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As set out in Section 5, there is a recognised prohibition on arbitrary displacement that will be breached by a State where it fails to prevent climate change and its impacts from displacing people. Where displacement does occur internally, the State's full range of human rights obligations continue to apply to displaced individuals who are rendered particularly vulnerable. Those rights that are threatened by displacement include the right to 'life, personal integrity, private life, health, water, food, housing, participation in cultural life, [and] property.'<sup>72</sup> The Court has recognised this link.<sup>73</sup> This highlights the importance of preventing displacement in the first instance but the need to ensure human rights protections are available when internal displacement does occur.

## 7. Responses

Both the Commission and the Court have utilised their powers to clarify the application of human rights to refugees, asylum seekers and displaced persons and have dealt sympathetically with the admissibility of petitions. They have made clear that complementary human rights protection is applicable to nationals and non-nationals.<sup>74</sup> The following will outline the content of these protections.

### 7.1 Access to asylum

The Inter-American system protects access to asylum as a human right and this is the foundation of the rights protection for asylum seekers and refugees.<sup>75</sup> The Commission's jurisprudence since the 1990s demonstrates that it interprets the right of asylum with reference to refugee protection and the right to 'receive' asylum is understood as an obligation on States.<sup>76</sup> The AO of 2018 outlined that the right to "seek and receive asylum" in the context of the inter-American system is enshrined as an individual human right to seek and receive international protection on foreign territory.<sup>77</sup> The Commission has also held that this right extends to people seeking protection from *refoulement* under the human rights complementary protection<sup>78</sup> such that it can apply to those displaced as a result of climate change induced disasters.

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<sup>72</sup> OC-23/17 (n 1) [66].

<sup>73</sup> OC-23/17 (n 1) 29-30, fn. 106-114.

<sup>74</sup> See fn 27

<sup>75</sup> See Article XXVII ADHR 'Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements' and Article 22(7) ACHR.

<sup>76</sup> See Inter-American Commission on Human Rights, Report on the Situation of Human Rights of Asylum-Seekers within the Canadian Refugee Determination System (OAS 2000) OEA/Ser.L/V/II.106/Doc 40 rev, para 60; referenced in Cantor and Barichello (n28, 2013) p.8; See also OC-25/18 (n 8) [69-96] for discussion of Latin American tradition of the right to seek and receive asylum.

<sup>77</sup> OC-25/18 (n 8) [132].

<sup>78</sup> OC-25/18 (n 8); See also Report on Terrorism and Human Rights (n 23) [405].

The purpose of asylum is to protect an individual from a violation of their human rights. It is ‘... an institution that provides for the protection of individuals whose life or liberty is threatened or endangered by acts of persecution or violence stemming from the acts or omissions of a State<sup>79</sup>’ and the AO of 2018 held that ‘the primary purpose of the institution is to preserve the life, security, liberty, or integrity of the person<sup>80</sup>’. As such, the Commission has utilised a purposive interpretation of the right to asylum to protect other human rights and ensure particular procedural protections.<sup>81</sup>

These procedural protections include a right to due process and in particular to have a hearing to determine their protection status.<sup>82</sup> This includes the right to apply to the appropriate authorities<sup>83</sup>, to have their claim determined by a competent decision making authority<sup>84</sup>, that the process be fair and transparent<sup>85</sup> to make an individualised and adequate assessment of the risk facing the person<sup>86</sup>. Further, the AO of 2018 outlines that:

‘the right to seek and receive asylum...imposes on the State certain specific duties:

- i) obligation not to return (non-refoulement) and its extraterritorial application;
- ii) the obligation to allow the asylum application and not to reject it at the border;
- iii) obligation not to penalise or punish irregular entry or presence and not to arrest;
- iv) obligation to provide effective access to a fair and efficient procedure for determining refugee status;
- v) obligation to ensure the minimum guarantees of due process in fair and efficient procedures to determine refugee status or condition;
- vi) obligation to adapt procedures to the specific needs of children and adolescents;
- vii) obligation to grant international protection if the refugee definition is met and ensure the maintenance and continuity of refugee status;
- viii) obligation to restrictively interpret exclusion clauses, and
- ix) obligation to provide access to rights with equal conditions under refugee status.<sup>87</sup>

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<sup>79</sup> Inter-American Commission on Human Rights, ‘Recommendation on Asylum and International Crimes’ (20 October 2000) in Annual Report of the Inter-American Commission on Human Rights 2000 (OAS 2001) OEA/Ser.L/V/II.111/Doc 20 rev. Quoted in Cantor and Barichello (n 12, 2013) p 9.

<sup>80</sup> OC-25/18 (n 8) [101].

<sup>81</sup> Report on Terrorism and Human Rights (n 23) [394].

<sup>82</sup> *John Doe et al v Canada* Case 12586 (Commission Report No 78/11, 21 July 2011) [92] (hereafter *John Doe*); *Haitian Interdictions* (n 13) [155]; *Pacheco Tineo family v. Bolivia* (n 11) Section VII. on Due process; Cantor and Barichello (n 12, 2013), 10.

<sup>83</sup> *Michael Edwards et al v The Bahamas* Case 12067 (Commission Report No 48/01, 4 April 2001) para 171

<sup>84</sup> Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of Asylum-Seekers within the Canadian Refugee Determination System* (OAS 2000) OEA/Ser.L/V/II.106/Doc 40 rev [60].

<sup>85</sup> Report on Terrorism and Human Rights (n 23) [394].

<sup>86</sup> *John Doe* (n 82) [94].

<sup>87</sup> OC-25/18 (n 8) [99]; see also OC-21/14 (n 9) [179] ‘...Indeed, the principle of non-refoulement or non-refoulement constitutes the cornerstone of the international protection of refugees and asylum seekers.’

The Commission highlights that the importance of due process stems from the risk of refoulement.<sup>88</sup> In order for the right to asylum to be effective, persons must not be rejected at the border or expelled without an adequate and individualised analysis of their requests with due guarantees.<sup>89</sup>

## 7.2 Human rights and Irregular migration

A wide set of Inter-American human rights provisions provide a basis for protection beyond the right to asylum that can apply to those seeking asylum, but also to those who may be moving irregularly who do not fall within the remit of refugee or complementary protection. As such all aliens (and nationals) who are displaced, internally or across a border, will have access to human rights protections without discrimination as affirmed by the preamble to the ADHR and reiterated by the Commission – these are ‘essential rights of man ... not derived from the fact that he is a national of a certain state’.<sup>90</sup> Further, Advisory Opinion OC-21/14 states that ‘these obligations are imposed on States, for the benefit of human beings under their respective jurisdictions, and regardless of the nationality or migratory status of the protected persons.’<sup>91</sup>

States may not discriminate in regards to access to rights between national and non-nationals. In *Juridical Condition and Rights of the Undocumented Migrants*, the court outlined that equality and non-discrimination rules are *jus cogens* and extended to irregular migrants due to their vulnerable situation.<sup>92</sup> It stated that:

168. The goals of migratory policies should take into account respect for human rights. Likewise, migratory policies should be implemented respecting and guaranteeing human rights. As indicated above, the distinctions that the States establish must be objective, proportionate and reasonable.<sup>93</sup>

The right to equality has been interpreted as a procedural protection that is both connected to the implementation of another substantive right but also a standalone right prohibiting ‘unreasonable differentiation between persons belonging to the same class’.<sup>94</sup>

The rights protected under the Inter-American system include the protection from refoulement, which includes refoulement to a risk of human rights abuse as outlined under Article 22(8) ACHR.<sup>95</sup> State responsibility will be engaged where it removes a person to a State where there is

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<sup>88</sup> Report on Terrorism and Human Rights (n 23) [394].

<sup>89</sup> OC-25/18 (n 8) [122].

<sup>90</sup> *Ferrer-Mazorra* (n 20) [178].

<sup>91</sup> OC-21/14 (n 9) [79].

<sup>92</sup> OC-18/03 (n 20); See also *Ferrer-Mazorra* (n 20) [239]; an objective of the ADHR was to ensure ‘equal protection of the law to nationals and aliens alike in respect of the rights set forth [therein]’.

<sup>93</sup> *Ferrer-Mazorra* (n 20) [168].

<sup>94</sup> *Haitian Interdictions* (n 13) [178].

<sup>95</sup> *Ferrer-Mazorra* (n 20) [177].

a real risk to their right to life or security under Article I ADHR.<sup>96</sup> Removal may also violate family rights, though as this is not an absolute right it must be balanced against a State's rights.<sup>97</sup>

The rights within the Inter-American system also include procedural protections that apply to nationals and non-nationals.<sup>98</sup> This includes procedural standards for the treatment of aliens, particularly regarding removal or expulsion. For example, minimum due process standards must be observed in removal proceedings against aliens.<sup>99</sup> The ACHR regulates the expulsion of aliens, with the collective expulsion being prohibited under Article 22(9) and may only be expelled pursuant to a decision made in accordance with the law (Article 22(6)).<sup>100</sup>

Individuals are protected from excessive or unreasonable deprivations of liberty under the right to liberty (Article I ADHR) and the right to protection against arbitrary arrest (Article XXV ADHR). This includes detention but also where a State takes measures of control over an individual.<sup>101</sup> This ensures certain protections for aliens in regards to detention. First, migrants are not criminals so they must not be held in regular prisons with criminals.<sup>102</sup> Second, it provides procedural guarantees including knowing the grounds for detention and regular review of detention,<sup>103</sup> the ability to challenge detention in court<sup>104</sup> and provision of legal aid. Third, the case of *Vélez Loor v Panama* also considered the legality of detention and the importance of ensuring proper investigations into allegations of torture.<sup>105</sup>

In *Juridical Condition and Rights of the Undocumented Migrants*, the Court provided guidance on the labour rights of migrants. It highlighted the vulnerability of migrant workers<sup>106</sup> and underscored that undocumented workers possess the same labour rights as other workers of the State.<sup>107</sup> As such, depriving them of human rights, including labour rights irrespective of regular or irregular status.

Finally, the Court, in its advisory opinion on the topic, has outlined the rights and guarantees of children in the context of migration.<sup>108</sup> These include guarantees of due process, the non-deprivation of children and basic conditions when detention does occur, the obligations of non-

<sup>96</sup> *Haitian Interdictions* (n 13) [167–71].

<sup>97</sup> *Wayne Smith et al v USA* Case 12562 (Commission Report No 81/10, 12 July 2010) paras 48–51; the state is also obligated to ensure that family rights and the interests of the child are considered in any immigration decisions under Art V-VII ADHR; Art 11, 17 and 19 ACHR.

<sup>98</sup> OC-18/03 (n 20) [121] 'Due process of law is a right that must be ensured to all persons, irrespective of their migratory status.'

<sup>99</sup> Protected by Art XXVI ADHR and Art 8(2) ACHR

<sup>100</sup> *Loren Rieve et al v Mexico* (n 22) [107].

<sup>101</sup> *Haitian Interdictions* (n 13) [169].

<sup>102</sup> Report on Terrorism and Human Rights (n 23) [396]; See also *Vélez Loor v. Panama* (n 23) VIII(A).

<sup>103</sup> *Ferrer-Mazorra* (n 20) [221].

<sup>104</sup> *Ferrer-Mazorra* (n 20) [235].

<sup>105</sup> *Vélez Loor v. Panama* (n 23) VIII(B).

<sup>106</sup> OC-18/03 (n 20) [131-2].

<sup>107</sup> OC-18/03 (n 20) [160].

<sup>108</sup> OC-21/14 (n 9); See also *Pacheco Tineo family v. Bolivia* (n 11) Section IV.

refoulement, the right of children to seek and receive asylum and the right to family life when a parent is being deported. It provided that four guiding principles should guide all policies:

1. the principle of non-discrimination,
2. the principle of the best interest of the child,
3. the principle of respect for the right to life, survival and development,
4. and the principle of respect for the opinion of the child in any procedure that affects her or him in order to ensure the child's participation.<sup>109</sup>

A robust regional framework specifically oriented towards the protection of the human rights of aliens exists through the instruments and jurisprudence of the Inter-American system. These will be applicable to those individuals who are displaced as a result of disasters and climate change hazards and ensure a range of obligations on the State to ensure access to these rights protections.

## 8. Conclusion

Answering the questions asked of this Court in the request for an Advisory Opinion begins with addressing the cause of the climate emergency itself; State failures to mitigate the causes of climate change when adequately warned decades ago. The scope of State obligations must be, above all, the prevention of transboundary harm in the form of the adverse effects of climate change. State responsibility is appropriately affixed whenever such breaches of international obligations occur, and consequences must follow. The most appropriate consequences are, first, the immediate cessation of the wrongful act and, second, paying reparations to States that can demonstrate material injuries. Displacement constitutes a material injury to the State as it infringes on that State's capacity to fulfil its own obligations of ensuring the human rights of its subjects, the economic costs of addressing displacements, and the loss of cultural and natural resources.

Beyond prevention, States also have certain obligations to address the adverse effects of the climate emergency. This submission focused on the response to displacement, in particular. In this context, the first obligation of States is to ensure the human rights of those affected, paying special attention to the vulnerability created or exacerbated by displacement. In addition to respecting human rights, a point must be made to prevent refoulement, protect the rights of children and the vulnerable, and provide access to due process in applying for asylum.

While there are many points to consider in determining the scope of State obligations to respond to the climate emergency, it is the opinion of the authors that preventing the climate emergency is the first priority. For those people already being displaced, and for those for whom displacement will be necessary, States are obligated to respect and ensure the human rights of all, especially the most vulnerable. An important option for externally displaced persons is for States to consider the

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<sup>109</sup> OC-21/14 (n 9) [69].

expanded refugee definition in the Cartagena Declaration that allows refugee protection to be extended to those fleeing social disorder, which the climate crisis is in many cases causing. Finally, all those suffering the adverse effects of climate change must be given access to legal processes for seeking remedies. This includes States reaching peaceful settlement through the application of State responsibility as well as individuals engaging municipal mechanisms to seek compensation for their own suffering.

Signed:



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## Annex: Selected published sources for reference

In addition to the works cited in this submission, there exists an extensive body of literature on displacement and other forms of mobility in the context of disasters and climate change for reference, including:

- Bruce Burson and Richard Bedford
  - *Clusters and Hubs: Toward a Regional Architecture for Voluntary Adaptive Migration in the Pacific* (Nansen Initiative on Disaster-Induced Cross-Border Displacement, 2013)
  - *In the Same Canoe: Building the Case for a Regional Harmonisation of Approaches to Humanitarian Entry and Stay in 'Our Sea of Islands'* (Platform on Disaster Displacement 2021) (with Charlotte Bedford)
- David Cantor, '[Environment, Mobility and International Law: A New Approach in the Americas](#)' (2021) 21(2) *Chicago Journal of International Law* 263 [open access]
- Carol Farbotko, Celia McMichael, Olivia Dun, Hedda Ransan-Cooper, Karen McNamara and Fanny Thornton, 'Transformative mobilities in the Pacific: promoting adaptation and development in a changing climate' (2018) 5(3) *Asia & the Pacific Policy Studies* 393
- Jane McAdam
  - *Climate Change, Forced Migration, and International Law* (Oxford University Press 2012)
  - 'Displacement in the Context of Climate Change and Disasters' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021)
- Ana Mosneaga, '[Unsustainable development, disasters and displacement: Revisiting the governance challenge](#)' (2022) 79 *International Journal of Disaster Risk Reduction* 103172.
- New Zealand Immigration and Protection Tribunal (B Burson): *AF (Kiribati)* [2013] NZIPT 800413; *AC (Tuvalu)* [2014] NZIPT 800517-520; *MS (India)* [2022] NZIPT 802082; *AW (Kiribati)* [2022] NZIPT 802085. All decisions available at: <https://forms.justice.govt.nz/search/IPT/RefugeeProtection>
- Chiara Scissa, Francesca Biondi Dal Monte, Matthew Scott, Margit Ammer and Monika Mayrhofer, '[Legal and Judicial Responses to Disaster Displacement in Italy, Austria and Sweden](#)' (*Völkerrechtsblog*, 19 October 2022)
- Matthew Scott, *Climate Change, Disasters and the Refugee Convention* (Cambridge University Press 2020)
- Sanjula Weerasinghe, '[In Harm's Way: International protection in the context of nexus dynamics between conflict or violence and disaster or climate change](#)' (UNHCR 2018)