

INTER-AMERICAN COURT ON HUMAN RIGHTS

REQUEST FOR AN ADVISORY OPINION ON CLIMATE EMERGENCY AND HUMAN RIGHTS (RE: REPUBLICS OF COLOMBIA AND CHILE)

EXPERT OPINION

**THE NOTRE DAME LAW SCHOOL HUMAN RIGHTS CLINIC (NDLS GHRC)
in collaboration with the
THE NOTRE DAME REPARATIONS DESIGN AND COMPLIANCE LAB
(ND REPARATIONS LAB)**

THE UNIVERSITY OF NOTRE DAME

**Prof. Dr. Diane A. Desierto¹
Prof. Dr. Francisco Urbina²
Prof. Dr. Anibal Perez-Liñan³
Mr. Nicolas Buitrago Rey⁴
Mr. Faisal Yamil Meneses⁵
Mr. Garrett Pacholl⁶**

¹ *Professor of Law and Global Affairs, Faculty Director of the LLM Program in International Human Rights Law, and Founding Director of the Notre Dame Law School Global Human Rights Clinic, Notre Dame Law School; joint appointment as tenured full Professor at the Keough School of Global Affairs, University of Notre Dame (Notre Dame, USA); Co-Principal Investigator, Notre Dame Reparations Design and Compliance Lab. Professor Desierto holds office at 2161 Eck Hall of Law, Notre Dame Law School, University of Notre Dame (Notre Dame, USA), and can be reached at ddesierto@nd.edu.*

² *Associate Professor of Law, Notre Dame Law School, and Member of the Board of Advisers, Notre Dame Law School Global Human Rights Clinic, Notre Dame Law School. Professor Urbina holds office at 2156 Eck Hall of Law, Notre Dame Law School, University of Notre Dame (Notre Dame, USA), and can be reached at furbina@nd.edu.*

³ *Director, Kellogg Institute of International Studies, University of Notre Dame; Professor of Political Science and Global Affairs, Department of Political Science and Keough School of Global Affairs, University of Notre Dame (Notre Dame, USA); Co-Principal Investigator, Notre Dame Reparations Design and Compliance Lab. Professor Perez-Liñan holds office at 2029 Jenkins Nanovic Hall, University of Notre Dame (Notre Dame, USA 46556), and can be reached at aperezl1@nd.edu.*

⁴ *JSD Candidate, Notre Dame Law School (Dissertation Supervisor: Prof. Diane Desierto), LLM in International Human Rights Law *summa cum laude*, Notre Dame Law School Class of 2021, and Research Associate, Notre Dame Reparations Design and Compliance Lab. He can be contacted at nbuitrag@nd.edu.*

⁵ *Research Associate, Notre Dame Reparations Design and Compliance Lab; LLM in International Human Rights Law *summa cum laude*, Notre Dame Law School Class of 2022. He can be contacted at fyamil2@nd.edu.*

⁶ *B.A. History and Global Affairs major, Class of 2024, University of Notre Dame; Research Student Affiliate, Notre Dame Reparations Design and Compliance Lab; Principal Investigator, Liu Institute of Asia and Asian Studies Justice and Asia 2023 Grant (under supervision of Professor Diane Desierto), and Glynn Family Honors Grant recipient. He can be contacted at gpacholl@nd.edu.*

The undersigned Professors, with the collaboration of their respective research students in the Notre Dame Law School Global Human Rights Clinic (hereafter, “NDLS GHRC”) and the Notre Dame Reparations Design and Compliance Lab (hereafter, “Notre Dame Reparations Lab”), respectfully submit this Expert Opinion for this Honorable Court’s consideration in its proceedings on the *Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile*:

1. Noting the request of the Republic of Colombia and the Republic of Chile for this Honorable Court to “provide guidance towards human rights-based solutions with an intersectional perspective”,⁷ this Expert Opinion deliberately draws on interdisciplinary methods that weave international law, international human rights law, jurisprudence, quantitative tools of political science, and qualitative tools of social science research to assist this Honorable Court in its task of addressing the manifold questions brought by the Republic of Colombia and the Republic of Chile. **Annex A** of this Expert Opinion contains the submission of the Notre Dame Reparations Lab on the standards of reparations adopted by domestic and international courts around the world in generating reparative measures in climate change cases throughout the world. **Annex B** of this Expert Opinion is the case study report of Principal Investigator Garrett Pacholl on Climate Reparations Perceptions held by various stakeholders (local communities, indigenous communities, government regulators, academics, among others) of a sample small island developing State (the Philippines) besieged by a multitude of challenges from climate change emergencies. We respectfully submit that the nature of the queries posed by both the Republic of Chile and the Republic of Colombia necessitate this comprehensive and evidence-based approach to appropriately inform States of their obligations under international law and the effectiveness required for any measures to implement such obligations.

⁷ *Request*, at p. 2.

I. PRELIMINARY OBSERVATIONS ON INTERSECTIONALITY AND THE PRINCIPLE OF EFFECTIVENESS IN THE SIMULTANEOUS APPLICATION OF CLIMATE CHANGE LAW AND INTERNATIONAL HUMAN RIGHTS LAW

A. The Intersectionality of Climate Change Law and International Human Rights Law

2. The intersectionality of climate change law and international human rights law has long been embedded in the most foundational global treaties on climate change, *precisely to ensure the effectiveness of any climate change measures and continuum of policy strategies that States would adopt in the present and future*. The 1992 United Nations Framework Convention on Climate Change (UNFCCC) set, as part of the objects and purposes of this treaty, the fundamental recognition that:

“*Acknowledging* that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions...”

Recalling the pertinent provisions of the Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm on 16 June 1972,

Recalling also that States have, **in accordance with the Charter of the United Nations and the principles of international law**, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction...”⁸ (Emphasis added.)

3. As seen in the above quoted paragraphs, States’ sovereign rights to exploit their own resources remained subject to the requirement that the same be *in accordance with the Charter of the United Nations and the principles of international law*, without qualification as to which specific international law norms applied to such sovereign rights. The 1972 Declaration of the United Nations Conference on the Human Environment (also known as the Stockholm Declaration) further elaborates on the broad

⁸ United Nations Framework Convention on Climate Change, 1992, Preamble, seventh to ninth paragraphs, full text at <https://unfccc.int/resource/docs/convkp/conveng.pdf> (last accessed 1 September 2023).

applicability of all (or the entirety) of international law to the same conception of ecosystem damage that might ensue from exercising the same sovereign rights of States to exploit their own resources:

“Principle 1: **Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.** In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.

...

Principle 6: The discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, **must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems.** The just struggle of the peoples of all countries against pollution should be supported.

Principle 7: States shall take **all possible steps to prevent pollution of the seas** by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea.

Principle 8: **Economic and social development is essential** for ensuring a favourable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life.

...

Principle 11: **The environmental policies of all States should enhance and not adversely affect the present or future development potential of developing countries, nor should they hamper the attainment of better living conditions for all,** and appropriate steps should be taken by States and international organizations with a view to reaching agreement on meeting the possible national and international economic consequences resulting from the application of environmental measures.

...

Principle 21: **States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies,** and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the

environment of other States or of areas beyond the limits of national jurisdiction.”⁹
(Emphasis and italics added.)

4. The 2015 Paris Agreement sharpened the applicability of the Charter of the United Nations and principles of international law by explicitly conditioning climate actions on the respect, promotion, and consideration of State obligations under international human rights law:

*“Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity...”*¹⁰ (Emphasis and italics added.)

5. The intersectionality between the climate emergency and international human rights law that the Republic of Colombia and Republic of Chile framed before this Honorable Court, therefore, is a matter of interpretation of existing international treaty norms that already prescribe climate actions to be simultaneously undertaken while continuing to ensure respect for, promotion of, and continued applicability and consideration of international human rights law. This intersectionality was further deepened when the United Nations Human Rights Council explicitly recognized the right to a clean, healthy, and sustainable environment in its Resolution 48/13 dated 18 October 2021.¹¹ This same Resolution recognized that “the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights....[which is] related to other rights

⁹1972 Declaration of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972, at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/NL7/300/05/PDF/NL730005.pdf?OpenElement> (last accessed 1 September 2023).

¹⁰ Paris Agreement, 2015, Preamble, twelfth paragraph, full text at https://unfccc.int/sites/default/files/english_paris_agreement.pdf (last accessed 1 September 2023).

¹¹ United Nations Human Rights Council, *The human right to a clean, healthy and sustainable environment*, A/HRC/RES/48/13, 18 October 2021.

and existing international law...[and whose promotion] requires the full implementation of the multilateral environmental agreements under the principles of international environmental law.”¹²

6. Thus, before any opinion can be proffered on the questions brought in these proceedings to this Honorable Court by the Republic of Chile and the Republic of Colombia, we first emphasize that *the intersectionality between climate change law and international human rights law already exists as a matter of law* under the foundational sources of international law that address climate change (e.g. the United Nations Framework Convention on Climate Change, the Paris Agreement, and the customary international law norms that have since crystallized from the articulation and subsequent State practice of the Rio Principles in the Stockholm Declaration). Bringing this intersectionality to bear through treaty interpretation, in particular, requires this Honorable Court’s own vigilance with respect to **the principle of effectiveness (*ut res magis valeat quam pereat*) which is particularly distinct for international human rights treaties, and which this Honorable Court has itself recognized in its own jurisprudence:**

“Even though all human rights treaties have their own distinct context and wording, there is nevertheless significant convergence around the notion that the core interpretive task for any interpreter is to make human rights treaty provisions ‘effective, real, and practical’ for individuals as rights-holders under international law. This is sometimes called the principle of effectiveness (*ut res magis valeat quam pereat*). Effectiveness is an overarching approach to human rights treaty interpretation. It animates a range of other more fine-grained, specific interpretive principles developed in the context of each human rights treaty. Examples include the interpretive principles of ‘autonomous concepts’, ‘living instrument’, and ‘practicality’ in the [European Court of Human Rights] context; the ‘responsiveness to African circumstances’ in the case of the African Commission on Human and Peoples’ Rights; the consideration of the ‘real situation’ in the case of the Inter-American Court of Human Rights; and the ‘dynamic instrument doctrine’ put forward by the Committee against All Forms of Discrimination against Women. These principles all derive from the interpretive consensus that interpretations that are devoid of actual and timely effect for human rights protections do not cohere with good faith interpretations of the wording and context of human rights treaties in the light of their object and purpose.

¹² Id. at footnote 11, at paras. 1 to 3.

As [Richard Gardiner] explains, the principle of effectiveness has two aspects. **The first aspect directs the interpreter to give meaning to each and every treaty provision so that each term has effect rather than no effect.** This aspect comes from the good faith requirement of Article 31. **The second aspect involves taking either a teleological or an evolutive approach to interpretation (or a combination of both).** In human rights treaty interpretation we find that interpreters have developed all aspects of effectiveness, often in tandem with each other, in conversation with the [Vienna Convention on the Law of Treaties].

The first aspect of effectiveness in the human rights treaty context means that the interpretation of provisions should have real effect in terms of the concrete and actual lives of individuals who are the recognized right-holders of human rights treaty law. That is, human rights interpretations must have ‘practical effect’....effectiveness instructs the interpreters to attribute ‘sincerity’ to the original intentions of the drafters (i.e. the context) in realizing human rights of individuals. The distinction between formalistic protection versus effective protection offers an animating reason to choose between conflicting understandings of the wording of the text.

The second version of effectiveness offers a deeper account of what really makes a human rights provision effective. In this teleological variant, it goes beyond an analysis of whether an existing protection is formal or effective as a matter of fact and asks the question of under what kinds of circumstances human rights treaty provisions can be trumped by other concerns or legitimately infringed. This version of effectiveness hinges on the question of whether treaty texts in principle should be interpreted in favour of the particular individual right (and expanding correlating duties) or in favour of the public interest that would restrict or not recognize a right or its correlating duty. A common trend amongst human rights interpreting bodies has been to adopt an understanding that favours the first option and thereby to assert that human rights treaties come with the presumption that protection of human rights has priority to sovereign rights....

The effectiveness principle articulated by the Inter-American Court of Human Rights comes closest to the full-blown teleological interpretation that sceptics have in mind. This Court holds that interpretation in favour of the individual (which it calls the principle of *pro-person*) must be followed, even if this comes at the expense of the wording or context. [citing *19 Tradesmen v Colombia* (5 July 2004) Inter-American Court of Human Rights Series C No 109, [173]. *State Obligations Concerning Change of Name, Gender Identity and Rights Derived From a Relationship Between Same Sex Couples (Interpretation and Scope of Articles 1(1), 3, 7, 11 (2), 13, 17, 18 and 24, in Relation to Article 1 of the Inter American Convention on Human Rights* (Advisory Opinion) (24 Nov 2017) OC-24/17 Inter American Court of Human Rights Series A No 24, [189]....

....If effectiveness animates the measure of text, context, and object and purpose in human rights treaty interpretation, it remains to ask how does effectiveness interact with the additional requirement in Article 31(3) [of the Vienna Convention on the Law of Treaties], requiring parties to take into account ‘any relevant rules of international law applicable in the relations between the parties?’ Human rights treaty interpreters

do this, locating human rights treaty interpretation as part of – and not in isolation from – general international law and other related treaties and instruments. This is in line with a more general duty to attempt to reach coherence amongst different bodies of international law, even though this may not be possible in each concrete instance.

Human rights interpreters interact with Article 31(3) in two directions. First, Article 31(3) may lead to the identification of an accumulation of interpretations. Second, Article 31(3) may lead to the identification of an actual or potential conflict with other bodies of international law. Resolution of such conflicts have taken different paths amongst different human rights interpreters with varying consequences for the relationship between general international law, its sub-branches, and human rights treaty interpretation....In the case of accumulation, other international law obligations or treaties regulating similar subject matters (as well as general international law) serve as a means of reaching an overlapping interpretation of human rights treaty provisions by cumulatively confirming a particular interpretation. The international comparative method employed by the Inter-American Court of Human Rights, the African Commission on Human and Peoples' Rights, the African Court of Human and Peoples' Rights, the European Court of Human Rights, and UN Human Rights Treaty Bodies explicitly point in this direction. The regional human rights commissions and courts and quasi judicial UN treaty bodies cite and interpret other international treaty law obligations – such as the UN Charter, UN human rights treaties,, statutes of international criminal courts, provisions of international humanitarian law, or International Labour Organization (ILO) Conventions – to confirm commonalities of meaning amongst human rights treaties or other international law. **In the case of the Inter-American Court of Human Rights, in particular, this extends to identification of some of its treaty provisions as *jus cogens* norms.** This practice of paying attention to the general and regional human rights treaty context enables interpreters to solidify the meanings of their human rights treaty provisions in light of the broader context of international law. It also has the potential of having effects external to the interpretation of a human rights treaty, in particular when, human rights interpreters also engage in the interpretation of general international law to confirm overlapping content.”¹³

7. As will be seen in the subsequent sections of this Expert Opinion, the simultaneous applicability of intersectional climate change treaty law and international human rights treaty law makes it important not just to specify the *scope* of State obligations *stricto sensu* as the respective Governments of Chile and Colombia have requested of this Honorable Court, but more importantly to provide due differentiation and appropriate context according to actual human rights deprivations

¹³ Başak Çalı, *Specialized Rules of Treaty Interpretation: Human Rights*, Chapter 21, pp. 504-522, at pp. 512-514, and pp. 516-518, in DUNCAN B. HOLLIS (ED.), *THE OXFORD GUIDE TO TREATIES* (Oxford University Press, 2nd Edition, 2020). Emphasis and italics added.

as they are very differently experienced within a range of constituencies, demographics, or communities within any State. Addressing the “State obligations derived from the duties of prevention and the guarantee of human rights in relation to the climate emergency” requested in Part A of the Questions for this Honorable Court, for example, cannot be done in isolation without also investigating the lived experiences and empirically-validated circumstances faced rights holders (under both climate change law and international human rights law), including their respective multiple vulnerabilities (or susceptibilities to climate change-related disasters or facing multiple challenges in adapting or mitigating human rights risks arising from or in relation to climate change challenges), owing to differences in endowments, capacities, age, disability, economic status or capability, sex, ethnicity, religion, language, nationality, geography, or any other identifying features of vulnerability. The 3,068 page report of the 2022 Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change defines vulnerability as the “propensity or predisposition to be adversely affected and encompasses a variety of concepts and elements, including sensitivity or susceptibility to harm and lack of capacity to cope and adapt”.¹⁴ The same Report describes human and ecosystem vulnerability to climate change from related risks that all implicate civil, political, economic, social, cultural, developmental, labor, and environmental rights:

“Vulnerability of ecosystems and people to climate change differs substantially among and within regions (*very high confidence*) by patterns of intersecting socioeconomic development, unsustainable ocean and land use, inequity, historical and ongoing patterns of inequity such as colonialism and governance (*high confidence*). Approximately 3.3 to 3.6 billion people live in contexts that are highly vulnerable to climate change (*high confidence*). A high proportion of species is vulnerable to climate change (*high confidence*). Human and ecosystem vulnerability are interdependent (*high confidence*). Current unsustainable development patterns are increasing exposure of ecosystems and people to climate hazards (*high confidence*).”¹⁵

¹⁴ The 2022 Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, at p. 5, at https://report.ipcc.ch/ar6/wg2/IPCC_AR6_WGII_FullReport.pdf (last accessed 1 November 2023).

¹⁵ Id. at footnote 14, at p. 12.

8. The same Report goes on to illustrate how climate vulnerabilities can widen or deepen existing human rights vulnerabilities, and vice-versa:

8.1. For small island developing states (SIDS) experiencing losses in marine ecosystem services, “climate change impacts exacerbate existing inequalities already experienced by some communities, including Indigenous Peoples, Pacific Island countries and territories and marginalized peoples, such as migrants and women in fisheries and mariculture. These inequities increase the risk to their fundamental human rights, by disrupting livelihoods and food security, while leading to loss of social, economic, and cultural rights. These maladaptive outcomes can be avoided by securing tenure and access rights to resources and territories for all people depending on the ocean, and by supporting decision-making processes that are just, participatory and equitable.”¹⁶

8.2. “Furthermore, interactions between climate impacts and existing inequalities can threaten the human rights of already-marginalized peoples by disrupting livelihoods and food security, which further erodes people’s social, economic and cultural rights.”¹⁷

8.3. “Marginalised people, like small-scale aquaculture farmers in lower-income and lower-middle-income countries, are often overlooked and are not represented at a governance level. Therefore, policy, economic, knowledge and other support must ensure representation with traditional and other stakeholder ecological knowledge at national, regional and local levels to

¹⁶ Id. at footnote 14, at p. 469.

¹⁷ Id. at footnote 14, at p. 485.

facilitate climate change adaptation and safeguard human rights for vulnerable and poor groups.”¹⁸

8.4. “Inclusive and sustainable adaptation can address the causes of systemic vulnerability...This points to the fundamental requirements of adaptation action in line with the Universal Declaration of Human Rights.”¹⁹

8.5. “The assessed literature shows that conditions and phenomena that characterize systemic vulnerability (hazard independent vulnerability), such as high levels of poverty and gender inequality, limited access to basic infrastructure services or state fragility are highly relevant for understanding societal impacts of climatic hazards and future risks of climate change...These factors and context conditions also influence individual vulnerability at household or community level. Access to basic services, such as water and sanitation, are linked to human rights and if not granted increase the likelihood that people disproportionately suffer from climate-induced hazards, due to their pre-existing lack of access to such services...”²⁰

8.6. “In terms of international law, the human rights obligations of states have been subject to multiple recommendations relating to climate change by United Nations treaty bodies in the reporting period. More broadly, rights-based approaches rely on the normative framework of human rights, requiring adaptation to be non-discriminatory, participatory, transparent and accountable in both formal (e.g. legal and regulatory) and informal (e.g. social or cultural norms) settings and at international, national and sub-national scales.”²¹

¹⁸ Id. at footnote 14, at p. 782.

¹⁹ Id. at footnote 14, at p. 973.

²⁰ Id. at footnote 14, at p. 1194.

²¹ Id. at footnote 14, at p. 1229.

8.7. “Climate change is affecting very aspect of our society and economy; thus, it is pertinent to understand the interactions between social justice and climate-change impacts, in particular, focusing on how vulnerability to various impacts is created, maintained and distributed across geographic, social, demographic and economic dimensions. For instance, environmental and health consequences of climate change, which disproportionately affect low-income countries and poor people in high-income countries, profoundly affect human rights and social justice. Furthermore, great concern is expressed about the plight of the poor, disadvantaged and vulnerable populations when it comes to climate, but not in other policy domains.”²²

9. The intersectionality of climate change law and international human rights law is thus not just a matter of interrelated language in the texts of treaties, but also in the felt and lived impacts of climate change on the experiences of exacerbating human rights deprivations of diverse communities, groups, and populations around the world as climate change worsens for the planet.

B. This Honorable Court’s Judicial Function, particularly on States’ *Pacta Sunt Servanda* Obligations for Climate Change Treaties as well as International Human Rights Treaties

10. Ensuring *pacta sunt servanda* with treaty provisions in climate change law that themselves mandate *the simultaneous and equally-weighted applicability of climate change law with international human rights law* --- and within the parameters of the specific queries posed by the Republic of Chile and the Republic of Colombia --- therefore, will be a matter of first impression for this Honorable Court. It will be the first opportunity for this Honorable Court to further amplify its well-elaborated pronouncement on the nexus of environmental protection and human rights

²² Id. at footnote 14, at p. 1531.

recognized in the American Convention on Human Rights, and the corresponding obligations of States therein, that this Honorable Court extensively discussed in its *Advisory Opinion OC-23/17 (The Environment and Human Rights)*:

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

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

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

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

57. It should also be considered that this right is included among the economic, social and cultural rights protected by Article 26 of the American Convention, because this norm protects the rights derived from the economic, social, educational, scientific and cultural provisions of the OAS Charter, the American Declaration of the Rights and Duties of Man (to the extent that the latter ‘contains and defines the essential human rights referred to in the Charter’) and those resulting from an interpretation of the

Convention that accords with the criteria established in its Article 29. The Court reiterates the interdependence and indivisibility of the civil and political rights, and the economic, social and cultural rights, because they should be understood integrally and comprehensively as human rights, with no order of precedence, that are enforceable in all cases before the competent authorities.

58. The Court underscores that the right to a healthy environment is recognized explicitly in the domestic laws of several States of the region, as well as in some provisions of the international *corpus juris*, in addition to the aforementioned Protocol of San Salvador, such as the American Declaration on the Rights of Indigenous Peoples, the African Charter on Human and Peoples' Rights, the ASEAN Human Rights Declaration, and the Arab Charter on Human Rights.

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

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

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

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

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

66. **The Court considers that the rights that are particularly vulnerable to environmental impact include the rights to life, personal integrity, private life, health, water, food, housing, participation in cultural life, property, and the right not to be forcibly displaced....other rights are also vulnerable and their violation may affect the rights to life, liberty and security of the individual, and infringe on the obligation of all persons to conduct themselves fraternally, such as the right to peace,** because displacements caused by environmental deterioration frequently unleash violent conflicts between the displaced population and the population settled on the territory to which it is displaced...

67. **The Court also bears in mind that the effects on these rights may be felt with greater intensity by certain groups in vulnerable situations.** It has been recognized that environmental damage ‘will be experienced with greater force in the sectors of the population that are already in a vulnerable situation’; hence, based on ‘international human rights law, States are legally obliged to confront these vulnerabilities based on the principle of equality and non-discrimination. Various human rights bodies have recognized that indigenous peoples, children, people living in extreme poverty, minorities, and people with disabilities, among others, are groups that are especially vulnerable to environmental damage, and have also recognized the differentiated impact that it has on women. In addition, the groups that are especially vulnerable to environmental degradation include communities that, essentially, depend economically or for their survival on environmental resources from the marine environment, forested areas and river basins, or run a special risk of being affected owing to their geographical location, such as coastal and small island communities. In many cases, the special vulnerability of these groups has led to their relocation or internal displacement.’²³

²³ *Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia, The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in relation to Articles 1(1) and 2 of the American Convention on Human Rights),*

8. In the same Advisory Opinion, this Honorable Court specifically enumerated various State duties to ensure the rights to life and to personal integrity, in the context of environmental protection, namely:

- 8.1. **The Obligation of Prevention**, which includes measures such as the duty to regulate, the duty to supervise and monitor, the duty to require and approve environmental impact assessments, the duty to prepare a contingency plan, and the duty to mitigate if environmental damage occurs;²⁴
- 8.2. **The Precautionary Principle**, which “refers to the measures that must be taken in cases where there is no scientific certainty about the impact that an activity could have on the environment...the Rio Declaration establishes that ‘in order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.’...the Court understands that States must act in keeping with the precautionary principle in order to protect the rights to life and to personal integrity in cases where there are plausible indications that an activity could result in severe and irreversible damage to the environment, even in the absence of scientific certainty. Consequently, States must act with due caution to

Inter-American Court of Human Rights, 15 November 2017, full text at https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf (last accessed 1 October 2023). Emphasis added.

²⁴ Id. at footnote 14, at pp. 51-68.

prevent possible damage...even in the absence of scientific certainty, they must take ‘effective’ measures to prevent severe or irreversible damage”;²⁵

8.3. **The Obligation of Cooperation**, which includes as part of its contemplated measures the duty to notify, the duty to consult and negotiate with potentially affected States, the duties to exchange information;²⁶ and

8.4. **Procedural obligations to ensure the rights to life and to personal integrity in the context of environmental protection**, which include duties of States on ensuring access to information, public participation, and access to justice (especially in cases of transboundary harm).²⁷

9. The simultaneous application of climate change law and international human rights law considers not just a conceptual or intersectional nexus between both regimes heavily-driven by international treaties (and also without prejudice to customary international law norms in climate change law and international human rights law, respectively, as well as generally accepted principles of law as further sources of climate change law and international human rights law), *but also the actual direct integration of climate change law and international human rights law*. This Honorable Court is itself credited with having opened this path of integration of climate change law and international human rights law, beginning with its landmark recognition of the right to a healthy environment in *Advisory Opinion OC-23/17*, as well as the renowned application of this right to the Court’s landmark 2020 Judgment on

²⁵ Id. at footnote 14, at paras. 175 and 180.

²⁶ Id. at footnote 14, at pp. 71-80.

²⁷ Id. at footnote 14, at pp. 81-90.

the Merits, Reparations, and Costs in the *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*:

“202. This Court has already stated that the right to a healthy environment ‘must be considered one of the rights...protected by Article 26 of the American Convention’, given the obligation of the State to ensure ‘integral development for their peoples’ as revealed by Articles 30, 31, 33 and 34 of the Charter.

203. The Court has already referred to the content and scope of this right based on various relevant norms in its *Advisory Opinion OC-23/17* and therefore refers back to that opinion. On that occasion, it stated that the right to a healthy environment ‘constitutes a universal value’; it ‘is a fundamental right for the existence of humankind’, and that ‘as an autonomous right...it protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals. This means that nature must be protected, not only because of its benefits or effects for humanity, ‘but because of its importance for the other living organisms with which we share the planet.’ This evidently does not mean that other human rights will not be violated as a result of damage to the environment....

207. Regarding the right to a healthy environment, for the purposes of this case it should be pointed out States not only have the obligation to respect this, but also the obligation established in Article 1(1) of the Convention to ensure it, and **one of the ways of complying with this is by preventing violations**. This obligation extends to the ‘private sphere’ in order to avoid ‘third parties violating the protected rights’ and ‘encompasses all those legal, political, administrative and cultural measures that promote the safeguard of human rights and that ensure that eventual violations of those rights are examined and dealt with as wrongful acts’. In this regard, the Court has indicated that, at times, **the States have the obligation to establish adequate mechanisms to monitor and supervise certain activities in order to ensure human rights, protecting them from actions of public entities and also private individuals**. The obligation to prevent is an obligation ‘of means or conduct and non-compliance is not proved by the mere fact that a right has been violated’. Since the foregoing is applicable to all the rights included in the American Convention, it is useful to establish that it also refers to the rights to adequate food, to water, and to take part in cultural life.

208. Nevertheless, specifically with regard to the environment, it should be stressed that the principle of prevention of environmental harm forms part of customary international law and entails the State obligation to implement the necessary measures *ex ante* damage is caused to the environment, taking into account that, owing to its particularities, after the damage has occurred, it will frequently not be possible to restore the previous situation. Based on the duty of prevention, the Court has pointed out that ‘States are bound to use all the means at their disposal to avoid activities under its jurisdiction causing significant harm to the environment.’ This obligation must be

fulfilled in keeping with the standard of due diligence, which must be appropriate and proportionate to the level of risk of environmental harm. Even though it is not possible to include a detailed list of all the measures that States could take to comply with this obligation, the following are some measures that must be taken in relation to activities that could potentially cause harm: (i) regulate; (ii) supervise and monitor; (iii) require and approve environmental impact assessments; (iv) establish contingency plans, and (v) mitigate, when environmental damage has occurred.

209. **The Court has also taken into account that several rights may be affected as a result of environmental problems, and that this ‘may be felt with greater intensity by certain groups in vulnerable situations’;** these include indigenous peoples and ‘communities that, essentially, depend economically or for their survival on environmental resources...[such as] from the marine environment, forested areas and river basins.’ **Hence, ‘pursuant to human rights law, States are legally obliged to confront these vulnerabilities based on the principle of equality and non-discrimination.’**²⁸

10. Precisely because this Honorable Court has not just recognized an intersectional nexus between climate change law and international human rights law, **but actually validated the direct integration of these two regimes, it is well within the judicial function of this Honorable Court to ensure that the principle of effectiveness applies to both climate change law and international human rights law.** At most, climate change law and international human rights law are already deemed integrated under the inter-American system, and at the very least, intersectionally recognized and linked through the preambular provisions of the UN Framework Convention on Climate Change and the 2015 Paris Agreement. Both the intersectionality and direct integration of the climate change law regime and the international human rights law regime has specific implications for the performance of treaty obligations and customary norm obligations by all States. The simultaneous application and operation of climate change law and international human rights treaty obligations poses a serious challenge to States on how to consistently ensure *pacta sunt servanda* for all of these treaty obligations.

²⁸ *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, Judgment on Merits, Reparations and Costs, Inter-American Court of Human Rights, 6 February 2020, full text at https://www.corteidh.or.cr/docs/casos/articulos/seriec_400_ing.pdf (last accessed 1 October 2023). Emphasis added.

C. The Differentiated Application of the Principle of Effectiveness in this Honorable Court's Integrated Interpretation of Climate Change Law and International Human Rights

11. Notwithstanding the substantive integration of climate change law and international human rights law under this Honorable Court's jurisprudence, however, in practical terms this Honorable Court cannot uniformly or homogeneously apply the principle of effectiveness to both treaty regimes of climate change law and international human rights law, expecting identical outcomes or automatically similar effects. This Honorable Court is indeed called upon to apply the principle of effectiveness to both climate change law and international human rights law, but the application of the principle of effectiveness has to differentiate between the ultimate objectives of each of these treaty regimes. As International Court of Justice President Joan Donoghue observed, "the starting point for examining the effectiveness of any institution must be the identification of the goals against which effectiveness is measured."²⁹

12. In the first place, **the ultimate objective of climate change treaties** such as the UN Framework Convention on Climate Change (UNFCCC) and the Paris Agreement is to enable global cooperation that achieves the stabilization of greenhouse gas emissions at a level that prevents dangerous anthropogenic interference with the climate system --- **at this time, net zero greenhouse gas emissions comprise that urgently needed level:**

12.1. Article 2 of the UNFCCC states that "the ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, **stabilization**

²⁹ Joan E. Donoghue, *The Effectiveness of the International Court of Justice*, 108 ASIL Proceedings (2014), pp. 114-118, at p. 116.

of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.”³⁰

- 12.2. Article 2 of the Paris Agreement emphasizes that “in enhancing the implementation of the [UN Framework Convention on Climate Change], **including its objective**...[this Paris Agreement] aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by: (a) Holding the increase in the global average temperature to well below 2 degree Celsius above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 degree Celsius above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change...”³¹

13. In contrast, **the ultimate objective of international human rights treaties** --- especially those concluded in the Charter of the United Nations era --- in laying down binding legal obligations for States to respect, protect, and fulfil human rights --- **is to affirm the dignity and worth of the human person.**³² As explained by Professor Paolo Carozza, “human dignity and human rights are

³⁰ UN Framework Convention on Climate Change, Article 2, at <https://unfccc.int/resource/docs/convkp/conveng.pdf> (last accessed 1 October 2023). Emphasis added.

³¹ Paris Agreement, 2015, at Article 2(1)(a), at https://unfccc.int/sites/default/files/english_paris_agreement.pdf (last accessed 1 October 2023).

³² Charter of the United Nations Preamble (“We the Peoples of the United Nations, determined to save succeeding generations from the scourge of war...to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small....to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom...”, at <https://www.un.org/en/about-us/un-charter/full-text> (last accessed 1 October 2023).

not lived as abstract concepts. They have tangible meaning and weight in the context and crucible of concrete human experience --- history, freedom, reason, and community...the idea of human dignity serves as the single most widely recognized and invoked basis for grounding the idea of human rights generally, and simultaneously as an exceptionally widespread tool in judicial discourse about the content and scope of specific rights.”³³

14. Applying the principle of effectiveness (*ut res magis valeat quam pereat*) appropriately to the more intersectional, if not deliberately integrated, climate change law and international human rights law in the inter-American system, therefore, requires this Honorable Court to avoid any interpretation of the treaties of *both* climate change law and international human rights law “in a manner that would render the language in the [legal instrument or treaty] redundant, void, or ineffective....a tribunal will interpret ambiguous, vague, or apparently conflicting provisions of a legal instrument in a manner that best sustains the validity and enforceability of the instrument.”³⁴ The late Judge Antônio Augusto Cançado Trindade of the International Court of Justice (and former President of this Honorable Court) also affirmed the applicability of the principle of effectiveness to this Honorable Court’s interpretation of human rights treaties:

“15. By virtue of the principle *ut res magis valeat quam pereat*, which corresponds to the so-called *effet utile* (sometimes called principle of effectiveness), widely supported by case-law, the States Parties to human rights treaties ought to secure to the conventional provisions the proper effects at the level of their respective domestic legal orders. Such principle applies not only in relation to the substantive norms of human rights treaties (that is, those which provide for the protected rights), but also in relation to the procedural norms, in particular, those relating to the right of individual petition and to the acceptance of the contentious jurisdiction of the international judicial organ of protection. Such conventional norms, essential to the efficacy of the system of international protection, **ought to be interpreted and applied in such a way as to**

³³ Paolo G. Carozza, *Human Dignity and Judicial Interpretation of Human Rights: A Reply*, 19 European Journal of International Law 5 (November 2008), pp. 931-944, at <https://academic.oup.com/ejil/article/19/5/931/505548> (last accessed 1 October 2023).

³⁴ AARON X. FELLMETH AND MAURICE HORWITZ, GUIDE TO LATIN IN INTERNATIONAL LAW (Oxford University Press, 2009), at p. 107.

render their safeguards truly practical and effective, bearing in mind the special character of the human rights treaties and their collective implementation.”³⁵

15. Applying the principle of effectiveness to achieve the *differentiated objectives* of both the treaties of climate change law and international human rights law also means, necessarily, that this Honorable Court has to avoid engaging in ‘proportionality’ analysis or ‘balancing’ that readily trades off the effectiveness of climate change treaties (e.g. getting to net zero greenhouse gas emissions) for the effectiveness of international human rights treaties (e.g. ensuring the protection of the dignity and worth of the human person), and vice-versa.

16. For example, there are practically an infinite multitude of scientific, operational, or practical measures that can enable a State to reach net zero greenhouse gas emissions (e.g. such as completely eliminating any fossil fuels use within its territory without any transition plan), but these measures cannot be automatically and simplistically imposed to allegedly vindicate the right to a clean, healthy, and safe environment, if they also result in trading off the effectiveness of international human rights treaties for the most vulnerable persons (e.g. persons in extreme poverty, rural women, indigenous peoples, disabled persons, children and youth, among others) who cannot afford or readily obtain access to feasible alternatives to fossil fuel use, and thus be forced to bear harms and deprivations to the enjoyment of the full spectrum of affected human rights (e.g. the right to life; the right to enjoy rights without discrimination on grounds of economic status, for example; the right to an adequate standard of living; the right to housing and the right to property; the right not to be deprived of means of subsistence; the right to development, among others).³⁶ If some notion of ‘balancing’ or some kind

³⁵ *Case of Benjamin et al. v. Trinidad and Tobago*, Inter-American Court of Human Rights, Judgment on Preliminary Objections, 1 September 2001, Separate Opinion of Judge A.A. Cançado Trindade, at https://www.corteidh.or.cr/docs/casos/articulos/seriec_81_ing.pdf (last accessed 1 October 2023). Emphasis added.

³⁶ See American Convention on Human Rights, Articles 1, 4, 21, 26; International Covenant on Economic, Social and Cultural Rights, Articles 1(2), 2(1), 10, 11, among others; United Nations Human Rights Council Resolution A/HRC/54/L.27 on the Right to Development, which transmitted the Draft International Covenant on the Right to Development to the General Assembly for its consideration, negotiation, and subsequent adoption, at

of ‘proportionality analysis’ is resorted to here simply to achieve maximal effectiveness for one group of treaties (e.g. climate change law), at the expense of diluting or altogether eliminating the effectiveness of another group of treaties (e.g. international human rights law), this Honorable Court would fail to discharge its adjudicative mandate to ensure the principle of effectiveness for *all* human rights. Engaging in this mode of ‘trade-off’ or balancing reasoning *in the abstract* in these advisory proceedings is particularly sensitive, since it risks glossing over the contexts of specific cases and particulars of the lived experiences of actual persons, *in a manner that ultimately diminishes the force of the full spectrum of human rights that such persons enjoy*. Professor Francisco Urbina rightly argued that human rights cannot depend on the tenuous and elliptical reasoning that results from engaging in balancing or proportionality exercises:

“Some defenders of proportionality argue that the pre-eminence of rights is itself a function of an underlying balancing...the limits of rights are the product of an implied balancing....Balancing is therefore considered ‘unavoidable’, and the question is only if it ‘takes place in a hidden way’ or openly....

But this is not what rights are about. The particular normative force that defines rights, and that links them with considerations of justice and desert, is different from that of the unstable pre-eminence that a principle or interest has over another under the balancing model. Rights reasoning is *categorical*, qualitative rather than quantitative. Whether we explain rights as trumps, or as side-constraints, or in the form of lexical priority...the result is the same: **rights are claims that need to be satisfied, regardless of certain types of opposing considerations**. The right has pre-eminence over these considerations. It trumps them (under the rights-as-trumps model); or it signals that those considerations cannot be satisfied by measures that affect the right (and thus establish side-constraints to the satisfaction of certain goals); or it requires that the interest or value or claim protected by the right be satisfied first, and only then other considerations can be addressed. For our purposes what is noteworthy in all these different ways of accounting for the structure of rights is that **they all operate categorically**. The question is whether a particular interest or claim belongs to the category of interests or claims that are protected by a right, and whether the opposing considerations belong to the category of considerations that the right trumps, or that can only be satisfied respecting the side-constraint that the right consists in, or that can only be satisfied once the right has been satisfied.

<https://www.ohchr.org/en/news/2023/10/human-rights-council-adopts-five-resolutions-submits-general-assembly-draft> (last accessed 1 October 2023).

This kind of ordering, where one type of consideration has this pre-eminence over another, cannot be justified by reference to balancing, because balancing does not capture the qualitative dimension that is crucial for a mode of practical reasoning that works categorically, as rights reasoning does. Balancing cannot establish that a category of considerations has pre-eminence over another category, because the method of balancing...is not one that singles out or uncovers the quality of things (determining to which category they belong) and their moral significance, but the quantity of things: what principle has been interfered more with, what interest has been more affected, what need is more stringent, etc. From a quantitative ordering one cannot produce a qualitative ordering...because balancing is not concerned with questions regarding categories of considerations that deserve some form of pre-eminence over other categories of considerations --- **rights cannot be grounded on an implied balancing test...**

...the fact that proportionality and balancing filter out morally relevant considerations counts against them. Even if proportionality were not applied to cases involving absolute rights such as the right not to be subject to torture, it will be applied to cases regarding other rights. If those rights possess a special force, a kind of pre-eminence, then proportionality will filter out that special force or pre-eminence.
...

I have argued that proportionality, at least under a widespread understanding of it, cannot capture the normative force of rights. It is not a form of rights reasoning, and, therefore, when it is applied, rights are moved out of the picture. This is paradoxical, since it seems that rights talk, and especially human rights talk, is more pervasive than ever. But legal rights can be understood in all sorts of different ways. They are given concrete meaning by the generally accepted doctrinal methods used for deciding cases involving them. It could well be that much in human rights cases does not respond to the kind of reasons that we call 'rights' in moral parlance. Now, my argument is not about the proper use of the word 'right'. One can call something a 'right', but treat it as a reason of a different type. What I want to call attention to is the moving out of the picture of a distinctive and important type of reason --- one associated with requirements of justice and attributed a special normative force --- often called 'right'. Because these are important considerations, sound moral and legal analysis should be sensitive to them, and it is a deficiency for a legal method to ignore considerations of this type when they are at stake. **If such considerations of justice are involved in human rights cases, then a legal method for addressing those cases needs to be sensitive to those considerations. It is a matter of the utmost seriousness if the most widespread understanding of the most widely used test for addressing human rights cases fails to meet this requirement.**

The maximization account of proportionality fails....It is open to the incommensurability objection, because it attempts to commensurate incommensurable rights or principles, and because it attempts to strike this comparison along variables that are themselves incommensurable (intensity and extension of interests; or degree of satisfaction of principles and reliability of premises regarding their satisfaction, etc.). Furthermore, there is no reason for applying the method proposed by the theories of the maximization account of proportionality to

human rights cases. Defenders of proportionality have not provided such a reason, and they cannot do so because the method filters out considerations that are morally relevant in the cases to which proportionality is applied. **The different objections show that human rights cases are more complex than the maximization account of proportionality supposes. They require distinguishing different kinds of interests and public goods, and all these from rights, and establishing relations of priority that cannot be reduced to or grounded on a single quantitative comparison.**³⁷

17. Professor Francisco Urbina’s critique of proportionality and balancing is especially apropos in the present case, when the breadth and tenor of the queries posed by the Republic of Colombia and the Republic of Chile appear to seek this Honorable Court’s specification of actual *measures* “to minimize the impact of the damage due to the climate emergency in light of the obligations established in the American Convention” (Part IV.A.2 of their Joint Request), “to facilitate the work of environmental human rights defenders” (Part IV.F.1 of their Joint Request), and “to ensure that attacks and threats against environmental defenders in the context of the climate emergency do not go unpunished” (Part IV.F.5 of their Joint Request). These are questions that are fundamentally *reparative* in nature, inviting this Honorable Court to declare specific measures in this advisory opinion, without yet adjudicating a *specific* breach creating harm to a *specific* class of plaintiffs. Given the *intersectionality (if not outright integration)* of climate change law and international human rights law in the inter-American system and the *differentiated objectives* of each of these respective treaty regimes, this Honorable Court should not be expected to produce a homogenized list of measures to minimize the impact of damage due to the climate emergency or measures to facilitate the work of environmental human rights defenders. There is a real risk that any such *a priori* designation of measures would be the product of ‘proportionality analysis’ or ‘balancing’, and thus shade over the special normative force of all human rights --- civil, political, economic, social, cultural, environmental, and developmental.

³⁷ FRANCISCO J. URBINA, A CRITIQUE OF PROPORTIONALITY AND BALANCING (Cambridge University Press, 2017), at p. 105 and 107, 108-109, 115, 120-121. Emphasis added.

18. There is also a counterpart risk that having this Honorable Court itself provide the requested list of *measures a priori* through these advisory proceedings, could deprive the Court of the significant present or future assistance that could be provided by Legislatures that themselves generate the detailed positive laws (as well as administrative rules and regulations that implement such legislative statutes or parliamentary decrees), that contain the kind of needed legislative, administrative, or regulatory granularity required in devising governmental and non-governmental measures that are needed to respect, protect, and fulfil human rights. Professor Francisco Urbina emphasizes the benefits of possible assistance to human rights adjudication stemming from such legislation:

“Legislation has great potential to aid human rights adjudication. It should be conceived as an asset for the protection and promotion of human rights *in courts*. Of course, assets can become liabilities, but it makes a difference whether one evaluates legislation that frustrates human rights as pathological or as the normal case. In arguing that legislation aids human rights adjudication by providing valuable legal direction, I recall that the problems of legally unaided adjudication are also present in human rights adjudication. Human rights adjudication can be greatly served by legislation that provides legal guidance for the resolution of human rights...

It is tempting to think that the epistemic benefit provided by legal learning is owed more to the common law traditions of thought and years of legal thinking and decision-making than to legislative activity. And yet, the legislature can be a receptacle of legal learning --- of knowledge of legal categories and their application. There is much legal expertise resident in the legislature, in the form of the expertise of its members, staff, legal advisors, and other actors that support the work of law-making...Furthermore, the legislature is empowered to call on legal experts from different fields, including judges, lawyers, legal academics, and public officials, and to use their knowledge in crafting law. Codification in civil law jurisdictions illustrates how the legislature can draw on traditions of positive law. No civil code is drafted without regard for history. Even so extreme an example as the Chilean Civil Code (the work of the genius of essentially one man, Andres Bello, in the nineteenth century) draws heavily on Roman law, German law, medieval Spanish law, colonial law, and French civil law, among other sources. Codification was a matter of selection, emendation, and reformulation of an already existing body of legal categories gathered from existing legislation, case law, and doctrine.

As compared with the common law, which draws primarily on the information made available to the court by counsel, **legislation takes a more abstract and general perspective.** It does not address one conflict or the claims of one person, but rather attempts to assess the claims of all those involved, as well as to take into consideration larger schemes of social coordination that have been put in place to respect other

worthy claims. It assumes a more architectonic point of view, legislating for the whole of a community and its members instead of deciding a particular case involving particular parties. Assessing the interests and claims of all those potentially affected by a measure is a difficult task, without doubt. Courts can try to assess all relevant claims and bear in mind the schemes of coordination and specific convergence that attempt to realise them, particularly in cases where the government is a party. In the human rights context, after all, the issue is often presented as involving a contest between the human right of one party and the 'public interest' defended by the government. The label 'public interest' is liable to obscure what often are the diverse claims of other persons, their interests and rights, as well as the requirement of creating the diverse conditions necessary for all the members of the community to flourish. Addressing this complexity is difficult. It should come as no surprise that the judicial exercise often fails to capture all the relevant interests or to assess all the different moral requirements at stake. When it comes to addressing diverse interests and claims, the legislature has specific strengths. Its larger and more diverse composition, its more direct relationship with people affected by its decisions, its ability to gather information through hearings and written evidence, and its professional staff devoted to conducting research, all provide it with a capacity to perceive and process the different interests and claims involved and to understand complex schemes of social coordination. Furthermore, there are countless cases in which resolving the issue requires assessment of possible or likely consequences of a given measure so as to evaluate the way in which that measure will affect interests, claims, and schemes of coordination. Here, legislatures also have an advantage, in that they have the required institutional capacity to assess empirical evidence and to understand likely consequences. All this is as expected: legislatures are designed to adopt the general, architectonic, view of the whole community required for deliberating aptly about norms of the generality characteristic of legislation. Courts are designed to address concrete cases involving the claims of specific parties (typically two) appearing before the court.

This is particularly important for the protection of human rights...to speak properly of a right --- or, less controversially, to speak of something being actually required of someone in virtue of another's right --- one must determine the just relation between persons. But because relations between persons are generally not to be understood one at a time, no one set of relationships may be contemplated without holding in view the full range of other relationships contemplated by other rights. If this is so, establishing the relationships that give shape to rights will be a task most naturally charged to an institution designed to hold in view *all* the relevant interests and claims of a community's members. The legislature is designed to have this architectonic view. The judicial process, on the other hand, is designed to focus on the claims made by the parties in a given case or line of cases. These are distinct ways of addressing moral and political questions, and wise inter-institutional collaboration will benefit from the strengths of each....

...All this illustrates the potential for legislation to serve as an epistemic guide to courts in overcoming the obstacles associated with the problem of complexity in human rights adjudication. It can assess the relevant information, and it can express it by enacting clear and systematic directives that can reflect the

complex array of relevant considerations. When the legislature does this, it can greatly aid in solving the problem of complexity.”³⁸

19. Professor Diane Desierto has thus long argued in favor of States themselves internalizing their respective international human rights obligations, when setting and implementing States’ Nationally Determined Contributions (NDCs) pursuant to the 2015 Paris Agreement:

“Now that many States have submitted their nationally determined contributions (NDCs) to the public registry established under the 2015 Paris Agreement, are States respecting and promoting all of their human rights obligations in setting forth both their climate ambition targets as well as the pathways to reaching these targets under the NDCs? In this post, I focus on the NDC submissions of the largest emitters (the United States, China, and the European Union member states taken together) and note the conspicuous absence of spaces for human rights evaluation, monitoring, and compliance in setting the NDCs and deciding on measures that will be taken to implement the NDCs. This is problematic, because the Paris Agreement itself requires States to respect and promote their human rights obligations in undertaking climate actions....

There is only place where the Paris Agreement contains the phrase ‘human rights’, and that is in including respect for, and promotion of, human rights as part of the objects and purposes of this treaty in the eleventh paragraph of the Preamble:

“Acknowledging that climate change is a common concern of humankind, **Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights**, the *right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity*,” (Italics and emphasis added.)

The language used is deliberate, imperative, specific, and comprehensive in covering all of human rights law. The duties of State Parties in taking climate change actions or responses require them to *respect* (e.g. themselves refrain from or avoid any violation of human rights), *promote* (e.g. advancing awareness of and educating all on human rights, consistent with the right and responsibility of all to promote and protect universally recognized human rights and fundamental freedoms), and *consider* (e.g. to think carefully about before making a decision) their respective human rights obligations, as well as certain specifically enumerated rights above (e.g. right to health, indigenous peoples’ rights, rights of vulnerable persons, the right to development,

³⁸ Francisco J. Urbina, *How Legislation Aids Human Rights Adjudication*, Chapter 6, pp. 153-180, at pp. 171-175 in GREGOIRE WEBBER, PAUL YOWELL, RICHARD EKINS, MARIS KÖPCKE, BRADLEY W. MILLER, AND FRANCISCO J. URBINA (EDS.), *LEGISLATED RIGHTS: SECURING HUMAN RIGHTS THROUGH LEGISLATION* (Cambridge University Press, 2018). Emphasis added.

etc.). The fact that this was placed in the Preamble of the Paris Agreement only emphasizes further that these duties form part of the objects and purposes of the treaty, and should be used as part of the interpretation of the Paris Agreement. This is infinitely a more direct treaty device for integrating human rights into the formulation and assessment of any State Party's climate action, rather than previous attempts by the UN Special Rapporteur on Human Rights and Environment that focused on drawing an interpretive nexus between human rights obligations and environmental duties of States....

Various provisions of the Paris Agreement that require States Parties to take action should thus ensure respect for, promotion of, and consideration of all human rights obligations and the above specifically enumerated rights. The recognition of the right to development in this enumeration is particularly significant, given that its precise content remains defined under Article 1(1) of the 1986 Declaration on the Right to Development (e.g. "The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, *in which all human rights and fundamental freedoms can be fully realized.*") and its legally binding instrument remains pending (e.g. Article 4(1) of the Draft Convention on the Right to Development refers to: "Every human person and all peoples have the inalienable right to development by virtue of which they are entitled to participate in, contribute to and enjoy economic, social, cultural, civil and political development *that is consistent with and based on all other human rights and fundamental freedoms.*"). In either version of the right to development, the desired outcome is development that either enables and fully realizes all human rights (the 1986 version), or development that is itself consistent with and based on all human rights (the pending Draft Convention version).

By intentionally subjecting all climate actions and responses to climate action to the threshold of respecting, promoting, and considering the most comprehensive scope of human rights, **it is not an overreach to state that climate actions themselves must ultimately be consistent or in conformity with all human rights.** Whether it is the Paris Agreement Article 5(1) obligation stating that Parties should take action to conserve and enhance, as appropriate, sinks and reservoirs of greenhouse gases as referred to in Article 4, paragraph 1 (d), of the Convention, including forests"; or the Article 6(2) obligation that Parties "shall apply robust accounting to ensure, inter alia, the avoidance of double counting, consistent with guidance adopted by the Conference of the Parties serving as the meeting of the Parties to this Agreement"; or, as I examine in this post, the Article 4(2) obligation of each Party to "prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions" and Article 4(13) duty of each Party to "account for their nationally determined contributions. In accounting for anthropogenic emissions and removals corresponding to their nationally determined contributions, Parties shall promote environmental integrity, transparency, accuracy, completeness, comparability and consistency, and ensure the avoidance of double counting, in accordance with guidance adopted by the Conference of the Parties serving as the meeting of the Parties to this Agreement" — all of these

mandatory obligations under the Paris Agreement have to be read and interpreted consistently with the object and purpose of the Paris treaty to respect, promote, and consider all human rights when taking action to address climate change.

The set of [decisions](#) taken by the Conference of Parties to implement the Paris Agreement did not refer to any need for human rights consistency or assessment of human rights impacts from climate actions and responses. Neither does it appear that human rights consistency, impacts, and compliance, bear upon the various methods of States Parties' accounting of emissions and mitigation actions, as seen from the [UNFCCC's Reference Manual for the Enhanced Transparency Framework under the Paris Agreement](#). United Nations Secretary-General Antonio Guterres recently [noted](#) the strengthened NDCs of the United States, Britain, and the European Union, but that there are still missing new NDCs from China, Saudi Arabia, India, and around 70 countries.

However, an examination of latest and existing submissions by the largest emitters (the [United States](#), [China](#), and of the [European Union](#)) indicates that only the European Union is explicitly “integrating the dimensions of human rights and gender equality by States in all their national plans and strategies under the EU Energy Union Governance Regulation” (p. 12 of the [EU NDC](#)). The United States' own updated NDC, submitted recently when it rejoined the Paris Agreement, prescribes the following sectoral pathways to achieve their nationally determined contributions to greenhouse gas emissions:

“Electricity: The United States has set a goal to reach **100 percent carbon pollution-free electricity by 2035**, which could be achieved through multiple cost-effective technology and investment pathways, each resulting in meaningful emissions reductions in this decade. Eliminating greenhouse gases from the electricity sector will also reduce air and water pollution, improving public health while supporting good jobs building modern infrastructure. Policies that contribute to emissions reduction pathways consistent with the NDC include incentives and standards to reduce pollution. The federal government will work with state, local, and tribal governments to support the rapid deployment of carbon pollution-free electricity generating resources, transmission, and energy storage and leverage the carbon pollution-free energy potential of power plants retrofitted with carbon capture and existing nuclear, **while ensuring those facilities meet robust and rigorous standards for worker, public, environmental safety and environmental justice**. The United States will also support research, development, demonstration, commercialization, and deployment of software and hardware to support a carbon pollution-free, resilient, reliable, and affordable electricity system.

Transportation: The largest sources of emissions from transportation are light-duty vehicles like SUVs, pickup trucks, and cars, followed by heavy trucks, aircraft, rail, and ships. These transportation modes are highly dependent on fossil fuels, with more than 90 percent of transportation energy use coming

from petroleum. Transportation provides essential access to services and economic opportunities, but has historically contributed to racial and environmental inequities in the United States. There are many opportunities to reduce greenhouse gas emissions from transportation while also saving money for households, improving environmental quality and health in communities, and providing more choices for moving people and goods. Policies that can contribute to emissions reduction pathways consistent with the NDC include: tailpipe emissions and efficiency standards; incentives for zero emission personal vehicles; funding for charging infrastructure to support multi-unit dwellings, public charging, and long-distance travel; and research, development, demonstration, and deployment efforts to support advances in very low carbon new-generation renewable fuels for applications like aviation, and other cutting-edge transportation technologies across modes. Investment in a wider array of transportation infrastructure will also make more choices available to travelers, including transit, rail, biking, and pedestrian improvements to reduce the need for vehicle miles traveled. While the emissions pathways analyzed focus on domestic emissions reduction, the United States is also exploring ways to support decarbonization of international maritime and aviation energy use through domestic action as well as through the International Maritime Organization (IMO) and International Civil Aviation Organization (ICAO).

Buildings: Building sector emissions come from electricity use, as well as fossil fuels burned on site for heating air and water and for cooking. There are many options to avoid these emissions while reducing energy cost burden for families and improving health and resilience in communities. The emissions reduction pathways for buildings consider ongoing government support for energy efficiency and efficient electric heating and cooking in buildings via funding for retrofit programs, wider use of heat pumps and induction stoves, and adoption of modern energy codes for new buildings. The United States will also invest in new technologies to reduce emissions associated with construction, including for high-performance electrified buildings.

Industry: Emissions in the heavy industry sector come from energy use, including onsite fuel burning as well as electricity, and direct emissions resulting from industrial processes. The United States government will support research, development, demonstration, commercialization, and deployment of very low- and zero-carbon industrial processes and products. For example, the United States will incentivize carbon capture as well as new sources of hydrogen – produced from renewable energy, nuclear energy, or waste – to power industrial facilities. In addition, the United States government will use its procurement power to support early markets for these very low and zero-carbon industrial goods.”

All of the above pledged sectoral pathways prescribe very specific transformations to American processes of production, consumption, industry, investment, technology, and energy use, which will generate their corresponding impacts on civil and political

rights as well as the enjoyment of the right to health, the right to development, and the human rights of indigenous peoples and vulnerable communities (children, women, persons with disabilities, local communities, among others). However, as promising as the US NDC is in setting a goal to reach 100% carbon pollution-free electricity by 2035, the NDC is completely silent on conducting counterpart human rights impact assessments, human rights due diligence, and human rights auditing for the intersectional effects of these definitively prescribed sectoral pathways on the multidimensional enjoyment of all human rights. China's NDC focuses mainly on creating pathways to a "low-carbon way of life", without ever discussing whether they will track their climate actions' consistency and compliance with human rights commitments (such as the International Covenant on Economic, Social and Cultural Rights, to which China is a State Party)....

The siloed approach to examining climate change as purely an issue of getting to net zero carbon emissions, as opposed to a global structural transformation that also has the possibility of provoking corresponding Schumpeterian creative destructions on how different demographics and constituencies enjoy their civil, political, economic, social, and cultural rights, suggests a deliberate deafening of climate change approaches to the literal terms of the Paris Agreement which already did set as one of its objects and purposes that climate actions should respect, promote, and consider all human rights law. The fact that the technical assessments and State-level planning now being made about carbon neutrality largely leave human rights consistency as an afterthought (or as a utilitarian object to be jettisoned at any time in the name of the goal of reaching carbon neutrality), without seriously providing for a system of monitoring, tracking, assessing, and evaluating human rights consistency and compliance for all climate actions, is troubling for those who will be rendered even more vulnerable, more displaced, jobless, or unequal as a result of systemic structural transformations in the global economy. It is hard enough for human rights constituencies to raise their voices against malignant actions of authoritarian regimes. It will be even harder when human rights constituencies of the most vulnerable around the world have to make themselves heard to State-level or international decision-makers who can uniformly prescribe – without taking into account differentiated vulnerabilities within populations – that we should use “zero emission personal vehicles”, change barely human rights-compliant housing or dwelling structures to retrofit them for net zero emissions, or be “climate advocates” ourselves without having our baseline human rights respected, promoted, and considered. There is an urgent, wider, and more inclusive debate that we could all be having about how to get us all to net zero or carbon neutrality as a way of life, without ignoring how carbon neutrality is wed to deliberate choices, values, habits and preferences – *and why those, at a minimum, should be framed towards orienting all of us towards human rights consistency and full realization..* The last thing we all need, after the authoritarian proliferation of oppressive measures in this pandemic, is for a new set of oppressive measures to be imposed to reach carbon neutrality at all costs, and in utter disregard of, and indifference to, our individual and collective civil, political, economic, social, and cultural rights. Climate actions are also about respecting, promoting, and considering all our human rights. Conditioning climate action on human rights consistency, compliance, and full realization is, *and in that process making sure that ALL*

voices (and not just behemoth States or organizations, but also disempowered vulnerable communities) are meaningfully consulted, heard, and considered before prescribing any climate action, is what should get us to the elusive dream of climate justice based on human rights in this time of global “just transition”.”³⁹

20. As of this writing, States’ NDCs still do not contain any audit or report of the human rights impacts of such commitments on diverse vulnerable groups, peoples, communities, and other demographics within their populations. Neither are States mapping or anticipating in any form of “human rights audit”⁴⁰ what the human rights impacts are of their proposed climate actions.

21. Even the most recent decision text from the UNFCCC’s 28th Conference of Parties (COP 28) in December 2023 does not reflect the imperative nature of the continuing international human rights treaty obligations of States as they implement their respective climate actions, stating only that the Conference of Parties “*encourages* Parties to implement climate policy and action that is gender-responsive, *fully respects human rights*, and empowers youth and children.”⁴¹

22. A minimal baseline measure, therefore, that this Honorable Court can require of States in these advisory proceedings is for States to conduct their respective human rights audits of their climate action commitments (mitigation and/or adaptation and/or loss and damage), *in light of the entirety of their international human rights treaty and customary obligations*, so as to enable this Honorable Court as well as the States concerned to proceed with a

³⁹ Diane A. Desierto, “Just Transitions in Climate Change Actions: Are States Respecting, Promoting, and Considering Human Rights Obligations in Setting and Implementing NDCs?”, EJIL:Talk!, 8 October 2021, at <https://www.ejiltalk.org/respecting-human-rights-obligations-in-climate-change-actions-are-states-evaluating-ndcs-human-rights-impacts/> (last accessed 1 November 2023).

⁴⁰ Diane A. Desierto, *Shifting Sands in the International Economic System: ‘Arbitrage’ in International Economic Law and International Human Rights*, 49 Georgetown Journal of International Law 1019 (2018), at pp. 1103-1107 (discussing how a comprehensive human rights audit of any anticipated regulatory change would ensure compliance with international human rights treaty and customary human rights law obligations).

⁴¹ United Nations Framework Convention on Climate Change Conference of Parties, *Outcome of the First Global Stocktake*, FCCC/PA/CMA/2023/L.17, 13 December 2023, para. 178, full text at https://unfccc.int/sites/default/files/resource/cma2023_L17_adv.pdf (last accessed 1 November 2023).

well-ordered discussion in these advisory proceedings as to the *scope* of State’s duty of prevention and measures that any State should take to minimize the impact of the damage due to the climate emergency (Questions under Part A.1 and Part A.2), the *scope* of obligations to preserve the right to life and survival in relation to the climate emergency (Questions under Part B), the *nature and scope of obligations of States in relation to the rights of children and the new generations in light of the climate emergency* (Questions under Part C), the nature and scope of State Party’s obligations to establish effective judicial remedies for human rights impacts of the climate emergency (Questions under Part D), among other queries in these proceedings. This would not require this Honorable Court to enumerate or list *in abstracto* measures that are intended to be reparative in nature or designed to implement international human rights treaties, as sought in the Questions under Parts E and F.

23. As seen from the report of the Notre Dame Reparations Lab (see **Annex A**) based on its open-access comprehensive datasets coding all the reparative measures adjudicated throughout all national, regional, and international jurisprudence for various kinds of climate change disputes, courts and tribunals everywhere around the world are already framing different reparative measures to respond to specific circumstances and felt harms.⁴² Applying the principle of effectiveness to both climate change law and international human rights law *requires this necessary factual, scientific, and legal differentiation to realize the ultimate objectives of both of these treaty regimes*. Thus, while this Expert Opinion provides empirical examples of what has been adjudicated by other international, regional, and national courts and tribunals, this Honorable Court can simply refer to them as illustrative data, without serving as the definitive *legal* response to the queries posed by the Republic of Colombia and the Republic of Chile to identify measures “to minimize the impact of the damage due to the climate

⁴² See also Diane A. Desierto, *COP25 Negotiations Fail: Can Climate Change Litigation, Adjudication and/or Arbitration Compel States to Act Faster to Implement Climate Obligations?*, 31 Environmental Law and Management 3 (2019), at <https://www.lawtext.com/publication/environmental-law-and-management/contents/volume-31/issue-3> (last accessed 1 November 2023).

emergency in light of the obligations established in the American Convention” (Part IV.A.2 of their Joint Request), “to facilitate the work of environmental human rights defenders” (Part IV.F.1 of their Joint Request), and “to ensure that attacks and threats against environmental defenders in the context of the climate emergency do not go unpunished” (Part IV.F.5 of their Joint Request).

24. Admittedly, there is no shortage of other illustrative data examples and paradigms that this Honorable Court can take into account in responding to the queries about measures to mitigate the impact of damage due to the climate emergency. **Annex C** is an example of a multidisciplinary study at the University of Notre Dame co-authored by Professor Diane Desierto as Co-Principal Investigator, which operationalizes the right to water and all human rights (including sustainability) for water-intensive industries, focusing not on the prescription of specific measures but on designing the decision-making process for private actors to work with local communities and government regulators to internalize human rights and sustainability needs under international human rights law and climate change law.⁴³ This study has been presented at the United Nations Headquarters in Spring 2023 during the UN 2-23 Water Conference,⁴⁴ and was also featured at World Water Week 2022.⁴⁵ **Annex D** is a very brief summary of sample actionable measures⁴⁶ that States could already implement to mitigate the impact of climate change, authored by international environmental activist and civil society lawyer Antonio A. Oposa Jr.,⁴⁷ the 2019-2022 Normandy Chair for Peace on Law and Future

⁴³ Marc F. Muller, Diane Desierto, Ellis Adams, Georges Enderle, Elizabeth Dolan, Ray Offenheiser, Leonardo Bertassello, Nathaniel Hanna, Shambhavi Shekokar, Sean O'Neill, and Tom Purekal, *Water and Human Rights Unlocked: A Guide for Water-Intensive Industries*, November 2022, Pulte Institute for Global Development, University of Notre Dame, at <https://keough.nd.edu/publications/water-and-human-rights-unlocked-a-guide-for-water-intensive-industries/> (last accessed 1 October 2023), attached as **Annex C** to this Expert Opinion.

⁴⁴ See <https://www.unwater.org/news/un-2023-water-conference> (last accessed 1 October 2023).

⁴⁵ Mollie Sager, “Water and human rights unlocked”, World Water Week, 24 August 2022, at <https://www.worldwaterweek.org/news/water-and-human-rights-unlocked> (last accessed 1 October 2023).

⁴⁶ Antonio A. Oposa Jr., *Stories of the Walk to the World we Want*, attached as **Annex D** to this Expert Opinion.

⁴⁷ See <https://normandychairforpeace.org/member/antonio-a-oposa-jr/> (last accessed 1 October 2023).

Generations and recipient of the Center for International Environmental Law Award and the Ramon Magsaysay Award. These sample measures reflect the same rationale and approach that the International Union on the Conservation of Nature (IUCN) advocates States to use when formulating Nature-Based Solutions for Climate Change Mitigation.⁴⁸ The University of Notre Dame's Environmental Change Initiative also hosts multiple research projects on the assessment and evaluation of damage due to climate emergencies.⁴⁹

25. This is not to say, however, that this Honorable Court cannot respond to the queries posed in the Joint Request for an Advisory Opinion submitted by the Republic of Colombia and the Republic of Chile. Mindful of the principle of effectiveness in ensuring *pacta sunt servanda* performance of State obligations under climate change law and international human rights law, especially in the specialized jurisprudence of this Honorable Court, the rest of this Expert Opinion will focus on the *nature and scope of State obligations* requested in Parts A to D, while omitting to specify the precise *measures* States should take to implement these obligations. We submit that the design of specific measures to implement States' climate change law and international human rights law obligations requires that **each State precisely differentiate according to its circumstances, capacities, resources, and vulnerabilities as they collectively yield their respective idiosyncratic human rights impacts from climate actions.** As such, we submit that it is beyond the purview of this Honorable Court's judicial function in these advisory proceedings to specify such measures in abstracto and well in advance of any concrete case or contentious dispute, when the same climate actions could very well

⁴⁸ International Union on the Conservation of Nature (IUCN) and United Nations Environment Programme (UNEP), *Nature-Based Solutions for Climate Change Mitigation*, 2021, full text at <https://wedocs.unep.org/xmlui/bitstream/handle/20.500.11822/37318/NBSCCM.pdf> (last accessed 1 October 2023).

⁴⁹ See <https://environmentalchange.nd.edu/research/> (last accessed 1 October 2023).

be tested or challenged before this Honorable Court by individuals, groups, peoples, communities, and populations that experience such human rights impacts in distinct and unique contexts.

II. NATURE AND SCOPE OF STATE OBLIGATIONS ARISING FROM THE DUTY OF PREVENTION AND THE GUARANTEE OF HUMAN RIGHTS IN RELATION TO THE CLIMATE EMERGENCY, INCLUDING FOR VULNERABLE GROUPS (ENVIRONMENTAL DEFENDERS, WOMEN, INDIGENOUS PEOPLES, AFRO-DESCENDANT COMMUNITIES, AMONG OTHERS)

1. The duty of prevention traces its origins to the customary obligation not to allow one's territory to be used in a manner that causes transboundary harm.⁵⁰ The International Court of Justice confirmed this principle in *Certain Activities Carried Out By Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*⁵¹:

“104. As the Court has had occasion to emphasize in its Judgment in the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*:

‘the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is ‘every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States’ [*Corfu Channel case, United Kingdom v. Albania*], *Merits, Judgment, I.C.J. Reports 1949*, p. 22]. A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State.’ (*Judgment, I.C.J. Reports 2010 (I)*, pp. 55-56, para. 101).

Furthermore, the Court concluded in that case that ‘it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource’ (*ibid.*, p. 83, para. 204). Although the Court’s statement in the *Pulp Mills* case refers to industrial activities, the underlying principle applies to proposed activities

⁵⁰ *Trail Smelter Arbitration*, Reports of International Arbitral Awards, Vol. III, pp. 1905-1982, at p. 1965 (“...under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.”).

⁵¹ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, International Court of Justice, Judgment of 16 December 2015, at <https://www.icj-cij.org/sites/default/files/case-related/150/150-20151216-JUD-01-00-EN.pdf> (last accessed 1 November 2023).

which may have a significant adverse impact in a transboundary context. **Thus, to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm, a State must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment.**

Determination of the content of the environmental impact assessment should be made in light of the specific circumstances of each case. As the Court held in the *Pulp Mills* case:

‘it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment’ (*I.C.J. Reports 2010 (I)*, p. 83, para. 205).’

If the environmental impact assessment confirms that there is a risk of significant transboundary harm, the State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk....⁵² (Emphasis added.)

2. The legal threshold that defines the scope of a State’s duty of prevention in relation to climate events caused by global warming, therefore, is **the risk of transboundary harm from human activities, measures, or actions over which the State exercises a certain degree of jurisdiction.**⁵³

The nature of these risk assessments have not yet been standardized under international law for a wide spectrum of human activities, public or private measures, or any form of climate actions, although the International Standards Organization (ISO) has published its ISO/TS 14092:2020 *Adaptation to Climate Change* (Requirements and guidance on adaptation planning for local governments and communities).⁵⁴ With no treaty prescribing a uniform method of risk assessment, States will expectedly conduct risk assessments for possible transboundary harm from human activities,

⁵² Id. at footnote 50, at para. 104.

⁵³ See also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, at para. 29; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, I.C.J. Reports (2010), at para. 101.

⁵⁴ See ISO/TS 14092:2020 at <https://www.iso.org/standard/68509.html> (last accessed 1 November 2023).

measures, or actions according to law applicable within their respective jurisdictions. To date, climate risk assessments face challenges as to their ultimate verifiability and reliability due to scope, the availability of data, and the different degrees of transparency across jurisdictions around the world.⁵⁵ To the extent that there is considerable variability in local, national, regional, sub-regional, or global assessments of the risk of transboundary harm, therefore, the operative scope of States' duty to prevent transboundary harm is equally imprecise to draw with clear red lines.

3. Significantly, however, the Intergovernmental Panel on Climate Change (IPCC) usefully provided a 2021 Guidance Note⁵⁶ on risk definitions as States undertake their own assessments. Risk is defined as “the potential for adverse consequences for human or ecological systems, recognizing the diversity of values and objectives associated with such systems. In the context of climate change, risks can arise from potential impacts of climate change as well as human responses to climate change. Relevant adverse consequences include those on lives, livelihoods, health and wellbeing, economic, social and cultural assets and investments, infrastructure, services (including ecosystem services), ecosystems and species.”⁵⁷ The IPCC goes on to note that “in the context of climate change *impacts*, risks result from dynamic interactions between climate-related hazards with the exposure and vulnerability of the affected human or ecological system to the hazards. Hazards, exposure and vulnerability may each be subject to uncertainty in terms of magnitude and likelihood of occurrence, and each may change over time and space due to socio-economic changes and human

⁵⁵ Alberto Arribas, Ross Fairgrieve, Trevor Dhu, Juliet Bell, Rosalind Cornforth, Geoff Gooley, Chris J. Hilson, Amy Luers, Theodore G. Shepherd, Roger Street, and Nick Wood, *Climate risk assessment needs urgent improvement*, 13 Nature Communications 4326 (2022), at <https://www.nature.com/articles/s41467-022-31979-w> (last accessed 1 November 2023).

⁵⁶ Intergovernmental Panel on Climate Change, *The concept of risk in the IPCC Sixth Assessment report: a summary of cross-Working Group discussions: Guidance for IPCC authors*, 4 September 2020, at https://www.ipcc.ch/site/assets/uploads/2021/02/Risk-guidance-FINAL_15Feb2021.pdf (last accessed 1 November 2023).

⁵⁷ Id. at footnote 56, at p. 4.

decision-making.”⁵⁸ In contrast, “in the context of climate change *responses*, risks result from the potential for such responses not achieving the intended objective(s), or from potential trade-offs with, or negative side-effects on, other societal objectives, such as the Sustainable Development Goals...Risks can arise for example from uncertainty in implementation, effectiveness or outcomes of climate policy, climate-related investments, technology development or adoption, and system transitions.”⁵⁹ Thus, risks can materialize from either contexts of experienced natural or man-made climate change *impacts*, as well as from human interventions through climate change *responses*.

4. Given the wide range of risks of transboundary harm from the climate emergency and the non-standardized risk assessment methods adopted by different States, the State’s duty to prevent must also be read in light of the precautionary principle, as articulated in Article 3, paragraph 3 of the UN Framework Convention on Climate Change itself (e.g. “*The Parties should take precautionary measures to anticipate, prevent, or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks, and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties.*”),⁶⁰ and is also contained in other international environmental treaties.⁶¹ The International Court of Justice’s 1997 Judgment on the Merits in *Gabcikovo-Nagymaros Project* was

⁵⁸ Id. at footnote 56, at p. 5.

⁵⁹ Id. at footnote 56, at p. 5.

⁶⁰ UN Framework Convention on Climate Change, Article 3(3), full text at <https://unfccc.int/resource/docs/convkp/conveng.pdf> (last accessed 1 November 2023).

⁶¹ See Convention on Biological Diversity, Preamble, ninth paragraph, at <https://www.cbd.int/doc/legal/cbd-en.pdf> (last accessed 1 November 2023).

likewise open to the applicability of the precautionary principle when examining a State's duty to prevent transboundary harm:

“97. Finally, Hungary argued that subsequently imposed requirements of international law in relation to the protection of the environment precluded performance of the Treaty. The previously existing obligation not to cause substantive damage to the territory of another State had, Hungary claimed, evolved into an *erga omnes* obligation of prevention of damage pursuant to the ‘precautionary principle’. On this basis, Hungary argued, its termination was ‘forced by the other party’s refusal to suspend work on Variant C.’...

112. ...the Court wishes to point out that newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties, could, by agreement, incorporate them through the application of Articles 15, 19 and 20 of the Treaty. These articles do not contain specific obligations of performance but require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan. By inserting these evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the Treaty is not static, and is open to adapt to emerging norms of international law. By means of Articles 15 and 19, new environmental norms can be incorporated in the Joint Contractual Plan.

The responsibility to do this was a joint responsibility. The obligations contained in Article 15, 19 and 20 are, by definition, general and have to be transformed into specific obligations of performance through a process of consultation and negotiation. Their implementation thus requires a mutual willingness to discuss in good faith actual and potential environmental risks.

It is all the more important to do this because as the Court recalled in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, ‘the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn’ (I.C.J. Reports 1996, p. 241, para. 29...)

The awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis have become much stronger in the years since the Treaty’s conclusion. These new concerns have enhanced the relevance of Articles 15, 19, and 20.

113. The Court recognizes that both Parties agree on the need to take environmental concerns seriously and to take the required precautionary measures, but they may fundamentally disagree on the consequences this has for the joint Project. In such a case, third-party involvement may be helpful and instrumental

in finding a solution, provided each of the Parties is flexible in its position.”⁶²
(Emphasis added)

5. States implementing climate actions and achieving the objectives of the UN Framework Convention on Climate Change have always been subject to operative principles in Article 3 of this Convention, which encompasses the duty of prevention and the precautionary principle, but also rights to sustainable development:

“Article 3 Principles

In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided, inter alia, by the following:

1. The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.
2. The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration.
3. **The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost.** To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties.
4. **The Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate to the specific conditions of each Party and should be integrated with national development programmes,**

⁶² *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 September 1997, International Court of Justice Reports 1997, at paras. 97, 112-113.

taking into account that economic development is essential for adopting measures to address climate change.

5. The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.”⁶³ (Emphasis and underscoring added.)

6. This Expert Opinion respectfully submits to this Honorable Court that the “appropriate specific conditions of each Party” referred to in Article 3, paragraph 4 of the above principles in the UN Framework Convention on Climate Change must and should take into account a State’s international legal obligations, most especially international human rights treaty obligations and customary human rights norms under international law. This creates the guarantee that, notwithstanding the uncertain scope of the duty to prevent transboundary harm resulting from the considerable variability when it comes to risk assessment and the precautionary principle that binds all States, that States remain obligated to ensure that policies and measures to protect the climate system against human-induced change would be “appropriate to the specific conditions of each Party”.

7. **Mapping a State’s international human rights treaty and customary obligations is a crucial first step that enables the State to precisely identify the specific conditions in its jurisdiction that would be impacted by policies and measures to protect the climate system against human-induced change.** Precisely because international human rights law focuses on the dignity and flourishing of the human person, it is critical not to reduce humans to totalizing or homogenizing assumptions that humans can all be subjected to identical climate protection policies and measures. International human rights law recognizes human vulnerabilities in exercising their civil and political rights, their economic, social and cultural rights, their rights to development and

⁶³ Id. at footnote 60, at Article 3.

sustainable development, as well as their human right to a healthy, safe, clean and sustainable environment. The manner in which these rights are realized and experienced within any State certainly differs for persons experiencing heightened vulnerabilities as a result of human rights violations, such as discrimination (on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status);⁶⁴ being subjected to torture or other cruel, inhuman or degrading punishment⁶⁵ or enforced disappearance;⁶⁶ experiencing refugee displacement or any form of migration;⁶⁷ or in need of special protections for women,⁶⁸ children,⁶⁹ persons with disabilities,⁷⁰ among others. Those experiencing intersectional bases of discrimination,⁷¹ in particular,

⁶⁴ International Covenant on Civil and Political Rights, Article 2(1); International Covenant on Economic, Social and Cultural Rights, Article 2(1); International Convention on the Elimination of Racial Discrimination, Article 1(1).

⁶⁵ Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment, Article 1(1) (e.g. the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”)

⁶⁶ International Convention for the Protection of All Persons from Enforced Disappearance, Article 2 (e.g. ‘enforced disappearance’ is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law).

⁶⁷ 1951 Convention Relating to the Status of Refugees, Article 1 (definition of ‘refugee’) and its 1967 Protocol; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Article 2(1), (e.g. ‘migrant worker’ refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national).

⁶⁸ Convention on the Elimination of All Forms of Discrimination Against Women, Article 1 (e.g. “discrimination against women: shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field).

⁶⁹ Convention on the Rights of the Child, Article 2(1) (non-discrimination obligation).

⁷⁰ Convention on the Rights of Persons with Disabilities, Article 2 (e.g. ‘discrimination on the basis of disability’ means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation).

⁷¹ Ana T. Amorim-Maia, Isabelle Anguelovski, Eric Chu, and James Connolly, *Intersectional climate justice: A conceptual pathway for bridging adaptation planning, transformative action, and social equity*, 41 Urban Climate (January 2022), at <https://www.sciencedirect.com/science/article/pii/S2212095521002832> (last accessed 1 November 2023); Michael Mikulewicz, Martina Angela Caretta, Farhana Sultana, and Neil J.W. Crawford, *Intersectionality and Climate Justice: A Call for*

are more than likely to experience even deeper vulnerabilities to climate change impacts and any human rights risks materializing from climate responses.⁷²

8. Thus, the most basic measures that States can feasibly take to minimize the impact of damage due to the climate emergency is to: a) **internalize their international human rights obligations in all policies and measures to address climate change**; and b) **conduct an ongoing human rights audit of prospective and ongoing climate change policies, measures, and actions to ascertain the nature and extent of human rights impacts experienced by different vulnerable individuals, groups, peoples, communities, and populations**. When implementing their respective sovereign obligations to regulate, to monitor and oversee, to request and to adopt social and environmental impact assessments, to establish contingency plans, and to mitigate activities under its jurisdiction that exacerbate or could exacerbate the climate emergency, States have to take their international human rights treaty obligations and international human rights customary obligations into account,⁷³ to provide a more accurate risk assessment that informs its continuing duty to prevent transboundary harm, especially in the context of climate change. It is only after that more accurate risk assessment is produced that States can feasibly devise and frame climate change responses and mitigation measures, while appropriately anticipating and designing reparative

Synergy in Climate Change Scholarship, 32 *Environmental Politics* 7 (2023), pp. 1275-1286; JOHANNA BOND, *GLOBAL INTERSECTIONALITY AND CONTEMPORARY HUMAN RIGHTS* (Oxford University Press, 2021), at Chapter 4 (Intersectionality and Human Rights within Regional Human Rights Systems).

⁷² See Ang Li, Mathew Toll, Rebecca Bentley, *Mapping social vulnerability indicators to understand the health impacts of climate change: a scoping review*, 7 *The Lancet Planetary Health* 11 (November 2023), pp. 925-937; Barbara Astle, Meghann Buyco, Ikponwosa Ero, Sheryl Reimer-Kirkham, *Global impact of climate change on persons with albinism: A human rights issue*, 9 *The Journal of Climate Change and Health* (January – February 2023); Liat Ayalon, Norah Keating, Karl Pillemer, Kiran Rabheru, *Climate Change and Mental Health of Older Persons: A Human Rights Imperative*, 29 *The American Journal of Geriatric Psychiatry* 10 (October 2021), pp. 1038-1040;

⁷³ See Sebastien Jodoin, Annalisa Savaresi, Margaretha Wewerinke-Singh, *Rights-based approaches to climate decision-making*, 52 *Current Opinion in Environmental Sustainability* (October 2021), pp. 45-53.

mechanisms for redress of any of the human rights impacts on existing or continuing vulnerabilities within States' populations.⁷⁴

9. In this Honorable Court's *Advisory Opinion OC-23/17 (The Environment and Human Rights)*,⁷⁵ this Honorable Court already extensively discussed the obligation of prevention and measures States must take to comply with the obligation of prevention. Our Expert Opinion respectfully submits that requiring the internalization of international human rights obligations in the proposed or actual NDCs of States, alongside the conduct of a human rights audit for all proposed or actual climate action or measure, would fully align with this Honorable Court's thorough disquisition on the obligation of prevention by **ultimately enabling greater effectiveness at risk assessment:**

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

128. Under environmental law, the principle of prevention has meant that States have the ‘responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.’ This principle was explicitly established in the Stockholm and Rio Declarations on the environment and is linked to the international obligation to exercise due diligence so as not to cause or permit damage to other States...

129. The principle of prevention of environmental damage forms part of international customary law. This protection encompasses not only the land, water and atmosphere, but also includes flora and fauna. Specifically, in relation to State obligations with regard to the sea, the United Nations Convention on the Law of the Sea established that ‘States have the obligation to protect and preserve the marine environment’ and imposes a specific obligation ‘to prevent, reduce and control pollution of the marine

⁷⁴ See United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, at <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation#:~:text=Adequate%2C%20effective%20and%20prompt%20reparation,violations%20and%20the%20harm%20suffered>. (last accessed 1 November 2023).

⁷⁵ Inter-American Court of Human Rights, *Advisory Opinion OC-23/17 of November 15, 2017, The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights)*, at https://www.corteidh.or.cr/docs/opiniones/seria_23_ing.pdf (last accessed 1 November 2023).

environment.’ The Cartagena Convention that Colombia mentions in its request also establishes this obligation.

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

...

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

...

143. ...the obligation of prevention established in environmental law is an obligation of means and not of results.

144. ...certain minimum measures can be defined that States must take within their general obligation to take appropriate measures to prevent human rights violations as a result of damage to the environment.

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

...

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

...

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

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

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

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

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

163. The Court considers that the environmental impact assessment must be carried out by an independent entity with the relevant technical capacity, under the State's supervision. Environmental impact assessments can be carried out by the State itself or by a private entity. However, in both cases, it is the State, in the context of its monitoring and oversight duty, that must ensure that the assessment is carried out correctly. If assessments are made by private entities, the State must take steps to ensure their independence.

164. During the process for approval of an environmental impact assessment, the State must analyze whether execution of the project is compatible with its international obligations. In this regard, it must take into account the impact that the project may have on its human rights obligations. In cases involving indigenous communities, the Court has indicated that the environmental impact assessment should include an evaluation of the potential social impact of the project. The Court notes that if the environmental impact assessment does not include a social analysis, the State must make this analysis while supervising the assessment.

c. It must include the cumulative impact.

165. The Court has indicated that the environmental impact assessment must examine the cumulative impact of existing projects and proposed projects. In this regard, if a proposed project is linked to another project, as in the case of the construction of an access road, for example, the environmental impact assessment should take into account the impact of both the main project and the associated projects. In addition, the impact of other existing projects should be taken into account. This analysis will

allow a more accurate conclusion to be reached on whether the individual and cumulative effects of existing and future activities involve a risk of significant harm.

d. Participation of interested parties

166. The Court has not ruled on the participation in environmental impact assessments of interested parties when this is not related to the protection of the rights of indigenous communities. In the case of projects that may affect indigenous and tribal territories, the Court has indicated that the community should be allowed to take part in the environmental impact assessment process through consultation. The right to participate in matters that could affect the environment is dealt with, in general, in the section on procedural obligations below (paras. 226 to 232).

167. However, regarding the participation of interested parties in environmental impact assessments, the Court notes that in 1987, the United Nations Environmental Programme adopted the Goals and Principles of Environmental Impact Assessments, which established that States should permit experts and interested groups to comment on environmental impact assessments. Even though the principles are not binding, they are recommendations by an international technical body that States should take into account. The Court also notes that the domestic laws of Argentina, Belize, Brazil, Canada, Chile, Colombia, Ecuador, El Salvador, Guatemala, Peru, Dominican Republic, Trinidad and Tobago and Venezuela include provisions that establish public participation in environmental impact assessments while, in general, Bolivia, Costa Rica, Cuba, Honduras and Mexico promote public participation in decisions relating to the environment.

168. The Court considers that, in general, the participation of the interested public allows a more complete assessment of the possible impact of a project or activity and whether it will affect human rights. Thus, it is recommendable that States allow those who could be affected or, in general, any interested person, to have the opportunity to present their opinions or comments on a project or activity before it is approved, while it is being implemented, and after the environmental impact assessment has been issued.

e. Respect for the traditions and culture of indigenous peoples

169. In the case of projects that may affect the territory of indigenous communities, social and environmental impact assessments must respect the traditions and culture of the indigenous peoples. In this regard, the intrinsic connection between indigenous and tribal peoples and their territory must be taken into account. The connection between the territory and the natural resources that have been used traditionally and that are necessary for the physical and cultural survival of these peoples and for the development and continuity of their world view must be protected to ensure that they can continue their traditional way of life and that their cultural identity, social structure, economic system, and distinctive customs, beliefs and traditions are respected, guaranteed and protected by States.

f. Content of environmental impact assessments

170. The content of the environmental impact assessment will depend on the specific circumstances of each case and the level of risk of the proposed activity. Both the International Court of Justice and the International Law Commission have indicated that each State should determine in its laws the content of the environmental impact assessment required in each case. The Inter-American Court finds that States should determine and define, by law or by the project authorization process, the specific content required of an environmental impact assessment, taking into account the nature and size of the project and its potential impact on the environment.

iv) Duty to prepare a contingency plan

171. The United Nations Convention on the Law of the Sea establishes that States shall together prepare and promote emergency plans to deal with incidents of pollution of the marine environment. The same obligation is included in the Convention on the Law of the Non-Navigational Uses of International Watercourses. In this regard, the Court considers that the State of origin should have a contingency plan to respond to environmental emergencies or disasters that includes safety measures and procedures to minimize the consequences of such disasters. Even though the State of origin is the main entity responsible for the contingency plan, when appropriate, the plan should be implemented in cooperation with other States that are potentially affected, and also competent international organizations. (*infra* para. 189).

v) Duty to mitigate if environmental damage occurs

172. The State must mitigate significant environmental damage if it occurs. Even if the incident occurs despite all the required preventive measures having been taken, the State of origin must ensure that appropriate measures are adopted to mitigate the damage and, to this end, should rely upon the best available scientific data and technology. Such measures should be taken immediately, even if the origin of the pollution is unknown. Some of the measures that States should take are: (i) clean-up and restoration within the jurisdiction of the State of origin; (ii) containment of the geographical range of the damage to prevent it from affecting other States; (iii) collection of all necessary information about the incident and the existing risk of damage; (iv) in cases of emergency in relation to an activity that could produce significant damage to the environment of another State, the State of origin should, immediately and as rapidly as possible, notify the States that are likely to be affected by the damage (*infra* para. 190); (v) once notified, the affected or potentially affected States should take all possible steps to mitigate and, if possible, eliminate the consequences of the damage, and (vi) in case of emergency, any persons who could be affected should also be informed.

173. In addition, as explained below, the State of origin and the States potentially affected have the obligation to cooperate in order to take all possible measures to mitigate the effects of the damage (*infra* paras. 181 to 210).

B.1.d Conclusion regarding the obligation of prevention

174. In order to ensure the rights to life and integrity, States have the obligation to prevent significant environmental damage within and outside their territory, as established in paragraphs 127 to 173 of this Opinion. In order to comply with this obligation, States must: (i) regulate activities that could cause significant harm to the environment in order to reduce the risk to human rights, as indicated in paragraphs 146 to 151 of this Opinion; (ii) supervise and monitor activities under their jurisdiction that could produce significant environmental damage and, to this end, implement adequate and independent monitoring and accountability mechanisms that include measures of prevention and also of sanction and redress, as indicated in paragraphs 152 to 155 of this Opinion; (iii) require an environmental impact assessment when there is a risk of significant environmental harm, regardless of whether the activity or project will be carried out by a State or by private persons. These assessments must be made by independent entities with State oversight prior to implementation of the activity or project, include the cumulative impact, respect the traditions and culture of any indigenous peoples who could be affected, and the content of such assessments must be determined and defined by law or within the framework of the project authorization process, taking into account the nature and size of the project and its potential impact on the environment, as indicated in paragraphs 156 to 170 of this Opinion; (iv) institute a contingency plan in order to establish safety measures and procedures to minimize the possibility of major environmental accidents in keeping with paragraph 171 of this Opinion, and (v) mitigate significant environmental damage, even when it has occurred despite the State's preventive actions, using the best scientific knowledge and technology available, in accordance with paragraph 172 of this Opinion.”⁷⁶ (Emphasis added.)

10. What is missing from the above elaboration by this Honorable Court on the obligation of prevention, *in the specific context of the climate emergency*, is precisely the requirement for States to internalize their international human rights obligations in their proposed NDCs, and to construct corresponding human rights audits for proposed or ongoing climate policies, measures, or actions, to further substantiate and more fully verify the risks to human rights implementation, realization, and compliance (appropriately disaggregated according to affected constituencies, especially for those with existing heightened vulnerabilities to human rights impacts, such as those already experiencing intersectional discrimination) from climate policies, measures, or actions contemplated by States.

⁷⁶ Id. at paras. 127 to 130.

11. While the authors of this Expert Opinion will not, at this point, proffer recommendations of measures in the abstract in relation to the States’ obligations to prevent and their counterpart duties to protect groups already vulnerable to various forms of human rights deprivations, such as environmental defenders, women, indigenous peoples, and Afro-descendant communities facing the climate emergency (Part D of Chile and Colombia’s Questions to this Honorable Court), the attention of this Honorable Court is specifically invited towards the following:

11.1. Global Witness’ September 2023 Report confirmed that 177 land and environmental defenders were killed in 2022 on the frontlines of defending human rights and the environment in the face of the climate emergency, and out of this entire group, 155 were from Latin America;⁷⁷

11.2. The United Nations Special Rapporteur on Violence Against Women and Girls’ 11 July 2022 Report found that climate change “acts as a threat multiplier and its impacts are felt more severely by those already on the margins...[such as women].”⁷⁸

11.3. The United Nations Special Rapporteur on the Rights of Indigenous Peoples’ 2017 Report also noted the deepening of indigenous peoples’ deficits in rights protection as a result of the climate crisis;⁷⁹ and

⁷⁷ Global Witness, *Standing Firm: The Land and Environmental Defenders on the Frontlines of the Climate Crisis*, September 2023, full text at <https://www.globalwitness.org/en/campaigns/environmental-activists/standing-firm/> (last accessed 1 November 2023).

⁷⁸ United Nations Secretary-General, *Violence against women and girls, its causes and consequences*, 11 July 2022, A/177/136, full text at <https://undocs.org/Home/Mobile?FinalSymbol=a%2F77%2F136&Language=E&DeviceType=Desktop&LangRequested=False> (last accessed 1 November 2023).

⁷⁹ United Nations Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples*, 15 September 2017, A/HRC/36/46, full text at <https://www.refworld.org/pdfid/59c2720c4.pdf> (last accessed 1 November 2023).

11.4. The intersectional discrimination faced by people of African Descent led to even worse climate change impacts on their lived experiences of human rights deprivation, as reported in 2020 for the UN Office of the High Commissioner for Human Rights.⁸⁰

12. These heightened risks of human rights deprivations and vulnerabilities experienced by specific groups from the climate emergency only raises the urgency for this Honorable Court to require States to both internalize their international human rights law commitments in their Nationally Determined Contributions (NDCs), as well as to devise and prepare human rights audits that disaggregate information on human rights impacts according to vulnerabilities within and across populations from actual or proposed climate change policies, measures, and actions.

III. SCOPE OF OBLIGATIONS ON ENVIRONMENTAL INFORMATION

1. Part B of the Questions for this Honorable Court focus on information, transparency, and participation duties and obligations of States under international human rights law and specific regional treaties such as the Ezcazu Agreement and the American Convention on Human Rights. Part D of the Questions for this Honorable Court examines the nature and scope of a State Party's obligation to establish effective judicial remedies to provide adequate and timely protection and redress for the impact on human rights of the climate emergency.

2. This Expert Opinion notes that the main treaties on climate change law --- the UN Framework Convention on Climate Change, the Kyoto Protocol, and the Paris Agreement --- all contain extensive obligations on transparency with respect to the exchange of environmental

⁸⁰ Olivier Flamand-Lapointe, Christina Lumsden, Samuel Pablo, Ignasius Pareira, Pauline Seppey, *Climate Change Impacts on the Rights of People of African Descent*, 2020 report produced for the UN Office of the High Commissioner for Human Rights, full text at <https://www.ohchr.org/sites/default/files/Documents/Issues/Racism/WGEAPD/Session28/written-input/capstone.pdf> (last accessed 1 November 2023).

information.⁸¹ Articles 4(1) and 5(1) of the Escazu Agreement give further substantive and obligatory content to these information transparency obligations in climate change law, especially since the Escazu Agreement Article 5(1) provides for a public right of access to environmental information according to the “principle of maximum disclosure”. Applying the Escazu Agreement to the States Parties to this treaty who are also treaty parties to the UN Framework Convention on Climate Change, the Kyoto Protocol, and the Paris Agreement, there should indeed be a “principle of maximum disclosure” by States as to information and access to information on greenhouse gas emissions, air pollution, deforestation, activities and sectors that contribute to a State’s emissions, and the determination of human impacts such as human mobility, migration, and forced displacement, among others. This is precisely the substantive content anticipated by this Expert Opinion when States are required to regularly undertake human rights audits that reasonably anticipate foreseeable human rights impacts⁸² (such impacts also disaggregated according to vulnerabilities experienced by different groups, peoples, communities, and individuals within populations), in the course of formulating, preparing, and implementing climate change policies, measures, and actions. The authors of this Expert Opinion will be glad to assist this Honorable Court and prepare a qualitative and quantitative or mixed methods approach⁸³ to Human Rights Impact Assessment for Just Transition policies on climate change that States could feasibly undertake throughout various levels of governance, as well as in projects and other collaborations or regulations applicable to private sector activities.

⁸¹ See among others UN Framework Convention on Climate Change, Article 4(1)(a), (b), (g), (h), Article 4(2)(a), (b), (c), Article 4(8), Article 5, Article 6; Kyoto Protocol to the UN Framework Convention on Climate Change, Article 2(1)(b), Articles 5, 6, 7, and 8; Paris Agreement, Article 4(1) to 4(19), Article 4(8), Article 6(2), Article 13.

⁸² See for example, United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Human Rights Impact Assessment of Economic Reforms*, at https://www.ohchr.org/sites/default/files/GuidePrinciples_EN.pdf (last accessed 1 November 2023).

⁸³ See an example of such an assessment in Annex C to this Expert Opinion.

3. Article 25 of the American Convention on Human Rights recognizes the right of everyone to “simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.” To this end, States assume the obligations to: a) ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; b) develop the possibilities of judicial remedy; and c) ensure that competent authorities shall enforce such remedies when granted. This Honorable Court likewise applied this right in the context of environmental protection in its *Advisory Opinion OC-23/17 (The Environment and Human Rights)*,⁸⁴ stressing that “in the context of environmental protection, access to justice permits the individual to ensure that environmental standards are enforced and provides a means of redressing any human rights violations that may result from failure to comply with environmental standards, and includes remedies and reparation. This also implies that access to justice guarantees the full realization of the rights to public participation and access to information through corresponding judicial mechanisms.”⁸⁵ This Honorable Court further established that “States have the obligation to guarantee access to justice in relation to the State environmental protection obligations described in this Opinion. Accordingly, States must guarantee that the public have access to remedies conducted in accordance with due process of law to contest any provision, decision, act or omission of the public authorities that violates or could violate obligations under environmental law; to ensure the full realization of the other procedural rights (that is, the right of access to

⁸⁴ Id. at footnote 75.

⁸⁵ Id. at footnote 75, para. 234.

information and to public participation), and to redress any violation of their rights as a result of failure to comply with obligations under environmental law.”⁸⁶

IV. NATURE AND SCOPE OF OBLIGATIONS TO ENSURE PROTECTION OF THE RIGHTS OF CHILDREN AND FUTURE GENERATIONS IN THE CLIMATE EMERGENCY

1. The authors of this Expert Opinion maintain their principal recommendations to this Honorable Court to ensure that States ultimately comply with the principle of effectiveness with respect to the simultaneous applicability of climate change law and international human rights law. A critical area in which some normative hierarchy may occur is on the protection of children’s rights in armed conflicts and displacement situations, which have long been the subject of United Nations Security Council Resolutions⁸⁷ that take precedence, under Article 103 of the Charter of the United Nations,⁸⁸ over other international treaties that pose any conflicting obligations. UN Security Council Resolution 1261 (dated 30 August 1999) called for all States to put an end to practices of targeting of children in situations of armed conflict (including killing and maiming, sexual violence, abduction and forced displacement, recruitment and use of children in armed conflict in violation of international law, attacks on places that have a significant presence of children such as schools and hospitals).⁸⁹ UN Security Council Resolution 1314 (dated 11 August 2000) further noted that the deliberate targeting of civilian populations or other protected persons such as children may constitute a threat to

⁸⁶ Id. at footnote 75, at para. 237.

⁸⁷ See United Nations Security Council Resolutions 1261, 1314, and 1379 on Children and Armed Conflict.

⁸⁸ Charter of the United Nations, Article 103: “In the event of a conflict between obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

⁸⁹ United Nations Security Council Resolution 1261, S/RES/1261 (1999), full text at <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/CAC%20SRES%201261.pdf> (last accessed 1 November 2023).

international peace and security.⁹⁰ UN Security Council Resolution 1379 (dated 20 November 2001) calls upon all States to provide protection and assistance to child refugees and child internally displaced peoples.⁹¹ As the United Nations Children’s Fund (UNICEF) shows in its report, *Children Displaced in a Changing Climate*,⁹² children (more so displaced children) are already the most vulnerable from climate change and its interrelated human rights impacts:

“The link between climate change and displacement is complex. Yet it is clearer than ever that the climate is shifting patterns of displacement. Although weather events, such as floods and storms, are natural phenomena and a single event cannot be directly attributed to climate change, there is widespread consensus that human-induced climate change is affecting the frequency, intensity, geographic range, duration, and timing of extreme weather events. Therefore, no weather is entirely ‘natural’ anymore, but rather occurs in the context of a changing climate. Large-scale disasters, which in the past occurred only occasionally, are now more frequent. In fact, with every one degree Celsius of warming, the global risks of displacement from flooding are projected to rise by approximately 50 percent.

Millions of children are already being driven from their homes by weather-related events, exacerbated by climate change. Decisions to move can be forced and abrupt in the face of disaster, or the result of pre-emptive evacuation – where lives may be saved, but many children still face the challenges that come with being uprooted from their homes. In the context of slow-onset climate processes, displacement can be driven by an interplay of socio-economic, political, and climate-related factors. Decisions to move often occur in a context of constrained life choices and eroding livelihoods, where children and young people are trapped between aspirations and hopes, a duty of care to their families and communities, and pressures to leave home.

Displacement – whether short-lived or protracted – can multiply climate-related risks for children and their families. In the aftermath of a disaster, children may become separated from their parents or caregivers, amplifying the risks of exploitation, child trafficking, and abuse. Displacement can disrupt access to education and healthcare, exposing children to malnutrition, disease, and inadequate immunization. Furthermore overcrowded and under-resourced evacuation sites may be located in climate-vulnerable areas...

⁹⁰ United Nations Security Council Resolution 1314, S/RES/1314 (2000), full text at <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/CAC%20SRES%201314.pdf> (last accessed 1 November 2023).

⁹¹ United Nations Security Council Resolution 1379, S/RES/1379 (2001), full text at <https://www.refworld.org/docid/3c4e94561c.html> (last accessed 1 November 2023).

⁹² United Nations Children’s Fund (UNICEF), *Children Displaced in a Changing Climate*, full report at [https://www.unicef.org/media/145951/file/Climate%20displacement%20report%20\(English\).pdf](https://www.unicef.org/media/145951/file/Climate%20displacement%20report%20(English).pdf) (last accessed 1 November 2023).

...There were 43.1 million internal displacements linked to weather-related disasters over the last six years --- the equivalent to approximately 20,000 child displacements per day. Almost all – 95% - of recorded child displacements were driven by floods and storms....”⁹³

The same UNICEF report shows that droughts and wildfires over the last five years, which demonstrate human-induced climate change, have specifically intensified in Latin America. The compounded hazards of floods, storms, droughts, and wildfires afflict the territories of States in the Organization of American States, accounting for about 2.3 Million children displaced from 2016-2021 as a result of human-induced climate change.

2. The heightened intersectional vulnerabilities to human rights impacts from climate change are thus most experienced by children. It is not coincidental that the United Nations Committee on the Rights of the Child issued its General Comment No. 26 in 2023, which discusses *Children’s rights and the environment with a special focus on climate change*,⁹⁴ **which prescribes a child rights-based approach to environmental protection**, specifically amplifying the child’s right to non-discrimination (Article 2 of the Convention on the Rights of the Child), the best interests of the child (Article 3 of the Convention on the Rights of the Child), the right to life, survival and development (Article 6 of the Convention on the Rights of the Child), the right to be heard on environmental issues and environmental decision-making (Article 12 of the Convention on the Rights of the Child), freedoms of expression, association and peaceful assembly (Articles 13 and 15 of the Convention on the Rights of the Child), the right of access to information (Articles 13 and 17 of the Convention on the Rights of the Child), the right to freedom from all forms of violence (Article 19 of the Convention on the Rights of the Child), the right to the highest attainable standard of health (Article 24 of the

⁹³ Id. at footnote 88, at pp. 4 and 12.

⁹⁴ United Nations Committee on the Right of the Child, *General Comment No. 26 (2023) on children’s rights and the environment, with a special focus on climate change*, CRC/C/GC/26, 22 August 2023, full text at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2F26&Lang=en (last accessed 1 November 2023).

Convention on the Rights of the Child), rights to social security, adequate standard of living, and education (Articles 26 to 29 of the Convention on the Rights of the Child), and the right to a clean, healthy and sustainable environment:

“7. In a children’s rights-based approach, the process of realizing children’s rights is as important as the result. As rights holders, children are entitled to protection from infringements of their rights stemming from environmental harm and to be recognized and fully respected as environmental actors. In taking such an approach, particular attention is paid to the multiple barriers faced by children in disadvantaged situations in enjoying and claiming their rights.

8. A clean, healthy and sustainable environment is both a human right itself and necessary for the full enjoyment of a broad range of children’s rights. Conversely, environmental degradation, including the consequences of the climate crisis, adversely affects the enjoyment of these rights, in particular for children in disadvantaged situations or children living in regions that are highly exposed to climate change. The exercise by children of their rights to freedom of expression, peaceful assembly and association, to information and education, to participate and be heard and to effective remedies can result in more rights-compliant, and therefore more ambitious and effective environmental policies. In this way, children’s rights and environmental protection form a virtuous circle...

...

63. Children have the right to a clean, healthy and sustainable environment. This right is implicit in the Convention and directly linked to, in particular, the rights to life, survival and development, under article 6, to the highest attainable standard of health, including taking into consideration the dangers and risks of environmental pollution, under article 24, to an adequate standard of living, under article 27, and to education, under article 28, including the development of respect for the natural environment, under article 29.

64. The substantive elements of this right are profoundly important for children, given that they include clean air, a safe and stable climate, healthy ecosystems and biodiversity, safe and sufficient water, healthy and sustainable food and non-toxic environments.”⁹⁵

3. Most significantly, the United Nations Committee on the Rights of the Child specifically identified the following measures as obligatory for States to “immediately take the following action”⁹⁶:

⁹⁵ Id. at footnote 90.

⁹⁶ Id. at footnote 90, at para. 65.

- (a) Improve air quality, by reducing both outdoor and household air pollution, to prevent child mortality, especially among children under 5 years of age;
- (b) Ensure access to safe and sufficient water and sanitation and healthy aquatic ecosystems to prevent the spread of waterborne illnesses among children;
- (c) Transform industrial agriculture and fisheries to produce healthy and sustainable food aimed at preventing malnutrition and promoting children's growth and development;
- (d) Equitably phase out the use of coal, oil and natural gas, ensure a fair and just transition of energy sources and invest in renewable energy, energy storage, and energy efficiency to address the climate crisis;**
- (e) Conserve, protect and restore biodiversity;
- (f) Prevent marine pollution, by banning the direct or indirect introduction of substances into the marine environment that are hazardous to children's health and marine ecosystems;
- (g) Closely regulate and eliminate, as appropriate, the production, sale, use and release of toxic substances that have disproportionate adverse health effects on children, in particular those substances that are developmental neurotoxins.

4. On climate change, the UN Committee on the Rights of the Child call for specific policies, actions, and measures to realize and protect children's rights in the face of the climate emergency:

“V. Climate change

A. Mitigation

95. The Committee calls for urgent collective action by all States to mitigate greenhouse gas emissions, in line with their human rights obligations. In particular, historical and current major emitters should take the lead in mitigation efforts.

96. Insufficient progress in achieving international commitments to limit global warming exposes children to continuous and rapidly increasing harms associated with greater concentrations of greenhouse gas emissions and the resulting temperature increases. Scientists warn about tipping points, which are thresholds beyond which certain effects can no longer be avoided, posing dire and uncertain risks to children's rights. Avoiding tipping points requires urgent and ambitious action to reduce atmospheric concentrations of greenhouse gases.

97. Mitigation objectives and measures should be based on the best available science and be regularly reviewed to ensure a pathway to net zero carbon emissions at the latest by 2050 in a manner that prevents harm to children. The Intergovernmental Panel on Climate Change has illustrated that it is imperative to accelerate mitigation

efforts in the near term, to limit the temperature increase to below 1.5°C above pre-industrial levels, and that international cooperation, equity and rights-based approaches are critical to achieving ambitious climate change mitigation goals.

98. When determining the appropriateness of their mitigation measures in accordance with the Convention, and also mindful of the need to prevent and address any potential adverse effects of those measures, States should take into account the following criteria:

(a) Mitigation objectives and measures should clearly indicate how they respect, protect and fulfil children's rights under the Convention. States should transparently and explicitly focus on children's rights when preparing, communicating and updating nationally determined contributions. This obligation extends to other processes, including biennial transparency reports, international assessments and reviews and international consultations and analyses;

(b) States have an individual responsibility to mitigate climate change in order to fulfil their obligations under the Convention and international environmental law, including the commitment contained in the Paris Agreement to hold the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels by 2030. Mitigation measures should reflect each State party's fair share of the global effort to mitigate climate change, in the light of the total reductions necessary to protect against continuing and worsening violations of children's rights. Each State, and all States working together, should continuously strengthen climate commitments in line with the highest possible ambition and their common but differentiated responsibilities and respective capacities. High-income States should continue to take the lead by undertaking economy-wide absolute emission reduction targets, and all States should enhance their mitigation measures in the light of their different national circumstances in a manner that protects children's rights to the maximum possible extent;

(c) Successive mitigation measures and updated pledges should represent the efforts of States in a progression over time, keeping in mind that the time frame for preventing catastrophic climate change and harm to children's rights is shorter and requires urgent action;

(d) Short-term mitigation measures should take into consideration the fact that delaying a rapid phase out of fossil fuels will result in higher cumulative emissions and thereby greater foreseeable harm to children's rights;

(e) Mitigation measures cannot rely on removing greenhouse gases from the atmosphere in the future through unproven technologies. States should prioritize rapid and effective emissions reductions now in order to support children's full enjoyment of their rights in the shortest possible period of time and to avoid irreversible damage to nature.

99. States should discontinue subsidies to public or private actors for investments in activities and infrastructure that are inconsistent with low greenhouse gas emission pathways, as a mitigation measure to prevent further damage and risk.

100. Developed States should assist developing countries in planning and implementing mitigation measures, in order to help children in vulnerable situations. The assistance could include providing financial and technical expertise and information and other capacitybuilding measures that specifically contribute to the prevention of harm to children caused by climate change.

B. Adaptation

101. Since climate change-related impacts on children's rights are intensifying, a sharp and urgent increase in the design and implementation of child-sensitive, gender-responsive and disability-inclusive adaptation measures and associated resources is necessary. States should identify climate change-related vulnerabilities among children concerning the availability, quality, equity and sustainability of essential services for children, such as water and sanitation, health care, protection, nutrition and education. States should enhance the climate resilience of their legal and institutional frameworks and ensure that their national adaptation plans and existing social, environmental and budgetary policies address climate changerelated risk factors by assisting children within their jurisdiction to adapt to the unavoidable effects of climate change. Examples of such measures include strengthening child protection systems in risk-prone contexts, providing adequate access to water, sanitation and health care, as well as safe school environments, and strengthening social safety nets and protection frameworks, while giving priority to children's right to life, survival and development. Healthy ecosystems and biodiversity also play an important role in supporting resilience and disaster risk reduction.

102. In adaptation measures, including disaster risk reduction, preparedness, response and recovery measures, due weight should be given to the views of children. Children should be equipped to understand the effects of climate-related decisions on their rights and have opportunities to meaningfully and effectively participate in decision-making processes. Neither the design nor the implementation of adaptation measures should discriminate against groups of children at heightened risk, such as young children, girls, children with disabilities, children in situations of migration, Indigenous children and children in situations of poverty or armed conflict. States should take additional measures to ensure that children in vulnerable situations affected by climate change enjoy their rights, including by addressing the underlying causes of vulnerability.

103. Adaptation measures should be targeted at reducing both the short-term and the longterm impacts, such as by sustaining livelihoods, protecting schools and developing sustainable water management systems. Measures that are necessary to protect children's rights to life and health from imminent threats, such as extreme weather events, include establishing early warning systems and increasing the physical safety and resilience of infrastructure, including school, water and sanitation and health infrastructure, to reduce the risk of climate change-related hazards. States should adopt

emergency response plans, such as measures to provide inclusive early warning systems, humanitarian assistance and access to food and water and sanitation for all. In formulating adaptive measures, the relevant national and international standards, such as those contained in the Sendai Framework for Disaster Risk Reduction 2015–2030, should also be considered. Adaptation frameworks should address climate change-induced migration and displacement and include provisions for ensuring a child rights-based approach to these issues. In the event of imminent threats of climate change-related harm, such as extreme weather events, States should ensure the immediate dissemination of all information that would enable children and their caregivers and communities to take protective measures. States should strengthen awareness among children and their communities of disaster risk reduction and prevention measures.

C. Loss and damage

104. In the Paris Agreement, the parties addressed the importance of averting, minimizing and addressing loss and damage associated with the adverse impacts of climate change. Through a human rights lens, the adverse impacts of climate change have led to significant losses and damages, in particular for those in the developing world.

105. The manner in which climate-related loss and damage affect children and their rights may be both direct and indirect. Direct impacts include instances where both sudden-onset extreme weather events, such as floods and heavy rains, and slow-onset events, such as droughts, lead to the violation of rights under the Convention. Indirect impacts may include situations in which States, communities and parents are forced to reallocate resources away from intended programmes, such as those for education and health care, towards addressing environmental crises.

106. In this respect, it is critical to acknowledge loss and damage as a third pillar of climate action, along with mitigation and adaptation. States are encouraged to take note that, from a human rights perspective, loss and damage are closely related to the right to remedy and the principle of reparations, including restitution, compensation and rehabilitation. 36 States should undertake measures, including through international cooperation, to provide financial and technical assistance for addressing loss and damage that have an impact on the enjoyment of the rights under the Convention.

D. Business and climate change

107. States must take all necessary, appropriate and reasonable measures to protect against harms to children's rights related to climate change that are caused or perpetuated by business enterprises, while businesses have the responsibility to respect children's rights in relation to climate change. States should ensure that businesses rapidly reduce their emissions and should require businesses, including financial institutions, to conduct environmental impact assessments and children's rights due diligence procedures to ensure that they identify, prevent, mitigate and account for how they address actual and potential adverse climate change-related impacts on

children's rights, including those resulting from production-related and consumption-related activities and those connected to their value chains and global operations.

108. Home States have obligations to address any harm and climate change-related risks to children's rights in the context of business enterprises' extraterritorial activities and operations, provided that there is a reasonable link between the State and the conduct concerned, and should enable access to effective remedies for rights violations. This includes cooperation to ensure the compliance of business enterprises operating transnationally with applicable environmental standards aimed at protecting children's rights from climate change-related harm and the provision of international assistance and cooperation with investigations and enforcement of proceedings in other States.

109. States should incentivize sustainable investment in and use of renewable energy, energy storage and energy efficiency, in particular by State-owned or controlled enterprises and those that receive substantial support and services from State agencies. States should enforce progressive taxation schemes and adopt strict sustainability requirements for public procurement contracts. States can also encourage community control over the generation, management, transmission and distribution of energy to increase access to and the affordability of renewable technology and the provision of sustainable energy products and services, in particular at the community level.

110. States should ensure that their obligations under trade or investment agreements do not impede their ability to meet their human rights obligations and that such agreements promote rapid reductions in greenhouse gas emissions and other measures to mitigate the causes and effects of climate change, including through the facilitation of investment in renewable energy. The climate change-related impacts on children's rights connected to the implementation of the agreements should be regularly assessed, allowing for corrective measures, as appropriate.

E. Climate finance

111. Both international climate finance providers and recipient States should ensure that climate finance mechanisms are anchored in a child rights-based approach aligned with the Convention and the Optional Protocols thereto. States should ensure that any climate finance mechanisms uphold and do not violate children's rights, increase policy coherence between children's rights obligations and other objectives, such as economic development, and strengthen the demarcation of roles of various stakeholders in climate finance, such as Governments, financial institutions, including banks, businesses and affected communities, especially children.

112. In line with the principle of common but differentiated responsibilities and respective capabilities, States' national circumstances need to be taken into account in efforts to address climate change. Developed States should cooperate with developing States in providing climate finance for climate action that upholds children's rights, in line with the international climate-related commitments that States have made. In particular, despite the link between various financing mechanisms, including on sustainable development, climate finance provided by developed States should be

transparent, additional to other financial flows that support children's rights and properly accounted for, including by avoiding tracking challenges such as double counting.

113. Developed States need to urgently and collectively address the current climate finance gap. The current distribution of climate finance, which is overly slanted towards mitigation at the cost of adaptation and loss and damage measures, has discriminatory effects on children who reside in settings where more adaptation measures are needed and children who are confronted with the limitations of adaptation. States should bridge the global climate finance gap and ensure that measures are financed in a balanced manner with consideration given to measures on adaptation, mitigation, loss and damage and broader means of implementation, such as technical assistance and capacity-building. The determination by States of the total global climate finance required should be informed by the documented needs of communities, especially to protect children and their rights. Climate finance provided to developing countries should be in the form of grants, rather than loans, to avoid negative impacts on children's rights.

114. States should ensure and facilitate access for affected communities, especially children, to information on activities supported by climate finance, including possibilities to lodge complaints alleging violations of children's rights. States should devolve decisionmaking on climate finance to strengthen the participation of beneficiary communities, especially children, and make the approval and execution of climate finance subject to a child rights impact assessment to prevent and address the financing of measures that could lead to the violation of children's rights.

115. Children are calling for the collective action of States. According to two children consulted for the present general comment: "The Governments of each country should cooperate to reduce climate change." "They need to acknowledge us and say, 'we hear you; here is what we are going to do about this problem'."⁹⁷

5. The authors of this Expert Opinion respectfully submit to this Honorable Court that the above discussion by the UN Committee on the Convention on the Rights of the Child also provides a starting point for the internalization of children's rights in States' actual or proposed Nationally Determined Contributions, as well as for designing human rights audits for States' proposed or actual climate change policies, measures, and actions. The Notre Dame Law School Global Human Rights Clinic, in particular, is already working in partnership with researchers at UNICEF Innocenti to focus on research on children's rights, displacement, human rights and climate change.

⁹⁷ Id. at footnote 90.

V. THE DUTY TO COOPERATE AND THE RIGHT TO DEVELOPMENT

1. Finally, in relation to queries on the nature of inter-State cooperation obligations in Part F of the Questions to this Honorable Court, the authors of this Expert Opinion invite this Honorable Court's attention to the 2023 Draft International Covenant on the Right to Development,⁹⁸ where Prof. Dr. Diane Desierto had served as Chair-Rapporteur and/or Member of the Expert Drafting Group that provided authorship and assistance to Chair Ambassador Akram in writing and completing this pending forthcoming human rights treaty (now serving as the legally binding instrument to elaborate the 1986 UN Declaration on the Right to Development). The Draft International Covenant on the Right to Development was approved by the UN Human Rights Council in October 2023, and transmitted to the United Nations General Assembly for adoption. Article 13 of the Draft International Covenant on the Right to Development specifically elaborates on the nature of the duty to cooperate, especially for environmental crises such as climate change:

“Article 13 Duty to cooperate

1. States Parties reaffirm and shall implement their duty to cooperate with each other through joint and separate action, in order to:
 - (a) Solve international problems of an economic, social, cultural, political, environmental, health-related, educational, technological or humanitarian character;
 - (b) End poverty in all its forms and dimensions, including by eradicating extreme poverty;
 - (c) Promote higher standards of living, full and productive employment, decent work, entrepreneurship, conditions of human dignity, and economic, social, cultural, technological and environmental progress and development;
 - (d) Promote and encourage universal respect for human rights and fundamental freedoms for all, without discrimination of any kind.
2. To this end, States Parties have primary responsibility, in accordance with the general principle of international solidarity described in the present Covenant, for the creation of international conditions favourable for the realization of the right to development for all,

⁹⁸ UN Human Rights Council, *Draft International Covenant on the Right to Development*, A/HRC/54/50, 18 July 2023, full text at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G23/128/17/PDF/G2312817.pdf?OpenElement> (last accessed 1 November 2023).

and shall take deliberate, concrete and targeted steps, individually and jointly, including through cooperation within international organizations and engagement with civil society:

- (a) To ensure that natural and legal persons, groups and States do not impair the enjoyment of the right to development;
- (b) To eliminate obstacles to the full realization of the right to development, including by reviewing international legal instruments, policies and practices;
- (c) To ensure that the formulation, adoption and implementation of States Parties' international legal instruments, policies and practices are consistent with the objective of fully realizing the right to development for all;
- (d) To formulate, adopt and implement appropriate international legal instruments, policies and practices aimed at the progressive enhancement and full realization of the right to development for all;
- (e) To mobilize appropriate technical, technological, financial, infrastructural and other necessary resources to enable States Parties, particularly in developing and least developed countries, to fulfil their obligations under the present Covenant.

3. States Parties shall ensure that financing for development and all other forms of aid and assistance given or received by them, whether bilateral or under any institutional or other international framework, adhere to internationally recognized development cooperation effectiveness principles and are consistent with the provisions of the present Covenant.

4. States Parties recognize their duty to cooperate to create a social and international order conducive to the realization of the right to development by, inter alia:

- (a) Promoting a universal, rules-based, open, non-discriminatory, equitable, transparent and inclusive multilateral trading system;
- (b) Implementing the principle of special and differential treatment for developing countries, in particular least developed countries, as defined in applicable trade and investment agreements;
- (c) Improving the regulation and monitoring of global financial markets and institutions, and strengthening the implementation of such regulations;
- (d) Ensuring enhanced representation and voice for developing countries, including least developed countries, in decision-making in all international economic and financial institutions, in order to deliver more effective, credible, accountable and legitimate institutions;
- (e) Enhancing capacity-building support to developing countries, including for least developed countries and small island developing States, to significantly increase the availability of high-quality, relevant, timely and reliable disaggregated data;
- (f) Encouraging official development assistance, financial flows and foreign investment, including through but not limited to the implementation of any existing commitments, for States where the need is greatest, in particular least developed countries, African countries, small island developing States and landlocked developing countries, in accordance with their national plans and programmes;
- (g) Enhancing North-South, South-South, triangular and other forms of regional and international cooperation in all spheres, particularly on access to science, technology and innovation, and also enhancing knowledge-sharing on mutually agreed terms, including through improved coordination among existing mechanisms, in particular at the United Nations level and through existing and new mechanisms for global technology facilitation;

- (h) Enhancing mitigation actions and adaptive capacity, strengthening resilience and response and reducing vulnerability to climate change and extreme weather events, addressing the economic, social and environmental impacts of climate change, taking into account the imperatives of a just transition, equity and the principles of common but differentiated responsibilities and respective capabilities in the light of national circumstances, and enhancing access to international climate finance, technology transfer and capacity-building to support mitigation and adaptation efforts in developing and least developed countries, especially those that are particularly vulnerable to the adverse effects of climate change;
- (i) Promoting the development, transfer, dissemination and diffusion of environmentally sound technologies to developing countries on favourable terms, including on concessional and preferential terms, as mutually agreed;
- (j) Eliminating illicit financial flows by combating tax evasion and corruption, reducing opportunities for tax avoidance, enhancing disclosure and transparency in financial and property transactions in both source and destination countries and strengthening the recovery and return of stolen assets;
- (k) Eliminating illicit arms flows by all necessary means, in accordance with international commitments;
- (l) Assisting developing and least developed countries in attaining long-term debt sustainability through coordinated policies aimed at fostering debt financing, debt relief and debt restructuring, as appropriate, and addressing the external debt of highly indebted poor countries to reduce debt distress;
- (m) Facilitating safe, orderly and regular migration and mobility of people, including through the implementation of planned and well-managed rights-based migration policies and the adoption of legislative and other measures to prevent and combat trafficking in persons, smuggling of migrants and crimes against migrants.”⁹⁹

As seen in the Commentaries to the Draft International Covenant on the Right to Development,¹⁰⁰ the above elaboration of State undertakings on the duty to cooperate is based on existing international instruments already adopted by States.

VI. CONCLUSION

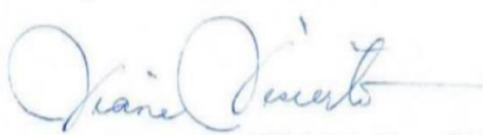
The intersectionality, if not the direct integration of, climate change law and international human rights law, poses serious problems of application, interpretation, and continuing effectiveness of international human rights obligations in their entirety to States singly and collectively facing the

⁹⁹ Id. at footnote 98.

¹⁰⁰ Full text of Commentaries at <https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F54%2F50%2FAdd.1&Language=E&DeviceType=Desktop&LangRequested=False> (last accessed 1 November 2023).

climate emergency. The authors welcome the opportunity to contribute this Expert Opinion for this Honorable Court's consideration in these advisory proceedings, which emphasizes the principle of effectiveness as the ultimate legal basis for its two main recommendations: (1) States should be required to internalize international human rights law commitments into their Nationally Determined Contributions (NDCs); and (2) States should be required to routinely and transparently produce human rights audits (drawing on interdisciplinary assessments of law and jurisprudence, quantitative data, qualitative data, and mixed methods) of contemplated or actual climate policies, measures, or actions, so as to provide the fullest possible picture of human rights impacts that should be anticipated for the most vulnerable individuals, groups, and communities. Appendix A provides information to this Honorable Court of all adjudicated climate reparations from the original dataset of the Notre Dame Reparations Lab. Appendix B contains a field investigation report of perceptions of climate change reparations ineffectiveness in a small island developing State. Appendix C provides an example of a possible interdisciplinary human rights implementation framework. Appendix D contains the practical recommendations of a globally-renowned international environmental lawyer, scholar, activist, and defender. We remain at the disposal of this Honorable Court in these proceedings to furnish further detailed information in subsequent Expert Opinions.

RESPECTFULLY SUBMITTED, 18 December 2023.

A handwritten signature in blue ink, appearing to read "Jane Smith", with a long horizontal flourish extending to the right.

*Founding Director, Notre Dame Law School Global Human Rights Clinic
Co-Principal Investigator, Notre Dame Reparations Design and Compliance Lab
University of Notre Dame, Indiana, United States of America.*

-----oOo-----