



*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*

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**AMICUS BRIEF**

**SUBMITTED TO THE INTER-AMERICAN COURT OF HUMAN RIGHTS BY THE  
FOSSIL FUEL NON-PROLIFERATION TREATY INITIATIVE**

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## ***PART I: INTRODUCTION***

1. The Fossil Fuel Non-Proliferation Treaty Initiative (“**Treaty Initiative**”) is a global initiative aimed at fostering international cooperation to accelerate a transition to clean energy for everyone, end the expansion of oil, gas and coal, and wind down existing production in keeping with what science shows is needed to address the climate emergency. Significant momentum is building behind the call for a treaty as a means to accelerate a fair, fast and financed transition away from fossil fuels. Twelve States have already endorsed this call.<sup>1</sup> Significantly, the Republic of Colombia — who is one of the States requesting this advisory opinion — has endorsed the call for a treaty, as have eleven cities or subnational governments in region, as well as indigenous groups.<sup>2</sup>
2. The Treaty Initiative wishes to participate in this advisory opinion process to assist the Court by explaining how fossil fuels drive the climate emergency and how existing human rights obligations require regulation of fossil fuel production, extraction, transport financing and other associated activities (“**fossil fuel production**”). The role of fossil fuel production in driving the climate emergency and the legal and human rights implications have not been sufficiently articulated in legal instruments,<sup>3</sup> or in the developing jurisprudence on human rights law in the context of climate change. Clarification is needed.
3. Our submission is structured as follows:
  - (a) **Part II** provides a summary of our submissions.
  - (b) **Part III** explains how fossil fuel production is driving the climate emergency.
  - (c) **Part IV** explains the relationship between fossil fuel production and the human rights recognized in the American Convention on Human Rights (the “**Convention**”) and associated instruments.
  - (d) **Part V** makes confined submissions, which are responsive to some of the topics raised by the questions asked of this Court in Colombia’s and Chile’s request for this advisory opinion.
  - (e) **Part VI** sets out our submissions in relation to State obligations under the Convention in the context of fossil fuel production in the climate emergency.
  - (f) **Part VII** provides a conclusion.

## ***PART II: SUMMARY***

4. By way of summary, the Treaty Initiative’s ultimate submission is that: **fossil fuel production is and always has been governed by States’ human rights obligations under the Convention (and associated instruments).**
5. As set out in more detail in Part VI, these obligations require that:

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<sup>1</sup> States who have endorsed the call include Tonga, Fiji, Niue, Solomon Islands, Tuvalu, Vanuatu, Antigua and Barbuda, Timor Leste, Palau, Colombia, Nauru and Samoa (<https://fossilfuel treaty.org/endorsements>). The proposal is also supported by 9 indigenous nations in Peru (<https://fossilfuel treaty.org/9-indigenous-nations>) in addition to the World Health Organization, the European Parliament, 101 Nobel Laureates, 600+ parliamentarians in 83 countries, 2,100 civil society organizations, 3,000 scientists and academics and over 90 cities and subnational governments.

<sup>2</sup> Lima, Peru; Port-au-Prince, Haiti; Belmopan, Belize; Belém, Brazil; Tilarán, Costa Rica; Buenos Aires, Costa Rica; Turrialba, Costa Rica; Siquirres, Costa Rica; Curridaba, Costa Rica; Santa Ana, Costa Rica; Montes de Oca, Costa Rica.

<sup>3</sup> For example, the Paris Agreement does not mention the words “fossil fuels”, “oil” or “coal”.

- (a) **wealthy and developed States must phase out fossil fuel production**, including by: (i) immediately halting new fossil fuel projects; (ii) ceasing to issue licenses for exploration or production; (iii) ceasing public or international finance for new fossil fuel-related projects or activities, including by divesting and refraining from investing in fossil fuel-related projects and ending fossil fuel subsidies; and (iv) fully transitioning to non-fossil fuel sources at the pace needed to remain within the carbon budget associated with the 1.5°C temperature goal;
  - (b) **wealthy and developed States must provide financial, technical and institutional support to less-wealthy and less-developed States to enhance their capacity** to phase out fossil fuels and fossil fuel production and secure alternative sources of economic revenue to replace revenue from fossil fuel production and enable continued sustainable development (on a timeline consistent with equity and differentiated obligations);
  - (c) **other States must also phase out fossil fuel production**, on a timeline consistent with equity and differentiated obligations;
  - (d) **all States must, consistently with the duty of prevention, exercise due diligence by taking the following actions to reduce the risk to human rights**: (i) regulate fossil fuel production; (ii) supervise and monitor fossil fuel production; (iii) require a climate impact assessment when there is a risk of significant harm to the climate system; (iv) institute a contingency plan; and (v) mitigate significant damage to the climate system caused by fossil fuel production;
  - (e) **all States must, under the right to environmental information, ensure that**: (i) information held by the State concerning fossil fuel production is actively disclosed and made available in a timely manner; (ii) information disclosed is accurate and that enforcement action is appropriately taken in respect of any misleading or deceptive information or greenwashing; and (iii) fossil fuel companies possess, update, disseminate and make available upon request information about their fossil fuel production; and
  - (f) **all States must pursue a just transition away from fossil fuels**, in a manner that is compliant with their human rights obligations.
6. In support of this ultimate submission, the analysis below will explain what **existing** human rights obligations under the Convention and associated instruments<sup>4</sup> require of States parties in respect of fossil fuel production in the context of the climate emergency.

### ***PART III: FOSSIL FUELS DRIVE THE CLIMATE EMERGENCY***

#### **A. The climate emergency**

- 7. We are in a state of climate emergency.
- 8. The best available science confirms that (emphasis added):

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<sup>4</sup> E.g., the Additional Protocol to the Convention of Human Rights on Economic, Social and Cultural Rights (**San Salvador Protocol**); see also OAS Resolution AG/RES.2818 (XLIV-O/14) (2014) (which states that climate change causes “deterioration of quality of life” for present and future generations).

- (a) “Human activities, principally through emissions of greenhouse gases, have unequivocally caused global warming, with global surface temperature reaching 1.1°C above 1850–1900 in 2011–2020”.<sup>5</sup>
  - (b) “Widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred. Human-caused climate change is already affecting many weather and climate extremes in every region across the globe. This has led to **widespread adverse impacts and related losses and damages to nature and people ...** Vulnerable communities who have historically contributed the least to current climate change are disproportionately affected.”<sup>6</sup>
  - (c) “Continued emissions will further affect all major climate system components. With **every additional increment of global warming, changes in extremes continue to become larger**”.<sup>7</sup>
  - (d) “Some future changes are unavoidable and/or irreversible but can be limited by deep, rapid and sustained global greenhouse gas emissions reduction. The **likelihood of abrupt and/or irreversible changes increases with higher global warming levels**. Similarly, the probability of low-likelihood outcomes associated with potentially very large adverse impacts increases with higher global warming levels. (*high confidence*)”<sup>8</sup>
9. To address this emergency, the Paris Agreement relevantly sets a global temperature goal of **1.5°C** above pre-industrial levels.<sup>9</sup>
10. Progress in achieving the temperature goal to date has been insufficient.<sup>10</sup> And the window in which effective action can be taken is rapidly closing: even under the IPCC’s very low greenhouse gas (**GHG**) emission scenario, temperature increase is “more likely than not” to reach 1.5°C before 2040.<sup>11</sup> According to a recent study, if emissions continue at current levels, the crossing of the 1.5°C global warming threshold will happen between 2028 and 2039, and most likely around 2033-2035.<sup>12</sup> If GHG emissions continue and global average

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<sup>5</sup> IPCC, *Synthesis Report of the IPCC Sixth Assessment Report (AR6)*, Summary for Policymakers, March 2023, statement A.1.

<sup>6</sup> IPCC, *Synthesis Report of the IPCC Sixth Assessment Report (AR6)*, Summary for Policymakers, March 2023, statement A.2.

<sup>7</sup> IPCC, *Synthesis Report of the IPCC Sixth Assessment Report (AR6)*, Summary for Policymakers, March 2023, statement B.1.3.

<sup>8</sup> IPCC, *Synthesis Report of the IPCC Sixth Assessment Report (AR6)*, Summary for Policymakers, March 2023, statement B.3.

<sup>9</sup> Paris Agreement, art. 2(1)(a) (the temperature goal is “**well below 2°C** above pre-industrial levels and pursuing efforts to limit the temperature increase to **1.5°C** above pre-industrial levels”). The Paris Agreement states that action to achieve the temperature goal must evolve with science (see art. 4(1)). Today, the politically endorsed scientific consensus, elucidated by the IPCC, is that current levels of warming are harmful, that even 1.5°C is not safe for many people, nations and ecosystems, that every fraction of a degree of warming increases harms, and therefore that States must act to keep global temperature rise below 1.5°C.

<sup>10</sup> The IPCC states: ‘Global GHG emissions in 2030 implied by nationally determined contributions (NDCs) announced by October 2021 make it likely that warming will exceed 1.5°C during the 21<sup>st</sup> century and make it harder to limit warming below 2°C. There are gaps between projected emissions from implemented policies and those from NDCs and finance flows fall short of the levels needed to meet climate goals across all sectors and regions’: IPCC, *Synthesis Report of the IPCC Sixth Assessment Report (AR6)*, Summary for Policymakers, March 2023, statement A.4.

<sup>11</sup> IPCC, *Synthesis Report of the IPCC Sixth Assessment Report (AR6)*, Summary for Policymakers, March 2023, statement B.1.

<sup>12</sup> N. Diffenbaugh, E. Barnes, ‘Data-driven predictions of the time remaining until critical global warming thresholds are reached’ (2023) 120/6 *Proceedings of the National Academy of Sciences* e2207183120. This

temperature exceeds the 1.5°C target, the result may be the crossing of critical thresholds in biophysical subsystems (known as ‘tipping points’) capable of pushing the climate system into potentially catastrophic uncharted territory.<sup>13</sup> The crossing of a tipping point “would likely cause serious disruptions to ecosystems, society, and economies”.<sup>14</sup> The IPCC has reported that if global temperature rise exceeds 1.5°C, even temporarily, it will unleash severe risks and irreversible impacts in many natural and human systems (e.g. glacier melt, loss of coral reefs, loss of human lives due to heat), even if the 1.5°C goal is later reached.<sup>15</sup>

## **B. The central role of fossil fuel production in the climate emergency**

11. The central role of fossil fuels in driving the climate emergency is incontrovertible.

- (a) Global warming is caused mainly by the increasing cumulation of **GHG** emissions (especially CO<sub>2</sub> emissions) in the atmosphere.<sup>16</sup>
- (b) The overwhelming **driver** of these cumulative GHG emissions is **fossil fuel combustion and industrial processes**.<sup>17</sup> Fossil fuels – coal, oil, and gas – are the single largest contributor to GHG emissions. They were responsible for 86% of CO<sub>2</sub> emissions in the most recent decade (2010-2019).<sup>18</sup> Emissions of CO<sub>2</sub> from fossil fuel combustion and industrial processes contributed about 78% of the total GHG emissions (in the preceding decade).<sup>19</sup>
- (c) The ultimate **source** of these cumulative GHG emissions is **fossil fuel production**.<sup>20</sup> Fossil fuel production cannot be disconnected from fossil fuel

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is consistent with the conclusions of the IPCC that: ‘continued greenhouse gas emissions will lead to increasing global warming, with the best estimate of reaching 1.5°C in the near term in considered scenarios and modelled pathways.’ See IPCC, *Synthesis Report of the IPCC Sixth Assessment Report (AR6)*, Summary for Policymakers, March 2023, statement B.1.

<sup>13</sup> W. Steffen et al, ‘Trajectories of the Earth System in the Anthropocene’ (2018) 14 *Proceedings of the National Academy of Sciences* 8252, 8254.

<sup>14</sup> W. Steffen et al, ‘Trajectories of the Earth System in the Anthropocene’ (2018) 14 *Proceedings of the National Academy of Sciences* 8252, 8252.

<sup>15</sup> IPCC, AR6, Working Group III, “Climate Change 2022: Mitigation of Climate Change”, *Technical Summary*, 69 [TS.C.13], see also 57 [TS.C.2.5].

<sup>16</sup> See IPCC, *Synthesis Report of the IPCC Sixth Assessment Report (AR6)*, Longer Report, Figure 3.5, page 48. IPCC, *Synthesis Report of the IPCC Sixth Assessment Report (AR6)*, Summary for Policymakers, March 2023, statement B.1.1. In 2019, atmospheric CO<sub>2</sub> concentrations (410 parts per million) were higher than at any time in at least 2million years (high confidence), and concentrations of methane (1866 parts per billion) and nitrous oxide (332 parts per billion) were higher than at any time in at least 800,000 years (very high confidence): IPCC, *Synthesis Report of the IPCC Sixth Assessment Report (AR6)*, Summary for Policymakers, March 2023, statement A.1.3.

<sup>17</sup> IPCC, *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policy Makers (SPM)*, p. 5; IPCC, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2021)* p. 676 (**IPCC AR6 WGI**) (“Of the total anthropogenic CO<sub>2</sub> emissions, the combustion of fossil fuels was responsible for 81–91%, with the remainder being the net CO<sub>2</sub> flux from land-use change and land management (e.g., deforestation, degradation, regrowth after agricultural abandonment, and peat drainage)”).

<sup>18</sup> IPCC AR6 WGI, p. 687.

<sup>19</sup> IPCC, *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policy Makers (SPM)*, 5 (“Emissions of CO<sub>2</sub> from fossil fuel combustion and industrial processes contributed about 78% of the total GHG emissions increase from 1970 to 2010, with a similar percentage contribution for the increase during the period 2000 to 2010 (high confidence)”).

<sup>20</sup> See Heede, R., *Tracing Anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers*, 122 *Climatic Change* 229 (2014).

combustion and industrial processes. That is because upstream fossil fuel production inevitably leads to, and is necessarily and causally linked to, downstream GHG emissions (which in turn cause climate change, and its rights-infringing impacts).<sup>21</sup> Fossil fuels, once extracted, get burned, and lead to GHG emissions.<sup>22</sup> Moreover, the production and extraction process itself releases emissions, including methane and CO<sub>2</sub>.

12. Against this background, and given the present state of climate emergency, it follows rather plainly that – **we cannot avert the climate emergency or effectively limit its impacts without rapidly reducing fossil fuel production and use.** We cannot fight climate change without ending reliance on fossil fuels. The best available science confirms that the world must leave major fossil fuel reserves undeveloped. In 2023, the IPCC concluded that all pathways to fulfilling the commitments of the Paris Agreement “involve rapid and deep and in most cases immediate [GHG] emission reductions in all sectors this decade.”<sup>23</sup> The IPCC has also recognized that “[l]imiting global warming to 2°C or below will [necessarily] leave a substantial amount of fossil fuels unburned and could strand considerable fossil fuel infrastructure (*high confidence*)”.<sup>24</sup> Further, the International Energy Agency (IEA) has said that there is no need for investment in new fossil fuel projects under a 1.5°C target.<sup>25</sup> The IEA has also indicated that some fossil fuel infrastructure and oil and gas fields may need to be retired early.<sup>26</sup> Moreover, the 2022 Emissions Gap Report from the UN Environment Programme concludes that:<sup>27</sup>

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<sup>21</sup> See *Gray v. The Minister for Planning and Ors* [2006] NSWLEC 720, paras. 97-100 (Pain J) (recognizing that upstream fossil fuel extraction is linked to downstream GHG emissions); *Gloucester Resources Limited v. Minister for Planning* [2019] NSWLEC 7, paras. 428, 486-490, 500-502, 513 (Preston CJ) (discussing the requirement to consider indirect (scope 3) GHG emissions in assessing the impacts of a fossil fuel project).

<sup>22</sup> And there are problems with capturing and storing emissions. For example, carbon dioxide removal presents its own difficulties under human rights law (see Pt VE below).

<sup>23</sup> IPCC, *Synthesis Report of the IPCC Sixth Assessment Report (AR6)*, Summary for Policymakers, March 2023, statement B.1.1.

<sup>24</sup> IPCC, AR6, Working Group III, “Climate Change 2022: Mitigation of Climate Change”, *Summary for Policymakers* (2022) C.4.4. See also IPCC, AR6, Working Group III, “Climate Change 2022: Mitigation of Climate Change”, *Technical Summary* (2022) Box TS.8 (p. 90) (focusing on Stranded Assets: “Without early retirements, or reductions in utilization, the current fossil infrastructure will emit more GHGs than is compatible with limiting warming to 1.5°C.”). See also Welsby, D, Price, J, Pye, S & Ekins, P, “Unextractable fossil fuels in a 1.5°C world” (2021) 597 *Nature* 229, 229 (as an underestimate of the production changes required, the authors find that: “[b]y 2050, ... nearly 60 per cent of oil and fossil methane gas, and 90 per cent of coal must remain unextracted to keep within a 1.5°C carbon budget.”. See further, Achakulwisut, P, Erickson, P, Guivarch, C, Schaeffer, R, Brutschin, E & Pye, S, “Global fossil fuel reduction pathways under different climate mitigation strategies and ambitions” (2023) 14 *Nature Communications* (online), 1 (“In scenarios limiting warming to 1.5 °C with no or limited overshoot, global coal, oil, and natural gas supply (intended for all uses) decline on average by 95%, 62%, and 42%, respectively, from 2020 to 2050, but the long-term role of gas is highly variable. ... If [carbon dioxide removal] is constrained by limits derived from expert consensus, the respective modelled coal, oil, and gas reductions become 99%, 70%, and 84%.”).

<sup>25</sup> International Energy Agency, *Net Zero Roadmap: A Global Pathway to Keep the 1.5°C Goal in Reach* (2023 Update – Executive Summary), p. 6. The IEA has also indicated that, in order to reach net zero emissions by 2050, “no new oil and gas fields should be approved for development” and there should be “no new coal mines or mine extensions”: International Energy Agency, *Net Zero by 2050: A Road Map for the Global Energy Sector* (2021) Summary for Policymakers, p. 11.

<sup>26</sup> International Energy Agency, *Net Zero Roadmap: A Global Pathway to Keep the 1.5°C Goal in Reach* (2023 Update – Executive Summary), p. 3.

<sup>27</sup> United Nations Environment Programme, *Emissions Gap Report 2022: The closing window. Climate crisis calls for rapid transformation of societies* (Nairobi, 2022), Executive Summary, at page xvi.

‘To get on track for limiting global warming to 1.5°C, global annual GHG emissions must be reduced by 45 per cent compared with emissions projections under policies currently in place in just eight years, and they must continue to decline rapidly after 2030, to avoid exhausting the limited remaining atmospheric carbon budget’

13. Despite this, according to the UN Environment Program’s “Production Gap” report, governments are planning to produce more than double the amount of fossil fuels by 2030 than is consistent with a 1.5°C trajectory.<sup>28</sup> According to the “Emissions Gap Report”, global progress towards 2030 targets are “highly inadequate”.<sup>29</sup>
14. Insufficient attention to and regulation of fossil fuel production is at the heart of the insufficient action to address the climate emergency to date. Given the lack of an international legal framework to manage a coordinated global decline in fossil fuel production and use, the Treaty Initiative is calling for a new multilateral instrument to phase out fossil fuel production. The absence of any such coordinated mechanism today does not, however, mean States currently have no obligation to halt the expansion of fossil fuel production and rapidly accelerate the phase out of fossil fuel production and use. To the contrary, existing laws, including human rights law, require States to curb fossil fuelled-climate change. Given that fossil fuels are the overwhelming cause of the climate emergency and that the impacts of climate change affect all human rights, we submit that States’ human rights obligations under the Convention govern fossil fuel production.

#### **PART IV: FOSSIL FUEL PRODUCTION & HUMAN RIGHTS LAW**

15. There are many ways in which fossil fuel production can impair human rights. Of most relevance to this advisory opinion, by virtue of driving the climate emergency, fossil fuel production is necessarily and causally linked to the impacts of climate change (including those which impinge on human rights).<sup>30</sup> We discuss this in Pt IV.A.
16. Further, the inherent polluting nature of fossil fuels, together with the way fossil fuel production is carried out, presents further human rights impacts (independent of those impacts which flow from climate change).<sup>31</sup> We discuss this briefly in Pt IV.B. We also note that the sovereign right to exploit natural resources (such as fossil fuels) is limited not only by the customary international law obligation to not cause transboundary harm,<sup>32</sup> but also by the need to respect human rights, including the rights of indigenous peoples.<sup>33</sup>
17. The logic of our submission is essentially that fossil fuel production is a necessary and major driver of climate change and, by reason of climate change and the process of fossil fuel production itself, engages and impairs myriad human rights. Accordingly, **State**

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<sup>28</sup> Stockholm Environment Institute et al, “The Production Gap Report 2023” (2023), pp. 2, 4.

<sup>29</sup> United Nations Environment Programme, *Emissions Gap Report 2022: The closing window. Climate crisis calls for rapid transformation of societies* (Nairobi, 2022), p. XVII.

<sup>30</sup> Although in one sense fossil fuel production could be said to have advanced the enjoyment of human rights by driving economic development and increases in the quality of life in areas of life (economy, agriculture, energy access, communication, transport, etc), it is very clear now that any continued production and use of fossil fuels threatens human rights through its generation of planet-warming emissions, and through myriad other adverse impacts on health and the environment at every stage of the fossil fuel lifecycle (from extraction and processing, to transport, use and disposal).

<sup>31</sup> As discussed in IVB.

<sup>32</sup> *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)*, Judgment of 1 December 2022, I.C.J. General List No 162 (unreported), paras. 83, 99; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Compensation*, Judgment, I.C.J. Reports 2018, p. 15, para. 35; *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment, I.C.J. Reports 1949, p. 22.

<sup>33</sup> H. van Asselt, “Governing fossil fuel production in the age of climate disruption: Towards an international law of ‘leaving it in the ground’ (2021) *Earth System Governance* 9, page 3.



**conduct in relation to fossil fuel production must be governed by and assessed against the obligations of States under human rights law.**

- (a) At a general level, States have obligations to respect the rights in the Convention (ie a negative obligation, to refrain from any practice or activity that denies or restricts rights) and to ensure the rights in the Convention (ie positive obligations, to take all appropriate steps to protect and preserve rights, including by adopting legal, political, administrative and cultural measures to promote and safeguard human rights; ensuring that violations of rights are examined, with perpetrators punished and victims appropriately compensated; and a duty to prevent third parties from violating the protected rights in the private sphere).<sup>34</sup> Under some economic and social rights (such as rights to health, food, water), States have immediate obligations to ensure access without discrimination and to take measures to achieve full realization of the rights; and also have duties to prevent third parties from impairing the enjoyment of the rights and to ensure minimum thresholds are met.<sup>35</sup>
- (b) At a more specific level, *in relation to fossil fuel production in the context of the climate emergency*, the obligations of States under the Convention — interpreted harmoniously with requirements under international environmental and climate law — require certain conduct of States. Our submissions on this are set out in Part VI, supported by the analysis to be found in Part V.
18. Before turning to address rights-infringing climate impacts and other rights-infringing impacts of fossil fuel production, we note the following important statement made by five UN Special Rapporteurs and one Independent Expert:

“While coal, oil and gas literally fuel the climate emergency, which is already preventing the full enjoyment of a range of human rights with disproportionate impacts on certain groups and communities, they also directly contribute to biodiversity loss, toxic pollution and water scarcity.

In fact, fossil fuels are at the heart of the planetary ecological crisis and their tremendous negative impacts on human rights are felt throughout their life cycle, from exploration and extraction to combustion and contamination.

Fossil fuels exploitation affects the rights to life, health, food, water and sanitation, education, an adequate standard of living, cultural rights, and a clean, healthy and sustainable environment with marginalised and vulnerable communities bearing the brunt of the consequences.

To address the planetary crisis and tackle the wide range of fossil fuels negative human rights impacts, States must urgently decarbonise and detoxify”.

That statement underscores our ultimate submission: that fossil fuel production must be governed by and assessed against the obligations of States under human rights law.

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<sup>34</sup> Inter-American Court of Human Rights, *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the Convention on Human Rights)*. Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23 (*Advisory Opinion OC-23/17*), paras. 117-118.

<sup>35</sup> *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, Judgment of February 6, 2020 (Merits, reparations and costs), Inter-Am. Ct. H.R. Series C No. 400 (*Lakha Honhat*), para. 229; *Advisory Opinion OC-23/17*, November 15, 2017. Inter-Am. Ct. H.R. Series A No. 23, para. 121.

A. *Rights-infringing climate impacts*

19. Climate change constitutes one “of the most pressing and serious threats to the ability of present and future generations to effectively enjoy all human rights”.<sup>36</sup> Relying on findings by the IPCC, five UN human rights treaty bodies have said that “adverse impacts on human rights are already occurring with 1°C of global warming; every additional increase in temperature will further undermine the realization of rights”.<sup>37</sup> Already at present levels of warming, the IPCC has observed that slow-onset and extreme weather events have had impacts on human health and food security, destroyed homes and infrastructure, and resulted in loss of property and income.<sup>38</sup> By reason of the increase in global temperature, there will be sea level rise, impacts on agriculture and subsistence lifestyles, and impacts on culture and traditional customs and lifeways, among others. The major organs of the Inter-American human rights system have also recognised that climate impacts interfere with the rights protected by the Convention and associated instruments.<sup>39</sup>
20. In our submission, at least the following rights recognized in the Inter-American human rights system are impaired by the climate emergency:
- (a) right to life (art. 4)
  - (b) right to a healthy environment (art. 26, with art. 11 of the San Salvador Protocol)
  - (c) right to a privacy and private, home and family life (art. 11(2))
  - (d) right to culture (art. 14)
  - (e) rights to property, particularly for indigenous peoples (art. 21)
  - (f) right to health (art. 10)
  - (g) rights to food and water (art. 12)
  - (h) rights of equality and non-discrimination
  - (i) rights of the child (art. 19)
21. We discuss below the scope and content of these rights and how they are impaired by fossil fuel production in the context of the climate emergency. At the outset, we emphasise that

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<sup>36</sup> UN General Assembly, 76th session, *The human right to a clean, healthy and sustainable environment*, U.N. Doc. No. A/RES/76/300, 28 July 2022, pp. 2-3; see also UN Human Rights Committee, *General Comment No. 36 - Article 6: Right to life*, 20 October 2018, U.N. Doc. CCPR/C/GC/36 (**HRC GC 36**), para. 62. Further, since 2008, the UN Human Rights Council has adopted several resolutions recognizing that the climate emergency threatens the enjoyment of human rights, particularly for the world’s most vulnerable populations.

<sup>37</sup> Joint statement 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, *Statement on human rights and climate change*, U.N. Doc. No. HRI/2019/1, 14 May 2020 (*UN Human Rights Treaty Bodies’ joint statement on human rights and climate change*), para. 5.

<sup>38</sup> IPCC, AR6, WG II (Climate Change 2022: Impacts, Adaptation and Vulnerability), *Summary for Policymakers*, B.1.6.

<sup>39</sup> Inter-American Commission on Human Rights and Special Rapporteur for Economic, Social, Cultural and Environmental Rights, *Climate Emergency: Scope of Inter-American Human Rights Obligations*, Inter-American Commission Resolution No. 3/2021, adopted 31 Dec 2021, at 4 (“[t]he nexus between climate change and human rights is increasingly evident”... “the existence of a directly proportional relationship between the increase in [GHG] emissions ... and the frequency and intensity of meteorological changes, which implies the amplification of risks to societies, people and natural systems.”), see also 8 (“climate change is one of the greatest threats to the full enjoyment and exercise of the human rights of present and future generations, to the health of ecosystems, and all species that inhabit the planet”).

human rights are indivisible, interdependent and interrelated and that the rights we focus on are not the only rights impaired by fossil fuel production.

### *Right to life*

22. Article 4 of the Convention relevantly provides that “[e]very person has the right to have his life respected”. The right is not interpreted narrowly.<sup>40</sup> In the jurisprudence of this Court, it has been recognized that “States are obliged to ensure the creation of the necessary conditions for the full enjoyment and exercise of this right”.<sup>41</sup> Those necessary conditions include access to (and quality of) food, water and health, which are protected rights themselves (and discussed further below).<sup>42</sup> Put another way, the right is a prerequisite for the enjoyment of other rights in the Convention.<sup>43</sup> This Court has also observed that environmental conditions which interfere with the right to life may also impinge on the right to personal integrity.<sup>44</sup> The right can be violated by a life-threatening situation, without the loss of life occurring, and so States must take positive measures and exercise obligations of due diligence *before the right is threatened*.<sup>45</sup>
23. It is clear that the right to life has operation in the context of climate change,<sup>46</sup> and thus that fossil fuel production (as a central driver of the climate emergency) is governed by the

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<sup>40</sup> *Case of the “Street Children” (Villagrán Moreals et al.) v. Guatemala*. Merits. Judgment of November 19, 1999, Inter-Am. Ct. H.R. Series C No. 63 (“*Street Children*”), para. 144.

<sup>41</sup> *Advisory Opinion OC-23/17*, November 15, 2017. Inter-Am. Ct. H.R. Series A No. 23, para. 108; “*Street Children*” Merits. Judgment of November 19, 1999, Inter-Am. Ct. H.R. Series C No. 63, para. 144. The State has negative obligations (to refrain from depriving individuals of the right to life), as well as positive obligations to regulate and protect its citizens against the acts of third parties, including businesses: *Advisory Opinion OC-23/17*, November 15, 2017. Inter-Am. Ct. H.R. Series A No. 23, para. 118-119

<sup>42</sup> *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs*. Judgment of June 17, 2005. Series C No. 125, paras. 163-167; *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, reparations and costs*. Judgment of March 29, 2006. Inter-Am Ct. H.R. Series C No. 146, paras. 156-178.

<sup>43</sup> See also *Advisory Opinion OC-23/17*, November 15, 2017. Inter-Am. Ct. H.R. Series A No. 23, para. 108: ‘...the realization of the other rights depends on its protection’ and African Commission on Human and Peoples’ Rights, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, Communication No. 279/03-296/05, 27 May 2009, para. 146: ‘It is basic to all human rights and without it all other rights are without meaning.’; “*Street Children*” Merits. Judgment of November 19, 1999, Inter-Am. Ct. H.R. Series C No. 63, para. 144; *Case of Zambrano Vélez et al. v Ecuador, Merits, reparations and costs*. Judgment of 4 July 2007, Inter-Am Ct. H.R. Series C No. 166, para. 78; *Case of Xákmok Kásek Indigenous Community v Paraguay, Merits, reparations and costs*, Judgment of 24 August 2010, Inter-Am Ct. H.R. Series C No. 214, para. 186.

<sup>44</sup> *Advisory Opinion OC-23/17*, November 15, 2017. Inter-Am. Ct. H.R. Series A No. 23, para. 114.

<sup>45</sup> Human Rights Committee, *General Comment No 36*, paras. 7, 21. See *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21, para. 1480.

<sup>46</sup> HRC GC 36, para. 62 (climate change is “one of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life”); Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019 (Daniel Billy et. al. v. Australia)*, U.N. Doc. No. CCPR/C/135/D/3624/2019, 22 September 2022 (*Billy et al v Australia*); Committee on the Rights of the Child, *General Comment No. 26*, paras. 20-25. In terms of domestic cases, see *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21, paras 1452-1513; *State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Urgenda Foundation* ECLI:NL:HR:2019:2007, (Supreme Court of the Netherlands 20 December 2019), 4.7; *Future Generations v Ministry of the Environment*, Corte Suprema de Justicia de Colombia [Supreme Court of Justice of Colombia], TC4360-2018, Radicación n. 11001-22-03-000-2018-00319-01 (5 April 2018). There are also many relevant reports of Special Rapporteurs, see as a sample: David Boyd, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: A safe climate*, Report of the Special Rapporteur on Human Rights and the Environment, 15 July 2019, U.N. Doc. A/74/161; Ian Fry, *Promotion and protection of human rights in the context of climate change mitigation, loss and damage and participation*, “Report of the Special Rapporteur on the promotion and protection of human

obligations of States in respect of the right. This Court has stated that the right is “particularly vulnerable to environmental impact”.<sup>47</sup> The UN Human Rights Committee has also stated that “environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life”.<sup>48</sup> In our submission, fossil fuel production — which is the main driver of the climate emergency — must necessarily be one of the most pressing and serious threats to the right to life.

### *Right to a healthy environment*

24. The right to a healthy environment is expressly guaranteed by Article 11 of the San Salvador Protocol, in the following terms:

1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.
2. The States Parties shall promote the protection, preservation, and improvement of the environment.

25. This scope and content of this right has been the subject of a previous advisory opinion of this Court.<sup>49</sup> The Court has explained that the right to a healthy environment under Art 11 forms part of the economic, social and cultural rights protected under Art 26 of the Convention and is ‘autonomous’ in its operation. As an “autonomous” right, it “protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals”.<sup>50</sup> The right to a healthy environment is also interdependent on other rights.<sup>51</sup>

26. There is no doubt that the right to a healthy environment is engaged by climate change. On 28 July 2022, the UN General Assembly reaffirmed recognition of the human right to a clean, healthy, and sustainable environment in UNGA Resolution 76/300.<sup>52</sup> In its recitals, the Resolution clarified the scope and content of the right to a clean and healthy environment and recognised that (emphasis added):

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rights in the context of climate change”, 26 July 2022, U.N. Doc. A/77/226; Pedro Arrojo Agudo (Special Rapporteur on the human right to safe drinking water and sanitation), *Special thematic report on climate change and the human rights to water and sanitation* (Jan. and Mar. 2022); Ian Fry, *Providing legal options to protect the human rights of persons displaced across international borders due to climate change*, Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change, 18 April 2023, U.N. Doc. A/HRC/53/34; Victoria Tauli-Corpuz, *Thematic study on the impacts of climate change and climate finance on indigenous peoples’ rights*, Special Rapporteur on the rights of indigenous peoples, U.N. Doc. A/HRC/36/46 (Nov. 1, 2017).

<sup>47</sup> *Advisory Opinion OC-23/17*, November 15, 2017. Inter-Am. Ct. H.R. Series A No. 23, para. 65.

<sup>48</sup> *Billy et al v Australia*, HRCtee, 22 September 2022, U.N. Doc. No. CCPR/C/135/D/3624/2019, para. 8.3, see the dissenting opinion of Committee member Duncan Laki Muhumaza, considered that Australia violated the authors’ rights to life, including because it failed to “cease the promotion of fossil fuel extraction and use” (para. 7). See, further, HRC GC 36, para. 62.

<sup>49</sup> *Advisory Opinion OC-23/17*.

<sup>50</sup> *Lakha Honhat*, Judgement, Inter-Am. Ct. H.R. (ser. C), 6 February 2020, paras. 202-203.

<sup>51</sup> As recognised by the Supreme Court of Justice of Colombia in *Future Generations v Ministry of the Environment* (TC4360-2018, 5 April 2018), in a case dealing with a ‘tetula’ constitutional claim that the deforestation of the Amazon was contravening fundamental rights, the “fundamental rights of life, health, the minimum subsistence, freedom, and human dignity are substantially linked and determined by the environment and the ecosystem”. The Court continued: “Without a healthy environment, subjects of law and sentient beings in general will not be able to survive, much less protect those rights, for our children or for future generations”.

<sup>52</sup> UN General Assembly, *The human right to a clean, healthy and sustainable environment*, Res 76/300, 28 July 2022, U.N. Doc. No. A/RES/76/300.

[T]he **impact of climate change**, the unsustainable management and use of natural resources, the pollution of air, land and water, the unsound management of chemicals and waste, **the resulting loss of biodiversity and the decline in services provided by ecosystems interfere with the enjoyment of a clean, healthy and sustainable environment** and that environmental damage has negative implications, both direct and indirect, for the effective enjoyment of all human rights.

27. The UN Special Rapporteur on the Human Rights and the Environment has also observed, “[t]he failure of States to take adequate steps to address climate change can constitute a violation of the right to a healthy environment”.<sup>53</sup> Domestic cases also recognise that the right to a healthy environment encompasses climate change.<sup>54</sup>

*Right to privacy and private, home and family life*

28. Article 11(2) of the Convention relevantly provides that: “No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honour or reputation”.
29. In the context of Indigenous peoples, components of the traditional Indigenous way of life and the special relationship with territory are elements that can also be considered to fall within the scope of this right.<sup>55</sup> Subsistence ways of life, which depend on crops, livestock, fruit trees, hunting, foraging, fishing and water resources, all are elements of a relationship with territory which can fall within the scope of this right (as well as cultural rights).<sup>56</sup> Moreover, cultural traditions and ancestral relationships – irrespective of minority status or indigenous identity – can be “taken into account when defining the term ‘family’ in a specific situation”.<sup>57</sup>
30. This Court has said that the right to private life is particularly vulnerable to environmental impact”.<sup>58</sup> The UN Human Rights Committee has confirmed that climate change impacts will interfere with the right to private, home and family life. In *Billy et al v Australia*, in finding a violation by the State Party of the equivalent right to private, home, and family life in art 17 of the ICCPR, the Committee said at para. 8.12:

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<sup>53</sup> David Boyd, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: A safe climate*, Report of the Special Rapporteur on Human Rights and the Environment, 15 July 2019, U.N. Doc. A/74/161, paras. 44; 63. The UN General Assembly has recognised in Resolution 76/300 of 2022 that “the impact of climate change ... the resulting loss of biodiversity and the decline in services provided by ecosystems’ interfere with the enjoyment of a clean, healthy and sustainable environment and that environmental damage has negative implications, both direct and indirect, for the effective enjoyment of all human rights”.

<sup>54</sup> See, e.g., *Held v Montana* (Montana First Judicial District Court, 14 August 2023, CDV-2020-307); *In re Hawai’i Electric Light Co* (Supreme Court of the State of Hawai’i, 13 March 2023, SCOT-22-0000418); *Demanda Generaciones Futuras v. Minambiente* (Supreme Court of Colombia, Decision of 5 Apr. 2018); *Leghari v. Federation of Pakistan* (W.P. No. 25501/201, High Court at Lahore, Decision of 4 Apr. 2015).

<sup>55</sup> See *Billy et al v Australia*, HRCtee, 22 September 2022, U.N. Doc. No. CCPR/C/135/D/3624/2019, para. 8.10 (in relation to the equivalent right in Art 17 of the ICCPR).

<sup>56</sup> Human Rights Committee, *Views in Communication 2751/2016* (*Portillo Cáceres and Others v. Paraguay*), 29 September 2019, U.N. Doc. CCPR/C/126/D/2751/2016, para. 8.3, see also para. 8.6 (re the right to culture in art. 27 of the ICCPR).

<sup>57</sup> Human Rights Committee, *Views in Communication No. 549/1993* (*Hopu and Bessert v. France*), 29 Dec. 1997, U.N. Doc. CCPR/C/60/D/549/1993/Rev.1, para. 10.3.

<sup>58</sup> *Advisory Opinion OC-23/17*, November 15, 2017. Inter-Am. Ct. H.R. Series A No. 23, para. 66. Similarly, the European Court of Human Rights has held that the equivalent right in the European human rights system is engaged where a person is directly and seriously affected by unsafe or disruptive environmental conditions (such as air or water pollution): see, *Cordella v Italy*, ECtHR App Nos. 54414/13 and 54264/15 (Jan 24, 2019); *Fadayeva v Russia*, ECtHR App. No. 55723/00 (June 9, 2005).

[W]hen climate change impacts, including environmental degradation on traditional (Indigenous) lands in communities where subsistence is highly dependent on available natural resources and where alternative means of subsistence and humanitarian aid are unavailable, have direct repercussions on the right to one's home, and the adverse consequences of those impacts are serious because of their intensity or duration and the physical or mental harm that they cause, the degradation of the environment may then adversely affect the well-being of individuals and constitute foreseeable and serious violations of private and family life and the home.

31. Further, in *Portillo Cáceres and Others v. Paraguay*, the Human Rights Committee found violations of the right to privacy in art. 17 of the ICCPR (and also the right to culture in art. 27 of the ICCPR) by reason of a failure by the State party to protect against pollution, by reason of disappearing natural resources needed for their subsistence (and in turn their ancestral practices and traditional knowledge which depend on those very natural resources) and erosion of the community structure, as families are forced to leave the community and the intergenerational transmission of culture becomes obstructed.<sup>59</sup>

*Indigenous rights in relation to property*

32. Art 21 of the Convention protects a “right to the use and enjoyment of ... property” and provides that “[n]o one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law”.
33. In the context of indigenous peoples, this Court has recognised that art 21 protects a right to communal ownership of their lands,<sup>60</sup> which derives from the close relationship between indigenous peoples and their lands, and with the natural resources on their ancestral territories and the intangible elements arising from these.<sup>61</sup> For such groups, this Court has recognized that there are heightened obligations, namely “positive measures to ensure that members of these peoples have access to a dignified life – which includes the protection of their close relationship with the land – and to their life project, in both its individual and collective dimensions”.<sup>62</sup> By collective or communal dimensions, this Court held in *Awás Tingni* that the right to property protects the ancestral lands of Indigenous peoples.<sup>63</sup> This communal dimension can also be understood that reflecting the right to self-determination, including the right to “freely pursue their economic, social and cultural development”, and “freely dispose of their natural wealth and resources” so as not to be “deprived of [their]

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<sup>59</sup> UN Human Rights Committee, *Views in Communication 2751/2016* (*Portillo Cáceres and Others v. Paraguay*), 29 September 2019, U.N. Doc. CCPR/C/126/D/2751/2016, para. 8.5.

<sup>60</sup> *Lhaka Honhat*, Judgment of February 6, 2020 (Merits, reparations and costs), Inter-Am. Ct. H.R. Series C No. 400, para. 93. See *Case of Mayagna (Sumo) Awás Tingni Community v. Nicaragua*, Judgment of 31 August 2001, Inter-Am. Ct. H.R. Series C No. 79, paras. 148, 149 and 151.

<sup>61</sup> *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations*. Judgment of June 27, 2012. Inter-Am Ct. H.R. Series C No. 245, paras. 145–147; see *Case of Mayagna (Sumo) Awás Tingni Community v. Nicaragua*, Judgment of 31 August 2001, Inter-Am. Ct. H.R. Series C No. 79, paras 142-155. See further *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs*. Judgment of June 17, 2005. Series C No. 125, paras 135-137.

<sup>62</sup> *Advisory Opinion OC-23/17*, November 15, 2017. Inter-Am. Ct. H.R. Series A No. 23, para. 48; *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs*. Judgment of June 17, 2005. Series C No. 125, para. 163.

<sup>63</sup> *Case of Mayagna (Sumo) Awás Tingni Community v. Nicaragua*, Judgment of 31 August 2001, Inter-Am. Ct. H.R. Series C No. 79, para. 148.

own means of subsistence.”<sup>64</sup> This Court has recognized that the right to self-determination implicates the rights of Indigenous Peoples.<sup>65</sup>

34. Fossil fuel production, as a central driver of climate change, can and does interfere with Indigenous rights relating to property and in that way poses a limitation on the right. Temperature increases and other impacts flowing from climate change can interfere with property interests,<sup>66</sup> including the natural resources on ancestral territories and the intangible elements arising from these and thus the “close relationship” between indigenous peoples and their lands. There is an inherent connection between this right, cultural rights and the right to self-determination. The insecurity engendered by a loss of predictability of seasonal weather patterns, seasonal timing, tides and availability of traditional and culturally important food sources, all interfere with this aspect of the right to property (along with inherently connected rights).

#### *Right to culture*

35. Article 14 of the San Salvador Protocol contains a wide-ranging right to the “[b]enefits of culture”, which includes the right of everyone to “take part in the cultural and artistic life of the community” amongst other rights.
36. This Court has said that the right to cultural identity “protects the freedom of individuals, including when they are acting together or as a community, to identify with one or several societies, communities or social groups, to follow a way of life connected to the culture to which they belong and to take part in its development”.<sup>67</sup> Thus, “this right protects the distinctive features that characterize a social group without denying the historical, dynamic and evolutive nature of culture”.<sup>68</sup>
37. Climate change impacts, brought on by fossil fuel production, have a profound impact on cultural rights and, for some peoples who will be displaced from their country, it risks the survival of their culture.<sup>69</sup> Indigenous peoples will be disproportionately affected by climate change impacts, due to the “tangible and intangible manifestations of their ways of life” and “their spiritual and physical relationships with their lands, territories and resources”.<sup>70</sup>
38. The Human Rights Committee has accepted that climate change impacts interfere with cultural rights. In *Billy*, the Committee found that Australia’s failure to adopt timely

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<sup>64</sup> United Nations Charter, art. 1; *International Covenant on Civil and Political Rights*, art. 1; *International Covenant on Economic, Social and Cultural Rights*, art. 1.

<sup>65</sup> *Case of the Saramaka People v Suriname, Preliminary Objections, Merits, Reparations, and Costs*. Judgment of 28 November 2007, Inter-Am. Ct. H.R. Series C No. 172, para. 93.

<sup>66</sup> For example, in *Budayeva v Russia* [2008] II Eur Court HR 267, the European Court of Human Rights held property destruction caused by a preventable mudslide engaged the right to property in the European Convention of Human Rights.

<sup>67</sup> *Lakha Honhat*, Judgement, Inter-Am. Ct. H.R. (ser. C), 6 February 2020, para. 240.

<sup>68</sup> *Lakha Honhat*, Judgement, Inter-Am. Ct. H.R. (ser. C), 6 February 2020, para. 240. The Court’s interpretation of the content of this right has been facilitated by the Committee on Economic, Social and Cultural Rights, in its *General Comment 21. Right of everyone to take part in cultural life (art. 15, para. 1(a), of the Covenant)*. See also *UN Human Rights Committee, Views in Communication 2751/2016 (‘Portillo Cáceres and Others v. Paraguay’)*, 29 September 2019, U.N. Doc. CCPR/C/126/D/2751/2016.

<sup>69</sup> See, as an illustration, *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21, para. 1565, see also the evidence summarized by the Queensland Land Court in paras. 1551-1564.

<sup>70</sup> UN Human Rights Council, *Promotion and Protection of the Rights of Indigenous Peoples with Respect to their Cultural Heritage*, 30th Sess, UN Doc A/HRC/30/53 (19 August 2015), para. 6. See also *Billy et al v Australia*, HRCtee, 22 September 2022, U.N. Doc. No. CCPR/C/135/D/3624/2019, para. 8.13 (“in the case of Indigenous Peoples, the enjoyment of culture may relate to a way of life which is closely associated with territory and the use of its resources, including such traditional activities as fishing or hunting”).

adequate climate adaptation measures to “protect the authors’ collective ability to maintain their traditional way of life and to transmit to their children and future generations their culture and traditions and use of land and sea resources” disclosed a violation of the right to minority culture under art 27 of the ICCPR.<sup>71</sup>

### *Right to health*

39. Article 10 of the San Salvador Protocol relevantly provides that:

- (a) “Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being” (art 10(1)); and
- (b) “In order to ensure the exercise of the right to health, the States Parties agree to recognize health as a public good” and, particularly, in ensuring that right, to adopt the following relevant measure: “Satisfaction of the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable” (art 10(2)(f)).

40. This right may be realised progressively, but it contains a minimum core of immediate obligations.<sup>72</sup> Further, the right depends on the maintenance of a healthy environment.<sup>73</sup>

41. Fossil fuel production, by driving climate change, clearly interferes with the right to health. The Special Rapporteur on the Environment has said that the climate emergency threatens the right to health.<sup>74</sup> In a case concerning whether a coal mining project should be recommended for approval or refusal, expert evidence set out the following health threats arising from a fossil-fuel induced climate emergency:<sup>75</sup>

- (a) Illness, injury, and death related directly to the effects of increasingly extreme and – with the exception of cyclones – more frequent events of heatwaves, severe storms, cyclones, floods and bushfires
- (b) Illness and death from hazardous smoke, and increased severe fire weather in areas previously not prone to dangerous fires
- (c) Increased transmission potential of mosquito-borne diseases resulting from a warmer and wetter climate
- (d) Drought affecting availability and affordability of fresh food and as a cause of psychological distress
- (e) Reduced water and food security, including limited supply, and more diseases associated with contaminated water and food
- (f) Potential for increased allergy and asthma, including thunderstorm asthma events
- (g) Loss of biodiversity, affecting physical and mental health, food supply, and potentially erasing future therapeutic discoveries
- (h) Sea level rise leading to economic, livelihood and cultural loss and psychological distress
- (i) Psychosocial distress and mental illness from loss of livelihoods, and destruction of places of cultural significance; and

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<sup>71</sup> *Billy et al v Australia*, HRCtee, 22 September 2022, U.N. Doc. No. CCPR/C/135/D/3624/2019, para. 8.14.

<sup>72</sup> *Advisory Opinion OC-23/17*, November 15, 2017. Inter-Am. Ct. H.R. Series A No. 23, para. 111.

<sup>73</sup> *Advisory Opinion OC-23/17*, November 15, 2017. Inter-Am. Ct. H.R. Series A No. 23, paras. 66, 110-111.

<sup>74</sup> David Boyd, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: A safe climate*, Report of the Special Rapporteur on Human Rights and the Environment, 15 July 2019, U.N. Doc. A/74/161, paras. 31-32.

<sup>75</sup> *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21, paras. 1492-1493.



- (j) Impacts on and increased costs of health services and systems, through increased and potentially highly unpredictable load from extreme events, impacts on the health workforce, and direct damage to facilities and infrastructure.

*Rights to food and water*

42. The right to food is protected by Art 12 of the San Salvador Protocol, along with other instruments.<sup>76</sup> Article 12 provides:
1. Everyone has the right to adequate nutrition which guarantees the possibility of enjoying the highest levels of physical, emotional and intellectual development.
  2. In order to promote the exercise of this right and eradicate malnutrition, the States Parties undertake to improve methods of production, supply and distribution of food, and to this end, agree to promote greater international cooperation in support of the relevant national policies.
43. According to this Court, the right to food protects “access to food that permits nutrition that is adequate and appropriate to ensure health”.<sup>77</sup>
44. This Court has considered that the right to water is protected by the progressive development provision in Article 26 of the Convention;<sup>78</sup> and has stated that “access to [...] water [...] includes ‘consumption, sanitation, laundry, food preparation, and personal and domestic hygiene,’ and for some individuals and groups it will also include ‘additional water resources based on health, climate and working conditions.’”<sup>79</sup>
45. The Court has said that the right to water, together with the right to food, and the right to participate in cultural life, is “particularly vulnerable” to environmental degradation.<sup>80</sup> The UN Special Rapporteur for Environment has also explained how the rights to food and water are undermined by climate impacts.<sup>81</sup> Climate change threatens food security, threatens livelihoods, impacts water supplies, and compromises access to safe drinking water. Global heating will exacerbate water scarcity and drought no matter whether the 1.5°C target is met. At 1.5°C of warming, 271 million people will remain exposed to water scarcity and 132.5 million could be exposed to severe drought.<sup>82</sup> These numbers only increase as temperatures rise.<sup>83</sup>

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<sup>76</sup> See also: *Charter of the Organization of American States*, art 34(j); *American Declaration of the Rights and Duties of Man*, Art XI. See further, *International Covenant on Economic, Social and Cultural Rights*, art 11(1).

<sup>77</sup> *Lakha Honhat*, Judgment, Inter-Am. Ct. H.R. (ser. C), 6 February 2020, para. 216, see paras. 217-221.

<sup>78</sup> *Lakha Honhat*, Judgment, Inter-Am. Ct. H.R. (ser. C), 6 February 2020, para. 222, see para. 223.

<sup>79</sup> *Advisory Opinion OC-23/17*, November 15, 2017. Inter-Am. Ct. H.R. Series A No. 23, para. 111. See also, *Case of Xákmok Kásek Indigenous Community v Paraguay, Merits, reparations and costs*, Judgment of 24 August 2010, Inter-Am Ct. H.R. Series C No. 214, para. 195.

<sup>80</sup> *Advisory Opinion OC-23/17*, November 15, 2017. Inter-Am. Ct. H.R. Series A No. 23, para. 66, see also paras 110-111. See *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, reparations and costs*. Judgment of June 17, 2005. Series C No. 125, para. 167.

<sup>81</sup> David Boyd, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: A safe climate*, Report of the Special Rapporteur on Human Rights and the Environment, 15 July 2019, U.N. Doc. A/74/161, paras. 31-32.

<sup>82</sup> Carbon Brief, ‘The impacts of climate change at 1.5°C, 2°C and beyond’. See also Fossil Fuel Non-Proliferation Treaty Initiative, *Fuelling Failure Report* (2022) (***Fuelling Failure Report***), p 33.

<sup>83</sup> Carbon Brief, ‘The impacts of climate change at 1.5°C, 2°C and beyond’; see *Fuelling Failure Report*, p 33 (noting that at 2°C, 388 million people will be exposed to water scarcity and 194.5 million exposed to severe drought).

46. Crop yields too are forecast to drop because of future warming, creating additional strain on food security. At 1.5°C of warming, maize yields are expected to drop by 6 percent and wheat yields by 5 percent by the end of this century.<sup>84</sup>

#### *Equality and non-discrimination*

47. The Convention and the San Salvador Protocol protect rights of equality and the principle of non-discrimination. By driving the climate emergency, fossil fuel production disproportionately affects children now living and those to be born, older people, people living in poverty, other disadvantaged people, and Indigenous peoples.<sup>85</sup> There is also a disproportionate impact on women.<sup>86</sup>

#### *Rights of the child*

48. Article 19 provides that “[e]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state”.
49. The risk that climate change poses to children is well-understood.<sup>87</sup> In *General Comment No. 15*, the UN Committee on the Rights of the Child recognised that there is a “growing understanding” of the relationship between the impacts of climate change and children’s health, and the relevance of the environment, beyond environmental pollution; and that climate change is one of the biggest threats to children’s health and exacerbates health disparities, so States should, therefore, put children’s health concerns at the centre of their climate change adaptation and mitigation strategies.<sup>88</sup> More recently, in *General Comment No. 26*, the Committee has developed extensively commentary on the impact of climate change on children’s rights.<sup>89</sup>

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<sup>84</sup> Carbon Brief, ‘The impacts of climate change at 1.5°C, 2°C and beyond’; *Fuelling Failure Report*, p 33.

<sup>85</sup> See *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21, para. 1643.

<sup>86</sup> For example: in its concluding observations to Uganda’s periodic review for compliance with the treaty, the Committee urged the State party to “[s]wiftly undertake an assessment of the situation of women affected by the mineral and oil and gas exploration sectors and climate change-related natural disasters, implement gender-responsive programmes for their rehabilitation and for securing their livelihoods and provide information on such measures in its next periodic reports” (emphasis added); Committee on the Elimination of Discrimination Against Women, *Concluding observations on the combined eighth and ninth periodic reports of Uganda* (81<sup>st</sup> sess, 7–25 February 2022), para. 48(b). Committee has also expressed concerns about Namibia’s policies regarding the extraction of fossil fuels, especially with regard to the lack of information on “(a) [t]he measures taken by the State party to ensure that climate change and energy policies, and specifically the policy on the extraction and export of oil and gas, take into account the differentiated and disproportionate impact of climate change and environmental degradation on women, especially on rural and indigenous women: Committee on the Elimination of Discrimination Against Women, *Concluding observations on the combined eighth and ninth periodic reports of Uganda* (81<sup>st</sup> sess, 7–25 February 2022), (82<sup>nd</sup> sess, 13 June–1 July 2022), para. 51(a).

<sup>87</sup> Knox, *Report on the relationship between children’s rights and environmental protection*, 24 January 2018, U.N. Doc. A/HRC/37/58, para. 69 (stating “climate change ... threaten[s] to cause long-term effects that will blight children’s lives for years to come.”). Human Rights Council, *Human Rights and Climate Change* (HRC Res. 32/33) 18 July 2016, UN Doc. A/HRC/RES/32/33, pmb1., para. 13 (“recognizing that children are among the most vulnerable to climate change); UN Office of the High Commissioner for Human Rights, *Analytical Study on the relationship between climate change and rights of the child*, 4 May 2017, U.N. Doc. A/HRC/35/13, paras. 20, 55 (noting that “[a]ll children are exceptionally vulnerable to the negative impacts of climate change,” and that the negative impacts of climate change will disproportionately affect children in vulnerable situations).

<sup>88</sup> UN Committee on the Rights of the Child, *General Comment No. 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art.24)*, 62nd Sess, 17 April 2013, UN Doc CRC/C/GC/15, paras. 5 and 50.

<sup>89</sup> UN Committee on the Rights of the Child, *General Comment No 26 on children’s rights and the environment, with a special focus on climate change*, 22 August 2023, UN Doc. CRC/C/GC/26.

50. There is growing jurisprudence recognising harm to the rights of children in the context of climate change.

- (a) In *Sacchi*,<sup>90</sup> a group of children brought several complaints to the Committee on the Rights of the Child against different States parties, contending that their rights under the *Convention on the Rights of the Child* were violated because those State parties had failed to prevent and mitigate the consequences of climate change. Although the Committee did not determine the merits of the allegations (due to a failure of the complainants to exhaust domestic remedies), the Committee observed (at para. 9.6):

“as children, the authors are particularly affected by climate change, both in terms of the manner in which they experience its effects and the potential of climate change to have an impact on them throughout their lifetimes, particularly if immediate action is not taken. Due to the particular impact on children, and the recognition by States parties to the Convention that children are entitled to special safeguards, including appropriate legal protection, States have heightened obligations to protect children from foreseeable harm.”

- (b) In *Held v Montana* (2023) CDV-2020-307, which was a claim brought by 16 youth plaintiffs alleging that the state’s fossil-fuel based energy system breached the right to a clean and healthy environment guaranteed in s 1 of Art IX of Montana’s state constitution, the state court accepted that physical and psychological harms to children “accrue from impacts to the climate such as heat waves, droughts, wildfires, air pollution, extreme weather events, the loss of wildlife, watching glaciers melt, and the loss of familial and cultural practices and traditions”.<sup>91</sup>
- (c) In the context of cultural rights of children specifically, the Queensland Land Court observed in *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* that:<sup>92</sup>

“Increased temperatures already hamper the efforts of the First Nations parents to teach their children about their sea country. If, as adults, these children are displaced from their country, that will risks severing their relationship to country and culture.”

51. Significantly, the need to phase out fossil fuels has been recognized in sources concerning children’s rights in context of the climate emergency. In its most recent *General Comment No. 26*, the Committee on the Rights of the Child has recognised that “delaying rapid phase out of fossil fuels will result in higher cumulative emissions and thereby greater foreseeable harm to children’s rights”.<sup>93</sup> Further, the Committee on the Rights of the Child has indicated that part of realising the right to a clean, healthy and sustainable environment for children involves “[e]quitably phas[ing] out the use of coal, oil and natural gas, ensur[ing] a fair and just transition of energy sources and invest[ing] in renewable energy, energy storage and energy efficiency to address the climate crisis.”<sup>94</sup>

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<sup>90</sup> UN 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*, 8 October 2021, U.N. Doc. No. CRC/C/88/D/104/2019, (*Sacchi v Germany*).

<sup>91</sup> *Held v Montana* (2023) CDV-2020-307, para. 108.

<sup>92</sup> [2022] QLC 21, para. 1601.

<sup>93</sup> Committee on the Rights of the Child, *General Comment No 26 on children’s rights and the environment, with a special focus on climate change*, 22 August 2023, UN Doc. CRC/C/GC/26, para. 98(d).

<sup>94</sup> Committee on the Rights of the Child, *General Comment No 26 on children’s rights and the environment, with a special focus on climate change*, 22 August 2023, UN Doc. CRC/C/GC/26, para. 65(d).

52. The principle of intergenerational equity, which “places responsibility with today’s decision makers to make wise choices for future generations”,<sup>95</sup> is also relevant. In *Waratah Coal*, the Queensland Land Court emphasised that “there is an intergenerational imbalance in the effects of climate change itself”<sup>96</sup> and this was a significant consideration in its recommendation against approving a coal mine.<sup>97</sup> In a case in which a group of German youth challenged the legislated emission reduction targets, the German Federal Constitutional Court said the targets were insufficiently stringent and violated their right to life and also recognised that: “one generation must not be allowed to consume large portions of the CO2 budget while bearing a relatively minor share of the reduction effort, if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to serious losses of freedom.”<sup>98</sup>
53. Moreover, the need to phase out fossil fuels is underscored by the *Maastricht Principles on the Human Rights of Future Generations*,<sup>99</sup> which lists the obligations of States to respect, protect, and fulfil the human rights of future generations and relevantly states that:
- (a) “[t]he failure to phase out fossil fuels within the shortest possible time, with States with the greatest responsibility and capacity to move most expeditiously” violates obligations to protect the rights of future generations,<sup>100</sup> and
  - (b) “[t]he failure to invest adequate resources to ensure a just and fair transition from the production and use of fossil fuels and other ecologically harmful activities” violates the obligations to fulfil the rights of future generations.<sup>101</sup>

*B. Other rights-infringing impacts of fossil fuel production*

54. As stated above, the inherent polluting nature of fossil fuel production, together with the way fossil fuel production is carried out, can itself involve human rights violations (in addition to the violations caused by reference to climate change). That is because fossil fuels, when produced and used as intended, inherently contribute to health impacts and environmental contamination.<sup>102</sup> Given the present advisory opinion is focused on the climate emergency, we do not discuss this aspect of the relationship between fossil fuel production and human rights in too much detail; however, we consider it important to provide some examples to the Court to illustrate this dimension. To this end, we submit that fossil fuel production can have distinct interferences with the following rights:
- (a) **rights to life and health:** fossil fuel production can be linked to loss of life, disease or malnutrition. For example, in each year between 2012 and 2018, an estimated 8.7 million people died prematurely due to fossil fuel air pollution (ie 1 in 5 premature deaths).<sup>103</sup> One study concluded that fossil-fuel related emissions

<sup>95</sup> *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21, para. 1603.

<sup>96</sup> *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21, paras. 1595-1596.

<sup>97</sup> *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21, para. 1603.

<sup>98</sup> Bundesverfassungsgericht [German Constitutional Court] 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20, 14 March 2021 (*Neubauer v Germany*) (referred to in *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21, para. 1588).

<sup>99</sup> *Maastricht Principles on the Human Rights of Future Generations* (adopted on Feb. 3, 2023).

<sup>100</sup> *Maastricht Principles on the Human Rights of Future Generations* (adopted on Feb. 3, 2023), s 19(b).

<sup>101</sup> *Maastricht Principles on the Human Rights of Future Generations* (adopted on Feb. 3, 2023), s 21(h).

<sup>102</sup> For example, fossil fuel production unearths methane and CO<sub>2</sub>, which are routinely released, vented or flared, and also unearths toxic waters and materials from below the surface. There is no production that is totally free of such emissions.

<sup>103</sup> Karn Vohra et al., “Global Mortality from Outdoor Fine Particle Pollution Generated by Fossil Fuel Combustion: Results from GEOSChem”, *Environmental Research* 195 (April 2021), referred to in *Fuelling Failure Report*, p 3.

account for around 65 percent of the excess mortality rate attributable to air pollution.<sup>104</sup>

- (b) **right to a healthy environment:** Fossil fuel production necessarily causes significant harm to a healthy environment, which cannot be avoided (irrespective of method of extraction, production or intended use).<sup>105</sup> Even before fossil fuel extraction begins, the initial exploration processes can negatively impact habitats and biodiversity.<sup>106</sup> During the extraction process, there are direct and indirect impacts on life on land due to conversion, degradation, pollution and disturbance caused at or close to extraction sites.<sup>107</sup> Pollution from fossil fuel production can cause acid rain that damages trees and causes soils and water bodies to acidify, making the water unsuitable for some fish and impacting the terrestrial wildlife that rely on water-based wildlife for sustenance.<sup>108</sup> In a similar vein, pollution from fossil fuels can drive a process known as eutrophication in which excessive nutrients harm aquatic ecosystems by lowering oxygen levels, causing algae blooms and threatening both habitats and food chains.<sup>109</sup>
- (c) **right to be free from arbitrary deprivations of property:** The immediate impacts of fossil fuel production can amount to an arbitrary deprivation of property; for example, in *Waratah Coal*, the Land Court considered that the noise and dust impacts of a coal mining project “will be a significant restriction on the owners use or enjoyment of the property” and approving the mining licence application would “amount to an arbitrary deprivation of property”.<sup>110</sup>
- (d) **right to food:** the global industrialised food system is currently dependent on fossil fuels in the production of synthetic nitrogen fertilisers, herbicides and pesticides, as well as to power irrigation pumps, mechanisation processes for crop production and food processing, and in the transportation of agricultural inputs and outputs.<sup>111</sup>
- (e) **rights of Indigenous communities:** these communities rely on ecosystems for their livelihoods, which are threatened by fossil fuel extraction taking place on their land. In the context of fossil fuel production, affected communities will have a right to information and to an effective consultation process;<sup>112</sup> and in some cases, free,

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<sup>104</sup> Lelieveld et al., 2019, “Effects of fossil fuel and total anthropogenic emission removal on public health and climate”, *Earth, Atmosphere and Planetary Sciences*, referred to in *Fuelling Failure Report*, p 3.

<sup>105</sup> For example, For example, land disturbance and habitat fragmentation, unearthing GHGs including methane as well as CO2 and other toxic earth and produced waters (brines).

<sup>106</sup> Parish et al., “Comparing scales of environmental effects from gasoline and ethanol production”, *Environmental Management*, (2013), referred to in *Fuelling Failure Report*, p 25.

<sup>107</sup> One study conducted over five years by the Wildlife Conservation Society examining the impact of two of the largest fossil gas fields in the U.S. on the pronghorn population found an 82 percent decline in “high quality” habitats: Beckmann et al., “Human-mediated shifts in animal habitat use: Sequential changes in pronghorn use of a natural gas field in Greater Yellowstone”, *Biological Conservation*, (2012), referred to in *Fuelling Failure Report*, p 25.

<sup>108</sup> Macaulay et al., “Chapter 3: Acid Rain: A Growing Global Concern”, *Handbook of Environment & Waste Management*, (2020), referred to in *Fuelling Failure Report*, p 26.

<sup>109</sup> Nazari-Sharabian et al., “Climate Change and Eutrophication: A Short Review”, *Engineering, Technology and Applied Science Research*, (2018) (referred to in *Fuelling Failure Report*, p 26.)

<sup>110</sup> *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21, paras 1667, 1671.

<sup>111</sup> Arizpe et al., “Food Security and Fossil Energy Dependence: An International Comparison of the Use of Fossil Energy in Agriculture (1991-2003)”, *Critical Reviews in Plant Sciences*, (2011), referred to in *Fuelling Failure Report*, p 33.

<sup>112</sup> The right to an effective consultation, which is firmly rooted in international human rights law and is grounded in core UN human rights treaties See ICCPR, UNGA Res 2200A (XXI), 16 December 1966, ,

prior and informed consent will need to be obtained before the fossil fuel production activity can proceed (eg for large-scale development activities which have major impacts on Indigenous peoples' territories).<sup>113</sup>

## **PART V: SUBMISSIONS IN RESPONSE TO CERTAIN QUESTIONS**

55. We provide confined submissions on certain topics raised by the request, in furtherance of demonstrating how fossil fuel production interacts with the Convention. Before doing so, we set out submissions regarding interpretation of the relevant obligations.
- A. *The Court should ensure harmonious interpretation of the Convention with relevant environmental and human rights instruments, but should not place undue overreliance on the international climate regime*
56. Like any treaty, the Convention must be interpreted in accordance with the customary international law rules of treaty interpretation, codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (“VCLT”).<sup>114</sup> The Treaty Initiative need not canvass those rules in any detail, but wishes to highlight two important points.
57. **First**, the preferred interpretive approach is one of **systemic integration**, which requires determining the precise relationship between two or more rules and principles that are both valid and applicable in respect of a particular situation.<sup>115</sup> Art 31(3)(c) of the VCLT requires that a treaty interpreter take into account, together with the context of the words, “any relevant rules of international law applicable in the relations between the parties”. Further, in its *Advisory Opinion OC-23/17*, this Court affirmed an approach of “systemic integration” and “harmonious interpretation”.<sup>116</sup> Thus, to determine the scope of the respective Convention rights, the Court can refer to the corpus of international law.<sup>117</sup>

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arts 1(1), 25, 27; ICESCR, UNGA Res 2200A (XXI), 16 December 1966, , arts 1(1), 1(2), 15(1); ICERD, UNGA Res 2106 (XX), 21 December 1965, arts 2, 5. The UN bodies established to monitor the implementation of these binding international legal treaties have clarified that consultation with indigenous peoples on matters that affect them is required in accordance with state obligations under those treaties: *See e.g.*, UN Committee on the Elimination of Racial Discrimination, *General Recommendation 23: Rights of indigenous peoples*, 18 August 1997, UN Doc A/52/18; UN Committee on Economic, Social and Cultural Rights, *General Comment 21. Right of everyone to take part in cultural life (art. 15, para. 1(a), of the Covenant)*, 21 December 2009, UN Doc. E/C.12/GC/21, paras. 36-37. *See* Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, 30 December 2009, para. 273. Significantly, the duty to consult finds prominent expression in the *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295, 2 October 2007, arts 19, 32(2). *See Case of the Saramaka People v Suriname, Preliminary Objections, Merits, Reparations, and Costs*. Judgment of 28 November 2007, Inter-Am. Ct. H.R. Series C No. 172, para. 133.

<sup>113</sup> *See Case of the Saramaka People v Suriname, Preliminary Objections, Merits, Reparations, and Costs*. Judgment of 28 November 2007, Inter-Am. Ct. H.R. Series C No. 172, paras. 134-137; *Centre for Minority Rights Development (Kenya) v Kenya*, African Commission on Human and Peoples' Rights, 276/2003 (4 February 2010), para. 291.

<sup>114</sup> *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations*. Judgment of June 27, 2012. Inter-Am Ct. H.R. Series C No. 245, para. 197 (referring to *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru, Interpretation of the judgment on preliminary objections, merits, reparations and costs*. Judgment of 8 October 2020. Inter-Am. Ct. H.R. Series C 413, para. 67).

<sup>115</sup> International Law Commission, *Report of the International Law Commission on the work of its fifty-eighth session*, Chapter XII Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law, 2006, 177-184.

<sup>116</sup> *Advisory Opinion OC-23/17*, November 15, 2017. Inter-Am. Ct. H.R. Series A No. 23, para. 44.

<sup>117</sup> *See Lakha Honhat*, Judgment, Inter-Am. Ct. H.R. (ser. C), 6 February 2020, para. 198. The corpus of relevant rules includes not only treaties, but also general principles and rules of customary international law, such as harm prevention, precaution, non-regression, and the application of best available science.

58. In the Treaty Initiative’s submission:

- (a) The starting point is that a state’s **human rights obligations** in the context of the climate emergency stem first and foremost from **human rights law**. It follows that, even if there were no international climate agreements, States would have a duty under established human rights law to take action on climate change.
- (b) Consistently with systemic integration, the international climate change regime — including the UNFCCC and the Paris Agreement, as well as customary international law rules as they apply in the context of climate change — are “relevant rules” be taken into account in discerning the scope and content of the human rights obligations in the Convention in the context of the climate emergency. International environmental and climate law makes a “decisive contribution”<sup>118</sup>
- (c) Although the international climate change regime must be taken into account, **it does not supplant or unduly restrict the interpretation and application of the human rights obligations codified in the Convention**. Accordingly, if a State discharges its obligations under the Paris Agreement, this does not mean that it has satisfied its obligations under the Convention (or any other human rights law instrument).<sup>119</sup> For example, if a State party complies with its obligations to prepare, communicate and maintain successive nationally determined contributions (NDCs) that it intends to achieve under art 4 of the Paris Agreement, this does not automatically mean that the State party has also discharged its duty to respect the right to life in the context of the climate emergency for the purposes of the Convention. That the State party has complied with its NDC might serve as evidence of it taking *measures* that it must take to fulfil its human rights obligations. But the enquiry does not end there: the Court must consider whether the State party has discharged its distinct human rights law obligations to take all measures within its power to prevent foreseeable harm to human rights, including harm caused by climate change and the fossil fuel production driving it.
- (d) There are many reasons in principle and logic which support this view:
  - i) The UNFCCC and the Paris Agreement do not, expressly or by necessary implication, cover the field of international law obligations in respect of climate change. Nor do the provisions of the UNFCCC and the Paris Agreement, in their operation and effect, govern all State conduct of relevance to climate change, or supplant human rights obligations.<sup>120</sup> These treaties contain rules that specifically address, from the date of their entry into force and without being exhaustive, aspects of the conduct in relation to climate change (namely mitigation, adaptation, loss and damage, finance, technology transfer and capacity-building). Of particular relevance is Article 2(1)(a) of the Paris Agreement, which sets the temperature goal, and Article 4(1) which sets out obligations to prepare, communicate and maintain

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<sup>118</sup> *Advisory Opinion OC-23/17*, November 15, 2017. Inter-Am. Ct. H.R. Series A No. 23, paras. 44, 55.

<sup>119</sup> Though, the inverse may be true: ie a State who fails to meet their obligations under the Paris Agreement will likely breach human rights obligations in the context of climate change, because the Paris Agreement may specify *some measures* that the State must take to fulfil its human rights obligations.

<sup>120</sup> The preambular language in the Paris Agreement confirms that it was written and concluded against the backdrop of international human rights law, to complement not replace it (“*Acknowledging* 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”).

successive NDCs that it intends to achieve, as stated above. Fossil fuel production is not directly regulated by such measures; indeed, not a single emissions-generating activity is directly regulated under the UNFCCC or the Paris Agreement. However, other obligations across the corpus of international law, including under human rights law, can nonetheless apply.

- ii) The international climate change regime (including the Paris Agreement and the UNFCCC) imposes *horizontal* obligations (ie inter-State), while human rights law imposes *vertical* obligations (ie between States and people/peoples within their jurisdiction). It would not be sound in principle or logic to say that, by satisfying a horizontal obligation under, say, the Paris Agreement, a vertical obligation under the Convention will necessarily also be satisfied in the context of climate change.
- iii) Further, from a human rights perspective, the Paris temperature goal is insufficient to address the severe impacts of the climate emergency. The IPCC Sixth Assessment Report (“AR6”) states that “reaching 1.5°C in the near-term, would cause unavoidable increases in multiple climate hazards and present multiple risks to ecosystems and humans.”<sup>121</sup> Accordingly, even if we were to keep warming to 1.5°C above pre-industrial levels compatibly with the temperature goals in Paris, there would still be negative impacts on human rights that human rights law must address. Any lacuna in respect of those human rights impacts would invite uncertainty and incoherence into Inter-American human rights law system.

59. **Second**, there is a need to take into account currently available factual information, including scientific information, in interpreting a given treaty.<sup>122</sup> In the Inter-American system, this Court has indicated that “human rights treaties are living instruments, the interpretation of which must evolve over time and reflect current living conditions.”<sup>123</sup> In the present context, scientific knowledge about climate change — and the central role of fossil fuels in driving the climate emergency — is well accepted.

60. Overall, the Court must interpret the relevant human rights obligations in the Convention harmoniously with – *but not constrained by* – the development of the international climate change regime; and in light of the best available science on climate change and the role of fossil fuels in the climate emergency.

B. *The prevention principle requires States to regulate fossil fuel production and mitigate climate-induced harms, including by phasing out fossil fuels. States have numerous duties, including but not limited to, regulating, monitoring, overseeing, assessing impacts of and mitigating fossil fuel production.*

61. Question A.1 concerns the scope of the State’s duty of prevention. Question A.2.A asks what a State should “take into account when implementing” the duties: “(i) to regulate; (ii) to monitor and oversee; (iii) to request and to adopt social and environmental impact assessments; (iv) to establish a contingency plan, and (v) to mitigate any activities under

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<sup>121</sup> IPCC, AR6 WGII, SPM, B.3. See also IPCC, 1.5SR, Technical Summary (TS), p. 44, Ch. 5, p. 447: “warming of 1.5°C is not considered ‘safe’ for most nations, communities, ecosystems and sectors and poses significant risks to natural and human systems as compared to the current warming of 1°C (high confidence),” especially for “disadvantaged and vulnerable populations.”

<sup>122</sup> As Judge Padilla Nervo of the ICJ observed in his separate opinion in the *Barcelona Traction* case, “[t]he law, in all its aspects ... change[s], as the world and the everyday requirements of international life change...”: see *Barcelona Traction, Light and Power Company, Limited, Judgment*, I.C.J. Reports 1970, p. 3, Separate Opinion of Judge Padilla Nervo, p. 248.

<sup>123</sup> *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations*. Judgment of June 27, 2012. Inter-Am Ct. H.R. Series C No. 245, para. 161.



its jurisdiction that exacerbate or could exacerbate the climate emergency?” Given that both questions stem from the prevention principle, we address them together.

62. The prevention principle has a strong basis in customary international law,<sup>124</sup> and this Court has recognised that it interacts with and operates in tandem with the State obligations under the Convention.<sup>125</sup> Guided by what this Court said in its *Advisory Opinion OC-23/17*, the obligation of prevention will arise when there is an interference with the climate system that causes “significant damage” (where ‘significant’ denotes something more than ‘detectable’ but need not rise to the level of ‘serious’ or ‘substantial’).<sup>126</sup>
63. We submit that any interference with the climate system that causes rights-infringing climate impacts of the kind described above will rise to the level of “significant damage”. Best available science demonstrates that significant damage has been done to the climate system by reason of fossil fuel-driven global warming (as explained in Part III above). While the precise threats to human rights will depend on the circumstances of individual cases, significant climate change-induced harms have long been foreseen and are now a foreseeable trigger for States’ duty to prevent.
64. It follows that, because fossil fuel production is a central driver of the climate emergency, State Parties have obligations of prevention that operate directly on fossil fuel production. Drawing on the conclusions reached by this Court in its *Advisory Opinion OC-23/17*,<sup>127</sup> and applying them to fossil fuel production in the context of the climate emergency, the Treaty Initiative submits that States must exercise due diligence in relation to the following:
- (a) **Duty to regulate fossil fuel production.** Article 2 of the Convention obliges States Parties to adopt, in accordance with their constitutional processes and the provisions of the Convention, such legislative or other measures as may be necessary to give effect to the rights and freedoms therein. In the present context, art. 2 requires that States enact laws and regulations to adequately regulate fossil fuel production to prevent significant harm to the climate system which would impair the rights recognized in the Convention.<sup>128</sup> This includes regulating fossil fuel production of both public and private entities to keep GHG emissions to 1.5°C above pre-industrial levels, consistent with the 1.5°C goal in the Paris Agreement.

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<sup>124</sup> There is ample support for the customary grounding of the prevention principle: *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, para. 27-29; *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I. C. J. Reports 1997, p. 7, para.140; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I), para. 101; *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, I.C.J. Reports 2015 (II), p. 706, para.104; *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)*, Judgment of 1 December 2022, General List No 162 (unreported), paras. 83, 99.

<sup>125</sup> See *Advisory Opinion OC-23/17*, November 15, 2017. Inter-Am. Ct. H.R. Series A No. 23, para. 133, where this Court states that: “although the principle of prevention ... was established within the framework of inter-State relations, the obligations that it imposes are similar to the general duty to prevent human rights violations”.

<sup>126</sup> See *Advisory Opinion OC-23/17*, November 15, 2017. Inter-Am. Ct. H.R. Series A No. 23, paras 135-136.

<sup>127</sup> *Advisory Opinion OC-23/17*, November 15, 2017. Inter-Am. Ct. H.R. Series A No. 23, para. 174.

<sup>128</sup> We note that UN human rights treaty bodies are making similar recommendations. In concluding observations to Canada’s periodic review of compliance with the Convention on the Rights of the Child, the Committee on the Rights of the Child recommended establishing “a clear regulatory framework for the industries operating in the State party and abroad to identify, prevent, mitigate and account for activities that negatively affect human rights or endanger children’s rights, **in particular risks posed by fossil fuel production.**” (emphasis added): UN Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Canada*, 23 June 2022, UN Doc. CRC/C/CAN/CO/5-6, para. 16(a).

- (b) **Duty to monitor and oversee fossil fuel production.** Under international law, States have a duty to *continuously* monitor the environmental impact of a project or activity.<sup>129</sup> In the Inter-American context, States have the duty to establish appropriate mechanisms to supervise and monitor certain activities to guarantee human rights.<sup>130</sup> As part of this, of relevance to the climate emergency, States must supervise and monitor fossil fuel production within their jurisdiction that may cause significant harm to the climate system.
- (c) **Duty to carry out climate and environmental impact assessments.** This duty exists in relation to any fossil fuel production that involves a risk of significant damage to the climate system.<sup>131</sup> In another context, the UN Committee on the Rights of the Child has said that States must require the assessment, both before and after implementation, of the possible *direct* and *indirect* impact on the environment and climate, including the transboundary, cumulative, and *production* and consumption effects.<sup>132</sup> Together with the usual requirements of environmental impact assessment,<sup>133</sup> States must assess cumulative climate impacts of, and on, planned or proposed fossil fuel production within their jurisdiction or control,<sup>134</sup> so as to avoid causing or contributing to rights-infringing climate impacts. Such assessments inform States' analyses of whether execution of a fossil fuel project is compatible with international obligations, including human rights.<sup>135</sup> States' obligations in this regard are to assess foreseeable emissions and impacts of fossil fuel production and use, *regardless of where those emissions and impacts occur* (i.e., Scope 1, 2, and 3 emissions).
- (d) **Duty to establish contingency plans.** This duty arises in other treaty regimes.<sup>136</sup> In the present context, the duty requires that States in which fossil fuel production occurs should have a contingency plan to respond to environmental emergencies or disasters that includes safety measures and procedures to minimize the consequences of such disasters.<sup>137</sup> In the context of the climate emergency, this extends to require contingency planning for climate change impacts, in addition to disasters and emergencies related to the production process itself.

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<sup>129</sup> See ICJ, *Case of Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment of April 20, 2010, para. 205; 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. 161.

<sup>130</sup> *Advisory Opinion OC-23/17*, November 15, 2017. Inter-Am. Ct. H.R. Series A No. 23, para. 152. See *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations*. Judgment of June 27, 2012. Inter-Am. Ct. H.R. Series C No. 245, para. 167.

<sup>131</sup> *Advisory Opinion OC-23/17*, November 15, 2017. Inter-Am. Ct. H.R. Series A No. 23, paras. 158, 160.

<sup>132</sup> UN Committee on the Rights of the Child, *General Comment No 26 on children's rights and the environment, with a special focus on climate change* (UN Doc. CRC/C/GC/26, 22 August 2023), para. 65(d).

<sup>133</sup> See *Advisory Opinion OC-23/17*, November 15, 2017. Inter-Am. Ct. H.R. Series A No. 23, paras. 162-166.

<sup>134</sup> See *Advisory Opinion OC-23/17*, November 15, 2017. Inter-Am. Ct. H.R. Series A No. 23, para. 165.

<sup>135</sup> *Advisory Opinion OC-23/17*, November 15, 2017. Inter-Am. Ct. H.R. Series A No. 23, para. 164.

<sup>136</sup> See UNCLOS, art 199; Convention on the Law of the Non-Navigational Uses of International Watercourses (entered into force on August 17, 2014), art 28.

<sup>137</sup> *Advisory Opinion OC-23/17*, November 15, 2017. Inter-Am. Ct. H.R. Series A No. 23, para. 171.

- (e) **Duty to mitigate:** Where a significant interference with the climate system occurs despite all the required preventive measures having been taken, States must ensure that appropriate measures are adopted to mitigate the damage.<sup>138</sup>
- C. *All countries have duties to restrict fossil fuel production in line with their differentiated obligations. Accordingly, wealthy and developed States who bear the most responsibility for the climate emergency and who have enjoyed the benefits of emitting activities must act first and provide support to other States.*
65. Question F, in effect, raises matters of equity and common but differentiated responsibilities (**CBDR**). CBDR (and cognate principles, such as common but responsibilities and respective capabilities (**CBDR-RC**))<sup>139</sup> are underpinned by the concept of differentiated obligations. Differentiation can occur in different ways.<sup>140</sup>
66. While all countries have a responsibility to restrict fossil fuel production under human rights law, some have more of a responsibility than others. As the UN Special Rapporteur on Human Rights and the Environment has explained, “[t]he main contributors to the problem have reaped immense economic benefits and thus have the greatest responsibility to solve the problem, pursuant to the principle of common but differentiated responsibilities”.<sup>141</sup> In addition to reaping economic benefits, it should also be pointed out that such emitting entities have disproportionately contributed to harm suffered as a result of the climate emergency.
67. Accordingly, when it comes to the standard of due diligence required to discharge human rights obligations in the context of climate change, the Treaty Initiative submits that the obligations of wealthy and developed States (ie those who have historically high fossil fuel production and are acutely more responsible for the climate emergency) are more onerous

<sup>138</sup> *Advisory Opinion OC-23/17*, November 15, 2017. Inter-Am. Ct. H.R. Series A No. 23, para. 172 (“Some of the measures that States should take are: (i) clean-up and restoration within the jurisdiction of the State of origin; (ii) containment of the geographical range of the damage to prevent it from affecting other States; (iii) collection of all necessary information about the incident and the existing risk of damage; (iv) in cases of emergency in relation to an activity that could produce significant damage to the environment of another State, the State of origin should, immediately and as rapidly as possible, notify the States that are likely to be affected by the damage; (v) once notified, the affected or potentially affected States should take all possible steps to mitigate and, if possible, eliminate the consequences of the damage, and (vi) in case of emergency, any persons who could be affected should also be informed.” (citations omitted))

<sup>139</sup> The term “common but differentiated responsibilities” first appeared in Principle 7 of the 1992 *Rio Declaration on Environment and Development*: see UN General Assembly, *Report of the United Nations Conference on Environment and Development* (Rio de Janeiro, 3-14 June 1992), 12 August 1992, A/CONF.151/26 (Vol 1), Annex 1. The principle in cognate form features in both the UNFCCC and the Paris Agreement. See UNFCCC, Article 3 (“Principles”), paragraph 1 (“the Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their **common but differentiated responsibilities and respective capabilities**”) (emphasis added). See also UNFCCC, sixth preambular recital (“Acknowledging that the global nature of climate change calls for the widest possible cooperation by all countries ... in accordance with their **common but differentiated responsibilities and respective capabilities and their social and economic conditions**”) (emphasis added); see also Paris Agreement, arts 2.2, 3, 4.1, 4.3, 4.4, 4.5.

<sup>140</sup> For example, the UNFCCC differentiates between developed (Annex I) and developing (Annex II) countries, which have different obligations regarding GHG emissions (Articles 4.1-4.2) and regarding the provision of finance and technology to other countries (Articles 4.3-4.7). The Paris Agreement takes a rather different approach, whereby differentiated obligations can be adjusted over time (see Article 4.4 which requires that developed States “tak[e] the lead by undertaking economy-wide absolute emission reduction targets,” while developing countries should “continue enhancing their mitigation efforts” and “move over time towards economy-wide emission reduction or limitation targets”).

<sup>141</sup> David Boyd, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: A safe climate*, Report of the Special Rapporteur on Human Rights and the Environment, 15 July 2019, U.N. Doc. A/74/161, para. 26.

than those of other States (ie those who have not contributed so extensively to climate change nor benefitted as greatly from fossil fuel production in the past).

68. In the present context, this means that wealthy and developed States must:

- (a) **immediately phase out** fossil fuel production;<sup>142</sup> and
- (b) **provide financial, technical and institutional support** to less-wealthy and less-developed States to enhance their capacity to phase out fossil fuel production and secure alternative sources of economic revenue to replace revenue from fossil fuel production and enable continued sustainable development, on a timeline consistent with equity and appropriately differentiated obligations;<sup>143</sup>

*D. States must ensure access to information*

69. Question B.1(i), (v) and B.2 concerns environmental information.<sup>144</sup>

70. Article 13 of the Convention is entitled “[f]reedom of thought and expression” but is relevantly expressed to also include the “freedom to seek, receive, and impart information”. This aspect of art 13 protects the right of the individual to request access to information held by the State,<sup>145</sup> with exceptions as set out in the Convention’s regime of restrictions.<sup>146</sup> Correlatively, there is a positive “obligation of active transparency” on States to provide the information requested in an accurate, updated, understandable, timely and proactive manner, so that the individual may have access to it in order to examine and assess it.<sup>147</sup>

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<sup>142</sup> The UN Special Rapporteur on Human Rights and the Environment suggests that developed countries should prohibit ‘further exploration for additional fossil fuels’, reject ‘any other expansion of fossil fuel infrastructure’, and prohibit ‘the expansion of the most polluting and environmentally destructive types of fossil fuel extraction, including oil and gas produced from hydraulic fracturing (fracking), oil sands, the Arctic or ultra-deepwater’: David Boyd, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: A safe climate*, Report of the Special Rapporteur on Human Rights and the Environment, 15 July 2019, U.N. Doc. A/74/161, para. 78.

<sup>143</sup> In its climate emergency resolution, the Inter-American Commission on Human Rights states 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”: Climate Emergency: Scope of Inter-America Human Rights Obligations para. 7. See also David Boyd, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: A safe climate*, Report of the Special Rapporteur on Human Rights and the Environment, 15 July 2019, U.N. Doc. A/74/161, paras. 26, 68. Also, the Committee on Economic, Social and Cultural Rights recognizes that the countries who have historically contributed the most to climate change, and the current main contributors, “shall assist the countries that are most affected by climate change but are least able to cope with its impact, including by supporting and financing land-related adaptation measures”: CESCR GC No. 26, para. 58.

<sup>144</sup> For completeness, we note that the right to environmental information forms part of a wider array of procedural environmental rights, including also the right to participation in environmental decision-making and the right to access to justice (including for environmental defenders). Given the scope and purpose of our submission, we do not discuss these aspects of procedural environmental rights; however, we underscore that such rights are extremely important in the context of the climate emergency and rely on the helpful submissions of other participants in this advisory proceeding to assist the Court as to the scope and content of those additional rights. See, e.g., *Amicus brief submitted by the UN Special Rapporteurs on Toxics and Human Rights (Marcos Orelliana)*, *Human Rights and the Environment* (David Boyd), and the *Right to Development* (Surya Deva), paras. 168-175.

<sup>145</sup> *Advisory Opinion OC-23/17*, November 15, 2017. Inter-Am. Ct. H.R. Series A No. 23, para. 213. See also *Case of Claude-Reyes et al v Chile*, 19 September 2006, Merits, Reparations, and Costs Judgment, ICtHR Series C No. 15, paragraphs 99-103 and 114-123.

<sup>146</sup> For restrictions to the right to access information, see *Advisory Opinion OC-23/17*, November 15, 2017. Inter-Am. Ct. H.R. Series A No. 23, para. 224.

<sup>147</sup> According to this Court, the public should be provided with “as much information as possible on an informal basis” and the information “should be complete, understandable, in an accessible language, and

71. This Court has emphasized that access to information on activities and projects that could have an impact on the environment is a matter of “evident public interest”.<sup>148</sup> This includes information on environmental quality, environmental impact on health and the factors that influence this, and also information on legislation and policies, as well as assistance on how to obtain such information.<sup>149</sup> In our submission, access to information on activities and projects that could have an impact on the climate system is equally a matter of evident public interest, including information on fossil fuel production.
72. We also note that, in the context of indigenous peoples, the right to environmental information will have overlap with rights to free, prior and informed consent.<sup>150</sup>
73. The Treaty Initiative submits that human rights obligations under the Convention require States to provide access to environmental information, including information on fossil fuel production. Further, States must ensure that fossil fuel companies possess, update, disseminate and make available upon request information about their fossil fuel production.
74. The Treaty Initiative highlights the importance of the right to environmental information, given the dearth of publicly accessible information fossil fuel reserves in the ground.<sup>151</sup> Further, there is no official comprehensive or detailed map of specific fossil fuel extraction projects and thus no way to track particular projects, including where they are very significant (eg involve “carbon bombs”), leading to investigative efforts by NGOs to track such information.<sup>152</sup> The Treaty Initiative submits that States’ obligations include to disclose information on fossil fuel production, for instance in a Global Registry on Fossil Fuels, as means of facilitating an international transparency and accountability mechanism for fossil fuel production.

*E. Human Rights law requires a just transition*

75. Question B.1(ii) concerns a “just transition” for groups and individuals who are “particularly vulnerable to the effects of global warming”.

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current, and be provided in a way that is helpful to the different sectors of the population”: *Advisory Opinion OC-23/17*, November 15, 2017. Inter-Am. Ct. H.R. Series A No. 23, para. 221.

<sup>148</sup> *Advisory Opinion OC-23/17*, November 15, 2017. Inter-Am. Ct. H.R. Series A No. 23, para. 213, see also para. 214. The specific obligation to provide access to environmental information is established in Principle 10 of the *Rio Declaration on Environment and Development*; and exists in comparative law and policy instruments: see *Advisory Opinion OC-23/17*, November 15, 2017. Inter-Am. Ct. H.R. Series A No. 23, paras. 216-218, see para. 222.

<sup>149</sup> *Advisory Opinion OC-23/17*, November 15, 2017. Inter-Am. Ct. H.R. Series A No. 23, para. 223.

<sup>150</sup> In relation to rights to consultation in the Inter-American context, see *Case of the Saramaka People v Suriname, Preliminary Objections, Merits, Reparations, and Costs*. Judgment of 28 November 2007, Inter-Am. Ct. H.R. Series C No. 172, paras. 134-137. For a comparative perspective, see *Centre for Minority Rights Development (Kenya) v Kenya*, African Commission on Human and Peoples’ Rights, 276/2003 (4 February 2010), para. 291.

<sup>151</sup> For example, a right to environmental information could be argued to involve the State requiring corporate disclosure of long-term climate-related risks associated with capital-intensive upstream production and exploration: see FFNPT Initiative, *Briefing Note: Aligning the Fossil Fuel Production with 1.5°C and the Paris Agreement*.

<sup>152</sup> A “carbon bomb” is “a proposed or existing fossil fuel extraction project (a coal mine, oil or gas project) that would result in more than 1 gigaton of CO<sub>2</sub> emissions if its reserves were completely extracted and burnt”: Kuhne, Bartsch, Tate, Higson and Habet, “Carbon Bombs’ – Mapping key fossil fuel projects”, *Energy Policy* 166 (2022), 1. Global Energy Monitor conducts investigative research to provide maps of fossil fuel extraction projects: <https://globalenergymonitor.org/>.

76. In our submission, the rights under the Convention entail obligations on States not only to phase out fossil fuels, but also to do so in a manner which is human rights compliant.<sup>153</sup> In this way, human rights law requires a just transition.
77. A just transition will involve transitioning to more sustainable energy sources, whilst enabling sustainable development, protecting a clean environment, providing access to jobs for stranded workers and ensuring affordable access to essential goods and services for the enjoyment of human rights.<sup>154</sup> Just transition measures can also include provisions that prevent negative impacts on communities from renewable energy deployment, e.g. land grabs or environmental impacts from large-scale wind or solar installations and, of particular relevance in the Americas, exploitation of critical minerals.<sup>155</sup>
78. Also, a just transition requires that use of new technologies be human rights compatible. Any reliance on speculative technologies must be carefully assessed for compatibility with human rights law. According to the UN Human Rights Advisory Committee on New Technologies for Climate Protection, “[t]he main way for States to be human rights-compliant is to rapidly phase out fossil fuels **only through viable, scientifically proven technologies and approaches**” (emphasis added). As the same Committee also noted, while “[p]roposals to phase out fossil fuels, including for a fossil fuel non-proliferation treaty, are aligned with State obligations to respect and protect human rights from the adverse effects of climate change,”<sup>156</sup> a fossil fuel phase-out that relies on speculative technologies,<sup>157</sup> such as carbon capture and storage (CCS) and geoengineering are not so aligned with human rights.<sup>158</sup>
79. Consistently with considerations of equity and differentiated obligations, wealthy developed States must support less-wealthy and less-developed States, including via financial support, to ensure they too can pursue a just transition.

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<sup>153</sup> The UN Committee on the Rights of the Child considers that States should “immediately” act to “ensure a fair and just transition of energy sources and invest in renewable energy, energy storage and energy efficiency to address the climate crisis”. UN Committee on the Rights of the Child, *General Comment No. 26 on children’s rights and the environment, with a special focus on climate change* (UN Doc. CRC/C/GC/26, 22 August 2023), para. 65(d).

<sup>154</sup> See Tigre et al, *Just Transition Litigation in Latin America: An Initial Categorization of Climate Litigation Cases Amid the Energy Transition* (Sabin Centre for Climate Change Law, January 2023), at 22-24, 28-29.

<sup>155</sup> The Americas are an important region in the extraction and processing of critical minerals for the clean energy transition. South America accounts for 40% of global production of copper, led by Chile (27%), Peru (10%), and Mexico (3%). South America also has significant potential in graphite, nickel, manganese, and rare earth elements. See “Latin America’s opportunity in critical minerals for the clean energy transition”, International Energy Agency (Apr. 7, 2023).

<sup>156</sup> Human Rights Council Advisory Committee, *Impact of new technologies intended for climate protection on the enjoyment of human rights* (54<sup>th</sup> sess, 12 July 2023, UN Doc A/HRC/54/47), Sec. VII, Recommendation I.

<sup>157</sup> Marcos Orellana, *The toxic impacts of some proposed climate change solutions*, Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, 13 July 2023, HRC 54<sup>th</sup> sess, U.N. Doc A/HRC/54/25, para. 71 (the “inseparable link between carbon capture and storage and the use of fossil fuels underlines the risks posed by this technology to human rights”).

<sup>158</sup> Carbon capture technology risks “locking in place fossil fuel-reliance and the associated environmental injustices”. See Marcos Orellana, *The toxic impacts of some proposed climate change solutions*, Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, 13 July 2023, HRC 54<sup>th</sup> sess, U.N. Doc A/HRC/54/25, paras. 70-71.

## ***PART VI: STATES' HUMAN RIGHTS DUTIES TO MITIGATE CLIMATE CHANGE, INCLUDING THROUGH A PHASE OUT OF FOSSIL FUEL PRODUCTION***

80. Fossil fuel production clearly impairs human rights (as set out above). This is particularly so in the context of the climate emergency. The conduct of states in respect of fossil fuel production must therefore be governed by and assessed against their obligations under human rights law, including under the Convention (and associated instruments).
81. The Court has previously opined in the context of environmental degradation that Convention obligations are owed by States to individuals and peoples within its territory, but also extraterritorially where there is a causal link between the acts or omissions of the State in question and the negative impact on those individuals and communities outside that State's territory; and the State exercises effective control over the sources of the emissions in question.<sup>159</sup> In applying this approach in the climate context, the Committee on the Rights of the Child considered that the State party's ability "to regulate activities that are the source of [carbon] emissions and to enforce such regulations" meant that "the State party has effective control over the emissions".<sup>160</sup>
- A. *Differential obligations to phase out of fossil fuel production*
82. In our submission, States must respect and ensure the rights protected in the Convention and associated instruments in the context of the climate emergency by **phasing out the production and burning of fossil fuels, which includes coal, oil, and natural gas**. This obligation must be discharged by *all* States parties, in line with principles of equity and CBRD(RC). Efforts directed towards phasing out fossil fuels will mitigate dangerous climate change and thus can protect and promote the enjoyment of rights.<sup>161</sup>
83. There are of course countervailing considerations. States may purportedly seek to pursue fossil fuel production for legitimate objectives such as aiming to promote economic development<sup>162</sup> or in discharging obligations to provide wide and affordable access to

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<sup>159</sup> *Advisory Opinion OC-23/17*, November 15, 2017. Inter-Am. Ct. H.R. Series A No. 23, paras. 101-103.

<sup>160</sup> *Sacchi v Germany*, Committee on the Rights of the Child, 8 October 2021, U.N. Doc. No. CRC/C/88/D/104/2019, para. 10.10, see para. 10.7.

<sup>161</sup> The need for States to phase out fossil fuels in compliance with human rights obligations is increasingly recognised by UN human rights treaty bodies. See *UN Human Rights Treaty Bodies' joint statement on human rights and climate change*, para. 12 ("States parties should contribute effectively to phasing out fossil fuels, promoting renewable energy and addressing emissions from the land sector, including by combating deforestation"). In a recent General Comment, the Committee on Economic, Social, and Cultural Rights explained that "mitigation policies should lead to absolute emissions reductions through the phasing out of fossil fuel production and use": CESCR GC No. 26, para. 56. See also UN Committee on the Rights of the Child, *General Comment No 26 on children's rights and the environment, with a special focus on climate change* (UN Doc. CRC/C/GC/26, 22 August 2023), paras. 56 and 98(d).

<sup>162</sup> See e.g., *UN General Assembly, Declaration on the Right to Development, UNGA Res 41/128* (41<sup>st</sup> sess, 1986-1987) U.N. Doc A/RES/41/128. See also *UN Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No 1457/2006 ('Poma Poma v Peru')* 24 April 2009, UN Doc CCPR/C/95/d/1457/2006, [7.4], where the Committee recognises that a State "may legitimately take steps to promote its economic development", though recalls that economic development may not "undermine" rights to culture protected by art 27 of the ICCPR and any "leeway" the State has in this area "should be commensurate with the obligations it must assume under article 27.

energy.<sup>163</sup> Some fossil-fuel dependent States may engage in fossil fuel production in pursuit of such objectives solely out of necessity.<sup>164</sup>

84. In response to such suggestions, it can be observed that the phasing out of fossil fuels is a measure that will be compatible with human rights law and need not invite energy or economic insecurity. In support of this view, the IEA's 1.5°C pathway does not compromise energy access;<sup>165</sup> this year, the IEA has said that “no new long-lead time upstream oil and gas projects are needed in the [net zero emissions scenario], neither are new coal mines, mine extensions or new unabated coal plants.”<sup>166</sup> There are also research findings that every region of the world has enough renewable energy potential to scale up renewable energy and meet their needs fully, while phasing down fossil fuels.<sup>167</sup> Further, in *Waratah Coal*, the Land Court of Queensland reasoned that fossil fuel production is “not the only way to provide energy security” and that there are “already alternatives that are less restrictive in limiting the human rights, which are reasonably available”.<sup>168</sup> The Land Court concluded that the importance of preserving the right to life in the face of climate impacts “weighs more heavily in the balance than the economic benefits of the mine and furthering energy security”.<sup>169</sup>
85. Moreover, beyond mitigating the climate emergency, there are other human-rights-promoting consequences from an energy transition away from fossil fuels and towards renewable energy. These have been referred to by the UN Special Rapporteur on Extreme Poverty and Human Rights as the “triple dividend” of (a) cleaner environments; (b) decent jobs; and (c) improved access to affordable goods and services.<sup>170</sup>
86. While all states have an obligation under human rights law to avert foreseeable risks of harm to human rights by taking all measures within their power to curb fossil fuel production and use, what measures are within a state's power will vary depending on their

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<sup>163</sup> Say, in furtherance of the right to energy (a component part of the right to development, rights to an adequate standard of living and adequate housing, as well as the right to health). See Viñuales, J, *International Law of Energy* (CUP 2021), 54-55, referring to ICESCR, Articles 11(1) and 12; *CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, 11 August 2000, Document E/C.12/2000/4, paras. 3, 4, 11, 15, 36, 43(c) (repeatedly referring to housing as an underlying determinant of health). See *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, 1 March 2002, UN Doc. E/CN.4/2002/59, paras. 35, 46(b); Committee on Economic, Social and Cultural Rights, *General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions*, 20 May 1997, E/1998/22, paras. 1, 17; CESCR, *General Comment No. 4: The Right to Adequate Housing*, 13 December 1991, E/1992/23, para. 8(b).

<sup>164</sup> E.g., Timor-Leste: see José Ramos-Horta (President, East Timor), “For a fraction of Australia's fighter jet budget, I'd leave East Timor's fuel in the ground” (5 October 2022) *The Sydney Morning Herald* (online).

<sup>165</sup> See International Energy Agency, *Net Zero by 2030: A Roadmap for the Global Energy Sector* (4<sup>th</sup> revision, October 2021).

<sup>166</sup> International Energy Agency, *Net Zero Roadmap: A Global Pathway to Keep the 1.5°C Goal in Reach* (2023 Update – Executive Summary), 6.

<sup>167</sup> S Teske and S Niklas, *Fossil Fuel Exit Strategy* (June 2021, University of Technology Sydney).

<sup>168</sup> *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* (No 6) [2022] QLC 21, paras. 1437-1438, see para. 1439 (where Kingham P noted that: “Fossil fuels cannot be replaced entirely by other sources immediately and will continue to play a part in energy supply for some time. However, renewable energy storage and transmission technologies are rapidly developing. As the cost of renewables continues to decline relative to thermal coal, and the challenge of intermittency in supply is overcome, renewable sources will increasingly replace thermal coal as the source of energy.”)

<sup>169</sup> *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* (No 6) [2022] QLC 21, para. 1513 (Kingham P).

<sup>170</sup> Oliver De Schutter, Special rapporteur on extreme poverty and human rights, *Extreme poverty and human rights*, 7 October 2020, UN Doc A/75/181/Rev.1. In support of job-creation, the IEA estimates that transitioning to a global economy that produces net-zero GHG emissions will result in 14 million new jobs by 2030 in the clean energy sector, with a loss of only 5 million jobs in the fossil fuel sector: *Net Zero by 2050: A Roadmap for the Global Energy Sector*, p. 17.



economic means and capabilities – that is, some States will be able to halt dependence on fossil fuel production sooner and make up for the revenues through other means, or transition faster.

87. The Treaty Initiative submits that:

- (a) **wealthy and developed States must phase out fossil fuel production**, including by: (i) immediately halting new fossil fuel projects; (ii) ceasing to issue licenses for exploration or production; (iii) ceasing public or international finance for new fossil fuel-related projects or activities, including by divesting and refraining from investing in fossil fuel-related projects and ending fossil fuel subsidies; and (iv) fully transitioning to non-fossil fuel sources at the pace needed to remain within the carbon budget associated with the 1.5°C temperature goal;
- (b) **wealthy and developed States must provide financial, technical and institutional support to less-wealthy and less-developed States to enhance their capacity** to phase out fossil fuels and fossil fuel production and secure alternative sources of economic revenue to replace revenue from fossil fuel production and enable continued sustainable development (on a timeline consistent with equity and differentiated obligations); and
- (c) **other States must also phase out fossil fuel production**, on a timeline consistent with equity and differentiated obligations.

*B. Other obligations*

88. Additional to the obligation to phase out fossil fuel production, the above analysis supports at least the following obligations on **all** States:

- (a) consistently with the **duty of prevention**, States must exercise due diligence by taking the following actions to reduce the risk to human rights:
  - i) **regulate fossil fuel production**, noting that it causes significant harm to the climate system and other parts of the environment, such as by reducing fossil fuel production and use, in light of all foreseeable climate-induced impacts on human rights, regardless of where they occur;
  - ii) **supervise and monitor fossil fuel production** under their jurisdiction that could produce significant harm to the climate system and, to this end, implement adequate and independent monitoring and accountability mechanisms that include measures of prevention and also of sanction and redress;
  - iii) **require a climate impact assessment when there is a risk of significant harm to the climate system**, regardless of whether the fossil fuel production will be carried out by a State or by private persons and regardless of where those foreseeable impacts occur (within the State's own jurisdiction or extraterritorially);
  - iv) **institute a contingency plan** in order to establish safety measures and procedures to minimize the possibility of major accidents causing significant harm to the climate system; and
  - v) **mitigate significant damage to the climate system**, even when it has occurred despite the State's preventive actions, using the best scientific knowledge and technology available;
- (b) consistently with rights to **environmental information**, States must ensure that:

- i) information held by the State concerning fossil fuel production is actively disclosed and made available in a timely manner; and
  - ii) information disclosed is accurate and that enforcement action is appropriately taken in respect of any disinformation, misinformation, or greenwashing; and
  - iii) fossil fuel companies possess, update, disseminate and make available upon request information about their fossil fuel production; and
- (c) in phasing down/out fossil fuel production, pursue a **just transition** away from fossil fuels in a manner that is compliant with their human rights obligations.

## ***PART VII: CONCLUSION***

89. We are in a state of climate emergency. As developed above, this is due overwhelmingly to fossil fuel production, which has led to increased CO2 emissions, to global warming and the climate emergency, including the various rights-infringing impacts of climate change discussed above. We ultimately submit that fossil fuel production is governed by and must be assessed against the human rights obligations of States arising under the Convention (and associated instruments). Those obligations are set out in Part VI.

90. We are grateful to the Environmental Defenders Office Ltd; the Centre for International Environmental Law; and Professor Harro van Asselt, Hatton Professor of Climate Law at the University of Cambridge, for their input and assistance in preparing this submission.

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**Rebecca Byrnes**

*(Acting) Executive Director,*  
Fossil Fuel Non-Proliferation Treaty  
E: [rebecca@fossilfuel treaty.org](mailto:rebecca@fossilfuel treaty.org)  
T: +61 480 265 394

Legal Representation:



**Rohan Nanthakumar**

*International Legal Consultant*  
E: [nanthakumarr@unimelb.edu.au](mailto:nanthakumarr@unimelb.edu.au)  
T: +61 418 993 365

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