

Inter-American Court of Human Rights

Request for an Advisory Opinion on the Climate Emergency and Human Rights by the Republics of Colombia and Chile

Amicus Brief submitted by a Coalition of Caribbean Civil Society Organisations, supported by the Global Strategic Litigation Council

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A. STATEMENT OF INTEREST

1. This is an Amicus Curiae (“**Amicus**”) submitted by the Global Strategic Litigation Council for Refugee Rights (“**the Council**”) and a Coalition of Caribbean civil society organisations, academic institutions, and experts in relation to the request for an Advisory Opinion submitted by the Republic of Chile and the Republic of Colombia on the Climate Emergency and Human Rights (“**the Request**”). The purpose of this brief is to consider the issue of climate displacement under international law, in particular, human rights, environmental, and refugee law.
2. The Council was founded in September 2021 to empower civil society to advance the rights of refugees and migrants through strategic litigation and legal advocacy. The Council has a membership of over 350 NGOs, refugee leaders, lawyers, advocates and academics from every region of the world. The Council supports its members to share knowledge, collectively identify priorities, and develop and implement litigation and advocacy strategies to advance the protection of people on the move. In doing so, it aims to support the consistent and progressive development of international law relating to displacement worldwide. The Council has particular expertise in international law as it relates to involuntary and forced migration; and one of the Council’s key thematic priority areas is climate displacement.
3. Many of the co-signatories to the Amicus are also members of the Council. The co-signatories include Caribbean civil society organizations, academic institutions and experts who devote their efforts to issues of climate justice and/or migration. The Coalition consists of: Sosyete Kiltirèl Jen Ayisyen - Haitian Youth Cultural Society (SOKIJA); the Caribbean Centre for Human Rights; the Caribbean Natural Resources Institute (CANARI); Centro Montalvo; Colette Lespinasse; the Cropper Foundation; Foyer Maurice Sixto (FMS); Fundación Cónclave Investigativo de las Ciencias Jurídicas Y Sociales (CIJYS); the Global Justice Clinic of NYU School of Law which includes the Caribbean Climate Justice Initiative, Haitian Immigrant Rights Project and Haiti Justice and International Accountability; Institut Interuniversitaire de Recherche et de Développement (INURED); and Komisyon Episkopal Nasyonal Jistis ak Lapè (CE-JILAP). Between them, they bring expertise and experience to this Court on the realities of climate change and climate displacement across the Caribbean and Latin America. In particular, many of the co-signatories are keen to intervene in these proceedings in order to shed light on the specific and pressing climate issues which face their particular country. A full list of the signatories and details of their work on the issues in the Request is contained in Annex I to this Amicus.

4. The Council and Coalition of Caribbean civil society organizations (“**the Interveners**”) are represented by leading lawyers and academics in public international law, international human rights law, and environmental law. Between them, the legal team has acted in climate change cases in domestic courts around the world, before international tribunals, and has published widely in the field of environmental law. The Interveners are also supported by a leading climate scientist, Dr. Shobha Maharaj. Dr. Maharaj is a climate scientist who specialises in assessing the impacts of climate change, the development of climate adaptation and resilience strategies, particularly for small islands and biodiversity hotspots. She is a Lead Author of the latest Assessment Report (AR6) of the Intergovernmental Panel on Climate Change (“**the IPCC**”). She has acted as an expert on climate change, for example, by providing expert testimony before the International Tribunal for the Law of the Sea.
5. This Amicus will focus on States’ obligations with respect to climate displacement, having particular regard to the Caribbean context. In terms of the questions posed within the 2023 Request, the Interveners focus on question F.3, but the prism of climate displacement offers a critical lens to analyse States’ general obligations in respect of climate change. As such, this Amicus also address question A (General Substantive Obligations), questions B and D (General Procedural Obligations), and question E.3 (Differentiated Impacts).
6. This Amicus refers to different forms of human mobility in the context of disasters and climate change.¹ The term ‘human mobility’ includes displacement, migration, and planned relocation.² It can take place within and across international borders. Displacement and migration are traditionally framed as representing two ends of a sliding scale between voluntary (migration) and forced (displacement). However, in the Interveners’ view, in practice it is difficult to draw a clear distinction, and movement that may appear ‘voluntary’ may on closer inspection reveal a significant degree of compulsion. This is the case particularly in relation to the slow-onset adverse impacts of climate change. Accordingly, in this Amicus, reference to displacement also includes such slower onset forms of forced

¹ See e.g., UN Framework Convention on Climate Change, 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*”, FCCC/CP/2010/7/Add.1, 15 March 2011, §14(f).

² The term “migrant” refers to a person who is outside of a State of which they are a citizen or national, or, in the case of a stateless person, their State of birth or habitual residence. It includes any person whose legal status is defined by another legal instrument, such as refugees and survivors of human trafficking. See African Commission on Human & Peoples’ Rights, “*African Guiding Principles on the Human Rights of All Migrants*” (2023), Principle 2; and Inter-American Commission on Human Rights, “*Inter-American Principles on the Human Rights of All Migrants*” (2019), p.3. The Amicus is focused on persons displaced across international borders. However, it briefly addresses States’ substantive and procedural obligations to internally displaced persons, who fall outside the definition of “migrants”.

migration. Planned relocation refers to State-led initiatives to move groups of people from one location that is exposed to climate hazards to a new location. This process represents a threat to procedural as well as substantive human rights. Finally, it is important to recall that the adverse impacts of climate change can increase immobility – meaning that people who would like (or who need) to move are increasingly unable to do so, for instance, as a consequence of decreasing financial capital to support such movement.

B. EXECUTIVE SUMMARY

7. This Amicus sets out States' obligations in respect of climate change and human rights, having particular regard to the Caribbean context and climate displacement. The scientific evidence clearly demonstrates that climate change poses significant risks to human life, the Earth's environment and ecosystems, and to Caribbean and Small Island States in particular.
8. Climate-related displacement is driven by the adverse effects of climate change. Climate displacement in the Caribbean, particularly in Haiti, is on the rise. The threat and the realities of displacement pose a particular and heightened threat to the rights of at-risk groups, including Indigenous People and tribal groups, people of African descent, women, and children.

States' General Obligations on Climate Change

9. People are already suffering human rights violations induced by climate change, and failure to limit global warming to an increase of more than 1.5°C would pose devastating further risks.
10. Accordingly, to protect the human rights guaranteed by the American Convention on Human Rights ("**ACHR**"), States must take appropriate measures to reduce greenhouse gas ("**GHG**") emissions, implement adaptation measures, and remedy resulting damages.
11. **First**, States must take appropriate mitigation measures in order to reduce GHG emissions to the highest extent possible, as agreed under Articles 2-4 of the Paris Agreement, on the basis of their common but differentiated responsibilities. States in the Global North who are historically responsible for a greater share of GHG emissions have enhanced responsibilities to reduce emissions and should provide support for States in the Global South. States will need to analyse activities and sectors that contribute to GHG emissions and conduct impact assessments for projects that may result in significant

emissions. They will also need to regulate, supervise and monitor emissions of non-State actors.

12. **Second**, States must implement effective adaptation measures to reduce vulnerability to climate change, taking into consideration the views and knowledge of at-risk groups and the impacts on persons displaced by climate change. This will include:
 - (a) Assessments of climate vulnerability and resilience building;
 - (b) Adopting effective disaster risk reduction policies and strategies; and
 - (c) Putting in place effective legislative and administrative systems to protect the rights of persons displaced by climate change.
13. **Third**, States must establish effective legislative and administrative systems to provide redress in relation to human rights violations. Since historic responsibility for the majority of cumulative GHG emissions rests with States in the Global North, these States must co-operate to establish effective international systems to address the losses and damages caused by climate change in order to provide redress for persons in vulnerable countries. States must also establish effective international systems to protect the rights of displaced persons, including via the establishment of safe migration pathways. At a national level, States should, taking into account their common but differentiated responsibilities and respective capabilities, take steps to support those who have suffered loss and damage.
14. **Fourth**, States are also under procedural obligations. They should ensure the public has access to information, can participate in decision-making, and can access justice in relation to the impacts of climate change and climate displacement (and in relation to policies and laws adopted to address those impacts).
15. In terms of access to information, States should collate and disseminate information relating to climate vulnerabilities and risks to human life, including climate displacement. States must also adopt mechanisms through which the public can request information. All information should be provided in a format that is clear and accessible to all, including at-risk groups.
16. The public has the right to take part in all stages of the environmental decision-making process. In a displacement context, this includes public participation in relation to evacuation, camp management, and risk-sensitive land use planning. States must also perform environmental assessments of projects that could significantly affect the

environment, so that people can understand, comment, and participate in decision-making.

17. **Fifth**, States must provide effective remedies to the victims of climate change-induced human rights violations. All persons, including those displaced, must have access to judicial or administrative mechanisms to challenge State decisions on climate change matters.

At-Risk Groups and the Principle of Non-Discrimination

18. Certain groups may be particularly at risk of discrimination and human rights violations in the context of climate change. Within their home States, such groups may be more exposed to the impacts of climate change and may struggle to leave high-risk regions in the wake of slow-onset climate change or climate disaster. When displaced internally and across borders, such groups are at acute risk of human rights violations.
19. The Amicus considers the particular challenges which may be experienced by: (i) Indigenous People and tribal groups; (ii) people of African descent; (iii) women; and (iv) children. The groups considered in the Amicus are illustrative and there are many other categories of vulnerability. Membership of these groups does not make an individual vulnerable per se. Rather, membership of these groups is an indication of potential vulnerability. That vulnerability may be exacerbated in the case of intersectional individuals and groups, who suffer multiple forms of disadvantage.
20. Under the ACHR and other international treaties, States have an obligation to ensure that rights are enjoyed without discrimination. The principle of non-discrimination therefore informs States' systemic and operational obligations and their obligations to persons in situations of human mobility. In the context of disasters and climate change:
 - (a) States have a negative obligation to avoid adopting climate-related policies that discriminate against at-risk groups.
 - (b) Ostensibly neutral policies which disparately impact or fail to account for the needs of at-risk groups, including persons in a situation of human mobility in the context of disasters and climate change, may violate the prohibition against discrimination, even without intent. States may therefore have to adopt differentiated policies which address the particular needs of at-risk and vulnerable groups.

- (c) Where indicia for discrimination such as structural poverty and membership of a marginalised group coalesce, States have obligations to take positive steps to remedy those inequalities.

Obligations of Receiving States

21. States which receive persons in a situation of cross-border mobility in the context of disasters and climate change are under obligations to protect those persons. Such obligations derive from international human rights law, international refugee law and customary international law.
22. States must comply with the principle of *non-refoulement*, which prohibits States from returning people to a place where they may suffer certain types of harm, including persecution, threat to life, torture, and inhumane and degrading treatment. States must comply with the duty not to *refoule*, or forcibly to return refugees under Article 33 of the Convention and Protocol relating to the Status of Refugees 1951 (“**the Refugee Convention**”). Further, several instruments provide protection against *non-refoulement* to persons in a situation of human mobility in the context of disasters and climate change who do not meet the Refugee Convention definition of a refugee. This includes protection under the Convention Against Torture (“**CAT**”) and the International Convention on Civil and Political Rights (“**ICCPR**”).
23. Of note is the UN Human Rights Committee’s (“**the UNHRC**”) landmark ruling in *Teitiota v New Zealand*, which was the first decision by a UN human rights treaty body on a complaint by an individual seeking asylum protection from the effects of climate change.³ In this case, the Committee stated that State parties must not extradite, deport, expel or otherwise remove a person from their territory when there are substantial grounds for believing that there is a real risk of irreparable harm to a person’s life (as contemplated by Article 6 ICCPR), and/or a real risk that the person will be subjected to cruel, inhuman or degrading treatment (as contemplated by Article 7 ICCPR).
24. States must process claims for those who have a valid claim for international protection. In this respect, States must have regard to the fact that some persons displaced in the context of disasters and climate change are, in principle, capable of satisfying the definition of refugee as contained in Article 1A(2) of the Refugee Convention and/or the

³ UNHRC, *Teitiota v New Zealand*, CCPR/C/127/D/2728/2016, 7 January 2020.

regional definition adopted in the Cartagena Declaration on Refugees 1984 (“**the Cartagena Declaration**”).⁴

25. It is notable in this regard that (as has been recognised by the Inter-American Court of Human Rights) the effect of the Cartagena Declaration was to expand the definition of refugee (vis-à-vis the Refugee Convention definition). In particular, it encompasses “*persons who have fled their countries because their life, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.*” The Interveners submit that the concept of “*public order*” is engaged where the State is paralysed or unable to function effectively, particularly when fundamental human rights are at stake. In this context, it is submitted that the Court should hold that climate disasters may amount to “*circumstances*” that could “*seriously disturb public order*”, for the purpose of determining whether an individual may be recognised as a refugee pursuant to the Cartagena Declaration.
26. States must provide protection to those who have been compelled to cross borders in light of climate disasters in their country of origin, including providing access to healthcare, employment, social care, and effective administrative procedures. States must comply with obligations in this regard arising under, *inter alia*, the International Covenant on Economic, Social and Cultural Rights (“**ICESCR**”), the Convention on the Rights of the Child (“**CRC**”), and the Refugee Convention.

The Duty to Co-operate

27. Under the current international legal framework, there is no comprehensive and bespoke legal regime for dealing with human mobility across international borders in the wake of climate disasters and slow-onset climate change.
28. In addition, a limited number of countries are facing an unfair and unjust burden in dealing with such climate displacement. Those States may lack the resources and infrastructure to deal effectively with migration, displacement, and planned relocation.

⁴ The Cartagena Declaration on Refugees is a non-binding regional instrument for the protection of refugees and was adopted in 1984 by delegates from 10 Latin-American countries: Belize, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama and Venezuela. The Declaration has since been incorporated into the national laws and state practices of 16 countries: Argentina, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Paraguay, Peru, Uruguay and Nicaragua.

29. States have obligations under Article 26 of the ACHR to co-operate to address those issues, in order to ensure the economic and social rights protected by the Convention.
30. The duty to co-operate is also recognised in various treaties and soft law instruments and is arguably a general principle of international law. It is well established in the context of international development and environmental law. The obligation to co-operate in respect of climate change-induced human mobility encompasses the following specific duties:
 - (a) A duty to negotiate in good faith to develop new legal arrangements to respect, protect and enforce the rights of persons who move across international borders due to climate change, including the establishment of safe migration pathways; and
 - (b) A duty to co-operate to share the burden of receiving and supporting those who move across international borders due to climate change.
31. The duty to co-operate should take account of the role that States in the Global North have played in climate change. Specifically, States which are major historic emitters of GHGs should assume an appropriate share of: (i) the cost of ensuring safe migration; (ii) receiving those displaced by climate change; and (iii) provision of economic support to States which neighbour countries affected by climate change and receive high numbers of displaced persons.

C. FACTS

32. The Caribbean region is one of the most vulnerable areas on the planet in terms of predicted adverse effects of climate change, including the effects of rising sea-levels; coastal erosion; and stronger, more frequent extreme weather events.⁵ Since 1950, observers, particularly the Centre for Research on Epidemiology of Disasters, have traced more than 24,206 recorded deaths in the Caribbean directly to meteorological, hydrological, and climatological disasters; these disasters otherwise affected nearly 54 million people in the Caribbean.⁶ During a visit to Suriname in 2022, UN Secretary-General António Guterres called the Caribbean “*ground zero*” for the climate emergency, pointing

⁵ Roy, D., “*How the Caribbean Is Building Climate Resilience*” (2023), Council on Foreign Relations, §1. Available at: <https://www.cfr.org/backgrounder/how-caribbean-building-climate-resilience#:~:text=The%20Caribbean%20is%20one%20of,meanwhile%2C%20threaten%20its%20unique%20biodiversity>. Extreme weather events are defined below at fn.9 and the accompanying text.

⁶ High-Level Working Group on Climate Change in the Caribbean, “*Extreme Weather Events and Resilience*” (2023), p.11 (citing the Centre for Research on the Epidemiology of Disasters, “*EM-DAT The International Disaster Database*”, <https://www.emdat.be/>). Available at: <https://theglobalamericans.org/wp-content/uploads/2023/05/Extreme-Weather-Events-and-Resilience-in-the-Caribbean.pdf>.

to damage along the coast and interior of the country due to climate change.⁷ Despite contributing very little to global GHG emissions, Caribbean countries are bearing the brunt of climate disruptions, which has caused countries in the Caribbean region to fall into significant debt and has been associated with increased migration across the region.⁸

(1) Extreme Weather Events Take Different Forms and Have Become Frequent

33. The IPCC defines an extreme weather event as “an event that is rare at a particular place and time of year”, while an extreme climate event is defined as “a pattern of extreme weather that persists for some time, such as a season.”⁹ This includes hurricanes and tropical storms, increased rainfall and flooding, dangerous high temperatures, droughts, coastal erosion and saltwater intrusion, and longer dry seasons and shorter wet seasons.¹⁰
34. From June to November, the Caribbean faces hurricane season, heatwaves, droughts, and heavy rains.¹¹ Moreover, it is forecasted that extreme weather events will worsen as temperatures continue to rise.¹² Indeed, the World Meteorological Organization has concluded that, “over the past two decades, the ocean warming rate has increased, and the ocean heat content in 2022 was the highest on record.”¹³

(2) Extreme Weather Events Cause Severe Adverse Effects on States and Their

⁷ United Nations Climate Action, “It’s Climate Week for Latin America and the Caribbean” (2022). Available at: <https://www.un.org/en/climatechange/latin-america-and-caribbean-climate-week>.

⁸ Roy, D., *supra* n.5, at §1.

⁹ Seneviratne, S., and Zhang, X., “Weather and Climate Extreme Events in a Changing Climate” (2021), Climate Change 2021: The Physical Science Basis 1513, 1522. Available at: [https://www.ipcc.ch/report/ar6/wg1/chapter/chapter-11/#:~:text=The%20extremes%20considered%20include%20temperature,\(multivariate%20and%20concurrent%20extremes\)](https://www.ipcc.ch/report/ar6/wg1/chapter/chapter-11/#:~:text=The%20extremes%20considered%20include%20temperature,(multivariate%20and%20concurrent%20extremes)). See also Dr. Shobha Maharaj’s Expert Report to ITLOS in Case No. 31, 16, 18 (16 June 2023): “[T]hese communities are already suffering, and will continue to suffer, from the compounding and systematic effects of sea-level rise, tropical cyclones, storm surges, droughts and other changes in precipitation patterns which are becoming more frequent and/or severe due to climate change.”

¹⁰ Roy, D., *supra* n.5, at §3.

¹¹ High-Level Working Group on Climate Change in the Caribbean, *supra* n.6, p.8. Although hurricane season is generally from June to November, hurricane strength storms have been occurring outside of the season. The Working Group on Climate Change in the Caribbean’s report uses the words hurricanes and tropical cyclones synonymously, but for the purposes of this Amicus we will use hurricanes.

¹² *Ibid*, p.9. See also World Meteorological Organisation, “Preliminary Data Shows Hottest Week on Record. Unprecedented Sea Surface Temperatures and Antarctic Sea Ice Loss” (10 July 2023): “The world just had the hottest week on record, according to preliminary data. It follows the hottest June on record, with unprecedented sea surface temperatures and record low Antarctic sea ice extent.” Available at: <https://wmo.int/media/news/preliminary-data-shows-hottest-week-record-unprecedented-sea-surface-temperatures-and-antarctic-sea>. See also World Meteorological Organisation, “State of the Climate in Latin American and the Caribbean 2022” (2023) (“State of the Climate”), p.5: “The year 2022 was either the fifth or sixth warmest year on record according to six data sets, despite the cooling effect of La Niña. The years 2015 to 2022 were the eight warmest years on record in all data sets” (internal citation excluded). Available at: <https://library.wmo.int/records/item/66252-state-of-the-climate-in-latin-america-and-the-caribbean-2022>.

¹³ State of the Climate, *supra* n.12, p.5.

Populations

35. Some of the most pressing concerns for the Caribbean region are the effects that these frequent and/or intense extreme weather events have had on various industries, ecosystems, and communities, including agriculture, infrastructure, tourism, and human mobility.¹⁴ Below is an overview of some of the most common adverse effects.
36. **First**, increased temperatures, frequent droughts, flooding, frequent and increasingly intense tropical cyclones are reducing the availability of fresh water. This detrimentally affects livelihoods and food imports, harms farmland, and increases food insecurity.¹⁵
37. **Second**, in terms of infrastructure, transportation hubs, homes, health-care facilities, and schools have been destroyed by extreme weather events and rising sea-levels.¹⁶ Many Caribbean islands' infrastructure and other economic assets are located very near to coastlines, rendering them directly vulnerable to increasing sea-level rises, compounded with increasingly intense tropical cyclones and consequent storm surges and flooding.¹⁷ Extreme weather events have also destroyed large-scale power operations, including oil platforms, gas pipelines, and electrical grids. This is particularly harmful in the Caribbean where energy prices are among the highest in the world.¹⁸
38. **Third**, extreme weather events have put a strain on the States' sources of revenues. They have had detrimental effects on the tourism sector, an important source of income for the region.¹⁹ One recent study predicted that sea-level rise alone could result in a 38-47% reduction in tourism revenue by 2100. A reduction of that scale would lower the GDPs of Caribbean countries and make infrastructure investments less feasible.²⁰
39. **Fourth**, many Caribbean economies are particularly dependent on imports, tourism, and remittances, and therefore can face difficulties raising funds for infrastructure development

¹⁴ Roy, D., *supra* n.5, at §§7-12 (on the pressing climate concerns of the Caribbean). A further discussion of climate-based migration is included below at §§177-213. See also Dr. Maharaj, *supra* n.9, pp.6-8.

¹⁵ Roy, D., *supra* n.5, at §7.

¹⁶ *Ibid.*, §8: "The massive earthquake that struck Haiti in 2010... damaged or destroyed more than three hundred thousand homes, while the island lost some 60 percent of its administrative and economic infrastructure."

¹⁷ Mycoo et al., "Small Islands" in "Climate Change 2022: Impacts, Adaptation and Vulnerability" (2022), Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p.2045.

¹⁸ Roy, D., *supra* n.5, §8: "Energy prices in the Caribbean are already among the highest in the world, with several countries depending on imported oil to meet approximately 90 percent of their energy needs."

¹⁹ *Ibid.*, §9: "The Caribbean is the most tourism-dependent region in the world. In 2021, the travel and tourism sector contributed more than \$39 billion to the region's GDP. However, analysts say that climate effects such as reduced rainfall, prolonged heat waves, and the loss or deterioration of natural attractions are already impacting the Caribbean's tourism industry."

²⁰ *Ibid.*

and climate measures²¹, making rebuilding after an extreme weather event particularly difficult. Owing to these factors, and because many Caribbean economies are small and less diversified than those of other nations, States in the region often take on high levels of debt in order to support recovery actions after extreme weather events occur.²² Funds that should be used for increasing the climate adaptation and resilience capacities of the communities are thus diverted towards recovery, increasing the vulnerability of these nations.²³

40. **Fifth**, already at-risk groups are made more vulnerable due to climate-based migration.²⁴ By way of example, women and girls experience higher mortality rates and are at higher risk of gender-based violence after disasters occur.²⁵
41. **Sixth**, importantly, as extreme weather events become more intense, so does large scale displacement - it is only a matter of time before certain areas of the Caribbean become nearly uninhabitable if international changes do not occur.²⁶ In a single month during the 2017 hurricane season, three major hurricanes (Harvey, Irma, and Maria) displaced approximately three million people.²⁷ Furthermore, the Internal Displacement Monitoring Centre (“IDMC”) found that “between 2008 and 2022, close to ten million people in the [Caribbean] region were internally displaced by natural disasters, with the number

²¹ Ibid., §5. See also, High-Level Working Group on Climate Change in the Caribbean, *supra* n.6, p.11: “Similar to most small island developing states (SIDS), their small domestic markets, scarce natural resources, high public debts, and strong economic dependence on climate-sensitive sectors such as agriculture, fisheries, and tourism have limited their economic development”; Dr. Maharaj, *supra* n.9, p.17: “small islands are characterized by their physical boundedness, geographic remoteness, limited terrain and isolation.”

²² Roy, D., *supra* n.5, §5.

²³ Mycoo et al., *supra* n.17, p.2073.

²⁴ See generally: Bleeker et al., “Advancing Gender Equality in Environmental Migration and Disaster Displacement in the Caribbean” (2021), ECLAC Subregional Headquarters for the Caribbean. Available at: <https://www.cepal.org/en/publications/46737-advancing-gender-equality-environmental-migration-and-disaster-displacement>; McLeman, R., and Hunter, L., “Migration in the Context of Vulnerability and Adaptation to Climate Change: Insights from Analogues” (2021), National Library of Medicine. Available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3183747/>; Chavers et al., “The Intersectionality of Racism, Globalization, Climate Change, and Forced Migration” (2021), 8 Professional Agricultural Workers Journal 1, 10. Available at: <https://tuspubs.tuskegee.edu/cgi/viewcontent.cgi?article=1181&context=pawj>; The White House, “Report on the Impact of Climate Change on Migration” (2021). Available at: <https://www.whitehouse.gov/wp-content/uploads/2021/10/Report-on-the-Impact-of-Climate-Change-on-Migration.pdf>.

²⁵ Bleeker et al., *supra* n.24, p.24.

²⁶ Roy, D., *supra* n.5, §2: “Countries such as Barbados and Dominica have implemented a range of mitigation and adaptation measures, including increasing public spending on resilient infrastructure, and many have set ambitious targets for emissions reductions. But with the region requiring significantly more help to stave off the worst effects, some leaders in particular are pushing for fundamental reforms of global development aid and climate financing.”

²⁷ Francis, A., “Free-Movement Agreements & Climate-Induced Migration: A Caribbean Case Study” (2019), Sabin Centre for Climate Change Law, Colombia Law School, p.17. Available at: https://scholarship.law.columbia.edu/sabin_climate_change/62.

*projected to rise.*²⁸ Two million of those people were internally displaced in 2017 alone.²⁹ The IDMC has also determined that “*the ten countries and territories worldwide with the highest average annual internal displacement per capita are all small island developing states (SIDS), the top six of which are located in the Caribbean.*”³⁰ Estimates by the World Bank suggest that, by 2050, “*216 million people from the poorest and most climate-vulnerable regions will be displaced due to both slow-onset events as well as sudden-onset natural disasters associated with climate change.*”³¹ The region is replete with small States which share borders. As such, there is interplay between large scale internal displacement and international displacement within the region.

42. **Seventh**, migration has generated an additional series of challenges, both for the host State and the population that is fleeing a natural disaster. For example, in the Bahamas, climate-related migration has led to increased violence against women.³² Haitian migrants have also faced race-based torture and cruel treatment within the region and across the Americas.³³ In the Dominican Republic, Haitians are discriminated against, with both the government and civilians perpetuating acts of violence.³⁴ The Interuniversity Institute for Research and Development (“**INURED**”) has identified major issues for Haitians migrating to the Dominican Republic, including the “*lack of transparency on the part of the host country governments as it relates to the politically contentious act of deporting migrants.*”³⁵ Moreover, the Inter-American Commission on Human Rights (“**IACHR**”) has expressed its concern about the worsening treatment of Haitians in the Dominican Republic, including, *inter alia*, reports from civil society organisations that migration authorities are allegedly carrying out migration control operations in hospitals that report large influxes of pregnant

²⁸ Roy, D., *supra* n.5, §12. See also Francis, A., *supra* n.27, Executive Summary, p.1: “*The Internal Displacement Monitoring Center (IDMC) reports that approximately 265 million people have been displaced by natural hazards since 2008. Over 17 million people were internally displaced by disasters in 2018 alone.*”

²⁹ Trenchi, A., and Mihm, J., “*Addressing Climate Migration in the Caribbean*” (2023), Global Americas, §2 (citing statistics from the Internal Displacement Monitoring Centre). Available at: <https://theglobalamericans.org/2023/03/addressing-climate-migration-in-the-caribbean/>.

³⁰ Francis, A., *supra* n.27, Executive Summary, p.1. In the context of the Caribbean region the FMAs that are relied on come from labour migration standards created in the 1960s and 1970s, during recent extreme weather events such FMAs have been utilised to provide protections for displaced peoples, however they were not specifically created to respond to climate-based migration.

³¹ Trenchi, A., and Mihm, J., *supra* n.29, §2 (citing conservative estimates by the World Bank).

³² Bleeker et al., *supra* n.24, p.37: “*Gender inequality and GBV are pervasive problems in the Bahamas, amplifying women and girls’ risk and vulnerability to extreme weather events and climate change.*”

³³ Amnesty International, “*Americas: States Must End Racist Treatment of Haitian Asylum Seekers*” (20 June 2023). Available at: <https://www.amnesty.org/en/latest/news/2023/06/end-racist-treatment-haitian-asylum-seekers/>.

³⁴ Interuniversity Institute for Research and Development, “*Post-Earthquake Haitian Migration to Latin America*” (2020), p.46. Available at: http://www.inured.org/uploads/2/5/2/6/25266591/mideq_inured_2020_post-earthquake_haitian_migration_to_latin_america_v1.pdf.

³⁵ *Ibid.*

migrant women, mainly of Haitian origin or descent.³⁶ Without pathways to regular migration, migrants will continue to face violence and discrimination when displaced by extreme weather events.

43. The following paragraphs highlight the impact of climate change on three States in the Caribbean region. These examples of the impact of climate change are not exclusive to the States identified; rather they have been selected as illustrative of the nature of the wider problems facing the region.

(i) *Haiti is Particularly Vulnerable*³⁷

44. Haiti has been described as “*the most vulnerable country*” to climate change in Latin America and the Caribbean, a region that is already considered particularly vulnerable.³⁸ This is in part due to its location in the Caribbean hurricane zone.³⁹ It is also considered to be the “*most populated and poorest country in the Caribbean.*”⁴⁰ Further, it is estimated that since 2000, Haiti has been impacted by 79 meteorological, hydrological, and climatological disasters, resulting in \$2.8 billion in damages and 7,543 deaths.⁴¹ Some of the most damaging hurricanes to hit Haiti recently include Hurricane Jeanne (2004), Hurricane Sandy (2012), and Hurricane Matthew (2016).⁴² An assessment by the World Bank, following Hurricane Matthew’s landfall, found that approximately two million people were directly impacted, and that as many as 90% of crops and livestock were lost in the

³⁶ Organisation of American States, “*IACHR Expresses Concern Over Pregnant Women Expelled from the Dominican Republic...*” (1 December 2021). Available at: https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/media_center/PReleases/2021/320.asp.

³⁷ Many of the co-signatories to this brief have a particular interest in highlighting events effecting Haiti, although similar trends are present throughout the region.

³⁸ Climate Links, “*Haiti: At a Glance*” (accessed 3 October 2023): “*Haiti is the most vulnerable country in Latin America and the Caribbean to climate change.*” Available at: <https://www.climatelinks.org/countries/haiti#:~:text=Widespread%20deforestation%20and%20unmaintained%20drainage,impacts%20on%20already%20sensitive%20sectors>. See also Eckstein et al., “*Global Climate Risk Index 2021*” (2021), p.5: “*Between 2000 and 2019, Puerto Rico, Myanmar and Haiti were the countries most affected by the impacts of extreme weather events.*”

³⁹ Singh, B., and Cohen., M., “*Climate Change Resilience: The Case of Haiti*” (2014), Oxfam Research Reports, p.9: “*Because of its location in the Caribbean hurricane zone and widespread deforestation, Haiti has long faced severe natural and human-created hazards.*”

⁴⁰ High-Level Working Group on Climate Change in the Caribbean, *supra* n.6, p.25: “*Haiti, located on the island of Hispaniola, with 11,447,569 inhabitants and a GNI per capita in 2021 of \$1,430 is the most populated and poorest country in the Caribbean. Given its complex historical, economic, and social developmental challenges – exacerbated by international meddling, political instability, and violence – it remains the poorest and most fragile country in Latin America and the Caribbean.*”

⁴¹ *Ibid.*, p.25: “*The International Disaster Database (EM-DAT) estimates that since 2000, Haiti has been impacted by 79 disasters meteorological, hydrological, and climatological disasters, including hurricanes, tropical storms, droughts, riverine floods, and coastal floods – resulting in approximately \$2.8 billion in damages and 7,543 deaths.*” See also Eckstein et al., *supra* n.38, p.13; *EM-DAT The International Disaster Database*, Centre for Research on the Epidemiology of Disasters (CRED). Available at: <https://www.emdat.be/>.

⁴² High-Level Working Group on Climate Change in the Caribbean, *supra* n.6, p.25: These hurricanes “*caused the most damage, accounting for a combined \$2.6 billion in damages and 3,375 deaths.*”

southern region of the country; thousands of roads and bridges were rendered inoperable; an estimated 450,000 children could not attend school; and vaccine chains were destroyed, with cholera cases rising sharply.⁴³

45. Haiti has also faced droughts that have exacerbated its decades-long food crisis.⁴⁴ In March 2016, the United Nations Office for the Coordination of Humanitarian Affairs (“OCHA”) assessed that 3.5 million were food insecure, 1.5 million were severely food insecure, 131,000 children faced global acute malnutrition, and 600,000 farmers were severely impacted by the droughts.⁴⁵
46. Haiti’s vulnerability is linked to its history of enslavement, colonisation, and debt, which has prevented it from having the necessary resources to develop State infrastructure to mitigate climate harms.⁴⁶
47. Between political instability and a lack of funding, Haiti often struggles to respond to extreme weather events after they occur, while also lacking the resources to improve infrastructure to mitigate the harm done by such disasters.⁴⁷ Furthermore, Haiti’s “*geographic location, lack of resources, and institutional and social fragilities*”⁴⁸ all make coping with extreme weather events difficult and, at times, infeasible. The IACHR has recognised that Haitians in situations of human mobility may be particularly vulnerable.⁴⁹

⁴³ Ibid. See also the World Bank, “*Rapidly Assessing the Impact of Hurricane Matthew in Haiti*” (2017). Available at: <https://www.worldbank.org/en/results/2017/10/20/rapidly-assessing-the-impact-of-hurricane-matthew-in-haiti>. For more information about the effect of Hurricane Matthew on Haiti see Marcelin, L., and Cela, T., “*After Hurricane Matthew*” (2017), Interuniversity Institute for Research and Development, Annex 4.

⁴⁴ High-Level Working Group on Climate Change in the Caribbean, *supra* n.6, p.26.

⁴⁵ Ibid, p.26: “*Data from [OCHA] shows that, between 2015 and 2016, agricultural production fell by 60 percent from pre-drought levels.*”

⁴⁶ Global Justice Clinic, Submission on “*Climate Change and Racial Discrimination in Haiti*”, NYU School of Law (2022). Available at: <https://www.ohchr.org/sites/default/files/documents/issues/climatechange/cfi-hrc-53-session/submissions/2022-11-28/Global-Justice-Clinic-1.pdf>. Significant redistribution of global resources is required to address and remediate the climate injustice that Haiti faces. While the recent creation of the Loss and Damage Fund is a positive step, Loss and Damage is not equivalent to a comprehensive reparations scheme. As the UN Special Rapporteur on Racism has argued: “*To the extent that contemporary international legal principles present barriers to historical responsibility for climate change, United Nations Member States must decolonize or transform this law in a manner that makes it capable of guaranteeing genuine equality and self-determination for all peoples. Reparations, which entail equitable international economic, political and legal frameworks, are a precondition for reorienting the global order away from ecological crisis*” (Report of the Special Rapporteur, Tendayi Achiume, pursuant to General Assembly resolution 73/262, 25 August 2019). Haiti shows the inextricable connections between the case for climate reparations to the Global South and reparations for colonisation and enslavement. As argued by scholar Olúfemi O. Táíwò: “*In our era, climate justice and reparations are the same project: climate crisis arises from the same political history as racial injustice and presents a challenge of the same scale and scope. The transformations we succeed or fail to make in the face of the climate crisis will be decisive for the project of racial justice, and vice versa*” (Táíwò, O., “*Reconsidering Reparations*” (2022), p.147).

⁴⁷ High-Level Working Group on Climate Change in the Caribbean, *supra* n.6, p.26 (citing generally Singh, B., and Marc J. Cohen, M., “*Climate Change Resilience: The Case of Haiti*” (2014), Oxfam America. Available at: https://www.cdn.oxfam.org/s3fs-public/file_attachments/rr-climate-change-resilience-haiti-260314-en_2.pdf).

⁴⁸ Marcelin et al., “*Haiti and the Politics of Governance and Community Responses to Hurricane Matthew*” (2016), Disaster Health Vol 3(4), 151-151, p.152.

⁴⁹ IACHR, “*Protection of Haitians in Human Mobility: Inter-American Solidarity (Resolution 2/2021)*”, 24 October 2021.

(ii) *Dominica*

48. In 2017, Hurricane Maria resulted in damages of \$354 million for Dominica and killed 65 people.⁵⁰ The storm caused \$1.3 billion in losses, amounting to 226% of Dominica's GDP in 2016. 51 Indigenous groups felt the brunt of such losses, with approximately 90% of the Kalinago Indigenous People losing their homes due to this hurricane.⁵²
49. Following Hurricane Maria, poverty rates rose sharply from 29% to 42.8% of the population, with a proportionately greater increase in the number of women living in poverty.⁵³

(iii) *Antigua and Barbuda*

50. Antigua and Barbuda are both reliant on natural resources and tourism to support their economy, as with many other Caribbean nations.⁵⁴ In 2017, Hurricane Irma left 90% of the housing in Barbuda destroyed.⁵⁵ Following the storm, and prior to Hurricane Jose's landfall, all 1,800 residents of Barbuda were ferried to Antigua for shelter.⁵⁶ As late as 2020, many of those families had not returned to Barbuda because of delays in the rebuilding process.⁵⁷ It is estimated that more families will have to migrate in the region as the effects of climate change worsen.⁵⁸

(3) Measures of Mitigation and Relief Taken by Caribbean States

51. Caribbean governments have placed climate change as one of their top concerns. Several States have enacted policies focused on converting to renewable energy sources,

⁵⁰ High-Level Working Group on Climate Change in the Caribbean, *supra* n.6, p.29.

⁵¹ Ibid., citing Government of the Commonwealth of Dominica, "Post-Disaster Needs Assessment Hurricane Maria September 18, 2017" (2017). Available at: <https://reliefweb.int/report/dominica/post-disaster-needs-assessment-hurricane-maria-september-18-2017>.

⁵² Ibid, pp.29-30.

⁵³ UN Women, "The Gender and Age Dimensions of a Hurricane in Dominica" (2019). Available at: <https://wrd.unwomen.org/node/134#:~:text=Poverty,%2042.8%20percent%20after%20the%20hurricane>. Women are particularly vulnerable for numerous reasons, including the higher likelihood that they are employed in the informal rather than formal economy.

⁵⁴ Climate Change Knowledge Portal, "Country Summary: Antigua and Barbuda" (accessed on 17 November 2023). Available at: <https://climateknowledgeportal.worldbank.org/country/antigua-and-barbuda#:~:text=Analysis%20of%20climate%20change%20for,increase%20in%20tropical%20storm%20intensity>.

⁵⁵ UNICEF Eastern Caribbean Area, "In the Wake of Hurricane Irma, Families Flee the Ravaged Island of Barbuda Ahead of the Next Storm" (2017). Available at: <https://www.unicef.org/stories/families-flee-ravaged-island-barbuda>.

⁵⁶ Garcia, S., "What a UN Ruling Could Mean for Climate Refugee" (2020), PBS News Hour. Available at: <https://www.pbs.org/newshour/science/as-cop-25-ends-a-look-at-why-climate-migrants-dont-have-refugee-status>.

⁵⁷ Ibid.

⁵⁸ Ibid.

limiting their use of fossil fuels, and reducing their GHG emissions.⁵⁹ Caribbean States are also pursuing policy changes to help make them “climate resilient”⁶⁰, albeit funding for increasing climate resilience is often diverted to recovery after extreme weather events.⁶¹ Without international changes and co-operation, such domestic measures are likely to be insufficient in tackling the adverse effects of climate change set out above.⁶²

52. Moreover, the Caribbean has adapted some Free Movement Agreements (“**FMA**s”) to climate-based migration.⁶³ Two examples of FMAs in the region are the Caribbean Community (“**CARICOM**”) and Organization of Eastern Caribbean States (“**OECS**”).⁶⁴ During the 2017 hurricane season, adaptations to these FMAs: (i) provided persons displaced by a natural event the right of entry to other islands; (ii) supported the waiver of travel document requirements where documents had been lost or damaged; (iii) granted indefinite stays to some disaster displaced persons, facilitating permanent resettlement; and (iv) eased access to foreign labour markets through a mutual recognition of skills scheme and/or a waiver of work permit requirements.⁶⁵
53. However, while FMAs have been able to support some migrants, they can only be part of the solution.⁶⁶ In fact, although this migration framework could be adapted to climate migration, currently most FMAs focus on skilled workers who are displaced.⁶⁷ In addition, there are many challenges to adapting the FMAs to climate displacement on a large scale,⁶⁸ including, *inter-alia*, that entry remains at the discretion of immigration

⁵⁹ Roy, D., *supra* n.5, §13.

⁶⁰ “Climate resilience” refers to “*the ability to prepare for, recover from, and adapt to [climate impacts... including] more frequent and severe weather, ocean warming and acidification, extended periods of drought and extreme temperatures, and other deleterious effects of climate change*” (Centre for Climate Change and Energy Solutions, “*What is Climate Resilience, and Why Does it Matter?*” (2019), §1). Available at: <https://www.c2es.org/document/what-is-climate-resilience-and-why-does-it-matter/>.

⁶¹ Mycoo et al., *supra* n.17, p.2073.

⁶² Roy, D., *supra* n.5, §2.

⁶³ Francis, A., *supra* n.27, Executive Summary, p.1: “*FMAs are provisions within (sub-)regional economic integration schemes that liberalize migration restrictions between participating member states.*”

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*, Executive Summary, p.2: “*FMAs can facilitate migration prompted by both slow- and sudden-onset disasters and provide access to rights of entry, work, and resettlement to climate migrants.*” The above provisions are generally included in FMAs in the region, although some agreements may not include all of these protections or may provide different protections for migrants from particular member states, and not provide those protections for migrants from other member states.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*, pp.17-18.

⁶⁸ *Ibid.*, pp.18-19.

authorities⁶⁹, and that those allowed entry are not always guaranteed adequate protection.⁷⁰

54. Even with regional migration mechanisms, the Caribbean region relies on international migration to cope with lack of economic opportunities, political persecution, and other humanitarian issues in the region.⁷¹ Most persons in a situation of human mobility in the context of disasters or climate change move toward North America, specifically to the United States, or to Europe.⁷² There is also intraregional migration, with many migrants moving from Haiti to the Dominican Republic, as well as to Latin American countries.⁷³ As sea levels continue to rise along with increasingly intense tropical cyclones and hurricanes, and in the aftermath of border closures and travel restrictions due to Covid-19, migration patterns and economic wellbeing have been severely impacted in the region.⁷⁴ From 2010 to 2020, 9.14 million new disaster-related displacements occurred in the Caribbean.⁷⁵ Extreme weather events are becoming more frequent and the number of migrants leaving the region will only continue to grow. However, with border closures and other immigration policies in the United States and Europe, the current pathways are inadequate to support this migratory system.⁷⁶
55. In sum, people living in the Caribbean, and particularly in Haiti, are experiencing increasingly adverse effects due to climate-related disasters, with internal and cross-border migration and displacement on the rise. Although some regional mechanisms have been adapted, more work is needed at the regional and intra-regional level to address the adverse human rights impacts experienced by those who remain in disaster affected areas, and those who move in search of safety and sustainable livelihoods.

⁶⁹ Ibid, p.19: “While this discretion facilitated 100% admission of Dominican nationals after Hurricane Maria, border officials could also deny entry to disaster displaced persons in the future, especially if nationals were considered a threat to the public interest. Member states may tighten migration policies if the number of disaster displaced persons in the region swells due to increased adverse climate effects, or in response to domestic political pressures.”

⁷⁰ Ibid.

⁷¹ High-Level Working Group on Climate Change in the Caribbean, “Climate Change, Migration, and Indigenous and Tribal Peoples” (2023), p.20: “Reasons associated with lack of economic opportunities, political persecution, and humanitarian emergencies have historically driven Caribbeans to migrate extra-regionally.” Available at: <https://theglobalamericans.org/wp-content/uploads/2023/02/Climate-Change-Migration-and-Indigenous-and-Tribal-Peoples-1.pdf>.

⁷² Migration Data Portal, “Migration Data in the Caribbean” (2023).

⁷³ High-Level Working Group on Climate Change in the Caribbean, *supra* n.71, p.20.

⁷⁴ World Bank, “AskWBCaribbean – Caribbean Migration: Challenges and Opportunities” (2023): “Border closures and travel restrictions have severely impacted many Caribbean economies that depend on tourism for jobs and overall economic wellbeing.” Available at <https://www.worldbank.org/en/events/2023/09/26/askwbcaribbean-migration-across-the-region>.

⁷⁵ Migration Data Portal, “Migration Data in the Caribbean” (2023).

⁷⁶ Lacarte et al., “Challenges and Opportunities of Migration in the Caribbean” (2023), Inter-American Development Bank. Available at: <https://blogs.iadb.org/migracion/en/challenges-and-opportunities-of-migration-in-the-caribbean/>.

D. LEGAL FRAMEWORK

56. In its Advisory Opinion following a request in 2017 from the Republic of Colombia (OC-23/17), the Inter-American Court of Human Rights (“**IACtHR**”) explained its approach to interpretation of the ACHR.⁷⁷ Specifically, the IACtHR “*must take international law on environmental protection into consideration when defining the meaning and scope of the obligations assumed by the States*” under the ACHR.⁷⁸ Moreover, in order to ensure a “*harmonious interpretation*” of international obligations, the IACtHR will take into account international treaties, resolutions, rulings, declarations, jurisprudence, decisions, as well as principles of customary international law, general principles, and soft law.⁷⁹ The same approach must apply to the 2023 Request.
57. A portmanteau of sources of international law regulate States’ obligations in respect of the environment. States have well-established primary duties to prevent significant environmental harm, within or outside of their territory.⁸⁰ Further, the obligation of due diligence, which imposes on States both substantive and procedural obligations to prevent such harm, has recently been applied to climate change in the proceedings before the International Tribunal on the Law of the Sea (“**ITLOS**”) by many of the State parties who made submissions to the Tribunal.⁸¹ In addition, the precautionary, prevention, and polluter-pay principles find expression in a number of sources of international environmental law, such as Article 191 of the Treaty on the Functioning of the European Union (TFEU); Principles 15 and 16 of the Rio Declaration; and Article 3 of the Economic Commission for Latin American & Caribbean Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (“**the Escazú Agreement**”), which entered into force in 2021. These principles and obligations shape States’ more specific obligations in respect of climate change, such as those embodied in the Paris Agreement. States are also under

⁷⁷ IACtHR, Advisory Opinion OC-23/17, “*The Environment and Human Rights*”, 15 November 2017, §§40-45.

⁷⁸ *Ibid.*, §44.

⁷⁹ *Ibid.*, §§44-45. See also IACtHR, Advisory Opinion OC-1/82, “*Other Treaties’ Subject to the Consultative Jurisdiction of the Court*”, 24 September 1982. Here, the IACtHR held that its advisory role applied to any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States.

⁸⁰ IACtHR, Advisory Opinion OC-23/17, “*The Environment and Human Rights*”, 15 November 2017, §140; United Nations, Stockholm Declaration, 1972, Principle 21; United Nations, Rio Declaration, 1992, Principle 2. Cf. United Nations Convention on the Law of the Sea. The law of the sea imposes obligations of, *inter alia*, due diligence on States.

⁸¹ See ITLOS, ‘Commission of Small Island States on Climate Change and International Law: Request for Advisory Opinion’ (12 December 2022) available at https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf (last accessed 13 June 2023); ICJ, *Corfu Channel Case (United Kingdom v. Albania)*, Judgment, ICJ Reports 1949, p. 22; ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgement, ICJ Reports 2010, pp. 55-56, §101; ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, 16 December 2015; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, ICJ Reports 2015, p.665, §104.

obligations to co-operate and to adopt measures using the best available evidence and techniques.

58. States' obligations in relation to climate change are also regulated by human rights law and refugee law. Both this Court and other regional human rights courts/tribunals have recognised that climate change may interfere with human rights, as explained below at §§70-82. In addition, the body responsible for overseeing the protection of refugees, the United Nations High Commissioner for Refugees ("**UNHCR**"), has also recognised that those fleeing from climate emergencies may, in principle, qualify for international protection under the Refugee Convention and other regional instruments such as the Cartagena Declaration. This Amicus also endorses and builds upon the UNHCR's "*Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters*" ("**UNHCR Climate Change Guidance**")⁸² and its "*Assessing serious disturbances to public order under the 1969 OAU Convention, including in the context of disasters, environmental degradation and the adverse effects of climate change*" ("**UNHCR's 2023 Guidance**").⁸³
59. In short, public international law, international environmental law, and international human rights and refugee law together regulate the substantive and procedural obligations of States in relation to climate change. These obligations include: (i) prohibitions on certain activities, including those which may cause significant harm to the climate system and other parts of the environment; (ii) mitigation and adaption duties; (iii) the need to respect human rights and the principle of non-discrimination; (iv) participation, information, and access to justice rights; and (v) the principle of *non-refoulement*, which prohibits receiving States from returning individuals to a country where they may suffer certain types of harm, including those arising out of, or in connection with, climate change.

(1) This Court's 2017 Advisory Opinion

60. The ACHR protects a number of substantive rights threatened by climate change, including Article 4 (right to life), Article 5 (right to humane treatment), and Article 21 (right to property). Articles 1 and 24 ACHR provide for the right to equal protection. In addition, the Additional Protocol to the American Convention on Human Rights in the Area of

⁸² UNHCR, "*Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters*", 1 October 2020.

⁸³ UNHCR, "*Assessing serious disturbances to public order under the 1969 OAU Convention, including in the context of disasters, environmental degradation and the adverse effects of climate change*", 27 September 2023.

Economic, Social and Cultural Rights (“**Protocol of San Salvador**”) contains the rights to health (Article 10), food (Article 12), and a healthy environment (Article 11).

61. States are bound to comply with their obligations under the ACHR with due diligence. In other words, States’ ongoing conduct or behaviour must secure the rights protected, as opposed to obligations requiring results that entail the achievement of a specific objective.⁸⁴ States must take all appropriate measures to protect and preserve the rights recognised in the ACHR, and to organise all the structures through which public authority is exercised so that they are able to ensure, legally, the free and full exercise of human rights.⁸⁵ The standard of due diligence must be appropriate and proportionate to the level and risk of harm.⁸⁶
62. In its 2017 Advisory Opinion, the IACtHR analysed the content of Articles 4 and 5(1) ACHR in relation to environmental damage. The IACtHR also held that Article 11 of the Protocol of San Salvador has both collective but also individual dimensions, in the sense that its violation may have direct and indirect impacts on individuals, owing to its connectivity to other rights.⁸⁷ Moreover, the IACtHR held that as an “autonomous right”, Article 11 protects components of the environment in themselves, even absent evidence of risks to humans.⁸⁸
63. The IACtHR also identified that States are under procedural obligations to ensure the rights to life and to personal integrity by providing access to information in relation to environmental harm; ensuring the right to public participation in decision-making that may affect the environment; and establishing access to justice in relation to State obligations regarding protection of the environment.⁸⁹ In addition, the IACtHR established that to ensure the rights protected by the ACHR, States are required to co-operate with each other in good faith to ensure protection against environmental damage.⁹⁰ This includes the obligations to: (i) notify other potentially affected States in a timely manner; and (ii) consult and negotiate with potentially affected States in the context of significant transboundary harm.

⁸⁴ IACtHR, Advisory Opinion OC-23/17, “*The Environment and Human Rights*”, 15 November 2017, §123.

⁸⁵ Ibid.

⁸⁶ Ibid., §14.

⁸⁷ Ibid., §§56-60.

⁸⁸ Ibid., §62. While the focus of Advisory Opinion OC-23/17 was on the rights to life and to personal integrity, the IACtHR made it clear that that was because those were the focus of Colombia’s Request: obligations may also exist with regard to other rights that are vulnerable to environmental degradation.

⁸⁹ Ibid., §§213-241.

⁹⁰ Ibid., §§181-210.

64. As the IACtHR has recognised on many occasions, to comply with these obligations, States must have regard to the differentiated impacts of environmental harm on vulnerable communities.⁹¹
65. Finally, in terms of transboundary environmental damage, the IACtHR concluded that jurisdiction can be established over human rights violations that take place outside the territory of a State if that State exercises effective control over damaging activities that cause the violation, and so could prevent the consequent harm.⁹² Therefore, individuals whose rights under the ACHR have been violated owing to transboundary environmental harm are subject to the jurisdiction of the State from where the harm originated.⁹³

(2) International Environmental Law

66. States have well-established primary duties to prevent significant environmental harm, within or outside their territory, applying the precautionary, prevention, and polluter-pay principles. These principles were addressed by the Court in detail in its 2017 Advisory Opinion.
67. To understand States' practical obligations regarding climate change in particular, an important part of international environmental law to which the IACtHR will need to have regard is the Paris Agreement, adopted in 2015 by the 196 Parties to the United Nations Framework Convention on Climate Change ("**UNFCCC**").⁹⁴ Under the Paris Agreement, Parties agreed *inter alia* to:
- (a) Strengthen the global response to climate change, by:
 - (i) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C, recognising this would significantly reduce the risks and impacts of climate change; and
 - (ii) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience (Article 2).

⁹¹ Ibid., §68.

⁹² Ibid., §§72-104.

⁹³ Ibid., §104 (Summary Conclusions).

⁹⁴ The UNFCCC was adopted in 1992.

- (b) Make efforts of the highest possible ambition to reduce GHG emissions, in the form of increasingly progressive nationally determined contributions (“**NDCs**”) (Articles 3 and 4). Parties agreed to pursue domestic mitigation measures, recognising that developing countries will need support and that the least developed and small island States’ NDCs will reflect their special circumstances.
68. The Preamble to the Paris Agreement specifically links these commitments to human rights, stating that, in taking action to address climate change, Parties should “*respect, promote and consider their respective obligations on human rights...*” The Paris Agreement also requires policies to be developed on the basis of the best scientific evidence.
69. The four procedural obligations identified by the IACtHR in its 2017 Advisory Opinion (set out above at §63) facilitate the realisation of other human rights, including the rights to health, life, personal integrity and to a healthy environment. These procedural rights are also mutually reinforcing.⁹⁵ These important procedural obligations arise under international environmental legal instruments, such as the Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (“**the Aarhus Convention**”), which entered into force on 30 October 2001 and the Escazú Agreement. They are also mirrored in international human rights instruments, including the ACHR itself.

(3) International Human Rights Law

70. Climate change has been dealt with to different extents by key international and regional human rights courts and bodies.
71. The European Court of Human Rights (“**ECtHR**”) has found that States have obligations in relation to environmental damage under both Article 2 (the right to life) and Article 8 (the right to respect for private and family life and home) of the European Convention on Human Rights (“**ECHR**”). In doing so, the ECtHR has recognised that an individual’s rights may be negatively impacted by an unsafe or disruptive environment.⁹⁶ States who failed

⁹⁵ See Article 4(4) of the Escazú Agreement; and Inter-American Committee on Sustainable Development, “*The Inter-American Strategy for the Promotion of Public Participation in Decision-making on Sustainable Development*”, OEA/Ser.W/II.5, 20 April 2000, which confirmed that access to environmental information is a core component of facilitating public participation (§5, p.4).

⁹⁶ ECtHR, *Cordella v Italy*, No.54414/13 and 54264/15, 24 January 2019; ECtHR, *Fadeyeva v Russia*, No.55723/00, 9 June 2005, §§68-69, §§133-134; ECtHR, *López Ostra v Spain*, No.16798/90, 9 December 1994, §51.

to take appropriate measures (such as implementing land-planning and emergency-relief policies) have been held to breach the ECHR on multiple occasions.⁹⁷

72. The ECtHR has not yet decided a case on climate change at the time of writing. However, national courts in Europe have addressed such questions, including the Dutch Supreme Court in *Urgenda Foundation v The Netherlands Case*.⁹⁸ Here, the Court found that the risks caused by climate change were real and imminent, such that there were significant threats to the rights guaranteed by the ECHR. There are also three cases pending before the ECtHR in which the applicants argue that States' human rights obligations under the ECHR must extend to taking reasonable and proportionate measures to safeguard against the grave threat posed by climate change.⁹⁹
73. UN treaty bodies have already adjudicated upon human rights issues in the climate change context in *Billy v Australia*¹⁰⁰, *Sacchi v Argentina and others*¹⁰¹, and *Teitiota v New Zealand*.¹⁰² By way of this case law, UN bodies have established that the rights to life, minority culture, and family and home under the ICCPR may all be threatened by climate change, generating States' preventative obligations.¹⁰³ In *Sacchi*, the UN Committee on the Rights of the Child ("**UNCRC**") also held that, in accordance with the principle of common but differentiated responsibility, the global nature of climate change does not absolve States of individual responsibility for harm caused by emissions originating within their territories.¹⁰⁴
74. With regards to climate displacement in particular, in *Teitiota*, the UNHCR held that the effects of climate change may in principle expose individuals to a violation of their right to a life with dignity (ICCPR Article 6), triggering *non-refoulement* obligations (albeit that those *non-refoulement* obligations did not arise on the facts of the case).¹⁰⁵

⁹⁷ On Article 2, see e.g., ECtHR, *Budayeva v Russia*, No. 15339/02, 20 March 2008, §§147-158. On Article 8, see ECtHR, *Cordella v Italy*, No.54414/13 and 54264/15, 24 January 2019; ECtHR, *Fadeyeva v Russia*, No.55723/00, 9 June 2005, §§68-69, §§133-134; ECtHR, *López Ostra v Spain*, No.16798/90, 9 December 1994, §51.

⁹⁸ Supreme Court of the Netherlands, *Urgenda Foundation v The Netherlands*, No. 19/00135, ECLI:NL:HR:2019:2007 (2019).

⁹⁹ These include: *Verein KlimaSeniorinnen Schweiz v Switzerland*, App. No. 53600/20; *Carême v France*, App. No. 7189/21; and *Agostinho v Portugal and 32 Other States*, App. No. 39371/20.

¹⁰⁰ UNHRC, *Billy v Australia*, UN Doc. CCPR/C/135/D/3624/2019 (2022).

¹⁰¹ UNCRC, *Sacchi v Argentina and others*, UN Doc. CRC/C/88/D/104/2019 (2021).

¹⁰² UNHRC, *Teitiota v New Zealand*, UN Doc. CCPR/C/127/D/2728/2016 (2020).

¹⁰³ UNHRC, *Billy v Australia*, UN Doc. CCPR/C/135/D/3624/2019 (2022), §§8.3-8.14.

¹⁰⁴ UNCRC, *Sacchi v Argentina and others*, UN Doc. CRC/C/88/D/104/2019 (2021), §10.10.

¹⁰⁵ UNHRC, *Teitiota v New Zealand*, UN Doc. CCPR/C/127/D/2728/2016 (2020), §9.1.

75. The UN General Assembly, like the IACtHR, has also recognised the right to a clean, healthy and sustainable environment as an emerging new human right under customary international law.¹⁰⁶
76. The UN Guiding Principles on Internal Displacement (which reflect international human rights law) include 30 provisions outlining the rights of internally displaced persons (“IDPs”)¹⁰⁷, which includes those displaced in the context of disasters and the corresponding duties of national governments pre-, during, and post-displacement.¹⁰⁸ The Guiding Principles also guarantee non-discrimination on the basis of race, colour, national, ethnic or social origin, social status, disability or similar criteria, and require that protection and assistance take into account the special needs of vulnerable groups.¹⁰⁹
77. The ACHR contains explicit non-discrimination provisions in Articles 1¹¹⁰, 23(1)(c)¹¹¹, 24¹¹², and 27(1)¹¹³, as do numerous international and regional conventions. Both States’ systemic and operational obligations, and States’ obligations to IDPs and persons in a situation of human mobility in the context of disasters and climate change, must be informed by the principle of non-discrimination, which provides that:

¹⁰⁶ See UNHRC, Resolution, “*The Human Right to a Clean, Healthy and Sustainable Environment*”, 8 October 2021 (A/HRC/RES/48/13); UN General Assembly, Resolution, “*The Human Right to a Clean, Healthy and Sustainable Environment*”, 28 July 2022 (A/RES/76/300).

¹⁰⁷ OCHA, “*Guiding Principles on Internal Displacement*” (1998). The Guiding Principles broadly define IDPs as persons forced or obliged to flee or to leave their homes or places of habitual residence . . . as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters who have not crossed an internationally recognized state border (Introduction, §2).

¹⁰⁸ Although not a binding legal instrument, the UN Guiding Principles have gained considerable authority since their adoption in 1998. The UN General Assembly has recognised them as an important international framework for IDP protection and encouraged all relevant actors to use them when confronted with situations of internal displacement. Regional organisations and states have also deemed the principles a useful tool and some have incorporated them into laws and policies. See Internal Displacement Monitoring Centre, “*Guiding Principles on Internal Displacement*” (accessed 4 October 2023). Available at: <https://www.internal-displacement.org/internal-displacement/guiding-principles-on-internal-displacement#:~:text=The%20principles%20interpret%20and%20apply,since%20their%20adoption%20in%201998>.

¹⁰⁹ OCHA, “*Guiding Principles on Internal Displacement*” (1998), Principles 4.1 and 4.2. Special needs groups include the sick and elderly, infants, children, pregnant women, persons with disabilities and special transportation needs, persons in hospitals or homes, prisoners, and low-income individuals who may have limited access to private transportation and other assistance.

¹¹⁰ Article 1 ACHR provides that “*States must respect and ensure the Convention rights and freedoms without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.*”

¹¹¹ Article 23(1)(c) establishes that everyone has the right to have access, under general conditions of equality, to the public service.

¹¹² Article 24 provides that “*All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.*”

¹¹³ Article 27(1) allows States to take measures derogating from its obligations under the Convention where strictly required by the exigencies of public danger or other emergency, but does not permit measures which involve discrimination on the ground of race, colour, sex, language, religion, or social origin.

- (a) States have a negative obligation not to adopt climate-related policies that discriminate against vulnerable groups.
- (b) Ostensibly neutral policies which disparately impact or fail to account for the needs of vulnerable groups, including persons in a situation of human mobility in the context of disasters and climate change, may violate the prohibition against discrimination, even without a showing of intent or animus. States may therefore have to adopt differentiated policies which address the particular needs of vulnerable groups.
- (c) Where indicia for discrimination such as structural poverty and membership of a marginalised group coalesce, States have obligations to take positive steps to remedy those inequalities.

(4) International Refugee Law

- 78. In addition, the UNHCR has recognised States may have: (i) an obligation to respect the principle of *non-refoulement* which prohibits States from returning persons to a place where they may suffer persecution; and (ii) to provide international protection to those persons fleeing from climate emergencies and who satisfy the definition of a refugee under the Refugee Convention or regional instruments such as the Cartagena Declaration.
- 79. The principle of *non-refoulement* forms a part of human rights law, being embodied in a wide range of human rights treaties including the CAT, the ICCPR, the ECHR and the ACHR. It is also a principle enshrined in Article 33 of the Refugee Convention. Although the texts of the treaties differ in terms of the focal harms, the duty of *non-refoulement* is similar in all cases. It prohibits return to serious human rights violations unless the risk in question is not sufficiently “real”. The principle of *non-refoulement* is also a norm of customary international law.¹¹⁴
- 80. The right to *non-refoulement* under the Refugee Convention requires a causative link between a risk of persecution and a protected ground. In contrast, the right to *non-refoulement* under the Convention and other human rights treaties can be engaged where there is a risk of exposure to serious human rights violations. The right to *non-refoulement* under the Convention and other human rights treaties may therefore be of broader

¹¹⁴ *Mason v the Minister of Citizenship and Immigration* [2023] SCC 2, §11: “*non-refoulement* is a cardinal principle of international refugee law, most prominently expressed in Article 33 of the Refugee Convention and recognized as a norm of customary international law”; *R (on the application of AAA (Syria) and others) (Respondents/Cross Appellants) v Secretary of State for the Home Department* [2023] UKSC 42.

application than the right under the Refugee Convention, when the underlying context of climate change events and disasters which expose individuals to harm are taken into account.

81. The principle of *non-refoulement* gives rise to a due process right to a determination of whether an individual is at risk of serious human rights violations in their home State. In addition, under the Refugee Convention, a person is a refugee as soon as they meet the criteria as set out in Article 1A(2) of the Refugee Convention, which necessarily comes about before a State has, by way of its determination procedures, officially recognised the person as a refugee. Accordingly, States must ensure that they comply with the principle of *non-refoulement* as soon as an individual comes within their effective control.
82. Additionally, States must observe a number of other obligations under international human rights law and the Refugee Convention to ensure the proper protection of certain categories of persons displaced in the context of disasters or climate change. These include, *inter alia*, the protection of rights of persons under the ICESCR and the provision of additional protections to child refugees under the CRC. It also includes rights under the Refugee Convention to, *inter alia*, religious practice (Article 4), property (Article 13), association (Article 15), access to courts (Article 16), gainful employment (Articles 17-19), welfare provisions (Articles 20-24), assistance in administrative processes (Article 25), and in respect of certain rights, involves positive obligations, including establishing domestic legislation.

E. CLIMATE CHANGE: SUBSTANTIVE AND PROCEDURAL OBLIGATIONS

83. Drawing together the facts and legal framework, there is now a clear international consensus that: (i) climate change is a human rights issue; (ii) exceeding the Paris Temperature Limit of 1.5°C would have further grave human rights consequences; and (iii) climate change-induced loss and damage and associated human rights violations have already occurred. The Interveners submit that States must therefore take appropriate measures to mitigate GHG emissions, implement adaptation measures, and remedy resulting damages.

(1) States' Substantive Obligations

84. There is an emerging consensus that to comply with their various international law obligations States must: (i) refrain from certain proposed activities; and (ii) take positive action to prevent environmental damage. In the field of climate change, various courts and

bodies around the world have affirmed that States are under a duty in international law to adopt mitigation and adaptation measures in respect of climate change. Properly interpreted, the 2017 Advisory Opinion has the effect that States may be in violation of the ACHR in cases where non-compliance with those obligations interferes with the rights guaranteed by the ACHR.

(i) *Positive Obligations: Triggers and Requirements*

85. In the 2017 Advisory Opinion, this Court laid down the test for when States' positive obligations in respect of the environment are triggered.¹¹⁵ On a proper interpretation and application of those requirements to climate change, States have positive obligations to adopt mitigation and adaptation policies to: (i) comply with States' commitments under the Paris Agreement; and (ii) to protect the human rights guaranteed by the ACHR and other human rights instruments.
86. In that connection, the ECtHR's case law is of assistance in understanding the nature of States' positive and due diligence obligations with regard to the environment. The ECtHR has held that the positive duties on States contain two elements. The first is a general duty on the State to put in place legislative and administrative frameworks that provide effective deterrence against threats to rights from environmental harm ("**the systemic duty**").¹¹⁶ The second is that, in certain circumstances where there are risks of specific environmental damage arising, States come under duties to act to safeguard those rights ("**the operational duty**").¹¹⁷ The Interveners submit that, although not articulated as such, the distinction between systemic and operational duties is apparent in this Court's jurisprudence, in particular in its 2017 Advisory Opinion. That framework provides a structured framework through which to consider States' obligations.

¹¹⁵ IACtHR, Advisory Opinion OC-23/17, "*The Environment and Human Rights*", 15 November 2017, §§118-121; IACtHR, *Case of the Sawhoyamaya Indigenous Community v Paraguay* (Merits, reparations and costs), Judgment of 29 March 2006, at §153 the IACtHR established that the positive obligation under Article 4 requires States to "*create an adequate statutory framework to discourage any threat to the right to life; to establish an effective system of administration of justice able to investigate, punish and repair any deprivation of lives by state agents, or by individuals.*" See also: IACtHR, *Case of the "Street Children" (Villagrán Morales et al.) v Guatemala* (Merits), Judgment of 19 November 1999, §139; IACtHR, *Case of Juan Humberto Sánchez v Honduras* (Preliminary objection, merits, reparations and costs), Judgment of 7 June 2003, §110; and IACtHR, *Case of Gonzalez et al ("Cotton Field") v Mexico* (Preliminary objection, merits, reparations and costs), Judgment of 16 November 2009.

¹¹⁶ ECtHR, *Öneriyildiz v Turkey*, No. 48939/99, 30 November 2004, §89. In cases of environmental harm, the State's positive obligations under Articles 2 and 8 overlap: the State is expected to take the same measures pursuant to Art. 8 that it would have to take pursuant to Article 2 (ECtHR, *Brincat v Malta*, No. 60908/11, 24 July 2014, §102).

¹¹⁷ ECtHR, *Öneriyildiz v Turkey*, No. 48939/99, 30 November 2004, §101.

87. Before turning to the test for positive obligations, it is necessary to identify further common ground between the decisional practice of this Court and the ECtHR:
- (a) Under both the IACtHR and the ECtHR's jurisprudence, these systemic and operational duties include duties to prevent third parties from violating protected rights through environmental damage, including corporations and other private actors.¹¹⁸ States' responsibilities may therefore result from a failure to regulate, supervise, or monitor activities of third parties.
 - (b) Furthermore, in fulfilling their positive and negative obligations in the environmental damage context, the IACtHR and ECtHR have both established that States must act in accordance with the precautionary principle.¹¹⁹ As such, scientific uncertainty as to the eventualisation of a given environmental risk does not discharge States of their obligations.¹²⁰
88. As regards the test for identifying the nature and scope of States' positive obligations, the IACtHR stressed in its 2017 Advisory Opinion that positive obligations must "*not impose an impossible or disproportionate burden*" on States.¹²¹ As such, applying the IACtHR's own jurisprudence, States' positive obligations in the face of climate change arise where the following conditions are satisfied: (i) imminence, (ii) victimhood, (iii) causation, (iv) knowledge, and (v) significance. The Interveners submit that this Court should interpret those requirements as follows.
89. **First**, for positive operational obligations to arise, the situation must be one of "real and imminent danger."¹²² On the basis of the scientific evidence available (as summarised above at §§32-55) the threats of climate change *already* pose real and imminent risks to rights enjoyed under the Convention, including current experiences of heatwaves, flooding, and sea-level rises, which are particularly important in relation to the Caribbean.¹²³ Indeed, in *Urgenda Foundation v The Netherlands Case*, the Dutch

¹¹⁸ IACtHR, Advisory Opinion OC-23/17, "*The Environment and Human Rights*", 15 November 2017, §§119-120. In the European context see ECtHR, *Jugheli v Georgia*, No.38342/05, 13 July 2017, §§73-75.

¹¹⁹ IACtHR, Advisory Opinion OC-23/17, "*The Environment and Human Rights*", 15 November 2017, §177, §180.

¹²⁰ See, e.g., ECtHR, *Tătar v Romania*, No.67021/01, 27 January 2009, §120.

¹²¹ IACtHR, Advisory Opinion OC-23/17, "*The Environment and Human Rights*", 15 November 2017, §121.

¹²² *Ibid.*

¹²³ See generally documents cited in Facts Section above. See also Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, "*Climate Change 2022: Impacts, Adaptation and Vulnerability (Summary for Policy Makers)*" (2022); IACHR, Resolution 3/2021, "*Climate Emergency: Scope of Inter-American Human Rights Obligations*" (2021); UNGA, Resolution 77/276, "*Request for an Advisory Opinion to the ICJ: Obligations of States in respect of Climate Change*", 29 March 2023; Supreme Court of the Netherlands, *Urgenda Foundation v The Netherlands*, No. 19/00135; and HRC, *Billy v Australia*, UN Doc. CCPR/C/135/D/3624/2019 (2022), §§8.3-8.5.

Supreme Court found that the risks caused by climate change are real and imminent so as to engage States' positive obligations.¹²⁴ Similarly, the Colombian Supreme Court in its 2018 decision in *Demanda Generaciones Futuras v Minambiente* found that the Paris Agreement “established binding measures to mitigate climate change, requiring countries to make concrete commitments to reduce pollution and the increase of global temperatures.”¹²⁵

90. The Interveners submit that this Court should interpret the ‘imminence’ requirement in line with the approach of the ECtHR. Accordingly, the requirement for a “real and imminent” risk should be understood as referring to risks that are “directly threatening”, rather than limited to situations of short-term risk.¹²⁶ For example, in *Öneryildiz v Turkey*, a methane explosion at a refuse tip resulted in a landslide, which engulfed a slum and killed residents. The ECtHR held that the authorities knew, or ought to have known, that the refuse tip constituted a real and immediate risk to the lives of persons living close to it.¹²⁷ The risk of this harm occurring at any time had existed for years. Similarly, in *Taşkin v Turkey*, the ECtHR held that the right to home and family life extended to the threat of environmental pollution that might materialise in 20 to 50 years.¹²⁸
91. As such, the ‘imminence’ requirement should be interpreted as requiring a sufficient link between climate change and the putative harm. It should not be interpreted as requiring an analysis of when the harm will crystallise.
92. **Second**, this real and imminent danger must be to the rights of a specific individual or group of individuals.¹²⁹ In that regard, this requirement should be interpreted to mean that an individual can point to: (i) personal circumstances in their own life which evidence a threat to their human rights, or (ii) the group disadvantage suffered by the group to which

¹²⁴ Supreme Court of the Netherlands, *Urgenda Foundation v The Netherlands*, No. 19/00135, ECLI:NL:HR:2019:2007 (2019), §5.2.2 and §5.6.2.

¹²⁵ Supreme Court of Colombia, *Demanda Generaciones Futuras v Minambiente*, STC4360-2018, p. 22.

¹²⁶ See e.g., *ECHR also regards risks that may only materialise in the longer term.*”

¹²⁶ ECtHR, *Öneryildiz v Turkey*, No. 48939/99, 30 November 2004, §101; ECtHR, *Budayeva v Russia*, No. 15339/02, 20 March 2008, §§147-158; ECtHR, *Kolyadenko v Russia*, No. 17423/05, 28 February 2012, §§165, §§174-180; ECtHR, *Taşkin v Turkey*, No.46117/99, 10 November 2004, §107 and §111-114. In Supreme Court of the Netherlands, *Urgenda Foundation v The Netherlands*, No. 19/00135 (2019) at §5.2.2 it was noted with reference to the case law of the ECtHR that: “The term ‘immediate’ does not refer to imminence in the sense that the risk must materialise within a short period of time, but rather that the risk in question is directly threatening the persons involved. The protection of Art. 2 ECHR also regards risks that may only materialise in the longer term.”

¹²⁷ ECtHR, *Öneryildiz v Turkey*, No. 48939/99, 30 November 2004, §101.

¹²⁸ ECtHR, *Taşkin v Turkey*, No.46117/99, 10 November 2004, §107 and §§111-114. Similarly, Article 8 was engaged in possible longer-term health risks from heavy metal emissions from gold mining in ECtHR, *Tătar v Romania*, No.67021/01, 27 January 2009.

¹²⁹ IACTHR, Advisory Opinion OC-23/17, “*The Environment and Human Rights*”, 15 November 2017, §121.

they belong. As regards (ii), certain groups are particularly vulnerable to, and in the wake of, climate disasters. This is due to the intersection between the effects of climate disasters, the particular characteristics of the relevant group, and the structural disadvantage they suffer (see below at §§139-165).¹³⁰ This Court should discard interpretations of the Convention which would produce discriminatory effects. Accordingly, to satisfy the specificity requirement, it is necessary only to point to the group disadvantage that a person suffers.

93. In addition, the Interveners note that in the environmental disaster context, the ECtHR has found that States can owe protective obligations to residents of an entire region, or even to the general population or society at large.¹³¹ The fact that a particular form of environmental degradation (be that a sea level rise submerging a whole island, or radiation from an explosion spreading over a whole country) impacts many people cannot, in principle, be a reason for obviating States' substantive obligations.¹³² Accordingly, the concept of 'group disadvantage', which guides the Court's jurisprudence on discrimination, should be interpreted to include entire populations who, by their geographical situation, are vulnerable to region-wide harms.
94. **Third**, it must be established that the authorities "knew or should have known" of the risk posed.¹³³ That knowledge is plainly made out in the climate emergency context; States have been put on the clearest notice that their positive action is required to avert the risks, threats, and harms posed by climate change. States are aware, or should be aware, of the international consensus, including as recognised under the Paris Agreement, of the risks to human rights posed by climate change. UN bodies at all levels have repeatedly recognised such risks.¹³⁴ For example, the Report of the UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment concluded that the foreseeable and potentially catastrophic effects of climate change on a wide range of human rights gives rise to extensive duties

¹³⁰ See documents cited, *supra* n.123.

¹³¹ For Article 2, see, *inter alia*, ECtHR, *Gorovenko and Bugara v Ukraine*, No.36146/05, 12 January 2012, §32; and ECtHR, *Tagayeva v Russia*, No. 26562/07, 13 April 2017, §482. For Article 8, see, *inter alia*, ECtHR, *Stoicescu v Romania*, No. 9718/026 July 2011, §59; and the environmental hazard case of *Cordella v Italy*, No.54414/13 and 54264/15, 24 January 2019, §172. This is applied by the Applicants to the climate change context in ECtHR Grand Chamber, *Verein KlimaSeniorinnen Schweiz v Switzerland*, App. No. 53600/20, Additional Statement of Facts and Grounds ("**SFG**"), §52.

¹³² Supreme Court of the Netherlands, *Urgenda Foundation v The Netherlands*, No. 19/00135, ECLI:NL:HR:2019:2007 (2019).

¹³³ IACtHR, Advisory Opinion OC-23/17, "*The Environment and Human Rights*", 15 November 2017, §121.

¹³⁴ For example, see UNCRC's 2023 General Comment No. 26 on Climate Change CRC/C/GC/26; UNHRC, General Comment No. 36, UN Doc. CCPR/C/GC/36 (2019) at §62; UNHRC Resolution 12 July 2019 A/HRC/RES/41/21 Human rights and climate change; UN Human Rights Council resolution 50/9 of 7 July 2022 "Human Rights and Climate Change".

of States to take immediate actions to prevent those harms.¹³⁵ There can be no doubt that signatory States to the ACHR are acutely aware of the risks posed by climate change to the rights guaranteed by the Convention. The concept of constructive knowledge is important here to guard against the possibility of States relying on their own ignorance or failures to defend a course of conduct or State measure which causes environmental harm.

95. **Fourth**, there must also be a “*causal link*” between the impact on life and integrity and the significant damage caused to the environment for positive obligations to arise.¹³⁶ In general, there is an established and internationally recognised causal link between increased GHG emissions, environmental degradation through climate change, and threats to human rights.¹³⁷ Causation would need to be analysed on the facts of each given case of climate-induced environmental harm.
96. In addition, the causation requirement is not a but-for test or one of proximate causation. It is sufficient to establish a connection between a State’s actions or failure to act, and the threat to human rights.
97. In that regard, the Interveners note that, while the climate crisis itself is multi-causal in nature, this does not absolve States of their common but differentiated obligations to mitigate and adapt, including under the Paris Agreement, as confirmed by the UNCRC in *Sacchi*.¹³⁸ This was also emphasised in the UNCRC’s General Comment No. 26 (2023) on children’s rights and the environment, with a special focus on climate change. Here, the UNCRC explicitly highlighted the climate emergency and recommended measures to protect the lives and life perspectives of children. As the IACHR resolved in its Resolution on the scope of human rights and the climate emergency: “*These obligations should not be neglected because of the multi-causal nature of the climate crisis, as all States have common but differentiated obligations in the context of climate action.*”¹³⁹

¹³⁵ UN, Report of the Special Rapporteur, “*The Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*”, A/74/161, 15 July 2019, §§62-65.

¹³⁶ IACtHR, Advisory Opinion OC-23/17, “*The Environment and Human Rights*”, 15 November 2017, §121.

¹³⁷ See Facts section, *supra*.

¹³⁸ UNCRC, *Sacchi v Argentina and others*, UN Doc. CRC/C/88/D/104/2019 (2021), §§10.7-10.14; and IACHR, Resolution 3/2021, “*Climate Emergency: Scope of Inter-American Human Rights Obligations*” (2021), §15. See also the findings of the German Constitutional Court in *Neubauer and others v. Germany*, 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1, 29 April 2021, §119 and §§202-203: “*There is a direct causal link between anthropogenic climate change and concentrations of human-induced greenhouse gases in the Earth’s atmosphere*”; “*... the obligation to take national climate action cannot be invalidated by arguing that such action would be incapable of stopping climate change*”; “*The state may not evade its responsibility here by pointing to greenhouse gas emissions in other states...*”

¹³⁹ IACHR, Resolution 3/2021, “*Climate Emergency: Scope of Inter-American Human Rights Obligations*” (2021), §15.

98. Similarly, in *KlimaSeniorinnen*, the applicants contend that the contribution by multiple States to climate change does not preclude any individual State bearing responsibility for its part.¹⁴⁰ Further, in *Agostinho*¹⁴¹, the children applicants contend that, under established principles of international law, States have shared responsibility for climate damage when they engage in conduct that: (i) is attributable to each of them separately; (ii) constitutes a breach of international obligations; and (iii) contributes to the indivisible injury of a person.¹⁴²
99. Accordingly, the requirement of causation must be interpreted broadly so as to prevent States from escaping their obligations by pointing to other but-for or proximate causes.
100. **Fifth**, States are not obliged to prevent all damage. The threshold is that States must act “to prevent significant harm or damage to the environment, within or outside their territory”, with any harm that may involve a violation of the rights to life and personal integrity considered significant.¹⁴³ The Interveners submit that the concept of significance must be assessed on a case-by-case basis in each case and in each sphere of environmental policy. In the case at hand, the risk of harm associated with climate change plainly satisfies the significance requirement given the existential threat it poses to life on Earth, including flooding, extreme weather events, and the risk of submersion of entire islands under water.¹⁴⁴
101. For the reasons set out above, this Court is invited to adopt the interpretation of each requirement as outlined above. In addition, even on more restrictive and stringent requirements, the threat posed by climate change clearly triggers positive obligations of mitigation and adaptation. The Amicus now turns to consider these two broad categories of obligations.

¹⁴⁰ *Verein KlimaSeniorinnen Schweiz v Switzerland*, App. No. 53600/20, Applicants’ Reply at §69, §72, §75, §77, §§85-86.

¹⁴¹ *Agostinho v Portugal and 32 Other States*, App. No. 39371/20. The applicants are Portuguese nationals aged between 10 and 23. They claim that GHG from 33 European States contribute to global warming, resulting, among other things, in storms, heatwaves and forest fires affecting living conditions (risk of damage to homes) and health (including disrupted sleep patterns, allergies, respiratory problems, and anxiety).

¹⁴² *Ibid.*, Applicants’ Additional SFG, §§9-12, having regard to Principles 2 and 4 of the “Guiding Principles on Shared Responsibility in International Law” *European Journal of International Law*, Volume 31(1), February 2020, pp.15–72, as well as the content of those parts of the International Law Commission’s “Articles on the Responsibility of States for Internationally Wrongful Acts” *Yearbook of the International Law Commission*, 2001, Volume 2(2) that pertain to shared responsibility.

¹⁴³ IACtHR, Advisory Opinion OC-23/17, “*The Environment and Human Rights*”, 15 November 2017, §140.

¹⁴⁴ UNHRC, *Billy v Australia*, UN Doc. CCPR/C/135/D/3624/2019 (2022), §8.7 and §8.12. See also Facts section, *supra*.

(ii) *Mitigation*

102. There is an international scientific consensus that people are already suffering loss and damage induced by climate change and that a failure to meet the Paris temperature goals would pose even greater devastating risks to the enjoyment of human rights. This is most pertinent for the millions of people living in poverty who, even in the best of scenarios, would face food insecurity, forced migration, disease and death.¹⁴⁵
103. Accordingly, States are under human rights obligations to reduce GHG emissions at the highest possible level of ambition, as agreed under Articles 2-4 of the Paris Agreement, on the basis of the “*common but differentiated responsibilities*”, and in line with the precautionary principle.¹⁴⁶ Accordingly, in *Urgenda*, the Dutch Supreme Court found that the State was obliged to take suitable measures to protect the residents of the Netherlands from dangerous climate change, and its failure to make an appropriate contribution to meeting the global temperature limit of 1.5°C breached ECHR Articles 2 and 8.¹⁴⁷ Similarly, the German Constitutional Court ruled in *Neubauer* that “*protection of life and physical integrity [...] encompasses protection against impairments of constitutionally guaranteed interests caused by environmental pollution, regardless of who or what circumstances are the cause.*”¹⁴⁸ It ruled that the State’s duty of protection “*also encompasses the duty to protect life and health against the risks posed by climate change*”, and that it can, furthermore, “*give rise to an objective duty to protect future generations.*”¹⁴⁹
104. The Dutch Supreme Court and the German Supreme Court’s approaches align with that of the IACHR¹⁵⁰, as well as with the applicants in the three cases pending before the ECtHR. For example, in *KlimaSeniorinnen*, the applicants contend that States are under obligations to establish and enforce all necessary legislative and administrative measures within their power to achieve reductions of GHG emissions in line with international climate

¹⁴⁵ IACHR, Resolution 3/2021, “*Climate Emergency: Scope of Inter-American Human Rights Obligations*” (2021), pp.4-5. See also Facts section, *supra*.

¹⁴⁶ IACHR, Resolution 3/2021, “*Climate Emergency: Scope of Inter-American Human Rights Obligations*” (2021), §1; Paris Agreement, Articles 2-4; UNFCCC, Articles 3(1) and 4; Supreme Court of the Netherlands, *Urgenda Foundation v The Netherlands*, No. 19/00135, ECLI:NL:HR:2019:2007 (2019), §5.71; IACtHR, Advisory Opinion OC-23/17, “*The Environment and Human Rights*”, 15 November 2017, §180.

¹⁴⁷ Supreme Court of the Netherlands, *Urgenda Foundation v The Netherlands*, No. 19/00135, ECLI:NL:HR:2019:2007 (2019), §5.71.

¹⁴⁸ *Neubauer and others v. Germany*, 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1, 29 April 2021.

¹⁴⁹ *Neubauer and others v. Germany*, 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1, 29 April 2021.

¹⁵⁰ IACHR, Resolution 3/2021, “*Climate Emergency: Scope of Inter-American Human Rights Obligations*” (2021), §1.

law and the best available science.¹⁵¹ While States have discretion as to the “means”, there is no discretion on ambition.¹⁵² While the majority did not address mitigation, in the UNHRC’s case of *Billy v Australia*, Committee Member Gentian Zyberi concluded in a minority concurring opinion that “*the due diligence standard requires States to set their national climate mitigation targets at the level of their highest possible ambition and to pursue effective domestic mitigation measures with the aim of achieving those targets.*”¹⁵³

105. The overarching obligation is that, to ensure the human rights protected under the ACHR, including the rights to life, dignity and property, States must reduce emissions at the highest possible level of ambition, including by refraining from undertaking activities that might prevent them from doing their part to meet the Paris temperature goals.¹⁵⁴
106. However, as the IACtHR has established in its 2017 Advisory Opinion, States are also under positive due diligence obligations to put in place effective legislative and administrative systems to fulfil commitments to reduce GHG emissions at the highest possible level of ambition, on the basis of the “*common but differentiated responsibilities*”, and in line with the precautionary principle.¹⁵⁵ As such, States should:
- (a) Analyse activities and sectors that contribute to GHG emissions and require impact assessments for projects that may result in significant GHG emissions.¹⁵⁶
 - (b) Regulate, supervise and monitor emissions of non-State actors, appropriately mitigating activities that could exacerbate the climate emergency and provide incentives for sustainable activities.¹⁵⁷

¹⁵¹ *Verein KlimaSeniorinnen Schweiz v Switzerland*, App. No. 53600/20, Applicants’ Statement of Facts and Grounds at §§8-13, §16.

¹⁵² *Verein KlimaSeniorinnen Schweiz v Switzerland*, App. No. 53600/20, Applicants’ Reply at §138.

¹⁵³ UNHRC, *Billy v Australia*, UN Doc. CCPR/C/135/D/3624/2019 (2022), Concurring Opinion of Committee Member Gentian Zyberi, §3.

¹⁵⁴ IACtHR, Advisory Opinion OC-23/17, “*The Environment and Human Rights*”, 15 November 2017, §117, §180.

¹⁵⁵ IACHR, Resolution 3/2021, “*Climate Emergency: Scope of Inter-American Human Rights Obligations*” (2021), §1; Paris Agreement, Articles 2-4; UNFCCC, Articles 3(1) and 4; Supreme Court of the Netherlands, *Urgenda Foundation v The Netherlands*, No. 19/00135, ECLI:NL:HR:2019:2007 (2019), §5.71; IACtHR, Advisory Opinion OC-23/17, “*The Environment and Human Rights*”, 15 November 2017, §180.

¹⁵⁶ IACtHR, Advisory Opinion OC-23/17, “*The Environment and Human Rights*”, 15 November 2017, §§156-170; IACHR, Resolution 3/2021, “*Climate Emergency: Scope of Inter-American Human Rights Obligations*” (2021), §10.

¹⁵⁷ IACtHR, Advisory Opinion OC-23/17, “*The Environment and Human Rights*”, 15 November 2017, §§146-155; IACHR, Resolution 3/2021, “*Climate Emergency: Scope of Inter-American Human Rights Obligations*” (2021), §12; and UNCRC, *Sacchi v Argentina and others*, UN Doc. CRC/C/88/D/104/2019 (2021), §10.6.

- (c) Ensure sustainable use of natural resources, as advocated for by the UNHRC in its General Comment No. 36.¹⁵⁸
- (d) As agreed under Article 5 of the Paris Agreement, take action to conserve and enhance, as appropriate, sinks and reservoirs of GHGs, including forests.
- (e) In general, effectively regulate conduct that contributes to climate change, such as deforestation and cattle grazing.

107. As set out at Articles 3, 4, and 9 of the Paris Agreement, developing countries that need support in achieving their NDCs should seek this from developed countries, and developed countries should provide support, be it financial or technological.

108. States' compliance with these mitigation obligations is fundamental to preventing or mitigating climate displacement. Whilst climate displacement continues to blight the Caribbean region, the negative and positive mitigation obligations of States will ensure that the harm is minimised.

(iii) Adaptation

109. Turning to adaptation, there is also a clear international scientific consensus that climate change is already leading to significant environmental degradation by way of both extreme and slow-onset events, and that this will get worse as emissions increase (regardless of whether the Paris temperature goals are met).¹⁵⁹

110. By way of Article 7, Parties to the Paris Agreement have recognised the critical challenge of reducing vulnerability to climate change. Adaptive efforts should be participatory, transparent, grounded in science, and take into consideration vulnerable groups' views and knowledge (Article 7(5)). Parties also agreed to implement adaptation measures, including: action plans; climate vulnerability impact assessments; monitoring, evaluating and learning; and building resilience of socioeconomic and ecological systems (Article 7(9)).

111. Accordingly, as well as being under obligations to reduce their contributions to global warming, and as identified by the UNHRC and the UN Special Rapporteur, adaptation is

¹⁵⁸ UNHRC, General Comment No. 36, UN Doc. CCPR/C/GC/36 (2019), §62.

¹⁵⁹ See Facts section, *supra*.

a key pillar of States' human rights obligations in the face of climate change.¹⁶⁰ Adaptation duties also arise out of the duty of due diligence to take all appropriate conduct to prevent trans-boundary harm and, on an extension of that principle, to harm in the State's own territory.

112. In the international context, States have already been found to violate such duties. For example, in the UNHRC case of *Billy v Australia*, the authors were nationals of Australia belonging to an Indigenous minority group and Torres Strait islanders.¹⁶¹ They claimed that their islands were particularly vulnerable to climate change, from the destruction caused by sea level rises to the impact of ocean acidification, cyclones, tidal surges and strong winds.¹⁶² They alleged that the State had failed to implement an adaptation programme to ensure the long-term habitability of the islands and had failed to mitigate the impact of climate change.¹⁶³
113. The UNHRC noted that the right to life with dignity of present and future generations (Article 6 ICCPR) may be threatened by climate change, generating States' preventative obligations.¹⁶⁴ While the specific facts did not support a breach of the right to life, the applicants' Article 17 and Article 27 rights (to privacy, family, home, and to enjoyment of minority culture) were violated by the State's failure to implement adequate adaptation measures, given the seriousness of the impacts, including flooding of ancestral burial lands.¹⁶⁵ The applicants' ability to enjoy their culture was closely associated with traditional fishing and farming, and the State's failure to adopt effective and timely adaptation measures (such as building seawalls) was held to have violated that right.¹⁶⁶
114. Accordingly, to comply with their climate change human rights obligations in the sphere of increasing adaptive capabilities, States should, as always, refrain from undertaking activities that may subject more at-risk/vulnerable communities to climate-induced environmental degradation. For example, that might include developing land in a way that reduces natural protections from flood risk.

¹⁶⁰ UN, Report of the Special Rapporteur, "*The Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*", A/74/161, 15 July 2019, §65.

¹⁶¹ UNHRC, *Billy v Australia*, UN Doc. CCPR/C/135/D/3624/2019 (2022).

¹⁶² *Ibid.*, §§2.1-2.6.

¹⁶³ *Ibid.*, §§2.7-2.8.

¹⁶⁴ *Ibid.*, §§8.3-8.7.

¹⁶⁵ *Ibid.*, §8.12.

¹⁶⁶ *Ibid.*, §8.14.

115. In terms of positive obligations, the Interveners submit that States should:

- (a) Put in place and implement adequate and non-discriminatory systems to minimise the impact of the climate emergency, taking into particular consideration the views and knowledge of at-risk/vulnerable groups and the impacts on persons displaced by climate change.¹⁶⁷ This includes:
 - (i) Adaptation planning and implementation, including assessments of climate vulnerability and building resilience of socioeconomic and ecological systems.¹⁶⁸
 - (ii) Adopting effective disaster risk reduction policies and strategies to strengthen preparedness, including early warning systems, instituting a contingency plan to establish safety measures and procedures to minimise harm in the event of a climate-induced natural disaster, and evacuation planning and resilience-building strategies and plans.¹⁶⁹
 - (iii) Establishing non-discriminatory emergency relief policies and actions.¹⁷⁰
 - (iv) Putting in place effective legislative and administrative systems to protect the rights of persons displaced by climate change. This includes prevention and preparedness for displacement, protecting people during evacuation and throughout displacement, facilitation of durable solutions to displacement, as well as planned relocation and adaptation to climate-related internal migration.
 - (v) Establish systems to protect the rights of those persons who will be displaced in the context of:
 - (1) The implementation of climate change mitigation measures, such as use of biofuels or renewable energy planning; and

¹⁶⁷ Paris Agreement, Article 7.

¹⁶⁸ Ibid.

¹⁶⁹ IACtHR, Advisory Opinion OC-23/17, "*The Environment and Human Rights*", 15 November 2017, §170, §172; UN Framework Convention on Climate Change, UN Doc FCCC/CP/2018/10/Add, "*Report of the Conference of the Parties on its twenty-fourth session, held in Katowice from 2 to 15 December 2018*" (19 March 2019), p.43 (Recommendations from the report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts on integrated approaches to averting, minimizing and addressing displacement related to the adverse impacts of climate change).

¹⁷⁰ See e.g., the ECtHR finding of a breach of Article 2 in *Budayeva v Russia*, No. 15339/02, 20 March 2008, §§147-158; and the UN Guiding Principles on Internal Displacement (Principles 4.1 and 4.2).

(2) Conduct that contributes to climate change (such as deforestation), when this occurs despite the State's supervision and regulation.

(b) Where there is a specific incident or risk of significant climate-induced environmental harm, be that extreme or slow-onset damage, States have operational duties to act effectively and non-discriminatorily to prevent and mitigate harm, to the extent possible using the best scientific knowledge and technology available, such as through rapid disaster relief.¹⁷¹

(iv) *Loss and Damage*

116. As detailed in the Section C above, climate change is already leading to human rights violations, and adaptation and mitigation will not suffice to prevent all future violations (“*it is happening now*”).¹⁷² Under Article 8(1) of the Paris Agreement, Parties thereby recognised “*the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change...*”.

117. In that context, and having regard to States' procedural obligations to provide access to justice for those affected by climate change (see §§133-137 below), States must also establish effective legislative and administrative systems to provide redress in relation to economic and non-economic losses and damages.

118. Displacement can be considered a non-economic loss, although the movement of people away from regular employment often has significant economic costs.¹⁷³ The impacts of displacement are complex, and threaten the enjoyment of rights, including physical integrity, health, access to food and water security, decent work opportunities, social cohesion, and culture. For example, the displacement of Indigenous Peoples and the potential loss of their traditional lands, territories and resources threatens their cultural survival, traditional livelihoods, and right to self-determination.¹⁷⁴ Likewise, children who migrate may be separated from their cultural heritage and face difficulties accessing schools, adequate health care, and other necessities.¹⁷⁵

¹⁷¹ IACTHR, Advisory Opinion OC-23/17, “*The Environment and Human Rights*”, 15 November 2017, §172.

¹⁷² UN, Report of the Special Rapporteur, “*The Promotion and Protection of Human Rights in the Context of Climate Change*”, A/77/226, 26 July 2022, §1.

¹⁷³ *Ibid.*, §60.

¹⁷⁴ UN High Commissioner for Human Rights, “*Addressing Human Rights Protection Gaps in the Context of Migration and Displacement of Persons across International Borders...*”, A/HRC/38/21, 23 April 2018, §19.

¹⁷⁵ *Ibid.*, §20.

119. Historic responsibility for the majority of cumulative GHG emissions rests with developed States.¹⁷⁶ As the IACtHR has previously established, States that are origin emitters can be responsible for consequent transboundary harm (as they can be under the “polluter pays” principle of international environmental law).¹⁷⁷ States also have obligations to co-operate in good faith, including to consult and negotiate with potentially affected States in the context of significant transboundary environmental harm.¹⁷⁸ Accordingly, to address losses and damages at an international level, States are under obligations to:
- (a) Co-operate to establish effective international loss and damage mechanisms to provide redress for persons in vulnerable countries, including under the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts (“**WIM**”) established by the Parties to the UNFCCC¹⁷⁹ and the Loss and Damage Fund established at COP27.¹⁸⁰
 - (b) Co-operate to establish effective international systems to protect the rights of persons displaced across borders due to climate change and to provide redress for them, including establishment of safe migration pathways.¹⁸¹
120. At a national level, States should, taking into account their common but differentiated responsibilities and respective capabilities, enhance action on addressing loss and damage associated with the adverse effects of climate change.¹⁸² They should:
- (a) Assess the risk of loss and damage resulting from climate change, including through research, data collection, risk-analysis, and information sharing.¹⁸³

¹⁷⁶ UN, Report of the Special Rapporteur, “*The Promotion and Protection of Human Rights in the Context of Climate Change*”, A/77/226, 26 July 2022, §2; UN, Report of the Special Rapporteur, “*The Promotion and Protection of Human Rights in the Context of Climate Change*”, A/HRC/53/34, 18 April 2023, §10.

¹⁷⁷ IACtHR, Advisory Opinion OC-23/17, “*The Environment and Human Rights*”, 15 November 2017, §104 (Summary Conclusions).

¹⁷⁸ Ibid., §§181-210.

¹⁷⁹ Pursuant to UNFCCC, Decision 2/CP.19, “*Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts*.”

¹⁸⁰ OHCHR, “*Five UN Treaty Bodies Joint Statement on Human Rights and Climate Change*”, 16 September 2019. Available at: <https://www.ohchr.org/en/statements/2019/09/five-un-human-rights-treaty-bodies-issue-joint-statement-human-rights-and>. See also UNFCCC, Decision 3/CP.18, §8; and UNFCCC, Decision 2/CP.19 §14.

¹⁸¹ UN, Report of the Special Rapporteur, “*The Promotion and Protection of Human Rights in the Context of Climate Change*”, A/HRC/53/34, 18 April 2023, §25, §66, §70; Paris Agreement, Articles 8 and 9.

¹⁸² UN, Report of the Special Rapporteur, “*The Promotion and Protection of Human Rights in the Context of Climate Change*”, A/77/226, 26 July 2022, §2.

¹⁸³ UNFCCC, UN Doc FCCC/CP/2018/10/Add, “*Report of the Conference of the Parties on its twenty-fourth session, held in Katowice from 2 to 15 December 2018*” (19 March 2019), p.43 (Recommendations from the report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts on integrated approaches to averting, minimizing and addressing displacement related to the adverse impacts of climate change); UNFCCC, Decision 3/CP.18, “*Approaches to Address Loss and Damage Associated with Climate Change Impacts in Developing Countries*”, §6.

- (b) Design and implement risk management strategies and approaches.¹⁸⁴
- (c) Involve vulnerable communities and populations and other relevant stakeholders in the assessment of, and response to, loss and damage.¹⁸⁵
- (d) Establish mechanisms to help those who have already experienced losses and damages.
- (e) Until a legal regime to protect the rights of persons displaced across international borders due to climate change is established, develop legislative and administrative systems to protect the rights of those persons.¹⁸⁶
- (f) Comply with *non-refoulement* obligations (addressed below at §§177-213).

(2) States' Procedural Obligations

121. States are under procedural obligations in respect of climate change and climate displacement. Specifically, States are under an obligation to facilitate and respect access to information, participation and access to justice rights including, but not limited to, persons whose rights are under threat and environmental defenders. These rights are guaranteed by the ACHR, the Escazú Agreement, due diligence obligations, and customary international law.

(i) Information Rights and Climate Displacement

122. The right to access to information is well-established in international law.¹⁸⁷ The content of States' obligations to facilitate access to information can be summarised as follows:

¹⁸⁴ UNFCCC, Decision 3/CP.18, "Approaches to Address Loss and Damage Associated with Climate Change Impacts in Developing Countries", §6.

¹⁸⁵ Ibid.

¹⁸⁶ UN, Report of the Special Rapporteur, "The Promotion and Protection of Human Rights in the Context of Climate Change", A/HRC/53/34, 18 April 2023, §69; OHCHR, "Five UN Treaty Bodies Joint Statement on Human Rights and Climate Change", 16 September 2019; UNFCCC, Decision 3/CP.18, "Approaches to Address Loss and Damage Associated with Climate Change Impacts in Developing Countries", §6; UNFCCC, UN Doc FCCC/CP/2018/10/Add, "Report of the Conference of the Parties on its twenty-fourth session, held in Katowice from 2 to 15 December 2018", *supra* n.183; UN High Commissioner for Human Rights, "Addressing Human Rights Protection Gaps in the Context of Migration and Displacement of Persons across International Borders...", A/HRC/38/21, 23 April 2018, §41, §66; UN, Report of the Special Rapporteur, "The Human Rights of Migrants", A/77/189, 19 July 2022, §91.

¹⁸⁷ ACHR, Article 13; IACtHR, Advisory Opinion OC-23/17, "The Environment and Human Rights", 15 November 2017, §225; IACtHR, *Case of Furlan and family members v. Argentina* (Preliminary objections, merits, reparations and costs), Judgment of August 31, 2012, §§73, 77, 86, 87, 294; Escazú Agreement, Articles 5(1) and 5(2); Aarhus Convention, Article 4; UNCLOS, Article 244(1); UNEP Governing Council, "Guidelines for Development of National Legislation on Access to

123. **First**, States are under an active duty to conduct sufficient inquiries, collate, and disseminate information relating to climate vulnerabilities and risks to human health and safety as a consequence of climate change, even absent a specific request.¹⁸⁸ This obligation includes a specific obligation to provide information about and to vulnerable groups regarding the nature and consequences of proposed actions affecting their rights.¹⁸⁹
124. Accordingly, States must: (i) identify vulnerable groups in relation to climate risk, including of climate displacement; (ii) inform vulnerable groups about their exposure to risk, including of climate displacement; (iii) disseminate information about the mitigation and adaptation policies it is proposing to adopt, so as to facilitate participation in environmental decision-making, as addressed below;¹⁹⁰ and (iv) where relevant, provide access to information about the emissions impacts of proposed actions.¹⁹¹
125. **Second**, Articles 5(1) and 5(2) of the Escazú Agreement and Article 4 of the Aarhus Convention recognise the State's duty to passively disseminate environmental information upon a request by a member of the public. States must therefore adopt mechanisms through which the public can request information. Those mechanisms entitle the public

Information, Public Participation and Access to Justice in Environmental Matters, 26 February 2010, Decision SS.XI/5, part A, Guideline 5; Inter-American Committee on Sustainable Development, "Inter-American Strategy for the Promotion of Public Participation in Decision-making on Sustainable Development", 20 April 2000, OEA/Ser.W/II.5, CID/Doc. 25/00, pp.19-20; "North American Agreement on Environmental Cooperation", 1 January 1994, Article 4, and Articles on prevention of transboundary harm from hazardous activities (adopted by the International Law Commission in 2001 and annexed to the United Nations General Assembly Resolution 62/68, 6 December 2007); UN General Assembly, Resolution, UN Doc. A/RES/62/68Doc, "Consideration of Prevention of Transboundary Harm from Hazardous Activities and Allocation of Loss in the Case of Such Harm", 6 December 2007, Article 13.

¹⁸⁸ Article 6 of the Escazú Agreement requires States to generate and collect information relevant to their functions (Article 6(1)); and to have up-to-date environmental information systems. Article 2(e) of the Escazú Agreement defines "environmental information" as including information related to "environmental risks, and any possible adverse impacts affecting or likely to affect the environment and health". The duty of active transparency is particularly relevant in relation to the rights to life, personal integrity and health. See e.g., IACTHR, *Case of Furlan*, supra n.187, §294; IACTHR, *Case of I.V. v. Bolivia* (Preliminary objections, merits, reparations and costs), Judgment of 30 November 2016, §156 and §163; and Advisory Opinion OC-23/17, "The Environment and Human Rights", 15 November 2017, §§223-225.

¹⁸⁹ Articles 2(e), 5(1), 5(3)-(4) and 6(6) of the Escazú Agreement. See also Article 5 of the Aarhus Convention, which sets out the duties of Parties to collect and disseminate information on their own initiative. Articles 4(5); Articles 5(3)-5(4) and Article 6(6) of the Escazú Agreement emphasise the State's duty to assist vulnerable groups. The Escazú Agreement defines "persons or groups in vulnerable situations" as those persons or groups that face particular difficulties in fully exercising the access rights recognised in the present Agreement, because of circumstances or conditions identified within each Party's national context and in accordance with its international obligations (Articles 2(e) and 5(1)).

¹⁹⁰ The link between access to information and participation has been re-affirmed by the Inter-American Strategy for the Promotion of Public Participation in Decision-making on Sustainable Development and in Recital 9 of the Aarhus Convention.

¹⁹¹ Article 6(6)(a) of the Aarhus Convention imposes a mandatory requirement on public authorities to grant public access to information on the "residues" and "emissions" arising from specific proposed activities, as an aspect of compliance with the duty "to protect and improve the environment for the benefit of present and future generations" set out in Recital 7 (see also Recital 8). The Aarhus Convention Compliance Committee has not directly addressed the meaning of "emissions" in this context, but it has considered the meaning of "residues" and emphasised the broad nature of this term. This is, accordingly, capable of encompassing scope 1, 2, and 3 GHG emissions arising from the activity.

authority to withhold disclosure only in accordance with well-defined and clear exceptions.¹⁹²

126. **Third**, whether on request or otherwise, information must be complete, understandable, in an accessible language, up to date, and provided in a way that is helpful to the different sectors of the population.¹⁹³ This information must, in particular, be disseminated in a format that is clear and accessible to vulnerable groups. Information must be provided “*in the various languages used in the country*”, using “*alternative formats that are comprehensible to those groups, using suitable channels of communication*”.¹⁹⁴

(ii) *Participatory Rights and Climate Displacement*

127. The right of the public to take part in the environmental decision-making process is established in Article 23(1)(a) of the ACHR, Article 7 of the Escazú Agreement, and Article 6 of the Aarhus Convention. It is entwined with States’ information obligations: States must obtain environmental information, and the public must then be allowed to comment on that in a way that is capable of influencing the ultimate decision. That includes information relating to, and the implications of, a relevant decision on the climate emergency. A number of principles apply.
128. **First**, States must ensure that public participation is meaningful. In particular, the public must be able to participate at the early stages of decision-making, so as to play a meaningful role in shaping environmental decision-making and to have a genuine opportunity to object to particular actions.¹⁹⁵ In a displacement context, that includes public participation in relation to evacuation, camp management, and risk-sensitive land use planning.
129. **Second**, States must perform environmental impact assessments (“**EIA**”) in respect of proposed actions with the potential to *have “significant effects”* on the environment,

¹⁹² The relevant exceptions are laid down in Article 5(6) of the Escazú Agreement, Article 13(2) ACHR, and Article 4(4) of the Aarhus Convention. See also Advisory Opinion OC-23/17, “*The Environment and Human Rights*”, §225.

¹⁹³ The scope of this obligation has been defined in the resolution of the Inter-American Juridical Committee on the “Principles on the Right of Access to Information”, which establish that “[p]ublic bodies should disseminate information about their functions and activities – including, but not limited to, their policies, opportunities for consultation, activities which affect members of the public, their budget, and subsidies, benefits and contracts – on a routine and proactive basis, even in the absence of a specific request, and in a manner which ensures that the information is accessible and understandable” (Inter-American Juridical Committee, Principles on the Right of Access to Information, 73rd regular session, 7 August 2008, OEA/Ser.Q CJI/RES.147 (LXXIII-O/08)). The obligation to perform EIAs with respect to proposed actions with the potential to have significant effects on the environment arises also as a matter of customary international law. See, e.g., ICJ, *Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010.

¹⁹⁴ Article 6(6) of the Escazú Agreement.

¹⁹⁵ Article 6(2)-6(5) of the Aarhus Convention and Article 7(4)-7(6) of the Escazú Agreement.

consistent with both the right to information and the right to participation.¹⁹⁶ The Aarhus Convention Compliance Committee (“**ACCC**”) has determined that an EIA is a “*critical document concerning important details about a proposed project*”, relevant to compliance with States’ public participation obligations.¹⁹⁷ The ACCC has specifically recognised that the provision of information about GHG impacts is relevant to compliance with States’ participation obligations.¹⁹⁸

130. There can be no dispute that any contribution to climate change has a significant effect on the environment, at whatever scale and wherever it occurs, given its cumulative and global nature. As such, States are under an obligation to obtain and then disseminate information about the significant environmental impacts of such proposed projects or activities, so as to encourage public participation in decision-making.
131. **Third**, the Escazú Agreement requires public authorities to make efforts to identify individuals/groups who will be directly affected by projects or activities that have, or may have, a significant impact on the environment, and promote specific actions to facilitate their participation.¹⁹⁹ This includes persons in situations of vulnerability affected by relevant decisions in relation to climate change.
132. The right to public participation is important in the context of climate-related displacement. States should allow groups at risk of such displacement to participate in the design of mitigation and adaptation policies. Those groups should bring to bear their experience, concerns, and interests to the dialogue about how States prevent and respond to climate

¹⁹⁶ Findings of the ACCC adopted 18 February 2005 to date, Communication ACCC/C/2015/131 (UK), ECE/MP.PP/C.1/2014/5, §91. Available at: https://unece.org/sites/default/files/2021-12/Compilation_of_CC_findings_14.12.2021_eng.pdf. See also Recitals 18-21 of the Aarhus Convention; Case C-411/17, *Inter-Environnement Wallonie ASBL v Conseil des Ministres* (2020), ECLI:EU:C:2019:622, §164; and Case C-280/18, *Flausch v Ypourgos Perivallontos kai Energeias* (2020), Opinion of AG Kokott, §30.

¹⁹⁷ Findings of the ACCC adopted 18 February 2005 to date, Communication ACCC/C/2009/44 (Belarus), ECE/MP.PP/C.1/2017/11, §80: where it was held that EIA is relevant to compliance in particular with Article 6(6) of the Aarhus Convention.

¹⁹⁸ The approach of the Aarhus Convention has now also become an “integral part” of the European Union’s legal order. See Communication ACCC/C/2015/131 (UK), *supra* n.196, §91, where the ACCC found the extent of the provision of information in relation to the GHG impact of a proposed Annex I development (an activity typically subject to a requirement for an EIA) is relevant to compliance with Article 6(6). Noting in this instance the ACCC stated that it did not have sufficient information to determine whether there was a failure to comply with Article 6(6). Case C-240/09, *Lesoochránárske zoskupenie v Ministerstvo životného prostredia Slovenskej republiky* (2012), ECLI:EU:C:2011:125, §30 and §105. Article 6(1) of the Aarhus Convention was drafted with reference to Article 2(1) and Annexes I and II of the 1985 EIA Directive (see the Aarhus Convention, “*An Implementation Guide*”, pp.16-17). The 1985 EIA Directive was amended, in turn, in light of the Aarhus Convention. The stated objective of Directive 2003/35/EC was “*to contribute to the implementation of the obligations arising under the Aarhus Convention, in particular by: ... (b) improving the public participation and providing for provisions on access to justice within Council Directives 85/337/EEC...*” (Article 1). As is apparent from Recitals 18-21 of the Aarhus Convention, the EIA Directive was plainly intended to take account of the provisions of the Convention (see in the EU Case C-411/17, *Inter-Environnement Wallonie ASBL v Conseil des Ministres* (2020), §164. In a case concerning public participation procedures, AG Kokott advised that Articles 6, 9 and 11 of the EIA Directive “*must be interpreted in light of the Aarhus Convention, to whose implementation they contribute*” (*Flausch v Ypourgos Perivallontos kai Energeias*, *supra* n.196, §30).

¹⁹⁹ Escazú Agreement, Article 7(16).

displacement. This is particularly important given the jurisprudence of this Court (see below at §§139-165) reveals that States routinely fail to consider the bespoke needs and vulnerabilities of marginalised groups before, during, and in the aftermath of climate displacement. Public participation in decision-making would therefore reduce the risk of such human rights violations.

(iii) Access to Justice and Climate Displacement

133. The third critical procedural obligation in the climate context is the right of access to justice in environmental decision-making.
134. **First**, it is established under both the IACtHR's jurisprudence and international law that States are obliged to provide effective judicial remedies to the victims of human rights violations, substantiated in accordance with rules of due process of law, so as to ensure the free and full exercise of protected human rights for all persons subject to their jurisdiction.²⁰⁰ In its 2017 Advisory Opinion, the IACtHR noted that States must apply their duties of non-discrimination to guarantee access to justice in relation to environmental protection obligations, to enable individuals to ensure that environmental standards are enforced and that human rights violations arising from a failure to comply with environmental standards are redressed.²⁰¹
135. **Second**, States are obliged to ensure that individuals have access to judicial or administrative mechanisms to challenge decisions related to their right to access environmental information.²⁰² Review procedures must be effective, timely and not prohibitively expensive.²⁰³
136. **Third**, States should ensure access to judicial and administrative mechanisms to challenge and appeal acts, decisions, and omissions that could affect the environment adversely.²⁰⁴ Again, procedures should not be prohibitively expensive.²⁰⁵ States must also have mechanisms for redress, such as "*assistance for affected persons*".²⁰⁶ The

²⁰⁰ Under the ACHR, Articles 25, 8(1) and 1(1). See also IACtHR, *Case of Velásquez Rodríguez v. Honduras* (Preliminary objections), Judgment of 26 June 1987, §91; and IACtHR, *Case of Favela Nova Brasília v. Brazil* (Preliminary objections, merits, reparations and costs), Judgment of 16 February 2017, §174.

²⁰¹ Advisory Opinion OC-23/17, "*The Environment and Human Rights*", §§234-240.

²⁰² Article 9(1) of the Aarhus Convention; Article 8(2)(a) of the Escazú Agreement.

²⁰³ Article 9(1) of the Aarhus Convention; Article 8(3)(b) of the Escazú Agreement.

²⁰⁴ Article 9(2) of the Aarhus Convention; Article 8(2)(c) of the Escazú Agreement.

²⁰⁵ Article 8(3)(b) of the Escazú Agreement.

²⁰⁶ Article 8(3)(f) of the Escazú Agreement.

architecture of the Escazú Agreement favours a broad interpretation of the phrase “*any other decision, act or omission that affects or could affect the environment*” in Article 8(2)(c).²⁰⁷ The protections must extend to decisions or actions by the State that will increase carbon emissions, and which thereby increase the risk of individuals being displaced from their homes due to climate change. Decisions relating to adaptation measures that would impact individuals at risk of climate displacement would also fall within Article 8(2)(c).

137. **Fourth**, States’ obligations to guarantee access to justice extend “*to anyone potentially affected by transboundary harm originated in their territory...without any discrimination on the basis of nationality or residence or place where the harm occurred.*”²⁰⁸ States thereby have an obligation to ensure that persons in a situation of human mobility in the context of disasters and climate change, both inside and outside its territory, have sufficient access to justice to seek redress from decisions of the State of origin that put those individuals at increased risk of displacement. In addition, it also requires States to ensure that their immigration laws and systems do not *ipso facto* place onerous legal and practical burdens, which make it impossible or excessively difficult for a person fleeing from a climate disaster to make an application for international protection or some other right to stay in the receiving State. States’ administrative and judicial procedures in the field of immigration control must also allow for an assessment of each claim for protection on a case-by-case basis. The substantive criteria for international protection are discussed below in Section E. At this stage, however, it suffices to note that States are under an obligation to ensure that their immigration systems do not exclude, de jure or de facto, applications for international protection related to climate displacement.

(3) Conclusion on Substantive and Procedural Obligations on Climate Change and Climate Displacement

138. The Interveners submit that this Court should interpret rights under the ACHR in line with the jurisprudence of this Court and in line with international law more generally. Accordingly, in combating climate change, States must adopt appropriate and non-discriminatory mitigation and adaptation policies. They must also facilitate the enjoyment

²⁰⁷ Recital 14 of the Escazú Agreement “*resolves to achieve the full implementation of the access rights provided for*” (emphasis added). Similarly, by Article 3(c) the parties are committed to the principle of “*progressive realisation*” of the access rights. By Article 4 the States are also committed to “*guarantee the right of every person to live in a healthy environment*” (emphasis added).

²⁰⁸ Advisory Opinion OC-23/17, “*The Environment and Human Rights*”, §§238-239.

of the right to information, the right to public participation, and the right to access to justice in respect of environmental matters, climate change, and climate displacement.

F. THE RIGHT TO NON-DISCRIMINATION: AT-RISK GROUPS AND CLIMATE CHANGE/CLIMATE CHANGE-RELATED DISPLACEMENT

139. In discharging the above substantive and procedural obligations, States must do so in a manner that respects the principle of non-discrimination. The ACHR contains explicit non-discrimination provisions in Articles 1²⁰⁹, 23(1)(c)²¹⁰, 24²¹¹, and 27(1).²¹² The jurisprudence of this Court makes clear that the principle contains both a negative and positive obligation.²¹³ Both the negative and positive obligation guard against direct and indirect discrimination.²¹⁴
140. Negative obligation: The IACtHR has developed a robust case law regarding the negative conception. It has adjudicated: (i) cases of differential treatment that were considered arbitrary but where no specific protected ground was alleged;²¹⁵ and (ii) cases of differential treatment based on one or more grounds protected by Article 1(1) of the ACHR.²¹⁶ Both may be relevant to issues of climate displacement.
141. Positive obligation: The positive obligation has been defined by the IACtHR as requiring the adoption of positive measures in order to revert or change existing discriminatory

²⁰⁹ Article 1 provides that “States must respect and ensure the Convention rights and freedoms without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”

²¹⁰ Article 23(1)(c) establishes that everyone has the right to have access, under general conditions of equality, to the public service.

²¹¹ Article 24 provides that “All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.”

²¹² Article 27(1) allows States to take measures derogating from its obligations under the Convention where strictly required by the exigencies of public danger or other emergency, but does not permit measures which involve discrimination on the ground of race, colour, sex, language, religion, or social origin.

²¹³ IACtHR, *Case of Furlan and Family v. Argentina* (Preliminary Objections, Merits, Reparations and Costs), Judgment of 31 August 2012, §267: the principle of non-discrimination entails “a negative concept related to the prohibition of arbitrary differentiation of treatment, and an affirmative concept related to the obligation of State Parties to create real equal conditions towards groups who have been historically excluded or who are exposed to a greater risk of being discriminated.”

²¹⁴ The IACtHR has interpreted the ACHR as prohibiting indirect discrimination. For example, see the *Case of Artavia Murillo et al. v Costa Rica* (Preliminary objections, merits, reparations and costs), Judgment of 28 November 2012, where the IACtHR stated that the ACHR prohibits indirect discrimination, i.e. when “a law or practice that appears to be neutral has particularly negative repercussions on a person or group with specific characteristics” (§286). It also noted in that case that an intention to discriminate was not essential, it was the effects which were relevant. This articulation of indirect discrimination is consistent with the decisional practice of other supranational tribunals, including the ECtHR and CJEU.

²¹⁵ See e.g., IACtHR, *Barbani et al. v. Uruguay* (Merits, reparations and costs), 13 October 2011; IACtHR, *Trujillo v. Venezuela* (Preliminary objection, merits, reparations, and costs), Judgment of 30 June 2009; IACtHR, *Jenkins v. Argentina* (Preliminary objections, merits, reparations and costs), 26 November 2019.

²¹⁶ Guzmán, S., “The Use of Proportionality by the Inter-American Court in Equality and Non-discrimination” in *Part II - Proportionality in Social Rights and Equality-Based Adjudication Cases*, Cambridge University Press (2020), p.186.

situations. This positive dimension is also referred to as “*substantive equality*.”²¹⁷ Indeed, the IACtHR has declared that States have an international responsibility to adopt positive measures in a context of inequality associated with individual circumstances of vulnerability,^{218 219} as well as to inequality arising from structural disadvantage.²²⁰²²¹

142. In the sections that follow, the Interveners draw to the Court’s attention the types of discrimination and human rights violations vulnerable groups are susceptible to in the context of climate change. The Interveners emphasise that: (i) the list of vulnerable groups particularised below is illustrative and non-exhaustive; and (ii) membership of these groups does not make an individual vulnerable per se. Rather, membership of these groups is an indicia of potential vulnerability (which may be exacerbated where there is intersection with other indicia of vulnerability and structural inequality).
143. The Interveners submit that vulnerable groups are at particular risk of climate change-related human rights violations in both their home States and when displaced. Within their home States, vulnerable groups are more exposed to the impacts of climate change and liable to be impeded from leaving high-risk regions in the wake of slow-onset climate change or climate disaster. When displaced internally and across borders, persons in a situation of human mobility in the context of disasters or climate change are at acute risk of human rights violations. Accordingly, the Interveners submit that the principle of non-discrimination gives rise to particular obligations for both (1) home States and (2) receiving States.
144. **First**, the principle of non-discrimination requires home States to: (i) avoid taking actions which may result in the displacement of vulnerable groups, particularly those groups with connections with the threatened land (for example, certain Indigenous Peoples); and (ii) adopt mitigation and adaptation policies which are appropriately tailored to the structural disadvantage suffered by vulnerable groups. Accordingly, the principle of non-discrimination may require States to modify, amend, or supplement pre-existing climate

²¹⁷ IACtHR, Advisory Opinion OC-18/03, “*Juridical Condition and Rights of the Undocumented Migrants*”, 17 September 2003, §104.

²¹⁸ Guzmán, S., “*Two Advances of the Inter-American Court of Human Rights in 2020 on Equality and Non-discrimination*”, *Agenda Estado de Derecho* (2021). Available at: <https://agendaestadodederecho.com/dos-avances-de-la-corte-idh-en-2020-sobre-igualdad-y-no-discriminacion/>.

²¹⁹ IACtHR, *Roche Azaña et al. v. Nicaragua* (Preliminary Objection, Merits and Reparations), Judgment of 3 June 2020), §93.

²²⁰ IACtHR, *Employees of the Fireworks Factory of Santo Antônio de Jesus and Their Families v. Brazil* (Preliminary Objections, Merits, Reparations and Costs), Judgment of 15 July 2020, §§198-200.

²²¹ Guzmán, S., *supra* n.216.

change policies, or adopt new policies altogether.²²² Where vulnerable groups are displaced internally, States have obligations to ensure that their responses are non-discriminatory and comply with the UN Guiding Principles on Internal Displacement.

145. **Second**, the Interveners submit that the principle of non-discrimination gives rise to obligations on receiving States to ensure policies are non-discriminatory. States may be required to take positive steps to prevent human rights violations suffered by vulnerable persons in a situation of human mobility in the context of disasters or climate change, and to remedy the structural disadvantages they face.

(1) Indigenous and Tribal Groups

146. The IACtHR has found that Indigenous Peoples' right to collective ownership is linked to the protection of, and access to, the resources to be found in their territories because those natural resources are necessary for the very survival, development and continuity of their way of life.²²³ The IACtHR has determined that, because Indigenous and tribal peoples are in a situation of special vulnerability, States must take positive measures to ensure that indigenous peoples have access to a dignified life, which includes the protection of their close relationship with the land.²²⁴
147. Indigenous Peoples are particularly vulnerable in the context of climate-induced displacement. The IACtHR has held that lack of access to ancestral territories and natural resources may expose Indigenous communities to precarious and "subhuman" living conditions and increased vulnerability to disease and epidemics. Consequently, States' conduct may amount to extreme neglect that could result in various human rights violations, in addition to undermining the preservation of Indigenous Peoples' way of life, customs and language.²²⁵

²²² As emphasised by the IACHR in its Resolution 3/2021 (*supra* n.123) and by UNHRC, Resolution 50/9, "Human Rights and Climate Change", 7 July 2022, States should put in place specific protections for groups and individuals who are particularly vulnerable to the effects of global warming, owing to factors such as geography (e.g. coastal areas), poverty, gender, age, Indigenous or minority status, including Afro-descendant communities.

²²³ See, *inter alia*, IACtHR, *Case of the Yakye Axa Indigenous Community v. Paraguay* (Merits, reparations and costs), Judgment of 17 June 2005, §137; IACtHR, *Case of the Sawhoyamaya Indigenous Community v. Paraguay* (Merits, reparations and costs), Judgment of 29 March 2006, §118; IACtHR, *Case of the Saramaka People v. Suriname* (Preliminary objections, merits, reparations and costs), Judgment of 28 November 2007, §§121-122; IACtHR, *Case of the Kaliña and Lokono Peoples v. Suriname* (Merits, reparations and costs), Judgment of 25 November 2015, §173; the Indigenous and Tribal Peoples Convention, 1989 (No. 169); and the United Nations Declaration on the Rights of Indigenous Peoples.

²²⁴ Cf. IACtHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*, §163; and IACtHR, *Case of the Kaliña and Lokono Peoples v. Suriname*, §181.

²²⁵ Cf. IACtHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*, §164; IACtHR, *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador* (Merits, reparations and costs), Judgment of 27 June 2012, §147; and IACtHR, *Case of the Afrodescendant Communities displaced from the Rio Cacarica Basin (Operation Genesis) v. Colombia* (Preliminary objections, merits, reparations and costs), Judgment of 20 November 2013, §354.

148. In *Yakye Axa v Paraguay*, the IACtHR examined Paraguay's obligations to the Yakye Axa community, who had been displaced following the sale of their ancestral lands.²²⁶ This displacement caused the community difficulties in sourcing food, as there were no appropriate conditions for cultivation or practicing traditional subsistence activities like hunting and fishing.²²⁷ The Yakye Axa did not have access to appropriate housing with the basic minimum services, such as clean water and toilets.²²⁸ The IACtHR held that the State had failed to take measures towards the fulfilment of the right to a decent life, especially for those who were vulnerable, and that it had failed to take measures regarding the conditions that affected the Yakye Axa's ability to live a "*decent life*."²²⁹
149. In *Río Massacres v. Guatemala*, members of the Río Negro community were forced to flee their ancestral lands after the massacres perpetrated against them in 1980 and 1982.²³⁰ Survivors took refuge in nearby mountains in order to flee persecution by the State. After 1983, some survivors were resettled by the Government in the Pacux settlement.²³¹
150. The IACtHR noted the requirements of the UN Guiding Principles on Internal Displacement and that Indigenous Peoples who have been forcibly displaced will be in a situation of special vulnerability owing to the relationship between their land and their physical and cultural survival.²³² This meant that the State was under a positive obligation to repair and/or mitigate the harmful effects of displacement. While the IACtHR recognised that the State had made efforts to resettle survivors of the massacres, the living conditions in the new settlement were not sufficient to revert the effects of the displacement.²³³ For example, the Court recognised surviving members of the community "*have had to participate in economic activities that have not provided them with a stable income, and this has also contributed to the disintegration of the social structure and the cultural and spiritual life of the community. In addition, the facts of the case have proved that the*

²²⁶ IACtHR, *Case of the Yakye Axa Indigenous Community v. Paraguay* (Merits, reparations and costs), Judgment of 17 June 2005.

²²⁷ *Ibid.*, §164.

²²⁸ *Ibid.*

²²⁹ *Ibid.*, §176.

²³⁰ IACtHR, *Case of the Río Negro Massacres v. Guatemala* (Preliminary objection, merits, reparations and costs), Judgment of 4 September 2012.

²³¹ *Ibid.*, §179.

²³² *Ibid.*, §177.

²³³ *Ibid.*, §183.

*inhabitants of Pacux live in very precarious conditions, and that their basic needs in the areas of health, education, electricity and water are not being fully met.*²³⁴

151. In accordance with the ACHR, UN Declaration on the Rights of Indigenous Peoples²³⁵, and the principle of non-discrimination, States should therefore:
- (a) Ensure that their mitigation and (particularly) adaptation policies are appropriately tailored to protect the rights of Indigenous groups to their land as a matter of urgency. Indigenous groups must receive information about any adaptive planning and be afforded the opportunity to participate in policy making so as to ensure that any adaptive measures respect their cultures and traditions.²³⁶
 - (b) Recognise that any relocation of Indigenous Peoples triggers requirements including free, prior and informed consent, as well as restitution and compensation under the Declaration.²³⁷
 - (c) Ensure Indigenous Peoples' rights across international borders that may currently divide their traditional territories.²³⁸
 - (d) Ensure that Indigenous Peoples migrating from their territories, including from rural to urban areas within their countries, are guaranteed rights to their identity and adequate living standards, as well as necessary and culturally appropriate social services.²³⁹

(2) People of African Descent

152. People of African descent (“**PAD**”) continue to be subjected to environmental racism and are disproportionately affected by the climate crisis. Environmental racism refers to

²³⁴ Ibid.

²³⁵ UN Declaration on the Rights of Indigenous Peoples, Article 2: “*Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.*” See also Articles 10, 11, 26, and 29.

²³⁶ IACtHR, Advisory Opinion OC-21/14, “*Rights and Guarantees of Children in the context of Migration and/or in Need of International Protection*”, 19 August 2014, §168: With respect to matters relating to the Convention of the Rights of the Child, the IACtHR identified the particular circumstances of children who were members of Indigenous communities when they had been displaced, voluntarily or forcibly, outside their territory and community, indicating that the measures of protection must be adopted and implemented taking their cultural context into consideration.

²³⁷ UNHCR, “States Must Act Now to Protect Indigenous Peoples During Migration”, 7 August 2018. Available at: <https://www.ohchr.org/en/press-releases/2018/08/states-must-act-now-protect-indigenous-peoples-during-migration>.

²³⁸ Ibid.

²³⁹ Ibid.

environmental injustice in practice and in policies in racialised societies.²⁴⁰ The factors that lead to poverty among PAD are mainly structural, with discrimination being apparent in the unequal access these groups have to basic services. PAD are often disadvantaged, for example, in access to education, healthcare, markets, loans and technology.²⁴¹

153. In light of this structural disadvantage, there are a multitude of ways in which climate change and climate displacement place PAD in a position of heightened vulnerability. The following is a non-exhaustive list of examples:

- (a) The rights to life and to health of PAD in North America are threatened by health consequences from heat waves, air pollution, extreme weather events and a lack of access to medical care. In South America, floods are particularly threatening to the health and lives of PAD.²⁴²
- (b) The right to adequate housing is violated in both North America and South America, where PAD have poor quality housing in disadvantaged areas that are vulnerable to climate events.²⁴³
- (c) The right to adequate food of PAD is liable to be disproportionately impacted by rising prices of food following climate events or delayed reconstruction of grocery stores/markets after a disaster, due to structural poverty. Economic and physical access to food in rural communities can also be threatened by the depletion of agricultural yield and fisheries due to climate change.²⁴⁴
- (d) The right to education of PAD is disproportionately impacted by displacement of school-age children in the aftermath of disaster and the right to work by displacement, due to their high level of intransience once displaced.²⁴⁵

²⁴⁰ Chairperson of the Intergovernmental Working Group on the Effective Implementation of the Durban Declaration and Programme of Action, “*Chairperson’s Preparatory Document for the Draft United Nations Declaration on the Promotion and Full Respect of the Human Rights of People of African Descent*”, pursuant to Resolution A/RES/76/226, 4 October 2022, Article 23. Available at: <https://www.ohchr.org/sites/default/files/documents/issues/racism/wgwg-durban/session20/2022-10-04/Chair-IGWGs-Preparatory-Draft-UN-Declaration-Rights-people-African-descent.pdf>.

²⁴¹ UN, “*People of African Descent*” [online]. Available at: <https://www.un.org/en/fight-racism/vulnerable-groups/people-of-african-descent#:~:text=in%20your%20browser.-,Poverty,%2C%20markets%2C%20loans%20and%20technology> (accessed 6 October 2023).

²⁴² Flamand-Lapointe, et al., “*2020 Capstone Report: Climate Change Impacts on the Rights of People of African Descent*”, produced for the OHCHR, 2 December 2020, p.2. Available at: <https://www.ohchr.org/sites/default/files/Documents/Issues/Racism/WGEAPD/Session28/written-input/capstone.pdf>.

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Ibid.

- (e) The right to participate in public affairs is not fully respected, due to the historic and ongoing impediments to involvement of PAD in public life, and limited decision-making influence on climate policies.²⁴⁶
- (f) Not only do PADs face structural and systemic discrimination in their countries of origin, they continue to be impacted and marginalised in many countries to which they migrate, in which they are often confronted with the host country's legacies of colonialism, enslavement and racism. Moreover, they risk being doubly marginalised - as migrants, but also as PADs.²⁴⁷
- (g) PADs may face particular challenges while in a situation of human mobility. The Committee to Eliminate Racial Discrimination's recent statement noted with concern that *"reports of human rights violations and abuses against persons on the move in various countries in the Americas region that disproportionately affect people of African descent including persons of Haitian origin, at borders, in migrant detention centres, as well as along extremely dangerous migration routes in this region used by these persons due to strict migration control measures, the militarisation of borders, systematic immigration detention policies, and the obstacles to international protection and regularization processes in some States Parties in the Americas region, which expose them, among others, to assaults on their life and security, including through killings, disappearances, acts of sexual and gender-based violence, and trafficking by criminal networks."*²⁴⁸

154. In *Employees of the Fireworks Factory of Santo Antônio*, the IACtHR held that where factors of discrimination such as structural poverty and membership of a marginalised group coalesce, the State had an obligation to take positive steps to remedy those structural inequalities.²⁴⁹

²⁴⁶ Ibid.

²⁴⁷ OHCHR, "Stop Deporting Haitians on the Move in Americas, UN Committee Warns" (2023). Available at <https://www.ohchr.org/en/press-releases/2023/04/stop-deporting-haitians-move-americas-un-committee-warns>; Black Alliance for Just Immigration, "The Impact of Anti-Black Racism on African Migrants at Mexico's Southern Border" (2021). Available at: <https://baji.org/wp-content/uploads/2021/01/The-Impact-of-Anti-Black-Racism-on-African-Migrants-at-Mexico.pdf>. See also Priya Morley et al., "A Journey of Hope: Haitian Women's Migration to Tapachula, Mexico" (2021). Available at: <https://imumi.org/attachments/2020/A-Journey-of-Hope-Haitian-Womens-Migration-to%20-Tapachula.pdf>.

²⁴⁸ OHCHR, *supra* n.248.

²⁴⁹ IACtHR, *Employees of the Fireworks Factory of Santo Antônio de Jesus and Their Families v. Brazil* (Preliminary Objections, Merits, Reparations and Costs), Judgment of 15 July 2020, §§198-200: *"the workers of the fireworks factory were part of a discriminated or marginalized group because they were in a situation of structural poverty and also most of them were Afro-descendant women and girls. However, the State failed to take any measure that could be assessed by the Court as a way of addressing or seeking to reverse the situation of structural poverty and marginalization of the fireworks factory workers"*

155. In accordance with the Convention, International Convention on the Elimination of All Forms of Racial Discrimination (“**ICERD**”)²⁵⁰, and the principle of non-discrimination, States should therefore:

- (a) Adopt mitigation and adaptation policies which not only prevent further environmental degradation, but also seek to remedy the structural disadvantage which renders PAD particularly vulnerable to the effects of climate change and risk of climate displacement. This may, for example, require States to commit to rebuilding poorer areas affected by climate change or to ensure that the provision of disaster relief is non-discriminatory and positively supports groups who suffer from structural poverty. Racial impact assessments should also be a part of human rights due diligence efforts for all climate and environmental action.²⁵¹
- (b) Receiving States should remove any element of their migration policies and practices that may create racial and ethnic discrimination. Host countries of displaced PAD should consider the provision of adequate social services, in particular in the areas of health, education and adequate housing, as a matter of priority, in co-operation with United Nations agencies, regional organisations and international financial bodies.²⁵²

(3) Women and Girls

156. In many contexts, women are impeded from leaving regions that are at high risk of disaster or migrating to re-establish their lives in the wake of extreme climatic events. Gender-based stereotypes, household responsibilities, discriminatory laws, lack of economic

based on the factors of discrimination that coalesced in this case.” Mexico was found to have failed to ensure the right of Afro-descendent women and girls to just and favourable conditions of work without discrimination, as well as the right to equality established in Articles 24 and 26, in relation to Article 1(1) of the ACHR.

²⁵⁰ Article 1 of ICERD states that “*racial discrimination*” means “*any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life*”. Article 2, on its main purpose, affirms: “*States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races.*” See also Articles 4, 5 and 7.

²⁵¹ Chairperson of the Intergovernmental Working Group on the Effective Implementation of the Durban Declaration and Programme of Action, “*Chairperson’s Preparatory Document for the Draft United Nations Declaration on the Promotion and Full Respect of the Human Rights of People of African Descent*”, pursuant to Resolution A/RES/76/226, 4 October 2022, Article 23.

²⁵² *Ibid.*, Article 24.

resources and limited access to social capital frequently restrict the ability of women to migrate.²⁵³

157. In situations of crisis, women and girls are more likely to take on house chores and caring duties. Girls may drop out of school and women and girls may be subjected to child or forced marriage.²⁵⁴ Situations of crisis exacerbate pre-existing gender inequalities and compound the intersecting forms of discrimination against, among others, women living in poverty, Indigenous women, women belonging to ethnic, racial, religious and sexual minority groups, women with disabilities, refugee and asylum-seeking women, internally displaced, stateless and migrant women, rural women, unmarried women, adolescents and older women.²⁵⁵ Women in these groups are often disproportionately affected compared with men or other women.²⁵⁶
158. When women and girls are displaced, they often have more limited livelihood opportunities and access to health care, and are exposed to a higher risk of sexual and gender-based violence, forced labour, exploitation, abuse and trafficking in persons.²⁵⁷ In some societies, women and girls might face discrimination and barriers to accessing basic services and obtaining civil documentation.²⁵⁸
159. In its submissions to the UNHRC Special Rapporteur, the Centre for Feminist Foreign Policy noted that as more people are displaced across borders due to climate change, border personnel are becoming more and more brutal, heavily armed and restrictive, and gender-based violence is consequently increasing.²⁵⁹
160. In accordance with the Convention, the UN Committee on the Elimination of Discrimination Against Women's ("CEDAW") General Recommendation No. 26²⁶⁰ provides that States should therefore:

²⁵³ CEDAW, "General Recommendation No.37 on Gender-Related Dimensions of Disaster Risk Reduction in a Changing Climate", 13 March 2018, §76.

²⁵⁴ Ibid.

²⁵⁵ For example, in the ECtHR's pending case of *KlimaSeniorinnen* (*supra* n.99), a group of older women allege that they have been particularly impacted by climate change-induced heatwaves due to their specific health and living conditions.

²⁵⁶ CEDAW, *supra* n.254, §2.

²⁵⁷ UNGA, Special Rapporteur on the Human Rights of Internally Displaced Persons, "Report on Internal Displacement in the Context of the Slow-onset Adverse Effects of Climate Change", 1 July 2020, p.14.

²⁵⁸ Ibid.

²⁵⁹ Cited in UN, Report of the Special Rapporteur, "The Promotion and Protection of Human Rights in the Context of Climate Change", A/HRC/53/34, 18 April 2023, p.7.

²⁶⁰ CEDAW, "General Recommendation No.26 on Women Migrant Workers", 5 December 2008.

- (i) Ensure that migration and development policies are gender responsive, that they include sound disaster risk considerations, and recognise disasters and climate change as important push factors for persons in a situation of human mobility in the context of disasters or climate change. That information should be incorporated into national and local plans for monitoring and supporting the rights of women and girls;
- (ii) Facilitate the participation of women in a situation of human mobility in the context of disasters or climate change, in the development, implementation and monitoring of policies designed to protect and promote their human rights at all phases of movement. Particular efforts should be made to involve women in a situation of human mobility in the context of disasters or climate change in designing appropriate services in areas including mental health and psychosocial support, sexual and reproductive health, education and training, employment, housing and access to justice;
- (iii) Ensure gender balance among the border police, military personnel and government officials responsible for the reception of women and train those groups on the gender-specific harm that women in a situation of human mobility in the context of disasters or climate change may face, including the increased risk of violence;
- (iv) Integrate human mobility-related considerations into disaster risk reduction and climate change mitigation and adaptation policies, taking into account the specific rights and needs of women and girls, including unmarried women and women heads of household, before, during and after disasters.²⁶¹

(4) Children

161. In *Sacchi v Argentina*, the UNCRC acknowledged that children are “*particularly impacted by the effects of climate change*” and States have heightened obligations to protect them from harm.²⁶²

²⁶¹ CEDAW, *supra* n.254, §78. See also OHCHR, “*Principles and Guidelines on the Human Rights Protection of Migrants in Vulnerable Situations*” (2018), Principle 11: “*Protect the human rights of migrant women and girls.*”

²⁶² UNCRC, *Sacchi v Argentina and others*, UN Doc. CRC/C/88/D/104/2019 (2021), §10.13.

162. The countries most exposed to the adverse effects of climate change have predominantly young populations. Given their young age and limited resources, children's ability to adapt to the changing climate is limited.²⁶³
163. At the early stages of slow-onset processes, boys of working age might migrate in search of better life opportunities, which exposes them to a number of risks. They are likely to have unsafe and poorly remunerated jobs and to live in inadequate housing in unsafe areas.²⁶⁴
164. Family separation makes children more likely to drop out of school and to work to support themselves or their families, increasing their vulnerability to child and forced labour, exploitation and abuse, including sexual exploitation and, in some contexts, child recruitment and use in armed conflict.²⁶⁵
165. In accordance with the ACHR, the CRC, the UNCRC's General Comment No. 26, and the principle of non-discrimination, States should therefore:
- (a) Take positive measures to ensure that children are protected from foreseeable, premature, or unnatural death and threats to their lives that may be caused by acts and omissions, as well as the activities of business actors, and enjoy their right to life with dignity. Such measures include the adoption and effective implementation of environmental standards, for example, those related to air and water quality, food safety, lead exposure and GHG emissions, and all other adequate and necessary environmental measures that are protective of children's right to life.²⁶⁶
 - (b) Receiving States should account for children in a situation of human mobility in the context of disasters or climate change in national child protection systems by establishing robust procedures for their protection in relevant legislative, administrative and judicial proceedings and decisions, as well as in migration

²⁶³ UNCRC, GRC/C/GC/26, "General Comment No. 26: Children's Rights and the Environment, with a Special Focus on Climate Change", 22 August 2023, §24.

²⁶⁴ Ibid., §80 recognises the necessity of "special attention to the risk exposure of certain groups of children, such as working children."

²⁶⁵ Ibid., §35.

²⁶⁶ See generally UNCRC, GRC/C/GC/26, "General Comment No. 26: Children's Rights and the Environment, with a Special Focus on Climate Change", 22 August 2023.

policies and programmes that impact children, including consular protection policies and services.²⁶⁷

- (c) Receiving States should ensure the establishment of specialised procedures for the identification, referral, care, and family reunification of children in a situation of human mobility in the context of disasters or climate change. They should also provide access to health care services, including mental health, education, legal assistance, and the right to be heard in administrative and judicial proceedings, including by swiftly appointing a competent and impartial legal guardian.²⁶⁸

G. OBLIGATIONS OF RECEIVING STATES

166. In the context of cross-border displacement, the Interveners emphasise the observations of the UNHRC Special Rapporteur:

“When people are displaced across international borders, the guidance and legal protection mechanisms tend to evaporate, because of the political sensitivity around such occurrences. The Special Rapporteur is of the view that it is now time to put aside this denial and accept the fact that a large number of people are being displaced across international borders due to climate change and that there is an international legal responsibility to properly protect them.”²⁶⁹

167. States have obligations to persons in a situation of human mobility in the context of disasters or climate change in their capacity as receiving States. These obligations derive from international refugee law, international human rights law, and customary international law. In light of these obligations, States must:

- (a) Provide protection to those who have been compelled to cross borders in light of climate disasters in their country of origin, including by providing access to healthcare, employment, and effective administrative procedures.

²⁶⁷ See also IACtHR, Advisory Opinion OC-18/03, “*Juridical Status and Rights of Undocumented Migrants*”, 17 September 2023, §§140-142; IACtHR, Advisory Opinion OC-21/14, “*Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*”, 19 August 2014; OHCHR, “*Principles and Guidelines on the Human Rights Protection of Migrants in Vulnerable Situations*” (2018), Principle 10: “*Guarantee the human rights of all children in the context of migration, and ensure that migrant children are treated as children first and foremost.*”

²⁶⁸ Ibid.

²⁶⁹ UNGA, Special Rapporteur on the Human rights of Internally Displaced Persons, “*Report on Internal Displacement in the Context of the Slow-onset Adverse Effects of Climate Change*”, 21 July 2020, §28.

- (b) Comply with the principle of *non-refoulement*, which prohibits States from returning people to a place where they may suffer certain types of harm, including persecution, threat to life, torture, and inhumane and degrading treatment.
- (c) Process claims for and grant refugee status to those who have a valid claim for international protection.

168. As recognised by the UNHRC Special Rapporteur, these obligations are important safeguards in the absence of bespoke international agreements in relation to climate displacement.²⁷⁰

(1) Protection of Rights in the Context of Displacement

169. States must comply with their obligations to protect the rights of individuals who have been displaced in the context of the climate emergencies, under wider instruments of international law. For example, the ICESCR applies broadly to “*everyone including non-nationals such as refugees, asylum-seekers, stateless persons, migrant workers, and victims of international trafficking, regardless of legal status and documentation*” (as recognised in the Committee on Economic, Social and Cultural Rights’ (“**CESCR**”) General Comment No. 20.²⁷¹ Crucially, the ICESCR applies to everyone, including all asylum-seekers, regardless of whether they are “*lawfully staying*” or “*lawfully in*” the territory. Within this purview, States must protect the rights under the ICESCR of persons displaced in the context of climate change who are lawfully in the territory, *inter alia*, in relation to work (Article 6), social security (Article 9), family (Article 10) and education (Article 13).
170. Additionally, the ICESCR requires States to take positive steps in order to protect certain rights. Article 2(1) obliges each State Party to give effect to its obligations under the ICESCR “*individually and through international assistance and co-operation... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized... by all appropriate means, including particularly the adoption of legislative measures*” (emphasis added). The CESCR’s General Comment No. 3 explains that the ICESCR “*...imposes an obligation to move as expeditiously and*

²⁷⁰ Ibid., §64.

²⁷¹ “General Comments” are not formally binding in their own right, but the International Court of Justice has advocated the following approach in respect of “General Comments” of the Human Rights Committee: namely that the Committee has “*built up a considerable body of interpretative case law...*”, such that the Court “*believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that threat. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled*” (ICJ, *Republic of Guinea v. Democratic Republic of the Congo*, Judgment of 30 November 2010, §66).

effectively as possible towards” the goal of the full realisation of the rights in question. Accordingly, it is submitted that States are under an obligation to adopt positive measures, such as to legislate to ensure that the wide-ranging economic, social and cultural rights of persons displaced in the context of climate change under the ICESCR are protected.

171. Moreover, State Parties are under additional obligations under the CRC to ensure that the rights of children who are seeking, or who have been recognised as holding, refugee status are protected in accordance with all applicable instruments of international human rights and humanitarian law. Article 22(1) CRC provides that States Parties shall take appropriate measures to ensure that such children, whether accompanied or not, shall “*receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties*” (emphasis added). As provided by Article 22(2), States must also co-operate with intergovernmental, non-governmental and multilateral initiatives to co-operate to protect and assist such a child to trace relevant parents or family members to obtain information necessary for reunification with his or her family. Further, in cases where no such family members can be found, States must afford to such children “*the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason*”, as set out in the CRC.
172. The Court has recognised that standardised protection should exist for persons who have not been recognised as regular migrants nor qualify under refugee status, but whose return would be contrary to the general obligations of *non-refoulement* under international human rights law²⁷², and that this “complementary protection” should recognise the basic rights of the persons protected.²⁷³
173. Under the Refugee Convention, States are also under obligations to protect refugees’ rights, *inter alia*, to religious practice (Article 4), property (Article 13), association (Article 15), access to courts (Article 16), gainful employment (Articles 17-19), welfare provisions (Articles 20-24) and assistance in administrative processes (Article 25).
174. In respect of certain such protections (e.g., employment and welfare provisions), receiving States must provide to refugees “*lawfully staying*” in their territory the same or not less favourable treatment as is accorded to nationals or to aliens generally in the same

²⁷² IACtHR, Advisory Opinion OC-21/14, “*Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*”, 19 August 2014, §237.

²⁷³ *Ibid.*, §240.

circumstances, with respect to the provisions in question. By way of example, Article 17 provides that refugees “*lawfully staying*” in the country must be afforded the “*most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.*” In that connection, “*lawfully staying*” is narrower than the term “*lawfully in*” (used elsewhere in the Refugee Convention, which excludes those who are present or admitted on a transient basis or for a very limited period of time), but, importantly, is broader than “*lawfully resident.*”²⁷⁴ For example, the Michigan Guidelines confirm that asylum seekers in a State that fails to comply with a refugee status determination, or where the procedure is unduly prolonged, must be treated as “*lawfully staying*” for the purpose of the Refugee Convention.²⁷⁵ States must, therefore, protect the relevant employment and welfare rights of persons displaced in the context of climate change where they are “*lawfully staying*” in the country, and of such persons who are granted residence rights.

175. In its Resolution on the scope of Inter-American human rights obligations in regards to the climate emergency, the IACHR and the Organisation of American States (“**OAS**”) called upon States in the region to address environmental mobility through a human rights-sensitive approach. For instance, by guaranteeing due process in respect of procedures relating to the recognition of migratory status, and guaranteeing human rights, including the safeguard of *non-refoulement* while an individual’s status is determined.²⁷⁶
176. In light of the above, it is the clear that States have an obligation to guarantee certain living standards to those who are in their territory as a result of cross-border climate displacement.

(2) Principle of Non-refoulement

177. The broader rights of *non-refoulement* apply to all migrants. They are not limited to those individuals who meet the definition of refugee under the Refugee Convention. The

²⁷⁴ Ad Hoc Committee on Refugees and Stateless Persons, Second Session: Summary Record of the Forty-Second Meeting Held at the Palais des Nations, Geneva, 24 August 1950, E/AC.32/SR.42: This, as expressed by the French representative to the second session of the ad hoc Committee “*was understood to mean not only a privileged resident or ordinary resident, but also a temporary resident [and] was therefore very wide in meaning.*” Available at: <https://www.unhcr.org/uk/publications/ad-hoc-committee-refugees-and-stateless-persons-second-session-summary-record-forty>. See also Dr Weis’ authoritative commentary in “*The Travaux Préparatoires Analysed with a Commentary by Dr Paul Weis*”, which concludes that: “*it results from the travaux préparatoires [to the Convention] that any refugee who, with the authorization of the authorities, is in the territory of a Contracting State otherwise than purely temporarily, is to be considered as ‘lawfully staying’ (‘résidant régulièrement’)*”. An example illustrates that ‘purely temporarily’ is to be interpreted narrowly: “*Performing artists on a tournée in a country other than their country of residence may be regarded as being purely temporarily in another country*” (p.268). Available at: <https://www.unhcr.org/sites/default/files/legacy-pdf/4ca34be29.pdf>.

²⁷⁵ Hathaway et al., “*The Michigan Guidelines on Refugee Freedom of Movement*” (2017). Available at: <https://www.refworld.org/pdfid/592ee6614.pdf>.

²⁷⁶ IACHR, Resolution 3/2021, “*Climate Emergency: Scope of Inter-American Human Rights Obligations*” (2021), §20.

Interveners submit that States must not *refoule*, or forcibly return individuals, to their country of origin or other countries where they face particular risks or threats related to climate change, in accordance with their obligations under international law.

178. It should be noted at the outset that several instruments provide *non-refoulement* protection to persons in a situation of human mobility in the context of disasters and climate change who do not meet the Refugee Convention definition of refugee. These include *non-refoulement* protection under the CAT and the ICCPR, and several of the rights discussed in the section entitled “Additional Protection” below, which find elaboration in the ICCPR and ICESCR.

(i) *Non-refoulement under International Human Rights Law*

179. The Interveners submit that States receiving displaced persons are under an obligation not to return, or *refoule*, an individual to a country where his or her life would be at risk, or would be subjected to cruel, inhuman or degrading treatment as a result of climate change.

180. In addition to the Refugee Convention, the principle of *non-refoulement* is embodied in a wide range of treaties. It has the same fundamental core, albeit expressed in slightly different terms across different instruments.²⁷⁷ Although the texts of the treaties differ in terms of the focal harms (for example, the Refugee Convention is focused on *non-refoulement* to persecution on specified grounds, while the CAT prohibits *non-refoulement* to torture), the duty of *non-refoulement* is similar in all cases. It prohibits return to serious human rights violations, unless the risk in question is not sufficiently “*real*.”²⁷⁸

(a) The IACtHR has recognised that “*within the framework of the American Convention, other provisions on human rights such as the prohibition of torture and other cruel, inhuman, or degrading punishment or treatment, recognized in Article 5 of the American Convention, provide a solid base of protection against return.*”²⁷⁹

(b) The CAT prohibits *refoulement* “*where there are substantial grounds for believing that he would be in danger of being subjected to torture*”, while the Convention on Enforced Disappearances prohibits *refoulement* “*where there are substantial*

²⁷⁷ Costello, C., and Foster, M., *Non-refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test*, *Netherlands Yearbook of International Law* (2016), p. 283.

²⁷⁸ IAtCHR, Advisory Opinion OC-25/18, “*The Institution of Asylum and its Recognition as a Human Right in the Inter-American System of Protection*”, §197. See also UNHRC, General Comment No. 31, “*Nature of the General Legal Obligation Imposed on States Parties to the Covenant*”, 26 May 2004, §12; and *AA v SSHA* [2023] EWCA Civ 745.

²⁷⁹ IAtCHR, Advisory Opinion OC-25/18, “*The Institution of Asylum and its Recognition as a Human Right in the Inter-American System of Protection*”, §197.

*grounds for believing that he or she would be in danger of being subjected to enforced disappearance.*²⁸⁰

(c) The ICCPR is interpreted as prohibiting return where there “*are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 [right to life] and 7 [right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment]*.”²⁸¹

(d) Under the ECHR, while in the main *non-refoulement* concerns risks of treatment contrary to Article 3 ECHR (torture, inhuman and degrading treatment), flagrant denials or breaches of other rights may also trigger *non-refoulement*.²⁸²

181. The principle of *non-refoulement* is also a norm of customary international law. As stated by the Canadian Supreme Court in *Mason v the Minister of Citizenship and Immigration*: “*Non-refoulement is a cardinal principle of international refugee law, most prominently expressed in Article 33 of the Refugee Convention and recognized as a norm of customary international law*” (emphasis added).²⁸³

182. The UNHRC’s landmark ruling in *Teitiota v New Zealand* (the first decision by a UN human rights treaty body on a complaint by an individual seeking asylum protection from the effects of climate change) recognised that the effects of climate change may put people’s lives at risk, thereby triggering State Parties’ *non-refoulement* obligations.²⁸⁴ The author of the communication claimed that New Zealand had violated his right to life under Article 6 ICCPR by rejecting his application for recognition of protected person status under the domestic immigration law (which applied Articles 6 and 7 ICCPR), and removing him to the Republic of Kiribati, which was suffering from the effects of rising sea levels.²⁸⁵ The Committee stated that State Parties must not extradite, deport, expel or otherwise remove a person from their territory when there are substantial grounds for believing that there is a real risk of irreparable harm to a person’s life, as contemplated by Article 6 ICCPR,

²⁸⁰ Convention against Torture, Article 16(1).

²⁸¹ UNHRC, General Comment No. 31, “*Nature of the General Legal Obligation Imposed on States Parties to the Covenant*”, 26 May 2004, §12.

²⁸² *Soering v. United Kingdom*, ECtHR, No. 14038/88, 7 July 1989; McAdam, J., “*Complementary Protection in International Refugee Law*” (2007), pp.136–172.

²⁸³ *Mason v the Minister of Citizenship and Immigration* [2023] SCC 2, §11.

²⁸⁴ UNHRC, *Teitiota v New Zealand*, CCPR/C/127/D/2728/2016, 7 January 2020. See also Foster, M. and McAdam, J., “*Analysis of ‘Imminence’ in International Protection Claims: Teitiota v New Zealand and Beyond*” (2022) UNSWLRS 31.

²⁸⁵ *Ibid.*, §§1-3.

and/or a real risk that the person will be subjected to cruel, inhuman or degrading treatment, as contemplated by Article 7 ICCPR.²⁸⁶

183. The Committee made the following general observations regarding the right to life under Article 6 ICCPR (the Article on which the author had pinned his complaint to the Committee) in the context of the climate emergency:

- (a) Environmental degradation can compromise effective enjoyment of the right to life, and severe environmental degradation may adversely affect an individual's well-being and lead to a violation of Article 6 ICCPR.²⁸⁷ It is also worth noting in this regard the comments of the UNHRC in *Billy v Australia*, which stated that "*environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.*"²⁸⁸
- (b) The right to life must be interpreted broadly as including the right to enjoy a life with dignity and to be free from acts or omissions that would cause the individual an unnatural or premature death.²⁸⁹
- (c) The right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life, and States may be in violation of Article 6 even if those threats and situations do not result in the loss of life.²⁹⁰ The Committee further noted that "*environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.*"²⁹¹
- (d) Individuals claiming to be victims of a violation by a State party of Article 6 ICCPR must demonstrate that the State party's actions resulted in a violation of their right

²⁸⁶ Ibid., §9.3. See also UNHRC, General Comment No. 31, "*Nature of the General Legal Obligation Imposed on States Parties to the Covenant*", 26 May 2004, §12.

²⁸⁷ Ibid., §9.5. The Committee cited the following: UNHRC, *Portillo Cáceres et al. v. Paraguay*, CCPR/C/126/D/2751/2016, §7.4; IACtHR, Advisory Opinion OC-23/17, "*The Environment and Human Rights*", 15 November 2017, §47; IACtHR, *Kawas Fernández v. Honduras* (Merits, reparations and costs), Judgment of 3 April 2009, §148; 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), §3 (States' responsibilities to protect life "*extend to preventive steps to preserve and protect the natural environment, and humanitarian responses to natural disasters, famines, outbreaks of infectious diseases, or other emergencies*"); ECtHR, *Cordella and Others v. Italy*, App. No.54414/13 and 54264/15, Judgment of 24 January 2019, §157 (serious environmental harm may affect individuals' well-being and deprive them of the enjoyment of their domicile, so as to compromise their right to private life).

²⁸⁸ UNHRC, *Billy v Australia*, §8.3. See also UNHRC, *Teitiota v New Zealand*, §9.4.

²⁸⁹ UNHRC, *Teitiota v New Zealand*, §9.4. See also UNHRC, *Billy v Australia*, §§8.3-8.4.

²⁹⁰ UNHRC, *Teitiota v New Zealand*, §9.4, citing UNHRC, *Portillo Cáceres et al. v. Paraguay*, §7.3.

²⁹¹ Ibid., §9.4, citing UNHRC, General Comment No. 36, "Article 6: Right to Life", CCPR/C/GC/36, 3 September 2019, §62.

to life that was specific to them as individuals, or presented an existing or imminent threat to their enjoyment of this right.²⁹²

184. The UNHRC set out the following principles in respect of violations of Article 6 ICCPR in the context of climate displacement, with additional observations in respect of Article 7 ICCPR:

- (a) State parties are under an obligation not to extradite, deport, expel or otherwise remove a person from their territory when there are substantial grounds for believing that there is a real risk of irreparable harm such as that contemplated by Articles 6 and 7 ICCPR.²⁹³
- (b) The risk must be personal; it cannot derive merely from general conditions in the State in question, except in the most extreme cases or where the individual is particularly vulnerable. In this regard, the Interveners submit that the threats facing entire populations in small island States facing rising sea levels may in certain circumstances amount to such extreme cases, and in such contexts, vulnerable groups will often be disproportionately threatened by such general conditions.
- (c) The extent to which the anticipated harm in the receiving State may be imminent goes only to the assessment of whether the individual faces a “*real risk*.”²⁹⁴
- (d) The obligation not to extradite, deport or otherwise transfer pursuant to Article 6 ICCPR may be broader than the scope of the principle of *non-refoulement* under international refugee law, since it may also require the protection of persons who do not meet the definition of refugee under the Refugee Convention (as discussed below).²⁹⁵

185. In *Teitiota*, the majority (with one Committee member dissenting) found that the information available to it did not indicate that when the author’s removal occurred, “there was a real and reasonably foreseeable risk that he would be exposed to a situation of indigence, deprivation of food, and extreme precarity that could threaten his right to life,

²⁹² Ibid., §8.4, citing UNHRC, *Aalbersberg et al. v. the Netherlands*, CCPR/C/87/D/1440/2005, §6.3; UNHRC, *Bordes and Temeharo v. France*, CCPR/C/57/D/645/1995, §5.5.

²⁹³ Ibid., §9.3, citing UNHRC, General Comment No. 31, “*Nature of the General Legal Obligation Imposed on States Parties to the Covenant*”, 26 May 2004, §12.

²⁹⁴ Ibid., §8.5.

²⁹⁵ Ibid., §9.3. See also UNHRC, General Comment No. 36, “*Article 6: Right to Life*”, CCPR/C/GC/36, 3 September 2019, §31.

including his right to a life with dignity."²⁹⁶ Nevertheless, the UNHRC established important principles to which States must have regard when assessing the refugee claims of persons displaced in the context of climate change.

186. Specifically, States are under an obligation pursuant to Articles 6 and 7 ICCPR, and the customary international law principle of *non-refoulement*, not to return individuals to their country of origin where to do so would expose them to a real risk to their life or cruel, inhumane or degrading treatment, in accordance with the principles set out above. Moreover, in the Interveners' submission, the Committee's decision in *Teitiota* (underscored by its wider decisions on the ICCPR-protected rights in the context of climate change) indicates that States must not *refoule* individuals where to do so would violate their corollary rights to life and protection from inhumane or degrading treatment.
187. It is worth briefly considering the Committee's comments in *Teitiota* (and mirrored in *Billy*) that, while it accepted that the sending State was likely to become uninhabitable within 10 to 15 years as a result of sea-level rises, this timeframe "*could allow for intervening acts by Kiribati, with the assistance of the international community to take affirmative measures to protect and if necessary, relocate its population.*"²⁹⁷ The Committee noted that New Zealand's authorities had "*thoroughly examined*" the issue and found that the Republic of Kiribati was taking adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms, and that it was not in a position to conclude that New Zealand's assessment had been clearly arbitrary or erroneous.²⁹⁸
188. The Interveners submit that, in order to comply with their obligations under international human rights law, States must, when assessing asylum claims, rigorously consider detailed expert evidence of adaptation measures underway in sending States, and the likely effectiveness of any such measures in reducing vulnerabilities relevant to the individual in question, together with any delays or omissions in the implementation of plans (see, e.g., *Billy* at §8.12). However, any such analysis should apply the precautionary principle, and lack of scientific certainty should not relieve States of their obligations to those displaced by climate change. Furthermore, as noted in *Teitiota*, "*given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with*

²⁹⁶ Ibid., §9.9.

²⁹⁷ Ibid., §9.12. See also UNHRC, *Billy v Australia*, §8.9.

²⁹⁸ Ibid., §9.12.

dignity before the risk is realized" (emphasis added).²⁹⁹ In the Interveners' submission, this is a fundamental consideration which must be properly interrogated and given full weight, both by authorities considering asylum claims, and courts considering complaints of human rights violations.

189. Finally, and for the avoidance of doubt, the Interveners underline that as a matter of principle, there is nothing inherent in the 'real risk' test under international human rights law (or the 'well-founded fear' test of international refugee law discussed above) that suggests that harm must be imminent in order for States' protection obligations to be engaged. As noted by Foster and McAdams, both tests "*are sufficiently open-textured to encompass the evolving nature of many contemporary forms of slower-onset harms which may present less immediate, but no less serious, risks to human rights.*"³⁰⁰
190. In a disaster context, it is often impossible to draw a hard line separating those forced from their homes by slow or sudden-onset hazards and those who move voluntarily. This difficulty arises for two reasons:
- (a) **First**, as slow-moving hazards, such as sea-level rise or drought, occur over longer periods of time, it becomes more difficult to determine whether displacement is caused by that hazard, or other contemporaneous factors. Communities living in certain areas, such as low-lying coastal areas, small island States and Arctic ecosystems, are more exposed to slow-onset events and therefore at higher risk of disaster displacement of this nature.³⁰¹
 - (b) **Second**, the choice to abandon one's home, even temporarily, is often determined by existing structural factors, including access to assistance, medical care, and evacuation routes; existing familial and social networks; economic resources and access to liquid assets; perceived and real vulnerability to present and future disasters; and cultural or community ties to the land. The more an individual is affected by these factors, the smaller their range of available "choices" to respond to a disaster and its impacts.³⁰² Further, the temporal assessment of a "*real risk of serious harm*" sufficient to prohibit *refoulement* should be sensitive to the particular

²⁹⁹ Ibid., §9.11.

³⁰⁰ Foster, M. and McAdam, J., "Analysis of 'Imminence' in International Protection Claims: *Teitiota v New Zealand and Beyond*" (2022), UNSWLRS 31.

³⁰¹ UNGA, Special Rapporteur on the Human rights of Internally Displaced Persons, "*Report on Internal Displacement in the Context of the Slow-onset Adverse Effects of Climate Change*", 21 July 2020, p. 11.

³⁰² Ibid., p.8.

position of children. In the refugee context, decision makers have at times been willing to look far into the future - for example, a decade, when considering a young child's protection needs.³⁰³ This Court is respectfully invited to favour the approach of the ECtHR on the concept of imminence over the approach of the Human Rights Committee (see §§90-91 above). A temporal definition of "imminence" is inappropriate given the threat to future generations, the threat to entire populations, and the vulnerabilities of certain groups.

- (c) In order to address these intersecting challenges and recognising that displacement due to slow-onset climate events is impacted by structural inequality and the vulnerabilities of particular groups, the principle of non-discrimination examined in Section E invites a holistic understanding of causality that is not limited to situations of sudden-onset disasters.³⁰⁴

191. States should put in place mechanisms and allocate resources to ensure that the protection needs of all persons in a situation of human mobility in the context of disaster and climate change can be assessed individually and with due process.³⁰⁵
192. States should establish mechanisms for entry and stay for persons in a situation of human mobility in the context of disasters or climate change, in order to ensure the principle of *non-refoulement*.³⁰⁶ Administrative and legislative mechanisms should be set up to grant legal status to those who cannot return, in the form of temporary, long-term or permanent status.³⁰⁷
193. The mechanisms in place must prevent peremptory *refoulement* (where an individual is not able to obtain an assessment of the risk of *refoulement* in the receiving State and is liable to be removed), *de jure refoulement* (where the risk is assessed in the receiving State but that process is unfair and/or applies excessively narrow criteria) and *de facto refoulement* (where the receiving State does not actively assess the risk but conditions,

³⁰³ 1703914 (Refugee) [2018] AATA 3088, 8 June 2018 (Aust.), §75. The case concerned the potential risk to an Ethiopian child (who was a toddler at the time of the decision) of being subjected to corporal punishment at school.

³⁰⁴ UNGA, Special Rapporteur on the Human rights of Internally Displaced Persons, "*Report on Climate Change and Internal Displacement*", 9 August 2011, p.9.

³⁰⁵ By parity of reasoning with the approach taken in CAT, General Comment No. 4 (2017) on "*The Implementation of Article 3 of the Convention in the Context of Article 22*", §13.

³⁰⁶ See e.g., IACtHR, Advisory Opinion OC-18/03, "*Juridical Condition and Rights of the Undocumented Migrants*", 17 September 2003, §119; IACtHR, Pacheco Tineo Family v. Bolivia (Preliminary Objections, Merits, Reparations and Costs), Judgment of 25 November 2013, §149. Also, by parity of reasoning with the approach advocated for in the Report of the Special Rapporteur on Torture, A/HRC/37/50, 26 February 2018, §40. See also CAT, General Comment No. 4 (2017) on "*The Implementation of Article 3 of the Convention in the Context of Article 22*", §22.

³⁰⁷ By parity of reasoning with the approach advocated for in CAT, *Seid Mortesa Aemei v Switzerland* (1997), No. 34/1995, 29 May 1997.

including delays, are so problematic that asylum-seekers are effectively compelled to leave).

194. Returning a person to a country in a state of climate emergency may result in the violation of that person's rights. Given that the principle of *non-refoulement* applies even before an assessment of the risk has been undertaken, the principle of *non-refoulement* prevents States from returning climate-related asylum-seekers to their country of origin or third country where those persons are at risk of *refoulement*.

(2) Asylum Seekers in the Context of Disasters and Climate Change: The Definition of 'Refugee' under International Law

195. States, in accordance with Article 33 of the Refugee Convention, must not *refoule* any person who meets the definition of refugee under Article 1A(2) once the individual is in the State's effective control. Article 33 provides: "*No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*"
196. The Interveners submit that some persons displaced in the context of disasters and climate change are in principle capable of satisfying the definition of "refugee" as contained in Article 1A(2) of the Refugee Convention and/or the regional definition adopted in the Cartagena Declaration. Accordingly, the Interveners submit that States must properly assess all refugee applications in accordance with the principles set out below.

(i) The Refugee Convention

197. Article 1A(2) of the Refugee Convention provides that the term "refugee" shall apply to any person who:

"owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

198. The Interveners submit that persons displaced in the context of disasters and climate change may have a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, and therefore fall within the protective scope of the Refugee Convention. In that regard, and as noted above,

the Interveners endorse and build upon the UNHCR Climate Change Guidance. As the Guidance highlights, there is a clear link between climate change and the heightened risk of persecution suffered by particular groups.

199. Taking each limb of the definition of refugee under the Refugee Convention in turn:

- (a) **Persecution:** There is no universally accepted definition of “*persecution*”³⁰⁸, and much less one which excludes a person who is displaced in the context of climate change. It can be inferred from Article 33 of the Refugee Convention that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group amounts to persecution, while other serious violations of human rights, for the same reasons, would also constitute persecution.³⁰⁹ As set out above, it has been recognised (not least in the IACtHR 2017 Advisory Opinion, e.g., at §§47-58) that environmental degradation and the adverse effects of climate change impact the real enjoyment of human rights. The UNHCR’s Climate Change Guidance makes clear that a person’s membership of a particular group which falls under the protective purview of the Refugee Convention may make them the subject of persecution. In addition, as explained in Section E above, climate change subjects at-risk/vulnerable groups to a heightened risk of discrimination and human rights abuses.
- (b) **Reasons of:** It has also been recognised that the existence and/or severity of such impacts may be causally connected to, or in the words of Article 1A(2), “*for reasons of*”, an individual’s membership of a particular social group. For example, the UNHRC has expressed concern that “*while these implications affect individuals and communities around the world, the adverse effects of climate change are felt most acutely by those segments of the population that are already in vulnerable situations*”

³⁰⁸ UNHCR, “*Handbook on Procedures and Criteria for Determining Refugee Status*” (2019), §51. Available at: <https://www.unhcr.org/media/handbook-procedures-and-criteria-determining-refugee-status-under-1951-convention-and-1967>.

³⁰⁹ Ibid. See in the UK context, *R v Secretary of State for the Home Department, ex p Sivakumaran* [1988] AC 958; the Canadian case of *the Minister of Public Safety and Emergency Preparedness v Medhanie Aregawi Weldemariam* (2021), §§6-7: “*The Preamble to the Refugee Convention embeds it within a broader human rights framework, grounded in the Charter of the United Nations and the Universal Declaration of Human Rights. As this Court stated in [Canada v. Ward, [1993] 2 S.C.R. 689], “[u]nderlying the Convention is the international community’s commitment to the assurance of basic human rights without discrimination. In Pushpanathan v. Canada [1998] 1 SCR 982], this Court noted “[t]he human rights character of the Convention” and held that “[t]his overarching and clear human rights object and purpose is the background against which interpretation of individual provisions must take place”. In later cases such as [Németh v. Canada (Minister of Justice), 2010 SCC 56] and [B010 v. Canada (MCI), [2015] 3 SCR 704], this Court noted that the IRPA, which expressly incorporates certain provisions of the Refugee Convention, must be construed and applied in a manner that is consistent with Canada’s obligations under international treaties and principles of international law, including international human rights law”; United Nations, “*Charter of the United Nations*”, 24 October 1945, 1 UNTS XVI; UN General Assembly, “*Universal Declaration of Human Rights 1948*”, 10 December 1948, 217 A (III).*

owing to factors such as geography, poverty, gender, age, indigenous or minority status, national or social origin, birth or other status and disability.”³¹⁰

(c) In addition, the UNHCR Climate Change Guidance notes “*in the risk reduction/preparedness phase, before a disaster occurs, or in the aftermath of a disaster, particular populations may be left out, leading to some being disproportionately affected or even targeted.*”³¹¹ As a result, “*members of such populations may have a well-founded fear of being persecuted, for example, as resources may diminish and access may be denied in a discriminatory manner, amounting to persecution for one or more Convention grounds.*”³¹² Certain groups are particularly vulnerable in the wake of climate disaster, where indicia for discrimination such as membership of a marginalised group and structural poverty intersect with the effects of climate events and displacement, as set out in Section E.

(d) **Well-founded fear:** “*Fear*” depends on the personality/circumstances of the applicant.³¹³ However, this is combined with an objective element in that the fear must be “*well founded*”.³¹⁴ When assessing whether a person has a well-founded fear of persecution, the State must carry out a forward-looking assessment, taking into account that the impacts of climate change may, as highlighted by the UNHCR, “*emerge suddenly or gradually; overlap temporally and geographically; vary in intensity, magnitude and frequency; and persist over time*”.³¹⁵ At the same time, mitigation and adaption efforts in the relevant country - and the sufficiency of the same for the protection of particular groups- must be taken into account.³¹⁶

200. Furthermore, persons displaced in the context of disasters and climate change who have a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion may be unable, or unwilling (owing to that

³¹⁰ UNHRC, Resolution 35/20, “*Human Rights and Climate Change*”, 22 June 2017, p.2.

³¹¹ UNHCR, “*Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters*”, 1 October 2020, §10.

³¹² Ibid.

³¹³ UNHCR, “*Handbook on Procedures and Criteria for Determining Refugee Status*” (2019), §40; Harrison et al., “*Macdonald’s Immigration Law and Practice*” (10th Ed.), §12.27; in the English context, *R v Secretary of State for the Home Department, ex p Singh* [1987] Imm AR 489, DC.

³¹⁴ UNHCR, “*Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters*”, 1 October 2020, §§7-9.

³¹⁵ Ibid., §9.

³¹⁶ Ibid., §§7-10.

fear), to avail themselves of protection by their home State or other States. In such circumstances, States have an obligation to:

- (a) Conduct an assessment of whether the individual has a well-founded fear of persecution requires consideration of the extent to which the State in question is complying with its mitigation and adaptation obligations, as discussed in section D(I)(iii)-(iv).
- (b) Importantly, international law does not require threatened individuals to exhaust all options within their own country before seeking asylum. For example, the claimant is not required to demonstrate that they sought internal relocation as a preliminary step, before seeking international protection.³¹⁷ In particular, while the adverse effects of climate change and disasters may be felt in only one part of a country, affected people may not be able to relocate to other parts of the country. This may be particularly so if the State is unable or unwilling to provide adequate protection for certain populations in accordance with the principles of non-discrimination set out above in Section E, or has a record of failing to comply (or lacks the means or structural capacity to comply) with the requirements of the UN Guiding Principles on Internal Displacement referred to above.³¹⁸

201. In light of the above, those who are the subject of cross-border displacement may, in principle, have a valid claim for refugee status under the Refugee Convention. The link between climate change and persecution cannot be disputed in light of the UNHCR Climate Guidance and the detailed considerations in Section E above on the realities of vulnerable groups.

(ii) The 1984 Cartagena Declaration

202. In addition, those fleeing from climate disasters can in principle fall within the regional definition of refugee. The Cartagena Declaration significantly widened the definition of a refugee to include “*persons who have fled their countries because their life, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously*”

³¹⁷ See also UNHCR, “Guidelines on International Protection No. 4: ‘Internal Flight or Relocation Alternative’ Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees”, 23 July 2003, HCR/GIP/03/04, §4.

³¹⁸ UNHCR, “Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters”, 1 October 2020, §12.

disturbed public order” (emphasis added).³¹⁹ The context and purpose of the Cartagena Declaration was the need to “enlarge[e] the concept of refugee”, “in view of the experience gained from the massive flows of refugees in the Central American area”, and “bearing in mind, as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention (article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights.”³²⁰ Even though the Declaration is not a treaty within the meaning of Article 1(a) of the Vienna Convention on the Law of Treaties (“VCLT”), it has been recognised by the General Assembly of the OAS³²¹ and it has been widely adopted by States in the Americas.³²²

203. This Court has re-affirmed that the purpose of the Cartagena Declaration was to widen the scope of international protection in the context of cross-border displacement. Relevantly, this Court has:

- (a) Recognised that the effect of the Cartagena Declaration was to “expand” the definition of refugee³²³ and it acknowledged the prevailing “state practices” in the region, “which have consisted in granting international protection as refugees to persons fleeing their country of origin due”, *inter alia*, “to circumstances which have seriously disturbed public order.”³²⁴
- (b) Repeatedly affirmed the purpose of the Cartagena Declaration and the importance of protecting those “whose need for international protection is evident”, without limitation as to the type of cross-border displacement. For example, its 2014

³¹⁹ Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, “Cartagena Declaration on Refugees” (22 November 1984), Paragraph III.

³²⁰ *Ibid.*

³²¹ Cf. General Assembly of the OAS, Resolution AG/RES. 774(XV-0/85), *Legal situation of refugees repatriated, and displaced persons in the American Hemisphere*, 9 December 1985, §3.

³²² All signatory states to the Inter-American Convention have ratified or acceded to the 1951 Refugee Convention and its 1967 Protocol. In addition, the following have adopted the expanded definition established in the Cartagena Declaration in its national legislation: Argentina, Belize, Bolivia, Brazil, Chile, Colombia, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, and Uruguay.

³²³ IACtHR, Advisory Opinion OC-21/14, “Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection”, 19 August 2014, §79. See also IACtHR, Advisory Opinion OC-25/18 “The Institution of Asylum, and its Recognition as a Human Right under the Inter- American System of Protection (interpretation and scope of Articles 5, 22(7) and 22(8) in relation to Article 1(1) of the American Convention on Human Rights)”, 30 May 2018, §68.

³²⁴ IACtHR, Advisory Opinion OC-21/14, “Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Inter-American Court of Human Rights”, 19 August 2014, §79: “the developments produced in refugee law in recent decades have led to state practices, which have consisted in granting international protection as refugees to persons fleeing their country of origin due to generalized violence, foreign aggression, internal conflicts, massive violations of human rights, or other circumstances which have seriously disturbed public order.” See also IACtHR, Advisory Opinion OC-25/18, “The Institution of Asylum, and its Recognition as a Human Right under the Inter- American System of Protection (interpretation and scope of Articles 5, 22(7) and 22(8) in relation to Article 1(1) of the American Convention on Human Rights)”, 30 May 2018), §68: “The term ‘refugee’ also applies to persons who have fled their countries of origin because their life, security or freedom have been threatened by widespread violence, foreign aggression, internal conflict, massive human rights violations or other circumstances which have seriously disturbed public order.”

Advisory Opinion rendered in the context of a request made to “*determine the precise obligations of the States in relation to the possible measures to be adopted regarding children, their immigration status or the status of their parents in light of the interpretation of*” the ACHR, the American Declaration of the Rights and Duties of Man, and the Inter-American Convention to Prevent and Punish Torture, this Court observed:

“Bearing in mind the progressive development of international law, the Court considers that the obligations under the right to seek and receive asylum are operative with respect to those persons who meet the components of the expanded definition of the Cartagena Declaration, which responds not only to the dynamics of forced displacement that originated it, but also meets the challenges of protection derived from other displacement patterns that currently take place. This criterion reflects a tendency to strengthen in the region a more inclusive definition that must be taken into account by the States to grant refugee protection to persons whose need for international protection is evident” (emphasis added).³²⁵

- (c) Affirmed in its 2018 Advisory Opinion rendered in the context of a request concerning, *inter alia*, the specific duties of States under the Refugee Convention (recognised in Article 22(7) ACHR), read in conjunction with the Cartagena Declaration, that “*the broadening of the definition of refugees is not only a response to the dynamics of forced displacement that gave rise to it, but also satisfies the protection challenges arising from other patterns of displacement that are occurring today.*”³²⁶

204. As explained in Section B, some Caribbean States, particularly Haiti, suffer from serious climate emergencies. The UNHCR has likewise noted the pressing threats associated with climate displacement.³²⁷ As one author put it, “*the [1984 Declaration] demonstrate[s] a willingness to accept a more expansive definition of refugee that, although not originally designed to, may offer protection to EDPs.*”³²⁸

205. In light of the above, the Interveners submit that this Court should hold that climate disasters are such “*circumstances*” that could “*seriously disturb public order*”. The Interveners further submit that the concept of “*public order*” is engaged where the State is paralysed or unable to effectively function, particularly when fundamental human rights are at stake. This may arise for a number of reasons effecting the exercise of its legal,

³²⁵ IACTHR, Advisory Opinion OC-21/14, “*Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Inter-American Court of Human Rights*”, 19 August 2014, §79.

³²⁶ IACTHR, Advisory Opinion OC-25/18, *supra* n.324, §68.

³²⁷ UNHCR, “*Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters*”, 1 October 2020, §14.

³²⁸ Havard, B., “*Seeking Protection: Recognition of Environmentally Displaced Persons under International Human Rights Law*”, 18 VILL. ENVTL. L.J. 65 (2007).

social, political, administrative, or other functions. This interpretation is supported by the following.

206. **First**, in accordance with Article 3(1) VCLT, the ordinary meaning of the term “public order” is broad enough to include protection from adverse effects of climate disasters. On the one hand, “public” is defined in the Merriam-Webster Dictionary as “of, relating to, or affecting all the people or the whole area of a nation or state.”³²⁹ On the other hand, “order” is defined as “the state of peace, freedom from confused or unruly behavior, and respect for law or proper authority.”³³⁰ This entails that where the State does not enjoy a state of peace, be it for reasons of war or natural/climate disaster, public order has come to be disturbed. On its ordinary meaning, therefore, climate disasters are capable, in principle, of resulting in public disorder. Consequently, a good faith application of international principles of treaty interpretation to the phrase “events seriously disturbing public order” does not support a distinction between natural events and other causes of public disorder.³³¹ The UNHCR has defined a disaster as “[a] serious disruption of the functioning of a community or a society at any scale due to hazardous events interacting with conditions of exposure, vulnerability and capacity, leading to one or more of the following: human, material, economic and environmental losses and impacts.”³³² Furthermore, recent decades inform us that natural disasters have the potential to disturb public order and the effective functioning of a State as much as, if not more than, financial crises, organised crime, foreign aggression, or internal conflicts. In fact, “[t]he effect of the disaster... is often widespread and could last for a long period of time” and it “may test or exceed the capacity of a community or society to cope, using its own resources, and therefore may require assistance from external sources, which could include neighbouring jurisdictions, or those at the national or international levels.”³³³

³²⁹ Merriam-Webster Dictionary: “public”. Available at: <https://www.merriam-webster.com/dictionary/public>.

³³⁰ Merriam-Webster Dictionary: “order”. Available at: <https://www.merriam-webster.com/dictionary/order>.

³³¹ According to UNHCR, “Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters”, 1 October 2020, §16: “Whether a disturbance to public order stems from human or other causes is not determinative for concluding a serious disturbance of public order; the central concern is the effect of a given situation. Accordingly, the principal inquiry at the time of assessing a claim for refugee status is whether a serious disturbance to public order exists as a matter of fact, based on an assessment of available evidence.” See also Warren, P., “Forced Migration After Paris COP21: Evaluating The “Climate Change Displacement Coordination Facility”, 116 *Colombia Law Review* 2103, 2123 (2016); Kolmannskog, V., “We Are in Between: Case Studies on the Protection of Somalis Displaced to Kenya and Egypt during the 2011 and 2012 Drought”, 2 *International Journal of Social Science Studies* (2013). Naldi, G. claims that the very purpose of the expanded refugee definition was to “take account of the particular difficulties facing Africa, such as wars of national liberation and environmental catastrophes such as drought and famine which had given rise to flight en masse and displaced whole populations” (cited Okoth-Obbo, G., “Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa”, 20(1) *Refugee Survey Quarterly* (2001), pp. 79, 87).

³³² United Nations Office for Disaster Risk Reduction, “Terminology: ‘disaster’”. Available at: <https://www.undrr.org/terminology/disaster>.

³³³ *Ibid.*

207. **Second**, this interpretation of “public order” is consistent with UNHCR’s guidance. According to the UNHCR’s Climate Change Guidance, the notion of “*public order*” reflects the “*prevailing level of the administrative, social, political and moral order as assessed according to the effective functioning of the State in relation to its population and based on respect for the rule of law and human dignity to such an extent that the life, security and freedom of people are protected.*”³³⁴ Accordingly, a “*disturbance*” to public order “*occurs when there is a disruption to the effective, normal and stable functioning of this order*” (emphasis added).³³⁵ Indeed, the UNHCR guidelines affirm that “[w]hether a disturbance to public order stems from human or other causes is not determinative for concluding a serious disturbance of public order; the central concern is the effect of a given situation. Accordingly, the principal inquiry at the time of assessing a claim for refugee status is whether a serious disturbance to public order exists as a matter of fact, based on an assessment of available evidence” (emphasis added).³³⁶
208. In addition, the Interveners’ proposed interpretation of public order is consistent with the UNHCR’s 2023 Guidance on the meaning of public order under a materially identical definition under the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa. As to this:
- (a) The guidance takes the principled stance that “*events that seriously disturb public order*” exist “*irrespective of whether they result from natural hazards, disasters, conflict or other drivers.*”³³⁷
 - (b) The guidance affirms that “*both the ordinary meanings of the English ‘public order’ and French ‘ordre public’ in domestic public law usages can... be said to refer to a state of societal stability, and the maintenance of public peace/tranquility, public safety, public security, and public health (at least in the narrow sense where public health impacts on public safety and hygiene, and hence public health is from here on considered to be captured under the concept of “public safety”).*”³³⁸ In particular, public safety “*implies the protection of individuals within its effective control from*

³³⁴ UNHCR, “Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions”, 2 December 2016, §§56, 78. See also “Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters”, 1 October 2020, §16.

³³⁵ See also “Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters”, 1 October 2020, §16.

³³⁶ Ibid.

³³⁷ UNHCR, “Assessing serious disturbances to public order under the 1969 OAU Convention, including in the context of disasters, environmental degradation and the adverse effects of climate change”, 27 September 2023, p.10.

³³⁸ Ibid., p.36.

*danger, harm and hazardous conditions, whether that relates to threats of harm caused by the actions of individuals, groups, infrastructure, the environment, the State itself, or other States.*³³⁹ As for “public security”, it “*recognizes that fundamental to State security is that individuals within that State can live in safety and with dignity*”.³⁴⁰ Furthermore, the protection of individual rights, including the right to dignity, is fundamental to public order, as it is “*integral to societal stability*.”³⁴¹

- (c) The guidance reaffirms that “*a disturbance to public order will meet the threshold of “serious” where it involves a widespread or generalised threat to the rights to life, physical integrity and/or liberty of individuals in a society, such that the disturbance can be said to affect society at large, and the State is unable or unwilling to restore public order.*”³⁴²

209. **Third**, the Intervenors’ interpretation of “public order” is consistent with the decisional practice of international tribunals and national courts on the interpretation of the term “public order”:

- (a) Amongst the courts of regional States, a Brazilian court attempted to define “*public order*” and did so as follows: “*Public order is evidently the order of society from a moral perspective as much as a material one... public order is thus the organization of society...*”.³⁴³ In short, “public order” refers broadly to the organisation of public life and disruptions thereto.
- (b) Similarly, climate disasters are analogous to economic crises in that they produce similar effects, in particular in respect of the State’s ability to function effectively. For instance, Argentina submitted in the *Continental Casualty Company v. Argentine Republic* investment arbitration case that, “*within the concept of public order*” are to be included “*at least the protection of public security and other powers included within the State’s police power.*”³⁴⁴ In nearly all of its investment arbitration cases on the 2001 financial crisis, Argentina argued the necessity of taking certain measures

³³⁹ Ibid., p.38.

³⁴⁰ Ibid., p.39.

³⁴¹ Ibid., pp.40-41.

³⁴² Ibid., p.45.

³⁴³ Puente, J., “Exclusion and Expulsion of Aliens in Latin America”, *American Journal of International Law* 36 Am. J. Int’l Law, p. 252 (“L’ordre public, c’est évidemment l’ordre de la société considérée au point de vue moral comme au point de vue matériel, dans le domaine des idées comme dans celui des faits, d’ordre public, c’est donc l’organisation de la société, et par suite les lois qui l’intéressent sont celles qui régissent plus ou moins directement cette organisation.”).

³⁴⁴ *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award (5 September 2008) (Sacerdoti, Veeder, Nader), §85.

to maintain “*public order*”, by preventing its “*financial crisis*”, and the “*shut down of schools... [and] health services*” from leading to a “*catastrophic state failure*.”³⁴⁵

- (c) Threats to human life and health are public order events. For example, in *Philip Morris v. Uruguay*, Uruguay pleaded that the protection of citizens against the sanitary, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke was necessary to protect public order.³⁴⁶ This is, of course, not an unusual argument in Investor-State arbitration.
- (d) Non-Latin American countries likewise adopt a broad definition of “*public order*”. For example, the United States pleaded before a World Trade Organization (“**WTO**”) panel that legislative measures regulating activities that pose “*social, psychological dangers and law enforcement problems*” and that protect public morals and fight against organised crime and other forms of criminality were justified by the need to maintain “*public order*.”³⁴⁷ More generally, the United States clarified before the panel that the protection of the general welfare of the United States and its people was also a matter of public order.³⁴⁸ As explained above in Section E, climate disasters can often result in criminal activity, such as the trafficking of women and girls and other forms of violence.
- (e) To date, no international court has narrowed or restricted the scope of “*public order*”. In fact, a WTO panel considered that “*public order*” refers to “*the preservation of the fundamental interests of a society, as reflected in public policy and law*” and that “*fundamental interests can relate, inter alia, to standards of law, security and morality*.”³⁴⁹ As for the International Court of Justice, the “*exercise of public order activities*” consist generally in the “*provision of public services*”; accordingly, where the provision of public services is practically and severely impaired, the concept of public order is engaged.³⁵⁰ Investment tribunals, for their part, regard “[e]xtremely severe crises in the economic, political and social sectors” that “*threaten the total*

³⁴⁵ See e.g., *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006) (de Maekelt, Rezek, van den Berg), §219; *ibid.*, §§215-218; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award (11 June 2012) (Park, Kaufmann-Kohler, Remón), §482.

³⁴⁶ *Philip Morris Brand SARL, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (8 July 2016) (Bernardini, Born, Crawford), §105.

³⁴⁷ WTO, Report of the Panel, WT/DS285, “*United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*”, 10 November 2004, §§3.253, 3.278, 3.282, and 6.457.

³⁴⁸ *Ibid.*, §3.279.

³⁴⁹ *Ibid.*, §6.467.

³⁵⁰ ICJ, *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, §81.

collapse of the Government” as a degree of “*public disorder*.”³⁵¹ As explained above in Section B, the effects of climate change in the Caribbean often do result in the collapse of effective government.

210. **Fourth**, interpreting the term “*other*” in the phrase “*other circumstances which have seriously disturbed public order*” to include climate disasters is supported by the principle of *effet utile*. This principle dictates that treaty provisions should be interpreted in a way “*as to give them their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason and a meaning can be attributed to every part of the text*”.³⁵² Indeed, “*other*” is commonly defined as being synonymous with “*different or additional*.”³⁵³ Thus, the Interveners respectfully submit that the phrase “*other circumstances which have seriously disturbed public order*” in paragraph III of the Cartagena Declaration can only be given full weight and effect if it includes climate disasters.
211. **Fifth**, there is State practice granting refugee status and international protection to those fleeing natural disasters. For instance, Somalis fleeing the 2011 droughts in the Horn of Africa were awarded *prima facie* status under the expanded refugee definition under the OAU 1969 Convention in Kenya, which provides the same expanded definition of “refugee” as the Cartagena Declaration.³⁵⁴ Somalis fleeing during the 2011 drought were also awarded *prima facie* refugee status in Yemen, though Yemen is not a party to the OAU 1969 Convention.³⁵⁵ As one author argued, “*the facts that the famine threatened their lives, domestic authorities able to help them did not exist, and the ongoing conflict and violence greatly hindered international organizations’ capacity to protect and assist Somalis during the famine, justified considering them as victims of an event “seriously disturbing public order in either part or the whole” of the country that “compelled” them to seek refuge abroad.*”³⁵⁶ It is also worth noting that Ethiopia has explicitly accepted the

³⁵¹ See e.g., *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006) (de Maekelt, Rezek, van den Berg), §231.

³⁵² R. Gardiner, “*Treaty Interpretation*” (2008), p.64.

³⁵³ Merriam-Webster Dictionary: “*other*”. Available at: <https://www.merriam-webster.com/dictionary/other>.

³⁵⁴ Wood, T., “*Technical Paper: Protection And Disasters in the Horn of Africa: Norms And Practice For Addressing Cross-Border Displacement in Disaster Contexts*” (2014), n.145. Available at: https://disasterdisplacement.org/wp-content/uploads/2015/03/190215_Technical_Paper_Tamara_Wood.pdf. Representatives from government, UNHCR and refugee-related NGOs working in Kenya reported that the grant of *prima facie* status to Somalis in Kenya was based on the 1969 Convention, although it is difficult to identify exactly when or by whom the decision to grant status in this way was made. During field research by the author in 2012, some interviewees reported that the decision was made unilaterally by the Kenyan Government, others reported it was made by UNHCR, pursuant to the 2010 Eligibility Guidelines for Somalia. Yet others described the arrangement as the result of an agreement between the two.

³⁵⁵ *Ibid.*

³⁵⁶ *Ibid.*, pp.32-33.

applicability of the regional refugee criteria under Article I(2) of the OAU 1969 Convention in the context of disasters.³⁵⁷

212. In light of the foregoing, a good faith application of international principles of treaty interpretation to the phrase “*events seriously disturbing public order*” does not support a distinction between natural events and other causes of public disorder.³⁵⁸ Furthermore, the experience of the last 40 years makes it tolerably clear that natural disasters have the potential to disturb public order and the effective functioning of a State as much as, if not more than, financial crisis, organised crime, foreign aggression, or internal conflicts. In fact, “[t]he effect of the [climate] disaster... is often widespread and could last for a long period of time” and it “may test or exceed the capacity of a community or society to cope, using its own resources, and therefore may require assistance from external sources, which could include neighbouring jurisdictions, or those at the national or international levels.”³⁵⁹
213. For the avoidance of doubt, the Interveners do not contend that every case of cross-border displacement will result in a valid claim for international protection. Each case will turn on its own facts. It is ultimately a task for the administrative authorities and national courts to process and assess the admissibility/merits of a claim for international protection. However, on a proper interpretation of the Cartagena Declaration, some cases of cross-border displacements may result from disturbances to public order within the meaning of the instrument.

H. DUTY TO CO-OPERATE

214. The Interveners submit that States have a duty to co-operate to establish effective international systems to protect the rights of persons in a situation of human mobility in the context of disasters or climate change and to provide redress for them.³⁶⁰
215. In April 2023, the UNHRC’s Special Rapporteur’s Report on the promotion and protection of human rights in the context of climate change emphasised that the protection of

³⁵⁷ See The Nansen Initiative Global Consultation, “*Conference Report*”, October 2015, Statement made by Ethiopia at the Nansen Initiative Global Consultation: Nansen Initiative, p.107. Available at: <https://disasterdisplacement.org/wp-content/uploads/2015/02/GLOBAL-CONSULTATION-REPORT.pdf>.

³⁵⁸ *Supra*, n.332.

³⁵⁹ *Ibid.*

³⁶⁰ See UN, Report of the Special Rapporteur, “*The Promotion and Protection of Human Rights in the Context of Climate Change*”, A/HRC/53/34, 18 April 2023, §25, §66, §70; Paris Agreement, Articles 8 and 9.

individuals displaced across international borders requires appropriate international co-operation:

*“It is evident that a limited number of countries are facing an unfair and unjust burden in dealing with situations of people displaced across international borders due to climate change [...] It requires an international response, commensurate with the enormity of the issue, and a global sense of responsibility [...] it is now time for the international community to realize a responsibility to those displaced across international borders. Consistent with the Paris Agreement, the international community has a responsibility to find the necessary funding and technical and humanitarian support to assist those displaced across international borders due to climate change and uphold their rights.”*³⁶¹

216. Article 41 of the International Law Commission’s Articles on State Responsibility places a positive duty on States to co-operate to end serious breaches as defined in Article 40. To qualify as a serious breach, the breach must arise from a peremptory norm of general international law and must be serious in nature.³⁶² The IACtHR³⁶³ and the ECtHR³⁶⁴ have recognised the principle of *non-refoulement* as a peremptory norm of international law. The IACtHR has also observed that the right to life and the right not to be subject to torture or cruel, inhuman and degrading treatment are *jus cogens* norms.³⁶⁵ On that basis, the Interveners submit that States have a duty to co-operate, in the manner set out at §§217-222 below, to prevent other States from refouling persons in a situation of human mobility in the context of disasters or climate change who meet the expanded definition of refugee under the Refugee Convention and Cartagena Declaration advocated for in this Amicus; or where their return would threaten their right to life or constitute a situation amounting to torture or cruel, inhuman and degrading treatment.

³⁶¹ Ibid., §25.

³⁶² UN, “Materials on the Responsibility of States for Internationally Wrongful Act” (2nd Ed, 2023), Article 40. Available at: <https://www.icj-cij.org/sites/default/files/case-related/187/187-20230630-req-06-01-en.pdf>. The IACtHR has held that the obligations in Article 40 “arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values” (IACtHR, Advisory Opinion OC-26/20, “The Obligations in Matters of Human Rights of a State that has Denounced the American Convention on Human Rights and the Charter of the Organisation of American States”, 9 November 2020, §§103-104). The International Arbitral Tribunal has found that Article 41 “imposes upon all States an obligation not to recognize as lawful a situation created by a gross or systematic failure by the responsible State to fulfil an obligation arising under a peremptory norm of general international law” (PCA, Case No. 2017-06, Award (Preliminary Objections), 21 February 2020, §170).

³⁶³ IACtHR, Advisory Opinion OC-25/18, “The Institution of Asylum and its Recognition as a Human Right in the Inter-American System of Protection”, §181.

³⁶⁴ ECtHR, *Hirsi and Others v Italy*, App. No. 27765/09, 23 February 2012, Concurring Opinion of Judge Pinto de Albuquerque, §67: “the prohibition of refoulement is a principle of customary international law, binding on all States, even those not parties to the UN Refugee Convention or any other treaty for the protection of refugees. In addition, it is a rule of *jus cogens*, on account of the fact that no derogation is permitted and of its peremptory nature, since no reservations to it are admitted” (citing Article 53 of the Vienna Convention on the Law of Treaties and Article 42(1) Refugee Convention and Article VII(1) of the 1967 Protocol).

³⁶⁵ ICJ, *Belgium v. Senegal*, 20 July 2012, §99; IACtHR, *Fernán Ramírez v. Guatemala* (Merits, reparations, costs), §117; IACtHR, Advisory Opinion OC-18/03, “Juridical Condition and Rights of the Undocumented Migrants”, 17 September 2003, §§97-101.

217. The Interveners submit that States also have a broader duty to co-operate to protect persons in a situation of human mobility in the context of disasters or climate change. It is well established that States may have duties to co-operate under international law. The duty is recognised in treaties and soft law instruments, and is arguably a general principle of international law:

- (a) Article 26 of the Convention requires States to take measures through international co-operation to achieve the full realisation of the economic and social Convention rights. The obligation to co-operate is also explicitly recognised in the Convention on the Rights of the Child (Article 4), the Convention on the Rights of Persons with Disabilities (Article 32), the International Covenant on Economic, Social and Cultural Rights (Article 2(1)), applicable Caribbean Community (CARICOM) instruments, the United Nations Conventions on the Law of the Sea (Articles 123, 194 and 197), and the UN Charter.³⁶⁶
- (b) The duty to co-operate in the context of international development has been established and institutionalised through bilateral and multilateral agreements,³⁶⁷ and has been characterised by some developing countries as a principle of customary international law.³⁶⁸
- (c) The duty to co-operate in the context of international environmental law is well established in international declarations³⁶⁹ and treaties.³⁷⁰ This Court has also

³⁶⁶ UN Charter, Article 1(3): “To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian characters, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”; Oranye, N., and Aremu, A., “The Duty to Cooperate in State Interactions for the Sustainable use of International Watercourses” (2021), p.1.

³⁶⁷ Wolfrum, R., “International Law of Cooperation” in Max Planck Encyclopedias of International Law, p.1.

³⁶⁸ UN General Assembly, “Report of the 1966 Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States”, UN Doc.:A/6230, 27 June 1966, §435; UN General Assembly, “Report of the 1966 Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States (Third Report)”, UN Doc.:A/6799, 26 September 1967, §140.

³⁶⁹ Craik, N., “The Duty to Cooperate in International Environmental Law: Constraining State Discretion through Due Respect”, *Yearbook of International Environmental Law*, Vol 30(1), 2019, p. 26: “Principle 7 also sets out the principle of common but differentiated responsibilities and thus links the duty to co-operate with notions of historic responsibility and the respective capabilities of states. This linkage makes sense since a central objective of the principle of common but differentiated responsibilities is to recognize a form of co-operation that is premised on nonreciprocity rooted in equity.” Citing Philippe Cullet, P., ‘Principle 7: Common but Differentiated Responsibilities’ in Jorge E Vinuales (ed), *The Rio Declaration on Environment and Development: A Commentary* (2015) p. 229.

³⁷⁰ See, *inter alia*, United Nations Framework Convention on Climate Change, 21 March 1994, Preamble and Articles 3.3, 5, 4(1.c) a i), 5.c) and 6.b); International Plant Protection Convention (revised text), 2 October 2005, Article VIII; Framework Convention for the Protection of the Environment of the Caspian Sea, 12 August 2006, Articles 4.d) and 6; and Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD), 5 October 1978, Article V(1). In Europe, the duty of co-operation is established in Article 8 of the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), entered into force on 10 September 1997.

recognised that States have a duty to co-operate with each other in good faith to ensure protection against environmental damage.³⁷¹

- (d) In the refugee and migration context, the principles of co-operation and international solidarity are reflected in soft law instruments including the 2018 Global Compact on Refugees.³⁷² The compact is aimed at facilitating more predictable and equitable responsibility-sharing, recognising that a sustainable solution to refugee situations cannot be achieved without international co-operation.³⁷³ By paragraph 21(h) of the Global Compact for Safe, Orderly and Regular Migration, adopted by the General Assembly in 2018, Governments committed to co-operate to identify, develop and strengthen solutions for migrants compelled to leave their countries of origin owing to slow-onset natural disasters, the adverse effects of climate change and environmental degradation, such as desertification, land degradation, drought and sea-level rise, including by devising planned relocation and visa options, in cases where adaptation in or return to their country of origin is not possible.³⁷⁴
- (e) Further, Article 7 of the International Law Commission Draft Articles on the protection of persons in the event of disasters provides that “*States shall, as appropriate, cooperate among themselves, with the United Nations, with the components of the Red Cross and Red Crescent Movement, and with other assisting actors.*”³⁷⁵

218. The impact of climate change-induced displacement on the enjoyment of economic and social rights, and its particular impact on the rights of vulnerable groups is clear. In the Interveners’ submission, States have obligations under Article 26 of the Convention to co-operate in responding to the realities of persons in a situation of human mobility in the context of disasters or climate change, in order to ensure the economic and social rights

³⁷¹ IACtHR, Advisory Opinion OC-23/17, “*The Environment and Human Rights*”, 15 November 2017, §§181-240.

³⁷² The 2018 Global Compact on Refugees is a non-legally binding framework developed by UNHCR and affirmed by the UN General Assembly on 17 December 2018. Available at: <https://www.unhcr.org/media/global-compact-refugees-booklet>.

³⁷³ Wolfrum, *supra* n.368, p.1; UN General Assembly, “*Annual Theme: International Solidarity and Burden-Sharing in all its Aspects: National, Regional and International Responsibilities for Refugees*”, 7 September 1998. Available at: <https://www.unhcr.org/sites/default/files/legacy-pdf/3ae68d978.pdf>.

³⁷⁴ Other relevant soft law in this area includes the “*Words into Action*” series of guidelines on disaster displacement (see generally <https://www.undrr.org/publications/words-into-action>) and the UN’s Guidance Note, “*Regular Pathways for Admission and Stay for Migrants in Situations of Vulnerability*.” Available at: <https://migrationnetwork.un.org/resources/guidance-note-regular-pathways-admission-and-stay-migrants-situations-vulnerability>.

³⁷⁵ Article 8, International Law Commission Draft Articles on the Protection of Persons in the Event of Disasters outlines “*forms of cooperation in the response to disasters*” which include “*Cooperation in the response to disasters includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, equipment and goods, and scientific, medical and technical resources.*”

protected by the Convention. By parity of reasoning with the duty to co-operate recognised by the Court in the context of environmental damage, and by reference to developing soft law in the sphere of refugee law and migration, the obligation can be framed as encompassing the following specific duties:

Duty to Negotiate in Good Faith

219. While States have obligations to persons in a situation of human mobility in the context of disasters or climate change under current international legal mechanisms, it is clear that protection under the current framework is haphazard and signifies a general lack of uniformity at the international level. A small number of States have national laws or bilateral, regional or subregional agreements that specifically address the admission or temporary stay of foreigners displaced by climate change, but the vast majority of countries lack any normative framework.³⁷⁶ States should therefore negotiate in good faith to develop new normative arrangements to respect, protect and enforce the rights of persons in a situation of human mobility in the context of disasters or climate change, including the establishment of safe migration pathways.

220. Those normative arrangements could consist of:

- (a) The establishment of a new protocol under the Refugee Convention to give protection to persons in a situation of human mobility in the context of disasters or climate change. This would normalise existing informal arrangements that the United Nations High Commissioner for Refugees applies in some circumstances.³⁷⁷
- (b) The adaption of already existing FMAs in the Caribbean Region to persons in a situation of human mobility in the context of disasters or climate change, as well as entry into new FMAs³⁷⁸ and the expansion and adaption of migration agreements in Latin America to cover climate change-induced displacement. These would: (i) provide a right of entry to other countries; (ii) support the waiver of travel document requirements where documents had been lost or damaged; (iii) grant indefinite stays where appropriate, facilitating permanent resettlement; and (iv) ease access to

³⁷⁶ International Organisation for Migration, “*Protection of the human rights and fundamental freedoms of migrants and the specific needs of migrants in vulnerable situations*” (2017). Available at: https://www.iom.int/sites/g/files/tmzbd1486/files/our_work/ODG/GCM/IOM-Thematic-Paper-Protection-of-Human-Rights-and-Vulnerable-Migrants.pdf.

³⁷⁷ UN, Report of the Special Rapporteur, “*The Promotion and Protection of Human Rights in the Context of Climate Change*”, A/HRC/53/34, 18 April 2023, §68.

³⁷⁸ Francis, A., *supra* n.27, Executive Summary, p.1: “*FMAs are provisions within (sub-)regional economic integration schemes that liberalize migration restrictions between participating member states.*”

foreign labour markets through a mutual recognition of skills scheme and/or a waiver of work permit requirements.

- (c) The development of coherent approaches to address the challenges of movements of people in the context of sudden-onset and slow-onset natural disasters, including by taking into consideration relevant recommendations from State-led consultative processes, such as the Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change, and the Platform on Disaster Displacement.
- (d) The development of systematic bilateral, regional and international co-operation and dialogue to exchange information on migration-related trends, including through joint databases, online platforms, international training centres and liaison networks, while upholding the right to privacy and protecting personal data.

Burden Sharing

221. Until a new normative framework is negotiated, States have a duty to co-operate to share the burden of receiving and supporting persons in a situation of human mobility in the context of disasters or climate change who meet the definition of “refugee” and/or cannot be returned to their home States by application of the principle of *non-refoulement*.

Separate and Differentiated Responsibilities

222. The duty to co-operate must be informed by the international responsibility of developed States who are major historic emitters of GHGs. As noted by the UNHRC Special Rapporteur, “*it is important to remember that climate change is primarily caused by greenhouse gas emissions from major emitting countries. There is an important aspect of causality and international responsibility that must be considered.*”³⁷⁹ Recognition of that causality requires States to assume an appropriate share of (i) the cost of ensuring safe movement, (ii) receiving persons in a situation of human mobility in the context of disasters or climate change, and (iii) the provision of economic support to States which neighbour

³⁷⁹ UN, Report of the Special Rapporteur, “*The Promotion and Protection of Human Rights in the Context of Climate Change*”, A/HRC/53/34, 18 April 2023, §10.

countries affected by climate change and receive disproportionate numbers of persons in a situation of human mobility in the context of disasters or climate change.³⁸⁰

I. CONCLUSION

223. For the reasons outlined above, the Interveners answer question F3 as follows:

- (a) Caribbean States suffer particularly from the effects of climate change. The scientific evidence is clear that climate change poses a real, significant, and imminent risk to human life and the Earth's environment and ecosystems of the Earth as a whole.
- (b) Climate-related displacement is driven by the adverse effects of climate change. Climate displacement in the Caribbean, particularly in Haiti, is on the rise. The threat and the realities of displacement pose a particular and heightened threat to the rights of vulnerable groups.
- (c) In addition, as with all forms of loss and damage, States are under an obligation to prevent and remedy the effects of climate displacement, including through adopting climate mitigation and adaptation measures. Those measures should be targeted at building resilience to, and preventing further, climate change and climate displacement.
- (d) States are under procedural obligations to secure access to information, participation in decision-making, and access to justice. Securing these procedural obligations will allow States to prevent, mitigate, and respond appropriately to climate displacement.
- (e) In discharging their substantive and procedural obligations, States must also have regard to the principle of non-discrimination. The principle of non-discrimination may require, in some circumstances, States to modify or adopt supplementary mitigation and adaptation policies, in recognition of the specific group disadvantage and substantive inequality suffered by groups. This includes Indigenous and tribal groups, people of African Descent, women, children, people with disabilities, and

³⁸⁰ Parties to the Paris Agreement should be developing funding arrangements to assist persons in a situation of human mobility in the context of disasters or climate change to address their vulnerabilities. Ad hoc humanitarian support is not adequate to meet the needs of such people. Parties to the United Nations Framework Convention on Climate Change and the Paris Agreement should be encouraged to develop appropriate financial arrangements to give support to persons in a situation of human mobility in the context of disasters or climate change through funding arrangements developed under the umbrella of the loss and damage fund (per UN, Report of the Special Rapporteur, "*The Promotion and Protection of Human Rights in the Context of Climate Change*", A/HRC/53/34, 18 April 2023, §§70-71).

any other marginalised group which derive specific protection under international law. In addition, States must comply with the UN's Guiding Principles on Internal Displacement, which are embodied in the Convention.

- (f) Receiving States must (i) recognise valid claims for international protection by refugees in the context of disasters and climate change, and (ii) comply with the principle of *non-refoulement*. Receiving States must also offer refugees and asylum-seekers additional protections, such as the enjoyment of certain economic, social, and other rights.
- (g) States have a duty to co-operate to establish effective international systems to protect the rights of persons in a situation of human mobility in the context of disasters or climate change and to provide redress for them, including the establishment of safe migration pathways. The nature of the co-operation provided by Global North states who are major historic emitters of GHGs should reflect their causal contribution to climate change-related displacement.

.....
ISABELLA MOSSELMANS

Director of the Global Strategic Litigation Council

Representative of the Signatories

25 January 2024

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25 January 2024

Annex I

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The Global Strategic Litigation Council for Refugee Rights (“the Council”)

Website: <https://zolberginstitute.org/initiatives/gslc/>

Description:

The Global Strategic Litigation Council was founded in September 2021 to empower global civil society to advance the rights of refugees and migrants through coordinated strategic litigation and legal advocacy. The Council has a membership of over 350 NGOs, refugee leaders, lawyers, advocates, and academics from every region of the world. The Council supports its members to share knowledge, collectively identify priorities, and develop and implement litigation and advocacy strategies to advance the protection of people on the move. In doing so, it aims to support the consistent and progressive development of international law relating to displacement worldwide.

The Council directly supports its members with litigation and legal advocacy. We regularly support on tasks such as litigation strategy, sourcing expert reports, brief writing, legal research, drafting/reviewing pleadings, coalition-building, and intervene as amicus on matters of international law.

The Council has particular expertise in international law as it relates to involuntary and forced migration, and one of the Council’s key thematic priority areas is climate displacement. In the context of this Amicus, the Council identified that there was a gap in Caribbean civil society representation and in particular on the issue of climate displacement. The Council therefore worked with Council members to convene a coalition of Caribbean civil society organizations and experts to ensure that Caribbean voices were heard at the Court. The legal team working on this case has acted in climate change and international refugee law cases in domestic courts around the world, international tribunals, and has published widely in environmental law.

Sosyete Kiltirèl Jen Ayisyen - Haitian Youth Cultural Society (SOKIJA)

Description:

SOKIJA plays a vital role in addressing the challenges of climate change and its impact on at-risk communities in Haiti, particularly in the Northwest department of Haiti. In response to the increasing severity of climate change impacts in Haiti, SOKIJA is actively engaged in initiatives addressing climate justice and forced climate displacement.

In Haiti, the escalating impact of climate change is generating growing concern, particularly in communities already facing vulnerabilities. The repercussions of climate change are most acutely felt by the country’s farmers, exacerbating the challenges they already confront. Haiti witnesses a significant rise in climate-induced displacements, compelling numerous families to relocate as they lose access to water and the ability to cultivate their land, a primary source of livelihood.

SOKIJA participates in campaigns and advocacy efforts to raise awareness and promote just policies on climate issues. They create educational tools, foster community engagement on climate change, and collaborate with the local farming communities disproportionately affected by climate change. SOKIJA is also partnering with the Global Justice Clinic of NYU School of Law to study the how climate disorder contributes to out-migration. This study aims to establish an effective database to facilitate community advocacy for justice and reparations.

Caribbean Centre for Human Rights (CCHR)

Description:

The Caribbean Centre for Human Rights (CCHR) is an independent nonprofit organization committed to promoting, protecting, and defending human rights in Trinidad and Tobago and the wider Caribbean. Established in 2006, the CCHR engages in multifaceted efforts to advance the human rights of asylum seekers, refugees, and individuals affected by prison reform, criminal justice reform, and police use of force. As UNHCR's legal services partner, the CCHR provides free legal assistance to forcibly displaced persons in Trinidad and Tobago.

The organization's work encompasses monitoring human rights concerns, conducting information and awareness campaigns, running training workshops, and engaging in legal advocacy. In alignment with its mission, CCHR addresses the protection needs of forcibly displaced persons through strategic litigation, advocacy, referrals, and provision of information. The organization operates within a framework outlined in its Charter, focusing on fostering respect for human rights, promoting national consciousness, and aiding the implementation of a human rights infrastructure.

Caribbean Natural Resources Institute (CANARI)

Website: www.canari.org

Description:

CANARI's mission revolves around promoting and facilitating stakeholder participation in the stewardship of natural resources in the Caribbean. The organization's Resilience Programme is centered on learning, advocating, and building capacity for holistic approaches that enhance resilience to climate change, natural disasters, and other risks faced by Caribbean people, ecosystems, and economies. The key areas of work under this programme include:

- Conserving, restoring, and sustainably managing the natural ecosystems contributing to environmental, climate, and disaster resilience, as well as the resilience of rural livelihoods and key economic sectors.
- Building resilience in rural community livelihoods and enterprises dependent on ecological goods and services.
- Supporting participatory governance arrangements engaging civil society and communities in decreasing vulnerability to climate change, natural disasters, and other threats to security and livelihoods.
- Developing, advocating, and building capacity for multi-dimensional approaches to resilience addressing linked development challenges.

Within this framework, CANARI convened the Caribbean Climate Justice Alliance and supported collective advocacy and action to implement the shared Climate Justice and Resilience Agenda. This agenda calls for urgent and accelerated implementation to address the climate crisis and meet the needs of Caribbean Small Island Developing States (SIDS) and other vulnerable countries. The Caribbean Climate Justice Alliance, comprising civil society organizations, grassroots leaders, activists, academics, creatives, and the media, seeks to amplify the voices of the most vulnerable communities and groups on the frontlines. The Alliance aims to catalyse actions for climate justice and local resilience in Caribbean SIDS, with priorities including:

- Curbing emissions to limit global temperature increase to 1.5°C.
- Scaling up locally led solutions for adaptation and addressing loss and damage.

- Improving access to and delivery of climate finance for frontline communities, small and micro enterprises, and civil society organizations as part of a 'whole of society' approach.
- Scaling up just, nature-based solutions for adaptation, mitigation, and resilience.
- Supporting a just transition for pro-poor, inclusive, sustainable, and resilient development.
- Promoting gender-equitable and socially inclusive approaches to climate action.
- Promoting youth and intergenerational equity as core elements of the climate response.

Centro Montalvo

Website: <https://centromontalvo.org/>

Description:

Centro Montalvo is a Dominican organization that promotes, enforces, and exercises human rights distinction, advocating for laws and public policies that guarantee their real and effective protection and following up on compliance with national laws and international human rights conventions and treaties signed by the country.

They play a vital role in addressing migration issues and broader environmental justice in the Dominican Republic, focusing specifically on the northwest, central, and southern regions. The organization is equally devoted to tackling climate change and advocating for the care of the planet, particularly in border communities. Recent endeavours involve supporting communities affected by Barrick Gold and organizing ecological assemblies to counter the threat of Unigold in the city of Restaruación in the province of Dajabon. Their support for communities affected by Barrick Gold demonstrates a dedication to safeguarding the rights and well-being of those impacted by environmental issues.

Additionally, Centro Montalvo's engagement in organizing ecological assemblies showcases a proactive stance in defending territories against potential environmental threats, exemplified by their efforts against Unigold. These experiences highlight Centro Montalvo's multifaceted approach, encompassing legal actions, community support, and environmental advocacy—integral components of their commitment to justice, human rights, and ecological well-being in the Dominican Republic.

Colette Lespinasse: Expert Individual

Description:

As an expert individual, Colette Lespinasse has a comprehensive background in addressing migration challenges. Her experience spans research and evaluation of migration projects, advocacy for the rights of migrants, and active participation in seminars focused on women's rights and gender equity. As a co-founder and former director of Groupe d'Appui aux Rapatriés et aux Réfugiés (GARR), she conducted extensive research on Haitian migrant women in the Dominican Republic. Her expertise also includes collaboration with organizations such as Movimiento de Mujeres Dominico-Haitiana (MUDHA) and Colectivo Mujer y Salud, emphasizing the situation of women migrants. Additionally, she participated in research on the migration situation at the Haiti-Dominican Republic border and contributed to numerous reports highlighting the challenges faced by Haitian migrants.

Colette Lespinasse also has in-depth knowledge and experience in climate change and environmental justice. As the co-host of a program on Alterradio focused on Development, Agroecology, and Climate Change since 2020, she engages in discussions on sustainable

development. Furthermore, her role as a consultant for OBMICA (Observatoire sur la Migration dans les Caraïbes) involved research on unaccompanied children and adolescents at the Haiti-Dominican Republic border, commissioned by the European Union and UNICEF. This work signifies her dedication to understanding and addressing the intersection of climate change and forced climate displacement. Colette's involvement in risk management and disaster seminars and her affiliation with organizations like Terre des Hommes Suisse further underscores her knowledge of climate-related issues.

The Cropper Foundation

Website: <https://thecropperfoundation.org/>

Description:

The Cropper Foundation actively addresses environmental challenges and inequalities, specifically food security, biodiversity loss, and climate justice. The organization employs a comprehensive approach, combining research and practical interventions within local communities and institutions. Their work spans various domains, including sustainable agriculture, environmental governance, and education for sustainable development.

Founded in 2000 by John and Angela Cropper, the organization has evolved into a thought leader in sustainable development, engaging in projects that reflect a commitment to holistic development. The foundation played a pivotal role in leading sub-global assessments, such as the Caribbean Sea Assessment and the Assessment of the Northern Range of Trinidad and Tobago. The organization has also established itself as a trusted partner in implementing large-scale development projects. Their philosophy, rooted in creating opportunities for human development and responsible development, underscores a commitment to influencing policy and practice at local, regional, and global levels. The Cropper Foundation's enduring credibility and partnerships showcase its continued impact on Trinidad and Tobago's civil society, emphasizing the importance of collaboration for the sustainable development of small island developing states like those in the Caribbean.

Foyer Maurice Sixto (FMS)

Website: <https://foyermauricesixtohaiti.com/>

Description:

Foyer Maurice Sixto (FMS) is an organization dedicated to addressing the challenges facing children in domestic servitude, known as "restaveks." FMS operates a school in Rivière Froide, Kafou, that accommodates these children and those from highly vulnerable families who have experienced climate displacement. Additionally, FMS observes a pattern where families in resource-deprived rural areas send their children to individuals in Port-au-Prince as "restaveks" in the wake of climate emergencies. The impact of climate change on food availability is another significant challenge for these children, as the soil's reduced productivity results in food shortages or delays in providing sustenance. That often compels families to relocate, including to the Dominican Republic.

Recognizing the urgency, FMS highlights the need to educate children about climate change and their human rights. This knowledge allows them to comprehend the phenomena they encounter and empowers them to take appropriate actions.

Fundación Cónclave Investigativo de las Ciencias Jurídicas Y Sociales (CIJYS)

Website: <https://fundacioncijys.org/>

Description:

The Fundación Cónclave Investigativo de las Ciencias Jurídicas Y Sociales (CIJYS) is a Haitian-led organization in Chile dedicated to addressing issues including climate migration. Their mission is to create a better society, represent individuals in court, and advocate for immigrant rights. They conduct workshops on climate justice and propose ways for people to act to avoid the adverse impacts of climate change. In recent legal actions, CIJYS has represented several immigrant cases, including women and children victimized and detained at the Santiago, Chile border. They defend the rights of immigrants facing racism and abuse by the police, assist those affected by cyclones and adverse weather conditions, and provide legal support to individuals pleading their cases in court.

In Chile (particularly in Valparaiso), where coastal flooding occurs annually, CIJYS collaborates with international entities to address the devastating effects on families, livelihoods, and lives caused by overflowing seawaters. They emphasize the financial and health implications, such as the high medical costs for cancer treatment due to environmental pollution. CIJYS expresses concern about the lack of positive governmental actions on climate change, emphasizing the impact on vulnerable populations, including the loss of lives, homes, and livelihoods. The organization advocates for renewable energy, climate-resilient housing, and policies to mitigate environmental degradation.

The organization also draws attention to the challenges facing immigrants in Chile due to landslides, droughts, and hunger caused by intense heat. The Chilean government's deportation of irregular migrants raises humanitarian concerns, especially considering the role of climate change in migration patterns. Haitian immigrants, in particular, have suffered due to droughts affecting agriculture, loss of property, and health issues resulting from sudden temperature changes. CIJYS urges governments to implement public policies that prioritize the well-being of those affected by climate change, recommending the creation of a ministry specifically addressing urgent cases and prevention of climate change. As a global issue, CIJYS advocates for the respectful and humane treatment of all displaced individuals without discrimination.

Global Justice Clinic of NYU School of Law

Website: <https://chrgj.org/focus-areas/global-justice-clinic/>

Description:

The Global Justice Clinic of NYU School of Law (GJC) has multiple projects addressing climate displacement and its root causes, including the Haitian Immigrant Rights Project, the Haiti Justice & International Accountability Project, and the Caribbean Climate Justice Initiative.

The Haitian Immigrant Rights Project launched the Hemispheric Network for Haitian Migrants' Rights ("Network"), connecting a coalition of Haitian activists, lawyers, and allies, collaborating to combat the anti-Black racism, exclusion, and cyclical displacement Haitians have faced as they have migrated throughout the Western Hemisphere. The Network currently has members from about a dozen countries throughout North and South America, allowing advocates to share information, collectively build their power and that of their constituents, and identify and pursue transnational advocacy priorities.

GJC has an established record advocating for Haitian immigrant rights. To advocate for Temporary Protected Status (TPS) for Haitians, GJC published a statutory analysis of country conditions in Haiti that was essential in TPS litigation, contributed to FOIA litigation to compel the Trump administration to disclose evidence of discriminatory intent, and GJC staff Ellie Happel testified in the *Saget v. Trump* trial, in which the judge issued a preliminary injunction to halt the Trump administration from terminating TPS for Haiti. In 2020, GJC co-hosted a conference and podcast series on race and immigration with the NAACP Legal Defense Fund.

The Caribbean Climate Justice Initiative collaborates with social movements and organizations in Haiti and the Dominican Republic. The initiative aims to uphold the human rights of marginalized communities on the frontlines of the global climate crisis and to advance climate justice priorities nationally and internationally.

GJC has incorporated a climate justice lens and accompanies partners on the frontline of climate harms to transform community concerns into advocacy. They provide legal, strategic, and technical expertise to partner organizations in Haiti—Action pour la Reforestation et la Defense de l’Environnement (AREDE) and Sosyete Kilitrèl Jen Ayisyen (SOKIJA)—to build community knowledge and mobilization towards climate justice, prevent land expropriation that further degrades the environment and marginalizes rural communities, and document and respond to climate migration. In 2024, GJC will publish seminal research connecting colonization, structural racism, and extractivism to climate injustice in Haiti and make a case for climate reparations.

Institut Interuniversitaire de Recherche et de Developpement (INURED)

Website: <http://www.inured.org/>

Description:

The Institut Interuniversitaire de Recherche et de Développement (INURED) actively addresses the global challenges of migration and climate change justice. Positioned at the intersection of justice and research, INURED believes everyone has the right to move freely and live in a healthy and secure environment. The organization conducts extensive studies focusing on various aspects of migration, including the impact of climate events on displacement.

INURED has conducted multiple studies on Haitian migrants in Latin America, revealing that many Haitians left their home country due to climate-related events such as the 2010 earthquake and Hurricane Matthew. A specific study on Hurricane Matthew's impact in the Grand Sud region of Haiti highlighted the extensive damage, equivalent to 22% of the country's GDP, with a significant concentration in the agricultural sector. The aftermath left the population vulnerable to food insecurity. INURED emphasizes the importance of resilience when facing climate-induced disasters, pointing out the need for comprehensive strategies and supportive policies.

The organization's mission extends beyond research, encompassing training, knowledge production, centralization, and diffusion. INURED actively intervenes in communities, promoting a multidisciplinary approach to address various challenges. Its initiatives include creating spaces for information dissemination and collective reflection accessible to all, irrespective of social origin or education level. INURED's efforts are rooted in a collaborative philosophy involving Haitian and international researchers, local partners, and institutions. Its approach emphasizes the connection between academic research and policy development.

Komisyon Episkopal Nasyonal Jistis ak Lapè (CE-JILAP)

Website: www.justicepaixhaiti.org.ht

Description:

Komisyon Episkopal Nasyonal Jistis ak Lapè, a member of the Support Group for Refugees and Repatriates (GARR), is actively engaged in addressing migration issues to defend the rights of Haitian migrants against human rights violations. The organization works with returned Haitian migrants and advocates against discrimination and mistreatment, especially of those heading to the Dominican Republic. In addition to its focus on justice reform and the defense of human rights, the commission demonstrates a broad interest in addressing climate change issues. Its strategic approach involves advocacy for legal reforms, including creating the CSPJ (Consejo Superior del Poder Judicial/High Council of the Judicial Power) to manage the justice system and the training of magistrates. The commission also gathers information on displacement issues, collaborates with GARR, and advocates for the rights of migrants, emphasizing the need for protection by the Haitian authorities during forced migrations. Together with GARR, they advocate for respecting migrants' rights, contributing to a better understanding of the impacts of climate change on communities.