Application no. 39371/20

EUROPEAN COURT OF HUMAN RIGHTS

GRAND CHAMBER

DUARTE AGOSTINHO AND OTHERS

Applicants

v

PORTUGAL AND OTHERS

Respondents

FINAL SUBMISSIONS OF THE APPLICANTS ON ADMISSIBILITY AND MERITS

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5 December 2022

I. INTRODUCTION

1. Consistent with the special character of the Convention as an instrument for the protection of human rights and the Court's well-established case law,[1] the Applicants maintain that the Convention is able to address the profound challenges which the existential threat of climate change poses to the protection of the most fundamental human rights, with this case properly falling within the scope of the Convention rights. It is in the face of such a threat that the *raison d'etre* of the Convention is at its clearest.

2. Further to the Registrar's letter dated 12 September 2022 (with questions to the Parties attached thereto), these are the Applicants' further submissions on the admissibility and merits of the case. The Applicants address the Court's questions at the appropriate juncture throughout the following sections: (i) Facts; (ii) Jurisdiction; (iii) Exhaustion of domestic remedies; (iv) Victim Status; (v) Applicability; (vi) Merits: Duties under the Convention; and (vii) Merits: Breach under the Convention.

3. As to **Question 1** posed by the Court, the Applicants confirm that their Observations dated 9 February 2022 (AO), including those concerning the violation of Art. 3, form part of the Applicants' claims referred to the Court in their original application (AA). Save for any additions or clarifications hereunder, the Observations represent the facts that have been adduced by the Applicants for the Court to examine.[2] The Applicants hereby provide a summary of AO.[3]

II. FACTS

A. Global Warming: Cause, Trajectory, Impacts and the 1.5°C Long-Term Temperature Goal

4. The Applicants rely on the best available science including the reports of the Intergovernmental Panel on Climate Change (IPCC).[4] According to the 6th Assessment Report (AR6) of the IPCC, "increases in well-mixed greenhouse gas (GHG)

[1] *Cyprus v Turkey* [GC] no 25781/94 (10 May 2001) §78. Also: *Wemhoff v Germany* no 2122/64 (27 June 1968) §8; *Ireland v United Kingdom* no 5310/71 (18 January 1978) §239.
[2] *Radomilja et al v Croatia* [GC] nos 37685/10 and 22768/12 (20 March 2018) §121.
[3] *Radomilja et al v Croatia* [GC] nos 37685/10 and 22768/12 (20 March 2018) §122, "However, this does not prevent an applicant from clarifying or elaborating upon his or her initial submissions during the Convention proceedings. The Court has to take account not only of the original application but also of additional documents intended to complete the latter by eliminating any initial omissions or obscurities".
[4] AO §§12-15. As to GBR2/§107(1)(d), the IPCC reports *inter alia* provide the factual basis for the obligations which the Applicants submit that the RSs are under but the Applicants do not suggest that these reports create binding obligations themselves.

concentrations since around 1750 are unequivocally caused by human activities".[5] The best estimate of the degree of human-caused global warming to date is 1.07°C.[6]

5. As to projected warming, the UN Environment Programme's (UNEP) Emissions Gap Report (EGR) 2022 states that "a continuation of the level of climate change mitigation effort implied by current unconditional NDCs is estimated to limit warming over the twenty-first century to about 2.6°C (range: 1.9–3.1°C) with a 66 per cent chance".[7] Further, "a continuation of current policies would result in about 0.2°C higher estimates of 2.8°C (range: 1.9–3.3°C) with a 66 per cent chance".[8]

6. The level of global warming to date is unsafe. AR6 states: "Climate change has adversely affected physical health of people globally (*very high confidence*) and mental health of people in the assessed regions (*very high confidence*)…In all regions extreme heat events have resulted in human mortality and morbidity (*very high confidence*)".[9] It notes the increase in diseases and that "[i]ncreased exposure to wildfire smoke, atmospheric dust, and aeroallergens have been associated with climate-sensitive cardiovascular and respiratory distress (*high confidence*)".[10]

7. AR6 states "Climate change and related extreme events will significantly increase ill health and premature deaths from the near- to long-term (*high confidence*). Globally, population exposure to heatwaves will continue to increase with additional warming, with strong geographical differences in heat-related mortality without additional adaptation (*very high confidence*)".[11] It finds that "[m]ental health challenges, including anxiety and stress, are expected to increase…in all assessed regions, particularly for children, adolescents [and others] (*very high confidence*)".[12] This finding is consistent with the heightened vulnerability of young people's mental and physical health to climate change generally.[13]

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[5] AR6 Working Group (WG) 1 (WG1) Summary for Policymakers (SPM) (**Key Annex 1**) 4 §A.1.1.
[6] ibid 4 §A.1.3 and IPCC Special Report on 1.5°C (SR1.5) SPM (**Key Annex 2**) 4 §A.1.
[7] EGR 2022 (**Key Annex 3**) 35. Also AR6 WG3 SPM (**Key Annex 4**) 21 §C.1.
[8] ibid. Also AR6 WG3 SPM (**Key Annex 4**) 21 §C.1.1.
[9] AR6 WG2 SPM (**Key Annex 5**) 11 §B.1.4. Also SR1.5 SPM (**Key Annex 2**) 5 §A.3.1.
[10] ibid.
[11] ibid 15 §B.4.4.
[12] ibid.
[13] Third Party Intervention (TPI) by the Council of Europe Commissioner for Human Rights (5 May 2021) 31-34; TPI by David R Boyd, UN Special Rapporteur on human rights and the environment, and Marcos A Orellana, UN Special Rapporteur on toxics and human rights (4 May 2021) 12-13; TPI by Save the Children International (5 May 2021) 6-18; Clark et al, A future for the world's children? A WHO–UNICEF–Lancet Commission (2020) 395 The Lancet 605, 609 (**AA Doc 9**)**;** Hickman et al (**Key Annex 6**); Thiery et al, Intergenerational inequities in exposure to climate extremes (2021) 374(6564) Science 158, 158-160; Sanson and Burke, Climate Change and Children: An Issue of Intergenerational Justice in Balvin and Christie (eds), *Children and Peace* (Springer 2019) 343, 345.

8. AR6 outlines Europe's vulnerability to climate change, noting four "key risks" including direct risks from heat and flooding.[14] It also finds that "impacts vary both across and within European regions, sectors, and societal groups (*high confidence*)" and that "[s]outhern regions tend to be more negatively affected, while some benefits have been observed, alongside negative impacts in northern and central regions".[15] Furthermore, "adaptive capacity […] tends to be higher in northern and western parts of Europe".[16]

9. AR6 states: "With every additional increment of global warming, changes in extremes continue to become larger".[17] In 2018 the IPCC stated: "Climate-related risks to health, livelihoods, food security, water supply, human security, and economic growth are projected to increase with global warming of 1.5°C and increase further with 2°C".[18]

10. Global warming of 1.5°C would not be safe. AR6 states: "Global warming, reaching 1.5°C in the near-term [i.e. 2021-2040], would cause unavoidable increases in multiple climate hazards and present multiple risks to ecosystems and humans (*very high confidence*)."[19] It also found that even under a "very low GHG emissions scenario", 1.5°C is "more likely than not to be reached" by 2040.[20]

11. *Any* overshoot of 1.5°C would cause severe risks. AR6 states: "If global warming transiently exceeds 1.5°C in the coming decades or later (overshoot), then many human and natural systems will face additional severe risks, compared to remaining below 1.5°C (*high confidence*). Depending on the magnitude and duration of overshoot […] some [impacts] will be irreversible".[21] Risks of overshooting include the crossing of "tipping points", which pose an existential threat to civilisation.[22] One such tipping point is a "[s]ubstantial increase in potentially deadly heatwaves".[23]

12. The RSs have been aware of the dangers of climate change since the adoption in 1992 of the UN Framework Convention on Climate Change (UNFCCC). In 2009, Parties to the UNFCCC acknowledged the risks of warming exceeding 1.5°C.[24] A review of the appropriate long-term temperature goal (LTTG) commenced in 2010 led to the replacement of the "below 2°C" LTTG with the LTTG of "well below 2°C above pre-

[14] AR6 WG2 Ch 13 ("Europe") (**Key Annex 23**) 1819.
[15] ibid.
[16] ibid 1823. It is clear from figure 13.2(a) that "western parts of Europe" does not include PRT.
[17] AR6 WG1 SPM (**Key Annex 1**) 15 §B.2.2.
[18] SR1.5 SPM (**Key Annex 2**) 9 §B.5. Also SR1.5 SPM (**Key Annex 2**) 5 §A.3.
[19] AR6 WG2 SPM (**Key Annex 5**) 13 §B.3.
[20] AR6 WG1 SPM (**Key Annex 1**) 15 §B.1.3. Also SR1.5 SPM (**Key Annex 2**) 4 §A.1.
[21] AR6 WG2 SPM (**Key Annex 5**) 19 § B.6. Also SR1.5 SPM (**Key Annex 2**) 7 § B.1.
[22] AR6 WG1 SPM (**Key Annex 1**) 27 § C.3.2. Lenton et al, Climate tipping points – too risky to bet against (2019) 575 Nature 592 (**AA Doc 5**) 595. Also: McKay et al, Exceeding 1.5°C global warming could trigger multiple climate tipping points (2022) 377 Science 1171.
[23] SR1.5 Ch 3, 264 (Table 3.7).
[24] Decision 2/CP.15, UN Doc FCCC/CP/2009/11/Add.1 ("Copenhagen Accord") §12.

industrial levels and pursuing efforts to limit the temperature increase to 1.5°C" (1.5°C LTTG) in Art. 2(1)(a) of the Paris Agreement (PA).[25] The RSs recently accepted the 1.5°C LTTG and *inter alia* the IPCC's and UNEP's findings in the "Sharm el-Sheikh Implementation Plan" adopted at COP27.[26]

B. The Effects of Global Warming on the Applicants

13. PRT is "one of the European countries that will be most affected by the adverse impact of climate change".[27] PRT faces "hard limits" to its ability to adapt to the impacts of global warming.[28] Impacts on and risks to the Applicants include the following.[29]

14. ***Heat-related impacts***. Since 1976, PRT has seen a significant trend in heat waves and tropical nights, with temperature records broken in 2018, 2019 and 2022.[30] Excessive heat stresses the body, disturbs sleep, and causes dehydration, exhaustion and other heat-related illnesses.[31] PRT's Heat Contingency Plan states that, in coastal areas with higher humidity, the temperature at which a person taking physical exercise starts to experience heat stress "may be as low as 29.5°C".[32] Temperatures above 40°C in PRT have and will become increasingly common.[33] During periods of extreme heat, the Applicants have had to curtail their usual youthful activities of playing in, exercising in,

[25] See Copenhagen Accord §2 and Decision 1/CP.16, UN Doc FCCC/CP/2010/7/Add.1 ("Cancun Agreements") §§4 and 138-140. Also CA Mitigation Report (**Key Annex 7**) 5-6 and 9-10, noting that "below 2°C" LTTG pathways carry a 66% probability of holding global warming to below 2°C, with maximum warming of 1.7-1.8°C (best estimate).
[26] Draft decision -/CP.27, UN Doc FCCC/CP/2022/L.19, §§1-5. As to acceptance of the IPCC findings also e.g. IRL2/§§72 and 75.
[27] PRT1/§173; PRT's Heat Contingency Plan (**Key Annex 8a**) 1.
[28] AR6 WG2 Ch 14 ("Mediterranean Region") (**Key Annex 9**) 2236 (2237 states that the Mediterranean includes PRT). Also AR6 WG2 Ch 13 (**Key Annex 23**) 13-4, WG2 SPM (**Key Annex 5**) 9 §B.1, 13 §B.3.3, 24 §C.2.7 and 25 §C.2.8 and SR1.5 SPM (**Key Annex 2**) 10 §B.6.3.
[29] See generally PRT's Climate Change Adaptation Program of Action (**Key Annex 10**) 13-20. Other impacts of climate change in PRT include droughts (the Mediterranean region, as a climate "hotspot", is projected to experience the greatest drying among 26 regions across the globe) and coastal storms becoming more intense and frequent. See CA Impacts Report (**Key Annex 11**) 540, 549-550; AR6 WG2 CCP4 (**Key Annex 12**) 2237-2238; Lisbon EMAAC (**Key Annex 13a**) Annex IV, 203.
[30] CA Impacts Report (**Key Annex 11**) 540-541; Portuguese Institute for Sea and Atmosphere (IPMA) Bulletins for May and July 2022 (**Key Annexes 14a** and **15a**). As to PRT2/§§22 and 27 and GBR2/§26(3), IPMA maps of maximum air temperature anomalies in May and July 2022 (**Key Annex 16**) show increases throughout the *entirety* of PRT; PRT's National Risk Assessment (**Key Annex 17**) described Meirinha as being at "moderate" not "low" risk of heatwaves; and the data on which Image 14 is based is from 2014.
[31] PRT's Heat Contingency Plan (**Key Annex 8a**) 24-27 and 29; Naumann et al (**Key Annex 18**) 6; EASAC (June 2019) (**Key Annex 19**) 16, citing Obradovich et al, Nighttime Temperature and Human Sleep Loss in a Changing Climate (2017) 3 Sci Adv e1601555 **(AO Annex 41).**
[32] PRT's Heat Contingency Plan (**Key Annex 8a**) 25. Also EASAC (June 2019) (**Key Annex 19**) 17 (climate change extends the amount of time during which outside temperatures are too high for physical exercise).
[33] CA Impacts Report (**Key Annex 11**) 8, 16-17.

and otherwise enjoying the outdoors.[34] Extremely hot nights have also made it difficult for them to sleep, making them more tired and less productive on the following days.[35]

15. As to the future,[36] PRT's five most relevant municipal climate change adaptation strategies project increases in: (i) annual average temperature; (ii) the average number of very hot days (at least 35˚C); (iii) the frequency and intensity of heat waves; and (iv) the average number of tropical nights (minimum 20˚C).[37] Extreme heat can cause heatstroke and exacerbate chronic conditions, including respiratory diseases.[38] In Europe, the largest increases in hospital admissions for heat-related respiratory disease are expected in Southern Europe (which includes PRT).[39] The rise in projected fatalities from extreme heat is most pronounced in Southern Europe, PRT having the highest per capita death rate for 2022.[40] In PRT, a 1˚C increase in mean temperature would lead to increases of 2.7% in general mortality and 1.7% in respiratory morbidity.[41] Martim, Catarina and André already suffer from respiratory conditions.[42]

16. ***Wildfires and smoke***. From 1980 to 2019 fire hazards increased throughout Europe, particularly in Southern Europe.[43] The June and October 2017 fires in PRT were made more likely and more widespread by climate change.[44] Cláudia, Martim and Mariana describe the "horror" of these fires, with Cláudia now suffering from anxiety as each

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[34] Statement of Cláudia, Martim and Mariana Duarte Agostinho (Duarte Agostinho statement) (**Key Annex 20**) §§5 and 11; Statement of Catarina dos Santos Mota (dos Santos Mota statement) (**Key Annex 21**) §§5 and 6; Statement of Sofia Isabel and André dos Santos Oliveira (dos Santos Oliveira statement) (**Key Annex 22**) §8.

[35] Duarte Agostinho statement (**Key Annex 20**) §11; dos Santos Mota statement (**Key Annex 21**) §7; dos Santos Oliveira statement (**Key Annex 22**) §8. For Sofia and André, who reside in Lisbon, "urban heat island effect" is relevant as its effect on temperature is particularly prevalent at night. See Naumann et al (**Key Annex 18**) 10; PRT's Heat Contingency Plan (**Key Annex 8a**) 1-2.

[36] AR6 finds that in Europe health impacts from extreme heat "will become severe more rapidly" in Southern Europe, defined as including PRT (WG2 Ch 13 (**Key Annex 23**) 1819 and 1822) and that in the Mediterranean region, heat extremes are likely to continue to increase more than the global average (WG2 CCP4 (**Key Annex 12**) 2235).

[37] Of PRT's municipalities that have developed adaptation strategies, the five most relevant are: Leiria, which borders Pombal municipality where Cláudia, Martim, Mariana, and Catarina reside (Leiria *municipality* is distinct from Leiria *district*, in which the municipalities of Leiria and Pombal are located); Barreiro and Lisbon, which are close to Almada municipality where Sofia and André reside; and Evora and Ferriera do Alentejo in the Alentejo region where Sofia and André's family frequently holiday. Leiria EMAAC (**Key Annex 24a**) 29 and 33 and Annex 4, 17; Barreiro EMAAC (**Key Annex 25a**) 26-27 and 30; Lisbon EMAAC (**Key Annex 13a**) 43-44 and 49-50; Evora EMAAC (**Key Annex 26a**) 31-32 and 34-35; Ferreira do Alentejo EMAAC (**Key Annex 27a**) 27-28 and 31-32.

[38] Naumann et al (**Key Annex 18**) 8; WHO Europe Statement (**Key Annex 28**).

[39] EASAC (June 2019) (**Key Annex 19**) 15.

[40] AR6 WG2 Ch 13 (**Key Annex 23**) 1819; Naumann et al (**Key Annex 18**) 1 and 9; WHO Europe Statement (**Key Annex 28**) 1.

[41] CA Impacts Report (**Key Annex 11**) 34-35.

[42] Duarte Agostinho statement **(Key Annex 20**) §13; Martim's medical certificate (**Key Annex 29**); dos Santos Oliveira statement **(Key Annex 22**) §9; André's medical certificate (**Key Annex 30**); dos Santos Mota statement (**Key Annex 21**) §9.

[43] AR6 WG2 Ch 13 (**Key Annex 23**) 1835 (with "*high confidence*"); CA Impacts Report (**Key Annex 11**) 17.

[44] PRT1/§32; CA Impacts Report (**Key Annex 11**) 18; Turco et al, Climate Drivers of the 2017 Devastating Fires in Portugal (2019) 9 Sci Rep 13886 **(AO Annex 26),** 1-5; Ó Gallachóir Report, IRL1/Annex 1, 3-4.

summer approaches.[45] Their garden was covered with ash, Martim was unable to attend school, and smoke filled the sky (containing chemicals harmful to human health).[46] The Applicants are concerned that wildfires at least as bad as those in 2017 will occur in the future.[47] Where the Applicants reside, the number of days of extreme wildfire risks is projected to significantly increase between 2000 and 2100.[48]

17. ***Air pollution and allergens***. Adverse health effects have been linked to the climate-sensitive air pollutants Ozone and Particulate Matter.[49] Climate change will expose people in PRT to high levels of pollution, and will potentially increase levels of aeroallergens exacerbating respiratory diseases such as asthma.[50] Martim, Catarina, Sofia and André suffer from health conditions sensitive to pollution and allergens.[51]

18. ***Mental health impacts***. In a survey of 10,000 young people aged 16-25, 30% of respondents in PRT were "extremely" worried about climate change and 35% were "very" worried, the highest levels in European countries surveyed.[52] The lead author of this study assessed the Applicants and concluded that they are all experiencing symptoms of anxiety and/or depression linked to climate change.[53] In her opinion, Mariana, Sofia and André's prolonged climate anxiety constitutes an "Adverse Childhood Experience", such "ACEs" leading to physical and mental health problems throughout a person's life.[54] The Applicants also experience a form of mental suffering called "moral injury" caused by their awareness of the failure by those in authority to protect them.[55]

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[45] Duarte Agostinho statement (**Key Annex 20**) §§5, 7 and 8; dos Santos Mota statement, (**Key Annex 21**) §3; dos Santos Oliveira statement (**Key Annex 22**) § 7; Hickman Report (**Key Annex 31**) 22-23; Expert Composite Report (**Key Annex 32**) 10 and 28 (mental health impacts of extreme weather events persisting for years).
[46] Turco et al (**AO Annex 26**) 2; EASAC (June 2019) (**Key Annex 19**) 17.
[47] Duarte Agostinho statement (**Key Annex 20**) §10; dos Santos Oliveira statement (**Key Annex 22**) §10; dos Santos Mota statement (**Key Annex 21**) §4.
[48] CA Impacts Report (**Key Annex 11**) 20-21; Leiria district was one of the three districts in PRT most affected by wildfires in 2022 (PRT's Nature Conservation and Forestry Institute (ICNF) 5th Rural Fire Interim Report 2022, 4 (Figure 1)).
[49] CA Impacts Report (**Key Annex 11**) 38-39. Also EASAC (June 2019) (**Key Annex 19**) 15 (additive effects between high temperature and air pollutants).
[50] CA Impacts Report (**Key Annex 11**) 41. Also AR6 WG1 Ch 12, 1781.
[51] Martim suffers from rhinitis and asthma, Catarina from bronchitis, and André from bronchial asthma, while Sofia is increasingly allergic to pollen (Martim's medical certificate (**Key Annex 29**); dos Santos Mota statement (**Key Annex 21**) §9; dos Santos Oliveira statement (**Key Annex 22**) §9; André's medical certificate (**Key Annex 30**)).
[52] Hickman et al (**Key Annex 6**) e866. Also Expert Composite Report (**Key Annex 32**).
[53] Hickman Report (**Key Annex 31**) 6-8, 17-18, 22-23, 26 and 29-32.
[54] Hickman Report (**Key Annex 31**) 11, 26 and 31.
[55] Hickman et al (**Key Annex 6**) e871; Hickman Report (**Key Annex 31**) 12-13, 17 and 32.

C. The Global Emissions Reductions Required to Achieve the 1.5°C LTTG

19. An "emissions pathway" is a global emissions reduction trajectory linked to a LTTG.[56] SR1.5 identified emissions pathways "with no or limited overshoot of 1.5°C" (NLO Pathways) as "[c]onsistent with" the 1.5°C LTTG.[57] In the NLO Pathways assessed in SR1.5 "global net anthropogenic CO_2 emissions decline by about 45% from 2010 levels by 2030 (40–60% interquartile range)".[58] 45% is the median CO_2 reduction envisaged by all NLO Pathways in SR1.5. AR6 assessed a further group of NLO Pathways.[59]

20. Some NLO Pathways in SR1.5 and AR6 envisage the extensive use of Carbon Dioxide Removal (CDR).[60] SR1.5 states that the extensive use of CDR "is subject to multiple feasibility and sustainability constraints (*high confidence*)".[61] This is also recognised in AR6,[62] which outlines a "feasibility framework" for assessing feasible levels of CDR reliance.[63] The less an NLO Pathway relies on CDR, the deeper the global emissions reductions envisaged by it.[64] The figures for median reductions envisaged by NLO Pathways would therefore be higher than they are in SR1.5 and AR6 if NLO Pathways which rely extensively on CDR were excluded.[65]

21. There is uncertainty as to the achievability of the 1.5°C LTTG associated with *all* NLO Pathways, which stems from uncertainty as to the amount of global warming caused by a unit of GHG.[66] In NLO Pathways in AR6, the likelihood of warming remaining below 1.5°C ranges from 33 to 58%.[67]

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[56] Also called "scenarios". See SR1.5 SPM (**Key Annex 2**) 24 and CA Mitigation Report (**Key Annex 7**) 8-9. As to the superiority of emissions pathways over "carbon budgets" as indicators of the required global reductions, see AO §§98-102.
[57] SR1.5 SPM (**Key Annex 2**) 12. Limited overshoot pathways are those "limiting warming to below 1.6°C and returning to 1.5°C by 2100". Ibid 24.
[58] SR1.5 SPM (**Key Annex 2**) 12 §C.1.
[59] AR6 WG3 SPM (**Key Annex 4**) 21 §C.1.1. These pathways have a "very similar" rate of decline to 2030 to that of SR1.5 NLO Pathways but envisage "slightly higher" absolute emissions in 2030 because global emissions have increased since the publication of SR1.5. AR6 WG3 SPM (**Key Annex 4**) 25 §C.1.4 and 27 (Box SPM.1).
[60] SR1.5 SPM (**Key Annex 2**) 17 §C.3; CA Mitigation Report (**Key Annex 7**) 18-19; AR6 WG3 SPM (**Key Annex 4**) 29 §C.3.5. References herein to CDR are equivalent to references in AO to CDR and NETs (Negative Emissions Technologies).
[61] SR1.5 SPM (**Key Annex 2**) 17 §C.3.
[62] AR6 WG1 SPM (**Key Annex 1**) 29 §D.1.4; AR6 WG3 SPM (**Key Annex 4**) 32-33 §C.4.6 and 40 §C.11; AR6 WG3 Ch 3, 3-36; AR6 WG3 Ch 4, 4-44; AR6 WG3 Ch 12, 12-39; AR6 WG3 Annex III, I-37.
[63] AR6 WG3 Annex III, II-58-II-60. Also SR1.5 SPM (**Key Annex 2**) 19 §C.3.2.
[64] CA Mitigation Report (**Key Annex 7**) 11 and 19.
[65] ibid 19.
[66] ibid 12.
[67] AR6 WG3 SPM (**Key Annex 4**) 22 (Table SPM.2). This range indicates the 5th and 95th percentile. AR6 further states that "[i]n the modelled pathways in AR6, the likelihood of limiting warming to 1.5°C has on average declined compared to SR1.5 […] because GHG emissions have risen since 2017". AR6 WG3 SPM (**Key Annex 4**) 25 §C.1.4.

22. Without the "rapid and deep" emissions reductions to 2030 envisaged by NLO Pathways, the 1.5°C LTTG will become unachievable,[68] even if emissions are reduced at a later date to the ultimate level envisaged by these pathways[69] The longer the delay in achieving the necessary emissions reductions, the greater the reductions required (eventually reaching an impossible level).[70] The "window of opportunity" to hold global warming to the 1.5°C LTTG "is closing rapidly".[71]

D. Territorial Emissions: States' "Fair Shares" of the Required Global Emissions Reductions

23. AR6 states: "[I]t is only in relation to [its] 'fair share' that the adequacy of a state's contribution [to the required global emissions reductions] can be assessed".[72] There are multiple ways to measure a State's fair share; this is a consequence of the failure by States to agree a single approach.[73] The different approaches include historical responsibility, capability, equality (i.e. equal per capita), cost-effectiveness (i.e. where it is cheapest to achieve emissions reductions) and "grandfathering".[74] Equality, cost-effectiveness and grandfathering are favourable approaches from the perspective of developed States.[75]

24. The IPCC has outlined ranges of emissions reductions required of different States based on the various measures of their fair share (i.e. fair share ranges).[76] In *Urgenda v The Netherlands*, the Dutch Supreme Court relied on a fair share range presented in the IPCC's 4th Assessment Report (AR4).[77] If all States pursue emissions reductions consistent with the less stringent end of their fair share ranges, as the Dutch Supreme Court ordered NLD to do, it is not possible to achieve a LTTG.[78] This reflects the fact

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[68] AR6 WG3 SPM (**Key Annex 4**) 21 §C.1. As to the steepness of the reductions required, see EGR 2022 (**Key Annex 3**) 33 (Figure 4.2).
[69] CA Mitigation Report (**Key Annex 7**) 33 citing EGR 2020, 34.
[70] EGR 2020, 34.
[71] EGR 2022 (**Key Annex 3**) 1. Also AR6 WG2 SPM (**Key Annex 5**) 33 §D.5.3.
[72] AR6 WG3 Ch 14 (**Key Annex 33**) 14-26.
[73] CA Mitigation Report (**Key Annex 7**) 21.
[74] Each approach is further explained at AO §§127-135, citing AR5 WG3 Ch 3, 213-219 and Ch 4, 317-321.
[75] CA Mitigation Report (**Key Annex 7**) 22, 26 and 32. Indeed, with equality, "the impact of historical emissions is grandfathered in to the allocation of future emissions": Supplemental Allen Report (IRL1/Annex 2, 5). Cost-effectiveness and grandfathering are not consistent with the principles of equity and "common but differentiated responsibilities" (CBDR) referred to in Arts. 2(2) and 4(3) of the PA; whether equality is so consistent is contested. AO §129 and Rajamani et al (**Key Annex 34**) 996-997.
[76] AR4 WG3 Ch 13, 776 (Box 13.7); AR5 WG3 Ch 6, 460 (Box 6.28).
[77] *The State of the Netherlands v Urgenda Foundation*, ECLI:NL:HR:2019:2006 (Supreme Court of the Netherlands) (20 December 2019) §8.3.5.
[78] CA Mitigation Report (**Key Annex 7**) 32, citing Robiou du Pont and Meinshausen, Warming assessment of the bottom-up Paris Agreement emissions pledges (2018) 9 Nature Communication 2. Also Rajamani et al (**Key Annex 34**) 998 and 1000.

that "[e]ffective mitigation of climate change will not be achieved if each…country acts independently in its own interest".[79]

25. The Climate Action Tracker (CAT) fair share methodology identifies different levels of global warming (1.5°C, 2°C, <3°C, <4°C and >4°C) that will result by 2100 from a State achieving different "levels of ambition" on its fair share range, if all States achieve equivalent levels of ambition on their respective fair share ranges.[80] It "avoids selecting a single 'correct' approach to effort sharing, relying instead on a 'synthesis framework' which draws on all of the various approaches to effort sharing identified in the available literature" (using the dataset of studies used by the IPCC).[81] The more the level of ambition pursued by one State falls short of the 1.5°C-compatible level on its fair share range, the more another State must pursue a level of ambition which *exceeds* that level on its range to achieve the 1.5°C LTTG, which no State is doing.[82]

26. The RSs do not contest that their respective fair share ranges are as outlined in the Climate Analytics Mitigation Report or that it correctly identifies the level of ambition on those ranges required to achieve the 1.5°C LTTG if all States pursue an equivalent level of ambition, subject to the following points which go nowhere.

27. The RSs who criticise the accuracy, clarity or objectivity of CAT fail to engage with the explanation of its methodology in the CA Mitigation Report.[83] This is also true of the expert reports on which IRL relies.[84] The only specific allegation made as to the lack of clarity is that CAT "introduces an approach called *scenario inference* that it distinguished from a *scenario construction* approach" but no explanation is provided as to what is unclear.[85]

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[79] AR5 WG3 Ch 3, 214.

[80] CA Mitigation Report (**Key Annex 7**) 34-39. The assessments based on this methodology are referred to herein as the CAT "Fair Share Assessments" and the 1.5°C-compatible level of ambition on each RS's fair share range as its "Fair Share Target". CAT analysis is relied on by *inter alia* the UNEP, e.g. EGR 2022 (**Key Annex 3**) 13.

[81] ibid 34-35.

[82] ibid 39. The Rajamani et al (**Key Annex 34**) methodology uses the same approach as CAT, but, as AR6 states, it "excludes approaches based on cost and grandfathering, narrowing the range of national fair shares previously assessed", because they are not consistent with the principles of equity and CBDR. See CA Mitigation Report (**Key Annex 7**) 40 and AR6 WG3 Ch 4, 4-21. This results in more stringent 2030 reductions for *all* Respondents compared with their CAT Fair Share Assessments. As to IRL2/§415, AR6 says nothing to imply that this methodology is an "outlier".

[83] BGR2/§8 (BGR refers to CA Mitigation Report (**Key Annex 7**) 22-29 but ignores the explanation of the methodologies at 34-40). CHE2/§10, citing CHE1/Annex 4 (contrary to what is stated therein, the criticism is of CHE's plan to achieve emissions reductions abroad in relation to its failure to achieve greater domestic emissions reductions, not the funding of emissions reduction abroad *per se*); EST2/§11; GBR2/§§-25(1) and 135(4); GRC2/§27; ITA2/§8; NOR2/§21; POL2/§75; PRT2/§§8-10.

[84] IRL2/§§416 and 422-424, citing Supplemental Ó Gallachóir and Allen Reports (IRL2/Annex 1 and Annex 2).

[85] Supplemental Ó Gallachóir Report 7. Climate Analytics explains the role of these approaches and that the difference between them is minor. See CA Mitigation Report (**Key Annex 7**) 37-38. IRL's related claim that Gross National Income would be a better measure of IRL's and LUX's capacity than Gross Domestic Product (as used in certain studies reflected in the fair share ranges) to account for "multi-

28. IRL's criticism of CAT based on *Dooley et al.* reinforces the Applicants' case.[86] *Dooley et al.* note that certain approaches to fair share are not represented in CAT such that it is "dominated by inequitable approaches [which] causes a systemic bias in favour of wealthier, higher emitting countries".[87] The implication of IRL's submission is therefore that CAT is too lenient on developed States.[88] As to IRL's related claim that specific studies are excluded from CAT:[89] one is in fact included; two others relate only to the equitable allocation of CDR quotas, not States' overall emissions quotas; another does not outline (let alone quantify) any approach to fair share; and the final two relate only to SWE/GBR and IRL.[90]

29. As to IRL's claim regarding CAT's use of GWP100 to measure contributions of different GHGs to global warming,[91] IRL and all RSs apply GWP100[92] and the alternative approach advocated for by IRL/Prof. Allen is described in AR6 as "contested".[93]

E. Territorial Emissions: Cost-Effectiveness, Feasibility, Climate Finance and Projections

30. The Domestic Pathways Assessments identify the level of GHG reductions that should occur *within* an individual State to achieve the 1.5°C LTTG in the most globally cost-effective way possible.[94] They also demonstrate that it is technically and economically

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national corporations booking profits in those jurisdictions that do not reflect domestic economic activity" ignores the fact that taxation raised from these profits contributes to these RS' capacity. See IRL2/§416 and Supplemental Allen Report 3. Both LUX and IRL's corporate tax revenue as a share of total tax revenue is significantly higher than the OECD average. See OECD Corporate Tax Statistics: Third Edition (2021), 5.

[86] IRL2/§414. The separate criticism that CAT mixes incompatible approaches relates to the fact that CAT avoids selecting a single "correct" approach.

[87] Dooley et al, Ethical choices behind quantifications of fair contributions under the Paris Agreement (2021) 300 Nature, 303. CAT only includes studies which "operationalise" (i.e. quantify) approaches to fair share and includes studies based on "grandfathering". See CA Mitigation Report (**Key Annex 7**) 34-35. Not all fair share approaches have been quantified in the literature. See Dooley et al, 303 and AR6 WG3 Ch 4, 4-99.

[88] IRL2/§422. It further follows from IRL's submission that, as between CAT and Rajamani et al**,** the latter is more appropriate. Regarding IRL's claim (IRL2/§415) as to the "limitations" of Rajamani et al, the passage from that study (995-996) which IRL cites primarily addresses the non-quantification of certain fair share measures.

[89] IRL2/§414, citing Supplemental Ó Gallachóir Report (IRL2/Annex 1, 4-5). The studies included by CAT are listed on its website.

[90] Respectively Holz et al (2018), Pozo et al (2020) and Fyson et al (2020), three of whose authors are authors of the CA Mitigation Report); Saelen et al (2019), Anderson et al (2020) and McMullin et al (2020). Anderson et al concluded that SWE and GBR's ambition "is less than half of what is the absolute minimum necessary to deliver on the Paris Agreement" and its lead author separately advised IRL to pursue much greater ambition than envisaged by its 2030 target (see IRL1/Annex 9, 11). McMullin et al concluded that IRL must cut its emissions by 11% per year from 2016, much more than it aims to (see AO IRL§§544-545).

[91] IRL2/§417 citing Supplement Allen Opinion (IRL2/Annex 2, 4).

[92] Regulation 4 of the Climate Action and Low Carbon Development Act 2015 (Greenhouse Gas Emissions) Regulations 2021 (cited in IRL2/§406), citing the annex to Commission Delegated Regulation (EU) 2020/1044; Decision 4/CMA.1, Annex II, §1(a), citing Decision 18/CMA.1, Annex, §37.

[93] AR6 WG3 Ch 2, 2-18. It is also described as unfair. See AR6 WG3 Ch 4, 4-21.

[94] CA Mitigation Report (**Key Annex 7**) 40-43.

feasible to achieve domestically the level of reductions envisaged by them but do *not* indicate *maximum* feasibility.[95] They are based on a "downscaling" of emissions reductions envisaged by a subset of NLO Pathways from the regional to the national level.[96] This subset covers the NLO Pathways which do not rely on CDR beyond the level deemed sustainable in SR1.5 (Feasible NLO Pathways).[97]

31. It is the middle of the range of downscaled Feasible NLO Pathways which is used to measure the appropriate level of reductions according to the Domestic Pathways Assessments.[98] The level of ambition on a State's fair share range that the middle of the pathways range reflects varies by RS; given their relatively high levels of development, capacity and/or historic responsibility, the middle of all the RSs' domestic pathway ranges, bar RUS and TUR, envisage lower GHG reductions in 2030 than those envisaged by their CAT Fair Share Targets.[99] Domestic Pathways Assessments are not available to the Applicants for BGR, CYP, EST, HRV, LTU, LVA, MLT and SVK. However, it would be possible for these RSs to conduct their own such assessments.[100] Further, other studies demonstrate that it is feasible for these and other RSs to achieve greater reductions by 2030 than they plan or are on course to achieve (see §§ 158 and 161).

32. As to the distinction between cost-effectiveness and equity in determining where globally GHG reductions ought to be achieved, the IPCC has recognised that it can be addressed by separating "where mitigation occurs" from "who pays".[101] Similarly, where the level of reductions required by a State's fair share exceeds the level that is feasible for it to achieve domestically, it can achieve the difference between what is domestically feasible and its fair share by funding GHG reductions in other States.[102] Art. 9 PA obliges developed States to provide both mitigation and adaptation finance to developing countries.[103] It is axiomatic, however, that if States were permitted to count contributions to adaptation-only finance towards their fair share, the necessary global GHG reductions would not be achieved (giving rise to a need for even greater levels of adaptation finance).[104] CAT rates the climate finance contributions of CHE, DEU, the

[95] ibid 41.
[96] ibid 42. This answers ESP2/§54.
[97] ibid.
[98] ibid.
[99] ibid 138-140 and 149-150.
[100] ibid 41. As to HRV2/9, the absence of such an assessment has no bearing on CAT as they operate independently.
[101] AR5 WG3 Ch 3, 225, Box 3.2.
[102] CA Mitigation Report (**Key Annex 7**) 22. The amount of climate finance required is therefore the amount necessary to achieve the difference between the reductions a state envisages domestically and its fair share. See GBR2/§135(4).
[103] Art. 6 PA also contemplates the achievement of GHG reductions by one state in another.
[104] See IRL2/§432 and PRT2/§109.

EU, GBR, NOR and RUS; insufficient data is available to rate TUR's contributions and CAT does not rate those of individual EU Member States except DEU.[105]

33. CAT and the Domestic Pathways Assessments assess "economy-wide" GHG levels and therefore assess only the *projected* economy-wide emissions of those EU Member States whose only 2030 targets are sectoral targets prescribed by EU law.[106] Under the UNFCCC, states prepare (i) "with existing measures" (WEM) projections which "encompass currently implemented and adopted policies and measures", and (ii) "with additional measures" (WAM) projections which "also encompas[s] planned policies and measures".[107] The above methodologies assess States' WEM projections only.[108]

F. States' Contributions to Non-Territorial Emissions

34. ***Fossil Fuel Production.*** The energy sector accounts for 75% of global GHG emissions.[109] The International Energy Agency (IEA) thus notes that reducing fossil fuel production "holds the key to averting the worst effects of climate change" and "net zero means a huge decline in use of fossil fuels".[110] UNEP observes that States must undertake "steep and sustained reductions in fossil fuel production" to avoid locking in levels of supply inconsistent with the LTTG of 1.5°C.[111]

35. Yet, according to the UNEP Production Gap Report (PGR) 2021, governments plan to produce "more than double the amount of fossil fuels in 2030 than would be consistent with limiting global warming to 1.5°C".[112] To achieve the 1.5°C LTTG, "global coal, oil, and gas production would have to decrease by around 11%, 4%, and 3%, respectively, each year between 2020 and 2030",[113] equating to approximate reductions on 2020 levels by 2030 of 69% in coal production, 34% in oil production, and 26% in gas production (PGR 1.5°C Rates).[114]

36. The 2021 "Net-Zero Emissions by 2050 Scenario" (NZE) developed by the IEA envisages reductions from 2020 levels in coal, oil and gas use by 2030 of approximately

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[105] CA Mitigation Report (**Key Annex 7**) 44.
[106] CA Mitigation Report (**Key Annex 7**) 56-57, these Respondents are listed at §137 below. Also European Commission (EC) TPI §31. As to GRC2/§26 and IRL2/§413, that EU Member States collectively achieve their emissions reductions under the Paris Agreement presents no obstacle to assessing their economy-wide projections or targets.
[107] UNFCCC reporting guidelines on national communications, UN Doc FCCC/CP/1999/7 (2000) 87, §29.
[108] CA Mitigation Report (**Key Annex 7**) 45-46. They do not rely on CAT's own independently produced projections and therefore CHE's criticism of the latter is irrelevant. See CHE1/Annex 4, 1.
[109] IEA NZE (**Key Annex 35**) 13.
[110] ibid 13 and 18.
[111] PGR 2021 (**Key Annex 36**) 4.
[112] ibid 3-4. No PGR was published in 2022. Also AR6 WG3 SPM (**Key Annex** 4) 20 §B.7. Fossil fuels were responsible for 86% of anthropogenic CO_2 emissions in the last 10 years: AR6 WG1 Technical Summary, TS.5.
[113] PGR 2021 (**Key Annex 36**) 15.
[114] PGR rates, as to the manner in which these figures have been calculated, see AO §167 (fn 360).

52%, 20% and 5.5% respectively to achieve the 1.5°C LTTG.[115] The NLO Pathways in AR6 also envisage steep reductions in fossil fuel use.[116] A recent study found that when AR6 NLO Pathways which rely on CDR beyond levels considered feasible by AR6's "feasibility framework" (see §20) are excluded, "oil and gas production needs to decrease by 30% by 2030".[117] AR6 states: "Phasing out fossil fuels from energy systems is technically possible and is estimated to be relatively low in cost".[118]

37. As to fair share, the PGR 2021 stated that "countries with greater capacity and lower dependency on fossil fuels will likely need to wind down their production faster than the global average".[119] Based on a similar measure, a recent study quantified for the first time the fair shares of production of multiple States, including 16 RSs, and found that all are on course to exceed their fair share of production consistent with the 1.5°C LTTG.[120]

38. The IEA NZE further envisages that, "[b]eyond projects already committed as of 2021, there are no new oil and gas fields approved for development…and no new coal mines or mine extensions are required".[121] A further study found that achieving the 1.5°C LTTG requires "revok[ing] some existing licences and prematurely clos[ing] some already producing fields and mines".[122] The necessity of not opening new fossil fuel projects, as an absolute minimum, follows from the long lifespans of oil/gas fields and coal mines, and the dangers of locking in increased fossil fuel supply if new projects are approved.[123] As to government subsidies of fossil fuel production, the need for their phase-out is recognised *inter alia* by the IPCC and UNEP.[124]

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[115] IEA NZE (**Key Annex 35**) 47 and 57-58. The 2022 update of the IEA NZE envisages gas supply decreasing by "more than one-quarter by 2030". IEA World Energy Outlook 2022 (November 2022) 128. One factor that explains the difference in rates between the PGR and the IEA NZE is that the latter envisages extensive reliance on CDR: IEA NZE (**Key Annex 35**) 79.
[116] AR6 WG3 SPM (**Key Annex 4**) 28 §C.3.2.
[117] International Institute for Sustainable Development, Lighting the Path: What IPCC energy pathways tell us about Paris-aligned policies and investments (2022) 4.
[118] AR6 WG3 Ch 17, 17-23. Conversely, "[i]f investments in coal and other fossil infrastructure continue, energy systems will be locked-in to higher emissions, making it harder to limit warming to 2°C or 1.5°C (*high confidence*)." AR6 WG3 Technical Summary, TS-53.
[119] PGR 2021 (**Key Annex 36**) 35, citing PGR 2020, 31-33.
[120] Calverley and Anderson, Phaseout Pathways for Fossil Fuel Production Within Paris-compliant Carbon Budgets (2022) Research Report 1, 54. The RS assessed are AUT, DEU, DNK, EST, FRA, GBR, HUN, HRV, IRL, ITA, NLD, NOR, POL, ROM, RUS and TUR.
[121] IEA NZE (**Key Annex 35**) 21.
[122] Trout et al, Existing fossil fuel extraction would warm the world beyond 1.5°C (2022) 17 Environmental Research Letter, 10. The same conclusion has been reached in previous studies from as early as 2016: AO §164.
[123] AR6 states: "Without early retirements, or reductions in utilisation, the current fossil infrastructure will emit more GHGs than is compatible with limiting warming to 1.5°C". AR6 WG3 Technical Summary, TS-54.
[124] AR6 WG3 SPM (**Key Annex 4**) 50 §E.4.2 and PGR 2021 (**Key Annex 36**) 65.

39. ***Importation of "embedded" emissions.*** Up to 25% of GHGs are caused by the production of goods destined for trade across national borders.[125] "Embedded" or "consumption" emissions are those resulting from the production of imported goods.[126] The IPCC 5th Assessment Report (AR5) found that 20% of developing States' CO_2 emissions are attributable to increased demand for products in developed States.[127] Most European States import embedded emissions corresponding to between $^1/_3$ and $^2/_3$ of their territorial emissions and the embedded emissions of RSs such as CHE, LUX and MLT exceed their territorial emissions.[128] As recognised by certain RSs, there is a range of means by which RSs can measure and limit their embedded emissions, all of which involve regulating activity only *within* their territory.[129] The failure to do so encourages a phenomenon called "carbon leakage" whereby the shift in production to States with less stringent climate policies may result in a "net increase in global emissions, denoting a carbon leakage rate in excess of 100%".[130] States can and already do measure and limit certain embedded emissions, without any disruption to the UNFCCC framework of accounting for GHG emissions or diminution of exporting States' responsibilities for their territorial emissions.[131]

40. ***Overseas emissions of entities domiciled within the RS' jurisdictions.*** GHG emissions attributable to corporate entities are categorised as Scope 1, 2 and 3 emissions.[132] These categories are recognised by *inter alia* the EU which defines them as: "Direct GHG emissions from sources owned or controlled by the company (Scope 1)"; "Indirect GHG emissions from the generation of acquired and consumed electricity, steam, heat, or cooling…(Scope 2)"; and "All indirect GHG emissions (not included in scope 2) that occur in the value chain of the reporting company, including both upstream and downstream emissions (Scope 3)".[133] A study in 2016 found that emissions embedded in the supply chains of multinational companies totalled 18.7% of global emissions.[134] The Scope 1, 2 and/or 3 emissions of multinational companies and

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[125] Mehling and van Asselt Report (**Key Annex 37**) §1. Also EGR 2022 (**Key Annex 3**) 9.
[126] ibid.
[127] AR5 WG3 Ch 5, 385 (an incorrect reference to AR4 §182 was made in AO and the Mehling and van Asselt Report (**Key Annex 37**) §12). Also EGR 2022 (**Key Annex 3**) 9.
[128] Mehling and van Asselt Report (**Key Annex 37**) §3. Also EGR 2022 (**Key Annex 3**) 9.
[129] ibid §22-47 and 49. This is recognised by certain RS and the EU. See, e.g., Sixth Carbon Budget Report (GBR1/Annex 3) 316, 341, 344 and 347; CHE1/§112; SWE2/§27-30 and AO EU§§38-40.
[130] Mehling and van Asselt Report (**Key Annex 37**) §§14 and 17.
[131] Mehling and van Asselt Report (**Key Annex 37**) §§18-27.
[132] This classification originates in World Resources Institute and World Business Council for Sustainable Development, Greenhouse Gas Protocol: A Corporate Accounting and Reporting Standard, Revised Edition (2015) 25.
[133] European Commission, Guidelines on non-financial reporting: Supplement on reporting climate-related information, (2019/C 209/01) (2019), Section 3.5.
[134] Zhang et al, Embodied carbon emissions in the supply chains of multinational enterprises (2020) 10 Nature Climate Change 1096, 1096. AO §186(b) referred in error to this figure applying only to Scope 1 emissions.

banks that finance activity plainly contributes to climate change, with many of the companies/banks domiciled in the RSs. For example, many of the "Carbon Majors", 100 companies which one study deemed responsible for 71% of GHGs since 1988, are domiciled in the RSs.[135] Further, 15 European banks have been assessed as being in the top 33 polluting banks in the world.[136]

III. JURISDICTION

41. As to **Question 2**: (i) it is undisputed that territorial jurisdiction is established with respect to PRT; (ii) as regards the other RSs, extraterritorial jurisdiction is established on the grounds that, in the exceptional circumstances of the Application, the RSs' emissions and/or failures to regulate/limit their emissions produce effects outside their territories bringing the Applicants within their jurisdiction.

42. As to **Question 2.2**, the Applicants' position represents a faithful application of the principles developed in the Court's case law, and the Court is not invited to revisit or amend those principles. However, the Court has yet to apply Art. 1 in the context of transboundary environmental harm or climate change. In applying the established principles to this new context, the Court must take account of certain factors, including special features regarding climate change, and there may necessarily be a degree of incremental development consistent with the Court's approach to Art. 1 in its case law.

43. The central concern of jurisdiction lies in determining whether there is a sufficient factual and/or legal connection between the Contracting State and the individual, capable of giving rise to a State's obligations.[137] Accordingly, extraterritorial jurisdiction can be established in exceptional circumstances where there is such a sufficient factual and/or legal connection. It is thus well-established that "acts of the States Parties performed, or producing effects, outside their territories can constitute an exercise of jurisdiction".[138]

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[135] See, e.g., The Carbon Majors Database – CDP Carbon Majors Report 2017 at 10, referencing *inter alia* Lukoil (RUS), Rosneft (RUS), BP (GBR), Total (FRA), Glencore (CHE), Statoil (NOR) and Eni (ITA) as being among the top 50 fossil fuel companies in 2015. Also AO§187.

[136] Rainforest Action Network, BankTrack, Indigenous Environmental Network, Oil Change International, Reclaim Finance, Sierra Club, and Urgewald, Banking on Climate Chaos (March 2022). 15 banks domiciled in the RS and found to be among the top 33 polluting banks in the 2021 version of this report are listed at AO §188 (fn 405).

[137] See: *M.N. et al v Belgium* [GC] no 3599/18 (5 March 2020) §113. This understanding is implicit in the Court's analysis of whether special features existed so as to give rise to jurisdiction in: *H.F. et al v France* [GC] nos 24384/19 and 44234/20 (14 September 2022) §§185, 190 and 197. For relevant commentary, see AO fn 467.

[138] *M.N. et al v Belgium* [GC] App no 3599/18 (5 March 2020) §131; *H.F. et al v France* [GC] nos 24384/19 and 44234/20 (14 September 2022) §185. See also: *Carter v Russia* no 20914/07 (21 September 2021) §124.

44. Exceptional circumstances have involved: (i) acts of diplomatic agents; (ii) exercise of public powers of a territorial State; (iii) use of force and exercise of physical control; (iv) control over territory; and (v) specific procedural circumstances.[139] These exceptions are not exhaustive and are capable of evolving.[140] They are examples of the principle that jurisdiction can arise from acts performed or producing effects outside States' territories, and have provided a useful framework in analysing whether jurisdiction has been established in certain cases.[141]

45. The material question is whether there is a sufficient connection between the State and the individual to give rise to jurisdiction, which rests on a range of factors in relation to the particular facts of a given case. For the reasons below, the Applicants submit that there is a sufficient connection.

46. By way of preliminary observation: (i) to the extent facts are disputed which overlap with the merits of the Application, such matters should be resolved at that stage and the Applicants' case should be taken at its highest for the purpose of jurisdiction;[142] (ii) having regard to the fact that obligations can be divided and tailored, the Applicants only assert jurisdiction with respect to a very limited range of positive obligations to take measures within their power to regulate and/or limit their emissions.[143]

47. First, the nature of the connection between the Applicants and the RSs must take into account certain **special features[144] regarding climate change** which militate in favour of finding jurisdiction, namely:

    a. Climate change has a multilateral dimension. It is a responsibility of all States in that each has contributed to and must take action to limit global warming.
    b. The gravity of the climate impacts is already significant and will be catastrophic if global warming surpasses 1.5°C.[145]
    c. The Applicants have no alternative means of holding the RSs to account or preventing the impacts of climate change on their Convention rights.[146]

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139 *Bankovic et al v Belgium et al* [GC] no 52207/99 (12 December 2001) §§71-73; *Al-Skeini et al v United Kingdom* [GC] no 55721/07 (7 July 2011) §§133-140; *M.N. et al v Belgium* [GC] no 3599/18 (5 March 2020) §62.
140 *Georgia v Russia (II)* [GC] no 38263/08 (21 January 2021) §114.
141 AO §§233-240.
142 *Arlewin v Sweden* no 22302/10 (1 June 2016) §42; *Abu Zubaydah v Lithuania* no 46454/11 (8 October 2018) §§410-411; *Carter v Russia* no 20914/07 (21 September 2021) §136.
143 *Al-Skeini et al v The United Kingdom* [GC] no 55721/07 (7 July 2011) §137; *Treska v Albania and Italy* App no 26937/04 (29 June 2006) 12-14; *Rantsev v Cyprus and Russia* no 25965/04 (10 May 2010) §§207, 244-245.
144 AO §264. As to the relevance of "special features" in the assessment of jurisdiction, see: *Rantsev v Cyprus and Russia* no. 25965/04 (10 May 2010) §§243-244; *Güzelyurtlu et al v Cyprus and Turkey* [GC] no 36925/07 (29 January 2019) §§192-195; *Romeo Castano v Belgium* no 8351/17 (9 October 2019) §§41-42; *Hanan v Germany* [GC] no 4871/16 (16 February 2021) §§137-142.
145 Facts §§6-11 (and §§13-18 for the impacts on the Applicants specifically).
146 Facts §13.

d. The RSs must undertake deep and rapid emissions reductions by 2030 if there is to be a hope of keeping global warming to 1.5℃ and averting the most severe impacts on the Applicants' Convention rights.[147]

48. These special features underline the exceptional circumstances of the Application and the necessity that Article 1 is interpreted so as to enable the RSs to hold obligations to the Applicants under the Convention with respect to climate change.[148] To find otherwise would fail to interpret the Convention in light of present-day conditions,[149] deprive the Convention of its effectiveness in the face of climate change,[150] and create a "regrettable vacuum in the system of human rights protection" within Convention Legal Space ("CLS").[151]

49. Second, **that the Applicants would be permitted to bring the Application against PRT does not change this analysis** in that:[152]

a. The Application would be limited to a small fraction of the RSs' contributions to climate change.

b. In view of (i) the differential severity of climate impacts in different parts of the CLS and (ii) the varying levels of adaptive capacity of different RSs, it could not be assumed that a decision that PRT violated the Applicants' rights would mean that all the other RSs would be in breach of the rights of individuals within their territorial jurisdictions. Likewise, a decision that an extraterritorial State has taken sufficient mitigation and adaptation measures to protect the rights of its residents would not necessarily mean it has taken sufficient mitigation and climate finance measures to comply with its obligations as to the Applicants who are outside its territory.[153]

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147 Facts §22.

148 AO §265.

149 The Applicants submit that the living instrument principle is relevant to the interpretation of Art. 1. This proposition was accepted by LVA (LVA2/§25). The relevance of the living instrument principle follows from the effectiveness principle and the imperative of avoiding a vacuum in human rights protection (see below). See *H.F. et al v France* [GC] nos 24384/19 and 44234/20 (14 September 2022) where the Court had regard to the context of globalisation and international mobility in interpreting Art. 1 in a manner that would not deprive Article 3(2) of Protocol No.4 of its effectiveness (§§210-211). See further AO §252.

150 The relevance of the effectiveness principle was recognised in *Carter v Russia* no 20914/07 (21 September 2021) §128 and *H.F. et al v France* [GC] nos 24384/19 and 44234/20 (14 September 2022) §§208-209.

151 *Cyprus v Turkey* [GC] no 25781/94 (10 May 2001) §78. See also: *Güzelyurtlu et al v Cyprus and Turkey* [GC] no 36925/07 (29 January 2019) §195.

152 AO §§266-272.

153 The German Federal Constitutional Court recognises this distinction in *Neubauer et al v Germany, BVerfG*, Beschluss des Ersten Senats vom 24. März 2021 - 1 BvR 2656/18 -, Rn. 1-270 (Order of the First Senate of 24 March 2021) (*Neubauer & Ors v Germany*) §§176-179, when it held that (i) the State fulfils its duty to protect German residents through a combination of mitigation and adaptation measures, and may choose a balance between them, whereas (ii) the State cannot adopt adaptation measures outside its territory, hence its obligations to persons outside Germany are confined to mitigation measures and climate finance. See further AO §§270-272 and Facts above §8.

c. The process of waiting for appropriate applicants from each RS to bring comparably ambitious applications to test the limits of their territorial State's obligations with respect to climate change is fundamentally at odds with the speed at which emissions must be reduced and the scope of States' obligations clarified.

50. Third, there is a **sufficient connection between the RSs and the Applicants to give rise to jurisdiction** on account of the factors below (**Question 2.1**).[154]

51. The RSs exercise control over the Applicants' Convention interests:[155] A focus on physical power or control as determinative of jurisdiction would be inappropriate given the nature of climate change as involving indirect transboundary environmental harm and its multilateral dimension. The locus of control is that over the Applicants' Convention interests.[156] The RSs exercise a considerable degree of control by materially contributing to the risk of climate impacts that affect the Applicants. Further, this is not a case where the Applicants have voluntarily submitted to the control of a State.[157]

52. There is a causal link between the RSs' activities and the effects on the Applicants:[158] While the "*mere fact*" of causation alone is insufficient to give rise to jurisdiction, causation is a relevant factor.[159] The Applicants do not place sole reliance on causation and, as such, do not rely on a "cause and effect notion of jurisdiction".[160] However, it is relevant that (i) the RSs' emissions and failures to regulate/limit their emissions materially contribute to the risk of global warming and the corresponding impacts on the Applicants' rights[161] (ii) the multilateral dimension of climate change means that extraterritorial and territorial RSs stand in the same causal relationship with the Applicants' rights in terms of the risk of harm caused by their omissions *when it comes to the level of their emissions and mitigation measures*.[162]

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154 Reflecting the factors identified in the Court's Question 2.1 at (i) – (vi). The final factor identified at (vii) is addressed further below.

155 AO §§246(a), 274-277. LVA accepted that this was a relevant factor in certain cases (LVA2/§16).

156 This is analogous to cases where the nature of the link between the State and the individual is materially different to that in use of force cases, see: *Kovačić et al* nos 44574/98 et al (9 October 2003), p 55; *Zouboulidis v Greece (No.2)* no 36963/06 (6 November 2009); *Tarnopolskaya et al v Russia* nos 11093/07 et al (28 June 2010).

157 Compare to *M.N. et al v Belgium* [GC] no 3599/18 (5 March 2020) §118. See AO §277.

158 AO §§246(b), 278-279.

159 Latvia appears to accept this proposition (LVA2/§27). For the proposition that causation alone is insufficient, see: *Bankovic et al v Belgium et al* [GC] no 52207/99 (12 December 2001) §75; *Georgia v Russia (II)* [GC] no 38263/08 (21 January 2021) §124. For cases where causation has been a factor, see: *Andreou v Turkey* no 45653/99 (3 June 2008) p. 11; *Stephens v Malta (No.1)* no 11956/07 (14 September 2009) §51; *Ilascu et al v Moldova and Russia* [GC] no 48787/99 (8 July 2004) §317; *Kovačić et al* nos 44574/98 et al (9 October 2003); *Pad et al v Turkey* no 60167/00 (28 June 2007); *Big Brother Watch et al v United Kingdom* [GC] nos 58170/13 et al (25 May 2021).

160 The RS submissions to the contrary are misconceived and give little regard to the nature of the Applicants' *actual* case: see (FIN2/§68; FRA2/§31; EST2/§44; ESP2/§31; GBR2/§46).

161 By analogy, see: *Sacchi et al v Argentina et al* (2021) Communication No. 107/2019, §§10.8-10.12.

162 Put another way, a gigaton of GHGs emitted by FRA has an equal effect on the Applicants as a gigaton of GHG emissions by PRT. From the perspective of causation, there are therefore no grounds to

53. The effects on the Applicants' rights were foreseeable and/or within the knowledge or contemplation of the RSs:[163] The RSs have been aware of the occurrence and effects of climate change since 1992 at the latest, and Portugal's vulnerability to climate impacts is well-documented.[164] The RSs' contributions to the climate impacts were reasonably foreseeable and, being prescribed by their laws, at all times in their contemplation.[165]

54. The effects on the Applicants are long-lasting:[166] The RSs' contributions to climate change have been long-lasting and will persist for decades, as will the climate impacts upon the Applicants.

55. The effects are produced by activities within the territories and/or under the control of the RSs:[167] The RSs exercise control over (i) the land, resources, individuals and entities responsible for emissions in their territories, (ii) the extraction and export of fossil fuels in their territories, (iii) the importation of embedded emissions, and (iv) entities domiciled in their territories that contribute to overseas emissions.[168]

56. The protection of the Applicants' interests requires all the RSs to take measures within their power to regulate/limit their emissions:[169] Recent case law has confirmed that the relative capacities of the territorial and extraterritorial States in securing an individual's rights can be special features establishing jurisdiction.[170] Given the multilateral

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distinguish between the territorial and extraterritorial States, and this scientific reality must influence the Court's jurisdictional assessment. While the Applicants acknowledge that PRT has the possibility of taking adaptation measures, PRT does not have the adaptive capacity to safeguard their rights from the impacts of climate change (see above Facts §13). To the extent possible within the CLS, their rights can only be adequately protected by steep and rapid emissions reductions from all the RSs. The RSs' reliance on the notional possibility of Portuguese adaptation ignores this reality and is misconceived (FIN2/§63).

[163] AO §§246(c), 280-281. For cases where foreseeability and/or knowledge has been a factor, see: *Stephens v Malta (No.1)* no 11956/07 (14 September 2009) §51; *Kovačić et al* nos 44574/98 et al (9 October 2003) 55; *Zouboulidis v Greece (No.2)* no 36963/06 (6 November 2009); *Tarnopolskaya et al v Russia* nos 11093/07 et al (28 June 2010).

[164] See above Facts §§12-18. AO Part II, Section A, Sub-section e (§§54*ff*).

[165] By analogy, see: *Sacchi et al v Argentina et al* (2021) Communication No. 107/2019, §§10.8-10.12.

[166] AO §§246(d), 282. The relevance of this factor can be inferred from the Court's treatment of "*instantaneous acts",* see: *Medvedyev et al v France* [GC] no 3394/03 (29 March 2010) §64; *Hirsi Jamaa et al v Italy* [GC] no 27765/09 (23 February 2012) §73; *Georgia v Russia (II)* [GC] no 38263/08 (21 January 2021) §124.

[167] AO §§246(e), 283-285. The relevance of this factor can be inferred from the Court's treatment of extraterritorial acts being a factor going against jurisdiction (see the footnote above) and is supported by comparative case law. For example, see: *Medio Ambiente y Derechos Humanos (Opinión Consultiva)* (2017) OC-23/17, §§101-103; UNHRC, *General Comment No. 36* (2018) CCPR/C/GC/36, §63; *Sacchi et al v Argentina et al* (2021) Communication No. 107/2019, §10.7.

[168] AO §§257 and 285. By analogy, see: *Sacchi et al v Argentina et al* (2021) Communication No. 107/2019, §§10.8-10.12; *Medio Ambiente y Derechos Humanos (Opinión Consultiva)* (2017) OC-23/17, §§101-103; IACHR and REDESCA, Climate Emergency: Scope of Inter-American Human Rights Obligations (Resolution 3/2021) (31 December 2021) (2021 IACommHR Resolution) §§39-41. For supportive TPIs, see: TPI by Amnesty International (6 May 2021) §16.

[169] AO §§246(f), 286-287.

[170] *Güzelyurtlu et al v Cyprus and Turkey* [GC] no 36925/07 (29 January 2019), §§193-194; *Hanan v Germany* [GC] no 4871/16 (16 February 2021) §§137-142, 145; *Rantsev v Cyprus and Russia* no 25965/04 (10 May 2010) §245. For recent cases, see: *Carter v Russia* no 20914/07 (21 September 2021) §134; *Bekoyeva v Georgia* no 48347/08 (5 October 2021) §39; *Toledo Polo v Spain* no 39691/18 (22 March 2022) §§179-182 and 195. These cases bely the RSs' understanding of *Güzelyurtlu* and *Hanan*, as well as their assertions that capacity

dimension of climate change and severity of climate impacts in the Applicants' regions, Portugal does not have the adaptive capacity to protect the Applicants' rights alone. To the extent possible within the CLS, protection of the Applicants' interest requires all the RSs to take urgent action to regulate/limit their emissions.

57. Fourth, a finding of jurisdiction is **supported by and harmonious with the relevant rules of international law** and approaches of other international human rights bodies:[171]

    a. A finding of no jurisdiction would release the RSs from accountability under the Convention in relation to transboundary harm caused by activities within their territories and would impede the Applicants' ability to access remedies, contrary to both the prevention/no-harm principle and the Aarhus Convention Art. 3(9).[172]

    b. The approach contended for by the Applicants would provide for a greater degree of harmony between the Court, UN treaty bodies, and the Inter-American Court of Human Rights (IACtHR) without requiring the Court to revisit the principles established in its case law.[173]

IV. EXHAUSTION OF DOMESTIC REMEDIES

58. As to **Question 3**, the Applicants were not required to exhaust domestic remedies as effective remedies were not available in the RSs and/or there were special circumstances absolving them of the requirement.

59. Art. 35(1) provides for "**the Exhaustion Rule**" (or "**EDR**"). As the Convention is a special instrument of human rights protection guaranteeing rights that are practical and effective, the EDR must be applied with "some degree of flexibility and without excessive formalism",[174] only requiring exhaustion of remedies which are effective and available in theory and practice.[175] The EDR "is not capable of being applied

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is irrelevant to the jurisdictional assessment, see: (LVA2/§19; GBR2/§46(6)). Further, these cases are not solely concerned with the procedural limb under Art. 2.

[171] AO §§253-257, 288-290. That substantive norms of international law and comparative jurisprudence are relevant to the assessment under Art. 1 is confirmed in the Court's case law, see: *Jaloud v Netherlands* [GC] no 47708/08 (20 November 2014) §§139, 141; *Issa et al v Turkey* no 31821/96 (30 March 2005) §71; *Hanan v Germany* [GC] no 4871/16 (16 February 2021) §137; *Toledo Polo v Spain* no 39691/18 (22 March 2022) §§179-182 and 195; *H.F. et al v France* [GC] nos 24384/19 and 44234/20 (14 September 2022) §209. RSs' assertions to the contrary are misconceived (ESP2/§38; GBR2/§49; NLD2/§§8-9).

[172] 2021 IACommHR Resolution, §39. Also: TPI by UN Special Rapporteurs (4 May 2021) §§30-35.

[173] Cf GBR2/§51, the 2021 IACommHR Resolution confirms that the IACtHR Advisory Opinion applies to climate change.

[174] *Mocanu et al v Romania* [GC] nos 10865/09 et al (17 September 2014) §224; *McFarlane v Ireland* [GC] no 31333/06 (10 September 2010) §112; *Akdivar et al v Turkey* [GC] no 21893/93 (16 September 1996) §69. See also: *Gherghina v Romania* [GC] no 4221907 (9 July 2015) §87; *Vučković et al v Serbia* (preliminary objection) [GC] nos 17153/11 et al (25 March 2014) §76.

[175] *McFarlane v Ireland* [GC] no 31333/06 (10 September 2010) §§107-108. Also: *Gherghina v Romania* [GC] no 4221907 (9 July 2015) §§85-86; *Mocanu et al v Romania* [GC] nos 10865/09 et al (17 September 2014) §223; *Vučković et al v Serbia* (preliminary objection) [GC] nos 17153/11 et al (25 March 2014), §§71, 73;

automatically" and "it is essential to have regard to the particular circumstances of each individual case", including the general legal and political context and the personal circumstances of the applicants.[176] Against that background, the Applicants submit that effective remedies were not available.

60. First, **the Court must have regard to the specific nature of the Applicants' complaints**,[177] namely, that the RSs have breached their rights under Arts. 2, 3, 8 and 14 by failing to regulate and limit their emissions in a manner that is consistent with achieving the LTTG of 1.5°C.[178] The proposed remedy must be "adequate and sufficient in respect of the applicants' complaints",[179] "capable of redressing directly the impugned state of affairs" and "must offer reasonable prospects of success".[180] Remedies will therefore only be effective and capable of providing redress where there are reasonable prospects that (i) the domestic court will assess whether the RS's emission reduction targets and measures are sufficient such that, if all States took equally ambitious measures, the result would be consistent with achieving the LTTG of 1.5°C, and, (ii) if that is not the case, the domestic court will compel the RS to make the necessary emissions reductions to be consistent with achieving *that LTTG* ("**the Key Issues**").[181]

61. Second, **in RSs that have jurisprudence in human rights-based or comparable climate claims,[182] the remedies available are not capable of and/or do not offer reasonable prospects of providing *effective* redress** in respect of the Applicants' complaints.[183]

Sejdovic v Italy [GC] no 56581/00 (1 March 2006) §45; *Akdivar et al v Turkey* [GC] no 21893/93 (16 September 1996) §§67, 73.

[176] *Gherghina v Romania* [GC] no 4221907 (9 July 2015) §§85, 91; *Kurić et al v Slovenia* [GC] no 26828/06 (26 June 2012) §§286, 302-304; *Akdivar et al v Turkey* [GC] no 21893/93 (16 September 1996) §§69, 73. Cf GBR2/§34; ITA2/§31.

[177] *Mocanu et al v Romania* [GC] nos 10865/09 et al (17 September 2014) §226.

[178] For the proposition that EDR objections that are closely related to the substance of a claim should be joined to the merits, see: *Nicolae Virgiliu Tanase v Romania* [GC] no 41720/13 (25 June 2019) §§103-104; *A, B & C v Ireland* [GC] no 25579/05 (16 December 2010) §§154-155; *S.L. & J.L. v Croatia* no 13712/11 (7 May 2015) §§51-53.

[179] *Akdivar et al v Turkey* [GC] no 21893/93 (16 September 1996) §72; *Vučković et al v Serbia* (preliminary objection) [GC] nos 17153/11 et al (25 March 2014) §71; *Mocanu et al v Romania* [GC] nos 10865/09 et al (17 September 2014) §222; *Gherghina v Romania* [GC] no 4221907 (9 July 2015) §85.

[180] *Gherghina v Romania* [GC] no 4221907 (9 July 2015) §§85, 91; *Mocanu et al v Romania* [GC] nos 10865/09 et al (17 September 2014) §222; *Vučković et al v Serbia* (preliminary objection) [GC] nos 17153/11 et al (25 March 2014), §74.

[181] AO §§198-200. In this sense, the Applicants agree with the RSs that the test under Art. 35(1) is whether there is a remedy that prevents or remedies violations (IRL2/§135; DNK2/§30). It is simply disputed what constitutes a violation of the Convention in the particular circumstances of the Application.

[182] By human rights-based or comparable climate claims, the Applicants refer to cases that address whether and to what extent States must regulate and limit at least the entirety of a state's territorial emissions.

[183] In contrast, the test the CRC applied in *Sacchi* was whether domestic remedies had any prospects of success, not reasonable prospects of success (FRA/§10.16).

62. In GBR, CHE and before the Court of Justice of the European Union, the Applicants would be unable to access remedies in domestic courts due to a lack of standing in human rights-based climate cases.[184] In other jurisdictions, the burden of proof is on the RSs to demonstrate the Applicants' standing to bring a similar claim to the Application notwithstanding their residence.[185]

63. Likewise, the Applicants would not have reasonable prospects of success in RSs, where the domestic courts have assessed the merits of human rights-based climate cases but have found that States' do not owe duties under the Convention in relation to climate change or have not breached such duties.[186]

64. In RSs that have had formally successful climate cases, the available remedies would not be capable of providing redress to the Applicants' case. The relevant cases are:

    a. *Urgenda Foundation v State of the Netherlands*:[187] The Dutch Supreme Court held that the NLD's pledge to reduce emissions by 17% by 2020 violated Arts. 2 and 8. However, the Court examined the adequacy of the pledge against "the lower limit of its share in the measures to be taken worldwide against dangerous climate change" (§6.3), and thus selected the lowest end of NLD's fair share range in the IPCC AR4 as the appropriate benchmark for compliance (§7.5.1).
    b. *Neubauer & Ors v Germany*:[188] The German Federal Constitutional Court ('FCC'): (i) held that an emissions target aligned with a 2℃ LTTG was constitutional because the resulting health impacts could be alleviated by adaptation measures (§167); (ii) "[t]aking the leeway afforded to the legislator into account", accepted DEU's

[184] AO §§205-206. For example, GBR (*Plan B v Secretary of State for Business, Energy and Industrial Strategy* [2018] EWHC 1892 (Admin), §49; *R (Plan B) et al v Prime Minister et al* [2021] EWHC 3469 (Admin) §78), CHE (*Verein KlimaSeniorinnen Schweiz et al v Federal Department of the Environment, Transport, Energy and Communications*, Federal Tribunal, 1C_37/2019 (5 May 2020) §§ 5.4-5.5), and the CJEU (*Carvalho et al v European Parliament and the Council of the European Union* (25 March 2021) C-565/19 P, ECLI:EU:C:2021:252, §§69-79). Regarding the latter, RSs' reliance on the availability of remedies at the EU level is therefore misconceived (IRL2/§140). To the extent that such RSs assert that questions of standing may be open to being developed in future cases, the available remedies would not be sufficiently certain to be effective (see §67 below).

[185] *Mocanu et al v Romania* [GC] nos 10865/09 et al (17 September 2014) §§225; *Vučković et al v Serbia* (preliminary objection) [GC] nos 17153/11 (25 March 2014) §77; *Sejdovic v Italy* [GC] no 56581/00 (1 March 2006) §46; *Akdivar et al v Turkey* [GC] no 21893/93 (16 September 1996) §68. In particular, the RSs must respond to Question 3.1 of the Questions for the Parties.

[186] For example, AUT (*Greenpeace et al. v Austria*, Case no G 144-145/2020-13, V 332/2020-13 (Supreme Court of Austria, 30 September 2020)), GBR (*R (Plan B) et al v Prime Minister and Others* [2021] EWHC 3469 (Admin) §§48-77), IRL (*Friends of the Irish Environment CLG v The Government of Ireland and The Attorney General* [2019] IEHC 747, §§143-146), and NOR (*Greenpeace Nordic Association and Nature and Youth v Ministry of Petroleum and Energy*, Case no 20-051052SIV-HRET (Supreme Court of Norway, 22 December 2020), in relation to emissions relating to the extraction of fossil fuels).

[187] *The State of the Netherlands v Urgenda Foundation*, ECLI:NL:HR:2019:2006 (Supreme Court of the Netherlands) (20 December 2019). See further AO §207(a).

[188] *Neubauer & Ors v Germany*. See further AO §207(b). Noting that in *Sacchi*, the complainants did not address and the CRC did not consider these arguments regarding the adequacy of the remedy demonstrated in *Neubauer*.

calculation of its fair share on an equal per capita basis (§230), a favourable measure of fair share from DEU's perspective; and (iii) found no violation with respect to complainants outside of DEU, in part because DEU could not adopt adaptation measures in their countries (§§173-181).

c. *Klimaatzaak v Belgium*:[189] The Brussels Court of First Instance held that BEL's failure to achieve its targets under EU law breached Arts. 2 and 8, but the separation of powers doctrine prevented it from deciding whether Belgium was required to undertake further reductions (pp 79-82).

d. *Klimaticka v Czech Republic*:[190] The Prague Municipal Court held that CZE must achieve the target in the EU's Nationally Determined Contribution (NDC) (§§250-259); 55% reductions by 2030 but declined to assess the adequacy of its mitigation policies according to a measure of its fair share of global emissions reductions (§240).[191]

e. *Grande-Synthe v France; Notre Affaire à Tous v France*:[192] The French Council of State held that FRA must adopt measures to achieve its 2030 target but declined to review the adequacy of that target or determine whether France was required to take further measures, including under the Convention.

f. *Friends of the Irish Environment CLG*:[193] The Irish Supreme Court held that IRL's mitigation plan breached national legislation by failing to specify how to achieve a transition to a "low carbon, climate resilient and environmentally sustainable economy" by 2050 (§§6.18-6.46). Beyond that narrow question of statutory construction, the judgment did not assess the extent to which Ireland was required to reduce its emissions (§7.24).

65. In each of the above, the RSs' domestic courts failed to effectively address the Key Issues. If domestic courts in all States adopted the above approaches in assessing the adequacy of emission reduction targets and required measures, the aggregation of those measures would be inconsistent with achieving the LTTG of 1.5°C.

66. The jurisprudence in each of the RSs that have existing climate cases indicates that either (i) domestic courts would refuse to assess the Key Issues at all on the grounds of

[189] *ASBL Klimaatzaak v Kingdom of Belgium and Others*, French-speaking Court of First Instance of Brussels (2015/4585/A, 17 June 2021). See further: AO §207(c).
[190] *Klimaticka v Czech Republic* (15 June 2022) Judgment No. 14A 101/2021.
[191] Noting that at §§139-158 and AO EU§§3-36, the Applicants outline why the EU's target is inadequate and not compatible with Arts. 2, 3 and 8.
[192] AO §203E(b). *Commune de Grande-Synthe v France* (19 November 2020) No 427301; *Notre Affaire à Tous v France* (14 October 2021) Nos 190496 et al. Also: *Grande-Synthe, Opinion, Stephanie Hoynck, Consultant Judge (Rapporteur Public)*, section 2.2, where the Rapporteur Public opines that the court should refrain from reviewing the adequacy of FRA's target under the Convention.
[193] AO §203(a).

standing, (ii) the Applicants would have little prospects of success, or (iii) the available remedies would be insufficient to redress the Applicants' complaints.

67. Third, **in RSs where there has been no jurisprudence concerning human rights-based climate cases or equivalent claims, any proposed remedies would not be sufficiently certain** to be effective and accessible.[194] While mere doubts are insufficient, remedies must be "sufficiently certain" in theory and practice, "failing which they will lack the requisite accessibility and effectiveness".[195] In RSs without any relevant jurisprudence, there are no "well-established" remedies "clearly set out and confirmed or complemented by practice or case law" which can demonstrate the requisite certainty.[196] The existence of broad constitutional provisions that *in theory* could provide an effective remedy does not provide sufficient certainty *in practice* to alter this analysis.[197]

68. Whereas applicants have been required to test the extent of otherwise uncertain protections in certain cases, this requirement would be inappropriate here: (i) new specific remedies have not been introduced;[198] (ii) emissions reductions must be taken urgently to keep global warming to 1.5°C, so it would undermine the effective protection of the Applicants' rights if they were required to -test the extent of protection available in each RS;[199] (iii) if tested, there is no basis to assume effective remedies would be available given the novel nature of climate litigation and the ineffectiveness of domestic remedies in all other States thus far.[200]

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194 AO §§214-219. Such RSs include BGR, CYP, DNK, ESP, EST, GRC, HRV, ITA, LTU, LUX, LVA, MLT, POL, PRT, ROU, RUS, SVK, SVN, SWE and TUR (noting that cases challenging the inadequacy of climate change mitigation measures are pending decision at first instance in ESP, ITA, POL, RUS and SWE: see http://climatecasechart.com/). Further, apart from NOR, no domestic courts have addressed the non-territorial emissions. CHE could also be included on the basis it has yet to assess the merits of such a case.

195 *Gherghina v Romania* [GC] no 4221907 (9 July 2015) §85; *Mocanu et al v Romania* [GC] nos 10865/09 et al (17 September 2014) §§222-223; *Vučković et al v Serbia* (preliminary objection) [GC] nos 17153/11 et al (25 March 2014) §§71, 74; *Sejdovic v Italy* [GC] no 56581/00 (1 March 2006) §45; *Akdivar et al v Turkey* [GC] no 21893/93 (16 September 1996) §66.

196 *Gherghina v Romania* [GC] no 4221907 (9 July 2015) §§86, 88; *Yagnina v Bulgaria* no 18238/06 (27 January 2015) §§30-34; *Voynov v Russia* no 39747/10 (3 July 2018) §§44-45; *Ádám et al v Romania* nos 81114/17 et al (13 October 2020) §§49-50; *Horvat v Croatia* no 51585/99 (26 July 2001) §44; *Melnītis v Latvia* no 30779/05 (28 February 2012) §§50-51; *McFarlane v Ireland* [GC] no 31333/06 (10 September 2010) §120; *Sejdovic v Italy* [GC] no 56581/00 (1 March 2006) §§50-55.

197 *Sejdovic v Italy* [GC] no 56581/00 (1 March 2006) §§117-120.

198 Cf ibid; *Gherghina v Romania* [GC] no 4221907 (9 July 2015) §100; *Bregu and Nokshiqi v Albania* nos 41411/11 et al (28 September 2021) §§31-35. *Vučković et al v Serbia* (preliminary objection) [GC] nos 17153/11 et al (25 March 2014) can be distinguished as there were three constitutional court judgments on the relevant issue (§§83-84).

199 While the Applicants accept that domestic cases in one State cannot be decisive in demonstrating the unavailability of effective remedies in another State, this is one factor going to the assessment of certainty. RSs' observations to the contrary are misconceived (CZE2/§21; DNK2/§31; GBR2/§§37-38).

200 See: GBR2/§40; IRL2/§§147-148; FIN2/§§130-131. The Applicants note that, in *Sacchi*, no equivalent analysis of the jurisprudence or lack of jurisprudence in the Respondent States was undertaken.

69. Fourth, it would impose **an unreasonable burden upon the Applicants as children and young people to require them to exhaust domestic remedies in all RSs**:[201] (i) the logistical and financial difficulties in simultaneously bringing novel claims in 33 different States would render any effective remedies inaccessible in practice; (ii) the time it would take to exhaust remedies in each State would be incompatible with the urgency with which emissions must be reduced by 2030;[202] and (iii) having regard to the gravity of climate impacts upon the Applicants' rights, the aforesaid urgency, and the supranational nature of climate change, it was necessary for the effective protection of the Applicants' rights that they brought their claim against all of the RSs so as to bring the widest possible range of emissions into the scope of the Application.[203]

70. Fifth, compatibility of the RSs' climate change measures with the Convention is a novel and supra-national issue.[204] It is **imperative that the Court provide guidance to the Contracting States** regarding their obligations in relation to climate change,[205] consistent with the principle of subsidiarity and the nature of the Court's supervisory jurisdiction. Far from opening the "floodgates", providing such guidance would assist domestic authorities and courts in ensuring effective remedies are available on the national level in future cases.[206] This is not theoretical: it has been significant for domestic courts in Ireland and the UK in dismissing human-rights based climate claims that there is no guidance from the Court on the matter.[207]

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[201] AO §§222-224. For authority that Art. 35(1) must not be interpreted in a manner which imposes an unreasonable burden upon the applicant or constitutes a disproportionate obstacle to the effective exercise of the right of individual application under Art. 34, see: *Gaglione et al v Italy* nos 45867/07 et al (21 December 2010) §22; *M.S. v Croatia (No. 2)* no 75450/12 (19 February 2015) §§123-125; *Vaney v France* no 53946/00 (30 November 2004) §53. Also: *McFarlane v Ireland* [GC] no 31333/06 (10 September 2010) §114.

[202] *Pine Valley Developments Ltd et al v Ireland* no 12742/87 (29 November 1991) §47. See also: *Story et al v Malta* nos 56854/13 et al (29 October 2015) §80; *Vlad et al v Romania* nos 40756/06, 41508/07 and 50806/07 (26 November 2013) §118. The urgency of the Application is reflected in the Court's decision to grant this case priority treatment pursuant to Rule 41 of the Rules of the Court.

[203] RSs observations that any burden upon the Applicants is a result of the free choice ignore that imperative (IRL2/§145; GBR2/§42).

[204] *Hatton et al v United Kingdom* no 36022/97 [GC] (8 July 2003), Dissenting Opinion of Judges Costa, Ress, Türmen, Zupančič and Steiner.

[205] *Finger v Bulgaria* no 37346/05 (10 May 2011) §§127-128. Contrary to (GBR2/§41(6); CZE2/§§23-24), the Application plainly concerns a systemic issue in relation to which guidance is required.

[206] RS observations to the contrary are misconceived (POL2/§13).

[207] *Plan B et al v Prime Minister et al* (2022) CA-2021-003448, §5, per Singh LJ ("[t]he fundamental difficulty which the Claimants face is that there is no authority from the European Court of Human Rights on which they can rely"); *Friends of the Irish Environment CLG v The Government of Ireland and The Attorney General* [2019] IEHC 747, §§139-140, per MacGrath J ("it is not for the domestic court to declare rights under the Convention, but that this is a matter for the European Court").

71. In the alternative, the Applicants submit that the reasons above constitute "special circumstances" absolving them from the Exhaustion Rule.[208] In either case, Art. 35(1) provides no bar to the admissibility of the Application.

V. VICTIM STATUS

72. The Application is admissible under Art. 34, the Applicants being victims of the RS' failures to regulate and limit their emissions in a manner consistent with achieving the 1.5°C LTTG, as required by Arts. 2, 3, 8 and 14.

73. As to **Question 4**, the Applicants are **actual victims** who have been directly affected by the violations of the RSs.[209] Anthropogenic climate change already has exposed and will continue to expose the Applicants to intensifying harms.[210]

74. The Applicants are also **potential victims** who have produced reasonable and convincing evidence of the likelihood that violations affecting them personally will occur.[211] As global warming increases, the harm to the Applicants will *inevitably* worsen (*a fortiori* if it exceeds 1.5°C). The Applicants face risks of additional harms.[212]

75. The Court should recognise the Applicants' victim status in circumstances where the risk of harm to them from global warming exceeding 1.5°C are "serious and irreparable".[213] That certain of these risks may not materialise for some years should not deprive the Applicants of victim status in respect of these risks.[214] As to catastrophic harms, while it is not presently known whether the Applicants themselves will suffer from, for example, heat-related morbidity or mortality, it is (a) certain that many thousands of their generation will suffer as they get older if global warming remains on its current trajectory[215] and (b) presently impossible to establish which of their

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[208] *Vučković et al v Serbia* (preliminary objection) [GC] nos 17153/11 et al (25 March 2014) §73; *Sejdovic v Italy* [GC] no 56581/00 (1 March 2006) §§45, 55; *M.S. v Croatia (No. 2*) no 75450/12 (9 February 2015) §§123-125.

[209] *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania* [GC] no 47848/08 (17 July 2014) §96; *Caron et al v France* no 48629/08 (29 June 2010) §1. This criterion that is not to be applied in a "rigid, mechanical and inflexible way": *Roman Zakharov v Russia* [GC] no 47143/06 (4 December 2015) §164. The term "victim" should be interpreted without an excessive formalism, in an evolutive manner in the light of conditions in contemporary society, and bearing in mind the nature and seriousness of the complaint: *Gorraiz Lizarraga et al v Spain* no 62543/00 (27 April 2004) §38; *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania* [GC] no 47848/08 (17 July 2014) §§105 and 112.

[210] Facts §§14, 16-18.

[211] *Tauira et al v France* no 28204/95 (Commission Decision, 4 December 1995) §131; *Aly Bernard et al v Luxembourg* no 29197/95 (29 June 1999) §6; *Segi et al & Gestoras Pro-Amnistia et al v 15 States of the European Union* nos 6422/02 and 9916/02 (23 May 2002) §7; *Senator Lines GmbH v Austria et al* [GC] no 56672/00 (10 March 2004) §11; *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania* [GC] no 47848/08 (17 July 2014) §101.

[212] Facts §§15-17.

[213] See *Soering v United Kingdom* no 14038/88 (7 July 1989) §90. See above Facts §§10-11 and 13-18.

[214] See *Taşkin et al v Turkey* no 46117/99 (10 November 2004) §§104, 107 and 114.

[215] Facts above §§7 and 15.

generation will so suffer. By analogy with the caselaw on secret surveillance, the Applicants' victim status in respect of such harms should be recognised as otherwise the Convention articles relevant to them will be "nullified".[216]

76. Plainly, applicants can be victims where the impact of environmental harm is sufficient to engage Arts. 2, 3 or 8.[217] As outlined in the following section, such Arts. are applicable in the present case and victim status necessarily follows.

77. The Applicants are victims as they meet the criteria for actual or potential victim status,[218] even if many other persons may be affected in a similar way.[219] It is contrary to principle for the RSs to rely on the large number of persons affected by their failures, to seek to deny victim status to the otherwise eligible Applicants: this would make protection of the Convention rights ineffectual and illusory.[220] In any case, the Court has demonstrated that it can address issues affecting large numbers of people.[221]

78. As to **Question 4.1**, in view of their age, **the Applicants belong to a specific segment of the population that is particularly affected by climate change**. The Court has repeatedly held that a person may contend that a law violates his or her rights, in the absence of an individual measure of implementation, if he or she is a member of a class of people who risk being directly affected by the legislation.[222] The Court has recognised victim status in this way, notwithstanding the large size of the identified class: in the *Open Door and Dublin Well Woman* case, the Plenary Court identified the class as "women

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[216] *Klass et al v Germany* no 5029/71 (6 September 1978) §36; *Kennedy v United Kingdom* no 26839/05 (18 May 2010) §124; *Roman Zakharov v Russia* [GC] no 47143/06 (4 December 2015) §165.

[217] *López Ostra v Spain* no 16798/90 (9 December 1994) §51; *Di Sarno et al v Italy* no 30765/08 (10 January 2012) §§81 and 2018; *Solyanik v Russia* no 47987/15 (10 May 2022) §§41-45; *Pavlov et al v Russia* no 31612/09 (11 October 2022) §69.

[218] The Application is accordingly not an *actio popularis*. Compare to *Caron and Others v France* no 48629/08 (29 June 2010), where the applicants were complaining *in abstracto* about the effects of genetically modified organisms ("GMOs") without explaining how they would have been personally affected by the targeted GMO plots; and *Le Mailloux v France* no 18108/20 (5 November 2020), where the applicant had not explained how alleged failures of the national authorities could affect his health or privacy.

[219] *M.S.S. v Belgium and Greece* [GC] no 30696/09 (21 January 2011) §359; *Neubauer & Ors v Germany* §§110 and 131.

[220] The concept of "victim status" in Article 34 contrasts with the criterion of "individual concern" in §4 of Art. 263 of the Treaty on the Functioning of the European Union: *Plaumann et al v Commission of the European Economic Community* (15 July 1963) 25/62, EU:C:1963:17; *Carvalho et al v European Parliament and the Council of the European Union* (25 March 2021) C-565/19 P, ECLI:EU:C:2021:252, §§35-52.

[221] For example, in *Turan et al* nos 75805/16 and 426 others (23 November 2021) §98, the Court only considered one of many similar applications due to "the overriding interest to ensure the long-term effectiveness of the Convention system".

[222] *Burden v United Kingdom* [GC] no 13378/05 (29 April 2008) §34, cited in *Tanase v Moldova* [GC] no 7/08 (27 April 2010) §104, and in *Sejdic and Finci v Bosnia and Herzegovina* [GC] nos 27996/06 and 34836/06 (22 December 2009) §28. Also, in the secret surveillance context, *Klass et al v Germany* no 5029/71 (ECtHR, 6 September 1978) §34; *Kennedy v United Kingdom* no 26839/05 (18 May 2010) §124; and *Zakharov v Russia* [GC] no 47143/06 (4 December 2015) §§170-171.

of child-bearing age"; and in secret surveillance cases the Court has found that the legislation directly affects all users of the relevant communication services.[223]

79. The specific segment of the population/relevant class to which the Applicants belong is children and youths located in their respective regions of PRT. This segment/class is particularly affected by climate change because children and youth are especially vulnerable to the mental and physical health impacts of climate change.[224] Additionally, children and youths, as a class, will live further in the future and will therefore experience the adverse impacts of climate change for longer (and for a greater proportion of their lives). They will also experience worsening impacts and risks as climate change, on its current trajectory, intensifies throughout their lifetimes. The Applicants have addressed how PRT, including the areas where the Applicants reside or spend time, is particularly vulnerable to the adverse impacts of climate change.[225]

VI. APPLICABILITY

80. As to **Question 5**, Arts. 2, 3, 8 and 14 are applicable to the Applicants' case on account of the impacts that climate change has had and will continue to have on their rights. The applicability thresholds must be applied in light of: (i) the object of the Convention as an instrument for the protection of human rights;[226] (ii) the principle that rights are to be interpreted so as to be "practical and effective";[227] and (iii) the Convention is to be interpreted "in light of present-day conditions".[228] It is also relevant that environmental protection and the enjoyment of Convention rights are inextricably connected. A healthy environment is a "precondition" for enjoyment of one's rights, whereas environmental degradation can preclude such enjoyment.[229] This is *a fortiori* the case in the context of climate change.[230]

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[223] *Open Door and Dublin Well Woman v Ireland* nos 14234/88 and 14235/88 (29 October 1992); *Klass et al v Germany* no 5029/71 (6 September 1978) §37; *Roman Zakharov v Russia* [GC] no 47143/06 (4 December 2015) §175.

[224] See above Facts §7. Also Naumann et al (**Key Annex 18**) 8 (children particularly susceptible to heat waves); EASAC (June 2019) (**Key Annex 19**) 14 (young children particularly vulnerable to heat); AR6 WG2 SPM (**Key Annex 5**) 11 §B.1.4 ("*very high confidence*"); Expert Composite Report (**Key Annex 32**) 58.

[225] As to GBR2/§68(2), it is axiomatic that official findings as to the heat and other impacts of climate change in a *municipality* adjacent to one in which an Applicant resides provides evidence of the impacts to which that Applicant is exposed.

[226] *Saadi v United Kingdom* no 13229/03 (29 January 2008) §26.

[227] *Öneryildiz v Turkey* no 48939/99 (30 November 2004) §69.

[228] *Tyrer v United Kingdom* no 5856/72 (25 April 1978) §31.

[229] AO §429. *Pavlov et al v Russia* no 31612/09 (11 October 2022), Concurring Opinion of Judge Serghides, §§4-17.

[230] OHCHR, Global update at the 42nd session of the Human Rights Council (Opening statement by UN High Commissioner for Human Rights Michelle Bachelet, 9 September 2019); Statement on human rights and climate change, UN Doc HRI/2019/1 (14 May 2020).

81. Further, there is an important distinction between applicability and the merits. Where applicability and positive obligations are concerned, the question is whether there is an interference with the applicant's rights capable of engaging States' obligations, regardless of its source, rather than whether it is attributable to the State.[231] Contrariwise, the question at the merits stage is whether the State has taken sufficient measures to protect an individual from that interference. The interference in the Application is climate change and its impacts upon the Applicants' Convention rights. The following are not therefore relevant to applicability: (i) the measures a State has taken to mitigate climate change insofar as the interference remains; (ii) the extent climate impacts can be attributed to the State; (iii) which LTTG provides the appropriate benchmark to judge the adequacy of States' measures. These are issues that will be addressed at the merits stage.

A. Article 8 ECHR

82. Art. 8 protects a broad range of interests, including a person's physical and psychological well-being, personal development and relationships with the outside world, living conditions, and the enjoyment of one's home.[232] An issue under Art. 8 may arise "where an individual is directly and seriously affected by noise or other pollution".[233] Firstly, there must be an "actual" or "direct interference" in the sense there is a sufficient causal link between the environmental nuisance and the effect on the applicant's rights.[234] Secondly, the adverse effects of environmental pollution must attain a minimum level of severity.[235] The threshold is relative, depending on the circumstances, such as the intensity and duration of the harm, and its physical and mental effects on the applicants. There is no requirement for health to be seriously endangered; a deterioration in one's "quality of life" or enjoyment of one's home may be sufficient.[236]

83. Against that background, first, there is a **sufficient causal link between climate change and the impacts on the Applicants' rights** to establish a direct

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[231] *Guerra et al v Italy* [GC] no 14967/89 (19 February 1998) §§57-58; *Nicolae Virgiliu Tanase v Romania* [GC] no 41720/13 (25 June 2019) §134.
[232] *Paradiso and Campanelli v Italy* [GC] no 25358/12 (24 January 2017) §159. Also: *Beizaras and Levickas v Lithuania* no 41288/15 (14 January 2020) §117 ("psychological well-being and dignity"); *Hudorovic et al v Slovenia* nos 24816/14 and 25140/14 (10 March 2020) §§112-116 ("living conditions", "health and human dignity"); *Bensaid v United Kingdom* no 44599/98 (6 February 2001) §47 ("mental health").
[233] *Çiçek et al v Turkey* no. 44837/07 (4 February 2020) §22. See also: *Ivan Atanasov v Bulgaria* no 12853/03 (2 December 2010) §§66, 75; *Pavlov et al v Russia* no 31612/09 (11 October 2022) §61.
[234] *Çiçek et al v Turkey* no. 44837/07 (4 February 2020) §29; *Fadeyeva v* Russia no 55723/00 (9 June 2005) §§68, 70; *Ivan Atanasov v Bulgaria* no 12853/03 (2 December 2010) §§66, 75.
[235] *Fadeyeva v Russia* no 55723/00 (9 June 2005) §69; *Dubetska et al v Ukraine* no 30499/03 (10 February 2011) §105; *Cordella et al v Italy* nos 54414/13 and 54264/15 (24 January 2019) §157; *Ivan Atanasov v Bulgaria* no 12853/03 (2 December 2010) §§66, 75; *Pavlov et al v Russia* no 31612/09 (11 October 2022) §61.
[236] *López Ostra v Spain* no 16798/90 (9 December 1994) §51; *Jugheli et al v Georgia* no 38342/05 (13 July 2017) §§62-63, 71; *Di Sarno et al v Italy* no 30765/08 (10 January 2012) §108; *Pavlov et al v Russia* no 31612/09 (11 October 2022) §§61, 69.

interference.[237] The science is unequivocal that climate change has increased and will continue to increase the frequency and intensity of heatwaves, forest fires and air pollution in the Applicants' localities.[238] Further:

a. The Applicants are not required to establish that the environmental pollution causes "quantifiable harm".[239] The Applicants have provided evidence from which a presumption can be drawn that they have and will "inevitably be made…more vulnerable" to the widespread risk of climate impacts in their localities.[240]
b. The weight to be placed on proximity to the source of pollution depends on the circumstances of the case.[241] It is immaterial that the source of pollution may not be proximate to the Applicants' homes given that all global emissions stand in an equal causal relationship to the climate impacts on the Applicants.[242]
c. It is established that adverse effects can relate to "potential risks" in the future.[243] In the circumstances of the Application requiring an immediate causal link would fail to have regard to the cumulative relationship between GHG emissions and climate impacts, and the long-term threats posed by climate change.[244]
d. It is the link between climate change and the current/potential impacts upon the Applicants' rights that is relevant, rather than attribution to the RS (§4*ff*). Alternatively, the RS acts/omissions have materially contributed to the risk of the climate impacts, and that is sufficient to meet any causal threshold under the Convention where multiple wrongdoers have contributed to an indivisible injury.[245]

84. If Art. 8 was not applicable on account of a requirement of proximity, imminence, or strict causation, "the positive obligation on the State to take reasonable and appropriate

[237] See further: AO §§403-404.
[238] Facts §§13-17.
[239] *Fadeyeva v Russia* no 55723/00 (9 June 2005) §88; and see *Cordella et al v Italy* nos 54414/13 and 54264/15 (24 January 2019) §105; *Dubetska et al v Ukraine* no 30499/03 (10 February 2011) §§106, 111.
[240] Facts §§13-18. This is analogous to cases where there was a "*crisis*" or a situation of widespread environmental risk for a segment of the population within which the applicants fall: *Di Sarno et al v Italy* no 30765/08 (10 January 2012) §108; *Cordella et al v Italy* nos 54414/13 and 54264/15 (24 January 2019) §§102-109. See also: *Jugheli et al v Georgia* no 38342/05 (13 July 2017) §§63, 71; *Pavlov et al v Russia* no 31612/09 (11 October 2022) §§68-70.
[241] *Pavlov et al v Russia* no 31612/09 (11 October 2022) §§63-66. Also: *Okyay et al v Turkey* no 36220/97 (12 October 2005) §§61-69. Compare to *Ivan Atanasov v Bulgaria* no 12853/03 (2 December 2010) §76.
[242] See §83(b).
[243] *Hardy and Maile v United Kingdom* no 31965/07 (9 July 2012) §§190-192; *Hudorovic et al v Slovenia* nos 24816/14 and 25140/14 (10 March 2020) §113. Compare to *Ivan Atanasov v Bulgaria* no 12853/03 (2 December 2010) §76.
[244] Facts §§ 5 and 9.
[245] AO §564. By analogy to the causation tests applied in *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2002] 3 WLR 89, §9, Principle 10 of Guiding Principles on Shared Responsibility in International Law, §6 of the Commentary; *Summers v Tice*, 33 Cal 2d 80 (1948), pp 85–86; see also *D. Earnshaw and Others (Great Britain) v United States (Zafiro Case)*, Award of 30 November 1925, (2006) RIAA Vol VI 160, p 164.

measures to secure the applicant's rights under [Art. 8(1)] would be set at naught" in the climate context.[246]

85. Second, the current and potential future **impacts of climate change on the Applicants' physical and psychological well-being, living conditions and personal development are sufficient to cross the threshold of minimum severity**:[247]

a. The Applicants have already experienced serious climate impacts.[248]

b. Martim, Catarina, Sofia and Andre suffer from health conditions that are sensitive to air pollution and allergens, which will increase with global warming.[249]

c. The Applicants suffer from mental health impacts (i.e. climate anxiety and distress) as a result of extreme weather events they have been and will continue to be exposed to with increasing severity and frequency as a result of climate change.[250]

d. The severity of the impacts and the "potential risks" will increase significantly with devastating consequences if the LTTG of 1.5℃ is exceeded.[251] A requirement that the Applicants establish short-term health risks would fail to have regard to the long-term and intensifying nature of the risks climate change poses to their rights if immediate action is not taken.[252]

B. Article 2 ECHR

86. As to Art. 2, the starting point is that the positive obligation to "take appropriate steps to safeguard lives" will be applicable "in the context of any activity, whether public or not, in which the right to life may be at stake".[253] The right to life may be at stake in the absence of death or serious injury, and in relation to risks that materialise in the longer term.[254]

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[246] *Taşkin et al v Turkey* no 46117/99 (10 November 2004) §113.

[247] By analogy, see *Billy et al v Australia* (2022) Communication No. 3624/2019, §8.12. These exceed environmental nuisances such as noise, smells and fumes that have previously met the severity threshold (see: *Hatton et al v United Kingdom* no 36022/97 [GC] (8 July 2003) (noise); *López Ostra v Spain* no 16798/90 (9 December 1994) (smells/fumes); *Giacomelli v Italy* no 59909/00 (26 March 2007) (fumes)).

[248] Facts §§14, 16-18.

[249] Facts §17.

[250] Facts §18.

[251] Facts §11.

[252] Compare to *Ivan Atanasov v Bulgaria* no 12853/03 (2 December 2010) §76. See: *The State of the Netherlands v Urgenda Foundation*, ECLI:NL:HR:2019:2006 (Supreme Court of the Netherlands) (20 December 2019) §§5.2.2, 5.6.2.

[253] *Centre for Legal Resources on Behalf of Valentin Câmpeanu v Romania* no 47848/08 (17 July 2014) §130; *Brincat et al v Malta* nos 60908/11 et al (24 October 2014) §§79-80.

[254] *Öneryildiz v Turkey* no 48939/99 (30 November 2004) §§98–101; *Budayeva et al v Russia* nos 15339/02 et al (20 March 2008) §§147–158; *Kolyadenko et al v Russia* nos 17423/05 et al (28 February 2012) §§151, 174-180. There are parallels to the UNHRC's approach, see: *Billy et al v Australia* (2022) Communication No. 3624/2019, §8.3.

87. The Applicants need not establish a "real and immediate risk" to life. Whether that test applies depends on the context of the case and the nature of the duties relied upon:[255] (i) the real and immediate risk test only applies to the duty to take "preventive operational measures" in relation to specific threats to life such as use of force from non-State actors and self-harm;[256] (ii) the real and immediate risk test does not apply *vis-à-vis* the broader duties to put in place a legislative and administrative framework, regulations and/or an appropriate set of preventive measures to protect people's lives.[257] Accordingly, the test has not generally been applied in the environmental context and would be particularly inapt where what is at stake are broader issues of regulation.[258]

88. Further, while the dangerous nature of an activity will place a "special emphasis…on regulations geared to the special features of the activity", this is a matter of emphasis regarding the content of substantive obligations rather than a criterion for applicability.[259]

89. Against that background, the **current and future climate impacts the Applicants face have resulted in a situation where the right to life is at stake**.[260] Climate change increases risks of heat-related mortality and exposure to life threatening weather events.[261] The Applicants, on account of their location, are currently exposed to "a threat to their physical integrity" through climate-related wildfires.[262] Further, owing to their age, they will be exposed to the threat of wildfires and heat-related mortality with increasing severity and frequency through their lifetimes, particularly if the LTTG of 1.5℃ is exceeded.

90. Alternatively, **the relevant climate impacts constitute real and immediate risk to the Applicants' lives** noting: (i) the dangerous wildfires that affect the Applicants' localities; (ii) the heat-related threats to life are immediate in the sense that their causes are imminent and such threats will likely become irreversible unless sufficient action is taken immediately. Owing to these special circumstances in the climate context,

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[255] AO §§367, 374, 379-382.
[256] *Osman v United Kingdom* no 23452/94 (28 October 1998) §§115-116; *Fernandes de Oliveira v Portugal* no 78103/14 (31 January 2019) §110; *Nicolae Virgiliu Tanase v Romania* [GC] no 41720/13 (25 June 2019) §136. The Applicants note that a nuanced version of the test applies to the autonomous investigative duty under Article 2 that is not directly relevant to the Application (see: *Nicolae Virgiliu Tanase v Romania* [GC] no 41720/13 (25 June 2019) §§138-143).
[257] *Nicolae Virgiliu Tanase v Romania* [GC] no 41720/13 (25 June 2019) §135.
[258] *Öneryildiz v Turkey* no 48939/99 (30 November 2004) §71; *Budayeva et al v Russia* nos 15339/02 et al (20 March 2008) §§129-131.
[259] AO §§375-378. *Brincat et al v Malta* nos 60908/11 et al (24 October 2014) §80; *Öneryildiz v Turkey* no 48939/99 (30 November 2004) §90; *Budayeva et al v Russia* nos 15339/02 et al (20 March 2008) §§130, 132.
[260] See the UNHRC in *Billy et al v Australia* (2022) Communication No. 3624/2019, §§8.3, 8.7.
[261] Facts §§6-7, 11.
[262] Compare to *Budayeva et al v Russia* nos 15339/02 et al (20 March 2008) §146.

"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".[263] For the reasons outlined at §§13-18 above, the threat to life is sufficiently direct.

C. Article 3 ECHR

91. Art. 3 imposes a positive obligation on States to act to protect individuals from ill-treatment.[264] Ill-treatment must attain a "minimum level of severity" to engage Art. 3, the level of which is "*relative*" and intention is not necessarily required.[265]

92. Whilst it is accepted that the threshold under Art. 3 is higher than Art. 8, the gravity of the climate impacts, taken cumulatively,[266] is sufficient to engage Art. 3 for the following reasons:

a. The "feelings of fear, anxiety and powerlessness"[267] that the Applicants endure as a result of the present and intensifying risks of climate impacts in their localities and the visceral threat of wildfires that looms over their daily lives in hotter months;[268]
b. The intensifying risks of physical harm posed by the climate change;[269] and
c. The Applicants' vulnerability as young people, the "official indifference" from the RSs to take sufficient action to mitigate the climate harms, and the situation of "prolonged uncertainty" and hopelessness this has created.[270] Together, this causes the Applicants "moral injury" as a result of knowing governments are failing to protect them from the threats of climate change.[271]

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263 *The State of the Netherlands v Urgenda Foundation*, ECLI:NL:HR:2019:2006 (Supreme Court of the Netherlands) (20 December 2019), §5.2.2 (see also §5.6.2).
264 *Nicolae Virgiliu Tanase v Romania* [GC] no 41720/13 (25 June 2019) §115.
265 ibid §§116-123. While it is accepted intention is often a significant factor, the absence of intention is not decisive on the facts of the Application for the reasons provided in this section.
266 *Piechowicz v Poland* no 20071/07 (17 April 2012) §163 (on cumulative approach). Contrast to *Brincat et al v Malta* nos 60908/11 et al (24 October 2014) (§§130-131) and *López Ostra v Spain* no 16798/90 (9 December 1994) (§60) where comparatively less grave interferences where concerned.
267 Compare to *Volodina v Russia* No 41261/17 (9 July 2019) §75. Also: *Rodić v Bosnia and Herzegovina* no 22893/05 (27 May 2008) §73 ("constant mental anxiety caused by the threat of physical violence"); *El-Masri v Former Yugoslav Republic of Macedonia* no 39630/09 (13 December 2012) §202 ("permanent state of anxiety"); *Nicolae Virgiliu Tanase v Romania* [GC] no 41720/13 (25 June 2019) §118.
268 Facts §16.
269 This includes the current risk of being caught with their families in wildfires, the growing restrictions on their day-to-day activities caused by extreme heat, and the intensifying heat-related risks to their health throughout their lifetimes (see Facts §§14-17). Compare to harmful effects of passive smoking in detention: *Florea v Romania* no 37186/03 (14 September 2010) §§60-61; *Elefteriadis v Romania* no 38427/05 (25 January 2011) §§49-55.
270 *M.S.S. v Belgium and Greece* no 30696/09 (21 January 2011) §§232, 263 ("feelings of fear, anguish or inferiority capable of inducing desperation" combined with "prolonged uncertainty"); *Bouyid v Belgium* no 23380/09 (28 September 2015) §109 (vulnerability with respect to minors); *Budina v Russia* no 45603/05 (18 June 2009) §3 ("official indifference"); *Vinter et al v United Kingdom* nos 66069/09 et al (9 July 2013) p 54 (hope).
271 Facts §18.

D. Article 14 ECHR

93. Art. 14 is applicable: (i) the Application falls within the ambit of Arts. 2, 3 and 8 (see above); and (ii) the Applicants, as "children and youth[s]", fall under the protected "other status" of age, which includes cohorts of individuals of a similar age.[272]

VII. MERITS: DUTIES UNDER THE CONVENTION

94. It is well-established that (i) those Arts. 2, 3 and 8 impose upon each RS duties within their jurisdiction to take reasonable and sufficient measures capable of protecting the right to life, the right to prevent the risk of inhuman/degrading treatment, and the right to respect for private life and home (ii) RSs are under a primary duty to put in place legislative and administrative frameworks for the effective deterrence against threats to the right to life, inhuman/degrading treatment and private life and home, including effective prevention of environmental damage[273] (which may include putting in place relevant environmental legislation)[274] (iii) each RS is required to take the steps that are "reasonable in the circumstances" to protect the Applicants' rights,[275] with the measures required to discharge the RSs' obligations varying in accordance with the activities concerned and the level of danger thereof.[276]

A. The Overriding Obligation to Regulate and Limit Emissions

95. In the present case, fulfilment of the obligations under Arts. 2, 3 and 8[277] requires each RS (i) to regulate and limit its emissions (ii) in a manner that is consistent with achieving the LTTG of 1.5°C ("**the overriding obligation ('the OO')**"), of which there is both

[272] *Schwizgebel v Switzerland* no 25762/07 (10 June 2010) §85.
[273] See *Tătar v Romania* no 67021/01 (27 January 2009) §88; *Greenpeace E.V. et al v Germany* no 18215/06 (12 May 2009); *Jugheli et al v Georgia* no 38342/05 (13 July 2017) §§75-76; *Budayeva et al v Russia* nos 15339/02 et al (20 March 2008) §129.
[274] *Kurşun v Turkey* no 22677/10 (30 October 2018) §115; *Jugheli et al v Georgia* no 38342/05 (13 July 2017) §75.
[275] Given the circumstances of this case, the Applicants maintain their position that the scope of the positive obligations under Arts. 2 and 3 requires each RS to do "everything within its power" for the protection of the Applicants' rights: AO §450 and see *Budayeva et al v Russia* nos 15339/02 et al (20 March 2008) §175.
[276] *Budayeva et al v Russia* nos 15339/02 et al (20 March 2008) §132. Also: *Öneryildiz v Turkey* no 48939/99 (30 November 2004) §90; *Tătar v Romania* no 67021/01 (27 January 2009) §88; *Kolyadenko et al v Russia* nos 17423/05 et al (28 February 2012) §158; *Mučibabić v Serbia* no 34661/07 (12 July 2016) §126; *Jugheli et al v Georgia* no 38342/05 (13 July 2017) §75.
[277] Once engaged, the scope of the positive obligations under these Articles in the present context "largely overlap" and the same principles apply in assessing compliance: see *Budayeva et al v Russia* nos 15339/02 et al (20 March 2008) §§133–136; *Öneryildiz v Turkey* no 48939/99 (30 November 2004) §§90, 107 and 160.

a substantive and procedural aspect.[278] Far from being "radical",[279] the OO is based on (i) indisputable facts and (ii) well-established principles (albeit applied to and reflecting the current existential crisis of climate change).

96. That there is a duty to regulate and limit their emissions under the Convention stems from the indisputable facts that: (i) anthropogenic climate change above a certain level will have catastrophic and irreversible consequences on the Applicants rights;[280] (ii) the impact of the current temperature increase of 1.1°C is already causing serious impacts on the Applicants' health and lives;[281] (iii) GHG emissions are the key determinant of temperature increases and the cause of such harms;[282] (iv) RSs' acts and omissions contribute to GHG emissions;[283] (v) mitigating the increase in temperature requires States to act to reduce GHG.[284]

97. The requirement that such regulation and limitation of emissions must be in a manner consistent with achieving the LTTG of 1.5 °C follows from the scientific consensus that, noting the effects of global warming even up to 1.5°C are severe, a LTTG restricting the global temperature rise to 1.5°C above pre-industrial levels is essential to avoid additional catastrophic and irreversible consequences.[285] Due to the severity of the consequences of failing to act in a manner inconsistent with achieving the LTTG of 1.5°C, such failure cannot strike a fair balance between the rights of the Applicants' and the RSs' interests. Such failure would necessarily entail a serious interference with the Applicants' rights. Regard must be had to this accepted factual basis when determining the scope of the obligations.[286]

98. The existence and content of the OO are further supported by and consistent with the following well-established principles.

99. The **principle of practical and effective protection**:[287] the OO must be interpreted in such a way as to ensure that (i) if it were to be implemented by all RSs, it would be

[278] See the RSs' acknowledgement that the Court has a role in environmental claims as regards both a procedural and substantive assessment (IRL2/§§231, 279-280; GBR2/§109; POL2/§33; FRA2/§62). In the circumstances of the present case, the Court's review extends to both a procedural and substantive assessment.
[279] Cf IRL2/§§232-233; POL2/§37; CZE2/§36. The UK recognises that "if there is any obligation, it is to take reasonable and appropriate measures to regulate and limit GHGs" (GBR2/§109, also §113).
[280] AO Part II(A)(c)-(e); see above Facts §§9-11 and 13-18.
[281] AO §§18 and 514(b); Facts above §§4 and 6 citing AR6 WG1 SPM (**Key Annex 1**) 4 §A.1.3.
[282] AO Part II(A)(b) and §514(c); Facts above §4 citing AR6 WG1 SPM 4 (**Key Annex 1**) §A.1.1.
[283] AO §514(d). See further §§111*ff* and 124*ff* below addressing emissions arising in four different contexts.
[284] AO §514(e); Facts §19 and 22.
[285] AO Part II(A)(c) and §516(a); Facts §§10-11 citing AR6 WG1 SPM (**Key Annex 1**) 15 §B.6; Facts §12 citing IPCC's and UNEP's findings in the "Sharm el-Sheikh Implementation Plan" adopted at COP27.
[286] *Broniowski v Poland* no 31443/96 (22 June 2004) §162; TPI by Climate Action Network Europe (6 May 2021) 5.
[287] Relevant to this principle is that "the Convention is a living instrument which […] must be interpreted in light of present-day conditions" (*Tyrer v United Kingdom* no 5856/72 (25 April 1978) §31), and the observation that it is "necessary to seek the interpretation [of the Convention obligations] that is most

consistent with achieving the LTTG of 1.5°C[288] (ii) the focus is on what the RSs must do by 2030 (given the imperative of deep and urgent reductions by that date)[289] (iii) it is not solely territorial emissions that are relevant in this context.[290]

100. As to **Question 6.3.1**, the RSs have a **narrow margin of appreciation (MoA)**, with discretion as to the choice of means to satisfy the OO (provided those means are feasible).[291] It is acknowledged that the OO implicates policies of a broad nature and involves a degree of complexity, but any effect such factors may have in broadening the RSs MoA are outweighed by the following factors that should be taken into account:

a. Rights at issue:[292] the rights engaged are some of the most fundamental provisions in the Convention and must be strictly construed.[293]

b. Nature, severity, and duration of the interference:[294] there is an impending grave and serious (indeed irreversible) interference with the Applicants' rights.[295] The vulnerability of the Applicants and the duration of the interferences only adds to the severity of the interference with their rights.[296]

c. Competing interests of the RSs:[297] these pale in comparison to the severity of the interference with the Applicants' rights,[298] noting (i) the long-term consequences of failing to address climate change will outweigh the costs of acting to avoid climate change, in particular if RSs take immediate action to implement deep emissions reductions this decade;[299] (ii) RSs communities will benefit from remedial action, and share an overriding interest in avoiding the worst impacts of climate change.

d. Burden on the RSs:[300] it is notable that (i) the RSs have made commitments to limiting the global temperature rise to 1.5°C above pre-industrial levels[301] (ii) the

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appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties" (*Wemhoff v Germany* no 2122/64 (27 June 1968) §8).

288 AO §§520 and 574(a) including cases cited therein.

289 AO §521; Facts §22.

290 See §124 below.

291 AO Part VII(A)(d) and Part VII (B), §§523-528.

292 *Buckley v United Kingdom* no 20348/92 (25 September 1996) §§74 and 76; *Vavřička et al v Czech Republic* no 47621/13 et al (8 April 2021) §273. See also *Hudorovič et al v Slovenia* nos 24816/14 and 25140/14 (7 September 2020) §142.

293 *Budayeva et al v Russia* nos 15339/02 et al (20 March 2008) §175.

294 *Hatton et al v United Kingdom* no 36022/97 (8 July 2003) §123. Also: *Moreno Gómez v Spain* no 4143/02 (16 November 2004) §60; *Budayeva et al v Russia* nos 15339/02 et al (20 March 2008) §175; *Apanasewicz v Poland* no 6854/07 (3 May 2011) §98; *Jugheli et al v Georgia* no 38342/05 (13 July 2017) §77; *Yevgeniy Dmitriyev v Russia* no 17840/06 (1 December 2020) §55.

295 Facts §§13-18.

296 Facts §§7-8, 13-18.

297 *Ledyayeva et al v Russia* nos 53157/99 et al (26 March 2007) §101. Also: *Dubetska et al v Ukraine* no 30499/03 (10 February 2011) §155.

298 Facts §§13-18.

299 See AO §§34(g)-35; AO fn 1028.

300 *Öneryildiz v Turkey* no 48939/99 (30 November 2004) §107. Also: *Budayeva et al v Russia* nos 15339/02 et al (20 March 2008) §135; *Kolyadenko et al v Russia* nos 17423/05 et al (28 February 2012) §§160 and 183.

301 Facts §12.

RSs have discretion as to the feasible choice of means in achieving the LTTG. Further, there is a presumption (unrebutted by the RSs) that taking measures to regulate and limit emissions consistent with the LTTG of 1.5°C would not impose a disproportionate or impossible burden on the State.[302]

e. State's knowledge and/or the foreseeability of environmental concerns:[303] the RSs had knowledge of (i) climate change (occurrence, causes and impacts) since latest 1992 (adoption of the UNFCCC) (ii) the catastrophic consequences of global warming beyond the LTTG of 1.5°C since latest 2006 (Copenhagen Accord). The harm to persons such as the Applicants of exceeding the LTTG was foreseeable.

f. Quality of decision-making processes:[304] these have been inadequate with respect to RSs measures on climate change (See §§163-164, 171, 173 and 175).

g. Availability and extent to which mitigation measures have been taken in response to the environmental concerns:[305] mitigation measures available to prevent or reduce the interference with the Applicants' rights have yet to be taken.

h. Subsidiary principle:[306] the Court is well-placed to assess the broader picture of emission reductions required noting (i) each national court can only assess the individual State's conduct, and the question of climate change "is a supra-national one as it knows no respect for the boundaries of national sovereignty"[307]; (ii) the current trajectory of global warming is a consequence of States acting in their short-term, individual (cf longer-term, collective) self-interest.[308] In the context of this case, the Court's role is not limited to considering if there was a "manifest error of appreciation" by the national authorities.[309]

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[302] See AO §526(b).

[303] *Öneryildiz v Turkey* no 48939/99 (30 November 2004) §101. Also: *Budayeva et al v Russia* nos 15339/02 et al (20 March 2008) §157; *Tătar v Romania* no 67021/01 (27 January 2009) §121; *Băcilă v Romania* no 19234/04 (4 October 2010) §68; *Dubetska et al v Ukraine* no 30499/03 (10 February 2011) §108; *Di Sarno et al v Italy* no 30765/08 (10 January 2012) §112; *Kolyadenko et al v Russia* nos 17423/05 et al (28 February 2012) §181; *Brincat et al v Malta* nos 6090811 et al (24 July 2014) §110.

[304] *Giacomelli v Italy* no 59909/00 (2 November 2006) §84. See also: *Buckley v United Kingdom* no 20348/92 (25 September 1996) §76; *Budayeva et al v Russia* nos 15339/02 et al (20 March 2008) §136; *Grimkovskaya v Ukraine* no 38182/03 (21 July 2011) §72; *Kolyadenko et al v Russia* nos 17423/05 et al (28 February 2012) §161; *Hatton et al v United Kingdom* no 36022/97 (8 July 2003) §123.

[305] *Hatton et al v United Kingdom* no 36022/97 (8 July 2003) §127. Also: *Powell and Rayner v United Kingdom* no 9310/81 (21 February 1990) §§43-44; *Fadeyeva v Russia* no 55723/00 (9 June 2005) §133; *Ledyayeva et al v Russia* nos 53157/99 et al (26 March 2007) §110; *Budayeva et al v Russia* nos 15339/02 et al (20 March 2008) §137; *Dubetska et al v Ukraine* no 30499/03 (10 February 2011) §§122 and 154; *Zammit Maempel v Malta* no 24202/10 (20 November 2011) §69.

[306] *Hatton et al v United Kingdom* no 36022/97 (8 July 2003) §97.

[307] Dissenting Opinion of Judges Costa, Ress, Türmen, Zupančič and Steiner in *Hatton et al v United Kingdom* no 36022/97 [GC] (8 July 2003). See also §70 above noting the need for guidance for domestic courts.

[308] AO §520 citing CA Mitigation Report (**Key Annex 7**) 32- 33 and the citations therein.

[309] As to *Greenpeace E.V. et al v Germany* no 18215/06 (12 May 2009) cited by GBR2/§109, this concerned the application of the MoA on the facts of that case.

i. Compatibility with relevant elements of international law:[310] the existence and content of the OO is consistent with and/or required by the relevant elements of international law (as summarised below).

101. Turning to **Question 6.3.2** and the **relevance of instruments of international law,**[311] it is well-established that (i) reflecting the "living" nature of the Convention, the Court "can and must take into account [relevant] elements of international law"[312] (ii) it does so by seeking a harmonious interpretation of the Convention and other relevant instruments of international law[313] (iii) a specific instrument may itself reflect an "emerging consensus"[314] and/or reflect a broader principle embodied in various instruments and/or "evolving standards in the field of human rights"[315] (iv) States cannot dilute the effectiveness of the Convention rights by relying upon less onerous obligations which they have agreed to pursuant to separate treaties.[316]

102. As to the **UNFCCC and the PA**:[317]

a. Their core principles and objectives support the existence and content of the OO, notably (i) the objective of limiting temperature rise to 1.5°C (PA, Art. (2)(1)(a))[318] (ii) by reference to the precautionary approach[319] (UNFCCC, Art. 3(2)) and the principle of sustainable development[320] (UNFCCC, Art. 3(4)) (iii) by placing general mitigation and emissions reduction obligations upon States (UNFCCC, Art. 4(2); PA, Art. 4) (iv) noting the imperative of rapid reductions (UNFCCC, PA, Art. 4(1))

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[310] *Tătar v Romania* no 67021/01 (27 January 2009) §§109, 118 and 120; *Taşkın et al v Turkey* no 46117/99 (30 March 2005) §§99 and 119; *Demir and Baykara v Turkey* no 34503/97 (12 November 2008) §§76-86.
[311] These observations are relevant to the introductory paragraph of Question 6.3.2.
[312] Emphasis added. AO §463, citing *Demir and Baykara v Turkey* no 34503/97 (12 November 2008) §§76-86; *Bayatyan v Armenia* no 23459/03 (7 July 2011) §102.
[313] *Demir and Baykara v Turkey* no 34503/97 (12 November 2008) §§67 and 68; *Case of X et al v Bulgaria* no 22457/16 (2 February 2021) §6.
[314] *Demir and Baykara v Turkey*, cited above, §85. Examples of such specific instruments are the UNFCCC and PA referred to below.
[315] European Court of Human Rights, Background Document for the Judicial Seminar 2020: The Convention as a Living Instrument at 70 (Judicial Seminar 2020).
[316] AO §464.
[317] These observations address the first and second bullet points of Question 6.3.2.
[318] Cf GBR2/§99; FRA2/§55; GRC2/§24 which disregard (i) the plain terms of Art. 2(1)(a) ("pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels") and (ii) scientific consensus (see Facts §§10-12).
[319] It is not accepted that the relevance of this well-established principle is limited to precluding justifications for delay in taking cost-effective measures on the basis of scientific uncertainty (IRL2/§299; GBR2/§110; CZE2/§29). In the present case, the precautionary principle requires that the RS (a) have regard to the risks and consequences associated with overshooting 1.5°C, resulting in irreversible impacts for the Applicants (and humanity at large) (b) do not place disproportionate reliance on technologies that do not yet exist/largescale deployment is infeasible (c) provide for rapid, deep and sustained reductions in emissions (noting avoiding overshoot requires accelerated action in this critical decade): see AO §§472-475 and 532. Accordingly, the precautionary principle has been applied in several other cases regarding climate change: *Neubauer & Ors v Germany*; *The State of the Netherlands v Urgenda Foundation*, ECLI:NL:HR:2019:2006 (Supreme Court of the Netherlands) (20 December 2019), §§5.7.3, 7.2.5, 7.2.10; *Billy et al v Australia* (2022) Communication No. 3624/2019, Annex I §§14, 16; Annex III §4.
[320] As to the principle of sustainable development, see further AO §§476-481 and 533.

and (v) by requiring measures reflecting a State's "highest possible ambition" and recognising the role of CBDR, with developed countries taking the lead (UNFCC, Arts. 3(1), 4(2)(a) and 4(3); PA, Arts. 2(2) and 4(4)).

b. While the UNFCCC and PA do not expressly provide for the OO, the obligations under the UNFCCC and PA do not and cannot exhaust or dilute the RSs' obligations under the Convention or preclude an interpretation of their obligations in a manner that is practical and effective.[321] If the content of the RSs' obligations were interpreted to require no more than the obligations in the UNFCCC and PA, it would render the Applicants' Convention rights theoretical and illusory.[322]

c. The Applicants do not seek to "disregard"[323] or "displace"[324] the PA, or ask the Court to "monitor [its] compliance".[325] Rather, as an element of international law, it is properly taken into account in informing the existence and content of the OO, while not placing a ceiling with respect to the delimitation of the RSs' obligations.

103. The preamble of the PA also expressly refers to consideration of States' obligations as to the **rights of children**. The Court has held that in cases bearing upon children the Convention obligations must be interpreted taking into account Art. 3(1)[326] of the United Nations Convention on the Rights of the Child (UNCRC).[327] The rights of the child are of clear relevance in the context of global warming given their unique vulnerability: (i) decisions affecting them will have a longer-term and more significant impact on their interests relative to adults whose interests are also at stake; and (ii) children have less capacity to shape policy and determine events relative to adults.[328] The rights and best interests of the child thus plainly support the existence of the OO.

104. As to the **2001 ILC Draft Articles**,[329] they reflect the prevention and no harm principles[330] (noting the indisputable and catastrophic harm that would result if States

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[321] AO §§465, 471 and 531(a).

[322] In this regard, it is recalled that the neither the UNFCCC nor the PA set mitigation targets for the State Parties, nor do they provide a mechanism for evaluating individual States' compliance with the LTTG under Art. 2(1) PA, with no mechanism (beyond reporting) for enforcing compliance with States' own NDCs.

[323] IRL2/§294.

[324] IRL2/§292; FIN2/§§243-247.

[325] FRA2/§57.

[326] Art. 3(1) provides "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". See further AO §§486-487.

[327] *Neulinger v Switzerland* no 41615/07 (6 July 2010) §§131–132. Also: *Khan v France* no. 12267/16 (28 February 2019) §12; *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* no 13178/03 (12 October 2006). See further AO §485.

[328] AO §§484 and 488-489.

[329] International Law Commission, Draft articles on Prevention of Transboundary Harm from Hazardous Activities, UN Doc A/56/10 (2001) ("2001 ILC Draft Articles") 148, 153. These observations address the third bullet point of Question 6.3.2.

[330] See AO §§490-493 and 535, citing the 2001 ILC Draft Articles at fn 946, 953, 1053 and 1054, and also *inter alia* the preamble of the UNFCCC and Principle 2 of the 1992 Rio Declaration. See further *Pulp Mills*

fail to act now to prevent the LTTG exceeding 1.5°C). Consistent with the fact that an important aspect of the prevention principle is the State's duty of due diligence with respect to the environment,[331] the core "statement of principle" enshrined in Art. 3 of the 2001 ILC Draft Articles provides that States "shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof", i.e. they are mandated to take measures "appropriate and proportional" to the magnitude of the risks of transboundary harm posed.[332] The OO is entirely consistent with that core statement.[333]

105. As to the **UNGA Resolution A/76/L.75** of 26 July 2022,[334] this post-dated the AO but relates to the right to a healthy environment referred to therein.[335] The Resolution (passed with 161 States voting in favour and zero votes against[336]) expressly recognises "the right to a clean, healthy and sustainable environment as a human right" (Art. 1), that this right "is related to other rights and existing international law" (Art. 2) and observing that climate change constitutes one "of the most pressing and serious threats to the ability of present and future generations to effectively enjoy all human rights" (preamble). It is recalled that (i) there are a plethora of other international law instruments identifying a right to a healthy environment,[337] including on the European plane (see the Aarhus Convention of 1998[338]) and the Council of the European Parliamentary Assembly resolution of 2021[339] (ii) the right is recognised in all but one of the domestic laws of the RSs[340] (iii) UN treaty bodies and courts under other regional human rights instruments have referred to the developing international law right to a healthy environment as relevant to the interpretation of obligations before it, including this Court and the European Committee on Social Rights.[341] Thus, (i) there is, at the very least, an emerging consensus on the right to a healthy environment and (ii) the

on the River Uruguay (Argentina v Uruguay) (Judgment) [2010] ICJ Rep 14, §101 and *Tătar v Romania* no 67021/01 (27 January 2009) §111.

331 See 2001 ILC Draft Articles at 154 and *Responsibilities and Obligations of States with respect to Activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, 10, §§117–120.

332 2001 ILC Draft Articles at 154 (§11).

333 See AO §535(c). Also AO §§449(c), 492(a) and 514(f).

334 These observations are relevant to the fifth bullet point of Question 6.3.2.

335 AO §§494- 501 and 536.

336 UN General Assembly, Seventy-sixth session, 97th meeting, UN Doc GA/12437 (28 July 2022).

337 AO §§495, 497-499.

338 Cited at AO §497(a).

339 Council of Europe, "Combating inequalities in the right to a safe, healthy and clean environment" (29 September 2021) Resolution 2400 (2021), cited at AO §497(c).

340 AO §495 and see sources cited in AO fn 958.

341 AO §497(b) citing *International Federation for Human Rights (FIDH) v Greece*, Complaint No. 72/2011 (ECSR, 23 January 2013) §49*ff*; *Marangopoulos Foundation for Human Rights (MFHR) v Greece*, Complaint No. 30/2005 (ECSR, 6 December 2006) §195

Court must take the right to a healthy environment into account when interpreting the Convention rights.[342]

106. Recognising the close connection between the right to a healthy environment and other human rights, the IACtHR has interpreted the right to life and personal integrity in Arts. 4 and 5 of the American Convention on Human Rights (ACHR) as containing duties to (i) take appropriate and proportionate measures to prevent significant damage to the environment within their control, (ii) regulate, supervise and control activities to reduce the risk of such damage, (iii) require and conduct environmental impact studies, and (iv) mitigate environmental damage.[343] This is entirely consistent with the existence and content of the OO.

107. As to "**the European Climate Law**",[344] it is consistent with and supports the OO, notably recognising (i) the appropriate LTTG of 1.5℃[345] (ii) the imperative that States significantly reduce emissions, with deep and rapid reduction required by 2030[346] and (iii) the relevance of the precautionary principle[347] and the 'do no harm principle'[348] in guiding States in achieving that imperative.[349] As to the specific target of domestic reduction of net emissions by at least 55% compared to 1990 levels by 2030, (i) Member States have discretion to go beyond what is required by EU law regarding emissions reductions[350] (ii) it is left to the Member State's discretion regarding how to implement the target reduction in emissions. For the avoidance of doubt, the 'Bosphorus presumption' (which it is noted is no longer pursued by the RS[351]) is not engaged.[352]

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342 For a similar understanding, see *Pavlov et al v Russia no 31612/09 (11 October 2022), Concurring Opinion of Judge Serghides*.

343 AO §500 citing *State Obligations in relation to the Environment in the context of the Protection and Guarantee of the Rights to Life and to Personal Integrity*, Advisory Opinion OC-23/17, Inter-American Court of Human Rights Series A No 23 (15 November 2017). See also *Indigenous Communities of the Lhaka Honhat [Our Land] Association v Argentina*, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 400 (6 February 2020). See also: AO §498(a) citing UN Human Rights Committee, "General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life" (30 October 2018) UN Doc CCPR/C/GC/36, §26.

344 Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021. These observations address the fourth bullet point of Question 6.3.2.

345 Art. 1 Regulation (EU) 2021/1119. See Preamble §(3) noting that SR1.5 "confirms that greenhouse gas emissions need to be urgently reduced, and that climate change needs to be limited to 1,5 °C, in particular to reduce the likelihood of extreme weather events and of reaching tipping points".

346 Art. 1 and 4(1). See also Preamble §(1) "The existential threat posed by climate change requires enhanced ambition and increased climate action by the Union and the Member States".

347 Preamble §(9) refers to the "precautionary principle established in the Treaty on the Functioning of the European Union", which was noted in the AO §473.

348 Preamble §(9).

349 The Preamble further states that strong public engagement should be both encouraged and facilitated at all levels in an inclusive and accessible process (Preamble §(38)).

350 As to the inadequacy of the 55% target see AO EU§§3-33.

351 Cf to fleeting reference at GRC2/§32.

352 See AO §§546-554.

108. In addition to the substantive aspect of the OO (to regulate and limit emissions in a manner that is consistent with achieving the LTTG of 1.5°C), there is a **procedural aspect of the OO**:

a. It is well-established that regarding environmental issues "the decision-making process leading to measures of interference must be fair and such as to afford due respect for the interests of the individual as safeguarded by [Art.] 8".[353] The same applies *mutatis mutandis* to Arts. 2 and 3.[354]

b. Here, this procedural aspect concerns the scope of the RSs assessments in (i) assessing the extent of their individual contributions to climate change and the level of emissions reductions required to be achieved globally to achieve the LTTG of 1.5°C (ii) assessing the level of emissions reductions that are appropriate for them to achieve and (iii) provision of information to the public.[355]

c. The existence and content of this procedural aspect to the OO is supported by the (i) the principle of practical and effective rights[356] (noting States must be properly informed to ensure consistency with the LTTG 1.5C) (ii) the relevant elements of international law, including (i) UNFCCC Art. 4(1) and the European Climate Law Arts. 2(2) and 5(4) requiring that States take climate change considerations into account in their policies and actions[357] (ii) the precautionary approach, pursuant to which RSs must conduct detailed assessments of the compliance of their policies with the LTTG of 1.5°C before enacting and continuing with such policies[358] (iii) the requirement under the principle of sustainable development and the duty to prevent harm that States undertake environmental impact assessments where there is a risk that their activities will cause significant adverse transboundary harm[359] (iv) RSs' procedural obligations under Aarhus Convention Art. 1, the European Social Charter Art.11, ICCPR Art.6, and the ICESCR Arts. 11 and 12[360] (v) the duty to conduct environmental impact assessments under ACHR Arts. 4-5.[361]

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353 *Taşkın et al v Turkey* no 46117/99 (30 March 2005) §118; *Hatton et al v United Kingdom* no 36022/97 (8 July 2003) §104; *Giacomelli v Italy* no 59909/00 (2 November 2006) §82; *Dubetska et al v Ukraine* no 30499/03 (10 February 2011) §143; *Udovičić v Croatia* no 27310/09 (24 April 2014) §151.

354 See e.g. with respect to Art. 2, *Budayeva et al v Russia* nos 15339/02 et al (20 March 2008) §131.

355 AO §§452 and 539. See GBR2/§126 acknowledging that "If there is a procedural obligation, it is for States to base their climate change mitigation measures on appropriate investigations and studies enabling public participation". Also various interventions referring to relevant procedural obligations: AO fn 1057.

356 AO §540(a).

357 AO §540(c)(i).

358 AO §540(c)(ii).

359 AO §540(c)(iii), notably fn 1059 citing *Indus Waters Kishenganga Arbitration (Pakistan v India)*, Partial Award, 18 February 2013, (2013) 154 ILR 1, §§449–451*; Gabčíkovo-Nagymaros Project (Hungary/ Slovakia)* (Judgment) [1997] ICJ Rep 7, §140; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14, §204.

360 AO §540(c)(iv).

361 AO §540(c)(v), citing *State Obligations in relation to the Environment in the context of the Protection and Guarantee of the Rights to Life and to Personal Integrity,* Advisory Opinion OC-23/17, Inter-American Court of Human Rights Series A No 23 (15 November 2017).

d. As to the MoA,[362] the same factors as outlined at §100 above apply and reduce the RSs' margin of discretion to choice of feasible means.[363]

109. Turning to the contexts in which the RSs have breached the OO (relevant to Q**uestions 6, 6.1, 6.2, 6.4 and 7**), it is recalled that the individual responsibility of each RS is engaged by reference to (i) their obligations under the Convention (i.e. the OO) and (ii) the act(s) and/or omission(s) attributable to each RS that is in breach of the OO.[364] The Applicants do not need to establish that each RS (or the RSs jointly) has caused or can cause a trajectory of more than 1.5°C: the OO concerns conduct that is consistent with that LTTG.[365]

110. Developments in the interpretation of fundamental rights at the national level support the Applicants' case as to the interpretation of Arts. 2, 3 and 8 (see Q**uestion 6.3.3**). *Urgenda*[366] and *Neubauer*[367] confirmed the following present-day realities that must be taken into account given "the Convention is a living instrument which […] must be interpreted in light of present-day conditions":[368] (i) urgent action is needed to tackle climate change; (ii) climate change impacts significantly on the basic human rights of individuals; (iii) while no State alone can resolve climate change, there remains an obligation on each State to act.[369] As to the latter, the Supreme Court of the Netherlands observed that: "a country cannot escape its own share of the responsibility" by arguing that "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", but held that "[t]his 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".[370]

B. Territorial Emissions

111. As to the content of the OO with respect to territorial emissions, the RSs must regulate and limit emissions generated within their territories in a manner consistent with

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362 These observations are relevant to Question 6.3.1.
363 AO §540(b).
364 AO §§558-570, notably §§560-561, 565-566 and 568.
365 AO §§565-567.
366 *The State of the Netherlands v Urgenda Foundation*, ECLI:NL:HR:2019:2006 (Supreme Court of the Netherlands) (20 December 2019).
367 *Neubauer & Ors v Germany*.
368 *Tyrer v the United Kingdom* no 5856/72 (25 April 1978) §31.
369 "The fact that no state can resolve the problems of climate change on its own due to the global nature of the climate and global warming does not invalidate the national obligation to take climate action. Under this obligation, the state is compelled to engage in internationally oriented activities to tackle climate change at the global level and is required to promote climate action within the international framework": *Neubauer & Ors v Germany*, Headnote 2c.
370 *The State of the Netherlands v Urgenda Foundation*, ECLI:NL:HR:2019:2006 (Supreme Court of the Netherlands) (20 December 2019) 4-5.

achieving the LTTG of 1.5°C i.e. the RSs must have in place a legislative and administrative framework designed to ensure their territorial emissions are regulated and limited as above.

112. The **substantive aspect** of that obligation requires, at a minimum, that the RSs must:

a. Take domestic mitigation measures and, where necessary or appropriate, fund emissions reductions in other States that are consistent with the level of ambition on their fair share ranges necessary to achieve the LTTG of 1.5℃ if all States do the same (as per CAT Fair Share Targets; hereafter "**Limb 1**").

b. Take domestic mitigation measures alone that are consistent with the level of reductions that are feasible and reflect their "highest possible ambition" (as per, *inter alia*, the Domestic Pathways Assessments; hereafter "**Limb 2**").

c. Reduce their territorial emissions in a manner consistent with their domestic targets (hereafter "**Limb 3**").[371]

113. As to **Limb 1**, the emissions reductions required of individual RSs must be calculated in accordance with their respective fair shares of global emissions reductions.[372] The emission reductions required by individual States will differ according to their fair share of the reductions envisaged by the 1.5°C emissions pathways.[373] In light of the divergent levels of States' development, capacity to reduce emissions and historic levels of responsibility for climate change, the required contributions of individual States to emission reductions must differ and be allocated in a manner that is equitable.[374] Plainly, if the most developed States only reduced their emissions in line with global averages, there would be no realistic prospect of achieving the LTTG of 1.5℃ and such an interpretation of Arts. 2, 3 and 8 would render the Applicants' rights theoretical and illusory. This approach is supported by Arts. 3(1) and 4(2)(a) UNFCCC and Arts. 2(2), 4(3)-(4) PA which require emissions to be reduced on the basis of equity and for developed States to take the lead by enacting deeper and more rapid emissions reductions.[375] This approach is also consistent with the principle of sustainable development, requiring the equitable use of natural resources; as well as proportionality and the MoA, as the burden will be less onerous upon developed States which have

[371] AO §§574(a), 600.
[372] AO §§103-110 and §532(a)-(c); regarding negative emission technologies: AO §§111-113. the required contributions of individual States to emission reductions must be calculated on the basis of global emission pathways which provide for no or limited overshoot of the LTTG and which do not place a disproportionate reliance upon negative emission technologies.
[373] This is set out at §§23*ff* above and AO §§126*ff*.
[374] AO §§127-135, 574(c).
[375] AO §§128*ff*.

greater capacity to make emission reductions and whose competing interests will be of lesser weight.[376]

114. It is acknowledged that (i) there are different approaches to establishing the fair share of individual States (ii) there has been a failure by States to agree on a burden-sharing approach when it comes to emissions reductions, and (iii) the Convention obligations must not be interpreted in such a way as to impose a disproportionate burden upon the RS.[377] However, where there is ambiguity as to what constitutes an individual RS' fair share of the reductions required by the 1.5°C emissions pathways, this must be resolved in favour of the Applicants.[378] This is necessary to ensure that the Applicants' rights remain practical and effective, and is required by the precautionary and prevention principles, as well as being consistent with the concept of highest possible ambition as set out in Art. 4(3).[379]

115. Against that background, the CAT (addressed above §25) represents a suitable measure of the fair share of the RSs' necessary reductions in territorial emissions that can be relied upon by the Court and can be treated as indicative of the extent to which each RS is complying with the OO to limit territorial emissions in a manner consistent with achieving the LTTG of 1.5°C.[380] The Applicants note that:

a. The CAT Fair Share Assessments are based on a dataset of studies quantifying different approaches to fair share used by the IPCC. The CAT is rooted in the best available climate science and provides an evidentially robust basis for the Court's assessment.

b. The CAT fair share range for each State represents an aggregation of the different approaches which seek to define States' fair share of territorial emission reductions. The CAT does not decide which of the approaches is the best measure of a State's fair share; rather, it collates the different approaches and determines the level of ambition on a fair share range that is consistent with the 1.5°C target, and other levels of warming, if all other States pursue equivalent levels of ambition relative to their fair share ranges.

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[376] AO §§476-481, 533 and 547.

[377] See Facts above §23.

[378] AO §576. Cf GBR2/§119; FRA2/§59; GRC2/§27.

[379] AO §§472-475, 112, 468(b)(ii), 487, 500(e), 530(b), 532, 576, 588 and 670(c). Rajamani et al (**Key Annex 34**) 993, noting that these principles create "a strong pull towards more stringent targets within the range of fair shares". Arts. 3(1) and 4(2)(a) UNFCCC and Arts. 2(2), 4(3)-(4) PA support the requirement to pursue mitigation measures in line with fair share. Art. 4(4) requires developed states to "take the lead".

[380] CAT is only relied upon with respect to territorial emissions (as to the other forms of emissions, see further below). AO §§122, 136-144, 572.

c. The CAT does not therefore require the Court to decide that a single measure of fair share (e.g. equality per capita) is ethically superior to others.[381] On the other hand, relying upon the CAT disables the RSs from being permitted to choose a less stringent measure of their fair share to pursue, which would mean the LTTG of 1.5℃ necessarily could not be achieved.[382]

d. The CAT does not impose an impossible or disproportionate burden upon the RSs. It is noted that similar methodologies and other approaches to fair share envisage significantly greater reductions by the RSs, CAT having been criticised as being excessively lenient.[383] In any case, the emissions reductions envisaged by the CAT Fair Share Targets reflect the RSs' higher levels of capacity and development and, in the event that it is now impossible for the RSs to achieve the entirety of their fair shares domestically, they can be partially achieved in other States (see below).[384] In any case, the burden must be upon the RS to prove that they would be placed under a disproportionate or impossible burden in achieving their fair share of reductions.[385]

e. The CAT Fair Share Targets can be achieved through a combination of domestic emissions reductions and the funding of emissions reductions in other States through climate finance.[386] Whereas the Domestic Pathways Assessments set out the minimum level of domestic mitigations measures *alone* that the RS must take to comply with the OO, the level of emissions reductions in those pathways is insufficient for the RSs to achieve their Fair Share Targets by 2030.[387] To achieve this, the RS must either: (i) take further domestic mitigation measures; and/or (ii) provide sufficient levels of climate finance to fund emission reductions in other States in order to supplement their domestic mitigation measures and cover any shortfall between emissions reductions resulting from their domestic mitigation measures and the CAT Fair Share Target to achieve the LTTG. This approach is consistent with PA Art. 6 which permits voluntary cooperation, including the use of "internationally transferred mitigation outcomes" "to allow for higher ambition"

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381 Cf NLD2/§31; FRA/§59.

382 Facts §25. The CAT is thus compatible with the principles of effectiveness, harm prevention and precaution.

383 Facts §25 (fn 82) and §28.

384 AO §§582, 136-144.

385 AO §§582(e), 584, 588. In particular, if an RS avers that it is unable to achieve its Fair Share Target, the burden is on the RS to demonstrate (i) the highest possible ambition in terms of the level of mitigation which is feasible for it to achieve and (ii) that its inability to achieve its Fair Share Target is not as a result of its failure to have adopted steeper emissions reductions sooner. For example, see GBR2/§121.

386 AO §§135, 582(c), 586, 602(b)(iii).

387 AO §582(d); with the exception of TUR and UKR (though noting that the case is no longer being pursued against UKR) see generally AO §§143, 586, 595(b).

than what is possible through domestic mitigation measures.[388] Where a RS funds emission reductions in other States towards the achievement of their Fair Share Targets, the burden is on that individual RS to demonstrate the level of emission reductions that have resulted from their use of climate finance, as such facts lie wholly or primarily within that RS' knowledge.[389]

116. It is within the RSs' MoA to decide what measures to take to reduce their territorial emissions and, subject to Limbs 2 and 3, the mix of domestic mitigation measures and climate finance to achieve their Fair Share Targets.[390] Beyond that choice of means, the Applicants' interests in requiring the RSs to pursue mitigation measures compatible with the LTTG of 1.5°C far outweighs any competing interests due to, *inter alia*, the severe consequences of climate change if the LTTG is not met.[391] Insofar as the RSs do not limit their territorial emissions in accordance with their respective CAT Fair Share Targets, they must be taken to have exceeded their MoA.

117. As to **Limb 2**, the RSs will be in breach of their obligation to regulate and limit territorial emissions in a manner consistent with the LTTG if their domestic mitigation measures alone are inconsistent with the level of reductions that is feasible and appropriate for each State to achieve, and does not reflect their "highest possible ambition".[392] This submission is in addition to and without prejudice to Limb 1.

118. The Applicants recall the duty on States in PA Art. 4(3) to set NDCs which "reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capacities". Consistent with the aforesaid, and having regard to their respective capacities, the OO requires the RSs to pursue domestic mitigation measures which reflect their highest possible ambition.[393] Where it is demonstrated that a RS's domestic mitigation measures are inconsistent with the level of reductions that is feasible for it to achieve, such measures cannot reflect its highest possible ambition.[394]

119. The Applicants primarily, but not exclusively, rely upon the Domestic Pathways Assessments set out in the CA Mitigation Report as the evidential basis for their

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[388] See also Art. 9 PA which provides for financial resources to assist developing countries with respect to both mitigation and adaptation measures.
[389] AO §§143, 588.
[390] AO §584.
[391] AO §§457-462, 32-35.
[392] AO §§590-595. Cost-effectiveness models are unrelated to equity but are based on where in the world emissions reductions can be achieved most cost-effectively. In view of the RSs' high levels of development, the emissions reductions required from the perspective of cost-effectiveness are less than those required by their Fair Share Targets.
[393] See further: *Billy et al v Australia* (2022) Communication No. 3624/2019, Individual opinion by Committee Member Gentian Zyberi (concurring) §3.
[394] AO §593.

submissions under Limb 2.[395] The Domestic Pathways Assessments represent a reliable measure of the *minimum* level of domestic emission reductions that are feasible for the relevant RS to achieve.[396] To the extent it is disputed that such reductions are beyond what is feasible or exceed a RS's highest possible ambition, the burden rests upon the RS to provide information to establish that it would not be feasible for them to achieve the level of domestic emission reductions under the Domestic Pathways Assessments.[397]

120. Where a RS has set a domestic emissions target which is inconsistent with its Domestic Pathways Assessment, this would therefore amount to a breach of the OO. For the avoidance of doubt, if a RS sets a mitigation target which is consistent with its Domestic Pathways Assessment, this alone is not sufficient to comply with its obligations arising under the Convention regarding domestic emissions. The RS must actually adopt policies and measures necessary to achieve that level of emissions reduction. The Court must be concerned with the substance of the RS' emission reductions rather than their form.

121. Further, that a RS has failed to take domestic mitigation measures consistent with the level of emissions reductions that are feasible for it to achieve and reflect its highest possible ambition can also be demonstrated by independent and/or State commissioned studies that demonstrate that it would be feasible to achieve greater emissions reductions than those envisaged by its 2030 targets.[398]

122. As to **Limb 3**, without prejudice to the foregoing, the RSs will also be in breach of the OO where they fail to limit their territorial emissions in line with their own domestic mitigation targets.[399] That such a failure will exceed the RSs' MoA is supported by the factors of domestic illegality and/or discordance with domestically accepted standards.[400] The Applicants acknowledge that upon adopting a new mitigation target, States' WEM projections will not immediately reflect the ambition in that target, but

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[395] AO §§592-593. These pathways are based on regional emissions reductions pathways implied by the Reasonable NLO Pathways in the IPCC's SR1.5, downscaled to a national level based on scientific literature. The pathways are cost-effectiveness models which are unrelated to equity but are based on where in the world emissions reductions can be achieved most cost-effectively. In view of the RSs' high levels of development, the emissions reductions required from the perspective of cost-effectiveness are less than those required by their Fair Share Targets.

[396] Given that such reductions are technically and economically feasible, they necessarily fall within and are encompassed by the RS' "highest possible ambition" (Art. 4(3) PA). Cf IRL2/§353.

[397] AO §593.

[398] Where such studies exist, a breach of Limb 2 can be established where Domestic Pathways Assessments are not available or even if the Domestic Pathways Assessments are not otherwise relied upon by the Court.

[399] AO §§596-599. As set out at AO §598, this limb of the OO cannot exhaust RS' obligations under Arts. 2, 3 and 8. This limb of the OO accords with how domestic courts have assessed States' mitigation measures in *ASBL Klimaatzaak v Kingdom of Belgium et al*, French-speaking Court of First Instance of Brussels (2015/4585/A, 17 June 2021) (pp 71-72), *Commune de Grande-Synthe v France* (19 November 2020) No 42730 (§5) and *Klimaticka v Czech Republic* (15 June 2022) Judgment No. 14A 101/2021 (§§263-280).

[400] AO §597. See further §100.

given the urgency with which States must reduce their emissions, policies and measures should be adopted promptly thereafter to ensure that WEM projections align with their 2030 targets.[401] As set out in Section VIII below, it is clear that all of the RSs have failed to take measures consistent with their CAT Fair Share Targets, Domestic Pathways Assessments and/or their domestic mitigation targets, such that they have breached the OO obligation and are accordingly in breach of Arts. 2, 3 and 8.[402]

123. The obligation to regulate and limit emissions generated within their territories in manner consistent with achieving the LTTG of 1.5°C also has the following **procedural aspects**:[403]

a. Each RS must determine the level of reductions required globally to achieve the LTTG of 1.5°C, having regard to the IPCC's NLO Pathways, the risk of reliance on CDR and the uncertainty inherent in all pathways.[404]

b. Each RS must determine the level of territorial emission reductions that are appropriate for it to achieve, having regard to: (i) its fair share of global emissions reductions and, in particular, the likelihood of the LTTG of 1.5℃ being achieved if all States pursued an equivalent level of ambition relative to their respective fair share ranges; (ii) the level of emissions reductions that are feasible for it to achieve domestically and, where appropriate, through funding emissions reductions in other States, and which reflects its highest possible ambition; and (iii) the fair balance between actual and future climate impacts on persons inside and outside its territory on one hand, and the burden on the RS on the other.[405]

c. Each RS must make publicly available the results of these assessments.

C. Extra-Territorial Emissions

124. The OO must extend to the RSs' acts and omissions regarding extra-territorial emissions, namely, (i) the extraction of fossil fuels, (ii) imported, consumption-based emissions (i.e. embedded emissions), and (iii) overseas emissions of entities domiciled within the RSs' jurisdictions for the following reasons:

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401 Facts §33; AO §§150, 569-599; c.f. IRL2/§§358-360, GRC2/§§34-36. See further: *SBL Klimaatzaak v Kingdom of Belgium et al*, French-speaking Court of First Instance of Brussels (2015/4585/A, 17 June 2021) (71-72), *Commune de Grande-Synthe v France* (19 November 2020) No 42730 (§5) and *Klimaticka v Czech Republic* (15 June 2022) Judgment No. 14A 101/2021 (§§263-280).
402 AO Section VIII(A)(a), (B)(a) and Section IX.
403 AO §§602-603.
404 Facts §§19-21; AO §§145-147.
405 AO §602(b).

a. The extra-territorial emissions significantly contribute to global warming and are causally connected to the climate impacts felt by the Applicants (i.e. the interference with their rights).[406]

b. The RSs' acts and omissions which cause or permit extraterritorial emissions are attributable to the RSs under the customary rules of State Responsibility, and occur within each RS's territorial jurisdiction.[407]

c. An exclusive focus on territorial emissions would enable the RSs to take steps to reduce their territorial emissions in a manner consistent with achieving the LTTG of 1.5°C, whilst increasing their extra-territorial emissions. RSs could reduce territorial emissions while: (i) increasing the extraction and export of fossil fuels to States outside the CLS; (ii) using international trade to shift their emissions outside the CLS, creating the phenomenon of "carbon leakage"; and (iii) permitting/encouraging domiciled entities to take advantage of weaker regulatory environments outside the CLS where their emissions are under-regulated. This would appear as making progress towards reducing territorial emissions but would result in the LTTG of 1.5°C being exceeded.[408]

d. Any assumption that extra-territorial emissions will be adequately constrained if all States reduce their territorial emissions in a manner that is consistent with 1.5°C has not materialised in practice. States have not sufficiently reduced their territorial emissions and, consequently, global demand for fossil fuels, the level of emissions embedded in imported goods, and the regulation of emissions-producing activities outside the CLS remain manifestly inconsistent with 1.5°C.[409]

e. While the Court cannot evaluate compliance of States outside the CLS, it can and must assess the RSs' acts and omissions regarding extra-territorial emissions which contribute to the climate impacts which interfere with the Applicants' rights. An approach limited to territorial emissions would render the Applicants' rights theoretical and illusory as conduct attributable to the RSs which materially contributes to global warming would be free from scrutiny.[410]

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[406] Facts §§34-40 and AO §§556(a) & (c), 608, 642, 658(b) & (d).

[407] International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Report of the ILC on the Work of its Fifty-third Session, UN Doc A/56/10 (2001), Art 4. See further AO §§556(b) and 561. Cf IRL2/§366; GBR2/§113(2).

[408] Facts §§34-40; AO §§556(d), 614, 645-646. As to "carbon leakage", see Mehling & van Asselt Report (**Key Annex 37**) §§9-14, cited at AO §646.

[409] Facts §§34-40; AO §§612-613, 646. GBR's contention that it is consistent with achieving the LTTG of 1.5°C for States to focus on their own territorial emissions does not reflect reality (GBR2/§113(1)).

[410] AO §§556(b) and (e), 614-615, 646-647, 657(a), 658(c)-(d). This does not involve the RSs shouldering the responsibilities of other States, but taking responsibility for their own acts and omissions. Cf IRL2/§§372-374; FIN2/§280.

125. Concerns regarding "double counting" are misplaced.[411] The importance of avoiding double counting is limited to the calculation of States' emissions within the UNFCCC framework so as to enable the construction of an accurate picture of the total amount of GHGs produced worldwide. If the same emissions could be attributed to multiple States, this would provide an inflated picture of global emissions and frustrate those objectives. Outside that framework, there is no practical or conceptual difficulty in different States having overlapping responsibilities with respect to the same emissions,[412] as demonstrated by a number of the RSs in practice.[413]

126. As to the content of the OO with respect to the **extraction of fossil fuels**, while the RSs must limit extraction in a manner that is equitable, there is insufficient evidence currently available to determine fair shares of fossil fuel extraction with respect to individual RSs.[414] A more limited position is therefore advanced based upon standards which can be derived from the best available evidence (IPCC, UNEP and IEA). Such standards delineate the RSs' MoA and indicate the minimum steps the RSs must take.

127. Having regard to that evidence and the factors and principles at §§98-107, the OO requires that the RSs regulate and limit the extraction of fossil fuels within their territories in a manner that is consistent with achieving the LTTG of 1.5℃. At a minimum, this obligation requires that the RSs must:

a. Reduce their extraction of fossil fuels at a rate consistent with the global average reductions consistent with LTTG of 1.5℃. The Applicants rely upon the UNEP's 2021 PGR, which envisages reductions on 2020 levels by 2030 of 69% in coal production, 34% in oil production, and 26% in gas production as providing minimum thresholds for compliance. Alternatively, the Applicants rely upon the IEA NZE Pathway, which envisages reductions of 52% in coal production, 20% in oil production, and 5.5% in gas production.[415]

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411 For example, SWE1/§§26*ff*; GBR1/§§209ff; IRL1/§§188-192; IRL2/§367.

412 AO §§557, 611, 644, 658(e). GBR latterly appears to accept that there would be no practical difficulty in accounting for such emissions (GBR2/§113(5)). Further, that States can have responsibilities in relation to extra-territorial emissions outside the UNFCCC framework in no way undermines the functioning of the UNFCCC framework (cf IRL2/§367; GBR2/§113(3)-(4); FRA2/§56).

413 For example, FRA, CHE, IRL, SWE and GBR already measure or account for extra-territorial emissions at the domestic level, without that affecting the reporting of their territorial emissions in the UNFCCC framework (AO §557).

414 Facts §37; AO §§616-617. For example, States with the greatest capacity and lowest dependence on fossil fuel production need to reduce their extractive activities faster than States with lesser capacity and highest dependence.

415 Facts §§35-36. See further AO §§624-630, 634-635. The Applicants recall that: (i) these reduction rates are global averages; (ii) applying an equity approach, RSs with higher levels of capacity and lower levels of dependence on fossil fuels must be expected as a matter of principle to reduce production by levels higher than those global averages but the Applicants do not presently have sufficient evidence to determine fair shares; (iii) having regard to the aforesaid, the practical and effectiveness principle, and the precautionary principle, the higher UNEP thresholds should take precedence over the IEA thresholds; (iv) for the reasons mentioned at §100(d), the burden of proof rests with the RSs to demonstrate that the

b. Not open, approve, license, permit, invest in, or plan new coal mines, oil fields or gas fields. The existence of this duty is supported by the IEA NZE Pathway and scientific evidence.[416] At a minimum, there must be a strong presumption that opening, licensing, permitting, investing in, or planning new coal mines, oil fields or gas fields exceeds the RSs' MoA and is incompatible with the OO.[417]

c. Implement plans to phase out support and subsidies for fossil fuel extraction. The existence of this duty is supported by the UNEP 2021 PGR and international commitments several of the RSs have made.[418]

128. For the reasons at §108, the obligation to limit fossil fuel extraction in a manner consistent with achieving the LTTG of 1.5℃ has the following **procedural aspects**:

a. Each RS must identify and assess its individual contribution to climate change with respect to its level of planned fossil fuel production and support for fossil fuel production;

b. Each RS must conduct appropriate studies and investigations to determine the level of reductions in fossil fuel production that is appropriate for it to achieve, having regard to: (i) the level of reductions that is feasible for it to achieve; (ii) the level of reductions required globally in order to achieve the LTTG of 1.5℃ (as per *inter* alia UNEP and the IEA thresholds); and (iii) the RS's relative capacity/dependence on fossil fuels;

c. Each RS must inform the public of the results of the above assessments.[419]

129. As to the content of the OO with respect to **embedded emissions** and having regard to the factors and principles at §§98-107, the OO requires the RSs to regulate and limit

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obligation would impose an impossible or disproportionate burden; (v) rather than demonstrate the need for increased fossil fuel production, the energy crisis and Russian invasion of Ukraine underline the need for a rapid energy transition IEA World Energy Outlook 2022 (November 2022) 19-20, 181-182 (vi) while it would be within RSs' margins to decide to offset lower reductions in production of one fossil fuel with higher reductions in another fossil fuel, the aggregate level of reductions must be equivalent to that envisaged by the UNEP or, alternatively, IEA thresholds; (vii) that said, the burden rests with the RS to demonstrate such equivalence, having regard to the principles on the burden of proof at §100(d) and (viii) equity may permit a lower rate of reduction for RUS and TUR given their lower levels of development.

[416] Facts §38; AO §§620-622, 634-635.

[417] The strength of this presumption follows from: (i) that existing sanctioned fossil fuel reserves exceed the global carbon budget associated with achieving the LTTG of 1.5℃; (ii) the risk that sanctioning new fossil fuel reserves will lock in increased fossil fuel supply for decades given the life cycle of oil/gas fields and coal mines; (iv) the consequent scientific consensus that, at a minimum, achieving the LTTG of 1.5℃ requires that States do not sanction any new fossil fuel reserves; and (v) given their higher levels of capacity and development, this minimum threshold for compatibility with the LTTG of 1.5℃ applies *a fortiori* to the RSs. Consistent with §115(d), to rebut this presumption, the burden falls upon the RS to provide evidence that there is an overriding justification in favour of permitting the sanctioning of new fossil fuel reserves, whether that be for reasons of energy security, employment, economic development or otherwise. No RS has provided such evidence.

[418] Facts §38. See further: AO §§631-635.

[419] AO §640.

their emissions from imported goods in a manner consistent with achieving the LTTG of 1.5℃. This requires the RSs to put in place an effective legislative and/or administrative framework to regulate emissions from imported goods. To be effective, that framework must:

a. Set a binding limit and/or reduction target on emissions from imported goods; and
b. That limit must be appropriate and feasible for the RS to achieve, taking into account its consistency with the LTTG of 1.5℃.[420]

130. Relative to these obligations: (i) it is within the RSs' choice of means to determine how to regulate emissions from imported goods within that framework;[421] (ii) there is currently no evidential basis to determine the rate at which each RS must limit its emissions from imported goods. Thus the **procedural aspects** of the obligation to regulate and limit emissions from imported goods attain a particular significance in enabling the RSs to determine the level of reductions which are appropriate and consistent with achieving the LTTG of 1.5℃. Those procedural aspects are:

a. Each RS must identify and assess its individual contribution to climate change with respect to emissions from imported goods.
b. Each RS must conduct appropriate studies and investigations to determine the level of reductions in emissions from imported goods that is appropriate for it to achieve, having regard to: (i) the level of reductions that is feasible for it to achieve and (ii) the level of reductions required globally to achieve the LTTG of 1.5℃.
c. Each RS must inform the public of such measures and assessments.[422]

131. As to the content of the OO with respect to **overseas emissions of entities domiciled within the RSs' jurisdictions**: (i) an entity is domiciled within an RS where it has its place of incorporation/registration, its principal assets are located, its central administration/management is located, or its principal place of business is located;[423] (ii) the obligation encompasses an entity's scope 1, 2 and 3 emissions or "*direct and indirect*

[420] AO §649.
[421] Available measures include disclosure and reporting requirements for importers, performance standards, border carbon adjustments, and consumption charges. See further AO §648.
[422] AO §653.
[423] AO §658(a). See further: Open-Ended Intergovernmental Working Group, UN Human Rights Council, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises (Third Revised Draft, 17 August 2021), Art 9.2. Also: UN 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" (10 August 2017) UN Doc E/C.12/GC/24, 31.

emissions";[424] and (iii) the RSs presently exercise or have the ability to exercise control over entities within their jurisdictions so as to regulate their overseas emissions.[425]

132. In addition to the factors and principles at §§98-107, the existence and the content of the OO in this context is supported and informed by: (i) the emerging consensus that businesses have a responsibility to respect human rights and conduct due diligence, which extends to direct and indirect environmental impacts from business activities and GHG emissions;[426] (ii) the obligation under international human rights law to take reasonable measures to prevent and redress infringements of human rights that occur both within *and outside* their territories due to the activities of entities domiciled within and/or under their control;[427] and (iii) the no-harm and prevention principles, as reflected in the 2001 ILC Draft Articles.[428] Drawing upon these principles, the IACtHR held in *Miskito Divers (Lemoth Morris et al) v Honduras* that States have a duty under Arts. 4 and 5 ACHR to prevent human rights violations by private companies through adopting legislative, regulatory and other measures to ensure that businesses have appropriate due diligence processes in place to protect human rights.[429]

133. Against that background, the OO requires the RSs to regulate and limit overseas emissions of entities domiciled within and/or under their control in a manner consistent with achieving the LTTG of 1.5℃. At a minimum, this requires the RSs to put in place an effective legislative and/or administrative framework to regulate such emissions. To be effective, that framework must:

a. Involve a mandatory due diligence requirement (that is legally and practically enforceable) or equivalent duty upon domiciled entities which is capable of requiring reductions in their overseas emissions in appropriate cases; and

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[424] Facts §40; AO §658(a)-(b).
[425] AO §658(c).
[426] AO §§503-506, 660. See further: OHCHR, "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework" (2011) UN Doc HR/PUB/11/04, Principles 11, 13, 15, 17; Council of Europe, Committee of Ministers, "Recommendation CM/Rec(2016)3: Human Rights and Business" (2 March 2016), Appendix to Recommendations, §§1-2, 5; OECD, "OECD Guidelines for Multinational Enterprises" (OECD Publishing, 2011), Part II at A2 & A10-12, Part VI & §69 of the Commentary.
[427] AO §§507-508, 660. See further: UN 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" (10 August 2017) UN Doc E/C.12/GC/24, §§30–35; UN Committee on the Elimination of Discrimination Against Women, "General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women" (16 December 2010) UN Doc CEDAW/C/GC/28, §36; UN Human Rights Committee, "General Comment No. 36, Article 6: Right to life" (3 September 2019) UN Doc CCPR/C/GC/36, §22; Council of Europe, *Recommendation CM/Rec(2016)3*, §§13-20.
[428] AO §§491-492, 660.
[429] *Case of the Miskito Divers (Lemoth Morris et al) v Honduras*, Judgment, IACtHR Series C 432 (31 August 2021) §§42-53. Further: *Medio Ambiente y Derechos Humanos (Opinión Consultiva)* (2017) OC-23/17, §§146-155; *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina*, Judgment, IACtHR (6 February 2020) §§208*ff*.

b. Require domiciled entities to report the level of their direct and indirect emissions.

134. For the reasons at §108, the obligation to regulate and limit overseas emissions of entities domiciled within and/or under their control in a manner consistent with achieving the LTTG of 1.5℃ has the following **procedural aspects**:

a. Each RS must conduct assessments to determine the measures it could take to reduce overseas emissions, and the extent to which such measures would be feasible and capable of limiting emissions to a level consistent with the LTTG of 1.5℃ and

b. Each RS must inform the public of such measures and assessments.[430]

D. Article 14

135. Turning to Q**uestion 8**, in breach of Art. 14 the Applicants have been indirectly discriminated[431] against on the basis of their age.[432] The consequences of the RSs' acts and omissions are causing—and continuing to cause—an increase in global warming,[433] which has a disproportionately prejudicial effect upon the Applicants (who are children and young people).[434] There is no objective and reasonable justification for such disproportionate prejudicial effects,[435] noting a narrow MoA must apply with respect to the RSs' assessment in this regard, having regard to the factors outlined above[436] and (i) the principle of intergenerational equity[437] (ii) UNCRC Art. 3(1).[438]

VIII. MERITS: BREACHES OF THE CONVENTION

136. On the basis of the legal framework outlined above and the available evidence regarding the RSs' policies and assessments, the Applicants hereby set out how each RS has breached the OO and thus acted incompatibly with Arts. 2, 3, 8 and 14. The Applicants presented detailed assessments of each RS's policies and measures at AO Section VIII,

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430 AO §664. Subject to those requirements, the Applicants recall that the choice of means in how to design this framework falls with the RSs' MoA. For example, in principle, a duty of care which – with sufficient certainty – requires entities to limit their emissions in appropriate cases would suffice (e.g. *Vereniging Milieudefensie et al v Royal Dutch Shell plc*, (26 May 2021) case C/09/571932 / HA ZA 19-379).

431 The Court has confirmed that indirect discrimination arises where a general policy or measure has disproportionately prejudicial effects on a particular group, even where it is not specifically aimed at that group and there is no discriminatory intent, noting that discrimination potentially contrary to the Convention may result not only from a legislative measure but also from a de facto situation: *S.A.S. v France* no 43835/11 (1 July 2014) §161; *D.H. v Czech Republic* no 57325/00 (13 November 2007) §184; *Zarb Adami v Malta* no 17209/02 (20 June 2006) §76.

432 See §93 above; AO §667(c).

433 AO §668.

434 Facts §7 and 13-18. See also AO §§42-48, 482-489.

435 Facts §§6-11 and 13-18. Also Merits: Breaches of the Convention §§142 and 154-161.

436 See §100 above. See further AO §§457-462.

437 AO §479(a).

438 AO §§482-489. See §103 above.

and carefully applied the aforesaid to each limb of the OO. A summary of the assessments in the AO and key themes therein are set out below. The summary first addresses territorial emissions, before turning to extra-territorial emissions.

A. Territorial Emissions

137. CHE, CZE, DEU, DNK, ESP, EST, FIN, FRA, GBR, GRC, HUN, IRL, LVA, LTU, NLD, NOR, PRT, RUS, TUR and the EU have economy-wide 2030 GHG targets.[439] AUT, BEL, BGR, CYP, HRV, ITA, MLT, POL and ROU's only 2030 targets are those arising under EU law.[440] AUT is in the process of adopting an economy-wide 2040 target.[441] LUX, SVK, SVN and SWE have more ambitious 2030 ESR targets than those prescribed by EU law.[442] SWE's 2030 ESR target is a "milestone" towards its economy-wide 2045 target.[443]

138. Tables 1 and 1A annexed hereto outline the latest available RSs' projected 2030 emissions (on a WEM basis) and 2030 economy-wide targets (where applicable). The tables compare the RSs' projected emissions and targets against (i) the CAT Fair Share Assessments, (ii) the Domestic Pathways Assessments and (iii) outlines the gap between certain RSs' projected emissions and their 2030 economy-wide or ESR targets.

139. As to the **substantive aspect of the obligation to regulate and limit territorial emissions in a manner consistent with achieving the LTTG of 1.5°C**, every RS has violated at least one of the limbs of that obligation as follows:

Limb 1[444]	All RSs
Limb 2	All RSs. Domestic Pathways Assessments are relied upon for all RSs save for BGR, CYP, EST, HRV, LTU, LVA, MLT, RUS, and TUR, for which alternative evidential bases are relied upon.
Limb 3	All bar BGR, EST, HRV, LTU, RUS and TUR.

[439] CHE1/§§24, 104 and CHE2/§7; **AO** CZE§202; **AO** DEU§418; DNK1/§80; ESP1/§22; EST1/§29; FIN2/§271; FRA1/§127; GBR1/§14; GRC2/§17; HUN1/§ 56; IRL2/§397; **AO** LVA§624; LTU1/§24; NLD1/§75; NOR1/§59; PRT1/§62; RUS1/§62; TUR1/§192; EC TPI §16. As to NOR2/§19, NOR has chosen not to incorporate the non-binding 2030 climate neutrality target of the *Storting* into its Climate Change Act and NDC. The Applicants base their case on NOR's binding target.

[440] AUT1/§1.9.2 (AO AUT§60 refers to AUT's ESR target under EU law); BEL1/40; BGR1/§20; CYP1/Annex I, 4-7; HRV1/§§103, 183-184; ITA1/§59; MLT1/§15; POL1/§127; ROU1/§116.

[441] AUT1/§§3.2, 7.2.

[442] **AO** LUX§682; SVK1/§52; SVN1/§56; SWE1/§§41-42. An "ESR target" refers to a target applicable to emissions covered by the EU Effort Sharing Regulation (also, a "non-ETS" target). See EC TPI §§30-31.

[443] SWE1/§§41-42 and **AO** SWE§972.

[444] As to the definition of Limb 1, Limb 2 and Limb 3 respectively, see above §112.

140. ***Limb 1: Fair shares of global emissions reductions.*** First, no RS's domestic mitigation measures are consistent with the level of ambition necessary to achieve the LTTG of 1.5℃ if all States pursue an equivalent level of ambition. This is demonstrated by the comparison of RSs' targets and projected emissions to their CAT Fair Share Targets.

141. Second, no RS intends or is on course to achieve, through the provision of climate finance or other measures, the level of emissions reductions in other States needed to close the gap between their 2030 targets and/or projected emissions and their CAT Fair Share Targets.[445] CAT assessed the climate finance contributions of CHE, DEU, GBR, NOR, RUS and the EU to be insufficient to alter the ratings by the CAT Fair Share Assessments of their 2030 targets.[446] As noted at §164(b), no RS has assessed the level of emissions reductions its climate finance measures would achieve in other States.

142. Third, no RS has demonstrated that achieving their CAT Fair Share Target would impose an impossible or disproportionate burden.[447] No RS has provided evidence to show: (i) that the level of emissions reductions, both domestic and in other States, that would be feasible for it to achieve is lower than that envisaged by their CAT Fair Share Targets; or (ii) that any such inability of the RS to achieve their CAT Fair Share Target is not as a result of their failure to have adopted steeper emissions reductions sooner.

143. Fourth, many of the RSs' emissions targets were not calculated on the basis of any or any adequate global emissions pathways or LTTGs. While the basis upon which the RSs' emissions targets were calculated is not a necessary condition to establish substantive breach insofar as the targets themselves are insufficient to comply with the OO on the basis of the framework set out at §§95-97, this observation provides relevant context and underlines the inadequacy of the RSs' emissions targets and assessments.

144. The 2030 targets of DNK, ESP, EST, FIN, GRC, HUN, LVA, LTU, LUX, PRT, RUS, SVK, SVN and the EU were not calculated on the basis of *any* global emissions pathways.[448] Documents describing how the 2030 targets of ESP, LUX, PRT were calculated and a document assessing the impact of the EU's 2030 target merely refer to

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[445] CHE is the only RS which intends to achieve a specific amount of GHG reduction in other states towards its overall 2030 target; it does so in circumstances where it is feasible and appropriate in terms of global cost-effectiveness to achieve more than its *overall* target domestically (AO CHE§§1127-1128). GBR provided evidence only of its estimate of the reductions it has *previously* achieved in other states. See GBR1/Annex 40.

[446] See the respective fair share analyses of these RSs in the CA Mitigation Report (**Key Annex 7**). Insufficient data is available to make a similar assessment of TUR's climate finance. Ibid 44.

[447] See above §§100(d) and 115(d).

[448] **AO** DNK§239, ESP§§938-940, EST§§289-290, FIN§§330-331, GRC§475, HUN§§507-509, LVA§626, LTU§656, LUX§683, PRT§817, RUS§1070, SVK§884, SVN§911 and the EU§§6-10. AO DNK

the reductions envisaged by NLO Pathways but make clear that these targets were not calculated based on them.[449] DNK and FIN calculated their 2030 targets based only on carbon budgets.[450]

145. The 2030 targets of CHE, CZE, DEU, FRA, GBR, NLD, NOR and TUR and the 2040 target of AUT were calculated wholly or partly based on global emissions pathways consistent with an LTTG above 1.5°C or have been otherwise linked to such an LTTG.[451] As to GBR's claim to the contrary,[452] the "leadership-driven" scenario according to which the Climate Change Committee (CCC) assessed the Balanced Net Zero Pathway (on which GBR's 2030 target is based) is described as being consistent with "a 50% probability of keeping warming to below 1.75°C".[453] The CCC also stated that its recommendations are consistent with limiting warming to "well below 2°C",[454] which it defined to mean "at least a 66% probability of keeping peak warming below 2°C".[455] GBR's 2030 target has therefore been at least partially calculated based on "below 2°C" pathways.[456]

146. SWE's 2045 target was calculated based on 1.5°C global pathways outlined in the 2014 IPCC AR5 some of which, as SWE acknowledged, envisage extensive use of CDR.[457]

147. As to IRL's claim that its 2030 target was derived from modelling that "resulted coincidentally in a target of 7.6% per year"[458] (i.e. the annual *global* reductions to 2030 deemed necessary by the 2019 EGR to achieve the 1.5°C LTTG), the position must be either that: (a) it is partially derived from the figures from this report, which are based on a set of NLO Pathways that include some which rely extensively on CDR[459] or (b) IRL's target has not been derived from *any* global emissions pathways.[460]

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[449] **AO** ESP§938, LUX§683, PRT§§817-819, EU§§6-10. LUX2/§§9-13 does not contradict AO LUX§§683-684 that its 2030 target was derived from a scenario based exclusively on the policies it had already planned.

[450] **AO** DNK§§240-241(a), FIN§330. See Facts above §19 (fn 57).

[451] **AO** CHE§§1110-1116, CZE§203, DEU§§419-420, FRA§364, GBR§§1233-1235, NLD§§735-736, NOR§§1022-1023, TUR§1156 and AUT§61. CHE2/§8 refers to but does not cite or annex a study it conducted in response to SR1.5. That the study "n'a […] pas donné lieu à une modification de l'objectif pour 2030" further demonstrates that CHE's 2030 target is based on the "below 2°C" LTTG in that significantly greater emissions reductions by 2030 are envisaged by NLO Pathways than "below 2°C" pathways. CA Mitigation Report (**Key Annex 7**) 9-10.

[452] GBR2/§132.

[453] AO GBR§1235. GBR1/Annex 3 (Sixth Carbon Budget Report) 334.

[454] GBR1/Annex 3 (Sixth Carbon Budget Report) 17.

[455] ibid 325.

[456] The CCC's interpretation of "well below 2°C" as reflecting the "below 2°C" LTTG is inconsistent with the fact that the term "well below 2°C" was adopted into the Paris Agreement to reflect the scientific consensus as to the dangers associated with the "below 2°C" LTTG. See above Facts §12. Also **AO** DEU§424 and NLD§736.

[457] AO SWE§974.

[458] IRL2/§398.

[459] Facts §20. Also "Written Statement of Dr. Andrew Jackson" ("Jackson Submission") 6, appended to the report submitted as IRL2/Annex 8.

[460] It is unclear which is the case because IRL does not cite or annex the modelling analysis to which it refers, and it does not appear to be public.

148. Fifth, and further underlining the inadequacy of the RSs' emissions targets, no RS has calculated its emissions target on the basis of any or any adequate measure of its fair share of global emissions reductions. The 2030 targets of CHE, CZE, DEU, ESP, EST, FRA, GRC, HUN, IRL, LTU, LUX, LVA, NOR, PRT, RUS, SVK, SVN and TUR are not derived from any measure of fair share.[461] CHE, ESP, FRA and NOR have justified the ambition levels of their 2030 targets on the basis that they are aligned with the global averages of reductions envisaged by SR1.5 NLO Pathways (i.e. "grandfathering").[462]

149. IRL's claim that its 2030 target does not reflect "grandfathering" is contradicted by its own expert.[463] Further, the annual reductions to 2030 envisaged by its carbon budgets are less than 6% and therefore *less* than those envisaged by the 2019 EGR[464] (i.e. less ambitious than grandfathering). IRL's claim as to the relative ambition of its target is artificial in that it relies on the choice of 2018 as the base year.[465] IRL's claim that its target "would potentially make [it] the first developed economy to end its contribution of territorial emissions to ongoing global warming" is based on a contested methodology which treats reductions in its disproportionately high methane emissions as having a cooling effect.[466]

150. AUT, DNK, GBR, NLD and SWE have calculated or justified their 2030, 2040 or 2045 targets based on unacceptable interpretations of their fair share. AUT and DNK have calculated/justified their targets on the basis of an "equal per capita" emissions approach, which DNK acknowledged is a less stringent measure of its fair share and, in AUT's case, "does not correspond with climate justice".[467] GBR's CCC assessed its 2030 target as being towards the least stringent end of the range of fair share measures

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461 **AO** CHE§1119, CZE§207, DEU§428, ESP§947, EST§293, FRA§370, GRC§479, HUN§513, IRL§552, LTU§661, LUX§686, LVA§630, NOR§1028, PRT§823, RUS§§1076-1077, SVK§887, SVN§915 and TUR§§1160-1161.

462 **AO** CHE§1120, ESP§946, FRA§370, NOR§1027.

463 IRL2/§398. In relation to the equal per capita measure which Professor Allen states IRL's 2030 target is consistent with, he acknowledges that "the impact of historical emissions is grandfathered in to the allocation of future emissions". Supplement Allen Opinion (IRL2/Annex 2, 5).

464 IRL2/§407. See the submission of Professor Barry McMullin, appended to the report submitted as IRL2/Annex 8 and Jackson Submission 11.

465 AO IRL§553-556. As to IRL2/§399, it is the comparison of the ambition of that target with those of other states expressed relative to their 2018 emissions levels that is contested, not the choice of 2018 as a base year. As to IRL2/§400, on the Human Development Index IRL ranked 23rd globally in 1990 and now ranks 8th.

466 IRL1/Annex 2, 3. Also AO IRL§551, citing *Rogelj and Schleussner*. As to IRL2/§426, it is accepted that IRL does not rely on GWP* to makes the above assertion; the methodology relied on, however, is advantageous to large methane emitters such as IRL by treating methane reductions as having a cooling effect. Further, the focus on ongoing warming also discounts IRL's significant historical methane emissions (i.e. they are "grandfathered").

467 **AO** AUT§62 and DNK§§245-247, 249. AO AUT§62/fn15 ought to have stated "**Climate Protection Report 2021 (Annex 59a) 60** citing Wegener Center Study Update 2020 (Annex 58a) 2." DNK§249/fn26 ought to have stated "**Status Outlook Report 2021 (Annex 73)** 4 (emphasis added)".

assessed in respect of the LTTG of 1.5°C.[468] NLD and SWE relied upon a "converging equal per capita approach", which involves grandfathering.[469]

151. The EU has sought to justify its 2030 target on the basis of global cost-effectiveness, unrelated to any measure of fair share.[470] As the 2030 targets of DEU, ESP, IRL and PRT were adopted to reflect the ambition of the EU targets, they are tainted by its inadequacies.[471] So too will be the targets imposed by EU law to reflect the EU's targets.[472]

152. FIN's 2030 target is derived from an assessment by the Finnish Climate Change Panel (FCCP) of FIN's fair share based on "ability to pay".[473] However, the FCCP was only able to assess FIN's 2030 target as consistent with this measure by assuming extensive annual CO_2 removals, including natural removals, in FIN's LULUCF sector.[474] FIN's CAT Fair Share Assessment demonstrates the extent to which its 2030 target reflects a less stringent measure of its fair share when LULUCF is excluded.[475] Further, FIN's LULUCF sector has recently become a net emissions *source* (i.e. the opposite of a *sink*).[476] It is therefore appropriate to assess the ambition of its 2030 target with LULUCF excluded.[477]

153. Multiple RSs justify their targets on the basis that the % emissions reductions envisaged by their targets are higher than the global median % emissions reductions envisaged by NLO Pathways.[478] Their CAT Fair Share Assessments demonstrate that their targets

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[468] AO GBR§§1245-1250. Moreover, each of the measures assessed incorporates an element of grandfathering (AO GBR§1246, fn27 ought to have referred to CA Mitigation Report (**Key Annex 7**) 158). Further, contrary to GBR2/§136(3), the CCC did not state that it is "not credible to impose such support [as climate finance] as a legally binding target". It stated: "[S]ome [measures of fair share] suggest more ambitious emissions reductions than the Committee currently deems credible as the basis for legally binding targets. Therefore, we also consider additional contributions that the UK can make [including through climate finance]". GBR1/Annex 3 (Sixth Carbon Budget Report) 322). This point was made in the context of the CCC recommending a *domestic* target and implies nothing as to the "credibility" of targets to achieve emissions reductions in other states.

[469] **AO** NLD§742 and SWE§§980-981. AO SWE§980/fn13 ought to have stated "March 2016 Report (Annex 129a) 36". AO SWE§980/fn14 ought to have stated "Climate Analytics Mitigation Report (Annex 1) 26."

[470] AO EU§§23-24. Furthermore, the EU's Domestic Pathways Assessment makes clear that it is feasible and appropriate for it to achieve significantly greater reductions from this perspective. AO EU§§28-29.

[471] ESP1/§22; AO DEU§§419-420; IRL2/§398; PRT2/§96; The CCC also described GBR's 2030 target as being of comparable ambition to the EU's 2030 target. See GBR1/Annex 3 (Sixth Carbon Budget Report) 330. FRA and GRC intend to revise their targets to bring them into line with the EU's targets: FRA2/§108; GRC2/§17.

[472] EC TPI §30.

[473] FIN2/§271.

[474] 'LULUCF' stands for Land Use, Land Use Change and Forestry (see AO §148). The FCCP assumes the "average net land-use sink […] to be -21 Mt CO2e/a", equivalent to 37% of FIN's 2018 emissions (57 Mt CO_2e). 2019 FCCP Report (**AO Annex 82**) 10 and 14. As to natural removals, the FCCP acknowledged that Art 4(1) PA refers only to "anthropogenic" removals and stated that there is a debate as to the meaning to this term but decided to "sidestep the 'anthropogenic' problem". Ibid. 8.

[475] For the basis on which LULUCF is excluded, see AO §§151-152.

[476] FIN Annual Climate Report 2022 (**Key Annex 47a**) 24.

[477] Cf FIN2/§§14, 218.

[478] GBR2/§§131(2), 133(2)(a), 136(2); IRL2/§425; LUX2/§12; NLD2/§§38-40; POL2/§60.

may exceed the global average reductions envisaged by NLO Pathways but may be well below its Fair Share Target owing to, *inter alia*, their development, capacity and historical responsibility

154. ***Limb 2: Feasibility and highest possible ambition.*** All the RSs' domestic mitigation measures are inconsistent with the level of reductions that are feasible and appropriate for them to achieve and, as such, do not reflect their "*highest possible ambition*". The evidential basis for asserting breach of Limb 2 varies between RSs which for which there are Domestic Pathways Assessments (DPRS) and those for which there are not.

155. No DPRS has adopted domestic mitigation measures that are consistent with its Domestic Pathways Assessment (see Table 1). No DPRS has demonstrated that achieving the level of domestic emissions reductions envisaged by them would impose an impossible or disproportionate burden.[479]

156. While DNK and IRL's 2030 emissions targets are compatible with their Domestic Pathways Assessments, breach is established on the basis of their projected emissions.[480]

157. The Domestic Pathway Assessments show that it is feasible for RUS and TUR to achieve significantly greater domestic emissions reductions than their projected emissions or than envisaged by their 2030 targets.[481] It is acknowledged that it would not be appropriate for RUS and TUR to have to achieve the full extent of what is feasible per the Domestic Pathways Assessments as they exceed what is required by their CAT Fair Share Targets.[482] However, given the extent of the deficit between their targets/projected emissions and their CAT Fair Share Targets, it is plainly both feasible and appropriate for them to achieve significantly greater domestic emissions reductions *towards* their CAT Fair Share Targets. They have provided no evidence to the contrary.

158. In addition to their Domestic Pathways Assessments, studies conducted or commissioned by GBR, HUN, NLD, PRT, and SVN found it is feasible for them to achieve greater domestic emissions reductions than those envisaged by their 2030 targets.[483] Independent studies found the same for CHE, CZE, DEU, TUR and the EU.[484] Studies conducted by CHE, ESP, GBR, HUN, POL, PRT and the EU found

[479] POL (POL2/§§70-72) observes that "the unit costs of emission reductions […] differ greatly from one member state to the next" and outlines the costs associated with different mitigation scenarios in POL. Its Domestic Pathways Assessments demonstrate that it is appropriate for it to achieve significantly greater domestic emissions reductions from the perspective of global cost-effectiveness, which POL does not dispute.

[480] **AO** DNK§264 and IRL§570.

[481] **AO** RUS§§1082-1083 and TUR§§1166-1167; See further the study in respect of TUR referred to below.

[482] In RUS' case, it is noted there is only a small gap between the reductions envisaged by its CAT Fair Share Target and Domestic Pathways Assessment.

[483] **AO** GBR§1263; HUN§520; NLD§750; PRT§827; SVN§917.

[484] **AO** CHE§1129; CZE§213; DEU§440; TUR§1168; EU§30(b).

that it would be economically beneficial to achieve their targets or greater reductions, demonstrating or further demonstrating by implication that it would be feasible to achieve greater reductions than envisaged by these targets.[485] Studies by FIN and SWE found that the achievement of their 2030 and 2045 targets would involve limited economic cost.[486]

159. GBR observes, relying on the views of the CCC, that it would not be feasible for it to achieve greater domestic emissions reductions than those envisaged by its 2030 target and that there is no requirement for it to do so anyway because *inter alia* CAT's website allegedly states that its 2030 target is compatible with the 1.5°C LTTG.[487] However:

a. GBR relied on the November 2021 update of the CAT website's assessment of GBR.[488] The current (October 2022) update states: "The UK's climate action is not consistent with the Paris Agreement. While the UK's NDC and long-term targets are broadly aligned with cost-effective domestic pathways, they do not represent a fair share of the global effort to address climate change".[489]

b. The CAT website rates GBR's 2030 target as compatible with domestic 1.5°C pathways because on the CAT website it is the upper bound of the domestic pathways range that is used to measure compatibility with these pathways whereas in the CA Mitigation Report it is the middle of that range that is used.[490] That GBR can achieve greater domestic reductions than envisaged by its 2030 target and that it is reasonable to rely on the middle of the domestic pathways range is established on the basis that: (i) GBR's own study confirmed that achieving greater reductions than those envisaged by its 2030 target is "technically feasible" and to achieve that target would be economically beneficial;[491] (ii) the Domestic Pathways Assessments do not demonstrate the outer limits of what is feasible[492] and there are pathways in GBR's range which indicate that reductions greater than what is envisaged by the middle of that range are feasible; (iii) what is "credible" or "politically feasible"[493] must be understood in light of what is proportionate.

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485 **AO** CHE§1130; ESP§954; GBR§1259; HUN§520; POL§794-795; PRT§828 and EU§31.
486 **AO** FIN§341 and SWE§997.
487 GBR2/§§132(2), 136(2), 137, 138.
488 GBR2/Annex 12.
489 Climate Action Tracker, United Kingdom (17 October 2022) (**Key Annex 39**).
490 The middle of the 5th and 50th percentiles on the range of domestic 1.5°C pathways is used for the purpose of the assessments in the CA Mitigation Report (**Key Annex 7**) 43. The CAT website uses the 50th percentile. See: Climate Action Tracker, CAT rating methodology: Modelled domestic pathways (**Key Annex 40**).
491 AO GBR§§1259 and 1263. As to GBR2/§138(3), this study did not state that "technical feasibility" excludes economic feasibility.
492 See above §30.
493 GBR2/§138; See above §§100 and 115(d).

160. The abovementioned studies provide a further or alternative basis upon which it can be established that those DPRSs are in breach of Limb 2.

161. Although Domestic Pathways Assessments are not available for BGR, CYP, EST, HRV, LTU, LVN, MLT and SVK, it would be feasible for those RSs to achieve greater domestic emissions reductions than they plan or are on course to achieve.[494] Studies conducted by CYP, HRV and SVK found this explicitly.[495] Studies conducted by CYP and MLT found that it would be economically beneficial to achieve their planned emissions reductions, demonstrating or further demonstrating by implication that it would be feasible to achieve greater reductions.[496] A recent study by the International Monetary Fund (IMF) found that "multiple policy tools are available to address [BGR]'s main climate mitigation challenges" and that doing so "could bring long-term economic benefits".[497] That LVA and LTU could achieve greater emissions reductions than those envisaged by their 2030 targets can be inferred from the fact that their 2030 targets only envisage minimal reductions from their current emissions levels.[498] As regards EST, the IEA and EU found that it could achieve greater reductions than envisaged by its targets; its 2030 target does not envisage any reduction from its current emissions levels; and studies commissioned by it confirm that achieving its targets could be economically beneficial.[499]

162. ***Limb 3: Incompatibility of projected emissions with domestic targets.*** The RSs other than BGR, EST, HRV, LTU, RUS and TUR are failing to limit their emissions in line with their own domestic emissions targets (see § 139).[500] Tables 1 and 1A outline the gap between certain RSs' projected emissions and their 2030 economy-wide or ESR targets.[501] Further, assessments by the RSs published in 2022 which outline the extent to which they are not on course to achieve their own targets, where available/applicable, are annexed hereto (and supplement the equivalent reports submitted with AO).

163. ***Procedural obligations.*** First, all RSs have failed to determine the level of emissions required globally to achieve the LTTG of 1.5°C. Only DEU, DNK, ESP, FRA, GBR, HUN, IRL, LTU, LUX, NOR, PRT, SVN and the EU have assessed the emissions

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[494] The Applicants submitted with AO evidence providing the basis for assertions of breach of Limb 2 against CYP, HRV, MLT and SVK, however such assertions were omitted in error in respect of these RSs. In the case BGR, the Applicants rely on a study post-dating AO.
[495] **AO** CYP§181, HRV§158, SVK§889. As to SVK, see further SVK1/Annex 3, 8-10 and 18-21 noting *inter alia* that the reductions it envisages would be "cost-effective".
[496] **AO** CYP§189 and MLT§721.
[497] IMF, Bulgaria: Selected Issues (June 2022) (**Key Annex 41**) §18.
[498] **AO** LVA§§634-637 and LTU§§665-667.
[499] AO EST§§297-304.
[500] An assertion of breach of Limb 3 by HRV was included in error at AO HRV§169(c).
[501] As outlined in Table 1A **(Key Annex 38),** the latest WEM projections of BGR's emissions covered by the ESR indicate that it is now on course to achieve its current 2030 target under the ESR; the Applicants' claim against BGR under Limb 3 is therefore withdrawn.

reductions envisaged globally by 2030 by NLO Pathways.[502] However, no RS (or the EU) has assessed whether greater emissions reductions are required globally when unfeasible reliance on CDR is excluded.[503] Nor has any RS, except FIN,[504] assessed whether further global emissions reductions are needed to compensate for the uncertainty inherent in *all* NLO Pathways that, if followed, the 1.5°C LTTG will be achieved.[505]

164. Second, no RS has determined or adequately assessed the level of territorial emissions that are appropriate for it to achieve. In particular:

a. No RS has assessed the likelihood of the 1.5°C LTTG being achieved if, in reducing its territorial emissions, it was to pursue a particular level of ambition on its fair share range and other states were to pursue equivalent levels of ambition on their respective fair share ranges; nor has the EU. Most RSs have not assessed their fair share of emissions reductions at all. AUT, DNK, FIN, GBR, HRV, NLD and SWE have assessed their fair share based on relatively less stringent measures thereof.[506] DEU also assessed its fair share prior to but independently of the calculation of its 2030 target, based on an approach which it acknowledged to be self-serving.[507] IRL assessed its fair share based on a self-serving approach *after* adopting its 2030 target.[508]

b. No RS has assessed the full extent of the emissions reductions that are feasible for it to achieve domestically (i.e. reflect its highest possible ambition),[509] nor the level of emissions reduction that would be feasible for it to achieve through funding mitigation in other states (if relied upon to supplement its domestic mitigation

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[502] **AO** DEU§421, DNK§240, ESP§940, FRA§§365-366, GBR§1233, HUN§508, IRL§547, LTU§656, LUX§683, NOR§1022, PRT§817, SVN§912 and the EU§11. FRA did so only after adopting its 2030 target (AO FRA§365). AUT assessed its targets as being consistent with pathways carrying a 50% probability of holding warming to 1.5°C by 2100 "after up to ~1.7°C 'overshoot' before that". AO AUT§61. AO DNK§240/fn12 ought to have stated "Input Report (Annex 70) 10".

[503] GBR acknowledged the risks associated with certain NLO Pathways. See AO GBR§1237.

[504] AO FIN§332.

[505] DEU, GBR and the EU have acknowledged the existence of this uncertainty without assessing whether it necessitates further global emissions reductions. See **AO** DEU§425, GBR§§1239-1240 and EU§14.

[506] As to AUT, DNK, GBR, NLD and SWE, see §150. As to FIN, see §152. As to HRV, see AO HRV§150. An assertion of breach in respect of failure to assess fair share *at all* was made in error at AO HRV§170(b)(i).

[507] AO DEU§§429-432.

[508] See Carbon Budget Technical Report (IRL2/Annex 5, 72-76). Also Jackson Submission 6.

[509] As to GBR2/§§137-138, see above §159. As to IRL2/§436, no document annexed by IRL suggests that it assessed the full extent of the emissions reductions that are feasible for it to achieve (which IRL claims it is under no obligation to do: see ibid). As to ITA2/§114, the fact that the projections referred to therein are based on "models representing the structure/dynamics of the national energy-emission system" does not mean that they reflect the full extent of the reductions that are feasible. Nor do the cited documents state that this is what these models assess. See AO ITA§594.

measures). The EU *explicitly declined* to assess whether reductions greater than those envisaged by its 2030 target are feasible.[510]

165. No RS has weighed the impacts global warming on persons within/outside its territory against the burden that it is appropriate to impose upon itself in setting its 2030 target.

B. Non-Territorial Emissions

166. ***Extraction of fossil fuels.*** The Applicants pursue their claim in relation to fossil fuel production against AUT, BGR, CZE, DEU, DNK, EST, FRA, GBR, GRC, HRV, HUN, IRL, ITA, NLD, NOR, POL, ROU, RUS and TUR who produce fossil fuels (FFP RSs).[511]

167. Save for DNK, FRA, and IRL, no FFP RS is reducing its extraction of fossil fuels at a rate consistent with achieving the LTTG of 1.5°C. In particular:

a. The Applicants submitted evidence from the PGR 2021 and other sources that the following RSs are projected or intend to produce fossil fuels at rates exceeding the PGR 1.5°C Rates: BGR (coal and gas), EST (oil shale), GBR (oil), DEU (coal and oil), HRV (oil and gas), GRC (gas), NLD (oil), NOR (gas and oil), RUS (coal, gas and oil) and TUR (oil and gas).[512]

b. The Applicants submitted evidence from the BP Statistical Review of World Energy 2021 (BP Data) of the rate of increase/decline in the production of coal, gas or oil between 2009 and 2019 by AUT (oil and gas), CZE (coal), HUN (coal), ITA (oil), POL (coal and gas), ROU (coal, gas and oil) and TUR (coal) and observed that (i) were these rates to continue, they would be inconsistent with the PGR 1.5°C Rates and (ii) 2030 projections were not publicly available for these RSs.[513] These RSs have not submitted evidence to show that their fossil fuel production levels will reduce this decade at a rate consistent with the PGR 1.5°C Rates. CZE claims that its coal production has declined at a greater rate than indicated by the BP Data but provides no evidence to support the figures it cites which, in any event, would

[510] AO EU§30(a).
[511] For the latest statistics, see IEA, World Energy Balances 2022 Highlights (free extract) (2022).
[512] **AO** BGR§§132-133; EST§§310-313; GBR§§1274-1279; DEU§§453-454; HRV§§162-163; GRC§491; NLD§762; NOR§1047-1049; RUS§§1089-1092 and TUR§1175. In the alternative, the rates of BGR (coal and gas), HRV (oil and gas), EST (oil shale), DEU (coal only), GRC (gas), NLD (oil), NOR (gas and oil), RUS (coal, gas and oil) and GBR (oil) are inconsistent with the IEA NZE Pathway rates.
[513] **AO** AUT§77; CZE§222; HUN§526; ITA§607; POL§797, 799; ROU§§864-866; TUR§§1173. In the alternative, the rates of AUT (oil and gas), CZE (coal), HUN (coal), ITA (oil), POL (gas only), ROU (coal only), and TUR (gas and coal) are inconsistent with the IEA NZE Pathway rates.

not be consistent with the PGR 1.5°C Rates.[514] GBR and NOR reject the figures relied on by the Applicants without purporting to identify any errors with them.[515]

168. No FFP RS has proscribed the opening of new or the extension of existing coal mines or gas or oil fields. Furthermore:

a. DNK, FRA and IRL have adopted measures restricting the extraction of fossil fuels, however, they provide for the licensing of extraction from new gas or oil fields by the entities holding exploration licences at the time of their adoption.[516]

b. There is evidence that the opening of new or the extension of existing coal mines or gas or oil fields is contemplated in each FFP RS other than BGR, DNK, EST, FRA, NLD and ROU.[517] CZE disputes the Applicants' assertion that it has not restricted the opening of new coal mines or the expansion of existing ones but does not claim that doing so is proscribed by law.[518] Further, CZE intends to expand its coal mining capacity and the process for expanding the "Bílina" coal mine continues to progress.[519] IRL claims that no extraction from the (as yet unexploited) "Barryroe" gas field is contemplated despite the fact that the application process for a lease of that field is ongoing.[520] Regarding BGR, DNK, EST, NLD and ROU, the Applicants emphasise that these RSs have significant fossil fuel reserves and, in the absence of (total) proscription, proceed on the assumption such reserves will be extracted.[521]

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[514] CZE2/§§49-50. CZE claims that were the decline in its coal production to continue at the rate it claims it declined between 2009-2019, it would reduce by 52% from the beginning to the end of this decade, short of the 69% reductions in coal production by 2030 compared to 2020 levels envisaged by the PGR 1.5°C Rates.

[515] GBR2/§142(3)(c) and NOR2/§23-25. Importantly, the reductions referred to by NOR2/§30 are of emissions associated with the *extraction* of fossil fuels and not their *combustion*.

[516] An assertion of breach on this basis was omitted in error from AO DNK; DNK's Subsoil Act Amendment clearly provides for the granting of new both exploration and extraction licences until 2050. See Subsoil Act Amendment (**AO Annex 75a**) §16. **AO** FRA§§386-387; IRL§§572-573. IRL acknowledges that the (since enacted) Bill it refers to (IRL2/§448) does not proscribe the extraction of oil (as distinct from oil shale) or gas.

[517] **AO** AUT§77; CZE§223; DEU§452; GBR§§1280-1282; GRC§491; HRV§162; HUN§527; IRL§573; ITA§609; NOR§§1050-1051; POL§798; RUS§§1089-1091; TUR§§1173-1175.

[518] CZE2/§51.

[519] AO CZE§223. See also Ceska Televize 24, "Ministerstvo s těžaři jedná o možnosti prodloužení těžby uhlí i po roce 2033" (15 April 2022) and Seznam Zprávy, "Mostečtí zastupitelé souhlasili s pokračováním těžby uhlí v Bílině" (8 September 2022). Translations by Google Translate submitted as **Key Annexes 42a** and **43a** respectively.

[520] IRL2/§446. See, in particular, the item entitled "Update on Lease Undertaking Application" (**Key Annex 44**) dated 22/11/2022 on the "News & Events" section of the website of the applicant company, "Barryroe Offshore Energy" – formerly "Providence Resources", as referred to in AO IRL§573.

[521] **AO** BGR§§132-133, DNK§§267-269, EST§§309-313, NLD§763 and ROU§867. It is emphasised that the absence of evidence available to the Applicants that the opening of new or extension of existing coal mines or oil or gas fields is contemplated within these RSs is not evidence that such activity is not contemplated.

169. No FFP RS has adopted and implemented plans to phase out the subsidies they each provide for fossil fuel production, as to which the Applicants have submitted evidence.[522]

170. In relation to each of the above allegations, no FFP RS has presented evidence that compliance with the above requirements would impose an impossible or disproportionate burden upon them (see §100(d) regarding the burdens of proof).[523]

171. The FFP RSs are in breach of their procedural obligations relevant to the regulation and limitation of the production of fossil fuels in a manner consistent with the 1.5°C LTTG. No FFP RS has: (i) assessed its individual contribution to climate change with respect to its level of planned fossil fuel extraction; or (ii) assessed the full extent of the reduction in fossil fuel production that is feasible for it to achieve or its appropriate share of the reduction in global production required to achieve. In the alternative, no FFP RS has made those assessments available to the public.

172. ***Embedded emissions.*** No RS has adopted a legislative and administrative framework to regulate and limit their embedded emissions, nor has the EU.[524] SWE has *proposed* the adoption of a target for the reduction of such emissions but has not yet adopted that target.[525] FRA's "*plafond indicatif*" for embedded emissions is non-binding and does not meet the requirement that an effective framework contains a binding limit.[526] Contrary to GBR's observations, the CCC did not state that it would not be credible to adopt such a target.[527]

173. As to the procedural aspect of the obligation to regulate and limit embedded emissions:

a. Save for AUT, CHE, DEU, DNK, FIN, FRA, GBR, NLD and SWE, which measure their consumption emissions,[528] no RS assesses its individual contribution to climate change with respect to embedded emissions.

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[522] **AO** AUT§78, BGR§134, CZE§224, DEU§455, DNK§272, EST§314, FRA§390, GBR§1283, GRC§492, HRV§164, HUN§528, IRL§574, ITA§610, NLD§764, NOR§1052, POL§802, ROU§868, RUS§1093, TUR§1176. As to NOR2/§26 and IRL2/§445, the OECD Fossil Fuel Subsidy Tracker data is based on publicly available databases of subsidies compiled by the OECD, IEA and IMF. See OECD Fossil Fuel Subsidy Tracker: Methodology. DEU, DNK, FRA and NLD did not respond to the Applicants' invitation to address the implementation of their announced intentions to phase out these subsidies.

[523] As to GBR2/§127, in the absence of evidence, assertions that compliance with this obligation would have widespread ramifications on energy security, employment and the economy ought to be given little weight.

[524] As to IRL2/§453, emissions from *exported* goods, being Scope 3 emissions of the exporting entity, are covered by the obligation to regulate emissions of entities domiciled within a RS.

[525] SWE2/§27-30.

[526] AO FRA§392.

[527] GBR2/§143(4). See above fn 468 *mutatis mutandis*. As to GBR2/§143(3), it is precisely because other countries do not follow pathways consistent with the 1.5°C LTTG that such measures are necessary.

[528] **AO** AUT§80, CHE§1141, DEU§458, DNK§274, FIN§351, FRA§394, GBR§§1285-1286, NLD§766 and SWE§1009.

b. No RS has assessed or adequately assessed the level of reductions in its embedded emissions that are appropriate for it to achieve. Save for FRA and SWE, no RS has assessed the level of reduction in their embedded emissions that is consistent with the 1.5°C LTTG.[529] No RS (or the EU) has assessed the full extent of reductions in embedded emissions that are feasible for it to achieve.[530]

174. ***Overseas emissions.*** No RS has adopted a legislative and administrative framework to regulate and limit the overseas emissions of entities domiciled within their jurisdictions in a manner consistent with the 1.5°C LTTG, nor has the EU. While DEU, FRA and NOR have mandatory corporate human rights due diligence legislation in place, none of those RSs responded to the Applicants' invitation to clarify whether it is capable of requiring corporate entities to reduce their overseas emissions in appropriate cases.[531] While the duty of care in the Dutch Civil Code may be sufficient to discharge part of the NLD's framework duty, this remains insufficiently certain whilst *Milieudefensie v Royal Dutch Shell* is pending appeal and does not entail a reporting requirement.[532]

175. No RS, nor the EU, has assessed the range of measures it could take to compel the reduction of such emissions. Alternatively, no RS has made such an assessment available to the public.

IX. JUST SATISFACTION

176. The Applicants seek 'just satisfaction' for the purposes of Art. 41, in the form of declarations, in respect of each of the RSs, of breach of the Convention, in particular Arts. 2, 3 and 8, and Art. 14 taken together with those Arts. The Applicants' aim in seeking such declarations is to urgently stop the RSs from breaching their duties under the Convention. They do not seek a monetary award.

177. In relation to **Question 9**, should the Court declare any or all of the RSs to be in breach of the Convention, this would in turn provide the necessary guidance for the RSs to take appropriate steps and also for domestic courts to make more concrete orders in individual States. Thus the Court could give the impetus for the creation of effective domestic remedies where they are currently lacking. The Applicants submit that this

529 **AO** FRA§394 and SWE§1009. Also SWE2/§§32-33.
530 An assertion of breach of this procedural obligation was omitted in error from AO GBR. The "Paris Agreement scenario", according to which the CCC assessed the appropriate level of reduction in GBR's consumption emissions, is the 1.75°C "leadership-driven" scenario referred to at §145 above. See GBR1/Annex 3 (Sixth Carbon Budget Report) 335 (Figure 7.4) and 349 (Figure B7.2) and AO GBR§1290.
531 **AO** DEU§463, FRA§405 and NOR§1057. In contrast, ITA's Legislative Decree No. 231/2001 is overly limited in scope to potentially discharge the framework duty. See AO ITA§613.
532 AO NLD§§768-771.

would be an example of subsidiarity in action, and is entirely appropriate in light of the role of the Court as a supervisory jurisdiction extending across the CLS.[533] In addition, under Art. 46, the Committee of Ministers would supervise the execution of the judgment. In the usual way, this would involve each RS which had been found to be in breach reporting to the Committee as to what steps they had taken to bring themselves into compliance.[534] This would in turn depend on the terms of the Court's judgment, including its framing of the RSs' obligations and the reasons for finding any breach.

[533] AO §221(e).
[534] *Ilgar Mammadov v. Azerbaijan* [GC] App. No 15172/13 (ECtHR, 29 May 2019) §§147-156; 161-164; *Kavala v. Türkiye* [GC] App. No 28749/18, (ECtHR, 11 July 2022) §175.