IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS

in the advisory proceedings concerning

CLIMATE EMERGENCY AND HUMAN RIGHTS

presented by the Republic of Chile and the Republic of Colombia on 9 January 2023

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A. INTRODUCTION

1. These submissions are made by Agora International Human Rights Group (Russia), Centro de Estudios Legales y Sociales (CELS, Argentina), Dejusticia (Colombia), Egyptian Initiative for Personal Rights, Irish Council for Civil Liberties, Human Rights Law Centre (Australia), Hungarian Civil Liberties' Union, Kenya Human Rights Commission, KontraS (Indonesia) and Legal Resources Centre (South Africa) as *amici curiae*. The interveners are NGOs who are members of the International Network of Civil Liberties' Organizations (INCLO).[1] The details on individual intervening organisations are provided in the appendix.

2. Scientific evidence of climate change and the effect of the greenhouse gas emissions produced by human activity on the growth of global temperatures are not being contested. The interveners will accordingly make the submissions on the legal issues raised in the request of Chile and Colombia.

3. These submissions will start with setting out the Convention rights affected by climate change. The amici will then, firstly, deal with the most recent developments concerning procedural obligations of States with regard to the climate emergency that took place after the Advisory Opinion OC-23/17. Secondly, the submissions will insist on the emergence of obligations of result, their justification in international law and the possibility of judicial review of the States' compliance therewith.

4. Because, as will be argued below, the obligations of States with regard to climate emergency include consultations on environmental and climate policies, the submissions will discuss the situation of environmental human rights defenders.

B. CONVENTION RIGHTS AFFECTED BY CLIMATE CHANGE

5. This section will discuss international authorities that interpret existing human rights provisions insofar as those provisions are applicable to the State actions to fight climate emergency. While the issue may be novel, international human rights law contains relevant rules requiring States to act and provides a framework for their actions.

6. Even though the right to a healthy environment is not explicitly found as such in the American Convention, the Court has understood that it derives from its Article 26 (Advisory Opinion OC-23/17 of 15 November 2017, *Lhaka Honhat (Nuestra Tierra) v. Argentina*, judgment of 6 February 2020, Series C no. 400). The Court also pointed out the interrelation of the right to a healthy environment with other rights provided by the Convention, such as the rights to life and

[1] www.inclo.net

integrity (Advisory Opinion 23, para. 47). Moreover, this right is guaranteed by the San Salvador Protocol to the American Convention and by the Escazú Agreement on Access to Information, Public Participation and Justice in Environmental Matters even if it proclaims the right as its objective, and not a substantive provision.

7. The interveners submit that the rights guaranteed by the American Convention should be interpreted by this Court as imposing obligations on States to combat climate change. The interveners will provide international and comparative context relevant to the interpretation of the American Convention in this respect.

8. Judge Weeramantry famously declared that "environmental rights are human rights" (separate opinion in ICJ, *Gabčikovo-Nagymaros Project (Hungary / Slovakia)*, Judgment, ICJ Reports 1997, p. 114). Even though it was made in a separate opinion, the International Court of Justice made rulings on the nature of environmental obligations of States relevant for the interpretation of human rights provisions.

9. In an often-quoted passage from the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion the ICJ recognised that the environment was "not an abstraction" but represented "the living space, the quality of life and the very health of human beings, including generations unborn" (ICJ Reports 1996, p. 241, para. 29). Further, in *Gabčikovo-Nagymaros* the ICJ found that the States' compliance with environmental rules was their joint responsibility (judgment cited above, p. 68). The intergenerational nature of the obligations of States and their joint responsibility for the compliance with environmental rules are thus well-established in international law and should guide the Court's interpretation of the American Convention.

10. European Court of Human Rights has initially found that in environmental cases Article 8 of the European Convention on Human Rights (private and family life) applied, that "severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health" (*López Ostra v. Spain*, judgment of 9 December 1994, Series A no. 303-C, para. 51). It later qualified the applicability of Article 8 by ruling that it "would not be appropriate… to adopt a special approach… by reference to a special status of environmental human rights" (*Hatton and others v. the United Kingdom* [GC], no. 36022/97, 8 July 2003, ECHR 2003-VIII).

11. That wording did not mean the dismissal of environmental complaints, although the applicants had to show the specific effect of pollution on themselves, while attempts aimed at protecting the natural environment were routinely declared inadmissible (e.g., *Kyrtatos v. Greece*, no. 41666/98, 22 May 2003, ECHR 2003-VI,

para. 52 *in fine*). This did not prevent the ECtHR from developing wide-reaching environmental jurisprudence which is referred to in these submissions.

12. If, however, environmental disasters resulted in death, Article 2 of the European Convention (right to life) unquestionably applied (*Öneryıldız v. Turkey*, no. 48939/99, 30 November 2004, ECHR 2004-XII). And because climate change does indeed poses risks to life, the Contracting Parties to the European Convention have a positive obligation to take regulatory and preventive operational measures to protect life from a known danger having recourse to the means within their reach (*Osman v. the United Kingdom*, judgment of 28 October 1998, Reports 1998-VIII, para. 115; for this obligation in the context of natural disasters see *Budayeva and others v. Russia*, nos. 15339/02 *et al.*, 20 March 2008, ECHR 2008-II; for a recent application to climate change see CA Bruxelles, *Klimaatzaak et autres c. l'Etat belge, la région wallonne, la région flamande et la région Bruxelles-Capitale*, n° 2021/AR/1589 *et al.*, 30 novembre 2023, para. 159).

13. Following these developments, this Court in the Advisory Opinion OC-23/17 has read the virtual entirety of international environmental law, including the principles of prevention and precaution, into the American Convention. This Court tied economic, social, cultural and environmental rights, by way of indivisibility, to the American Convention's rights to life, health and personal integrity (Series A no. 23, paras. 57 and 62; see also *Lhaka Honhat v. Argentina*, cited above, para. 202). It also extended the applicability of the Advisory Opinion to climate change issues (*ibid.*, para. 54). Similarly, in the *Neubauer* case the German Constitutional Court assessed that country's climate policies under the constitutional provisions on the right to life, personal integrity and development (BVerfG, 1 BvR 2656/18, 24 March 2021, para. 99).

14. Climate change featured prominently in General Comment no. 36 of the Human Rights Committee on the right to life. According to the Committee, environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life, making States' obligations under international environmental law and under Article 6 ICCPR intertwined (CCPR/C/GC/36, 3 July 2019, para. 62; see also recent views in *Billy v. Australia*, CCPR/C/135/D3624/2019, 22 September 2022, paras. 8.3-8.4 and applying Article 17 ICCPR on the right to private life as well).

15. Importantly, the Dutch Supreme Court (*Hoge Raad*) in the *Klimatzaak Urgenda* extended the interpretation of the European Court of Human Rights case-law under Articles 2 and 8 of the European Convention (right to life and to privacy, respectively) to become grounds for assessing the Netherlands' climate policies (ECLI:NL:HR:2019:2006, 20 December 2019, section 5, esp. para. 5.6.2). When this approach was challenged by the *rapporteur public* Hoynck who invited the

French Supreme Administrative Court, the *Conseil d'Etat*, not to follow *Urgenda* in his conclusions,[2] the judges included a reference to the European Convention on Human Rights in their ruling regardless (CE 6/5 ch.r., n° 427301, 1er juillet 2021, *Commune de Grande-Synthe et autres*).

16. As is demonstrated below, the assessment of the States' climate policies include obligations to consult with the populations concerned and enable civil society, to provide environmental information and judicial remedies, so freedoms of expression, assembly and association and rights of access to court, to information and to take part in public activities apply (see, e.g., UN Special Rapporteur on the Right to a Healthy Environment, *Framework Principles on Human Rights and the Environment*, A/HRC/37/59, 24 January 2018, principle 5).

17. Prohibition of discrimination and right to effective remedy apply in all circumstances. As regards the former, the Superior Court of Justice of Ontario, Canada, held in a case where the young challenged that province's climate undertakings that "the adverse effects of climate change on younger generations – who presumably would have more years to live than current generations – may be considered self-evident" (*Mathur v. Ontario* [2020] ONSC 6918, para. 188). Accordingly, the prohibition of discrimination on account of age applied in that case, as were the rights to life, liberty and security.

18. The African system of the protection of human rights also underlines the indivisibility of rights related to the environment. Thus, in *Social and Economic Rights Action Centre* (*SERAC) and another v. Nigeria* the African Commission on Human and People's Rights (ACHPR) highlighted the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual ([2001] AHRLR 60 at 51).

19. A recent case from the African Court of Human and People's Rights demonstrates that both civil rights (rights to life and personal integrity) and social and economic rights (right to a healthy environment) may apply to the same facts and the violations of both groups of rights may be established on account of the same facts, unlawful waste dumping which caused death and injury in the specific case (*Ligue ivoirienne des droits de l'homme et autres c. Côte d'Ivoire*, n° 041/2016, 5 septembre 2023). Because the right to personal integrity, guaranteed, in particular, by Article 5 of the American Convention, may apply interchangeably with the right to a healthy environment and because the latter, in its modern interpretation, includes measures to combat climate change (UN GA res. no. 76/300 of 28 July 2022, recitals 4, 8, 11 and 12, paras. 2 and 3), American Convention rights apply to such measures.

[2] https://www.conseil-etat.fr/fr/arianeweb/CRP/conclusion/2020-11-19/427301?download_pdf

20. Indivisibility of human rights means interchangeability of legal grounds against which measures to combat climate change taken by a State may be assessed. Yet different provisions of the American Convention allow for different discretion of States in complying with the Convention. The very language of Article 26 of the Convention only requires the States to take measures "progressively" to achieve "full realization" of rights and this Court has taken this wording into account (*Lhaka Honhat*, cited above, para. 272). This is why applying rights to life and to personal integrity to climate change policies is important as it narrows the States' discretion.

C. PROCEDURAL OBLIGATIONS WITH REGARD TO CLIMATE EMERGENCY

21. The *amici* note that international environmental law has largely been a law of procedural obligations so far.[3] Such obligations remain binding on States and should be complied with in the situation of climate emergency. The *amici* will make submissions on the recent developments in international and comparative law concerning public consultations, environmental impact assessments, access to information and the obligation of States to regulate industrial activity as far as these developments are relevant to dealing with the climate emergency.

22. At the outset the *amici* reiterate that this Court's Advisory Opinion OC-23/17 should be complied with in its entirety. This also holds true for the future advisory opinions of the International Tribunal for the Law of the Sea and of the International Court of Justice for the obvious reason that the climate emergency is global and the States' actions should be coordinated.

a. Public consultations

23. Questions D.1 and D.2 of the request for advisory opinion refer to the issue of the States' obligation to hold public consultations. Advisory Opinion OC-23/17 reiterates the well-established rule in international human rights law that the decision-making in environmental matters should include consultations with the individuals concerned (see paras. 165-166). This obligation extends to decisions made on climate policies.

24. Most recently, in *Kotov and others v. Russia* the European Court of Human Rights accepted that a mere fact of holding consultations would suffice for the State to discharge of its obligations under Article 8 of the European Convention which protects the right to private life (nos. 6142/18 *et al.*, 11 October 2022, para. 132).

25. Other courts expose, however, a much higher threshold for the authorities to meet when consulting the communities concerned by its policies. An example is

[3] J. Brunnée, "Procedure and Substance in International Environmental Law", (2020) 405 *Recueil des Cours* 44.

the Supreme Court of Kenya which in the leading judgment of *British American Tobacco PLC v. Cabinet Secretary for the Minister of Health and others* set out the criteria that the public consultations have to meet to be regarded as genuine (Petition 5 of 2017, [2019] eKLR at para. 96). The criteria are as follows:

> (i) Public participation applies to all aspects of governance.
>
> (ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
>
> (iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.
>
> (iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional requirement. There is need for both quantitative and qualitative components in public participation.
>
> (v) Public participation is not an abstract notion; it must be purposive and meaningful.
>
> (vi) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.
>
> (vii) Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.
>
> (viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.
>
> (ix) Components of meaningful public participation include the following:
>
> a. clarity of the subject matter for the public to understand;
>
> b. structures and processes (medium of engagement) of participation that are clear and simple;
>
> c. opportunity for balanced influence from the public in general;
>
> d. commitment to the process;
>
> e. inclusive and effective representation;
>
> f. integrity and transparency of the process;
>
> g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.

26. Importantly, the Supreme Court of Kenya underscored that the industry that is likely to profit from a governmental decision should be kept at length from the public consultations for the consultations to remain meaningful (*ibid.*, at 107-108). A recent reform was invalidated by the High Court of Kenya at Nairobi for the reason that the public consultations were limited to a half of the proposals of the reform (*Matindi and others v. President of the Republic of Kenya and others* [2023] KEHC 19534, 3 July 2023, para. 220). This Court has further found that public consultations were not genuine where they were not conducted in a way traditionally accepted by the indigenous population concerned

(*Saramaka People v. Surinam*, judgment of 28 November 2007, Series C no. 172, para. 133).

27. In *Dennis Murphy Tipakalippa v. National Offshore Petroleum Safety and Environmental Management Authority & Another* ([2022] FACFC 193), the Federal Court of Australia, an intermediate appeal court, decided to halt a project for offshore oil drilling near the Tiwi Islands, a biodiversity hotspot, because Indigenous groups had not been properly consulted for the reason that the traditional connection to at least a part of the sea where drilling had been envisaged was disregarded. High Court of South Africa (Eastern Cape Division) at Makhanda struck down licences issued after the public consultations conducted only with the leaders of the communities concerned, but not with members thereof, and without making any proper notice of the proposed industrial activity (*Sustaining the Wild Coast NPC et al. v. Minister of Mineral Resources and Energy et al.*, Case no. 3491/2021, 1 September 2022, at 92 and 99).

b. Environmental and climate change impact assessments

28. Question A.2.A.iii of the request for advisory opinion makes reference to environmental impact assessments ("EIAs"). It has been long established in the case-law of the International Court of Justice that EIAs gained so much acceptance that it may be regarded as a "requirement under general international law" to undertake them "where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context" (*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, p. 83, para. 204; see also this Court's Advisory Opinion OC-23/17, para. 156). ITLOS concluded that those considerations meant that the obligation to conduct environmental impact assessment was a rule of customary international law (*Activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 51, para. 148). Failure to undertake an EIA for a development project would breach the American Convention (*Saramaka People v. Suriname*, cited above, para. 147).

29. The interveners submit that the nature of climate change is such that environmental pollution, e.g. greenhouse gas emissions, within one State may result in harm not only to the immediately neighbouring States, but elsewhere on the planet. Relying on Article 4 of the UN Framework Convention on Climate Change (hereinafter, "the UNFCCC"), the interveners accordingly submit that environmental impact assessments should, as a matter of obligation under international law, include the impugned activity's impact on climate change.

30. This is precisely what the National Environmental Tribunal of Kenya ruled in *Save Lamu and others v. National Environment Management Authority and others* (NET 196 of 2016, 26 June 2019). That Tribunal recalled that the purpose of EIAs was to assist a country in attaining sustainable development when

commissioning projects and that the achievement of the United Nations' Sustainable Development Goals should go hand in hand with tackling climate change (para. 16). It struck down a decision to grant an operating licence because of the failure to consider the impact of a proposed coal power plant on climate change during the EIA (para. 151). The same sailure led to the same findings having been made by the North Gauteng High Court at Pretoria, South Africa (*Earthlife Africa Johannesburg v. Minister of Environmental Affairs and others* [2017] ZAGPPHC 58, para. 107).

31. In an earlier case, applying the notion of indivisibility of rights, in particular the right to healthy environment and social and economic rights, the Constitutional Court of South Africa held that environmental impact assessment would not be lawful, under the Constitution and international law, if it did not include socio-economic impacts of the proposed activity (*Fuel Retailers Association of Southern Africa v. Director General, Environmental Management et al.*, [2007] ZACC 13, 7 June 2007, at 89-91). The African Commission in *SERAC* also insisted on the continuous nature of independent review of the environmental impacts of industrial activities (cited above, at 53). In view of the obligation of States to ensure that climate change impact assessments are conducted, these requirements should apply to such assessments as well.

32. In Europe the vast majority of States, except Iceland and Russia, is bound by the Espoo Convention on Environmental Impact Assessment in a Transboundary Context adopted under the auspices of the UN Economic Commission for Europe (hereinafter, "the UNECE"). The Espoo Convention provides for the participation of States potentially concerned by transboundary harm in the EIAs of the projects likely to cause such harm.

33. In 2003 the Espoo Convention was supplemented by the Kyiv Protocol on Stategic Environmental Assessment (in force since 2010), Article 2(7) of which provides for impact assessment of the effect of governmental plans and programmes on "the environment, including… climate… and the interaction among these factors". Because measures to combat climate change are taken in the forms of plans or programmes adopted by the governments, they would require EIAs that take into account the impact on climate change. Standing in such EIAs was granted even to States outside Europe.[4]

c. Access to information

34. Questions B.1.i and iv and B.2 of the request for advisory opinion refer to the right of individuals to obtain and of the States to provide access to information. This right, which includes the obligations of States to collect, produce and

[4] Federated States of Micronesia were allowed to participate in an EIA of a Czech power plant: http://environmentalrightsdatabase.org/federated-states-of-micronesia-fsm-request-for-czech-government-to-consider-the-transboundary-environmental-effects-of-a-coal-plant/

publish the data on environmental pollution, has long been recognised in international human rights law both by this Court (Advisory Opinion OC-23/17, cited above, paras. 213 and 221-223; *Claude Reyes and others v. Chile*, judgment of 19 September 2006, Series C no. 151, paras. 94-95) and by the European Court of Human Rights (*Guerra and others v. Italy*, judgment of 19 February 1998, Reports 1998-I).

35. Regional agreements on the access to environmental information have been concluded on both sides of the Atlantic, the Escazú and the Aarhus Conventions. The latter, also adopted under the auspices of UNECE, provided, in particular, for the creation of a Compliance Committee empowered to consider individual cases. In one of the cases, the Compliance Committee ruled that raw data on the state of the air and the atmosphere constituted environmental information, so public authorities should ensure access to it. It further held with regard to the processed data that the authorities should advise on how those data were processed and what they represented (*Moray Feu Traffic Subcommittee v. the United Kingdom*, ACCC/C/2010/53, 11 January 2013, paras. 74 and 77).

d. Regulation of industrial activity

36. Regulating, monitoring and enforcing the regulations against polluters, referred to in questions A.2.A.i-ii of the request for advisory opinion, has been at the heart of the European Court of Human Rights environmental case-law (*Hatton and others* and *Fadeyeva*, both cited above, among many examples). In a recent *Pavlov and others v. Russia* judgment it recalled that regulatory measures should be "aimed at ensuring the private industry compliance with the relevant environmental standards and addressing poor environmental conditions to which the applicants were exposed" (no. 31621/09, 11 October 2022, para. 87). In the context of climate change this also means that environment protection measures would not be sufficient if they are not aimed at the reduction of greenhouse gas emissions (so held by the Land and Environment Court of New South Wales, Australia, in *Bushfire Survivors for Climate Action Inc. v. Environment Protection Authority* [2021] NSWLEC 92 (26 August 2021) at 122).

37. In the same vein Human Rights Committee found violations of Articles 6 and 17 of the ICCPR where State authorities were imposing fines on polluters, the fines having been incapable of forcing the polluters to comply with the environmental regulations (*Cáceres and others v. Paraguay*, CCPR/C/126/D/2751/2016, 20 September 2019, paras. 7.5 and 7.8; *Pereira and others v. Paraguay*, CCPR/C/132/D/2552/2015, 21 September 2022). A delay in taking enforcement measures would also constitute a breach of the State's human rights obligations (ECtHR, *Cordella et autres c. Italie*, n^{os} 54414/13 et 54264/15, 24 janvier 2019, para. 168).

38. More generally, as recalled by the ITLOS, the State's due diligence in regulating and monitoring the industrial activities is a variable concept depending on scientific and technological knowledge and the risks involved in the activity in question: the standard of due diligence has to be more severe for the riskier activities (*Activities in the Area*, cited above, p. 43, para. 117).

D. OBLIGATIONS OF RESULT AND THE AVAILABILITY OF JUDICIAL REVIEW

39. Should the procedural obligations under international environmental and international human rights law have been sufficient, the issue of climate emergency would not arise at all. Yet its very existence testifies to the insufficiency of procedural obligations. The interveners will demonstrate that there is a shift in international law towards obligations of result, the main of which is to reduce the emissions of greenhouse gases and other polluting substances. This is reflected in question A.2 of the request for advisory opinion and especially in question A.2.B which refers to mitigation measures which are by definition oriented towards achieving a result. Even if there is no specialised review of the States' compliance with obligations of result, international and comparative law provide clear criteria against which the States' compliance may and should be assessed.

40. The 2015 Paris Agreement adopted under the UNFCCC requires States to undertake to reduce emissions. This obligation is phrased as procedural,[5] for Article 1(a) of the Paris Agreement only enjoins the States to pursue "efforts to limit the temperature increase". The Paris Agreement also sets no binding international review of the undertakings.

41. Yet the interveners submit, relying on the extensive judicial practice, that judicial review of the States' undertakings is possible and results in the obligation of reducing emissions being regarded as an obligation of result. This view is supported by the Human Rights Committee's General Comment no. 36 which requires States, in application of Article 6 ICCPR, to, *inter alia*, adopt substantive environmental standards (*op. cit.*, para. 62). Reduction of GHG emissions should be measurable and genuine in nature, not being a paper exercise.[6] The reduction of emissions is required under the American Convention, as the Inter-American Commission on Human Rights already indicated (*Climate Emergency: Scope of Inter-American Rights Obligations*, Resolution 3/2021, 31 December 2021, para. 1)

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[5] J. Brunnée, *op. cit.* at 46.

[6] Example of Russia is relevant. Because of the dissolution of the USSR and dismantling of major military industry it now emits approximately 58% of its 1990 GHG emissions. Under the Paris Agreement it undertook to achieve 75% of its 1990 GHG emissions by 2030, that is, to increase them.

42. The interveners will deal, in turn, with international and comparative law authorities on mean levels of pollution, assessment of scientific evidence, evaluating amounts of governmental undertakings and the relevant remedies.

a. Mean levels of pollution

43. International human rights law, especially in Europe, has developed rules on assessing mean levels of pollution. The European Court of Human Rights initially focused on peak emissions, having criticised a respondent government for producing only annual averages of the concentration of polluting substances, but failing to "disclose daily or maximum pollution levels" (*Fadeyeva v. Russia*, no. 55723/00, 9 June 2005, ECHR 2006-IV, para. 84).

44. But in a recent case of *Pavlov and others v. Russia* the European Court (cited above, para. 88) decided several issues of the case on the basis of whether the average annual and daily concentrations of forty pollutants were within the maximum permitted levels established by the domestic legislation. Consequently, the *Pavlov and others* judgment provides a basis for taking into account mean levels of pollution (or temperature) when adjudicating on environmental and/or climate change issues. This was, in particular, underlined by Judge Krenc in his separate opinion (paras. 6-8).

b. Assessment of scientific evidence

45. In the present proceedings, the interveners submit, the scientific evidence is clear and unambiguous. However, should parties in future cases challenge it, international law provides for criteria of its assessment by judges. This is what was done by the ICJ in the *Whaling in the Antarctic* case (*Australia v. Japan: New Zealand intervening*, judgment, 31 March 2014, ICJ Reports 2014, p. 226) which concerned Japan's program of killing whales allegedly for scientific purposes.

46. ICJ stressed that it had to analyse whether the program was reasonable in relation to achieving its stated objectives and its standard of review should be objective (*ibid.*, p. 254, para. 67). The legal interpretation of reasonableness under the applicable international law as the task of the Court was to be distinguished from scientific conclusions as to whether lethal methods were permissive in scientific research (*ibid.*, p. 257, para. 82).

47. In the *Whaling Case* ICJ had to assess decisions regarding the use of lethal methods; the scale of the programme's use of lethal sampling; the methodology used to select sample sizes; a comparison of the target sample sizes and the actual take; the time frame associated with a programme; the programme's scientific output; and the degree to which a programme coordinates its activities with related research projects (*ibid.*, p. 258, para. 88). In order to do that ICJ was

faced with the task of assessment of scientific evidence, including expert reports and submissions.

48. Consensus among experts was accepted by the ICJ (on the need for a testable hypothesis for research to be scientific and on the general permissibility of lethal methods, *ibid.*, pp. 255-256, para. 77, and p. 269, para. 135, respectively). Where expert evidence diverged, the ICJ found against the respondent where it

- did not provide expert evidence to comment the evolution of methods over 20 years preceding the case (*ibid.*, pp. 269-270, para. 138);
- produced documents not relevant to the subject-matter of the case (*ibid.*, p. 270, para. 138);
- produced studies without analysis in support of the studies' conclusions (*ibid.*, p. 271, para. 143);
- produced internally inconsistent research (*ibid.*, pp. 279-280, 284 and 289, paras. 178, 193-194 and 209) which did not lead to statistically relevant information (*ibid.*, p. 280, paras. 179 and 181);
- produced research lacking transparency (*ibid.*, pp. 283 and 284, paras. 188 and 195);
- made self-contradictory statements (*ibid.*, p. 289, para. 197).

49. ICJ concluded on the evidence so evaluated that the actual take of whales had been "largely, if not entirely, a function of political and logistical considerations", so it doubted the scientific nature of the Japanese large scale whale-killing program (*ibid.*, p. 290, para. 212).

50. Consequently, the principles of judicial assessment of conflicting scientific evidence that follow from the *Whaling Case* are completeness, contemporariness, relevance to the subject-matter, justification of conclusions by analysis, consistency and transparency of methods.

c. Judicial review of the governmental plans and undertakings to reduce greenhouse gas emissions

51. Comparative research shows that courts routinely assess governmental plans, undertakings and policies aimed at the reduction of GHG emissions and at combating climate change by other means. The courts routinely treat such aims as obligations of result and examine whether the relevant governmental authorities achieve that result.

52. In 2019, the Supreme Court of the Netherlands in the above-cited *Urgenda* case upheld the lower courts' orders to the State, directing the State to reduce the country's greenhouse gases by at least 25% by 2020 (compared to 1990 measures) pursuant to its obligations under Articles 2 and 8 of the European Convention on Human Rights. The *Urgenda* case was the first in the world in which a government has been ordered to reduce its greenhouse gas emissions by

an absolute minimum amount in order to comply with its legal obligations. The United Nations High Commissioner for Human Rights has stated that "the decision confirms that the Government of the Netherlands and, by implication, other governments have binding legal obligations, based on international human rights law, to undertake strong reductions in emissions of greenhouse gases."[7]

53. Other national and international courts assessed the results of the governmental policies with regard to either environmental pollution or combating climate change. Federal Constitutional Court of Germany reached similar conclusions in the *Neubauer* case having held that the allowed pre-2030 emissions were overly generous (cited above, para. 123). In the case of *Commune de Grande-Synthe*, also cited above, the French *Conseil d'Etat* did the same, having explicitly disregarded the drop of greenhouse gas emissions due to the Covid-19 lockdowns. European Court of Human Rights concluded in *Cordella and others* that not only the Italian government acted belatedly to combat pollution, its projects also failed to meet any of the necessary goals (cited above, para. 167).

54. The courts have also developed criteria for assessing governmental plans to preserve the environment and/or combat climate change. The European Court of Justice ruled in *Janecek v. Freistaat Bayern* that the relevant authorities should develop a plan once the risk of exceeding the limits of emissions comes into existence and that the risk should be reduced to a minimum by striking a balance between competing public and private interests (C-237/07, 25 July 2008, paras. 39, 44-46). The objectives that should thus be reached must be quantifiable (para. 30).

55. Equally, the Supreme Court of Ireland in the *Friends of the Irish Environment v. the Government of Ireland* found that judicial review of the governmental plan to combat climate change was not limited to procedural matters like consultations, but included substantive provisions ("whether the Plan does what it says… is a matter of law and clearly justiciable" [2020] IESC 49, 31 July 2020, at para. 6.27). The plan was struck down precisely for the failure to meet the required objectives of reducing the emissions of greenhouse gases (paras. 6.46-6.47).

d. Judicially ordered remedies

56. Failure to meet the obligations of result means the international responsibility of the State concerned is engaged and entails the obligations that follow from an internationally unlawful act (this Court's Advisory Opinion OC-14/94, 9 December 1994, Series A no. 14; Articles 30-31 of the Articles on State Responsibility for Internationally Wrongful Acts, UN GA res. 58/63, 12 December 2001; PCIJ, *Factory at Chorzow (Merits)*, 13 September 1928, Series A no. 17,

[7] The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v. Stichting Urgenda | ESCR-Net

p. 47). Furthermore, remedies awarded by domestic and international courts go well beyond declaratory judgments.

57. The courts that ruled against the governmental objectives or plans ordered that the executive either adopted a higher undertaking to reduce greenhouse gas emissions (in *Urgenda* from 20% to 25%, in *Commune de Grande-Synthe* from 12% to 40%, in the Belgian *Klimaatzaak* case from 40% to 55%) or other harmful pollution (CE 6/1 ch.r., n° 394254, 12 juillet 2017, *Amis de la terre France*). Where governmental plans were struck down an overhaul of the planning process was ordered (to include climate change considerations, if absent at all, as in *Bushfire Survivors for Climate Action*, at 101; or to provide for the specific measures to reduce greenhouse gas emissions in *Friends of the Irish Environment*).

58. In the case of failure to adopt and, *a fortiori*, implement rules aimed at combating climate change the Colombian *Consejo de Estado*, the supreme administrative court, ordered the defaulting Ministry of Environment and Sustainable Development to report to the first-instance court monthly on the measures taken to comply with the judgment (Rad.: 25000-23-41-000-2022-01551-01, el 20 de abril 2023, *Procuraduría general de la nación*).

59. In the case of the established failure to comply with its orders the French *Conseil d'Etat* also sanctioned the executive by ordering it to make regular payments ('*astreinte*') to environment protection organisations until the emissions were within limits (CE Ass., n° 428409, 10 juillet 2020, *Amis de la terre France et autres* ; CE 6/5 ch.r., n° 428409, 4 août 2021, *Amis de la terre France*).

e. Extraterritoriality of State's climate change responsibilities

60. The interveners submit that the standards set by this Court in its Advisory Opinion 23 should be a starting point in defining States' extraterritorial obligations to combat climate change. States have the obligations to prevent transboundary damage and to take all necessary measures to avoid activities under their control affecting the rights of persons within or outside their territory (para. 104). In this respect, the Court considered that extraterritorial jurisdiction arises in cases of transboundary damage "if there is a causal link between the act that originated in its territory and the infringement of the human rights of persons outside its territory" (para. 101).

61. The United Nations Committee on the Rights of the Child upheld this approach in *Sacchi et al. v. Argentina et al.* (CRC/C/88/D/104/2019, 11 November 2021, para. 10.7) to the effect that when transboundary harm occurs, children are under the jurisdiction of the State on whose territory the emissions originated if (i) there is a causal link between the acts or omissions of the State in question and the negative impact on the rights of children located outside its territory, and

(ii) the State of origin exercises effective control over the sources of the emissions in question.

62. Yet with regard to climate change two factors militate for the development of the approach set in the Advisory Opinion 23. Firstly, as follows, in particular, from the practice related to environmental impact assessments, climate everywhere is affected by GHG emissions anywhere. Secondly, the requirement of "causal link" would mean tracing damage to climate to a source on a particular State territory which is a high threshold to meet given the nature of damage from GHG emissions. Even in environmental cases the requirement of causal link was applied flexibly, having shifted to a "combination of indirect evidence and presumptions" leading at least to "vulnerability" (ECtHR, *Fadeyeva*, cited above, para. 88).

63. A solution to the need to adapt the jurisdictional standard to climate change is provided in the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights of 28 November 2011.[8] Compiled by a group of experts, convened by the Maastricht University and the International Commission of Jurists. The experts came from universities and organisations located in all regions of the world and included current and former members of international human rights treaty bodies, regional human rights bodies, and former and current Special Rapporteurs of the United Nations Human Rights Council. While non-binding, they are a statement of the law by the leading authorities in the field based on a decade of research.

64. Principle 9 thus defines the scope of States' jurisdiction to respect, protect and fulfil rights as extending to a) situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law and, importantly, b) situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory. Both 'effective control' and 'foreseeable effects' are known and defined in international human rights law, with regard to both jurisdiction and the obligations to prevent, for example, loss of life or infringement of human dignity. Consequently, even if formulated with respect to economic, social and cultural rights, Principle 9 is consistent with the whole body of international law and the interveners invite the Court to adapt its approach to jurisdiction in climate cases in its light.

65. The Maastricht principles also provide for the obligation to avoid causing harm extraterritorially (principle 13) and the obligation to conduct prior assessment of the potential extraterritorial impacts of their laws, policies and practices on the enjoyment of human rights (principle 14). In addition, principle 25 determines

[8] https://www.fidh.org/IMG/pdf/maastricht-eto-principles-uk_web.pdf

that States must adopt and enforce measures to protect economic, social and cultural rights when:

"a) the harm or threat of harm originates or occurs on its territory;
b) where the non-State actor has the nationality of the State concerned;
c) as regards business enterprises, where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned;
d) where there is a reasonable link between the State concerned and the conduct it seeks to regulate, including where relevant aspects of a non-State actor's activities are carried out in that State's territory".

E. PROTECTION OF ENVIRONMENTAL DEFENDERS

66. Because climate emergency and applicable international rules require that impact assessments and public consultations be conducted, affected populations must be heard. This means that freedoms of expression, assembly and association are indispensable in responding to climate emergency. This part will accordingly set out the specific requirements of international human rights law to protect environmental defenders, especially those who are women, indigenous peoples, and Afro-descendant communities, a crucial element of any meaningful climate action, to which question E.1 of the request for advisory opinion refers.

67. A helpful general overview of the existing standards is provided in a recent Human Rights House publication "Rights of Defenders. Principles and Standards Empowering Human Rights Work".[9] What follows below is a review of recent specific developments.

a. Right to life

68. The Human Rights Committee recalls in General Comment no. 36 on the right to life under the ICCPR that States Parties are required to take special measures of protection towards persons in vulnerable situations, including human rights defenders, whose lives have been placed at particular risk because of specific risks or pre-existing patterns of violence (*op. cit.*, para. 23).

69. In particular, according to the Human Rights Committee, Article 6 of the ICCPR reinforces the obligations of States parties under the Covenant and the Optional Protocol to protect individuals against reprisals for promoting and striving to protect and realise human rights. States Parties must accordingly take the necessary measures to respond to death threats and to provide adequate

[9] https://humanrightshouse.org/wp-content/uploads/2023/12/2023-Rights-of-Defenders.pdf

protection to human rights defenders, including the creation and maintenance of a safe and enabling environment for defending human rights (*ibid.*, para. 53). This Court established that the right to life of an environmental defender was violated in *Kawas Fernández v. Honduras* because, among other elements, of the participation of a police agent in her murder (judgment of 3 April 2009, Series C no. 196, para. 99).

b. Environmental NGOs and the freedom of association

70. With specific regard to human rights NGOs and also environmental NGOs the European Court of Human Rights accepted, on multiple occasions, their role as 'watchdogs' in a democratic society and their activities on matters of public interest in the field of their expertise requiring reinforced protection (*Vides Aizsardzības Klubs c. Lettonie*, n° 57829/00, 27 mai 2004, para. 42; *Təbiəti Mühafizə Cəmiyyəti and Israfilov v. Azerbaijan*, no. 37083/03, 8 October 2009, ECHR 2009-…, para. 53).

71. It has also been acknowledged by the Aarhus Convention Compliance Committee that non-governmental organisations, by bringing together expertise and resources, generally have greater ability to effectively exercise their rights under the Convention than individual members of the public. For this reason, limits on the nationality of those who can be founders of associations, on the territorial scope of their activities (e.g., only organisations of a certain size may participate in nation-wide actions) and prohibition of activities of non-registered organisations would fall short of the States' obligation to support and promote environmental protection (*Biotica v. Turkmenistan*, ACCC/C/2004/5, 14 March 2005, paras. 16 *et seq.*)

72. In *Ecodefence and others v. Russia* the European Court of Human Rights underscored that labelling human rights defenders, including environmental defenders, as "foreign agents"and criminalising them was based on a notion that matters such as respect for human rights and the rule of law are "internal affairs" of the State and that any external scrutiny of such matters is suspect and a potential threat to national interests. This notion, according to the European Court, was not compatible with the underlying values of the European Convention on Human Rights as an instrument of European public order and collective security, whereby the rights of all persons within the legal space of the Convention are a matter of concern to all member States (no. 9988/13 *et al.*, 14 June 2022, para. 139). In the field of environment and climate change this approach is consistent with the ICJ's above-cited findings in the *Gabcikovo-Nagymaros* case on the respect for the environment being 'joint responsibility' of States.

73. More generally, States are required to provide a safe and enabling environment for defenders to operate free from threats, harassment, intimidation and violence

(Declaration on Human Rights Defenders, UN GA res. no. 53/144, 9 December 1998). The requirements for such an environment include that States: adopt and implement laws that protect human rights defenders in accordance with international human rights standards; publicly recognize the contributions of human rights defenders to society and ensure that their work is not criminalised or stigmatised; develop, in consultation with human rights defenders, effective programmes for protection and early warning; provide appropriate training for security and law enforcement officials; ensure the prompt and impartial investigation of threats and violations and the prosecution of alleged perpetrators; and provide for effective remedies for violations, including appropriate compensation (*Framework Principles on Human Rights and the Environment*, cited above, principle 4).

c. Freedom of assembly, right to protest

74. The right to protest has to be protected and not only by the State. Business enterprises have a responsibility to respect human rights, including the right of peaceful assembly of, for example, communities affected by their activities and of their employees, private entities and broader society may be expected to accept some level of disruption (HRC, General Comment no. 37 on the right to peaceful assembly (article 21 ICCPR), CCPR/C/GC/37, 17 September 2020, para. 31).

75. The disruption that has to be tolerated goes beyond mere inconveniences. France's supreme administrative court, the *Conseil d'Etat*, has recently quashed a ministerial decision to ban a group of environmental protesters. The minister argued that the group had been involved in violence, but the judges distinguished between violence against persons (unacceptable, but not proven by the minister) and violence against property which was not considered sufficient to justify the prohibition of the group (CE Sect., n° 476384 *et al.*, 9 novembre 2023, *Soulèvements de la terre et autres*, cons. 12).

76. This right extends beyond State borders. An arbitral tribunal under the UN Convention on the Law of the Sea has confirmed that protest at sea is an internationally lawful use of the sea related to the freedom of navigation (*Arctic Sunrise Arbitration (the Netherlands v. Russia)*, PCA case no. 2014-02, award on the merits, 14 August 2015, para. 227). The case concerned the Russian border guards' boarding of a ship flying the Dutch flag and arresting its crew (known as the "Arctic 30"). The crew's intention was to protest seabed drilling and their criminalisation by Russia was also a violation of the European Convention on Human Rights (ECtHR, *Bryan and others v. Russia*, no. 22515/14, 27 June 2023).

d. Criminalisation of human rights defenders

77. Criminalisation is not limited to arresting, charging and convicting environmental defenders for the exercise of their rights under international and

national law which would be a violation of their freedom of expression, as this Court has recently held in *Baraona Bray v. Chile* (judgment of 24 November 2022, Series C no. 481). Despite the developed international human rights standards, they are often breached where environmental defenders and protesters suffer police violence and then criminally prosecuted whereas the police is not even investigated.[10]

78. Criminalisation may take other forms, in particular, recovery of costs may amount to penalisation (*Morgan and Keynsham v. the United Kingdom*, ACCC/C/2008/23, 18 October 2010, para. 53, even though on the facts of that case the Compliance Committee was satisfied with the award of costs). In this regard, Sachs J writing for the unanimous South African Constitutional Court observed that in constitutional cases "if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs". He indicated that the rationale for the rule was, in particular, to diminish "the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights" in cases which may concern not only the interests of particular litigants, but everyone in the same situation. Exceptions should be limited to "frivolous or vexatious or in any other way manifestly inappropriate" applications (*Biowatch Trust v. Registrar, Genetic Resources, and others* [2009] ZACC 14, 3 June 2009, paras. 22-24).

F. RIGHTS OF THE CHILD

79. Questions C.1 and C.2 of the request for advisory opinion refer to the rights of the child. The Convention on the Rights of the Child is a cornerstone in the international human rights framework as it is the Convention with the highest ratification rate amongst the international community. The Convention's recent development is the new General comment no. 26 (CRC/C/GC/26, 22 August 2023) on children's rights and the environment, with a special focus on climate change issued by the Committee on the Rights of the Child which sets out obligations to States regarding their responsibilities in the face of climate change and environmental degradation. The Court is invited to consider the specific obligations set out in this General Comment.

80. The General Comment recognises States' responsibilities in ensuring the right to a clean and healthy environment, implicit in the Convention, in the face of climate change and environmental degradation within a broad range of children's rights, including the rights to life and to the highest attainable standard of health

[10] For a recent example, see https://twitter.com/ScientistRebel1/status/1702695080895672759?s=20 and N. Lakhani, "'Very disturbing': crackdown on oil pipeline protests in Uganda concerns UN rights expert", *The Guardian*, 19 October 2023, available at https://www.theguardian.com/world/2023/oct/19/uganda-police-assault-arrest-oil-pipeline-protestors

(paras. 63-64). The CRC Committee admits that the dynamic interpretation of the Convention is required and states that "*environmental degradation, including the consequences of the climate crisis, adversely affects the enjoyment of these rights, in particular for children in disadvantaged situations or children living in regions that are highly exposed to climate change*" (para. 8).

81. Examples of the articulated requirements for States by the General Comment include such positive obligations as taking appropriate measures like, for example, the sustainable use of resources needed for covering basic needs and the protection of healthy ecosystems and biodiversity and special measures of protection needed to prevent and reduce child mortality from environmental conditions (para. 21). The CRC Committee also spells out specific requirements, i.e. to prohibit the development or retention of, and ensure the clean-up of areas contaminated by, unexploded ordnance and residue of biological, chemical and nuclear weapons, in line with international commitments (para. 22).

82. The General Comment's most definite obligations are set out regarding children's right to a clean, healthy and sustainable environment, as "immediately" needed actions by States (para. 65):

(a) Improve air quality, by reducing both outdoor and household air pollution, to prevent child mortality, especially among children under 5 years of age;
(b) Ensure access to safe and sufficient water and sanitation and healthy aquatic ecosystems to prevent the spread of waterborne illnesses among children;
(c) Transform industrial agriculture and fisheries to produce healthy and sustainable food aimed at preventing malnutrition and promoting children's growth and development;
(d) Equitably phase out the use of coal, oil and natural gas, ensure a fair and just transition of energy sources and invest in renewable energy, energy storage and energy efficiency to address the climate crisis;
(e) Conserve, protect and restore biodiversity;
(f) Prevent marine pollution, by banning the direct or indirect introduction of substances into the marine environment that are hazardous to children's health and marine ecosystems;
(g) Closely regulate and eliminate, as appropriate, the production, sale, use and release of toxic substances that have disproportionate adverse health effects on children, in particular those substances that are developmental neurotoxins.

83. The General Comment also highlights States' responsibilities to regulate business enterprises (paras. 68, 78-81 and 107-110), their obligations related to energy policies, such as transitioning to clean energy and adopting strategies and programmes to ensure the sustainable use of water resources (para. 68) and, more generally and with due regard to intergenerational equity, to prevent "*foreseeable environment-related threats arising as a result of their acts or omissions now, the full implications of which may not manifest for years or even decades*" (paras. 11, 68-69).

84. As far as the request for advisory opinion refers to the specific obligations arising from Article 12 of the Convention on the Rights of the Child for States to give due weight to children's views in all matters affecting the child, the General Comment's input on Article 12 recalls that children's views should be proactively sought and given due weight in the design and implementation of measures aimed at addressing the significant and long-term environmental challenges that are fundamentally shaping their lives. For that, States must ensure that age-appropriate, safe and accessible mechanisms are in place for children's views to be heard regularly and at all stages of environmental decision-making processes for legislation, policies, regulations, projects and activities that may affect them, at the local, national and international levels. At the international level, States, intergovernmental organisations and international non-governmental organisations should facilitate the involvement of children's associations and child-led organisations or groups in environmental decision-making processes (paras. 26-28).

G. COMMON BUT DIFFERENTIATED RESPONSIBILITIES

85. Questions F.1 and F.2 (first "1" and "2" in the "F" section) of the request for advisory opinion refer to the notion of common but differentiated responsibility. Its interpretation will be discussed below with regard to the UNFCCC and Paris Agreement, comparative and international human rights law and the relevant case law of the PCIJ.

a. Implications of the principle under international environmental law and international human rights law

86. Recent studies indicate that, in the period between 1990 to 2015, the richest 10% of the world's population was responsible for 52% of carbon emissions, while the poorest 50% was responsible for only 7% of them.[11] In this context, the principle of common but differentiated responsibilities has developed from the application of equity in general international law, and acknowledges the historical and material differences between developed and developing states regarding their contribution to the climate crisis and their ability to cope with it.[12] This principle is found in the Preamble to and Articles 3 and 4 of the UNFCCC, articles 2.2, 4.3 and 4.19 of the Paris Agreement, among other international environmental law instruments.

[11] T. Gore, 'Confronting Carbon Inequality: Putting Climate Justice at the Heart of the COVID-19 Recovery', available at https://oxfamilibrary.openrepository.com/bitstream/handle/10546/621052/mb-confronting-carbon-inequality-210920-en.pdf.

[12] Ph. Sands, *Principles of International Environmental Law*, CUP 2018, p. 233.

87. Article 4 of the UNFCCC provides that, although all parties to the Convention should take effective measures to combat climate change and mitigate its effects, developed nations should take the lead in addressing climate change, given their historical contributions to GHG emissions. Particularly, paragraph 3 stipulates that developed countries shall provide financial resources, including for the transfer of technology, needed by the developing country Parties to meet the agreed full incremental costs of implementing the Convention's measures that are covered by paragraph 1 of this Article. Moreover, paragraph 5 provides that developed countries shall take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and knowhow to other Parties, particularly developing countries, to enable them to implement the provisions of the Convention. Finally, article 11 of the UNFCCC created a financial mechanism for the provision of financial resources by concession or grant.

88. Financial obligations were reinforced by the Paris Agreement. Article 9 paragraph 1 states that "developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention", and paragraph 3 stipulates that "developed country Parties should continue to take the lead in mobilising climate finance from a wide variety of sources, instruments and channels, noting the significant role of public funds, through a variety of actions, including supporting country-driven strategies, and taking into account the needs and priorities of developing country Parties".

89. In this regard, the Inter-American Commission on Human Rights stated in its Resolution 3/2023 on Climate Emergency that "those States that have greater financial capacity must provide the guarantees to provide greater technical and logistical capacity to the States that have a greater degree of impact on climate change, as well as less financial and infrastructure capacity to face the climate emergency" (para. 7). It also indicated that "within the framework of climate finance mechanisms, States should seek the generation of institutional frameworks that allow obtaining permanent funds for the financing of losses and damages caused by climate change", specifically focusing on people who have been most disproportionately affected (para. 52).

90. Similarly, UN treaty bodies indicated that "as part of international assistance and cooperation towards the realisation of human rights, high-income States should support adaptation and mitigation efforts in developing countries by facilitating transfers of green technologies and by contributing to financing climate mitigation and adaptation. In addition, States must cooperate in good faith in the establishment of global responses addressing climate-related loss and damage suffered by the most vulnerable countries, paying particular attention to safeguarding the rights of those who are at particular risk of climate harm and

addressing the devastating impact of climate disruptions, including on women, children, persons with disabilities and indigenous peoples".[13]

91. In the same vein, principle 29 of the Maastricht Principles provides for the obligation to create an international enabling environment, taking steps through international cooperation including, importantly, in matters related to finance and environmental protection.

92. Some attempts to fulfil financing commitments were seen during the United Nations Climate Change Conferences (COP), showing that developed States acknowledge their responsibility for climate change and the consequent need to finance adaptation and mitigation measures in developing countries. In COP15 (2009), developed States agreed on a collective contribution for climate financing of 100 billion dollars per year from 2020 to 2025. However, this goal has not been achieved. Indeed, for the case of Latin America and the Caribbean, the United Nations Environment Programme estimated that it needs 4 to 8 times the amount of financial resources it received during the last years.[14]

93. During COP27 (2022) States agreed to create a "loss and damage" fund for vulnerable countries hit hard by climate disasters. At COP28 (2023), consensus was achieved on how to operationalise this fund. However, the pledges States made by the end of COP28 cover less than 0.2% needed of estimated $400bn in losses developing countries face each year.[15] Moreover, besides the creation of the loss and damage fund, COP28 agreements on finance, adaptation and emissions reduction were disappointing.[16]

94. In sum, numerous legal standards unequivocally impose an obligation on developed countries to finance developing nations in climate change mitigation, adaptation, and addressing loss and damage. Regrettably, these standards have not been consistently honoured or implemented, making current international financing insufficient. Consequently, we request the Court to develop progressive standards that clarify inter-state obligations and responsibilities on the matter, as well as methods for accountability. These standards would enlighten

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[13] Joint statement on human rights and climate change, issued on 16 September 2019 by the Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities.

[14] UNEP, 'Emissions Gap Report 2022: The Closing Window – Climate crisis calls for rapid transformation of societies', available at: https://www.unep.org/resources/emissions-gap-report-2022

[15] The Guardian, "$700m pledged to loss and damage fund at Cop28 covers less than 0.2% needed", 6 December 2023, available at https://www.theguardian.com/environment/2023/dec/06/700m-pledged-to-loss-and-damage-fund-cop28-covers-less-than-02-percent-needed.

[16] See FARN, COP27: qué nos dejaron las negociaciones climaticas, available at: https://farn.org.ar/cop27-que-nos-dejaron-las-negociaciones-climaticas/

Inter-American states to comply and demand compliance with climate agreements and drive climate negotiations according to human rights.

95. First, the Court should strongly encourage states to take all necessary measures to operationalize the loss and damage fund. Within it, developed countries must bear the primary economic responsibilities, in accordance with the principle of common but differentiated responsibilities.

96. Second, States should demand that developing countries comply with the obligation to contribute their fair share. After breaching the 100 billion dollars per year goal, States are expected to set a New Collective Quantified Goal on Climate Finance (NCQG) in 2024, that would start ruling in 2025. The NCQG should be established through a transparent and participatory process, ensuring representation from the different stakeholders involved. The goal must be defined in accordance with the principle of common but differentiated responsibilities, based on scientific evidence, and considering the impacts on human rights, especially for vulnerable groups.[17] It is also important to determine accountability methods that ensure compliance with the NCQG.

97. Finally, it is crucial to establish the specific financial instruments and conditions under which the NCQG and climate financing operate. Currently, climate financing is provided mostly through loans.[18] Whether it functions as a donation or a loan makes a significant difference: loans contribute to the growing indebtedness of developing countries, which has harmful effects on human rights as countries have less resources to fulfil them.[19] Loans also stimulate developing countries to invest in extractive industries in order to meet repayment obligations.[20] Consequently, these countries get delayed in sustainable transition and fail to fulfil climate commitments. Thus, climate financing should not create more debt and should be in the form of reparations, as a means for restorative justice. Developing states have the right to receive reparations, while developed countries have the duty to provide them for their historical and present GHG emissions that caused the climate crisis. Debt relief and cancellation would also be an appropriate alternative as well as other major reforms to the international

[17] See Climate Finance Group of Latin America and the Caribbean (GFLAC), 'Proposals for the determination of a New Collective Quantified Goal on Climate Finance', available at: https://unfccc.int/sites/default/files/resource/GFLAC%20Submission%20NCQG.pdf

[18] See OECD, 'Climate Finance Provided and Mobilised by Developed Countries in 2013-2021', at: https://www.oecd-ilibrary.org/environment/climate-finance-provided-and-mobilised-by-developed-countries-in-2013-2021_e20d2bc7-en

[19] See Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephas Lumina Guiding principles on foreign debt and human rights, 2011, available at: https://www.ohchr.org/en/documents/reports/ahrc2023-guiding-principles-foreign-debt-and-human-rights

[20] See Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Visit to Argentina, A/HRC/52/34/Add.1, 17 February 2023.

financial architecture, including a green fiscal deal for mobilising the resources needed for a just transition.[21]

b. 'Polluter pays' principle in comparative perspective

98. The interpretation of the principle of common but differentiated responsibilities under the UNFCCC and the Paris Agreement is consistent with the 'polluter pays' principle, which is a part of international environmental law and is consistent with human rights treaties (Rio Declaration on Environment and Development, A/CONF.151/26 (Vol. I), 12 August 1992). As confirmed by the Supreme Court of India in a rare right to life case applying the principle directly, 'polluter pays' means it is incumbent on the government - irrespective of whether the country is developed or developing - to enforce financial sanctions against polluters, private or public, and direct the collected funds to the victims of the pollution, nature conservation, etc. (*Indian Council for Enviro-Legal Action v. Union of India and others*, 1996 SCC (2) 212, 13 February 1996).

99. Under international human rights law, interpreted in the light of the UNFCCC, even small polluters are not absolved, however, from taking climate action. Human rights legal régime does not allow States to cite lack of funds as an excuse for not honouring a judgment debt (*Burdov v. Russia*, no. 59498/00, 7 May 2002, ECHR 2002-III, para. 35), and even less so when the prohibition of inhuman or degrading treatment applies (*Kalashnikov v. Russia*, no. 47095/99, 15 July 2002, ECHR 2002-VI, paras. 94 et seq.) The Inter-American Court adopted a similar approach in relation even to social and economic rights in the above-cited *Lhaka Honhat* case.

100. With specific regard to climate change the Committee on Rights of the Child ruled in *Sacchi and others v. Argentina* that States parties to the CRC still carry individual responsibility for their own acts or omissions in relation to climate change and their contribution to it (CRC/C/88/D/104/2019, 8 October 2021, paras. 10.8 and 10.10). The above-cited ITLOS *Area Opinion* warns against the pitfalls of differentiation by reference to the need to prevent commercial enterprises based in developed States from setting up companies in developing States, acquiring their nationality and obtaining their sponsorship in the hope of being subjected to less burdensome regulations and controls. According to ITLOS, the spread of sponsoring States "of convenience" would jeopardise uniform application of the highest standards of protection of the marine environment, the safe development of activities in the Area and protection of the common heritage of mankind (para. 159).

[21] GI-ESCR, Dejusticia, AIDA, FIMA, Nuestra América Verde & GFLAC (2023), Impuestos verdes y progresivos para la transición socioecológica, available at https://www.dejusticia.org/wp-content/uploads/2023/12/Impuestos-verdes-y-progresivos-para-la-transicion-socioecologica.pdf

c. Relevant PCIJ case law

101. General international law provides a relevant example of resolving a similar problem of interpretation. In 1922 the Council of the League of Nations requested an advisory opinion from the Permanent Court of International Justice on whether the International Labour Organisation's competence extended to regulating the conditions of labour of agricultural workers. The 1919 Versailles Treaty, which established the ILO, provided for a number of principles of regulation of labour, including the regulation of work hours, equality of women and men, protection from illness and injury, abolition of child labour, monitoring of the enforcement of the laws and regulations etc. PCIJ heard that the adoption of humane conditions of labour might to some extent be retarded by the danger that such conditions would form a handicap against the nations which had adopted them and in favour of those which had not, in the competition of the markets of the world.

102. In the Advisory Opinion of 12 August 1922 (Series B no. 2) the PCIJ noted that there was agreement between States in respect of the applicability of most of the principles to agricultural labour, including the general limitations of working hours and of child labour. PCIJ further found that the enunciation of general principles came with the declaration that "differences of climate, habits and customs, of economic opportunity and industrial tradition" were recognised. So while *all* States should *endeavour* to apply *all* principles, it was for ILO to have due regard to climate conditions or other special circumstances in formulating recommendations or conventions (p. 31). It followed that modification to the general régime could and should be made to meet the case of the countries concerned (p. 33).

103. Applying this approach to combating climate change by the States bound by the American Convention, it is submitted that all States bear procedural and substantive obligations, but the amounts of the reduction of GHG emissions may and should be adjusted in relation to the specific circumstances of each and every State, in keeping with the objective of reducing the global warming. Enforcement action should be taken by the governments, subject, in particular, to the 'polluter pays' principle.

H. CONCLUSIONS

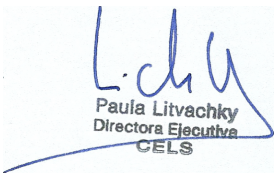
104. In view of the above, the interveners submit that:

- Climate change affects multiple Convention rights, including right to life, to personal integrity, to private and family life and home, prohibition of discrimination, right to a healthy environment, as well as other social, economic

and cultural rights; specific aspects of States' obligations to combat climate change engage freedoms of expression, peaceful assembly and association; these rights have to be interpreted with regard to future generations;

- Procedural obligations of States to combat climate change include conducting environmental impact assessments that take into account climate change considerations; collecting and providing in accessible form information, including raw data, on climate change; conducting meaningful, not formal, public consultations; regulate private industry to ensure reduction of GHG emissions;
- Implementing procedural obligations is not sufficient to combat climate change, the major substantive obligation of States is to reduce GHG emissions;
- Courts are equipped to assess whether States comply with such obligations by, *inter alia*, assessing climate policies' compliance with international obligations, assessing scientific evidence; ordering remedies to ensure reduction of GHG emissions;
- States' obligations to combat climate change are extraterritorial and are engaged when the acts within a State bring about foreseeable effects abroad;
- States' obligations to combat climate change include respect for the rights of environmental human rights defenders as guaranteed under international law;
- States' obligations to combat climate change include respect for the rights of the child as guaranteed under international law;
- The concept of "common but differentiated responsibilities" interpreted in the light of international environmental law and international human rights law means that major polluters bear financial responsibility for GHG emissions and must undertake more ambitious climate action, but this does not absolve less polluting states from taking climate action of their own.

Respectfully submitted,
this 18th of December 2023,



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ANNEX: Information on the interveners

Agora International Human Rights Group

Agora is an association of more than 100 lawyers and other legal professionals working on landmark human rights cases domestically and internationally. Agora permanent legal teams working in Moscow, Saint Petersburg, Sochi, Kazan, Nizhniy Novgorod, Stavropol, Yekaterinburg, Chelyabinsk, Lipetsk, Chita, and other cities in Russia and abroad. A response unit that handles incidents involving human rights violations operates across the entire European part of Russia. Agora is currently representing applicants in several hundred applications brought before the European Court of Human Rights (ECHR). They also provide support to political immigrants, persons who have been forced to leave Russia due to persecution by the authorities and asylum seekers. Agora is also active across post-Soviet States where the negative impact of Russian authorities on the human rights situation is strongly felt.

Centro de Estudios Legales y Sociales (CELS)

CELS is an Argentine organization that works to protect and expand the effective exercise of human rights, justice and social inclusion at a national and international level. It was founded in 1979 as an urgent response to the enforced disappearances and other atrocities being committed during the country's last dictatorship. After the return to civilian rule in 1983, while preserving its flagship work on transitional justice, CELS transitioned to an expanded agenda addressing violations under democracy and the structural causes of inequality and human rights violations on matters of citizen security, economic, social and cultural rights (ESCR), judicial reform, prisons and criminal justice, mental health, migrants' rights, freedom of expression, civilian control of the Armed Forces and, more recently, decent habitat and labor outsourcing.

Dejusticia

Dejusticia is a leading human rights NGO in Colombia. It believes that empowered communities imbued in a culture of inclusiveness, and stronger, more rights-focused institutions can ignite virtuous cycles of community engagement, policy reform, and accountability. Dejusticia works to strengthen the rule of law and the voice of the Global South, empower vulnerable and marginalized communities, and combat inequality with a human rights focus.

Egyptian Initiative for Personal Rights (EIPR)

The Egyptian Initiative for Personal Rights has been working since 2002 to strengthen and protect basic rights and freedoms in Egypt, through research, advocacy and supporting litigation in the fields of civil liberties, economic and social rights, and criminal justice.

Irish Council for Civil Liberties (ICCL)
The ICCL is Ireland's leading independent human rights campaigning organisation. The ICCL monitors, educates and campaigns to secure human rights for everyone in Ireland. The ICCL acts as an essential defender of human rights and civil liberties and as an effective champion for the advancement of justice and freedom in Irish society. The ICCL has been at the forefront of all key human rights campaigns in Irish society, making a significant impact on law, policy and public opinion. These have included the campaigns for legal divorce, decriminalisation of homosexuality and for marriage equality; working for equality legislation and institutions; resistance to emergency legislation and the removal of constitutional due process protections; and consistent advocacy for women's rights, including reproductive rights.

Human Rights Law Centre (HRLC)
The Human Rights Law Centre protects and promotes human rights in Australia and in Australian activities overseas, by using an integrated strategic combination of legal action, advocacy, research and capacity building.

Hungarian Civil Liberties Union (HCLU)
The HCLU is a law reform and watchdog public interest NGO in Hungary, working independently of political parties, the state or any of its institutions. Since its foundation in 1994, the HCLU has been working towards everybody being informed about their fundamental human rights and being empowered to enforce them against undue interference by those in positions of public power. In the areas of political freedoms (including the freedom of speech and he press, the right of assembly, etc.), privacy rights and equality, HCLU monitors legislation, pursues strategic litigation (200 cases annually), provides free legal aid (in more than 4500 cases per year), provides training and launches awareness raising media campaigns in order to mobilise the public. HCLU initiates the implementation and amendment of legislation, and seeks to change enforcement practice in law. HCLU also cooperates with many domestic and foreign human rights organisations and institutions, and does advocacy and outreach.

Kenya Human Rights Commission (KHRC)
The KHRC is a premier and flagship non-governmental human rights and governance institution in Africa that was founded in 1992 with a mission to foster human rights, democratic values, human dignity and social justice. They deal with human rights and social justice issues and situations at all levels in the society. The KHRC's interventions are executed under four interdependent strategic objectives and thematic programs: Civil and Political Rights; Economic and Social Rights; Equality and Non-Discrimination and Institutional Development and Sustainability. The KHRC is recognized for its long history, tenacity, consistency, expertise, and passion in providing technical and political leadership around the pertinent human rights and governance programs at all levels.

KontraS

KontraS (the Commission for the Disappearances and the Victims of Violence), which was born on 20 March 1998, is a task force formed by a number of civil society organisations and community leaders of Indonesia. This task force was originally named KIP-HAM, which was formed in 1996. As a commission that works to monitor human rights issues, KIP-HAM received many complaints and input from the public, both victims and communities who dared to express their aspirations about the human rights problems that occurred in their area.

Legal Resources Centre (LRC)

The Legal Resources Centre is an independent, client-based, non-profit public interest law clinic which uses law as an instrument of justice. It was established in 1979 and is South Africa's largest public interest, human rights law clinic. In addition to its national office , LRC has four regional offices, in Cape Town, Durban, Grahamstown and Johannesburg. In its earlier years, the LRC challenged the legal mechanisms used by the apartheid government to oppress millions of South Africans. Since 1994, the LRC has focused on making the South African Constitution a living document and ensuring that the rights and responsibilities enshrined therein are respected, promoted, protected and fulfilled using a range of strategies including impact litigation, law reform and networking. The LRC provides legal services for the vulnerable and marginalised, including the poor, homeless, and landless people and communities of South Africa who suffer discrimination by reason of race, class, gender, disability or by reason of social, economic, and historical circumstances.