

JOINT SUBMISSION

Caribbean Environmental Law Unit
of the
Faculty of Law at Cave Hill,
the One Ocean Hub,
Renew TT,
GNHRE Caribbean Region &
the ILA Caribbean Branch

in response to

The Request
for an
Advisory Opinion
from the
Inter-American Court of Human
Rights
on the
Climate Emergency & Human Rights

18 December 2023



INTER-AMERICAN COURT OF HUMAN RIGHTS

REQUEST FOR AN ADVISORY OPINION
ON THE
CLIMATE EMERGENCY & HUMAN RIGHTS
SUBMITTED BY

THE REPUBLIC OF COLUMBIA AND THE REPUBLIC OF CHILE
(REQUEST FOR ADVISORY OPINION SUBMITTED TO THE COURT)

JOINT SUBMISSION OF

THE FACULTY OF LAW
THE UNIVERSITY OF THE WEST INDIES (CAVE HILL CAMPUS)
IN COLLABORATION WITH
THE ONE OCEAN HUB,

RENEW TT,
THE GLOBAL NETWORK FOR THE STUDY OF HUMAN RIGHTS
CARIBBEAN REGION

&

THE INTERNATIONAL LAW ASSOCIATION CARIBBEAN BRANCH

Prepared by

Alana Malinde S.N. Lancaster
Britney G. Nurse
Elisa Morgera
Andrea Longo
Mitchell Lennan
Sanya Alleyne

Bridgetown, Barbados
January 24, 2024
REF.: CDH-SOC-1-2023/1170
Advisory Opinion SOC-1-2023

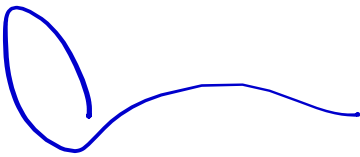
Pablo Saavedra Alessandri
The Secretary of the Court
Inter American Court of Human Rights
Avenida 10
Calles 47 y 47
Los Yoses
San Pedro
San José
Costa Rica

Dear Sir and Madam,

Please find enclosed, with our regards, a Joint Submission to the Secretariat of the Inter-American Court of Human Rights on behalf of the Caribbean Environmental Law Unit of the Faculty of Law of the University of the West Indies, the One Ocean Hub, the Renew TT, the Global Network for the Study of Human Rights Caribbean Region (GNHRE) and the International Law Association Caribbean Branch.

The Joint Submission provides the observations of the *Amici* on the request for an Advisory Opinion presented to the Inter American Court of Human Rights by the Republic of Chile and the Republic of Colombia on January 9th, 2023.

Cordialmente,



Alana Malinde S.N. Lancaster
Lecturer in International Environmental & Energy Law and
Head of the Caribbean Environmental Law Unit

The *Amici*

Name	Affiliation	Contact Information
Alana Malinde S.N. Lancaster ¹	The University of the West Indies One Ocean Hub GNHRE Caribbean & ILA Caribbean Branch	
Britney G. Nurse ²	Renew TT	
Elisa Morgera ³	University of Strathclyde/One Ocean Hub	
Andrea Longo ⁴	University of Strathclyde/One Ocean Hub	
Mitchell Lennan ⁵	University of Aberdeen/One Ocean Hub	
Sanya Alleyne ⁶	ILA Caribbean Branch	

Table of Contents

- I. Introduction
- II. Interest & Expertise of the *Amicii*
- III. Scope, Objective, and Structure of the Written Statement in Relation To The Advisory Opinion
 - A. State Obligations Derived from the Duties of Prevention and the Guarantee of Human Rights in the Climate Emergency
 - B. State Obligations to Preserve the Right to Life and Survival in Relation to the Climate Emergency in Light of Science and Human Rights
 - C. State Obligations in Relation to the Rights of Children and the New Generations considering the Climate Emergency
 - D. Obligations Arising from the Convention in Regard to the Prevention and the Protection of Territorial and Environmental Defenders, as well as Women, Indigenous Peoples, and Afro-descendant Communities in the Context of the Climate Emergency
 - E. Conclusions

I. Background & Context

1. On January 9, 2023, Chile and Colombia made a joint [Request](#)⁷ to the Inter-American Court of Human Rights to clarify the scope of State in response to the climate emergency in their individual and collective dimensions. The Request is a 14-page [document](#) which includes an introduction, a description of the effects of the climate emergency on human rights, a justification for having ‘Inter-American Standards’ which respond to the climate emergency, and six subsections of questions. These subsections comprise twenty-one questions distributed across the following aspects: due diligence (five questions), right to life (two questions), children’s rights (two questions), procedural rights (two questions), environmental defenders (five questions), and common but differentiated responsibilities (five questions). All questions, explicitly and implicitly, seek clarification on how mitigation, adaptation, and loss and damage relate to human rights obligations.⁸

II. Interests and Expertise of the *Amici*

2. The present Joint Submission is a collaboration of the Environmental Law, Ocean Governance & Climate Justice Unit of the Faculty of Law of The University of the West Indies, Cave Hill Campus, (“The UWI Cave Hill”), the One Ocean Hub, Renew TT, the Caribbean Region of the Global Network for the Study of Human Rights and the Environment (“GNHRE”) and the International Law Association, Caribbean Branch (“ILA”) in respect to the Request for an Advisory Opinion from the Inter-American Court of Human Rights (“IACtHR”) submitted on 14 January 2023 by the Republic of Columbia and the Republic of Chile on the basis of Article 64(1) and 64(2) of the American Convention on Human Rights and in accordance with Article 70(1) and 70(2) of the Rules of Procedure of the Inter-American Court.
3. The University of the West Indies (The UWI)⁹ is a public university system established to provide tertiary education to the residents of 18 English-speaking states in the Caribbean region, by “unlock[ing] the potential for economic and cultural growth” in the West Indies to support the goal of improved regional autonomy which swept through the region in the post-independence period. The University is one of two in the world where the University is spread over four physical campuses in multiple states, as well as having an open campus component. The strategic focus of The UWI is threefold: climate action and advocacy; a culture of innovation and entrepreneurship; and as an SDG-engaged university, prioritising global partnerships, connecting knowledge to opportunities for multi-stakeholder development solutions with a special focus on the Caribbean and small island developing states (SIDS).¹⁰

⁷ 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, (9 January 2023), https://www.corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf, [Request]

⁸ J Auz and T Viveros-Uehara, ‘Another Advisory Opinion on the Climate Emergency? The Added Value of the Inter-American Court of Human Rights’ (EJIL : Talk!, 2 March 2023), <https://www.ejiltalk.org/another-advisory-opinion-on-the-climate-emergency-the-added-value-of-the-inter-american-court-of-human-rights/>

⁹ The University of the West Indies, <https://www.uwi.edu/>

¹⁰ The University of the West Indies, ‘Strategic Focus,’ online: <https://www.uwi.edu/>

4. The Faculty of Law¹¹ is the founding, and longest existing Faculty at the Cave Hill Campus¹² and boasts a rich tradition of excellence of solid tradition of legal research and the most extensive repository of legal resources in the Region. In the face of the expansion of law faculties across the region, the Faculty at Cave Hill has continued to distinguish itself and lead the way in both traditional as well as contemporary fields of law that are critical to the Caribbean Region. Critical to providing support to stakeholders in the Region and preparing a cadre of legal professionals who are expertly trained current paradigms, has been the establishment of three Units aimed at social equity, environmental and corporate sustainability. First, the Environmental Law, Ocean Governance & Climate Justice Unit aims to transform the Faculty of Law at Cave Hill into a centre of excellence for such areas of law and interdisciplinary studies, including climate justice, business, environmental and human rights, the blue economy, marine spatial planning, ocean and maritime crime, ocean and human health, and the regulation of renewables derived from the marine environment. The Alternative Dispute Resolution Unit will provide support in environmental and social governance, and address non-contentious, community approaches to climate justice and the Health Law Unit will provide stakeholders with an in-depth knowledge of the law at the intersection of global health and climate change respectively.
5. The One Ocean Hub¹³ is an international programme of collaborative research for sustainable development, working to promote fair and inclusive decision-making for a healthy ocean whereby people and planet flourish. The Hub brings together coastal people, researchers, decision-makers, civil society, and international organisations to value, and learn from, different knowledge systems and voices. The Hub is funded by UK Research and Innovation (UKRI) through the Global Challenges Research Fund (GCRF) (Grant Ref: NE/S008950/1) and brings together expertise in the marine and social sciences, law, economics, and arts from 20 research institutions in the U.K., South Africa, Ghana, Namibia, as well as the two regional universities (the University of West Indies and the University of the South Pacific). The Hub includes among its partners various UN bodies: the UN Division on Ocean Affairs and the Law of the Sea (UNDOALOS); the UN Environment Programme; the Food and Agriculture Organization of the United Nations; the Secretariat of the Convention on Biological Diversity; UNESCO-IOC; and the UN Development Programme. In addition, the Hub has collaborated with the UN Office of the High Commissioner for Human Rights; the UN Special Rapporteurs on Human Rights and the Environment, and on the Right to Food; the Children's Environmental Rights Initiative; the Global Network for Human Rights and the Environment; the Danish Institute for Human Rights; and IUCN People and the Ocean.

¹¹ Faculty of Law, The University of the West Indies (Cave Hill Campus), <https://www.cavehill.uwi.edu/Law/home.aspx>

¹² The University of the West Indies (Cave Hill Campus), <https://www.cavehill.uwi.edu/home>

¹³ The One Ocean Hub, oneocean-hub@strath.ac.uk.

6. RenewTT is a local grassroots organization based in the Republic of Trinidad and Tobago that focusses on a cross-section of issues around the region and the wider world - with specific focus on climate change, environmental law, and policy development in the twin-island. Our aim is to bring together individuals, especially young people, who are passionate and driven to promoting and attaining equilibrium between development and environmental policy in our society, through the support and creation of sustainable laws and policies. Our mission is to create and inspire change in our homes, schools, communities and even among our leaders. At RenewTT, we believe that the impact of environmental degradation on the sustainability of our lives is constantly neglected, and it is up to all of us to improve the state of the environment and hold those entities accountable for making and enforcing the relevant laws and policies.
7. The Global Network for Human Rights and the Environment (GNHRE) is a community of scholars, activists, practitioners, defenders, researchers, and policy-makers working at the intersection of human rights and the environment.¹⁴ Together we produce, exchange, and learn from world-leading scholarship and insights drawn from community-embedded experience and practice all over the world, including the Caribbean Region, which has done recent work on the issue of climate change, and the Latin American Chapter, which has spearheaded efforts on the Escazú Agreement.
8. The International Law Association, Caribbean Branch was founded in 2014, with the objectives, under its Constitution, to promote “the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law.” The ILA Caribbean's membership ranges from lawyers in private practice, academia, government, and the judiciary, to non-lawyer experts from corporate, commercial, trade, environmental and climate justice and financial spheres.

¹⁴ The Global Network for Human Rights and the Environment, <https://gnhre.org/>

III. Scope & Structure of the Written Statement in Relation to the Advisory Opinion

9. Global climate change has been confirmed¹⁵ as one of the triple planetary crises¹⁶ of the Anthropocene.¹⁷ With 2023 registering the four hottest months on record,¹⁸ it is increasingly evident, that a dystopian future – predicted in seminal ‘climate fiction’ (‘cli-fi’) novels¹⁹ such as Octavia E. Butler’s *Parable of the Sower*²⁰ – is already here.²¹ Published three decades ago in 1993, but set in 2024, Butler’s prescience about the devastating fires,²² water scarcity,²³ growing numbers of migrants,²⁴ and the disproportionate impact a warming world would have on the poor, people of colour, and women²⁵ predicts issues directly at the heart of the “... principles of equity, justice, cooperation and sustainability, with a human rights-based approach ...” which serve as the foundation of the Request.²⁶
10. Described as a “wicked” problem to emphasise its complex, interconnected nature,²⁷ and its role as a compounding factor to the other two planetary crises of biodiversity

¹⁵ AR6 Synthesis Report: Climate Change 2023 — IPCC. (n.d.). IPCC. <https://www.ipcc.ch/report/sixth-assessment-report-cycle/>

¹⁶ United Nations. (2022, April 13). What is the Triple Planetary Crisis? United Nations Climate Change. <https://unfccc.int/blog/what-is-the-triple-planetary-crisis>; S Hellweg et al., (2023). Life-cycle assessment to guide solutions for the triple planetary crisis. *Nature Reviews Earth & Environment*, 4(7), 471–486. <https://doi.org/10.1038/s43017-023-00449-2>

¹⁷ BH Desai (2023). The 2022 Stockholm+50 moment in the era of a planetary crisis: some lessons for the scholars and the decision-makers. *Environmental Policy and Law*, 53(1), 3–18. <https://doi.org/10.3233/epl-219055>

¹⁸ Summer 2023: the hottest on record. (n.d.). Copernicus. <https://climate.copernicus.eu/summer-2023-hottest-record>; September smashes monthly temperature record by record margin. (2023, October 20). World Meteorological Organization. <https://public-old.wmo.int/en/media/news/september-smashes-monthly-temperature-record-record-margin>

¹⁹ Fix-Grist (2022, October 28). The definitive climate fiction reading list. Fix. <https://grist.org/fix/climate-fiction/definitive-climate-fiction-reading-list-cli-fi-books/>

²⁰ OE Butler, *Parable of the Sower* (New York: Grand Central Publishing, 2001 (republished))

²¹ Al-Jazeera News (2023, September 11). Climate change ‘dystopian future already here.’ Al Jazeera. <https://www.aljazeera.com/news/2023/9/11/climate-change-dystopian-future-already-here>

²² OECD. (2023). Taming Wildfires in the Context of Climate Change. OECD Policy Highlights. <https://www.oecd.org/climate-change/wildfires/policy-highlights-taming-wildfires-in-the-context-of-climate-change.pdf>;

K Abnett (2023, August 17). How climate change drives heatwaves and wildfires in Europe. Reuters. <https://www.reuters.com/business/environment/how-climate-change-drives-heatwaves-wildfires-europe-2023-08-17/>;

Climate change more than doubled the likelihood of extreme fire weather conditions in Eastern Canada – World Weather Attribution. (n.d.). <https://www.worldweatherattribution.org/climate-change-more-than-doubled-the-likelihood-of-extreme-fire-weather-conditions-in-eastern-canada/>

²³ United Nations. (n.d.). Water – at the center of the climate crisis United Nations. [https://www.un.org/en/climatechange/science/climate-issues/water#:~:text=Climate%20change%20is%20exacerbating%20both,world's%20water%20in%20complex%20ways](https://www.un.org/en/climatechange/science/climate-issues/water#:~:text=Climate%20change%20is%20exacerbating%20both,world's%20water%20in%20complex%20ways;);

C Klobucista (2023, April 3). Water stress: a global problem that’s getting worse. Council on Foreign Relations. <https://www.cfr.org/backgrounder/water-stress-global-problem-thats-getting-worse>; Un-Water. (n.d.). Water and climate

Change | UN-Water. UN-Water. <https://www.unwater.org/water-facts/water-and-climate-change>

²⁴ Human Rights Committee, *Teitiota v. New Zealand*, CCPR/C/127/D/2728/2016 (7 January 2020)

²⁵ M Stone, ‘Can climate fiction deliver climate justice?’ (Fix, 16 August 2022), https://grist.org/fix/climate-fiction/can-climate-fiction-deliver-climate-justice/?_thumbnail_id=504985

²⁶ Request (n. 7), 1

²⁷ HWJ Rittel and MM Webber, ‘Dilemmas In A General Theory Of Planning’ (1973) 4 *Policy Science* 155–169; F.P. Incropera, *Climate Change: A Wicked Problem* (Cambridge University Press: New York, NY, USA, 2015); J Sun and K Yang ‘The Wicked Problem of Climate Change: A New Approach Based on Social Mess and Fragmentation’ (2016) 8 *Sustainability* 1312

loss and pollution,²⁸ climate change is **the** most pressing ecological and human rights issue of our time. The phenomenon was described since the nineteenth century by researchers such as Fourier,²⁹ Tyndall,³⁰ and Arrhenius,³¹ who discovered that anthropogenic emissions of greenhouse gases (GHGs) – primarily CO₂, from the combustion of fossil fuels³² – had an unintentional effect on the global climate.³³ Climate destabilisation resulting from these emissions, is worsened by the decreasing ability of oceans, forests and soils to sequester carbon, and is also a result of human activities and State action in facilitating deforestation.³⁴ These emissions have led to a global energy imbalance and consequent dangerous disruption of the climate system and oceans upon which all life on earth depends.³⁵ The increasing concentration of CO₂ in the atmosphere serves as a buffer, preventing the planet from returning as much heat into space as it receives from the sun.³⁶ As a result, the mean global surface temperature is increasing,³⁷ and current science indicates that, to protect the Earth’s systems, the long-term increase in the average global surface. That said, climate change should not be understood or addressed **in isolation from the other planetary crises**, as biodiversity loss and climate change are interdependent and climate change solutions that negatively impact on biodiversity, including marine biodiversity, undermine the Earth’s natural capacity to mitigate climate change.³⁸ Thus, it is essential to consider

²⁸ C Frazão Santos, et al., ‘The Climate Change Challenge: A review of the barriers and solutions to deliver a Paris Solution. Climate’ (2022) 10(5), 75. <https://doi.org/10.3390/cli10050075>

²⁹ J Fourier, ‘Memoire sur Les Températures du Globe Terrestre et des Espaces Planétaires’. (1827) 7 Mém. L’acad. R. Sci. L’inst. Fr. , 569–60; J Fourier, ‘Résumé Theorique des Propriétés de la Chaleur Rayonnante’, (1824) 27 Ann. Chim. Phys. 236–281

³⁰ J Tyndall, XXVII. ‘On Radiation Through the Earth’s Atmosphere’, (1863) 25 Lond. Edinb. Dublin Philos. Mag. J. Sci. 200–206

³¹ S Arrhenius, XXXI. ‘On The Influence of Carbonic Acid in the Air Upon the Temperature of the Ground’, (1896) 41 Lond. Edinb. Dublin Philos. Mag. J. Sci. 237–276; S. Arrhenius, *Worlds in the Making: The Evolution of the Universe (Translation)* (Harper & Bros: New York, NY, USA, 1908)

³² Exhibit A, Declaration of Dr. James E. Hansen in Support of Our Children’s Trust et al.’s Submission to the UN Committee on the Rights of Child Regarding State Obligations, Children’s Rights and Climate Change (Aug. 19, 2016) available at <http://www.ourchildrenstrust.org/s/HansenCRCDeclaration.pdf>; Exhibit B, Our Children’s Trust, Policies Must Be Based on 350 ppm and 1 Degree Celsius to Protect Young People and Future Generations (2016) available at http://www.ourchildrenstrust.org/s/OCT_Why350ppm.pdf

³³ IPCC. *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*; (Cambridge University Press: Cambridge, UK, 2022); GN Plass, ‘The Carbon Dioxide Theory of Climatic Change’ (1956) 8 Tellus 140–154

³⁴ IPCC, Summary for Policymakers, *Climate Change 2014: Impacts, Adaptation, and Vulnerability: Contribution of Working Group II to the Fifth Assessment Report of the IPCC*, 37 (Christopher B. Field et al. eds., 2014), http://ipcc-wg2.gov/AR5/images/uploads/IPCC_WG2AR5_SPM_Approved.pdf ; J Hansen, et al. ‘Ice melt, sea level rise and superstorms: evidence from paleoclimate data, climate modelling, and modern observations that 2 C global warming could be dangerous’ (2016) 16 (6) Atmospheric Chemistry and Physics 3761; S Solomon et al., Irreversible Climate Change Due to Carbon Dioxide Emissions, 106 Proc. Nat’l Acad. Sci. 1704, 1704 (2009)

³⁵ J Hansen et al., Assessing “Dangerous Climate Change”: Required Reduction of Carbon Emissions to Protect Young People, Future Generations and Nature, PLOS ONE 8:12, 3763 (2013) [hereinafter Assessing “Dangerous Climate Change”], 12

³⁶ *Ibid.*, at 4; see also J Abatzoglou et al., A Primer on Global Climate Change and Its Likely Impacts, in *Climate Change: What It Means for Us, Our Children, and Our Grandchildren* 11, 15-22 (JFC Di Mento and P Doughman eds., 2007)

³⁷ Environmental Protection Agency (“EPA”), Technical Support Document for Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act 17 (Dec. 9, 2009), at ES-2

³⁸ Submission by the One Ocean Hub to the ITLOS in Case No. 31 ‘Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law’, para. 6 at 4, [es/31/written_statements/4/C31-WS-4-10-OOH.pdf](https://www.itlos.org/en/cases/31-written-statements/4/C31-WS-4-10-OOH.pdf) [OOH Submission to the ITLOS]

biodiversity and ocean science, as well as international biodiversity law and the law of the sea, in addressing climate-related issues in this Request.

11. The Request by Columbia and Chile, references this “climate emergency [as having] a devastating potential for life on earth”³⁹ and that “human rights not only provide a necessary perspective from which to assess the consequences of the emergency, but also essential tools to seek solutions that are opportune, just, equitable and sustainable.”⁴⁰ This draws on the Court’s remit under the American Convention on Human Rights (ACHR, or American Convention),⁴¹ its Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (hereinafter “Protocol of San Salvador”),⁴² and the landmark decision to recognise the right to a healthy environment as an autonomous human right (a free-standing right that is not primarily derived from existing human rights).⁴³ The decision was rendered within the context of addressing the impact of infrastructure projects on the coastal marine environment in relation Convention Area⁴⁴ of the Regional Seas Programme⁴⁵ for the Wider Caribbean Region,⁴⁶ and international obligations concerning prevention, precaution, mitigation of damage, and cooperation between the States potentially affected.⁴⁷

³⁹ Request (n 7), 2

⁴⁰ *Ibid.*, 1 – 2

⁴¹ American Convention on Human Rights, opened for signature Nov. 22, 1969, adopted in San José on 22 November 1969, entered into force on 18 July 1978, American Convention on Human Rights, 1144 UNTS 123 [ACHR, American Convention or Pact of San José]

⁴² Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, entered into force Nov. 16, 1999, OAS Treaty Series No. 69; 28 ILM 156 [Protocol of San Salvador]

⁴³ *cfr.* Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia: The Environment and Human Rights, Inter-American Court of Human Rights (IACtHR), 15 November 2017, https://www.refworld.org/cases_IACRTHR_5e67c7744.html [IACtHR, *Advisory Opinion OC-23/17*], para. 180.; See also, MA Tigre and N Urzola, The 2017 Inter-American Court’s Advisory Opinion: Changing the Paradigm for International Environmental Law in the Anthropocene, 12 J. Hum. Rts. & Env’t 24, 42 (2021); D Giannino, The Ground-Breaking Advisory Opinion OC-23/17 of the Inter-American Court of Human Rights: Healthy Environment and Human Rights, Int’l J. Const. L. Blog (Dec. 1, 2018); ML Banda, Inter-American Court of Human Rights’ Advisory Opinion on the Environment and Human Rights, 22 ASIL Insights 6 (May 10, 2018)

⁴⁴ Article 1 (1), Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, with Annex and Protocol Concerning Cooperation in Combating Oil Spills in the Wider Caribbean Region [Cartagena Convention], adopted in Cartagena on 24 March 1983 and entered into force on 11 October 1986, 1506 United Nations Treaty Series 157, <https://www.car-spaw-rac.org/IMG/pdf/cartagena-convention.pdf> [Cartagena Convention]

⁴⁵ DM Johnston, and LMG Enomoto, ‘Regional Approaches to the Protection and Conservation of the Marine Environment’, in DM Johnston (ed.), The Environmental Law of the Sea (IUCN, 1981) 285, 324-37; <https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1810&context=gjicl>

⁴⁶ Cartagena Convention (n. 44)

⁴⁷ IACtHR, Advisory Opinion OC-23/17 (n. 43), paras 1-3. It is arguable that this includes impacts at the ocean-climate nexus, which will be further clarified by the pending Advisory Opinion on Climate Change from the International Tribunal of the Law of the Sea. See ITLOS Case No. 31, ‘Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law’, (12 December 2022), https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf [ITLOS Advisory Opinion on Climate Change]. See LP Baars, ‘The Salience of Salt Water: An ITLOS Advisory Opinion at the Ocean-Climate Nexus’ (2023) 38(3) The International Journal of Marine and Coastal Law 581

12. There is now universal endorsement⁴⁸ of the human right to a healthy environment,⁴⁹ and recognition of children's human right to a healthy environment as inherent in the UN Convention on the Rights of the Child (UNCRC).⁵⁰ The human right to a healthy environment has a close relationship to a gamut of substantive and procedural rights which have an impact on the life, survival and development of present and future generations. These human rights, as will be discussed in this Joint Submission, are protected internationally, and increasingly interpreted as applicable and therefore imposing binding obligations on States under the climate change regime, and other relevant spheres of international law, *inter alia* international biodiversity law, and the law of the sea, that contribute to climate change mitigation and adaptation.
13. Confirming the Court's wide scope of appreciation of relevant international law, the Request refers to a list of multiple international law instruments and principles, including the United Nations Framework Convention on Climate Change ("UNFCCC"),⁵¹ the Paris Agreement,⁵² the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (the "Escazú Agreement");⁵³ the Convention on Access to Information, Public Participation, the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the "Aarhus Convention"),⁵⁴ ***among other instruments*** [our emphasis].⁵⁵
14. Put simply, the Request draws on the realisation that those who have contributed the least to climate change, unjustly and disproportionately suffer its harms. It is widely accepted, especially by States in the Global South⁵⁶ that a fundamental tenet of

⁴⁸ UNGA, The Human Right to a Clean, Healthy and Sustainable Environment, A/RES/76/300 (28 July 2022) [UNGA A/RES/76/300]. On 28 July 2022, the UNGA adopted the Resolution A/76/L.75 recognising the human right to clean, healthy, and sustainable environment by a recorded vote of 161 in favor and zero against. Eight Member States – Belarus, Cambodia, China, Ethiopia, Iran, Kyrgyzstan, the Russian Federation, and Syria – abstained. The right is "related to other rights and existing international law," and affirms that its promotion "requires the full implementation" of the multilateral environmental agreements (MEAs) "under the principles of international environmental law."

⁴⁹ UNGA Res 76/300 (2022). See DR Boyd, 'Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment', in JH Knox & R Pejan (eds), *The Human Right to a Healthy Environment* (2018), 18

⁵⁰ United Nations Convention on the Rights of the Child [UNCRC], adopted in New York on 20 November 1989 and entered into force on 2 September 1990) 1577 United Nations Treaty Series, p. 3. In this regard, see Committee on the Rights of the Child (CteeRC), 'General Comment No. 26 (2023) on Children's Rights and the Environment, with a Special Focus on Climate Change,' CRC/C/GC/26 (22 August 2023) [General Comment 26]

⁵¹ United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 102-38

⁵² Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104

⁵³ Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement), 4 Mar. 2018, in force 22 Apr. 2021, available at: https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf [Escazu Agreement]

⁵⁴ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, entered into force Oct. 30, 2001, 2161 UNTS 447, 38 ILM 517 [Aarhus Convention]

⁵⁵ Request (n. 7), p. 2

⁵⁶ AMSN Lancaster et al., 'Ocean-Based Solutions As Tools For Achieving Climate Justice: Some Reflections From the Perspective Of Vulnerable States & Peoples' in F Doughty-Wagner et al., (eds.) *The Fourth Environmental Era: Climate Justice* (Delaware: Vernon Press, 2024 *forthcoming*); AMSN Lancaster 'Oceans As Theatres For (In)justice' in D Lupin, AMSN Lancaster and MA Tigre (eds.) *Edward Elgar Research Handbook on Climate Justice* (London: Edward Elgar, 2025 *forthcoming*); CA Ogunbode, 'Climate justice is social justice in the Global South' (2022) 6 (11) *Nature Human Behaviour* 1443; G Barnwell and N Wood, 'Climate justice is central to addressing the climate emergency's psychological

addressing climate mitigation and adaptation⁵⁷ actions is the climate justice approach,⁵⁸ which requires that climate action is consistent with existing human rights agreements, obligations, standards, and principles. Consequently, those who are disproportionately affected, must be afforded mechanisms to meaningful participants in climate decision-making, have access to effective remedies,⁵⁹ and be the primary beneficiaries of adaptation, mitigation and loss & damage actions.⁶⁰ This is a specific application of the general principle of international law of equity which underpins such instruments such as the UNFCCC, UNFSA and the newly minted BBNJ Agreement.

15. Against this backdrop, the *Amicii* submit, that in addition to “... dealing with the consequences of the climate emergency, including a proliferation of droughts, floods, landslides and fires ...,”⁶¹ the **marine environment** of the Wider Caribbean Region, as provided for in Article 1 of the Cartagena Convention,⁶² and as examined by the Inter American Court in Advisory Opinion 23/17⁶³ is an integral part of the climate system. This is understood as the **ocean-climate nexus**,⁶⁴ and is recognised under several regimes of international law, such as the law of the sea and international biodiversity law.⁶⁵ Addressing threats at the nexus, requires the protection of economic, social and cultural and cultural rights identified both under the Escazú Agreement and the Protocol of San Salvador, *inter alia*, the right to a healthy environment,⁶⁶ the right to the formation and protection of families,⁶⁷ the right to health,⁶⁸ the right to food,⁶⁹

consequences in the Global South: A narrative review’ (2002) 52 (4) South African Journal of Psychology 486; n CG Gonzalez, ‘Environmental justice, human rights, and the global south’ (2015) 13 Santa Clara J. Int’l L. 13

⁵⁷ S Robinson, ‘Climate change adaptation in SIDS: A Systematic Review of the Literature Pre and Post the IPCC Fifth Assessment Report’ (2020) 11 (4) WIREs Climate Change, p.e653

⁵⁸ F Sultana, ‘Critical Climate Justice’ (2021) 188(1) The Geographical Journal, 118, 120 – 121

⁵⁹ 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
<https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/COP21.pdf>

⁶⁰ P Toussaint, ‘Loss and Damage, Climate Victims, and International Climate Law: Looking Back, Looking Forward.’ (2023) Transnational Environmental Law 1; P Toussaint, ‘Voices unheard—affected communities and the climate negotiations on loss and damage’ in J Sändig et al. (eds), *Affectedness and Participation in International Institutions* (Routledge, 2020) 179

⁶¹ Request (n. 7), 1

⁶² The ‘Convention Area’ means the marine environment of the Gulf of Mexico, the Caribbean Sea and the areas of the Atlantic Ocean adjacent thereto, south of 30-degree north latitude and within 200 nautical miles of the Atlantic coasts of the States referred to in Article 25 of the Convention

⁶³ IACtHR, Advisory Opinion OC-23/17 (n. 41). See A Papantoniou, ‘Advisory Opinion on the Environment and Human Rights’ (2018) 112 (3) American Journal of International Law 460

⁶⁴ E Morgera and M Lennan, ‘Introduction: Applying a Human Rights Lens to the Ocean-Climate Nexus’ (2023) The International Journal of Marine and Coastal Law 1.aop : 1-7; E Morgera et al., ‘Ocean-based climate action and human rights implications under the international climate change regime’ (2023) 38(3) The International Journal of Marine and Coastal Law 8 (2023): 411-446; E Morgera and M Lennan, ‘Strengthening intergenerational equity at the ocean-climate nexus: reflections on the UNCRC general comment No. 26+’ (2022) 52 (5-6) Environmental Policy and Law 445; M Lennan and E Morgera, ‘The Glasgow Climate Conference (COP26)’ (2022) 37 (1) The International Journal of Marine and Coastal Law 13; Lancaster, Mitchell and Nurse (n. 56)

⁶⁵ OOH Submission to the ITLOS (n. 38), para. 6 at 4

⁶⁶ Escazú Agreement (n. 53), Article 11

⁶⁷ Protocol of San Salvador (n. 41), Article 15. See also, Human Rights Committee (HRC), *Daniel Billy and others v. Australia*, UN Doc CCPR/C/135/D/3624/2019, (2022) [*Torres Strait Islands* case]

⁶⁸ Protocol to San Salvador (n. 41), Article 10

⁶⁹ *Ibid*, Article 12

the right to the benefits of culture,⁷⁰ the right to education,⁷¹ and the right to work,⁷² with special consideration for vulnerable and marginalised groups such as Indigenous peoples,⁷³ children,⁷⁴ the elderly⁷⁵ and the disabled.⁷⁶ Additionally, for the small island developing states (SIDS)⁷⁷ Members of the Caribbean Community (CARICOM)⁷⁸ within Latin America and the Caribbean (LAC), the Charter of Civil Society for the Caribbean Community⁷⁹ also extends similar considerations⁸⁰ for the protection of environmental⁸¹ and other socio-cultural rights.⁸²

16. However, rising temperatures, along with ocean acidification and deoxygenation are together the “three horsemen” of climate-driven biodiversity loss, and are directly or indirectly driven by increasing concentrations of greenhouse gases in the atmosphere, and their absorption into the ocean.⁸³ All three threats are also the major climate-driven stressors affecting marine biodiversity on a global scale, but disproportionately for Small Island Developing States (SIDS)⁸⁴ whose economies and people are the most

⁷⁰ Protocol to San Salvador (n. 41), Article 14

⁷¹ *Ibid.*, Article 13

⁷² *Ibid.*, Article 6

⁷³ Advisory Opinion on the Environment and Human Rights, OC 23/17 (n 62)

⁷⁴ Article 16, *Duarte Agostinho and Others v. Portugal and Others*, ECtHR Case No. 39371/20, Communicated Case, 30 November 2020, relinquished to the Grand Chamber on 29 June 2022; CtteeRC, General Comment 26 (n. 50)

⁷⁵ Article 17, *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*, ECtHR Case No. 53600/20, Communicated Case, 17 March 2021, relinquishment to the Grand Chamber on 26 April 2022

⁷⁶ Article 18. See A Kosanic, et al., ‘An Inclusive Future: Disabled Populations in the context of Climate and Environmental Change’ (2022) 55 Current Opinion in Environmental Sustainability 101159; <https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/materials/2PDisabilitiesLight.pdf>

⁷⁷ Taken from the OHRLLS official website, at <https://www.un.org/ohrlls/content/about-small-island-developing-states> [SIDS]

⁷⁸ The Caribbean Community (CARICOM) is an intergovernmental organisation guided by the 2001 Revised Treaty of Chaguaramas, that is a political and economic union of 15 member states (14 nation-states and one dependency) found in the Americas, with the primary objective to promote economic integration, trade and cooperation among its members. The full members of CARICOM are Antigua & Barbuda, The Bahamas, Barbados, Belize, The Commonwealth of Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Lucia, St. Christopher (St. Kitts) & Nevis, San Vicente y las Granadinas, Suriname, and Trinidad & Tobago. The union also comprises five associate members: Anguilla, Bermuda, The [British] Virgin Islands, Cayman Islands, and the Turks & Caicos Islands

⁷⁹ CARICOM, Charter of Civil Society for the Caribbean Community (1997), http://www.sice.oas.org/labor/CARICOM_CCS.asp [CARICOM Charter of Civil Society]. See Glenn A. Bowen, ‘Caribbean Civil Society: Development Role and Policy Implications’ (2013) 4 (1) Nonprofit Policy Forum 81

⁸⁰ Notably, CARICOM Charter of Civil Society (n. 77), Article XI (Indigenous peoples), XII (women), XIII (children) and XIV (disabled persons)

⁸¹ *Ibid.*, Article XXIII

⁸² *Ibid.*, Article IX (religious diversity), X (cultural diversity), XV (education and training), XVI (rights of the family) and XX (health)

⁸³ UNESCO, The “Three Horsemen” of Climate-linked Biodiversity Loss: Why Improving Ocean Observing is crucial for life Below Water, (16 October 2023), <https://www.unesco.org/en/articles/three-horsemen-climate-linked-biodiversity-loss-why-improving-ocean-observing-crucial-life-below>. See also, Intergovernmental Panel on Climate Change (IPCC), *Special Report on the Ocean and Cryosphere in a Changing Climate* [H-O Pörtner et al. (eds)] (Cambridge University Press, Cambridge, 2022) <https://www.ipcc.ch/srocc/> [SROCC Report]

⁸⁴ UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (OHRLLS), available at <https://www.un.org/ohrlls/content/list-sids>

dependent on the ocean,⁸⁵ and which are the first to experience the most intense negative impacts of climate change.⁸⁶

17. Within the Latin America & Caribbean (LAC) Region are sixteen⁸⁷ SIDS, who face greater vulnerability than their other Latin American counterparts. Recognised as a special case both for their environment and development at the Rio Conference, as well as under UNCLOS,⁸⁸ this group of States “faces unique social, economic, and environmental vulnerabilities,”⁸⁹ which exacerbate their vulnerability to the ravages of climate change.⁹⁰ SIDS are exceedingly rich in terrestrial biodiversity,⁹¹ and have relied heavily on their coastal marine resources such as fisheries and tourism for centuries for their gross domestic product (GDP), food, livelihoods, and culture. Additionally, SIDS share a common history of colonialism and resource extraction which has bequeathed unique challenges in the Anthropocene.⁹² However, adaptation responses vary among small islands because their diversity requires place-specific and culturally specific adaptation responses.⁹³

⁸⁵K Tokunaga, et al., Ocean risks in SIDS and LDCs. Ocean Risk and Resilience Action Alliance (ORRAA) Report, (2021), <https://gmri-org-production.s3.amazonaws.com/documents/ORRAA-Ocean-Risks.pdf>; M McField, ‘Impacts of climate change on coral in the coastal and marine environments of Caribbean Small Island Developing States (SIDS)’ (2017) 52 Caribbean Marine Climate Change Report Card: Science Review, https://assets.publishing.service.gov.uk/media/5a81caf240f0b62305b90d53/6_Coral.pdf

⁸⁶I Kelman and JJ West, ‘Climate change and small island developing states: a critical review’ (2009) 5 (1) Ecological and Environmental Anthropology 1; A Cashman and MR Nagdee, ‘Impacts of climate change on settlements and infrastructure in the coastal and marine environments of Caribbean small island developing states (SIDS)’ (2017) Science Review 155, https://assets.publishing.service.gov.uk/media/5a82c330ed915d74e623781c/11_Settlements_and_Infrastructure_combined.docx.pdf

⁸⁷Taken from the full list with the UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (OHRLLS), available at <https://www.un.org/ohrrls/content/list-sids>

⁸⁸See G Baldacchino, ‘UNCLOS at 40: Small Island Developing States and New Forays Into Positive Sovereignty’ (2022) 111 (5) The Round Table 598; K Hassanali, ‘Participating in Negotiation of a New Ocean Treaty under the Law of the Sea Convention: Experiences of and Lessons From a Group of Small-Island Developing States’ (2022) 9 Frontiers in Marine Science 902747

⁸⁹SIDS (n. 77)

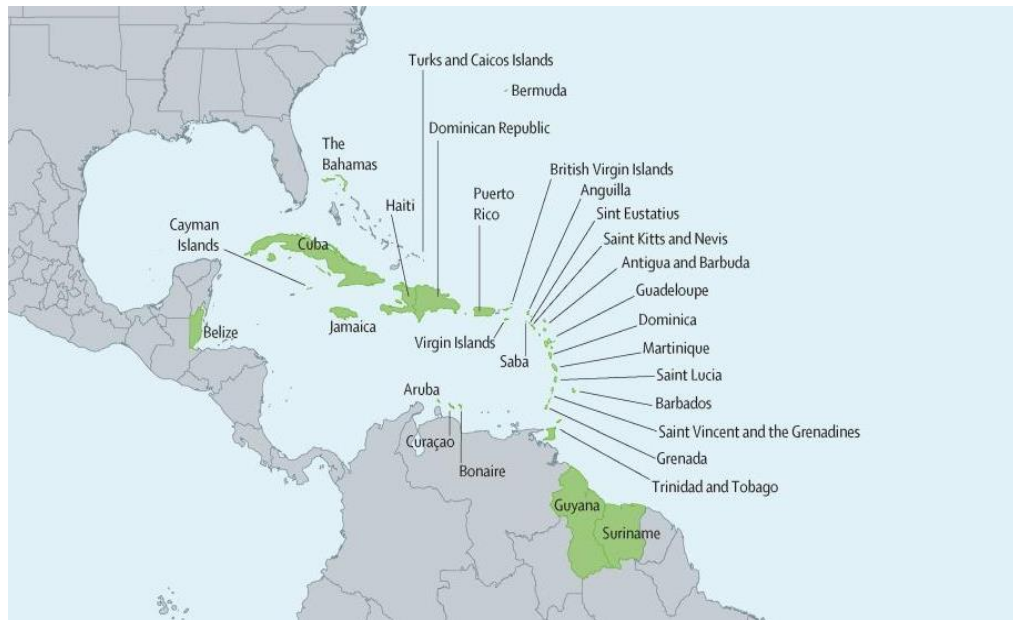
⁹⁰AMSN Lancaster ‘How CoP 28 Failed Small Islands’ (*The Conversation*, 15 December 2023), <https://theconversation.com/how-cop28-failed-the-worlds-small-islands-219938>

⁹¹N Myers et al., “Biodiversity Hotspots for Conservation Priorities” (2000) 403(6772) Nature 853; N Myers, “Biodiversity Hotspots Revisited” (2003) 53 BioScience 916; *cfr.* RA Mittermeier et al., “Biodiversity Hotspots and Major Tropical Wilderness Areas: Approaches to Setting Conservation Priorities” (1998) 12 Conservation Biology 516

⁹²AMSN Lancaster and BG Nurse, ‘Oceans Apart? Colonialism, Culture & Climate Change: Can We Critically [Re] Conceptualising The ‘Conquest’ Of The Last Frontier’ in Dalano DaSouza, Chevy Eugene and Talkmore Chidede (eds.) *Public Policy Formulation in Post-Colonial Africa and the Caribbean: Reshaping the Development Imperative* (Toronto: ICPP6, 2025 *forthcoming*)

⁹³H-O Pörtner et al. (eds.), *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC: Cambridge University Press. Cambridge University Press, Cambridge, UK and New York, NY, USA, 2022), <https://www.ipcc.ch/report/ar6/wg2/>, 2048 [IPCC Sixth Assessment Report]

18. Caribbean SIDS are especially vulnerable to rising sea levels as well as extreme weather like hurricanes and tsunamis,⁹⁴ and their biodiversity is among the most threatened in the world due to climate change.⁹⁵ The expected rise in sea levels of 0.45-0.82 metres, will threaten coastal infrastructure, exacerbate coastal erosion and inundate beaches, which in turn will impact tourism⁹⁶ and fisheries. Additionally, increasing temperatures and decreasing rainfall will exacerbate the high risk of drought currently being experienced by SIDS.⁹⁷



Map of Caribbean SIDS within the Latin America & the Caribbean Region (including overseas territories of the U.K. U.S., France and The Netherlands)

Source : Safarti et. al., 2019⁹⁸

19. While the richness of their marine biodiversity is largely unknown, but potentially unquantifiable, the ocean under their control needs to be safeguarded, as the lion's share of their natural resource capital resides in their continental shelves and exclusive economic zones (EEZs), with the latter on average, twenty-eight times their land mass.⁹⁹ Accordingly **the legal obligations which arise at the ocean-climate nexus, currently under examination by ITLOS, will be exceedingly instructive for SIDS.**¹⁰⁰

⁹⁴ IPCC Sixth Assessment Report (n. 93), Chapter 15 "Small Islands", <https://www.ipcc.ch/report/ar6/wg2/chapter/chapter-15/>

⁹⁵ HL Lenderking et al., 'Climate change and food security in Caribbean small island developing states: challenges and strategies' (2021) *International Journal of Sustainable Development & World Ecology* 28.3 (2021): 238-245

⁹⁶ M Nicholls *Climate Change: Implications for Tourism: Key Findings from the Intergovernmental Panel on Climate Change Fifth Assessment Report* (Cambridge University Press: Cambridge 2014)

⁹⁷ TS Stephenson and JJ Jones, "Impacts of climate change on extreme events in the coastal and marine environments of Caribbean Small Island Developing States (SIDS)." *Caribbean Climate Change Report Card: Science Review* 2017 (2017): 10-22

⁹⁸ D Sarfati, et al., 'Cancer Control in Small Island Nations: From Local Challenges to Global Action' (2019) 20 (9) *The Lancet Oncology*: e535-e548, [https://www.thelancet.com/journals/lanonc/article/PIIS1470-2045\(19\)30511-X/fulltext](https://www.thelancet.com/journals/lanonc/article/PIIS1470-2045(19)30511-X/fulltext)

⁹⁹ Taken from the OHRLLS official website, at <https://www.un.org/ohrlls/content/about-small-island-developing-states>

¹⁰⁰ See generally, See OOH Submission to the ITLOS (n. 38)

20. In addition to these large ocean characteristics,¹⁰¹ their size and geographical characteristics make SIDS integrated land-sea systems, which require the management of land and sea areas collectively as a single unit, under the concept of the ridge to reef (R2R) approach. This is especially critical where climate change has become a regional and localised threat to hillsides, coral reefs, as well as coastal zones, because of a range of direct impact, leading to, e.g., widescale degradation of the region's coral reefs from increased and intensified storms, coral bleaching, and acidification.¹⁰² Reefs are also impacted by local activities such as overfishing, coastal development, in some cases extractive industries (primarily oil & gas, but in the future, potentially deep seabed mining)¹⁰³ and watershed pollution.
21. On the landward side, there has been an increase in deforestation, leading to scarred hillsides, desertification, unsustainable agricultural systems, and a decline in freshwater resources.¹⁰⁴ These impacts in turn intensify effects on the coastal zone and the marine environment, including from land-based pollution. Expanding land developments and the threat of sea level rise are also persistent threats on the coast. Given the smallness and concentration of populations on the coastal margins, the ecosystem connectivity between the land-sea margin is therefore greater than the sum of the parts of conservation of land and sea separately.¹⁰⁵
22. The Court has contemplated the R2R approach in its 2017 Advisory Opinion by addressing communities which are economically dependent for their survival on environmental resources from the marine environment, forested areas and river basins.¹⁰⁶ The Court observed that biodiversity loss can be exacerbated by the effects of climate change, which may result in saltwater flooding, desertification, hurricanes, erosion and landslides, leading to scarcity of water supplies and affecting food production from agriculture and fishing, as well as destroying land and housing.¹⁰⁷

¹⁰¹ N Chan, "Large Ocean States": Sovereignty, Small Islands, And Marine Protected Areas In Global Oceans Governance" (2018) 24 *Global Governance: A Review of Multilateralism and International Organizations* 537-555; A Hume et al., "Towards An Ocean-Based Large Ocean States Country Classification" (2021) 134 *Marine Policy* 104766; C Frazão Santos, et al., "A Sustainable Ocean For All" (2022) 1 *npj Ocean Sustainability* 1-2

¹⁰² DK Gledhill et al., "Ocean Acidification of the Greater Caribbean Region 1996–2006" (2008) 113 *Journal of Geophysical Research: Oceans* 31; C Langdon et al., "Two Threatened Caribbean Coral Species Have Contrasting Responses to Combined Temperature and Acidification Stress" (2018) 62 *Limnology and Oceanography* 2450

¹⁰³ GJ Hamley, 'The implications of seabed mining in the Area for the human right to health' (2022) 31 (3) *Review of European, Comparative & International Environmental Law* 389; E Morgera and H Lily, 'Public participation at the International Seabed Authority: An international human rights law analysis' (2022) 31 (3) *Review of European, Comparative & International Environmental Law* 374

¹⁰⁴ AMSN Lancaster, "Between the Devil & The Deep Blue Sea: Can Ridge-to-Reef Initiatives & Man and the Biosphere Reserves Foster Resilience in Small-scale Fisheries for the CARICOM & OECS Caribbean?" (Review of European, Comparative & International Environmental Law, 2024 *forthcoming*)

¹⁰⁵ RR Carlson et al., "Synergistic Benefits of Conserving Land-Sea Ecosystems" (2021) 28 *Global Ecology and Conservation* e01684

¹⁰⁶ IACtHR, Advisory Opinion OC-23/17 (n 41), para 67

¹⁰⁷ *Ibid.*, as cited in footnotes 125 and 126

23. Apart from these outstanding marine resources, Latin American & Caribbean States also possess diverse coastal marine environments which are of particular importance in this context. Blue¹⁰⁸ and teal¹⁰⁹ carbon ecosystems have been recognised since 2006 by the Intergovernmental Panel on Climate Change as important carbon sinks.¹¹⁰ These ecosystems span the gamut – from inland freshwater wetlands, mangroves, salt-marshes, seagrasses, seaweed, and sediments – and mediate interactions between land, sea and estuarine areas, ecosystems, and are critical components of nature-based solutions.¹¹¹ Overwhelming, these ecosystems sequester copious amounts of carbon – much more than forests (or green carbon) – on land,¹¹² as they absorb carbon dioxide (CO₂) through photosynthesis and store it at a rate up to two times faster and for longer periods than forests per unit area. This sequestration occurs both in the plants themselves, as well as in the sediments below them,¹¹³ and these ecosystems contribute to over 50% of all the blue carbon on Earth, despite covering a tiny fraction (0.2%) of the ocean area.¹¹⁴
24. The sequestration by blue carbon ecosystems, includes over half of all the atmospheric carbon captured by living organisms,¹¹⁵ which is critical for the ocean-climate nexus, as well as contributing to climate mitigation and adaptation efforts. Further, in addition to their impressive roles in attenuating the climate conundrum, blue and teal carbon

¹⁰⁸ L Wylie, AE Sutton-Grier and A Moore, ‘Keys to successful blue carbon projects: Lessons learned from global case studies’ (2016) 65 *Marine Policy* 76–84; NL Bindoff *et al.*, ‘Chapter 5: Changing Ocean, Marine Ecosystems and Dependent Communities’ in SROCC Report (n 83), 447–587; N Hilmi *et al.*, ‘The role of blue carbon in climate change mitigation and carbon stock conservation’ (2021) 3 *Frontiers in Climate* 710546.; PI Macreadie *et al.*, ‘Blue carbon as a natural climate solution’ (2021) 2(12) *Nature Reviews: Earth and Environment* 826–839; A Martin *et al.*, *Blue Carbon – Nationally Determined Contributions Inventory. Appendix to: Coastal Blue Carbon Ecosystems: Opportunities for NDCs* (GRID-Arendal, Norway, 2016)

¹⁰⁹ SJ Dundas *et al.*, ‘Integrating oceans into climate policy: Any green new deal needs a splash of blue’ (2020) 13(5) *Conservation Letters* e12716; L Zinke, ‘The colours of carbon’ (2020) 1 (3) *Nature Reviews Earth & Environment* 141; AM Nahlik and M S Fennessy, ‘Carbon storage in US wetlands’ (2016) 7 (1) *Nature Communications* 1; M E Malerba, *et al.* ‘Methane and nitrous oxide emissions complicate the climate benefits of teal and blue carbon wetlands’ (2022) 5 (2) *One Earth* 1336. Teal carbon is especially relevant in small island settings, where the connection between land and marine ecosystems is more intimate. See AMSN Lancaster, ‘Between the Devil & The Deep Blue Sea ... (n. 104) ... Alison Buckholtz, ‘Barbados’ Blueprint for Climate Resilience’ <https://ifc.shorthandstories.com/barbados-blueprint-for-climate-resilience/index.html>

¹¹⁰ IPCC, 2013 Supplement to the 2006 IPCC Guidelines for National Greenhouse Gas Inventories: Wetlands [T Hiraishi *et al.* (eds)](IPCC, Switzerland, 2014), <https://www.ipcc.ch/report/2006-ipcc-guidelines-for-national-greenhouse-gas-inventories/>. During discussions with delegates at the 2023 Ocean-Climate Dialogue at the UNFCCC intersessional meetings, it became apparent that several Parties to the Paris Agreement were not aware of this supplement. See, E Morgera *et al.*, ‘Ocean-based Climate Action and Human Rights ...’ (n 64), at 422–423

¹¹¹ UNFCCC, ‘Report of the Conference of the Parties on its twenty-seventh session, held in Sharm el-Sheikh from 6 to 20 November 2022 - Decision 1/CP.27 Sharm el-Sheikh Implementation Plan’, FCCC/CP/2022/10/Add.1 (17 March 2023); CBD Decision XV/4, Kunming-Montreal Global Biodiversity Framework, CBD/COP/DEC/15/4 (19 December 2022)

¹¹² United Nations, *The Second World Ocean Assessment Volume I* (UN, 2021) at 360

¹¹³ *Ibid*

¹¹⁴ *Ibid*

¹¹⁵ PI Macreadie *et al.* (n. 108), H K Morrisette, *et al.*, ‘Belize Blue Carbon: Establishing a national carbon stock estimate for mangrove ecosystems’ (2023) 870 *Science of The Total Environment* 870 (2023): 161829; O Serrano, *et al.*, ‘Seagrass blue carbon stocks and sequestration rates in the Colombian Caribbean’ (2021) 11 (1) *Scientific Reports* 11067; O. Serrano, *et al.*, ‘Conservation of blue carbon ecosystems for climate change mitigation and adaptation’ 2019 in *Coastal wetlands* (Elsevier, 2019. 965); C Nellemann and E Corcoran (eds.) *Blue carbon: the role of healthy oceans in binding carbon: a rapid response assessment* (UNEP/Earthprint, 2009)

systems host ecological and ecosystem functions linked to enhanced fisheries and other marine resources, coastal tourism, aquaculture, and mariculture fundamental to the States and peoples of the Latin America and Caribbean Region.¹¹⁶ This pairs directly with human rights derived from the ecosystem services provided by the healthy functioning of areas beyond national jurisdiction,¹¹⁷ and the deep seabed (the Area).¹¹⁸ The role of blue carbon ecosystems in climate mitigation is therefore a growing area of interest for both researchers and States.¹¹⁹

25. Accordingly, we submit that the Court must give careful considerations, among others, to the following instruments and principles:

- a. the Cartagena Convention¹²⁰ and its Protocols on Oil Spills,¹²¹ Specially Protected Areas & Wildlife (SPAW)¹²² and Land Based Activities (LBS Protocol), the latter two of which is and is mutually supportive to the Convention on Biological Diversity (CBD),¹²³ and Ramsar¹²⁴ through its Class I Waters in Annex III.¹²⁵ This Regional Seas Programme provides a unique institutional framework that facilitate progress towards the attainment of ocean-related SDG targets¹²⁶ and operates within the framework of UNCLOS. Regional Seas Programmes further offer an enabling environment for the implementation of Part XII of UNCLOS,

¹¹⁶ See also the discussion in the European Court of Human Rights in *Carême v. France*, ECtHR Case No. No. 7189/21, filed on 28 January 2021, relinquished to the Grand Chamber on 31 May 2022

¹¹⁷ E Morgera et al., 'Addressing the ocean-climate nexus in the BBNJ agreement: strategic environmental assessments, human rights and equity in ocean science' (2023) 38 (3) *The International Journal of Marine and Coastal Law* 447; AP Jenkins et al., 'Human health depends on thriving oceans' (2023) *The Lancet*; AMSN Lancaster, 'Human Rights and Areas Beyond National Jurisdiction: A Necessary, Yet Nebulous Concept?' *Marine Policy*, 2024 *forthcoming*)

¹¹⁸ G J Hamley (n 103); E Morgera and H Lily (n 103)

¹¹⁹ See United Nations General Assembly (UNGA) Res 72/75 (5 December 2017) *Oceans and the law of the sea*, UN Doc A/RES/72/73, para. 197; S Lutz, 'Why protect ocean biodiversity', presentation for the webinar series 'Policy Lates' 2021, Royal Society of Biology (2021) available at <https://www.youtube.com/watch?v=aZG5butO7CM&t=3s>

¹²⁰ Cartagena Convention (n. 44)

¹²¹ *Ibid*

¹²² Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Jan. 18, 1990, available in 1 Y.B. INT'L ENVT'L L. 441 (1990), <https://www.car-spaw-rac.org/IMG/pdf/spaw-protocol-en.pdf> [SPAW Protocol]. See also, C De Fontaubert and A Tundi, "Critical analysis of the SPAW protocol: The dilemma of regional cooperation." *The University of Miami Inter-American Law Review* (1998): 85-98; A Vanzella-Khouri, "Implementation of the protocol concerning specially protected areas and wildlife (SPAW) in the Wider Caribbean region." *The University of Miami Inter-American Law Review* (1998): 53-83; G Bustamante et al., "Marine protected areas management in the Caribbean and Mediterranean seas: making them more than paper parks." *Aquatic Conservation: Marine and Freshwater Ecosystems* 24.S2 (2014): 153-165; D Freestone, "Specially Protected Areas and Wildlife in the Caribbean-The 1990 Kingston Protocol to the Cartagena Convention." *Int'l J. Estuarine & Coastal L.* 5 (1990): 362

¹²³ Convention on Biological Diversity, adopted in Rio de Janeiro on 5 June 1992 and entered into force on 29 December 1993, 1760 United Nations Treaty Series, p. 79 [CBD]

¹²⁴ DR Barker, 'Biodiversity Conservation in the Wider Caribbean Region' *Rev. Eur. Comp. & Int'l Envtl. L.* 11 (2002): 74.

¹²⁵ Protocol Concerning Pollution from Land-Based Sources and Activities to the Convention for the Protection and the Development of the Marine Environment of the Wider Caribbean Region, 6 October 1999, <http://www.cep.unep.org/cartagenaconvention/lbs-protocol/lbs-protocol-english>

¹²⁶ UNEP, Regional Seas Programmes, Our Work : <https://www.unep.org/explore-topics/oceans-seas/what-we-do/working-regional-seas/our-work>

which provides the legal framework for the conservation and sustainable use of oceans and their resources;¹²⁷

- b. UNCLOS, traditionally considered the “Constitution for the Oceans” for its wide subject-matter scope virtually covering most of human activities at sea, the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Fish Stocks Agreement)¹²⁸ and the Agreement on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ Agreement), which – while not yet in force – already provides evidence of the progressive development of international law in a mutually supportive way across the areas of ocean, biodiversity, climate change and human rights;¹²⁹
- c. the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement, the two primary instruments addressing climate change and imposing obligations on States to reduce greenhouse gases anthropogenic emissions;
- d. the Convention on Biological Diversity (CBD), the 196 States Parties to which have already agreed on mutually supportive interpretations across climate change, ocean governance and human rights, grounded in the ecosystem approach, and which as stated by the Regional Sea Programme of the Cartagena Convention,¹³⁰ is mutually supportive to the SPAW Protocol;
- e. the Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar), which addresses the management and conservation of blue and teal carbon ecosystems up to 6 metres,¹³¹ and which as stated by the Regional Sea Programme of the Cartagena Convention,¹³² is mutually supportive to the CBD and SPAW Protocol;

¹²⁷ UNEP, Regional Seas Programmes (n. 126)

¹²⁸ United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, adopted on the occasion of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks adopted in New York on 4 December 1995 and entered into force on 11 December 2001, 2167 United Nations Treaty Series 3 [UNFSA or Fish Stocks Agreement]

¹²⁹ One Ocean Hub, Legal Note on the Request for an Advisory Opinion from the International Court of Justice on the Obligations of States, 13 December 2023, <https://oneoceanhub.org/wp-content/uploads/2023/12/ICJ-legal-note-draft-SUPERFINAL-14dec2023.pdf> [Legal Note To ICJ]; E Morgera et al. (n. 117)

¹³⁰ B Sheehy, ‘International marine environment law: A case study in the Wider Caribbean Region’ (2003) 16 Geo. Int’l Env’tl. L. Rev. 441

¹³¹ Article 1 provides that Convention wetlands are areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres

¹³² Sheehy (n. 130); Barker (n. 124)

- f. the Inter-American Convention for the Protection and Conservation of Sea Turtles (IAC) which provides the legal framework for countries in the Americas and the Caribbean to promote the protection, conservation, and recovery of sea turtles and the habitats they depend on, based on the best available data and environmental, socioeconomic, and cultural characteristics, and is therefore mutually supportive to the CBD and SPAW Protocol;
- g. the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD), for the relevance to the “proliferation of droughts, floods, landslides and fires” mentioned in the Request, the importance to small island developing states (SIDS) such as those in the Caribbean Region, because of their geographic circumstances, and heavy reliance on their large ocean spaces. These islands comprise interconnected ridge to reef systems, which when impacted by drought and desertification issues have corresponding effects on both terrestrial and marine ecosystems and biodiversity, and the human rights of peasants¹³³ such as small-scale fishers and farmers;
- h. the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement);
- i. the Convention on Access to Information, Public Participation, the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention);
- j. the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights (Protocol of San Salvador);
- k. the International Covenant on Civil and Political Rights (ICCPR)¹³⁴ and the International Covenant on Economic, Social and Cultural Rights (ICESCR);¹³⁵
- l. the United Nations Convention on the Rights of the Child (UNCRC), which provides obligations on States to effectively protect the substantive and procedural rights of children and future generations;

¹³³ See definition in Art. 1, United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas, UNGA Resolution A/C.3/73/L.30 (28 September 2018), <https://digitallibrary.un.org/record/1661560?ln=en> (UNDROP); Human Rights Council, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Working Group 3 (9 October 2023), https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/54/L.11, E Morgera and J Nakamura, ‘Shedding a light on the human rights of small-scale fishers: Complementarities and contrasts between the UN Declaration on Peasants’ Rights and the Small-Scale Fisheries Guidelines’ in Mariagrazia Alabrese *et. al.*, *The United Nations’ Declaration on Peasants’ Rights* (Routledge, 2022)

¹³⁴ International Covenant on Civil and Political Rights, adopted in New York on 16 December 1966 and entered into force on 23 May 1976, 999 United Nations Treaty Series, 171 [ICCPR]

¹³⁵ International Covenant on Economic, Social and Cultural Rights, adopted in New York on 16 December 1966 and entered into force on 23 May 1976, 993 United Nations Treaty Series, 3 [ICESCR],

- m. the principle of intergenerational equity, enshrined in several of the above-mentioned instruments, which provides further guidance on the protection and empowerment of children and future generations;¹³⁶
 - n. the precautionary approach/principle, which belongs to the corpus of international environmental law including the protection of the climate system;
 - o. the principle of prevention, which belongs to the corpus of international environmental law including the protection of the climate and ocean systems;
 - p. the principle of common but differentiated responsibility as a principal tenet of climate change law, both in respect to States in the Global North and Global South, but also in regard to human rights and environmental protection.¹³⁷
26. The rules contained in international legal regimes such as those underpinning climate change, biodiversity, law of the sea and human rights, must be interpreted and applied in a mutually supportive manner, in light of the principle of systemic integration,¹³⁸ so as to ensure that international legal rules are not interpreted in a vacuum, but rather in the context of “the entire legal system prevailing at the time of the interpretation”.¹³⁹ This mutual supportiveness of international law has been characterised as an interpretative tool¹⁴⁰ to prevent or solve normative conflicts¹⁴¹ or to foster and

¹³⁶ See E Morgera and M Lennan, (n 64); General Comment 26 (n. 50), para. 11

¹³⁷ The Preamble to the Paris Agreement indicates: “[a]cknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.”

¹³⁸ The principle of systemic integration finds its collocation in Article 31(3)(c) of the Vienna Convention on the Law of Treaties [VCLT], adopted in Vienna on 23 May 1969 and entered into force on 27 January 1980, 1155 United Nations Treaty Series, p. 331. The literature on the principle is vast: see, amongst others, C McLachlan, “The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention on the Law of Treaties” (2008) 4(2) *International Comparative Law Quarterly* 279-320. The principle of systemic integration was reiterated by the ICJ and by other international courts or dispute settlement bodies on several occasions: amongst many, see *Case concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, Judgment, ICJ Reports 2003, p. 161, para. 41. Cfr. European Court of Human Rights (ECtHR), *Loizidou v Turkey (Judgement on the Merits)* App. No. 15318/89, 18 December 1996, para 43; *United States—Import Prohibition of Certain Shrimp and Shrimp Products* [12 October 1998] (WTO Appellate Body) WT/DS58/AB/R paras 130-134; *China—Measures related to the Exportation of Various Raw Materials* [5 July 2011] (WTO Panel) WT/DS394/R WT/DS395/R WT/DS398/R para 7.364

¹³⁹ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971, at 16, para. 53

¹⁴⁰ R Pavoni, “Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the ‘WTO-and-Competing-Regimes’ Debate?” (2010) 21 *European Journal of International Law* 649, 650. See also ILC, “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law” (13 April 2006) UN Doc A/CN.4/L.682, para 412 [*ILC, Report on Fragmentation*]

¹⁴¹ N Matz-Luck, “Harmonization, Systemic Integration, and Mutual Supportiveness as Conflict-Solution Techniques: Different Modes of Interpretation as a Challenge to Negative Effects of Fragmentation” (2006), vol. 17 *Finnish Yearbook of International Law* 39-53, at p. 43

strengthen synergies amongst different regimes of international law.¹⁴² Systemic interpretations can more effectively respond to the complex and multifaceted nature of global challenges such as climate change and biodiversity loss,¹⁴³ helping fulfil the core objects and purposes of all relevant international regimes.¹⁴⁴ This principle has been relied upon by the Human Rights Committee (HRCttee) in the *Torres Islanders* case in relation to Australia's failure to adopt climate change adaptation measures in a timely manner against foreseeable and serious adverse impacts on the human rights to private and family life and to culture of Indigenous peoples. In addition, General Comment 36 on the right to life states that "Obligations of States parties under international environmental law should thus inform the content of Article 6 of the Covenant."¹⁴⁵

27. Utilising the principle of mutually supportive interpretation¹⁴⁶ can more effectively respond to the complex and multifaceted nature of global challenges such as climate change and biodiversity loss, while making sure not to frustrate the core objects and purposes of the regimes at stake. This is particularly important to clarify the content and scope of the international obligations contained in each of these regimes, especially where States are left with a significant degree of discretion as to the means of implementation (e.g., the Paris Agreement, the UNCLOS, or the CBD).¹⁴⁷ Further, mutually supportive interpretation is envisaged under Article 293(1) UNCLOS and, specifically with regard to the protection of the marine environment, Article 237 UNCLOS, in addition to the numerous rules of reference laid down in its provisions and calling for the incorporation of rules and standards from other external instruments. This approach is also endorsed by Article 22 CBD, and Articles 3 (2), 4 (4) and 4 (5) of the Cartagena Convention.

¹⁴² See P-M Dupuy and J E Viñuales, *International Environmental Law* (CUP 2015), 393, citing R Pavoni (n. 138), 654-5.

¹⁴³ MA Young (ed.), *Saving Fish Trading Fish: The Interaction between Regimes in International Law*, (Cambridge University Press, 2011), at pp. 3-5

¹⁴⁴ ILC, Report on Fragmentation (n.140)

¹⁴⁵ In its 2019 General Comment 36 on the right to life, the HRCttee held that "Obligations of States parties under international environmental law should thus inform the content of article 6 of the Covenant, and the obligations of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law". HRCttee, General Comment 36 on Article 6 (the Right to Life), CCPR/C/GC/36 (3 September 2019), para. 62

¹⁴⁶ Pavoni (n 140)

¹⁴⁷ One Ocean Hub, Written Statement of the One Ocean Hub, International Tribunal For The Law Of The Sea (Case No. 31) Request For An Advisory Opinion Submitted By The Commission Of Small Island States On Climate Change And International Law (Request For Advisory Opinion Submitted To The Tribunal) (June 2023) , https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/4/C31-WS-4-10-OOH.pdf [Statement to ITLOS]; Ocean Hub Legal Note To ICJ (n. 129)

28. Accordingly, the *Amicii* respectfully submit responses to:

- a. **Part A, Question 1** (the scope of States' duty to prevent climate change's adverse effects), **Question 2 A** (measures States should take into consideration when implementing its obligations in respect to the climate emergency) and **Question 2 B** on principles that should inspire States' actions of mitigation, adaptation and response to the loss and damage resulting from the climate emergency in the affected communities;
- b. **Part B, Question 1** (the scope States obligations to the right to live and survival in light of science and human rights under the American Convention, Escazú Agreement and the regime of the Cartagena Convention);
- c. **Part C** (the differentiated obligations of States in relation to rights of children and future generations in light of the climate emergency), **Question 1** (nature and scope of the obligation to adopt timely and effective measures) and **Question 2** (nature and scope of the obligation to provide information and effective administrative and judicial remedies);
- d. **Part E** (the obligations of States in relation to rights of vulnerable groups from the impacts of the climate emergency), **Question 1** (environmental and human rights defenders), **Question 2** (women [and] human rights defenders); and **Question 3** (Indigenous peoples and Afro-descendant persons).

29. Against this background, the present Joint Submission is structured as follows. **Section A** below presents principles and approaches related to the duty of protection and the guarantee of human rights at the **ocean-climate nexus**, considerations for implementing these obligations and principles which should inspire adaptation, mitigation and loss and damage measures in Latin America and the Caribbean; **Section B** addresses the State's obligation to preserve the right to life and survival, and underscores the importance of information, education, participation in decision-making and access to justice to protecting human rights; **Section C** highlights the special case of children and new generations in light of the climate emergency, and illustrates the importance of emerging Inter-American Standards on business and climate change and **Section D** examines the obligations to environmental, climate and ocean human rights defenders, as well as women, Indigenous and Afro-descendant peoples given that social and economic conditions are still drastically unequal and there are large information and recognition gaps that affect their rights across the Latin America and Caribbean Region within the context of the climate emergency.

A. State Obligations Derived From The Duties Of Prevention And The Guarantee Of Human Rights In The Climate Emergency

I. The Scope of the State's Duty of Prevention

30. A State's duty of prevention originates in the international courts' and tribunals' case law¹⁴⁸ and the consolidated practice of States,¹⁴⁹ and is now considered a well-established obligation of international customary law enshrined in multiple international law instruments¹⁵⁰ binding States Parties to the American Convention on Human Rights (ACHR, or American Convention),¹⁵¹ The ACHR imposes general obligations on States, particularly Articles 1(1), 4(1), 5(1) to take measures to prevent, investigate, and address human rights violations, including those related to environmental harm. Although the ACHR does not explicitly mention climate change or global warming, the literal interpretation of the ACHR provisions is clarified in the preamble to the Protocol of San Salvador, emphasising the close relationship between the exercise of economic, social and cultural rights – which include the right to a healthy environment – and of civil and political rights. The Protocol further indicates that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human being.¹⁵²

¹⁴⁸ See, amongst others, *Trail Smelter Case* (United States v Canada) (Arbitration Tribunal) (1941) 3 RIAA 1905, 1965; ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, July 8, 1996, para. 29; ICJ, Case concerning the *Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia). Judgment of September 25, 1997, para. 140; ICJ, Case of *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment of April 20, 2010, para. 101; and ICJ, *Certain Activities carried out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua) and *Construction of a Road in Costa Rica Along the San Juan River* (Nicaragua v. Costa Rica). Judgment of December 16, 2015, para. 104. The International Tribunal for the Law of the Sea (ITLOS) and the Permanent Court of Arbitration (PCA) have also indicated this. Cf. ITLOS, *Dispute concerning delimitation of the maritime boundary between Ghana and Cote d'Ivoire in the Atlantic Ocean* (Ghana v. Cote d'Ivoire). Case No. 23, *Order for Provisional Measures of April 25, 2015*, para. 71; PCA, *Iron Rhine Arbitration* (Belgium v. The Netherlands). Award of May 24, 2005, para. 222; PCA, *Kishanganga River Hydroelectric Power Plant Arbitration* (Pakistan v. India). Partial award of February 18, 2013, paras. 448 to 450 and Final award of December 20, 2013, para. 112, and PCA, *South China Sea Arbitration* (Philippines v. China), Award of July 12, 2016, para. 941

¹⁴⁹ ILC, "2001 Articles on Transboundary Harm", ILC Report (2001) GAOR A/56/10, 366

¹⁵⁰ By way of example, the duty of prevention is an integral element of the content of the general obligation to protect and preserve the marine environment under Article 192 of the United Nations Convention on the Law of the Sea (UNCLOS), and is expressly foreseen in Article 194 UNCLOS with regard to the prevention, control and regulation of marine pollution, Article 211 (vessels), and arts 145(a) and 209 (exploitation of activities in the Area). See also Principle 2 of the 1992 Rio Declaration: UN General Assembly, *Report of the United Nations Conference on Environment and Development – Annex I: Rio Declaration on Environment and Development*, A/CONF.151/26 (Vol. I) (3-14 June 1992); The International Law Commission (ILC) Articles on the Prevention of Transboundary Harm from Hazardous Activities (with Commentaries)' (2001) UN Doc A/56/10, Non Legally Binding Instrument on All Types of Forests', UNGA Res 62/98 (17 December 2007) UN Doc A/RES/62/98, UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (adopted 17 March 1992, entered into force 6 October 1996) (1992) 31 ILM 1312, Article 2(1); UN Convention on the Law of the Non-Navigational Uses of International Watercourses (adopted 21 May 1997, entered into force 17 August 2014) (1997) 36 ILM 700, Article 7; Convention for the Protection of the Ozone Layer (adopted 22 March 1985, entered into force 22 September 1988) (1985) 26 ILM 1529; CBD, Article 2; Fish Stocks Agreement, Preamble; UNFCCC, Preamble and Article 2

¹⁵¹ American Convention (n. 41)

¹⁵² IACtHR, Advisory Opinion OC-23/17 (n. 41), Preambular Paragraph 3

31. The application of the prevention duty in the context of climate change is particularly relevant in the ACHR system, as the Court has already recognised that “environmental degradation and the adverse effects of climate change have impaired the real enjoyment of human rights”.¹⁵³ In its 2017 Advisory Opinion on *The Environment and Human Rights*, and further held that such an obligation applies also extraterritorially and with respect to conduct contributing to climate change and to forms of environmental harm.¹⁵⁴ In particular, the Court observed that complying with a number of duties and principles including, among others, the obligation of prevention, is necessary to fulfil “the obligations to respect and ensure the rights to life and personal integrity, in the context of environmental protection”.¹⁵⁵ Further, the ACHR system affords explicit protection of the human right to a healthy environment under Article 11 of the Protocol of San Salvador, as further reiterated by the Court in its Opinion.¹⁵⁶ These expressions also find support in Articles 1 and 4 (1) of the Escazú Agreement, which provides substantial avenues and protections for climate and ocean defenders.
32. The State’s duty in the context of the climate emergency, including extreme events and slow onset events, extends to all rights holders, and to harm that happens both within and beyond state borders.¹⁵⁷ The obligations imposed on international agencies, national governments and private actors¹⁵⁸ include adhering to and enforcing international law rules and principles, implementing policies and regulations to reduce emissions, ensuring accountability and effective and timely remedies, and cooperating with other States to prevent foreseeable harms caused by climate change and guarantee human rights in the climate emergency.¹⁵⁹ In fulfilling the full of their duty, States are expected to act in accordance with their individual and collective legal obligations under human rights treaties, international agreements, including the ACHR and the Paris Agreement, as well as growing scientific consensus on climate-related impacts, while also considering general principles of international law and customary international law.
33. Further, the 196 Parties to the CBD have pointed out that biodiversity and ecosystem functions and services significantly contribute to climate change adaptation and mitigation as well as to disaster reduction.¹⁶⁰ By the same token, climate change has been recognised not only as one of the four drivers of global biodiversity loss,¹⁶¹ but

¹⁵³ Case of *Kawas Fernández v. Honduras*, Merits, Reparations and Costs. Judgment of April 3, 2009. Series C No. 196, para. 148. *Cfr.* IACtHR, Advisory Opinion OC-23/17 (n. 41), para. 47. In this Advisory Opinion, the Court further concluded that “the obligation to prevent transboundary environmental damage or harm is an obligation recognised by international environmental law, under which States may be held responsible for any significant damage caused to persons outside their borders by activity originating in their territory or under their effective control or authority”, and that such an obligation “does not depend on the lawful or unlawful nature of the conduct that generates the damage”, para. 103

¹⁵⁴ IACtHR, Advisory Opinion OC-23/17 (n. 41), paras. 141-142, and para. 152

¹⁵⁵ *Ibid.*, para. 125

¹⁵⁶ *Ibid.*, paras. 56-70

¹⁵⁷ UN OHCHR, Frequently Asked Questions on Human Rights and Climate Change, https://www.ohchr.org/sites/default/files/Documents/Publications/FSheet38_FAQ_HR_CC_EN.pdf

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ CBD Decision XIV/5, “Biodiversity and climate change”, CBD/COP/DEC/14/5 (30 November 2018), Preamble.

¹⁶¹ CBD and United Nations Environment Programme-World Conservation Monitoring Centre (UNEP-WCMC), *Global Biodiversity Outlook 3* (UNEP-WCMC, 2010) at 22

also as a factor exacerbating the impact of other drivers, thereby resulting in an unprecedented rate of biodiversity degradation in the past 50 years and undermining the progress towards the achievement of the connected United Nations Sustainable Development Goals.¹⁶²

34. On that basis, the mutually supportive interpretation and application of the prevention duty in the context of climate change was also upheld by Parties to the CBD in the 2022 Global Biodiversity Framework (GBF),¹⁶³ which urges action, by 2030, to

“minimise the impact of climate change and ocean acidification on biodiversity and increase its resilience through mitigation, adaptation, and disaster risk reduction actions including through nature-based solutions and/or ecosystem-based approaches, while minimising negative and fostering positive impacts of climate action on biodiversity”.¹⁶⁴

The Framework also recognises the importance of restoring, maintaining, and enhancing nature in order to secure ecosystem functions and services, including climate regulation.¹⁶⁵ In addition, the GBF articulates the international community’s consensus about the need to “substantially and progressively increase the level of financial resources from all sources ... including by ... [o]ptimising co-benefits and synergies of finance targeting the biodiversity and climate crises”.¹⁶⁶

35. While the Inter-American Court has long recognised the relevance of the CBD and CBD CoP decisions to provide interpretative guidance for the protection of the human rights of Indigenous and tribal peoples,¹⁶⁷ within the GBF, CBD parties for the first time expressly endorsed a human rights-based approach to reinforce and effectively implement CBD obligations so as to give due consideration to the rights of Indigenous peoples and local communities, women and girls,¹⁶⁸ children and youth, persons with disabilities, and environmental human rights defenders.¹⁶⁹ For instance, the GBF “acknowledge(d) the important roles and contributions of indigenous peoples and local communities as custodians of biodiversity and as partners in its conservation, restoration and sustainable use”,¹⁷⁰ and specifically called for the fair and equitable

¹⁶² S Diaz et al. (eds.), Summary for policymakers of the global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES, 2019)

¹⁶³ Kunming-Montreal Global Biodiversity Framework (n. 111)

¹⁶⁴ *Ibid.*, Target 11

¹⁶⁵ *Ibid.*, Target 19

¹⁶⁶ *Ibid.*, Annex, Target 8

¹⁶⁷ For example, IACtHR, *Case of the Kaliña and Lokono Peoples v. Suriname*, Merits, Reparations and Costs. Judgement of November 25, 2015. Series C No. 309 [*Kaliña and Lokono Peoples*], paras. 173-174, 177-178, 181 and 214, footnote 247, referring to the Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity, CBD Decision VII/12 (2004), Annex II and the CBD work programme on protected areas; see discussion in E Morgera, “Under the radar: fair and equitable benefit-sharing and the human rights of indigenous peoples and local communities connected to natural resources” (2019) 23 International Journal of Human Rights 1098-1139

¹⁶⁸ As for women, *cfr.* CBD Decision XIII/5, “Ecosystem restoration: short-term action plan”, CBD/COP/DEC/XIII/5 (10 December 2016), Annex, paras. 8-10

¹⁶⁹ Kunming-Montreal Global Biodiversity Framework (n. 111), Target 22

¹⁷⁰ *Ibid.*, para. 7(a)

sharing of benefits deriving from the utilisation of genetic resources with Indigenous people and local communities.¹⁷¹

36. In addition, the GBF recognised Indigenous peoples' and local communities' rights in several Targets, specifically protecting and encouraging their customary practices¹⁷² and envisaging the mechanism of the free, prior and informed consent for the sharing of traditional knowledge, innovations, practices and technologies.¹⁷³ Lastly, the GBF also included a Target ensuring "the full, equitable, inclusive, effective and gender-responsive representation and participation in decision-making",¹⁷⁴ especially underscoring the relevance of gender equality in the implementation of the whole Framework.¹⁷⁵ All these references are helpful to understand how the human right to a healthy environment can inform the interpretation of the CBD in relation to "State's duty of prevention with regard to climate events caused by global warming, including extreme events and slow onset events".¹⁷⁶ The need to recognize that the implementation of international biodiversity law is also a human rights matter had already been underscored by the U.N Special Rapporteur on Human Rights and the Environment in 2017.¹⁷⁷
37. The Preamble to the Paris Agreement outlines that countries should "respect, promote and consider their respective obligations of human rights".¹⁷⁸ The provisions indicate that State's duty of prevention under the framework requires the adoption of effective measures to reduce emissions and enhance resilience, thereby preventing and mitigating climate impacts that may breach the agreed temperature limits. The nature of this duty requires States, non-exhaustively, to submit increasingly developing national climate action plans every five years, known as nationally determined contributions (NDCs), provide finance, technology, and capacity-building support to developing countries, increase climate change education, training, public awareness, public participation, and public access to information.
38. Further, scientific consensus, as reflected in successive reports by the Intergovernmental Panel on Climate Change (IPCC)¹⁷⁹ since 1990, suggests that limiting global temperature increases to 1.5 degrees Celsius is critical to avoiding catastrophic climate impacts. This consensus underscores the urgency of immediate and robust climate action. The State's duty of prevention, in the context of the scientific consensus, obliges governments to take rapid, ambitious, and science-based actions to reduce greenhouse gas emissions and limit global warming. This includes transitioning to low-carbon and sustainable energy sources, enhancing energy efficiency, and implementing policies to reduce emissions across various sectors.

¹⁷¹ *Ibid.*, para. 12, Goal C. *Cfr. Ibid.*, Target 13

¹⁷² *Ibid.*, para. 9

¹⁷³ *Ibid.*, Target 21

¹⁷⁴ Kunming-Montreal Global Biodiversity Framework (n. 111), Target 22

¹⁷⁵ *Ibid.*, Target 23

¹⁷⁶ See Question 1 above

¹⁷⁷ UN Doc A/HRC/34/49 (2017); see discussion in E Morgera, "Dawn of a New Day? The Evolving Relationship between the Convention on Biological Diversity and International Human Rights Law" (2018) 54 Wake Forest Law Review 691-712

¹⁷⁸ Frequently Asked Questions (n. 157)

¹⁷⁹ IPCC Assessment Report (n. 33); SROOC (n. 83)

39. The above-cited sources of international law, illustrate glaring similarities, and emphasises the State's duty of prevention is broad, encompasses a range of actions, and requires all reasonable and necessary steps to effectively mitigate climate change, adapt to the impacts of climate change, prevent harm caused by climate events exacerbated by global warming, and exercise due diligence to ensure the protection of human rights consistently and effectively, and the well-being of their populations. Critical to this endeavour for Global South States, is the principle of equity,¹⁸⁰ and which addresses the extent of a State's responsibility to other States and the individual rights of the citizen within their jurisdiction and others. It is therefore that the Escazú Agreement endorses the principle of equality¹⁸¹ as a guiding tenet of its implementation.
40. The CBDR principle acknowledges the varying capacities of States to address the challenges associated with Climate Change and to implement measures for domestic mitigation and adaptation to assure that the climate ambition is attained i.e., "to hold the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels."¹⁸² It is commonly accepted that Least Developed Countries (LDCs),¹⁸³ Landlocked Developing Countries (LLDCs)¹⁸⁴ and Small Island Developing States (SIDS),¹⁸⁵ examples of which are found across Latin America & the Caribbean (LAC) are most vulnerable to negative effects of climate change and have limited capabilities to regulate, monitor and oversee, as well as institute innovative measures to mitigate the impact of the climate emergency.
41. In addition to the international environmental law and climate change law regimes, the prevention duty finds its application also in international human rights law, including under the ACHR system.¹⁸⁶ Climate events caused by global warming led to human rights violations when they result in loss of life, displacement, or other adverse impacts on communities. Therefore, under the ACHR, States have a duty to prevent foreseeable harm to individuals and protect their right to life, health, and a healthy environment, which includes mitigation measures, and timely responses to loss and damage to the environment. States' negative and positive obligations to respect and protect human rights require them to refrain from foreseeably causing or contributing to harm, and to take all necessary measures to prevent others from causing or contributing to harm. Building on the UN Committee on the Rights of the Child's findings in *Sacchi et al. v Argentina et al.*,¹⁸⁷ according to which "the potential harm of the State party's acts or omissions regarding the carbon emissions originating in its territory was reasonably

¹⁸⁰ See the third recital of the Preamble of the Paris Agreement

¹⁸¹ Article 3 (a)

¹⁸² Article 2.1(a) of the Paris Agreement

¹⁸³ Haiti, Taken from the OHRLLS official site at, <https://www.un.org/ohrlls/content/list-ldcs>

¹⁸⁴ Plurinational State of Bolivia, Taken from the OHRLLS official site at, <https://www.un.org/ohrlls/content/list-lllcs>

¹⁸⁵ Antigua and Barbuda, The Bahamas, Barbados, Belize, Commonwealth of Dominica, Dominican Republic, Grenada, Guyana, Haiti (also a Least Developed Country), Jamaica, St. Christopher (St. Kitts) and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago, Taken from the OHRLLS official site at, <https://www.un.org/ohrlls/content/list-sids>

¹⁸⁶ IACtHR, Advisory Opinion OC-23/17 (n 41), paras. 127-174

¹⁸⁷ Committee on the Rights of the Child, "Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communications No. 104/2019" CRC/C/88/D/104/2019 (8 October 2021) [CRC, *Sacchi v. Argentina*]

foreseeable” in light of the existing scientific evidence,¹⁸⁸ we submit that States have the obligation to mitigate and regulate any conduct contributing to climate change or to prevent any form of environmental harm, and to immediately reduce emissions and **phase out fossil fuels**.¹⁸⁹

42. Already in 2015 in *Kaliña and Lokono Peoples v. Suriname*,¹⁹⁰ the IACtHR in examining a complaint about the rights of Indigenous peoples and the protection of the environment, built its reasoning by interpreting the ACHR in light of the Rio Declaration and of decisions adopted under the CBD. More recently, in its 2017 Advisory Opinion, the Court expressly stated that it must take into account other regimes of international law “when defining the meaning and scope of the obligations assumed by the States under the American Convention, in particular, when specifying the measures that the States must take”.¹⁹¹ Given the **importance of the ocean-climate nexus in Latin America and the Caribbean**, is therefore essential to consider the full interconnected range of marine ecosystem services (including deep-sea ecosystem services) that are negatively impacted by climate change (food and water supply, renewable energy, benefits for health and well-being, cultural values, tourism, trade, and transport).¹⁹² There is sufficient scientific knowledge to identify and avoid “foreseeable negative impacts on human rights”¹⁹³ that can arise from decisions that may negatively affect marine biodiversity, as marine ecosystem services affected by climate change are essential for various dimensions of human well-being, which are protected as international human rights.¹⁹⁴

43. With this in mind, the *Amicii* respectfully submit that States’ prevention duty as invoked in the present Request for an Advisory Opinion must also be interpreted in a mutually supportive way, especially where States are left with a significant degree of discretion as to the means of implementation.¹⁹⁵ Against this backdrop, the following paragraphs submit that **the scope of States’ duty to prevent climate change adverse effects is to be substantiated through the mutually supportive interpretation of the numerous obligations contained in international climate change law, biodiversity law,**

¹⁸⁸ CRC, *Sacchi v. Argentina* (n. 187), paras. 10.11 and 10.14

¹⁸⁹ This has been a source of contention at the recently concluded CoP 28, as the UAE Consensus on the First Global Stocktake has called for a transition away from fossil fuels. See UAE Consensus on the First Global Stocktake, FCCC/PA/CMA/2023/L.17, 13 December 2023, https://unfccc.int/sites/default/files/resource/cma2023_L17_adv.pdf [UAE Consensus], para 28 (d). There has also been a concurrent proposal for a fossil proliferation treaty, which has been endorsed by Columbia and Vanuatu, Tuvalu, Tonga, Fiji, the Solomon Islands, Niue, Antigua and Barbuda, Timor-Leste, Palau, Colombia, Samoa, and Nauru. See Fossil Fuel Non-Proliferation Treaty, <https://fossilfuel treaty.org/>

¹⁹⁰ *Kaliña and Lokono Peoples* (n. 167), paras. 177 to 179

¹⁹¹ IACtHR, Advisory Opinion OC-23/17 (n 41), para. 44

¹⁹² These are discussed in E Morgera et al., “Ocean-based Climate Action and Human Rights ...” (n 64) and E Morgera et al., “Addressing the ocean-climate nexus in the BBNJ Agreement ... (n 117)”

¹⁹³ Human Rights Council (HRC), “Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Framework Principles on Human Rights and the Environment,” A/HRC/37/59 (24 January 2018) [Framework Principles on Human Rights and the Environment]. See also HRC, “Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment,” A/HRC/34/49 (19 January 2017), para. 34

¹⁹⁴ E Morgera et al., “Ocean-based Climate Action and Human Rights ...” (n 64)

¹⁹⁵ E Morgera and M Lennan, “Ensuring Mutual Supportiveness of the Paris Agreement with other Multilateral Environmental Agreements: A Focus on Ocean-Based Climate Action”, in Zahar (ed.) *Research Handbook on the Law of the Paris Agreement* (Edward Elgar, forthcoming 2024)

the law of the sea and international human rights law (Question 2 A), and further operationalised through the application of the ecosystem, precautionary and intergenerational equality principles (Question 2 B). Before looking at these two aspects, we first highlight the primary measures that States must take to address the adverse effects of climate change (Question 2).

II. Measures to Minimise the Impact of the Damage due to the Climate Emergency in Light of the Obligations Established in the American Convention

44. Amongst the primary measures that States need to undertake to minimise the impact of the damage arising out of the climate emergency, we want to bring the Court's attention to:

- a) the development and management of Area-Based Management Tools (ABMTs);¹⁹⁶
- b) the conduct of Environmental Impact Assessments (EIAs) and Strategic Environmental Assessments (SEAs); and
- c) control of technologies.

45. ABMTs such as marine protected areas (MPAs) and fisheries reserves, are supported by the SPAW Protocol of the Cartagena Convention, the CBD and the BBNJ Agreement, and are measures designed to regulate human activities in a spatially defined area with a view to enhancing conservation and sustainable use of biological resources within their boundaries. CBD Decisions have contributed to clarifying States' obligations in respect of area-based management measures and CBD Parties agreed to identify key areas for mitigation and adaptation purposes, undertake joint planning of protected area networks and consider climate change when assessing the very management of such protected areas.¹⁹⁷ Also, CBD Parties are expected to integrate protected areas into wider landscapes, seascapes and sectors through the use of connectivity and biodiversity restoration measures, in order to better address climate change adverse impacts and enhance resilience of such areas; and to involve all relevant stakeholders, including Indigenous peoples and local communities, to support the development of adaptive management plans and to reinforce the management effectiveness of protected areas in addressing impacts from climate change on biodiversity.¹⁹⁸

¹⁹⁶ IUCN, 'Measures Such As Area-Based Management Tools, Including Marine Protected Areas,' https://www.un.org/depts/los/biodiversity/prepcom_files/area_based_management_tools.pdf

¹⁹⁷ CBD Decision X/31, "Protected Areas" UNEP/CBD/COP/DEC/X/31 (29 October 2010), paras 14(d) and (f) and 19(c)

¹⁹⁸ *Ibid*, paras. 14(b) and (c)

46. These interpretations are reflected in a recent decision of the SPAW Protocol,¹⁹⁹ and to some extent in the BBNJ Agreement, which situates ABMTs in the broader context of the ocean-climate nexus.²⁰⁰ For instance, the Protocol's Scientific and Technical Advisory Committee (STAC) in 2023 identified the need to invest in the science of ecosystem connectivity and Marine Protected Areas to respond to climate change and other threats as they emerge.²⁰¹ The establishment of networks of sites important in rapidly identifying and facilitating collaborative responses, and an ecological network of the SPAW protected areas provides a network of ecosystem protections, as well as a network of ecosystem sentinels that can report and coordinate responses to existing and new threats as they emerge.²⁰² Additionally, these connected networks will enhance measures to prevent coral bleaching,²⁰³ maximise conservation and/or fisheries benefits,²⁰⁴ and conserve turtles.²⁰⁵
47. The BBNJ Agreement, in turn, provides that ABMTs are designed to “[p]rotect, preserve, restore and maintain biodiversity and ecosystems, including with a view to enhancing their productivity and health, and strengthen resilience to stressors, including those related to climate change, ocean acidification and marine pollution”,²⁰⁶ and that they are employed with a view to “strengthen[ing] cooperation and coordination ... among States, relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies”.²⁰⁷ In addition, ABMTs are meant to “support food security and other socioeconomic objectives, including the protection of cultural values”.²⁰⁸ Thus, ABMTs are not only designed and managed with a view to enhancing and consolidating the resilience of biodiversity and natural ecosystems, but also to ensuring the protection of socio-cultural and human rights.
48. In addition to the establishment of ABMTs, States have adopted guidance with respect to the conduct of **EIAs and SEAs, specifically with a view to minimising negative impacts on biodiversity, including from climate change-related stressors.** For instance, already in the early 2000s, CBD Parties agreed that EIAs could be mandatory for activities that “have direct influence on legally protected areas, for example by *emissions* into the area”,²⁰⁹ thereby indirectly addressing also impacts

¹⁹⁹ E Morgera et al, “Addressing the ocean-climate nexus in the BBNJ Agreement ... (n. 117)

¹⁹⁹ UNEP., Developing An Ecological Network Among The SPAW-Listed MPAs of the Wider Caribbean, UNEP(DEPI)/CAR WG.42/INF.10, (11 February 2021), <https://gefcrew.org/carrcu/SPAWCOP12/WG.42-INF10-en.pdf>

²⁰⁰ E Morgera et al, “Addressing the ocean-climate nexus in the BBNJ Agreement ... (n. 117)

²⁰¹ UNEP(DEPI)/CAR WG.42/INF.10 (n. 199), 3

²⁰² *Ibid*

²⁰³ UNEP(DEPI)/CAR WG.42/INF.10 (n. 199), 45

²⁰⁴ *Ibid.* 6

²⁰⁵ *Ibid.* 14

²⁰⁶ Article 17(c) BBNJ Agreement

²⁰⁷ Article 17(b) BBNJ Agreement. See D S Berry, ‘Unity or Fragmentation in the Deep Blue: Choices in Institutional Design for Marine Biological Diversity in Areas Beyond National Jurisdiction’ (2021) 8 *Frontiers in Marine Science*: 761552

²⁰⁸ Article 17(d) BBNJ Agreement

²⁰⁹ CBD Dec. VI/7, “Identification, monitoring, indicators and assessments”, UNEP/CBD/COP/6/20 (7-19 April 2002), Annex, Appendix 2, Category A(c), emphasis added. *Cfr.* CBD Dec. VIII/28, “Impact assessment: voluntary guidelines on biodiversity-inclusive impact assessment”, UNEP/CBD/COP/DEC/VIII/28 (15 June 2006), Annex, paras. 17(d), 19(a), and 31(d), as well as Appendix 1

from one of the driving factors of climate change. Eventually, in the revised 2012 guidelines on EIAs and SEAs in marine and coastal areas, CBD Parties referred to the need “to consider the cumulative effect of environmental changes such as climate change and ocean acidification”,²¹⁰ explicitly recognising the adverse effects of climate change on biodiversity and ecosystems. Both the Cartagena Convention²¹¹ and SPAW Protocol²¹² reinforce these principles, by providing that “decisions about industrial and other projects and activities that would have a negative environmental impact and significantly affect areas or species ... afforded special protection under th[e] Protocol ... shall ... take into consideration the possible direct and indirect impacts, including cumulative impacts, of the projects and activities being contemplated”²¹³ Emphasis is placed “particularly in coastal areas,” where most of the population in LAC reside, and where such critical blue and teal carbon may be found, “so that appropriate measures may be taken to prevent any substantial pollution of, or significant and harmful changes to, the Convention Area”²¹⁴

49. In addition to the above, States’ general obligation to carry out EIAs should be interpreted in a mutually supportive manner with relevant UNCLOS rules²¹⁵ and other international law instruments,²¹⁶ with a view to addressing the huge environmental, socio-cultural and human rights impact of large-scale industrial fisheries. Indeed, large-scale fishing vessels and factory fishing ships with powerful propulsion systems and intense high fuel cause significant impacts on the marine environment;²¹⁷ Further, they potentially emit more than 130 million tonnes of carbon dioxide,²¹⁸ thereby contributing to ocean warming and acidification and aggravating the impacts of climate change.²¹⁹ In addition, the large-scale industrial fisheries sector may also operate, particularly on the high seas, with the support of bunkers or tankers for refuelling of fishing vessels, as well as reefers or refrigerated cargo ships and other transport vessels used for transshipment.

²¹⁰ CBD Dec. XI/23, “Marine and coastal biodiversity: revised voluntary guidelines for the consideration of biodiversity in environmental impact assessments and strategic environmental assessments in marine and coastal areas”, UNEP/CBD/COP/11/23 (21 August 2012), Annex I, para. 31(f)

²¹¹ Article 12

²¹² Article 13

²¹³ SPAW Protocol (n. 122), Article 13 (1)

²¹⁴ *Ibid.*, Article 12 (2)

²¹⁵ Article 206 UNCLOS and, more generally, the other general provisions under Part II UNCLOS on the protection and preservation of the marine environment

²¹⁶ Amongst others, see the Fish Stocks Agreement (n 128)

²¹⁷ J Nakamura et al., “International legal requirements for environmental and socio- cultural assessments for large-scale industrial fisheries” (2022) *RECIEL* 1-13

²¹⁸ PH Tyedmers, R Watson and D Pauly, ‘Fueling Global Fishing Fleets’ (2005) 34(8) *AMBIO: A Journal of the Human Environment* 635-638. See also RWR Parker and PH Tyedmers, ‘Fuel Consumption of Global Fishing Fleets: Current Understanding and Knowledge Gaps’ (2015) 16 *Fish and Fisheries* 684

²¹⁹ B Haas et al, ‘Big Fishing: The Role of the Large-scale Commercial Fishing Industry in Achieving Sustainable Development Goal 14’ (2019) 29 *Reviews in Fish Biology and Fisheries* 161, 165–166. Notably, fishing vessels in general have recently accounted for large emissions of black carbon, which contribute to global warming. In this regard, see B McKulin and JE Campbell, ‘Emissions and Climate Forcing from Global and Arctic Fishing Vessels’ (2016) 121 *Journal of Geophysical Research Atmospheres* 1844

50. All these support facilities are themselves powered by different types of fossil fuels, and in turn complicate the effective flag State's monitoring and enforcement duties, creating opportunities for industrial fishing vessels to carry out unsustainable and overfishing practices and apply inadequate working conditions on board while going unnoticed.²²⁰ As most States have not specifically legislated on the need for EIAs and SEAs in the fisheries sector,²²¹ the *Amicii* submit that States' obligations on climate change also include **requiring EIAs and SEAs for industrial fishing activities, policies and plans and extend to their socio-cultural and human rights impact under their scope.**²²² For example, Guyana has conducted an Environmental Sustainability Assessment for their groundfish fisheries, which contemplates international and regional agreements that inform Guyanese fisheries management, but does not consider human rights impacts.²²³ In addition, States must create binding rules for, and effectively monitor, large-scale industrial fishing operators to contribute to mitigate climate change and respect human rights (particularly those of Indigenous Peoples and small-scale fishers whose sacred sites, and traditionally occupied and used areas, are involved or affected by large-scale industrial fisheries).²²⁴
51. Hence, as developed in Paragraphs 64 - 69 below, CBD Parties committed to expanding the scope of EIAs and SEAs so as to not only address impacts on biodiversity, but also on **biodiversity-based livelihoods, thus contributing to the protection of the human rights of Indigenous peoples and local communities.**²²⁵ This interpretation finds resonance in the BBNJ Agreement, which requires States to carry out EIAs²²⁶ and to consider conducting SEAs²²⁷ in order to duly consider "consequences of climate

²²⁰ C Ewell et al., "Potential Ecological and Social Benefits of a Moratorium on Transshipment on the High Seas" (2017) 81 *Marine Policy* 293; D Tickler et al., "Modern Slavery and the Race to Fish" (2018) 9 *Nature Communications* 1, p. 2; A Longo, "The Human Dimension of Fishing Activities: Towards a Broader Meaning of Illegal Fishing?" (2023), 2 *ASCOMARE Yearbook on the Law of the Sea* 125-158. See, more generally, International Labour Office report "Caught at Sea: Forced Labour and Trafficking in Fisheries", ILO, Special Action Programme to Combat Forced Labour (DECLARATION/SAP-FL), Sectoral Activities Department (SECTOR). - Geneva: ILO, 2013; cfr. Environmental Justice Foundation, "Thailand's Seafood Slaves. Human Trafficking, Slavery and Murder in Kantang's Fishing Industry", EJF report (2015)

²²¹ M Barelli, "Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead" (2012) 16 *International Journal of Human Rights* 1, p. 15. See also HRCtee, *Jouni E. Lämsman et al v Finland*, Communication No. 671/1995, CCPR/C/58/D/671/1995 (22 November 1996), para 10.7

²²² On States' duty to conduct EIAs and SEAs in respect of industrial fishing activities, and to the inclusion of socio-cultural and human rights impact within their scope, see J Nakamura et al. (n 217). See also P Duffy, "Agriculture, Forestry and Fisheries: The Orphans of Environmental Impact Assessment" (2004) 22 *Impact Assessment and Project Appraisal* 175, p. 176

²²³ J Drugan, Environmental Sustainability Assessment: Guyana Artisanal Groundfish Fisheries (22 October 2019), https://clmeplus.org/app/uploads/2020/06/Guyana-Environmental-Sustainability-Assessment_Artisanal-Groundfish-Fisheries.pdf, 35

²²⁴ J Nakamura et al. (n 217)

²²⁵ CBD Dec. X/33, "Biodiversity and climate change", UNEP/CBD/COP/DEC/X/33, (29 October 2010)

²²⁶ Article 28 BBNJ Agreement

²²⁷ Article 39 BBNJ Agreement. See K Hassanali and R Mahon, 'Encouraging proactive governance of marine biological diversity of areas beyond national jurisdiction through Strategic Environmental Assessment (SEA)' (2022) 136 *Marine Policy*: 104932.

change, ocean acidification and related impacts”,²²⁸ as well as “economic, social, cultural and human health impacts”,²²⁹ as part of the broad notion of “cumulative impacts” within the meaning of Article 1(6) BBNJ Agreement.

52. Notably, the introduction of the concept of SEAs in the law of the sea by means of the Agreement draws on the guidance developed under the CBD, whereby SEAs aim “to ensure that the environmental consequences of programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account”.²³⁰ For these reasons, in the context of EIAs and SEAs, CBD Parties have to address biodiversity loss and degradation and, where appropriate, related social, environmental and economic impacts associated with climate change and disasters, and take into account the status of biodiversity and its vulnerability to current and future climate change adverse impacts when planning and implementing adaptation, mitigation and disaster risk reduction strategies.²³¹ Also, SEAs may be conducted so as to include stakeholder participation and transparency, technical assessment, information-sharing, and monitoring and evaluation after the policy or plan has been adopted.²³²
53. Lastly, CBD Parties have further agreed to implement global strategies specifically aimed at enhancing the resilience of marine biodiversity and ecosystems, especially vulnerable ones such as coral reef and deep waters ecosystems. In this regard, ocean acidification is generally recognised as one of the climate change-related global stressors for the marine environment²³³ and, accordingly, States committed to integrate relevant policies and planning with emerging knowledge on such an issue. For instance, CBD Parties agreed to strengthen international, national and regional efforts to **manage coral reefs as socio-ecological systems by reducing the impact of global and local stressors**,²³⁴ increasing the capability of local and national managers to forecast and proactively plan for climate risks,²³⁵ and integrating ecological and social resilience factors of coral reefs and closely associated ecosystems into the design and management of Marine Protected Areas networks.²³⁶ Likewise, they committed to maintaining sustainable livelihoods and food security in reef-dependent coastal communities²³⁷ and promoting community-based measures to e.g., manage fisheries

²²⁸ Article 1(6) BBNJ. The obligation to assess the “cumulative impact” is expressly envisaged in the provision regarding, e.g., the scoping of EIAs, namely Article 31(1)(b) BBNJ Agreement. This has further implications with respect to the protection of human rights, as it will be argued in Paragraphs 64 - 69 below

²²⁹ Article 31(1)(b) BBNJ Agreement

²³⁰ Article 14(b) CBD

²³¹ CBD Dec. XIII/4, “Biodiversity and climate change”, CBD/COP/DEC/XIII/4 (10 December 2016), para. 8(b)

²³² CBD Dec. XI/23 (n 210), Annex II, para. 14

²³³ On the impact of ocean acidification on marine biodiversity, see CBD Subsidiary Body on Scientific, Technical and Technological Advice, “Systematic Review on the Impact of Ocean Acidification and Proposal to Update the Specific Workplan on Coral Bleaching”, UNEP/CBD/SBSTTA/18/INF/6 (19 June 2014)

²³⁴ CBD Dec. XII/23, “Marine and coastal biodiversity: Impacts on marine and coastal biodiversity of anthropogenic underwater noise and ocean acidification, priority actions to achieve Aichi Biodiversity Target 10 for coral reefs and closely associated ecosystems, and marine spatial planning and training initiatives”, UNEP/CBD/COP/DEC/XII/23 (17 October 2014), para 14. Cfr. CBD Dec. VII/5, Marine and Coastal Biological Diversity, UNEP/CBD/COP/DEC/VII/5 (13 April 2004) and CBD Dec. X/29, Marine and Coastal Biodiversity, UNEP/CBD/COP/DEC/X/29 (29 October 2010)

²³⁵ Dec. XII/23 (n. 234), para 14(d)

²³⁶ *Ibid*, Annex, para. 8.3(c)

²³⁷ *Ibid*. para. 14(c)

sustainably and prioritise the recovery of reef species with key ecological functions.²³⁸ Remarkably, in its 2017 Advisory Opinion, the Inter American Court of Human Rights upheld the duty to prepare contingency plans to proactively respond to incidents from pollution and to other forms of environmental disasters, also foreseeing safety measures and procedures to mitigate and the impact of such disasters.²³⁹

54. CBD Parties have also acknowledged the impact of ocean acidification on deep-water corals and other organisms living in the deep-sea,²⁴⁰ and adopted a specific workplan to address this and other area-specific stressors that affect deep-sea biodiversity and ecosystems.²⁴¹ In addition, CBD Parties identified the designation of MPAs as a strategy to address ocean acidification, to help ensure that areas in need of protection facilitate the maximum adaptive capacity of biodiversity.²⁴² CBD Parties also identified several actions relevant to address ocean acidification, such as preventing the further loss and degradation of coastal ecosystems and catalysing their recovery through restoration and management. Further, MPAs can implement ecosystem-based fisheries management to limit the impacts of destructive fishing practices (e.g. bottom-trawling), as well as other physical pressures and disturbances to ecosystems, and overfishing.²⁴³
55. The interpretations of the ecosystem approach and the precautionary principle under the CBD have great importance for identifying and assessing the risks associated with the use of climate change technologies in the marine environment. With respect to geo-engineering, CBD Parties decided by consensus that, in the absence of science-based, transparent, effective control and regulatory mechanisms over **geo-engineering** activities, and given the risk of affecting biodiversity, no such **activities should take place “until there is an adequate scientific basis** on which to justify such activities and appropriate consideration of the associated risks for the environment and biodiversity and associated social, economic and cultural impact”.²⁴⁴
56. In addition, CBD Parties agreed that “**small-scale scientific research studies**” could be, exceptionally, “conducted in a controlled setting in accordance with Article 3 of the Convention, and only if they are justified by the need to gather specific scientific data and are subject to a thorough prior assessment of the potential impacts on the environment.”²⁴⁵ The CBD decision was considered an authoritative moratorium by the Advisory Committee of the Human Rights Council in a 2023 Report, in recognition

²³⁸ Dec. XII/23 (n. 234), Annex, para. 8.1(a-f)

²³⁹ IACtHR, Advisory Opinion OC-23/17 (n. 41), para. 171

²⁴⁰ CBD Decision XIII/11, “Voluntary specific Workplan on biodiversity in cold-water areas within the jurisdictional scope of the Convention” CBD/COP/DEC/XIII/11 (10 December 2016)

²⁴¹ *Ibid.*, Annex II

²⁴² CBD Decision X/29, “Marine and Coastal Biodiversity”, UNEP/CBD/COP/DEC/X/29 (29 October 2010)

²⁴³ Decision XI/18; UNEP/CBD/SBSTTA/16/6 (2012), ANNEX III, para 5

²⁴⁴ CBD Decision X/33, “Biodiversity and climate change”, UNEP/CBD/COP/DEC/X/33 (29 October 2010), para. 8(w), which was reiterated in CBD Decision XIII/14, “Decision: Climate-related geoengineering” CBD/COP/DEC/XIII/14 (8 December 2016). For the definition of geo-engineering under the CBD, see CBD Decision XI/20, “Climate-related geoengineering” UNEP/CBD/COP/DEC/XI/20 (5 December 2012), para. 5(a-d)

²⁴⁵ *Ibid.*

that the reference to “associated social, economic and cultural impact” can support the consideration of applicable intentional human rights.²⁴⁶

57. The legal value of the CBD CoP decision on geo-engineering should be understood also in terms of clarifying international human rights law obligations. Earlier CBD decisions²⁴⁷ have cautioned against ocean fertilisation in particular, which led the London Dumping Convention/Protocol regime to ban ocean fertilisation and allow associated research controlled as projects only to increase knowledge without creating significant risks to the marine environment.²⁴⁸ As the Advisory Committee reports, “[i]n 2023, the scientific groups reporting to the consultative meetings and meetings of the contracting parties agreed that four marine geo-engineering techniques had the potential to cause deleterious effects that were widespread, long-lasting or severe.” This includes geo-engineering techniques such as ocean alkalinity enhancement and electrochemical carbon dioxide removal; biomass cultivation for carbon removal; marine cloud brightening; and surface albedo enhancement involving reflective particles and/or other materials.²⁴⁹
58. With regard to other technologies for the **large-scale removal of carbon dioxide**, the *Amicii* agree with human rights experts in civil society that these are still speculative technologies that may not be compliant with States’ duties under UNCLOS to protect the marine environment²⁵⁰ and under the CBD to conserve and sustainably use biodiversity. There are indications that these technologies can have “potential impacts over vast spatial scales, long timelines and the risk of unintended planetary-scale effects” and they are unregulated at the national level.²⁵¹
59. It has also been cautioned that even “field experiments involving these techniques could affect both near and distant marine ecosystems in the same ways as projected for large-scale ocean [carbon dioxide removal] deployment.”²⁵² This reflects the decision by CBD Parties for contained, small-scale experiments for geo-engineering, *inter alia*, that **experiments of other climate technologies should be subject to thorough environmental and socio-cultural impact assessments**, rigorous justification in terms of the need to gather specific scientific data and public participation standards (i.e., access to information, public participation in decision-making, free prior informed

²⁴⁶ Human Rights Council Advisory Committee, “Impact of new technologies intended for climate protection on the enjoyment of human rights,” A/HRC/54/47 (10 August 2023), para. 32 [HRC Advisory Committee, Report on the impact of ...]

²⁴⁷ s, CBD Decision IX/16, “Biodiversity and climate change”, UNEP/CBD/COP/DEC/IX/16 (9 October 2008)

²⁴⁸ The Thirtieth Meeting of the Contracting Parties to the London Convention and the Third Meeting of the Contracting Parties to the London Protocol, “Resolution LC-LP.1 on the Regulation of Ocean Fertilization”, LC 30/16 (31 October 2008)

²⁴⁹ Human Rights Council Advisory Committee, “Impact of new technologies intended for climate protection on the enjoyment of human rights,” A/HRC/54/47 (10 August 2023), para 33 and footnote 29 [HRC Advisory Committee, Report on the Impact of New Climate Technologies on Human Rights], referring to International Maritime Organization, “Marine geoengineering: assessing the impacts on the marine environment”, 24 March 2023

²⁵⁰ See the Joint Submission by the Center of International Environmental Law and Greenpeace International to the ITLOS in Case No. 31 “Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law” [*CIEL and GPI’s joint submission to the ITLOS*], para. 89(4) at 39

²⁵¹ R Loomis et al, ‘A Code of Conduct is Imperative for Ocean Carbon Dioxide Removal Research’ (2022) 9 *Frontiers in Marine Science* 9:872800

²⁵² *Ibid.*

consent if negative impacts are foreseeable on Indigenous peoples and small-scale fishing and other communities, and access to justice and effective remedies).²⁵³

60. This reflects similar provisions within the Escazú Agreement²⁵⁴ and the Miskito Standards on business and human rights set by the Court, which direct companies to avoid human rights abuses as a result of their activities, and adopt preventive measures to protect environmental and human rights.²⁵⁵ In addition, it has been underscored by the Advisory Committee of the Human Rights Council that the social consequences of these technologies would likely be “uneven geographically” with “harsher [effects] on poorer States and the Global South”, thereby “strengthen[ing] entrenched inequalities and deepen climate injustice.”²⁵⁶
61. Meanwhile, given the risk that these technologies may divert attention from other State obligations, the precautionary principle²⁵⁷ should be interpreted as “requiring States to prioritise measures known to be effective at averting continued temperature rise [...] including the **phase-out of fossil fuels, transition to available renewable energy sources, and increased energy efficiency**,”²⁵⁸ and **nature-based solutions**²⁵⁹ in light of the potential harm to the enjoyment of human rights that carbon dioxide removal technologies may cause.²⁶⁰ In other words, States are to “withhold public support (including funding)” towards the development and deployment of carbon dioxide removal techniques.²⁶¹
62. Similar concerns have emerged also in relation to **deep-seabed mining** exploitation activities. As agreed in 2022, prior to starting such activities, CBD Parties have to ensure that “the impacts on the marine environment and biodiversity are sufficiently researched and the risks understood, the technologies and operational practices do not cause harmful effects to the marine environment and biodiversity, and appropriate rules, regulations and procedures are put in place by the International Seabed Authority, in accordance with the best available science and the traditional knowledge of Indigenous

²⁵³ HRC Advisory Committee, *Report on the Impact of ...* (n 249), para. 49 and 6§, 75

²⁵⁴ Articles 5, 7, 8 and 9

²⁵⁵ *Case of the Miskito divers (Lemonth Morris et al.) v. Honduras*, Merits, reparations and costs, Judgement of August 31, 2021, https://www.corteidh.or.cr/docs/casos/articulos/seriec_432_ing.pdf, para 49. See AMSN Lancaster and BG Nurse, ‘Oceans, Climate Change & Human Rights Due Diligence: Contemporary Perspectives from Caribbean Investment Law’ (Climate Law, 2024 *forthcoming*); Elisa Morgera, Sophie Shields, Mia Strand, Mitchell Lennan, Bernadette Snow and Alana Malinde S.N. Lancaster, ‘The Ocean Is Included In The Zero Draft Of The Un General Comment On Children’s Rights To A Healthy Environment’ (December 6, 2022), <https://oneoceanhub.org/the-ocean-is-included-in-the-zero-draft-of-the-un-general-comment-on-childrens-rights-to-a-healthy-environment/>

²⁵⁶ HRC Advisory Committee, *Report on the Impact of ...* (n 249), para. 18

²⁵⁷ HRCtee, General Comment 36 on Article 6 (the Right to Life), CCPR/C/GC/36 (3 September 2019), para. 62; *cfr.* IACtHR, Advisory Opinion OC-23/17 (n. 41), para. 180

²⁵⁸ See the CIEL and GPI’s *Joint Submission to the ITLOS* (n 250); *Cfr.* CBD Dec. XI/20 (2012) (n 244), para. 4; and CBD Dec. XIII/14 (2016) (n 244), para. 3; HRC Advisory Committee, *Report on the impact of ...* (n 249), para. 71

²⁵⁹ *Ibid.*, HRC Advisory Committee, *Report on the Impact of ...* (n 249), para. 71

²⁶⁰ CIEL and GPI’s *Joint Submission to the ITLOS* (n 250), paras. 70-73, quoting IACtHR, Advisory Opinion OC-23/17 (n. 41), paras. 130, 133, 142 and 180; *cfr.* European Court of Human Rights (ECtHR), *Tătar v Romania*, App. no. 67021/01 (27 January 2009), paras. 108-109. See also the CBD Decisions cited above at n 181. In this regard, we share the concern of the Human Rights Council Advisory Committee regarding the use of marine geo-engineering technologies: *Ibid.*, HRC Advisory Committee, *Report on the impact of ...* (n. 249), paras. 47-56

²⁶¹ *Ibid.*, HRC Advisory Committee, *Report on the Impact of ...* (n. 249), para. 74

peoples and local communities with their free, prior and informed consent, and the precautionary and ecosystem approaches”.²⁶²

63. Thus, the assumptions about the potential of deep-seabed mining to contribute to humanity’s climate change mitigation efforts²⁶³ need to be systematically assessed in the light of growing scientific evidence about the irreparable damage to deep-sea biodiversity that could derive from it, which could also in turn impact negatively on the ocean’s natural contributions to climate change mitigation.²⁶⁴ In 2022, the UN Special Rapporteur on Climate and Human Rights referred to “the potential environmental and human rights impacts from deep seabed exploration and mining”,²⁶⁵ and so did in 2023 the UN Working Group on Human Rights and Transnational Corporations and other Business Enterprises.²⁶⁶ These concerns were also shared by the United Nations Office of the High Commissioner for Human Rights in a 2023 note.²⁶⁷ The protection of marine biodiversity from the negative impacts of deep-seabed mining should be seen as an integral component of States’ international obligations to protect the marine environment, conserve biodiversity, mitigate climate change and protect human rights.²⁶⁸
64. The above-mentioned measures mostly highlighted the environmental dimension of States’ **“duty of prevention with regard to climate events.”**²⁶⁹ Below, we draw attention in **Sub-Section II (a) (Question 2 A)** on the **socio-cultural and human rights implications arising out of said obligation, thus underscoring “intersectional considerations” in relation to the protection of vulnerable populations (Question 2 B).**²⁷⁰

²⁶² CBD Decision XV/24, “Conservation and sustainable use of marine and coastal biodiversity”, CBD/COP/DEC/15/24 (19 December 2022), para. 16

²⁶³ D Paulikas et al, “Deep-sea Nodules Versus Land Ores: A Comparative Systems Analysis of Mining and Processing Wastes for Battery-Metal Supply Chains” (2022) 26 Journal of Industrial Ecology 2154

²⁶⁴ One Ocean Hub Policy Brief at <https://oneoceanhub.org/publications/policy-brief-the-need-for-strategic-environmental-assessments-and-regional-environmental-assessment-in-abnj-for-ecologically-meaningful-management/> (2022)

²⁶⁵ I Fry, “Report of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change: Promotion and Protection of Human Rights in the context of Climate Change Mitigation, Loss and Damage, and Participation”, A/77/226 (26 July 2022), para-25

²⁶⁶ UNGA, “Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises - Extractive sector, just transition and human rights”, A/78/155 (11 July 2023), para 44

²⁶⁷ United Nations Office of the High Commissioner for Human Rights, “Key Human Rights Considerations on the Impact of Seabed Mining”, available at: <https://www.ohchr.org/sites/default/files/documents/issues/climatechange/information-materials/ohchr-seabed-mining-10-july.pdf#:~:text=Current%20scientific%20consensus%20suggests%20that%20deep-sea%20mining%20would,duty%20to%20prevent%20human%20rights%20violations%20and%20harms> at,

²⁶⁸ E Morgera and H Lily (n 103). As highlighted in paras. 246 - 248 above, geo-engineering may have a devastating impact on the enjoyment of human rights, including both individual and collective rights

²⁶⁹ Question 1 above

²⁷⁰ Question 2, B, below

II (a) Consideration When Implementing Its Obligations

65. In its 2017 Advisory Opinion the Court established an explicit link between States' obligation to prevent environmental harm and to protect human rights under the ACHR system.²⁷¹ In light of this relationship, the Court spelled out a list of duties directly stemming from the prevention obligation and meant "to prevent human rights violations as a result of damage to the environment".²⁷² These are: a) the duty to regulate activities that may cause an environmental harm; b) the duty to supervise and monitor such activities; c) the duty to carry out timely and independent EIAs; d) the duty to establish contingency plans and e) to mitigate the impact of possible accidents.
66. The Opinion upheld the application of such duties in the context of activities potentially impairing Indigenous people's rights, and further extended them to any activities potentially causing environmental harm.²⁷³ Against this backdrop, The *Amicci* submit that those duties also apply more generally to any planned activities or projects contributing to a varying degree to the climate emergency and to environmental and biodiversity degradation. In particular, States must fulfil their prevention obligation also by taking into account their human rights implications, in a mutually supportive way.
67. Such an interpretation is triggered by the multiple express references contained in the relevant international law instruments referenced in Paragraph 17 above. By way of example, the UNFCCC describes climate change as a "common concern of humankind",²⁷⁴ and specifically envisages the benefit of present and future generations as one of its principles,²⁷⁵ and links the definition of "adverse effects of climate change" to the harmful consequences on "human health and welfare".²⁷⁶ On the other hand, the Preamble of the Paris Agreement expressly calls for States to "respect, promote and consider their respective obligations on human rights".²⁷⁷ In addition, both treaties clarify that the objective of stabilising and reducing greenhouse gas concentration in the atmosphere is meant to, amongst other things, eradicate poverty²⁷⁸ and "ensure that food production is not threatened".²⁷⁹
68. Likewise, with regard to the protection of the marine environment, the UNCLOS acknowledges that "the problems of ocean space are closely interrelated and need to be considered as a whole",²⁸⁰ and specifically aims at "the realisation of a just and equitable international economic order which takes into account the interests and needs of mankind

²⁷¹ IACtHR, Advisory Opinion OC-23/17 (n. 41), Paras. 47-55

²⁷² *Ibid.*, Para. 144

²⁷³ See, amongst others, IACtHR, Advisory Opinion OC-23/17 (n. 41), para. 157

²⁷⁴ First Preambulatory Clause, UNFCCC; *cfr.* Eleventh Preambulatory Clause, Paris Agreement

²⁷⁵ Article 3(1) UNFCCC

²⁷⁶ Article 1(1) UNFCCC

²⁷⁷ Eleventh Preambulatory Clause, Paris Agreement

²⁷⁸ Article 2(1) Paris Agreement. *Cfr.* Article 4(7) UNFCCC

²⁷⁹ Article 2 UNFCCC. *Cfr.* Article 2(1)(b) Paris Agreement. See also the Cancun Agreements, whereby UNFCCC parties "should in all climate change related actions, fully respect human rights", Decision 1/CP.16, Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention

²⁸⁰ Third Preambulatory Clause, UNCLOS

as a whole”.²⁸¹ As a living treaty, UNCLOS provides several other entry points for the protection of the individual in the law of the sea.²⁸² Amongst those specifically linked to the climate system, the notion of “pollution” under Article 1(1)(4) UNCLOS is relevant from an international human rights law perspective,²⁸³ and so are also the references to the “nutritional needs of the populations”²⁸⁴ in Part V and to “common heritage of mankind” in Part XI.²⁸⁵

69. In a similar vein, the newly adopted BBNJ Agreement makes both explicit and implicit references to human rights. For instance, both the preamble and the general principles refer to the respect, promotion and use of “relevant traditional knowledge of Indigenous Peoples and local communities, where available”.²⁸⁶ Also, the Agreement considers ABMTs as possible measures to “support food security and other socio-economic objectives, including the protection of cultural values”.²⁸⁷ In addition, EIAs and SEAs under the BBNJ agreement may involve considerations of the “cumulative impacts”²⁸⁸ of a given activity, project or policy, on local communities,²⁸⁹ thereby including the broader human rights implications on women and children,²⁹⁰ small-scale fishers²⁹¹ and Indigenous peoples.
70. Regionally, the Preamble of the Cartagena Convention charges parties to “protect the marine environment ..for the benefit and enjoyment of present and future generations”²⁹² and the SPAW Protocol, requires the “ ... formulati[on] [of] management and protective measures, [to] take into account and provide exemptions, as necessary, to meet traditional subsistence and cultural needs of ... local populations”²⁹³ thereby confirming similar considerations within the context of the Regional Seas Agreement.²⁹⁴ Additionally, for the Members of the Caribbean Community (CARICOM) within Latin American & the Caribbean, these considerations are also encapsulated in

²⁸¹ Fifth Preambulatory Clause, UNCLOS

²⁸² See, amongst many, the references to safety and working conditions under Article 94 UNCLOS and the very text of article 98 and 99 UNCLOS respectively on the protection of life at sea and on the prohibition of slave trade. *Cfr.* B Oxman, ‘Human rights and the United Nations Convention on the Law of the Sea’ (1997) 36(1/2) *Columbia Journal of Transnational Law* 399–429, at pp. 401–402. See also T Treves, ‘Human rights and the law of the sea’ (2010) 28(1) *Berkeley Journal of International Law* 1–14; I Papanicolopulu, *International Law and the Protection of People at Sea* (Oxford University Press, Oxford, 2018); T Ndiaye, ‘Human rights at sea and the law of the sea’ (2019) 10(2) *Beijing Law Review* 261–277

²⁸³ The definition of pollution under UNCLOS contains an express reference to “hazards to human health”

²⁸⁴ Articles 69(2)(d) and 70(3)(d) UNCLOS

²⁸⁵ See, amongst others, Article 136 UNCLOS

²⁸⁶ Article 7(j) BBNJ

²⁸⁷ Article 17(d) BBNJ

²⁸⁸ Article 1(6) BBNJ

²⁸⁹ *Cfr.* Articles 33–39 BBNJ

²⁹⁰ S Shields et al., ‘Children’s Human Right to be Heard at the Ocean-Climate Nexus’ (2023) 38(3) *The International Journal of Marine and Coastal Law* 545–580

²⁹¹ J Nakamura et al., (n. 217) 516–544

²⁹² Second Preambular Paragraph, Cartagena Convention

²⁹³ Article 14 (1)

²⁹⁴ Additionally, for Members of the Caribbean Community (CARICOM) within LAC these considerations are also encapsulated in Articles of the 2001 Revised Treaty of Chaguaramas, as are for Members of the Organisation of Eastern Caribbean States (OECS), under Articles of the Revised Treaty of Basseterre and Articles of the Protocol

the 2001 Revised Treaty of Chaguaramas,²⁹⁵ as well as under the Revised Treaty of Basseterre,²⁹⁶ the Protocol of the Economic Union²⁹⁷ and the St. George's Declaration,²⁹⁸ which guide the sub-union of the Organisation of Eastern Caribbean States (OECS).²⁹⁹ The inclusion of complimentary provisions in these regional trading agreements,³⁰⁰ which are meant to be implemented under relevant international instruments,³⁰¹ illustrate the fundamental importance of the terrestrial, coastal and marine environment for the sustainable development of these SIDS.

71. In light of the foregoing considerations, a mutually supportive interpretation of the above provisions would enhance States' response to climate change, including in respect of the protection of human rights of the individual within their jurisdiction. For instance, building on the numerous references to human health highlighted in paragraphs above, CBD Decisions recognise the links between the human right to health and biodiversity, such as food and nutrition security, infectious and non-communicable diseases, as well as the psychological and biocultural dimensions of health.³⁰² These decisions give effect to CBD Parties' obligations to integrate knowledge about the interlinkage between biodiversity and human health into relevant national policies, risk analysis and vulnerability assessments;³⁰³ address unintended negative impacts of biodiversity interventions on health and of health interventions on biodiversity;³⁰⁴ and adopt preventive measures for human health that give due regard to the resilience of socio-ecological systems.³⁰⁵

²⁹⁵ Articles 55 (tourism), 56 (agriculture), 58 (natural resources management, including biodiversity of important medicinal and traditional value), 60 (fisheries), 61 (forestry), 65 (environmental protection), 66 (c)(ii) (indigenous Caribbean culture), 66 (c)(iii) (traditional knowledge and Indigenous populations) and 141 (special status of the Caribbean Sea)

²⁹⁶ Article 14.1 (d); Article 14.2 (b). For more information, see AMSN Lancaster and J St. George (2015). 'The Organisation of Eastern Caribbean States' in M Odello and F Seatzu (eds.) *Latin America and the Caribbean International Institutional Law* (Berlin: Springer), 231

²⁹⁷ Article 20 (agriculture and fisheries), Article 21 (tourism), Article 22 (education), Article 24 (environmental sustainability)

²⁹⁸ St. George's Declaration of Principles for Environmental Sustainability in the OECS, Principles 6 (sustainable environmental management), Article 8 (climate change), Article 9 (disasters), Article 11 (sustainable use of natural resources), Article 12 (cultural and natural resources), Article 13 (biodiversity) and Article 17 (MEAs)

²⁹⁹ The Organisation of Eastern Caribbean States is an inter-governmental organisation dedicated to economic harmonisation and integration, protection of human and legal rights, and the encouragement of good governance between countries and territories in the Eastern Caribbean. The full members of the OECS are Antigua & Barbuda, The Commonwealth of Dominica, Grenada, Montserrat, St. Christopher (St. Kitts) & Nevis, Santa Lucia and San Vicente y las Grenadines. The union also comprises five associate members: Anguilla, The [British] Virgin Islands, Martinique, and Guadeloupe

³⁰⁰ For more on CARICOM and OECS, see DS Berry, *Caribbean Integration Law*. (OUP Oxford, 2014)

³⁰¹ Article 65 (4), Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy, 5 July 2001, entry into force 4 February 2002, http://www.sice.oas.org/trade/caricom/caricind_text.asp.

³⁰² CBD Dec. XIII/6, "Biodiversity and Human Health", CBD/COP/DEC/XIII/6 (14 December 2016). *Cfr.* CBD Dec. XIV/4, "Biodiversity and Human Health", CBD/COP/DEC/14/4 (30 November 2018) and, more recently, CBD Dec. XV/29, "Biodiversity and Human Health", CBD/COP/DEC/15/29 (19 December 2022)

³⁰³ See generally *Ibid*, CBD Dec. XIII/6

³⁰⁴ CBD (n. 123), Dec. XIII/6 (n. 302), para. 4(e)

³⁰⁵ CBD (n. 123), Dec. XIV/4 (n. 302). See more generally E Morgera, "Biodiversity as a Human Right and its Implications for the EU's External Action" (European Parliament 2020) available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/603491/EXPO_STU\(2020\)603491_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/603491/EXPO_STU(2020)603491_EN.pdf), 14

72. In addition, the mutually supportive interpretation of the above provisions also strengthens the overall protection granted to those individuals who are particularly vulnerable to the adverse effects of climate change, such as indigenous peoples and local communities. **Detailed submissions regarding States' obligations to ensure the protection of Indigenous Peoples and local communities will be provided below in the answers to Question E. However, it is worth anticipating a few considerations underscoring the importance of the CBD and of the law of the sea instruments for their protection *vis-à-vis* the mitigation and adaptation measures highlighted above.**
73. The CBD offers numerous entry points triggering a mutually supportive interpretation and application of its provisions with a view to strengthening the human rights of Indigenous peoples and local communities. The CBD preamble underscores the “close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources”³⁰⁶ and acknowledges “the vital role that women play in the conservation and sustainable use of biological diversity” and the need for their “full participation ... at all levels of policy-making and implementation”.³⁰⁷ The operative text of the CBD includes important references to, e.g., Indigenous peoples’ and local communities’ knowledge and practices in the sustainable use of biological diversity,³⁰⁸ public participation in the conduct of EIAs,³⁰⁹ and the “risks to human health” associated with the use and release of living modified organisms.³¹⁰
74. These obligations³¹¹ have been clarified through decisions adopted by consensus by 196 CBD Parties³¹² to entail the need to “enhance the integration of climate-change considerations related to biodiversity” with respect to the rights and traditions of indigenous and local communities.³¹³ For instance, in the implementation of climate change adaptation measures, CBD Parties underscored the relevance of ecosystem restoration for the implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)³¹⁴ and the need to engage women and other relevant stakeholders at all stages.³¹⁵

³⁰⁶ CBD (n. 123), Twelfth Preambulatory Clause

³⁰⁷ *Ibid.*, Thirteenth Preambulatory Clause

³⁰⁸ *Ibid.*, Article 8(j). Cfr. Article 10(c) CBD

³⁰⁹ *Ibid.*, Article 14(a)

³¹⁰ *Ibid.*, Article 8(g)

³¹¹ *Ibid.*, Articles 8(j) and 10(c)

³¹² E Morgera, ‘No Need to Reinvent the Wheel for a Human Rights-Based Approach to Tackling Climate Change: The Contribution of International Biodiversity Law’ in Hollo, Kulovesi and Mehling (eds.), *Climate Change and the Law* (Springer, 2013) 350

³¹³ CBD (n. 123), Dec. IX/16, para. 4(a). Cfr. CBD Dec. IX/2, para. 2(b) and CBD Dec. X/37, paras. 2, 4 and 8-10. For a broader view, see Framework Principles on Human Rights and the Environment (n 193), Principle 15

³¹⁴ UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples: Resolution /adopted by the General Assembly, 2 October 2007, A/RES/61/295; See CBD Dec. XIV/5, Annex

³¹⁵ CBD (n. 123), Dec. XIII/5 (n. 167), Annex, paras. 9-10

75. By the same token, CBD Parties have committed to promoting community-based measures in reef-dependent coastal communities³¹⁶ and to applying measures to maintain their sustainable livelihoods and ensure their food security,³¹⁷ including by providing resources and capacity-building.³¹⁸ Further, CBD Parties agreed to enhance “coordination and collaboration” with Indigenous peoples and local communities, fishers, civil society and the general public, in the conservation and management of biodiversity in marine areas, with a view to integrating traditional knowledge and increasing transparency.³¹⁹
76. All of the above, in turn, underscores the progressive involvement of Indigenous people and local communities in the decision-making and management processes,³²⁰ and recognising their role as knowledge- and rights-holders³²¹ by underscoring the importance of their free prior and informed consent³²² in the context of selecting, implementing, monitoring and reviewing climate change response measures. This evolutive interpretation of the CBD is enshrined in the Framework Principles on Human Rights and the Environment,³²³ which spell out in a detailed manner how States are to discharge their obligations towards Indigenous peoples and local communities.³²⁴ In particular, EIAs and SEAs, free prior informed consent, and fair and equitable benefit-sharing constitute processes that States have the obligations to respect when integrating Indigenous and traditional knowledge and practices, as confirmed also by the IACtHR on multiple occasions.³²⁵
77. In addition, the law of the sea provides relevant entry points to extend EIAs scope also to socio-cultural and human rights. For instance, as observed above,³²⁶ the mutually supportive interpretation of obligations under the UNCLOS, the UNFSA, the CBD and human rights instruments suggests that industrial fishing activities must be also included in the scoping of EIAs, with a view to assessing the multiple human rights implications of

³¹⁶ CBD (n. 123), Dec. XII/23, Annex, para. 8.1(b)

³¹⁷ *Ibid.*, Dec. XIV/5, para. 9

³¹⁸ *Ibid.*, para. 10(f)

³¹⁹ For instance, in the conservation and management of biodiversity in cold-water areas: *cfr.* CBD (n. 123), Dec. XIII/11, “Voluntary specific workplan on biodiversity in cold-water areas within the jurisdictional scope of the Convention”, CBD/COP/DEC/XIII/11 (10 December 2016), Annex II, para. 5.5(e)

³²⁰ CBD (n. 123), Dec. X/29, para. 13(b) and CBD Dec. X/33, para. 8(u-v). *Cfr.* CBD Dec. XIII/11, Annex, para. 5.5(a)

³²¹ *Ibid.*, Dec. XIV/5, Biodiversity and Climate Change, para. 13(a)

³²² *Ibid.*, Annex, para. 10. As far as it concerns Indigenous- and Community-Conserved Areas (ICCAs), see *Ibid.* para. 8(j) and *Ibid.* para. 3(a-h)

³²³ Framework Principles on Human Rights and the Environment (n 193)

³²⁴ *Ibid.*, Principle 15(a-d)

³²⁵ The Court characterises the EIA as an effective safeguard for Indigenous Peoples’ and local communities’ rights to ownership. See, amongst others, IACtHR, *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*, Judgment of November 28, 2007. Series C No. 172, para. 129; IACtHR, *Case of the Saramaka People v. Suriname. Interpretation of the judgment on preliminary objections, merits, reparations and costs*, Judgment of August 12, 2008. Series C No. 185, paras. 31 to 39; IACtHR, *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, Merits, Reparations and Costs*. Judgment of June 27, 2012. Series C No. 245, para. 205; IACtHR, *Case of the Triunfo de la Cruz Garifuna Community and its members v. Honduras. Merits, Reparations and Costs*. Judgment of October 8, 2015. Series C No. 305, para. 156, and IACtHR, *Kaliña and Lokono Peoples* (n. 167), paras. 214 and 215

³²⁶ Paragraphs 18 – 19 above

fishing.³²⁷ In particular, States must create binding rules for, and effectively monitor,³²⁸ large-scale industrial fishing operators to respect human rights (particularly those of Indigenous peoples and small-scale fishers whose sacred sites, and traditionally occupied and used areas, are involved or affected by large-scale industrial fisheries), as well as to protect biodiversity and contribute to climate change mitigation.³²⁹

78. Also, the BBNJ Agreement includes key obligations on EIAs and SEAs as involving broader human rights implications for local coastal communities, including women and children, small-scale fishers, indigenous and local knowledge holders. First, the obligation to conduct EIAs has a broad scope and entails the identification of “key environmental and any associated impacts, such as economic, social, cultural and human health impacts, including potential cumulative impacts”.³³⁰ Second, the assessment must be carried out “by using the best available science and scientific information and, where available, relevant traditional knowledge of Indigenous peoples and local communities”,³³¹ thereby fostering the protection of cultural rights as well as of related civil and political, and social and economic rights. Third, the obligation to “consider conducting” SEAs³³² may be interpreted as requiring States to assess the need for SEAs with local actors as well as with other States (multilaterally or minilaterally³³³), and to provide justifications for any decisions not to conduct one. The power of the CoP to mandate SEAs is also relevant here.³³⁴

³²⁷ On States’ duty to conduct EIAs and SEAs in respect of industrial fishing activities, and to the inclusion of socio-cultural and human rights impact within their scope, see J Nakamura et al. (n 217). See also P Duffy, ‘Agriculture, Forestry and Fisheries: The Orphans of Environmental Impact Assessment’ (2004) 22 *Impact Assessment and Project Appraisal* 175, 176

³²⁸ The IACtHR upheld the duty to monitor and oversee planned activities in order to ensure the protection of human rights especially in the context of safeguarding indigenous communities. In this regard, see IACtHR, *Kaliña and Lokono Peoples* (n 167), paras. 221 and 222

³²⁹ J Nakamura et al. (n 217)

³³⁰ Article 31(1)(b) BBNJ Agreement. For the definition of “cumulative impact”, see Article 1(6) BBNJ Agreement. See more generally the discussion in the previous section, paras. 39 – 43

³³¹ Article 31(1)(b) BBNJ Agreement

³³² Article 39(1) BBNJ Agreement

³³³ Consider, for instance, opportunities for international collaboration on this as part of bilateral or minilateral development cooperation agreements, or trade and investment agreements that contain environmental protection and sustainable development clauses. For a general background, see GM Duran and E Morgera, *Environmental Integration in the EU’s External Relations: Beyond Multilateral Dimensions* (Hart, 2012); and S Jinnah and E Morgera, “Environmental Provisions in American and EU Free Trade Agreements: A Preliminary Comparison and Research Agenda” (2013) 22 *Review of European Community and International Environmental Law* 324-339

³³⁴ E Morgera et al, “Addressing the ocean-climate nexus in the BBNJ Agreement ... (n 117)”

II (b) Principles Inspiring Mitigation, Adaptation & Responses to Loss and Damage

79. The *Amicii* submit that at least three principles must inform States' "actions of mitigation, adaptation and response to the loss and damage resulting from the climate emergency in the affected communities."³³⁵ These are a) the ecosystem-based principle; b) the precautionary principle, and c) the principle of intergenerational equity, which find expression across the majority of international and regional instruments highlighted in Paragraph 16.
80. The ecosystem approach under the CBD has been interpreted as a strategy for the integrated management of land, water and living resources, and the promotion of their conservation and sustainable use in an equitable manner and through an adaptive approach, further paying consideration to the interested communities through the development of efficient and fair decision-making processes and structures.³³⁶ Additionally, CBD Parties agreed to apply the ecosystem approach to the design and implementation of their ocean-climate policies and plans, including climate change adaptation and mitigation measures.³³⁷ This is reinforced regionally by the SPAW Protocol³³⁸ and Annex III³³⁹ of the LBS Protocol³⁴⁰ in the planning and management of MPAs and other ABMTs, and proposed plans by the STAC to invest in the science of ecosystem connectivity and Marine Protected Areas to respond to climate change and other threats³⁴¹
81. Another key dimension of the ecosystem approach is its emphasis on equity, recognising that human beings, and their cultural diversity are an integral component of many ecosystems,³⁴² thereby opening up for a consideration of human rights³⁴³ From this perspective, the ecosystem approach entails a decentralised, social process.³⁴⁴ It underscores the need to understand and factor in societal choices, rights and interests of Indigenous peoples and local communities, and intrinsic as well as tangible and intangible values attached to biodiversity, ultimately leading to a balance between local interests and

³³⁵ Request (n 7), 9, Question 2 B

³³⁶ CBD Decision V/6, "Ecosystem Approach", UNEP/CBD/COP/6/20 (7-19 April 2002); CBD Decision VII/11, "Ecosystem Approach", UNEP/CBD/COP/DEC/VII/11 (13 April 2004), and, specifically on ecosystem-based approach to climate adaptation, CBD Dec. XIV/5 (2018) (n 79) and CBD Decision XIII/4, "Biodiversity and climate change", CBD/COP/DEC/XIII/4 (10 December 2016), para. 4, CBD Dec. V/6 (2002), *Cfr. Ibid.*, CBD Dec. VII/11 (2004), para. 10, and CBD Decision X/29, Marine and Coastal Biodiversity, UNEP/CBD/COP/DEC/X/29 (29 October 2010), para. 13(h) and Annex, para. d.

³³⁷ See generally CBD Decision V/6 (n 336); CBD Decision VII/11, (n 336), and, specifically on ecosystem-based approach to climate adaptation, CBD Dec. XIV/5 (2018) (n 160) and CBD Decision XIII/4, "Biodiversity and climate change", (n 336), para. 4

³³⁸ Articles 6, 8 and 9

³³⁹ Article 2 and 3

³⁴⁰ Article VII (4)

³⁴¹ UNEP(DEPI)/CAR WG.42/INF.10 (n. 199), 3

³⁴² CBD (n. 123), Dec. V/6 (n 336), para 2

³⁴³ See E Morgera, 'The Ecosystem Approach and the Precautionary Principle' in E Morgera and J Razzaque (eds) *Encyclopedia of Environmental Law: Biodiversity and Nature Protection Law* (EE, 2017) 70-80

³⁴⁴ CBD (n. 123), Dec. V/6 (n 336), para 2

the wider public interest.³⁴⁵ It also points to the challenge of ensuring appropriate representation of community interests in the decision-making process.³⁴⁶

82. CBD guidance serves to flesh out the references to the ecosystem approach that can be identified in the UNCLOS, SPAW and LBS Protocols, the UNFSA and the BBNJ Agreements. Several UNCLOS operative provisions can be read as supporting an ecosystem approach to the management of human activities that may affect the marine environment. UNCLOS Article 192 is “an integrative norm encompassing all aspects of the marine environment and all maritime zones”, and, as such, can be said “to effectively express the key elements of the ecosystem approach”.³⁴⁷ It is also an inclusive norm, its formulation broad enough to accommodate environmental principles that emerged after the adoption of UNCLOS, of which the ecosystem approach is one.³⁴⁸
83. An ecosystem orientation is also implicit in UNCLOS Article 194, which requires States to take measures to prevent, reduce, and control pollution of the marine environment, including “rare and fragile ecosystems as well as habitat of depleted, threatened or endangered species and other forms of marine life”.³⁴⁹ The same applies to UNCLOS provisions dealing with the conservation and management of marine living resources, which require that associations and interdependencies between species be taken into account.³⁵⁰ As highlighted in Paragraph 16, UNCLOS Part XII provisions are implemented under Regional Seas Programmes (RSPs) within a legal framework for the conservation and sustainable use of oceans and their resources.
84. On the basis of the ecosystem approach, CBD Parties have agreed to minimise and, where possible, avoid activities that may increase the vulnerability and reduce the resilience of biodiversity and ecosystems;³⁵¹ to integrate ecosystem-based approaches into their own Nationally Determined Contributions (NDCs) under the Paris Agreement and, more generally, in the pursuance of domestic climate action, with a view to specifically protecting marine biodiversity;³⁵² to minimise impacts of climate change and ocean acidification on biodiversity and increase its resilience through mitigation, adaptation and disaster risk reduction actions, through nature-based solutions and ecosystem-based approaches by 2030.³⁵³
85. A further key principle that shall inspire States’ preventive measures against climate change adverse impacts is the precautionary principle, which is also an integral part of the ecosystem approach discussed above.³⁵⁴ The precautionary principle prescribes that “[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent

³⁴⁵ CBD (n. 123), Annex, Principle 1

³⁴⁶ *Ibid.*, Dec. VII/11 (2004) (n. 336), Annex I, para 2.5

³⁴⁷ V De Lucia, “The Ecosystem Approach and the Negotiations towards a New Agreement on Marine Biodiversity in Areas beyond National Jurisdiction” (2019) 2 *Nordic Environmental Law Journal* 7 19

³⁴⁸ *Ibid*

³⁴⁹ Article 194(5) UNCLOS

³⁵⁰ Articles 61(3) and (4), 63 and 119(1) UNCLOS

³⁵¹ CBD Dec. XIII/4 (2016) (n 231), para. 8 (a-b)

³⁵² CBD Dec. XIV/5 (2018) (n 160), para 5 (a-b)

³⁵³ Kunming-Montreal Global Biodiversity Framework (n. 111), Target 8

³⁵⁴ E Morgera, “The Ecosystem Approach ...” (n 343)

environmental degradation.”³⁵⁵ In other words, precaution requires appreciating the limits of scientific prediction and reversing the idea that facts must be ascertained prior to taking appropriate responsive actions, for precautionary action must be undertaken before the ascertainment of facts, especially where this would require some time and there was a possibility – or even just a fear or suspect – of significant harm to the environment. Conversely, the precautionary approach requires actors willing to conduct certain activities involving a degree of significant harm to prove safety of such activities, for the “lack in evidence of harm does not provide a basis for reaching the conclusion that there is no threat of harm”.³⁵⁶

86. As part of the operationalisation of both the ecosystem approach and the precautionary principle, CBD Parties agreed to minimise and, where possible, avoid activities that may increase the vulnerability and reduce the resilience of biodiversity and ecosystems.³⁵⁷ Precaution is an integral element of the content of the due diligence obligation,³⁵⁸ and States’ measures to ensure the protection from climate change adverse effects also encompass safeguarding marine biodiversity from the negative impacts of deep-seabed mining, as well as a substantive element of everyone’s human right to a healthy environment and the other basic human rights dependent on it.³⁵⁹ Hence, deep-seabed mining risks jeopardising the full enjoyment of a number of human rights – especially the human right to a healthy environment, indigenous peoples’ and local communities’ cultural rights, children’s human rights and environmental defenders’ human rights³⁶⁰ – and, accordingly States must ensure that no unjustified and foreseeable infringements of human rights arise from such activities.
87. Finally, another fundamental principle that must inspire States’ measures against climate change adverse effects is intergenerational equity. Intergenerational equity is expressly mentioned in numerous international law instruments³⁶¹ including the Preamble of the Cartagena Convention and the corpus of the Escazú Agreement,³⁶² and obliges States to safeguard “(t)he natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems ... (for) the benefit of present and future generations”.³⁶³ Thus, it requires States to pay due regard to the distributive effects of their policies and measures, including environmental ones, especially with a view to carefully balancing the interests of present and future generations.

³⁵⁵ Rio Declaration, Principle 15

³⁵⁶ This is frequently referred to as “reversal of the burden of proof”. C Foster (ed.) *Science and Precautionary Principle in International Courts and Tribunals* (Cambridge University Press 2012) at 19. In this regard, see also E Fisher, “Is the precautionary principle justiciable?” (2001), 13(3) *Journal of Environmental Law* 315-334, at 319

³⁵⁷ CBD Dec XIII/4, para. 8 (a-b)

³⁵⁸ Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), 1 February 2011, <https://www.itlos.org/index.php?id=109>, para. 131 [ITLOS Seabed Dispute Chamber Advisory Opinion]

³⁵⁹ As developed further in Paragraphs 47 – 51, geo-engineering may have a devastating impact on the enjoyment of human rights, including both individual and collective rights. For an in-depth analysis, see E Morgera and H Lily (n. 103)

³⁶⁰ E Morgera and H Lily (n. 103), at 376

³⁶¹ See, amongst many, Article 3(1) UNFCCC; *cfr.* Paris Agreement, preamble

³⁶² Article 3(g)

³⁶³ Stockholm Declaration on the Human Environment, A/CONF.48/14/Rev. 1 (1973), A/Conf.48/14, 2, Corr. 1 (1972), Principle 2

88. The international definition of ‘sustainable use’ of biological resources, under the CBD, as the “use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations”.³⁶⁴ Accordingly, the interpretation of inter-generational equity must be based on the respect of children’s human rights, these being amongst the groups of individuals who will suffer the most from climate change adverse effects in spite of their negligible contribution to it.³⁶⁵
89. **We will provide a more detailed answer about the principle of intergenerational equity and the need to ensure the protection of children and future generations when addressing Question C below.**³⁶⁶ Yet, for the purpose of this **Sub-Question 2 B**, the *Amicii* recall the recently adopted Maastricht Principles on the Human Rights of Future Generations,³⁶⁷ which clarify the interlinkages between the protection of the environment – including the marine environment – and the human rights of future generations,³⁶⁸ and highlight a number of violations,³⁶⁹ and urge States to ensure effective remedies³⁷⁰ and the meaningful representation of future generations in decision-making.³⁷¹

³⁶⁴ CBD (n. 123), Article 2

³⁶⁵ UN General Assembly, ‘The Human Right to a Clean, Healthy and Sustainable Environment’, A/RES/76/300 (1 August 2022); *cfr.* Human Rights Council, Resolution A/HRC/RES/52/23 (13 April 2023), Preamble

³⁶⁶ See Paragraphs 88 – 100 in Section C below

³⁶⁷ S. Liebenberg et al., “Maastricht Principles on the Human Rights of Future Generations” (July 2023), available at <https://www.rightsoffuturegenerations.org/home> [Maastricht Principles]

³⁶⁸ S. Humphreys, ‘Against Future Generations’ (2022) 33 (4) European Journal of International Law 1061; M. Wewerinke-Singh et al., ‘In Defence of Future Generations: A Reply to Stephen Humphreys’ (2023) 34 (3) European Journal of International Law 651; P. Lawrence, ‘International Law Must Respond to the Reality of Future Generations: A Reply to Stephen Humphreys’ (2023) 34 (3) European Journal of International Law 669; S. Humphreys, ‘Taking Future Generations Seriously: A Rejoinder to Margaretha Wewerinke-Singh, Ayan Garg and Shubhangi Agarwalla, and Peter Lawrence’ (2023) 34 (3) European Journal of International Law 683

³⁶⁹ By way of example, Maastricht Principles (n. 367), see paras. 17 and 22, respectively underscoring the violation of the right to enjoy natural resources and the right to participate and be effectively represented in decision-making

³⁷⁰ Maastricht Principles (n. 367), para. 13(d)

³⁷¹ *Ibid.*, para. 22(a). In this regard, see S. Shields et al. (n. 290). See generally, Human Rights Council, “Protection of the rights of the child in the implementation of the 2030 Agenda for Sustainable Development”, Report of the United Nations High Commissioner for Human Rights, A/HRC/34/27 (15 December 2016)

B. State Obligations to Preserve the Right to Life and Survival in Relation to the Climate Emergency in Light of Science and Human Rights

90. In order to protect our planet's climate system and vital natural resources on which human survival and welfare depends, climate policies of States must be based on the best available climate science.³⁷² The best climate science provides a prescription for climate recovery that requires States to decrease atmospheric carbon dioxide (CO₂) levels to below 350 parts per million (ppm) by 2100 and stabilise the long-term average global temperature increase at no higher than 1 degree Celsius (°C).³⁷³ This use of best available science, enables States both to benefit from the right to development as set out in the Rio Declaration, while taking the appropriate mitigation and adaptation measures.
91. Additionally, the best available science, is a fundamental part human right to science proclaimed in the Universal Declaration of Human Rights³⁷⁴ and has been enshrined in several treaties, including the International Covenant on Economic, Social and Cultural Rights.³⁷⁵ Morgera notes that while the scope, normative content and obligations of States with regard to the right had remained underdeveloped, with virtually no efforts to implement the obligations to promote, protect and fulfil it, there are contemporary efforts to clarify the content of the right to science and international human rights bodies will devote increasing attention to States' conduct in this area.³⁷⁶
92. The most authoritative guidelines to date come from the UN Special Rapporteur in the field of cultural rights in 2011, *inter alia*, that the right to science encompasses four distinct elements: (i) the right to access the benefits of science by everyone without discrimination; (ii) the opportunity for all to contribute to scientific research; (iii) the obligation to protect all persons against negative consequences of scientific research or its applications on their food, health, security and environment; and (iv) the obligation to ensure that priorities for scientific research focus on key issues for the most vulnerable.³⁷⁷ These normative elements align with the notion of "inclusive innovation" advocated with regard to the ocean genome,³⁷⁸ and "explicitly include[es] those who have been excluded from the

³⁷² D Barnes et al., 'Icebergs, Sea Ice, Blue Carbon and Antarctic Climate Feedbacks' (2018) 376 *Philosophical Transactions of the Royal Society A* 2017.0176; N Hilmi et al., 'The Role of Blue Carbon in Climate Change Mitigation and Carbon Stock Conservation' (2021) 3 *Frontiers in Climate Science* 710546.

³⁷³ Our Children's Trust et al. Submission to UN Committee on the Rights of the Child, paragraph 1, Executive Summary

³⁷⁴ Article 27 (2). See WA Schabas, Study of the right to enjoy the benefits of scientific and technological progress and its applications, in: Y. Donders, V. Volodin (Eds.), *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (Ashgate Publishing, 2007); AR Chapman, "Towards an understanding of the right to enjoy the benefits of scientific progress and its applications" (2009) 8 *Journal of Human Rights* 1

³⁷⁵ ICESCR (n.135), Article 15. See also the Charter of the Organization of American States (1948) 119 UNTS 3, Article 38; American Declaration on the Rights and Duties of Man (1948) O.A.S. Res. XXX, Article XIII; Protocol of San Salvador (n.42), Article 14; and Arab Charter on Human Rights (2004), reprinted in *International Human Rights Reports* 893 (2005), Article 42

³⁷⁶ E Morgera, 'The Relevance of the Human Right to Science for the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: A New Legally Binding Instrument to Support Co-Production of Ocean Knowledge Across Scales' in V De Lucia et al. (eds), *International Law and Marine Areas beyond National Jurisdiction: Current Status and Future Trends* (Leiden: Brill, 2022) 242, 255

³⁷⁷ UNGA, Report of the Special Rapporteur in the Field of Cultural Rights: The Right to Enjoy the Benefits of Scientific Progress and its Applications (UN Doc A/HRC/20/26, 14 May 2012) paras 1, 25 and 30–43

³⁷⁸ E Morgera, "The Relevance of the Human Right to Science..." (n 376), at 255

development mainstream ... [by] produc[ing] and deliver[ing] innovative solutions to the problems of the poorest and most marginalised communities.”³⁷⁹

93. A critical corollary to the right to development and the right to science is grounded in Rio Principle 10, which seeks to ensure that every person has access to information, can participate in the decision-making process and has access to justice in environmental matters with the aim of safeguarding the right to a healthy and sustainable environment for present and future generations. The scope of this right is undergoing massive judicial restructuring at the national level with recent cases such as *DeFreitas and Thomas*,³⁸⁰ *Held*,³⁸¹ and *Mathur*,³⁸² and regionally in the form of the trilogy of cases before the Grand Chamber of the European Court of Human Rights, concerning the duty to protect life and private life by cutting greenhouse gas emissions: *Duarte Agostinho and Others v Portugal and Others*,³⁸³ *KlimaSeniorinnen v Switzerland*³⁸⁴ and *Carême v. France*.³⁸⁵ This will arguably be counterbalanced globally by the trilogy of advisory opinions across world courts, including that before the Inter-American Court,³⁸⁶ and hold potential significance for the unfolding developments on climate justice, which are ultimately premised on both intragenerational and intergenerational equity.
94. The right to environmental (and cultural) education, finds its genesis in the Universal Declaration of Human Rights³⁸⁷ and has globally been recognized as significant since the 1970s in the *Tbilisi Declaration*.³⁸⁸ Nonetheless, as was the case with human rights its goals were broad, and there has been a lesser focus on the marine environment than the terrestrial one.³⁸⁹ However, General Comment 26,³⁹⁰ and the findings of the Human Rights Council in the *Torres Islanders* case illustrated the importance of education and the right of knowledge and transmission of culture respectively, from one generation to another, as

³⁷⁹ R Blasiak et al., 2020. The Ocean Genome: Conservation and the Fair, Equitable and Sustainable Use of Marine Genetic Resources. Washington, DC: World Resources Institute, 37

³⁸⁰ *Thomas & de Freitas v Guyana* 2021 HC Dem Civ. See also Joana Setzer and Catherine Higham, *Global Trends in Climate Change Litigation: 2023 Snapshot* (London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, 2023), https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/06/Global_trends_in_climate_change_litigation_2023_snapshot.pdf

³⁸¹ *Held v. Montana*, No. CDV-2020-307 (1st Dist. Ct. Mont., Aug. 14, 2023)

³⁸² *Mathur v. Ontario*, 2023 ONSC 2316. See S Wood, ‘Mathur v Ontario: Grounds for Optimism About Recognition of a Constitutional Right to a Stable Climate System in Canada’ (2023) 69 McGill Law Journal

³⁸³ *Duarte Agostinho and Others* (n. 74)

³⁸⁴ *Verein KlimaSeniorinnen Schweiz and Others* (n. 75)

³⁸⁵ *Carême v. France* (n. 115); *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020); *Thomas & de Freitas v Guyana* 2021 HC Dem Civ.;. See also J Setzer and C Higham, *Global Trends in Climate Change Litigation: 2023 Snapshot* (London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, 2023), https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/06/Global_trends_in_climate_change_litigation_2023_snapshot.pdf

³⁸⁶ ITLOS Advisory Opinion on Climate Change (n. 47); *Obligations of States in Respect of Climate Change (Request for Advisory Opinion)*, ICJ Case 187; Request for an advisory opinion on the scope of the state obligations for responding to the climate emergency, Inter-American Court of Human Rights (IACtHR) (2023)

³⁸⁷ Article 26

³⁸⁸ Tbilisi Declaration, adopted UNESCO Intergovernmental Conference, Tbilisi, Georgia, USSR, October 14 – 26, 1977, <https://www.gdrc.org/uem/ee/Tbilisi-Declaration.pdf>

³⁸⁹ R A Barnes, ‘Environmental Rights in Marine Spaces’ in S Bogojevic and R Rayfuse (eds.), *Environmental Rights in Europe and Beyond* (Hart Publishing 2018).

³⁹⁰ Paragraph 23

a critical human right at the ocean-climate nexus.³⁹¹ This includes outdoor learning methodologies,³⁹² such as utilising the Empatheatre³⁹³ methodology,³⁹⁴ in *Lalela uLwandle*³⁹⁵ to tell intergenerational stories of the sea, and the impact of climate change on the marine environment, coastal peoples and communities.

95. Further, the recognition of the importance of the ocean for survival, cultural lives, and health, is complemented by the global recognition of the importance of ‘ocean literacy’³⁹⁶ as ‘an understanding of [one’s] influence on the ocean, and its influence on [people].’³⁹⁷ This relationship is understood as a complex and adaptive concept that involves several dimensions such as awareness, access and experiences, emotional connections, and knowledge.³⁹⁸ Ocean literacy is emerging as a promising aspect of global ocean governance, having recently been endorsed as a crucial focus of the UN Decade of Ocean Science for Sustainable Development (2021-2030).³⁹⁹ As highlighted in Paragraph 4 above, another recent counterpart to the paradigm shift of ocean literacy, is the adoption of the right to a clean, healthy, and sustainable environment⁴⁰⁰ as this underpins a suite of rights to both the terrestrial and marine environment.⁴⁰¹ One of the important mechanisms to engaging and enabling this right, and the spectrum of other human rights, is an awareness of one’s rights, and equally important, the ability to access information, participate in decision making, and to access remedies if one’s rights are abrogated.
96. Further, environmental education is a fundamental aspect of the rights to culture and education,⁴⁰² a just recognition of traditional ecological knowledge (TEK)⁴⁰³ and

³⁹¹ S Shields et al. (n. 290); E Morgera et al., “Ocean-based Climate Action and Human Rights ...” (n. 64)

³⁹² General Comment 26 (n. 50), para 35

³⁹³ About Empatheatre, <https://www.empatheatre.com/about>

³⁹⁴ What is Empatheatre?, <https://www.youtube.com/watch?v=vioKkGqnL8Q&t=31s>

³⁹⁵ Empatheatre, Lalela uLwandle Research-Based Theatre Project, <https://www.empatheatre.com/lalela-ulwandle>

³⁹⁶ UNESCO, *Ocean Literacy For All: A Toolkit* (Paris: IOC/UNESCO, 2018); IOC, *The Science We Need for the Ocean We Want: The United Nations Decade of Ocean Science for Sustainable Development (2021-2030)* (UNESCO, IOC, 2020);

³⁹⁷ J Claudet, ‘The Seven Domains of Action for a Sustainable Ocean’ (2021) 184 (6) *Cell* 2021, 1426-1429. <https://doi.org/10.1016/j.cell.2021.01.055>; E McKinley et al., ‘The Evolution of Ocean Literacy: A New Framework for the United Nations Ocean Decade and Beyond’ (2023) 186 *Marine Pollution Bulletin* 114467

³⁹⁸ *Ibid.*, E McKinley et al

³⁹⁹ UNESCO, *Ocean Literacy For All* (n 396); IOC, *The Science We Need for the Ocean We Want: The United Nations Decade of Ocean Science for Sustainable Development (2021-2030)* (UNESCO, IOC, 2020)

⁴⁰⁰ UNGA A/RES/76/300 (n. 48)

⁴⁰¹ AMSN Lancaster et al., (n. 56)

⁴⁰² M Strand et al., ‘Protecting Children’s Rights to Development and Culture by Re-Imagining ‘Ocean Literacies’’ (2023) 31 (4) *The International Journal of Children’s Rights*, 941

⁴⁰³ AMSN Lancaster, *Decolonizing Tenure Rights in the CARICOM and OECS Caribbean: [Re]-Assessing the Role of International Legal Instruments* (2024) 4 (4) *Asian Journal of International Law* 1; D Brixius, ‘From Ethnobotany to Emancipation: Slaves, Plant Knowledge, and Gardens on Eighteenth-century Isle de France’ (2020) 58 (1) *History of Science* 51-75; D Brixius, ‘A Hard Nut to Crack: Nutmeg Cultivation and the Application of Natural History between the Maluku Islands and Isle de France (1750s–1780s)’ (2018) 51 (4) *The British Journal for the History of Science* 585-606; F Muttentzer and M Andriamahefazafy, ‘From Ritual Performers to Ocean Defenders: Fisher Migrations, Identity Narratives and Resource Access in the Barren Isles, West Madagascar’ (2021) 19 (3) *African Identities* 375-399; M Colchester, ‘Conservation Policy and Indigenous Peoples’ (2004) 7 (3) *Environmental Science & Policy* 145-153; M Colchester et al., *A Survey of Indigenous Land Tenure: A Report for the Land Tenure Service of the FAO*, (FAO, 2001); L Parks and E Tsioumani, ‘Transforming Biodiversity Governance? Indigenous Peoples’ Contributions to the Convention on Biological Diversity’ (2023) 280 *Biological Conservation*: 109933

empowering agency by women and girls,⁴⁰⁴ children,⁴⁰⁵ and marginalised groups.⁴⁰⁶ It is unsurprising therefore, that progressively, there have been efforts in treaties, notably the Escazú Agreement and Aarhus Convention, which promote Rio Principle 10 rights, the right to education and culture, and as will be discussed in **Part D**, promote the procedural rights of environmental, climate and ocean defenders.⁴⁰⁷ Environmental education must be viewed as a vehicle to galvanise increased agency by a broad diversity of stakeholders, and is a critical component in mainstreaming environmental democracy against an increasing wave of undemocratic processes such as land-,⁴⁰⁸ coastal-,⁴⁰⁹ and blue-⁴¹⁰grabbing, climate *injustice*⁴¹¹ and plastic pollution.⁴¹² In this regard, environmental education's role, and the rise of greater environmental, social and governance accountability within business and human rights approaches⁴¹³ and corporate due diligence regulation,⁴¹⁴ especially with respect to vulnerable groups such as children,⁴¹⁵ cannot be underestimated, nor understated.

⁴⁰⁴ AMSN Lancaster et al., 'Children, Gender & The Ocean-Climate Nexus: Emphasising The Rights and Roles Of Girls (And Women) In Ocean-Climate Decision-Making' (2024) *The International Journal of Children's Rights*, under review

⁴⁰⁵ Sharm el-Sheikh Implementation Plan (n. 110); UNCRC (n. 50), Art. 4, 12, 13, 15, 17; General Comment 26 (n. 50), paras 84 – 86; 87-89

⁴⁰⁶ See Sections C & D below

⁴⁰⁷ R López de la Lama and S. de la Puente, 'Small-scale fishers fight against illegal industrial fishing in Northern Peru' in N. Bennett & R. López de la Lama (Eds.), *The Ocean Defenders Project* (2023); N J Bennett, et al. 'Ocean defenders and human rights' (2023) 9 *Frontiers in Marine Science* :1089049; N J Bennett, et al. 'Environmental (in) justice in the Anthropocene ocean' *Marine Policy* 147 (2023): 105383; N J Bennett, et al., 'Local marine stewardship and ocean defenders' (2022) 1 (1) *npj Ocean Sustainability* : 3; C Frazão Santos, et al. (n. 100), 'A sustainable ocean for all' (2022) 1 (1) *npj Ocean Sustainability* 1.1 (2022): 2; N J Bennett, et al., 'Environmental Justice in the Ocean' (2022) 39 *Institute for the Oceans and Fisheries, University of British Columbia*

⁴⁰⁸ B Yang and J He, 'Global Land Grabbing: A Critical Review of Case Studies Across the World' (2021) 10 (3) *Land* 324. See also, *Aurelio Cal & Others v the Attorney General of Belize* (2007) 71 W.I.R. 110

⁴⁰⁹ M Bavinck et al., 'The Impact of Coastal Grabbing on Community Conservation—A Global Reconnaissance' (2017) 16 *Maritime Studies* 1-17

⁴¹⁰ NJ Bennett et al., 'Blue Growth and Blue Justice: Ten Risks and Solutions for the Ocean Economy' (2021) 125 *Marine Policy* 104387; M Barbesgaard, 'Blue Carbon: Ocean Grabbing in Disguise?' (2016) *Transnational Institute* 1-11; NJ Bennett et al., 'Ocean Grabbing' (2015) 57 *Marine Policy* 61-68. See also, *Framhein (Appellant) v Attorney-General of the Cook Islands (sued on behalf of the Crown) (Respondent) (Cook Islands)* [2022] UKPC 4

⁴¹¹ D Ciplet et al, 'The Unequal Geographies of Climate Finance: Climate Injustice and Dependency in the World System' (2022) 99 *Political Geography* 102769; S Riggs Stapleton, 'A Case for Climate Justice Education: American Youth Connecting to Intragenerational Climate Injustice in Bangladesh' (2019) 25 (5) *Environmental Education Research* 732-750

⁴¹² M MacLeod et al., 'The Global Threat From Plastic Pollution' (2021) 373 (6550) *Science*, 61-65; L Penghui et al., 'Characteristics of Plastic Pollution in the Environment: A Review' (2021) 107 *Bulletin of Environmental Contamination and Toxicology* 577-584

⁴¹³ UN OCHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, (UN, 2011); OEIGWG on transnational corporations and other business enterprises with respect to human rights, Chairmanship Third Revised Draft, August 17, 2021, <https://www.business-humanrights.org/en/big-issues/binding-treaty/>, UNGA Resolution A/76/238 (27 July 2021); Escazú (n. 52); Case of the *Miskito Divers* (n. 255). See S Deva and T Van Ho, 'Addressing (In) Equality in Redress: Human Rights-Led Reform of the Investor-State Dispute Settlement Mechanism' (2023) 24 (3) *The Journal of World Investment & Trade* 398-436

⁴¹⁴ European Commission, Corporate Sustainability Reporting Directive, 23 February 2022; Corporate Sustainability Due Diligence Directive, 1 June 2023; Supply Chain Due Diligence Act (Germany), 1 January 2023; Escazú (n. 52); Case of the *Miskito Divers* (n. 255); AMSN Lancaster et al., 'Oceans, Climate Change & Human Rights Due Diligence ... (n. 255)

⁴¹⁵ General Comment 26 (n. 50), paras 90 -93

97. Climate change affects all populations in the Global South disproportionately, and as highlighted in Paragraphs 9 – 14 and 32 above, there are especially vulnerable populations in Small Island Developing States (SIDS), Least Developed Countries (LDCs) and Landlocked Developing Countries (LLDCs) across the Latin America & the Caribbean (LAC). Further, there are several groups or persons which are at higher risk as a result of their vulnerability. In **Sections C and D**, the *Amici* highlight and underscore the climate vulnerability in LAC, and addressing the root causes and impacts, are critical for groups such as women, children, youth and future generations, Indigenous peoples, Afro-descendant persons, environmental, land, climate and ocean defenders, as well as climate migrants. While the *Amici* do not address the impact of climate change on displaced persons, LGBTQIA+ persons, persons with disabilities and the elderly in comprehensive detail, it is worth noting that these populations are also at high risk in the context of the adverse consequences of climate change in Latin America and the Caribbean.

C. State Obligations In Relation To The Rights Of Children And The New Generations In Light Of The Climate Emergency

98. Without action by States around the world to immediately start reducing CO₂ emissions and other greenhouse gases (GHGs) that cause climate change, in line with the clear scientific evidence,⁴¹⁶ children of today and the future disproportionately suffer the dangers and catastrophic impacts of climate destabilisation and ocean acidification. The current generation of children are growing up during a time of increasing climate instability, as threats from more frequent catastrophic weather events, increasing ocean acidification, loss of coastline and even entire geographic regions to rising sea levels, rising rates of epidemiological disease, dislocation, and social disruption occur, the failure of States to cease supporting GHG emitting industries and to implement comprehensive, science-based climate recovery plans represents an ongoing violation of nearly all of the rights possessed by children under the CRC.
99. These threats will only intensify for future generations of children, who may never have a chance of realising their CRC rights, unless States step in now to curtail emissions and restore natural sequestration services of plants and soil in line with the scientific standard of climate recovery. However, a derogation from the non-binding emission reduction pledges made by States under the Paris Agreement would likely result in an increase in emissions through 2030, and cause climate warming of around 2.7 °C, a temperature increase deemed catastrophic by experts, far above the 1°C maximum scientific standard of protection and climate stabilisation identified by scientists.

Children, Including Girls

100. To date, 196 States are party to UNCRC, which makes it the most widely ratified human rights instrument in history.⁴¹⁷ Treaty obligations therein contained are all relevant to the “protection of the climate system and of other parts of the environment”, besides playing a key role in ensuring the protection of yet another group of individuals heavily “affected by the adverse effects of climate change”.⁴¹⁸ As a matter of fact, there exist critical links between both substantive and procedural rights protected under the UNCRC and the protection of the environment, including the marine environment.⁴¹⁹ For instance, more than half of the oxygen on Earth is produced in the ocean by marine plankton and photosynthetic organisms, hence safeguarding a healthy ocean is a key substantive component of children’s right to life.⁴²⁰

⁴¹⁶ HRC, ‘Realising the Rights of the Child through a Healthy Environment Report of the United Nations High Commissioner for Human Rights’, A/HRC/43/30 (3 January 2020), para 52–55

⁴¹⁷ As of May 2023, the United States of America is the only State that has just signed the UNCRC

⁴¹⁸ UNGA Resolution (n. 413), p. 3

⁴¹⁹ S Shields et al. (n. 290), at 551–562. See generally, HRC, “Protection of the rights of the child in the implementation of the 2030 Agenda for Sustainable Development”, Report of the United Nations High Commissioner for Human Rights, A/HRC/34/27 (15 December 2016)

⁴²⁰ CY Keong, “The Ocean Carbon Sink and Climate Change: A Scientific and Ethical Assessment” (2019) 10 *International Journal of Environmental Science and Development* 246, at 248; E Morgera et al., “SDG14 and children’s human rights” (One Ocean Hub Report, August 2022), at 5,

101. In addition, children's right to health is heavily dependent on access to food and clean water, the latter being inherently linked to the degradation of ecosystems and biodiversity.⁴²¹ Furthermore, children's right to participate in decisions affecting their lives and be effectively heard is protected under the UNCRC as "every child has the right to express their views, feelings and wishes in all matters affecting them, and to have their views considered and taken seriously".⁴²²
102. This interpretation is explicitly found in the Escazú Agreement,⁴²³ which makes provision for environmental human rights defenders, and its counterpart, the Aarhus Convention, under which parties created a new rapid response mechanism for environmental and climate defenders.⁴²⁴ Children and youth are also increasingly accepted with climate negotiations, as they have been recognised as agents of change as part of the Sharm el-Sheikh Implementation Plan.⁴²⁵ This is a distinct entry point for child climate and ocean defenders, and will constitute an important area towards children's agency at the ocean-climate nexus. The UAE Consensus underscores the participation of children⁴²⁶ and "[e]ncourages [the] implement[ation] [of] climate policy and action that is gender responsive, fully respects human rights, and empowers youth and children"
103. Further, it is now confirmed by the UN Committee on the Rights of the Child in the General Comment 26 on Children's Rights and the Environment, with a Special Focus on Climate Change,⁴²⁷ with a view to clarifying States obligations under the UNCRC. Notably, the General Comment upholds children's rights to a healthy environment as implicit in the text of the UNCRC, and further provides guidance as to its interpretation and application in such a way as to be consistent with the protection of the marine environment. For instance, the General Comment 26 clarifies that for the realisation of children's rights to a healthy environment, States have to take immediate action to e.g. conserve, protect and restore biodiversity, including marine biodiversity,⁴²⁸ prevent marine pollution – e.g. amongst others, via the introduction of greenhouse gases into the marine environment⁴²⁹ – and ensure that industrial fisheries are meant to fight malnutrition and promote children's right to development.⁴³⁰ The extensive provisions of General Comment 26 on State obligations in relation to climate change should also be read in a mutually supportive way with international biodiversity law and the law of the sea to

https://pure.strath.ac.uk/ws/portalfiles/portal/142898190/Morgera_etal_OOH_2022_SDG14_and_childrens_human_rights.pdf

⁴²¹ World Health Organisation, "The Global Ocean and Marine Resources", Policy Brief Europe (Copenhagen, 2010), at 109. See also *ibid.*, E Morgera et al. (n. 420) at 4

⁴²² Article 12 UNCRC. See, more in depth, For a more in-depth discussion, see S Shields et al (n 290)

⁴²³ Article 9 UNCRC

⁴²⁴ UNECE 'Decision VII/9 on a Rapid Response Mechanism to Deal with Cases Related to Article 3 (8) of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters' UN Doc ECE/MP.PP/2021/CRP.8 (18–20 October 2021) [UNECE 'Decision VII/9']. See T Weber, 'Are climate activists protected by the Aarhus Convention? A note on Article 3 (8) Aarhus Convention and the new Rapid Response Mechanism for environmental defenders' (2022) 31 (1) Review of European, Comparative & International Environmental Law 67

⁴²⁵ Sharm El Seik Implementation Plan (n. 111), Preambular Para 5 and Paras 55-57

⁴²⁶ UAE Consensus (n. 189), Para 9

⁴²⁷ General Comment 26 (n 50)

⁴²⁸ *Ibid.*, para 65(e)

⁴²⁹ *Ibid.*, para 65(f)

⁴³⁰ *Ibid.*, para 65(c)

ensure a holistic approach to the protection of children's rights in the context of environmental protection.⁴³¹

104. It is essential to understand State obligations to effectively address climate change as a matter also of human rights obligations of non-discrimination against children. According to the UNCRC, "State Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status".⁴³² This has been interpreted as an obligation for States to ensure that children are not disproportionately affected by environmental harm, including by considering "*possible future risk and harm*", taking precautionary measures, and adopting, implementing, and effectively enforcing non-retrogressive standards.⁴³³
105. In addition, the rights and obligations under the UNCRC offer key guidance to substantiate the preventive and precautionary principles.⁴³⁴ Children's human rights to life, survival, health and food call for immediate action, whereas their right to development can serve as a basis to assess the long-term effects of environmental impact on children's life and well-being at later stages of their lives.⁴³⁵ Accordingly, applying these principles in the context of the UNCRC means that States have the due diligence obligation⁴³⁶ "to take appropriate preventive measures to protect children against reasonably foreseeable environmental harm and violations of their rights", which entails "assessing the environmental impacts of policies and projects, identifying and preventing foreseeable harm, mitigating such harm if it is not preventable and providing for timely and effective remedies to redress both foreseeable and actual harm".⁴³⁷ Also, it requires States to "refrain from any action that would limit children's rights to express their views on matters relating to the environment and from impeding access to accurate environmental information".⁴³⁸ Lastly, it requires States to "take into account the possibility that environmental decisions that seem reasonable individually and on a shorter timescale can become unreasonable in aggregate and when considering the full harm that they will cause to children throughout their life courses."⁴³⁹

⁴³¹ General Comment 26 (n 50), paras 5, and 63-64; Elisa Morgera, Sophie Shields, Mia Strand, Alana Malinde S.N. Lancaster, Mitchell Lennan and Bernadette Snow 'The One Ocean Hub Contributes To The UN General Comment On Children's Rights And A Healthy Environment' (February 28, 2023), <https://oneoceanhub.org/the-one-ocean-hub-contributes-to-the-un-general-comment-on-childrens-rights-and-a-healthy-environment/>

⁴³² Article 12 UNCRC

⁴³³ HRC A/HRC/43/30 (n. 416), para 52-55

⁴³⁴ S Shields et al. (n 290)

⁴³⁵ CtteeRC, "General Comment 26" (n 50), para. 25

⁴³⁶ See First Quantum Minerals/ *Minera Panamá* on the constitutionality of Ley 406 de 20 de octubre de 2023, Corte Suprema de Justicia de Panamá (28 October 2023), at 186 – 187, where the Supreme Court of Panama, acknowledged the importance of General Comment 26, and stated *inter alia* that "... children are a vulnerable group and the future of the nation, who should not be deprived of the right to a healthy environment, and the State has an obligation to guarantee these rights through robust constitutional and legal mechanisms on the part of the State..."

⁴³⁷ CtteeRC, "General Comment 26" (n 50), para. 69

⁴³⁸ *Ibid.*, para. 70

⁴³⁹ *Ibid.*, para. 19

Future Generations

106. Future generations are the ones who, in spite of their lack of contribution to climate change, will suffer the most from its adverse effects, as recognised, amongst others, by the UNGA and the Human Rights Council.⁴⁴⁰ In this regard, former UN Special Rapporteur on Human Rights and the Environment John Knox clarified that the debate on the rights of future generations must “take into account the rights of the children who are constantly arriving, or have already arrived, on this planet”, thus bringing into play the principle of intergenerational equity.⁴⁴¹ This principle calls on States to carefully balance the interests of present and future generations, and to pay due regard to the distributive effects of their policies and measures, including environmental ones.
107. Intergenerational equity is expressly mentioned in numerous international law instruments,⁴⁴² including the Escazú Agreement and Cartagena Convention, which calls on States to safeguard “(t)he natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems ... (for) the benefit of present and future generations”.⁴⁴³ The international definition of ‘sustainable use’ of biological resources, under the CBD, as the “use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations”.⁴⁴⁴ The argument here is that interpretation of intergenerational equity must be based on the respect of children’s human rights, as outlined in the previous section.
108. In addition, the recently adopted Maastricht Principles on the Human Rights of Future Generations⁴⁴⁵ clarify the interlinkages between the protection of the environment – including the marine environment – and the human rights of future generations, and highlight numerous violations in respect of, e.g., the enjoyment of natural resources or decision-making.⁴⁴⁶ In this regard, the Principles aim to clarify that States have the obligation to respect, protect and fulfil the human rights of future generations,⁴⁴⁷ whereby such obligations extend to all State conducts, whether actions or omissions, and whether undertaken individually or collectively,⁴⁴⁸ and further urge States to ensure effective remedies⁴⁴⁹ and the meaningful representation of future generations in decision-making.⁴⁵⁰

⁴⁴⁰ UNGA Resolution 76/300 (n. 48); *cfr.* HRC Resolution A/HRC/RES/52/23 (n. 365), Preamble

⁴⁴¹ HRC, ‘Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment,’ A/HRC/37/58 (24 January 2018), para. 68 [Special Rapporteur J Knox 2018]

⁴⁴² See, amongst many, Article 3(1) UNFCCC; *cfr.* Paris Agreement, Preamble

⁴⁴³ Stockholm Declaration on the Human Environment, A/CONF.48/14/Rev. 1 (1973), A/Conf.48/14, 2, Corr. 1 (1972), Principle 2

⁴⁴⁴ Article 2 CBD

⁴⁴⁵ S Liebenberg et al., “Maastricht Principles on the Human Rights of Future Generations” (July 2023), available at <https://www.rightsoffuturegenerations.org/home>

⁴⁴⁶ *Ibid.*, see, respectively, para. 17 and para. 22

⁴⁴⁷ *Ibid.*, para. 13(a)

⁴⁴⁸ *Ibid.*, para. 13(b)

⁴⁴⁹ *Ibid.*, para. 13(d)

⁴⁵⁰ *Ibid.*, para. 22(a). In this regard, see S Shields et al. (n. 290)

109. The mutually supportive interpretations outlined in this submission find resonance in the Montreal-Kunming Global Biodiversity Framework (GBF), the global blueprint aiming to “catalyse, enable and galvanise urgent and transformative action by governments, and subnational and local authorities with the involvement of all of society, to halt and reverse biodiversity loss”.⁴⁵¹

⁴⁵¹ Kunming-Montreal Global Biodiversity Framework (n. 111), para. 4

D. Obligations Arising from the Convention regarding the Prevention and the Protection of Territorial and Environmental Defenders, As Well As Women, Indigenous Peoples, And Afro-Descendant Communities in the Context of the Climate Emergency

110. Pursuant to the obligations arising from Articles 1(1) and 2 of the American Convention, States undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, States to the Convention undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.
111. The Inter-American Court has on multiple occasions clarified that States have an obligation to conduct environmental and socio-cultural impact assessments, seek the free prior informed consent and ensure fair and equitable benefit-sharing with Indigenous and tribal peoples when authorising or taking development or conservation actions that may negatively affect the territories and human rights of Indigenous and tribal peoples, developing a consistent line of interpretation on the basis of the CBD and its decisions.⁴⁵² This line of interpretation is relevant to the selection and application of climate change mitigation and adaptation measures, including at the ocean-climate nexus.

Indigenous Peoples

112. States have to pay due regard to the livelihoods and cultures of Indigenous and tribal peoples within ecosystems that are particularly vulnerable to climate change negative impacts by taking into account their socio-economic and cultural co-benefits,⁴⁵³ thereby effectively and meaningfully involving them.⁴⁵⁴ In this regard, CBD Parties have adopted the Akwé: Kon Guidelines on Socio-Cultural and Environmental Impact Assessments,⁴⁵⁵ which provide a step-by-step approach to assessing inter-linked socio-cultural and biodiversity impacts of a given plan or policy on sacred sites and areas traditionally occupied or used by Indigenous peoples and local communities. The Guidelines specifically relate to: beliefs systems, languages and customs, traditional systems of natural resource use, maintenance of genetic diversity through Indigenous customary management, exercise of customary laws regarding land tenure, as well as distribution of resources and benefits from transgenerational aspects, including opportunities for elders to pass on their knowledge to youth.⁴⁵⁶ In this regard, there

⁴⁵² E Morgera, “Under the radar...” (n 167)

⁴⁵³ CBD Dec. XIV/5, para. 5(a-b)

⁴⁵⁴ CBD Dec. X/33, para. 8(u-v). See, amongst others, IACtHR, *Saramaka People v Suriname* (n 325), para. 129 and 130; IACtHR, *Kichwa Indigenous People of Sarayaku v. Ecuador*, (n 325) para. 206; and IACtHR, *Kaliña and Lokono Peoples* (n 167), para. 215

⁴⁵⁵ CBD Dec. VII/16 F, “Akwe: Kon Voluntary Guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities”, UNEP/CBD/COP/DEC/VII/16 (13 April 2014) [Akwe: Kon Voluntary Guidelines]

⁴⁵⁶ *Ibid.*, para 46

is congruence with Article 14 of the SPAW Protocol, which provides exemption for traditional activities.

113. The Akwé: Kon Guidelines also call for the integration of fair and equitable benefit-sharing as part of any assessment, which is a requirement for the protection of the human rights of Indigenous peoples,⁴⁵⁷ and is also expected under the Small-Scale Fisheries Guidelines⁴⁵⁸ and the UN Declaration on the Rights of Peasants (UNDROP).⁴⁵⁹ The consideration of fair and equitable benefit-sharing is essential to move away from an exclusive focus on ‘damage control’ issues,⁴⁶⁰ to one which carefully considers benefits from the viewpoint of Indigenous peoples and other communities. At the early stage of scoping for impacts, in and of itself requires a systematic consideration of both the negative impacts (e.g. potential damage to ways of life, livelihoods, well-being and traditional knowledge) and the positive impacts on food, health, environmental sustainability, together with community well-being, vitality and viability (e.g. employment levels and opportunities, welfare, education and its availability, standards of housing, infrastructure, services).⁴⁶¹
114. Several international human rights bodies⁴⁶² have specifically mentioned the importance of the CBD Akwé: Kon Guidelines. The position of the Inter-American Court on these issues⁴⁶³ has been followed by other international human rights bodies (e.g. under the Convention on the Elimination of Racial Discrimination (CEDAW)⁴⁶⁴ and is considered generally applicable to global human rights treaties.⁴⁶⁵ Such an instrument, as interpreted and applied in the jurisprudence of international courts and treaty bodies,⁴⁶⁶ calls for undertaking EIAs where the given project or activities may cause significant harm to lands, waters or resources traditionally belonging to Indigenous Peoples.⁴⁶⁷

⁴⁵⁷ Various international interpretative guiding documents have clarified this obligation under international human rights treaty law, as summarised in the Framework Principles on Human Rights and the Environment (n. 193), Principle 15

⁴⁵⁸ Food and Agriculture Organisation, “Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication”, (FAO 2014), Sections 5.1 and 5.10 [SSF Guidelines]

⁴⁵⁹ UNDROP (n. 133) Article 5. See Morgera and Nakamura (n. 133)

⁴⁶⁰ E Morgera, “Under the radar...” (n 167)

⁴⁶¹ Akwé: Kon Voluntary Guidelines (n 455), para 40

⁴⁶² HRC ‘Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment’ UN Doc A/HRC/34/49 (19 January 2017) para. 72

⁴⁶³ IACtHR, Advisory Opinion OC-23/17 (n 41); *cfr.* IACtHR, *Saramaka People v Suriname* (n 325), para 41; IACtHR, *Yakye Axa Indigenous Community v Paraguay*, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 125 (17 June 2005) paras. 124, 135 and 137; IACtHR, *Kaliña and Lokono Peoples v Suriname* (n. 167), para. 164. In particular, in *Kaliña and Lokono Peoples v Suriname*, the IACtHR acknowledged that EIAs ‘must respect the traditions and culture of the Indigenous peoples’, para. 215

⁴⁶⁴ CERD ‘Concluding Observations on the Combined Thirteenth to Fifteenth Periodic Reports of Suriname’ UN Doc CERD/C/SUR/CO/13-15 (25 September 2015), para 26

⁴⁶⁵ Framework Principles on Human Rights and the Environment (n 193), Principles 8 and 15

⁴⁶⁶ IACtHR, Advisory Opinion OC-23/17 (n. 41); *cfr.* IACtHR, *Saramaka People v Suriname* (n. 355), para 41; IACtHR, *Yakye Axa Indigenous Community* (n. 463) paras. 124, 135 and 137; IACtHR, *Kaliña and Lokono Peoples v Suriname* (n. 167), para. 164. In addition to the IACtHR, the Committee on the Elimination of Racial Discrimination (CERD) has also upheld the need for EIAs to assess impacts on the human rights of vulnerable communities. See CERD, “*Concluding Observations on the Combined Thirteenth to Fifteenth Periodic Reports of Suriname*”, UN Doc CERD/C/SUR/CO/13–15 (25 September 2015) para. 26. This is also upheld in the SSF Guidelines (n. 458) and in the UNDROP (n. 133): *cfr.* SSF Guidelines (n. 458) and in the UNDROP (n. 133)

⁴⁶⁷ IACtHR, Advisory Opinion OC-23/17 (n 41), paras. 156–170. On the respect for the traditions, culture, and practices of indigenous peoples, see in particular *ibid.*, IACtHR, *Saramaka People v Suriname* (n. 325), para. 41 and *Kaliña and Lokono Peoples v Suriname* (n. 167), para. 164

115. Free prior informed consent and fair and equitable benefit-sharing are also required when Indigenous and local knowledge are integrated in climate change response measures,⁴⁶⁸ according to the CBD,⁴⁶⁹ the human right to science⁴⁷⁰ and Principle 15 of the Framework Principles on Human Rights and the Environment.⁴⁷¹

Climate & Ocean Defenders⁴⁷²

116. Environmental non-governmental organisations and activists are protected by international human rights law as environmental human rights defenders, even if they may not self-identify as such.⁴⁷³ Environmental human rights defenders were defined by former UN Special Rapporteur on Human Rights Defenders Michel Forst, as the individuals and communities that raise awareness about the negative impacts on human rights of unsustainable decisions on the environment.⁴⁷⁴ Environmental human rights defenders include climate-, land- and ocean-defenders, and are increasingly the object of (often lethal) attacks by governments or private actors, through harassment, denigration or side-lining.⁴⁷⁵ They are increasingly recognised and studied as agents of change,⁴⁷⁶ including for their role in preventing unsustainable and unjust uses of the environment that may lead to conflict.⁴⁷⁷
117. Former UN Special Rapporteur John Knox clarified specifically that activists that ‘protect components of ecosystems whose benefits to humans may be less obvious, such as endangered species’ should be considered environmental human rights defenders due to the links between biodiversity and human rights.⁴⁷⁸ Environmental human rights defenders are entitled to all the rights and protections set out in the 1998 UN Declaration on the Right and Responsibility of

⁴⁶⁸ UN Committee on Economic, Social and Cultural Rights, General Comment No. 25 (2020) on Science and Economic, Social and Cultural Rights of the International Covenant on Economic, Social and Cultural Rights, E/C.12/GC/25, 30 April 2020, para. 40

⁴⁶⁹ CBD Art. 8(j); The CBD Tkarihwaié:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities Relevant to the Conservation and Sustainable Use of Biological Diversity; and the CBD Mo' otz Kuxtal Voluntary Guidelines for the development of mechanisms, legislation or other appropriate initiatives to ensure the “prior and informed consent”, “free, prior and informed consent” or “approval and involvement”, depending on national circumstances, of indigenous peoples and local communities for accessing their knowledge, innovations and practices, for fair and equitable sharing of benefits arising from the use of their knowledge, innovations and practices relevant for the conservation and sustainable use of biological diversity, and for reporting and preventing unlawful appropriation of traditional knowledge

⁴⁷⁰ General Comment No. 25 (n. 468), para 1

⁴⁷¹ Framework Principles on Human Rights and the Environment (n 193), Principle 15

⁴⁷² AMSN Lancaster and B Nurse, *Children’s Rights, Climate Change & The Ocean: Can Article 9 Of The Escazú Agreement Provide Opportunities For Children As Climate & Ocean Defenders?* (RECEIL, 2024 *forthcoming*)

⁴⁷³ M Forst, ‘Report of the Special Rapporteur on the Situation of Human Rights Defenders’ UN Doc A/71/281 (3 August 2016).

⁴⁷⁴ *Ibid*

⁴⁷⁵ Global Witness, ‘Defending Tomorrow: The Climate Crisis and Threats Against Land and Environmental Defenders’ (2020) <https://www.globalwitness.org/en/campaigns/environmental-activists/defending-tomorrow>

⁴⁷⁶ A Nah et al, ‘A Research Agenda for the Protection of Human Rights Defenders’ (2013) 5 *Journal of Human Rights Practice* 522

⁴⁷⁷ A Scheidel et al, ‘Environmental Conflicts and Defenders: A Global Overview’ (2020) 63 *Global Environmental Change* 102104

⁴⁷⁸ J Knox, ‘Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment’ UN Doc A/HRC/34/49 (19 January 2017) paras 31–32 and 68; see also Special Rapporteur J Knox 2018 (n. 441) Framework Principle 4

Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders).

118. To respect defenders' rights, States must ensure a safe and enabling environment for them to operate free from threats, harassment, intimidation, and violence, including by providing appropriate training for security officials. Protection further entails publicly recognizing the contributions of defenders to society and ensuring that their work is not stigmatised.⁴⁷⁹ Similar protections are included in the recently adopted Escazú Agreement,⁴⁸⁰ and in 2022, parties to the Aarhus Convention appointed a Special Rapporteur on Environmental Defenders as part of a rapid response mechanism to protect any person experiencing or at imminent threat of penalisation, persecution, or harassment for seeking to exercise their environmental rights.⁴⁸¹ However, heightened levels of protection are needed for children defenders,⁴⁸² and Article 9 of the Escazú Agreement provides exactly such a framework in Latin America & the Caribbean.⁴⁸³
119. Article 9 of the Escazú Agreement⁴⁸⁴ entreats State Parties to guarantee a safe and enabling environment for persons, groups and organisations which promote and defend human rights in environmental matters, so that they can be free from threat, restriction, and insecurity. Governments should also ensure that there are adequate and effective measures in place to recognise, protect and promote all the rights of human rights defenders in environmental matters, including their right to life, personal integrity, freedom of opinion and expression, peaceful assembly and association, and free movement, as well as their ability to exercise their access rights, taking into account its international obligations in the field of human rights, its constitutional principles and the basic concepts of its legal system. It is imperative that each State shall also take appropriate, effective, and timely measures to prevent, investigate and punish attacks, threats, or intimidation that human rights defenders in environmental matters may suffer while exercising the rights set out in the Agreement.
120. Escazú is a landmark agreement for a variety of reasons,⁴⁸⁵ not the least of which is its provision. Latin America and the Caribbean has earned the reputation for being the world's deadliest region for human rights defenders and killings of environmental activists.⁴⁸⁶ Despite these challenging circumstances, human rights defenders (HRDs) in the Americas are undeterred in their long-standing role in defending land and territories, seeking access to justice and building peace to sustain creative responses to persisting challenges in the region,

⁴⁷⁹ M Sekaggya, 'Human Rights Defenders' UN Doc A/66/203 (28 July 2011); and M Forst, 'Situation of Human Rights Defenders' UN Doc A/71/281 (3 August 2016)

⁴⁸⁰ Escazú Agreement(n.53), Article 9

⁴⁸¹ UNECE 'Decision VII/9 (n. 424). See Weber (n. 424)

⁴⁸² L Lundy, 'The Rights of Child Human Rights Defenders: Implementation Guide' (Child Rights Connect 2020), <https://wedocs.unep.org/bitstream/handle/20.500.11822/34574/RCHRD.pdf?sequence=1&isAllowed=y>

⁴⁸³ Lancaster and Nurse (n. 472)

⁴⁸⁴ S Stec and J Jendroška, 'The Escazú Agreement and the regional approach to Rio Principle 10: Process, Innovation, and Shortcomings' (2019) 31 (3) Journal of Environmental Law 533; U Etemire, 'Public Voices and Environmental Decisions: The Escazú Agreement in Comparative Perspective' (2023) 12 (1) Transnational Environmental Law 175-199

⁴⁸⁵ Lancaster (n. 403); S López-Cubillos, et al., 'The Landmark Escazú Agreement: An Opportunity to Integrate Democracy, Human Rights, and Transboundary Conservation' (2022) 15 (1) Conservation Letters: e12838; L De Silva, 'Escazú Agreement 2018: A Landmark for the LAC Region' (2018) 2 (1) Chinese Journal of Environmental Law 9

⁴⁸⁶ European Parliament Research Service, 'Democracy and Human Rights in Latin America: Is Democratic Erosion Gathering Pace?' (Briefing Note, January 2022), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/698868/EPRS_BRI\(2022\)698868_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/698868/EPRS_BRI(2022)698868_EN.pdf)

and to transform their societies and communities.⁴⁸⁷ However defenders have been subject to a variety of coercive actions, including death threats, physical attacks, arrest and detention, surveillance and other forms of harassment,⁴⁸⁸ primarily in regard to land rights issues, and extractive industries and megaprojects.⁴⁸⁹ Defenders have increasingly defended their rights to access justice, freedom of expression and gender rights, with women human rights defenders (WHRDs) and LGBTQIA+ groups continuing to flourish and creatively build new leaderships.⁴⁹⁰ However, the criminalisation of defenders, including WHRDs, journalists and anti-corruption defenders continues to be a pervasive threat, and those defending indigenous peoples', Afro-descendant communities', land and environmental rights were exposed to persistent and alarming levels of violence by both state and non-state actors, including widespread killings.

121. Additionally, the impacts of climate change such as the displacement of peoples and climate migration, is also spawning another wave of environmental defenders. In 2022, the Americas saw their first climate refugees, as the Indigenous Guna peoples of Gardí Sugdub, or Crab Island⁴⁹¹ in the San Blás archipelago have been forced to relocate *en masse* to a new settlement on the mainland Panama because of rising sea levels.⁴⁹² In Antigua & Barbuda on the other hand, after Hurricane Irma – a Category 5 + storm – hit the island in 2017, the government of Antigua and Barbuda promoted new laws⁴⁹³ which allowed the construction of a multi-million dollar luxury resort and golf course⁴⁹⁴ in a protected wetland,⁴⁹⁵ as well as a landing strip for private jets through 300 acres of virgin forest. This erosion of the traditional land tenure system⁴⁹⁶ threatens traditional livelihoods such as farming, fishing and seed work first

⁴⁸⁷Frontline Defenders, *Global Analysis* 2022, https://www.frontlinedefenders.org/sites/default/files/1535_fld_ga23_web.pdf, 34

⁴⁸⁸ *Ibid.*, 33

⁴⁸⁹ *Ibid.*

⁴⁹⁰ *Ibid.*, 34

⁴⁹¹Human Rights Watch, “The Sea is Eating the Land Below Our Homes” (31 July 2023), <https://www.hrw.org/report/2023/07/31/sea-eating-land-below-our-homes/indigenous-community-facing-lack-space-and-rising>

⁴⁹²Michael Scott, Meet the first climate refugees from the Americas to flee rising seas’ (*Financial Times*, 27 October 2023), <https://www.ft.com/content/7351d53f-ac37-4716-8715-9af005874001>

⁴⁹³Gregory Scruggs, ‘Bitter land dispute hovers over Barbuda's post-hurricane reconstruction’ (*Reuters*, 6 December 2017), <https://www.reuters.com/article/barbuda-hurricane-landrights-idINL8N1O44UP>. Barbuda is an autonomous part of the twin-island state of Antigua and Barbuda, located 30 miles (48 km) north of Antigua, in the eastern Caribbean. With a population of 1,634, and an area of 62 square miles (160 km²), Barbuda is one of the most sparsely populated islands in the Caribbean, with the sole settlements on the island are Codrington and its surrounding localities. Barbuda is a flat island with the western portion being dominated by Codrington Lagoon, a Ramsar site, now threatened by proposed land developments. The economy of Barbuda is based mostly around tourism and fisheries, including a significant lobster catching industry, accounts for most of the island's exports. In September 2017, the Category 5 Hurricane Irma destroyed more than 90 percent of Barbuda's buildings, and the entire population was temporarily evacuated to Antigua

⁴⁹⁴ Kenneth Mohammed, ‘“Billionaire club”: the tiny island of Barbuda braces for decision on land rights and nature’ (*The Guardian*, 6 November 2023), <https://www.theguardian.com/global-development/2023/sep/26/billionaire-club-the-tiny-island-of-barbuda-braces-for-decision-on-land-rights-and-nature>

⁴⁹⁵Ramsar Sites Information Services, Codrington Lagoon, Barbuda, <https://rsis Ramsar.org/ris/1488>

⁴⁹⁶ In 1685, the entire island Barbuda was leased to brothers John and Christopher Codrington as a single land grant. After the abolition of slavery in 1834, this title was retained, and Barbudans kept on autonomous cultivation on communal property. Barbuda is therefore characterized by a commonhold land tenure, a system of property ownership in which all land is held in common by Barbudans only. Approval for foreign owned developments is granted leasehold (fixed amount of time to own) for property, but not for the parcel of land. This contrasts with freehold ownership of land, in which an individual has outright ownership of a parcel

practised by enslaved African women.⁴⁹⁷ Land rights defenders are now enmeshed in a legal battle⁴⁹⁸ about the human and environmental impact of construction, which may expose the island to greater risk from future climate events. However, they are subject to criminalisation, defamation, arbitrary arrests, judicial harassment, and repeated intimidation, as they fight for their rights to food, water and sanitation, housing and a healthy environment, as well as cultural rights.⁴⁹⁹

122. It is therefore submitted that States must adopt and implement laws that protect human rights defenders in accordance with international human rights law, including by ensuring that their laws do not criminalise or otherwise prevent the exercise of their rights to freedom of expression, assembly, and association, among others. In that regard, States should refer to the Model National Law on Human Rights Defenders, developed by the International Service for Human Rights (ISHR) and 28 leading experts in the field, including current and former UN Special Rapporteurs on human rights defenders.⁵⁰⁰

of land and property indefinitely. This is an unusual arrangement for the Caribbean Region, which has its origins in colonialism, and has been framed by Antigua as a primary threat to economic recovery after the 2017 hurricane. Antigua, like the remainder of the Commonwealth Caribbean, has a long history of freehold ownership and struggle to obtain “productive” lands from former planters, which resulted in increasingly fragmented land tenure and land-use practices that have posed challenges for practitioners

trying to decrease their exposure to extreme events. See Cory Look, Erin Friedman, and Geneviève Godbout, ‘The Resilience of Land Tenure Regimes During Hurricane Irma: How Colonial Legacies Impact Disaster Response and Recovery in Antigua and Barbuda’ (2019) 6(1) *Journal of Extreme Events* 1940004; Taylor McCammon Lightman, ‘Dispossessed: Exploring the Factors That Enable Post-Disaster Land Grabs’ (2020); Kevon Rhiney, ‘Dispossession, Disaster Capitalism and The Post-Hurricane Context in the Caribbean’ (2020) 78 *Political Geography* 102171 (2020): 10-1016; Andreas Rienow, et al. “Detecting Land Use and Land Cover Change on Barbuda Before and After the Hurricane Irma with Respect to Potential Land Grabbing: A combined Volunteered Geographic Information and Multi Sensor Approach” (2022) 108 *International Journal of Applied Earth Observation and Geoinformation* 102732

⁴⁹⁷ Sarah Johnson, ‘Seeds of potential: the Caribbean women reviving a dying art’ (*The Guardian*, 28 October 2023), <https://www.theguardian.com/world/2023/oct/28/antigua-and-barbuda-caribbean-seed-work>

⁴⁹⁸ *Mussington and Another v Development Control Authority and 2 Others* (Antigua and Barbuda), JCPC 2021/0116. See Alana Malinde S.N. Lancaster, ‘Out Of Their Depth & O-fishally At Sea? The Privy Council’s Judgement in *Framhein & Mussington*, and the Implications for Customary Users of the Ocean in Post-Colonial Caribbean States’ (2024) *International & Comparative Law Quarterly* (forthcoming)

⁴⁹⁹ Frontline Defenders, ‘22 environmental and human rights defenders facing charges for visiting contested luxury tourism construction site – serious concerns over legal intimidation’ (27 September 2022), <https://www.frontlinedefenders.org/en/statement-report/22-environmental-and-human-rights-defenders-facing-charges-visiting-contested>

⁵⁰⁰ See International Service for Human Rights (ISHR), Model Law: For the Recognition and protection of Human Rights Defenders (15 June 2016) https://ishr.ch/sites/default/files/documents/model_law_full_digital_updated_15june2016.pdf

Women & Girls

123. Women and girls experience disproportionate impacts from climate change. The United Nations estimates that, globally, women and girls are 14 times more likely than men to die during a climate disaster and represent 80% of displaced people.⁵⁰¹ Other factors such as the likelihood of violence⁵⁰² and other impacts from climate risks⁵⁰³ the increased care burden,⁵⁰⁴ and the lack of adequate housing and basic services⁵⁰⁵ disproportionately affect women's ability to anticipate, cope with, and recover from the impact of disasters. For example, in LAC, women's land tenure security is much lower than that of men, representing only 25% of landowners in the region.⁵⁰⁶
124. Additionally, from an intersectional perspective, women and people with disabilities face higher risks and mortality⁵⁰⁷ during climate disasters. Studies indicate that Hurricane Katrina disproportionately impacted 155,000 people with visual, physical, and learning disabilities.⁵⁰⁸ In addition, it is estimated that globally women represent 73.4% percent of all female and domestic workers⁵⁰⁹ who are international migrants. Finally, indigenous women,⁵¹⁰ who in their role as environmental defenders⁵¹¹ suffer from gender-based violence, also depend heavily on natural resources⁵¹² for their survival.
125. Women are powerful agents for urban climate action. In urban contexts, women continue to pave the way for inclusion, helping communities to become safer, more resilient and prepared to face disasters. The Inter-American Development Bank (IDB) - as part of its Vision 2025⁵¹³ "Reinvest in the Americas" - is committed to increasing the adaptation and mitigation of climate change in our cities in projects where the knowledge and contributions of women are

⁵⁰¹ UN. Women, 'SDG 13: Take urgent action to combat climate change and its impacts' <https://www.unwomen.org/en/news/in-focus/women-and-the-sdgs/sdg-13-climate-action>

⁵⁰² L. Aguilar Revelo, *La igualdad de género ante el cambio climático: ¿qué pueden hacer los mecanismos para el adelanto de las mujeres de América Latina y el Caribe?*, Serie Asuntos de Género, N° 159 (LC/TS.2021/79), (Santiago: CEPAL, 2021). https://repositorio.cepal.org/bitstream/handle/11362/46996/4/S2100332_es.pdf , 10

⁵⁰³ *Ibid.*, 26

⁵⁰⁴ *Ibid.*

⁵⁰⁵ A. Revi, et. al., 'Urban areas' in: *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [C.B. Field, et. al., (eds.)]. (Cambridge: Cambridge University Press, 2014) https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-Chap8_FINAL.pdf, 535

⁵⁰⁶ S Chant and C McIlwaine, *Cities, Slums and Gender in the Global South Towards a Feminised Urban Future* (Oxfordshire: Routledge, 2016)

⁵⁰⁷ UN Department of Economic and Social Affairs, *Disability and Development Report* (UNDESA, 2018) <https://www.un.org/development/desa/disabilities/publication-disability-sdgs.html>

⁵⁰⁸ UNEP, 'How climate change disproportionately impacts those with disabilities' (9 December 2019), <https://www.unep.org/news-and-stories/story/how-climate-change-disproportionately-impacts-those-disabilities>

⁵⁰⁹ UN Women, 'Refugee and migrant women' <https://www.unwomen.org/es/news/in-focus/women-refugees-and-migrants>

⁵¹⁰ A C García, 'Urban indigenous women: The challenge of creating fairer cities with cultural identity' (IDB, 13 September 2021), <https://blogs.iadb.org/ciudades-sostenibles/en/urban-indigenous-women-the-challenge-of-creating-fairer-cities-with-cultural-identity/>

⁵¹¹ C Herrera, 'Mujeres indígenas: defensoras del medio ambiente' (NRDC, 9 August 2017), <https://www.nrdc.org/es/bio/carolina-herrera/mujeres-indigenas-defensoras-medio-ambiente>

⁵¹² R S Santisteban (ed.), *Mujeres indígenas frente al cambio climático* (IWGIA, 2019), <https://www.iwgia.org/images/documentos/Libros/MujeresIndigenasCambioClimatico19.pdf>

⁵¹³ IDB, *Visión 2025 Reinvertir En Las Américas: Una Década De Oportunidades* (2021), <https://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=EZSHARE-328957462-89>

recognised. An example of this is the Comprehensive Tourism and Urban Development Program of the Colonial City of Santo Domingo, where training for women in the management and maintenance of electric vehicles (eco-driving), green employment with professional potential, in an area dominated by men, will be prioritised⁵¹⁴ and after Hurricane Matthew, in Port-au-Prince, Haiti,⁵¹⁵ local women-led groups created aid networks to address the immediate needs of women and children.

126. More than 80% of the population of LAC⁵¹⁶ lives in urban areas, and in them the main risks and solutions of the impacts of climate change are concentrated. For this reason, it is essential to recognize the role of women and ensure their equitable participation in the different climate decision-making spaces in our cities. For this reason, the *Amicii* submit that there be greater visibility in databases, strengthening the disaggregated registry at the national and local levels, accounting for variables associated with intersectionality and interculturality in contexts of climate change such as gender, ethnicity, race, socioeconomic level, disability, etc. Cities must ensure the equitable and intersectional participation of women in the management of national ecosystems. States must ensure gender equality when developing resource mobilisation policies or strategies, apply climate finance instruments, and ensure equal participation in the use of financial resources, particularly at the local level. There has been a strong call for the equitable incorporation of women in the labor “just transition” of our cities, training them with the necessary skills to meet the current and future demand for green jobs.
127. Guidance provided by the CEDAW Committee in 2016 is thus relevant in interpreting State obligations under the international climate change regime, such as: establishing gender-responsive enabling institutional, legal and policy frameworks, that are adequately budgeted, on rural development, agriculture, water, forestry, livestock, fisheries and aquaculture; mainstreaming a gender perspective in all rural development policies, strategies, plans and programmes, with a view to enhancing women’s agency, their fair and equitable participation along with their leadership; and developing and implementing temporary special measures to enable rural women to benefit from the public distribution, lease or use of land, water bodies, fisheries, forests and from agrarian reform policies, rural investments and management of natural resources in rural areas, giving priority to landless rural women in the allocation of public lands, fisheries and forests.⁵¹⁷ In addition, the CEDAW Committee recommended ensuring that rural development projects (which arguably includes climate response measures) are implemented only after: conducting participatory gender and environmental impact assessments (EIAs) with full participation of rural women; obtaining rural women’s free, prior informed consent (FPIC) and ensuring benefit-sharing (for instance, in revenues generated by large-scale development projects).⁵¹⁸ The UN Special Rapporteur on Human Rights and the Environment confirmed in 2022 that States must “recognise and prioritise the collective and individual needs and rights of women and girls in these communities in all climate actions and

⁵¹⁴ IDB, Integrated Tourism and Urban Development Program for the Colonial City of Santo Domingo, (2021), <https://www.iadb.org/en/project/DR-G0004>

⁵¹⁵ A Tenuta, ‘After Hurricane Matthew, Women Lead The road to Recovery in Haiti’ (The Wire, 22 October 2016), <https://thewire.in/world/haiti-hurricane-matthew-recovery-women>

⁵¹⁶ CEPAL, La urbanización presenta oportunidades y desafíos para avanzar hacia el desarrollo sostenible <https://www.cepal.org/notas/73/Titulares2>

⁵¹⁷ Convention on the Elimination of All Forms of Discrimination against Women, General Recommendation No. 34 on the Rights of Rural Women, CEDAW/C/GC/34, 7 March 2016, <https://digitallibrary.un.org/record/835897?ln=en>

⁵¹⁸ Convention on the Elimination of All Forms of Discrimination against Women., Concluding observations on the seventh periodic report of Argentina, CEDAW/C/ARG/CO/7, 25 November 2016,

efforts to conserve, protect, restore, sustainably use and equitably share the benefits of nature.⁵¹⁹ In 2022, the CEDAW Committee adopted a series of recommendations specifically on Indigenous women and girls.⁵²⁰

Afro-descendant Peoples

128. African diaspora communities in the Americas, or “Afro-descendants,” are culturally distinct group of peoples, who comprise more than 133 million citizens that make up the African diaspora.⁵²¹ Found in the largest concentration in LAC,⁵²² Afro-descendants are defined in the Declaration of Santiago related to Afro-descendants,⁵²³ as “persons of African origin who live in the Americas and in the region of the African Diaspora as a result of slavery, who have been denied the exercise of their fundamental rights. : Afro-descendance” resulted from the trade of enslaved African people that took place between the sixteenth and nineteenth centuries.⁵²⁴ The definition agreed at the Regional Conference of the Americas was ratified at the Third World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, as well as most of the content of the Declaration of Santiago.
129. A particular Afro-descendant culture in Latin America developed through a *sui generis* process of acculturation and deculturation shaped by numerous worldviews and through long-term conditions that were very different from those experienced by Indigenous and mestizo groups⁵²⁵ and in the main, Afro-descendants prefer to self-identify. Afro-descendant culture in the Americas follows a long-term, distinct, historical process mediated by the circumstances of slavery, colonisation, and exclusion, during which they have been subjected to violence and intolerant attitudes, and have encountered barriers related to structural racism, inequality, and poverty that obstruct their collective development and fulfilment as citizens.
130. Afro-descendants began to seek legal recognition in the context of international human rights law, and especially within the InterAmerican human rights system. Progress has been remarkable, including the rulings of the Inter-American Court of Human Rights, changes in the constitutional and legal systems of Latin American countries, and a UN Draft of a

⁵¹⁹ Human Rights Council, Women, girls and the right to a clean, healthy and sustainable environment, A/HRC/52/33, 5 January 2023

⁵²⁰ Convention on the Elimination of All Forms of Discrimination against Women, General recommendation No. 39 (2022) on the rights of Indigenous women and girls, CEDAW/C/GC/39, 31 October 2022

⁵²¹ A L Montes, *Contrapunteos Diáspóricos. Cartografías Políticas De Nuestra Afroamérica* (Universidad del Externado, 2020)

⁵²² UN OHCHR, ‘People of African Descent’ <https://www.ohchr.org/sites/default/files/Documents/Issues/Racism/PAD.pdf>

⁵²³ Declaration of the Regional Conference of Santiago, WCR/RCONF/SANT/2000/L.1/Rev.4 (20 December 2000), [https://www.oas.org/dil/2000%20Declaration%20of%20the%20Conference%20of%20the%20Americas%20\(Preparatory%20meeting%20for%20the%20Third%20World%20Conference%20against%20Racism,%20Racial%20Discrimination,%20Xenophobia%20and%20Related%20Intolerance\).pdf](https://www.oas.org/dil/2000%20Declaration%20of%20the%20Conference%20of%20the%20Americas%20(Preparatory%20meeting%20for%20the%20Third%20World%20Conference%20against%20Racism,%20Racial%20Discrimination,%20Xenophobia%20and%20Related%20Intolerance).pdf)

⁵²⁴ R Bastide, *Las Américas Negras: Las Civilizaciones Africanas En El Nuevo Mundo* (Madrid: Alianza, 1969).

⁵²⁵ M Zapata Olivella, *La Rebelión De Los Genes. El Mestizaje Americano En La Sociedad Futura* (Altamir, 1997)

Declaration of the Rights of People of African Descent, as part of the International Decade for People of African Descent (2015–2024). However, conceptual, technical, and doctrinal issues still exist in defining the legal agency of people of African descent under international law.⁵²⁶

131. International instruments have inspired domestic legal and constitutional reforms in Latin America. For example, the Constitutions of Ecuador, Bolivia, and Mexico have granted Afro-descendants the status of “peoples.” Chile and Costa Rica also recognize Afro-descendant peoples as tribal peoples, including in Chile’s constitutional draft, rejected in September 2022.⁵²⁷ Further, some domestic courts have followed suit, notably, the Constitutional Court of Colombia which has recognised Afro-Colombians, in particular the Black communities that live in the Colombian Pacific basin, including the area of the Atrato River which flows into the Caribbean Sea, as tribal peoples.⁵²⁸
132. Additionally, under ILO Convention No. 169, Afro-descendant communities have a similar status to that of pre-Hispanic Indigenous populations, as it applies to populations considered “Indigenous” or “tribal,” regarded as such on account of their “descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions;”⁵²⁹
133. However, the legal status of people of African descent in the Americas is key for the vindication of their individual and collective human rights, but perspectives of differentiated demands between Indigenous and Afro-descendant peoples have been often ignored.⁵³⁰ For example, the IACtHR in the *Saramaka v. Suriname* case,⁵³¹ recognized Afro-descendants as a group of right holders as Indigenous peoples within the context of the Americas, since Afro-descendants have cultural characteristics similar to tribal peoples and could be recognized as such. Other cases have complemented the recognition of rights to Afro-descendants as tribal peoples,⁵³² but as Dulitzky⁵³³ highlights, the cultural approach adopted by the IACtHR to territorial claims, raises inconsistencies and problem areas,⁵³⁴ which can reinforce the

⁵²⁶ J H A Sánchez, ‘Latin American International Law And Afro-Descendant Peoples’ (2022) 116 American Journal of International Law, 334

⁵²⁷ *Ibid.*, 335

⁵²⁸ Constitutional Court [C.C.] [Constitutional Court], Auto 004/09 (26 January 2009) (Colombia)

⁵²⁹ ILO Convention No. 169 Concerning Indigenous And Tribal People In Independent Countries, 27 June 1989, 1650 U.N.T.S., , Art. 1

⁵³⁰ Sánchez, (n. 526), 336

⁵³¹ *Saramaka People v. Suriname*, Judgment, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007)

⁵³² *Garífuna Triunfo de la Cruz Community v. Honduras*, Judgement, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No.; *Garífuna Punta Piedra Community and its members v. Honduras*, Preliminary Objections, Merits, Reparations and Costs. Judgment (ser. C) No. 304 (Oct. 8, 2015); *Afro-descendant Communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, Preliminary Objections, Merits, Reparations and Costs (ser. C) No. 270 (Nov. 20, 2013); *Moiwana v. Suriname*, Sentencia, Excepciones Preliminares, Fondo, Reparaciones y Costas (Inter.-Am. Ct. H.R. June 15, 2005); *Aloeboetoe et al. v. Suriname*, Merits, Judgment, InterAm. Ct. H.R. (ser. C) No. 305 (Oct. 8, 1991). *Aloeboetoe et al. v. Suriname*, Reparations and Costs, Inter.-Am. Ct. H.R. (ser. C) No. 15 (Sept. 10, 1993); *Aloeboetoe et al. v. Suriname*, Merits, Inter.-Am. Ct. H.R. (ser. C) No. 11 (Dec. 4, 1991)

⁵³³ A E Dulitzky, ‘When Afro-descendants Became Tribal Peoples: The inter-American Human Rights System and Rural Black Communities’ (2010) 15 UCLA J. Int’l L. Foreign Aff. 15 29

⁵³⁴ *Ibid.*, 48 - 60

structural discrimination faced by Afro-descendant peoples in Latin America & the Caribbean.⁵³⁵

134. Despite significant legislative progress at the international and national levels, therefore recognising cultural and ethnic diversity and the rights of Afro-descendant Peoples, social and economic conditions are still drastically unequal and there are large information and recognition gaps that affect their rights, including fighting for a place in international climate and conservation debates. With the advent of the Escazu Agreement.⁵³⁶ Therefore, there is scope for the recognition of collective tenure rights to their ancestral lands. This lacuna has been an obstacle to adequately establishing how important Afro-descendant territories are for protecting biodiversity and dealing with complex challenges such as climate change, ecosystem degradation, loss of food systems, and other environmental problems.⁵³⁷
135. In 2016, the Inter-American Commission on Human Rights (hereinafter ‘Commission’ or ‘IACHR’) addresses State obligations with regard to extraction, exploitation, and development activities concerning natural resources and the special obligations of the States regarding activities of this nature affecting the rights of indigenous peoples and Afro-descendant communities.⁵³⁸ These include, in particular, violations of the right to collective ownership of indigenous and tribal peoples, and Afro-descendant communities over their lands, territories and natural resources; the right to cultural identity and religious freedom; the right to life, health, personal integrity, and a healthy environment; economic and social rights such as food,⁵³⁹ access to water.⁵⁴⁰
136. Recognising the increased vulnerability of Afro-descendant peoples to climate change,⁵⁴¹ Commission also hosted a landmark hearing on ‘The Impact of Extractive Industries on Human Rights and Climate Change in the Caribbean’ during its One Hundred and Eighty-first Period of Sessions which focused on the impact of the mining and fossil fuels industries on the economic, social, cultural and environmental rights of women, Indigenous, Afro-descendant, and rural communities in the Caribbean.⁵⁴² During the Hearing, it was stated that

[e]xtractive industries are fueling ecocide and widespread human rights violations in the Caribbean with little to no accountability. Major threats include the climate crisis, the contamination of ecosystems, the erosion of food and

⁵³⁵ *Ibid.*, 30

⁵³⁶

⁵³⁷ Rights and Resources Initiative, Process of Black Communities (PNC), the Pontifical Universidad Javeriana's Observatory of Ethnic and Campesino Territories (OTEC), and the National Coordination of Articulation of Rural Black Quilombola Communities (CONAQ), *Afro-descendant Peoples' Territories in Biodiversity Hotspots across Latin America and the Caribbean: Barriers To Inclusion In Conservation Policies* (2023), https://rightsandresources.org/wp-content/uploads/Brief-Mapeo_Biodiversidad_English_v5-1.pdf

⁵³⁸ Inter-American Commission on Human Rights, Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities, OEA/Ser.L/V/II., Doc. 47/15, 31 December 2015, <https://www.oas.org/en/iachr/reports/pdfs/ExtractiveIndustries2016.pdf>

⁵³⁹ M W Pasquini, C Sánchez-Ospina, and J-S. Mendoza, ‘Traditional food plant knowledge and use in three afro-descendant communities in the Colombian Caribbean Coast: Part II drivers of change’ (2018) 72 *Economic Botany* 295

⁵⁴⁰ Pan American Health Organization, *Health of Afro-descendant People in Latin America*. (Washington, D.C: PAHO, 2021), <https://iris.paho.org/handle/10665.2/54503>

⁵⁴¹ O Flamand-Lapointe, Olivier, et al. *Climate Change Impacts on the Rights of People of African Descent* (OCHR, 2020).

⁵⁴² Panos Caribbean, IACHR to Hold Landmark Hearing on Extractive Industries, Human Rights, and Climate Change in the Caribbean, 18 October 2021, <https://panoscaribbean.org/en/50-news/182-iachr-to-hold-landmark-hearing-on-extractive-industries-human-rights-and-climate-change-in-the-caribbean>

water security, and the devastation of rural livelihoods and traditional ways of being. We urgently need rights-based, earth-centered alternatives for post-colonial development in the region,”⁵⁴³

137. The inequities faced by Afro-descendant people in a context of discrimination and institutional racism, are often exacerbated by gender inequalities factors related to discrimination and stigmatization, along with gender inequalities and social and economic disadvantages, which compound both the direct and indirect effects of climate change.

⁵⁴³ *Ibid.*, Malene Alleyne, Jamaican human rights lawyer and Founder of Freedom Imaginaries, and Esther Figueroa, Jamaican environmental filmmaker

E. Conclusions

138. In conclusion, the *Amici* respectfully suggests the Court adopt an Opinion grounded in the principle of systemic integration, with a view to clarifying State obligations under international climate change law, international biodiversity law, law of the sea, and international human rights law.
139. Accordingly, as part of their obligations “to ensure the protection of the climate system and other parts of the environment”, States must:
- a. Apply the **ecosystem approach, precautionary principle and international human rights** to the design, implementation, financing, monitoring and review of climate, biodiversity and ocean policies, plans, and actions, including climate change adaptation and mitigation measures and “just transition” or “blue economy” policies, plans and actions. In particular, they must:
 - i. prioritise: drastically reducing greenhouse gas emissions; phasing out fossil fuels production and consumption; and implementing nature-based, including ocean-based, solutions (including removal of greenhouse gases by sinks, and renewable energy);
 - ii. refrain from funding and authorising large-scale carbon dioxide removal actions that do not ensure avoidance of foreseeable harm to biodiversity and human rights;
 - iii. regulate and control contained, small-scale experiments of carbon dioxide removal technologies so that they are subject to environmental and human rights impact assessments, rigorous justification in terms of the need to gather specific scientific data, and public participation standards (access to information, public participation in decision-making, free prior informed consent if negative impacts are foreseeable on Indigenous and Afro-descendant peoples and small-scale fishing and other communities, and access to justice and effective remedies;
 - iv. refrain from undertaking marine geo-engineering activities and deep-seabed mining until there is adequate scientific basis to ensure avoiding foreseeable harm to biodiversity and human rights;
 - v. ensure the meaningful participation of human rights holders in relevant decision-making, including free, prior informed consent of local communities, Indigenous and Afro-descendant peoples where activities or foreseeable harm may involve sacred or traditionally used territories, and children;
 - b. States must minimise activities that increase the vulnerability and reduce the **resilience of biodiversity and ecosystems**, and/or negative impacts on human health or other human rights, such as large-scale, destructive, and illegal, unregulated and unreported (IUU) fisheries;

- c. In creating and managing **area-based measures**, States must:
- i. undertake joint planning of protected area networks (for example transboundary fisheries management areas and MPAs modelled on the ecosystem approach where relevant), and integrate them into wider landscapes, seascapes and sectors through the use of connectivity and biodiversity restoration measures;
 - ii. integrate ecological and social resilience factors of coral reefs and closely associated ecosystems into the design and management of Marine Protected Areas networks, strengthening international, national and regional efforts to manage coral reefs as socio-ecological systems by reducing the impact of global and local stressors;
 - iii. ensure the genuine participation of all relevant human rights holders, including children and seeking the free prior informed consent of Indigenous peoples and local communities - in their design, implementation, financing, monitoring and review;
- d. With regard to **EIAs and SEAs**, and other planning processes, States must:
- i. Assess risks of foreseeable harm to biodiversity and related socio-cultural and economic human rights associated with adaptation, mitigation and disaster risk reduction strategies;
 - ii. take into account the status of biodiversity and its vulnerability to current and future climate change adverse impacts, including ecosystem services science, when planning and implementing adaptation, mitigation and disaster risk reduction strategies;
 - iii. require SEAs and EIAs for commercial, large-scale policies, plans and projects;
 - iv. conduct EIAs with respect to the impact of activities in marine areas beyond national jurisdiction, duly considering consequences of climate change, ocean acidification and related impacts;
 - v. support the conduct of regional SEAs with respect to the impact of activities in marine areas beyond national jurisdiction, duly considering consequences of climate change, ocean acidification and related impacts, and the need for marine scientific research at the genetic level;
 - vi. integrate relevant human rights holders, including children, as well as Indigenous and Afro-descendant peoples and local knowledge holders seeking free prior informed consent and ensuring fair and equitable benefit-sharing when sacred or traditionally used territories are at stake;

- vii. comply with the human rights obligations relating to the environment, including but not limited to, providing for assessment of the environmental impacts of all proposed projects and policies that may affect the enjoyment of human rights; providing in the law for public access to information on environmental matters, including on environmental assessments, and ensuring that relevant information is provided to communities affected by proposed projects in a language that they understand;
 - viii. provide for and facilitating informed public participation in environmental decision-making, including decision-making relating to proposed development projects that may have environmental effects;
 - ix. ensure access to effective remedies for environmental harms; establishing legal and institutional frameworks for environmental protection that regulate environmental harm from private actors as well as government agencies;
 - x. adopt and implement substantive environmental standards that accord wherever possible with international health standards, are non-retrogressive and non-discriminatory, and take into account the situations of those who are particularly vulnerable to environmental harm; effectively implementing international environmental standards.
- e. In respect to **women and girls**, States must:
- i. take additional steps to facilitate the participation of women and girls in climate- and ocean-related decision-making processes;
 - ii. recognise that women and girls face a greater threshold of threat from environmental and climate insecurity because their physiology renders them more susceptible to anthropogenic, as well as environmental harms;
 - iii. put in place measures to increase and protect access to freshwater, land, coastal and marine tenure systems, as well as traditional land tenure systems by women and girls;
 - iv. apply measures to maintain their sustainable livelihoods and ensure their food security, including by providing resources and capacity-building.
- f. In relation to **children and future generations**, States must:
- i. carefully **balance the interests of present and future generations** when adopting climate change response measures;
 - ii. take appropriate preventive measures to protect children against reasonably foreseeable environmental harm and violations of their rights;
 - iii. recognise that are more vulnerable to environmental harm because they are more susceptible to heat, pollutants and vector-borne diseases, among other factors;

- iv. ensure the meaningful representation and participation of children and youth in climate- and ocean-related decision-making processes.
- g. With regard to **environmental, climate, land, ocean and human rights defenders**, States must
 - i. accede to the Escazú Agreement and ensure strong protections for EHRDs in national law, including with respect to rights to freedom of association and expression. In addition to requiring national protections, States should establish an independent international mechanism through which complaints from EHRDs can be received and investigated. Additionally, those eligible to join the Aarhus Convention should do so;
 - ii. publicly recognise the valuable role of human rights defenders, and fight back against suggestions that defenders are working against the interests of the country;⁵⁴⁴
 - iii. ensure prompt and independent investigation of all violations of the rights of human rights defenders, the prosecution of alleged perpetrators, and the provision of effective remedies;
 - iv. establish and support strong national human rights institutions to support access to information and remedies;
 - v. set up specific protection programmes for human rights defenders, which include an early warning system to trigger the launch of protective measures, address risks to defenders' family members, and provide appropriate training to security and law enforcement officials. The programmes should be developed in consultation with human rights defenders themselves, and should consider the different situations faced by different types of human rights defenders;
 - vi. consider adopting a right to a healthy environment at the constitutional level if they have not yet done so. Among other benefits, doing so would forestall claims that environmental defenders are not really defending human rights;
 - vii. reduce barriers to standing in environmental cases and consider instituting environmental courts, and they should facilitate training of judges on the relationship of human rights and the environment;
 - viii. consider whether a regional agreement on corporate due diligence is required to further strengthen the effect of the Escazú Agreement and the Miskito Standards to prevent and address corporate human rights violations;

⁵⁴⁴ These recommendations draw in particular on the Report of the Special Rapporteur on the situation of human rights defenders, Sekaggya (n. 479), UN Doc. A/HRC/25/55, paras. 54-133 (23 December 2013), which set out elements of a safe and enabling environment for human rights defenders

- ix. address the role of corporations in environmental human rights abuses and in relation to violations of the rights of EHRDs.⁵⁴⁵
 - x. ensure prompt and independent investigation of all violations of the rights of human rights defenders, the prosecution of alleged perpetrators, and the provision of effective remedies.
 - xi. establish and support strong national human rights institutions, which include strong protections for EHRDs, including with respect to rights to freedom of association and expression. In addition to requiring national protections, the agreement should establish an independent international mechanism through which complaints from EHRDs can be received and investigated.
- h. Genuinely involve **Indigenous peoples, Afro-descendant peoples, Afro-descendant tribal communities and local communities** in the decision-making, financing, management, monitoring and review processes related to climate change responses, as knowledge- and human rights-holders subject to their free prior informed consent. In particular, States must:
- i. promote community-based measures in agrarian and reef-dependent coastal communities, with a view to maintaining sustainable livelihoods and ensuring food security in reef-dependent coastal communities;
 - ii. apply measures to maintain their sustainable livelihoods and ensure their food security, including by providing resources and capacity-building;
 - iii. enhance collaboration with Indigenous peoples, Afro-descendant peoples and local communities in the conservation and management of biodiversity in coastal and marine areas;
 - iv. recognise the rights of Indigenous and Afro-descendant peoples with respect to the territory that they have traditionally owned, occupied and used, including the natural resources on which they rely;
 - v. accord these rights to other marginalised communities which, like Indigenous and Afro-descendant peoples, depend heavily on the environment for their subsistence and culture. This includes communities, which primarily reliant on subsistence agrarian, fishing, and other pheasant activities, as well as racial, ethnic, and other minorities in Latin America;
 - vi. put in place measures to protect indigenous and traditional land tenure systems such as commonhold and other communally held land rights;

⁵⁴⁵ Global Witness, On Dangerous Ground: 2015's deadly environment: the killing and criminalization of land and environmental defenders worldwide, p. 4 (20 June 2016), available at: <https://www.globalwitness.org/en/reports/dangerous-ground/>

- vii. consult with Indigenous peoples, Afro-descendant peoples, Afro-descendant tribal communities and local communities and obtaining their free, prior and informed consent before relocating them either for temporary or longer-term purposes;
 - viii. ensure the meaningful participation of Indigenous peoples, Afro-descendant peoples, Afro-descendant tribal communities and local communities in climate and ocean decision-making. This includes ensuring that those extractive activities and other activities that adversely affect their rights to their lands, territories or resources do not take place without their free, prior and informed consent and without fair and equitable benefit-sharing;
 - ix. support an intercultural approach in which the ancestral knowledge of Indigenous and Afro-descendant women is valued in dialogues to advance climate policy and actions, recognizing their knowledge, priorities, needs, contributions, and expectations for the management of nature;
 - x. ensure land acquisitions do not violate land rights of Indigenous peoples and local communities, in accordance with the Food and Agriculture Organisation of the United Nations (FAO) Voluntary Guidelines on the Governance of Tenure of Land, Forests and Fisheries.
- i. With regard to the **SIDS** within LAC, States must:
- i. prioritise climate change mitigation approaches that avoid threats to SIDS' right to self-determination;⁵⁴⁶
 - ii. assess potential transboundary environmental impacts and extraterritorial human rights impacts on SIDS of proposed climate change mitigation and adaptation measures; and
 - iii. prioritise international scientific and other forms of cooperation (notably country-driven funding, capacity building and technology co-development) towards nature-based solutions to climate change for integrated land-sea systems, with the genuine participation of Indigenous, Afro-descendant, and local communities, women and children;
 - iv. enhance coordination mechanisms between the larger Latin American Region, with States within the Wider Caribbean Region (such as the Regional Seas Programme), on common threats, as well as shared interests within the context of the -ocean-climate nexus.

140. The *Amici* thank the Court for this opportunity to contribute to this important judicial process for the Latin America & Caribbean Region.

⁵⁴⁶ See A S Bordner, 'Climate Migration & Self-Determination' (2019) 51 Colum. Hum. Rts. L. Rev. 183; N Jones, 'Prospects for invoking the law of self-determination in international climate litigation' (2023) 32 Review of European, Comparative & International Environmental Law 250