

INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

(REQUEST FOR ADVISORY OPINION)



WRITTEN COMMENTS OF THE REPUBLIC OF
KIRIBATI

15 August 2024

TABLE OF CONTENTS

<i>I. INTRODUCTION</i>	2
<i>II. ISSUES ARISING FROM THE WRITTEN STATEMENTS SUBMITTED TO THE COURT</i>	2
A. Governing Law	2
i. The ‘Global Carbon Budget’ as a Global Common Resource.....	3
ii. Sovereign Equality as the Source of States’ Duty to Share the Global Carbon Budget Equitably and Reasonably	8
iii. The Duty to Utilize Common Resources in an Equitable and Reasonable Way	10
iv. Sovereign Equality and the Obligations to Protect Other States as Part of Peoples’ Right to Self Determination and Territorial Integrity.....	12
v. Human Rights Instruments Govern the Conduct of States in Relation to Climate Change.....	15
vi. Sovereign Equality also Entails Extraterritorial Human Rights Law Obligations	16
vii. UNFCCC and Paris Agreement do not Operate as <i>Lex Specialis</i>	18
B. The Conduct at Stake is Inconsistent with International Law	21
C. Specific Legal Consequences	24
i. With Respect to 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.....	24
ii. With Respect to “Peoples and Individuals of the Present and Future Generations Affected by the Adverse Effects of Climate Change”	26
<i>III. CONCLUSION</i>	26

I. INTRODUCTION

1. Pursuant to the Order of the President of the Court of 15 December 2023, the Republic of Kiribati hereby submits its written comments on the written statements presented in the request for an advisory opinion in the UN General Assembly Resolution 77/276, adopted by consensus on 29 March 2023.
2. This written comment addresses specific issues arising from the written statements submitted by other States and international organizations. It is organised in three parts: (A) the governing law, including the specific obligations arising from general international law, in particular discussions on the ‘global carbon budget’ and the foundational precepts of sovereign equality and self-determination, (B) the breach resulting from such conduct, and (C) the specific legal consequences triggered by such breach.
3. The Republic of Kiribati respectfully submits this comment to the Court and emphasizes that the exercise of sovereign equality, self-determination, and fulfilment of human rights—particularly in the face of the existential threat of sea-level rise—affirm the legal presumption of state continuity and provide that the conduct of States causing significant harm to the climate system triggers specific legal consequences of cessation and reparation.

II. ISSUES ARISING FROM THE WRITTEN STATEMENTS SUBMITTED TO THE COURT

A. Governing Law

4. There is scientific consensus that anthropogenic emissions of greenhouse gases (GHG) have caused climate change over time. This consensus is formulated in the reports of the Intergovernmental Panel on Climate Change (IPCC), including in their summaries for policymakers,¹ which are adopted by States, acting by consensus, following a painstaking

¹ Intergovernmental Panel on Climate Change (IPCC), *Synthesis Report of the IPCC Sixth Assessment Report (AR6), Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policymakers* (2023), statement A.1 (‘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’); 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, Summary for Policymakers* (2021), statement A.1 (‘It is unequivocal that human influence has warmed the atmosphere, ocean and land.’).

procedure of line-by-line approval.² Such consensus is expressly formulated in preambular paragraph 9 of UN General Assembly Resolution 77/276, as a prelude to the request for an advisory opinion:

*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 greenhouse gases are unequivocally the dominant cause of the global warming observed since the mid-20th century.*³

5. The conduct responsible for climate change is expressly characterized in the text of the resolution, first in very general terms (Question (a) refers to ‘*anthropogenic emissions of greenhouse gases*’), then in more detail to guide the identification of the relevant obligations (preambular paragraph 5, in fine, refers to ‘*the conduct of States over time in relation to activities that contribute to climate change and its adverse effects*’). Thus, the Court must consider whether, as a matter of principle, the conduct is consistent or inconsistent with international law. Then, Question (b) refers to ‘*acts and omissions*’ whereby States ‘*have caused significant harm to the climate system and other parts of the environment*’, which sets the specific legal consequences for the breach in conduct.

i. The ‘Global Carbon Budget’ as a Global Common Resource

6. The concept of global “carbon budget” or “CO2 budget”, defined by the IPCC⁴ reflects the amount of emissions that the atmosphere can tolerate before temperatures rise beyond a certain harmful threshold. The IPCC distinguishes between two aspects of the budget: the ‘*Total carbon budget,*’ namely the estimated cumulative net global anthropogenic

² IPCC, Appendix A to the Principles Governing IPCC Work: Procedures for the preparation, review, acceptance, adoption, approval, and publication of IPCC Reports (adopted 15th Sess., San José, 15 – 18 April 1999; amended 37th Sess., Batumi, 14 – 18 October 2013), §§ 2 and 4.4.

³ United Nations (UN) General Assembly Resolution 77/276: ‘Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change’, preambular ¶ 9, relying on Intergovernmental Panel on Climate Change, *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 (2014), Statement 1.2; 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*, Summary for Policymakers (2021), Statement A.1.

⁴ IPCC, 2018: Summary for Policymakers. In: *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* [Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, at 3 – 24, <https://doi.org/10.1017/9781009157940.001> [hereinafter IPCC 2018 SPM Special Report].

CO2 emissions from the pre-industrial period to the possible result of limiting the warming to a given level, and the ‘*Remaining carbon budget*’ which is the estimated cumulative net global anthropogenic CO2 emissions from any given start date to the reaching of net zero emissions.⁵ The Federal German Constitutional Court⁶ referred to the remaining carbon budget as “how much CO2 can still be released into the Earth’s atmosphere and remain there permanently without causing the desired temperature to be exceeded.”⁷

7. Several States have endorsed the conception of the global carbon budget as a global commons.⁸ As China states in its response: “The climate system is global resource that concerns the common interests of humankind as well as the benefit of present and future generations, which should be protected and utilized in an equitable and reasonable manner.” China also regards the UNFCCC and the Paris Agreement as reflecting the duty of equitable utilization. It points out that “Article 3 of UNFCCC requires that “the Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity”. Article 2(2) of the Paris Agreement further underlines that “[it] will be implemented to reflect equity.”⁹
8. China adds that the principle of equity requires both intragenerational equity and intergenerational fairness, ensuring current resources are used sustainably and equitably, in particular “to pay attention to the specific needs and circumstances of developing countries that are vulnerable to the adverse effects of climate change,”¹⁰ and “especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration.”¹¹

⁵ *Id.* at Part C.1.3.

⁶ Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court] Mar. 24, 2021, Order of the First Senate, 1 BvR 2656/18, 1-270, (Ger.) (official English translation), ¶ 36 [hereinafter BVERFGE, 1 BvR 2656/18].

⁷ *Id.*

⁸ BVERFGE, 1 BvR 2656/18, *supra* note 6, ¶ 36.

⁹ Obligations of States in respect of Climate Change, Written Statement by China, ¶ 31.

¹⁰ *Id.* at ¶ 32.

¹¹ *Id.*

9. India devotes extensive discussion to “equitable access to the carbon budget for climate justice.” It posits that “[t]he available carbon global budget, which is consistent with achieving the temperature goal of the Paris Agreement, is rapidly depleting,¹² and argues:

It is evident from successive reports of the IPCC that historical emissions and the use of the world’s carbon budget are not equitably distributed. There are inequalities in the distribution of per capita annual emissions across different countries and regions. This implies that Parties are undertaking climate action from different contexts and starting points, and hence, there will be differentiated and equitable pathways to achieve Paris Agreement temperature goals based on equitable access to the total carbon budget and based on their national circumstances.¹³

And submits that “equity implies the equitable share of this total carbon budget among all countries,”¹⁴ and that:

[C]ommon but differentiated responsibilities of countries, ... will be based on the responsibility for historical emissions and ensuring that the cumulative emissions of each country from the pre-industrial era to net zero does not exceed their equitable share of the total carbon budget. [...] In view of developed countries’ cumulative emissions being disproportionately high, the developed countries have to compensate their excessive use of the total carbon budget.¹⁵

10. Egypt points out that “industrialized countries ... have appropriated atmospheric space, thereby preventing other countries from emitting their ‘fair share’ within a carbon budget consistent with the global temperature target of remaining below 2°C of warming and have constrained the policy choices of such countries about what development pathways to pursue.”¹⁶
11. Burkina Faso also emphasizes the urgency in collectively reducing the use of the “remaining carbon budget” which is almost exhausted:

Deuxièmement, il est impératif de réduire significativement les émissions de CO₂ afin de garantir une marge de manoeuvre décente aux générations futures. En effet, le « budget carbone restant » [...] est quasiment épuisé...¹⁷

¹² Obligations of States in respect of Climate Change, Written Statement by India, ¶ 61.

¹³ *Id.* at ¶ 62.

¹⁴ *Id.* at ¶ 76.

¹⁵ *Id.*

¹⁶ Obligations of States in respect of Climate Change, Written Statement by Egypt, ¶ 64 (citing Shue, Henry. *Historical Responsibility, Harm Prohibition, and Preservation Requirement: Core Practical Convergence on Climate Change*. MORAL PHILOSOPHY AND POLITICS, Vol. 2, No. 1 (2015), at 7 – 31 available at: <https://doi.org/10.1515/mopp-2013-0009>).

¹⁷ Obligations of States in respect of Climate Change, Written Statement by Burkina Faso, ¶ 83.

adding that:

... Il faut aussi prendre en compte le gaz à effet de serre déjà accumulé dans l'atmosphère. En effet, celui-ci a déjà fragilisé la capacité de résilience du système climatique. Il a également réduit à une peau de chagrin le « budget carbone » pour les générations futures et rapproché dangereusement l'humanité du point de bascule climatique (tipping point) à partir duquel l'étendue des dommages se démultiplie et où le système climatique devient complètement imprévisible.¹⁸

12. Bolivia similarly notes the inequities in the use of the global carbon budget:

[D]eveloped countries have disproportionately used the carbon budget to benefit from irrational development, while the most vulnerable to climate change are the peoples of developing countries, who have not contributed significantly to the alteration of atmospheric composition but who nevertheless bear a large part of the current impacts.¹⁹

13. Bolivia argues further that:

developed countries must assume the historical responsibility they have both in; (a) Leading the reduction of GHG emissions, allowing developing countries to have the remaining carbon budget to exercise their right to development [...].²⁰

14. According to Bolivia, “the equitable distribution of the remaining carbon budget” must be the focal point of the solution to the climate crisis:

The solution to the climate crisis must be based on a vision of climate justice that treats all countries and peoples fairly, particularly developing countries and vulnerable groups, who, although they have not caused the climate crisis, bear the significant burden of its impacts and potential solutions. Developed countries must assume their responsibility and leadership to face the climate crisis, assuming the payment of the climate debt that corresponds to them, within the framework of the principle of equity and common but differentiated responsibilities, which should consider the equitable distribution of the remaining carbon budget, considering the right to integral development of the countries and the historical and cumulative responsibility of GHG emissions.²¹

15. Similarly, Antigua and Barbuda contend that:

As explained above, the duty to cooperate bears particular weight in the context of climate change, since acting with due diligence requires States to divide equitably the available carbon budget amongst themselves. States must cooperate to ensure that the collective level of emissions reductions is sufficient to ensure that

¹⁸ *Id.* at ¶ 179.

¹⁹ Obligations of States in respect of Climate Change, Written Statement by Bolivia, ¶ 39.

²⁰ *Id.* at ¶ 42.

²¹ *Id.* at ¶ 44.

continued emissions by States, as equitably divided among them, stay within the available carbon budget.²²

16. The same approach to the global carbon budget as a global common resource—which all must share equitably and reasonably without causing significant harm—was accepted by several national courts. In addition to the German Federal Constitutional Court,²³ the focus on the ‘remaining carbon budget’ was also central to the determination of the Dutch Supreme Court in the *Urgenda* judgment, reasoning that The Netherlands had an obligation under the European Convention for Human Rights to urgently reduce its greenhouse gas emissions. The Dutch court noted that “the reduction of greenhouse gas emissions is more urgent than ever.”²⁴ The court also clarified that since any reduction helps to preserve the carbon budget, every reduction, however minimal, is not insignificant:

[...] each reduction of greenhouse gas emissions has a positive effect on combating dangerous climate change, as every reduction means that more room remains in the carbon budget.

Therefore, the Dutch court concluded, each and every State is responsible to reduce its emissions, independently of other States’ cooperation:

The defence that a duty to reduce greenhouse gas emissions on the part of the individual states does not help because other countries will continue their emissions cannot be accepted for this reason either: no reduction is negligible.²⁵

17. Colombia’s Supreme Court has noted the consequences of deforestation in the Amazon on, among others, global warming due to carbon dioxide emissions, and stated that:

The principle of solidarity, for the specific case, is determined by the duty and co-responsibility of the Colombian state to stop the causes of the GHG emissions from the abrupt forest reduction in the Amazon; thus, it is imperative to adopt immediate mitigation measures, and to protect the right to environmental welfare, both of the plaintiffs, and to the other people who inhabit and share the Amazonian territory, not only nationals, but foreigners, together with all inhabitants of the globe.²⁶

²² Obligations of States in respect of Climate Change, Written Statement by Antigua & Barbuda, ¶ 403.

²³ *Neubauer v. Germany*, 1 BvR 2656/18 2020, Decision of 24 March 2021 (Germany), at ¶ 36.

²⁴ *Urgenda Foundation v. State of the Netherlands*, Supreme Court of the Netherlands, ECLI:NL:HR, 20 December 2019 (Netherlands), ¶ 4.6.

²⁵ *Urgenda*, *supra* note 24, ¶ 5.7.8.

²⁶ *Demanda Generaciones Futuras v Minambiente et al.*, Supreme Court of Justice of Colombia, STC No. 4360-2018, 4 April 2018, ¶ 11.3.

18. Similarly, the decision of the European Court for Human Rights in *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (2024) concluded that:

In this regard the Court cannot but note that the IPCC has stressed the importance of carbon budgets and policies for net-zero emissions, which can hardly be compensated for by reliance on the State's nationally determined contributions (NDCs) under the Paris Agreement, as the Government seemed to suggest. The Court also finds convincing the reasoning of the GFCC, which rejected the argument that it was impossible to determine the national carbon budget, pointing to, inter alia, the principle of common but differentiated responsibilities under the UNFCCC and the Paris Agreement. This principle requires the States to act on the basis of equity and in accordance with their own respective capabilities. Thus, for instance, it is instructive for comparative purposes that the European Climate Law provides for the establishment of indicative GHG budgets.²⁷

ii. Sovereign Equality as the Source of States' Duty to Share the Global Carbon Budget Equitably and Reasonably

19. As the Republic of Kiribati detailed in its Statement before the Court, grounded on the principle of sovereign equality, all States must share this global commons in an equitable and reasonable way, without causing significant harm to it, taking into account current and future needs, and most importantly, paying special regard to the requirements of vital human needs.
20. That it is the principle of sovereign equality that inspires the duty to share collective resources equitably and reasonably was highlighted by the Permanent Court of International Justice in the *River Oder* judgement:

[A] community of interests in a navigable river [that traverses or separates the territory of more than one state] becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others.²⁸

21. As Gunther Handl explains,

[T]his equality of right flows of course from the basic principle of the sovereign equality of states itself. For given an interdependence of resource utilizations in different national jurisdictions, territorial sovereignty-based claims concerning the exploitation of natural resources within one jurisdiction must be consonant with

²⁷ European Court for Human Rights in *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (2024), ¶ 571.

²⁸ Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder, 1929 P.C.I.J. (ser. A) No. 23, at 27 [hereinafter 'River Order'].

the respect due to the sovereignty of other states within whose territory the repercussions of the former's conduct will be felt.²⁹

22. Several States emphasized in their written statements the obligation to share the global carbon budget equitably and reasonably, an obligation that is grounded in the foundational principle of sovereign equality.

23. Costa Rica proposes that:

The obligation not to cause significant transboundary harm is a corollary of the principle of sovereign equality of States and the obligation to respect the sovereignty and the territorial integrity of other States. The conduct within a State causing significant harm to the territory, the population or the environment of another State or to areas beyond national jurisdiction is incompatible with the idea that, being sovereign equals, States must respect the component elements of the others, and those that are common as well. As such, it can be said that the principle of not causing significant transboundary harm has existed since the very existence of a plurality of States having relations among them. What has evolved is the awareness upon its existence and the different manners in which this harm can be produced to the other components of the international community.³⁰

24. In its submission, Belize echoes this assertion:

It follows from the principles of sovereign equality and territorial sovereignty of States that a State has a right to engage in certain activities of its choosing within its own territory. There are, however, limitations on the exercise of that right, including in the form of a countervailing obligation which requires a State to prevent transboundary harm to the areas beyond the limits of its national jurisdiction, including the environment of other States. Such harm, emanating from within a State's territory but affecting areas exterior to it, is known as transboundary harm.³¹

25. Pakistan has similarly stressed the connection between sovereign equality and the obligation to protect global resources:

Sovereign equality and territorial sovereignty entail that States have the exclusive right to display activities of a State and the duty to protect the rights of other state to prevent transboundary harm.³²

26. The Solomon Islands suggested that “The contemporary legal order is predicated on the claim that all States are sovereign and equal: a perspective that stands in the way of

²⁹ Gunther Handl, *The Principle of Equitable Use as Applied to Internationally Shared Natural Resources: Its Role in Resolving Potential International Disputes over Transfrontier Pollution*, 14 REV. BDI 40 (1978), at 43.

³⁰ Obligations of States in respect of Climate Change, Written Statement by Costa Rica, ¶ 49.

³¹ Obligations of States in respect of Climate Change, Written Statement by Belize, ¶ 32.

³² Obligations of States in respect of Climate Change, Written Statement by Pakistan, ¶ 30.

equitable and fair outcomes. The principle of “*common but differentiated responsibilities and respective capabilities, in the light of different national circumstances*”, seeks to bridge the gap between factual inequality and formal equality of States.”³³

27. The Republic of the Marshall Islands, another low-lying atoll nation that shares in the Republic of Kiribati’s unique climate change concerns, further emphasized that:

[T]he Common but Differentiated Responsibilities in the UNFCCC recognizes that developed countries have a greater responsibility for combating climate change due to their historical and current emissions, as well as their higher levels of economic development. This is further recalled and refined in the Paris Agreement.³⁴

iii. The Duty to Utilize Common Resources in an Equitable and Reasonable Way

28. Several States and international organizations emphasized this duty. The European Union (EU) in its response emphasized that the principle of equity is a common theme of various treaties:

The principle of ‘equity’ has been referenced in several international treaties relevant to the obligations of States to protect the climate system. In addition to the UNFCCC and Paris Agreement, this notably includes UNCLOS in which there is an explicit reference to “the equitable and efficient utilization” of the ocean’s resources’ in the Preamble. The 1992 Biodiversity Convention and its Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity also refer to the “fair and equitable” sharing of benefits of the use of genetic sources among their objectives and the 1987 Montreal Protocol likewise refers to “*equity*”.³⁵

29. More generally, the EU acknowledged “that the principle of equity in a broad sense is a general principle of law, within the meaning of Art 38(1) of the ICJ Statute.”³⁶ The EU shows that “Indeed, this Court has held that the “*the legal concept of equity is a general principle directly applicable as law*”.³⁷ It refers to “the often-cited passage of the individual opinion in a case concerning the *Diversion of Water from the Meuse* (the

³³ Obligations of States in respect of Climate Change, Written Statement by Solomon Island, ¶ 87.

³⁴ Obligations of States in respect of Climate Change, Written Statement by The Republic of the Marshall Islands, ¶ 19.

³⁵ Obligations of States in respect of Climate Change, Written Statement by the European Union, ¶ 169.

³⁶ *Id.* at ¶ 171.

³⁷ *Id.* at ¶ 172, citing *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, at 18, ¶ 71. *See also*, *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, at 3, ¶ 88.

Netherlands v Belgium), Judge Manley Hudson interpreted certain equity maxims as “general principles of law recognised by civilized nations”.³⁸

30. In its response, Iran stressed the duty to cooperate in protecting shared resources and avoiding harm:

Consequently, this Court considers that States have a duty to cooperate in good faith to ensure protection against environmental damage. This duty to cooperate is especially important in the case of shared resources, the development and use of which should be carried out in an equitable and reasonable manner in keeping with the rights of the other States that have jurisdiction over such resources.³⁹

31. Barbados similarly highlighted the international duty to ensure equitable and reasonable use of shared resources and take measures to avoid causing significant harm, stressing that: Modern international instruments document the obligations not to cause [...] transboundary environmental harm,” noting, for example, the duty of States, grounded in customary international law, to use international watercourses in an equitable and reasonable manner, without causing significant harm.”⁴⁰
32. New Zealand expressed concern about the plight of small island developing States, pointing out that “the contribution [to the harm] and risk is shared unequally and inequitably, with the least developed States, including small island developing States, having contributed least to atmospheric GHGs but facing the greatest risk of harm from climate change and having the least capacity to adapt.”⁴¹

³⁸ European Union, at ¶172 (citing Individual Opinion of Judge Manley Hudson in *Diversion of Water from the Meuse (the Netherlands v Belgium)* case, at 76).

³⁹ Obligations of States in respect of Climate Change, Written Statement by Iran, ¶ 185 (citing *Regarding shared resources, the Charter of Economic Rights and Duties of States* which establishes that: “[i]n the exploitation of natural resources shared by two or more countries, each State must co-operate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others.”); *see also*, Charter of Economic Rights and Duties of States adopted by the United Nations General Assembly on 12 December 1974, in Resolution 3281 (XXIX), UN DOC. A/RES/29/3281, art. 3; *see*, Convention on the Law of the Non-Navigational Uses of International Watercourses, entered into force on 17 August 2014, arts. 5 and 8, and Draft Articles on the Law of Transboundary Aquifers, prepared by the International Law Commission and annexed to United Nations General Assembly Resolution 68/118 of 19 December 2013, UN DOC. A/RES/68/118, art. 7.

⁴⁰ Obligations of States in respect of Climate Change, Written Statement by Barbados, ¶ 131.

⁴¹ Obligations of States in respect of Climate Change, Written Statement by New Zealand, ¶ 28.

33. The statement by Antigua and Barbuda on behalf of the Alliance of Small Island States (AOSIS) emphasizes “the general principle of equity in international law.” Accordingly, AOSIS maintains:

Small island developing states contribute less than one percent of all global production of fossil fuels, and our share of marine plastic waste is estimated at less than 1.3 percent. However, the adverse effects of climate change, sea-level rise, and plastic pollution disproportionately affect our industries, infrastructure, health, and culture. Equity is vital – small islands have contributed almost nothing to these overlapping and significant transboundary harms. It is inequitable, and frankly unjust, to expect that small islands use their relatively small national budgets to respond to and remediate the effects of transboundary harm caused by others.⁴²

iv. Sovereign Equality and the Obligations to Protect Other States as Part of Peoples’ Right to Self Determination and Territorial Integrity

34. As this Court has recently affirmed (OPT 19.7.24),

the right of all peoples to self-determination is “one of the essential principles of contemporary international law.”⁴³ Indeed, it has recognized that the obligation to respect the right to self-determination is owed *erga omnes* and that all States have a legal interest in protecting that right.⁴⁴

35. This Court also drew the legal consequences from this *erga omnes* obligation. Recalling the Friendly Relations Resolution, the Court found that “all States must co-operate with the United Nations” to ensure the full realization of the right of the Palestinian people to self-determination.⁴⁵ It further determined that:

It is for all States, while respecting the Charter of the United Nations and international law, to ensure that any impediment resulting from the illegal presence of Israel in the Occupied Palestinian Territory to the exercise of the Palestinian people of its right to self-determination is brought to an end.⁴⁶

⁴² Obligations of States in respect of Climate Change, Written Statement by Antigua and Barbuda on behalf of the Alliance of Small Island States, ¶ 5.

⁴³ Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion [hereinafter OPT Opinion], at ¶ 232 (citing *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, at 102, ¶ 29).

⁴⁴ *Id.*, citing (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), at 199, ¶ 155; Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I), at 139, ¶ 180).

⁴⁵ OPT Opinion, ¶ 275.

⁴⁶ *Id.* at ¶ 279.

36. Elaborating on the rights of peoples to self-determination in the context of the impacts of climate change on particularly vulnerable peoples, Burkina Faso stated:

Le Burkina Faso soutient que les émissions anthropiques de gaz à effet de serre qui causent les changements climatiques et leurs effets néfastes portent atteinte à la jouissance du droit de certains peuples à l'existence.⁴⁷

37. As Burkina Faso pointed out, this right is linked to the right to territorial integrity, a right that is threatened for some countries by the prospective rise of sea level:

les émissions anthropiques de gaz à effet de serre et les changements climatiques qui en résultent ainsi que leurs effets néfastes causent des pertes de territoires du fait de la survenance des phénomènes extrêmes comme l'érosion côtière et l'élévation du niveau de la mer.⁴⁸

38. Similarly, Bangladesh stated that:

States are obliged to promote the right to self-determination in Bangladesh by taking steps to mitigate these climate impacts, including by meeting their other obligations to prevent transboundary harm from GHG emissions and to curb GHG emissions in accordance with UNCLOS and the Paris Agreement, and by meeting climate financing commitments. States' failure to take these necessary steps to address their own GHG emissions or to fulfill their commitments to assist with climate adaptation directly impede the exercise of the right to self-determination in Bangladesh.⁴⁹

39. With respect to the obligation of all states to promote the realization of the rights of other people to self-determination, Tuvalu argues:

Of particular relevance in the context of climate change is the "obligation to promote the realization" of the right to self-determination and to "respect" the right. It is difficult to imagine a more profound obstacle to the realization of the right to determine the political status of a people and "freely to pursue their economic, social and cultural development", to use Obligations of States in respect of Climate Change, Written Statement by the words of Article 1(1) common to the ICCPR and the ICESCR and Article 3 of UNDRIP, than uncertainty as to whether all or part of the State and its maritime zones will continue to exist, and for how long. That is the situation that Tuvalu faces.⁵⁰

40. As asserted by the Pacific Island Forum Secretariat (PIFS),

A core element of the 2023 Declaration is PIF Members' declaration that their statehood and sovereignty will continue, and the rights and duties inherent thereto will be maintained, notwithstanding the impact of climate change-related sea-level

⁴⁷ Obligations of States in respect of Climate Change, Written Statement by Burkina Faso, ¶ 206.

⁴⁸ *Id.* at ¶ 207

⁴⁹ Obligations of States in respect of Climate Change, Written Statement by Bangladesh, ¶ 123.

⁵⁰ Obligations of States in respect of Climate Change, Written Statement by Tuvalu, ¶ 81.

rise [2023 Declaration, Para 13].”⁵¹ PIFS explains the importance of continuity of statehood, as it is linked to, *inter alia*, sovereign equality and the right to self-determination, “The 2023 Declaration also recognises that the continuity of statehood in the face of climate change-related sea-level rise is consistent with important principles and rights of international law. This includes the right of peoples to self-determination, the right to a nationality, the protection of territorial integrity and political independence, principles of equity and fairness, the maintenance of international peace and security which in turn requires stability in international relations, the right of a state to provide for its preservation, the duty of cooperation, the sovereign equality of states, and permanent sovereignty over natural resources.”⁵²

41. Finally, as thoughtfully provided in the submission by the Commission of Small Island Developing States (COSIS), the presumption of the continuation of the State is a well-established principle of international law that has already been accepted by a majority of States.⁵³ Further, at least 106 States have acknowledged that in the face of climate change-related sea-level rise, maritime baselines remain fixed at their current coordinates despite resultant physical coastline change.⁵⁴ Naturally, this is of the utmost importance to the Republic of Kiribati, a State that through no fault of its own, is threatened by the imminent effects that climate change portends to its existing sovereign areas and sovereign rights in its maritime areas, including its territorial seas, exclusive economic zones and continental shelves. Considering this, the Republic of Kiribati wishes to

⁵¹ Obligations of States in respect of Climate Change, Written Statement by PIFS, ¶ 32.

⁵² *Id.* at ¶ 33.

⁵³ See African, Caribbean, and Pacific Group of States (ACP), 9th Summit of Heads of State and Government, Nairobi Nguvu Ya Pamoja Declaration (11 December 2019), ¶ 24 (stressing ‘the need to act in solidarity with the concerned countries at the multilateral level, to ensure that the existing maritime boundaries are not affected by the impacts of climate change, and that ACP States are not deprived of rights and access to ocean resources’). This represents the views of Angola, Antigua and Barbuda, Belize, Bahamas, Barbados, Benin, Botswana, Burkina Faso, Burundi, Cape Verde, Cameroon, Central African Republic, Chad, Comoros, the Republic of the Congo, Cook Islands, Côte d’Ivoire, Cuba, the Democratic Republic of the Congo, Djibouti, Dominica, the 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, Saint Christopher (Saint Kitts and Nevis), Saint Lucia, Saint 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, and Zimbabwe. See also, Pacific Islands Forum, Declaration on Preserving Maritime Zones in the Face of Climate Change-Related Sea-Level Rise (6 August 2021); Alliance of Small Island States, Leaders Declaration 2021 (22 September 2021) (affirming that there is no obligation under UNCLOS to update baselines and outer limits of maritime zones “notwithstanding any physical changes connected to climate change-related sea-level rise”).

⁵⁴ Obligations of States in respect of Climate Change, Written Statement by The Commission of Small Island States on Climate Change and International Law, ¶ 72. See specifically, footnote 209 listing 104 States—representing the majority of island and coastal states—with an addition of Albania and El Salvador to reach a majority of 106 States worldwide.

emphasize that this issue of preservation of sovereign and jurisdictional rights is distinctly a legal question that is within the purview of the Court that has global relevance. The international legal system must adapt to the physical changes caused by climate change and harmful human conduct through the recognition of the sovereignty, statehood, territory, and maritime spaces of small island developing States.⁵⁵

v. Human Rights Instruments Govern the Conduct of States in Relation to Climate Change

42. Firstly, the right to a healthy, clean, and sustainable environment is effectively an integral part of customary international law. In fact, as has been argued in many written comments before the Court,⁵⁶ with notable exception of the United States' and Germany's written submissions,⁵⁷ the right to a healthy environment is a peremptory norm of customary international law.
43. The UN General Assembly specifically recognized the universality of this right in Resolution 76/300 (2022), adopted by an overwhelming majority of States (the Republic of Kiribati included). This followed the Human Rights Council Resolution 48/31 (2021) which acknowledged the undeniable importance of a healthy environment to the exercise of all other human rights.
44. Perhaps most poignant to the recognition of the right to a healthy environment as part of *jus cogens* is the consideration of sovereign equality and intergenerational equity in securing its realisation. In *Pulp Mills*, separate opinions noted that 'it can hardly be doubted that the acknowledgment of intergenerational equity forms part of conventional wisdom in International Environmental Law.'⁵⁸

⁵⁵ See also, Obligations of States in respect of Climate Change, Written Statement by Costa Rica, ¶126 (outlining this issue as distinctly legal and resolvable through legal interpretation). Also consider using more inclusive and prescriptive terms like 'Large Ocean States.'

⁵⁶ See e.g., Written Statements by Antigua and Barbuda, Argentina, Bangladesh, Barbados, Bolivia, Burkina Faso, Costa Rica, Democratic Republic of the Congo, Dominican Republic, Ecuador, El Salvador, Federated States of Micronesia, Kiribati, Liechtenstein, Madagascar, Republic of the Marshall Islands, Mauritius, Mexico, Namibia, The Philippines, Samoa, Sierra Leone, Slovenia, and Vanuatu.

⁵⁷ Obligations of States in respect of Climate Change, Written Statement by The United States of America, ¶ 4.52; Obligations of States in respect of Climate Change, Written Statement by Germany, ¶¶ 104, 107.

⁵⁸ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgement, I.C.J. Reports 2010, Separate Opinion of Judge Cançado Trindade, ¶ 122.

45. The Human Rights Committee’s General Comment on the right to life (Article 6 of the International Covenant on Civil and Political Rights)⁵⁹ stated that “environmental degradation can compromise effective enjoyment of the right to life, and [...] severe environmental degradation can adversely affect an individual’s well-being and lead to a violation of the right to life.”⁶⁰

vi. Sovereign Equality also Entails Extraterritorial Human Rights Law Obligations

46. State parties to the Covenant on Civil and Political Rights⁶¹ commit to respect protect and ensure human rights “within their jurisdiction.”⁶² The reference to this geographic scope refers to the act or omission of the State, which must be “within the jurisdiction” of the State. This geographic limitation does not extend to the consequence of that act or omission, which can take place outside the State’s jurisdiction, but is nevertheless covered by the obligation under that Covenant.

47. In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*,⁶³ the Court interpreted that provision. It found that:

[W]hile the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.⁶⁴

48. The Court grounded its findings *inter alia*, on the *travaux préparatoires* of the Covenant, which, according to the Court, showed that “the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside

⁵⁹ Human Rights Committee, *General Comment No. 36: Article 6: Right to Life*, U.N. Doc. CCPR/C/GC/36 (3 Sept. 2019), ¶ 62.

⁶⁰ Human Rights Committee, U.N. Doc. CCPR/C/135/D/3624/2019, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019, ¶¶ 8.4–8.5 (22 Sept. 2022) [hereinafter *Billy v. Australia*].

⁶¹ As of June 2024, the International Covenant on Civil and Political Rights (ICCPR) has 174 Parties and six signatories and remains one of the most widely ratified human rights treaties.

⁶² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 2004 I.C.J. 136, 136 (July 9).

⁶³ *Id.* at ¶ 109.

⁶⁴ *Id.*

their national territory.”⁶⁵ It follows that the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction within their national territory and which cause human rights violations to persons residing abroad.

49. This interpretation is consistent with the fundamental obligation not to allow their territory to be used for acts contrary to the rights of other States.⁶⁶ Inspired by this Court’s jurisprudence, the Inter-American Court of Human Rights recognized the applicability of States’ obligations to avoid transboundary environmental damage that can affect the human rights of individuals outside their territory.⁶⁷ The same approach was taken by the UN Human Rights treaty bodies such as the Human Rights Committee⁶⁸ and the Committee on the Rights of the Child.⁶⁹
50. This is certainly the case if one regards the Universal Declaration of Human Rights as reflecting customary international law.⁷⁰ The UDHR expressly extends its coverage to “[a]ll human beings”⁷¹ without delimiting any territorial restriction on States’ obligations to respect, protect and fulfil them.
51. In light of the above, the International Covenant on Civil and Political Rights is also applicable in respect of the Conduct of States parties to the convention to the extent that

⁶⁵ *Id.*

⁶⁶ *Corfu Channel Case (United Kingdom v. Albania)*, Assessment of Compensation, 15 XII 49, I.C.J. (15 Dec. 1949).

⁶⁷ State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity (Arts. 4(1) and 5(1) in relation to Arts. 1(1) and 2 American Convention on Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R., ¶ 101 (Nov. 15, 2017).

⁶⁸ Human Rights Committee, *General Comment No. 36: Article 6: Right to Life*, U.N. DOC. CCPR/C/GC/36 (3 Sept. 2019), ¶¶ 62, 63 (“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. [...] a State party has an obligation to respect and ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control.”).

⁶⁹ Committee on the Rights of the Child, *General Comment No. 26 on children’s rights and the environment, with a special focus on climate change*, U.N. DOC. CRC/C/GC/26 (22 Aug. 2023), ¶¶ 84, 86, 106.

⁷⁰ Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 97, ¶ 35 (25 Feb. 2019) (“Certainly the [UDHR] reflects customary international law”). In the regional context, see e.g., *Anudo Ochieng Anudo v. United Republic of Tanzania*, No. 012/2015, Judgment, Afr. Ct. on Hum. and Peoples’ Rts. (22 Mar. 2018), ¶ 76 (recognizing the UDHR as “forming part of Customary International Laws”).

⁷¹ G.A. Res. 217A (III), U.N. DOC. A/810 at 71 (1948), Universal Declaration of Human Rights (UDHR), 10 Dec. 1948, Art. 1.

the conduct infringed the enumerated rights of persons living abroad, including in low-lying small developing islands like Kiribati.

vii. UNFCCC and Paris Agreement do not Operate as Lex Specialis

52. The rights and duties of States with respect to climate change, and in particular with respect to the use of the global carbon budget and the specific duties toward specially affected States, including low lying island States, are grounded in foundational, *erga omnes* principles of international law: sovereignty, sovereign equality, national self-determination, and the protection of basic human rights. These rights and obligations are non-derogable. Agreements that will attempt to undermine them are null and void. Therefore, any treaty or other instruments must be interpreted as seeking to promote, and obviously not to detract, from those rights and obligations. Therefore, the argument that the UNFCCC and Paris Agreement operate as *lex specialis* must be rejected.
53. It is submitted that for this reason, in its latest Advisory Opinion, ITLOS rejected a similar claim outright:

The Tribunal also does not consider that the Paris Agreement modifies or limits the obligation under the Convention. In the Tribunal's view, the Paris Agreement is not *lex specialis* to the Convention and thus, in the present context, *lex specialis derogat legi generali* has no place in the interpretation of the Convention.⁷²

54. The Tribunal further considered that UNCLOS and the Paris Agreement are separate agreements with separate sets of obligations, so while the Paris Agreement 'complements' UNCLOS in relation to the obligation to take all necessary measures to prevent, reduce, and control marine pollution from anthropogenic GHG emissions, the '*former does not supersede the latter*'. Thus, as the Tribunal states directly:

Article 194, paragraph 1, imposes upon States a legal obligation to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions, including measures to reduce such emissions. If a State fails to comply with this obligation, international responsibility would be engaged for that State.⁷³

55. UNFCCC addresses the marine environment in an extremely narrow manner, namely not as the marine environment to be protected and preserved (Article 192) but as mere "*sinks and reservoirs*" of greenhouse gases [Article 4(1)(d)]. It would be an extreme overstretch

⁷² ITLOS Advisory Opinion, ¶ 223.

⁷³ *Id.*

to consider that such a limited treatment constitutes a *lex specialis* with respect to the comprehensive regulation provided in the UNCLOS as well as other relevant agreements protecting the marine environment.

56. In any event, neither the UNFCCC nor the Paris Agreement were in force before 21 March 1994 and 4 November 2016, respectively, whereas the relevant conduct has been ongoing for over a century. Thus, from both a *ratione materiae* and *ratione temporis* standpoint, it is not possible to conclude that the UNFCCC and the Paris Agreement are the only treaties to regulate the relevant conduct. In fact, well before these instruments were negotiated, the relevant conduct was ongoing, and it was already regulated by a range of instruments, to which the UN General Assembly requests the Court to have '*particular regard*' (Resolution 77/276, operative part, chapeau).
57. In its Resolution, the UN General Assembly specifically requested the Court not to limit itself to the interpretation and application of one or two treaties, such as the UNFCCC and the Paris Agreement, but to identify the relevant obligations from the entire corpus of international law and assess the legal consequences of the conduct responsible for climate change under international law.
58. From the perspective of rules and treaties other than those of the climate change regime, the formal application of human rights treaties and the United Nations Convention on the Law of the Sea (UNCLOS) to govern the relevant conduct (i.e., anthropogenic emissions of greenhouse gases from a State) has been specifically confirmed by the European Court of Human Rights,⁷⁴ the Human Rights Committee,⁷⁵ and the International Tribunal on

⁷⁴ European Court of Human Rights (ECtHR), *Case of Verein Klimaseniorinnen Schweiz and others v. Switzerland*, ECtHR Application no. 53600/20, Judgment of the Grand Chamber (9 April 2024), ¶¶ 410 – 411.

⁷⁵ UN Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019: Daniel Billy et al. v. Australia*, CCPR/C/135/D/3624/2019, 22 Sept. 2022, ¶ 8.7 ; UN Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016: Teitiota v. New Zealand*, CCPR/C/127/D/2728/2016, 23 Sept. 2020, ¶ 9.9.

the Law of the Sea (ITLOS)⁷⁶ as well as the current proceedings under the Inter-American Court of Human Rights.⁷⁷

59. There is also ample evidence from the practice of the Human Rights Council and its special procedures—which is expressly referred to in preambular paragraph 4—and in domestic litigation that UNFCCC and the Paris Agreement do not comprise the only governing law.⁷⁸ The text of Resolution 77/276 removes any doubt regarding the instruments that the General Assembly consider to be the applicable law. This is clear from the first paragraph of the question put to the Court.⁷⁹ Additionally, the preamble of the UNFCCC expressly refers to the prevention principle as one of the pillars on which climate action rests.⁸⁰
60. Finally, as some States rightly point out, there is no basis to claim that the prevention principle is not applicable to conduct leading to anthropogenic emissions of greenhouse gases. The preamble of the Paris Agreement specifically acknowledges the application of human rights to Parties ‘*when taking action to address climate change,*’ and that such actions should:

respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the

⁷⁶ International Tribunal on the Law of the Sea (ITLOS), *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)*, available at <https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/>.

⁷⁷ Inter-American Court of Human Rights, *Solicitud de Opinión Consultiva presentada por Colombia y Chile ante la Corte Interamericana de Derechos Humanos*, 9 Jan. 2023, available at https://www.corteidh.or.cr/observaciones_oc_new.cfm?nId_oc=2634.

⁷⁸ See e.g., *Urgenda Foundation v. State of the Netherlands*, Supreme Court of the Netherlands, ECLI:NL:HR, 20 Dec. 2019 (Netherlands), ¶¶ 5.3.2, 5.6.2, 5.8; *VZW Klimazaak v. Kingdom of Belgium*, Decision of 30 Nov. 2023, Cour d’appel Bruxelles, 2021/AR/1589, ¶ 139; *Neubauer v. Germany*, 1 BvR 2656/18 2020, Decision of 24 Mar. 2021 (Germany), ¶ 144; *Generaciones Futuras v. Ministerios de Ambiente y Desarrollo Sostenible*, República de Colombia Corte Suprema de Justicia STC4360-2018 (5 April 2018), ¶ 11; *Kula Oil Palm Ltd v. Tieba* (2021) P.G.N.C. 611, N9559, ¶ 26.

⁷⁹ See preambular paragraphs of Resolution 77/276.

⁸⁰ United Nations Framework Convention on Climate Change (UNFCCC), 9 May 1992, 1771 U.N.T.S. 107, preambular ¶ 8 (*Recalling also that States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction*). It further refers to the Declaration of the Stockholm Conference on the Human Environment and the Rio Declaration on Environment and Development, which in their principles 21 and 2, respectively, provide the canonical formulation of the prevention principle.

right to development, as well as gender equality, empowerment of women and intergenerational equity.⁸¹

61. Aside from this acknowledgment that such obligations apply to actions that address climate change, no further reference to human rights is made in the Paris Agreement, and none is made in UNFCCC. Thus, whereas the application of human rights to the relevant conduct is expressly acknowledged by the Paris Agreement, there is absolutely no basis to claim that the Paris Agreement would operate as a *lex specialis* in relation to human rights obligations.

B. The Conduct at Stake is Inconsistent with International Law

62. Through various written statements, the Court has been provided specific empirical information to identify who the main State emitters of greenhouse gases are, individually and collectively,⁸² and the share of both emissions and global warming for which each of them (and groups thereof) is responsible.⁸³
63. Furthermore, the conduct responsible for climate change and its adverse effects may also be general in nature. In its advisory opinion on the *Legality of Nuclear Weapons*, the Court was consulted about the permissibility under international law of the ‘*threat or use of nuclear weapons*’ pertaining to ‘*any circumstance*’. The General Assembly did not specify any individual State or group thereof or, still, any specific set of circumstances of threat or use.⁸⁴ The Court addressed the conduct in general, at times distinguishing between nuclear-weapon States and non-nuclear-weapon States as well as identifying other relevant subjects such as individual bearers of the human right to life.⁸⁵
64. In response to the position of some States and organizations that seek to remove the issue of climate justice (responsibility for causing significant harm to the climate system and other parts of the environment) from the purview of the Court, the factual and legal analysis of why the conduct can be described as a breach has been clearly provided by a majority of States, especially those which due to their geographical circumstances and

⁸¹ Paris Agreement, 12 Dec. 2015, 3156 U.N.T.S. 79, preambular ¶ 11.

⁸² Obligations of States in respect of Climate Change, Written Statement by Vanuatu, ¶¶ 151 – 154, 162 – 170, 177 – 192.

⁸³ *Id.* at ¶ 162 – 170.

⁸⁴ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, at 226, ¶ 1.

⁸⁵ *Id.* at 226, ¶¶ 24 – 25 and 60 – 63.

level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change. This likewise applies to the consideration of cultural traditions that may be lost to climate change-induced sea level rise (e.g., non-economic loss and damage).

65. As per Article 15 of the Articles on Responsibility of States for Internationally Wrongful Acts, the relevant conduct giving rise to a breach constitutes a “*composite act*” under the law of State responsibility – “*a series of actions or omissions defined in aggregate as wrongful*”.⁸⁶ The breach crystallizes once cumulative emissions over time cross the threshold of causing significant harm, with the start of the wrongful act set to when the first act or omission in the series took place.⁸⁷ This means that States with historically high cumulative emissions cannot claim to be in compliance with their international obligations just because their annual emissions may have peaked or declined. Their past lack of due diligence in mitigating emissions is sufficient to establish a composite breach. The bar for demonstrating diligent conduct is also higher for such States given their

⁸⁶ 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), Art. 15 (the concept of a breach resulting from a composite act has received wide recognition in international judicial and arbitral practice). See e.g., *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States* and *Talsud S.A. v. The United Mexican States*, ICSID Cases No. ARB(AF)/04/3 and ARB(AF)/04/4, Award (16 June 2010), ¶¶ 12 – 44; *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL Arbitration, Award on Jurisdiction and Liability (28 April 2011), ¶¶ 495 – 500; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011), ¶ 516; *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections (1 June 2012), ¶¶ 2.70 – 2.71, available at: <https://www.italaw.com/cases/783> (accessed 15 June 2024); *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (4 April 2016), ¶ 669, available at the following link: <https://www.italaw.com/cases/1530> (visited on 15 March 2024); *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016), at ¶ 227; *Blusun A.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID, Case No. ARB/14/3, Award (27 December 2016), ¶ 361; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID, Case No. ARB/08/5, Decision on Reconsideration and Award (7 February 2017), at ¶ 452; *Hydro S.r.l. et al. v. Republic of Albania*, ICSID Case No. ARB/15/28, Award (24 April 2019), ¶¶ 557 – 558; *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Award (27 March 2020), ¶ 411, available at: <https://www.italaw.com/cases/4695> (accessed 15 March 2024); *Carlos Ríos and Francisco Ríos v. Republic of Chile*, ICSID Case No. ARB/17/16, Award (11 January 2021), ¶ 189; *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award (3 June 2021), ¶ 230; *El-Masri v. The Former Yugoslav Republic of Macedonia*, European Court of Human Rights, Application No. 39630/09, Judgment (13 December 2012), ¶ 97; *Husayn (Abu Zubaydah) v. Poland*, European Court of Human Rights Application No. 7511/13, Judgment (24 July 2014), para. 201; *Nasr et Ghali v. Italy*, European Court of Human Rights Application 44883/09, Judgment, 23 February 2016, ¶ 185; *Duzgit Integrity Arbitration (Republic of Malta v. Democratic Republic of São Tomé and Príncipe)*, PCA Case No. 2014-07, Award on Reparation (18 December 2019), ¶ 86.

⁸⁷ 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), art. 15, commentary, ¶ 8.

outsized contribution to the problem, as per the principle of equity and common but differentiated responsibilities and respective capabilities.

66. The human rights impacts arising from this breach are far reaching. States are obligated to take all necessary measures, including the reduction of GHG emissions to protect the rights to life; a clean, healthy and sustainable environment; housing; food; water and sanitation; livelihood, and to participate fully in political and cultural life. It is also important to emphasize the disproportionate impacts of climate change on women and children in all their diversity, so elevated attention is needed to ensure gender equality and social inclusion are mainstreamed in climate change responses. As is thoroughly outlined in the Republic of Kiribati's initial written submission, the recognition of the right to self-determination, even in the face of sea-level rise, is essential for the enjoyment of other human rights.
67. Furthermore, in similar proceedings regarding human rights and States' responsibility for internationally wrongful acts with respect to climate change, the European Court of Human Rights (ECtHR) in *Klimaseniorinnen v. Switzerland* regarding Switzerland's breach of Article 6 (right to a fair trial) and, above all, Article 8 (right to respect for private and family life) determined that Switzerland did not do enough to cut its emissions of greenhouse gases.⁸⁸
68. In its analysis, ECtHR specifically looked at the relationship between an insufficient action (i.e., act/omission) and the specific harm to human rights (through the intermediary of the harm caused to a part of the environment/the climate system). For many obligations governing the relevant conduct, harm of a certain degree—significant or otherwise—to the environment is sufficient for the conduct to be in breach of the obligation, without a further need to establish a link between such harm and the harm suffered by a specific person or group of persons. Thus, the analysis in *Klimaseniorinnen* is a specific application of the most demanding standard and concludes that failure to sufficiently cut emissions of greenhouse gases amounts to a breach of human rights.

⁸⁸ *Case of Verein Klimaseniorinnen Schweiz and others v. Switzerland*, ECtHR Application no. 53600/20, Judgment of the Grand Chamber (9 April 2024), ¶¶ 439 – 444 (emphasis added).

C. Specific Legal Consequences

69. The Court has clearly recognized that the general rules of reparation must be read in the light of the specific circumstances arising from the nature of environmental harm.⁸⁹ These rules include Articles 30 (Cessation and non-repetition), 31 (Reparation), 33 (Scope of the international obligations set out in this part), 34 (Forms of reparation), 35 (Restitution) and 36 (Compensation). Moreover, specific aspects relating to the application of those general rules on reparation, including the assessment of the required causal nexus, “*may vary depending on the primary rule violated and the nature and extent of the injury.*”⁹⁰

i. With Respect to 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

70. Given the Republic of Kiribati’s specific ‘victimhood’ in Resolution 77/276 as a low-lying atoll nation that is specially affected by and vulnerable to the adverse effects of climate change [Question (b)(i)] as well as to the plight of its present and future generations’ [Question (b)(ii)] ability to continue to exercise sovereign equality and self-determination in the face of sea-level rise, the following legal consequences as outlined should apply:

- (a) Reparation for the consequences of extreme and slow onset events (preambular paragraphs 8 and 10);
- (b) Finance, capacity-building and technology transfer for adaptation and loss and damage (preambular paragraph 11); and
- (c) Developed countries’ commitment of USD 100 billion per year by 2020 for mitigation action (preambular paragraph 12).⁹¹

71. Under the obligation of cessation and non-repetition there must be a requirement to adopt all necessary legislation in accordance with the best available science and to recognize

⁸⁹ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation, Judgment, I.C.J. Reports 2018 at 15, ¶¶ 34 and 41 – 43.

⁹⁰ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Reparations, Judgment of 9 February 2022, ¶ 94. See also *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation, Judgment, I.C.J. Reports 2018, at 15, ¶ 34.

⁹¹ Although these are not contentious proceedings, the Republic of Kiribati, in its written statement has previously established the specific harm suffered to obtain reparation, *see e.g., Section III (B) ‘The Impact of Climate Change on the Situation of the Republic of Kiribati’* which enumerates specific illustrations of these and other types of harm suffered by atoll nations to aid the Court on the types of consequences that should follow for affected States.

the binding character of such policies, including in nationally determined contributions under the Paris Agreement.

72. It cannot be emphasized enough that the recognition that geoengineering and carbon dioxide removal is *not* cessation. These carbon capture and carbon offsets often introduce independent and additional risks to human rights and the environment. For example, carbon capture and storage (CCS) refers to technological processes that aim to trap or “capture” carbon dioxide from an emitting source—like a fossil fuel power plant—and then compress and transport it for storage, use, or both.⁹²
73. Despite being portrayed as an innovative climate solution, CCS is a decades-old technology that has a history of failure, is unproven at scale, and has been identified by the IPCC as one of the highest-cost mitigation measures with the lowest potential for reducing emissions by 2030—the most critical period for avoiding catastrophic levels of warming.⁹³ CCS technology has been used by the fossil fuel industry since the 1970s, primarily to extract more oil out of existing wells, through a process known as “enhanced oil recovery.” Its history has “largely been one of underperformance” and “unmet expectations” and CCS projects implemented to date have systematically overpromised and under-delivered on emissions reductions.
74. Under the obligation of reparation (restitution), the Republic of Kiribati stresses that the recognition of existing maritime spaces and of the continued sovereignty of those States that lose their territory because of sea-level rise. Reparation also entails compensation when restitution is not possible (i.e., economic and non-economic loss and damage, that is for damage caused to the environment in and of itself as well as cultural loss). As discussed earlier, violations to human rights and the obligations arising from the right to self-determination have particular consequences when attached to serious breaches (e.g., largescale ecocide and human rights abuses) that are owed *erga omnes* or to the international community as a whole.
75. Under the obligation of reparation (compensation) for loss and damage, there exists more than just a primary rule (aid or financial assistance), but also a secondary rule of State responsibility.

⁹² International Energy Agency (IEA), *Carbon Capture, Utilisation and Storage* available at <https://www.iea.org/energy-system/carbon-capture-utilisation-and-storage> (accessed 22 June 2023).

⁹³ See IPCC, AR6 WGIII SPM, Figure SPM.7.

76. Under the obligation of reparation (satisfaction), the Republic of Kiribati also requests the recognition of existing maritime spaces and of the continued sovereignty of those States that lose their territory as a result of sea-level rise. The legal consequences of such serious breaches of obligations are owed to the entire international community. Every State must recognize existing maritime spaces and continued sovereignty, to ensure the respect of the right of peoples to self-determination.⁹⁴

ii. With Respect to “Peoples and Individuals of the Present and Future Generations Affected by the Adverse Effects of Climate Change”

77. Remedies and redress for loss and damage, specifically in relation to climate-induced mobility (displacement and migration) and to the rights of future generations (recognition that geoengineering and carbon dioxide removal is not cessation). Additionally, the application of novel forms of remedy should be encouraged, like the establishment of intergenerational and inclusive committees, in which youth and women play an equal and active role, to determine and oversee the expeditious implementation of measures to mitigate and adapt to the impacts of climate change. This is of particular importance given that the generation of this request for an advisory opinion was spearheaded from Pacific youth.

III. CONCLUSION

78. Based on the foregoing considerations, the Republic of Kiribati respectfully submits that the following elements should be part of the answers of the Court to the questions raised by the General Assembly in its request for an advisory opinion contained in Resolution 77/276:

Governing Law

⁹⁴ For specific regional context, recall the 2021 Pacific Island Forum Leaders’ Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise (which *inter alia*, Record[s] the position of Members of the Pacific Islands Forum that maintaining maritime zones established in accordance with the Convention, and rights and entitlements that flow from them, notwithstanding climate change-related sea-level rise, is supported by both the Convention and the legal principles underpinning it [...]; Proclaim[s] that our maritime zones, as established and notified to the Secretary-General of the United Nations in accordance with the Convention, and the rights and entitlements that flow from them, shall continue to apply, without reduction, notwithstanding any physical changes connected to climate change-related sea-level rise.’).

There is a scientific consensus that anthropogenic emissions of greenhouse gases (GHG) have caused climate change over time.

1. As endorsed by several States, including China, India, Egypt, Burkina Faso, Bolivia and Antigua and Barbuda, the global carbon budget is a global commons, which all States must share equitably and reasonably without causing significant harm to it.
2. The same approach to the global carbon budget as a global common resource, which all States must share equitably and reasonably without causing significant harm, was accepted by several national courts, as well as the European Court for Human Rights.
3. Sovereign equality is the source of all States' duty to share the global carbon budget equitably and reasonably, without causing significant harm to it, taking into account current and future needs, and most importantly, paying special regard to the requirements of vital human needs.
4. Several States, including Costa Rica, Belize, Pakistan, and the Solomon Islands emphasized in their written statements the obligation to share the global carbon budget equitably and reasonably.
5. Several States and international organizations emphasized the duty to utilize common resources in an equitable and reasonable way. These include the European Union, Iran, Barbados, New Zealand, and Antigua and Barbuda on behalf of the Alliance of Small Island States (AOSIS).
6. Grounded on the principle of sovereign equality, the right to self-determination is linked to the right to territorial integrity, a right that is threatened for some countries by the prospective rise of sea level.
7. All states have an obligation to promote the realization of the rights of other people to self-determination.
8. Human rights instruments govern the conduct of states in relation to climate change.
9. The right to a healthy, clean, and sustainable environment is effectively an integral part and is a peremptory norm of customary international law.
10. Sovereign equality also entails extraterritorial human rights law obligations.

11. The UDHR expressly extends its coverage to “[a]ll human beings” without delimiting any territorial restriction on States’ obligations to respect, protect and fulfil them.
12. The International Covenant on Civil and Political Rights is also applicable in respect of the Conduct of States parties to the convention to the extent that the conduct infringed the enumerated rights of persons living abroad, including in low-lying small developing islands like Kiribati.
13. UNFCCC and Paris Agreement cannot and do not operate as *lex specialis*. The rights and duties of States with respect to climate change, and in particular with respect to the use of the global carbon budget and the specific duties toward specially affected States, in particular low lying island States, are grounded in foundational, *erga omnes* and even *jus cogens* principles of international law, which are non-derogable. Agreements that will attempt to undermine them are null and void.

The Conduct at Stake is Inconsistent with International Law

14. Through various written statements, the Court has been provided specific empirical information to identify who the main State emitters of greenhouse gases are, individually and collectively, and the share of both emissions and global warming for which each of them (and groups thereof) is responsible.
15. Furthermore, the conduct responsible for climate change and its adverse effects may also be general in nature.
16. The factual and legal analysis of why the conduct constitutes a breach has been clearly provided by a majority of States.
17. States with historically high cumulative emissions cannot claim to be in compliance with their international obligations just because their annual emissions may have peaked or declined.

Specific Legal Consequences with Respect to Small Island Developing States.

Cessation:

18. The immediate the cessation of the conduct, when a State or group thereof is still displaying it, and reparation, by all States that have taken part in that conduct.

19. Under the obligation of cessation and non-repetition there must be a requirement to adopt all necessary legislation in accordance with the best available science and to recognize the binding character of such policies, including in nationally determined contributions under the Paris Agreement.
20. Geoengineering and carbon dioxide removal is *not* cessation. These carbon capture and carbon offsets often introduce independent and additional risks to human rights and the environment.

Restitution including finance, capacity-building and technology transfer for adaptation and loss and damage:

21. The obligation of reparation (restitution) requires the continued recognition by all States of the Republic of Kiribati's and other low-lying island States' rights to their current maritime spaces as well as their continued sovereignty over their territories, even if that territory is submerged or otherwise impacted because of sea-level rise.
22. Developed countries' commitment of USD 100 billion per year by 2020 for mitigation action.
23. With respect to "Peoples and Individuals of the Present and Future Generations Affected by the Adverse Effects of Climate Change", remedies and redress for loss and damage, specifically in relation to climate-induced mobility (displacement and migration) and the loss of the rights of future generations (recognition that geoengineering and carbon dioxide removal is not cessation).
24. Legal consequences arising from the infringement of the obligation to secure the right to self-determination of affected States, in particular low-lying island States such as the Republic of Kiribati include specific forms of reparation to ensure the continuity of peoples losing their territory. These include the continued recognition of the sovereignty, statehood, territory, and maritime spaces of small island developing States regardless of changes that result from rising sea levels.

[Date of submission]

15 August 2024

[Signature]

A handwritten signature in black ink on a light green background. The signature is stylized and appears to be 'Aretaake Jentaake'.

Aretaake Jentaake & Director of Human Rights

[Name and title of the person signing the brief, e.g. Agent of the relevant country, attorney
general, etc.]