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Bern, 18 December 2023

Amicus Curiae

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 of January 9, 2023

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I. Introduction

The Presidency of the Inter-American Court of Human Rights (hereafter "IACHR" or "the Court"), acting pursuant to Article 73, paragraph 3 of the Court's Rules of Procedure, invited all interested parties to submit a written opinion in Advisory proceedings commenced by the Republic of Columbia and Chile on January 2023, pursuant to Article 64, paragraph 1 of the American Convention on Human Rights – Pact of San José (hereinafter "the Pact of San José" or "the Convention"). Article 64 of the Convention confers on this Court an advisory jurisdiction that is more extensive than that enjoyed by any international tribunal in existence today.

Jurisdictional competence of the Inter-American Court of Human Rights

Article 62 (3) of the 1969 American Convention on Human Rights establishes the Inter-American Court's jurisdiction over matters related to the interpretation or application of the Convention. It has a contentious and an advisory function. The scope of its advisory function is not limited to the American Convention, but also to the treaties adopted within the framework of the Inter-American system, and other human rights treaties signed and ratified by American States. Under Article 64: 'The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states.' The Inter-American Court of Human Rights has broadly interpreted its competence. In 1982, upon request by Peru, the Inter-American Court of Human Rights rendered an opinion on 'other treaties subject to the consultative jurisdiction of the Court (Article 64 of the American Convention),' where it defined the limits of its advisory jurisdiction. The Court acknowledged that it has the power to interpret 'any treaty as long as it is directly related to the protection of human rights in a Member State of the inter-American system' (para. 21), and that the purpose of the advisory jurisdiction is to assist the American States in 'fulfilling their international human rights obligations and to assist the different organs of the inter-American system to carry out the functions assigned to them in this field' (para. 25). It concluded that: a) it can provide advisory opinions on any provision 'dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the principal purpose of such a treaty, and whether or not non-Member States of the inter-American system are or have the right to become parties thereto;' b) the Court 'may decline to comply

with a request for an advisory opinion if it concludes that, due to the special circumstances of a particular case, to grant the request would exceed the limits of the Court's advisory jurisdiction for the following reasons, inter alia: because the issues raised deal mainly with international obligations assumed by a non-American State or with the structure or operation of international organs or bodies outside the inter-American system; or because granting the request might have the effect of altering or weakening the system established by the Convention in a manner detrimental to the individual human being.'

With regard to the request for the advisory opinion we are discussing here, this in particular mentioned the Escazú Agreement, which can be interpreted for the abovementioned argument of the Court itself. According to the 1982 opinion, the Court can also interpret the Paris agreement unless the exercise of its function does not alter or weaken the system established by the Convention in a manner detrimental to the individual human being. It is difficult to see any possible detrimental effect to the individuals by the forthcoming advisory opinion. Even though the Inter-American Court is willing to use developing principles, the human rights protection will remain at the core of the legal reasoning, with hopefully interesting considerations on a holistic approach that takes into account the belonging of human beings to the environment. In terms of jurisdiction, it is self-evident that the topic of climate change is not limited to the boundaries of territorial jurisdiction of a State. The Inter-American Court of Human Rights, in its 2017 advisory opinion, stated that the jurisdictional link of effective control should extend to damaging activities that cause the violation. This interpretation allows the application of the human rights' system of protection beyond the place where the effects of the climate change are produced[1].

Drawing from the analysis above, the Inter-American Court of Human Rights can exercise render the advisory opinion requested on the scope of state obligations for responding to the climate emergency under the frame of international human rights law and, specifically, under the American Convention on Human Rights. The competence stems from the American Convention on Human Rights, as interpreted by the Inter-American Court of Human Rights. The historical moment is crucial and a regional court of human rights has the possibility not only to clarify certain concepts and the boundaries of states' obligations, but also to endorse approaches that emphasise the centrality of new concepts that put human

[1] Inter-American Court of Human Rights advisory opinion OC-1/82 of 24 September 1982, Other treaties subject to the consultative jurisdiction of the Court (Art. 64 American Convention on human rights), paras 102-104. Advisory Opinion 2017, Tigre M.A. and Urzola N. (2021), The 2017 Inter-American Court's Advisory Opinion: changing the paradigm for international environmental law in the Anthropocene, available at: https://www.elgaronline.com/view/journals/jhre/12-1/jhre.2021.01.02.xml.

beings in an interconnected relationship with nature. The United Nations Special Rapporteur on Human Rights of Migrants highlighted in his 2022 report that Latin America is "among the areas of greatest fragility and vulnerability to the impacts of climate change, together with the African Sahara region. The most vulnerable countries identified are: Bolivia (Plurinational State of), Guatemala, Guyana, Haiti and Honduras. In Central America, one of the impacts of slow-onset events of climate change is that a significant part of the movement of people is caused by droughts in the region's dry corridor."[2] It is notable that in order to confront the proliferation of environmental and social conflicts and ensure the protection of human rights of climate migrants, a number of governments in the region have embarked on negotiations at regional level to increase access to regular paths for mobility in Latin America and the Caribbean.

This amicus brief is based on a range of international legal sources, including judgments of the International Court of Justice, the jurisprudence of the Inter-American Court of Human Rights, decisions of other regional human rights courts and commissions, concluding observations and general comments of United Nations human rights treaty bodies, reports by UN special procedures, resolutions of human rights organs, and other relevant sources.

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In response to this request, we respectfully submits the following written opinion, as a group of experts of international law, migration and human rights widely recognized independent expertise, in order to assist the Court in its deliberations.

The observations contained in this written opinion have been organized in three sections. This first section, Section I, provides of brief introduction to the request for the Advisory Opinion by the Court and the questions presented for the Court's consideration. Section II, contextualizes the questions on which the Court is requested to opine by detailing the nexus between human rights and the environment. Section III, the core of this written opinion, which we emphasize, then addresses in detail the specific question for which the Republic of Colombia and Chile has sought the opinion from the Court.

[2] UN Special Rapporteur on the Human Rights of Migrants (2022), *Report on the Impacts of Climate Change and the Protection of the Human Rights of Migrants*, UN Doc A/77/189, 19 July 2022.

II. General Considerations

In the past months, we have witnessed very important developments at international, regional and domestic levels that contribute to identifying and better defining pertinent issues for the present submission. We provide below a list of major recent developments supported by the adoption of new reports, climate-related cases pertaining to human rights, and state practice that we would like to further discuss. As of 2022, key reports have been submitted and discussed by the Third Committee of the General Assembly in New York (13 October – 28 October 2022) that deal with the topic of climate change and human rights duties. This includes:

- The *Report on ecological crisis, climate justice and racial justice*, submitted by the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance;[3]
- The *Report on human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, submitted by the UN Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment; [4]
- The *Report on the promotion and protection of human rights in the context of mitigation, adaptation, and financial actions to address climate change*, submitted by the UN Special Rapporteur Human Rights and Climate Change;[5]
- The *Report on violence against women and girls in the context of the climate crisis, including environmental degradation and related disaster risk mitigation and response*, submitted by the UN Special Rapporteur on Violence Against Women;[6]

[3] UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance (2022), *Report on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance on Ecological Crisis, Climate Change and Racial Justice*, UN Doc A/77/2990, 25 October 2022.
[4] UN Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment (2022), *Report on Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc A/77/284, 10 August 2022.
[5] UN Special Rapporteur on the Human Rights and Climate Change (2022), *Report on the Promotion and Protection of Human Rights in the Context of Mitigation, Adaptation, and Financial Actions to Address Climate Change*, UN Doc A/77/226, 26 July 2022.
[6] UN Special Rapporteur on Violence Against Women and Girls, Its Causes and Consequences (2022), *Report on Violence Against Women and Girls in the Context of the Climate Crisis, Including Environmental Degradation and Related Disaster Risk Mitigation and Response*, UN Doc A//77/136, 11 July 2022.

- The *Report on the impacts of climate change and the protection of the human rights of migrants*, submitted by the UN Special Rapporteur on the Human Rights of Migrants.[7]

These reports offer significant and innovative analysis of recent developments on how human rights intersects with environmental harm. All reports have been informed by states members' contributions and inputs received from diverse stakeholders such as civil society, international organizations and national human rights institutions. For instance, the UN Special Rapporteur on Contemporary Forms of Racial Discrimination and the UN Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment warn that the escalating effects of the climate crisis are disproportionally burdensome to people living in what they identify as 'sacrifice zones'. These are described as places rendered dangerous due to environmental degradation and where residents suffer physical health consequences and human rights violations particularly for those in vulnerable situations. These events interfere with the full enjoyment of human rights by creating unprecedented protection gaps and it is increasingly relevant to prioritize mitigation, adaptation and restoration measures for those who are vulnerable to or at risk from environmental harm. This was confirmed by the IPCC 2022 report, which highlights that 'approximately 3.3 to 3.6 billion people live in contexts that are highly vulnerable to climate change (high confidence).'[8] Together with the 'situational' dimension, the contemporary use of the notion of vulnerability refers to a 'personal' dimension that can affect certain individuals and/or communities more seriously than others.

The Paris Agreement also takes on a vulnerability approach, paragraph 11 of which mentions 'people in vulnerable situations' (Preamble), where the characterization of an individual or a group as a 'vulnerable subject' identifies them as 'particularly prone to being harmed, exploited or discriminated' against. During the COP27, which took place from 6 to 18 November 2022, Member states stressed the increasing link between vulnerability and environmental harm.[9] In line with this, it is important to recall

[7] UN Special Rapporteur on the Human Rights of Migrants (2022), *Report on the Impacts of Climate Change and the Protection of the Human Rights of Migrants*, UN Doc A/77/189, 19 July 2022.

[8] Intergovernmental Panel on Climate Change (IPCC) (2022), *Climate Change 2022: Impacts, Adaptation and Vulnerability*, Contribution of Working Group II to the Sixth Assessment Report of the IPCC, Technical Summary, Cambridge: Cambridge University Press, available at: https://doi.org/10.1017/9781009325844.

[9] Angola, High-level Segment Statement COP 27, 10 November 2022, 'The nexus between climate change and the challenges of peace and security at a global level, especially in Africa, is increasingly evident. Rising temperatures, the seas level rise, prolonged droughts and other extreme weather effects are affecting the lives and livelihoods of communities around the world, worsening economic, social or political conditions, leaving vulnerable populations very exposed to conflicts and instability'; Zimbabwe, High-level Segment Statement COP 27, 13 November 2022, 'We meet at a time when the impact of climate change

the work of International Law Commission (ILC) Study Group on 'Sea Level Rise in International Law' established in 2019 to address issues related to the protection of people affected by slow-onset events by the United Nations. During the 77th Session of the Sixth Committee of the General Assembly (28 October – 1 November 2022), the first issue paper was presented and discussed in New York. More than 60 statements have been submitted by Member states that raise attention on the crucial need to clarify human rights obligations relating to the human impacts of environmental events by identifying and prioritizing the needs of vulnerable rights holders.[10]

a) Vulnerability: Climate Migrants at the Frontlines

The notion of vulnerability that is gaining momentum in the legal reasoning of all international human rights bodies in the context of environmental changes.[11] The Intergovernamental Panel on Climate Change (IPCC) in 2007 stated that "vulnerability to climate change is the degree to which geophysical, biological and socio-economic systems are susceptible to, and unable to cope with, adverse impacts of climate change […] The term "vulnerability" may therefore refer to the vulnerable system itself, e.g. low-lying islands or coastal city; the impact to the system, e.g. flooding of coastal cities and agricultural lands or forced migration; or the mechanims causing these impacs, e.g., disintegration of the West Antactic ice sheet".[12] The definition highlights the disadvantage position of certain countries that due

continues destroying people's lives and livelihoods in every part of the world'; Canada, High-level Segment Statement COP 27, 16 November 2022, 'Inspirons-nous des nations et des communautés les plus vulnérables, leur donner les moyens d'agir et les inclure dans les discussions – les peuples autochtones, les femmes et les groupes marginalisés qui sont en première ligne face aux changements climatiques'.

[10] Jamaica highlights that 'the climate crisis affects those rights that are protected by human rights law. The International Covenant on Civil and Political Rights (ICCPR) confers a positive obligation on States to protect the right to life and the International Covenant on Economic, Social and Cultural Rights (ICESCR) mandates States to ensure adequate food, housing and improved standard of living', 1 November 2022; Maldives states that 'This debate, in our view, should follow a human rights-based approach. Further, the unforgiving effects of climate change disproportionally affect the most vulnerable sections of the population: women, children, seniors, people with disabilities, people of colour, and indigenous groups are particularly vulnerable to the impacts of sea level rise. In light of the international law instruments relating to vulnerable populations, the Maldives argues that there ought to be an intersectional approach to the debate, and this is essential', 27 October 2022.

[11] This paragraph draws from the research conducted with prof. Fornalé: Fornalé E. (2023), "Vulnerability, Intertemporality, and Climate Litigation", *Nordic Journal of Human Rights*, 41(4): 357-377, available at: https://doi.org/10.1080/18918131.2023.2225973.

[12] Intergovernmental Panel on Climate Change (IPCC) (2007), *Climate Change 2007: Impacts, Adaptation, and Vulnerability*, Contribution of Working Group II to the Fifth Assessment Report of the IPCC, 783, available at: https://www.ipcc.ch/site/assets/uploads/2018/03/ar4_wg2_full_report.pdf.

to their geographic positioning together[13] with the "situational" dimension, the contemporary use of this notion refers to a "personal" dimension that can affect more seriously certain individuals and/or communities.[14] The caracterization of an individual or a group as a "vulnerable subject" identifies them as "particularly prone to being harmed, exploited or discriminated".[15] At the same time, preventive interventions could translate a passive dimension of the vulnerable subject by disempowering individuals or group of individuals as "in need of protection" and reducing their capacity to actively engage and to intervene in the environment. To avoid these complicating implications, the several scholars suggest to draw on the "idea of layers" to give flexibility to the concept and to consider how "a particular situation makes or renders someone vulnerable" in a non permanent way.[16] In applying this expansive understanding, vulnerability could be refined to take under considerations several layers of vulnerabilities (being poor, women, illiterate, young, suffering violence etc.) and to acknowledge the complex interplay of multiples variables that could expose someone more than other.[17]

A second constitutive dimension is the relational understanding of the concept of vulnerability that suggests to claim – instead of a fixed definition of *who is vulnerable – when and where people* are vulnerable and *who is defining the relationship* that constitutes vulnerability. Consequently, in the climate context, the relational vulnerability calls for a responsive state to carry a broad network of legal obligations that could bring into life resilient and preventive responses to address the adverse impacts of climate change. In this scenario, it is crucial to explore the role of law to address vulnerabilities by exploring how human rights law could guide climate-affected and non-climate-affected states to identify criteria to design measures apt to avoid and/or to reduce the potential exposure to vulnerability. This may help to rescue the concept from critics by adopting a non-idealistic view of human agents and "their

[13] Human Rights Council (HRC) (2018), *Addressing Human Rights Protection Gaps in the Context of Migration and Displacement of Persons Across International Borders Resulting from the Adverse Effects of Climate Change and Supporting the Adaptation and Mitigation Plans of Developing Countries to Bridge Protection Plans*, UN Doc A/HRC/38/21, 23 April 2018, para. 14.

[14] In general, vulnerability "can result from multiple and intersecting forms of discrimination, inequality, and structural and societal dynamics that lead to diminished and unequal levels of power and enjoyment of rights" (A/HRC/38/21, para. 14). See also the excellent analysis of Turner, B.S. (2006), *Vulnerability and Human Rights*, Pennsylvania: Pennsylvania State University; Mackenzie, C. (2014), *The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability*, New York: Oxford University Press.

[15] Adorno R. (2006), "Is Vulnerability the Foundation of Human Rights?", in Masferrer A. and García-Sánchez E. (eds.), *Human Dignity of the Vulnerable in the Age of Rights*, Cham: Springer, 258.

[16] Luna F. (2009), "Elucidating the Concept of Vulnerability: Layers not Labels", *International Journal of Feminist Approaches to Bioethics*, 2(1): 121-139.

[17] Ibid.

relation to the context".[18] The open-ended nature of this relation made possible to integrate concerns to protect the rights of "vulnerable" subjects,[19] as highlighted by several resolutions on human rights and climate change adopted by the Human Rights Council, the first of which was adopted in 2008.[20] By recognizing that the adverse impacts of climate change could be felt "most acutely by those segments of the population that are already in vulnerable situations", the UN High Commissioner of Human Rights has adopted analytical studies to explore the impact on the enjoyments of human rights for children,[21] women,[22] migrants,[23] persons with disabilities,[24] and the elderly.[25]

A specific attention deserves the growing recognition of vulnerability for reaching international **protection of climate migrants**. Faced with the gap of legal pathways for providing the entry and stay in the context of disasters, jurisprudentiel efforts are already happening to protect specific categories of persons by having vulnerability concerns at their center. The growing recognition of disasters and environmental degradation as drivers of cross-border mobility was already a reality in the climate-claims lodged before Australia and New Zealand tribunals since 1995.[26] The cases offered the opportunity to expand the debate on how framing the obligations of states to protect persons in the context of climate change. As stressed by the Tribunal of New Zealand in the Tuvalu case "the disasters that occur in

[18] Fineman M.A. (2010), "The Vulnerable Subject and the Responsive State", *Emory Law Journal*, 60(2): 251-275.
[19] Human Rights Council (HRC) (2013*), Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H. Knox, Mapping Report*, UN Doc A/HRC/25/53, 30 December 2013.
[20] The Human Rights Council widely make reference to groups or individuals that could be "especially vulnerable to the effects of climate change" (UNHRC, 2008). The groups include "women, children, indigenous peoples and communities, persons with health problems, migrants and non-nationals, persons with disabilities, the poor, older persons and minorities" (UNGA 2020, para. 29-33).
[21] UN High Commissioner for Human Rights, *Analytical Study on the Relationship between Climate Change and the Full and Effective Enjoyment for the Rights of the Child*, UN Doc A/HRC/35/13, 4 May 2017.
[22] UN High Commissioner for Human Rights, *Analytical Study on Gender-responsive Climate Action for the Full and Effective Enjoyment of the Rights of Women*, UN Doc A/HRC/41/26, 1 May 2019.
[23] Human Rights Council (HRC) (2018), *Addressing Human Rights Protection Gaps in the Context of Migration and Displacement of Persons Across International Borders Resulting from the Adverse Effects of Climate Change and Supporting the Adaptation and Mitigation Plans of Developing Countries to Bridge Protection Plans*, UN Doc A/HRC/38/21, 23 April 2018.; See also UN Doc A/HRC/37/34 for a definition of the "concept of 'migrants in vulnerable situations'" paras. 12-15.
[24] UN High Commissioner for Human Rights, *Analytical Study on the Promotion and Protection of the Rights of Persons with Disabilities in the Context of Climate Change*, UN Doc A/HRC/44/30, 22 April 2020.
[25] UN High Commissioner for Human Rights, *Analytical Study on the Promotion and Protection of the Rights of Older Persons in the Context of Climate Change*, UN Doc A/HRC/47/46, 30 April 2021.
[26] Wewerinke-Singh M., Tabe T., Singh H. and Singh J.K. (2020), Human Rights and the Environment in Pacific Island States, in Wewerinke-Singh M. and Hamman, E. (eds.), *Environmental Law and Governance in the Pacific: Climate Change, Biodiversity and Communities*, Oxford: Routledge, 237-262.

Tuvalu derive from vulnerability of natural hazards such as droughts and hurricanes, and inundation due to sea-level rise and storm surges. The content of Tuvalu's positive obligations to take steps to protect the life od persons within its jurisdiction from such hazards must necessarily be shaped by this reality."[27] Even if the claims were dismissed, the New Zealand's approach was "at the vanguard of legal development"[28] by exploring how expanding complementary protections mechanisms - grounded in international human rights law (article 6 of the ICCPR and article 7 of the ICCPR) - provide pathways for entry.[29] In line with this trend, domestic courts are progressively recognizing that environmental changes affect negatively individuals lifelihood and consequently are pushing towards less restrictive position in the implementation of human rights obligations.[30] One example of this, it is the progressive interpretation adopted by domestic authorities in Italy in reasoning in terms of vulnerability to grant humanitarian protection in the context of natural disasters.[31]

b) Non-Discrimination and Intersectionality

As experts note climate does not affect all people in the same ways. Gender, class and generation play a key role in the exposure to risks and women are particularly vulnerable to climate and environmental harm.[32] The UN Special Rapporteur on Violence against Women contributes to a critical appraisal of how the climate breakdown risks disproportionately affecting women and girls by intensifying their vulnerability to human rights violations and slow violence that require to clarify human rights

[27] AC (Tuvalu) [2014], NZIPT, 800517-520, para: 25.
[28] Burson B., Bedford R. and Bedford C. (2021), "In the Same Canoe: Building the Case for a Regional Harmonization of Approaches to Humanitarian Entry and Stay in 'Our Sea of Islands'", *Platform on Disaster Displacement*, 57-58.
[29] McAdam J. (2015), "The Emerging New Zealand Jurisprudence on Climate Change, Disasters and Displacement", *Migration Studies*, 3: 131-142, 135.
[30] A recent example is the decision adopted by a German Higher Administrative Court that included "environmental conditions, such as the climate and natural disasters" to conduct the positive assessment for granting humanitarian protection to the applicant from Afghanistan (VGH Baden-Wuerttemberg, Judgment of 17 December 2020, A 11 S 2042/20, para. 25). For a preliminary analysis, see Schloss C. (2021, March 03), "Climate Migrants – How German Courts Take the Environment into Account when Considering Non-Refoulement", *Voelkerrechtsblog*. See also the case adopted by the French Court of Appeals Bordeaux (CCA Bordeaux, 18 December 2020, n° 20BX02193/n° 20BX02195, considération 4) which granted humanitarian protection to a citizen from Bangladesh due to the impact of air pollution on his respiratory illness.
[31] Until 2018, the Italian Migration Law included the possibility to grant humanitarian protection in case of neither refugee or subsidiary protection mechanisms were admissible (Article 5(6) of the Italian Consolidated Immigration Act - TU 286/98). This third form of protection was defined as a "safeguard clause of the Italian system", to be used to grant the authorization to stay of vulnerable subject that were not in the position to return.
[32] UN Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment (2022), *Report on Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc A/77/284, 10 August 2022, para. 43.

obligations in the context of the gender–climate nexus by ensuring the fulfilment of their rights and avoiding exacerbating pre-existing inequitable socio-economic conditions. In her words, violence against women is 'a pervasive form of gender discrimination' that affects 'women's ability to enjoy rights and freedoms on an equal basis and is interconnected with and indivisible from other human rights'.[33] The layered dimensions of violence were also part of the work of the 2022 annual session of the Commission on the Status of Women (CSW) that focused first the first time on 'gender equality and the empowerment of all women and girls in the context of climate change, environmental and disaster risk reduction policies and programmes'. The CSW in its 2022 Concluding Observations requires exploring the normative implications of the gender–climate nexus by drawing attention to the facts that women are among the most at risk such as to the adverse impacts of environmental degradation.[34]

The CSW highlighted the importance of engaging with far-reaching consequences for women's full enjoyment of the rights to life, private life and access to justice in the climate debate. Building on its outcome, a new report has been published on 8 November 2022 by UN Women and the International Union for the Conservation of Nature (*Addressing Violence Against Women and Girls in the Context of Climate Crisis and Environmental Degradation: CSW66 agreed conclusions and ways forward for addressing VAWG and climate change linkages in policies, decision making and programming*)[35] to discuss key opportunities drawn from examples of promising practices and adaptable resources for addressing the linkage between violence against women and girls (VAWG) and climate change issues as part of the agreed conclusions is a vital step for driving progress and supporting human rights obligations to protect by ruling.

We also witness an increasing attention on the impacts of climate change on older women; we can briefly recall the UNIDOP 2022 event on 'Older Persons as Active Agents in a Changing Climate' which took

[33] UN Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment (2022), *Report on Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc A/77/284, 10 August 2022, para. 10.

[34] The concluding observations will be reviewed the sixty-seventh session of the Commission on the Status of Women will take place from 6 to 17 March 2023. It stated '(f) Identify and eliminate all forms of discrimination against women and girls in the context of climate change, environmental degradation and disasters, in relation to land tenure security and access to, ownership of and control over land and other forms of property, inheritance, natural resources, appropriate new technology and financial services, including microfinance, and ensure women's and girls' access to justice and accountability for violations of their human rights, with particular attention given to older women, widows and young women', CSW66 Agreed Conclusions, UN Doc E/CN.6/2022/L.7, 29 March 2022, 14.

[35] Available at: https://www.unwomen.org/en/news-stories/in-focus/2022/03/in-focus-un-commission-on-the-status-of-women-csw66.

place on 30 September 2022 on the United Nations International Day of Older Persons (UNIDOP) 2022. The concept note of the event highlighted that 'climate change disproportionately impacts older persons, especially older women, persons living in situation of poverty, and older persons with disabilities'[36]. As highlighted by the UN Special Rapporteur on Violence Against Women and Girls 'climate change will continue to have a disproportionate impact on older persons, as vulnerabilities are exacerbated by ageism. Older women are particularly vulnerable to climate change, and limited access to emergency services during extreme weather events and a corresponding increase in the death toll of older people from heat has been well documented'[37] and could result in the layering of diverse types of violence that operate on seemingly different spatial and temporal scales.

In particular, the UN Special Rapporteur raised the attention of how these phenomena could increase the **human mobility of women** by contributing to "drivers and factors that compel women and girls to leave their countries of origin", such as loss of their home, water scarcity and/or interruption its supply, destruction and damage to schools and health facilities. In this contexts, women forced to mbove by by climate change and environmental degradation are exposed to increased risk of increased risks of violence and exploitation (e.g. reduced access to work, education, essential health services, including reproductive health services and psychosocial support).[38]

The CSW raised the attention also the need to promote a gender perspective in the adoption of migration policies and legal frameworks at responding to the situations of vulnerability to be responsive to diverse forms of violences that could occur (e.g. sexual, economic, physical) in responding to all forms of violence that can occur as a result of displacement. Importantly, the CSW recalled the Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change and the Platform on displacement caused by disasters. Also the 2022 report adopted by the UN Special Rapporteur raised a specific attention to migrant women by highlighting how the chances of suffering violence multiply when women are displaced or find themselves in emergency shelters; when they

[36] Available at: https://unece.org/Population/events/UNIDOP-2022.
[37] UN Special Rapporteur on Violence Against Women and Girls, Its Causes and Consequences (2022), *Report on Violence Against Women and Girls in the Context of the Climate Crisis, Including Environmental Degradation and Related Disaster Risk Mitigation and Response*, UN Doc A//77/136, 11 July 2022.
[38] De Vido S. (2023), "In dubio pro futuris generationibus: una risposta giuridica ecocentrica alla slow violence", in Frulli, M. (ed.), *L'interesse delle future generazioni nel diritto internazionale e dell'Unione europea*, Napoli: Editoriale Scientifica.

migrate to towns, cities and peri-urban areas as a consequence of forced displacement or planned relocation, encountering difficulties in accessing adequate housing, work and social protection mechanisms.[39] Women are also at risk of trafficking for the purpose of sexual exploitation or domestic work following disasters.[40]

The combination of **age and gender** could become a major source of problems in the future for the disproportionate impact of the adverse impact of environmental changes, as the exposure to high temperature. The increasingly elderly population plays a large role and it is one of the most vulnerable groups. We highlight a very recent study, published on 7 September 2022[41], that in its concluding observations states 'Age, sex, and gender, and the intensity/duration of exposure to high temperatures (e.g., heat wave exposure versus heat day or high ambient temperature exposure) may also modify the relationship between high temperatures and various CVD (Cardiovascular-Related Morbidity)-related hospital encounters'.[42] On 1 October 2022, Claudia Mahler, UN Independent Expert on the enjoyment of all human rights by older persons stressed that states should 'identify and integrate the specific needs of older women into the planning, response and recovery stages of emergency and humanitarian action as well as in climate change, disaster risk reduction measures and peacebuilding. States should include older women in all relevant policy design, implementation and monitoring and take the necessary steps to ensure older women have access to information on legislation, policies and services that affect their lives in order to be able to make informed decisions and participate meaningfully'.[43]

[39] UN Special Rapporteur on Violence Against Women and Girls, Its Causes and Consequences (2022), *Report on Violence Against Women and Girls in the Context of the Climate Crisis, Including Environmental Degradation and Related Disaster Risk Mitigation and Response*, UN Doc A//77/136, 11 July 2022.

[40] De Vido S. (2023), "Climate Violence and Gendered Migration in International Law", in Di Stasi et al., *Migrant Women and Gender Based Violence in the International and European Legal Framework*, Napoli: Editoriale Scientifica, 137-171.

[41] Cicci K.R et al. (2022), "High Temperatures and Cardiovascular-Related Morbidity: A Scoping Review", *International Journal of Environmental Research and Public Health*, 19(18): 11243-11267, available at: https:// doi.org/10.3390/ijerph191811243.

[42] The study involves prof. Vicedo-Cadrera who leads the research group on Climate Change and Health at the Oeschger Center for Climate Change, at the University of Bern. The research group conducts very innovative research that mainly addresses the impacts of climate change on health, with an evaluation of current and future temperature-related health impacts in Switzerland and overseas. See for instance De Schrijver E. *et al.* (2022), "Nationwide Analysis of the Heat- and Cold-Related Mortality Trends in Switzerland between 1969 and 2017: The Role of Population Aging", *Science of The Total Environment*, 130(3): 037001-1 - 037001-9, 037001-2, available at: https://doi.org/10.1289/EHP9835.

[43] Available at: https://www.ohchr.org/en/statements/2022/09/un-expert-praises-older-womens-resilience-face-ongoing-emergency-challenges; Fornalé E. (2023), "Slow Violence, Gender and Climate Agency", *Revista de Derecho Europeo* 61.

Gender-climate nexus has been addressed during the work of the COP 27.[44] The preamble of the Paris Agreement in acknowledges the need for the States parties to recognize 'their respective obligations on human rights' as well gender equality and empowerment of women (para. 11 of the Preamble)[45]. Gender is included also in article 7.5 ('adaptation action should follow a country-driven, gender-responsive, participatory and fully transparent approach'), and article 11.2 ('capacity building should be [...] gender -responsive'). As wisely illustrated by Grahn-Farley,[46] women empowerment and gender are among the priority themes of what some scholars identifies as a new form of regime where the climate justice agenda and the human rights agenda are unified[47]. The decision adopted on 19 November 2022 on gender and climate change 'recognizes with concern the unprecedented crisis caused by the coronavirus disease 2019 pandemic, the uneven nature of the global response to the pandemic and the pandemic's multifaceted effects on all spheres of society, including the deepening of pre-existing inequalities, including gender inequality, and resulting vulnerabilities, which negatively impacted the implementation of the gender action plan, which has negatively impacted the implementation of effective gender-responsive climate action, and urges Parties to accelerate their efforts to advance implementation of the enhanced Lima work programme on gender and its gender action plan.'[48]

On intersectionality

Violence can derive from both major disasters but also slow-onset environmental degradation force: loss of livelihoods, limited resources, water scarcity and droughts, slow but irreparable pollution are all cause of disproportionate risks of violence for vulnerable people. In particular, we recommend to explore how the notion of vulnerability is taken into account under the international human rights framework to move

[44] Gender and climate change. Draft conclusions proposed by the Chair UNFCCC. Subsidiary Body for Implementation (SBI) FCCC/SBI/2022/L.32, 2022. Among the preparatory documents for the COP27, we include the synthesis report by the Secretariat: *Implementation of gender-responsive climate policies, plans, strategies and action as reported by Parties in regular reports and communications under the UNFCCC process*, FCCC/CP/2022/6, 16 September 2022.

[45] Fornalé E. and Cristani F. (eds.) (2023), *Women Empowerment and Its Limits: Interdisciplinary and Transnational Perspectives Toward Sustainable Progress*, London: Palgrave/Springer.

[46] Grahn-Farley M. (2022), "The Human Rights Claim in Climate Justice: Children Leading the Way", *Journal of Gender, Race and Justice*, 25: 439-488.

[47] Fornalé, E. and Cristani, F. (eds.) (2023), *Women Empowerment and Its Limits: Interdisciplinary and Transnational Perspectives toward Sustainable Progress*, London: Palgrave/Springer.

[48] Decision -/CP.27, *Intermediate review of the implementation of the gender action plan*, available at https://unfccc.int/documents/624406; For a first assessment of what IHRL has to say about the disparate impact the COVID 19 pandemic have on women and how to address it, Tramontana E. (2021), "Women's right and gender equality during the Covid-19 pandemic", *QIL*, Zoom-in 87: 5-28.

international protection to the centre stage of the problematization of climate change. This will allow to better clarify the relationship between vulnerability, human rights and climate change; second to identify how human rights obligations can be taken into account for defining the scope and content of climate change action; and finally to gain some insights from the interpretative practice of UN treaty to define the content of States' obligations to ensure the highest standards of protection.[49] In terms of access to justice, the "differentiated measures" come into play[50]. "Climate action is not only a matter of intergenerational solidarity, but is also a human rights duty and a matter of intergenerational justice."[51] Access to justice is pivotal in the protection of human rights, but in climate change cases it is complicated due to the transboundary nature of environmental harm, and usual lack of proximity between what caused the harm and whom is affected by its effects.[52]

One possibility is to push for a consolidation of the argument made by the Inter-American Court of Human Rights in the advisory opinion of 7 February 2018 concerning the obligations of States Parties to the American Convention on Human Rights.[53] The Court argued that jurisdiction of a State is established when it exercises control over the activities that caused the harm. This shift in the legal analysis is particularly relevant. In the words of the Inter-American Court of Human Rights:

> The exercise of jurisdiction by a State of origin in relation to transboundary damage is based on the understanding that it is the State in whose territory or in whose jurisdiction these activities are undertaken, who has effective control over them and is in a position to prevent the causation of transboundary damage that may affect the enjoyment of human rights of individuals outside its territory. The potential victims of the negative consequences of these activities should be deemed to be within the jurisdiction of state of origin for the purposes of any potential state

[49] Fornalé E. (2023), "The Role of Vulnerability in Climate Change Litigation", in Pomade A. (ed.), *Vulnérabilité (s) environnementale (s): perspectives pluridisciplinaires*.
[50] De Vido S. and Fornalé E. (2023), "Achievements and Hurdles Towards Women's Access to Climate Justice", in Fornalé E. and Cristani F. (eds.), *Women Empowerment and Its Limits*, London: Palgrave.
[51] As well highlighted by the then Special Rapporteur on the Human Rights of Internally Displaced Persons, Cecilia Jimenez-Damary, in the internal displacement in the context of the slow-onset adverse effects of climate change (2020); De Vido S. and Fornalé E. (2023), "Achievements and Hurdles Towards Women's Access to Climate Justice", in Fornalé E. and Cristani F. (eds.), *Women Empowerment and Its Limits*, London: Palgrave, available at: https://doi.org/10.1007/978-3-031-29332-0_3.
[52] Fornalé E. and Koehler T. (2022, February), "Climate change inaction and children rights", *JURIST – Academic Commentary*.
[53] Inter-American Court of Human Rights, Advisory Opinion No. 23/17 of 15 November 2017, *Medio ambiente y derechos humanos.*

responsibilities for failure to prevent transboundary damage. In any case, not every injury activates this responsibility.[54]

There is, however, an intrinsic procedural limit: the fact that such a legal argument is constrained within spacial boundaries, owing to the nature of the human rights treaty (in this case the American Convention on human rights) in which the interpretation operated. What about other legal systems where there is no access to a regional mechanism for the protection of human rights, or to an effective domestic remedy, or where the State has not accepted the competence of UN treaty bodies in receiving individual complaints? It emerges here, especially with regard to environmental cases, an inherent systemic discrimination which can hardly be solved without a serious commitment by States.

In that regard, the attempt is to offer an innovative view to the legal matter. In climate change litigation, when it comes to assess the responsibility of States for not complying with the provisions of the Paris Agreement and human rights obligations, the disproportionate impact of climate change on categories of people, looking at intersecting grounds of discrimination, must be taken into account both at the procedural level in the identification of who is the victim, and in terms of compensation, as the jurisprudence of the Inter-American Court of Human Rights teaches us.[55]

c) The Question of Time and Human Rights Duties[56]

In this context, the temporal dimension plays a significant role when evaluating whether the alleged environmental harm will have an impact now, by causing vulnerabilities (time as imminence), or whether it will have an impact in the future by exacerbating pre-existing vulnerabilities (e.g. by accelerating the deterioration of health of elderly people or by affecting the rights of future generations) (time as duration and as length). From this perspective, the temporal dimension of vulnerability can be

[54] Ibid, para. 102.

[55] See, for example, IACtHR, 30 Nov. 2016, Preliminary exceptions, Merits and Reparations, *I.V. v Bolivia,* Serie C n°329. Rogers, N. (2023), "Climate Violence and the Word", *Journal of Human Rights and the Environment*, 14(2): 14-168. 7. De Vido, S. (2023), "Climate Violence and Gendered Migration in International Law", in Di Stasi et al., *Migrant Women and Gender Based Violence in the International and European Legal Framework*, Napoli: Editoriale Scientifica, 137-171; De Vido S. (2023), "In dubio pro futuris generationibus: una risposta giuridica ecocentrica alla slow violence", in Frulli M. (ed.), *L'interesse delle future generazioni nel diritto internazionale e dell'Unione europea*, Napoli: Editoriale Scientifica.

[56] This paragraph draws from the research conducted with prof. Fornalé: Fornalé E. (2023), "Vulnerability, Intertemporality, and Climate Litigation", *Nordic Journal of Human Rights*, 41(4): 357-377, available at: https://doi.org/10.1080/18918131.2023.2225973.

a device that captures real-life harms by recognizing the 'differently-manifested need for protection' in giving meaning to human rights obligations triggered by climate change.

The concept of climate-related vulnerability captures in its meaning the 'susceptibility', the 'risk of exposure' (future long-term uncertainty), the condition of being vulnerable associated with environmental harm – which could lead to human rights violations. This idea of vulnerability suggests processes that are dynamic and operate over different spatial-temporal scales. This is particularly relevant in present times where we face a proliferation of phenomena with disastrous effects that are identified as 'slow moving and long in the making disasters.'[57] A close scrutiny of the time and temporalities of environmental changes is becoming clearly crucial for understanding the adverse impact of environmental changes. In determining if an alleged breach of human rights, in particular the right to life, has been recently invoked as relevant parameter and standard relating to the assessment of vulnerability and human rights obligations in jurisprudential discussions.[58]

III. Response to question *F. Regarding the shared and differentiated human rights obligations and responsibilities of States in the context of the climate emergency*

1. General Principles of International Law

This part will provide an overall introduction to general principles of law[59] that are of relevant for addressing the human rights implications of climate change and needed to guide the interpretation of the obligations under both the Inter-America Convention (hereafter ACHR) and the Declaration on Human Rights (hereafter ADHR). General principles of law are constantly invoked by the Inter-American Court in its case law when interpreting and applying the American Convention.[60]

[57] Nixon R. (2011), *Slow Violence and the Environmentalism of the Poor*, Cambridge (MA): Harvard University Press.
[58] Immigration and Protection Tribunal New Zealand, AW (Kiribati), 31 October 2022 [2002] NZIPT 802085; Human Rights Committee, Daniel Billy et al. v. Australia Views Adopted by the Committee under Article 5(4) of the Optional Protocol, Concerning Communication No. 3624/2019/, Daniel Billy et al. v. Australia, UN Doc. CCPR/C/135/D/3624/2019, 22 September 2022.
[59] Rudiger, W. (2021), *Solidarity and Community Interests: Driving Forces for the Interpretation and Development of International Law*, Pocketbooks of the Hague Academy of International Law, Leiden: Brill.
[60] See Cançado Trindade, Concurring opinion in Advisory Opinion No. 18 on *The Juridical Status and Rights of Undocumented Migrants (2003)* on the fundamental role of principle of law at national and international level.

a. Humanity

Contemporary international law (treaty based and general) accounts for the principle of humanity.[61] This principle is fundamental for customary international humanitarian law and it corresponds to 'humane treatment, under any and every circumstance, encompasses all forms of human behavior and all situations of vulnerable human existence.'[62] The principle of humanity, usually invoked in the domain of international humanitarian law, thus extends itself also to that of international human rights law and it permeates the whole corpus juris of protection of the human person.[63]

The contemporary evolution of this principle brings into evidence a convergence of international law at normative and operational level of its relevance to maximize the protection of human rights.

Contemporary international law is particularly sensitive to the pressing need of human treatment of persons, in any circumstances, so as to prohibit inhuman treatment, by reference to humanity as a whole, in order to secure protection to all, even more so when they stand in situations of great vulnerability in the relations between public power and all persons subject to the jurisdiction of the State concerned. 'Humaneness' is to orient human behaviour in all circumstances, in times of peace as well as of disturbances and armed conflict. More forcibly humanenness needs to come to fore to overcome the crisis/non-crisis dilemma when the hidden subjects of violations – climate migrants – are even more *defencelessness* as gradually deprived of their freedoms.

As highlighted by Cançado Trindade, 'the primacy of the principle of respect for the dignity of the human being is identified as the purpose of both law and the legal system at the national and the international level. By virtue of this fundamental principle, all individuals must be respected (both their honor and their beliefs), based on the mere fact of belonging to the human race, irrespective of any other circumstance'.

Among principles of law, the principle of humanity is of fundamental relevance in the domain of international human rights, together with the principles of dignity of the human being and that of

[61] Cançado Trindade (2016), *Application of Genocide Convention. Dissident Opinion of Judge Cançado Trindade, International Court of Justice*, 18 April 2016, available at: https://www.icj-cij.org/public/files/case-related/118/118-20150203-JUD-01-05-EN.pdf.

[62] Ibid.

[63] Human Rights Committee, General Comment note 31 (of 2004), para 11; Cançado Trindade, Separate opinion (paras. 93-106 and 107-142) in the International Court of Justice's Judgment (of 30 November 2010) in the case Ahmadou Sadio Diallo (Republic of Guinea v. Demo- cratic Republic of the Congo), Merits.

inalienability of human rights[64]. This principle may be invoked referring to humanity as a whole, in relation to matters of common, general and direct interest to the latter.

Finally the *Martens clause*, which was originally inserted in the preambles to the 1899 Hague Convention (II) (para. 9) and the 1907 Hague Convention (IV) (para. 8), both relating to the laws and customs of war on land invoked "the principles of international law, as they result from the usages established," and also the "laws of humanity" and "the dictates of the public conscience." Subsequently, maintains that the principles of international law, the laws of humanity and the requirements of the public conscience continue to be applicable, irrespective of the emergence of new situations.[65]

b. Common but Differentiated Responsibilites

The principle of common but differentiated responsibilities (CBDR) is a core principle of international law. It is based on the recognition that some States have benefitted from their social and economic position historically to the detriment of other States. The principle requires that States that have benefited should carry the greater part of the burden for remedying the harm caused.

The foundation of CBDR is the historical responsibility of States for past actions that have caused harm to people. The need to compensate for historical harm caused is articulated in international human rights treaties. Although the protection of civil and political rights in the American Convention on Human Rights (ACHR),[66] and other human rights treaties, is based on equal obligations, the principle of common but differentiated obligations is recognized in international human rights instruments.

The compensation of historical inequalities and inequities is also the foundation of the principle of affirmative action that is expressly recognized in human rights treaties. **Affirmative action** is supported in article 1, paragraph 5 of the Inter-American Convention against Racial Discrimination and Related Forms of Intolerance;[67] article 1, paragraph 4, and article 2, paragraph 2 of the International Convention

[64] Both principles are referred in the Advisory Opinion No. 18 on The Juridical Status and Rights of Undocumented Migrants (2003) by the Inter-American Court.
[65] Cançado Trindade (2021), "Reflexiones sobre el Desarraigo como Problema de Derechos Humanos Frente a la Conciencia Jurídica Universal", in Trindade, C. and Ruiz de Santiago, J. (eds.), *La Nueva Dimensión de las Necesidades de Protección del Ser Humano en el Inicio del Siglo XXI*, San José, Costa Rica, UNHCR, 19-78, 58-78.
[66] 1144 U.N.T.S. 123 (1978).
[67] 3225 U.N.T.S. I-54915 (entered into force 11 November 2017). Only Costa Rica and Uruguay have ratified it to date.

on the Elimination of All Forms of Racial Discrimination;[68] and article 4 of the Convention on the Elimination of all Forms of Discrimination Against Women.[69]

CBDR is most notably articulated in environmental instruments. These articulations are essential to a just interpretation and application of the international legal obligations of Inter-American countries related to human rights.

CBDR is the foundation of Principle 9 of the ***Stockholm Declaration*** of 1972 that calls for "the transfer of substantial quantities of financial and technological assistance" to developing countries to help them take the steps necessary to protect the environment.[70] And Principle 12 acknowledges "the circumstances and particular requirements of developing countries" and calls for financial and technological assistance to help them incorporate environmental safeguards.

CBDR is expressly articulated in principle 7 of the ***Rio Declaration*** of the United Nations Conference on Environment and Development held in 1992, that reads "States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities."[71] Again, the historical responsibility of States that have contributed more to the deterioration of the environment are stressed.

In 1992, CBDR was enshrined in the legally binding ***United Nations Framework Convention on Climate Change*** in article 3, paragraphs 1 that reads:

> [t]he Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their *common but differentiated responsibilities* and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof [italics emphasis added].[72]

[68] 660 U.N.T.S. 195 (1969).
[69] 1249 U.N.T.S. 13 (1979).
[70] Report of the United Nations Conference on the Human Environment, held in Stockholm 5-16 June 1972, UN Doc. A/CONF.48/14/Rev.1 (1972).
[71] Report of the United Nations Conference on Environment and Development, UN Doc. A/CONF.151/26 adopted in Rio de Janeiro, 3-14 June 1992.
[72] 1771 U.N.T.S. 107 (1992).

CBDR is also recognized in the preamble and in operative articles 2, paragraph 2 and article 4, especially paragraph 3, of the ***Paris Agreement***, a treaty agreed by States under the auspices of the UNFCCC. The references make it clear that States must respect the principle in fulfilling their legal obligations in regard to all actions taken to address the adverse effects of climate change.[73]

The Office of the Special Rapporteur on Economic, Social, Cultural and Environmental Rights (REDESCA) of the Inter-American Commission on Human Rights (IACHR) has called for States to respect "the common but differentiated obligations of States in climate action" in order to ensure Inter-American States human rights obligations are respected.[74]

The Inter-American Commission adopted a resolution entitled ***"Climate Emergency: Scope of Inter-American Human Rights Obligations"*** on 31 December 2021 that recognizes that

> [b]ased on the principle of common but differentiated responsibility, those States that have greater financial capacity must provide the guarantees to provide greater technical and logistical capacity to the States that have a greater degree of impact on climate change, as well as less financial and infrastructure capacity to face the climate emergency.[75]

From the foregoing it is evidence that the principle of common but differentiated responsibilities is of essential importance to Inter-American States obligations to ensure the human rights of persons under their jurisdiction. It is both a principle of customary international law and a principle found in treaties that define the action States must take to prevent interferences with human rights that are caused by the adverse effects of climate change. For this reason, States must consider the principle when acting to ensure human rights and ensure that their action are consistent with the principle. Consequently, the Court, and other Inter-American human rights bodies, must consider the principle of CBDR in evaluating States' action taken by States under the ACHR to ensure that States are taking adequate action in accordance with their differentiated responsibilities.

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[73] 3156 U.N.T.S. 79 (2015).

[74] Office of the Special Rapporteur on Economic, Social, Cultural and Environmental Rights of the Inter-American Commission on Human Rights (REDESCA), "REDESCA urges States to take concrete and equitable actions to address climate change and its adverse effects "OAS Doc. No. RD278/23 (Press Release of 30 November 2023) accessed at https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/media_center/PReleases/2023/278.asp.

[75] Resolution No. 3/2021, adopted by the IACHR (31 December 2021). The resolution was adopted within the framework of the functions conferred on the Commission by Article 106 of the Charter of the Organization of American States, in application of Article 41(b) of the American Convention on Human Rights and Article 18(b) of its Statute, which provides the Commission authority to interpret and apply the American Declaration on the Rights and Duties of Man.

While all State parties have an obligation to ensure the protection of human rights of persons under their jurisdiction to the greatest extent possible, developed countries or UNFCCC-Annex I States have additional obligations. These additional obligations of developed countries or UNFCCC-Annex I States are positive obligations to take action to provide new, additional, and adequate, financial contributions, capacity building, and technology transfer to developing countries or non-UNFCCC-Annex I countries and to lead in mitigating or cutting their greenhouse gas emissions. International human rights law therefore requires that developed countries or UNFCCC-Annex I States, provide resources to non-Annex I or developing States, when these resources are necessary to enable developing States to take action to combat the adverse effects of climate change that will interfere with the human rights of persons under their jurisdiction.

The Inter-American Court and other Inter-American human rights bodies should ensure that they take into consideration CBDR when determining whether a State, particularly an UNFCCC-Annex I State is taking sufficient action to meet its responsibility to individuals under its jurisdiction. In addition, the obligations derived from CBDR should be taken into account when a State's, particularly an UNFCCC-Annex I State's, action is resulting in or would result in the interference of the human rights of persons in other countries.

c. Prevention

The principle of prevention, as a customary principle of international law, is translated in the state´s duty to prevent that activities within its jurisdiction or control do not cause transboundary harm. Under international law, we find the principle of prevention referred to both as a general principle of law, and then more specifically as a principle of international environmental. Under general international law, the International Law Commission (ILC) has referred to the obligation of prevention in its Draft Articles on Responsibility of States for Internationally Wrongful Acts. According to article 14, para. 3 of the Draft Articles, "[t]he breach of an international obligation requiring a State *to prevent a given event* occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation" [emphasis added].[76] In the Commentary to this article,

[76] International Law Commission (ILC) (2001), *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, article 14, para. 3, https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

the ILC explained that "[o]bligations of prevention are usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur".[77] The ILC then referred to "the obligation to prevent transboundary damage by air pollution" as one of the examples of the obligation of prevention.[78]

In its Submission to the 21st Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC), the Office of the High Commissioner for Human Rights recalled that "States are obligated to respect, protect, promote, and fulfil all human rights for all people. This includes an affirmative obligation to prevent foreseeable harms including those caused by climate change".[79]

As also already highlighted by the Inter-American Court of Human Rights (IACtHR), "[t]he obligation to ensure the rights recognized in the American Convention entails the duty of States to prevent violations of these rights […T]his obligation of prevention encompasses all the diverse measures that promote the safeguard of human rights and ensure that eventual violations of these rights are taken into account and may result in sanctions as well as compensation for their negative consequences". [80]

The principle of prevention was highlighted already in 1938 in the arbitral award in the Trail Smelter case,[81] according to which "[u]nder the principles of international law, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence".[82]

The principle was then included in the 1972 Stockholm Declaration on the Human Environment, according to which "States have the responsibility to ensure that activities within their jurisdiction or

[77] Ibid., Commentary to article 14, para. 3, point 14.
[78] Ibid.
[79] 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 (2015), *Understanding Human Rights and Climate Change*, https://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf.
[80] Inter-American Court of Human Rights, Advisory Opinion OC-23/17 of 15 November 2017 Requested by the Republic of Colombia, The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights), para. 127.
[81] Trail smelter case (United States, Canada), UN Reports of International Arbitral Awards, Vol. III, Award, 16 April 1938, p. 1905.
[82] Ibid., p. 1982. See in general also the most report prepared by Katelyn Horne, Maria Antonia Tigre, Michael B. Gerrard, Status Report on Principles of International and Human Rights Law Relevant to Climate Change (Sabin Center for Climate Change Law, 2023), 16.

control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".[83] The Declaration referred also to a collective prevention duty when it comes to sea pollution, by affirming that "States shall take all possible steps to prevent pollution of the seas".[84]

The principle of prevention was then restated in principle 2 of the Rio Declaration,[85] while the United Nations Framework Convention on Climate Change (UNFCCC) makes it clear that "[t]he Parties should take precautionary measures to anticipate, *prevent* or minimize the causes of climate change and mitigate its adverse effects" [emphasis added].[86]

The International Court of Justice has emphasized the principle of prevention on several occasions, especially in the field of international environmental law. In the Gabčíkovo-Nagymaros case, the Court stated that it "is mindful that, in the field of environmental protection, vigilance and *prevention* are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage" [emphasis added].[87] In its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the Court expressly recognized that this obligation "is now part of the corpus of international law relating to the environment".[88] And as expressed in the Pulp Mills case, "the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory".[89]

In the Pulp Mills case, the International Court of Justice specified that the principle of prevention requires each State to "use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of

[83] Declaration on the Human Environment, United Nations Conference on the Human Environment, Stockholm, 16 June 1972, UN Doc. A/CONF.48/14/Rev.1, Principle 21.
[84] Ibid., Principle 7.
[85] According to which "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction". Rio Declaration on Environment and Development, Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, UN Doc A/CONF.151/26 (Vol. I).
[86] United Nations Framework Convention on Climate Change, 1992, FCC/INFORMAL/84/Rev.1, Article 3, para. 3, https://unfccc.int/process-and-meetings/the-convention/history-of-the-convention/convention-documents.
[87] International Court of Justice, Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, 25 September 1997, I.C.J. Reports 1997, p. 78, para. 140.
[88] International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996, 1. C.J. Reports 1996, p. 242, para. 29.
[89] International Court of Justice, Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, 20 April 2010, I.C.J. Reports 2010, p. 55, para. 101.

another State".[90] Accordingly, States should not only implement "appropriate rules and measures" to prevent significant transboundary harm, but also ensure "a certain level of vigilance in the […] enforcement" of those measures, such as by monitoring activities likely to cause harm.[91]

The Inter-American Court of Human Rights (IACtHR) recognized the right to a healthy environment, also with reference to the relevant obligations of States to avoid transboundary environmental damage that could violate the human rights of persons outside their territory, in its 2017 Advisory Opinion.[92]

Then, in 2021, the Inter-American Commission adopted its Resolution "Climate Emergency: Scope of Inter-American Human Rights Obligations", where it "[r]eiterat[ed] that States must take action to limit the anthropogenic emission of greenhouse gases, which also concerns the obligation to regulate the activities and policies that produce it, in order to prevent as much as possible, the effects on the rights of people",[93] and also specified that "[i]n the context of the climate crisis, the obligation to prevent transboundary environmental harm is manifested in the development and implementation of GHG mitigation targets that reflect a level of ambition consistent with the obligations of the Paris Agreement and other applicable instruments, particularly with the obligation not to exceed global temperature to such an extent as to jeopardize the enjoyment of human rights".[94]

Principle of prevention as a cooperative duty of states

The principle of prevention refers to the state duty when acting individually, but also jointly. As stated by principle 24 of the 1972 ***Stockholm Declaration***, "[i]nternational matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big or small, on an equal footing. Cooperation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, *prevent*, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States" [emphasis added].

[90] Ibid.
[91] Ibid., 79, para. 197.
[92] Inter-American Court of Human Rights, Advisory Opinion OC-23/17 of 15 November 2017, para. 126.
[93] Inter-American Commission, Resolution No. 3/2021, *Climate Emergency: Scope of Inter-American Human Rights Obligations*, 31 December 2021, Preamble.
[94] Ibid., para. 41.

The articles on prevention of transboundary harm from hazardous activities (2001) provide in article 4 that "States concerned shall cooperate in good faith and, as necessary, seek the assistance of one or more competent international organizations in *preventing* significant transboundary harm or at any event in minimizing the risk thereof" [emphasis added].

Also the International Court of Justice has emphasized how the obligation of cooperation among states and the obligation of prevention (in the field of environmental protection) are interlinked. Indeed, in the Pulp Mills case, the Court affirmed that, "it is by cooperating that the States concerned can jointly manage the risks of damage to the environment […] so as to prevent the damage in question".[95]

This has also been explicited by the International Law Commission (ILC) in its 2021 ***Draft guidelines on the protection of the atmosphere***: according to Guideline 3 of the Draft Articles, "States have the obligation to protect the atmosphere by exercising due diligence in taking appropriate measures, in accordance with applicable rules of international law, to *prevent*, reduce or control atmospheric pollution and atmospheric degradation" [emphasis added].[96] In the commentary of Guideline 3, the ILC highlights that "[t]he reference to "States" for the purposes of the draft guideline denotes both the possibility of States acting individually and jointly, as appropriate",[97] specifying that "[t]he obligation to "prevent, reduce or control" denotes a variety of measures to be taken by States, whether individually or jointly, in accordance with applicable rules relevant to atmospheric pollution on the one hand and atmospheric degradation on the other".[98]

Also the ILC´s ***Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*** affirms that "States […] shall cooperate in good faith and, as necessary, seek the assistance of one or more competent international organizations in *preventing* significant transboundary harm or at any event in minimizing the risk thereof" [emphasis added].[99] In the Commentary, the ILC makes it clear that "[t]he principle of cooperation between States is essential in designing and implementing effective

[95] Ibid., 49, para. 77
[96] International Law Commission (ILC) (2021), *Draft Guidelines on the Protection of the Atmosphere, with Commentaries*, Guideline 3, available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/8_8_2021.pdf.
[97] Ibid., Commentary to Guidelines 3, point 4.
[98] Ibid., Commentary to Guidelines 3, point 7.
[99] International Law Commission (ILC) (2001), *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries*, Article 4, available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf.

policies to prevent significant transboundary harm or at any event to minimize the risk thereof. The requirement of cooperation of States extends to all phases of planning and of implementation".[100]

Also the United Nations General Assembly, in its Resolution 2995 (XXVII) of 15 December 1972 on cooperation between States in the field of the environment, "[r]ecognizes that co-operation between States in the field of the environment […] include[s] co-operation towards the implementation of principles 21 and 22 of the Declaration of the United Nations Conference on the Human Environment", which includes the principle of prevention. This echoes what also established in Article 4 of the UNFCC, according to which, "[a]ll Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall: […p]romote and cooperate in the development, application and diffusion, including transfer, of technologies, practices and processes that control, reduce or *prevent* anthropogenic emissions of greenhouse gases […] in all relevant sectors, including the energy, transport, industry, agriculture, forestry and waste management sectors" [emphasis added].[101]

And already the Inter-American Commission made it clear that "States have an obligation to cooperate in good faith in order to prevent pollution of the planet, which entails reducing their emissions to ensure a safe climate that enables the exercise of rights".[102]

d. International Cooperation and Common Concerns

We invite the IACHR to advance the understanding of the principle of cooperation. As highlighted by the *Special Rapporteur on Human Rights and the Environment* "the failure of States to effectively address climate change through international cooperation would prevent individual States from meeting their duties under human rights law to protect and fulfil the human rights of those within their

[100] Ibid. Commentary to Article 4, point 1.
[101] United Nations Framework Convention on Climate Change (1992), FCC/INFORMAL/84/Rev.1, Article 4, para. 1(c), available at: https://unfccc.int/process-and-meetings/the-convention/history-of-the-convention/convention-documents.
[102] Inter-American Commission, Resolution No. 3/2021, "Climate Emergency: Scope of Inter-American Human Rights Obligations", 31 December 2021, para. 11.

jurisdiction".[103] The duty to cooperate corresponds to duties to "act collectively" to overcome complex action problems in the context of environmental degradation and for the fulfilment of human rights.[104]

In the last years, it has become more and more clear how the interdependence among states affects the capacity to implement civil, political and socio-economic rights. In terms of identifying the content of states' obligations, we suggest adopting the **doctrine of 'common concern'** to strengthen the role of cooperation[105]. With the adoption of the ***Paris Agreement*** in 2015 it became clear that the 'change in the Earth's climate and its adverse effects are a common concern of all humankind' requiring collective and cooperative efforts. Common concerns function both as an 'instrumental value' and a 'constraint' that cannot be confined within domestic borders; these phenomena respect no frontiers. Common concern is a concept that guides states on cooperating to address problems of global interest. The notions of prevention and cooperation are powerful in their practical meaning for dealing with common concerns, by acting unilaterally and concertedly upon commonly agreed rules. We suggest defining the contours of the obligation *to cooperate to prevent*, combining the duty to cooperate with the duty to prevent foreseeable harm and human rights violations.[106]

To clarify the scope of this obligation, we refer to the attempt of De Schutter to clarify how the duty to cooperate in human rights law[107] could include in its definition a duty to seek to conclude agreements with other States to ensure a global implementation.[108] This could be beneficial in translating human rights obligations into a cooperative duty to prevent harm for present and future generations by institutionalizing a cooperative framework that enables the full realization of their rights.

This raises new issues concerning the 'interplay between the internal and external dimensions of climate risk governance', which requires a departure from a State-centric approach to facilitate cooperation at

[103] UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (2016), UN Doc A/HRC/31/52, 01 February 2016; Human Rights Council, resolution 26/27 and 29/15.
[104] See Articles 55 and 56 of the Charter of the United Nations.
[105] Fornalé, E. (2022), "Collective Action, Common Concern and Climate-Induced Migration", Behrman, S. and Kent, A. (eds.), *Climate Refugees*, Cambridge: Cambridge University Press, 107-127, available at: https://doi.org/10.1017/9781108902991.006.
[106] De Schutter O. (2021), "A Duty to Negotiate in Good Faith as Part of the Duty to Cooperate to Establish 'An International Legal Order in Which Human Rights Can Be Fully Realized'", in Bhuta *et al.* (eds.), *The Struggle for Human Rights*, Oxford: Oxford University Press.
[107] CESCR, General Comment n.12, UN Doc E/C.12995/, para 36 'consider the development of further international legal instruments to that end (to comply with the right to food).
[108] CRC, General Comment No. 5, UN Doc CCGC/2003/5, para. 5; See also the CESCR, General Comment No. 25 (2020) on Science and Economic, Social and Cultural Rights (to encourage the adoption of multilateral agreements to prevent risks from materializing or to mitigate the effects of climate change, loss of biodiversity, among others (para. 81).

the international level and effectively address uncertainty in relation to pursuing relocation and moving people permanently[109]. International cooperation has been the vehicle that facilitates inter-State relations and helps to maintain international peace and stability, by contributing to the establishment of bilateral, regional and global cooperation agreements.

This could be beneficial in translating human rights obligations into a cooperative duty to prevent harm for present and future generations by institutionalizing a cooperative framework that enables the full realization of their rights.

e) Good Neighbourliness

The principle of good neighbourliness emerged in international practice and it is included in international treaties (e.g. international environmental treaties) to manage the 'mutual relationship between neighbouring States.'[110] The origin of the principle and the existence of a regime of neighbourliness in international law was related to the need to 'protect mutual interests of the neighbours.'

Good neighbourliness has, as the International Court of Justice held in the *Asylum* case,[111] "always held a prominent place" in Latin-American states. Good neighbourliness is often linked to the adage of *sic utere tuum ut alienam non laedas ("use your own property in such as manner as not to injure that of another").*[112] It is an ethical principle that underpins many international legal principles, such as the no harm principle and duties of prevention, and could also be considered as an interstitial norm, as defined by Vaughan Lowe (see below - Part 2). However, the principle of good neighbourliness requires more than just abstaining from activities that cause harm – which are highly relevant to the questions central to this request for an Advisory Opinion. These obligations of good neighbourliness[113] could require

[109] International Law Association (ILA) (2022), Interim Report of the Committee, Conference of the ILA, Lisbon, available at: https://www.ila-hq.org/en_GB/committees/international-law-and-sea-level-rise.
[110] Boisson de Chazournes, L. and Campanelli, D. (2006), "Neighbor States", *Max Planck Encyclopedia of International Law*.
[111] International Court of Justice, Asylum, Colombia v Peru, Merits, Judgment, [1950] ICJ Rep 266, 20th November 1950.
[112] Maljean-Dubois, S. (2018), "Les Obligations de Diligence Dans La Pratique: La Protection de l'environnement", *Le Standard de Due Diligence et La Responsabilité Internationale*, 150.
[113] UN GA; Development and strengthening of good-neighbourliness between States : resolutions / adopted by the General Assembly, 1982: "Bearing in mind that, owing to geographic proximity, there are particularly favourable opportunities for co-operation and mutual advantage between neighbouring countries in many fields and various forms and that the development of

active cooperation between states: good neighbourliness also underpins the obligations to notify other states in the case of impending damage and to cooperate with other states to avoid harm being cause to them. According to the 1998 report submitted (but not adopted) by the Sub-Committee on Goood-Neighbourliness - created by the Sixth Committee - the 'movement of person' has been identified as a specific area of ambit of obligations of this notion (para. 19). This requires: '20. Co-operation in the protection and promotion of human rights [including the rights of persons to national minorities]; 21.Protection of migrant workers and their families; 22. Dissemination of information, access information and exchange of information on aspects of life in neighbouring States'. As highlighted by Boisson de Chazournes and Campanelli (2006), this principle is 'subject to evolution' and the subject area of climate change and human rights protection illustrates the potential of strengthen the content of this regime. For instance, the recent Australia-Tuvalu Filapeli Framework (2023)[114] is underpinned under the notion of *falepili* 'which connotes the traditional values of good neighbourliness, duty of care and mutual respect'. This reference to good-neighbourliness in the context on climate cooperation make a case for the relevance of this notion to 'provide the citizens of Tuvalu with a special human mobility pathway to access Australia underpinned by a shared understanding and commitment to ensuring human mobility with dignity(b).'

2. Principles to Inspire the Actions of Mitigation, Adaptation and Response to the Losses and Damage Resulting from the Climate Emergency in the Affected Communities

The actions of mitigation, adaptation and response to the losses and damages resulting from the climate emergency in the affected communities can be inspired by principles that have consolidated or are consolidating in a regional or the international system. The two principles – *rectius*, formula, that might or are consolidating as international principles – that will be considered here are the following: the *in dubio pro natura*, and a *de jure condendo* formula, namely *in dubio pro futuris generationibus*.

such co-operation may have a positive influence on international relations as a whole"; Report of the Sub-Committee. UN. General Assembly (43rd sess.: 1988-1989). 6th Committee. Subcommittee on Good-Neighbourliness, 1988, UN Doc A/C.6/43/L.1, 16 November 1988. Among the Development by neighbouring States of legal regimes to enhance their mutual relations and cooperation between them: 'Negotiations between States with a view to considering and solving issues of common interest between neighbouring States' (point 5).

[114] Available at: https://www.dfat.gov.au/geo/tuvalu/australia-tuvalu-falepili-union-treaty.

a) In dubio pro natura[115]

As it is known, the expression *in dubio pro natura* dates back at least to 1994, when it was used by the Brazilian scholar Luiz Fernando Coelho. At the conference *II Encontro Magistratura e Meio Ambiente*, the philosopher of law used this concept to refer to a theory of interpretation, integration and application of laws in the environmental context. With the aim of establishing common principles and rules of hermeneutics, Coelho intended to defend natural resources such as flora, fauna and water, embracing the philosophy of *deep ecology* and a holistic vision to be transposed into law.[116] According to him, as legal practitioners would be obliged to apply the most favorable rule to the social objective of nature conservation, the 'main criterion for resolving all these problems of applying nature protection rules will always be *in dubio pro natura*, the cornerstone of which will be a new natural law.'[117]

In dubio pro natura fails to find proper conceptualization in international law. Neither international treaties nor soft law instruments adopted at the international level contribute to shed some light on this apparently very clear brocardo. In the *Guide to Latin in International Law*, the principle is defined as a 'a maxim meaning that, when in doubt as to whether an activity harmful to the environment should proceed, the doubt should be resolved in favor of protecting the environment.'[118] In other words, when in doubt as to whether an activity harmful to the environment should proceed, the doubt should be resolved in favor of protecting the environment.'[119] This statement reflects 'to a degree the "precautionary principle" commonly adopted in international environmental law instruments.'[120]

Back to 1997, the International Court of Justice in the *Gabcikovo-Nagymaros Project* (*Hungary v. Slovakia*) case dealt extensively with environmental issues, confirming the evolution of international

[115] This paragraph draws from a common research conducted with Prof. Serena Baldin, University of Trieste, Italy: Baldin, S. and De Vido S. (2022), "The In dubio pro natura Principle: An Attempt of a Comprehensive Legal Reconstruction", *Revista General de Derecho Público Comparado*, 32: 168-199.
[116] Coelho L.F. (2008), "In dubio pro natura interpretação crítica do direito ambiental", in Sánchez Bravo, A. (ed.), *Políticas públicas ambientales*, 157-187.
[117] Coelho L.F. (2008), "In dubio pro natura interpretação crítica do direito ambiental", in Sánchez Bravo, A. (ed.), Políticas públicas ambientales, 157-187, 170.
[118] Fellmeth A.X. and Horwitz M. (2009), *Guide to Latin in International Law*, Oxford: Oxford University Press, 126.
[119] Ibid.
[120] Ibid.

environmental law, which was said to have gradually embraced new concerns and concepts, such as the one of sustainable development:

> Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – […] new norms and standards have been developed […]Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past.

The Court also added that: 'This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.'[121]

The dispute between Hungary and Czechoslovakia (then Slovakia) concerned the construction of a system of locks on the river Danube, regulated by a bilateral treaty, which was likely to have a considerable impact on the environment. In talking about the suspension of the Hungarian works at Dunakiliti which impaired the interests of Czechoslovakia under the treaty, Judge Herczegh in his dissenting opinion stressed the existence of a conflict of interests between, on the one hand, the financial interests of Czechoslovakia, and, on the other hand, the Hungarian interest in safeguarding the ecological balance jeopardized by the project. He added: '*in dubio pro natura*',[122] without however exploring in detail the meaning of this brocardo, which was also unknown to pivotal soft law instruments of international environmental law, such as the Rio Declaration on Environment and Development of 1992 that notoriously defined what precaution means.[123]

Traces of the *in dubio pro natura* principle can be found in the Harmony with Nature resolutions adopted by the UN General Assembly, starting from 2009. Despite their non-binding nature, they are extremely advanced in trying to overcome the limits of the Anthropocene, though focusing more on the 'interconnections between humankind and nature,' and on the protection of the ecosystems as a way to contribute to the co-existence of humankind,[124] rather than on the protection of nature *per se*. It seems that Harmony with Nature resolutions, despite their innovative character, which cannot be clearly

[121] Case concerning the Gabcikovo Nagymaros project, *Hungary v. Slovakia* [1997] ICJ Reports 7, para. 140.
[122] Dissenting opinion of Judge Herczegh, 184.
[123] See https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf.
[124] Resolution adopted by the General Assembly on 19 December 2019, UN Doc A/RES/74/224, 17 January 2020, paras. 9-10.

denied, in leaving an anthropocentric approach aside, do let it re-enter from the backdoor, by promoting a sustainable development which however perpetuates in the end the dichotomy between humankind and nature.[125] A step forward has been undertaken by the most recent resolution adopted in times of COVID-19 pandemic,[126] where the rights of nature emerge, along with relevant State practice and Earth Jurisprudence, and the proposal of a planetary wellbeing:

> With the acceleration of climate change and ecosystems being pushed to collapse, the human right to a healthy environment cannot be achieved without securing Nature's own rights first. More precisely, the human right to life is meaningless if the ecosystems that sustain humankind do not have the legal rights to exist. Furthermore, the rights of each sentient being are limited by the rights of all other beings to the extent necessary for the maintenance of the integrity, balance and health of larger ecological communities.[127]

There is a trend to take some steps forward towards ecocentrism – 'in which the lives of all human and non-human species matter'[128] – and where the resolution acknowledges that 'humanity accepts the reality that its well-being is derived from the well-being of the Earth and that, to sustain all life on the planet and guarantee future generations of all species, it is necessary to live in harmony with Nature and be guided by the laws of the Earth'.[129] The principle of *in dubio pro natura* has never been explicitly invoked, but one cannot disregard the attention to nature, by encouraging a transformative change also in the way humankind conceives economics and development.

A more evident affirmation of what *in dubio pro natura* might entail, even without explicit recognition, comes from the jurisprudence of the Inter-American Court of Human Rights, which recognized the right

[125] These two paragraphs have been recurrent in several resolutions, starting from UN Doc A/RES/68/216 (2013): '9. Invites States: (a) To further build up a knowledge network in order to advance a holistic conceptualization to identify different economic approaches that reflect the drivers and values of living in harmony with nature, relying on current scientific information to achieve sustainable development, and to facilitate the support and recognition of the fundamental interconnections between humanity and nature; (b) To promote harmony with the Earth, as found in indigenous cultures, and learn from them, and to provide support for and promote efforts being made from the national level down to the local community level to reflect the protection of nature'.

[126] Report of the Secretary-General, *Harmony with Nature*, UN Doc A/75/266, 28 July 2020.

[127] Ibid, para. 41.

[128] Ibid, para. 94.

[129] Ibid, para. 36.

to a healthy environment, not the *human* right to a healthy environment, in its landmark Advisory opinion of November 2017.[130] The right to a healthy environment 'constitutes a universal value,' having both an individual and a collective dimension,[131] and, most importantly, it is 'an autonomous right,' because, 'unlike other rights, protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals.'[132] As a consequence, and this is the relevant passage, 'it protects nature and the environment, not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as health, life or personal integrity, but because of their importance to the other living organisms with which we share the planet that also merit protection in their own right.'[133] If the right is autonomous, even though related to other human rights, both in its collective and individual dimension, and it disregards evidence of possible risks for humankind, it means that the environment must be protected in itself and that humankind benefits from the protection of the environment, because it is part of it.

Against this backdrop, the *in dubio pro natura* principle can flourish, because it relies on a right to a healthy environment and allows the consideration of nature as primary in a potential conflict of interests which might arise between more economic aspects and nature. This has proved to be particularly developed by national courts in Latin American countries, where, indeed, the right to a healthy environment and the rights of nature are either part of constitutions or affirmed in jurisprudence. It might be tempting to say that the *in dubio pro natura* principle is equivalent to the precautionary principle. The position of this *amicus curiae* is however that the brocardo *in dubio pro natura* cannot be used as synonym of precaution in international law and can be conceived as a broader notion, capable of being applicable to different scenarios. Commentators have extensively discussed the nature of the precaution as a principle – and, if so, whether aspirational or binding rule – or approach, or strategy.[134]

[130] Inter-American Court of Human Rights Advisory Opinion OC-23/17 [2017]. See also Case of the *Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina* [2020].
[131] OC-23/17, para. 59.
[132] Ibid., para. 62.
[133] Ibid.
[134] On the precautionary principle, see, *inter alia*, among hundreds of studies, https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0063.xml, Hickey Jr. J.E. and Walker V.R. (1995), "Refining the Precautionary Principle in International Environmental Law", in *Virginia Environmental Law Journal*, 14(3): 423-454; Freestone D. and Hey E. (eds.) (1996), *The Precautionary Principle and International Law: The challenge of implementation*, The Hague/London/Boston: Kluwer Law International; Harding R. and

Some authors are convinced that precaution has ripened into a norm of customary international law.[135] Others, however, prefer to use the concept as principle: '[i]f the precautionary principle is viewed not as a customary law rule but simply as a general principle then its use by national and international courts and by international organizations is easier to explain.'[136] Precaution must be surely appreciated as 'one of the central concepts for organizing, influencing and explaining contemporary international environmental law and policy.'[137] Without delving into the details of the legal reasoning,[138] it should be said that the premise for the application of the precautionary principle is a situation of scientific incertitude and the need to avoid environmental degradation. This is not necessarily the case for the *in dubio pro natura* principle, which can be used even absent scientific incertitude and is not necessarily related to potential environmental degradation. It can be used as a means of interpretation of existing laws, whose application might be dubious in terms of impact on the environment, or as an instrument to solve conflicts of interests in favor of the protection of nature, or to shift the burden of proof in environmental disputes.

As Nicholas Robinson stated: 'when a matter may be unsure or the equities appear evenly balanced', *in dubio pro natura* compels 'a decision that best protects nature.'[139] For example, in litigation of environmental matters, it could be useful 'especially when harms are difficult to trace, caused by many

Fisher E. (eds.) (1999), *Perspectives on the Precautionary Principle*, Leichhardt/New South Wales: Federation Press, 29; Trouwborst A. (2002), *Evolution and Status of the Precautionary Principle in International Law*, The Hague/London/Boston: Kluwer Law International; Boisson de Chazournes L. (2002), "Le principe de précaution: nature, contenu et limites", in Leben, C. and Verhoeven, J. (eds.), *Le principe de précaution. Aspects de droit international et communautaire*, Paris: Panthéon Assas 65-94; Bassan F. (2006), *Gli obblighi di precauzione nel diritto internazionale*, Napoli: Aracne; Bianchi A. and Gestri M. (eds.) (2006), *Il principio di precauzione nel diritto internazionale e comunitario*, Milano: Giuffrè; Wiener J.B. (2007), "*Precaution*", in Bodansky D., Brunnée J. and Hey E. (eds.), *The Oxford Handbook of International Environmental Law*, Oxford: Oxford University Press; Fodella A. and Pineschi L. (eds.) (2009), *La protezione dell'ambiente nel diritto internazionale*, Torino: Giappichelli; Foster C.E. (2011), *Science and the Precautionary Principle in International Courts and Tribunals*, Cambridge: Cambridge University Press; Proelss A. (2016), "Principles of EU Environmental Law: An Appraisal", in Nakanishi Y. (ed.), *Contemporary Issues in Environmental Law. The EU and Japan*, Tokyo: Springer, 29-45.

[135] Trouwborst A. (2002), *Evolution and Status of the Precautionary Principle in International Law*, Hague/New York: Kluwer Law International, 284.

[136] Boyle A. (2007), "The Environmental Jurisprudence of the International Tribunal for the Law of the Sea", *The International Journal of Marine and Coastal Law*, 22(3): 369-381, 375. Referring to a 'still evolving principle of environmental protection', Crawford J. (2012), *Brownlie's Principles of Public International Law*, Cambridge: Cambridge University Press, 357.

[137] Birne P., Boyle A. and Redgwell C. (2009), *International Law and the Environment*, Oxford, OUP, 147. See also Daniel Bodansky, D. (2010), *The Art and Craft of International Environmental Law*, Cambridge: Harvard University Press, 200: '[principles] articulate collective aspirations that play an important role over the longer term, framing both discussions about the development of international law and negotiations to develop more precise norms'.

[138] Available in Baldin S. and De Vido S., cit.

[139] Robinson N.A. (2014), "Fundamental Principles of Law for the Anthropocene?", *Environmental Policy and Law*, 44(1-2): 13-27, 16.

parties or appearing only after a long period of latency.'[140] *Mutatis mutandis*, it can be contended that as much as the principle *in dubio pro reo* was meant to address cases in which 'the applicable laws or the relevant facts are unclear or ambiguous,' and to solve them 'in a manner favorable to the defendant,' the same can be said with regard to the *in dubio pro natura* principle. When the applicable law appears to be unclear or ambiguous with regard to the protection of the environment, the interpretation must lead, or the conflict of interests must be solved, in a manner favorable to the protection of the environment. Formulated in this way, the difference between the precautionary and the *in dubio pro natura* principles seems adamant. Going back to the previous paragraph, and in line with the jurisprudence of the Inter-American Court of Human Rights, the *in dubio pro natura* applies even absent a risk for human beings' health.

b) In dubio pro futuribus generationibus

This *amicus curiae* goes a step forward in the legal reasoning, by assessing the possibility of elaborating the *de jure condendo* formula *in dubio pro futuris generationibus*, which draws from the principle of intergenerational equity,[141] questions its inherent anthropocentrism, and, by departing from the precautionary principle, embraces current environmental concerns in its innovative understanding of the *in dubio pro natura* brocardo.[142]

The starting point is that intergenerational equity is a fundamental principle while dealing with the concept of time and temporalities in international human rights law,[143] and with the compelling issues emerging in international environmental and climate change law. Concerning the protection of the environment for present and future generations, both natural major disasters and slow-onset

[140] Bryner N. (2015), *"*Applying the Principle In Dubio Pro Natura for Enforcement of Environmental Law*"*, in *Environmental Rule of Law: Trends from the Americas*, General Secretariat of the Organization of American States, Montego Bay, Jamaica, 169, at https://www.oas.org/en/sedi/dsd/environmentalruleoflaw_selectedessay_english.pdf.

[141] On which see extensively, Brown Weiss, E. (1989), *In Fairness of Future Generations*, New York: Transnational Publishers.

[142] This principle was first presented in Florence at the conference of the Italian Society of International Law in 2022, and published, as part of an ongoing research by Sara De Vido, in Italian: De Vido S. (2023), "In dubio pro futuris generationibus: una risposta giuridica ecocentrica alla slow violence", in Frulli, M. (ed.), *L'interesse delle future generazioni nel diritto internazionale e dell'Unione europea*, Napoli: Editoriale Scientifica.

[143] McNeilly K. and Warwick B. (eds.) (2022), *Time and Temporalities in International Human Rights Law*, London: Bloomsbury.

emergencies, or, better – to transfer a non-legal concept to legal arguments – 'slow violence'[144] are relevant. The phenomena are different: major disasters erupt in a precise moment of time, and their effects are clearly immediate, medium and long-term, but the present dimension usually prevail in the adoption of policies aimed at responding to the emergency. Slow violence, on the contrary, might or might not lead to major environmental disasters.

Several bodies have acknowledged this twofold dimension in the protection of the environment. For example, the Human Rights Committee, in *Daniel Billy et al. v. Australia* (views of 21 July 2022), confirmed the affirmation already included in *General Comment No. 36* that 'environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.'[145]

The *in dubio pro futuris generationibus* formula comes from a reflection on both the precautionary principle and the *in dubio pro natura* formula. The idea is to disentangle the principle of intergenerational equity from the principle of sustainable development, to which it is commonly referred, and to reflect on its connection with the precautionary principle.

As Redgwell has argued, 'the [precautionry] principle does not require a sacrifice on the part of present generations for the benefit of future generations, but balances their interests by providing that where there is a threat to the environment globally, but scientific uncertainties remain, steps can and should be taken that will in any case benefit the present generation and mitigate suspected adverse impacts on future generations.'[146] In spite of the complexity of this principle and its application, 'the [its] ability [...] to prevent those actions with a risk of irreversible damage to the environment has a direct (and positive) bearing on the interests of future generations.'[147]

The suggestion we make in these pages, which is part of a broader analysis, is to push for a inchoate principle: *in dubio pro futuris generationibus*, which draws from the *in dubio pro natura* brocardo and explains in operative terms the principle of intergenerational equity, entailing a consideration of the

[144] Nixon R. (2011), *Slow Violence and the Environmentalism of the Poor*, Cambridge (MA): Harvard University Press.
[145] HRC, General Comment No. 36 (2019) on Article 6, Right to life. HRC, *Daniel Billy et al. v. Australia*, view of 21 July 2022, Communication No. 3624/2019.
[146] Redgwell C. (1999), *Intergenerational Trusts and Environmental Protection*, Manchester: Juris, 139.
[147] Ibid., 111.

interests of both human and non-human future generations in all actions undertaken by States.[148] The perspective is eco-centric, because it appreciates the environment as a whole, composed of human and non-human beings, as well as natural objects, including present and future generations.[149]

What we suggest is that the environment does not need to be protected *in favour* of present and future generations, but the protection of the environment *in itself* contains the protection of the interests of both the present and the future generations. This argument is pivotal to appreciate that both present and future generations will benefit from an approach that puts at the core of any legal reasoning the environment. As a consequence, the *in dubio pro natura* brocardo can be read and interpreted as *in dubio pro futuris generationibus*, meaning that, when there is an uncertain situation or a conflict of interest, or the state of the art of science does not allow to solve the doubt of whether there might be irreparable effects for future generations, the doubt must be solved *in dubio pro futuris generationibus*, where generations are both human and non-human. This formula, which is strongly inspired by the precautionary principle, can be used as interpretative tool or as "interstitial" norm, as prof. Lowe argued many years ago with regard to the precautionary principle.[150]

The effects of this inchoate principle, used as interpretative tool, is potentially enormous. For example, looking at the Inter American Court of Human Rights' advisory opinion of November 2017, one could argue that the protection of the environment, irrespective of the benefits *pro* present 'human' generation, should be granted as expression of the "right to a healthy environment" and *in dubio pro futuris generationibus*.

In this way, we can consider the new "temporality" of international law, which disrupts the traditional boundaries between past, present and future to contemplate audacious changes of theoretical and interpretative perspective. As corollary of the principle of intergenerational equity, and inspired by the brocardo *in dubio pro natura*, the brocardo *in dubio pro futuris generationibus* gradually emerges as a

[148] De Vido S. (2023), "In dubio pro futuris generationibus: una risposta giuridica ecocentrica alla slow violence", in Frulli, M. (ed.), *L'interesse delle future generazioni nel diritto internazionale e dell'Unione europea*, Napoli: Editoriale Scientifica.

[149] See also CESCR, General Comment No. 25 (2020) on science and economic, social and cultural rights (article 15(1)(b), (2), (3), and (4) of the International Covenant on Economic, Social and Cultural Rights, where the "unacceptable harm" to humans or the environment" is contemplated. Needless to say, the concept of environment as a whole refers to C. Stone, *Should Trees Have Standing*?, Oxford University Press, 3rd ed., 2010.

[150] Lowe V. (2001), "The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?", in Byers M. (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law*, Oxford University Press: Oxford.

flexible instrument capable of guiding judges in the interpretation and national and international legislators in the adoption of policies that put at the center the interests of the environment, meant, as we said, in the holistic way Christopher Stone theorized 50 years ago,[151] and magisterially revisited by the then Special Rapporteur David Boyd.[152]

This inchoate formula does not disregard the fact that the term generation is not a monolith: on the one hand, because it considers both human and non-human species, as already stated; on the other hand, because it appreciates the disproportionate impact of violence on a 'part' of the human generation. In that respect, the concepts of climate vulnerability and intersectionality fall within this analysis.

3. Principles in the Context of Climate Migration

a) Introduction: Human Mobility in Latin America[153]

Successive reports of the Intergovernmental Panel on Climate Change (IPCC) have illustrated how drought, soil erosion, changes in rainfall patterns, and sea-level rise in Latin America are exacerbating precarity and violence and interfering with the full enjoyment of human rights by increasing climate-driven displacement,[154] In 2019, the Human Rights Council included Central America among the key areas are progressively impacting vulnerable populations, and mobility appeared to increase as a common response to changing environmental conditions.

There is an increase attention to climate migrants who travel through Latin America to enter the United States through the geographical region of the Darién jungle, known as the 'Darién Gap', located at the border between Colombia and Panama.

As the historical epicentre of disputes and symbolic borders between different Latin American development models,[155] the Darién region is the first and most dangerous corridor for massive migration

[151] Stone C. (2010), *Should Trees Have Standing?*, Oxford: Oxford University Press (3rd ed.).
[152] Boyd D. (2017), *The Rights of Nature*, Toronto: ECW Press.
[153] We thank Dr Simone Ferrari, University of Milan, for this overview.
[154] Cantor D.J. (2021), "Environment, Mobility, and International Law: A New Approach in the Americas", *Chicago Journal of International Law*, 21(2): 263-322.
[155] Morales Pamplona G. (2005), "Un esfuerzo de incorporación de la provincia del Darién al estado indiano", *Anuario de Historia Regional y de las Fronteras*, 10(1): 151-180; Alameda Viveros S. (2009), "Tapón del Darién: el dilema del desarrollo", Universidad Nacional de Colombia, Facultad de Ciencias Económicas y Escuela de Economía, available at: https://repositorio.unal.edu.co/handle/unal/70010; Velásque Runk J. (2015), "Creating Wild Darien", *Journal of Latin American Geography*, 14(3): 127-156; Carmona Londoño L.S. (2020), "Tapón del Darién: en disputa por la Unión de las Américas", Revista De La Facultad De Trabajo Social, 26(26): 12-27.

to North America.[156] The continuous growth in the numbers of migrants transiting through the Darién jungle has been mirrored by the strengthening of paramilitary organizations dedicated to human trafficking in the regions of Urabá Antioqueño and the Caribbean coast of the Colombian Chocó.[157] At the same time, during the seven- to ten-day journey through the jungle, migrants face numerous threats to their survival (natural calamities, accidents and illnesses) and are exposed to multiple forms of violence (robbery, exploitation, rape, disappearances, kidnappings, murders), as pointed out, among others, by the UN Human Rights Office.[158] Official data on migration through the Darién gap collected by the Panamanian border authorities over the past decade (2013–2023) show the exponential growth of the migration phenomenon. In 2017, a total of 6,780 migrants crossed the Darién jungle, most of them coming from Bangladesh, Nepal and India.[159]. The first consistent increase in migration flows through the Darién was during 2021, when a total of 133,726 migrants crossed it.[160] In 2022, 248,284 migrants crossed the Darién Gap[161], and in the first seven months of 2023, 251,758 migrants have crossed the Darién jungle, with projections of more than 400,000 crossings by the end of the year.[162]

The data provided by the Panamanian authorities also offers an overview of the transnational and global dimension of the Darién migration phenomenon. For example, in 2022, 13,664 migrants came from the

[156] Marín G. A., Álvarez Uribe M. C. and Rosique Gracia J. (2018), "Crisis alimentaria y violencia en Acandí - Darién Caribe colombiano", *Perspectivas En Nutrición Humana*, 12: 39-52.

[157] Organización Internacional para las Migraciones (OIM), Misión Colombia (2007), *Informe Ejecutivo*, *Estudio Investigativo para la descripción y análisis de la situación de la migración y trata de personas en la zona fronteriza Colombia-Venezuela*, (Case COL-OIM0149), OIM Misión Colombia, 01 July2007, available at: https://repository.iom.int/bitstream/handle/20.500.11788/1088/COL-OIM%200149.pdf?sequence=1&isAllowed=y.; Miraglia P. (2016), "The Invisible Migrants of the Darién Gap: Evolving Immigration Routes in the Americas", *Council On Hemispheric Affairs*, available at: https://www.coha.org/wp-content/uploads/2016/11/Refugees-Darien-Gap.pdf.

[158] Office of the United Nations High Commissioner for Human Rights (OHCHR) (2023), *Darien Gap Migrants*, 05 September 2023, available at: https://www.ohchr.org/en/press-briefing-notes/2023/09/darien-gap-migrants; Office of the United Nations High Commissioner for Human Rights (OHCHR) (2023), *Darien Gap: A Risky Path in Search of a Safer Life*, 05 September 2023, available at: https://www.ohchr.org/en/stories/2023/09/darien-gap-risky-path-search-safer-life.

[159] Servicio Nacional de Migración, República de Panamá (2020), *Estadísticas Tránsito Irregular por Darién*, available at: https://www.migracion.gob.pa/images/img2023/pdf/IRREGULARES_POR_DARIEN_DICIEMBRE_2020.pdf.

[160] Servicio Nacional de Migración, República de Panamá (2022), *Estadísticas Tránsito Irregular por Darién*, available at: https://www.migracion.gob.pa/images/img2023/pdf/IRREGULARES_POR_DARIEN_DICIEMBRE_2022.pdf.

[161] Servicio Nacional de Migración, República de Panamá (2023), *Estadísticas Tránsito Irregular por Darién*, available at: https://www.migracion.gob.pa/images/img2023/pdf/LEGALIZACIONES%20.pdf.

[162] Servicio Nacional de Migración, República de Panamá (2023), *Estadísticas Tránsito Irregular por Darién*, available at: https://www.migracion.gob.pa/images/img2023/pdf/LEGALIZACIONES%20.pdf.

Asian continent (mostly from Bangladesh, India, Afghanistan and China) and 12,168 from African countries (mostly from Senegal, Cameroon, Somalia, Angola and Ghana).[163]

The heterogeneous trajectories of migration through the Darién Gap, due to the ease of legal access to countries such as Ecuador and Brazil, by those crossing the border between Colombia and Panama lead to extremely differentiated migratory phenomena. They range from climate migrants, to migrants displaced by armed conflicts or persecution, exiled people and 'economic' migrants from 'southern' areas of the world.[164]

This is facilitating the growing awareness of the key role of regional actors and initiatives. Regional organizations recognize, through 'soft law' declarations, the challenges posed by climate change and natural disasters, as well as by the displacement of people across borders that these phenomena may cause in the region.

b) International Cooperation and the Protection of Climate Migrants' Rights

Scholars have started to gain more empirical insights into the extent to which existing migratory instruments may function as a "protection stop-gap".[165] By taking stock of the existing and emerging body of instruments[166], this overview illustrates the changing landscape and understanding of the climate–migration nexus in terms of an emerging agenda that marks the recent escalation of normative initiatives. The door to this agenda was opened in 2010 with the adoption of paragraph 14(f) COP16, which aimed to identify ways of meeting new mobility needs. A further step, the adoption of the Global Compact for Migration (GCM) in 2018 has broadened the possibilities for multilevel governance, and

[163] Servicio Nacional de Migración, República de Panamá (2023), *Estadísticas Tránsito Irregular por Darién*, available at: https://www.migracion.gob.pa/images/img2023/pdf/LEGALIZACIONES%20.pdf.

[164] Cantons A.S.P. (2023), "Repensando la respuesta humanitaria a la crisis del Tapón del Darién en el marco de los ODS: el triple nexo humanitario en perspectiva", *Análisis Jurídico-Político*, 5(10): 147-178; Moran A. H. (2023), "Implicaciones legales y jurídicas del tránsito irregular de migrantes en la República de Panamá", *Sapientia*, 14(2): 50-59.

[165] Francis, A. (2019), *Free Movement Agreements & Climate-Induced Migration: A Caribbean Case Study*, Columbia Public Law Research Paper. This paragraph draws from a common research conducted with Dr Cristani and Prof. S. Lavenex, University of Geneva, Cristani F., Fornalé E. and Lavenex S. (2020). "Regional Environmental Migration Governance", in Krieger T., Panke D. and Pregernig M. (eds.), *Environmental Conflicts, Migration and Governance*. Bristol: Bristol University Press, 137-156, 141.

[166] The analysis is based on the recently launched interactive legal maps of human mobility and environmental changes, available at: https://interactivemaps.clisel.eu/maps. The database includes 254 instruments and covers 25 countries (Fornalé, F. and Cristani, F. (2019), www.climco2.org).

we focus on three levels as identified by Cristani et al.[167] These are (1) the international level, which emerges as a platform for discussion and consultation; (2) the regional level, which has a prominent role in framing concrete and operational responses; and (3), the national level, at which the States, together with local actors, are responsible for the implementation of domestic laws and policies in line with regional and international norms.[168]

International Level: Under the auspices of the UN, the GCM was adopted in 2018[169] as a framework that aspires to a "360-degree vision" of human mobility (para. 11).[170] It is linked, in particular, with the 2030 Agenda for Sustainable Development, which also includes a commitment by UN Member States in facilitating safe, orderly and regular migration. The Global Compact process was officially launched by the UN New York Declaration for Refugees and Migrants by the UN General Assembly in 2016, when "the adverse effects of climate change, natural disasters (some of which may be linked to climate change), or other environmental factors",[171] in combination with other factors, were recognized as drivers of human mobility (Objective 2). The key idea behind the Compact is that enhanced international cooperation under existing international instruments – human rights law– is needed to address the challenges emerging from cross-border mobility.[172] The commitments include: "strengthening the resilience of people at risk by integrating human mobility considerations",[173] "the provision of pathways for regular migration which allow people to move out of harm's way before disasters strike or to cope with the impacts of such disasters" (Objective 5, para. 21 g/h), "to harmonize and develop approaches and mechanisms at the sub-regional and regional level to allow access to humanitarian assistance for

[167] Cristani, F., Fornalé, E. and Lavenex, S. (2020), "Environmental Migration Governance at the Regional Level", in Krieger, T., Panke, D. and Pregernig, M. (eds.), Environmental Conflicts, Migration and Governance, Bristol: Bristol University Press, 137-156.
[168] Cristani F., Fornalé E. and Lavenex S. (2020). "Regional Environmental Migration Governance", in Krieger T., Panke D. and Pregernig M. (eds.), *Environmental Conflicts, Migration and Governance*. Bristol: Bristol University Press, 137-156, 141.
[169] Countries that didn't adopt the GCM include: Australia, Austria, Belgium, Bulgaria, Czech Republic, Hungary, Italy, Israel, Poland, Slovakia, Switzerland and the US.
[170] United Nations General Assembly (UNGA) (2018), *Draft Outcome of the Conference. Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration*, UN Doc A/CONF.231.3, 30. July 2018; Fornalé E. (2020), A l'envers: Setting the Stage for a Protective Environment to Deal with 'Climate Refugees' in Europe, European Journal for Migration Law, 22 (4), (2020) 518–540.
[171] United Nations General Assembly (UNGA) (2006), *Resolution 60/251 Human Rights Council*, New York: United Nations.
[172] Carrera S. *et al.* (2018), "Some EU Governments Leaving the UN Global Compact on Migration: A Contradiction in Terms?", *CEPS Policy Insights*, 2018/15.
[173] Kaelin W. (2018), "The Global Compact for Migration: A Ray of Hope for Disaster-Displaced Persons", *International Journal of Refugee Law*, 30(4): 664–667.

persons affected by sudden or slow-onset disasters" (Objective 2, para. 18 k) and "the development of coherent approaches to address the challenges of migration movement" (Objective 2, para. 18 l).
In the process of implementation of the GCM, states take a holistic approach when seeking to achieve the objective of improving the application of internationally agreed human rights standards. In September 2019, a joint statement issued by five UN human rights treaty bodies highlighted that

> "5. Migrant workers and members of their families are forced to migrate because their States of origin cannot ensure the enjoyment of adequate living conditions, due to the increase in hydrometeorological disasters, evacuations of areas at high risk of disasters, environmental degradation and slow-moving disasters, the disappearance of small island states due to rising sea levels, and even the occurrence of conflicts over access to resources. Migration is a normal human adaptation strategy in the face of the effects of climate change and natural disasters, as well as the only option for entire communities and has to be addressed by the United Nations and the States as a new cause of emerging migration and internal displacement."[174]

Under existing human rights law, "States have the duties to respect, to protect and to fulfil human rights so as to protect persons from the foreseeable harms emanating from the impacts of climate change" (Principles 1-3 of the Sidney Declaration).[175] These duties require States not to engage in actions that deprive individuals of their rights and to take action to prevent human rights violations, including acts of omission[176]. The UN Human Rights Committee (HRC), in a decision (Portillo Cáceres and Others v. Paraguay, 2019),[177] recognized that a State's failure to take action against environmental harm can

[174] Committee on the Elimination of Discrimination Against Women, Committee on Economic, Social and Cultural Rights, Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, Committee on the Rights of the Child, and Committee on the Rights of Persons with Disabilities, Joint Statement on Human Rights and Climate Change (16 September 2019).
[175] "Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life", HRC, General Comment No. 36, Article 6 (Right to Life), 3 September 2019, UN Doc CCPR/C/GC/35; CEDAW, General Recommendation No. 37 on Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change, 7 February 2018 (UN Doc CEDAW/C/GC/37).
[176] Fornalé E. (2023), "Vulnerability, Intertemporality, and Climate Litigation", Nordic Journal of Human Rights, 41(4): 357-377; International Law Association (ILA) (2022), Interim Report of the Committee, Conference of the ILA, Lisbon, available at: https://www.ila-hq.org/en_GB/committees/international-law-and-sea-level-rise.
[177] HRC, Views Adopted by the Committee under Article 5(4) of the Optional Protocol, Concerning Communication No. 2751/2016, 20 September 2019 (UN Doc CCPR/C/126/D/2751/2016).

violate its obligations to protect the right to life (Articles 6 and 17) and it consolidates the interpretation adopted in a series of cases heard by regional courts, in particular by the European Court of Human Rights.

The GCM created the International Migration Review Forum as a fruitful "implementation mechanism".[178] This intergovernmental global platform is scheduled to take place every four years.[179] During the preparation phase, regional meetings organized by the UN Network on Migration (Compact, para. 50) are held. The workshop 'Cross border displacement and assistance to migrants in the context of disasters' held for Ibero-American Immigration Authorities Network' in 2022 aimed to strengthen knowledge, trends and challenges associated to environmental mobility in the regional and strategies for implementing global and regional frameworks. It provided an opportunity to adopt a common position and key messages to the International Migration Review Forum (IMRF) organized by the United National Network on Migration in June 2022.[180] International Migration Review Forum 2022 (IMRF): served an opportunity to showcase effective practices and available policy instruments related to pathways for regular migration in disaster and climate change contexts at regional, national and local levels.[181] Recent developments have also been described in the first biennial report by the UN Secretary-General on the implementation of the GCM submitted in 2020.[182] Concerning the inclusion of "environmental degradation, natural disaster and climate change as a driver of contemporary migration", the report highlighted several countries that had incorporated climate change considerations into their

[178] This mechanism is scheduled to take place every four years and it will start in 2022 (GCM, para. 49).
[179] Guild E., Basaran T. and Allison K. (2019), "From Zero to Hero? An Analysis of the Human Rights Protections within the Global Compact for Safe, Orderly and Regular Migration", *International Migration*, 56(6): 459-467.
[180] For the UNECE regional review forum, fourteen states and many regional organizations (including the EU) and stakeholders have submitted reports on their actions. Available at https://migrationnetwork.un.org/country-regional-network/europe-north-america.
[181] The United Kingdom, Regional Review of the Global Compact for Safe, Orderly and Regular Migration (GCM) UNECE Region, November 2020.
[182] In particular: the Government of Germany adopted the Skilled Labour Immigration Act (2020); Spain developed a pilot labour migration programme with Senegal for the agricultural sector in 2019 and a pilot visa programme with Argentina; and the "WHO has facilitated a bilateral agreement for the training of Sudanese health workers to work in Saudi Arabia" (para 63). UN Secretary-General, Global Compact for Safe, Orderly, and Regular Migration, 26 October 2020 (A/75/542) based on inputs received from 54 Member States.

national migration policies before the adoption of the GCM (para. 40).[183] It also mentioned a number of countries that are developing *ad hoc* measures as part of their climate strategy.[184]

Regional Level: In the absence of a comprehensive legal framework to provide protection to vulnerable population who cross international borders due to climate change-related factors the regional is emerging as "a particular promising approach".[185] This promise arises from several factors.[186] Experiences with climate migration are often similar within a given region. In addition, the regional level entails the advantage to rely on a pre-existing (and in some cases, well-consolidated) framework of regulation in several key areas. Furthermore, these responses can be associated with and embedded within already existing regional migration frameworks that have proliferated in particular since the 1990s.[187] Thus, while hitherto little coordinated and highly fragmented, provisions potentially relevant for conflict and environmentally induced migration have been developed in regional human rights, refugee, and free movement regimes, as well as by more recent informal Regional Consultation Processes (RCPs).

This was clearly affirmed by the *Nansen Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change*:

> [r]ecognizing that most cross-border disaster-displacement takes place within regions […], the roles of regional and sub-regional organizations, for example the African Union and the African regional economic communities or the Pacific Islands Forum, are of primary importance for developing integrated responses. More specialized (sub-)regional mechanisms include Regional Consultative Processes (on migration), human rights mechanisms, disaster risk management centres, climate change adaptation strategies, as well

[183] In particular: Bolivia (Plurinational State of), Botswana, and Uganda.
[184] Peru is developing a specific national plan of action to address climate-related drivers of migration; Belize is integrating human mobility and planned relocation into its climate strategy; and the 2019 revision of the Guatemala National Plan of Action on Climate Change integrates a section on human mobility that includes concrete commitments.
[185] Se Platform on Disaster Displacement, 'State-Led, Regional, Consultative Processes: Opportunities to Develop Legal Frameworks on Disaster Displacement', in: *Climate Refugees: Beyond the Legal Impasse* (2018), London: Routledge, 126-154.
[186] Cristani F., Fornalé E. and Lavenex S. (2020), "Environmental Migration Governance at the Regional Level", in Krieger T., Panke D. and Pregernig M. (eds.), *Environmental Conflicts, Migration and Governance*, Bristol: Bristol University Press, 137-156.
[187] Ibid.

as common markets and free movement of persons arrangements, among others. Contributions by the international community and development partners are also important.[188]

In Latin America and the Caribbean, States have already identified the need for a cooperative framework to address the challenges created by climate change, disasters, and migration. The regional conference on Migration (or Puebla Process) held a regional Workshop on Temporary Protection Status and/or Humanitarian Visas in Situations of Disasters in 2015, which facilitated the development of "Protection for persons moving across borders in the context of disasters: A Guide to effective practices for RCM Member Countries", adopted in November 2016 during the Regional Conference on Migration (RCM). This Guide was drafted building on a series of best practices collected in the region and aimed at providing guidance on which law, policy and practice to follow in case of natural disasters[189]. Even though the instrument is not binding, it has been proven successful so far and has been effectively used by RCM Countries. Suffice to recall the workshop on disaster displacement organized by Costa Rica and Panama in March 2017, where the RCM Guide was the starting document for the preparation of a set of draft Standard Operating Procedures on the collaboration between the two countries in case of natural disasters.

In the context of climate migration, the South American Network for Environmental Migration (RESAMA) submitted to the XVI South American Conference on Migration (Conferencia Suramericana sobre Migraciones), held on 3-4 November 2016, a series of recommendations on how to deal with environmentally induced migration, fostering, among others, better coordination between the regional and national levels on legal and political initiatives on environmentally induced migration and the establishment of an ad hoc working group in order to guarantee the harmonization of policies at the regional and national levels and to give technical assistance and disseminate knowledge on such topics. Most recently, within the framework of the above-mentioned regional consultations for the preparation of the Global compact for safe, orderly and regular migration, the Economic Commission for Latin America and the Caribbean (ECLAC), United Nations Population Division of the Department of

[188] Nansen Initiative (2015), *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change*, Vol. I, 10, available at. https://www.nanseninitiative.org/global-consultations.
[189] Fornalé, E. (2022), "Collective Action, Common Concern and Climate-Induced Migration", Behrman, S. and Kent, A. (eds.), *Climate Refugees*, Cambridge: Cambridge University Press, 107-127.

Economic and Social Affairs and the International Organization for Migration (IOM) jointly organized the Latin American and Caribbean Regional Preparatory Meeting of International Migration Experts on 30 and 31 August 2017 in Santiago (Chile). In its Final report, issue on 6 March 2018, the link between climate change and migration is presented among the 'global issues' that emerged in the consultations. The South America Conference on Migration (SACM)[190] is a new network on Migration, Environment, Disaster and Climate Change that support this topic in region. In 2018, it adopted the Regional Guidelines on the Protection and Assistance of Cross-Border Displaced Persons and Migrants Affected by Disasters[191] and mapping tools have been created to implement the 2018 Regional Guidelines.[192]

National Level: At the domestic level, innovative policies or promising practices have so far been adopted mainly by States, such as in Latin America, where the impacts of slow-onset and sudden-onset events on the population are becoming more visible.

Latin America provides examples of *ad hoc* provisions adopted together with the interpretative expansion of existing instruments. Illustrative cases are: 1) ad hoc provisions for granting temporary protection in case of disasters, adopted by **Brazil** in 2017; 2) the migration law (Ley N. 370. Ley de Migración), adopted by **Bolivia** in 2013, which includes a definition of "climate migrant"; 3) the Ley Organica de Movilidad Humana, adopted by **Ecuador** in 2017 to grant temporary protection in case of disasters. In 2022, **Argentina** adopted a special "Humanitarian Visa Program" for nationals and residents in Mexico, Central America, and the Caribbean, displaced my socio-natural disasters (Disposición DNM N° 891/2022). This initiative will involve 23 states to 'provide humanitarian protection, planned relocation and durable solutions to nationals and residents from Mexico, Central America and the Caribbean situated in vulnerable areas and at high risk of displacement.'[193] According to Article 23 (m) of the Immigration Act No 25871 temporary visa to grant admission for humanitarian

[190] Available at: https://www.csmigraciones.org/es/grupo/migracion-medio-ambiente-desastres-y-cambio-climatico.
[191] South American Conference on Migration SACM (2018*), Regional guidelines on the protection and assistance of cross-border displaces persons and migrants in countries affected by disasters*, available at: https://csmigraciones.org/sites/default/files/2022-01/CSM_Lineamientos%20Regionales_ENG.pdf; South American Conference on Migration SACM (2018), *Mapeo sobre Migración, Medio ambiente y cambio climático en América del Sur*, available at: https://csmigraciones.org/sites/default/files/2022-10/Posici%C3%B3n%20Conjunta%20CSM%20COP27.pdf.
[192] Available at: https://disasterdisplacement.org/portfolio-item/mapeo-sobre-migracion-medio-ambiente-y-cambio-climatico-en-america-del-sur/.
[193] Available at: https://disasterdisplacement.org/portfolio-item/mapeo-sobre-migracion-medio-ambiente-y-cambio-climatico-en-america-del-sur/.

ground can be up to three years, with the option of being translated into permanent resident status. Recently, in October 2022, Disposición N° 2641/22 has been adopted to 'facilitate paperwork and provides guidelines on admission in case of massive and/or abrupt entry of people displaced across borders in the context of sudden-onset socio-natural disasters from neighboring countries.'[194] It is relevant to highlight that also non-residents who lack appropriate documentation could benefit to the entry into the country.[195] This new policy provides safe return in coordination with relevant authorities from neighbouring countries. The tool contributes to 'facilitating safe, orderly, and regular migration by aiming to provide protection to those people who cannot be granted international protection under refugee law, but are nevertheless temporality unable to return to their countries of origin due to the prevailing humanitarian conditions in the context of disasters'.[196]

In the Caribbean region, the International Organization for Migration issued a comprehensive report,[197] which focused on two regional agreements in place for the CARICOM[198] and the OECS Community.[199] These frameworks facilitated the mobility of disaster-displaced persons during the 2017 Atlantic hurricane season when more than 2000 people were displaced at domestic and cross-border level.[200]

[194] Ibid.
[195] In this case, they will have to sign an affidavit that will allow to stay for three months (with the possibility to extend this period of time).
[196] Dirección Nacional de Migraciones Argentina, 2022; Disposición 891/2022, Programa especial de visado humanitario para personas nacionales y residentes en los Estados Unidos mexicanos, Centroamérica y el Caribe desplazadas por desastres socio-naturales; Disposición 2641/2022, https://www.boletinoficial.gob.ar/detalleAviso/primera/274488/20221027; Platform on Disaster Displacement, *Argentina: Leading Initiatives to Address Displacement in the Context of Disaster and Climate Change*, Policy Brief, 2023
[197] International Organization for Migration (IOM) (2019), Free Movement of Persons in the Caribbean: Economic and Security Dimension. *Regional Program on Migration Meso America & the Caribbean.* Grand-Saconnex: IOM.
[198] The Caribbean Community and Common Market was created in 1973 by the adoption of the Treaty of Chaguaramas. Nationals have the right to enter and stay in another of the Member States for up to six months (Article 46 of the Revised Treaty of Chaguaramas).
[199] The Organization of Eastern Caribbean States (OECS) was created in 1981 with the adoption of the Treaty of Basseterre. It includes seven members (OECS protocol Member States) and four associate members. Permanent stay is granted to residents of all its Member States; Fornalé E. (2022), "Collective Action, Common Concern and Climate-Induced Migration", Behrman, S. and Kent, A. (eds.), Climate Refugees, Cambridge: Cambridge University Press, 107-127.
[200] International Organization for Migration (IOM) (2019), *Free Movement of Persons in the Caribbean: Economic and Security Dimension*, Regional Program on Migration Meso America & the Caribbean, Grand-Saconnex: IOM.

c) Non-refoulement

The prohibition of return of people to a country where they would be at risk of irreparable harm is regarded as absolute and non-derogable.[201] It applies in the context of climate change and disaster. As highlighted by De Vido,[202] the prohibition of non-refoulement should apply both when the government of the State of origin is not able to apply a policy of protection of its citizens from the effects of climate change, and in cases where the government of the State of origin discriminates between citizens or groups of citizens in its policies to respond to the effects of climate change. This has been recently recognized by two important development. First, the decision (Teitiota v. New Zealand, 2020) of the UN Human Rights Committee highlighted that "severe environmental degradation can adversely affect an individual's well-being and lead to a violation of the right to life", and that "the effects of climate change in receiving States may expose individuals to a violation of their rights […] thereby triggering the non-refoulement obligations of sending States."[203] Second, the development and eventual endorsement of the Nansen Initiative's 'Protection Agenda'. Importantly, the Protection Agenda's has been endorsed by 109 States and this, as suggested by Burson, could suggest that States are oriented to recognize that the non-refoulement obligation can arise in the climate change context. The Protection Agenda includes 'the non-return of foreigners to a disaster-affected country, whether based on a legal obligation or as a humanitarian measure based on regular or exceptional migration measure, as a critical tool.'[204]

The following objectives of the Global Compact for Migration need to be carefully taken under consideration and implemented:

[201] Di Stasi *et al*. (2023), *Migrant Women and Gender Based Violence in the International and European Legal Framework*, Napoli: Editoriale Scientifica.
[202] De Vido S. (2023b), "Climate Violence? And Gendered Migration in International Law", in Di Stasi et al., Migrant Women and Gender Based Violence in the International and European Legal Framework, Napoli: Editoriale Scientifica, 137-171.
[203] HRC, *Views Adopted by the Committee under Article 5(4) of the Optional Protocol, Concerning Communication No. 2728/2016*, 7 January 2020 (CCPR/C/127/D/2728/2016), para 9.5 and 9.11; Delval E. (2020), "From the U.N. Human Rights Committee to European Courts: Which Protection for Climate-Induced Displaced Persons under European law?" Blog, EU Immigration and Asylum Law and Policy.
[204] Burson B. (2023), *Protecting the Rights of Affected Persons: Whose obligation?*, Presentation at the International Conference on Sea Level Rise and International Law, University of Bern, World Trade Institute, 9 June 2023 (https://www.wti.org/outreach/events/926/sea-level-rise-and-its-international-law-implications-for-legal-certainty-stability-and-human-rights/).

Objective 8: Save lives and establish coordinated international efforts on missing migrants

Commit to search and rescue operations that uphold the principle of non-refoulement, the prohibition of collective expulsion, and ensure the human rights, safety and dignity of persons rescued.

Objective 11: Manage borders in an integrated, secure and coordinated manner

Commit to ensure due process at international borders and that all migrants are treated in accordance with international human rights law including the principle of non-refoulement.

Objective 21: Cooperate in facilitating safe and dignified return and readmission, as well as sustainable reintegration: Commit to upholding the fundamental international human rights law principle of non-refoulement and the prohibition of collective expulsion.

IV. Interest of Amici

We aim to assist the Court based on our thorough knowledge of international law, the intersection of international human rights law, migration law, and issues pertaining to time and temporalities in human rights law. From the outset, our research seeks to change the lens through which the climate-human rights nexus is interpreted, researched and regulated by seizing this historic moment when the recognition of this subject matter is high on the international agenda. This is a complex scenario where the intersection between natural sciences and social sciences is marked. We all are involved in facing the challenge of understanding, analysing and advancing common knowledge, not only with the aid of scientific methods, but also by relying on humanities perspective that includes human rights law.

In addition to our personal expertise, we are involved in large-scale research projects, in particular the newly awarded Horizon Europe Project (***States' Practice of Human Rights Justification: a study in civil society engagement and human rights through the lens of gender and intersectionality***), led by Prof. Grahn-Farley Maria. The project brings together a number of researchers and practitioners with an expertise in climate change, human rights, intersectionality. The aim of the project is two-fold: first, to advance innovative academic research and dissemination through scientific publications and national and international conferences, seminars and lectures; second, it provides scientific support at the institutional level by adopting legal recommendations and assistance for the drafting normative proposals.

The research also falls under a new project: ***Gendering International Legal Responses to Climate Emergencies,*** Bando PRIN 2022, 2022XYHPTC, GenREm, financed by the EU — NextGenerationEU, within the PNRR (*Piano nazionale di ripresa e resilienza*) programme in Italy, led by prof. De Vido Sara. GenREm disrupts the dichotomy normality vs state of exception, and ordinary vs disaster, by conceptualising States' legal obligations to address slow violence. The project develops a new method of analysis and legal research that is based on a holistic and gendered comprehension of contemporary emergency phenomena, and is aimed at having an impact on multiple stakeholders.

V. Conclusion

The analysis in this brief also demonstrates that in cases where human rights interference results from environmental degradation, the American Convention on Human Rights must be interpreted and applied in light of relevant international principles and norms. In particular, the brief includes extensive references to the jurisprudence of the international courts. Comments of UN Treaty bodies, reports of the UN special procedures, and additional relevant sources that have been useful to identify the content of human rights duties of member states to ensure the protection of the people under their jurisprudence. In line with this, in the present advisory proceedings, we respectfully request the Court to give due consideration to the following points:

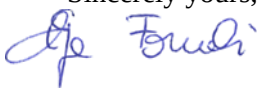
- Defining the notion of vulnerability in the context of climate change;
- Defining the principle of non-discrimination and the concept of intersectionality;
- Including the question of time when evaluating the impact of climate change on human rights in the relevant case-law;

More particularly in the context of the Response to question *F. Regarding the shared and differentiated human rights obligations and responsibilities of States in the context of the climate emergency*: Providing an overall introduction to general principles of law that are of relevant for addressing the human rights implications of climate change, with a special focus on

- The principle of humanity
- The principle of common but differentiated responsibilities
- The principle of prevention
- The principle of international cooperation and common concerns
- The principle of good neighbourliness
- The *in dubio pro natura* principle
- The *in dubio pro futuribus generationibus* principle

- Defining inter-state cooperation in the protection of climate migrants' rights
- Specifying the non-refoulement principle in the context of climate change and disaster.

Sincerely yours,



Prof. Elisa Fornalé

On behalf of all

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This request is submitted by the following seven scholars, experts on international public law, climate change and human rights:

1) **Elisa Fornalé** is a Swiss National Science Foundation (SNSF) Professor at the World Trade Institute (WTI), the University of Bern. Since 2017, she is the Principal Investigator of the project *Framing Environmental Degradation, Human Mobility and Human Development as a Matter of Common Concern* (www.climco2.org), which is exploring the adverse impacts of slow-onset events and human rights protection. Since 2021, she leads the *Gender Equality in the Mirror (GEM*), which explores women's participatory rights (www.womenandparticipation.org). Since 2023, she is Work Package (WP) leader on Climate Change and Human Rights, in the Horizon Europe HRJust project (*States' Practice of Human Rights Justification: a study in civil society engagement and human rights through the lens of gender and intersectionality – GA 101094346*). She is the appointed Co-rapporteur of the International Law Association (ILA) Committee on International Law and Sea Level Rise (since 2021). She holds a PhD in international law from the University of Palermo (IT).

2) **Veronika Bílková** is the head of the Centre for International Law at the Institute of International Relations, Prague, and a Professor in international law at the Faculty of Law of the Charles University in Prague. She is member of the Venice Commission of the Council of Europe (since 2010) and of the Management Board of the EU Fundamental Rights Agency (since 2020). She is also the Vice-President of the European Society of International Law and the chair of the Czech Committee for Human Rights of Older Persons. She was member of the two expert missions on Ukraine established within the OSCE Moscow Mechanism in spring 2022. Her fields of research include the use of force, international humanitarian law, international human rights law, international criminal law and the fight against terrorism.

3) **Laurence Burgorgue-Larsen** is Professor in Law at the Sorbonne Law School (University Paris 1), Member and Former Vice-Deputy of the Institut de Recherche en droit international et européen de la Sorbonne (IREDIES), and Director of the Master 2 "Human Rights and the European Union". Between 2012 and 2019, she was a member of the Constitutional Court of Andorra and was the President between 2014 and 2016. In September 2020, she published in French *The 3 Regional Human Rights Court in context* (Paris, Pedone, 588 p.), the first book to present a critical and interdisciplinary analysis of the

functioning of the 3 regional human rights protection systems. The second edition has been published in May 2023 and an English version will be published by OUP. She is the Director of the Collection "Cahiers européens" in the French editor Pedone. She researches and teaches in the areas of Human Rights Law, Comparative constitutional Law and European and International Law. Her publications (in three languages) are diverse in the field of regional human rights (e.g. she is the co-author, with A. Úbeda de Torres, of *The Inter-American Court of Human Right. Case law and commentaries* (OUP, 2011). She has been invited in numerous Universities in Europe, Africa, as various Latin American countries.

4) **Federica Cristani** is the Head of the Centre for International Law at the Institute of International Relations in Prague, where she is currently involved as WP co-leader in the Horizon Europe HRJust project (*States' Practice of Human Rights Justification: a study in civil society engagement and human rights through the lens of gender and intersectionality* – GA 101094346). She holds a PhD in international law from the University of Verona (IT). She earlier worked as a post-doctoral researcher at the World Trade Institute of the University of Bern (CH), and at the University of Verona, and has been a visiting scholar in different universities and research centres in Hungary, Slovakia, Germany, Denmark, the United Kingdom. Between 2021 and 2023, she has been a senior visiting scholar at the Arctic Centre of the University of Lapland (FI). She has also been adjunct professor in Bologna (IT) and a guest lecturer in Budapest (HU), Bratislava (SK) and Kharkiv (Ukraine). Her main research interests include climate change law, international economic law and international law of cyberspace.

5) **Sara De Vido** is Associate Professor of International Law at Ca' Foscari University of Venice, Italy, where she teaches International Law, EU Law and Human Rights Law. She is an affiliate to the Manchester International Law Centre, UK, where she co-founded the Women in International Law Network. She is a delegate of the Rector for Gender Equality and a member of the Centre for Human Rights at Ca' Foscari University. She has been working on countering violence against women for years, as expert on the Istanbul Convention, and her most recent book is *Violence against Women's Health in International Law* (Manchester University Press, Melland Schill Studies in International Law, 2020), and she co-edited a report for the European Commission on countering violence against women in 31 European States (EELN, 2021). She has recently focused her research on ecocentric and ecofeminist approaches to international law. She co-edited, along with Micaela Frulli (university of Florence) the commentary on the Istanbul Convention (Elgar Publishing, 2023).

6) **Curtis F.J. Doebbler** is Research Professor of Law in the Department of Law at the University of Makeni, Sierra Leone and proprietor of The Law Office of Dr Curtis FJ Doebbler. He holds law degrees from New York Law School (J.D.), Radboud Universiteit (Meestertitle, LL.M.), and the London School of Economics and Political Science (Ph.D.). He has authored twelve books, more than two hundred academic and newspaper articles, and numerous online contributions. He is also a regular commentator on international law on television and radio news programmes. He represents the NGO International-Lawyers.Org at the United Nations and practices international law before domestic and international tribunals, advising and representing both governments and non-governmental actors. He has taught law at universities in the Middle East, Africa and Europe. His books include *The Dictionary of International Law* (Rowman & Littlefield Publishers) is from March 2018**.**

7) **An Hertogen** is a Senior Lecturer at the University of Auckland, Faculty of Law. She completed her undergraduate law degree at the KU Leuven in Belgium, before studying for her LLM at Columbia University in New York, and for her PhD at the University of Auckland. Before starting her PhD, she practiced in competition law in Brussels and Auckland. Her research interests are in international law, with a particular emphasis on international economic law and on Aotearoa New Zealand's engagement with international law. She is leading the research project on '*Good Neighbourliness*' funded by a Marsden Fund Fast-Start grant, that explores how obligations of good neighbourliness have developed in international environmental law to deal with the negative impact of a state's decisions on the physical environment of another state. She explores the concept's potential as a foundation for legal restrictions on states' sovereign decisions that have a non-physical impact on other states.

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VI. KEY PUBLICATIONS

1. Baldwin, A. and Fornalé, E. (2017), "Adaptive Migration: Pluralising the Debate on Climate Change and Migration", Themed Section, *The Geographical Journal*, 183(4): 322-328, available at: https://doi.org/10.1111/geoj.12242.
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12. Fornalé, E., Armiero, M. and Odasso, L. (2023), "Trust in Disaster Resilience", *Disaster Prevention and Management*, 32(2): 253-267, available at: https://doi.org/10.1108/DPM-04-2022-0082.
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