedings did not contest each of the measures taken by the respondents cannot be construed as a waiver on their part of their right to invoke the violation of articles 2 and 8 of the ECHR, nor can it alter the assessment of the respondents' compliance with these provisions.

Similarly, the fact that the appellants are no longer asking the Belgian State to achieve a GHG emissions reduction target by 2025 does not necessarily mean that they are giving up their claim that the measures already implemented are insufficient, but is more likely to be the simple consequence of the passage of time since the case was brought before the appeal court.

Finally, even if the positive obligations of the Belgian State and the Regions to take preventive operational measures to preserve the lives of individuals and their right to respect for private and family life are, as indicated above (point 139), in principle obligations of means and not obligations of result (conclusions of the Belgian State, p. 201; conclusions of the Brussels-Capital Region, p. 81 *in fine),* it is undisputed, and at the very least indisputable, in view of the climate science examined above, that measuring the reduction of GHG emissions is the main tool for combating dangerous global warming. The extent to which the right to life and to respect for private and family life has or has not been sufficiently safeguarded can therefore be assessed by analyzing the GHG emission reduction objectives that have been pursued and by verifying the results that have been obtained. Indeed, at international and European level, it is the measurement of GHG emission reductions that is used to determine Belgium's obligations and to assess the results of its climate governance, rather than a detailed analysis of the concrete measures designed to implement this governance. While the mere fact that an insufficient objective has been set or that a sufficient result has not been achieved cannot, considered in isolation, suffice to establish a violation of Articles 2 or 8 of the ECHR with regard to the obligations of means which they enshrine, the setting of an insufficient objective coupled with results which are also insufficient constitute, in this context, a sufficient presumption that the public authorities failed to take appropriate measures to prevent the realization of the serious and imminent risk of which they were aware, and thus violated articles 2 and 8 of the ECHR, unless they can establish that these measures constituted a disproportionate burden.

2) Compliance with article 2 of the ECHR

The risk involved

164. The existence of a real risk to the lives of the natural persons involved in the case is not in dispute. The Court has already noted the numerous warnings issued by the most eminent climate experts and the admission of this risk by the international political community (see points 12, 14, 17, 18 and 29 to 32 of the statement of facts). Moreover, even if the threshold of global warming deemed dangerous is not expected to be crossed for several decades, the "immediate" nature of this risk in the above sense is clear from the numerous IPCC reports referred to above: the process has in fact been underway for several decades and has already had negative consequences for the lives of many people, so that it is imperative to take action now. In its latest report, the IPCC noted that, although GHG mitigation policy and legislation have continued to develop since the ARS, global warming of 3.2°C by 2100 is currently forecast on the basis of Nationally Determined Contributions (NDCs) pledged up to October 2021. In order to limit warming to 1.5°C, the IPCC therefore recommends immediate action to significantly reduce global emissions over the course of this decade. Admittedly, it is likely that some of the individuals involved will no longer be alive by the end of the century. However, it is worth remembering the gradual nature of global warming and the impact it is already having (and will continue to have in the future), particularly in terms of heatwaves, a situation that threatens the lives of the very elderly.

Moreover, the real and immediate nature of the consequences of global warming is not really contested by the respondents. For example, the Belgian State *"does not deny that global warming is likely to endanger, even gravenly, the lives of natural persons who are parties to the proceedings*" (its conclusions, p. 205, emphasis added). Nor does it deny "*the need to mitigate climate change" (Ibid.,* p. 201, emphasis added). The Walloon Region cites its Déclaration de Politique Régionale of September 2019, in which it stated that *"(\}'urgence climatique et les dégradations environnementales sont telles que la société tout entière* est *appelée à modifier ses comportements en profondeur"* (its conclusions, p. 23, emphasis added). The Brussels-Capital Region, for its part, "does *not intend in any way to contest the merits of the arguments raised by the appellants as to the demonstration of the urgency created by the risks associated with climate change, as evidenced by the significant resources deployed to bring GHG emission reductions to their maximum level in the Brussels-Capital Region*" (its conclusions, p. 7, emphasis added). Finally, the Flemish Region takes up, without contesting, the lessons of the various COPs, notably those of COP25, which emphasized "*the urgency of climate change and the need for Parties to do their utmost to ensure that their Nationally Determined Contributions (NDCs) are revised with a high level of ambition*" (its conclusions, p. 16, emphasis added).

Risk awareness

165. It is then necessary to verify when the respondent parties knew or should have known that they had to act (and to what extent), before determining whether they took appropriate and reasonable measures to ensure the protection of the lives of the natural persons involved in the case.

166. Since at least 1988, it has been accepted that climate change is a "*common concern of mankind"* that will require *"timely action to address climate change within a global framework"* (UN General Assembly Resolution 43/53 on Protection of Global Climate for Present and Future Generations). This was followed by the establishment of international climate governance, as well as the creation of the IPCC and its first reports. In 1995, the IPCC was still stating that it was not possible to establish an "*unmistakable link"* between climate change and human activities. As early as the Kyoto Protocol, which was adopted in 1997 but came into force in 2005, Belgium undertook to reduce its GHG emissions by 8% between 2008 and 2012 (the first commitment period), a target reduced, by virtue of burden-sharing between member states, to 7.5% by European Union Decision n°2002/358/EC. It is not disputed that this target has been achieved, so there is no need to dwell on this period, especially as the appellants in the main proceedings are only asking the Court to declare that the parties have breached Articles 2 and 8 of the ECHR "*in pursuing their climate policy over 2020*".

The 2013-2020 period

167. According to the appellants in the main proceedings, Belgium "*knew as early as 2009-2011, and by 2015 at the latest, that it had to put in place a climate governance system that would enable it to achieve emissions reductions of over 25% and at least 40% by 2020, in order to comply with a downwardly revised dangerous warming limit. And all this time she knew that it was urgent to make this effort, that the threat to all life was immediate and potentially irreversible. It didn't.*" (his conclusions, p. 111).

168. With specific reference to the second commitment period (2013-2020), the Court recalls that, in March 2007, the European Council had initially decided on a reduction in GHG emissions of at least 20% by 2020 compared to 1990 levels. A few months later, however, the IPCC recommended in its 4th"e report that Annex I countries reduce GHG emissions by 25 to 40% by 2020.

Similarly, in its above-mentioned report, the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol on the work of its fourth session, held in Vienna from August 27 to 31, 2007, stressed that, "*according to the contribution of Working Group III to the Fourth Assessment Report, in order to achieve the lowest stabilization level assessed in the work of the Intergovernmental Panel on Climate Change to date, and to limit potential damage accordingly, Annex I Parties should collectively reduce their emissions to a level of*

emissions by 25% to 40% below 1990 levels by the means that may be available to them to achieve these objectives". Following on from the above, at COP13 in Bali in December 2007, the States Parties to the UNFCCC adopted an Action Plan which explicitly recognizes the need to substantially reduce GHG emissions to meet the ultimate objective of the UNFCCC, stresses the urgency with which this should be done and refers, albeit in a footnote, to the IPCC's recommendation of a 25-40% reduction in GHGs for Annex I countries.

Despite this action plan, the European Parliament, which had declared a few months earlier that a -30% GHG target for 2020 was imperative, adopted the 2020 Climate and Energy Package on December 17, 2008, calling for a 20% reduction in GHG emissions by 2020, with a commitment to increase this target to 30% if other major economies in the developed and developing world commit to making a fair contribution to the overall effort to reduce emissions.

Belgium, which is bound by the positive obligations imposed by Article 2 of the ECHR, was nevertheless aware that a 20% target was insufficient in the light of these obligations. Thus, in its declaration of Walloon regional policy of July 16, 2009, the Walloon Parliament had indicated that "*the objectives set by the European Union to reduce greenhouse gas emissions by 20% by 2020 (or by 30% in the event of an international agreement) compared to 1990 levels are laudable but insufficient",* that Europe should "*see further, Belgium and Wallonia too",* so that, in "the *event of an international agreement, the Government will request that Belgium advocate that the European objective be raised to 40%*". On December 3, 2009, the House of Representatives passed a resolution in the run-up to the Copenhagen COP, in which it called on the federal government to demand at international and European level that the targets to be adopted take account of the 25-40% GHG reduction included in the recommendations of the 4th"e IPCC report, and a few days later the Flemish Parliament passed a resolution stating that "*the precautionary principle implies that for the group of developed countries reduction targets of 25-40% are necessary by 2020 compared to 1990* (...)"*.*

169. At COP15 in December 2009, the States Parties signed the Copenhagen Accord, which recognized that a sharp reduction in global GHG emissions was essential to limit global warming to 2°C, while considering "*strengthening the long-term goal, taking into account various scientific findings, in particular with regard to a temperature increase of 1.5°C*". At COP16 in 2010 (Cancûn Agreements), States recognized that climate change had an impact on the effective enjoyment of human rights, and that consideration should be given to strengthening the long-term global goal, "taking into *account the best available scientific knowledge, in particular with regard to a global average temperature increase of 1.5°C*". In 2011, in Durban, the COP noted the worrying and significant gap "*between the combined effect of the Parties' mitigation commitments and the global target".*

annual global GHG emissions by 2020 and global emissions profiles that provide a reasonable prospect of containing the rise in global average temperature to below 2°C or 1.5°C above pre-industrial levels". In both Cancún and Durban, the need for Annex I countries to reduce GHG emissions by 25-40% by 2020 was explicitly reiterated.

Despite these repeated warnings, the parties to the Kyoto Protocol agreed on December 8, 2012, following COP18 in Doha, to target a reduction in GHG emissions of just 18% below 1990 levels by 2020 for Annex I parties (with the European Union's target set at 20%). As mentioned above, however, it was also decided that, by 2014 at the latest, it would be necessary for Annex I countries to revise their ambitions upwards, taking into account the target set in Bali.

At each of the COPs 19, 20 and 21, the target of a 25-40% reduction in greenhouse gas emissions by 2020 compared with 1990 levels, based on a 2ºC warming trend, was systematically reiterated3*. As a result, there was not only a scientific but also a political consensus on the issue, which provides a basis for interpreting Article 2 of the ECHR in the context of Belgium's positive obligations.

Admittedly, as J'affirme l'Etat belge, the objectives of the 4th[e] IPCC report were *"set globally for Annex I countries"* (its conclusions, p. 168). This did not, however, absolve Belgium, in the absence of a clear individual allocation, from referring to these objectives, which were scientifically established and the subject of a consensus on the part of the international political community, in order to determine its share in preventing a violation of Article 2 of the ECHR. Where necessary, the Court recalls the principles of common but differentiated responsibilities and precaution enshrined in Article 3 of the UNFCCC, as well as Article 3.1 of the Kyoto Protocol, which refers more explicitly to the individual responsibility of Annex I parties (in the same vein, see. Hoge Raad, *Urgenda, op. cit. §7.3.2:* "*The United Nations Climate Convention and the Paris Agreement are both based on the individual responsibility of States",* according to the uncontested translation of the appellants in the main proceedings).

The Court concluded that it had been clear to the respondents since 2007, and at the very least since 2009, that in view of its obligations under Article 2 ECHR, Belgium had to reduce its GHG emissions by at least 25% by 2020 in order to limit global warming to 2ºC. The fact, invoked in particular by the Belgian State, that adaptation can constitute an "*equally adequate* response *to climate change*" (its conclusions, p. 154, see also the conclusions of the Brussels-Capital Region, p. 83) does not prevent the mitigation systematically advocated by the IPCC reports from being the only solution.

---

[3]As the Dutch Supreme Court points out, the fact that this target was not subsequently recalled is explained by the fact that the distinction between Annex I and non-Annex I countries was subsequently abandoned, which does not imply that the AR4 reduction scenario would have been exceeded (Hoge Raad, Urgenda, *op. cit...),* §7.2.4).

indispensable, though not necessarily sufficient or exclusive. The same applies to the other measures mentioned by the Brussels-Capital Region "*to protect the lives of Brussels residents from the consequences of climate change*" (its conclusions, p. 83).

170. Moreover, it is not disputed that other European countries have already raised their 2020 GHG emissions reduction targets in 2009: Germany (40%) (2012), Denmark (40%) (2013), the UK (35%) (2013) and Sweden (40%) (2009), and have therefore set themselves a national target that is up to twice as high as the EU target. Nor is it disputed that their intentions have been realized. According to the inventory reports submitted by these countries in 2022 for the period 1990-2020 to the UNFCCC secretariat (available on the Secretariat's website (www.unfccc.int) and included in exhibits P30 to P32 of the appellants' file in the main proceedings) .

- emissions in Germany will be 41.3% lower in 2020 than in 1990; emissions in the United Kingdom will be 49% lower in 2020 than in 1990; emissions in Sweden will be 36% lower in 2020 than in 1990;
emissions in Denmark will be 41.3% lower in 2020 than in 1990.

171. This does not mean, however, that in absolute terms, a minimum GHG emissions reduction threshold of -40% was necessarily required to ensure compliance with Article 2 of the ECHR. As the Brussels-Capital Region points out, comparison is not reason, and these figures do not take into account other criteria such as the efforts made before 1990 or the particular situation of each of these countries (its conclusions, p. 39; see also the comparative work between these four countries and Belgium, on pp. 40-46 of its conclusions). These figures confirm, however, that the Belgian authorities were under no obligation to adhere to European targets, and that other countries have taken note of the inadequacy of these targets in the face of climate challenges.

172. The appellants in the main proceedings present, on pp. 103 and 182 of their conclusions, a table summarizing the factors which, in their view, justify setting the minimum target at a reduction of -40%.

Effort required in relation to the fork of 25-40% over 2020	Country Annex II
From 2007, 2°C	
RCD principle	Significantly more than 25%; towards the top of the fork
Fairness principle	Reinforces the RCD principle; towards the top of the fork, if not 40%.

Precautionary principle Principe de précaution	40%
Damage prevention principle Principe de prévention des dommages	Towards the top of the fork, if not 40%
From 2009 gradual shift from 2°C to 1,5°C Dès 2009 glissement progressif de 2°C vers 1,5°C	
COP decisions Décisions de la COP Paris Agreement Accord de Paris	40% or more Plus que 40% 40% off

173. However, it has to be said that these parties do not clearly indicate how each of the principles invoked, the COP decisions or the Paris Agreement make it possible to achieve a minimum 40% reduction in GHG emissions by 2020. In this respect, it should be remembered that the obligations of the Belgian authorities under Article 2 of the ECHR concern persons under their jurisdiction, so that neither the RCD principle nor the principle of equity can, beyond the political consensus reached in Bali and subsequently confirmed, be taken into account in determining the minimum threshold imposed by this provision in view of the requirements of the principle of separation of powers.

174. However, it is clear that, over time, the inadequacy of the -25% threshold must have become clear to the respondents.

175. So, after the IPCC indicated that global warming would probably exceed 2º C by the end of the century, COPs 19 and 20 reiterated on the one hand that climate change represented *"an urgent and potentially irreversible threat to human societies, future generations and the planet*" (COP19), and secondly that there was a significant and worrying gap between States' GHG reduction commitments for 2020 and the objective of containing the rise in the planet's average temperature to below 2°C or 1.5°C. Finally, the Paris Agreement of December 2015, reached at COP-21, acknowledged the need to contain *"the rise in global average temperature to* well *below 2°C above pre-industrial levels"* and to continue "*action to limit the rise in temperatures to 1.5°C above pre-industrial levels*". The Belgian government admits that, since the Paris Agreement, "*the 1.5°C objective has become clearer"* (its conclusions, p. 170), while the Brussels-Capital Region states that this threshold is "more realistic".
appeared for the first time in the Paris Agreement' (his conclusions, p. 60).

176. Since at least 2015, therefore, it has become clear that the aforementioned minimum of -25% would be insufficient given the need to keep global warming "*well below 2º C"*, and the 2018 special report confirmed that the 2°C target should now be abandoned for that of 1.5° C. In its 2018 report, UNEP also noted that the current commitments expressed in the NDCs were insufficient and that, if the ambitions of the NDCs were not revised upwards before 2030, it would become impossible to meet the 1.5°C target.

While the shift from a target of 2º C to 1.5º C necessarily implied an upward revision of the minimum threshold of -25% for 2020, the Court was unable to determine with certainty that this shift from 2º to 1,5° C had to be translated into a -40% reduction in GHG emissions under Article 2 of the ECHR (even considering that it had to be combined with the precautionary and preventive principles), *a fortiori* that the respondents were in a position to make this translation at the time, in theory or in practice.

On the other hand, a national reduction in GHG emissions of -30% by 2020 could be considered a minimum in the light of Article 2 of the ECHR.

In this respect, the Court notes that in its communication of January 10, 2007, the European Commission proposed that "*the EU* should *set itself the objective, within the framework of international negotiations, of reducing greenhouse gas (GHG) emissions from developed countries by 30% (compared with their 1990 levels) by 2020*", such an effort being considered "*necessary to limit the rise in global temperatures to 2 degrees Celsius*" (Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Limiting Global Climate Change to 2 degrees Celsius. The way ahead for 2020 and beyond, COM(2007) 2 final, Brussels, January 10, 2007). On January 31, 2008, the European Parliament adopted a resolution "*recalling that industrialized countries, including those that have not yet ratified the Kyoto Protocol, have a leading role to play in the global fight against climate change and must commit to reducing their emissions by at least 30% by 2020*". Lastly, the preamble to Directive 2009/29/EC reiterates *"the European Council's target of a 30% reduction by 2020, which is considered scientifically necessary to avoid dangerous climate change*".

The European Union's 2013-2020 Climate and Energy Package took note of this objective, albeit cautiously since it called for a 20% reduction in GHG emissions by 2020 compared to the base year (1990), with a commitment to increase this target to 30% if other major economies in the developed and developing world commit to making a fair contribution to the overall effort to reduce emissions.

177. The Walloon Region has made no mistake in this regard, since as early as 2014 (the deadline set by the Doha COP for raising the EU's proposed -20% target), it was already forecasting a 30% reduction in GHG emissions by 2020 in its "Climate" decree.

Moreover, it claims, without being contradicted on this point, to have far exceeded this target, having reduced its GHG emissions by 38.5% by 2020 (excluding the sector).

forestry3[2]). The "COVID" effect discussed below seems to have played only a marginal role, given that the Walloon Region specifies, also without being challenged, that its GHG emissions (excluding the forestry sector) were 38.2% lower in 2021 than in 1990 (its conclusions, p. 42).

In these circumstances, the Court considers that it has not been established that the Walloon Region has not done its part in reducing GHG emissions, which is essential in order to comply with its positive obligation to respect the right to life of the people living on its territory. The criticism that it (also) failed to cooperate sufficiently with the other respondents does not appear sufficient to call this conclusion into question, given the results sought (see also point 51 of the statement of facts above) and obtained.

178. As regards the measures taken by the other respondents, the Court notes that the Belgian State states in its conclusions that, despite the decision taken by the National Climate Commission on April 26, 2012 to extend the National Climate Plan 2009-2012 to the period 2013-2020, this plan could not be implemented as it was subject to negotiations on burden sharing 2013-2020 between the Belgian State and the Regions, which were only concluded with an agreement of December 4, 2015, which was finally included in a cooperation agreement of February 12, 2018, i.e. 2 years before the expiry of the second commitment period.

According to the Belgian State, the Belgian reduction in GHG emissions was, in 2019, 19.95% compared to 1990 and, in 2020, 26.9% compared to 1990. It admits, however, that this spectacular drop is due to the COVID crisis: "*From 2019 to 2020, there is a sharp decrease (8.60%) linked to the health crisis'* (its conclusions, p. 120). This is confirmed by the fact that, by 2021, total GHG emissions (excluding the LULUCF sector) "*had fallen by 23.9% compared with 1990* (...)" (Belgian State conclusions, p. 59). For the record, in its 2021 report, UNEP had noted an exceptional 5.4% drop in global GHG emissions in 2020 (see point 57 above).

The graph of Belgium's GHG reductions from 1990 to 2021 inclusive (source: federal website Climat.be, cited by the appellants in the main proceedings) shows a relative stagnation of GHG emissions between 2015 and 2019 and a sharp rise from 2021, demonstrating that, without the Covid effect, the results required by Union law would probably n o t have been achieved:

[2] *As the parties have not explained the impact of this forestry sector, the court concludes that it is negligible.

Figure 4.a. History of GHG emissions

179. In any case, it is undisputed that the -30% target was not reached in 2020, with or without a health crisis, and it is clear that, without the effect of this crisis, even the -25% target would not have been reached. The graph above also confirms that, for most of the period under consideration (2013-2019), the efforts made have produced only minimal results. However, as indicated above, Article 2 of the ECHR required the Belgian State to take appropriate measures, throughout this period, to reach the minimum threshold, initially -25%, which should have been revised upwards, by 2018 at the latest, to aim for a 30% reduction in GHGs.

Given this lack of ambition, the violation of Article 2 of the ECHR is established on the part of the Belgian State, even if the results achieved do not depend solely on the climate governance carried out at federal level.

180. The Flemish Region highlights the adoption, on June 28, 2013, of its third Flemish Climate Policy Plan 2013-2020, which includes a Flemish Mitigation Plan ("Het Vlaams Mitigatieplan" or VMP) whose aim is to reduce GHG emissions in Flanders between 2013 and 2020 (its conclusions, p. 38). However, it does not specify Flanders' overall target for this period. An examination of this plan reveals, on the one hand, that it was in line with the European objective of -20% for 2020 and, on the other, that it was aware of a document dated March 8, 2011 from the European Commission (COM(2011) 112) indicating that, in order to achieve an 80% reduction in GHG emissions by 2050, the EU actually needed to achieve a 25% reduction in GHG emissions by 2020 (VMP, p. 15). The appellants in the main proceedings also refer to an opinion of the Minaraad (Flemish Council for the Environment and Nature) submitted to the Flemish Parliament on December 4, 2009, which already stated that, for the 2020 target, "*the emission reductions required for developed countries should rather be at the upper end of this range (2S ä 40%)*" (their conclusions, p. 183).

Given its national importance[33] , particularly in terms of GHG emissions, it was incumbent on the company to set itself a target of at least -30% by 2020.

This was not the case. Nor does the Flemish Region indicate what its GHG reductions were in 2020 compared with 1990, merely stating "*that* it *can generally be concluded that Flanders has achieved (...) the non-ETS targets for the period 2013-2020*" (its conclusions, p. 86) and that the VEKP ("Het Vlaams Energie- en Klimaatplan") 2021-2030 is the subject of an annual progress report, the most recent of which dates from October 28, 2022 and "*contains the latest Flemish GHG inventory data for the year 2020*" (its conclusions, p. 39).

An examination of this report (especially p. 8) reveals the following:

- the reduction in GHG emissions across all sectors between 2013 and 2019 is marginal,
- the reduction in GHG emissions in Flanders by 2020 was only 20%,
- This reduction represents a *"sharp fall"* compared with 2019 (-9%) which, according to the report, can be largely explained by the health crisis.

Here too, it is clear that the Flemish Region did not take appropriate and reasonable measures to do its part during the period in question.

181. The Brussels-Capital Region *'emphasizes the special context of the city-region that is BruxelleS and the measures taken by the Region to combat climate change*' (its conclusions, p. 76), underlines its *"institutional particularity due to its role as the capital of Belgium*" and the fact that, as a "*city-region",* it "*differs from other regions in particular through its essentially urban character, its small surface area and its population density*", which explains why *"efforts in terms of emissions reduction or development of renewable energies (per capita) deliver lesser results in the Brussels-Capital Region*" (its conclusions, p. 91).

These particularities must be taken into account: unlike the Flemish and Walloon Regions, whose size and configuration make them more comparable to small states, the Brussels-Capital Region should be compared to other cities in a comparable situation. Thus, without being challenged on this point, the Brussels-Capital Region asserts that total GHG emissions from the territory of the Brussels-Capital Region represented, in 2020, only 3% of Belgium's total emissions.

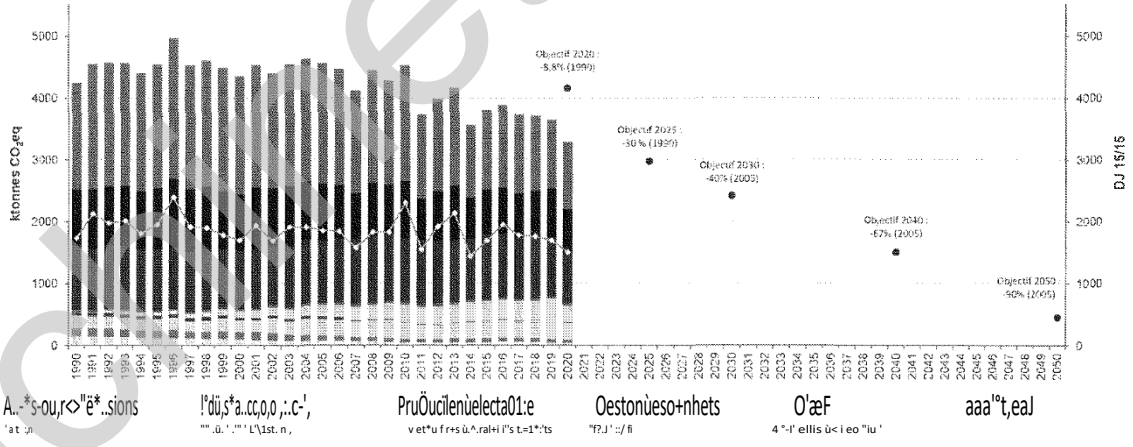
Just as the global dimension of global warming cannot exempt Belgium from doing its part, its special status cannot spare the Region from doing its part.

[3]According to the Brussels-Capital Region, in 2020, the Flemish Region was responsible for around 65% of GHG emissions from Belgian territory (its conclusions, p. 33).

Bruxelles-Capitale to do likewise in Belgium's efforts to reduce GHG emissions, since it is, like the other respondents, subject to the obligations imposed by Article 2 of the ECHR.

However, while in 2002 the Brussels Government had adopted a "*Plan d'amélioration structurelle de la qualité de l'air et de lutte contre le réchauffement climatique 2002-2010"* which integrated "*the strategy, priorities and actions to be undertaken over the next ten years and was imperative for all the administrative entities dependent on the Region"* (conclusions of the Brussels-Capital Region, p. 88), nothing of the kind has, according to information provided to the court, been adopted for the period 2013-2020. It was only on June 2, 2016 that, according to the Brussels-Capital Region, "*the first Regional Air-Climate-Energy Plan (...)* was adopted*, which, in addition to achieving the regional objectives that stemmed from the (intra- and inter-) Community agreements on the distribution of European objectives, set an objective of reducing GHG emissions by 30% in 2025"* (its conclusions, p. 91).

In terms of results, the Brussels-Capital Region claims to have reduced its GHG emissions by 23% in 2020 compared with 1990. It does not, however, specify the figures for 2021, although it follows from the above that, at least for global and national emissions and for those of Flanders, the health crisis has had a significant effect on the 2020 figures. This impact is confirmed by an examination of the graph below, which is included in the conclusions (on p. 37).



The same graph shows that, over the period 2013-2020, efforts to reduce GHG emissions have been very limited: after a substantial increase in 2013 and a significant reduction in 2014, emissions have risen again, only to fall slightly, reaching a level in 2019 that is almost identical to the situation prevailing in 2011.

In the same way as for the Belgian State and the Flemish Region, these elements testify to the fact that the Brussels-Capital Region has not taken the appropriate measures to do its part under Article 2 of the ECHR.

182. It follows from these developments that, with the exception of the Walloon Region, none of the respondent parties was in a position to set objectives compatible with what the best climate science, validated by the Bali Agreement and therefore by the international political community, required in terms of article 2 of the ECHR, i.e. GHG emission reductions of at least 25%, in order to take account of the lessons learned that a target well below 2º C of global warming was necessary to avoid ultimately endangering the lives of people living on Belgian territory, and therefore of the individuals involved in the case. This lack of ambition was reflected in the actual reductions in Belgium's GHG emissions, which, without the COVID effect, would clearly have fallen short of the 25% reduction recommended more than 13 years earlier (as confirmed by the 2021 results). The same is true of the Flemish and Brussels regions. This is all the more true given that the
If not since 2015, then at least since 2018 in view of the 1.5° C target, the -25% target had become manifestly insufficient, so that it was now necessary to aim for GHG reductions of at least 30% by 2020. It should be noted, incidentally and as the first judges did, that throughout the years of the second commitment period, the European Union had frequently warned the Belgian State of the risk of not reaching the European objective - which was nevertheless insufficient in view of the positive obligations incumbent on the Belgian State under article 2 of the ECHR - of 20%.

183. Admittedly, the -30% target should only have appeared necessary over the period 2013-2020, so that slightly lower reductions could have been accepted in view of the obligations imposed by Article 2 of the ECHR, the principles of which have been recalled above. However, it has to be said that the results achieved by Belgium, which was able to benefit from those of the Walloon Region, fell far short of this objective. However, neither the Belgian State, nor the Flemish Region, nor the Brussels-Capital Region have established that a target of -30% (and, *a fortiori,* any target in the 25-30% range) would have constituted an excessive burden, so that it can be concluded that these parties did not take appropriate and reasonable measures to ensure that the Belgian State did its part to prevent the threshold deemed dangerous by the scientific community, as this threshold resulted from the IPCC reports at the time, from being crossed.

The application, insofar as it seeks a finding of a violation of Article 2 of the ECHR by the respondent parties, with regard to the climate policy they pursued and implemented between 2013 and 2020, is well-founded, except with regard to the Walloon Region. The judgment is therefore confirmed insofar as it concerns, for this period, the violation of Article 2 ECHR by the Belgian State, the Flemish Region and the Brussels-Capital Region (with the exception of Klimaatzaak, see point 158 above).

- The 2021-2030 commitment period

184. As regards the 2021-2030 commitment period, the appellants in the main proceedings consider that the respondents should have opted for an 81% reduction in GHG emissions by 2030 compared with 1990 and that, having failed to do so, they have, also for this period, breached Articles 2 and 8 of the ECHR. Taking into consideration, in particular, the principle of the separation of powers and the margin of appreciation of public authorities in the exercise of their powers, but also the fact that this objective had become unattainable due to insufficient performance in 2020, they nevertheless limited the injunction to be addressed to the respondents to measures sufficient to reduce the overall volume of annual GHG emissions from Belgian territory by a minimum of 61% by 2030.

185. It is up to the appellants in the main proceedings to show that the percentages of 81% or at least 61%, which they claim constitute Belgium's minimum contributory share, are justified in the light of the protection they enjoy under Article 2 of the ECHR.

186. With regard to the 81 o/o reduction percentage, the appellants, recalling the Glasgow Pact of November 2021 and citing a scientific study of 2021[3] *, insist on the crucial nature of the present decade with regard to the challenges of global warming, and consider that the developed States, whose historical responsibility is high and whose GDP per capita is high, have in fact already consumed their fair share of emissions and should in principle cease emitting from 2030 onwards, so that this justifies a particularly increased effort on their part (their conclusions, p. 110, n° 234).

187. The percentages of -81% and -61% result from a study by Professor Joeri Rogelj of the Grantham Institute, entitled "Belgium's national emission pathway in the context of the global remaining carbon budget", carried out in March 2023. Rogelj is Professor of Climate Science and Policy at Imperial College London, co-author of IPCC reports and UNEP's annual Emission Gap Reports, and a member of the European Union's Scientific Council on Climate Change (their conclusions, p. 196). In his study, he starts from the global residual carbon budget established by the 6th"e IPCC assessment report, which gives a two out of three chance of meeting the threshold of a dangerous global warming of 1.5°C, i.e. 400 GtCO2, and deduces, according to different distribution keys, the remaining carbon budgets for Belgium from January 2021 and, on this basis, a linear trajectory of GHG reductions from 2020 to 2030, decreasing thereafter to reach a target of net zero in 2050 ("trajectory 1", or "path 1", described as a "concave trajectory" by the appellants in the main proceedings). In another table, Professor Rogelj envisages a linear trajectory not from 2020 to 2030, but from

[34] L. RAJAMANi et al, "National 'fair shares' in reducing greenhouse gas emissions within the principled framework of international environmental law", *Climate Policy,* 2021, 21:8, Exhibit J4 in the file of the appellants in the main proceedings.

2020 until Belgium's carbon budget is exhausted, still determined according to the different allocation keys ("trajectory 2" or "path 2").

188. The percentage of -81% is determined on the basis of the criterion of equal per capita emissions, which is, according to the appellants in the main proceedings, the one that is "*minimally consistent with fairness*" (their conclusions, p. 197).

As indicated above (point 173), however, the principle of equity cannot, beyond that which has been the subject of sufficient international political consensus (such as the Bali Plan), be taken into account in the development of our business.
under Article 2 of the ECHR, which concerns Belgium's respect for the right to life of persons under its jurisdiction within the meaning of Article ieF of the ECHR.

189. In the alternative, the appellants in the main proceedings propose the distribution key that is least restrictive for Belgium (known as the "Grandfathering" key, which, according to Mr. Rogelj, is contrary to the principles of equity in international environmental law) and the lowest percentage between trajectories 1 and 2, i.e. -61%, concluding that this is the "*minimum minimorum for effectively tackling the climate emergency", which* is *"beyond any margin of discretion. The respondents have no choice but to do even less": "In other words, this is the minimum threshold in respect of which the authorities have no discretion to comply with their obligations under ECHR law (…*)" (their conclusions, p. 351).

190. The reasoning of the appellants in the main proceedings can be approved in principle, as indicated above: the principle of separation of powers prohibits the court from determining a rate of GHG reduction which it deems desirable or equitable in view of Belgium's historical responsibility for GHG emissions. In order to establish a violation of Article 2 of the ECHR, it is necessary to show that the respondent parties failed to take appropriate and reasonable measures to prevent the right to life of the natural persons involved in the case from being endangered in the long term, taking into account the knowledge available for the 2020-2030 commitment period. Only a GHG emissions reduction target for 2030 can therefore be adopted, which would be the minimum accepted by the best available climate science, if the Belgian State is to do "its part" to prevent the dangerous threshold in terms of global warming from being crossed.

191. In this respect, there is currently a scientific and political consensus (at least internationally), notably following the 2018 IPCC Special Report and the Glasgow and Sharm El-Sheik COPs, that the threshold for dangerous warming should be set at 1.5°C rather than 2°C, albeit with some tolerance ("*with no or limited overshoot*", according to AR6). Professor Rogelj's choice is therefore valid.

192. The choice of the to retain the the allocation key of Nor is "Grandfathering" open to criticism. If this key is problematic in terms of

certain principles of equity debated in international environmental law, which, while not binding, cannot be taken into consideration in the application of Article 2 of the ECHR in view of the aforementioned principles: in order to avoid interfering with the prerogatives of the legislative and executive powers, the judge can only take into account the distribution key which is the least restrictive for the State, in the absence of political consensus on this point.

193. Finally, the choice of the remaining global carbon budget, to which the distribution key is to be applied, depends on the probability of limiting global warming to 1.5°C. For example, it is currently accepted that a scenario with a one-in-two chance of avoiding dangerous global warming would result in a total carbon budget of 500 GtCOt, whereas a scenario with a two-in-three chance of avoiding dangerous global warming would limit this budget to 400 GtCOt.

The appellants in the main proceedings point out that the IPCC "*systematically works with a probability of two chances out of three",* just as it does in UNEP's Emission Gap Reports and in the studies they cite. They consider that logic leads to the exclusion of "*a probability of one chance out of two; as in a coin toss, chance reigns*", and point out that Professor Rogelj excluded this probability on the basis of the precautionary principle and that, in the *Neubauer* judgment, the German court "*acknowledged the use of the probability of 67%, two chances out of three, without making any specific comments, espousing the established approach on this point"* (their conclusions, p. 202).

However, the Walloon Region considers that there is a trade-off to be made in the choice of the residual carbon budget, depending on whether it gives two chances out of three of meeting the threshold of a dangerous global warming of 1.5°C "*rather than a budget giving one chance out of two or another giving five chances out of six*" (its conclusions, p. 83). In the same vein, the Belgian State points out that the reports relied on by the appellants in the main proceedings are based "*like any effort-sharing scenario, (...) on values*" and are therefore "*in this sense, eminently political*" (its conclusions, p. 174).

194. The Court notes that the IPCC reports take into account both a two-in-three probability and a 50% probability. Thus, in AR6, it is stated that the best estimate for the residual carbon budget since 2020 to limit warming to 1.5°C with a 50% probability is estimated at 500 GtCOz (synthesis report, p. 46). The 67% probability seems, in this report, to be used only for limiting warming to 2º C *(Idem).* The same applies to the summary for political decision-makers.

The 50% scenario is also retained in the opinion issued on June 15, 2023 by the European Scientific Advisory Board on Climate Change (hereinafter the "Advisory Board"), tabled at the hearing on October 12 with the agreement of all parties. The Advisory Board, which was established by the European Climate Ioi (Article 12 of which introduced an Article *10a* into Regulation (EC) No 401/2009 on the European Environment and Energy Agency), is responsible for the preparation and implementation of the European Climate Change Strategy.

the European information and observation network for the environment), is made up of The Board is made up of "*fifteen confirmed scientific experts representing a wide range of relevant disciplines*", appointed by the Board of Directors "*following an open, fair and transparent selection procedure"* and who "*deliver their opinion in complete independence of the Member States and the institutions of the Union"* (art. 10bis above). Under Article 3 of the same law, the Council has been given a number of tasks, including examining the most recent scientific findings of IPCC reports and scientific data on climate, and providing scientific opinions on existing measures and measures proposed by the Union, on climate objectives and indicative GHG balances, and on their suitability in relation to the objectives of this Regulation and the Union's international commitments under the Paris Agreement. Article 3, §3 specifies that, in its work, the Advisory Board *"shall base itself on the best available and most recent scientific data, including the latest reports from the IPCC, IPBES and other international bodies*", that it "shall *proceed in full transparency and shall make its reports public".* The members of this committee currently include Professor Joeri Rogelj, author of the study on which the appellants' request is based.

195. In view of these factors, the court is not in a position to conclude that only a scenario at - 61% would be compatible with the positive obligations of Article 2 of the ECHR, whether according to the best available climate science, by virtue of the precautionary principle invoked in the aforementioned study, the binding scope of which is not developed by the appellants in the main proceedings, or by virtue of an international political consensus. On the contrary, it can be deduced from the fact that the Advisory Board, on which Mr Rogelj sits, has retained such a budget t h a t , according to the best climate science, a 50% scenario is not unreasonable. What's more, as Professor Rogelj points out, a budget of 500 GT CO2 implies that a warming of 1.7°C (i.e. still well below 2°C) can be avoided with a probability of around 85%, whereas the 1.5°C threshold allows for certain overruns. Admittedly, it might seem more prudent to opt for a higher probability. However, in view of the above-mentioned factors, such a choice would b e a political decision involving the consideration of numerous factors and falling - at least for the time being - outside the scope of Article 2 of the ECHR as interpreted in the light of the principle of the separation of powers.

The fact that the German Constitutional Court - indeed, without further elaboration - would have endorsed a two-in-three scenario (submissions of the appellants in the main proceedings, p. 202) does not detract from this conclusion. In its *Neubauer* judgment, the German Court did not comment specifically on the choice of the 67% scenario: it merely took note of the fact that the German committee of experts had adopted it (§36 of the judgment), so that no conclusion can be drawn from it in legal terms.

196. In these circumstances, no violation of article 2 of the ECHR can be inferred from the fact that none of the respondent parties has to date undertaken to achieve a reduction of the

emissions by a minimum of 81% or 61% by 2030 and, o *fortiori,* that they have not taken the appropriate measures to achieve such targets.

197. However, the appellants in the main proceedings told the court that their claim also concerned, in the alternative, a reduction of less than 61%, in the event that the court were to consider that the *"minimum threshold in respect of which the authorities have no discretionary power in order to comply with their obligations under ECHR law (...)*' would be lower. The respondents confirmed at the hearing that the court could rule *infra petita.* As the Court is seized of such a request, it is incumbent on it to ascertain what this minimum threshold is, compliance with which would be required by article 2 of the ECHR as interpreted in the light of the principle of the separation of powers.

198. The European Union's adoption of the Climate Law means that, at least since 2021, there has been a European consensus on the need to reduce the EU's GHG emissions by at least 55% by 2030. The Court also pointed out that Belgium has been committed to this objective since the Belgian State signed a government agreement on September 30, 2020, explicitly incorporating it.

It remains to be seen whether, in the light of Article 2 of the ECHR, this 55% target is compatible with a threshold of 1.5°C in a scenario with a 50% chance of success, or whether it is insufficient.

199. At the request of the court, the parties specifically debated the question of the scientific basis for this percentage of -55%. They produced an impact report drawn up on September 17, 2020 by the European Commission. This report consists of two parts, 140 pages and 228 pages respectively (the annexes). It states (on pp. 6-8 of Part I) that, in order to meet the commitments made by the European Union under the Paris Agreement (notably the development of a long-term GHG strategy), the EU had set itself a target of climate neutrality by 2050, which implied revising the previous -40% GHG target for 2030 upwards, to reach a target of 50 or 55% (to avoid having to make a significant part of the transition after 2030). The Commission expresses its preference for the 55% target, which would enable a faster green energy transition with limited economic risks (p. 127). Part II of the report refers to the overall residual carbon budget for a temperature of 1.5°C resulting from the SR1.5 special report (i.e. 580 and 420 GtCO2respectively for 50% and 67% scenarios), but points out that such a budget does not indicate *how* GHGs *can be* reduced in a way that is compatible with limiting global warming to well below 2°C or 1.5°C (p. 194). The Commission goes on to point out that the latest UNEP reports do not provide any information on the trajectories to be followed at "regional" level (such as the EU) to comply with the Paris agreements, but that the "ADVANCE" project leads to the conclusion that the objective of climate neutrality in 2050 combined with GHG reductions of 50-55% in 2030 is not feasible.

not only compatible with the 1.5°C target, but also more ambitious than required.

The 55% rate was also discussed in the aforementioned June 15, 2023 opinion issued by the European Union's Advisory Council. In this 110-page report, the Advisory Council, which is an independent body, envisages a target for the EU by 2040 to achieve carbon neutrality by 2050, in a way that is compatible with global warming of 1.5°C with no or limited overshoot. The Council notes that, according to certain principles of fairness, the EU has already used up its fair share of the global emissions budget. It therefore suggests, on the basis of the latest scientific data available and after analyzing more than 1,000 possible trajectory scenarios (and their implications in terms of side effects, benefits, resilience and feasibility), to keep the EU's GHG emissions budget within the limits of 11 to 14 Gt CO2between 2030 and 2050, which implies reducing GHG emissions by 90 to 95% by 2040, compared with 1990 (a range that takes into account several dimensions of equity and feasibility of emissions reductions).

With regard to the EU's target of at least a 55% reduction in GHG emissions compared with 1990, the Advisory Board believes that this will enable the recommended 2040 target to be met, and post-2030 emissions to be kept within the recommended budget, although it believes that further efforts to increase ambition beyond 55% (to 70% or more by 2030) would significantly reduce the EU's cumulative emissions up to 2050, and thus increase the equity of the EU's contribution to global GHG mitigation.

Finally, the Court notes that, in the above-mentioned study by Professor Rogelj, the GHG emission reduction rate shown for Belgium in the second table, using the same distribution key *(grandfathering)* but assuming an overall residual carbon budget of 500GtCO/ (i.e. a probability of 50%), is also 55% for 2030 compared with 1990.

200. The appellants in the main proceedings claim that, in 2020, the European Parliament would have
"criticized the target of -55% by 2030 compared with 1990, pointing out that it was not in line with the best available climate science and the findings of UNEP". They then quote from a report ("Draft report on the proposal for a regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law) (COM(2020)0080"), which they translate as follows: "*As UNEP's 2019 Emissions Gap Report makes clear, global emissions must be reduced by 7.6% per year, starting now, in order to limit global warming to 1.5°C. For the EU - even without taking into account ëquitë issues such as per capita emissions or responsibility for historical emissions - This would mean a 68% reduction by 2030 compared with 1990 levels*" (Iheir conclusions, p. 121).

An examination of the report shows, however, that this is not the official position of the European Parliament, but rather the proposal of the rapporteur of one of the Parliament's committees, who suggested opting for a more ambitious reduction target of 65% by 2030 (p. 38/39). This proposal has clearly not been followed, even by the Parliament, since the European Climate Law was adopted by the latter in co-decision with the Council.

The appellants also cite a statement allegedly made by the Vice-President of the European Commission prior to COP 27 in Sharm-El-Sheikh in November 2022, "*announcing that the target of at least -55% by 2030 would be raised to at least -57% by 2030*" (their conclusions, p. 121). For its part, the Belgian State states (its conclusions, page 94) that the Parliament and the Council of the European Union have reached a provisional agreement on a revision of the regulation on land use, land-use change and forestry, as part of the "Fit For 55" legislative package, which will raise the European Union's GHG reduction target from 55% to 57% by 2030. It does not follow, however, that a 55% reduction in GHG emissions by 2030 would prevent any EU country from doing its part to avoid an unacceptable breach of 1.S°C under Article 2 of the ECHR.

201. The court concludes that it does not yet have the elements to consider that the The "minimum minimorum" sought by the appellants in the main proceedings would be greater than this 55% reduction by 2030. The Court also notes, insofar as is necessary, that the German Constitutional Court, in its *Neubauer* judgment, considered that this objective was not incompatible with the right to life and physical integrity protected by Article 2 §2 of the Constitution (§§144-170), but, based on a scenario of 67% (i.e. less favorable to the German State), concluded that the German law was unconstitutional in that it was likely to impose a disproportionate burden on fundamental rights for the period after 2030 (§§182-265).

For the reasons already given in paragraph 161 above, but also because the validity of the European objectives currently in force and, more specifically, of Directive 2003/87/EC and Regulation (EU) 2018/842 is not called into question, it is not necessary to refer to the Court of Justice for a preliminary ruling the question suggested by the Flemish Region or, in the body of its conclusions (p. 29, no. 52), by the Belgian State[35] .

202. On the other hand, it can be considered, on the basis of the same elements, that a -55 Ois reduction in GHG emissions by 2030 constitutes this minimum threshold, below which Belgium cannot go without failing to comply with Article 2 of the ECHR.

[35] In it, the Belgian State states that: *"In any event, the action brought by the parties KLIMAATZAAK et al. could not be upheld without first referring a question to the Court of Justice of the European Union for a preliminary ruling on the conformity of European climate legislation with the right to life and the right to respect for family life as enshrined in the Charter of Fundamental Rights of the European Union".*

Admittedly, the European system is more complex since, as explained above, it is made up of ETS sectors on the one hand and non-ETS sectors on the other. For the latter, Regulation (EU) 2023/857 of April 19, 2023 amending Regulation (EU) 2018/842 on binding annual reductions in GHG emissions by the Member States from 2021 to 2030 contributing to climate action to meet their commitments under the Paris Agreement and Regulation (EU) 2018/1999 imposed on the Belgian State a -47% reduction in GHG by 2030 compared with 2005 levels. Bearing in mind that the European Climate Act targets a 55% reduction by 2030 compared with 1990, and that the Belgian State is positioned more favorably than many other European States in terms of its ability to contribute, there is no doubt that Belgium's compliance with a target of reducing GHG emissions from its territory by at least 55% by 2030 compared with 1990 is a minimum requirement for meeting its positive obligations to protect human rights. This is the objective set by the Belgian government in its agreement of September 30, 2020. The Walloon Region estimates in its PACE 2030, page 20, that the implementation of a -47% reduction compared to 2005 for non-ETS sectors, combined with the expected reductions in ETS, will enable it to meet its overall reduction target of -55% compared to 1990.

The Court concludes that the target of -55% by 2030 must be achieved as *a minimum,* so that, as far as the Belgian State, the Flemish Region and the Brussels-Capital Region are concerned, the violation of Article 2 of the ECHR committed during the second commitment period is brought to an end, and, as far as the Walloon Region is concerned, no such violation can be found for the 2020-2030 commitment period.

203. The question of how long this objective should have been pursued by the respondents requires a qualified answer.

On the one hand, it should be remembered that the obligation placed on States by Article 2 of the ECHR cannot impose an excessive burden on them, and that, even in the event of a climate emergency, the time needed for a public authority to adapt, through democratic means, its GHG emission reduction targets in the light of all the factors to be taken into consideration (and in particular the latest findings of climate science) cannot be disregarded. In the original quotation, the appellants in the main proceedings called for a reduction in GHG emissions of 55% and at least 40% by 2030, so that, at least in 2015, 55% seemed to them to be the most ambitious, while 40% did not seem unreasonable. I(should also be borne in mind the specific characteristics of each of the respondents. For example, the Flemish Region is characterized by the presence of large cities and heavy industry (in particular, the port of Antwerp), while the Brussels-Capital Region emphasizes "*the virtual absence of industry* in *the Brussels area",* which means that it "*can only implement a climate policy that essentially targets individual emissions (heating, transport),*

where margins are limited" (his conclusions, p. 38). As for the federal State, it has limited power over its territory, which includes that of the Regions, since it acts only through the competences that remain attributed to it, notably in fiscal matters and in the energy sector, and which are detailed in its conclusions (its conclusions, p. 100, no. 170).

On the other hand, each new IPCC report showed that the situation was worsening more significantly and more rapidly than expected, and that the efforts proposed by each State were manifestly insufficient to limit global warming, which, by 2018 at the latest, it appeared should be limited to 1.5°C. In their conclusions of December 16, 2019, the appellants' demand was raised to "65% *or at least 55%"*, based on a report drawn up by a group of Belgian experts at the request of "Youth for Climate". However, this report does not explicitly state what percentage should be targeted for 2030 in order to guarantee climate neutrality in 2050 while respecting a specific carbon budget for Belgium, even though it clearly shows that a target of 40% in 2030 would be clearly insufficient.

As early as 2019, a target of -55% has been mentioned. In its Regional Policy Declaration of September 9, 2019, the Walloon Region states that it is "*aiming for carbon neutrality by 2050 at the latest, with an intermediate stage of reducing greenhouse gas (GHG) emissions by 55% compared to 1990 by 2030*" (p. 3).

In 2020, the relevance of this target was confirmed and made known to the respondents: as indicated above, on September 17, 2020, the European Commission published its impact report in which it concluded that the objective of climate neutrality for 2050 implied revising the previous -40% GHG target for 2030 upwards, to a target of 50% and, preferably, 55%. The government agreement of September 30, 2020 stipulates in particular that the federal government "*sets itself the target of a 55% reduction in GHG emissions by 2030 and takes measures within its sphere of competence to achieve this*" and *"undertakes to adapt its contribution to the National Energy and Climate Plan (PNEC) along these lines through an action plan*".

Finally, since the entry into force of the European Climate Law on July 29, 2021, the target of a 55% reduction has become binding for the European Union. Even though it was not yet known how this target would be divided between the member states, the respondents could not have been unaware that, from that date onwards, they would have to work towards it.

204. However, to date, the Belgian State, the Flemish Region and the Brussels-Capital Region have failed to demonstrate that they would have taken appropriate and reasonable measures to enable Belgium to reduce its GHG emissions by 55% by 2030, and thus put an end to the violation of Article 2 of the ECHR already committed during the second commitment period (2013-2020) and still continuing today.

205. On pages 179 to 183 of its conclusions, the Belgian government describes the actions taken to implement and update the PNEC 2030 and monitor climate policies. In particular, it cites the Council of Ministers' decision of April 2, 2021 to implement federal policies *and measures (*PAMs) aimed at reducing GHG emissions as quickly as possible, and mentions that, in this context, a total of 36 roadmaps have been drawn up by the various federal ministers, who are responsible for their implementation. It cites the summary report of September 2022 on the implementation of climate policies 2021-2030, the Government's decision of December 17, 2021 to set up a Belgian Knowledge Centre for Complex Climate Risks, and the establishment of climate roundtables. The Belgian government also cites a plan for recovery and resilience, adopted in 2021, providing for investments of 5.9 billion euros, including 1.2 billion for the Belgian government, to contribute to the effort to reduce GHG emissions. Also mentioned are the federal sustainable development plan, the agreement on energy transition, the issue of green government bonds and Belgium's decision, taken at COP 26 *'in* Glasgow, to join the *Global Methane Pledge* to contribute to a collective effort to reduce global methane emissions by at least 30% below 2020 levels by 2030.

These projects are to be welcomed and encouraged, but the Belgian government has produced no evidence to show how the reduction in GHG emissions has progressed since their adoption or, even in terms of projections, to what extent these decisions are likely to enable it to make up the lost ground following the 2013-2020 commitment period. Worryingly, the Belgian government admits that, by 2021 and despite the government agreement of September 30, 2020, GHG emissions had only fallen by 23.9% compared with 1990, which raises serious concerns about the 2030 deadline. The court also noted that counter-productive measures are still in place, financing the production of fossil fuels[36] at a time when the decade (2020-2030) crucial to avoiding the risk of dangerous global warming is already well underway.

206. In addition, under article 14 of EU regulation no. 2018/1999 of December 11, 2018 on the governance of the energy union and climate action, Belgium was required to submit to the European Commission by June 30, 2023 a draft update of the latest notified version of the integrated national energy and climate plan (PNEC). However, at the time of the pleadings, and despite the urgent request to this effect sent in February 2023 by the country's various strategic councils[37] , this project had clearly not been completed.

[6] *In particular, the federal CRM program - "Capacity Remuneration Mechanism" - set up by the federal authorities to award energy contracts and subsidies (via auctions) enabling new gas-fired power plants to become profitable.

[7] *See. the opinion on the revision of the National Energy-Climate Plan 2030 (PNEC) jointly drafted by the Economic and Social Council of the Brussels-Capital Region (CESRBC), the Environmental Council of the Brussels-Capital Region (CERBC), the Milieu- et Natuurraad van Vlaanderen (Minaraad), the Sociaal-Economische Raad van Vlaanderen (SERV), the Conseil économique et social de Wallonie (CESW) and the Conseil wallon de l'Environnement pour le Développement durable (CWEDD) (exhibit p. P.38 of the appellants in the main proceedings).

still not been submitted (although, according to the Belgian State, the Council of Ministers has, since April 21, 2023, taken note of the draft federal contribution to the adapted draft NECP). Similarly, the cooperation agreement for sharing the effort to reduce GHG emissions between the Belgian State and the Regions for the period 2021-2030 was still under discussion until the day the present case was taken under advisement. This delay is all the more problematic in that, according to the forecasts of the existing NECP - which was itself criticized by both the European Commission and all the country's strategic councils in their February 2023 opinion - and applying the "WAM" scenario (i.e. the most ambitious), Belgium can only meet the previous target of -35% GHG in the non-ETS sector by using flexibility mechanisms to make up the shortfall (the forecasts indicate -34.4%). Admittedly, the Belgian government states that this version of the NECP *"will be revised by means of an action plan, in line with the objective of reducing GHG emissions by 55% in 2030 compared with 1990"* (its conclusions, p. 134). However, this was still not the case at the time the report was taken under advisement.

207. At regional level, the Flemish Region writes in its conclusions that, while the "*European Climate Law sets a new net reduction target of -55% by 2030, compared to 1990"* and the *"climate* target *for non-ETS sectors for Belgium is increased to -47% (compared to 2005)*", the Flemish Government would have "*by approving the draft update of VEKP 2021-2030, increased the reduction ambition for non-ETS sectors from -35% to -40% (compared to 2005)*", specifying that, in particular "*through new burden-sharing agreements, the various entities will ensure that the Belgian climate objeCtive is achieved by taking additional measures and/or by utillSClht the flexibility allowed within the European framework"* (its conclusions, p. 101). It also states that, on December 20, 2019, the Flemish Government "approved the Flemish Climate Strategy 2050 ("Vlaamse Klimaatstrategie 2050")", which
"sets a clear target for 2050, i.e. a reduction in emissions for sectors outside SEQE of 85% by 2050 and the ambition to move closer to climate neutrality" (conclusions, p. 43, emphasis added). The court concludes that neither in terms of measures taken, nor even in terms of climate ambition, is the Flemish Region currently doing its part to enable Belgium to reduce its GHG emissions by 55% by 2030.

208. Finally, the Brussels-Capital Region has no intention of setting, even on its own scale, a reduction in GHG emissions that would enable it to meet the aforementioned target. The Brussels COBRACE plan calls for a 40% reduction in GHG emissions by 2030, but in relation to 2005 levels. Without contradicting them on this point, the appellants in the main proceedings point out that, in 2005, the Region's emissions "*were a little higher than in 1990*", so that a *"-40% compared to 2005 is* normally *a slightly smaller effort than a "-40% compared to 1990".*
-40% compared to 1g9o" (conclusions, p. 215). The Brussels-Capital Region also writes in its conclusions (p. 36) that its GHG emissions "*in 2020 are 23% lower than in 1990, and 28% lower than in 2005*", confirming the difference, which is far from anecdotal, between the two reference years.

209. The Court concludes that the violation of Article 2 of the ECHR continues in the heads of these three paFties, none of which explicitly asserts - or in any case establishes - that a reduction of - 5S % would constitute an excessive burden. The mere fact that measures taken to combat global warming are liable to be challenged by private individuals (cf. the conclusions of the Brussels-Capital Region, p. 106) cannot suffice to conclude that such a burden exists.

210. As far as the Walloon Region is concerned, the question arises differently, since it has not been demonstrated that it violated Article 2 of the ECHR during the second commitment period. On the contrary, it reduced its GHG emissions by almost 40% by 2020, in line with the countries set as examples by the appellants in the main proceedings. As a result, it has necessarily entered the 2020-2030 decade in a better position than the other respondents. The Court also noted that, unlike the other respondents, it had shown itself to be more ambitious on the normative front, since it had mentioned, without being contradicted on this point, a legislative reform in progress (submitted to the Conseil d'Etat during the pleadings) aimed at enshrining the 55% target in positive law.

The mere fact that, at the time of the pleadings, there was no definitive anchoring of the aforementioned reduction target in Walloon legislation, nor any sanction provided for in the event of non-compliance with targets mentioned in the PACE, is not sufficient to undermine the above conclusions, given that the Walloon Region demonstrated in 2020 that it was not only complying with the targets it had set itself, but was even achieving better results. Nor is the fact that the Walloon Region would have granted permits for two new gas-fired power plants at Flémalle (Awirs) and Seraing in 2021-2022 sufficient to find a violation of Articles 2 and 8 of the ECHR. The Court recalls that it has no business interfering in the specific choices made by the public authority. From the point of view of its review, the Court confined itself to the results of the GHG emissions as they result from the reports produced (and not contested).

The Court concludes that, also for the 2021-2030 commitment period, the appellants in the main proceedings do not demonstrate that the Walloon Region is in breach of Article 2 of the ECHR.

The mere fact that the situation of the Walloon Region is more favorable than that of other Regions does not detract from this conclusion.

211. The application, insofar as it seeks a finding of a violation of Article 2 of the ECHR by the respondent parties, with regard to the climate policy they have pursued and implemented since 2021 and up to the present day, is therefore well-founded, with the exception of the Walloon Region. The judgment is confirmed insofar as it concerns, for this period and until its delivery, the violation of article 2 of the ECHR by the Belgian State, the Flemish Region and the Brussels-Capital Region, with regard to the natural persons involved. It will be reformed insofar as it concerns the Walloon Region and relates to the violation of Klimaatzaak's fundamental rights.

212. On the other hand, it cannot be prejudged at this stage whether the Belgian State, the Flemish Region and the Brussels-Capital Region will fail to comply with Article 2 of the ECHR in the future and by 2030, in the context of the climate governance they will be implementing, which has yet to be updated in the light of the current European objectives, which, given their scientific basis, according to the Court, constitute an adequate criterion for assessing the respondents' compliance with human rights.

The request, insofar as it seeks to establish that there are serious and unequivocal indications that, in pursuing their climate policy for 2030, the respondents will continue to violate article 2 of the ECHR, is therefore unfounded.

3) Compliance with article 8 of the ECHR

213. With regard to Article 8 of the ECHR, the Belgian State and the Brussels-Capital Region consider that the natural persons involved in the proceedings must demonstrate a causal link between global warming and the negative impact on their living environment, and that the threshold of severity has been reached.

However, the Court was of the opinion that the above-mentioned IPCC reports not only sufficiently demonstrated that the location and living conditions of all individuals (and therefore including the physical persons involved in the case) are and above all will be impacted by global warming, but also that this impact will be extremely significant. These include, but are not limited to, dangerous rises in temperature and sea levels (Flanders was particularly at risk), increased risk of flooding, water shortages, negative impact on human health (including mental health, with the growing phenomenon of eco-anxiety), jeopardized food security, increased climate migration and poverty.

As explained under article 2 of the ECHR, this risk is real and immediate. It is unprecedented, and is likely to seriously impair the ability of natural persons present at the case to enjoy their home and their private or family life.

The mere fact that the public authorities seem to have finally understood the need to act is not enough to exclude the causal link mentioned above.

214. For the rest, the above developments relating to Article 2 of the ECHR can be transposed, *mutatis mutandis,* to the analysis relating to Article 8 of the ECHR, including with regard to the thresholds for 2020 and 2030.

Admittedly, it could be argued that the minimum threshold for reducing GHG emissions could be higher, as there is no question of avoiding endangering life and limb.

of individuals, but to protect their right to respect for their private life and home. It should be remembered, however, that

- environmental nuisances are only likely to result in a violation of Article 8 of the ECHR if they are of a certain seriousness,
- the principles developed in the context of the positive obligations arising from article 8 also apply to article 2,
- in the context of Article 8 of the ECHR, a fair balance must be struck between the competing interests of the individual and society as a whole, which implies, from the point of view of domestic law, particular caution in setting the thresholds required with regard to the separation of powers.

The Court concludes that, both for the 2013-2020 commitment period and for the 2021 commitment period to date, the respondents have, with the exception of the Walloon Region, also violated Article 8 of the ECHR in relation to the natural persons in question.

215. On the other hand, for the same reasons as set out above, the application, insofar as it seeks a finding that there are serious and unequivocal indications that, in pursuing their climate policy to 2030, the respondents will continue to violate article 8 of the ECHR, is unfounded.

216. Since, on the basis of articles 2 and 8 of the ECHR, the Court has only partially upheld the claim of the appellants in the main proceedings, it is necessary to ascertain whether, on the basis of articles 1382 et seq. of the former Civil Code as invoked in their second plea, it is possible to uphold the claim in its entirety.

2. The second plea: violation of articles 1382 and 1383 of the former French Civil Code

IntroduCtlOFt

217. The appellants in the main proceedings challenge the extra-contractual civil liability of the Belgian State and the three Regions on the basis of Articles 1382 and 1383 of the former Civil Code, claiming not a breach of the norms of positive international, European and Belgian climatic law, but of the general standard of prudence insofar as, being aware of the danger, these authorities refrained from taking the necessary measures to prevent it or, in any case, to limit it (their conclusions, no. 423, p. 169).

218. After recalling the principles applicable to civil liability (a), the Court will consider the existence of the faults attributed to the respondents (b), the damage alleged by the appellants in the main proceedings (c), the causal link between the damage alleged and the faults (d) and, finally, the possible impact of the conduct of the appellants in the main proceedings on the liability attributed to the respondents (e).

a) Principles applicable to civil liability

1) Fault, damage and a causal link

219. In accordance with articles 1382 and 1383 of the old Civil Code, aquilian liability is subject to the simultaneous fulfilment of three conditions: the existence of fault, the existence of damage and the existence of a causal link between the two.

220. Fault can be defined as *"any violation of a legal or regulatory norm imposing or prohibiting a certain behavior*" or "*any breach of the standard of care*", the latter being *"violated when one does not behave as a normally far-sighted and diligent person finding himself in identical circumstances."* (Cass., May 24, 2018, R.G. n° C.17.0504.N, www-iuportal.be). In a similar vein, but underlining the subjective element of fault, X. Thunis defines it as "*the violation, imputable to his auteur, d'une norme juridiquement obligatoire imposant d'agir de manière déterminée ou de se comporter comme une personne normalement diligente et prudente*" (X. THUNIS, "La faute civile, un concept polymorphe", in *Responsabilités. Traité théorique et pratique,* J.-L. Fagnart (ed.), Titre ll, Livre 20, 2e"e éd., Waterloo, Wolters Kluwer, 2017, p. 26, n° 27; see also the numerous references cited in B. DUBUISSON, V. CALLEWAERT, B. Dr CONINCK, F. GEORGE et N. SCHMITZ, "Les faits générateurs de responsabilité", in *Droit de la responsabilité civile,* vol. 1, Bruxelles, Larcier, 2023, p. 15 et seq.)

221. The notion of "damage" consists of "*the impairment of any interest or the loss of any legitimate advantage",* and presupposes "*that the victim of the wrongful act is in a less favorable situation after it than before*" (Cass., June 5, 2020, *R.G.A.R.,* 2020, 15712). It therefore refers to the negative difference between two situations, the first being that of the victim after the harmful event and the second being that in which the victim would have been in a less favorable situation than before the event.
(Conclusions du ministère public avant Caen, ieFavril 2004, 1.*T.,* 2005, p..
357, note Estienne; see in the same vein the definition given by the Flemish Region, on p. 122 of its conclusions).

The damage must be certain and personal to the person claiming compensation (D. DE CALLATAŸ, "Le dommage réparable", in *Droit de la responsabilité civile,* vol. 2, Bruxelles, Larcier, 2023, p. 26 and references cited; on the second condition, see. Cass., June 5, 2020, *R.G.A.R.,* 2020,

15712: "*Only the holder of such an interest or benefit may invoke* the infringement *thereof. scope*"). It is sometimes taught that damage must be "*born and present"*, but this is not always the case.
The expression is "*ambiguous and even inaccurate, since the judge can precisely take account of future damage",* so that it is "*an imperfect qualification intended to exclude uncertain damage", which "therefore duplicates the characteristic of certainty*" (P. VAN OMMESLAGHE, *LeS Obligations,* t. II, Bruxelles, Bruylant, 2013, p. 1551). A victim can therefore *"seek and obtain reparation for future damage, provided that he can demonstrate its occurrence and extent with certainty*" (C. DELFORGE, C. DELBRASSINNE, A. LELEUX, S. MORTIER, â. VAN ÊUYLEN, L. VANDENHOUTEN, M. DEFOSSE, S. LARIELLE and N. VANDENBERGHE, "Chronique de jurisprudence (2015 to 2016) - Aquilian liability (articles 1382 and 1383 of the Civil Code) ", *R.C.J.B.,* 2019/4, p. 727; in the same vein, 1. DURANT, " La réparation dite intégrale du dommage ", in B. Dubuisson et P. Jourdain (diF.), *Le dommage et sa réparation dans la responsabilité Contractuelle et extracontractuelle,* Bruxelles, Bruylant, 2015, p. 448; D. DE CALLATAŸ, "Le dommage réparable", *op. cit.,* p. 41; B. DuBuisso , "Civil liability and climate change. Libres propos sur le jugement rendu dans l'affaire 'Klimaatzaak'", *op. cit.* p. 276). In a decision dated January 3, 2018, the French Supreme Court (Cour de cassation) overturned a decision that had dismissed claimants' claims for compensation on the grounds that they had not proved that the damage had been incurred in the present, whereas "*the judge may* award *damages for the prejudice that the injured party will suffer in the future, provided that the cause of the prejudice exists at the time of the judgment in such a way that the court can5e assess the damage that will necessarily result from it*" (Cass., January 3, 2018, *Pas.* 2018, n° 3, p. 9; *R.G.A.R.,* 2018, 15475). Lastly, the certainty of the loss is a notion of fact left to the discretion of the trial judge (Cass., October 14, 2020, *R.G.A.R.,* 2020, 15725).

222. The legal notion of cause is understood, in accordance with the theory of equivalence of conditions, as being the condition without which the damage would not have occurred as it did in *concreto* (Cass., June 13 1932, *Pas.,* I, 189; June 18 1973, *Pas.,* I, 968; March 27 1980, *Pas.,* \, 931; May 3, 1996, *Pas.,* I, n° 146; February 21, 2001, *Pas.,* I, n° 107). If the damage suffered has been caused by several concurrent faults, each of the authors is liable for reparation of the entire damage (Cass., October 17, 2014, *Pas.,* I, p. 2277; Cass., February 17, 2017, RG n°C.16.0297.N, www.juridat.be). In terms of obligation to the debt, these authors will therefore, in principle, be held *in solidum* (P. VAN OMMESLAGHE, *De Page. Traité de droit civil belge,* t. II, vol. 2, Brussels, Bruylant, 2013, pp. 1630-1631).

The judge cannot order the tortfeasor to compensate for the damage suffered if he finds that there is doubt as to the causal link between the fault and the damage (Cass., December 6, 2013, *Pas.,* I, p. 2457, concl. T. Werquin). However, the proof that the plaintiff must provide is not absolute. Jurisprudence is satisfied with judicial certainty, i.e. a high degree of likelihood (in this sense in particular, I. DURANT, "A propos de ce lien de causalité qui doit unir la faute au dommage", in *Droit de la responsabilité,* CUP, 01/2004, p. 27; see also P. Vol OMMESLAGHE, *De Page. Traitë de droit civil belge, op. cit.* p. 1613, who prefers to speak of "reasonable human certainty"). To exclude the causal link, the judge must
"be able to say that, without the fault, the damage would nevertheless have occurred as it did.

in concreto, all other conditions of damage being identical' (Cass., November 21, 2012, *Pas.,* \, p. 2272).

223. The burden of proof for all three elements lies with the plaintiff3 . He must therefore demonstrate that, without the fault, the damage would not have occurred as it did *in concreto* (art. 8.4 of the Civil Code). Unless otherwise stipulated by law, proof must be provided
The burden of proof must be established "*with a reasonable degree of certainty"* (art. 8.5), it being specified that the person who bears the burden of proof of a fact *"for which, by the very nature of the fact to be proved, it is not possible or not reasonable to require certain proof*", may *"content himself w i t h establishing the likelihood of this fact*". As far as the existence of the damage is concerned, this can be done by any legal means (Cass., October 14, 2020, *R.G.A.R.,* 2020, 15725). The certainty required is a judicial certainty, and the damage must "*not necessarily be certain in its extent, but in its principle"* (D. DE CALLATAY, *op. cit.,* p. 41).

2) The victim's behavior

224. There are two ways in which the victim's behavior can be taken into account when determining the extent of reparation owed by the tortfeasor, in application of the theory of equivalence of conditions.

On the one hand, when the damage has been caused by concurrent faults, including that of the victim, *"the author of the damage cannot be ordered to pay full reparation to the victim"* and *"it is up to the judge to assess the extent to which the fault of each party contributed to causing the damage and to determine, on this basis, the share of damages owed by the author to the victim*" (Cass., September 5, 2003, *Pas., I.,* 1360). The victim's compensation is therefore "*limited when he has himself committed a fault in causal relationship with the loss suffered", the* judge having to take "*into account in this respect the relative importance of the different faults, i.e. their greater or lesser ability to cause the loss*" (Cass., March 13, 2013, *Pas.,* I, n°178).

On the other hand, it is widely accepted that the victim must, after the event giving rise to the damage, ensure that it does not worsen unnecessarily. However, he or she is not obliged to restrict the damage as far as possible, but only to take reasonable measures to limit the loss if this would have been the behaviour of a reasonable and prudent man (Cass., May 14 1992, *J.1.M.B.,* 1994, p. 48; Cass., June 13 2016, *A.G.D.C.,* 2017, liv. 6,
p. 370).

In both cases, the onus of proving the victim's fault lies with the party at fault. The victim's fault does not have the effect of interrupting causality, and can only exclude the liability of the tortfeasor if it can be shown that Ie

[38] Even if the Flemish Region considers t h a t it "*must establish that in this case no fault can be imputed to it*" (its conclusions, p. 122).

without this fault, the damage would have occurred in the same way as it did in *concreto* (P. VAN OMMESLAGHE, *De Page. Traitë de droit civil belge, op. cit.* t. Il, vol. 2, pp. 1616 and 1629).

3) The aquilian responsibility of public authorities

225. By entrusting the courts and tribunals with disputes concerning civil rights, the Belgian constituent intended to protect these rights by having regard *'neither to the quality of the disputing parties, nor to the nature of the acts which would have caused an injury to rights, but solely to the nature of the injured right*', so that the judiciary is competent to hear a claim for compensation for an injury, even if the author is '*the State, a municipality, or some other person under public law (...*\') (Cass, November 5, 1920, *Pas.,* I, p. 239, also known as Arrêt
"La Flandria").

Since the *La Flandria* ruling, it has been accepted that the State may incur liability in the exercise of its executive function. According to settled case law, the administrative authority commits a fault giving rise to liability under articles 1382 and 1383 of the Civil Code, when it adopts a course of conduct which either amounts to an error of conduct to be assessed according to the criterion of the normally careful and prudent authority, placed in the same conditions, or, subject to an invincible error or other cause of justification, violates a norm of national law or an international treaty which requires this authority to abstain or to act in a specific manner (Cass., May 13 1982, *Pas,* I, p. 1086; Cass. october 25 2004, *Pas,* I, p. 1667, n°.
507; Cass., December 21, 2007, *Pas.,* I, no. 661; Cass., March 19, 2010, *Pas.,* I, no. 200; Cass., February 9, 2017, J.T., 2019, liv. 6756, p. 33, which specifies that the international law provision must have direct effects in the domestic order).

The principle of the separation of powers does not imply that the State would be "*generally exempt from the obligation to compensate for damage caused to others by its fault or that of its organs in the exercise of the legislative function"* (Cass., September 28, 2006, *J.T.,* 1996, pp. 594 et seq. with the conclusions of First Advocate General J.-F. Leclercq, said judgment...).
"Ferrara").

Under articles 1382 and 1383 of the former French Civil Code, the fault of the legislature which may give rise to liability on the part of the State consists of conduct which either constitutes an error of conduct to be assessed according to the criterion of the normally careful and prudent legislator, placed in the same conditions, or, subject to invincible error or some other ground for exoneration from liability, violates a norm of national or international law having direct effects in the domestic order, which requires it to refrain from or to act in a certain way (in the same sense, see. Cass., December 15, 2022, RG n° C.21.0003.F, www.|uportal.be; see also Cass., April 30, 2015, *Pas.,* I, p. 1077; see also Cass., September 10, 2010, *Pas.,* \, p. 2226). The Brussels-Capital Region is therefore wrong to "*argue that, under Belgian law and more particularly in the*

According to the jurisprudence of the Cour de cassation, the mere violation of the general principle of prudence cannot, on its own, constitute the basis of a fault on the part of the legislator, and therefore cannot engage his civil liability on the basis of article 1382 of the Civil Code" (his conclusions, p. 58).

226. From a methodological point of view, it is first necessary, in principle, to verify whether a supra-legislative rule required the legislator to act or refrain from acting in a specific manner. In this respect, the Court agrees with the doctrine which considers that "*the degree of determination of a legal command does not lie solely in the wording of the provision which conveys it*" and that it is "necessary to ascertain whether a supra-legislative rule requires the legislator to act or refrain from acting in a specific manner".
In this respect, the term 'liability' can only be experienced through an appreciation of the interpretative context which gives it its meaning and significance at a given moment" (S. vAN DROOGHENBROECK, "La responsabilité extracontractuelle du fait de légiférer, vue d'ensemble", in *La responsabilité des pouvoirs publics,* Brussels, Bruylant, 2016, p. 371).

In the absence of a violation of a norm imposing a specific behavior, the judge must check whether the legislator behaved like a normally prudent and diligent legislator in the same circumstances. Criteria that may be taken into consideration include whether the legislator ignored the warning issued by the Legislation Section of the Conseil d'Etat, or whether the violation of a higher standard was manifest *(Ibid.,* pp. 374-376). In his conclusions preceding the *Ferrara* ruling, Advocate General Leclercq considered that the legislator is not acting as a good father of the family if he fails to act.
"when the *country is threatened by risks to safety, public health, hygiene, the environment, etc.*") or when it
"fails to take the necessary measures to guarantee its subjects constitutional rights and freedoms and the rights and freedoms of the ECHR" *(Pas.,* 2006, I, no. 445).

In the view of the Belgian State, if a judge were to find that the legislator had not behaved like a normally prudent and diligent legislator, he would himself be creating a model of such a legislator, thereby creating a risk of legal uncertainty and a clear violation of the principle of the separation of powers, judicial review must therefore be carried out "*at the margins, so as not to obscure the hazards and constraints associated with all political decision-making"*, and only *"manifest errors of assessment can be sanctioned*" (his conclusions, pp. 147-148). He believes that
"He cites articles by Professors Van Drooghenbroeck and Bouhon, among others.

According to the former, when it comes to verifying the legislator's compliance with the standard of care, the judge "*will be very close to a frontier that the principle of the separation of powers forbids him to cross",* so that he will have to *"exercise caution and restraint himself"* (S. VAN DROOGHENBROECK, "La responsabilité eKtracontractuelle du fait de légiférer, vue d'ensemble", *op. cit.,* p. 380).

According to the second, if *"it is not positive law that serves as a reference, then moral considerations take over - as, moreover, the notion of the normally prudent and diligent legislator, inspired by the good father of the family of yesteryear, encourages us to do".* And he asks: *"When legislative production is not incompatible with constitutional or international law, who other than the legislator himself, with his full competence (which is admittedly relativized today), can assess its adequacy in relation to a moral ideal - or rather moral ideals?*" (Fr. BOUHON, "La responsabilité civile pour la faute du législateur - Anno 2020", 1.*T.,* 2020, p. 749).

The Court notes, however, that these two authors immediately qualify their remarks by rightly pointing out that the extensive interpretation given to certain legal norms has the consequence of marginalizing hypotheses in which the only standard of conformity is that of the normally prudent and diligent legislator. Thus, S. Van Drooghenbroeck notes that "*the multiplication of supralegislative norms, and the extensive interpretation given to them by their appointed interpreters, make it relatively easy to find that, in addition to a possible breach of the duty of prudence, the legislator has also been guilty of a violation of a higher norm prescribing him to act in a given direction*", giving the example of *"abstention from acting in the event of serious environmental peril",* which "*can be analyzed as a breach of the positive obligations imposed on the State on the basis of Articles 2 or 8 of the European Convention on Human Rights, as interpreted by the case law of the European Court of Human Rights"* (S. VAN DROOGHENBROECK, "La responsabilité extracontractuelle du fait de légiférer, vue d'ensemble", *op. cit,* p. 380; see also the conclusions of Advocate General Werquin, who repeats these remarks virtually *in extenso,* before Cass., December 15, 2022, RG n° C.21.0003.F, www iuportal.be). In the same vein, Professor Bouhon points out that, even in the aforementioned cases, *"the State's obligation to act may often be based on rules of law, such as Article 2 of the European Convention on Human Rights which, as interpreted by the European Court of Human Rights, requires States to act in the face of certain risks in order to prevent foreseeable harm"* (Fr. BouHON, *op. cit.,* p. 749).

227. As already indicated, there is no doubt that the formulation of climate policy is the prerogative of the legislature, which has wide discretionary powers in this area. Nor is it disputable that the *"judge cannot substitute his subjective assessment for that of the democratically elected bodies"* or that *"climate policy cannot be pursued in disregard of any other consideration of social cohesion, economic development or other aspects of the environment, for example*" (conclusions of the Belgian State, p. 164). As indicated above (paragraph 156), however, the court does not violate the principle of the separation of powers if it confines itself to respecting the minimum requirements laid down by norms of international law which, given their context (in the sense referred to above), have direct effect in the case submitted to it or, in the absence of such norms, if it confines itself to determining, on the basis of data on which there is scientific and political consensus, the minimum requirements.

in the face of a serious threat to the environment, property and personal safety.

228. When examining fault, and as the Belgian State rightly points out, "*one must be careful not to carry out an a posteriori analysis of fault*" (its conclusions, p. 153). In principle, therefore, it is at the time of adoption of the disputed rule that the wrongfulness of the State's conduct should be assessed, and not at the time when the rule was deemed unconstitutional or contrary to a norm of international law with direct effects (S. VAN DROOGHENBROECK, "La responsabilité extracontractuelle du fait de légiférer, vue d'ensemble", *op. cit,* p. 376; Conclusions de l'avocat général Werquin avant Cass., 15 décembre 2022, RG n° C.21.0003.F, www iuportal.be). However, if a norm should, subsequent to the adoption of the disputed rule, acquire a degree of determination sufficient to conclude that it henceforth requires the legislator to act or refrain from acting in a specified manner, the legislator may also be held at fault for having failed to amend the said rule in accordance with the command thus specified.

b) Examination of alleged faults

229. As a reminder, the appellants in the main proceedings are sending the respondents a double reproach '

- their share of the global effort to reduce GHG emissions in order to avoid dangerous global warming, and more specifically: for the past, they believe that the Belgian State and the Regions should have at least reduced Belgium's GHG emissions by 40% by 2020 compared with 1990 ;
  - o For the future, they consider that the policy to be implemented should aim, at the very least, for an 81% reduction in GHG emissions in 2030 compared to 1990;
- the absence of the healthy and loyal cooperation needed to develop good climate governance at national level.

Before examining the two periods in dispute, it is still necessary to address two objections raised by the respondents, concerning the identification of the MiS a II pouvOiFS involved and the limited capacity of these parties in the fight against global warming.

The Court has already noted that, as soon as the parties agree that there is no binding supra-legislative rule of international law that would impose a specific behaviour on the respondent parties with regard to reducing GHG emissions, the cOUF will first examine compliance with the standard of behaviour (the only one invoked by the parties).

appellants in the main proceedings), before going on to examine the question of Articles 2 and 8 of the ECHR.

1) As for identifying the powers involved

230. The Brussels-Capital Region criticizes the judgment for failing to distinguish between the responsibility of the Brussels legislature and that of the Brussels executive.

It points out that, until the adoption of the above-mentioned "climate" ordinance of June 17, 2021, there was no legislative standard empowering the Brussels Government or requiring it to take all necessary measures to reduce the overall volume of GHG emissions in Brussels. In this context, it considers that to grant the requests of the appellants in the main proceedings would be tantamount to requiring the Brussels Parliament to legislate in this sense, failing which the Brussels Government would be able to act without empowerment, which would lead to a confusion of executive and legislative powers and would violate the principle of the separation of powers and articles 105 and 108 of the Constitution.

231. The executive and legislative powers are organs of the Brussels-Capital Region through which it necessarily acts, within the limits of its competences.

The Brussels-Capital Region is liable for the inaction of its bodies, insofar as it proves to be at fault. In this respect, it is immaterial whether the fault is precisely attributable to the legislative power, because it wrongfully refrained from legislating, or to the executive power, because it wrongfully refrained from executing the norms in force, or from taking the legislative initiatives (submission of draft laws, ordinances or decrees) that prudence dictated.

As will be explained below (point 237 et seq.), by taking into account Belgium's international commitments - which, it is true, are not binding as regards the level of national contributions in terms of reducing GHG emissions, beyond what has been promised by the European Union - combined with scientific knowledge acquired in the field of climate science, it is possible to define a standard of good behaviour that is sufficiently precise to be able to assess, without violating the principle of the separation of powers, the extent to which each entity, including the legislative power, is committing, at its own level, a breach of the general duty of care, by refraining from taking, within the framework of the competences devolved to it, the minimum measures necessary to reduce GHG emissions and thus respond to the climate emergency.

Moreover, the initiative to legislate does not entirely escape the executive branch, which has the power to introduce bills, decrees or ordinances. In this case, it is as much in the definition of the necessary climatic ambitions as in their implementation that mistakes have been made.

have been committed by each entity, within the limits of the powers devolved to them.

Lastly, since the entry into force of COBRACE, as amended by the climate ordinance of June 17, 2021, the Brussels executive is indeed empowered to take the necessary measures to achieve the reduction targets expressed in the regional Air-Climate-Energy plan (the "PRACE") as described in point 66 of the statement of facts.

2) On Belgium's limited capacity in the global fight against global warming

232. The respondents to the main action point out that the federal State and the federated entities are only some of the many players involved in the fight against global warming, that their action is limited to emissions emanating from Belgian territory, and that the impact of these emissions is minimal on a global scale. Consequently, the Belgian State considers that, if it were envisaged to condemn it and/or the Regions, a balance of interests should first be carried out, taking into account the effects of such a condemnation in the light of other policies of general interest (economic, fiscal, budgetary, etc.) and other actions already taken by the various Belgian public authorities.

233. The Court has already examined the plea relating to the limited impact of Belgian efforts at global level from the angle of Articles 2 and 8 of the ECHR. Reference should be made to them where necessary (paragraph 160). It is clear from the latest IPCC reports that every GHG emission counts and has an impact on global warming, since it reduces the residual carbon budget at world level (cf. in particular, in the IPCC Special Report on Global Warming of 1.5°C, the technical summary for decision-makers, page VI of the introductory section: "*Every fraction of a degree more, every year, every choice counts*"). It should also be remembered that, from the point of view of equivalence of conditions, the slightest fault is in principle sufficient to activate the regime of articles 1382 and 1383 of the former Civil Code.

234. It is also clear from the elements in the file (in particular, the report by the National Climate Commission, K. De Ridder *et al, Évaluation de l'impact socio-économique du changement climatique en Belgique. Étude commandée par la commission nationale climat,* VITO, July 2020, 253 p., exhibits C.15 and C16 of the appellants' file in the main proceedings) that postponing efforts will be more costly than rapidly implementing reduction measures with a view to gradually achieving net emissions equal to zero in 2050 (this is the "price of procrastination"), as indeed was judged by the German Constitutional Court in its *Neubauer* ruling of March 24, 2021 (appellants' exhibit 0.14 of the appellants: "*In practice, the sparing of future freedom requires that the transition to climate neutrality be launched in good time*", recitals no. 248 *ff*, pp. 82 ff).

235. Lastly, § 203 of this German judgment, cited above when examining the plea concerning the violation of the ECHR (point 160 above), and § 204, underlining, in the Paris Convention, the importance, in order to win and preserve the mutual trust of the States parties, of honouring their commitments as the key to the effectiveness of this agreement, an indispensable instrument in the global fight against global warming. It follows that the inadequate contribution of a single country is detrimental to the global fight against global warming.

236. In the light of all these factors, the minimum national contribution (in terms of reducing GHG emissions) as defined below, on the basis of the IPCC reports and the international consensus that existed at the time, constitutes the exact measure of the behavior to be expected from a normally prudent and diligent authority, with regard to the risks of dangerous global warming.

3) The 2013-2020 period

237. In the case in point, for the period 2013-2020, the Court considers that the behavior of the Belgian State, the Flemish Region and the Brussels-Capital Region is at fault insofar as the thresholds for their contribution to the reduction of GHG emissions, as defined and implemented, were clearly insufficient in the light of the achievements of climate science at the time, to meet the risks of dangerous global warming.

As a reminder, the existence of a real risk of damage linked to global warming and the impact of human activities and rising GHG concentrations have been known with a sufficient degree of certainty at least since the 4'th"[e] IPCC report in 2007 (see point 12 above).

As indicated above (point 169), the fact that adaptation can be an equally adequate response to climate change does not mean that the mitigation systematically advocated by the IPCC reports is not indispensable, even if it is not necessarily sufficient or exclusive.

238. On the basis of points 12 and 15 above, it is now clear that, since 2007 and at least since 2009, Belgium has been aware of the need to reduce GHG emissions by at least 25% by 2020 in order to limit global warming to 2ºC, even though the European Union has set a less ambitious target (20%).

In points 37 et seq. of the statement of facts, the Court also recounted the reasons for considering that, progressively from 2015 onwards, it appeared that the aforementioned minimum of -25% would be insufficient in view of the need to keep global warming "*well below 2º C*".

The IPCC's 2018 special report confirmed that the 2°C target should now be replaced by the 1.5°C target.

Of course, as the Belgian government points out, the 4th[e] IPCC report set a reduction target of 25% to 40% "*globally for Annex I countries*", without distinguishing individually for each country (its conclusions, p. 168). It can also be accepted that, in principle,
"(I) the equi/ivre *to be found is global"* and that *"it is therefore not unreasonable for a State to join the Concert of Nations in determining its climate policy*" (its conclusions, p. 171). However, as indicated above (point 169), as soon as the States had not agreed on any distribution of the effort to be made, it was incumbent on the Belgian State (and the federated entities), as normally prudent and diligent authorities, to take into consideration at least the lower range to determine the efforts to be made initially and, once a consensus had been reached on the 1.5°C target, to be more ambitious (as the Walloon Region has done, but also, as already mentioned, many other states which have gone so far as to set themselves targets of -40% for 2020), given the high risks involved.

As explained in paragraphs 171 to 176 above, this does not mean that, in absolute terms, a minimum GHG emissions reduction threshold of -40% by 2020 was necessarily imposed on Belgium to avoid dangerous global warming. For the reasons set out above, the Court is not in a position to determine with certainty that the change from 2º to 1.5° C had to be translated into a -40% reduction in GHG emissions by 2020 in the light of the general obligation of prudence, nor, *a fortiori,* that the respondents were in a position to make this translation at the time, in theory or in practice.

On the other hand, the Court considers that, since at least 2018 (see point 176 above), given the -25% threshold set on the basis of a 2º C target and the shift from 2 to 1.5°C, a -30% reduction in GHG emissions at national level by 2020 could, at the very least, be considered a minimum in the light of the general obligation of prudence, which had to be taken into account, from that point onwards, when defining climate governance. In concrete terms, given the approach of the 2020 deadline, this meant that, as early as 2018, the authorities had to seriously revise upwards their GHG emission reduction targets, not only for 2020 but also for future deadlines such as 2030 and 2050.

239. 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. On the one hand, as already indicated above, the standards in force within the European Union in no way prevented Member States from individually pursuing higher GHG emission reduction targets, and on the other hand, 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. What's more, if these European targets (a 20% reduction in GHG emissions) go beyond those defined in the

Initially set by the Doha Amendment in 2012 (COP-18, i.e. an 18% reduction), these targets were quickly exceeded, as they were due to be revised upwards as early as 2014 (point 34 above) and, in 2015, the Paris Agreement also implied an upward revision of nationally determined contributions, even if this was not quantified.

240. By taking into consideration the minimum threshold required by prudence in view of the risk posed by dangerous global warming, the Court did not violate the principle of the separation of powers. This is the minimum threshold, within the range of possible actions set out in the IPCC reports (from -25% to -40% by 2020, compared with 1990), to limit the risk of serious disruption in terms of economic and human costs, which the state of climate science known at the time made it possible to predict with a sufficient degree of certainty, if GHG emissions were not reduced sufficiently.

Below the minimum threshold imposed by prudence, given the magnitude of the consequences of climate disruption as predicted, if policy remains unchanged, the margin of appreciation of each State simply no longer exists, and there is no longer any reason to arbitrate with other interests such as, for example, the preservation of social cohesion or economic growth (conclusions of the Belgian State, p. 165), interests which it has not been demonstrated could not be preserved by pursuing these minimum objectives, and which would in any case also be flouted in the event of dangerous global warming.

Such an approach does not, any more than in the context of the examination of articles 2 and 8 of the ECHR, amount to granting scientific reports a "*legal consecration*" (conclusions of the Belgian State, p. 192) or to recognizing them indirectly as a "*source of positive law"* (conclusions of the Brussels-Capital Region, p. 86), but to ascertain the extent to which the best available climate science makes it possible to confer on the standard of care a sufficiently precise content to assess, in law, the conduct of the authorities to which a fault is attributed, and to do so without substituting for the discretionary power of the legislative and executive powers.

241. It could therefore be expected of a normally prudent and diligent State (or federated entity) that, between 2013 and 2020, it would initially set itself a GHG emissions reduction target of 25% below 1990 levels by 2020, and that in 2018, following the Paris Agreement, this target would be revised upwards, taking into account the fact that, to avoid global warming of more than 1.5°C, it should have been raised to at least -30% by 2020. In this respect, the Court recalls that article 4.3 of the Paris Agreement states that "/o *next nationally determined contribution of each Party shall represent a*
contribution determined at the previous national level and will correspond to its level of ambition as high as possible, taking into account its common but differentiated responsibilities and its respective capacities, in view of the

dÎffërenteS Situations nationales" (emphasis added). However, it cannot reasonably be argued that Belgium did not have the capacity to set itself such objectives.

242. Not only was climate governance, as conceived, faulty because it was insufficiently ambitious, but its implementation also showed shortcomings and only finally achieved the objective initially assigned (deemed insufficient) thanks to the Covid crisis. In this respect, the Court refers to the comments made above in paragraphs 178 to 182 concerning the Belgian State, the Brussels-Capital Region and the Flemish Region, which individually failed to take the necessary measures and to coordinate their action effectively.

243. However, there is no fault to be found with the Walloon Region, which, as early as 2014, included the -30% GHG emissions reduction target in its "Climate" decree, a target which it is undisputed was met at the end of the 2013-2020 commitment period (cf. point 177 above).

The claim insofar as it relates to a finding of a breach of articles 1382 and 1383 of the former Civil Code by the respondents, in respect of the climate policy they pursued and implemented between 2013 and 2020, is well-founded except in respect of the Walloon Region. The judgment is therefore confirmed insofar as it concerns, for this period, the violation of articles 1382 and 1383 of the former Civil Code by the Belgian State, the Flemish Region and the Brussels-Capital Region.

4) The 2021-2030 period

244. The Court also found that the Belgian State, the Brussels-Capital Region and the Flemish Region were at fault in their current climate policy for 2030.

As a reminder, the final 2019 NECP currently being implemented was designed around the European Union's previous target of a -35% reduction in GHG emissions in non-ETS sectors by 2030 (linked to an overall GHG reduction target for the Union of -40% by 2030 compared to 1990, Article 2, 11º of Regulation (EU) 2018/1999 of December 11, 2018).

For the reasons given above, it is clear that Belgian climate governance is at fault insofar as it has not pursued the objective of reducing GHG emissions by at least 25% below 1990 levels by 2020, and then, from 2018 onwards, a more ambitious target for the future, taking into account the need f o r a reduction of at least -30% by 2020, a minimum target that would have been imposed on any normally reasonable and prudent authority in the same circumstances.

It follows that this climate governance is also at fault insofar as, up to now, the measures currently in force in Belgium have been based on an objective of

reduction limited to -35% for non-ETS sectors by 2030 (in line with the general European objective of -40% compared to 1990), a threshold that is clearly insufficient in view of the -30% threshold that should already have been imposed by 2020, and the consequent delay in reducing emissions, and the objective of neutrality by 2050.

The Court again refers to the IPCC's special report of late 2018, which points to the consequences of global warming beyond 1.5° C and concludes that limiting global warming to 1.5° C implies reducing global GHG emissions by around 45% (between 40% and 60%) in 2030 compared with 2010, and achieving zero net emissions by 2050 (recital C1, page 12). A 40% reduction in GHG emissions by 2030 compared with 2010 means, in the Belgian context, a greater reduction effort than a 40% reduction in emissions by 2030 compared with 1990.

The same report states, in point D1 of the summary for decision-makers on page 18, that

"According to estimates, the mitigation measures announced by countries under the Paris Agreement would result in global GHG emissions of 52 - 58 GteqCO2 yr-1 in 2030 (medium confidence level). Trajectories that take these announced measures into account would fail to limit global warming to 1.5°C, even if they also took into account an increase in the scale of emission reductions and measures announced after 2030, which would be very difficult to achieve (high confidence). Overruns and dependence on large-scale CO2 elimination can only be avoided if global CO2 emissions begin to decline well before 2030 (high confidence). {1.2, 2.3, 3.3, 3.4, 4.2, 4.4, encadré inter- chapitre5 11 du chapitre 4}" (emphasis added).

The court also recalls the UNEP reports of 2018 and 2019, which highlight the serious inadequacy of the national contributions subscribed to date.

As already mentioned, these scientific reports and the commitments made by Belgium at international level, even if they are not binding as regards the level of the national contribution expected from each country, help to define what would be the behavior of a normally reasonable and prudent authority, placed in the same circumstances.

Given the need to pursue a gradual reduction in GHG emissions over time, and the scientifically-proven need to achieve zero net emissions by 2050, a normally prudent and diligent authority was obliged, as early as 2019, in the light of the latest scientific findings and the commitments made under the UNFCCC and the Paris Agreement, to define and take the appropriate measures to implement, by 2030, a GHG emissions reduction threshold well in excess of 40% compared with 1990.

Indeed, it was on the basis of similar considerations that, as early as 2021, the European Union raised its overall target for reducing GHG emissions to -55% below 1990 levels by 2030, a threshold which, for the reasons set out in paragraphs 199 to 202 above and which can be transposed here *mutatis mutandis,* the Court validates as constituting the minimum level required by prudence (and not a level of -81% or -61%, taking into account the requirements of the principle of separation of powers), of which the respondents should have been aware since 2021 at the latest.

This threshold is reasonably necessary to avoid :

- exposing future generations to the risk of major climate disruptions rendering part of our territory uninhabitable (rising sea levels, flood zones), or with serious consequences for the economy, health and access to basic resources (heat waves, storms, extreme rainfall, etc.),
- to impose a very sharp reduction in GHG emissions in the future, over a 20-year period between 2030 and 2050.

These two hypotheses would undoubtedly be far more damaging for the entire Belgian population than the constraints and restrictions to be expected from a higher level of ambition now, by 2030.

The only way to limit the risk of finding oneself in one of the two above-mentioned hypotheses is to set a threshold for reducing GHG emissions to well over 40% below 1990 levels by 2030 - in this case, the -55% threshold validated at European and federal level. Moreover, the Belgian State explicitly admits that "*the Green Pact for Europe and the objectives it contains unquestionably make it possible to determine the standard of conduct as provided for by article 1382 of the Civil Code*" (its conclusions, p. 177).

However, it is undisputed that Belgian GHG emissions rose again in 2021 and that, even in the scenario with additional policies ("WAM"), the results expected in 2030 will not even reach the -35% target in the non-ETS sector (the announced result being -34.4%).

The European Commission, in its October 14, 2020 opinion on the final 2019 PNEC, has already pointed out the plan's lack of ambition, criticisms echoed in 2023 by all the country's strategic councils (page 41 of the judgment under appeal, exhibits P.38 of the appellants, point 65 of the statement of facts).

Without a new direction soon, and without updating the NECP to take account of the new European objectives, the policies currently being implemented are clearly not likely to achieve a sufficient reduction in GHG emissions by 2030 to meet the climate emergency that has become increasingly urgent.

It is true that, since 2020, the federal and regional authorities have taken decisions in principle to implement the objectives defined at European level, as described in points 64 to 66 and 68 above, and a new cooperation agreement is currently being negotiated to update the PNEC.

This does not exonerate the Belgian authorities from the mistakes they have made in setting up, until recently, a climate governance system that was too unambitious, and whose effects will linger as long as these new decisions are not translated into legally binding standards, or at the very least into concrete achievements or sufficiently persuasive incentives to steer the behavior of citizens and businesses in the right direction. None of the documents submitted can guarantee that the measures adopted to date will make it possible to achieve the -55% target by 2030 and climate neutrality by 2050.

At this stage, the Court confines itself to identifying a fault insofar as the upward revision of Belgium's climate ambitions for the 2021-2030 commitment period was late and, to date, the policies actually implemented are clearly not likely to achieve the target of reducing GHG emissions by minus 55% by 2030.

245. As stated above, the Walloon Region is in a better position than the other respondents because

- by 2020, it has already achieved and largely surpassed a GHG reduction target already set, since 2014, at a 30% reduction compared to 1990 ;
  for the future, it already incorporates the Belgian target of a -47% reduction in GHG emissions in the draft revision of the PNEC ;
- PACE incorporates the European objective of a total reduction in GHG emissions of up to -55% by 2030 compared with 1990 (page 20 of PACE);
- a draft "carbon neutrality" decree has, according to the arguments put forward, been approved on second reading and was, at the time of writing, being submitted to the legislation section of the Conseil d'Etat.

In this context, and unlike the other respondents, it has not been established that the Walloon Region is at fault in the climate policy it is implementing for the long term, up to 2030.

5) For both periods combined

246. Surabondamment et comme indiqué ci--dessus, même si ce n'est pas invoqué comme tel par les parties appelants au principal3[9] , la Belgique violate non seulement la norme de prudence, telle que définie ci--dessus, mais également une norme contraignante de droit international qui a acquis un contenu suffisamment déterminé.

By virtue of the general principle of law according to which the judge is bound to decide the dispute in accordance with the rule of law applicable to it, he has "*the obligation, while respecting the rights of the defense, to raise ex officio the legal grounds whose application is required by the facts specifically invoked by the parties in support of their claims*" (Cass., March 4, 2013, *Pas.,* I, n°526).

The Court also recalls that the general principle of law relating to respect for the rights of the defense does not require a judge to order the reopening of debates when he bases his decision on elements which the parties could have expected, in view of the course of the debates, to be included in his judgment, and which they were able to contradict (J.-F. VAN DROOGHENBROECK, "Faire l'économie de la contradiction?", *R.C.J.B.,* 2013/2, pp. 203-248), as is the case here.

However, as explained above, Belgium's positive obligations under Articles 2 and 8 of the ECHR have, given the context as defined above, acquired a sufficiently definite content so that their breach alone constitutes a fault within the meaning of Articles 1382 and 1383 of the former Civil Code.

6) Individualizing faults

247. As mentioned above (points 181 and 203), there are obviously differences between each of the Regions and the Federal State.

The Belgian State also stresses that it does not have the power to compel federated entities to work together more effectively. It states that it has put in place the necessary and appropriate structures to ensure effective collaboration between all the entities concerned. According to the Belgian State, the introduction of more integrated climate governance would require a reform of the Constitution, which did not achieve the required majority in 2019. The Belgian State also maintains that there is no obligation to conclude a cooperation agreement on climate matters. It concludes that no fault can be imputed to it (its conclusions on pages 19S to 198).

[3e] The appellants criticize the first judges for having considered that only objectives enshrined in norms of positive international, European and national domestic climate law would be binding, and for not having taken into consideration the possibility of liability on the basis of an error of conduct to be assessed according to the criterion of the normally careful and prudent administrative authority placed in the same conditions (their conclusions, no. 425, p. 170).However, contrary to what the Walloon Region maintains, they do not exclude the possibility that the Court might examine the liability of authorities for failure to comply with legal standards.

However, the Belgian State has not demonstrated that Belgium's federal structure prevented it from basing its climate policy on the thresholds referred to above (-25% and -30% for 2020, -55% for 2030, in relation to 1990), which are defined in relation to a level where there is no longer any margin of appreciation with regard to the future dangers and constraints involved in pursuing a less ambitious emissions reduction threshold. Moreover, the Government Agreement of September 30, 2020 stipulates that the federal government *"will set itself the target of a 55% reduction in GHG emissions by 2030, and will take measures within its sphere of competence to achieve this",* and *"undertakes to adapt its contribution to the National Energy and Climate Plan (PNEC) in this direction by means of an action plan*", At the very least, this demonstrates that, for the future, the Belgian State considers itself capable of pursuing and implementing more ambitious climate governance than in the past.

Neither the Belgian State, nor the Brussels-Capital Region, nor the Flemish Region have demonstrated that their characteristics constitute an obstacle to the definition and pursuit of climate governance that meets the minimum requirements imposed by the standard of care and, moreover, human rights.

It follows that it is not necessary to go beyond the foregoing developments in paragraphs 178 to 182 (concerning the violation of Articles 2 and 8 of the ECHR, which apply here *mutatis mutandis)* to establish the existence of fault committed individually by the Federal State, the Brussels-Capital Region and the Flemish Region. It suffices to note the inadequacy of their ambitions and results.

248. It was also up to the Federal State and the Regions to cooperate effectively to achieve this result.

However, it is a fact that the cooperation required to define effective climate governance is not working properly in Belgium: it is enough to note that it took until 2018 for the previous cooperation agreement, concluded in 2015, to be validated, and that the update of the PNEC 2021-2030, which should have taken place by June 2023, has still not been completed for lack of a cooperation agreement obtained in good time. The Court also refers to the opinions issued in 2014 and 2023 by the country's Strategic Councils (exhibits F.17 and P. 38 of the appellants, above points 48 and 65).

The NECPs that have been negotiated are no more than the sum of the policies pursued individually by each entity, and lack a cross-cutting, integrated vision of the measures to be implemented at national level, illustrating the shortcomings of cooperation between the federal state and the various regions.

Each party must make a loyal contribution with a view to reaching a cooperation agreement whose outcome should be, at the very least, that defined above in terms of GHG emission reduction thresholds.

Admittedly, the absence of a cooperation agreement or of sufficiently integrated cooperation at national level does not, in itself, allow us to conclude that all the parties called upon to negotiate it have failed to cooperate.

This does not, however, allow the Belgian State, the Flemish Region and the Brussels-Capital Region to evade their individual responsibility for the climate policy they have pursued to date, which, given its lack of ambition and results, constitutes a fault for each of them. As emphasized in the *Neubauer* judgment of March 24, 2021 (Exhibit 0.14 of the appellants), the fact that climate and global warming are global phenomena, and that the problems caused by climate change cannot be solved by the action of a single state, does not preclude the obligation formulated at national level to protect the climate. Likewise, each federated entity is, in principle, individually responsible, at its own level, for any shortcomings in climate governance that prevent Belgium from achieving the levels of GHG emissions reduction required, as *a minimum,* by the general duty of care and the protection of human rights.

As for the Walloon Region, while it may have failed in its obligation to cooperate, which has not been sufficiently demonstrated, it must be acknowledged that this alleged failure has had no impact on the results it has achieved in terms of reducing GHG emissions by 2020 and on the objectives it is pursuing for 2030, and that it has made a useful contribution to the Belgian results achieved for 2020, so that this failure, assuming it has been established, is unrelated to the damage in question.

7) Conclusion

249. The claim, insofar as it relates to a finding of fault on the part of the respondents in respect of the climate policy they have pursued and implemented for the periods 2013-2020 and from 2021 to the present, is well-founded, with the exception of the Walloon Region. The judgment is therefore confirmed insofar as it concerns, for this period and until its delivery, the finding of fault by the Belgian State, the Flemish Region and the Brussels-Capital Region.

Since the Court finds no fault on the part of the Walloon Region, there is no reason to ask the Constitutional Court the preliminary questions it suggested concerning the constitutionality of article 1382 of the former Civil Code.

250. On the other hand, as indicated above, it is not possible at this stage to prejudge the faults that the Belgian State, the Flemish Region and the Brussels-Capital Region will commit, in the future and by 2030, in the context of the climate governance that they will implement and which has yet to be updated in the light of current European objectives, objectives which, given their scientific basis, constitute, in the Court's view, an adequate criterion for assessing whether the respondents have complied with the general duty of care, and even allow international law norms (Articles 2 and 8 of the ECHR) to be given a sufficiently precise content to constitute norms of international law with direct effect imposing a specific course of conduct.

The request, insofar as it seeks to establish that there are serious and unequivocal indications that, in pursuing their climate policy for 2030, the respondents will continue to commit faults, is unfounded.

c) <u>As for the damage</u>

251. The appellants in the main proceedings argue that they are suffering damage that is "*rapidly worsening and crescendoing*" (their conclusions, p. 317). They explain that there is a time lag of some forty years between GHG emissions and the "*full realization of their warming potential*" *(Idem).* They thus distinguish three time slices in the damage caused by global warming

one that "*includes the consequences of the global warming we are observing today*" and was caused by GHG emissions between 1750 *and* 1980, which led to a global warming of 1.1°C,
the second concerns the harmful effects of GHG emissions from 1980 to the present day, which *"will gradually be realized week by week, month by month, over the coming years*" but will not be fully realized until 2050-2060 (although they can no longer be avoided),

- a third tranche relating to GHG emissions produced from now on, which will have an impact in around 40 years' time and could lead, when added to past emissions, to a warming of 3.2 to 4º C in 2100.

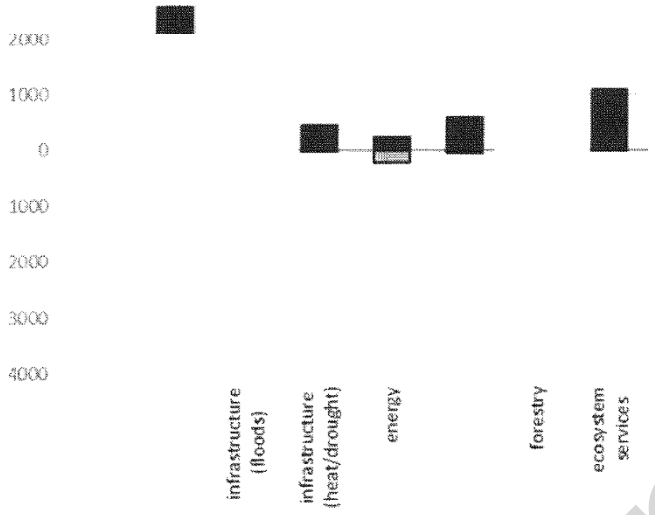
In their view, Belgian citizens *are* "*currently* suffering *the latent and creeping effects of emissions up to 1980, while the effects of emissions between 1980 and 2023 have yet to manifest themselves"* (their conclusions, p. 320). They point out that the areas of daily life affected are the basic physical conditions of daily life (heat), the integrity of the territory in which we live (rising sea levels), health (especially vulnerable people, but also climate anxiety), geopolitical stability and security, food and energy security, mobility, the economy and the equilibrium of financial markets.

The appellants in the main proceedings point out that, among the various people in Appendix A, *'some will experience the entire progressive* reo//sot/on of *the damage over 2100 years, others will not',* specifying that, among them, *'more than 30% are under 30 years of age, more than 43% under 35*', some of whom *are* '*children and adolescents'* (his conclusions, p. 321). And he adds: "*Given the ubiquity and severity of these impacts, it's simply impossible not to be affected" (Idem).*

The appellants in the main proceedings also point to the damage resulting from the "*price of procrastination*", both in terms of individual freedoms and in socio-economic terms.

In terms of freedoms, they point out that the postponement of measures to reduce GHG emissions "*seriously threatens the fundamental rights and freedoms of individuals (…) in that the effects will intensify and the measures to be taken will become more drastic and costly*" (their conclusions, p. 323). In the same vein, they cite the judgment of the German Constitutional Court of March 24, 2021 (*Neubauer* judgment*),* which found that it infringed the rights and freedoms guaranteed by the German Constitution to postpone beyond 2030 the burdens entailed by the restrictions necessary to preserve the climate (Exhibit 0.14 in their file).

252. On the socio-economic front, the appellants in the main proceedings cite a 2020 study by the National Climate Commission, which assesses the cost of climate change in Belgium and identifies costs "*in the areas of health, labor produCtivity, infrastruCture in correlation with flooding and in correlation with drought and heat, energy, agriculture, forestry, ëcosystem services, insurance and cross-border impacts".* They produce the following table in which the estimated economic costs are shown above level 0 and the gains from climate change below this level by sector, compared with current conditions, taking into account the RCP8.5 *(business as usual)* climate scenario*,* for the year 2050 (bars) and for the year 2100 (dots). This would result in total costs of around €9,500 million/year, or around 2% of Belgian GDP, while the gains (milder winters) would amount to €3,000 million/year, or 0.65% of GDP (by way of comparison, the annual budget of the Federal Public Service of Justice in 2019 was €1,950 million).



253. Les parties appelantes au principal dénoncent encore une atteinte prochaine au patrimoine des personnes physiques via les impôts qui seront plus élevés pour prendre les mesures nécessaires (conclusions, pp. 325-326). Selon elles, si « *les parties intimées avaient mené une politique climatique prudente et diligente, avec un niveau d'ambition approprié comme d'autres pays l'ont fait, chacune des personnes physiques à la cause bénéficierait de la possibilité de mesures moins incisives, s'inscrivant dans un éventail d'options plus large, à coûts économiques moindres et à chances de réussite plus élevées* » (leurs conclusions, p. 325). Et de citer l'arrêt rendu par le Hoge Raad des Pays-Bas dans son arrêt *Urgenda* du 20 décembre 2019: « *Chaque émission de GES réduit le budget carbone encore disponible* (…). *Tout report des réductions d'émissions signifie donc que les réductions d'émissions futures devront être de plus en plus importantes pour compenser le report dans le temps et dans l'espace. Cela signifie qu'à chaque report de la réduction des émissions, les mesures d'atténuation à prendre ultérieurement devront, en principe, être de plus en plus intrusives et coûteuses pour atteindre le résultat escompté, et seront également plus risquées* (…) ».

254. The appellants in the main proceedings state that the damage manifests itself differently on Belgian territory, but that it personally affects each of the natural persons involved, regardless of their geographical location. Based on various reports, they summarize the impact as follows

"For Wallonia, reference is made to the deadly floods of summer 2021. For current and future damage, reference is made to urban areas such as the city of Liège, which is prone to flooding and heat waves. In Flanders, a rise in the level of the North Sea has already been observed since 1951. In 2010, the average sea level in Ostend rose by 103 mm, in Nieuwpoort by 115 mm and in Zeebrugge by 133 mm compared to 1970.

These figures correspond to an average rise of 2.6 mm, 2.9 mm and 3.3 mm per year respectively over recent decades. By 2100, sea levels on the Belgian coast are projected to rise by 60 to 90 cm, or even 200 to 300 cm in the most pessimistic scenarios.
Future projections highlight that in Brussels, as a result of concrete development, heatwaves will triple by 2100, doubling in intensity and halving in duration. In Flanders, groundwater reserves will be particularly high due to the high level of soil sealing (16%) in the region. With regard to biodiversity and tourism in Wallonia, the loss of the Fagnes is noteworthy (...)" (their conclusions, n° 839 and 840, p.326).

255. Klimaatzaak asserts that it has suffered moral and personal ecological damage, given its corporate purpose, which concerns the protection of present and future generations against anthropogenic climate change and the loss of biodiversity, as well as the protection of the environment. It "*seeks an injunction to prevent or at least limit the worsening of the damage*" (its conclusions, p. 321).

256. The Belgian State does not directly address the question of the damage claimed by the appellants in the main proceedings: it considers that the claim does not seek to repair existing damage, but only to prevent future damage (its conclusions, p. 144). The Court will return to this question in the chapter on injunctions.

In the same vein, the Brussels-Capital Region considers that the appellants in the main proceedings have not demonstrated that their claims are of such a nature as to make good the damage they have suffered or to prevent such damage (its conclusions, p. 124). Nor does it expand on the nature of this damage.

The Flemish Region contests the fact that the appellants in the main proceedings have suffered personal and actual damage. It considers that the alleged damage is not certain, but rather hypothetical. In its view, the "*alleged health problems have not been proven*", nor has the alleged non-material damage. The Flemish Region considers that, insofar as it has an ambitious climate policy and that this policy will continue to evolve in the years to come, the appellants cannot hold it liable for the damage they allege (its conclusions, pp. 126-128).

The Walloon Region considers that the damage is not certain, personal or sufficiently localized geographically. Like the Belgian State and the Flemish Region, it considers that the action is not aimed at repairing existing damage, but at preventing future damage, which would be uncertain since its occurrence is envisaged only in terms of probability in the IPCC reports (its conclusions, p. 97 ff.).

257. As indicated above (points 126 and 132, admissibility section), the appellants in the main proceedings do not limit their claims to collective environmental damage (i.e. damage to a collective interest caused by a man-made physical change to the environment, over and above any damage to individual interests).

The damages claimed by the appellants in the main proceedings - individuals - concern their person and/or their private assets. They are real and both present and future.

Heatwaves and droughts are already occurring, particularly in Belgium. It is a certainty that these episodes will multiply and worsen as the climate warms. The same applies to extreme rainfall accompanied by flooding. The same applies to the phenomenon of climate-related anxiety and the economic cost of climate disruption, which is already being felt, for example, in the budgets of federated entities, which have had to cope with the consequences of climate disruption (notably the destruction of infrastructure following the floods of 2021) or finance the adaptations needed to prevent its effects (the works needed to prevent rising sea levels). Increased spending to cope with climate disruption will put pressure on other aspects of the budget of the federal state and federated entities, and limit funding possibilities for other crucial sectors such as education, justice, health, public transport, etc.

It has been reasonably established that these damages are - and will be - suffered individually by each of the parties as natural persons. None of the appellants in the main proceedings can escape the negative effects of climate change mentioned above, which in one way or another are being felt throughout Belgium.

Even if their relative impact is minimal, on the scale of a country such as Belgium, compared to the rest of the world, the harmful effects of each additional GHG emission compared to what would have been required by non-infringing climate governance are certain and are already being felt today.

The consequences of the reduction in the residual carbon budget still available to limit climate disruption, and the cost of excessively postponing the burden of reducing GHG emissions over time, are certain to be felt by each of the appellants involved.

258. As far as Klimaatzaak is concerned, it was explained above in paragraph 127 that it was entitled to claim non-material damage as a result of the damage to the environment.

As indicated above, an environmental association may, at the very least, suffer moral damage as a result of the harm caused to the collective interest in defending the environment.

of which it was formed (C.C., January 21, 2016, no. 7/2016, *Amén.,* 2016, no. 3, p. 194, pt. B.8.1).

The purpose of this association is :

-protecting present and future generations from anthropogenic climate change;
protecting present and future generations from the loss of biodiversity;
environmental protection within the meaning of the law of January 12, 1993 concerning a right of action in environmental matters.

It is a scientific fact that these interests are harmed by the risk of global warming in excess of 1.5°C.

The Court found that Belgian climate governance as carried out to date does not respect the minimum contribution that can be expected from Belgium, in terms of reducing GHG emissions, to meet *this* risk and consequently violates both articles 2 and 8 of the ECHR and articles 1382 and 1383 of the former Civil Code.

This is sufficient to demonstrate the injury to the interests for which Klimaatzaak was set up.

d) As for the causal link

259. The Belgian government points out that the impact "*of GHGs created today on Belgian territory is minimal on a global scale*", so that "*reducing this impact would not in itself solve the problem*" (its conclusions, pp. 153-154).

260. The Brussels-Capital Region disputes any causal link between the faults of which it is accused and the damage claimed by the appellants in the main proceedings (its conclusions, p. 48). It points out that it *is* difficult "to *demonstrate a causal link between an action or abstention of a State in climate matters and specific consequences on the situation or rights of a specific claimant",* since "*questions of liability linked to global warming are characterized by a particularly distant causal link between the fault and the damage",* whereas, for "*liability to be activated, there must be a causal link between a specific fault and specific damage".* According to the Region, the appellants cite numerous reports, none of which establishes that
They do not "formally establish the link between global warming and GHG emissions from the Brussels-Capital Region", nor do they prove "*that if the Brussels-Capital Region had taken such and such measures, there would be no heatwaves, no increase in vector-borne diseases, no floods and no unrest".*

allergy. She5 therefore did not establish any causal link between the fault and the alleged damage" (her conclusions, pp. 53-54).

261. The Flemish Region also contests the causal link, arguing that "*its policy has only a very marginal influence on this global problem"* (its conclusions, p. 129). In her view, "*since* the *Flemish Region's alleged negligence can only have a minimal impact on the climate problem (less than 0.50%), it is doubtful whether the condition relating to the Causal link is met*" (her conclusions, p. 130), even if she admits that "*any person can be held liable for a fault which is a necessary condition for the damage suffered in practice"* and that no distinction "*is made according to the more or less important role played by the fault in the damage*" (her conclusions, p. 122).

262. The Walloon Region also contests any causal link between the alleged breaches and the damage, pointing out that, with or without the necessary measures, it cannot be ruled out that the feared damage will still occur. It stresses that the sources of the damage are worldwide, and that each State taken individually is powerless to cause or prevent the damage, and that the condemnation of certain "responsible parties" to the exclusion of others "responsible" will not allow the damage to be made good, nor will it provide any benefit to the victim (cf. the question referred for a preliminary ruling on page 103 of its conclusions).

263. From the point of view of equivalence of conditions, the fact that the appellants in the main proceedings have not called the Communities into the case, even though some of their competences concern climate policy, and that they have not made "*any attempt to delimit the responsibility of each of the legislators involved"* (Belgian State's submissions, p. 156) is irrelevant. Moreover, the Communities are not concerned by the cooperation agreements concluded to date with the aim of fulfilling Belgium's international obligations to combat global warming.

264. As a reminder, the damage alleged by the appellants in the main proceedings manifests itself chronologically in three successive stages, as follows

a first tranche which includes the consequences of the global warming we are observing today, caused by GHG emissions between 1750 and 1980, which led to a global warming of 1.1°C,
the second concerns the harmful effects of GHG emissions from 1980 to the present day, which will gradually be realized but will not be fully realized until 2050-2060,
a third tranche relates to GHG emissions produced from now on, which will have an impact in around 40 years' time and could lead, when added to past emissions, to a warming of 3.2 to 4º C in 2100.

265. The first stage is not causally linked to the shortcomings or faults identified here: it would have occurred even if the respondents had revised their ambitions upwards in good time, given that, before the 1980s, the measures needed to avoid dangerous global warming were not yet clearly identifiable and quantifiable, and that the technological means to deal with it (notably renewable energies) had not yet been sufficiently developed.

266. Part of the second part of the damage is already present. While it is certain that the quantity of GHGs emitted would have been less without the fault of the respondents, it is not sufficiently certain that the effects of global warming as such, which constitute part of the damage alleged by the appellants in the main proceedings, could have been mitigated if, as early as the second commitment period referred to above (2013-2020), the respondents had raised their ambitions in terms of reducing GHG emissions. Other countries have followed suit and, unfortunately, the effects of global warming are now being felt more intensely and more rapidly than originally anticipated. In this respect, it is at most the loss of a chance to avoid the effects of global warming as they are already appearing in Europe (heatwaves, droughts, floods, etc.) that is causally linked to the shortcomings observed from 2013 onwards. However, it is not necessary for the resolution of the dispute to determine more precisely the percentage of this loss of opportunity (insofar as this is possible).

Among the harmful effects of emissions from 1980 to the present day, the court nonetheless found the following to be causally linked to the faults committed:

- O eco-anxiety, a health problem that has been shown to affect a significant proportion of the population (Exhibit E.22 of the appellants, study by *The Lancet Countdown),*
- o non-material damage resulting from the appellants' awareness of the inadequacy of the means used by the Belgian authorities to protect the interests of future generations,
- o damage to the interests defended by Klimaatzaak.

What's more, the insufficient ambitions of the past continue to have an impact today. At the very least, they are delaying the achievement of the objectives needed at national level to prevent dangerous global warming, in collaboration with other nations.

The excessive reduction in the residual carbon budget, which is the consequence of both past and current misconduct, means that efforts to avoid dangerous global warming will be postponed. This will necessarily have detrimental consequences for the parties to the main proceedings, not only in socio-economic terms, but also in terms of their fundamental rights, which will be more limited than they would be if

the necessary measures had been taken in good time (the "price of procrastination", in the words of the appellants in the main proceedings). This damage exists in its entirety today, as GHG emissions are released into the atmosphere beyond what prudence and respect for human rights require. Finally, the court points to the risk of undermining the human rights of future generations, who may also be faced with the need to reduce their GHG emissions more rapidly and without adequate transition. The awareness of the risk, without adequate climate governance, of leaving one's descendants with an irremediably destroyed environment or significantly less favorable living conditions constitutes reparable moral damage suffered personally by the appellants in the main proceedings in their individual capacity.

267. The third part of the damage, namely the consequences of GHG emissions produced today, is future damage that can still be prevented or, at the very least, the risk of occurrence limited.

In this respect, the most recent scientific data confirms the existence of a window of opportunity by 2030 to combat dangerous global warming (latest UNEP annual report 2022, Exhibit E.28 of the appellants in the main proceedings).

268. The Court concluded that there was a causal link between the faults it had identified and the damage suffered by the appellants in the main proceedings, which consisted of :

in the phenomenon of eco-anxiety;
in moral prejudice resulting from awareness of the inadequacy of the means implemented by the Belgian authorities to protect the interests of future generations; in the loss of a chance to avoid the effects of global warming as they are already appearing today in Europe (heat waves, droughts, floods, etc.) and as they will appear in the future;

- in the excessive reduction in the residual carbon budget compared with what was required for good climate governance, with the future but certain consequences that this implies;
in undermining the interests defended by Klimaatzaak.

Without the faults committed, the eco-anxiety would have been lower, as would the moral prejudice, the residual carbon budget would not have been dented to the same extent, Klimaatzaak's interests would have been preserved and Belgium would be in a better position to fight effectively, in concert with other nations, against the risk of dangerous global warming.

e) <u>As for the appellants' conduct</u>

269. The Brussels-Capital Region explains that it has, for several years, "*approved numerous ordinances and decrees and approved various strategic plans intended (essentially or incidentally) to reduce GHG emissions*" but that the appellants in the main proceedings "*have never contested these deCisiOn5 (which they claim are insufficient) and refrain from doing so in5 the context of the present action*" (their conclusions, p. 5).

Insofar as this remark should be interpreted as a breach by the appellant paFties in the main action of their obligation to limit their damage, it cannot be accepted: on the one hand, the appellant parties in the main proceedings brought their action in 2015, i.e. only two years after the first period criticized (2013-2020, i.e. the second commitment period) and, on the other hand, it could not be expected of these parties that they would systematically challenge each and every decision adopted by the Brussels-Capital Region (and, more generally, the respondent parties), especially as they call into question Belgian climate policy as a whole.

270. The Flemish Region, for its part, considers that, if the Court finds that there is a causal link between the fault attributed to it and the damage claimed by the appellants in the main proceedings, it should be noted that the latter are also liable: "*Indeed, the appellants themselves also produce GHG emissions. (...) It could therefore be said that, without the actions of each of the appellants, the damage would not have occurred as it did. Responsibility does not lie solely with the defendants".* She concludes that, in this case, *"there can only be shared liability*" (her conclusions, p. 131).

As she points out, however, Aquilian liability presupposes the meeting of three cumulative conditions, namely fault, damage and a causal link, and the "*mere fact that an action causes damage is not sufficient to consider it faulty*" (her conclusions, pp. 121-122). In the present case, however, the Flemish Region does not invoke - and o *fortiori* does not establish - the existence of fault on the part of the appellants in the main proceedings.

D. Functions

1. Applicable principles

a) Injunction and the principle of separation of powers

271. The question of respect for the principle of the separation of powers arises not only at the stage of examining the possible violation of articles 2 and 8 ECHR or articles 1382 and 1383 of the former Civil Code (is the obligation imposed by these provisions sufficiently deteFmined - if necessary taking into account the context as defined above - to enable an individual to denounce its violation in the context of a subjective dispute?) but also, in the event of a positive answer, at the stage of the measures that may be ordered by the judge.

In his conclusions preceding a decision of June 26, 1980, the then Attorney General Venu had already pointed out that the courts of the judiciary "*constitute in the State a Power which is the natural guardian of all subjective rights"* and that the Constitution "*necessarily entrusted them with the mission of ordering the reparation of unlawful infringements of these rights" (Pos.,* 1980, I, p. 1355), so that they "*do not violate the principle of the separation of powers by interfering in the attributions reserved to the Executive when, in order to restore the rights of the victim of the illiCite act of the administrative authority, they order compensation in kind for the damage and prescribe to this authority the measures intended to put an end to the infringement of the victim's rights*" (p. 1356). However, he went on to specify that the judge cannot "*perform acts in place of (the administrative authority) which that authority alone is competent to perform*", so that he can neither annul nor reform administrative acts. On the other hand, the judge may issue an injunction, but this must be individual in nature: "*such an order does not, in itself, infringe the principle of continuity of public service, even when the work ordered relates to State property which the State assigns to a public service".* This principle only precludes measures of forced execution, which does not exclude a penalty payment *"which, although constituting an indirect means of coercion, is not a means of forced execution"* (pp. 1357-1361).

Since then, it has been widely accepted that the courts of the judiciary, which, as indicated above, have the power both to prevent and to remedy any unlawful infringement of subjective rights by public authorities, may, without violating the principle of separation of powers, order the administration to take measures to put an end to such infringement (Cass., 26 juin 1980, *Pas.,* I, p. 1350 et seq.; Cass. 1er octobre 2007, *Pas.,* I, p. 1676; Cass. 4 septembre 2014, *Pas.,* I, p. 1731). However, this principle prohibits them "from *carrying out, outside this hypothesis, acts of public administration and from reforming or annulling the acts of administrative authorities"* (Cass., September 4, 2014, *Pas.,* I, p. 1731). The measures thus ordered cannot in fact deprive the public authority of the choice of measures to be implemented to achieve the ordered result. In the aforementioned ruling of September 4, 2014, the Cour de cassation thus rightly considered that the contested ruling justified its decision to "order õ lo [plaintiff] to *withdraw from cultivation the disputed parcel belonging to it"* but could not, without disregarding the general legal principle of the separation of powers, order it to give this parcel "*an allocation of meadow, hay meadow, fallow land or green area"* (Cass., September 4, 2014, *Pas.,* I, p. 1731). More recently, it held that "*the judge who, in order to fully restore the rights of an injured party, orders reparation in kind for his loss by prescribing the administration to take measures intended to put an end to the harmful illegality, must indicate the illegality to which these measures are intended to put an end and, without depriving this authority of its authority, must order the administration to take measures intended to put an end to the harmful illegality.*
discretion nor substitute for it, specify their scope in such a way that it cannot give rise to any reasonable doubt for this administration" (Caso., ie£ April 2022, RG n° C.21.0338.F, www.juportal.be). In the opinion preceding this judgment, Advocate General de Koster had stated that, "*although the judgment under appeal was obliged to impose a principal sentence formulated in a sufficiently precise manner insofar as this sentence was accompanied by a penalty payment (...), it could not deprive the claimant of her freedom (...).*

of appreciation as to the choice of the most appropriate measure to ensure compensation in kind for the loss resulting from the plaintiff's fault, on pain of violating the principle of the separation of powers".

The same principles apply, *mutatis mutandis,* to the legislative power.

In the type of litigation submitted to the court, several authors consider that the fact of making an injunction to the executive or even the legislative power does not necessarily constitute an infringement of the principle of separation of powers if, such as the measure to reduce GHG emissions requested by the appellants in the main proceedings, it "*remains general, in the sense of the result to be achieved for the purposes of compliance with a higher standard, without going into a precise and exhaustive indication of the means of achieving it*" (S. VAN DROOGHENBROECK, "Flandria, Anca, Ferrara .... Urgenda? Entre réparation et prévention, de l'indemnisation à l'injonction", 1. 7. 2020/36, p.. 750, which states that such a measure could even, in fundamental rights litigation, be *'dictated by the need to honor the right to effective legal protection guaranteed, inter alia, by Article 13 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union",* and that "*it is not a question of throwing out the principle of the separation of powers in order to satisfy European requirements, but simply, in a conciliatory approach, of adopting the interpretation best able to meet them"). A* number of authors have taken the same line (X. THUNIS, "Dérèglement climatique : y a-t-il un pilote dans l'avion ?", *Amén.,* 2022,
p. 34; M. WUINE, "Analyse du jugement du tribunal de première instance dans l'affaire climat à la lumière des décisions rendues dans 'l'Affaire du siècle' et Urgenda*", J.L.M.B.,* 2022/8, p. 367; see also P. LEFRANC, "het klimaatzaak vonnis: wachten op "de man de bomen plantte"?
", 7.M./î., 2021/4, p. 340; E. DE KEZEL, "De Belgische klimaatzaak: het aansprakelijkheidsrecht als gamechanger?", *7.0.0.,* 2021, p. 216).

The Court also considers - contrary to what was decided in the judgment under appeal - that, given the violations of articles 2 and 8 of the ECHR as well as articles 1382 and 1383 of the former Civil Code, an injunction to remedy this unlawful infringement of individual rights would not, in principle, be contrary to the principle of the separation of powers.

Imposing such a reduction in order to prevent global warming does not, as the Brussels-Capital Region has argued, deprive the public authority of the choice of measures to adopt in order to achieve the objective of limiting global warming, nor does it "petrify" public action, as the Walloon Region maintains (its conclusions on page 84), since it is indisputable (and moreover not seriously contested) that this is an absolutely essential measure (even if not necessarily sufficient) to achieve it, that the Court limits itself to defining a minimum threshold of reduction to be achieved in several years' time, below which there is fault or negligence (a threshold which the respondents in the main proceedings are therefore free to raise), and that there is a wide range of concrete measures available to these authorities to enable them to achieve this objective (as illustrated by the extensive discussion of measures already taken in the respondents' submissions in the main proceedings).

b) Injunction and prohibition to rule by general provision

272. The Brussels-Capital Region also considers that, if the Court were to grant the request made by the appellants in the main proceedings, it would be ruling by way of general provisions, in violation of article 6 of the Judicial Code (its conclusions, p. 113).

273. Article 6 of the Judicial Code stipulates that judges "*may not rule by way of general and regulatory provisions on cases submitted to them*". Inherited from French law (former art. 5 of the Civil Code), which developed in a context of mistrust of judges quite different from the prevailing conception in our legal system, article 6 of the Judicial Code nevertheless finds a foundation in our constitutional law. As P. Martens writes, "*even without having to explain it by a history that is not our own, it is the expression of the separation of powers* (...)" (P. MARTENS, "Que reste-t-il de l'article 6 du Code judiciaire?", in *Le Code judiciaire a 50 ans. Et après? Hommage à E. Krings et M. Storme,* Bruxelles, Larcier, 2018, p. 185). It is therefore first and foremost in the light of this principle that this provision must be interpreted. However, the Court has already noted that the principle of separation of powers does not necessarily preclude the application made to it by the appellants in the main proceedings.

Moreover, the main aim of this provision was to prohibit the judge from legislating, even if it was mainly applied in France and Belgium to sanction decisions that referred to judicial precedents without any further motivation (P. BELLET, "Servitudes et libertés du juge : les articles 4 et 5 du Code civil français", in *Arguments d'autorités et arguments de raison en droit,* G. Haarscher, L. Ingber and R. Vander Elst (eds.), Brussels, Ed. Nemesis, 1988, pp. 153 and 157).

However, in the present case, the appellants' request does not seek the Court's intervention. As one authoritative doctrine points out, a general injunction to impose a reduction in GHG emissions on a State "does *not directly affect the rights and obligations of citizens who are not parties to the dispute, nor does it purport to dictate a precise standard to anyone*" (N. BERNARD, S. VAN DROOGHENBROECK, I. HACHEZ, C. JADOT, A. DAviD, A. PicauE, C. LANGLois and B. GOMES, *op. cit.,* p. 30).

c) Ini nction and respect for the division of powers between the federal State and the Regions

274. Lastly, the respondents point to the problem posed by the fact that environmental matters are divided between them, so that it would be inconceivable to convict them all together without infringing constitutional principles concerning the division of powers.

275. There can be no doubt that, in the context of internal proceedings such as those in the present case, the authorities responsible for a particular climate-related matter must in principle be involved, and that "*in application of the principles of exclusivity of competence*

and autonomy in their exercise (...) no one may be required in fine to do more or anything other than what falls within 'his' share of responsibility, as determined by the rules dividing competence" (N. BERNARD, S. VAN DROOGHENBROECK, 1. HACHEZ, Û . JADOT, A. DAVID, A. PICQUÉ, C. LANGLois and B. GOMES, *Op. cit.* p. 34). These authors consider, however, that "(a)s *long as it does not go into the precise identification of the actions to be taken, a general injunction to act, addressed to all authorities (federal and federated) holding competences potentially relevant to achieving the prescribed result*" does *not "seem reprehensible in terms of the canons of Belgian federalism*", a global injunction can "*be satisfied by identifying all the authorities which, in terms of competences, are in a position to act to achieve the desired result*", leaving it to them "subsequently to *determine the actions to be taken*" *(Idem).*

The Court also considers that an award against all the respondent parties is conceivable, but that constitutional principles concerning the division of powers require that these parties be given the opportunity to determine how the award should be shared. In other words, an order *in Solidum,* even if it were possible, in the case of an injunction and/or reparation in kind and not an order for the payment of a sum, is not conceivable from a constitutional point of view (and is no longer requested by the appellants in the main proceedings): the award as envisaged here could therefore only consist of a single result to be achieved collectively by the entities to which the injunction is addressed, these being called upon to negotiate and determine themselves, within the limits of their competences, the share that each would invest in achieving the overall objective, as well as the means and measures to be implemented to achieve it.

Indeed, the definition of a minimum threshold only makes sense at national level, and only this level is relevant to the obligations of the Belgian State. As for the latter, while there is no doubt that its powers are limited with regard to the territory of the Regions, its levers are not non-existent: it has already put in place the structures necessary for the smooth collaboration of all the entities concerned, and can put in place policies natuFe to promote results (as confirmed by the decisions of the Council of Ministers of April 2, 2021 and October 8, 2021, referred to in points 216 and 217 of its conclusions).

276. The issue is further complicated by the fact that, as the Walloon Region has committed neither a fault within the meaning of Articles 1382 and 1383 of the former Civil Code, engaging its liability, nor a breach of Articles 2 and 8 of the ECHR, the injunction would not be addressed to the latter but only to the Belgian State, the Flemish Region and the Brussels-Capital Region. However, the territory of the Belgian State includes that of the Walloon Region, and the results at national level will necessarily be determined by the Walloon results. However, the foregoing developments have shown that, to date, the Walloon Region has done more than "its share" in reducing GHG emissions by 2020, and has committed itself to doing its share by 2030, so that an injunction concerning the entire national territory should, in fact, be of such a nature as to facilitate the task of the condemned parties. However, it goes without saying that, if the situation were to change, this would be a factor to be taken into account in monitoring compliance by the parties concerned.

the Belgian State, the Flemish Region and the Brussels-Capital Region, of the injunction in question. In any event, and as indicated above, each entity would only be condemned to the extent of its share in the effort to be made.

d) Ini°nction as a sanction for violation of articles 2 and 8 of the ECHR

277. As indicated above (point 146), while it is true that Articles 2 and 8 of the ECHR do not explicitly provide for a sanction in the event of a breach of the obligations enshrined therein, such a sanction may nevertheless be inferred from the right to an effective remedy enshrined in Article 13 of the ECHR, which must make it possible to put an end to the violation of the other rights enshrined in the Convention, and ideally to prevent it, but also to obtain compensation for the damage caused by the violation. Article 9.4 of the Aarhus Convention also stipulates that judicial proceedings must provide adequate and effective remedies, including injunctive relief where appropriate.

It is therefore perfectly possible for an injunction to be the best, if not the only, remedy for a violation of Articles 2 and 8 of the ECHR, particularly in environmental litigation.

Moreover, these international requirements are compatible with our legal system, as can be seen from the reasons given in point 271 above.

e) Ini nction, as reparation in kind for damage causally linked to the faults committed and as a preventive measure against the occurrence of future damage.

1) Introduction

278. The Court has noted above that the conditions for civil liability under articles 1382 and 1383 of the former Civil Code have been met in the case of the Belgian State, the Flemish Region and the Brussels-Capital Region, which have committed faults in the climate governance carried out to date, faults that are causally linked to damage that has already occurred, as described in points 257, 258 and 268 above.

Some of this damage (so-called dangerous global warming and excessive damage to the residual carbon budget) has not yet occurred, however, and the risk of it happening can be limited if Belgium, like other countries, does its part to combat global warming.

Hence the question of the legal justification for the measure sought by the appellants in relation to the principles applicable in tort law.

2) The distinction between reparation in kind, cessation of unlawful action and preventive action

279. The Belgian State insists on the need to make a clear distinction between reparation in kind for damage, which may take the form of an injunction but which implies that the damage for which reparation is claimed has already occurred, and a prohibition or injunction whose sole purpose is to prevent damage that has not yet occurred. In his view, the claim made by the appellants in the main proceedings is not a claim for reparation, but rather a preventive action (his conclusions, pp. 144-145). However, such a claim would have to be anchored in a legal regime that has not even been enshrined yet, namely article 6.42 of the proposed law on Book 6 "Extra-contractual liability" *(Doc. Ch.,* sess. 2022-2023, n°55-3231/001), which imposes a triple condition not met in the present case, namely the violation of a norm imposing a specific behavior, a certain future damage causally linked to the unlawfulness and an adequacy between the injunction and the unlawfulness (his conclusions, p. 189 et seq.).

280. In the same vein, the Brussels-Capital Region considers that, "*as the law currently stands, a judge is not empowered to issue injunctions such as those sought by the appellants on the basis of articles JJ82* and *1383 of the Civil Code*" (its conclusions, p. 124).

281. For the past ten years, legal writers have been calling for a distinction to be made, following the lead of French doctrine (see in particular G. VINEY, "Réparation en nature, cessation de l'illicite et mesures purees préventives"). VINEY, "Réparation en nature, cessation de l'illicite et mesures purement préventives
", in *Le dommage et sa réparation dans la responsabilité contractuelle et extracontractuelle,* B. Dubuisson and P. Jourdain (dir.), Bruxelles, Bruylant, 2015, pp. 7-58), between claims for reparation in kind for damage already sustained, claims aimed at putting an end to an unlawful situation at the origin of damage already sustained or in the process of being sustained, and claims for purely preventive measures (Th. LÉONARD, "Faute extra-contractuelle et juridictions commerciales: principes et plaidoyer pour un retour à une vision unitaire de la faute", *R.D.C.-T.B.H.,* 2013/10, p. 954-955; P. WÉRY, "Les condamnations non pécuniaires dans le contentieux de la responsabilité", in *Le dommage et sa réparation dans la responsabilité contractuelle et extracontractuelle, op. cit.*
59 et seq. See also F. DELPÉRÉE, "La prévention et la réparation des dommages causés par l'administration", note sous Cass. 26 juin 1980, *R.C.J.B.,* 1983, p. 192; H. BOCKEN, "Herstel in natura en rechtelijk beyel of verbod", in *Liber amicorum Jan Ronse,* Brussels, E.Story-Scientia, 1986, p. 500 ff).

Compensation in kind for damage is at the heart of the indemnity function of extra-contractual civil liability. For some, it is even the only civil "sanction" resulting from the application of articles 1382 and 1383 of the former Civil Code (Th. LÉONARD, "Faute extra- contractuelle et juridictions commerciales: principes et plaidoyer pour un retour à une vision unitaire de la faute", *op. cit.,* p. 954). More recently, X. Thunis confirms that, "*(e)ven today, reparation and compensation of victims remains the main function of civil liability, even if the function of prevention is emerging in recent texts" (X.* THUNIS, ' Dérèglement climatique : y a-t-il un pilote dans l'avion ? ", *Amën.,* 2022, p. 32).

L

The possibility for a person to ask a judge for an injunction to stop wrongful conduct that has caused him or her damage is not specific to civil liability. It is a prerogative that belongs to any person holding a subjective right, who can bring an action for cessation of the infringement of his right, even in the absence of fault (Th. LÉONARD, *Conflits entre droits subjectifs, libertés civiles et intérêts légitimes. Un modèle de résolution basë sur l'opposabilité et la responsabilité civile,* Bruxelles, Larcier, 2005, 1995, pp. 380-381 and 483). When applying articles 1382 and 1383 of the former Civil Code, however, the three conditions of liability (fault, damage and causal link) must be met for the plaintiff to be able to invoke the violation of t h e subjective right he claims to derive from these provisions.

The question of the possibility of bringing an action to prevent future damage is more complex. The authors of the aforementioned proposal for a law on Book 6 "Extra-contractual liability" consider that such an action is not currently permitted by our legal system. In their view, "*the theoretical basis for justifying*" an injunction to prevent future damage "*is insufficient*" if "*one of the conditions of liability, namely the existence of damage, is not fulfilled"* and "the *mere fear of future damage does not negate present prejudice" (Doc. Ch.,* sess. 2022-2023, n°55-3231/001, p. 162). Article 18 of the Judicial Code, which authorizes legal action "*when it has been instituted, even on a declaratory basis, with a view to preventing the violation of a right that is seriously threatened*", does not offer a solution either, since it is "*a simple procedural rule which leaves unchanged the application of the rules of substantive law in matters of liability" (Idem;* in the same vein, see. J.-L. FAGNART, "Introduction générale au droit de la responsabilité", Vol. 1, *Responsabilités. Traitë théorique et pratique,* Brussels, Ed. Kluwer, 1999, p. 17, no. 28: "*La prévention des dommages est étrangère à la responsabilité en droit positif").*

However, this position is not unanimous. Professor Wéry points out that, under article 144 of the Constitution, judges are competent "*both to prevent and to remedy an unlawful injury to a civil right*" (P. WÉRY, "Les condamnations non pécuniaires dans le contentieux de la responsabilité", *op. cit.,* p. 86, citing Cass., October 21 1982, *Pas.* 1983, I, p. 51; see also Cass., June 2 2006, *Pas. 2006,* liv. S-6, 1302). This author is also less categorical about the fact that article 18 of the Code judiciaire could not be mobilized (P. WÉRY, "Les condamnations non pécuniaires dans le contentieux de la responsabilité", *op. cit.,* p. 86: "*Comment, par ailleurs, ne ne pas faire aussi écho aux propos du Procureur général E. Krings qui rappelle l'existence de l'article 18 du Code judiciaire . . .)").*

The reservation expressed by the authors of the Ioi proposal seems all the more unjustified given that, as indicated above, reparable damage also extends to future damage when the latter is certain (which they also admit, since article 6.27 of the proposal confirms that *"future damage is reparable if it* is *the certain consequence of a present impairment of a legally protected interest"*\.

The Court concludes that, in the current state of positive law, an action to prevent future damage is admissible when the fault has already been committed and the damage is sufficiently serious.

certain (in the aforementioned sense). In addition, it follows from the foregoing (see above, in particular paragraph 246) that the conditions set out in draft article 6.42 are met in the case in point, provided that the standards violated require sufficiently specific conduct and that the misconduct committed has a causal link with certain future damage.

2. Application of the principles to the case in point

282. Contrary to what the Belgian State maintains in particular (its conclusions in point 402, p. 225), 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.

283. In view of the moral damage and anxiety resulting from the realization that the authorities are not doing enough to face up to a danger that threatens future generations, in view of the moral damage resulting from the infringement of the interests defended by Klimaatzaak, there is no more adequate remedy than the establishment of climate governance that pursues, right now, an objective in line with what prudence and the preservation of human rights require.

More broadly and for the future, to limit the risk of dangerous global warming and prevent excessive damage to the residual carbon budget, there is no more appropriate measure than reducing GHG emissions from Belgian territory.

The national contributions of each of the States party to the UNFCCC, including Belgium, to reducing GHG emissions are the world's main tool for preventing and mitigating the risk of dangerous global warming. These international agreements are based on the mutual trust of the States that are party to them in the fact that each will contribute to the effort required to achieve the desired result, and it is in this way that the contribution of each State, including a "small" State like Belgium (on a global scale), plays a decisive role in the fight against global warming.

Enjoining the Belgian State and the Flemish and Brussels Regions to reduce their GHG emissions by 2030 is both the most adequate reparation in kind for damage already done and the prevention of future damage, which is recognized (cf. above) as being admissible in law if it results with sufficient certainty from faults already committed.

284. In the case in point, the Court has already ruled that the GHG emissions reduction rate requested by the appellants in the main proceedings, i.e. -61% by 2030, was not in a position to

determine that this was the only scenario compatible with Belgium's positive obligations under articles 2 and 8 of the ECHR or articles 1382 and 1383 of the former Civil Code (see points 189 to 195 above).

For the reasons set out above in paragraphs 198-202, it must be considered that a - 5S% reduction in GHG emissions compared to 1990 by 2030 constitutes this minimum threshold, below which Belgium cannot go without violating both Articles 2 and 8 of the ECHR and the general duty of care.

In this respect, the court has already ruled that it was not sufficiently established that this objective would have been insufficient to prevent the consequences of dangerous global warming.

285. In view of the shortcomings noted in the past and which continue to this day, which can only be corrected by reductions to be planned for the future, in view of the threat posed to the right to life, private life and family life of the appellants, natural persons, by ongoing global warming, in view of the urgency of the measures to be taken during the present decade, in view of the importance of maintaining, at international level, the mutual trust of the States parties to the UNFCCC in the fact that each State will effectively contribute to the global fight against global warming, in view of the absence of any concrete sanction to date for failure to meet the European objectives, it is justified, both in terms of the violation of articles 2 and 8 of the ECHR and of articles 1382 and 1383 of the former Civil Code, to issue an express injunction to the Belgian State, the Brussels-Capital Region and the Flemish Region to take, in consultation with the Walloon Region, the appropriate measures to ensure that Belgium achieves by 2030 the target of a 55% reduction in GHG emissions from its territory compared with 1990.

286. As the Court's injunction is limited to a GHG emissions reduction target that has already been validated at European level, and whose relevance is not contested by the respondents, this injunction can in no way constitute an infringement of the principle of the separation of powers.

As indicated above, however, the injunction cannot be assimilated to a condemnation *in solidum;* the respondent parties (with the exception of the Walloon Region) are not required to achieve the - 55% target by 2030 on their own, but rather to do their part, within the limits of their respective competences, to ensure that this target can be achieved. It will therefore be up to these parties, in consultation with the Walloon Region, and in particular within the framework of the NECPs to be presented to the European Commission, to determine how and in what way this effort should be borne (the Court notes in this respect that a cooperation agreement was, at the time of taking the matter under advisement, in the process of being negotiated with regard to the requirements set by the European Union), in order to achieve the result they are enjoined to reach by 2030.

In addition, the Flemish Region, the Belgian State and the Brussels-Capital Region are invited to submit to the Court, on the occasion of the debates to be held on the question of the astreinte (point on

which the Court reserves the right to rule on (see below), the latest updated NECP, which should reflect Belgium's target of a 55% reduction in GHG emissions by 2030 compared with 1990, making it possible to individualize the efforts made and to be made by the Federal State, the Flemish Region and the Brussels-Capital Region to achieve this target.

E. On-call duty and document production requests

287. In their summary submissions, the appellants in the main proceedings seek an order that the respondents to pay Klimaatzaak a penalty of €1,000,000 per month of delay in reaching the target imposed for 2030, with effect from August [1], 2031. They request to this end, on the one hand, to order the respondents to communicate to Klimaatzaak the GHG emissions report for 2030 on the same day that it is communicated to the European Commission in 2031 and, on the other hand, to order them to pay Klimaatzaak a penalty of €10,000 per day of delay in communicating the GHG emissions report for 2030.

288. Lastly, the appellants also request that it be recorded that Klimaatzaak undertakes to fully allocate the astreintes due in accordance with its corporate purpose.

1. As for the request for astreintes ancillary to the injunction

289. The Belgian State is opposed to this, arguing that, on the one hand, "*the separation of powers prevents the judiciary from imposing, without respect for the democratic principle, a precise objeCtive on the legiSlCitive power, even if the latter has committed a fault within the meaning of article 1382 of the Civil Code*" and that, on the other hand, *the attainment of GHG emission reduction targets therefore also depends in part on the effective compliance of those to whom the standards are addressed*", as the State has limited powers of action in this area, with the result that "*the principal obligation is not sufficiently precise to allow the addition of a penalty payment"* (pp. 245 and 246).

290. In its conclusions, the Brussels-Capital Region concurs with the Belgian State's argument, considering that any order that might be made against it in respect of the measures requested by the appellants in the main proceedings "*could not be formulated in terms5 sufficiently precise for their infringement to be ascertained and give rise to the payment of a penalty payment"* (p. 135).

291. For its part, the Flemish Region, which is also contesting this claim, insists that the astreinte does not constitute a claim for damages. In this respect, it likens the appellants' claim in the main proceedings to a "*disguised request for compensation*". She develops that "*the appellants are asking, de facto, in the alternative, for financial compensation in the event that reparation in natura is not possible*" (p. 135 of her summary conclusions). Finally, joining the Belgian State on this issue, the Flemish Region asserts that "*the claim is so broad that it is impossible to couple it with a penalty payment"* (p. 137).

The Flemish Region also considers that the rules governing the competence, internal organization and operation of the authorities make it impossible for it to execute the main request, "as *the penalty as an incentive* loses(s) *all its usefulness*" (p. 137).

292. Finally, the Walloon Region considers that it would be inconceivable for a party to be condemned to a penalty payment because of the behavior of a third party. In the alternative, it asks the Court to question the Constitutional Court as follows: "*Does article 1385bis of the Judicial Code, interpreted as meaning that an order to pay astreintes together, in solidum or in some other way, may be made against debtors irrespective of their power and competence, as defined by the Constitution and the laws enacted to implement it, violate articles 10, 11 and 134 of the Constitution in that it treats debtors in incomparable situations in the same way?* "(his conclusions, pp.115-116).

293. In terms of principles, the Court points out that the common law on astreinte is based on articles 1385b/s to 1385oct/es of the French Judicial Code, which were inserted by the Ioi of January 31, 1980 approving the Benelux Convention of November 26, 1973 providing a uniform law relating to astreinte.

An astreinte is a pecuniary sentence, accessory to a "principal" sentence (art. 1385bis of the French Judicial Code), intended to encourage the party to whom it is addressed to comply with the principal sentence, because it is due only in the event of non-compliance (C. DE BOE, "Le contentieux de l'astreinte", in *Droit des Saisies et voies d'exécution,* A. Gillet (ed.), Bruxelles, Larcier, 2022, p. 123). Thus, an astreinte is not a means of enforcing judgments, but a means of pressure designed to compel a recalcitrant litigant (including public authorities - see below) to effectively and promptly enforce a judicial decision (J. DE LEVAL, "Observations sur l'astreinte", J.£., 1980, pp. 242 -245).

The astreinte may be ordered by a subsequent decision (Cass., May 11, 2010, *Pas.,* \, n°1466), and the imposition of an astreinte is an option for the judge, not an obligation (Cass., May 4, 2016, R.G. n°P.16.0011.F, www.juportal.be). The judge is free to determine the terms and conditions according to the circumstances of the case (Cass., April 26, 2012, *Pas.,* n°917).

The judge may set the astreinte at a single sum, or at a fixed sum per unit of time or per contravention. In the latter two cases, the judge may also determine an amount beyond which the astreinte order will cease to have effect (art. 1385ter of the French Judicial Code).

Having set out these principles, the Court also recalls that courts and tribunals may, at the request of a party invoking a subjective right, impose on public authorities the measures necessary to prevent, halt or remedy a violation of that right, where appropriate under penalty of a fine. However, the judge must be careful not to infringe the political freedom of the said authority (A. WIRTGEN, "Civiele acties tegen de Staat: een verstoorde balans in de trias politica?", *T.P.R.,* 2022, all. 1-2, 131-207, n°68). This possibility had already been put forward by Attorney General Velu,

then Advocate General, in his aforementioned conclusions, in which he specified that the principle of continuity of public service, which does not prohibit an injunction to be issued against the public authorities, only precluded measures of forced execution, which therefore did not exclude a penalty payment "*which, although constituting an indirect method of coercion, is not analyzed as a means of forced execution" (Pas.,* 1980, I, p. 1361).

In its aforementioned ruling of September 4, 2014, the Cour de cassation thus rightly considered that the contested ruling justified its decision to "order *the* [plaintiff], *under penalty of a fine of two hundred and fifty euros per day of delay, to withdraw from cultivation the disputed parcel belonging to it*" (Cass., September 4, 2014, *Pas.,* I, p. 1731). More recently, Advocate General de Koster had stated that, "*while the judgment under appeal was obliged to pronounce a principal condemnation formulated in a sufficiently precise manner insofar as this condemnation was accompanied by a fine (...), it could not deprive the plaintiff of her freedom of appreciation as to the choice of the most appropriate measure to ensure reparation in kind of the loss resulting from the fault of the plaintiff under penalty of violating the principle of separation of powers"* (Caen., 1er April 2022, RG n° C.21.0338.F, www.|uportal.be).

In other words, the measures ordered by the court may be subject to a penalty as long as they do not deprive the public authority of the choice of measures to be implemented to achieve the ordered result.

294. It is therefore in vain that the Belgian State asserts in its conclusions that the principle of the separation of powers prevents the Court in the present case from granting, where appropriate, the penalty payment requested in favor of Klimaatzaak in order to accompany the injunction made to it, as well as to the Brussels-Capital Region and the Flemish Region, to take the appropriate measures so that Belgium achieves in 2030 the objective of reducing GHG emissions by 55% compared to 1990.

295. As decided above (points 282-286), in the case of the Belgian State, the Brussels-Capital Region and the Flemish Region, the injunction is based both on the violation of articles 2 and 8 of the ECHR and on the remedy for present damage or the prevention of future damage on the basis of articles 1382 and 1383 of the former Civil Code. In this respect, as the Court has already pointed out, imposing such a reduction in GHG emissions in order to prevent global warming does not deprive the public authority of its discretion in the matter, as long as the law imposes, as *a minimum,* the pursuit of this objective, below which there is no margin of discretion. On the other hand, the public authority retains full discretion both as regards the pursuit of a possibly more ambitious objective, and as regards the determination of the measures likely to enable its implementation. *Mutatis mutandis,* attaching a penalty to the injunction does not deprive the public authorities of the choice of a more ambitious objective or of the measures to be implemented to achieve the ordered result.

296. In addition, and contrary to what the respondents maintain, the undertaking by the Belgian State, the Brussels-Capital Region and the Flemish Region to do their part to achieve the aforementioned objective of -55% GHG emissions by 2030 is sufficiently precise to be able to be

accompanied, where appropriate, by a penalty payment. This is particularly the case when the parties have agreed on the share to be borne by each of them.

Nor, contrary to what the Flemish Region maintains, does the division of environmental powers between the Belgian State and the aforementioned federated entities affect the precision of the principal sentence, to which a penalty payment may be added, since the Court does not require the respondents to exercise powers other than their own.

Lastly, it is futile to try to see how the request made by the appellants in the main proceedings to attach a penalty to the aforementioned injunction constitutes a disguised claim for damages, as the Flemish Region maintains.

In fact, the request for an astreinte made by the appellants in the main proceedings corresponds to the nature of an astreinte, which, if granted, is to constitute a means of putting pressure on the debtor so that he complies with the sentence imposed on him. The Flemish Region thus confuses the injunction issued by the Court with the astreinte requested, which is coercive in nature and does not seek to remedy any prejudice on the part of the appellants in the main proceedings.

It must therefore be concluded from the foregoing that there is no legal impediment to attaching a penalty, if necessary, to the injunction better described above, issued by the Court to the Belgian State, the Brussels-Capital Region and the Flemish Region. Since the Court does not issue any injunction to the Walloon Region, there is no reason to question the Constitutional Court along the lines suggested by the Walloon Region, as to the constitutionality of article 1385bls of the Judicial Code. In any event, the Court does not accept the interpretation on the constitutionality of which the Walloon Region is questioning.

However, the Court considers that it does not have sufficient evidence at this stage to conclude, with the requisite degree of certainty, that the effectiveness of the condemnation requires the immediate pronouncement of an astreinte, nor that there are *ipso facto* grounds for presuming that the respondents would not voluntarily comply with the injunction issued by the Court.

Accordingly, the Court considers that it is appropriate to reserve judgment on the question of the astreintes (penalty payments) intended to accompany the main judgment, pending communication by the most diligent party :

- official GHG emission figures for Belgium, the Brussels-Capital Region and the Flemish Region, for the years 2022 to 2024, official figures that will be contained in the annual GHG emission inventories that Belgium will be responsible for transmitting to the European Union pursuant to Article 26 of EU Regulation 2018/1999 of December 11, 2018, and
- of the latest PNEC updated at that time, enabling individual efforts to be made by each entity.

Updating the data to 2024 should thus enable the court to verify the need to impose a penalty on one or other of the parties to ensure the effectiveness of the sentence.

The case will be rescheduled before the court on the initiative of the most diligent party.

2. As for the request to produce a document under penalty of a fine

297. It follows from the conclusions of the appellants in the main proceedings that it is only for the purpose of verifying compliance with the principal injunction and the discharge of the fine of €1,000,000 per month of delay which they wish to attach to it that they also request that the respondents be ordered to communicate to Klimaatzaak, under penalty of a fine of €10,000 per day of delay, the GHG emissions report for 2030.

298. The respondents object. In this respect, the Belgian State argues pius specifically that the report requested by Klimaatzaak "*is, in any event, public and published*" and that the need to attach a penalty to any order has not been demonstrated (p. 246), while the Brussels-Capital Region refers *"to the provisions of regional law relating to the publication of environmental information, which provides for ad hoc remedies"* (p. 135).

299. Insofar as the Court reserves to rule, until the data relating to the years 2022 to 2024 are communicated to it, on the penalty payments linked to the main injunction, it will also reserve to rule on Klimaatzaak's request for the production, subject to a penalty payment, of the GHG emissions report relating to 2030, insofar as this request is intrinsically linked to the first penalty payment request, the fate of which is reserved.

F. Costs

300. The Walloon Region' s main appeal still has a purpose with regard to the parties intervening in the appeal proceedings, whom it has named as respondents, insofar as their intervention is inadmissible. It is without object insofar as it is directed against the parties listed in Appendix A to the judgment under appeal, who have not lodged an appeal. Its cross-appeal is well-founded in that the judgment under appeal is reversed insofar as it found fault on its part and a violation of articles 2 and 8 of the ECHR, so that it can be considered as the successful party within the meaning of article 1022 of the French Judicial Code.

The Walloon Region seeks an order that the appellants in the main proceedings, Mrs De Vriendt and the other persons whose names appear in Annex B attached to the application to intervene dated January 10, 2022, pay the costs.

In principle, however, protective intervention does not give rise to an award of costs, as long as the intervener is not unsuccessful or unsuccessful within the meaning of articles 1017 and 1018.

1022 of the Judicial Code (H. BOULARBAH, "Les frais et les dépens, spécialement l'indemnité de procédure", in *Actualités en droit judiciaire,* H. Boularbah and F. Georges (dir.), Bruxelles, Larcier, 2013, pp. 369-370; P. KNAEPEN, "PdS d'indemnité de procédure pour l'intervenant conservatoire", *J.T.,* 2015/8, n° 6594, pp. 205-206 and ref. cited). The mere fact that the intervening parties have been summoned by the Walloon Region is not sufficient to make them parties who succumb vis-à-vis the Walloon Region.

It follows that the parties appealing in the main proceedings by appeal 2022/AR/891 may be considered as the unsuccessful parties against the Walloon Region and ordered to bear its costs. However, in the absence of a statement, these costs will be reserved.

The fee for the scheduling of the petition due upon registration of case RG n°2022/AR/891 will be borne by the Walloon Region (10%) and by the appellants (90%).

301. As far as the relationship between the appellants in the main proceedings and the other respondents is concerned, it is true that the court is reserving judgment in part, since it is not at this stage ruling on the question of penalty payments.

This question alone, however, is not sufficient to prevent the Court from awarding costs, since it is clear from the foregoing that, whatever is decided with regard to the astreintes, these other respondents are unsuccessful, even if only partially, in relation to the appellants in the main proceedings.

Despite the considerable stakes involved in this dispute, it is not a case that can be assessed in monetary terms.

The appellants in the main proceedings ask the court to order *"the Parties5 respondents to pay all costs and expenses of both proceedings, including the procedural indemnity of €1,320 + €1,680, i.e. €3,000, indexed if necessary".*

For the first instance, the basic amount for cases not assessable in money at the date of delivery of the judgment under review was €1,560.

On appeal, the basic amount is €1,800.

The registration fee due upon registration of the case RG n°2022/AR/737 will be borne by the Belgian State, its main appeal being devoid of purpose (except insofar as it is directed against the intervening parties but without creating a link of proceedings with these parties) or unfounded.

The registration fee due at the time of registration of case RG n°2021/AR/1589 will be borne by the Belgian State, the Flemish Region and the Brussels-Capital Region if they are unsuccessful.

BY THESE REASONS,

THE COURT, ruling contradictorily,

Having regard to article 24 of the law of June 15, 1935 on the use of languages in judicial matters,

Acknowledges the parties' procedural agreement, more fully described above, regarding the identification of the parties to the appeal;

Gives notice to the original plaintiffs of the death of [redacted];

Insofar as their death has been duly notified to the court, declares that the proceedings are extinguished as far as they are concerned in the absence of any resumption of proceedings before the close of the debates;

Acknowledges that the Belgian State has waived its warranty claim;

Declares the motion to intervene filed on January 10, 2022

inadmissible; Declares the appeals admissible;

Declares the appeals of the Belgian State and the Walloon Region to be without object, insofar as they are directed against the parties referred to in Appendix A, as attached to the judgment under appeal of June 17, 2021, and which are not included in Appendix A attached to the request for appeal;

Declares the main appeal of the Belgian State, and the cross-appeals of the Flemish Region and the Brussels-Capital Region unfounded, except insofar as the judgment under appeal found a violation of Articles 2 and 8 of the ECHR to the detriment of ASBL Klimaatzaak;

Declares the main appeal of the Walloon Region well-founded insofar as follows;

Declares the main appeal filed by Klimaatzaak and the parties referred to in Appendix A as attached to the appeal petition and updated on September 8, 2023 admissible and well-founded to the following extent;

Confirms the judgment under appeal insofar as it

declared admissible the original action and the voluntary intervention of the parties listed in Appendix B of the judgment;
ruled that the dispute fell within the jurisdiction of the courts and tribunals;
ruled that, in pursuing their climate policy, the Belgian State, the Brussels-Capital Region and the Flemish Region did not behave as normally prudent and diligent authorities, which constitutes a fault within the meaning of article 1382 (extended by the Court to article 1383) of the former Civil Code and

infringe the fundamental rights of the individual plaintiffs, and more specifically articles 2 and 8 of the ECHR, by failing to take all necessary measures to prevent the effects of climate change on their lives and privacy;

Reversing and ruling for the remainder;

Also ruling on the new request made by the appellants in the main proceedings;

Declares it admissible and well-founded to the following extent:

Declares the original claim and the new claim unfounded insofar as they are directed against the Walloon Region and partially founded insofar as they are directed against the other respondents in the main proceedings;

Finds that, with regard to the climate policy they have pursued and implemented since the judgment under appeal was handed down and up to the present day, 2020 and 2030, the Belgian State, the Flemish Region and the Brussels-Capital Region have violated Articles 2 and 8 of the ECHR and have committed faults within the meaning of Articles 1382 and 1383 of the former Civil Code;

By way of reparation for the harmful consequences of the breaches found, to prevent the occurrence of future and certain damage, part of which has already occurred, and to ensure the effectiveness of the protection of Articles 2 and 8 of the ECHR, orders the Belgian State, the Flemish Region and the Brussels-Capital Region to take, after consultation with the Walloon Region, the appropriate measures to do their part in reducing the overall volume of annual GHG emissions from Belgian territory by at least -55% in 2030 compared with 1990;

Holds that it is up to the respondents condemned by the present judgment to determine, in consultation with the Walloon Region, the share to be borne by each of them;

Declares the application unfounded, insofar as its purpose is to establish that there are serious and unequivocal indications that, in pursuing their climate policy for 2030, the respondents will continue to violate articles 2 and 8 of the ECHR and to commit faults within the meaning of articles 1382 and 1383 of the former Civil Code;

Suspend judgment on the request for penalty payments intended to ensure compliance with the above injunction issued to the Belgian State, the Flemish Region and the Brussels-Capital Region, pending communication by the most diligent party of official figures for Belgium's GHG emissions for the years 2022 to 2024, which official figures will be contained in particular in the annual inventories of GHG emissions that it will be up to the Belgian State, the Flemish Region and the Brussels-Capital Region to produce.

Belgium to transmit to the European Union pursuant to Article 26 of Regulation EU 2018/1999 of December 11, 2018 and the latest updated PNEC at that time for the years 2021-2030;

Also postpones ruling on Klimaatzaak's request to produce, under penalty of a fine, the GHG emissions report for the year 2030;

Invites the more diligent party to have the case rescheduled before this Court, as soon as the GHG emissions figures for the years 2022 to 2024 and the latest updated PNEC available at that time are obtained, with a view to ruling on the request for penalty payments and on the request for production, under penalty payment, of the GHG emissions report for the year 2030;

Orders the appellants in the main proceedings to pay the costs of the Walloon Region, reserved in the absence of a statement ;

Orders the Belgian State, the Flemish Region and the Brussels-Capital Region to pay the costs of the appellants in the main proceedings, liquidated on their behalf at €395.36 (summons costs) + €1,560 (IP 1st inst.) + €1,800 (IP appeal);

Order the Walloon Region to pay the sum of €40 to SPF Finances (RG no. 2022/AR/891), as the fee for scheduling the appeal, in accordance with
article 269 of the code of registration, mortgage and court fees,

Orders the appellants in the principal action to pay the sum of €360 to SPF Finances (RG n°2022/AR/891), as a fee for scheduling the appeal request, in accordance with article 269^2 , §1^e ' of the Code of Registration, Mortgage and Court Fees.

Condemns the Belgian State to pay the sum of €400 to SPF Finances (RG n°2022/AR/737), as a fee for scheduling the appeal, in accordance with article 269^2 , §1er of the Code of registration, mortgage and court fees,

Orders the Belgian State, the Flemish Region and the Brussels-Capital Region to pay the sum of €400 to SPF Finances (RG no. 2021/AR/1589), by way of fees for scheduling the appeal, in accordance with article 2692, §1 of the Code of registration, mortgage and court fees,

Thus judged and delivered at the public civil hearing of the 2nd"^{e} chamber F of the Brussels Court of Appeal, on November 30, 2023.

Where were present and seated

R. Coirbay, Chairman,
L. Coenjaerts, consultant,
J. Van Meerbeeck, consultant,

C. Willaumez, clerk.

C. Willaumez J. Vari Meerbeeck

L. Coenjaerts R. Coirbay