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Before the Inter-American Court of Human Rights Written Opinion regarding the Request for an Advisory Opinion on the Climate Emergency and Human Rights

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Written Opinion

regarding the Request for an Advisory Opinion

on the Climate Emergency and Human Rights

Submitted by:

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December 18, 2023

Attachment: UIC Law School International Human Rights Clinic & Santa Clara University International Human Rights Clinic, Escazú Toolkit: Using the Escazú Agreement in Cases Before the Inter-American System (Nov. 2022, updated Mar. 2023), https://repository.law.uic.edu/whitepapers/25/.

December 18, 2023

Pablo Saavedra Alessandri
Secretary of the Inter-American Court of Human Rights
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San José, Costa Rica

Submitted via email to tramite@corteidh.or.cr

Dear Secretary Saavedra Alessandri,

On behalf of the International Human Rights Clinic at Santa Clara University School of Law and the International Human Rights Clinic at the University of Illinois Chicago School of Law, please find a joint submission to assist the Honorable Court in developing its response to the request for an advisory opinion submitted by the Republic of Colombia and the Republic of Chile, requesting the Court to clarify the scope of State obligations, in their individual and collective dimension, in order to respond to the climate emergency within the framework of international human rights law. We write this communication pursuant to Article 73.3 of the Rules of Procedure of the Inter-American Court of Human Rights.

Last year, both Clinics collaborated to develop a toolkit analyzing the complementarity between the Inter-American Human Right System's existing approach to environmental access rights and the more specialized normative framework provided by the *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean* ("Escazú Agreement"). The toolkit addresses the environmental access rights recognized in the Escazú Agreement, as well as the Agreement's special protections for individuals and groups in situations of vulnerability and State obligations to create a safe, enabling environment for human rights defenders. Our hope in publishing this toolkit was to promote the integration of the Escazú Agreement's specific obligations as normative guidance on the procedural dimensions of the human right to a healthy environment into the Inter-American System's interpretation of State obligations arising under the human right to a healthy environment and other related rights.

Given the significant role that environmental access rights play in the context of the climate emergency, this submission provides a brief summary of the most relevant points raised in our toolkit, and we have also attached the toolkit itself as an annex. Accordingly, our submission provides our observations on the questions that implicate the importance of environmental access rights to preventing human rights violations arising from the climate emergency, specifically questions A(2)(a), B(1)(iv), and D(1), examining the State duty of prevention, the right to access information, and the right to access to justice.

Specifically, we ask this Honorable Court to expand on the following three legal obligations of States:

1) the due diligence obligation to protect against environmental harms that may exacerbate the climate emergency, whether by public or private entities, which includes the duty to ensure that environmental and social impact assessments ("ESIAs") address future and aggregate harm, as well as the duty to prepare contingency plans and to actively mitigate any activities that have the potential to exacerbate the climate emergency; (Question A(2)(a))

2) the obligation to affirmatively produce and provide access to comprehensive and accurate environmental information, including on factors that contribute to the climate emergency, whether by public or private entities, as well as the duty to provide such access without unnecessary restrictions, (Question B(1)(iv)) and

3) the obligation to provide adequate, effective, and timely judicial remedies to provide protection and redress for the human rights impacts of the climate emergency (Question D(1)).

Our analysis indicates that robust implementation of environmental access rights is essential for the fulfillment of the human right to a clean, healthy, and sustainable environment and related rights, particularly in the context of the climate emergency. We strongly share the view of the UN Special Rapporteur on Human Rights and the Environment, who stated that "[t]o comply with their international human rights obligations, States should apply a rights-based approach to all aspects of climate change and climate action. Applying a rights-based approach clarifies the obligations of States and businesses; catalyzes ambitious action; highlights the plight of the marginalized and most vulnerable; and empowers people to become involved in designing and implementing solutions."[1]

We therefore ask the Honorable Court to consider extending its existing standards in light of the specialized protections outlined in the Escazú Agreement to ensure that vulnerable individuals and communities can utilize their environmental access rights to combat the climate emergency. Additionally, we encourage the Court to incorporate in its analysis the considerations that the International Court of Justice and other international bodies will soon publish in response to other pending advisory opinions on the obligations of States in respect of climate change.

We appreciate the opportunity to share our research and analysis in this regard with the Honorable Court.

In solidarity,

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[1] David R. Boyd. (2019). Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/74/161 (15 July 2019), ¶ 62.

TABLE OF CONTENTS

I. QUESTION A(2)(a)[2] - The Court should declare that States' due diligence obligations to protect against environmental harms extend to any activities that may exacerbate the climate emergency, whether by public or private entities

1. Both the Inter-American Human Rights System [hereinafter "IAHRS" or "Inter-American System"] and the Escazú Agreement already provide guidance on State obligations to regulate, monitor and oversee, request and adopt environmental and social impact assessments [ESIAs], establish contingency plans, and mitigate activities under their jurisdiction that exacerbate or could exacerbate environmental harm as components of the broader duty to prevent significant environmental harm. ESIAs are a tool to implement environmental regulation, monitor and oversee activities that may cause environmental harm, and inform affected communities of relevant risks and alternatives. They are a primary vehicle for fulfilling this obligation, together with contingency plans and mitigation measures to redress environmental harm, but especially important for when preventive measures fail.[3] This section addresses how the Court should extend these obligations to activities that exacerbate or could exacerbate the climate emergency by drawing on the existing

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

[3] ESIAs are, as this Court has already acknowledged, widely incorporated into international and domestic environmental laws# and are generally understood to be the primary domestic environmental management procedure to evaluate the likely impact of a proposed activity on the environment "with a view to ensuring environmentally sound and sustainable development." UNEP, Resolution 14/25 of June 17, 1987, adopting the Goals and Principles of Environmental Impact Assessment. UN Doc. UNEP/WG.152/4 Annex [hereinafter UNEP Resolution 14/25]; U.N. Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, 30 I.L.M. 800 (1991) at art. 1(vi). An ESIA is "the process of identifying, predicting, evaluating and mitigating the biophysical, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made." Thus, government agencies are usually required to produce a "publicly reviewable physical document reflecting the required internal project analysis," ensuring "that the agency has given 'good faith consideration' to the environmental consequences of its proposed action and its reasonable alternatives." Almost always, the EIA process includes the public in the gathering of information as well as in the review of the document. Tseming Yang, The Emergence of the Environmental Impact Assessment Duty as a Global Legal Norm and General Principle of Law, 70 Hastings L.J. 525, 529 (2019). See also, Advisory Opinion OC-23/17 at ¶ 150, note 297, 157-159 (citing UNEP, Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach, 2004, p. 18. Available at: https://unep.ch/etu/publications/textONUBr.pdf. See also, UNEP, Resolution 14/25 of June 17, 1987, adopting the Goals and Principles of Environmental Impact Assessment, UN Doc. UNEP/WG.152/4 Annex, Principle 2). An ESIA is commonly designed to inform and elicit feedback from those who may be affected. Yang; See also Sarah Dávila A., Making the Case for a Right to a Healthy Environment for the Protection of Vulnerable Communities: A Case of Coal- Ash Disaster in Puerto Rico, 9 Mich. J. Envtl. & Admin. L. 379, 410-411 (2020) (noting that a State's failure to provide an environmental impact statement particularly impacts the ability of vulnerable groups to access information and participate in decision-making processes). In addition to identifying environmental impacts and potential mitigation measures, ESIAs typically provide an assessment of alternatives to the proposed activity. UNEP Res. 14/25, Principle 4(b-e). Pursuant to the Rio Declaration, "[e]nvironmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority." Report of the United Nations Conference on Environment and Development, Rio Declaration on Environment and Development: Rep. of the G.A., U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992).

Inter-American normative framework as well as the specialized guidance provided by the Escazú Agreement.

2. In its Advisory Opinion on the Environment and Human Rights [Advisory Opinion 23], the Inter-American Court interpreted State obligations to respect and protect the rights to life and personal integrity under the American Convention on Human Rights [American Convention] in light of the fundamental principles of international environmental law.[4] As this Court laid out in the Advisory Opinion, States have a strong duty of prevention that requires them to regulate, monitor and oversee, request and adopt environmental and social impact assessments, establish contingency plans, and mitigate any activities under their jurisdiction that may generate significant environmental harm.[5] The Court defined significant environmental harm as "any harm to the environment that may involve a violation of the rights to life and personal integrity[.]"[6] These obligations are grounded in the requirement that States "comply with their obligations under the American Convention with due diligence[]"[7] by taking all necessary steps to ensure rights, including by protecting against violations by private parties.[8] In the case *Indigenous Communities of the Lhaka Honhat (Nuestra Tierra) Association v. Argentina*,, the Court reaffirmed that the obligation of prevention is an important way for States to comply with their obligation to ensure the right to a healthy environment pursuant to Article 1(1) of the American Convention.[9] The Court added that this obligation of prevention includes actions by public as well as private entities.[10] The Court also reaffirmed that this is a broad duty, finding that "States are bound to use all the means at their disposal to avoid activities under its jurisdiction causing significant harm to the environment."[11]

3. To meet these requirements for compliance with the duty of prevention, this Court has indicated that, pursuant to their obligations under Article 2 of the American Convention,[12] "States must [...] regulate activities that could cause significant harm to the environment in order to reduce

[4] Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, (Nov. 15, 2017). [hereinafter Advisory Opinion OC-23/17]. The United Nations General Assembly (UNGA) requested the International Court of Justice (ICJ) to interpret States' obligations concerning climate change under key instruments, including the UN Charter, International Covenants on Civil and Political Rights, Social and Cultural Rights, the UN Framework Convention on Climate Change, Paris Agreement, UN Convention on the Law of the Sea, and relevant principles of international environmental law (UNGA resolution 77/276).

[5] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 145; I/A Court H.R., Case of the Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina. Merits, Reparations and Costs. Judgment of February 6, 2020. Series C No. 400, ¶ 208. [hereinafter Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina]

[6] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 140.

[7] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 123; see also, Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina, *supra* note 5, at ¶ 208.

[8] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 118.

[9] Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina, *supra* note 5, at ¶ 207.

[10] *Id*.

[11] *Id*. at ¶ 208 (citing Advisory Opinion OC-23/17, *supra* note 4, at ¶ 142).

[12] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 146.

the risk"[13] of other human rights violations.[14] To fulfill the duty to supervise and monitor, States must also establish monitoring and accountability mechanisms that are both adequate and independent.[15] Such mechanisms must cover public and private actors[16] and include both protective or preventative measures[17] and "appropriate measures to investigate, punish and redress possible abuse through effective policies, regulations and adjudication."[18] According to this Court, the greater the environmental risk, the more vigorous the supervision and monitoring mechanisms must be.[19] While ESIAs are an important component of the duties to regulate and to supervise and monitor, "the control that a State must exercise does not end with the environmental impact assessment; rather, States must continuously monitor the environmental impact of a project or activity."[20] Because ESIAs are one of the most important mechanisms by which States fulfill their obligations to regulate and supervise and monitor activities that may cause significant environmental harm, as well as to provide information about risks and alternatives to such activities, this section addresses the first three elements of the duty of prevention in the context of ESIAs, before going on to address contingency plans and mitigation measures.

4. The Escazú Agreement further clarifies that States must take an active role at all possible times to prevent and protect against the present and potential adverse climate impacts of all activities within their jurisdiction, whether public or private. The Economic Commission for Latin America and the Caribbean has observed that:

> The Escazú Agreement is also a key human rights agreement for climate action. In addition to expressly recognizing and setting out procedural human rights, it serves as the basis for the full exercise of substantive rights such as the right to a healthy environment, the right

[13] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 174.
[14] *Id*.
[15] *Id.* at ¶ 154.
[16] *Id*. at ¶ 153. The Court also emphasized the independent obligations of business enterprises under the UN Guiding Principles on Business and Human Rights to "respect and protect human rights, and prevent, mitigate and assume responsibility for the adverse human rights impacts of their activities." *Id*. at ¶ 155. We respectfully encourage the Court to emphasize the applicability of these obligations to business activities that exacerbate or may exacerbate the climate emergency.
[17] *Id*. at ¶ 152 (citing Case of Ximenes Lopes v. Brazil. Merits, reparations and costs. Judgment of July 4, 2006. Series C No. 149, ¶ 89 and 90; Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits, reparations and costs. Judgment of June 27, 2012. Series C No. 245, ¶ 167; Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs. Judgment of November 30, 2016. Series C No. 329, ¶ 154 and 208; Case of the Kaliña and Lokono Peoples v. Suriname. Merits, reparations and costs. Judgment of November 25, 2015. Series C No. 309, ¶ 221 and 222. [hereinafter "Kaliña and Lokono Peoples"].
[18] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 154.
[19] *Id*.; Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina, *supra* note 5, at ¶ 208.
[20] Advisory Opinion OC-23/17 *supra* note 4, at ¶ 153 (citing ICJ, Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay). Judgment of April 20, 2010, ¶ 205, and ICJ, Certain activities carried out by Nicaragua in the border area (Costa Rica v. Nicaragua) and Construction of a road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica). Judgment of December 16, 2015, ¶ 161).

to life, health or food in the context of climate change. It also focuses on persons and groups in vulnerable situations, in an effort to ensure that no one is left behind.[21]

5. The following subsections accordingly address normative guidance from the Inter-American System and the Escazú Agreement on the specific components of the duty of prevention, addressing the obligations to regulate and supervise, monitor through ESIAs, and the obligations to develop contingency plans and mitigation measures to remediate the human rights impacts of significant environmental harm.

6. Given the existential threat posed by the climate emergency to the rights to life and personal integrity, the Honorable Court should explicitly declare that States' due diligence obligation to prevent significant environmental harm applies to the climate emergency. Specifically, we respectfully urge the Honorable Court to interpret the duty of prevention in light of the specialized guidance provided by the Escazú Agreement, consider that all harm caused by the climate emergency constitutes significant environmental harm triggering the duty of prevention, and extend the specific obligations arising under the duty of prevention to all dimensions of the climate emergency, as outlined below.

A. States must request and adopt adequate ESIAs that include an assessment of climate impacts, whether such activities are carried out directly by the State or by private actors.

7. The Inter-American System requires States to approve and conduct ESIAs[22] that "include an evaluation of the potential social impact of the project"[23] when there is a risk of significant damage to the environment. The obligation to conduct an ESIA "is independent of whether a project is being implemented directly by the State or by private individuals."[24] Although this Court has thus far only addressed the ESIA requirement through its contentious jurisdiction in cases involving the rights of Indigenous Peoples,[25] it explicitly declared in its Advisory Opinion on the Environment and Human Rights that the ESIA obligation "also exists in relation to any activity that may cause significant environmental damage."[26] Specifically, the Court declared that "when it is determined that an activity involves a risk of significant damage, an [ESIA] must be carried

[21] Economic Commission for Latin America and the Caribbean/United Nations High Commissioner for Human Rights (ECLAC/OHCHR) *Climate change and human rights: contributions by and for Latin America and the Caribbean* (LC/TS.2019/94), p. 48, Santiago, 2019.
[22] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 164 (citing to Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 129 (Nov. 28, 2007) [hereinafter "Saramaka People"], and Kaliña and Lokono Peoples, *supra* note 17, at ¶¶ 213-226.
[23] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 164 (citing to Saramaka People, *supra* note 22, at ¶ 129, and Kaliña and Lokono Peoples, *supra* note 17, at ¶¶ 213-226).
[24] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 160.
[25] *Id*. at ¶ 156.
[26] *Id*. at ¶ 157.

out."[27] The Court should extend this obligation to all activities that exacerbate or may exacerbate the climate emergency and add a requirement for all ESIAs to directly assess the environmental and social dimensions of a proposed activity's climate impact. To the degree that the obligations to regulate and to supervise and monitor go beyond ESIAs, the Court should also extend these obligations to the climate emergency by explicitly declaring that States have a due diligence obligation to regulate and to supervise and monitor activities that may contribute to the climate emergency.

8. ESIAs serve a vital protective function while also supporting the realization of the core environmental access rights of access to information and public participation in environmental decisions. The Court has found a violation of the right to participate under Article 23 of the American Convention where the State has failed to conduct an adequate ESIA as part of a process of free, prior, and informed consultation with Indigenous Peoples whose communal territory may be affected by a proposed activity.[28] In extending the ESIA requirement to all activities that may cause significant environmental harm, the Court considered that ESIAs play an essential function in fulfilling States' due diligence obligation to protect against human rights violations, by allowing States to determine whether a proposed activity will cause significant environmental harm, preventing such harm and to inform the public about the proposed activity's potential risks and alternatives.[29]

9. As noted above, the Court developed its specific ESIA requirements through its jurisprudence on Indigenous Peoples' rights, beginning with the *Saramaka People v. Suriname* judgment,[30] and the Court has extended these requirements to all activities that pose a risk of significant environmental harm.[31] To be considered adequate under this standard, all ESIAs:

> must be made by independent entities with State oversight prior to implementation of the activity or project, include the cumulative impact, respect the traditions and culture of any indigenous peoples who could be affected, and the content of such assessments must be determined and defined by law or within the framework of the project authorization process, taking into account the nature and size of the project and its potential impact on the environment[.][32]

10. The following paragraphs provide a brief discussion of those required ESIA elements that the Court should explicitly extend to activities that exacerbate or could exacerbate the climate emergency.

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[27] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 160.
[28] Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina, *supra* note 5, at ¶¶ 182-184.
[29] Advisory Opinion OC-23/17, *supra* note 4, at ¶¶ 140, 156, citing Saramaka People *supra* note 22, at ¶ 40.
[30] Saramaka People, *supra* note 22, at ¶ 129.
[31] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 157.
[32] *Id.* at ¶ 174.

11. In *Kichwa Indigenous People of Sarayaku v. Ecuador*, the Court followed *Saramaka* in providing specific guidance for what constitutes an adequate ESIA. First, all ESIAs must be done "in conformity with the relevant international standards and best practices[.]"[33] The Court reiterated that this standard applies to all ESIAs in its Advisory Opinion on the Environment and Human Rights.[34] The core standards that the Court has emphasized in its jurisprudence are the requirements that in cases involving Indigenous and Tribal Peoples, that the ESIA "respect the[ir] traditions and culture[,]"[35] and in all cases, that the ESIA be carried out before the State permit the activity in question,[36] as discussed below.

12. However, applicable international standards and best practices for ESIAs encompass a much wider set of considerations, including ones that bear on State obligations relating to the climate emergency. Accordingly, we respectfully encourage the Court to join the UN Special Rapporteur on the human right to a healthy environment in recognizing that these international standards and best practices call for ESIAs to directly consider the present and potential climate impacts of the proposed activity, including projects, plans, and policies;[37] and to explicitly incorporate this requirement into the components of an adequate ESIA under the Inter-American normative framework. In the report submitted by civil society in conjunction with the 2019 thematic hearing convened by the Inter-American Commission on Human Rights (Commission), the authors cite to several examples of climate litigation where domestic tribunals have imposed this requirement.[38] The consideration of climate change should include not only the proposed activity's impact on the climate emergency but also the environmental and social dimensions of those impacts - in other words, the impact of intensified climate change on related human rights

[33] Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, *supra* note 17, at ¶ 206. In the context of Indigenous Peoples' rights, the Court has referred to the Akwé:Kon Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities as a source (Saramaka People, *supra* note 22).

[34] Advisory Opinion OC-23/17, *supra* note 4, ¶ 161, citing Saramaka People, *supra* note 22, at ¶ 41; Case of the Triunfo de la Cruz Garifuna Community and its members v. Honduras, ¶ 180 [hereinafter Triunfo de la Cruz Garifuna Community and its members v. Honduras]; Kaliña and Lokono Peoples, *supra* note 17, ¶ 216.

[35] Triunfo de la Cruz Garifuna Community and its members v. Honduras, *supra* note 34, at ¶ 180. In other cases, it has been suggested that this requirement be understood as obliging States to ensure that the proposal conforms to the principle of non-discrimination and considers the needs of those who are particularly vulnerable to environmental harm. Diaz Albar, Magdalena, et al. Cambio Climático y los Derechos de Mujeres, Pueblos Indígenas y Comunidades Rurales en las Américas (abril 2020) p. 66 (citing John Knox. (2018). Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/37/59, ¶ 21).

[36] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 162.

[37] Boyd, *supra* note 1, at ¶ 64(d).

[38] Diaz Albar, Magdalena, et al., *supra* note 35, at pp. 66-68; see also AIDA, High court orders Colombian government to adopt concrete actions for climate crisis mitigation and adaptation (23 Oct 2023), at https://aida-americas.org/en/press/high-court-orders-colombian-government-to-adopt-concrete-actions-for-climate-crisis-mitigation-and-adaptation?emci=ed01fee5-1b8f-ee11-8925-002248223cba&emdi=a4d784be-888f-ee11-8925-002248223f36&ceid=877690.

and vulnerable groups.[39] For example, climate impact analysis should assess not only whether the proposed activity would exacerbate the climate emergency or disrupt mitigation efforts, but also whether it would affect the climate change resilience or adaptive capacity of affected communities.[40] States should also apply this approach to the evaluation of proposed responses to climate change, including adaptation and mitigation activities.[41] In fulfilling this requirement, States should assess "both the upstream and downstream effects"[42] and, in keeping with the Court's recognition that States have a particular obligation to regulate "activities that involve significant risks to [] health[,]"[43] give particular attention to proposals that strongly implicate the climate emergency, such as oil drilling, coal mining, or energy generation that involves combustion of fuel or otherwise results in the release of large amounts of greenhouse gases.[44]

13. With regard to the timing of ESIAs, the Court in *Sarayaku* held that States may not permit a proposed activity until they "have made a prior environmental and social impact assessment."[45] Although States have a heightened obligation when conducting ESIAs that may affect Indigenous territory,[46] the Court has broadened this requirement, indicating that States must use ESIAs to ensure that any affected community is aware of the possible risks, including environmental threats and health risks, in order for them to accept the proposed development or investment plan on an informed and voluntary basis.[47] To meet this requirement, which applies to all ESIAs, the Court has declared that States must ensure that an ESIA "is concluded before the activity is carried out or before the permits required for its implementation have been granted."[48] The prior nature of the ESIA is necessary to permit the consideration of less destructive alternatives and reduce the likelihood of financial losses resulting from changes to the proposed activity.[49] According to the Court, the prior nature of the ESIA also relates to the broader requirement that States implement the actions required to fulfill the obligation of prevention before "damage is caused to the

[39] United Nations Environment Programme, Climate Change and Human Rights, 2015, p. 17.
[40] International Institute for Environment and Development. Climate change in impact assessments: towards an integrated approach (October 2023), p. 3, at https://www.iied.org/sites/default/files/pdfs/2023-10/21636iied.pdf.
[41] United Nations Environment Programme, Climate Change and Human Rights, *supra* note 39, p. 34; Office of the United Nations High Commissioner for Human Rights, Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, Focus report on human rights and climate change (2014).
[42] Boyd, *supra* note 1, at ¶ 64(d).
[43] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 141.
[44] Diaz Albar, Magdalena, et al., *supra* note 35, at p. 66 (citing United Nations Environment Programme, Climate Change and Human Rights, *supra* note 39, at p. 16).
[45] Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, *supra* note 17, at ¶ 205, citing Saramaka People, *supra* note 22, at ¶ 130.
[46] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 169.
[47] *Id*. at ¶ 156; see also Saramaka People, *supra* note 22 at ¶¶ 129, 133; Kichwa Indigenous People of Sarayaku, *supra* note 17, at ¶ 206
[48] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 162.
[49] *Id*.

environment, [… since] after the damage has occurred, it will frequently not be possible to restore the previous situation."[50]

14. The Court has also declared that ESIAs must be carried out by "independent and technically competent bodies, under the supervision of the State."[51] Specifically, States must observe their monitoring and oversight obligation by supervising the development of ESIAs to guarantee their independence and technical quality, either by conducting them directly or by ensuring they are "carried out by an independent entity with the relevant technical capacity, under the State's supervision."[52] The Court has further clarified that, to adequately meet its supervisory obligations in this context, the State may not approve an ESIA without first assessing "whether execution of the project is compatible with its international obligations[,]" including "the impact that the project may have on its human rights obligations."[53] The Court has also emphasized that ESIAs must address the social, cultural, and, particularly in cases involving Indigenous and Tribal Peoples,[54] the spiritual impacts deriving from the proposed project.[55] In its Advisory Opinion on the Environment and Human Rights, the Court explicitly extended the requirement from its Indigenous Peoples' rights jurisprudence that ESIAs must "include an evaluation of the potential social impact of the project."[56] Accordingly, all environmental impact statements must "include a social analysis"[57] and the State bears the burden of ensuring that the ESIA includes this essential component.[58]

15. The Court has further declared that ESIAs must address "the cumulative impact of existing and proposed projects."[59] This requirement includes an assessment of the combined impact of the proposed project with other existing, associated, and proposed projects to, according to the Court, "allow a more accurate conclusion to be reached on whether the individual and cumulative effects of existing and future activities involve a risk of significant harm."[60] Because climate change acts as a threat multiplier that interacts with existing conditions in complex ways that can exacerbate underlying vulnerabilities, the Court should apply this requirement to the climate change analysis

[50] Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina, *supra* note 5, at ¶ 208.
[51] Kichwa Indigenous People of Sarayaku, *supra* note 17, ¶ 205, citing Saramaka People, *supra* note 22, at ¶ 130.
[52] Advisory Opinion OC-23/17, supra note 4, ¶ 163, citing Saramaka People, *supra* note 22, at ¶ 41, and Kaliña and Lokono Peoples, *supra* note 17, at ¶ 201.
[53] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 164.
[54] *Id*. at ¶ 169.
[55] Kichwa Indigenous People of Sarayaku, *supra* note 17, at ¶ 204.
[56] Advisory Opinion OC-23/17, *supra* note 4, ¶ 164, citing Saramaka People, *supra* note 22, at ¶ 129; Kaliña and Lokono Peoples, *supra* note 17, at ¶ 213-226.
[57] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 164.
[58] *Id*.
[59] Kichwa Indigenous People, *supra* note 17, at ¶ 206.
[60] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 165, citing Saramaka People, *supra* note 22, at ¶ 41.

dimension of ESIAs, requiring States to take an integrated approach that accounts for cumulative, indirect, and interconnected impacts at all levels and over time.[61]

16. The Court also indicated that States should ensure that interested parties have the ability to participate meaningfully in the development and assessment of all ESIAs, finding that "the participation of the interested public allows for a more complete assessment of the possible impact of a project or activity and whether it will affect human rights."[62] In cases involving Indigenous and Tribal Peoples, the Court has required that States do so as a necessary component of the right to consultation.[63] Specifically, the Court has repeatedly held that States must ensure that ESIA processes "respect the [I]ndigenous [P]eoples' traditions and culture, and be completed before the concession is granted [...] to guarantee the effective participation of the [I]ndigenous [P]eoples in the process of granting concessions."[64] This means that the State must guarantee that the ESIA is prepared with the participation and the free, prior, and informed consultation of the affected Indigenous Peoples.[65] Given the growing international and regional consensus around extending this requirement to all interested parties, which the Court acknowledged in Advisory Opinion on *The Environment and Human Rights*[66] and which is reinforced by the Escazú Agreement's strong protections for the rights to access information and to public participation,[67] as well as the strong public interest in the wide ranging impacts of the climate emergency, the Court should explicitly declare that States must ensure the effective participation of all interested parties in all phases of the ESIA process when the proposed activity may exacerbate climate change.

17. The Court has also interpreted the duty to regulate to require that States set forth ESIA requirements in law. In Advisory Opinion 23, the Court specified that States must enact domestic laws or regulations regarding ESIAs, which:

> must be clear, at least as regards: (i) the proposed activities and the impact that must be assessed (areas and aspects to be covered); (ii) the process for making an environmental impact assessment (requirements and procedures); (iii) the responsibilities and duties of project proponents, competent authorities and

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[61] International Institute for Environment and Development, *supra* note 40, at p. 3.
[62] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 168.
[63] Kichwa Indigenous People of Sarayaku, *supra* note 17, at ¶¶ 204, 207 (finding a violation where the ESIA "was prepared without the participation of the Sarayaku People[.]"); see also Advisory Opinion OC-23/17, *supra* note 4, at ¶ 166, citing Saramaka People, *supra* note 22. Preliminary objections, merits, reparations and costs, ¶ 129, 130; Kichwa Indigenous People of Sarayaku, *supra* note 17, ¶ 206; Kaliña and Lokono Peoples, *supra* note 17, at ¶ 215.
[64] Kichwa Indigenous People of Sarayuku, *supra* note 17, at ¶ 206.
[65] *Id.* at ¶¶ 204, 207 (finding a violation where the ESIA "was prepared without the participation of the Sarayaku People[.]").
[66] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 167.
[67] Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, Arts. 5-7, Nov. 30, 2018, https://repositorio.cepal.org/server/api/core/bitstreams/7e888972-80c1-48ba-9d92-7712d6e6f1ab/content. [hereinafter Escazú Agreement].

> decision-making bodies (responsibilities and duties); (iv) how the environmental impact assessment process will be used in approval of the proposed actions (relationship to decision-making), and (v) the steps and measures that are to be taken in the event that due procedure is not followed in carrying out the environmental impact assessment or implementing the terms and conditions of approval (compliance and implementation).[68]

18. With regard to this element, the Court should explicitly declare that States must adopt legislative or administrative provisions that define climate change as an environmental impact that all ESIAs must address and thereby require the consideration of climate impacts in their domestic ESIA regime.

19. Finally, the Court found that "States should determine and define, by law or by the project authorization process, the specific content required of an environmental impact assessment, taking into account the nature and size of the project and its potential impact on the environment."[69] The Court indicated that "[t]he content of the environmental impact assessment will depend on the specific circumstances of each case and the level of risk of the proposed activity."[70] As noted above, the Court requires a higher level of scrutiny for proposals that pose greater risks.[71]

20. In the Case of *Nuestra Tierra,* the Court noted that ESIAs "should not be conducted as a mere formality but should make it possible to evaluate alternatives and the adoption of impact mitigation measures[.]"[72] To do so, the ESIA must comply with the criteria outlined above.[73]

21. The purpose of an ESIA is to foster transparency with the public regarding the environmental impacts of any proposed project or activity that poses the risk of significant environmental harm.[74] ESIAs that comport with the above requirements serve an essential preventive function while also guaranteeing the rights to access information and to public participation by informing the public about the potential harm and differentiated impacts of a proposed project, as well as whether less harmful alternatives or preventive measures can be applied, ultimately supporting a transparent participatory process to determine whether the project should go forward at all.[75] Doing so allows the State to comply with its due diligence and

[68] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 150.
[69] *Id.* at ¶ 170.
[70] *Id.*
[71] *Id.* at ¶ 154; Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina, *supra* note 5, at ¶ 208.
[72] Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina, *supra* note 5, at ¶ 174, note 162,
[73] *Id.*
[74] Kichwa Indigenous People of Sarayaku, *supra* note 17, at ¶ 206.
[75] See, e.g., Advisory Opinion OC-23/17, *supra* note 4, at ¶ 150, note 297, 157-159 (citing UNEP, Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach, 2004, p. 18. Available

prevention obligations regarding a proposed activity's potential impact on the environment, and allows the public to take an active role in helping mitigate environmental damage, and by extension the climate emergency.[76]

B. The Escazú Agreement provides States with further guidance on the role ESIAs play in addressing the climate emergency.

22. The Escazú Agreement recognizes that ESIAs are an important source of environmental information and critical for effective public participation in environmental decision-making.[77] It also recognizes that ESIAs partially fulfill a State's duty of prevention.[78] In particular, the Escazú Agreement specifies the steps States must take to ensure that domestic ESIA procedures conform to environmental access rights, thereby engaging the public in holding States accountable to their duties of due diligence and prevention. As David Boyd, the United Nations Special Rapporteur on human rights and the environment has emphasized, States' procedural obligations to respect, protect, and fulfill environmental access rights must be understood as essential part of a rights-based approach to climate change.[79] Therefore, the Court should incorporate the specialized guidance provided by the Escazú Agreement into its explicit application of the ESIA requirement to activities that exacerbate or may exacerbate the climate emergency.

23. Several provisions of the Escazú Agreement support the importance of public access to ESIAs and by extension, to information about the potential climate impacts of a proposed activity. Article 6(3)(h) of the Escazú Agreement suggests that States should include "information on environmental impact assessment processes and on other environmental management instruments" in their environmental information systems.[80] This requirement that States make information about EIAs publicly available pursuant to Article 6(3)(h) helps guarantee that EIAs themselves are part of the environmental information that the public can access and supports the right of public participation in the ESIA process.[81] Article 6 of the Escazú Agreement not only establishes ESIAs as a means of fulfilling a State's obligation to comply with the right of access to information, but also requires States to guarantee that ESIAs, along with any other environmental information systems, are well organized and widely accessible, including through "information technology and georeferenced media, where appropriate."[82]

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at: https://unep.ch/etu/publications/textONUBr.pdf. See also, UNEP, Resolution 14/25 of June 17, 1987, *supra* note 3; UNEP Resolution 14/25, *supra* note 3; Yang, *supra* note 3.

[76] Boyd, *supra* note 1, at ¶ 62-64.

[77] Escazú Agreement, *supra* note 67, at Arts. 6(3)(h), 7(9), 7(17).

[78] *Id.* at Arts. 6(3)(h), 7(9), 7(17).

[79] Boyd, *supra* note 1, at ¶ 62-64.

[80] Escazú Agreement, *supra* note 67, at Art. 6(3)(h).

[81] *Id.*

[82] *Id.* at Art. 6(3).

24. Article 7(9) of the Escazú Agreement requires that States publicly share the decision made after consideration of an ESIA and related public input "in an effective and prompt manner[.]"[83] To ensure that affected communities have the information necessary to challenge such decisions pursuant to the right to access justice, this information should "include the established procedure to allow the public to take the relevant administrative and judicial actions."[84]

25. Likewise, Article 7(17) requires States to share multiple information categories associated with ESIAs to ensure that the public can effectively participate in the environmental decision-making processes informed by these assessments.[85] The listed types of information should also be considered as the minimum requirements for an ESIA that comports with the rights to access environmental information and to participate in environmental decision-making.[86] In addition to descriptions of the impacts of the proposed project or activity[87] and measures to address those impacts,[88] these categories include: reports and analyses by the entities involved in the project,[89] information about potential technologies and alternative locations,[90] and "actions to monitor the implementation and results of environmental impact assessment measures."[91] This last category matches the evolving international consensus that States may not abandon their supervision and monitoring function once an ESIA has been approved; rather, they must continue to monitor the environmental impacts of the proposed activity, including its social and climate impacts.[92]

26. In light of the foregoing, the Court should declare that for States to meet their due diligence obligation to prevent environmental harm, including harm related to the climate emergency, they must request and adopt adequate environmental and social impact assessments that include an assessment of climate impacts and serve as an effective vehicle for regulation, monitoring, and oversight of activities with the potential to cause significant damage to the environment, whether such activities are carried out directly by the State or by private actors.

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83 *Id.* at Art. 7(9).
84 *Id.*
85 *Id.* at Art. 7(17).
86 *Id.* Article 7(17) provides that at a minimum the following type of information should be made available to the public: description of physical and technical characteristics of proposed project or activity; main environmental impacts, as appropriate, and including cumulative environmental impact; foreseen measures in relation to the environmental impacts; summary of the information in comprehensible and accessible manner (non-technical), public authority relating to project or activities; available information relating to technologies for executing projects or activities subject to the assessments, and actions taken to monitor the implementation and results of EIA measures.
87 *Id.* at Art. 7(17)(a-b).
88 *Id.* at Art. 7(17)(c).
89 *Id.* at Art. 7(17)(e).
90 *Id.* at Art. 7(17)(f).
91 *Id.* at Art. 7(17)(g).
92 Advisory Opinion OC-23/17, *supra* note 4, at ¶ 153; Knox, *supra* note 35, at ¶ 20.

C. States have a duty to prepare contingency plans and to actively mitigate any activities, whether public or private, that have the potential to exacerbate the climate emergency.

27. As noted above, in its Advisory Opinion on *The Environment and Human Rights*, this Court found that States must meet the principle of prevention, which requires States to take effective measures to protect the environment when proposed activities pose the risk of significant environmental harm.[93] In addition to the duties to regulate, monitor, supervise, require, and approve ESIAs, discussed above, the obligation of prevention also encompasses the duty to prepare contingency plans and the duty to mitigate if significant environmental damage occurs.[94] The Court should interpret these obligations in light of both specific provisions in the Escazú Agreement that illustrate how to give effect to the duty to mitigate, as well as relevant business and human rights standards. The Court should also declare that these obligations apply to public and private activities that may exacerbate the climate emergency.

28. To comport with the obligation of prevention, the Court has already declared that States must "have a contingency plan to respond to environmental emergencies or disasters that includes safety measures and procedures to minimize the consequences of such disasters."[95] Such plans must address both domestic and transboundary harm and cover both public and private conduct,[96] keeping in mind that the goal of contingency plans is to respond to emergencies or environmental disasters, and therefore these plans should establish security measures and procedures that minimize the environmental consequences of all activities within the State's jurisdiction.

29. States are also required to immediately mitigate significant environmental damage.[97] To fulfill this obligation, it is insufficient to have preventative measures in place if they fail to be effective.[98] This Court has specified that States may not avoid the obligation to mitigate where damage occurs after the adoption of otherwise adequate preventative measures.[99] As noted above, the Court in *Nuestra Tierra* also emphasized the importance of robust ESIAs as an effective tool to identify harms, consider alternatives, and develop appropriate measures of mitigation.[100]

30. The Inter-American System has also recognized that States' due diligence obligations to prevent and mitigate environmental harm require them to protect against harms caused by private actors. The Commission has declared that States have a duty to "organize their entire governmental

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[93] Advisory Opinion OC-23/17, *supra* note 4, at ¶¶ 125-174.
[94] *Id.* at ¶ 145.
[95] *Id.* at ¶ 171.
[96] *Id.* at ¶¶ 133, 171.
[97] *Id.* at ¶ 155.
[98] *Id.* at ¶¶ 172-173.
[99] *Id.*
Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina, *supra* note 5, at ¶ 174, note 162.

apparatus and, in general, all the structures that manifest the exercise of public power, in such a way that they are capable of legally ensuring the free and full exercise of human rights."[101] States are obligated to protect their citizens against abusive corporate behavior.[102] Ultimately, the Commission has declared that "States must ensure that business activities are not carried out at the expense of individuals' or groups of individuals' fundamental rights and freedoms[.]"[103] The obligation is comprehensive; as recognized in 1988 by the Court, a State's responsibility "to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts."[104] According to the Commission, States are responsible "for the actions of third parties, when they act based on the tolerance, acquiescence, or negligence of the State, or with the support of any state policy or guideline that favors the creation of situations or discrimination."[105] The Commission and the Court have declared that States are required to "take affirmative measures to guarantee that the individuals under their jurisdiction are able to exercise and enjoy the rights contained in the American Convention"[106]

31. These Inter-American standards for affirmative State action to prevent corporate human rights violations mirror international standards, such as those laid out in the United Nations Guiding Principles on Business and Human Rights.[107] The UN Special Rapporteur on human rights and the environment has recognized that, pursuant to the UN Guiding Principles, private actors bear their own obligation to prevent and mitigate environmental harm as well; specifically,

> the responsibility of business enterprises to respect human rights includes the responsibility to avoid causing or contributing to adverse human rights impacts through environmental harm, to address such impacts when they occur and to seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships.[108]

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[101] IACHR, OEA/Ser.L/V/II, Business and Human Rights: Inter-American Standards, p. 61 (1 Nov. 2019). [hereinafter OEA/Ser.L/V/II, Business and Human Rights].
[102] *Id.* at ¶ 3.
[103] *Id.*
[104] Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶176 (July 29, 1988) (stating that if a "State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention" it has "failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction").
[105] IACHR, OEA/Ser.L/V/II, Compendium on Labor and Trade Union Rights: Inter-American Standards, ¶143 (30 Oct. 2020) [hereinafter OEA/Ser.L/V/II, Compendium on Labor and Trade Union Rights] (citing Report No. 25/18. Case 12,428. Admissibility and merits. Workers of the Fireworks Factory in Santo Antônio de Jesus and their Families. Brazil. OAS/Ser.L/V/II. 167. Doc. 29. March 2, 2018). See also *Id*. at 66.
[106] OEA/Ser.L/V/II, Compendium on Labor and Trade Union Rights, *supra* note 105, p. 66.
[107] OEA/Ser.L/V/II, Business and Human Rights, *supra* note 101, at 57.
[108] Knox, *supra* note 35, at ¶ 35.

32. As discussed previously, the obligation of prevention under the Escazú Agreement requiring that State or private actor activities do not cause significant environmental harm is complementary to the Inter-American System.[109] This broad obligation is articulated in multiple provisions designed to increase environmental access rights to protect against and mitigate environmental harm. Throughout Article 8, for example, the Escazú Agreement addresses the right to access justice to redress environmental past or ongoing harm but also to ensure recourse to mechanisms aimed at preventing potential environmental harm. Article 8(3)(d) provides that States should have "the possibility of ordering precautionary […] measures […] to prevent, halt, mitigate, or rehabilitate damage to the environment."[110] Likewise, Article 8(3)(g) obligates States to ensure comprehensive, restorative reparations in situations of environmental harm.[111] Additionally, Article 6 obligates States to mitigate harms caused by environmental emergencies by imposing a requirement that States establish an early warning system for situations that pose "an imminent threat to public health or the environment[.]"[112] The Escazú Agreement further requires that States must "immediately disclose and disseminate through the most effective means all pertinent information in its possession that could help the public take measures to prevent or limit potential damage."[113]

33. The Court should extend all these obligations deriving from the duty of prevention to activities that exacerbate or could exacerbate the climate emergency, drawing on the existing Inter-American normative framework as well as the specialized guidance provided by the Escazú Agreement and relevant business and human rights standards.

II. QUESTION B(1)(iv)[114] - The Court should declare that States must affirmatively produce and provide access to environmental information, including on factors that contribute to the climate emergency, whether by public or private entities.

34. Under the American Convention and the Escazú Agreement, States have an affirmative duty to produce information and guarantee access to environmental information, in keeping with

[109] Escazú Agreement, *supra* note 67, atArt. 3(e).
[110] *Id.* at Art. 8(3)(d).
[111] *Id.* at Art. 8(3)(g).
[112] *Id.* at Art. 6(5).
[113] *Id.*
[114] Question B(1)(iv): "Taking into account the right of access to information and the obligations concerning the active production of information and transparency reflected in Article 13 and derived from the obligations under Articles 4(1) and 5(1) of the American Convention, in light of articles 5 and 6 of the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement): (1) What is the scope that States should give to their obligations under the Convention vis-à-vis the climate emergency, in relation to: . . . (iv) Production of information and access to information on greenhouse gas emissions, air pollution, deforestation, and short-lived climate forcers; analysis of activities and sectors that contribute to emissions, or other factors[?]"

the principle of maximum disclosure. The Court should interpret the right to access information in light of the specialized guidance of the Escazú Agreement and explicitly extend this standard to information about factors that contribute to the climate emergency. Such information should include but not be limited to accessible data about greenhouse gas emissions, air pollution, deforestation, short-lived climate forcers; an analysis of activities and sectors that are particularly likely to contribute to the climate emergency; efforts at climate mitigation and adaptation, and any other factors that will enable the public to understand the climate situation and related human rights impacts. Additionally, the Court should require States to produce and disseminate information that facilitates public ability to assess whether climate-related conditions are improving or worsening, as well as differentiated effects on particular groups, including those in situations of vulnerability. All such impacts should be continuously monitored, and the relevant information should be regularly updated.[115] Finally, the Court should require States to exercise their due diligence obligations by requiring private actors, including business enterprises, to provide such data and ensure its accessibility to the public.

35. States' obligations under the American Convention to uphold environmental procedural rights play a crucial role in addressing the climate emergency by ensuring that vulnerable individuals and communities have access to relevant information, have the means to participate in decision-making processes, and are able to seek effective remedies when environmental and climate-related issues affect their rights and well-being.[116] These rights are essential tools in the fight against the climate emergency because they ensure that climate-related decisions are transparent, inclusive, and responsive to the needs and concerns of those most affected by environmental changes such as women, indigenous peoples, children, youth, migrants, persons with disabilities, coastal communities, and lower-income groups, among others.[117]

36. The Escazú Agreement seeks to protect environmental human rights, including the right to a healthy environment, by guaranteeing the full and effective implementation of environmental procedural rights within Latin America and the Caribbean.[118] The Escazú Agreement also seeks to support the "creation and strengthening of capacities and cooperation, contributing to the protection of the right of every person of present and future generations to live in a healthy environment and [the right] to sustainable development."[119]

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115 Advisory Opinion OC-23/17, *supra* note 4, at ¶ 153 (citing ICJ, Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay). Judgment of April 20, 2010, ¶ 205, and ICJ, Certain activities carried out by Nicaragua in the border area (Costa Rica v. Nicaragua) and Construction of a road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica). Judgment of December 16, 2015, ¶ 161).

116 Organization of American States, American Convention on Human Rights at Arts. 13, 23, 25, Nov. 22, 1969, 114 U.N.T.S. 143 [hereinafter American Convention].

117 Economic Commission for Latin America and the Caribbean/United Nations High Commissioner for Human Rights (ECLAC/OHCHR), *supra* note 21, at p. 7.

118 Escazú Agreement, *supra* note 67.

119 *Id.* at Art. 1.

37. The Escazú Agreement outlines the specific obligations States Parties must comply with to ensure distinct protections regarding the accessibility of information, including the types of information States must produce and disseminate, how States provide such information, and the measures States must make available to persons and groups in vulnerable situations to facilitate their access to such information.[120]

38. In light of this normative framework, the Honorable Court should consider incorporating the human rights obligations outlined in Articles 5 and 6 of the Escazú Agreement[121] into its interpretation of the right to access information in relation to the climate emergency, in line with its understanding that environmental access rights are an essential component in giving effect to State obligations to protect the rights to life and personal integrity.[122] Specifically, as noted above, this Court should explicitly declare that States have a duty to produce and provide access to information on greenhouse gas emissions, air pollution, deforestation, and short-lived climate forcers, as well as an analysis of activities and sectors that contribute to emissions, and other factors related to the climate emergency.

A. States must guarantee the right to access information in environmental matters, including information pertaining to the climate emergency.

39. Both the Inter-American System and the Escazú Agreement require States to proactively and expansively guarantee the right to access environmental information. This subsection provides an analysis relating to aspects of this normative framework that support the extension of these obligations to information related to the climate emergency.

40. The Inter-American System obligates States to provide access to environmental information,[123] and the Court should explicitly extend this obligation to information relevant to the climate emergency. As outlined in *Claude-Reyes v. Chile*, the State's obligation to provide access to environmental information protects the right to public participation and promotes States' transparency and accountability, thereby strengthening democracy.[124] This rationale applies with

[120] Escazú Agreement, *supra* note 67. *See also* UIC Law School International Human Rights Clinic & Santa Clara University International Human Rights Clinic, Escazú Toolkit: Using the Escazú Agreement in Cases Before the Inter-American System, p. 17 (Nov. 2022, updated Mar. 2023), https://repository.law.uic.edu/whitepapers/25/. [hereinafter Escazú Toolkit].
[121] Escazú Agreement, *supra* note 67. *See also* Escazú Toolkit, *supra* note 120, at p. 17-35.
[122] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 211.
[123] Case of Claude Reyes v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 151, ¶ 76-81 (Sept. 19, 2006); Advisory Opinion OC-23/17 at ¶ 225. [hereinafter Reyes v. Chile].
[124] Reyes v. Chile, *supra* note 123, at ¶ 76-81; Advisory Opinion OC-23/17, *supra* note 4, at ¶¶ 86, 213. In two recent judgments, the Court reaffirmed this interpretation when it noted that the right to consultation also implicates this aspect of the right to information and found violations where the States in question failed to guarantee adequate access to information necessary to facilitate meaningful participation in environmental decisionmaking and to meet Inter-American standards for free, prior, and informed consultation. Triunfo de la Cruz Garifuna Community and its members v. Honduras, *supra* note 34, at ¶¶ 123, 129, 131, 136; I/A Court H.R., Case of the Maya Q'eqchi' Indigenous

even greater force to the context of the climate emergency, where extending this obligation would empower individuals and communities to access the information necessary to hold States accountable to their obligation to protect against human rights violations generated by climate change.

41. Article 13(1) of the American Convention provides that "[e]veryone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in form or art, or through any other medium of one's choice."[125] In *Claude Reyes v. Chile*, the Court interpreted Article 13 to encompass the right to access State-held information, holding that it:

> protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case.[126]

42. In *Baraona Bray v. Chile*, the Court built upon its prior jurisprudence and reaffirmed that access to information and freedom of expression are different facets of the same right and that both are important to the strengthening of democracy, the sustainability in development, and human rights,[127] citing both Principle 10 of the 1992 Río Declaration on Environment and Democracy and the Escazú Agreement.[128] The Court emphasized that procedural environmental rights "support[] better environmental policymaking"[129] and that "respect for and the guarantee of freedom of expression in environmental matters is an essential element to ensure citizens' participation in processes related to such matters and, with it, the strengthening of the democratic system through the application of the principle of environmental democracy."[130]

43. The Court developed more specific guidance on the content of the right to access environmental information in Advisory Opinion on *The Environment and Human Rights*, where it declared that "States have the obligation to respect and ensure access to information concerning possible environmental impacts[,]"[131] which "involves both providing mechanisms and procedures for individuals to request information, and also the active compilation and dissemination of

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Community of Agua Caliente v. Guatemala. Merits, Reparations and Costs. Judgment of May 16, 2023. Series C No. 488, ¶¶ 252, 261, 266, 269.

[125] American Convention, *supra* note 116, at Art. 13(1).

[126] Reyes v. Chile, *supra* note 123, at ¶ 77. *See also* Escazú Toolkit, *supra* note 120, at subsection (IV)(A)(iii)(b) for further discussion of permissible restrictions on access to State-held information.

[127] Baraona Bray v. Chile, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 481, ¶ 94-100 (Nov. 24, 2022) [hereinafter Baraona Bray v. Chile].

[128] *Id.* at ¶ 94-100.

[129] Baraona Bray v. Chile, *supra* note 127, at ¶ 94.

[130] *Id.* at ¶ 100.

[131] Advisory Opinion OC-23/17, *supra* note 4. at ¶ 225.

information by the State."[132] The Court found that "information must be handed over without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied."[133] It further noted that "access to environmental information should be affordable, effective and timely."[134]

44. Accordingly, the Court found that States have an "obligation of active transparency"[135] which requires States to provide accurate, updated, and understandable information in a timely and proactive manner to build public trust and allow the public to use such information to exercise their other rights, especially "the rights of life, personal integrity and health."[136] In environmental matters, this obligation requires States to provide "relevant and necessary information on the environment […] includ[ing] 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."[137] This obligation applies with heightened force in cases of environmental emergencies.[138]

45. The Court's clear statement of States' duty of active transparency provides a strong foundation for extending this obligation to information relating to the climate emergency.[139] In its Merits Report in the *La Oroya* case, the Inter-American Commission found that Perú violated its duty of active transparency by failing to "actively produce necessary information in a timely manner about the environment in La Oroya in order to guarantee the human rights of its residents."[140] In analyzing the active transparency obligation, the Commission reasoned that "the State should ensure that the members of a community are aware of the possible risks, including environmental and health risks[,] caused by State decisions regarding business activities[.]"[141] Accordingly, it noted that Perú's failure had particularly serious consequences because the residents were, therefore, unable to protect themselves from the serious health risks caused by

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[132] *Id.*
[133] *Id* at ¶ 219
[134] *Id.* at ¶ 220.
[135] *Id.* 17 at ¶ 221.
[136] *Id.*
[137] *Id.* at ¶ 223.
[138] *Id.*
[139] *Id.* at 223. *See also* La Oroya Community v. Peru, Merits Report, Case No. 12.718, Inter-Am. Comm'n H.R., Report No. 330/20, OEA/Ser.L/V/II doc. 348, ¶ 150 (Nov. 19, 2020). [hereinafter La Oroya Community v. Peru].
[140] La Oroya Community v. Peru, *supra* note 139, at ¶ 200 (In light of the evidence, "the Commission finds that the State failed to comply with its duty of active transparency as a component of the right to access to information when it failed to actively and timely produce the necessary information on the environment in La Oroya in order to guarantee the human rights of its inhabitants.") (in the original Spanish, "la Comisión estima que el Estado incumplió con su deber de transparencia activa como componente del acceso a la información al omitir producir activa y oportunamente la información necesaria sobre el medio ambiente en La Oroya a efectos de garantizar los derechos humanos de sus pobladores.")
[141] *Id.* at ¶ 154.

severe environmental degradation (including air, water and soil contamination), which the Commission characterized as "one of the worst environmental emergencies in the world[.]"[142]

46. Thus, in light of the Court's jurisprudence and related decisions of the Inter-American Commission, the Court should compel States to provide access to environmental information in relation to the climate emergency, including the production of information and access to information on greenhouse gas emissions, air pollution, deforestation, and short-lived climate forcers, as well as an analysis of activities and sectors that contribute to emissions, including by private actors such as business enterprises. Regarding private actors, the Court should emphasize States' obligations of due diligence regarding the impact of business activities on climate and adopt the framework outlined by the UN Special Rapporteur on human rights and the environment, which applies the UN Guiding Principles on Business and Human Rights to call on businesses to adopt human rights policies, conduct human rights due diligence, and disclose their emissions.[143]

47. Likewise, under Articles 5 and 6 of the Escazú Agreement, States must guarantee access to environmental information, including by affirmatively producing and disseminating such information, and taking steps to ensure access for the most vulnerable persons and communities.[144] The Court should explicitly extend States' obligation to provide access to environmental information to include the production and dissemination of information relevant to the climate emergency and interpret State obligations under Article 13 of the American Convention in light of the specialized guidance provided by the Escazú Agreement.

48. Articles 5 and 6 of the Escazú Agreement require a State Party to "ensure the public's right of access to environmental information in its possession, control or custody, in accordance with the principle of maximum disclosure."[145] The Agreement defines "environmental information" broadly to encompass "any information [...] regarding the environment and its elements and natural resources, including information related to environmental risks, and any possible adverse impacts affecting or likely to affect the environment and health, as well as to environmental protection and management."[146]

49. In order for States to properly implement the right of access to environmental information, Article 5 requires States to ensure the public has the ability to:

> (a) request[…] and receiv[e] information from competent authorities without mentioning any special interest or explaining the reasons for the request;

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[142] *Id.* at ¶ 198 ("an environmental emergency considered one of the worst in the world").
[143] Boyd, *supra* note 1, at ¶ 71-72.
[144] Escazú Agreement, *supra* note 67, at Arts. 5, 6. *See also* Escazú Toolkit, *supra* note 120, pp. 32-35.
[145] Escazú Agreement, *supra* note 67, at Art. 5(1).
[146] *Id.* at Art. 2(c).

(b) be[…] informed promptly whether the requested information is in possession or not of the competent authority receiving the request; and

(c) be[…] informed of the right to challenge and appeal when information is not delivered, and of the requirements for exercising this right.[147]

50. The Escazú Agreement also requires that States provide and ensure the accessibility of information held by public authorities, including information on environmental impact assessment processes and other environmental management instruments.[148] Additionally, Article 5(18) requires States to create independent oversight mechanisms to guarantee "transparency in access to environmental information, to oversee compliance with rules, and guarantee the right of access to information."[149]

51. Information that States generate, collect, publicize and disseminate must be "reusable, processable[,] and available in formats that are accessible, [with] no restrictions […] placed on its reproduction or use[.]"[150] In order to ensure that their environmental information systems facilitate access, States must ensure that these information systems "are duly organized, accessible to all persons[,] and made progressively available through information technology and georeferenced media[.]"[151]

52. In addition, States have an obligation to take affirmative steps to ensure persons and groups in vulnerable situations—such as women, Indigenous Peoples, children, youth, migrants, persons with disabilities, coastal communities, and lower-income groups, among others who may be particularly vulnerable to or disproportionately affected by the consequences of environmental harm, including climate change[152]—have access to environmental information by "establishing procedures for the provisions of assistance, from the formulation of requests through the delivery of the information, taking into account their conditions and specificities, for the purpose of promoting access and participation under equal conditions."[153]

53. The Economic Commission for Latin America [ECLAC] has recognized the importance of the human rights protections of the Escazú Agreement in the context of the climate emergency.[154] With regard to the right to access information, ECLAC has noted that "[t]he Escazú Agreement

[147] *Id.* at Art. 5(2).
[148] *Id.* at Art. 6(3)(h).
[149] *Id.* at Art. 5(18).
[150] *Id.* at Art. 6(2).
[151] *Id.* at Art. 6(3).
[152] Escazú Agreement, *supra* note 67, at Arts. 2(e), 5(3). *See also* Economic Commission for Latin America and the Caribbean/United Nations High Commissioner for Human Rights (ECLAC/OHCHR), *supra* note 21, at p. 7.
[153] Escazú Agreement, *supra* note 67, at Art. 5(3).
[154] Economic Commission for Latin America and the Caribbean/United Nations High Commissioner for Human Rights (ECLAC/OHCHR), *supra* note 21, at p. 48.

means that the public shall have access to data and information on emissions, climate vulnerabilities and other information related to climate observations and the risks associated with climate change, among other things."[155] ECLAC further observed that "the Escazú Agreement also promotes the generation and proactive dissemination of climate information, such as sources related to CO2 emissions."[156]

54. Thus, in light of the human rights obligations articulated in Articles 5 and 6 of the Escazú Agreement, the Court should direct States to provide access to environmental information in relation to the climate emergency, which includes public authorities overseeing the generation and dissemination of the broadest possible range of information relevant to the climate emergency and ensuring vulnerable persons and groups have access to such information.

B. States may only restrict access to environmental information under specific, limited circumstances; the Court should explicitly extend this obligation to information regarding the climate emergency.

55. Both the Inter-American System and Escazú Agreement require States to treat environmental information as presumptively accessible, with restrictions on access permitted only under a narrow set of specifically enumerated circumstances. Given the critical public interest in information relevant to the climate emergency, the Court should explicitly apply the principle of maximum disclosure to such information.

56. While Article 13 of the American Convention specifies that the right to access information is not absolute, it is clear that restrictions on the right of information must be justified and in accordance with the narrow grounds enumerated in Article 13(2).[157] In both *Claude Reyes* and *Gomes Lund v. Brazil*, the Court has held that the principle of good faith and maximum disclosure should limit restrictions on access to State-held information.[158] The Court incorporated these standards in its Advisory Opinion 23, where it reiterated the proportionality test and requirements established in *Claude-Reyes*.[159]

57. The Escazú Agreement also binds States to the principle of maximum disclosure.[160] States may only limit access to environmental information if one of a limited set of exceptions enumerated under Article 5(6) is clearly met.[161] These limited exceptions are:

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[155] *Id.* at p. 49.
[156] *Id.*
[157] American Convention, *supra* note 116, at Art. 13(1).
[158] Reyes v. Chile, *supra* note 123, at ¶ 92; Gomes Lund et al v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R., (ser. C) No. 219, ¶¶ 199, 230 (Nov. 24, 2010).
[159] Advisory Opinion OC-23/17, *supra* note 4, at ¶¶ 213, 224. *See also* Escazú Toolkit, *supra* note 120, pp. 21-23.
[160] Escazú Agreement, *supra* note 67, at Arts. 3(h), 5(1).
[161] *Id.* at Art. 5(5-6). *See also* Escazú Toolkit, *supra* note 120, at p. 20.

(a) when disclosure would put at risk the life, safety or health of individuals;
(b) when disclosure would adversely affect national security, public safety, or national defence;
(c) when disclosure would adversely affect the protection of the environment, including any endangered or threatened species; or
(d) when disclosure would create a clear, probable[,] and specific risk of substantial harm to law enforcement, prevention, investigation[,] and prosecution of crime.[162]

58. Even when a restriction on access to information meets one of the criteria listed above, the Escazú Agreement requires that States only impose the restriction when several factors are met.[163] First, States must have previously established their reasoning for imposing a restriction by law, and the restriction must be "clearly defined and regulated."[164] Such reasons must take the public interest into account and "shall [...] be interpreted restrictively."[165] Second, States have to overcome the presumption that access to information is necessary and bear the burden to prove that limitations to access information are justified.[166] Lastly, where States imposes restrictions on access to information, they must communicate the "refusal in writing, including the legal provisions and the reasons justifying the decision in each case, and inform the applicant of the right to challenge and appeal."[167]

59. Given the strong public interest in information relating to the climate emergency, the Court should interpret Article 13 of the American Convention in light of the complementary specialized guidance provided by the Escazú Agreement and explicitly extend these standards to limit the ability of States to restrict access to such information.

C. States must produce comprehensible and accurate environmental information; the Court should extend this requirement to information relating to the climate emergency, including periodic updates as the climate emergency worsens.

60. As noted above, the Inter-American System applies the principle of maximum disclosure to the right to access information.[168] It has likewise established that States have an obligation of active transparency to take proactive steps to share environmental information with the public.[169] However, the Court has not yet had the opportunity to define the obligation of active transparency

[162] Escazú Agreement, *supra* note 67, at Art. 5(6)(a)-(d).
[163] *Id.* at Art. 5(5), 5(8).
[164] *Id.* at Art. 5(8).
[165] *Id.*
[166] *Id.* at Art. 5(5), 5(8).
[167] *Id.* at Art. 5(5).
[168] Advisory Opinion OC-23/17, *supra* note 4, at ¶¶ 221-223.
[169] *Id.*

to include stronger and more specific requirements to produce, organize, update, and disseminate environmental information, as specified in Article 6 of the Escazú Agreement. The Court should deepen its existing normative framework by incorporating the strong, specific requirements of Article 6 of the Escazú Agreement regarding the environmental information that States must affirmatively produce, organize, update, and disseminate into its interpretation of Article 13 of the American Convention and apply these requirements to information relevant to climate change.

61. Beyond requiring that States actively provide information about particular situations of environmental impact, Article 6 of the Escazú Agreement calls for the establishment of long-term environmental monitoring mechanisms that should provide the public with a view of how environmental quality is changing over time as a result of State environmental decision-making.[170] Because the climate emergency implicates many human rights, States need to create these kinds of environmental information systems to provide the public with the necessary information to understand how climate change may be affecting their other rights and to allow them to take preventive or protective action. The Court can look to the Escazú Agreement to provide specific content regarding the ways that States should produce and disseminate environmental information relevant to the climate emergency pursuant to the existing obligation of affirmative transparency. It can also more fully conceptualize how the interconnections between climate change, environmental access rights, the right to a healthy environment, and affected substantive rights can be addressed by this instrumental application of the right to access information. Accordingly, this subsection briefly outlines the requirements that the Court should consider.

62. The Escazú Agreement not only requires that States make environmental information accessible, but it also directs States to actively produce and disseminate such information.[171] The inclusion of this proactive duty recognizes that in a technically complex area like the environment, the right to access information has no meaning unless comprehensible, accessible, and accurate information exists and is made publicly available in an organized, updated format. Accordingly, the Agreement provides detailed guidelines as to the types of environmental information that States must produce, how it should be organized, and the means States must implement to ensure that this information is properly disseminated and updated.[172] States must achieve these obligations "to the extent possible within available resources[.]"[173]

63. Article 6(1) of the Escazu Agreement requires States to "generate, collect, publicize and disseminate environmental information [. . .] in a systematic, proactive, timely, regular, accessible

[170] Escazú Agreement, *supra* note 67, at Art. 6.
[171] *Id.*
[172] Escazú Agreement, *supra* note 67, at Art. 6.
[173] *Id.* at Art. 6(1).

and comprehensible manner[.]"[174] States must also "periodically update this information"[175] and "encourage the disaggregation and decentralization of environmental information at the subnational and local levels."[176]

64. Additionally, States must "encourage independent environmental performance reviews[;]"[177] "promote access to environmental information contained in concessions, contracts, agreements[,] or authorizations granted, which involve the use of public goods, services[,] or resources[;]"[178] and "ensure that consumers and users have official, relevant[,] and clear information on the environmental qualities of goods and services and their effects on health[.]"[179]

65. In accordance with Article 6(3), States are required to maintain up-to-date environmental information systems.[180] These systems should encompass data on relevant resources, regulations, including environmental laws,[181] pertinent public authorities,[182] scientific and academic research,[183] environmental impact assessment procedures,[184] and other environmental management tools.[185] Notably, this provision explicitly requires States to include data on climate change sources.[186] Additionally, these systems may include substantive information concerning environmental conditions,[187] such as polluted areas categorized by pollutant type and location,[188] data on natural resource utilization and preservation,[189] and an estimated inventory of waste by type, ideally specifying volume, location, and year.[190]

66. In addition, pursuant to Article 6(4), States must also "take steps to establish a pollutant release and transfer register covering air, water, soil[,] and subsoil pollutants, as well as materials and waste in its jurisdiction[,]"[191] which can "be established progressively" and "updated periodically."[192]

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[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.* at Art. 6(8).
[178] *Id.* at Art. 6(9).
[179] *Id.* at Art. 6(10).
[180] *Id.* at Art. 6(3).
[181] *Id.* at Art. 6(3)(a).
[182] *Id.* at Art. 6(3)(c).
[183] *Id.* at Art. 6(3)(f).
[184] *Id.* at Art. 6(3)(h).
[185] *Id.* at Art. 6(3)(j).
[186] *Id.* at Art. 6(3)(g).
[187] *Id.* at Art. 6(3)(b).
[188] *Id.* at Art. 6(3)(d).
[189] Escazú Agreement, *supra* note 67, at Art. 6(3)(e).
[190] *Id.* at Art. 6(3)(i).
[191] *Id.* at Art. 6(4).
[192] *Id.*

67. Similarly, Article 6(5) also requires States to establish an early warning system for situations that pose "an imminent threat to public health or the environment[.]"[193] States must "immediately disclose and disseminate through the most effective means all pertinent information in its possession that could help the public take measures to prevent or limit potential damage."[194]

68. Although the Escazú Agreement primarily refers to State-held or controlled information,[195] it recognizes that the public also has a right to access to privately held information. Article 6(12) requires States to "take the necessary measures [...] to promote access to environmental information in the possession of private entities, in particular information on their operations and the possible risks and effects on human health and the environment."[196] Article 6(13) similarly requires States to "encourage public and private companies, particularly large companies, to prepare sustainability reports that reflect their social and environmental performance."[197]

69. We urge the Court to apply its recognition that States have an affirmative, proactive duty to produce information and guarantee access to environmental information, in keeping with the principle of maximum disclosure, to information relating to the climate emergency. The Court should interpret the right to access information in light of the specialized guidance of the Escazú Agreement and explicitly extend this standard to information about factors that contribute to the climate emergency, including data about relevant pollutants and activities, climate mitigation and adaptation efforts, the progress of climate effects, the differentiated impacts experienced by vulnerable groups, and privately held information.

III. QUESTION D(1)198 - The Court should declare that States have an obligation to provide adequate, effective, and timely judicial remedies to provide protection and redress for the human rights impacts of the climate emergency.

70. Both the Inter-American System and the Escazú Agreement recognize the importance of the right to access to justice to protect against and remedy environmental harm; this understanding should be applied with even greater force to the climate emergency. The Court should interpret the right to access justice in environmental matters in light of the specialized guidance provided by

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[193] *Id.* at Art. 6(5).
[194] *Id.*
[195] *Id.* at Art. 5(1).
[196] *Id.* at Art. 6(12). *See also* California State Senate Bill 253 ("Climate Corporate Data Accountability Act") and Senate Bill 261, requiring California public and private companies to publicly disclose their GHG emissions, climate-related financial risks, and measures they adopt to reduce and adapt to that risk, with reporting beginning in 2026.
[197] Escazú Agreement, *supra* note 67, at Art. 6(13).
[198] Question D(1): "Based on Articles 8 and 25 of the American Convention, and taking into account that scientific research has indicated that there is a limit to the amount of greenhouse gases that we can continue to emit before reaching dangerous and irreversible climate change, and that we could reach this limit within the current decade: . . . . (2) What is the nature and scope of a State Party's obligation in relation to the establishment of effective judicial remedies to provide adequate and timely protection and redress for the impact on human rights of the climate emergency?"

the Escazú Agreement and declare that States have an obligation to provide adequate, effective, and timely judicial remedies to provide protection and redress for the human rights impacts of the climate emergency.

71. Given that the climate emergency is exacerbating existing vulnerabilities, it is essential that the Court recognize the heightened obligations States have toward such groups in this context. Although the right to access justice applies to the whole population, States must implement measures to ensure that vulnerable individuals and communities have access to effective judicial remedies. Access to effective judicial remedies plays a crucial role in addressing environmental harms by ensuring that vulnerable individuals and communities have the means to seek effective protection or remedies when climate-related harms threaten or violate their human rights.[199] Article 8 of the Escazú Agreement provides specialized guidance on access to justice for vulnerable groups that the Court should draw upon when interpreting State obligations in the context of the climate emergency.

72. The right to access justice is well-established in the Inter-American System under Articles 8 and 25 of the American Convention,[200] which includes States' obligation to provide effective remedies for human rights violations,[201] to investigate,[202] and to ensure accountability for those violations.[203] Likewise, one of the three main pillars of the Escazú Agreement is the right to access justice in environmental matters, which includes effective judicial and administrative mechanisms.[204] The following subsections highlight the complementarity between these two normative frameworks and highlight the elements that the Court should explicitly apply to the climate emergency.

73. This Honorable Court has previously recognized States' obligation to provide judicial remedies in the context of environmental protection and should interpret this obligation in light of Article 8 of the Escazú Agreement and explicitly extend this obligation to the context of the climate emergency, taking into account the scientific research stating the limit to the amount of greenhouse

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[199] Economic Commission for Latin America and the Caribbean/United Nations High Commissioner for Human Rights (ECLAC/OHCHR), *supra* note 21, at p. 7.
[200] American Convention, *supra* note 116, at Arts. 8, 25.
[201] Velásquez Rodríguez v. Honduras, *supra* note 104, at ¶ 91; *see also* Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina, *supra* note 5, at ¶¶ 294-95; Access to Justice as a Guarantee of Economic, Social, and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.129, doc. 4, ¶ 177 (Sep. 7, 2007), available at https://www.cidh.oas.org/countryrep/AccesoDESC07eng/Accesodescindice.eng.htm.
[202] *See, e.g.*, Villaseñor Velarde et al. v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No.374, ¶ 110 (Feb. 5, 2019).
[203] *See, e.g.*, Case of Cruz Sánchez et al. v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 292, ¶ 398 (Apr. 17, 2015); Case of Anzualdo Castro v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 202, ¶ 124 (Sept. 22, 2009). For further discussion, see Escazú Toolkit, *supra* note 120, at p. 50.
[204] Escazú Agreement, *supra* note 67, at Art. 8.

gases that humanity can continue to emit before reaching dangerous and irreversible climate change.

74. In 2020, the Court affirmed in the *Nuestra Tierra* case the applicability of the right to access justice in the context of environmental protection. The Court found that States, in order to respect individuals' right to access justice, must guarantee effective remedies by "taking into account whether 'domestic remedies exist that guarantee real access to justice to claim reparation for a violation[;]'" respect due process guarantees; and respond to all requests for a remedy "within a reasonable time."[205] Additionally, the State violates the right to access justice if it fails to provide effective remedies that give individuals the opportunity to challenge State acts that may have violated their rights.[206]

75. In its Advisory Opinion on *The Environment and Human rights*, the Court listed the right "to an effective remedy" among the procedural rights most strongly implicated in environmental matters[207] and reiterated that "access to justice is a peremptory norm of international law."[208] In environmental matters, the right to access justice ensures that individuals can call upon the State to enforce environmental standards and to provide redress, "including remedies and reparation[s]" for human rights violations when a State fails to follow or enforce its own environmental rules.[209] The Court also recognized the intersection between the right to access justice and other environmental access rights, noting that "access to justice guarantees the full realization of the rights to public participation and access to information[.]"[210]

76. In addition, the Court linked the right to access justice to a State's obligation of prevention, observing that this duty encompasses measures to investigate human rights violations, punish those responsible, and ensure reparations to the victims.[211] States must supervise and monitor activities within their jurisdiction that may cause significant damage to the environment[]"[212] through "adequate independent monitoring and accountability mechanisms[,]"[213] which can include both preventive measures and measures to investigate, punish and redress possible abuse through policies, regulations, and adjudication.[214]

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[205] Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina, *supra* note 5, at ¶¶ 294-295, 298 (Feb. 7, 2020). *See* Escazú Toolkit, *supra* note 120, at p. 51.
[206] Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina, *supra* note 5, at ¶¶ 295, 304.
[207] 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 Arts. 4(1) and 5(1) in relation to Arts. 1(1) and 2 of the American Convention on Human Rights); Advisory Opinion OC-23/17, *supra* note 4, at ¶ 64.
[208] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 233.
[209] *Id.* at ¶ 234.
[210] Advisory Opinion OC-23/17, *supra* note 4, at ¶ 234.
[211] *Id.* at ¶ 127.
[212] *Id.* at ¶ 154.
[213] *Id.*
[214] *Id.*

77. Thus, the Honorable Court should explicitly extend this normative framework around access to justice to the context of the climate emergency, to enable vulnerable individuals and communities to protect themselves against and seek redress for human rights violations generated by the effects of climate change.

78. Similarly, Article 8 of the Escazú Agreement recognizes the right to access justice in environmental matters, including protecting vulnerable persons or groups, with an emphasis on the State's obligation to prevent and mitigate harm.[215] The Honorable Court should interpret the obligations outlined above in light of this provision and explicitly extend these protections to those seeking protection from and redress for human rights violations caused by the climate emergency.

79. Article 8(1) of the Escazú Agreement requires States Parties to "guarantee the right of access to justice in environmental matters in accordance with the guarantees of due process."[216] Article 8(2) requires States to guarantee "access to judicial and administrative mechanisms to challenge and appeal" violations of other environmental access rights protected by the Agreement as well as any other State act or omission with actual or potential negative environmental effects or that violates environmental laws or regulations.[217] These procedural protections ensure that individuals and communities have access to justice when they face obstacles in receiving environmental information or participating in environmental decision-making processes, as well as any actual or potential violation of substantive human rights affected by environmental harm.[218]

80. Article 8(3) enumerates specific affirmative steps that States must take to guarantee the right of access to justice in environmental matters. First, States are obligated to invest in competent State entities with environmental expertise.[219] Second, these State entities must provide "effective, timely, public, transparent[,] and impartial procedures[.]"[220] Persons and groups must be granted broad legal standing to bring claims regarding the harms to the environment.[221]

81. Article 8(4) sets forth the measures States must undertake to facilitate access to justice. Specifically, States must reduce or eliminate barriers to access to justice.[222] They are also obligated to "publicize the right of access to justice and [corresponding] procedures to ensure its effectiveness[.]"[223] Similarly, States must make relevant judicial and administrative decisions

[215] Escazú Agreement, *supra* note 67, at Art. 8.
[216] *Id.* at Art. 8(1).
[217] *Id.* at Art. 8(2).
[218] *Id.* at Art. 8. For further discussion, *see* Escazú Toolkit, *supra* note 120 at p. 52.
[219] Escazú Agreement, *supra* note 67, at Art. 8(3).
[220] *Id.* at Art. 8(3).
[221] *Id.* at Art. 8(3)(c).
[222] *Id.* at Art. 8(4)(a).
[223] *Id.* at Art. 8(2).

publicly accessible.[224] This requirement relates to the Article 8(6) obligation that environmental decisions and their legal grounds be made in writing.[225]

82. In addition, the Agreement requires that State enforcement of judicial decisions be timely and for States to provide comprehensive reparations, including restoration, compensation, "assistance for affected persons[,]" and other forms of redress.[226] These obligations also constitute important means for States to comply with their due diligence obligation to mitigate environmental harm, discussed above.

83. The Escazú Agreement also recognizes the importance of the right to access to justice in giving effect to several of its guiding principles, predominantly the preventive principle,[227] the precautionary principle,[228] and the principle of intergenerational equity.[229] Article 8(3)(d) complements these principles by requiring that States provide precautionary or other measures to prevent environmental harm.[230] By defining the types of actions subject to review broadly and by including not only definite environment harm but also potential harm, Article 8 provides the public with powerful tools to seek preventive measures and to overcome State resistance to taking action before the risk of harm has been scientifically proven.[231]

84. Additionally, States must ensure access to justice for vulnerable individuals and groups.[232] In keeping with the Escazú Agreement's overall commitment to ensuring that vulnerable persons or groups can exercise their environmental access rights, Article 8(5) requires States to "meet the needs of vulnerable people and groups by establishing 'support mechanisms, including, as appropriate, free technical and legal assistance.'"[233] A suite of other provisions can be interpreted to give further scope to State obligations regarding access to justice for vulnerable groups when read in combination with the Agreement's commitment to the "[p]rinciple of equality and principle of non-discrimination[,]"[234] the pro persona principle[235] and the related requirement that States "adopt the most favourable interpretation for the full enjoyment of and respect for the access rights when implementing the . . . Agreement."[236] For example, the provision noted above requiring States to give "broad legal standing in defence of the environment[]"[237] should expand the ability

[224] *Id.* at Art. 8(4)(c).
[225] *Id.* at Art. 8(2).
[226] *Id.* at Art. 8(6).
[227] *Id.* at Art. 3(e).
[228] *Id.* at Art. 3(f).
[229] *Id.* at Art. 3(g).
[230] *Id.* at Art. 8(3)(d).
[231] *See* Escazú Toolkit, *supra* note 120, at 64, 32-33 for a discussion of this aspect of the Agreement.
[232] Escazú Agreement, *supra* note 67, at Art. 8(5).
[233] *Id.*
[234] *Id.* at Art. 3(a).
[235] *Id.* at Art. 3(k).
[236] *Id.* at Art. 4(8).
[237] *Id.* at Art. 8(3)(c).

of vulnerable groups to engage in proceedings that affect them. Likewise, the requirements that States undertake "measures to minimize or eliminate barriers to the exercise of the right of access to justice"[238] and allow for protective measures[239] should apply with heightened force to vulnerable groups, who may face greater barriers and experience more significant harms where the State fails to prevent environmental damage. Similarly, a joint reading suggests that States should take particular care to ensure adequate reparations that meet the unique needs of vulnerable groups, pursuant to the guarantee of broad measures of redress in Article 8(3)(g).[240]

85. The Court should interpret its existing normative framework on access to justice in light of the specialized guidance provided by the Escazú Agreement and extend these obligations to the climate emergency. The Escazú Agreement provides a helpful tool for understanding the right to access justice in the specific context of cases of environmental rights violations and by extension, the climate emergency, thereby enhancing protections in this area, particularly on issues of effectiveness, timeliness, and affordability of environmental justice mechanisms, including for vulnerable groups. We ask the Court to declare that States have a broad obligation to provide adequate, effective, and timely judicial remedies to protect against and provide redress for the human rights impacts of the climate emergency.

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86. In summary, we respectfully urge the Court to explicitly extend the State obligations discussed in this submission to the context of the climate emergency and interpret the American Convention in light of the specialized guidance provided by the Escazú Agreement as outlined herein. We thank the Court for the opportunity to submit our observations in this vital matter.

[238] *Id.* at Art. 8(4)(a).
[239] *Id.* at Art. 8(3)(d).
[240] *Id.* at Art. 8(3)(g).