Re: Written Opinion pursuant to Article 73(3) of the Rules of Procedure of the Inter-American Court of Human Rights in Relation to the Advisory Opinion on Climate Emergency and Human Rights

I. INTRODUCTION

1. These are the submissions of the Global Legal Action Network (**GLAN/the Intervenor**), made as an interested party pursuant to Article 73(3) of the Rules of Procedure of the Inter-American Court of Human Rights (**the Court**) in relation to the Advisory Opinion on Climate Emergency and Human Rights.

2. By way of context, GLAN represents the applicants in the climate change case of *Duarte Agostinho and Others v Portugal and 32 Other States* (No. 39371/20) which was heard on 27th September 2023 by the Grand Chamber of the European Court of Human Rights in Strasbourg. These submissions present an overview of the arguments concerning the extraterritorial obligations and duties of States under international law, adapted to the context of the American Convention on Human Rights (**ACHR/the Convention**) where appropriate. The following submissions have been drafted by the same team responsible for drafting the submissions in the *Duarte Agostinho* case.

3. Climate change poses an existential threat to the protection of the fundamental rights of all peoples across the Americas. The science is clear: global temperatures on Earth cannot be permitted to rise by more than 1.5°C relative to the levels recorded in the 1990s (referred to as the long-term temperature goal (**LTTG**) of 1.5°C). Failure to keep the LTTG below this level will result in catastrophic and irreversible consequences for all those who the Convention applies to, with inevitable impacts upon their environment, health, well-being and livelihoods as the planet warms, leading to frequent extreme weather events. In order to limit global warming to the LTTG of 1.5°C and mitigate such impacts, it is incumbent upon States to take far more ambitious actions than they have to date.

4. Consistent with the special character of the Convention as an instrument for the protection of fundamental rights and the Court's well-established case law, it is submitted that the Convention can and must address the profound impacts that climate change has and will

have upon fundamental rights. It is in the face of such an overwhelming threat to life and humanity that the *raison d'etre* of the Convention is at its clearest.

5. As is set out in detail below, the legal principles that have been developed throughout the life of the Convention to address a diverse range of threats to human rights apply with equal force to the challenges posed by global warming. The more serious the threat to human rights, the greater the need for a direct response from this Court. Any attempt to separate the sphere of human rights protection from issues concerning climate change and to frame those issues as solely for resolution in the political sphere are misconceived.

6. The international nature of climate change, by which a multitude of States contribute to the impact of global warming collectively, means that international courts and tribunals are uniquely placed to offer much needed guidance and protection vis-à-vis human rights obligations at a supranational level. It is imperative that this Court provides guidance to the Convention States regarding their obligations in the context climate change in a way that offers real protection to those under the umbrella of the Convention, and the time to do so is now. Providing such guidance would, in turn, assist domestic authorities and courts across the Americas in ensuring effective remedies are available at the national level.

7. Pursuant to the Court's invitation for interested parties to present their written opinions, these submissions address the questions contained in the request for an advisory opinion made by Republics of Chile and Colombia, at the appropriate junctures throughout the following sections: (i) Relevant factual background; (ii) Relevant principles of interpretation; (iii) Relevant principles of international law; (iv) Jurisdiction; (v) Duties under the Convention in the context of climate change; and (vi) Conclusion.

II. RELEVANT FACTUAL BACKGROUND

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

8. The Intervenor relies on the best available science including the reports of the Intergovernmental Panel on Climate Change (**IPCC**). According to the 6th Assessment Report (**AR6**) of the IPCC, "increases in well-mixed greenhouse gas (**GHG**)

concentrations since around 1750 are unequivocally caused by human activities".[1] The AR6 Working Group 1 report, published in August 2021, states that the best estimate of the degree of human-caused global warming to date is 1.07°C.[2]

9. As to projected warming, the UN Environment Programme's (**UNEP**) Emissions Gap Report (**EGR**) 2023 states that "[a] continuation of the level of climate change mitigation efforts implied by current policies is estimated to limit warming over the twenty-first century to about 3°C (range: 1.9–3.8°C) with a 66 per cent chance".[3] It further notes that "[a] continuation of the unconditional NDC scenario lowers this estimate to 2.9°C (range 2–3.7°C, whereas the additional achievement and continuation of conditional NDCs lowers this to 2.5°C (range 1.9–3.6°C)".[4]

10. The level of global warming to date is unsafe. AR6 states: "Climate change has adversely affected physical health of people globally (*very high confidence*) and mental health of people in the assessed regions (*very high confidence*)…In all regions extreme heat events have resulted in human mortality and morbidity (*very high confidence*)".[5] The effects of climate change include, *inter alia*: heatwaves, wildfires and smoke, droughts, flooding, hurricanes, air pollution, spread of infectious diseases, cardiovascular and respiratory distress, mental health impacts, food insecurity, forced migration, ocean acidification, coastal erosion and loss of biodiversity.[6]

11. As to future impacts on humans, AR6 states: "Climate change and related extreme events will significantly increase ill health and premature deaths from the near- to long-term (*high confidence*). Globally, population exposure to heatwaves will continue to increase with additional warming, with strong geographical differences in heat-related mortality without additional adaptation (*very high confidence*)".[7] It further highlights the projected increase in climate-sensitive diseases, noting that "[i]n particular, dengue risk will increase with longer seasons and a wider geographic distribution in [regions including] Central and South America […], potentially putting additional billions of people at risk by the end of the

[1] AR6 Working Group (WG) 1 (WG1) Summary for Policymakers (SPM), 4 §A.1.1.
[2] Ibid., 4 §A.1.3. See also IPCC (2018) Special Report on 1.5°C (SR1.5) SPM, 4 §A.1.
[3] UNEP (2023) Emissions Gap Report 2023 (**EGR 2023**), xxii. See also AR6 WG3 SPM, 21 §C.1.
[4] Ibid. See also AR6 WG3 SPM, 21 §C.1.1.
[5] AR6 WG2 SPM, 11 §B.1.4. See also SR1.5 SPM, 5 §A.3.1.
[6] Ibid.
[7] Ibid., 15 §B.4.4.

century (*high confidence*)."[8] As to mental health, it finds that "[m]ental health challenges, including anxiety and stress, are expected to increase…in all assessed regions, particularly for children, adolescents [and others] (*very high confidence*)".[9]

12. AR6 outlines the vulnerability of "Central and South America" and "North America" to climate change.[10] It states that "Central and South America (CSA) are highly exposed, vulnerable and strongly impacted by climate change",[11] noting several "key risks" including food and water insecurity, risk to people and infrastructure due to floods and landslides, risk of increasing epidemics and "[c]ascading risks surpassing public service systems".[12] Key risks for North America include "mounting damages to infrastructure and housing" as well as "disruption of livelihoods, and issues with mental and physical health, leisure and safety".[13] The AR6 also notes in its chapter on impacts in Central and South America that "poor populations and countries are more vulnerable and have lower adaptive capacity to climate change compared to rich ones (*very high confidence*)".[14]

13. AR6 states that "[w]ith every additional increment of global warming, changes in extremes continue to become larger".[15] In its 2018 Special Report on 1.5°C (**SR1.5**), the IPCC similarly stated: "Climate-related risks to health, livelihoods, food security, water supply, human security, and economic growth are projected to increase with global warming of 1.5°C and increase further with 2°C".[16]

14. Even containing global warming to 1.5°C would not be safe. AR6 states in this regard that "[g]lobal warming, reaching 1.5°C in the near-term [i.e. 2021-2040], would cause unavoidable increases in multiple climate hazards and present multiple risks to ecosystems and humans (*very high confidence*)."[17] It also found that even under a "very low GHG emissions scenario", 1.5°C is "more likely than not to be reached" by 2040.[18]

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[8] Ibid.
[9] Ibid.
[10] AR6 WG2 Ch 12 ("Central and South America") which also addresses impacts in the Caribbean and Ch 14 ("North America"). See also Inter-American Commission on Human Rights (31 December 2021), "Climate Emergency: Scope of Inter-American Human Rights Obligations" (Resolution 3/2021).
[11] AR6 WG2 Ch 12 ("Central and South America"), 1691.
[12] Ibid., 1692.
[13] AR6 WG2 Ch 14 ("North America"), 1931.
[14] AR6 WG2 Ch 12 ("Central and South America"), 1746.
[15] AR6 WG1 SPM, 15 §B.2.2.
[16] SR1.5 SPM, 9 §B.5. See also SR1.5 SPM, 5 §A.3.
[17] AR6 WG2 SPM, 13 §B.3.
[18] AR6 WG1 SPM, 15 §B.1.3. See also SR1.5 SPM, 4 §A.1.

15. *Any* overshoot in temperature above 1.5°C will cause severe risks to the world's population. AR6 states that "[i]f global warming transiently exceeds 1.5°C in the coming decades or later (overshoot), then many human and natural systems will face additional severe risks, compared to remaining below 1.5°C (*high confidence*). Depending on the magnitude and duration of overshoot […] some [impacts] will be irreversible".[19] Risks of overshooting include the crossing of "tipping points", which pose an existential threat to civilisation.[20]

16. States have been aware of the dangers of climate change since at least 1992, when the UN Framework Convention on Climate Change (**UNFCCC**) came into being. In 2009, Parties to the UNFCCC acknowledged the risks of global warming exceeding 1.5°C. A review of the appropriate LTTG commenced in 2010 led to the replacement of the "below 2°C" LTTG with the LTTG of "well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C" (**1.5°C LTTG**) in Art. 2(1)(a) of the Paris Agreement (**PA**).[21] A large number of States have accepted the 1.5°C LTTG and the IPCC's and UNEP's findings in the "Sharm el-Sheikh Implementation Plan" adopted at COP27,[22] and more recently in the "Outcome of the first global stocktake" at COP28.[23]

B. The Global Emissions Reductions Required to Limit Global Warming to the LTTG of 1.5°C

17. An "emissions pathway" is a global emissions reduction trajectory linked to a LTTG.[24] SR1.5 identified emissions pathways "with no or limited overshoot of 1.5°C" (**NLO Pathways**) as being "[c]onsistent with" the 1.5°C LTTG.[25] In the NLO Pathways assessed

[19] AR6 WG2 SPM, 19 § B.6. See also SR1.5 SPM, 7 § B.1.
[20] AR6 WG1 SPM, 27 § C.3.2. Lenton et al, Climate tipping points – too risky to bet against (2019) 575 Nature 592, 595. See also: McKay et al, Exceeding 1.5°C global warming could trigger multiple climate tipping points (2022) 377 Science 1171.
[21] Decision 2/CP.15, UN Doc FCCC/CP/2009/11/Add.1 (**Copenhagen Accord**) §12 and Decision 1/CP.16, UN Doc FCCC/CP/2010/7/Add.1 §§4 and 138-140.
[22] Draft decision-/CP.27, UN Doc FCCC/CP/2022/L.19, §§1-5.
[23] Draft decision-/CMA.5, UN Doc FCCC/PA/CMA/2023/L.17, (**Outcome of the first global stocktake**) §§5-6.
[24] Also called "scenarios". See SR1.5 SPM, 24.
[25] SR1.5 SPM, 12. Limited overshoot pathways are those "limiting warming to below 1.6°C and returning to 1.5°C by 2100". Ibid., 24.

in AR6, net global GHG emissions are projected to fall from 2019 levels by 43% by 2030.[26] 43% is the median GHG reductions envisaged by all NLO Pathways in AR6. Some NLO Pathways envisage the extensive use of Carbon Dioxide Removal (**CDR**).[27] SR1.5 states that such use of CDR "is subject to multiple feasibility and sustainability constraints (*high confidence*)".[28] This is also recognised in AR6,[29] which outlines a "feasibility framework" for assessing feasible levels of CDR reliance.[30]

18. Without the "rapid and deep" emissions reductions by 2030 envisaged by NLO Pathways, the 1.5°C LTTG will become unachievable.[31] According to the AR6, "[d]eep GHG emissions reductions by 2030 and 2040, particularly reductions of methane emissions, lower peak warming, reduce the likelihood of overshooting warming limits".[32] In relation to methane emissions specifically, the AR6 has also identified the need for "[s]trong, rapid and sustained reductions" in such emissions.[33]

19. The longer the delay in achieving the necessary emissions reductions, the greater the reductions required, eventually reaching an impossible level.[34] Therefore the window of opportunity to hold global warming to the 1.5°C LTTG "is closing rapidly".[35] The AR6 states in this regard that "[a]ny further delay in concerted anticipatory global action on adaptation and mitigation will miss a brief and rapidly closing window of opportunity to secure a liveable and sustainable future for all. (*very high confidence*)".[36]

[26] AR6 WG3 SPM, 21 §C.1.1. These pathways have a "very similar" rate of decline to 2030 to that of SR1.5 NLO Pathways but envisage "slightly higher" absolute emissions in 2030 because global emissions have increased since the publication of SR1.5. See also AR6 WG3 SPM, 25 §C.1.4 and 27 (Box SPM.1).
[27] SR1.5 SPM, 17 §C.3. See also AR6 WG3 SPM, 29 §C.3.5.
[28] SR1.5 SPM, 17 §C.3.
[29] AR6 WG1 SPM, 29 §D.1.4; AR6 WG3 SPM, 32-33 §C.4.6 and 40 §C.11; AR6 WG3 Ch 3 ("Mitigation Pathways Compatible with Long-term Goals"), 324; AR6 WG3 Ch 4 ("Mitigation and Development Pathways in the Near to Mid-term"), 438; AR6 WG3 Ch 12 ("Cross-sectoral Perspectives"), 1263.
[30] AR6 WG3 Annex III ("Scenarios and modelling methods"), 1876-1877. See also SR1.5 SPM, 19 §C.3.2.
[31] AR6 WG3 SPM, 21 §C.1. As to the steepness of the reductions required, see EGR 2022, 33 (Figure 4.2).
[32] AR6 WG3 SPM, 23 §C.2.
[33] AR6 WG1 SPM, 27 §D.1.
[34] UNEP (2020), Emissions Gap Report 2020, 34.
[35] EGR 2022, 1.
[36] AR6 WG2 SPM, 33 §D.5.3.

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

20. AR6 states: "[I]t is only in relation to [its] 'fair share' that the adequacy of a state's contribution [to the required global emissions reductions] can be assessed".[37] There are multiple ways to measure a State's fair share; this is a consequence of the failure by States to agree a single approach.[38] The different approaches include historical responsibility, capability, equality (i.e. equal per capita), cost-effectiveness (i.e. where it is cheapest to achieve emissions reductions) and "grandfathering".[39] Equality, cost-effectiveness and grandfathering are more favourable approaches from the perspective of "developed" States.[40]

21. The IPCC has outlined ranges of emissions reductions required of different States based on the various measures of their fair share i.e. fair share ranges.[41] If all States pursue emissions reductions consistent with the least stringent end of their fair share ranges, it would not be possible to limit global warming to the LTTG of 1.5°C.[42] This reflects the fact that "[e]ffective mitigation of climate change will not be achieved if each…country acts independently in its own interest".[43]

22. The Climate Action Tracker (**CAT**) assesses the compatibility of States' emissions reduction targets, policies and actions against (i) "modelled domestic pathways" (derived from global cost-effectiveness models) and (ii) "fair share" (derived from an aggregation of different studies used by the IPCC which seek to define States' fair shares of territorial

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[37] AR6 WG3 Ch 14 ("International Cooperation"), 1468.
[38] Climate Analytics (2022), Achieving the 1.5°C Limit of the Paris Agreement: an Assessment of the Adequacy of the Mitigation Measures and Targets of the Respondent States in Duarte Agostinho v Portugal and 32 other States (CA Report), 21.
[39] AR5 WG3 Ch 3 ("Social, Economic, and Ethical Concepts and Methods"), 213-219 and Ch 4 ("Sustainable Development and Equity"), 317-321.
[40] CA Report, 22, 26 and 32. Rajamani et al. (2021), National 'fair shares' in reducing greenhouse gas emissions within the principled framework of international environmental law ('*Rajamani et al.*'), 999.
[41] AR4 WG3 Ch 13 ("Policies, Instruments and Co-operative Arrangements"), 776 (Box 13.7); AR5 WG3 Ch 6 ("Assessing Transformation Pathways"), 460 (Box 6.28).
[42] CA Report, 32, citing Robiou du Pont and Meinshausen, Warming assessment of the bottom-up Paris Agreement emissions pledges (2018) 9 Nature Communication 2. See also *Rajamani et al.*, 998 and 1000. The Intervenor notes in this regard that, in the landmark climate change case of *Urgenda v The Netherlands*, the Dutch Supreme Court relied on a fair share range linked to the outdated LTTG of 2°C presented in the IPCC's 4th Assessment Report and held that the Netherlands must achieve emissions reductions in line with the least stringent end of that range (*The State of the Netherlands v Urgenda Foundation*, ECLI:NL:HR:2019:2006 (Supreme Court of the Netherlands) (20 December 2019) §8.3.5.). For the reasons stated, such an approach is incompatible with limiting global warming to 2°C (let alone 1.5°C).
[43] AR5 WG3 Ch 3, 214.

emissions reductions). As to the latter, the CAT's fair share methodology identifies different levels of global warming that will result by 2100 from a State achieving different "levels of ambition" on its fair share range, if all States achieve equivalent levels of ambition on their respective fair share ranges.[44] It "avoids selecting a single 'correct' approach to effort sharing, relying instead on a 'synthesis framework' which draws on all of the various approaches to effort sharing identified in the available literature" (using the dataset of studies used by the IPCC).[45] The more the level of ambition pursued by one State falls short of the 1.5°C-compatible level on its fair share range, the more another State must pursue a level of ambition which *exceeds* that level on its range to limit global warming to the 1.5°C LTTG, which no State is doing.[46]

23. Some authors, such as *Dooley et al.*, have noted that certain approaches to fair share are not represented within the CAT methodology, such that it is dominated by inequitable approaches that cause a systemic bias in favour of wealthier, higher emitting countries.[47]

24. A related methodology, outlined in a study by *Rajamani et al.* titled "National 'fair shares' in reducing greenhouse gas emissions within the principled framework of international environmental law", employs the same methodology as the CAT but excludes from its fair share ranges the effort-sharing approaches of cost-effectiveness and "grandfathering" on the basis that they are not compatible with principles of international environmental law, including equity.[48] This results in relatively more stringent reductions for wealthier countries, relative to when these approaches are included.[49]

25. As to the distinction between cost-effectiveness and equity in determining where global emissions reductions ought to be achieved, the IPCC has recognised that it can be addressed by separating "where mitigation occurs" from "who pays".[50] Similarly, where the level of reductions required by a State's fair share exceeds the level that is feasible for it to achieve domestically, it can achieve the difference between what is domestically

[44] CA Report, 34-39. CAT analysis is relied on by *inter alia* the UNEP, see e.g. EGR 2022, 13.
[45] Ibid., 34-35.
[46] Ibid., 39.
[47] Dooley et al, Ethical choices behind quantifications of fair contributions under the Paris Agreement (2021) 300 Nature, 303. CAT only includes studies which "operationalise" (i.e. quantify) approaches to fair share and includes studies based on "grandfathering". See CA Report, 34-35. Not all fair share approaches have been quantified in the literature. See Dooley et al, 303 and AR6 WG3 Ch 4, 472.
[48] Rajamani et al., 996-998. See also AR6 WG3 Ch 4, 423.
[49] Ibid., 999.
[50] AR5 WG3 Ch 3, 225 (Box 3.2).

feasible and its fair share by funding reductions in other States.[51] The PA obliges developed States to provide both mitigation and adaptation finance to developing countries.[52]

D. Extra-Territorial Emissions

26. States' contributions to global emissions are not confined to the release of emissions from within their borders. They contribute to the release of emissions beyond their borders by producing and exporting fossil fuels, by importing emissions "embedded" in the goods which they import and consume, and by permitting entities domiciled within their jurisdictions to contribute to global emissions outside their borders.

27. ***Fossil fuel production:*** In 2021, the International Energy Agency (**IEA**) reported that the energy sector accounts for 75% of global GHG emissions.[53] As recently observed by UN experts, "[f]ossil fuels are the largest source of greenhouse gas emissions, which have unequivocally caused the climate crisis".[54] The IEA has thus noted that reducing fossil fuel production "holds the key to averting the worst effects of climate change" and achieving "net zero means a huge decline in use of fossil fuels".[55] The UNEP Production Gap Report (**PGR**) 2021 observed that States must undertake "steep and sustained reductions in fossil fuel production" to avoid locking in levels of supply inconsistent with the LTTG of 1.5°C.[56]

28. Yet, according to the UNEP PGR 2023, governments plan to produce "more than double the amount of fossil fuels in 2030 than would be consistent with limiting global warming to 1.5°C".[57] According that report, the median reductions in global coal, oil and gas

[51] CA Report, 22. The amount of climate finance required is therefore the amount necessary to achieve the difference between the reductions a state envisages domestically and its fair share.
[52] See Article 9 of the Paris Agreement. Article 6 also contemplates the achievement of GHG reductions by one state in another. It is axiomatic, however, that if States were permitted to count contributions to adaptation-only finance towards their fair share, the necessary global GHG reductions would not be achieved (giving rise to a need for even greater levels of adaptation finance).
[53] IEA (2021), Net Zero by 2050 A Roadmap for the Global Energy Sector (**IEA NZE**), 13.
[54] Mr. David Boyd, Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Mr. Pedro Arrojo Agudo, Special Rapporteur on the human rights to safe drinking water and sanitation; Mr. Marcos A. Orellana, Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Mr. Livingstone Sewanyana, Independent Expert on the promotion of a democratic and equitable international order; Mr. Surya Deva, Special Rapporteur on the right to development: and Mr. Olivier De Schutter, Special Rapporteur on extreme poverty and human rights (30 November 2023), "Fossils fuels at the heart of the planetary environmental crisis: UN experts".
[55] IEA NZE, 13 and 18.
[56] UNEP (2021), PGR 2021, 4.
[57] UNEP (2023), PGR 2023, 4. See also AR6 WG3 SPM, 20 §B.7.

production by 2030 (relative to 2020 levels) envisaged by NLO Pathways – and therefore consistent with the LTTG of 1.5°C assessed in AR6 are 78%, 10% and 29% respectively.[58] The AR6 itself concluded that "[p]hasing out fossil fuels from energy systems is technically possible and is estimated to be relatively low in cost".[59] According to the PGR 2021, "countries with greater capacity and lower dependency on fossil fuels will likely need to wind down their production faster than the global average".[60]

29. The IEA considers that beyond projects already committed to by States as of 2021, for the LTTG of 1.5°C to remain achievable, there ought to be no new oil, gas and goal projects approved for development.[61] A further study found that achieving this LTTG will require revoking some existing licences and closing some existing fields and mines globally.[62] The necessity of not opening new fossil fuel projects, as an absolute minimum, follows from the long lifespans of oil/gas fields and coal mines, and the dangers of locking in increased fossil fuel supply if new projects are approved.[63] The significance of this for States within the Americas is clear. For example, the PGR 2023 makes clear that Brazil's 10-Year Energy Expansion Plan 2032 foresees production of oil and gas increasing by 63% and 124%, respectively, between 2022 and 2032.[64] As to government subsidies of fossil fuel production, the need for their phase-out is recognised *inter alia* by the IPCC and UNEP.[65]

30. ***Importation of "embedded" emissions:*** Up to 25% of GHGs are caused by the production of goods destined for trade across national borders.[66] "Embedded" or "consumption" emissions are those resulting from the production of imported goods.[67] There are a range of means by which States can measure and limit their embedded emissions, all of which involve regulating activity only *within* their territory.[68] The failure to

[58] Ibid., 26.
[59] AR6 WG3 Ch 17 ("Accelerating the Transition in the Context of Sustainable Development"), 1743. Conversely, "[i]f investments in coal and other fossil infrastructure continue, energy systems will be locked-in to higher emissions, making it harder to limit warming to 2°C or 1.5°C (*high confidence*)." AR6 WG3 Technical Summary, 89.
[60] PGR 2021, 35, citing PGR 2020, 31-33. See also PGR 2023, 30-32.
[61] IEA NZE, 21. This is confirmed in the 2023 Update to the IEA NZE. See IEA (2023), Net Zero Roadmap A Global Pathway to Keep the 1.5°C Goal in Reach 2023 Update, 16.
[62] Trout et al, Existing fossil fuel extraction would warm the world beyond 1.5°C (2022) 17 Environmental Research Letter 10.
[63] AR6 states: "Without early retirements, or reductions in utilisation, the current fossil infrastructure will emit more GHGs than is compatible with limiting warming to 1.5°C". AR6 WG3 Technical Summary, 90 (Box TS.8).
[64] PGR 2023, 70.
[65] AR6 WG3 SPM, 50 §E.4.2 and PGR 2021, 65.
[66] Mehling and van Asselt (2022), Expert report addressing the contribution of emissions from imported goods §1. See also EGR 2022, 9.
[67] Ibid. See also AR5 WG3 Ch 5 ("Drivers, Trends and Mitigation"), 385 and EGR 2022 9.
[68] Ibid., §22-47 and 49.

do so encourages a phenomenon called "carbon leakage" whereby the shift in production to States with less stringent climate policies may result in a net increase in global emissions.[69]

31. ***Overseas emissions of entities domiciled within States' jurisdictions.*** GHG emissions attributable to corporate entities are categorised as Scope 1, 2 and 3 emissions.[70] A study in 2016 found that emissions embedded in the supply chains of multinational companies totalled 18.7% of global emissions.[71]

III. RELEVANT PRINCIPLES OF INTERPRETATION

32. The following four principles of interpretation are of particular importance in these proceedings.

33. **First**, as affirmed by the Court, the ACHR is to be interpreted in accordance with the well-established customary rules of treaty interpretation set out in the Vienna Convention on the Law of Treaties (**VCLT**) at Articles 31 and 32.[72] Pursuant to Article 31(1) of the VCLT, the ACHR shall be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

34. **Second**, the Court has identified the object and purpose of the ACHR as the protection of the fundamental rights of human beings.[73] Accordingly, the Convention's provisions should be interpreted using a "model supported based on the values that the inter-

[69] ibid. §§14-27.
[70] This classification originates in World Resources Institute and World Business Council for Sustainable Development, Greenhouse Gas Protocol: A Corporate Accounting and Reporting Standard, Revised Edition (2015), 25. The European Commission defines the different scopes of emissions as follows: "Direct GHG emissions from sources owned or controlled by the company (Scope 1)"; "Indirect GHG emissions from the generation of acquired and consumed electricity, steam, heat, or cooling…(Scope 2)"; and "All indirect GHG emissions (not included in scope 2) that occur in the value chain of the reporting company, including both upstream and downstream emissions (Scope 3)" (European Commission, Guidelines on non-financial reporting: Supplement on reporting climate-related information, (2019/C 209/01) (2019), Section 3.5.).
[71] Zhang et al, Embodied carbon emissions in the supply chains of multinational enterprises (2020) 10 Nature Climate Change 1096, 1096.
[72] E.g., Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23, para. 40 (**Advisory Opinion OC-23/17**). Vienna Convention on the Law of Treaties, U.N. Doc A/CONF.39/27 (1969), 1155 U.N.T.S. 331, signed at Vienna on May 23, 1969, entered into force January 27, 1980.
[73] Advisory Opinion OC-23/17, para. 41, citing Advisory Opinion OC-2/82 of September 24, 1982. Series A No. 2, para. 29, and Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21, para. 53.

American system seeks to safeguard, from the "best perspective" for the protection of the individual".[74] As expressed by Judge Piza Escalanate: "the fundamental criterion which creates the very nature of human rights requires that the norms which guarantee or extend human rights be broadly interpreted and those that limit or restrict human rights be narrowly interpreted", then referring to this "fundamental criterion" as "the *pro homine* principle of the Law of Human Rights".[75]

35. **Third**, and flowing from the first and second point above, the Convention is a living instrument "the interpretation of which must evolve with the times and contemporary conditions".[76]

36. **Fourth**, mindful of the importance of the harmonious interpretation of the ACHR with other relevant sources of international law, the Court will take into account the "international *corpus iuris* as special rules applicable" in interpreting the rights and obligations under the ACHR.[77] Thus, in the environmental context, the Court "must take international law on environmental protection into consideration when defining the meaning and scope of the obligations assumed by the States under the [ACHR], in particular, when specifying the measures that the States must take".[78] Indeed, "the principles, rights and obligations contained [in different instruments on environmental law] make a decisive contribution to establishing the scope of the American Convention".[79]

37. **Fifth**, Article 29 of the Convention expressly provides for "restrictions regarding interpretation" (encapsulating the *pro persona* principle[80]). Notably, Article 29(a) and (b)

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[74] Advisory Opinion OC-23/17, para. 41. See also Advisory Opinion OC-21/14 para. 53: "the norms should also be interpreted based on a model supported by the values that the inter-American system seeks to safeguard from the perspective of the "best approach" for the protection of the individual".

[75] Individual Opinion of Judge Piza Escalanate in *Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights)*. Advisory Opinion OC-7/85 of August 29, 1986. Series A No. 7, para. 36.

[76] Advisory Opinion OC-23/17, para. 43, citing *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala*. Merits. Judgment of November 19, 1999. Series C No. 63, para. 193; Advisory Opinion OC-16/99, para. 114; *Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica*. Preliminary objections, merits, reparations and costs. Judgment of November 28, 2012. Series C No. 257, para. 245; Advisory Opinion OC-22/16 of October 1, 1999, para. 49, and *Case of the Hacienda Brasil Verde Workers v. Brazil*. Preliminary objections, merits, reparations and costs. Judgment of October 20, 2016. Series C No. 318, para. 245.

[77] *Case of Hernández v. Argentina*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of November 22, 2019. Series C No. 395, paras. 65-66.

[78] Advisory Opinion OC-23/17, paras 44-45 and 55. See also *Case of the Indigenous communities of the Lhaka Honhat (our land) Association v Argentina*, Judgment 6 February 2020, para. 196-198.

[79] Ibid.

[80] The principle of *pro persona* is also referred to in the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean ('the Escazu Agreement'),

provides that "no provision of this Convention shall be interpreted as (a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein (b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party".[81] Thus the Court has observed:

> "if in the same situation both the American Convention and another international treaty are applicable, the rule most favorable to the individual must prevail. Considering that the Convention itself establishes that its provisions should not have a restrictive effect on the enjoyment of the rights guaranteed in other international instruments,[82] it makes even less sense to invoke restrictions contained in those other international instruments, but which are not found in the Convention, to limit the exercise of the rights and freedoms that the latter recognizes".[83]

IV. RELEVANT PRINCIPLES OF INTERNATIONAL LAW

38. Given the "decisive contribution" of the relevant principles, rights and obligations in international environmental law to the Court's interpretation of the ACHR in these proceedings (see para. 36 above), the following are highlighted.[84]

39. **First**, two international treaties are of particular significance in the climate change context: (i) the United Nations Framework Convention on Climate Change (**UNFCCC**) (a framework agreement, ratified by 197 States)[85] and (ii) the PA (adopted under the

Art. 3(k). That Agreement entered into force on 22 April 2021 (currently with 24 signatories and 15 parties), and has particular significance in the present context (see further below).

[81] Article 29(c) and (d) provide that: "no provision of this Convention shall be interpreted as:…(c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; (d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have".

[82] See Article 29b cited above.

[83] Advisory Opinion OC-5/85, para. 52. See also: *Case of Cuscul Pivaral* et al. *v. Guatemala*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of August 23, 2018. Series C No. 359, paras. 94-95; *Case of Ricardo Canese v. Paraguay*. Merits, Reparations, and Costs. Judgment of August 31, 2004. Series C No. 111, para. 181.

[84] It is not submitted that the aspects of international environmental law highlighted below is exhaustive. In particular, with respect to the present proceedings the obligation of co-operation (see e.g. Advisory Opinion OC-23/17, Section VII B.3; IACHR Resolution "Climate Emergency: Scope of Inter-American Human Rights Obligations" ('the 2021 IACHR Resolution'), paras 7 and 11), as well as the rights of the child (see e.g. United Nations Convention on the Rights of the Child, Art. 3; 2021 IACHR Resolution, paras. 21 and 29; UN Human Rights Council, "Analytical study on the relationship between climate change and the full and effective enjoyment of the rights of the child: report of the Office of the United Nations High Commissioner for Human Rights" (4 May 2017) UN Doc A/HRC/35/13) are also important.

[85] 1771 UNTS 107, entered into force on 21 March 1994.

UNFCCC, with 193 Parties).[86] The following aspects of those two treaties are of particular note:

a. The "ultimate objective" of the UNFCCC is the "stabilization of [GHG] concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system" (Art 2).

b. Article 2(1)(a) of the PA provides that it enhances the implementation of the objective of the UNFCCC by, *inter alia*, "[h]olding the increase in the global temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change". The PA thus recognized 1.5°C as the LTTG which States should be pursuing if the catastrophic and irreversible impacts of climate change are to be reduced (PA, Art 2(1)(a));[87]

c. States must make rapid reductions in emissions of greenhouse gases if the LTTG is to be met, as well as take mitigation measures (UNFCCC, Arts 2 and 4(2); PA Art 4).[88]

d. States shall "[t]ake climate considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions (UNFCCC, Art 4(1)).

e. The parties should take a precautionary approach with respect to measures taken to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects: lack of full scientific certainty should not be used as a reason for postponing such measures (UNFCCC, Art 3(3)).

f. Measures taken should reflect a State's "highest possible ambition" and reflect the role of common but differentiated responsibilities, with developed countries taking the lead (UNFCC, Arts. 3(1), 4(2)(a) and 4(3); PA, Arts. 2(2) and 4(4)).

[86] 3156 UNTS, entered into force on 4 November 2016.
[87] See also the Resolution 3/2021 on Climate Emergency: Scope of Inter-American Human Rights Obligations (**the 2021 IACHR Resolution**) which refers to the importance of limiting the LTTG to 1.5°C.
[88] See also the 2021 IACHR Resolution which emphasises "the urgency of redoubling mitigation and adaptation efforts by national and subnational governments within the framework of international cooperation". See further e.g. paras. 1 and 15.

g. The Parties should promote sustainable development and protect the climate system for the benefit of present and future generations (UNFCCC, Art. 3(1) and (4); PA Art. 4(1)).

40. The structure of the UNFCCC and PA rely upon a bottom-up approach where States have reporting obligations concerning their mitigation targets and measures (most notably through their "national determined contributions" (PA, Art. 4). Neither the UNFCCC or PA set mitigation targets for State Parties, nor do they provide a mechanism for evaluating individual States' compliance with the LTTG of the PA or the principles outlined above. Whilst both the UNFCCC and PA must properly be considered with respect to the meaning and scope of the obligations assumed by the States under the ACHR (see para. 36 above addressing harmonious interpretation), neither the UNFCCC nor the PA can be relied upon to restrict the rights recognised in the ACHR (see para. 37 above addressing ACHR Art. 29).

41. **Second**, the precautionary principle is a central principle of international environmental law.[89] It provides that where there are threats of serious or irreversible damage (as is undoubtedly the case with respect to climate change: see paras. 10-15 above, lack of full scientific certainty shall not be used as a reason for postponing action.[90]

42. The Court has recognised this principle's centrality, having previously observed its reference in various treaties[91] and international and domestic case law.[92] It was also expressly referred to in the Inter-American Commission on Human Rights' (**IACHR**) *Resolution 3/2021* on *Climate Emergency: Scope of Inter-American Human Rights Obligations* (**the 2021 IACHR Resolution**),[93] as well as in the Escazu Agreement.[94]

43. Applied to the rights to life and personal integrity expressly provided for in the ACHR, the Court has confirmed that "States must act in keeping with the precautionary

[89] Whether characterised as a customary rule of international law (as is submitted) or a general principle (or approach) under international law, pursuant to the jurisprudence of this Court the precautionary principle is to be taken into consideration (see para. 36 above addressing harmonious interpretation).
[90] Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, Río de Janeiro, June 3 to 14 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. 1) (**the Rio Declaration**), Principle 15. See also UNFCCC, Art 3(3) cited at para. 39(e) above.
[91] Advisory Opinion OC-23/17, para. 176.
[92] Advisory Opinion OC-23/17, paras. 177-178.
[93] Reference here is made to paras. 8 and 10 (Part II) of the 2021 IACHR Resolution.
[94] Reference here is made to Art. 3(f).

principle…even in the absence of scientific certainty, they must take "effective" measures to prevent severe or irreversible damage".[95]

44. **Third**, the principle of prevention requires States to ensure that activities within their control do not cause harm or damage to the environment of other States or areas beyond the limits of their jurisdiction,[96] and is well-established as a rule of customary international law.[97]

45. The principle is applicable with regard to activities which take place in a State's territory or under its jurisdiction that may cause damage to the environment of another State or areas that are not part of the territory of any State.[98] It is only engaged once harm or damage attains a certain level, with the threshold of "significant" damage or harm often being used.[99] What is significant may be determined on the basis of the nature, size and context of the relevant activities;[100] it is "something more than 'detectable' but need not be at the level of 'serious' or 'substantial'", but must have a "real detrimental effect" on matters such as health, industry, property, environment or agriculture in other States.[101]

46. States must "use all means at [their] disposal" or "exert [their] best possible efforts" to avoid or minimise risks associated with activities causing significant damage to the environment of another State.[102] "This must be fulfilled in keeping with the standard of due diligence, which must be appropriate and proportionate to the level of risk of

[95] Advisory Opinion OC-23/17, para. 180. See also para. 242c. For a comparable approach, see: *Tătar v Romania* App no 67021/01 (ECtHR, 27 January 2009), paras. h), 109 and 120.
[96] See the preamble of the UNFCCC. See also: the Rio Declaration, Principle 2; Stockholm Declaration on the Human Environment, United Nations Conference on the Human Environment, Stockholm, June 5 to 16, 1972, UN Doc. A/CONF.48/14/Rev.1, Principle 21. This has been elaborated upon in International Law Commission, Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, Report of the ILC on the Work of its Fifty-third, UN Doc A/56/10 (2001) 144.
[97] Advisory Opinion OC-23/17, para. 129. For a more recent confirmation by the Court (in a contentious case), see *Case of the Indigenous communities of the Lhaka Honhat (our land) Association v Argentina*, Judgment 6 February 2020, para. 208. It was also referred to in the 2021 IACHR Resolution at paras. 10 and 39- 41.
[98] Advisory Opinion OC-23/17, para. 131. See also: *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14, para. 101. See also *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*. Judgment of December 16, 2015, paras. 104 and 118.
[99] Advisory Opinion OC-23/17, paras. 134-137. See also: *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, para. 101.
[100] Advisory Opinion OC-23/17, para. 135. Citing *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)*, para. 155.
[101] Advisory Opinion OC-23/17, para. 136. Citing Draft articles on Prevention of Transboundary Harm, Art. 2, para. 4.
[102] *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, para. 101. See also: Draft articles on Prevention of Transboundary Harm, 154. Cited in Advisory Opinion OC-23/17, para. 142.

environmental harm".[103] Relatedly, States must conduct environmental impact assessments in relation to activities which may cause significant transboundary harm.[104]

47. **Fourth**, the principle of sustainable development encapsulates the balance between economic development and environmental protection (as recently recognised in the 2022 UNGA resolution on the right to a clean healthy and sustainable environment).[105] In particular, it requires that States have regard to (i) intergenerational equity (namely the rights of future generations including their developmental and environmental needs[106]) (ii) intragenerational equity (namely the equitable use of natural resource[107]) and (iii) sustainable use of resources.[108] The principle is of significance with respect to the assessing of activity that may have a significant harm or damage to the environment (i.e. where the obligation of prevention is engaged: see paras. 44-46 above).[109]

48. **Finally**, individuals enjoy a series of access rights under international environmental law, comprising (i) a right of access to environmental information, (ii) a right of public participation in the environmental decision-making process and (iii) a right of access to

[103] Advisory Opinion OC-23/17, para. 142. Citing Draft articles on Prevention of Transboundary Harm, paras. 117-120, and Art. 3 (para.11); *Responsibilities and Obligations of States with respect to Activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, 10, para. 117.
[104] Advisory Opinion OC-23/17, para. 158. Citing *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, para. 204; *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)*, para. 104; *Responsibilities and Obligations of States with respect to Activities in the Area*, para. 145; Rio Declaration on Environment and Development, Principle. 17.
[105] UN Doc. A/76/L.75 citing UNGA Res. 70/1 of 25 September 2015 and 2021 Resolution of the Human Rights Council on the human right to a clean, healthy and sustainable environment (A/HRC/Res/48/13). See also OAS, General Assembly Resolution entitled "Inter-American Program for Sustainable Development," AG/RES. 2882 (XLVI-O/16), June 14, 2016 referring to the "three dimensions of sustainable development: economic, social, and environmental". See further Advisory Opinion OC-23/17, fn 85 noting "Articles 30, 31, 33 and 34 of the Charter establish an obligation for the States to achieve the "integral development" of their peoples. "Integral development" has been defined by the OAS Executive Secretariat for Integral Development (SEDI) as "the general name given to a series of policies that work together to promote sustainable development."
[106] The 2021 IACHR Resolution (para. 21) and Escazu Agreement (Art. 3(g)) refer to the principle of intergenerational equity. See further the Inter-American Democratic Charter (2001), Art 15: "It is essential that the States of the hemisphere implement policies and strategies to protect the environment, including application of various treaties and conventions, to achieve sustainable development for the benefit of future generations". The principle of sustainable development and intergenerational equity were relied upon in the 2018 judgment of the Colombian Supreme Court in *Demanda Generaciones Futuras v. Minambient* STC4360-2018 (April 4, 2018).
[107] *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14, para 177.
[108] OAS, General Assembly Resolution entitled "*Human Rights and the Environment in the Americas*," adopted at the fourth plenary session held on June 10, 2003, AG/RES. 1926 (XXXIII-O/03), preamble and second operative paragraph: the OAS General Assembly acknowledged "a growing awareness of the need to manage the environment in a sustainable manner to promote human dignity and well-being," and decided "[t]o continue to encourage institutional cooperation in the area of human rights and the environment in the framework of the Organization, in particular between the Inter-American Commission on Human Rights (IACHR) and the Unit for Sustainable Development and Environment."
[109] See e.g. *Indus Waters Kishenganga Arbitration (Pakistan v India)*, Partial Award, 18 February 2013, (2013) 154 ILR 1, paras 449–451.

justice in environmental matters.[110] Such rights have been affirmed in various significant international instruments,[111] including more recently in the Escazu Agreement,[112] and the 2022 UNGA resolution on the right to a clean, healthy and sustainable environment.[113]

V. JURISDICTION

A. Applicable Principles

49. Article 1(1) of the ACHR provides that the States Parties "undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms". The exercise of jurisdiction is a "necessary precondition for a State to incur responsibility for any conduct that may be attributed to it that allegedly violates any of the rights under the Convention".[114]

50. Jurisdiction "is not limited to the national territory of a State";[115] rather, extraterritorial jurisdiction can be established in exceptional cases when justified in the circumstances of the specific case.[116] The Court has thus observed:

> "a person is subject to the "jurisdiction" of a State in relation to an act committed outside the territory of that State (extraterritorial action) or with effects beyond its territory, when the said State is exercising authority over

[110] Advisory Opinion OC-23/17, paras. 211-241.
[111] See e.g. (i) Rio Declaration (Principle 10),[111] as affirmed in the subsequent Declaration of the United Nations Conference on Sustainable Development https://sustainabledevelopment.un.org/rio20/futurewewant (ii) the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) 2161 UNTS 447: see in particular Art. 4 (addressing access to environmental information); Arts 6-8 (addressing public participation); Art. 9 (addressing access to justice in environmental matters).
[112] See in particular Art. 2(a) defining access rights; Art. 5 (addressing access to environmental information); Art. 7 (addressing public participation); Art. 8 (addressing access to justice in environmental matters). See *Case of Baraona Bray v Chile*, 24 November 2022, para. 126 "Sobre el particular, la Corte recuerda que estándares internacionales en materia ambiental resaltan la importancia de que los Estados adopten medidas adecuadas y efectivas para proteger el derecho a la libertad de opinión y expresión y el acceso a la información con el fin de garantizar la participación ciudadana en asuntos ambientales la cual resulta de vital importancia en la materialización y protección del derecho al medio ambiente sano, conforme al Acuerdo de Escazú".
[113] UN Doc. A/76/L.75: "*Recognizing* that the exercise of human rights, including the rights to seek, receive and impart information, to participate effectively in the conduct of government and public affairs and to an effective remedy, is vital to the protection of a clean, healthy and sustainable environment."
[114] Advisory Opinion OC-23/17, para. 72, citing, *inter alia*, *Ilaşcu and Others v. Moldavia and Russia* [GS], No. 48787/99. Judgment of July 8, 2004, para. 311.
[115] Advisory Opinion OC-23/17, para. 78. See also: IACHR, *Franklin Guillermo Aisalla Molina (Ecuador v. Colombia),* Admissibility Report No. 112/10 of October 21, 2011, para. 91, and IACHR, *Case of Coard et al. v. United States*, Merits Report No. 109/99 of September 29, 1999, para. 37.
[116] Advisory Opinion OC-23/17, para. 81.

> that person or when that person is under its effective control, either within or outside its territory."[117]

51. Recognition of extraterritorial jurisdiction is reinforced by the object and purpose of the ACHR. As the IACHR has observed: "Otherwise, there would be a legal loophole regarding the protection of the human rights of persons that the [ACHR] is striving to protect, which would be contrary to the purpose and end of this instrument".[118]

52. In the context of the environment, having regard to the States Parties' obligations under special environmental protection regimes and the principle of prevention under international environmental law,[119] the Court considered:

> "When transboundary harm or damage occurs, a person is under the jurisdiction of the State of origin if there is a causal link between the action that occurred within its territory and the negative impact on the human rights of persons outside its territory. The exercise of jurisdiction arises when the State of origin exercises effective control over the activities that caused the damage and the consequent human rights violation."[120]

53. This test was approved by the Committee on the Rights of the Child (**CRC**) in its decision in *Sacchi et al. v. Argentina et al.*[121] The CRC additionally considered that "the alleged harm suffered by the victims needs to have been reasonably foreseeable to the State party at the time of its acts or omissions".[122]

B. Jurisdiction in the Context of Climate Change

54. Climate change plainly gives rise to transboundary environmental harm. Thus, whether extraterritorial jurisdiction can be established in the context of climate change is contingent upon:

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[117] Advisory Opinion OC-23/17, para. 81, citing *Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection* Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21, para. 219.
[118] IACHR, *Case of Danny Honorio Bastidas Meneses and others v. Ecuador*. Admissibility. Report No. 153/11 of November 2, 2011, para. 21.
[119] Discussed at paras. 44-46 above.
[120] Advisory Opinion OC-23/17, para. 104(h). See further, paras. 101-102.
[121] *Sacchi et al v Argentina et al.* Decision of September 22, 2021. CRC/C/88/D/104/2019, paras. 10.5, 10.7 (***Sacchi et al v Argentina et al***).
[122] *Sacchi et al v Argentina et al*, para. 10.7.

a. The State of origin exercising effective control over the sources of the GHGs in question;

b. There being a causal link between the acts and omissions of the relevant State within its territory and the negative impact on the rights of the individuals located outside its territory; and

c. If the CRC's approach is to be adopted, the alleged harm to those individuals being reasonably foreseeable.

55. Whilst it is recognised that whether jurisdiction arises will ultimately depend on the circumstances of a given case, the Intervenor makes the following observations regarding the criteria (as set out above) in the context of climate change.

56. **First**, the States Parties, through their ability to regulate and enforce such regulations, exercise control over: (i) the land, resources, individuals and entities responsible for GHG emissions in their territories (i.e. territorial emissions); (ii) the extraction of fossil fuels within and the export of fossil fuels from their territories, even if the GHGs arising from the combustion of those fossil fuels occur outside their territories;[123] (iii) the importation of embedded emissions;[124] and (iv) entities domiciled in their territories which generate emissions through their activities outside the domicile State.[125] The States Parties therefore exercise effective control over the sources of the territorial and extraterritorial emissions addressed in this Intervention.[126]

57. **Second**, there is a sufficient causal link between the States Parties' acts and omissions within that State's territory and the negative impacts on Convention rights caused by climate change.[127] In this regard:

a. It is beyond dispute that the States Parties' GHG emissions contribute to the worsening of climate change.[128]

[123] See paras. 27-29 above.
[124] See para. 30 above.
[125] See para. 31 above.
[126] By comparison, see *Sacchi et al v Argentina et al, supra*, para. 10.9.
[127] By comparison, see *Sacchi et al v Argentina et al, supra*, para. 10.9.
[128] Discussed at paras. 8 and 13 above.

b. The science is unequivocal that climate change has increased and will continue to increase the frequency and intensity of *inter alia* heatwaves, wildfires, droughts, flooding, hurricanes, air pollution, spread of infectious disease, and air pollution across the States Parties' territories.[129]

c. As a result, climate change has had, and will continue to have, a significant impact on the Convention rights of millions of people, both within and outside the territory of the emitting State.[130]

58. It is nothing to the point that *but for* causation cannot be established between the impact of climate change on Convention rights and the GHG emissions of any one State.[131] Such a requirement would result in the States Parties never incurring responsibility under the ACHR with respect to persons outside their territories in the context of climate change given its multilateral nature as a phenomenon contributed to by the GHGs of all States. This would create a "legal loophole" that would undermine the effectiveness of the protections in the ACHR, frustrate its object and purpose, and run counter to the living instrument principle.[132]

59. Rather, as the CRC observed in *Sacchi*:

> "[i]n accordance with the principle of common but differentiated responsibility, as reflected in the Paris Agreement, the Committee finds that the collective nature of the causation of climate change does not absolve the State party of its individual responsibility that may derive from the harm that the emissions originating within its territory may cause to children, whatever their location".[133]

60. **Third**, it is incontrovertible that the climate harms impacting individuals' rights under the ACHR are reasonably foreseeable.[134] As outlined at paragraph 16 above, the States Parties have known of (i) the occurrence, causes and impacts of climate change since the adoption of the UNFCCC in 1992 at the very latest, and (ii) of the catastrophic consequences of

[129] Discussed at paras. 10-15 above.
[130] Discussed at paras. 64-69 below.
[131] By comparison, see: *O'Keeffe v Ireland* no 35810/09 (28 January 2014) §149; *Opuz v Turkey* no 33401/02 (9 June 2009) §136.
[132] *Case of Danny Honorio Bastidas Meneses and others v. Ecuador,* para. 21. For a discussion of the relevant principles, see paras. 34-35 above.
[133] *Sacchi et al v Argentina et al, supra*, para. 10.10.
[134] By comparison, see *Sacchi et al v Argentina et al,* paras. 10.11-10.12.

global warming beyond the LTTG of 1.5℃ since the Copenhagen Accord was reached in 2009.[135] That knowledge is underlined by the periodic reports of the IPCC that have been produced since 1990 and the States Parties' ratification of the PA in 2016.

61. **Fourth**, recognising territorial jurisdiction alone is insufficient to protect the rights of persons in States Parties that are most vulnerable and least able to adapt to climate change impacts. Owing to the variation in the vulnerability to climate impacts and adaptive capacity of the States Parties, a less vulnerable State Party with a higher adaptive capacity may seek to protect the rights of persons on its territory by adopting measures designed to adapt to a higher level of global warming coupled with mitigation measures aligned to the same higher level of warming.[136] However, in permitting less vulnerable States Parties to reduce their GHGs in a manner consistent with higher levels of global warming, the inevitable result is that the rights of persons in States Parties who suffer the most severe climate change impacts and who cannot adequately be protected by adaptation measures would not be effectively protected.

62. Consistent with the observations above, the IACHR has recognized that the States Parties have extraterritorial obligations under the ACHR in respect of climate change. In particular, the IACHR observed that States Parties' GHGs contribute to "the increase in frequency and intensity of meteorological phenomena attributable to climate change, which, regardless of their origin, contribute cumulatively to the emergence of adverse effects in other States".[137] Therefore, States Parties are "responsible not only for actions and omissions in its territory, but also for those within its territory that could have effects on the territory or inhabitants of another State" and "have the obligation, within their jurisdiction, to regulate, supervise and monitor activities that may significantly affect the environment inside or outside their territory" through the implementation of GHG mitigation targets.[138]

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[135] At the Copenhagen Accord, the parties to the UNFCCC acknowledged the risks of warming exceeding 1.5℃ for the first time in a COP decision. See Copenhagen Accord, para. 12.

[136] This approach was endorsed by the Federal Constitutional Court in Germany which held that it was consistent with the constitutional obligation to protect human health for Germany to pursue mitigation measures linked to 2°C global warming, i.e. significantly in excess of the LTTG of 1.5°C, based on its own vulnerability and adaptive capacity (*Neubauer et al v Germany, BVerfG*, Beschluss des Ersten Senats vom 24. März 2021 - 1 BvR 2656/18 -, Rn. 1-270 (Order of the First Senate of 24 March 2021), §167).

[137] The 2021 IACHR Resolution, para. 39.

[138] The 2021 IACHR Resolution, paras. 40-41.

VI. DUTIES UNDER THE CONVENTION IN THE CONTEXT OF CLIMATE CHANGE

63. This section will address: (A) ACHR rights affected by climate change; (B) the duty to prevent significant environmental harm; (C) the engagement of the prevention duty in the context of climate change; (D) the overriding obligation to regulate and limit emissions in a manner consistent with limiting global warming to the LTTG of 1.5°C (**OO/Overriding Obligation**) that can be derived from those duties in the context of climate change; (E) the application of the OO to territorial and extra-territorial emissions; and (F) procedural obligations in relation to climate change.

A. Convention Rights Affected by Climate Change

64. The 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".[139] The root of this relationship stems from the reality that "several fundamental rights require, as a necessary precondition for their enjoyment, a minimum environmental quality".[140]

65. This synergistic relationship is exemplified in the context of climate change. The IACHR recognized in its resolution on climate change that even reaching 2°C above pre-industrial levels:

> "would have devastating consequences, especially for millions of people living in poverty, who even in the best of scenarios, would face food insecurity, forced migration, disease and death. This threatens the very future of human rights and would undo the last fifty years of progress in development, health and poverty reduction.
>
> Specifically, both abrupt and slow-onset climate impacts produce changes in the natural cycles of ecosystems, droughts, floods, heat waves, fires, coastal losses, among others. They have brought with them a major threat to the enjoyment of a wide range of rights, inter alia, the right to life, food, housing, health, water and the right to a healthy environment."[141]

[139] Advisory Opinion OC-23/17, para 47. See also: *Case of the Indigenous communities of the Lhaka Honhat (our land) Association v Argentina*, *supra*, para. 244.
[140] Advisory Opinion OC-23/17, para 49.
[141] The 2021 IACHR Resolution, 4-5.

66. The IACHR thus emphasized that "climate change is one of the greatest threats to the full enjoyment and exercise of human rights of present and future generations".[142] This nexus between climate change and human rights has been echoed by several international human rights bodies.[143]

67. The rights most patently affected by climate change include:

    a. *The right to life* (Article 4): This entails a right to have, and the duty of the State to protect, "access to the conditions that guarantee a dignified existence" ("*la vida digna*").[144] Global warming exceeding 1.5℃ will threaten the lives of millions of people across the States Parties and deny many more people access to the conditions for a dignified existence, through extreme weather events such as heatwaves, wildfires, droughts and hurricanes.[145] The UN Human Rights Committee thus observed that "environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life" and "that without robust national and international efforts, the effects of climate change may expose individuals to a violation of their [rights to life]".[146] The CRC has also recognised that "[t]he right to life is threatened by climate change" that that States have duties to take positive measures to protect children "from environmental conditions that may lead to direct threats to the right to life".[147] It is recalled that the right to life is fundamental, in that the preservation of life and

[142] The 2021 IACHR Resolution, p.8.
[143] Committee on the Elimination of Discrimination Against Women, Committee on Economic, Social and Cultural Rights, Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, Committee on the Rights of the Child, Committee on the Rights of Persons with Disabilities, "Joint Statement on 'Human Rights and Climate Change'" (16 September 2019). See also: UN Human Rights Committee, "General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life" (30 October 2018) UN Doc CCPR/C/GC/36, para 26. In *Sacchi et al v Argentina et al*, the CRC observed: "it is generally accepted and corroborated by scientific evidence that […] climate change has an adverse effect over the enjoyment of rights by individuals both within as well as beyond the territory of the State party" (para. 10.9.). Most recently, the CRC recognised the impact of climate change on a wide range of children's rights in its latest general comment (CRC, "General Comment No. 26 (2023) on children's rights and the environment, with a special focus on climate change" (22 August 2023) UN Doc CRC/C/GC/26, paras 40-41 (**CRC General Comment No. 26**)).
[144] *Case of Guzmán Albarracín* et al. *v. Ecuador*. Merits, Reparations, and Costs. Judgment of June 24, 2020. Series C No. 405, para. 155; *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations, and Costs. Judgment of 17, 2005. Series C No. 125, paras. 167-168 (referring to the close connection between the right to life and the rights to health, food and water in this respect.
[145] Discussed at paras. 10-15 above.
[146] UN Human Rights Committee, *Billy et al. v Australia* (21 July 2022) UN Doc CCPR/C/135/3624/2019, para. 8.3.
[147] **CRC General Comment No. 26***,* paras. 20-21.

its effective protection are prerequisites for the enjoyment of all other rights and freedoms.[148]

b. *The right to personal integrity* (Article 5): Having regard to the "close relationship between the right to life and the right to personal integrity", the "lack of access to conditions that ensure a dignified life" induced by climate change will "also constitute a violation of the right to personal integrity" for many of the most vulnerable.[149]

c. *The right to private life* (Article 11): This right protects a broad range of interests, including a person's physical and psychological well-being, living conditions and enjoyment of one's home; each of which can be directly and seriously affected by environmental harm.[150] That is and will *a fortiori* be the case in the context of climate change; a proposition recognised by the UN Human Rights Committee in *Billy et al v Australia*.[151]

d. *Economic, social and cultural rights* (Article 26): This includes justiciable rights to *inter alia* health, water, food, and a healthy environment.[152] Each of the aforesaid will plainly be affected by climate change:

    i. Recalling that the right to a healthy environment protects components of the environment as "legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals", it is axiomatic that climate change will interfere with the health of the environment by causing ocean

[148] *Case of the "Juvenile Reeducation Institute" v. Paraguay*. Preliminary Observations, Merits, Reparations, and Costs. Judgment of September 2, 2004. Series C No. 112, para. 156. In *Billy et al.*, the UN Human Rights Committee thus observed that "the right to life cannot be properly understood if it is interpreted in a restrictive manner" (para. 8.3.).
[149] Advisory Opinion OC-23/17, para. 114. See also: *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, supra,* para. 249.
[150] Advisory Opinion OC-23/17, para. 114. See jurisprudence of the European Court of Human Rights in, for example: *Case of Çiçek et al. v. Turkey,* No. 44837/07. Judgment of February 4, 2020, para. 22. See also: *Case of Ivan Atanasov v. Bulgaria*, No. 12853/03. Judgment December 2, 2010, paras. 66, 75; *Case of Pavlov et al. v. Russia,* No. 31612/09. Judgment of October 11, 2022, para. 61.
[151] Illustrating the point, the UN Human Rights Committee made the following observation in *Billy et al. v Australia* (para. 8.12.): "when climate change impacts – including environmental degradation on traditional [indigenous] lands in communities where subsistence is highly dependent on available natural resources and where alternative means of subsistence and humanitarian aid are unavailable – have direct repercussions on the right to one's home, and the adverse consequences of those impacts are serious because of their intensity or duration and the physical or mental harm that they cause, then the degradation of the environment may adversely affect the well-being of individuals and constitute foreseeable and serious violations of private and family life and the home."
[152] Advisory Opinion OC-23/17, para 66; *Case of the Indigenous communities of the Lhaka Honhat (our land) Association v Argentina*, *supra,* paras. 195, 202; *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2017. Series C No. 340, para. 142.

acidification, coastal erosion, wildfires, damage to natural ecosystems and consequent biodiversity loss.[153]

ii. In addition to the aforesaid, climate impacts such as drought will affect the availability, quality and accessibility of food and water.[154]

iii. Those impacts will correspondingly impact the "underlying determinants of health", whereas increased heatwaves, wildfires, hurricanes and infectious diseases will directly endanger the health of affected individuals, impacting the right to health.[155]

68. Those impacts are felt with the greatest intensity by vulnerable groups, such as children, indigenous peoples, women, disabled people, minorities, and people living in extreme poverty.[156] As regards children, climate change engages the rights of the child in Article 19,[157] impacting upon the development and survival of children across the States Parties.[158]

69. In view of the interconnected nature of the rights outlined above and the manner in which they are impacted by climate change, the duties arising from those rights in the context of climate change can be addressed together.[159]

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[153] Advisory Opinion OC-23/17, *supra*, para. 62; *Case of the Indigenous communities of the Lhaka Honhat (our land) Association v Argentina*, *supra,* paras. 202-208. Discussed at paras. 10-15 above.

[154] *Case of the Indigenous communities of the Lhaka Honhat (our land) Association v Argentina*, *supra,* paras. 210-230. See also: CESCR, *General Comment No. 12. The right to adequate food (Art. 11)*. Twentieth session (1999). Doc. E/C.12/1995/5, paras. 6-13; CESCR (*General Comment 15: The right to water ((Arts. 11 and 12 of the Covenant).* January 20, 2003.UN Doc. E/C.12/2002/11, paras. 2, 10-11. Discussed at paras. 12-13 above.

[155] CESCR, *General Comment 14: The right to the highest attainable standard of health (Art. 12 of the Covenant*). UN Doc. E/C.12/2000/4, August 11, 2000, para. 11. For general recognition of the right, see: *Case of Poblete Vilches* et al. *v. Chile*. Merits, Reparations, and Costs. Judgment of March 8, 2018. Series C No. 349, paras 118-124. Discussed at paras. 10-15 above.

[156] The 2021 IACHR Resolution, p.6; Advisory Opinion OC-23/17, *supra*, para. 67. See also: *Case of the Indigenous communities of the Lhaka Honhat (our land) Association v Argentina*, *supra,* paras. 209.

[157] This is an autonomous right which bears a close relation to the rights protected in the Convention on the Rights of the Child ('UNCRC'): *Case of the "Street Children" (Villagrán Morales* et al.) *v. Guatemala*, *supra,* paras. 178ff; *Gender identity, and equality and non-discrimination with regard to same-sex couples.* Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, para. 151. In accordance with Article 3(1) UNCRC, this includes the right of the child to have "his or her best interests assessed and taken into account as a primary consideration in all actions or decisions that concern him or her".

[158] The Committee on the Rights of the Child observed in *Sacchi et al v Argentina et al* that "children […] are particularly impacted by the effects of climate change, both in terms of the manner in which they experience such effects as well as the potential of climate change to affect them throughout their lifetime, in particular if immediate action is not taken" (para. 10.13.). This has recently been reaffirmed by the CRC in *General Comment No.26*. See also: Analytical study on the relationship between climate change and the full and effective enjoyment of the rights of the child: report of the Office of the United Nations High Commissioner for Human Rights, paras. 4-27.

[159] By comparison, see: *Case of the Indigenous communities of the Lhaka Honhat (our land) Association v Argentina*, *supra,* paras. 243-245, 274.

B. The Duty to Prevent Significant Environmental Harm

70. Article 1(1) provides that States Parties have an obligation to "respect" and "ensure" the rights and freedoms recognised under the ACHR. The obligation to "ensure" or "guarantee" rights requires States to "take all appropriate steps to protect and preserve" rights under the ACHR.[160] States must organize the "entire governmental apparatus and, in general, all the structures through which public power is exercised" to ensure the free and full enjoyment of rights under the ACHR.[161] As a consequence, States must "prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, must attempt to restore, if possible, the right violated".[162] The duty to prevent requires State Parties to take reasonable steps within the scope of their powers – of a legal, political, administrative and cultural nature – to prevent violations of ACHR rights where State authorities knew, or reasonably ought to have known, of a real and immediate risk to the rights of the relevant individual or group.[163] This encompasses the duty to "prevent third parties from violating the protected rights in the private sphere".[164]

71. Article 2 provides that States must "adopt […] such legislative or other measures as may be necessary to give effect to those rights and freedoms" protected in the ACHR. Pursuant to the principle of *effet utile,* "the provisions of domestic law must be effective".[165] The general duty under Article 2 implies the adoption of two different types of measures: (i) "the elimination of rules and practices of any way violate the guarantees provided for under the Convention"; and (ii) "the promulgation of norms and the development of practices conducive to the effective observance of those guarantees".[166] This duty is not limited to constitutional or legislative measures, but "must extend to all legal provisions of a regulatory nature and result in effective practical implementation".[167]

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[160] Advisory Opinion OC-23/17, para. 118.
[161] *Case of Velásquez Rodríguez v. Honduras*. Merits. Judgment of July 29, 1988. Series C No. 4, para. 166; *Case of Miskito Divers (Lemoth et al.) v. Honduras.* Merits. Reparations, and Costs. Judgment of August 31, 2021. Series C 432, para 43; Advisory Opinion OC-23/17, para. 123.
[162] *Case of Velásquez Rodríguez v. Honduras, supra,* para. 166; *Case of Miskito Divers (Lemoth et al.) v. Honduras, supra,* para. 43; Advisory Opinion OC-23/17, para. 118.
[163] *Case of Velásquez Rodríguez v. Honduras*, *supra,* paras. 174-175; *Case of López Soto et al. v. Venezuela.* Merits, Reparations, and Costs. Judgment of September 26, 2018. Series C No. 362, paras. 140-141.
[164] Advisory Opinion OC-23/17, *supra,* para. 118. See also: *Case of the Indigenous communities of the Lhaka Honhat (our land) Association v Argentina*, *supra*, para. 207.
[165] *Case of Vélez Loor v. Panama.* Preliminary Observations, Merits, Reparations, and Costs. Judgment of November 23, 2010. Series C No. 218, para 194.
[166] *Case of Miskito Divers (Lemoth et al.) v. Honduras, supra,* para. 45. See also: *Case of Vélez Loor v. Panama, supra*, para 194.
[167] Advisory Opinion OC-23/17, *supra,* para. 146.

72. In order to ensure ACHR rights in the environmental context, "States have the obligation to prevent significant environmental damage within or outside their territory" (**the prevention duty**).[168] That obligation arises where (i) the authorities knew or should have known of a real and immediate risk to the rights of the relevant individual or group, and (ii) there is a "causal link between the impact on [the ACHR right] and the significant damage caused to the environment".[169] Any harm to the environment that "may involve a violation of the rights" under the ACHR must be considered significant harm.[170]

73. Where the prevention duty arises, the "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";[171] and "States are bound to use all the means at their disposal to avoid activities under its jurisdiction causing significant harm to the environment".[172] To satisfy the prevention duty, States must take the following measures in relation to activities that could potentially cause significant environmental damage: (i) regulate; (ii) supervise and monitor; (iii) conduct, require and approve environmental impact assessments; and (iv) establish contingency plans, (v) mitigate, when environmental damage has occurred.[173] It is acknowledged that, having regard to the operational choices, priorities and resources of States, these "positive obligations must be interpreted in a way that does not impose an impossible or disproportionate burden on the authorities".[174]

C. The Engagement of the Duty to Prevent in the Context of Climate Change

74. The States Parties' duties to prevent significant environmental damage within or outside their territory plainly arise with respect to the rights outlined at para. 67 in the context of climate change.

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[168] Advisory Opinion OC-23/17, para. 242(a). See also: *Case of the Indigenous communities of the Lhaka Honhat (our land) Association v Argentina*, *supra*, para. 208.
[169] Advisory Opinion OC-23/17, para. 120.
[170] Advisory Opinion OC-23/17, para. 140.
[171] Advisory Opinion OC-23/17, para. 142.
[172] *Case of the Indigenous communities of the Lhaka Honhat (our land) Association v Argentina*, *supra,* para. 208.
[173] Advisory Opinion OC-23/17, paras. 125, 145, 174 and 242. See also: *Case of the Indigenous communities of the Lhaka Honhat (our land) Association v Argentina*, *supra*, para. 208. It is also acknowledged that States have duties to cooperate and have procedural duties in the environmental context. The former is not addressed in this intervention. The latter is addressed in the final section.
[174] Advisory Opinion OC-23/17, para. 120.

75. **First**, there can be no question that the States Parties know, or ought to know, of the real and immediate risk that climate change poses to the Convention rights of individuals and groups across the States Parties to the ACHR:

    a. As outlined at para. 67, climate change will have a grave impact on the enjoyment of the rights to *inter alia* life, personal integrity, private life, food, water, health and a healthy environment. The best available climate science leaves no doubt as to the *reality* of that risk.[175]

    b. Climate impacts are already occurring and thus immediate.[176] While certain of the impacts associated with climate change will occur in the long-term, there is immediacy when it comes to their causes and the prospects of averting the worst consequences of climate change; the most severe climate impacts will become unavoidable and irreversible tipping points may be reached unless sufficient action is taken *immediately*.[177]

    c. For the reasons given at paras. 16 and 60, the States Parties have the requisite knowledge of the risks posed by climate change.

76. **Second**, where the positive prevention duty is concerned, the relevant causal link is that between the impact on the rights concerned and the environmental harm (regardless of its source). The source of the environmental harm need not be attributable or causally linked to the actions of the State, but can relate to any external source, such as private parties, third States, or natural phenomena.[178] In examining causation for present purposes, the relevant link is therefore between climate change and the impacts on the Convention rights, not the individual GHG emissions of a given State. In those premises, the reasons given at paras. 57-59 apply with even greater force to the conclusion that there is a sufficient causal link between the impacts on Convention rights and the significant environmental harms associated with climate change to engage the prevention duty.

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[175] Discussed at paras. 10-15 above.
[176] Discussed at paras. 10-15 above.
[177] In *The State of the Netherlands v Urgenda Foundation*, §5.2.2 (see also §5.6.2), the Dutch Supreme Court observed that in the context of climate change, "immediate does not refer to imminence in the sense that the risk must materialise within a short period of time, but rather that the risk in question is directly threatening the persons involved". Discussed at paras. 15 and 19 above.
[178] *Case of the Indigenous communities of the Lhaka Honhat (our land) Association v Argentina*, *supra*, para. 207; *Community of La Oroya v Peru* No. 76/09; *Yanomami v. Brazil* No. 12/85; *Case of Saramaka People v. Suriname*, *(Preliminary Objections, Merits, Reparations, and Costs)* Judgment, November 28 2007.

D. The Overriding Obligation to Regulate and Limit Emissions

77. It follows, pursuant to Article 1(1) and in conjunction with *inter alia* Articles 4, 5, 11 and 26, that States Parties must take all appropriate and reasonable steps to prevent significant environmental harm caused by climate change.[179] Read with Article 2, the States Parties must adopt effective legislative, regulatory, and other measures to that end.[180]

78. In terms of the measures required by the States to satisfy the prevention duty in the context of climate change, the irreducible core is that the States Parties must (i) regulate and limit their emissions (ii) in a manner that is consistent with the Overriding Obligation of achieving the LTTG of 1.5. Taking the two aspects of the Overriding Obligation in turn:

79. **First**, the duty to regulate and limit emissions (which forms an irreducible part of the prevention duty in the context of climate change) stems from the indisputable facts that: (i) anthropogenic climate change above a certain level will have catastrophic and irreversible consequences for the Convention rights of millions of people in the States Parties;[181] (ii) the impact of global warming of 1.07°C has already caused serious impacts on those rights;[182] (iii) GHG emissions are the key determinant of temperature increases and the cause of such harms;[183] (iv) the States Parties' acts and omissions contribute to those harms by permitting the release of GHGs; and (v) the only way to mitigate the increase in temperature is for States to act to reduce GHGs.[184]

80. In a similar vein, the 2021 IACHR Resolution provides that "States should adopt and implement policies aimed at reducing [GHGs] that reflect the greatest possible ambition" and "for the effective protection of human rights, States must take appropriate measures to mitigate [GHGs]".[185] The CRC has reached a similar conclusion in its recent *General Comment No.26* on children's rights and the environment.[186]

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[179] Advisory Opinion OC-23/17, *supra*, paras. 118, 242(a). See also: *Case of Velásquez Rodríguez v. Honduras*, *supra,* paras. 174-175; *Case of López Soto et al. v. Venezuela, supra*, paras. 140-141; *Case of the Indigenous communities of the Lhaka Honhat (our land) Association v Argentina*, *supra*, para. 208.
[180] *Case of Vélez Loor v. Panama, supra*, para 194; *Case of Miskito Divers (Lemoth et al.) v. Honduras, supra,* para. 45; Advisory Opinion OC-23/17, *supra,* para. 146.
[181] Discussed at paras. 10-15 above.
[182] Discussed at para. 10 above. The "Outcome of the first global stocktake" recently adopted at COP28 noted "with alarm and serious concern" the findings of the AR6 in this regard. See Outcome of the first global stocktake, §15.
[183] Discussed at paras. 8 and 13 above.
[184] Discussed at paras. 18-19 above. This is reflected in Articles 4(2)(a) UNFCCC and Article 4 PA.
[185] The 2021 IACHR Resolution, paras. 1, 15.
[186] CRC General comment No. 26, paras. 20-21, 73, 95-96.

81. While the States Parties must also take adaptation measures to protect individuals' Convention rights from the impacts of climate change in order to comply with the prevention duty, adaptation is not a substitute for mitigation and does not detract from the existence and content of the Overriding Obligation.[187] Having regard to (i) the fact that GHG emissions are the key determinant of temperature increases, (ii) the hard limits to the States Parties' adaptive capacities, and (iii) the inability of States Parties to undertake adaptation measures with respect to persons outside their territory but under their jurisdiction, reducing GHG emissions is the only means of effectively preventing and minimising the risks to Convention rights.

82. **Second**, the requirement that emissions must be regulated and limited in a manner consistent with limiting global warming to the LTTG of 1.5°C follows from the scientific consensus that, noting that effects of global warming even up to 1.5°C are severe, a LTTG restricting the global temperature rise to 1.5°C above pre-industrial levels is essential to avoid additional catastrophic and irreversible consequences.[188] Due to the severity of the consequences of failing to act in a manner inconsistent with limiting global warming to the LTTG of 1.5°C on the Convention rights of millions of persons across the States Parties, a State would fail to act in keeping with the "standard of due diligence" and in a manner that is "appropriate and proportionate" to those risk if it adopts a target, or takes measures, consistent with a LTTG associated with a higher temperature limit.[189] Regard must be had to the best available science, notably the IPCC reports, when determining the scope of the obligations. Consistent with the aforesaid, the CRC considered in *General Comment No.26* that States' "[m]itigation objectives and measured should be based on the best available science", which illustrates "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".[190]

83. **Third**, requiring States to regulate and limit their emissions in a manner consistent with remaining under 1.5°C is plainly appropriate and proportionate, having regard to:

[187] While the content of the States Parties' duties to take adaptation measures is outside the scope of this written opinion, the Intervenor notes the 2021 IACHR Resolution, para. 15. For the proposition that adaptation is not a substitute for mitigation and the limits to States Parties' adaptive capacities, see AR6 WG1 SPM, 15 §B.1.3 and SR1.5 SPM, 4 §A.1.
[188] Discussed at paras. 10-16 above. The 2021 IACHR Resolution, 4-5.
[189] Advisory Opinion OC-23/17, para. 142.
[190] CRC General Comment No. 26, para. 97.

a. The fact that the Convention rights that will be impacted include some of the most fundamental provisions in the ACHR, including the right to life;[191]

b. The serious and irreversible impact that global warming above 1.5°C will have upon the Convention rights of millions of people across the States Parties;

c. The fact that the individuals affected will disproportionately be from the most vulnerable groups in society, including children and indigenous peoples;[192]

d. The fact that any competing interests of the States Parties pale in comparison to the severity of the interference with the Convention rights posed by climate change, noting that (i) the long-term consequences of failing to address climate change will outweigh the costs of acting to avoid climate change, in particular if States take immediate action to implement deep emissions reductions by 2030; and (ii) communities across the States Parties will benefit from remedial action, and share an overriding interest in avoiding the worst impacts of climate change;

e. There is a strong presumption that compliance with the OO will not impose an impossible or disproportionate burden on States Parties, given that (i) the States have committed to limiting global warming to 1.5°C, (ii) the requirements of the OO are tailored toward the circumstances and level of development of each State in line with considerations of equity and their CBDR, and (iii) the States Parties retain a discretion (i.e. choice of means) as to how to reduce their GHG emissions. Having regard to those matters, the *pro homine* principle and the severity of the impacts to the Convention Rights, the onus would be upon the State Party in the particular circumstances of a given case to demonstrate that complying with the OO would impose an impossible or disproportionate burden.[193]

f. As outlined at para. 16, the States Parties have had knowledge of the occurrence, causes and potential impacts of climate change since 1992, and the risks associated with surpassing 1.5°C since 2009.

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[191] *Case of the "Juvenile Reeducation Institute" v. Paraguay, supra*, para. 156. Discussed at para. 97 above.
[192] Discussed at para. 68 above. See also: CRC General Comment No.26, para. 73.
[193] The Intervenor notes the Court's approach to presumptive evidence in other contexts, such as: *Case of Miembros de la aldea Chichupac y communidades vecinas del municipio de Rabinal v. Guatemala*. Judgment. November 30, 2016. Series C No. 328, para. 324.

84. **Fourth**, the existence and content of the OO are supported by the object and purpose of the Convention in protecting the fundamental rights of human beings, and is consistent with the principle that the ACHR's provisions should be interpreted from the "best perspective" for the protection of the individual.[194] It is also a necessary interpretation if the Convention is to "evolve with the times and contemporary conditions" in relation to climate change and the evolving risks which it poses to Convention rights.[195] A less stringent interpretation which either (i) does not require States to reduce their GHG emissions or (ii) is inconsistent with the LTTG of 1.5 would permit States to contribute to catastrophic harms to Convention rights and undermine the very purpose of the ACHR.

85. **Fifth**, the Overriding Obligation is consistent with, and supported by, the following relevant instruments and principles of international law:

    a. As to the UNFCCC and PA, the OO is supported by (i) the objective of limiting temperature rise to 1.5°C (PA, Art. (2)(1)(a)), (ii) the obligation on States to take mitigation measures and reduce their emissions (UNFCCC, Art. 4(2); PA, Art. 4), (iii) the recognised imperative of rapid reductions (UNFCCC, PA, Art. 4(1)) and (v) the requirement that measures reflect a State's "highest possible ambition" and CBDR (UNFCC, Arts. 3(1), 4(2)(a) and 4(3); PA, Arts. 2(2) and 4(4)). While the UNFCCC and PA do not expressly provide concrete emissions reduction duties equivalent to the OO, the obligations thereunder cannot exhaust or dilute States' obligations under the Convention or preclude an interpretation of their obligations in a manner that is effective and necessary to prevent the significant impacts to the Convention rights in question. If the content of States' obligations under ACHR were limited to those in the UNFCCC and PA, this would undermine the protection of the Convention rights and be contrary to the *pro persona* principle.[196]

    b. Climate change represents a threat of serious and irreversible harm, engaging the precautionary principle. While it is certain that climate change is occurring, is caused by anthropogenic GHGs and will have catastrophic impacts, the precautionary principle militates in favour of adopting the "worst-case hypothesis"

[194] Advisory Opinion OC-23/17, para. 41. Discussed at para. 34 above.
[195] Advisory Opinion OC-23/17, para. 43. Discussed at para. 35 above.
[196] Advisory Opinion OC-5/85, para. 52. Discussed at para. 37 above.

and adopting a more stringent approach *vis-à-vis* GHG reductions.[197] The OO represents such a precautionary approach. Consistent with the Court's approach, States must "act in keeping with the precautionary principle" embodied within the OO in order to comply with the prevention duty in the context of climate change.[198]

c. The prevention or no-harm principle (as well-established under international environmental law[199]) is fundamentally consistent with the OO, in that a failure of States to regulate their emissions in a manner consistent with 1.5°C would cause significant transboundary harm. Accordingly, States must act with due diligence and "take appropriate measures to prevent" and "minimize the risk" of such harm.[200]

d. Having regard to the grave and irreversible nature of the consequences if global warming surpasses 1.5°C, complying with the OO is necessary to protect the rights of future generations and is consistent with the equitable and sustainable use of natural resources mandated by the principle of sustainable development.

86. **Sixth**, the content of the OO is reinforced by the rights of the child under Article 19. The rights of the child are of clear relevance in the context of global warming, given that: (i) children are among the most vulnerable to the impacts of climate change in the near-term; (ii) decisions affecting them will have a longer-term and more significant impact on their interests relative to adults whose interests are also at stake, given that climate change is progressively intensifying; and (iii) children have less capacity to shape policy and determine events relative to adults.[201] This is underscored by the CRC's recent *General Comment No.26*.

87. A series of concrete duties can then be derived from the Overriding Obligation that apply to territorial and extra-territorial emissions. These are addressed below.

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[197] Expert Group on Global Climate Obligations, "Oslo Principles on Global Climate Change Obligations" (2015), Principle 1.
[198] Advisory Opinion OC-23/17, para. 242(c).
[199] Discussed at paras. 70-73 above.
[200] International Law Commission, Draft articles on Prevention of Transboundary Harm from Hazardous Activities, UN Doc A/56/10 (2001) ("2001 ILC Draft Articles"), 154 (§11).
[201] The 2021 IACHR Resolution, p.6; PA, preamble; *Sacchi et al v Argentina et al*, para. 10.13.; Analytical study on the relationship between climate change and the full and effective enjoyment of the rights of the child: report of the Office of the United Nations High Commissioner for Human Rights, paras. 4-27.

E. Application to Territorial Emissions

88. As to the content of the Overriding Obligation with respect to territorial emissions, States must regulate and limit emissions generated within their territories in a manner consistent with limiting global warming to the LTTG of 1.5°C. Put another way, the States Parties' obligations under the ACHR must be interpreted in such a way as to ensure that, if it were implemented by all States, it would be consistent with keeping global warming to 1.5°C above pre-industrial levels.

89. As a matter of principle and necessity, the level of emissions reductions required by the OO in respect of individual States must be calculated in accordance with their respective fair shares of global emissions reductions. In light of the divergent levels of States Parties' development, capacity to reduce emissions and historic levels of responsibility, the required contributions of individual States to global emissions reductions must inevitably differ and be allocated in a manner that is equitable.[202] This approach finds support in the following premises:

    a. Articles 3(1) and 4(2)(a) of the UNFCCC and Articles 2(2), 4(3) and (4) of the PA, which require emissions to be reduced on the basis of equity, in accordance with States' "highest possible ambition" and CBDR, such that developed States take the lead;

    b. The principle of sustainable development, which requires natural resources to be used equitably;

    c. The CRC's recognition that "[m]itigation measures should reflect each State party's fair share of the global effort to mitigate climate change".[203]

    d. The recognition that imposing an emissions reduction burden beyond a State's fair share would amount to imposing an impossible and disproportionate burden on the State; and

    e. The reality that, if one or a group of States do not act in accordance with their fair share, no State will exceed its fair share of emissions reductions to remedy that

[202] Discussed at paras. 20-21 above.
[203] CRC General Comment No.26, paras. 98 and 113.

shortcoming. The corresponding necessity is that every State undertakes its fair share of the global emissions reduction burden if global warming is to be held to 1.5°C.

90. In terms of calculating the fair share of each State Party, it is acknowledged that (i) there are different approaches to establishing the fair share of individual States and (ii) there has been a failure by States to agree on a burden-sharing approach when it comes to emissions reductions under the UNFCCC. That failure cannot relieve States of their duties under the Convention to limit their emissions so as to prevent the catastrophic climate impacts that will occur if global warming surpasses 1.5°C. Further, it is axiomatic that if all States pursue reductions consistent with the less stringent measures of their fair share, cherry picking the equity interpretation most preferable to them, then global warming will not be limited to 1.5°C.

91. Rather, the object and purpose of the Convention, the principle of interpreting its provisions from the "best perspective" of the individual, and the precautionary principle demand that: (i) ambiguity as to what constitutes State Parties' fair shares must be resolved in favour of the individual; and (ii) each State's fair share should be assessed assuming an equivalent level of ambition by other States.[204]

92. Against that background, the Intervenor submits that the approach of the CAT and *Rajamani et al.* studies to assessing States' fair shares (see paras. 22-24 above) provide a suitable indicative measure of the extent to which individual States are complying with the Overriding Obligation with respect to their territorial emissions. The reasons for that submission are as follows:

    a. Being based on an aggregation of various approaches to effort sharing in the available literature, the CAT and *Rajamani et al.* studies avoid favouring any single approach to fair share. They avoid the Court having to select whether any single measure of fair share is superior to others.

    b. By identifying a level of ambition on a State's fair share range that is consistent with the LTTG of 1.5°C if all States pursue an equivalent level of ambition on their

[204] Discussed at paras. 34-35 and 41-43 above.

respective fair share ranges, the CAT and *Rajamani et al.* studies disable States from being permitted to cherry pick less stringent measures of their fair share.

c. The CAT and/or *Rajamani et al.* studies are rooted in the best available science and provide a robust evidential basis for the Court's assessment. Both studies are primarily based upon the dataset of studies used by the IPCC to construct its fair share ranges in its AR5 report. Further, the studies have been developed by eminent climate scientists, including scientists in the IPCC.

93. It is noted that the criticism of some authors that the CAT fair share ranges are dominated by inequitable approaches to burden-sharing such as cost-effectiveness and grandfathering (see para. 23 above) does not apply to the *Rajamani et al.* methodology (as it excludes these inequitable approaches from States' fair share ranges). It is recognised that the approach of *Rajamani et al.* may therefore be considered to be more appropriate in relation to less wealthy States with lower historical responsibility for climate change in particular.

94. Without prejudice to that position, the Intervenor highlights two supplementary approaches that the Court could rely upon in evaluating compliance with States Parties' duties to regulate and limit territorial emissions in a manner consistent with limiting global warming to the LTTG of 1.5°C. The Intervenor submits that there would be a strong *prima facie* basis to conclude that a State is not acting with due diligence and taking all appropriate and reasonable steps to prevent significant harm caused by climate change where:

a. Appropriate independent and/or State-commissioned studies demonstrate that a State could reasonably achieve greater emissions reductions than those envisaged in its emissions targets or policy measures, subject to the position that a State is not obliged to achieve more than its fair share of the necessary global emissions reductions.[205] In such cases, the State's emissions reductions would demonstrably not reflect their "highest possible ambition" per Article 4(3) PA.

[205] However, the Intervenor observes that at no time should any State Party be required under the ACHR to reduce its GHG emissions by a level that exceeds its fair share of the global emissions burden even if it might be feasible for it to do so. That would, in the Intervenor's view, impose a disproportionate burden on States Parties that is contrary to the principles of equity which underpin the UNFCCC and PA.

b. The State is failing to limit its territorial emissions in line with its own domestic mitigation targets.[206]

F. Application to Extra-Territorial Emissions

95. The Overriding Obligation must extend to the States Parties' acts and omissions regarding extra-territorial emissions – namely, (i) the extraction of fossil fuels, (ii) the importation of embedded emissions, and (iii) overseas emissions of entities domiciled within States Parties' jurisdictions – because:

a. Such extra-territorial emissions contribute significantly to global warming and the corresponding impacts on individuals' Convention rights.[207]

b. The States Parties' acts and omissions which cause or permit extraterritorial emissions are attributable to those States for the purposes of the international law of State responsibility, and occur within each State's territorial jurisdiction.[208]

c. An exclusive focus on territorial emissions would enable States to take steps to reduce their territorial emissions in a manner consistent with limiting global warming to the LTTG of 1.5°C, whilst increasing their extra-territorial emissions. A State could, for example, reduce territorial emissions while: (i) increasing the extraction and export of fossil fuels; (ii) using international trade to shift their emissions by importing carbon intensive goods, creating the phenomenon of "carbon leakage"; and (iii) permitting/encouraging domiciled entities to take advantage of weaker regulatory environments in other States where their emissions are under-regulated. The result would be an appearance of progress towards reducing territorial emissions but would ultimately result in the LTTG of 1.5°C being exceeded.[209]

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[206] *Advisory Opinion oc-7/85 of August 29, 1986 enforceability of the right to reply or correction (arts. 14(1), 1(1) and 2 American Convention on Human Rights,* paras 26-27. For examples where national courts have held States accountable for not meeting their own targets, see: *ASBL Klimaatzaak v Kingdom of Belgium et al*, Court of First Instance of Brussels (2015/4585/A, 17 June 2021), pp. 71-72, *Commune de Grande-Synthe v France* (19 November 2020) No 42730, para. 5.
[207] Discussed at paras. 26-31 above.
[208] International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Report of the ILC on the Work of its Fifty-third Session, UN Doc A/56/10 (2001), Art 4. See also: *Case of Velásquez Rodríguez v. Honduras, supra,* paras. 164, 172.
[209] For example, see the discussion at para. 30 above.

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

e. While the Court cannot evaluate compliance of States outside the Convention, it can and must assess the States Parties' acts and omissions regarding extra-territorial emissions which contribute to the climate impacts upon the Convention rights. An approach limited to territorial emissions would undermine the effectiveness of the OO and the object and purpose of the Convention, as conduct attributable to the States Parties which materially contributes to global warming would be free from scrutiny.

96. Turning to the extra-territorial emissions mentioned at paras. 27-31, the Overriding Obligation requires that the States Parties regulate and limit the **extraction of fossil fuels** within their territories in a manner that is consistent with limiting global warming to the LTTG of 1.5°C.[210] It is noted in this regard that the "Outcome of the first global stocktake" recently adopted at COP28 calls on States to "[t]ransitio[n] away from fossil fuels in energy systems, in a just, orderly and equitable manner, accelerating action in this critical decade, so as to achieve net zero by 2050 in keeping with the science".[211] While the extent of reductions required under such a duty must therefore be equitable, there is limited evidence currently available to determine fair shares of fossil fuel extraction with respect to the State Parties. A more limited position is therefore advanced that:

a. States Parties must set a binding limit and/or reduction target that is consistent with limiting global warming to the LTTG of 1.5°C, having regard to (i) the level of reductions in fossil fuel extraction required globally per the best available climate

[210] This accords with the Joint Statement of UN human rights experts on 30 November 2023: "To address the planetary crisis and tackle the wide range of fossil fuels negative human rights impacts, States must urgently decarbonise and detoxify. Wealthy States and high emitters should lead the phase out of fossil fuels, beginning with avoiding new investments and terminating fossil fuel subsidies."
[211] Outcome of the first global stocktake §28.

science (such as the UNEP 2023 PGR),[212] (ii) their respective levels of capacity and dependence on fossil fuels, and (iii) the assessments carried out in accordance with the procedural obligations set out below.

b. States Parties must not open, approve, license, permit, invest in, or plan new coal mines, oil fields or gas fields. The existence of this duty is supported by the IEA NZE Pathway and scientific evidence.[213] At a minimum, there must be a strong presumption that opening, licensing, permitting, investing in, or planning new coal mines, oil fields or gas fields is incompatible with the OO.[214]

97. In a similar vein, the Overriding Obligation requires States Parties to regulate and limit their **embedded emissions** from imported goods in a manner consistent with limiting global warming to the LTTG of 1.5°C, which requires the States Parties to set a binding limit and/or reduction target on emissions from imported goods that is appropriate and reasonable for the State to achieve, taking into account its consistency with the LTTG of 1.5°C and the assessments set out below.

98. The Overriding Obligation also extends to **overseas emissions of entities domiciled within the States Parties' jurisdictions**. As to the scope of this duty: (i) an entity is domiciled within a State where it has its place of incorporation/registration, its principal assets are located, its central administration/management is located, or its principal place of business is located;[215] (ii) the obligation encompasses an entity's scope 1, 2 and 3 emissions or "*direct and indirect emissions*";[216] and (iii) the States presently exercise or have the ability to exercise control over entities within their jurisdictions so as to regulate their overseas emissions.

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[212] Discussed at paras. 27-28 above.
[213] Discussed at para. 29 above.
[214] The strength of this presumption follows from: (i) that existing sanctioned fossil fuel reserves exceed the global carbon budget associated with achieving the LTTG of 1.5°C; (ii) the risk that sanctioning new fossil fuel reserves will lock in increased fossil fuel supply for decades given the life cycle of oil/gas fields and coal mines; and (iii) the consequent scientific consensus that, at a minimum, limiting global warming to the LTTG of 1.5°C requires that States do not sanction any new fossil fuel reserves. To rebut this presumption, the burden falls upon the State to provide evidence that there is an overriding justification in favour of permitting the sanctioning of new fossil fuel reserves, whether that be for reasons of energy security, employment, economic development or otherwise.
[215] Open-Ended Intergovernmental Working Group, UN Human Rights Council, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises (Third Revised Draft, 17 August 2021), Art 9.2. Also: CESCR, "General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities" (10 August 2017) UN Doc E/C.12/GC/24, 31.
[216] Discussed at para. 31 above.

99. In addition to the factors and principles at para. 95, the existence and content of the OO in this context is supported and informed by: (i) the emerging consensus that businesses have a responsibility to respect human rights and conduct due diligence, which extends to direct and indirect environmental impacts from business activities and GHG emissions;[217] (ii) the obligation of States under international human rights law to take reasonable measures to prevent and redress infringements of human rights that occur both within *and outside* their territories due to the activities of entities domiciled within and/or under their control;[218] and (iii) the no-harm and prevention principles.[219] Drawing upon these principles, the Court held in *Miskito Divers (Lemoth Morris et al) v Honduras* that States have a duty under Articles 4 and 5 ACHR to prevent human rights violations by private companies through adopting legislative, regulatory and other measures to ensure that businesses have appropriate due diligence processes in place to protect human rights.[220] This duty is no more than an extension of that principle in the context of climate change.

100. Against that background, the OO requires States Parties to regulate and limit overseas emissions of entities domiciled within and/or under their control in a manner consistent with limiting global warming to the LTTG of 1.5°C.[221] At a minimum, this requires the States Parties to put in place an effective legislative and/or regulatory measures to regulate such emissions. To be effective, that framework must: (i) involve a mandatory due diligence requirement or equivalent duty upon domiciled entities which is capable of requiring reductions in their overseas emissions in appropriate cases; and (ii) require domiciled entities to report the level of their direct and indirect emissions.

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[217] OHCHR, "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework" (2011) UN Doc HR/PUB/11/04, Principles 11, 13, 15, 17; OECD, "OECD Guidelines for Multinational Enterprises" (OECD Publishing, 2011), Part II at A2 & A10-12, Part VI & para. 69 of the Commentary.

[218] CESCR, "General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities" (10 August 2017) UN Doc E/C.12/GC/24, paras. 30–35; CEDAW, "General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women" (16 December 2010) UN Doc CEDAW/C/GC/28, para. 36; HRC, *General Comment No. 36*, *supra,* para. 22.

[219] Discussed at paras. 44-46 above.

[220] *Case of Miskito Divers (Lemoth et al.) v. Honduras, supra,* paras. 43-52. In particular, at para. 51, the Court observed: "Businesses should adopt, at their own expense, preventive measures to protect the human rights of their workers, as well as measures aimed at preventing their activities from having a negative impact on the communities in which they operate or on the environment" (emphasis added).

[221] By way of comparison, see: The 2021 IACHR Resolution, para. 12.

G. Procedural Obligations in Respect of Climate Change

101. In addition to the duty to conduct environmental impact assessments under the prevention duty, the ACHR provides for a series of access rights, which are: (i) expressly provided for in the Convention (see Arts. 13, 23(1)(a), 8 and 25); and (ii) essential in order to effectively achieve the purpose of protection of other rights provided in the ACHR, notably right to life and personal integrity.[222] Accordingly, this Court has observed that States have the obligation to guarantee:

a. The right of access to information related to potential environmental harm, established in Article 13 of the American Convention;[223]

b. The right to public participation of the persons subject to their jurisdiction, established in Article 23(1)(a) of the American Convention, in policies and decision-making that could affect the environment;[224]

c. Access to justice, established in Articles 8 and 25 of the American Convention, in relation to the relevant State obligations with regard to protection of the environment.[225]

102. These duties arise in the context of climate change and form part of the OO, which entails assessment and access duties.[226] The imposition of such procedural duties is consistent with and supported by: (i) Article 4(1) UNFCCC, which requires States to take climate change considerations into account in their policies and actions; (ii) the precautionary principle, pursuant to which States must conduct detailed assessments of the consistency of their policies with the LTTG of 1.5°C before enacting and continuing with such policies; and (iii) the requirement under the principles of prevention and sustainable development

[222] Advisory Opinion OC-23/17, para. 211: "inter-American jurisprudence has recognized the instrumental nature of certain rights established in the American Convention, such as the right of access to information, insofar as they allow for the realization of other treaty-based rights, including the rights to health, life and personal integrity". With respect to the importance of access rights to sustainable development, see Advisory Opinion OC-23/17, para 217 and United Nations Conference on Sustainable Development, Future We Want -Outcome document, para. 43.
[223] Advisory Opinion OC-23/17, paras. 213- 225, in particular para. 225, and para. 242(f).
[224] Advisory Opinion OC-23/17, paras. 226-232, in particular para 232, and para. 242(g).
[225] Advisory Opinion OC-23/17, paras. 233-240, in particular para. 237, and para. 242(h).
[226] Advisory Opinion OC-23/17, paras. 156-170, 211-241. See also: The 2021 IACHR Resolution, paras. 33-38.

that States undertake environmental impact assessments where there is a risk that their activities will cause significant adverse transboundary harm.[227]

103. Against that background, there are three central aspects to the procedural duties which relate to State Parties' territorial and extra-territorial emissions.

104. **First**, the States Parties must assess the extent of their individual contributions, through both territorial and extra-territorial emissions, to climate change (i.e. they must conduct climate impact assessments). Moreover, climate impact assessments must not only be carried out in relation to the State's policies at large, but to the licensing, approval or carrying out of any activity which has a significant contribution to climate change.[228]

105. **Second**, the States Parties must assess the level of territorial and extra-territorial emissions reductions that are reasonable and appropriate for it to achieve, having regard to: (i) the level of reductions required globally to limit global warming to the LTTG of 1.5°C, taking into account feasibility constraints in relying on CDR in particular; (ii) the level of emissions reductions that are economically and technologically feasible for it to achieve (and reflect its highest possible ambition); and (iii) its fair share of global emissions reductions and, in particular, the likelihood of the LTTG of 1.5°C being achieved if all States pursued an equivalent level of ambition relative to their respective fair share ranges.

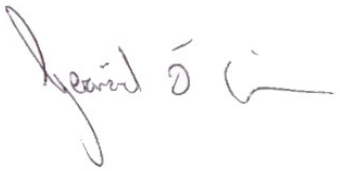
106. **Third**, the States Parties must ensure access to information (in particular, the results of the abovementioned assessments), public participation in policies and decision-making concerning climate change, and access to justice in respect of climate change.

VII. CONCLUSION

107. The Intervenor has made these written submissions with a view to clarifying the scope of the Convention States' obligations to respond to the climate emergency within the framework of international human rights law, as set out in the request for the advisory

[227] *Indus Waters Kishenganga Arbitration (Pakistan v India)*, Partial Award, 18 February 2013, (2013) 154 ILR 1, paras 449–451; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7, para. 140; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14, para. 204.
[228] Advisory Opinion OC-23/17, para. 162.

opinion. If the Court has any questions arising from these submissions or requires further information or supporting documentation, the Intervenor will assist as needed.



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18 December 2023

* Global Legal Action Network (GLAN) is a charitable organisation incorporated in England and Wales (with charity number 1167733). Documents authenticating the existence of GLAN and Dr Gearóid Ó Cuinn's position as director of GLAN are annexed herewith. Regarding communications and notifications to be sent by the Court, it is respectfully requested that these be sent to the email addresses of both Dr Ó Cuinn and Gerry Liston, Senior Lawyer with GLAN