



**Comments in Respect of the Request for an Advisory
Opinion on the Climate Emergency and Human Rights
Submitted to the Inter-American Court of Human Rights by
the Republic of Colombia and the Republic of Chile**

Submitted by

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Introduction

These comments respond to the following questions.

A.1. What is the scope of the State's duty of prevention with regard to climate events caused by global warming, including extreme events and slow onset events, based on the obligations under the American Convention, in light of the Paris Agreement and the scientific consensus which recommend that global temperatures should not increase beyond 1.5°C?

2.A. What should a State take into consideration when implementing its obligations: (i) to regulate; (ii) to monitor and oversee; (iii) to request and to adopt social and environmental impact assessments; (iv) to establish a contingency plan; and (v) to mitigate any activities under its jurisdiction that exacerbate or could exacerbate the climate emergency?

F.1. What considerations and principles should States and international organisations take into account, collectively and regionally, when analyzing shared but differentiated responsibilities in the context of climate change, from the perspective of human rights and intersectionality?

F.3. What obligations and principles should guide the individual and coordinated measures that the States of the region should adopt to deal with involuntary human mobility, exacerbated by the climate emergency?

These comments are submitted by the following persons who are all Members of the Human Rights Centre and hold research and teaching positions at Essex Law School, University of Essex.

- (a) **Judith Bueno de Mesquita** is Senior Lecturer and Co-Deputy Director of the Human Rights Centre. For two decades, her publications and practice have been in the area of health and human rights, and economic, social and cultural rights. Ongoing research is focused on climate change mitigation and human rights, and the relationship of proposed alternatives to mainstream development that promote social and environmental well-being, such as Doughnut Economics, Degrowth and Buen Vivir, with human rights. Judith has worked extensively with UN organisations including the

WHO, UNFPA, UNAIDS, OHCHR, the Independent Panel on Pandemic Preparedness and Response, and the mandate of the UN Special Rapporteur on the right to health.

- (b) **Dr Koldo Casla** is Senior Lecturer in Law and the Director of the Human Rights Centre Clinic of the University of Essex. He also leads 'Human Rights Local', a project of the Human Rights Centre to make human rights locally relevant in different parts of England. Between 2017 and 2019, Dr Casla was a Research Associate at the Institute of Health & Society of Newcastle University, where he co-drafted the first Bill on Economic, Social and Cultural Rights in the UK. Between 2016 and 2019, he was the Policy Director of Just Fair, leading the organisation's research, strategic communications, partnerships and campaigning on economic and social rights in the UK. Among other publications, Dr Casla is the author of 'Politics of International Human Rights Law Promotion in Western Europe: Order versus Justice' (Routledge 2019) and 'Spain and Its Achilles' Heels: The Strong Foundations of a Country's Weaknesses' (Rowman & Littlefield 2021), and co-editor of 'Social Rights and the Constitutional Moment: Learning from Chile and International Experiences' (Hart 2022) and 'The European Social Charter: A Commentary, Volume 3' (forthcoming Brill 2024).
- (c) **Professor Geoff Gilbert** is the Sérgio Vieira de Mello Professor of International Human Rights and Humanitarian Law of the University of Essex. He is a Barrister (non-practising), called July 1980, and a Bencher of the Middle Temple (elected February 2010) and Co-Editor-in-Chief of the International Journal of Refugee Law. With colleagues from the Kaldor Centre for International Refugee Law (UNSW) and the Center for Gender and Refugee Studies (UCCLSF), Geoff is working with UNHCR to provide guidance on the international law pertaining to the protection of persons displaced as a result of climate change and disaster (forthcoming 2024). At the request of UNHCR, he wrote the background paper on exclusion for the UNHCR Global Consultations on International Protection as part of the 50th Anniversary of the 1951 Convention Relating to the Status of Refugees. He acted as an expert consultant to UNHCR in 2014-15 on rule of law and its engagement to effect solutions, producing an 18000-word internal report with his co-consultant Anna Magdalena Bentajou, née Rüsich. He was seconded to UNHCR 2017-18 to write a confidential paper on exclusion and security, and on the political participation of refugees in their country of nationality. In 2020-21, he again co-authored with Anna Magdalena Bentajou an evaluation of the organisation's Rights Mapping Tool and recommend improvements and developments to ensure its utility until 2030 and beyond. He is currently seconded to UNHCR writing three papers on (i) implementing the new 'Rights Mapping Analysis Platform' (RiMAP), (ii) UNHCR's Legislative Guidance to States, and (iii) revision of UNHCR's external guidance on the interpretation and application of international refugee, human rights and humanitarian law.
- (d) **Dr Stephen Turner** is a Senior Lecturer at Essex Law School and Human Rights Centre. His research relates to international environmental law, global environmental governance, climate change and corporate responsibility. He has written two monographs that focus on 'rights-based' approaches to environmental governance: 'A Substantive Environmental Right' (Kluwer Law International, 2009) and 'A Global

Environmental Right' (Earthscan /Routledge, 2014). He was also the lead editor of 'Environmental Rights - The Development of Standards' (Cambridge University Press, 2019). His ongoing work considers how legal frameworks such as those found in trade law, investment law, corporate law, banking and finance law, and insurance law can be streamlined to ensure that they guarantee specific environmental outcomes. He has spoken widely on the subject of environmental governance at numerous venues including the United Nations Environment Programme (Nairobi) and the World Bank (Washington D.C.). He has also been consulted by the World Health Organisation and has played an active role in the consultation processes associated with the mandates of successive UN Special Rapporteurs on Human Rights and the Environment.

(e) Dr Anil Yilmaz Vastardis is a Senior Lecturer at Essex Law School and Human Rights Centre and the Co-Director of the Essex Business and Human Rights Project. She sits on the steering committee of Climate Finance for Equitable Transitions project, which is a multi-institutional and multi-stakeholder initiative aimed at exploring the climate finance supply chain within the context of the multilateral climate change regime, international financial architecture and international economic law. Dr Yilmaz Vastardis has written extensively on the relationship between human rights and economic activity. Her work focuses on critiquing and developing the law to prevent and remediate harmful impacts of investment and business activity on human rights and the environment. Currently, she is supporting the work of the Institute of Economic Justice (South Africa) on developing a human rights based approach to climate finance.

These comments are submitted in our personal capacities and reflect the interpretation of the authors, and they should not be read as reflecting the views of the Human Rights Centre and Essex Law School, University of Essex.

- Comments on A1 (p. 10) and A2 (p. 18) are written by Stephen Turner, Judith Bueno de Mesquita and Anil Yilmaz¹.
- Comments on F1 (p. 24) are written by Koldo Casla.
- Comments on F3 (p. 27) are written by Geoff Gilbert.

Our response highlights specific issues in terms of existing interpretations of international human rights law, as well as lacunae therein, for the Court's consideration in drafting its Advisory Opinion. The amicus starts with recommendations, included in both Spanish and English. Subsequently, each section highlights recommendations, followed by a commentary that highlights legal sources, scientific evidence and related legal and social scientific research on climate change and human rights. In particular, our interpretation of international human rights standards is informed by principles established in the Court's Advisory Opinion OC-23/17 on the environment and human rights and the case law of the Inter-American Court of Human Rights (IACtHR); the United Nations Framework Convention on Climate Change

¹ Anil Yilmaz would like to acknowledge the research support provided by João V Stuart Jambo and Egle Martins Spina.

(UNFCCC),² and the Paris Agreement;³ and core international human rights treaties interpreted in the context of climate change by UN Treaty Bodies and Special Procedures. Our analysis and recommendations aim to highlight specific issues which we consider merit inclusion in the Court's Advisory Opinion.

Resumen de Recomendaciones

1

- a. Dado el corto plazo disponible para prevenir un cambio climático catastrófico y el correspondiente menoscabo a los derechos humanos, las contribuciones determinadas a nivel nacional deberían ser revisadas para reflejar mejor “la mayor ambición posible” a la que hace referencia el Acuerdo de París (artículo 4(3)).*
- b. Todos los Estados deberían aumentar las medidas de mitigación, en base a las diferentes circunstancias nacionales y al principio de responsabilidades comunes pero diferenciadas. Los Estados de altos ingresos deberían adoptar objetivos de reducción absoluta de emisiones que abarquen todo el sistema económico para proteger los derechos humanos del cambio climático.*
- c. El deber de prevención exige que los Estados se abstengan de confiar en tecnologías no probadas de emisión negativa. Por el contrario, deberían centrarse en reducciones de emisiones rápidas y eficaces.*
- d. Los Estados tiene la obligación positiva de mitigar el cambio climático y evitar amenazas crecientes a los derechos humanos para las generaciones presentes y futuras.*
- e. El deber de prevención de los Estados incluye la obligación de cooperar a nivel internacional para abordar los determinantes subyacentes, las causas de origen y los ejes impulsores de las emisiones antropogénicas de gases de efecto invernadero que pueden identificarse dentro de los marcos jurídicos y económicos internacionales. (Por lo tanto, puede ser necesario cooperar en áreas tales como el derecho de sociedades, el derecho de inversión, el derecho bancario y el derecho de seguros, por ejemplo).*

2A

- a. Los Estados deberían tomar en consideración y aplicar la debida diligencia necesaria para cumplir con su responsabilidad de regular, hacer seguimiento y supervisar las emisiones de actores públicos y privados en todos los sectores.*

² United Nations Framework Convention on Climate Change (New York) 9 May 1992, in force 24 March 1994, 1771 UNTS 107 (1992 Climate Change Convention)

³ Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, in force Nov. 4, 2016, T.I.A.S. No. 16-1104 (Paris Agreement)

- b. En el contexto de las obligaciones de los Estados de (i) regular, (ii) hacer seguimiento y supervisar las actividades que pudieran exacerbar la emergencia climática, a la luz de las contribuciones determinadas a nivel nacional, los Estados tienen la obligación específica de centrarse en la transición energética desde los combustibles fósiles a la energía renovable.**
- c. El desarrollo humano debe desvincularse de la destrucción de la naturaleza y del sobreconsumo de recursos naturales para lograr la realización de los derechos humanos de las generaciones presentes y futuras, así como la integridad de la naturaleza y de los sistemas naturales.**
- d. Los Estados deberían considerar y tomar medidas para garantizar que las políticas y las iniciativas de mitigación adoptan un enfoque basado en los derechos humanos, incluyendo evaluaciones de impacto de los derechos humanos, medidas para mitigar el menoscabo a los derechos humanos, y acceso a la justicia y reparaciones.**

F1

- a. En el análisis de las responsabilidades comunes pero diferenciadas en el contexto del cambio climático, los Estados y las organizaciones internacionales deberían tomar en consideración que el cambio climático tiene implicaciones muy diferentes para distintos grupos. Es por lo tanto esencial que los Estados y las organizaciones internacionales adopten un enfoque interseccional sobre la igualdad, incluyendo la pobreza y el estatus socioeconómico.**
- b. La pobre y fallida gobernanza de la naturaleza, incluyendo la conducente a pérdidas a través de actividades ilegales y el uso insostenible de recursos públicos y privados, ha contribuido a niveles insostenibles de daño al medio natural. En base a la función social de la propiedad, reconocida en múltiples constituciones nacionales particularmente en las Américas, el derecho a la propiedad debe ser entendido en el marco de una sociedad democrática que aspira a garantizar derechos individuales al tiempo que avanza en el bienestar general y la protección del medio natural. El derecho a la propiedad debe ser compatible con medidas necesarias y proporcionadas para preservar otros derechos humanos y abordar el cambio climático.**

F3

- a. A la luz del Pacto Mundial sobre los Refugiados y la Declaración Universal de Derechos Humanos, los Estados de la región y en el resto del mundo deberían garantizar que las fronteras permanecen abiertas para que las personas que huyen de emergencias y desastres climáticos puedan tomar medidas de adaptación para obtener protección y avanzar hacia soluciones duraderas y sostenibles.⁴**

⁴ [Pacto Mundial sobre los Refugiados de Naciones Unidas](#) (2018).

Summary of Recommendations

1

- a. *Keeping in mind the short time frame for preventing catastrophic climate change and harm to human rights, States' nationally determined contributions should be revised to better reflect the 'highest possible ambition' referred to in the Paris Agreement (art. 4 (3)).*
- b. *All States should enhance mitigation measures in light of different national circumstances and the principle of common but differentiated responsibilities, with high-income States undertaking economy-wide absolute emission reduction targets to protect human rights from climate change.*
- c. *The duty of prevention entails that States should not rely on unproven negative emissions technologies, rather they should focus on rapid and effective emissions reductions.*
- d. *States have positive obligations to mitigate climate change to prevent increased threats to human rights of current and future generations.*
- e. *A State's duty of prevention includes the obligation to cooperate at the international level to address underlying determinants, root causes and drivers of anthropogenic GHG emissions that can be identified within domestic and international legal and economic frameworks. (Therefore cooperation may be required in areas such as corporate law, investment law, trade law, banking law and insurance law, for example).*

2A

- a. *States should take into consideration and implement the due diligence required in their responsibility to regulate, monitor and oversee emissions from public and private actors across all sectors.*
- b. *Within the context of the obligation of States to (i) regulate (ii) monitor and oversee activities that could exacerbate the climate emergency, in light of their nationally determined contributions, States have a particular obligation to focus on the energy transition away from fossil fuels to renewable energy.*
- c. *Human development must be decoupled from the destruction of nature and the overconsumption of natural resources to achieve the realization of the human rights of present and future generations and the integrity of nature and natural systems.*
- d. *States should take into consideration and take measures to ensure that mitigation policies and initiatives embrace a human rights-based approach, including human rights impact assessments, measures to mitigate human rights harms, and access to justice and remedies in the context of harms to human rights.*

F1

- a. *In the analysis of shared but differentiated responsibilities in the context of climate change, States and international organizations should bear in mind that climate change has very unequal implications for different groups. It is therefore essential for States and international organizations to adopt an intersectional approach to equality, including poverty and socio-economic status.*
- b. *Poor and failed governance of nature, including that leading to losses through illegal activities and the unsustainable use of publicly and privately owned resources, has contributed to unsustainable levels of damage to the natural environment. In the spirit of the social function of property, recognized in multiple national constitutions particularly in the Americas, the right to property must be understood within the context of a democratic society that aims to secure individual rights, while advancing public welfare and protecting the natural environment. The right to property must be made compatible with the necessary and proportionate measures to preserve other human rights and tackle climate change.*

F3

- a. *States in the region and beyond, having regard to the Global Compact on Refugees and the Universal Declaration of Human Rights, should ensure borders remain open so that persons fleeing climate emergencies and disasters can take adaptive measures to obtain protection and engage in steps toward durable and sustainable solutions.⁵*

⁵ [UN Global Compact on Refugees](#) (2018).

Preface to Recommendations and Commentary

The Paris Agreement provides the basis for national commitments that aim to keep temperature rises well within 2°C or ideally 1.5°C of pre-industrial levels.⁶ The 1.5°C target is aligned with scientific guidance on the climate change planetary boundary (the notion of ‘a safe operating space for humanity’),⁷ beyond which warming threatens greater, more harmful and irreversible ecological changes that will lead to: the inability of humanity to thrive and develop due to loss of lives, livelihoods or incomes, food, water and nutritional security; displacement; and chronic disease, injury or malnutrition.

Whilst the UNFCCC system, including the Paris Agreement, has made major progress in bringing States together and has achieved advances in cooperation and commitment, the scientific evidence indicates that States’ commitments made under the terms of the Paris Agreement currently fail to adequately respond to climate change in terms of both mitigation and adaptation.⁸ The UNFCCC system has unfortunately not been successful in leading to a trajectory of reduction in the levels of anthropogenic GHG emissions that would be consistent with those that the Intergovernmental Panel on Climate Change (IPCC) holds are required.⁹ Therefore, the evidence suggests that the UNFCCC is not currently meeting its own stated goal under Article 2:

‘The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.’

The 2015 Paris Agreement recognises in its preamble the linkages between human rights and climate change, and there is now increasingly widespread recognition that the climate emergency poses significant threats to the enjoyment, realisation, and protection of the entire catalogue of human rights including, but not limited to, the rights to life, health, food, housing, water and sanitation, and a healthy environment:¹⁰

⁶ Ibid.

⁷ Johan Rockstrom and others, ‘[Planetary Boundaries: Exploring the Safe Operating Space for Humanity](#)’ (2009) 14(2) Ecology and Society 32; Will Steffen and others, ‘[Planetary Boundaries: Guiding Human Development on a Changing Planet](#)’ (2015) 347 (6223) Science.

⁸ IPCC, 2023: [Summary for Policy makers](#). In: *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland. Pp 1-34 doi: 10.59327/IPCC?AR6-9789291691647.001; UN Climate Change, ‘[Climate Plans Remain Insufficient: More Ambitious Action Needed Now](#)’ (26 October 2022).

⁹ Ibid.

¹⁰ Resolution adopted by the Human Rights Council on 12 July 2019, [Human Rights and Climate Change](#), A/HRC/RES/41/21, 23 July 2019; [Understanding Human Rights and Climate Change](#), Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change, Office of the United Nations High Commissioner for Human Rights (OHCHR);

- Within the UN Human Rights Council, this was first formally recognised in 2008¹¹ and a body of work recognizing the linkages between human rights and climate change subsequently emerged,¹² including under the auspices of UN Special Procedures addressing the relationship between human rights and the environment and climate change.¹³
- The UN General Assembly resolution on the right to a healthy environment recently recognised that unsustainable development and climate change ‘constitute some of the most pressing and serious threats to the ability of present and future generations to effectively enjoy all human rights.’¹⁴
- As of 2019, 110 national constitutions recognised rights and/or duties that relate specifically to the protection of the environment.¹⁵ There are now also numerous national constitutions that specifically include rights and/or duties relating to climate change.¹⁶ Significant jurisprudence has developed in which constitutional provisions have been used for the protection of the environment and peoples’ rights relating to it.

The Protocol of San Salvador to the American Convention on Human Rights (ACHR) represented a major step forward for the international community when it included the right to a healthy environment and the corresponding obligations of States relating to it.¹⁷

In line with the principle of systemic integration, the need to follow scientific evidence, and in the light of States’ failures to move towards decarbonisation in recent years which threatens human rights, UN treaty bodies and other human rights oversight bodies have drawn on the Paris Agreement to interpret climate change mitigation obligations under international human rights treaties, while also drawing on international human rights law to frame the nature and scope of these obligations.

¹¹ UN HRC Resolution 7/23 (2008).

¹² UN HRC Resolutions: 50/9 (July 2022); 47/24 (July 2021); 44/7 (July 2020); 42/21 (July 2019); 38/4 (July 2018); 35/20 (July 2017); 32/33 (July 2016); 18/22 (September 2011); 10/4 (March 2009).

¹³ UN HRC Resolution 19/10 (2012); UN Doc. A/HRC/31/52 (1st Feb. 2016); UN Doc. A/HRC/74/161 (15 July 2019); UN Doc. A/HRC/Res/48/14 (8th Oct. 2021).

¹⁴ UN General Assembly (UNGA), ‘The Right to a Safe, Clean, Healthy and Sustainable Environment’, UN Doc. A/76/L.75 (26 July 2022).

¹⁵ [Report of the UN Special Rapporteur on the right to a healthy environment](#), UN Doc. A/HRC/43/53 (30 Dec. 2019), para. 11.

¹⁶ See for example, the national constitutions of Algeria, Bolivia, Côte d’Ivoire, Cuba, Dominican Republic, Ecuador, Thailand, Tunisia, Venezuela, Vietnam, and Zambia.

¹⁷ Art. 11.

Response to A.1

A.1. What is the scope of the State's duty of prevention with regard to climate events caused by global warming, including extreme events and slow onset events, based on the obligations under the American Convention, in light of the Paris Agreement and the scientific consensus which recommend that global temperatures should not increase beyond 1.5°C

Summary of Recommendations

- f. Keeping in mind the short time frame for preventing catastrophic climate change and harm to human rights, States' nationally determined contributions should be revised to better reflect the 'highest possible ambition' referred to in the Paris Agreement (art. 4 (3)).*
- g. All States should enhance mitigation measures in light of different national circumstances and the principle of common but differentiated responsibilities, with high-income States undertaking economy-wide absolute emission reduction targets to protect human rights from climate change.*
- h. The duty of prevention entails that States should not rely on unproven negative emissions technologies, rather they should focus on rapid and effective emissions reductions.*
- i. States have positive obligations to mitigate climate change to prevent increased threats to human rights of current and future generations.*
- j. A State's duty of prevention includes the obligation to cooperate at the international level to address underlying determinants, root causes and drivers of anthropogenic GHG emissions that can be identified within domestic and international legal and economic frameworks. (Therefore, cooperation may be required in areas such as corporate law, investment law, trade law, banking law, and insurance law, for example).*

A1. Recommendations with Commentary

- a) Keeping in mind the short time frame for preventing catastrophic climate change and harm to human rights, States' nationally determined contributions (NDCs) should be revised to better reflect the 'highest possible ambition' referred to in the Paris Agreement (art. 4 (3)).*

The Paris Agreement requires each Party to prepare, communicate and maintain successive nationally determined contributions (NDCs), in line with the principle of 'highest possible ambition' and reflecting 'its common but differentiated responsibilities and respective capabilities'.¹⁸ However, at the present time, States' current pledges put the world on track for 2.5°C warming above pre-industrial levels by the end of the century.¹⁹ The UN Committee

¹⁸ Art. 2(2).

¹⁹ IPCC n 8; UN Climate Change, ['Climate Plans Remain Insufficient: More Ambitious Action Needed Now'](#) (26 October 2022).

on Economic, Social and Cultural Rights (CESCR) has highlighted a link between obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the ambition of NDCs:

‘The nationally determined contributions that have been announced so far are insufficient to meet what scientists tell us is required to avoid the most severe impacts of climate change. In order to act consistently with their human rights obligations, those contributions should be revised to better reflect the ‘highest possible ambition’ referred to in the Paris Agreement (art. 4 (3)).’²⁰

The UN Committee on the Rights of the Child (CRC) has highlighted the importance of short-term action to protect children in the longer term: ‘Successive mitigation measures and updated pledges should represent the efforts of States in a progression over time, *keeping in mind that the time frame for preventing catastrophic climate change and harm to children’s rights is shorter and requires urgent action*’.²¹ (emphasis added).

b) *All States should enhance mitigation measures, in light of different national circumstances and the principle of common but differentiated responsibilities, with high-income States undertaking economy-wide absolute emission reduction targets to protect human rights from climate change.*

The Paris Agreement states that developed country Parties should ‘continue taking the lead by undertaking economy-wide absolute emission reduction targets.’²² Developing country Parties should ‘continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances’.²³ Drawing on this, the CRC has interpreted the Convention on the Rights of the Child to require: urgent collective action by all States to mitigate greenhouse gas (GHG) emissions in line with their human rights obligations; historical and current major emitters should take the lead in mitigation efforts; high-income States should continue to take the lead, specifically by undertaking economy-wide absolute emission reduction targets; and all States should enhance their mitigation measures in the light of their different national circumstances in a manner that protects children’s rights to the maximum possible extent.²⁴

c) *The duty of prevention entails that States should not rely on unproven negative emissions technologies, rather they should focus on rapid and effective emissions reductions.*

A 2023 briefing note, issued by the UNFCCC Article 6.4 Supervisory Body secretariat on activities involving ‘removals’ of GHGs from the atmosphere, highlighted concerns with over-reliance on unproven technologies for the removal of GHGs from the atmosphere.²⁵ It stated

²⁰ UN Committee on Economic, Social and Cultural Rights, [Statement on Climate Change and the International Covenant on Economic, Social and Cultural Rights](#), E/C.12/2018/1 (31 October 2018).

²¹ UN Committee on the Rights of the Child, ‘[General Comment No. 26 on Children’s Rights and the Environment, with a Special Focus on Climate Change](#)’ CRC/C/GC/26 (22 August 2023), para 98(c).

²² Art. 4(4).

²³ Ibid.

²⁴ CRC n 21, paragraphs 95-98.

²⁵ UNFCCC, [Information Note: Removal activities under the Article 6.4 mechanism](#). A6.4-SB005-AA-A09 (version 04.0) (May 2023).

that '[e]ngineering-based removal activities are technologically and economically unproven, especially at scale, and pose unknown environmental and social risks'.²⁶ It goes on to point out that '[c]urrently, these activities account for removals equivalent to 0.01 MtCO₂ per year (P-15:a) compared to 2,000 MtCO₂ per year removed by land-based activities'.²⁷ This report is reflective of broader concerns amongst scientists that some proposed technologies for climate change mitigation are highly speculative. For example, BECCS (bioenergy with carbon capture and storage) has been questioned in terms of economic feasibility and scalability,²⁸ and whether the necessary storage capacity exists.²⁹ As such, emphasis is increasingly placed on GHG reductions. In adopting the Glasgow Climate Pact in COP26, the States parties agreed to accelerate efforts to phase out unabated coal power and phase-out inefficient fossil fuel subsidies.³⁰ The Intergovernmental Panel on Climate Change (IPCC) Synthesis report published in 2023 warned that 'there is a rapidly closing window of opportunity to secure a liveable and sustainable future for all,'³¹ and that steps taken by governments have been inadequate to achieve a substantial reduction in fossil fuel use, with public and private finance flows for fossil fuels still being greater than those for climate adaptation and mitigation.

In a standpoint that is reflective of this scientific opinion, the CRC took the position that State parties cannot 'rely on removing greenhouse gases from the atmosphere in the future through unproven technologies'; rather States should 'prioritize rapid and effective emissions reductions now in order to support children's full enjoyment of their rights in the shortest possible period of time and to avoid irreversible damage to nature'.³²

UN treaty bodies have made a small number of relevant recommendations that allude to the need for rapid reductions in the use of fossil fuel and to the relationship between human rights, consumption and nature. The CESCR has recommended in Concluding Observations on States' parties reports that States should refrain from oil and gas extraction; reduce the use of coal-fired power; promote renewable energy sources; and reduce public and private investment in the fossil fuel industry.³³ The CRC pointed out that 'delaying a rapid phase out of fossil fuels will result in higher cumulative emissions and thereby greater foreseeable harm to children's rights' and that the 'the rights to adequate housing, food, water and sanitation should be realized sustainably, including with respect to material consumption, resource and energy use and the appropriation of space and nature'.³⁴

²⁶ Ibid at p. 18.

²⁷ Ibid at p. 18. The land activities would include, ie afforestation/reforestation, improved forest management, wetland restoration, carbon soil sequestration, and Biochar.

²⁸ Pete Smith et al. '[Biophysical and economic limits to negative CO₂ emissions](#),' Nature Climate Change (2016) 6(1), pp. 42-50; Glen Peters '[Does the carbon budget mean the end of fossil fuels?](#)' Climate News (2017).

²⁹ Global CCS Institute, '[Global Status of CCS 2015: Summary Report](#)' (2015).

³⁰ Glasgow Climate Pact, Decision 1/CMA.3 (2021), contained in doc. FCCC/PA/CMA/2021/10/Add.1, para 36.

³¹ IPCC n 8.

³² Ibid.

³³ E.g. UN Committee on Economic, Social and Cultural Rights Concluding Observations on: Luxembourg, UN Doc. E/C.12/Lux/CO/4 (15 Nov 2022), paras. 10–11; Portugal, UN Doc. E/C.12/Prt/CO/5 (30 March 2023); Ecuador, UN Doc. E/C.12/ECU/CO/4 (14 November 2019), paras. 11–12; and China, UN Doc. E/C.12/Chn/CO/3 (22 March 2023), paras. 24-26.

³⁴ UN CRC n 21, para. 46.

d. States have positive obligations to mitigate climate change to prevent increased threats to human rights of current and future generations.

Responsibilities to future generations have been integrated within contemporary international environmental law:

- The Stockholm Declaration (1972) states in Principle I that, ‘Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being and he bears a solemn responsibility to protect and improve the environment for present and future generations’.³⁵
- The Rio Declaration (1992) states in Principle 3 that, ‘[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations’.³⁶
- The UNFCCC states in Article 3(1) that, ‘[t]he parties should protect the climate system for the benefit of present and future generations of human kind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof’.³⁷
- The Paris Agreement’s preamble addresses future generations through the principle of intergenerational equity: ‘[a]cknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights....and intergenerational equity’.

This responsibility is repeated in numerous other international environmental law treaties.³⁸ Duties to future generations are increasingly framed in human rights terms, including in the context of climate change and the right to a healthy environment:

- The UN GA Resolution on the right to a clean, healthy and sustainable environment recognised in the preamble that ‘environmental degradation, climate change, biodiversity loss, desertification and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to effectively enjoy all human rights’.³⁹

³⁵ United Nations Conference on the Human Environment (Stockholm) , Declaration on the Human Environment, UN Doc. A/Conf.48/14/Rev.1 (1972) (UNCHE) Principle I.

³⁶ United Nations Conference on the Environment and Development (Rio de Janeiro), Rio Declaration on Environment and Development UN Doc. A/Conf. 151/5/Rev.1 (1992) (UNCED).

³⁷ UNFCCC Art. 3(1) supra at 2.

³⁸ For example the Convention on International Trade in Endangered Species of Wild Flora and Fauna (Washington) 3 March 1973, in force 1 July 1975, 993 UNTS 243 (1973 CITES) Preamble; Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki) 17 March 1992, in force 6 October 1996 31 ILM 1312 (1992) Art 2(5)(c); Convention on Biological Diversity (Rio de Janeiro) 5 June 1992, in force 29 Dec. 1993 31 ILM 822 (1992) Preamble.

³⁹ UNGA res. A/76/L.75 (26th Jul. 2022).

- The Human Rights Committee has recognised that ‘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’.⁴⁰
- The Escazú Convention 2018 further confirmed the, ‘right of every person of present and future generations to live in a healthy environment and to sustainable development’.⁴¹
- The Maastricht Principles on the Human Rights of Future Generations, which were recently adopted by a group of experts seeking to clarify and provide a progressive interpretation of international human rights law, affirm that future generations are ‘legally entitled to human rights’.⁴²

The temporal scope of mitigation obligations in relation to current generations has also been given some interpretive attention by UN treaty bodies. Notably, the CRC has recognised children’s rights as a source of longer-term mitigation obligations due to the potential of climate change to affect them throughout their lifetime, even though the full implications of their actions may not be apparent for decades to come.⁴³ By contrast, in *Billy et al v Australia* (2022),⁴⁴ the Human Rights Committee held Australia must implement adaptation measures to protect the applicants - eight Torres Strait Islanders and their children - against climate change-related human rights violations, but stopped short of finding a violation on the basis of the country’s inadequate mitigation measures, holding that Australia’s future adaptation plans would be sufficient. However, this position has been critiqued. For example, the concurring opinion of Gentian Zyberi held that there is imbalance in this approach and that the decision should have linked ‘more clearly to mitigation measures, based on national commitments and international cooperation... if no effective mitigation actions are undertaken in a timely manner, adaptation will eventually become impossible.’ This opinion identified a need for a longer-term temporal approach to mitigation. Voigt (Co-chair of the Paris Agreement’s Compliance and Implementation Committee) described the silence ‘on the need for timely and adequate mitigation measures’ as part of States positive obligations the ‘one major shortcoming’ of the decision, which could have interpreted mitigation obligations ‘in light of the global consensus expressed in the Paris Agreement’.⁴⁵

e) A State’s duty of prevention includes the obligation to cooperate at the international level to address underlying determinants, root causes and drivers of anthropogenic GHG emissions that can be identified within domestic and international legal and economic frameworks. (Therefore cooperation may be required in areas such as corporate law, investment law, trade law, banking law, and insurance law, for example).

⁴⁰ UN Human Rights Committee, ‘General Comment No. 36 on the Right to Life’ [CCPR/C/GC/36](#) (3 September 2019), para. 62.

⁴¹ UN Economic Commission for Latin America and the Caribbean (ECLAC), Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Costa Rica) 4th March 2018, in force 22nd April 2021, UNTS vol 3387C.NM.195.2018. (2018) Art. 1.

⁴² [Maastricht Principles on the Human Rights of Future Generations](#) (2023), principle 2.

⁴³ UN CRC n 21.

⁴⁴ UN Human Rights Committee, *Billy et al v Australia*, communication 3624/2019, Views Adopted 21 July 2022. UN doc. CCPR/C/135/D/3624/2019.

⁴⁵ Christina Voigt, ‘[UNHRC is Turning up the Heat: Human Rights Violations Due to Inadequate Adaptation Action to Climate Change](#)’ (*EJIL:Talk*, 26 September 2022).

Derived from obligations of ‘prevention’ and ‘cooperation’, international human rights law requires States to engage meaningfully in the processes of reform of legal and economic frameworks insofar as those processes can lead to changes that would respond to specific underlying determinants, root causes and drivers that lead to the emission of GHGs or which fail to abate the emission of GHGs. Such engagement and cooperation amounts to a duty to prevent within the scope of the ACHR. It also responds to the requirement under OAS Res 3/21 which requires States to, ‘adopt and implement policies aimed at reducing greenhouse gas emissions that reflect the greatest possible ambition, foster resilience to climate change and ensure that public and private investments are consistent with low-carbon and climate-resilient development’.⁴⁶

The obligation of prevention is recognised in the 2017 Advisory Opinion relating to Article 4 of ACHR that requires States to ‘take all appropriate measures to protect and preserve the right to life’.⁴⁷ The interpretation of the ‘right to life’ in this context should correspond with that of General Comment No 36 to the ICCPR which states:

[e]nvironmental 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. The obligations of States parties under international environmental law should thus inform the content of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law. Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors. States parties should therefore ensure sustainable use of natural resources, develop and implement substantive environmental standards, conduct environmental impact assessments and consult with relevant States about activities likely to have a significant impact on the environment, provide notification to other States concerned about natural disasters and emergencies and cooperate with them, provide appropriate access to information on environmental hazards and pay due regard to the precautionary approach.⁴⁸

With specific regard to the obligation of ‘prevention’ related to environmental damage caused by third parties, it is noted that the 2017 Advisory Opinion again advises that States have an obligation to ‘take all appropriate steps to protect and preserve the rights to life and to integrity’⁴⁹ and that ‘the duty of prevention includes measures of legal, political, administrative and cultural nature’.⁵⁰

To understand the obligation of prevention in relation to the ‘underlying determinants, and drivers of anthropogenic GHG emissions’, it is possible to elucidate guidance from the 2017

⁴⁶ OAS Res 3/21, para. 1.

⁴⁷ Para. 108.

⁴⁸ UN Human Rights Committee, General Comment No 36 to Art. 6 (Right to Life) HRC (3rd Sept. 2019) CCPR/C/GC/36 Para. 62.

⁴⁹ Para. 118.

⁵⁰ *Idem*.

Advisory Opinion relating to ‘ the obligation to act progressively and with due diligence’. It advises that ‘States are bound to comply with their obligations under the American Convention with due diligence. The general concept of due diligence in international law is typically associated with the possible responsibility of a State in relation to obligations with respect to its conduct or behavior, as opposed to obligations requiring results that entail the achievement of a specific objective’.⁵¹ The understanding of due diligence is further elaborated later in the 2017 Advisory Opinion where it states that, ‘[l]ikewise, based on the obligation of prevention in environmental law, States are bound to use all the means at their disposal to avoid activities under their jurisdiction causing significant harm to the environment. This obligation must be fulfilled in keeping with the standard of due diligence, which must be appropriate and proportionate to the level of risk of environmental harm’.⁵²

Under international human rights treaties, States must engage in international cooperation with a view to protecting human rights. For example, Article 26 of the American Convention on Human Rights recognises that:

‘The States Parties undertake to adopt measures, both internally and through international cooperation specially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.’⁵³

The obligation for States to cooperate was also referred to in the Protocol of San Salvador 1988 which states that:

‘The States Parties to this Additional Protocol to the American Convention on Human Rights undertake to adopt the necessary measures, both domestically and through cooperation among states, especially economic and technical, to the extent allowed by their available resources, and taking into account their degree of development, for the purpose of achieving progressively and pursuant to their internal legislations, the full observance of the rights recognized in this Protocol.’⁵⁴

The obligation is further emphasised at length in the 2017 Advisory Opinion.⁵⁵ The obligation of cooperation is also embraced in international environmental law, being integrated throughout the Rio Declaration which establishes in particular that ‘States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem’,⁵⁶ and that ‘States should co-operate to promote a supportive and open international economic system that would lead to economic growth and sustainable

⁵¹ Para. 123.

⁵² Para. 142.

⁵³ Art. 26.

⁵⁴ Protocol of Sa n Salvador Art. 1.

⁵⁵ Paras. 181-6.

⁵⁶ Principle 7.

development in all countries, to better address the problems of environmental degradation'.⁵⁷

The UNFCCC⁵⁸ and the Paris Agreement⁵⁹ also specifically include the obligation of States to cooperate in actions to combat anthropogenically induced climate change. The CESCR has highlighted that States should ensure that ESC rights are given due attention in international agreements and, to that end, consider the development of further legal instruments, and that the conclusion of international agreements does not adversely impact these rights.⁶⁰

The main mitigation focus of the UNFCCC relates to GHG emissions of State parties. The UNFCCC focuses less attention on underlying determinants and root causes of these GHG emissions, including those that exist within international and domestic legal and economic frameworks that can predispose business and industry to decision-making that leads to environmental harm, including the emission of GHGs.⁶¹ These underlying determinants can exist within international legal and economic frameworks such as those within corporate law,⁶² investment law,⁶³ international trade law,⁶⁴ banking law,⁶⁵ and insurance law, for example.⁶⁶

Within the context of the obligation of States to cooperate to 'address the underlying determinants, root causes and drivers of anthropogenic GHG emissions', it is pertinent to note that under Art. 2 of ACHR, States have the obligation to develop appropriate laws where none exist. This obligation is restated in Art. 2 of the Protocol of San Salvador. This obligation can be interpreted as a requirement to amend existing laws where necessary and also to cooperate at the international level to improve associated international law where necessary, too.

The obligation is consistent with and puts into effect the expectation of the OAS that States

'should adopt and implement policies aimed at reducing greenhouse gas emissions that reflect the greatest possible ambition, foster resilience to climate change and ensure that public and private investments are consistent with low-carbon and climate-resilient development.'⁶⁷

⁵⁷ Principle 12.

⁵⁸ Articles 3, 4 and 6.

⁵⁹ Article 14(3).

⁶⁰ CESCR General Comment 14 on the Right to Health E/C.12/2000/4 (2000).

⁶¹ Daniel Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press, 2010) 10; Karen Morrow, 'Rio + 20, the Green Economy and Re-Orienting Sustainable Development,' (2012) 14 *Environmental Law Review*, 279; Philippe Sands, 'The Environment, Community and International Law,' (1989) 30 *Harvard International Law Journal*, 393, 399; Stephen J. Turner, *A Global Environmental Right* (Routledge, 2014) 101-115.

⁶² Peter Muchlinski, *Multinational Enterprises and the Law* (OUP, 2021) 727.

⁶³ Surya P. Subedi, *International Investment Law – Reconciling Policy and Principle* (Hart Publishing, 2020) 127-8, 251-297.

⁶⁴ Daniel Esty, *Greening the GATT – Trade, Environment and the Future* (Columbia University Press, 1994) 131-2.

⁶⁵ Kern Alexander, *Principles of Banking Regulation*, (CUP, 2019) 350-2.

⁶⁶ Working Group—UNEP FI, *The Global State of Sustainable Insurance—Understanding and Integrating Environmental, Social and Governance Factors in Insurance*. 2009.

⁶⁷ IACmHR OAS Res. 3/21 C. Operative Part. 1(1).

Response to 2A

2.A What should a State take into consideration when implementing its obligations: (i) to regulate; (ii) to monitor and oversee; (iii) to request and to adopt social and environmental impact assessments; (iv) to establish a contingency plan; and (v) to mitigate any activities under its jurisdiction that exacerbate or could exacerbate the climate emergency?

Summary of Recommendations

- a) *States should take into consideration and implement the due diligence required in their responsibility to regulate, monitor and oversee emissions from public and private actors across all sectors.*
- b) *Within the context of the obligation of States to (i) regulate (ii) monitor and oversee activities that could exacerbate the climate emergency, in light of their nationally determined contributions, States have a particular obligation to focus on the energy transition away from fossil fuels to renewable energy.*
- c) *Human development must be decoupled from the destruction of nature and the overconsumption of natural resources to achieve the realization of the human rights of present and future generations and the integrity of nature and natural systems*
- d) *States should take into consideration and take measures to ensure that mitigation policies and initiatives embrace a human rights-based approach, including human rights impact assessments; measures to mitigate and human rights harms; and access to justice and remedies in the context of harms to human rights*

2A Recommendations with Commentary

a) States should take into consideration the due diligence required in their responsibility to regulate, monitor and oversee emissions from public and private actors across all sectors.

The Paris Agreement provides direction relating to the due diligence requirements of States in the way that they regulate, monitor and oversee emissions from public and private actors across all sectors. It states that:

‘[i]n accounting for anthropogenic emissions and removals corresponding to their nationally determined contributions, Parties shall promote environmental integrity, transparency, accuracy, completeness, comparability and consistency, and ensure the avoidance of double counting, in accordance with guidance adopted by the Conference of the Parties serving as the meeting of the Parties to this Agreement.’⁶⁸

It further states that:

⁶⁸ Paris Agreement, n 3, para. 13.

‘[i]n the context of their nationally determined contributions, when recognizing and implementing mitigation actions with respect to anthropogenic emissions and removals, Parties should taken into account, as appropriate, existing methods and guidance under the Convention.’⁶⁹

International human rights bodies, including the Inter-American Court of Human Rights and UN treaty bodies, have made recommendations to States to regulate, monitor and oversee third party actors insofar as their activities impact upon the environment, as well as climate change more specifically, with consequences for human rights. In its Advisory Opinion OC-23/17 on the environment and human rights,⁷⁰ the Inter-American Court held that state obligations to respect and ensure the rights and freedoms recognised under the American Convention entails the duty of States to:

‘(i) regulate activities that could cause significant harm to the environment in order to reduce risk to human rights ...; (ii) supervise and monitor activities under their jurisdiction that could produce significant environmental damage and, to this end, implement adequate and independent monitoring and accountability mechanisms that include measures of prevention and also of sanction and redress, ...; (iii) require an environmental impact assessment when there is a risk of significant environmental harm, regardless of whether the activity or project will be carried out by a State or by private persons. ...; (iv) institute a contingency plan in order to establish safety measures and procedures to minimize the possibility of major environmental accidents ...; and (v) mitigate significant environmental damage, even when it has occurred despite the State’s preventive actions, using the best scientific knowledge and technology available.’⁷¹

The Advisory Opinion also underlined that States’ duties extend to actions to preventing businesses from violating the right to a healthy environment and the rights associated with it. It held that ‘In the context of environmental protection, the State’s international responsibility derived from the conduct of third parties may result from a failure to regulate, supervise or monitor the activities of those third parties that caused environmental damage.’⁷²

b) Within the context of the obligation of States to (i) regulate, (ii) monitor and oversee activities that could exacerbate the climate emergency, in light of their nationally determined contributions, States have an obligation to focus on the energy transition away from fossil fuels to renewable energy.

Activities that States must regulate in the context of energy transition include the fossil fuel industry, as well as energy use in other sectors that heavily rely on fossil fuels. In its *Saachi et al v Argentina et al* decisions, which focused on States with high current and historic GHG emissions, the CRC emphasised the importance of regulating emissions of GHG which cause climate change holding that: ‘through its ability to regulate activities that are the source of

⁶⁹ Ibid para. 14.

⁷⁰ Paras 116 onwards.

⁷¹ Para. 114.

⁷² Para 119, and 146-170.

these emissions and to enforce such regulations, the State party has effective control over the emissions'.⁷³

However, a distinct consideration that arises in the context of the duty to prevent regarding the impacts of the climate emergency, is less about how fossil fuel extraction or use is regulated, but more about the need to regulate for reducing reliance on fossil fuels. The urgent need to phase out from using coal power means that regulations must be put in place to rapidly shut down coal power plants, reliance on oil and gas for energy needs must be reduced at pace, subsidies should not be granted to dirty fuels, but should rather be allocated to green energy production. It is estimated by scientists that approximately 60 % of oil and gas, and 90 % of coal must remain unextracted to keep within a 1.5 °C carbon budget – oil and gas stranded assets estimated to cost over USD 1 Trillion.⁷⁴

A key consideration and obstacle for States in implementing their duty to prevent through fossil fuel phaseout concerns their obligations under international investment treaties. As recently recognised by the IPCC⁷⁵ and the UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd,⁷⁶ investment treaty obligations of States pose challenges to energy transition by inducing regulatory chill and raising the cost of fossil fuel phase-out.⁷⁷ The fossil fuel sector is among the most frequent users of investment treaties and investment arbitration to seek onerous levels of compensation for oil, gas and mining projects that are impacted by government regulation to protect rights of affected communities and the environment.⁷⁸ Such cases included those filed against member States of the American Convention of Human Rights, such as *Bear Creek v Peru*,⁷⁹ *Eco Oro v Colombia*,⁸⁰ and *Copper Mesa v Ecuador*⁸¹, where project terminations or refusals to grant mining licenses in order to protect the rights of indigenous peoples and the natural environment gave rise to state liability under international investment law. Principle 9 of the UN Guiding Principles on Business and Human Rights provides that '[s]tates should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts'. To minimize the risk of investment treaty claims in response to regulation or measures phasing out fossil fuels, States should review their investment treaty commitments to identify arbitration or litigation risks arising from such instruments that restrict the State's ability to fulfil its duty to prevent environmental and human rights harms. States could terminate investment treaties

⁷³ UN Committee on the Rights of the Child, *Sacchi et al. v Argentina et al*, Communication No. 104/2019, CRC/C/88/D/104/2019 (22 September 2021), para. 10.6.

⁷⁴ Dan Welsby and others, '[Unextractable fossil fuels in a 1.5 C world](#)', *Nature* (2021) 597, pp. 230-234.

⁷⁵ IPCC 6th Assessment Report Chapters 14 and 15, 2022 (Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the IPCC)

⁷⁶ Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd [Paying polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights](#), A/78/168, 13 July 2023

⁷⁷ Kyla Tienhaara and Lorenzo Cotula, 'Raising the cost of climate action? Investor-state dispute settlement and compensation for stranded fossil fuel assets' 2020 IIED Land, Investment and Rights Series.

⁷⁸ Lea Di Salvatore, '[Investor-State Disputes in the Fossil Fuel Industry](#)' IISD Report, December 2021.

⁷⁹ *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21.

⁸⁰ *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41.

⁸¹ *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA No. 2012-2.

or introduce climate change carve-outs to ensure measures taken to fight climate change are not covered by such treaties.

c) Human development must be decoupled from the destruction of Nature and the overconsumption of natural resources to achieve the realization of the human rights of present and future generations and the integrity of nature and natural systems.

The Inter-American Court should be mindful of scientific and social-scientific debate around how global economic growth bears on climate change and other environmental harms,⁸² and it should be mindful of proposed alternatives to mainstream development that centre on harmony between society and nature.⁸³ For example, social movements have promoted *Buen Vivir*, the concept of 'living well' which derives from worldviews of Quechua speaking peoples, and is recognised in the Constitutions of Bolivia and Ecuador, the latter stating: 'We ... hereby decide to build a new form of public coexistence, in diversity and in harmony with nature, to achieve the good way of living'.⁸⁴ Other Andean indigenous peoples have similar worldviews, including *Ametsa Asaiki* of the Peruvian Amazonian peoples and *Nandereko* of the Guarani.⁸⁵ Raworth's 'Doughnut Economics' is guided by a social floor, which she argues could be normatively established in line with international human rights standards, together with an ecological ceiling to identify a socially just and environmentally safe space for humanity that avoids overshooting planetary boundaries,⁸⁶ while other postgrowth proposals are also centred on human and environmental wellbeing.⁸⁷

Indeed, the jurisprudence of the Inter-American Court of Human Rights already provides a strong foundation for a holistic interpretation of human rights in relation to the climate emergency and the symbiosis between the well-being of people and the planet, recognising the links of a healthy environment with a range of human rights, as well as recognising rights of indigenous peoples to property and culture in relation to land, which has deep connections with nature. The mentioned Advisory Opinion OC-23/17 on the environment and human rights is worth citing in this regard.⁸⁸ Another especially good example of a holistic approach

⁸² eg. Intergovernmental Panel on Climate Change (IPCC), '[Climate Change 2022: Mitigation of Climate Change](#)' (IPCC, 2022); Jason Hickel, 'The Contradiction of the Sustainable Development Goals: Growth versus Ecology on a Finite Planet' (2019) 27 *Sustainable Development* 873.

⁸³ Several legal scholars have considered the implications of these alternatives in relation to international law. See, for example: Andre Nunes Chaib, '[Multinaturalism in International Environmental Law: Redefining the Legal Context for Human and Non-Human Relations](#)' *Asian Journal of International Law* (2022) 12(1); Judith Bueno De Mesquita, 'Re-interpreting human rights in the climate crisis: moving beyond economic growth and (un)sustainable development to a future with degrowth' *Netherlands Quarterly of Human Rights* (forthcoming, January 2024); Louis Kotze and Sam Adelman, 'Environmental Law and the Unsustainability of Sustainable Development: A Tale of Disenchantment and of Hope' (2022) 3(3) *Law Critique* 1.

⁸⁴ Constitution of the Republic of Ecuador (2008), preamble.

⁸⁵ Eduardo Gudynas, 'Buen Vivir: Tomorrow's Today' (2011) 54(4) *Development* 441-447.

⁸⁶ Kate Raworth, *Doughnut Economics: Seven Ways to Think Like a Twenty First Century Economist* (Cornerstone 2017).

⁸⁷ See, for example, Giacomo D'Alisa, Federico Demaria and Giorgos Kallis, *Degrowth: A Vocabulary for a New Era* (Routledge, 2014); Jason Hickel, *Less is More: How Degrowth will Save the World* (Heinemann, 2020) Jason Hickel & Giorgos Kallis 'Is Green Growth Possible?' (2020) 25(4) *New Political Economy*, 469-486.

⁸⁸ Inter-American Court of Human Rights, 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), Advisory Opinion OC-23/17 of 15 November 2017. Series A No. 23.

to the interdependence of human rights is *Lhaka Honhat v Argentina* (2020). Based on a combined reading of Articles 21 and 26 ACHR, in that case the Court for the first time drew an explicit connection between the right to communal and traditional property of indigenous peoples, on the one hand, and the rights to food, water, cultural identity and diversity, and the right to a healthy environment, on the other hand.⁸⁹

As stated above, the CRC has stated that:

‘The rights to adequate housing, food, water and sanitation should be realized sustainably, including with respect to material consumption, resource and energy use and the appropriation of space and nature.’⁹⁰

However, the contribution of consumer lifestyles to climate change and risks to human rights have yet to be addressed by human rights mechanisms.⁹¹ As stated by the Maastricht Principles on the human rights of future generations:

‘The cessation of unsustainable patterns of production, consumption and lifestyles is required to guarantee the full enjoyment of human rights, including economic, social, cultural and environmental rights, by all members of present and future generations. Human development must be decoupled from the destruction of Nature and the overconsumption of natural resources to achieve the realization of the human rights of present and future generations and the integrity of nature and natural systems.’⁹²

d) States should take measures to ensure that mitigation policies and initiatives embrace a human rights-based approach, including human rights impact assessments; measures to mitigate and human rights harms, and access to justice and remedies in the context of harms to human rights.

The Paris Agreement states in its preamble that when taking action to address climate change, States should ‘respect, protect, promote and consider their respective obligations on human rights’. In many contexts, human rights have been neglected and harmed in green energy-related developments, for example, the construction of wind or solar farms on land of indigenous peoples without their consent, or displacement of local communities, the violation of workers’ rights (or child rights where child labour is involved);⁹³ or pollution affecting front-line communities’ human rights to water, health and a healthy environment, in the context of the mining of minerals, such as copper, cobalt, lithium and manganese that are needed for energy transitions.⁹⁴ General Comment 26 builds on this non-operative paragraph, as well as norms and obligations under international human rights law to clarify that under the CRC,

⁸⁹ Inter-American Court of Human Rights, *Indigenous Communities of Lhaka Honhat (Our Land) Association v Argentina*, Merits, Reparations and Costs (6 February 2020), paras. 92-98 and 202-54.

⁹⁰ UN CRC n 21, para. 46.

⁹¹ Ibid.

⁹² Maastricht Principles, n 42, preamble.

⁹³ Amnesty, [Industry Giants Fail to Tackle Child Labour Allegations in Cobalt Battery Supply Chains](#) (2017)

⁹⁴ Business and Human Rights Resource Centre found 510 allegations of human rights harms related to the extraction of minerals essential to green technologies between 2010-2022. See <https://www.business-humanrights.org/en/from-us/transition-minerals-tracker/>

‘States should integrate standards and procedures to assess the risk of harm to children into the planning and implementation of new environment-related projects and take measures to mitigate the risks of harm, in compliance with the Convention and the Optional Protocols thereto. States should cooperate to support the establishment and implementation of procedures and mechanisms to provide access to effective remedies for violations of children’s rights in this context.’⁹⁵

⁹⁵ UN CRC n 21, para. 93.

Response to F1

F.1. What considerations and principles should States and international organisations take into account, collectively and regionally, when analyzing shared but differentiated responsibilities in the context of climate change, from the perspective of human rights, international refugee law and intersectionality?

Summary of Recommendations

- a) *In the analysis of shared but differentiated responsibilities in the context of climate change, States and international organizations should bear in mind that climate change has very unequal implications for different groups. It is therefore essential for States and international organizations to adopt an intersectional approach to equality, including poverty and socio-economic status.*
- b) *Poor and failed governance of nature, including that leading to losses through illegal activities and the unsustainable use of publicly and privately owned resources, has contributed to unsustainable levels of damage to the natural environment. In the spirit of the social function of property, recognized in multiple national constitutions particularly in the Americas, the right to property must be understood within the context of a democratic society that aims to secure individual rights, while advancing public welfare and protecting the natural environment. The right to property must be made compatible with the necessary and proportionate measures to preserve other human rights and tackle climate change.*

F1 Recommendations with Commentary

a) In the analysis of shared but differentiated responsibilities in the context of climate change, States and international organizations should bear in mind that climate change has very unequal implications for different groups. It is therefore essential for States and international organizations to adopt an intersectional approach to equality, including poverty and socio-economic status.

The Inter-American Court can make a defining contribution to a richer understanding and acknowledgment of the cumulative and varied effects of discrimination and disadvantage due to the combination of identity – for example sex, ethnicity, disability, – and material conditions – income and wealth. A holistic and interdependent approach to human rights, having due regard on economic, social, cultural and environmental rights, requires paying attention to the situation and needs of people and groups at greater risk of harm, disadvantage and discrimination, who should be prioritized in public policies intended to protect and fulfil these rights: this includes indigenous populations, children, older persons, racially and ethnically marginalized groups, and people living in poverty. People experiencing multiple forms of exclusion are often most at risk. An approach to equality that includes poverty and socio-economic status would contribute to the advancement of the Inter-American Court’s jurisprudential awareness of intersectionality, including material inequality. As pointed out by the Inter-American Court in the *Fireworks Factory Case* (2020):

‘... The right to equality guaranteed by Article 24 of the Convention has two dimensions. The first is a formal dimension that establishes equality before the law; the second is a material or substantial dimension that requires the adoption of positive measures of promotion in favor of groups that have historically been discriminated against or marginalized due to the factors referred to in Article 1(1) of the American Convention. This means that the right to equality entails the obligation to adopt measures that ensure that the equality is real and effective; in other words, to correct existing inequalities, to promote the inclusion and participation of historically marginalized groups, and to guarantee to disadvantaged individuals or groups the effective enjoyment of their rights and, in short, to provide individuals with the real possibility of achieving material equality. To this end, States must actively combat situations of exclusion and marginalization.’

In the context of climate change, it is important to bear in mind that, while the rich may be able to afford to escape hunger, health threats and conflict that arise in the context of climate change, people in poverty experience the worst of its effects. At the same time, climate change is disproportionately fueled by lifestyles and consumption of the world’s rich, with disparities evident within and between countries.

b) Poor and failed governance, including that leading to losses of nature through illegal activities and the unsustainable use of publicly and privately owned resources, has contributed to unsustainable levels of damage to the natural environment. In the spirit of the social function of property, recognized in multiple national constitutions particularly in the Americas, the right to property must be understood within the context of a democratic society that aims to secure individual rights, while advancing public welfare and protecting the natural environment. The right to property must be made compatible with the necessary and proportionate measures to preserve other human rights and tackle climate change.

Anthropogenic GHG emissions are the result of human actions and omissions. While States and public authorities are ultimately responsible to respect, protect and fulfil rights, both public and private actors are responsible for global warming. The social function of property can help when dealing with situations where privately owned resources – e.g. cars, home goods, land - whether owned by individuals or companies - result in social and environmental harm. The idea of the social function of property has been incorporated into a number of national constitutions in the Americas. However, to our knowledge, the principle of the social function has only been explicitly acknowledged once by the Court, in *Chiriboga v Ecuador* (2008):

‘The right to property must be understood within the context of a democratic society where in order for the public welfare and the collective rights to prevail there must be proportional measures that guarantee individual rights. The social role of the property is a fundamental element for its functioning and for this reason, the State, in order to guarantee other fundamental rights of vital relevance in a specific society, can limit or

restrict the right to property, always respecting the cases contained in Article 21 of the Convention and the general principles of international law.⁹⁶

In a new Advisory Opinion, the Inter-American Court could contribute to the recognition, development and operationalization of the principle of the social function of the right to property. While regional human rights bodies have not been prolific in the unpacking of this principle, the concept has found its place in international law. Already in 1969, the UN General Assembly agreed that development required ‘the establishment, in conformity with ... the social function of property, of forms of ownership of land and of the means of production which preclude any kind of exploitation of man, ensure equal rights to property for all and create conditions leading to genuine equality among people’.⁹⁷ More recently, in General Comment No. 17, on the right to benefit from scientific and literary productions one is the author of, the CESCR established that intellectual property has a social function, as a result of which States should prevent unreasonably high costs for access to medicines, educational material, and means of food production.⁹⁸ Similarly, in her report on the financialization of housing, then UN Special Rapporteur on Adequate Housing, Leilani Farha, called on States to ensure that public and private investment in housing ‘recognizes its social function and States’ human rights obligations’.⁹⁹

The synergy between social function and human rights would contribute to identify the core content of the right to property. As observed by the African Commission on Human and Peoples’ Rights, one of the elements to take into account when determining the proportionality of a limitation of rights is whether the ‘very essence’ of the right is at risk.¹⁰⁰ The social function of property would invite the Inter-American Court of Human Rights to specify the very essence or the core content of the right to property in light of the whole corpus juris of human rights and environmental law. Article 23 of the 1948 American Declaration of the Rights and Duties of Man could be a helpful starting point: the essential or core content of private property would be the level that ‘meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home’.

⁹⁶ Inter-American Court of Human Rights, *Salvador Chiriboga v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs (6 May 2008), para. 60.

⁹⁷ UN General Assembly Resolution 2542 (XXIV), Declaration on Social Progress and Development, art. 6 (11 December 1969)

⁹⁸ CESCR, General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (Art. 15, Para. 1 (c) of the Covenant), 2006, UN Doc. E/C.12/GC/17, para. 35; see also CESCR, General Comment No. 25: Science and Economic, Social and Cultural Rights (art. 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights), 2020, U.N. Doc. E/C.12/GC/25, para. 62.

⁹⁹ Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, 2017, U.N. Doc. A/HRC/34/51, para. 77.

¹⁰⁰ African Commission on Human and Peoples’ Rights, *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v. Zimbabwe*, Case 284/03 (2009), para. 176.

Response to F3

F3 What obligations and principles should guide the individual and coordinated measures that the States of the region should adopt to deal with involuntary human mobility, exacerbated by the climate emergency?

Recommendations with Commentary

*a) States in the region and beyond, having regard to the Global Compact on Refugees and the Universal Declaration of Human Rights, should ensure borders remain open so that persons fleeing climate emergencies and disasters can take adaptive measures to obtain protection and engage in steps toward durable and sustainable solutions.*¹⁰¹

The Inter-American System of Human Rights (IASHR) can provide guidance to States that will set out their obligations under international human rights law to respond to the concomitant displacements flowing from climate emergency events and disasters. Everyone affected by climate emergency is in a situation of vulnerability, but that is compounded by displacement from their homes, whether that be within the territory of their country of nationality or across an international border. Moreover, this builds on the complementary protection provided by the IASHR in cases of forced displacement.¹⁰²

In international law, refugees are persons who are outside their country of nationality and have a well-founded fear of persecution on grounds of race, religion, nationality, membership of a particular social group or political opinion, and who are unwilling or unable to avail themselves of the protection of their country of nationality or, if stateless, habitual residence (Article 1A.2 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol thereto).¹⁰³ Those fleeing climate emergencies are generally not recognised as refugees.¹⁰⁴ The 1998 Guiding Principles on internal displacement do include those affected by natural or man-made disasters;¹⁰⁵ furthermore, a refugee in the country of asylum can find themselves internally displaced by a natural or man-made disaster and would still fall within the protection mandate of UNHCR.¹⁰⁶ Within the Americas, the Cartagena Declaration of 1984 provides more regionally contextual rules, discussed below.

The American Declaration on the Rights and Duties of Man lays the foundations in Articles I, VIII and XXVII for the protection of the rights of persons who may be forcibly displaced as a

¹⁰¹ [UN Global Compact on Refugees](#) (2018).

¹⁰² Inter-American Court of Human Rights, *Pacheco Tineo Family v Plurinational State of Bolivia*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 25 November 2013, Ser C, No 272.

¹⁰³ 189 UNTS 137 (28 July 1951), Article 1A.2 (1951 Convention); and 1967 Protocol, 606 UNTS 267 (16 December 1966).

¹⁰⁴ But see, UNHCR, Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters, 1 October 2020, <https://www.refworld.org/docid/5f75f2734.html>. See also, J. McAdam and T. Wood, Kaldor Centre Principles on Climate Mobility, November 2023, <kaldorcentre.unsw.edu.au>.

¹⁰⁵ Guiding Principles on Internal Displacement 1998 (Guiding Principles), and African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), 22 October 2009.

¹⁰⁶ See Statute of the Office of UNHCR, UNGA Res 428 (V) (14 December 1950) para 1, and <http://www.refworld.org/idps.html>.

consequence of climate emergencies. To the extent that climate emergencies have created insecurity in States, the need for asylum must be understood to include situations where the rule of law cannot be maintained for the safety of all people on the territory, including those already forcibly displaced from another state who now find themselves compromised by climate emergency in the country of asylum.

The effects of climate emergencies on populations in States parties to the American Convention on Human Rights clearly have the potential to undermine their ability to enjoy the rights accorded them thereunder. In particular, climate emergencies threaten the following rights: right to life [Article 4], humane treatment, including inhuman or degrading treatment [5],¹⁰⁷ personal liberty and security [7], protection of family unity [17], specific rights of the child [19], freedom of movement (within and beyond borders) and residence [22], equal protection before the law [24], and non-discrimination [1].

Protection under international refugee law and human rights law

International refugee law is set out in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. All countries in the region are parties to at least one.¹⁰⁸ In 1984, the Organization of American States (OAS) promulgated the Cartagena Declaration on Refugees that expanded the definition of a refugee for the region.¹⁰⁹

§III To reiterate that, in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention [Governing the Specific Aspects of Refugee Problems in Africa] (article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.

¹⁰⁷ In *AC (Eritrea)* [2023] NZIPT 802201–202, paras. 142-49, the New Zealand Immigration and Protection Tribunal held that while they did not qualify as 1951 Convention refugees, returning an elderly couple who were subsistence farmers to a region affected adversely by climate change events made them vulnerable to food insecurity such that it would be cruel, inhuman or degrading treatment under Article 7 ICCPR to return them.

¹⁰⁸ Available at <https://www.unhcr.org/uk/media/states-parties-1951-convention-and-its-1967-protocol>. The post-1967 definition of a refugee is someone who is outside her/his country of nationality with a well-founded fear of persecution based on one of five grounds, race, religion, nationality, membership of a particular social group, or political opinion, and who is unable or unwilling due to that fear to avail her/himself of the protection of her/his country of nationality. The definition also applies, *mutatis mutandis*, to stateless persons with respect to their country of habitual residence.

¹⁰⁹ OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190-93 (1984-85), 17 April 1998.

It is asserted here that the effects of climate change or other disaster could comprise events seriously disturbing public order.¹¹⁰ For certain, the effects of climate change can place pressure on land use and on access to water that have triggered violence between different groups in States across the globe, such that those fleeing could fall within the traditional 1951 definition of a refugee and would be entitled to protection from *refoulement*. However, even if there is no such violence or conflict in the Americas, people having to move as part of adaptation measures to climate change or disaster, even including economic instability, should fall within the extended Cartagena definition. Where homes, access to health care and livelihood, and education have been destroyed by earthquakes or floods, for example, governments in the region need to keep their borders open and provide refuge until it is safe to return because those events will have seriously disturbed public order threatening human rights and rule of law in the country of nationality.¹¹¹

Before moving on to internally displaced persons, one further element of cross-border displacement needs to be considered. The framework provided by the 1951 Convention focuses on protection in the country of asylum.¹¹² Nevertheless, the Preamble to the 1951 Convention does recognise that:

the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation.¹¹³

Thus, respecting refugee status and the concomitant rule that repatriation must be voluntary, requires States to co-operate to ensure displacement is as short-lived as possible and that refugees can obtain a durable and sustainable solution. In line with the Objectives and Guiding Principles of the 2018 Global Compact on Refugees,¹¹⁴ States should '(i) ease pressures on host countries; ... and (iv) support conditions in countries of origin for return in safety and dignity' (Paragraph 7). That safety and dignity can only be achieved where human rights standards and the rule of law can be respected and countries in the region,

¹¹⁰ And see, Cleo Hansen-Lohrey, 'Assessing serious disturbances to public order under the 1969 OAU Convention, including in the context of disasters, environmental degradation and the adverse effects of climate change,' Division of International Protection, PPLA/2023/01 September 2023, at p. 62.

Both slow and sudden-onset disasters may also result in a serious disturbance to public order in a society. A sudden-onset disaster such as an earthquake or cyclone, for example, can have widespread adverse impacts that affect essential services and the availability of clean water and adequate food, and damage road, telecommunications and health infrastructure. These impacts may undermine societal stability and result in a denial of individuals' rights to physical integrity, liberty or even life. Slow-onset disasters can result in or contribute to a serious disturbance to public order where, for example, they cause widespread environmental degradation or destruction which impacts public safety and human security, which the State may be unable or unwilling to address.

¹¹¹ On the linkages between international rule of law and forced displacement, see Geoff Gilbert & Anna Magdalena Rüsçh, 'Rule of Law and UN Interoperability,' *International Journal of Refugee Law* (2018) 30.

¹¹² Above, n 103.

¹¹³ On the principle of international co-operation, see Article 1.3 of the United Nations Charter, Charter of the United Nations, 892 UNTS 119, 26 June 1945, and Article 2.1 of the International Covenant on Economic, Social and Cultural Rights, UNGA res. 2200A (XXI), 993 UNTS 3.

¹¹⁴ Above, n 101.

implementing MIRPS, can work together to mitigate the effects of climate change and disaster. Remaining with the Global Compact on Refugees, Paragraph 8 provides:

‘While not in themselves causes of refugee movements, climate, environmental degradation and natural disasters increasingly interact with the drivers of refugee movements. In the first instance, addressing root causes is the responsibility of countries at the origin of refugee movements. However, averting and resolving large refugee situations are also matters of serious concern to the international community as a whole, requiring early efforts to address their drivers and triggers, as well as improved cooperation among political, humanitarian, development and peace actors.’

Paragraph 9 goes on to state:

‘All States and relevant stakeholders are called on to tackle the root causes of large refugee situations, including through heightened international efforts to prevent and resolve conflict; to uphold the Charter of the United Nations, international law, including international humanitarian law, as well as the rule of law at the national and international levels; to promote, respect, protect and fulfil human rights and fundamental freedoms for all; and to end exploitation and abuse, as well as discrimination of any kind on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability, age, or other status. The international community as a whole is also called on to support efforts to alleviate poverty, reduce disaster risks, and provide development assistance to countries of origin, in line with the 2030 Agenda for Sustainable Development and other relevant frameworks.’

It is suggested that the Inter-American system of human rights is a relevant stakeholder for this purpose as part of the OAS and that it should have regard to the Global Compact on Refugees and other relevant instruments of international refugee law when interpreting the obligations of States under the ACHR.

As for internally displaced persons (IDPs), the 1998 Guiding Principles,¹¹⁵ increasingly recognised as reflecting customary international law,¹¹⁶ apply human rights standards to a population group who are facing very particular circumstances. Whereas a refugee has to have crossed an international border, an IDP is displaced within the frontiers of their own state, although refugees in the country of asylum could be further displaced therein alongside an IDP population.

The description of IDPs found in paragraph 2 of the *Introduction and Scope* of the Guiding Principles sets out that they have been ‘forced or obliged to flee ... as a result of or in order to avoid ... natural or human-made disasters, ...’. Therefore, there are none of the problems of trying to find ways to interpret the refugee definition to include those where climate change or disaster have been part of why a person crossed an international border.

¹¹⁵ Above n 105.

¹¹⁶ See <http://www.refworld.org/idps.html>. See also, Vol.39 *Refugee Survey Quarterly* (Special Issue) 405-664 (2020).

The Guiding Principles ‘reflect and are consistent with international human rights law and international humanitarian law’ paragraph 3 of the *Introduction and Scope*. As such, Principle 1 sets out that ‘[internally] displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced’. Section III of the Guiding Principles set out the rights of persons during the internal displacement and these Principles can be mapped directly on to rights found in the ACHR and set out above in paragraph 9 of this opinion, along with other obligations binding on States in the region.

What is even more important with respect to ensuring people are not displaced in the first place, Section II includes a set of Principles to protect from displacement, including displacement ‘...as a result of or in order to avoid ... natural or human-made disasters, ...’. Principle 6 prohibits arbitrary displacement, including ‘(d) In cases of disasters, unless the safety and health of those affected requires their evacuation’; and displacement shall last no longer than required by the circumstances (Principle 6.3).

Principle 7¹¹⁷ sets out the criteria a State must meet ensuring all feasible alternatives are explored, minimization measures are taken, and that, *inter alia*, the free and informed consent of those to be displaced shall be sought, and the authorities concerned shall endeavour to involve those affected, particularly women, in the planning and management of their relocation.

According to Principle 9, ‘States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands’. By analogy, given that a refugee population has already been displaced once and may be suffering trauma therefrom, it is asserted that they too require a special consideration before they are relocated within the country of asylum.

Forcibly displaced persons may have been displaced by climate change or disaster or they may subsequently be caught up in such events when displaced, internally or across borders, for another reason. There are specific legal regimes in place for such persons, but within the Americas, the protection offered by the ACHR works in parallel. This opinion shows that the

¹¹⁷ Set out here in full: Principle 7 1. Prior to any decision requiring the displacement of persons, the authorities concerned shall ensure that all feasible alternatives are explored in order to avoid displacement altogether. Where no alternatives exist, all measures shall be taken to minimize displacement and its adverse effects.

2. The authorities undertaking such displacement shall ensure, to the greatest practicable extent, that proper accommodation is provided to the displaced persons, that such displacements are effected in satisfactory conditions of safety, nutrition, health and hygiene, and that members of the same family are not separated.

3. If displacement occurs in situations other than during the emergency stages of armed conflicts and disasters, the following guarantees shall be complied with: (a) A specific decision shall be taken by a State authority empowered by law to order such measures; (b) Adequate measures shall be taken to guarantee to those to be displaced full information on the reasons and procedures for their displacement and, where applicable, on compensation and relocation; (c) The free and informed consent of those to be displaced shall be sought; (d) The authorities concerned shall endeavour to involve those affected, particularly women, in the planning and management of their relocation; (e) Law enforcement measures, where required, shall be carried out by competent legal authorities; and (f) The right to an effective remedy, including the review of such decisions by appropriate judicial authorities, shall be respected.

range of rights and protection guarantees apply during displacement but that there are legal obligations to prevent displacement in the first place.