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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2024

Public sitting

held on Friday 6 December 2024, at 10 a.m., at the Peace Palace,

President Salam presiding,

***on the* Obligations of States in respect of Climate Change**
(Request for advisory opinion submitted by the General Assembly of the United Nations)

VERBATIM RECORD

ANNÉE 2024

Audience publique

tenue le vendredi 6 décembre 2024, à 10 heures, au Palais de la Paix,

sous la présidence de M. Salam, président,

***sur les* Obligations des États en matière de changement climatique**
(Demande d'avis consultatif soumise par l'Assemblée générale des Nations Unies)

COMPTE RENDU

Present:	President	Salam
	Vice-President	Sebutinde
	Judges	Tomka
		Abraham
		Yusuf
		Xue
		Bhandari
		Iwasawa
		Nolte
		Charlesworth
		Brant
		Gómez Robledo
		Cleveland
		Aurescu
		Tladi
	Registrar	Gautier

Présents : M. Salam, président
M^me^ Sebutinde, vice-présidente
MM. Tomka
Abraham
Yusuf
M^me^ Xue
MM. Bhandari
Iwasawa
Nolte
M^me^ Charlesworth
MM. Brant
Gómez Robledo
M^me^ Cleveland
MM. Aurescu
Tladi, juges

M. Gautier, greffier

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HE Ms Symone Betton Nayo, Ambassador of Jamaica to the Kingdom of the Netherlands,

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For the complete list of delegations of all participants, please refer to CR 2024/35.

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M. Dan Sarooshi, KC, conseiller juridique.

The PRESIDENT: Good morning. Please be seated. The sitting is now open.

The Court meets this morning to hear the following Participants on the questions submitted by the United Nations General Assembly, namely, Jamaica, Papua New Guinea, Kenya, Kiribati and Kuwait. Each of the delegations has 30 minutes at its disposal for its presentation. The Court will observe a short break after the presentation of Kenya.

I shall now give the floor to Her Excellency Ms Kamina Johnson Smith, speaking on behalf of Jamaica.

Ms JOHNSON SMITH:

I. INTRODUCTION

1. Mr President, distinguished Members of the Court, it is indeed an honour to appear before you on behalf of Jamaica.

2. Today, we come before this Court with the firm belief that international law plays a central role in addressing the urgent and existential climate crisis that we face. This honourable Court has compelling submissions before it from several small island developing States including Vanuatu, and Antigua and Barbuda, and other CARICOM States on the science, on the devasting impact of climate change and on the international law setting out the legal obligations and consequences in respect of climate change. Jamaica will focus our submissions on the effects of the breaches of climate change obligations and the legal consequences arising therefrom.

3. Small island developing States, like Jamaica, are most affected by the effects of climate change whilst contributing the least to emissions. Climate model projections show increasing temperatures for the Caribbean region that will result in increased changes in the frequency and intensity of extreme weather events, greater climate variability and rising sea levels. These changes continue to adversely affect Jamaica's resources, including freshwater resources, coastal and marine resources, biodiversity, human health, human settlements and infrastructure, and our primary productive sectors: agriculture, fisheries and tourism. The disruption from extreme weather events also hampers our efforts to realize sustained, inclusive growth and development. For example, hurricanes and storms cause significant learning disruptions as schools are used for shelters and students are otherwise unable to attend classes due to damaged infrastructure.

4. Jamaica's vulnerability has been exacerbated by climate change as we have not been spared from the impact of increasingly intense weather events. The passage of Hurricane Beryl which resulted in billions of dollars in loss and damage is merely one recent example. As the Court will hear in our submissions, impacts have been experienced at the national, sectoral, community and individual levels, sometimes to devastating degrees.

5. While Jamaica has sought to strengthen our ability to respond to, and recover from, such disasters through a risk-layered approach to disaster response financing, there is urgent need for improved access to adequate and predictable climate finance for mitigation and adaptation as well as capacity-building and support to respond to loss and damage. Beyond this however, it is critical that States address the source of the problem as these response and recovery mechanisms do not reduce the occurrence of disasters, nor prevent the disruption, dislocation and destruction they cause.

6. In Jamaica's view, climate change obligations include obligations relating to the prevention and mitigation of the negative effects of climate events, obligations to co-operate to assist affected States to respond and recover when these events occur and to make reparation for injury caused. No country can address the impacts of climate change on its own. International co-operation is crucial. The political process has yielded some positive results, but more is required. By clarifying the existing obligations of States under international law, this Court will play a vital role in helping States effectively address this pressing issue.

7. Before addressing State obligations in respect of certain human rights, and the duty of responsible States to provide reparation, Jamaica would now like to address in detail some of the specific impacts that climate change has had on Jamaica and on its people. Mr President, I will now request that you invite Ms Sherise Gayle to the podium. I thank you.

The PRESIDENT: I thank Her Excellency Ms Kamina Johnson Smith. I now give the floor to Ms Sherise Gayle.

Ms GAYLE:

II. SPECIFIC IMPACTS OF CLIMATE CHANGE ON JAMAICA

1. Mr President, distinguished Members of the Court, the adverse weather events which have impacted Jamaica over the years have severely affected the country's economic growth and development. For example, during the period 2000 to 2010, Jamaica had 35 flood events which combined resulted in loss and damage amounting to approximately J$132.5 billion.

2. Specifically, Hurricane Ivan in 2004 resulted in loss equivalent to 6.8 per cent of Jamaica's GDP. In 2010, Tropical Storm Nicole caused damage to road networks and bridges resulting in losses estimated at J$14 billion. In respect of Hurricane Beryl, which affected Jamaica in July 2024, agriculture, mining, tourism and infrastructure services experienced the greatest impact with the cost of damage estimated at J$32.2 billion or 1.1 per cent of our GDP. With no opportunity to recover from Beryl, in November 2024, Tropical Storm Rafael is estimated to have cost the country J$647 million. For many Jamaicans, this is a continuous cycle of loss and damage with little room to recover.

3. We will now focus specifically on the impact climate change has had on a few key sectors to illustrate the critical importance of taking action now to mitigate and to adapt to the effects of climate change in Jamaica. Notably, just last month, the World Bank assessed that in Jamaica, "agriculture and tourism amount for more than half the jobs and are particularly vulnerable to climate-related events". This demonstrates the importance of these sectors to Jamaica's economy.

4. Turning to agriculture and fisheries, an in-depth analysis of the agriculture sector in Jamaica identifies two critical impacts of climate change. First, the reduced water availability for agriculture systems, especially for small-scale agriculture. Second, the increased extreme climate-related events such as hurricanes, floods, landslides and saltwater intrusion. In all cases, these impacts significantly affect not only agriculture, but also rural livelihoods and value chains. A 2011 study on the impact of climate change on Jamaican hotel industry supply chains and on farmers' livelihoods predicted that the suitability of crops is expected to decline by 2050. The high-value crops such as coffee, citrus, sugarcane and banana are highly vulnerable to extreme climate events.

5. The financial impact of extreme climate events on the agriculture sector in Jamaica from 1994 to 2010 amounted to approximately J$14.4 billion. These weather-related shocks accounted for the most significant losses in agricultural production during a four-year period, 2004-2008. Mr President, distinguished Members of the Court, by next year, the annual losses in Jamaica in the low-impact scenario are projected to be 3.4 per cent of our baseline GDP.

6. Also, climate change threatens food security and the livelihood of fisher folk through the risk of increased hurricanes and storms that not only disrupt fishing activities, but also destroy fishing infrastructure, cause loss of fish stock and habitats, and alter marine ecosystems.

7. In respect of human health, Mr President and distinguished Members of the Court, the effects of climate change on the health of Jamaicans and on the health care sector in Jamaica is of grave concern. Climate change has many negative effects on health, including an increased risk of infectious, respiratory and cardiovascular diseases, and heat-related illnesses. Climate change is also a threat to mental health, food and water security while also causing injuries and premature deaths related to extreme weather events. There is evidence that hospital admission rates increase during warmer months, and similarly, poor air quality is among the top three to five risk factors for the major contributors to disease burden.

8. Climate change can and will disrupt health care facilities in various ways such as power outages, flooding and supply chain disruptions. In 2007, Hurricane Dean damaged 112 health facilities with an estimated cost of repairs being J$168.4 million. In 2024, Hurricane Beryl caused significant damage to health facilities, particularly in one or two parishes where 82 facilities reported damage leading to the relocation of health care services to community centres and shopping plazas. The estimated overall cost of repairs for the damage caused by Hurricane Beryl was J$1.8 billion.

9. Finally, concerning one of our most important economic sectors: tourism. Tourism is linked to many coastal livelihood activities, and climate change impacts have been disastrous in the past few decades with loss and damage resulting in billions of dollars. The proximity of the hotel industry and recreational infrastructure by our coast also poses a high level of vulnerability to beach erosion, storm surge and sea level rise.

10. Mr President, distinguished Members of the Court, historical and current trends in climate variability have already resulted in significant biophysical and socio-economic impacts to coastal

communities and livelihoods in Jamaica. It is these communities, including those most vulnerable, that endure the daily effects of the loss and damage caused by extreme weather events.

III. STATE OBLIGATIONS IN RESPECT OF THE IMPACTS OF CLIMATE CHANGE ON HUMAN RIGHTS

11. Mr President, distinguished Members of the Court, in respect of question *(a)*, we now turn to the issue of the protection of human rights as obligations of States. The enjoyment of human rights can and will be infringed by the impacts of climate change, and States bear human rights obligations directly relevant and intrinsically linked to this Court's inquiry. Notably, the preamble of the Paris Agreement recognizes that parties "should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights". These rights include, but are not limited to, the right to life, the right to adequate food, the right to water, the right to health, the right to development, and the right to a clean, healthy and sustainable environment.

12. The right to life, and the right to an adequate standard of living (which encompasses the right to adequate food, water, and housing), as well as the right to health are firmly established under international law, as enshrined in key human rights instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

13. The right to health, as outlined in the General Comment No. 14 of the Committee on Economic, Social and Cultural Rights, extends to the underlying determinants of health, such as "food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment"[1]. In our view, this underscores the inalienable and interconnected nature of these human rights.

14. Jamaica further highlights the right to development, which along with the right to health is singled out in the preamble of the Paris Agreement as rights which State parties must respect, promote and consider when taking action to address climate change. The international community has long recognized the right to development[2]. In the context of climate change, this right is particularly

[1] CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, 11 August 2000, UN doc. E/C.12/2000/4, para. 11.

[2] UNGA resolution 41/128, Declaration on the right to development.

relevant, as the climate crisis undermines the ability of Jamaica and other small island development States (SIDS) to pursue development in a sustainable and equitable manner, thus impeding the realization of broader human rights goals.

15. Moreover, the United Nations General Assembly resolution 76/300 recognizes the right to a clean, healthy and sustainable environment as a human right, which a vast majority of States have recognized in some form through international agreements, their national constitutions, legislation, laws or policies.

16. Jamaica further submits that States owe human rights obligations to persons outside their territory regarding their anthropogenic greenhouse gas emissions and the ensuing effects of climate change. In addition to the responsibility of States to co-operate to bring about compliance with the human rights imperilled by climate change, States also have a responsibility to repair damage caused by climate change. This was underscored by the Inter-American Court of Human Rights in its 2017 Advisory Opinion on the Environment and Human Rights.

17. We therefore urge the Court to affirm the human rights obligations of States in the context of climate change and the extraterritorial effect of those obligations. Through their acts and omissions, the responsible States have violated their human rights obligations, which, as Jamaica contends, extends to individuals beyond their borders. Mr President, I will now request that you invite Ms Michelle Walker to the podium.

The PRESIDENT: I thank Ms Sherise Gayle. I now give the floor to Ms Michelle Walker.

Ms WALKER:

IV. REPARATION FOR BREACHES OF STATE OBLIGATIONS IN RESPECT OF CLIMATE CHANGE

1. Mr President, distinguished Members of the Court, Jamaica also adopts the written submissions of Vanuatu regarding “Relevant Conduct” that underpins the questions posed to the Court. We have identified a few of the myriad ways in which Jamaica, as a small island developing State, has been injured by the adverse effects of climate change. Jamaica avers that this honourable Court should examine and advise on the issue of the appropriate remedies for the breaches of States’ obligations.

2. We submit that the rules of general international law on State responsibility are the relevant rules for determining the legal consequences of the breach of obligations by the responsible States, i.e. the States described in paragraph *(a)* of the question, who have caused significant harm to the climate system as stated in paragraph *(b)* of the question. Further, Jamaica supports the written statement of Vanuatu, which outlines the applicable provisions of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) to the issue stated herein.

3. It has been argued by some States that it is not possible to provide compensation for environmental harm. But this honourable Court has determined the issue in the compensation Judgment in the case of *Certain Activities Carried Out by Nicaragua in the Border Area*, at paragraph 42[3], by finding that damage to the environment itself and the consequent impairment or loss of the ability of the environment to provide goods and services is compensable under international law. This Court further noted that such compensation may include indemnification for the impairment or loss of environmental goods and services in the period prior to recovery, and payment for the damaged environment.

4. Mr President, distinguished Members of the Court, we have identified how for Jamaica, like other SIDs, the effects of global warming from climate change has caused tremendous loss both directly and indirectly and will continue to do so. The limited ability to address these impacts results in, among other things, damage to several productive sectors of our economy and the consequent financial loss, a reality for most SIDS. This is but one example of economic loss that has undermined development. Another instance is the permanent loss of biodiversity which not only affects us now but will harm future generations.

5. The commitments under the Paris Agreement to provide critical adaptation and mitigation measures have also been carried out ineffectively and inadequately. The financial architecture under climate change agreements intended to provide climate financing remains grossly underfunded and too often practically inaccessible. Many other delegations have addressed this point so as to collectively identify for this Court the full extent of these continuing breaches and the significant ongoing harm caused to Jamaica and other SIDS.

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

6. The primary obligations applicable to States' acts and omissions under the different sources of international law that we have already elaborated on should be distinguished from the secondary rules of State responsibility, including the duty to make full reparation, which flows from the relevant conduct breaching these primary obligations.

7. For example, contributions to the United Nations Framework Convention for Climate Change (UNFCCC) Fund for responding to Loss and Damage, as a primary obligation which is voluntary and does not entail acceptance of responsibility or liability by the responsible States. As the Conference of Parties' Decision CP1.21 suggests, the existence of this Fund and/or meagre contributions to pay into it on a voluntary basis would not satisfy the duty to make reparation under a secondary rule of State of responsibility. This is evident from the terms and mandate of the COP Decision establishing the Fund[4].

8. The obligation of the responsible States to make full reparation is established under international law and reflected in the Articles on State Responsibility. This obligation to make reparation for the injury caused arises from a breach, by act or omission, of the responsible States.

9. Under international law the purpose of reparation by the responsible State is to erase all consequences of its illegal act and to re-establish the situation as it would in all probability have existed if that act had not been committed. In this case, which involves environmental harm, restitution and compensation are two options which can provide reparation to Jamaica and other SIDS. However, we also submit that some aspects of both these principles require clarification by this Court.

10. Restitution is intended to wipe out legal consequences of a breach. However, we agree with those who have argued that it is too late for any group of States to undo the harm to the environment caused by GHG emissions. Nevertheless, there are measures which could amount to restitution by the responsible States, if the required, consistent responsive and accountable support is provided to the SIDS affected. These measures, which have been suggested by other States, should include: (i) assistance with land reclamation, (ii) support for adaptation measures, and

[4] UN doc. FCCC/CP/2022/10 Add 1, Decision 2/CP.27, paras. 3, 5.

(iii) recognizing the existing sovereignty and maritime spaces of SIDS who may lose their territory because of sea level rise.

11. Where restitution is impossible, the responsible States have an obligation to provide compensation for harm to the climate system. Such compensation may cover material and non-material loss. Material loss can be assessed in economic terms for some aspects, for example, where it can be established that adverse weather events linked to GHG emissions, such as drought, severe flooding or extended periods of rainfall, have affected sectors such as agriculture, tourism and health.

12. The absence of adequate evidence on the extent of material damage will not be an obstacle to granting compensation in all cases[5]. Indeed, this Court has determined that in the absence of adequate evidence, an assessment on material damage can be done by equitable considerations. While some material losses may be easier to assess than others, determining non-material loss may pose even greater difficulties. Nevertheless, this category of injury can cause significant harm and requires redress. Experiences such as the psychological toll on a community displaced by three adverse weather events in five months, or the mental and physical effects on a population whose food security is threatened by adverse climate events in the short and medium terms merit redress.

13. It is also important to recognize that full reparation should include redress for the population as a whole in SIDS that are affected. Monetary compensation by itself will not provide such relief. Measures such as technology transfer on fair and equitable terms, capacity-building, support for regional scientific research on climate change, and climate financing, including reasonable access to such financing, are all essential parts of reparation by the responsible States.

V. CONCLUSION

14. In concluding, Mr President, distinguished judges of the Court, Jamaica, like many other SIDS, has suffered significant, in some cases irreparable, injury because of the failure of responsible States to meet their obligations to reduce anthropogenic emissions of GHG. The Jamaican people have suffered harrowing experiences due to the severe impact of climate change on their daily lives. In a few hours, they will have had their livelihoods destroyed, their families plunged into despair,

[5] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I*).

and their lives forever changed. They have had no choice but to attempt to rebuild from nothing, until the next storm.

15. Thank you for your consideration. Jamaica concludes its oral submission.

The PRESIDENT: I thank the representatives of Jamaica for their presentation. I now invite the next participating delegation, Papua New Guinea, to address the Court and I call upon His Excellency Mr Fred Sarufa to take the floor.

Mr SARUFA:

I. INTRODUCTION

1. Mr President, Madam Vice-President, distinguished Members of the Court. Papua New Guinea is honoured to participate in these proceedings.

2. In our nearly fifty years of nationhood, this is the first ever that we are appearing before the International Court of Justice. Although we did not make a written submission in these advisory proceedings, we are pleased, now before this honourable Court, to make our oral submission on climate change as a grave matter for our country and people, as well as the world, which cannot be ignored. This was demonstrated by the consensus of all UN Member States in passing the General Assembly resolution 77/276 which brought these proceedings before the Court.

3. Papua New Guinea is home to, and the custodian of, a diverse geophysical and geomorphic landscape, including:

(a) 20,197 km of coastline;

(b) 40,000 sq km of coral reefs;

(c) one of the highest-known levels of marine biological diversity in the world;

(d) around 10 per cent of the world's biodiversity in less than 1 per cent of the world's total land area; and

(e) the world's third-largest expanse of pristine tropical rainforest, covering 77.8 per cent of our total land area[6].

[6] "Papua New Guinea-Country Profile, Biodiversity Facts", Secretariat of the Convention on Biological Diversity, https://www.cbd.int/countries/profile?country=pg, accessed 5 December 2024.

4. Papua New Guinea's biodiversity is directly linked to its unsurpassed linguistic diversity — where over 850 languages are spoken, the most in the world. This linguistic diversity goes hand in hand with our cultural diversity.

5. Papua New Guinea is proud to recall that our Constitution is an embodiment of who we are as a Melanesian people. It provides, in pertinent part:

> "We, the people of Papua New Guinea, united in one nation, pay homage to the memory of our ancestors — the source of our strength and origin of our combined heritage, acknowledge the worthy customs and traditional wisdoms of our people, which have come down to us from generation to generation, pledge ourselves to guard and pass on to those who come after us our noble traditions"[7].

It further enshrines the principles of sustainable development and intergenerational equity, recalling in Principle 4 of its national goals and directive principles: "We declare our fourth goal to be for Papua New Guinea's natural resources and environment to be conserved and used for the collective benefit of us all, and be replenished for the benefit of future generations."[8]

6. Today, these sacred principles are in peril — and not by any action of ours, but rather by the action of others, causing sea-level rise, storm surges, cyclones and other extreme weather events, droughts, changing precipitation patterns, coral bleaching, invasive species and the loss of biodiversity. This is why Papua New Guinea joined our Pacific brethren in adopting, within the framework of the Pacific Islands Forum, the Boe Declaration on Regional Security[9], which affirms, *inter alia*, that climate change remains the single greatest threat to the livelihoods, security and well-being of the peoples of the Pacific.

7. Our remaining presentation today is in three parts. First, the Honourable Pila Niningi, Papua New Guinea's Attorney General and Minister for Justice, will recount the multiple ways in which the conduct responsible for climate change has injured the State of Papua New Guinea and its people. Second, Dr Eric Kwa, Secretary of Papua New Guinea's Department of Justice and Attorney General, will address question *(a)*, by discussing the cross-cutting nature of the applicable law and, specifically, the right to self-determination. Thirdly and finally, Mr Leslie Mamu, Papua New

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[7] Preamble, Adoption of Constitution, Constitution of the Independent State of Papua New Guinea.

[8] National Goals and Directive Principles, Constitution of the Independent State of Papua New Guinea.

[9] Boe Declaration on Regional Security, Pacific Islands Forum, https://forumsec.org/sites/default/files/2024-03/BOE-document-Action-Plan.pdf, accessed 5 December 2024.

Guinea's Public Solicitor, will conclude Papua New Guinea's submission by addressing question *(b)*, namely the legal consequences that flow from these breaches of international law.

8. Mr President, I respectfully ask that you call the Honourable Pila Niningi, Minister for Justice and Attorney General of Papua New Guinea, to take the podium.

The PRESIDENT: I thank His Excellency Mr Fred Sarufa. I now give the floor to Mr Pila Niningi.

Mr NININGI:

II. PAPUA NEW GUINEA'S PERSPECTIVE ON CLIMATE CHANGE

1. Mr President, Madam Vice-President, distinguished Members of the Court, for the many peoples of Papua New Guinea, climate change is not a distant threat or an abstract notion, it is an existential threat that has already resulted in immense harm. Among other things, it has forced people to abandon their ancestral lands and territories; altered landscapes and seascapes; disrupted livelihoods; and led to civil unrest among traditional landowners fighting over increasingly limited land space. It has also endangered food crop and water security and the collapse of traditional and cultural practices and indigenous systems of governance.

2. To take but two examples of climate-induced relocation, both the Carteret Islanders from the north-east of Bougainville as well as the people of Veraibari in the Gulf Province of Papua New Guinea have been forced to abandon their ancestral lands as rising seas have engulfed their homes and schools and have inundated what is left of the arable land. And these are only the best-known examples. To be sure, more than 10 of our islands have already been lost due to sea-level rise, and concerningly, this number continues to grow.

3. In addition to sea-level rise, intensified storms and changing weather patterns are now the new norm, disrupting food and water security, damaging infrastructure and displacing vulnerable communities on the islands and in coastal areas. These and other forces have increased pressure along tectonic fault lines, leading to increased seismic activity, including earthquakes. To take but one example, in May 2024, we experienced one of the deadliest natural disasters in our history, with the

Mulitaka landslide in Enga Province. That day, more than 1,100 homes were destroyed, and more than 300 people were buried alive while they slept.

4. Finally, I would like to make some brief remarks about the steps that we have taken within our limited capacity in response to climate change and its consequences.

5. In the face of unrelenting climate crisis impacting adversely the maritime zones of Papua New Guinea and the Pacific region, our Pacific Leaders adopted the 2021 Pacific Islands Forum Leaders Declaration on Preserving Maritime Zones in the face of Climate Change-related Sea-Level Rise[10]. This Declaration recognizes the principles of legal stability, security, certainty and predictability that underpin the United Nations Convention on the Law of the Sea (UNCLOS). The Declaration states that

> "our maritime zones, as established and notified to the Secretary-General of the United Nations in accordance with the Convention, and the rights and entitlements that flow from them, shall continue to apply, without reduction, notwithstanding any physical changes connected to climate change-related sea-level rise"[11].

6. In a similar spirit, the Pacific Islands Forum leaders adopted the 2023 Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-Related Sea-Level Rise[12]. It declares that the statehood and sovereignty of Pacific Islands Forum members will continue, and the rights and duties inherent thereto will be maintained, notwithstanding the impact of climate change-related sea-level rise. It further declares that Pacific Island Forum members, individually and collectively, bear an important responsibility for ensuring protection of our people, and are committed to protecting such persons affected by climate change-related sea-level rise — including with respect to human rights duties, political status, culture, cultural heritage, identity and dignity — and meeting essential needs.

7. We are committed to doing all we can to adapt to and mitigate climate change impacts but those responsible for the conduct that is causing climate change, also need to do significantly more.

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[10] 2021 Pacific Islands Forum Leaders Declaration on Preserving Maritime Zones in the face of Climate Change-related Sea-Level Rise, Pacific Islands Forum, available at: https://forumsec.org/sites/default/files/2024-03/2021%20Declaration%20on%20Preserving%20Maritime%20Zones%20in%20the%20face%20of%20Climate%20Change-related%20Sea-level%20rise.pdf (accessed 5 December 2024).

[11] *Ibid.*

[12] 2023 Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-Related Sea-Level Rise, Pacific Islands Forum, available at: https://forumsec.org/publications/2023-declaration-continuity-statehood-and-protection-persons-face-climate-change (accessed 5 December 2024).

Despite the fanfare and pledges for climate action, made over the years, by high-emitting States, regrettably there are inadequate efforts to combat the climate change crisis. Consequently, the adverse impacts of climate change continue to seriously cause injury to countries like Papua New Guinea who have contributed the least to climate change. This inequality was called out by the Prime Minister of Papua New Guinea, the Honourable James Marape, at the United Nations General Assembly in September 2024 and it is the reason Papua New Guinea protested the recent COP in Baku but appears before you today.

8. Mr President, I ask that you call upon Dr Eric Kwa to the floor to address the first question before this Court.

The PRESIDENT: I thank Mr Niningi. I now give the floor to Mr Eric Kwa.

Mr KWA:

III. OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

1. Mr President, Madam Vice-President, distinguished Members of the Court. I will address the applicable law. I will first address the cross-cutting nature of the applicable law and then focus on the right to self-determination specifically.

2. Mr President and Members of the Court, the conduct responsible for climate change is widely recognized as the emission of anthropogenic greenhouse gases over time. As many Participants have already submitted, that is clear in the terms of resolution 77/276 and has been accepted by the IPCC[13]. The consequences of climate change are widespread and intense, particularly in the Pacific. Hence, duties under many régimes of international law are directly applicable to the conduct under enquiry in these proceedings due to their distinct characterizations and are equally applicable.

3. The conduct at the forefront of these proceedings has a direct impact on the lives of small island developing States. Like other SIDS, Papua New Guinea has been directly and disproportionately injured by the conduct responsible for climate change, particularly by the multiple adverse effects of climate change including those mentioned earlier in our submissions.

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[13] United Nations General Assembly, resolution 77/276, question *(a)*, preambular paragraph 5, question *(b)*.

4. The consequences arising out of climate change impacts on small island developing States are existential.

(i) Cross-cutting legal obligations

5. Mr President and Members of the Court, Papua New Guinea respectfully submits that climate change is inherently cross-cutting and multidimensional, impacting multiple areas of human rights, environmental integrity, economic stability and intergenerational equity. We echo the submissions of numerous Participants who have said the legal obligations governing climate change are all of the rules of international law, and urge this Court to consider that the legal obligations governing climate change arise under the entire corpus of international law, including but not limited to those recalled expressly in the preambular paragraph of resolution 77/276.

6. The Court's interpretation, Mr President and Members of this Court, must reach beyond the climate treaty régime. While treaties like the Paris Agreement and the UNFCCC provide a foundation, the Court must also consider obligations and legal consequences across the broader corpus of international law. This especially includes human rights law, which recognizes the fundamental rights to life, health and livelihood — all under severe threat from climate change impacts.

7. Additionally, the principles of international environmental law, the law of the sea and customary international law relating to State responsibility and transboundary harm are crucial to a comprehensive and holistic interpretation. By integrating these diverse legal frameworks, this Court can provide authoritative guidance that clarifies States' duties to protect vulnerable populations and future generations while holding major emitters accountable for the irreversible damage their actions continue to inflict upon climate-impacted countries.

8. The principle of common but differentiated responsibilities established under international law acknowledges that while climate change is a shared global challenge, the primary responsibility lies with high-emission countries. The SIDS and Pacific Island countries not only lack the technical and funding capacity to counter the effects of climate change, Mr President, Madam Vice-President and Members of this Court, we also have historically contributed the least to the causing of climate change.

9. The world's global emissions and climate change has a far more devastating impact on small island developing States, including those in the Pacific, even though, collectively, SIDS contribute so minimally to greenhouse gas emissions. This is, at heart, an issue of justice, for which the world's highest court is well placed to provide answers.

(ii) Self-determination

10. Mr President and Members of the Court, Papua New Guinea respectfully submits that while there are many obligations applicable, the right to self-determination is cardinal.

11. All States have the obligation to respect the right to self-determination. This is well established under both treaty and customary international law. It is expressly recognized in the United Nations Charter and is prominently enshrined in the first article of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. It has found expression in multiple United Nations General Assembly resolutions and has been elaborated upon by human rights treaty bodies. This Court has characterized the right to self-determination as an essential principle of contemporary international law[14]; and, more recently, characterized it as a peremptory norm of international law.

12. Mr President, Madam Vice-President and Members of the Court, this right has been violated by the conduct responsible for climate change. In the aforementioned cases of both the Carteret Islanders and the people of Veraibari Village, the breach of the right is evidenced by the forced dispersal of these peoples from their traditional territories. We therefore ask this Court to find that their right to self-determination has been breached by the relevant conduct in this case.

13. Permanent sovereignty over natural resources is a component of the right to self-determination. It is enshrined in the second paragraph of the common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. It is also recognized as a norm of customary international law. It guarantees all people the right to "freely dispose of their natural wealth and resources" and provides that "[i]n no case may a people be deprived of its own means of subsistence". This principle is critical in the context of the various adverse effects of climate change, which have foreclosed the ability of

[14] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, para. 29.

Papua New Guinean peoples to freely dispose of their natural resources in both their terrestrial and marine environments.

14. Some States have argued that no breach of the right to self-determination can be established because they were not bound by the relevant obligations at the time their historical emissions occurred. This argument, Mr President and Members of this Court, overlooks the fact that States have been bound by the obligation to respect the right to self-determination since at least 1960 and also as part of their obligations at least since 1945, when self-determination was codified in the United Nations Charter, if not earlier[15].

15. Mr President, I would like to now, with your permission, call on Mr Leslie Mamu to address the Court on the second question to be answered by this Court. Thank you.

The PRESIDENT: I thank Mr Eric Kwa. I now give the floor to Mr Leslie Mamu.

Mr MAMU:

IV. LEGAL CONSEQUENCES

1. Mr President, Madam Vice-President and distinguished Members of the Court, it is my honour to address you today on behalf of my country.

2. Like the Republic of Vanuatu and many other Participants, Papua New Guinea submits that legal consequences for breach of applicable laws is governed by the law of State responsibility, helpfully articulated in the Articles on Responsibility of States for Internationally Wrongful Acts.

3. Within this framework, PNG wishes to emphasize two legal consequences, in particular: sovereignty, territorial integrity and statehood.

*(*i) Sovereignty, territorial integrity and statehood

4. First, we call on the Court to affirm that all States must recognize, regardless of physical changes to our territory, our sovereignty, statehood and maritime zones. Statehood, for Papua New Guinea, once declared in accordance with existing international law, is in perpetuity, irrespective of the adverse impact of climate-related sea-level rise and other related natural phenomena. This

[15] Written Statement of Vanuatu, para. 304.

includes our rights over maritime zones, even if land is lost due to climate impacts. Such legal protections are essential to safeguarding the identity, culture and continuity of Papua New Guinea, including Pacific Island nations and small island States. That all States must so recognize flows as a result of the breach of obligations owed *erga omnes* under the right to self-determination. This conclusion is consistent with the principle of permanent sovereignty over natural resources, and we urge the Court to recognize the significance of this, and other relevant legal principles, in answering the legal question. We also refer the Court to the 2021 and 2023 Pacific Islands Forum declarations previously mentioned.

(ii) Reparation for loss and damage

5. Second, we call on the Court to affirm that reparations are owed by responsible polluting States to small island developing States. As the Court has already heard from numerous Participants, reparations take three forms: restitution; compensation and satisfaction[16].

6. Climate change is a force multiplier, exacerbating poverty, limiting economic growth, and straining social and healthcare systems. For Papua New Guinea, this means our development goals including efforts to reduce poverty and strengthen resilience are in jeopardy. The rainforests of Papua New Guinea provide a pivotal global service, absorbing vast amounts of carbon dioxide and housing biodiversity that sustains our planet's ecological balance. However, preserving these resources comes at a cost, which we cannot bear alone. States' responsibility for causing significant harm to the climate system must, as a means of restitution, provide financial and technical assistance in support of preserving these resources.

7. As the impact of climate change mounts, millions of vulnerable people in SIDS and Pacific islands have faced and continue to face unusual and extreme natural disasters, contaminated water sources, livelihood security, forced migration and displacement, and loss of cultural identity.

8. Many small island developing nations, including Papua New Guinea, cannot continue to bear the burden of searching for new land or bear the responsibility of reclaiming what they have lost due to no fault of their own. There is an immediate need for high-emitting States to recognize their

[16] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *YILC*, 2001, Vol. II, Part Two, 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), Arts. 34-37.

legal obligations and make reparations, in the form of providing compensation, for the losses and damages that have already occurred and continue to occur for small island developing States.

The PRESIDENT: I am sorry to interrupt you, but I would like to draw your attention to the fact that you have already exceeded the time allocated to Papua New Guinea, so if you could kindly conclude within two minutes.

Mr MAMU:

(iii) Conclusion

9. If I may proceed to concluding, Mr President and Members of the Court, Papua New Guinea submits — on the basis of the arguments we have presented to the Court and in support of the case led commendably by our distinguished Melanesian neighbour, Vanuatu — the injury to our peoples caused by climate change impacts represents severe violations of fundamental human rights, including their right to self-determination and the injury to our State, in particular to the right to sovereignty over its territory and natural resources.

10. We look to the Court to provide us with clear and authoritative guidance, taking into account the whole corpus of international law, so that our people, including communities like the Carteret Islands and Veraibari Village do not lose our distinctive identities, cultures and ways of life.

11. With that said, may I, on behalf of Papua New Guinea, thank you, Mr President and Members of the Court, for your kind attention and commitment for your respective mandate. This concludes Papua New Guinea's submissions today. Thank you.

The PRESIDENT: I thank the representatives of Papua New Guinea for their presentation. I now invite the delegation of Kenya to address the Court and I give the floor to Her Excellency Ms Halima Mucheke.

Ms MUCHEKE:

1. Mr President, Madam Vice President, Members of the Court, I am honoured to appear before you today to present the Republic of Kenya's position in these historic advisory proceedings on the obligations of States in respect of climate change.

2. Kenya's commitment to international law has always been, and will continue to be, without question. As the host country of the United Nations Environment Programme, we continue to strive to be an authoritative advocate for actions addressing the triple planetary crises of climate change, biodiversity loss and pollution. In relation to climate change, Kenya is a proud member State of the 2015 Paris Agreement, the United Nations Framework Convention on Climate Change, as well as the Kyoto and the Montreal Protocols.

3. This Court has heard numerous Participants stress the existential nature of the threat caused by climate change. In response, this Court must bring clarity to the law, informed by perspectives of developing States; particularly those in Africa, where temperatures are rising the fastest[17]. We believe that a clarification of the existing legal obligations will provide much needed guidance to States as well as the impetus for the next phase of political negotiations.

4. Kenya specifically invites the Court to draw on equitable principles reflected in climate change treaties such as the principle of common but differentiated responsibilities.

5. Climate change threatens to destroy the very fabric of Kenyan society as well as that of other African States. The intensity of extreme climate events such as flooding, droughts and oppressive heatwaves, are causing profound suffering and destructive impacts across many of Kenya's critical economic sectors. These impacts include unprecedented loss and damage and the displacement of thousands of already vulnerable populations. These are not mere abstract possibilities. In fact, Kenya has been repeatedly struck by brutal flooding episodes, leading to the loss of hundreds of lives and displacements, in one instance of over 200,000 people[18], and the destruction of key national infrastructure assets such as roads, railway lines and electric transmission cables[19]. By exacerbating conflict over basic resources like food and water, refugee flows, these extreme weather events are also a growing threat to Kenya's national security.

6. It is this reality that has made Kenya strive to lead by example in advocating climate justice across Africa. For instance, in September 2023, African Heads of State and Governments gathered

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[17] IPCC, "Regional Fact Sheet – Africa", available at: https://www.ipcc.ch/report/ar6/wg1/downloads/factsheets/IPCC_AR6_WGI_Regional_Fact_Sheet_Africa.pdf.

[18] OCHA, "Eastern Africa: Heavy rains and flooding Flash Update #4 (30 May 2024)", available at: https://www.unocha.org/publications/report/kenya/eastern-africa-heavy-rains-and-flooding-flash-update-4-30-may-2024.

[19] See also, Rising Water Levels in the Rift Valley, available at: https://ir-library.ku.ac.ke/items/5216a109-054f-4e6e-af2a-c78774f62d82.

in Nairobi to adopt the Nairobi Declaration on Climate Change and Call to Action, which reiterates with one voice Africa's strong stance on climate change[20]. As the Nairobi Declaration makes profoundly clear, the contribution of African States to the phenomenon of climate change has been essentially nil, yet Africa is unjustly saddled with the burden of confronting the consequential climate crisis.

7. It is an even deeper tragedy, that despite possessing 40 per cent of the world's renewable energy resources, Africa receives only 2 per cent of total renewable energy investment[21]. Technology transfer and financial assistance remain critical for Africa in our efforts to confront the climate crisis while pursuing sustainable development. For as long as developed States do not comply with the enhanced financial obligations in the Paris Agreement, African States — indeed, the entire global south — will be unable to meet the escalating costs of adaptation, resilience-building and mitigation. Moreover, most of these States are also servicing extremely huge levels of national debt, most of it foisted upon them by a global financial architecture that is flagrantly skewed against them. In this context, the yearly US$300 billion target agreed at Baku is barely an improvement on the unfulfilled US$100 billion goal agreed back in 2009[22].

8. Mr President, in concluding, Kenya reaffirms its commitment to the collective duty of the international community in upholding justice as it addresses the climate crisis. Despite the many setbacks including most recently at the COP29, Kenya remains convinced that the world can, and will, correct its course of action on climate change. This Court's role in reversing the current trajectory has never been more urgent.

9. That concludes my opening remarks and with the leave of the Court, I now call upon Professor Phoebe Okowa to continue with Kenya's substantive legal arguments. Thank you.

The PRESIDENT: I thank Her Excellency Ms Halima Mucheke. I now give the floor to Professor Phoebe Okowa.

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[20] The African Leaders Nairobi Declaration on Climate Change and Call to Action, available at: https://www.afdb.org/sites/default/files/2023/09/08/the_african_leaders_nairobi_declaration_on_climate_change-rev-eng.pdf.

[21] See the Nairobi Declaration, para. 14.

[22] Copenhagen Climate Change Conference, Copenhagen Accord, FCCC/CP/2009/11/Add. (2009), p. 7.

Ms OKOWA:

I. INTRODUCTION

1. Mr President, Madam Vice-President, Members of the Court, I appear before you on behalf of the Republic of Kenya, and it is a special honour to do so. Kenya maintains in full the arguments in its written submissions. Today I will only focus on specific points that Kenya deems particularly relevant.

II. QUESTION *(A)* — PRIMARY OBLIGATIONS OF STATES

2. At the outset, Kenya concurs with the majority of Participants — and ITLOS in its *COSIS* Advisory Opinion — that climate change treaties do not constitute *lex specialis* but must be interpreted within the broader international legal framework[23], including human rights obligations.

3. There were attempts by some Participants to smuggle the *lex specialis* argument through the back door, by arguing that customary law obligations of prevention do not apply or, if they do apply, their content must be determined exclusively by reference to the UNFCCC and the Paris Agreement[24]. In Kenya's view, these climate change treaties to some extent inform customary international law on prevention but do not delineate the scope of its application.

4. It is well established that, for treaty obligations to give rise to customary international law, they must be of a norm-creating character and be consistent with a conviction on the part of States that their conduct was required not merely by the terms of an applicable treaty but by a binding norm of customary law[25]. As the International Law Commission explained in its work on the identification of customary law, "in and of themselves, treaties cannot create a rule of customary international law or conclusively attest to its existence or content"[26]. Yet without any evidence, nor any clear distinction between the rules in the UNFCCC and the Paris Agreement, these Participants would like

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[23] See *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (ITLOS Case No. 31), Advisory Opinion of 21 May 2024, paras. 220 to 224.

[24] CR 2024/36, pp. 35-52 (Australia). CR 2024/40, pp. 8-16 (United Arab Emirates) and pp. 39-51 (United States of America).

[25] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 3.

[26] Identification of customary international law, *YILC* 2018, A/73/10, p. 143, para. 2 of the commentary to Conclusion 11; see O. Sender & M. Wood, Identification of Customary International Law (2024), p. 203.

us to believe that the content of customary law is no more than what is already contained in those treaties. And we ask, where is the evidence?

5. In any event, even if UNFCCC and the Paris Agreement, or some of their rules, attained customary law status, it does not necessarily follow that the content of the two régimes must be identical. In *Nicaragua*, you confirmed that although the content of customary law can be influenced by treaty provisions, both retain a separate legal existence[27]. The UNFCCC and Paris Agreement thus exist alongside the customary law obligations of prevention and due diligence, but do not subsume them.

6. Kenya also invites the Court to dismiss an argument implicit in some of the Participants' submissions that the UNFCCC and the Kyoto Protocol have fallen into *desuetude*, having been replaced by the Paris Agreement as the sole relevant legal instrument governing climate change. Mr President, as is well known, *desuetude* requires a very considerable period not merely of neglect, but of usage contrary to the earlier treaty obligations[28]. Moreover, in your own practice, you have in general refrained from finding that obligations are terminated or modified in the absence of evidence of unequivocal intention to do so[29].

7. There can be no question of *desuetude* here as the Paris Agreement explicitly notes that it is an active implementation of the UNFCCC[30], and the Kyoto Protocol's third commitment period is still being actively negotiated[31]. Kenya asks that you do no more than follow your own established practice and apply the United Nations climate change régime as an integrated whole alongside customary international law.

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[27] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America*)*, Merits, Judgment, I.C.J. Reports 1986*, p. 14, paras. 177-182.

[28] See M. G. Kohen, "Desuetude and Obsolescence of Treaties" in E. Cannizzaro (ed.), *The Law of Treaties beyond the Vienna Convention: Essays in Honour of Giorgio Gaja* (Oxford University Press, 2011), pp. 350-359.

[29] See e.g. *Right of Passage over Indian Territory (Portugal* v. *India), Merits, Judgment, I.C.J. Reports 1960*, p. 6, para. 37; case concerning *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 12.

[30] Paris Agreement, Art. 2 (1).

[31] Kyoto Protocol, Conference of the Parties, 17th Session, Report of the Conference of the Parties, UN doc. FCCC/KP/CMP/2022/9/Add.1 (17 March 2023), Decision 1/CMP.17.

A. Customary international law and historical responsibility

8. Mr President, in answering question *(a)*, Kenya wishes to reiterate that the pressing issue at the heart of these proceedings is States' historic responsibility for greenhouse gas emissions. We ask the Court to clarify the *temporal* scope of legal obligations regarding greenhouse gas emissions, including the extent to which historical emissions should influence the content and application of the CBDR-RC principle.

9. In order to assist the Court, we discuss the relevant rules by reference to two distinct periods. First is the period before 1992, when customary international law exclusively applied: States were long under the obligation to prevent significant harm caused by greenhouse gas emissions. Second is the period since 1992, when the climate change treaty régime applies in parallel with customary law obligations.

10. The best available science is not contested. According to the IPCC, 58 per cent of cumulative net carbon dioxide emissions to date occurred from 1850 to 1989, with the majority of emissions coming from developed States[32]. Africa, as a continent, has contributed only 3 per cent to historical emissions[33].

11. Some Participants have argued that because these emissions occurred before the crystallization of customary obligations related to climate change, they must be ignored because of the principle of intertemporal law[34].

12. This is inaccurate and misguided, for three reasons.

13. *Firstly*, it is not true that States were under no legal obligation in respect of greenhouse gas emissions until the UNFCCC in 1992.

14. The "no-harm" principle, that is, the obligation of States not to allow knowingly its territory to be used for acts contrary to the rights of others, has long been a cornerstone principle of international law, and with general application irrespective of the context. The influential *Trail*

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[32] IPCC, *Climate Change 2023: Synthesis Report — Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate* (2023), p. 44. See also IPCC, *Climate Change 2022: Mitigation of Climate Change. Working Group III Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (2022), p. 233.

[33] IPCC, *Climate Change 2022: Mitigation of Climate Change: Working Group III Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (2022), p. 233.

[34] Written Statement of the Federal Republic of Germany, para. 40; Written Statement of Kuwait, paras. 122-123; Written Statement of Canada, para. 32.

Smelter arbitration in 1938 and 1941 recognized its applicability in the context of air pollution, long before the widespread scientific acceptance of the effects of greenhouse gases on the climate system[35].

15. In *Silala*, with specific reference to your 1949 Judgment in *Corfu Channel*, you observed that the principle of prevention has always rested on this precise basis that is: "in general international law it is 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'"[36]. In short, the principle of prevention is a logical corollary of the "no-harm" principle.

16. The 1972 Stockholm Declaration, the 1992 Rio Declaration and the UNFCCC all affirm and supplement the obligation to prevent environmental harm. Nothing in the record of the drafting of these instruments indicates that the negotiating States regarded themselves as creating new law. Therefore, Kenya invites the Court to clarify that the customary legal obligation not to cause harm through excessive greenhouse gas emissions existed *before* 1992.

17. *Secondly*, Kenya acknowledges the logic of the principle of intertemporal law is not in dispute. However, we invite the Court to avoid the fallacy that only a rigid application of the rule of non-retroactivity is consistent with the principle. Pertinently, the principle cannot be so ossified as to exclude the perspectives of developing States, many of which were under colonial domination until the late twentieth century, and lacked all agency in the original elucidation of the principle. Moreover, the intertemporal principle itself is not inflexible. Both the UNFCCC and the Kyoto Protocol recognized historical emissions as a relevant factor in the allocation of responsibility. To insist on an outdated view of intertemporal law would allow historical polluters to undermine their responsibility for past emissions.

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[35] *Trail Smelter case (United States* v. *Canada)*, 1941, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. III, p. 1965.

[36] *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), Judgment, I.C.J. Reports 2022 (II)*, p. 648, para. 99, citing *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22; *Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J Reports 1997*, p. 7, para. 40.

18. As ITLOS observed in the COSIS advisory opinion, it is an "inequitable situation" to allow States to evade responsibility for harm they have caused, while vulnerable States like Kenya bear the brunt of climate change despite their negligible contribution[37].

19. *Finally*, Participants citing the intertemporal principle as formulated in the *Island of Palmas* case have generally excluded the second prong of Max Huber's two-part formulation of the principle. According to the first part, and I quote, "a juridical fact must be appreciated in light of the law contemporary with it and not the law in force at the time when a dispute in regard to it arises or falls to be settled"[38]. The second part, however, is an invitation to fully take on board changes in the law — Arbitrator Huber noted that "the same principle which subjects the acts creative of a right to the law in force at the time the right arises, demands that the existence of the right, . . . its continued manifestation, shall follow the conditions required by the evolution of law"[39].

20. On this view, the parties' responsibility for historical emissions falls to be decided not under the relevant legal framework at the time of the industrial revolution but the law that reflects the scientific consensus on climate change after 1992. This reasoning is also consistent with the express recognition of the relevance of the pre-1992 emissions in UNFCCC and the Kyoto Protocol.

B. Concrete obligations in the UN climate régime

21. Kenya invites the Court to preserve a discrete role for climate change treaties *qua* treaty even though some of their provisions may have also crystallized into customary law. It is thus important that these treaties are interpreted as a consistent whole. The UNFCCC and Montreal Protocol, whose identity of parties and subject-matter make them "relevant rules of international law"[40], must inform a proper interpretation of the Paris Agreement[41]. This also includes innovations

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[37] *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (ITLOS Case No. 31) at para. 327.

[38] *Island of Palmas* (Netherlands/United States of America) RIAA, Vol. I at p. 845.

[39] *Island of Palmas* (Netherlands/United States of America) RIAA, Vol. II at p. 845.

[40] Vienna Convention on the Law of Treaties 1969, Article 31 (3) *(c)*.

[41] See Written Comments of the Republic of Kenya at para. 4.31.

from the Montreal Protocol, such as its implementation of CBDR-RC along with financial assistance and technology transfer[42].

22. Kenya rejects the argument that the Paris Agreement creates only hortatory goals and voluntary or discretionary obligations[43]. The argument ignores the object and purpose of the Paris Agreement and is premised on a false dichotomy between obligations of conduct and obligations of result[44].

23. The Paris Agreement creates "goal-oriented obligations" to progressively realize the treaty's ultimate aim[45], that is, the temperature targets of 1.5°C and "well below 2°C". The performance of the obligations in Articles 4 (1) and 7 (1) is explicitly linked to the temperature targets, and States' conduct must be measured according to the "best available science" as embodied in the work of the IPCC[46].

24. Kenya hopes that the Court's consultations with IPCC scientists on 26 November 2024 were sufficiently frank as to elucidate fully the consequences of failing to meet these temperature targets.

25. States are therefore obligated, including in their NDCs, to progressively work towards fulfilment of the temperature targets by adopting pathways towards 1.5°C or 2°C[47]. Rather than being merely discretionary targets, States are bound to the Paris Agreement's ambition cycles subject only to CBDR-RC.

26. In that regard, Kenya invites the Court to confirm the following as core elements of CBDR-RC in the UN climate régime: (1) drawing from the Montreal Protocol, CBDR-RC cannot mask a reduction in ambition to reduce greenhouse gas emissions, but can provide additional time or flexibility for States[48]; (2) contributions to historic emissions and accrued benefits from depletion of

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[42] ILC, *Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, UN doc. A/CN.4/L.682 (2006), pp. 95-96, paras. 470-471.

[43] CR 2024/35, pp. 141-154 (Germany).

[44] *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (ITLOS Case No. 31), Declaration of Judge Kittichaisaree, para. 22.

[45] Written Comments of the Republic of Kenya at Chapter 4 (II) (B).

[46] Paris Agreement, Article 4 (1); *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (ITLOS Case No. 31) at para. 208.

[47] Written Comments of the Republic of Kenya at paras. 4.42 to 4.47.

[48] Written Comments of the Republic of Kenya at para. 4.49.

the carbon budget impose enhanced responsibilities to assist vulnerable States; and (3) mitigation and adaptation measures must be continuously assessed according to a State's developmental capacity.

27. These conclusions are directly relevant to the other ambition cycle created by the Paris Agreement, namely, financial assistance and technology transfer. Articles 9 and 10 also create goal-oriented obligations to progressively enhance levels of financial assistance and technology transfer to vulnerable States[49]. Article 4 (8) of the UNFCCC, in turn, obligates States to "co-operate in preparing for adaptation . . . and for protection and rehabilitation of areas, *particularly in Africa*, affected by drought and desertification, as well as floods". Enhanced assistance to African States is therefore an imperative.

28. Once more, we invite this Court to confirm that significant financial assistance and technology transfer are binding legal obligations and not matters of discretion.

III. QUESTION *(B)* – LEGAL CONSEQUENCES

29. Mr President, Members of the Court, Kenya concurs with the majority of Participants that States that have caused significant harm to the global climate system, through their greenhouse gas emissions, bear the legal consequences of such breaches under the law of international responsibility.

30. Responsible States must cease wrongful acts or remedy any omissions harmful to the climate system, as well as make reparation for all damage caused by their breach. Such reparation may take the form of compensation for loss and damage. Of course, the Court in these proceedings need not definitively pronounce on compensation in the context of historical emissions. However, this is a precious opportunity to integrate the *corpus juris* of climate change treaty law, customary international law including CBDR-RC in a way that will assist States in establishing workable frameworks for compensation.

31. Moreover, Kenya respectfully submits that the awareness by States of the harms caused by excess greenhouse gas emissions is directly relevant for determining whether States have acted with the requisite degree of due diligence. At present, States are undoubtedly aware of the imminence of catastrophic harm and pledged in the Sharm el-Sheikh Implementation Plan to effect "rapid, deep

[49] Written Comments of the Republic of Kenya at paras. 4.53 to 4.56.

and sustained reductions in global" greenhouse gas emissions by 2030[50]. In fact, this awareness — which goes well beyond foreseeability and into the realm of certainty — has existed for decades, stretching back even before 1992, with the conclusion of the UNFCCC, and into the middle of the twentieth century, as other Participants have pointed out[51].

32. The best available science embodied in the IPCC's latest reports serves to clarify, in the language of ITLOS, that only "stringent" diligence will fulfil the obligation to prevent the severe adverse consequences of global temperature increases.

33. In the context of those historical emissions and the conduct of States prior to 1992, maintaining a distinct role for remedies plays an important role in reinforcing primary obligations. Kenya notes that international law contains considerable flexibility with regard to appropriate forms of reparation, including restitution, monetary compensation and of course other measures as forms of *satisfaction*.

34. We invite the Court to consider whether debt relief could constitute appropriate satisfaction, as a response to the most serious consequences of the climate emergency.

35. In countries like Kenya, where the costs of servicing debts consume a significant proportion of the national budget, debt cancellation would free up resources that could be redirected towards climate mitigation and adaptation measures. By enabling such States to invest in their own resilience, debt cancellation could break the cycle of climate vulnerability and economic instability[52]. Moreover, agreements on debt relief would be entirely in keeping with the principle in Article 39 of the Articles on State Responsibility, as it would take due account of the minimal contribution of most vulnerable States to cumulative greenhouse gas emissions.

36. Debt cancellation arrangements may be agreed not only between States as appropriate satisfaction, but may also be effected unilaterally in situations where climate change harms constitute a grave and imminent peril to a vulnerable State. This is especially so when such a measure would

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[50] Paris Agreement, Conference of Parties, 4th Session, *Action Taken by the Conference of the Parties*, UN doc. FCCC/PA/CMA/2022/10/Add.1 (6-20 November 2022), Decision 1/CMA, para. 15. See also Paris Agreement, Conference of the Parties, 5th Session, *First Global Stocktake*, UN doc. FCCC/PA/CMA/2023/L.17, Draft Decision -/CMA.5, para. 28.

[51] CR 2024/36, pp. 81-90.

[52] Soren Ambrose, "Social Movements and the Politics of Debt Cancellation" (2005) 6, *Chicago Journal of International Law*, 267.

be the only means remaining to protect the life and health of its population — by definition, an essential interest of any State. Provided that no essential interest of the creditor State would be impaired, Kenya invites the Court to confirm that a unilateral restructuring or denunciation of debt obligations may, in such extreme circumstances, be a legitimate circumstance precluding wrongfulness under the law of international responsibility[53].

37. While unilateral enforcement or "self-help" remedies and the defence of necessity must remain exceptional, the best available science has laid bare the impending catastrophe if States do not act. There are considerable guard rails in the ILC's formulation of the defence in its draft Article 25, because the actions taken must be the only way to safeguard an essential interest from a grave and impending danger.

38. Similarly, investment treaties have also been identified by the IPCC as a hindrance to climate change action[54]. Beyond debt cancellation, States may also be justified in acting inconsistently with obligations owed to investors where the regulatory measures undertaken are necessary to mitigate the adverse effects of climate change.

39. Mr President, Members of the Court, Kenya respectfully concludes that States have an obligation to provide reparations, including financial compensation, for harm caused to the climate system. It cannot be right that States responsible for historical pollution can decide in their own self-interest that no legal consequences should attach to a catastrophe of their own making.

40. This concludes Kenya's oral presentation. I thank you for your kind attention.

The PRESIDENT: I thank the representatives of Kenya for their presentation. Before I invite the next delegation to take the floor, the Court will observe a short 15-minute break. The hearing is suspended.

The Court adjourned from 11.35 a.m. to 11.55 a.m.

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[53] ILC Draft Article 25; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J Reports 1997*, para. 57.

[54] IPCC (2022) Climate Change 2022 (www.ipcc.ch/report/ar6/wg3).

The PRESIDENT: Please be seated. The sitting is resumed. I now invite the next participating delegation, Kiribati, to address the Court and I call His Excellency Mr Teburoro Tito to the podium. You have the floor, Sir.

Mr TITO:

I. INTRODUCTION

1. Mr President, honourable Members of the Court, I am Ambassador Teburoro Tito, the current Permanent Representative of Kiribati to the United Nations and Kiribati's former President.

2. I am deeply honoured to address the Court on this historic case. We know that bold action at all levels, *including the law*, is necessary to address climate change.

3. Throughout this advisory opinion process, we have seen most of the world's governments admit the urgency of this issue and commit themselves to collective action and co-operation.

4. For low-lying atoll nations like Kiribati, the need for action is *NOW*. We are one of the most vulnerable nations at the front lines of climate change.

5. Our aim today is simple. We want to secure our *self-determination and permanent sovereignty* over our natural resources.

6. We cherish our traditional way of life. Our relationship to ocean, land and family is our identity. Climate change directly affects the heart of who we are.

7. As an atoll nation, we do not have higher ground. Most of our 32 islands are below 2 m above sea level. Our highest point is only 4 m above the ocean. When the full moon brings the king tides to our doorstep, *we have nowhere else to go.*

8. We do not want to become stateless refugees: we want to stay in our homes, in our communities.

9. This is why sea-level rise is a massive threat. We do not have the means to erect walls like I have seen here in the Netherlands.

10. In 2016, our Government introduced a 20-year Vision to transform Kiribati into a healthy, wealthy and peaceful nation. Our direct adaptation measures include *sea-wall construction*, desalination systems and other technologies. Access to safe water and improved sanitation are also our key targets.

11. Mr President, in closing let me bestow upon this assembly the traditional Kiribati blessings of *Te Mauri, Te Raoi, ao Te Tabomoa*, meaning 'health, peace and prosperity' to you all and to all of us. Thank you.

12. Mr President, Madam Vice-President, Members of this honourable Court, I will be followed today by two speakers on behalf of the Republic of Kiribati. First, Mr Aretaake Ientaake, Director of Human Rights at the Ministry of Justice, who will share human rights harms that climate change has already caused to I-Kiribati people. Then, Professor Eyal Benvenisti, who will emphasize the need for this Court to apply international law to the conduct responsible for climate change.

13. Mr President, I would now kindly ask you to call Mr Aretaake Ientaake. Thank you.

The PRESIDENT: I thank His Excellency Mr Teburoro Tito. I now give the floor to Mr Aretaake Ientaake. You have the floor, Sir.

Mr IENTAAKE:

II. HUMAN RIGHTS IMPACTS

1. Thank you, Mr President, Members of the Court. It is an honour to appear before you on behalf of the Republic of Kiribati.

2. Sea-level rise and sea temperature rise directly affects the human rights I-Kiribati.

3. Kiribati's culture and heritage are deeply connected to ocean and land. *They cannot be replicated in another environment.*

4. I am not only the Director for Human Rights at the Ministry of Justice; I am also a proud fisher, widely esteemed for my skills which I have learned from my elders and will pass on to our children. I can testify first-hand about our dire situation because of climate change.

5. We are a nation dependent on the ocean, living at one with it. I have seen first-hand our fish stocks diminish. Changes in ocean temperatures make tuna migrate to cooler waters, directly effecting the livelihoods of communities across Kiribati.

6. I have witnessed the degradation of coral reefs, a vital habitat for our fish. This reduces the biological diversity and abundance of our waters. Coastal erosion and loss of mangroves further the decline of our fish populations. This not only jeopardizes our own food security and our export

economy. But also food security beyond our region as the waters of the western and central Pacific Ocean produce *60 per cent of the world's tuna*.

7. It is important to recognize that small island States, while having tiny land mass, actually possess sovereignty over land swathes of the world's oceans. For example, we are better categorized as large ocean States, as over 99 per cent of Kiribati is ocean. Mr President, Members of the Court, others have argued before you, in referencing future generations, that international law need not protect *abstract* persons from *abstract* risks. *There is nothing abstract in our predicament.* I wish now to show you a short video that will present *real* people who are suffering from *real* climate risks. The video features some of the people who have made written testimonies annexed to Kiribati's submission.

[On screen: pre-recorded statements.]

Transcript of statements

[Transcript provided by the Republic of Kiribati.]

1. My name is Kautunanata. My Father's name is Kobia, and my mother's name is Raoi. I am from the island of Abaiang, Tebunginako village, and I am 43 years of age. Where I'm standing now is where I used to play when I was a kid. Especially that spot. Right now, it's gone due to the erosion of the land. Our water tanks and wells, crucial for fresh drinking water are also compromised along with land that is now completely submerged.

2. My name is Barekiau. I am from Tebunginako village. If you look at what happened in the village, it is the result of the king tides. Yes, there are many impacts on our village. One of them is the sea water entering freshwater ponds where banana trees grow and killing them. A Te ika raoi ship from Tarawa used to come and pick all the bananas from the village and market them on the mainland. This was about 20 years ago. There is little assistance and people are relocating due to rising sea levels. We had so many banana trees in those days but now we are losing them.

3. My name is Bubunrenga and my father's name is Teiou. I'm 23 years old, and I'm from Tebunginako village. This place was where our home used to be. But we relocated due to rising sea levels. I did not do anything that contributed to this problem. It was the rise in sea levels which caused

the erosion of our land. I am deeply worried about the future. Firstly, water. If you look at our village, there are no wells or underground water supply anymore. Because the water has become brackish due to its proximity to the sea. We did not cause this problem of land erosion. It is the result of rising sea levels.

Mr IENTAAKE:

8. Mr President, Members of the Court, to end, I wish to recall a statement from an elder of my community, Mr Kiaitonga Burara. I think his words capture the heart of this case best.

9. He is heartbroken that his eldest son does not remember their original village. Climate change made them relocate and he describes how this changed the social structures of his community:

> "In the past, there was a strong system for the village, with one leader for the village, and our church to also manage the village. Now, it's the same, but disjointed.
>
> People of Abaiang, including my village, are connected to the sea and to the land. Imagine that in the past, in the old place, it was a big community with big land. Now since we relocated, we are scattered. Broken."

10. *We have a right to stay in our homes, with our people*. We do not wish to live apart, separated by forces beyond our control. Stateless. Refugees in other peoples' lands. For the most vulnerable, migration is simply not an option. This cry extends beyond just Kiribati, but from all countries around the world.

11. Mr President, I would kindly ask you to call Professor Eyal Benvenisti. I thank you.

The PRESIDENT: I thank Mr Aretaake Ientaake. I now give the floor to Professor Eyal Benvenisti.

Mr BENVENISTI:

III. LEGAL INTERVENTION

1. Thank you, Mr President, Members of the Court. It is an honour to appear before you on behalf of the Republic of Kiribati.

2. My task is to clarify the legal responsibility of greenhouse gas-emitting nations towards Kiribati and its people. I will not repeat the written statement and comment by Kiribati, but only elaborate on some of its key parts.

3. First, I will examine the nature of the relevant State conduct in this case, that is the emission of greenhouse gases, and explain the meaning of the "no-harm" rule in this context. Second, I will apply the "no-harm" rule to the emission of such gases and explore the legal consequences, particularly to small island developing States. I will then address the territorial scope of international human rights obligations and conclude with the question of interpreting the climate-related treaties.

4. The answers to all these questions are informed by the basic rules of international law: sovereignty, sovereign equality and peoples' right to self-determination. These rules have shaped the evolution of the law on transboundary and global resources, and they govern the questions before the Court.

Greenhouse gas emissions and the "no-harm" rule

5. Mr President, Members of the Court, the legal obligation not to cause harm to other States is not in dispute today. What is in dispute is the application of this obligation in the context of greenhouse gas emissions.

6. Such emissions differ from the straightforward case of fumes crossing boundaries. They differ in two key aspects. First, unlike smoke, which is noticeable, greenhouse gases are invisible. Second, while smoke drifts from one State to another, greenhouse gases disperse globally.

7. But these distinctions bear no legal consequence. Despite their invisibility, greenhouse gases are harmful, even more harmful than transient smoke. This has been a matter of general awareness since the 1960s. When the famous *Trail Smelter* award stated that no State had the right to "cause injury by fumes in or to the territory of another"[55] it did not qualify the nature of the fumes. Nor did it make sense to do so: under customary international law[56], harmful gases are harmful gases, whether or not they are visible to the naked eye.

Sovereign liberty ends when harm to the atmosphere begins

8. The second distinction is also baseless. International law does not differentiate between harming another State's territory and harming the atmosphere. This is because harming the atmosphere directly and predictably harms other States, especially small island developing States.

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[55] *Trail Smelter case (United States* v. *Canada)*, 1941, United Nations, *RIAA*, Vol. III, p. 1965.

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

9. More fundamentally, harming the atmosphere is in and of itself a violation of international law.

10. Mr President, Members of the Court, no State owns the atmosphere. As Judge Xue previously explained, the atmosphere "belongs to everyone or to no one"[57]. Regardless of whether the atmosphere is *res communis* or *res nullius*, all States are responsible for any harm they cause to the atmosphere, especially if as a result they harm others.

11. The proposition that States have no sovereign rights over the atmosphere is grounded in the foundational principle of sovereign equality[58]. This principle requires no State consent. In fact, States owe their own sovereignty to this principle.

12. Sovereign equality implies that no State has more rights than other States. As affirmed by the PCIJ in the *Lotus* case: "[T]he 'principles of international law' . . . apply equally to all the contracting Parties."[59]

13. It was this principle of sovereign equality which informed the evolution of the law on international watercourses, being the object of a "common legal right" of riparian States. And the reason for this common legal right is, as the PCIJ explained in the *River Oder* Judgment, "the perfect equality of all riparian States"[60].

14. It was this "perfect equality" that has led the Court to confirm that the customary international law obligations to prevent significant harm extended also into "areas beyond national control"[61].

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[57] Hanqin Xue, *Transboundary Damage in International Law* (Cambridge University Press, 2003), pp. 193-196.

[58] Charter of the United Nations, Article 1 (2); UNGA res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN doc. A/8082 (24 Oct. 1970), p. 122.

[59] *"Lotus", Judgment No. 9, 1927, P.C.I.J. Series A, No. 10*, p. 17.

[60] *Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23*, p. 27.

[61] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 241-242, para. 29; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 41, para. 53, and p. 77, para. 140; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 78, para. 193.

15. The areas beyond national control include the atmosphere and other common resources[62]. They also include the global carbon budget as defined by the IPCC[63].

16. In the words of the German Federal Constitutional Court, "[t]he world has a so-called remaining CO_2 budget"[64]. This budget is a shared resource, belonging equally to all States. Alternatively, if the atmosphere belongs to no one, no State may appropriate parts of it at will. Rooted in the principle of sovereign equality, the use of this budget by States has always been governed by the principle of equitable and reasonable use, along with the obligation to prevent significant harm.

The failure to uphold the "no-harm" obligation

17. Mr President, Members of the Court. Each and every State is responsible for its take of the global carbon budget. As the Supreme Court of the Netherlands stated, "every reduction means that more room remains in the carbon budget"[65].

18. States do not enjoy sovereign-free discretion, nor a margin of appreciation, to dispose of their natural resources, if by doing so they harm the atmosphere.

19. Such discretion, such a margin, cannot reflect the law for two reasons. First, since no State owns the atmosphere, a State's unfettered freedom to exploit its resources ends where it places a burden on the atmosphere — just as individual freedom is limited when it begins to harm the well-being of others.

20. Second, unlike a suggestion made by one State[66], decisions affecting the atmosphere entail not a balancing of one State's *rights* against the mere *interests* of other States. Rather, they require the balancing of one State's rights against the *equal rights* of all other States. This more demanding

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[62] Nico Schrijver, "Managing the global commons: common good or common sink?", *Third World Quarterly*, Vol. 27 (2016), p. 1253; Malgosia Fitzmaurice, "Liability for Environmental Damage Caused to the Global Commons", *Rev. Eur. Comp. & Int'l Envtl. L.* (1996), p. 305.

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

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

[65] Hoge Raad (The Netherlands Supreme Court), 20 Dec. 2019, ECLI:NL:HR:2019:2006, (official English translation), para. 5.7.8.

[66] The United States of America, Written Statement, 22 March 2024, para. 4.23.

balancing act lies at the heart of the due diligence obligation to prevent foreseeable harm to the rights of others[67].

21. States that have caused significant harm to the climate system and have taken far more than their fair share of the global carbon budget, have by such conduct breached their customary international law obligations to all other States.

"No harm" to States' right to self-determination

22. Mr President, Members of the Court, under the principle of common but differentiated responsibilities, even stronger obligations exist towards specially affected States like Kiribati. As my colleagues explained, climate change threatens the I-Kiribati's right to self-determination.

23. Like some other affected States, Kiribati cannot tackle these severe challenges without external support. While adaptation is technically possible and would require far less effort than constructing a complex system like the Dutch polders, Kiribati lacks the resources and capacity to implement such measures on its own.

24. The duty of all States to act positively to facilitate the realization of other peoples' right to self-determination is firmly grounded in international law, as this Court has recognized on several occasions[68].

25. Building on this Court's recent jurisprudence, it must be concluded that all States have a duty to co-operate — both with the United Nations and through other means — to ensure that the I-Kiribati and other threatened communities can continue to exercise their right to self-determination on their land[69].

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[67] *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), Judgment, I.C.J. Reports 2022 (II)*, p. 648, para. 99; (citing *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, pp. 55-56, para. 101); *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, p. 706, para. 104; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 242, para. 29.

[68] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, *Advisory Opinion of 19 July 2024*, para. 232; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 199, para. 155; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, *Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 139, para. 180.

[69] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, *Advisory Opinion of 19 July 2024*, para. 275.

"No harm" and international human rights

26. Similar obligations arise under international human rights law. As detailed by my colleagues and elaborated in Kiribati's submissions, climate change has already severely impacted individual and collective human rights.

27. Such deprivations are among the harms for which the emitting States are responsible. This responsibility arises because the decisions to allow the harmful emissions were made within their jurisdiction, and the emissions themselves originated there[70].

28. It was argued before the Court that human rights treaties protect only individuals who find themselves subject to the direct control of the State concerned, and the test for direct control is informed by the principle of subsidiarity[71].

29. The subsidiarity rationale respects States' sovereignty, both in terms of the State's ability to protect rights within its territory and its sovereign discretion to choose among various options. In other words, the underlying premise of the subsidiarity approach is that each State is, and must be, the primary rights protector.

30. This rationale breaks down in the face of emissions that threaten the very existence of States like Kiribati. In such cases, the victim State is unable to protect its citizens' rights, and respect for sovereign discretion rings hollow. It is, in fact, deeply cynical for emitting States to speak highly of respecting the sovereignty of States that are threatened as a direct result of their acts.

31. The international system for protecting human rights was grounded on the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family"[72]. It is in this light that the territorial scope of human rights treaties must be interpreted and applied to this consideration of subsidiarity in this exceptional situation.

32. This interpretation requires recognizing "jurisdiction" as arising from decisions to permit harmful emissions or from failures to prevent emissions within areas under a State's control, when such actions or omissions expose citizens of other States to irreparable and irreversible violations of

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[70] Committee on the Rights of the Child, Decision adopted (on 22 September 2021) by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 104/2019, UN doc. CRC/C/88/D/104/2019, para. 10.7-8.

[71] European Court of Human Rights, *Duarte Agosthino and others against Portugal and 32 others* (GC), No. 39371/20, Judgment of 9 April 2024, para. 201.

[72] International Covenant on Civil and Political Rights (ICCPR), adopted 16 December 1966, entered into force 23 March 1976), *UNTS*, Vol. 999, p. 171, preamble.

their human rights that their States cannot remedy. This approach was adopted by the Inter-American Court of Human Rights and by the Committee on the Rights of the Child[73]. The same rationale arguably prompted the German Federal Constitutional Court to acknowledge, in principle, that the German Basic Law required the national authorities to consider also the human rights of individuals in foreign countries[74]. Subsidiarity upholds human dignity. It must never be misused to hinder its fulfilment.

The Paris Agreement and the UNFCCC

33. Mr President, Members of the Court, I wish to propose that, in fact, the UNFCCC and the Paris Agreement cannot derogate from these basic, peremptory principles that Kiribati invokes today. Therefore, these treaties should not be interpreted as aspiring to do so. As Kiribati declared upon signing the UNFCCC, "no provisions in the Convention can be interpreted as derogating from the principles of general international law"[75].

34. Accordingly, the object and purpose of these treaties must be understood as securing the equitable and reasonable use of the global carbon budget, the prevention of significant harm, the protection of individual and collective human rights and the right to self-determination, as well as the recognition of the corresponding responsibility that arises from any breach of these obligations.

35. Accordingly, and following the Dutch Supreme Court's interpretation[76], the specific State obligations enumerated in the UNFCCC and the Paris Agreement must be read as strictly limiting States' discretion. The same applies to the duty, under the Paris Agreement Article 4.2, "to prepare, communicate and maintain successive nationally determined contributions"[77]. As this Court said in

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[73] Committee on the Rights of the Child, Decision adopted (on 22 September 2021) by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 104/2019, UN doc. CRC/C/88/D/104/2019, para. 10.7-8; Inter-American Court of Human Rights, *State Obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity: Interpretation and scope of Articles 4(1) and 5(1) in relation to Articles 1(1) and 2*, Advisory Opinion OC-23/17 of 15 November 2017.

[74] Bundesverfassungsgericht (BVERFGE) (Federal Constitutional Court), 24 Mar., 2021, Order of the First Senate, 1 BvR 2656/18, 1-270, (Ger.) (official English translation), paras. 175-176.

[75] Kiribati Declaration upon signature of the UNFCCC, available at https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en.

[76] Hoge Raad (The Netherlands Supreme Court), 20 December 2019, ECLI:NL:HR:2019:2006, (official English translation), para. 5.7.5.

[77] Art. 4.2 of the Paris Agreement.

its *Whaling in the Antarctic* Judgment — also referring to a State's exercise of discretion burdening global commons — "[t]his standard of review is an objective one"[78].

36. Mr President, Members of the Court, that concludes my presentation and the Kiribati argument before this honourable Court. I thank you for your kind attention.

The PRESIDENT: I thank the representatives of Kiribati for their presentation. I now invite the next participating delegation, Kuwait, to address the Court and I call upon His Excellency Talal Sulaiman Al-Fassam to take the floor.

Mr AL-FASSAM:

I. INTRODUCTORY REMARKS AND OVERVIEW

1. *Bismillah iRahman iRahim*, Mr President, Members of the esteemed Court, it is an honour to appear before you on behalf of the State of Kuwait.

2. In participating in these proceedings, Kuwait underlines its respect and support for the Court.

3. The State of Kuwait firmly believes that the United Nations is the cornerstone of multilateralism, guided by the principles and purposes enshrined in the United Nations Charter. Accordingly, Kuwait was one of the first States to sign the United Nations Framework Convention on Climate Change. It is also a State party to the Kyoto Protocol and the Paris Agreement. These agreements together comprise the specialized treaty régime that governs greenhouse gas emissions and climate change.

4. Kuwait is committed to the observance of this régime. Kuwait is actively engaged with this specialized treaty régime, and continues to make extensive efforts to mitigate greenhouse gas emissions.

5. Kuwait as a developing country recognizes that the global nature of climate change calls for maximum co-operation and participation by all States to implement effectively the terms of the UNFCCC in accordance with common but differentiated responsibilities.

6. Kuwait in its oral submission to the Court will focus on two key matters:

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[78] *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 254, para. 67.

(i) *First*, I will consider briefly the measures taken by Kuwait to adapt to the effects of climate change; and explain the constructive efforts it has taken to reduce greenhouse gas emissions.

(ii) *Second*, I will then hand over to Professor Sarooshi who will consider the questions posed to the Court.

7. Mr President, I now turn to consider briefly the issue of Kuwait and climate change.

II. THE IMPACT OF CLIMATE CHANGE ON KUWAIT

8. Kuwait is vulnerable to the adverse effects of climate change in a number of ways. It is already a subtropical desert with an extremely arid climate.

9. During the summer there is no rainfall and daily temperatures can reach 50°C.

10. Kuwait is already one of the most water-stressed countries in the world. It relies almost entirely on seawater desalination for its freshwater needs[79].

11. However, desalination is an energy-intensive process, and with increasing temperatures due to climate change, the demand for water will likely increase in the coming years.

12. Nearly 70 per cent of Kuwait's land area is subject to desertification[80]. With rising global temperatures, desertification is likely to increase and Kuwait has already suffered an increase in the frequency and intensity of sandstorms[81].

13. These changes cause all kinds of serious problems, including the degrading of air quality and major public health risks to Kuwait's population in terms of heat stress, and cardiovascular and respiratory diseases associated with more frequent sandstorms[82].

14. Kuwait has almost 500 km of coastline. Significant areas of Kuwait's territory are in low-lying coastal areas with much of its economic activity and infrastructure being within 20 km of the coastline[83]. An increase in sea levels will adversely affect these coastal areas which include Kuwait's Bay and densely populated neighbourhoods around Kuwait City[84].

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[79] State of Kuwait's Nationally Determined Contributions 2021, p. 6.

[80] State of Kuwait's Second National Communication, p. 5.

[81] State of Kuwait's Intended Nationally Determined Contributions, November 2015, p. 2.

[82] State of Kuwait's Second National Communication, p. 57.

[83] *Ibid.*, pp. 41 to 42.

[84] *Ibid.*, p. 47.

15. Current coastal protection structures are insufficient to deal with rising sea levels and significant work will have to be undertaken[85]. In certain scenarios, roughly half of the large Boubyan Island, an important area for biodiversity, would be inundated[86].

III. THE MEASURES TAKEN BY KUWAIT TO ADAPT TO THE EFFECTS OF CLIMATE CHANGE

16. Kuwait has already undertaken various major projects at local, regional and international levels to adapt to climate change, but more national projects will be required in the coming years. Kuwait has developed a national adaptation plan 2019-2030 which was prepared in accordance with the UNFCCC[87].

17. Not only is Kuwait a developing country which is vulnerable to climate change, but its economy is heavily dependent on oil exports which accounts for the majority of the country's total government revenues[88]. Kuwait is highly dependent on the exploration, production and export of fossil fuels for its economic growth and prosperity, the welfare of its population and energy security. It is also using oil revenues to diversify its economy and energy sources.

18. Kuwait does recognize the urgency and seriousness of climate change. As a developing State with historically very low greenhouse gas emissions, Kuwait appreciates the importance of international co-operation through the specialized treaty régime to combat climate change.

19. Kuwait set its first nationally determined contribution (NDC) in November 2015[89], and then undertook a more ambitious commitment in a revised NDC in October 2021[90]. By its revised NDC, Kuwait now seeks to avoid the equivalent of 7.4 per cent of its total emissions in 2035 through unconditional national efforts[91]. Kuwait is also actively engaged in developing future plans to achieve net-zero emissions by 2060 on the national level.

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[85] *Ibid.*

[86] State of Kuwait's Second National Communication, p. 47.

[87] State of Kuwait Environment Public Authority ("Kuwait National Adaptation Plan 2019-2030") (2019), p. 24.

[88] NDC 2021, p. 7.

[89] State of Kuwait's Intended Nationally Determined Contributions.

[90] NDC 2021.

[91] *Ibid.*, pp. 3 and 9.

20. Domestically, Kuwait has undertaken numerous measures and projects to achieve its NDC objectives[92]. A number of these are considered in Kuwait's written statement. I will provide now only a few examples.

21. In 1995, Kuwait has established an independent and active Environment Public Authority[93] which enacted the key Environmental Protection Law No. 42 of the year 2014 which recognizes climate change and regulates greenhouse gas emissions[94].

22. Kuwait has adopted a national Clean Development Mechanism to achieve emission-reduction targets and stimulate sustainable development[95]. This has seen the implementation of various emission-mitigation projects relating to renewable energy, flare gas recovery and improving efficiency of electricity distribution[96].

23. Kuwait has undertaken the largest project in its history: the Clean Fuel Energy Project with an overall cost of US$15.5 billion, to produce environmentally friendly oil products with significantly lower emissions[97].

24. To achieve energy diversification, Kuwait has set ambitious renewable energy targets and has undertaken significant projects to achieve these goals. It aims to produce 50 per cent of electricity from solar energy by 2050[98].

25. The Kuwait Fund for Arab Economic Development has provided more than US$22 billion in loans, grants and technical support to other developing countries, supporting various projects including those aimed at mitigating climate change[99].

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[92] See para. 136 (1)-(4) of the State of Kuwait's Written Statement on the Obligations of States in respect of Climate Change dated 22 March 2024 ("State of Kuwait's Written Statement").

[93] Overseen by the Environment Supreme Council (Environmental Protection Law 42/2014 (as amended by Law 99/2015), Article 6).

[94] Environmental Protection Law 42/2014 (as amended by Law 99/2015), Articles 48, 52 and 53.

[95] State of Kuwait's Second National Communication, p. 66.

[96] *Ibid.*

[97] *Ibid.*, p. 27.

[98] The Speech of His Highness Crown Prince Sheikh Sabah Al-Khaled Al-Hamad Al-Mubarak Al-Sabah in the 29th Session of the Conference of the Parties to the United Nations Framework Convention on Climate Change, p. 5.

[99] Statement of the Minister of Foreign Affairs of the State of Kuwait Sheikh Salem Abdullah Al-Jaber Al-Sabah at the 28th Conference of the Parties of the United Nations Framework Convention on Climate Change, 1-2 December 2023.

26. Kuwait Petroleum Corporation is a wholly State-owned national oil corporation[100]. It is one of the least emission-intense oil and gas producers worldwide which has already undertaken a number of significant projects to reduce greenhouse gas emissions with a view to achieving a net-zero emissions target by 2050[101].

27. I thank you, Mr President, I now invite you please to give the floor to Professor Sarooshi.

The PRESIDENT: I thank His Excellency Talal Sulaiman Al-Fassam. I now give the floor to Professor Dan Sarooshi.

Mr SAROOSHI:

IV. THE OBLIGATIONS OF STATES IN THE AREA OF GREENHOUSE GAS EMISSIONS ARE GOVERNED AND LIMITED BY THE SPECIALIZED TREATY RÉGIME ON CLIMATE CHANGE

1. Mr President, Members of the Court, it is an honour to appear before you on behalf of the State of Kuwait.

2. On the first question asked by the General Assembly — the obligations of States in the area of greenhouse gas emissions — these are governed and limited by the specialized treaty régime on climate change which comprises the UNFCCC, the Kyoto Protocol and the Paris Agreement. However, this does not mean that other relevant treaties and customary rules cannot be used to interpret the obligations contained in the treaty régime, but these other rules cannot displace or amend the specific obligations contained in the climate change treaties.

3. The Paris Agreement in Article 2.1 sets out its "aim" to "strengthen the global response to the threat of climate change . . . in the context [it says] of sustainable development and efforts to eradicate poverty". It is Article 4.2 of the Paris Agreement which contains a binding obligation on States when it requires that each party shall prepare, communicate and maintain its NDC. It also requires each party to pursue domestic mitigation measures with the aim of achieving the objective of its NDC. These binding obligations in Article 4.2 are though limited in scope. They are obligations

[100] Decree-Law No. 6/1980 on the establishment of the Kuwait Petroleum Corporation (KPC).

[101] Kuwait Petroleum Corporation, Sustainability: A sustainable Energy Future (accessible: https://www.kpc.com.kw/Sustainability).

of conduct rather than of result. They do not require anything in terms of the content of each State's NDC. That is left to each State to determine.

4. Article 4.3 of the Paris Agreement creates an obligation on States to put forward a successive NDC every five years. This again is an obligation of conduct. States are enjoined to seek the "highest possible ambition" when formulating their successive NDCs, and in doing so they should take into account what Article 4.3 refers to as common but differentiated responsibilities and capabilities ("CBDR"), in the light of national circumstances. Indeed these limitations of CBDR and national circumstance apply across the entire climate treaty régime[102].

5. The UNFCCC goes further in Article 4.8 to identify specific national circumstances of developing States that should be given consideration by all States when implementing their Article 4 obligations.

6. I would highlight here Article 4.8 *(h)* which provides a specific circumstance for States "whose economies are highly dependent on income generated from the production, processing and export, and/or on consumption of fossil fuels".

7. This specific national circumstance is important in Kuwait's submission. It makes clear that none of these specialized treaty obligations can be construed to require States to cease, for example, fossil fuel production, use and export.

8. I now turn to explain why the obligations in a specialized treaty régime exclusively regulate State conduct on greenhouse gas emissions and climate change. This is important since it limits the source of States' obligations to this régime. There are a number of other Participants in these proceedings that agree with Kuwait on this key issue[103].

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[102] They apply, for example, to the obligations contained in Articles 9 and 13 of the Paris Agreement. They also apply to the UNFCCC, specifically to the various obligations contained in Article 4.1 of the UNFCCC.

[103] See, for example, the Written Statement of the Kingdom of Saudi Arabia, para. 1.9; the Written Statement of Japan, para. 11; the Written Statement of Australia, paras. 2.2 and 2.62; the Written Statement of Brazil, para. 10; the Written Statement of Canada, para. 11; the Written Statement of the Dominican Republic, para. 4.21; the Written Statement of India, para. 19; the Written Statement of the United Arab Emirates, paras. 16-17; and the Written Statement of the Organization of the Petroleum Exporting Countries, para. 9.

9. As a general matter, the Court has accepted in the *North Sea Continental Shelf*[104] and *Nicaragua*[105] cases that a treaty in a particular area may derogate from general customary law that would otherwise have governed the relations between parties to a treaty.

10. This is precisely the way that the specialized treaty régime operates in the area of GHG emissions and climate change. This régime comprises the only treaties under which States have agreed to regulate their conduct relating to anthropogenic GHG emissions in the specific context of climate change.

11. This is demonstrated by two key features of the specialized treaty régime.

12. *First*, the régime reflects a series of careful compromises agreed by States and the striking of a balance in relation to three main sets of competing considerations that operate in the area. These three main considerations are as follows.

13. First, the régime has been established on the one hand with a specific focus on regulating GHG emissions and reducing their role in creating climate change, but on the other hand it has sought to ensure the widest possible participation and meaningful co-operation amongst States by taking account of their common but differentiated responsibilities, and their different social and economic conditions.

14. In the case of the UNFCCC, these considerations and the balance struck is reflected in express terms in preambular paragraphs 1 and 5 and Articles 2 and 3.1; while in the Paris Agreement it is reflected in preambular paragraph 3 and Article 2.2.

15. The second set of competing considerations on which a careful balance was struck and incorporated in the treaty régime concerns the recognition on the one hand that some States have contributed the largest share of historical and current GHG emissions, and on the other hand a recognition that certain developing States are in some cases particularly vulnerable to the adverse effects of climate change.

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[104] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 42, para. 72.

[105] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 137, para. 274.

16. The balance struck here is embodied in the UNFCCC in preambular paragraphs 2, 17 and 18 and Article 3.1; while in the Paris Agreement it is embodied in preambular paragraphs 5 and 16.

17. The third set of competing considerations involve:

— *On the one hand*, a State's right to "permanent sovereignty over [their] natural resources" and their related sovereign right to use these resources to grow and develop their economy in a sustainable manner pursuant to a gradual energy transition. This is particularly the case for a number of developing States whose economies are heavily dependent on fossil fuel production, use and export.

— *And on the other hand*, there is a State's responsibility to ensure that activities under its jurisdiction and control do not cause significant transboundary harm to the environment of other States by GHG emissions and that they act in a precautionary manner to stabilize the emissions to prevent interference with the climate system.

The balance struck on these competing considerations is embodied in the UNFCCC in preambular paragraphs 7, 9, 19, 20 and 21 and Articles 3.3 and 3.4; while it is embodied in the Paris Agreement in preambular paragraphs 7 and 8 and Article 2.1.

18. The incorporation of the careful balance struck by States on these competing considerations in the specialized treaty régime is of great importance.

19. Let me be clear: no other treaties have provisions that incorporate the same competing considerations and no other treaties strike a balance specifically in relation to GHG emissions and climate change. This is a powerful reason why the specialized treaty régime exclusively regulates States' conduct in this area. It would, for example, not be appropriate to construe treaties such as UNCLOS — a treaty that nowhere refers to climate change — as containing obligations for States that override the careful balance struck in a specialized treaty régime on GHG emissions and climate change.

20. *I now turn to the second reason* why the specialized treaty régime embodies an exclusive set of obligations for parties in relation to GHG emissions and climate change. The point here is that States have already taken the more general principles of customary law relating to the environment and transboundary pollution; and subsumed, integrated and applied them within our specialized

climate change treaties, specifically in relation to GHG emissions. States have done this in the case of the precautionary principle, the preventive principle, and other procedural obligations under international law that may otherwise have been considered of potential relevance to GHG emissions and climate change.

21. *In the case of the precautionary principle*, its customary status is unclear, but in any event it has been expressly referenced and subsumed into the UNFCCC by Article 3.3 which establishes a specific standard and application of the precautionary principle in relation to GHG emissions and the environment. The use of the word "should" rather than "shall" in Article 3.3 of the UNFCCC is important since it means the provision does not embody a binding obligation on States but is rather advisory. Thus while the precautionary principle applies in the specific context of Article 3.3, it does so only in a way that is non-binding and that is consistent with the UNFCCC's other terms. This is important since it indicates the parties did not want the principle to apply in a binding manner in the area of GHG emissions and climate change. There is also a number of important qualifications that modify the application of the precautionary principle as it exists in Article 3.3.

— This approach embodied in Article 3.3 is subsequently adopted in the third preambular paragraphs of both the Kyoto Protocol and the Paris Agreement.

— In sum, the specialized treaty régime integrates and subsumes the precautionary principle and includes a specific formulation that applies in a non-binding way to States parties. This is the way in which States have chosen that the precautionary principle should apply in the specific context of GHG emissions and climate change.

22. It is the same in relation to the principle applied by the Court in the *Pulp Mills* case[106]: that a State should ensure that activities within its control do not cause significant transboundary harm to the environment of other States. This principle has been expressly integrated in preambular paragraph 7 of the UNFCCC which contains a specific formulation of the principle as applied to parties, but which is balanced by the sovereign right of States to exploit their own natural resources pursuant to their own environmental and developmental policies.

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[106] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*.

— Indeed the UNFCCC then proceeds to implement the transboundary harm principle in the specific context of GHG emissions by imposing obligations contained in Article 4 of the UNFCCC which in turn were further developed by Article 4 of the Paris Agreement. As I have already explained, Article 4.2 of the Paris Agreement imposes an obligation on States to prepare, communicate and maintain successive NDCs.

— Thus a State by complying with its NDC obligations under the Paris Agreement can be said to be acting with due diligence in discharge of its obligation to ensure that its GHG emissions do not cause damage to the environment of other States. This is the extent to which States have agreed that the prevention principle applies in the context of GHG emissions and climate change.

23. *To summarize on the first question asked of the Court:* the only obligations that apply to GHG emissions and climate change are those contained in the specialized climate change treaties. These treaties represent the only clear consensus amongst States in an area that is beset with competing policy considerations. The Court will appreciate that it cannot override this specialized treaty régime by seeking to apply more general formulations of customary rules that have in any case been expressly incorporated into this régime as I have shown the Court.

V. LEGAL CONSEQUENCES OF BREACH: GREENHOUSE GAS EMISSIONS BY STATES CANNOT ENGAGE STATE RESPONSIBILITY GIVEN STATES' OBLIGATIONS AND IN ANY CASE THE SPECIALIZED TREATY RÉGIME PRECLUDES REPARATIONS AS DOES THE CAUSATION REQUIREMENT UNDER THE ILC ARTICLES

24. *I turn now, Mr President, to the second question:* the Court is asked by the General Assembly to consider what are the legal consequences if States have breached their obligations in the area of GHG emissions and climate change.

25. The answer here is relatively straightforward. Since the obligations in the specialized treaty régime do not as such prohibit or constrain GHG emissions, then it is not possible for such emissions to constitute an internationally wrongful act by States.

26. But in any case, the Court is aware that any customary rules on State responsibility only operate as "residual" rules in determining the legal consequences of a State's breach of a treaty. And these "residual rules" will be displaced or modified where a treaty provides a set of specialized rules that regulate the legal consequences that flow from breach of the treaty, as envisaged by Article 55 of the ILC Articles on State Responsibility.

27. In the present case, it is the Paris Agreement, the Conference of Parties and to a lesser extent the Kyoto Protocol, which provide the set of specialized rules that specifically govern treaty breaches and these do not include any obligation to make reparations but instead focus on other ways to deal with breaches of the climate change treaties.

28. The Paris Agreement in Article 15 contains its compliance mechanism which envisages a "Compliance Committee". The Committee is required to function in a non-adversarial and non-punitive way and must pay particular attention to the different national circumstances of States parties.

29. As the Court is aware, this Compliance Committee was subsequently established by the Parties to the Paris Agreement. This has been set out in Kuwait's Written Statement[107].

30. The key points for today are that the Compliance Committee when considering breaches should not impose penalties or sanctions for non-compliance. Instead, the Committee must focus on constructive engagement and consultation with the Party that is in breach to try and secure its eventual compliance.

31. It must take a number of stipulated "appropriate measures" when responding to breaches of the Paris Agreement[108]. None of the defined appropriate measures allow the imposition of an obligation to pay reparations for breach of the treaty. Instead the Compliance Committee should engage in dialogue, it should identify obstacles facing the State, it should provide information and support, and it should recommend and assist in formulating an action plan to help ensure eventual compliance. Such an approach is entirely consistent with the aim of the Paris Agreement as contained in Article 2.1 with its focus on strengthening the global response to the threat of climate change in the context of sustainable development, and with the emphasis in Article 2.2 that implementation of the Agreement is to reflect equity and the principle of CBDR and different national circumstances.

32. In sum, it is this specialized set of provisions flowing from the climate change treaties that governs exclusively the legal consequences for any State that is in breach of their provisions.

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[107] See paras. 96 (3), 97-106.

[108] Decision 20/CMA.1, Modalities and Procedures for the Effective Operation of the Committee to Facilitate Implementation and Promote Compliance Referred to in Article 15, Paragraph 2, of the Paris Agreement.

33. In any case, even if the Court was inclined to apply the "residual" rules of State responsibility, this could only be in relation to alleged breaches by States of their obligations under the UNFCCC, Kyoto Protocol and the Paris Agreement. Any attempt to seek compensation more generally in relation to the adverse effects of climate change would run contrary to the ILC Articles which limit damage to breaches of the treaties.

34. As the Court has affirmed in the *Diallo* case[109] and in its compensation Judgment in *Costa Rica* v. *Nicaragua*[110], compensation is only due when there is a "direct and certain causal link" between a State's wrongful act and the injury suffered by the claimant State.

35. The Court's approach would not allow, for example, a claim for compensation to be made by a State for the adverse effects of climate change, since there is no direct and certain causal link to a breach of a specific provision of the specialized treaty régime.

36. There is a further problem of causation here. As the Court recognized in the *Nicaragua Border Area* case[111], there may be difficulties with establishing causation where damage may be due to several concurrent causes[112].

37. Proof of causation in the case of a particular State, or group of States, will be particularly difficult to prove in the case of GHG emissions and climate change. This is because the harm caused by GHG emissions is cumulative in nature over a significant course of time and occurs when GHG levels pass a certain threshold.

38. There is also a range of causes that have impacted the climate system. Many of these causes are historical and date back to the first industrial revolution as the IPCC has found[113]. 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. Nor is it clear whether any of the acts by private actors responsible for GHG emissions were attributable to the States concerned.

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[109] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I).*

[110] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I)*, p. 35, para. 72.

[111] *Ibid.*, p. 26, para. 34.

[112] *Ibid.*

[113] The IPCC stated "Observed increases in … GHG emissions since around 1750 are unequivocally caused by GHG emissions from human activities." (Intergovernmental Panel on Climate Change (IPCC), "Summary for Policymakers" in *Climate Change 2021*: The Physical Science Basis (2021), p. 4.)

39. Mr President, Members of the Court, thank you. That concludes Kuwait's submissions.

The PRESIDENT: I thank the representatives of Kuwait for their presentation. This concludes this morning's sitting. The oral proceedings will resume this afternoon at 3 p.m., in order for Latvia, Liechtenstein, Malawi, the Maldives and the African Union to be heard on the questions submitted to the Court.

The sitting is closed.

The Court rose at 12.55 p.m.

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