

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



COMMENT OF SAMOA

15 August 2024

I. INTRODUCTION

1. On 21 March 2024, Samoa filed a written statement in the Registry of the International Court of Justice (“ICJ” or “Court”) in the advisory proceedings on the *Obligations of States in respect of Climate Change*, within the time-limit of 22 March 2024 set by Order of the President of the Court of 15 December 2023. 91 other participants, both States and international organizations, filed written statements in the Registry.
2. By Order dated 30 May 2024, the President of the Court set 15 August 2024 as the time-limit within which States and organizations which have presented written statements may submit written comments on the other written statements.
3. In accordance with that order, Samoa submits these written comments on the other written statements.
4. In summary, Samoa offers the following comments:
 - a. While the UN climate change treaties constitute the most prominent source of international obligations with respect to protection of the climate system and other parts of the environment, those treaties do not – by virtue of *lex specialis*, *lex posterior* or otherwise – exclude, disapply or derogate from other rules of international law which concern the acts required for protection of the climate system and other parts of the environment.
 - b. The rule of customary law which requires States to exercise due diligence to prevent significant transboundary harm is applicable in relation to the serious injurious effects produced by the emission of anthropogenic GHGs. The requisite standard of diligence in these

circumstances is informed by the agreed temperature goals enshrined in the Paris Agreement and is in no way diminished by the climate change treaties.

- c. Human rights law is a source of obligations which are relevant to the protection of the climate system and other parts of the environment against anthropogenic GHG emissions. Human rights impose independent obligations on States to protect the climate system and other parts of the environment from anthropogenic GHG emissions. Human rights also inform the content of the UN climate change treaties, and are in turn informed by the provisions of those treaties.

5. Each of these comments will be addressed in a separate sections below.

II. THE UN CLIMATE CHANGE TREATIES AND THEIR RELATIONSHIP WITH OTHER RELEVANT RULES

6. While many of the written statements have described the UN climate change treaties (that is, the United Nations Framework Convention on Climate Change (“UNFCCC”) and the agreements and decisions concluded thereunder, including the Kyoto Protocol and the Paris Agreement) as the ‘primary’ source of international obligations to ensure the protection of the climate system from anthropogenic GHG emissions, a small number of statements have gone so far as to contend that the Court should refer *only* to the UN climate change treaties when responding to the General Assembly’s request.
7. This contention rests on the claim that the UN climate change treaties constitute a specialised treaty regime which, as the universally accepted result of careful negotiation by States, sets out comprehensively the applicable law governing the protection of the climate system from anthropogenic GHG emissions. On this view, the obligations under the UN climate change treaties apply to the exclusion of other potentially applicable obligations, such as those established in

international human rights law (both in treaties and custom) or in general customary law (including the obligation to exercise due diligence to prevent significant transboundary environmental harm). In attempting to justify this contention, some statements expressly characterise the UN climate change treaties as *lex specialis*, whereas a few other statements adopt a similar position while avoiding the *lex specialis* terminology.

8. Samoa observes that the international law relevant to the multi-faceted and complex array of problems connected with climate change is to be found in a wide range of sources, both treaty-based and customary. Samoa's Written Statement reflects this understanding, as do the vast majority of statements submitted to the Court.
9. Moreover, Samoa observes that there is no basis for prioritising the application of the UN climate change treaties over other relevant obligations established by other sources of international law, nor are there valid grounds for excluding the applicability of these other rules which concern the action necessary to protect the climate system against anthropogenic GHGs.
10. Several reasons support this view.

A. Conditions for application of the *lex specialis* principle

11. First, the *lex specialis* principle only applies in situations where two or more potentially applicable rules are in conflict with one another. Thus, it is essential to determine whether there is an actual inconsistency between the potentially applicable rules, or whether the different provisions may coexist and so apply simultaneously in parallel. As the International Law Commission noted:

For the lex specialis principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else

*a discernible intention that one provision is to exclude the other. Thus, the question is essentially one of interpretation.*¹

12. Neither of these criteria – actual inconsistency, or evidence of exclusionary intention – are present when considering the diverse obligations binding upon States in relation to climate change.

i. **Absence of normative conflict**

13. Turning to the first criterion, Samoa perceives no actual incompatibility or inconsistency between the various obligations enshrined in the UN climate change treaties and those established under other parts of international law.

14. As analysed in Samoa's Written Statement, the UN climate change treaties enshrine States' binding commitments to undertake a range of actions, including the sharing of information, the provision of financial support, transfer of technology, and mitigation efforts, including the pursuit of maximally ambitious, continually progressive, nationally determined actions.

15. Certain of the obligations provided in the UN climate change treaties are obligations of conduct, not of result: they require States to make efforts towards certain goals, without obliging States to achieve certain outcomes by those efforts. For example, the Paris Agreement does not quantify the amount of financial support each State party is obliged to provide, nor does it stipulate the minimum mitigation efforts which a State must undertake.

16. In this respect, these obligations in the climate change treaties resemble the customary obligation to exercise due diligence to prevent significant transboundary harm. There is no normative conflict or incompatibility between obligations which afford States significant discretion as to the specific action they will undertake in the circumstances in order to fulfil these obligations of conduct.

¹ ARSIWA Commentary, point 4.

These rules allow States to decide in the particular circumstances what, for example, amounts to due diligence in the prevention of a serious risk of significant transboundary harm, or what reflects their maximal ambition in making a nationally determined contribution to the long-term collective temperature goals formalised in the Paris Agreement. That these rules afford States a certain discretion in their performance does not preclude the possibility of a State's compliance with these binding obligations being assessed objectively by an authorised decision-maker, such as an international court or tribunal. But the nature of these rules, entailing obligations of conduct, excludes the invocation of the *lex specialis* principle to justify the exclusive or preferential application of the UN climate change treaties, since there is no real incompatibility or conflict between the requirements of these different rules.

17. Other customary rules, such as the customary obligations to undertake an environmental impact assessment and to notify neighbouring States when planned works might reasonably be expected to produce environmental impacts, are entirely consistent with obligations enshrined in the UN climate change treaties.
18. Similarly, some human rights obligations allow considerable discretion to States to determine the specific manner of their compliance with their obligations to respect, protect and fulfil the human rights of individuals and groups. There is no scope for invoking the *lex specialis* principle to exclude or set aside their application: the rules apply in parallel.
19. Moreover, far from being in conflict, certain provisions of the UN climate change treaties reflect and reinforce certain human rights which are protected by treaties and as a matter of custom. For example, the provision for public participation in decision-making and access to information on climate change set out in Article 12 of the Paris Agreement complements the rights to participate in public life

which are protected under international human rights law. Indeed, as discussed further below, in accordance with the principle of systemic integration in treaty interpretation, these different rules inform and enrich one another: they are complementary, not in conflict. Further, how other rules operate will depend on temporal considerations and the particular issue. For example, neither the UNFCCC nor the Paris Agreement addresses responsibility for the conduct at issue.

20. For its part, the International Tribunal for the Law of the Sea (“ITLOS”), in its recent advisory opinion on the *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (Case No. 31)(“ITLOS Climate Change Opinion”), expressly rejected the characterisation of the climate change treaties as *lex specialis* with respect to the United Nations Convention on the Law of the Sea (“UNCLOS”). The Tribunal made the point emphatically:

“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.”²

ii. **No discernible exclusionary intention**

21. Turning to the second criterion, the texts of the UN climate change treaties provide no evidence at all that the States parties intended, by conclusion of those instruments, to set aside, modify, deviate from or exclude the varied suite of

² ITLOS, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)*, Advisory Opinion, Case No. 31, 21 May 2024, para. 224.

other international rules which are relevant to the actions required to protect the climate system against anthropogenic GHGs.

22. The UNFCCC recalls in its preamble that:

“States have, in accordance with the Charter of the United Nations and the principles of international law... 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 limit of national jurisdiction.”

23. The preambular text is generally regarded as an essential element when clarifying the object and purpose of a treaty, and the inclusion of this reference to the customary obligation to prevent significant transboundary harm in the UNFCCC’s preamble provides a clear indication that the States parties to the UNFCCC did not intend to derogate from or disapply other potentially applicable international rules.

24. The same can be said with regard to human rights. The Paris Agreement expressly refers to human rights obligations in its preamble:

“Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.”

25. The ordinary meaning makes it abundantly clear that States understand that they are not relieved of their human rights obligations when upholding their obligations under the Paris Agreement, nor are their commitments under the Paris Agreement intended to prevail over or displace their obligations on human rights. Instead, this text shows that the States parties to the Paris agreement understand that they must comply with their obligations under the Paris Agreement at the very same time as they fulfil their obligations on human rights.

26. According to this analysis, the provisions of the UN climate change treaties may not be characterised as *lex specialis*, and so do not take precedence over or otherwise affect the applicability of other relevant rules of international law.

B. General rules remain valid

27. It should be recalled that, even where a relationship of *lex specialis* is found to exist between two provisions which might otherwise be applicable to a particular situation, action or party, the application of the more specialised rule does not result in the invalidation of the more general rule. Rather, the general rule remains in existence, and is available for application in other circumstances. The ILC acknowledged this point when it remarked in connection with the effect when a treaty provision is properly characterised as *lex specialis* to a general customary rule:

*“None of this means that the general customary law would thereby become extinguished. It will continue to apply in the background and become fully applicable when, for instance, the treaty is no longer in force or... if the jurisdiction of the relevant law applying organ fails to cover the treaty.”*³

28. As this quote indicates, general rules may acquire particular significance in the context of dispute settlement, as a court or tribunal might have the jurisdiction to consider and apply a customary rule in circumstances where it lacks jurisdiction to decide the matter on the basis of a particular treaty.

29. The ongoing existence of general rules, even in circumstances where they are disapplied by *lex specialis*, provides another reason for the Court to reject the suggestion that it should base its answer to the questions posed in the General Assembly’s request solely on the terms of the UN climate change treaties.

³ ILC Fragmentation Report para. 82

C. No special rules governing breach and consequences

30. The preceding reference to dispute settlement prompts Samoa to observe that the UN climate change treaties supply no special [secondary] rules concerning the content or implementation of international responsibility for breach of the binding obligations contained within those instruments. Accordingly, the claim made in certain statements that [Paris agreement exclusively governs] is misplaced.
31. As Samoa noted in its Written Statement, Article 55 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts ("**Articles on State Responsibility**") provides that the Articles, embodying the general law of international responsibility, do not apply "*where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law*".
32. Although the UN climate change treaties, and the Paris Agreement in particular, establish certain mechanisms to assist States in fulfilling their obligations under those instruments, there is no indication that these mechanisms are intended to supplant the general law on international responsibility or to eliminate access to the various international legal institutions by which this international responsibility may be implemented. The treaties do not specify any special means for determining whether state responsibility exists; in other words, the treaties do not set out particular rules to determine that a State is in breach of any of the treaties' provisions. Nor do the treaties create, or else appoint, a certain mechanism by which the consequences of any such breach are to be determined. The mechanisms which have been created – such as the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts – have not been allocated the competence to decide either: (a) when a State is in

breach of its treaty obligations, or (b) what the consequences flowing from that breach shall be. These mechanisms are intended to offer assistance so that States may avoid non-compliance with their treaty obligations (such as the obligations to provide financial support or to share information); they have no role in deciding the existence of content of international responsibility when a State is claimed to have violated its treaty obligations.

33. That the States parties to the UN climate change treaties lacked the intention to supersede the general law of international responsibility with special rules is most clearly illustrated by the inclusion of a dispute settlement provision, Article 14 of the UNFCCC. Article 14 provides that States parties shall seek a settlement of any dispute concerning the interpretation of the application of the Convention through negotiation or any other peaceful means of their own choice. States have the option under this Article to indicate at any time that they accept the compulsory submission of a dispute to this Court or to arbitration. By this provision, the States parties indicate their acceptance that the generally available means for determining international responsibility may be employed in relation to the climate change treaties. When considered alongside the fact that none of the climate change treaties specifically provide for special rules for establishing when a State party incurs international responsibility, or the content of that responsibility, it is clear that the climate change treaties do not exclude the usual rules or mechanisms for establishing that the treaties' provisions have been breached, or for deciding the consequences thereof.

D. Systemic integration in interpretation

34. Finally, Samoa observes that the relationship between the climate change treaties and other relevant rules of international law – including international human rights law and the duty to prevent significant transboundary harm – is better described in terms of integration and complementarity, not exclusion and

conflict. The appropriate relationship between these bodies of law is achieved and maintained by a process of harmonious interpretation, whereby one norm assists in the interpretation of another.

35. This approach accords with the principle of ‘systemic integration’ which is enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties. This principle, which is also recognised as an element of the general rule of treaty interpretation under customary law, provides that the interpretation of treaties should take into account “any relevant rules of international law applicable in the relations between the Parties”. Applying this rule of treaty interpretation, treaty provisions should be interpreted so as to be compatible with other international norms which are relevant to the issue at hand. On this view, the obligations set out in the climate change treaties are informed by the rules of customary international law and other treaties, just as the provisions of the climate change treaties assist in the interpretation of other international treaties.
36. In the recent ITLOS Climate Change Opinion, the Tribunal made clear that UNCLOS is a “*living instrument*” that must be interpreted in co-ordination and harmonisation with other relevant rules of international law that can assist in clarifying the meaning of its provisions. ITLOS noted the “*openness [of UNCLOS]... to other treaty regimes*”, and found that the external rules which should be applied to give meaning to UNCLOS include the UNFCCC, the Kyoto Protocol and the Paris Agreement, together with other treaties which specifically address certain forms of environmental harm.⁴ According to ITLOS, UNCLOS cannot be interpreted in isolation and must be understood in the context of other obligations that arise in the context of climate change. In its specific interpretation of Article 192 of UNCLOS, the Tribunal found that the contents of

⁴ ITLOS Climate Change Opinion, para. 130.

the general obligation to protect and preserve the marine environment are informed by, among other things, customary international law, including the rule requiring States to act diligently to prevent significant transboundary harm.⁵

37. Furthermore, the ITLOS decision reinforces the conclusion that UNCLOS and the climate change treaties enjoy a discrete, compatible existence. It emphasises that a State's action in complying with the Paris Agreement would not necessarily suffice to satisfy the obligations enshrined in Article 194 of UNCLOS. The Tribunal stated:

*"The Tribunal does not consider that the obligation under article 194, paragraph 1 of the Convention would be satisfied simply by complying with the obligations and commitments under the Paris Agreement. The Convention and the Paris Agreement are separate agreements, with separate sets of obligations. While the Paris Agreement complements the Convention in relation to the obligation to regulate marine pollution from anthropogenic GHG emissions, **the former does not supersede the latter**. Article 194, paragraph 1, imposes upon States a legal obligation to take necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions, including measures to reduce such emissions. If a State fails to comply with this obligation, international responsibility would be engaged for that State."*⁶

III. THE APPLICABILITY OF THE CUSTOMARY DUTY TO PREVENT TRANSBOUNDARY HARM

38. Samoa records its disagreement with the claim that the customary rule which requires States to act with due diligence to prevent significant transboundary harm is not applicable in the specific context of climate change or to the harms produced by the emission of anthropogenic GHGs.
39. As Samoa noted in its Statement, the customary status of this rule – referred to in the chapeau of the General Assembly's request as the 'principle of prevention of significant environmental harm' – cannot be doubted, as it has been recognised and applied by international courts and tribunals, including this

⁵ ITLOS Climate Change Opinion, paras 232–243. See also *South China Sea Arbitration (Philippines–People's Republic of China)*, Award, 12 July 2016, PCA Case No. 2013-19, para. 941.

⁶ ITLOS Climate Change Opinion, para. 223 (emphasis added).

Court, consistently over many decades. Nor, as has been examined in the previous section, has it been modified, displaced or disapplied by the UN climate change agreements or other treaty-based rules of international law.

40. Moreover, Samoa submits that this rule is applicable to protect against the harms occasioned by the emission of anthropogenic GHGs just as it has been applied in respect of damage caused by the release of other forms of airborne pollution.
41. It has been claimed in some statements that the customary rule may not be applied in the context of climate change, since this context, it is said, differs in certain material respects from the ordinary cases to which the customary duty of prevention has been applied to date. These statements have contended that the harm caused by GHG emissions is distinct from cases, such as the paradigmatic *Trail Smelter* arbitration, where the polluting activity on the territory of one State directly produces injurious effects on the territory of another, because the harmful effects of anthropogenic GHG emissions are cumulative, and it is not possible to establish causation linking the GHG emissions originating from a particular State's territory with injurious effects observable elsewhere.
42. However, while acknowledging that certain difficulties may arise when applying the customary duty of prevention in relation to the harmful impacts of climate change, Samoa submits that these difficulties do not preclude the application of the customary rule.
43. First, ITLOS, in its recent advisory opinion concerning climate change, gave detailed consideration to the question whether anthropogenic GHG emissions into the atmosphere constitute pollution of the marine environment within the meaning of Article 1(1)(4) of UNCLOS. The Tribunal noted that "*a large majority of the participants in the proceedings recognised that anthropogenic GHG emissions*

[met] the definition of pollution”⁷ on its way to reaching the same conclusion: that GHG emissions satisfy the UNCLOS definition of pollution. While the UNCLOS definition of pollution is set out in precise and finite terms, ITLOS’s analysis shows how GHG emissions are sufficiently similar in character and effect to be treated as pollution. As ITLOS observed, “through the introduction of carbon dioxide and heat (energy) into the marine environment, anthropogenic GHG emissions cause climate change... which results in the deleterious effects illustrated in the [UNCLOS] definition of pollution...”⁸

44. Second, Samoa observes that some statements focus on forensic difficulties in establishing with sufficient probability that a particular adverse event or impact in a certain location is attributable to the anthropogenic GHG emissions emanating from a specific State in the course of arguing that certain rules should not apply. However, any forensic difficulties – even if they do indeed exist, which may be doubted – do not provide a principled basis for deviating from or disapplying the general rule.
45. Furthermore, as scientific knowledge continues to develop, it may be expected that our understanding of the causes, effects and modalities of climate change will improve, and along with it our capacity to attribute specific consequences to finite causes might grow. It would seem premature to conclude at this moment of environmental peril that present deficiencies in attribution science justify foreclosure on the possibility of applying a long-standing, well-established rule of customary law to the most pressing issue of our time.
46. It does not follow from the mere fact that a rule is difficult to apply in a particular hard case that the rule should be considered inapplicable in every cases arising in that context. Surely, the more apt response to an assessment that there are

⁷ ITLOS AO para 160.

⁸ ITLOS AO para 178.

challenges confronting the application of a certain general rule in a particular set of circumstances is to entrust the task of applying the rule to an actor which is better equipped for the task. In that regard, and without commenting on the specific issues concerning causation which might conceivably arise in future disputes concerning the harm prevention rule, Samoa observes that this Court, entrusted with a flexible and comprehensive set of fact-finding powers, has shown itself to be more than capable of addressing complex questions of fact in its past practice. On this basis, Samoa considers that the ICJ is fit for the task of assessing compliance with the customary duty to prevent significant transboundary harm irrespective of the forensic complications which such a task might entail.

47. Another reason in support of Samoa's submission that the customary duty to prevent transboundary harm is applicable in the context of climate change relates to the fact that compliance with this duty requires satisfaction of the flexible, contextually-sensitive standard of due diligence. While the nature and scale of the GHG emissions released from a certain State's territory is undoubtedly a central consideration in determining whether that State has acted with the due diligence required, numerous other facts affect the assessment. In this light, clear evidence that a State might have fallen egregiously short of what is required to satisfy the standard of due diligence in the circumstances – perhaps by knowingly permitting a single facility to produce GHG emissions in quantities far in excess of that State's nationally determined contribution under the Paris Agreement – might justify a conclusion that the customary duty has been breached, notwithstanding a degree of uncertainty as to the emitting State's contribution to the injury suffered by the claimant. (In this connection, it may be recalled that the Court has previously devised and employed suitable methodologies for quantifying loss in difficult circumstances for the purpose of

assessing reparations.⁹) Ultimately, in a situation such as this, the difficulties associated with applying the customary rule in respect of certain adverse effects of climate change are far from insurmountable. It is excessive to claim that the customary harm prevention rule may not be applied in any case where anthropogenic GHG emissions might be involved.

48. Finally, in terms of determining the standard of due diligence which is integral to the customary duty to prevent significant transboundary harm, Samoa offers the two following observations.

A. Recent ITLOS remarks on due diligence

49. First, in its recent advisory opinion addressing climate change, ITLOS provided a useful discussion of the standard of due diligence. Confirming many of the remarks presented by Samoa in its Statement, the Tribunal described due diligence as a “*variable concept*” which is “*difficult to describe... in general terms*” since “*the standard of due diligence varies depending on the particular circumstances to which an obligation of due diligence applies.*”¹⁰ The Tribunal then listed the factors which affect the standard in particular circumstances: they include “*technological information, relevant international rules and standards, the risk of harm and the urgency involved.*”¹¹ The standard of due diligence may change over time as these factors evolve, but in general “*the standard of due diligence has to be more severe for ... riskier activities*”, with risk being measured “*in terms of both the probability of foreseeability of the occurrence of harm and its severity or magnitude*”.¹²
50. After noting that the best available science indicates that anthropogenic GHG emissions pose a high risk both in terms of foreseeability and severity of harm to

⁹ DRC v Uganda (Reparations).

¹⁰ ITLOS AO para 239.

¹¹ ITLOS AO para 239.

¹² ITLOS AO para 239.

the environment, and that a broad scientific consensus predicts that severe consequences will ensue if global temperature increases exceed 1.5°C, the Tribunal clarified that *“the standard of due diligence States must exercise in relation to marine pollution from anthropogenic GHG emissions needs to be **stringent**.”*¹³

51. ITLOS proceeded to explain that the implementation of the due diligence standard *“may vary according to States’ capabilities and available resources”*, though all States must do whatever they can in accordance with those capabilities and resources to meet the standard.¹⁴ Finally, the Tribunal also noted that the obligation of due diligence is *“closely linked with the precautionary approach”*. As a result, *“States would not meet their obligation of due diligence... if they disregarded or did not adequately account for the risks involved in activities under their jurisdiction or control. This is so, even if scientific evidence as to the probability and severity of harm... were insufficient.”*¹⁵

B. Due Diligence and the Paris Agreement’s long-term temperature goal

52. Second, reflecting the observation of ITLOS that the standard of due diligence varies in specific circumstances according to ‘relevant international rules and standards’, and in keeping with the principle of systemic integration discussed above, Samoa submits that the standard of due diligence which is incorporated in the customary duty to prevent transboundary harm must be informed by the long-term global temperature goals enshrined in Article 2 of the Paris Agreement.¹⁶ Samoa contends that a State could not be considered to be

¹³ ITLOS AO para 241 (emphasis added).

¹⁴ ITLOS AO para 241.

¹⁵ ITLOS AO para 242.

¹⁶ Article 2 provides: *“(1) This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by: (a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change...”*

exercising due diligence to prevent significant transboundary harm if its policies and actions were not conceived and effectively implemented with a view to limiting the temperature increase to 1.5°C above pre-industrial levels.

53. As the various elements of international law relevant to various facets of climate change inform and reinforce each other, the long-term temperature goal agreed by States parties to the Paris Agreement provides content and clarity to the due diligence standard which conditions the duty to prevent significant transboundary harm. But, these separate rules retain their separate existence, and so must be fulfilled in parallel by States, as ITLOS observed in its Climate Change Opinion.

IV. HUMAN RIGHTS OBLIGATIONS RELEVANT TO CLIMATE CHANGE

A. Overview

54. Samoa rejects the view expressed in a small number of statements that international human rights law contains no obligations concerning anthropogenic emissions of GHGs or other statements arguing that the extent of its applicability is limited. Rather, Samoa understands that international human rights is a source of obligations on States to take measures for the protection of the climate system and other parts of the environment.
55. Samoa will expand on its position on the relevance and operation of human rights obligations by addressing the following:
 - a. the right to self-determination;
 - b. specific human rights obligations; and
 - c. extraterritoriality.
56. Samoa's treatment of these issues reference views and general comments from treaty bodies established under the International Covenant on Civil and Politic

Rights (“ICCPR”) and International Covenant on Economic, Social and Cultural Rights (“ICESCR”) and the Convention on the Rights of the Child (“CRC”). This Court has previously noted that, when interpreting the terms of a particular treaty, special weight should be accorded to the views of the supervisory body established by that treaty. With specific reference to the Human Rights Committee, this Court observed that it *“should ascribe great weight to the interpretation adopted by this treaty body that was established specifically to supervise the application of the treaty”*.¹⁷ Not only are these general comments and views primary aids in interpreting the relevant human rights treaties, they offer valuable illustrations of the applicability of human rights obligations to climate change, and so support Samoa’s position.

B. The right to self-determination

57. Several States have argued that the right to self-determination entails a corollary obligation requiring all States to protection of the climate system and other parts of the environment from significant harm from the emission of anthropogenic GHGs

Samoa wishes to add the following two points with respect to the right of self-determination. First, the right to self-determination is a fundamental human right. This Court has affirmed that the right of self-determination is an *“essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of these rights”*.¹⁸ Furthermore, this Court has

¹⁷ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, ICJ Reports 2010, p. 639, para. 66.

¹⁸ *Legal consequences arising from the policies and practices of Israel in the occupied Palestinian territory, including East Jerusalem, Advisory Opinion*, 19 July 2024, , para. 233, citing Human Rights Committee, General Comment No.12 (13 March 1984), *Official Records of the General Assembly, Thirty-ninth Session, Supplement No.40* (Un Doc.A/39/40 para.1).

accepted that *“the right of peoples to self-determination... has an erga omnes character”*.¹⁹

58. A key component of this right, which all States are obliged to respect, is enshrined in common Article 1 of the ICCPR and the ICESCR, which states: *“All peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.”*
59. The Samoan people – *tagata Samoa* – have chosen to freely pursue a form of economic, social and cultural development which is peaceful, neighbourly, and in close and continuous kinship with nature. The ability of the Samoan people to exercise their right of self-determination by adopting this environmentally-sustainable model of social and economic organisation has been significantly curtailed by the serious degradation of the climate system and other parts of the environment, and by the accelerating production of intensifying environmental impacts which constitute climate change. In this way, the Samoan people’s ongoing right to self-determination has been, and is being, infringed. Furthermore, the widespread and profound harm to the climate system caused by anthropogenic GHGs constitutes a significant interference with the ability of the State of Samoa, as the representative of *tagata Samoa*, to guarantee, observe, promote and strengthen human rights. This is not only the case for Samoa, but for all Small Island Developing States in the Pacific region, who are vulnerable owing to geographical and socio-economic factors to the disproportionate adverse effects of climate change.
60. As the IPCC characterizes the harm in its Sixth Assessment Report:

“Widespread, pervasive impacts to ecosystems, people, settlements, and infrastructure have resulted from observed increases in the frequency and intensity of climate and weather extremes, including hot extremes on land and

¹⁹ *East Timor (Portugal v. Australia), Judgment*, ICJ Reports 1995, p.90, p. 102, para. 29. See also Human Rights Committee, *General Comment No. 31*, 26 May 2004, CCPR/C/21/Rev.1/Add.13 at para. 2.

in the ocean, heavy precipitation events, drought and fire weather (high confidence). Increasingly since AR5, these observed impacts have been attributed to human-induced climate change particularly through increased frequency and severity of extreme events. These include increased heat-related human mortality (medium confidence), warm-water coral bleaching and mortality (high confidence), and increased drought-related tree mortality (high confidence). Observed increases in areas burned by wildfires have been attributed to human-induced climate change in some regions (medium to high confidence). Adverse impacts from tropical cyclones, with related losses and damages, have increased due to sea level rise and the increase in heavy precipitation (medium confidence). Impacts in natural and human systems from slow-onset processes such as ocean acidification, sea level rise or regional decreases in precipitation have also been attributed to human induced climate change (high confidence).

Climate change has caused substantial damages, and increasingly irreversible losses, in terrestrial, freshwater and coastal and open ocean marine ecosystems (high confidence). The extent and magnitude of climate change impacts are larger than estimated in previous assessments (high confidence). Widespread deterioration of ecosystem structure and foundation, resilience and natural adaptive capacity, as well as shifts in seasonal timing have occurred due to climate change (high confidence) with adverse socioeconomic consequences (high confidence).”²⁰

61. The IPCC observes that small islands:

“[A]re increasingly affected by increases in temperature, the growing impacts of tropical cyclones, storm surges, droughts, changing precipitation patterns, sea level rise, coral bleaching and invasive species, all of which are already detectable across both natural and human systems (very high confidence).”²¹

²⁰ IPCC, 2022: Summary for Policymakers, in *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (“IPCC Sixth Assessment Report”)*, Cambridge University Press, at paras.B.1.1-B.1.2. (Hereafter, “**WGII Summary for Policy Makers**”.)

²¹ Mycoo, M., M.Wairiu, D. Campbell, V. Duvat, Y. Golbuu, S. Maharaj, J. Nalau, P. Nunn, J. Pinnegar, and O.Warrick, ‘Small Islands’, in IPCC Sixth Assessment Report at p.2046. (“**Small Islands: WGII**”).

62. The IPCC has also found that this “rise in weather and climate extremes has led to some irreversible impacts as natural and human systems are pushed beyond their ability to adapt. (high confidence)”.²²
63. Freshwater systems on small islands are exposed to dynamic climate change impacts and *are among the most threatened on the planet*.²³ Tropical cyclones are severely impacting small islands. Studies have shown that “heavy rainfall and intense wind speed of individual TCs were increased by climate change”.²⁴ In the IPCC’s words: “*Vulnerable communities who have historically contributed the least to climate change are disproportionately affected (high confidence)*”.²⁵ Samoa has set out some of the climate change impacts that it is experiencing in its Written Statement at paragraphs 15-83, which are consistent with the IPCC’s above observations.
64. Samoa wishes to illustrate how tropical cyclones, which are intensifying in the region affect GDP, and act as a socio-economic threat multiplier, by undermining a central means by which Samoa can guarantee and protect human rights. Tropical Cyclones Ofa (1990) and Val (1991) caused damage with cost estimates of approximately four times the GDP of Samoa.²⁶ In late 2012, Tropical Cyclone Evan caused significant damage to durable physical assets, amounting to damage valued at USD 110 million and production losses (and higher production costs) of USD 100 million.²⁷ It also caused 45% severe damage and an additional 30% moderate damage to agriculture area on the island of Upolu, one

²² WGII Summary for Policy Makers, at B.1 and Figure SPM.2

²³ Small Islands: WGII at p.2045.

²⁴ Small Islands: WGII, at FAQ 15.1, p.2095.

²⁵ IPCC, ‘Summary for Policymakers’, in *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* IPCC, Geneva, Switzerland, at A.2

²⁶ Written Statement of the Independent State of Samoa (“**Samoa Written Statement**”) at paragraph 35,

²⁷ Samoa Written Statement, 22 March 2024, at para. 36.

of two main islands in the Independent State of Samoa.²⁸ Adding all of the other adverse climate change impacts on-top, which one might describe as compounding, exacerbating and accelerating adverse effects, such as coastal territory loss, water lens damage, drought, agriculture losses and decline, sea level rise, ocean temperature rise and acidification (Samoa is experiencing some of the worst indicia here²⁹), coral bleaching, forest fires and the like, *climate change constitutes a human rights emergency for Samoa*.

65. Second, Samoa submits that the deprivation of its people's means of subsistence because of climate change impacts, by itself, constitutes an overlooked but severe infringement of the right of self-determination. Common Article 1.2 of the ICCPR and the ICESCR contains an absolute prohibition – “*In no case may a people be deprived of its own means of subsistence*”. For Samoa and *tagata Samoa*, the means of subsistence includes territory, land, seas, environment, ecology, biodiversity, water, food, housing, home, family and health at a minimum.
66. For Samoa “the means of subsistence” must also include culture, because our culture, customs and traditions are intimately intertwined with our territory, land, seas, environment and health. Like many other Pacific peoples, Samoans have relied on a stable climate and healthy environment from time immemorial for our physical, spiritual and cultural sustenance. Samoa's stable climate and healthy environment forms part of our traditional indigenous way of life. We have our own understanding of the seasons, which are now unpredictable due to the conduct. Our traditional economy, which is ‘subsistence’, is the primary way we obtain our food, as 90% of Samoan families fish for and grow their own foods,³⁰ which are also cultural staples and part of our cultural identity, such as *kalo* (taro). So important are our customs and traditions based on our customary

²⁸ Samoa Written Statement at para.58.

²⁹ Samoa Written Statement at para.29.

³⁰ Samoa Written Statement at para.51.

land, that we have enshrined the protection of customary land from alienation under the *Constitution of the Independent State of Samoa*.

C. International human rights and the conduct

67. As Samoa noted above, it rejects the position taken in a small number of written statements that international human rights obligations do not apply to climate change, either wholly or in part. Before Samoa sets out some of the ways in which human rights do apply to climate change, it will briefly address these positions.
68. The link between the environment, environmental degradation and international human rights has been well established and widely acknowledged for decades. The 1972 *Stockholm Declaration* stated as its first principle that humanity has “*the fundamental right to freedom, equality and adequate conditions of life in an environment of quality that permits a life of dignity and well-being*”.³¹ Moreover, from at least the 1980s, there has been a growing body of international human rights jurisprudence in United Nations treaty bodies, as well as regional human rights bodies, that have applied human rights to environmental degradation and, more recently, to climate change.³² Not surprisingly, many of the early decisions involved indigenous peoples, who are among the most vulnerable to environmental degradation and climate change.³³

³¹ UNGA Resolution 76/300 (emphasis added)

³² See the Inter-American Court of Human Rights (“**IACtHR**”), *The Environment and Human Rights: Advisory Opinion OC-23/17*, 15 November 2017 at pp. 20-24.

³³ See *Lubicon Lake Band v. Canada*, CCPR/C/38/C/167/1984; Human Rights Committee, *General Comment No 23: Article 27 (Rights of Minorities)*, CCPR/C/21/Rev.1/Add.5, 5 April 1994; Committee for the Elimination of Racial Discrimination (“**CERD**”), *General Comment No.23: Indigenous Peoples*, A/52/18, annex V, 18 August 1997; *Mary and Carrie Damn v. United States* (Early Warning and Urgent Action Procedure), Decision 1 (68), CERD/C/USA/DEC/1, 11 April 2006; *Angela Poma v. Peru*, CCPR/C/95/D/1457/2006; Committee for Economic, Social and Cultural Rights (“**CESCR**”), *General Comment No.21 (2009) on the right of everyone to take part in cultural life*, E/C.12/GC/21, 21 December 2009; *Oliveiria Pereira v. Paraguay*, CCPR/C/132/D/2552/2015; *Alisa Roy v. Australia*, CCPR/C/137/D/3585/2019; *Lars-Anders Agren et al. v. Sweden*, CERD/C/102/D/53/2013; *Yaku Sacha Perez Guartambel v. Ecuador*,

69. It is now well established, given this long association between environmental degradation and human rights, that international human rights obligations apply to climate change. There is already a significant body of practice at the United Nations,³⁴ regional³⁵ and domestic level affirming that human rights obligations are specifically applicable to the context of climate change and its multiple manifestations. For example, the Human Rights Committee has recognised that environmental degradation, climate change and unsustainable development as constituting the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.³⁶ In 2019, 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 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) recognised in a joint statement that States

CERD/C/106/D/61/2017; CESCR, *General Comment No.26 (2022) on land and economic, social and cultural rights*, E/C.12/GC/26, 23 January 2023;

³⁴ See, for example, Human Rights Council, Report of the Human Rights Council, UN Doc A/63/53 (28 March 2008); Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights, UN Doc A/HRC/10/61 (15 January 2009). UN Human Rights Committee, *Daniel Billy et al. v. Australia*, Comm. No. 3624/2019, UN Doc. CCPR/C/135/D/3624/2019, 22 September 2022, para. 8.7; UN Human Rights Committee, *Teitiota v. New Zealand*, Comm. No. No. 2728/2016, UN Doc. CCPR/C/127/D/2728/2016, 23 September 2020, para. 9.9; 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; *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; 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).

³⁵ *Case of Verein Klimaseniorinnen Schweiz and others v. Switzerland*, App. No. 53600/20, Judgment (Grand Chamber), 9 April 2024, paras. 410-411; IACTHR, *The Environment and Human Rights: Advisory Opinion OC-23/17*, 15 November 2017 at para.47; 'Climate Emergency : Scope of Inter-American Human Rights Obligations' Inter-American Commission on Human Rights (31 December 2021) Resolution No. 3/2021; African Commission on Human and Peoples' Rights, Resolutions 153(XLVI)09 (2009), 271(LV)2014 (2014), 342(LVIII)2016 (2016).

³⁶ Human Rights Committee, *General Comment No.36 (Article 6)*, 3 September 2019, CCPR/C/GC/36 at para.62.

have obligations under international law to protect harm from climate change. Failure to take measures to prevent foreseeable harm to human rights caused by climate change, or regulate activities contributing to such harm, could constitute a violation of States' human rights obligations.³⁷

70. At the regional level, the Inter-American Court of Human Rights, which is currently preparing an advisory opinion on climate change and impacts on human rights, has "*recognized the existence of an undeniable relationship between the protection of the environment and the realization of other human rights, in that environmental degradation and the adverse effects of climate change affect the real enjoyment of human rights*".³⁸ Similarly, the European Court of Human Rights has found that Switzerland's efforts to address climate change to be insufficient and to be a contravention under the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.³⁹
71. There have also been numerous judgments or decisions at a domestic level, including in the Pacific region, where the right to life has been recognised to protect a right to a healthy environment and that State inaction to address climate change may breach that right.⁴⁰

³⁷ 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.

³⁸ IACtHR, *The Environment and Human Rights: Advisory Opinion OC-23/17*, 15 November 2017 at para.47. Emphasis added.

³⁹ *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, European Court of Human Rights, Grand Chamber, Application No 53600/20, 9 April 2024.

⁴⁰ In *Morua v China Harbour Engineering Co (PNG) Ltd* [2020] PGNC 16; N8188 (7 February 2020), the Papua New Guinea National Court of Justice observed (at para.52): "*It should follow therefore that a failure of states to take adequate steps to address climate change may constitute a violation of the right to a healthy environment.*"

D. Specific human rights obligations concerning the conduct

72. Samoa wishes to address specific human rights which place obligations on States to protect the climate system and other parts of the environment and identify, without limitation, its position on how these rights apply to the adverse effects of climate change.

Right to life (UDHR, Article 3; ICCPR, Article 6)

73. The right to life is codified in the UDHR at Article 3. It is a norm of customary international law, creating obligations *erga omnes*.
74. The ICCPR guarantees at Article 6 that every human being has “*the inherent right to life*”. Article 3 of the UDHR states: “*Everyone has a right to life*”. Its “*effective protection*” is a prerequisite for the enjoyment of all other human rights and the content of which can be informed by other human rights.⁴¹
75. The right to life should not be interpreted in a restrictive manner and the protection of the right requires State parties to adopt positive measures to protect the right to life.⁴²
76. In *General Comment No.36*, the Human Rights Committee concluded the following about the right to life.

⁴¹ Human Rights Committee, *General Comment No.36 (Article 6)*, 3 September 2019, CCPR/C/GC/36, para.2.

⁴² Human Rights Committee, *General Comment No.36 (Article 6)*, 3 September 2019, CCPR/C/GC/36, para.3; Human Rights Committee, *Daniel Billy and others v. Australia*, 18 September 2023, CCPR/C/135/D/3624/2019 (“*Billy v. Australia*”), para.8.3; and Human Rights Committee, *Portillo Caceres et al v. Paraguay* (“*Caceres v. Paraguay*”) CCPR/C/126/D/2751/2016, para.7.3.

- a. It concerns “*the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity*”.⁴³
- b. The duty to protect life implies that State parties should take appropriate measures to address general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their life with dignity, including degradation of the environment; deprivation of indigenous peoples of their land, territory and resources, widespread hunger and malnutrition and extreme poverty and homelessness.⁴⁴
- c. The obligation of States to respect and ensure the right to life “*extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life*”.⁴⁵ State parties may be in violation of Article 6 even if such threats and situations do not result in loss of life.

77. The Human Rights Committee has further stated that the right to life applies to environmental degradation, climate change and unsustainable development. In *Norma Portillo Caceres v. Paraguay* (“*Caceres v. Paraguay*”), the Human Rights Committee found that Paraguay violated the authors right to life and to a life with dignity by failing to take appropriate measures to address general conditions in society. In that case, the conditions that the State failed to address was environmental pollution due to toxic pesticides. The Committee said:

“In the present case, the Committee is of the view that heavily spraying the area in question with toxic agrochemicals – an action which has been amply documented – poses a reasonably foreseeable threat to the authors’ lives given

⁴³ Human Rights Committee, *General Comment No.36 (Article 6)*, 3 September 2019, CCPR/C/GC/36, para.2.

⁴⁴ Human Rights Committee, *General Comment No.36 (Article 6)*, 3 September 2019, CCPR/C/GC/36, para.26.

⁴⁵ Human Rights Committee, *General Comment No.36 (Article 6)*, 3 September 2019, CCPR/C/GC/36, para.7.

that such large-scale fumigation has contaminated the rivers in which the authors fish, the well water they drink and the fruit, trees, crops and farm animals that are their source of food.”⁴⁶

Some of the authors were also hospitalised and one of the authors died prior to the publication of the Human Rights Committee’s views.

78. In the climate change context, the Human Rights Committee has taken the position that adverse effects of climate change can violate the right to life. In *Daniel Billy et al. v. Australia (“Billy v. Australia”)*, the Human Rights Committee stated that climate change may violate the right to life in circumstances where:
- a. an individual has faced or currently face adverse impacts on their own health; and/or
 - b. a real and reasonably foreseeable risk of being exposed to a situation of physical endangerment or extreme precarity that could threaten their right to life, including their right to life with dignity.⁴⁷
79. The authors in *Billy v Australia* did not put on evidence addressing these two criteria and, thus, the Human Rights Committee did not make a finding that the right to life had been violated in those circumstances.⁴⁸
80. Nevertheless, the Human Rights Committee noted that in certain places, the lack of alternatives to subsistence livelihoods may place individuals at a heightened risk of vulnerability to the adverse effects of climate change.⁴⁹ The Human Rights Committee further considered, given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a

⁴⁶ *Caceres v. Paraguay*, para.7.5.

⁴⁷ *Billy v Australia*, para.8.6.

⁴⁸ *Billy v Australia*, para.8.6.

⁴⁹ *Billy v Australia*, para.8.6.

country may become incompatible with the right to life before the risk is realised.⁵⁰

81. Samoa submits that the right to life applies to the conduct, the adverse effects of climate change and is inclusive of a right to life with dignity. Samoa notes the following examples illustrating how the adverse effects of climate change has violated the right to life in Samoa and across the Pacific region:

- a. Across our region, individuals have lost their lives during category 5 tropical cyclones that have broken historical records. For example, cyclone Winston making landfall in Fiji in 2016 was one of the deadliest storms in Fiji's history. It caused 44 deaths.⁵¹ Cyclone Pam, a category 5 tropical cyclone, in Vanuatu killed 11 people in 2015.⁵²
- b. Additionally, the increasing intensity of cyclones in our region, which the IPCC has said is an adverse effect of climate change, causes physical endangerment and extreme precarity when it makes landfall. As Samoa noted above, Cyclone Evan in 2011 destroyed 60% of Upolu's agriculture area, which was predominately for subsistence. Moreover, after Cyclone Evan, water supply infrastructure was completely damaged for 1 month,⁵³ leaving communities to rely on other water sources like springs and rivers, (noting that climate change also affects these types of water sources - see, subparagraph (h) below).

⁵⁰ *Billy v Australia*, para.8.7.

⁵¹ Australian Department of Foreign Affairs and Trade, <http://www.dfat.gov.au/sites/default/files/tropical-cyclone-winston-education-response-evaluation.pdf>.

⁵² Republic of Vanuatu Written Submission, Exhibit 38, SPC, Vanuatu Report, 5.

⁵³ Samoa Written Statement, para.45.

- c. Between 2010-2020, human mortality from floods and droughts and storms was *15 times higher in highly vulnerable regions*, including small islands, compared to regions with low vulnerability.⁵⁴
- d. Samoa is experiencing higher temperatures (already in the context of a tropical climate). There has been a 66% increase in annual warm days between 1960 and 2016, with a 20% decrease in cool nights across the same period⁵⁵. There is very little cooling architecture, such as air conditioning in Samoa.⁵⁶ Rising temperatures are linked to heat-related illnesses such as heat exhaustion and heatstroke. These conditions can result in dehydration, heat cramps, and, in severe cases, organ failure or death. Higher temperatures exacerbate cardiovascular and respiratory conditions. Vulnerable populations, including the elderly, children, and those with pre-existing health conditions, face heightened susceptibility to health impacts of rising temperatures.⁵⁷
- e. Increased temperatures pose risks to pregnant individuals, potentially leading to adverse birth outcomes such as preterm birth, low birth weight, and developmental issues in infants.⁵⁸
- f. Temperature increases in Samoa will most likely reach the maximum heat tolerance thresholds of crops and induce heat stress, wilting, and crop failure, especially in traditional staple crops.⁵⁹ Models indicate that, in tropical and subtropical regions, temperature increases of only 1-2C

⁵⁴ WGII Summary for Policy Makers, at para.B.2.4 (*high confidence*).

⁵⁵ Samoa Written Statement at para.49.

⁵⁶ *Ibid.*

⁵⁷ See, Professor Tan Sri Dr. Jemilah Mahmood, *Expert Report on Health Impacts of Climate Change*, Exhibit 38 to the Written Statement of the Melanesian Spearhead Group (“**MSG Health Expert Report**”) at para.1.

⁵⁸ *Ibid.*

⁵⁹ Samoa Written Statement, para.56.

are likely to depress yields as heat tolerance levels are exceeded.⁶⁰ Current measurements indicate that this temperature increase has already been exceeded.⁶¹ Research on repeated exposure to extreme weather events or the adverse effects of climate change in Samoa and the Pacific region is in its infancy. However, a 2020 study of Tuvalu found that a “high proportion of participants are experiencing psychological distress that reportedly cause them impairment in one of more areas of daily life.”⁶²

- g. More frequent and intense extreme weather events also manifest in severe mental health issues. According to the American Psychiatric Association, “the mental health consequences of single disasters for most people include mild stress and insomnia, high-risk coping behaviour such as increased alcohol use, and mental disorders such as depression, anxiety and post-traumatic stress”.⁶³
- h. As noted above, freshwater systems in small islands are among the most threatened on the planet. Samoans draw one third of their drinking water from groundwater sources.⁶⁴ Salination from sea level rise entering groundwater systems has been referred to as a ‘slow poison’’. High concentrations can lead to hypertension, exacerbating pre-existing health conditions, puts the elderly at risk, and increases hospital visits for cardiovascular disease and abdominal pain. Elevated salinity in drinking water has been linked to increased risk of pre-eclampsia and

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² See, K.E.Gibson, J.Barnett, N.Haslam, I.Kaplan, “The mental health impacts of climate change: Findings from a Pacific Island atoll nation”, *Journal of Anxiety Disorders*, Vol 73, June 2020.

⁶³ See MSG Health Expert Report, para.7.

⁶⁴ Samoa Written Statement, para.46.

gestational hypertension, infant mortality, cholera outbreaks, renal disease, cirrhosis, and skin and diarrhoeal diseases.⁶⁵

- i. Climate change causes significant vector-borne disease to spread, such as dengue fever (a disease that is prevalent in Samoa). Warmer climates extend the disease transmission season, and temperature standing water. Severe cases of dengue fever can be fatal or involve shock, severe bleeding or severe organ impairment.⁶⁶

82. Samoa also notes CERD's approach that "*realization of indigenous peoples' land rights may also be a prerequisite for the exercise of the right to life, such as, to 'prevent their extinction as a people'*".⁶⁷ Samoa submits that climate change impacts leading to partial or total territorial loss in the case of indigenous peoples or similarly situated peoples may present an existential threat to the self-determination of the peoples of Samoa and other climate vulnerable peoples.

The right not to be subjected to inhuman and degrading treatment (UDHR, Article 5; ICCPR, Article 7)

83. The right not to be subjected to inhuman and degrading treatment is protected under the UDHR at Article 5 and the ICCPR at Article 7. It is to protect "*both the dignity and the physical and mental integrity of the individual*"⁶⁸ and it allows of no limitation.⁶⁹

84. The Human Rights Committee observed in *Ioane Teitiota v. New Zealand* ("*Teitiota*") that "*without robust national and international efforts, the effects of*

⁶⁵ See MSG Health Expert Report, para.4.

⁶⁶ See MSG Health Expert Report, para.5.

⁶⁷ Committee for the Elimination of Racial Discrimination, *Lars-Anders Agren et al v. Sweden*, CERD/C/102/D/54/2013 at para.6.6

⁶⁸ Human Rights Committee, *General Comment No.20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* (10 March 1992), CCPR A/44/40 at para.2.

⁶⁹ *Ibid*, para.3.

*climate change in receiving States may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant”.*⁷⁰

85. The Committee recognised that the adverse effects of climate change may violate the right not to be subjected to degrading and inhuman treatment even in circumstances which fall short of a violation of the right to life.⁷¹
86. This possibility has already been recognised at the domestic level. In *Matsipane Mosetlhanyane v The Attorney General*, a domestic court in Botswana found a violation of the protection against inhuman and degrading treatment enshrined in Botswana’s constitution where an indigenous community was deprived by the government of a readily available source of water in an arid area. According to the court, this constituted degrading treatment.⁷²
87. In Samoa’s view, State actions and omissions that exacerbate the suffering of individuals and groups in circumstances of environmental hardship and degradation may be characterizable as inhuman and degrading treatment, and so may amount to a human rights violation. The Human Rights Committee when deciding against Australia’s argument that Australia’s mitigation measures were inadmissible, *ratione materiae*, because they lay outside the scope of the ICCPR, observed that Australia was both a significant contributor to greenhouse gas emissions and had the capacity to address those emissions.

“With respect to mitigation measures, although the parties differ as to the amount of greenhouse gases emitted within the State party’s territory and as to whether those emissions are significantly decreasing or increasing, 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 gases have been produced. The Committee notes that the State party

⁷⁰ Human Rights Committee, *Ioane Teitiota v. New Zealand*, CCPR/C/127/D/2728/2016 at para.9.11.

⁷¹ See also *Caceres v. Paraguay*, para.7.6.

⁷² See, *Matsipane Mosetlhanyane v The Attorney General*, Court of Appeal of the Republic of Botswana Civil Appeal No.CACLB-074-10 at paras.19-22 and para 8 for a description of the impact of the lack access to a readily available water source on the community.

*ranks 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 and 2 of the Optional Protocol and therefore that it is not precluded from examining the present communication.*⁷³

88. Moreover, the continuation and expansion of fossil fuels (enabled and sponsored by States through subsidies and energy policies) by States that have already caused significant harm is egregious.

Cultural rights (UDHR Articles 22 and 27; ICCPR Article 27; ICESCR Article 15)

89. Those rights which protect the cultural life of individuals and groups – that is, the rights of minorities under Article 27 of the ICCPR and the right of everyone to take part in cultural life under Article 15 of ICESCR, are also affected by climate change. Fulfilment of the rights contained in Article 15 is an obligation owed by States to “everyone”. These articles mirror and affirm the cultural rights that are also enshrined in the UDHR at Articles 22 and 27.
90. The cultural rights of indigenous peoples protect a way of life that is closely associated with traditional lands, territories, and resources, and that the protection of this right’ “is directed towards ensuring the survival and continued development of...cultural identity”.⁷⁴ Samoa submits that such similar cultural protections apply to all peoples whose way of life is similarly associated with traditional lands, territories and resources, including Samoans.

⁷³ *Billy v. Australia*, para.7.10.

⁷⁴ *Alisa Roy v Australia*, CCPR/C/137/D/3585/2019 at para.8.3. See also, CERD, *General Comment No.23: Indigenous Peoples* (08/18/1997); *Oliveira Pereira et al. v. Paraguay*, CCPR/C/132/D/2552/215; *Angela Poma v. Peru (“Poma v. Peru”)*, CCPR/C/95/D/1457/2006; *Lubicon Lake Band v. Canada*, CCPR/C/38/D/167/1984; *Mahuika et al. v. New Zealand*, CCPR/C/70/D/547/1993; *Lars-Anders Agren et al. v. Sweden*, CERD/C/102/D/53/2013; *Mary and Carrie Dann v. United States* (Early Warning and Urgent Action Procedure), Decision 1 (68), CERD/C/USA/DEC/1; *Yaku Sacha Perez Guartambel v. Ecuador*, CERD/C/106/D/61/2017; *Ioane Teitiota v. New Zealand*, CCPR/C/127/D/2728/2016; *Daniel Billy and others v. Australia*, CCPR/C/135/D/3624/2019.

91. Around 90 per cent of Samoan families participate in a traditional economy, which has been misleadingly called “subsistence”, but does form the actual basis of people’s subsistence, sustenance, nutrition, gifts and cultural exchanges. It is also an important way for Samoan families to bring produce to market for cash. Most of the land in Samoa is held collectively by *aiga* (extended family) under custom. So important is customary land to *tagata Samoa* (Samoans) that, upon gaining independence in 1962, Samoans protected customary land in the Constitution of the Independent State of Samoa, and this land cannot be alienated. *Fanua* (land) is the source, foundation and means of the Samoan traditional economy, culture, governance, including the *fa’a matai*, our chiefly system. Land is, in other words, the basis of sustenance in every sense.
92. A people’s or a group’s “*cultural values and rights associated with ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life*”.⁷⁵ CERD has also recognised that this close tie to land must be recognised and understood as the fundamental basis of indigenous peoples’ cultures, spiritual life, integrity and economic survival. The relationship of indigenous peoples to the land contains a material and spiritual element protected under international law, which includes an ability to preserve their cultural legacy and transmit it to future generations. Therefore, the Human Rights Committee has defined the enjoyment of culture as protecting the “*inalienable right*” of indigenous peoples to enjoy their traditional territories and natural resources.⁷⁶
93. The test for a violation of cultural rights is when an act or omission has caused substantial interference with or substantial impact on culture.⁷⁷ The protection

⁷⁵ *Alisa Roy v Australia (“Roy v. Australia”)* CCPR/C/137/D/3585/2019 at para.8.6.

⁷⁶ *Roy v Australia* at para.8.3 (emphasis added)

⁷⁷ See, *Daniel Billy and others v. Australia*, CCPR/C/135/D/3624/2019 at para.8.14.

from substantial interference with culture ensures the *integrity* of culture and cultural identity.⁷⁸ For example, in *Angela Poma v. Peru*, the diversion of water which affected the author's ability to raise llamas and alpacas was destroyed, leaving her in poverty. While the Human Rights Committee recognised the right of the State to economic development, it could not be at the expense of the author's culture.⁷⁹

94. Measures that fail to protect indigenous peoples and other similarly situated peoples from the adverse effects of climate change can violate cultural rights. In *Billy v. Australia*, the Human Rights Committee found that Australia's failure to adopt timely adaptation measures to protect the lands and islands of the Torres Strait Islander authors from the adverse effects of climate change violated Article 27:

"The Committee considers that the climate impacts mentioned by the authors represent a threat that could have reasonably been foreseen by the State party, as the authors' community members began raising the issue in the 1990s. While noting the completed and ongoing sea wall construction on the islands where the authors live, the Committee considers that the delay in initiating these projects indicates an inadequate response by the State party to the threat faced by authors...[T]he Committee considers that the information made available to it indicates that the State party's failure to adopt timely adequate adaptation measures to protect the authors' collective ability to maintain their traditional way of life and to transmit to their children and future generations their culture and traditions and use of land and sea resources discloses a violation of the State

⁷⁸ *Poma Poma v. Peru* at para. 7.4: "The Committee recognizes that a State may legitimately take steps to promote its economic development. Nevertheless, it recalls that economic development may not undermine the rights protected by article 27. Thus the leeway the State has in this area should be commensurate with the obligations it must assume under article 27. The Committee also points out that measures whose impact amounts to a denial of the right of a community to enjoy its own culture are incompatible with article 27, whereas measures with only a limited impact on the way of life and livelihood of persons belonging to that community would not necessarily amount to a denial of the rights under article 27".

⁷⁹ *Ibid.*

party's positive obligation to protect the authors' right to enjoy their minority culture."⁸⁰

95. With reference to paragraphs 15-83 in Samoa's Written Statement, the conduct is having a profound impact on Samoa's culture, which is intertwined with Samoa's environment.
96. In this context, Samoa further argues that cultural rights also protect the cultural aspects of the current environment and therefore extend to protect culturally significant components of the environment, such as precious ecologies, waterbodies, totems (i.e., other species, whether plant, insect, bird or animal) that are adversely impacted by climate change, where such an impact is substantial. The threshold of substantial has materialised.

The right to privacy, family and home (UDHR, Article 12; ICCPR, Article 17)

97. Article 17 of the ICCPR guarantees that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation".
98. The right to family and home has been linked to territory, environment and culture, such as to crops, fruit trees, marine resources, livestock, water resources, villages, burial lands, traditional gardens, plantations, fishing, foraging and family farming.⁸¹
99. Article 17 protects against unlawful and arbitrary acts of interference, obliging the State to refrain from arbitrary interference. It also imposes positive obligations on State parties "to adopt positive measures that are needed to

⁸⁰ *Billy v. Australia*, CCPR/C/135/D/3624/2019 at para.8.14.

⁸¹ See, *Oliveira Pereira et al. v. Paraguay*, CCPR/C/132/D/2552/215; *Caceres v. Paraguay* para.7.7-7.8; *Billy v Australia*.

ensure the effective exercise of the rights under article 17 in the presence of interference by the State authorities and physical or legal persons”.⁸²

100. The threshold for violation from conduct not attributable to the State is foreseeability and serious interference.⁸³

101. The Human Rights Committee has found that Article 17 applies to the adverse effects of climate change.

“The Committee consider that when climate change impacts, including environmental degradation on traditional Indigenous lands in communities where subsistence and humanitarian aid are unavailable, have direct repercussions on the right to one’s home, and the adverse consequences of those impacts are serious because of their intensity or duration and the physical and mental harm that they cause, the degradation of the environment may then adversely affect the well-being of individuals and constitute foreseeable and serious violations of private and family life and home.”⁸⁴

102. In *Billy v. Australia*, the Human Rights Committee found there was violation of Article 17 due to Australia’s failure to adopt timely climate change adaptation measures. In coming to this view of a violation of Article 17, the Human Rights Committee affirmed that the reduction of marine resources used for food loss of crops and fruit trees on land on which the authors live and grow crops as all elements that constitute components of the authors private life, family and home. It noted the way that the authors lives have been adversely affected by flooding and inundation of their villages and ancestral burial lands, destruction and withering of their traditional gardens through salinification caused by flooding or seawater ingress and decline of nutritionally and culturally important marine species and associated coral bleaching and ocean

⁸² *Billy v Australia*, para.8.10.

⁸³ *Billy v Australia*, para.8.9.

⁸⁴ *Billy v Australia*, para.8.9.

acidification.⁸⁵ The Human Rights Committee also noted the emotional and familial impact on the authors.

“The Committee further notes the authors’ allegations that they experience anxiety and distress owing to erosion that is encroaching on their homes in their communities and that the upkeep and visiting of ancestral graveyards is associated with the very heart of their culture, which requires experiencing feelings of communion with deceased relatives.”⁸⁶

103. With reference to paragraphs 15-83 in Samoa’s Written Statement, the conduct is having a profound impact on Samoans private life, family and home, which is intertwined with Samoa’s environment.

The right to health (UDHR, Article 25.1; ICERD, Article 5(e)(iv); ICESCR, Article 12)

104. Article 12 of the ICESCR guarantees “the right to the highest attainable standard of physical and mental health” (“**the right to health**”). Article 25.1 of the UDHR protects the right of health through ensuring a standard of living conducive to health and well-being (Everyone “has the right to a standard of living adequate for the health and well-being of himself and family, including food”).

105. In the CESCR’s words, health is fundamental human right “indispensable for the exercise of other human rights”⁸⁷. It extends to the “underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and working conditions, and a healthy environment”.⁸⁸

⁸⁵ *Billy v. Australia*, para.8.12.

⁸⁶ *Billy v. Australia*, para.8.12.

⁸⁷ CESCR *General Comment No.14: The Right to the Highest Attainable Standard of Health (Art.12)* (11 August 2000) CESCR E/C.12/2000/4 para.1.

⁸⁸ *Ibid*, para.4 (emphasis added).

106. Further, while there is a progressive realisation aspect to the right to health, States are also under obligations to respect and protect the right to health. Respect means that it cannot interfere with an individual's, or collective's, health. Protect means that it must ensure that the activities of third parties also do not interfere with an individual, or collectives, right to health.⁸⁹

107. The CESCR has specifically recognised a collective dimension of health for Indigenous Peoples, which requires States to refrain from measures dislocating indigenous peoples from their territories or which severs the symbiotic relationship between indigenous peoples and their environment.

*"The Committee notes that, in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this respect, the Committee considers that development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has deleterious effect on their health."*⁹⁰

108. For Samoans as with other Pacific peoples in our region health and well-being are holistically inclusive of physical, mental, social and spiritual dimensions as well as other cultural and environmental factors. As the CESCR also notes, relationship to territories, land and environment are essential for Indigenous health and well-being, which is equally applicable to Samoans.

109. The symbiotic nature of our relationships with our lands are embedded in *gagana Samoa*, the Samoan language. Samoa explained in its written Statement at paragraph 16 that the *faasinomaga* is the basis of Samoans sense of belonging, which is symbiotic (as sharing our identities with the cosmos, the sky, the land, the sea and with our nation, our village, our *aiga* or family). The Samoan word for land, *fanua* is also the word for placenta as indicative of this symbiotic relationship between culture, health and territories, land, environment *and*

⁸⁹ Ibid, para.33.

⁹⁰ Ibid, para.27.

reproductive health. The word for soil (*eleele, palapala*) is the same word for blood.

The right to an adequate standard of living (ICESCR, Article 11)

110. Article 11.1 of the ICESCR recognises the “right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”.
111. It is the source of the right for food (discussed below at paragraphs 115 - 122); the right to water (discussed below at paragraphs 123 - 29).
112. The CESCR considers that the notion of “adequacy” is “to a large extent determined by prevailing social, economic, cultural, climactic, ecological and other conditions”.⁹¹ While adequacy entails a progressive realisation through the obligation of States to fulfil the Article 11 right, there is a presumption of non-regression.⁹² There are also obligations to *respect* and *protect* all matters that constitute an adequate standard of living.
113. As a right that is essential to both the right to development and the right to self-determination, the CESCR has interpreted the right in the light of “sustainability”. Thus, the right to an adequate standard of living when construed in reference to sustainability - incorporates the notion of long-term availability and accessibility for both “present and future generations”. Sustainability also includes environmental sustainability.⁹³ *These are essentially pre-conditions underlying the right to adequate standard of living.*

⁹¹ CESCR, *General Comment 12: The right to adequate food (art.11)*, E/C.12/1999/5, 12 May 1999, at para.6.

⁹² *Ibid*, at para.7.

⁹³ *Ibid*, at para.7.

114. Adequacy and sustainability are key aspects of the right to water and the right to food, as discussed below and which Samoa submits as essential integers of these rights.

The right to food (UDHR, Article 25; ICESCR, Article 11)

115. The right to food is protected under Article 11 of the ICESCR and UDHR, Article 25. It is part of the broader right to an adequate standard of living at Article 11.1 (*“including adequate food”*) but is also a standalone right. Article 11.2 recognises that *“more immediate and urgent steps may need to be taken to ensure the ‘fundamental right of everyone to be free from hunger and malnutrition’*”.⁹⁴

116. Samoa submits that the right to food must be construed in relation to right to self-determination in common Article 1 of the ICCPR and ICESCR. The right to food is a pre-condition to the right to self-determination, as the absolute injunction in common Article 1.2 affirms (*“in no case may a people be deprived of its own means of subsistence”*).

117. The core content of the right to food implies:

The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture;

The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other rights.⁹⁵

118. Samoa submits that States take on the obligations to “respect”, “protect” and “fulfil” the right to food. This means:⁹⁶

⁹⁴ Ibid at para.1.

⁹⁵ Ibid at para.8.

⁹⁶ Ibid at para.15.

- a. Respect – existing access to adequate food requires State parties not to take any measures that result in preventing such access.
- b. Protect – requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food.
- c. Fulfil – States must proactively engage in activities intended to strengthen people’s access to and utilisation of resources and means to ensure their livelihood, including food security.

119. The obligation to fulfil the right to food is to be realised progressively, but the obligations to respect and protect prohibit interference with and deprivation of food by States or third parties and the obligation to protect requires States to take positive measures.⁹⁷ The IPCC has highlighted that observed “climate change is already affecting food security through increasing temperatures, changing precipitation patterns, and greater frequency of some extreme events (*high confidence*)”.⁹⁸ Moreover, food security will be increasingly affected by projected future climate change.⁹⁹ Given increasing extreme events and interconnectedness, risks of food system disruptions are growing.¹⁰⁰

120. As Samoa set out in its Written Statement at paragraphs 54-64, Samoans are subsistence peoples, whose food systems are dependent on their relationship with their customary lands. An overwhelming majority of Samoan families - 90% - are involved in some agricultural and fishing activities. The resilience and

⁹⁷ Ibid, para.15.

⁹⁸ Mbow, C., C. Rosenzweig, L. G. Barioni, T. G. Benton, M. Herrero, M. Krishnapillai, E. Liwenga, P. Pradhan, M. G. Rivera-Ferre, T. Sapkota, F. N. Tubiello, Y. Xu, 2019: Food Security. In: *Climate Change and Land: an IPCC special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems* [P. R. Shukla, J. Skea, E. Calvo Buendia, V. Masson-Delmotte, H.-O. Pörtner, D. C. Roberts, P. Zhai, R. Slade, S. Connors, R. van Diemen, M. Ferrat, E. Haughey, S. Luz, S. Neogi, M. Pathak, J. Petzold, J. Portugal Pereira, P. Vyas, E. Huntley, K. Kissick, M. Belkacemi, J. Malley, (eds.)]. <https://doi.org/10.1017/9781009157988.007> Special Report on Climate Change and Land, para.5.2.2.

⁹⁹ (*High confidence*) Ibid at paras.5.2.3-5.2.4.

¹⁰⁰ (*High confidence*), Ibid.

healthiness of our lands and seas and their sustainability is critical – necessary and essential - to the survival and well-being of *tagata Samoa* and the generations to come. Climate change is adversely affecting our food security. The impacts of climate change have been reported by farmers, fishers and other key members in the traditional economy. For example, numerous effects of climate change and variability – cyclones, flash floods, high temperatures and long dry periods - have made agricultural production increasingly challenging. Cyclone Evan severely impacted 45 per cent and moderately impacted 30 per cent of agricultural area in Upolu, one of the two major islands constituting Samoa.

121. Moreover, we are at the threshold of tolerance for our food systems. As we stated in the Written Submission at paragraph 56:

“Temperature increases will most likely reach the maximum heat tolerance thresholds of crops and induce heat stress, wilting, and crop failure, especially in traditional staple crops. Models indicate that, in tropical and subtropical regions, temperature increases of only 1-2C are likely to depress yields as heat tolerance levels are exceeded. Current measurements in Samoa indicate that this temperature increase has been exceeded.”

The IPCC observes: declines in yields and crop suitability are projected under higher temperatures, especially in tropical and semi tropical regions. Heat stress reduces fruit set and speeds up development of annual vegetables, resulting in yield losses, impaired product quality, and increasing food loss and waste.¹⁰¹ Some scientific studies reviewed by the IPCC has *“demonstrated a strengthening relationship between observed climate variables and crop yields that indicate future expected warming will have severe impacts on food production.”*¹⁰²

¹⁰¹ Ibid, para 5.2.2.

¹⁰² Ibid, para 5.2.2.1.

122. This does not even consider all the adverse effects on ecological services, such as reefs. 1.5C (which is predicted will be reached in 4.5 years)¹⁰³ of global warming will result in the loss of 70-90% of reef-building corals and 99% of coral is projected to perish at 2C,¹⁰⁴ which is vital to our fisheries (food), for example. There will be significant loss of territory, which will destroy gardens and plantations.¹⁰⁵ While these are factors are euphemistically called compounding factors, which interact with and exacerbate each other, these compounding facts are representative of large-scale and gross human rights violations.

The right to water (ICESCR, Article 11)

123. Water is essential to life and the preservation of life. It is protected under the right to an adequate standard of living under Article 11, ICESCR. While water is not mentioned in Article 11, the right to an adequate standard of living is inclusive, using “including” to identify the types of matters protected under the right. Thus, water has been identified and can be treated as a standalone right.

124. Samoa submits that the right to water must also be construed in relation to right to self-determination in common Article 1 of the ICCPR and ICESCR. The right to water is a pre-condition to the right to self-determination, as the absolute

¹⁰³ Lamboll, R.D., Nicholls, Z.R.J., Smith, C.J. et al, ‘Assessing the size and uncertainty of remaining carbon budgets’, (2023) 13 *Nat. Clim. Chang* 1360–1367 . The authors predict that 1.5C global warming will be reached 6 years from Jan 2023.

¹⁰⁴ Hoegh-Guldberg, O., D. Jacob, M. Taylor, M. Bindi, S. Brown, I. Camilloni, A. Diedhiou, R. Djalante, K.L. Ebi, F. Engelbrecht, J.Guiot, Y. Hijioka, S. Mehrotra, A. Payne, S.I. Seneviratne, A. Thomas, R. Warren, and G. Zhou, 2018: Impacts of 1.5°C Global Warming on Natural and Human Systems. In: *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* [Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T.Maycock, M.Tignor, and T. Waterfield (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, pp. 175-312. <https://doi.org/10.1017/9781009157940.005>, at Box 3.4, p.230.

¹⁰⁵ Ibid.

injunction in common Article 1.2 affirms (“in no case may a people be deprived of its own means of subsistence”).

125. The CESCR has observed that States have international co-operation obligations with respect to the right to water, and this also reflects Samoa’s position.

“To comply with their international obligations in relation to the right to water, States parties have to respect the enjoyment of the right in other countries. International cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. Any activities undertaken within the State party’s jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction.”¹⁰⁶

126. Our water sources are culturally significant, reflecting its role as a pillar of life. For example, the name of a spring in the *nu’u* or village Falefa, Upolu is *Tafaaola*, meaning: “the sprinkling of water to restore life”, which also refers to its origin from a gifted coconut that was pierced and its water sprinkled into the spring.¹⁰⁷ As the Special Rapporteur on the rights to water and sanitation points out in indigenous and ancestral cultures “water is not considered or managed as a resource but is considered to be part of an interconnected whole that encompasses other natural resources and living beings, so that its management is based on an integrated territorial vision and deep respect and care...”.¹⁰⁸ The Special Rapporteur signals the need to shift to an ecosystem approach towards the right to water,¹⁰⁹ something that Samoa supports as it infuses in international

¹⁰⁶ CESCR, *General Comment No.15: The Right to Water (Arts.11 and 12 of the Covenant)*, E/C.12/2002/11 at para.31 (“**General Comment: Right to Water**”). Emphasis added.

¹⁰⁷ See, Former Samoan Prime Minister and Head of State, Tui Atua Tupua Tamasese Ta’isi Efi, “Water and the Samoan Indigenous Reference” in Tamasailau M. Suaalii-Sauni, I’Uogafa Tauagalau, Toilau Nin Kirifi-Alai, Naomi Fuamatu (eds.), *Su’esu’e Manogi: In Search of Fragrance: Tui Atua Tupua Tamasese Ta’isi Efi and the Samoan Indigenous Reference* (Wellington: Huia Publishers, 2018), kindle version, p.335.

¹⁰⁸ Report of the Special Rapporteur on the human rights to safe drinking water and sanitation, *Human rights to safe drinking water and sanitation of indigenous peoples: state of affairs and lessons from ancestral cultures*, A/HRC/51/24, para.19.

¹⁰⁹ *Ibid.*

human rights law a more holistic lens. For example, it also focuses attention on the role of rain in replenishing water sources, the impact of droughts and dry spells (something that Samoa has been experiencing)¹¹⁰, its ecological home for other species, its role as essential to health and life of all living beings and the cultural aspects of water. It also reinforces the applicability of human rights to conduct (noting in particular *hydrosphere* as within the meaning of climate system). In the IPCC's words – "Human and ecosystem vulnerability are interdependent".¹¹¹

127. States are required to fulfil, respect and protect the right. Violations of the obligation to respect follow from the State party's interference (direct or indirect) with the right to water.¹¹² Violations of the obligation to protect follows from the failure by a State to take all necessary measures to safeguard within their jurisdiction infringements of the right to water by third parties.¹¹³
128. Further, Samoa submits that States are responsible for preserving water resources so they can be available for future generations.¹¹⁴ This is a position that the CESCR has taken, conducting: "The manner of the realization of the right to water must also be sustainable, ensuring that the right can be realized for present and future generations".¹¹⁵
129. The conduct violates the right to protect and respect water in our region as well as the international co-operation obligations on States. As the IPCC has said, freshwater systems on small islands "are among the most threatened on the

¹¹⁰ Samoa Written Statement, paras.38-39.

¹¹¹ (High confidence), IPCC AR6, Working Group II – Impacts, Adaptation and Vulnerability, "Headline Statements from the Summary for Policymakers" at B.2.

¹¹² General Comment: Right to Water, para.21.

¹¹³ Ibid, para.23.

¹¹⁴ Ibid, para.11.

¹¹⁵ Ibid.

planet”.¹¹⁶ Samoa has also set out all the water impacts at the following places in its Written Statement (at paragraphs 44-47).

Right to a healthy environment

130. Samoa submits that the right to a clean, healthy and sustainable environment (“**the right to a healthy environment**”) is a standalone right whose time has come. It *has crystallised* as a human right in customary international law as well as a standalone *implied right* under the ICCPR, ICESCR (and the CRC, which Samoa will discuss below at paragraphs 141 - 152). The right to a healthy environment includes a right to a safe climate as part of its substantive content. Samoa submits that the conduct violates the right to a healthy environment, including the right to a safe climate, which the right to a healthy environment protects. Further, *individuals and peoples, particularly in vulnerable States have a right to be protected from the adverse effects of climate change as these effects have already materialised.*

131. First, with respect to its customary international law status, Samoa adopts and repeats Vanuatu’s evidence supporting the crystallisation of this emergent human right in customary international law (see, paragraph 380 of Vanuatu’s Written Submission). This includes recognition of the right to a healthy environment “*as a human right*” in UNGA (2022) and UN Human Rights Council (2021) resolutions.¹¹⁷ Samoa adds that as of April 2024, 161 out of 180 countries have now recognised and adopted the right to a healthy environment through constitutions, legislation and regional treaties.¹¹⁸

¹¹⁶ Small Islands: WGII at p.2045.

¹¹⁷ *The human right to a clean, healthy and sustainable environment*, UN General Assembly Resolution 76/300 adopted 28 July 2022, A/RES/76/300 and *The human right to a clean, healthy and sustainable environment*, Human Rights Council Resolution 48/13, adopted 8 October 2021, A/HRC/RES/48/13.

¹¹⁸ Special Rapporteur on the Human Right to a Clean, Healthy and Sustainable Environment, David R. Boyd, *The Right to a Healthy Environment: A User’s Guide*, p.8.

132. Small island developing States, including Samoa, have strongly supported the UN resolutions related to a healthy environment.¹¹⁹ A healthy environment is embedded in Samoan traditional cultural praxis and is a requirement for subsistence livelihoods, thus a clean, healthy, sustainable environment is an underlying foundation for this kind of way of life.¹²⁰ Samoa notes that many of the witness or impact statements and expert statements/reports filed written statements from the Pacific region which evidence traditional cultural practices that are founded on or support a healthy environment and environmental sustainability across the Pacific. This includes the use of customary prohibitions to protect areas, such as reefs when fish are spawning.
133. Second, the right to a healthy and sustainable environment also already exists as a derived or implied right under the ICCPR and ICESCR and is an obligation on State parties to those treaties. It is a pre-condition for most, if not all, universal human rights protected under those treaties or is otherwise within the necessary scope of their protection. Samoa argues that the implied nature of the right is also necessary under the principle of effectiveness to ensure the effectiveness of the human rights guaranteed under the ICCPR and ICESCR (and this has been explicitly acknowledged in relation to many of the rights already discussed above). These include:
- a. *Right to life* – The right to life with dignity plainly protects the conditions of life, including the environment from degradation. In other words, severe environmental degradation can adversely affect the effective

¹¹⁹ Ibid, p.8.

¹²⁰ Tamatoa Bambridge (ed), *The Rahui: Legal pluralism in Polynesian traditional management of resources and territories*, (Canberra: ANU Press, 2016) <http://doi.org/10.22459/TR.03.2016>; Tui Atua Tupua Tamasese Ta'isi efi, "Samoa Jurisprudence and the Samoan Land and Titles Court: The Perspective of the Litigant", Chapter 14; "Bio-ethics and the Samoan Indigenous Reference", Chapter 15 in Tamasailau M. Suaalii-Sauni, I'Uogafa Tauagalau, Toilau Nin Kirifi-Alai, Naomi Fuamatu (eds.), *Su'esu'e Manogi: In Search of Fragrance: Tui Atua Tupua Tamasese Ta'isi Efi and the Samoan Indigenous Reference* (Wellington: Huia Publishers, 2018).

enjoyment of the right to life. The Human Rights Committee has recognised that environmental degradation, climate change and unsustainable development as constituting the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.

- b. *Right to privacy, family and home* – In *Billy v Australia*, the Human Rights Committee considered that ‘home’ included the environment, seas, territories, marine resources, gardens, plantations of the Torres Strait Islander authors and, in this respect, this right implicitly (or perhaps, explicitly) protects a healthy environment. While the threshold of harm is foreseeable and serious interference, this threshold will be met earlier in the case of peoples whose way of life is intertwined with their environments. However, this right is a universal right not limited to the protection of a minority culture. Thus, while it protects the right to a healthy environment for Indigenous Peoples or similarly situated peoples, it protects the rights of all individuals in circumstances where environmental harm seriously interferes with their private, family and home life. In *Caceres v. Paraguay*, the Human Committee found that pollution, in this case toxic pesticides, causing environmental degradation (that is, adversely affecting the healthiness or safety of the environment), could also violate the right to privacy, family and home. In the words of the Human Rights Committee, “[w]here pollution has direct repercussions on the right to one’s private and family life and home, and the adverse consequences of that pollution are serious because of its intensity or duration and the physical or mental harm that it does, then the degradation of the environment may adversely affect the well-

being of individuals and constitute violations of private and family life and the home".¹²¹

- c. *Right to health* – The right to health explicitly protects a healthy environment and protects against environment degradation, including the adverse effects of climate change. When applied to the situation of indigenous peoples and other similarly situated peoples, the health of the individual is linked to health of society as a whole and has a collective dimension. The right to health in this context requires protection of territories, environment and sources of nutrition and to ensure that the symbiotic relationship with their lands is not undermined or severed.
- d. *The cultural rights of indigenous peoples and others whose way of life intersects with the environment* – A right to a healthy environment can be characterised as the other side of the same coin of cultural rights for Indigenous Peoples, as cultural rights protects territories, lands, resources, culturally significant species (plant, animal, fish, insect, etc.), where an act or omission has a substantial impact on culture.
- e. *Right to self-determination* – Among other things, protects the means of subsistence. Samoa has argued that means is to be construed as the environment at a minimum.
- f. *Right to food* – For this right, the requirement of accessibility, includes a requirement of environmental sustainability.
- g. *Right to water* – For this right, the requirement of accessibility, includes a requirement of environmental sustainability.

¹²¹ *Caceres et al. v. Paraguay*, at para.7.4. Emphasis added.

134. The Committee on the Rights of the Child has recognised that the right to a healthy environment is “implicit in the Convention [on the Rights of the Child]” and treats it as a standalone obligation on State parties.¹²² This approach is appropriate in discussing the scope of a variety of other human rights.

135. The Committee on the Rights of the Child has concluded:

“It is directly linked to, in particular, the rights to life, survival and development, under article 6, to the highest attainable standard of health, including taking into consideration the dangers and risks of environmental pollution, under article 24, to an adequate standard of living, under article 27, and to education, under article 28, including the development of respect for the natural environment, under article 29.”¹²³

136. The right to a healthy environment has both substantive and procedural components. The Special Rapporteur has identified its substantive content to include the rights to clean air, a safe climate, healthy and sustainably produced food, safe water, adequate sanitation, non-toxic environments, and healthy ecosystems and biodiversity.¹²⁴ It protects the *quality* of the environment (clean, healthy or sustainable). As for the procedural content, this includes, the right to access to environmental information, public participation in environmental decision-making and access to environmental justice.¹²⁵

137. Samoa argues that right to a healthy environment is an “*autonomous*” right, which means that it “protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of a

¹²² Committee on the Rights of the Child, *General comment No.26 (2023) on children’s rights and the environment, with a special focus on climate change* (22 August 2023), CRC/C/GC/26, para.63.

¹²³ *Ibid.*

¹²⁴ David Boyd (Special Rapporteur on the issue of human rights obligations relating to enjoyment of a safe, clean, healthy and sustainable environment), *Right to a healthy environment: good practices*, UN Doc A/HRC/43/53, 30 December 2019, paras.8-18.

¹²⁵ *Ibid.*, paras.8-18.

certainty of a risk to individuals”.¹²⁶ It also has a collective dimension, which protects the quality of the environment *per se*, constituting a “universal value that is owed to both present and future generations”.¹²⁷

138. Without an environment which is stable and unimpacted by the adverse effects of climate change, the right to a healthy environment is not realised. The IPCC has identified the scale of the change in temperature through a comparison with other timeframes.

- a. Each of the last four decades has been successively warmer than any decade that preceded it since 1850. This is unprecedented “in at least the last 2000 years”.¹²⁸
- b. Temperature changes reconstructed from paleoclimate records shows that the current change in global surface temperature is very likely higher than the warmest multi-century period in the last 100,000 years.¹²⁹
- c. **“The scale of the recent changes across the climate system as a whole – and the present state of many aspects of the climate system – are unprecedented over many centuries to many thousands of years”.**¹³⁰

139. IPCC has said that global warming of 1.5C “is not considered ‘safe’ for most nations, communities, ecosystems and sectors and poses significant risks to

¹²⁶ Inter-American Court of Human Rights, *Advisory Opinion OC-23/17* (“The Environment and Human Rights”), Series A No.23, 15 November 2017, para.59.

¹²⁷ Ibid.

¹²⁸ IPCC, 2023: Summary for Policymakers. In: *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, pp. 1-34, doi: 10.59327/IPCC/AR6-9789291691647.001 at para.A.1.1.

¹²⁹ Figure SPM.1 at <https://www.ipcc.ch/report/ar6/wg1/figures/summary-for-policymakers/figure-spm-1>.

¹³⁰ IPCC AR6, Working Group I – The Physical Science Basis, “Headline Statements from the Summary for Policymakers” at A.1.1.

natural and human systems”.¹³¹ 1.5C will be exceeded in 4.5 years, as Samoa has already noted above.

140. In any event, all the rights from which the right to a healthy environment is derived have also been violated by the conduct

Convention on the Rights of the Child

141. Samoa has a strong commitment to the promotion and protection of children’s rights. It was the first Pacific Island country to have submitted the instrument of ratification for the three Optional Protocols to the Convention on the Rights of the Child (“CRC”). Samoa supports Vanuatu’s Written Statement on the CRC at paragraphs 468-478 but wishes to add the following.

142. While the rights of children who are present on Earth require immediate urgent attention, the children constantly arriving are also entitled to the realization of their human rights to the maximum extent. Beyond their immediate obligations under the CRC with regard to the environment, States bear the responsibility for foreseeable environment-related threats arising as a result of their acts and omission now, the full implications of which may not be manifest for years or even decades.¹³²

¹³¹ Roy, J., P. Tschakert, H. Waisman, S. Abdul Halim, P. Antwi-Agyei, P. Dasgupta, B. Hayward, M. Kanninen, D. Liverman, C. Okereke, P.F. Pinho, K. Riahi, and A.G. Suarez Rodriguez, 2018: *Sustainable Development, Poverty Eradication and Reducing Inequalities*. In: *Global Warming of 1.5°C*. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty [Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, pp. 445-538. <https://doi.org/10.1017/9781009157940.007> at p.447 (in the Executive Summary).

¹³² Committee on the Rights of the Child, *General comment No.26 (2023) on children’s rights and the environment, with special focus on climate change*, (22 August 2023) CRC/C/GC/26 at para. 11.

143. As the IPCC has said, each increment of global warming will intensify multiple and concurrent hazards and changes in extremes become larger.¹³³

“Many changes in the climate system become larger in direct relation to increasing global warming. They include increases in the frequency and intensity of hot extremes, marine heatwaves, heavy precipitation, and in some regions, agricultural and ecological droughts; an increase in proportion of intense tropical cyclones; and reductions in Arctic sea ice, snow cover and permafrost.”¹³⁴

144. Further, risks with more incremental global warming will become “increasingly complex and more difficult to manage”.¹³⁵ The likelihood of abrupt and/or irreversible changes increases with higher global warming levels. Similarly, the probability of low-likelihood outcomes associated with potentially very large adverse impacts increases with higher global warming levels,¹³⁶ such as tipping points and hothouse earth scenario. Recent scientific studies since IPCC AR6 suggests that the chance of reaching tipping points increases from 1.5C of warming.¹³⁷ These tipping points are conditions beyond which changes in a part of the climate system become self-perpetuating. Samoa has already noted that the IPCC considers that global warming of 1.5C is not considered ‘safe’ for most nations, communities, ecosystems and sectors and poses significant risks to natural and human systems. The first temperature threshold in the Paris Agreement of 1.5C is on track of being exceeded in 4.5 years.

145. Despite the harms, including irreversible losses, that have already occurred and the worsening situation, State parties are continuing and expanding the conduct, including continuing and expanding fossil fuel production, enabled and

¹³³ IPCC, AR6 Synthesis Report, “Headline Statements”, at Summary, para.B.1.

¹³⁴ IPCC, AR6 Physical Science Basis, B.2.

¹³⁵ IPCC, AR6, Impacts, Adaptation and Vulnerability, “Summary for Policymakers Headline Statements” at para.B.5.

¹³⁶ High Confidence, AR6 Synthesis Summary Report, para.B3, p.18.

¹³⁷ D. I. Armstrong McKay, A. Staal, J.F. Abrams, R. Winkelmann, B. Sakschewski, S. Loriani, I. Fetzer, S. E. Cornell, J. Rockstrom and T. M. Lenton, “Exceeding 1.5C global warming could trigger multiple climate tipping points”, *Science* (2022), DOI: 10.1126/science.abn7950

sponsored by fossil fuel policies and energy policies. According to the latest UNEP Production 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 1.5C.¹³⁸

146. The conduct violates multiple rights guaranteed to children under the CRC, including children constantly arriving. Further, the conduct violates the CRC, Article 3(1) requirement that the “best interests of the child shall be a primary consideration” in “all actions taken concerning children”.
147. Samoa wishes to pay particular attention to the following children’s rights that are violated by the conduct and supporting the Committee on the Rights of the Child’s interpretation of the CRC.
- d. The right to a clean, healthy and sustainable environment; and
 - e. the right to freedom from all forms of violence.
148. First, the Committee on the Rights of the Child has found that there is an implied right to a clean, healthy and sustainable environment (“**right to a healthy environment**”) under the CRC.

“A clean, healthy and sustainable environment is both a human right itself and necessary for the full enjoyment of a broad range of children’s rights. Conversely, environmental degradation, including the consequences of the climate crisis, adversely affects the enjoyment of these rights, in particular for children in disadvantaged situations or children living in regions that are highly exposed to climate change.”¹³⁹

¹³⁸ SEI, Climate Analytics, E3G, IISD, and UNEP. (2023). The Production Gap: Phasing down or phasing up? Top fossil fuel producers plan even more extraction despite climate promises. Stockholm Environment Institute, Climate Analytics, E3G, International Institute for Sustainable Development and United Nations Environment Programme. <https://doi.org/10.51414/sei2023.050>, p.6.

¹³⁹ Committee on the Rights of the Child, *General comment No.26 (2023) on children’s rights and the environment, with special focus on climate change*, (22 August 2023) CRC/C/GC/26 at para.8.

149. Samoa agrees with the Committee on the Rights of the Child position taken in 2023 in *General Comment No.26* that the realisation of the right to a healthy environment for children requires that States should “*immediately...equitably phase out the use of coal, oil and natural gas, ensure a fair and just transition of energy sources and invest in renewable energy, energy storage and energy efficiency to address the climate crisis*”.¹⁴⁰
150. While Samoa considers that the immediate phase out of fossil fuels, without which 1.5C will be exceeded, is an obligation arising out of the right to healthy environment under the CRC, such an immediate phase out is also a requirement of cessation and non-repetition under the secondary rules codified in the International Law Commission Draft articles on Responsibility of States for International Wrongful Acts for States that have displayed the Conduct(for the multiple violations of primary rules, which constitutes a composite act under those Draft articles).
151. Other relevant action identified by the Committee on the Rights of the Child to immediately take in relation to securing the rights of children, which also concerns the conduct is to:
- f. ensure access to safe and sufficient water and sanitation and healthy aquatic ecosystems to prevent the spread of waterborne illnesses among children;
 - g. conserve, protect and restore biodiversity; and
 - h. prevent marine pollution, by banning the direct or indirect introduction of substances into the marine environment that are hazardous to children’s health and marine ecosystems.¹⁴¹

¹⁴⁰ Ibid para.65. Emphasis added.

¹⁴¹ Ibid, para.65.

152. Another concern is children’s current and anticipated psychosocial and mental health conditions caused by environmental harm, including climate change-related events. The clear emerging link between environmental harm and children’s mental health, such as depression and eco-anxiety.¹⁴²

Extraterritoriality

153. In this section, Samoa wishes to address the question of the extraterritoriality of three international human rights treaties, noting that some States have taken the position that these obligations do not extend extraterritorially. Samoa submits that the ICERD, the ICCPR and the ICESCR are not territorially confined but are “applicable to the conduct of a State party which has effects beyond its territory”, to use the language employed by this Court in its recent advisory opinion on *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*.¹⁴³ Samoa requests the Court to provide some clarity on this issue, though it understands that there is a limit to what the Court may say in a general context. Certain cases may present themselves where a different approach is justified, but guidance on this issue at the present moment may contribute to clarity and certainty in the field of human rights. This is a vital task: as the Court noted in the *Diallo* case, “The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.”¹⁴⁴

¹⁴² See, Committee on the Rights of the Child, *General comment No.26 (2023) on children’s rights and the environment, with special focus on climate change*, (22 August 2023) CRC/C/GC/26.

¹⁴³ *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.101.

¹⁴⁴ *Diallo, Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, ICJ Reports 2010, p. 639, para. 66.

154. Below are some different ways that extraterritoriality might apply, recognising the nuance in each text and approach of the different treaty bodies different approaches concerning States, peoples or individuals.
155. First, Samoa observed above, the right to self-determination is a fundamental human right, which is reflected as the common Article 1 of the ICCPR and the ICESCR. This Court has previously affirmed the Human Rights Committee’s explanation of the importance of the right to self-determination stems from the fact that “its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of these rights”.¹⁴⁵
156. Thus, a State which engages in systemic and widescale conduct, including acts or omissions, which negatively impact the ability of another State to uphold fundamental human rights violates its obligations to respect the right of self-determination. Such systemic and widescale conduct may constitute a form of “external interference” which is prohibited by the law of self-determination.
157. Second, the CESCR has indicated in relation to different rights¹⁴⁶, that to comply with their international obligations, State parties must respect the enjoyment of the right in other countries and to refrain from actions that interfere directly or indirectly with that right. Any activities undertaken within the State’s party’s jurisdiction “*should not deprive another country of the ability to realize the right for persons within its jurisdiction*”.¹⁴⁷ The Inter-American Court adopted this same

¹⁴⁵ *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.233, citing Human Rights Committee, *General Comment No.12* (13 March 1984), *Official Records of the General Assembly, Thirty-ninth Session, Supplement No.40* (Un doc.A/39/40 (SUPP)), Annex VI, para.1).

¹⁴⁶ See, for example, CESCR, *General Comment No.15: The Right to Water (Arts.11 and 12 of the Covenant)*, UN Doc. E/C.12/2002/11, January 20, 2003, para.31 and CESCR, *General Comment No.14: The Right to the Highest Attainable Standard of Health (Art.12)*, para.39.

¹⁴⁷ CESCR, *General Comment No.15: The Right to Water*, para.31.

principle, to wit, that to “respect and ensure human rights require States abstain from preventing or hindering other States Parties from complying with the obligations derived from the [American] Convention”.¹⁴⁸

158. Third, the Human Rights Committee has observed that every State Party has a “legal interest” (a “contractual dimension”) in the performance by every other State Party of its obligations. The Committee explained: “This follows from the fact that the ‘rules concerning the basic rights of the human persons’ are *erga omnes* obligations and that, as indicated in the fourth preambular paragraph of the Covenant, there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms”.¹⁴⁹ In respect of obligations *erga omnes* States Parties to the ICCPR have a legal interest in the protection and promotion of fundamental human rights.

159. Fourth, nothing in the text of the ICERD, the ICCPR, or the ICESCR expressly limits the obligations of States under each convention to their territory. As the Court concluded in its recent advisory opinion related to the legal consequences of policies and practices in the Occupied Palestinian Territory, ICERD contains no provisions restricting its territorial application. It notes that several provisions impose obligations that are applicable “in territories under their jurisdiction” or in relation to “individuals within their jurisdiction”. This “indicates that [ICERD] is also applicable to conduct of a State party which has effects beyond its territory”.¹⁵⁰

160. The ICESCR also does not contain provisions restricting its territorial application. It is clear from the preceding discussion that ICESCR is also

¹⁴⁸ Inter-American Court of Human Rights, *The Environment and Human Rights*, Advisory Opinion OC-23/17 of 15 November 2017, Para.101.

¹⁴⁹ Emphasis in the original. Human Rights Committee, *General Comment No.31[80]: The General Nature of the Legal Obligations Imposed on States Parties to the Covenant* (29 March 2004) at para.2.

¹⁵⁰ *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.101.

applicable to conduct of a State party which has effects (“directly or indirectly”, in the CESCR’s words) beyond its territory. Each State must avoid activities that directly or indirectly interfere with certain rights, such as the right to water.

161. This Court has previously observed that the lack of a provision as to the scope of the ICESCR’s application might be “explicable by the fact that this Covenant guarantees rights which are essentially territorial”.¹⁵¹ The Court noted, regardless, that it extended to territories or areas where a State exercises jurisdiction. Further, as Samoa has pointed out above, the CESCR has considered that certain rights, such as the right to food and water, obliges States not to interfere directly or indirectly with the right in other States. Moreover, some of these rights are dependent on a clean, healthy and sustainable environment (or, are completely nullified in the absence of).

162. The ICCPR has a jurisdiction test under Article 2, which requires a State party to respect and ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. The latter applies to anyone within the power or effective control of that State party.

163. The Committee on the Rights of the Child has found, under the CRC, that jurisdiction extends to “effective control” of human rights violating activities in the context of climate change. The CRC at Article 2(1) states: State parties have the obligation to respect and ensure the rights of “each child within their jurisdiction”. With respect to effective control, the Committee on the Rights of the Child has offered this interpretation:

The Committee considers that it is generally accepted and corroborated by scientific evidence that the carbon emissions originating in the State party contribute to the worsening of climate change, and that climate change has an adverse effect over the enjoyment of rights by individuals both within as well as beyond the territory of a State

¹⁵¹ *Legal consequences of the construction of a wall in the occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, Para.112.

*party. The Committee considers that, through its ability to regulate activities that are the source of these emissions and to enforce such regulations, the State party has effective control over emissions.*¹⁵²

164. Finally, Samoa notes that the European Court of Human Rights (“ECtHR”) found that the specific notion of jurisdiction under the European Convention of Human Rights was specific to that Convention and restrictive. The ECtHR recognised that there are “*different notions of jurisdiction*” under other Conventions or Covenants, such as the Convention on the Rights of the Child. As the ECHR said, “*other instruments of international law may provide for a different scope of protection than the Convention*”¹⁵³ and, the ECtHR continued, as “*regards the Inter-American Court’s approach in its Advisory Opinion and that of the CRC in Sacchi and Others...the Court notes that both are based on a different notion of jurisdiction*”.¹⁵⁴

¹⁵² See, Committee on the Rights of the Child, *Chiara Sacchi et al. v. Argentina*, CRC/C/88/D/104/2019, para.10.9.

¹⁵³ *Duarte Agostinho and Others v. Portugal and 32 Others* (App. 39371/20), para.209.

¹⁵⁴ *Ibid.*

**FOR THE GOVERNMENT OF
THE INDEPENDENT STATE OF SAMOA**

(HE Ms Francella Strickland)

**AMBASSADOR EXTRAORDINARY AND PLENIPOTENTIARY OF SAMOA
TO THE KINGDOM OF BELGIUM**

15 August 2024