



REFERENCE: ACP/84/037/24

INTERNATIONAL COURT OF JUSTICE

**OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE
(REQUEST FOR ADVISORY OPINION)**

**WRITTEN STATEMENT OF THE
ORGANISATION OF AFRICAN CARIBBEAN AND PACIFIC STATES
(OACPS)**

22 MARCH 2024

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INTRODUCTION

1. On 29 March 2023, the UN General Assembly adopted by consensus Resolution 77/276 “Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change” (**Resolution 77/276**). The request for advisory opinion asked the Court to address the following two questions:

“Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment,

- (a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations;
 - (b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:
 - (i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?
 - (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?”
2. By letter dated 6 September 2023, the Organisation of African Caribbean and Pacific States (**OACPS**) requested the Court’s permission “to submit a written statement in the proceedings and to provide comments on the statements that may be submitted by other participants”.
3. By letter dated 15 September 2023, the Registrar of the Court informed that “the Court has decided, pursuant to Article 66 of the Statute, that the OACPS is likely to be able to furnish information on the question before the Court”.
4. This Written Statement is submitted to the Court within the deadline set by the Order of the President of the Court dated 15 December 2023, which extended

the time limits for the filing of written statements and written comments in these advisory proceedings.

5. The OACPS is an international organisation created by the 1975 Georgetown Agreement (see in Appendix A, the 1975 Georgetown Agreement, as revised in 2019¹) to consolidate and strengthen the existing solidarity between Member States, and to promote improved cooperation between peoples based on their interdependence, complementarity and mutual interests. It aims to help create conditions that favour the socio-economic development of the Member States. The OACPS is the largest formal and structured organisation of developing countries. It is comprised of 79 Member States, spanning three continents from the Africa, Caribbean and Pacific regions, and including many States who emerged from colonial rule.
6. This Written Statement represents the contribution of the OACPS to the work of the Court. The OACPS strongly supports the international judicial function of the Court, especially its role of clarifying international legal obligations through advisory opinions. This is particularly important with respect to the two questions formulated by the General Assembly in Resolution 77/276, which concern the legal obligations of States with respect to climate change, and the legal consequences attached to the violations of these obligations.
7. The questions are of great interest to the international community at large, the OACPS as an international organisation, and the individual Member States of the OACPS. The OACPS stresses that the well-being of present and future generations of humankind depends on an urgent, ambitious and equitable response to climate change, but it also emphasises that the harm already caused cannot be ignored. Climate justice is a core part of the questions put to the Court, particularly the second question. Member States of the OACPS, despite contributing the least to climate change, have been among the worst hit by its adverse effects, including global warming, desertification, sea-level rise, and acidification of the oceans. The plight of OACPS countries is even more critical

¹ Georgetown Agreement on the organisation of the African, Caribbean and Pacific Group of States (ACP), concluded at Georgetown on 6 June 1975, as revised by Decision No .1/CX/19 of the 110th session of the ACP Council of Ministers held in Nairobi, Kenya, on 7 December 2019, and endorsed by the 9th Summit of the ACP Heads of State and Government, Nairobi, Kenya, 9-10 December 2019 (Appendix A), [available here](#).

in that climate change has serious socio-economic consequences and raises fundamental issues of fairness and equity in international relations.

8. The purpose of this Written Statement is primarily to provide information to the Court on a specific aspect of climate justice, the full recognition of which is of paramount importance for OACPS countries, namely the colonial origin of climate change and how such origin adversely affects North-South cooperation for development, including on climate change. The OACPS is convinced that an answer by the Court to the two questions formulated by the General Assembly will enable the OACPS to better support the actions of its Member States in the fight against climate change as well as to give concrete legal meaning to climate justice.
9. This Written Statement is sub-divided into 5 sections, followed by a list of documents.² **Section I** of the Written Statement establishes that the Court has jurisdiction to entertain the request for advisory opinion and that there are no compelling reasons calling for the Court to exercise its discretionary power not to give the requested advisory opinion. **Section II** of the Written Statement clarifies that there is a scientific consensus regarding climate change, its causes and effects. It is this consensus that constitutes the factual basis for the OACPS' views expressed in this Written Statement. This section also provides information concerning the specific situation of OACPS countries in the context of climate change, as this informs their perspective of the obligations of States with respect to climate change and the legal consequences resulting from the breach of such obligations. The subsequent two sections review in turn the questions posed by the General Assembly to the Court in Resolution 77/276. Accordingly, **Section III** addresses *Question (a)* and **Section IV** examines *Question (b)*. Finally, **Section V** concludes summarising the elements that, in the OACPS' submission, should inform the answer of the Court.

² Although termed annexes, many documents referred to in the footnotes are legal references. They are referred to as annexes in the Written Statement, in the list of documents placed at the end and in the pen-drive submitted to the Registrar only to facilitate access to them by the Court, as they are in the public domain.

I. JURISDICTION OF THE COURT AND ADMISSIBILITY OF THE REQUEST FOR ADVISORY OPINION

10. The OACPS submits that the Court has jurisdiction to give the advisory opinion requested by the General Assembly in Resolution 77/276 **(A)** and that there is no compelling reason for the Court to refrain from doing so **(B)**.

A. The Court has jurisdiction to deliver the requested advisory opinion

11. The Court has jurisdiction to deliver the requested advisory opinion. Article 65, paragraph 1, of the Statute of the Court provides that “[t]he Court may give an advisory opinion on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such a request.” The OACPS submits that the two conditions for the jurisdiction of the Court to render an advisory opinion, pursuant to Article 65 of the ICJ Statute, are satisfied in the present advisory proceedings.
12. First, the request has been made by the General Assembly, which is a “body (...) authorized by the UN Charter” to request advisory opinions from the Court. Article 96 of the UN Charter provides that “[t]he General Assembly (...) may request the International Court of Justice to give an advisory opinion on any legal question.”
13. Secondly, the two questions submitted by the General Assembly are “legal questions” within the meaning of Article 65 of the Statute. In the *Wall* advisory opinion, the Court, referring to its case law in the *Western Sahara* advisory opinion, clarified that a question that is framed in legal terms and raises problems of international law is by its very nature a legal question and is susceptible of a reply based on law.³ In the *Chagos* advisory opinion, the Court clarified further that “a request from the General Assembly for an advisory opinion to examine a situation by reference to international law concerns a legal question”.⁴
14. The OACPS recalls that the two questions formulated by the General Assembly are framed in “legal terms”, and request the Court to identify, on the one hand,

³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004*, p. 136 (Annex 1) [available here](#), para. 37.

⁴ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95 (Annex 2) [available here](#), para. 58.

“[w]hat are the obligations of States under international law” in respect of climate change, and on the other hand, to determine “the legal consequences under these obligations” arising for States that have caused significant harm to the climate system and other parts of the environment. Both questions require the examination of specific conduct and situations by reference to international law. Both questions are, therefore, legal questions which require from the Court to perform an essentially judicially task, namely “an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law”.⁵ To answer the two questions, “the Court must identify the existing principles and rules, interpret them and apply them to [climate change and its adverse impacts], thus offering a reply to the question posed based on law”.⁶

B. There are no compelling reasons for the Court to decline to give the requested advisory opinion

15. The OACPS submits that there are no compelling reasons justifying the exercise by the Court of its discretionary power not to render an advisory opinion. The OACPS notes that based on the wording of Article 65 of the Statute which indicates that the Court “may” render an advisory opinion, the Court stressed that it has the power to decline to give an advisory opinion. However, the Court has also stressed that such a power must be exercised only in exceptional circumstances. This is because the Court is mindful of the fact that its answer to a request for an advisory opinion “represents its participation in the activities of the Organization, and, in principle, should not be refused”.⁷
16. The Court may therefore exercise its discretion not to render an advisory opinion only for “compelling reasons”, when this is necessary to protect the integrity of its judicial function. The Court has explained that “[t]he discretion whether or not to respond to a request for an advisory opinion exists so as to protect the integrity of the Court’s judicial function as the principal judicial organ of the United

⁵ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226 (Annex 3) [available here](#), para. 13.

⁶ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226 (Annex 3) [available here](#), para. 13.

⁷ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion*, I.C.J. Reports 1950, p. 65 (Annex 4) [available here](#), p. 71.

Nations.”⁸ The present Court has never exercised this discretionary power. With this important aspect in mind, the case law of the Court suggests that the Court could exercise such discretion only in two circumstances. First, there could be a compelling reason for the Court to decline to give an advisory opinion when such a reply “would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent”.⁹ Secondly, when the Court does not have before it all the facts sufficient to render the requested opinion. Thus, in the *Western Sahara* advisory opinion, the Court stressed that what was decisive in this respect was whether the Court had “sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character”.¹⁰

17. The OACPS maintains that there are no compelling reasons for the Court to decline to exercise its jurisdiction with respect to the advisory opinion requested in the present proceedings. First, the request made to the Court did not arise from a context of specific disputes between States. Rather, the questions concern the international community as a whole and certain victims of climate injustice in particular. Secondly, the evidentiary basis to inform the Court’s function is extremely solid, as it rests on a scientific consensus acknowledged as such by States. In this respect, the OACPS draws on the enormous documentation that was submitted by the Secretary-General of the United Nations, including the various reports drafted by the Intergovernmental Panel on Climate Change (**IPCC**). The OACPS sees the pending request for an advisory opinion as an important and timely opportunity for the Court to contribute to the clarification of the international law obligations on climate change, with an authority and scope of competence that no other international jurisdiction possesses.

⁸ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, I.C.J. Reports 2019, p. 95 (Annex 2) [available here](#), para. 64.

⁹ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, I.C.J. Reports 2019, p. 95 (Annex 2) [available here](#), para. 85; see also *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, p. 12 (Annex 5) [available here](#), para. 33.

¹⁰ *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, p. 12 (Annex 5) [available here](#), para. 46.

II. THE SCIENTIFIC AND FACTUAL PREMISES OF THE WRITTEN STATEMENT OF THE OACPS

18. In this section, the OACPS presents the factual basis that informs its views on the two questions formulated by the General Assembly. The OACPS submits that that the Court should determine the obligations of States with respect to climate change and the legal consequences of their violation in light of these facts. Firstly, the OACPS recalls that there is a scientific consensus with respect to climate change, its causes and its adverse impacts in general **(A)**. Secondly, the OACPS provides information on the specific situation of OACPS countries with respect to climate change, which is that of a triple injustice **(B)**.

A. There is a scientific consensus with respect to the causes and impacts of climate change

19. The OACPS submits that there is a scientific consensus on the causes and impacts of climate change on which the Court can and should rely **(1)**. This consensus makes it absolutely clear that a certain conduct is the cause of climate change and its adverse effects **(2)**.

1. There is a scientific consensus on the causes and impacts of climate change

20. The OACPS submits that there is a consensus, based on the most authoritative scientific evidence available, on climate change, its causes, impacts, and how to address the current climate situation. For this purpose, the OACPS relies primarily on the reports of the IPCC and other UN bodies. The IPCC is a subsidiary organ created in 1988 by the United Nations Environment Programme (**UNEP**) and the World Meteorological Organisation (**WMO**) to assess the scientific data relating to climate change in order to inform policy makers' decisions. The General Assembly "[e]ndorsed the action of the World Meteorological Organization and the United Nations Environment Programme in jointly establishing an Intergovernmental Panel on Climate Change to provide internationally coordinated scientific assessments of the magnitude, timing and potential environmental and socio-economic impact of climate change and

realistic responses strategies, and express[ed] appreciation for the work already initiated by the Panel”.¹¹ More specifically, the General Assembly requested the Secretary-General of the WMO and the Executive Director of the UNEP, through the IPCC,

“immediately to initiate action leading, as soon as possible, to a comprehensive review and recommendations with respect to:

- (a) The state of knowledge of the science of climate of change;
- (b) Programmes and studies on the social and economic impacts of adverse climate change;
- (c) Possible response strategies to delay, limit or mitigate the impact of adverse climate change;
- (d) The identification and possible strengthening of relevant existing international legal instruments having on bearing on climate;
- (e) Elements for inclusion in a possible future convention on climate”¹²

21. At the time the IPCC was created, there was already a wealth of knowledge on the causes and potential impacts of climate change dating back several decades. The preamble of the aforementioned 1988 General Assembly resolution expressly states that the General Assembly was “[a]ware that a considerable amount of valuable work, particularly at the scientific level and in the legal field, has already been initiated on climate change, in particular by the United Nations Environment Programme, the World Meteorological Organization and the International Council of Scientific Unions and under the auspices of individual States”.¹³ Regarding the latter reference, as it is well-known, in June 1988, the prominent US scientist James Hansen had provided testimony to the US Senate on both the causes and impacts of climate change:

“Number one, the earth is warmer in 1988 than at any time in the history of instrumental measurements. Number two, the global warming is now large enough that we can ascribe with a high degree of confidence a cause and effect relationship to the greenhouse effect. And number three, our computer climate simulations indicate that the greenhouse effect is already large

¹¹ UN General Assembly Resolution 43/53. Protection of Global Climate for Present and Future Generations of Mankind, 6 December 1988 (Annex 6), para. 5 (italics in the original), [available here](#).

¹² UN General Assembly Resolution 43/53. Protection of Global Climate for Present and Future Generations of Mankind, 6 December 1988 (Annex 6), para. 10, [available here](#).

¹³ UN General Assembly Resolution 43/53. Protection of Global Climate for Present and Future Generations of Mankind, 6 December 1988 (Annex 6), preambular para. 8, [available here](#).

enough to begin to affect the probability of extreme events such as summer heat waves ... Altogether the evidence that the earth is warming by an amount which is too large to be a chance fluctuation and the similarity of the warming to that expected from the greenhouse effect represents a very strong case. In my opinion, that the greenhouse effect has been detected, and it is changing our climate now".¹⁴

The same year, Margaret Thatcher, then the UK Prime Minister, referred expressly to the risks posed by climate change in a keynote address to the Royal Society in London,

"Recently three changes in atmospheric chemistry have become familiar subjects of concern. The first is the increase in the greenhouse gases—carbon dioxide, methane, and chlorofluorocarbons—which has led some to fear that we are creating a global heat trap which could lead to climatic instability. We are told that a warming effect of 1°C per decade would greatly exceed the capacity of our natural habitat to cope. Such warming could cause accelerated melting of glacial ice and a consequent increase in the sea level of several feet over the next century. This was brought home to me at the Commonwealth Conference in Vancouver last year when the President of the Maldives Islands reminded us that the highest part of the Maldives is only six feet above sea level. The population is 177,000. It is noteworthy that the five warmest years in a century of records have all been in the 1980s—though we may not have seen much evidence in Britain!"¹⁵

22. Knowledge of climate change in policy circles had started to consolidate decades before. The two examples mentioned in the previous paragraph establish knowledge at the highest levels of the colonial power which unleashed the Industrial Revolution, the UK, as well as in the Senate of the largest historical emitter of GHG, the US. But there was a wealth of actionable information, known at the highest levels, already in the 1960s. In February 1965, Lyndon Johnson, then President of the United States, delivered a speech to the Congress on Conservation and Restoration of Natural Beauty specifically referring to the causes and the impacts of growing emissions of carbon dioxide:

"Air pollution is no longer confined to isolated places. This generation has altered the composition of the atmosphere on a

¹⁴ Statement of Dr. James Hansen, Director, NASA Goddard Institute for Space Studies, 23 June 1988, Hearing before the Committee on Energy and Natural Resources of the United States Senate (Annex 7), [available here](#).

¹⁵ Margaret Thatcher, Speech to the Royal Society, 27 September 1988 (Annex 8) (emphasis added), [available here](#).

global scale through radioactive materials and a steady increase in carbon dioxide from the burning of fossil fuels”¹⁶

By the end of the 1960s, Richard Nixon, then President of the United States, appointed a Task Force which, in June 1970, delivered a report on “*Cleaner Air for the Nation*”. This report contains a specific section devoted to “Climatic Effects of Pollutants”, where the Task Force concludes in the clearest terms that “the greatest consequences of air pollution for man’s continued life on earth are its effects on the earth’s climate”.¹⁷ Around the same time, the work of the WMO had identified climate change one of the top three priorities regarding global pollution. A Report of July 1968 of the UN Secretary-General specifically refers to “the increase of the carbon-dioxide in the earth’s atmosphere which may change our climate”.¹⁸

23. By the late 1970s, knowledge about the causes and impacts of climate change had been widely disseminated through international organisations, with a level of detail and sophistication which enabled scientists to make specific predictions. A WMO technical note of 1977 on the “Effects of Human Activities on Global Climate” specifically identifies the cause of climate change and – quite troublingly – also predicts with remarkable accuracy the effects we are witnessing today, urging decision-makers to take action:

“The largest single effect of human activities on the climate is due to the increase in atmospheric carbon dioxide concentration resulting from burning fossil fuels (coal, petroleum, natural gas), since the additional carbon dioxide gas absorbs infra-red radiation from the surface that would otherwise escape into space, producing an increase in lower atmosphere temperature ...

A best estimate of the resultant warming of the mean surface temperature of the Earth due to human activities is about 1°C by 2000 AD (25 per cent increase in atmospheric carbon dioxide) and about 3°C by 2050 AD (doubling of atmospheric carbon dioxide), with an uncertainty of roughly a factor of two. Warming of the polar regions is expected to be three to five times greater than the global average ...

¹⁶ Lyndon B. Johnson, Special Message to the Congress on Conservation and Restoration of Natural Beauty, 8 February 1965 (Annex 9), [available here](#).

¹⁷ US President’s Task Force on Air Pollution, *Cleaner Air for the Nation: The Report of the President’s Task Force on Air Pollution* (1970) (Annex 10) [available here](#), 34,

¹⁸ ‘Activities of United Nations Organizations and programmes relevant to the human environment: Report of the Secretary-General’ (11 July 1968) E/4553 (Annex 11) [available here](#), para. 78.

The question is raised of how the decision-makers of the world can make use of this information, dealing as it does with a probable change that will only become readily apparent after a decade or two.”¹⁹

24. At the same time, the emerging consensus on climate change had vast implications for the burning of fossil fuels. There is evidence that major fossil fuel companies felt threatened by potential policy action affecting their interests and took action to sow doubt about the science of climate change. In a study published in 2017 in the peer-reviewed journal *Environmental Research Letters* and then expanded in 2020, Geoffrey Supran and Naomi Oreskes from Harvard University reached the following conclusions:

“In our 2017 study ‘Assessing ExxonMobil’s climate change communications (1977–2014)’, we concluded that ExxonMobil has in the past misled the public about climate change. We demonstrated that ExxonMobil ‘advertorials’—paid, editorial-style advertisements—in The New York Times spanning 1989–2004 overwhelmingly expressed doubt about climate change as real and human-caused, serious, and solvable, whereas peer-reviewed papers and internal reports authored by company employees by and large did not. Here, we present an expanded investigation of ExxonMobil’s strategies of denial and delay. Firstly, analyzing additional documents of which we were unaware when our original study was published, we show that our original conclusion is reinforced and statistically significant: between 1989–2004, ExxonMobil advertorials overwhelmingly communicated doubt. We further demonstrate that (i) Mobil, like Exxon, was engaged in mainstream climate science research prior to their 1999 merger, even as Mobil ran advertorials challenging that science; (ii) Exxon, as well as Mobil, communicated direct and indirect doubt about climate change and (iii) doubt-mongering did not end after the merger. We now conclude with even greater confidence that ExxonMobil misled the public, delineating three distinct ways in which they have done so”²⁰

The detail of these disinformation efforts is summarised in an editorial by Supran and Oreskes published in the newspaper *The Guardian* in 2021.²¹ Even a cursory

¹⁹ W. W. Kellogg, *Effects of Human Activities on Global Climate. A summary, with consideration of the implications of a possibly warmer Earth*, WMO Technical Note No. 156 (Geneva: WMO Secretariat, 1977), Summary (Annex 12) [available here](#), at VII-VIII.

²⁰ G. Supran, N. Oreskes, “Addendum to ‘Assessing ExxonMobil’s climate change communications (1977–2014)’ Supran and Oreskes (2017 Environ. Res. Lett. 12 084019)” *Environmental Research Letters* 15 (2020) 119401 (Annex 13), abstract, [available here](#). Similar evidence concerning other major oil companies has been compiled in a freely available format in the platform Climate Files (Annex 14), [available here](#).

²¹ G. Supran, N. Oreskes, “The forgotten oil ads that told us that climate change was nothing”, *The Guardian*, 11 November 2021 (Annex 15), [available here](#).

reading of this piece is enraging to anyone sensitive to issues of climate justice. Significantly, the evidence examined by this study shows that the disinformation efforts intensified at the time the IPCC was being set up precisely with the opposite objective.

25. It is in this context that the IPCC, through its Working Groups I, II, and III, submitted a series of assessment reports on climate change, covering its causes, its impacts and pathways for addressing such causes and impacts.²² Importantly, in the *Application of the Genocide Convention (Bosnia v. Serbia)* case, the Court explained that the evidentiary value of reports from official or independent bodies depends “among other things, on (1) the source of the item of evidence (for instance partisan, or neutral), (2) the process by which it has been generated (for instance an anonymous press report or the product of a careful court or court-like process), and (3) the quality or character of the item (such as statements against interest, and agreed or uncontested facts).”²³ In the *Congo v. Uganda* case, the Court stressed that UN reports enjoy a special evidentiary weight.²⁴
26. The OACPS submits that the Court should grant the sources on which the scientific consensus on the causes and consequences of climate change rests, particularly those of the IPCC and other UN bodies, great weight considering the neutrality of their source and the process through which the reports have been generated. Concerning their sources, these reports are drafted by the most

²² The sixth and latest assessment report was published between 2021 and 2023: IPCC, Contribution of Working Group I of the IPCC: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2021) (Annex 16) [available here](#); IPCC, Contribution of Working Group II of the IPCC: Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2022) (Annex 17) [available here](#); IPCC, Contribution of Working Group III of the IPCC: Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2022) (Annex 18) [available here](#); IPCC, Synthesis Report of the IPCC: Synthesis Report of the IPCC Sixth Assessment Report (2023) (Annex 19) [available here](#). The entire Sixth Assessment Report is available at: <https://www.ipcc.ch/assessment-report/ar6/>

²³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43 (Annex 20) [available here](#), para. 227.

²⁴ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations*, Judgment, I.C.J. Reports 2022, p. 13 (Annex 21) [available here](#), para. 125 (“The Court notes that the evidence included in the case file by the DRC is, for the most part, insufficient to reach a precise determination of the amount of compensation due. However, given the context of armed conflict in this case, the Court must take account of other evidence, such as the various investigative reports in the case file, in particular those from United Nations organs”).

qualified experts on the question of climate change, who come from all countries of the world, including both developed and developing countries. They therefore represent the best available scientific knowledge on the topic. Concerning the process through which the reports are generated, the OACPS stresses that the sections of the IPCC reports entitled “Summary for Policymakers” represent not just consensus among scientific experts but also among governments. Indeed, such Summaries are adopted following line by line discussion and approval by governments.²⁵ According to the IPCC Procedures, “‘Approval’ of IPCC Summaries for Policymakers signifies that the material has been subject to a detailed, line by line discussion and agreement”.²⁶

27. In addition, a similar weight should be submitted to the relevant reports of the UNEP and the WMO. UNEP publishes three series of annual reports specifically addressing climate change, namely the *Emissions Gap Reports* (focusing on the gap between observed and projected GHG emissions and the emissions reductions required to address climate change), the *Production Gap Reports* (focusing on the root cause of emissions, namely the production of fossil fuels) and the *Adaptation Gap Reports* (focusing on the mismatch between the needs and the actual level of adaptation observed). As for the WMO, it has issued since 1993 increasingly comprehensive statements on the state of the global climate, including its the report series *State of the Global Climate* as well as statements with a regional focus.²⁷ Some of these reports have been shared in the dossier communicated by the UN Secretariat to the Court as part of the present advisory proceedings.
28. The scientific consensus that emerges from this vast body of evidence is summarised in preambular paragraph 9 of Resolution 77/276:

“Noting with utmost concern the scientific consensus, expressed, inter alia, in the reports of the Intergovernmental Panel on Climate Change, including that anthropogenic emissions of greenhouses gases are unequivocally the

²⁵ IPCC, Appendix A to the Principles Governing IPCC Work: Procedures for the preparation, review, acceptance, adoption, approval and publication of IPCC Reports (Annex 22) [available here](#), section 4.4.

²⁶ IPCC, Appendix A to the Principles Governing IPCC Work: Procedures for the preparation, review, acceptance, adoption, approval and publication of IPCC Reports (Annex 22) [available here](#), section 2.

²⁷ The State of Global Climate report series are accessible at the following WMO website : <https://wmo.int/resources/publication-series>

dominant cause of the global warming observed since the mid-20th century, that human-induced climate change, including more frequent and intense extreme events, has caused widespread adverse impacts and related losses and damages to nature and people, beyond natural climate variability, and that across sectors and regions the most vulnerable people and systems are observed to be disproportionately affected,”

More specifically, the core components of this scientific consensus can be fleshed out for present purposes as follows.

29. *First*, there is a scientific consensus with respect to the fact that human activities, specifically anthropogenic emissions of greenhouse gases, are the cause of climate change. The Summary for Policymakers of the IPCC’s 2023 Synthesis Report (6th Assessment Report (AR6)), states this component in the clearest terms:

“Human activities, principally through emissions of greenhouse gases, have unequivocally caused global warming, with global surface temperature reaching 1.1°C above 1850–1900 in 2011–2020. Global greenhouse gas emissions have continued to increase, with unequal historical and ongoing contributions arising from unsustainable energy use, land use and land-use change, lifestyles and patterns of consumption and production across regions, between and within countries, and among individuals”²⁸

30. *Secondly*, there is a scientific consensus on the fact that global warming due to anthropogenic emissions of greenhouse gases has caused the adverse impacts of climate change, including the global retreat of glaciers, decrease in Arctic Sea ice, warming of the ocean, global acidification of the ocean, sea level rise, and both marine and land heatwaves. The Summary for Policymakers of the IPCC’s 2021 Working Group 1 Report (AR6) clarifies several points in this regard:

“It is unequivocal that human influence has warmed the atmosphere, ocean and land. Widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred’ (emphasis added).²⁹

²⁸ IPCC, Synthesis Report of the IPCC: Synthesis Report of the IPCC Sixth Assessment Report (2023) (Annex 19) [available here](#), Summary for Policymakers, statement A.1.

²⁹ IPCC, Contribution of Working Group I of the IPCC: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2021) (Annex 16) [available here](#), Summary for Policymakers, statement A.1.

‘Each of the last four decades has been successively warmer than any decade that preceded it since 1850’.³⁰

“Human influence is very likely the main driver of the global retreat of glaciers since the 1990s and the decrease in Arctic sea ice area between 1979–1988 and 2010–2019 (decreases of about 40% in September and about 10% in March)”.³¹

“It is virtually certain that the global upper ocean (0–700 m) has warmed since the 1970s and extremely likely that human influence is the main driver. It is virtually certain that human-caused CO₂ emissions are the main driver of current global acidification of the surface open ocean”³²

“Global mean sea level increased by 0.20 [0.15 to 0.25] m between 1901 and 2018. Human influence was very likely the main driver of these increases since at least 1971”³³

“It is virtually certain that hot extremes (including heatwaves) have become more frequent and more intense across most land regions since the 1950s... with high confidence that human-induced climate change is the main driver of these changes.”³⁴

“Marine heatwaves have approximately doubled in frequency since the 1980s (*high confidence*), and human influence has very likely contributed to most of them since at least 2006.”³⁵

31. *Thirdly*, there is scientific consensus that these unprecedented changes to the climate system have caused widespread adverse impact and related losses and damages to nature and peoples. According to the IPCC:

“Human-induced climate change, including more frequent and intense extreme events, has caused widespread adverse impacts and related losses and damages to nature and people, beyond natural climate variability.The rise in weather and

³⁰ IPCC, Contribution of Working Group I of the IPCC: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2021) (Annex 16) [available here](#), Summary for Policymakers, statement A.1.2.

³¹ IPCC, Contribution of Working Group I of the IPCC: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2021) (Annex 16) [available here](#), Summary for Policymakers, statement A.1.5.

³² IPCC, Contribution of Working Group I of the IPCC: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2021) (Annex 16) [available here](#), Summary for Policymakers, statement A.1.6.

³³ IPCC, Contribution of Working Group I of the IPCC: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2021) (Annex 16) [available here](#), Summary for Policymakers, statement A.1.7.

³⁴ IPCC, Contribution of Working Group I of the IPCC: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2021) (Annex 16) [available here](#), Summary for Policymakers, statement A.3.1.

³⁵ IPCC, Contribution of Working Group I of the IPCC: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2021) (Annex 16) [available here](#), Summary for Policymakers, statement A.3.1.

climate extremes has led to some irreversible impacts as natural and human systems are pushed beyond their ability to adapt”³⁶

More specifically, the IPCC’s 2022 Report highlighted the impact that climate change has on nature, stressing that:

“Climate change has caused substantial damages, and increasingly irreversible losses, in terrestrial, freshwater and coastal and open ocean marine ecosystems (high confidence). The extent and magnitude of climate change impacts are larger than estimated in previous assessments (high confidence). Widespread deterioration of ecosystem structure and function, resilience and natural adaptive capacity, as well as shifts in seasonal timing have occurred due to climate change (high confidence), with adverse socioeconomic consequences (high confidence)”³⁷

Climate change also has specific adverse impacts on human life. In its 2022 Report, the IPCC noted that:

“Climate change including increases in frequency and intensity of extremes have reduced food and water security, hindering efforts to meet Sustainable Development Goals (high confidence)”³⁸

“Climate change has adversely affected physical health of people globally (very high confidence) and mental health of people in the assessed regions (very high confidence)”³⁹

“Climate change is contributing to humanitarian crises where climate hazards interact with high vulnerability (high confidence)”⁴⁰

“Climate and weather extremes are increasingly driving displacement in all regions (high confidence)”⁴¹

³⁶ IPCC, Contribution of Working Group II of the IPCC: Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2022) (Annex 17) [available here](#), Summary for Policymakers, statement B.1.

³⁷ IPCC, Contribution of Working Group II of the IPCC: Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2022) (Annex 17) [available here](#), Summary for Policymakers, statement B.1.2.

³⁸ IPCC, Contribution of Working Group II of the IPCC: Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2022) (Annex 17) [available here](#), Summary for Policymakers, statement B.1.3.

³⁹ IPCC, Contribution of Working Group II of the IPCC: Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2022) (Annex 17) [available here](#), Summary for Policymakers, statement B.1.4.

⁴⁰ IPCC, Contribution of Working Group II of the IPCC: Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2022) (Annex 17) [available here](#), Summary for Policymakers, statement B.1.7.

⁴¹ IPCC, Contribution of Working Group II of the IPCC: Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2022) (Annex 17) [available here](#), Summary for Policymakers, statement B.1.7.

2. The conduct responsible for climate change

32. The conduct which has caused the level of interference with the climate system known as climate change and its adverse effects is well identified. As noted earlier by the reference to the scientific consensus emerging *inter alia* from the IPCC reports, the Summary for Policymakers of the IPCC's 2023 Synthesis Report identifies this conduct as follows:

“Human activities, principally through emissions of greenhouse gases, have unequivocally caused global warming, with global surface temperature reaching 1.1°C above 1850–1900 in 2011–2020. Global greenhouse gas emissions have continued to increase, with unequal historical and ongoing contributions arising from unsustainable energy use, land use and land-use change, lifestyles and patterns of consumption and production across regions, between and within countries, and among individuals”⁴²

33. Importantly, as it is made fully clear in this paragraph, there are deep inequalities regarding the respective contributions of different countries as well as those who suffer the most from the adverse effects of climate change. As it will be explained in the following section, the OACPS countries have contributed little, and yet, have suffered disproportionately from such adverse effects.
34. Thus, scientifically, the inequality component is at the heart of the problem of climate change, hence the need to address climate injustice. The questions put to the Court do so. This conduct is expressly referred in both Questions (a) and (b) of Resolution 77/276 with increasing levels of specificity. Question (a) refers, like the IPCC in the aforementioned statement, to “anthropogenic emissions of greenhouse gases”. In light of the IPCC statement, the conduct underpinning this terminology consists of “human activities”, mainly “unsustainable energy use, land use and land-use change, lifestyles and patterns of consumption and production across regions”.⁴³ And such activities embody the profound inequality at the heart of climate change. From the perspective of Question (a), the Court is

⁴² IPCC, Synthesis Report of the IPCC: Synthesis Report of the IPCC Sixth Assessment Report (2023) (Annex 19) [available here](#), Summary for Policymakers, statement A.1.

⁴³ IPCC, Synthesis Report of the IPCC: Synthesis Report of the IPCC Sixth Assessment Report (2023) (Annex 19) [available here](#), Summary for Policymakers, statement A.1.

requested to clarify what “obligations of States under international law” govern these activities. Whether or not the State itself is the direct emitter, States have both the power and the duty to regulate anthropogenic emissions of greenhouse gases in a manner consistent with their international obligations. Preambular paragraph 5 of Resolution 77/276 further clarifies how the conduct of States at stake in these proceedings is understood. This paragraph refers *in fine* to “the conduct of States over time in relation to activities that contribute to climate change and its adverse effects”. Thus, it is indeed “conduct of States”, as it has unfolded “over time” and “in relation to” the activities causing anthropogenic emissions of greenhouse gases and, thereby, “contribut[ing] to climate change and its adverse effects”.

35. Question (a) asks the Court to identify and clarify the broad set of obligations governing such conduct. In turn, Question (b) focuses on the legal consequences of such conduct when a State by its “acts and omissions, ha[s] caused significant harm to the climate system and other parts of the environment”. In light of preambular paragraph 5, the conduct on which this question focuses consists therefore of “acts and omissions” of a State “over time” and “in relation to activities that contribute to climate change and its adverse effects” to a degree that amounts to “significant harm” to the environment, including the climate system. Thus, the conduct described in Question (b) sets a higher threshold – and is a subset – of the conduct described in Question (a) and in preambular paragraph 5. It is only acts and omissions of a State in relation to the relevant activities which have caused a certain level of interference, namely “significant harm”, which is both more than negligible harm and less than catastrophic harm in the form of climate change and its adverse effects.
36. The conduct of all States, including OACPS countries is governed by the obligations that the Court will identify in response to Question (a), but no OACPS country has reached the threshold of interference described in Question (b). OACPS countries are on the receiving end of climate injustice.

B. OACPS countries and climate change

37. The OACPS is a group of 79 Member States, spanning three continents from the Africa, Caribbean and Pacific regions.⁴⁴ OACPS countries are in general countries from the African continent and small islands States. The vast majority of OACPS Member States have been subject to colonialism.
38. The situation of OACPS countries with respect to climate change is that of a triple injustice. OACPS countries have contributed the least by their greenhouse gas emissions to climate change **(1)**. However, OACPS countries bear the most disproportionate share of the adverse impacts of climate change **(2)**. In this respect, OACPS countries may be characterised as “sacrifice zones” that are paying the price of industrial development without any of the related benefits **(3)**.

1. OACPS countries have contributed the least to climate change

39. The OACPS highlights that its Member States have contributed the least to the emissions of greenhouse gases that have caused climate change. From 1850 to 2019, industrialised countries accounted for well over half of these emissions, while the entire regions of Africa, Asia and Pacific, and Latin America and Caribbean combined contributed less than 30%. Corporations based in the Global North and under the jurisdiction or control of industrialised countries are responsible for the majority of historical emissions.
40. When one considers specifically the main cause of climate change, namely carbon dioxide emissions from fossil fuels and industrial sectors (CO₂-FFI), the disparity is shocking. Thirty-three African countries of OACPS Member States are LDCs and have contributed approximately only 0.4% of the historical CO₂-FFI emissions between 1850 and 2019.⁴⁵ The entire group of small-islands States,

⁴⁴ OACPS Member States include Angola; Antigua and Barbuda; Belize; Cape Verde; Comoros; Bahamas; Barbados; Benin; Botswana; Burkina Faso; Burundi; Cameroon; Central African Republic; Chad; Congo (Brazzaville); Congo (Kinshasa); Cook Islands; Côte d’Ivoire; Cuba; Djibouti; Dominica; Dominican Republic; Eritrea; Eswatini; Ethiopia; Fiji; Gabon; Gambia; Ghana; Grenada; Republic of Guinea; Guinea-Bissau; Equatorial Guinea; Guyana; Haiti; Jamaica; Kenya; Kiribati; Lesotho; Liberia; Madagascar; Malawi; Maldives; Mali; Marshall Islands; Mauritania; Mauritius; Micronesia; Mozambique; Namibia; Nauru; Niger; Nigeria; Niue; Palau; Papua New Guinea; Rwanda; St. Kitts and Nevis; St. Lucia; St. Vincent and the Grenadines; Solomon Islands; Samoa; São Tomé and Príncipe; Senegal; Seychelles; Sierra Leone; Somalia; Sudan; Suriname; Tanzania; Timor Leste; Togo; Tonga; Trinidad and Tobago; Tuvalu; Uganda; Vanuatu; Zambia; Zimbabwe.

⁴⁵ IPCC, Contribution of Working Group III of the IPCC: Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel

including the OACPS small-islands States, have contributed only 0.5%, of the of historical CO₂-FFI emissions during the relevant period.⁴⁶ These limited contributions are far exceeded by the historical contribution of other regions to the historical emissions of the CO₂. The IPCC indicates that North America has contributed 32% of the global historical emissions of CO₂ and Europe 16%.

41. The disproportionate share of the contribution of certain developed countries to the atmospheric GHG emissions becomes more dramatic when emissions from colonial territories are attributed to the colonial powers that controlled them.⁴⁷ Since those territories were not self-governing and were administered by colonial powers, the latter must bear the responsibility for the emission of greenhouse gases from such territories during that period. This results in important corrections of the emissions record, which are summarised in a report from the think tank Carbon Brief as follows:

“[T]he US (21%) and China (12%) still [come on] top – but the share of former colonial powers grow[s] significantly. The French share of historical emissions rises by half, the UK nearly doubles, the Netherlands nearly triples and Portugal more than triples ... India is among the former colonies seeing its share of historical responsibility fall (by 15%, to below the UK), with Indonesia down by 24% and Africa’s already small contribution also dropping 24%”⁴⁸

42. Whereas the contributions of OACPS countries are thus further reduced, the impacts of the adverse effects of climate change affecting them are disproportionately high.

on Climate Change (2022) (Annex 18) [available here](#), Summary for Policymakers, statements B.3.1 and B.3.2.

⁴⁶ IPCC, Contribution of Working Group III of the IPCC: Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2022) (Annex 18) [available here](#), Summary for Policymakers, statements B.3.1 and B.3.2.

⁴⁷ See S. Evans, *Revealed: How colonial rule radically shifts historical responsibility for climate change*, November 2023 (Annex 23), [available here](#).

⁴⁸ See S. Evans, *Revealed: How colonial rule radically shifts historical responsibility for climate change*, November 2023 (Annex 23), [available here](#).

2. OACPS countries bear the most disproportionate share of the adverse impacts of climate change

43. The adverse impacts of climate change do not fall evenly on all countries. They disproportionately affect those countries that are the least responsible for causing climate change and have the least means to face them. The IPCC's Summary for Policymakers of 2023 of IPCC's 2023 Synthesis Reports observed that:

“Vulnerable communities who have historically contributed the least to current climate change are disproportionately affected (*high confidence*)” (emphasis added).⁴⁹

44. The IPCC, elaborating further on the communities that are considered as the most vulnerable communities, explained that:

“Approximately 3.3 to 3.6 billion people live in contexts that are highly vulnerable to climate change. Human and ecosystem vulnerability are interdependent. Regions and people with considerable development constraints have high vulnerability to climatic hazards. Increasing weather and climate extreme events have exposed millions of people to acute food insecurity and reduced water security, with the largest adverse impacts observed in many locations and/or communities in Africa, Asia, Central and South America, LDCs, Small Islands and the Arctic, and globally for Indigenous Peoples, small-scale food producers and low-income households. Between 2010 and 2020, human mortality from floods, droughts and storms was 15 times higher in highly vulnerable regions, compared to regions with very low vulnerability. (*high confidence*)”⁵⁰

45. Chapter 9 of volume II of the IPCC Sixth Assessment Report deals particularly with the situation of OACPS countries that are African countries. The Executive summary makes it clear that

“Africa is one of the lowest contributors to greenhouse gas emissions causing climate change, yet key development sectors have already experienced widespread losses and damages attributable to human-induced climate change, including

⁴⁹ IPCC, Synthesis Report of the IPCC: Synthesis Report of the IPCC Sixth Assessment Report (2023) (Annex 19) [available here](#), Summary for Policymakers, statement A.2.

⁵⁰ IPCC, Synthesis Report of the IPCC: Synthesis Report of the IPCC Sixth Assessment Report (2023) (Annex 19) [available here](#), Summary for Policymakers, statement A.2.

biodiversity loss, water shortages, reduced food production, loss of lives and reduced economic growth (*high confidence*)⁵¹

46. Consolidating the findings of previous assessments, this report further notes that:

[a] Hot days, hot nights and heatwaves have become more frequent; heatwaves have also become longer (high confidence). Drying is projected particularly for west and southwestern Africa (high confidence) (IPCC, 2018c; Shukla et al., 2019).

[b] Climate change is contributing to land degradation, loss of biodiversity, bush encroachment and spread of pests and invasive species (IPCC, 2018b; IPCC, 2019a; IPCC, 2019b).

[c] Climate change has already reduced food security through losses in crop yields, rangelands, livestock and fisheries, deterioration in food nutritional quality, access and distribution, and price spikes. Risks to crop yields are substantially less at 1.5°C compared with 2°C of global warming, with a large reduction in maize cropping areas projected even for 1.5°C, as well as reduced fisheries catch potential (IPCC, 2018b; IPCC, 2019b; IPCC, 2019a).

[d] Increased deaths from undernutrition, malaria, diarrhoea, heat stress and diseases related to exposure to dust, fire smoke and other air pollutants are projected from further warming (IPCC, 2018c; Shukla et al., 2019)

[...]⁵²

47. Chapter 15 of this same IPCC report addresses the situation of OACPS countries which are Small Island Developing States. It notes that:

“A sense of urgency is prevalent among small islands in the combating of climate change and in adherence to the Paris Agreement to limit global warming to 1.5°C above pre-industrial levels. Small islands are increasingly affected by increases in temperature, the growing impacts of tropical cyclones (TCs), storm surges, droughts, changing precipitation patterns, sea level rise (SLR), coral bleaching and invasive species, all of which are already detectable across both natural and human systems (*very high confidence*).”⁵³

⁵¹ IPCC, Contribution of Working Group II of the IPCC: Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2022) (Annex 17) [available here](#), Chapter 9 (Africa), p. 1289.

⁵² IPCC, Contribution of Working Group II of the IPCC: Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2022) (Annex 17) [available here](#), Chapter 9 (Africa), p. 1294.

⁵³ IPCC, Contribution of Working Group II of the IPCC: Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2022) (Annex 17) [available here](#), Chapter 15 (Small Islands), p. 2045.

48. Unfortunately, projections are far from encouraging. With respect to African countries, the IPCC noted that “[b]etween 1.5°C and 2°C global warming—assuming localised and incremental adaptation—negative impacts are projected to become widespread and severe with reduced food production, reduced economic growth, increased inequality and poverty, biodiversity loss, increased human morbidity and mortality (high confidence). Limiting global warming to 1.5°C is expected to substantially reduce damages to African economies, agriculture, human health, and ecosystems compared to higher levels of global warming (*high confidence*)”.⁵⁴ Concerning Small Island States, the IPCC in its Summary for Policymakers to the 2022 Working Group II Report, concludes that “[s]ea level rise poses an existential threat for some Small Islands and some low-lying coasts”⁵⁵.

3. OACPS countries as “sacrifice zones”

49. Professor Tendayi Achiume, the former UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, explains in her Expert Report appended to this Written Statement that the global processes that have driven anthropogenic greenhouse gas emissions were built on systemic racism and colonialism. For centuries, States – both metropolitan European States and their settler colonial States outside Europe – relied on racist ideologies to justify the brutal extraction of natural resources, industrialization, and consumption patterns that caused these emissions. Colonial domination established a global economic system premised on sacrificing non-white territories and peoples for the benefit of white colonial metropolises. Recognising this historical reality is essential for understanding the contemporary effects of greenhouse gases on the climate.⁵⁶

⁵⁴ IPCC, Contribution of Working Group II of the IPCC: Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2022) (Annex 17) [available here](#), Chapter 9 (Africa), Executive Summary, p. 1289.

⁵⁵ IPCC, Contribution of Working Group II of the IPCC: Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2022) (Annex 17) [available here](#), Summary for Policymakers, statement B.4.5.

⁵⁶ Racial Equality and Racial Non-Discrimination Obligations of State in Respect of Climate Change. Expert Report of Professor E. Tendayi Achiume, March 2024 (Appendix B) (enclosed), paras. 4-7.

50. Professor Achiume specifically refers to the concept of “sacrifice zones” to describe the situation of OACPS in relation to climate injustice.⁵⁷ As Steve Lerner explains, “[t]he label sacrifice zones comes from ‘National Sacrifice Zones,’ an Orwellian term coined by government officials to designate areas dangerously contaminated as a result of the mining and processing of uranium into nuclear weapons”.⁵⁸ The concept was also extended to colonial territories that were used for nuclear tests for the benefits of colonial powers⁵⁹ and, more recently, to “extremely contaminated areas where vulnerable and marginalized groups bear a disproportionate burden of the health, human rights and environmental consequences of exposure to pollution and hazardous substances”.⁶⁰ Typically, “sacrifice zones” are located among disenfranchised communities and colonial or formerly colonial territories.
51. The OACPS submits that climate change has created “new sacrifice zones”, including the territories of African, Caribbean and Pacific Member States. The UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment has explained that:

“The climate crisis is creating a new category of sacrifice zones as a result of unabated greenhouse gas emissions, as communities have become, and are becoming, uninhabitable because of extreme weather events or slow-onset disasters, including drought and rising sea levels”.⁶¹

⁵⁷ Racial Equality and Racial Non-Discrimination Obligations of State in Respect of Climate Change. Expert Report of Professor E. Tendayi Achiume, March 2024 (Appendix B) (enclosed), paras. 12-14.

⁵⁸ S. Lerner, *Sacrifice Zones: The Front Lines of Toxic Chemical Exposure in the United States* (Cambridge, Massachusetts, MIT Press, 2010) (Annex 24) [available here](#), p. 2.

⁵⁹ J. Barkas Threet, “Testing the bomb: disparate impacts on Indigenous Peoples in the American West, the Marshall Islands, and in Kazakhstan”, *University of Baltimore Journal of Environmental Law*, vol. 13, No. 1 (2005) (Annex 25), enclosed.

⁶⁰ The right to a clean, healthy and sustainable environment: non-toxic environment, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Mr David Boyd, 12 January 2022, A/HRC/49/53 (Annex 26) [available here](#), Summary.

⁶¹ The right to a clean, healthy and sustainable environment: non-toxic environment, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Mr David Boyd, 12 January 2022, A/HRC/49/53 53 (Annex 26) [available here](#), para. 27.

52. The OACPS observes that the boundaries of climate change “sacrifice zones” follow racial lines,⁶² often encapsulating areas where Indigenous peoples or people of African descent live. The scale is such that the entire territory of some OACPS Member States may be considered a “sacrifice zone”.⁶³ The Working Group of Experts on People of African Descent detailed how environmental racism and the climate crisis have disproportionately affected people of African descent, owing in part to racialised histories of colonial domination, the trade in enslaved Africans and systematic discrimination against and segregation of people of African descent.⁶⁴ Even “green” solutions to climate change, by focusing on the natural resources of OACPS countries may favour the creation of “green sacrifice zones”,⁶⁵ “meaning that racially and ethnically marginalized groups are disproportionately exposed to human rights violations associated with the extraction or processing of these alternatives”.⁶⁶
53. All in all, it is a core contention of the OACPS that the fault-lines underpinning climate injustice convergence with those underpinning inequality and injustice arising from colonial domination and racial inequality. It is not possible to address climate justice, as the General Assembly has requested the Court to do, particularly in its Question (b), as prepared by the answer to Question (a), without

⁶² Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, E. Tendayi Achiume, *Ecological crisis, climate justice and racial justice*, 25 October 2022, A/77/549 (Annex 27) [available here](#), para. 19.

⁶³ Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, E. Tendayi Achiume, *Ecological crisis, climate justice and racial justice*, 25 October 2022, A/77/549 (Annex 27) [available here](#), paras. 18-19, 32-33.

⁶⁴ See Report of the Working Group of Experts on People of African Descent, *Environmental justice, the climate crisis and people of African descent*, 21 September 2021, (A/HRC/48/78) (Annex 27) [available here](#), para. 61 (explaining that: “The climate crisis has now become a ticking time bomb. This global emergency, characterized by global warming and climate change as a result of human decision-making, including the burning of fossil fuels and the release of excessive amounts of carbon into the environment, has already had a disproportionate impact on the lives of people of African descent. Disproportionate effects have also been reported on the African continent. Communities and even entire States that occupy and rely upon low-lying coastal lands, tundra and Arctic ice, arid lands, and other delicate ecosystems are at particular risk. Policymaking, including how States respond to the climate crisis, may strengthen the impact of the climate crisis on communities of African descent, which often have less political and positional power locally and globally. Addressing the climate crisis requires a human rights-based approach that prioritizes the inclusion of people of African descent in decision-making at all stages, including preparedness, mitigation, response and recovery. Protection should be equal and effective”).

⁶⁵ C. Zografos, P. Robbins, “Green sacrifice zones, or why a green new deal cannot ignore the cost shifts of just transitions” (2020) 3/5 *One Earth* 543 (Annex 28) [available here](#).

⁶⁶ Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, E. Tendayi Achiume, *Ecological crisis, climate justice and racial justice*, 25 October 2022, A/77/549 (Annex 27) [available here](#), para. 62.

specifically articulated and fleshing out the inequality and injustice arising from former colonial rule and racial discrimination.

III. QUESTION (a): OBLIGATIONS OF STATES UNDER INTERNATIONAL LAW IN RELATION TO CLIMATE CHANGE

54. In this section, OACPS examines *Question (a)* of the request for advisory opinion submitted to the Court, which deals with the legal obligations for States in respect of climate change. *First*, the OACPS interprets the question submitted by the General Assembly and establishes that its meaning is clear and does not require reformulation **(A)**. *Secondly*, the OAPCS examines the obligations bearing on States with respect to the conduct that has caused climate change, which is the gist of the question asked by the General Assembly **(B)**.

A. Scope of *Question (a)*

55. The OACPS recalls that *Question (a)* of the request reads as follows:

“Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment,

(a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations”

56. The OACPS submits that *Question (a)*, which is enshrined in a resolution of the General Assembly should be interpreted in accordance with the rules of interpretation of resolutions of international organisations. In the *Kosovo* advisory opinion, which dealt with a resolution of the Security Council, the Court explained that that “the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance” on the interpretation of resolutions of the Security Council. Yet, additional factors relating to the nature of the Council and its decision-making process may “require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United

Nations organs and of States affected by those given resolutions”.⁶⁷ The OACPS submits that similar considerations apply to the interpretation of the resolutions of the General Assembly.

57. The OACPS submits that the meaning of *Question (a)* is clear and unambiguous. It asks the Court to identify and clarify the “obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases”. In this respect, the term “greenhouse gases” refers to:

“Gaseous constituents of the *atmosphere*, both natural and *anthropogenic*, that absorb and emit radiation at specific wavelengths within the spectrum of radiation emitted by the Earth’s surface, by the atmosphere itself, and by clouds. This property causes the *greenhouse effect*. Water vapour (H₂O), *carbon dioxide* (CO₂), *nitrous oxide* (N₂O), *methane* (CH₄) and *ozone* (O₃) are the primary GHGs in the Earth’s atmosphere. Human-made GHGs include *sulphur hexafluoride* (SF₆), *hydrofluorocarbons* (HFCs), *chlorofluorocarbons* (CFCs) and *perfluorocarbons* (PFCs); several of these are also O₃-depleting (and are regulated under the *Montreal Protocol*)”.⁶⁸

58. The term “anthropogenic emissions” must in turn be understood as follows:

“Emissions of greenhouse gases (GHGs), precursors of GHGs and aerosols caused by human activities. These activities include the burning of fossil fuels, deforestation, land use and land use changes (LULUC), livestock production, fertilisation, waste management, and industrial processes”⁶⁹

59. In addition, the wording of Resolution 77/276 indicates that the Court is asked to determine “the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations.” The preamble of Resolution 77/276 confirms the view that the General Assembly expects from the Court a comprehensive examination of these obligations, which only the Court can provide in light of its general competence and standing. Preambular paragraphs 5 and 6 of the Resolution

⁶⁷ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, p. 403 (Annex 29) [available here](#), para. 94.

⁶⁸ IPCC Glossary (Annex 30) [available here](#) (italics original)

⁶⁹ IPCC Glossary (Annex 30) [available here](#)

77/276 identify a number of legal instruments and principles of customary international law of particular relevance. It emphasises the “the importance” of these instruments and principles “to the conduct of States over time in relation to activities that contribute to climate change and its adverse effects”. This conduct includes both “acts and omissions” as *Question (b)* makes it clear.

60. The instruments that are listed include “the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the United Nations Convention on the Law of the Sea, the Vienna Convention for the Protection of the Ozone Layer, the Montreal Protocol on Substances that Deplete the Ozone Layer, the Convention on Biological Diversity and the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa”. The customary international law principles identified by the General Assembly are “the relevant principles and relevant obligations of customary international law, including those reflected in the Declaration of the United Nations Conference on the Human Environment and the Rio Declaration on Environment and Development”. In this context, the task for the Court with respect to Question (a) is to review exhaustively all the rules of international law that govern the conduct of States leading to anthropogenic emissions of greenhouse gases.
61. Most, but not all, of these instruments and rules are expressly stated in the chapeau of the operative part of Resolution 77/276. The Court is asked to have “particular regard” to them. This is another clear statement of the task that the General Assembly needs the Court to tackle, which concerns the examination of a wide body of instruments and rules, well beyond specific treaties such as the United Nations Framework Convention on Climate Change (**UNFCCC**),⁷⁰ the Kyoto Protocol⁷¹ or the Paris Agreement.⁷² These instruments and rules are

⁷⁰ United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107 (Annex 31) [available here](#).

⁷¹ Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, 2303 UNTS 162 (Annex 32) [available here](#).

⁷² Paris Agreement, 12 December 2015, 3156 UNTS 79 (Annex 33) [available here](#).

mentioned in an expressly non-exhaustive manner, as emphasised by the terms “particular regard” in the chapeau and further confirmed by the reference to a range of other treaties, instruments and rules in the preambular paragraphs of Resolution 77/276.

62. The OACPS notes that, in some rare cases, the Court “has departed from the language of the question put to it where the question was not adequately formulated (...) or where the Court determined, on the basis of its examination of the background to the request, that the request did not reflect the ‘legal questions really in issue’ ... Similarly, where the question asked was unclear or vague, the Court has clarified the question before giving its opinion”.⁷³ However, in this case, the question is clear and the background of the resolution indicates that the General Assembly needs a comprehensive examination of the obligations of States with respect to the conduct of States leading to anthropogenic greenhouse gases. There is therefore no reason for the Court to reformulate the scope of the question.

B. The content of the obligations of States in relation to anthropogenic emissions of greenhouse gases under the sources listed by Resolution 77/276

63. The OACPS submits that the obligations bearing upon States with respect to climate change are those that arise from the primary sources of international law. In the following paragraphs, the OACPS examines a sub-set of these obligations, which are particularly relevant from the perspective of climate injustice, colonial injustice and racial discrimination. Such obligations are by no means the only relevant ones. They are singled out and examined because the OACPS considers their recognition in a climate context of the utmost importance. The following obligations are analysed: obligations arising from the right of peoples to self-determination **(1)**, the obligation to prevent the crime of genocide **(2)**, the prohibition of racial and gender discrimination **(3)**, the duty to cooperate in good faith **(4)**, the duty to exercise due diligence **(5)**, the duty to prevent significant harm to the environment **(6)**, the duty to protect and preserve the marine

⁷³ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, p. 403 (Annex 29) [available here](#), para. 50.

environment (7), the duty to prevent violations of human rights (8), and finally, certain obligations arising from the UNFCCC and the Paris Agreement (9).

1. Obligations arising from the right of peoples to self-determination

64. The OACPS notes that climate change, and therefore the conduct responsible for it, has an adverse impact on the enjoyment and fulfilment of the principle of equal rights and self-determination of peoples. It submits in this context that compliance with the principle of equal rights of peoples and the right to self-determination requires States (i) to reduce their anthropogenic greenhouse gas emissions, (ii) to adopt measures that allow peoples to adapt to the adverse impacts of climate change, (iii) to cooperate, taking into account the principle of equal rights of peoples, to put an end to climate change and its adverse impacts, and (iv) to cease the conduct in breach and repair its consequences in accordance with the general international law of State responsibility.
65. The OACPS observes that the principle of the equal rights of peoples and the right to self-determination is “one of the essential principles of contemporary international law”,⁷⁴ which appears already in the UN Charter as one of the “purposes of the United Nations”.⁷⁵ Characterised by the Court as a “fundamental human right, [with] a broad scope of application”⁷⁶, the Human Rights Committee has stated, in its General Comment No. 12, that:

“[t]he right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants.”⁷⁷

⁷⁴ *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 90 (Annex 34) [available here](#), para. 29.

⁷⁵ Charter of the United Nations (Annex 35) [available here](#), Article 1(2).

⁷⁶ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, I.C.J. Rep. 2019, p. 95 (Annex 2) [available here](#), para. 144.

⁷⁷ Human Rights Committee, General Comment No. 12: Article 1 (Right to Self-determination) The Right to Self-determination of Peoples, 13 March 1984 (Annex 36) [available here](#), para. 1.

66. As far as the international hierarchy of norms is concerned, the principle of equal rights of peoples and the right to self-determination is a *jus cogens* norm of contemporary international law,⁷⁸ which generates *erga omnes* obligations, binding on all members of the international community.⁷⁹
67. Conduct contributing to climate change and, above all, conduct that reaches the threshold of significant interference with the climate system and other parts of the environment, affect the enjoyment and fulfilment of the right of self-determination by threatening the very existence of peoples. In this respect, the OACPS observes that the right of peoples to existence is an integral part of the right of peoples to self-determination. Similar to the right to life for individuals, it is the right that makes the enjoyment of all other peoples' rights possible. The African Charter on Human and Peoples' Rights reflects this understanding of the relations between the right of peoples to existence and other rights of peoples. Thus, Article 20, paragraph 1, of the African Charter, which opens the Charter list of peoples' rights, stipulates that "[a]ll peoples shall have the right to existence". The other rights of peoples then follow in the provision and subsequent ones. Common Article 1 of the International Covenant on Civil and Political Rights and of the International Covenant of Economic and Social Rights protects the right to existence of peoples by emphasising that

"All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."

⁷⁸ Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the ILC (2001), Volume II, Part II, Report of the Commission to the General Assembly on the Work of its Fifty-Third Session*, document A/CN.4/SER.A/2001/Add.1 (Part 2) (Annex 37) [available here](#), para. 5 of commentary to art. 26; Dire Tladi, "Fourth Report of the Special Rapporteur on Peremptory Norms of General International Law (Jus Cogens)", 31 January 2019, UN Doc A/CN.4/727 (Annex 38) [available here](#), pp. 48–52, paras. 108–115.

⁷⁹ *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 90 (Annex 34) [available here](#), para. 29; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, I.C.J. Rep. 2019, p. 95 (Annex 2) [available here](#), para. 180; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136 (Annex 1) [available here](#), paras. 88, 155-156. See also, Human Rights Committee, General Comment No. 12: Article 1 (Right to Self-determination) The Right to Self-determination of Peoples, 13 March 1984 (Annex 36) [available here](#), para. 5.

68. The OACPS submits that climate change – and therefore the conduct responsible for it – affects the right of peoples to existence by threatening both their physical integrity and by depriving them of the means of their subsistence. As mentioned above, climate change is an existential threat to the human community as a whole, including its different peoples. This is especially the case for Small Island States. Rising seas and other impacts risk literally wiping out the territories of some nations, undermining their physical and cultural survival. The OACPS recalls that the IPCC concluded in its Summary for Policymakers to the 2022 Working Group II Report that “[s]ea level rise poses an existential threat for some Small Islands and some low-lying coasts”.⁸⁰ For peoples facing such existential risks, climate change represents a fundamental assault on their self-determination.

69. Climate change and the conduct responsible for it also infringes the right of peoples to self-determination by affecting the territorial integrity of certain peoples, including peoples of low-lying island States. The Office of the UN High Commissioner for Human Rights explained in 2009 how climate change may impact the enjoyment and fulfilment of the right of peoples to self-determination as follows:

“Sea level rise and extreme weather events related to climate change are threatening the habitability and, in the longer term, the territorial existence of a number of low-lying island States. Equally, changes in the climate threaten to deprive indigenous peoples of their traditional territories and sources of livelihood. Either of these impacts would have implications for the right to self-determination.”⁸¹

70. The work of the International Law Commission on sea-level rise in relation to international law confirms this understanding:

“Land inundation stemming from sea-level rise can pose risks to the territorial integrity of States with extensive coastlines and to small island States; at its most extreme, sea-level rise may threaten the continued existence of some low-lying States. In

⁸⁰ IPCC, Contribution of Working Group II of the IPCC: Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2022) (Annex 17) [available here](#), Summary for Policymakers, statement B.4.5.

⁸¹ Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights (15 January 2009), UN Doc A/HRC/10/61 (Annex 39) [available here](#), para. 40.

such cases, the right to self-determination could be at risk, since it is unlikely that the whole community would be able to be relocated and remain together elsewhere, with functioning institutions and governance capacity. In these and other cases, the impact of sea-level rise may deprive indigenous peoples of their traditional territories and sources of livelihoods. The potential loss of traditional territories from sea-level rise and coastal erosion ... threatens the cultural survival, livelihoods and territorial integrity of indigenous peoples.”⁸²

71. The OACPS concludes therefore that the principle of equal rights of peoples and the right to self-determination required, since its emergence, States to take all the measures at their disposal to avoid the adverse impacts of climate change on peoples, including deep cuts of their greenhouse gas emissions and reparation for any harm resulting from having failed to do so. The Human Rights Committee’s *General Comment 12* on the right to self-determination emphasised that “[t]his right [the right of self-determination] entails corresponding duties for all States and the international community”.⁸³

2. Obligations arising from the duty to prevent the crime of genocide

72. The OACPS submits that, taking into account States’ obligations to prevent and punish genocide, all States shall take measures to prevent genocide against a protected racial group, namely people of African descent and protected national groups, namely the peoples of Small-Island States. Concretely, this obligation requires the reduction of greenhouse gases and the adoption of measures to adapt to the adverse effects of climate change.
73. As the Court explained in *Reservations to the Genocide Convention*, “[t]he [Genocide] Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm

⁸² ILC, “Sea-level Rise in Relation to International Law: Second Issues Paper” by Patricia Galvao Teles and Juan José Ruda Santolaria, Co-Chairs of the Study Group on Sea-level Rise in Relation to International Law’ UN Doc A/CN.4/752 (19 April 2022) (Annex 40), [available here](#), para. 252(j).

⁸³ Human Rights Committee, General Comment No. 12: Article 1 (Right to Self-determination) The Right to Self-determination of Peoples, 13 March 1984 (Annex 36) [available here](#), para. 5.

and endorse the most elementary principles of morality.”⁸⁴ In this respect, the OACPS recalls that genocide is defined as

“any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group”.

74. The obligation bearing upon States to prevent the crime of genocide is codified in Articles 1 and 8 of the Genocide Convention. Pursuant to Article I of the Convention, “[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law *which they undertake to prevent* and to punish.”⁸⁵ Pursuant to Article VIII of the Genocide Convention, “[a]ny Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate *for the prevention* and suppression of acts of genocide or any of the other acts enumerated in article III”.⁸⁶
75. The Court has clarified the normative autonomy and scope of the obligation to prevent genocide. In the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the Court stressed that the obligation to prevent genocide

“is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty. It has its own scope, which extends beyond the particular case envisaged in Article VIII, namely reference to the competent organs of the United Nations, for them to take such action as they deem appropriate. Even if and when these organs have been called upon, this does not mean that the States parties to the Convention are relieved of the obligation to take such action as they can to prevent genocide from occurring,

⁸⁴ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Reports 1951, p. 15 (Annex 41) [available here](#), at 23.

⁸⁵ Convention on the Prevention and Punishment of the Crime of Genocide, 9 December, 1948, 78 UNTS 276 (Annex 42) [available here](#), Article I (emphasis added).

⁸⁶ Convention on the Prevention and Punishment of the Crime of Genocide, 9 December, 1948, 78 UNTS 276 (Annex 42) [available here](#), Article VIII (emphasis added).

while respecting the United Nations Charter and any decisions that may have been taken by its competent organs”.⁸⁷

76. In the same case, the Court clarified the contours of the obligation to prevent genocide. *First*, the Court stressed that “[t]he substantive obligations arising from Articles I and III are not on their face territorially limited. They apply to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question”.⁸⁸ *Secondly*, the Court stressed that the obligation to prevent genocide is an obligation “to employ all means reasonably available to them, so as to prevent genocide so far as possible”.⁸⁹ The obligation to prevent genocide therefore requires States to “use their capacity to influence effectively the action of persons likely to commit, or already committing genocide.” *Thirdly*, and very importantly, the Court specified that:

“it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result — averting the commission of genocide — which the efforts of only one State were insufficient to produce”⁹⁰

Finally, the Court found that the obligation to prevent genocide does not come into being only when perpetration commences, noting that such a view “would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act”. The Court therefore concluded that “a State’s obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious

⁸⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43 (Annex 20) [available here](#), para. 427.

⁸⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43 (Annex 20) [available here](#), para. 183.

⁸⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43 (Annex 20) [available here](#), para. 430.

⁹⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43 (Annex 20) [available here](#), para. 430.

risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit”.⁹¹

77. The OACPS maintains that there is a serious risk of genocide against at least two protected groups pursuant to the Genocide Convention, namely Small-Island national groups, and a racial group, namely the peoples of African descent. In the context of climate change, the risk of genocide arises from the nature of the impacts of climate change, which are existential threats, and from the discrete and disproportionate impacts of climate change on these groups, compared to all other groups. In this context, there is no need to enquire whether the genocidal intent behind greenhouse gases emissions is certain. As the Court stressed it in its judgment in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* case, “a State may be found to have violated its obligation to prevent even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way”.⁹²
78. The OACPS recalls the following observation of the UN Working Group of Experts on People of African Descent:

“The climate crisis has now become a ticking time bomb. This global emergency, characterized by global warming and climate change as a result of human decision-making, including the burning of fossil fuels and the release of excessive amounts of carbon into the environment, has already had a disproportionate impact on the lives of people of African descent. Disproportionate effects have also been reported on the African continent. Communities and even entire States that occupy and rely upon low-lying coastal lands, tundra and Arctic ice, arid lands, and other delicate ecosystems are at particular risk. Policymaking, including how States respond to the climate crisis, may strengthen the impact of the climate crisis on communities

⁹¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43 (Annex 20) [available here](#), para. 431.

⁹² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43 (Annex 20) [available here](#), para. 432.

of African descent, which often have less political and positional power locally and globally. Addressing the climate crisis requires a human rights-based approach that prioritizes the inclusion of people of African descent in decision-making at all stages, including preparedness, mitigation, response and recovery. Protection should be equal and effective”.⁹³

79. These observations are corroborated by the findings of the IPCC that are cited above and which stress that the national groups of low-lying island States and arid regions of Africa and Small Island States are the most vulnerable to the adverse effects of climate change.
80. The OACPS submits that the following consequences derive from the duty to prevent “serious risks of genocide” against these protected national and racial groups. *First*, from the duty to prevent genocide derives a duty not to commit genocide.⁹⁴ Accordingly, States that are the sources of significant emissions of greenhouse gases must refrain from contributing to such emissions. *Secondly*, they must use all the means available to them, including their regulatory powers in relation to private companies, to achieve deep cuts of their greenhouse gas emissions. In this respect, they must not wait for genocide to occur before adopting the measures available to them to prevent genocide. *Finally*, they must cooperate with the protected national groups of Small Island States and African States to take measures necessary to adapt to the adverse impacts of climate change. In any event, these actions do not remove the breach that may have already resulted from their past conduct.

⁹³ Report of the Working Group of Experts on People of African Descent, *Environmental justice, the climate crisis and people of African descent*, 21 September 2021, (A/HRC/48/78) (Annex 43) [available here](#), para. 61.

⁹⁴ In the *Bosnian Genocide* case, the Court noted that “taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article categorizes genocide as “a crime under international law”: by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described. Secondly, it follows from the expressly stated obligation to prevent the commission of acts of genocide”. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43 (Annex 20) [available here](#), para. 166.

3. Obligations arising from the prohibition of racial and gender discrimination

81. The prohibition of racial and gender discrimination are fundamental principles of contemporary international law. Both principles appear in the preamble and in Article 1 of the UN Charter. The preamble of the UN Charter reiterates the “faith (...) in the dignity and worth of the human person, in the equal rights of men and women”. Article 1, paragraph 4, of the UN Charter establishes that one of the purposes of the United Nations consists of “promoting and encouraging respect for human rights and for fundamental freedoms for all *without distinction as to race, sex, language, or religion*”. Thus, in the *Namibia* advisory opinion, the Court noted that “to establish (...), and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.”⁹⁵ Similar considerations would apply to gender discrimination, which appears, together with racial discrimination, in the preamble and article 1 of the UN Charter that listed the purposes of the United Nations. Two international conventions, namely the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)⁹⁶ and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),⁹⁷ elaborate further on the prohibition of racial and gender discrimination under the UN Charter.
82. The OACPS submits that both the prohibition of racial discrimination and that of gender discrimination are *jus cogens* norms of international law. *Concerning* the prohibition of racial discrimination, the OACPS notes that the Court has implicitly recognised its *jus cogens* character in the *Kosovo* advisory opinion.⁹⁸ The Court explained that the declaration of illegality by the Security Council of the unilateral

⁹⁵ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16 (Annex 44) [available here](#), para. 131.

⁹⁶ International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, 660 UNTS 195 (Annex 45) [available here](#).

⁹⁷ Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 UNTS 13 (Annex 46) [available here](#).

⁹⁸ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, p. 403 (Annex 29) [available here](#), para. 81.

declaration of independence of Southern Rhodesia was “connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character.” Indeed, in Resolution 216, the Security Council had called upon “all States not to recognize this illegal racist minority régime in Southern Rhodesia and to refrain from rendering any assistance to this illegal régime.”⁹⁹ The prohibition of racial discrimination, as a *jus cogens* norm, was therefore at the core of the decision of the Security Council to call upon States not to recognise the declaration of independence of Southern Rhodesia. In addition, the prohibition of racial discrimination, together with that of apartheid, appears on the illustrative list of the International Law Commission on rules of *jus cogens*.¹⁰⁰ Furthermore, the Court acknowledged that the prohibition of racial discrimination generates *erga omnes obligations* in the *Barcelona Traction* case.¹⁰¹

83. With respect to the prohibition of gender discrimination, the OACPS notes that, in the same manner that a treaty to implement a policy of racial discrimination would be null and void due to its contradiction with *jus cogens* rules, a treaty allowing a policy of gender discrimination would be equally null and void for the same reasons.¹⁰² The case law of the Inter-American Court of Human Rights supports the view that the prohibition of gender discrimination, as part of a broader principle of non-discrimination, has a *jus cogens* character.¹⁰³ The Inter-

⁹⁹ Security Council Resolution 216 (1965) (12 November 1965) (Annex 47) [available here](#).

¹⁰⁰ Dire Tladi, “Fourth Report of the Special Rapporteur on Peremptory Norms of General International Law (Jus Cogens)”, 31 January 2019, UN Doc A/CN.4/727 (Annex 38) [available here](#), paras 91-101.

¹⁰¹ *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 1970, p. 3 (Annex 48) [available here](#), para. 34 (considering that “obligations *erga omnes* derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”).

¹⁰² See H. Charlesworth, C. Chinkin, “The Gender of Jus Cogens” (1993) 15 Human Rights Quarterly 63 (Annex 49) (enclosed)

¹⁰³ *Yatama v. Nicaragua, Judgment (Preliminary objections, merits, reparations and costs)*, Inter-American Court of Human Rights, 23 June 2005, Series C, No. 127 (Annex 50) [available here](#), para. 184; *Servellón-García et al. v. Honduras, Judgment (Merits, reparations and costs)*, Inter-American Court of Human Rights, 21 September 2006, Series C, No. 152 (Annex 51) [available here](#), para. 94; *Expelled Dominicans and Haitians v. Dominican Republic, Judgment (Preliminary objections, merits, reparations and costs)*, Inter-American Court of Human Rights, 28 August 2014, Series C, No. 282 (Annex 52) [available here](#), para. 264; *Veliz Franco et al. v. Guatemala, Judgment (Preliminary objections, merits, reparations and costs)*, Inter-American Court of Human Rights, 19 May 2014, Series C, No. 277 (Annex 53) [available here](#), para. 205.

American Court of Human Rights explained the rationale behind the *jus cogens* character of the principle of equality and non-discrimination as follows:

“Regarding the principle of equality before the law and non-discrimination, the Court has indicated that ‘the notion of equality springs directly from the oneness of the human family, and is linked to the essential dignity of the individual.’ Thus, any situation is incompatible with this concept that, by considering one group superior to another group, leads to treating it in a privileged way; or, inversely, by considering a given group to be inferior, treats it with hostility or otherwise subjects it to discrimination in the enjoyment of rights that are accorded to those who are not so classified. The Court’s case law has also indicated that, at the current stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the sphere of *jus cogens*. It constitutes the foundation for the legal framework of national and international public order and permeates the whole legal system.”¹⁰⁴

84. The OACPS submits that States’ obligations to eliminate racial and gender discrimination extends to the disproportional impacts of climate change on the populations and groups of OACPS members. *First*, States have the duty to promote racial and gender equality, and to prevent breaches of the prohibition of racial and gender discrimination by tackling climate change and its adverse effects on groups and individuals disproportionately affected by such effects. The OACPS recalls that a difference of treatment, which is neutral on its face, may still fall under the *jus cogens* prohibition of racial and gender discrimination when it causes a disproportional impact on a specific person or group distinguished by race, colour, descent, national or ethnic origin or gender. Concerning particularly racial discrimination, the Court found that

“[a]ny measure whose purpose is a differentiation of treatment based on a prohibited ground under Article 1, paragraph 1, constitutes an act of racial discrimination under the Convention. (...) [R]acial discrimination may result from a measure which is neutral on its face, but whose effects show that it is “based on” a prohibited ground. This is the case where convincing evidence demonstrates that a measure, despite being apparently neutral, produces a disparate adverse effect on the rights of a person or a group distinguished by race, colour, descent, or national or ethnic origin, unless such an effect can be explained in a way that does not relate to the prohibited grounds in Article 1,

¹⁰⁴ *Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile*, Judgment (Merits, reparations and costs), Inter-American Court of Human Rights, 29 May 2014, Series C, No. 279 (Annex 54) [available here](#), para. 197.

paragraph 1. Mere collateral or secondary effects on persons who are distinguished by one of the prohibited grounds do not, in and of themselves, constitute racial discrimination within the meaning of the Convention.”¹⁰⁵

85. Concerning peoples of African descent, the Working Group of Experts on People of African Descent explained that:

“The climate crisis has now become a ticking time bomb. This global emergency, characterized by global warming and climate change as a result of human decision-making, including the burning of fossil fuels and the release of excessive amounts of carbon into the environment, has already had a disproportionate impact on the lives of people of African descent. Disproportionate effects have also been reported on the African continent. Communities and even entire States that occupy and rely upon low-lying coastal lands, tundra and Arctic ice, arid lands, and other delicate ecosystems are at particular risk. Policymaking, including how States respond to the climate crisis, may strengthen the impact of the climate crisis on communities of African descent, which often have less political and positional power locally and globally. Addressing the climate crisis requires a human rights-based approach that prioritizes the inclusion of people of African descent in decision-making at all stages, including preparedness, mitigation, response and recovery. Protection should be equal and effective”.¹⁰⁶

86. For its part, the Committee on the Elimination of Discrimination against Women observed that “[w]omen, girls, men and boys are affected differently by climate change and disasters, with many women and girls experiencing greater risks, burdens and impacts”, noting that “[a]s a result of those inequalities, women and girls are more likely to be exposed to disaster-induced risks and losses relating to their livelihoods, and they are less able to adapt to changes in climatic conditions.”¹⁰⁷

¹⁰⁵ *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, 31 January 2024 (Annex 55) [available here](#), para. 196 ; see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Preliminary Objections, Judgment, I.C.J. Reports 2021, p. 71 (Annex 56) [available here](#), para. 112.

¹⁰⁶ Report of the Working Group of Experts on People of African Descent, *Environmental justice, the climate crisis and people of African descent*, 21 September 2021, (A/HRC/48/78) (Annex 43) [available here](#), para. 61.

¹⁰⁷ Committee on the Elimination of Discrimination against Women, *General recommendation No. 37 (2018) on the gender-related dimensions of disaster risk reduction in the context of climate change* (CEDAW/C/GC/37) (Annex 57) [available here](#), paras. 2 and 3.

87. The OACPS submits therefore that that the prohibition of gender and racial discrimination imposes specific obligations on States with respect to climate change. In the words of the Committee on the Elimination of Discrimination against Women, “[a]ny mitigation or adaptation measures should be designed and implemented in accordance with the human rights principles of substantive equality and non-discrimination, participation and empowerment, accountability and access to justice, transparency and the rule of law.”¹⁰⁸ In addition, States have an obligation to significantly reduce greenhouse gas emissions, which would avoid the burden of climate change to first exist, and subsequently to be borne disproportionately by women and peoples of African descent. The OACPS recalls that Article 2, paragraph 3 (c), of the International Convention on the Elimination of All Forms of Racial Discrimination provides that “[e]ach State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.” The OACPS also recalls that, pursuant to Article 14 of the Convention for the Elimination of All Forms of Discrimination against Women, “States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas”.
89. In sum, international human rights law obliges States to address discrimination that is intentional or effectuated through facially neutral policies. They must reform any laws or practices that create or perpetuate environmental or climate-related racism. ICERD also requires adopting affirmative measures to ensure substantive equality for racially marginalised groups in the face of climate impacts. Discrimination based on intersections between race and other characteristics like gender, disability, or indigenous status must also be remedied

¹⁰⁸ Committee on the Elimination of Discrimination against Women, *General recommendation No. 37 (2018) on the gender-related dimensions of disaster risk reduction in the context of climate change* (CEDAW/C/GC/37) (Annex 57) [available here](#), para. 14.

under other international human rights instruments. As explained by Professor Achiume in her Expert Report:

“Within the context of the global ecological crisis, for States to meet their non-discrimination obligations they must protect racially and ethnically marginalized communities and individuals, from the adverse impacts of climate change and ensure that they do not face discrimination in claiming their human rights”¹⁰⁹

Her analysis focuses on:

“States’ racial equality and non-discrimination obligations under international law, with particular focus on the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination. It should be noted, however, that non-discrimination and equality obligations are enshrined across many other international human rights treaties, including the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities.”¹¹⁰

90. The conduct responsible for climate change contravenes these obligations and triggers legal consequences, as discussed Section IV of this Written Statement.

4. Obligations arising from the duty to cooperate in good faith

91. The OACPS submits that all States have a general duty under international law to cooperate in good faith to address the global challenges facing the international community, such as climate change. The duty to cooperate is one of the fundamental principles concerning friendly relations and cooperation among States in accordance with the UN Charter. Article 1, paragraph 3, of the UN Charter provides that one of the purposes of the United Nations is “to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.” Resolution 2625 (XXV) of the General

¹⁰⁹ Racial Equality and Racial Non-Discrimination Obligations of State in Respect of Climate Change. Expert Report of Professor E. Tendayi Achiume, March 2024 (Appendix B) (enclosed), para. 20.

¹¹⁰ Racial Equality and Racial Non-Discrimination Obligations of State in Respect of Climate Change. Expert Report of Professor E. Tendayi Achiume, March 2024 (Appendix B) (enclosed), para. 20.

Assembly, which elaborates further on the principles of international law contained in the Charter, emphasises that

“States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation.”

92. Accordingly, the OACPS stresses that States have a duty to cooperate with each other to address the causes – including anthropogenic GHG emissions but also the production of fossil fuels – and adverse impacts of climate change. Cooperating to address the causes and adverse impacts of climate change, as an existential threat to humankind as a whole, is by its very nature, cooperation “in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation”. Indeed, the adverse impacts of climate change on the maintenance of international peace and security as well as on the general welfare of nations are well documented (see Sections II and III of this Written Statement).
93. The OACPS notes that the obligation of States to cooperate in accordance with the UN Charter is not a simple obligation to cooperate but an obligation to achieve a specific result, following the distinction that the Court made in the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion.¹¹¹ Paraphrasing the finding of the Court in this respect, the legal import of the obligation to cooperate to ensure that international peace and security, international economic stability and progress, and the general welfare of nations are not endangered by climate change goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result – the significant reduction of greenhouse gases to avert the adverse impacts of climate change – by adopting a particular course of conduct, namely the pursuit of negotiations in good faith.¹¹²

¹¹¹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226 (Annex 3) [available here](#), para. 99.

¹¹² *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226 (Annex 3) [available here](#), para. 99.

94. The OACPS stresses that the duty to negotiate in good faith measures to achieve deep reductions of anthropogenic GHG emissions, to adapt to the adverse effects of climate change and to avert, minimise and address loss and damage amounts to an obligation to achieve a precise result. From the case law of the Court relating to negotiation in good faith to achieve a concrete result, States are required to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation. They are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when some States or groups of States insist upon their own position without contemplating any modification of it.¹¹³ During the negotiations, they shall pay special regards to the rights and interests of other parties.¹¹⁴ According to an arbitral tribunal, “good faith as properly to be understood” requires “sustained upkeep of the negotiations over a period appropriate to the circumstances; awareness of the interests of the other party; and a persevering quest for an acceptable compromise”.¹¹⁵
95. Conversely, the principle of good faith calls upon States to abstain from conduct that is known to frustrate the negotiations or to make the prospect of an agreement impossible. For instance, supporting financially or through administrative measures the emissions of greenhouse gases is antithetic to States’ duty to negotiate in good faith to address the problem climate change, when it is known that the reduction in anthropogenic GHG emissions is the very objective of the negotiations. Legitimate doubts can be raised as to whether States are negotiating in good faith when one looks at the UNEP’s Production Gap Report 2023:

“the increases estimated under the government plans and projections pathways would lead to global production levels in 2030 that are 460%, 29%, and 82% higher for coal, oil, and gas, respectively, than the median 1.5°C-consistent pathways ... The disconnect between governments’ fossil fuel production plans

¹¹³ *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3 (Annex 58) [available here](#), para. 85.

¹¹⁴ *Fisheries Jurisdiction (Federal Republic of Germany v. Zeeland)*, Merits, Judgment, I.C.J. Reports 1974, p. 175 (Annex 59) [available here](#), para. 69.

¹¹⁵ *Government of Kuwait/The American Independent Oil Company (AMINOIL)*, arbitral award, (24 March 1982) (Annex 60) [available here](#), para 70.

and their climate pledges is also apparent across all three fuels.”¹¹⁶

5. Obligations arising from the duty to exercise due diligence

96. The OACPS submits that States have under international law the obligation to exercise due diligence over activities occurring in their territories or control that risk to impact adversely the rights and interests of third States and the environment in areas beyond State jurisdiction, such as greenhouse gas emissions.
97. The duty of due diligence is a corollary of the principle of the territorial sovereignty which international law recognises to all States. As the sole arbitrator in the *Island of Palmas/Miangas (Netherlands/United States)* explained it:

“Territorial sovereignty (...) involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty. Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian.”¹¹⁷

98. The duty to exercise due diligence is therefore a duty that is inherent to the modern system of international relations that is structured around sovereign States. One cannot exist without the other. The operation of the duty of due diligence was recognised in a specifically environmental context as early as 1941, in the award rendered in the *Trail Smelter Arbitration* according to which: “[i]nternational decisions, in various matters, from the Alabama case onward, *and also earlier ones*,” endorsed the rule that “[a] State owes at all times a duty to

¹¹⁶ United Nations Environment Programme, *Production Gap Report 2023: Phasing down or phasing up? Top fossil fuel producers plan even more extraction despite climate promises* (Annex 61) [available here](#), pp. 4-5.

¹¹⁷ *Island of Palmas/Miangas case (Netherlands v. United States of America)*, PCA, Award of the Tribunal (April 1928) II Reports of International Arbitral Awards 829-871 (Annex 62) [available here](#), at p. 839

protect other States against injurious acts by individuals from within its jurisdiction”.¹¹⁸

99. The obligation to exercise due diligence has a wide scope of application and requires that States adopt all the measures available to them to ensure that activities within their territories do not cause damage to the rights of third States and to the climate system as a whole. *First*, the principle of due diligence applies to all activities occurring in a State’s territory or under its control, including the greenhouse gas emissions by private actors and State measures supporting such emissions. *Secondly*, the principle of due diligence protects not only State rights and interests, but also the environment in areas beyond national jurisdiction. In the *Legality of the Threat or use of Nuclear Weapons*, the Court clarified that “[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.”¹¹⁹ *Thirdly*, the duty of diligence calls for the adoption and proactive enforcement of all “appropriate measures”¹²⁰ available to a State that may serve to protect the right and interests protected by international law, including the rights of third States and the environment.
100. The OACPS submits that, given the existential threat posed by climate change, the duty of due diligence sets a stringent standard against which the conduct of States over time must be assessed. The OACPS invites the Court to affirm that, in principle, the conduct over time that has caused climate change constitutes a

¹¹⁸ *Trail Smelter Arbitration (United States/Canada)* (11 March 1941) III Reports of International Arbitral Awards 1905-1982 (Annex 63) [available here](#), at p. 1963.

¹¹⁹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226 (Annex 3) [available here](#), para. 29.

¹²⁰ *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, Advisory Opinion of 1 February 2011, ITLOS Case No. 17 (Annex 64) [available here](#), para. 131 (explaining that: “Having established that under the Nodules Regulations and the Sulphides Regulations, both sponsoring States and the Authority are under an obligation to apply the precautionary approach in respect of activities in the Area, it is appropriate to point out that *the precautionary approach is also an integral part of the general obligation of due diligence of sponsoring States, which is applicable even outside the scope of the Regulations. The due diligence obligation of the sponsoring States requires them to take all appropriate measures to prevent damage that might result from the activities of contractors that they sponsor. This obligation applies in situations where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks. A sponsoring State would not meet its obligation of due diligence if it disregarded those risks. Such disregard would amount to a failure to comply with the precautionary approach*”) (italics added).

breach of the duty to exercise due diligence in the prevention of significant harm to the climate system and other parts of the environment.

6. Obligations arising from the duty to prevent significant harm to the environment, and the climate system as a part thereof

101. The duty to prevent significant harm to the environment, including the climate system, originates from the more general duty of due diligence applicable under general international law.¹²¹ Accordingly, the duty to prevent significant harm to the environment is an “obligation of conduct and not an obligation of result”.¹²² The duty to prevent significant harm to the environment has been repeatedly recognised by the Court as a rule of customary international law.¹²³ It protects the environment as such, whether of other States or of areas beyond national jurisdiction.¹²⁴ Pursuant to the duty to prevent significant harm to the environment, a State is thus obliged to use all the means at its disposal in order to ensure that activities which take place in its territory, or in any area under its

¹²¹ *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)*, Judgment, I.C.J. Reports 2022, p. 614 (Annex 65) [available here](#), para. 99.

¹²² *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)*, Judgment, I.C.J. Reports 2022, p. 614 (Annex 65) [available here](#), para. 83 (stressing that “[t]he Parties also agree that the obligation to prevent transboundary harm is an obligation of conduct and not an obligation of result”).

¹²³ The Court has reiterated in several cases that the duty to prevent significant transboundary harm to the environment has a customary international law character. *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I. C. J. Reports 1997, p. 7 (Annex 66) [available here](#), para. 140; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14 (Annex 67) [available here](#), para. 101; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015 (II), p. 665 (Annex 68) [available here](#), para. 104; *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)*, Judgment, I.C.J. Reports 2022, p. 614 (Annex 65) [available here](#), paras. 83 and p. 648, para. 99.

¹²⁴ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226 (Annex 3) [available here](#), paras. 29-28; *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015, ITLOS Case No 21 (Annex 69) [available here](#), paras. 111, 120; *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean* ITLOS Case No. 23, Order of 25 April 2015 (Provisional Measures) (Annex 70) [available here](#), para 68-73; *In the matter of the South China Sea Arbitration before and Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea*, PCA Case No. 2013-19, Award (12 July 2016) (Annex 71) [available here](#), para 927; *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russian Federation)*, PCA Case No. 2017-06, Award concerning the preliminary objections of the Russian Federation (21 February 2020) (Annex 72) [available here](#), para. 295.

jurisdiction or control, do not cause significant harm to the environment or a part thereof, such as the climate system.¹²⁵

102. The OACPS submits that the obligation to prevent significant harm to the environment applies to the climate system as a whole, and to its various components. The climate system is at the same time part of the “environment” of other States and “of areas beyond the limits of national jurisdiction”. As defined by Article 1 (3) of the UNFCCC, the term of “climate system” refers to “the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions”. This is consistent with its scientific understanding, which does not depend on the applicability of the UNFCCC. The IPCC, in a more detailed manner, explains that the global climate system consists of “five major components: the *atmosphere*, the *hydrosphere*, the *cryosphere*, the *lithosphere* and the *biosphere* and the interactions between them”.¹²⁶
103. The OACPS maintains that the conduct of States with large GHG emissions has already resulted in “significant” harm to the climate system and other parts of the environment.¹²⁷ Accordingly, such States have both a duty to take and proactively enforce all the necessary measures to prevent additional harm and the obligation to repair the harm already caused in breach of this obligation. The Court’s case law suggests that three factors should be taken into account when assessing the existence of the risk of significant harm that calls for exercising the duty to prevention, namely (i) the nature or (ii) the magnitude of the activities concerned and (iii) the context of implementation of the relevant activity.¹²⁸ In relation to these three criteria, the OACPS notes that the emission of greenhouse gases

¹²⁵ *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)*, Judgment, I.C.J. Reports 2022, p. 614 (Annex 65) [available here](#), para. 99. *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14 (Annex 67) [available here](#), para. 101 ; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996 (I), p. 226 (Annex 3) [available here](#), para. 29; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015 (II), p. 665 (Annex 68) [available here](#), para. 104.

¹²⁶ IPCC Glossary (Annex 30) [available here](#) (italics original)

¹²⁷ See Section II of this Written Statement.

¹²⁸ *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)*, Judgment, I.C.J. Reports 2022, p. 614 (Annex 65) [available here](#), para. 126. See also, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015 (II), p. 665 (Annex 68) [available here](#), para. 155.

severely affects the climate system and its different components and that their adverse impacts cannot by their very nature be circumscribed to the territory of the emitting State. Rather, they cause an existential threat to humanity as whole while laying the most hardship on peoples already made vulnerable by historical crimes, such as slavery and colonialism. In addition, the magnitude of the emission of greenhouse gases should be assessed taking into account the level of greenhouse gases already accumulated in the climate system. As the IPCC's Synthesis Report of 2023 stresses, "[c]ontinued emissions will further affect all major climate system components. With every additional increment of global warming, changes in extremes continue to become larger".¹²⁹ Furthermore:

"Some future changes are unavoidable and/or irreversible but can be limited by deep, rapid and sustained global greenhouse gas emissions reduction. The likelihood of abrupt and/or irreversible changes increases with higher global warming levels. Similarly, the probability of low-likelihood outcomes associated with potentially very large adverse impacts increases with higher global warming levels".¹³⁰

104. Accordingly, the OACPS submits that States must, pursuant to the duty to prevent significant harm to the climate system, use all legislative, administrative and other means at their disposal to achieve deep cuts of their greenhouse gas emissions. In any event, the significant harm already caused constitutes a breach of this obligation and triggers the legal consequences of cessation and reparation described in the general international law of State responsibility.

7. Obligations arising from the duty to protect and preserve the marine environment

105. The OACPS submits that States have the obligation to protect and preserve the marine environment from the conduct responsible for the interference with the climate system and other parts of the environment. This obligation is codified in Article 192 of the 1982 UN Convention on the Law of the Sea, which states the general obligation that "States have the obligation to protect and preserve the marine environment." The Court has recognised the customary international law

¹²⁹ IPCC, Synthesis Report of the IPCC: Synthesis Report of the IPCC Sixth Assessment Report (2023) (Annex 19) [available here](#), Summary for Policymakers, statement B.1.3.

¹³⁰ IPCC, Synthesis Report of the IPCC: Synthesis Report of the IPCC Sixth Assessment Report (2023) (Annex 19) [available here](#), Summary for Policymakers, statement B.3.

character of this obligation in the *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)* case.¹³¹ In addition, the obligation to protect and preserve the marine environment is an *erga omnes* obligation.¹³² The term “marine environment” in this respect is understood broadly, as encompassing “the marine environment in all maritime areas, both inside the national jurisdiction of States and beyond it”¹³³ as well as both living and non-living resources.¹³⁴

106. The obligation to protect and preserve the marine environment entails both a positive obligation to protect and preserve the marine environment and a negative obligation not to degrade it. According to the arbitral tribunal in the *South China Sea Arbitration*:

“This ‘general obligation’ extends both to “protection” of the marine environment from future damage and “preservation” in the sense of maintaining or improving its present condition. Article 192 thus entails the positive obligation to take active measures to protect and preserve the marine environment, and by logical implication, entails the negative obligation not to degrade the marine environment. ”.¹³⁵

In addition, the obligation to protect and preserve the marine environment should be read in light of the entire corpus of international law. As the arbitral tribunal stressed in the *South China Sea Arbitration*, the “corpus of international law relating to the environment (...) informs the content of the general obligation in Article 192” and “requires that States ‘ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control.’ Thus, States have a positive ‘duty to prevent, or at least mitigate’

¹³¹ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2022, p. 266 (Annex 73) [available here](#), para. 95.

¹³² *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, Advisory Opinion of 1 February 2011, ITLOS Case No. 17 (Annex 64) [available here](#), para. 180.

¹³³ *In the matter of the South China Sea Arbitration before and Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea*, PCA Case No. 2013-19, Award (12 July 2016) (Annex 71) [available here](#), para. 940.

¹³⁴ *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p. 280 (Annex 74) [available here](#), at p. 295, para. 70 (stressing that “the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment”).

¹³⁵ *In the matter of the South China Sea Arbitration before and Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea*, PCA Case No. 2013-19, Award (12 July 2016) (Annex 71) [available here](#), para 941.

significant harm to the environment when pursuing large-scale construction activities.”¹³⁶

107. Article 192, as a general obligation that opens Part XII of UNCLOS on the protection and the preservation of the marine environment covers a larger scope than other more specific obligations contained in other provisions of Part XII, which implement it.¹³⁷ For example, such is the case of Article 194 of UNCLOS concerning the measures to prevent, reduce and control pollution of the marine environment.
108. The OACPS maintains that States have an obligation to protect and preserve the marine environment, which is a component of the climate system. Article 1(3) of the UNFCCC defines the climate system as: “the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions”. The hydrosphere is characterised in the IPCC Glossary as “[t]he component of the climate system comprising liquid surface and subterranean water, such as in oceans, seas, rivers, freshwater lakes, underground water, wetlands”.¹³⁸ The marine environment is clearly part of the hydrosphere, and also of other components of the climate system, such as the biosphere.
109. The conduct responsible for climate change and its adverse effects has already caused harm to the marine environment of a magnitude that far exceeds the threshold of significant harm, especially through increased ocean temperatures, acidification, deoxygenation and sea level rise. In the *2023 Climate Change Synthesis Report*, the IPCC noted that “[g]lobal mean sea level increased by 0.20 [0.15 to 0.25] m between 1901 and 2018. The average rate of sea level rise was 1.3 [0.6 to 2.1] mm yr⁻¹ between 1901 and 1971, increasing to 1.9 [0.8 to 2.9] mm yr⁻¹ between 1971 and 2006, and further increasing to 3.7 [3.2 to 4.2] mm

¹³⁶ *In the matter of the South China Sea Arbitration before and Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea*, PCA Case No. 2013-19, Award (12 July 2016) (Annex 71) [available here](#), para. 941.

¹³⁷ *In the matter of the South China Sea Arbitration before and Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea*, PCA Case No. 2013-19, Award (12 July 2016) (Annex 71) [available here](#), para 942.

¹³⁸ IPCC Glossary (Annex 30) [available here](#)

yr-1 between 2006 and 2018 (high confidence).”¹³⁹ It also noted that “[c]limate change has caused substantial damages, and increasingly irreversible losses, in terrestrial, freshwater, cryospheric, and coastal and open ocean ecosystems (*high confidence*). Hundreds of local losses of species have been driven by increases in the magnitude of heat extremes (*high confidence*) with mass mortality events recorded on land and in the ocean (*very high confidence*).”¹⁴⁰ Furthermore, “[o]cean warming and ocean acidification have adversely affected food production from fisheries and shellfish aquaculture in some oceanic regions (high confidence)”.¹⁴¹

110. The adverse effects of climate change on the marine environment will dramatically increase if States do not engage in a profound and immediate reduction of their greenhouse gas emissions. According to the IPCC, “[c]ontinued emissions will further affect all major climate system components [...] projected changes include further reduced extents and/or volumes of almost all cryospheric elements (*high confidence*), further global mean sea level rise (*virtually certain*), and increased ocean acidification (*virtually certain*) and deoxygenation (*high confidence*).”¹⁴² Furthermore, the IPCC highlighted that “[d]ue to relative sea level rise, current 1-in-100 year extreme sea level events are projected to occur at least annually in more than half of all tide gauge locations by 2100 under all considered scenarios (*high confidence*). Other projected regional changes include intensification of tropical cyclones and/or extratropical storms (*medium confidence*), and increases in aridity and fire weather (*medium to high confidence*).”¹⁴³

111. The OACPS submits that, pursuant to their obligation to protect and preserve the marine environment, States are required to profoundly and immediately reduce

¹³⁹ IPCC, Synthesis Report of the IPCC: Synthesis Report of the IPCC Sixth Assessment Report (2023) (Annex 19) [available here](#), Summary for Policymakers, statement A2.1.

¹⁴⁰ IPCC, Synthesis Report of the IPCC: Synthesis Report of the IPCC Sixth Assessment Report (2023) (Annex 19) [available here](#), Summary for Policymakers, statement A. 2.3.

¹⁴¹ IPCC, Synthesis Report of the IPCC: Synthesis Report of the IPCC Sixth Assessment Report (2023) (Annex 19) [available here](#), Summary for Policymakers, statement A 2. 4.

¹⁴² IPCC, Synthesis Report of the IPCC: Synthesis Report of the IPCC Sixth Assessment Report (2023) (Annex 19) [available here](#), Summary for Policymakers, statement B.1.3.

¹⁴³ IPCC, *Synthesis Report of the IPCC Sixth Assessment Report (AR6)*, Summary for Policymakers, statement B.1.4, available at: <https://www.ipcc.ch/report/sixth-assessment-report-cycle/>

their greenhouse gas emissions to prevent further ocean pollution, warming and sea level rise. In addition, they must take all the measures necessary to allow the marine environment to adapt to the adverse effects of climate change and to make it more resilient. The OACPS submits that the conduct of States that is at stake in the present proceedings constitutes a breach of these obligations, triggering legal consequences.

8. Obligations arising from the duty to respect human rights

112. Pursuant to Article 1, paragraph 3, of the UN Charter, one of the purposes of the United Nations is “to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”. Article 55 of the UN Charter further stipulates that “[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”.
113. The OACPS notes that, the UN General Assembly adopted unanimously the Universal Declaration on Human Rights,¹⁴⁴ as a core component of what, together with the International Covenants on Civil and Political Rights¹⁴⁵ and on Economic, Social and Cultural Rights¹⁴⁶, became known as the International Bill of Rights. In adopting the Universal Declaration of Human Rights, the General Assembly proclaimed

“this Universal Declaration of Human Rights as a *common standard of achievement for all peoples and all nations*, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and

¹⁴⁴ UN General Assembly Resolution 217 A(III): Universal Declaration of Human Rights, 10 December 1948 (Annex 75) [available here](#).

¹⁴⁵ International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (Annex 76) [available here](#).

¹⁴⁶ International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 (Annex 77) [available here](#).

education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.”¹⁴⁷

114. In the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion, the Court clarified that:

“General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character.”¹⁴⁸

115. The OACPS submits that the Universal Declaration of Human Rights has a customary international law character in view of its content (which declares rights), the conditions of its adoption (unanimity), and the *opinio juris* as to its normative character. The OACPS notes that the Court has endorsed this view when it held, in the *Diplomatic and Consular Staff (United States v. Iran)* case, that “[w]rongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself *manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights*.”¹⁴⁹

116. Moreover, the Universal Declaration of Human Rights must be understood as an authentic interpretation of the UN Charter itself, fleshing out the dense core of provisions in the Charter which affirm the respect for human rights. Article 31(3)(a)-(b) of the Vienna Convention on the Law of Treaties codifies a customary rule requiring the interpreter of a treaty “to take into account, together with the context” of a treaty “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” and “any

¹⁴⁷ See UN General Assembly Resolution 217 A(III): Universal Declaration of Human Rights, 10 December 1948 (Annex 75) [available here](#).

¹⁴⁸ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996 (I), p. 226 (Annex 3) [available here](#), para. 70.

¹⁴⁹ *United States Diplomatic and Consular Staff in Tehran*, Judgment, I. C. J. Reports 1980, p. 3 (Annex 78) [available here](#), para. 91, (emphasis added).

subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”.¹⁵⁰

117. The human rights that were protected by the Universal Declaration of Human Rights have subsequently been detailed in several human rights treaties, the large majority of which were adopted by the UN General Assembly and opened for signature by States. Although some of these treaties have been subject to reservations and interpretative declarations, they leave unaffected the legal authority of the rights contained in the UN Declaration of Human Rights, the “fundamental principles” of which reflects customary international human rights law.
118. In the developments below, the OACPS elaborates on States’ obligations with respect to climate change that arise from human rights. As a preliminary remark, the OACPS notes that the obligation to respect human rights covers three distinct obligations, namely the obligations of States to respect, protect and fulfil human rights, both in their territory and abroad if the victim or the source of harm is under the State’s effective control.¹⁵¹ In addition, the Universal Declaration of Human

¹⁵⁰ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (Annex 79) [available here](#), art. 31(3)(a)-(b).

¹⁵¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory, ICJ Reports 2004, p. 136 (Annex 1) [available here](#), paras. 108–113; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order of 15 October 2008, ICJ Reports 2008, p. 353 (Annex 80) [available here](#), para. 109 ; *Delia Saldias de Lopez v. Uruguay*, HRC Communication no. 52/1979 (29 July 1981) (Annex 81) [available here](#), paras. 12.1 and 12.3; *Association pour la sauvegarde de la paix au Burundi v. Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia*, Communication no. 157/96 (29 May 2003) (Annex 82) [available here](#), para. 75; *Al-Skeini and Others v UK*, ECtHR Application no. 55721/07 (7 July 2011) (Annex 83) [available here](#), paras. 130-140; *Alejandre and Others v. Cuba* (1999), IACCommHR Case 11.589, Report no. 86/99 (Annex 84) [available here](#), paras. 23–25. This also includes situations where the State has effective control only over the source of harm: *Advisory Opinion OC-23/17 of November 15, 2017, requested by the Republic of Colombia: The Environment and Human Rights (State obligations in relation to the environment within the framework of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4.1 and 5.1 in relation with Articles 1.1 and 2 of the American Convention on Human Rights)* (Annex 85) [available here](#), paras. 101-102; *Basem Ahmed Issa Yassin v Canada*, HRC Communication no. 2285/2013 (26 July 2017) (Annex 86) [available here](#), paras 6.5-6.7; Concluding Observations on the Sixth Periodic Report of Germany adopted by the Committee at its 106th Session (15 October–2 November 2012) CCPR/C/DEU/CO/6, (12 November 2012) (Annex 87) [available here](#), para. 16; Human Rights Committee, General comment No. 36 on article 6: right to life, (3 September 2019) CCPR/C/GC/36 (Annex 88) [available here](#), paras. 21-22; General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017, E/C.12/GC/24 (Annex 89) [available here](#), paras. 31-33; General Comment No. 15: The Right to Water (arts. 11 and 12 of the International Covenant on Economic Social and Cultural Rights), E/C.12/2002/11, 20 January 2003 (Annex 90) [available here](#), paragraphs 31-34; General Comment No. 18: The Right to Work, E/C.12/GC/18, 6 February 2006 (Annex 91) [available here](#), para. 30; General Comment No. 14: The Right to the Highest Attainable Standard of Health (article 12 of

Rights conceives them as universal, indivisible, interdependent and interrelated. In the context of environmental protection, it has been specifically accepted that jurisdiction has to be interpreted broadly to cover any person that could be affected by a State's conduct, including persons outside the State's territory. In the advisory opinion on *Human Rights and the Environment*, the Inter-American Court of Human Rights held, in a long excerpt that is worth quoting in full, that:

101. The obligations to respect and to ensure human rights require that States abstain from preventing or hindering other States Parties from complying with the obligations derived from the Convention (...). Activities undertaken within the jurisdiction of a State Party should not deprive another State of the ability to ensure that the persons within its jurisdiction may enjoy and exercise their rights under the Convention. The Court considers that States have the obligation to avoid transboundary environmental damage that can affect the human rights of individuals outside their territory. **For the purposes of the American Convention, when transboundary damage occurs that effects treaty-based rights, it is understood that the persons whose rights have been violated are under the jurisdiction of the State of origin, if there is a causal link between the act that originated in its territory and the infringement of the human rights of persons outside its territory.**

102. In cases of transboundary damage, **the exercise of jurisdiction by a State of origin is based on the understanding that it is the State in whose territory or under whose jurisdiction the activities were carried out that has the effective control over them and is in a position to prevent them from causing transboundary harm that impacts the enjoyment of human rights of persons outside its territory. The potential victims of the negative consequences of such activities are under the jurisdiction of the State of origin for the purposes of the possible responsibility of that State for failing to comply with its obligation to prevent transboundary damage.** That said, not every negative impact gives rise to this responsibility. The limits and characteristics of this obligation are explained in greater detail in Chapter VIII of this Opinion.

103. Accordingly, it can be concluded that the obligation to prevent transboundary environmental damage or harm is an obligation recognized by international environmental law, under which States may be held responsible for any significant damage caused to persons outside their borders by activities

the International Covenant on Economic Social and Cultural Rights), E/C.12/2000/4, 11 August 2000 (Annex 92) [available here](#), para. 39; General Comment 8: The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights, UN Doc. E/C.12/1997/8, 12 December 1997 (Annex 93) [available here](#), paras. 11–14.

originating in their territory or under their effective control or authority. It is important to stress that this obligation does not depend on the lawful or unlawful nature of the conduct that generates the damage, because States must provide prompt, adequate and effective redress to the persons and States that are victims of transboundary harm resulting from activities carried out in their territory or under their jurisdiction, even if the action which caused this damage is not prohibited by international law. That said, there must always be a causal link between the damage caused and the act or omission of the State of origin in relation to activities in its territory or under its jurisdiction or control”.¹⁵²

119. The OACPS submits that the conduct responsible for climate change has an adverse impact on all the fundamental obligations arising from human rights. The Special Rapporteur on *Human rights in the context of climate change* noted that “[t]hroughout the world, the rights of people are being denied as a consequence of climate change. This includes a denial of the rights to, inter alia, life, health, food, development, self-determination, water and sanitation, work, adequate housing and freedom from violence, sexual exploitation, trafficking and slavery.”¹⁵³ In an important Joint Statement on “Human Rights and Climate Change”, five human rights treaty bodies specifically stated that States must reduce their GHG emissions displaying their “highest possible ambition”, including by means of “phasing out fossil fuels”, holding private actors “accountable for harm they generate both domestically and extraterritorially” and “discontinuing financial incentives or investments in activities and infrastructure that are not consistent with low greenhouse gas emissions pathways”.¹⁵⁴

¹⁵² *Advisory Opinion OC-23/17 of November 15, 2017, requested by the Republic of Colombia: The Environment and Human Rights (State obligations in relation to the environment within the framework of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4.1 and 5.1 in relation with Articles 1.1 and 2 of the American Convention on Human Rights)* (Annex 85) [available here](#), paras. 101-10 (emphasis added). See also, Committee on the Rights of the Child, *Chiara Sacchi et. al. v. Argentina, Brazil, France, and Germany* (Communication Nos. 104-107/2019, CRC/C/88/D/104/2019, CRC/C/88/D/105/2019, CRC/C/88/D/106/2019, CRC/C/88/D/107/2019), 11 November 2021 (Annex 94) [available here](#), para. 10.7 (where the Committee sought to adapt the relevant approach to jurisdiction taken by the Inter-American Court of Human Rights in its advisory opinion on human rights and the environment).

¹⁵³ Report of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change, Ian Fry (28 July 2023), A/78/255 (Annex 95) [available here](#), para.88.

¹⁵⁴ Statement on human rights and climate change: Joint statement by the Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities, 14 May 2020, HRI/2019/1 (Annex 96) [available here](#), paras. 11 and 12 (“holding that : “In order for States to comply with their human rights obligations and to realize the objectives of the Paris Agreement, they must adopt and

120. The OACPS further submits that States have the duty to adopt far-reaching and immediate mitigation and adaptation measures to avoid violating specific human rights, which are impaired by the conduct responsible for climate change. There is a wealth of evidence on such impairments in relation to the right to life, the right to privacy, family and home life and cultural rights.
121. Regarding the first, it is widely acknowledged that climate change is one of “the most pressing and serious threats to the ability of present and future generations to enjoy the right to life”.¹⁵⁵ The Human Rights Committee held in the *Daniel Billy and others v. Australia* and *Teitiota v. New Zealand* cases that States’ failure to take adequate mitigation and adaptation measures “may expose individuals to a violation of their rights under article 6”.¹⁵⁶ Numerous rulings from domestic courts

implement policies aimed at reducing emissions. These policies must reflect the highest possible ambition, foster climate resilience and ensure that public and private investments are consistent with a pathway towards low carbon emissions and climate resilient development. In their efforts to reduce emissions, States parties should contribute effectively to phasing out fossil fuels, promoting renewable energy and addressing emissions from the land sector, including by combating deforestation. In addition, States must regulate private actors, including by holding them accountable for harm they generate both domestically and extraterritorially. (...) States should also discontinue financial incentives or investments in activities and infrastructure that are not consistent with low greenhouse gas emissions pathways, whether undertaken by public or private actors, as a mitigation measure to prevent further damage and risk”).

¹⁵⁵ Human Rights Committee, General comment No. 36 on article 6: right to life, (3 September 2019) CCPR/C/GC/36 (Annex 88) [available here](#), para. 62 (observing that: “Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. The obligations of States parties under international environmental law should thus inform the content of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law. Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors. States parties should therefore ensure sustainable use of natural resources, develop and implement substantive environmental standards, conduct environmental impact assessments and consult with relevant States about activities likely to have a significant impact on the environment, provide notification to other States concerned about natural disasters and emergencies and cooperate with them, provide appropriate access to information on environmental hazards and pay due regard to the precautionary approach.”); *Daniel Billy and others v. Australia : Views adopted by the Committee under art. 5 (4) of the Optional Protocol, concerning communication No. 3624/2019*, Human Rights Committee CCPR/C/135/D/3624/2019, 22 September 2022 (Annex 97) [available here](#), para. 8.3 (finding that “environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life”).

¹⁵⁶ *Daniel Billy and others v. Australia : Views adopted by the Committee under art. 5 (4) of the Optional Protocol, concerning communication No. 3624/2019*, Human Rights Committee CCPR/C/135/D/3624/2019, 22 September 2022 (Annex 97) [available here](#), para. 8.7 (holding that “[r]egarding the authors’ assertion that their islands will become uninhabitable in 10 years (Boigu and Masig) or 10 to 15 years (Poruma and Warraber) in the absence of urgent action, the Committee recalls that without robust national and international efforts, the effects of climate change may expose individuals to a violation of their rights under article 6 of the Covenant” (emphasis added).

confirm this understanding.¹⁵⁷ The IPCC has found that “[c]limate-related illnesses, premature deaths, malnutrition in all its forms, and threats to mental health and well-being are increasing.”¹⁵⁸ Furthermore, unpredictable rainfall patterns and extreme changes in precipitation resulting from climate change causes dangerous natural disasters, such as storms, floods and droughts, are leading to loss of life.¹⁵⁹ Such events also amplify the spread of vector-borne diseases, such as dengue fever, malaria and chikungunya.¹⁶⁰

122. With respect to the right to privacy, family and home life, Article 12 of the Universal Declaration of Human Rights provides that:

“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

In *Daniel Billy and others v. Australia*, the Human Rights Committee concluded that the respondent State had violated this right, as enshrined in Article 17 of the ICCPR, due to its failure to proactively adopt measures to protect the affected communities:

“by failing to discharge its positive obligation to implement adequate adaptation measures to protect the authors’ home, private life and family, the State party violated the authors’ rights under article 17 of the Covenant”.¹⁶¹

¹⁵⁷ See *Urgenda Foundation v. State of the Netherlands*, ECLI:NL:HR:2019:2007, Judgment, Supreme Court of the Netherlands (20 December 2019) (Annex 98) [available here](#), para. 5.3.2, see also paras. 5.6.2, 5.8; *VZW Klimaatzaak v. Kingdom of Belgium*, Decision of 30 November 2023, Cour d’appel Bruxelles, 2021/AR/1589 (Annex 99) [available here](#), para. 139; *Neubauer v. Germany* (2020), Decision of 24 March 2021, 1 BvR 2656/18 (Annex 100) [available here](#), para. 144, see also paras. 120, 177-181; see further *Generaciones Futuras v. Ministerios de Ambiente y Desarrollo Sostenible*, República de Colombia Corte Suprema de Justicia STC4360-2018 (Apr. 5, 2018) (Annex 101) [available here](#), para. 11; *Kula Oil Palm Ltd v Tieba* [2021] PGNC 611, N9559 (Annex 102) [available here](#), para. 26.

¹⁵⁸ IPCC, Contribution of Working Group II of the IPCC: Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2022) (Annex 17) [available here](#), Chapter 7, p. 1044.

¹⁵⁹ IPCC, Synthesis Report of the IPCC: Synthesis Report of the IPCC Sixth Assessment Report (2023) (Annex 19) [available here](#), Summary for Policymakers, statement A.2.2.

¹⁶⁰ IPCC, Contribution of Working Group II of the IPCC: Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2022) (Annex 17) [available here](#), Chapter 7, p. 1094; A. Roth *et al.*, “Preparedness for Threat of Chikungunya in the Pacific” (2014) 20(8) Emerging Infectious Diseases e130696 (Annex 103) [available here](#).

¹⁶¹ *Daniel Billy and others v. Australia* : Views adopted by the Committee under art. 5 (4) of the Optional Protocol, concerning communication No. 3624/2019, Human Rights Committee CCPR/C/135/D/3624/2019, 22 September 2022 (Annex 97) [available here](#), para. 8.12 (holding that “[t]he

The impairment of this right was, in this case, closely linked to the protection of the applicants' culture.

123. As regards cultural rights, Article 22 of the Universal Declaration of Human Rights provides that:

“Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economy: social and cultural rights indispensable for his dignity and the free development of his personality.”

The Special Rapporteur in the field of cultural rights observed that climate change already is, and will continue to have “a grave impact on the cultures and cultural heritages of all humankind” and “could wipe out centuries of human cultural achievement and render ongoing cultural practices virtually impossible in the future”.¹⁶² Indigenous peoples are particularly vulnerable to the adverse effects of climate change because such impacts impair the “tangible and intangible manifestations of their ways of life” and “their spiritual and physical relationships with their lands, territories and resources”.¹⁶³ In *Daniel Billy and others v Australia*, the Human Rights Committee noted the applicants' contention that “they experience anxiety and distress owing to erosion that is encroaching on some homes in their communities and that the upkeep and visiting of ancestral graveyards is associated with the very heart of their culture, which requires experiencing feelings of communion with deceased relatives.”¹⁶⁴ Given the facts

Committee concludes that the information made available to it indicates that by failing to discharge its positive obligation to implement adequate adaptation measures to protect the authors' home, private life and family, the State party violated the authors' rights under article 17 of the Covenant”).

¹⁶² Special Rapporteur in the field of cultural rights, Report on climate change, culture and cultural rights, 10 August 2020, A/75/298 (Annex 104) [available here](#), para. 24.

¹⁶³ Expert Mechanism on the Rights of Indigenous Peoples, *Promotion and Protection of the Rights of Indigenous Peoples with Respect to their Cultural Heritage*, 30th Session, UN Doc A/HRC/30/53 (19 August 2015), (Annex 105) [available here](#), para. 6; see also, *Daniel Billy and others v. Australia : Views adopted by the Committee under art. 5 (4) of the Optional Protocol, concerning communication No. 3624/2019*, Human Rights Committee CCPR/C/135/D/3624/2019, 22 September 2022 (Annex 97) [available here](#), para. 8.13 (holding that “in the case of indigenous peoples, the enjoyment of culture may relate to a way of life which is closely associated with territory and the use of its resources, including such traditional activities as fishing or hunting. Thus, the protection of this right is directed towards ensuring the survival and continued development of the cultural identity”).

¹⁶⁴ *Daniel Billy and others v. Australia : Views adopted by the Committee under art. 5 (4) of the Optional Protocol, concerning communication No. 3624/2019*, Human Rights Committee CCPR/C/135/D/3624/2019, 22 September 2022 (Annex 97) [available here](#), para. 8.12.

of the case, this observation was made in relation to Article 17 of the ICCPR but the Committee went on to draw all the consequences of such impairment, finding that the respondent State had breached its obligation under Article 27 of the Covenant since “the information made available to it indicates that the State party’s failure to adopt timely adequate adaptation measures to protect the authors’ collective ability to maintain their traditional way of life, to transmit to their children and future generations their culture and traditions and use of land and sea resources discloses a violation of the State party’s positive obligation to protect the authors’ right to enjoy their minority culture”.¹⁶⁵

124. These are by no means the only human rights impaired by the conduct responsible for climate change. The right to an adequate standard of living, including the rights to health and to food, is also impacted. Article 25 of the Universal Declaration of Human Rights states that:

“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”

125. Scientific evidence attests to the adverse impact of climate change on agriculture and fisheries and therefore on the right to food. According to the IPCC:

“Approximately 3.3 to 3.6 billion people live in contexts that are highly vulnerable to climate change. Human and ecosystem vulnerability are interdependent. Regions and people with considerable development constraints have high vulnerability to climatic hazards. Increasing weather and climate extreme events have exposed millions of people to acute food insecurity and reduced water security, with the largest adverse impacts observed in many locations and/or communities in Africa, Asia, Central and South America, LDCs, Small Islands and the Arctic, and globally for Indigenous Peoples, small-scale food producers and low-income households. Between 2010 and 2020, human mortality from floods, droughts and storms was 15 times higher in highly vulnerable regions, compared to regions with very low vulnerability (*high confidence*).”¹⁶⁶

¹⁶⁵ *Daniel Billy and others v. Australia* : Views adopted by the Committee under art. 5 (4) of the Optional Protocol, concerning communication No. 3624/2019, Human Rights Committee CCPR/C/135/D/3624/2019, 22 September 2022 (Annex 97) [available here](#), para. 8.14.

¹⁶⁶ IPCC, Synthesis Report of the IPCC: Synthesis Report of the IPCC Sixth Assessment Report (2023) (Annex 19) [available here](#), Summary for Policymakers, statement A.2.2. See also, statement A. 2.4 (noting that

126. With regard particularly to the right to health, the IPCC noted that :

“In all regions increases in extreme heat events have resulted in human mortality and morbidity (*very high confidence*). The occurrence of climate-related food-borne and water-borne diseases (*very high confidence*) and the incidence of vector-borne diseases (*high confidence*) have increased. In assessed regions, some mental health challenges are associated with increasing temperatures (*high confidence*), trauma from extreme events (*very high confidence*), and loss of livelihoods and culture (*high confidence*). Climate and weather extremes are increasingly driving displacement in Africa, Asia, North America (*high confidence*), and Central and South America (*medium confidence*), with small island states in the Caribbean and South Pacific being disproportionately affected relative to their small population size (*high confidence*).”¹⁶⁷

127. Predictions are even worse if ambitious mitigation and adaptation measures are not immediately adopted. The IPCC predicts that:

“B.2.1 In the near term, every region in the world is projected to face further increases in climate hazards (*medium to high confidence, depending on region and hazard*), increasing multiple risks to ecosystems and humans (*very high confidence*). Hazards and associated risks expected in the near term include an increase in heat-related human mortality and morbidity (*high confidence*), food-borne, water-borne, and vector-borne diseases (*high confidence*), and mental health challenges³⁶ (*very high confidence*), flooding in coastal and other low-lying cities and regions (*high confidence*), biodiversity loss in land, freshwater and ocean ecosystems (*medium to very high confidence, depending on ecosystem*), and a decrease in food production in some regions (*high confidence*). Cryosphere-related changes in floods, landslides, and water availability have the potential to lead to severe consequences for people, infrastructure and the economy in most mountain regions (*high confidence*). The projected increase in frequency and intensity of heavy precipitation (*high confidence*) will increase rain-generated local flooding (*medium confidence*). (...)

B.2.2 Risks and projected adverse impacts and related losses and damages from climate change will escalate with every increment of global warming (*very high confidence*). They are

“Climate change has reduced food security and affected water security, hindering efforts to meet Sustainable Development Goals (*high confidence*). Although overall agricultural productivity has increased, climate change has slowed this growth over the past 50 years globally (*medium confidence*), with related negative impacts mainly in mid and low latitude regions but positive impacts in some high latitude regions (*high confidence*). Ocean warming and ocean acidification have adversely affected food production from fisheries and shellfish aquaculture in some oceanic regions (*high confidence*). Roughly half of the world’s population currently experience severe water scarcity for at least part of the year due to a combination of climatic and non-climatic drivers (*medium confidence*).”

¹⁶⁷ IPCC, Synthesis Report of the IPCC: Synthesis Report of the IPCC Sixth Assessment Report (2023) (Annex 19) [available here](#), Summary for Policymakers, statement A.2.5.

higher for global warming of 1.5°C than at present, and even higher at 2°C (*high confidence*). Compared to the AR5, global aggregated risk levels (Reasons for Concern) are assessed to become high to very high at lower levels of global warming due to recent evidence of observed impacts, improved process understanding, and new knowledge on exposure and vulnerability of human and natural systems, including limits to adaptation (*high confidence*). Due to unavoidable sea level rise (...), risks for coastal ecosystems, people and infrastructure will continue to increase beyond 2100 (*high confidence*). (...)

B.2.3 With further warming, climate change risks will become increasingly complex and more difficult to manage. Multiple climatic and non-climatic risk drivers will interact, resulting in compounding overall risk and risks cascading across sectors and regions. Climate-driven food insecurity and supply instability, for example, are projected to increase with increasing global warming, interacting with non-climatic risk drivers such as competition for land between urban expansion and food production, pandemics and conflict. (*high confidence*) (...)"¹⁶⁸

128. In light of the foreseeable impacts of climate change on various aspects of the right to an adequate standard of living, including the rights to health and food, the OACPS submits that international human rights law obliges States to protect individuals against such impacts, with heightened obligations to protect children and other rightsholders in situations of vulnerability.¹⁶⁹ States that have, through

¹⁶⁸ IPCC, Synthesis Report of the IPCC: Synthesis Report of the IPCC Sixth Assessment Report (2023) (Annex 19) [available here](#), Summary for Policymakers, statements B.2.1-B.2.2 and B.2.3.

¹⁶⁹ Committee on the Rights of the Child, *Chiara Sacchi et. al. v. Argentina, Brazil, France, and Germany* (Communication Nos. 104-107/2019, CRC/C/88/D/104/2019, CRC/C/88/D/105/2019, CRC/C/88/D/106/2019, CRC/C/88/D/107/2019), 11 November 2021 (Annex 94) [available here](#), para. 10.13 (observing that “[i]n the specific circumstances of the present case, the Committee notes the authors’ claims that their rights under the Convention have been violated by the respondent States parties’ acts and omissions in contributing to climate change and their claims that said harm will worsen as the world continues to warm up. It notes the authors’ claims: that smoke from wildfires and heat-related pollution has caused some of the authors’ asthma to worsen, requiring hospitalizations; that the spread and intensification of vector-borne diseases has also affected the authors, resulting in some of them contracting malaria multiple times a year or contracting dengue or chikungunya; that the authors have been exposed to extreme heatwaves, causing serious threats to the health of many of them; that drought is threatening water security for some of the authors; that some of the authors have been exposed to extreme storms and flooding; that life at a subsistence level is at risk for the indigenous authors; that, due to the rising sea level, the Marshall Islands and Palau are at risk of becoming uninhabitable within decades; and that climate change has affected the mental health of the authors, some of whom claim to suffer from climate anxiety. The Committee considers that, as children, the authors are particularly affected by climate change, both in terms of the manner in which they experience its effects and the potential of climate change to have an impact on them throughout their lifetimes, particularly if immediate action is not taken. Due to the particular impact on children, and the recognition by States parties to the Convention that children are entitled to special safeguards, including appropriate legal protection, States have heightened obligations to protect children from foreseeable harm”).

their acts and emissions, caused significant harm to the climate system and other parts of the environment have evidently breached these obligations.

9. Obligations arising from the UN climate regime

129. The OACPS notes that the UN climate change regime consists of several treaties, including the three instruments known as the Rio Conventions, i.e. the UNFCCC,¹⁷⁰ the Convention on Biological Diversity,¹⁷¹ and the United Nations Convention to Combat Desertification,¹⁷² as well as the Paris Agreement¹⁷³ and other instruments adopted under the aegis of the United Nations or one of its regional economic commissions¹⁷⁴ governing emissions of a range of greenhouse gases. These legal instruments are supplemented by a series of decisions adopted by the Conference of the Parties. In the paragraphs below, the OACPS reviews briefly and, non-exhaustively, the obligations arising from the UNFCCC and the Paris Agreement, and their import for the regulation of the conduct responsible for climate change.
130. States parties to these instruments have the obligation to adopt mitigation measures, that is to say, to significantly reduce their emissions of greenhouse gases,¹⁷⁵ with the specific overarching objective, both for the UNFCCC and the Paris Agreement:

“The ultimate objective of **this Convention and any related legal instruments** that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, **stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system**. Such a level should be achieved within a **time-frame** sufficient to allow ecosystems to adapt naturally to climate change, to ensure that

¹⁷⁰ United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107 (Annex 31) [available here](#).

¹⁷¹ Convention on Biological Diversity, 5 June 1992, 1760 UNTS 79 (Annex 106), [available here](#).

¹⁷² United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 14 October 1994, 1954 UNTS 3 (Annex 107), [available here](#).

¹⁷³ Paris Agreement, 12 December 2015, 3156 UNTS 79 (Annex 33) [available here](#).

¹⁷⁴ See, for example, the Protocol to the 1979 Convention on Long-range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-Level Ozone (Gothenburg Protocol), 30 November 1999 (Annex 108) [available here](#). This Protocol, as amended, governs inter alia emissions of black carbon, a significant greenhouse gas.

¹⁷⁵ See United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107 (Annex 31) [available here](#), Article 4(1)-(2).

food production is not threatened and to enable economic development to proceed in a sustainable manner.” (emphasis added)¹⁷⁶

131. The obligations set in the UNFCCC as well as, later, in the Kyoto Protocol and the Paris Agreement, must be understood in light of this overarching objective. The reports of the IPCC establish that State parties, particularly Annex I countries, who were required to take the lead, failed to achieve the requisite stabilisation of greenhouse gas concentrations. The obligation was clear. According to Article 4(2)(a), developed countries and countries in transition to a market economy (together Annex I countries) were and are required to mitigate their emissions of greenhouse gases consistent with the objective set in Article 2 of the UNFCCC, within a specific time-frame:

“Each of these Parties [Annex I countries] **shall adopt national policies and take corresponding measures on the mitigation of climate change**, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs. These policies and measures will demonstrate that **developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions consistent with the objective of the Convention, recognizing that the return by the end of the present decade [1990-2000] to earlier levels** of anthropogenic emissions of carbon dioxide and other greenhouse gases” (emphasis added)

132. This has not happened. Annex I countries have failed to discharge their obligations. According to the scientific consensus expressed in the Summary for Policymakers of the IPCC:

“Human-induced climate change, including more frequent and intense extreme events, has caused widespread adverse impacts and related losses and damages to nature and people, beyond natural climate variability. ... The rise in weather and climate extremes has led to some irreversible impacts as natural and human systems are pushed beyond their ability to adapt”¹⁷⁷

Article 8(1) of the Paris Agreement acknowledges that the dangerous anthropogenic interference with the climate system that the obligations of the

¹⁷⁶ United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107 (Annex 31) [available here](#), Article 2.

¹⁷⁷ IPCC, Contribution of Working Group II of the IPCC: Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2022) (Annex 17) [available here](#), Summary for Policymakers, statement B.1.

UNFCCC were aimed to prevent has now materialised in the form of irreversible loss and damage:

“Parties recognize the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of loss and damage”.

133. In this context, the Paris Agreement is an effort to manage the climate crisis emerging from the failure of the system of the UNFCCC and the Kyoto Protocol. The temperature goal of the Paris Agreement is an estimate of the temperature goal that needs to be achieved to minimise – rather than to prevent – the risks and impacts of climate change. Article 2(1)(a) of the Paris Agreement set the temperature goal of “[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change”.¹⁷⁸ For this purpose, State parties “shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve”,¹⁷⁹ which shall reflect “progression beyond the Party’s then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in light of different national circumstances”.¹⁸⁰ In addition, States “shall, as appropriate, engage in adaptation planning processes and the implementation of actions, including the development or enhancement of relevant plans, policies and/or contributions”,¹⁸¹ including by “[f]ormulat[ing], implement[ing], publish[ing] and regularly update[ing] national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and

¹⁷⁸ Paris Agreement, 12 December 2015, 3156 UNTS 79 (Annex 33) [available here](#), Article 2(1)(a).

¹⁷⁹ Paris Agreement, 12 December 2015, 3156 UNTS 79 (Annex 33) [available here](#), Article 4(2) (providing that “[e]ach Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.”).

¹⁸⁰ Paris Agreement, 12 December 2015, 3156 UNTS 79 (Annex 33) [available here](#), Article 4(3).

¹⁸¹ Paris Agreement, 12 December 2015, 3156 UNTS 79 (Annex 33) [available here](#), Article 7(9).

removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change”.¹⁸²

134. Importantly, as part of their historical responsibility and respective capabilities, as well as the specific commitment to take the lead in curbing anthropogenic GHG emissions, developed countries have the obligation to provide scientific, technological and financial assistance to developing countries. With respect to financial and technological assistance to developing countries, Article 4, paragraph 3, of the UNFCCC imposes on developed countries the obligation to “provide such financial resources, including for the transfer of technology, needed by developing country Parties to meet the agreed, full, incremental costs of implementing measures that are covered by paragraph 1 of this Article and that are agreed between a developing country Party and the international entity or entities referred to in Article 11 in accordance with that Article.”¹⁸³ This provision takes into account the fact that “[t]he extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overwhelming priorities of the developing country Parties.”¹⁸⁴
135. The OACPS notes that “the principle of common but differentiated responsibilities and respective capabilities, in light of different national circumstances” is a fundamental principle of the UN climate change regime,¹⁸⁵ and of international

¹⁸² See United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107 (Annex 31) [available here](#), Article 4(1)(b).

¹⁸³ United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107 (Annex 31) [available here](#), Article 4(3): “They [developed countries] shall also provide such financial resources, including for the transfer of technology, needed by developing country Parties to meet the agreed, full, incremental costs of implementing measures that are covered by paragraph 1 of this Article and that are agreed between a developing country Party and the international entity or entities referred to in Article 11 in accordance with that Article.”

¹⁸⁴ United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107 (Annex 31) [available here](#), Article 4(7).

¹⁸⁵ United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107 (Annex 31) [available here](#), Article 2(2)

environmental law in general. Its rationale is found in principle 7 of the Rio Declaration on the Environment, which provides that:

“In view of the different contributions to global environmental degradation, states have a common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of technologies and financial resources they command”

136. In the specific context of the UNFCCC, Article 3(1) provides that:

“The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.”

137. The commitment of Annex I countries to take the lead in curbing GHG emissions is therefore solidly established, and so is their failure to do so in light of the IPCC findings on loss and damage and the recognition of this failure in Article 8 of the Paris Agreement.

IV. QUESTION (b): LEGAL CONSEQUENCES OF THE VIOLATIONS BY STATES OF THEIR OBLIGATIONS IN RESPECT OF CLIMATE CHANGE

138. In this section, the OACPS examines *Question (b)* of the operative part of Resolution 77/276. The section proceeds as follows. First, the OACPS states its views regarding the core of *Question (b)* and establishes that its meaning is clear and does not require reformulation by the Court **(A)**. In essence, *Question (b)* invites the Court to determine the legal consequences, under the obligations identified in response to *Question (a)*, arising from the display by some States of a certain specific conduct described in *Question (b)* itself (see above section II.A.2). The OACPS submits that such conduct is, in principle, inconsistent with those obligations **(B)**, and that their breach carries legal consequences under the international law of State responsibility **(C)**.

A. Scope of Question (b)

139. *Question (b)* of Resolution 77/276 reads as follows:

“(b) What are the legal consequences under these obligations [the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations] for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:

- (i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?
- (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?”

140. The OACPS submits that the Court should interpret *Question (b)* in light of its criteria for interpreting decisions of international organisations, as detailed in the *Kosovo* advisory opinion with respect to resolutions of the Security Council.¹⁸⁶ Accordingly, *Question (b)* asks the Court to determine the legal consequences of

¹⁸⁶ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, p. 403 (Annex 29) [available here](#), para. 94.

a conduct, namely the acts and omissions relating to the emissions of greenhouse gases, whereby certain States have individually caused significant harm to the climate system and other parts of the environment and, taken together, caused catastrophic harm in the form of climate change and its adverse effects.

141. The OACPS notes that the General Assembly has specifically identified the relevant conduct for the assessment of which it seeks the legal opinion of the Court. This conduct consists of “acts and omissions” of States that have reached a certain threshold in their level of interference with the climate system, namely which “have caused significant harm to the climate system and other parts of the environment”. This threshold is not about “causing” climate change as such but about contributing to it, as suggested by the terminology of preambular paragraph 5 in fine. Causing significant harm requires acts and omissions whereby the State itself or the activities within its jurisdiction or control have led to substantial anthropogenic GHG emissions. This is because such emissions are the established caused of climate change and its adverse effects. Thus, any State whose conduct has led to substantial emissions has, by that fact, interfered significantly with (caused significant harm to) the climate system and other parts of the environment. Taken together, the anthropogenic emissions of major GHG emitters have caused not only significant harm but catastrophic harm – indeed climate change – to the climate system and other parts of the environment.
142. In addition, it must be noted that OACPS States, peoples and individuals are the very focus of *Question (b)* when it defines the beneficiaries of the obligations concerned, as well as the main victims of climate injustice, as “(i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change” and “peoples and individuals of the present and future generations affected by the adverse effects of climate change”. The OACPS has already established that OACPS States, peoples and individuals are both particularly vulnerable and directly impacted by the adverse impacts of climate change (see section II.B.2).

B. States that have caused significant harm to the climate system and other parts of the environment have committed internationally wrongful acts

143. It is the OACPS' submission that States that have caused significant harm to the climate system and other parts of the environment have committed internationally wrongful acts. The OACPS recalls that, pursuant to the general international law of State responsibility, as codified in the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts ("**ARSIWA**"):

"There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(a) is attributable to the State under international law; and

(b) constitutes a breach of an international obligation of the State."¹⁸⁷

144. The OACPS submits that all the elements necessary to characterise a conduct as internationally wrongful under the customary international law rules on State responsibility are satisfied with respect to the "acts and omissions" of States which "have caused significant harm to the climate system and other parts of the environment". Such conduct is attributable to the relevant States **(1)** and it is in breach of both general international law and treaty law **(2)**. The OACPS further notes that there are no circumstances precluding wrongfulness that may justify this illegality **(3)**.

1. The acts and omissions that have caused significant harm to the climate system and other parts of the environment are attributable to the relevant States

145. The OACPS identifies in this section both acts and omissions whereby the relevant States have caused significant harm to the climate system and other parts of the environment. Concerning "acts", the relevant conduct consists, among others, in the performance of activities which result in substantial GHG emissions, the provision of governmental subsidies to fossil fuels (coal, oil and gas) and/or the adoption of laws, policies, programmes and decisions regarding

¹⁸⁷ Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the ILC (2001), Volume II, Part II, Report of the Commission to the General Assembly on the Work of its Fifty-Third Session*, document A/CN.4/SER.A/2001/Add.1 (Part 2) (Annex 37) [available here](#), art 2.

energy policy which favoured activities known to contribute significantly to greenhouse gas emissions. Concerning omissions, they relate to the failure of the relevant States to prevent those activities within their jurisdiction or control the cause of significant harm to the climate system and other parts of the environment.

146. In both scenarios, the conduct at stake is attributable to the relevant States pursuant to the customary international law rules on State responsibility, mainly under Article 4 of ARSIWA which concerns conduct, both acts and omissions, of State organs and individuals and entities assimilated to State organs.¹⁸⁸ Only the territorial State is empowered to regulate such activities unfolding in its territory and under its jurisdiction and, failure to do so, is an attributable conduct (omission).

2. Breach of the obligations identified in *Question (a)*

147. The OACPS maintains that the acts and omissions of States that have caused, through their emissions of greenhouse gases, significant harm to the climate system and other parts of the environment, constitute breaches of their international obligations. Pursuant to Article 12 of ARSIWA, “[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character”. Pursuant to Article 13 ARSIWA, “[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs”. Article 13, therefore, embodies the first rule of the intertemporal law principle, namely the principle of contemporaneity, according to which the legality of acts, facts and situations has to be assessed at the moment when they occur.¹⁸⁹ The OACPS maintains that the acts and

¹⁸⁸ Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the ILC (2001), Volume II, Part II, Report of the Commission to the General Assembly on the Work of its Fifty-Third Session*, document A/CN.4/SER.A/2001/Add.1 (Part 2) (Annex 37) [available here](#), art 4 reads in relevant part “1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.”

¹⁸⁹ *Island of Palmas/Miangas case (Netherlands v. United States of America)*, PCA, Award of the Tribunal (April 1928) II Reports of International Arbitral Awards 829-871 (Annex 62) [available here](#), at p. 845.

omissions that have caused significant harm to the climate system and other parts of the environment were at all relevant times governed by international law. Large GHG emitting States were bound by them and their conduct, individually and collectively, constitutes a composite act amounting to a breach, in the meaning of Article 15 of ARSIWA.

148. *First*, the acts and omissions were at all times governed by the principle of due diligence. The OACPS recalls that the principle of due diligence arose with the structuring of contemporary international relations around sovereign territorial States. Although there are controversies as to the exact moment when contemporary international relations became built around the principle of exclusive territorial sovereignty, there is consensus that the principle consolidated around 1648 with the Peace Treaties of Westphalia. The OACPS concludes therefore that the obligation to exercise due diligence existed already in 1648, well before the Industrial Revolution. Importantly, arbitral tribunals recognised the duty for States to exercise due diligence already in the nineteenth century.¹⁹⁰ Accordingly the OACPS submits that States whose acts and omissions have caused significant harm to the climate system were at all times bound by the duty to exercise due diligence. As explained in Section III.B(5) of this Written Statement, this duty required States not to allow their territory to be used in a manner which could cause significant harm to the interests of other States. Whether one counts anthropogenic GHG emissions starting from 1750, 1850, 1945 or 1990, at all times large emitters were required to exercise due diligence, particularly since the 1960s when the potentially catastrophic implications of anthropogenic GHG emissions became understood in both scientific and policy circles (see Section II.A(1) of this Written Statement). States with large anthropogenic GHG emissions failed to do so leading to well

¹⁹⁰ See, *Alabama Claims of the United States of America against Great Britain*, Award rendered on 14 September 1872 by the tribunal of arbitration established by Article I of the Treaty of Washington of 8 May 1871, XXIX Reports of International Arbitral Awards 125-134 (Annex 109) [available here](#). See also, Institute of International Law, *International Duties of Neutral States—Rules of Washington* in James Brown Scott (ed), *Resolutions of the Institute of International Law Dealing with the Law of Nations: With an Historical Introduction and Explanatory Notes* (Oxford University Press 1916) (Annex 110) [available here](#) (the original version is in French: ‘Devoirs internationaux des Etats neutres. Règles de Washington. Conclusions adoptées à La Haye.’ (1877) 1 *Annuaire de l’Institut de Droit International* 139 (Annex 111) [available here](#)).

documented irreversible loss and damage. This is clearly a breach of the duty of due diligence.

149. *Secondly*, the OACPS maintains that the States concerned were also bound, at the relevant times, by the principle of prevention of significant harm to the environment, which is an application of the duty of due diligence to the specific context of environmental protection. In the *Trail Smelter (Canada/United States)* arbitration, the arbitral tribunal reaffirmed the duty of due diligence in an environmental context by referring expressly to “[i]nternational decisions, in various matters, from the Alabama case onward, and also earlier ones”. Based on this general principle of international law and decisions from the US Supreme Court in disputes between federated states,¹⁹¹ the arbitral tribunal found, already in 1941, that:

“under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.”¹⁹²

Accordingly, the OACPS concludes that, from the beginning of the Industrial Revolution, and certainly in the period between the *Alabama claims arbitration* and the *Trail Smelter* arbitration, States whose acts and omissions caused significant harm to the environment, including the climate system, were bound by the obligations to exercise due diligence and to prevent significant harm to the environment. Even after the duty of due diligence was specified in relation to environmental protection, including – specifically – air pollution, the conduct responsible for climate change continued and, indeed, intensified. For the

¹⁹¹ *Trail Smelter Arbitration (United States/Canada)* (11 March 1941) III Reports of International Arbitral Awards 1905-1982 (Annex 63) [available here](#), at pp. 1963-1964: “No case of air pollution dealt with by an international tribunal has been brought to the attention of the Tribunal nor does the Tribunal know of any such case. The nearest analogy is that of water pollution. But, here also, no decision of an international tribunal has been cited or has been found. There are, however, as regards both air pollution and water pollution, certain decisions of the Supreme Court of the United States which may legitimately be taken as a guide in this field of international law for it is reasonable to follow by analogy, in international cases, precedents established by that court in dealing with controversies between States of the Union or with other controversies concerning the quasi-sovereign rights of such States, where no contrary rule prevails in international law and no reason for rejecting such precedents can be adduced from the limitations of sovereignty inherent in the Constitution of the United States”.

¹⁹² *Trail Smelter Arbitration (United States/Canada)* (11 March 1941) III Reports of International Arbitral Awards 1905-1982 (Annex 63) [available here](#), at 1965.

reasons mentioned in relation to the duty of due diligence, such conduct constitutes a breach of the duty of prevention of significant environmental harm.

150. *Thirdly*, the OACPS maintains that the States that have caused significant harm to the environment were bound, as of 1945, by their obligation to respect human rights, including the principle of the equal rights of peoples and their right to self-determination, as well as the prohibition of gender and racial discrimination and the obligation to prevent genocide. Those States were bound by their obligations to respect human rights, at the latest in 1948, when the General Assembly adopted the Universal Declaration of Human Rights. The well documented disproportional impacts of the conduct responsible for climate change on peoples and individuals in vulnerable situations, including Indigenous peoples and peoples of African descent, in OACPS countries amounts to a breach of the prohibition of racial discrimination. Similarly, the disproportional impacts on women and girls also amount to a breach of the prohibition of all forms of discrimination against women. Importantly, the conduct described in Question (b) has direct implications for the very possibility of enjoyment of the right of peoples to self-determination, which is fundamentally impaired. Moreover, its reckless character, despite the scientifically established consequences on the very survival of certain protected peoples and groups, may also amount to a breach of the obligation to prevent genocide.
151. The OACPS notes that the acts and omissions that have caused significant harm to the climate system and other parts of the environment are also governed by several treaty rules, including those specifically examined in Section III of this Written Statement in relation to *Question (a)*. The OACPS maintains that, as explained in that section, some of the provisions of these treaties codified customary international law. Accordingly, States were bound by them before their entry into force. As for the provisions that did not have a customary international law character, States became bound by them at their date of entry into force.
152. All in all, the OACPS submits that States which by their acts and omissions have caused significant harm to the climate system and other parts of the environment were bound by the duty of due diligence and by its extension, the duty to prevent significant harm to the environment, at all relevant times, including from the

beginning of the Industrial Revolution. They were also bound by the duty to respect human rights as of 1945, and by their treaty obligations from the date their entry into force. The OACPS concludes therefore that the intertemporal principle is no obstacle to finding that the conduct of States that have caused significant harm to the climate system and other parts of the environment breached their international law obligations.

153. In any event, the Court does not need to establish the exact moment at which each of these rules emerged or became binding on a specific State. This is because the conduct described by *Question (b)* is a composite act in the meaning of the rule codified in Article 15 of ARSIWA:

“1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.”

As long as the relevant obligation emerged or became binding on a specific State before or while the series of acts and omissions constituting the composite act was unfolding, such obligation governs the conduct.

154. The OACPS submits that the cumulative nature of the acts and omissions of States that have caused significant harm to the climate system and other parts of the environment makes them a composite breach, which is ongoing and governed by all the obligations examined in Section III, in response to *Question (a)*. The ILC’s commentary to the ARSIWA explains, indeed, that composite acts concern an “aggregate of conduct and not individual acts” and provides as examples “genocide, apartheid or crimes against humanity, [and] systematic acts of racial discrimination”.¹⁹³

¹⁹³ Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the ILC (2001), Volume II, Part II, Report of the Commission to the General Assembly on the Work of its Fifty-Third Session*, document A/CN.4/SER.A/2001/Add.1 (Part 2) (Annex 37) [available here](#), commentary to art 15, p. 62, para. 2.

155. With respect to climate change, the acts and omissions in relation to greenhouse gas emissions that have caused significant harm to the climate system and other parts of the environment constitute such an “aggregate of conduct”. Accordingly, at the level of individual States, the moment at which the level of GHG emissions of a given State reached the threshold to consummate the breach is when such emissions became substantial enough to interfere with the climate system, i.e. to cause significant harm to the climate system and other parts of the environment. At that crystallisation moment, (i) the conduct must be considered in its entirety as an aggregate conduct, rather than as a multitude of independent acts and omissions separate from one another, (ii) such is also the moment at which the application of one or more rules of international law must be established and (iii) the wrongful act is deemed to start retrospectively at the moment when the first act or omission in the series took place, under all the rules in force at that moment. With respect to the group of States whose greenhouse gas emissions, taken together, have caused the catastrophic harm to the climate system known as climate change, their acts and omissions, taken together, also amount to a composite act in breach of the relevant rules of international law.
156. The OACPS concludes therefore that the conduct described in *Question (b)* falls under the temporal scope of the rules identified in the response to *Question (a)*. It is, in any event, the entire composite conduct which must be assessed, as per Article 15 of ARSIWA, and such conduct was and remains, in principle, inconsistent with the applicable obligations examined in Section III of this Written Statement.
157. Finally, the OACPS notes that none of the circumstances precluding wrongfulness are relevant in the context of the acts and omissions that have caused significant harm to the climate system and other parts of the environment. Articles 20 to 26 of ARSIWA list consent, self-defence, countermeasures, distress, force majeure and necessity as grounds precluding the wrongfulness of an otherwise unlawful conduct. Each of these circumstances must be specifically invoked by the breaching State and their operation precludes the wrongfulness of a specifically circumscribed set of conduct. It is therefore not a blanket authorisation to behave illegally and, importantly, it does not make the unlawful conduct, here the long series of acts and omissions responsible for interference

with the climate system, lawful as a matter of principle. Such conduct remains, in principle, unlawful, unless justified or excused. Article 27 of ARSIWA further notes that the invocation of such circumstances is without prejudice to “(a) compliance with the obligation in question, if and to the extent that the circumstances precluding wrongfulness no longer exists; (b) the question of compensation for any material loss caused by the act in question”. Moreover, the peremptory character of some of the obligations contravened by the conduct responsible for the interference with the climate system place important limits to the operation of circumstances precluding wrongfulness.

C. The legal consequences

158. In the following paragraphs, the OACPS examines the legal consequences arising from the composite conduct in breach of the international obligations of States with large anthropogenic GHG emissions. As the Court held it in the *Namibia* advisory opinion,

[a] binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence. Once the Court is faced with such a situation, it would be failing in the discharge of its judicial functions if it did not declare that there is an obligation, especially upon Members of the United Nations, to bring that situation to an end.¹⁹⁴

159. The basic legal consequences resulting from a breach of a primary rule of obligation takes the form of secondary obligations of cessation/non-repetition and reparation **(2)**. In addition to the general consequences of the internationally wrongful act, the law of State responsibility provides for a special regime of State responsibility for breaches of *jus cogens* obligations and *erga omnes* obligations **(3)**. Before delving into these issues, the OACPS recalls that the beneficiaries of these legal consequences (the secondary obligations, in the terminology of State responsibility) include OACPS Member States, their peoples and individuals, as they fall within items (i) and (ii) of *Question (b) (1)*.

¹⁹⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16 (Annex 44), [available here](#), para. 117.

1. OACPS Member States, peoples and individuals of the present and future generations are covered by items (i) and (ii) of *Question (b)*

160. *Question (b)* identifies those who have suffered from the conduct responsible for climate change and “with respect to” whom the clarification of the legal consequences is sought. Those entities are defined in the operative part of Resolution 77/276 as follows:

- (i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change, and
- (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change

161. The OACPS has already indicated how its member States, peoples and individuals are particularly vulnerable to and affected by climate change and its adverse effects and how they remain so.¹⁹⁵ In summary, the OACPS is composed by small island developing States and countries in low-lying coastal regions and arid regions, which place their peoples and individuals in the front line of climate impacts, despite their negligible contribution to the problem.

2. The general consequences under the law of State responsibility

162. Under the customary rules of State responsibility as codified in the ARSIWA, several consequences arise from the violations of a primary rule of obligation. A State that is found to have breached its international obligations must, pursuant to Article 30 of ARSIWA, cease the breaching conduct **(2.1)** and, pursuant to Article 31 of ARSIWA, it must repair the effects of the breaches of international law **(2.2)**.

2.1. Cessation and non-repetition

163. Article 31 of ARSIWA provides that “[t]he State responsible for the internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing; (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances

¹⁹⁵ See Section III B(2) of this Written Statement.

so require”. As explained by the arbitral tribunal in the *Rainbow Warrior case*, the obligation to cease the violation is dependent on two conditions, namely the continuing character of the act or omission that constitutes the violation of international law, and the continuing binding force of the obligation that has been breached.¹⁹⁶

164. The OACPS has explained that the conduct responsible for climate change is an ongoing composite conduct consisting of a series of acts and omissions which in the aggregate constitute a breach. As such, States displaying such conduct are required to cease to do so. The Court has clarified the content of the obligation of cessation in the *Jurisdictional Immunities (Germany v. Italy)* case. In the Court’s words:

“According to general international law on the responsibility of States for internationally wrongful acts, as expressed in this respect by Article 30 (a) of the International Law Commission’s Articles on the subject, the State responsible for an internationally wrongful act is under an obligation to cease that act, if it is continuing. Furthermore, even if the act in question has ended, the State responsible is under an obligation to re-establish, by way of reparation, the situation which existed before the wrongful act was committed, provided that re-establishment is not materially impossible and that it does not involve a burden for that State out of all proportion to the benefit deriving from restitution instead of compensation. This rule is reflected in Article 35 of the International Law Commission’s Articles.”¹⁹⁷

165. Accordingly, the OACPS submits that the States that have caused significant harm to the climate system and other parts of the environment must, first, cease their conduct. Concretely, the obligation to cease the continuing violations means that those States must proceed immediately to adopt measures to achieve deep cuts of their anthropogenic GHG emissions, in a manner consistent with the

¹⁹⁶ Case concerning the differences between New Zealand and France arising from the *Rainbow Warrior* (30 April 1990), XIX Reports of International Arbitral Awards 215-284 (Annex 112) [available here](#), p. 270, para. 114: “The authority to issue an order for the cessation or discontinuance of a wrongful act or omission results from the inherent powers of a competent tribunal which is confronted with the continuous breach of an international obligation which is in force and continues to be in force. The delivery of such an order requires, therefore, two essential conditions intimately linked, namely that the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued. Obviously, a breach ceases to have a continuing character as soon as the violated rule ceases to be in force.”

¹⁹⁷ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, p. 99 (Annex 113) [available here](#), para. 137. The same conclusion was reached, by reference to Arts. 30 and 31 of ARSIWA, by the Grand Chamber of the European Court of Human Rights in *Case of Georgia v. Russia (I)*, ECtHR (Grand Chamber) Application No. 13255/07, Judgment (31 January 2019) (Annex 114) [available here](#), para. 54.

projections of the IPCC reports and the pathways identified in the UNEP's Emissions Gap Reports and Production Gap Reports. According to the IPCC, cessation of the unlawful conduct would entail following a pathway consistent with science, described as follows:

"All global modelled pathways that limit warming to 1.5°C (>50%) with no or limited overshoot, and those that limit warming to 2°C (>67%), involve rapid and deep and, in most cases, immediate greenhouse gas emissions reductions in all sectors this decade", statement C.2 ("Deep, rapid and sustained mitigation and accelerated implementation of adaptation actions in this decade would reduce projected losses and damages for humans and ecosystems ... and deliver many co-benefits, especially for air quality and health ... Delayed mitigation and adaptation action would lock-in high-emissions infrastructure, raise risks of stranded assets and cost-escalation, reduce feasibility, and increase losses and damages ... Near-term actions involve high up-front investments and potentially disruptive changes that can be lessened by a range of enabling policies"), statement C.3.2 ("Net zero CO2 energy systems entail: a substantial reduction in overall fossil fuel use, minimal use of unabated fossil fuels"¹⁹⁸

UNEP's Emissions Gap Report 2022 requires the pathway consistent with science as follows: "global annual GHG emissions must be reduced by 45 per cent compared with emissions projections under policies currently in place in just eight years".¹⁹⁹ As for UNEP's Production Gap Report 2023, it notes that:

"to stay on track to achieve net-zero CO2 emissions by mid-century and limit long-term warming to 1.5 °C, global production of all three fossil fuels needs to decline substantially between now and 2050, in parallel with other key climate mitigation strategies such as reducing fossil fuel demand, increasing renewable energy generation, and reducing methane emissions from all sources, including oil and gas production activities"²⁰⁰

166. Importantly, the obligation of cessation cannot be met by removing greenhouse gases from the atmosphere through geoengineering techniques. None of the two

¹⁹⁸ IPCC, Synthesis Report of the IPCC: Synthesis Report of the IPCC Sixth Assessment Report (2023) (Annex 19) [available here](#), Summary for Policymakers, statement B.6.

¹⁹⁹ UNEP, *Emissions Gap Report 2022 : The closing window. Climate crisis calls for rapid transformation of societies*, Executive Summary, at page xvi, available at : https://www.unep.org/resources/emissions-gap-report-2022?gclid=EAlaIQobChMIjO2oxJST_gIVuBoGAB2YvQ5LEAAYASAAEgKv7PD_BwE.

²⁰⁰ United Nations Environment Programme, *Production Gap Report 2023: Phasing down or phasing up ? Top fossil fuel producers plan even more extraction despite climate promises* (Annex 61) [available here](#), p. 27.

main categories of techniques, namely Carbon Dioxide Removal (**CDR**)²⁰¹ and Solar Radiation Modification (**SRM**),²⁰² amount to “cease” anthropogenic GHG emissions. Quite to the contrary, despite their highly uncertain potential and their many risks, they are often portrayed as a way of continuing emissions as usual in the remote hope that the pollution will be removed at some uncertain point in the future. By their very definition, such techniques take as a starting-point that greenhouse gases have been and are being emitted.

167. In any event, to paraphrase the Court, even if the act in question has ended, the State responsible is under an obligation to re-establish, by way of reparation, the situation which existed before the wrongful act was committed.²⁰³ Reparation is of paramount importance for OACPS countries due to the fundamental injustice at the roots of climate change, namely that those who have contributed the least, suffer the most. Given the colonial and racialised divide lines between those States which are mainly responsible for and those States which are mainly affected by climate change and its adverse effects, reparation must be approached as part of a historical redress process.

2.2. Reparation and its modalities, including more equitable terms of international trade

168. Article 31 of ARSIWA provides that :

“1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.”

²⁰¹ See IPCC Glossary (Annex 30) [available here](#): Carbon Dioxide Removal (CRD): “*Anthropogenic activities removing carbon dioxide (CO₂) from the atmosphere and durably storing it in geological, terrestrial, or ocean reservoirs, or in products. It includes existing and potential anthropogenic enhancement of biological or geochemical CO₂ sinks and direct air carbon dioxide capture and storage (DACCS) but excludes natural CO₂ uptake not directly caused by human activities*”.

²⁰² See IPCC Glossary (Annex 30) [available here](#): Solar Radiation Modification (SRM): “*Refers to a range of radiation modification measures not related to greenhouse gas (GHG) mitigation that seek to limit global warming. Most methods involve reducing the amount of incoming solar radiation reaching the surface, but others also act on the longwave radiation budget by reducing optical thickness and cloud lifetime*”.

²⁰³ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, p. 99 (Annex 113) [available here](#), para. 137.

169. As to its content, the Permanent Court of International Justice (**PCIJ**) clarified in the *Chorzow Factory* case that:

“The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.”²⁰⁴

170. The OACPS notes that the conduct responsible for climate change has led to several types of damage to the States, peoples and individuals particularly vulnerable to or affected by it, in particular, the significant environmental harm to the climate system and other parts of the environment, the impairment of human rights, the economic and social damage. In this respect, the OACPS stresses that international law does not exclude a priori any type of damage from reparation. What matters is the existence of a sufficiently direct and certain causal nexus between the internationally wrongful act and the damage caused.²⁰⁵

171. The OACPS submits that there is a sufficiently direct connection between the failure of States to reduce their anthropogenic greenhouse gas emissions and climate change, on the one hand, and between climate change and the injuries suffered by OACPS States, peoples and individuals through its adverse effects. As noted in preambular paragraph 9 of Resolution 77/276, which relies on IPCC statements, both the causes and the impacts of climate change are established

²⁰⁴ *Factory at Chorzow*, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17 (Annex 115) [available here](#), p. 47.

²⁰⁵ According to the Court, “[a]s a general rule, it falls to the party seeking compensation to prove the existence of a causal nexus between the internationally wrongful act and the injury suffered. In accordance with the jurisprudence of the Court, compensation can be awarded only if there is “a sufficiently direct and certain causal nexus between the wrongful act . . . and the injury suffered by the Applicant, consisting of all damage of any type, material or moral” (ibid.). See, p. 48, para. 93; See also, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation, Judgment, I.C.J. Reports 2018, p. 15 (Annex 116) [available here](#), para. 32; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, I.C.J. Reports 2012, pp. 324 (Annex 117) [available here](#), para. 14.

by a scientific consensus. The following excerpt from Resolution 77/276 adds the reference to the IPCC sources of preambular paragraph 9:

“anthropogenic emissions of greenhouses gases are unequivocally the dominant cause of the global warming observed since the mid-20th century,²⁰⁶ that human-induced climate change, including more frequent and intense extreme events, has caused widespread adverse impacts and related losses and damages to nature and people, beyond natural climate variability, and that across sectors and regions the most vulnerable people and systems are observed to be disproportionately affected”²⁰⁷

172. In this respect, the OACPS stresses that environmental damage, including damage to the climate system, may raise particular issues with respect to causation. As the Court pointed out in *Costa Rica v. Nicaragua*:

“The damage may be due to several concurrent causes, or the state of science regarding the causal link between the wrongful act and the damage may be uncertain. These are difficulties that must be addressed as and when they arise in light of the facts of the case at hand and the evidence presented to the Court. Ultimately, it is for the Court to decide whether there is a sufficient causal nexus between the wrongful act and the injury suffered. (...) Ultimately, it is for the Court to decide whether there is a sufficient causal nexus between the wrongful act and the injury suffered”²⁰⁸

The OACPS considers that the same considerations apply to human rights damage, and socio-economic damages.²⁰⁹

173. Turning now to the content of the duty of reparation, the OACPS recalls that, pursuant to Article 34 of ARSIWA, which reflects in this respect customary

²⁰⁶ This sentence in preambular paragraph 9 is based on the following IPCC sources: IPCC, 2014: *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers (Annex 118) [available here](#), statement 1.2; IPCC, Contribution of Working Group I of the IPCC: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2021) (Annex 16) [available here](#), Summary for Policymakers, statement A.1.

²⁰⁷ This sentence of preambular paragraph 9 is in turn based on: IPCC, Contribution of Working Group II of the IPCC: Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2022) (Annex 17) [available here](#), Summary for Policymakers, statement SPM.B.1.

²⁰⁸ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation, Judgment, I.C.J. Reports 2018, p. 15 (Annex 116) [available here](#), para. 34.

²⁰⁹ *Factory at Chorzow*, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17 (Annex 115) [available here](#), p. 47

international law, “[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination”.

174. Concerning restitution, Article 35 of the ARSIWA provides that:

“A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) is not materially impossible;

(b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation”

175. The notion of restitution is to be construed broadly. According to the ILC commentary of ARSIWA, “[t]he term ‘restitution’ in article 35 (...) has a broad meaning, encompassing any action that needs to be taken by the responsible State to restore the situation resulting from its internationally wrongful act”.²¹⁰ Restitution is, according to the words of the Court, “the re-establishment of the situation which existed before occurrence of the wrongful act”.²¹¹ The ILC rightly observed that “[r]estitution may take the form of material restoration or return of territory, persons or property, or the reversal of some juridical act, or some combination of them.”²¹²

176. The OACPS submits that parts of the reparation of the damage caused by the conduct responsible for climate change and its adverse effects may be achieved by restitution. Concerning the environmental damage, including the damage to the climate system, the OACPS notes that restitution calls for the adoption of restorative measures to the climate system and parts of the environment which

²¹⁰ Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the ILC (2001), Volume II, Part II, Report of the Commission to the General Assembly on the Work of its Fifty-Third Session*, document A/CN.4/SER.A/2001/Add.1 (Part 2) (Annex 37) [available here](#), commentary to art 35, pp. 97-98, para. 5.

²¹¹ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14 (Annex 67) [available here](#), para. 273.

²¹² Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the ILC (2001), Volume II, Part II, Report of the Commission to the General Assembly on the Work of its Fifty-Third Session*, document A/CN.4/SER.A/2001/Add.1 (Part 2) (Annex 37) [available here](#), commentary to art 35, p. 97.

has been damaged by the emissions of greenhouse gases and the failure to exercise due diligence. In the *Costa Rica v. Nicaragua* case, the Court noted that

“[p]ayment for restoration accounts for the fact that natural recovery may not always suffice to return an environment to the state in which it was before the damage occurred. In such instances, active restoration measures may be required in order to return the environment to its prior condition, in so far as that is possible”²¹³

Thus, the OACPS submits that the States that caused significant harm to the climate system shall take measures to actively restore the loss of biodiversity and desertification due to climate change caused by the emission of greenhouse gases. Restoration also requires, as necessary, land reclamation to recover territorial losses due to climate change, the recognition that maritime zones as established and notified to the UN Secretary-General remain unchanged notwithstanding climate change-related sea-level rise, and physical adaptation measures to avoid further losses of territory, as well as financial and technological support to achieve this. By contrast, geoengineering is not an appropriate form of restitution because the harm already caused or the loss and damage which is by now irreversible would in no way be repaired by the removal – and even less the hypothetical and speculative prospect for removal – of greenhouse gases through geoengineering techniques. With respect to the damage caused to human rights, the OACPS notes that some of the damage can also be restored. This is the case of the loss of private property rights due to sea-level rise and of cultivable lands to desertification. Regarding socio-economic damage caused to the economy of the affected States, restoration calls for the reimbursement of the loss in State revenues due to the adverse impacts of climate change.

177. Even when outright restoration is not possible, States that have caused significant harm to the climate system and other parts of the environment must discharge their obligation to restore by reference to “the principle of approximate application”. According to Judge Lauterpacht:

“It is a sound principle of law that whenever a legal instrument of continuing validity cannot be applied literally owing to the conduct of one of the parties, it must, without allowing that party

²¹³ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation, Judgment, I.C.J. Reports 2018, p. 15 (Annex 116) [available here](#), para. 43.

to take advantage of its own conduct, be applied in a way approximating most closely to its primary object. To do that is to interpret and to give effect to the instrument - not to change it”²¹⁴

The OACPS considers that the principle of approximate application of the duty of restoration would call for providing equivalent territory and properties for a people to continue exercising its right to self-determination when its territories and properties can no longer be restored. In some cases, this would be needed to maintain the unity of States, peoples, and communities that are affected by the impacts of climate change, as well as their cultural identity.

178. Nevertheless, the OACPS is mindful that a significant share of the damage caused by the failure of large emitting States to prevent significant harm to the climate systems may not be repaired through restitution or restoration. In the *Pulp Mills* case, the Court recalled that

“where restitution is materially impossible or involves a burden out of all proportion to the benefit deriving from it, reparation takes the form of compensation or satisfaction, or even both”²¹⁵

179. In view of the major impacts resulting from climate change to States, peoples and individuals, satisfaction alone is not an appropriate form of compensation. The OACPS turns to outlining the contours of the duty to pay compensation as a consequence of the breach of their international obligations by States which have caused significant harm to the climate and other parts of the environment. Article 36 of ARSIWA provides that:

“1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

²¹⁴ *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, I.C.J. Reports 1956, separate opinion of Sir Hersch Lauterpacht p. 35 (Annex 119) [available here](#), at p. 46. In the *Gabcikovo-Nagymaros* case, the Court refused to take position as to the validity of the “principle of approximate application”, which was invoked by Slovakia to justify Variant C. The Court explained that “it is not necessary for the Court to determine whether there is a principle of international law or a general principle of law of “approximate application” because, even if such a principle existed, it could by definition only be employed within the limits of the treaty in question. In the view of the Court, Variant C does not meet that cardinal condition with regard to the 1977 Treaty”. *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I. C. J. Reports 1997, p. 7 (Annex 66) [available here](#), para. 76.

²¹⁵ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14 (Annex 67) [available here](#), para. 273.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established”

180. The OACPS maintains that all three types of damages suffered by affected States, peoples and individuals are compensable under the law of State responsibility, namely environmental harm, the human rights harm and the economic and social harm caused by the conduct responsible for climate change. This is even more so that there is a wealth of evidence regarding the extent of the material damage. Nevertheless, the OACPS recalls that “the absence of adequate evidence as to the extent of material damage will not, in all situations, preclude an award of compensation for that damage”, since the amount of compensation due may be determined “on the basis of equitable considerations”.²¹⁶

181. Concerning environmental damage, including significant harm to the climate system, the Court clarified in the *Costa Rica v. Nicaragua* case that:

“[D]amage to the environment, and the consequent impairment or loss of the ability of the environment to provide goods and services, is compensable under international law. Such compensation may include indemnification for the impairment or loss of environmental goods and services in the period prior to recovery and payment for the restoration of the damaged environment. Payment for restoration accounts for the fact that natural recovery may not always suffice to return an environment to the state in which it was before the damage occurred. In such instances, active restoration measures may be required in order to return the environment to its prior condition, in so far as that is possible”²¹⁷

182. With respect to impairments of human rights, the OACPS maintains that breaches of human rights resulting from irreversible loss and damage associated with the adverse effects of climate change, including loss of life, infringements to the right of peoples to self-determination, the right to adequate standard of living (encompassing inter alia the rights to health and to food) and other cultural rights,²¹⁸ may be made good in part through compensation, in addition to

²¹⁶ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation, Judgment, I.C.J. Reports 2018, p. 15 (Annex 116) [available here](#), para. 35.

²¹⁷ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation, Judgment, I.C.J. Reports 2018, p. 15 (Annex 116) [available here](#), paras. 41-43

²¹⁸ The Human Rights Council was slightly more exhaustive, when in its Resolution on “Human rights and climate change” of 12 July 2023 it : “[e]mphasiz[ed] that the adverse effects of climate change have a range of implications, both direct and indirect, that increase with greater global warming, for the effective

restoration and rehabilitation measures for loss and damage. Various human rights bodies have come to the same conclusion concerning the right of compensation in the context of loss and damage as a result of climate change.²¹⁹ States that have caused significant harm to the climate system and other parts of the environment are therefore required to provide effective remedies to peoples, individuals and groups that are affected by the adverse effects of climate change.²²⁰ In addition, they are required to cooperate with the States of nationality or residence of peoples, individuals and groups affected by the adverse impacts of climate change to provide compensation for the damage suffered. As the Office of the High Commissioner for Human Rights concluded:

“States should establish domestic mechanisms to mobilize resources to address human rights harms caused by climate change and measurably advance the effective enjoyment of economic, social and cultural rights by those affected”²²¹

183. Reparations, to fully wipe out the consequences of the internationally wrongful act, must be both victim-specific and structural.²²² The UN Special Rapporteur

enjoyment of human rights, including, inter alia, the right to life, the right to adequate food, the right to the enjoyment of the highest attainable standard of physical and mental health, the right to adequate housing, the right to self-determination, the rights to safe drinking water and sanitation, the right to work and the right to development, and recalling that in no case may a people be deprived of its own means of subsistence. *Expres[sed]* concern that ... the adverse effects of climate change are felt most acutely by those segments of the population that are already in vulnerable situations owing to factors such as geography, poverty, gender, age, race, ethnicity, indigenous or minority status where applicable, national or social origin, birth or other status, and disability, among others.” Human Rights Council Resolution 53/6. “Human rights and climate change”, 12 July 2023, A/HRC/RES/53/6 (Annex 120) [available here](#), preamble, paras. 17 and 18.

²¹⁹ Committee on the Rights of the Child, General Comment No. 26 (2023) on children’s rights and the environment, with a special focus on climate change, 22 August 2023 (CRC/C/GC/26) (Annex 121) [available here](#), para. 104 (concluding that “through a human rights lens, the adverse impacts of climate change have led to significant losses and damages, in particular for those in the developing world”); Report of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change, Ian Fry (26 July 2022), A/77/226 (Annex 122) [available here](#), paras. 26 (encouraging States “to take note that, from a human rights perspective, loss and damage are closely related to the right to remedy and the principle of reparations, including restitution, compensation and rehabilitation”).

²²⁰ Office of the High Commissioner for Human Rights, *Key Messages on Human Rights and Loss and Damage*, November 2023 (Annex 123) [available here](#), Key message 1 (explaining that “the rights of those who are often disproportionately affected by climate change such as women and girls, children, youth, older persons, persons with disabilities, Indigenous Peoples, minorities, migrants, rural workers, persons living in poverty and others in vulnerable situations”).

²²¹ Office of the High Commissioner for Human Rights, *Key Messages on Human Rights and Loss and Damage*, November 2023 (Annex 123) [available here](#), Key message 3.

²²² Human Rights Committee, General Comment no. 31: The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13 (Annex 124) [available here](#), para. 17. Decision 10/CP.24 (2018): Report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts (Annex 125) [available here](#), para. 1(g)(i) (urging State Parties to the UNFCCC “to consider formulating laws, policies and strategies, as

on the *Promotion and Protection of Human Rights in the Context of Climate Change* detailed these consequences by reference to the specific contents that climate change legislation is expected to have:

“With respect to loss and damage, new climate change legislation should:

(a) Support processes for international cooperation on loss and damage based on the principle of solidarity entailing a duty of assistance without expectation of reciprocity;

(b) Create provisions for compensation, liability and reparations to ensure that major greenhouse gas polluters – countries and corporations alike – pay for the harm they are causing. This should include domestic and transnational liability;

(c) Ensure that individuals are granted freedom of movement and given full legal rights as though they were refugees if they are displaced across international borders as a consequence of climate change;

(d) Develop affordable insurance and risk-pooling mechanisms to assist the most vulnerable

(e) Create mechanisms to assess, quantify and compensate for loss and damage for economic and non-economic losses, including human rights impacts;

(f) Support the establishment of an international mechanism for processing loss and damage claims in an expedited manner”²²³

184. In *Daniel Billy and others v. Australia*, the Human Rights Committee drew the following legal consequences from its finding that Australia breached several human rights of the applicants. It held:

“Pursuant to article 2(3)(a) of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, inter alia, to provide adequate compensation, to the authors for the harm that they have suffered; engage in meaningful consultations with the authors’ communities in order to conduct needs assessments; continue its implementation of measures necessary to secure the

appropriate, that reflect the importance of integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change and in the broader context of human mobility, taking into consideration their respective human rights obligations and, as appropriate, other relevant international standards and legal considerations”).

²²³ Report of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change, Ian Fry (28 July 2023), A/78/255 (Annex 95) [available here](#), para. 72.

communities' continued safe existence on their respective islands; and monitor and review the effectiveness of the measures implemented and resolve any deficiencies as soon as practicable. The State party is also under an obligation to take steps to prevent similar violations in the future"²²⁴

In engaging with peoples, individuals and other groups, States must ensure meaningful and informed participation as well as consent of the affected peoples, individuals and communities.²²⁵

185. Concerning the socio-economic impacts of the conduct responsible for climate change, the OACPS maintains that the resulting damage is also compensable to the extent that there is a sufficient and direct causality between breach of the obligation and the injury. The IPCC has established that climate change and its adverse impacts have socio-economic costs on the most affected States. Given the scientific consensus that anthropogenic emissions of greenhouse gases are the cause of climate change and its adverse effects, the OACPS concludes that States that have made a significant contribution to the problem in terms of emissions are responsible for the socio-economic damage to the most affected States. It follows that they owe compensation for such damage.
186. To conclude on the duty of compensation, the OACPS recalls that the ultimate goal of reparations is to wipe out all effects of the internationally wrongful act. Thus, "[t]he fundamental concept of "damages" is ... reparation for a loss suffered; a judicially ascertained compensation for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole"²²⁶
187. To be constructive, the OACPS does not advocate for punitive damages, but merely for full reparation of the loss and damage effectively suffered by injured and specially affected States, as well as affected peoples and individuals of the

²²⁴ *Daniel Billy and others v. Australia* : Views adopted by the Committee under art. 5 (4) of the Optional Protocol, concerning communication No. 3624/2019, Human Rights Committee CCPR/C/135/D/3624/2019, 22 September 2022 (Annex 97) [available here](#), para. 11.

²²⁵ Office of the High Commissioner for Human Rights, *Key Messages on Human Rights and Loss and Damage*, November 2023 (Annex 123) [available here](#), Key message 4 (recalling the obligations of States to "ensur[e] meaningful and informed participation, particularly of those most affected by loss and damage ... ensur[e] that sufficient financial and other resources are directly accessible to the people and communities most affected by loss and damage" and to exercise care to "tailor international funding to the needs of the people and States most affected by climate change").

²²⁶ *Lusitania*, (Arbitral Award) (1923), VII Reports of International Arbitral Awards 32-44 (Annex 126) [available here](#), at p. 39.

present and future generations. In this respect, the OACPS notes that if “compensation generally consists of a monetary payment [...] it may sometimes take the form, as agreed, of other forms of value”.²²⁷ Accordingly, the OACPS welcomes the decision of the State Parties to the UNFCCC to create a Loss and Damage Fund. The Loss and Damage Fund reflect the consensus among States regarding

“the urgent and immediate need for new, additional, predictable and adequate financial resources to assist developing countries that are particularly vulnerable to the adverse effects of climate change in responding to economic and non-economic loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, especially in the context of ongoing and ex post (including rehabilitation, recovery and reconstruction) action”.²²⁸

188. Nevertheless, the OACPS considers that the Loss and Damage Fund cannot be the equivalent of the obligation to provide reparation for the internationally wrongful acts that have caused significant harm to the climate system and other parts of the environment. This is because the funds that flow into such fund do not come even close to reflect the scale of the loss and damage and the process of disbursement is not consistent with the obligation of compensation. Thus, whereas the Loss and Damage Fund could be one of the modalities for implementing the duty to provide reparation, it cannot be assimilated to it.
189. The OACPS further submits that, taking into account the magnitude of the damage caused to the injured, specially affected or particularly vulnerable States, peoples and individuals, States that have caused significant harm to the climate system and other parts of the environment are also required to cooperate with the specific objective to reform the international economic and financial system. Such efforts must serve as tools to reduce the needs for financial and technological assistance to adapt to the adverse effects of climate change. They must also serve to remove the structural injustice and inequity in the global

²²⁷ Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the ILC (2001), Volume II, Part II, Report of the Commission to the General Assembly on the Work of its Fifty-Third Session*, document A/CN.4/SER.A/2001/Add.1 (Part 2) (Annex 37) [available here](#), commentary to art 36, p. 99, para. 4.

²²⁸ Decision 2/CP.27, Funding arrangements for responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage, FCCC/CP/2022/10/Add.1 (17 March 2023) (Annex 127) [available here](#), para. 1.

system that has even further entrenched historical crimes such as slavery, colonialism and racial discrimination.

3. The aggravated regime for the violations of *jus cogens* norms and *erga omnes* obligations

190. The customary international law regime of State responsibility provides for a special regime of responsibility for violations of *jus cogens* and *erga omnes* obligations. Article 40 of the ARSIWA provides that:

“1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation”

191. The OACPS notes that the Court has relied both on the violations of *jus cogens* norms²²⁹ and that of *erga omnes* obligations to trigger the application of the regime of aggravated responsibility.²³⁰ The conduct responsible for climate change is inconsistent with certain obligations widely recognised as either peremptory norms of international law (the right of peoples to self-determination, the prohibition of racial discrimination, the obligation to prevent genocide, the prohibition of massive violations of human rights, including the rights of Indigenous peoples) or obligations *erga omnes* (the duty of due diligence, the duty to prevent significant harm to the environment, the obligation to protect and preserve the marine environment) (see Section III.B of this Written Statement).

²²⁹ See, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, p. 403 (Annex 29) [available here](#), para. 81 (attaching the duty of non-recognition of some unilateral declarations of independence to the violation of *jus cogens* obligations).

²³⁰ See, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, I.C.J. Reports 2019, p. 95 (Annex 2) [available here](#), para. 180 (with respect to the obligation to cooperate, including with the United Nations, to end the breach of *erga omnes* obligations); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136 (Annex 1) [available here](#), para. 159 (where the Court applied the regime of aggravated responsibility with respect to violations of *jus cogens* norms).

192. Concerning the content of the aggravated regime, Article 41 of ARSIWA, which codifies in certain respects the international law framework applicable in this respect, reads as follows:

“1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40 [that is to say, “a serious breach by a state of an obligation arising under a peremptory norm of general international law].

2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation”

193. The Court has addressed in detail the aggravated regime in the advisory opinion on the *Construction of a Wall in Occupied Palestine Territory* where the Court examined the legal consequences arising for States other than Israel from Israel’s violation of certain obligations. The Court noted that “the obligations violated by Israel includ[ed] certain obligations *erga omnes*”, referring specifically to “the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law”.²³¹ The Court then derived the additional legal consequences resulting from the breach of these obligations:

“Given the character and the importance of the rights and obligations involved, the Court is of the view that all States **are under an obligation not to recognize the illegal situation** resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under **an obligation not to render aid or assistance in maintaining the situation created by such construction**. It is also for all States, while respecting the United Nations Charter and international law, **to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end.**”²³²

194. The OACPS submits that, given the character and the importance of the rights and obligations breached, all States are, *first*, under an obligation not to recognise the illegal situation resulting from the breach. States are therefore required not to recognise any loss of territory and related maritime areas due to sea-level rise

²³¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136 (Annex 1) [available here](#), para. 155.

²³² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136 (Annex 1) [available here](#), para. 159 (emphasis added)

caused by climate change. *Second*, all States are also under an obligation not to render aid or assistance in increasing or maintaining the current level of accumulation of greenhouse gases in the atmosphere. As a result, they are required to remove all legislative and administrative measures, including subsidies and any other forms of financial assistance to activities that contribute to further emissions and accumulation of greenhouse gases. *Third*, States must cooperate to ensure that the breaches of the peremptory norms and obligations *erga omnes*, including the right of peoples to self-determination, resulting from the conduct responsible for climate change are brought to an end.

V. GENERAL CONCLUSIONS OF THE WRITTEN STATEMENT

195. For the reasons provided in this Written Statement, the OACPS submits that the Court has jurisdiction to give the requested advisory opinion and that there are no compelling reasons for the Court to decline to give it.
196. *With respect to Question (a)*, the OACPS submits that the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations include *inter alia*:
- (i) The obligation to respect the right to self-determination, including the rights of peoples to territorial integrity, to existence and to subsistence
 - (ii) The obligation to prevent the crime of genocide
 - (iii) The obligation to prevent racial and gender discrimination
 - (iv) The obligation to cooperate in good faith to mitigate greenhouse gas emissions and to adapt to climate change
 - (v) The obligation to exercise due diligence
 - (vi) The obligation to prevent significant harm to the environment
 - (vii) The obligation to protect and preserve the marine environment
 - (viii) The obligation to respect human rights
 - (ix) The obligation to respect their obligations under the UN climate change regime
197. *With respect to Question (b)* the OACPS submits that the legal consequences under these obligations arising for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to injured, specially affected and particularly vulnerable States and affected peoples and individuals of the present and future generations are the following:
- (i) The obligation to cease the violation of their obligations by returning to an emissions pathway consistent with the requirements of the scientific consensus on climate change;

- (ii) The obligation to provide reparation and effective remedies to the injured, specially affected and particularly vulnerable States, as well as to affected peoples and individuals as required under international law. This includes restitution in the form of restoration, compensation, and satisfaction;
- (iii) The obligation of all States not to recognise any situation arising from the violation of peremptory norms and *erga omnes* obligations, including the loss of territory and maritime zones due to climate change;
- (iv) The obligation of all States not to render aid or assistance in increasing or maintaining the current level of accumulation of greenhouse gases in the atmosphere, including by removing all legislative and administrative measures, including subsidies and any other forms of financial assistance to activities that contribute to further emissions and accumulation of greenhouse gases;
- (v) The obligation of all States to cooperate to ensure that the breaches of the peremptory norms and obligations *erga omnes*, including the right of peoples to self-determination, resulting from the conduct responsible for climate change are brought to an end.

Respectfully submitted,

H.E. Georges Rebelo Pinto CHIKOTI
Secretary-General
Organisation of African Caribbean and Pacific States (OACPS)

22 March 2024

Certification

I certify that the copies of documents annexed to this Written Statement are true copies of the original documents referred to.

22 March 2024

H.E. Georges Rebelo Pinto CHIKOTI
Secretary-General
Organisation of African Caribbean and Pacific States (OACPS)

List of documents

Appendices

Appendix A: Georgetown Agreement on the organisation of the African, Caribbean and Pacific Group of States (ACP), concluded at Georgetown on 6 June 1975, as revised by Decision No .1/CX/19 of the 110th session of the ACP Council of Ministers held in Nairobi, Kenya, on 7 December 2019, and endorsed by the 9th Summit of the ACP Heads of State and Government, Nairobi, Kenya, 9-10 December 2019 (Appendix A), available at: <https://www.oacps.org/wp-content/uploads/2022/05/ACP-Brochure-Revised-Georgetown-Agreement-UK-def.pdf>

Appendix B: Racial Equality and Racial Non-Discrimination Obligations of States in Respect of Climate Change. Expert Report of Professor E. Tendayi Achiume, March 2024 (enclosed)

Annexes

(NB: although termed annexes, many documents are legal references. They are listed as annexes in the Written Statement, in the following list and in the pen-drive only to facilitate access to them by the Court, as they are in the public domain)

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