

INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

(REQUEST FOR ADVISORY OPINION)



**Response of the Republic of Kiribati to the questions posed by Judges at the at the end  
of the Court's public sitting on 13 December, 2024.**

20 December 2024

## Question put by Judge Cleveland

“During these proceedings, a number of participants referred to the production of fossil fuels in the context of climate change, including with respect to subsidies. In your view, what are the specific obligations under international law of States within whose jurisdiction fossil fuels are produced to ensure protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gasses, if any?”

### Reply

#### **Introduction: International Law & Fossil Fuel Subsidies**

1. This quality question focuses on the critical issue of fossil fuels and the importance of an advisory opinion that explicitly addresses this primary driver of climate change. The object and purpose of the Paris Agreement, and the greater climate change treaty framework in general, cannot be achieved without such a focus, especially given that the best available science, which shows:

[P]rojected emissions from existing fossil fuel infrastructure alone will exceed the remaining carbon budget to limit warming to 1.5°C.<sup>1</sup>

2. Compliance with customary international law and treaty-based obligations to prevent and mitigate greenhouse gas (GHG) emissions that result in climate harm is *not possible* without a cessation of the expansion of fossil fuel production. Fossil fuel subsidies expand its production, or at the very least, delay its necessary phase out from energy systems.
3. Yet, fossil fuels still account for 80 per cent of global primary energy, due in part to massive fossil fuel subsidies by governments estimated at over USD\$600 billion per annum,<sup>2</sup> demonstrating the centrality of fossil fuel subsidies in restricting their expansion. Again, only a rapid and equitable phase-out of fossil fuels can protect the health of both people and planet from the climate crisis, which will unquestionably require an end to fossil fuel subsidies.

#### **Specific obligations for States in whose jurisdiction fossil fuels are produced under international law to ensure protection of the climate system and other parts of the environment from GHG emissions**

4. States have obligations not only to refrain from participating in and authorizing or financing fossil fuel proliferation, but also to *regulate* fossil fuel production in a manner consistent with the Paris Agreement. This includes respecting the duty to prevent transboundary harm and the obligation of due diligence. This can be best summed up via the International Tribunal on the Law of the Sea’s (ITLOS) Advisory Opinion

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<sup>1</sup> The Pacific Community’s Oral Submission, ¶ 18, I.C.J. Verbatim Record 2024/53, 13 December 2024, *stating* the science as found in Intergovernmental Panel on Climate Change (IPCC), IPCC AR6 Synthesis Report—Summary for Policymakers, Chap. B.5.

<sup>2</sup> The World Health Organization’s Oral Submission, ¶ 20, I.C.J. Verbatim Record 2024/54, 13 December 2024, *citing* the research found by P. Wooders, *The WTO Can Help Reform Subsidies to Fossil Fuels That Propel the Climate Crisis*, Forum on Trade, Environment, & the SDGs (TESS), 22 May 2024, available at <https://tessforum.org/latest/the-wto-can-help-reforms-subsidies-to-fossil-fuels-that-propel-the-climate-crisis>.

regarding in the application of these principles in the prevention of marine pollution. In elaborating on the obligations of States with respect to a specific source of pollution, ITLOS recognized that the adoption of national legislation and the establishment of international rules and standards to mitigate source-specific obligations is fundamental to fulfilling such obligations.<sup>3</sup>

5. ITLOS further explained that obligation of due diligence requires a State to put in place a national system, including legislation, administrative procedures and an enforcement mechanism necessary to regulate the activities in question, and to exercise adequate vigilance to make such a system functions efficiently, with a view to achieving the intended objective. The Tribunal notes in this regard that the ICJ itself, in *Pulp Mills on the River Uruguay*, described an obligation to act with due diligence as follows:

It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators.<sup>4</sup>

6. Further, and most importantly in this context, ITLOS explained that the nature of the obligation of due diligence is particularly relevant in a situation where the activities in question are carried out by a private entity—like that of fossil fuel emissions from a power station—making the obligation to regulate *primary*.<sup>5</sup> Such reasoning should also be applied to fossil fuel proliferation and subsidies in this case.
7. Additionally, with respect to carbon dioxide from an emitting source like a fossil fuel power plant, Kiribati further argued that the introduction of independent and additional risks to human rights and the environment via technologies like carbon capture and storage has largely under-delivered on emissions reductions. As such, it should once again be emphasized that geoengineering and carbon dioxide removal cannot be considered cessation under the law of state responsibility.
8. In this regard, Kiribati would also like to highlight the oral statement from the Commission on Small Island States (COSIS) which argued that:

[T]he Court should also consider the obligations of cessation and non-repetition. In this regard, the 2023 IPCC report concluded with high confidence that ‘[e]stimates of future CO<sub>2</sub> emissions from existing fossil fuel infrastructures without *additional abatement* already exceed the remaining carbon budget for limiting warming to 1.5°C’. In this light, several COSIS members have endorsed the Fossil Fuel Non-Proliferation Treaty Initiative.<sup>6</sup>

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<sup>3</sup> INSERT.

<sup>4</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I), p. 14, at p. 79, ¶ 197.

<sup>5</sup> International Tribunal for the Law of the Sea (ITLOS), *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (COSIS Request for Advisory Opinion Submitted to ITLOS), Case No. 31, Advisory Opinion, ITLOS Reports 2024, ITLOS Advisory Opinion, ¶ 236 (emphasis added).

<sup>6</sup> COSIS Oral Submission, ¶ 11, I.C.J. Verbatim Record 2024/53, 13 December 2024 (emphasis added).

9. Ending fossil fuel subsidies would constitute ‘additional abatement’ needed to limit warming and fulfil obligations to not only regulate, but also to meet cessation and non-repetition obligations.

10. As Kiribati has argued in its Written Comment, reiterating statements by Antigua and Barbuda on behalf of the Alliance of Small Island States (AOSIS) regarding the ‘general principle of *equity* in international law’ (emphasis added):

Small island developing states contribute less than one percent of all global production of fossil fuels, and our share of marine plastic waste is estimated at less than 1.3 percent. However, the adverse effects of climate change, sea-level rise, and plastic pollution disproportionately affect our industries, infrastructure, health, and culture. Equity is vital – small islands have contributed almost nothing to these overlapping and significant transboundary harms. It is inequitable, and frankly unjust, to expect that small islands use their relatively small national budgets to respond to and remediate the effects of transboundary harm caused by others.<sup>7</sup>

11. The object and purpose of the Paris Agreement, as reflected in its Preamble, and more widely under customary international law and the peremptory norms of international law like that of equity, sovereignty, sovereign equality, and peoples’ right to self-determination, further emphasize the need to end fossil fuel subsidies.

#### **Obligations under the Paris Agreement (Arts. 2.1a, 2.1c, 4.1 and 4.3)**

12. Additionally, even if looking strictly under the Paris Agreement, Articles 2.1a, 2.1c, 4.1 and 4.3 all require States to phase-out fossil fuel production and end both direct and indirect subsidies for them. This is because to achieve the global temperature target, consistent with the object and purpose of the climate regime,<sup>8</sup> finance flows must align with low-GHG pathways and development.

13. This becomes particularly important in view of the best available science and the requirement to harmonize law to reflect such urgency. Again, as stated in the Pacific Community’s Oral Statement before the Court:

[States] are on a pathway to 3°C by the end of this century. Despite the clear science, finance flows to fossil fuels continue to outstrip the transition and scale-up of renewables in every region of the world.<sup>9</sup>

14. Thus, fossil fuel subsidies fly in the face of the object and purpose of the Paris Agreement and the critical obligations States agreed to within it. States cannot on the one hand promise to limit emissions and transition away from fossil fuels while subsidizing their existence on the other.

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<sup>7</sup> Obligations of States in respect of Climate Change, Written Statement by Antigua and Barbuda on behalf of the Alliance of Small Island States, ¶ 5; Obligations of States in respect of Climate Change, Written Comment by Kiribati, ¶ 33.

<sup>8</sup> See also, Kiribati response to Question put by Judge Tladi for further elaboration.

<sup>9</sup> The Pacific Community’s Oral Submission, ¶ 7, I.C.J. Verbatim Record 2024/53, 13 December 2024.

## **Obligations under the law of State responsibility**

15. Finally, the duty under the law of State responsibility to cease wrongful conduct on other States, i.e. significant harm to the climate system and other parts of the environment from anthropogenic emissions of greenhouse gasses, guarantees non-recurrence. This means that States within whose jurisdiction fossil fuels are produced must stop at the *very least*, increasing fossil fuel production by immediately halting its expansion and taking immediate steps to rapidly and equitably phase out fossil fuel.

## **Conclusion**

16. In sum, States with jurisdiction and effective control over fossil fuel production are obliged to: (a) take the inevitable emissions and climate impacts of fossil fuel production into account before any decisions to engage in, authorize, or finance their proliferation,<sup>10</sup> regardless of where the emissions ultimately occur or where resultant climate harm manifests; (b) immediately halt and refrain from undertaking, authorizing, or supporting any expansion of fossil fuel production, including via subsidies; and (c) take immediate steps to rapidly and equitably reduce fossil fuel production toward full phaseout. Increasing production and use of fossil fuels, by expanding or entrenching dependence on the products that are the primary drivers of the planetary climate crisis, increases the risk of further climate harm and is presumptively at odds with States' preventive obligations and treaty-based duties to reduce GHG emissions in line with long-term temperature goals.

### **Question put by Judge Tladi**

“In their written and oral pleadings, participants have generally engaged in an interpretation of the various paragraphs of Article 4 of the Paris Agreement. Many participants have, on the basis of this interpretation, come to the conclusion that, to the extent that Article 4 imposes any obligations in respect of Nationally Determined Contributions, these are procedural obligations. Participants coming to this conclusion have, in general, relied on the ordinary meaning of the words, context and sometimes some elements in Article 31 (3) of the Vienna Convention on the Law of Treaties. I would like to know from the participants whether, according to them, “the object and purpose” of the Paris Agreement, and the object and purpose of the climate change treaty framework in general, has any effect on this interpretation and if so, what effect does it have?”

## **Reply**

### **Introduction: Article 31(1) of the Vienna Convention on the Law of Treaties**

1. The the object and purpose of the Paris Agreement, and the object and purpose of the climate change treaty framework in general, have significant effects on the interpretation of the Paris Agreement and the UNFCCC, because according to Article 31(1) of the Vienna Convention on the Law of Treaties,

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<sup>10</sup> This includes, for example, environmental impact assessments and the subsidization of fossil fuels.

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context **and in the light of its object and purpose.**” (emphasis added).

2. Therefore, the interpretation of the Paris Agreement and the UNFCCC must also take into account their object and purpose.

### **What is the object and purpose of the Paris Agreement?**

3. As Kiribati has argued before this honorable Court,

“[T]he 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.”<sup>11</sup>

4. As elaborated in this Reply, this argument is based on an analysis of the object and purpose of the Paris Agreement, as reflected in the Preamble of the Paris Agreement, from the relationships between the Paris Agreement and customary international law and the peremptory norms of international law: sovereignty, sovereign equality, and peoples’ right to self-determination.

### **A Treaty’s Preamble as key for identifying the object and purpose of a treaty**

5. The preamble of the Paris Agreement is the primary, if not the exclusive, source for identifying its object and purpose. That the preamble of a treaty is the primary or even the exclusive key for identifying a treaty’s object and purpose is grounded in the uniform jurisprudence of this Court. As the Court said in *United States Nationals in Morocco* case,

“the interpretation of the provisions of the Act must take into account its purposes, which are set forth in the Preamble...”<sup>12</sup>

6. Similarly, in its *Military and Paramilitary Activities in and against Nicaragua* judgment, the Court derived the object and purpose of the relevant treaty from the what was “stated in the Preamble of the Treaty.”<sup>13</sup> A similar exclusive reliance on the preamble of a treaty was made by the Court in *Case Concerning Oil Platforms*.<sup>14</sup> In *Whaling in the Antarctic*, the Court studied “[t]he relationship between Article VIII [of the relevant Convention] and the object and purpose of the Convention,” enumerating the various paragraphs of the preamble.<sup>15</sup>

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<sup>11</sup> Kiribati’s Oral Submission, ¶ 34, I.C.J. Verbatim Record 2024/43, December 6, 2024.

<sup>12</sup> *Case concerning Rights of Nationals of the United States of America in Morocco*, Judgment of August 27, 1952, I.C.J. Reports 1952, p. 176, at p. 197.

<sup>13</sup> *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14, at ¶ 275.

<sup>14</sup> *Case concerning Oil Platforms* (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996, p. 803, at ¶ 27.

<sup>15</sup> *Whaling in the Antarctic* (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014, p. 226, at ¶ 56.

7. The same approach was followed by Judge Tomka who said, with respect to the relevant treaty, “one may just recall the preamble of the Treaty, which sets out the object and purpose of the Treaty.”<sup>16</sup>
8. As Judge Bhandari notes, reliance on the preambular text is particularly necessary when the text invokes tenets of international law such as sovereign equality, peaceful coexistence, and the development of friendly relations between States.<sup>17</sup>
9. Reliance on the treaty’s preamble to determine its object and purpose was also the approach taken by the PCIJ. While interpreting the Greco-Bulgarian Convention of 1919, the Court derived the general purpose of the Convention from the preamble.<sup>18</sup> Similarly, the PCIJ relied on the preamble of the ILO Convention to determine its objectives, which, as the Court stated, were “set forth in the Preamble.”<sup>19</sup>
10. The same reliance on the preamble as the key for identifying the object and purpose of a treaty was reiterated by the ILC in its Draft Articles on the Law of Treaties with commentaries, 1966, which presents the Court’s approach as follows:

“the Court has more than once had recourse to the statement of the object and purpose of the treaty in the preamble in order to interpret a particular provision.”<sup>20</sup>

### **The object and purpose of the Paris Agreement in light of its Preamble**

11. The Preamble of the Paris Agreement makes reference and thereby incorporates the UNFCCC when it declares that it is adopted “[i]n pursuit of the objective of the [UNFCCC], and being guided by its principles.”
12. The Preamble of the UNFCCC reflects strong commitment of the State Parties to address all aspects of climate change. It confirms the States’ determination to (emphases added):

- “[P]rotect the climate system for present and future generations,”

- Regard “the Earth’s climate and its adverse effects [as] **a common concern of humankind**,”

- “[A]cknowledg[ment] that the global nature of climate change calls for the **widest possible cooperation by all countries** and their participation in an **effective and appropriate international response**, in accordance with their

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<sup>16</sup> *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2021, p. 9, Declaration of Judge Tomka, at ¶ 10.

<sup>17</sup> *Immunities and Criminal Proceedings* (Equatorial Guinea v. France), Judgment, I.C.J. Reports 2020, p. 300, Dissenting Opinion of Judge Bhandari, at ¶ 19.

<sup>18</sup> *The Greco-Bulgarian ‘Communities’*, Advisory Opinion of July 31, 1930, P.C.I.J., Series B, No. 17, at ¶ 19.

<sup>19</sup> *Competence of the International Labour Organization in Regard to the International Regulation of the Conditions of the Labour of Persons Employed in Agriculture*, Advisory Opinion, P.C.I.J., Series B, No. 2 (1922), p. 9, ¶¶ 25–27, esp. ¶ 29.

<sup>20</sup> Draft Articles on the Law of Treaties with Commentaries, 1966, at p. 221.

**common but differentiated responsibilities and respective capabilities and their social and economic conditions,”**

-Acknowledgement “that States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, **and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction,**

-“Reaffirm[] the principle of sovereignty of States in international cooperation to address climate change.

-“[E]nact effective environmental legislation, that environmental standards, management objectives, and priorities should reflect the environmental and developmental context to which they apply, and that standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries,”

-“Recogni[ze] the need for **developed countries to take immediate action in a flexible manner on the basis of clear priorities,** as a first step towards comprehensive response strategies at the global, national, and, where agreed, regional levels that take into account all greenhouse gases, **with due consideration of their relative contributions to the enhancement of the greenhouse effect.**”

-“Recogni[ze] that low-lying and other small island countries, countries with low-lying coastal, arid, and semiarid areas or areas liable to floods, drought, and desertification, and developing countries with fragile mountainous ecosystems are particularly vulnerable to the adverse effects of climate change,”

13. The Preamble of the Paris Agreement implements the UNFCCC goals, while expressing commitment to (emphases added):

-“the principle of equity and **common but differentiated responsibilities and respective capabilities,** in the light of different national circumstances,”

-“the need for an **effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge,**

-“the **specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable** to the adverse effects of climate change.”

-“climate change [as] **a common concern of humankind,**”

- “**respect, promote, and consider their respective obligations on human rights,** the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations, and the right to development, as well as gender equality, empowerment of women, and intergenerational equity,”



-“**ensuring the integrity of all ecosystems**, including oceans, and the protection of biodiversity, recognized by some cultures as Mother Earth, and **noting the importance for some of the concept of "climate justice"**, when taking action to address climate change,”

-securing “sustainable lifestyles and sustainable patterns of consumption and production, with **developed country Parties taking the lead, play an important role** in addressing climate change.”

14. The common denominator of the two interlocking Preambles reflects an object and purpose that entails a collective commitment to:

- a. Undertaking a collective response to address what is a common concern of humankind;
- b. Recognizing States’ common but differentiated responsibilities and respective capabilities, in light of different national circumstances, with **developed country parties taking the lead and playing a critical role in addressing climate change**;
- c. Adopting a proactive, ambitious, immediate, science-based, agenda to implement an effective and progressive response to the urgent threat of climate change, based on the best available scientific knowledge;
- d. Respecting the principles of the Charter of the United Nations and the principles of international law, including the principle of sovereignty of States, to ensure that activities within State Parties’ jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

15. The preamble reflects no intention to detract from the prevailing customary international law at the time of the Agreement’s adoption. In fact, the preamble:

- a. Reaffirms the principles of international law, including the customary international law obligations prevailing at the time, such as the responsibility of States to ensure that activities within their jurisdiction or control do not cause harm to the environment of other States or areas beyond national jurisdiction;
- b. Adopts a proactive agenda to further enhance State Parties’ obligations to address the urgent threat of climate change in an effective, equitable, and just manner, with developed country parties taking the lead in addressing these challenges; and
- c. Respects and promotes the peremptory norms of international law, including sovereignty, sovereign equality, and peoples’ right to self-determination.

16. Therefore, the object and purpose of the Paris Agreement and the UNFCCC do not reflect any intention to derogate from customary international law or peremptory norms of international law. On the contrary, they aim to facilitate and ensure compliance with these norms and principles.

17. Consequently, as Kiribati argued before this Court,

“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.” As this Court said in 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.”<sup>21</sup>

### **Question put by Judge Aurescu**

“Some participants have argued, during the written and/or oral stages of the proceedings, that there exists the right to a clean, healthy and sustainable environment in international law. Could you please develop what is, in your view, the legal content of this right and its relation with the other human rights which you consider relevant for this advisory opinion?”

**Reply**<sup>22</sup>

### **Introduction: The Right to a Clean, Healthy and Sustainable Environment Exists**

1. The right to a clean, healthy and sustainable environment is widely acknowledged to be a precondition to the effective enjoyment of all human rights.<sup>23</sup> In fact, the object and purpose of the Paris Agreement and the UNFCCC further enforce this human right.
2. More than 50 States (Kiribati included) made submissions to this Court urging it acknowledge that the right to a healthy environment is an integral part of the broader corpus of international human rights law that it is relevant, and in fact essential, to the determination of States’ international obligations to address climate change.
3. Beyond this, a wide range of jurisprudence further substantiates this right, priming this Court to do this same in its advisory opinion. The Inter-American Court of Human Rights,<sup>24</sup> as well as courts in a diverse range of States including Brazil,<sup>25</sup> Colombia,<sup>26</sup>

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<sup>21</sup> Kiribati’s Oral Submission, ¶ 35, I.C.J. Verbatim Record 2024/43, December 6, 2024, quoting from *Whaling in the Antarctic* (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014, p. 226, at ¶ 67.

<sup>22</sup> Response from parts of David R. Boyd’s (former United Nations Special Rapporteur on human rights and the environment) guidance on ‘The Right to a Healthy Environment’ Memo shared with States wishing to answer Question 3; Kiribati thanks David Boyd and his work to assist States in answering this important question.

<sup>23</sup> Resolution HRC/RES/48/13, The human right to a clean, healthy and sustainable environment (2021). Resolution A/RES/76/300, The human right to a clean, healthy and sustainable environment (2022). At the Human Rights Council in 2021, 43 States voted in favour, while China, India, Japan and Russia abstained. At the General Assembly, 161 States voted in favour, while Belarus, Cambodia, China, Ethiopia, Iran, Kyrgyzstan, Russia and Syria abstained. Kyrgyzstan subsequently submitted an official letter to the UN indicating it had abstained in error and had intended to vote in favour of the resolution. Saint Kitts and Nevis and the Seychelles indicated they had intended to vote in favour. See Official Record of the 97th plenary meeting of the 76th session A/76/PV.97, p. 11

<sup>24</sup> *Inhabitants of La Oroya v. Peru*, Inter-American Court of Human Rights, 2024, ¶ 118.

<sup>25</sup> *Partido Socialista Brasileiro (PSB), Partido Socialismo e Liberdade (PSOL), Partido dos Trabalhadores (PT) e Rede Sustentabilidade v. Brazil* (on Climate Fund), Federal Supreme Court of Brazil, ADPF 708, 1 July 2022

<sup>26</sup> *Future Generations v. Ministry of the Environment et al*, STC No. 4360-2018, decision of 5 April 2018, Supreme Court of Colombia.

Ecuador,<sup>27</sup> India,<sup>28</sup> Mexico,<sup>29</sup> Nepal,<sup>30</sup> South Africa,<sup>31</sup> and even the United States have confirmed that a safe, livable climate is part of the right to a healthy environment. Most notably, within U.S. jurisdiction, the Supreme Court of Hawaii stated that the ‘right to a clean and healthy environment encompasses the right to a life-sustaining climate system,’<sup>32</sup> when confirming the denial of a permit of a power plant as it would produce a substantial amount of greenhouse gas emissions.

## The Legal Content of the Right

4. The right to a clean, healthy and sustainable environment has both substantive and procedural elements that establish its corresponding State obligations. The substantive elements include: clean air; safe, sufficient water and adequate sanitation; healthy and sustainably produced food; non-toxic environments in which to live, work, learn and play; healthy biodiversity and ecosystems; and a safe, livable climate.<sup>33</sup> The procedural elements include: access to information, the right to participate in decision-making, and access to justice and effective remedies, including the secure exercise of these rights free from intimidation, reprisals and criminalization.<sup>34</sup> These procedural elements have deep roots in international law dating back to the Universal Declaration of Human Rights, and were reiterated in the 1992 Rio Declaration on Environment and Development.<sup>35</sup>
5. The duties to respect, protect and fulfil the right to a healthy environment impose on States the obligation to refrain from conduct that foreseeably causes or contributes to significant climate and environmental degradation and to take all necessary measures to prevent conduct by others that foreseeably threatens this right. States’ obligations are not geographically limited to their own territories or citizens but include the duty to refrain from conduct that foreseeably breaches the right to a healthy environment of persons in another territory or restricts the abilities of other States to fulfil their human rights obligations to their own peoples. As the UN Committee on the Rights of the Child and the Inter-American Court of Human Rights have concluded, when foreseeable

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<sup>27</sup> *Herrera Carrion et al. v. Ministry of the Environment et al.* 2020, (Caso Mecheros), Provincial Court of Justice of Sucumbios, Ecuador.

<sup>28</sup> *M.K. Ranjitsinh and Others v. Union of India*, 2024 INSC 280, Writ Petition (Civil) No. 838 of 2019, Supreme Court of India, 21 March 2024.

<sup>29</sup> *Ruling on Modification to Ethanol Fuel Rule*, Amparo 610/2019, Supreme Court of Mexico, 22 January 2020.

<sup>30</sup> *Shrestha v. Office of the Prime Minister et al.* (2015) Supreme Court of Nepal, 61 NKP 3.

<sup>31</sup> *African Climate Alliance et al. v Minister of Mineral Resources and Energy et al.*, 2024, Case 56901/2021, High Court of South Africa, Gauteng Division, December 4, 2024.

<sup>32</sup> *In the matter of Hawai’i Electric Light Company*, 2023, SCOT—22—0000418, Supreme Court of Hawai’i, 13 March 2023. See also *Rikki Held et al v. State of Montana et al*, 2023, Cause No. CDV-2020-307, Montana First Judicial District Court, Lewis and Clark County, 14 August 2023.

<sup>33</sup> *Inhabitants of La Oroya v. Peru*, Inter-American Court of Human Rights, 2024, ¶ 118. The former UN Special Rapporteur on the right to a clean, healthy and sustainable environment published comprehensive reports on each of the substantive elements, including A/74/161 (safe climate), A/75/161 (healthy ecosystems and biodiversity), A/76/179 (healthy and sustainably produced food), A/HRC/40/55 (clean air), A/HRC/46/28 (safe and sufficient water), and A/HRC/49/53 (non-toxic environments). All thematic reports of the current and previous Special Rapporteurs on human rights and the environment are here: <https://www.ohchr.org/en/special-procedures/sr-environment/annual-thematic-reports>

<sup>34</sup> Inter-American Court of Human Rights, 2017, *Advisory Opinion OC-23/17*, ¶ 212.

<sup>35</sup> See Articles 8, 19 and 21 of the Universal Declaration of Human Rights, and principle 10 of the Rio Declaration on Environment and Development.

transboundary harm occurs because of climate change, persons are under the jurisdiction of the State on whose territory the greenhouse gas emissions originated if there is a causal link between the acts or omissions of the State in question and the negative impact on the rights of people located outside its territory, when the State of origin exercises effective control over the sources of the emissions in question.<sup>36</sup>

6. State obligations related to respecting, protecting and fulfilling the right to a healthy environment are summarized in the Framework Principles on Human Rights and the Environment.<sup>37</sup> These obligations include: making environmental information publicly available; facilitating public participation in decision-making; ensuring access to justice with effective remedies; providing a safe environment for human rights defenders; providing environmental education; requiring environmental impact assessments of proposed projects and policies; regulating private sector activities that could harm the environment (including the climate); establishing, implementing and enforcing environmental standards based on the best available science; cooperating internationally; and taking additional steps to protect vulnerable and marginalized populations.<sup>38</sup>
7. The principle of prevention of significant environmental harm imposes due diligence obligations on States, obligations that are heightened in proportion to the degree of risk, a key factor considering the existential threat posed by the climate crisis. States' human rights obligations are engaged where serious harm and rights violations are foreseeable, which is clearly the case in the climate context.
8. Finally, in line with Kiribati's answer to the Question put by Judge Cleveland, a group of UN Special Rapporteurs recommended that wealthy States should accelerate the just and equitable phase-out of fossil fuels, beginning with coal.<sup>39</sup> This further emphasizes the need for an advisory opinion that includes this human right and ties it directly to the primary driver of climate change.

### **Relationship between the Right to a Clean, Healthy and Sustainable Environment and Other Rights**

9. The right to a healthy environment is closely linked to the effective enjoyment of all human rights, as human rights are interdependent, inalienable and indivisible.<sup>40</sup> It is also closely linked to the rights to life, health, food, water, sanitation, livelihoods, self-determination as well as cultural rights, the rights of the child, and the rights of Indigenous Peoples. This has been determined by numerous UN bodies.
10. For example, the UN Human Rights Committee recently explained that "Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy

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<sup>36</sup> Sacchi et al. v. Argentina et al., UN Committee on the Rights of the Child, Communication 104/2019, 22 Sept. 2021, CRC/C/88/D/104/2019, ¶ 10.7. Inter-American Court of Human Rights, 2017, *Advisory Opinion OC-23/17*, at ¶¶ 102-103.

<sup>37</sup> UN Special Rapporteur on human rights and the environment, 2018, Annex to A/HRC/37/59.

<sup>38</sup> UN Special Rapporteur on human rights and the environment, 2018, Annex to A/HRC/37/59.

<sup>39</sup> See OHCHR, *Fossil fuels at the heart of the planetary environmental crisis: UN Experts*, available at <https://www.ohchr.org/en/press-releases/2023/11/fossils-fuels-heart-planetary-environmentalcrisis-un-experts> (2023).

<sup>40</sup> Inter-American Court of Human Rights, 2017, *Advisory Opinion OC-23/17*, ¶ 64.

the right to life.<sup>41</sup> The Human Rights Committee stated further that “Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, *inter alia*, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors.”<sup>42</sup>

11. As outlined by the UN Committee on Economic, Social and Cultural Rights, the right to health 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*”.<sup>43</sup> The UN Committee on the Rights of the Child concluded that the right to a healthy environment is implicit in the Convention on the Rights of the Child, and is related to, *inter alia*, the rights to life, health, an adequate standard of living, play and education.<sup>44</sup> The UN Committee on Economic, Social and Cultural Rights similarly determined that the right to a healthy environment is implicit in the International Covenant on Economic, Social and Cultural Rights and linked to the full range of these rights.<sup>45</sup>
12. The work of other UN Special Rapporteurs further reinforces the linkages between the right to a healthy environment and other human rights affected by climate change. Relevant reports on these linkages have been published by, *inter alia*, the Special Rapporteur on the promotion and protection of human rights in the context of climate change, the Special Rapporteur on the rights to water and sanitation, the Special Rapporteur on the right to food, the Special Rapporteur on the human rights of migrants, the Special Rapporteur on the rights of Indigenous Peoples, the Special Rapporteur on extreme poverty and human rights, the Special Rapporteur on the right to freedom of peaceful assembly and association, and the Special Rapporteur on cultural rights.<sup>46</sup>

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<sup>41</sup> UN Human Rights Committee, General Comment 36, (2019) Article 6: right to life, CCPR/C/GC/36, ¶ 62.

<sup>42</sup> *Id.*

<sup>43</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000) The right to the highest attainable standard of health, E/C.12/2000/4, ¶¶ 4, 11 (emphasis added).

<sup>44</sup> UN Committee on the Rights of the Child, General Comment 26 (2023) on children’s rights and the environment with a special focus on climate change, CRC/C/GC/26, ¶¶ 14-62.

<sup>45</sup> UN Committee on Economic, Social and Cultural Rights, Draft General Comment 26 on economic, social and cultural rights and the environmental dimension of sustainable development, ¶ 10.

<sup>46</sup> Elisa Morgera, Special Rapporteur on the promotion and protection of human rights in the context of climate change, Scene-setting report. A/HRC/56/46, 24 July 2024. See also Pedro Arrojo Agudo (Special Rapporteur on the human right to safe drinking water and sanitation), *Special thematic report on climate change and the human rights to water and sanitation* (Jan. and Mar. 2022); Clement Nyaletsossi Voule (Special Rapporteur on the right to freedom of peaceful assembly and association), *Exercise of the rights to freedom of peaceful assembly and of association as an essential to advancing climate justice*, U.N. Doc. A/76/222 (July 23, 2021), ¶ 90(g); Saad Alfarargi (Special Rapporteur on the right to development), *Climate action at the national level*, U.N. Doc. A/HRC/48/56 (July 2, 2021); Philip Alston (Special Rapporteur on extreme poverty and human rights), *Climate change and poverty*, U.N. Doc. A/HRC/41/39 (July 17, 2019); Balakrishnan Rajagopal (Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context), *Towards a just transformation: climate crisis and the right to housing*, U.N. Doc. A/HRC/52/28 (Dec. 23, 2022); Hilal Ever (Special Rapporteur on the right to food), *Right to food*, U.N. Doc. A/70/287 (Aug. 5, 2015); Cecilia Jimenez-Damary (Special Rapporteur on the human rights of internally displaced persons), *Protection of and assistance to internally displaced persons*, U.N. Doc. A/66/285 (Aug. 9, 2011); Karima Bennouna (Special Rapporteur on the field of cultural rights), *Field of cultural rights*, U.N. Doc. A/75/298 (Aug. 10, 2020); Reem Alsalem (Special Rapporteur on violence against women and girls, its causes and consequences), *Violence against women and girls in the context of the climate crisis, including environmental degradation and disaster risk management and response*, U.N. Doc. A/77/135 (July 11, 2022); Siobhan Mullally (Special Rapporteur on trafficking in persons, especially women and children), *Addressing the gender dimensions*

## Conclusion

13. In conclusion, it is imperative that the International Court of Justice recognize that the right to a clean, healthy and sustainable environment is a key element of international human rights law and that States' human rights obligations must inform much more urgent and ambitious responses to the global climate crisis to fulfil this right. The evidence is clear that the right to a clean, healthy and sustainable environment is fundamental to the wellbeing and survival of humanity, includes a safe and livable climate, and is intricately connected with many other human rights being harmed by the climate crisis.

### Question put by Judge Charlesworth

“In your understanding, what is the significance of the declarations made by some States on becoming parties to the UNFCCC and the Paris Agreement to the effect that no provision in these agreements may be interpreted as derogating from principles of general international law or any claims or rights concerning compensation or liability due to the adverse effects of climate change?”

### Reply

1. The analysis of the object and purpose of the Paris Agreement and the UNFCCC has shown that no provision in these agreements may be interpreted as derogating from principles of general international law or any claims or rights concerning compensation or liability due to the adverse effects of climate change. Therefore, any declaration made by States on becoming parties to the UNFCCC and the Paris Agreement simply reflect the correct interpretation of these agreements. They do not add or detract an iota from the commitments of the State Parties.
2. In fact, it would have been irrational for the declaring States to become parties to these treaties if those treaties did not reflect those principles of international law, because if such was the case, States affected by other States' emissions would have undermined their own legal position by joining the treaties, with no apparent consideration.
3. In light of this understanding of the declaring States, good faith would have required States, whose understanding of the treaty was that it freed themselves from their customary international law obligations through these two treaties, to counter the declarations and thereby to clarify their own, true adverse intentions. The presumption that States act in good faith suggests that the other States' silence in this context must

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*of trafficking in persons in the context of climate change, displacement and disaster risk reduction*, U.N. Doc. A/77/170 (July 15, 2022); François Crépeau (Special Rapporteur on the human rights of migrants), *Human rights of migrants*, A/67/299 (Aug. 13, 2022); and Victoria Tauli-Corpuz, Special Rapporteur on the rights of Indigenous Peoples), *Report of the Special Rapporteur on the rights of indigenous peoples*, U.N. Doc. A/HRC/36/46 (Nov. 1, 2017).

be interpreted as their tacit consent to the declarations, or at least their acquiescence, and thus constitute a further endorsement of the contents of the declarations.<sup>47</sup>

4. Therefore, the declarations reflect the general understanding that the climate treaties do not constitute a *lex specialis* that would exclude the application of general international law or other relevant rules pertaining to remedies.

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<sup>47</sup> On acquiescence as a presumption of a State's silence see Danae Azaria, 'State Silence as Acceptance: A Presumption and an Exception,' *British Yearbook of International Law*, Advance Access (16 February 2024).