Organisation of African, Caribbean and Pacific States (OACPS)

Organisation des États d'Afrique, des Caraïbes et du Pacifique (OEACP)

REFERENCE: ACP/84/116/24

INTERNATIONAL COURT OF JUSTICE

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

WRITTEN COMMENTS OF THE

ORGANISATION OF AFRICAN CARIBBEAN AND PACIFIC STATES (OACPS)

15 AUGUST 2024

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I. INTRODUCTION

1. The present Written Comments are filed pursuant to the Order of the President of the International Court of Justice dated 30 May 2024. The Order fixed time-limits for the submission of written comments with respect to the "Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change" (**Resolution 77/276**).

2. The operative section of Resolution 77/276 reads as follows:

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

3. Pursuant to the Order of the President of the Court dated 15 December 2023, the OACPS and 90 other States and international organisations, within the meaning of Article 65 of the Statute of the International Court of Justice, filed written statements in the pending advisory proceedings. The OACPS notes that this number of submissions is unprecedented and that many were made by developing States that have never before participated in a proceeding before the Court. The OACPS submits that this widespread engagement demonstrates the vital importance of the questions currently before the Court to the international community, especially those most vulnerable to the adverse effects of climate change.

4. At the outset, the OACPS wishes to highlight four key features of its Written Statement. *First*, the OACPS' Written Statement draws the Court's attention to the

conduct of States that underlies the questions asked to the Court.[1] As the fifth recital of Resolution 77/276 of the General Assembly makes abundantly clear, the conduct at stake in these proceedings consists of acts and omissions of States "over time in relation to activities that contribute to climate change and its adverse effects". The request of the General Assembly asks the Court to clarify the obligations of States with respect to such conduct (broadly stated in *Question (a)* as "anthropogenic emissions of greenhouse gases"), and the legal consequences arising when a State, through its acts and omissions, has contributed significantly to climate change, i.e. when it has caused significant harm to the climate system and other parts of the environment.

5. *Second*, the OACPS' Written Statement explains how the conduct underlying the questions is governed by and has breached numerous legal obligations,[2] including obligations arising from the peoples' right to self-determination,[3] the duty to prevent the crime of genocide,[4] the prohibitions of racial and gender discrimination,[5] the duty to cooperate in good faith,[6] the duty of due diligence,[7] the duty to prevent significant harm to the environment,[8] the duty to protect and preserve the marine environment[9] and the duty to respect human rights,[10] as well as obligations arising from the climate change treaties.[11]

6. *Third*, the OACPS' Written Statement details the legal consequences for States which, by their acts and omissions in relation to activities which contribute to climate change and its adverse effects, have caused significant harm to the climate system and other parts of the environment in breach of their international obligations. Those legal consequences include both general legal consequences[12]

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1 Written Statement OACPS, paras. 32-36.

2 Written Statement OACPS, paras. 145-157 (addressing attribution and the nature of the breach in general).

3 Written Statement OACPS, paras. 64-71 and 151.

4 Written Statement OACPS, paras. 72-80 and 151.

5 Written Statement OACPS, paras. 81-90 and 151.

6 Written Statement OACPS, paras. 91-95 and 151.

7 Written Statement OACPS, paras. 96-100 and 148.

8 Written Statement OACPS, paras. 101-104 and 149.

9 Written Statement OACPS, paras. 105-111 and 151.

10 Written Statement OACPS, paras. 112-128 and 150.

11 Written Statement OACPS, paras. 129-137 and 151.

12 Written Statement OACPS, paras. 162-189.

and aggravated legal consequences applicable in the case of breach of *erga omnes* obligations.[13]

7. *Fourth*, the OACPS' Written Statement unveils the colonial and racial injustices underpinning the climate crisis. It stresses that greenhouse gas (**GHG**) emissions from colonies should be attributed to colonial powers, not to newly independent countries.[14] It further demonstrates the ways in which intertwined legacies of colonial oppression and racial discrimination have left Africans, peoples of African descent, Indigenous Peoples, and the peoples of Small Island Developing States disproportionately affected by the adverse effects of anthropogenic climate change and with less capacity to adapt.[15] Compounding this, colonial legacies have created a development paradigm in which former colonies—including many of the OACPS' Member States—are highly dependent on aid from their former colonisers, a situation only exacerbated by the disproportionate impact of climate change in these same States. In contrast, the colonial powers primarily responsible for the climate crisis have enriched themselves through both massive use of carbon-intensive energies and exploitation of their colonies, leaving them relatively well-equipped to deal with the adverse effects of climate change. Questions of climate justice are therefore inseparable from questions of racial and decolonial justice.[16]

8. The OACPS observes that the written statements submitted by the participants in the proceedings display a remarkable degree of consensus, especially considering their great number. *First*, except for the Islamic Republic of Iran ("Iran"), no participant challenges the jurisdiction of the Court to render the advisory opinion or argues for the exercise of discretion to refuse to respond to the request. Nuances are confined to arguments regarding the exercise of the Court's jurisdiction in a particular manner both with respect to *Question (a)* and *Question (b)* of the Request. *Second*, no participant holds the view that the conduct at stake in these proceedings, namely the conduct of States in relation to activities driving emissions of greenhouse gases, falls in a legal blackhole. All participants agree that States have obligations under international law that are applicable to anthropogenic emissions of greenhouse gases. An overwhelming majority also

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13 Written Statement OACPS, paras. 190-194.

14 Written Statement OACPS, paras. 39-42.

15 Written Statement OACPS, paras. 49-53 and 103.

16 Written Statement OACPS, para. 167.

recognises that such obligations arise under all sources of international law, namely customary international law, treaty law, and general principles of law, and that these obligations may be breached by the conduct at stake in the present proceedings. However, a minority of participants erroneously contend that international law obligations governing greenhouse gas emissions and the legal consequences of their violations stem solely from the "climate change treaty regime", encompassing the United Nations Framework Convention on Climate Change (**UNFCCC**), the Kyoto Protocol and the Paris Agreement. *Third*, all participants to the current proceedings agree that States have obligations to mitigate their greenhouse gas emissions and to adapt to their adverse impacts. They also agree that all States should cooperate with those States that are injured or specially affected by or particularly vulnerable to the adverse effects of climate change. *Fourth*, consistent with the shared view that the acts and omissions resulting in the emission of large amounts of greenhouse gases are governed by international law, most participants agree that there are legal consequences attached to the breach by States of their obligations under these rules. Whereas the large majority of participants acknowledges that such legal consequences include those arising under the customary international law of State responsibility for internationally wrongful acts, a minority of participants put forward the misguided argument that the breach of these obligations is governed only by the UNFCCC, the Kyoto Protocol and the Paris Agreement.

9. The OACPS observes that each of these points of conflict, raised by a minority of participants, revolves around the scope of the mandate of the Court. **This minority of participants, which consists essentially of large emitters of greenhouse gases and/or major producers of fossil fuels, seek to reduce the scope of the questions posed to the Court and the Court's engagement with it to the point of insignificance. In contrast, the OACPS and the overwhelming majority of the participants submit that the Court should fully engage with both parts of the questions by comprehensively examining both the obligations of States with respect to anthropogenic emissions of greenhouse gases, and the legal consequences of their breach through States' acts or omissions over time**.

10. In this respect, the OACPS stresses that Resolution 77/276 must be interpreted in conformity with the customary rules of interpretation applicable to resolutions of the organs of international organisations, as identified by the Court in the *Kosovo*

advisory opinion.[17] The answer of the Court represents its contribution to the work of the United Nations on a matter which determines the future of humankind as a whole. In this respect, the Court has previously observed there is "no need for it to interpret restrictively the questions put to it by the General Assembly".[18] The Court should rather "ascertain the meaning and full implications of the question in the light of the actual framework of fact and law in which it falls for considerations".[19] Thus, **following its own jurisprudence, the Court should avoid answering the questions posed by the General Assembly in a way that would be "incomplete, and, in consequence, ineffectual and even misleading as to the pertinent legal rules actually governing the matter under consideration by the requesting Organization".**[20]

11. In this submission, the OACPS provides comments on the identified points of disagreement between the position of the OACPS (as well as of most other participants) and that of a minority of participants, mainly major emitters of greenhouse gases and/or producers of fossil fuels. The OACPS structures its comments according to whether the points of disagreement concern: the jurisdiction of the Court or its discretion not to entertain the request for advisory opinion **(II)**; *Question (a)* of the Request for advisory opinion **(III);** or *Question (b)* of the Request **(IV)**, before briefly concluding (**V**).

II. JURISDICTION OF THE COURT

12. All participants in the advisory proceedings agree that the Court has jurisdiction, pursuant to Article 65 of the Statute of the International Court of Justice, to deal with the questions posed by the General Assembly.[21] However, a minority of

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17 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 442, para. 94.

18 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 129, para. 137.

19 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, ICJ Reports 1980*, p. 76, para. 10.

20 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, ICJ Reports 1980*, p. 76, para. 10.

21 Written Statement Portugal, paras. 26, 29; Written Statement Democratic Republic of Congo, para. 18; Written Statement Colombia, paras. 1.22; Written Statement Palau (acceptance implicit); Written Statement Tonga, para. 9; Written Statement OPEC, para. 13 (acceptance implicit), para. 13; Written Statement IUCN (acceptance implicit); Written Statement Singapore, paras. 2.6; Written Statement Peru, paras. 7-8, Written Statement Solomon Islands, para. 11; Written Statement Canada, para. 11; Written Statement Cook Islands, para. 10; Written Statement Seychelles, para. 8; Written Statement Kenya, paras. 4.10; Written Statement Denmark, Finland, Iceland, Norway, Sweden, para. 11; Written Statement MSG, paras. 22-3; Written Statement Philippines, para. 26; Written Statement Albania, paras. 26-7; Written Statement Micronesia, paras. 20-22; Written Statement Saudi Arabia, paras. 3.5, 3.10-17

participants argue that the Court should be cautious when deciding whether to exercise its discretion to entertain the request for advisory opinion **(A)** or that it should reformulate the questions **(B)**. A few participants insist that the Court should exercise its jurisdiction over the request in a particular manner that they attempt to define **(C)**.

A. There are no compelling reasons for the Court not to entertain the request for an advisory opinion

13. The OACPS notes that of the 91 participants in the present proceedings, only Iran explicitly argues that the Court should exercise its discretion not to entertain the request for an advisory opinion. Specifically, Iran argues that the Court should decline to render the advisory opinion because the questions are not precise enough[22] and further invites the Court to decide the issues presented as a matter of *de lege ferenda*.[23]

(accepting jurisdiction but arguing that the Court should take care when exercising its jurisdiction because of the political nature of ongoing negotiations on the international law of climate change); Written Statement Sierra Leone, paras. 2.3-5; Written Statement Vanuatu, paras. 33-6; Written Statement Switzerland, para. 10; Lichtenstein, para. 14; Written Statement Grenada, para. 9; Written Statement St Lucia, para. 10; Written Statement Saint Vincent and the Grenadines, para. 18; Written Statement Belize, para. 4; Written Statement United Kingdom (acceptance implicit); Written Statement Netherlands, para. 1.4; Written Statement Bahamas, para. 29; Written Statement United Arab Emirates, para. 5; Written Statement Marshall Islands, para. 14; Written Statement Parties to the Nauru Agreement (acceptance implicit); Written Statement Pacific Islands Forum (acceptance implicit); Written Statement France, paras. 5-6; Written Statement New Zealand (acceptance implicit); Written Statement Slovenia, para. 7; Written Statement Kiribati, paras. 5-8; Written Statement Forum Fisheries Agency (acceptance implicit); Written Statement China, para. 6; Written Statement Timor-Leste, para. 13; Written Statement Korea, para. 5; Written Statement India, para. 4-7; Written Statement Japan (acceptance implicit); Written Statement Samoa, para. 10; Written Statement Alliance of Small Island States, paras. 9-10; Written Statement Iran, paras. 14-22 (accepting jurisdiction in principle but arguing the Court should exercise discretion to decline jurisdiction); Written Statement Latvia, para. 8; Written Statement Mexico, paras. 8-10; Written Statement South Africa, paras. 8-10 (accepting jurisdiction in principle but suggesting the Court should reformulate the questions); Written Statement Ecuador, para. 2.6-7; Written Statement Cameron, paras. 8-9; Written Statement Spain (implicit acceptance); Written Statement Barbados, paras. 27-30; Written Statement African Union, para. 30; Written Statement Sri Lanka, para. 10; Written Statement OACPS, para. 11; Written Statement Madagascar, para. 7; Written Statement Uruguay, para. 72; Written Statement Egypt, para. 20; Written Statement Chile, para. 16; Written Statement Namibia, para. 20, 25; Written Statement Tuvalu (acceptance implicit); Written Statement Romania (acceptance implicit); Written Statement USA (acceptance implicit); Written Statement Bangladesh, para. 81-82; Written Statement EU, para. 27; Written Statement Kuwait (acceptance implicit); Written Statement Argentina, para. 12; Written Statement Mauritius, para. 17; Written Statement Nauru (acceptance implicit); Written Statement WHO (acceptance implicit); Written Statement Costa Rica, para. 8; Written Statement Indonesia, para. 24; Written Statement Pakistan (acceptance implicit); Written Statement Russia, pg. 3; Written Statement Antigua and Barbuda (acceptance implicit); Written Statement Commission of Small Island States on Climate Change and International Law (acceptance implicit); Written Statement El Salvador, paras. 7-8; Written Statement Bolivia, para. 5; Written Statement Australia, para. 1.25; Written Statement Brazil, para. 6; Written Statement Viet Nam, para. 8; Written Statement Dominican Republic, paras. 3.5-6; Written Statement Ghana, para. 20; Written Statement Thailand (acceptance implicit); Written Statement Germany, paras. 10; Written Statement Nepal, paras. 3-4; Written Statement Burkina Faso, para. 55; Written Statement Gambia, para. 1.

22 Written Statement Iran, paras. 15-20

23 Written Statement Iran, paras. 21-24.

14. Pursuant to the case law of the Court, "the question put to it for an advisory opinion must be a legal question and must be precise enough to enable the Court to give a meaningful opinion".[24] However, the Court has never exercised its discretion not to entertain a request for advisory opinion based on the lack of clarity of the question posed to it. In a few cases, the Court has reformulated questions asked to it.[25] The questions here do not justify either course of action.

15. The OACPS has already explained in its Written Statement the meaning and significance of the questions submitted by the General Assembly for an advisory opinion of the Court, establishing that the questions are clearly formulated and that both (*Question (a)* and *Question (b)*) require a legal answer.[26] This understanding is confirmed in the Written Statements of other participants.[27] The two arguments raised by Iran miss the mark. *First*, Iran argues that the questions are not clear because there is a contradiction between the reference to certain treaties in the chapeau of Resolution 77/276, on the one hand, and to international law more generally in the text of *Question (a)*, on the other. The OACPS recalls that the resolution of the General Assembly must be interpreted in the light of the customary rules of interpretation applicable to such instruments, as elaborated by the Court in its *Kosovo* advisory opinion.[28] In this respect, the OACPS notes that the obligations of States under international law include their conventional obligations. There is therefore no contradiction between the chapeau and the text of *Question (a)*. The Court is called to examine the obligations of States with respect to the entire corpus of international law, including both treaty law for the States parties to such treaties and customary international law for all States.

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24 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 442, para. 94.

25 See *Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV), Advisory Opinion, 1928, P.C.I.J., Series B, No. 16* (where the question was not adequately formulated) and *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 89, para. 35 (where the Court considered that the request did not reflect the "legal questions really in issue"), and *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 348, para. 46 (where the Court considered that the question asked was unclear or vague).

26 Written Statement OACPS, paras. 13-14, 55-62 (Question (a)), paras. 139-142 (Question (b)).

27 See in particular the detailed explanation provided in the Written Statement Vanuatu, paras. 31-36, 211-216 (Question (a)), paras. 489-492 (Question (b)).

28 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 442, para. 94.

16. *Second*, Iran argues that *Question (a)* would require the Court "to enter *lex ferenda* which departs from its functions and precedent".[29] However, this conclusion is based on Iran's incorrect view that "the obligation to ensure the protection of the climate system and other parts of the environment is not solidly rooted in the cited instruments".[30] As demonstrated in the OACPS' Written Statement, the obligations ensuring the protection of the climate system and other parts of the environment arise from a wide range of international norms.[31] Moreover, as the OACPS has demonstrated, the adverse effects of climate change affect the core object of numerous applicable legal norms and instruments, including those pertaining to the protection of human rights,[32] the prohibition on genocide,[33] and the right of peoples to self-determination.[34] The identification and clarification of related obligations is an essential aspect of the question posed by the General Assembly. There is, therefore, no ground which would compel the Court to decline to exercise its jurisdiction or reformulate the question based on Iran's erroneous views on the content of the law.

B. The Court should not reformulate the questions posed by the General Assembly

17. The OACPS notes that a few participants have argued that the questions posed by the General Assembly are not precise enough, that they are too broad or phrased in too broad of terms. Based on such arguments, some participants have suggested that the Court should interpret the questions posed by the General Assembly narrowly.[35]

18. The OACPS observes that, in some rare cases, the Court "has departed from the language of the question put to it where the question was not adequately formulated or where the Court determined, on the basis of its examination of the background to the request, that the request did not reflect the 'legal questions really

29 Written Statement Iran, para. 22.

30 Written Statement Iran, para. 22.

31 Written Statement OACPS, paras. 63-137.

32 Written Statement OACPS, paras. 81-90, 112-128.

33 Written Statement OACPS, paras. 72-80.

34 Written Statement OACPS, paras. 64-71.

35 See for instance, Joint Written Statement Nordic Countries, paras. 30-33.

in issue'. Similarly, where the question asked was unclear or vague, the Court has clarified the question before giving its opinion".[36]

19. In the present proceedings, the questions posed by the General Assembly is clear and—very importantly— its specific wording has been deemed understandable by all States of the General Assembly (including therefore all those who now call their clarity into question), which adopted Resolution 77/276 by consensus. By its very terms, *Question (a)* requires the Court to identify the obligations of States with respect to anthropogenic greenhouse gas emissions. *Question (b)* asks the Court to determine the legal consequences arising from a certain conduct, namely acts and omissions whereby certain States have caused significant harm to the climate system and other parts of the environment. As such, **the two questions ask the Court to perform a strictly judicial task, namely "an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law".[37] To answer the questions, "the Court must identify the existing principles and rules, interpret them and apply them to [climate change and its adverse impacts], thus offering a reply to the question posed based on law"**.[38] The questions are clear and they ask the Court to provide a legal answer, without prejudging any issue of law. There is no reason for the Court to reformulate them.

C. The Court should exercise its jurisdiction in its ordinary manner

20. A limited number of participants have argued that the Court should exercise its jurisdiction in the present case in a particular manner based on pending negotiations on climate change in different fora. In this respect, some participants have argued that the Court should approach this issue "prudently".[39] Saudi Arabia has argued that the Court should be "careful" when exercising its jurisdiction not to contradict compromises that have been arrived at through the negotiations relating to climate change.[40]

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36 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 423, para. 50 (internal citation omitted).

37 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 234, para. 13.

38 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 234, para. 13 (emphasis added).

39 Written Statement China, para. 9.

40 Written Statement Saudi Arabia, para. 3.17. See also, Written Statement China, para. 3.7.

21. The OACPS notes that the submissions of participants asserting this view are nebulous. They do not explain the specific implications of the "prudence" they suggest, unless their submission is merely to ask the Court to do what it always does, namely to carefully and thoroughly consider all aspects of a situation when discharging its judicial function. This type of prudence is at the heart of the Court's work, as evidenced by the Court's overall practice, which affirms that its jurisdiction is not that of a legislator and that its role is to strictly apply the law.[41] In this respect, the submission of these participants is at best redundant.

22. Concerning pending negotiations, the Court has consistently held, including recently,[42] that existing negotiations are no obstacle to the Court's exercise of its advisory jurisdiction. When these negotiations lead to an agreement, such agreement becomes part of the law that the Court must apply. However, when negotiations do not lead to an agreement, the advisory jurisdiction of the Court may facilitate the negotiations by clarifying the international legal framework within which they are taking place. As this Court stated in its most recent advisory opinion, "the question of whether the Court's opinion would have an adverse effect on a negotiation process is a matter of conjecture. The Court cannot speculate about the effects of its opinion."[43] Accordingly, the OACPS maintains that the Court should not depart from its established practice in the current case.

III. QUESTION (A): OBLIGATIONS OF STATES UNDER INTERNATIONAL LAW IN RESPECT OF ANTHROPOGENIC EMISSIONS OF GREENHOUSE GASES

23. *Question (a)* of the request for advisory opinion reads as follows:

> "Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment,
>
> (a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from

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41 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I. C.J. Reports 1996*, p. 226, para. 18.

42 *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*, p. 18, para. 40.

43 *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem, Advisory Opinion, Advisory Opinion of 19 July 2024, General List No. 186*, p. 18, para. 40.

anthropogenic emissions of greenhouse gases for States and for present and future generations"

24. In its Written Statement, the OACPS established that a range of international obligations are applicable to protect the climate system and other parts of the environment from anthropogenic greenhouse gas emissions, **not only "for States" but also "for present and future generations"**.[44] The vast majority of other Written Statements put forth essentially the same position.[45] As the OACPS has explained, such obligations include the right of peoples to self-determination, the prohibition against racial discrimination, the obligation to exercise due diligence, the principle of no-harm, the duty to protect and preserve the marine environment and, of course, obligations arising from human rights.

25. The OACPS notes that a minority of participants have raised points of disagreement with respect to *Question (a)* concerning the scope of the obligations of States with respect to anthropogenic emissions of greenhouse gases. Specifically, these participants make arguments that either seek to reduce the scope of the applicable law before the Court **(A)**; or seek to reject the application of specific obligations to the anthropogenic emissions of greenhouse gases **(B)**.

A. The Court's response to the question should draw on the entirety of international law

26. As the OACPS has explained, the question referred by the General Assembly asks the Court to consider State obligations "under international law" with no qualifications, having particular regard for those sources of law referenced in the

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44 Written Statement OACPS, paras. 63-137.

45 *See, e.g.*, Written Statement Melanesian Spearhead Group, para. 231; Written Statement Vanuatu, paras. 203-207; Written Statement Solomon Islands, paras. 53-55; Written Statement Colombia, para. 3.71; Written Statement Peru, paras. 68-73; Written Statement Cook Islands, paras. 132-147; Written Statement Kenya, para. 2.8; Written Statement Sierra Leone, para. 3.5; Written Statement Grenada, para. 19; Written Statement Saint Lucia, paras. 39-42; Written Statement Saint Vincent and the Grenadines, para. 94; Written Statement Marshall Islands, paras. 103, 124; Written Statement Slovenia, paras. 9-10; Written Statement Samoa, paras. 85-86; Written Statement Latvia, para. 15; Written Statement Mexico, para. 37; Written Statement Ecuador, paras. 3.2-3.3; Written Statement African Union, paras. 40-41; Written Statement Sri Lanka, paras. 90-91; Written Statement Madagascar, para. 17; Written Statement Egypt, paras. 68-75; Written Statement Chile, para. 33; Written Statement Namibia, paras. 40-41; Written Statement Uruguay, paras. 81-83; Written Statement Argentina, paras. 33-34; Written Statement Mauritius, para. 219; Written Statement Costa Rica, paras. 32-36; Written Statement Viet Nam, para. 15; Written Statement Dominican Republic, para. 4.1; Written Statement Thailand, paras. 3-4; Written Statement Singapore, paras. 3.1, 3.27, 3.44; Written Statement Seychelles, paras. 64-67; Written Statement Federated States of Micronesia, paras. 42-48; Written Statement Bangladesh, paras. 84-85; Written Statement Pakistan, para. 28; Written Statement Burkina Faso, para. 68; Written Statement Philippines, para. 49; Written Statement Albania, paras. 63-64; Written Statement Bahamas, para. 83; Written Statement Kiribati, paras. 108-190; Written Statement Tuvalu, para. 72; Written Statement Nepal, paras. 17-21; *cf.* Written Statement Canada, paras. 19, 32; Written Statement Tonga, paras. 124.127, 139-144; Written Statement Netherlands, paras. 3.22-3.23, 4.3-4.6, 4.15-4.17, 4.24.

chapeau paragraph. The broad scope of the question reflects the Court's singular competence as the principal judicial organ of the United Nations. Only the Court has jurisdiction to consider the issue of climate change under the entirety of international law. The OACPS and others have also established that a wide array of treaties, customary norms, and general law principles instill States with legal obligations in relation to anthropogenic greenhouse gas emissions.

27. Two main arguments have been made by a limited number of participants seeking to reduce the scope of the applicable law. First, some participants have argued that the UNFCCC, the Kyoto Protocol and the Paris Agreement, sometimes referred to as the climate change treaty regime, is the only applicable law **(1)**. Other participants acknowledge that these treaties are not the only applicable law, but maintain that all other legal rules applicable to the anthropogenic emissions of greenhouse gases and their adverse effects should be interpreted in a manner that is consistent with those three treaties—such that mere compliance with them would be sufficient to discharge all obligations arising from any other sources of law **(2)**. The OACPS considers each of these arguments in turn and explains why they are incorrect and misguided.

1. Numerous sources of law, including customary law, treaty law, and general principles of law, are applicable to the anthropogenic emissions of greenhouse gases and their adverse effects

28. A small number of participants have argued that what they refer to as the climate change treaty regime is the only law applicable to the current proceedings either for *Question (a)* or *Question (b)* or for both questions.[46] The positions of the States and international organisations which make this broad argument are not uniform and vary from references to the *lex specialis* principle to concepts such as that of purported "self-contained regimes".

29. The OACPS maintains that none of these arguments are tenable. From the outset, the OACPS stresses that, if the only applicable law consisted of the purported

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46 Written Statement Kuwait, paras. 60-65 (claiming that other principles under customary international law are subsumed by the UNFCCC and the Paris Agreement); Written Statement Japan, paras. 4-18; Written Statement Russia, p. 5; Written Statement OPEC, para. 62 (arguing that "Obligations of States under international law to protect the climate system and other parts of the environment from anthropogenic GHG emissions are expressly outlined in the climate change treaty regime of the UNFCCC, Kyoto Protocol, and Paris Agreement (*lex specialis*). These instruments are "*self-contained*" in their holistic governance of anthropogenic GHG emissions"), Written Statement Saudi Arabia, para. 4.1-4.5; See more generally, Chapter IV of Saudi Arabia's Written Statement; Written Statement South Africa, paras. 12-20 (self-contained regime/and lex specialis); Joint Written Statement Nordic Countries, para. 52.

climate change treaty regime, **there would be no need for the General Assembly, acting by consensus, to ask the Court to identify the relevant obligations "having particular regard" to a much wider body of law**.

30. Indeed, the terms of Resolution 77/276 and of the questions themselves indicate that the Court is being asked to consider the entire corpus of international law. The relevant conduct for the purpose of *Question (a)* is broadly defined as "anthropogenic emissions of greenhouse gases" (the conduct is more narrowly defined for *Question (b)* about the legal consequences). The term "anthropogenic" stresses that these are emissions from human activities, as recalled in the fifth recital of Resolution 77/276 referring to "activities that contribute to climate change and its adverse effects". This conduct thus clearly implicates several treaties, in addition to the purported climate change treaty regime, that specifically regulate emissions of greenhouse gases. These include the Montreal Protocol on Substances that Deplete the Ozone Layer[47] (and its overarching Vienna Convention on the Protection of the Ozone Layer[48]), the MARPOL Convention,[49] the Gothenburg Protocol[50] (and its overarching Convention on Long-Range Transboundary Air Pollution[51]) and many others. **Moreover, and more importantly, the questions do not limit the scope of the applicable law to treaties that focus on specific types of pollutants or polluting activities. Nor indeed is there any reason for the scope of applicable law to be so limited. The questions both expressly reference and plainly implicate treaties and rules of general international law that govern specific problems driven by climate change (e.g., desertification[52]) as well as objects to be protected from both emissions of pollutants and the problems they cause.** These objects include the marine environment (governed by the United Nations Convention on

47 Montréal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, 1522 UNTS 3.

48 Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, 1513 UNTS 293.

49 Protocol of 1997 to amend the International Convention for the Prevention of Pollution from Ships of 2 November 1973, as modified by the Protocol of 17 February 1978, 26 September 1997; Resolution MEPC.176(58), Amendments to the Annex of the Protocol of 1997 to amend the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating there to (10 October 2008).

50 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on the Reduction of Acidification, Eutrophication and Ground-Level Ozone, 30 November 1999, Document of the Economic and Social Council EB.AIR/1999/1.

51 Convention on Long-Range Transboundary Air Pollution, adopted in Geneva on 13 November 1979, 1302 UNTS 217.

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

the Law of the Sea (UNCLOS)[53]), biodiversity (governed by the Convention on Biological Diversity[54]), and the well-being of individuals and peoples of present and future generations (governed by numerous sources of law, including a wide range of human rights treaties, the principle of self-determination, and the general principle of intergenerational equity). Likewise, the customary duty to protect and preserve the marine environment and the principle of prevention of significant environmental harm are specifically designed to protect certain objects from any threat or harm, including harms stemming from climate change.

31. Next, arguments that the so-called climate change treaty regime is "self-contained" and thus precludes the applicability of other sources of law find are both misguided and legally unfounded. **Even assuming that there is a legally-grounded concept of a "self-contained regime", the purported climate change treaty regime does not consider itself as such**. For such a regime to exist, it would need to provide for its own rules governing treaty interpretation and the legal consequences of internationally wrongful acts. As is axiomatic, a self-contained regime cannot exist without a treaty clause that specifically creates it. Nor can it be inferred from existing clauses. Although the Court referred to the concept of "self-contained regimes" in the *Tehran Hostages* case, the reference was to indicate that the Vienna Convention on Diplomatic and Consular Relations have their own mechanisms to ensure compliance with their provisions.[55] This was not to say that the conventions are self-sufficient and govern alone and exclusively all matters. In subsequent cases, the Court has referred to general international law, human rights law and other rules of international law to interpret and apply these conventions. Concerning particularly international environmental law, the Court has stressed that many rules and treaties can contribute to environmental protection by referring to "the existing international law relating to the protection and safeguarding of the environment".[56]

32. **More basically, the very text of the UNFCCC, the Kyoto Protocol and the Paris Agreement specifically refer to the continued application of other rules of international law to anthropogenic emissions of greenhouse gases**. For

53 United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 397.

54 Convention on Biological Diversity, 5 June 1992, 1760 UNTS 69.

55 *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment, I.C.J. Reports 1980*, p. 40, para. 86.

56 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 243, para. 33.

example, while there is no reference to human rights in the UNFCCC, a decision of the Conference of the Parties in December 2010 "emphasizes" at paragraph 8 "that Parties should, in all climate change related actions, fully respect human rights".[57] This statement makes it abundantly clear that human rights govern "all climate change related actions" and that the relevant obligations do not flow from the UNFCCC itself. Article 2(1)(a)(ii) of the Kyoto Protocol expressly requires Parties to "tak[e] into account [their] commitments under relevant international environmental agreements" and reserves certain matters to the application of the Montreal Protocol or to negotiations under International Civil Aviation Organization or the International Maritime Organization. The Paris Agreement "*acknowledges*" that "when taking action to address climate change" Parties are to "respect, promote and consider their respective obligations on human rights".[58] Again, it is clear that human rights govern "action to address climate change", and that the relevant obligations certainly do not flow from the text of the Paris Agreement. To conclude, the OACPS recalls that "a rule of international law, whether customary or conventional, does not operate in a vacuum; it operates in relation to facts and in the context of a wider framework of legal rules of which it forms only a part".[59]

33. Likewise, the argument that the purported climate change treaty regime is *lex specialis* is legally defective, both in relation to customary international law rules, such as the duty of due diligence or the duty to prevent significant harm to the environment, and in relation to other fields of international law such as the law of the sea or international human rights law.

34. As a general matter, the operation of the *lex specialis* doctrine does not concern vague conceptual categories such as "fields" (or "branches") displacing other "fields" (or "branches"). This is confirmed by the Court's jurisprudence. In the *Wall Advisory Opinion*, the Court indicated that the relations between human rights and humanitarian law is not one of *lex specialis* at the level of the branch of international law themselves.[60] In the *DRC v. Uganda* case, the Court applied both rules of

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

58 Paris Agreement, 12 December 2015, 3156 UNTS 79, preambular paragraph 11.

59 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 76, para. 10.

60 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 178, para. 106 (holding that "[m]ore generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human

human rights and humanitarian law to a situation of armed conflict and disregarded the *lex specialis* doctrine.[61] The idea of the climate change regime displacing the application of the entire field of international law in relation to anthropogenic emissions of greenhouse gases is therefore alien to the Court's jurisprudence on the *lex specialis* doctrine, as well as to the letter of the UNFCCC, the Kyoto Protocol and the Paris Agreement. This conclusion has been confirmed by the International Tribunal for the Law of the Sea (**ITLOS**) specifically in relation to the Paris Agreement in its recent **unanimous advisory opinion** on State obligations in respect of climate change under the UNCLOS. The Tribunal explained that:

> "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 . . . 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**".[62]

35. In addition, the *lex specialis* doctrine is based on the rationale that States subject to an obligation may have derogated from such obligation through a more specific agreement. As the International Law Commission's (**ILC**) commentary to the Articles on State Responsibility for Internationally Wrongful Acts (**ARSIWA**) explains, such a derogation must be express or result very clearly from the terms of the *lex specialis*:

> "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".[63]

36. However, none of the participants who invoke the application of the *lex specialis* doctrine refer to a specific provision through which the parties to the UNFCCC, the Kyoto Protocol or the Paris Agreement made clear that they intended to contract

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rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law"). See also, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 240, para. 25.

61 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*, p. 168, paras. 216-217.

62 *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)*, ITLOS Case No. 31, Advisory Opinion (21 May 2024), paras. 223-224 (emphasis added).

63 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 to Article 55, para. 4.

out from any other rules of international law. Moreover, such participants fail to explain how other international law obligations, including those protecting the human rights of individuals, peoples and Indigenous Peoples, are inconsistent with the obligations that seek to mitigate and adapt to the adverse effects of climate change. They were unable to make these showings because their arguments are baseless. Indeed, as noted earlier, if any indication can be derived from the text of the UNFCCC, the Kyoto Protocol or the Paris Agreement, it leads to the exact opposite conclusion: these treaties were never intended to operate as a *lex specialis* with respect to other international legal obligations.

2. All applicable obligations retain independent force alongside climate change treaties

37. Another attempt to give primacy to what some participants call the climate change treaty regime recognises that these treaties are not the only applicable law yet seeks to gut other legal rules of their independent operation. Participants taking this view argue that obligations under other sources of international law should be interpreted and applied in a manner that is "consistent" with the climate change treaty regime,[64] in a complementary[65] or harmonious manner.[66] Some other participants seek to establish a presumption of conformity in favour of the climate change regime. For some of these participants, a State that complies with the climate change treaty regime should be presumed to have complied with their other international law obligations.[67] In this respect, some participants have referred to the principle of systemic integration[68] or suggested that the Paris Agreement should provide parameters to determine compliance with other obligations.[69]

38. The OACPS observes that these arguments, which seek to nullify the legal significance of entire fields of international law as well as of numerous specific obligations, are in clear contradiction with the principle of effectiveness that governs the interpretation of legal instruments. The principle of effectiveness precludes the interpretation of the provisions of a treaty from making other

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64 Written Statement Australia, para. 2.62; Written Statement Saudi Arabia, para. 4.95 (with respect to UNCLOS); Written Statement USA, para. 4.1 (with respect to customary international law).

65 Written Statement China, para. 19.

66 Written Statement France, paras 11 and 13.

67 See for instance, the Joint Written Statement Nordic Countries, para. 73.

68 Written Statement Spain, para. 18; Written Statement Germany, para. 118 a), para. 13.

69 Joint Written Statement Nordic Countries, para. 73.

provisions of the same treaty redundant. Thus, it precludes *a fortiori* the interpretation of the provisions of a treaty to deprive of *effet utile* entire treaties and rules of general international law. Accordingly, Article 31(3)(c) of the Vienna Convention on the Law of Treaties (**VCLT**) cannot be used to displace the application of other rules of international law under the guise of systemic integration.[70] None of the participants in the current proceedings has been able to show a single judicial decision that made nugatory entire fields of international law, under the guise of systemic integration or based on presumptions. In this respect, the OACPS wishes to correct a misreading of the Court's jurisprudence in the *Legality of Nuclear Weapons* made by some participants. In that advisory opinion, the Court stressed that it would apply "the most directly relevant applicable law governing the question of which it was seized".[71] However, the Court came to such conclusion not by excluding other applicable laws, but only after considering that the other obligations referred to in the proceedings did not provide an answer to the specific question put to the Court. In any event, the Court went on to discuss a wide range of treaties and rules, including *jus ad bellum*, *jus in bello* and arms control treaties.[72]

39. The OACPS further notes that the ITLOS has expressly considered and **unanimously dismissed** the idea that compliance with the Paris Agreement could be equated to compliance with another international regime that governs climate change, namely the UNCLOS.[73] The OACPS therefore submits that the Court should interpret each applicable provision "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", as required by Article 31(1) of the VCLT. This approach ensures that all applicable provisions produce their *effet utile* in the pending proceedings. Systemic integration and harmonious interpretation support this interpretative requirement. Indeed, no existing rule of interpretation can

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70 *Jadhav (India v. Pakistan), Judgment, I.C.J. Reports 2019*, p. 418, para. 135; *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)*, ITLOS Case No. 31, Advisory Opinion (21 May 2024), para 224; *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue (31 August 2018), para. 158.

71 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 243, para. 34.

72 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, paras. 33-34.

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

plausibly be understood as performing an alchemical feat that transforms a State's compliance with a narrow set of obligations under the UNFCCC, Kyoto Protocol and Paris Agreement into instantaneous compliance with every other relevant obligation binding upon it.

40. The absurdity of the "alchemical feat" argument becomes even more glaring when considering treaty and customary rules enshrining *jus cogens* norms, and obligations arising under the UN Charter pursuant to its Article 103. It is well established that obligations stemming from *jus cogens* norms, such as the right of peoples to self-determination and the prohibition against racial discrimination, prevail over any other obligation. Moreover, pursuant to Article 103 of the UN Charter, any obligation arising from the UN Charter—including the duties to respect human rights and the right to self-determination—prevail over any other treaty obligations for UN Member States. The notion that compliance with a narrow set of obligations under the UNFCCC, Kyoto Protocol and Paris Agreement could automatically satisfy these overriding norms and obligations is patently untenable.

B. Specific obligations that govern State conduct in relation to anthropogenic emissions of greenhouse gases

41. The OACPS and numerous other participants established in their Written Statements that a wide range of legal obligations govern State conduct in relation to anthropogenic greenhouse gas emissions. A limited number of participants, here again mostly major GHG emitters and/or fossil fuel producers, have sought to reject the application of specific international obligations to the anthropogenic emissions of greenhouse gases. The obligations that are the most targeted for exclusion from *Question (a)* include, unsurprisingly, those obligations that are most clearly breached by the conduct defined in *Question (b)*, namely the obligations under UNCLOS **(1)**, the obligations under human rights law, including the right of peoples to self-determination **(2)**, the obligations with respect to the rights of future generations **(3)**, and the duty to prevent significant harm to the environment **(4).**

1. Obligations under the United Nations Convention on the Law of the Sea

42. The OACPS and the vast majority of participants making submissions on the applicability of the UNCLOS take the view that it vests States with legal obligations

in relation to anthropogenic emissions of greenhouse gases.[74] This interpretation was recently confirmed by the ITLOS.[75] A minority of participants, however, have questioned the relevance of the UNCLOS as a source of obligations of States with respect to anthropogenic emissions of greenhouse gases. For instance, Russia maintains that the UNCLOS is not applicable,[76] while China maintains that anthropogenic emissions of greenhouse gases do not constitute marine pollution.[77] Their views may have evolved after receiving the unanimous advisory opinion of the ITLOS rejecting such contentions, but for the avoidance of doubt, the OACPS addresses the arguments.

43. The OACPS notes that neither the UNCLOS nor the UNFCCC, Kyoto Protocol or Paris Agreement exclude the applicability of UNCLOS to anthropogenic emissions of greenhouse gases. As explained in the Written Statements of the OACPS and numerous other participants, and recently confirmed by the ITLOS,[78] anthropogenic emissions of greenhouse gases constitute pollution of the marine environment within the meaning of Article 1(1)(4) of the UNCLOS. Accordingly, anthropogenic emissions of greenhouse gases are governed not only by the UNCLOS treaty rules regarding the protection and preservation of the marine environment, but also by those provisions more specifically focusing on pollution

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74 Written Statement OACPS, paras. 105-106; Written Statement Portugal, para. 66; Written Statement Democratic Republic of Congo, paras. 211-220; Written Statement Tonga, para. 224; Written Statement International Union for the Conservation of Nature, paras. 174-175; Written Statement Singapore, paras. 3.44-3.46, 3.52-3.53; Written Statement Peru, para. 86; Written Statement Solomon Islands, para. 205; Written Statement Canada, para. 19; Written Statement Cook Islands, paras. 158-178; Written Statement Saint Lucia, paras. 68-74; Written Statement United Kingdom, para. 118; Written Statement Netherlands, paras. 2.8, 3.21; Written Statement Bahamas, para. 124; Written Statement Marshall Islands, paras. 45-46; Written Statement Parties to the Nauru Agreement, paras. 26-29; Written Statement France, paras. 101-105; Written Statement New Zealand, para. 90; Written Statement Korea, para. 26; Written Statement Latvia, paras. 40-42; Written Statement Ecuador, paras. 3.88-3.92; Written Statement Cameroon, para. 13; Written Statement Barbados, paras. 159, 185; Written Statement African Union, para. 57; Written Statement Sri Lanka, para. 94(c); Written Statement Egypt, paras. 275-285; Written Statement Argentina, para. 48; Written Statement Mauritius, paras. 148-154; Written Statement Tuvalu, para. 73; Written Statement Bangladesh, para. 97; Written Statement European Union, para. 288-292; Written Statement Federated States of Micronesia, paras. 100-102; Written Statement Sierra Leone, para. 3.124; Written Statement Costa Rica, paras. 68-69; Written Statement Antigua and Barbuda, paras. 198-208; Written Statement Commission of Small Island States on Climate Change and International Law, para. 106; Written Statement Burkina Faso, paras. 146-147.

75 *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)*, ITLOS Case No. 31, Advisory Opinion (21 May 2024), para 441.

76 Written Statement Russia, pp. 12-14.

77 Written Statement China, para. 103.

78 *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)*, ITLOS Case No. 31, Advisory Opinion (21 May 2024), para 179 ("[T]he Tribunal concludes that anthropogenic GHG emissions into the atmosphere constitute pollution of the marine environment within the meaning of article 1, paragraph 1, subparagraph 4, of the Convention.").

of the marine environment.[79] As a sister UN judicial body, the Court should give "utmost importance" to the unanimous views of the ITLOS, which is the tribunal specifically established to monitor the interpretation and application of the UNCLOS.[80] In this respect, the OACPS notes that the Court has already done so in the past,[81] particularly concerning maritime delimitation.[82] The Court has also endorsed findings made by the ITLOS in advisory proceedings.[83]

2. Human rights obligations, including in respect of peoples' rights

44. The OACPS reiterates the submissions made in its Written Statement that human rights obligations govern State conduct in respect of anthropogenic emissions of greenhouse gases and their adverse effects, and that these obligations apply extra-territorially.[84] The OACPS notes that, of those participants who make submissions on human rights, the vast majority take positions that converge with that of the OACPS.[85] The views of this majority of participants reflect the well-established and consistent determinations of human rights bodies and courts that human rights obligations apply, and do so extra-territorially, in the context of climate change.[86] Yet a small minority of participants have questioned the applicability of

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79 See Written Statement OACPS, paras. 105-111; *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)*, ITLOS Case No. 31, Advisory Opinion (21 May 2024), paras 193-291.

80 See by analogy with the Court's approach to the International Criminal Tribunal for the former Yugoslavia's findings on international criminal responsibility, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, para. 403.

81 See for instance, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2022*, p. 311, paras. 179, 195 (concerning the definition of the "marine environment").

82 See for instance, the numerous instances of reliance by the Court to the findings of ITLOS in the *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Judgment, I.C.J. Reports 2021*, p. 265, paras. 162, 166, 189.

83 See *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2022*, p. 336, para. 179 (concerning the implementation by the flag state of environmental regulations issued by the coastal state).

84 Written Statement OACPS, paras. 118-119.

85 See, e.g., Written Statement Vanuatu, paras. 253, 260; Written Statement Singapore, para. 3.75; Written Statement Marshall Islands, paras. 49-50; Written Statement Kiribati, paras. 155-170; Written Statement Ecuador, paras. 3.97-3.98, 3.113; Written Statement Egypt, paras. 198-205, 244-247; Written Statement Chile, paras. 68-70; Written Statement Tuvalu, paras. 98-102; Written Statement Costa Rica, paras. 66-67, 110; Written Statement Burkina Faso, paras. 190-194; Written Statement Democratic Republic of Congo, para. 189; Written Statement Colombia, paras. 3.69-3.72; Written Statement Peru, paras. 88-89; Written Statement Kenya, paras. 5.51-5.53; Written Statement Bahamas, paras. 141-175; Written Statement Samoa, paras. 180-186; Written Statement African Union, paras. 208-209; Written Statement Namibia, paras. 79-81; Written Statement European Union, paras. 243-284; Written Statement Antigua and Barbuda, paras. 171-196, 358; Written Statement Bolivia, paras. 13-14; Written Statement Dominican Republic, para. 5.1; Written Statement Thailand, paras. 27-28; Written Statement Latvia, paras. 65-67; Written Statement Nepal, paras. 19, 31.

86 *See, e.g., Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, ECtHR Application no. 53600/20, Judgment of the Grand Chamber (9 April 2024), paras. 544-554, 573-574 (2024); UN Human Rights

human rights to the anthropogenic emission of greenhouse gases, arguing that human rights obligations do not apply extra-territorially.[87] As explained next, the position of this minority is both misleading and untenable.

45. From the outset, the OACPS wishes to clarify that the human rights obligations of States with respect to anthropogenic emissions of greenhouse gases are partly territorial, requiring States to take measures to reduce greenhouse gas emissions from their territory or otherwise under their jurisdiction. This is a requirement for all States, particularly large emitters of greenhouse gases, with respect to the individuals and peoples in their territories and under their jurisdiction. At the same time, States are prohibited from allowing conduct in its territory that is known to prejudice the enjoyment of human rights in the territory of other States.[88] Thus, the obligations have two strong territorial elements, i.e. the power over the source of harm and the power over the affected individuals and peoples.

46. The OACPS further recalls that all States hold, pursuant to the UN Charter[89] and international human rights law, the obligation to cooperate for the realisation of human rights. This requires international cooperation and assistance to ensure that developing countries are equipped to prevent and redress human rights violations resulting from climate change.[90] This responsibility is not only a legal requirement but also embodies a profound moral imperative, which is underscored by developing countries' capacity constraints in safeguarding the human rights of their

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Committee, 'General Comment No. 36: Article 6: Right to Life', UN Doc. CCPR/C/GC/36, para. 62 (3 Sept. 2019); UN Human Rights Committee, 'Views adopted by the Committee under art. 5 (4) of the Optional Protocol, concerning communication No. 3624/2019: Daniel Billy and others v. Australia', UN Doc. CCPR/C/135/D/3624/2019, para. 8.13 (22 Sept. 2022); Committee on the Rights of the Child, *Chiara Sacchi et. al. v. Argentina, Brazil, France, and Germany*, UN Docs. CRC/C/88/D/I 04/2019, CRC/C/88/D/I 05/2019, CRC/C/88/D/106/2019, CRC/C/88/D/107/2019, para. 10.13 (11 Nov. 2021); *see also* Summary Report of the Office of the United Nations High Commissioner for Human Rights on the Outcome of the Full-Day Discussion on Specific Themes Relating to Human Rights and Climate Change, UN Doc. A/HRC/29/19, para. 77 (1 May 2015); Ian Fry (Special Rapporteur on the promotion and protection of human rights in the context of climate change), *Promotion and protection of human rights in the context of climate change*, UN Doc. A/78/225 (26 July 2022); Human Rights Council, Res. 7/23, 'Human Rights and Climate Change' UN Doc. A/HRC/RES/7/23 (28 Mar. 2008).

87 See for instance, Written Statement China, para. 119.

88 UN Committee Economic, Social and Cultural Rights (CESCR), 'General Comment No. 14 The Right to the Highest Attainable Standard of Health' (2000) UN Doc. E/C.12/2000/4, para. 39 (explaining that "39. To comply with their international obligations in relation to article 12, States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law.")

89 See UN Charter, art. 1, paras. 3, 55-56 (1945).

90 See e.g., Written Statement Colombia, paras. 3.64-3.65; Written Statement Albania, paras. 87-92; Written Statement Singapore, para. 3.94; Written Statement Kenya, paras. 5.19-5.21; Written Statement Burkina Faso, paras. 236-238; Written Statement Chile, para. 129; *cf.* Written Statement Melanesian Spearhead Group, para. 258; Written Statement Bahamas, paras. 172-175 (discussing in the context of the ICESCR).

citizens. These constraints are inseparable from historical injustices of colonisation, resource extraction, and exploitation by developed countries.[91] These climate crisis, predominantly caused by the same colonial powers, only exacerbates these challenges.

47. With respect to the extra-territorial application of human rights in relation to anthropogenic emissions of greenhouse gases, the OACPS specifically recalls the following holding of the Inter-American Court of Human Rights:

> "The obligations to respect and to ensure human rights require that States abstain from preventing or hindering other States Parties from complying with the obligations derived from the Convention (...). Activities undertaken within the jurisdiction of a State Party should not deprive another State of the ability to ensure that the persons within its jurisdiction may enjoy and exercise their rights under the Convention. The Court considers that States have the obligation to avoid transboundary environmental damage that can affect the human rights of individuals outside their territory. For the purposes of the American Convention, when transboundary damage occurs that effects treaty-based rights, it is understood that the persons whose rights have been violated are under the jurisdiction of the State of origin, if there is a causal link between the act that originated in its territory and the infringement of the human rights of persons outside its territory.
>
> **In cases of transboundary damage, the exercise of jurisdiction by a State of origin is based on the understanding that it is the State in whose territory or under whose jurisdiction the activities were carried out that has the effective control over them and is in a position to prevent them from causing transboundary harm that impacts the enjoyment of human rights of persons outside its territory.** The potential victims of the negative consequences of such activities are under the jurisdiction of the State of origin for the purposes of the possible responsibility of that State for failing to comply with its obligation to prevent transboundary damage. That said, not every negative impact gives rise to this responsibility. The limits and characteristics of this obligation are explained in greater detail in Chapter VIII of this Opinion.
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> Accordingly, it can be concluded that the obligation to prevent transboundary environmental damage or harm is an obligation recognized by international environmental law, under which States may be held responsible for any significant damage caused to persons outside their borders by activities originating in their territory or under their effective control or authority. It is important to stress that this obligation does not depend on the lawful or unlawful nature of the conduct that generates the damage, because States must provide prompt, adequate and effective redress to the persons and States that are victims of transboundary harm resulting from activities carried out in their territory or under their jurisdiction, even if the action which caused this damage is not prohibited by international law. That said, there must always be a causal link between the damage caused and the act or omission of the State of origin in relation to activities in its territory or under its jurisdiction or control".[92]

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91 See Written Statement OACPS, paras. 49-53; Written Statement Burkina Faso, para. 368; Written Statement Brazil, para. 81; Written Statement India, paras. 71-72; Written Statement Namibia, para. 119.

92 Inter-American Court of Human Rights, *A Request for an Advisory Opinion from the Inter-American Court of Human Rights Concerning the Interpretation of Article 1(1), 4(1) and 5(1) of the American Convention on Human Rights*, OC-23/17, Am.C.HR, Series A, 15 November 2017) paras. 101-103. See also

48. The jurisprudence of the Court confirms that a State that has effective control over the source of harm, i.e. over the activities that emit greenhouse gases, is required to act under its human rights obligations not only to protect the human rights of the persons within its territory, but also to protect those of persons beyond its territory.

49. Recently, in its advisory opinion on *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, the Court affirmed that States may have international human rights obligations in areas in which a State "exercises its jurisdiction outside its territory".[93] Such applicable human rights obligations include those contained in the Convention on the Elimination of Racial Discrimination (**CERD**), which does not have any provisions "expressly restricting its territorial application" and in fact has several provisions that impose obligations on States Parties "'in territories under their jurisdiction' (Article 3 of CERD)" or "'within their jurisdiction' (Article 6 of CERD)".[94] The Court also affirmed its holding in the 2003 advisory opinion. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, that the International Covenant on Civil and Political Rights (**ICCPR**) is "applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory" and that the International Covenant on Economic, Social and Cultural Rights (**ICESCR**), in certain circumstances, applies "both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction".[95] That earlier advisory opinion also clarified that the Convention on the Rights of Child (**CRC**) is applicable within the Occupied Palestinian Territory on account of Article 2's command that the States Parties "shall respect and ensure the rights set forth in the . . . Convention to each child

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Committee on the Rights of the Child, *Chiara Sacchi et. al. v. Argentina, Brazil, France, and Germany* (Communication Nos. 104-107/2019, CRC/C/88/D/104/2019, CRC/C/88/D/105/2019, CRC/C/88/D/106/2019, CRC/C/88/D/107/2019) (11 November 2021), para. 10.10, see also para. 10.7 (where the Committee sought to adapt the relevant approach to jurisdiction taken by the Inter-American Court of Human Rights in its advisory opinion on human rights and the environment).

93 *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem, Advisory Opinion, Advisory Opinion of 19 July 2024, General List No. 186*, p. 32, para. 101.

94 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*, p. 32, para. 101.

95 *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem, Advisory Opinion, Advisory Opinion of 19 July 2024, General List No. 186*, p. 32, para. 100; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, I.C.J. Reports 2003*, p. 136, paras. 111-112.

within their jurisdiction . . . .".[96] The Court has therefore reaffirmed the extraterritorial nature of human rights obligations in a variety of circumstances where a State can be said to be exercising its jurisdiction.

50. States also hold obligations in relation to the effects of anthropogenic greenhouse gas emissions on people's rights. Indeed, a fundamental obligation contained within the principle and human right of self-determination is the *erga omnes* obligation of States to promote and realise the right of self-determination of all peoples.[97] Among other things, this obligation requires that States "refrain from interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right to self-determination".[98] Therefore, as a definitional matter, the right of self-determination imposes legal boundaries on States' acts and omissions and prohibits States from infringing the self-determination of peoples outside of their territory. The OACPS and several other participants have explained in their written statements how State conduct in relation to anthropogenic emissions of greenhouse gases has already caused grievous violations of the right to self-determination of peoples, including throughout the OACPS membership.[99] States' *erga omnes* obligations in relation to self-determination are thus engaged in this context. Likewise, all human rights obligations under customary international law, which are owed to "all people", cannot be understood as being territorially confined.

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96 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, I.C.J. Reports 2003*, p. 136, para. 113.

97 UN Human Rights Committee, 21st session 'CCPR General Comment No. 12: Article 1 (Right to Self-determination), The Right to Self-determination of Peoples' (13 March 1984) paras 1, 6; UN Committee on the Elimination of all forms of Racial Discrimination (CERD), 48th session 8 March 1996 'General Recommendation 21, the right to self-determination' (1996) UN Doc. A/51/18 annex VIII paras 2-3; Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (the "Friendly Relations Declaration"), UNGA Res 2625 (XXV) (24 October 1970) principle V, para 2.

98 UN Human Rights Committee, 21st session 'CCPR General Comment No. 12: Article 1 (Right to Self-determination), The Right to Self-determination of Peoples' (13 March 1984) para 6.

99 Written Statement OACPS, paras. 64-69; Written Statement Melanesian Spearhead Group, paras. 233-241; Written Statement Solomon Islands, paras. 171-173, 214-217; Written Statement Vanuatu, paras. 294-306; Written Statement Singapore, para. 3.81; Written Statement Cook Islands, paras. 342-354; Written Statement Kenya, paras. 5.66-5.68; Written Statement Philippines, para. 106; Written Statement Albania, para. 96b; Written Statement Federated States of Micronesia, para. 82; Written Statement Sierra Leone, paras. 3.88-3.92; Written Statement Liechtenstein, paras. 27-31; Written Statement Saint Vincent and the Grenadines, para. 109; Written Statement Kiribati, para. 141; Written Statement Timor-Leste, paras. 333-345; Written Statement African Union, para. 198; Written Statement Madagascar, paras. 59-60; Written Statement Tuvalu, paras. 75-89; Written Statement Bangladesh, para. 119-122; Written Statement Mauritius, paras. 167-169; Written Statement Nauru, paras. 37-46; Written Statement Costa Rica, paras. 72-74; Written Statement Antigua and Barbuda, para. 195; Written Statement Commission of Small Island States on Climate Change and International Law, paras. 74-78; Written Statement Dominican Republic, para. 4.43; Written Statement Burkina Faso, paras. 201, 208-210.

51. It should further be noted that, while the majority of participants stress the applicability of the human right to a clean, healthy and sustainable environment in the context of climate change,[100] a limited number of participants have questioned the existence of this right under international law.[101] The OACPS recalls that the existence of a standalone human right to a clean, healthy and sustainable environment has been recognised in the relevant case law,[102] and in landmark resolutions of the Human Rights Council[103] and the General Assembly.[104] In addition, such a right may be inferred from other human rights such as the right to life and the right to private and family life.[105] In any event, the status of the right to a clean, healthy and sustainable environment does not materially affect the core position put forward by the OACPS and the majority of participants that States' acts and omissions that have caused climate change are in breach of their human rights obligations under international law.

3. The rights of future generations

52. As reflected in the text of the questions, consideration of the rights of future generations is a core aspect of the task before the Court. Many participants in these proceedings have emphasised the importance of these rights and set forth the numerous sources of law that enshrine them. A small contingent of fossil fuel producers and major greenhouse gas emitters, however, have argued that there is no legal protection of future generations in international law. Despite the express

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100 *See, e.g.*, Written Statement Democratic Republic of Congo, paras. 145-157; Written Statement Colombia, para. 260; Written Statement Solomon Islands, paras. 174-178; Written Statement Seychelles, paras. 143-144; Written Statement Kenya, para. 5.73; Written Statement Melanesian Spearhead Group, paras. 283-289; Written Statement Albania, para. 96; Written Statement Federated States of Micronesia, paras. 78-80; Written Statement Liechtenstein, paras. 45-47; Written Statement Netherlands, paras. 3.33-3.34; Written Statement Slovenia, paras. 17-25; Written Statement Iran, para. 139; Written Statement Mexico, paras. 87-91; Written Statement Ecuador, para. 3.108; Written Statement Spain, para. 15; Written Statement Barbados, paras. 160-162; Written Statement African Union, para. 192; Written Statement Madagascar, paras. 61-62; Written Statement Namibia, paras. 121-123; Written Statement Tuvalu, para. 100; Written Statement Bangladesh, para. 110; Written Statement Argentina, para. 38; Written Statement Costa Rica, paras. 80-83; Written Statement Antigua and Barbuda, paras. 182-185; Written Statement Bolivia, paras. 17-21, 53, 56; *cf.* Written Statement El Salvador, para. 82.

101 See for instance, Written Statement United States of America, para. 4.39.

102 Written Statement Vanuatu, paras. 380-381.

103 Resolution 48/13 of the Human Rights Council, *The human right to a clean, healthy and sustainable environment* (8 October 2021) (UN Doc. A/HRC/RES/48/13), specifically referred to in the preamble of Resolution 77/276.

104 See, Resolution 76/300 of the General Assembly: The human right to a clean, healthy and sustainable environment (1 August 2022) (UN Doc. A/RES/76/300), specifically referred to in the preamble of Resolution 77/276.

105 See Written Statement OACPS, paras 121-128.

terms of the questions, they have therefore sought to reduce the ability of the Court to consider the legal interests of future generations in shaping its decision.[106]

53. The OACPS maintains that future generations are holders of human rights and that their interests are in any event protected by international law, including in the context of climate change. The OACPS fully adopts the arguments presented by Vanuatu,[107] the Democratic Republic of Congo,[108] the International Union for the Conservation of Nature (**IUCN**),[109] Sierra Leone,[110] Liechtenstein,[111] Ecuador,[112] the African Union,[113] Sri Lanka,[114] Namibia,[115] and Antigua and Barbuda[116] regarding the status of future generations as beneficiaries and/or rights holders protected under various legal rules related to climate stability and the consequences associated with climate change. As such, States hold legal obligations to ensure that their conduct in relation to anthropogenic emissions of greenhouse gases do not violate future generations' rights.

54. In particular, the OACPS agrees with: the position of IUCN that, based on the principle of intergenerational equity as well as decisions from the UN Human Rights Committee, "claims and requests for the cessation of wrongful acts may also be made on behalf of future generations, not just current ones";[117] the position presented by the African Union that reference to "present and future generations" in the request made by the General Assembly "clarifies that the second category specifically affected by the adverse impacts of climate change includes all right-holders, individual or collective, in present or future generations"[118]; the position presented by Namibia that future generations "have the right to invoke the responsibility of States that have breached their climate change obligations, to the

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106 See for instance, Written Statement Russia, pp. 16-17; Written Statement New Zealand, para. 144.

107 Written Statement Vanuatu, paras. 609-613.

108 Written Statement Democratic Republic of Congo, para. 321.

109 Written Statement IUCN, para. 603.

110 Written Statement Sierra Leone, para. 3.146.

111 Written Statement Liechtenstein, paras. 28, 47, 46.

112 Written Statement Ecuador, para. 4.35.

113 Written Statement African Union, para. 249.

114 Written Statement Sri Lanka, para. 94.

115 Written Statement Namibia, paras. 152, 161.

116 Written Statement Antigua and Barbuda, paras. 579-584.

117 Written Statement IUCN, para. 603.

118 Written Statement African Union, para 249.

same extent that present generations do",[119] and that, "the fact that the injury is inflicted on both present and future generations must be taken into account in the making of full reparation";[120] and the position presented by Antigua and Barbuda that all peoples and individuals of present and future generations are beneficiaries of international legal obligations that serve to protect the climate system, may invoke the responsibility of States under international law, and are entitled to reparations.[121]

55. The OACPS recalls that in its advisory opinion on the *Legality of Nuclear Weapons*, the Court noted that "the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations". Accordingly, the Court stressed that:

> "in order correctly to apply to the present case the Charter law on the use of force and the law applicable in armed conflict, in particular humanitarian law, it is imperative for the Court to take account of the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, **and their ability to cause damage to generations to come**".[122]

56. The OACPS notes that, as unequivocally established by overwhelming scientific consensus, anthropogenic emissions of greenhouse gases share the same characteristics as nuclear weapons in that they will have massive adverse impacts on future generations.[123] Indeed, massive harm to future generations is already guaranteed because of the changes to the climate system already caused by past and present greenhouse gas emissions, with the magnitude of that harm a direct consequence of the level of climate action that States take in this decade.[124] Accordingly, in order to correctly apply international law in the current case, the

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119 Written Statement Namibia, para. 152.

120 Written Statement Namibia, para. 161.

121 Written Statement Antigua and Barbuda, paras. 579-584.

122 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, pp. 243-244, para. 35-36 (emphasis added).

123 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, Statement C.1.3 (2023) ("Continued emissions will further affect all major climate system components, and many changes will be irreversible on centennial to millennial time scales and become larger with increasing global warming. Without urgent, effective, and equitable mitigation and adaptation actions, climate change increasingly threatens ecosystems, biodiversity, and the livelihoods, health and well-being of current and future generations. (high confidence).").

124 Written Statement Vanuatu, paras. 92-100 (setting out the science establishing that 2020-2030 is a "critical decade" to limit the adverse effects of climate change on future generations).

Court must take into account the capacity of anthropogenic emissions of greenhouse gases to cause untold human suffering to generations to come.

57. In the *Gabčíkovo-Nagymoros* case, this Court further affirmed that that protection of the environment includes protection for future generations.[125]

58. To date, and as summarised by the Center for International Environmental Law (CIEL), least 42 international environmental agreements explicitly incorporate or reference the principle of intergenerational equity or make references to future generations in their texts.[126]

59. The obligation to protect the rights of future generations is based on existing international law and is reflected in the UN Charter.[127] As highlighted in the 2023 Maastricht Principles on the Human Rights of Future Generations, neither the Universal Declaration of Human Rights, nor any other human rights instruments, impose a temporal limitation on human rights obligations or limit such rights to the present time. Human generations exist on a continuum extending from the past into the future, and human rights obligations must respect this continuum.[128]

60. The 1972 Declaration of Stockholm Conference on the Human Environment, referenced in the preamble of Resolution 77/276, affirmed that "the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being", impose a "solemn responsibility to protect and improve the environment for present and future generations".[129] Similarly, the 1992 Rio Declaration on Environment and Development, also referenced in the preamble of Resolution 77/276, proclaims that "[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations".[130] In addition, the Paris

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125 *Case Concerning the Gabčíkovo-Nagymaros Project (Hung. V. Slovk.), Judgment, 1997 I.C.J. 7 (Sept. 25)*, p. 7, para. 140.

126 Written Statement of the Center for International Environmental Law, Memorandum on the Rights of Future Generations (20 March 2024) para 8 (collecting authorities), available at <https://www.ciel.org/wp-content/uploads/2024/02/Amicus-Brief-ICJ-Defining-States-Climate-Obligations-Rights-Future-Generations.pdf>.

127 See U.N. Charter, pmbl. (1945) (stating "We the Peoples of the United Nations determined to save succeeding generations from the scourge of war.").

128 Maastricht Principles on the Human Rights of Future Generations, pmbl. II, III (July 2023).

129 Stockholm Declaration, UN Doc. A/CONF.48/14/Rev.1 (1972), Principle I.

130 Rio Declaration on Environment and Development, 31 ILM 874 (1992), Principle III.

Agreement, in calling for climate action consistent with human rights obligations, emphasises the need for "intergenerational equity".[131]

61. As part of their obligations to future generations, "States must necessarily impose reasonable restrictions on activities that undermine the rights of future generations, including the unsustainable use of natural resources and the destruction of nature".[132] Furthermore, during their time on Earth, "each generation must act as trustees of the Earth for future generations" and must "protect and sustain the Earth's natural and cultural heritage for future generations".[133]

62. Finally, as the OACPS has explained in its Written Statement, past and current structures of racial injustice render racialised and marginalised groups disproportionately impacted by the adverse effects of climate change.[134] In order to protect the rights of future generations from experiencing this same discrimination, State obligations with respect to the human rights of future generations thus require States to eliminate and prevent all forms of discrimination against groups and peoples that have experienced historical and/or systemic forms of discrimination.[135]

4. The duty to prevent significant harm to the environment

63. Overwhelmingly, participants in these proceedings submit that the duty to prevent significant harm to the environment governs State conduct in relation to anthropogenic emissions of greenhouse gases.[136] A few participants, however,

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131 Preamble to the Paris Agreement, 12 December 2015, 3156 UNTS 79.

132 Maastricht Principles on the Human Rights of Future Generations (July 2023) Principle 7(c).

133 Maastricht Principles on the Human Rights of Future Generations (July 2023) Principle 8(a)(b).

134 Written Statement OACPS, paras. 49-53.

135 Maastricht Principles on the Human Rights of Future Generations (July 2023) Principle 6(d).

136 See, e.g., Written Statement OACPS, paras. 102-104; Written Statement Palau, para. 14; Written Statement International Union for the Conservation of Nature, para. 307; Written Statement Singapore, para. 3.1; Written Statement Solomon Islands, paras. 146, 150; Written Statement Seychelles, paras. 110-113; Written Statement Kenya, para. 5.8; Written Statement Philippines, para. 55; Written Statement Albania, para. 65; Written Statement Micronesia, para. 62; Written Statement Sierra Leone, para. 3.10; Written Statement Switzerland, para. 36; Written Statement Grenada, para. 38; Written Statement Saint Lucia, paras. 66-68; Written Statement Belize, paras. 36-37; Written Statement Netherlands, para. 3.65; Written Statement Bahamas, paras. 92-102; Written Statement Marshall Islands, paras. 22-27; Written Statement Korea, para. 33; Written Statement Samoa, paras. 103-108; Written Statement Latvia, paras. 58-60; Written Statement Mexico, para. 40; Written Statement South Africa, para. 74; Written Statement Ecuador, para. 3.25; Written Statement Cameroon, para. 13; Written Statement Spain, para. 8; Written Statement Barbados, paras. 10, 148; Written Statement African Union, para. 56; Written Statement Sri Lanka, paras. 95-97; Written Statement Madagascar, paras. 34-37; Written Statement Uruguay, paras. 91-95; Written Statement Egypt, para. 88; Written Statement Namibia, paras. 58-61; Written Statement Tuvalu, para. 73; Written Statement Romania, para. 98; Written Statement Bangladesh, para. 88; Written Statement European Union, para. 317; Written Statement Mauritius, para. 192; Written Statement Nauru, paras. 30-33; Written Statement Costa Rica, para. 44; Written Statement Pakistan, paras. 29, 35-39;

maintain that this rule does not apply. For example, India claims that the prohibition on transboundary harm is not applicable because carbon and heat are not pollutants,[137] whereas Japan argues that international law does not prohibit anthropogenic emissions of greenhouse gases.[138]

64. From the outset, the OACPS finds it surprising that these few participants still attempt to question whether greenhouse gases are pollutants, despite the global scientific consensus on the adverse impact of greenhouse gases on the climate system and other parts of the environment, including the acidification of the marine environment.[139] The OACPS recalls in this respect that ITLOS recently held that greenhouse gas emissions are indeed pollution of the marine environment.[140]

65. In addition, the OACPS wishes to recall that the applicability of the duty to prevent significant harm to the environment is in no way affected by arguments about territoriality (transboundary) or extraterritoriality. This is because the very focus of the rule is to prohibit significant harm both to the environment of other States and of areas beyond national jurisdiction. The "climate system" is, in any event, ubiquitous. It is both part of the environment of other States and of areas beyond national jurisdiction. Thus, even if the rule was confined to localised effects (*quod non*), it would still be applicable to harm to the climate system.

IV. QUESTION (B): LEGAL CONSEQUENCES OF THE VIOLATIONS BY STATES OF THEIR OBLIGATIONS IN RELATION TO ANTHROPOGENIC EMISSIONS OF GREENHOUSE GASES

66. *Question (b)* of the General Assembly's request for advisory opinion reads as follows:

Written Statement Antigua and Barbuda, paras. 300-304; Written Statement Commission of Small Island States on Climate Change and International Law, paras. 80-86; Written Statement El Salvador, para. 37; Written Statement Brazil, para. 70; Written Statement Dominican Republic, paras. 4.31, 5.1; Written Statement Ghana, para. 23; Written Statement Thailand, para. 9; Written Statement Nepal, para. 26; Written Statement Burkina Faso, para. 175.

137 Written Statement India, para. 17.

138 Written Statement Japan, para. 20.

139 *See, e.g.*, 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, Statements A.2-A.2.7 (2023).

140 *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)*, ITLOS Case No. 31, Advisory Opinion (21 May 2024), para 179.

"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) [...]

(b) What are the legal consequences under these obligations [the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases] for States 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?"

67. The OACPS notes that the question expressly requests the Court to deal with "legal consequences", namely the responsibility of States for internationally wrongful acts.

68. The OACPS recalls its position, shared by the majority of participants, that States which, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment have effectively engaged their international responsibility under the general law of State responsibility, as codified in the ARSIWA.[141] Participants broadly agree that such conduct triggers the

141 Written Statement OACPS, paras. 143-157; Written Statement Palau, para. 4; Written Statement International Union for the Conservation of Nature, para. 534; Written Statement Singapore, para. 4.1; Written Statement Solomon Islands, paras. 230-231; Written Statement Kenya, para. 6.87; Written Statement Melanesian Spearhead Group, para. 292; Written Statement Philippines, para. 115; Written Statement Albania, para. 129; Written Statement Vanuatu, para. 559; Written Statement Federated States of Micronesia, paras. 121-128; Written Statement Sierra Leone, para. 3.134; Written Statement Switzerland, para. 72; Written Statement Grenada, para. 74; Written Statement Saint Lucia, para. 86; Written Statement Saint Vincent and the Grenadines, para. 128; Written Statement Netherlands, para. 5.4; Written Statement Marshall Islands, paras. 55-57; Written Statement Kiribati, para. 179; Written Statement Timor-Leste, para. 355; Written Statement India, para. 82; Written Statement Samoa, para. 190; Written Statement Latvia, para. 74; Written Statement Ecuador, para. 4.6; Written Statement Barbados, paras. 272-273; Written Statement African Union, para. 254; Written Statement Madagascar, paras. 73-75; Written Statement Uruguay, paras. 155-160; Written Statement Egypt, paras. 287-292; Written Statement Chile, para. 93; Written Namibia, paras. 130-131; Written Statement Tuvalu, para. 120; Written Statement Bangladesh, para. 145; Written Statement Mauritius, para. 210; Written Statement Costa Rica, para. 95; Written Statement Antigua and Barbuda, paras. 532-533; Written Statement Commission of Small Island States on Climate Change and International Law, paras. 146, 150-151; Written Statement El Salvador, para. 50; Written Statement Brazil, paras. 78-79; Written Statement Viet Nam, paras. 42-44; Written Statement Dominican Republic, para. 4.57; Written Statement Thailand, para. 29; Written Statement Burkina Faso, paras. 346-401; Written Statement Democratic Republic of the Congo, paras. 255-270, 323-343; *cf.* Written Statement Portugal, para. 115; Written Statement Nordic States, paras. 102-106.

general legal consequences of State responsibility. In addition, several participants, including the OACPS, have noted that the aggravated responsibility that attaches to the violation of *jus cogens* norms and *erga omnes* obligations is also engaged.[142]

69. A limited number of participants—once again primarily major greenhouse gas emitters and/or fossil fuel producers—have questioned the applicability of the general international law of State responsibility to State conduct in relation to anthropogenic emissions greenhouse gases. Some participants argue that the customary international law rules on State responsibility, as reflected in the ARSIWA, do not apply at all **(A).** It has also been claimed that the conduct that is damaging the climate system does not constitute an internationally wrongful act and therefore does not trigger legal consequences (**B**). This argument takes various forms, with some arguing that the conduct at issue is not attributable to the State, while others argue that the conduct was not unlawful at the moment where it occurred, and still others argue that legal consequences cannot attach to individual States for their contributions to global anthropogenic greenhouse gas emissions. A third line of argument suggests that, although the conduct at issue may be internationally wrongful and trigger legal consequences in theory, practical implementation is impossible or impractical because there is not a sufficiently direct and certain causal link between the damage caused by climate change and anthropogenic greenhouse gas emissions **(C)**. Finally, some participants have departed from the general rules of State responsibility and suggested their own imaginings of what legal consequences attach to international responsibility for anthropogenic emissions of greenhouse gases (**D**). The OACPS reviews and rebuts these arguments in turn.

A. The general international law of State responsibility applies to climate change

70. Some participants have sought to challenge the application of the customary rules of State responsibility for internationally wrongful acts. They have adduced two

142 Written Statement Vanuatu, paras. 601-607, 637-640; Written Statement Solomon Islands, paras. 232-233; Written Statement OACPS, paras. 190-194; Written Uruguay, para. 159; Written Statement Costa Rica, paras. 104-106; Written Statement Netherlands, para. 5.8; Written Statement Ecuador, para. 4.11; Written Statement Liechtenstein, para. 74; Written Statement of the Commission of Small Island States on Climate Change and International Law Commission of Small Island States on Climate Change and International Law, paras. 193-199.

main arguments in this context, namely the special nature of climate change **(1)** and—again—the *lex specialis* argument **(2)**.

1. The general international law of State responsibility is applicable to climate change as a matter of principle

71. The OACPS, like the majority of participants, maintains that the customary rules of State responsibility for internationally wrongful acts apply, in principle, to breaches by States of any international obligation. The OACPS recalls that Article 1 of the ARSIWA, reflecting customary international law, provides that "[e]very internationally wrongful act of a State entails the international responsibility of that State".[143]

72. The OACPS notes that this view was already endorsed by the Permanent Court of International Justice in the *Chorzow Factory* case, when it held that "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation".[144] Rules on State responsibility, due to their nature as secondary rules, do not depend on the content of the primary norm that is breached or its subject matter. In this respect, the OACPS fully subscribes to the following review of judicial and State practice by Special Rapporteur Roberto Ago:

> "**There is not a single judgment of the Permanent Court of International Justice or of the International Court of Justice, or a single international arbitral award, that recognizes either explicitly or implicitly the existence of international obligations the breach of which would not be a wrongful act and would not entail international responsibility.** Furthermore, the international awards specifying in general terms the conditions for the existence of an internationally wrongful act and the creation of international responsibility speak of the breach of an international obligation without placing any restriction on the subject-matter of the obligation breached, despite the fact that, in the different cases in question, the judges and arbitrators were concerned with obligations having the most widely different content. The same conclusions are reached when considering the positions taken by States".[145]

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143 Article 1 of the 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*, UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

144 *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 29 (emphasis added).

145 Report of the International Law Commission on the work of its twenty-eighth session, 3 May - 23 July 1976, UN Doc. A/31/10 (Extract from Fifth Report of the Special Rapporteur Robert Ago, Commentary to Article 19, *in* Yearbook of the International Law Commission, 1976 (II)) <https://legal.un.org/ilc/documentation/english/reports/a_31_10.pdf> p. 96, par. 4 (emphasis added).

73. The OACPS notes in this respect that the Court has reaffirmed the applicability of the customary rules of State responsibility to environmental obligations. The Court has observed that:

> "It is consistent with the principles of international law governing the consequences of internationally wrongful acts, including the principle of full reparation, to hold that compensation is due for damage caused to the environment, in and of itself, in addition to expenses incurred by an injured State as a consequence of such damage".[146]

74. Accordingly, the OACPS maintains that all arguments invoked to challenge the applicability of the customary rules of State responsibility on the grounds of the specificity of climate change or the lack of reference to it in the ARSIWA are ill-founded. From the outset, there is no need for an agreement to apply customary international law rules to a situation. It is the departure of a treaty regime from the customary international law rules that requires the specific agreement of the parties. The OACPS also notes that no evidence has been brought to the Court of a case where a tribunal refused to apply customary international rules on State responsibility to a question because of the novelty of the underlying topic. The Court discussed a similar issue in its advisory opinion on the *Legality of Nuclear Weapons* when it examined the question of whether international humanitarian law rules and principles, which existed well before the invention of nuclear weapons, were applicable to such weapons. The Court observed:

> "Turning now to the applicability of the principles and rules of humanitarian law to a possible threat or use of nuclear weapons, the Court notes that doubts in this respect have sometimes been voiced on the ground that these principles and rules had evolved prior to the invention of nuclear weapons and that the Conferences of Geneva of 1949 and 1974-1977 which respectively adopted the four Geneva Conventions of 1949 and the two Additional Protocols thereto did not deal with nuclear weapons specifically. Such views, however, are only held by a small minority. In the view of the vast majority of States as well as writers there can be no doubt as to the applicability of humanitarian law to nuclear weapons.
>
> The Court shares that view. Indeed, nuclear weapons were invented after most of the principles and rules of humanitarian law applicable in armed conflict had already come into existence; the Conferences of 1949 and 1974-1977 left these weapons aside, and there is a qualitative as well as quantitative difference between nuclear weapons and all conventional arms. However, it cannot be concluded from this that the established principles and rules of humanitarian law applicable in armed conflict did not apply to nuclear weapons. Such a conclusion would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future. In this respect it seems significant

146 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment, I.C.J. Reports 2018*, p. 14, para. 41.

> that the thesis that the rules of humanitarian law do not apply to the new weaponry, because of the newness of the latter, has not been advocated in the present proceedings. On the contrary, the newness of nuclear weapons has been expressly rejected as an argument against the application to them of international humanitarian law".[147]

75. The OACPS subscribes to these views of the Court and deems them applicable to the present opinion. By their very nature, the secondary rules of international law, which constitute the backbone of international law, are designed to apply to a variety of circumstances, old and new, subject to a variety of primary norms, and their applicability is no way conditioned by an opt-in clause.

2. Climate change treaties in no way replace the general international law of State responsibility

76. Some participants also dispute the applicability of the customary rules of State responsibility to the relevant conduct by invoking the doctrine of *lex specialis*. Participants who make this argument maintain that the so-called climate change treaty regime, and specifically the UNFCCC and the Paris Agreement, are controlling with respect to State responsibility.

77. The OACPS has already explained that the *lex specialis* argument has no merit. The OACPS recalls that this argument is premised—deliberately or inadvertently—on a misguided reading of Resolution 77/276 and of the text of the UNFCCC, the Kyoto Protocol and the Paris Agreement, and that it has in any event been rejected by international courts and tribunals, including the European Court of Human Rights and the ITLOS, in addressing responsibility for insufficient greenhouse gas emission mitigation action.[148]

78. The OACPS recalls that the conduct underpinning the questions put to the Court is not merely about specific pollutants (a wide range of "greenhouse gases"). It equally pertains to activities (primarily regarding the production and use of fossil fuels and land use changes), environmental problems resulting from these activities (including global warming, desertification, sea-level rise, ocean acidification, and biodiversity loss) and protected objects or values (such as the climate system and other parts of the environment, human rights, self-determination, culture, and intergenerational equity). The OACPS notes that the

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147 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, paras. 85-86.

148 See Part III(A)(1), *supra*.

UNFCCC, the Kyoto Protocol and the Paris Agreement, even when interpreted in the broadest possible manner, in no way purport to provide a comprehensive regulation of these causes, processes, effects or values.

79. The OACPS submits that the complex and far-reaching nature of climate change calls for a comprehensive response to the questions posed in the present proceedings. This response must draw upon the wide range of international obligations applicable to the acknowledged cause of climate change, i.e. anthropogenic emissions of greenhouse gases, incorporating the perspectives of activity regulation, problem regulation, and the protection of specific objects and values. The Court should reject attempts by major polluters to artificially simplify the questions so that said polluters effectively escape responsibility for the massive harm to the climate system and other parts of the environment that they have already caused, as well as the harm resulting from such unprecedented interference with the climate system that has been suffered by vulnerable States, peoples, and individuals, in the form of loss and damage and human rights violations.

80. From the perspective of secondary rules, even if it could be admitted (*quod non*) that the UNFCCC, the Kyoto Protocol and the Paris Agreement provide for a comprehensive *lex specialis* displacing the ARSIWA, such would be the case only for breaches of primary rules of obligation included in these three treaties, not for breaches of the many other rules governing the conduct at stake in these proceedings.

81. In any event, there needs to be an express or implicit derogation for a treaty regime to derogate from a treaty or customary international law regime. But none of the participants who makes a *lex specialis* argument has identified a treaty provision which derogates expressly from other treaty regimes, such as human rights, the law of the sea, or from other customary international law rules. Nor do these participants point to any provision in the UNFCCC, the Kyoto Protocol or the Paris Agreement that purports to displace the customary rules of State responsibility. The only argument that identifies a specific treaty provision concerns Article 8 of the Paris Agreement, read together with paragraph 51 of the COP Decision 1/CP. 21. Article 8 of the Paris Agreement reads as follows:

> "1. Parties recognize the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, including

extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of loss and damage.

2. The Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts shall be subject to the authority and guidance of the Conference of the Parties serving as the meeting of the Parties to this Agreement and may be enhanced and strengthened, as determined by the Conference of the Parties serving as the meeting of the Parties to this Agreement.

3. Parties should enhance understanding, action and support, including through the Warsaw International Mechanism, as appropriate, on a cooperative and facilitative basis with respect to loss and damage associated with the adverse effects of climate change.

4. Accordingly, areas of cooperation and facilitation to enhance understanding, action and support may include: (a) Early warning systems; (b) Emergency preparedness; (c) Slow onset events; (d) Events that may involve irreversible and permanent loss and damage; (e) Comprehensive risk assessment and management; (f) Risk insurance facilities, climate risk pooling and other insurance solutions; (g) Non-economic losses; and (h) Resilience of communities, livelihoods and ecosystems.

5. The Warsaw International Mechanism shall collaborate with existing bodies and expert groups under the Agreement, as well as relevant organizations and expert bodies outside the Agreement".[149]

The relevant paragraph of COP Decision 1/CP.21 provides that Article 8 of the Agreement "does not involve or provide a basis for any liability or compensation".[150]

82. Neither Article 8 nor paragraph 51 of the COP Decision 1/CP. 21 discuss the relationship between the climate change treaty regime and the customary international law rules on State responsibility. Article 8 of the Paris Agreement deals with "averting, minimizing and addressing loss and damage associated with the adverse effects of climate change", as is apparent from its paragraph 1, and establishes a cooperation framework to pursue this objective. As for paragraph 51 the COP Decision 1/CP. 21, it merely states that "Article 8 [of the Paris Agreement] does not involve or provide a basis for any liability or compensation", without in any way limiting responsibility, liability or compensation resulting from breaches of other obligations under the Paris Agreement, UNFCCC or Kyoto Protocol—let alone obligations other under any other applicable treaties or customary international law rules. Accordingly, some countries expressly declared, when adopting the Paris Agreement, that Article 8 may not be construed as a

149 Article 8 of the Paris Agreement, 12 December 2015, 3156 UNTS 79.

150 "Adoption of the Paris Agreement", Decision 1/CP.21, 12 December 2015, FCCC/CP/2015/10/Add.1, para. 51.

renunciation to their right to compensation under other international law rules. For instance, Vanuatu indicated that:

> "Whereas the Government of the Republic of Vanuatu declares its understanding that ratification of the Paris Agreement shall in no way constitute a renunciation of any rights under any other laws, including international law, and the communication depositing the Republic's instrument of ratification shall include a declaration to this effect for international record".[151]

83. The OACPS maintains that none of the UNFCCC, the Kyoto Protocol and the Paris Agreement effect, whether expressly or implicitly, any derogation from the customary international law of State responsibility. The OACPS recalls that:

> "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".[152]

Yet, the UNFCCC, the Kyoto Protocol and the Paris Agreement are silent as to the legal consequences of internationally wrongful acts arising from anthropogenic emissions of greenhouse gases. This is only natural. As the Permanent Court of International Justice explained it in the *Chorzów Factory* case,

> "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself".[153]

84. In conclusion, the OACPS joins the majority of participants in submitting that the customary international law rules on State responsibility are applicable to determine the legal consequences that arise from the acts and omissions whereby certain States have caused significant harm to the climate system and other parts of the environment.

B. The conditions for State responsibility are satisfied

85. In its Written Statement, the OACPS explained that the conduct at issue is properly conceived as a series of acts and omissions over time, amounting to a composite

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151 Similar declarations were made by the Marshall Islands, the Philippines, Cook Islands, Federated States of Micronesia, Nauru, Niue, Solomon Islands, and Tuvalu. *See* 'Paris Agreement', United Nations Treaty Collection, available at < https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en#EndDec>.

152 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*, UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), commentary to Article 55, para. 4.

153 *Factory at Chorzów, (Claim for Indemnity) (Jurisdiction), Series A, No 9 (1927)*, p. 21.

act within the meaning of Article 15(1) of the ARWISA;[154] that these acts and omissions are attributable to the State;[155] and that States engaging in this conduct have breached numerous legal obligations that were operational for most of the time period over which the conduct occurred.[156]

86. Some participants have argued that, assuming the general rules of State responsibility do apply, the conditions to hold a State responsible for an internationally wrongful act relating to climate change cannot be satisfied.[157] Article 2 of the ARSIWA reads as follows:

> "There is an internationally wrongful act of a State when conduct consisting of an action or omission:
>
> (a) is attributable to the State under international law; and
>
> (b) constitutes a breach of an international obligation of the State".[158]

Accordingly, these participants argue, either disjunctively or cumulatively, that the conduct described in *Question (b)* is not attributable to States **(1)** or that there were no relevant international obligations at the relevant time when the conduct occurred **(2)**. Some participants argue further that State responsibility cannot attach given the contribution of numerous States to the problem of climate change (**3**). The OACPS briefly recalls the law regarding the application of the general rules of State responsibility. In so doing, the OACPS explains why each of these arguments is flawed.

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154 Written Statement OACPS, paras. 154-156. See also, e.g., Written Statement African Union, para. 231; Written Statement Egypt, paras. 293-295; Written Statement Vanuatu, paras. 530-535.

155 Written Statement OACPS, paras. 145-146. See also, e.g., Written Statement Vanuatu, paras. 494-497; Written Statement International Union for the Conservation of Nature, para. 554; Written Statement Kenya, para. 6.104; Written Statement Melanesian Spearhead Group, paras. 295-297; Written Statement Marshall Islands, para.49; Written Statement Egypt, para. 297; Written Statement Costa Rica, para. 103.

156 Written Statement OACPS, paras. 148-152. See also, e.g., Written Statement Melanesian Spearhead Group, paras. 298-299; Written Statement Brazil, para. 26; Written Statement Antigua and Barbuda, para. 536; Written Statement Egypt, paras. 323-324; Written Statement Sierra Leone, para. 3.137; Written Statement Colombia, para. 4.2; Written Statement Democratic Republic of Congo, para. 254; Written Statement Vanuatu, paras. 527-529.

157 See Written Statement Kuwait, para. 3.4.

158 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the ILC (2001), Volume II, Part II, Report of the Commission to the General Assembly on the Work of its Fifty-Third Session*, document A/CN.4/SER.A/2001/Add.1 (Part 2), article 2.

1. The relevant conduct is attributable to States

87. The first of these arguments is based on an incorrect understanding of the conduct at issue as the emission of greenhouse gases by non-State actors, attributable not to States but to private individuals.[159]

88. The OACPS recalls that *Question (b)* of the request for advisory opinion, read together with the fifth recital of the preamble of Resolution 77/276, asks the Court to determine the legal consequences arising from the "acts and omissions" of States "in relation to activities that contribute to climate change and its adverse effects". As pointed out in other written statements,[160] the conduct as defined encompasses (1) State subsidies for fossil fuels; (2) authorisation for expansion of fossil fuels; (3) adoption of laws, policies, programmes, and decisions regarding energy policy that support fossil fuel production and consumption; and (4) failure to adequately regulate anthropogenic emissions of greenhouse gases under the State's jurisdiction or control. The first three are plainly positive acts of the State itself or its organs, the latter an omission of the State—which as sovereign is the only entity empowered to regulate anthropogenic emissions of greenhouse gases within its territory or control. All of these acts or omissions are plainly attributable to the State within the meaning of article 4 of the ARSIWA.[161]

89. Further, while any discrete such act or omission may not amount to a breach of relevant legal obligations, *Question (b)* defines the relevant conduct as an aggregate of "acts and omissions" occurring "over time," and thus invites the Court to assess the legal consequences arising from a "breach consisting of a composite act", defined by Article 15 of the ARSIWA as "a series of actions or omissions defined in aggregate as wrongful".[162]. The attributable conduct constituting the breach encompasses a broad spectrum of acts and omissions. This includes direct

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159 See for instance, Written Statement Saudi Arabia, para. 6.7.

160 See e.g. Written Statement Vanuatu, paras. 493-499; Written Statement Costa Rica, para. 103; Written Statement Dominican Republic, para. 4.59

161 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the ILC (2001), Volume II, Part II, Report of the Commission to the General Assembly on the Work of its Fifty-Third Session*, UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), article 4, commentary, para. 6 ("the reference to a State organ in article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level. No distinction is made for this purpose between legislative, executive or judicial organs".).

162 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the ILC (2001), Volume II, Part II, Report of the Commission to the General Assembly on the Work of its Fifty-Third Session*, UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), article 15.

greenhouse gas emissions from the State or its organs, provision of subsidies or other support for fossil fuel production or use, and the failure to regulate emissions from private actors. The nature of these acts—whether they are active contributions or passive failures to act—does not affect their attributability to the State. Where a State has the power to reduce anthropogenic emissions of greenhouse gases through its laws and policies, its failure to do so—or worse, its actions that increase emissions—are squarely attributable to that State.

2. The applicable obligations have governed the relevant conduct for decades

90. Some participants suggest that the conduct described in *Question (b)* cannot constitute an internationally wrongful act because there was no international obligation that governed anthropogenic emissions of greenhouse gases for much of the duration of the harmful conduct.[163] For some, this follows from their view that the climate change treaty regime is *lex specialis*. Others concede that other sources of law governed the conduct, but they remained inoperable for most of the applicable period (that is from 1750 until the present). For example, Switzerland argues that the element of knowledge required by the obligation of due diligence did not exist before 1990.[164]

91. The OACPS has shown in its Written Statement that both of these arguments are incorrect. Customary international law principles such as the duty of due diligence and the prohibition of transboundary harm, human rights, the right of peoples to self-determination, the prohibition against racial, or gender discrimination, the duty to prevent and repress the crime of genocide, and the duty to cooperate were binding for several decades over which the relevant conduct unfolded, and treaty-based obligations have been governing since relevant treaties came into force.[165]

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163 Written Statement United Kingdom, para. 137.4.2; Written Statement Kuwait, para. 123 (explaining that "The largely historical cause of climate change has the further consequence that such anthropogenic activity at the time was not regulated, let alone prohibited, by international law, and nor is it clear whether any of the acts by private actors responsible for GHG emissions were attributable to the States concerned"); Written Statement Saudi Arabia, para. 6.7. Written Statement Canada, para. 32.

164 Written Statement Switzerland, paras. 47 and 76.

165 See Written Statement OACPS, paras. 147-152. See also Written Statement Vanuatu, para. 529. As detailed in these written statements, the duty of due diligence was operational as early as 1872, the prohibition on transboundary harm as early as 1941, and obligations in respect of self-determination, the prohibition on racial and gender discrimination, and customary human rights since at least the 1940s following promulgation of the UN Charter and UDHR. Duties relating to the prohibition of genocide were operable by 1948, with entry into force of the Genocide Convention, if not earlier. Treaty based human rights obligations attached with entry into force of relevant instruments, including the ICCPR and ICESR

92. In the same vein, the Written Statement of the OACPS, among others, has established that, as early as the 1940s, States were aware of reliable scientific information demonstrating that anthropogenic emissions of greenhouse gases have an adverse impact on the climate system and other parts of the environment, as well as on the enjoyment of human rights.[166] Accordingly, the duty of due diligence and to cooperate to prevent violations of these international obligations was triggered well before the 1990s.

93. In any event, under the rule codified in Article 15 of the ARSIWA, for a series of acts and omissions constituting a composite act to be in breach of a given obligation, it is not necessary that each isolated act or omission, including the first ones in the series, were themselves in breach of an international obligation. **It suffices that when the aggregate conduct—the composite act—crystallises as such, it is inconsistent with an obligation in force at the time of crystallisation. At such point, the aggregate conduct becomes a breach for as long as the relevant obligation has been in force.** To the extent that a major emitter has continued to emit large amounts of greenhouse gases, its additions are far more than mere isolated—and artificially disaggregated—acts. Whether or not the specific incidents of pollution preceding the crystallisation of the composite act were lawful or unlawful, it is the additional straw (GHG emissions) added on the camel's back (the environment), on top of previously added straw (GHG emissions over time), that breaks the camel's back (gives rise to the breach).

3. Responsibility can be assigned to individual States

94. The OACPS joins other participants in emphasising that the existence of multiple responsible States does not absolve individual responsible States of their own responsibility under international law.[167] Some participants, however, have argued that it is impossible for State conduct to amount to an internationally wrongful act entailing legal consequences because "the emission of GHGs is a diffuse,

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in 1976. Obligations under UNCLOS became operational in 1994, while the customary law rules codified in that Convention are among the earliest principles of international law.

166 See Written Statement OACPS, paras. 20-24. See also Written Statement Vanuatu, paras. 177-192; Written Statement Democratic Republic of Congo, para. 275; Written Statement Kiribati, paras. 184-186; Written Statement Egypt, paras. 305-314; Written Statement Burkina Faso, paras. 299-309.

167 See, e.g., Written Statement Democratic Republic of Congo, para. 301; Written Statement Bangladesh, para. 145; Written Statement Vanuatu, para. 535; Written Statement Egypt, paras. 293-295; Written Statement Sierra Leone, para. 3.145; Written Statement Nordic States, para. 106; Written Statement Bahamas, para. 234; Written Statement Tuvalu, para. 121; Written Statement Commission of Small Island States on Climate Change and International Law, para. 166-171; Written Statement Chile, para. 98; Written Statement Vanuatu, para. 535.

universal activity, with countless sources in every country and every part of the world".[168] This argument is simply incorrect.

95. The responsibility of multiple States for the same internationally wrongful act is explicitly contemplated in Article 47 of ARSIWA.[169] This approach has been applied in the case law of international courts and domestic courts alike, including in the specific context of climate change.[170] The merits of this well-established approach are particularly clear in the present factual and legal situation, wherein all the States that have through their acts and omissions caused significant harm to the climate system and other parts of the environment: (i) are bound by the relevant obligations, which are solidly anchored in general international law and therefore generally applicable; and (ii) have been bound by many of them for much of the duration of the harmful conduct. This overlap in time between applicable law and the relevant conduct is evident from the early origins and crystallisation of applicable norms such as the obligation of due diligence, the obligation of prevention of transboundary harm, the right of self-determination, and the prohibition on racial and gender discrimination.[171]

96. In line with this view, several written statements emphasise that it is judicially possible in the present advisory proceedings to determine the legal consequences for a specific State or group of States which, through their acts and omissions, have caused significant harm to the climate system and other parts of the

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168 Written Statement USA, paras. 4.17-4.19.

169 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the ILC (2001), Volume II, Part II, Report of the Commission to the General Assembly on the Work of its Fifty-Third Session*, UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), article 47 ("Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act".).

170 See *Case of Verein Klimaseniorinnen Schweiz and others v. Switzerland*, ECtHR Application no. 53600/20, Judgment of the Grand Chamber (9 April 2024), paras. 442-443 ("The Court considers that a respondent State should not evade its responsibility by pointing to the responsibility of other States, whether Contracting Parties to the Convention or not [...]This position is consistent with the Court's approach in cases involving a concurrent responsibility of States for alleged breaches of Convention rights, where each State can be held accountable for its share of the responsibility for the breach in question (see, albeit in other contexts, M.S.S. v. Belgium and Greece, cited above, §§ 264 and 367, and Razvozzhayev v. Russia and Ukraine and Udaltsov v. Russia, nos. 75734/12 and 2 others, §§ 160-61 and 179-81, 19 November 2019). It is also consistent with the principles of international law relating to the plurality of responsible States, according to which the responsibility of each State is determined individually, on the basis of its own conduct and by reference to its own international obligations (see ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Commentary on Article 47, paragraphs 6 and 8)"); *Urgenda Foundation v. State of the Netherlands*, Supreme Court of the Netherlands, ECLI:NL:HR, 20 December 2019 (Netherlands), para. 5.7.5-5.7.9; VZW *Klimaatzaak v. Kingdom of Belgium*, Decision of 30 November 2023, Cour d'appel Bruxelles, 2021/AR/1589, paras. 237-243, 258; *Neubauer v. Germany*, 1 BvR 2656/18 2020, Decision of 24 March 2021 (Germany), paras. 199-202.

171 See Written Statement OACPS, paras. 147-152.

environment.[172] There is a wealth of evidence in the unprecedentedly voluminous record of these proceedings, upon which the Court could draw in this regard. For example, several robust scientific studies have established the percentage contribution of individual States to both cumulative global greenhouse gas emissions and to the resulting global warming.[173]

97. The OACPS further notes that, even though the factual and legal record enables the Court to address the legal consequences for individual States or groups of tests, the question—which does not itself identify any particular State or group of States—also permits the Court to provide an answer in principle. The OACPS recalls that the abstract character of a question is not a ground for the Court to decline to exercise its jurisdiction to render an advisory opinion.[174] This principle affirms the Court's authority to address the issue at hand, even if the question is interpreted as requiring the Court to make judicial determinations at a certain level of generality. The OACPS notes that the Court has recently dealt with a similar issue with respect to Israel's policies and practices in the Occupied Palestinian Territory. The Court considered, in such a context, that:

> "[I]n its request, the General Assembly has not sought from the Court a detailed factual determination of Israel's policies and practices. The object of the questions posed by the General Assembly to the Court is the legal characterization by the Court of Israel's policies and practices. Therefore, in order to give an advisory opinion in this case, it is not necessary for the Court to make findings of fact with regard to specific incidents allegedly in violation of international law. The Court need only establish the main features of Israel's policies and practices and, on that basis, assess the conformity of these policies and practices with international law. The Court has already concluded that it has before it the necessary information to perform this task".[175]

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172 See e.g., Written Statement OACPS, paras. 145-146; Written Statement Democratic Republic of Conga, para. 295; Written Statement Melanesian Spearhead Group, paras. 295-297; Written Statement Sierra Leone, para. 3.145; Written Statement Marshall Islands, para. 49; Written Statement Sri Lanka, para. 28; Written Statement Egypt, para. 291; Written Statement Tuvalu, para. 114; Written Statement Mauritius, paras. 215-217; Written Statement Costa Rica, para. 103; Written Statement Antigua and Barbuda, paras. 566-592; Written Statement Vanuatu, paras. 503-506.

173 See, e.g., United Nations Environment Programme, The Closing Window, Emissions Gap Report 2022, Executive Summary, page V; Written Statement Vanuatu, Ex. B, Expert Report of Professor Corinne Le Quéré on Attribution of global warming by country (dated 8 Dec. 2023), paras. 25-26. See also Written Statement Vanuatu, paras. 162-170 (setting forth the authoritative science quantifying the percentage contribution of individual States and groups of States to global cumulative greenhouse gas emissions and to total global warming).

174 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, para. 15 ("[I]t is the clear position of the Court that to contend that it should not deal with a question couched in abstract terms is "a mere affirmation devoid of any justification", and that "the Court may give an advisory opinion on any legal question, abstract or otherwise".).

175 *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*, p. 26, para. 77.

Similar considerations apply in the present proceedings, where the Court could answer the questions put to it by identifying the range of obligations governing the conduct defined in the text of the Resolution 77/276 and then assessing the conformity of such conduct with those obligations in general.

98. Finally, the OACPS submits that regardless of the level of specificity at which the Court decides to answer the questions, it is necessary for the Court's opinion to be sufficiently clear about the (un)lawfulness, as a matter of principle, of the conduct at stake in the present proceedings in order to provide a meaningful answer to the General Assembly's request.[176]

C. The full range of legal consequences attaches to the unlawful conduct

99. The OACPS invites the Court to detail all the consequences of the internationally wrongful acts identified. As acknowledge by the majority of participants, the wrongful conduct at issue here—like all internationally wrongful acts—trigger the duties of cessation and non-repetition[177] as well as the duty to provide reparation in the form of restitution, compensation, and satisfaction as appropriate.[178]

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176 Written Statement Vanuatu, para. 491.

177 Written Statement OACPS, paras. 159, 165-166; Written Statement Democratic Republic of Congo, paras. 255-261, 331-333; Written Statement Colombia, paras. 4.7-4.9; Written Statement Singapore, paras. 4.5, 4.10; Written Statement Solomon Islands, paras. 234-235, 248; Written Statement Kenya, para. 6.91; Written Statement Philippines, paras. 10, 121-123, see 136; Written Statement Albania, paras. 133-134; Written Statement Micronesia, paras. 120, 127; Written Statement Sierra Leone, paras. 3.135-3.136, 4.8; Written Statement Switzerland, para. 74; Written Statement Saint Vincent and the Grenadines, paras. 128, 133(c); Written Statement Netherlands, para. 5.9; Written Statement Bahamas, paras. 237-238; Written Statement France, para. 197; Written Statement Kiribati, para. 180; Written Statement Timor-Leste, paras. 362, see 374; Written Statement India, para. 89; Written Statement Samoa, paras. 196-197; Written Statement Ecuador, para. 4.12; Written Statement Sri Lanka, para. 104; Written Statement Madagascar, paras. 73-74; Written Statement Uruguay, para. 156; Written Statement Egypt, paras. 359-363; Written Statement Chile, paras. 111-112; Written Statement Namibia, paras. 132-134; Written Statement Tuvalu, paras. 126-127; Written Statement Mauritius, paras. 210(c), 222; Written Statement Costa Rica, paras. 123-124; Written Statement Antigua and Barbuda, paras. 537-539, 598; Written Statement El Salvador, para. 51; Written Statement Brazil, para. 86; Written Statement Vanuatu, paras. 567-575; Written Statement Vietnam, paras. 48-49; Written Statement Palau, para. 4; Written Statement Dominican Republic, paras. 4.1, 4.63-4.64; Written Statement Thailand, para. 29; Written Statement Burkina Faso, para. 351; Written Statement IUCN, paras. 584; Written Statement MSG, paras. 314, 333; Written Statement African Union, paras. 258, 263-265; Written Statement Commission of Small Island States on Climate Change and International Law, paras. 173-174.

178 Written Statement Vanuatu, paras. 580-600; Written Statement Democratic Republic of Congo, para. 268, 334-344; Written Statement Colombia, paras. 4.12-4.14; Written Statement Palau, para. 4; Written Statement Tonga, para. 297-302; Written Statement IUCN, paras. 589, see 590-591; Written Statement Singapore, para. 4.12-4.16; Written Statement Solomon Islands, paras. 236-243, 247; Written Statement Seychelles, para. 149; Written Statement Peru, paras. 93, 95; Written Statement Kenya, paras. 6.93-6.94; Written Statement MSG, paras. 316-322, 331-332; Written Statement Philippines, paras. 126-128; Written Statement Albania, paras. 135-139; Written Statement Micronesia, paras. 120-131; Written Statement Sierra Leone, paras. 3.135-3.140; Written Statement Switzerland, para. 75; Written Statement Grenada, para. 75; Written Statement St. Lucia, paras. 92-95; Written Statement Saint Vincent and the Grenadines, paras. 133-134; Written Statement Bahamas, paras. 235, 244; Written Statement Marshall Islands, para. 125; Written Statement Kiribati, paras. 182-187; Written Statement Timor Leste, para. 364, see also 372-374; Written Statement Ecuador, para. 4.15-4.16, 4.26; Written Statement Barbados, paras. 251, 259, 271-278; Written Statement African Union, paras. 275, 278-290; Written Statement Sri Lanka, para. 104;

Breaches of *erga omnes* obligations and *jus cogens* norms of international law, including the prohibition on genocide, the prohibitions on racial and gender discrimination, and the right to self-determination, trigger additional legal consequences for all States, including the duty to cooperate to bring the unlawful situation to an end and to redress harms experienced as a consequence of the internationally wrongful conduct.

100. Some participants have argued that the ordinary consequences of State responsibility should not be applied with respect to climate change. Some argue that the only legal consequences applicable are best efforts of global cooperation or development aid, excluding the general legal consequences for internationally wrongful acts (**1**). Others argue that there is no duty to offer reparation for the damage caused for internationally wrongful conduct in relation to anthropogenic emissions of greenhouse gases because a causal connection cannot be established between the internationally wrongful conduct and the harm felt by States, individuals, and peoples (**2**). The OACPS briefly addresses each of these flawed arguments before considering the practical content of the applicable legal consequences (**3**).

1. The legal consequences under the general law of State responsibility attach to internationally wrongful conduct in relation to anthropogenic greenhouse gas emissions

101. Arguments that the ordinary legal consequences under the general law of State responsibility do not apply are grounded in the *lex specialis* doctrine,[179] which the OACPS has already refuted at the level of both primary and secondary rules.

102. In short, these arguments seek to craft a convoluted regime for the legal consequences arising from State conduct in relation to greenhouse gas emissions

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Written Statement OACPS, paras. 176-189; Written Statement Madagascar, paras. 83, 84-89; Written Statement Uruguay, paras. 158-161; Written Statement Egypt, paras. 380-387; Written Statement Chile, para. 120, see 121-125; Written Statement Namibia, paras. 131, 136-141, 158; Written Statement Tuvalu, paras. 128-130, 136-145; Written Statement USA, paras. 5.5, 5.11; Written Statement Bangladesh, paras. 146-147; Written Statement Mauritius, para. 222; Written Statement Costa Rica, para. 122; Written Statement Antigua and Barbuda, paras. 554-559; Written Statement Commission of Small Island States on Climate Change and International Law, paras. 182-190; Written Statement El Salvador, para. 51; Written Statement Brazil, paras. 88-93; Written Statement Vietnam, paras. 46-49; Written Statement Dominican Republic, para. 5.1; Written Statement Thailand, paras. 29-31; Written Statement Burkina Faso, paras. 372-388; Written Statement Latvia, para. 76.

179 See among others, Written Statement OPEC, para. 128. 2; Written Statement European Union, Conclusion 7.3; Written Statement Iran, para. 162; Written Statement Japan, para. 138; Written Statement Saudi Arabia, para. 6.8.

that would baselessly derogate from the customary rules of State responsibility. They present legal obligations of States with respect to anthropogenic emissions of greenhouse gases as mere prescriptions of morality or convenience, recklessly or deliberately disregarding that compliance with and strict adherence to them is vital for the very survival of humankind—and also required by law. However, the OACPS reminds the Court that no participant was able to refer to a binding legal instrument embodying even the rudiments of the alleged special regime that would displace or derogate from the general rules of State responsibility. Accordingly, the OACPS submits that the Court should apply the entire customary international law framework relating to the breach of international obligations in accordance with the normal operation of the law. Concerning particularly environmental damage, which is a major part of the damage caused by anthropogenic emissions of greenhouse gases, the OACPS reiterates that:

> "[I]t is consistent with the principles of international law governing the consequences of internationally wrongful acts, including the principle of full reparation, to hold that compensation is due for damage caused to the environment, in and of itself, in addition to expenses incurred by an injured State as a consequence of such damage".[180]

2. Responsible States are obliged to make full reparation for the damage they have caused

103. Some participants argue that, under the framework of the general rules of State responsibility, there is no duty to offer reparation because a causal connection cannot be established between the internationally wrongful conduct of States in relation to anthropogenic greenhouse gas emissions and the harm experienced by States, individuals, and peoples due to the adverse effects of climate change. For some participants, there is no agreed scientific method to attribute climate change to the emissions of individual States and, accordingly, to trigger the obligation to offer reparations.[181] For other participants, there is no scientific or legal criteria to allocate to a given State a specific detrimental consequence.[182] A few participants

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180 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment, I.C.J. Reports 2018*, p. 14, para. 41.

181 Written Statement United Kingdom, para. 137.4 (arguing that "there is currently no single or agreed scientific methodology to attribute climate change to the emissions of individual States or to attribute extreme events caused by climate change to the GHG emissions of any particular State. This means that, even if an internationally wrongful act were to be established, it would not be possible to establish the causal nexus required to trigger the obligation to make reparation"); Written Statement Kuwait, para. 121-122.

182 Written Statement Nordic countries, para. 107; In a similar vein, Written Statement Saudi Arabia, para. 6.7.

argue that there is no causal link between climate change and the harm that it has caused at all. For instance, the United Kingdom argues that the harm caused by climate change is at best indirect.[183] A number of participants have argued that proof of causation is impossible,[184] that it poses particular complexities,[185] that it is challenging,[186] that it is not established,[187] or more generally that it is difficult to establish.[188] Russia also maintains that it is impossible to know whose greenhouse gases are affecting adversely what aspect of the climate system.[189]

104. The OACPS maintains that these arguments are based on a number of misconceptions relating to the conduct at stake. *First*, as has been established, the Court has not been asked to determine the individual responsibility of States in the pending advisory proceedings for a specific extreme weather event or other particular adverse effect of climate change, and even less so for the consequences of a specific greenhouse gas release event. Rather, the Court has been asked to determine the legal consequences of State conduct in relation to the anthropogenic emission of greenhouse gases, which is, according to a global scientific consensus,[190] the cause of climate change and its adverse effects. Moreover, the science establishes that the conduct of a certain group of States (i.e. major greenhouse gas-emitting States), when taken together, is the primary driver of the phenomenon of climate change itself,[191] which embodies not only significant but catastrophic harm to the climate system and other parts of the environment, as

183 Written Statement United Kingdom, para. 137.4.1.

184 Written Statement Russia, p. 16-17; Written Statement Saudi Arabia, para. 6.7; Written Statement OPEC, para. 102 (quoting Special Rapporteur Murase).

185 Written Statement Australia, paras. 5.3 and 5.9.

186 Written Statement Indonesia, para.74.

187 Written Statement Korea, para. 47.

188 Written Statement Kuwait; Written Statement Singapore; Written Statement USA; Written Statement Australia, para. 5.3.

189 Written Statement Russia, p. 17.

190 See, e.g., 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, Statements A.1 (2023) ("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".); 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, Statement A.1.1 (2021) ("Observed increases in well-mixed greenhouse gas (GHG) concentrations since around 1750 are unequivocally caused by human activities".).

191 United Nations Environment Programme, *Emissions Gap Report 2022: The closing window: Climate crisis calls for rapid transformation of societies*, Executive Summary, p. v (2022) ("The top seven emitters (China, the EU27, India, Indonesia, Brazil, the Russian Federation and the United States of America) plus international transport accounted for 55 per cent of global GHG emissions in 2020 []. Collectively, G20 members are responsible for 75 per cent of global GHG emissions".).

well as to States, individuals, and peoples.[192] It is equally well-established that "[v]ulnerable communities who have historically contributed the least to current climate change are disproportionately affected", including the States represented by the OACPS and their peoples.[193] The causal link between the State conduct at issue here and the resulting harm experienced by victims is thus well-established.

105. *Second*, the Court is not asked to determine individual State responsibility for the entire problem of climate change, but only for a significant contribution to the problem. *Question (b)* targets the acts and omissions whereby certain States have caused significant harm to the climate system and other parts of the environment. The States whose acts and omissions have caused significant harm to the climate system and other parts of the environment are clearly identified—to the specific level of their percentage contribution to cumulative GHG emissions and global warming to date. The robust science underlying this accounting is included in authoritative reports in the record of the present proceedings and examined in great detail in the Written Statement of the Republic of Vanuatu.[194] The OACPS recalls that, according to the Court in *Costa Rica v. Nicaragua*:

> "The damage may be due to several concurrent causes, or the state of science regarding the causal link between the wrongful act and the damage may be uncertain. These are difficulties that must be addressed as and when they arise in light of the facts of the case at hand and the evidence presented to the Court. Ultimately, it is for the Court to decide whether there is a sufficient causal nexus between the wrongful act and the injury suffered".[195]

106. In sum, the causal links between State contributions to climate change, and between climate change and the adverse effects already experienced by States, individuals, and peoples—in particular within the OACPS membership—are well-established. This is more than sufficient to meet the requirements of causality in respect of the duty to provide reparation. Indeed, the ECtHR has determined, on the basis of this very evidence, that "a legally relevant relationship of causation"

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192 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, Statement A.2 (2023) (explaining that as a consequence of historic cumulative emissions, "[w]idespread 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)").

193 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, Statement A.2 (2023).

194 Written Statement Vanuatu, Chapter III, particularly Section 3.2.3.

195 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment, I.C.J. Reports 2018*, p. 14, para. 34.

could be drawn between anthropogenic GHG emissions attributable to the State and the harms affecting individuals due to the adverse effects of climate change.[196] Arguments to the contrary ignore the science, overstate the causal complexity, and mischaracterise the conduct at issue before the Court.

3. The Court should flesh out the content of the applicable legal consequences

107. Climate justice for victims that have already experienced immense losses as a consequence of climate change—including States, peoples, and individuals across the OACPS membership—hinges on the legal consequences attaching to the conduct that has caused these losses. The OACPS has therefore urged this Court to detail the full legal consequences of the internationally wrongful conduct in its advisory opinion, and draws the Court's attention to the numerous written statements calling for the same.[197] These submissions strongly suggest that only a comprehensive detailing of these consequences would contribute fully and significantly to the United Nations' work, befitting the Court's status as its principal judicial organ.[198] The Court should thus avoid confining itself to a general reference to the secondary rules on State responsibility, as suggested by Latvia, and it should instead provide a detailed analysis of the relevant legal consequences arising from the wrongful conduct at stake in these proceedings.

108. The OACPS thus invites the Court to outline what are the concrete meanings, in the present context, of: (i) the duty of cessation and non-repetition; (ii) the duty to offer reparation, including restitution, compensation and satisfaction; (iii) the duty of non-recognition of situations created by breaches of obligations *erga omnes* or of *jus cogens* norms; and (iv) the duty to cooperate to bring such situations to an end. The OACPS has already detailed what those consequences may entail in its Written Statement.[199] Here, the OACPS offers a few additional remarks emphasising aspects of certain legal consequences meriting particular attention.

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196 *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*, ECtHR Application no. 53600/20, Judgment of the Grand Chamber (9 April 2024), para. 478.

197 See, e.g., Written Statements identified in footnote 178, *supra*.

198 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, para. 146.

199 Written Statement OACPS, paras. 163-194.

109. *First*, with regard to cessation and non-repetition, the Court is specifically urged to clarify that the promotion and use of geoengineering would contravene the duty of cessation and various applicable primary rules, including human rights obligations. The OACPS endorses in full the arguments made by Vanuatu that the obligation to cease the wrongful conduct that is causing damage to the climate system "cannot be discharged using geoengineering technologies, and that reliance on such technologies in responding to climate change could constitute a distinct violation of States' obligations under international law".[200] This position is particularly salient given that fossil fuel companies are "among the most active" in developing, patenting, and promoting key geoengineering technologies.[201] The OACPS shares Vanuatu's concern that the sheer promotion of geoengineering could serve to prolong fossil fuel use rather than facilitate transition to sustainable energy, thereby compounding the unlawful conduct that has caused catastrophic harm to the climate system.

110. Geoengineering technologies pose additional risks to the environment, including "dangerous consequences" for biodiversity, the ozone layer, and regional climate stability, while also undermining social justice and political stability.[202] The UN Human Rights Council Advisory Committee has concluded that deploying such technologies would "be contrary to the human rights and environmental framework."[203] The potential for significant, even existential, impacts on climate-vulnerable States and Indigenous Peoples is particularly concerning, as it could exacerbate injuries already caused by anthropogenic climate change and colonial practices.

111. Given these risks, hundreds of scientists and organisations have called for a comprehensive non-use agreement on geoengineering technologies, particularly solar radiation management.[204] The Court should consider articulating a

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200 Written Statement Vanuatu, para 575.

201 Center for International Environmental Law (CIEL), 'Fuel to the Fire: How Geoengineering Threatens to Entrench Fossil Fuels and Accelerate the Climate Crisis' p. 5 (2019), available at <https://www.ciel.org/wp-content/uploads/2019/02/CIEL_FUEL-TO-THE-FIRE_How-Geoengineering-Threatens-to-Entrench-Fossil-Fuels-and-Accelerate-the-Climate-Crisis_February-2019.pdf>

202 Aarti Gupta et al, 'Towards a Non-Use Regime on Solar Geoengineering: Lessons from International Law and Governance', *Transnational Environmental Law*, pp. 2-3 (2024).

203 Human Rights Council Advisory Committee, 'Impact of new technologies intended for climate protection on the enjoyment of human rights', UN Doc. A/HRC/54/47 (10 August 2023), para 57.

204 See, e.g., 'We Call for an International Non-Use Agreement on Solar Geoengineering', Solar Engineering Non-use Agreement (accessed 13 August 2024), available at <https://www.solargeoeng.org/non-use-agreement/open-letter/>.

requirement for such safeguards as part of the duty of cessation. Moreover, the OACPS urges the Court to emphasise that human rights compliance primarily requires States to "rapidly phase out fossil fuels through viable, scientifically proven technologies and approaches".[205] By providing clear guidance on these points, the Court can ensure that States' cessation efforts focus on genuine solutions rather than speculative and dangerous interventions that not only aggravate the breach, but also risk adding new breaches.

112. The OACPS further urges the Court to reject arguments that damage to the climate system can be overlooked or ignored because of the possibility that States may develop hypothetical technologies designed to store greenhouse gases or otherwise fulfill their energy needs in the future through "advanced technology".[206] These kinds of speculative arguments assume a *deus ex machina* that will reverse the incredible damage to the planet being caused today by the anthropogenic emissions of greenhouse gases. The possibility of future speculative and hypothetical technological development is not a defense, excuse, or justification under international law for the continuation of internationally wrongful acts. Instead, such conduct much genuinely cease, and States are required to take measures of non-repetition. The OACPS agrees with Vanuatu's view that this requires, among other measures, "legislative measures to criminalize environmental and ecological harm amounting to ecocide, both domestically and through international cooperation to establish an international crime of ecocide".[207]

113. *Second,* with respect to reparation, the OACPS notes that the appropriate forms and manifestations of reparation will vary depending on the nature of the harm being redressed. Here, the OACPS stresses that reparations should be victim-driven—informed by and responsive to the needs of the harmed States, individuals, and peoples. The OACPS notes that restitution is the preferred form of reparation, and that restitution is possible for certain harms caused by anthropogenic greenhouse gas emissions. Given that the vulnerability and limited adaptive capacity of many of the most impacted States and communities are the product of colonial legacies, including the persistent neocolonial development paradigm, the OACPS fully endorses the submission of Madagascar, that

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205 Human Rights Council Advisory Committee, 'Impact of new technologies intended for climate protection on the enjoyment of human rights', UN Doc. A/HRC/54/47 (10 August 2023), para 71.

206 See, e.g., Written Statement OPEC, paras 27(a), 30, 58.

207 Written Statement Vanuatu, para 577.

"restitution for the damage suffered as a result of climate change requires redressing an entire system rooted in the consequences of colonialism and an inequitable international economic system".[208] The OACPS further suggests that this form of redress can be facilitated by transformational adaptation, which seeks to make fundamental changes at the systemic and structural level in order to address the root causes of human vulnerability to climate change.[209]

114. The OACPS notes that certain irreparable harms cannot be addressed through restitution, and stresses that in these cases the appropriate form of reparation is compensation. The OACPS agrees with the many participants who have stressed that compensation must be available for both economic and non-economic losses, including moral, spiritual, and cultural losses—which, as the Marshall Islands rightly states, are often much more profound and disruptive than economic losses.[210] The OACPS fully agrees with the point raised by several participants that the legal obligation to provide compensation for harm caused by internationally wrongful conduct cannot be satisfied by **voluntary** contributions to the Paris Agreement's Loss and Damage fund.[211] Equally, the OACPS stresses that compensation in the form of development aid is unacceptable, as such "aid" often comes in the form of loans, has strings attached, entails onerous reporting requirements, and is not responsive to the needs on the ground, therefore only further burdening vulnerable countries.[212] More fundamentally, the OACPS emphasises that compensation is not "aid" or "charity", but a legal duty owed for harm caused as a product of a responsible State's internationally wrongful conduct.

115. Finally, the OACPS agrees with participants who observe that no form of restitution or compensation can adequately address the deepest and most profound losses caused by climate change. As Solomon Islands explains, ""monetary compensation will never be sufficient to remedy the myriad harms of climate

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208 Written Statement Madagascar, para. 59.

209 Intergovernmental Panel on Climate Change, *Climate Change 2023: 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, Introduction, p. 7 (2023); G. Fedele et al., *Transformative adaptation to climate change for sustainable social ecological systems*, 101 Environmental Science & Policy, p. 116 (2019).

210 Written Statement Marshall Islands, para. 78. See also, e.g., Written Statement Melanesian Spearhead Group, para. 320-322; Written Statement Kenya, paras. 6.100-6.101, Written Statement Egypt, paras. 380-386; Written Statement Costa Rica, paras. 118-120.

211 Written Statement OACPS, para. 188; Written Statement Melanesian Spearhead Group, para. 322;

212 Written Statement Madagascar, para. 92; Written Statement Namibia, paras. 143-144; Written Statement Timor Leste, paras. 173-174;

change, due to the profound loss of culture, ecology, and social structures."[213] Reparation in the form of satisfaction is needed to address these dimensions of harm. In this respect, the OACPS endorses in full the arguments made by the Melanesian Spearhead Group that reparation should include processes such as "a truth and reconciliation commission, that provide for acknowledgment, reckoning and healing on the terms of the victims—including future generations. Culturally grounded rituals of atonement and reconciliation must complement formal legal remedies".[214] The OACPS notes that, among other things, such culturally grounded processes are an essential aspect of reparation for breaches of cultural self-determination and for the interference caused by responsible States on the ability of peoples, including Indigenous Peoples, to perfect their cultural development and to pass on their culture to their youth and to future generations. Processes such as formal apologies, truth and reconciliation, and similar frameworks are needed as a form of reparation and as an acknowledgement that the ways of life of responsible States have caused significant damage to the culture and ways of life of peoples and States that are not responsible for the crisis.

V. CONCLUSION

116. In light of the written statements submitted in these advisory proceedings, the OACPS respectfully reiterates the elements of answer that it has indicated in its Written Statement in relation to the questions asked by the General Assembly.

117. To summarise the essential points that are in issue in the present proceedings:

(1) The Court has jurisdiction over the request for advisory opinion submitted by the General Assembly and there is no reason for the Court to exercise its discretion not to render an advisory opinion;

(2) The relevant conduct that underpins the questions posed by the General Assembly is a "composite act" consisting of acts and omissions over time whereby certain States have caused significant harm to the climate system and other parts of the environment and, taken together, catastrophic harm in the form of climate change and its adverse effects;

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213 Written Statement Solomon Islands, para. 242.

214 Written Statement Melanesian Spearhead Group, para 337.

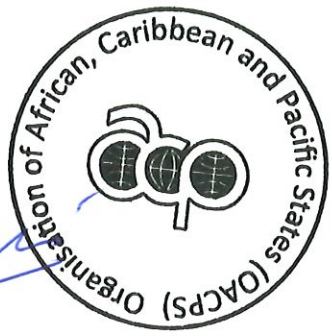
(3) The international obligations governing the relevant conduct include, *inter alia,* the prohibition of genocide, the prohibition of racial discrimination, the duty to respect and promote the right to self-determination, the duty to prevent significant harm to the environment, the duty of due diligence, the duty to protect and preserve the marine environment, the duty to respect, protect and fulfil human rights, the duty to cooperate, and the obligations arising from the climate change treaty regime and other environmental regimes;

(4) The relevant conduct—namely States' support for fossil fuel production and consumption and their failure to regulate greenhouse gas emissions under their control over time—is, in principle, in breach of most, if not all of these obligations. While these breaches materialised when the aggregate conduct first crossed a relevant threshold of legality set by an obligation (such as the threshold of causing "significant harm"), the starting point for the breach is the first act or omission in the series governed by the obligation;

(5) The legal consequences arising from these breaches cover all the consequences foreseen in customary international law, namely, cessation and guarantees of non-repetition, reparation in the forms of restitution, compensation, satisfaction, as well as the consequences arising from the breach of *erga omnes* obligations and *jus cogens* norms of international law, including the duty to cooperate to bring to an end the internationally wrongful act, the duty not to recognise situations created in violations of such norms, and the duty not to render aid or assistance in maintaining such situations.

(6) The Court is invited to provide clarity on these essential points.

Respectfully submitted,



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

13 August 2024

Certification

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

13 August 2024

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H.E. Georges Rebelo Pinto CHIKOTI

Secretary-General

Organisation of African Caribbean and Pacific States (OACPS)

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

Annex 1 _OACPS_ WC: *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010,* p. 442, available at: https://www.icj-cij.org/sites/default/files/case-related/141/141-20100722-ADV-01-00-EN.pdf.

Annex 2 _OACPS_ WC: *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019,* p. 129, available at: https://www.icj-cij.org/case/169/advisory-opinions.

Annex 3_OACPS_ WC: *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, ICJ Reports 1980*, p. 76, available at: https://www.icj-cij.org/case/65/advisory-opinions.

Annex 4_OACPS_ WC: *Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV), Advisory Opinion, 1928, P.C.I.J., Series B, No. 16*, available at: https://www.worldcourts.com/pcij/eng/decisions/1928.08.28_greco_turkish.htm.

Annex 5_OACPS_ WC: *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 348, available at: https://www.icj-cij.org/sites/default/files/case-related/66/066-19820720-ADV-01-00-EN.pdf.

Annex 6_OACPS_ WC: *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 234, available at: https://www.icj-cij.org/sites/default/files/case-related/95/095-19960708-ADV-01-00-EN.pdf.

Annex 7_OACPS_ WC: *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*, p. 18, available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-00-en.pdf.

Annex 8_OACPS_ WC: Montréal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, 1522 UNTS 3, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-2-a&chapter=27&clang=_en.

Annex 9_OACPS_ WC: Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, 1513 UNTS 293, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-2&chapter=27&clang=_en.

Annex 10_OACPS_ WC: Protocol of 1997 to amend the International Convention for the Prevention of Pollution from Ships of 2 November 1973, as modified by the Protocol of 17 February 1978, 26 September 1997, available at: https://homeport.uscg.mil/Lists/Content/Attachments/891/1997_Annex%20VI.pdf.

Annex 11_OACPS_ WC: Resolution MEPC.176(58), Amendments to the Annex of the Protocol of 1997 to amend the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (10 October 2008), available at: https://www.classnk.or.jp/hp/pdf/activities/statutory/soxpm/resmepc176-58.pdf.

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