INTERNATIONAL COURT OF JUSTICE

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

Written Comments of the Republic of Vanuatu

15 August 2024

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TABLE OF ABBREVIATIONS

%	Percentage
°C	Degrees Centigrade
CAOSIS	Alliance of Small Island States
ACHPR	African Commission on Human and Peoples' Rights
ARSIWA	ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts
Art./Art(s)	Article/articles
CBDR-RC	Common but differentiated responsibilities and respective capabilities
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CH_4	Methane
CO_2	Carbon Dioxide
CoP/COP	Conference of Parties
COSIS	Commission of Small Island States on Climate Change and International Law
CRC	Convention on the Rights of the Child
DRC	Democratic Republic of the Congo
ECtHR	European Court of Human Rights
EU	European Union
EU27	27 States of the European Union, excluding the United Kingdom
FFI	Fossil Fuel and Industry
G20	Group of 20
GHG(s)	Greenhouse gas(es)
GDP	Gross Domestic Product
H_2O	Water vapour
ICAO	International Civil Aviation Organization
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ/I.C.J.	International Court of Justice
ILC	International Law Commission
IMO	International Maritime Organization
IMF	International Monetary Fund
IPBES	Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services
IPCC	Intergovernmental Panel on Climate Change
ITLOS	International Tribunal for the Law of the Sea
IUCN	International Union for Conservation of Nature
LDCs	Least Developed Countries
LULUC	land use and land use changes
LULUCF	land use and land use changes, and forestry
m	Metre

MARPOL Convention	The International Convention for the Prevention of Pollution from Ships
MSG	Melanesian Spearhead Group
N_2O	nitrous oxide
NDCs	Nationally Determined Contribution(s)
OACPS	Organisation of African, Caribbean and Pacific States
OHCHR	Office of the High Commissioner for Human Rights
OPEC	Organization of Petroleum Exporting Countries
p./pp.	Page/pages
para./paras.	Paragraph(s)
PgC	Petagram
PGNC	Papua New Guinea National Court of Justice.
QLC	Land Court of Queensland
Res.	Resolution
Rev.	Revision
RIAA	Reports of International Arbitral Awards
s./ss.	Section/sections
SIDS	Small Island Developing States
SPM	Summary for Policymakers
STC	Supreme Court of Justice (Columbia)
tCO2e	Tons of CO2 equivalent
U.N.T.S./UNTS	United Nations Treaty Series
UDHR	Universal Declaration on Human Rights
UN/U.N.	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNEP	United Nations Environmental Programme
UNFCCC	United Nations Framework Convention on Climate Change
USD	United States Dollar
v./v	Versus
VCLT	Vienna Convention on the Law of Treaties
Viz.	Videlicet
Vol/vol.	Volume
WHO	Word Health Organization
WMO	World Meteorological Organization
WS	Written Statement

LIST OF FIGURES AND TABLES

I. OVERVIEW

1. In the first phase of these proceedings, 91 Written Statements were filed with the Registry of the Court, which according to the Court's press release No 2024/31 of 12 April 2024 is "*the highest number of written statements ever to have been filed in advisory proceedings before the Court*".

2. It should be further mentioned that many non-governmental organizations, including youth organizations, also made submissions in the hope that the Court will consider them in accordance with Practice Direction XII of 30 July 2004.

3. Of particular significance is the unprecedented participation of numerous States and intergovernmental organizations in proceedings before the Court for the first time. This widespread engagement stems from the gravity of the questions at hand, which concern the "*unprecedented challenge of civilizational proportions*" of climate change, as the UN General Assembly referred to it when adopting, by consensus, Resolution 77/276. But it is also a manifestation of the strong desire of so far unheard voices that the Court will fully and comprehensively address the issue of climate justice, namely that "*[v]ulnerable communities who have historically contributed the least to current climate change are disproportionately affected*".[1]

4. The fundamental inequity underpinning the existential climate crisis reverberates through many of the Written Statements, and is explicitly addressed in no fewer than 36 of them.[2] These include submissions from many first-time participants, as well as intergovernmental organizations representing developing countries most vulnerable to climate change impacts. Notable among these are the Organisation of African, Caribbean and Pacific States (**OACPS**), also a first-time participant, representing 79 developing countries (many of which are small island States and least developed countries) and the African Union, representing 55 African States. Their participation amplifies the voices of those most at risk, demanding that their concerns be heard and addressed by the Court.

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1 Intergovernmental Panel on Climate Change, *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.2 (link).

2 See WS DRC, paras. 63-65, 67-102, 324ff; WS Colombia, paras. 4.2-4.18, 5.8; WS Palau, paras. 25-26 ; WS MSG, paras. 338-342; WS Philippines, paras. 31-33, 50; WS Albania, paras. 145(c); WS Vanuatu, para. 490 ; WS Micronesia, paras. 132-133 ; WS Sierra Leone, paras. 4.5-4.6 ; WS Grenada, paras. 66-69; WS St Lucia, paras. 83, 97(v)-(vi); WS St. Vincent and the Grenadines, para. 92; WS Kiribati, paras. 174-178; WS Timor Leste, paras. 369-374; WS Ecuador, paras. 4.09, 4.12, 4.25; WS Barbados, para. 343; WS African Union, paras. 228-229; WS Sri Lanka, para. 107; WS OACPS, paras 7-8; WS Madagascar, paras. 69, 74 and 87; WS Egypt, paras. 57-67, 297; WS Chile, paras. 102, 119-120; WS Namibia, paras. 16 and 171; WS Tuvalu, paras. 119-125; WS Mauritius, para. 215-217 ; WS Nauru, paras. 45-48; WS Costa Rica, paras. 116-122; WS Antigua and Barbuda, paras. 616-617; WS COSIS, paras. 51 and 149; WS El Salvador, paras. 51-53; WS Bolivia, paras. 44-46; WS Brazil, paras. 81-82; WS Vietnam, paras. 37-52, 55; WS Dominican Republic, paras. 4.60 and 5.1; WS Nepal, para. 23; WS Burkina Faso, paras. 356ff.

5. Behind these formal submissions lies a global constituency of individuals, communities and peoples of the present generations but seeking justice also for future generations and for the environment. They come, through their governments and in the forms available to them, with the expectation that the Court, the only judicial body with general competence over the entire corpus of international law, will provide a detailed and comprehensive ruling "on legal consequences for nations that are damaging the climate". [3] As explained by Cynthia Houniuhi, president of the youth advocacy group Pacific Islands Students Fighting Climate Change, which initiated the global campaign for an advisory opinion from the Court:

> "Climate change is not a dinner-table conversation for my people — we do not have that luxury. It is what we lie awake worrying about at night. Climate change is the deaths of our people, whose losses we feel; it is lost possessions and homes, swept away by storms; it is wanting to move back to our childhood homes, but knowing they will be flooded in a matter of years; it is the threat of losing the places that our identities are tied to." [4]

6. It was this lived reality that led this youth group, soon joined by so many others from across the globe, to "agitate for an ICJ ruling".[5] It also inspired Vanuatu to do everything in its power to support their cause. It informed close partnerships with States from all regions who shared Vanuatu's commitment to have the issue fully discussed at the UN General Assembly. This diplomatic campaign, together with the ongoing advocacy of our youth and guided by their vision, led to the adoption by consensus of Resolution 77/276 on 29 March 2023, and to the present proceedings.

7. The issue that is now before the Court is, in the words of civil society lawyers, "*simple at core*":

> "Many laws have been broken. Many lives have been lost and many more will be lost. And there has been no accountability. States, peoples, individuals—indeed the whole world—is looking to the Court for the clarity and candor that will unlock requisite ambition and reparations owed." [6]

8. This shared vision is reflected in Vanuatu's position, stated in paragraph 1 of its Written Statement, which it reaffirms in this submission:

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[3] Cynthia Houniuhi, "Why I'm leading Pacific Islands students in the fight on climate change", *Nature* (World View, online, 30 May 2023) (link).

[4] Cynthia Houniuhi, "Why I'm leading Pacific Islands students in the fight on climate change", *Nature* (World View, online, 30 May 2023) (link).

[5] Cynthia Houniuhi, "Why I'm leading Pacific Islands students in the fight on climate change", *Nature* (World View, online, 30 May 2023) (link).

[6] Written Statement submitted by the Center for International Environmental Law (CIEL), *Obligations of States in respect of Climate Change (Request for Advisory Opinion)*, 20 March 2024 (link).

> "at the heart of the request submitted by the UN General Assembly to the Court in Resolution 77/276 is a simple but fundamental question: **whether a certain conduct of States – the "Relevant Conduct" – which has caused both significant harm to the environment, particularly to and through the climate system, and indeed catastrophic harm in the form of climate change and its adverse effects, is consistent, as a matter of principle, with international law**. **The Republic of Vanuatu submits that the Relevant Conduct is, in principle, inconsistent with several rules of treaty and customary international law, including the obligations arising from the instruments and rules mentioned in the chapeau paragraph of the operative part of Resolution 77/276. That carries the legal consequences contemplated in the general international law of State responsibility as well as in specific treaties, with respect to the two categories of victims of climate injustice identified in sub-paragraphs (i) and (ii) of Question (b)"** (emphasis original)

9. These proceedings present the Court with a historic opportunity to provide clarity on this question. The Court's advisory opinion will be instrumental in guiding State conduct and could shape the future of global climate action.

II. MAIN ISSUES ARISING FROM THE WRITTEN STATEMENTS

2.1. Overview

10. The main issues arising from a systematic review of the Written Statements submitted in the previous phase of these proceedings concern the power of the Court to give the requested advisory opinion (Section 2.2), the specification of the conduct which is at the heart of the two questions put to the Court (Section 2.3), the scope of the international law governing such conduct (Section 2.4), the inconsistency of this conduct with the international obligations governing it (Section 2.5) and the specific legal consequences arising for States which have displayed such conduct (Section 2.6).

11. For each of these issues, this submission systematically reviews and summarizes the positions of those States and organizations having submitted Written Statements, refers to the relevant sections of Vanuatu's Written Statement when an issue had been anticipated therein, and provides additional comments specifically addressing – and when necessary, rebutting – the arguments made in the Written Statements.

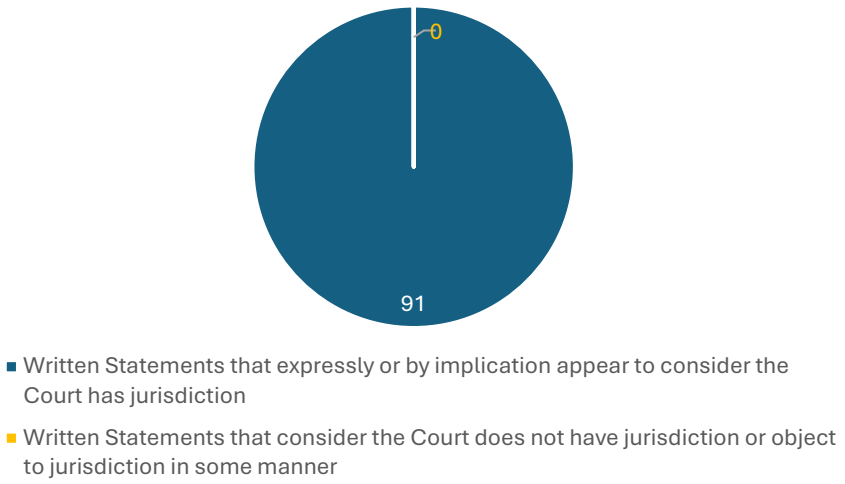
2.2. The Court has jurisdiction to render the requested advisory opinion, and there are no reasons for declining to do so

2.2.1. *Overview of the Written Statements*

12. There is remarkable convergence in the Written Statements with respect to the conclusions that the Court has jurisdiction to give the advisory opinion requested and that there are no compelling reasons preventing the Court from exercising such jurisdiction.[7] Figure 1 provides a graphic overview of the positions taken in the Written Statements with respect to this issue:

[7] The following references to the written statements are organized following the order given to them by the Registry (which reflects the order of submission). In each case, the relevant paragraphs are identified. The terms "acceptance implicit" are used when a written statement proceeds to the merits without offering any grounds to challenge the jurisdiction of the Court or the admissibility of the request. When the position in a written statement is not entirely clear, this is mentioned between parenthesis for the sake of full transparency: WS Portugal, paras. 26, 29; WS DRC, para. 18 ; WS Colombia, paras. 1.22; WS Palau (acceptance implicit); WS Tonga, para. 9; WS OPEC, para. 13 (impliedly agreeing that the Court has jurisdiction, para. 13; WS IUCN (acceptance implicit); WS Singapore, paras. 2.6; WS Peru, paras. 7-8, WS Solomon Islands, para. 11; WS Canada, para. 11; WS Cook Islands, para. 10; WS Seychelles, para. 8; WS Kenya, paras. 4.10; WS Denmark, Finland, Iceland, Norway, Sweden, para. 11; WS MSG, paras. 22-3; WS Philippines, para. 26; WS Albania, paras. 26-7; WS Micronesia, paras. 20-22; WS Saudi Arabia, paras. 3.5, 3.10-17 (Although Saudi Arabia accepts that the Court has jurisdiction under Article 96, paragraph I of the UN Charter and Article 65, paragraph I, of its Statute, it submits that the Court should take care when exercising its jurisdiction because *inter alia* of the political nature of ongoing negotiations on the international law of climate change); WS Sierra Leone, paras. 2.3-5; WS Vanuatu, paras. 33-6; WS Switzerland, para. 10; Lichtenstein, para. 14; WS Grenada, para. 9; WS St Lucia, para. 10; WS SVG, para. 18; WS Belize, para. 4; WS UK (acceptance implicit); WS Netherlands, para. 1.4; WS Bahamas, para. 29; WS UAE, para. 5; WS Marshall Islands, para. 14; WS PNAO (acceptance implicit); WS PIF (acceptance implicit); WS France, paras. 5-6; WS New Zealand (acceptance implicit); WS Slovenia, para. 7; WS Kiribati, paras. 5-8; WS FFA (acceptance implicit); WS China, para. 6; WS Timor-Leste, para. 13; WS Korea, para. 5; WS India, para. 4-7; WS Japan (acceptance implicit); WS Samoa, para. 10; WS AOSIS, paras. 9-10; WS Iran, paras. 14-22 (it does not contest jurisdiction *per se* but lays down grounds for the Court to exercise jurisdiction to decline the request); WS Latvia, para. 8; WS Mexico, paras. 8-10; WS South Africa, paras. 8-10 (it does not challenge the jurisdiction/competence of the Court but makes some observations with respect to how the questions have been formulated); WS Ecuador, para. 2.6-7; WS Cameron, paras. 8-9; WS Spain (implicit acceptance); WS Barbados, paras. 27-30; WS African Union, para. 30; WS Sri Lanka, para. 10; WS OACPS, para. 11; WS Madagascar, para. 7; WS Uruguay, para. 72; WS Egypt, para. 20; WS Chile, para. 16; WS Namibia, para. 20, 25; WS Tuvalu (acceptance implicit); WS Romania (acceptance implicit); WS USA (acceptance implicit); WS Bangladesh, para. 81-2; WS EU, para. 27; WS Kuwait (acceptance implicit); WS Argentina, para. 12; WS Mauritius, para. 17; WS Nauru (acceptance implicit); WS WHO (acceptance implicit); WS Costa Rica, para. 8; WS Indonesia, para. 24; WS Pakistan (acceptance implicit); WS Russia, pg. 3; WS Antigua and Barbuda (acceptance implicit); WS COSIS (acceptance implicit); WS El Salvador, paras. 7-8; WS Bolivia, para. 5; WS Australia, para. 1.25; WS Brazil, para. 6; WS Vietnam, para. 8; WS Dominican Republic, paras. 3.5-6; WS Ghana, para. 20; WS Thailand (acceptance implicit); WS Germany, paras. 10; WS Nepal, paras. 3-4; WS Burkina Faso, para. 55; WS Gambia, para. 1.

Figure 1: Written Statements that consider that the Court has jurisdiction v. Written Statements that do not



13. Yet, in a minority of Written Statements, a number of issues have been raised which need to be addressed, as they mischaracterize both the questions and the task entrusted by the UN General Assembly to the Court. These issues are identified and discussed in the next section.

2.2.2. *A fundamental contribution of the Court to the activities of the United Nations and to climate justice*

A. Overview

14. In some Written Statements, a number of issues have been raised which concern mostly the nature of the task that Resolution 77/276 entrusts the Court with, and more specifically: (i) the level of specificity of question(s) and the potential need for reformulation (Section B); (ii) whether the questions invite the Court to make rather than to state the law (Section C); (iii) the political context – specifically the climate negotiation context – in which the advisory opinion would intervene (Section D); and (iv) the need to avoid fragmentation between the pronouncements of different international courts and tribunals on a fundamentally similar issue (Section E). Each of these issues is addressed next.

B. Whether the questions need reformulation

15. At the outset, it should be recalled that the Court has only reformulated the questions put to it in exceptional cases, on grounds which are far from applicable in the present case.[8] It is important in this context that the formulation of the

[8] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, I.C.J. Reports 2010, p. 403, para. 50. See WS Vanuatu, paras. 59-65. In its recent advisory opinion on Israel policies in Palestine, the Court recalled, first, that lack of clarity does not deprive the Court of its jurisdiction and that it is for the Court to "*appreciate and assess the appropriateness of the formulation of the questions*", *Legal consequences arising from the policies and*

question was adopted **by consensus** following intense negotiations on the specific wording. For example, the terms "*legal consequences*" are "*expressly stated*" mindful of the Court's statement in its advisory opinion on Kosovo that "*in past requests for advisory opinions, the General Assembly and the Security Council, when they have wanted the Court's opinion on the legal consequences of an action, have framed the question in such a way that this aspect is expressly stated*".[9] More fundamentally, it cannot be argued in good faith that the specific formulation of a resolution which was co-sponsored by no less than 132 States when tabled, and which was then adopted by consensus by the States of the General Assembly does not reflect exactly what the General Assembly needs the Court to clarify.

C. Whether the questions require the Court to make, rather than to state, the law

16. The argument according to which the Court is invited to create law is contrary to the express wording of Resolution 77/276 which requests the Court to "*hav*[e] *particular regard to*" (Chapeau) a list of rules and instruments which are binding, then to clarify the obligations of States "*under international law*" (Question (a)) and, finally, to determine "*legal consequences under these obligations*" (Question (b)).

17. The fact that the question may be answered with respect to the conduct of specific States or groups thereof, or in general terms, in no way affects the jurisdiction of the Court, and it is certainly not a compelling reason for the Court to refrain from giving its opinion. In its Advisory Opinion on the *Legality of Nuclear Weapons*, the Court made clear that it can answer abstract questions:

> "it is the clear position of the Court that to contend that it should not deal with a question couched in abstract terms is 'a mere affirmation devoid of any justification', and that 'the Court may give an advisory opinion on any legal question, abstract or otherwise' (Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948, p. 61; see also Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I. C.J. Reports 1954, p. 51 ; and 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. 27, para. 40)"[10]

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practices of Israel in the occupied Palestinian territory, including East Jerusalem, Advisory Opinion of 19 July 2024, General List No. 186, paras 29 and 49.

9 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, I.C.J. Reports 2010, p. 403, para. 51.

10 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* I.C.J. Reports 1996, p. 226, para. 15.

D. Whether the political context of ongoing negotiations prevents the Court from rendering its advisory opinion

18. The political nature of a question, including the existence of negotiations, has been expressly rejected by the Court as a relevant consideration for the decision of whether to render or not an advisory opinion. The Court has previously acknowledged that obtaining an advisory opinion may be "*particularly necessary*" to clarify "*the legal principles applicable with respect to the matter under debate*".[11] More fundamentally, the Court has emphasized that it cannot second-guess the General Assembly's judgement on the political usefulness of an advisory opinion—a consideration weighing even more heavily when the resolution requesting the opinion has been adopted by consensus, thus sending an unequivocal signal that, at this precise juncture, the Court's advice is deemed crucial.

19. Climate negotiations can greatly benefit from an authoritative statement regarding the main obligations and their implications for the conduct which is the acknowledged cause of climate change. In the *Kosovo* advisory opinion, the Court expressly mentioned that:

> "Nor does the Court consider that it should refuse to respond to the General Assembly's request on the basis of suggestions, advanced by some of those participating in the proceedings, that its opinion might lead to adverse political consequences. Just as the Court cannot substitute its own assessment for that of the requesting organ in respect of whether its opinion will be useful to that organ, it cannot — in particular where there is no basis on which to make such an assessment — substitute its own view as to whether an opinion would be likely to have an adverse effect. As the Court stated in its Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, in response to a submission that a reply from the Court might adversely affect disarmament negotiations, faced with contrary positions on this issue 'there are no evident criteria by which it can prefer one assessment to another'".[12]

20. In four key cases, the Court addressed submissions that it should refrain from answering a question due to ongoing negotiation processes or otherwise take into account those circumstances in giving its advice. In these cases, the Court provided its authoritative guidance as an additional element to the negotiation process, and it went at times as far as expressly directing UN member States to cooperate in bringing the problem under negotiation towards an accelerated solution. In this way, the Court's own practice on the exercise of its advisory jurisdiction in circumstances of negotiation processes supports the giving of comprehensive guidance to ensure that all participants are fully apprised of their rights and obligations under

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11 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt,* Advisory Opinion, I.C.J. Reports 1980, p. 73, para. 33.

12 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, I.C.J. Reports 2010, p. 403, para. 35.

international law, particularly those parties to the negotiation process who find themselves disproportionately affected by the problem.

21. First, in *Legality of the Threat or Use of Nuclear Weapons*, some participants submitted that an advisory opinion "*might adversely affect disarmament negotiations and would, therefore, be contrary to the interest of the United Nations*".[13] While the Court acknowledged that its opinion would "*present an additional element in the negotiations on the matter*", the effect of its opinion was "*a matter of appreciation*" and did not constitute a compelling reason to decline to exercise its jurisdiction.[14]

22. Second, in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, some participants argued that an advisory opinion "*could impede a political, negotiated solution to the Israeli-Palestinian conflict*", specifically because it would "*undermine the scheme*" of a 2003 roadmap towards a two-State solution (endorsed by the Security Council) or otherwise "*complicate the negotiations*" under that roadmap.[15] While the Court remained "*conscious*" that the 2003 roadmap indeed "*constitute[d] a negotiating framework*", participants had "*expressed differing views*" as to "*what influence the Court's opinion might have on those negotiations*".[16] Again, there was no compelling reason for the Court to refrain from giving its opinion.

23. Third, in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, some participants submitted that "*the time frame for completing the decolonization of Mauritius is a matter for bilateral negotiations to be conducted between Mauritius and the United Kingdom*".[17] This case is particularly apposite because the Court addressed this point in answering a question on legal consequences. The fact of ongoing negotiations in no way restricted the Court's interpretation of the question, but rather formed the practical backdrop for its authoritative guidance: the United Kingdom had "*an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible*", such that "*all Member States must co-operate with the United Nations to complete the decolonization of Mauritius*."[18]

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13 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* I.C.J. Reports 1996, p. 226, para. 17.

14 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* I.C.J. Reports 1996, p. 226, para. 17.

15 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion,* I.C.J. Reports 2004, p. 136, para. 51.

16 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion,* I.C.J. Reports 2004, p. 136, para. 54.

17 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion,* I.C.J. Reports 2019, p. 95, para. 176.

18 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion,* I.C.J. Reports 2019, p. 95, para. 182.

24. Recently, in *Legal consequences arising from the policies and practices of Israel in the occupied Palestinian territory, including East Jerusalem*, the Court addressed again the now familiar argument that ongoing negotiations would be an obstacle to the rendering of an advisory opinion. Once again, the Court dismissed this argument referring to its advisory opinion on the *Legality of Nuclear Weapons*.[19]

25. These statements display the legally correct relationship between any request for an advisory opinion and the circumstance of ongoing negotiations, particularly when such negotiations occur in an international legal framework like the UNFCCC, the Kyoto Protocol and the Paris Agreement. The General Assembly's request for authoritative guidance on all obligations of States in respect of the Relevant Conduct is not foreclosed by climate negotiations, whether under the UNFCCC, the Kyoto Protocol, the Paris Agreement or elsewhere, whether multilaterally or bilaterally.

26. The Court may indeed remain conscious of ongoing negotiations as part of the "*actual framework of law and fact*" to give a "*pertinent and effectual reply*".[20] However, these negotiations in no way support a restrictive interpretation of the General Assembly's request or the terms of any applicable treaty or obligation. Furthermore, they certainly do not provide a compelling reason for the Court to decline to exercise its advisory jurisdiction. By fulfilling its advisory function, the Court can contribute valuable legal insights that could support and complement negotiation processes, rather than impeding them.

E. Whether there is a risk of fragmentation of international law

27. The existence of pending proceedings on related issues has never prevented the Court from rendering an advisory opinion. Moreover, the proceedings to which the Court has been referred to in this regard concern more focused normative contexts, specifically those of the UNCLOS, the European Convention on Human Rights and the American Convention on Human Rights.

28. In any event, the Court is perfectly capable of taking into account the conclusions reached by the ITLOS, the European Court of Human Rights and, as the case may be, the Inter-American Court of Human Rights. Even if a risk of fragmentation could be established, and if such a risk were deemed relevant in the present context, this would underscore the necessity of the Court's advisory opinion rather than detract from it. As the sole international court with a general competence, the Court is uniquely positioned to take stock of all the relevant developments and bring them to bear in a coherent manner in its own advisory opinion. **Any perceived risk of**

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19 *Legal consequences arising from the policies and practices of Israel in the occupied Palestinian territory, including East Jerusalem*, Advisory Opinion of 19 July 2024, General List No. 186, para 40.

20 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion,* I.C.J. Reports 1980, p 73, para. 10.

fragmentation is not a deterrent, but a compelling reason for the Court to render its advisory opinion.

2.3. The Relevant Conduct: There is a scientific consensus on what is the conduct responsible for the significant interference with the climate system

2.3.1. *Overview of the Written Statements*

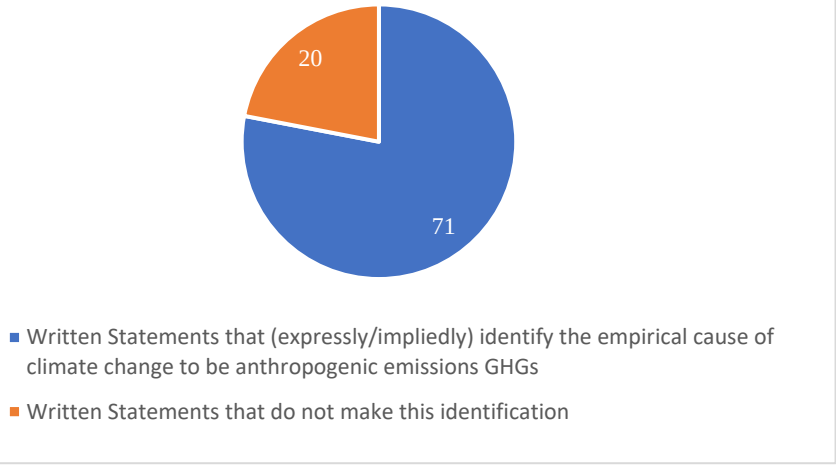
29. The specification of the conduct underpinning the two questions put to the Court is an issue of paramount importance, as without such specification, the Court would not be able to identify which obligations govern such conduct and what are the legal consequences of having displayed such conduct.

30. In their Written Statements, a large majority of participating States and international organizations (70 out of 91) acknowledged that such conduct consists of anthropogenic emissions of greenhouse gases,[21] whereas some others (16 out of the

[21] The following references to the written statements are organized following the order given to them by the Registry (which reflects the order of submission). In each case, the relevant paragraphs are identified. When the position in a written statement is not entirely clear, this is mentioned between parenthesis for the sake of full transparency: WS Portugal, para. 40 ; WS DRC, paras. 47-64; WS Colombia, para. 2.1 ; WS Palau, paras. 6, 9 and 16; WS Tonga, paras. 48-50 (implicit in Tonga's discussion of the "*the impacts of the continued increase in anthropogenic greenhouse gas emissions on Tonga*"); WS IUCN, para. 50; WS Solomon Islands, paras 35, 133 (implicit in statements that GHGs cause ocean temperatures to rise and that the "*climate science is clear on the anthropogenic causes of dangerous climate change*"); WS Singapore, para. 3.16; WS Peru, para. 9; WS Cook Islands, para. 41; WS Seychelles, para. 112; WS Kenya, para. 3.4; WS MSG, para. 222; WS Philippines, paras. 27-28; WS Albania, para. 51; WS Vanuatu, paras. 77-79; WS Sierra Leone, para. 1.4; WS Liechtenstein, para. 21 ; WS St Lucia, para. 19; WS SVG, paras. 38-46; WS UK, paras. 4.1, 13.1; WS Netherlands, paras. 2.1-2.2; WS Bahamas, para. 14; WS UAE, para. 9; WS France, para. 15 (implicitly from the following statement: *"there is no need for the Court to examine these facts or to seek scientific expertise on climate change. Climate change is an established fact - as evidenced by the IPCC reports. In responding to the present request for an opinion, the Court can usefully draw on work reflecting the scientific consensus on the issue of climate change, in particular the work of the IPCC.*"); WS New Zealand, para. 3; WS Kiribati, paras. 19-23; WS China, paras. 12-13 (stating that climate change is caused by both anthropogenic emissions and natural processes, with anthropogenic emissions mainly from developed countries having significantly increased the atmospheric concentration of GHGs since the 1850s. China notes that the relationship between GHG emissions and climate change has been gradually understood and recognized internationally, supported by scientific knowledge); WS Korea, para. 25 (implicit from "*greenhouse gases emitted into the atmosphere cause ocean warming, ocean acidification, and sea-level rise.*"); WS Samoa, para. 3; WS Mexico, para. 26; WS South Africa, para. 78 (implicit from the following statement: "*developed States have greater responsibility to reduce their greenhouse gas emissions because they have historically contributed significantly more to climate change*"); WS Ecuador, para. 1.9; WS Spain, paras. 3-4; WS Barbados, paras. 83, 90; WS Sri Lanka, paras. 26-27 ; WS OACPS, para. 29; WS Madagascar, para. 33; WS Uruguay, paras. 3, 10, 12, 17; WS Egypt, paras. 38, 57; WS Chile, paras. 29-30, 41; WS Romania, paras. 17-18; WS USA, paras. 2.1-2.2 ; WS Bangladesh, paras. 18-20; WS EU, paras. 12, 49 (There is a scientifically established and undisputable link between anthropogenic GHG emissions, and harm to the climate system and environment, including biodiversity loss); WS Kuwait, para. 10 (implicit from the following statement: "…*specific focus on regulating GHG emissions in an attempt to reduce their role in creating climate change by*..."); WS Mauritius, para. 54; WS Costa Rica, paras. 44, 98; Pakistan; para. 4; WS Antigua and Barbuda, paras. 22-23, 26-28; WS COSIS, paras. 13, see 14-27; WS El Salvador, para. 11; WS Bolivia, paras. 13, 38; WS Dominican Republic, para. 5.1(i)); WS Ghana, para. 30; WS

remaining 21) do not address this issue.[22] Figure 2 represents graphically such understanding:

Figure 2: Written Statements that identify, generally or specifically, the conduct responsible for climate change



31. The position of the large majority of States and international organizations reflects both the global scientific consensus on the causes of climate change and its adverse effects and the very text of UN General Assembly Resolution 77/276, which specifically characterizes the conduct at stake. In its Written Statement, Vanuatu referred to this conduct as the "*Relevant Conduct*"[23] and provided a detailed explanation of what it has consisted of,[24] the States and groups thereof that have displayed it, and the effects attributable to them, individually and collectively.[25]

32. Unsurprisingly, however, the Written Statements of some major emitters of greenhouse gases, as well as of major producers of fossil fuels, attempt to play down

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Burkina Faso, paras. 5, 13-4; WS Micronesia, para. 20 (reference to "*established science on the anthropogenic emissions of greenhouse gases and their harmful effects*"); WS Belize, paras. 2(c), 47(a); WS Timor-Leste, paras. 34, 36 (implicit from the following statement: "*continued increase in anthropogenic greenhouse gas emissions*" will lead to adverse effects of climate change in the country); WS African Union, para. 83; WS Namibia, paras. 57, see also 5; WS Tuvalu, para. 26; WS Nauru, paras. 14-16, 46 (Specifically notes the impact between GHG emissions and climate change-induced sea-level rise); WS WHO, para. 6; WS Denmark, Finland, Iceland, Norway, Sweden, para. 3; Indonesia, para. 17; WS Australia, para. 1.4 (defines the grave challenges posed by anthropogenic emissions of GHGs upon the climate system as "*climate change*"); WS Brazil, paras. 30-31; WS Vietnam, para. 12); WS Germany, paras. 40, 94 (implicitly from Germany's acceptance of the science); WS Grenada, para. 73; and Annex 1: scientific expert report; WS India, para. 87 (implicitly from not discussing "*the aggregate national contribution of States to the problem"* and recognition of *"the scientific consensus on the subject of the climate change*").

22 WS Nepal; WS Switzerland; WS Saudi Arabia; WS Marshall Islands; WS PNAO; WS PIF; WS Slovenia; WS FFA; WS AOSIS; WS Latvia; WS Cameroon; WS Japan; WS Canada; WS Thailand; WS Gambia; WS Argentina.

23 WS Vanuatu, para. 134.

24 WS Vanuatu, paras. 137-157.

25 WS Vanuatu, paras. 162-170.

this core aspect of the request. Their attempts are organized around three main contentions, all fundamentally flawed.

33. The first contention concerns the science of climate change. Very few Written Statements make long-debunked claims about causality.[26] Given the global scientific consensus on the causes and effects of climate change, which all States of the Intergovernmental Panel on Climate Change (**IPCC**) have accepted through their approval of the Summaries for Policymakers of IPCC reports, this contention is baseless, both scientifically and legally. Under such circumstances, it is most likely made to suggest that the Court would need to embark on a determination of the science of climate change, which is clearly not necessary. This is addressed in Section 2.3.2 of this Written Comment.

34. The second contention seeks to circumvent the global scientific consensus by arguing that the problem is not the science, but the lack of specification of the conduct in the questions put to the Court.[27] This contention overlooks or ignores the clear terms of Resolution 77/276, which specifically characterize the Relevant Conduct in Question (a), then in preambular paragraph 5 *in fine*, and finally in Question (b). A variation of this contention does not take issue with the formulation of the questions, which is clear, but repeats a well-known argument, which the Court has systematically rejected in its case law, namely that the question is abstract, academic or general in nature (see above Section 2.2.2.C). In point of fact, there is a wealth of specific factual evidence about the anthropogenic emissions of greenhouse gases of each State and their impact on the climate system and other parts of the environment, which appears in the Written Statements of Vanuatu[28] and other participants in these proceedings.[29] In any event, the abstract nature of the conduct in no way precludes the Court from assessing it in the light of the relevant rules of international law, consistently with its past practise. These two aspects of the contention are addressed in Section 2.3.3.

35. The third contention acknowledges the global scientific consensus that anthropogenic emissions of greenhouse gases are unequivocally the cause of climate change but mischaracterizes the question of causality. Specifically, it erroneously frames the question put to the Court in terms of causality between emissions from *specific point sources* and *specific impacts*, rather than addressing

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26 See WS OPEC, para. 117 ("*There are, moreover, a myriad of factors that have impacted the climate system. Many of these causes are historical, like the exponential increase in emissions due to the Industrial Revolution, revealing some of its effects today, and others through natural causes*"). As authority for this statement, the OPEC refers to the 2023 *World Oil Outlook 2045* at pp. 80-81. See also WS Iran, para. 5 ("[the Resolution] *also unduly focuses on one assumed cause of climate change …* [while] *it is necessary to ask comprehensive questions and for the Court to consider the matter holistically and comprehensively*.")

27 See e.g. WS OPEC, para. 117; WS Denmark, Finland, Iceland, Norway, Sweden, paras 29–30; WS Iran, paras. 15–20; WS South Africa, para. 10.

28 WS Vanuatu, paras. 162-170.

29 WS OACPS, paras. 39-42.

the causal relationship between *cumulative emissions over time from specific States* and *significant interference with the climate system*. The relevant causality link is not about attributing specific harmful events to isolated releases of greenhouse gases (e.g., attributing a specific heat wave affecting a town in State B in August 2024 to 10 tonnes of CO2 emitted in 1965 by a specific factory in State A). Instead, the question is whether a State that over a period of decades or centuries has emitted massive amounts of greenhouse gases has contributed to the overall problem, namely the interference with the climate system. The mischaracterization of the causality link appears to be part of an attempt to argue that no legally relevant connection may be drawn between the manifold sources of greenhouse gas emissions ("*in every country and every part of the world*") and "*the harm caused by anthropogenic climate change*", including both extreme weather events and slow-onset events.[30] This contention is baseless and misleading given that (i) empirically, it is unquestionable that some States have contributed far more to climate change than others, (ii) legally, each State is required under international law to do its part to the best of its capabilities (and cannot therefore hide either behind "drop in the ocean" arguments or allegations that other States are also negligent), (iii) scientifically, it is entirely possible to establish which share of global warming has been caused by the emissions of a specific State and, thereby, whether such emissions have caused significant harm to the climate system, and (iv) in any event, the questions put to the Court are not about the causal link between the emissions from a specific source and a specific impact, but about a series of acts and omissions over time – a composite act – whereby specific States have caused, individually and collectively, significant harm to the climate system as part of the environment. This is addressed in Section 2.3.4.

2.3.2. *There is not only evidence, but a global scientific and governmental consensus on the conduct responsible for the dangerous interference with the climate system*

36. As noted earlier, an overwhelming majority of participating States and international organizations acknowledges that anthropogenic emissions of greenhouse gases are the cause of climate change.

37. The term "*anthropogenic emissions*" is important in this context. It is used both in the preamble and in the operative part of Resolution 77/276, specifically in the formulation of Question (a). The IPCC Glossary defines "*anthropogenic emissions*" by reference to the activities which cause them. This is what the term "anthropogenic" means: "*Emissions of greenhouse gases (GHGs), precursors of GHGs and aerosols caused by human activities. These activities include the*

[30] WS USA, paras 4.17–4.19.

burning of fossil fuels, deforestation, land use and land use changes (LULUC), livestock production, fertilisation, waste management, and industrial processes."[31]

38. Of these human activities, the burning of fossil fuels is the main cause of anthropogenic emissions of greenhouse gases. The technical summary of the IPCC's 2021 Report on the Physical Science Basis of Climate Change provides a precise break down of which activities have contributed what share of both emissions and the resulting concentrations of greenhouse gases in the atmosphere.[32] The terminology is technical, but it is reproduced in full to remove any room for contestation regarding what is stated in the excerpt:

> "Based on multiple lines of evidence using interhemispheric gradients of CO2 concentrations, isotopes, and inventory data, it is unequivocal that the growth in CO2 in the atmosphere since 1750 (see Section TS.2.2) is due to the direct emissions from human activities. The combustion of fossil fuels and land-use change for **the period 1750–2019** resulted in the release of 700 ± 75 PgC (likely range, 1 PgC = 10^{15} g of carbon) to the atmosphere, of which about 41% ± 11% remains in the atmosphere today (high confidence). Of the total anthropogenic CO2 emissions, **the combustion of fossil fuels was responsible for about 64% ± 15%, growing to an 86% ± 14% contribution over the past 10 years**. The remainder resulted from land-use change. **During the last decade (2010–2019), average annual anthropogenic CO2 emissions reached the highest levels in human history** at 10.9 ± 0.9 PgC yr^{-1} (high confidence). Of these emissions, 46% accumulated in the atmosphere (5.1 ± 0.02 PgC yr^{-1}), 23% (2.5 ± 0.6 PgC yr^{-1}) was taken up by the ocean and 31% (3.4 ± 0.9 PgC yr^{-1}) was removed by terrestrial ecosystems (high confidence)." (emphasis added)[33]

The unit PgC (petagram) is equivalent to a gigatonne (a billion tonnes). This is an extremely large volume. By way of comparison, the biomass of all the humans living in the planet has been estimated to only 0.06 gigatonnes of carbon or, measured in dry mass, to a bit over a tenth (0.12) of a gigatonne.[34] Another helpful comparator to grasp the concept of gigatonne concerns the reported emissions of the world's largest emitters of greenhouse gases, amounting to several gigatonnes of carbon dioxide equivalent per annum.[35] The combustion of fossil fuels is, for the period 1750-2019, responsible for 448 gigatonnes emitted (64% of the 700 gigatonnes emitted) and for 322 gigatonnes accumulated in the atmosphere (46%

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31 IPCC Glossary (link).

32 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), Technical Summary (link).

33 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), Technical Summary, Box TS5, at page 80 (link).

34 Yinon M. Bar-On, Rob Phillips and Ron Milo, 'The biomass distribution on Earth' (2018) 115(25) *Proceedings of the National Academy of Sciences* 6506-6511, Fig. 1 and Materials and Methods (link).

35 Monica Crippa et al, *GHG emissions of all world countries*, Publications Office of the European Union, Luxembourg, 2023, doi:10.2760/953332, JRC134504. Figure 1, at page 5 (link).

of the 700 gigatonnes emitted). If a shorter period of time is considered (2010-2019), the combustion of fossil fuels is responsible for 86% of all anthropogenic emissions.

39. The acts and omissions of States underpinning these human activities – specifically the combustion of fossil fuels (coal, oil and gas) – are meticulously documented and quantified by respected international organizations such as the International Monetary Fund (**IMF**) or the United Nations Environment Programme (**UNEP**). According to an IMF Report of 2023, in 2022 government subsidies to fossil fuels reached an all-time historical high of USD 7 trillion, equivalent to over 7% of global Gross Domestic Product (**GDP**).[36] Of particular note, explicit fossil fuel subsidies (i.e. direct undercharging for fossil fuel supply costs) more than doubled between 2020-2022.[37] Beyond subsidies, the main producers and emitters continue to implement policies that expand production of fossil fuels. According to the latest UNEP *Production Gap Report* (2023):

> "While 17 of the 20 countries profiled have pledged to achieve net-zero emissions, and many have launched initiatives to reduce emissions from fossil fuel production activities, **most continue to promote, subsidize, support, and plan on the expansion of fossil fuel production. None have committed to reduce coal, oil, and gas production in line with limiting warming to 1.5°C.**" (emphasis added)[38]

40. These reports demonstrate that States' failure to curb anthropogenic emissions of greenhouse gases in line with the global scientific consensus is not merely an omission. Rather, it represents a proactive and deliberate conduct by certain States that directly drive "*anthropogenic*" emissions.

41. Preambular paragraph 9 of Resolution 77/276 also expressly refers to anthropogenic emissions of greenhouse gases:

> "*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 dominant cause of the global warming observed since the mid-20th century" (emphasis added)

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36 Simon Black, Antung A. Liu, Ian Parry & Nate Vernon, 'IMF Fossil Fuel Subsidies Data: 2023 Update' (August 2023) IMF Working Paper (Fiscal Affairs Department), Washington, DC, WP/23/169, at page 3 (link).

37 Simon Black, Antung A. Liu, Ian Parry & Nate Vernon, 'IMF Fossil Fuel Subsidies Data: 2023 Update' (August 2023) IMF Working Paper (Fiscal Affairs Department), Washington, DC, WP/23/169, at page 3 (link).

38 UNEP, *Production Gap Report 2023*: *Phasing down or phasing up ? Top fossil fuel producers plan even more extraction despite climate promises* (November 2023), p. 5 (link). The 20 countries studied are (in alphabetical order): Australia, Brazil, Canada, China, Colombia, Germany, India, Indonesia, Kazakhstan, Kuwait, Mexico, Nigeria, Qatar, Russian Federation, Saudi Arabia, South Africa, United Arab Emirates, United Kingdom and the United States.

This formulation specifically relies on the Summary for Policymakers of two IPCC Reports.[39] More recently, in the Summary for Policymakers of the IPCC's Synthesis Report of 2023, the scientific consensus is stated in the following terms: "*Human activities, principally through emissions of greenhouse gases, have unequivocally caused global warming*".[40]

42. These very terms are not only a global scientific consensus, but also one specifically approved by the 195 Member States of the IPCC.[41] Indeed, according to the IPCC Procedures, "*Approval*" of Summaries for Policymakers "*means that the material has been subjected to detailed line-by-line discussion and agreement*".[42] Section 4.4. of the IPCC Procedures describes the process of approval of Summaries for Policymakers as follows:

> "The Summaries for Policymakers should be subject to simultaneous review by both experts and **governments**, **a government round of written comments** of the revised draft before the approval Session and to **a final line by line approval** by a Session of the Working Group" (emphasis added)

43. In the light of this evidence, there is simply no basis whatsoever for an argument questioning the causal link between anthropogenic emissions of greenhouse gases and climate change. Nor is there any basis to claim that the Court would need to embark in anything even remotely resembling a scientific trial or a determination of climate science questions. Above all, there is a global scientific and governmental consensus regarding the human activities – combustion of fossil fuels and land use change – that are the source of anthropogenic emissions of greenhouse gases as well as regarding the involvement of specific States – through subsidies, energy policies and lack of climate mitigation action – in such human activities. This is the conduct which has significantly interfered with the climate system and – as explained next – this is therefore the conduct specifically targeted in Resolution 77/276.

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39 IPCC, *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers (2014), statement 1.2 (identifying anthropogenic emissions of greenhouse gases as the "*dominant cause*" of global warming) (link); 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 (using the term "*unequivocal*" to describe the causality link between anthropogenic emissions and global warming) (link).

40 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 (link).

41 The list of countries is available at the following (link).

42 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), section 2 (link).

2.3.3. *The Relevant Conduct is specifically defined in Resolution 77/276 and the Court can assess it in concreto or in abstracto*

44. Two other related contentions concern the identification of the conduct at stake – in the terminology used by Vanuatu the "*Relevant Conduct*" – in the text of Resolution 77/276. According to the first contention, the questions put to the Court are silent or ambiguous regarding the characterization of the Relevant Conduct. The second contention does not take issue with the characterization of the Relevant Conduct in Resolution 77/276 but emphasizes instead the abstract character of the conduct. As demonstrated in this section, both contentions are fundamentally flawed.

A. It is plainly incorrect to state that Resolution 77/276 does not characterize the Relevant Conduct

45. Regarding the first contention, the Relevant Conduct is expressly characterized in the text of Resolution 77/276, first in very general terms (Question (a) refers to "*anthropogenic emissions of greenhouse gases*"), then in more detail so as 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*.") and finally in great specificity for the Court to consider whether, as a matter of principle, the conduct is consistent or inconsistent with international law and, in the latter case, what are the specific legal consequences (Question (b) refers to "*acts and omissions*" whereby States "*have caused significant harm to the climate system and other parts of the environment*").

46. As discussed in greater detail in the Written Statement of Vanuatu,[43] such characterization is specifically dictated by what the UN General Assembly needs the Court to clarify.

47. Regarding the obligations addressed in Question (a), the wording of Resolution 77/276 uses a broad characterization of the conduct ("*anthropogenic emissions of greenhouse gases*"). Here, the Court is requested to consider a wide corpus of treaty and customary rules, which are further circumscribed in the chapeau paragraph of the operative part ("*Having particular regard to* …") and, importantly, in preambular paragraph 5 which "[e]*mphasiz*[es] *the importance*" of these and some other rules "*to the conduct of States over time in relation to activities that contribute to climate change and its adverse effects*". Again, such is the conduct to be considered to identify the obligations in response to Question (a).

48. Question (b) further specifies a sub-set of the conduct characterized which the Court is asked to examine in the light of the obligations identified in response to Question (a). For this specific purpose, the conduct is characterized as "*acts and omissions*" whereby States "*have caused significant harm to the climate system and other parts of the environment*". The conduct is not whether a specific act or omission led a

[43] WS Vanuatu, paras. 137-157.

specific factory in the territory of a specific State to emit a specific amount of greenhouse gases that was then causally linked to a specific weather event affecting a specific State, people or individual. The conduct is whether such "*acts and omissions*" in the aggregate, namely a series of acts and omissions which taken to together amount to a composite act (Article 15 of the Draft Articles on the Responsibility of States for Internationally Wrongful Act (**ARSIWA**)), have contributed significantly to the disruption of the climate system ("*have caused significant harm to the climate system and other parts of the environment*"), which is a far lower threshold than being the sole or the major cause of climate change. Of course, the acts and omissions of major emitters taken together have also caused more than "*significant harm*" to the climate system; they have caused catastrophic harm in the form of climate change and its adverse effects. But the General Assembly needs an answer regarding **the legality, as a matter of principle, of the conduct consisting of having contributed significantly to climate change**.

49. This is because there is a fundamentally unjust imbalance between those States which have significantly contributed to the problem and those which have disproportionately suffered from it. As stated in the Summary for Policymakers of the IPCC's 2023 Synthesis Report, it is well established that:

> "Vulnerable communities who have historically contributed the least to current climate change are **disproportionately** affected (high confidence)" (emphasis added) [44]

More specifically, as stated in the Summary for Policymakers of a 2022 IPCC Report:

> "Historical contributions to cumulative net anthropogenic CO2 emissions between 1850 and 2019 vary substantially across regions in terms of total magnitude […] **LDCs** [nb: least developed countries] **contributed less than 0.4% of historical cumulative CO2-FFI** [nb: fossil fuels and industrial] **emissions between 1850 and 2019, while SIDS** [nb: small island developing States] **contributed 0.5%**."[45] (emphasis added)

50. In its Written Statement, Vanuatu summarizes the characterisation of the conduct in graphic terms.[46] For ease of reference, Figure 3 reproduces Figure 3 of Vanuatu's Written Statement:

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44 Intergovernmental Panel on Climate Change, *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.2 (link).

45 Intergovernmental Panel on Climate Change, *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers, statements B.3.2, B.3.2 (link).

46 WS Vanuatu, para. 150, Figure 3.

Figure 3: The Relevant Conduct as characterized in Resolution 77/276

51. The conclusion emerging from the preceding analysis is that it is simply incorrect to state that Resolution 77/276 is silent or ambiguous regarding the characterization of the conduct underpinning the questions put to Court. The exact opposite is true. Resolution 77/276 specifically characterizes this conduct, in a consistent manner and with the degree of specificity appropriate to the questions asked to the Court.

B. There is ample evidence to assess the Relevant Conduct *in concreto* and the Court can, in any event, also assess an abstract conduct

52. The second contention concerns the purportedly abstract nature of the conduct, which the Court would allegedly be unable to examine. This argument is flawed both empirically and legally. Empirically, there is a solid and specific evidentiary basis, introduced into the record by the Written Statements of Vanuatu and other States and organizations, regarding which States displayed the Relevant Conduct with which effects. The Court could, if it so wishes, assess the legality of the conduct displayed by specific States and groups thereof *in concreto*. Legally, the Court may well decide to assess the legality of the conduct in the abstract as it has

done in the past. As shown in Section 2.2.2.C of this Written Comment, the abstract nature of a question in no way precludes the Court from answering it.

53. First, it is plainly incorrect to state that the Court has no factual basis to answer the questions put to it. As discussed next, **the essential factual consideration – the significant contribution of some States to climate change and the disproportionate impact on others whose contribution is negligible – is fully established in the record**. In reviewing the following material, it is important to keep in mind that in the present proceedings, no less than 91 States and organizations – an unprecedented number in the history of the Court – "*have submitted information relevant to a response to the questions put by the General Assembly to the Court*".[47] The Court also has "*a voluminous dossier submitted by the Secretary-General of the United Nations, which contains extensive information on the situation*"[48] of climate change, including reports from the IPCC and UNEP, which are discussed in written submissions and in the following paragraphs.

54. At a general level, this factual dimension emerges from the Summaries for Policymakers of IPCC reports. The very first statement (A.1) of the Summary for Policymakers of the IPCC's 2023 Synthesis Reports makes this point clear:

> "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" (emphasis added)[49]

The Summary for Policymakers of the IPCC's 2023 Synthesis Report and the 2022 Report provide further specificity regarding the imbalance:

> "**Vulnerable communities who have historically contributed the least** to current climate change are **disproportionately affected**" (emphasis added).[50]

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47 *Legal consequences arising from the policies and practices of Israel in the occupied Palestinian territory, including East Jerusalem*, Advisory Opinion of 19 July 2024, General List No. 186, para. 47 (in that case, the number of States and organizations having submitted information was 50).

48 *Legal consequences arising from the policies and practices of Israel in the occupied Palestinian territory, including East Jerusalem*, Advisory Opinion of 19 July 2024, General List No. 186, para. 47 (the report submitted by the UN Secretary General in the present proceedings is even more voluminous and encompassing than in the Palestine case).

49 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 (link).

50 Intergovernmental Panel on Climate Change, *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.2 (link).

> "Across sectors and regions the **most vulnerable people and systems** are observed to be **disproportionately** affected." (emphasis added)[51]
>
> "Increasing weather and climate extreme events have exposed millions of people to acute food insecurity and reduced water security, with the **largest impacts observed in many locations and/or communities in Africa, Asia, Central and South America, Small Islands and the Arctic**." (emphasis added)[52]
>
> "Climate and weather extremes are increasingly driving displacement in all regions…with **Small Island States disproportionately affected**." (emphasis added)[53]

55. At a more specific level, the contributions of specific countries to climate change have been tracked by organisations such as the UNEP and the European Union. Since 2010, the UNEP's Emissions Gap Report series has tracked the contributions of major emitters to climate change. Part III(B) of the dossier of relevant documents communicated by the UN Secretariat to the Court includes the 2022 edition of UNEP's Emissions Gap Report.[54] The third key message of this report states, in plain terms, the essential factual considerations underlying the questions put to the Court:

> "The top seven emitters (China, the EU27, India, Indonesia, Brazil, the Russian Federation and the United States of America) plus international transport accounted for 55 per cent of global GHG emissions in 2020 (figure ES.1). **Collectively, G20 members are responsible for 75 per cent of global GHG emissions**.
>
> Per capita emissions vary greatly across countries (figure ES.1). World average per capita GHG emissions (including LULUCF) were 6.3 tons of CO2 equivalent (tCO2e) in 2020. The United States of America remains far above this level at 14 tCO2e, followed by 13 tCO2e in the Russian Federation, 9.7 tCO2e in China, about 7.5 tCO2e in Brazil and Indonesia, and 7.2 tCO2e in the European Union. India remains far below the world average at 2.4 tCO2e. On average, least developed countries emit 2.3 tCO2e per capita annually" [55]

A report published by the European Union provides data on emissions for all countries between 1970 and 2022.[56] Only the most significant emitters (Brazil,

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51 Intergovernmental Panel on Climate Change, *Climate Change 2022: Impacts, Adaptation and Vulnerability*. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policymakers (2022), statement B.1 (link).

52 Intergovernmental Panel on Climate Change, *Climate Change 2022: Impacts, Adaptation and Vulnerability*. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policymakers (2022), statement B.1.3 (link).

53 Intergovernmental Panel on Climate Change, *Climate Change 2022: Impacts, Adaptation and Vulnerability*. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policymakers (2022), statement B.1.7 (link).

54 UNEP, *The Closing Window. Emissions Gap Report 2022* (link).

55 UNEP, *The Closing Window. Emissions Gap Report 2022*, Executive Summary, page V (link).

56 Monica Crippa et al, *GHG emissions of all world countries*, Publications Office of the European Union, Luxembourg, 2023, doi:10.2760/953332, JRC134504 (link).

China, EU27, India, Russia, and the United States) are plotted in the main report, which also highlights data for the G20. Figures 4 and 5, extracted from this report, shows the main emitters in 2022 as well as the main emitters in the period 1970-2022:

Figure 4: Main GHG emitters in 2022 (in gigatonnes of carbon dioxide equivalent)

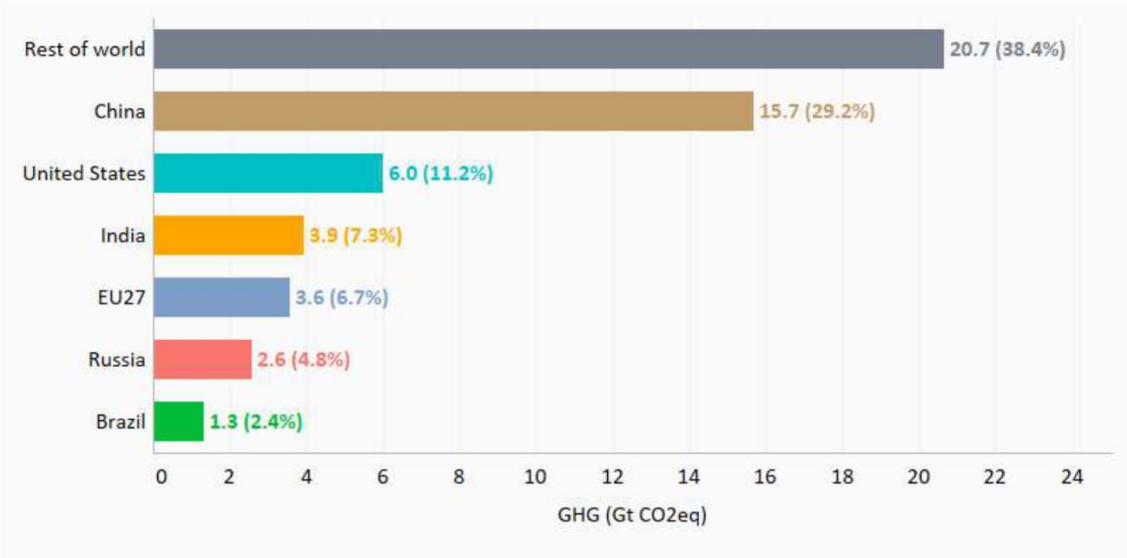
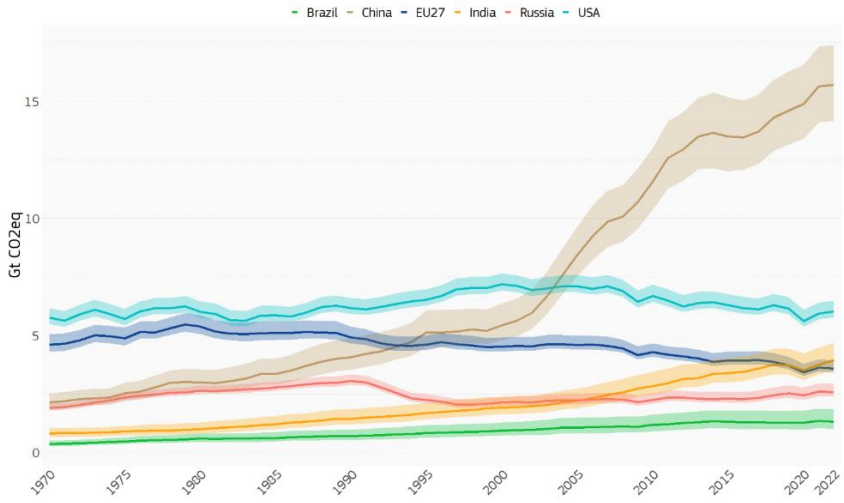


Figure 5: Main GHG emitters in 1970-2022 (in gigatonnes of carbon dioxide equivalent)



56. At an even more specific level, it is possible to identify with great detail the cumulative emissions of the three main greenhouse gases (carbon dioxide, methane and nitrous oxide) of each country in the periods 1851-2022 and 1990-2022, and the global warming caused by those specific emissions. Vanuatu submitted with its Written Statement an expert report from Professor Corinne Le Quéré, a world

authority in climatology who was an author of three IPCC assessment reports.[57] Professor Le Quéré reaches the following conclusions:

> "**Cumulative CO_2 emissions, the main cause of human-induced climate change, has clear origin in historical use of fossil fuels and land by countries.** The largest contributors to cumulative emissions of CO_2 during 1851-2022 were the USA (20.5%), whose emissions peaked around 2005; the EU27 (11.7%), with emissions decreasing since the early 1980s; China (11.7%), with most of its emissions occurring since 2000; Russia (7.0%); and Brazil (4.6%) (see Figure 3). All 42 industrial countries of the Annex I in aggregate account for 52% of cumulative CO_2 emissions, while all 47 Least Developed Countries (LDCs) in aggregate contributed 4.5%. As a result of the long-term trends in emissions by countries, the patterns have shifted in recent decades. The largest contributors to cumulative emissions of CO_2 during 1990-2022 were China (19.4%), the USA (15.5%), the EU27 (9.3%), Brazil (5.1%), and Russia (4.8%). Globally, land use contributed 31% and fossil fuel use 69% to cumulative CO_2 emissions during 1851-2022. Land use emissions were the dominant source of global CO_2 emissions globally until the 1950s"[58]

The global warming caused by each State as a result of their cumulative GHG emissions is as follows:

> "**The top 10 contributors to global warming from historical emissions of GHG during 1851-2022 are the USA (responsible for 17.0% of the global warming in 2022 due to their historical GHG emissions; 0.28°C), China (12.5%; 0.21°C), the EU27 (10.3%; 0.17°C, including Germany 2.9%, France 1.3%, Poland 1.0% and Italy 0.9%), Russia (6.3%; 0.11°C), Brazil (4.9%; 0.081°C), India (4.7%; 0.078°C), Indonesia (3.7%; 0.061°C), the United Kingdom (2.4%; 0.040°C), Canada (2.1%; 0.035°C), and Japan (2.1%; 0.035°C).** The GHG emissions from these contributors, together with those from Australia (1.5%; 0.025°C), Mexico (1.4%; 0.023°C), Ukraine (1.4%; 0.022°C), Nigeria (1.2%; 0.019°C), Argentina (1.2%; 0.019°C), and Iran (1.1%; 0.019°C), amount to three quarters of the global warming due to GHG emissions during 1851-2022 […] **The same countries figure among the largest contributors to global warming from emissions of GHG during the shorter 1990-2022, with China the largest contributor in that period**"[59]

The granular analysis provided by Professor Le Quéré emphasizes the critical scientific fact that States' contributions to the problem consist of cumulative emissions. Consequently, a State's significant contributions to the disruption of the climate system persist even if its greenhouse gas emissions may have stabilized or even slightly decreased. Acknowledging this scientific fact prevents developed

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57 Expert Report of Professor Corinne Le Quéré on Attribution of global warming by country (dated 8 December 2023), WS Vanuatu, Exhibit B.

58 Expert Report of Professor Corinne Le Quéré on Attribution of global warming by country (dated 8 December 2023), WS Vanuatu, Exhibit B, para. 17 (emphasis original, underlining added).

59 Expert Report of Professor Corinne Le Quéré on Attribution of global warming by country (dated 8 December 2023), WS Vanuatu, Exhibit B, paras. 25 and 26 (emphasis original, underlining adding).

countries from evading their historical responsibility by pointing to the growing emissions of developing countries, in an attempt to exclude from the overall picture what happened in the past. The insistence of some States on a "*forward looking*" question and answer is, in many ways, a euphemism for an attempt at escaping historical responsibility.

57. It is remarkable that, from the most general to the most specific studies, the States whose cumulative emissions are singled out are the same. When the scope of States considered is widened, it is mainly the States of the G20 which are singled out. By contrast, on the receiving end, LDCs and SIDS are, in turn, singled out for their negligible contribution to the problem and the disproportional burden they carry. In the light of this evidence, as well as of the wider evidentiary basis in the record, the contention that the Court has no factual basis regarding the significant contribution of some States to climate change and the disproportionate impact on others whose contribution is negligible is plainly incorrect. There is a wealth of converging evidence establishing which States, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment and, taken together, catastrophic harm in the form of climate change and its adverse effects.

58. Second, and in any event, nothing precludes the Court from assessing the legality of the Relevant Conduct in general. In Section 2.2.2.C of this submission, it was shown that the abstract nature of a question is no obstacle for the Court to give its advisory opinion. The Court could decide to address the conduct as such, without ascribing it to a specific State or group of States. There is precedent for this approach. 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*" with regard 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.[60] 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.[61]

59. In the present proceedings, the Court could assess whether a State which, by its acts and omissions, has caused significant harm to the climate system and other parts of the environment, such as the marine environment, is in principle in breach of its obligations under treaty and customary international law. Such assessment could be made in general, without referring to any specific State, and it would apply to States that (i) have displayed this conduct in the past and/or (ii) are displaying it at present

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60 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* I.C.J. Reports 1996, p. 226, para. 1.

61 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* I.C.J. Reports 1996, p. 226, paras. 24-25, 60-63.

and/or (iii) may display it in the future. It is the conduct responsible for climate change which would be the centre of the assessment.

2.3.4. *Attempts to mischaracterize the question of causality must be expressly rejected*

60. As noted earlier in this submission, a third contention attempts to mischaracterize the causality inquiry relevant for these proceedings in such a way as to make it appear as scientifically intractable. It does so to argue that no legally relevant connection may be drawn between the manifold sources of greenhouse gas emissions ("*in every country and every part of the world*") and "*the harm caused by anthropogenic climate change*", whether extreme weather events or slow-onset events.[62] However, this contention is baseless and misleading for at least four main reasons: (i) empirically, it is unquestionable that some States have contributed far more to causing climate change than others, (ii) legally, each State is required under international law to do its part to the best of its capabilities (and cannot therefore hide either behind "drop in the ocean" arguments or allegations that other States are also negligent), (iii) scientifically, it is entirely possible to establish which share of global warming has been caused by the anthropogenic emissions of greenhouse gases of a specific State and, thereby, whether such emissions have caused significant harm to the climate system, and (iv) in any event, the questions put to the Court are not about the causal link between the emissions from a specific source and a specific impact, but about a series of acts and omissions over time – a composite act – whereby specific States have caused, individually and collectively, significant harm to the climate system as such, as part of the environment.

A. The contributions of different States to climate change are profoundly unequal

61. As recalled in paragraphs 54 to 57 of this submission and shown in greater detail in the Written Statement of Vanuatu,[63] such a framing of the Relevant Conduct is disingenuous given the wealth of converging authoritative evidence establishing that some States have contributed far more to climate change than others. Suggesting that a State responsible for 20.5% of all cumulative emissions in the period 1851-2022 and for 17% of the global warming observed in 2022 is not more responsible for "*the harm caused by anthropogenic climate change*" than a small island developing nation with negligible emissions is misleading, and profoundly unfair.

62. This is particularly the case considering that all major emitters have approved line by line (see paragraph 42 above) statements in the Summary for Policymakers of IPCC reports which expressly recognize that:

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62 WS USA, paras 4.17–4.19.

63 WS Vanuatu, paras. 162-170. See also WS OACPS, paras. 39-42.

> "Vulnerable communities who have historically contributed the least to current climate change are disproportionately affected"[64];
>
> "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"[65]
>
> "Historical contributions to cumulative net anthropogenic CO2 emissions between 1850 and 2019 vary substantially across regions in terms of total magnitude […] LDCs contributed less than 0.4% of historical cumulative CO2-FFI emissions between 1850 and 2019, while SIDS contributed 0.5%."[66]

B. Each State is legally required to do its part to the best of its capabilities

63. Under international law, each State is required to do its own part to the best of its capabilities to curb emissions of greenhouse gases. The fact that displaying the due diligence required by a given rule of international law from a State would not be enough to prevent the adverse effect from happening is irrelevant. As noted by the Court in the *Bosnia Genocide* case:

> "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"[67]

This reasoning equally applies to other obligations requiring the exercise of due diligence, and this "*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 [here preventing dangerous anthropogenic interference with the climate system, the pollution of the marine environment, the causing of significant harm to the environment of other States or of areas beyond national jurisdiction,*

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64 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.2 (link).

65 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 (link).

66 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*, Summary for Policymakers, statements B.3.2, B.3.2 (link).

67 *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, para. 430.

impairing human rights, etc.] which the efforts of only one State were insufficient to produce".[68]

64. This same conclusion has been reached in relation to climate inaction in the context of human rights proceedings. In *Daniel Billy et al v. Australia*, the Human Rights Committee rejected the argument that "*the State party cannot be held responsible – as a legal or practical matter – for the climate change impacts that the authors allege in their communication*"[69] because "*the information provided by both parties indicates that the State party is and has been in recent decades among the countries in which large amounts of greenhouse gas emissions have been produced*".[70] It is therefore the significance of the contribution, despite the fact that a State could have done more, that makes the conduct inconsistent with the requisite due diligence obligation.

65. This approach has been recently confirmed by the European Court of Human Rights (**ECtHR**) in *Verein Klimaseniorinnen Schweiz v. Switzerland* in terms which follow closely the position of the Court in the *Bosnia Genocide* case:

> "the Court notes that while climate change is undoubtedly a global phenomenon which should be addressed at the global level by the community of States, the global climate regime established under the UNFCCC rests on the principle of common but differentiated responsibilities and respective capabilities of States (Article 3 § 1). This principle has been reaffirmed in the Paris Agreement (Article 2 § 2) and endorsed in the Glasgow Climate Pact (cited above, paragraph 18) as well as in the Sharm el-Sheikh Implementation Plan (cited above, paragraph 12). It follows, therefore, that **each State has its own share of responsibilities to take measures to tackle climate change and that the taking of those measures is determined by the State's own capabilities rather than by any specific action (or omission) of any other State** (see Duarte Agostinho and Others, cited above, §§ 202-03). **The Court considers that a respondent State should not evade its responsibility by pointing to the responsibility of other States, whether Contracting Parties to the Convention or not** […]
>
> This position […] is also **consistent with the principles of international law relating to the plurality of responsible States, according to which the responsibility of each State is determined individually, on the basis of its own conduct and by reference to its own international obligations** (see ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Commentary on Article 47, paragraphs 6 and 8). Similarly, the alleged infringement of rights under the Convention through harm arising from GHG emissions globally and the acts and omissions on the

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68 *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, para. 430.

69 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, 21 July 202221 July 2022, para. 7.6 (link).

70 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, 21 July 202221 July 2022, para. 7.8 (link).

> part of multiple States in combating the adverse effects of climate change may engage the responsibility of each Contracting Party […]
>
> Lastly, **as regards the "*drop in the ocean*" argument implicit in the Government's submissions – namely, the capacity of individual States to affect global climate change – it should be noted that in the context of a State's positive obligations under the Convention, the Court has consistently held that it need not be determined with certainty that matters would have turned out differently if the authorities had acted otherwise.** The relevant test does not require it to be shown that "*but for*" the failing or omission of the authorities the harm would not have occurred. Rather, **what is important, and sufficient to engage the responsibility of the State, is that reasonable measures which the domestic authorities failed to take could have had a real prospect of altering the outcome or mitigating the harm** […] In the context of climate change, this principle should also be understood in the light of Article 3 § 3 of the UNFCCC according to which States should take measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects" (emphasis added)[71]

66. Similarly, in the context of the United Nations Convention on the Law of the Sea (**UNCLOS**), the International Tribunal on the Law of the Sea (**ITLOS**) has rejected the argument that "*it is only through joint action that global levels of GHG emissions in the atmosphere and the consequent pollution of the marine environment can be prevented, reduced and controlled*"[72] and concluded, instead, that:

> "While the importance of joint actions in regulating marine pollution from anthropogenic GHG emissions is undisputed, it does not follow that the obligation under article 194, paragraph 1, of the Convention is discharged exclusively through participation in the global efforts to address the problems of climate change. **States are required to take all necessary measures, including individual actions as appropriate**" (emphasis added)[73]

67. From this consistent line of cases, it can be concluded that each State is required to do its own part to the best of its capabilities to curb emissions of greenhouse gases. A State cannot therefore escape its responsibility by reference to the lack of action of other States or to the insufficiency of its own contribution to cause the entire problem, as long as such contribution is significant.

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71 *Verein Klimaseniorinnen Schweiz and others v. Switzerland*, ECtHR Application no. 53600/20, Judgment of the Grand Chamber (9 April 2024), paras. 439-444 (link).

72 *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)*, ITLOS Case No. 31, Advisory Opinion (21 May 2024), para. 202 (link).

73 *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)*, ITLOS Case No. 31, Advisory Opinion (21 May 2024), para. 202 (link).

C. It is scientifically possible to determine whether the contribution of a State to global warming is significant

68. As noted in paragraph 56 by reference to the Expert Report of Professor Corinne Le Quéré, it is scientifically possible to determine the specific contribution of each country to global warming, both in share and even in fractions of a degree Celsius. This Expert Report builds on independent data and analysis which was published, by pure coincidence, the very day that the UN General Assembly adopted Resolution 77/276 by consensus.[74] Importantly, such studies demonstrate that, far from an intractable question, the causal link between cumulative emissions and a specific share of the observed global warming can indeed by determined with great specificity. This evidence uses different degrees of significance to single out specific contributions.

69. In the study by Jones et al., the threshold is set to cause at least 3% of the observed global warming (a fraction of a degree Celsius). The specific States whose individual contribution to global warming exceeds this threshold include the United States of America, China, the Russian Federation, Brazil, India and Indonesia. Figure 6 is extracted from Jones et al:

Figure 6: Share of global warming caused by the GHG emissions of specific States and groups of States

Gas	Source	Country or Grouping	°C	%
		GLOBAL	1.61	
		NONANNEX	0.86	53.5
		ANNEXI	0.72	44.8
	CO_2 CH_4 N_2O	OECD	0.64	39.8
		ANNEXII	0.55	33.8
		LMDC	0.46	28.6
		BASIC	0.37	23.0
	Total	**USA**	**0.28**	**17.3**
		China	**0.20**	**12.3**
		EIT	0.18	11.2
		EU27	***0.17***	***10.4***
		LDC	0.10	6.2
		Russia	**0.10**	**6.1**
		Brazil	**0.08**	**4.9**
		India	**0.08**	**4.8**
		Indonesia	**0.06**	**3.4**

[74] Matthew W. Jones, Glen P. Peters, Thomas Gasser, Robbie M. Andrew, Clemens Schwingshackl, Johannes Gütschow, Richard A. Houghton, Pierre Friedlingstein, Julia Pongratz & Corinne Le Quéré, 'National contributions to climate change due to historical emissions of carbon dioxide, methane and nitrous oxide since 1852' (2023) 10:155 (link).

70. The Expert Report from Professor Corinne Le Quéré uses a lower threshold of significance of a contribution to the observed global warming of at least 1% for the periods 1851-2022 and 1990-2022, and it concludes, as already noted:

> "**The top 10 contributors to global warming from historical emissions of GHG during 1851-2022 are the USA (responsible for 17.0% of the global warming in 2022 due to their historical GHG emissions; 0.28°C), China (12.5%; 0.21°C), the EU27 (10.3%; 0.17°C, including Germany 2.9%, France 1.3%, Poland 1.0% and Italy 0.9%), Russia (6.3%; 0.11°C), Brazil (4.9%; 0.081°C), India (4.7%; 0.078°C), Indonesia (3.7%; 0.061°C), the United Kingdom (2.4%; 0.040°C), Canada (2.1%; 0.035°C), and Japan (2.1%; 0.035°C).** The GHG emissions from these contributors, together with those from Australia (1.5%; 0.025°C), Mexico (1.4%; 0.023°C), Ukraine (1.4%; 0.022°C), Nigeria (1.2%; 0.019°C), Argentina (1.2%; 0.019°C), and Iran (1.1%; 0.019°C), amount to three quarters of the global warming due to GHG emissions during 1851-2022 […] **The same countries figure among the largest contributors to global warming from emissions of GHG during the shorter 1990-2022, with China the largest contributor in that period**"[75]

71. Thus, far from an intractable scientific exercise, when the causality link is appropriately understood as concerning, on the one hand, the cumulative emissions attributable to a State and, on the other hand, the global warming caused by them, it is possible to determine which States, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment.

D. The relevant causality link is clearly identified in the terms of Question (b)

72. More fundamentally, the text of Question (b) of the operative part of Resolution 77/276 specifically refers to the causal link between the "*acts and omissions*" of individual States as well as a group thereof and the "*significant harm to the climate system and other parts of the environment*" resulting from them ("*caused*" by them).

73. The terms "*acts and omissions*" are used to accurately describe what is scientifically understood as the cause of climate change, namely the anthropogenic emissions of a State over time and taken as a whole. Specifically, the conduct is a "*composite act*" in the meaning of the rule formulated in Article 15 of the ARSIWA, namely a "*series of actions or omissions defined in aggregate as wrongful*".[76] Far from punctual episodes of emissions which could be artificially disaggregated to create causal complexity between them and a temporally and spatially remote impact, the ILC commentary to Article 15 of ARSIWA explains that a composite act is an

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75 Expert Report of Professor Corinne Le Quéré on Attribution of global warming by country (dated 8 December 2023), WS Vanuatu, Exhibit B, paras. 25 and 26 (emphasis original).

76 Draft 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 (link).

"*aggregate of conduct and not individual acts*".[77] The commentary further clarifies one important implication of framing the Relevant Conduct as a composite act, namely that:

> "A consequence of the character of a composite act is that the time when the act is accomplished cannot be the time when the first action or omission of the series takes place. It is only subsequently that the first action or omission will appear as having, as it were, inaugurated the series. **Only after a series of actions or omissions takes place will the composite act be revealed, not merely as a succession of isolated acts, but as a composite act, *i.e.* an act defined in aggregate as wrongful**." (emphasis added)[78]

It is, therefore, misleading to seek to "*isolate*" specific acts or omissions or, more specifically, specific episodes or point sources of emissions, in an attempt at blurring the causality link.

74. Similarly, the very effect of this composite act envisioned in the wording of Question (b) is not a punctual extreme or slow onset weather event but, more fundamentally, a significant level of interference with the climate system. This is why the Question refers to acts and omissions whereby specific States "*have caused significant harm to the climate system and other parts of the environment*", rather than stating that such acts and omissions have caused specific adverse effects of climate change. The causal link underpinning Question (b) is between harmful conduct and the problem it causes.

75. For these reasons, arguing that no legally relevant connection may be drawn between the manifold sources of greenhouse gas emissions ("*in every country and every part of the world*") and "*the harm caused by anthropogenic climate change*"[79] is not only unfair, legally incorrect, and scientifically inaccurate; it is simply not the question that has been asked to the Court.

2.4. The applicable law is not limited to the UNFCCC, the Kyoto Protocol and the Paris Agreement

2.4.1. *Overview of the Written Statements*

76. The UN General Assembly has specifically requested the Court not to limit itself to the interpretation and application of the UNFCCC, the Kyoto Protocol and the Paris

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[77] Draft 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, para. 2 (link).

[78] Draft 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, para. 7 (link).

[79] WS USA, paras 4.17–4.19.

Agreement, but to identify the applicable obligations from the entire corpus of international law and assess the legal consequences of the conduct responsible for climate change under international law. This involves taking into consideration both treaty law and general international law.

77. The large majority of the Written Statements confirm the need, expressed in the request, for the Court to consider the entire corpus of international law in its response to the questions put to it. **Crucially, the Court is the only international jurisdiction with a general competence over all areas of international law which allows it to provide such an answer. No other international jurisdiction could do so**. This is why the General Assembly, acting by consensus, decided to request an advisory opinion to the Court specifically asking it to "*hav*[e] *particular regard to*" a wide range of treaties and rules, the "*importance*" of which "*to the conduct of States over time in relation to activities that contribute to climate change and its adverse effects*" is expressly "*emphasiz*[e]d" in preambular paragraph 5 of Resolution 77/276. Despite such clarity, in the Written Statements of some States and organizations, mostly large emitters of greenhouse gases and/or producers of fossil fuels, it is argued that the principal or even only source of obligations are the treaties of what they present as the climate change regime, essentially the UNFCCC, the Kyoto Protocol and the Paris Agreement. Only a minority of States and organizations does so.

78. Indeed, out of 91 Written Statements submitted to the Court in these proceedings, 70 take the position that a wider range of obligations from treaty and customary international law are applicable to the conduct underpinning anthropogenic emissions of greenhouse gases. Importantly, this position is taken by a large number of States and international organizations from all continents and levels of

development.[80] Of the remaining 21 Written Statements, 4 are silent on the issue,[81] 6 argue that only the climate change regime applies as a *lex specialis*,[82] and 11 argue that the climate change regime applies as a *principal source*, but in some cases exclude the *lex specialis* reasoning and emphasize the need for interpretation.[83] Figure 7 provides a graphic summary of these positions:

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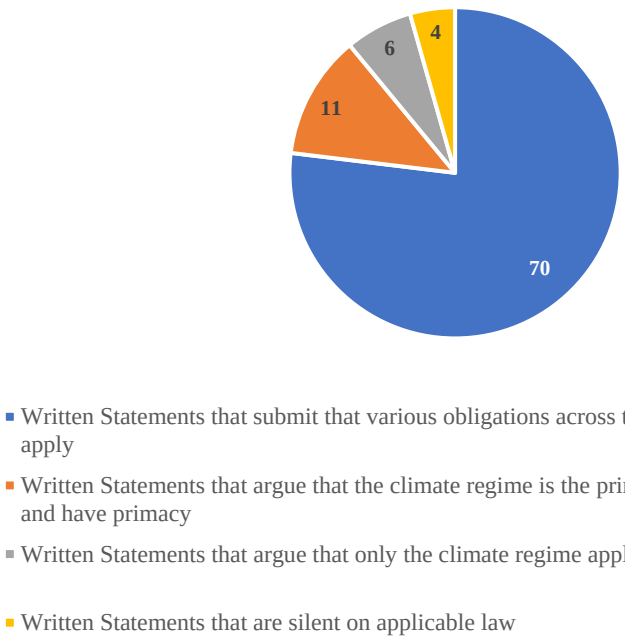
[80] The following States and organizations have taken this position (nb: where there were specific limitations or nuances in a statement's position, this is added between parenthesis for the relevant State, for ease of reference by the Court): WS Portugal, para. 39; WS Vanuatu, paras. 203, 207 ; WS DRC, para. 122 ; WS Colombia, para. 3.2, 3.5 ; WS Palau, paras. 3, 14; WS Tonga, paras. 124, 127, see also 216, 240; WS IUCN, para. 87 ; WS Singapore, paras. 3.1, 3.27, 3.44 and 3.73 onwards; WS Peru, paras. 68-71; WS Solomon Islands, paras. 53-55; WS Canada, para. 32, see para. 19 (climate change regime and UNCLOS); WS Cook Islands (paras. 132-134); WS Seychelles, para. 64; WS Kenya, para. 2.8; WS MSG, paras. 231-232; WS Philippines, section V (A), para. 49; WS Albania, paras. 63-64, see 99; WS Micronesia, para. 42; WS Sierra Leone, paras. 3.5-3.6; WS Switzerland, para. 65-70 (with qualification regarding human rights but clearly stating that climate regime is not *lex specialis* and "*participation in the conventions is not necessarily sufficient to ensure compliance with this customary law obligation [the no harm rule], as this requires a case-by-case assessment of the measures taken in response to risks*"; WS Liechtenstein, para. 25; WS Grenada, paras. 19, 37; WS St. Lucia, para. 39; WS SVG, para. 94; WS Belize: obligation of prevention of harm to the environment, paras. 3, 31; WS UK, paras. 30-31 (in addition to climate change law, which forms the principal obligations, there are three additional categories of sources of relevant obligations found under (a) sector-specific regimes (aviation and shipping); (b) pollutant-specific regimes (for ex: Montreal Protocol, Gothenburg Protocol); (c) the UNCLOS); WS Netherlands, paras. 3.2, see 3.22-3.23, 4.3-4.6, 4.15-4.17, 4.24; WS Bahamas, para. 83; WS Marshall Islands, Part A, paras. 103, 124; WS Slovenia, para. 9; WS Kiribati, paras. 108-109; WS India, paras. 19, 79 (acknowledging application of human rights); WS Samoa, paras. 85-86; WS AOSIS, para. 7 (referring to the ILC's work as indicative of customary international law and arguing for it to be applied as such); WS Latvia, para. 15; WS Mexico, para. 37; WS Ecuador, paras. 3.2-3.3, see 3.15, 3.23, 3.66-3.67, 3.98; WS Cameroon, para. 12; WS Spain, paras. 5 and 15 (arguing that the Court should undertake an integrated interpretation of the legislative instruments referred to in the question posed to the Court, which would allow the Court to incorporate Paris Agreement obligations into those instruments, "*facilitating the latter's greening or ecologization*", and also referring to the right to a clean, healthy environment); WS Barbados, para. 197; WS African Union, paras. 40, 47, see 50-80; WS Sri Lanka, paras. 90, 92, 94; WS OACPS, para. 59-60, 63; WS Madagascar, para. 17; WS Uruguay, para. 81-83; WS Egypt, para. 68, 71; WS Chile, para. 33; WS Namibia, para. 40; WS Tuvalu, para. 72; WS Romania, Part IV and paras. 97-98; WS Bangladesh paras. 84-85; WS European Union, paras. 51, 58 (The EU acknowledges that climate obligations can be derived in principle from international treaties, customary international law, and general principles of law and invites the Court to examine the UN climate regime and its interaction with due diligence as the principal source of governing law); WS Argentina, paras. 33-34; WS Mauritius, para. 219; WS Nauru, parts II, IV and V (emphasizing the prohibition on transboundary harm, right of all States to territorial integrity, self-determination); WS Costa Rica, paras. 32-36; WS Indonesia, para. 46 (refers to obligations from international environmental law, in addition to the climate framework, and relies on the UNCLOS and Montreal Protocol); Pakistan, para. 28ff (relying on the principles of transboundary harm to the environment, common but differentiated responsibilities, and the UN Desertification Convention); Russia, at pages 8-13 (reference to customary principles of environmental law, like prevention, and the norms of specialized climate treaties correlate as *lex generalis* and *lex specialis*, but they do not cancel out, and the former is applied subsidiarily to the norms of climate treaties. But it argues against the application of human rights or UNCLOS); WS Antigua and Barbuda, para. 230; WS COSIS, paras. 64-65; WS El Salvador, para. 27-28; WS Bolivia, paras. 13-42; WS Vietnam, para. 15; WS Dominican Republic, paras. 4.1, 4.6, 4.8; WS Ghana, para. 26; WS Thailand, para. 5; WS Nepal, paras. 17-21; WS Burkina Faso, paras. 103, 160, 183, 190-194; PNAO, Part. C, VIII.

[81] See WS Gambia, FFA, PIF, WHO.

[82] See WS Japan, para. 11; WS Kuwait, para. 3; WS OPEC, para. 17 and 64ff; WS Saudi Arabia, paras. 1.9, 1.15; WS South Africa, paras. 14-15; WS USA, paras. 3.1-3.4. 4.1.

[83] WS Australia, paras. 2.61-2.62; WS Brazil, para. 10; WS China, paras. 92, 131; WS Denmark, Finland, Iceland, Norway and Sweden, paras. 61, 63, 74, 95; WS France, paras 11-13; WS Germany, para. 37, 42,

Figure 7: Positions of the written statements on the issue of applicable law



79. A minority of Written Statements (12) also argue that the ARSIWA[84] are inapplicable or have limited utility in the context of climate change (this is represented graphically in Figure 8, at paragraph 150 below). This argument concerns both Question (a) and Question (b) of the request.

80. As explained in the following sections, the very text of Resolution 77/276 asks the Court to examine the entire corpus of international law in its response to the questions put to it by the UN General Assembly (2.4.2). Moreover, the UNFCCC, the Kyoto Protocol and the Paris Agreement specifically acknowledge the application of other rules of international law to the Relevant Conduct (2.4.3). Furthermore, other rules of international law are applicable and have been effectively applied to the Relevant Conduct or aspects thereof (2.4.4). In addition, in relation to arguments about harmonious interpretation and systemic integration, it is important to make absolutely clear that complying with one applicable rule/treaty (e.g. the Paris Agreement) is **not sufficient** to meet the requirements of all applicable rules/treaties (2.4.5). Also, it is clear that the international law of State

118(a); WS Iran, paras. 31-32; WS Korea, paras. 17, 27, 37, 51; WS New Zealand, paras. 21, 30, 80-86; WS UAE, paras. 17-18; WS Timor-Leste, paras. 83-93.

84 Draft 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) (link).

responsibility for internationally wrongful acts is applicable to breaches of obligations governing the Relevant Conduct (2.4.6).

2.4.2. *The specification in the text of Resolution 77/276 of the applicable law in general and in the context of Question (a)*

81. In Chapter IV of its Written Statement, Vanuatu provided a detailed analysis of (i) the applicable law in general, (ii) the specific terms of Question (a) and, subsequently, (iii) also of the specific obligations governing the Relevant Conduct. In this section, aspects (i) and (ii) are further elaborated on in order to show that the very terms of General Assembly Resolution 77/276 exclude the arguments of a purported *lex specialis* covering all aspects of the conduct responsible for climate change. It must be recalled again that, remarkably, these terms were adopted by consensus by all UN Member States, including those which now seek to rewrite the text of the resolution.

82. The relevant text of the operative part of Resolution 77/276 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"

83. The chapeau paragraph refers to both treaties and customary international law. The customary character of "*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*" has been expressly recognized by this Court.[85] This is important due

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[85] Such recognition appears, for each of these rules, in the following decisions: for the duty of due diligence, in *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia), Judgment,* I.C.J. Reports 2022, p. 614, para. 99, the Court itself identified the relevant prior case law: *Corfu Channel (United Kingdom v. Albania),* Merits, Judgment, I.C.J. Reports 1949, p. 22; *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, I.C.J. Reports 1996 (I), p. 226, para. 29; *Pulp Mills on the River Uruguay (Argentina v. Uruguay),* Judgment, I.C.J. Reports 2010 (I), para. 101; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica),* Judgment, I.C.J. Reports 2015 (II), p. 706, para. 104; for the obligations arising from the rights recognized in the Universal Declaration on Human Rights: *Barcelona Traction, Light and Power Company, Limited, Judgment,* I.C.J. Reports 1970, p. 3, paras. 33-34; *United States Diplomatic and Consular Staff in Tehran (USA v. Iran),* I.C.J. Reports 1980, p. 3, para. 91; for the principle of prevention of significant harm to the environment: *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* I.C.J. Reports 1996, p. 226, paras. 27-29; *Gabcikovo-*

both to their relevance and their general application to all States.[86] The expression "*having particular regard to*" in the chapeau is a clear indication that this is not an exhaustive list of treaties and rules. This understanding is confirmed inter alia by reference to preambular paragraph 5, which "[e]*mphasiz*[es] *the importance*" of these but also other treaties and rules "*to the conduct of States over time in relation to activities that contribute to climate change and its adverse effects*". These include the Convention on the Rights of the Child,[87] the Vienna Convention for the Protection of the Ozone Layer[88] and its Montréal Protocol on Substances that Deplete the Ozone Layer[89], the Convention on Biological Diversity[90], and the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa.[91]

84. Recalling the applicability of these other instruments is important not only to clarify the meaning of the expression "*having particular regard*" in the chapeau but also to better understand the fallacious character of the argument of a purported *lex specialis* or *principal source* governing anthropogenic emissions of greenhouse gases and limited to the UNFCCC, the Kyoto Protocol and the Paris Agreement. As explained earlier in this submission (see above at paragraph 37), the term "*anthropogenic emissions*" encompasses a range of human *"activities ... that contribute to climate change and its adverse effects*", to use the wording of preambular paragraph 5 of Resolution 77/276, such as the combustion of fossil fuels and land use change. Land use change is directly governed by many nature protection treaties, including some expressly mentioned in preambular paragraph 5. Indeed, the Convention on Biological Diversity and the Desertification Convention directly govern land use change, as a major driver of nature loss[92] and

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Nagymaros Project (Hungary/Slovakia), Judgment, I. C. J. Reports 1997, p. 7, para. 140; *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment*, I.C.J. Reports 2010 (I), para. 101; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment,* I.C.J. Reports 2015 (II), p. 706, para. 104; *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia), Judgment,* I.C.J. Reports 2022, p. 614, paras. 83 and 99; for the duty to protect and preserve the marine environment: *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Judgment,* I.C.J. Reports 2022, p. 266, para. 95.

86 See WS Vanuatu, para. 276.

87 Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 (link).

88 Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, 1513 UNTS 293 (link).

89 Montréal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, 1522 UNTS 3 (link).

90 Convention on Biological Diversity, 5 June 1992, 1760 UNTS 69 (link).

91 United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 14 October 1994, 1954 UNTS 3 (link).

92 In its *Global Assessment Report on Biodiversity and Ecosystem Services,* the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (**IPBES**), the equivalent of the IPCC for ecosystem integrity, concluded that: *"For terrestrial and freshwater ecosystems, land-use change has had the largest relative negative impact on nature since 1970, followed by the direct exploitation, in particular overexploitation, of animals, plants and other organisms, mainly via harvesting, logging, hunting and fishing*", IPBES, Global Assessment Report on Biodiversity and Ecosystem Services (2019), Summary for policy makers, statement B.1 (link).

desertification.[93] One of the most important human activities encompassed by the expression "*anthropogenic emissions of greenhouse gases*" is thus directly governed by treaties other that the purported *lex specialis* or principal source identified in a minority of Written Statements. Similar considerations apply to other treaties such as the Vienna Convention for the Protection of the Ozone Layer and its Montreal Protocol, which directly govern anthropogenic emissions of greenhouse gases. Indeed, Annex I of the Vienna Convention expressly identified as falling under its scope three main greenhouse gases: carbon dioxide, methane, and nitrous oxide. The Montréal Protocol governs substances that deplete the ozone layer, which may also be greenhouse gases. Remarkably, after its Kigali Amendment in 2016, the Montréal Protocol also regulates potent greenhouse gases (hydrofluorocarbons) which are **not** ozone depleting substances.[94] Yet another example concerns the Convention on the Rights of the Child, which has been specifically interpreted by the Committee on the Rights of the Child, in General Comment 26, as governing mitigation and adaptation to climate change.[95]

85. The formulation of Question (a) circumscribes the relevant obligations by reference to four aspects: "*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*".[96] First, the question is about the international obligations of

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93 Land use change is also a major cause of desertification, which fuels climate change and, in turn, exacerbates desertification further. According to an IPCC *Report on Climate Change and Land*: "*Desertification is land degradation in arid, semi-arid, and dry sub-humid areas, collectively known as drylands, resulting from many factors, including human activities and climatic variations. The range and intensity of desertification have increased in some dryland areas over the past several decades*" (page 271). The report later specifies the type of human activities involved: "*The major human drivers of desertification interacting with climate change are expansion of croplands, unsustainable land management practices and increased pressure on land from population and income growth*", IPCC, *Special Report on Climate Change and Land* (2019), Chapter 3, Executive Summary, at page 251 (link).

94 Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, 15 October 2016, in force since 1 January 2019, introducing inter alia a new Article 2J on hydrofluorocarbons and a new Annex F covering hydrofluorocarbons as one of the controlled substances under the Protocol (link).

95 Committee on the Rights of the Child, *General Comment No. 26 on children's rights and the environment, with a special focus on climate change*, UN Doc CRC/C/GC/26 (22 August 2023), e.g. para. 98 ("*When determining the appropriateness of their mitigation measures in accordance with the Convention, and also mindful of the need to prevent and address any potential adverse effects of those measures, States should take into account the following criteria […] (b) States have an individual responsibility to mitigate climate change in order to fulfil their obligations under the Convention and international environmental law, including the commitment contained in the Paris Agreement to hold the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels by 2030.31 Mitigation measures should reflect each State party's fair share of the global effort to mitigate climate change, in the light of the total reductions necessary to protect against continuing and worsening violations of children's rights. Each State, and all States working together, should continuously strengthen climate commitments in line with the highest possible ambition and their common but differentiated responsibilities and respective capacities. High-income States should continue to take the lead by undertaking economy-wide absolute emission reduction targets, and all States should enhance their mitigation measures in the light of their different national circumstances in a manner that protects children's rights to the maximum possible extent*") (link).

96 WS Vanuatu, paras. 211-216.

States, including those to regulate the activities of non-State actors. Second, the relevant obligations are those that aim to protect "*the climate system and other parts of the environment*". The terms "*and **other parts** of the environment*" make clear that the climate system is one part of the environment amongst others (the French version of Resolution 77/276 is even more emphatic, referring to the "*système climatique*" as a component of the environment, "*composant[e] de l'environnement*"). According to the IPCC Glossary, the climate system encompasses five major components: "the *atmosphere*, the *hydrosphere*, the *cryosphere*, the *lithosphere* and the *biosphere* and the interactions between them."[97] The oceans and – seen from an environmental perspective – the marine environment, are therefore part of the climate system and, more generally, of the environment. Similarly, the biosphere, including nature and biodiversity, is a part of the climate system and, more generally, of the environment. The two remaining aspects of Question (a) concern the identification of the threat and that of the end goal. On the threat, it is clear that that the obligations are those that seek to protect from a conduct, namely those human activities underpinning the expression "*anthropogenic emissions*" of greenhouse gases. These activities have been explained earlier in this submission (above paragraphs 37-39) and in Vanuatu's Written Statement.[98] On the end goal pursued by the protection, it is important to note the terms "*for States **and** for present and future generations*". These terms are intended to be as encompassing as possible. The protective obligations are not only those operating in an inter-State context but also as a step to protect the human rights of present and future generations. Therefore, the obligations to be clarified in response to Question (a) include both inter-State obligations (e.g. the duty of due diligence, the prevention principle, the duty to protect and preserve the marine environment, those arising from the UN Charter, the UNCLOS, UNFCCC, the Paris Agreement, the Convention on Biological Diversity, the Montreal Protocol, etc.) and human rights obligations arising from treaties and customary international law, including the right of peoples to self-determination.

86. Once these four aspects have been explained, and in the light of chapeau of the operative part and of the preamble of Resolution 77/276, it is simply not possible to conclude that the UNFCCC, the Kyoto Protocol the Paris Agreement are the *lex specialis* or the principal source governing "*anthropogenic emissions of greenhouse gases*" from the perspective of the "*protection of the climate system and other parts of the environment … for States and for present and future generations*". As explained next, the UNFCCC, the Kyoto Protocol and the Paris Agreement specifically acknowledged, even reserved, the application of other rules of international law to anthropogenic emissions of greenhouse gases and such rules have been effectively applied *inter alia* by the European Court of Human Rights, human rights treaty bodies, human rights special procedures, domestic courts and

97 IPCC Glossary (link).

98 WS Vanuatu, paras. 139-146, 493-498.

the International Tribunal on the Law of the Sea to regulate the conduct at stake in these proceedings or aspects thereof.

2.4.3. *The UNFCCC, the Kyoto Protocol and the Paris Agreement specifically acknowledge, even expressly reserve, the application of other rules of international law to the Relevant Conduct*

A. Overview

87. The argument according to which the Court should limit its analysis to a purported *lex specialis* or a *principal source of obligations* consisting, essentially, of the UNFCCC, the Kyoto Protocol and the Paris Agreement is developed in a minority of Written Statements. As illustrations of these arguments, this section uses as a starting point the Written Statements of the two main emitters of greenhouse gases, China and the United States of America, and that of the international organization that brings together the main producers of fossil fuels, the Organization of Petroleum Exporting Countries (**OPEC**).[99]

88. It has already been shown, in the previous section, that this argument is baseless and contradicts not only the very text of Resolution 77/276 but, more generally, the fact that the human activities underpinning the expression "*anthropogenic emissions of greenhouse gases*" are directly governed by a range of other instruments. Addressing this same argument, the ITLOS was formal that the *lex specialis* argument has no application in the relations between the Paris Agreement and the UNCLOS:

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[99] The OPEC submits that the only applicable obligations of States are to be found in the '*self-contained* lex specialis *regime of the Kyoto Protocol, Paris Agreement and the UNFCCC*', thus excluding the general international law on environmental protection (viz., the prevention principle, the precautionary principle, and the duty of due diligence) and precluding any additional obligations or legal consequences in respect of peoples or individuals, WS OPEC, paras. 9, 87, 121. The People's Republic of China makes a similar albeit subtler submission: "*The objectives, principles and norms of the UNFCCC regime serve as specialized laws tailored to address climate change and its adverse effects, and constitutes a* sui generis *body of law*." (WS China, para. 92). This argument thus informs its specific submissions on, *inter alia*: (i) human rights obligations ("*The obligations deriving from international human rights law […] are applicable only to the extent that the provisions of international human rights law are compatible with those of the UNFCCC regime*."), WS China, para. 123; (ii) the law of the sea ("*the identification of anthropogenic GHG emissions as "pollution of the marine environment" is inconsistent with the UNFCCC regime*"), WS China, para. 105; and (iii) other obligations of general international law ("*The principle of prevention of significant harm to the environment is inapplicable to the issue of climate change*", WS China, para. 128; "*In assessing whether States have fulfilled their duty of due diligence by their actions to address climate change and its adverse effects, it should follow the relevant benchmarks set by the provisions of the UNFCCC regime*", WS China, para. 131. The USA submits that the obligations of States are found "*primarily*" in the climate change regime, foremost the Paris Agreement, WS USA, para. 3.3. But this argument carries similar implications to those in China's submissions. Although the USA disputes whether the customary duty to exercise due diligence in preventing significant harm to the environment even applies also to GHG emissions, it submits that "*the specific regime of the Paris Agreement is compatible with a context-specific due diligence standard*" such that any "*customary obligation of due diligence […] should be considered fulfilled by a State's implementation of its obligations under the Paris Agreement*", WS USA, para. 4.28. See also WS Brazil, paras. 10–11; WS Kuwait, paras 60–81; WS Saudi Arabia, ch. . 4; WS South Africa, paras 14–17.

> "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**." (emphasis added)[100]

The ITLOS concluded that the obligations arising from the UNCLOS are applicable, not as mere interpretive aids to clarify the Paris Agreement, but as governing law, with the Paris Agreement serving as an aid to interpret the UNCLOS itself. Clearly, there is no primacy, centrality or pivotal character of the Paris Agreement with respect to the pollution of the marine environment resulting from anthropogenic emissions of greenhouse gases. This aspect of the ITLOS' advisory opinion is examined in detail in paragraphs 131-137 and 144 of this submission.

89. This section of the submission demonstrates that the very instruments presented as a purported *lex specialis* or *principal source* specifically acknowledge, and even reserve in their text, the application of other instruments and rules. Thus, from the perspective of their subject-matter (*ratione materiae*), the purported *lex specialis* or principal source arguments are baseless. Yet, before entering into this analysis, it is important to emphasize that the UNFCCC, the Kyoto Protocol and the Paris Agreement could, in any event, not serve as the *lex specialis* or principal source of obligation for most of the duration of the Relevant Conduct because of their restricted applicability *ratione temporis*.

B. Fundamental mismatch between the temporal span of the Relevant Conduct and the application *ratione temporis* of the UNFCCC, the Kyoto Protocol and the Paris Agreement

90. At the outset, it must be noted that there is a fundamental mismatch between the long temporal span of the Relevant Conduct and the application *ratione temporis* of the UNFCCC, the Kyoto Protocol and the Paris Agreement. Indeed, as recalled in preambular paragraph 5 of Resolution 77/276 by the terms "*over time*", the Relevant Conduct encompasses a series of acts and omissions whereby certain States have released a cumulative amount of greenhouse gases that, through their concentration in the atmosphere and in the oceans, has caused significant harm to the climate system and other parts of the environment. The expert report of Professor Corinne Le Quéré covers emissions between 1851 and 2022,[101] whereas

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100 *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)*, ITLOS Case No. 31, Advisory Opinion (21 May 2024), para. 224 (link).

101 Expert Report of Professor Corinne Le Quéré on Attribution of global warming by country (dated 8 December 2023), WS Vanuatu, Exhibit B, para. 17 ("***Cumulative CO_2 emissions, the main cause of human-induced climate change, has clear origin in historical use of fossil fuels and land by countries.*** *The largest contributors to cumulative emissions of CO_2 during 1851-2022 were the USA (20.5%), whose emissions peaked around 2005; the EU27 (11.7%), with emissions decreasing since the early 1980s; China (11.7%), with most of its emissions occurring since 2000; Russia (7.0%); and Brazil (4.6%)*" (emphasis original)).

the IPCC's 2021 Report on the Physical Science Basis of Climate Change covers the period 1750-2019.[102]

91. By contrast, the UNFCCC only entered into force on 21 March 1994, the Kyoto Protocol on 16 February 2005, and the Paris Agreement on 4 November 2016. **The argument according to which they are the only legal instruments governing the Relevant Conduct would mean that such conduct was totally unregulated under treaty and customary international law until those dates**, whether in its harm to the environment in general or to certain parts thereof, such as the marine environment. This despite the clear awareness in scientific and political circles of the risks entailed, since as early as the 1960s. As noted in the expert report of Professor Naomi Oreskes, a leading historian of climate science and policy from Harvard University:

> "at least from the 1960s, the United States and other States with high cumulative emissions of greenhouse gases (GHGs), including France and the UK, were aware that (i) the release of greenhouse gases into the Earth's atmosphere had the potential to alter the climate system, and (ii) that such interference, if unmitigated, could have catastrophic effects for humans and the environment".[103]

92. **If, instead, the purported *lex specialis* or principal source is understood as only becoming so in 1994 or later, then the conduct would remain governed by other instruments and rules, at the very least, until that date**. That would be enough to call for their elucidation under Question (a) and the assessment of the Relevant Conduct in their light under Question (b). Yet, to the extent that it recognizes the *lex specialis* or principal source character for the period post-1994, such a conclusion would still be incorrect from the perspective of the limited application of the UNFCCC, the Kyoto Protocol and the Paris Agreement *ratione materiae*.

C. Limits to the applicability *ratione materiae* of the UNFCCC, the Kyoto Protocol and the Paris Agreement

93. The *lex specialis* and principal source arguments fail not only *ratione temporis* but, more fundamentally, *ratione materiae*. **For the UNFCCC, the Kyoto Protocol**

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102 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), Technical Summary, Box TS5, at page 80 ("*Based on multiple lines of evidence using interhemispheric gradients of CO2 concentrations, isotopes, and inventory data, it is unequivocal that the growth in CO2 in the atmosphere since 1750 (see Section TS.2.2) is due to the direct emissions from human activities. The combustion of fossil fuels and land-use change for the period 1750–2019 resulted in the release of 700 ± 75 PgC (likely range, 1 PgC = 10^{15} g of carbon) to the atmosphere, of which about 41% ± 11% remains in the atmosphere today (high confidence). Of the total anthropogenic CO2 emissions, the combustion of fossil fuels was responsible for about 64% ± 15%, growing to an 86% ± 14% contribution over the past 10 years. The remainder resulted from land-use change*") (link).

103 Expert Report of Professor Naomi Oreskes on Historical Knowledge and Awareness, in Government Circles, of the Effects of Fossil Fuel Combustion as the Cause of Climate Change (dated 29 January 2024), WS Vanuatu, Exhibit D, para. 4. Awareness of the need to act is demonstrated in detail in the WS Vanuatu, at paras. 177-192.

and the Paris Agreement to operate as *lex specialis* or principal source, they would have to comprehensively govern – fully displacing any other more general rules – aspects of the conduct which are not only not addressed in any detail in their text but acknowledged to be governed by other rules. The limitations of the UNFCCC, the Kyoto Protocol and the Paris Agreement are particularly clear for three main areas, namely human rights, the law of the sea and certain customary principles, most notably the principle of prevention of significant environmental harm.

(1) Obligations arising from human rights

94. There are no references to human rights in the text of the UNFCCC. The first express reference to them appeared in the work of the Conference of the Parties (**COP**), fourteen years after the entry into force of the Convention, in a set of decisions adopted by the COP in December 2010, known as the Cancún Agreements.[104] By then, the impact of climate change and its adverse effects on human rights was well understood, including in the work of the Human Rights Council in a stream of resolutions on climate change and human rights, which are expressly referenced in preambular paragraph 4 of Resolution 77/276. This body of work is also expressly referenced in the preamble of the Cancún Agreements.[105] The main statement regarding human rights in the Cancún Agreements makes fully clear that such rights are applicable to "*all climate related action*", but they do not flow from the UNFCCC itself. Indeed, at paragraph 8, the COP "[e]*mphasizes that Parties should, in all climate change related actions, fully respect human rights*".[106] Together with preambular paragraph 7, these are the only two express uses of the terms "*human rights*" in the entire Cancún Agreements.

95. It was at the time, and it is still clear to all States that the UNFCCC does not contain provisions formulating human rights for individual or collective subjects, nor does it stipulate specific obligations arising from such rights. The UNFCCC stands as an inter-State instrument under international law, with obligations operating on a State-to-State level. This is in stark contrast to human rights norms, which create correlative duties owed directly to individual and collective subjects. The Paris Agreement, as a subsidiary instrument to the UNFCCC, reaffirms this distinction in its preamble by calling on States to "*respect, promote and consider their*

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104 The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, Decision 1/CP16, FCCC/CP/2010/7/Add.1 (link).

105 The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, Decision 1/CP16, FCCC/CP/2010/7/Add.1 (link), preambular para. 7 ("*Noting resolution 10/4 of the United Nations Human Rights Council on human rights and climate change, which recognizes that the adverse effects of climate change have a range of direct and indirect implications for the effective enjoyment of human rights and that the effects of climate change will be felt most acutely by those segments of the population that are already vulnerable owing to geography, gender, age, indigenous or minority status, or disability.*").

106 The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, Decision 1/CP16, FCCC/CP/2010/7/Add.1, para. 8 (link).

respective obligations on human rights" when taking climate action. This reference acknowledges the applicability of international human rights law to climate action, without conflating the two domains or altering their distinct legal characters.

96. The close relationship between international human rights law and climate action becomes particularly evident in complex scenarios. On the one hand, a State's failure to sufficiently curb emissions may simultaneously breach its obligations under the UNFCCC and human rights law. On the other hand, certain actions taken to curb emissions, such as the forced relocation of Indigenous Peoples for renewable energy projects, could involve human rights violations. In the case of the Relevant Conduct, Vanuatu contends that its scale, impact and recklessness, with decades of increasingly specific knowledge about its devastating impact on ecosystems and human societies, render it violative of a wide range of instruments and rules, including both the UNFCCC and human rights law. This exemplifies how these legal regimes, while distinct, overlap in their application to egregious climate-related conduct. The crux of the matter lies in recognizing that **these instruments and rules have partly overlapping but distinct substantive scopes, precluding a relationship of speciality-generality**.

97. Like the UNFCCC, the Kyoto Protocol makes no reference to human rights. This is unsurprising because neither the UNFCCC nor the Kyoto Protocol ever intended to substitute themselves as a purported *lex specialis* displacing human rights law. The first formal reference in a treaty under the UNFCCC framework came with the adoption of the Paris Agreement. It is important to note, when assessing the claims made some States regarding the purported *lex specialis* or principal source character of this treaty, that States such as Norway, Saudi Arabia and the United States expressly opposed the inclusion of human rights language in the Paris Agreement.[107] This alone would be a ground for them to be estopped from claiming that the Paris Agreement is a *lex specialis* or principal source governing also matters of human rights.[108] **The only alternative for their argument would be to claim not that the Paris Agreement is a human rights instrument but that it is a *lex specialis* or principal source because human rights are simply not applicable to climate action at all. Yet, the very preamble of the Paris Agreement, adopted by consensus (including these three countries) "*acknowledges*" the contrary**, namely that human rights apply to Parties: "*when taking action to address climate change*" and, specifically, the need for them "*respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality,*

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107 Human Rights Watch, "Human Rights in Climate Pact under Fire: Norway, Saudis, US Blocking Strong Position", Human Rights Watch, 7 December 2015 (link).

108 WS Denmark, Finland, Iceland, Norway and Sweden, paras. 61, 63, 74, 95 ; WS Saudi Arabia, paras. 1.9, 1.15; WS USA, paras. 3.1-3.4. 4.1.

empowerment of women and intergenerational equity".[109] Aside from this acknowledgment that such "*obligations*" apply to "*action to address climate change*", no further reference is made in the Paris Agreement. 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* or a principal source in relation to human rights obligations.

(2) Obligations arising from the UNCLOS and customary international law with respect to the law of the sea

98. Similar considerations apply to the protection and preservation of the marine environment. The UNFCCC addresses the marine environment in an extremely narrow manner, namely not as the marine environment to be protected and preserved (as per Article 192 of UNCLOS and the customary rule codified in it) but as mere "*sinks and reservoirs*" of greenhouse gases (Article 4(1)(d)). It would be an extreme overstretch to consider that such a limited treatment constitutes a *lex specialis* or a principal source displacing the comprehensive regulation provided in the UNCLOS as well as other relevant agreements protecting the marine environment.

99. The Kyoto Protocol expressly reserves certain matters to the regulation under the Montréal Protocol and international environmental agreements, as well as under frameworks to be developed under the International Civil Aviation Organization or the International Maritime Organization. Article 2(1)(a)(ii) states the following in relation to "*sinks and reservoirs of greenhouse gases*", which is how narrow aspects of the marine environment and the biosphere are addressed by the Kyoto Protocol:

> "1. Each Party included in Annex I, in achieving its quantified emission limitation and reduction commitments under Article 3, in order to promote sustainable development, shall:
>
> (a) Implement and/or further elaborate policies and measures in accordance with its national circumstances, such as:
>
> (ii) Protection and enhancement of sinks and reservoirs of greenhouse gases **not controlled by the Montreal Protocol, taking into account its commitments under relevant international environmental agreements**; promotion of sustainable forest management practices, afforestation and reforestation" (emphasis added)

This provision is very clear regarding the continued application of the Montréal Protocol and other commitments under international environmental agreements, e.g. the UNCLOS. Then, Article 2(2) further reserves matters regarding international airspace and the law of the sea:

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[109] Paris Agreement, 12 December 2015, 3156 UNTS 79, preambular para. 11 (link).

> "The Parties included in Annex I shall pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation and **marine bunker fuels**, working through the International Civil Aviation Organization **and the International Maritime Organization**, respectively" (emphasis added)

100. As for the Paris Agreement, the preamble "*not*[e]*s the importance of ensuring the integrity of all ecosystems, including oceans … when taking action to address climate change*".[110] Thus, climate action remains subject to the obligations that seek to ensure the integrity of the oceans, but the Paris Agreement does not even purport to regulate this dimension. It simply recalls the continued application of the relevant rules.

(3) Application of the principle of prevention of significant environmental harm and other principles of customary international law

101. With respect to customary international law, the argumentation in the Written Statements converges on the duty of due diligence and the principle of prevention of significant environmental harm. These rules are by no means the only applicable obligations of customary international law. Vanuatu has explained in significant detail, in its Written Statement, which other customary rules govern the Relevant Conduct.[111] But for the purpose of rebutting the incorrect statements made by certain States and organizations in relation to the *lex specialis* or principal source character of the UNFCCC, the Kyoto Protocol and the Paris Agreement, it is apposite to focus on the prevention principle.

102. This rule features with different denominations in the Written Statements, often called simply "*no harm*" for ease of reference. The terminology used by the Court itself is more precise, as it covers the full scope of application of this customary rule. In its advisory opinion on the *Legality of Nuclear Weapons*, the Court formulated this customary rule by reference to Principle 21 of the Declaration of the Stockholm Conference on the Human Environment and Principle 2 of the Rio Declaration on Environment and Development, as follows:

> "The 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."[112]

This formulation must be emphasized to avoid any attempts at narrowing down the scope of the rule to a purely "*transboundary*" context. In any event, given the ubiquitous nature of the climate system, as one part of the environment, including

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110 Paris Agreement, 12 December 2015, 3156 UNTS 79, preambular para. 13 (link).

111 WS Vanuatu, Section 4.4.3.

112 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* I.C.J. Reports 1996, p. 226, para. 29.

the hydrosphere and the marine environment, it would make no difference to narrow down the rule to its transboundary dimension ("*respect the environment of other States*"). Yet, from a legal standpoint, the Court has made it clear that the rule also protects "*the environment … of areas beyond national control*".

103. Two main arguments have been advanced in an attempt to exclude or limit the application of this obligation to the Relevant Conduct. According to the first argument, this rule is not applicable to anthropogenic emissions of greenhouse gases. The second argument acknowledges the application of the rule but argues that its application is excluded by the UNFCCC, the Kyoto Protocol and the Paris Agreement, as the purported *lex specialis* or principal source. Both arguments fail.

104. Regarding the first argument, as already noted, preambular paragraph 5 of Resolution 77/276 "[e]*mphasiz*[ed] *the importance … of 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*". This reference must be placed in the context of the Court's advisory opinion on the *Legality of Nuclear Weapons*, where the contents of the customary prevention principle were recognized by specific reference to these two Declarations.[113] Such importance is "[e]*mphasiz*[ed]" in Resolution 77/276 with respect to "*the conduct of States over time in relation to activities that contribute to climate change and its adverse effects*". States have the power and the duty to regulate such activities, which underpin anthropogenic emissions of greenhouse gases. If they fail to do so, then they fail "*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*."[114] If any doubt could remotely remain regarding the application of the prevention principle to climate action in general and, specifically to mitigation action, it is simply removed by the

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113 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* I.C.J. Reports 1996, p. 226, paras. 27-29 (the full statement reads as follows, with emphasis added: "*In both their written and oral statements, some States furthermore argued that any use of nuclear weapons would be unlawful by reference to existing norms relating to the safeguarding and protection of the environment, in view of their essential importance. Specific references were made to various existing international treaties and instruments (…) Also* ***cited were Principle 21 of the Stockholm Declaration of 1972 and Principle 2 of the Rio Declaration of 1992*** *which express the common conviction of the States concerned that they have a duty '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' (…) Other States questioned the binding legal quality of these precepts of environmental law (…) The Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.* ***The 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***."

114 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* I.C.J. Reports 1996, p. 226, para. 29.

preamble of the UNFCCC itself, which "*recall*[s]" at paragraph 8 the wording of Principle 2 of the Rio Declaration:

> "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".

In the preambular paragraph immediately preceding this statement, there is a reference to the "*pertinent provisions*" of the Declaration of the Stockholm Conference on the Human Environment. It should be recalled that the UNFCCC was finalized before being opened for signature at the Rio Conference where the Rio Declaration was later adopted, which explains the express reference to the Stockholm Declaration. It is not conceivable that a purportedly irrelevant principle would be recalled twice, first by reference to the instrument codifying the rule (preambular paragraph 7), and then in its actual content (preambular paragraph 8). Its importance is further emphasized in preambular paragraph 5 of Resolution 77/276 and it the chapeau of the operative part. This text was adopted by consensus, including by those States that now attempt to question the principle's applicability to climate mitigation action.

105. With respect to the second argument, Vanuatu notes that it carries with it a concession that the prevention principle is applicable to the Relevant Conduct. Accepting, *arguendo*, that the UNFCCC, the Kyoto Protocol and the Paris Agreement are a *lex specialis* that has effectively replaced the prevention principle, a necessary corollary is that the prevention principle governed the Relevant Conduct at least up until the entry into force of the UNFCCC in 1994. That applicability is in itself sufficient for the Court to address the principle among the obligations covered by Question (a) of Resolution 77/276. However, as explained next, the correct position is that the prevention principle never ceased to apply, remains applicable, and will continue to apply to the Relevant Conduct in the future. This is for four main reasons.

106. First, the Court has noted that the fact that two norms, a treaty and a custom, have a similar content does not prevent either of them from applying separately and autonomously. In the *Nicaragua v. United States* case, the Court famously noted that:

> "[E]ven if the customary norm and the treaty norm were to have exactly the same content, this would not be a reason for the Court to hold that the incorporation of the customary norm into treaty-law must deprive the customary norm of its applicability as distinct from that of the treaty norm […]. There are a number of reasons for considering that, even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of

> treaty-law and on that of customary international law, these norms retain a separate existence. This is so from the standpoint of their applicability […] It will therefore be clear that customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content"[115]

In the present case, the customary and treaty rules are not identical. The customary obligation of prevention converges with the broad mitigation obligations like those formulated in Articles 4(1)-(2) of the UNFCCC, 3(1) of the Kyoto Protocol or 3 and 4(2) of the Paris Agreement, but the content of these rules is distinct enough and it applies separately. Mitigation, as typically formulated in treaties, focuses on reducing the impact of potentially harmful activities. In contrast, the duty of prevention aims to halt or prevent activities that cause significant harm.

107. Second, for a rule to operate as a *lex specialis* with respect to another rule, there must be some indication that it derogates from such other rule, to use the terms of the Latin maxim. In the relations between the prevention principle and mitigation obligations arising from the UNFCCC, the Kyoto Protocol and the Paris Agreement, the indications point to the exact opposite. As noted earlier, the preamble of the UNFCCC "*recall*[s]" both the "*pertinent provisions*" of the Stockholm Declaration (paragraph 7) and the prevention principle itself (paragraph 8). The term "*recalling*" is also used for the Vienna Convention on the Protection of the Ozone Layer and the Montréal Protocol, the application of which is expressly reserved. The preamble also refers to "*the principle of sovereignty of States*". These different indications clearly suggest that the principles stated in the preamble are recalled because they are and continue to be applicable. The alternative would lead to the conclusion that the ozone regime and the principle of sovereignty of States are also a general law which the UNFCCC derogates from, which is clearly inconsistent with the text of the UNFCCC. As regards the Kyoto Protocol (preambular paragraphs 1 to 4) and the Paris Agreement (preambular paragraphs 1 and 3), they both operate under the UNFCCC and are expressly subject to its principles, including the prevention principle. Preambular paragraph 3 of the Paris Agreement specifically places the entire agreement under the UNFCCC and its principles:

> "In pursuit of the objective of the Convention, and being guided by its principles, including the principle of equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances"

108. Third, Vanuatu agrees with the position formulated in the Written Statement of Switzerland that the climate change treaties do not contain any norm that derogates from the principle of prevention (in Switzerland's terminology, the "*no harm*" rule):

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115 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, ICJ Reports 1986, p. 14, paras. 177-179.

> "There are no norms in the above-mentioned conventions derogating from the no-harm rule, because in various ways they contribute to the implementation of this norm of customary law. Moreover, the legal regime governing climate change is not a stand-alone regime but is part of general international environmental law and its norms."[116]

The corollary of this statement is that "*there is no normative conflict between this general international principle and these conventions*".[117] Given that such conflict is a pre-requisite for the operation of the *lex specialis* maxim, it follows that the *lex specialis* argument is not applicable to the conduct responsible for climate change.[118] Importantly, Switzerland stresses that, in the relations between the treaties of the climate change regime and the customary prevention principle, the pivotal rule is the latter, not the former. Therefore, respecting the climate change regime is in no way sufficient to respect other rules, *in casu* the customary prevention principle. The relevant paragraphs are reproduced below:

> "the mere fact that a state participates in the conventions relating to climate change does not mean that the no-harm rule has been fully respected nor that the state has demonstrated due diligence. Switzerland considers that **participation in the conventions is not necessarily sufficient to ensure compliance with this customary law obligation**, as this requires a case-by-case assessment of the measures taken in response to risks.
>
> The specific rules of the relevant conventions, in particular those of the **Paris Agreement, may be used to interpret the rules of customary international law. This should not, however, result in a weakening or relativisation of the obligations arising from customary law, but rather in their strengthening**. The requirement that each state's climate protection efforts correspond to its highest possible level of ambition86 sets the standard of due diligence required of each state. This standard is also part of the state's obligation to ensure that activities carried out on its territory or under its jurisdiction do not cause damage outside it." (emphasis added)[119]

109. Fourth, the previous reason is important because it not only sets the record straight regarding the pivotal norm, i.e. prevention, but it also defeats the purported *lex specialis* or primary source arguments, and it recalls that two rules may apply at the same time if they address different aspects. Even if there were a conflict between the prevention principle and the UNFCCC (or the Kyoto Protocol or the Paris Agreement) (*quod non*), and even if the latter instruments were considered a *lex specialis* (*quod non*), that would not necessarily entail that the application of the prevention principle is entirely excluded. As the Court noted in its advisory opinion on the *Legality of Nuclear Weapons* by reference to the right to life, two rules could apply together, with the *lex specialis* (the law of armed conflict) affecting the

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116 WS Switzerland, para. 66.

117 WS Switzerland, para. 67.

118 WS Switzerland, para. 68.

119 WS Switzerland, paras. 70-71.

meaning of arbitrary deprivation of life.[120] Similarly, in relation to the display of the Relevant Conduct, the prevention principle would continue to apply, with the level of diligence being determined by reference *inter alia* to whether the emissions of a State have been such that they are inconsistent with the ultimate objective of the UNFCCC "*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*". The Paris Agreement is a "*related legal instrument*" directed at "*enhancing the implementation of the Convention, including its objective*".[121] It recognizes, in its Article 8, that the objective has not been reached because "*loss and damage*" has already occurred.

110. **For most major emitters, irrespective of the benchmark of diligence selected, high or low, their conduct would fall far short of what is required. The evidence supporting this conclusion is overwhelming.** The following table contrasts what diligent conduct in accordance with the best available scientific knowledge would require and the conduct that has been and, in most cases, is still being displayed by major emitters, even with respect to their obligations under the Paris Agreement. **The contrast is so stark that it is unsurprising that so much effort is put into trying to exclude the application of the prevention principle. But this conduct also breaches the climate change agreements, the obligations arising from human rights instruments, the duty to protect and preserve the marine environment, and a range of other international obligations.** Table 1 contrasts the required conduct with the observed conduct of major emitters of greenhouse gases:

Table 1: Conduct required vs. conduct observed

Diligent conduct in accordance with the "*best available scientific knowledge*" (Paris Agreement, preambular paragraph 4)	**Conduct observed in relation to emissions, fossil fuel production, and mismatch between nationally determined contributions and such conduct**
"global annual GHG emissions must be reduced by 45 per cent compared with emissions projections under policies currently in place in just eight years"[122] "[b]eyond projects already committed as of 2021, there are no new oil and gas fields approved for development in our	"**The consequences of the continued delay in stringent emission reductions are evident when examining the past decade of Emissions Gap Reports**. As highlighted in the Emissions Gap Report 2019 (UNEP 2019) the underlying data from the reports reveal that had serious climate action been initiated in 2010, the annual emission reductions necessary to achieve emission levels consistent with the below 2°C and 1.5°C scenarios by 2030 would

120 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* I.C.J. Reports 1996, p. 226, para. 25.

121 "The Paris Agreement", Decision 1/CP.21, 12 December 2015, FCCC/CP/2015/10/Add.1, 21, Annex, art. 2(1) (link).

122 UNEP, *The Closing Window. Emissions Gap Report 2022*, Executive Summary, at page xvi (link).

pathway, and no new coal mines or mine extensions are required"[123] "little or no new CO2-emitting infrastructure can be commissioned, and that existing infrastructure may need to be retired early (or be retrofitted with carbon capture and storage technology) in order to meet the Paris Agreement climate goals"[124] "rapid and deep and, in most cases, immediate greenhouse gas emissions reductions in all sectors this decade"[125] "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"[126] "Net zero CO2 energy systems entail: a substantial reduction in overall fossil fuel	have been only 0.7 per cent and 3.3 per cent on average, respectively (Höhne *et al.* 2020). **The lack of stringent emission reductions means that the required emission cuts from now to 2030 have increased significantly. To reach emission levels consistent with a below 2°C pathway in 2030, the cuts required per year are now 5.3 per cent from 2024, reaching 8.7 per cent per year on average for the 1.5°C pathway**. To compare, the fall in total global GHG emissions from 2019 to 2020 due to the COVID-19 pandemic was 4.7 per cent (UNEP 2022)." (emphasis added)[128] "the total global GHG emission level in 2030 taking into account implementation of all latest NDCs is estimated to be 10.6 (3.6–17.5) per cent above the 2010 level and 0.3 percent below the 2019 level."[129] [0.3% below 2019 levels is far removed from the 45% below 2019 levels that GHG emissions need to be at in 2030 for a pathway consistent with the 1.5°C target.[130]] "While 17 of the 20 countries profiled have pledged to achieve net-zero emissions, and many have launched initiatives to reduce emissions from fossil fuel production activities, **most continue to promote, subsidize, support, and plan on the expansion of fossil fuel production. None have committed to reduce coal, oil, and gas production in line with limiting warming to 1.5°C.**" (emphasis added)[131] "the increases estimated under the government plans and projections pathways would lead to global production levels in 2030 that are 460%, 29%, and

123 International Energy Agency, *Net Zero by 2050. A Roadmap for the Global Energy Sector* (Summary for policymakers) (2021), p. 11 (link).

124 Dan Tong, Qiang Zhang, Yixuan Zheng, Ken Caldeira, Christine Shearer, Chaopeng Hong, Yue Qin & Steven J. Davis, 'Committed emissions from existing energy infrastructure jeopardize 1.5 °C climate target' (2019) 572 Nature 373, WS Vanuatu, Exhibit Y, p. 373.

125 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 B.6 (link).

126 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 C.2 (link).

128 UNEP, *Emissions Gap Report 2023: Broken Record. Temperatures reach new highs, yet world fails to cut emissions (again)* (November 2023), at p. 30 (link).

129 'Nationally determined contributions under the Paris Agreement: Synthesis report by the secretariat', 26 October 2022, FCCC/PA/CMA/2022/4, 7, para. 13 (link).

130 IPCC, *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*, Summary for Policymakers (2018), statement C.1 (link).

131 UNEP, *Production Gap Report 2023*: *Phasing down or phasing up ? Top fossil fuel producers plan even more extraction despite climate promises* (November 2023), p. 5 (link).

use, minimal use of unabated fossil fuels"[127]	82% higher for coal, oil, and gas, respectively, than the median 1.5ºC-consistent pathways … **The disconnect between governments' fossil fuel production plans and their climate pledges is also apparent across all three fuels**." (emphasis added)[132]

111. Further information on the major emitters considered in the reports of the second column is provided in Vanuatu's Written Statement in the discussion of the Relevant Conduct,[133] but the Court may also address the Relevant Conduct in general.

112. All in all, as demonstrated in this section, the *lex specialis* and principal source arguments fail not only *ratione temporis* but, more fundamentally, *ratione materiae*.

2.4.4. *Other rules of international law are applicable and have been effectively applied to regulate the Relevant Conduct*

A. Overview

113. From the perspective of rules and treaties other than the UNFCCC, the Kyoto Protocol or the Paris Agreement, the formal application of human rights treaties and the UNCLOS to govern anthropogenic emissions of greenhouse gases has been specifically confirmed *inter alia* by the European Court of Human Rights,[134] the Human Rights Committee,[135] the Committee on the Rights of the Child,[136] and the

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127 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 C.3.2 (link).

132 UNEP, *Production Gap Report 2023*: *Phasing down or phasing up ? Top fossil fuel producers plan even more extraction despite climate promises* (November 2023), pp. 4-5 (link).

133 WS Vanuatu, Chapter III, particularly at paras. 137-170.

134 *Verein Klimaseniorinnen Schweiz and others v. Switzerland*, ECtHR Application no. 53600/20, Judgment of the Grand Chamber (9 April 2024), paras. 410-411 (link).

135 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, 21 July 2022, para. 8.7 (link); UN Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016:* 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 September 2020, para. 9.9 (link).

136 Committee on the Rights of the Child, *General Comment No. 26 on children's rights and the environment, with a special focus on climate change*, UN Doc. CRC/C/GC/26 (22 August 2023) paras. 95-98 (link); Committee on the Rights of the Child, Views adopted by the Committee under art. 10 (5) of the Optional Protocol on a communications procedure, concerning communication No. 104/2019, *Chiara Sacchi et al. v. Argentina, Brazil, France, and Germany*, 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), paras 10.10–10.11 (link).

ITLOS[137], and it is likely that it will be further confirmed by the Inter-American Court of Human Rights.[138] There is ample evidence also from the practice of the Human Rights Council and its special procedures – which is expressly referred to in preambular paragraph 4 - and domestic litigation.[139]

114. Importantly, the obligations arising from these other treaties and customary rules are expressly emphasized in preambular paragraph 5 of UN General Assembly Resolution 77/276 as important to "*the conduct of States over time in relation to activities that contribute to climate change and its adverse effects*". Moreover, the chapeau of the operative part of this resolution requests the Court to "[h]*av*[e] *particular regard*" to, *inter alia*:

> "[…] the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, […] 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 […]"

115. As a formal confirmation of the conclusion reached in the previous section that the UNFCCC, the Kyoto Protocol and the Paris Agreement are neither a *lex specialis* nor the principal source governing the Relevant Conduct, this section demonstrates that **international human rights law, the law of the sea and a range of customary international law principles are applicable *ratione materiae* and, in some cases, they have been effectively applied as such to the Relevant Conduct** in international and domestic practice.

B. Applicability *ratione materiae* and effective application of human rights law to the Relevant Conduct

116. The applicability *ratione materiae* and the effective application of human rights law to the Relevant Conduct has been affirmed by numerous authoritative bodies in the international human rights system. These include UN treaty bodies,[140] the UN

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137 *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)*, ITLOS Case No. 31, Advisory Opinion (21 May 2024), para. 224 (link).

138 *Solicitud de Opinión Consultiva presentada por Colombia y Chile ante la Corte Interamericana de Derechos Humanos*, 9 de enero de 2023, pending (link).

139 *Urgenda Foundation v. State of the Netherlands*, Supreme Court of the Netherlands, ECLI:NL:HR, 20 December 2019 (Netherlands), para. 5.3.2, 5.6.2, 5.8 (link); VZW *Klimaatzaak v. Kingdom of Belgium*, Decision of 30 November 2023, Cour d'appel Bruxelles, 2021/AR/1589, para. 139 (link); *Neubauer v. Germany*, 1 BvR 2656/18 2020, Decision of 24 March 2021, (Germany), para. 144 (link); *Generaciones Futuras v. Ministerios de Ambiente y Desarrollo Sostenible*, República de Colombia Corte Suprema de Justicia STC4360-2018 (Apr. 5, 2018), para. 11 (link); *Kula Oil Palm Ltd v. Tieba* [2021] PGNC 611, N9559, para. 26 (link).

140 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, 21 July 2022, para. 8.7 (link); UN Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016:*

Human Rights Council and its Special Procedures, regional human rights courts[141] and commissions,[142] and domestic courts. Their jurisprudence and analysis provide a robust foundation for the application of human rights obligations to the Relevant Conduct.

117. At the level of UN treaty bodies, an overwhelming body of practice supports the applicability of international human rights law to the Relevant Conduct. The consensus on this point is reflected in a statement issued in 2019 by five UN treaty bodies: 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. The statement recognizes that States have obligations under international law to protect human rights from the harm caused by climate change, leaving no doubt that these obligations cover the Relevant Conduct:

> "Failure to take measures to prevent foreseeable harm to human rights caused by climate change, or to regulate activities contributing to such harm, could constitute a violation of States' human rights obligations."[143]

118. The UN Human Rights Committee has affirmed this understanding in several key decisions addressing the intersection of human rights obligations and climate change. In *Teitiota v. New Zealand*, the Committee recognized 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*

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 September 2020, para. 9.9 (link); Committee on the Rights of the Child, *General Comment No. 26 on children's rights and the environment, with a special focus on climate change*, UN Doc. CRC/C/GC/26 (22 August 2023) para. 10 (link); Committee on the Rights of the Child, Views adopted by the Committee under art. 10 (5) of the Optional Protocol on a communications procedure, concerning communication No. 104/2019, *Chiara Sacchi et al. v. Argentina, Brazil, France, and Germany*, 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), paras 10.10–10.11(link); Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities, *Statement on human rights and climate change*, HRI/2019/1 (14 May 2020) (link).

141 *Verein Klimaseniorinnen Schweiz and others v. Switzerland*, ECtHR Application no. 53600/20, Judgment of the Grand Chamber (9 April 2024), paras. 410-411 (link).

142 'Climate Emergency: Scope of Inter-American Human Rights Obligations' Inter-American Commission on Human Rights (31 December 2021) Resolution No. 3/2021 (link); African Commission on Human and Peoples' Rights, Resolutions 153(XLVI)09 (2009), 271(LV)2014 (2014), 342(LVIII)2016 (2016) (link).

143 Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities, *Statement on human rights and climate change*, HRI/2019/1 (14 May 2020), paras. 10-11 (link).

enjoy the right to life."[144] While not finding a violation in that specific case, the Committee emphasized the State party's "*continuing responsibility*" to consider climate impacts in future cases to avoid breaching its obligations to ensure the right to life in the face of climate change.[145]

119. The Committee's reasoning in *Teitiota* built upon its General Comment No. 36, which explicitly stated that the right to life obliges States to take measures to "*preserve the environment and protect it against harm, pollution and climate change caused by public and private actors.*"[146] This interpretation directly links State obligations under the ICCPR to the Relevant Conduct as defined in these proceedings. In the landmark decision of *Daniel Billy v. Australia*, the Human Rights Committee found violations of Articles 17 and 27 of the ICCPR due to the State's failure to adequately protect Indigenous communities from sea-level rise and other climate change impacts.[147] Crucially, the Committee made the following observation in connection with the State's assertion that its alleged failures to take mitigation measures did not fall within the scope of the Covenant:[148]

> "With respect to mitigation measures […] the information provided by both parties indicates that the State party is and has been in recent decades among the countries in which large amounts of greenhouse gas emissions have been produced. The Committee also notes that the State party ranks high on world economic and human development indicators. In view of the above, the Committee considers that the alleged actions and omissions fall under the State party's jurisdiction under articles 1 or 2 of the Optional Protocol […]"[149]

120. This reasoning confirms the Court's competence to review the Relevant Conduct under applicable human rights obligations. The Human Rights Committee's emphasis on the conduct of developed States with high emissions is also entirely

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144 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 September 2020, para. 9.4 (link).

145 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 September 2020, para. 9.14 (link).

146 HRC, 'General Comment No. 36, Article 6: right to life,' CCPR/C/GC/36, 3 September 2019, para. 62 (link).

147 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, 21 July 2022, paras. 8.12, 8.14 (link).

148 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, 21 July 2022, para. 4.3 (link).

149 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, 21 July 2022, para. 7.8 (link).

consistent with Vanuatu's submissions to the Court and its definition of the Relevant Conduct.[150]

121. The Committee on the Rights of the Child has similarly applied human rights law to State conduct related to emissions and climate change. Especially relevant are the Committee's findings in *Sacchi v. Argentina et al*. with respect to the transboundary impacts of the Relevant Conduct. The Committee concluded that a State could be responsible for extraterritorial harm to children's rights under the Convention on the Rights of the Child if there is a "*causal link*" between the State's acts or omissions and the negative impact on the rights of children if such harm was "*reasonably foreseeable*" at the time of its acts or omissions, and if the State exercised "*effective control over the sources of the emissions in question*."[151] The Committee went on to explain that a State that has the "*ability to regulate activities that are the source of these emissions and to enforce such regulations*" has "*effective control over the emissions*."[152]

122. The Committee further elaborated on States' obligations relating to the Relevant Conduct in its General Comment No. 26 (2023), recognizing that the failure of States to limit their emissions "*exposes children to continuous and rapidly increasing harms associated with greater concentrations of greenhouse gas emissions and the resulting temperature increases*."[153] Further, it stressed that "*States have an individual responsibility to mitigate climate change in order to fulfil their obligations under the* [Convention on the Rights of the Child] *and international environmental law*".[154]

123. In Vanuatu's submission, the Committee on the Rights of the Child's pronouncements not only confirm the applicability of international human rights law to the Relevant Conduct, but also elucidate how and why the Relevant Conduct may be understood as breaching States' human rights obligations. Moreover, the Committee's delineation of legal standards in *Sacchi* demonstrates that reviewing the Relevant Conduct under international human rights law is not—as a handful of States in these proceedings have suggested—too complex an undertaking.

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150 WS Vanuatu, para. 137 (definition of Relevant Conduct).

151 Committee on the Rights of the Child, Views adopted by the Committee under art. 10 (5) of the Optional Protocol on a communications procedure, concerning communication No. 104/2019, *Chiara Sacchi et al. v. Argentina, Brazil, France, and Germany*, 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), para. 10.7 (link).

152 Committee on the Rights of the Child, Views adopted by the Committee under art. 10 (5) of the Optional Protocol on a communications procedure, concerning communication No. 104/2019, *Chiara Sacchi et al. v. Argentina, Brazil, France, and Germany*, 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), para. 10.9 (link).

153 Committee on the Rights of the Child, *General Comment No. 26 on children's rights and the environment, with a special focus on climate change*, UN Doc. CRC/C/GC/26 (22 August 2023) para. 96 (link).

154 Committee on the Rights of the Child, *General Comment No. 26 on children's rights and the environment, with a special focus on climate change*, UN Doc. CRC/C/GC/26 (22 August 2023) para. 98(b) (link).

124. The applicability of international human rights law to the Relevant Conduct has further been confirmed by the UN Human Rights Council in a slew of resolutions adopted over a period of 16 years,[155] as well as by its Special Procedure mandate holders. These include the Special Rapporteur on the promotion and protection of human rights in the context of climate change,[156] the Special Rapporteur on extreme poverty and human rights,[157] the Special Rapporteur on the human right to a clean, healthy and sustainable environment,[158] the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance,[159] and the Special Rapporteur on the rights of Indigenous Peoples.[160]

125. Regional human rights bodies have also effectively applied human rights law to assess the consistency of mitigation policies with it. The Grand Chamber of the European Court of Human Rights, in its recent judgment in *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, confirmed that the European Convention on Human Rights imposes positive obligations on States to take effective measures to mitigate climate change. These obligations flow directly from the causal relationship between climate change and the enjoyment of Convention rights.[161] A violation of these obligations was established based on Switzerland's failure "*to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change*."[162] This finding is consistent with those of the European Committee on Social Rights in the case of *Marangopoulos Foundation for Human Rights v Greece,* which established violations of the right to a clean environment

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155 See, e.g., UN Human Rights Council 'Human rights and climate change' (March 2008) UN Doc A/HRC/RES/7/23; UN Human Rights Council 'Human rights and climate change' (14 July 2022) UN Doc A/HRC/RES/50/9 (link); see also Office of the United Nations High Commissioner for Human Rights, 'Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights' (15 Jan 2009) UN Doc A/HRC/10/61 (link); Office of the United Nations High Commissioner for Human Rights, 'Panel discussion on climate change's negative impact on the full and effective enjoyment of human rights by people in vulnerable situations' (27 Dec 2022) UN Doc A/HRC/52/48 (link).

156 Ian Fry, 'Exploring approaches to enhance climate change legislation, supporting climate change litigation and advancing the principle of intergenerational justice' (28 July 2023) UN Doc A/78/255 (link).

157 Philip Alston, 'Climate change and poverty,' *Report of the Special Rapporteur on extreme poverty and human rights* (17 July 2019) UN Doc A/HRC/41/39 (link).

158 David Boyd, 'Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable 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* (15 July 2019) UN Doc A/74/161 (link).

159 E. Tendayi Achiume, 'Ecological crisis, climate justice and racial justice,' *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance* (25 Oct 2022) UN Doc A/77/549 (link).

160 Victoria Tauli-Corpuz, 'Impacts of climate change and climate finance on indigenous peoples' rights,' *Report of the Special Rapporteur on the rights of Indigenous Peoples* (1 Nov 2017) UN Doc A/HRC/36/46 (link).

161 *Verein Klimaseniorinnen Schweiz and others v. Switzerland*, ECtHR Application no. 53600/20, Judgment of the Grand Chamber (9 April 2024) para. 545 (link).

162 *Verein Klimaseniorinnen Schweiz and others v. Switzerland*, ECtHR Application no. 53600/20, Judgment of the Grand Chamber (9 April 2024) para. 545 (link).

under the European Social Charter based in part on the State's partial ownership of several lignite coal mines and coal-fired power plants contributing to climate change and environmental degradation.[163]

126. The Inter-American Commission on Human Rights has likewise affirmed that human rights law requires States to "*adopt and implement policies aimed at reducing greenhouse gas emissions that reflect the greatest possible ambition, foster resilience to climate change and ensure that public and private investments are consistent with low-carbon and climate-resilient development*."[164] The Commission emphasized that States "*must comply with their international obligations to protect and guarantee the enjoyment and exercise of human rights by all persons who, as a result of environmental impacts, including those attributable to climate change, are significantly affected both individually and collectively*."[165] These views build on the 2017 advisory opinion on the environment and human rights of the Inter-American Court of Human Rights, which reaffirmed that "*the adverse effects of climate change affect the real enjoyment of human rights*"[166] and concluded that "*States must take measures to prevent significant harm or damage to the environment, within or outside their territory*" to prevent human rights violations associated with such harm or damage.[167]

127. The African Commission on Human and Peoples' Rights has similarly and consistently affirmed that human rights obligations are an integral part of the international legal framework related to climate change and its adverse impacts.[168]

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163 *Verein Klimaseniorinnen Schweiz and others v. Switzerland*, ECtHR Application no. 53600/20, Judgment of the Grand Chamber (9 April 2024) para. 240 (link).

164 Climate Emergency: Scope of Inter-American Human Rights Obligations' Inter-American Commission on Human Rights (31 December 2021) Resolution No. 3/2021 para. 1 (link).

165 'Climate Emergency: Scope of Inter-American Human Rights Obligations' Inter-American Commission on Human Rights (31 December 2021) Resolution No. 3/2021 para. 9 (link).

166 *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles (1) and 2 of the American Convention on Human Rights*, Inter-American Court of Human Rights (17 November 2017) Advisory Opinion OC-23/17, para. 47 (link).

167 *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles (1) and 2 of the American Convention on Human Rights*, Inter-American Court of Human Rights (17 November 2017) Advisory Opinion OC-23/17, para. 140 (link).

168 'Résolution sur le Changement Climatique et les Droits de l'Homme et la Nécessite d'une Etude sur son Impact en Afrique' African Commission on Human and Peoples' Rights (25 November 2009) CADHP/Res.153(XLVI)09 (link); 'Resolution on Climate Change in Africa' African Commission on Human and Peoples' Rights (12 May 2014) ACHPR/Res.271(LV)2014 (link); 'Resolution on Climate Change and Human Rights in Africa' African Commission on Human and Peoples' Rights (20 April 2016) ACHPR/Res.342(LVIII)2016 (link); 'Resolution on the human rights impacts of extreme weather in Eastern and Southern Africa due to climate change' African Commission on Human and Peoples' Rights (19 May 2019) ACHPR / Res. 417 (LXIV) 2019 (link); 'Resolution on Climate Change and Forced Displacement in Africa' African Commission on Human and Peoples' Rights (31 Dec 2021) ACHPR/Res. 491 (LXIX)2021 (link). See further, African Commission on Human and Peoples' Rights,

In 2016, for example, it encouraged African States "*to strengthen regional and international cooperation in order to achieve a strong, committed and comprehensive climate action that will ensure that the human rights of Africans are safeguarded to the greatest extent possible both today and for future generations*".[169] As with the resolutions adopted by the Inter-American Commission on Human Rights, the resolutions adopted by the African Commission reflect the understanding that climate change and the Relevant Conduct that has caused it are subject to international legal obligations, including human rights obligations.

128. The practice of domestic courts provides further evidence of the applicability of human rights law to the Relevant Conduct. In *Urgenda Foundation v. State of the Netherlands*, the Supreme Court of the Netherlands held that Articles 2 and 8 of the European Convention on Human Rights obliged the Netherlands to "*do its part*" to address climate change, in accordance with equity and common but differentiated responsibilities and respective capabilities.[170] Similar decisions have been reached by courts in Belgium,[171] Brazil,[172] Germany,[173] Colombia,[174] France,[175] Pakistan,[176]

'African Commission calls for human rights based policy measures towards climate change at COP27' (6 November 2022) (link).

169 'Resolution on Climate Change and Human Rights in Africa' African Commission on Human and Peoples' Rights (20 April 2016) ACHPR/Res.342(LVIII)2016, paras. 1, 2 (link).

170 *Urgenda Foundation v. State of the Netherlands*, Supreme Court of the Netherlands, ECLI:NL:HR, 20 December 2019 (Netherlands), para. 5.7.8, 5.8 (link).

171 VZW *Klimaatzaak v. Kingdom of Belgium*, Decision of 30 November 2023, Cour d'appel Bruxelles, 2021/AR/1589, paras. 211, 214 (Belgium) (link).

172 *PSB and others v Brazil* [2022] ADPF 708 (Federal Supreme Court of Brazil) (link).

173 *Neubauer v. Germany*, 1 BvR 2656/18 2020, Decision of 24 March 2021, (Germany), para. 144 (link).

174 *Generaciones Futuras v. Ministerios de Ambiente y Desarrollo Sostenible*, República de Colombia Corte Suprema de Justicia STC4360-2018 (Apr. 5, 2018), paras. 6-8 (Colombia) (link).

175 *Notre Affaire à Tous and Others v. France* (Administrative Court, 1st Chamber), Case Nos. 1901967, 1904968, 1904972, 1904976/4-1, Decision of October 14, 2021 (France) (link); *Commune de Grande-Synthe v. France* (Litigation Section, 6th Chamber), Case No. 427301, Decision of 1 July 2021 (France) (link).

176 *Asghar Leghari v. Pakistan* (Lahore High Court), Case No. W.P. No. 25501/2015, Decision of 25 January 2018 (Pakistan) (link); *Sheikh Asim Farooq v. Pakistan* (Lahore High Court), Writ Petition No. 192069 of 2018, Decision of 30 August 2019 (Pakistan) (link).

Nepal,[177] Ireland,[178] India,[179] Australia,[180] South Africa,[181] and within the USA,[182] among others.

129. This consistent jurisprudence from international, regional, and domestic bodies demonstrates the effective application of human rights law to the Relevant Conduct. It establishes that States have specific obligations under human rights law to mitigate their greenhouse gas emissions and take effective measures to combat climate change. These obligations exist independently of, and in addition to, States' commitments under the UNFCCC, the Kyoto Protocol and the Paris Agreement.

130. The effective application of human rights law to the Relevant Conduct is thus well-established and provides a clear basis for the Court to consider human rights obligations in answering the questions posed by the General Assembly. As the Court has previously noted, it ascribes "*great weight*" to the interpretation of human rights treaties by authoritative bodies and regional human rights courts.[183] The consistent jurisprudence outlined above should therefore inform the Court's analysis of States' obligations with respect to climate change.

C. Applicability *ratione materiae* and effective application of the UNCLOS and the customary rules codified in it to the Relevant Conduct

131. In respect of the law of the sea, as shown in paragraphs 98 to 100, the UNFCCC, the Kyoto Protocol and the Paris Agreement acknowledge the need to protect "*marine ecosystems*" (Article 4(1)(d) UNFCCC) which must be "*conserve*[d] *and enhance*[d]" (Article 5(1) Paris Agreement), but they only deal with them from the narrow perspective of their operation as "*sinks and reservoirs*". For the wider perspective of the protection and preservation of the marine environment, Article 2(1)(a)(ii) of the Kyoto Protocol expressly directs States to their "*commitments under relevant international environmental agreements*". Similarly, preambular paragraph 13 of the Paris Agreement acknowledges the need to take this broader

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177 *Padam Bahadur Shreshta v Office of the Prime Minister and Others*, The Supreme Court of Nepal, NKP, Part 61, Vol. 3, judgment of 25 December 2018 (Nepal) (link).

178 *Friends of the Irish Environment CLG v The Government of Ireland, Ireland and the Attorney General [2020]* Appeal no 205/19 (Supreme Court of Ireland) (link) (albeit that the court upheld the case on the basis of administrative law, rather than human rights provisions).

179 *MK Ranjitsinh & Ors v Union of India & Ors*, Supreme Court of India [2024] Writ Petition (Civil) No 838 of 2019, 21 March 2024 (India) (link).

180 *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors*, Land Court of Queensland, (No 6) [2022] QLC 21, 25 November 2022, President Fleur Kingham (Australia) (link).

181 *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* [2017] 65662/16 (link).

182 *Held and others v. State of Montana and others*, Montana First District Court for Lewis and Clark county, Findings of Fact, Conclusions of Law, and Order, 14 August 2023, Cause no. CDV-2020-307 (Montana, USA) (link).

183 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, *Judgment*, I.C.J. Reports 2010, p. 639, paras. 66–67.

perspective, "[n]*oting the importance of ensuring the integrity of all ecosystems, including oceans*".

132. In such a context, the argument according to which greenhouse gas emissions could not be characterized as "*pollution of the marine environment*" under the law of the sea because that would be "*patently incompatible*" with the climate change regime's treatment of the oceans as mere sinks and reservoirs is baseless.[184] The climate change regime itself recognizes the need to ensure "*the integrity of all ecosystems, including oceans*" and the continuing discharge of high volumes of carbon dioxide into the oceans hamper their very ability to continue to operate as sinks and reservoirs.

133. In any event, the ITLOS has now authoritatively confirmed that anthropogenic emissions of greenhouse gases fall squarely within the definition of "*pollution of the marine environment*" under Article 1(1)(4) of the UNCLOS, namely the "*introduction by man*, *directly or indirectly, of substances*' into the marine environment that is "*likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health*". **Importantly, the ITLOS did not say that anthropogenic emissions of greenhouse gases *may* constitute pollution of the marine environment. It said that they *are* so**:

> "the Tribunal concludes that anthropogenic GHG emissions into the atmosphere constitute pollution of the marine environment within the meaning of article 1, paragraph 1, subparagraph 4, of the Convention"[185]

134. In reaching this conclusion, the tribunal noted that "*a large majority of the participants in the proceedings recognized that anthropogenic GHG emissions meet the definition*" provided in Article 1(1)(4) of the UNCLOS. [186]

135. Moreover, from a legal standpoint, the principal or pivotal source was the UNCLOS as such, which was interpreted by reference to the UNFCCC and the Paris Agreement, but also to the Convention on Biological Diversity and the work of the ILC on the protection of the atmosphere.[187] But such interpretation in no way limits the distinct and autonomous operation of the relevant UNCLOS provisions. The ITLOS was particularly clear on this point:

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184 WS China, para. 105.

185 *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)*, ITLOS Case No. 31, Advisory Opinion (21 May 2024), para. 179 (link).

186 *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)*, ITLOS Case No. 31, Advisory Opinion (21 May 2024), para. 160 (link).

187 *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)*, ITLOS Case No. 31, Advisory Opinion (21 May 2024), para. 161-170 (link).

> "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."[188]

136. In addition, the ITLOS relied for the scientific and empirical basis on the IPCC reports, including for the core finding that: "[b]*eing itself a component of climate change, ocean warming, according to the IPCC findings made with high confidence, 'accounted for 91% of the heating in the climate system' (WGI 2021 Report, p. 11)*".[189] This is an empirical finding. The marine environment is part of the climate system, and the impact of greenhouse gas emissions over time – in the form of both ocean warming and acidification – is a major cause of global warming.

137. On this basis, the ITLOS concluded that several important obligations from Part XII of the Convention, most notably those formulated in Articles 192, 193 and 194(1)-(2) of the UNCLOS, which codify rules of general international law, as well as in Articles 207 (Pollution from land-based sources), 211 (Pollution from vessels) and 212 (Pollution from or through the atmosphere), govern anthropogenic emissions of greenhouse gases.

D. Applicability *ratione materiae* and effective application of other customary international law rules to the Relevant Conduct

138. Finally, in respect of other obligations under general international law – specifically obligations arising from the right of self-determination, the duty of due diligence, and the prevention principle – such obligations differ in their scope of application from those under the climate change regime, most notably – but not only – in their application *ratione temporis* and *ratione materiae*.[190] Each of these three obligations under general international law is addressed in turn.

139. The Court has recognized the customary grounding of the right of peoples to self-determination since at least 1960 in the context of decolonization, and this right has been protected by international law. at the very least since its recognition in the UN Charter recognized in 1945.[191] As with human rights obligations, the obligations of States arising from the right of self-determination are owed vertically with respect

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188 *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)*, ITLOS Case No. 31, Advisory Opinion (21 May 2024), para. 224 (link).

189 *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)*, ITLOS Case No. 31, Advisory Opinion (21 May 2024), para. 175 (link).

190 The different scopes of application are explained in WS Vanuatu, paras. 217–230.

191 WS Vanuatu, paras. 304–306. The Court has recently confirmed the importance of the right to self-determination, characterizing it as a peremptory norm of international law. *Legal consequences arising from the policies and practices of Israel in the occupied Palestinian territory, including East Jerusalem*, Advisory Opinion of 19 July 2024, General List No. 186, paras. 231-233.

to peoples, rather than horizontally among States, even though self-determination is realized through independent statehood with a defined territory.[192] Given the existential threat posed by climate change to territories of low-lying island States, States are internationally responsible for violating the right of peoples to self-determination where, as a result of their display of the Relevant Conduct, they have altered the territory,[193] impaired the natural resources[194] and/or impaired the environmental conditions that underpin the political, economic, social and cultural aspects of peoples' existence.[195] Such obligations directly govern the Relevant Conduct; yet they exceed the temporal, personal, and material scope of the UNFCCC, the Kyoto Protocol and the Paris Agreement.

140. As explained in Vanuatu's Written Statement, as well as in the Written Statements of Costa Rica and Cook Islands,[196] the fundamental duty of all States to exercise due diligence in the prevention of reasonably foreseeable harm from activities within their jurisdiction or control crystallized as a primary obligation of international law no later than 1872.[197] This obligation thus covers much of the temporal span of the Relevant Conduct.[198] This fundamental duty is broader than the prevention principle, insofar as due diligence regulates the risk of reasonably foreseeable harms in general, not only environmental harm, and does not impose the higher risk threshold of significant harm.[199] The duty of due diligence supports a precautionary approach to the regulation of potentially catastrophic risks in the absence of full scientific certainty.[200] Major GHG emitting States have accordingly been in breach of their fundamental duty of due diligence since at least the 1960s, when governments became aware that GHG emissions had the potential to alter the

192 WS Vanuatu, paras. 288–291.

193 *Legal consequences arising from the policies and practices of Israel in the occupied Palestinian territory, including East Jerusalem*, Advisory Opinion of 19 July 2024, General List No. 186, para. 237.

194 *Legal consequences arising from the policies and practices of Israel in the occupied Palestinian territory, including East Jerusalem*, Advisory Opinion of 19 July 2024, General List No. 186, para. 240.

195 *Legal consequences arising from the policies and practices of Israel in the occupied Palestinian territory, including East Jerusalem*, Advisory Opinion of 19 July 2024, General List No. 186, para. 241; WS Vanuatu, paras. 292–303.

196 WS Costa Rica paras. 37–39; WS Cook Islands paras. 161–165.

197 *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 p. 125 (link); *Corfu Channel (United Kingdom v. Albania)*, Merits, *Judgment*, I.C.J. Reports 1949, pp. 17-23; *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia), Judgment*, I.C.J. Reports 2022, p. 614, para. 99.

198 WS Vanuatu, paras. 235–243.

199 WS Vanuatu, paras. 244–248.

200 *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, para. 131 (link), referring further to *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Order of 27 August 1999, ITLOS Reports 1999, p. 274, para. 77.

climate system, and that such interference, if unmitigated, could have catastrophic effects for humans and the environment. [201]

141. The recognition of the prevention principle in its contemporary form found expression in principle 21 of the Declaration of the Stockholm Conference on the Human Environment.[202] By that time, the no harm rule, from which the prevention principle emerged, had already been recognized and applied by international tribunals since 1941 as an expression of the fundamental duty of due diligence in the circumstances of transboundary environmental harm, specifically "*fumes*",[203] and, in a different context, by the ICJ in the *Corfu Channel* case.[204] The Court has confirmed that the principle of prevention of significant harm to the environment is part of general international law.[205] **The prevention principle has long regulated the risk of significant harm beyond the transboundary context, applying to areas beyond national jurisdiction; the ubiquitous climate system is thus encompassed by both the transboundary and global dimensions of the obligation of States to exercise due diligence in the prevention of significant harm to the environment**.[206] Moreover, as explained in paragraphs 101-110 above, the **UNFCCC itself affirms that the prevention principle applied and continued to apply to acts and omissions of States before the UNFCCC entered into force, and also thereafter**.

142. To the extent that the duty of due diligence and the prevention principle overlap with any more specific rules under the UNFCCC, the Kyoto Protocol or the Paris Agreement, this in no way deprives those customary obligations of their separate applicability.[207] Considered together, moreover, it becomes clear that there is no basis to exclude GHG emissions or the risk of significant harm to the climate system from the scope of the prevention principle, given the principle's fundamental basis

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201 Expert Report of Professor Naomi Oreskes on Historical Knowledge and Awareness, in Government Circles, of the Effects of Fossil Fuel Combustion as the Cause of Climate Change (dated 29 January 2024) (Exhibit D to WS Vanuatu), para. 4.

202 *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972*, A/CONF.48/14/Rev.1, part one, chap. I, principle 21 (link). See also *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992*, vol. I, *Resolutions Adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution 1, annex I, principle 2 (link).

203 *Trail Smelter Arbitration*, RIAA, vol. III, pp. 1905–82, at p. 1965 (link).

204 *Corfu Channel (United Kingdom v. Albania)*, Merits, *Judgment*, I.C.J. Reports 1949, p. 22.

205 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226, paras. 27-29; *Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment*, I. C. J. Reports 1997, p. 7, para. 140; *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment*, I.C.J. Reports 2010, p. 14, para. 101; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment*, I.C.J. Reports 2015 (II), p. 706, para. 104; *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia), Judgment*, I.C.J. Reports 2022, p. 614, paras. 83 and 99.

206 WS Vanuatu, paras. 264–266.

207 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment. I.C.J. Reports 1986, p. 14, para. 175.

in the duty of due diligence, which has long addressed all types of reasonably foreseeable harm arising from acts or omissions of States.

2.4.5. *Consistent or harmonious interpretation cannot transform compliance with one applicable rule or instrument into compliance with all applicable obligations*

143. Some Written Statements which rejected the premise that the UNFCCC, the Kyoto Protocol and the Paris Agreement operate as *lex specialis*, argue instead for the harmonious interpretation of other treaties and rules of general international law in accordance with the principle of systemic integration under Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties (**VCLT**).[208] In New Zealand's view, for example, "*it is not necessary to have regard to the rule of* lex specialis derogate lex generali" because "*the obligations on States arising from a range of other agreements which relate to the environment and arising from customary international law*" would be "*consistent with, rather than conflict with, the obligations under the climate change treaty regime*".[209]

144. It is important to observe, however, that **the search for overall consistence does not prevent each of these obligations from applying autonomously, governing the Relevant Conduct independently and subjecting it to its specific requirements**. If such requirements are not met, then the conduct will constitute a breach, irrespective of whether it is consistent or not with the requirements of other obligations. This has been clearly stated by the ITLOS in its recent advisory opinion on climate change:

> "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. Furthermore, as stated above, the protection and preservation of the marine environment is one of the goals to be achieved by the Convention. Even if the Paris Agreement had an element of *lex specialis* to the Convention, it nonetheless should be applied in such a way as not to frustrate the very goal of the Convention."[210]

145. The same point was stressed in the Written Statement of Switzerland with respect to the autonomous operation of the prevention principle (or "*no harm*" rule):

> "the mere fact that a state participates in the conventions relating to climate change does not mean that the no-harm rule has been fully respected nor that

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208 See also, e.g., WS Costa Rica, para. 32; WS Egypt, paras 73–75; WS Tonga, paras 125–126; WS IUCN, para. 154.

209 WS New Zealand, paras. 85–86.

210 *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)*, ITLOS Case No. 31, Advisory Opinion (21 May 2024), para. 224 (link).

> the state has demonstrated due diligence. Switzerland considers that participation in the conventions is not necessarily sufficient to ensure compliance with this customary law obligation, as this requires a case-by-case assessment of the measures taken in response to risks.
>
> The specific rules of the relevant conventions, in particular those of the Paris Agreement, may be used to interpret the rules of customary international law. This should not, however, result in a weakening or relativisation of the obligations arising from customary law, but rather in their strengthening. The requirement that each state's climate protection efforts correspond to its highest possible level of ambition86 sets the standard of due diligence required of each state. This standard is also part of the state's obligation to ensure that activities carried out on its territory or under its jurisdiction do not cause damage outside it."[211]

146. Thus, overall consistency across obligations means that it is possible for a State to comply with all its obligations simultaneously, **but it certainly does not mean that complying with the requirements of one obligation or treaty is sufficient to comply with all other obligations, even if the former obligation or treaty is useful to interpret the latter obligations.** Treating compliance with one obligation as equivalent to compliance with all obligations would effectively negate the distinct existence and individual content of a wide range of applicable rules and, thereby, the entire process of negotiation and conclusion of individual treaties.

2.4.6. *Application of the general international law of State responsibility*

147. A small minority of Written Statements argue or imply that the ARSIWA would be inapplicable or of limited utility in the context of climate change. This argument is made mainly as an attempt to remove Question (b) from the Court's purview, despite the clear focus of this question on "*legal consequences*" of the Relevant Conduct. This contention is groundless, as demonstrated in Section 2.5.2 of this submission.

2.5. The Relevant Conduct is, in principle, inconsistent with the obligations governing it under international law

148. In the following sections, Vanuatu reaffirms that Question (b) is governed by the general international law of State responsibility, as codified in the ARSIWA. In doing so, Vanuatu first provides an overview of the positions taken across the Written Statements on the rules determining the legal consequences of the Relevant Conduct (2.5.1). It then rebuts certain arguments raised in the Written Statements of other States and organizations, mainly large emitters of greenhouse gases and/or producers of fossil fuels (2.5.2). Finally, Vanuatu demonstrates how specific aspects of the Relevant Conduct are, in principle, inconsistent with the requirements of a

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211 WS Switzerland, paras. 70-71.

specific set of obligations arising from general international law and applicable treaties (2.5.3).

2.5.1. *Overview of the Written Statements*

149. As set out above in Section 2.3.1, while not all Written Statements discuss the Relevant Conduct in detail, nearly all recognize – as they must – that anthropogenic GHG emissions are the cause of climate change and have caused significant harm to the climate system and other parts of the environment. Many Written Statements correctly consider this harm as indicative of a breach of obligations arising under various sources of international law.

(a) Several States and organizations, including Vanuatu, have explained in detail why the conduct identified in Question (b) is in breach of the primary legal obligations identified in response to Question (a).[212]

(b) Several States and organizations have either explicitly asserted or assumed the existence of a breach of primary obligations, whereas others recognize the possibility of such a breach by asserting that, if such a breach is found, the ARSIWA regime applies.[213]

150. Importantly, most States and organizations consider that the legal rules governing legal consequences for the purposes of Question (b) are the customary international rules of State responsibility, as reflected in the ARSIWA. As depicted in Figure 8, **53 of the 91 Written Statements adopt this approach**.[214] Only 12 of the 91

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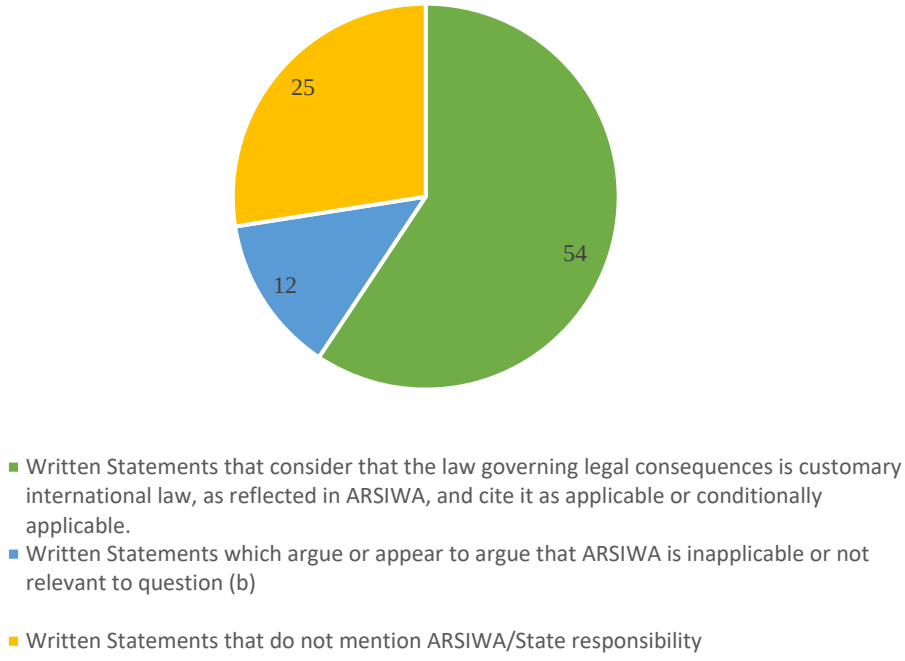
212 See e.g. WS Vanuatu, paras. 507-526; WS Egypt, paras. 322-328, 342-345 ; WS Costa Rica, paras. 104-114; WS OACPS, paras. 147-157.

213 See e.g. WS Portugal, para. 115; WS Colombia, paras. 4.1-4.5; WS Tonga, paras. 285-296; WS Singapore, para. 4.1; WS Solomon Islands, paras 230-231; WS Kenya, paras. 6.88-6.90; WS Seychelles, paras. 152-155; WS Philippines, paras. 115-119; WS Micronesia, paras. 121-128; WS Sierra Leone, para. 3.134-3.135; WS Switzerland, para. 72; WS Saint Lucia, para. 86; WS Saint Vincent and the Grenadines, paras. 128, 132; WS Netherlands, paras. 5.4-5.9; WS Kiribati, paras. 179; WS Timor-Leste, paras. 355; WS India, paras. 82, 88-90; WS Samoa, paras. 189-191; WS Ecuador, paras. 4.6; WS Madagascar, paras. 73-75; WS Chile, paras. 93, 100; WS Namibia, paras. 130-1; WS Tuvalu, para. 112; WS USA, paras. 5.1-5.4; WS Bangladesh, paras. 145-6; WS Mauritius, para. 210; WS Antigua and Barbuda, paras. 532-533; WS COSIS, paras. 148-151; WS El Salvador, paras. 50-52; WS Brazil, para. 79; WS Vietnam, paras. 42-44; WS Dominican Republic, para. 4.57; WS Thailand, paras. 29-31, 34; WS Melanesian Spearhead Group, para. 292; WS Grenada, para. 74; WS Bahamas, paras. 233-234; WS Barbados, paras. 254-257, 272-273; WS Sri Lanka, paras. 104-105; WS OACPS, paras. 143; WS Uruguay, paras. 155-160; WS DRC, paras. 255-261, 264-271; WS Kenya, paras. 6.88-6.90; WS Albania, paras. 129, 132; WS Marshall Islands, paras. 56-57.

214 See WS Palau, paras. 4, 19-20; WS Vanuatu, paras. 557-558, see 559; WS Portugal, para. 115; WS DRC, paras. 255–261, 264–271; WS Colombia, para. 4.8 (relies on ARSIWA for cessation); WS IUCN, paras. 534, see 538; WS Singapore, para. 4.1; WS Solomon Islands, paras. 230-231; WS Kenya, para. 6.88-6.90; WS Denmark; Finland, Iceland, Norway, para. 102 (accept ARSIWA's application subject to the Court only applying *lex lata* and not looking at historical acts (i.e. be forward-looking), paras. 22, 23, 29 (do not presuppose breaches of relevant obligations); WS MSG, para. 292; WS Philippines, paras. 115-119 (mostly describes the law of state responsibility, but the heading of this section (on pg. 37) indicates that the Philippines submits that States' acts/omissions resulting in GHG emission amount to an internationally wrongful act; and it thus invokes the law of state responsibility in that context); WS Albania, paras. 129, 132; WS Micronesia, paras. 121-128; WS Sierra Leone, para. 3.134, see 3.135l; WS Grenada, para. 74; WS Saint Lucia, paras. 86; WS Saint Vincent and the Grenadines, para. 128, 132; WS

Written Statements appear to argue that ARSIWA is not applicable or not relevant to Question (b).[215] The remaining 26 Written Statements do not refer to ARSIWA.[216]

Figure 8: Application and Relevance of ARSIWA



Netherlands, paras. 5.4, see 5.5-5.9; WS Bahamas, para. 233-234; WS Marshall Islands, paras. 56-57; WS Kiribati, para. 179ff; WS Timor-Leste, para. 355ff; WS Korea, para. 45, see also paras. 46-47 (applying the rules of State responsibility in the context of climate change is "*not straightforward*" and so "*legal consequences should be approached with caution*"); WS India, paras. 82, see 88-90; WS Samoa, paras. 189, see 190-191; WS Latvia, paras. 74-76, 78(g); WS Ecuador, para. 4.6; WS African Union, para. 253; WS Sri Lanka, paras. 104-105 (conditional approach: notes Article 55 of the ARSIWA (*lex specialis*), which recognize the residual nature of legal consequences under the ARSIWA, to submit that ARSIWA will apply only when treaties are silent on the specific consequences resulting from a breach of obligations); WS Madagascar, paras. 73-75; WS OACPS, para. 143; WS Uruguay, paras. 155-158, 160; WS Egypt, para. 288; WS Chile, paras. 93, see 110; WS Namibia, paras. 130-131; WS Tuvalu, para. 112ff; WS USA, para. 5.1-5.4 (finds the ARSIWA framework to *per se* apply, but argues criteria are not established (ex: lack of causal link, etc.); WS Mauritius, para. 210; WS Costa Rica, para. 95; WS Antigua & Barbuda, para. 532-533; WS COSIS, paras 148-151; WS El Salvador, paras. 50, see also 51-52; WS Brazil, para. 79; WS Vietnam, paras. 42-44; WS Dominican Republic, para. 4.57; WS Thailand, paras. 29-31, 34; WS Burkina Faso, paras. 338, 340, see also 346-401; WS Barbados, paras. 254-257, 272-273; WS Bangladesh, paras. 145-146; WS Switzerland, para. 72; WS Tonga, paras. 285, see 288-296; WS Russia, pgs. 16-17 (accepts the law of state responsibility applies in principle, but "*virtually impossible to identify the responsible State, the exact internationally wrongful act that has led to the negative consequences and sometimes even the injured State.*")

215 See WS Canada, paras. 33-34; WS OPEC, paras. 119-121; WS UK, paras. 136-138; WS Saudi Arabia, paras. 5.6, 6.3, 6.7-6.8); WS France, para. 177-211; WS New Zealand, para. 140; WS China, paras. 133-136; WS Japan, para. 41; WS Iran, para. 158; WS European Union, paras. 348-355; WS Kuwait, para. 86; WS Australia, paras. 5.9-10.

216 See WS Bolivia; WS Pakistan; WS Spain; WS Cameron (reserves opinion on q2); WS South Africa; WS Mexico; WS Peru; WS AOSIS; WS FFA; WS Slovenia; WS Belize; WS Liechtenstein; WS UAE; WS PNAO; WS PIF; WS Cook Islands; WS Seychelles; WS Argentina; WS Nauru; WS WHO; WS Indonesia; WS Ghana; WS Germany; WS Nepal; WS Gambia; WS Romania.

2.5.2. *Rebuttal of arguments raised in the Written Statements of certain States, mainly large emitters of greenhouse gases and/or producers of fossil fuels*

151. A minority of States and organizations argue that the Court cannot or should not determine legal consequences based on the ARSIWA. These participants either rely on arguments that stretch the UNFCCC and the Paris Agreement far beyond their scope of operation or exaggerate the difficulties of applying the general international law of State responsibility in practice.

152. A small number of States submit that the international climate regime constitutes a *lex specialis* regime also with respect to legal consequences.[217] This argument has been addressed and rebutted with respect to primary rules of obligation. A similar argument can be addressed – and disposed of – in relation to secondary rules of international responsibility. The argument is plainly wrong for the reasons that Vanuatu has previously given in its Written Statement (at paragraph 517). Moreover, the argument that the international climate regime is *lex specialis* has been explicitly rejected by the ITLOS in its recent Advisory Opinion on Climate Change.[218] The fact that the Grand Chamber of the European Court of Human Rights in *Klimaseniorinnen v. Switzerland* found violations of States' human rights obligations,[219] while also interpreting and considering those obligations in tandem with States' obligations under the Paris Agreement,[220] *even further emphasizes* that the latter is not *lex specialis*.

153. Some States argue that the UNFCCC, the Kyoto Protocol and the Paris Agreement provide for special secondary obligations in the context of climate change, which operate to exclude the general rules contained in the ARSIWA. For example, the United Kingdom conflates primary and secondary rules arguing that the climate treaties "*identify the legal consequences of [the Relevant Conduct] in the form of primary treaty obligations.*"[221] The Organization of Petroleum Exporting Countries submit that the answer to Question (b) involves "*defer[ence] to States' agreed upon self-contained special provisions in the primary sources of international law, the UNFCCC, Kyoto Protocol and Paris Agreement*," including the "*compliance and implementation mechanisms*" contained in those instruments.[222] Similarly, the People's Republic of China argues that legal consequences are governed by the UN

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217 See, e.g., WS Saudi Arabia, paras. 5.6, 6.3, 6.7-6.8; WS Kuwait, para. 86.

218 *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)*, ITLOS Case No. 31, Advisory Opinion (21 May 2024), para. 222-224 (link).

219 *Verein Klimaseniorinnen Schweiz and others v. Switzerland*, ECtHR Application no. 53600/20, Judgment of the Grand Chamber (9 April 2024), paras. 571-572 (link).

220 *Verein Klimaseniorinnen Schweiz and others v. Switzerland*, ECtHR Application no. 53600/20, Judgment of the Grand Chamber (9 April 2024), para. 546 (link).

221 WS UK, para. 136.

222 WS OPEC, para. 119.

Climate Regime's "*tailor-made*" solutions to facilitate compliance and address loss and damage.[223] The European Union argues that the secondary rules of State responsibility are displaced by the "*non-adversarial*" mechanisms under the UN climate regime, which are based on "*global solidarity and development cooperation*" rather than "*legal consequences for harm resulting from a breach*".[224]

154. Vanuatu regards such arguments as untenable on the basis of four important considerations.

155. *First,* the ARSIWA applies to breaches of all primary obligations, unless they have been specifically displaced by special rules of State responsibility. As noted in paragraph 5 of the ILC general commentary:

> "the present articles are concerned with the whole field of State responsibility. Thus they are not limited to breaches of obligations of a bilateral character, e.g. under a bilateral treaty with another State. They apply to the whole field of the international obligations of States, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole."[225]

The ILC further explained in its commentary on Article 55 of ARSIWA, that in order for the secondary rules of State responsibility to be displaced, "*there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other.*"[226] The UNFCCC and the Paris Agreement contain no special secondary rules of State responsibility and, even less so, a comprehensive regime of secondary rules capable of displacing the general international law regime.

156. Moreover, nothing in their text suggests the existence of an inconsistency with the ARSIWA regime or an intention to exclude that regime. In fact, if any indications can be found in the text and context of the UNFCCC and the Paris Agreement, they lead to the opposite conclusion. Article 14 of the UNFCCC (which Article 24 of the Paris Agreement incorporates by reference) contemplates the possibility for parties to submit disputes to the Court or to an arbitral tribunal. There is no indication whatsoever that the Court or the arbitral tribunal would be in any way bound by special secondary rules under the UNFCCC, which in any event are nowhere to be found in the UNFCCC. Moreover, numerous State parties to the Paris Agreement

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223 WS China, paras. 140-141; see also, e.g., WS Iran, para. 158 (arguing that legal consequences may only be governed pursuant to the compliance mechanisms under Article 15 of the Paris Agreement).

224 WS EU, paras. 328-334.

225 Draft 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), general commentary, para. 5 (link).

226 Draft 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. 55, commentary, paras. 4-5 (link).

explicitly declared that nothing in this treaty could be interpreted as derogating from the general international law of State responsibility or relinquishing any claims or rights regarding compensation for the adverse effects of climate change.[227]

157. Furthermore, the Court should reject any arguments that such an intention can be discerned from Articles 8 and 15 of the Paris Agreement. Article 15 of the Paris Agreement establishes a mechanism "*to facilitate implementation of and promote compliance*" with the Paris Agreement.[228] It does not establish legal consequences for States' breach of their primary legal obligations. As has been noted by the ILC's Special Rapporteur on the protection of the atmosphere, there is a "*fundamental difference*" between "*breach*" and "*non-compliance*" in relation to international obligations.[229] The non-compliance mechanisms established in multilateral environmental treaties, often consisting of both lawyers and non-lawyers, seek to promote cooperation,[230] but they do not establish a framework of State responsibility for **breach** of primary legal obligations. Accordingly, while the Paris Agreement's non-compliance mechanism is complementary to the ARSIWA regime, it does not purport to — and, by its very nature, could not — exclude that regime. As regards Article 8 of the Paris Agreement, it has provided a basis for the establishment of the Warsaw International Mechanism for Loss and Damage. This is a voluntary mechanism to assist States that have suffered loss and damage due to climate change, but certainly not one that establishes compensation for liability. In any event, the observation that Article 8 does not involve or provide a basis for any liability or compensation,[231] which numerous States have emphasized,[232] blatantly contradicts the claim that Article 8 is or could operate as a special secondary rule excluding the general international law regime. A rule which is said not to be about responsibility cannot later be said to be a special rule about responsibility, absent a decision to that effect adopted by the Conference of the Parties.

158. *Second*, the text of the operative part of Resolution 77/276 specifically uses, both in the English and French versions, the terminology of ARSIWA. In Question (b), the terms "*injured*" States ("*lésés*" in the French version of Resolution 77/276) and

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227 Declarations to this effect were made by the Philippines, Cook Islands, Federated States of Micronesia, Nauru, Niue, Solomon Islands, and Tuvalu. In addition, Vanuatu and the Marshall Islands declared that ratification of the Paris Agreement "*shall in no way constitute a renunciation of any rights under any other laws, including international law*." *See* United Nations Treaty Collection, "Status of Ratification of the Paris Agreement" (link).

228 Paris Agreement, 12 December 2015, 3156 UNTS 79, Art. 15 (link).

229 International Law Commission, Fifth report on the protection of the atmosphere by Shinya Murase, Special Rapporteur, UN Doc. A/CN.4/711 (8 February 2018), para. 33 (link).

230 International Law Commission, Fifth report on the protection of the atmosphere by Shinya Murase, Special Rapporteur, UN Doc. A/CN.4/711 (8 February 2018), paras. 33-34, see also paras. 16-18 (link).

231 Adoption of the Paris Agreement, Decision 1/CP.21, 12 December 2015, FCCC/CP/2015/L.9, para. 51 (link).

232 See, e.g., WS China, para. 141; WS USA, paras. 3.31, 3.33; WS UK, para. 161.4; WS Saudi Arabia, para. 4.83; WS Japan, paras. 43-44; WS Australia, paras. 2.45-2.46.

"*specially affected*" States ("*spécialement atteints*" in the French version) are a clear and direct reference to Article 42 ARSIWA.

159. *Third,* the UN General Assembly has specifically used the terminology of "*legal consequences*", which the Court understands in its case law as a reference to State responsibility.[233]

160. *Fourth,* the application of the ARSIWA to anthropogenic emissions of greenhouse gases from a State has been expressly recognized and examined by other international and regional courts. In the context of States' obligations with respect to anthropogenic emissions of greenhouse gases under the UNCLOS, the ITLOS has recently indicated that "*if a State fails to comply with [its] obligations, international responsibility would be engaged for that State.*"[234] In *Verein Klimaseniorinnen Schweiz v. Switzerland*, the European Court of Human Rights specifically emphasized the relevance of the rule codified in Article 47 of the ARSIWA regarding the contribution of multiple States to climate change.[235] In particular, the Grand Chamber reasoned that:

> "while climate change is undoubtedly a global phenomenon which should be addressed at the global level by the community of States, the global climate regime established under the UNFCCC rests on the principle of common but differentiated responsibilities and respective capabilities of States (Article 3 § 1). This principle has been reaffirmed in the Paris Agreement (Article 2 § 2) and endorsed in the Glasgow Climate Pact (cited above, paragraph 18) as well as in the Sharm el-Sheikh Implementation Plan (cited above, paragraph 12). It follows, therefore, that each State has its own share of responsibilities to take measures to tackle climate change and that the taking of those measures is determined by the State's own capabilities rather than by any specific action (or omission) of any other State (see Duarte Agostinho and Others, cited above, §§ 202-03). The Court considers that a respondent State should not evade its responsibility by pointing to the responsibility of other States, whether Contracting Parties to the Convention or not […]
>
> This position is consistent with the Court's approach in cases involving a concurrent responsibility of States for alleged breaches of Convention rights, where each State can be held accountable for its share of the responsibility for the breach in question (see, albeit in other contexts, M.S.S. v. Belgium and Greece, cited above, §§ 264 and 367, and Razvozzhayev v. Russia and Ukraine and Udaltsov v. Russia, nos. 75734/12 and 2 others, §§ 160-61 and 179-81, 19 November 2019). **It is also consistent with the principles of international law relating to the plurality of responsible States, according to which the responsibility of each State is determined individually, on the basis of its own conduct and by reference to its own**

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233 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion,* I.C.J. Reports 2019, p. 95, paras. 175-182.

234 *Climate Change and International Law,* Advisory Opinion, Case No. 31, International Tribunal for the Law of the Sea (21 May 2024), paras. 223, 286 (link).

235 *Verein Klimaseniorinnen Schweiz and others v. Switzerland,* ECtHR Application no. 53600/20, Judgment of the Grand Chamber (9 April 2024), paras. 442-443 (link).

> **international obligations (see ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Commentary on Article 47, paragraphs 6 and 8)**. Similarly, the alleged infringement of rights under the Convention through harm arising from GHG emissions globally and the acts and omissions on the part of multiple States in combating the adverse effects of climate change may engage the responsibility of each Contracting Party"[236] (emphasis added)

161. A minority of States – mainly large historical emitters of greenhouse gases and/or producers of fossil fuels – and organizations further submit that, even if the ARISWA is applicable in theory for the purposes of Question (b), it is difficult, impractical or even impossible to apply them *in practice*.[237] In support of that view, some of these States and organizations refer to the unique nature and specificities of climate change, which — so they argue — presents problematic factual features relating to causation and attribution, which the ARSIWA regime does not contemplate and was never designed to address.

162. This contention is flawed, baseless and misleading. As explained in Section 2.3.4 of the present submission: (i) empirically, it is unquestionable that some States have contributed far more to climate change than others,[238] (ii) legally, as confirmed by the case law of no less than four international jurisdictions, including the ICJ,[239]

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236 *Verein Klimaseniorinnen Schweiz and others v. Switzerland*, ECtHR Application no. 53600/20, Judgment of the Grand Chamber (9 April 2024), paras. 442-443 (emphasis added) (link).

237 See e.g. WS OPEC ("*impossible*"), para. 93; WS UK ("*impossible*"), para. 137; WS New Zealand, para. 140 ("*very difficult*"); WS South Korea, para. 46 ("*difficult*"); WS China, paras. 134-8; WS US, para. 5.7-5.10; WS Kuwait, para. 121, 124; WS Indonesia, para. 74; WS Russia, pg. 17; WS Australia, para. 5.9-5.10; WS Saudi Arabia, para. 6.7; WS OPEC, para. 120.

238 Major emitters and producers have themselves approved the following statements of the IPCC: 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) (link), statement A.2 ("*Vulnerable communities who have historically contributed the least to current climate change are disproportionately affected*") and statement A.1 ("*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*"), and 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*, Summary for Policymakers (link), statements B.3.2, B.3.2 ("*Historical contributions to cumulative net anthropogenic CO2 emissions between 1850 and 2019 vary substantially across regions in terms of total magnitude* […] *LDCs contributed less than 0.4% of historical cumulative CO2-FFI emissions between 1850 and 2019, while SIDS contributed 0.5%.*").

239 *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, para. 430 ("*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*"); 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, 21 July 202221 July 2022, para. 7.6 (link) (""*the information provided by both parties indicates that the State party is and has been in recent decades among the countries in which large amounts of greenhouse gas*

each State is required under international law to do its part to the best of its capabilities (and cannot therefore hide either behind "drop in the ocean" arguments or allegations that other States are also negligent), (iii) scientifically, it is entirely possible to establish which share of global warming has been caused by the emissions of a specific State and, thereby, whether such emissions have caused significant harm to the climate system,[240] and (iv) in any event, the questions put to the Court in Resolution 77/276 are not about the causal link between the emissions from a specific point source and a specific impact, but about a series of acts and omissions over time – a composite act amounting to breach in the meaning of Article 15 of ARSIWA – whereby specific States have caused, individually and collectively, significant harm to the climate system as a part of the environment.

163. Practically, the "*series of actions or omissions defined in aggregate as wrongful*"[241] includes (1) State subsidies for fossil fuel production; (2) authorization for expansion of fossil fuels; (3) adoption of laws, policies, programmes, and decisions regarding energy policy that support fossil fuel production and consumption; (4) failure to adequately regulate GHG emissions under the State's jurisdiction or control and (5) failure to sufficiently assist developing States with financial and

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emissions have been produced"); *Verein Klimaseniorinnen Schweiz and others v. Switzerland*, ECtHR Application no. 53600/20, Judgment of the Grand Chamber (9 April 2024), paras. 439-444 (link) ("*each State has its own share of responsibilities to take measures to tackle climate change and that the taking of those measures is determined by the State's own capabilities rather than by any specific action (or omission) of any other State* […] *The Court considers that a respondent State should not evade its responsibility by pointing to the responsibility of other States, whether Contracting Parties to the Convention or not [...] Lastly, as regards the "drop in the ocean" argument* […] *what is important, and sufficient to engage the responsibility of the State, is that reasonable measures which the domestic authorities failed to take could have had a real prospect of altering the outcome or mitigating the harm* […] *In the context of climate change, this principle should also be understood in the light of Article 3 § 3 of the UNFCCC according to which States should take measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects*"; *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)*, ITLOS Case No. 31, Advisory Opinion (21 May 2024), para. 202 (link) ("*States are required to take all necessary measures, including individual actions as appropriate*").

240 Expert Report of Professor Corinne Le Quéré on Attribution of global warming by country (dated 8 December 2023), WS Vanuatu, Exhibit B, paras. 25 and 26 ("*The top 10 contributors to global warming from historical emissions of GHG during 1851-2022 are the USA (responsible for 17.0% of the global warming in 2022 due to their historical GHG emissions; 0.28 ℃), China (12.5%; 0.21 ℃), the EU27 (10.3%; 0.17 ℃, including Germany 2.9%, France 1.3%, Poland 1.0% and Italy 0.9%), Russia (6.3%; 0.11 ℃), Brazil (4.9%; 0.081 ℃), India (4.7%; 0.078 ℃), Indonesia (3.7%; 0.061 ℃), the United Kingdom (2.4%; 0.040 ℃), Canada (2.1%; 0.035 ℃), and Japan (2.1%; 0.035 ℃). The GHG emissions from these contributors, together with those from Australia (1.5%; 0.025 ℃), Mexico (1.4%; 0.023 ℃), Ukraine (1.4%; 0.022 ℃), Nigeria (1.2%; 0.019 ℃), Argentina (1.2%; 0.019 ℃), and Iran (1.1%; 0.019 ℃), amount to three quarters of the global warming due to GHG emissions during 1851-2022* […] *The same countries figure among the largest contributors to global warming from emissions of GHG during the shorter 1990-2022, with China the largest contributor in that period*"). See also M. W. Jones et al, 'National contributions to climate change due to historical emissions of carbon dioxide, methane and nitrous oxide since 1852' (2023) 10:155 (link). This study identifies States whose individual emissions have caused at least 3% of the observed global warming: United States of America, China, the Russian Federation, Brazil, India and Indonesia.

241 Draft 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 (link).

technological aid.[242] This series of acts or omissions has unfolded over time, as specifically observed in preambular paragraph 5 of Resolution 77/276 ("*the conduct of States over time in relation to activities that contribute to climate change and its adverse effects*"). The breach crystallizes once cumulative emissions over time cross the threshold of causing significant harm, with the start of the wrongful act retroactively set to when the first act or omission in the series took place.[243] 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 diligence is sufficient to establish a breach. The bar for demonstrating diligent conduct is also higher for such States, given their outsized contribution to the problem, as per the principle of equity and common but differentiated responsibilities and respective capabilities.[244]

164. It is, therefore, **unsurprising that major historical emitters of greenhouse gases and producers of fossil fuels may attempt to mischaracterize the causality link at stake in the present proceedings, as a tactical step to then overstate the unsuitability of the general system of ARSIWA to responsibility for harm to the climate system**. **It is critical to warn the Court against such efforts to mislead it into thinking that it would need to draw a direct link between specific acts and omissions, on the one hand, and specific adverse effects of climate change, on the other. This is not so**. Taking a position fully consistent with the case law of the Court, the Human Rights Committee, the European Court of Human Rights and, more recently, the ITLOS,[245] numerous Written Statements correctly note that **the inability to apportion or attribute either a specific extreme weather event or the entirety of climate change to a single State is not a bar to the application of the principle of responsibility of a wrong-doing State; and that wrongful conduct can be attributed to multiple States simultaneously**, where each State is individually and independently responsible for

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242 On this see WS African Union, paras. 145-152; WS Saint Vincent and the Grenadines, paras. 49, 52; WS Saint Lucia, paras. 37, 39.

243 Draft 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, para. 8 (link).

244 In addition to Vanuatu, other States and organizations also characterize climate change or conduct of emitting GHGs over time as a "*composite act*" under ARSIWA, see e.g., WS African Union, para 231; WS OACPS, para. 147; WS Egypt, paras. 293-295.

245 *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, para. 430; 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, 21 July 202221 July 2022, para. 7.6 (link); *Verein Klimaseniorinnen Schweiz and others v. Switzerland*, ECtHR Application no. 53600/20, Judgment of the Grand Chamber (9 April 2024), paras. 439-444 (link); *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)*, ITLOS Case No. 31, Advisory Opinion (21 May 2024), para. 202 (link)

breaches of its international legal obligations.[246] Many States and organizations consider that conduct which causes significant harm to the climate system can be attributed to specific States;[247] and that States can be held responsible for failing to adequately regulate or control private actors who cause harm to the climate system.[248]

2.5.3. *Specific aspects of the Relevant Conduct are, in principle, inconsistent with the requirements of a specific set of obligations arising from various sources of international law*

165. In response to the position of States and organizations which seek to remove the issue of climate justice (the responsibility of some specific States for causing significant harm to the climate system and other parts of the environment) from the purview of the Court, Vanuatu draws attention to the factual and legal analysis of why the conduct constitutes a breach. **Specifically, Vanuatu invites the Court to review the detailed analysis of relevant obligations and key inconsistencies of the Relevant Conduct with the requirements of each relevant obligation set out in Vanuatu's Written Statement at Section 4.4 (discussion of breach as an extension of the examination of the specific requirements of each obligation) and in Section 5.2.3 (particularly under sub-section C, which offers a summary discussion of how the Relevant Conduct breaches each obligation)**.

166. **For convenience, Table 2 identifies the range of obligations governing the Relevant Conduct, the aspects of those obligations most relevant to the questions before the Court, the temporal scope of each obligation, and a summary of the nature of the breach of the said obligation resulting from the Relevant Conduct**. Following the structure of Chapter IV of Vanuatu's Written

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246 See e.g. WS Egypt**,** paras. 293-295; DRC, paras. 295, 301; WS Sierra Leone, para. 3.145; WS Denmark, para. 106; WS Bahamas, para. 234, WS Tuvalu, para. 121, WS COSIS, para. 166-171; WS Chile, para. 98. Notably, Uruguay, Egypt, and Antigua and Barbuda submit that these difficulties cannot preclude the legal consequences for the States which have caused significant harm to the climate system and other parts of the environment: see WS Uruguay, paras. 166-174; WS Egypt, paras. 349-350; WS Antigua and Barbuda paras. 542-551. Ecuador and Burkina Faso note that the issue of causality arises in the context of reparation for injury, and the Court is not called upon to address specific instances of injury in the present advisory proceedings. Nevertheless, Ecuador encourages the Court to take note that scientific evidence has conclusively shown that a wide range of disasters and extreme conditions, and resultant harms, are the result of climate change: see WS Ecuador, para. 4.17; WS Burkina Faso, para. 264. See also WS Sri Lanka, para. 28 (attribution science makes specific attribution of harm to a State's conduct possible).

247 See e.g. WS DRC, para. 295; WS MSG, paras. 295-297; WS Sierra Leone, para. 3.145; WS RMI, para. 49; WS Sri Lanka, para. 28; WS OACPS, paras. 145-146; WS Egypt, para. 291; WS Tuvalu, para. 114; WS Mauritius, paras. 215-217; WS Costa Rica, para. 103; WS Antigua and Barbuda, paras. 566-592. Like Vanuatu, some participants specify the conduct: see e.g. WS MSG, paras. 295-297. In some cases, it is implicit that a State/Organization accepts that conduct can be attributed: WS SVG, para. 133; WS India, para. 87. CBDR-RC can assist overcome attribution difficulties: see WS Seychelles, para. 154, and *Verein Klimaseniorinnen Schweiz and others v. Switzerland*, ECtHR Application no. 53600/20, Judgment of the Grand Chamber (9 April 2024), paras. 442 (link).

248 See e.g. WS IUCN, para. 554; WS Kenya, para. 6.104; WS France, para. 182; WS OACPS, para. 145-146; WS Egypt, 291; WS Costa Rica, para. 103; WS Marshall Islands, para. 49; WS Tuvalu, para. 115; see also WS Antigua and Barbuda, para. 591.

Statement, the table distinguishes, for presentation purposes, (1) the obligations arising from general international law, (2) the obligations arising from treaties, and (3) the obligations arising in respect of future generations (which are based on either or both general international law and/or treaty law). This table is not intended to replace the analysis in Vanuatu's Written Statement, but only to assist the Court by recalling some core inconsistencies between the Relevant Conduct and what is required by each of the obligations that Vanuatu has identified for the purposes of Question (a).

Table 2: The Relevant Conduct is, in principle, in breach of many international obligations

Identification of obligation	Specific aspects most directly concerned	Temporal scope of obligation	Nature of the breach
Obligations arising from general international law			
Duty of due diligence	All States must exercise due diligence in preventing reasonably foreseeable harm from activities within their jurisdiction or control.[249] This requires adopting timely and effective measures to prevent foreseeable harm caused by the State's historical and ongoing acts and omissions.[250]	This duty emerged in the nineteenth century.[251]	A State that has displayed the Relevant Conduct has caused significant harm to the climate system and other parts of the environment and thus has, in principle, breached its duty to exercise due diligence in preventing reasonably foreseeable harm to other States, peoples, or individuals.[252]
Obligations arising from rights recognized in the UDHR	All States have obligations to respect, protect, and fulfil the full catalogue of human rights enshrined in the UDHR.[253]	These obligations have applied at least since the UDHR was adopted by the UN General Assembly on 10 December 1948, whether as customary international law and/or as an	Human rights violations[254] associated with significant harm to the climate system and other parts of the environment are attributable to States who have engaged in the Relevant Conduct.[255] These States have breached their human rights obligations, e.g. by failing to take the necessary steps to protect human rights from the harm

249 WS Vanuatu, paras. 235, 237, 510. As to "*stringent*" due diligence in the context of the UNCLOS, see *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)*, ITLOS Case No. 31, Advisory Opinion (21 May 2024), paras. 241-243, 256, 258, 398-400 (link).

250 WS Vanuatu, para. 510.

251 WS Vanuatu, para. 235, see para. 243.

252 WS Vanuatu, paras. 248, 510.

253 WS Vanuatu, paras. 253, 260.

254 WS Vanuatu, paras. 260, 511.

255 WS Vanuatu, paras. 254-255.

Identification of obligation	Specific aspects most directly concerned	Temporal scope of obligation	Nature of the breach
		authentic interpretation of the UN Charter provisions on human rights.	resulting from their conduct and, as also, by failing to hold accountable the companies responsible for GHG emissions and harm.[256]
Principle of prevention of significant environmental harm	All States must use all of the means at their disposal to ensure that activities in their territory or any area under their jurisdiction do cause significant damage to the climate system and other parts of the environment.[257] This is governed by due diligence, requiring States to adopt appropriate legal frameworks and formulate policy measures consistent with international standards and the current scientific understanding of the problem, as well as proactive steps to ensure that such frameworks are effectively applied and measures are implemented.[258]	The principle applies since at least 1941, when it was recognized in the *Trail Smelter* arbitration.[259]	The Relevant Conduct constitutes a breach of States' due diligence obligations under the prevention principle.[260] The severe harm to the climate system and other parts of the environment caused by the Relevant Conduct meets the requisite threshold of "*significance*", as is evident from the specific share of global warming caused by certain States and the violations of human rights and destruction of ecosystems, including in the marine environment, associated with such significant interference with the climate system.[261]
Duty to protect and preserve the marine environment (under general international law)	The marine environment is part of hydrosphere, itself a component of the "*climate system*"[262] as well as of the environment more generally. States are subject to a stringent duty of due diligence in the protection and preservation of the marine environment, including with respect to the pollution of the marine environment arising from the Relevant Conduct and its related adverse impacts.[263]	The duty to protect and preserve the marine environment was codified in the UNCLOS at the time of its adoption in 1982, and it has thus operated since well before the UNCLOS entered into force in 1994.	States' having displayed the Relevant Conduct have breached the duty to protect and preserve the marine environment under general international law. The best available science establishes that the marine environment has been directly polluted and harmed by anthropogenic GHG emissions attributable to specific States, and such harm goes well beyond the threshold of significance, with "*virtually certain*" increased ocean acidification and "*high*

256 WS Vanuatu, para. 511.

257 WS Vanuatu, para. 269.

258 WS Vanuatu, para. 269.

259 WS Vanuatu**,** para. 261; see *Trail Smelter Arbitration*, RIAA, vol. III, pp. 1905–82, at p. 1965 (link).

260 WS Vanuatu, paras. 273, 277-278, 512.

261 WS Vanuatu, para. 268.

262 WS Vanuatu, para. 283.

263 See e.g., *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)*, ITLOS Case

Identification of obligation	Specific aspects most directly concerned	Temporal scope of obligation	Nature of the breach
			confidence" regarding deoxygenation of the marine environment.[264]
Obligations arising from the right to self-determination	All States must (a) *respect* the right, by refraining from any conduct that causes or allows significant harm to the climate system and other parts of the environment; and (b) *promote and further realize* the right, by adopting and implementing laws, policies and programmes and engaging in international cooperation with other States to address and avert the threats posed by the Relevant Conduct to the climate system and other parts of the environment.[265] As to the aspects of the right most directly concerned, the right to self-determination guarantees for all peoples: the freedom to determine their political status and freely pursue their economic, social and cultural development; territorial integrity of their lands; and permanent sovereignty over their natural resources.[266] For Indigenous peoples, these ties to land go beyond mere possession and production; they encompass a material	States have been bound by the right to self-determination as part of customary international law since at least 1960 and also as part of their obligations under the 1945 UN Charter.[267] The recognition of the right to self-determination of peoples is, in fact, much older. This is because it is fundamental to the very existence of modern international law as the normative foundation for recognizing sovereign States, evidenced by its invocation as a principle during the various independence revolutions of the 18th century and as a right in the early 1920s (see	By altering the environmental conditions that underpin the political, economic, social, and cultural aspects of peoples' existence, States having engaged in the Relevant Conduct have impaired the ability of peoples to freely make autonomous choices about their political status and in pursuit of their economic, social and cultural development, and to exercise sovereignty over their natural resources. This is evident from e.g. the forced displacement of peoples from their ancestral lands, the loss of coral reefs, the destruction of freshwater resources and the loss of cultivable land, all attributable to States having engaged in the Relevant Conduct.[269] Further, the Relevant Conduct has deprived peoples of their means of subsistence.[270]

No. 31, Advisory Opinion (21 May 2024), para 441 (see also paras. 241-243, 256, 258, 398-400) (link). See WS, paras. 280, 282-283, 390

264 WS Vanuatu, para. 513.

265 WS Vanuatu, paras. 302-303.

266 WS Vanuatu, paras. 288, 292-293. The Court has very recently affirmed each of these components of the right to self-determination: see *Legal consequences arising from the policies and practices of Israel in the occupied Palestinian territory, including East Jerusalem*, Advisory Opinion of 19 July 2024, General List No. 186, paras. 237 (right to territorial integrity), 240 (right to exercise permanent sovereignty over natural resources), 241 (right to freely determine political status and pursue economic, social and cultural development).

267 WS Vanuatu, para. 304(b).

269 WS Vanuatu, paras. 298-301, 514.

270 WS Vanuatu, paras. 294, 514.

Identification of obligation	Specific aspects most directly concerned	Temporal scope of obligation	Nature of the breach
	and spiritual element that Indigenous peoples must fully enjoy, to preserve their cultural legacy and transmit it to future generations.	the *Åland Islands Case*).[268]	
Duty to cooperate	All States must cooperate in good faith to prevent significant harm to the climate system and other parts of the environment.[271] In performing that obligation, States must not preclude the outcome of a cooperative process by unilateral action taken while the process is ongoing.[272]	States have been bound by the general duty to cooperate since 1945, when it was codified in the UN Charter.[273] Since the 1970s, the duty has also manifested specifically in the context of protection of the environment, including the climate system.[274]	The duty to cooperate has been breached by States taking unilateral action which effectively undermines and precludes the outcome of cooperative efforts to reduce GHG emissions consistently with the best available science[275] and the ultimate goal of preventing dangerous anthropogenic interference with the climate system. The breach is particularly blatant in light of the fact that, as evidenced in UNEP's Production Gap Report 2023, the increase in the production of fossil fuels makes a mockery of the very climate pledges of States engaging, in parallel, in such unilateral action.[276]
Obligations arising from the principle of good faith	The principle of good faith governs the Relevant Conduct in 4 aspects: (a) duty to cooperate in good faith; (b) good faith in carrying out treaty obligations; (c) good faith in governing commitments and pledges made concerning climate change;	States have been bound by obligations arising from the principle of good faith since 1945, when the principle was codified in the UN Charter.[278]	States having displayed the Relevant Conduct have acted contrary to good faith in (a) their under-performance of their other international obligations and (b) in their disingenuous negotiations and pledges to reduce GHG emissions since their policies lead to a massive increase in

268 WS Vanuatu, para. 304(a).

271 WS Vanuatu, para. 312.

272 WS Vanuatu, para. 515.

273 WS Vanuatu, para. 308.

274 WS Vanuatu, paras. 311-12.

275 WS Vanuatu, paras. 313, 515.

276 WS Vanuatu, para. 313, 515. Note that UNEP's Production Gap Report 2023 (link) shows that major GHG emitters are, in fact, aiming to increase their production of fossil fuels to levels that, in 2030, "*are 460%, 29%, and 82% higher for coal, oil, and gas, respectively, than the median 1.5C-consistent pathways*".

278 WS Vanuatu, para. 314.

Identification of obligation	Specific aspects most directly concerned	Temporal scope of obligation	Nature of the breach
	and (4) good faith in the interpretation of treaties.[277]		the production and use of fossil fuels.[279]
Obligations arising from treaties			
Obligations arising from the UN Charter	The obligations above, concerning human rights recognized in the UDHR, right to self-determination, duty to co-operate and good faith, also arise under the UN Charter, and apply concurrently and autonomously to the Relevant Conduct.[280]	All obligations under the UN Charter bind States since 1945 (when the Charter came into force) or since the moment they became UN members.	For the reasons given for each relevant obligation above, the Relevant Conduct amounts to a breach, in principle, of the UN Charter.[281]
Obligations arising from the rights enshrined in the ICESCR and ICCPR	All States are obligated *to respect* the human rights protected in these treaties by refraining from any conduct that causes or allows significant harm to the climate system and other parts of the environment and to *ensure*, *protect* and *fulfil* the rights (as applicable) by exercising due diligence, adopting and implementing laws, policies and programmes, and engaging in international cooperation with other States, to address and avert the threats posed by the Relevant Conduct to the climate system and other parts of the environment.[282] The obligations arising under the ICCPR and the ICESCR apply extraterritorially.[283] They are reflective of universal	Human rights obligations bind States Parties to the ICCPR and ICESCR, but also form a part of general international law and bind States at least since the UDHR was adopted by the UN General Assembly on 10 December 1948, whether as customary international law and/or as an authentic interpretation of the UN Charter provisions on human rights.	The Relevant Conduct is, in principle, in breach of the obligations arising from a range of human rights, including as a minimum the rights to life; private, family and home life; culture; an adequate standard of living, encompassing food, health and housing; and health.[285] This should not be treated as an exhaustive account of human rights violations, because climate change affects virtually all human rights and the range of implications which flow from the adverse effects of climate change (and the Relevant Conduct) can impair the enjoyment of rights in overlapping and layered ways.[286]

277 WS Vanuatu, paras. 315-319.
279 WS Vanuatu, paras. 320, 516.
280 WS Vanuatu, paras. 325, 327.
281 WS Vanuatu, paras. 328, 517.
282 WS Vanuatu, paras. 339, see 337-338.
283 WS Vanuatu, paras. 334-336.
285 WS Vanuatu, paras. 342, 518.
286 WS Vanuatu, para. 342.

Identification of obligation	Specific aspects most directly concerned	Temporal scope of obligation	Nature of the breach
	human rights obligations which are applicable to all States in relation to the Relevant Conduct over time, irrespective of whether and when they ratified the ICCPR or ICESCR.[284]		
Obligations associated with the right to life	All States must *respect* and *ensure* the right to life,[287] which can be violated by a life-threatening situation (including the adverse effects of climate change) without the loss of life occurring. Accordingly, all States must take positive measures of due diligence before the right is threatened.[288]	Binds all States at least since the UDHR was adopted by the UN General Assembly on 10 December 1948, whether as customary international law and/or as an authentic interpretation of the UN Charter provisions on human rights.	The Relevant Conduct is in breach of obligations arising from the right to life because it contributes to reasonably foreseeable life-threatening harm, as supported by the reports of the IPCC. This manifests as tropical cyclones, climate-related illnesses, premature deaths, malnutrition in all its forms, threats to mental health and well-being, loss of life from extreme heat, etc.[289] Such life-threatening harms already materialized and will become even more intense and frequent in the future.[290]
Obligations associated with the right to privacy, family, and home life	All States must *respect* and *ensure* the right to privacy, family and home life.[291] The scope of the right covers culture and the protection of subsistence ways of life, which depend on crops, livestock, fruit trees, hunting, foraging, fishing, and water resources.[292]	Binds all States at least since the UDHR was adopted by the UN General Assembly on 10 December 1948, whether as customary international law and/or as an authentic interpretation of the UN Charter provisions on human rights.	As a result of the Relevant Conduct, small island nations and communities, including in Vanuatu, are already experiencing flooding and inundation of their villages and ancestral burial lands, destruction or withering of their traditional gardens through salinification caused by flooding or seawater ingress, decline of nutritionally and culturally important marine species and associated coral bleaching and

284 WS Vanuatu, paras. 341.
287 WS Vanuatu, para. 346.
288 WS Vanuatu, paras. 344.
289 WS Vanuatu, paras. 347.
290 WS Vanuatu, paras. 518.
291 WS Vanuatu, para. 352.
292 WS Vanuatu, paras. 349-350.

Identification of obligation	Specific aspects most directly concerned	Temporal scope of obligation	Nature of the breach
			ocean acidification.[293] Climate change also results in the destruction of homes and livelihoods, endangered and endemic bird species and culturally and spiritually significant flora and fauna, and ancestral burial sites and sacred artifacts. These impacts overlap and amount to significant harm to the protected elements of private, home and family life.[294]
Cultural rights	All States must *respect* and *ensure* the right to enjoy culture in art 27 of the ICCPR.[295] This right protects the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong.[296] All States must progressively realize, and ensure the minimum essential levels of, the right to take part in cultural life in art 15(1)(a) of the ICESCR; and further, must respect, protect and fulfil this right.[297] This right encompasses participation, access, and contribution to cultural life.[298] Culture is intertwined with the natural environment and	Binds all States at least since the UDHR was adopted by the UN General Assembly on 10 December 1948, whether as customary international law and/or as an authentic interpretation of the UN Charter provisions on human rights.	The impacts of climate change – such as, rainfall variability, soil nutrient loss, high wind exposure, and excessive temperatures and the changing weather, environment and climate – have forced many communities to abandon their ancestral lands and important traditional food sources and relocate to safer areas, often resulting in the loss of cultural heritage, cultural identity, cultural practices, social cohesion, and economic stability and insecurity.[300] Such impacts on cultural rights were reasonably foreseeable by States displaying the Relevant Conduct.[301]

293 WS Vanuatu, para. 518.

294 WS Vanuatu, paras. 351-4; 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, 21 July 2022, para. 8.10-8.12 (link).

295 WS Vanuatu, para. 337.

296 WS Vanuatu, para. 359.

297 WS Vanuatu, para. 337.

298 WS Vanuatu, para. 360.

300 WS Vanuatu, paras. 518, see also 364-365.

301 WS Vanuatu, paras. 518, see also 364-365.

Identification of obligation	Specific aspects most directly concerned	Temporal scope of obligation	Nature of the breach
	its landscapes, wildlife and climate. It is particularly significant for Indigenous peoples, where the enjoyment of culture guarantees a way of life that is closely associated with territory and the use of natural resources, including traditional activities like fishing or hunting.[299]		
Adequate standard of living (encompassing rights to food, water, housing)	All States must progressively realize, and ensure the minimum essential levels of, the right to an adequate standard of living in art 11 of the ICESCR; and further, must respect, protect and fulfil this right.[302] The right to an adequate standard of living comprises the right to housing, water, and food.[303] • Food must be available, adequate, sustainable, and physically and economically accessible • Water must be sufficient, safe, acceptable, physically accessible, and affordable for personal and domestic use • Housing must allow living with security, peace, and dignity. [304]	Binds all States at least since the UDHR was adopted by the UN General Assembly on 10 December 1948, whether as customary international law and/or as an authentic interpretation of the UN Charter provisions on human rights.	The reasonably foreseeable impacts of the Relevant Conduct on some of these components, including adequate food, water and shelter, make such conduct inconsistent with the *right to an adequate standard of living*.[305] Food: The IPCC has documented the impact of climate change on fisheries and fishing communities, linking climate change and food insecurity in this context.[306] Water: Vanuatu is already water-stressed. Sea-level rise will increase saltwater intrusion into precious sources of groundwater, which impacts water quality and therefore reduces the availability of freshwater. Housing: The various cyclones experiences in Vanuatu (Pam, Harold, Judy, Kevin) have resulted in the destruction of many homes.[307]
Right to health	All States must progressively realize, and	Binds all States at least since the	The impacts of climate change, including tropical

299 WS Vanuatu, paras. 359-60.
302 WS Vanuatu, para. 337.
303 WS Vanuatu, para. 367.
304 WS Vanuatu, para. 367.
305 WS Vanuatu, para. 518.
306 WS Vanuatu, para. 368.
307 WS Vanuatu, para. 369.

Identification of obligation	Specific aspects most directly concerned	Temporal scope of obligation	Nature of the breach
	ensure the minimum essential levels of, the right to health in art 12 of the ICESCR; and further, must respect, protect and fulfil this right.[308] The right to health guarantees complete physical, mental and social well-being.[309] It extends to protecting the underlying determinants of health, such as safe and potable water and adequate sanitation, adequate supply of safe food, nutrition and housing, and healthy environmental conditions.[310]	UDHR was adopted by the UN General Assembly on 10 December 1948, whether as customary international law and/or as an authentic interpretation of the UN Charter provisions on human rights.	cyclones and other extreme weather events, have interfered with the provision of health and medical services in Vanuatu and many other countries in vulnerable situations, and they have amplified other problems. The health effects of extreme heat include death, heat stroke, heat cramps, hyperthermia, and exacerbation of existing illnesses, and rainfall patterns and humidity will create conditions for increase vector-borne diseases.[311]
Right to clean, healthy and sustainable environment	All States have obligations to *respect*, *protect* and *fulfil* this right.[312] Heightened obligations are owed to Indigenous Peoples and other traditional communities that rely on their ancestral territories for their material and cultural existence.[313] As to substantive content, the right protects clean air, a safe climate, healthy and sustainably produced food, safe water, adequate sanitation, non-toxic environments to live, work and play, and healthy ecosystems and biodiversity.[314] The right is "*autonomous*" and thus	The right to a clean, healthy and sustainable environment can be understood as a necessary derivation from other existing rights.[317] Accordingly, obligations arising under the right can be understood as running since the time the rights from which it is derived were recognized at international law, i.e. at least since 26 June 1945, when the Charter	Due to the Relevant Conduct, the quality of the climate system and the environment in Vanuatu and elsewhere no longer meets the essential standards required for it to safeguard the enjoyment of other rights or to preserve its inherent value for present and future generations.[318] By engaging in the Relevant Conduct, States caused significant harm to the climate system and other parts of the environment, and they have therefore incurred international responsibility for violations of this right.

308 WS Vanuatu, para. 337.

309 WS Vanuatu, paras. 372.

310 WS Vanuatu, paras. 371-372.

311 WS Vanuatu, paras. 518, see 375.

312 WS Vanuatu, para. 386.

313 WS Vanuatu, para. 388.

314 WS Vanuatu, para. 382. The right also has a procedural content, which ensures access environmental information, public participation in environmental decision-making and access to environmental justice: see WS Vanuatu, para. 382.

317 WS Vanuatu, para. 381.

318 WS Vanuatu, para. 391.

Identification of obligation	Specific aspects most directly concerned	Temporal scope of obligation	Nature of the breach
	"*protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals*".[315] The right has a collective dimension, which operates *temporally* (in respect of present and future generations), *spatially* (as a universal value; as a common concern of humankind), and also *extraterritorially*.[316]	of the UN was adopted.	
Obligations arising under the climate regime (UNFCCC and the Paris Agreement)	The UNFCCC and the Paris Agreement contain binding GHG mitigation obligations for all Parties, including relevantly the procedural obligation to prepare, communicate and maintain successive NDCs and the substantive obligation to pursue domestic measures with the aim of achieving the objectives of the NDC.[319] The latter is an obligation of conduct,	Obligations arising under the international climate regime run from when the UNFCCC, the Kyoto Protocol, and the Paris Agreement came into force. This is 1992, 2005, and 2016, respectively.	The Relevant Conduct of the major GHGs emitting States, individually[326] and collectively,[327] is in breach of their obligations under the climate regime.[328] The NDCs from major GHGs emitting States are not in line with their "*highest possible ambition*" and fair share,[329] judged by any standard consistent with the science and with the temperature goal of the Paris Agreement.[330]

315 WS Vanuatu, para. 383.

316 WS Vanuatu, para. 383.

319 WS Vanuatu, paras. 409, see generally 408-417. See United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107, Article 4.1-4.2 **(**link**)**; Paris Agreement, 12 December 2015, 3156 UNTS 79, Article 4(2) (link).

326 The Climate Action Tracker, a leading and well-respected expert-led source, finds that the policies and actions of China, Indonesia, Brazil and the Russian Federation are consistent with 4°C warming, the United States of America's and India's in line with 3°C warming, and the European Union with 2°C warming: see WS Vanuatu, paras. 438, 520.

327 The 2022 UNFCCC NDCs Synthesis Report (link) estimates, based on an assessment of existing national contributions from Parties, that the peak temperature in the twenty-first century is in the range of 2.1–2.9°C. Similarly, the UNEP Emissions Gap Report (2023) (link) finds that "*even in the most optimistic scenario considered in this report, the chance of limiting global warming to 1.5°C is only 14 per cent*": see WS Vanuatu, paras. 439, 520.

328 WS Vanuatu, paras. 437-441, 520.

329 To stay in line with a 1.8°C or 1.5°C consistent emissions level in 2030, some developed countries would need to be around zero (USA, Japan) or net-negative (e.g. Germany, France, UK) by 2030. This means that these States have already used their "*fair share*" of emissions space and should stop emitting GHGs by 2030: see WS Vanuatu, paras. 440, 520.

330 WS Vanuatu, paras. 437-441, 520.

Identification of obligation	Specific aspects most directly concerned	Temporal scope of obligation	Nature of the breach
	entailing the exercise of due diligence by States.[320] The standard of due diligence is **high**. It requires States to undertake mitigation measures that are in line with the 1.5°C temperature goal and reaching "*net zero*" by or around mid-century, and that reflect their "*highest possible ambition*", CBDR-RC, the nature and degree of harm that would be suffered in the absence of due diligence.[321] In carrying out their obligations, States must be guided by the best available science.[322] Developed States must provide financial resources to assist developing countries with their mitigation (and adaptation) obligations.[323] The UNFCCC and the Paris Agreement contain binding obligations requiring Parties to adapt to the adverse effects of climate change.[324] Where Parties fall short of the high standard of due diligence required of them in relation to GHG mitigation, there may be higher demands on them in relation to adaptation efforts and costs.[325]		As noted by the 2021 Glasgow Climate Pact, the financial support provided by developed States to developing States is also well below the levels required under the relevant obligations.[331]

320 WS Vanuatu, paras. 409.

321 WS Vanuatu, para. 435, see paras. 412-418.

322 WS Vanuatu, paras. 406-407.

323 WS Vanuatu, paras. 424-425. See Paris Agreement, 12 December 2015, 3156 UNTS 79, Articles 9(1) and 3 (link); see also United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107, Articles 4.3, 4.5 and 4.7 **(**link**).**

324 WS Vanuatu, paras. 419-423. See United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107, Article1 4.1 **(**link**);** Paris Agreement, 12 December 2015, 3156 UNTS 79, Articles 7(9), 2(1), 7(4) and 7(6) (link).

325 WS Vanuatu, para. 422.

331 WS Vanuatu, para. 427.

Identification of obligation	Specific aspects most directly concerned	Temporal scope of obligation	Nature of the breach
Obligations arising under Part XII of UNCLOS	Anthropogenic GHG emissions fall squarely under the definition of "*pollution of the marine environment*", for the purposes of the obligations under Part XII of the UNCLOS.[332] All States Parties have obligations to: • protect and preserve the marine environment (UNCLOS Art 192) • take all measures necessary to prevent, reduce and control pollution of the marine environment from any source (UNCLOS Art 194(1))[333] • take all measures necessary to ensure that activities under their jurisdiction or control (i.e. third-party activities) are conducted in a way to prevent harm to the environment of other States and of areas beyond national, from any source of marine pollution (UNCLOS Art 194(2))[334]	For the customary obligation, see above ('The duty to protect and preserve the marine environment.') All treaty obligations arising under UNCLOS have bound States since 1994, when UNCLOS came into force.	The Relevant Conduct has resulted in pollution of the marine environment. The level of pollution is massive and well documented, as concisely recalled in relation to the customary duty to protect and preserve the marine environment. As such, it is also a breach of the duty to protect and preserve the marine environment in Article 192 of the UNCLOS.[341] In addition, States' failure to take the necessary measures to prevent, reduce and control pollution of the marine environment.[342] contravenes the obligations set out in Article 194(1)-(2) of the UNCLOS.[343] The Relevant Conduct amounts to massive land-based pollution of the marine environment and, as such, it is in breach of Article 207(1)-(2) of the UNCLOS,[344] requiring State Parties to take measures to prevent, reduce and control pollution of the marine environment from land-based sources. State parties to the UNCLOS need to go beyond MARPOL to prevent harm from shipping emissions as a matter of due

332 WS Vanuatu, para. 448. This has been confirmed by ITLOS: see *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)*, ITLOS Case No. 31, Advisory Opinion (21 May 2024), paras. 159-79, 385 (link).

333 WS Vanuatu, paras. 446-450.

334 WS Vanuatu, paras. 451-454.

341 WS Vanuatu, para. 521.

342 WS Vanuatu, paras. 450, 521.

343 WS Vanuatu, paras. 450, 521; see *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)*, ITLOS Case No. 31, Advisory Opinion (21 May 2024), paras. 234-40 (link).

344 WS Vanuatu, paras. 458, 521.

Identification of obligation	Specific aspects most directly concerned	Temporal scope of obligation	Nature of the breach
	• adopt laws, regulations, and other necessary measures to prevent, reduce and control pollution of the marine environment from land-based sources (UNCLOS Art 207(1)-(2))[335] • adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry (UNCLOS Art 211(2));[336] and		diligence.[345] [346]The failure to do so indicates a breach of UNCLOS Art 211(2). State Parties to UNCLOS are required to take measures to reduce emissions from aviation. Their failure to do so[347][348] amounts to a breach of UNCLOS Art 212(1)-(2).

335 WS Vanuatu, paras. 455-457.

336 WS Vanuatu, para. 459.

345 WS Vanuatu, para. 463; see *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)*, ITLOS Case No. 31, Advisory Opinion (21 May 2024), para. 280 (link).

346 WS Vanuatu, para. 460. According to the UNEP's Emissions Gap Report (2022), emissions from international transport, i.e. aviation and shipping, was one of the eight major emitters in 2020, alongside China, the United States of America, the European Union (27), India, Indonesia, Brazil and the Russian Federation: United Nations Environment Programme, *Emissions Gap Report* (2022), p. 7 (link). A study from the International Maritime Organisation (IMO) found that, in 2018, the share of shipping emissions in global anthropogenic emissions of carbon dioxide, methane and nitrous oxide was 2.89%: International Maritime Organization, *Fourth IMO GHG Study 2020*, Executive Summary (link). Historically, international aviation and shipping together have contributed 2% of cumulative net anthropogenic emissions of carbon dioxide, a figure similar to the contribution of the entire Middle East region: Intergovernmental Panel on Climate Change, *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers, SPM.2 panel (b) (link). Moreover, according to the IPCC, "*current sectoral levels of* [mitigation] *ambition vary, with emission reduction aspirations in international aviation and shipping lower than in many other*": Intergovernmental Panel on Climate Change, *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers, statement E.6.4 (link).

347 WS Vanuatu, paras. 466-467. A 2020 report from a private consultancy estimated, on the basis of a study of 34811 aircraft around the world, that the highest number of registered aircraft is concentrated in only a few States, mainly the United States (9371) and China (4081): Study by consultancy Cirium, reported in Tom Boon, 'Where Are The World's Aircraft Registered' *(Simple Flying*, 13 October 2020) (link). A Study from the International Civil Aviation Organization (ICAO) estimating the trends on carbon dioxide emissions between 2005 and 2050 further shows that, even in the most optimistic fuel efficiency, traffic management and infrastructure use scenarios, emissions from aviation are on a substantial upward trend: Gregg G. Fleming, Ivan de Lépinay & Roger Schaufele, 'Environmental Trends in Aviation to 2050' in *Aviation & Environmental Outlook* (ICAO, 2022), Figure 1.6 (link).

348 WS Vanuatu, para. 521, see also paras. 466-467.

Identification of obligation	Specific aspects most directly concerned	Temporal scope of obligation	Nature of the breach
	• adopt laws and regulations or take other measures, in relation to "*air space under their sovereignty and to vessels flying their flag or vessels* ***or aircraft*** *of their registry*" (emphasis added) to prevent, reduce and control pollution of the marine environment (UNCLOS Art 212(1)-(2)).[337] According to ITLOS, the standard of conduct applicable to relevant obligations under UNCLOS is **stringent** due diligence.[338] Necessary measures must be determined objectively, considering the best available science, relevant international rules and standards, and State capabilities.[339] In the context of preventing transboundary harm caused by anthropogenic GHG emissions under Art 194(2), the standard of due diligence is "*especially stringent*".[340]		
Obligations associated with children's Rights	All States must *respect* and *ensure* the CRC rights in the context of climate change, and the right to a clean,	Bind States at least since the Convention on the Rights of the Child entered into force in 1990.	Virtually all children's rights are affected by climate change and its adverse effects.[351] Consistently with the analysis of how climate impacts impair human rights above, and

337 WS Vanuatu, paras. 467, 464-466.

338 See *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)*, ITLOS Case No. 31, Advisory Opinion (21 May 2024), paras. 241-243, 256, 258, 398-400 (link).

339 *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)*, ITLOS Case No. 31, Advisory Opinion (21 May 2024), paras. 207-229, 243 (link); see also WS Vanuatu, para. 450.

340 *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)*, ITLOS Case No. 31, Advisory Opinion (21 May 2024), paras. 256, 258 (link).

351 WS Vanuatu, para. 477.

Identification of obligation	Specific aspects most directly concerned	Temporal scope of obligation	Nature of the breach
	healthy and sustainable environment.[349] The *best interests of the child* must be taken into account as a primary consideration in all decisions regarding the prevention of significant harm to, and protection of, the climate system and other parts of the environment.[350]		noting the Views of the Committee on the Rights of the Child in *Chiara Sacchi et al* that children are "*particularly impacted by the effects of climate change*" and that States have "*heightened obligations*" to protect children from foreseeable harm,[352] the Relevant Conduct violates several rights under the CRC, such as the rights to health, education, an adequate standard of living, and culture.[353]
Obligations arising in respect of future generations			
Future Generations	All States must protect the climate system and other parts of the environment from significant harm for the benefit of persons, individuals and peoples of future generations.[354] This involves obligations on States to *respect* and *ensure* the rights of future generations; and also take into account the *best interests of future generations of children*.[355]	The legal basis for these obligations rests on existing international law sources, namely: (a) the principle of intergenerational equity; (b) human rights law; and (c) other treaties, including on the protection of the environment and cultural heritage, that recognize obligations towards future generations.[356]	The violations of human rights experienced by the persons (including children), groups and people of Vanuatu extend to future generations. These violations include an inability of future children to enjoy their culture where harm to the climate system and other parts of the environment involves the destruction of cultural heritage, thus preventing its transmission to future generations. Accordingly, it is clear from the evidence set out above in respect of the situation of Vanuatu and in connection with each of the obligations of States discussed above, that certain violations of future generations' rights have already materialized and will

349 WS Vanuatu, paras. 470-471.

350 WS Vanuatu, paras. 472-473.

352 WS Vanuatu, para. 474, 476; Committee on the Rights of the Child, Views adopted by the Committee under art. 10 (5) of the Optional Protocol on a communications procedure, concerning communication No. 104/2019, *Chiara Sacchi et al. v. Argentina, Brazil, France, and Germany*, 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), para. 10.13 (link).

353 WS Vanuatu, paras. 477-478, 525.

354 WS Vanuatu, paras. 482, 526.

355 WS Vanuatu, paras. 483, 526.

356 WS Vanuatu, paras. 480-481.

Identification of obligation	Specific aspects most directly concerned	Temporal scope of obligation	Nature of the breach
			continue to materialize as a result of the Relevant Conduct.[357]

167. Vanuatu emphasises that the table immediately above is not an exhaustive catalogue of the range of obligations governing the Relevant Conduct. Indeed, the Written Statements of other participants raise numerous obligations which Vanuatu has not itself raised, but which Vanuatu considers it would be helpful for the Court to address. Of particular significance in this regard are two submissions of the OACPS, of which Vanuatu is a member State:

(a) The OACPS submits that the obligation of States to prevent genocide applies in the context of climate change.[358] Moreover, the OACPS submits that, in order to restore compliance with their obligations to prevent genocide stemming from climate change, States engaged in the Relevant Conduct must, at minimum, (1) use all means available to them to achieve drastic reductions in GHG emissions under their jurisdiction and control and (2) cooperate with and provide assistance to groups facing serious risks of genocide to take measures necessary to adapt to the adverse impacts of climate change.[359]

(b) The OACPS also argues that the prohibitions on racial discrimination and gender discrimination apply in the context of climate change.[360] By reason of these obligations, the OACPS submits that States must prevent and ameliorate the disproportionate impacts of climate change on marginalised racial and gender groups. While climate change and the conduct that causes it may be neutral on its face, the evidence is clear that racial minorities (such as people and communities of Africa, the Caribbean and the Pacific) and women are disproportionately affected.[361]

168. Vanuatu invites the Court to engage with these submissions, as it presents an opportunity to provide important clarification on the nature and scope of these

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357 WS Vanuatu, para. 526.

358 WS OACPS, paras. 72-80.

359 See WS OACPS, para. 80.

360 *See* WS OACPS, paras. 81-90.

361 See, e.g., Committee for the Elimination of Racial Discrimination, *First draft general recommendation No. 37 on racial discrimination in the enjoyment of the right to health* (15 May 2023) CERD/C/GC/37, para. 15 (link); E. Tendayi Achiume, 'Ecological crisis, climate justice and racial justice,' *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance* (25 Oct. 2022) UN Doc. A/77/549, para. 1 (link); Committee on the Elimination of Discrimination against Women, *General recommendation No. 37 on the gender-related dimensions of disaster risk reduction in the context of climate change* (13 Mar. 2018), CEDAW/C/GC/37, paras. 2-3 (link).

obligations as they relate to climate change and whether and how they govern the Relevant Conduct.

2.6. Specific legal consequences arising for States having displayed the Relevant Conduct with respect to the two categories of victims of climate injustice identified in Question (b)(i) and (ii)

2.6.1. *Overview of the Written Statements*

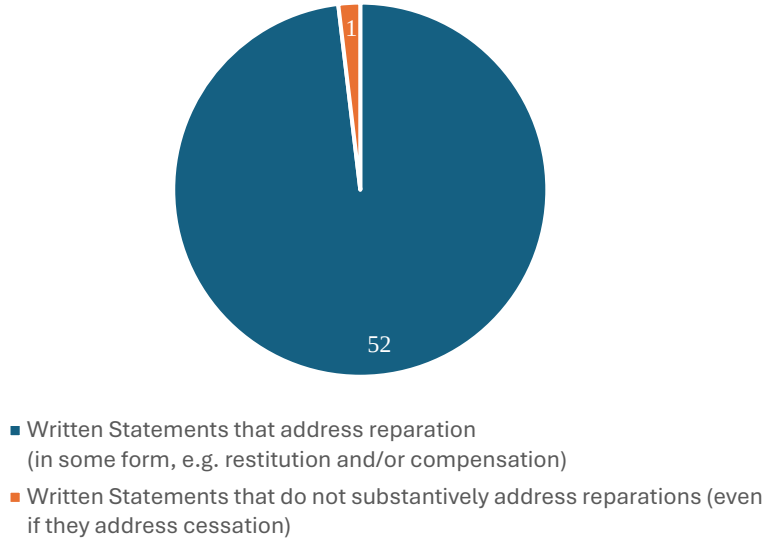
169. The Relevant Conduct, whether assessed at the level of a specific State, a specific group of States or in general, is, in principle, inconsistent with the obligations governing such conduct. Under the general international law of State responsibility, this inconsistency amounts to a breach and triggers legal consequences. The nature of the legal consequences requires specific analysis, which is provided in Chapter V of Vanuatu's Written Statement. This section is limited to providing comments on the relevant legal consequences in light of the Written Statements submitted by States and organizations in the previous phase of the proceedings.

170. As it is apparent from Figure 9, out of the 53 Written Statements which consider the ARSIWA applicable, 52 identify reparation – in one or more of its forms (restitution, compensation, satisfaction) – as a core legal consequence.[362] These

[362] WS Vanuatu, paras. 580-600; WS Portugal, paras. 113-114 (stating in para. 113 that Paris "*closes the door to any direct claims for reparation, including compensation, in relation to responsibility for losses or damages*", but adding in para. 114 says that the Paris Agreement does not exclude other international responsibility); WS DRC, para. 268, 334-344; WS Colombia, paras. 4.12-4.14; WS Palau, para. 4; WS Tonga, para. 297-302; WS IUCN, paras. 589, see 590-591; WS Singapore, para. 4.12-4.16 ; WS Solomon Islands, paras. 236-243, 247; WS Seychelles, para. 149 (noting that the term "*legal consequences*" per the Court's jurisprudence encompasses the consequences of a State's international responsibility, namely, cessation and non-repetition, and reparation); WS Peru, paras. 93, 95 (noting how the ARSIWA is applicable and provides for the basic principles regarding reparation and its forms); WS Kenya, paras. 6.93-6.94; WS MSG, paras. 316-322, 331-332; WS Philippines, paras. 126-128; WS Albania, paras. 135-139; WS Micronesia, paras. 120-131; WS Sierra Leone, paras. 3.135-3.140; WS Switzerland, para. 75 (agreeing that damage to the environment is compensable under international law, but also supporting that international law does not dictate any specific method for assessing compensation); WS Grenada, para. 75; WS St. Lucia, paras. 92-95; WS Saint Vincent and the Grenadines, paras. 133-134; WS Netherlands, paras. 5.11, 5.9, 5.13, 5.34-5.35 (acknowledging that an injured State or an interested State is legally entitled to reparation, but submitting that given the complexities of the causes and effects of climate change, which have only recently been understood, the law of State responsibility would not seem to provide a compelling legal basis for one State to claim reparation from another. Also noting that individuals have a right to reparation for human rights violations, and States have a corresponding obligation to grant reparation (para. 5.34). The primary form of reparation is restitution (para 5.35)); WS Bahamas, paras. 235, 244; WS Marshall Islands, para. 125; WS Kiribati, paras. 182-187; WS Timor Leste, para. 364, see also 372-374; WS Korea, para. 47 (referring to the remedies of cessation, non-repetition, and reparation as outcomes but also submitting that these may likewise raise challenging questions in the context of climate change (see paras. 46-48)); WS Ecuador, para. 4.15-4.16, 4.26; WS Barbados, paras. 251, 259, 271-278; WS African Union, paras. 275, 278-290; WS Sri Lanka, para. 104; WS OACPS, paras. 176-189; WS Madagascar, paras. 83, 84-89; WS Uruguay, paras. 158-161; WS Egypt, paras. 380-387; WS Chile, para. 120, see 121-125; WS Namibia, paras. 131, 136-141, 158; WS Tuvalu, paras. 128-130, 136-145 ; WS USA, paras. 5.5, 5.11; WS Bangladesh, paras. 146-147; WS Mauritius, para. 222 ; WS Costa Rica, para. 122; WS Antigua and Barbuda, paras. 554-559 ; WS COSIS, paras. 182-190; WS El Salvador, para. 51; WS Brazil, paras. 88-93; WS Vietnam, paras. 46-49; WS Dominican

submissions signal that these advisory proceedings are about climate justice, not merely about a purported "forward-looking" question that could be addressed by recalling the requirement under international law to "*cease*" the unlawful conduct while ignoring the unprecedented harm already caused. **Cessation is fundamental but it is not sufficient**. **The harm already caused to the climate system and other parts of the environment, with all the associated adverse effects, must also be specifically addressed**.

Figure 9: Virtually all written statements embracing ARSIWA consider reparations as a legal consequence



171. Question (b) uses the term "*have caused*" for a specific reason. This tense is intended to capture the fundamental inequity at the heart of the existential climate crisis facing the planet today, namely that **those who have contributed the least to climate change are also the most affected**. The Summary for Policymakers of IPCC's 2023 Synthesis Report states this fundamental issue in concise and clear terms:

Republic, para. 5.1; WS Thailand, paras. 29-31; WS Burkina Faso, paras. 372-388; WS Latvia, para. 76. Of the 53 written statements, the one from India argues (at paragraph 90) that restitution may be unsuitable. As for compensation, noting difficulties of attribution in climate context, it argues that particularly vulnerable States (like SIDS and developing countries) should be compensated from existing or planned financial assistance, including the Loss and Damage Fund.

> "Vulnerable communities who have historically contributed the least to current climate change are **disproportionately** affected (high confidence)" (emphasis added) [363]

172. Cessation of the unlawful conduct is therefore fundamental, but it is certainly not enough.

2.6.2. *Cessation and Guarantees of Non-Repetition of the Relevant Conduct*

A. Overview

173. This section analyses the widespread support for cessation as a legal obligation and explores their implications in connection with the Relevant Conduct.

174. As discussed in Section 2.5.1 above, 53 of the 91 Written Statements consider that the legal rules governing legal consequences for the purposes of Question (b) are the customary international rules of State responsibility, as reflected in the ARSIWA. A substantial majority of these Written Statements explicitly acknowledge cessation as a fundamental legal consequence for States that have caused significant harm to the climate system.

(c) These include the following States: Democratic Republic of the Congo,[364] Colombia,[365] Singapore,[366] Solomon Islands,[367] Kenya,[368] Philippines,[369] Albania,[370] the Federated States of Micronesia,[371] Sierra Leone,[372] Switzerland,[373] Saint Vincent and the Grenadines,[374] Netherlands,[375] Bahamas,[376] France,[377] Kiribati,[378] Timor-Leste,[379] India,[380] Samoa,[381]

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363 Intergovernmental Panel on Climate Change, *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.2 (link).

364 WS DRC, paras. 255-261, 331-333.

365 WS Colombia, paras. 4.7-4.9

366 WS Singapore, paras. 4.5, 4.10.

367 WS Solomon Islands, paras. 234-235, 248.

368 WS Kenya, para. 6.91.

369 WS Philippines, paras. 10, 121-123, see 136.

370 WS Albania, paras. 133-134.

371 WS Micronesia, paras. 120, 127.

372 WS Sierra Leone, paras. 3.135-3.136, 4.8.

373 WS Switzerland, para. 74.

374 WS Saint Vincent and the Grenadines, paras. 128, 133(c).

375 WS Netherlands, para. 5.9.

376 WS Bahamas, paras. 237-238.

377 WS France, para. 197.

378 WS Kiribati, para. 180.

379 WS Timor-Leste, paras. 362, see 374.

380 WS India, para. 89.

381 WS Samoa, paras. 196-197.

Ecuador,[382] Sri Lanka,[383] Madagascar,[384] Uruguay,[385]Egypt,[386] Chile,[387] Namibia,[388] Tuvalu,[389] Mauritius,[390] Costa Rica,[391] Antigua and Barbuda,[392] El Salvador,[393] Brazil,[394] Vanuatu,[395] Viet Nam,[396] Palau,[397] Dominican Republic,[398] Thailand,[399] and Burkina Faso.[400]

(d) Several international organizations, including the International Union for Conservation of Nature (IUCN),[401] the Melanesian Spearhead Group (MSG),[402] the African Union,[403] the Organization of African, Caribbean and Pacific States (OACPS),[404] and the Commission of Small Island States (COSIS),[405] also explicitly recognize this obligation.

B. The meaning of cessation of the Relevant Conduct

175. Cessation is a well-established legal consequence for States whose ongoing conduct is inconsistent with an obligation of international law. Such States are required, individually and collectively, to cease this unlawful conduct.[406]

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382 WS Ecuador, para. 4.12.

383 WS Sri Lanka, para. 104.

384 WS Madagascar, paras. 73-74.

385 WS Uruguay, para. 156.

386 WS Egypt, paras. 359-363.

387 WS Chile, paras. 111-112.

388 WS Namibia, paras. 132-134.

389 WS Tuvalu, paras. 126-127.

390 WS Mauritius, paras. 210(c), 222.

391 WS Costa Rica, paras. 123-124.

392 WS Antigua and Barbuda, paras. 537-539, 598, see 602- 608, 612.

393 WS El Salvador, para. 51.

394 WS Brazil, para. 86.

395 WS Vanuatu, paras. 567-575.

396 WS Vietnam, paras. 48-49.

397 WS Palau, para. 4.

398 WS Dominican Republic, paras. 4.1, 4.63-4.64.

399 WS Thailand, para. 29.

400 WS Burkina Faso, para. 351, see paras. 346-354.

401 WS IUCN, paras. 584, see 532, 540, 580.

402 WS MSG, paras. 314, 333.

403 WS African Union, paras. 258, 263-265.

404 WS OACPS, paras. 159, 165-166.

405 WS COSIS, paras. 173-174, see 201.

406 Draft 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. 30 (link); *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment*, I.C.J. Reports 2012, p. 99, para. 137. See *Trail Smelter Arbitration*, RIAA, vol. III, pp. 1905–82, at p. 1934 (link); *Whaling in the Antarctic (Australia v. Japan; New Zealand intervening), Judgment*, I.C.J. Reports 2014, p. 226, paras. 244-245; *United States Diplomatic and Consular Staff in Tehran, Judgment*, I.C.J. Reports 1980, p. 3, paras. 63-65, 68, 95; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, I.C.J. Reports 2019, p. 95, para. 182; *Legal Consequences of the*

176. In Vanuatu's submission, cessation is a critical legal consequence for States that have caused significant harm to the climate system and other parts of the environment and continue to display the Relevant Conduct. Indeed, domestic and international courts have already required governments to cease violating international obligations by taking positive action in respect of climate mitigation and human rights obligations, whether in terms of specific GHG emissions reduction targets or by declaring in general that a State has failed to put in place an appropriate legislative and administrative framework.[407]

177. Fundamentally, in the context of these advisory proceedings, the obligation of cessation requires that each State displaying the Relevant Conduct ceases its unlawful behaviour. In its Written Statement, Vanuatu has explained what is specifically required by the obligation of cessation, providing quantitative estimates taken from the work of organizations such as the IPCC and the UNEP.[408] **Whether the Court addresses these quantitative estimates or not, Vanuatu exhorts the Court to clearly state that a legal consequence of displaying the Relevant Conduct is the obligation to cease at least three main manifestations of such conduct**, which are not exhaustive but rather some of the most flagrant acts or omissions of continuing breach:

(a) To *cease subsidizing fossil fuels*, a continuing positive act of State organs and entities empowered to exercise governmental authority, which according to the International Monetary Fund reached an all-time high of USD 7 trillion in 2022 and must be cut drastically to end support for the production and consumption of the major source of anthropogenic GHG emissions.[409]

(b) To *cease policies supporting the expansion of fossil fuel production*, also a continuing positive act attributable to States, which according to the UN Environment Programme's Production Gap Reports are presently leading "*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*".[410]

(c) More generally, to *cease the omission to act as required by international law, namely to cease the continuing under-regulation of GHG emissions from both public and private sources under its jurisdiction or control* by urgently

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Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, paras. 151, 163.

407 *Urgenda Foundation v. State of the Netherlands*, Supreme Court of the Netherlands, ECLI:NL:HR, 20 December 2019 (Netherlands) (link); *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, ECtHR (Grand Chamber) Application No. 53600/20, Judgment (9 April 2024), para. 573 (link).

408 WS Vanuatu, paras. 567-575.

409 WS Vanuatu, paras. 144-145, 495. See Simon Black, Antung A. Liu, Ian Parry & Nate Vernon, 'IMF Fossil Fuel Subsidies Data: 2023 Update' (August 2023) IMF Working Paper (Fiscal Affairs Department), Washington, DC, WP/23/169 (link).

410 UNEP, *Production Gap Report 2023*: *Phasing down or phasing up ? Top fossil fuel producers plan even more extraction despite climate promises* (November 2023), pp. 4-5 (link).

increasing the level of ambition and action in relation to climate mitigation, adaptation, and finance in accordance with international obligations.

178. Many Written Statements align with Vanuatu's position in this regard[411] in calling for a wide range of cessation measures, including immediate and drastic reductions in greenhouse gas emissions;[412] phasing out fossil fuel production and use, including the use of aid, subsidies and other incentives;[413] refraining from approving or developing new fossil fuel projects;[414] and otherwise adopting legislative and regulatory measures to enforce emissions reductions and repealing laws and policies that contribute to climate harm.[415] Some States go further and submit that the provision of technical and financial assistance by responsible States to developing States forms part of the obligation of cessation.[416] This comprehensive array of cessation measures identified by States and international organizations is telling; it indicates that cessation is not merely about stopping specific actions (although it most certainly encompasses this) but is also about fundamentally restructuring economic and regulatory systems to eliminate any climate-harming activities.

179. Several Written Statements, including those from Albania,[417] Costa Rica,[418] COSIS,[419] MSG[420] and the OACPS,[421] highlight the need for cessation measures to align with the best available scientific evidence, particularly the pathways

411 WS Vanuatu, paras. 567-575.

412 See, e.g., WS Vanuatu, para. 567; WS DRC, paras. 255-261; WS Albania, para. 133; WS Bahamas, para. 238; WS COSIS, para. 174; WS MSG, paras. 314, 333 WS OACPS, para. 165.

413 See, e.g., WS Vanuatu, para. 567; WS DRC, para. 333 ("*ceasing to grant subsidies to fossil fuels or certain agricultural activities, closing coalfired power plants, supporting the development of renewable energies*"); WS MSG, para. 333 ("*a rapid and just transition away from fossil fuels*"); WS Burkina Faso, para. 351 ("*States must withdraw all measures (including aid, subsidies, and other incentives) for the production or consumption of fossil fuels*"). See also, in the context of guarantees for non-repetition of breach, WS MSG, para. 315 ("*immediate phasing out of fossil fuels*"); WS Colombia, para. 4.10 ("*committing to timelines for decarbonizing their economies and phasing out fossil fuels*").

414 See, e.g., WS Albania, para. 133 (cessation may entail "*refusing to approve or not supporting any new fossil fuel projects.*"); WS MSG, para. 314 ("*no new fossil fuel (coal, oil and gas) projects are approved or developed.*").

415 See, e.g., WS DRC, paras. 260 ("*Concrete and effective forms of cessation … include[] compliance plans, implementing laws and regulations…, etc.*"), 333 ("*Cessation can require the State to adopt measures to bring its legislation and practices into line with its international obligations: regulating activities on its territory or under its jurisdiction or control that contribute to human rights abuses, ceasing to grant subsidies to fossil fuels or certain agricultural activities, closing coalfired power plants, supporting the development of renewable energies.*"; WS Colombia, para. 4.7 ("*To meet its obligation of cessation, a State may need to change significant parts of its laws, regulatory system, and levels of assistance requested from/provided to other States to restore compliance with relevant obligations*"); WS Egypt, para. 359 ("*implementing "effective" rules and laws that permit the regulation of GHG emitting activities and reduce GHG emissions*").

416 See, e.g., WS DRC, para. 333; WS Burkina Faso, para. 351.

417 WS Albania, para. 133.

418 WS Costa Rica, para. 124.

419 WS COSIS, paras. 173-174.

420 WS MSG, para. 314.

421 WS OACPS, para. 165.

identified in IPCC reports and the Production Gap and Emission Gap Reports of the UNEP. Albania's submission, for example, explicitly links cessation to scientific benchmarks:

> "…cessation entails stopping all wrongful conduct. In the context of this case, that translates into taking concrete steps to ensure immediate and significant reductions of GHG consistent with the projections of the IPCC reports, and the pathways identified in the Production Gap and Emission Gap Reports of the UNEP." (citations removed) [422]

180. This emphasis on scientific alignment underscores the importance of basing legal obligations on the best available evidence, to safeguard the capacity of international law to address environmental crises such as the climate emergency.

181. Many of the Written Statements discussing the duty of cessation also present it as possessing a quality of immediacy, requiring an urgent and comprehensive approach to reducing greenhouse gas emissions and addressing climate harms,[423] which is informed by the best available science.[424] As Vanuatu observed in its Written Statement, **the urgency, stringency and comprehensiveness of the obligation of cessation on responsible States is a consequence of those States consistently having delayed climate action, exhibited low ambition in pursuing GHG reductions and, in practice, maintaining concrete plans to expand the extraction and use of fossil fuels**.[425] Consequently, as Tuvalu puts it in its Written Statement, cessation is critical because "*massive quantities of GHGs continue to emit from activities conducted on States' territory, well in excess of what is required to limit average global temperature rise to within 1.5ºC of pre-industrial levels*".[426]

182. It follows then that cessation entails a more urgent and comprehensive approach than mere mitigation. As Colombia observes, harmful anthropogenic interference with the climate system should not just have been mitigated but prevented

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422 WS Albania, para. 133.

423 WS DRC, para. 259 ("*States in breach must in all cases immediately embark on a process that will enable them to cease their unlawful conduct as quickly as possible*"); WS Albania, para. 133 ("*taking concrete steps to achieve immediate and significant reductions of [GHG emissions]*"); WS Samoa, para. 197 ("*immediate and effective measures to control the harm-causing emissions*"); WS Namibia, para. 133 ("*immediately take steps to cease that breach and come into compliance with the obligation*"); WS OACPS, para. 165 ("*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*"); WS COSIS, para. 174 ("*responsible States must immediately return to a path of compliance, including by dramatically cutting emissions, reaching global peaking of GHG emissions as soon as possible, and undertaking rapid reductions thereafter*"); WS MSG, paras. 314 ("*States with the highest historical emissions to rapidly implement deep emission cuts across all sectors*"), 333 ("*duty of cessation requires States to urgently implement all necessary measures to prevent future emissions that would lead to further human rights harms, including a rapid and just transition away from fossil fuels*").

424 Most relevantly, the IPCC reports and the UNEP Production Gap and Emission Gap Reports: see WS Costa Rica, para. 124; WS Albania, para. 133; WS OACPS, para. 165. See also, WS MSG, para. 314.

425 WS Vanuatu, paras. 273-4, 341-2, 512.

426 WS Tuvalu, para. 127.

altogether. Cessation thus requires not merely limiting or reducing excessive emissions:

> "[T]hey must be brought to a complete halt along with appropriate assurances and guarantees of non-repetition. Therefore, it is imperative for major polluters to discontinue all activities that directly harm the environment." [427]

183. Samoa highlights the distinction between cessation and primary obligations, observing that the duty of cessation "*is more stringent than the primary obligation of mitigation*".[428] That the customary obligation to prevent significant harm to the environment has been violated (as established by Vanuatu in its Written Statement[429]) further supports the understanding of cessation as requiring more immediate and effective measures to control emissions than those currently outlined in existing climate agreements.[430] Similarly, Vanuatu recalls its submission in paragraph 570 of its Written Statement:

> "To be clear, it is <u>not</u> Vanuatu's submission that taking measures to limit global warming to 1.5°C is sufficient to achieve cessation of the Relevant Conduct. It must be recalled that global warming of 1.5°C, as per the IPCC, "is not considered 'safe' for most nations, communities, ecosystems and sectors and poses significant risks to natural and human systems". **Cessation of the Relevant Conduct thus requires more ambitious mitigation action than what is required under the IPCC's pathways for achieving no or limited overshoot of 1.5°C.**" (citations omitted; emphasis added)

184. Some Written Statements, such as that of the OACPS, highlight that the obligation of cessation cannot be met through geoengineering or other speculative technologies.[431] This position is plainly correct, as it aligns with the basic understanding of cessation as requiring responsible States to "*cease*" the wrongful conduct. The duty of cessation thus requires urgent, genuine and substantive action to cease the harmful emissions. Geoengineering technologies, in contrast, seek to mitigate some of the effects of climate change but do not address its actual causes.[432] They are not directed towards cessation of the Relevant Conduct; to the contrary, they are designed to permit that very conduct to continue, on the risky and speculative assumption that there will not be any further harm caused to the climate system, or that such harm will be outweighed by some speculative benefits. The IUCN has also cautioned against the reliance on "*unproven, untested and unregulated geoengineering technologies to reach net-zero emission goals*".[433] Moreover, as Vanuatu has noted in its Written Statement, the use of geoengineering involves further risks, including human rights risks, potentially leading to additional

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427 WS Colombia, para. 4.8.

428 WS Samoa, para. 197.

429 WS Vanuatu, paras. 261-278, particularly paras. 273-278.

430 WS Samoa, para. 197.

431 WS OACPS, para. 166.

432 WS Vanuatu, para. 571.

433 WS IUCN, Appendix II, para. 26; see IUCN Position Paper for UNFCCC COP 28 (2023) (link).

breaches of international obligations.[434] For all these reasons, Vanuatu is extremely concerned to note OPEC's Written Statement emphasizing the supposed promise of certain geoengineering techniques in addresing the climate crisis while allowing for the continued use of fossil fuels. This submission in no way acknowledges or grapples with the speculative, counterproductive and risky qualities of such techniques.[435] In Vanuatu's view, it underscores that the promotion of geoengineering and other speculative 'techno-fixes' is counterproductive to the obligation of cessation, and caution is needed to ensure that it is not conflated with cessation.[436] To avoid confusion on this critical question, Vanuatu therefore urges the Court to articulate safeguards against geoengineering as part of the duty of cessation.

185. The widespread recognition of cessation as a legal consequence of the Relevant Conduct is a significant development in international law. The emphasis on cessation as distinct from and more demanding than primary obligations reveal a shift in the legal paradigm surrounding climate change, brought about by the unlawful nature of the Relevant Conduct. The present proceedings provide the Court with an opportunity to articulate in clear terms the standards of diligence for cessation of the Relevant Conduct, thus assisting States in restoring compliance with international law in the face of climate change.

C. Guarantees of non-repetition

186. This section analyses the positions taken in the Written Statements with respect to guarantees of non-repetition as legal obligations, and it explores their implications for the Relevant Conduct.

187. Of the 53 Written Statements relying on ARSIWA, many explicitly acknowledge guarantees or assurances of non-repetition as a fundamental legal consequence. Vanuatu notes that at least the following States and international organizations have identified the obligation of providing assurances and guarantees of non-repetition as a legal consequence: Vanuatu,[437] Democratic Republic of the Congo,[438] Antigua and Barbuda,[439] Albania,[440] Melanesian Spearhead Group,[441] Kenya,[442]

434 WS Vanuatu, paras. 572-575.
435 See WS OPEC, paras. 27(a), 32.
436 WS Vanuatu, para. 574.
437 WS Vanuatu, paras. 576-579.
438 WS DRC, paras. 335, 340.
439 WS Antigua and Barbuda, para. 539.
440 WS Albania, para. 134.
441 WS MSG, paras. 315.
442 WS Kenya, para. 6.114.

Colombia,[443] Commission of Small Island States,[444] France,[445] Uruguay,[446] Singapore,[447] Philippines,[448] Federated States of Micronesia,[449] Netherlands,[450] Sierra Leone,[451] Timor-Leste,[452] Sri Lanka,[453] Thailand,[454] Mauritius,[455] Madagascar,[456] Saint Vincent and the Grenadines,[457] the Solomon Islands,[458] IUCN,[459] Samoa,[460] African Union,[461] OACPS,[462] Bahamas,[463] Egypt,[464] Chile,[465] Namibia,[466] Costa Rica,[467] and Vietnam.[468]

188. Vanuatu wishes to highlight two important points arising from the Written Statements, which are consistent with the submissions it advanced in its own Written Statement on this topic.

189. The first point is that **responsible States must engage in policy, regulatory and legislative reform, as a means of guaranteeing non-repetition of breach**. For example, the Democratic Republic of the Congo submits that guarantees of non-repetition require "*the review and reform of climate change legislation*",[469] while Antigua and Barbuda note that it will require *"modification or repeal of legislation*".[470] In this regard:

(a) Vanuatu reemphasizes its earlier submission that specific legislative measures must be adopted, including to criminalize the most grievous forms of the

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443 WS Colombia, paras. 4.6m, 4.10.
444 WS COSIS, paras. 175-77.
445 WS France, paras. 198-199.
446 WS Uruguay, para. 156.
447 WS Singapore, paras. 4.5.
448 WS Philippines, paras. 122.
449 WS Micronesia, para. 127.
450 WS Netherlands, para. 5.9.
451 WS Sierra Leone, paras. 3.135.
452 WS Timor-Leste, paras. 362.
453 WS Sri Lanka, para. 104.
454 WS Thailand, para. 29.
455 WS Mauritius, paras. 210(c).
456 WS Madagascar, paras. 67, 73.
457 WS Saint Vincent and the Grenadines, paras. 128, 134.
458 WS Solomon Islands, paras. 201, 229, 249.2.
459 WS IUCN, para. 580.
460 WS Samoa, paras. 199, 216.
461 WS African Union, paras. 263. 297, 299.
462 WS OACPS, paras. 159, 163
463 WS Bahamas, para. 237
464 WS Egypt, paras. 296, 355.
465 WS Chile, paras. 10.
466 WS Namibia, paras. 151.
467 WS Costa Rica, para. 123.
468 WS Viet Nam, paras. 46.
469 WS DRC, para. 340.
470 WS Antigua and Barbuda, para. 539.

Relevant Conduct (e.g. environmental and ecological harm amounting to ecocide).[471] While other participants do not explicitly mention an obligation to proscribe ecocide as a required assurance of non-repetition, Vanuatu submits that such an obligation forms a necessary part of such assurances. This is so because any legislative reform designed to guarantee non-repetition of breach — where breach crystallizes when significant harm has been caused to the climate system or other parts of the environment — must at least proscribe the most severe and intense cases of such harm.

(b) Moreover, responsible States must make their nationally determined contributions (**NDCs**) under the Paris Agreement binding under domestic law to enable their effective enforcement.[472] At the policy level, States must revise their NDCs to reflect their highest ambition, including as part of restoring compliance with their international obligations.[473]

190. The second point is that **guaranteeing non-repetition must also involve States preventing any non-State actors under their jurisdiction, including companies, from causing (further) harm to the climate system and other parts of the environment**. Several participants in these proceedings, including Vanuatu, have made this point in their Written Statements.[474] For example, Burkina Faso submits that States must "*take all necessary measures to ensure that activities taking place on their territories, in particular those of oil companies, do not cause damage to third parties*".[475] As Colombia puts it:[476]

> "Adhering to legal commitments to reduce GHG, formally committing to timelines for decarbonizing their economies and phasing out fossil fuels, **while adopting and enforcing regulations for their private sectors in accordance with such obligations**, are not only welcomed but also much needed, albeit insufficient, assurances and guarantees of non-repetition"

191. Vanuatu invites the Court to assist States in understanding what their obligations to provide assurances and guarantees of non-repetition of breach are *in practice*, in circumstances where they have breached their obligations under international law by reason of causing significant harm to the climate system and other parts of the environment.

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471 WS Vanuatu, paras. 577-578.

472 WS Vanuatu, para. 579.

473 See e.g., WS Vanuatu, para. 579; WS Albania, para. 134

474 Written Statement of Vanuatu, para. 577.

475 WS Burkina Faso, para. 351.

476 WS Colombia, para. 4.10.

2.6.3. *Reparation of the harm caused by the Relevant Conduct*

A. Overview

192. In its Written Statement, Vanuatu has identified the following forms of reparations as applicable legal consequences triggered by the Relevant Conduct: restitution, compensation and satisfaction. This section analyzes the support for these forms of reparation across the Written Statements and explores their implications in connection with the Relevant Conduct.

193. Of the 53 Written Statements that rely on the customary international rules of State responsibility, as reflected in the ARSIWA, the substantial majority similarly identify each of these forms of reparations. More specifically, Vanuatu observes that:

(a) At least 39 Written Statements explicitly identify and discuss **restitution** as an aspect of reparations;[477]

(b) At least 44 Written Statements explicitly identify and discuss **compensation** as an aspect of reparations;[478]

(c) At least 26 Written Statements explicitly identify and discuss **satisfaction** as an aspect of reparations;[479] and

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477 See WS Tonga, paras. 300-301, 306; WS Sierra Leone para. 3.140; WS Saint Vincent and the Grenadines, para. 134; WS Kiribati, paras. 183, 186, 192, 196; WS Timor-Leste, paras. 364, 371; WS Samoa, paras. 199-202; WS Ecuador, paras. 4.14, 4.16; WS Sri Lanka, para. 104; WS Uruguay, para. 158; WS Namibia, para. 136; WS Tuvalu, paras. 138-140; WS Mauritius, para. 222; WS El-Salvador, paras. 51, 56; WS Brazil, paras. 88-93; WS Vietnam, para. 46; WS Burkina Faso, paras. 372-376; WS the Philippines, paras. 125-127; WS DRC, paras. 335-336; WS Colombia, paras. 4.11-4.13; WS IUCN, paras. 586-587, 590; WS Singapore, paras. 4.12-13, 4.21-4.22; WS Solomon Islands, paras. 239-240, 247; WS Kenya, paras. 6.93-6.94, 6.113; WS MSG, paras. 317-319; WS Albania, paras. 135-136; WS Vanuatu, paras. 580-588; WS Micronesia, paras. 120, 129; WS St. Lucia, paras. 91-2; WS Netherlands, para. 5.35; WS Bahamas, paras. 241-242; WS India, para. 90; WS Chile, para.116; WS African Union, paras. 276-278; WS OACPS, paras. 175-6; WS Madagascar, paras. 84-85; WS Egypt, paras. 375-379; WS Bangladesh, para. 147; WS Antigua and Barbuda, paras. 553-554; WS COSIS, paras. 180-182.

478 WS Portugal, para. 114; WS DRC, paras. 269-271, 291-310; WS Colombia, para. 4.15; WS Palau, para. 4; WS IUCN, para. 589; WS Singapore, para. 4.13-4.15; WS Solomon Islands, para. 241; WS Kenya, paras. 6.97-6.101; WS MSG, paras. 319-321; WS Philippines, para. 128; WS Albania, paras. 138-139; WS Micronesia, para. 130; WS Grenada, paras. 75-76; WS Saint Lucia, paras. 93-94; WS Saint Vincent and the Grenadines, para. 133; WS Bahamas, para. 244; WS Marshall Islands, para. 125; WS Kiribati, paras. 182-187; WS India, para. 90; WS Ecuador, para. 4.15; WS Barbados, paras. 241, 248; WS African Union, para. 292, 290; WS Sri Lanka, para. 104; WS OACPS, paras. 180, 188; WS Uruguay, para. 158, 161; WS Egypt, paras. 380-387; WS Namibia, paras. 137-145; WS Tuvalu, paras. 141-145; WS Bangladesh, para. 147; WS Mauritius, para. 222; WS Costa Rica, paras. 118-122; WS Antigua and Barbuda, paras. 558-562; WS COSIS paras. 183-190; WS El-Salvador, para. 51; WS Thailand, para. 31; WS Burkina Faso, paras. 380, see paras. 387-388; WS Tongo, para. 301; WS Peru, paras. 92.5, 110; WS Vanuatu, paras. 589-97; WS Sierra Leone, paras. 3.135, 3.140; WS Samoa, paras. 202-7; WS Madagascar, paras. 86-92; WS Chile, paras. 115-121; WS Vietnam, para. 50.

479 WS IUCN, para. 591; WS Solomon Islands, para. 243; WS Kenya, paras. 6.110-6.112; WS Philippines, paras. 130-133; WS Albania, para. 140; WS Micronesia, para. 131; WS Sierra Leone, paras. 3.140, 3.149; WS Saint Lucia, paras. 92, 95; WS Saint Vincent and the Grenadines, para. 134; WS Samoa, paras. 201, 208; WS Madagascar, paras. 93-95; WS Uruguay, para. 158; WS Tuvalu, para. 147; WS Bangladesh, para. 147; WS Mauritius, para. 222; WS Antigua and Barbuda, para. 563; WS COSIS, paras. 191-192;

(d) Numerous Written Statements identify restitution, compensation and satisfaction as possible forms of reparation, but do not advance detailed submissions.

194. Moreover, Vanuatu — like many other States and organizations — have also identified specific manifestations of the forms of reparation in the context of climate change and the Relevant Conduct. These are discussed in more detail in the next section.

B. Vanuatu's comments on the appropriate forms of reparation

195. In this section, Vanuatu responds to and expands upon some of the arguments made across the Written Statements on certain aspects of reparations. Vanuatu draws the Court's attention to some of the key matters on which its advice would be necessary. However, this is not an exhaustive statement of Vanuatu's position on legal consequences, and it is only intended to supplement the submissions made in Vanuatu's Written Statement.[480]

(1) The meaning of restitution as reparation for States

196. The primary form of reparation is restitution, namely to "*re-establish the situation which existed before the wrongful act was committed*" unless such restitution is materially impossible or too burdensome in proportion to its benefits.[481] As Kenya puts it, restitution is "*the first of the forms of reparation available*"[482] and, in principle, mandatory where return to the *status quo ante* is possible. Vanuatu submits that restitution forms a critical component of the legal consequences triggered by the Relevant Conduct. The Written Statements submitted to the Court overwhelmingly support this view, revealing a broad consensus on the importance and feasibility of restitution measures, even in the face of irreversible harm to the climate and other parts of the environment.

197. Across the Written Statements, Vanuatu has observed many specific forms of restitution that arise as obligations for responsible States. Concisely stated, these include the following:

(a) clean up, restoration and rehabilitation of areas, sites, habitats, etc;[483]

WS Brazil, para. 98; WS Vietnam, para. 46; WS Thailand, para. 29; WS DRC, paras. 335, 339; WS Tonga, para. 302; WS Singapore, para. 4.12; WS Vanuatu, paras. 598-600; WS Grenada, para. 74; WS Bahamas, para. 245.

480 WS Vanuatu, paras. 580-607, 621-642.

481 Draft 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. 35 (link).

482 WS Kenya, para. 6.94.

483 See, e.g., WS Solomon Islands, para. 239; WS Kenya, para. 6.94; WS Philippines, para. 127; WS Micronesia, para. 129; WS OACPS, para. 176; WS Madagascar, paras. 84-85; WS Bangladesh, para. 147; WS the Melanesian Spearhead Group, para. 318; WS Burkina Faso, para. 373.

(b) provision of equivalent territory and properties where restoration is not possible;[484]

(c) provision of finance and technological assistance (including, for some, through a loss and damage fund);[485]

(d) return and/or reclamation of land, territory, persons or property;[486]

(e) non- monetary redress for the human mobility caused by the adverse effects of climate change, including displacement and migration;[487]

(f) preservation and continued recognition of the sovereignty, statehood, territory, and maritime zones of SIDS and coastal States;[488] and

(g) enhanced mitigation, enhanced adaptive capacities and transformational adaptation.[489]

198. Like Vanuatu, numerous States emphasize **the preservation and continued recognition of the sovereignty, statehood, territory, and maritime zones of small island developing States (SIDS) and coastal States, as a means of restitution**. Albania argues that restitution could entail recognizing the sovereignty, territory, and maritime entitlements of States perpetually.[490] Costa Rica suggests that it involves recognizing the preservation of existing maritime areas as they were measured and communicated in accordance with international law or as decided by an international court or tribunal, regardless of sea-level rise.[491] The OACPS suggests that the principle of approximate application calls for providing equivalent territory and properties to maintain the unity and cultural identity of affected States, peoples, and communities.[492]

199. Importantly, many States and organizations also emphasize the preservation and continued recognition of the sovereignty, statehood, territory, and maritime zones in connection with other obligations. For instance, Vanuatu identifies this obligation also as a legal consequence flowing from the obligations to not recognize situations resulting from illegal conduct,[493] and as a legal consequence arising from serious

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484 See, e.g., WS IUCN, para. 590; WS OACPS, para. 177.

485 See, e.g., WS MSG, para. 318; WS Saint Vincent and the Grenadines, para.133; WS African Union, para. 278; WS COSIS, para. 182; WS OACPS, para. 182; WS St Lucia, para. 92; WS the Solomon Islands, para. 247; WS Kiribati, para. 196; see WS Timor-Lests, para. 371.

486 See, e.g., WS Philippines, para. 127; WS OACPS, para. 176; WS Albania, para. 136; WS Tuvalu, para. 138; WS Burkina Faso, para. 374.

487 WS Vanuatu, paras. 585-586.

488 See, e.g, WS Albania, para. 136; WS OACPS, para. 176; WS Vanuatu, paras. 582, 587-588; see WS Kiribati, para. 192; WS El-Salvador, para. 56.

489 WS COSIS, para. 182; WS Vanuatu, paras. 583-584; WS Kiribati, para. 188; WS DRC, para. 336; WS Tuvalu, para. 136-138; WS MSG, para. 318; WS Timor-Leste, para. 371; WS St. Lucia, para. 92.

490 WS Albania, para. 136.

491 WS Costa Rica, para. 125.

492 WS OACPS, para. 177.

493 WS Vanuatu, para. 605.

breaches of obligations owed *erga omnes*, specifically the right to self-determination.[494] Other Written Statements identify this obligation in connection with emerging State practice,[495] the principles of legal certainty and stability,[496] obligations of cooperation,[497] the right to self-determination,[498] the right of permanent sovereignty over natural resources,[499] the right of States to survival;[500] the principle of territorial integrity;[501] and the principle of stability of boundaries.[502] In Vanuatu's submission, the plurality of ways in which States and international organizations argue for the preservation and continued recognition of the sovereignty, statehood, territory, and maritime zones underscores the importance of the issue in the context of both questions (a) and (b); and the Court should be inclined to address the issue accordingly.

200. Vanuatu also emphasizes that **environmental restoration and adaptation measures are frequently cited as appropriate forms of restitution for the injury caused by the Relevant Conduct**. For instance, the Solomon Islands,[503] Bangladesh,[504] Federated States of Micronesia,[505] Madagascar, and Kenya[506] suggest that restitution could entail habitat restoration, wildlife and biodiversity protection, and rehabilitation of areas harmed by greenhouse gas emissions. States having engaged in the Relevant Conduct have a distinct obligation to provide financial and other support towards these aims as a means of restitution.[507] Namibia submits that the duty to make restitution could be partially fulfilled through measures to reverse some of the effects of greenhouse gas emissions, including measures to protect, enhance and create carbon sinks to remove carbon dioxide from the atmosphere.[508] Kenya cites, as another example of potential restitution, "*investments in healthcare for communities impacted by pollution (to the extent that these health problems are curable or reversible).*"[509] Tuvalu argues that land reclamation efforts should be considered a form of restitution, helping to re-

494 WS Vanuatu, para. 642.

495 WS Bahamas, para. 222; WS El Salvador, para. 58; WS Micronesia, para. 115; WS Solomon Islands, paras. 210-212; WS Tonga, para. 235.

496 WS The Bahamas, para. 223; WS El Salvador, para. 55; WS Solomon Islands, para. 209.

497 WS The Bahamas, paras. 224-226.

498 WS Kiribati, paras. 193-195; WS Liechtenstein, paras. 74-76; WS Sierra Leone, para. 3.91; WS COSIS, paras. 74-75.

499 WS Liechtenstein, para. 77.

500 WS Bahamas, para. 226; WS Dominican Republic, paras. 4.36 and 4.42; WS El Salvador, para. 57; WS COSIS, para. 73.

501 WS Dominican Republic, paras. 4.34-4.42; WS COSIS, paras. 69-72.

502 WS Bahamas, para. 223; WS Kiribati, para. 191; WS Nauru, para. 12.

503 WS Solomon Islands, para. 239.

504 WS Bangladesh, para. 147.

505 WS Micronesia, para. 129.

506 WS Kenya, para. 6.94.

507 WS Kenya, para. 6.94.

508 WS Namibia, para. 136.

509 WS Kenya, para. 6.94.

establish lost territory and protect vulnerable land.[510] States must therefore, "*fund and otherwise assist with the land reclamation efforts needed to re-establish the loss of land small island States like Tuvalu will face as a result of climate change.*"[511] The African Union emphasizes finance, capacity-building, and technology transfer for adaptation as means of providing restitution.[512] COSIS submits that restitution could take the form of "*material, technology, know-how, funding, or other support to restore parts of the built or natural environment lost to climate change.*"[513] In Vanuatu's submission, there is complementarity across the various approaches taken in this regard.

201. Many submissions stress **the need for an understanding of restitution that goes beyond the traditional notion of returning to the *status quo ante***. Burkina Faso submits that, in light of the difficulty in trying to bring back the climate system to its condition prior to the Relevant Conduct, restitution requires responsible States to provide themselves for the necessary means to achieve this objective. This applies to research and development of the technology and means needed to mitigate greenhouse gas emissions and their concentration in the atmosphere, and to adapt to their consequences.[514] The Melanesian Spearhead Group considers that even when full restoration of the climate system is impossible, restitution can still be provided through various means.[515] These include assisting with adaptation measures to reduce vulnerability and restore resilience, actively restoring biodiversity loss and land degradation, reclaiming or protecting territory, and providing financial and technological means for transformative adaptation.[516] The OACPS submits that, in the context of climate change impacts, "*restitution calls for the adoption of restorative measures to the climate system and parts of the environment which has been damaged by the emissions of greenhouse gases and the failure to exercise due diligence.*"[517] Where "*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 'the principle of approximate application'.*"[518] Saint Lucia submits that restitution "*can be progressively and gradually achieved by consistent actions taken to counteract climate change*" including through reductions of greenhouse gas emissions and "*technology transfer for mitigation, adaptation and loss and damage, in particular to SIDS.*"[519]

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510 WS Tuvalu, paras. 137-138.
511 WS Tuvalu, para. -139.
512 WS African Union, para. 278.
513 WS COSIS, para. 182.
514 WS Burkina Faso, para. 376.
515 WS MSG, para. 316.
516 WS MSG, para. 318.
517 WS OACPS, para. 176.
518 WS OACPS, para. 177.
519 WS Saint Lucia, para. 92.

202. Several submissions go further emphasising that **restitution must include structural and systemic changes to confront the root causes of climate change and its disproportionate impact on those injured or specially affected**. Madagascar submits that restitution should address systemic issues rooted in the consequences of colonialism and an inequitable international economic system. Brazil submits that reparations should entail a "*range of measures,*" including the cessation of discriminatory trade measures, additional mitigation and adaptation finance to developing countries, technology development and transfers, and capacity building,[520] noting that colonialism and imperialism "*are at the roots of practices that historically increased global temperatures.*"[521] Saint Vincent and the Grenadines stresses the need for structural remedies additional to climate finance, including assistance for infrastructure developments, technology transfers, and educational opportunities such as scholarships to build human capacity.[522] The Philippines observes that a remedial measure akin to its domestic Writ of Kalikasan (Writ of Nature) could be an appropriate framework in the context of reparation for the injury caused by the Relevant Conduct, providing for "*permanent cessation and desistance, rehabilitation or restoration, strict compliance, periodic reports, and such other reliefs which relate to the right of the people to a balanced and healthful ecology or to the protection, preservation, rehabilitation, or restoration of the environment.*"[523] In this way, the Writ of Kalikasan can be seen as a domestic implementation of secondary obligations (legal consequences) under international law in the specific context of harms to nature and the environment.

203. The expanded notion of restitution shared by many States is all the more important in light of the admission by some States that the traditional restitution *status quo ante* may not be achievable in the context of climate change. At least six States, including the Bahamas,[524] Singapore,[525] India,[526] Egypt,[527] Antigua and Barbuda,[528] and France,[529] argue that restitution may be impossible on account of the severe nature of the damage to the climate system and that, therefore, compensation and satisfaction may be more appropriate remedies. Singapore notes that "*the balance to be struck between the benefit gained by the injured State from restitution and the burden restitution would impose on the responsible State may be different when the injured State is a small island developing State.*"[530]

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520 WS Brazil, para. 96.
521 WS Brazil, para. 81.
522 WS Saint Vincent and the Grenadines, para. 133.
523 WS Philippines, para. 136..
524 WS Bahamas, para. 242.
525 WS Singapore, para. 4.13.
526 WS India, para. 90.
527 WS Egypt, para. 379.
528 WS Antigua and Barbuda, para. 557.
529 WS France, para. 202.
530 WS Singapore, para. 4.13.

204. With respect to these submissions, Vanuatu urges the Court to consider the ways in which responsible States can make restitution *up until the point* at which restitution becomes materially impossible or disproportionate. As the commentary to the ARSIWA notes, "*restitution may be only partially excluded, in which case the responsible State will be obliged to make restitution to the extent that this is neither impossible nor disproportionate.*"[531] Vanuatu refers again to the numerous Written Statements submitting that the above forms of restitution are available and tenable. Moreover, these forms of restitution cannot conceivably be considered as involving a burden out of all proportion to the benefit deriving from it, given the fundamental rights at stake. By way of illustration:

(a) Preservation and continued recognition of sovereignty, statehood, territory, and maritime zones looms large for small island developing States like Vanuatu, which are already facing the reality of loss of territory and maritime spaces and threats to their peoples' self-determination and continued survival. For such harm, restitution can take the form of declaratory relief whereby the official territorial and maritime limits of the State are recognized. The material possibility and lack of disproportionate burden is borne out by international practice, including the 2021 Pacific Island Forum Leaders' Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise,[532] the International Law Commission's Study Group on sea-level rise in relation to international law,[533] and bilateral agreements between developed and small island developing States.[534]

(b) Land reclamation as restitution is not a disproportionate legal consequence for a breach of a right as fundamental as the right to self-determination.[535]

(c) Environmental restoration and enhanced adaptation measures to preserve the geophysical and biophysical status of injured States, while potentially demanding, are also proportionate in light of what is at stake for injured States, peoples and individuals.[536] This point is illustrated by the observation made by COSIS that the value of keeping alive the chance to save a State from total submergence "*is enormously high and would justify significant contributions*

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531 Draft 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 35, comment (7) (link).

532 Pacific Island Forum Leaders, Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, 6 August 2021 (signed by Australia, the Cook Islands, the Federated States of Micronesia, Fiji, French Polynesia, Kiribati, Nauru, New Caledonia, New Zealand, Niue, Palau, Papua New Guinea, the Marshall Islands, Samoa, the Solomon Islands, Tonga, Tuvalu, and Vanuatu).

533 Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the International Law Commission's Study Group on sea-level rise in relation to international law, *Sea-level rise in relation to international law: Additional paper to the first issues paper* (2020), 13 February 2023, A/CN.4/761, para. 83.

534 E.g., Article 2(2)(b) of Australia-Tuvalu Falepili Union Treaty.

535 See, e.g., WS Tuvalu, paras. 138-139 (in relation to land reclamation as restitution).

536 WS Tuvalu, paras. 138-139.

from a State responsible for the existential threat" faced by a vulnerable State.[537]

205. In addition to concerns about the material possibility and proportionality of restitution, the Netherlands and the United States of America raise concerns about causation, arguing that causation issues may limit the applicability of restitution in the climate change context. The United States specifically argues that showing causality for the purposes of reparation requires a "*but-for*" analysis, meaning that a State alleging injury in the context of climate change "*would have to demonstrate that another State's violation of an international obligation led to a specific harm alleged.*"[538] According to the United States, "*climate-related events—both extreme weather events and slow onset events—have multiple causes and are not driven solely by global warming resulting from anthropogenic GHG emission.*"[539] As explained in Section 2.3.4 of this submission, this framing of the causality issue is legally and empirically flawed. In this context, it is important to recall the following considerations:

(a) Some participants in these advisory proceedings have overstated the issue of causation in respect of the adverse effects of climate change because they have mischaracterized the Relevant Conduct, giving rise to breach. The key point is that **a State, people, or individual invoking the responsibility of another State would only need to establish a causal link between the *breach resulting from a composite act* (an aggregate of acts and omissions – rather than a specific act or omission in isolation – whereby a State has caused significant harm to the climate system and other parts of the environment) and the *injury* (which – depending on the specific primary obligation that has been breached – may require a specific impact on the claimant or – as is the case for obligations *erga omnes* – only an impact of the protected object).** In establishing this causal link, it must be proved that the alleged injury would have been avoided "*with a sufficient degree of certainty*" in the absence of the significant interference with the climate system resulting from the composite breach.[540]

(b) There is an overwhelming scientific consensus on the anthropogenic causes of climate change, as endorsed by the IPCC,[541] on how the unprecedented changes to the climate system are causing widespread adverse impacts and related losses and damages to nature and people.[542] **In light of the decades of work conducted by the IPCC connecting the emissions of greenhouse gases to**

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537 WS COSIS, para. 182.

538 WS USA, para. 5.10.

539 WS USA, paras. 5.2-5.12.

539 WS USA, para. 5.10.

540 *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, para. 462.

541 WS Vanuatu, para. 561.

542 WS Vanuatu, paras. 83-91.

the losses and damages now faced by States, causation (including "*but-for*" causation) has already been amply demonstrated for purposes of the legal causation analysis. Such evidence makes it irrefutable that the unprecedented changes to the climate system are causing widespread adverse impacts and related losses and damages to nature and people, with the required "*sufficient degree of certainty*".[543]

(c) Numerous Written Statements emphasize that the significant harm caused to the climate system and other parts of the environment (which cause further violations of States' obligations to States, peoples, and individuals) can be attributed to States acts and omissions.[544] **Vanuatu has provided specific evidence quantitatively estimating how much global warming has been caused by the GHG emissions of each major emitter**.[545]

(d) The recent decision of the European Court of Human Rights in *Klimaseniorinnen v. Switzerland* **expressly acknowledged the need to and the manner in which causality must be adapted to the specificities of climate change.**[546] The European Court noted that "*a legally relevant relationship of causation*" could be drawn between State actions or omissions (causing or failing to address climate change) and the harm affecting individuals from the existing, cogent scientific evidence.[547] **If this test is sufficient in the context of violations of human rights, which require a sufficiently specific injury, it is *a fortiori* sufficient when the claimant only needs to establish, under the relevant primary rule of obligation, harm to a protected object**, such as the "*climate system*", the "*marine environment*", "*biodiversity*" or "*the environment of other States or of areas beyond the limits of national jurisdiction*".

206. Given these considerations, Vanuatu urges the Court **(i) to clarify how the obligation to make full reparation arises in respect of conduct which has caused significant harm to the climate system and other parts of the environment as a composite breach; and (ii) to remove any artificial doubts resulting from the disingenuous attempts at breaking up the Relevant Conduct into small isolated pieces for the sole purpose of escaping historical responsibility**.

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543 *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, para. 462.

544 WS DRC, para. 295; WS MSG, paras. 295-297; WS Sierra Leone, para. 3.145; WS RMI, para. 49; WS Sri Lanka, para. 28; WS OACPS, paras. 145-146; WS Egypt, para. 291; WS Tuvalu, para. 114; WS Mauritius, paras. 215-217; WS Costa Rica, para. 103; WS Antigua and Barbuda, paras. 566-592.

545 Expert Report of Professor Corinne Le Quéré on Attribution of global warming by country (dated 8 December 2023), WS Vanuatu, Exhibit B, paras. 25 and 26.

546 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, ECtHR (Grand Chamber) Application No. 53600/20, Judgment (9 April 2024), paras. 439-440 (link).

547 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, ECtHR (Grand Chamber) Application No. 53600/20, Judgment (9 April 2024), para. 478 (link).

207. In conclusion, the analysis of Written Statements reveals a broad consensus on the importance and feasibility of restitution in the context of climate change, particularly for SIDS and other particularly vulnerable States. There is strong support for a broad understanding of restitution that encompasses the preservation of sovereignty and maritime spaces, environmental restoration and adaptation measures, and structural and systemic remedies addressing historical inequities. Through this concept of restitution, international law offers a pathway for addressing the unprecedented challenges faced by SIDS and other particularly vulnerable States in the face of climate change. It provides a framework for meaningful reparative action that goes beyond mere financial compensation, aiming to preserve the fundamental rights and identities of affected States and peoples. Accordingly, Vanuatu respectfully invites the Court to confirm that this understanding of restitution is indeed correct, thus providing comprehensive guidance to States in addressing the far-reaching consequences of climate change in accordance with international law.

(2) The meaning of restitution as reparation for peoples and individuals of the present and future generations (structural human rights remedies)

208. In Vanuatu's submission, restitution in the present case extends beyond environmental restoration to encompass structural human rights remedies. This section discusses how obligations of restitution can be translated into concrete domestic legal and policy frameworks to address the human rights impacts of the Relevant Conduct.

209. The Human Rights Committee's views in *Daniel Billy et al v. Australia* are particularly apposite. The Human Rights Committee concluded that responsible States, *in casu* Australia, have an obligation under international human rights law to implement measures necessary to secure communities' continued safe existence on their islands, monitor and review the effectiveness of these measures, and take steps to prevent similar violations from occurring in the future.[548] These views underscore the need for proactive and ongoing efforts to protect human rights in the face of human rights violations resulting from climate change impacts.

210. A corollary of the Court's reasoning in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* is that obligations of restitution require States **both** to dismantle administrative and legal apparatuses contributing to violations of international law[549]**and** to devise and implement new forms of domestic structural remedies. In the context of climate change, this implies a need for comprehensive legislative and policy reforms aimed at undoing the injury

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548 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, 21 July 2022, para. 11 (link).

549 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, p. 136, paras. 149, 151.

caused by the Relevant Conduct through its significant interference with the climate system.

211. Several areas emerge as crucial for structural human rights remedies in response to the Relevant Conduct. Foremost among these is the need for domestic legislation providing remedies for human rights breaches resulting from climate change impacts. Equally important are procedural rights ensuring access to environmental justice through administrative or judicial mechanisms. Additionally, protection measures for persons displaced by climate change impacts form a critical component of these structural remedies.

    (a) Saint Vincent and the Grenadines aptly note that reparation and redress extend beyond mere climate financing to include infrastructure development, technology transfers, educational opportunities, and changes to domestic legislation and policies.[550] This holistic approach recognizes the multifaceted nature of climate change impacts on human rights.

    (b) The Marshall Islands highlight a critical gap in the existing international regulatory framework, noting that climate change and its adverse effects are not recognized as grounds for protected status under current refugee law.[551] This observation suggests that restitution may involve addressing the urgent need for new and additional legal structures to address climate-induced displacement and migration.

    (c) The OACPS emphasizes that reparation must be both victim-specific and structural, requiring States responsible for significant harm to the climate system to provide effective remedies to affected peoples, individuals, and groups.[552] This dual approach ensures that both immediate needs and long-term systemic issues are addressed.

    (d) Vanuatu submits that restitution necessitates structural remedies within responsible States designed to protect the dignity of individuals displaced by climate change, particularly those from States injured by the effects of the Relevant Conduct. Such remedies must ensure that the human rights of displaced persons are respected, protected, and fulfilled.

212. In conclusion, the concept of restitution in the context of climate change and human rights requires revising and, where necessary, adopting domestic legal and policy frameworks. It calls for the recognition and clarification of actionable rights and obligations, including procedural rights for environmental justice and comprehensive protections for climate-displaced persons. These structural remedies are essential for addressing the complex and far-reaching human rights violations resulting from the Relevant Conduct, and for ensuring that States fulfil their obligations under international law. By implementing such measures, States

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550 WS Saint Vincent and the Grenadines, para. 133(e).

551 WS Marshall Islands, para. 114.

552 WS OACPS, para. 182, 183.

can work towards not only mitigating the impacts of climate change but also safeguarding the rights and dignity of those most affected by its consequences.

(3) Relevant forms of compensation

213. Compensation, as a form of reparation for injury, is available where the damage caused by the breach is not made good by restitution. It covers any financially assessable damage.[553]

214. Compensation is an essential form of reparation for injury caused by the Relevant Conduct.[554] This view is grounded in established principles of international law, as affirmed by the Court in *Costa Rica v. Nicaragua*, which recognized that damage to the environment as such (pure ecological damage), as well as in the goods and services it provides (environmental damage), is compensable.[555] In that case, the Court affirmed that:

> "damage 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."[556]

In the valuation of that damage, moreover, the Court held 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.*"[557]

215. In Vanuatu's submission:

(a) The concept of compensation in the context of climate change extends beyond traditional notions of environmental damage. It encompasses obligations to provide adequate climate finance, technology transfer, and capacity-building to enable injured States to adapt to the adverse effects caused by the Relevant Conduct, and to avert, address, and minimize loss and damage.[558]

(b) Crucially, compensation in the context of the Relevant Conduct intersects with both primary obligations, including obligations under international climate and human rights regimes; and secondary rules of State responsibility for breaches of international law. Compensation as reparation is distinct from — and

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553 Draft 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. 36 (link).

554 WS Vanuatu, para. 591.

555 WS Vanuatu, para. 592.

556 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment,* I.C.J. Reports 2018, p. 15, para. 42.

557 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment,* I.C.J. Reports 2018, p. 15, para. 35.

558 WS Vanuatu, paras. 594-597.

additional to — existing obligations to provide finance under the international climate change regime and other treaties. In other words, financial payments from major GHG emitting States to those States most vulnerable to the adverse effects of climate change are not only required as primary obligations under the Paris Agreement, regarding the need for developed countries to scale up finance, technology transfer and capacity building, they are also due as a legal consequence arising from the Relevant Conduct. Clearly, the mechanisms for the compensation of loss and damage under the climate change regime are not the only channel to provide compensation for the loss and damage caused by the Relevant Conduct. Compensation is also required from a plurality of States engaging in the Relevant Conduct to discharge their obligation of reparation for breach of primary obligations towards vulnerable States that have been injured or specially affected by the significant interference with the climate system arising from acts and omissions regarding GHG emissions over time.[559] Consistently with the comments above, this requires a causal nexus to be drawn between the composite breach (not isolated acts or omissions) and the injury required by the applicable primary rule of obligation.

216. In this context, Vanuatu highlights four key points that emerge from the Written Statements, all of which are consistent with the views expressed above and in its Written Statement. *First*, numerous Written Statements recognize that mechanisms like the Warsaw International Mechanism for Loss and Damage – or others that may be established under the UNFCCC or the Paris Agreement – do not negate or replace the obligation of compensation arising from breaches of international law. As Kenya,[560] MSG,[561] and the OACPS[562] correctly note, these mechanisms are complementary to but are not substitutes for compensation owed as a matter of State responsibility. Thus, they pose no impediment to the legal basis for compensation in connection with loss and damage flowing from the conduct causing significant harm to the climate system and other parts of the environment.[563]

217. *Second*, many Written Statements acknowledge that there are various relevant bases of compensation. For example, numerous States and organizations submit that compensation should address costs associated with **material (or tangible) losses** (e.g. physical and psychological damage, loss of income, relocation, reconstruction and restoration, including to public infrastructure and private dwellings; costs of property loss or damage, costs of recovery from lost agricultural or industrial

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559 On compensation for injury caused by a plurality of responsible States, see Draft 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. 47 (link).

560 WS Kenya, paras. 6.100-6.101.

561 WS MSG, para. 322.

562 WS OACPS, para. 188.

563 See, e.g., WS DRC, paras. 291-310; WS Kenya, paras. 6.97-8; WS Mauritius, para. 222; WS Ecuador, para. 4.21.

activities, etc.); **moral (or intangible) losses** (e.g. emotional pain and suffering, injury to feelings, and intrusion on privacy); amongst **other bases** (e.g. environmental damage; cultural damage; climate adaptation measures).[564]

218. Relatedly, as the Solomon Islands submits, in the context of small island developing States and Least Developed Countries (**LDCs**), "*monetary compensation will never be sufficient to remedy the myriad harms of climate change, due to the profound loss of culture, ecology, and social structures*".[565] The Solomon Islands continued:

> "This non-economic loss and damage includes harm to individuals through loss of life, health, and mobility; to societies through lost territory, cultural heritage, ecosystem services, and indigenous and local knowledge; and to the natural environment itself through loss of and damage to biodiversity and habitats."[566]

219. Numerous States also referred to the case of *Daniel Billy v. Australia*, in which the Human Rights Committee concluded that compensation was an appropriate remedy where a State had breached its positive human rights obligations in the context of climate adaptation, causing damage to the Indigenous authors who lived on the Torres Strait Islands.[567]

220. *Third*, the assessment of compensation, while quantitatively complex, is clearly doable.[568] While some States, such as Switzerland[569] and France,[570] express concerns about the difficulty of assessing climate-related damages, these concerns should not preclude the Court from addressing the issue. Similarly, OPEC's argument regarding the complexity of factors impacting the climate system,[571] which is reminiscent of the tobacco industry's efforts to blur the link between smoking and lung cancer, fails to recognize the Court's demonstrated ability to navigate complex environmental damages. As demonstrated in *Costa Rica v. Nicaragua* (and previous cases dating back to the award of the arbitral tribunal in the *Trail Smelter* case), the absence of absolute certainty does not prevent the Court from awarding an amount it considers approximately reflective of the harm.[572] The Court's affirmation that it would be a "*perversion of fundamental principles of*

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564 See e.g., WS Solomon Islands, para. 241; WS MSG, para. 320; WS Micronesia, para. 130; WS Bahamas, para. 244; WS Samoa, para. 204; WS Antigua and Barbuda, paras. 558-562; WS DRC, para. 337; WS Namibia, paras. 140, 146; WS Uruguay, paras. 158, 61; WS COSIS, paras. 183-90; WS Burkina Faso, para. 388.

565 WS Solomon Islands, para. 242.

566 WS Solomon Islands, para. 242.

567 See, e.g., WS Burkina Faso, para. 387; WS DRC, paras. 342-343.

568 WS Sierra Leone, para. 4.7; WS Albania, paras. 137-139.

569 WS Switzerland, paras. 75, 79-80.

570 WS France, paras. 202-206.

571 WS OPEC, para. 117.

572 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation, Judgment, I.C.J. Reports 2018, p. 15, at para. 35.

justice"[573] to deny all relief due to difficulties in precise calculation is particularly relevant in this context. Vanuatu reiterates that in the present case, the evidence before the Court provides a solid basis for clarifying the applicable methods for assessing and awarding compensation. Moreover, the ecosystem services approach offers a framework for valuing environmental goods and services, both market and non-market.[574] In all cases, equitable considerations should form the basis of awarding and calculating compensation.[575]

221. *Fourth*, compensation must be genuine and appropriate to the harm suffered. As Madagascar[576] and Namibia[577] stress, it cannot be structured as loans, which would further burden already vulnerable States.

222. In conclusion, compensation is owed both as a primary rule of obligation – arising from a range of treaties – and as a secondary rule of State responsibility for breach. The legal framework for compensation in the context of climate change must recognize both primary obligations and secondary rules of State responsibility. It must provide for genuine, adequate compensation that goes beyond existing climate finance commitments. While the assessment of damages may be quantitatively complex, established legal principles and precedents provide a solid foundation for addressing any issues. Accordingly, Vanuatu invites the Court to affirm the dual nature of climate finance obligations and to take a comprehensive approach to compensation that addresses both compliance with existing commitments and reparation for harms caused by breaches of international law.

(4) Relevant forms of satisfaction

223. In Vanuatu's submission, satisfaction plays a critical role in repairing the injuries caused by the Relevant Conduct, given that restitution or compensation alone cannot fully remedy these injuries. This form of reparation can take various forms, from public acknowledgments to educational campaigns aimed at restoring the dignity of affected peoples and fostering a deeper understanding of the climate crisis.[578] Furthermore, it encompasses a crucial moral and historical dimension, particularly in addressing the enduring legacies of colonialism and structural inequities that have contributed to the climate crisis.

224. **Crucially, satisfaction as a form of reparation for significant harm to the climate system and other parts of the environment requires, but it is not confined to, the acknowledgement of wrongdoing by way of a formal apology.**

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573 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation, Judgment, I.C.J. Reports 2018, p. 15, at para. 35.

574 See, e.g., WS Costa Rica, para. 119; WS Solomon Islands, para. 242.

575 WS Antigua and Barbuda, paras. 560-2.

576 WS Madagascar, para. 92.

577 WS Namibia, paras. 143-145.

578 WS Vanuatu, para. 599.

This understanding finds support in the Written Statements of numerous other States and international organizations. Across the numerous Written Statements which explicitly identify and discuss satisfaction as an available form of reparations, Vanuatu observes that groups of States and international organizations have identified the following means of satisfaction:

(a) disciplinary action against individuals and entities of the State under whose authority breaches occurred;[579]

(b) new forms of loss and damage funding (not compensation);[580]

(c) declaratory relief;[581]

(d) creation of a trust fund to manage compensation payments in the interests of the beneficiaries or the award of symbolic damages for non-pecuniary injury;[582] and

(e) financial assistance (including enhancing the international financial framework for climate change).[583]

225. The imperative for satisfaction as an indispensable part of reparations owed by States that have engaged in the Relevant Conduct is particularly pronounced when considering the historical context of climate change. As Albania aptly notes, satisfaction addresses not only specific harms but also sets the stage for collective responsibility and global cooperation in mitigating climate impacts.[584] In this way, satisfaction can play a crucial role in recognising that the climate crisis is not merely an environmental issue but one deeply rooted in historical and ongoing injustices.

226. Tuvalu's emphasis on satisfaction to account for "*moral damage*" further underscores its importance in the context of climate change. A formal declaration of wrongfulness can serve to rebalance inter-State relations and provide a foundation for more equitable global climate cooperation.[585] This aspect of satisfaction is particularly relevant for SIDS and other vulnerable nations that have borne the brunt of climate impacts despite contributing minimally to the problem.

227. However, as the IUCN rightly cautions, satisfaction alone is unlikely to meet the standard of "*full reparation*" under the law of State responsibility.[586] Vanuatu concurs, emphasising that satisfaction should complement, not replace, obligations

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579 See, e.g., WS Solomon Islands, para. 243; WS Micronesia, para. 131.

580 See, e.g., WS Kenya, para. 6.112; WS Timor-Leste, para. 371.

581 See e.g., WS Albania, para. 140; WS Antigua and Barbuda, para. 563; WS Singapore, para. 4.12; WS the Solomon Islands, para. 243; WS Bangladesh, para. 147; WS COSIS, para. 192; WS Tuvalu, para. 147.

582 See e.g., WS Vanuatu, para. 598; WS Antigua and Barbuda, para. 563.

583 See e.g., WS Madagascar, para. 94; WS Sierra Leone, para. 3.149.

584 WS Albania, para. 140.

585 WS Tuvalu, para. 147.

586 WS IUCN, para. 591.

of restitution and compensation. This balanced approach ensures that all aspects of climate harm – material, moral, and historical – are adequately addressed.

228. The OACPS, as a voice for 79 States, many of which emerged from colonial rule, rightly underscores that satisfaction must be designed to remove structural injustices and economic barriers at the heart of the climate crisis. This includes addressing the enduring and unjust legacies of colonialism, slavery, and racial discrimination. By reforming the international economic and financial system, satisfaction can contribute to dismantling the structural inequities that have exacerbated climate vulnerability in many parts of the world.[587]

229. The Federated States of Micronesia's suggestion that satisfaction could include enforcement of disciplinary actions against responsible entities and individuals adds another dimension to this form of reparation.[588] Such measures could serve as a deterrent and reinforce accountability and effective remedies for human rights harms resulting from the Relevant Conduct.

230. In conclusion, satisfaction as a form of reparation for injury resulting from the Relevant Conduct offers a unique opportunity to address the moral, historical, and structural dimensions of the crisis. While it should not be seen as a substitute for material forms of reparation, satisfaction plays a vital role in restoring dignity, fostering understanding, and laying the groundwork for more equitable global climate cooperation. By acknowledging historical injustices and committing to structural reforms, satisfaction can contribute significantly to a comprehensive and just response to the climate crisis.

2.6.4. *Legal consequences arising for all States*

231. Finally, Vanuatu recalls the demonstration in its Written Statement that there are additional legal consequences arising for all States and international organizations in view of the character and importance of the rights and obligations involved.[589] As has been recognized by numerous participants,[590] breaches of these norms trigger the duty to cooperate to bring the unlawful situation to an end and to redress harms experienced as a consequence of the internationally wrongful conduct;[591] as well as the duty not to recognize situations created by such breaches.[592] Importantly, in the context of the latter duty, the obligation of all States to recognize the sovereignty, territory, and maritime entitlements of States that lose territory as a

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587 WS OACPS, para. 189.

588 WS Micronesia, para. 131.

589 WS Vanuatu, paras. 601-607, 637-640

590 See e.g., WS Solomon Islands, paras. 232-233; WS OACPS, paras. 190-194; WS Uruguay, para. 159; WS Costa Rica, paras. 104-106; WS Netherlands, para. 5.8; WS Ecuador, para. 4.11; WS Liechtenstein, para. 74; WS COSIS, paras. 193-199.

591 ARSIWA, Art. 41(1).

592 ARSIWA, Art. 41(2).

result of sea-level rise flow as a legal consequence of violations of the right to self-determination.[593] Other Written Statements have expressed a similar position.[594]

III. CONCLUSIONS

232. For the reasons provided in these Written Comments, Vanuatu **reaffirms the conclusions it reached in its Written Statement** and further provides the following concluding observations:

A) There is remarkable convergence in the Written Statements with respect to the conclusions that the Court has jurisdiction to give the advisory opinion requested and that there are no compelling reasons preventing the Court from exercising such jurisdiction. There is, moreover, no reason for the Court to reformulate the terms of the questions, which were negotiated in detail and adopted by consensus by all the States of the UN General Assembly.

B) Arguments made in a minority of Written Statements, such as (i) the insinuation that the Court is invited to create law or (ii) to answer an abstract question or (iii) to interfere with ongoing negotiations or, still, (iv) to promote the fragmentation of international law, are all groundless. Argument (i) is refuted by the clear terms of Resolution 77/276, which specifically request the Court to apply existing international law and derive legal consequences from a conduct. Regarding argument (ii), the fact that Question (b) about legal consequences may be answered with respect to the conduct of specific States or groups thereof, or in general terms, in no way affects the jurisdiction of the Court, and it is certainly not a compelling reason for the Court to refrain from giving its opinion. There is, quite to the contrary, compelling evidence in the record of which specific States and groups thereof are responsible for significant harm to the climate system and, if their conduct is taken together, catastrophic harm in the form of climate change and its adverse effects. Concerning argument (iii), the political nature of a question, including the existence of negotiations, has been expressly rejected by the Court as a relevant consideration for the decision of whether to render or not an advisory opinion. Climate negotiations can, in fact, greatly benefit from an authoritative statement regarding the main obligations and their implications for the conduct which is the cause of climate change. As for argument (iv), the existence of pending proceedings on related issues has never prevented the Court

593 WS Vanuatu, para. 605.

594 See WS Burkina Faso, paras. 389–401; WS Costa Rica, para. 125; WS MSG, para. 326; WS COSIS, para. 196.

from rendering an advisory opinion. In any event, the Court is perfectly capable of taking into account the conclusions reached in other proceedings in its own advisory opinion. Even if a risk of fragmentation could be established, and even if some relevance could be ascribed to it in the present context, the Court's advisory opinion would be even more necessary. As the only international Court with a general competence, the Court is uniquely positioned to take stock of all the relevant developments and bring them to bear in a coherent manner in its own advisory opinion. A risk of fragmentation – even if admitted – is a compelling reason for the Court to render its advisory opinion.

C) There is a scientific consensus on what is the conduct responsible for the significant interference with the climate system and which States have displayed it. The position of the large majority of States and international organizations in their Written Statements reflects both the global scientific consensus on the causes of climate change and its adverse effects and the very text of UN General Assembly Resolution 77/276 specifically characterizes the conduct at stake.

D) Arguments made in a minority of Written Statements, such as (i) the veiled attempts at questioning the link between anthropogenic emissions of greenhouse gases and climate change, or (ii) the contention that, even if the science is not in question, Resolution 77/276 does not sufficiently specify the conduct underpinning the questions put to the Court, or (iii) that the Court would be led to address an abstract question or, still, (iv) that causality between emissions from specific point sources and specific impacts is too complex to determine, are all groundless and to some extent deliberately misleading. Argument (i) has been long debunked, and there is now a global scientific consensus on the causes and effects of climate change, which all States of the IPCC have accepted through their approval of the Summaries for Policymakers of IPCC reports. Argument (ii) overlooks or ignores the clear terms of Resolution 77/276, which specifically characterize the Relevant Conduct in Question (a), then in preambular paragraph 5 in fine, and finally in Question (b). Argument (iii) has been systematically rejected in the Court's case law, and, in any event, there is a wealth of evidence in the record about the greenhouse gas emissions of specific States and their impact on the climate system and other parts of the environment. Argument (iv) deliberately or inadvertently mischaracterizes the question put to the Court, which does not concern causality between emissions from *specific point sources* and *specific impacts*, but causality between *cumulative emissions over time from specific States* and *significant interference with the climate*

system itself as part of the environment. This contention is, in any event, baseless and misleading given that: empirically, it is unquestionable that some States have contributed far more to climate change than others; legally, each State is required under international law to do its part to the best of its capabilities (and cannot therefore hide either behind 'drop in the ocean' arguments or allegations that other States are also negligent); scientifically, it is entirely possible to establish which share of global warming has been caused by the emissions of a specific State and, thereby, whether such emissions have caused significant harm to the climate system, and; more generally, the questions put to the Court are not about the causal link between the emissions from a specific source and a specific impact, but about a series of acts and omissions over time – a composite act – whereby specific States have caused, individually and collectively, significant harm to the climate system and other parts of the environment.

E) The UN General Assembly has specifically requested the Court not to limit itself to the interpretation and application of the UNFCCC, the Kyoto Protocol and the Paris Agreement, but to identify the applicable obligations from the entire corpus of international law and assess the legal consequences of the conduct responsible for climate change under international law. The large majority of the Written Statements (70 out of 91) confirm the need, expressed in the request, for the Court to consider the entire corpus of international law in its response to the questions put to it. Crucially, the Court is the only international jurisdiction with a general competence over all areas of international law which allows it to provide such an answer. No other international jurisdiction could do so. This is why the General Assembly, acting by consensus, decided to request an advisory opinion to the Court specifically asking it to "*hav*[e] *particular regard to*" a wide range of treaties and rules, the "*importance*" of which "*to the conduct of States over time in relation to activities that contribute to climate change and its adverse effects*" is expressly "*emphasiz*[e]d" in preambular paragraph 5 of Resolution 77/276.

F) A minority of Written Statements (i) argue that the UNFCCC, the Kyoto Protocol and the Paris Agreement apply as a *lex specialis*, substituting themselves for and trumping all other obligations of States, including those on human rights, self-determination, the law of the sea, due diligence and prevention. Some States also argue (ii) that the UNFCCC, the Kyoto Protocol and the Paris Agreement, even if not a *lex specialis*, apply as a 'principal source', and they emphasize the need for harmonious interpretation. The *lex specialis* argument is untenable and, to the extent that the 'principal source'

argument is a tactic to indirectly achieve the same outcome, it is also groundless and fails. The very text of Resolution 77/276 asks the Court to examine the entire corpus of international law in its response to the questions put to it by the UN General Assembly. Moreover, the application of the UNFCCC, the Kyoto Protocol and the Paris Agreement is limited in many ways, including *ratione temporis* and *ratione materiae*. These instruments specifically acknowledge their limits as well as the application of other rules of international law to the Relevant Conduct. Furthermore, international human rights law, the law of the sea and a range of customary international law principles are applicable, including *ratione temporis* and *ratione materiae*. In some cases, they have been effectively applied as such to the Relevant Conduct *inter alia* by the ECtHR, the ITLOS and the Human Rights Committee, as well as by several domestic courts, including at the highest levels. In addition, in relation to arguments about harmonious interpretation and systemic integration, it is important to make absolutely clear that complying with the requirements of one obligation or treaty is not sufficient to comply with all other obligations, even if the former obligation or treaty is useful to interpret the latter obligations.

G) Vanuatu recalls its demonstration in its Written Statement that specific aspects of the Relevant Conduct are, in principle, inconsistent with the requirements of the customary and treaty obligations governing such conduct. The legal consequences triggered by such breaches are defined, first and foremost, by the rules of general international law codified in the ARSIWA.

H) Some Written Statements argue that the UNFCCC, the Kyoto Protocol and the Paris Agreement provide for special secondary obligations in the context of climate change, which operate to exclude the general rules contained in the ARSIWA. Vanuatu regards such arguments as baseless because: first, the ARSIWA applies to breaches of all primary obligations, unless they have been specifically displaced by special rules of State responsibility, and no such rules are found in the UNFCCC, the Kyoto Protocol or the Paris Agreement; second, the text of the operative part of Resolution 77/276 specifically uses, both in the English and French versions, the terminology of Article 42 of the ARSIWA; third, the UN General Assembly has specifically used the terminology of "*legal consequences*", which the Court understands in its case law as a reference to State responsibility; fourth, the application of the ARSIWA to the Relevant Conduct (anthropogenic emissions of greenhouse gases from a State) has been expressly recognized and confirmed by other international and regional courts.

I) The legal consequences arising for States which have engaged in the Relevant Conduct include both cessation and reparation. Cessation is fundamental but it is not sufficient. The harm already caused to the climate system and other parts of the environment, with all the associated adverse effects, must also be specifically addressed. Vanuatu recalls further the demonstration in its Written Statement that there are additional legal consequences arising for other States and international organizations as a result of the *erga omnes* and/or *peremptory* nature of some of the obligations breached.

J) A legal consequence of displaying the Relevant Conduct is the obligation to cease at least three main manifestations of such conduct, which are not exhaustive but rather some of the most flagrant acts or omissions of continuing breach: (a) To *cease subsidizing fossil fuels*, a continuing positive act of State organs and entities empowered to exercise governmental authority, which must be cut drastically to end support for the production and consumption of the major source of anthropogenic GHG emissions; (b) To *cease policies supporting the expansion of fossil fuel production*, also a continuing positive act attributable to States; and more generally (c) to *cease the omission to act as required by international law, namely to cease the continuing under-regulation of GHG emissions from both public and private sources under its jurisdiction or control* by urgently increasing the level of ambition and action in relation to climate mitigation, adaptation, and finance in accordance with international obligations. The urgency, stringency and comprehensiveness of the obligation of cessation on responsible States is a consequence of those States consistently having delayed climate action, exhibited low ambition in pursuing GHG reductions and, in practice, maintaining concrete plans to expand the extraction and use of fossil fuels

K) A related legal consequence is that responsible States must engage in policy, regulatory and legislative reform, as a means of guaranteeing non-repetition of breach. Guaranteeing non-repetition must also involve ensuring that any non-State actors under their jurisdiction, including companies, is prevented from causing (further) harm to the climate system and other parts of the environment.

L) With respect to reparation, there is a broad consensus emerging from the Written Statements on the importance and feasibility of restitution in the context of climate change, particularly for small island developing States and other particularly vulnerable States. There is strong support for a broad understanding of restitution that

encompasses: (a) the preservation and continued recognition of the sovereignty, statehood, territory, and maritime zones of small island developing States and coastal States, as a means of restitution; (b) support for environmental restoration and adaptation measures in injured, specially affected and/or particularly vulnerable States; (c) structural and systemic changes in responsible States to confront the root causes of climate change and its disproportionate impact on those injured, specially affected and/or particularly vulnerable States. Vanuatu respectfully invites the Court to confirm that this understanding of restitution is indeed correct in the present context, thus providing comprehensive guidance to States in addressing the far-reaching consequences of climate change in accordance with international law.

M) Restitution is also important in the context of climate change and human rights. In such context, it requires responsible States to revise and, where necessary, adopt domestic legal and policy frameworks. It calls for the recognition and clarification of actionable rights and obligations, including procedural rights for environmental justice and comprehensive protections for climate-displaced persons. These structural remedies are essential for addressing the complex and far-reaching human rights violations resulting from the Relevant Conduct, and for ensuring that States fulfil their obligations under international law. By implementing such measures, responsible States can work towards not only mitigating the impacts of climate change but also safeguarding the rights and dignity of those most affected by its consequences.

N) Regarding compensation, Vanuatu submits that it is owed both as a primary rule of obligation – arising from a range of treaties – and as a secondary rule of State responsibility for breach. The legal framework for compensation by States having displayed the Relevant Conduct must recognize both primary obligations and secondary rules of State responsibility. It must provide for genuine, adequate compensation that goes beyond existing climate finance commitments. While the assessment of damages may be quantitatively complex, established legal principles and precedents provide a solid foundation for addressing any issues. Vanuatu invites the Court to affirm the dual nature of climate finance obligations and to take a comprehensive approach to compensation that addresses both compliance with existing commitments and reparation for harms caused by breaches of international law.

O) With respect to satisfaction as a form of reparation for injury resulting from the Relevant Conduct, Vanuatu submits that it offers

a unique opportunity to address the moral, historical, and structural dimensions of the climate crisis. While satisfaction should not be seen as a substitute for material forms of reparation, it plays a vital role in restoring dignity, fostering understanding, and laying the groundwork for more equitable global climate cooperation. By acknowledging historical injustices and committing to structural reforms, satisfaction can contribute significantly to a comprehensive and just response to the climate crisis. Vanuatu invites the Court to clarify the forms that satisfaction should take in the present context.

Respectfully submitted by:

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Ambassador Georges Maniuri
Representative of the Republic of Vanuatu

15 August 2024

Certification

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

15 August 2024

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Ambassador Georges Maniuri

Representative of the Republic of Vanuatu

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