

## Submission to the Inter-American Court of Human Rights

*Amicus curiae: “What is the scope of the State obligations for responding to the climate emergency?”*

- Refugee Law Initiative -  
Working Group on Climate Change, Disasters and Displacement  
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## Executive Summary

**Summary** - This submission proposes that the first obligation of States is to prevent the climate emergency. While many have failed thus far, they remain obligated to cease contributions to climate change and make reparations for those adverse effects now unavoidable. Displacement is one of the most significant adverse effects in terms of human security. In the context of displacement, State obligations include respect for human rights for all, and a particular emphasis on the rights of the most vulnerable. In addition to the rights to life and a healthy environment, as well as the right not to be forcibly displaced, rights to seek asylum, against refoulement, to have access to due process, to maintain family unity, and the material rights to an adequate standard of living, healthcare, education, inter alia, must all be considered threatened by the climate crisis and be deserving of special attention in determining the scope of State obligations.

## Purpose

This submission provides scholarly opinions relevant to the questions before the Court regarding the scope of State obligations for responding to the climate emergency. It pays particular attention to questions related to displacement, a significant and growing adverse effect of climate change.

## Theory (see Section 2)

There is no legal definition for displacement, though it can be understood as non-voluntary movement. While it is recognised that movements are often driven by multiple causes, it is widely understood that climate change is contributing significantly to increasing non-voluntary movements. The Court has acknowledged this link between environmental impact and mobility.<sup>1</sup> Recognising that displacement is an adverse effect of climate change, not an adaptation strategy, creates a foundation from which to understand the role of State responsibility and access to justice.

**Question A1** - What is the scope of the duty of States to prevent climate phenomena generated by global warming? (see Section 3)

Contributions to climate change constitute breaches of international obligations under the customary law of prevention of transboundary harm. The UNFCCC and its development over more than three decades reflect that States recognised the potential for harm, had the opportunity to act, and that preventative measures would not have been disproportionate to the massive loss of life, displacement, and economic and political disruptions resulting from unmitigated climate change. These breaches must trigger State responsibility, including the appropriate remedies flowing from affixing responsibility. Preventing climate change could have prevented displacements and other

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<sup>1</sup> Inter-American Court of Human Rights, [The Environment and Human Rights \(State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4\(1\) and 5\(1\) of the American Convention on Human Rights\)](https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf). Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23. [https://www.corteidh.or.cr/docs/opiniones/seriea\\_23\\_ing.pdf](https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf) [66 and 67]. (hereafter OC-23/17)

adverse effects, and immediately coming into compliance with obligations will drastically reduce the adverse effects in the future. The more detailed analysis found in Sections 3 and 4 speaks not only to Question A1, but also to questions of differentiated responsibilities, and access to justice.

**Question F2** - How should States act individually and collectively to guarantee rights to reparations for damages generated by their actions or omissions? (Section 4)

Affixing State responsibility for the failure to maintain the appropriate standard of care in preventing transboundary harm requires that consequences follow. States suffering the adverse effects of climate change, including displacements, must have the opportunity to seek legal remedies through international courts. This must include satisfaction at least in the form of cessation of the wrongful act. For States that can demonstrate material injuries, reparations in the form of restitution, compensation, or some combination of the two would be appropriate. Failures to provide justice weakens the international rules-based order and has the potential to increase political tensions between States.

Individuals also have the right to seek justice, but this is most appropriately sought through municipal legal systems. Therefore, the scope of State obligations in this context must be to ensure that individuals have access to such mechanisms. These mechanisms need not be limited to an applicant's country of origin as the Court has previously held that an individual can be considered under the jurisdiction of the State from which the act causing harm originated.<sup>2</sup>

**Question BIV** - What is the scope of State obligations, inter alia, regarding the determination of impacts on people, such as human mobility, migration and forced displacement? (see Section 5)

There is no doubt the right not to be forcibly displaced is deeply entrenched in international law. It can be found in the ICCPR,<sup>3</sup> the ICESCR,<sup>4</sup> as well as the UNHCR Guiding Principles.<sup>5</sup> It also appears in regional instruments like the Kampala Convention.<sup>6</sup> While any forcible displacement is a violation of people's rights, the practical considerations will differ depending on whether they are internally or externally displaced.

External Displacement (see Section 6.1)

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<sup>2</sup> OC-23/17 (n 1) [238].

<sup>3</sup> UNGA, *International Covenant on Civil and Political Rights* (16 December 1966) 999 UNTS 171, Art 12(1). (hereafter ICCPR)

<sup>4</sup> UNGA, *International Covenant on Economic, Social and Cultural Rights* (16 December 1966) 993 UNTS 3, Art. 11. (hereafter ICESCR)

<sup>5</sup> UNHCR, 'Guiding Principles on Internal Displacement' (1998) ADM 1.1, PRL 12.1, PR00/98/109. (hereafter Guiding Principles)

<sup>6</sup> African Union, *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa ("Kampala Convention")*, 23 October 2009. (hereafter Kampala Convention)

The 1951 Refugee Convention<sup>7</sup> is not appropriate for most persons displaced by climate change, even those meeting the requirement of alienage, because they likely do not meet the ‘persecution’ requirement. However, the expanded definition found in the Cartagena Declaration includes those forced to move because of ‘seriously disturbed public order.’<sup>8</sup> In those cases, State obligations would extend to providing protections for externally displaced individuals accordingly. This protection includes a prohibition of refoulement as ‘the cornerstone of the international protection of refugees and asylum seekers.’<sup>9</sup> Further, those seeking refugee status are protected from discrimination<sup>10</sup> and have a right to due process in establishing their refugee status.<sup>11</sup> Where refugee status is established, then individuals will have access to the rights outlined within the 1951 Refugee Convention, including access to healthcare, education, rights to work etc.

In addition to the protection provided to those who fall under the protection of the Refugee Convention, additional protection is provided by human rights law under the Inter-American system. This complementary protection ensures the gaps left by refugee law are filled.<sup>12</sup> This protection includes a prohibition of *refoulement*<sup>13</sup> and a wider set of human rights protection for those who are externally displaced.<sup>14</sup>

#### Internal Displacement (see Section 6.2)

Most displaced persons will remain within their country of origin. States bear responsibility for ensuring their human rights are fully enjoyed and protected. 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>15</sup> The Court has recognised this link.<sup>16</sup>

<sup>7</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137. (hereafter 1951 Refugee Convention)

<sup>8</sup> Inter-American Court of Human Rights, *The institution of asylum, and its recognition as a human right under the Inter-American System of Protection* (interpretation and scope of Articles 5, 22(7) and 22(8) in relation to Article 1(1) of the American Convention on Human Rights). Advisory Opinion OC-25/18 of May 30, 2018. Series A No. 25 [68] (emphasis added). (hereafter OC-25/18)

<sup>9</sup> I/A Court H.R., *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, [202]. (hereafter OC-21/14)

<sup>10</sup> OC-21/14 (n 9) [79 and 181] ‘without any discrimination whatsoever.’<sup>181</sup> 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>11</sup> See for example I/A Court H.R., *Case of the Pacheco Tineo family v. Bolivia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2013. Series C No. 272. Section VIII (B). (hereafter *Pacheco Tineo family v. Bolivia*)

<sup>12</sup> Cantor DJ and Barichello S, *Protection of Asylum Seekers under the Inter-American Human Rights System in Regional Approaches to the Protection of Asylum Seekers* (Routledge, 2014); Cantor DJ & Barichello S (2013) *The Inter-American human rights system: a new model for integrating refugee and complementary protection?*, *The International Journal of Human Rights*, 17:5-6, 689-706.

<sup>13</sup> Inter-American Commission on Human Rights, *Haitian Centre for Human Rights et al. v. USA* Case 10675 (Commission Report No. 51/96, 13 March 1997) [167–71] (hereafter *Haitian Interdictions*); See Cantor and Barichello (n 12, 2013) p 692-3 for further details.

<sup>14</sup> See Cantor and Barichello (n 12, 2014) p 15-25 and Section 7 below for further discussion.

<sup>15</sup> OC-23/17 (n 1) [66].

<sup>16</sup> OC-23/17 (n 1) 29-30, fn. 106-114.

**Question G3** - What obligations and principles should guide the individual and coordinated actions taken by States to address non-voluntary human mobility?

Right to Asylum (see Section 7.1)

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>17</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 an obligation on States.<sup>18</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>19</sup>

Human Rights and Irregular Migration (see Section 7.2)

Many people displaced as a result of climate change and disasters will not be protected by refugee law. Irregular migrants, regardless of the extent to which mobility is voluntary, are also entitled to certain protections from all States. The Court has held, for example, that equality and non-discrimination rules are *jus cogens* and extended to irregular migrants due to their vulnerable situation.<sup>20</sup> States are also obligated to prevent refoulement,<sup>21</sup> protect against collective expulsion,<sup>22</sup> and not to arbitrarily detain migrants.<sup>23</sup> Additionally, children are entitled to special considerations. These include guarantees of due process, the non-deprivation of children and basic conditions when detention does occur, the obligations of non-refoulement, the right of children to seek and receive asylum and the right to family life when a parent is being deported.<sup>24</sup>

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<sup>17</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>18</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, [60]; referenced in Cantor and Barichello (n 12, 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>19</sup> OC-25/18 (n 8) [132].

<sup>20</sup> Inter-American Court of Human Rights, Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No.18. [101] '...this Court considers that the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*...'; [112] 'Migrants are generally in a vulnerable situation as subjects of human rights...'; [119] 'Consequently, States may not discriminate or tolerate discriminatory situations that prejudice migrants.' (hereafter OC-18/03); See also *Rafael Ferrer-Mazorra et al. v. USA* Case 9903 (Commission Report No. 51/01, 4 April 2001), para. 178, para 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>21</sup> *Ferrer-Mazorra* (n 20) [177].

<sup>22</sup> See *Loren Rieve et al v Mexico* Case 11610 (Commission Report No 49/99, 13 April 1999) [107]. (hereafter *Loren Rieve et al v Mexico*)

<sup>23</sup> Inter-American Commission on Human Rights, Report on Terrorism and Human Rights (OAS 2002) OEA/Ser.L/V/II.116/Doc 5 rev 1 corr [396] (hereafter Report on Terrorism and Human Rights); See also I/A Court H.R., *Case of Vélez Loor v. Panama*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010 Series C No. 218. VIII(A). (hereafter *Vélez Loor v. Panama*)

<sup>24</sup> OC-21/14 (n 9); See also *Pacheco Tineo family v. Bolivia* (n 11) Section IV.

## 1. Introduction

The Refugee Law Initiative (RLI) Working Group on Climate Change, Disasters and Displacement is an interdisciplinary group of specialist researchers and decision makers. We offer the following input to the Advisory Opinion on the scope of State obligations for responding to the climate emergency. In particular we will focus on responding to the questions posed that relate to displacement and the obligation to prevent transboundary harm. We will primarily draw upon the jurisprudence of the Inter-American Court and Commission, as well as authoritative guidance on the relationship between climate change and mobility.

Following this introduction, Section 2 sets out the links between climate change, disasters and displacement which will respond to question B1(V) of the advisory opinion request relating to the impacts on people of climate change. Section 3 then presents the obligation to prevent transboundary harm (Question A1) on the duty of States to prevent climate phenomena. Section 4 considers the need to ensure access to justice and reparations for States and individuals, responding to questions A2(B) and F2 of the advisory opinion request. Next, Section 5 explores the scope of the State's obligation to prevent forcible displacement, which is breached by contributing to climate change as linked to displacement in Section 2 (Questions B1(III) and B1(V)). Finally, Section 6 focuses on the States obligations when displacement occurs as a result of climate change and disasters (Question G3). It begins by looking at the State's obligations for external displacement and the question of the application of refugee status. It then looks at the State's obligations towards internally displaced persons (IDPs). Finally, it examines the various responses to displacement in regard to the application of human rights to irregular migrants and ensuring access to asylum.

## 2. Theoretical framework - the link between climate change and displacement

The advisory opinion request, in question G3, acknowledges that climate change will result in non-voluntary human mobility. Before expanding on the nature of the obligations that arise as a result, we first want to outline our understanding of the link between climate change and displacement. Displacement, or non-voluntary human mobility, is but one of the impacts on people of climate change. It is also but one form of mobility arising in the context of climate change and disasters. Alternatives include immobility (not moving at all), migration and planned relocation. The forcible character of displacement (as opposed to, typically, voluntary migration) suggests a broader range of rights will often be engaged with a corresponding stronger emphasis on the State obligation to ensure or fulfil rights (e.g., the rights to adequate housing, food and water). The focus of our input is on non-voluntary movement, as opposed to other forms of mobility, and the rights that arise in this context.

Disasters are events through which climate change drives displacement. Mobility in disaster contexts tends to be multi-causal and, particularly for slow-onset disasters, the role of the hazard in pushing movement can sometimes be hard to single out from other factors as the main trigger

for movement. The role of climate change in influencing mobility decisions is one step further removed still, i.e. it is a background factor that has the potential to shape the frequency, intensity and duration of climate-related hazards (e.g. storms, temperature extremes). As such, whilst climate change will shape mobility scales and patterns at the macro-level across decades, it will be difficult to identify it as *the* trigger for individual displacements. This renders a legal protection status based solely on ‘climate change’ impact challenging. A focus on the impact of disasters offers better prospects for developing legal protection, since they are one step closer to mobility decisions; and climate-related hazards would be included as well as other kinds of hazards that generate displacement.

Despite this complex causal relationship, the IACrTHR has itself acknowledged the link between environmental impact and mobility.<sup>25</sup> This acknowledgement is particularly clear in the Advisory Opinion on the Environment and Human Rights. The recognised links include not only the direct threat of being forcibly displaced, but also additional threats that might contribute to driving mobility, such as threats to ‘life, personal integrity, private life, health, water, food, housing, participation in cultural life, [and] property.’<sup>26</sup> Further, the Court cites numerous earlier cases in which these links were recognised.<sup>27</sup> Additional links include the vulnerability of communities that ‘depend economically or for their survival on environmental resources from the marine environment, forested areas and river basins,’ or those at risk owing to their geographical location, such as coastal and small island communities.<sup>28</sup>

The great majority of mobility (of all forms) in the context of disasters appears to be internal, i.e. within the same country, rather than cross-border; and, for cross-border disaster displacement, most tends to be between countries in the same region.<sup>29</sup> The people who are most vulnerable to disasters (and the long-term negative impacts of climate change) tend to be the poorest and most marginalised; as such, they will tend to have resources only to displace internally, if at all, and will be unable to leave the country. Alongside efforts to address the legal situation of the small resulting flow of persons outside their countries due to disasters, it is crucial to support countries particularly exposed to disasters in dealing with the mobility-related impacts in-country.

With this context and the causal relationship between climate change, disasters and displacement in mind, we would outline that there are two tiers of collective and individual obligations on States to respond to the climate emergency. The first is that States have an obligation to prevent climate change and the ensuing disaster displacement it causes. The second is that, when displacement

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<sup>25</sup> OC-23/17 (n 1) [66 and 67].

<sup>26</sup> OC-23/17 (n 1) [66].

<sup>27</sup> OC-23/17 (n 1) 29-30, fn. 106-114.

<sup>28</sup> OC-23/17 (n 1) [67].

<sup>29</sup> OC-23/17 (n 1) [67]; see also fn. 125 ‘Cf. Human Rights Council, Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, February 9, 2009, UN Doc. A/HRC/10/13 [22]; see also Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, January 15, 2009, UN Doc. A/HRC/10/61, [51 and 56].

does occur, States have an obligation to respond to this to protect the human rights of individuals, whether they have been displaced internally or across a border.

The underlying obligations and principles of ensuring access to justice, access to asylum and preserving the personal integrity of all individuals is evident throughout the jurisprudence of the IACrHR. In the 2017 AO on the Environment and Human Rights, the IACrHR acknowledged the importance of interpreting rights of individuals broadly to ensure the greatest protection.<sup>30</sup> These principles are central to guiding and inspiring State responses to climate change, including to loss and damage, displacement and the rights of the individual.

### **3. Prevention - What is the scope of the duty of States to prevent climate phenomena generated by global warming?**

States bear responsibility for causing climate change and, in turn, for the adverse effects it creates. This includes, inter alia, the negative impacts on human rights and security, economics and development, culture, and the environment. Therefore, the scope of State obligations for responding to the climate emergency must begin with the States' responsibility to mitigate anthropogenic climate change and its adverse effects. The extent of the climate crisis occurring now is a direct result of the failure of States to meet this obligation thus far. This section asserts that these obligations stem from the customary legal principle of preventing transboundary harm, that the first consequence of recognising a breach of these obligations is cessation of the wrongful act, and that further reparations may fall within the scope of State obligations to respond to the climate emergency.

#### **3.1 Obligations to prevent transboundary harm - due diligence**

The prevention of transboundary harm is a matter of customary law, binding on all States.<sup>31</sup> The Draft articles on Prevention of Transboundary Harm from Hazardous Activities (APTH) provides valuable insights into how this principle is understood in practice.<sup>32</sup> Importantly, there are two distinct obligations; one of conduct and one of result. The obligation of conduct requires that States exercise a certain level of due diligence to prevent harm. In the context of climate change, it is this obligation of conduct, of prevention, that responsible States can first be said to breach. Obligations of result, or material injuries, are secondary and only determined on an ad hoc basis. Whether a State has met its obligation of conduct, or the appropriate level of due diligence, can be determined

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<sup>30</sup> OC-23/17 (n 1) [149], the pro person principle implies that, when interpreting the provision of a treaty, precedence must be given to applying the rule that grants greater protection to the rights of the person, and/or the rights must be interpreted broadly and in favour of the individual.

<sup>31</sup> For example, see Wolfrum R, 'Purposes and Principles of International Environmental Law' (1990) 33 German YB Int'l L 308, 309; see also Bodansky D, 'Customary (and Not So Customary) International Environmental Law' (1995) 3 Ind J Global Legal Stud 105, 106.

<sup>32</sup> ILC, 'Draft articles on Prevention of Transboundary Harm from Hazardous Activities with Commentaries' (10 August 2001) 2 Yearbook of the International Law Commission 2. (hereafter APTH)

objectively based on whether the State had the opportunity to act, the potential harm was foreseeable, and the level of harm was not disproportionate to the preventative act.<sup>33</sup>

In the context of climate change, the level of due diligence to be expected can be easily identified. There can be no doubt that States could foresee the potential harm and had the opportunity to act. The Preamble to the UN Framework Convention on Climate Change (UNFCCC) offers a signed and dated recognition of the dangers and causes of climate change. This is clear in the acknowledgments ‘that change in the Earth's climate and its adverse effects are a common concern of humankind,’ that it is caused by human activity and ‘may adversely affect natural ecosystems and humankind’, and that ‘the largest share of historical and current global emissions of greenhouse gases has originated in developed countries.’<sup>34</sup> Even without specific legally binding obligations in the UNFCCC, the document provides a globally endorsed recognition of the potential for harm from climate change, as well as an acknowledgement that developing countries are to blame. The specific list of developed countries is then provided in Annex II (the US and Canada being the only members in the Americas).<sup>35</sup>

Further, there should be no debate that the level of harm was not disproportionate to the preventative act. The APTH makes clear that as the level of risk of harm increases, so the degree of required due diligence increases.<sup>36</sup> To note but one authoritative source, the Intergovernmental Panel on Climate Change’s (IPCC) First Assessment Report (FAR), in 1990, made clear that continued greenhouse gas (GHG) emissions would lead to increasingly dangerous weather events, ‘more floods and drought, more intense hurricanes or typhoons, and more heatwaves’,<sup>37</sup> the displacement of hundreds of millions of people worldwide,<sup>38</sup> as well as threats of starvation, and political and economic instability.<sup>39</sup> These dire warnings make clear that the highest levels of due diligence should have been expected, and that no preventative act could be argued to be disproportionate to the risks to human security.

To argue that the UNFCCC does not impose legally binding obligations per se is to ignore the customary legal principle prohibiting transboundary harm and its inherent obligation to perform due diligence. The appropriate level of due diligence has been clearly established through the evolution of the climate regime. For States that have effective control, the opportunity to act, and the capacity to foresee the potential harm, then there exists an international obligation to maintain the highest standard of care to prevent transboundary harm. By failing to meet that standard, State’s

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<sup>33</sup> Aycock B, ‘State Responsibility for Environmental Internal Displacements’ (Doctoral Dissertation, International Christian University 2023), 91.

<sup>34</sup> United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107. Preamble. (hereafter UNFCCC)

<sup>35</sup> UNFCCC (n 34) Annex II.

<sup>36</sup> APTH (n 32) 154[11].

<sup>37</sup> Tegart WM, Sheldon GW, and Griffiths DC, (eds) *Intergovernmental Panel on Climate Change Working Group 2: First Assessment Report: Impacts Assessment of Climate Change* (1990), 5-1 <https://www.ipcc.ch/report/ar1/wg2/> accessed 30 August 2021 (hereafter IPCC FAR WGII)

<sup>38</sup> IPCC FAR WGII (n 37) 5-2.

<sup>39</sup> IPCC FAR WGII (n 37) 5-3.

are in breach of their obligations of conduct and, potentially, those of result, too. The clearly established dangers of the adverse effects of climate change require States to exercise the highest standard of care to prevent climate phenomena generated by global warming. The IACrTHR has previously accepted this view in the Advisory Opinion on the Environment and Human Rights.<sup>40</sup> Having established that State responsibility can be assigned for breaches of international obligations in creating the climate crisis, international law requires that consequences follow, as discussed in the following section.

**4. Justice** - How should States act individually and collectively to guarantee rights to reparations for damages generated by their actions or omissions?

#### **4.1 Access to justice for injured States**

Access to justice for States in the context of climate change follows directly from breaches of international obligations to prevent transboundary harm. The State bearing primary responsibility for ensuring the human rights of its population means that any infringement on its ability to do so is an injury to that State. Those most responsible for creating the climate crisis are in breach of international obligations, and those suffering the adverse effects are entitled to remedies. All States are bound by the principle of prevention of transboundary harm, as a matter of customary international law, to two separate obligations; one of conduct and one of result. Any breach of these obligations must rightfully trigger State responsibility which, in turn, must result in reparations in some form. Breaches of obligations conduct, failures to perform due diligence, require no evidence of material injury. By contrast, obligations of result can only be established if material injuries can be demonstrated. Therefore, all States may claim legal injury by virtue of the fact a breach of the obligation of conduct has occurred, and legally injured States may seek satisfaction, including the immediate cessation of the wrongful act. However, States claiming material injury must additionally demonstrate that damages have been suffered and may pursue monetary reparations in the form of compensation or restitution.

As discussed, for any acts attributable to the State, legal injury can be established by determining whether the State had the opportunity to act, could foresee the harm, and that the significance and likelihood of the potential harm was not disproportionate to the preventative act. If these questions can be answered in the affirmative, then a breach of conduct has occurred. There is little question that the UNFCCC's Annex II countries have failed to meet their obligations of conduct in terms of contributions to climate change. Scientific warnings have consistently warned of the significance and likelihood of harm, leaving no question that the harm would be of the most significant nature and that it was entirely foreseeable. The repeated efforts within the climate regime to demand action reflect multiple opportunities to act, and also failures to do so. Further, the progressive development of the climate regime itself reflects a clear, internationally recognised

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<sup>40</sup> OC-23/17 (n 1) [174].

minimum standard of behaviour that these States failed to meet. It is also not debated that the due diligence required in terms of regulating overall emissions is an act attributable to the State, nor is it challenged that Annex II States had both effective control over their respective jurisdictions and the capacity to meet the expected standard of due diligence. Based on these facts, the Annex II countries are in breach of their obligations of conduct and any other State may invoke responsibility and demand satisfaction, at least by way of cessation of the wrongful act and assurances of non-repetition.

It is impractical to address every possible case of material injury that may result from these failures of due diligence. Each one must be evaluated individually to determine whether and to what extent State responsibility applies and what remedies might be most appropriate. Germane to the questions before the Court, violations of human rights, including displacements caused by climate change, may constitute material injuries. In addition to the legal injury stemming from the breach of conduct already described, States hosting climate-induced IDPs, for example, may also invoke responsibility for the material injuries associated with the forced displacements of their populations. In such cases, it is generally the State who has standing to make these claims in international law. It is also the State that is injured by, inter alia, the impediment to its fulfilment of its own obligations, including ensuring the human rights of its subjects and providing for their general welfare, the infringement on the State's right to sustainable development, and the economic costs. The facts of each case will determine the precise injuries. However, it is important to note that, in principle, States that can demonstrate that the adverse effects of climate change have caused material injuries, including displacements, are entitled to seek reparations. The reality is that States in the global South are burdened with addressing the harms created by the global North and are entitled to compensation. Determining the amount of compensation must also take into consideration not only direct financial costs, but the non-economic losses such as culture and other human rights.

What is clear is that the most desirable outcome from applying State responsibility in any case is the cessation of the wrongful act, the prevention of future harm, and the maintenance of peaceful relations between nations. The magnitude of the climate crisis demands such action for the sake of human security and, indeed, the very survival of life on earth. In protecting its own citizens during a hostage situation, the US rightly argued the importance of finding legal remedies to preserving peaceful relations when it urged the International Court of Justice to act swiftly because 'each day that this condition continues causes irreparable damage to principles of international law.'<sup>41</sup> Surely each day that the wealthiest, most industrialised States of the global North continue to wilfully contribute to transboundary harm that adversely affects the global South is causing irreparable harm to the rule of law. Ensuring access to justice for these States is critical to maintaining peaceful, rules-based international relations.

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<sup>41</sup> *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* (29 November 1979) Request for the indication of Provisional Measures of protection submitted by the Government of the United States of America [4]. <https://www.icj-cij.org/en/case/64> accessed 24 August 2022

## 4.2. Access to justice for injured individuals

In addition to the role of international courts in providing access to justice for injured States, municipal legal systems must also provide access to justice for individuals. The IACtHR ‘has indicated that access to justice is a peremptory norm of international law.’<sup>42</sup> This should not be a controversial assertion. This obligation has even been affirmed in the context of environmental protection.<sup>43</sup> However, it is the obligation of each State to determine the precise manner in which this access is provided, based on its own legal system. There is a universal recognition that it is the State that is responsible for ensuring the rights of those within its territorial jurisdiction and, in turn, serving as the link between the individual and the realm of international law. It is a virtually uncontested principle that ‘States are the arch-custodians of human rights.’<sup>44</sup> Therefore, it is expected that individuals should exhaust all domestic measures before appealing to international mechanisms. However, it is important to remember the IACtHR position that individuals’ access to justice even through municipal mechanisms is not limited to their home State. The Advisory Opinion on the Environment and Human Rights notes:

The Court has established that, in the case of transboundary harm, it is understood that a person is under the jurisdiction of the State of origin when there is a causal link between the project or activity that has been or will be executed in its territory and the effects on the human rights of persons outside its territory (supra paras. 95 to 103). Therefore, States have the obligation to guarantee access to justice to anyone potentially affected by transboundary harm originated in their territory.<sup>45</sup>

States are obligated to provide access to justice through municipal mechanisms to individuals. This includes individuals in other jurisdictions if their injuries are linked to transboundary harm.

The answer to this question before the Court, then, is that there are two avenues for access to justice. States are entitled to remedies against other States for breaches of international obligations like preventing transboundary harm, and individuals are entitled to access to municipal mechanisms through which to seek remedies. It is the purview of international law to ensure States have the appropriate means to settle disputes and to ensure that each State provides appropriate municipal mechanisms. It would only be appropriate for international mechanisms to be engaged further when the State fails to provide appropriate opportunities.

## 5. Obligations to prevent displacement - right not to be forcibly displaced

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<sup>42</sup> OC-23/17 (n 1) [233].

<sup>43</sup> OC-23/17 (n 1) [234].

<sup>44</sup> Abass A, *International Law: Text, Cases, and Materials* (2nd ed, Oxford University Press, Oxford, 2014), 692.

<sup>45</sup> OC-23/17 (n 1) [238].

As discussed in Sections 3 and 4, States must be held responsible for causing transboundary harm, and displacement can be considered a material injury, a breach of the obligation of result, for which reparations are justified. Having established that climate change constitutes a transboundary harm, and that displacement was a foreseen result of failures to mitigate climate change, this section looks specifically at the right not to be forcibly displaced and how violating this right is a breach of an international obligation.

The right protecting individuals from forcible displacement is widely acknowledged in international law. Principle 6 of the Guiding Principles on Internal Displacement (Guiding Principles) expounds the ‘right [of every human being] to be protected against being arbitrarily displaced from his or her home or place of habitual residence.’<sup>46</sup> Principle 8 dictates that any displacement shall not be carried out in a manner that violates the rights to life, dignity, liberty and security of those affected. The Guiding Principles outline that States should have both the duty to respect the right not to be displaced by refraining from carrying out arbitrary displacement, and the duty to protect the right from being threatened by non-State actors, such as armed militias, or particular circumstances, like natural or human-made disasters.<sup>47</sup> This prohibition of arbitrary displacement is further developed in regional law. The African Union Convention for the Protection and Assistance of Internally Displaced Persons (Kampala Convention) is the first hard law instrument with a right not to be arbitrarily displaced.<sup>48</sup>

Further support for the right not to be forcibly displacement is inherent to other human rights protections including Article 12(1) International Covenant on Civil and Political Rights (ICCPR):

Everyone lawfully within the territory of a State shall, within the territory, have the right to liberty of movement and freedom to choose his residence.<sup>49</sup>

Protection against individual or collective transfers can be inferred, *inter alia* and *a contrario*, from the right to freedom of movement and choice of residence. The right to freedom of movement also places positive obligations on States.<sup>50</sup> This includes preventing acts of individuals or private entities that would limit freedom of movement, ensuring that any ‘necessary’ restriction abides by the legal requirements to avoid it becoming arbitrary and putting in place protections to preserve the right.<sup>51</sup> Conduct by States or private entities that contribute to climate change, causing displacement as a result, could breach the positive rights inherent to Article 12.

<sup>46</sup> Guiding Principles (n 5) [9].

<sup>47</sup> Michèle Morel, Maria Stavropoulou and Jean-François Durieux, ‘The History and Status of the Right Not to Be Displaced’ [2012] Forced Migration Review 5.

<sup>48</sup> Kampala Convention (n 6) Article vi.

<sup>49</sup> ICCPR (n 3) Art 12(1); See also *Protocol 4 to the ECHR* (16 September 1963), Article 2; *African Charter on Human and Peoples' Rights (ACHPR)* 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) Article 12.

<sup>50</sup> See pronouncements by ECHR regarding Moldova in *Ilascu*.

<sup>51</sup> Vladislava Stoyanova, ‘Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights’ (2018) 18 Human Rights Law Review 309; Rowan Cruft, ‘Human Rights and Positive Duties’ (2005) 19 Ethics & International Affairs 29.

Article 12(4), which forbids ‘arbitrarily denying an individual the right to return to their own country,’ guarantees people’s right of voluntary return to their country of origin or of citizenship.<sup>52</sup> The material scope of the right to return amounts to a negative obligation on the State to not prevent individuals from returning to their country of origin and implies a right to remain in one’s own country.<sup>53</sup> This is implicated where climate change has meant that an individual is unable to return due to the impacts of disasters.

Other examples imply this right. For example, collective expulsion is prohibited, according to the Human Rights Committee (CCPR), Article 13 of ICCPR ‘implicitly’ contains a prohibition on collective or mass expulsions.<sup>54</sup> In 2014 the International Law Commission (ILC) adopted the ‘Draft articles on the expulsion of aliens’ with Article 9 explicitly prohibiting collective expulsion.<sup>55</sup> Implicit protection from other human rights protections may also be engaged by the act of displacement. For example, ICCPR article 7 (prohibition of torture), article 6 (right to life), article 17 (right to private and family life),<sup>56</sup> and article 11 International Covenant on Economic, Social, and Cultural Rights (ICESCR) (right to an adequate standard of living).<sup>57</sup>

Developments in jurisprudence indicate that displacement caused by climate change can, in certain circumstances, even engage the Refugee Convention, particularly article 33’s prohibition on refoulement.<sup>58</sup> Even in denying the applicant’s claim in *Teitiota*, the New Zealand Supreme Court wrote, ‘Our decision in this case should not be taken as ruling out [engaging non-refoulement in the context of environmental degradation] in an appropriate case.’<sup>59</sup> This is a good indication that courts are willing to recognise the links between climate change and displacement and the impact on rights. Indeed, there should be no doubt that forcible displacement is a violation of human rights principles, and that this holds even in the context of the adverse effects of climate change.

Finally, as discussed in Sections 3 and 4, it is the State that bears responsibility for forcing displacement if the act leading to displacement is attributable to the State. In addition to the

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<sup>52</sup> ICCPR (n 3) Article 12(4); See also Protocol 4, ECHR, Article 3(2); ACHP, Article 12(2); *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD) 21 December 1965, Article 5d(ii): ‘the right to leave any country, including one’s own, and to return to one’s country’.

<sup>53</sup> CCPR, ‘General Comment 27’ [19].

<sup>54</sup> CCPR, ‘General Comment 15 (The Position of Aliens under the Covenant)’ (1986) para 10.: ‘article 13 would not be satisfied with laws or decisions providing for collective or mass expulsions’.

<sup>55</sup> Draft Articles on the Expulsion of Aliens, with commentaries (2014); The ILC included the topic ‘Expulsion of aliens’ in its long-term programme of work in 2000: *Official Records of the General Assembly Fifty-fifth Session, Supplement no 10* (A/55/10), para 729; See *ND and NT v Spain* [2020] ECHR Application Nos. 8675/15 and 8697/15 [26].

<sup>56</sup> ICCPR (n 3) Articles 7, 6, 17.

<sup>57</sup> ICESCR (n 4) Art. 11.

<sup>58</sup> 1951 Refugee Convention (n 7) Article 33.

<sup>59</sup> *Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment* [2013] NZHC 3125 [Teitiota (HC)] [13].

scholarly works recognising this,<sup>60</sup> the IACtHR has asserted this position in its decision in the Operation Genesis Case.<sup>61</sup> Acts attributable to the State violated human rights, including the right not to be forcibly displaced, and the Court held that responsibility applied. Similarly, State breaches of obligations related to climate change must trigger responsibility and the consequences that flow from that. Further, the IACtHR has acknowledged the right not to be forcibly displaced and its vulnerability to environmental impact in its advisory opinion of 2017.<sup>62</sup>

## 6. Displacements

### 6.1 External - applicability of refugee law framework

Whilst a majority of displacement due to climate change hazards will remain internal, some individuals will cross an international border and this raises questions as to the applicable protection framework.

The international refugee law framework is focussed on the provision of special protection for those falling under the definition of a refugee under Article 1(A) of the 1951 Refugee Convention such that an individual must be outside their country of origin (CoO) and they must have an individual fear of persecution due to their membership of a protected group.<sup>63</sup> We would propose that refugee law is not an appropriate framework for responding to cross-border displacement in disaster contexts, except where the disaster event or response unleashes persecution, discrimination or violence that brings a person within the applicable refugee definition.

Within the Inter-American System, the refugee definition with the 1951 Convention is supplemented by that of the Cartagena Declaration. The Advisory Opinion of 2018 outlines that the expanded definition of a refugee found within the Cartagena Declaration is:

‘also applicable to those who have fled their countries of origin because their lives, safety, or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violations of human rights, or other circumstances which have seriously disturbed public order.<sup>64</sup>

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<sup>60</sup> R Hoffman, ‘Refugee-Generating Policies and the Law of State Responsibility’ [1985] ZaoRV; Nafees Ahmad, ‘Refugees: State Responsibility, Country of Origin and Human Rights’ (2009) 10 Asia-Pacific Journal on Human Rights and the Law 1; Katja S Ziegler, *Causing Refugee Flows as a Delict under International Law - International Responsibility of the State of Origin for Causing Refugee Movements* (Duncker and Humblot 2002).

<sup>61</sup> *Case of the Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia* (Inter-American Court of Human Rights), Judgement of 20 November 2013, [486(2-5)].

<sup>62</sup> OC-23/17 (n 1) [66]. ‘and the right to not be forcibly displaced’. Fn 115: See, for example, Commission on Human Rights, Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39. Addendum: Guiding Principles on Internal Displacement, Principle 6. UN Doc. E/CN.4/1998/53/Add.2, February 11, 1998, and with regard to climate change, Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, January 15, 2009, UN Doc. A/HRC/10/61, [56].

<sup>63</sup> 1951 Refugee Convention (n 7) Article 1(A); See also OC-25/18 (n 8) [68].

<sup>64</sup> OC-25/18 (n 8) [68] (emphasis added).

Circumstances that ‘seriously disturbed public order’ can include the disasters that result from the impacts of climate change. The Court has found that this definition responds to ‘the challenges of protection derived from other displacement patterns that currently take place.’<sup>65</sup> As such, refugee protection may be available to individuals displaced as a result of climate change impacts where they can fulfil the definition outlined in the Cartagena Declaration.

This protection includes a prohibition of *refoulement* as outlined by the Court in advisory opinion OC-21/14 para 202 such that: ‘the principle of non-refoulement or non-refoulement constitutes the cornerstone of the international protection of refugees and asylum seekers.’ Further, those seeking refugee status are protected from discrimination<sup>66</sup> and have a right to due process in establishing their refugee status.<sup>67</sup> Where refugee status is established, then individuals will have access to the rights outlined within the 1951 Refugee Convention, including access to healthcare, education, rights to work etc.

Not everyone who is displaced by the impacts of climate change will fall within the purview of refugee law. However, complementary protection provided by human rights law can apply to persons impacted by disasters, whether they are ‘refugees’ or not.<sup>68</sup> The Inter-American system has treated the question of protection for asylum seekers as a human rights matter such that it fills the gaps left by refugee law.<sup>69</sup> This protection includes a prohibition of *refoulement* that may prevent an individual’s removal to a situation where disaster risks or conditions present a real risk of certain fundamental rights being breached.<sup>70</sup> Further, the Inter-American human rights system ensures a wider set of human rights protection for those who are internally or externally displaced.<sup>71</sup> The scope of these protections will be explored further in Section 7.

## 6.2. Internal - Respect for Human Rights

Given the aforementioned link between climate change, disasters and displacement, where State’s fail to prevent climate change, it is widely accepted that its impacts will result in a greater

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<sup>65</sup> OC-25/18 [96]; Cf. OC-21/14 (n 9) [79].

<sup>66</sup> OC-21/14 (n 9) [79 and 181] ‘without any discrimination whatsoever.’<sup>181</sup> 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>67</sup> See for example *Pacheco Tineo family v. Bolivia* (n 11) Section VIII (B).

<sup>68</sup> The preamble to the ADHR and the Commission have stated that the rights contained therein are ‘essential rights of man . . . not derived from the fact that he is a national of a certain state’; see also *Ferrer-Mazorra* (n 20) [178].

<sup>69</sup> David J Cantor and Stefania Barichello, Protection of Asylum Seekers under the Inter-American Human Rights System in *Regional Approaches to the Protection of Asylum Seekers* (Routledge, 2014); David James Cantor & Stefania Eugenia Barichello (2013) The Inter-American human rights system: a new model for integrating refugee and complementary protection?, *The International Journal of Human Rights*, 17:5-6, 689-706.

<sup>70</sup> *Haitian Interdictions* (n 13) [167–71]; See Cantor and Barichello (n 12, 2013) 692-3 for further details.

<sup>71</sup> See Cantor and Barichello (n 12, 2014) 15-25 for further discussion.

occurrence of natural disasters and displacement. This displacement will primarily be internal and as such, will result in a number of State obligations to arise.

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>

<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:



Dr. Brian Aycock



Dr. Kathryn Allinson

## 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)
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