INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

(REQUEST FOR ADVISORY OPINION)

Written Comments of the Democratic Socialist Republic of Sri Lanka

August 2024

TABLE OF CONTENTS

Page

I. Introduction ……. 03

II. Specific Issues arising from the Written Statements by other States and International Organizations ……. 04

A. Relevant conduct …….. 04

B. Applicable law …….. 06

C. Legal consequences …….. 22

III. Conclusion …….. 34

I. INTRODUCTION

1. The Democratic Socialist Republic of Sri Lanka (Sri Lanka) tenders these Written Comments in response to the Order of the President of the International Court of Justice (ICJ) issued on 20 May 2024. They serve as a reply to some of the main arguments contained in the several Written Statements tendered to the ICJ in respect of the Request for an Advisory Opinion contained in United Nations General Assembly (UNGA) Resolution 77/276, adopted by consensus on 29 March 2023. Sri Lanka itself submitted its Written Statement on the said Request for an Advisory Opinion, on the following legal questions:

> *Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment,*
>
> > *a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations;*
> >
> > *b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:*
> >
> > *i. States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?*

ii. Peoples and individuals of the present and future generations affected by the adverse effects of climate change?

2. Whereas Sri Lanka's Written Statement contained submissions on the jurisdiction of the court and the admissibility of the Request for an Advisory Opinion, climate change and its impacts, with particular emphasis on Sri Lanka, and the merits of the legal questions, these Written Comments focus on the following specific issues arising from the Written Statements tendered by other States and international organizations: **A.** Relevant conduct, **B.** Applicable law and, **C.** Legal consequences.

3. It is Sri Lanka's respectful submission that the ICJ should be pleased to cover the entire gamut of specific and general international law when identifying States' obligations to ensure the protection of the climate system and other parts of the environment, including the marine environment, from anthropogenic emissions of greenhouse gases, and extend such obligations to present and future generations. It is also urged that when answering the question of legal consequences under these obligations for States which have caused significant harm to the climate system and other parts of the environment, the ICJ should traverse the international law of State responsibility in a manner that would be ultimately meaningful to States, Peoples and individuals of present and future generations, injured or specially affected by or are particularly vulnerable to the adverse effects of climate change.

II. SPECIFIC ISSUES ARISING FROM THE WRITTEN STATEMENTS BY OTHER STATES AND INTERNATIONAL ORGANIZATIONS

A. Relevant conduct

4. In respect of the two legal questions posed to the ICJ, some Written Statements seek to argue that climate change and its adverse effects are too complex and, therefore, it is not possible to cast attribution to any act or omission of States. This argument rests on the misconception that the ICJ is being requested to engage in an exercise to respond to the question of whether acts or omissions of States resulting in anthropogenic emissions of

greenhouse gases (GHG) cause adverse effects of climate change on States, Peoples and individuals. However, no such attribution is contemplated in the above two legal questions. What is requested in the form of the questions is general. The ICJ is requested to, firstly, identify the obligations of States to ensure the protection of the climate system and other parts of the environment from anthropogenic GHG emissions and, secondly, identify the legal consequences where States have, by their acts or omissions (based on obligations identified by the answer to the first legal question), caused significant harm to the climate system and other parts of the environment. There is no direct connection sought to be made between such acts/omissions and adverse effects of climate change. The phrase "*significant harm to the climate system and other parts of the environment*" is not to be confused with "*adverse effects of climate change"* on States, peoples and individuals.

5. Indeed, the ICJ may, in the future, be confronted with a dispute in which a State claims that another State has, by its acts/omissions caused significant harm to the climate system and that the resultant climate change has adversely affected and thereby caused injury to the claimant. In such a case, the ICJ would inevitably be required to adjudicate upon whether the alleged injury has been caused, i.e. can be attributed, to the breach of an obligation by the defendant State. However, the instant Request for an Advisory Opinion which is before the ICJ does not contain such a dispute nor calls for attribution. It simply requests identification of the legal obligations and legal consequences that apply to acts and omissions of States, resulting in GHG emissions that have caused significant harm to the climate system and other parts of the environment.

6. In fact, the nature of the relevant conduct is already clarified by the text of the two legal questions themselves. Question (a) makes reference "*anthropogenic emissions of greenhouse gases*" whilst Question (b) makes reference to "*acts and omissions [which] have caused significant harm to the climate system and other parts of the environment*". Preambular paragraph 5 of UN General Assembly Resolution 77/276 (UNGA Resolution) further clarifies the nature of the conduct as follows: "*the conduct of States over time in relation to activities that contribute to climate change and its adverse effects*." Further, such conduct may be assessed by reference to the acts/omissions of a State in its individual capacity or to the collective conduct of a group of States. It may also be possible to assess conduct without recourse to any specific event, but only in

principle, as was done in the Advisory Opinion on *Legality of Nuclear Weapons*.[1] Therefore, the ICJ is not expected to address acts or omissions that must have directly caused a particular adverse effect of climate change.

7. On the other hand, many of the Written Statements, including that which was tendered by Sri Lanka, offer real examples of the adverse impact of climate change.[2] When considered together with overwhelming scientific consensus that the cause of climate change is anthropogenic emissions of GHG over time,[3] as expressly referred to in preambular paragraph 9 of the UNGA Resolution, there is sufficient material to assess the relevant conduct contemplated in the two legal questions before the ICJ in this matter.

B. Applicable law

8. There appears to be broad consensus across the Written Submissions that matters pertaining to climate change under international law are governed by the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement. In general, parties do not dispute the applicability of provisions in those two sources of international law, but are only at variance with regard to the interpretation of obligations thereunder. Nevertheless, several Written Statements have advanced the position that obligations of States as contemplated in the two legal questions are to be found only in the self-contained *lex specialis* regime of the UNFCCC and the Paris Agreement, thus excluding the application of the general international law to the matters before court. Therefore, another argument found among the Written Statements is that the ICJ should, in approaching the two legal questions, particularly, when identifying the obligations referred to in Question (a), confine its lens to the UNFCCC (including the Kyoto Protocol) and the Paris Agreement. However, this too is a misconceived contention for more than one reason.

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

[2] Written Statement of Sri Lanka, paras. 26-87.

[3] Intergovernmental Panel on Climate Change, *Synthesis Report of the IPCC Sixth Assessment Report (AR6). Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers (2023), statement A.1; Intergovernmental Panel on Climate Change, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers (2021), statement A.1.

9. First and foremost, the preambular paragraphs of the UNGA Resolution, a resolution which was adopted by consensus of all Parties, begs court to take into account a non-exhaustive list of materials.

> "Having **particular regard** to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment…
>
> *Recalling* its resolution 77/165 of 14 December 2022 and all its other resolutions and decisions relating to the protection of the global climate for present and future generations of humankind, and its resolution 76/300 of 28 July 2022 on the human right to a clean, healthy and sustainable environment,
>
> *Recalling also* its resolution 70/1 of 25 September 2015 entitled "Transforming our world: the 2030 Agenda for Sustainable Development",
>
> *Recalling further* Human Rights Council resolution 50/9 of 7 July 20221 and all previous resolutions of the Council on human rights and climate change, and Council resolution 48/13 of 8 October 2021, as well as the need to ensure gender equality and empowerment of women,
>
> *Emphasizing* the importance of the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the United Nations Convention on the Law of the Sea, the Vienna Convention for the Protection of the Ozone Layer, the Montreal Protocol on Substances that Deplete the Ozone Layer, the Convention on Biological Diversity and the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, **among other instruments, and of the relevant principles and relevant obligations of customary international law, including** those reflected in the Declaration of the United Nations Conference on the Human Environment and the Rio Declaration on Environment and Development, to the conduct of States over time in relation to activities that contribute to climate change and its adverse effects" [Emphasis added]

10. It is evident, therefore, that the ICJ has been requested to consider not only the UNFCCC and the Paris Agreement, but all relevant treaty law and general international law, in order to identify the legal obligations and legal consequences in respect of climate change.

11. During the past 5 years, the European Court of Human Rights,[4] the Human Rights Committee[5] and the Committee on the Rights of the Child,[6] have applied their respective treaties to address grievances arising from anthropogenic GHG emissions, irrespective of the outcome of the cases before them. The Human Rights Council too has unequivocally acknowledged that such emissions are the primary cause of the global climate crisis and resolved that, to comply with their international human rights obligations, States should apply a rights-based approach to all aspects of climate change and climate action.[7] Most recently, the International Tribunal for the Law of the Sea (ITLOS) confirmed that even the United Nations Convention of the Law of the Sea (UNCLOS) governs the relevant conduct, i.e. anthropogenic GHG emissions.[8]

12. Secondly, neither the UNFCCC, nor the Paris Agreement comprehensively deal with climate change-related issues affecting human rights, the law of the sea or the general prevention of significant harm to the environment. Although the preamble of the Paris Agreement "*acknowledges*" the application of human rights "*when taking action to address climate change*", this by no means is sufficient to concede or conclude that the Paris Agreement would operate as a *lex specialis* in relation to human rights obligations. Likewise, the UNFCCC does not address the marine environment in a manner that constitutes a *lex specialis* with respect to the regulatory mechanism provided for in the UNCLOS as well as other relevant agreements protecting the marine environment. The preamble of the Paris Agreement merely notes "*the importance of ensuring the integrity of all ecosystems, including oceans … when taking action to address climate change*", but does not regulate this aspect. Whereas consistency across obligations may enable a State to comply with all its obligations simultaneously, fulfilling a specific obligation

---

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

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

6 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); *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. 10.9-10.11.

7 Human Rights Council, Resolution 50/9, Human Rights and Climate Change, UN Doc. A/HRC/RES/50/9 (14 July 2022), paras 12 and 62.

8 Request for an advisory opinion submitted by the Commission of Small Island States on Climate Change and International Law, ITLOS Case 31, Advisory opinion (21 May 2024), paras. 223-224.

under one treaty will not amount to sufficient compliance with all other obligations under all other treaties and general international law.

13. Thirdly, the relevant conduct stretches at least as far back as the period of the Industrial Revolution and obligations linked to the right to self-determination, the preventive principle and due diligence, pre-date the international climate change regime, since the UNFCCC came into force only in 1994 and the Paris Agreement, even later, in 2016. Therefore, neither instrument can lay claim to be equipped to fully address State obligations and responsibility for climate change.

14. In the circumstances, the UNFCCC and the Paris Agreement alone are inadequate to provide any regulatory responses to the relevant conduct envisaged in the two legal questions before the ICJ. They do not pass the tests of *ratione materiae* (subject matter) and *ratione temporis* (temporal scope) in order to stand out as the sole and exclusive international law regime relating to State obligations and legal consequences in respect of climate change.

15. Against the above backdrop, Sri Lanka rejects the premise that there is a climate change legal regime comprising the UNFCCC and the Paris Agreement which operates as *lex specialis*. Instead, it supports the harmonious interpretation of other treaties and general international environmental law, whether it be an interpretation founded upon the systemic integration approach, concurrent application, object and purpose rule, or evolutive principle.

i) Systemic integration approach

16. The systemic integration approach to interpretation is mandated by Article 31(3)(c) of the Vienna Convention on the Law of Treaties 1969 in the following manner:

> *"There shall be taken into account, together with the context:*
> ...
> *(c) any relevant rules of international law applicable in the relations between the parties.*"

17. The provisions of Article 31(3)(c) are based on the notion that treaties are themselves part of the international law system. Accordingly, the systemic integration approach requires that international treaties be applied and interpreted vis-a-vis the rules of international law applicable in relations between the parties.

18. The systemic integration approach has been applied by the ICJ on numerous prior occasions. In the *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*,[9] it was held as follows:

> *"64. The Court next briefly turns to the issue of how the 1975 Statute is to be interpreted. The Parties concur as to the 1975 Statute's origin and historical context, although they differ as to the nature and general tenor of the Statute and the procedural and substantive obligations therein.*
>
> *The Parties nevertheless are in agreement that the 1975 Statute is to be interpreted in accordance with rules of customary international law on treaty interpretation, as codified in Article 31 of the Vienna Convention on the Law of Treaties.*
>
> *65. The Court has had recourse to these rules when it has had to interpret the provisions of treaties and international agreements concluded before the entry into force of the Vienna Convention on the Law of Treaties in 1980 (see, e.g., Territorial Dispute (Libyan Arab Jamahiriya/ Chad), Judgment, I.C.J. Reports 1994, p. 21, para. 41; Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II), p. 1059, para. 18).*
>
> *The 1975 Statute is also a treaty which predates the entry into force of the Vienna Convention on the Law of Treaties. In interpreting the terms of the 1975 Statute, the Court will have recourse to the customary rules on treaty interpretation as reflected in Article 31 of the Vienna Convention. Accordingly the 1975 Statute is to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the [Statute] in their context and in light of its object and purpose".* ***That interpretation will also take into account, together with the context, "any relevant rules of international law applicable in the relations between the parties"***." [Emphasis added]

19. In the *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*,[10] it was held as follows:

> "41. *Moreover, under the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account "any relevant rules of international law applicable in the relations between the parties" (Art. 31, para. 3 (c)). The Court cannot accept that Article XX, paragraph 1 (d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force. The application of the relevant rules of international law relating to this question*

[9] [2006] ICJ Rep 113.
[10] 1996 I.C.J. 803.

thus forms an integral part of the task of interpretation entrusted to the Court by Article XXI, paragraph 2, of the 1955 Treaty."

20. In *Legality of the Threat or Use of Nuclear Weapons*,[11] the ICJ opined as follows:

> *"The powers conferred on international organizations are normally the subject of an express statement in their constituent instruments. Nevertheless, the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as "implied" powers.*
>
> *...*
>
> *As these provisions demonstrate, the Charter of the United Nations laid the basis of a "system" designed to organize international Co-operation in a coherent fashion by bringing the United Nations, invested with powers of general scope, into relationship with various autonomous and complementary organizations, invested with sectorial powers. The exercise of these powers by the organizations belonging to the "United Nations system" is Co-ordinated, notably, by the relationship agreements concluded between the United Nations and each of the specialized agencies."*

21. *Kasikili/Sedudu Island (Botswana v. Namibia),* Judgment,[12] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France),* Judgment[13] *and Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, Judgment,[14] provide further examples of instances in which the ICJ adopted the systemic integration approach to interpretation.

22. The ICJ is not alone in applying this approach to interpretation, for similar jurisprudence is available in the pronouncements of other bodies too, particularly those adjudicating upon human rights. Since the ICJ ascribes '*great weight*' to the views of such authoritative bodies and regional human rights courts,[15] it is urged that persuasive value be attached to the dicta emanating from the European Court of Human Rights.

21. In *Golder v United Kingdom*, [16] the ECtHR held that:

---

[11] I.C.J. Reports 1996, para. 25
[12] I.C.J. Reports 1999, p. 1045, para. 93.
[13] I.C.J. Reports 2008, p. 177, paras. 112-114.
[14] I.C.J. Reports 2017, p. 3, paras. 89-91.
[15] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, p. 639, paras. 66-67.
[16] [1975] ECHR 1, para. 35.

> *"Article 31 para. 3 (c) of the Vienna Convention indicates that account is to be taken, together with the context, of "any relevant rules of international law applicable in the relations between the parties". Among those rules are general principles of law and especially "general principles of law recognized by civilized nations" (Article 38 para. 1 (c) of the Statute of the International Court of Justice). Incidentally, the Legal Committee of the Consultative Assembly of the Council of Europe foresaw in August 1950 that "the Commission and the Court must necessarily apply such principles" in the execution of their duties and thus considered it to be "unnecessary" to insert a specific clause to this effect in the Convention (Documents of the Consultative Assembly, working papers of the 1950 session, Vol. III, no. 93, p. 982, para. 5).*"

23. The ECtHR adopted a similar approach in *Demir and Baykara*:[17]

> *"The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases."*

24. In view of the foregoing submissions, it is apparent that any relevant rules of international law, including customary law, applicable in the relations between the parties, should be taken into account, together with their context, in the process of interpretation of provisions relating to a specific subject of international law.

25. Therefore, Sri Lanka respectfully submits that the UNFCCC and Paris Agreement do not in isolation form the sole legal regime governing obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations. It cannot be maintained that instruments such as the International Covenant on Civil and Political Rights (ICCPR). International Covenant on Economic, Social and Cultural Rights (ICESCR) or the United National Convention on the Law of the Sea (UNCLOS) or any other treaty or, for that matter, general principles of international law, including customary principles of law, have no applicability to a process of identifying climate change related obligations of States.

ii) Concurrent application

[17] [2008] ECHR 1345, para. 85.

26. Without prejudice to Sri Lanka's reliance on the systemic integration approach in these comments, it is respectfully submitted that even the concurrent application approach supports its position that the ICJ should navigate the questions before it with reference to the international legal framework outside and beyond the climate change specific obligations arising from the UNFCCC and Paris Agreement.

27. The concurrent application approach to interpretation is articulated by the UN Human Rights Committee in its *General Comment No. 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*:

> *"While, in respect of certain Covenant rights,* ***more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.***" [Emphasis added]

28. In the *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. The United States of America),* the concurrent application approach in the interpretation of treaty provisions is discussed:[18]

> *"The Court does not consider that, in the areas of law relevant to the present dispute, it can be claimed that all the customary rules which may be invoked have a content exactly identical to that of the rules contained in the treaties which cannot be applied by virtue of the United States reservation. On a number of points, the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content. But in addition,* ***even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability. Nor can the multilateral treaty reservation be interpreted as meaning that, once applicable to a given dispute, it would exclude the application of any rule of customary international law the content of which was the same as, or analogous to, that of the treaty-law rule which had caused the reservation to become effective****."* [Emphasis added]

[18] (1986) ICJ Rep 14, para.175.

29. The preamble of UNFCCC recalls that there are other relevant sources of international law which complement its objectives and derives impetus from the general body of international law:

> *"Recalling the pertinent provisions of the* ***Declaration of the United Nations Conference on the Human Environment****, adopted at Stockholm on 16 June 1972,*
>
> "*Recalling also that* ***States have, in accordance with the Charter of the United Nations and the principles of international law****, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and* ***the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction***," [Emphasis added]

30. The preambular text makes it apparent that the UNFCCC has been introduced to address climate change, in furtherance of general obligations imposed upon the States under *inter alia* the Declaration of the United Nations Conference on the Human Environment, the Charter of the United Nations and the principles of international law. Thus, it is evident that the intention of the parties to the UNFCCC was never to implement it as a self-contained *lex specialis* regime.

31. The concurrent application approach supports the harmonious interpretation of all applicable rules pertaining to climate change, irrespective of whether it is a special law or the general law. It enables laws to simultaneously apply. Therefore, where there is an inconsistency, the special law will apply, but it does not mean the general law has no application. General international law may form a crucial part of the legal regime governing obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations. Thus, under the concurrent application approach the climate change regime and human rights obligations may apply concurrently, given their different requirements and scopes of application.

32. Further, overall consistency across obligations may mean that it is possible for a State to meet all its obligations under international law simultaneously. However, it does not

imply that meeting the requirements of one obligation is sufficient to comply with all obligations. Treating compliance with one obligation as equivalent to compliance with all obligations would effectively negate the distinct existence and individual content of a wide range of applicable rules.

iii) Object and purpose rule

33. The "*object and purpose*" rule of interpretation is premised on Article 31(1) of the Vienna Convention which enables a treaty to be interpreted *in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*

34. The rule is extensively discussed by the ECtHR *in Golder v. The United Kingdom*: [19]

> "*Taking all the preceding considerations together, it follows that the right of access constitutes an element which is inherent in the right stated by Article 6 para. 1 (art. 6-1). This is not an extensive interpretation forcing new obligations on the Contracting States:* ***it is based on the very terms of the first sentence of Article 6 para. 1 (art. 6-1) read in its context and having regard to the object and purpose of the Convention, a lawmaking treaty (see the Wemhoff judgment of 27 June 1968, Series A no. 7, p. 23, para. 8), and to general principles of law.***
>
> *The Court thus reaches the conclusion, without needing to resort to "supplementary means of interpretation" as envisaged at Article 32 of the Vienna Convention, that Article 6 para. 1 (art. 6-1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6 para. 1 (art. 6-1) as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing. The Court has no need to ascertain in the present case whether and to what extent Article 6 para. 1 (art. 6-1) further requires a decision on the very substance of the dispute (English "determination", French "décidera").*" [Emphasis added]

[19] [1975] ECHR 1, para. 36.

35. The ICJ opined in *Legality of the Threat or Use of Nuclear Weapons*[20] that:

> *"According to the customary rule of interpretation as expressed in Article 31 of the 1969 Vienna Convention on the Law of Treaties,* ***the terms of a treaty must be interpreted "in their context and in the light of its object and purpose*** *...*
> *...*
> *The Court has had occasion to apply this rule of interpretation several times (see Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), Judgment, I.C.J. Reports 1991, pp. 69-70, para. 48; Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I. C.J. Reports 1992, pp. 582-583, para. 373, and p. 586, para. 380; Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994, pp. 21-22, para. 41; Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility, Judgment, I. C. J. Reports 1995, p. 18, para. 33); it will also apply it in this case for the purpose of determining whether, according to the WHO Constitution, the question to which it has been asked to reply arises "within the scope of [the] activities" of that Organization.*" [Emphasis added]

36. Similarly, in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,[21] the ICJ discussed the suitability and applicability of the "*object and purpose*" rule as follows:

> *"The Court would recall that, according to customary international law as expressed in Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969, a treaty must be interpreted in good faith in accordance with the* ***ordinary meaning to be given to its terms in their context and in the light of its object and purpose***." [Emphasis added]

37. When the objects and purpose rule of interpretation is applied, the applicability of the ICCPR, CESCR and UNCLOS for identifying State obligations for the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations becomes even more clear.

38. The preambles of both the ICCPR and the ICESCR proclaim that the Covenants are entered into "*Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and*

[20] I.C.J. Reports 1996, para. 19.
[21] [2004] ICJ Rep 136, para. 94.

freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights." On the other hand, neither civil and political rights nor economic, social and cultural rights can be enjoyed without the fundamental right to life and that too, not just any manner of life, but one which reflects an adequate standard of living. In this regard, it is pertinent to note that the Universal Declaration of Human Rights (UDHR) which has inspired the ICCPR and the ICESCR recognizes those very rights. Article 3 of the UDHR upholds the *right to life* whereas Article 22 declares the right of the individuals to *a standard of living adequate for the health and well-being of himself and of his family.* Together, all three instruments of international human rights are of one voice, their underlying common objects and purpose being to impose on States the obligation of ensuring that peoples fully enjoy the right to life, including an adequate standard of living.

39. To this extent, the promotion of human rights and environmental protection are interdependent. For, a safe, clean, healthy and sustainable environment is not merely necessary, but essential for the full enjoyment of human rights, including the rights to life and right to an adequate standard of living.

40. However, in a world where the adverse effects of climate change undermine a healthy environment, not only is the attainment of an adequate standard of living and the enjoyment of the right to life prejudiced, but the very existence of humanity is threatened. Therefore, it is important that the provisions of the UDHR, ICCPR and ICESCR are interpreted to form part and parcel of the climate-change legal regime, based on the "objects and purpose" rule of interpretation.

41. The application of the "objects and purpose" rule of interpretation also allows the UNCLOS to be brought into the fold of the international law regime on climate change. Whereas the preamble of UNCLOS states that the Convention shall "endeavour *to promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment*", climate change is one of the phenomena which stand in the way of achieving those objects and purposes.

42. In the wake of climate change, attainment of objects such as promoting the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment, shall become onerous. Thus, the provisions of UNCLOS cannot be ignored in the formation of the legal regime on protection of climate systems.

43. Therefore, Sri Lanka submits that, in giving due regard to and upholding their objects and purposes, the ICCPR, ICESCR and UNCLOS play a significant part in imposing obligations on States to protect climate systemsfor future generations and aliens.

iv) Evolutive interpretation

44. The ICJ has addressed how the inevitable evolution of international law should affect the interpretation of a treaty, especially, in cases where a considerable passage of time may occur between the conclusion of the treaty and the interpretation and application thereof.

45. In its Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*,[22] the ICJ opined thus:

> "*the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law.* ***Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.*** *In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments.*" [Emphasis added]

46. The ICJ embraced the evolutive aspect of treaty interpretation in its finding in the case of the *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*:[23]

[22] [1971] I.C.J Rep 16, para. 53.
[23] ICGJ 421 (ICJ 2009), para. 70.

> "*The Court concludes from the foregoing that the terms by which the extent of Costa Rica's right of free navigation has been defined, including in particular the term "comercio", must be understood to have the meaning they bear on each occasion on which the Treaty is to be applied, and not necessarily their original meaning. Thus, even assuming that the notion of "commerce" does not have the same meaning today as it did in the mid-nineteenth century, it is the present meaning which must be accepted for purposes of applying the Treaty.*"

47. Applying the evolutive principle of interpretation, it can be convincingly argued that, although climate change related concerns had not come to light at the time ICCPR, ICESCR or customary principles of international law were introduced, it is those sources of international law which have formed the basis for the climate change specific UNFCCC and the Paris Agreement.

48. Further, relying on the "*object and purpose*" rule and evolutive approach of interpretation discussed above, Sri Lanka submits that jurisdiction competence of States under general international law in climate-change related circumstances, extends to impose extraterritorial obligations and that the international environmental law acknowledges the notion of future generations.

49. Accordingly, Sri Lanka rejects the argument that jurisdiction competence of States under general international law is primarily territorial and/or confined to the present.

50. Under the preambles to the UNFCCC and Paris Agreement, it is recalled 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 limits of national jurisdiction. Reference is also made to the Declaration of the Stockholm Conference on the Human Environment and the Rio Declaration on Environment and Development. Not only do these features manifest the applicability of the prevention principle to the relevant conduct, but they also effectively shut out any claim that the obligations under the UNFCCC and Paris Agreement do not transcend territorial jurisdiction.

51. However, several parties in their Written Statements have taken the stance that under general international law, the jurisdictional competence of States are territorial and as such, any obligations imposed under such general laws such as ICCPR, CESCR or UNCLOS in relation to climate change shall not extend beyond the territorial jurisdiction. This stance is flawed for the reasons set out below.

52. Under Article 2(1) of the ICCPR, each State Party to the ICCPR has undertaken to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

53. Sri Lanka aligns with the interpretation of the UN Human Rights Committee on Article 2(1) of ICCPR under General Comment No.15 which specifies the position of aliens under ICCPR as follows:

> "*02. Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike. …*
>
> *…*
>
> *04. The Committee considers that in their reports States parties should give attention to the position of aliens, both under their law and in actual practice.* ***The Covenant gives aliens all the protection regarding rights guaranteed therein, and its requirements should be observed by States parties in their legislation and in practice as appropriate.*** *The position of aliens would thus be considerably improved. States parties should ensure that the provisions of the Covenant and the rights under it are made known to aliens within their jurisdiction.*
>
> *…*
>
> *07.* ***Aliens thus have an inherent right to life, protected by law, and may not be arbitrarily deprived of life.*** *They must not be subjected to torture or to cruel, inhuman or degrading treatment or punishment; nor may they be held in slavery or servitude."* [Emphasis added]

54. Accordingly, it is apparent that the obligations specified under the ICCPR give aliens all the protection regarding rights guaranteed therein extending such obligations

horizontally and transnationally as appropriate, and, that the Human Rights Committee has specifically established that the "jurisdiction" of ICCPR extends towards protecting and upholding the rights and liberties of all people including aliens especially in the case of upholding the right to life guaranteed under Article 6 of ICCPR.

55. In like manner, application of the aforesaid four types of rules of interpretation helps to clarify that State obligations extend to future generations. Article 6 of ICCPR which mandates States to ensure that every human being has the inherent right to life also mandates States to respect and ensure the right to life by implementing measures to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors. Such is evident from the General Comment No.36 on Right to Life under Article 6 of ICCPR issued by the UN Human Rights Committee which provides as follows:

> *"62.* ***Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.*** *The obligations of States parties under international environmental law should thus inform the content of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law. Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors. States parties should therefore ensure sustainable use of natural resources, develop and implement substantive environmental standards, conduct environmental impact assessments and consult with relevant States about activities likely to have a significant impact on the environment, provide notification to other States concerned about natural disasters and emergencies and cooperate with them, provide appropriate access to information on environmental hazards and pay due regard to the precautionary approach.*" [Emphasis added]

56. The position that the State Parties owe a duty to ensure that the right to life of the unborn are protected has been further upheld by the UN Human Rights Committee in its General Comment No.6 on Right to Life under Article 6 of ICCPR:

> *"1. The right to life enunciated in article 6 of the Covenant has been dealt with in all State reports. It is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation (art. 4).*
>
> *...*
>
> *5. Moreover, the Committee has noted that the right to life has been too often narrowly interpreted. The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that* ***it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy****, especially in adopting measures to eliminate malnutrition and epidemics."* [Emphasis added]

57. In view of the above, the contention that States do not have an obligation under ICCPR to protect and uphold the right to life of the unborn fails.

58. Therefore, insofar as the Applicable Law is concerned, Sri Lanka contends that established principles of interpretation of treaties support that the provisions of instruments of international law specific to climate change such as the UNFCCC and Paris Agreement should be considered in the interpretation of human rights obligations and *vice versa.* The obligations under the UNFCCC and Paris Agreement should not be read in isolation but, where more specific rules found thereunder derogate from the principles of international environmental law, it is only then that the principles of general international environmental law should not be resorted to. Further, the State obligations in respect of climate change extend toward aliens and future generations.

C. Legal consequences

59. In its Written Statement, Sri Lanka relied primarily on the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA') – which is generally considered as an expression of customary international law in respect of State Responsibility, to support its position in respect of Question (b). Sri Lanka also associates itself with the broad general consensus that States have contributed to and continue to contribute to climate change in unequal manner, particularly when considered from the perspective of historic contribution and the undeniable fact that it is those States which are Small Island Developing States who have contributed the least,

but are adversely affected the most. Such an uneven playing field inevitably triggers the principle of Common but Differentiated Responsibilities and Respective Capabilities (CBDR–RC), recognized by the UNFCCC.

60. However, it is noted that an argument has been advanced that the court cannot/should not determine legal consequences based on the ARSIWA and that compliance with climate change-related obligations can only be assessed under the climate change treaty regime. Whilst many States agree on the application of the general international law of State responsibility, as reflected in the ARSIWA, i.e. a) cessation, b) non-repetition, and c) reparations in the form of restitution, compensation, satisfaction, some Written Statements espouse the view that conduct which has caused significant harm to the climate system does not carry any legal consequences at all, under the law of State responsibility. This view is without merit, for the reasons set out below.

61. As the ILC's commentary to the ARSIWA makes clear, the provisions of the ARSIWA are applicable to the whole field of international obligations of States, but being of general application, those provisions have a residual character.[24] However, it is useful to recall the commentary to Article 55 of the ARSIWA. Although it provides that the ARSIWA will not apply *where and to the extent that the conditions for the existence of an internationally wrongful act or its legal consequences are determined by special rules of international law*,[25] the commentary on Article 55 clarifies that for the *lex specialis* principle to come into operation "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."[26] The provisions of the international climate change regime do not satisfy this threshold and cannot, therefore, exclude the application of the ARSIWA.

62. In this regard, Sri Lanka further submits that the provisions of Article 15 of the Paris Agreement must be seen as establishing a mechanism to address non-compliance rather

[24] Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the ILC (2001), Volume II, Part II, Report of the Commission to the General Assembly on the Work of its Fifty-Third Session*, document A/CN.4/SER.A/2001/Add.1 (Part 2), general commentary, para. 5.
[25] Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the ILC (2001), Volume II, Part II, Report of the Commission to the General Assembly on the Work of its Fifty-Third Session*, document A/CN.4/SER.A/2001/Add.1 (Part 2), commentary on Article 55, para. 2.
[26] Ibid, para. 4.

than determining the legal consequences of any breach of the provisions of the Agreement. That the provisions of Article 15 were not intended to address the legal consequences of a breach is made clear by the provisions of Article 24 of the Paris Agreement. Article 24 adopts the provisions of dispute settlement under Article 14 of the UNFCCC which provides for the submission of any dispute before the ICJ; in other words, the invocation of State responsibility. Article 15 of the Paris Agreement accordingly provides a complementary but fundamentally different mechanism – being amicable rather than adversarial – from the legal consequences for internationally wrongful acts under the general law of State responsibility, such that the former cannot preclude the Court from giving its authoritative guidance to clarify the latter.

63. Further, the Warsaw International Mechanism for Loss and Damage is distinct from compensation as a form of reparation for injury caused by an internationally wrongful act under the general law of State responsibility. As several State parties had themselves noted in their submissions, the Parties to the Paris Agreement decided on its adoption that 'Article 8 of the Agreement does not involve or provide a basis for any liability or compensation'.[27] Thus, questions of liability and compensation for loss and damage associated with the adverse effects of climate change are specifically excluded from the Paris Agreement and must be resolved by reference to general international law rules of State Responsibility. Indeed, several State parties, when signing and ratifying the Paris Agreement explicitly declared that nothing in the treaty can be interpreted as derogating from the general law of State responsibility or any claims or rights regarding compensation for the adverse effects of climate change.[28] Similarly, Vanuatu and the Marshall Islands declared more generally that ratification of the Paris Agreement 'shall in no way constitute a renunciation of any rights under any other laws, including international law'.[29]

64. Sri Lanka also submits that there is neither any overlaying subject matter nor any actual inconsistency or discernible intention that the provisions of the Paris Agreement on non-compliance and loss and damage were designed to exclude the general law of State responsibility or the obligation to pay compensation as a form of full reparation for

[27] Adoption of the Paris Agreement, Decision 1/CP.21, 12 December 2015, FCCC/CP/2015/L.9, para. 51.
[28] See Status of Ratification of the Paris Agreement here: link.
[29] Ibid.

injury as a legal consequence of breach. Indeed, the contrary intention may be discerned from the structure of the treaty and from explicit declarations of the parties.

65. In this respect, Sri Lanka emphasizes the relevance of three main consequences, namely, cessation, restitution and reparation.

i) Cessation

66. In terms of Article 30 of the ARSIWA, a State responsible for an internationally wrongful act is under an obligation to cease that act, if it is continuing. An order of cessation may require a State to undertake certain positive acts in order to stop the breaching conduct.

67. In *Rainbow Warrior*[30],the Arbitral Tribunal held against New Zealand's contention that '…if one wants a party to desist from certain action cessation would be appropriate, but not if one wants a party to act positively'[31] noting that 'there may be cessation consisting in abstaining from certain actions—such as supporting the "contras"—or consisting in positive conduct, such as releasing the U.S. hostages in Teheran'.[32] Further to Australia's request for an order requiring cessation in *Whaling in the Antarctic*,[33] the ICJ issued order directing Japan, among others, to 'revoke any extant authorization, permit or license to kill, take or treat whales in relation to JARPA II'[34]. In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[35], the ICJ observed that '…in view of the Court's finding … that Israel's violations of its international obligations stem from the construction of the wall and from its associated regime, cessation of those violations entails the dismantling forthwith of those parts of the structure situated within the Occupied Palestinian Territory, including in and around East Jerusalem. All legislative and regulatory acts adopted with a view to its construction, and to the establishment of its associated

[30] *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior affair*, UNRIAA, vol. XX, p. 215-285 (30 April 1990).
[31] Ibid 268.
[32] Ibid 270.
[33] *Whaling in the Antarctic (Australia v. Japan; New Zealand intervening), Judgment*, I.C.J. Reports 2014, p. 226,
[34] Ibid para. 245.
[35] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, p. 136.

regime, must forthwith be repealed or rendered ineffective …'[36]. In *Questions relating to the Obligation to Prosecute or Extradite*[37], this Court ordered that Senegal is required to cease the wrongful conduct by taking 'without further delay the necessary measures to submit the case to its competent authorities for the purpose of prosecution, if it does not extradite Mr. Habre.[38]

68. The findings of domestic and international courts have similarly required governments to cease violating international obligations by taking positive action. In *Urgenda*[39], for instance, the Supreme court of the Netherlands upheld an order of the Hague District Court directing the Dutch State to 'limit the joint volume of Dutch annual greenhouse gas emissions, or have them limited, so that this volume will have reduced by at least 25% at the end of 2020 compared to the level of the year 1990…'[40] in order to cease the Dutch State's failure to comply with its obligations under the international climate change regime and the European Convention on Human Rights. In *Commune de Grande-Synthe v. France*[41], the Petitioners sued the French Government challenging France's refusal to take legislative measures to comply with its mitigation commitments.[42] The Court held with the Petitioners ordering the Government to '"take all the measures necessary" to meet its climate goals by bending the curve of GHG emissions, including a 40 per cent reduction by 2030'.[43]

69. In the context of Question (b), therefore, Sri Lanka submits that the obligation to cease requires, among others, the States responsible for the breach of obligations identified under Question (a) being ordered to cease their under-regulation of GHG emissions from both public and private sources under its jurisdiction or control, a continuing omission to act, by urgently increasing their levels of ambition and action in relation to climate mitigation, adaptation, and finance in accordance with their international obligations. In terms of the 2022 Emissions Gap Report, '[c]ollectively, the G20

[36] Ibid para. 151.
[37] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgement,* I.C.J. Reports 2012, p. 422.
[38] Ibid para. 121
[39] *Urgenda Foundation v. State of the Netherlands*, Supreme Court of the Netherlands, ECLI:NL:HR, 20 December 2019 (Netherlands).
[40] *Urgenda Foundation v. State of the Netherlands*, The Hague District Court, ECLI:NL:RBDHA:2015:7196, 24 June 2015 (Netherlands) Para. 5.1.
[41] *Commune de Grande-Synthe v. France*, Council of State of France, No. 427301, 1 July 2021 (France).
[42] UNEP, Global Climate Litigation Report: 2023 Status Review, 42.
[43] Ibid.

members are not on track to achieve their new or updated NDCs. Based on current policies scenario projections in independent studies, there is an implementation gap, defined as the difference between projected emissions under current policies and projected emissions under full implementation of the NDCs.'[44] Further, research commissioned by Oxfam International also reports that 'the G20 countries – both collectively, and almost all of them individually – are failing to achieve their fair share of ambitious global mitigation required to limit global heating to 1.5°C'.[45] As repeatedly noted in the 2023 IPCC Synthesis Report, however, limiting global warming to 1.5°C and 2°C requires 'rapid, deep and sustained mitigation and accelerated adaptation actions'[46] without which 'losses and damages will continue to increase, including projected adverse impacts in Africa, LDCs, SIDS, Central and South America, Asia and the Arctic, and will disproportionately affect the most vulnerable populations.'[47] Effective climate governance could support and enable the achievement of rapid, deep, and sustained emissions reductions.[48]

70. Hence, climate justice could be achieved more fully if the ICJ gives legal recognition to cessation of acts such as the subsidizing of fossil fuels and the expansion of fossil fuel production, as well as cessation of non-regulation of GHG emissions under the jurisdiction or control of States as possible legal consequences under Question (b).

ii) Restitution

71. Article 35 of ARSIWA recognizes legal consequences in the form of restitution. It provides that a State responsible for an internationally wrongful act is 'under an obligation to make restitution, that is, to re-establish the situation which existed before

[44] UNEP, The Closing Window: Climate crisis calls for rapid transformation of societies, XIX.
[45] Oxfam, Are G20 Countries doing their fair share of Global Climate Mitigation? Comparing ambition and Fair shares assessments of G20 countries' Nationally Determined Contributions (NDCs), Discussion paper, September 2023.
[46] Intergovernmental Panel on Climate Change, *Synthesis Report of the IPCC Sixth Assessment Report (AR6). Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers (2023), statement C.2.2. (link).
[47] Ibid.
[48] Ibid 32, statement C.6.1 – C.6.5.

the wrongful act was committed', provided and to the extent that restitution it is 'neither materially impossible nor wholly disproportionate to the benefit'.[49]

72. Restitution has been recognized as an appropriate remedy even in domestic jurisprudence where environmental law cases have been filed before the courts of Sri Lanka. In *Centre for Environmental Justice (Guarantee) Limited v Anura Satharasinghe and others*, the Court of Appeal of Sri Lanka, issued an order in the nature of mandamus ordering the Conservator General of Forests to, among others, 're-instate the forest lands to the forest reserve and organize forest replanting programme under and in terms of the provisions of the Forest Ordinance No. 16 of 1907 as amended'. [50]

73. Therefore, where Question (b) is concerned, Sri Lanka submits that the obligation to make restitution requires responsible States to, among others, extend support to affected States to improve their adaptive capacity. State parties to the UNFCCC has recognized that there is an urgency in 'scaling up action and support, including finance, capacity-building and technology transfer, to enhance adaptive capacity, strengthen resilience and reduce vulnerability to climate change' in developing countries.[51]

74. In this context, it is crucial that the ICJ take this opportunity to clarify that States responsible for causing significant harm to the climate system may be required to make restitution in the form of financial support for adaptive capacity to those impacted by the adverse effects of such harm. It is noted that financial constraints are a key obstacle for developing countries to improving adaptive capacity.[52] As noted in the 2023 Adaptation Gap Report,[53] the estimated adaptation costs and needs for developing

[49] Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the ILC (2001), Volume II, Part II, Report of the Commission to the General Assembly on the Work of its Fifty-Third Session*, document A/CN.4/SER.A/2001/Add.1 (Part 2), commentary on Article 35, para 7.
[50] CA(Writ) 291/2015 decided on 16.11.2020, page 8.
[51] Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on its third session, held in Glasgow from 31 October to 13 November 2021, Addendum, FCCC/PA/CMA/2021/10/Add.1, p.3, para.7.
[52] Intergovernmental Panel on Climate Change, *Synthesis Report of the IPCC Sixth Assessment Report (AR6). Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers (2023), statement A.3.6. (link).
[53] UNEP, Underfinanced. Underprepared: Inadequate investment and planning on climate adaptation leaves world exposed (2023)

countries is in the range of US$215 billion - US$387 billion per year.[54] However, as noted in the 2023 IPCC Summary for Policymakers,

> "*There are widening disparities between the estimated costs of adaptation and the finance allocated to adaptation (high confidence). Adaptation finance has come predominantly from public sources, and a small proportion of global tracked climate finance was targeted to adaptation and an overwhelming majority to mitigation (very high confidence). Although global tracked climate finance has shown an upward trend since AR5, current global financial flows for adaptation, including from public and private finance sources, are insufficient and constrain implementation of adaptation options, especially in developing countries (high confidence). Adverse climate impacts can reduce the availability of financial resources by incurring losses and damages and through impeding national economic growth, thereby further increasing financial constraints for adaptation, particularly for developing and least developed countries (medium confidence).*'[55]

75. Under these circumstances, financial support for adaptive capacity is particularly useful for climate vulnerable developing countries such as Sri Lanka which are also facing debt constraints. According to UNCTAD, developing countries are 'currently spending more on interest payments than on climate investments.'[56]Therefore, assistance with adaptation, non-monetary redress for climate-induced displacement and migration, and recognition of sovereignty, statehood, and territory despite sea-level rise may be some of the types of restitution called for under State responsibility.

76. However, restitution may not effective in some cases. The 2023 IPCC Synthesis Report notes that human-caused climate change has 'led to widespread adverse impacts and related losses and damages to nature and people (high confidence)'[57] and that these adverse impacts disproportionately affect vulnerable regions and people who have historically contributed the least to the climate crisis[58]. The IPCC report also notes that

---

[54] Ibid XIV.
[55] Intergovernmental Panel on Climate Change, *Synthesis Report of the IPCC Sixth Assessment Report (AR6). Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers (2023), statement A.3.6.
[56] UNCTAD, A World of Debt, 19.
[57] Intergovernmental Panel on Climate Change, *Synthesis Report of the IPCC Sixth Assessment Report (AR6). Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers (2023), statement A.2.
[58] Intergovernmental Panel on Climate Change, *Synthesis Report of the IPCC Sixth Assessment Report (AR6). Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers (2023), statement A.2 & A.2.2.

climate change has caused '…increasingly irreversible losses, in terrestrial, freshwater, cryospheric, and coastal and open ocean ecosystems (*high confidence*)'.[59] Given that these adverse impacts are irreversible, restitution will not suffice in effecting full reparation.

77. Thus, it is essential that, in response to Question (b), the ICJ identifies legal consequences other than cessation or restitution, where restitution is an inadequate remedy.

iii) Reparation

78. In terms of Article 31 of the ARSIWA, a State responsible for an internationally wrongful act is under an obligation to make full reparation for the injury, whether material or moral, caused by the said wrongful act. This form of reparation for injury is available where the damage caused by breach is not made good by restitution.[60] A preliminary inquiry, therefore, is whether there is a sufficient causal nexus between the relevant breach and the alleged injury.

79. In this regard, it is useful to recall the following observations of this Court in *Certain Activities carried out by Nicaragua in the Border Area*[61] as regards the approach to be taken in addressing issues of causation in cases of environmental damage:

> "*In cases of alleged environmental damage, particular issues may arise with respect to the existence of damage and causation. The damage may be due to several concurrent causes, or the state of science regarding the causal link between the wrongful act and the damage may be uncertain. These are difficulties that must be addressed as and when they arise in light of the facts of the case at hand and the evidence presented to the Court. Ultimately, it is for the Court to decide whether there is a sufficient causal nexus between the wrongful act and the injury suffered.*'[62]

[59] Ibid statement A.2.3.
[60] Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the ILC (2001), Volume II, Part II, Report of the Commission to the General Assembly on the Work of its Fifty-Third Session*, document A/CN.4/SER.A/2001/Add.1 (Part 2), Article 36.
[61] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment*, I.C.J. Reports 2018, p. 15
[62] Ibid 15, para. 34.

80. The above observations of court suggest that the approach to determining questions relating to causation may be adapted taking into account the peculiarities of the case before Court. The ECtHR appears to have taken a similar view in *Klimaseniorinnen v. Switzerland*:[63]

> "*In the context of climate change, the particularity of the issue of causation becomes more accentuated. The adverse effects on and risks for specific individuals or groups of individuals living in a given place arise from aggregate GHG emissions globally, and the emissions originating from a given jurisdiction make up only part of the causes of the harm. Accordingly, the causal link between the acts or omissions on the part of State authorities in one country, and the harm, or risk of harm, arising there, is necessarily more tenuous and indirect compared to that in the context of local sources of harmful pollution. Furthermore, from the perspective of human rights, the essence of the relevant State duties in the context of climate change relates to the reduction of the risks of harm for individuals. Conversely, failures in the performance of those duties entail an aggravation of the risks involved, although the individual exposures to such risks will vary in terms of type, severity and imminence, depending on a range of circumstances. Accordingly, in this context, issues of individual victim status or the specific content of State obligations cannot be determined on the basis of a strict conditio sine qua non requirement.*
>
> *It is therefore necessary to further adapt the approach to these matters, taking into account the special features of the problem of climate change in respect of which the State's positive obligations will be triggered, depending on a threshold of severity of the risk of adverse consequences on human lives, health and well-being."*[64]

81. Sri Lanka respectfully submits that in the instant proceedings, the requirement for a causal nexus will be satisfied if it could be demonstrated that a causal nexus exists between 'significant harm to the climate system and other parts of the environment' (i.e., the composite breach) and the alleged injury, and that the acts or omissions of States alleged to be responsible can be shown to have contributed to such composite breach.

---

[63] *Case of Verein Klimaseniorinnen Schweiz and others v. Switzerland*, ECtHR Application no. 53600/20, Judgment of the Grand Chamber (9 April 2024).
[64] Ibid paras. 439-440.

82. The fact that the acts and omissions of certain States have resulted over time in a level of anthropogenic GHG emissions which have led to significant harm to the climate system and other parts of the environment which in turn has resulted in adverse impacts and related losses and damages is not in dispute:

> "*Human activities, principally, through emissions of greenhouse gases, have unequivocally caused global warming, with global surface temperature reaching 1.1°C above 1850–1900 in 2011– 2020. Global greenhouse gas emissions have continued to increase with unequal historical and ongoing contributions arising from unsustainable energy use, land use and land-use change, lifestyles and patterns of consumption and production across regions, between and within countries, and among individuals (high confidence).*
>
> *Widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred. Human-caused climate change is already affecting many weather and climate extremes in every region across the globe. This has led to widespread adverse impacts and related losses and damages to nature and people (high confidence). Vulnerable communities who have historically contributed the least to current climate change are disproportionately affected (high confidence).*"[65]

83. Thus, where the causal nexus has been drawn, reparation in the form of compensation can be pursued under the ARSIWA. In *Certain Activities carried out by Nicaragua in the Border Area*[66], the ICJ affirmed that 'damage to the environment, and the consequent impairment or loss of the ability of the environment to provide goods and services, is compensable under international law. Such compensation may include indemnification for the impairment or loss of environmental goods and services in the period prior to recovery and payment for the restoration of the damaged environment.'[67]

84. In the context of human rights adjudication, the failure to take appropriate adaptation and mitigation measures has been held to be compensable. In *Daniel Billy et al v Australia*,[68] eight Torres Strait Islanders and six of their children submitted a complaint

[65] Intergovernmental Panel on Climate Change, *Synthesis Report of the IPCC Sixth Assessment Report (AR6). Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Summary for Policymakers (2023), statement A.1 and A.2.
[66] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment,* I.C.J. Reports 2018, p. 15.
[67] Ibid para 42.
[68] *Daniel Billy et al v Australia*, CCPR/C/135/D/3624/2019.

against the Australian Government to the United Nations Human Rights Committee. The Petitioners argued that the Australian Government's failure to address climate change was violative of several of their rights under the ICCPR. In 2022, the Committee held with the Petitioners noting that the State party 'is obligated, inter alia, to provide adequate compensation, to the authors for the harm that they have suffered…'[69]

85. Compensation should be available irrespective of whether the injury caused by adverse effects of climate change is economic or non-economic loss and damage and should be construed as a legal obligation distinct from and owed in addition to finance obligations under the climate treaties and voluntary contributions to loss and damage funds, such as under the Warsaw Mechanism.

86. The relevant conduct underpinning Questions (a) and (b) of the legal questions submitted to Court, i.e., a series of acts or omissions that, taken together, has caused significant harm to the climate system as part of the environment, constitutes a breach arising from a composite act.[70] Such breach then gives rise to the responsibility of each individual State which has displayed the relevant conduct. Where the breach of an international obligation consists of a composite act, the breach extends over the entire period starting with the first of the actions or omissions of the series of actions or omissions which constitute the composite act.[71] Thus, States which are historically responsible for high GHG emissions cannot escape legal responsibility simply because their current emission rates have reduced and legal consequences such as cessation, restitution and reparation, none of which are excluded by the climate change legal regime, will ensue under the general international law of State responsibility in respect of such historical conduct.

87. ARSIWA applies regardless of the primary rules which have been breached[72] and it is only if the treaty in question contains special secondary rules will ARSIWA be

---

[70] Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the ILC (2001), Volume II, Part II, Report of the Commission to the General Assembly on the Work of its Fifty-Third Session*, document A/CN.4/SER.A/2001/Add.1 (Part 2), art. 15(1).
[71] Ibid art. 15(2).
[72] Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the ILC (2001), Volume II, Part II, Report of the Commission to the General Assembly on the Work of its Fifty-Third Session*, document A/CN.4/SER.A/2001/Add.1 (Part 2), general commentary, para. 5.

overridden by such rules; that too, only for the specific aspects addressed in such rules. However, neither the UNFCCC nor the Paris Agreement contain special secondary rules setting out the content of State responsibility. Further, the UNGA Resolution deliberately makes reference to "*legal consequences*", which the ICJ has already understood as a reference to State responsibility.[73] In fact, the preambular paragraphs of the Resolution identifies aspects of legal consequences which require clarification, such as reparation for the consequences of extreme and slow onset events (paragraphs 8 and 10), finance, capacity-building and technology transfer for adaptation and loss and damage (paragraph 11) and the commitment of USD 100 billion per year by 2020 for mitigation action by developed countries (paragraph 12).

88. Therefore, the argument that the general law of State responsibility is displaced by the climate change legal regime as *lex specialis* is not a convincing one. The two questions before the ICJ specifically request the court to consider the general law of State responsibility in a legal context where neither the UNFCCC nor the Paris Agreement displace such responsibility. Any non-adversarial and financial redress mechanisms found in the UN climate change regime are complementary. Further, the general law of State responsibility is by no means inapplicable to the issue of climate change, especially since the relevant conduct falls within the meaning of the very language of the ARSIWA, i.e., a "breach consisting of a composite act".

III. CONCLUSION

89. In view of the foregoing, Sri Lanka submits that there is ample material for the ICJ to clarify and confirm the following, despite arguments to the contrary in Written Statements of some States and International Organizations:

a) The **Relevant Conduct** contemplated under the UNGA Resolution 77/276 is acts and omissions of States which have caused significant harm to the climate system by GHG emissions over time, and scientific evidence to prove such harm is already available and undisputed;

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

b) The **Applicable Law** relating to State obligations to protect the climate system and other parts of the environment referred to in Question (a) is to be found not only in climate change specific instruments, but the entirety of the vibrant and diverse corpus of international law, including general principles and customary law, and such obligations extend to present and future generations; and

c) The **Legal Consequences** under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, should not be limited to the systems of redress contained in the UNFCCC or the Paris Agreement, but should include cessation, restitution and reparation as codified in the ARSIWA, as well as take into account historical responsibility and CBDR.

90. The recent jurisprudence emanating from the ITLOS lends credence to the position put forth by Sri Lanka and like-minded States and international organizations on many issues such as the non-exclusivity of UNFCCC and the Paris Agreement as *lex specialis*, the relevance of the precautionary principle and due diligence, and recourse to international responsibility when States fail to meet their obligations towards the climate system. Therefore, it is respectfully submitted that the ICJ be pleased to consider the persuasive value of that Advisory Opinion.

91. Whilst these Written Comments are limited to specific issues arising from the Written Statements of other States and International Organizations, Sri Lanka reiterates the contents of its Written Statement of March 2024, with regard to the following preliminary matters as well: the court has jurisdiction to render the requested advisory opinion, there are no compelling reasons to exercise discretion not to render the requested advisory opinion and there is no need to reformulate the two legal questions.

92. Thus, in the face of overwhelming scientific consensus on the causes and impacts of climate change, including country-specific evidence of such impacts on its own territory, Sri Lanka concludes by respectfully urging the ICJ to exercise its jurisdiction on the matter and opine on the two legal questions contained in the Request for an Advisory Opinion, in a manner that would clarify with recourse to all of the applicable

international law on climate change, the legal obligations of States and legal consequences for States when such obligations are breached. It is only then that climate justice will become a reality for the most vulnerable States, peoples and individuals and, indeed, all of humanity, today and in the future.

15th August 2024

_____

REKHA GUNASEKERA

[AMBASSADOR OF THE DEMOCRATIC SOCIALIST REPUBLIC

OF SRI LANKA

TO THE KINGDOM OF THE NETHERLANDS]