

KIM DO HYUN ET AL,  
*Plaintiffs*

Against

NATIONAL ASSEMBLY OF REPUBLIC OF KOREA,  
PRESIDENT OF REPUBLIC OF KOREA,  
*Defendants*

Case No: 2020Hunma389

*AMICUS CURIAE* BRIEF

SUBMITTED BY THE CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW (CIEL)

September 7, 2021

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**Interest of Amici**

The Center for International Environmental Law (CIEL) is a non-profit organization that uses the power of law to protect the environment, promote human rights, and ensure a just and sustainable society. Since 1989, CIEL has been a leader in the development of international environmental and human rights law, including with respect to climate change and the interlinkages between human rights and climate policies. CIEL has submitted third party interventions and amicus curiae briefs in numerous cases concerning human rights and the environment, before national, regional, and international courts and arbitral tribunals, including *inter alia*, the European Court of Human Rights, the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights, International Center for the Settlement of Investment Disputes (ICSID) panels, the United States Supreme Court, and U.S. Courts of Appeals, as well as other national courts and national human rights institutions. Additionally, CIEL has long engaged with international institutions and supported the development of international treaties governing climate change. CIEL enjoys observer status with the UN Framework Convention on Climate Change and Green Climate Fund. CIEL also has consultative status with the UN Economic and Social Council, is accredited to the United Nations Environment Programme (UNEP), and is registered with the Organization of American States. CIEL is co-author, with the UNEP, of the *UNEP Compendium on Human Rights and the Environment: Selected international legal materials and cases*.

CIEL respectfully submits this brief as *amicus curiae* to the Court. This brief provides an overview of relevant international and comparative law on climate change and human rights to assist the Court in its analysis of the claims before it. The present case concerns the compatibility of the Republic of Korea’s (Korea’s) climate change policy with the State’s obligations under constitutional and international human rights law, particularly as they pertain to the protection of the rights of today’s youth and future generations. Climate change and its

impacts on human rights are matters of great public interest in Korea and throughout the world. As emphasized in the preamble of the United Nations Framework Convention on Climate Change (UNFCCC) and of the Paris Agreement, “change in the earth’s climate and its adverse effects are a common concern of humankind”<sup>1</sup> and States should work together to collectively address this global problem. The interpretation and application of international human rights and environmental law norms in the context of climate change are also of particular interest to CIEL, given the organization’s mission and mandate.

Through this submission, CIEL aims to inform the Court’s assessment of the scope and content of Korea’s human rights obligations in the face of climate change. Specifically, it addresses whether Korea’s climate policy comports with its human rights obligations under the constitution and international law, by providing international and comparative law sources on the following: the scientific, legal, and political consensus that climate change threatens human rights; the State’s duty to protect the rights to life and a healthy environment against the threat of climate change; what international environmental law and best available science say about the measures adequate to satisfy the duty to protect against the threat of climate change; and the obligation to guarantee equal protection of human rights across generations, young and old, present and future, in conformity with the international law principles of non-discrimination and intergenerational equity.

## **I. Introduction**

Climate change poses a real and serious threat to the human rights of present and future generations. The adverse impacts of climate change are already being felt around the world at 1.2°C of warming above pre-industrial levels, and are only projected to worsen with every fraction of a degree that average global temperature rises. Over the last several decades, the scientific and political consensus has converged around an understanding that avoiding dangerous anthropogenic interference with the Earth’s climate system and the ensuing severe infringements on human rights requires keeping global warming below 1.5°C above pre-industrial levels. To do so, States must take immediate, adequate, and effective action to mitigate greenhouse gas emissions, adapt to the rapidly changing climate,<sup>2</sup> and address mounting loss and damage caused by climate change.

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<sup>1</sup> United Nations Framework Convention on Climate Change pmbl., May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC]; Paris Agreement pmbl., Dec. 15, 2015, T.I.A.S. No. 16-1104, [https://treaties.un.org/doc/Treaties/2016/02/20160215%2006-03%20PM/Ch\\_XXVII-7-d.pdf](https://treaties.un.org/doc/Treaties/2016/02/20160215%2006-03%20PM/Ch_XXVII-7-d.pdf).

<sup>2</sup> See, e.g., *Neubauer et al v. Germany*, Bundesverfassungsgerichtshof (BverfG) (Federal Constitutional Court), 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20, para. 177 (Apr. 29, 2021) (Ger.),

[https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324\\_1bvr265618en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html) (“There are two different ways in which the state fulfils its duty to protect the fundamental rights of people living in Germany against violations caused by the impacts of climate change. First, it is obliged to adopt measures that help to slow down global warming. Second, it can protect fundamental rights by implementing adaptation measures .... Notwithstanding any stricter climate-related obligations that may arise from Art. 20a GG, the task of fulfilling the duties of protection arising from fundamental rights involves a combination of mitigation and adaptation measures for which political accountability must be assumed.”); *ASBL Klimaatzaak v. Belgian State et al*, Tribunal de première instance

The Republic of Korea (Korea) has an obligation under international law to take such action on climate change as is necessary and appropriate to prevent foreseeable threats to human rights, including the rights to life and a healthy environment, for which a safe climate is an essential prerequisite. That duty applies equally across generations, present and future. A heightened standard of care is owed to children, who are disproportionately harmed by inaction on climate change both because of their current age-related vulnerabilities and because they will live more of their lives in the future when climate change impacts will be worse. Moreover, the duty to protect the right to healthy environment must be interpreted in light of the principle of intergenerational equity, which is firmly established in international law.

In interpreting the scope and content of the State's duty and assessing what measures are necessary to fulfil it, the Court should look to international environmental law and the best available science. Those sources reflect the scientific and political consensus that "warming of 1.5°C is not considered 'safe' for most nations, communities, ecosystems, and sectors,"<sup>3</sup> and that warming in excess of 1.5°C poses even graver threats to human rights than the world is currently experiencing. Comparative law from other jurisdictions elucidates the application of the duty to protect human rights in the context of the climate crisis, and reinforces the growing recognition among States that there is a legal and moral imperative to act ambitiously and urgently to avert climate catastrophe. Both international and comparative law demonstrate that preventing dangerous anthropogenic interference with the climate system requires, *at minimum*, keeping global temperature rise below 1.5°C, as every fraction of a degree of warming above that bound intensifies human rights harm. Consistent with the precautionary principle, which is firmly rooted in international law, States must adopt measures most likely to achieve that aim without delay or reliance on unproven technologies.

The brief begins by setting forth the scientific, legal, and political consensus that climate change threatens human rights. It then discusses the State's duty under international law to protect the rights to life and a healthy environment against this threat. Drawing on international and comparative law sources, section III describes Korea's duty to take steps to avert the risk that climate change poses to the rights to life and a healthy environment. Section IV contends that the adequacy of the State's action to avert the threat posed by climate change must be assessed

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francophone de Bruxelles, Section Civile-2015/4585/A, p. 62 (June 17, 2021) (unofficial translation) (Belg.) (acknowledging that the "appropriate measures" that States have a duty to take "can be of two kinds: either so-called mitigation measures that aim to prevent the hazard from materialising, or so-called adaptation measures that aim to cushion or mitigate its [climate change's] effects").

<sup>3</sup> Intergovernmental Panel on Climate Change (IPCC), *Technical Summary, in Global Warming of 1.5°C: An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*, p. 44 (Valérie Masson-Delmotte et al. eds., 2018), [https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15\\_Full\\_Report\\_Low\\_Res.pdf](https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_Low_Res.pdf) [hereinafter IPCC, *Special Report on 1.5°C*]; Joyashree Roy, et al., *Chapter 5: Sustainable Development, Poverty Eradication and Reducing Inequalities, in Special Report on 1.5°C, supra note 3*, at p. 447, [https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15\\_Chapter5\\_Low\\_Res.pdf](https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15_Chapter5_Low_Res.pdf) [hereinafter *Chapter 5, in IPCC, Special Report on 1.5°C*].

in light of international environmental law and the best available science. International climate agreements and the scientific consensus on which they are based inform what measures will satisfy the State's duty to protect under international human rights law. As comparative law makes clear, those sources indicate that measures to reduce greenhouse gas emissions should be consistent with the aim of keeping warming below 1.5°C and reasonably likely to achieve that goal. Section V demonstrates that the State's duty to protect applies equally across present and future generations. Interpreted consistently with the international law principles of non-discrimination and intergenerational equity, Korea's constitutional obligations bar climate action that has a discriminatory effect on today's youth, and require that the environment be preserved for the benefit of present and future generations.

## **II. The International Scientific, Legal, and Political Consensus Recognizes that Climate Change Threatens Human Rights**

Climate change does not represent a *potential* crisis; it is a present and accelerating emergency that scientists and governments have recognized as a serious threat to the enjoyment of a range of rights, now and into the future.<sup>4</sup> The scientific consensus around the causes and consequences of climate change is the basis for growing recognition by national and international courts, as well as international human rights bodies, that climate change threatens human rights and triggers State duties under human rights law. There is an international scientific, political, and legal consensus that, left unaddressed, climate change will further destabilize our ecosystems and cause catastrophic harm to human life. Unchecked global warming and the climate change it triggers unleash a range of adverse impacts on human rights, including, *inter alia*: increased health risks and deaths, displacement of millions of people, widespread destruction of property, increased water stress, global food insecurity, and economic challenges that risk both halting growth and exacerbating poverty.<sup>5</sup> Many of these impacts are already being felt, and present heightened threats to disadvantaged and vulnerable populations, including children.<sup>6</sup>

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<sup>4</sup> The IPCC currently is undertaking its Sixth Assessment Report and the first report released as part of that process concludes that “[i]t is unequivocal that human influence has warmed the atmosphere, ocean and land. Widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred” and that these changes, which include heatwaves, droughts, and increased precipitation among other impacts, are unprecedented and likely to continue and worsen. *See* Intergovernmental Panel on Climate Change (IPCC), *Summary for Policymakers, in Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, paras. A.1-A.3, B.1-B.2, Fig. SPM.3 (Valérie Masson-Delmotte et al. eds., 2021), <https://www.ipcc.ch/report/ar6/wg1/> [hereinafter IPCC, *AR6*]. Additionally, in its most recent resolution on climate change and human rights, the Human Rights Council recognized “that climate change poses an existential threat for some countries, and recognize[ed] also that it has already had an adverse impact on the full and effective enjoyment of the human rights enshrined in the Universal Declaration of Human Rights and other international human rights instruments.” Human Rights Council, Res. 47/..., U.N. Doc. A/HRC/47/L.19, at pmb. (July 8, 2021), <https://undocs.org/A/HRC/47/L.19>.

<sup>5</sup> *See* IPCC, *Summary for Policymakers, in Special Report on 1.5°C, supra* note 3, para. B.5, [https://report.ipcc.ch/sr15/pdf/sr15\\_spm\\_final.pdf](https://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf) [hereinafter IPCC, *Summary for Policymakers, in Special Report on 1.5°C*].

<sup>6</sup> *Id.* at para. B.5.1; Ove Hoegh-Guldberg, et al., *Chapter 3: Impacts of 1.5°C Global Warming on Natural and Human Systems, in IPCC, Special Report on 1.5°C, supra* note 3, at Box 6, sec. 3.4,

As outlined further below, international scientific and legal authorities, intergovernmental bodies, and national courts recognize that climate change presents a real, serious, and accelerating threat to human rights.<sup>7</sup> The Intergovernmental Panel on Climate Change (IPCC), the world's preeminent body on climate science, has warned with high confidence that every additional fraction of a degree of warming poses greater threats.<sup>8</sup> The United Nations (UN) Human Rights Committee has called climate change one of “the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.”<sup>9</sup> Relying on the international scientific consensus as their starting point, apex courts in multiple countries, including the German Constitutional Court, have acknowledged that climate change poses a foreseeable risk to life, health, and other human rights.<sup>10</sup> Moreover, climate change is well understood as a mounting threat to the full enjoyment of human rights, especially the rights of children, who are at disproportionate risk due both to their age-related vulnerability to certain climate impacts and to the greater share of their lifetimes that they will live in the future, when, all evidence suggests, temperatures will be higher and climate impacts more severe.

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[https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15\\_Chapter3\\_Low\\_Res.pdf](https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Chapter3_Low_Res.pdf) (noting, for example, the risks to food security and in para. 3.4.7.1 that children, women, and older adults are at greater risks to human health due to climate change); *Chapter 5, in IPCC, Special Report on 1.5°C, supra* note 3, at para. 5.2.1 (noting that global warming of 1.5°C “disproportionally affects children”).

<sup>7</sup> See Joint Statement by the Committee on the Elimination of Discrimination Against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities, Statement on “Human Rights and Climate Change,” U.N. Doc. HRI/2019/1, para. 5 (May 14, 2020), [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=HRI%2f2019%2fi&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=HRI%2f2019%2fi&Lang=en) [hereinafter Joint Statement on “Human Rights and Climate Change”] (statement originally released Sept. 16, 2019); see also references contained in footnote 10.

<sup>8</sup> IPCC, *Summary for Policymakers, in Special Report on 1.5°C, supra* note 3, at para. B.5; see also IPCC, *Summary for Policymakers, in AR6, supra* note 4, at para. B.2, figs. SPM.5, SPM.6.

<sup>9</sup> 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, para. 62, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018) [hereinafter Human Rights Committee, General Comment No. 36].

<sup>10</sup> See, e.g., *Neubauer et al., supra* note 2, at paras. 20-28, 148 (recognizing that the dangers of climate change are impacting present and future generations and that there are tipping points beyond which consequences for people are even greater); Supreme Court of the Netherlands, *The State of the Netherlands v. Urgenda*, paras. 4.2-4.8, 5.6.2, Case. No. 19/00135 (Engels) (Dec. 20, 2019) (English translation) [hereinafter *Urgenda*] (acknowledging that climate change is a “real and immediate risk”); *Shrestha v. Office of the Prime Minister et al.*, Nepal Supreme Court, Decision no. 10210, NKP Part 61, Vol. 3, p. 11 (2018) (Nepal) (unofficial translation) (noting the impacts that climate change has caused, including irreversible harms to nature, and the imminent threat to future generations); *Generaciones Futuras v. Minambiente*, Supreme Court of Colombia, STC. 4360-2018, pp. 34-37 (Apr. 5, 2018) (Col.) (unofficial translation by Dejusticia who supported the plaintiffs) (recognizing the dangers of climate change, including the irreversibility of the damage); *Ashgar Leghari v. Federation of Pakistan*, (2015) W.P. No. 25501/2015 (Lahore High Court) (Pak.) (stating “Climate Change is a defining challenge of our time and has led to dramatic alterations in our planet’s climate system.”).

## **A. Scientific authorities agree that climate change is already causing and is projected to cause severe impacts on human rights**

The scientific reports of the IPCC, key findings of which the 195 Member States of the IPCC, including Korea, endorse by consensus,<sup>11</sup> have consistently documented both current and projected impacts of climate change on human rights. The IPCC's Fifth Assessment Report (AR5), issued in 2013-14, identified numerous impacts from projected temperature rise, including: increased risks of death, injury, ill-health, or disrupted livelihoods in low-lying coastal zones and small islands; increased risk of severe ill-health and disrupted livelihoods for urban populations; increased risks due to breakdown of critical services such as electricity, water supply, and health and emergency services; and food insecurity.<sup>12</sup> In 2018, in a response to a request from the UNFCCC Conference of the Parties, the IPCC released a landmark report, the *Special Report on the Impacts of Global Warming of 1.5°C (Special Report on 1.5°C)*, which concluded that if the average global temperature rises by more than 1.5°C above pre-industrial levels, dramatic adverse impacts to human life will ensue.<sup>13</sup> Noting that the world was already more than 1°C warmer than during the pre-industrial era, and that 1.5°C would not be safe for most people,<sup>14</sup> the report examined potential pathways for reducing emissions and limiting temperature rise, as well as the differences in impacts depending on whether global temperature rose by 1.5°C or 2°C.<sup>15</sup> Further, each fraction of a degree of additional warming increases overall risks to human lives.<sup>16</sup> In subsequent analyses, the IPCC has emphasized that the stress of climate change to land is affecting food security and exacerbates risks to livelihoods and human health.<sup>17</sup> Currently, the IPCC is undertaking its Sixth Assessment Report (AR6). While it has yet to release the portion of AR6 addressing the impacts of climate change, in the first report from the assessment process, on the physical science of climate change, the IPCC concluded with more certainty than in AR5 that human-induced climate change has and will continue to affect

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<sup>11</sup> Intergovernmental Panel on Climate Change, *Appendix A to the Principles Governing IPCC Work: Procedures for the Preparation, Review, Acceptance, Adoption, Approval and Publication of IPCC Reports*, p. 9 (2013); see also Intergovernmental Panel on Climate Change, *IPCC Factsheet: How does the IPCC approve reports?* (2013), [https://www.ipcc.ch/site/assets/uploads/2018/02/FS\\_ipcc\\_approve.pdf](https://www.ipcc.ch/site/assets/uploads/2018/02/FS_ipcc_approve.pdf).

<sup>12</sup> IPCC, *Summary for Policymakers, in Climate Change 2014: Impacts, Adaptation, and Vulnerability, Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, p. 13 (C.B. Fields et al., eds. 2014) [hereinafter IPCC, AR5].

<sup>13</sup> See generally IPCC, *Special Report on 1.5°C*, *supra* note 3.

<sup>14</sup> IPCC, *Technical Summary, in Special Report on 1.5°C*, *supra* note 3, at p. 44; *Chapter 5, in IPCC, Special Report on 1.5°C*, *supra* note 3, at p. 447.

<sup>15</sup> IPCC, *Summary for Policymakers, in Special Report on 1.5°C*, *supra* note 3, at para. A.1. Since the release of the Special Report on 1.5°C global warming has only increased and is now estimated to be at 1.2°C above pre-industrial levels. See World Meteorological Organization (WMO), *State of the Global Climate 2020*, WMO-No. 1264, p. 6 (2021); see also IPCC, *Summary for Policymakers, in AR6*, *supra* note 4, at para. A.1.2 (stating that “[e]ach of the last four decades have been successively warmer than any decade that preceded it since 1850” and that “[g]lobal surface temperature was 1.09 [0.95 to 1.20] °C higher in 2011-2020 than 1850 to 1900”).

<sup>16</sup> IPCC, *Summary for Policymakers, in Special Report on 1.5°C*, *supra* note 3, at paras. A.3, B.5.

<sup>17</sup> IPCC, *Summary for Policymakers, in Climate Change and Land: An IPCC Special Report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems*, paras. A.2, A.5 (2019).



weather and climate extremes including heatwaves, droughts, heavy rain, and cyclones, among others.<sup>18</sup>

Many of these risks are already materializing. Climate change, caused primarily by the extraction and combustion of fossil fuels,<sup>19</sup> has led to an increase in the concentration of greenhouse gases in the atmosphere not seen in at least 800,000 years,<sup>20</sup> an associated average global temperature 1.2°C above pre-industrial levels, and an unprecedented 44 consecutive years of above-average global temperatures.<sup>21</sup> Recent years have seen repeated disasters stemming from climate change, from more intense and more frequent monsoons and typhoons, to droughts, flooding, wildfires, and heatwaves, which undermine a range of human rights. The World Health Organization (WHO) estimates that climate change has already had significant impacts on human health and led to excess deaths, for example from heatwaves and natural disasters, and will lead to an additional 250,000 deaths per year between 2030 and 2050.<sup>22</sup> The Food and Agriculture Organization of the United Nations (FAO) has found that climate change is impacting a range of sectors related to food security including agriculture, livestock, and forests, among others.<sup>23</sup> It is also negatively affecting fisheries due to warming of ocean waters, rising sea levels and floods, and ocean acidification, which undermines the livelihoods and food security of those who rely on fish.<sup>24</sup>

Parties to the UNFCCC also have consistently recognized the impacts of climate change on humans. The Convention itself recalls the principles set out in the Stockholm Declaration, which

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<sup>18</sup> IPCC, *Summary for Policymakers, in AR6, supra* note 4, at paras. A.1-A.3, B.1-B.3, B.5, C.2-C.3 Figs. SPM.3, SPM.5, SPM.6.

<sup>19</sup> IPCC, *Technical Summary, in AR6, supra* note 4, at Box TS.5 (stating with high confidence that the increase of CO<sub>2</sub> in the atmosphere is “unequivocally due to emissions from human activities” and that “the combustion of fossil fuels was responsible for about 64% ± 15%, growing 48 to an 86% ± 14% contribution over the past 10 years.”); IPCC, *Summary for Policymakers, in AR5, supra* note 12, at p. 5 (stating “Emissions of CO<sub>2</sub> from fossil fuel combustion and industrial processes contributed about 78% of the total GHG emissions increase from 1970 to 2010, with a similar percentage contribution for the increase during the period 2000 to 2010 (high confidence)”; Richard Heede, *Tracing Anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers*, 122 *Climatic Change* 229 (2014).

<sup>20</sup> See IPCC, *Summary for Policymakers, in AR6, supra* note 4, at para. A.2.1 (stating that “in 2019, atmospheric CO<sub>2</sub> concentrations were higher than at any time in at least 2 million years (*high confidence*) and that the concentrations of other greenhouse gases were higher than they have been in 800,000 years); *Technical Summary, in AR6, supra* note 4, at TS.2.2 (noting that the current concentrations of CO<sub>2</sub>, CH<sub>4</sub>, and N<sub>2</sub>O are at higher levels than seen in at least 800,000 years (*very high confidence*) and that it is the highest CO<sub>2</sub> concentrations in 2 million years (*high confidence*); *Chapter 1, in IPCC, Special Report on 1.5°C, supra* note 3, at p. 54, Box 1.1 (2018); IPCC, *Summary for Policymakers, in AR5, supra* note 12, at p. 4, SPM 1.2.

<sup>21</sup> WMO, *State of the Global Climate 2020, supra* note 15, at p. 6; see also NOAA, *2020 was Earth’s Second Hottest year, just behind 2016* (Jan. 14, 2021), <https://www.noaa.gov/news/2020-was-earth-s-2nd-hottest-year-just-behind-2016>.

<sup>22</sup> World Health Organization (WHO), *Climate Change and Health Fact Sheet* (Feb. 1, 2018), <https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health>.

<sup>23</sup> See generally Food and Agriculture Organization of the United Nations (FAO), *Climate Change and food security: risks and responses* (2015), <http://www.fao.org/3/i5188e/i5188e.pdf>.

<sup>24</sup> See *id.* at pp. 16-17.

proclaimed that the environment is essential to the enjoyment of human rights,<sup>25</sup> and acknowledged the threat climate change posed to human life.<sup>26</sup> The adoption of the 2010 Cancun Agreements was a watershed moment as they are the first UNFCCC decisions highlighting the impact of climate change on human rights.<sup>27</sup> With the Paris Agreement, Parties recognized that climate change and responses to it can affect people and their human rights, and that safeguarding food security was essential.<sup>28</sup>

## **B. International human rights authorities have repeatedly recognized that climate change poses a real and serious threat to human rights**

The world's top human rights bodies have consistently affirmed that climate change represents a present and growing threat to the enjoyment of a range of human rights, including the rights to life and a healthy environment. Since 2008, the United Nations Human Rights Council (HRC), a political body comprised of elected UN Member States on which Korea is currently serving its fifth term, has repeatedly adopted resolutions identifying climate change as a threat to human rights, including the right to life.<sup>29</sup> As a member of the HRC, Korea endorsed the HRC

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<sup>25</sup> Stockholm Declaration on the Human Environment, U.N. Doc. A/CONF.48/14 and Corr.1, *reprinted in* 11 I.L.M. 1416, para. 1 (1972) [hereinafter Stockholm Declaration].

<sup>26</sup> UNFCCC, *supra* note 1, at pmb. paras. 2, 7, art. 2.

<sup>27</sup> See UNFCCC Conference of the Parties, Decision 1/CP.16, The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, pmb., FCCC/CP/2010/7/Add.1 (Mar. 15, 2011) [hereinafter Cancun Agreement] (linking the agreements to the UN human rights system by “*Noting* resolution 10/4 of the United Nations Human Rights Council on human rights and climate change, which recognizes that the adverse effects of climate change have a range of direct and indirect implications for the effective enjoyment of human rights and that the effects of climate change will be felt most acutely by those segments of the population that are already vulnerable owing to geography, gender, age, indigenous or minority status.”).

<sup>28</sup> Paris Agreement, *supra* note 1, at pmb.; see also Cancun Agreement, *supra* note 27, at para. 8 (providing the first recognition in a UNFCCC decision that human rights should be respected in all climate action by “*Emphasiz[ing]* that Parties should, in all climate change related actions, fully respect human rights”).

<sup>29</sup> See, e.g., Human Rights Council, Res. 7/23, U.N. Doc. A/HRC/RES/7/23 (Mar. 28, 2008) (stating in its opening line: “*Concerned* that climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights”); Human Rights Council, Res. 10/4, U.N. Doc. A/HRC/RES/10/4 (Mar. 25, 2009); Human Rights Council, Res. 18/22, U.N. Doc. A/HRC/RES/18/22 (Oct. 17, 2011); Human Rights Council, Res. 26/27, U.N. Doc. A/HRC/RES/26/27 (July 15, 2014); Human Rights Council, Res. 29/15, U.N. Doc. A/HRC/RES/29/15 (July 22, 2015) (“*Emphasizing* that the adverse effects of climate change have a range of implications, both direct and indirect, for the effective enjoyment of human rights ...” and “[e]xpressing concern that ... the adverse effects of climate change are felt most acutely by those segments of the population that are already in vulnerable situations owing to factors such as geography, poverty, gender, age ...”); Human Rights Council, Res. 31/8: Human rights and the environment, U.N. Doc. A/HRC/RES/31/8, at pmb., para. 4(a) (Apr. 22, 2016); Human Rights Council, Res. 32/33, U.N. Doc. A/HRC/RES/32/33, at pmb. (July 18, 2016) (affirming that climate change has “an adverse impact on the full and effective enjoyment of human rights”); Human Rights Council Res. 35/20, U.N. Doc. A/HRC/35/20 (July 7, 2017); Human Rights Council, Res. 38/4: Human rights and climate change, U.N. Doc. A/HRC/RES/38/4, at pmb. (July 16, 2018) (recognizing that “climate change has already had an adverse impact on the full and effective enjoyment of the human rights enshrined in the Universal Declaration of Human Rights”); Human Rights Council, Res. 41/21, U.N. Doc. A/HRC/RES/41/21 (July 23, 2019); Human Rights Council, Res. 44/7, U.N. Doc. A/HRC/Res/44/7 (July 23, 2020); Human Rights Council, Res. 47/..., *supra* note 4, at pmb. (“*Emphasizing* that the adverse effects of climate change have a range of implications, both

resolutions linking climate change to human rights, including a 2017 resolution acknowledging that climate change contributes “to the increased frequency and intensity of both sudden-onset natural disasters and slow-onset events, and that these events have adverse effects on the full enjoyment of all human rights.”<sup>30</sup> The HRC reiterated this concern in its most recent resolutions on human rights and climate change and emphasized the urgency of addressing the adverse consequences of climate change.<sup>31</sup>

### **i. Climate Change Jeopardizes the Realization of a Range of Human Rights**

Like the Human Rights Council, UN Human Rights Treaty Bodies, which are committees of independent experts who interpret and monitor implementation of international human rights treaties, have repeatedly recognized that climate change jeopardizes the realization of human rights. Five UN Human Rights Treaty Bodies issued a rare joint public statement in 2019 expressing concern that the adverse impacts of climate change “threaten, among others, the right to life, the right to adequate food, the right to adequate housing, the right to health, the right to water and cultural rights” and emphasizing that population groups already in marginalized and vulnerable situations, including children, are at “particularly high” risk.<sup>32</sup> The joint statement stressed that “adverse impacts on human rights are *already occurring at 1°C of warming* and every additional increase in temperatures will further undermine the realization of rights.”<sup>33</sup> As the UN Office of the High Commissioner for Human Rights (OHCHR) has put it simply “[a]t its most extreme, climate change kills.”<sup>34</sup>

These treaty bodies have recognized that climate change represents an existential threat, putting fundamental rights at risk. In its General Comment No. 36 on the right to life, the Human Rights Committee (responsible for interpreting and monitoring implementation of the International Covenant on Civil and Political Rights, to which Korea is a party) described climate change as one of “the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.”<sup>35</sup> The Committee on Economic, Social and Cultural

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direct and indirect, that can increase with greater global warming, for the effective enjoyment of human rights, including, inter alia, the right to life, the right to adequate food, the right to enjoyment of the highest attainable standard of physical and mental health, the right to adequate housing, the right to self-determination, the right to work and the right to development, and recalling that in no case may a people be deprived of its own means of subsistence ...” and recognizing that it “has already had an adverse impact on the full and effective enjoyment of human rights ...”).

<sup>30</sup> Human Rights Council, Res. 35/20, *supra* note 29, at para. 1.

<sup>31</sup> See Human Rights Council, Res. 47/..., *supra* note 4, at paras. 1-2; Human Rights Council, Res. 44/7, *supra* note 29, at paras. 1-2; see also Human Rights Council, Res. 41/21, *supra* note 29.

<sup>32</sup> Joint Statement on “Human Rights and Climate Change,” *supra* note 7, at para. 3.

<sup>33</sup> *Id.* at para. 5 (emphasis added).

<sup>34</sup> Office of the United Nations High Commissioner for Human Rights, *Analytical Study on the relationship between climate change and the human right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, para. 8, UN Doc. A/HRC/32/33 (May 6, 2016).

<sup>35</sup> Human Rights Committee, General Comment No. 36, *supra* note 9, at para. 62.

Rights (CESCR) has also acknowledged that climate change is already affecting the rights to health, food, water, and sanitation and that these impacts will increase in the future.<sup>36</sup>

In addition to these general comments and recommendations interpreting treaty provisions, since 2008, the UN Human Rights Treaty Bodies have increasingly raised climate change in both the “List of Issues” to which States must respond as part of the periodic review of their compliance with treaty obligations, and in the Concluding Observations and recommendations the committees issue to individual States.<sup>37</sup>

Independent human rights experts appointed by the Human Rights Council (called UN Special Procedures)<sup>38</sup> also have documented the impact of climate change on the realization of a full range of human rights. In 2015, twenty-seven Special Procedures Mandate Holders issued a joint statement emphasizing “the grave harm climate change poses to the worldwide enjoyment of human rights,” including through its effects on water and food security, and disproportionate impacts on vulnerable groups such as children and those living in poverty.<sup>39</sup> The Special Rapporteur on extreme poverty and human rights detailed the current impacts of climate change on a host of rights, finding that it threatens to undo progress to date in development and poverty reduction and “exacerbate existing poverty and inequality.”<sup>40</sup> The UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (“Special Rapporteur on Human Rights and the Environment”) has repeatedly emphasized the threats climate change poses to human rights.<sup>41</sup>

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<sup>36</sup> Press Release, Committee releases statement on climate change and the Covenant: Climate Change and the International Covenant on Economic, Social and Cultural Rights, para. 4 (Oct. 8, 2018), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23691&LangID=E> [hereinafter Climate Change and the International Covenant on Economic, Social and Cultural Rights].

<sup>37</sup> See Center for International Environmental Law (CIEL) & Global Initiative for Economic, Social and Cultural Rights (GI-ESCR), *States’ Human Rights Obligations in the Context of Climate Change: 2020 Update* (Mar. 2020), <https://www.ciel.org/reports/states-human-rights-obligations-in-the-context-of-climate-change-2020-update-march-2020/>; Center for International Environmental Law (CIEL) & Global Initiative for Economic, Social and Cultural Rights (GI-ESCR), *States’ Human Rights Obligations in the Context of Climate Change: 2019 Update* (Mar. 2019), <https://www.ciel.org/reports/states-human-rights-obligations-context-climate-change-2019-update/>; Center for International Environmental Law (CIEL) & Global Initiative for Economic, Social and Cultural Rights (GI-ESCR), *States’ Human Rights Obligations in the Context of Climate Change* (Jan. 2018), <https://www.ciel.org/reports/states-human-rights-obligations-context-climate-change/>.

<sup>38</sup> United Nations Human Rights, Office of the High Commissioner (OHCHR), Special Procedures of the Human Rights Council, <https://www.ohchr.org/en/HRBodies/SP/Pages/Welcomepage.aspx> (last visited Apr. 25, 2021).

<sup>39</sup> See Joint Statement by UN Special Procedures on the occasion of World Environment Day, Climate Change and Human Rights (June 5, 2015), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16049&LangID=E>.

<sup>40</sup> Philip Alston (Special Rapporteur on extreme poverty and human rights), *Report on Climate Change and Poverty*, paras 3-13, U.N. Doc. A/HRC/41/39 (June 25, 2019).

<sup>41</sup> See John Knox (Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment), *Report on the human rights obligations relating to climate change*, para. 24, U.N. Doc. A/HRC/31/52 (Feb. 1, 2016) (noting the “... greater the increase in average temperature the greater the effects on the right to life and health ...”); see also David R. Boyd (Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment), *Report of the Special Rapporteur on the issue of human rights*

In his Safe Climate report, the current Special Rapporteur on Human Rights and the Environment has highlighted that the world is in the midst of a climate emergency which is “already having major impacts on human health, livelihoods, and rights.”<sup>42</sup> In this 2019 report, the Special Rapporteur noted that eighteen of the warmest years in history had occurred in the first nineteen years of the 21st century; the number of extreme weather events had doubled since the early 1990s; and climate change-linked natural disasters affected over 1.5 billion people, contributing to over 700,000 deaths, between 2005 and 2015.<sup>43</sup> The Safe Climate report further detailed the impacts of climate change on a whole slate of human rights including the right to life, health, food, water, and sanitation, as well as the rights of the child and vulnerable populations and the right to a healthy environment.<sup>44</sup> Addressing the impacts of climate change, the UN High Commissioner for Human Rights has warned that “the world has never seen a threat to human rights of this scope.”<sup>45</sup>

Regional bodies have likewise acknowledged that climate change is already negatively impacting the realization of human rights, including the right to life. The Organisation of American States (OAS) has stated that climate change causes “deterioration of quality of life” for present and future generations.<sup>46</sup> In its Advisory Opinion on Human Rights and the Environment, the Inter-American Court of Human Rights emphasized the interconnection between human rights and the environment including the adverse effects of climate change on the enjoyment of human rights.<sup>47</sup> A 2016 Resolution adopted by the African Commission on Human and Peoples’ Rights expressed concern “about the detrimental impact of the increased levels of greenhouse gases which could lead to temperature rises with serious consequences on the lives of African populations.”<sup>48</sup>

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*obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, para. 58, U.N. Doc. A/74/161 (July 15, 2019) [hereinafter Special Rapporteur on Human Rights and the Environment, *Safe Climate Report*] (noting that multiple other Special Rapporteurs have “all warned that climate change threatens the full enjoyment of human rights and that climate actions must be developed and implemented in accordance with human rights laws and norms”).

<sup>42</sup> Special Rapporteur on Human Rights and the Environment, *Safe Climate Report*, *supra* note 41, at para. 6.

<sup>43</sup> *Id.* at paras. 6-11 (highlighting numerous specific natural disasters).

<sup>44</sup> *See id.* at paras. 26-51.

<sup>45</sup> “Climate crisis is greatest ever threat to human rights, UN warns,” *The Guardian* (Sept. 9, 2019), <https://www.theguardian.com/law/2019/sep/09/climate-crisis-human-rights-un-michelle-bachelet-united-nations>.

<sup>46</sup> OAS Resolution AG/RES.2818 (XLIV-O/14) (2014).

<sup>47</sup> *See* The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in relation to Articles 1(1) and 2 of the American Convention on Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R., paras. 47, 49, 54 (Nov. 15, 2017) [hereinafter Advisory Opinion OC-23/17].

<sup>48</sup> African Commission on Human and Peoples’ Rights, 342 Resolution on Climate Change and Human Rights in Africa - ACHPR/Res.342(LVIII)2016 (Apr. 20, 2016), <https://www.achpr.org/sessions/resolutions?id=381>.

## ii. Climate Change Disproportionately Affects Children and Future Generations

International human rights experts have found that children face greater risks and disproportionate impacts due to climate change.<sup>49</sup> Children are the most vulnerable segment of the population to environmental harm of any kind.<sup>50</sup> Children are more vulnerable both to acute consequences from climate change such as heat exhaustion and dehydration, and to chronic consequences or injury from climate change such as malnutrition, exposure to environmental pollutants during development, and psychological harm from displacement.<sup>51</sup> Climate change-induced harm is no different; it negatively affects children's enjoyment of a full range of rights protected by the Convention on the Rights of the Child, including the rights to life, health, food, housing, water and sanitation, development, play, and recreation.<sup>52</sup> Additionally, "climate change heightens existing inequalities, intensifies poverty and reverses progress towards improvement in children's well-being."<sup>53</sup>

The Committee on the Rights of the Child (CRC) has found that climate change poses "one of the biggest threats to children's health and exacerbates health disparities."<sup>54</sup> The Committee has increasingly addressed the link between climate change and children's rights in its review of

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<sup>49</sup> See, e.g., Human Rights Council, Res. 32/33, *supra* note 29, at pmb., para. 13 ("recognizing that children are among the most vulnerable to climate change"); U.N. Office of the High Commissioner for Human Rights (OHCHR), *Analytical Study on the relationship between climate change and rights of the child*, paras. 20, 55, U.N. Doc. A/HRC/35/13 (May 4, 2017) (noting that "[a]ll children are exceptionally vulnerable to the negative impacts of climate change," and that the negative impacts of climate change will disproportionately affect children in vulnerable situations); see also John H. Knox (Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment), *Report on the relationship between children's rights and environmental protection*, paras. 22-26, 69, U.N. Doc. A/HRC/37/58 (Jan. 24, 2018); U.N. Office of the High Commissioner for Human Rights (OHCHR), *Frequently Asked Questions on Human Rights and Climate Change: Fact Sheet No. 38*, p. 24 (2021), [https://www.ohchr.org/Documents/Publications/FSheet38\\_FAO\\_HR\\_CC\\_EN.pdf](https://www.ohchr.org/Documents/Publications/FSheet38_FAO_HR_CC_EN.pdf) (stating "Children are disproportionately impacted by climate change due to their unique metabolism, as well as their physiology and developmental needs.").

<sup>50</sup> See *Report on the relationship between children's rights and environmental protection*, U.N. Doc. A/HRC/37/58, *supra* note 49, at para. 15.

<sup>51</sup> See, e.g., United States Environmental Protection Agency, *Climate Change and the Health of Children*, EPA 430-F-16-055, 1-3 (May 2016); Lawrence Stanberry, Madeleine Thomson & Wilmot James, *Prioritizing the needs of children in a changing climate*, *PLoS Med* 15(7): e1002627 (July 31, 2018), <https://doi.org/10.1371/journal.pmed.1002627>; Maya Earls, *Children Are Particularly Vulnerable to Climate Change's Health Impacts*, *Scientific American* (Nov. 14, 2019), <https://www.scientificamerican.com/article/children-are-particularly-vulnerable-to-climate-changes-health-impacts/>.

<sup>52</sup> See *Report on the relationship between children's rights and environmental protection*, U.N. Doc. A/HRC/37/58, *supra* note 49, at paras. 15-37; see also OHCHR, *Analytical Study on the relationship between climate change and rights of the child*, *supra* note 49, at paras. 50-51.

<sup>53</sup> OHCHR, *Analytical Study on the relationship between climate change and rights of the child*, *supra* note 49, at para. 50.

<sup>54</sup> Committee on the Rights of the Child, General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), paras. 5, 50, U.N. Doc. CRC/C/GC/15 (Apr. 17, 2013).

State Parties' implementation of the Convention.<sup>55</sup> In examining the threats posed by climate change-driven natural disasters, the Committee on the Elimination of Discrimination Against Women (CEDAW) similarly recognized the heightened exposure of youth to increasingly frequent and severe weather events, such as typhoons.<sup>56</sup>

Further, experts note that children are disproportionately exposed to the long-term impacts of climate change because they will live greater portions of their lives in the future, when temperature rise and its adverse impacts are greater than today. Indeed, "climate change ... threaten[s] to cause long-term effects that will blight children's lives for years to come."<sup>57</sup> Accordingly, the OHCHR recommends taking "ambitious mitigation measures to minimize the future negative impacts of climate change on children to the greatest extent possible by limiting warming to no more than 1.5°C above pre-industrial levels, as called for in the Paris Agreement."<sup>58</sup>

In addition to having a disproportionate effect on today's younger generations, climate change also disproportionately impacts future generations. As referenced above, the IPCC stated that each degree of warming will bring greater consequences, which, therefore, would mean greater impacts on future generations.<sup>59</sup> Human rights experts have characterized climate change as a threat to the ability of future generations to enjoy their rights, including the right to life.<sup>60</sup> In addressing the impacts of fracking on climate change, for example, the CESCR expressed particular concern about the rights of future generations.<sup>61</sup> Like children, future generations face significantly greater harm from climate change than adults alive today, given that as climate change worsens so too do its negative impacts – and both children and future generations will, by virtue of their birth cohorts, live all or significant portions of their lives in the future.

### **C. National courts have recognized the threat to human rights posed by climate change**

Many of the most recent national court decisions on climate policy recognize that global warming poses an undeniable threat to rights,<sup>62</sup> and take this scientifically established premise

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<sup>55</sup> See CIEL & GI-ESCR, *States' Human Rights Obligations in the Context of Climate Change: 2020 Update*, *supra* note 37, at 8.

<sup>56</sup> Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 37 on Gender-related dimensions of disaster risk reduction in the context of climate change, para. 1, U.N. Doc. CEDAW/C/GC/37 (Feb. 7, 2018) [hereinafter CEDAW, General Recommendation No. 37].

<sup>57</sup> *Report on the relationship between children's rights and environmental protection*, U.N. Doc. A/HRC/37/58, *supra* note 49, at para. 69.

<sup>58</sup> OHCHR, *Analytical Study on the relationship between climate change and rights of the child*, *supra* note 49, at para. 54(a).

<sup>59</sup> See IPCC, *Summary for Policymakers, in Special Report on 1.5°C*, *supra* note 3, at paras. A.3, B.5.

<sup>60</sup> Human Rights Committee, General Comment No. 36, *supra* note 9, at para. 62; see also Special Rapporteur on Human Rights and the Environment, *Safe Climate Report*, *supra* note 41, at para. 28.

<sup>61</sup> See Committee on Economic, Social and Cultural Rights, *Concluding observations on the fourth periodic report of Argentina*, U.N. Doc. E/C.12/ARG/CO/4, para. 13 (Nov. 1, 2018).

<sup>62</sup> See, e.g., *Urgenda*, *supra* note 10, at paras. 4.7, 5.6.2; *Neubauer et al*, *supra* note 2, at paras. 99, 148-49; *Shrestha*, *supra* note 10, at p. 11 ("The matter of climate change and threat posed by pollution is

as the basis for finding a State duty to take action to prevent and mitigate further climate change. The German Constitutional Court, as one such example, relied on the IPCC's reports as "the factual background of anthropogenic climate change, its consequences and the associated risks," in identifying the significant adverse impacts of climate change on human life and health and the duty of the government to act.<sup>63</sup>

National courts also have recognized that children and future generations are disproportionately vulnerable to climate change. Relying on expert scientists and doctors as well as the IPCC, the Federal Court of Australia recognized that "[c]hildren are extremely vulnerable to a real risk of harm from a range of severe harms caused by climate change, or more specifically, increased global average surface temperature brought about by increased greenhouse gases in the Earth's atmosphere."<sup>64</sup> The Court attributed children's heightened vulnerability both to "the magnitude of the potential risk of harm they face [and to] their powerlessness to avoid that harm."<sup>65</sup> The Superior Court of Justice – Ontario (Canada) acknowledged that children are also more vulnerable to climate change due to the fact that they will live longer with the impacts: "[t]he adverse effects of climate change on younger generations – who presumably would have more years to live than current generations – may be considered self-evident, especially if the Applicants are able to present evidence of historical or sociological disadvantage that the Applicants have experienced as a result of their age."<sup>66</sup>

Most recently, in its decision on a challenge to the State's climate policy, the Court of First Instance of Brussels in Belgium simply stated: "there can no longer be any doubt that there is a real threat of dangerous climate change with a direct negative effect on the daily lives of current and future generations of Belgium's inhabitants."<sup>67</sup>

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directly connected to the well being of citizens who are guaranteed with the right to clean environment and conservation under the Constitution"); *Generaciones Futuras*, *supra* note 10, at paras. 11-12.

<sup>63</sup> *Neubauer et al*, *supra* note 2, at para. 16. Cf. *ASBL Klimaatzaak*, *supra* note 2, at p. 63 (acknowledging the consensus on the existence of climate change including that "[o]n the basis of successive IPCC reports, a diplomatic consensus has developed among the Parties to the UNFCCC on the notion of dangerous global warming and the thresholds of warming that should not be exceeded."); *Association Notre Affaire à Tous et al v. France*, Paris Administrative Court, No. 1904967, 1904968, 1904972, 1904976/4-1, para. 16 (2021) (unofficial English translation provided by the Plaintiff), [http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210203\\_NA\\_decision-1.pdf](http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210203_NA_decision-1.pdf) ("It is further evident from these [IPCC] reports that global warming will reach 1.5°C between 2030 and 2052 if anthropogenic greenhouse gas emissions continue to increase at the current rate and that it will persist for several centuries, even if these emissions decrease, because of the persistence of greenhouse gases in the atmosphere, and that a warming of 2°C rather than 1.5°C would seriously increase these various phenomena and their consequences. This work also shows that each additional half degree of global warming significantly increases the associated risks, particularly for the most vulnerable ecosystems and populations, and that limiting this warming to 1.5°C requires a 45% reduction in greenhouse gas emissions by 2030 compared with 2010 and the achievement of carbon neutrality by 2050 at the latest").

<sup>64</sup> *Sharma by her litigation representative Sister Marie Brigid Arthur v. Minister for the Environment* [2021] FCA 560, para. 289 (May 27, 2021) (Austl.).

<sup>65</sup> *Sharma*, *supra* note 64, at para. 296.

<sup>66</sup> *Mathur v. Her Majesty the Queen in Right of Ontario*, 2020 ONSC 6918, para. 187 (Ontario Superior Court of Justice, Nov. 12, 2020) (Can.).

<sup>67</sup> *ASBL Klimaatzaak*, *supra* note 2, at p. 61.



As the following sections demonstrate, the threat that climate change poses to human rights triggers positive obligations on the part of the State.

### **III. The State has a duty under international human rights law to protect the rights to life and a healthy environment from the threat posed by climate change**

The threat posed by climate change, detailed in the preceding sections, triggers the State's positive obligations under international law. Those obligations arise both under the right to life and the right to a healthy environment, which provide distinct but mutually reinforcing grounds for the State's duty to act on climate change. As explained below, the Korean government has a duty under international human rights law and corresponding obligations under its national constitution to take all appropriate measures within its power necessary to protect against the foreseeable adverse impacts of climate change on the rights to life and a healthy environment.<sup>68</sup> As five UN Human Rights Treaty Bodies emphasized in their joint statement, “[f]ailure to take measures to prevent foreseeable human rights harm caused by climate change, or to regulate activities contributing to such harm, could constitute a violation of States’ human rights obligations.”<sup>69</sup> And those measures to mitigate climate change and its impacts should be developed and implemented in a manner consistent with human rights laws and norms.<sup>70</sup>

#### **A. The threat of climate change gives rise to a duty to protect under the right to life**

The right to life is fundamental and broad, including the right to live free from environmental threats. International human rights law, including customary international law and treaties binding on Korea, protects the fundamental right to life.<sup>71</sup> As a State party to the Convention on

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<sup>68</sup> Courts have used a variety of formulations, typically variations of measures being appropriate or reasonable and appropriate, to describe the measures States must take to protect against foreseeable human rights obligations. *See, e.g., ASBL Klimaatzaak*, *supra* note 2, at pp. 60-62, 83 (noting that the State failed to take “all necessary measures,” but also discussing that under the law the State has discretion with regards to “appropriate measures” and that appropriate measures include mitigation and adaptation); *Kolyadenko and Others v. Russia*, no. 17423/05, Eur. Ct. H.R., paras. 151, 157, 212, 216 (Feb. 28, 2012) (stating that States have an obligation “to take appropriate steps to safeguard the lives” related to the right to life (ECHR, art. 2) and “reasonable and appropriate measures” related to the right to private and family life (ECHR, art. 8) and that the State is “required ... to take the same practical measures” under both articles 2 and 8 of the ECHR); *Öneryildiz v. Turkey*, no. 48939/99, Eur. Ct. H.R., para. 89 (Nov. 30, 2004) (noting the “positive obligation to take all appropriate steps to safeguard life” stating that States’ duties are triggered when an activity is known to be dangerous and when there is a “real and immediate risk” to the right to life); *Taşkin and Others v. Turkey*, no. 46117/99, Eur. Ct. H.R., para. 113 (2004) (stating States should take “reasonable and appropriate measures”). Factors to consider in assessing the adequacy of the State’s measures are discussed further in section IV *infra*.

<sup>69</sup> Joint Statement on “Human Rights and Climate Change,” *supra* note 7, at para. 10.

<sup>70</sup> *See* Special Rapporteur on Human Rights and the Environment, *Safe Climate Report*, *supra* note 41, at para. 58; Paris Agreement, *supra* note 1, at pmb1.

<sup>71</sup> *See, e.g.,* Universal Declaration of Human Rights (UDHR), G.A. Res. 217 A(III), art 3 (Dec. 10, 1948) (declaring “Everyone has the right to life, liberty and security of person.”); Int’l Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, 999 U.N.T.S. 171 (stating “Every human being has the inherent right

the Rights of the Child, Korea “recognize[s] that every child has the inherent right to life,” and is bound to “ensure to the maximum extent possible the survival and development of the child.”<sup>72</sup> This right to life should be interpreted broadly,<sup>73</sup> to encompass the right to “a dignified life”<sup>74</sup> free from environmental threats.

The broad interpretation of the right to life entails corresponding State obligations to protect individuals from environmental harm. The State duty to protect the right to life is not limited to preventing arbitrary deprivation of life, but encompasses an obligation to “adopt any appropriate laws or other measures in order to protect life from all reasonably foreseeable threats, including from threats emanating from private persons and entities,” and to “address the general conditions in society that may give rise to direct threats to life or prevent individuals

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to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”) [hereinafter ICCPR].

<sup>72</sup> Convention on the Rights of the Child art. 6, Nov. 20, 1989, 1577 U.N.T.S. 3.

<sup>73</sup> See, e.g., Human Rights Committee, General Comment No. 36, *supra* note 9, at paras. 2-3 (reaffirming the U.N. Human Rights Committee, General Comment No. 6: Article 6 (Right to Life), para. 1 (Apr. 30, 1982), which states that the right to life is the “supreme right” and “should not be interpreted narrowly”); African Commission on Human and Peoples’ Rights, General Comment No. 3 on The African Charter on Human and Peoples’ Rights: The Right to Life (Article 4), para. 3 (2015) (the Charter “envisages the protection of not only a life in a narrow sense, but of dignified life. This requires a broad interpretation of States’ responsibilities to protect life.”); *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, para. 150, Judgement, merits, reparations and costs, Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006) (finding that given the fundamental nature of the right to life “no restrictive approach ... is admissible”); *Ioane Teitiota v. New Zealand*, para. 9.5, UN Doc. CCPR/C/127/D/2728/2016 (Jan. 7, 2020); Committee on the Rights of the Child, General Comment No. 21, para. 29, UN Doc. CRC/C/GC/21, (June 21, 2017).

<sup>74</sup> See, e.g., African Commission on Human and Peoples’ Rights, General Comment No. 3, *supra* note 73, at para. 3; U.N. Human Rights Committee, General Comment No. 6, *supra* note 73, at para. 1 (stating that the right to life “should not be interpreted narrowly”); *Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on behalf of Endorois Welfare Council) v. Kenya*, Comm. No. 276/2003, Afr. Comm’n H.P.R., para. 217, (Feb. 4, 2010), [https://www.hrw.org/sites/default/files/related\\_material/2010\\_africa\\_commission\\_ruling\\_o.pdf](https://www.hrw.org/sites/default/files/related_material/2010_africa_commission_ruling_o.pdf) (African Commission on Human and Peoples’ Rights positively citing the Inter-American Court’s “right to dignified life” in stating “The IActHR held that one of the obligations that the State must inescapably undertake as guarantor to protect and ensure the right to life is that of generating minimum living conditions that are compatible with the dignity of the human person and of not creating conditions that hinder or impede it. In this regard, the State has the duty to take positive, concrete measures geared towards fulfilment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority.”); *Yakye Axa Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, para. 162, 167 (June 17, 2005), [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_125\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_125_ing.pdf) (noting that “[o]ne of the obligations that the State must inescapably undertake as guarantor, to protect and ensure the right to life, is that of generating minimum living conditions that are compatible with the dignity of the human person” and that detriments to the rights to health, food, and clean water “have a major impact on the right to a decent existence”); *Villagrán Morales v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, paras. 144, 191 (Nov. 19, 1999), [https://www.corteidh.or.cr/corteidh/docs/casos/articulos/seriec\\_63\\_ing.pdf](https://www.corteidh.or.cr/corteidh/docs/casos/articulos/seriec_63_ing.pdf) (noting that the State’s treatment of street children violated the right to a “dignified life” (para. 191) and stating “the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence” (para. 144)).

from enjoying their right to life with dignity...[including] degradation of the environment.”<sup>75</sup> The Human Rights Committee has clarified that “States parties may be in violation of [their obligations] even if such threats and situations do not result in loss of life.”<sup>76</sup> As the Human Rights Committee has said, “Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution *and climate change* caused by public and private actors.”<sup>77</sup>

Regional and national courts recognize that States have a positive duty to take action to avert environmental threats to the right to life. Multiple authorities have held that States must take steps to both prevent harm and “protect and preserve the right to life” from foreseeable harms,<sup>78</sup> including environmental threats to the right to life and other rights.<sup>79</sup> This positive obligation requires States “to take *all* appropriate steps to safeguard life” including by “put[ting] in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life.”<sup>80</sup> States must ensure that the regulatory framework is implemented effectively, through measures “necessary and sufficient to protect” individuals from foreseeable harm.<sup>81</sup> In its Advisory Opinion on Human Rights and the Environment, the Inter-American Court of Human Rights found that “States must regulate, supervise and monitor the activities within their jurisdiction that could produce significant environmental damage; ... prepare a contingency plan ... to minimize the possibility of major environmental accidents, and mitigate any significant environmental damage that may have occurred ...”<sup>82</sup> The Inter-American Court emphasized, “[e]nvironmental degradation may cause irreparable harm to human beings; thus, a healthy environment is a fundamental right for the existence of humankind.”<sup>83</sup> Numerous

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<sup>75</sup> Human Rights Committee, General Comment No. 36, *supra* note 9, at paras. 3, 18, 26; *see also* Special Rapporteur on Human Rights and the Environment, *Safe Climate Report*, *supra* note 41, at para. 62.

<sup>76</sup> Human Rights Committee, General Comment No. 36, *supra* note 9, at para. 7.

<sup>77</sup> *Id.* at para. 62.

<sup>78</sup> *Case of the Sawhoyamaxa Indigenous Community*, *supra* note 73, at para. 152; *see also* Öneriyıldız, *supra* note 68, at paras. 71, 89 (noting the right to life includes a State’s obligation to safeguard the lives of people in its jurisdiction and “to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life”).

<sup>79</sup> *See Budayeva v. Russia*, no. 15539/02, Eur. Ct. H.R., para. 128 (2008) (reiterating that States have a positive obligation “to take appropriate steps to safeguard the lives of those within their jurisdiction” from environmental harm, including from a predictable or preventable environmental disaster); *Portillo Cáceres v. Paraguay*, para. 7.3-7.54, U.N. Doc. CCPR/C/126/D/2751/2016 (Sept. 20, 2019) (observing that States’ duties regarding the right to life include addressing threats stemming from environmental degradation and finding that the spraying of toxic chemicals in this case was a reasonably foreseeable threat to the right to life).

<sup>80</sup> *Kolyadenko and Others*, *supra* note 68, at para. 157 (citing Öneriyıldız, *supra* note 68, at para. 89, and *Budayeva and Others*, *supra* note 79, at para. 129) (emphasis added).

<sup>81</sup> Öneriyıldız, *supra* note 68, at paras. 89, 101; *see also* *Portillo Cáceres*, *supra* note 79, at para. 7.3; *Toussaint v. Canada*, para. 11.3 -11.5, U.N. Doc. CCPR/C/123/D/2348/2014 (2018) (finding that the State’s protective measures were insufficient to avert a serious, foreseeable threat to life and health); Advisory Opinion OC-23/17, *supra* note 47, at paras. 108-09, 118, 142, 146, 242(b) (stating in para. 142 that “States are bound to use all the means at their disposal to avoid activities under their jurisdiction causing significant harm to the environment.”).

<sup>82</sup> Advisory Opinion OC-23/17, *supra* note 47, at para. 242.

<sup>83</sup> *Id.* at para. 59.

domestic courts have likewise held that the right to life obliges States to prevent severe environmental degradation.<sup>84</sup>

International environmental law reinforces the notion that the right to life gives rise to a State duty to protect against environmental threats. As the Human Rights Committee has recognized, obligations under international environmental law should inform the content of the right to life.<sup>85</sup> International environmental law recognizes that environmental pollution and degradation can impede the enjoyment of human rights and therefore that environmental protection is essential to the right to life. International environmental instruments have long recognized the centrality of the environment to human rights. Nearly forty years ago, the Stockholm Declaration articulated that “man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”<sup>86</sup> “Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights -- even the right to life itself.”<sup>87</sup> Other instruments have built upon this recognition that environmental protection is a prerequisite for the enjoyment of other human rights including, among others, the right to life, health, water, and food.<sup>88</sup> The chief objective of the UNFCCC, to “prevent dangerous anthropogenic interference with the climate system ... within a time frame sufficient” to avoid

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<sup>84</sup> See, e.g., *Gbemre v. Shell Petroleum Dev. Co. Nigeria Ltd.* [2005] AHRLR 151 (Nigeria) (noting that the right to life includes the right to a healthy environment); *Mohiuddin Farooque v. Bangladesh* [1997] 17 B.L.D. (A.D.) 1 (Bangl.) (stating the right to life “encompasses within its ambit, the protection and preservation of the environment, ecological balance free from pollution of air and water, and sanitation without which life can hardly be enjoyed.”); *Minors Oposa v. Factoran*, G.R. No. 101083, 33 I.L.M. 173, 187 (S.C. July 30, 1993) (Phil.) (noting that the “right to a balanced and healthful ecology” is fundamental and “may even be said to predate all governments and constitutions” and therefore may not even need to be written as it is ‘assumed to exist from the inception of humankind’); *Sentencia 6240-93*, la Sala Constitucional de la Corte Suprema de Justicia (26 de noviembre de 1993) (Costa Rica) (finding that the right to life coupled with the state’s duty to protect natural beauty creates other enforceable rights including the right to a healthy environment).

<sup>85</sup> Human Rights Committee, General Comment No. 36, *supra* note 9, at para. 62; see also Vienna Convention on the Law of Treaties art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331.

<sup>86</sup> Stockholm Declaration, *supra* note 25, at Principle 1.

<sup>87</sup> *Id.* at para. 1.

<sup>88</sup> U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/5/Rev.1, reprinted in 1 I.L.M. 874 (1992) [hereinafter Rio Declaration]; Convention on Access to Information, Public Participation in Decisionmaking and Access to Justice in Environmental Matters pmb., June 25, 1998, 2161 U.N.T.S. 447 (“recognizing that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself”) [hereinafter Aarhus Convention]; Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, Mar. 4, 2018 [hereinafter Escazú Agreement]; UNFCCC, *supra* note 1, at pmb.; Paris Agreement, *supra* note 1, at pmb.; Convention on Biological Diversity pmb., June 5, 1992, 1760 U.N.T.S. 79 (acknowledging the importance of biological diversity for food and health); Vienna Convention for the Protection of the Ozone Layer pmb., Mar. 22, 1985, 1513 U.N.T.S. 293 (noting the importance of protecting human health and the environment).

threatening various functions necessary for life, acknowledges this relationship.<sup>89</sup> It therefore serves to reason that a broad interpretation of the right to life includes not only the right to a healthy environment, but also the right to a safe climate.<sup>90</sup>

Climate change triggers the duty to protect the right to life. Under international law, the State's duty to protect arises in the face of a reasonably foreseeable threat to the right to life.<sup>91</sup> As set forth in section II above, the impacts of climate change present such a reasonably foreseeable threat. International and comparative jurisprudence make clear that when States have actual or constructive knowledge of a foreseeable threat to the right to life, they have a duty to take all appropriate measures within their power, including through regulation and other actions necessary and sufficient to protect individuals against the threatened harm. As courts have sought to define the circumstances in which environmental harm and degradation satisfy this threshold test, they have formulated a variety of standards related to the severity of the threat presented. Courts have examined whether the risk is "real and serious," "real and immediate," or imminent.<sup>92</sup> Imminence, according to the International Court of Justice (ICJ), can include

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<sup>89</sup> UNFCCC, *supra* note 1, at art. 2; *see also* Special Rapporteur on Human Rights and the Environment, *Safe Climate Report*, *supra* note 41, at para. 52 (acknowledging that in adopting the UNFCCC, "States committed themselves to ensuring a safe climate").

<sup>90</sup> Special Rapporteur on Human Rights and the Environment, *Safe Climate Report*, *supra* note 41, at para. 96.

<sup>91</sup> *See* Human Rights Committee, General Comment No. 36, *supra* note 9, at paras. 7, 18 (stating that the duty to protect the right to life by law also includes an obligation for States parties to adopt any appropriate laws or other measures in order to protect life from all reasonably foreseeable threats, including from threats emanating from private persons and entities."); *see also* Joint Statement on "Human Rights and Climate Change", *supra* note 7, at para. 10 (highlighting that States could also violate their duty by failing "to take measures to prevent foreseeable human rights harm caused by climate change").

<sup>92</sup> *See, e.g., Brincat and Others v. Malta*, Nos. 60908/11, 62110/11, 62129/11, 62312/11, 62338/11, Eur. Ct. H.R., para. 82 (July 24, 2014) (noting that duties are triggered when "there was a serious risk of an ensuing death, even if the applicant was alive at the time of the application"); *Kolyadenko and Others*, *supra* note 68, at para. 155 (assessing that there was an "imminent risk"); *Budayeva*, *supra* note 79, at paras. 128, 146-60 (discussing foreseeability and reiterating that States have a positive obligation "to take appropriate steps to safeguard the lives of those within their jurisdiction" from environmental harm, including from a predictable or preventable environmental disaster, in this instance the foreseeable risk of mudslides); *Öneryildiz*, *supra* note 68, at paras. 71, 101 (stating that States' duties are triggered when an activity is known to be dangerous and when there is a "real and immediate risk" to the right to life); *Taşkın and Others*, *supra* note 68, at para. 113 (determining that duties apply where there is a "likely risk" of a "dangerous effects" of an activity on human rights); *Tătar v. Romania*, no. 67021/01, Eur. Ct. H.R., para. 107 (Jan. 27, 2009) (finding that "existence of a serious and substantial risk" triggers the States' positive obligations); *Jugheli and Others v. Georgia*, no. 38342/05, Eur. Ct. H.R., paras. 67, 71 (July 13, 2017) (assessing that duties apply when there is a "real risk" to "life and health" even where the plaintiffs do not end up suffering quantifiable harm); *Cordella and Others v. Italy*, Nos. 54414/13, 54264/15, Eur. Ct. H.R., para. 169 (Jan. 24, 2019) (relying on a test of "serious health and environmental risks"); *Case of the Sawhoyamaxa Indigenous Community*, *supra* note 73, at para. 156 (formulating the threshold as "an actual and impending risk for their lives"); Advisory Opinion OC-23/17, *supra* note 47, at para. 120 (discussing that a duty arises when there is a "situation of real and imminent danger for the life of a specific individual or group of individuals"); African Commission on Human and Peoples' Rights, General Comment No. 3, *supra* note 73, at paras. 3, 6, 41 (noting that "The State has a positive duty to protect individuals and groups from real and immediate risks to their lives"); *Portillo Cáceres*, *supra* note 79, at paras. 7.3-7.54 (observing that States' duties regarding the right to life include addressing threats

threatened harm that will occur in the future: “a ‘peril’ appearing in the long term might be held to be ‘imminent’ as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.”<sup>93</sup> Common to the various formulations of the threshold test is the notion that a real, not conjectural, and serious, non-negligible, risk of harm to life prompts the State’s positive obligations to take preventive action.<sup>94</sup> Regardless of the precise test adopted, the risk posed by climate change satisfies it.

Applying this standard, domestic courts around the world have recognized that the risks to the right to life from climate change trigger the State duty to protect. In *Neubauer et al v. Germany*, German youth challenged the sufficiency of Germany’s Federal Climate Protection Act. There, the German Constitutional Court ruled that “[t]he protection of life and physical integrity ... extends to protection against impairments caused by environmental pollution,” including “protection against risks to human life and health caused by climate change.”<sup>95</sup> The Court elaborated, “[t]he fundamental right to the protection of life and health ... obliges the state to afford protection against the risks of climate change. The state must combat the considerable potential risks emanating from climate change by taking steps which – with the help of international involvement – contribute to stopping human-induced global warming and limiting the ensuing climate change.”<sup>96</sup> The Court recognized that the State’s contribution to and failure to take steps to avert a risk of *future* harm from climate change can violate constitutional rights.<sup>97</sup>

In Belgium, the Court of First Instance of Brussels ruled in June of this year that the State has a “positive obligation ... to take the necessary measures to remedy and prevent the adverse consequences of dangerous global warming on [the plaintiffs’] lives and their private and family

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stemming from environmental degradation and finding that the spraying of toxic chemicals in this case was a reasonably foreseeable threat to the right to life); *see also* European Court of Human Rights, *Guide on Article 2 of the European Convention on Human Rights: Right to Life*, pp. 8, 12-13 (Apr. 30, 2021).

<sup>93</sup> *Gabcikovo-Nagymaros Project* (Hung. v. Slov.), Judgment, 1997 I.C.J. 7, para. 54 (Sept. 25); *accord Urgenda*, *supra* note 10, at para. 5.2.2 (noting that under established European Court of Human Rights case law “real and immediate risk” is “risk that is both genuine and imminent,” but that it does not mean that the risk has to be immediate, “but rather that the risk in question is directly threatening the persons involved” and that human rights protections extend to risks that materialize in a longer term).

<sup>94</sup> *See, e.g., Urgenda*, *supra* note 10, at para. 5.6.2; *ASBL Klimaatzaak*, *supra* note 2, at pp. 60-61 (noting that States’ positive obligations arise when there is a dangerous activity and a “serious and substantial risk”).

<sup>95</sup> *Neubauer et al*, *supra* note 2, at para. 99; *see also id.* at paras. 120, 143-44, 148, 197 (stating in para. 143 that “The risks posed by climate change give rise to duties of protection under Art. 2(2) first sentence and Art. 14(1)...”).

<sup>96</sup> *Id.* at paras. 144, 148.

<sup>97</sup> *Id.* at para. 108 (stating that “The possibility of a violation of the Constitution cannot be negated here by arguing that a risk of future harm does not represent a current harm and therefore does not amount to a violation of fundamental rights. Even provisions that only begin posing significant risks to fundamental rights over the course of their subsequent implementation can fall into conflict with the Basic Law. This is certainly the case where a course of events, once embarked upon, can no longer be corrected.” (internal citations omitted)).

lives.”<sup>98</sup> In assessing the application of the State’s duties under human rights law, the Court noted that “[i]n the current state of climate science ... there can no longer be any doubt that there is a real threat of dangerous climate change with a direct negative effect on the daily lives of current and future generations of Belgium’s inhabitants.”<sup>99</sup>

In a similar case several years ago, *The State of the Netherlands v. Urgenda*, the Supreme Court of the Netherlands considered the scientific evidence and found that “no other conclusion can be drawn but that the State is required pursuant to Articles 2 [right to life] and 8 [right to respect for private and family life] ECHR [European Convention on Human Rights] to take measures to counter the genuine threat of dangerous climate change.”<sup>100</sup> The Court noted that to trigger the duty to protect, a risk need not be “immediate” but “both genuine and imminent” and directly threatening to the persons involved.<sup>101</sup> The Court rejected the Dutch State’s argument that the rights to life and private family life “offer no protection” from the threat of climate change because the risks may only “materialise a few decades from now.”<sup>102</sup> Consistent with the precautionary principle, the Court held that “the mere existence of a sufficiently genuine possibility that [a] risk [to the right to life] will materialise means that suitable measures must be taken”<sup>103</sup>—including compliance with near-term emissions reduction targets.<sup>104</sup> The Court emphasized the threat of dangerous climate change and the urgency of action required to protect the right to life.<sup>105</sup>

In a case examining the duty of the Minister of Environment in relation to the expansion of a coal mine, the Federal Court of Australia determined that the risk to children due to climate change was real,<sup>106</sup> “not far-fetched or fanciful,”<sup>107</sup> and thus triggered the duty to protect. It further emphasized that the catastrophic nature of the foreseeable harm was such that even if the harm stemming from the specific conduct of the Minister was small, it was enough to support the conclusion that the Minister had a duty of care toward the children.<sup>108</sup>

Pakistani courts, too, have found that the right to life gives rise to State obligations to develop and implement adaptation measures to protect people within its jurisdiction from the impacts of climate change, and established a Climate Change Commission to monitor progress.<sup>109</sup> In *Ashgar Leghari v. Federation of Pakistan*, the Lahore High Court examined a farmer’s claims challenging the government’s inaction and delay in addressing climate change, and concluded that the State’s failure to address vulnerabilities associated with climate change violated

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<sup>98</sup> *ASBL Klimaatzaak*, *supra* note 2, at p. 61.

<sup>99</sup> *Id.* at p. 61.

<sup>100</sup> *Urgenda*, *supra* note 10, at paras. 5.6.2, 5.7.1.

<sup>101</sup> *Id.* at para. 5.2.2

<sup>102</sup> *Id.* at para. 5.6.2.

<sup>103</sup> *Id.* at para. 5.6.2.

<sup>104</sup> *Id.* at para. 8.2.6.

<sup>105</sup> *See Id.* at para. 8.3.4.

<sup>106</sup> *Sharma*, *supra* note 64, at para. 247.

<sup>107</sup> *Id.* at para. 187.

<sup>108</sup> *Id.* at para. 257.

<sup>109</sup> *Ashgar Leghari*, *supra* note 10, at para. 8.

fundamental constitutional rights including the right to life.<sup>110</sup> In its order, the court declared: “Climate Change is a defining challenge of our time and has led to dramatic alterations in our planet’s climate system. ... On a legal and constitutional plane this is a clarion call for the protection of fundamental rights of the citizens of Pakistan.”<sup>111</sup> Further, it said that fundamental rights, such as the right to life, helped provide the basis for climate justice.<sup>112</sup> Subsequently, the same Court issued a supplemental judgment assessing the progress made, including the government passing a new Climate Change Act, and created a Standing Committee on Climate Change with the power to approach the court “for appropriate order for the enforcement of the fundamental rights of the people in the context of climate change.”<sup>113</sup> The *Leghari* decision built on the Pakistan Supreme Court’s ruling in *Shehla Zia v. WAPDA*, where the Court found that the constitutional rights to life and dignity incorporated rights to a clean atmosphere and unpolluted environment, thus the right to a healthy environment.<sup>114</sup>

Other courts have likewise concluded that a healthy environment, including a safe climate, is essential to the enjoyment of the right to life. For example, in Colombia, 25 children and youth brought a *tutela*, or action for a constitutional injunction, alleging that the government was failing to protect their fundamental rights through its inaction on deforestation and climate change. The Supreme Court of Justice found that climate change impacts linked to the government’s failure to prevent deforestation and “the increasing deterioration of the environment is a serious attack on current and future life.”<sup>115</sup> It reasoned that a healthy environment is a necessary component of the right to life: “[T]he fundamental rights of life, health, the minimum subsistence, freedom, and human dignity are substantially linked and determined by the environment and the ecosystem. Without a healthy environment, subjects of law and sentient beings in general will not be able to survive, much less protect those rights, for our children or for future generations. Neither can the existence of the family, society or the state itself be guaranteed.”<sup>116</sup> Thus, the Court ordered the government to take action to reduce deforestation and to address climate change so as to meet its obligations to protect the rights of its citizens.<sup>117</sup>

Decades of jurisprudence in India recognize that the constitutional right to life includes the right to live in a healthy environment, even in the absence of a specific constitutional provision.<sup>118</sup> In *T. Damodhar Rao v. Municipal Corp. of Hyderabad*, the High Court of Andhra Pradesh

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<sup>110</sup> *Id.* at para. 1.

<sup>111</sup> *Id.* at para. 6.

<sup>112</sup> *Id.* at paras. 6-7.

<sup>113</sup> *Id.* at para. 27.

<sup>114</sup> See *Shehla Zia v. WAPDA*, PLD 1994 Supreme Court 693 (Pak.).

<sup>115</sup> See *Generaciones Futuras*, *supra* note 10, at pp. 10-13 (unofficial translation by Dejusticia who supported the plaintiffs).

<sup>116</sup> See *id.* at p. 13.

<sup>117</sup> See *id.* at pp. 48-50.

<sup>118</sup> See India Const. art. 21; see, e.g., *Shantistar Builders v. Narayan Khimalal Totame*, (1990) 1 SCC 520, para. 9 (India); see also *M.C. Mehta v. Union of India*, WP 182/1996, para. 12 (2000) (India) (the Supreme Court stating that “Any disturbance of the basic environment elements, namely air, water and soil, which are necessary for ‘life’, would be hazardous to ‘life’ within the meaning of Article 21 of the Constitution.”).



reasoned that “the enjoyment of life and its attainment and fulfilment guaranteed by Art. 21 of the Constitution embraces the protection and preservation of nature’s gifts without [which] life cannot be enjoyed. There can be no reason why practice of violent extinguishment of life alone should be regarded as violative of Art. 21 of the Constitution. The slow poisoning by the polluted atmosphere caused by environmental pollution and spoilation should also be regarded as amounting to violation of Art. 21 of the Constitution.”<sup>119</sup> It further found that in their role as enforcers of the Constitution, it is the courts’ duty “to forbid all action of the State and the citizen from upsetting the environmental balance.”<sup>120</sup>

## **B. The threat of climate change gives rise to a duty to protect under the right to a healthy environment**

Just as the threat posed by climate change triggers the duty to protect the right to life, it also triggers the duty to protect the right to a healthy environment. While the right to a healthy environment is not yet expressly codified in international human rights law,<sup>121</sup> it has been incorporated into regional human rights agreements<sup>122</sup> and has gained widespread domestic legal recognition, including in Korea’s constitution.<sup>123</sup> Article 35(1) of the Korean Constitution states: “All citizens shall have the right to a healthy and pleasant environment. The State and all citizens shall endeavor to protect the environment.”<sup>124</sup> Where the right to a healthy environment is expressly recognized in law, as it is in Korea and over 100 other countries, it forms an independent basis for the State duty to take action to prevent and mitigate climate change.

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<sup>119</sup> *T. Damodhar Rao v. Municipal Corp. of Hyderabad*, 1987 AIIRD 171, para. 24 (Andhra Pradesh High Court) (India).

<sup>120</sup> *Id.* at para. 25.

<sup>121</sup> See John H. Knox (Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment), *First Report to the General Assembly*, U.N. Doc. A/73/188 (July 19, 2018) (recommending that the U.N. General Assembly recognize the human right to a safe, clean, healthy and sustainable environment); Call for the Global Recognition of the Right to a Healthy Environment, <http://healthyenvironmentisaright.org/> (including an open letter from over 1,100 organizations calling for the recognition of the right to a healthy environment); Joint Statement of the Core Group on Human Rights and Environment delivered at the Human Rights Council 46th Session (Mar. 9, 2021), available at <http://healthyenvironmentisaright.org/> (the governments of Costa Rica, Maldives, Morocco, Slovenia, and Switzerland delivered a joint statement inviting governments to support the call for the recognition of the right to a healthy environment and over 60 governments have co-sponsored); Joint statement of United Nations entities on the right to a healthy environment (Mar. 8, 2021), <https://www.unep.org/news-and-stories/statements/joint-statement-united-nations-entities-right-healthy-environment> (fifteen UN entities calling for the global recognition of the right to a safe, clean, healthy and sustainable environment).

<sup>122</sup> See, e.g., Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador,” art. 11 (1988); African (Banjul) Charter on Human and Peoples’ Rights, 21 I.L.M. 58, art. 24 (1982).

<sup>123</sup> The vast majority of countries have included the right to a healthy environment in their constitutions. See Special Rapporteur on Human Rights and the Environment, U.N. Doc. A/73/188, *supra* note 121, at para. 54 (stating “The right to a healthy environment enjoys constitutional protection in more than 100 States. It is incorporated into the environmental legislation of more than 100 States. This right is included in regional human rights treaties and environmental treaties ratified by more than 130 States. In total, 155 States have already established legal recognition of the right to a healthy environment.”).

<sup>124</sup> Daehanminkuk Hunbeob [Hunebeob][Constitution] art. 35 (S. Kor.).

In other countries where the right to a healthy environment is similarly codified in domestic statute or constitution, national courts have found that it requires the State to take action to prevent the threat posed by climate change. The German Constitutional Court's recent ruling that the legislator needed to further limit warming was grounded in part in Article 20(a) of the German Constitution (Basic Law), which, like Article 35 of the Korean Constitution, protects the right to a healthy environment: "Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals ...."<sup>125</sup> That provision, the Court noted, enshrines "an obligation to take climate action."<sup>126</sup> The Supreme Court of Nepal, in *Shrestha v. Office of the Prime Minister et al*, also held that inadequate action to address the threat of climate change, including the failure to adopt a comprehensive climate change law, violates the right to a healthy environment as well as the right to a life with dignity.<sup>127</sup> In so doing, the court determined that the right to a healthy environment included the right to a safe climate.<sup>128</sup>

Regional human rights tribunals have similarly found that the right to a healthy environment, enshrined in regional agreements, obliges States to take action to prevent the pollution that drives climate change. The African Commission on Human and Peoples Rights, for example, found that the right to a healthy environment imposes specific duties on States requiring them "to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources."<sup>129</sup> Similarly, the Inter-American Court of Human Rights has elaborated on the right to a healthy environment. As part of its Advisory Opinion<sup>130</sup> on human rights and the environment, the Court specified that this right includes the obligations of States to guarantee a healthy environment in which to live and to promote the protection, conservation, and improvement of the environment,<sup>131</sup> adding that "States are bound to use all the means at their disposal to avoid activities under their jurisdiction causing significant harm to the environment."<sup>132</sup> More recently, in *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, the Court found that Argentina had violated the Indigenous

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<sup>125</sup> Grundgesetz [GG][Basic Law] art. 20(a) (Ger.), translation at [https://www.gesetze-im-internet.de/englisch\\_gg/](https://www.gesetze-im-internet.de/englisch_gg/).

<sup>126</sup> *Neubauer*, supra note 2, at para. 185.

<sup>127</sup> *Shrestha*, supra note 10, at pp. 5-6, 11-14.

<sup>128</sup> See *Shrestha*, supra note 10, at pp. 12-13.

<sup>129</sup> *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, Afr. Comm'n Human and Peoples' Rights, Comm. No. 155/96 (Oct. 27, 2001), para 52. [hereinafter *SERAC and CESR*]; see also Advisory Opinion OC-23/17, supra note 47, at para. 61 (citing to the African Commission on Human and People's Rights jurisprudence).

<sup>130</sup> See Advisory Opinion OC-23/17, supra note 47, at paras. 56-68 (acknowledging the existence of the right both directly in the San Salvador Protocol, article 11, and through article 26 (right to progressive development) of the American Convention on Human Rights, and noting that it is an individual and collective right that applies to both present and future generations and is interconnected to a host of other rights including that a "healthy environment is a fundamental right for the existence of humankind").

<sup>131</sup> Advisory Opinion OC-23/17, supra note 47, at paras. 60-61.

<sup>132</sup> Advisory Opinion OC-23/17, supra note 47, at paras. 141-42, 145; see also *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, para. 208, Judgement, merits, reparations and costs, Inter-Am. Ct. H.R. (Feb. 6, 2020), [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_400\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_400_ing.pdf).

communities' right to a healthy environment,<sup>133</sup> because States “not only have the obligation to respect this [right to a healthy environment], but also the obligation ... to ensure it.”<sup>134</sup> It further stated that “the principle of prevention of environmental harm ... entails the State obligation to implement the necessary measures [before] damage is caused to the environment” especially given that once it has occurred it is difficult to restore the previous situation.<sup>135</sup>

The growing body of international and comparative jurisprudence on States' human rights obligations with respect to climate change reaffirms that, as the UN Special Rapporteur on Human Rights and the Environment has emphasized: “a safe climate is a vital element of the right to a healthy environment and is absolutely essential to human life and well-being.”<sup>136</sup>

### **C. The State duty to protect exists even when the State does not bear sole responsibility for the threat and when the claimants are not the sole victims of the harm**

Climate change is not attributable solely to one country, nor is its impact limited to one place. However, the duty to protect human rights is not limited to instances in which the State is the sole cause of the harm or the single party capable of mitigating the risk to human rights.<sup>137</sup> Nor does the duty to protect apply with any less force to particular claimants because they are not the only injured parties or exclusive beneficiaries of the remedy.

States are not relieved of their own responsibility because other States bear concurrent duties to take steps to prevent harms from climate change. As is made clear in the Articles on Responsibility for Internationally Wrongful Acts, “Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.”<sup>138</sup> The UNFCCC underscores this by “[a]cknowledging that the global nature of climate change calls for the widest possible cooperation by all countries and their participation

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<sup>133</sup> *Indigenous Communities of the Lhaka Honhat (Our Land) Association*, *supra* note 132, at paras. 287-89 (finding that not only the right to a healthy environment, but also that the related rights to food, water, and taking part in cultural life of the Indigenous communities were violated due to the State's failure to curtail the activities of non-indigenous settlers that negatively impacted the land, environment, and lives of the Indigenous communities).

<sup>134</sup> *Id.* at paras. 202-03, 205, 207 (noting in para. 201 that this is the first contentious case in which the Court has had to rule on the right to a healthy environment and further acknowledging in para. 202 that this Court has recognized the right to a healthy environment through article 26 (right to progressive development) of the American Convention on Human Rights and, in para. 205, that Argentina has ratified the San Salvador Protocol, which directly includes the right to a healthy environment in article 11).

<sup>135</sup> *Id.* at para. 208.

<sup>136</sup> Special Rapporteur on Human Rights and the Environment, *Safe Climate Report*, *supra* note 41, at paras. 43, 96.

<sup>137</sup> See Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, para. 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004); Human Rights Committee, *General Comment No. 36*, *supra* note 9, at para. 7 (“States parties must also ensure the right to life and exercise due diligence to protect the lives of individuals against deprivations caused by persons or entities, whose conduct is not attributable to the State.”); *see also* Joint Statement on “Human Rights and Climate Change,” *supra* note 7.

<sup>138</sup> U.N. General Assembly, 56/83 Responsibility of States for internationally wrongful acts, annex, art. 47, U.N. Doc. A/RES/56/83 (Jan. 28, 2002).

in an effective and appropriate international response, in accordance with their common but differentiated responsibilities.”<sup>139</sup> In interpreting the Dutch state’s obligations in *Urgenda*, the Supreme Court of the Netherlands relied on these international law principles and the UNFCCC to hold that States are obligated “to do ‘their part’ to counter ... [the] danger” of climate change, even though it is a global problem.<sup>140</sup> Similarly, the German Constitutional Court in *Neubauer* and the Administrative Court of Paris in *Notre Affaire à Tous et al v. France* both expressly held that the State has an *individual* responsibility to mitigate climate change, notwithstanding the global nature of the threat.<sup>141</sup> In the words of the German court, “the particular reliance on the international community gives rise to a constitutional necessity to actually implement one’s own climate action measures on the national level.”<sup>142</sup> Most recently, the Court of First Instance of Brussels (Belgium) stated that “the global dimension of the problem of dangerous global warming does not exempt the Belgian public authorities from their pre-described obligation under [human rights law].”<sup>143</sup>

States, therefore, cannot avoid their obligations by claiming that others have to act or are (also) responsible for the impacts of climate on human rights. On the contrary, the duty to protect the right to life and the right to a healthy environment, among other rights, requires States to take all measures within their power that have a reliable prospect of mitigating the risk of harm.

The harm or risk of harm need not be unique to the claimants to trigger the State duty to protect. National courts have upheld claims based on the State’s obligation to take preventive measures even when the threat is diffuse and widespread. The German Constitutional Court, for example, concluded that the fact that many people face the risk of harm due to climate change does not mean the rights of the complainants here were not impacted.<sup>144</sup> Similarly, in *Urgenda*, the Supreme Court of the Netherlands held that the risk of harm need not be confined to specific persons for the State’s duties to be triggered; the State’s human rights obligations afford protection, the court reasoned, even if the risk is to the general population.<sup>145</sup>

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<sup>139</sup> UNFCCC, *supra* note 1, at pmbl. para. 6, art. 3.

<sup>140</sup> *Urgenda*, *supra* note 10, at paras. 5.6.2, 5.7.1-5.8.

<sup>141</sup> *Neubauer et al*, *supra* note 2, at paras. 197-204 (emphasizing that the global nature of climate change does not negate the obligation of the individual country (Germany) to protect the climate under article 20a of the German Constitution); *Association Notre Affaire à Tous et al*, *supra* note 63, at para. 34 (permitting applicants to claim that “*the State must be held liable*, within the meaning of the abovementioned provisions of Article 1246 of the Civil Code, *for part of the ecological damage found in paragraph 16*”).

<sup>142</sup> *Neubauer et al*, *supra* note 2, at para. 203.

<sup>143</sup> *ASBL Klimaatzaak*, *supra* note 2, at p. 61.

<sup>144</sup> *Neubauer et al*, *supra* note 2, at paras. 110, 131.

<sup>145</sup> *Urgenda*, *supra* note 10, at para. 5.3.1 (stating “The protection afforded by Articles 2 and 8 ECHR is not limited to specific persons, but to society of the population as a whole. The latter is for instance the case with environmental hazards. In the case of environmental hazards that endanger an entire region, Articles 2 and 8 ECHR offer protection to the residents of that region.”); *accord ASBL Klimaatzaak*, *supra* note 2, at p. 51.

#### **IV. The Adequacy of State Action to Avert the Threat of Climate Change Must be Understood in Light of International Environmental Law and the Best Available Science**

To satisfy the duty to protect human rights against environmental harm, the State must take adequate action to mitigate the threat posed by climate change. As stated above, the duty to protect the right to life obliges States to “take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity,” including environmental degradation and climate change.<sup>146</sup> The State’s failure to act with due diligence, employing all means at its disposal sufficient to prevent foreseeable harm from environmental threats, violates the duty to protect.<sup>147</sup> While States have some discretion in determining how they implement their human rights obligations, courts have a role to play in ensuring that the exercise of that discretion is within the bounds of the law.<sup>148</sup> Specifically, courts may assess whether a State’s actions are “necessary and sufficient to avert the risks” of harm.<sup>149</sup>

Climate law and science address the magnitude of the emissions reductions required to avoid dangerous anthropogenic interference with the climate system and the means most likely to achieve those reductions. Thus, while the duty to act on climate change stems from human rights law, international environmental law and the best available science inform what measures are necessary and sufficient to fulfil that duty. In evaluating the adequacy of Korea’s climate action, the Court should look, as other domestic courts have, to international climate law and the politically endorsed scientific consensus on the necessity of keeping warming below 1.5°C to avoid further infringements of the rights to life and a healthy environment.

This section begins by setting out the legal basis for looking to international environmental law and best available science to inform the content of State human rights obligations related to climate action. It then discusses why climate measures should accord with the climate science and the precautionary principle under international environmental law, and cites comparative jurisprudence applying these standards in recent climate litigation.

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<sup>146</sup> Human Rights Committee, General Comment No. 36, *supra* note 9, at paras. 26, 62.

<sup>147</sup> Advisory Opinion OC-23/17, *supra* note 47, at paras. 123-25 (stating that under international law, including international human rights law and international environmental law, the duty to act with due diligence has been fundamental in ensuring the protection of rights); *cf. Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. Reports 14, para. 197 (Apr. 20) (noting that States had to “act with due diligence in respect of all activities which take place under the jurisdiction and control of each party” to fulfil their obligations to preserve the environment and prevent pollution). *See also Öneriyıldız, supra* note 68, at paras. 71, 89-118; *Budayeva and Others, supra* note 79, at paras. 128-37, 146-60.

<sup>148</sup> *See Urgenda, supra* note 10, at para. 8.3.2 (emphasizing that “[D]ecision-making on the reduction of greenhouse gas emissions is a power of the government and parliament. They have a large degree of discretion to make the political considerations that are necessary in this regard. It is up to the courts to decide whether, in availing themselves of this discretion, the government and parliament have remained within the limits of the law by which they are bound.”).

<sup>149</sup> *Budayeva and Others, supra* note 79, at para. 140.

### **A. Human rights and corresponding State duties should be understood in light of international environmental law**

In accordance with Article 31(3)(c) of the Vienna Convention on the Law of Treaties, human rights instruments should be interpreted “in harmony with other rules of international law of which it forms part.”<sup>150</sup> The Human Rights Committee has clarified that the scope of human rights and related State duties should be informed by States’ obligations under international environmental law.<sup>151</sup> (The corollary is true as well: States’ duties to respect and protect the right to life should inform obligations under international environmental law.<sup>152</sup>) Similarly, the Inter-American Court of Human Rights acknowledges that “it must take international law on environmental protection into consideration when defining the meaning and scope of the obligations assumed by the States under the American Convention [on Human Rights], in particular, when specifying the measures that the States must take.”<sup>153</sup> And, as pointed out by the UN Special Rapporteur on Human Rights and the Environment, “human rights obligations are reinforced by international environmental law.”<sup>154</sup>

Human rights bodies have applied this approach when evaluating State duties to prevent environmental threats to human rights. For example, in *Portillo Cáceres*, a case concerning whether Paraguay violated its duty to protect the right to life from the improper use of toxic agrichemicals, which contaminated rivers and ultimately poisoned people, the Human Rights Committee observed that Paraguay was bound not only by its duties under the International Covenant on Civil and Political Rights (ICCPR), but also by the Stockholm Convention on Persistent Organic Pollutants.<sup>155</sup> Similarly, the European Court of Human Rights has looked to international environmental agreements and regional environmental agreements in assessing States’ obligations to protect human rights.<sup>156</sup> The Inter-American Court on Human Rights also relied on international environmental law when assessing and finding violations of indigenous communities’ rights to a healthy environment, food, and water due to the lack of secure land titling and the State’s allowing non-indigenous settlers to live on and use the Indigenous

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<sup>150</sup> See *Al Adsani v. The United Kingdom*, Judgement, App. no. 35763/97, Eur. Ct. H.R., para. 55 (Nov. 21, 2001); see also Vienna Convention on the Law of Treaties, *supra* note 85, at art. 31(3)(c).

<sup>151</sup> See Human Rights Council, General Comment No. 36, *supra* note 9, at para. 62 (stating “Obligations of States parties under international environmental law should thus inform the contents of article 6 of the Covenant”).

<sup>152</sup> *Id.* at para. 62.

<sup>153</sup> Advisory Opinion OC-23/17, *supra* note 47, at para. 44.

<sup>154</sup> Special Rapporteur on Human Rights and the Environment, *Safe Climate Report*, *supra* note 41, at para. 66.

<sup>155</sup> See *Portillo Cáceres*, *supra* note 79, at para. 7.3.

<sup>156</sup> See, e.g., *Taşkın and Others*, *supra* note 68, at paras. 98-100 (referring to relevant international texts on the right to a healthy environment including the Rio Declaration and Aarhus Convention); *Grimkovskaya v. Ukraine*, No. 38182/03, Eur. Ct. H.R., paras. 39-40 (July 21, 2011) (referring to the Aarhus Convention as relevant international material to consider in assessing a violation of the right to private and family life); *Öneryıldız*, *supra* note 68, at paras. 59-60 (looking to Council of Europe documents related to the environment including the Convention on Civil Liability for Damage resulting from activities Dangerous to the Environment and the Convention on the Protection of the Environment through Criminal Law).

communities' land.<sup>157</sup> In the context of climate change, international climate law and the climate science on which it is based provide those additional relevant sources of law that must be considered when defining the content of human rights obligations.

**B. International climate law informs the content of State duties to protect the rights to life and a healthy environment from the threats posed by climate change**

The legal regime governing international climate action is grounded in the best available science and explicitly recognizes that the measures required of States to avoid dangerous anthropogenic interference with the climate system will evolve with science. The UNFCCC and Paris Agreement as well as decisions adopted pursuant thereto provide the framework for States' action on climate through mitigation and adaptation measures consistent with the best available science. In signing and ratifying the UNFCCC and Paris Agreement, Korea has agreed to work to prevent dangerous anthropogenic climate change and to do so effectively by acting to achieve the highest possible ambition, on the basis of equity,<sup>158</sup> precaution (see section IV(B)(ii) *infra*), and the best available science.<sup>159</sup>

**i. International environmental law makes clear that the State must adopt measures consistent with keeping warming below 1.5°C**

The foundational international environmental law instruments require States to pursue sufficiently ambitious climate action to avoid danger to life and other rights. As laid out in Article 2 of the UNFCCC, the overarching objective of the regime is “to achieve ... stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system” and to do so in a timeframe that would allow ecosystems to naturally adapt and not disrupt food production.<sup>160</sup> State Parties also agreed that they “should protect the climate system for the benefit of present and future generations of humankind.”<sup>161</sup> In signing the Paris Agreement, Parties further agreed to undertake

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<sup>157</sup> *Indigenous Communities of the Lhaka Honhat (Our Land) Association*, *supra* note 132, at paras. 198, 202, 248-50.

<sup>158</sup> See UNFCCC, *supra* note 1, at art. 3(1) (including as the first principle that “Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.”); Paris Agreement, *supra* note 1, at pmb., art. 2(2) (reiterating in the preamble that this Agreement is guided by the principles of the UNFCCC including equity, and stating in art. 2(2) that “This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities”).

<sup>159</sup> See UNFCCC, *supra* note 1, at pmb., art. 2; Paris Agreement, *supra* note 1, at pmb., art. 4.1; *see also* Joint Statement on “Human Rights and Climate Change,” *supra* note 7, at paras. 10-12 (emphasizing that complying with a State’s human rights obligations includes adopting and implementing emissions reduction policies in line with these principles including that these policies should “reflect the highest possible ambition,” as well as shifting investments and regulating private actors).

<sup>160</sup> UNFCCC, *supra* note 1, at art. 2.

<sup>161</sup> *Id.* at art. 3(1).

progressively ambitious actions “reflect[ing] [a Party’s] highest possible ambition” to achieve the goals of the Paris Agreement.<sup>162</sup>

States Parties to the UNFCCC have committed to aligning their climate action and targets on the best available science. Drawing on the best available science, the State Parties to the UNFCCC linked the concept of a safe climate to a specific temperature target in the 2015 Paris Agreement.<sup>163</sup> The Paris Agreement further emphasized the relationship between human rights and climate change, while also stating that achieving the UNFCCC’s central objective requires, at minimum, “holding the increase in global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C” to avoid the most catastrophic impacts of climate change, and therefore avert threats to fundamental rights.<sup>164</sup> Additionally, the Paris Agreement recognizes “the need for an effective and progressive response to the urgent threat of climate change *on the basis of the best available scientific knowledge*”<sup>165</sup> and that Parties should take mitigation actions “in accordance with best available science.”<sup>166</sup>

The best available science on the appropriate long-term temperature goal has evolved since Paris, as reflected in the IPCC’s Special Report on 1.5°C. As discussed in section II, that report, which was requested by the Parties when they adopted the Paris Agreement and the findings of which were adopted by consensus of IPCC member states, has increased understanding of the impacts of climate change at present and projected future levels, and focused global consensus on the need to hold warming to no more than 1.5°C.<sup>167</sup> The Special Report on 1.5°C stated that every degree of warming above 1.5°C would engender significantly more catastrophic harms to human rights.<sup>168</sup>

The temperature goals set out in the Paris Agreement do not supersede fundamental human rights obligations to reduce emissions to the greatest extent possible to prevent foreseeable harm. This is especially so given mounting evidence that current levels of warming are causing significant human rights impacts. Ultimately, as the Paris Agreement recognizes, human rights obligations must be respected in and through climate action,<sup>169</sup> and those obligations may

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<sup>162</sup> Paris Agreement, *supra* note 1, at arts. 3, 4.1-4.3.

<sup>163</sup> Paris Agreement, *supra* note 1, at pmb., art. 2.1(a) (stating in the preamble “[r]ecognizing the need for an effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge” and establishing the goal of limiting temperature increase to 1.5°C in art. 2); *see also* Special Rapporteur on Human Rights and the Environment, *Safe Climate Report*, *supra* note 41, at para. 54.

<sup>164</sup> Paris Agreement, *supra* note 1, at art. 2(1)(a)(b).

<sup>165</sup> *Id.* at pmb. (emphasis added).

<sup>166</sup> *Id.* at art. 4.1.

<sup>167</sup> UNFCCC, Decision 1/CP.21, para. 21, U.N. Doc. FCCC/CP/2015/10.Add.1 (Jan. 29, 2016).

<sup>168</sup> IPCC, *Summary for Policymakers, in Special Report on 1.5°C*, *supra* note 3, at paras. A.3, B.5.

<sup>169</sup> In the preamble to the Agreement, the Parties acknowledged that they “should, when taking action to address climate change, respect, promote and consider their obligations on human rights....” Paris Agreement, *supra* note 1, at pmb.; *see also* Cancun Agreement, *supra* note 27, at para. 8 (acknowledging for the first time in a UNFCCC decision that Parties should fully respect human rights in all climate actions).



require States to adopt more ambitious action than that pledged in Paris as the science evolves.<sup>170</sup>

The goals identified in the UNFCCC and associated instruments and reports establish the floor (the minimum), not the ceiling, against which the adequacy of States' climate action should be assessed under human rights law. To be adequately protective, the measures a State adopts to protect the rights of present and future generations against foreseeable harms due to climate change must be—at minimum—consistent with scientifically defined and politically adopted limits, reflected in the UNFCCC, the Paris Agreement, and the reports of the IPCC, regarding what is needed to avoid dangerous anthropogenic interference in the climate system. A State's measures cannot be adequate to protect human rights unless, at minimum, they align with the internationally adopted scientific consensus about the outer bounds of the temperature increase (here 1.5°C) above which dangerous anthropogenic interference with the climate system will compound human rights harms. As climate impacts are already affecting human rights, States may be required under human rights law, interpreted in line with evolving best available science, to take more stringent measures to combat climate change.<sup>171</sup>

**ii. International environmental law makes clear that State climate measures must accord with the precautionary principle**

The precautionary principle—a foundational international environmental law principle—should guide the State's climate action. As the dangers and risk of irreversibility of climate change increase, States need to take precautionary measures to prevent the harm even if the full extent and scope of that harm remains uncertain. In international environmental law, the duty to prevent harm has manifested itself in the acceptance of the precautionary principle. In 1972, States recognized the importance of safeguarding the environment “for the benefit of present and future generations through careful planning or management.”<sup>172</sup> Twenty years later, the Rio Declaration, which was adopted by States at the UN Conference on Environment and Development, built upon this stating that the “precautionary approach shall be widely applied by States” to protect the environment and the “lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”<sup>173</sup> That same year the Parties adopting the UNFCCC reiterated the precautionary principle as a core principle for addressing climate change stating that “[t]he Parties should take precautionary

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<sup>170</sup> See, e.g., *Neubauer et al, supra* note 2, at para. 212 (noting that best available science could mean that the Constitutional requirements, in this instance in Germany, require setting emissions reductions targets to go beyond what is necessary to achieve the Paris temperature targets).

<sup>171</sup> See, e.g., *Neubauer et al, supra* note 2, at para. 211 (acknowledging that as science evolves and new reliable information emerges and if the Paris Agreement's temperature target proves inadequate, then the Constitutional obligation may require new measures); Climate Change and the International Covenant on Economic, Social and Cultural Rights, *supra* note 36, at para. 3 (welcoming the commitments States have made under the international climate regime, but acknowledging that “all States have human rights obligations, that should guide them in the design and implementation of measures to address climate change”).

<sup>172</sup> Stockholm Declaration, *supra* note 25, at principle 2.

<sup>173</sup> Rio Declaration, *supra* note 88, at principle 15.

measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects.”<sup>174</sup>

The Human Rights Committee has since also acknowledged the importance of this core international environmental law principle and noted that States should “pay due regard to the precautionary approach.”<sup>175</sup> Elaborating on the precautionary principle, the Inter-American Court of Human Rights emphasized that “States must act diligently to prevent harm” to the rights to life and personal integrity and that they “must act with due caution to prevent possible damage.”<sup>176</sup> In the context of the climate emergency, the precautionary approach dictates that States must take near-term action to avert the risk of harm posed by climate change, and cannot delay action or rely on unproven future measures.

### **C. Courts have looked to international environmental law and best available science in evaluating the adequacy of state action on climate change**

Taken together, international human rights and environmental law obligations require States to adopt measures that are sufficiently ambitious, accord with best available science, and avoid delay or over-reliance on unproven technologies. Measures to address the threat of climate change can take a variety of forms, from emissions reductions policies<sup>177</sup> to promotion of renewable energy<sup>178</sup> to adaptation actions, but in all instances the measures taken must be adequate to avert the risks. As explained in section IV(A), international human rights bodies and experts have turned to international environmental law and best available science to guide their assessment of State action on climate to ensure it fulfills the State’s human rights obligations.

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<sup>174</sup> UNFCCC, *supra* note 1, at art. 3(3).

<sup>175</sup> Human Rights Committee, General Comment No. 36, *supra* note 9, at para. 62.

<sup>176</sup> Advisory Opinion OC-23/17, *supra* note 47, at para. 180.

<sup>177</sup> Statements and recommendations from human rights treaty bodies have repeatedly emphasized the necessity to reduce emissions. *See, e.g.*, Joint Statement on “Human Rights and Climate Change,” *supra* note 7, paras. 10-12 (emphasizing that complying with a State’s human rights obligations includes adopting and implementing emissions reduction policies that “reflect the highest possible ambition,” shifting investments, and regulating private actors); Committee on the Rights of the Child, *Concluding Observations on the combined fifth and sixth periodic reports of Australia*, para. 41(b), U.N. Doc. CRC/C/AUS/CO/5-6 (Nov. 1, 2019) (urging “the State party: ... [t]o promptly take measures to reduce its emissions of greenhouse gases by establishing targets and deadlines to phase out the domestic use and export of coal and to accelerate the transition to renewable energy, including by committing to meeting 100 per cent of its electricity needs with renewable energy”); Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth reports of Belgium*, para. 35(b), U.N. Doc. CRC/C/BEL/CO/5-6 (Feb. 1, 2019) (recommending “that the State party ... [d]evelop a comprehensive national plan for reducing the level of greenhouse emissions to prevent dangerous climate impact”); Committee on the Rights of the Child, *Concluding Observations on the combined fourth and fifth periodic reports of Japan*, para. 37(d), U.N. Doc. CRC/C/JPN/CO/4-5 (Feb. 1, 2019) (recommending “that the State party ... [e]nsure that climate mitigation policies are compatible with the Convention, including by reducing its emissions of greenhouse gases in line with its international commitments to avoid a level of climate change threatening the enjoyment of children’s rights”).

<sup>178</sup> *See, e.g.*, Committee on the Rights of the Child, *Concluding Observations on the combined third to fifth periodic reports of Niger*, para. 36, U.N. Doc. CRC/C/NER/CO/3-5 (Nov. 21, 2018).

Courts too have looked to international climate change law and the best available science in examining the adequacy of countries' actions.<sup>179</sup>

International human rights bodies and experts have affirmed that States must take ambitious near-term climate action in line with the best available science. In their joint statement, five UN Human Rights Treaty Bodies likewise emphasized that complying with a State's human rights obligations in the face of climate change includes adopting and implementing emissions reduction policies that "reflect the highest possible ambition," shifting investments away from fossil fuels, and regulating private actors.<sup>180</sup> The Committee on Economic, Social, and Cultural Rights (CESCR) has called on States to take more ambitious climate action in its Concluding Observations. For example, the CESCR recommended that Germany increase its emissions reductions efforts to meet its Paris Agreement obligations.<sup>181</sup> The Committee has also expressed concern that neither Belgium nor Switzerland were doing enough to meet its 2020 emissions reduction targets and urged both States to raise their emissions reductions targets to be consistent with the "commitment to limit temperature rise to 1.5°C."<sup>182</sup> Moreover, the UN Special Rapporteur on Human Rights and Environment has laid out guidance to States on how to meet their obligations to ensure a safe climate; as he has repeatedly affirmed, a safe climate is *essential* to the right to life.<sup>183</sup> The Special Rapporteur observes the "best" climate legislation for ensuring a safe climate includes "bold targets [for emissions reductions], timelines and accountability mechanisms."<sup>184</sup> The adequacy of those emission reduction targets, timelines, and mechanisms—whether they have "a real prospect of altering the outcome or mitigating the harm"<sup>185</sup>—must be assessed in light of the international environmental law and best available science. It is well within courts' roles to undertake that review, and many have done so already.

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<sup>179</sup> See *Urgenda*, *supra* note 10, at paras. 6.1-7.3.6; *Neubauer et al*, *supra* note 2, at paras. 16, 31, 161, 202-03, 229, 235. The European Court of Human Rights has also referred to science in interpreting State obligations under the European Convention on Human Rights. See, e.g., *Rees v. The United Kingdom*, no. 9532/81, Eur. Ct. H.R., para. 47 (1986); *Cossey v. The United Kingdom*, no. 10843/84, Eur. Ct. H.R., para. 40 (1990); *Fretté v. France*, no. 36515/97, Eur. Ct. H.R., para. 42 (2002); cf. *Oluić v. Croatia*, no. 61260/08, Eur. Ct. H.R., paras. 29-31 (2010).

<sup>180</sup> Joint Statement on "Human Rights and Climate Change," *supra* note 7, at paras. 11-12.

<sup>181</sup> Committee on Economic, Social and Cultural Rights, *Concluding observations on the sixth periodic report of Germany*, paras. 18-19, U.N. Doc. E/C.12/DEU/CO/6 (Nov. 27, 2018).

<sup>182</sup> See Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Belgium*, paras. 9-10, U.N. Doc. E/C.12/BEL/CO/5 (Mar. 26, 2020); Committee on Economic, Social and Cultural Rights, *Concluding observations on the fourth periodic report of Switzerland*, paras. 18-19, U.N. Doc. E/C.12/CHE/CO/4 (Nov. 18, 2019).

<sup>183</sup> See Special Rapporteur on Human Rights and the Environment, *Safe Climate Report*, *supra* note 41; David R. Boyd, United Nations Special Rapporteur on human rights and the environment, Norway: End of Mission Statement (Sept. 23, 2019),

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25032&LangID=E>; UNSR on Human Rights and Environment, *The importance of a safe climate for human rights*, YouTube (Apr. 21, 2021), <https://www.youtube.com/watch?v=yOK9FO-Waw>.

<sup>184</sup> See Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, *Right to a healthy environment: good practices*, para 51, U.N. Doc. A/HRC/43/53 (Dec. 30, 2019) (discussing in paragraphs 48-72 the practices related to ensuring a safe climate).

<sup>185</sup> *Opuz v. Turkey*, No. 33401/02, Eur. Ct. H.R., para. 136 (June 9, 2009); *E. and Others v. the United Kingdom*, No. 33218/96, Eur. Ct. H.R. para. 99 (Nov. 26, 2002); *O'Keefe v. Ireland*, No. 35810/09, Eur.

Courts around the world have relied on the best available science to determine appropriate temperature limits when setting emissions reduction targets. For example, in *Neubauer et al.*, the German Constitutional Court found that Germany’s current emissions reductions targets were insufficient under the Constitution and needed to be redone. In making this determination, the Court examined the risks as detailed by the IPCC and others of global temperature rise of 1.5°C alongside the Constitution. The Court acknowledged that the German emissions reductions target, which aimed at staying under a 1.75°C limit, was within the legally permissible range set by the Paris Agreement.<sup>186</sup> However, the Court stated that article 20(a) of the Constitution requires the law to adapt to best available science, thus if the evolving science rendered the targets set forth in the Paris Agreement inadequate, then the German emissions reductions plans may have to be revised accordingly.<sup>187</sup> Ultimately, the Court determined that the “legislator does remain obliged to limit the increase in temperature to preferably 1.5°C.”<sup>188</sup> It further concluded that, under the Constitution, the German state was required to take climate action aimed at climate neutrality without overshooting the carbon budget, and to do so now so as not to overburden younger and future generations.<sup>189</sup>

Courts in the Netherlands and Ireland have similarly turned to best available science to assess the adequacy of the State’s emissions reduction targets. In *Urgenda*, the Dutch Supreme Court upheld the lower courts’ rulings that the State needs to reduce its emissions by at least 25% compared to 1990 by the end of 2020. In doing so, it examined IPCC reports, including its Fifth Assessment Report (AR5), and the danger of climate change including the risks related to global temperature rise greater than 1.5°C. While acknowledging the previous consensus around 2°C, the Court states “[c]limate science has since arrived at the insight that a safe warming of the earth must not exceed 1.5°C.”<sup>190</sup> The Court also acknowledged that the political consensus reflected in the Paris Agreement was premised on an understanding that “safe warming is limited to a maximum of 1.5°C,” and that the need to reduce emissions is increasingly urgent.<sup>191</sup> Given this, the Court recognized that achieving this 1.5°C target “necessitates a greater reduction in greenhouse gas emissions” than would have been necessary to meet the previous 2°C target.<sup>192</sup>

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Ct. H.R., para. 149 (Jan. 28, 2014); *Toussaint*, *supra* note 81, at paras. 11.4-11.5; *Jessica Lenahan (Gonzales) et al. v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, para. 134 (2011) (adopting the European Court of Human Rights obligation to protect standard--States are to be held responsible when they fail “to take reasonable measures that ha[ve] a *real prospect of altering the outcome or mitigating the harm.*” (emphasis added)).

<sup>186</sup> *Neubauer et al.*, *supra* note 2, at paras. 234-36.

<sup>187</sup> *Id.* at para. 212.

<sup>188</sup> *Id.* at para. 242.

<sup>189</sup> *Id.* at paras. 155, 245, 248, 253-56. The IPCC’s AR6 report from Working Group I provides further updates on the remaining carbon budget. *See* IPCC, *Summary for Policymakers*, in AR6, *supra* note 4, at para. D.1, Table SPM.2.

<sup>190</sup> *Urgenda*, *supra* note 10, at para. 4.3; *accord Friends of the Irish Environment v. The Government of Ireland & Ors.*, [2020] IESC 49, paras. 3.1-3.4 (Ir.) (acknowledging the growing consensus around 1.5°C).

<sup>191</sup> *Urgenda*, *supra* note 10, at paras. 4.5-4.6.

<sup>192</sup> *Id.* at para. 7.2.8.

Similarly, in *Friends of the Irish Environment v. Ireland*, the Supreme Court of Ireland noted the scientific consensus about the harms increasing as global temperature rise increases and that the consensus seemed to be shifting to acknowledge that 1.5°C should be the limit for global temperature rise. In considering the validity and constitutionality of the Irish National Mitigation Plan, the court pointed out that since the Paris Agreement, “scientific thinking has moved in the direction of a lower figure which is in the region of 1.5°C above pre-industrial levels.”<sup>193</sup> Although it was assessing a company’s conduct rather than a State’s, the Hague District Court (the Netherlands) reached a similar conclusion on the evolution of the science in *Milieudefensie et al v. Royal Dutch Shell PLC*. There, the court stated that “[i]n the last couple of years, further insight has shown that a safe temperature increase should not exceed 1.5°C.”<sup>194</sup> Recalling the reports of the IPCC and the possible reduction pathways contained therein, it concluded that Shell is obliged to reduce its emissions by 45% by 2030, relative to 2019 levels.<sup>195</sup>

Courts have also looked to climate science to assess whether the measures adopted by States are adequate to stay within acceptable temperature limits. In *ASBL Klimaatzaak*, for example, the Belgian court referred to current science on the “real threat of dangerous climate change with a direct negative effect on the daily lives of current and future generations,” and data on reductions achieved to conclude that the government failed to act “with prudence and diligence” or “to take all necessary measures to prevent the effects of climate change on the plaintiffs’ life and privacy.”<sup>196</sup> In *Notre Affaire À Tous*, the Paris Administrative Court found that France had not taken the steps necessary to comply with its emissions reductions targets and to halt the associated ecological damage.<sup>197</sup> The Court did not ultimately assess the adequacy of the French targets, but rather assessed whether the government was on track to meet them. In its analysis the Court found that the “ecological damage” asserted by the plaintiffs was established and would worsen over time if unchecked given that the science demonstrates that warming greater than 1.5°C is significantly worse than warming above 2°C and would lead to greater damages.<sup>198</sup>

National and regional courts similarly have relied on and applied the precautionary principle in addressing the adequacy of climate action. Courts in both the Netherlands and Germany applied the precautionary principle in assessing the adequacy of State action on climate change and concluded that uncertainty about the scope of climate harm should not result in delayed action to reduce greenhouse gas emissions.<sup>199</sup> The courts in both cases also emphasized that the

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<sup>193</sup> *Friends of the Irish Environment*, *supra* note 190, at para. 3.4.

<sup>194</sup> District Court of the Hague, *Milieudefensie et al v. Royal Dutch Shell*, paras. 2.3.3, case no. C/09/571932 / HA ZA 19-379 (May 26, 2021),

<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339&showbutton=true>.

<sup>195</sup> *Id.* at paras. 2.3.5-2.3.5.4, 4.1.4, 4.4.27-4.4.39, 4.4.55.

<sup>196</sup> *ASBL Klimaatzaak*, *supra* note 2, at pp. 61, 83.

<sup>197</sup> See *Association Notre Affaire à Tous et al.*, *supra* note 63, at paras. 40-45, arts. 3-4 .

<sup>198</sup> *Id.* at para. 16 (recognizing that “each additional half degree of global warming [over 1.5°C] significantly increases the associated risks, particularly for the most vulnerable ecosystems and populations”).

<sup>199</sup> *Urgenda*, *supra* note 10, at paras. 5.3.2, 5.6.2 (holding that the State had a duty to act to address the risk of climate harm even if it was uncertain whether the harm will occur); *Neubauer et al*, *supra* note 2, at paras. 229, 247 (reiterating that protecting the rights of future generations includes not delaying action

impacts of climate change are compounded over time and tipping points exist beyond which harm cannot be reversed. As a result, failure to adequately reduce emissions in the near term constrains the available pathways to stay below 1.5°C, which may then require radical emissions cuts after 2030 that may only be achievable at the cost of further impairing fundamental rights.<sup>200</sup> Most recently, the Federal Court of Australia concluded that the Minister of Environment should take into account the precautionary principle when making decisions on proposed actions (there, the extension of a coal mine to increase the extracted amount of coal) given the foreseeable harm of climate change.<sup>201</sup>

The precautionary principle obliges States to prioritize proven measures known to be effective at averting or minimizing foreseeable risk and measures that pose a lower risk of causing harm.<sup>202</sup> It is contrary to the precautionary approach to delay climate action in reliance on unproven future measures. Domestic courts have struck down mitigation plans that rely on uncertain carbon dioxide removal technologies instead of more stringent near-term reductions. Referencing the IPCC Special Report on 1.5°C, which highlighted the risks of such technologies,<sup>203</sup> the German Constitutional Court held that Germany could not rely on negative emissions technologies while delaying climate action as the large-scale deployment of these technologies is not yet foreseeable.<sup>204</sup> The Dutch Supreme Court in *Urgenda* similarly rejected plans from the Dutch State to rely on drastic measures to remove greenhouse gases from the atmosphere at a later stage noting that “there is no technology that allows this [removal of emissions] to take place on a sufficiently large scale” and “taking such risks would be contrary to the precautionary principle that must be observed when applying articles 2 and 8 ECHR [human rights obligations] and Article 3(3) UNFCCC.”<sup>205</sup> The Supreme Court of Ireland also decided that the Irish state’s mitigation plan was too reliant on technologies not yet existent or unproven at scale.<sup>206</sup>

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especially given the irreversibility of climate change, and that precautionary measures must be taken to manage the anticipated future reduction burdens in accordance with respect for fundamental rights).<sup>200</sup> *Neubauer et al, supra* note 2, at paras. 119, 161, 185-86, 197, 229 (highlighting the irreversibility of climate change and the tipping points as laid out by the IPCC in the Special Report on 1.5°C, and the subsequent impacts and burdens placed on future generations); *accord ASBL Klimaatzaak, supra* note 2, at p. 63-64; *Friends of the Irish Environment, supra* note 190, at paras. 3.6-3.7 (discussing tipping points). *Cf. Urgenda, supra* note 10, at paras. 4.2-4.4 (though not making a finding on emissions reductions post-2030, the Court did highlight the problems of the cumulative concentration of greenhouse gases in the atmosphere and the harms associated with tipping points as referred to by the IPCC in AR5).

<sup>201</sup> *Sharma, supra* note 64, at paras. 254-57.

<sup>202</sup> Advisory Opinion OC-23/17, *supra* note 47, at paras. 130, 133, 142, 180; *see also Tătar, supra* note 92, at para. 107.

<sup>203</sup> *Chapter 2, in IPCC, Special Report on 1.5°C, supra* note 3, at pp. 95-96, 118-21, para. 2.3.4, pp. 134-36, para. 2.4.2.3; *Chapter 4, in IPCC, Special Report on 1.5°C, supra* note 3, at p. 316 (“Most CDR options face multiple feasibility constraints, which differ between options, limiting the potential for any single option to sustainably achieve the large-scale deployment required in the 1.5°C-consistent pathways described in Chapter 2 (high confidence).”).

<sup>204</sup> *Neubauer et al, supra* note 2, at paras. 33, 182-97, 227 (discussing the risks of not taking action now to reduce emissions and the burden that will place on future generations and the risks of instead relying on so-called negative emissions technologies).

<sup>205</sup> *Urgenda, supra* note 10, at para. 7.2.5.

<sup>206</sup> *Friends of the Irish Environment, supra* note 190, at paras. 6.18, 6.46-6.47.

In sum, international human rights law, interpreted in the light of international environmental law and best available science, dictates that State measures on climate change must be sufficiently ambitious, urgent, and reliable to have a reasonable likelihood of averting the risk of harm to human rights.

#### **V. The State’s duty to protect human rights against the threat of climate change applies equally across generations, present and future**

International law guarantees individuals equal enjoyment of human rights, including the rights to life and a healthy environment, free from discrimination.<sup>207</sup> The Korean state is bound by Article 11 of the Constitution to ensure that all citizens are equal before the law and free from discrimination. In fulfilling its duty to protect the right to life, under Article 10 of the Constitution, and the right to a healthy environment, under Article 35, from the threat of climate change, the State must afford equal protection to all generations—adult and youth generations alive today, and future generations—consistent with the principles of non-discrimination and intergenerational equity, which are firmly established in international law. To do so, the State must take into consideration the disproportionate impacts of climate change on today’s youth and those who will be born in the future, and the discriminatory effect of inadequate climate action on those populations. Critically, the State must ensure that its conduct does not discriminate between generations presently alive and, in taking steps to preserve the environment, must act with both the present and the future in mind. This section addresses the recognition of these principles in international and comparative law, and their relevance to the interpretation and application of Korea’s constitutional obligations.

First, the prohibition on discrimination under Article 11 of the Korean Constitution<sup>208</sup> should be interpreted consistent with international law to encompass indirect discrimination based on age and birth cohort. Inadequate State action to reduce greenhouse gas emissions has a disparate impact on today’s youth, both by virtue of their current age, which renders them more vulnerable to adverse impacts of climate change, and by virtue of their birth cohort, which positions them to live a greater portion of their lives in the future when those impacts will be more severe. The measures necessary to safeguard the rights to life and a healthy environment from the threat of climate change must reflect both the State’s heightened responsibility vis-à-vis children today, and—to use the language of the German Constitutional Court—an inter-temporal balance between present and future liberties.<sup>209</sup> Respecting “intertemporal guarantees of liberty” requires balancing the infringements on liberty imposed today by climate action with those that will be required of persons alive in the future if climate change is permitted to worsen.<sup>210</sup> Shifting the burden of climate change and the costs of climate action to the future, by

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<sup>207</sup> See e.g., ICCPR, *supra* note 71, at arts. 2(1), 3, 26; Convention on the Rights of the Child, *supra* note 72, at art. 2(1); International Covenant on Economic, Social and Cultural Rights art. 2(2), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

<sup>208</sup> Daehanminkuk Hunbeob [Hunebeob][Constitution], *supra* note 124, at art. 11.

<sup>209</sup> *Neubauer et al*, *supra* note 2, at paras. 122, 146, 148, 183.

<sup>210</sup> *Id.* at para. 193.

taking inadequate measures to reduce greenhouse gases today, has a discriminatory effect on the present youth generation as compared to the adult generation, in violation of the prohibition on discrimination under international law binding on Korea, and enshrined in Article 11 of the Korean constitution.

Second, the State's duty to protect the environment, as required under Article 35 of the Korean constitution, should be interpreted and implemented consistent with the principle of intergenerational equity, which finds echoes in Article 34(4) of the Constitution.<sup>211</sup> That principle, rooted in the notion that the environment should be preserved not only for the benefit of current generations, young and old, but also for the use and enjoyment of future generations, is well-grounded in international law and has been applied in environmental and climate cases in courts around the world.

The failure to consider the impact of current climate policy on those who will be alive in the future, both today's children and generations to come, is at odds with longstanding principles of international law.

#### **A. Inadequate action to protect life and the environment against the threat of climate change has a discriminatory impact on today's children**

States are obligated under international law to prohibit discrimination and guarantee individuals equal enjoyment of human rights.<sup>212</sup> The ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) oblige States to ensure that individuals can enjoy the rights guaranteed in the respective treaties without discrimination.<sup>213</sup> Article 26 of the ICCPR also requires States to guarantee equality under the law,<sup>214</sup> which the Human Rights Committee has explained means that States must not discriminate in "law or in fact in any field regulated and protected by public authorities."<sup>215</sup> This obligation requires States to "act against discrimination by public and private agencies in all fields."<sup>216</sup>

International law expressly guarantees the right of children to be free from discrimination. The Convention on the Rights of the Child requires States to respect and ensure children's rights

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<sup>211</sup> Daehanminkuk Hunbeob [Hunebeob][Constitution], *supra* note 124, at art. 34(4) (stating "The State shall have the duty to implement policies for enhancing the welfare of senior citizens and the young.").

<sup>212</sup> *See* ICCPR, *supra* note 71, at arts. 2(1), 3, 26; Convention on the Rights of the Child, *supra* note 72, at art. 3; ICESCR, *supra* note 207, at art. 2(2).

<sup>213</sup> ICCPR, *supra* note 71, at art. 2(1); ICESCR, *supra* note 207, at art. 2(2).

<sup>214</sup> ICCPR, *supra* note 71, at art. 26; *see also* American Declaration of the Rights and Duties of Man art. II, 1948, <https://www.cidh.oas.org/basicos/english/basic2.american%20declaration.htm>.

<sup>215</sup> Toussaint, *supra* note 81, at para. 11.7 ; Human Rights Committee, General Comment No. 18 : Non-discrimination, para. 12, U.N. Doc. HRI/Gen/1 /Rev.1 (July 29, 1994) (compiling in one UN Document numerous General Comments from various treaty bodies including this HRC one that was originally adopted on Nov. 10, 1989).

<sup>216</sup> Human Rights Committee, General Comment No. 28: The Equality of Rights Between Men and Women (article 3), para. 31, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000).



“without discrimination of any kind.”<sup>217</sup> The Committee on the Rights of the Child has further clarified that this obligation “requires appropriate proactive measures taken by the State” so that all children are equally able to enjoy their rights.<sup>218</sup> States also have an obligation under international law to give “primary consideration” to the “best interests of the child” in all actions concerning children.<sup>219</sup> It follows that, as human rights experts and domestic courts have recognized, States owe heightened duties to children, and must ensure non-discrimination and equal treatment in the context of climate change and climate action.

Under international human rights law, the prohibition on discrimination applies to both direct and indirect discrimination. The UN bodies responsible for interpreting the rights and obligations set forth in the twin covenants, the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, have both interpreted the prohibition on discrimination to apply not only to intentional discrimination, but also to conduct that has a discriminatory effect.<sup>220</sup> The Human Rights Committee has clarified that a violation of article 26 of the ICCPR, can result from the discriminatory effect of a decision or measure that is facially neutral or enacted without intent to discriminate, if it is demonstrated that the detrimental effect of the State conduct falls disproportionately on an enumerated class of people, and the conduct was not based on objective and reasonable grounds.<sup>221</sup> The Committee on the Rights of the Child has likewise explained that the right to non-discrimination under article 2 of the Convention encompasses the right to substantive equality of opportunities for all children and corresponding duty on the State to redress situations of inequality, i.e. discriminatory effects.<sup>222</sup>

International law prohibits discrimination based on age. Although age is not expressly listed as a prohibited ground of discrimination in most human rights treaties or in Korea’s constitution,

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<sup>217</sup> Convention on the Rights of the Child, *supra* note 72, at art. 2; *see also* ICCPR, *supra* note 71, at arts. 2(1), 26; ICESCR, *supra* note 207, at art. 2(2), (both the ICCPR and ICESCR containing non-discrimination obligations that apply to children as well).

<sup>218</sup> *See* Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), para. 41, U.N. Doc. CRC/C/GC/14 (May 29, 2013) (detailing the connection between the best interest of the child and non-discrimination).

<sup>219</sup> Convention on the Rights of the Child, *supra* note 72, at art. 3(1).

<sup>220</sup> *See* Human Rights Committee, General Comment No. 18, *supra* note 215, at para. 7; Committee on Economic, Social and Cultural Rights, General Comment No. 20, paras. 7, 10, U.N. Doc. E/C.12/GC/20 (July 2, 2009) (providing more details on non-discrimination in art. 2(2) of the Covenant); *see also* Committee on the Rights of Persons with Disabilities, General Comment No. 6 (2018) on equality and non-discrimination, para. 18(b), U.N. Doc. CRPD/C/GC/6 (Apr. 26, 2018) (explaining that “‘indirect discrimination’ means that laws, policies or practices appear neutral at face value but have a disproportionate negative impact on a person with a disability” and providing examples in the context of the Convention on the Rights of Persons with Disabilities).

<sup>221</sup> *Althammer v. Austria*, para. 10.2, UN Doc. CCPR/C/78/D/998/2001 (Aug. 8, 2003).

<sup>222</sup> Committee on the Rights of the Child, General Comment No. 14, *supra* note 218, at para. 41; *see also* Committee on the Rights of the Child, General Comment No. 5, General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), para. 12, U.N. Doc. CRC/GC/2003/5 (2003) (identifying the prohibition of discrimination (art. 2) as a key principle and referencing the Human Rights Committee’s General Comment No. 18 and its emphasis on the State taking measures to eliminate or diminish conditions that cause discrimination in discussing the application of article 2 of the Convention on the Rights of the Child).

international bodies have interpreted the categories “birth and other status” to encompass age-related distinctions. The Human Rights Committee, for example, has recognized that discrimination based on age may fall within “other status” under article 26 of the ICCPR.<sup>223</sup> The Committee on Economic, Social and Cultural Rights has likewise interpreted the prohibition on discrimination in the ICESCR to bar discrimination based on age.<sup>224</sup>

As discussed in section II above, climate change disproportionately impacts children in at least two ways. First, children are more vulnerable to the effects of climate change by virtue of their youth, which makes them more susceptible to certain adverse health impacts and other socioeconomic harms caused by global warming.<sup>225</sup> Second, children are more exposed to the long-term effects of climate change by virtue of their birth cohort, the timing of their birth, meaning that more of their lives will be lived in the future when climate change is projected to worsen.

International human rights bodies and domestic courts have recognized that the State obligation to refrain from and prohibit discrimination, and to ensure equal protection of rights, applies in the context of States’ climate action. In their Joint Statement on climate change, five UN Human Rights Treaty Bodies asserted that States should seek to address discrimination and inequality including “taking into consideration the best interests of the child” in their climate action.<sup>226</sup> In his Safe Climate report, the current Special Rapporteur on Human Rights and Environment notes the centrality of non-discrimination to a rights-based approach to climate action, and holds that States have a duty to “not violate the right to a safe climate through their own actions” and “must avoid discrimination” in all climate action.<sup>227</sup> As the former Special Rapporteur on Human Rights and the Environment and the Framework Principles on human rights and the environment affirm, a State’s non-discrimination and equality obligations also apply to the “equal enjoyment of human rights relating to a safe, clean, healthy and sustainable environment.”<sup>228</sup> These duties, therefore, require States to enact measures to ensure that

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<sup>223</sup> See, e.g., *Love et al. v. Australia*, para. 8.2, U.N. Doc. CCPR/C/77/D/983/2001 (2003) (presenting views of 25 March 2003 of the Committee and stating “a distinction related to age which is not based on reasonable and objective criteria may amount to discrimination”); *Solis v. Peru*, para. 6.3, U.N. Doc. CCPR/C/86/D/1016/2001 (2006); *Althammer et al*, *supra* note 221, at para. 10.2; U.N. Secretary-General, *Follow-up to the Second World Assembly on Aging*, paras. 24-28, U.N. Doc. A/66/173 (July 22, 2011) (discussing discrimination against older persons, but pointing out that “age” has been considered as a prohibited ground of discrimination in human rights bodies).

<sup>224</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 20, *supra* note 220, at paras. 15, 27, 29 (stating in para. 27 that there needs to be “[a] flexible approach to the ground of ‘other status’” and that these “additional grounds are commonly recognized when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization” and in para. 29 recognizing that age falls into the “other status” category); *cf.* Committee on the Rights of Persons with Disabilities, General Comment No. 6, *supra* note 220, at para. 21 (explaining that “[p]rotection against ‘discrimination on all grounds’ means that all possible grounds of discrimination and their intersections must be taken into account” and that these “possible grounds” include age).

<sup>225</sup> See discussion in section II(B)(ii) *supra*.

<sup>226</sup> See Joint Statement on “Human Rights and Climate Change,” *supra* note 7, at para. 13.

<sup>227</sup> See Special Rapporteur on Human Rights and the Environment, Safe Climate Report, *supra* note 41, at para. 65; see also *id.* at paras. 27, 85.

<sup>228</sup> See *Report on the relationship between children’s rights and environmental protection*, U.N. Doc. A/HRC/37/58, *supra* note 49, at para. 64; see also *Report of the Special Rapporteur on the issue of*

environmental harm, such as the impacts of climate change, does not affect children disproportionately.<sup>229</sup>

Discrimination faced by children as a result of inadequate action to avert climate change should be understood not only as discrimination based on age, but as discrimination based on “birth cohort,” i.e. the group of people born within a specific time span. For example, a birth cohort of current youth, i.e. people born after 2000, will experience greater impacts from climate change than earlier birth cohorts (older persons), given the incontrovertible evidence that global warming and its consequences will increase in the future. Thus, the discrimination they face is not solely or principally due to their age at the present time, but also to their heightened exposure to foreseeable future risk. The consequence of inadequate action to reduce greenhouse gas emissions in the near term imposes a disproportionate burden on today’s youth based on when they were born and how much life they have left to live in an increasingly warming world.

Domestic courts have begun to consider birth cohort in their decisions in climate cases brought by youth plaintiffs. For example, in *Mathur v. Ontario*, the Ontario Superior Court of Justice held that the youth plaintiffs’ claim, that the State’s inaction on climate change and the associated disproportionate impacts of climate change on them amount to discrimination, should proceed to trial.<sup>230</sup> The Court rejected the notion that the plaintiffs could not demonstrate, as a matter of law, that the government’s conduct would increase gaps between youth and future generations and other groups in society, and thereby violate the right to “equal protection and equal benefit of the law without discrimination” under the Canadian Charter of Rights and Freedoms.<sup>231</sup> In allowing the case to proceed, the Court noted that, depending on the facts adduced at trial, the “adverse effects of climate change on younger generations – who presumably would have more years to live than current generations – may be considered self-evident.”<sup>232</sup>

Similarly, in determining that the government had to act to address climate change and deforestation, the Colombian Supreme Court considered that children together with future generations will be “directly affected, unless we presently reduce the deforestation rate to zero.”<sup>233</sup> More recently, the Federal Court of Australia found that the Minister of Environment had a duty of care to children when deciding whether to allow extraction of more coal from a mine. The Court explicitly highlighted evidence of the impacts that the current “cohort of

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*human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, annex, paras. 7-9, 64, U.N. Doc. A/HRC/37/59 (Jan. 24, 2018) (Framework Principles on human rights and the environment, principle 3: “States should prohibit discrimination and ensure equal and effective protection against discrimination in relation to the enjoyment of a safe, clean, healthy and sustainable environment”).

<sup>229</sup> See *Report on the relationship between children’s rights and environmental protection*, U.N. Doc. 37/58, *supra* note 49, at para. 66.

<sup>230</sup> See *Mathur*, *supra* note 66, at para. 180.

<sup>231</sup> *Id.* at paras. 175, 188.

<sup>232</sup> *Id.* at para. 187.

<sup>233</sup> *Generaciones Futuras*, *supra* note 10, at p. 34, para. 11.2 (unofficial translation).

children” would face as they aged due to climate change,<sup>234</sup> and described the devastating impacts of climate change on children as “the greatest inter-generational injustice ever inflicted by one generation of humans upon the next.”<sup>235</sup>

Some domestic courts have begun to apply the principle of non-discrimination—explicitly and implicitly—to future generations as well. For example, the Colombian Supreme Court emphasized that the rights of future generations are based on the notion that both present and future generations share natural resources and thus those resources must be managed equitably so as not to discriminate against future generations.<sup>236</sup> In finding that the State had a duty to take greater emissions reductions now, the German Constitutional Court implicitly applied the principle of non-discrimination, reasoning that future generations would face disproportionately burdensome restrictions on their freedom if present consumption of the carbon budget forced more radical emissions reduction measures in the future to avoid catastrophic harms.<sup>237</sup> In an environmental rights-based constitutional challenge to a law making it easier to engage in fracking, the Pennsylvania Supreme Court implicitly linked intergenerational equity and non-discrimination, finding that the rights of current and future generations were to be considered in a non-discriminatory manner.<sup>238</sup> Based on the public trust doctrine, under which the state holds natural resources in trust for the benefits of people, the Court determined that the state was obligated to “deal impartially with all beneficiaries and ... to balance the interests of present and future generations.”<sup>239</sup>

The prohibition on discrimination under the Korean constitution should be interpreted consistently with the international and comparative law cited above, to encompass indirect discrimination based on age and birth cohort. Given the State’s heightened duties to children, it must ensure that its action on climate change does not place a disproportionate burden on them and future generations.

### **B. State action to protect the environment from the threat of climate change should comport with the principle of intergenerational equity**

The responsibility of States not to discriminate against youth based on their birth cohort logically overlaps with the longstanding principle of intergenerational equity as discussed below. Intergenerational equity helps inform the understanding of discrimination based on birth cohort as both embody the notion that State conduct should not disadvantage generations to come including with regards to their enjoyment of the rights to life and a healthy environment.

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<sup>234</sup> *Sharma, supra* note 64, at paras. 209-13, 458.

<sup>235</sup> *Id.* at para. 293.

<sup>236</sup> *Generaciones Futuras, supra* note 10, at p. 20 (unofficial translation).

<sup>237</sup> *Neubauer et al, supra* note 2, at paras. 192-93.

<sup>238</sup> *Robinson Township, Washington County, Pa. et al. v. Commonwealth of Pennsylvania*, 83 A.3d 901 (Pa. 2013).

<sup>239</sup> *Id.* at p. 959.

**i. Intergenerational equity is a widely recognized principle of international environmental law**

International environmental law has long recognized the principles of intergenerational equity and the responsibilities of the present generation to future generations. The opening words of the UN Charter reflect the duty of present generations to protect future generations<sup>240</sup> and since then, this principle has been reiterated, reaffirmed, elaborated, and operationalized in foundational documents setting forth the principles of international environmental law and legally-binding multilateral environmental agreements. This includes the law and policy governing climate change and States' responses.

Over the last fifty years, UN resolutions, documents, and treaties have continually reaffirmed the principle that people and States must use natural resources in a manner that benefits both present and future generations.<sup>241</sup> The 1972 Stockholm Declaration averred that people have a “solemn responsibility to protect and improve the environment for present and future generations.”<sup>242</sup> It further states that “[t]he natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through planning or management, as appropriate.”<sup>243</sup>

The principle of intergenerational equity also has been affirmed as the core element of sustainable development. The UN-appointed World Commission on Environment and Development defined sustainable development as that which “meets the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>244</sup> It also recognized that ensuring sustainability would require “legal framework[s to] start from the proposition that an environment adequate for health and well-being is essential for all human beings including future generations.”<sup>245</sup> Similarly, the 1992 Rio Declaration, which laid out numerous principles of international environmental law including obligations to future generations, proclaimed that “[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.”<sup>246</sup> The 2030

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<sup>240</sup> See U.N. Charter pmb. (1945) (stating “We the Peoples of the United Nations determined to save succeeding generations from the scourge of war.”).

<sup>241</sup> See World Charter for Nature, U.N.G.A. Res. 37/7, 22 I.L.M. 455 (1983) (people “must acquire knowledge to maintain and enhance his ability to use natural resources in a manner which ensures the preservation of the species and ecosystems for the benefit of present and future generations.”); World Commission on Environment and Development, *Our Common Future*, para. 25, Annex 1, para. 2 (1987) [hereinafter *Brundtland Report*] (“States shall conserve and use the environment and natural resources for the benefit of present and future generations.”).

<sup>242</sup> Stockholm Declaration, *supra* note 25, at principle 1.

<sup>243</sup> *Id.* at principle 2.

<sup>244</sup> *Brundtland Report*, *supra* note 241, at para. 27.

<sup>245</sup> *Id.* at Chapter 2, para. 76.

<sup>246</sup> Rio Declaration, *supra* note 88, at principle 3; accord Int'l Law Ass'n, *New Delhi Declaration on Principles of International Law relating to Sustainable Development*, para. 2.1 (2002) (stating the principle of equity “refers both to inter-generational equity (the right of future generations to enjoy a fair level of the common patrimony) and intra-generational equity...” and noting, already in 2002, that intergenerational equity may be an emerging (general) principle of international law).

Agenda for Sustainable Development directs States to take “urgent action on climate change, so that [the planet] can support the needs of present and future generations.”<sup>247</sup>

Beyond their incorporation into the above-listed texts, forty-four international agreements, binding on their respective State Parties, including those on climate change, explicitly include or reference the principle of intergenerational equity and the rights of future generations.<sup>248</sup> From its inception, the international climate regime has reiterated the principle of international equity broadly as well as the importance of ensuring intergenerational equity. The opening words of the UNFCCC indicate that in adopting the agreement, Parties were “[d]etermined to protect the climate system for present and future generations.”<sup>249</sup> Further, its first guiding principle is that “Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.”<sup>250</sup> The Paris Agreement reiterates this principle: “Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights ... as well as ... intergenerational equity.”<sup>251</sup>

International courts have also relied on principles of intergenerational equity and sustainable development in their rulings. Judges and rulings at the ICJ have long recognized this principle. First, in 1993 Judge Weeramantry emphasized that global jurisprudence supported the notion of equity including “respect for the rights of future generations, and the custody of earth resources with the standard of due diligence expected of a trustee.”<sup>252</sup>

Subsequent decisions of the ICJ and judges’ opinions have expounded on this principle of equity. In its *Advisory Opinion on the Legality of the Threat of Nuclear Weapons*, the ICJ unanimously stated that “the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.”<sup>253</sup> In his dissenting opinion, Judge Weeramantry stated that, in regards to the environment, the Court must “pay due recognition to the rights of future generations” and noted that “the rights of future generations have passed the stage when they were merely an embryonic right struggling for recognition. They have woven themselves into international law through major treaties, through juristic opinion and through general principles of law recognized by civilized

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<sup>247</sup> UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, UN Doc A/RES/70/1, pmb., Goal 13.

<sup>248</sup> See CIEL, Submission to the UN Special Rapporteur on Human Rights and the Environment on the environment and the rights of the child, p. 3, Annex 2 (Oct. 31, 2017), <https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/Child/CIEL.pdf> (listing the 44 international environmental agreements with explicit references to intergenerational equity).

<sup>249</sup> UNFCCC, *supra* note 1, at pmb.

<sup>250</sup> *Id.* at art. 3(1).

<sup>251</sup> Paris Agreement, *supra* note 1, at pmb.

<sup>252</sup> *Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.)*, Judgement, Separate Opinion of Judge Weeramantry, 1993 I.C.J. Reports 38, para. 240 (June 14).

<sup>253</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996(I) I.C.J. Reports 242, para. 29 (July 8).

nations.”<sup>254</sup> Thus, “[w]hen incontrovertible scientific evidence speaks of pollution of the environment on a scale that spans hundreds of generations, this Court would fail in its trust if it did not take serious notes of the ways in which the distant future is protected by present law.”<sup>255</sup>

Subsequently, in the *Gabcikovo-Nagymoros* case, which was a dispute arising from a hydroelectric project on the Danube River, the ICJ further recognized that protection of the environment includes protection for future generations:

Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past.<sup>256</sup>

More recently, in the 2010 *Pulp Mills* case, which focused on transboundary environmental risks, Judge Cançado Trindade noted the importance of considerations of future generations in the precautionary principle and that “inter-generational equity forms part of conventional wisdom in International Environmental Law.”<sup>257</sup>

Thus, intergenerational equity has come to form a central tenet of international environmental law and cannot be overlooked in assessing risks, especially from environmental harm that spans decades, like that caused by climate change, or in evaluating State responses.

## **ii. Domestic Courts Globally Have Recognized the Duty to Protect the Right of Future Generations to a Healthy Environment**

Like international bodies, national courts have also increasingly recognized the principle of intergenerational equity and the rights of future generations. Rulings in numerous countries rely on the principle of intergenerational equity in ordering States to protect the environment or alter decisions made without sufficiently considering the interests of future generations.

First, courts have granted standing to (or allowed cases to proceed on behalf of) future generations. In 1993, the Supreme Court of the Philippines in *Minors Oposa v. Factoran* held that plaintiffs could file a petition challenging logging licenses not only on behalf of their generation, but also future “generations yet unborn.”<sup>258</sup> The Court held that “[t]heir personality to sue on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is

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<sup>254</sup> *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 253, at pp. 233-34 (dissenting opinion of Judge Weeramantry who was dissenting on the merits of the case, but not this principle).

<sup>255</sup> *Id.* at p. 234.

<sup>256</sup> *Gabcikovo-Nagymoros Project*, *supra* note 93, at para. 140.

<sup>257</sup> *Pulp Mills on the River Uruguay*, *supra* note 147, at paras. 64, 90, 122-23 (both States in the dispute also highlighted intergenerational equity and considerations of future generations as central to the case).

<sup>258</sup> *See Minors Oposa*, *supra* note 84.

concerned.”<sup>259</sup> Similarly, in *Urgenda*, the first instance decision of the Hague District Court in 2015 accepted that *Urgenda*, as an organization, could bring the case and represent the interests of both current and future generations of Dutch people.<sup>260</sup> Most recently, the Ontario Superior Court of Justice in Canada has allowed a lawsuit challenging government action and inaction to prevent climate change to proceed on behalf of future generations, “as [the Applicants’ generation], and future generations will bear the brunt of various impacts of climate change.”<sup>261</sup>

Second, in addressing the rights of future generations, courts have recognized that rights run to future generations and therefore that governments may be required to protect natural resources for their benefit, as well as that of present generations.<sup>262</sup> Courts have held that governments must protect bays (Philippines), national parks (Australia), rivers (Kenya), and forests (India) for the benefit of present and future generations.<sup>263</sup> Moreover, as the Supreme Court of India has held, the government’s duty to enforce environmental laws is in part because the “adverse effect” of the resulting “ecological imbalance and degradation of environment, ... will have to be borne by the future generations.”<sup>264</sup> When the government fails to adequately protect the environment, the Indian Supreme Court has held, “it becomes the duty of the Court to direct such steps being taken are necessary for cleaning the air so that the future generations do not suffer from ill health.”<sup>265</sup>

Third, courts have held that States must consider intergenerational equity and the rights of future generations when approving activities that adversely impact the environment. For

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<sup>259</sup> *See id.*

<sup>260</sup> *See Urgenda v. The State of the Netherlands*, C/09/456689 / HA ZA 13-1396, paras. 4.5-4.10 (June 24, 2015) [hereinafter *Urgenda I*]; accord *ASBL Klimaatzaak*, *supra* note 2, at pp. 50-55 (granting standing to both individuals and the organization *Klimaatzaak*, whose goal is to protect current and future generations from climate change, given the threat of climate change to current and future generations).

<sup>261</sup> *Mathur*, *supra* note 66, at paras. 249-53 (dismissing a motion to strike and allowing action to proceed) (motion for leave to appeal dismissed, 2021 ONSC 1624 (Mar. 25, 2021)).

<sup>262</sup> *See Minors Oposa*, *supra* note 84, at p. 11 (the Philippines Supreme Court affirmed that the right to a healthy environment applied to present and future generations); *A.P. Pollution Control Board v. Prof. M.V.Nayudu (Retd.) & Others*, S.O.L. Case No. 53, Supreme Court of India (Mar. 15, 1999) (India) (relying on the principle of intergenerational equity as set forth in various multilateral environmental agreements).

<sup>263</sup> *See, e.g., Metropolitan Manila Bay Development Authority et al. v. Concerned Residents of Manila Bay*, G.R. Nos. 171947-48, Supreme Court of the Philippines (Dec. 18, 2008) (Phil.); *Willoughby City Council v. Minister Administering the National Parks and Wildlife Act*, Land & Environment Court of New South Wales, (1992) 78 LGERA 19 (ss 47B, 47G, 47I) (Austl.); *Waweru (applicant) and Republic (respondent)*, (2007) AHRLR 149 (KeHC 2006), High court of Kenya at Nairobi (Mar. 2, 2006) (Kenya) (stating that “the intergenerational equity obligates the present generation to ensure that health, diversity and productivity of natural resources are maintained or enhanced for the benefit of future generations” and these resources included rivers and water tables); *State of Himachal Pradesh & others v. Ganesh Wood Products*, AIR 1996 SC 149, Supreme Court of India (Sept. 11, 1995) (India). This duty, the Philippines Supreme Court held, applies even without a specific legal provision, as the government “cannot escape their obligation to future generations of Filipinos to keep the waters of the Manila Bay clean and clear”). *Metropolitan Manila Bay Development Authority et al.*, *supra* note 263.

<sup>264</sup> *Indian Council for Enviro-Legal Action v. Union of India*, 1996 AIR 1446, paras. 26, 41, Supreme Court of India (Feb. 13, 1996) (India).

<sup>265</sup> *M.C. Mehta v. Union of India (Tanneries Case)*, AIR 2002 SC 1696, para. 27, Supreme Court of India (May 5, 2002) (India).



example, in a case about logging licenses that were granted without proper assessments, the Supreme Court of India emphasized that “the present generation has no right to deplete all the existing forests and leave nothing for the next and future generations” and that sustainable development requires a proper assessment.<sup>266</sup> Similarly, in *Jagannath v. Union of India & Ors*, the Court ruled that an environmental and social impact assessment should be conducted before authorizing new commercial shrimp farms and that the assessment specifically “must take into consideration the inter-generational equity.”<sup>267</sup>

### **iii. Governments have a Duty to Consider Intergenerational Equity in their Climate Action**

National courts and international human rights experts have begun emphasizing the principle of intergenerational equity and the duty of governments to consider the rights of future generations in their actions related to climate change. Courts around the world, including in Germany, the Netherlands, Pakistan, Nepal, and Colombia have all ruled that national climate policies must take intergenerational equity into account.

The German Constitutional Court in *Neubauer* analyzed a challenge by German youth to the federal Climate Protection Act through the lens of intergenerational equity. The court held that the government’s target to reduce greenhouse gas emissions by 55 percent from 1990 levels by 2030 was insufficient to satisfy its constitutional obligations because of how it distributed the burden of climate mitigation measures over time. The court examined the implications of the State’s climate policy for the distribution across time of the remaining carbon budget if the world is to avoid more dangerous levels of global warming (as indicated by the IPCC). It reasoned that “one generation must not be allowed to consume large parts of the CO<sub>2</sub> budget under a comparatively mild reduction burden ... and expose their [future generations] lives to serious losses of freedom.”<sup>268</sup> Under the German Constitution, the current generation needs to ensure that it does not damage the environment to an extent beyond which future generations can preserve it in a similarly reasonable manner.<sup>269</sup> Examining the constitutionality of Germany’s law, the Court found that the duty to protect the right to life, applied not only to violations of the right to life that had already occurred, but future violations as well, especially when the resultant harms may be irreversible, as may be the case with some impacts of climate change.<sup>270</sup>

The intergenerational distribution of climate burdens has likewise been central to the analysis of other courts examining the adequacy of States’ climate action. The initial decision by the Hague District Court in *Urgenda*, which was subsequently upheld, found that “the State, in choosing measures [to combat climate change], will also have to take account of the fact that the costs are

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<sup>266</sup> *State of Himachal Pradesh & Others*, *supra* note 263, at p. 150.

<sup>267</sup> *Jagannath v. Union of India & Ors*, (1996) INSC 1592, Supreme Court of India (Dec. 11, 1996) (India).

<sup>268</sup> *Neubauer et al*, *supra* note 2, at para. 192.

<sup>269</sup> *Id.* at paras. 186, 193.

<sup>270</sup> *Id.* at paras. 108, 144, 148.

to be distributed reasonably between the current and future generations.”<sup>271</sup> Noting that the principles of intergenerational equity would “establish an edifice of climate justice for present and future generations,”<sup>272</sup> the Nepali Supreme Court in *Shrestha* directed the government to develop a climate change law that included “arrangements to ensure ecological justice and environmental justice to the future generation through the conservation of natural resources, heritages and environmental protection while mitigating the effects of climate change.”<sup>273</sup> And in defining the legal obligations of the State to protect its citizens from the threat of climate change, the Lahore High Court in Pakistan similarly concluded that fundamental rights must be “read with ... the international environmental principles of sustainable development, ... inter and intra-generational equity and public trust doctrine.”<sup>274</sup>

Intergenerational equity has also played a key role in analysis of projects that would contribute to climate change. Though not assessing a climate policy, the Land and Environment Court of New South Wales (Australia) in *Gloucester Resources Limited v. Minister for Planning* (“*Rocky Hill* decision”) cited intergenerational equity as a reason, among others, that a coal mine should not be allowed to proceed. In assessing the proposed mine, the Court looked at numerous social, environmental, and economic factors including the distribution of its impacts, potential contributions to climate change, and Australia’s obligations under the UNFCCC and Paris Agreement.<sup>275</sup> The court found “that the Rocky Hill Coal Project will raise issues of distributive equity, both intra-generational equity and inter-generational equity”<sup>276</sup> and will include long-term “consequences,” including as a result of its greenhouse gas emissions and contributions to climate change, that will burden future generations.<sup>277</sup> Thus, the Court found, “[t]he benefits of the Project are therefore distributed to the current generation but the burdens are distributed to the current as well as future generations (inter-generational inequity)”<sup>278</sup> and should not be permitted.

Finally, the Colombian Supreme Court relied on the principles of intergenerational equity in ruling that the government had to develop action plans to reduce deforestation and address climate change. The Court held that “in terms of intergenerational equity, the transgression is obvious, as the forecast of the temperature increase is 1.6 degrees in 2041 and 2.14 in 2071; future generations, including children who brought this action, will be directly affected, unless we presently reduce the deforestation rate to zero.”<sup>279</sup> Moreover it held that the protection of fundamental rights includes the rights of “the unborn, who also deserve to enjoy the same environmental conditions that we have,”<sup>280</sup> and there was a “binding legal relationship

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<sup>271</sup> *Urgenda I*, *supra* note 260, at para. 4.76.

<sup>272</sup> *Shrestha*, *supra* note 10, at p. 11.

<sup>273</sup> *Id.* at p. 12.

<sup>274</sup> *Ashgar Leghari*, *supra* note 10, at para. 7.

<sup>275</sup> See generally *Gloucester Resources Limited v. Minister for Planning* [2019] NSWLEC 7 (Feb. 8, 2019) (Austl.).

<sup>276</sup> *Id.* at para. 406.

<sup>277</sup> *Id.* at para. 415, 525-27; accord *Sharma*, *supra* note 64, at para. 293.

<sup>278</sup> *Gloucester Resources Limited*, *supra* note 275, at para. 416.

<sup>279</sup> *Generaciones Futuras*, *supra* note 10, at p. 34, para. 11.2 (unofficial translation).

<sup>280</sup> *Id.* at p. 18 (unofficial translation).

regarding the rights of future generations” requiring limits on the present generation’s actions.<sup>281</sup>

UN treaty bodies have also highlighted impacts on future generations when addressing States’ human rights and environmental obligations to mitigate the causes of climate change. Increasingly, treaty bodies are addressing the human rights compatibility of State contributions to emissions through fossil fuel production. For example, in its concluding observations to Argentina, the CESCR cautioned that the State’s plans for fracking were “counter to the State party’s commitments under the Paris Agreement and would have a negative impact on global warming and on the enjoyment of economic and social rights by the world’s population and future generations” and recommended that Argentina reconsider its fracking plans in Vaca Muerta.<sup>282</sup>

The Committee on the Rights of the Child (CRC) has likewise invoked the concept of intergenerational equity and alluded to future generations of children in its concluding observations and recommendations to States regarding their climate obligations. In recent concluding observations to Austria, Australia, and Japan, the Committee expressed concerns about continued investment in fossil fuels, due to the implications for future emissions, and urged the countries to ensure that mitigation plans for the reduction of greenhouse gases were in line with international commitments to protect children’s rights, including an adequate standard of living.<sup>283</sup> Similarly, the CRC has issued recommendations urging States to consider the best interest of the child in designing and implementing laws and policies on climate change, especially given the explicit reference to intergenerational equity in the Paris Agreement.<sup>284</sup> As the Special Rapporteur for Human Rights and Environment has noted, present and future generations of children are closely connected.<sup>285</sup> A stable climate is critical to “the ability of both current and future generations to lead healthy and fulfilling lives.”<sup>286</sup>

The above international and comparative jurisprudence reinforces the notion that intergenerational equity applies across present generations, old and young, and between present and future generations, and should inform the interpretation of State duties with respect to climate change.

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<sup>281</sup> *Id.* at p. 21 (unofficial translation).

<sup>282</sup> CESCR, *Concluding observations on the fourth periodic report of Argentina*, *supra* note 61, at paras. 13-14.

<sup>283</sup> See Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Austria*, para. 35, U.N. Doc. CRC/C/AUT/CO/5-6 (Mar. 6, 2020); Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, *supra* note 177, at para. 41; Committee on the Rights of the Child, *Concluding Observations on the combined fourth and fifth periodic reports of Japan*, *supra* note 177, at para. 37.

<sup>284</sup> See Special Rapporteur on Human Rights and the Environment, *Safe Climate Report*, *supra* note 41, at para. 42 (discussing the CRC’s recommendations to States).

<sup>285</sup> See *Report on the relationship between children’s rights and environmental protection*, U.N. Doc. A/HRC/37/58, *supra* note 49, at para. 68.

<sup>286</sup> Special Rapporteur on Human Rights and the Environment, U.N. Doc. A/73/188, *supra* note 121, at para. 59.

## **VI. Conclusion**

In acknowledging the rights of current and future generations to live in a healthy environment, the Korean government joined the growing consensus among nations that human rights and the environment are integrally linked, and that the State has an affirmative duty to protect both. These commitments are reinforced through the international agreements to which Korea is a party, including those related to addressing climate change.

From Pakistan, Nepal, and Colombia, to Germany, the Netherlands, Belgium, and France, courts around the world have increasingly recognized that climate change threatens fundamental rights and that inadequate State action to avert the threat violates States' human rights obligations. In doing so, they have reinforced States' legal duty to protect against harms to the rights to life and a healthy environment due to climate change, by taking adequate measures to preserve a safe climate and prevent further infringements on human rights. They have also affirmed the role of courts in assessing whether State conduct on climate change comports with this duty.

The international scientific, legal, and political community has repeatedly and increasingly recognized that climate change is the greatest human rights challenge of this era and will have far-reaching consequences for present and future generations. In ratifying the Paris Agreement, as well as other international human rights agreements, the Korean government has committed to consider and address those human rights threats in all of its actions to address climate change. Therefore, it is essential for the protection of the rights to life and a healthy environment, among others, that the Korean government takes urgent, ambitious action to reduce its greenhouse gas emissions.

As the preceding sections show, international and comparative law demonstrate the duty of the State to take adequate action to combat climate change and to protect human rights of present and future generations to life and a healthy environment, and the authority of courts to review the adequacy of that action. While the details of States' actions will vary from country to country, measures must be consistent with the best available science and the precautionary principle under international law to ensure protection of the rights to life and a healthy environment. The Korean government should look to these international and comparative law sources in assessing the issues before it in this case and whether the actions taken and proposed by the Korean government are adequate to protect the rights to life and a healthy environment for the youth plaintiffs.