

YOUTH CLIMATE JUSTICE HANDBOOK

Legal Memorandum



PACIFIC ISLANDS
STUDENTS FIGHTING
CLIMATE CHANGE



World's Youth
for Climate
Justice

The Youth Climate Justice Handbook is published in three parts. This Legal Memorandum forms part of the Handbook along with a Summary for Policymakers, and a Status Report on Principles of International and Human Rights Law Relevant to Climate Change.

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my story is what
i leave behind for my children
and their children
may they won't be scared
to retell our story
so that others know
about who we are
and where we come from
this is what climate change
cannot take from us
the Pacific warriors
of change

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Samoa

A founding member of the Pacific Islands
Students Fighting Climate Change

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Youth Climate Justice Handbook – Legal Memorandum

I. Introduction and statement of purpose

During the 77th Session (29th March 2023) the United Nations General Assembly (UNGA) adopted by consensus Resolution A/RES/77/276 which concerned the request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change. By adopting this resolution, the General Assembly decided, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice (Court, ICJ), pursuant to Article 65 of the Statute of the Court, to render an advisory opinion on the questions indicated below.

Resolution A/RES/77/276 is the only UNGA request for an ICJ advisory opinion that has been adopted by consensus. This overwhelming endorsement signals strong and widespread support within the international community on the importance of clarifying legal principles, rights and obligations that affect the international community as a whole, including the present and future generations of humanity.

The questions contained in Resolution A/RES/77/276 are the following:

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

(a) What are the obligations of States under international law to ensure the protection of the climate system¹ and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations;

(b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:

(i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?

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

The global Youth² and Civil Society Alliance³ that supported the initiative to request this advisory opinion wishes to assist States and intergovernmental organisations in their preparations for the advisory opinion proceedings. With that aim we have prepared this handbook, which explains our goals in

¹ The IPCC defines the climate system as the highly complex system consisting of five major components: the atmosphere, the hydrosphere, the cryosphere, the lithosphere, and the biosphere, and the interactions among them. The climate system evolves in time under the influence of its own internal dynamics and because of external forcings such as volcanic eruptions, solar variations, and anthropogenic forcings such as the changing composition of the atmosphere and land use change. See. “Annex II - Glossary - Intergovernmental Panel on Climate Change” (*ipcc.ch2018*) <https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-AnnexII_FINAL.pdf> accessed March 9, 2023.

² Pacific Islands Students Fighting Climate Change and the World’s Youth For Climate Justice.

³ Alliance for a Climate Justice Advisory Opinion.

advancing the ICJ advisory opinion campaign and presents and justifies our response to the questions to be considered by the Court. This handbook is the pillar legal document of the global Youth and Civil Society Alliance's Campaign. It is intended to be easily accessible, containing a comprehensive explanation of our objectives and positions. This handbook is also intended to serve as a supportive tool to inspire States and non-State actors to gain a better understanding of the legal issues in question, and to support them in their preparation and decision-making during their participation in the ICJ proceedings.

This Youth Climate Justice Handbook - Legal Memorandum is divided into six chapters and one Annex.

Chapter I explains the purpose of the handbook and the significance of the global Youth and Civil Society Alliance campaign. Chapter II provides context for the campaign, including its history and its importance in the global climate justice movement. Chapter III explains the role of advisory opinions in international law, their importance in the development and clarification of international law, and their significance for the global Youth and Civil Society Alliance International Court of Justice Advisory Opinion campaign. Chapters IV and V introduce the legal foundations of the UNGA request, including the Court's jurisdiction to issue an advisory opinion on climate change. Chapter VI outlines the specific questions that the Court has been asked to address and provides the Youth and Civil Society Alliance's answer to the questions. Annex A explains the process for filing pleadings and presenting arguments in the advisory proceedings before the Court.

II. Background of the Youth and Civil Society ICJAO Campaign

a. ICJAO Campaign

The mission to seek this climate justice ICJ Advisory Opinion was first conceived among a class of law students at the University of the South Pacific. Learning about the United Nations Framework Convention on Climate Change's (UNFCCC) 30-year history of inadequate outcomes, and the severe consequences for their own communities, 27 young Pacific Islanders decided that all avenues to address climate change within the framework of international law must be investigated. These students formed an organisation - [Pacific Islands Students Fighting Climate Change \(PISFCC\)](#)⁴ - and in March 2019 commenced persuading the leaders of the [Pacific Island Forum \(PIF\)](#)⁵ to take the issue of climate change and human rights to the International Court of Justice. The August 2019 PIF Leaders Communique noted, without adopting, the ICJ advisory opinion proposal.

PISFCC creatively continued to build their civil society campaign during the COVID-19 pandemic, gaining support from civil society and youth movements from around the world. Recognizing the global relevance of the campaign, in 2020 PISFCC and youth partners organised to establish the [World's Youth for Climate Justice \(WYCJ\)](#)⁶ to unify all youth to work towards this mission. WYCJ has since expanded to Latin America, Asia, the Caribbean, Europe and Africa. WYCJ has mobilised national and regional civil society organisations and youth movements in support of the push for all governments to support Vanuatu's efforts in seeking the advisory opinion.

This civil society movement, born among students, grew exponentially in early 2022 with the formation

⁴ See Pacific Islands Students Fighting Climate Change (PISFCC), "Seeking an Advisory Opinion from the ICJ" (*Pacific Islands Students Fighting Climate Change 2019*) <<https://www.pisfcc.org/>> accessed March 9, 2023.

⁵ See Pacific Islands Forum, "Pacific Islands Forum" (*About us - Pacific Islands Forum*). <<https://www.forumsec.org/>> accessed March 9, 2023.

⁶ See World's Youth for Climate Justice, "World's Youth for Climate Justice" (*World's Youth for Climate Justice 2019*) <<https://www.wy4cj.org/>> accessed March 9, 2023.

of the Alliance for a Climate Justice Advisory Opinion. The Alliance represents more than 1500 separate organisations, from numerous grassroots associations to large international organisations.

The civil society Alliance for a Climate Justice Advisory Opinion came together to support the efforts of the Government of Vanuatu which adopted the objective of seeking a climate justice advisory opinion in September 2021. Speaking at the launch of the alliance, Vanuatu's Prime Minister presented his reasons for pursuing the climate justice advisory opinion:

“This is for the world’s most vulnerable, for all of humanity, and our collective future. This is about what we must save, not what has been lost. This is a campaign to build ambition, not division. This is a campaign to uplift the goals of the Paris Agreement. This is the young generations’ call for justice to the world’s highest court.”⁷

For the President of Vanuatu, it is also a matter of the moral obligation of leadership:

“[W]hen the law students suggested looking into whether existing international laws could be used to protect future generations, Mr. Vurobaravu said, he couldn’t just turn them away. In his culture, he said, elders have obligations. ‘They’re asking the government leadership, they are asking the regional leadership, they’re asking international leadership to pick up their obligation.’”⁸

In March 2023, four years of collective efforts achieved their first milestone - UNGA adoption of the Resolution calling for the ICJ to issue an advisory opinion on issues related to climate change, human rights and the protection of the rights of present and future generations.

These upcoming advisory proceedings offer a unique opportunity for all UN member States to have a role in shaping the interpretation and clarification of international law by the world’s top court. As the questions indicate, the perspectives and experiences of climate vulnerable States, and peoples and individuals of the present and future generations affected by the adverse effects of climate change, are particularly significant. This significance arises from the basic moral principle that the interests and voices of those most at risk of unjust harm and suffering must be amplified, and not silenced, or ignored.

Now that the campaign and the joint efforts have progressed to the stage of requesting the advisory opinion, it is everyone’s responsibility to assist the Court in answering the legal questions. We, the Youth and Civil Society Alliance that has since 2019 campaigned for an ICJ climate advisory opinion, believe that the upcoming advisory proceedings provide the global community with a powerful mechanism by which much more hopeful, positive and sustainable paths can be chosen and mapped out, in law and in action. We strongly urge the governments of all States, especially climate-vulnerable States, to take full advantage of this opportunity to participate in the Court’s proceedings and positively influence its interpretation of international law.

b. Justification of the need of an Advisory Opinion for Climate Change

On August 9, 2021, the Intergovernmental Panel on Climate Change (IPCC) report confirmed that anthropogenic climate change is undeniable, confirming the existence of a global crisis that present

⁷ Lyons K, “From Vanuatu Law School to the Hague: The Fight to Recognise Climate Harm in International Law” (*The Guardian* June 19, 2022) <<https://www.theguardian.com/world/2022/jun/20/from-vanuatu-law-school-to-the-hague-the-fight-to-recognise-climate-harm-in-international-law>> accessed March 9, 2023.

⁸ *New York Times* “Tiny Vanuatu Uses Its ‘Unimportance’ to Launch Big Climate Ideas”, 8 December 2022.

and future generations must tackle.⁹ In March 2023 IPCC reported that “[w]ithout urgent, effective and equitable adaptation and mitigation actions” climate change will increasingly threaten the human rights of people around the globe “with severe adverse consequences for current and future generations.”¹⁰ Globally, the IPCC findings make clear that climate change is contributing to humanitarian crises wherever climate hazards interact with high vulnerability. The latest IPCC Report concludes that human activities, principally through emissions of greenhouse gases, have unequivocally caused global warming, with global surface temperature reaching 1.1°C above the 1850–1900 average in 2011–2020. Global greenhouse gas (GHG) emissions are continuing to increase from energy use, land use and land-use change. It also describes severe impacts caused by widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere. Human-caused climate change is already affecting many weather and climate extremes in every region across the globe, leading to widespread adverse impacts and losses and damages to nature and people. Vulnerable communities who have historically contributed the least to climate change are disproportionately affected.¹¹ The report finds that global warming will continue to increase in the near term (2021–2040) mainly due to increased cumulative CO₂ emissions in nearly all considered scenarios and modelled pathways. In the near term, global warming is more likely than not to reach 1.5°C even under the very low GHG emission scenario and very likely to exceed 1.5°C under higher emissions scenarios.¹² The IPCC observed that increases in well-mixed greenhouse gas concentrations since around 1750 are unequivocally caused by human activities.

Global hotspots of high human vulnerability are found particularly in Africa, Southern Africa, South Asia, Central and South America, Small Island Developing States, and the Arctic. Climate and weather extremes are increasingly driving displacement in all regions, with Small Island States disproportionately affected.¹³ One event - Pakistan’s devastating floods in 2022 - displaced 33 million people, including approximately 16 million children.¹⁴

In the Pacific Island region climate change is already severely impacting all economic and resource sectors, especially agriculture, water, coastal and marine resources and infrastructure, as well as tourism.¹⁵ Climate extremes and slow onset events are causing catastrophic loss and damage, both economic and non-economic, including to biodiversity and cultural identities, and indigenous-held customary lands. For Vanuatu, damaging weather events - such as Cyclone Harold in 2020 - destroy homes and entire villages resulting in loss of life, and wiping out much of the national GDP in a single day. Similar catastrophic damage has been suffered in Fiji, Solomon Islands, and Tonga.¹⁶ In lower lying atoll nations like Kiribati, the

⁹ Intergovernmental Panel on Climate Change, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge University Press, 2021.

¹⁰ Intergovernmental Panel on Climate Change, *Sixth Assessment Report Synthesis Report (AR6)* section 4.1, p.56.

¹¹ *Id* at 5, IPCC AR6 SYR 2023.

¹² *Id* at 12, IPCC AR6 SYR 2023.

¹³ African Development Bank: <https://www.afdb.org/en/news-and-events/press-releases/africa-loses-15-its-gdp-capita-annually-because-climate-change-african-development-bank-acting-chief-economist-kevin-urama-54660>

¹⁴ “More than Three Million Children at Risk as Devastating Floods Hit Pakistan” (*UNICEF 2022*) <<https://www.unicef.org/press-releases/more-three-million-children-risk-devastating-floods-hit-pakistan>> accessed March 9, 2023.

¹⁵ Government of Vanuatu, “Vanuatu ICJ Initiative - Why ICJ” (*Vanuatu ICJ Initiative - Why ICJ*) <<https://www.vanuatuicj.com/why-icj>> accessed March 10, 2023. See also, IPCC (2014). “Climate Change 2014,” in *Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, eds C. B. Field, et al. (Cambridge: Cambridge University Press), 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*, eds V. Masson-Delmotte, P. Zhai, H. O. Pörtner, D. Roberts, et al. (Geneva: World Meteorological Organization)

¹⁶ Government of Vanuatu, “Vanuatu ICJ Initiative - Why ICJ” (*Vanuatu ICJ Initiative - Why ICJ*) <<https://www.vanuatuicj.com/why-icj>> accessed March 10, 2023. See also, “Pacific Islands: Tropical Cyclone Harold Humanitarian Situation Report No. 2 (Reporting Period: 15 to 29 April 2020) - Vanuatu” (*ReliefWeb April 30, 2020*) <<https://reliefweb.int/report/vanuatu/>

serious impacts from sea level rise and extreme sea-level events are forcing communities in outer islands to relocate due to the projection of the islands' vulnerability to permanent inundation.¹⁷

The continent of Africa is already experiencing the effects of climate change, including rising temperatures, droughts, floods and food insecurity. Data indicates that climate change is already taking a significant toll on the continent's economies. According to estimates in some places Africa has been losing upwards of 15% of its GDP growth because of climate change. By 2050, up to 86 million people in sub-Saharan Africa may be forced to migrate due to climate change-related factors such as desertification and water scarcity.¹⁸

In Latin America and the Caribbean more frequent severe weather events such as droughts, heatwaves, cold waves, tropical cyclones and floods have led to the loss of hundreds of lives, severe damages to crop production and infrastructure, and human displacement. Increasing sea-level rise and ocean warming are expected to continue to affect coastal livelihoods, tourism, health, food, energy, and water security, particularly in Caribbean and Central American countries. For many Andean cities, melting glaciers represent the loss of a significant source of the freshwater currently available for domestic use, irrigation, and hydroelectric power.¹⁹

In light of the above, it is not surprising that the global community has recognized climate change as a "common concern of humankind"²⁰, a concept encompassing the need to weigh interests beyond bilateral relations and instead relate them to the global concerns of humanity.²¹ Similarly, this concept focuses on the equitable sharing of burdens and responsibilities - in environmental protection - by all nations.²²

As a common concern of humankind, and a severe threat to the enjoyment of basic universal human rights, the international community has an urgent and shared interest in preventing the adverse effects of climate change.²³ Climate change calls for collective responsibility and action. The gravity and potential irreversibility of climate change impacts demand a global approach, and the interests at stake extend beyond those of individual States. It is, therefore, essential to obtain an advisory opinion from the International Court of Justice on climate change, which can help clarify the existing legal framework for collective action and responsibility. Moreover, it can help resolve legal questions that have a significant impact on the planet, paving the way for a more sustainable future.

In the following sections we will explain the role of the Court, highlight the importance of issuing an advisory opinion, and provide relevant information that will assist in answering the questions contained in Resolution A/RES/77/276.

pacific-islands-tropical-cyclone-harold-humanitarian-situation-report-no-2-reporting> accessed March 9, 2023.

¹⁷ Climate Change Knowledge Portal: https://climateknowledgeportal.worldbank.org/sites/default/files/country-profiles/15816-WB_Kiribati%20Country%20Profile-WEB.pdf

¹⁸ Richard Munang and Robert Mgendi 'In 2023, Africans can Vote for Climate Action' *International Policy Digest* <<https://intpolicydigest.org/in-2023-africans-can-vote-for-climate-action/>> accessed 31 March 2023.

¹⁹ World Meteorological Organization, *State of the Climate in Latin America and the Caribbean 2021*, World Meteorological Organization, Geneva, 2022.

²⁰ Preambulatory clause, United Nations Framework Convention on Climate Change (1992)(UNFCCC).

²¹ *Gabčíkovo-Nagymaros Project*, Hungary v Slovakia, Separate Opinion of Vicepresident Weeramantry, 25th September 1997, International Court of Justice, at page 115.

²² Cançado Trindade Antônio Augusto, "Volume 316," *International law for humankind: Towards a new JUS gentium: General course on public international law* (Martinus Nijhoff 2006) at page 386.

²³ "Causes and Effects of Climate Change" (*United Nations*) <<https://www.un.org/en/climatechange/science/causes-effects-climate-change>> accessed March 13, 2023

III. The Advisory Jurisdiction of the International Court of Justice: Role and Importance of Advisory Opinions

a. Why the International Court of Justice?

The International Court of Justice is the principal judicial organ of the United Nations (UN)²⁴ and was established as the successor to the Permanent Court of International Justice (PCIJ). The United Nations Charter (UN Charter) references the ICJ in multiple provisions, with Article 7 recognizing it as one of the principal organs of the UN.²⁵

The ICJ has jurisdiction over two types of proceedings: contentious cases, and advisory proceedings. In contentious cases the Court adjudicates legal disputes between two or more States. In contrast, in advisory proceedings the Court issues an advisory opinion on a legal question or questions posed by an authorised body.²⁶

Over the years, the ICJ has played a substantial role in the development and clarification of international law. Its significance lies in its status as the most authoritative judicial organ in the world, being a key actor in the settlement of disputes and the maintenance of international peace and security. While the ICJ is not a legislator, rather a judicial body applying and interpreting existing law, the Court does exercise its authority in identifying and clarifying both established and emerging international norms, as well as connecting previously discrete areas of law. Throughout its existence, not only has the ICJ settled disputes, but it has also prevented armed conflicts and the systematic violation of human rights.²⁷

Since the creation of the ICJ, 97 States have been parties to contentious proceedings, distributed as follows: 27 African States, 16 Latin American and Caribbean States; 19 Asian States; and 35 States from Europe and elsewhere. These States have submitted a total of 148 cases to the ICJ. 125 States and 11 intergovernmental organisations have participated in 28 advisory proceedings. The diversity of countries that have participated in these matters before the Court underlines its role as the World's Court. We note for clarity that the upcoming climate advisory proceeding is *not contentious* in nature.

b. What is an advisory opinion?

An advisory opinion is “an opinion issued by an international court or tribunal at the request of a body authorised to request it, with a view to clarifying a legal question for that body’s benefit.”²⁸ Advisory opinions offer advice in its truest form and do not bind either the requesting body or any State to take specific actions based on such opinion.²⁹ The object of advisory proceedings is not to decide disputes, but to

²⁴ Art. 7 (1) of the United Nations Charter (UN Charter).

²⁵ See also, Chapter XIV, Articles 92-96 of the UN Charter, Article 1 of the Statute of the International Court of Justice (ICJ Statute) which establishes the ICJ as the principal judicial organ of the United Nations.

²⁶ Article 96 of the UN Charter.

²⁷ For instance, in *Military and Paramilitary Activities in and against Nicaragua*. The case concerned a dispute between Nicaragua and the United States over certain allegations from Nicaragua of U.S support of Nicaraguan terrorist groups in its territory by mining Nicaragua’s ports. The Court ultimately ruled in favour of Nicaragua and, despite the United States non-appearance in the proceedings, it ordered the U.S. to pay reparations. While the U.S did not comply with the judgement and vetoed enforcement of the judgement in the United Nations Security Council, the ruling did ease the tensions between both nations. *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 392, paras. 75 - 125.

²⁸ Salmon J, “Dictionnaire De Droit International Public” (*Librairie en ligne de référence pour les ouvrages de droit* November 1, 2001) <<https://www.lgdj.fr/dictionnaire-de-droit-international-public-9782802715207.html>> accessed March 9, 2023.

²⁹ Hugh Thirlway, “Advisory Opinions” (April 2006) in Anne Peters (2021-) and Professor Rüdiger Wolfrum (2004-2020), *Max Planck Encyclopedia of Public International Law* (online edn), para. 1. Furthermore, Advisory Opinions should be

participate in the actions of the UN and to help determine States' obligations under international law³⁰. An advisory opinion is addressed to the requesting organ and not to specific States.³¹

States or international organisations can accept advisory opinions as binding through ex post agreements.³² As noted by the Court in its *Advisory Opinion on the Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, “[a] distinction should thus be drawn between the advisory nature of the Court’s task and the particular effects that parties to an existing dispute may wish to attribute, in their mutual relations, to an advisory opinion of the Court, which, ‘as such, [. . .] has no binding force.’”³³

The Court has further observed that despite not having binding force, its advisory opinions nevertheless carry great legal weight and moral authority as they are often “an instrument of preventive diplomacy and help to keep the peace”.³⁴ Similarly, the Court has observed that advisory opinions can clarify and advance international law, which in turn promotes the cultivation of peaceful relationships among nations.³⁵ By interpreting legal rules and clarifying their applicability or application, the Court makes its “contribution by shedding light upon, and clarifying, legal question that arise in the context of the activities of UN Organs (or of bodies affiliated to the UN), so as to facilitate their action and promote the role of international law within them”³⁶. In this sense, the Court’s findings of law are definitive.

It is also noted and emphasised that while the advisory opinion is not binding, the *international law* upon which the Court provides its opinion typically is binding.³⁷

To date, the ICJ has rendered 28 advisory opinions since its establishment in 1948 with 125 States and 11 organisations having participated in the proceedings (1946 to 2018).³⁸ The high level of participation by States in the advisory proceedings demonstrates the importance that States attach to the advisory jurisdiction of the Court and reflects the unique opportunity that States see in providing their interpretation and understanding of the legal questions submitted to the ICJ, while at the same time assisting the Court with its judicial task.

The importance of the ICJ’s advisory opinions has also been recognized by other international courts and tribunals such as the Court of Justice of the European Union (CJEU), the European Court of Human

distinguished from declaratory judgments. Declaratory judgments are binding, which means that the underlying dispute is resolved through the Judgment resulting in a *res judicata* effect. No such binding force attaches to an Advisory Opinion. See Hugh Thirlway, “Advisory Opinions” (April 2006) in Anne Peters (2021-) and Professor Rüdiger Wolfrum (2004–2020), *Max Planck Encyclopedia of Public International Law* (online edn), para. 2.

³⁰ See Kolb R, *The International Court of Justice* (Hart Publishing 2013), at p. 1021.

³¹ Notably, in the *Interpretation of Peace Treaties, Advisory Opinion*, the Court ruled that “[t]he Court’s Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, (...), represents its participation in the activities of the Organization, and, in principle, should not be refused.” *Interpretation of Peace Treaties, Advisory Opinion*, ICJ Reports 1950, p. 65, at p. 71

³² Hugh Thirlway, “Advisory Opinions” (April 2006) in Anne Peters (2021-) and Professor Rüdiger Wolfrum (2004–2020), *Max Planck Encyclopedia of Public International Law* (online edn), para. 3.

³³ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion*, ICJ Reports 1999, p. 62, para. 25; See also, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion*, ICJ Reports 1950, p. 71.

³⁴ “Advisory Jurisdiction” (*International Court of Justice*) <<https://www.icj-cij.org/advisory-jurisdiction>> accessed March 9, 2023.

³⁵ *Id.*

³⁶ See Kolb R, *The International Court of Justice* (Hart Publishing 2013), p. 1021.

³⁷ Jorge Viñuales, presentation to the Conference *Climate Change and International Law: The Promise of an Advisory Opinion from the International Court of Justice* Peace Palace, The Hague, 20 June 2022.

³⁸ See *The International Court of Justice Handbook* (Registrar of the International Court of Justice 2021), at pp.87-88.

Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR) and the International Tribunal of the Law of the Seas (ITLOS). In particular, ITLOS observed that “judicial determinations made in advisory opinions carry no less weight and authority than those in judgments because they are made with the same rigour and scrutiny by the “principal judicial organ” of the United Nations with competence in matters of international law.”³⁹

As acknowledged by Judge *ad hoc* and former Registrar of the ICJ, H.E. Mr. Philippe Couvreur “[t]he major disadvantage of the advisory procedure, it has been said, is that it leads to the delivery of non-binding opinions.” However, he notes that this observation must be qualified as

“[t]he judgments of the Court [in contentious proceedings], in accordance with Article 59 of the Statute, are binding only between the parties. In the absence of an international rule of precedent, the value of these decisions, beyond the framework of a specific case, lies in their technical quality and the authority of the Court. The same is true of advisory opinions, except that, as we have seen, debates before the Court are more open and the Court has more freedom to choose its responses. While the actual fate of opinions depends on the requesting bodies, they constitute, in the same way as judgments, the Court’s case law, which it draws on, like other international and national courts; they therefore ultimately carry the same overall weight.”⁴⁰

As this observation suggests, one advantage of an advisory opinion is that it is not limited only to matters arising from disputes between two countries. Instead, it can address matters of international law with wide application. It can also be added that the activity of the Court in advisory proceedings does not differ from that in contentious proceedings in the sense that the activity of the Court is identical, *i.e.*, the interpretation of legal rules and the clarification of their applicability and application. This includes matters such as the interpretation of multilateral treaties (including the UNFCCC), and the content of customary international law (such as cooperation). It is clear then, that through its advisory jurisdiction, the Court provides guidance on complex legal issues that require clarification and interpretation in a consistent and coherent manner.⁴¹

As the principal judicial organ of the United Nations, the ICJ is equipped with the legal expertise and authority to address complex and multifaceted legal issues, including those related to climate change and environmental law. The ICJ’s experience in interpreting and applying international law further enhances its ability to provide authoritative opinions on the protection of the global commons and all aspects of climate change. Its judicial functions play a crucial role in the development of both established and emerging international norms and in connecting previously separate areas of law. This connecting role is highly important in the context of climate change, because the law which governs States’ obligations concerning climate change is fragmented across many different regimes (such as environmental law, human rights law and law of the sea).

Additionally, the ICJ has a highly qualified and diverse group of judges who not only possess legal expertise, but also hail from very diverse legal cultures and backgrounds, and who reflect a range of global interests in one single judicial body. The ICJ’s reputation as an independent and impartial judicial

³⁹ *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean* (Mauritius/Maldives), ITLOS, Preliminary Objections, Judgment of 28 January 2021, para. 203.

⁴⁰ Conference delivered by H.E. Mr. P. Couvreur, the International Court of Justice and Climate Change, 16 May 2022, Latin American Table.

⁴¹ In *The Gambia v. Myanmar case*, the Court highlighted the significant legal value of its own advisory jurisdiction. In this case, the Court’s reliance on its previous Advisory Opinion in the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* demonstrated the importance of the ICJ’s Advisory Opinions as a source of legal guidance and precedent.

institution enhances the credibility and legitimacy of its legal opinions. It is not news that the climate change debate has been highly contested during the past decade. By providing an impartial legal opinion, the ICJ can contribute its legal expertise in providing a solid legal base for constructive dialogue and cooperation among States.

Advisory opinions are crucial to the advancement of international law by addressing and clarifying legal issues with substantial global ramifications. For this reason, we wholeheartedly agree with the June 2022 conclusions of Professor Viñuales, who noted that “[o]f all judicial routes available [to address climate change] at the international level, an advisory opinion from the ICJ requested by the General Assembly is the most legitimate, constructive, authoritative and non-confrontational avenue that can be selected”.⁴² All in all, an ICJ advisory opinion would significantly enhance the role of international law in responding to the urgent threats posed by climate change.

c. What is the role of advisory opinions in protecting community interests?

Because advisory opinions carry substantial legal weight in the development of international law, they are often used to clarify international obligations of States when they concern community interests. As outlined in section II b above, climate change has wide-ranging impacts that affect not only individual States but also global community interests, including the global commons such as the atmosphere, the oceans, Antarctica, and global biodiversity.⁴³ The diversity of these and other impacts reveals that climate change is not just an environmental issue, but affects all sectors of society,⁴⁴ posing significant challenges for States seeking to meet their obligations under international law, and to the enjoyment by people of the universal human rights that should be protected by international and national law. Therefore, an advisory opinion on the legal obligations of States regarding climate change would clarify these obligations, ensuring that these are upheld for the benefit of all communities and future generations.

The term “community interest” is often used in public international law to refer to interests protected by international law that go beyond national interests and benefit individuals or groups across borders.⁴⁵ The term is seldom defined and it is used interchangeably with other terms such as “common interests” or “shared values.”⁴⁶ Community interest norms can protect fundamental values that are recognized and sanctioned by international law as a matter of concern to the international community as a whole⁴⁷, like environmental protection and climate change. The concept of community interest is relevant for understanding the ways in which international law protects and promotes shared values and interests across borders.⁴⁸ Prefacing the discussion of intergenerational equity, we here note that the interests of

⁴² Jorge Viñuales, presentation to the Conference *Climate Change and International Law: The Promise of an Advisory Opinion from the International Court of Justice* Peace Palace, The Hague, 20 June 2022.

⁴³ “Global Governance and Governance of the Global Commons in the Global Partnership for Development beyond 2015” (*UN System Task Team on the Post UN 2015 UN Development Agenda*) <https://www.un.org/en/development/desa/policy/untaskteam_undf/thinkpieces/24_thinkpiece_global_governance.pdf> accessed February 26, 2023, pages 5-6.

⁴⁴ See Sharma A (ed), “Guide to the Paris Agreement - *Ecbi.org*” (*ebi.org 2020*). <<https://ecbi.org/sites/default/files/Guide%20to%20Paris%20Agreement.pdf>> accessed March 9, 2023, at p.34.

⁴⁵ Isabel Feichtner, “Community Interest” (February 2007) in Anne Peters (2021-) and Professor Rüdiger Wolfrum (2004-2020), *Max Planck Encyclopedia of Public International Law* (online edn), para. 2.

⁴⁶ *Ibid.*

⁴⁷ Isabel Feichtner, in citing Bruno Simma in “Community Interest” (February 2007) in Anne Peters (2021-) and Professor Rüdiger Wolfrum (2004-2020), *Max Planck Encyclopedia of Public International Law* (online edn), para. 3.

⁴⁸ At this point, we believe it is important to distinguish community interests from global commons. Although community interests and global commons share similarities, they are not exactly the same thing. Global commons specifically refer to common areas that lie beyond the national jurisdiction and control of States and that belong to no State; they are part of the *res communis*. (See Oral N, “The Global Commons and Common Interests: Is There Common Ground?” [2021] *The Protection of General Interests in Contemporary International Law* 13, p. 13.) On the other hand, community interests refer to the

future generations are a core component of community interests.

One powerful example of the Court's productive contribution to international law is its role in clarifying the legality of the threat or use of nuclear weapons. In its Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, the Court sharply circumscribed the circumstances in which States are permitted to make use of nuclear weapons, limiting their potential lawfulness to a set of extremely narrow and extreme circumstances.⁴⁹ The Court also emphasised that States have an obligation to pursue global nuclear disarmament.

In that case, the Court first acknowledged States' general obligations to protect the environment, affirming "[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control."⁵⁰

Furthermore in connection to the current request, the Court recognized that

"[...] the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn."⁵¹

This affirmation, made in 1996, remains true and is particularly relevant for the current request for an advisory opinion.⁵² It not only considers the potential catastrophic scenarios that could affect the environment, but also recognizes the environment as a living space, the importance of the rights of present and future generations and their right to life and health. It also points to the obligation of States to protect the environment, which is considered a global commons. On the basis of the Court's opinion in *Nuclear Weapons* and decisions taken in other proceedings, contentious and non-contentious, we are confident that the Court will answer the questions contained in Resolution A/RES/77/276 in a manner that contributes positively to the development and clarification of the relevant international law.

IV. The Court is competent to issue an advisory opinion on climate change

This section discusses the requirements necessary for the ICJ to issue an advisory opinion. Article 96(1) of the UN Charter and Article 65(1) of the ICJ Statute regulate the competence of the UNGA to request an advisory opinion from the ICJ. Accordingly, the Court may issue an advisory opinion if the following

needs, wants, and values of a particular community or group of people. It is true that all global commons are community interests because they affect the well-being of all people, but not all community interests are global commons. To exemplify, in *Chagos Marine Protected Area Arbitration*, between Mauritius and the United Kingdom (UK), the UK argued that there was a community interest in establishing a marine protected area around the Chagos archipelago, against the objection of Mauritius which claimed sovereignty over the archipelago. (See *Chagos Marine Protected Area Arbitration* (Mauritius v. U.K.), paras. 127-134 (Perm. Ct. Arb. Mar. 18, 2015)) In this regard, while establishing a protected marine zone might have been a community interest, it was certainly not part of the global commons, as Mauritius claimed sovereignty over the archipelago, and it was certainly not deemed to be a part of the *res communis*. Therefore, it can be argued that global commons are a subset of community interests, as they represent a common interest of all people, but they do not encompass all community interests. Additionally, the global commons refer to physical areas beyond national jurisdiction, whereas the common interests can be goals or interests shared by the international community, such as global efforts to control and reduce climate change or achieve sustainable development goals. (See Wolfrum R, "Identifying Community Interests in International Law: Common Spaces and Beyond," *Community Interests Across International Law* (Oxford University Press 2018), p. 20.)

⁴⁹ See *Legality of the Threat of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports, 1996, para. 29.

⁵⁰ See *Legality of the Threat of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports, 1996, para. 29.

⁵¹ See *Legality of the Threat of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports, 1996, para. 29.

⁵² See E. Sobenes et al, *The Environment Through the Lens of International Courts and Tribunals*, (2022).

two requisites are satisfied: (a) the request for an advisory opinion was submitted by an authorised body competent to submit that request - in this case the UNGA - and (b) the request concerns a legal question.

As discussed below, in the case at hand, we consider that both requisites are satisfied, and, considering its consensus adoption and the fact 132 countries co-sponsored the Resolution A/RES/77/276, there is no evident disagreement on this point. Nonetheless, we find it useful to explain why we consider there are no compelling grounds for the Court to decline to answer the legal questions contained in Resolution A/RES/77/276 (section c below).

a. The request has been made by an authorised body: The General Assembly

The request for an advisory opinion has been submitted by the General Assembly, which is a competent body pursuant to article 96 (1) of the UN Charter. Article 96 (1) authorises the UNGA to request an advisory opinion from the ICJ “on any legal question”, regardless of whether that legal question arises within the scope of its activities or not. What is necessary is that the question fall within the UN’s jurisdiction⁵³. The underlying issues contained in the resolution are indeed covered by the sphere of the UN’s jurisdiction, even if some are not mentioned explicitly in the Charter. This is so because the Charter confers it with the power and duty to encourage “[...] international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms.”⁵⁴

When the UNGA requests an advisory opinion from the Court in accordance with its own rules the presumption is that the Assembly has exercised its power validly. As the Court has explained, “[a] resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ’s rules of procedure and is declared by its President to have been so passed, must be presumed to have been validly adopted.”⁵⁵ Moreover, in the present case, the UNGA adopted the resolution by consensus among member States.

Furthermore, and unlike other UN organs and agencies, the UNGA’s power to request advisory opinions is not restricted. As properly described by Professor Kolb, the UNGA and the Security Council “have [...] ‘an originating jurisdiction’ rather than a specially limited one, the originating jurisdiction being derived not from the authorization of some other body, but as of right under the Charter”⁵⁶. Indeed, the scope of functions of the UNGA is extremely broad. The Court has observed “that Article 10 of the Charter has conferred upon the General Assembly a competence relating to “any questions or any matters” within the scope of the Charter.”⁵⁷

On only one occasion has the ICJ declined to provide an advisory opinion on the basis that this first requirement was not met. In *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* the Court declined to give its advisory opinion on the ground that the request submitted by the World Health Organization did not relate to a question arising “within the scope of [the] activities” of the World Health

⁵³ See Kelsen H, *The Law of the United Nations* (Published under the auspices of the London Institute of World Affairs by Stevens & Sons 1951), at p.546. See also, Kolb R, *The International Court of Justice* (Hart Publishing 2013), p.1034.

⁵⁴ Article 1 (3) of the UN Charter. See also, Article 10 of the Charter on Functions and Powers of the General Assembly.

⁵⁵ *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports 1982, p. 333, para. 21. See also, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) p. 232, para. 11; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, p. 413, para. 21.

⁵⁶ See also, Kolb R, *The International Court of Justice* (Hart Publishing 2013) at p.1038

⁵⁷ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226, para. 17

Organization⁵⁸. As explained above, this limitation does not apply in the present case, where questions submitted are clearly within the UNGA's competence.

Because the request for an advisory opinion has been validly adopted by a duly authorised organ – the UNGA⁵⁹ – acting within its competence, and raises questions directly relating to its mandate⁶⁰, the first requirement for the exercise of the advisory jurisdiction under Article 65(1) of the Statute of the Court is fully satisfied.

b. The Advisory Opinion on Climate Change concerns a legal question

Article 96(1) of the UN Charter and Article 65(1) of the Statute provide that the Court may give an advisory opinion only on a “legal question.” In addressing this requirement, the Court has explained that “questions... framed in terms of law and rais[ing] problems of international law... are by their very nature susceptible of a reply based on law” and “therefore they appear... to be questions of a legal character.”⁶¹

Further, the Court has noted that “a request from the General Assembly for an advisory opinion to examine a situation by reference to international law concerns a legal question.”⁶²

The questions put to the Court by the General Assembly in A/RES/77/276 are of a legal nature, since the Court is asked to clarify the obligations of States under international law to ensure the protection of the climate system and other parts of the environment for present and future generations, as well as the legal consequences of the breach of such obligations, in accordance with the relevant principles and rules of international law. To do this, the Court must identify the existing principles and rules, interpret them, and apply them, thus offering a reply to the question posed based on law. As noted by Professor Shabtai Rosenne, the Court's task is “to ensure respect for international law, of which it is the organ”⁶³ and “[o]wing to the organic relation now existing between the Court and the United Nations, the Court regards itself as being under the duty of participating, within its competence, in the activities of the Organization, and no State can stop that participation.”⁶⁴

Even if one considers that a question may have political implications, this does not “deprive the Court of a competence expressly conferred on it by its Statute”⁶⁵ and the UN Charter. Many valid legal questions have inevitable political implications. In the words of the Court, “the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have, are of no relevance in the establishment of its jurisdiction to give such an opinion.”⁶⁶ Furthermore, “[t]he Court cannot attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task, the interpretation of a treaty provision. It is not concerned with the motives which may have inspired this request.”⁶⁷

⁵⁸ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, I. C. J. Reports 1996, p. 66, para.23.

⁵⁹ See Article 96.1 of the UN Charter.

⁶⁰ Matters related to climate change and human rights fall within the scope of articles 10 to 14 of the UN Charter and relate to the maintenance of international peace and security as per the provisions of article 11.1 of the UN Charter.

⁶¹ *Western Sahara*, Advisory Opinion, ICJ Reports 1975, p. 18, para. 15. See also, *Declaration of Independence in Respect of Kosovo (Advisory Opinion)*, pp. 414-415, para. 25; *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, pp. 233-234, para. 13.

⁶² *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, p. 95, para. 58.

⁶³ *Corfu Channel case*, Judgment of April 9th, 1949, ICJ Reports 1949, p. 4, at p. 25.

⁶⁴ Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996*, Vol. II, Jurisdiction (1997), p. 1021.

⁶⁵ *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports 1973, p. 172, para. 14.

⁶⁶ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226, para. 13.

⁶⁷ *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter)*, Advisory Opinion, 1948, ICJ

Furthermore, as the Court has previously clarified “the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have, are of no relevance in the establishment of its jurisdiction to give such an opinion.”⁶⁸

Nevertheless, some States may advance arguments concerning political implications or suggest that the nature of the questions might lead the Court to make hypothetical or speculative declarations outside the scope of its judicial function. However, this is not sustained in law nor in the practice of the Court. The Court will answer the questions as contained in Resolution A/RES/77/276. As has been previously stated by the Court, “[i]t is [its] duty [...] to envisage the question submitted to it only in the abstract form which has been given to it; nothing (...) refers, either directly or indirectly, to concrete cases or to particular circumstances.”⁶⁹

Conclusively, it follows that the second requirement for the exercise of advisory jurisdiction under Article 65(1) of the Statute of the Court is also fulfilled. Accordingly, with both requirements satisfied, the Court plainly has jurisdiction to issue the advisory opinion on climate change requested by the General Assembly.

c. There are no compelling reasons for the Court to decline to issue an Advisory Opinion on Climate Change

Article 65(1) of the Court’s Statute “leaves the Court a discretion as to whether or not it will give an advisory opinion that has been requested of it, once it has established its competence to do so.”⁷⁰ This, however, is not a common practice. In addressing its discretion, the Court emphasises that “its answer to a request for an advisory opinion ‘represents its participation in the activities of the Organization, and, in principle, should not be refused’”.⁷¹ More specifically, the Court noted that “when a request is made under Article 96 of the Charter (...) the Court should entertain the request and give its opinion unless there are “compelling reasons” to the contrary.”⁷² The consistent jurisprudence of the Court has determined that “only “compelling reasons” should lead the Court to refuse its opinion in response to a request falling within its jurisdiction”.⁷³

Notwithstanding the discretionary character of advisory opinions, the ICJ “has never, in the exercise of this discretionary power, declined to respond to a request for an Advisory Opinion.”⁷⁴ Its predecessor, the PCIJ, did so on one occasion, in the *Status of Eastern Carelia* proceedings. The uniqueness of that request was clearly highlighted by the Court in *Western Sahara*, where it stated that “[i]n [*Eastern Carelia*], one of the States concerned was neither a party to the Statute of the Permanent Court nor, at the time, a Member of the League of Nations, and lack of competence of the League to deal with a dispute involving non-member

Reports 1947-1948, pp. 61-62.

⁶⁸ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226, para. 13.

⁶⁹ *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter)*, Advisory Opinion, 1948, ICJ Reports 1947-1948, pp. 6.1

⁷⁰ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), pp. 234-335, para.14. See also *Construction of a Wall* (Advisory Opinion), p. 156, para. 44, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, pp. 415-416, para. 29.

⁷¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, p. 156, para. 44. See also *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 ICJ, 15, p. 19 (May 28).

⁷² *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion, ICJ Reports 1989, p. 177, para. 37.

⁷³ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, p. 403, para. 30.

⁷⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, p. 156, para. 44

States which refused its intervention was a decisive reason for the Court's declining to give an answer.⁷⁵ Moreover, the PCIJ observed that the question in *Eastern Carelia* concerned an "actual dispute" between two States over territory.⁷⁶ The request for an advisory opinion thus constituted an attempt to secure a judgement resolving the dispute, without the consent of one of the disputing States.⁷⁷ None of the above applies to A/RES/77/276.

Despite the above, there may be some States that may consider opposing the request, or at least certain elements that it contains. For example, such States may question the motives of States that supported it in the General Assembly,⁷⁸ and assert that any opinion issued by the Court would have not have practical effect,⁷⁹ or may argue that the Court is not in a position to predict or address the effects of climate change, the obligations, or the scientific data. These arguments are not new and have been rejected by the Court in the past when deciding that alleged motives of particular States or possible future impacts of an opinion are irrelevant.⁸⁰ With regard to science, it is important to emphasise that the Court is being asked about the law and not about science as such; the questions are legal in nature and the Court is perfectly equipped to provide the legal answers. As the previous president of the Court himself stated, while the Court is not an arbiter of technical disputes and must decide on the law, the law is influenced by scientific and technological changes.⁸¹ As outlined in Article 50 of the ICJ Statute, the Court is permitted to appoint its own experts to fully appreciate the scientific issues raised and is no stranger to handling scientific questions.⁸²

There are no compelling reasons for the Court to refuse to give the advisory opinion. To the contrary, there are compelling reasons for issuing such an advisory opinion. These are identified in Resolution A/RES/77/276; its preambular paragraphs highlight, among others, the following compelling reasons to issue an advisory opinion:

"Recognizing that climate change is an unprecedented challenge of civilizational proportions, and that the well-being of present and future generations of humankind depends on our immediate and urgent response to it,

Recalling its resolution 77/165 of 14 December 2022 and all its other resolutions and decisions relating to the protection of the global climate for present and future generations of humankind, and its resolution 76/300 of 28 July 2022 on the human right to a clean, healthy, and sustainable environment,

⁷⁵ *Western Sahara*, Advisory Opinion, ICJ Reports 1975, pp.23-24, para. 30.

⁷⁶ *Status of Eastern Carelia*, Advisory Opinion of 23 July 1923, Permanent Court of International Justice, p. 28

⁷⁷ *Id.*, at p. 29.

⁷⁸ See, e.g., *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, para.32 ("One argument, advanced by a number of participants in the present proceedings, concerns the motives behind the request. . . . According to those participants, . . . the opinion of the Court was being sought not in order to assist the General Assembly but rather to serve the interests of one State and that the Court should, therefore, decline to respond.").

⁷⁹ See, e.g., *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, para. 34. ("It was also suggested by some of those participating in the proceedings that [the request for an Advisory Opinion] gave no indication of the purpose for which the General Assembly needed the Court's opinion and that there was nothing to indicate that the opinion would have any useful legal effect. This argument cannot be accepted. The Court has consistently made clear that it is for the organ which requests the opinion, and not for the Court, to determine whether it needs the opinion for the proper performance of its functions").

⁸⁰ See, e.g., *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, paras. 32-35.

⁸¹ General Assembly, 6th Committee, Seventy-Third Session, 25th & 26th Meeting Ga/L/3583, 26 October 2018. See: <https://press.un.org/en/2018/gal3583.doc.htm>

⁸² ICJ Statute, Article 50. E.g. *Whaling in the Antarctic, Australia v Japan: New Zealand intervening*, Judgment, 31 March 2014, [2014] ICJ Rep 226.

Recalling also its resolution 70/1 of 21 October 2015 entitled “Transforming our world: the 2030 Agenda for Sustainable Development.

Recalling further Human Rights Council resolution 50/9 of 7 July 2022 and all previous resolutions of the Human Rights Council on human rights and climate change, and Human Rights Council resolution 48/13 of 8 October 2021, as well as the need to ensure gender equality and empowerment of women,

(...)

Noting with profound alarm that emissions of greenhouse gases continue to rise despite the fact that all countries, in particular developing countries, are vulnerable to the adverse effects of climate change and that those that are particularly vulnerable to the adverse effects of climate change and have significant capacity constraints, such as the least developed countries and small island developing States, are already experiencing an increase in such effects, including persistent drought and extreme weather events, land loss and degradation, sea level rise, coastal erosion, ocean acidification, and the retreat of mountain glaciers, leading to displacement of affected persons and further threatening food security, water availability and livelihoods, as well as efforts to eradicate poverty in all its forms and dimensions and achieve sustainable development,

Noting with utmost concern the scientific consensus, expressed inter alia in the reports of the Intergovernmental Panel on Climate Change, including that anthropogenic emissions of greenhouse gases are unequivocally the dominant cause of the global warming observed since the mid-20th century, that human-induced climate change, including more frequent and intense extreme events, has caused widespread adverse impacts and related losses and damages to nature and people, beyond natural climate variability, and that across sectors and regions the most vulnerable people and systems are observed to be disproportionately affected,

Acknowledging that as temperatures rise, impacts from climate and weather extremes, as well as slow onset events, will pose an ever-greater social, cultural, economic, and environmental threat,

(...)”

The global Youth and Civil Society Alliance strongly endorses these findings. As this language makes clear, the advisory opinion requested by the General Assembly is intended to provide necessary legal guidance to address matters that have long been among the General Assembly’s highest priorities: intergenerational equity, sustainable development, the Sustainable Development Goals, environmental protection, climate change mitigation and adaptation, and the protection of human rights, among others.

In carrying out its role in environmental protection, the General Assembly will undertake, inter alia, a continuing responsibility to ensure that climate change mitigation and adaptation is fulfilled. In performing that function, the General Assembly would benefit from the Court’s advisory opinion.

The Court’s response to the first question would assist the General Assembly in establishing the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations.

The Court’s response to the second question is necessary for the General Assembly to determine the

legal consequences under international law that flow from States which, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, in particular, with respect to vulnerable States and with respect to people and individuals for present and future generations.

In conclusion, the Court is competent to issue the advisory opinion requested by the General Assembly. The General Assembly is an organ duly authorised to seek an advisory opinion from the Court, and the request raises questions of a legal character. The Court's exercise of its advisory jurisdiction will not circumvent any principle of international law. There are no compelling reasons for the Court to decline to exercise the advisory jurisdiction which the Charter and the Statute have conferred upon it. On this basis and in keeping with past precedent, the Court should exercise that jurisdiction and render the advisory opinion requested by the General Assembly. The Court's response to these questions will furnish the General Assembly with legal tools to further environmental protection and climate change mitigation and adaptation.

V. The Legal Questions

The General Assembly has posed two legal questions to the Court. The first calls upon the Court to identify the legal obligations of States concerning climate change, and the second asks the Court to specify the legal consequences from breaching those obligations. In addition, the questions are preceded by a preamble that focuses the Court's attention on the most important treaties and principles of law to be considered when answering the UNGA's request for an advisory opinion.

Below, we explain the *key legal elements of the questions* posed to the ICJ and our suggested answers to them in the following section.

a. The preamble of the questions

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

In formulating the questions, the UNGA has identified specific legal principles and pertinent treaties that the Court would have to consider while responding to the legal questions. Accordingly, the legal principles to take into account are: (i) The duty of due diligence, (ii) The principle of prevention of significant harm to the environment, and (iii) The duty to protect and preserve the marine environment and (iv) The obligation to protect, respect and fulfill human rights. The duties of due diligence and prevention of significant harm to the environment are reflected in numerous treaties and recognized by the ICJ as components of customary international law.⁸³ The duty to protect and preserve the marine environment is reflected in the United Nations Convention on the Law of the Sea, a convention ratified by 167 States.⁸⁴

Similarly, the UNGA has also identified a number of international agreements that echo several of the above principles and establish additional obligations in relation to climate change. These are identified by the UNGA as follows: (i) The Charter of the United Nations, (ii) The International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, (iii) The United Nations Framework

⁸³ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Rep. 226.

⁸⁴ UNCLOS art. 193.

Convention on Climate Change, (iv) The Paris Agreement, (v) The United Nations Convention on the Law of the Sea (vi) The Universal Declaration of Human Rights.

The legal principles and agreements mentioned do not form an exhaustive list, and the Court, and participating States and international organisations, have discretion to expand beyond this list as they deem appropriate. Further, we note that all these treaties and agreements contain several legal principles of international law, which we will draw on in our answer to the questions posed to the Court.

b. The legal elements of the First Legal Question

The first question before the Court asks:

“(1) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations;”

The global Youth and Civil Society Alliance observe that the first question calls upon the Court to identify and consider the rules of international law pertaining to the environment, human rights, and climate change, and to provide an answer on the State’s obligations under those rules “to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations”. The question contains four legal elements:

- i. *The obligations of States under international law*: This refers to the legal duties that States owe towards each other and towards the international community as a whole. These obligations are typically set out in international treaties; customary international law; and general principles of international law.⁸⁵
- ii. *To ensure the protection of the climate system and other parts of the environment*: This refers to the need to protect the environment, including the climate system⁸⁶ from harm caused by human activities such as the emission of greenhouse gases.
- iii. *Anthropogenic emissions of greenhouse gases*: This refers to the release of gases such as carbon dioxide, methane, and nitrous oxide into the atmosphere as a result of human activities such as burning fossil fuels, deforestation, agriculture and others.
- iv. *For present and future generations*: This refers to the need to protect the environment for the benefit of current and future generations. This need is reflected in the principle of intergenerational equity, an important principle of international environmental law.

c. The legal elements of the Second Legal Question

The second question before the Court asks:

“(2) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:

⁸⁵ ICJ Statute Article 38(1).

⁸⁶ See fn 2 above.

(i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?

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

The second question calls upon the Court to determine the legal consequences of the infringement of the obligations identified in the first question, in particular, with respect to small island developing States, given their particular vulnerability to the adverse effects on climate change. Significantly, the first part of the question concerns *States*, while the second part of the question concerns *peoples* and *individuals* (of both present and future generations).

The *first paragraph* of the Second Question acts as a preamble which informs the two sub questions. It contains the following key legal elements:

- i. *Legal Consequences in case of Violation of Obligations under international law*: The question presupposes that States have obligations under international law to prevent harm to the environment and the climate system. These obligations refer to those identified in the first question.
- ii. *State actions and inactions*: The question notes that States can cause harm to the environment by acting or failing to act to protect the environment. Therefore, legal consequences will be derived from acting or failing to act.
- iii. *Causation*: The question raises the issue of causation, specifically the circumstances under which States can be held responsible for causing significant harm to the climate system and other parts of the environment.
- iv. *State responsibility*: The question raises the issue of legal responsibility of States for their actions and inactions that cause significant harm to the climate system and the environment.
- v. *Reparation*: The first part of the question calls for the identification of legal consequences for breaches of the obligations.

The *second paragraph* of this question contains the first sub question and further narrows down the general question by focusing the attention of the Court in analyzing state responsibility concerning:

- i. *Special circumstances of Small Island Developing States*: The question highlights the special circumstances of small island developing States, including their vulnerability to the adverse effects of climate change, which may require additional legal protections.

The *third paragraph* of this question contains the second sub question and specifies the general question to focus the Court’s attention on human rights and intergenerational and intragenerational equity. Particularly, the specific elements of this sub question are:

- ii. *Peoples and individuals of present generations affected by adverse effects of climate change*: This refers to state responsibility toward the individuals and groups who are witnessing negative impacts of climate change now or over the course of their lives. This also implies, when applicable, specific human rights law reparations owed to individuals and peoples currently affected by climate change. This question takes into account the principle of intragenerational equity.
- iii. *Peoples and individuals of future generations affected by adverse effects of climate change*: This refers

to the obligation of States to take into account the individuals and groups who will most likely be impacted by the adverse effects of climate change in the future. We consider that this part of the question must be approached through the application of the principle of intergenerational equity.

d. Law applicable to the Advisory Opinion

The ICJ proceedings are governed by the applicable law clause stated in Article 38 of the Court's Statute, which outlines the sources of international law. It specifies that the Court must apply the following sources in resolving disputes that are submitted for its decision:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

Article 38 is very broad and calls for the application of treaty law, customary international law (CIL), general principles of law, judicial precedent and academic scholarship. In the case at hand, climate change law, beside being broad and complex, is a topic scattered among several treaties, principles, and legal opinions. An answer to the legal questions posed must therefore draw upon several sources of law in order to provide an informed answer.

Derived from the sources of law that the Court is empowered to utilise in answering the advisory opinion, we have identified the following universally applicable customary rules and general principles:

- the principles of intergenerational equity, intragenerational equity,⁸⁷ and the precautionary principle, which are emerging customary international law obligations;
- the principle of equity under international environmental law, which forms part of customary international law.
- the principle of prevention of transboundary harm which entails the obligation to exercise due diligence, the obligation to conduct an environmental impact assessment, the obligation to notify and consult in good faith, and the duty to compensate for harm;
- the duty to cooperate, the principle of solidarity, the principle of common but differentiated responsibilities and respective capabilities, the obligation of good faith, and the public participation principle;
- the obligation to protect, respect and fulfil human rights;
- the obligation to provide remedies for human rights violations arising from climate change;

⁸⁷ "Intragenerational equity is concerned with equity between people of the same generation and aims to assure justice among human beings that are alive today, as reflected in Rio Principle 6, mandating particular priority for the special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable." D. Shelton *Oxford Handbook of International Environmental Law*, Chapter 1 - Equity, 2008.

- the duty to protect the marine environment.

It is uncontroversial that principles which are widely recognized to form part of customary international law, such as the principle of the prevention of transboundary harm,⁸⁸ are a valid source of law for the ICJ to apply in the present case.

Additionally, we emphasise strongly that *emerging* customary international law obligations, such as the principle of intergenerational equity, should also be upheld because they reflect the evolving norms and practices of the international community. Customary international law arises from the general and consistent practice of States, accompanied by a sense of legal obligation (*opinio juris*). Upholding both customary international law and emerging customary international law obligations promotes stability and predictability in international law, being fundamental to the protection of human rights, the mitigation of climate change and the promotion of international justice. As new norms and practices emerge, it is essential that these reflect the values and principles of the international community as a whole.

e. Relevant rules of treaty interpretation

The rules of treaty interpretation are laid out in articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT).

First, treaties are interpreted in “good faith” in accordance with the ordinary meaning of the words, in their context, and in light of their object and purpose.⁸⁹ Second, the “context” under which a treaty is to be interpreted includes its preamble and annexes, including any agreement or instrument relating to the treaty or signed in connection with the conclusion of that treaty.⁹⁰ Third, when interpreting a treaty, the interpreter shall also take into account, together with the context, any subsequent agreement made by the parties concerning the interpretation or application of the treaty and any applicable rule of international law.⁹¹ Fourth, if the parties have allocated a particular meaning to a term, that meaning will prevail.⁹²

If the meaning of the treaty is still obscure or ambiguous, the interpreter shall recourse to supplementary means of interpretation in the *travaux préparatoires* (legislative history) to confirm or supplement the interpretation.⁹³

In particular, we consider Article 31(3)(c) of the VCLT to be crucial to the interpretation of States’ climate-related obligations under international law. Legal norms and standards relevant to climate change are spread out over a range of different international legal regimes, including public international law, international environmental law, international human rights law, and law of the sea. In this context, article 31(3)(c) requires that tribunals take into account “any relevant rules of international law applicable in the relations between the parties” when interpreting treaties. In other words, treaties should be interpreted in

⁸⁸ As recognized in *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Rep. 226.

⁸⁹ VCLT, art. 31.1.

⁹⁰ VCLT, art. 31.2.

⁹¹ VCLT, art. 31.3.

⁹² VCLT, art. 31.4.

⁹³ VCLT, art. 32. In addition to these general rules of interpretation, interpreters often use other interpretation techniques, including a *contratio* principle, whereby a right or obligation would not exist where it is not explicitly mentioned in a treaty. Additionally, the *lex posterior derogat legi priori* principle states that the later rule should prevail in cases where two possible rules could apply to the same issue. Similarly, the principle *lex specialis derogat legi generali* dictates that the specific rule should prevail over the general rule. See Murphy Sean D. 2018. *Principles of International Law* (version Third edition) Third ed. St. Paul MN: West Academic Publishing, pp. 96-98.

light of existing obligations emerging not only from that particular treaty regime, but from international law as a whole. This includes other treaties, customary international law and general principles of international law.

This provision has sometimes been described as enshrining a principle of “systemic integration”.⁹⁴ The principle has been widely recognized in academic literature,⁹⁵ in decisions of international tribunals (including the ICJ),⁹⁶ and in the work of expert bodies such as the International Law Commission.⁹⁷ The principle is important in contexts such as climate change, where different legal regimes operating in isolation from one another could give rise to conflicting legal standards and obligations. One core advantage of an ICJ advisory opinion is that the ICJ’s jurisdiction is not limited to any one single area or specialisation of international law,⁹⁸ meaning that it can authoritatively harmonise a wide range of obligations.

Article 31(3)(c) and the principle of systemic integration inform the approach taken by the global Youth and Civil Society Alliance in this handbook. Rather than examining international agreements (such as the Paris Agreement) in isolation, we interpret and situate them in the context of a wide range of norms and principles, including those derived from international environmental law, international human rights law, and law of the sea.

VI. Answers to the Questions of Resolution A/RES/77/276

The following sections answer, based on above analysis, the questions posed by the General Assembly. These sections also explain the underlying legal rules and principles that support the global Youth and Civil Society Alliance’s position.

It should firstly be noted, however, that the Court will give a specific answer to each of the questions

⁹⁴ The principle is also sometimes referred to by other names, such as “principe d’integration”; “systemic interpretation”; “systemic harmonization”; “systemic interpretation”; and “harmonious interpretation”. See Panos Merkouris, *Principle of Systemic Integration*, in Max Planck Encyclopedias of International Law (August 2020).

⁹⁵ See e.g. Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention*, 54 ICLQ 279 (2005); Adamantia Rachovitsa, *The Principle of Systemic Integration in Human Rights Law*, 66 ICLQ 557 (2017) (noting both advantages and limitations of the principle in the context of human rights).

⁹⁶ See e.g. *Golder v. United Kingdom*, Merits and Just Satisfaction, ECtHR, 21 February 1975, Series A No 18, para. 35; *Prosecutor v Anto Furundžija*, Judgment (Declaration of Judge Patrick Robinson), ICTY, 21 July 2000, Case No IT-95-17/1-A, para. 283; *Banković and Others v Belgium and Others*, Decision on Admissibility, ECtHR, 12 December 2001, ECHR 2001-XII 333, para. 57; *Oil Platforms, Iran v United States*, Preliminary Objections, 12 December 1996, [1996] ICJ Rep 803., para. 41; *Council v Front Polisario*, Judgment of the Court, 21 December 2016, Case C-104/16 P, ECLI:EU:C:2016:973, paras. 86ff; *Al-Adsani v United Kingdom*, Merits, ECtHR, 21 November 2001, ECHR 2001-XI 79, paras. 55-56; *Arbitration Regarding the Iron Rhine (‘Ijzeren Rijn’) Railway*, Belgium v Netherlands, Award, 24 May 2005, 27 RIAA 35, para. 59; *Ambiente Ufficio SpA and Others v Argentina*, Decision on Jurisdiction and Admissibility, 8 February 2013, ICSID Case No ARB/08/9, paras. 603-28; *Saluka Investments BV v Czech Republic*, Partial Award, 17 March 2006, PCA Case No 2001-04, para. 254; *Certain Questions of Mutual Assistance in Criminal Matters, Djibouti v France*, Judgment, 4 June 2008, [2008] ICJ Rep 177, paras. 112-13; *Selmouni v France*, Merits and Just Satisfaction, ECtHR, 28 July 1999, ECHR 1999-V 149, paras. 97-98; *Prosecutor v Slobodan Milošević*, Decision on Assigned Counsel’s Motion for Withdrawal, ICTY, 7 December 2004, Case No IT-02-54-T, para. A.5 and note 52; *Southern Bluefin Tuna cases, New Zealand and Australia v Japan*, Provisional Measures (Separate Opinion of Judge Treves), 27 August 1999, 1999 ITLOS Reports 280, para. 10; *Whaling in the Antarctic, Australia v Japan: New Zealand intervening*, Judgment (Separate Opinion of Judge Cañado Trindade), 31 March 2014, [2014] ICJ Rep 226, para. 26.

⁹⁷ International Law Commission, ‘Fragmentation of International Law; Difficulties Arising from the Diversification and Expansion of International Law - Report of the Study Group of the International Law Commission - Finalised by Martti Koskenniemi’ (13 April 2006) UN Doc A/CN.4/L.682, para. 426.

⁹⁸ In contrast to, for example, the Inter-American Court of Human Rights (limited to consideration of regional human rights); and the International Tribunal of the Law of the Sea (limited to maritime law and the United Nations Convention on the Law of the Sea).

referred. Those answers will be based on the reasoning which the Court will set out before reaching the operative part of the advisory opinion. Our task is therefore to set out, in a similar manner, the legal elements necessary to establish the existence of State obligations (as asked by the first question to the Court), and to determine the legal consequences of those obligations (as asked by the second question to the Court).

For clarity, we provide a brief answer to each question, before stating a more extensive justification based on discrete legal elements.

a. Answers to the First Question

Based on an approach which integrates several fields of international law, our position is as follows:

- i. The overarching legal obligation which States owe to each other and to present and future generations is to ensure the protection and stability of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases.
- i. The State obligation to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases has been firmly established based on customary international law, general principles of law and treaty law, including in the work of the United Nations and the rulings of domestic and international courts and tribunals, acknowledgment by States themselves, and through scholarly consensus.
- ii. Protecting the environment and the climate system requires the protection of the environment for present and future generations, taking into account the principles of intergenerational equity and intragenerational equity.
- iii. Environmental protection is closely connected to the protection of human rights. It is often the case that environmental concerns can lead to violations of human rights, just as human rights cannot be enjoyed when severe pollution and climate change impacts curtail, among others, the access to health, clean water, clean air, a healthy ecosystem, life, nutrition, housing, cultural and spiritual practices, and access to property.
- iv. International environmental law principles inform the application of the law and further create legal obligations on all States. On the one hand, they provide guidelines for judges and lawyers in deciding individual cases and inform policy making. On the other hand, they limit the discretionary powers of courts and States, and act as rules of law when they fill gaps in international law regimes. As directly applicable rules, international environmental law principles create international legal obligations that are binding on States.

The inescapable conclusion is that the protection of the climate system and other elements of the environment from anthropogenic greenhouse gas emissions is a significant legal obligation of States, established through customary international law, general principles of law, treaty law and domestic and international legal decisions. This obligation encompasses the principle of intergenerational and intragenerational equity, emphasising the need to protect the environment for present and future generations. Additionally, obligations of environmental protection and human rights are interrelated, and violations of either can have a direct impact on the other. To ensure environmental protection, international environmental law principles provide guidelines for deciding particular cases and inform public policy. Further, they limit the discretionary powers of courts and assist in legislative interpretation where existing law would otherwise contain loopholes or other elements of uncertainty. Finally, they also

act as directly applicable rules, thus, creating legal obligations for all States. As such, it is crucial to apply these principles when determining the legal obligations of States concerning climate change.

The following are the legal elements which inform and support the Court’s answer to the first question.

1. Equity, Intergenerational equity, intragenerational equity and climate change

As we consider the impact of climate change on future generations, the principle of intergenerational equity becomes increasingly relevant. Intergenerational equity is a concept rooted in international law, which derives from the broader principle of equity in international law. Intra-generational equity is also rooted in the principle of equity. In the context of environmental law, it is related closely to the principle of common but differentiated responsibilities and respective capabilities (CBDRR).

As a general principle of international law, equity promotes fairness and justice in the distribution of rights. More specifically, intergenerational equity highlights the importance of considering the long-term consequences of our actions on future generations. Although distinct, both concepts are highly interrelated and essential in addressing the climate change crisis.

In answering the questions posed to the Court, we elaborate both principles, including the additional rights and obligations that arise from these notions.

i. Equity under international environmental law

As a general principle of public international law, equity requires international tribunals to consider justice and fairness when establishing, operating, or applying a rule of law.⁹⁹ The ICJ has recognized that “the legal concept of equity is a general principle directly applicable as law” that calls for adjudicators – such as the Court – to apply this principle in interpreting the relevant rules of international law.¹⁰⁰ Therefore, equity plays a crucial role in international environmental law and climate change law by infusing elements of reasonableness and individualised justice.¹⁰¹

Equity is present in treaties and declarations related to the protection of the environment. It is strongly reflected in the Rio Declaration on Environment and Development which is a non-binding but highly influential statement of international environmental law signed by 175 countries. Recognizing the importance of sustainable development and intergenerational equity, Principle 3 of the Rio Declaration states that the right to development must be fulfilled in a way that meets the developmental and environmental needs of present and future generations.¹⁰² Equity is also reflected in the principle of “common but differentiated responsibilities and respective capabilities” (CBDRR), which recognizes that although climate change is a common concern, different States have different levels of responsibility in its mitigation, adaptation, and when compensating for loss and damage.¹⁰³ The UNFCCC¹⁰⁴ and the PA¹⁰⁵

⁹⁹ Sands P and others, *Principles of International Environmental Law* (Cambridge University Press 2019), p. 119.

¹⁰⁰ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, ICJ Reports 1982, p. 18, para. 71.

¹⁰¹ Francesco Francioni, “Equity in International Law” (November 2020) in *Max Planck Encyclopedia of Public International Law*, in Professor Anne Peters (2021–) and Professor Rüdiger Wolfrum (2004–2020), online ed. 7. See also, *Frontier Dispute (Burkina Faso v. Mali)*, Judgment, ICJ. Reports 1986, para. 28.

¹⁰² Rio Declaration, principle 3.

¹⁰³ UN Secretary General, *Gaps in international environmental law and environment-related instruments: towards a global pact for the environment*, UN Doc A/73/419, 30 November 2018, para. 21.

¹⁰⁴ UNFCCC, art. 3.3.

¹⁰⁵ PA, preamble and art. 2.2. Preamble “In pursuit of the objective of the Convention, and being guided by its principles, including the principle of equity and common but differentiated responsibilities and respective capabilities, in the light of

recognize the importance of equity and acknowledge the disproportionate impacts of climate change on developing States.¹⁰⁶

Equity is also a relevant principle in national climate change policies, especially as it relates to equality and non-discrimination in International Human Rights Law.¹⁰⁷ As the Office of the High Commissioner for Human Rights (OHCHR) has recognized, ensuring equity in climate action is a key human rights obligation in the face of climate change, requiring efforts to mitigate and adapt to the impacts of climate change to benefit people in developing countries, indigenous peoples, people in vulnerable situations, and future generations.¹⁰⁸

Equity requires States to acknowledge and address the disproportionate impacts of climate change, taking into account developing States, island nations, indigenous peoples, people in vulnerable situations, and future generations. States must fulfil the right to development¹⁰⁹ in a way that meets the developmental and environmental needs of present and future generations. Equity requires States to take differentiated approaches in complying with international obligations based on factual differences between and within States. Overall, equity requires States to prioritise the needs of those most affected by climate change and take action to address inequalities and injustices related to environmental issues.

ii. Intergenerational Equity: The Concept.

The principle of intergenerational equity states that the Earth is a shared inheritance among all individuals, including those of past, present, and future generations. While accepting that the present generation has the right to use the Earth and its natural resources to meet its own needs, it must pass the Earth on to future generations in a stable condition; no worse than which it was received. The principle implies both equity among generations in terms of access to resources, and that current and future generations can meet their respective needs. This principle promotes fairness among generations concerning the utilisation and preservation of the environment and its natural resources.¹¹⁰ Accordingly, it highlights the temporally distributive nature of the impacts of climate change, as well as States' responses to those impacts. Both must reflect considerations of intertemporal distributive justice.

Up to this date, there is no general international law instrument which defines the core elements of

different national circumstances”.

¹⁰⁶ UNFCCC, art. 4.

¹⁰⁷ In this sense, the UN Special Rapporteur on the promotion and protection of human rights in the context of climate change has recognized that “the intersection of gender with race, class, ethnicity, sexuality, indigenous identity, age, disability, income, migrant status and geographical location often compound vulnerability to climate change impacts, exacerbate inequity and create further injustice”. Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change, Promotion and protection of human rights in the context of climate change mitigation, loss and damage and participation, A/77/226, Jul. 26, 2022, para. 29. See also, OHCHR, Frequently Asked Questions on Human Rights and Climate Change. Fact Sheet No. 38, New York & Geneva, 2021, p. 38 & 42.

¹⁰⁸ OHCHR, Frequently Asked Questions on Human Rights and Climate Change. Fact Sheet No. 38, New York & Geneva, 2021, p. 32, 42.

¹⁰⁹ PA, preamble. “Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity”. See also Article 1(1) of the International Covenant on Economic, Social and Cultural Rights.

¹¹⁰ Edith Brown Weiss, “Intergenerational Equity” (April 2011) in Anne Peters (2021-) and Professor Rüdiger Wolfrum (2004–2020), *Max Planck Encyclopedia of Public International Law* (online edn), para. 1.

intergenerational equity, and its legal status is still debatable.¹¹¹ While States have yet to accept the principle as a binding international obligation, there is strong evidence of the application of the principle, in terms of recognition of interests of future generations in international and domestic proceedings, as well as in domestic environmental law and policy.¹¹²

Intergenerational equity is relevant to climate change because it requires that the current generation does not compromise the needs and aspirations of future generations.¹¹³ This principle has been extensively developed in international instruments related to environmental conservation and climate change, which recognize the importance of preserving natural resources for the benefit of present and future generations.¹¹⁴ The global Youth and Civil Society Alliance considers that the upcoming advisory opinion offers a timely opportunity for the Court to clarify the applicability and content of the principle of intergenerational equity. We urge all participating States and international organisations to support this argument; that the status of the principle of intergenerational equity be confirmed as binding international law.

In short, intergenerational equity requires that the current generation considers the impact of its current actions on future generations when making decisions related to climate change and safeguards the preservation and stability of the climate system for the benefit of present and future generations.

Intergenerational equity is closely related to the concept of sustainable development. Sustainable development refers to the ability to meet current needs without compromising future generations' ability to meet their own needs.¹¹⁵ This involves changing practices related to resource exploitation, investment decisions, technological development, and institutional organisation to align with both present and future social, economic, and environmental needs and development.¹¹⁶ Sustainable development is crucial for intergenerational equity and protecting the environment. In its unopposed recognition of the right to a healthy environment, the United Nations General Assembly recognized sustainable development as a condition for achieving human well-being and full enjoyment of human rights for present and future generations.¹¹⁷

The concept of intergenerational equity is recognized in several international treaties, such as the

¹¹¹ A.V. Lowe, "Sustainable Development and Unsustainable Arguments" in A. Boyle and D. Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press, 1999) 19, at pp. 27-9

¹¹² Edith Brown Weiss, "Intergenerational Equity" (April 2006) in Anne Peters (2021-) and Professor Rüdiger Wolfrum (2004-2020), *Max Planck Encyclopedia of Public International Law* (online edn), ¶ 1-3. For recent surveys of the application of intergenerational equity in climate litigation, see Lydia Slobodian, *Defending the Future: Intergenerational Equity in Climate Litigation*, 32 *Georgetown Environmental Law Review* 569 (2020); Sam Bookman & Margaretha Wewerinke-Singh, *Intergenerational Equity* in Margaretha Wewerinke-Singh & Sarah Mead (eds.), *Judges Handbook on Climate Litigation* (forthcoming).

¹¹³ Redgwell, C. "Principles and Emerging Norms in International Law: Intra- and Inter-generational Equity", in Part III Climate Change—Principles and Emerging Norms Concepts in International Law, Ch.9, Oxford University Press in *The Oxford Handbook of International Climate Change Law* (2009).

¹¹⁴ See, *inter alia*, Preamble, International Convention for the Regulation of Whaling, art. 4 of the Convention Concerning the Protection of the World Cultural and Natural Heritage, preamble of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, Art. 1 of the Aarhus Convention, Arts.1 and 3 of the Escazú Agreement

¹¹⁵ Bruntland Report, Report of the World Commission on Environment and Development: Our Common Future, 1987, UN Doc A/42/427, para. 27

¹¹⁶ *Id.* at 85, at para. 27-30

¹¹⁷ A/76/L.75, UNGA, "The Human Right to a Clean, Healthy and Sustainable Environment", 26 July 2022

Convention on Biological Diversity (CBD),¹¹⁸ the World Heritage Convention,¹¹⁹ the United Nations Economic Commission for Europe Water Convention,¹²⁰ the UNFCCC¹²¹ and the Paris Agreement.¹²² International courts and tribunals and as well as domestic judges have also recognized the principle of intergenerational equity as corollary to environmental protection and the preservation of climate systems for the future generations.

At the international level, intergenerational equity has often been referred to interchangeably with concepts of intergenerational “justice” and fairness. Most significantly, in the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, the Court recognized that the environment is not a mere abstraction, but “represents the living space, the quality of life and the very health of human beings, including generations unborn.”¹²³ Furthermore, individual ICJ judges have gone further in recognizing intergenerational equity as a standalone principle approaching the status of a general principle, or part of customary international law. In his Dissenting Opinion, Judge Weeramantry referred to “the principle of intergenerational equity” as an emerging principle which he viewed as an important and rapidly developing principle of contemporary international law.¹²⁴ In the *Pulp Mills Case*, Judge Cançado Trindade noted that “[n]owadays, in 2010, it can hardly be doubted that the acknowledgment of intergenerational equity forms part of conventional wisdom in international environmental law”, marking the influence of the principle and the temporal dimension of climate change.¹²⁵

Other international and regional tribunals have affirmed the legally operative nature of intergenerational justice. For instance, in *Myagna (Sumo) Awas Tingni V. Nicaragua*, the *Inter-American Court of Human Rights* (ICtHR) has acknowledged the intergenerational principle by recognizing the importance of the temporal dimension of international law and upholding indigenous cosmovisions. These cosmovisions view the conservation and preservation of the land as a duty to transmit their culture to future generations. This echoes the notion that the land is not merely a resource to be exploited, but rather a vital component of cultural heritage that must be safeguarded for future generations.¹²⁶

The UN Human Rights Committee has referred to the interests of future generations in two cases concerning the protection of human rights in the climate change context. In *Teitiota v. New Zealand*, the UNHRC noted that climate change and unsustainable development pose significant threats to the right to life for present and future generations.¹²⁷ Similarly, in *Daniel Billy et al v. Australia (Torres Straits Islanders case)*, the UN Human Rights Committee recognized that present generations have a duty to act responsibly and ensure that future generations can meet their developmental and environmental needs.¹²⁸

¹¹⁸ CBD, preamble.

¹¹⁹ Art. 4 of the World Heritage Convention.

¹²⁰ UNECE Water Convention, art. 2.5 (c).

¹²¹ UNFCCC, art. 3.

¹²² PA, preamble.

¹²³ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226, Jul. 8, 1996, para. 29.

¹²⁴ *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, Dissenting Opinion Of Judge Weeramantry, at p. 280.

¹²⁵ *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Separate Opinion, ICJ Reports 2010, p.80 at para. 122. See also, Separate Opinion in the 2014 case *Whaling in the Antarctic* (Australia v Japan: New Zealand Intervening), where he concluded that ‘inter-generational equity marks presence nowadays in a wide range of instruments of international environmental law, and indeed of contemporary public international law’ (para.47)

¹²⁶ ICtHR., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of Aug. 31, 2001. Series C No. 79.

¹²⁷ UNHRC, *Ioane Teitiota v. New Zealand*, Admissibility and Merits Views, No. 2728/2016, CCPR/C/127/D/2728/2016, Sept. 23, 2020, para. 9.4.

¹²⁸ UNHRC, *Daniel Billy et al. v. Australia*, Admissibility and Merits Views, No. 3624/2019, CCPR/C/135/D/3624/2019, Sept. 22, 2022, para. 5.8.

At the domestic level, several rulings¹²⁹ have also recognized the principle of intergenerational equity or related concepts (such as the interests of future generations). Notably in *Future Generations v. Ministry of the Environment*, the Supreme Court of Colombia observed that unborn individuals “deserve to enjoy the same environmental conditions enjoyed by us.”¹³⁰ Similarly, in the case of *Neubauer et al. v. Germany (2021)* regarding the country’s commitments under the Paris Agreement, the Federal Constitutional Court of Germany ruled that the State must consider the long-term impact of emission reductions on the rights of future generations when setting its targets.¹³¹ Specifically, the Court found that failure to take short-term action on climate change impermissibly deferred a burden to future generations, violating their constitutionally-protected rights and freedoms.

In *Goa Foundation vs. Union of India*¹³² the Supreme Court ruled that the four principles—intergenerational equity, sustainable development, the precautionary principle, and the polluter pays principle—are part of the right to life according to the Constitution. The Supreme Court of India has recognized the intergenerational equity principle (future generations must inherit at least as much as the present inheritance) in the context of conserving scarce resources.

All in all, we contend that the principle of intergenerational equity has been incrementally incorporated into customary international law through its widespread acceptance in treaty law, international and domestic court decisions, and its recognition as a crucial element in safeguarding the environment and preserving cultural heritage. The concept emphasises the importance of considering the impact of environmental degradation and climate change on future generations and the duty of present generations to act responsibly as stewards of the planet. This includes the expressly distributional dimensions of climate action and inaction: the principle rightly frames the failure to act as a violation of the needs, rights and interests of young and future persons.

¹²⁹ See *i.e.*, Decision No 14/2020 (VII.6 AB) Constitutional Court of Hungary (9 June 2020) (accessed 26 April 2021). *Dejusticia v Colombia* Corte Suprema de Justicia de Colombia [Supreme Court of Justice of Colombia] (Bogotá 5 April 2018) STC 4360-2018, *DG Khan Cement Co Ltd v Government of Punjab Through Its Chief Secretary, Lahore*, Supreme Court of Pakistan (15 April 2021) CP1290-L/2019, *Goa Foundation v Union of India and Others* Supreme Court of India (21 April 2014) 435 SCC 2012, *H Carlos Schneider S/A Comércio e Indústria e Outro v Ministério Público Federal Superior Tribunal de Justiça* [Superior Court of Justice of Brazil] (Brasília 23 October 2007) Recurso Especial no 650.728/SC (2d Panel), *Juliana v United States* United States Court of Appeals (9 Circuit) (17 January 2020) Case No 18-36082 DC, No 6:15-cv-01517-AA, *Leghari v Federation of Pakistan Lahore High Court* (25 January 2018) Case WP No 25501/2015. *Maria Khan and Others v Federation of Pakistan and Others Lahore High Court* (14 February 2019) Application No 8960 of 2019, *Ministério Público Federal v Ogata Superior Tribunal de Justiça* [Superior Court of Justice of Brazil] (Brasília 14 October 2008) Recurso Especial no 840.918/DF (2d Panel) Relator: Min. Eliana Calmon (Majority Opinion of Min. Antonio Herman Benjamin) (14 October 2008) (Brazil), *Motta v UNIÃO Superior Tribunal de Justiça* [Superior Court of Justice of Brazil] (Brasília 10 November 2009) Recurso Especial no 1.109.778/SC (2d Panel) Relator: Min. Antonio Herman Benjamin (10 November 2009) (Brazil). *Netherlands v Urgenda Foundation* *Gerichtshof Den Haag* [The Hague Court of Appeal] (9 October 2018) Case No 200.178.245/01 ECLI:NL:GHDHA:2018:2591. *Netherlands v Urgenda Foundation* *Raad der Nederlanden* [Supreme Court of the Netherlands] (The Hague 20 December 2019) Case No 19/00135 ECLI:NL:HR: 2019:2006, *Notre Affaire à Tous and Others v France* *Tribunal Administratif de Paris* [Paris Administrative Court] (3 February 2021) Nos 1904967, 1904968, 1904972, 1904976/4-1 (accessed 7 April 2021). *Oposa v Secretary of the Department of Environment and Natural Resources (Factoran)* Supreme Court of the Philippines (Manila 30 July 1993) (1994) 33 ILM 173, *Urgenda Foundation v Netherlands* *Rechtbank den Haag* [The Hague District Court] (24 June 2015) Case No C/09/456689 / HA ZA 13-1396 ECLI:NL:RBDHA:2015:7145. *Waweru, Mwangi (joining) and others v Kenya High Court of Kenya* (2 March 2006) Misc Civil App No 118 of 2004.

¹³⁰ *Andrea Lozano Barragán, Victoria Alexandra Arenas Sánchez, José Daniel Rodríguez Peña y otros Vs. Presidencia de la República, Ministerios de Ambiente y Desarrollo Sostenible y de Agricultura y Desarrollo Rural y otros*, Sala Cas. Civil CSJ Colombia, No. STC4360-2018, Apr. 5, 2018, paras 11.1 - 11.3

¹³¹ *Neubauer et al v Germany* [2022] Bundesverfassungsgericht [BVerfG] [1 BvR 3084/20] (German Federal Constitutional Court), para. 92.

¹³² *Goa Foundation v. Union of India*, (2014) 6 SCC 590. The court also ruled that the public trust doctrine extends to all natural resources and for which the state is a trustee for the people, especially for future generations.

Therefore, States have a duty to consider, prevent and redress the impact of environmental degradation and climate change on future generations and act responsibly as stewards of the planet.

iii. Rights of the child

The UN Convention on the Rights of the Child (UNCRC) is the world's most extensively ratified treaty.¹³³ Children are vulnerable to climate change in two distinct senses. First, children have particular vulnerabilities, which mean that existing impacts of climate change affect them with particular severity. For example, children may be more vulnerable to disease and water contamination in the aftermath of a climate-induced natural disaster. Secondly, children form part of the broader category of future generations. They are therefore more likely to be exposed to the long-term effects of climate change, which will worsen long after existing adults have lived out their lives. UNICEF has emphasised this notion and stated that “[b]ecause of the inter-connected and inter-related nature of rights, (...) virtually all children’s rights may be affected by the climate crisis, potentially impacting the effective implementation of the [UNCRC] as a whole.”¹³⁴ Among others, the most important rights of children concerning intergenerational equity are as follows:

Article 2 of the UNCRC recognizes the *right to freedom from discrimination*. This article requires States to actively identify individuals and groups of children who require special measures, and to recognize and realise their rights.¹³⁵ This obligation involves duties of respect and result¹³⁶ meaning States must not engage in discriminatory policies and must take necessary measures to ensure all children enjoy their Convention rights without discrimination.¹³⁷

It is important to emphasise that climate change affects children unevenly, with vulnerable groups like displaced children, those in poverty, and those with disabilities being disproportionately impacted by its adverse effects.¹³⁸ Inaction on climate change can thus be considered a violation of Article 2 of the UNCRC and a discriminatory policy. The idea that Article 2 protects children from discrimination based on their status as children is still developing, and is the subject of current litigation before regional and domestic courts.¹³⁹ However, UNICEF has stated that failing to recognize the special needs of children can threaten their right to non-discrimination under Article 2. It should also be noted that other international human rights treaties, including the International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social and Cultural Rights, prohibit discrimination in the enjoyment of rights on a wide range of grounds, which include age-based discrimination. Policies that exacerbate climate change can thus be seen as discriminatory against children, as they are more prone to harmful health effects.¹⁴⁰

¹³³ All countries have ratified the UNCRC, with the sole exception of the United States. See Office of the High Commissioner of Human Rights, “Ratification Status for CRC - Convention on the Rights of the Child” ([tbinetnet.ohchr.org](https://tbinetnet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC)) <https://tbinetnet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC> accessed March 10, 2023.

¹³⁴ UNICEF, “The Challenges of Climate Change: Children on the Front Line” (*UNICEF*) <<https://www.unicef-irc.org/publications/716-the-challenges-of-climate-change-children-on-the-front-line.html>> accessed March 9, 2023, at 111.

¹³⁵ Besson S, “The Principle of Non-Discrimination in the Convention on the Rights of the Child - Samantha Besson” [2005] *Children’s Rights: Progress and Perspectives* at 454, 455.

¹³⁶ *Id.* at 454.

¹³⁷ *Id.* at 454.

¹³⁸ Goldhagen JL and others, “Rights, Justice, and Equity: A Global Agenda for Child Health and Wellbeing” (2020) 4 *The Lancet Child & Adolescent Health* 80, at 85.

¹³⁹ *Agostinho v. Portugal*, App. No. 39371/20 (currently pending before the Grand Chamber of the European Court of Human Rights).

¹⁴⁰ UNICEF, “The Challenges of Climate Change: Children on the Front Line” (*UNICEF*) <<https://www.unicef-irc.org/publications/716-the-challenges-of-climate-change-children-on-the-front-line.html>>

Article 3 of the UNCRC recognizes that States have a *duty to act on the best interests of the child*, requiring that the best interests of the child be a primary consideration in all actions concerning children,¹⁴¹ including all institutions that affect children, like those that affect the environment.¹⁴² Arguably, the right acknowledged in Article 3 has three different aspects: a substantive right, a legal principle, and a rule of procedure.¹⁴³ Article 3 requires decision-makers to weigh the best interests of the child as an important factor in the decision-making process. Accordingly, the decision-making process must consider climate change's short-term and long-term effects on children.¹⁴⁴ The global Youth and Civil Society Alliance consider this obligation to be closely related to the principle of intergenerational equity.

Article 12 of the UNCRC guarantees *children's right to express their opinions and be heard*, including before courts and tribunals. The "Lundy Model" outlines four factors that must be considered for successful implementation of Article 12 which are: Space, Voice, Audience, and Influence.¹⁴⁵ In this vein, inclusion of youth is not enough, and their participation should be a sustainable part of government processes. This principle is reflected in, for example, the implementation of youth parliaments with follow-up mechanisms. Similarly, children have advocated for better climate policies through school strikes and legal challenges around the world.¹⁴⁶

The *children's right to survival and development* is enshrined in Article 6 of UNCRC. This right instructs States to take positive measures to extend children's lives, including a healthy and safe environment as per Article 24. Climate change endangers these rights, requiring international efforts to reverse its catastrophic effects.

Finally, article 24 of the UNCRC acknowledges that children have the *right to the highest attainable standard of health* and that States must consider environmental pollution risks when ensuring access to food and water. Climate change is a significant threat to children's health, exacerbating health disparities and impacting access to health services. The Committee on the Rights of the Child emphasises that States must prioritise children's health concerns in climate change mitigation and adaptation strategies.¹⁴⁷

cations/716-the-challenges-of-climate-change-children-on-the-front-line.html> accessed March 9, 2023, at 1.

¹⁴¹ UNCRC, art. 3.

¹⁴² Comment 14, Committee on the Rights of the Child Gen. UN Doc. CRC/C/GC/14, para. 26 (May 29, 2013).

¹⁴³ General Comment 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, para. 6.

¹⁴⁴ Francesca Ippolito, *The Best Interests of the Child: Another String to the Environmental and Climate Protection Bow?* 89 *Questions International Law Journal*, 7, at 7-9 (2022) (discussing the term "best interests of the child"), at p. 12.

¹⁴⁵ Lundy L, "Voice' Is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child" (2007) 33 *British Educational Research Journal* 927, at 932.

The Lundy model emphasises the importance of listening to and valuing the perspectives and opinions of children and young people, and recognizes them as active agents in their own lives rather than passive recipients of adult decisions. By giving children and young people a voice in decision-making processes, the Lundy model promotes their empowerment and helps to ensure that their rights are respected and upheld.

¹⁴⁶ See, e.g., Recent Case, *Sacchi v. Argentina*, 135 *Harvard Law Review* 1981, 1983 (2022); *Agostinho v. Portugal*, App. No. 39371/20 (currently pending before the Grand Chamber of the Eur. Ct. of Hum. Rts.)

¹⁴⁷ See General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)(CRC/C/GC/15), Committee on the Rights of the Child.

Conclusively, under the UNCRC, States have several obligations concerning the rights of the child. These obligations include actively identifying and recognizing the rights of individual and groups of children who require special measures, ensuring that all children enjoy their Convention rights without discrimination, upholding the best interests of the child as a primary consideration in all actions concerning children, and all institutions that affect children, extending positive measures to ensure the survival and development of children, guaranteeing children the right to express their opinions and be heard, and prioritising children’s health concerns in climate change mitigation and adaptation strategies. We consider these obligations to be closely related to the principle of intergenerational equity, and that UNCRC obligations and intergenerational equity are mutually reinforcing.

1. Intragenerational equity and climate change.

Intragenerational equity refers to fairness in the distribution of benefits and burdens of development within the current generation. It has its basis on the Principle 6 of the Rio Declaration, therefore requiring that international action in the field of environment and development addresses the interests and needs of all countries, particularly those most environmentally vulnerable. The principle of intragenerational ultimately aims to ensure justice among people alive today.¹⁴⁸

In the context of climate change, intragenerational equity is important because the impacts of climate change are not evenly distributed throughout the world, and are falling disproportionately on certain groups, such as low-income communities, indigenous peoples and developing States. Intragenerational equity includes fair access and sharing of ecosystem services, as well as fair sharing of pollution burdens.¹⁴⁹ Natural resources should be used efficiently and without waste.¹⁵⁰ In this regard, the International Law Association’s *Legal Principles Relating to Climate Change* note that States shall protect the climate system as a matter of urgency, keeping in mind that the focus of action will shift to adapt to the “the burden of responsibility to the most vulnerable and least responsible States.”¹⁵¹ When applied to inter-State relations, we argue that the CBDRR principle is an expression of intragenerational equity.¹⁵² In domestic law, intragenerational equity has been linked to poverty eradication to “equal access to common resources to be shared by humankind over time, rather than just the distribution of private property”.¹⁵³

Applying this principle, States responsible for causing climate change and failing to fulfill their international legal obligations, are to be allocated higher expenses for reducing, mitigating, and preventing climate change. This principle ensures accountability for addressing the harmful impacts of climate change.

2. Human rights and climate change

Climate change is not only an environmental crisis, but also a human rights crisis. It affects the full

¹⁴⁸ Shelton, D. (2008). Equity. In D. Bodansky, J. Brunnée, & E. Hey Oxford (Eds.), *The Oxford Handbook of International Environmental Law* (pp. 639-662). Oxford University Press.

¹⁴⁹ World Declaration on the Environmental Rule of Law, principle 5.

¹⁵⁰ World Declaration on the Environmental Rule of Law, principle 5.

¹⁵¹ ILA, Report of the Committee on the Legal Principles Relating to Climate Change, Washington Conference, 2014: draft Article 4 (3) of the Legal Principles Relating to Climate Change.

¹⁵² C. Redgwell, Part III ‘Climate Change—Principles and Emerging Norms Concepts in International Law, Ch.9 Principles and Emerging Norms in International Law: Intra- and Inter-generational Equity’ in *The Oxford Handbook of International Climate Change Law*.

¹⁵³ UN Secretary General, Report on the Intergenerational solidarity and the needs of future generations, UN Doc. A/68/322, Aug. 15, 2013, para 18.

range of human rights protected under international law. From the infringement of the right to life to the disproportionate impact of climate change on specific groups of people, such as indigenous communities, island nations, women, children, and people living in poverty, climate change significantly impacts human rights in all its dimensions. This relationship is not strange to the Court, which has previously recognized this connection noting that “the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings”¹⁵⁴ Because environmental damage threatens the health and the quality of life, States have agreed to meet obligations concerning the environment which are directly linked to their human rights obligations.

International human rights law primarily concerns the relationship between States and their citizens. This is different to international environmental law, which has historically been more concerned with the relationship between States over issues such as transboundary environmental harm and resource allocation. However, as outlined above, climate change is a cross-cutting issue. Different bodies of international law must be systemically integrated in order to build a full picture of obligations on States. The intersection of international human rights law and international environmental law produces a network of obligations which States must observe in their relations with one another, as well as their own citizens.

The obligations regarding human rights and climate change are extensive and encompass a vast array of legal duties which are enshrined in the applicable legal framework. This handbook emphasises only a select few of these obligations, which we consider to be the most relevant. Among others, we find that the most relevant human rights and climate change obligations of States are: (i) the right to life, (ii) the right to self-determination, (iii) the right to a healthy environment, (iv) the right to health, (v) the right to private and family life, (vi) the right to seek, receive, and impart information, and (vii) the right to effective remedy for the breach of human rights obligations. To inform the Court’s answer to the questions posed, we will analyse the relationship between human rights and climate change obligations. Specifically, we will examine how climate change impacts the violation of human rights. By doing so, we hope to provide a better understanding of the intersection between these two areas.

i. Right to life

The right to life is a well-established right of treaty law and customary international law.¹⁵⁵ As the foundational multilateral human rights treaty, the International Covenant on Civil and Political Rights (“**ICCPR**”), codifies this right in article 6 and recognizes that “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”¹⁵⁶

The implications of environmental degradation on the enjoyment of this right have been expressly identified by the United Nations Human Rights Committee (UNHRC), the independent body authorised by the United Nations to provide authoritative interpretations of ICCPR rights. The UNHRC has the authority

¹⁵⁴ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, para. 29. See also, *Gabcikovo-Nagymaros* (Hungary v. Slovakia), 1997 ICJ 7 (Sept. 25) (separate opinion of Judge Weeramantry) (describing the protection of the environment as a “sine qua non for numerous human rights such as the right to health and the right to life itself”).

¹⁵⁵ Universal Declaration of Human Rights (UDHR) art. 3 International Covenant on Civil and Political Rights (ICCPR) art. 6 European Convention on Human Rights (ECHR) art. 2 African Charter on Human and People’s Rights (ACHPR) art. 4 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa art. 4 African Charter on the Rights and Welfare of the Child (ACRWC) art. 5 Arab Charter on Human Rights art. 5, art. 6 African Charter on Human and Peoples’ Rights (Banjul Charter) art. 4 American Declaration of the Rights and Duties of Man (ADRDM) art. 1 American Convention on Human Rights (ACHR) art. 4 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará) art. 4 UNHRC General Comment No. 36; General Comment No. 3 On The African Charter On Human And Peoples’ Rights: The Right To Life

¹⁵⁶ ICCPR art. 6 (1). See also, UDHR, art. 3 (“Everyone has the right to life, liberty and security of person.”)

to issue authoritative interpretations of the codified rights. Notably, the UNHRC has expressly recognized that the obligation to protect the right to life encompasses obligations that concern the environment:

“The duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity. These general conditions may include (...) degradation of the environment.”¹⁵⁷

More specifically, the Committee has determined, among other things, that: “[t]he obligations of States parties under international environmental law should thus inform the content of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law.”¹⁵⁸ This observation matches the systemic integration approach adopted throughout this memorandum.

Importantly, the Committee has also recognized that “[t]he obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life,”¹⁵⁹ including “adverse climate change impacts”¹⁶⁰ that constitute “pressing and serious threats to the ability of present and future generations to enjoy the right to life.”¹⁶¹ Finally, the Committee has determined that State’s obligations are not purely territorial but extend beyond the State’s national borders.¹⁶²

In short, the authoritative interpreter of the ICCPR, the UNHRC, has in a wide range of circumstances noted that the obligation to protect, respect and fulfil the right to life encompasses duties to prevent harm to the environment, including through climate change.¹⁶³ In this context, States have a legal obligation to ensure that they take measures to prevent and mitigate the effects of climate change, which can threaten the lives and wellbeing of their citizens. This includes reducing greenhouse gas emissions, promoting renewable energy, and adapting to the impacts of climate change. States have a duty to protect their citizens from foreseeable harm, including harm caused by climate change, and to ensure that their actions do not contribute to human rights violations. States are also required to ensure that their actions do not disproportionately impact vulnerable communities, such as indigenous peoples, women, children, and the poor, who are often most affected by climate change.

¹⁵⁷ Human Rights Committee, General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc. CCPR/C/GC/36 (3 September 2019) para. 26.

¹⁵⁸ *Id.* para. 62.

¹⁵⁹ Human Rights Committee, views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019, UN Doc. CCPR/C/135/D/3624/2019 (22 September 2022).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² General comment No. 36 on article 6 of the I.C.C.P.R., on the right to life, CCPR/C/GC/36 (30 Oct. 2018), para. 22. See also General Comment No. 31, para. 10; Concluding Observations: United Kingdom (2008), para. 14; Communication No. 2285/2013, *Yassin v Canada*, Views adopted on 26 July 2017, para. 6.5; Concluding Observations: Canada (2015), para. 6; Concluding Observations: Germany (2012), para. 16; Concluding Observations: South Korea (2015), para. 10.

¹⁶³ Interpretations of other human rights treaties are in accord. See, e.g., General Comment No. 3 on the African Charter on Human And Peoples’ Rights: The Right To Life, para. 41 (“The right to life should be interpreted broadly. The State has a positive duty to protect individuals and groups from real and immediate risks to their lives caused either by actions or inactions of third parties. In cases where the risk has not arisen from malicious or other intent then the State’s actions may not always be related to criminal justice. Such actions include, inter alia, preventive steps to preserve and protect the natural environment and humanitarian responses to natural disasters, famines, outbreaks of infectious diseases, or other emergencies.”).

ii. Right to self-determination

The right to self-determination is a fundamental right recognized by the ICJ¹⁶⁴ and codified in the United Nations Charter¹⁶⁵ and the International Covenant on Civil and Political Rights.¹⁶⁶ This right includes the freedom to determine one's political status and pursue economic, social, and cultural development as well as rights such as the right to life, adequate food, water, health, housing, property, and cultural practices.¹⁶⁷ Climate change and environmental degradation threaten these subsidiary rights, particularly in small island developing States and climate vulnerable States where rising sea levels endanger human life and cultural identity.¹⁶⁸ The right to self-determination is therefore inherently linked to addressing climate change and environmental degradation. This is particularly true for small island and low-lying developing States, whose very territorial existence is threatened by climate change.

Therefore, States have an obligation to address climate change in order to ensure that individuals and communities have the ability to freely determine their political status and pursue their economic, social, and cultural development. This includes the full enjoyment of subsidiary rights such as the right to life, adequate food, water, health, housing, productive use of property, cultural practices, and traditions as well as the possibility to transmit their cultural and spiritual practices and traditions to their children and future generations.

iii. Right to a healthy environment

The following treaties recognize a right to a healthy environment: the African Charter on Human and Peoples' Rights,¹⁶⁹ the Arab Charter on Human Rights,¹⁷⁰ the Aarhus Convention,¹⁷¹ the Protocol of San Salvador to the American Convention on Human Rights (1969),¹⁷² the Escazú Agreement,¹⁷³ and the Charter of Fundamental Rights of the European Union.¹⁷⁴

Furthermore, various international courts and UN organs and agencies have recognized the right to a healthy environment. These include (i) the UN General Assembly's recognition of "the right to a clean, healthy and sustainable environment as a human right;"¹⁷⁵ (ii) the UN Human Rights Council noting "the right to a clean, healthy and sustainable environment as a human right that is important for the

¹⁶⁴See *Case Concerning East Timor* (Portugal v. Australia), Judgment, 1995 ICJ. 90, ¶ 29 (June 30); *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 ICJ (June 21).

¹⁶⁵ UN Charter, art.1.

¹⁶⁶ ICCPR, art 1.

¹⁶⁷ ICESCR, art.1, paras. 1-2..

¹⁶⁸ Human Rights Council Res. 16/11, UN Doc. A/HRC/RES/16/11, at 2 (Apr. 12, 2011).

¹⁶⁹ ACHPR, art. 24.

¹⁷⁰ Arab Charter on Human Rights, art. 38.

¹⁷¹ Aarhus Convention, preamble.

¹⁷² Protocol of San Salvador to the American Convention on Human Rights (1969), art. 1. See also Inter-American Court of Human Rights, Advisory Opinion, OC-23-17, 15 November 2017, para. 79 (the right to a healthy environment under Article 11 of the San Salvador Protocol protects individuals and collectives, including future generations, and can be used to hold States responsible for cross-border violations that are within their "effective control").

¹⁷³ Articles 1 and 4 of the Escazú Agreement (2018) (First environmental treaty of Latin America and the Caribbean; entered into force on 22 April, 2021).

¹⁷⁴ Article 37 of the Charter of Fundamental Rights of the European Union (providing that a high level of environmental protection must be integrated in EU policies).

¹⁷⁵ United Nations General Assembly Resolution (2022) A/RES/76/300.

enjoyment of human rights;¹⁷⁶ (iii) the appointment of a UN Special Rapporteur on Human Rights and the Environment;¹⁷⁷ (iv) the UN Special Rapporteur on Climate Change,¹⁷⁸ (v) the African Commission on Human and People's Rights,¹⁷⁹ (vi) and the Inter-American Court of Human Rights which recognized that in its collective dimension, "the right to a healthy environment constitutes a universal value that is owed to both present and future generations" and in its individual dimension the right to a healthy environment "may have a direct and an indirect impact on the individual owing to its connectivity to other rights, such as the rights to health, personal integrity, and life,¹⁸⁰ and which in the exercise of its judicial power found that certain logging activities violated indigenous communities' right to a healthy environment;¹⁸¹ and the African Commission on Human and People's Rights.¹⁸²

The constitutions of 110 States establish and protect a right to a healthy environment,¹⁸³ and many domestic courts enforce such rights.¹⁸⁴ States' failure to protect their citizens from the adverse effects of climate change, as well as their contribution to adverse impacts in other countries, amounts to a clear violation of this right.

Therefore, States have an obligation to take measures to ensure the enjoyment of the right to a healthy environment. Such measures may include the implementation of laws and policies that promote environmental and climate protection, the provision of information to the public about environmental risks and hazards, the establishment of participatory mechanisms for decision-making on environmental matters, and the enforcement of environmental standards and regulations.

¹⁷⁶ Human Rights Council Resolution HRC/RES/48/13.

¹⁷⁷ United Nations, Human Rights Council, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, A/HRC/37/59 (24 January 2018), available at <http://undocs.org/A/HRC/37/59> ("States should ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfill human rights.").

¹⁷⁸ Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change, A/77/226 (26 July 2022) available at <https://www.ohchr.org/en/documents/thematic-reports/a77226-promotion-and-protection-human-rights-context-climate-change> ("

¹⁷⁹ Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria (Communication No. 155/96) (pollution caused by the oil industry violated the Ogoni people's right to a healthy environment under Art. 24 of the African Charter).

¹⁸⁰ Inter-American Court of Human Rights, Advisory Opinion 23/17, available at: https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf

¹⁸¹ Inter-American Court of Human Rights, *Indigenous Communities of the Lhaka Honhat Association v. Argentina*, Judgment, February 6, 2020, para 289. See also *Advisory Opinion OC-23/17*, Advisory Opinion, November 15, 2017, para. 57.

¹⁸² *Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria* (Communication No. 155/96) (pollution caused by the oil industry violated the Ogoni people's right to a healthy environment under Art. 24 of the African Charter).

¹⁸³ A/HRC/43/53. See also, e.g., Conseil d'Etat, No. 243802 (July 5, 2004), Arts. 1, 2, 5; Basic Law for the Federal Republic of Germany, Article 20a (unofficial translation: "Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order").

¹⁸⁴ See, e.g., *Dover District Council v. CPRE Kent* [2017] UKSC 79 (appeal taken from Eng.) (referring to the Aarhus Convention to affirm the existence of the human right to a healthy environment); *Francisco Chahuan Chahuan versus Empresa Nacional de Petróleos, ENAP S.A.*, Case No. 5888-2019, (May 28, 2019) (adjudicating Chile's failure to address industrial air pollution in the Quintero-Puchuncaví region constituted a violation); *Cour Administrative d'Appel de Nantes*, No. 07NT03775 (Dec. 1, 2009) (holding the State liable for activities that produced water contamination); *Decision of the German Federal Administrative Court* dated February 27, 2018 (7 C 30/17); *First Chamber of the Supreme Court of Mexico*, Amparo 610/2019, 22 January 2020 (relying on the Ramsar Convention on Wetlands of International Importance to determine if the destruction of a mangrove forest violated the constitutional right to a healthy environment); *Lahore High Court Leghari v. Federation of Pakistan*, W.P. No. 25501/201, April 2015 (Finding the government violated the National Climate

iv. Right to health

The right to health is recognized in various international instruments and treaties, including the Universal Declaration of Human Rights,¹⁸⁵ International Covenant on Economic, Social and Cultural Rights (ICESCR),¹⁸⁶ Convention on the Rights of the Child,¹⁸⁷ African Charter on Human and Peoples' Rights,¹⁸⁸ and European Social Charter.¹⁸⁹

The right to health encompasses a wide range of socio-economic factors that promote conditions for a healthy life, including access to safe and potable water, adequate sanitation, and a healthy environment.¹⁹⁰ Thus, the right to health also implies a corresponding obligation on States to protect people from the impacts of environmental degradation, such as pollution of air, water, and soil.¹⁹¹

Accordingly, to fulfil their obligations to respect, protect and fulfil the right to health, States must, among others, refrain from polluting the environment, enact or enforce laws to prevent pollution of water, air, and soil by extractive and manufacturing industries, and adopt measures against environmental and occupational health hazards and any other threat as demonstrated by epidemiological data, including the adoption of national policies aimed at reducing and eliminating pollution of air, water, and soil.

v. Right to private and family life

The right to private and family life is recognized in international treaties, such as the ICCPR¹⁹² and the European Convention on Human Rights. Article 17 of the ICCPR states that no one should be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence, and that everyone has the right to the protection of the law against such interference or attacks.¹⁹³

Notably, in 2019 in the Torres Strait case, eight Australian citizens filed a complaint before the Human Rights Committee claiming that Australia had violated their rights under the ICCPR. They argued that climate change had impacted their private life, family, and home life, as they were facing the possibility of

Change Policy of 2012 and the Framework for Implementation of Climate Change Policy (2014-2030) by failing to meet goals set by the policies, and reasoning that the constitutional rights to life and human dignity (under articles 9 and 14 of the Constitution) included the right to a healthy and clean environment); *Netherlands v Urgenda*, no. 19/00135, Supreme Court of the Netherlands (December 20, 2020) para. 5.7.1. (“the Netherlands had an obligation ‘to do ‘its part’ in order to prevent dangerous climate change, even if it is a global problem”); Supreme Court of Columbia, *Future Generations v. Ministry of the Environment* (April 5, 2018); *Gloucester Resources Limited v Minister of Planning, New South Wales Land and Environment Court*, [2019] NSWLEC 7, 8 Feb. 2019, para 698; Decision of the German Federal Administrative Court, February 27, 2018 (7 C 30/17); Article 21, 48A and 51(g) of the Constitution of India enshrines the fundamental right to life, including the right to a clean and healthy environment. Also see *Enviro-Legal Action v. Union of India* 1996 AIR 1446, 1996 SCC (3) 212; *M. C. Mehta vs. Union of India* 1987 AIR 1086, 1987 SCR (1) 819; *Subhash Kumar vs. State of Bihar* 1991 AIR 420, 1991 SCR (1) 5; More than three-quarters of the world’s national constitutions include explicit references to environmental rights and/or environmental responsibilities. This includes most nations in Africa, Central and South America, South Asia, Asia-Pacific, the Middle East/Central Asia, and Europe.

¹⁸⁵ Article 25, Universal Declaration of Human Rights.

¹⁸⁶ ICESCR, art. 12.

¹⁸⁷ UNCRC, art. 24.

¹⁸⁸ ACHPR, art. 16.

¹⁸⁹ ESC, art. 11.

¹⁹⁰ UNCESCR General Comment No. 14, E/C. 12/2005/4, para. 34.

¹⁹¹ UNCESCR General Comment No. 14, E/C. 12/2005/4, para. 36.

¹⁹² Article 17 of the ICCPR.

¹⁹³ Article 17 of the ICCPR.

having to leave their homes due to rising sea levels.¹⁹⁴ In 2022, the Committee determined that Australia had indeed violated the complainants' right to private and family life by not taking sufficient measures to safeguard their home, private life, and family from the harmful effects of climate change.¹⁹⁵ Importantly, the Committee found that this obligation extends to interferences which arise from conduct not attributable to the State – in other words, States have an obligation to prevent interferences with this right, even if the cause of climate change is the conduct of non-government emitters of greenhouse gases.¹⁹⁶

Therefore, States have the obligation to prevent interference with a person's privacy, family or home. This obligation extends to interferences that arise from conduct not attributable to the State, at least where such interference is foreseeable and serious. This right includes protection against the effects of climate change, and entails the obligation to adequately address the causes and impacts of climate change to protect the right to private and family life.

vi. Right to seek, receive, and impart information

Article 19 of the ICCPR codifies the right to seek, receive, and impart information. This right includes freedom to seek and share information through any media without any borders. International instruments recognize that these rights are essential for States' duties in addressing climate change and protecting the environment. These procedural rights are increasingly reflected not only in human rights treaties, but also instruments of international environmental law. Principles 9-10 of the Rio Declaration on Environment and Development emphasises the importance of public participation, access to information, and effective access to judicial and administrative proceedings for environmental protection.¹⁹⁷ These core three rights are also referred to in the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). This agreement, ratified by 46 States, codifies binding obligations to provide information related to the environment.¹⁹⁸

Likewise, the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR) further requires contracting parties to provide available information related to their maritime area to any person who requests it without unreasonable charges and without the need to prove an interest.¹⁹⁹ Domestic courts have also required the disclosure of information on the effects of climate change and States' activities related to it, consistent with these international principles.²⁰⁰

A more recent treaty, the Escazú Agreement, has been ratified by 15 states since it was negotiated in early 2021. Like the Aarhus Convention, it guarantees (i) Access to Information, (ii) Public Participation, and (iii) Access to Justice regarding environmental matters throughout Latin America and the Caribbean.²⁰¹ Additionally, it promotes and defends the rights of environmental defenders and the rights of indigenous peoples and local communities.²⁰²

¹⁹⁴ Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019, UN Doc. CCPR/C/135/D/3624/2019 (22 July 2022).

¹⁹⁵ *Id.*, para. 8.12.

¹⁹⁶ *Id.*, para. 6.8.

¹⁹⁷ Rio Declaration on Environment and Development, principles 9-10.

¹⁹⁸ See Aarhus Convention, arts. 1, 2, 3.3.

¹⁹⁹ OSPAR Convention, art. 9.

²⁰⁰ See, e.g., *Greenpeace France v. France* (2021); (B.U.N.D.) e.V. v. Minister for Commerce and Labor on behalf of Federal Republic of Germany (rejecting the government's argument that information on German export credit activities did not constitute "environmental information").

²⁰¹ Escazú Agreement, art. 1.

²⁰² Escazú Agreement, art. 7.

Accordingly, under the right to seek, receive and impart information, States have the duty to provide appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities. Additionally, States have the obligation to encourage and facilitate public awareness and participation by making information widely available.

vii. Right to an effective remedy for the breach of human rights obligations

The right to an effective remedy is a crucial element of human rights law and is recognized in various international instruments and treaties.²⁰³ In international human rights law, the right to redress and remedy is a substantive right that is well-established through both custom²⁰⁴ and treaties.²⁰⁵ In the context of climate change, the right to an effective remedy applies to all rights-holders, including private actors, and both States and private actors must be held accountable for their contributions to climate change and their failure to regulate emissions adequately.

Concerning the right to an effective remedy for the breach of human rights obligations, the European Court of Human Rights (ECtHR) has emphasised that the purpose of human rights law is “[to guarantee] not rights that are theoretical or illusory but rights that are practical and effective.”²⁰⁶ Similarly, the African Commission on Human and Peoples’ Rights has stressed that “[t]he rights and freedoms of individuals enshrined in the [African] Charter can only be fully realized if governments provide structures which enable them to seek redress if they are violated.”²⁰⁷

As noted throughout this memorandum, the links between government inaction on climate change and human rights violations are becoming increasingly clear. The adverse impacts of climate change, such as increasingly extreme weather conditions, drought, floods, and rising sea levels, have severe consequences for people’s lives and livelihoods. As recently reported by the Intergovernmental Panel on Climate Change (IPCC), “climate change has adversely affected human physical health globally and

²⁰³ See, e.g., Universal Declaration of Human Rights (UDHR) art. 8; International Covenant on Civil and Political Rights (ICCPR) art. 2; International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) art. 6; UN Convention against Torture art. 14; Rome Statute art. 75 (titled “Protection of the victims and witnesses and their participation in the proceedings”); art. 75 (titled “Reparations to victims”); Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV) art. 3; Protocol Additional to the Geneva Conventions of 12 August 1949 art. 91; Protocol I of 8 June 1977 art. 91 relating to the Protection of Victims of International Armed Conflicts; African Charter on Human and Peoples’ Rights art. 25; American Convention on Human Rights art. 7; European Convention on Human Rights art. 13; EU Charter of Fundamental Rights art. 47; Declaration of Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; General Assembly resolution 60/147 of 16 December 2005 by which the Assembly adopted the recommended text, Scope of Obligation: 3.

²⁰⁴ See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res. 60/147 of 16 Dec. 2005, Annex, Principles 1(b), 2, 3 and (pertaining to gross violations of international human rights law and international crimes) 11. See also *Moiwana Village v. Surinama*, (2005), 124 Inter-American Court of Human Rights (ser. C) para. 169. See further Dinah Shelton, *Remedies in International Human Rights Law* (Oxford, UK: Oxford University Press, 2nd ed., 2010), at 103.

²⁰⁵ See e.g., ICCPR, art. 14; ACHR, arts. 1 and 8; ECHR, art. 13. Since 2008, the Human Rights Council and its Special Procedures Mechanisms have been actively involved in addressing the human rights impacts of climate change. The Council has held two-panel discussions on human rights and climate change, which was also the theme of the 2010 Social Forum.

²⁰⁶ See e.g., for example, *Airey v. Republic of Ireland* (1979) Series A no 32, 2 EHRR, 305. See Stephen Humphreys, ‘Introduction: Human Rights and Climate Change’, in Stephen Humphreys (ed.), *Human Rights and Climate Change* (Cambridge, UK: Cambridge University Press, 2010), at 11 (suggesting that the absence of a remedy for climate change victims would significantly undermine the hegemonic status (or aspiration) of human rights law).

²⁰⁷ *Jawara v. The Gambia Communications* 147/95, 149/96 74.

mental health (very high confidence), and is contributing to humanitarian crises where climate hazards interact with high vulnerability (high confidence).²⁰⁸ These impacts are already leading to “displacement in Africa, Asia, North America (high confidence), and Central and South America (medium confidence)... with small island states in the Caribbean and South Pacific being disproportionately affected relative to their small population size (high confidence)”²⁰⁹, reducing food and water security,²¹⁰ and affecting human health, livelihoods and key infrastructure²¹¹. Every increment of global warming will magnify the risks and projected adverse impacts from climate change resulting in further human rights violations to the right to life, health and family life among many others. The link between human rights violations and climate change is therefore unequivocal.²¹² In this context, it becomes necessary to highlight the remedies that are available in such circumstances.

Given the state of the climate crisis and the threat it poses to the enjoyment of established human rights,²¹³ international law must guarantee a correlative “right to remedy”.²¹⁴ The primary form of remedy in international human rights law is reparations. As the Inter-American Court of Human Rights has observed, “a full and adequate reparation cannot be reduced to the payment of compensation to the victims or their families, since, depending on the case, rehabilitation measures, satisfaction and guarantees of non-repetition are also necessary.”²¹⁵

Victims of human rights violations - including those associated with climate change - are entitled to access remedial institutions and procedures affording them a fair hearing and, ultimately, substantive redress.²¹⁶ The right of access to justice is affirmed not only by international human rights law, but - as noted in the preceding section - by a growing number of international environmental law instruments. Without access to effective institutions and procedures of justice, the obligations of States are too easily mischaracterized as voluntary commitments that may be upheld or disregarded at will.²¹⁷

Access to justice in environmental matters is also a procedural component of the broader obligation on States to guarantee the right to a healthy environment.²¹⁸ We strongly endorse the finding of the IACtHR that States are bound to “guarantee that the public have access to remedies conducted in accordance with due process of law to contest any provision, decision, act or omission of the public authorities that violates or could violate obligations under environmental law; to ensure the full realisation of the other procedural

²⁰⁸ IPCC AR6, Synthesis Report, Long Report, 2023, p.16 available at https://report.ipcc.ch/ar6syr/pdf/IPCC_AR6_SYR_LongerReport.pdf

²⁰⁹ *Id.*, p.16.

²¹⁰ *Id.*, p. 15.

²¹¹ *Id.*, p.16.

²¹² The UNGA recognises the right to a clean, healthy and sustainable environment as a human right. A/HRC/48/L.23/REV.1; Torres Strait Case: UNHRC has found that Australia’s failure to adequately protect indigenous Torres Islanders against adverse impacts of climate change violated their rights to enjoy their culture and be free from arbitrary interferences with their private life, family and home. UNHRC decision 22.09.2022 CCPR/C/135/D/3624/2019; Preamble, Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015. See also Glasgow Climate Pact, Decision 1/CP.26 and Decision 1/CMA.3, preambular para. 6.

²¹³ Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights, UN Doc A/HRC/10/61 (15 Jan. 2009). The report comments on five thematic areas: (a) the relationship between the environment and human rights; (b) implications of the effects of climate change for the enjoyment of specific rights; (c) vulnerabilities of specific groups; (d) human rights implications of climate change-induced displacement and conflict; and (e) human rights implications of measures to address climate change.

²¹⁴ See Wewerinke-Singh M, “Remedies for Human Rights Violations Caused by Climate Change” (2019) 9 Climate Law 224, at p.226.

²¹⁵ See e.g. IACtHR, *Herrera Espinoza et al. V. Ecuador* (2016), Series C No. 316, para. 314.

²¹⁶ *Id.*

²¹⁷ D. Shelton, “The Right to Reparations for Acts of Torture: What Right, What Remedies?”, 17(2) *Torture* 96 (2007), at 96.

²¹⁸ Aarhus Convention, art. 9, Escazú Agreement, art. 8.

rights ... and to redress any violation of their rights as a result of failure to comply with obligations under environmental law.”²¹⁹

The Office of the High Commissioner for Human Rights also recognizes that those who suffer violations to their human rights because of the harm caused by climate change must be guaranteed access to justice so that they may receive adequate reparation.²²⁰

In any case, domestic authorities are primarily responsible for ensuring that human rights are enforced within their jurisdiction. Therefore, States must ensure domestic remedies are effectively addressing human rights violations arising from climate change. Where these remedies are not available, or are not effective in practice, international and regional human rights systems must also be accessible for victims of human rights violations caused by climate change.

Conclusively, States have an obligation to provide access to effective remedies through judicial and other redress mechanisms - and to ensure that such remedies are implemented, including restoration of the environment - to individuals and communities who suffer violations to their human rights because of the harm caused by climate change. Domestic authorities are primarily responsible for ensuring human rights are enforced. However, international, and regional human rights systems must also be accessible for victims where domestic remedies are not available or not effective in practice.

3. Environmental law principles and climate change

The request for an advisory opinion touches upon several rules of customary international law and general principles regarding international environmental law. In line with the principle of systemic integration, we believe that these principles and rules of customary international law must be read together with States’ obligations under international human rights and climate change law. Below we briefly explain these rules and principles and how these relate to climate change and the advisory opinion.

i. Prevention of significant transboundary harm

States have the obligation to prevent the causing of environmental damage to other countries or areas beyond their control.²²¹ This obligation is called the principle of prevention of transboundary harm. The International Law Commission (ILC), representing many of the world’s leading experts on public international law, has concluded that transboundary harm occurs when there is harm caused within a territory that is under the jurisdiction or control of a State other than the State of origin, irrespective of whether or not the involved States share a common border.²²² In this regard, the ILC has identified four elements for transboundary harm: (i) a physical relationship between the activity and the damage caused, (ii) human causation, (iii) a certain threshold of severity, and (iv) the movement of harmful effects across borders.²²³ In other words, harmful conduct emanating from one State’s territory, which harms the environment of a State many miles away, may nevertheless constitute a violation of the prevention

²¹⁹The Environment and 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) of the American Convention on Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, para. 237 (Nov. 15, 2017), para. 237

²²⁰ UNHCR, Frequently Asked Questions on Human Rights and Climate Change (2021) Factsheet No. 38, p. 32.

²²¹ Brunnée J, “The Responsibility of States for Environmental Harm in a Multinational Context – Problems and Trends” (2005) 34 *Les Cahiers de droit* 827

²²² Article of the 2(c) of the Draft articles on Prevention of Transboundary Harm from Hazardous Activities 2001

²²³ Article of the 2(c) of the Draft articles on Prevention of Transboundary Harm from Hazardous Activities 2001.

principle. Thus, we submit that the emission of greenhouse gases by large developed countries in the Global North which cause environmental harm to small island developing States and other States in the Global South, that amounts to a violation of international environmental law.

This principle is included in many international treaties and agreements, such as the UNFCCC, Convention on Long-Range Transboundary Air Pollution (LRTAP), CBD, and United Nations Convention on the Law of the Sea (UNCLOS). It is recognized as a general principle of international law, with Principle 2 of the Rio Declaration explicitly stating that countries have the responsibility to ensure that their activities do not harm the environment of other States or areas beyond national jurisdiction. Significantly, the ICJ has recognized the harm prevention principle as a rule of customary international law. In its decision in *Pulp Mills on the River Uruguay*, the ICJ found that a State must “use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State”.²²⁴

In addition, the principle of prevention of transboundary harm entails several international obligations, including the (i) obligation to exercise due diligence, (ii) the obligation to conduct an environmental impact assessment, and (iii) the obligation to notify and consult in good faith.

First, the duty to prevent transboundary harm requires States to *exercise due diligence* in anticipating, preventing, or mitigating harm resulting from their activities. Notably, the Arbitral Tribunal in the *Trail Smelter* case confirmed this notion and asserted that “no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.”²²⁵ This principle is breached only if the State of origin has not acted diligently concerning its own activities.²²⁶

Second, the *obligation to conduct an environmental impact assessment (EIA)* is an important aspect of preventing transboundary harm. An EIA helps decision-makers to consider potential environmental effects before allowing activities to take place and encourages cooperation between affected parties²²⁷, which may indeed, suggest that, for example, fossil fuel projects would need to include climate change impacts assessment. International law requires an EIA and notification to possibly affected parties²²⁸ for activities that may cause significant environmental harm with transboundary consequences.²²⁹ This obligation has been recognized in various cases, including the *Pulp Mills* case, where the Court recognised the principle’s status as a rule of customary international law, confirming that ‘the Principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory’.²³⁰ The Court further recognised that the obligation to carry out an EIA where there is a risk that the proposed activity may have a significant adverse impact in a transboundary context is also “a requirement under general international

²²⁴ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 20 April 2010, ICJ, para. 101, quoting *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment, 25 March 1948.

²²⁵ Reports on International Arbitral Awards, *Trail Smelter* case (United States, Canada), 16 Apr 1938 and 11 Mar 1941, vol. III, pp. 1905-82.

²²⁶ Rishika Rishabh, ‘Responsibility v. Sovereignty: Transboundary Environmental Harm’ (2021) 4 Int’l J.L. Mgmt. & Human 598.

²²⁷ Goals and Principles of Environmental Impact Assessment, UNEP/GC/Dec./14/25 (1987); see also, UNGA Res. 42/184 (1987).

²²⁸ See Espoo Convention, arts. 2(1), (4) and (5).

²²⁹ Principle 17 of the Rio Declaration states that an “environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.”

²³⁰ *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, 20 April 2010, ICJ Reports 2010, pp. 55-56, para. 101.

law.”²³¹ Therefore, this obligation applies to all activities that are likely to have a significant adverse impact on the environment.

Third, the *duty of notification* was confirmed in Principle 19 of the Rio Declaration, which requires that States must consult and negotiate with States potentially affected by significant transboundary damage.²³² Because the overall impact of all greenhouse gas (GHG) emissions on the environment is “significant” in the terms of this principle, the obligation to notify would arguably also extend to all GHG emitters. In this regard, Article 4 of the Paris Agreement (PA) mentions the duty of States to communicate their nationally determined contributions (NDCs) that they intend to achieve,²³³ therefore, exemplifying this duty in action.

To further complement the duty of notification, the ILC’s Draft Articles on the Prevention of Transboundary Harm have adopted the obligation to notify and consult in good faith as a central element. They note that if an assessment shows a risk of significant transboundary harm, the State responsible for the harm must notify the potentially affected State and provide relevant information.²³⁴ The States concerned must then enter into consultations to prevent or minimise harm.²³⁵ The implementation of this principle will be a fundamental basis for creating a shared global awareness of responsibility and communication.

Under the principle of prevention of significant transboundary harm, States must take measures to prevent causing environmental damage to other countries or areas beyond their control. This includes countries which may be located a significant distance away from where the cause of the damage originates. This principle entails several international obligations. First, the duty to prevent transboundary harm requires States to exercise due diligence in anticipating, preventing, or mitigating harm resulting from their activities. Second, the obligation to conduct an environmental impact assessment (EIA) helps decision-makers consider potential environmental effects before allowing activities to take place and encourages cooperation between affected parties. Third, the duty of notification requires that States consult and negotiate with other States potentially affected by significant transboundary damage. All of these obligations are critical in preventing the adverse effects of climate change.

²³¹ *Id.*, para 204.

²³² Rio Declaration on Environment and Development, principle 19.

²³³ PA, art. 4.2.

²³⁴ Article 8(1) of the ILC Draft Articles on the Prevention of Transboundary Harm.

²³⁵ Article 9(1) of the ILC Draft Articles on the Prevention of Transboundary Harm.

ii. Precautionary principle

The precautionary principle is a principle of international environmental law that guides decision-making in cases of scientific uncertainty. This is crucial in the context of climate change, where many actors may seek to justify their actions or inactions on the basis of scientific uncertainty.²³⁶ This principle dictates that the lack of full scientific certainty shall not excuse failure to take the necessary measures to prevent environmental harm.²³⁷ In this regard, the level of confidence in the potential adverse impacts of climate change and the likelihood of their occurrence should not affect the obligation of States to prevent the causing of significant damage and to take measures to protect the climate system and other parts of the environment from further deterioration, as long as the other elements and requirements are met.²³⁸

The principle was first included in Principle 15 of the Rio Declaration²³⁹ and has since been included in over 60 multilateral treaties.²⁴⁰ Notably, UNFCCC Article 3, paragraph 3 recognizes the precautionary principle.²⁴¹ The UNFCCC conditions the application of the principle on a threat of serious or irreversible damage,²⁴² which has been the interpretation adopted by International Courts and Tribunals, and in other multilateral treaties, such as the 1997 UN Watercourses Convention.²⁴³

The position of international courts and tribunals on the status of this principle is not uniform. Nevertheless, the Seabed Disputes Chamber of ITLOS recognised that there has been a trend toward integrating the precautionary approach into customary international law.²⁴⁴ Although the Chamber did not explicitly state that the principle had become a customary rule, its opinion came close to accepting the customary nature of the principle. State practice and consideration by international courts and tribunals suggests that the principle is gaining wider recognition in international environmental law as a form of customary international law. We consider that the present advisory opinion offers the ICJ an opportunity to clarify the application of the principle as it applies to the two questions posed.

²³⁶ Pinto-Bazurco JF, “The Precautionary Principle” (*International Institute for Sustainable Development*) <<https://www.iisd.org/articles/deep-dive/precautionary-principle>> accessed March 13, 2023.

²³⁷ UN Doc A/ conf.151/ 26 (Vol 1) (12 August 1992), Annex 1, Principle 15. See also, Gullett, W. (2021), “Chapter 14 The Contribution of the Precautionary Principle to Marine Environmental Protection” In *Frontiers in International Environmental Law: Oceans and Climate Challenges*, Leiden, The Netherlands: Brill | Nijhoff. <https://doi.org/10.1163/9789004372887_015> Accessed 14 March 2023, at p.371.

²³⁸ Gullett, W. (2021), “Chapter 14 The Contribution of the Precautionary Principle to Marine Environmental Protection” In *Frontiers in International Environmental Law: Oceans and Climate Challenges*, Leiden, The Netherlands: Brill | Nijhoff. <https://doi.org/10.1163/9789004372887_015> Accessed 14 March 2023, at p.396.

²³⁹ Rio Declaration on Environment and Development, June 14, 1992, UN Doc. A/CONF. 151/5/Rev.1 (1992), reprinted in 31 ILM 874 (1992).

²⁴⁰ See *i.e.* 1992 Convention on the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), the 1992 Convention on the Protection of the Marine Environment of the Baltic Sea (Helsinki Convention), the 1995 UN Fish Stocks Agreement, the 1996 London Protocol to the Convention on the Prevention of Pollution by Dumping of Wastes, the 2000 Cartagena Protocol on Biosafety, and 2001 Stockholm Convention on Persistent Organic Pollutants; see also, the 2001 Stockholm Convention on Persistent Organic Pollutants, recognizing the precautionary principle as an objective in its Preamble, See the 1992 Convention on Biodiversity Conservation: in its preamble it states “Where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat”, Article 2, paragraph 5(a) of the 1992 Convention of the Protection and Use of Transboundary Watercourses and International Lakes.

²⁴¹ UNFCCC, art. 3.3.

²⁴² See also, 1992 Baltic Convention art. 3 (2), 1994 Danube Convention, art. 2(4-5) 1995 Fish Stock Agreement, arts. 5 and 6, 1996 Protocol to the 1972 London Convention art. 3, 1999 Rhine Convention, art. 4.

²⁴³ See Sobenes E and Devaney J, “The Principles of International Environmental Law Through the Lens of International Courts and Tribunals,” *The environment through the lens of International Courts and Tribunals* (Asser Press 2022), at p. 559.

²⁴⁴ *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, para. 135.

Under the precautionary principle, States have the obligation to take measures to prevent environmental harm or minimise its adverse effects, even when there is scientific uncertainty regarding the potential risks. The level of confidence in the potential adverse impacts of climate change and the likelihood of their occurrence should not affect the obligation of States to prevent the causing of significant damage and to take measures to protect the climate system and other parts of the environment from further deterioration, as long as the other elements and requirements are met.

iii. Duty to cooperate

The duty to cooperate is a well-established general principle of international law and is at the core of effective environmental policies.²⁴⁵ It is affirmed in virtually all international environmental agreements and represents one of the foundations of international law.²⁴⁶ The duty to cooperate has transformed from a “law of coexistence” to a “law of cooperation”.²⁴⁷ The cooperation principle has a relatively long history and can be seen as the backbone for peaceful relations between States.²⁴⁸

In the field of international environmental law, the recognition of the need for cooperation in order to ensure sustainable management of the natural environment and related issues requires cooperation between States. At the global level this has led to numerous treaties on international cooperation and joint action, most notably those adopted at the 1992 Rio Conference on Environment and Development: The Convention on Biological Diversity²⁴⁹ and the UNFCCC.²⁵⁰ It is also strongly reflected in the more recently concluded text of the Paris Agreement,²⁵¹ as further discussed below.

This principle is particularly significant in combating global problems which require joint efforts, such as climate change, and is a logical consequence of increased interdependence of countries. In the international climate change regime, cooperation is referred to in all three of the principal governing instruments, and these instruments (the UNFCCC, the Kyoto Protocol, and the Paris Agreement), reinforce and further operationalise the duty to cooperate.²⁵²

This general duty has been transformed into particular obligations using methods that encourage sharing of information and inclusive decision-making. These specific obligations consist of regulations related to environmental impact assessment, requirements for sharing crucial information with neighbouring countries (which necessitate exchange, consultation, and notification), sharing of emergency information, and enforcing transnational environmental standards, among others.

²⁴⁵ Leeb C, “Implementation of the General Duty to Cooperate,” *Research Handbook on international water law* (Edward Elgar Publishing Limited 2019).

²⁴⁶ Philippe Sands, *Principles of International Environmental Law*, (Manchester University Press, 1995), at 190-194. See also, e.g., the UNEP Draft Principles, UN General Assembly Resolutions and OECD Council Recommendations. It is also affirmed in Principle 24 of the Stockholm Declaration and in Principle 27 of the Rio Declaration and in those Conventions adopted in the context of the 1992 UN Conference on Environment and Development in Rio (United Nations Conference on Environment and Development [UNCED], 1992), including the Convention on Biological Diversity (CBD, 1992) and the UN Framework Convention on Climate Change (UNFCCC, 1992).

²⁴⁷ Erik Franckx & Marco Benatar, “The “Duty” to Co-Operate for States Bordering Enclosed or Semi-Enclosed Seas” 31 Chinese (Taiwan) YB Int’l L & Affairs 66.

²⁴⁸ Wouters P, “Dynamic Cooperation in International Law and the Shadow of State Sovereignty in the Context of Transboundary Water” [2013] *Water and the Law* 13.

²⁴⁹ CBD, preamble and arts. 10, 12, 13, 14, 16, 18.

²⁵⁰ UNFCCC, arts. 3, 4, 5, 6, 7, and 9.

²⁵¹ PA, preamble and arts. 6, 7, 8, 10, 11, 12, and 14.

²⁵² Leeb C, *Cooperation in the Law of Transboundary Water Resources* (Cambridge University Press 2015).

The extent to which these commitments are interrelated is reflected, for example, in Article 7 the 2008 Draft Articles on the Law of Transboundary Aquifers which, among others, determine that “States shall cooperate on the basis of sovereign equality, territorial integrity, sustainable development, mutual benefit and good faith in order to attain equitable and reasonable utilization and appropriate protection of their transboundary aquifers or aquifer systems (...) States should establish joint mechanisms of cooperation.”²⁵³ Similarly, Draft Article 8 determines that “[p]ursuant to draft article 7, aquifer States shall, on a regular basis, exchange readily available data and information on the condition of their transboundary aquifers or aquifer systems (...)”²⁵⁴ These obligations arising under the duty to cooperate should be viewed as independent from, and complementary to, other fundamental environmental principles, such as the no harm principle and the precautionary principle.

Therefore, the obligation of States under the duty to cooperate is to collaborate with other States in order to achieve a common goal, specifically in those environmental law contexts where States must protect the natural environment because the resource in question concerns common or shared spaces. This responsibility translates into additional obligations such as conducting environmental impact assessments beforehand, sharing crucial information with neighbouring countries (which necessitates exchange, consultation, and notification), sharing of emergency information, and enforcing transnational environmental standards, among others.

iv. Principle of solidarity

The principle of solidarity reflects the duty of States to provide mutual assistance to each other, without seeking reciprocity, in order to attain common objectives or overcome crisis situations.²⁵⁵ This principle is recognised in treaty law and other international instruments,²⁵⁶ and is important in international environmental law, where it helps to achieve common objectives.²⁵⁷

As evidenced in article 3.2 of the UNFCCC, solidarity is paramount in the context of climate change law as it recognises the special circumstances of developing countries that are particularly vulnerable to the adverse effects of climate change.²⁵⁸ This reflects the concept of distributive fairness, which includes active solidarity between developed states (those with assets) and passive solidarity with developing States particularly affected by climate change (those who suffer most).²⁵⁹ Article 3.2 also justifies the commitments made by developed States to developing and least developed States to aid in mitigation, adaptation measures, and addressing loss and damage derived from climate change.²⁶⁰ Overall, solidarity is a key principle in climate change law that fosters fair and equitable responses to the global challenge of

²⁵³ Article 7 of the Draft articles on the Law of Transboundary Aquifers (2008).

²⁵⁴ Article 8 of the Draft articles on the Law of Transboundary Aquifers (2008).

²⁵⁵ Danio Campanelli, “Principle of Solidarity” (November 2011) in *Max Planck Encyclopedia of Public International Law*, in Professor Anne Peters (2021-) and Professor Rüdiger Wolfrum (2004–2020), online ed

²⁵⁶ For example, article 3 (b) of the 1994 United Nations Convention to Combat Desertification (UNCCD), recognizes that “the Parties should, in a spirit of international solidarity and partnership, improve cooperation and coordination at sub-regional, regional and international levels, and better focus financial, human, organizational and technical resources where they are needed”. Moreover, the UN Millennium Declaration, adopted by the UN General Assembly, stipulates that “Solidarity. Global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice. Those who suffer or who benefit least deserve help from those who benefit most”.

²⁵⁷ Wolfrum R and Kojima C, *Solidarity: A Structural Principle of International Law* (Springer 2010) at p. 13

²⁵⁸ UNFCCC, art. 3.2.

²⁵⁹ Theresa Thorp, “Climate Justice: A Constitutional Approach to Unify the *Lex Specialis* Principles of International Climate Law”. *Utrecht Law Review* Vol. 8, No. 3, (2012) p. 7-37.

²⁶⁰ Report of the Independent Expert on human rights and international solidarity, international solidarity and climate change, A/HRC/44/44, 1 April 2020.

climate change.

Solidarity, along with the principles of equity, cooperation, and sustainable development, also serves as basis for other relevant principles of international environmental law, such as the principle of intergenerational equity (as discussed above), and the principle of common but differentiated responsibilities and respective capabilities (as discussed below).²⁶¹

Accordingly, developed countries are expected to bear a greater burden in addressing climate change, as they have benefited more from the causes of anthropogenic climate change, while present generations are asked to forego some advantages for the benefit of future generations.

v. Principle of common but differentiated responsibilities and respective capabilities

The principle of common but differentiated responsibilities and respective capabilities (CBDRR) is a fundamental concept of international environmental law, which has its origins in concepts of equity. It incorporates two ideas. The first is that not all countries are equally responsible for the climate crisis, by virtue of their present and historic emissions. The second is that different countries, by virtue of their levels of income, wealth, and development, differ in their capabilities to carry out mitigation and adaptation measures. As such, the principle acknowledges that developing countries have special needs that must be considered in the development, interpretation, and application of international environmental rules.²⁶² CBDRR consists of two elements: States share a common responsibility to protect the environment, but have differentiated responsibilities and abilities to respond to an environmental threat based on their contribution to the problem and level of development.²⁶³ The principle of CBDRR is recognised in various international instruments,²⁶⁴ including the UNFCCC,²⁶⁵ the Kyoto Protocol, and the Paris Agreement.²⁶⁶

These agreements establish differentiated obligations for developed and developing countries in mitigating and adapting to climate change.²⁶⁷ Developed States are called to take the lead in climate change mitigation.²⁶⁸ Notably, the Paris Agreement reaffirms this principle as a bedrock of climate change law,²⁶⁹ and recognises that developed country Parties “should continue taking the lead by undertaking economy-wide absolute emission reduction targets”. By contrast, developing country Parties “should continue enhancing their mitigation efforts”, and “least developed countries and small island developing States may prepare and communicate strategies, plans and actions for low greenhouse gas emissions development reflecting their special circumstances.”²⁷⁰

The principle of CBDRR also applies to individual State responsibility for harm caused by climate change. The Committee on the Rights of the Child found in *Sacchi et al vs. Argentina* that the collective

²⁶¹Williams A, “Solidarity, Justice and Climate Change Law” [2017] *Globalization and Common Responsibilities of States* 321 at 11.

²⁶²Sands P and others, *Principles of International Environmental Law* (Cambridge University Press 2019), p. 233.

²⁶³*Id.*

²⁶⁴ See, *inter alia*, Declaration of the United Nations Conference on the Human Environment, Jun. 16 1972, Rio Declaration on Environment and Development, Jun. 13, 1992, United Nations Convention on the Law of the Sea, Dec. 10, 1982, United Nations Framework Convention on Climate Change, May 9, 1992; Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, Paris Agreement, Dec. 12, 2015.

²⁶⁵ Article 3.1 and 4 of the UNFCCC.

²⁶⁶ Article 2.2, Paris Agreement.

²⁶⁷ Annex I- Developed States or those in transition to a market economy; Non-Annex I - developing States and least developed countries.

²⁶⁸ Article 10 of the Kyoto Protocol.

²⁶⁹ Article 2.2, Paris Agreement.

²⁷⁰ Article 4 of the Paris Agreement.

nature of climate change causation does not absolve a State from its individual responsibility for harm caused by emissions originating within its territory.²⁷¹ The UN Special Rapporteur on Human Rights and the Environment has further emphasised that wealthy countries must contribute their fair share towards the costs of mitigation and adaptation in low-income countries.²⁷²

According to the Inter-American Commission of Human Rights, under the CBDRR principle, States with greater financial capacity must provide support to developing States which are particularly impacted by climate change, but which nevertheless have less financial, technical and infrastructure resources to mitigate and adapt to climate change.²⁷³ In this vein, the principle also interacts with other principles such as the principle of cooperation,²⁷⁴ as well as those found in human rights law,²⁷⁵ due to the multi-causal nature of the climate crisis.

Accordingly, under the CBDRR principle, all States have a collective responsibility to prevent harm caused by climate change. States which have contributed to a greater extent to climate change must contribute a greater share towards the costs of mitigation and adaptation of the adverse effects of climate change in low-income countries. Additionally, States with greater financial capacity must provide support to developing States that experience a larger share of the adverse impacts of climate change but that have less financial, technical and infrastructure resources to mitigate and prevent climate change and adapt to its impacts.

vi. Good faith obligation

The principle of good faith in international law requires conduct that is honest, fair, and reasonable, and plays a crucial role in the creation, interpretation, and performance of treaties and other international obligations.²⁷⁶ It requires recognizing a common interest, participating in measures to promote that interest, and refraining from impairing it.²⁷⁷ Good faith is also a principle of treaty interpretation, and can assist in balancing conflicting interests and reducing textual ambiguity.²⁷⁸ The ICJ has elaborated on the principle of good faith in fulfilling a duty of cooperation for sustainable development and the sustainable management of shared resources.²⁷⁹

In the context of climate change, the obligations of States under the good faith principle are multifaceted and encompass honesty, fairness, and reasonableness. In the realm of international cooperation, good faith requires more than simply avoiding actions taken in bad faith. It involves recognizing a common or general interest, participating in measures to further that interest, and refraining from impairing that interest.

²⁷¹ Committee on the Rights of the Child, *Sacchi et al. v. Argentina* (dec.), 22 September 2021, CRC/C/88/D/104/2019, para. 10.10.

²⁷² UNCHR “Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment” (2019) UN Doc A/74/161, paras. 26 and 68

²⁷³ Inter-American Commission on Human Rights, “Climate Emergency: Scope of Inter-American Human Rights Obligations”, (2021) Resolution No. 3/2, point I.7. “(...) those States that have greater financial capacity must provide the guarantees to provide greater technical and logistical capacity to the States that have a greater degree of impact on climate change, as well as less financial and infrastructure capacity to face the climate emergency”.

²⁷⁴ *Ibid.*, point II.11.

²⁷⁵ *Ibid.*, II.15.

²⁷⁶ UN Charter, art. 2(2) *see also*, VCLT, arts. 18, 26, and 31.

²⁷⁷ Fitzmaurice G, *The Future of Public International Law and of the International Legal System in the Circumstances of Today: Special Report* (Institut de Droit International 1973), pp. 319–20.

²⁷⁸ Schwarzenberger G, *A Manual of International Law* (Professional Books 1976), pp. 118–19; Schwarzenberger G, *The Fundamental Principles of International Law*, Recueil des Cours, 1955-I, 323–5.

²⁷⁹ *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Judgment, ICJ Reports 1997, pp. 78–9, para.142.

vii. Public participation

Public participation refers to the ability of citizens to inform governmental decision-making, bringing different perspectives to bear on the process. This includes both the perspectives of the affected public and experts and researchers in various fields. It also includes the participation of groups especially vulnerable to climate and environmental harms, such as women, children, Indigenous peoples, and persons living in vulnerable geographies (such as low-lying areas and small island States). Public participation serves several purposes, including increasing the legitimacy of governmental decisions, and ensuring that the government has not overlooked any important aspects, impacts, or unintended consequences of the decision. As noted above, public participation is recognised as a right in many international human rights instruments, such as the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights.

In international environmental law, public participation has been an important element in decision-making for several decades, enshrined in instruments such as the 1992 Rio Declaration²⁸⁰ and the 1998 Aarhus Convention,²⁸¹ as well as the more recently-concluded Escazú Agreement. The right to public participation in environmental decision-making has three components: the right to participate, the right to information, and the right of access to justice.²⁸² The Aarhus Convention was a major step forward in the field of procedural environmental rights, comprehensively addressing these three interlinked rights in a single international treaty.²⁸³ The Convention acknowledges that sustainable development can only be achieved through the involvement of all stakeholders, and links government accountability and environmental protection.²⁸⁴ Its provisions have become widely recognised as a benchmark for environmental democracy, including access to environmental information, early and iterative involvement of the public in decision-making, participation opportunities and processes that are broad in scope, transparent and user-friendly. It also obliges States to ensure authorities take account of public input, provide a supportive institutional infrastructure, and an effective means of enforcement and appeal. The Escazú Agreement also recognises that environmental issues are best addressed with the participation of all people, and guarantees the full and effective implementation in Latin America and the Caribbean of the rights of access to environmental information, public participation in environmental decision-making and access to justice in environmental matters, as well as the creation and strengthening of capacities and cooperation that contribute to the protection of the right of every person, of present and future generations, to live in a healthy environment and to sustainable development.

²⁸⁰ Rio Declaration, principle 10.

²⁸¹ Aarhus Convention, arts. 6-8.

²⁸² Chai T, “The Importance of Public Participation” (*York* April 1, 2016). <<https://ejscclinic.info.yorku.ca/2016/04/the-importance-of-public-participation/#:-:text=Public%20participation%20has%20three%20components,right%20of%20access%20to%20justice>> accessed March 9, 2023.

²⁸³ Forty-six States and the EU are parties to this convention, along with transitioning economies including those from Central Asia - Kazakhstan, Kyrgyzstan, Tajikistan and Turkmenistan and Caucasian countries, namely Armenia, Azerbaijan and Georgia are Parties to the Convention. Also all other former Soviet countries such as Ukraine, Belarus, Republic of Moldova are Parties. In addition, most Balkan non-EU countries, such as Albania, Bosnia and Herzegovina, Montenegro, Serbia and the former Yugoslav Republic of Macedonia, are also Parties.

²⁸⁴ UNECE Secretariat, “Promoting Effective Public Participation in Public Affairs under the Convention on Access To Information, Public Participation In Decision-Making And Access To Justice In Environmental Matters And Its Protocol On Pollutant Release And Transfer Registers” (*ohcr.org*). <<https://www.ohchr.org/sites/default/files/Documents/Issues/ToxicWaste/RightToInformation/AarhusConventionUNECE2.pdf>> accessed March 9, 2023, at p.2.

Therefore, States have the obligation to ensure that they provide opportunities for public participation in environmental decision-making processes, provide access to information concerning the environment and activities affecting it, and provide access to justice. In this vein, States have the obligation to adopt as institutional principles the key elements of public participation, such as transparency, broad scope, and effective means of enforcement, to ensure that public participation is effective and meaningful.

4. UNFCCC, Paris Agreement, and UNCLOS

We now turn to international obligations arising from international climate change and law of the sea – and in particular, the Paris Agreement (PA) and UNFCCC, as well as the United Nations Convention on the Law of the Sea (UNCLOS).

i. Treaty recognition of common but differentiated responsibilities and respective capabilities, cost lowering and the primacy of States as actors

While the CBDR principle is a general principle of international law, it has also been codified in climate change law, namely in the PA and the UNFCCC. These treaties share in particular three principles of international environmental law: Common but Differentiated Responsibilities, Cost Lowering, and the Primacy of States as Actors. While only the CBDR is a principle of law, the remaining duties are more specific to the particular regime established by these two treaties.

The UNFCCC divides the global community into three tranches of responsibility based on levels of development: Annex I countries, Annex II countries, and developing countries.²⁸⁵ Both treaties aim to lower costs, increase transparency, and promote technological sharing.²⁸⁶ Overall, these treaties uphold the nation-State as the fundamental unit of agency for greenhouse gas reduction and climate change cooperation.

In summary, the shared principles of Common but Differentiated Responsibilities, Cost Lowering, and the Primacy of States as Actors require States to take responsibility for reducing GHG emissions, provide financial and technological support to low-to-middle-income nations, and lower costs of climate change mitigation through transparency and technological sharing.

ii. The duty to protect and preserve the marine environment and the United Nations Convention on the Law of the Sea

The oceans play a major role in climate change mitigation and adaptation, and according to the IPCC special report of 2018, 83% of the global carbon cycle is circulated through the ocean.²⁸⁷ Similarly, the oceans have absorbed more than 90% of the excess heat in the climate system.²⁸⁸ While this capacity acts as a “heat sink” and thus absorbs some of the full heating effects of climate change, it has resulted in a doubling

²⁸⁵ PA, art. 23

²⁸⁶ See UNFCCC, art. 8 and PA, art. 23.

²⁸⁷ Rhein, M., S.R. Rintoul, S. Aoki, E. Campos, D. Chambers, R.A. Feely, S. Gulev, G.C. Johnson, S.A. Josey, A. Kostianoy, C. Mauritzen, D. Roemmich, L.D. Talley and F. Wang, 2013: Observations: Ocean. In: *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [Stocker, T.F., D. Qin, G.-K. Plattner, M. Tignor, S.K. Allen, J. Boschung, A. Nauels, Y. Xia, V. Bex and P.M. Midgley (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA; see also, “Ocean Conference | Fact and Figures” (*United Nations*) <<https://www.un.org/en/conferences/ocean2022/facts-figures>> accessed March 9, 2023.

²⁸⁸ IPCC, “Special Report on the Ocean and Cryosphere in a Changing Climate” (*Headline Statements*) <<https://www.ipcc.ch/srocc/headline-statements/>> accessed March 9, 2023.

in the frequency of marine heatwaves since 1982.²⁸⁹

The obligation to protect the marine environment is enshrined in Part XII, particularly in article 192 of UNCLOS.²⁹⁰ The authoritative approach to the interpretation of UNCLOS Article 192 was set out in the *South China Sea arbitration*,²⁹¹ where ITLOS noted that the legal rule under this norm does impose a positive duty on State parties to protect the environment, which can later be informed by ancillary legal obligations enshrined in the following articles of the Convention and other applicable rules of international law.²⁹² Among other things, the Tribunal noted that:

“(…) Article 192 does impose a duty on States Parties, the content of which is informed by the other provisions of Part XII and other applicable rules of international law. This ‘general obligation’ extends both to ‘protection’ of the marine environment from future damage and ‘preservation’ in the sense of maintaining or improving its present condition. Article 192 thus entails the positive obligation to take active measures to protect and preserve the marine environment, and by logical implication, entails the negative obligation not to degrade the marine environment. (…) Thus, States have a positive ‘duty to prevent, or at least mitigate’ significant harm to the environment when pursuing large-scale construction activities.”²⁹³

Based on the information presented, it can be inferred that the positive obligation embedded in article 192 of UNCLOS is to “*protect and preserve the marine environment*” by taking measures to do so; and that, in turn, there is an obligation to abstain from degrading the marine environment.²⁹⁴ Furthermore, derived from the general obligation nature of article 192 of UNCLOS, all related obligations falling under this norm must therefore be interpreted under a contextual approach under article 31(2) of the Vienna Convention on the Law of Treaties.²⁹⁵ Therefore, any infraction of an obligation that falls within Part XII of the Convention will also entail a violation of the general obligation of article 192.

Other UNCLOS provisions giving rise to obligations concerning climate change include: article 194 on the requirement to prevent, reduce and control pollution of the marine environment; article 197 on the duty to cooperate; article 198 on the duty to notify of transboundary harm; article 202 on the duty of technical assistance to developing states; articles 207 and 212 on the duty to prevent, reduce and control the pollution of the marine environment; and articles 213 to 222 to put in place measures to enforce these obligations, among others.

In light of the above, we suggest that climate change is a violation of States’ obligations not to degrade the marine environment and excessive emissions of greenhouse gases amount to a violation of this duty.

²⁸⁹ *Id.*

²⁹⁰ UNCLOS, art. 192.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.* para. 941.

²⁹⁵ VCLT, art. 31.3.c.

Conclusively, States have a duty to protect and preserve the marine environment, in accordance with Article 192 of UNCLOS. This obligation requires taking active measures to prevent future damage and maintain or improve the current condition of the marine environment. It also includes a negative obligation not to degrade the environment. This duty extends to all related obligations falling under this norm, which must be interpreted systematically to avoid fragmentation of international law. Additionally, States have the obligation to prevent, reduce and control pollution of the marine environment, an obligation of international cooperation, and obligations to notify of transboundary harm, to provide technical assistance to developing states, and to put in place measures to enforce these duties. These duties require States to reduce their emissions of greenhouse gases, which degrade the marine environment.

iii. The Paris Agreement

The Paris Agreement's central aim is to strengthen the global response to the threat of climate change by keeping global temperature rise this century well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius.²⁹⁶ The adoption of the PA has established the factual and legal consideration of anthropogenic climate change making it less difficult to establish causation in litigation.²⁹⁷ It has demonstrated (i) the use of scientific evidence to connect the increase of GHG emissions causing climate change; (ii) human activity causing climate change; and (iii) the continuous dire consequences of climate change on the environment and human rights.²⁹⁸ This has substantially influenced domestic climate change litigation.²⁹⁹ The resulting cases demonstrate judicial implementation of the PA.

Article 4 of the PA contains the main mitigation obligations of States. Specifically, it requires each party to prepare, communicate, and maintain successive Nationally Determined Contributions (NDCs), and pursue domestic mitigation measures to achieve them.³⁰⁰ In other words, States must determine their own targets and plans for achieving the Paris Agreement's overall temperature goals, and publicly share those goals with the international community. Parties should submit increasingly ambitious NDCs every five years, and these will be stored in a public registry maintained by the Secretariat.³⁰¹ The main goal of the PA is to reach global peaking of GHG emissions as soon as possible and to achieve a balance between anthropogenic emissions by sources and removals by sinks in the second half of this century.³⁰² In line with the principle of CBDRR, the agreement recognizes that peaking will take longer for developing countries that need to develop economically and eradicate poverty. The NDC captures what a party intends to achieve but is not a legally binding obligation under the Paris Agreement. However, the general expectation of progression stipulated in Articles 4.3 and 4.11 is to adjust NDCs with a view to enhancing ambition.³⁰³ Developed countries are expected to indicate and continue to apply economy-wide emission caps, while developing countries are encouraged to move towards economy-wide targets

²⁹⁶ "Key Aspects of the Paris Agreement" (*Unfccc.int2020*) <<https://unfccc.int/most-requested/key-aspects-of-the-paris-agreement#:~:text=The%20Paris%20Agreement's%20central%20aim,further%20to%201.5%20degrees%20Celsius.>> accessed March 9, 2023.

²⁹⁷ PA, art. 4.1.

²⁹⁸ Justice B.J. Preston, "The Impact of the Paris Agreement on Climate Change Litigation and Law" Dundee Climate Conference, University of Dundee 2019 at page 34.

²⁹⁹ *Urgenda Foundation v Netherlands* (The Hague District Court, C/09/456689/HA ZA 13-1396, 24 June 2015) (*'Urgenda I'*); also see *Netherlands v Urgenda Foundation* (The Hague Court of Appeal, 200.178.245/01, 9 October 2018) (*'Urgenda II'*); also see *Gloucester Resources Limited v Minister for Planning* (2019) 234 LGERA 257.

³⁰⁰ Sharma A (ed), "Guide to the Paris - Ecbi.org" (*ebi.org* 2020) <<https://ecbi.org/sites/default/files/Guide%20to%20Paris%20Agreement.pdf>> accessed March 9, 2023, at p.44.

³⁰¹ *Id.*

³⁰² PA, art. 4, *Id.* at p. 45.

³⁰³ PA, arts. 4.3 and 4.11.

over time and are entitled to receive support for their mitigation actions.³⁰⁴

Article 7 of the Paris Agreement sets out a framework for climate adaptation.³⁰⁵ Article 7 includes a global goal on adaptation³⁰⁶ and recognizes the importance of support and international cooperation for adaptation.³⁰⁷ Notably, Article 7.1 establishes a global goal on adaptation to enhance adaptive capacity, strengthen resilience, and reduce vulnerability to climate change in the context of the global average temperature goal referred to in Article 2.³⁰⁸

Additionally, Articles 7.6 to 7.8 of the Paris Agreement describe the importance of cooperation between Parties and stakeholders to enhance action on adaptation, with emphasis on supporting developing countries.³⁰⁹

Article 8.1 of the PA recognizes the requirement to address loss and damage caused by climate change, which is critical for developing countries that are particularly vulnerable to its effects.³¹⁰ Decision 1/CP.21 clarifies that this article does not determine liability or compensation for loss and damage; this was historically opposed by developed countries.³¹¹ Despite this, several small island developing States have made declarations which confirm that their ratification of the Agreement does not relinquish their rights to seek compensation for loss and damage under international law,³¹² and that no provision in the Agreement should be interpreted as undermining the principles of general international law.³¹³

Article 9 of the Paris Agreement recognizes the need for financial support to respond to climate change, particularly in developing countries. This provision acknowledges the obligation of developed countries to provide additional financial resources to developing countries, without establishing binding financial arrangements. Instead, future financial commitments were dealt with outside the Agreement in Decision 1/CP.21.³¹⁴ In this vein, the Decision states that developed country Parties intend to continue their fundraising goal of US\$ 100 billion per annum.³¹⁵ Furthermore, Article 9.5 of the PA requires developed countries to submit biennial communications on their predicted levels of climate finance, while other parties are encouraged to provide such information voluntarily.³¹⁶ Similarly, Article 9.4 also calls for a balance between adaptation and mitigation funding, prioritising the financial needs of developing countries that are particularly vulnerable to climate change and have capacity constraints.³¹⁷ Finally, Article 9.9 of the PA requires institutions to develop fair processes for developing countries to access support without being disadvantaged. Further, the Adaptation Fund and Green Climate Fund (GCF) offer training to strengthen the capacity of entities to access and manage climate finance.³¹⁸

Articles 13.7 to 13.10 of the Paris Agreement outline reporting requirements, including the National

³⁰⁴ PA, art. 4.15 and *Id.*, at p. 51.

³⁰⁵ PA, art. 2.1 (b).

³⁰⁶ PA, art. 7.1.

³⁰⁷ PA, art. 4.1, *Id.*, at p. 65.

³⁰⁸ PA, art. 7.1, *Id.*, at p. 65.

³⁰⁹ PA, art. 7.6 – 7.7, *Id.*, at p. 67.

³¹⁰ PA, art. 8.1.

³¹¹ FCCC/CP/2015/10/Add.1, Decision 1/CP.21, Adoption of the Paris Agreement

³¹² The Solomon Islands was among the countries that made such a declaration, and they reiterated this stance in their statement following the adoption by the UNGA of Resolution A/RES/77/276 on 29 March 2023.

³¹³ PA, art. 8.1, *Id.*, at p. 74.

³¹⁴ PA, arts. 9.1-9.3. See also, *Id.* at, at pp. 80-81; see also, FCCC/CP/2015/10/Add.1, Decision 1/CP.21, Adoption of the Paris Agreement.

³¹⁵ PA, arts. 9.1-9.3. See also, *Id.* at pp. 80-81.

³¹⁶ PA, art. 9.5. See also, *Id.*, at pp. 82-84.

³¹⁷ PA, art. 9.4, Article 4.8 of the UNFCCC; see also, *Id.*, at pp. 84.

³¹⁸ PA, art. 9.9; see also, see also, *Id.*, at pp. 86.

Inventory Report (NIR) of greenhouse gas emissions and information to track progress in implementing and achieving Nationally Determined Contributions (NDCs). These requirements are mandatory for all Parties, and the NIR must use IPCC methodologies agreed by the CMA.³¹⁹ Moreover, Articles 13.14 and 13.15 recognize that developing countries will need additional support to meet the more stringent reporting requirements of the Enhanced Transparency Framework and build their capacity.³²⁰

Finally, Article 15 enshrines the facilitating and compliance implementation mechanism of the Paris Agreement. Notably, Article 15.1 establishes the compliance mechanism through a facilitative branch, which promotes compliance with procedural obligations such as submitting NDCs and participating in their review. The Paris Agreement expects parties to act in good faith and adhere to treaty provisions.³²¹

Accordingly, States have specific obligations under the Paris Agreement. First, concerning mitigation, each party is required to prepare, communicate, and maintain successive Nationally Determined Contributions (NDCs), and to pursue domestic mitigation measures to achieve them. Developed countries are expected to continue to apply economy-wide emission caps, while developing countries are encouraged to move towards economy-wide targets over time, and are entitled to receive support for their mitigation actions. Second, regarding adaptation, Parties must enhance their adaptive capacity, strengthen resilience, and reduce vulnerability to climate change in the context of the global average temperature goal. Third, concerning the financing of climate change mitigation and adaptation, developed countries are obligated to provide additional financial resources to developing countries, although the Agreement does not establish binding financial arrangements. Fourth, States also have reporting duties, and are required to submit mandatory National Inventory Reports of greenhouse gas emissions and information to track progress in implementing and achieving NDCs. Finally, States have the duty to comply with their declared NDCs and act in good faith, adhering to the PA commitments and treaty provisions.

b. Answers to the Second Question

The Second Question requests the Court's legal opinion on the legal consequences that arise, including, but not limited to, those concerning (i) injured States - in particular - small island developing States, particularly affected by the adverse effects of climate change, and (ii) peoples and individuals of the present and future generations affected by climate change. In other words, the first part of the question concerns the legal consequences for violating obligations toward *States*; while the second concerns *peoples and individuals*, both *present and future*.

In light of the obligations identified in the First Question, we submit:

- i. As a general rule of law, the consequence for not upholding international law obligations is State responsibility. State responsibility is based on three primary principles. In the first place, every internationally wrongful act of a State entails its international responsibility.³²² Second, an internationally wrongful act exists when conduct consisting of an act or omission is attributable to

³¹⁹ The CMA refers to the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement. All States that are Parties to the Paris Agreement are represented at the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement. States that are not Parties participate as observers. The CMA meets annually.

³²⁰ PA, arts. 13.13-13.15; see also, *Id.* at pp. 112-113.

³²¹ Sharma A (ed), "Guide to the Paris - Ecbi.org" (*ebi.org*2020) <<https://ecbi.org/sites/default/files/Guide%20to%20Paris%20Agreement.pdf>> accessed March 9, 2023, at p. 119.

³²² Art. 1 ARSIWA Articles.

a State and constitutes a breach of an international obligation owed by that State.³²³ And third, the characterization of an internationally wrongful act is governed by international law and is not affected by its characterization as lawful by internal law.³²⁴ As such, when State responsibility is determined, infringing States are required to immediately cease any violation of international law (ensuring that such actions will not be repeated), and have a legal duty to provide reparations to address the harm caused, which may include compensation or other forms of reparation. State responsibility must be interpreted in the light of the principles of CBDRR and equity under international law.

- ii. The failure to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations is an ongoing violation of international law that continues to cause harm. This situation must be rectified, and full compliance with international law must be reinstated. Such compliance can only be achieved by taking decisive action to address climate change as required by international law.
- iii. With regards to the timeline for addressing climate change, the IPCC³²⁵ has emphasised that climate change requires immediate action. This obligation is further supported by the urgency which has characterised climate action.³²⁶
- iv. The legal consequences for States in breach of their obligations toward States particularly affected by climate change includes: state responsibility, the obligation to cease harmful conduct, guarantees of non-repetition, and the obligation to provide reparation for the harm caused, including but not limited to the restoration and rehabilitation of the affected ecosystem to its original state if possible. If restoration and rehabilitation are not feasible, the infringing State must provide sufficient reparation to the affected parties, which may include compensation or other forms of redress.
- v. Pursuant to international law, injured States have the right to invoke state responsibility for the breach of international law obligations and are entitled to impose countermeasures against the breaching State.
- vi. Peoples and individuals who are affected by the adverse effects of climate change may take legal action against their governments for failing to uphold their international law obligations. They are also entitled to petition their governments to act against polluter States and major private sector carbon emitters that infringe their rights, and to file lawsuits seeking compensation from their governments for damages caused by climate change.
- vii. States have a responsibility to ensure that those impacted by human rights abuses and violations

³²³ Art. 2 ARSIWA Articles.

³²⁴ Art. 3 ARSIWA Articles.

³²⁵ IPCC, 2022: Summary for Policymakers. In: *Climate Change 2022: Mitigation of Climate Change*. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [P.R. Shukla, J. Skea, R. Slade, A. Al Khourdajie, R. van Diemen, D. McCollum, M. Pathak, S. Some, P. Vyas, R. Fradera, M. Belkacemi, A. Hasija, G. Lisboa, S. Luz, J. Malley, (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA. doi: 10.1017/9781009157926.001, at B.6.1, B.6.2

³²⁶ See Sustainable Development Goal 13. "Goal 13: Take Urgent Action to Combat Climate Change and Its Impacts" (*Climate change - united nations sustainable development*). <<https://www.un.org/sustainabledevelopment/climate-change/>> accessed March 13, 2023

See also, Jordan Wilson A and Orlove B (2019) working paper 1, "What do we mean when we say climate change is urgent", Columbia University: "In the context of climate decision making, we find that "urgency" functions as a boundary object relaying the internalization of time pressure between (1) the academic literature and the international climate change policy regime and (2) political movements and the popular press; especially as construed in these latter domains, "crisis" and "emergency" connote time pressure but so too generate a constellation of other affective and cognitive states."

within their jurisdiction have access to effective redress mechanisms, including holding companies accountable for any criminal, civil or administrative responsibility. If environmental damage has caused violations of rights, States must provide full reparation to victims by restoring the environment as a mechanism of integral restitution to prevent future repetition. In order to effectively protect human rights, States must take appropriate measures to mitigate greenhouse gases, implement adaptation measures, and remedy resulting damages, without neglecting their common but differentiated obligations in the context of climate action. Environmental rights, in the context of climate change, must be guaranteed to the maximum of available resources and progressively achieved by all appropriate means, just like economic, social, and cultural rights.

- viii. When compensation is paid, the State of which they are nationals has the obligation to disburse that compensation to those specific peoples and individuals affected by climate change. Disbursement does not necessarily need to be through direct payments, but can be achieved through programs that seek restoration or compensation of the damage.
- ix. Peoples and individuals affected by climate change can also enforce their rights before human rights bodies, such as UN Special Procedures, the Inter-American Court of Human Rights, the African Court on Human and Peoples' Rights, and the European Court of Human Rights.

The following are the legal elements which inform and support the Court's answer to the second question.

1. State responsibility for environmental damage.

State responsibility applies to any wrongful international act. State responsibility is a fundamental aspect of international law that arises from the legal personality of every State and their role as the primary bearers of international obligations.³²⁷ This general principle includes underlying concepts such as *attribution*, breach, excuses, and consequences.³²⁸ State responsibility is not limited to treaty obligations owed by States to other State parties. Obligations also arise from other sources of law such as *erga omnes* obligations owed to the international community as a whole,³²⁹ customary international law,³³⁰ and general principles of law.

To hold a State accountable for an international wrongdoing, the wrongdoing must be attributed to the State by identifying a specific act or omission and linking it to that country. However, wrongful acts are not committed by States themselves, but rather by individuals such as government officials or representatives. Accordingly, the actions of that individual must be *attributable* to the State. The ILC Articles on State Responsibility for Internationally Wrongful Acts have codified attribution rules that determine which conduct is attributable to a State. In essence, conduct may be attributed to a State if a particular organ or person is acting under state authority.³³¹

The general principle of state responsibility has been recognized by several international tribunals. The ICJ

³²⁷ James Crawford, "State Responsibility" (September 2006) in Anne Peters (2021-) and Professor Rüdiger Wolfrum (2004-2020), Max Planck Encyclopedia of Public International Law (online edn), para. 1.

³²⁸ James Crawford, "State Responsibility" (September 2006) in Anne Peters (2021-) and Professor Rüdiger Wolfrum (2004-2020), Max Planck Encyclopedia of Public International Law (online edn), para. 3.

³²⁹ James Crawford, "State Responsibility" (September 2006) in Anne Peters (2021-) and Professor Rüdiger Wolfrum (2004-2020), Max Planck Encyclopedia of Public International Law (online edn), para. 12.

³³⁰ ARSIWA, art. 12.

³³¹ ARSIWA, arts. 4,5,6,8,9,10,11. *Further*, once conduct has been attributed to the State, it is essential to analyze whether there is an international breach. According to the ILC, an act that is not in conformity with an international obligation constitutes a breach. (Art 12. ARWISA). Similarly, a State which assists or aids another State in committing a wrongful act can also be held responsible for that breach. (Arts. 16-19 ARWISA).

affirmed this general principle in its first contentious case, *Corfu Channel*.³³² In the *Gabčíkovo-Nagymaros Project Case*, the Court emphasised that it is “well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect”.³³³ In the context of climate change, it must be recalled that the Court found in the *Certain Activities Case* that “damage to the environment, and the consequent impairment or loss of the ability of the environment to provide goods and services, is compensable under international law.”³³⁴

When referring to the international responsibility of States in relation to damage caused by climate change, the UN Committee on the Rights of the Child has made it clear that “the collective nature of the causation of climate change does not absolve the State party of its individual responsibility that may derive from the harm that the emissions originating within its territory may cause to children, whatever their location.”³³⁵

2. Rights of injured States and individuals

When a breach of international law occurs, the injured State has at its disposal the following actions to seek redress for the injury: (i) the invocation of the breaching State’s responsibility, and (ii) the ability to impose countermeasures on the breaching State.³³⁶ These legal actions are in principle only available to injured States, or on the basis of *erga omnes* obligations, (i.e., obligations that apply to all States). However, peoples and individuals affected can compel their States through legal actions³³⁷ and civil society pressure to act against States in breach through initiating international proceedings. Similarly, peoples and individuals can seek direct redress before international human rights courts and tribunals. This is significant in the context of climate change, where, as the preceding analysis has shown, States owe a wide range of human rights obligations.

A State may invoke responsibility of the breaching State by notifying the latter of the wrongful conduct and specifying the corrective measures of that breach.³³⁸ This may include the cessation of the conduct and/or the reparation of the loss suffered according to the applicable principles of international law. Thus, a small island developing State which has been affected by climate change could notify a high-emitting State in such a manner.

If several States have been injured by an internationally wrongful act, they each have a claim against the breaching State or States and can recover up to the damage suffered.³³⁹ Furthermore, in certain cases, a non-injured state can invoke a breach of international law on behalf of the international community as a whole,³⁴⁰

³³² *Corfu Channel case*, Judgment of April 9th, 1949 ICJ Reports 1949, at p.23. See also *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14, at para. 292 (3) (noting that the United States of America had “acted against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State.”).

³³³ *Gabčíkovo-Nagymaros Project*, (Hungary/Slovakia), Judgment, ICJ Reports 1997, p. 7, para.47

³³⁴ *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua), Compensation, Judgment, ICJ Reports 2018, p. 15, at para. 42.

³³⁵ Committee on the Rights of the Child, Decision on Communication No. 104/2019, Chiara Sacchi et al (represented by counsels Scott Gilmore et al (Hausfeld LLP) and Ramin Pejan et al (Earthjustice)) under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, UN Doc. CRC/C/OPAC/104/2019 (14 January 2020).

³³⁶ ARSIWA, arts. 42 and 43. See also, Murphy Sean D. 2018. Principles of International Law (version Third edition) Third ed. St. Paul MN: West Academic Publishing, p. 242-248.

³³⁷ See e.g., Art. 54 of the Law of Jurisdictional Guarantees and Constitutional Control of Ecuador that provides a constitutional action for citizens to address situations where decisions or reports from international bodies responsible for protecting human rights are not being observed or respected.

³³⁸ ARSIWA, art. 43.

³³⁹ ARSIWA, art. 46-47.

³⁴⁰ ARSIWA, arts. 42(b) and 48 ARSIWA. See the definition of *erga omnes* obligations at *Barcelona Traction, Light and Power Company, Limited*, Judgment, ICJ Reports 1970, p. 3, paras. 33-34

where a breach concerns the common heritage of mankind,³⁴¹ or where a certain breach concerns a common concern of humankind.³⁴² As noted above, this may include cases concerning climate change. Notably, in the ICJ case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, a non-injured State—The Gambia—invoked responsibility for the violation of obligations that are owed to the international community.³⁴³ As noted by Professor Sean Murphy, this possibility is particularly relevant in the field of international environmental law, where there may be several injured States as well as several breaching States.³⁴⁴

3. Forms of reparation available to the injured States

When a breach of international law occurs, the breaching State continues to be bound by the legal obligation that it is infringing.³⁴⁵ It must therefore cease acting contrary to such obligation,³⁴⁶ and is liable for reparation for the damage caused.³⁴⁷ Further, the ILC has found that a State is obliged to offer assurances and guarantees of non-repetition.³⁴⁸ In the *Chorzow Factory Case*, the PCIJ emphasised that:

“[t]he essential principle contained in the actual notion of an illegal act- a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals- is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, (...), payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law”.³⁴⁹

Reparation for an internationally wrongful act is made in three ways: (i) restitution, (ii) compensation, and/or (iii) satisfaction, including through a combination of these forms.³⁵⁰

i. Restitution

Restitution in environmental law refers to the legal obligation of a party to provide redress for any harm

³⁴¹ See e.g. Articles 136, 311(6) UNCLOS, Art. 1 Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space (UNGA Res 1962 [XVIII] [13 December 1963]). The concept of “common heritage of mankind” was the first international law construction that alludes to common interests of mankind. These “community interests” prevail over national interests and encompass fundamental values that the international community as a whole is interested in safeguarding and benefiting from. This principle has been invoked whenever there is a distribution of resources that lie outside national jurisdiction, which are “*res communis*”, over which, the international community as a whole, has a shared obligation to act as trustees. See also, Tams, C., 2011. *From bilateralism to community interest: Essays in Honor of Bruno Simma*. 1st ed. Oxford: Oxford University Press, at p.380-381, Antônio Augusto Cançado at 365-366, The Principle of the Common Heritage of Mankind at page 313, Ridiger Wolfrum

³⁴² See, e.g. Convention on Biodiversity, United Nations Framework Convention on Climate Change, the Paris Agreement

³⁴³ The Gambia invoked the state responsibility of Myanmar on the basis of obligations *erga omnes partes*. The Gambia claimed that Myanmar’s military and other security forces perpetrated genocide by systemically destroying—through mass murder, rape, and other kinds of sexual violence—villages of the Rohingya in Rakhine province of Myanmar. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Judgment of 22 July 2022

³⁴⁴ Murphy Sean D. 2018. *Principles of International Law* (version Third edition) Third ed. St. Paul MN: West Academic Publishing, p. 242

³⁴⁵ ARSIWA, art. 29.

³⁴⁶ ARSIWA, art. 41.

³⁴⁷ ARSIWA, art. 34.

³⁴⁸ ARSIWA, art. 30.

³⁴⁹ *Case Concerning the Factory at Chorzow (Germany v. Poland)*, 1928 PCIJ, Judgment on Merits (Claim For Indemnity), at p. 47.

³⁵⁰ ARSIWA, art. 34.

or damage caused to the environment by their actions by restoring the environment or affected area to its original state. This can involve a range of measures, such as cleaning up contaminated areas, restoring habitats for wildlife, and implementing new policies to eliminate existing harm. The aim of restitution in environmental law is to ensure that the responsible parties are held accountable for their actions, and that the environment is protected and restored to its original state.

Restoration consists of any action (or alternative), or combination of actions (or alternatives), to restore, rehabilitate, replace, or acquire the equivalent of injured natural resources and services.³⁵¹ There are various methods for restoring environmental damage, as reflected in the European Union's Environmental Liability Directive.³⁵² The US provides for environmental restoration in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),³⁵³ the Oil Pollution Act (OPA),³⁵⁴ and the Natural Resource Damage Assessment (NDRA), which aims to return damaged ecosystems to their baseline conditions and compensate for interim losses of natural resources and services.³⁵⁵ Restoration is implemented through primary, complementary, and compensatory remediation, with the preferred alternative based on technical feasibility, natural recovery period, or cost-effectiveness.³⁵⁶

ii. Compensation

Compensation is a secondary form of reparation that entails the obligations of infringing States to provide monetary payment to the affected, except when damage has already been remedied through restitution.³⁵⁷ Compensation under international law covers any financially accessible damage, including loss of profits.³⁵⁸ This includes damages suffered by the State or its personnel, as well as damage suffered by its nationals, whether individuals or companies. Compensable personal injury includes both tangible losses such as loss of income and medical bills, and intangible losses such as emotional pain, suffering, and intrusion on privacy.

In the *Corfu Channel Case*, the United Kingdom sought compensation in respect of (i) replacement of the destroyer *Saumarez*, and (ii) damage resulting from the deaths and injuries of naval personnel. Concerning the destroyer *Saumarez*, the Court found that "the true measure of compensation" was "the replacement cost of the [destroyer] at the time of its loss".³⁵⁹ In addition, the Court upheld the United Kingdom's claim for representing "the cost of pensions and other grants made by it to victims or their dependents, and for costs of administration, medical treatment, etc."³⁶⁰ More recently, the Court upheld in its judgement on compensation in the *Certain Activities Case* the obligation to make full reparation for environmental damage caused by an unlawful act,³⁶¹

³⁵¹ 15 CFR § 990.10; see also, Kindji K and Faure M, "Assessing Reparation of Environmental Damage by the ICJ: A Lost Opportunity?" (QIL QDIMarch 31, 2019) <http://www.qil-qdi.org/assessing-reparation-of-environmental-damage-by-the-icj-a-lost-opportunity/#_ftn33>; accessed March 14, 2023.

³⁵² See Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

³⁵³ See 42 U.S. Code Chapter 103 - Comprehensive Environmental Response, Compensation, and Liability.

³⁵⁴ See 33 U.S. Code Chapter 40 - Oil Pollution.

³⁵⁵ See, 15 CFR § 990.10.

³⁵⁶ Kindji K and Faure M, "Assessing Reparation of Environmental Damage by the ICJ: A Lost Opportunity?" (QIL QDI-March 31, 2019) <http://www.qil-qdi.org/assessing-reparation-of-environmental-damage-by-the-icj-a-lost-opportunity/#_ftn33>; accessed March 14, 2023.

³⁵⁷ ARSIWA, art. 36.1.

³⁵⁸ ARSIWA, art. 36.2.

³⁵⁹ *Corfu Channel case*, Judgment of December 15th, 1949, Assessment of the amount of compensation due from the People's Republic of Albania to the United Kingdom of Great Britain and Northern Ireland, ICJ Reports 1949, p. 244, at p. 249.

³⁶⁰ *Id*; see also, MIV "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, p.10, at para. 176.

³⁶¹ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, Compensation, Judgment, ICJ Reports 2018, p. 26, para. 31.

where it reaffirmed that compensation may be an appropriate form of reparation “particularly where restitution is materially impossible or unduly burdensome”.³⁶² Given that many impacts of climate change will be irreversible (or will take a very long time to reverse), compensation may sometimes be a necessary legal consequence of States’ breach of their international obligations concerning climate change.

It is important to note that compensation is not by any means punitive in nature. Rather, its objective is to make injured States and the affected population whole.³⁶³ Under international law, compensation for environmental damages thus implies the payment of monetary damages to the affected parties, including particularly affected States for damages suffered by their nationals.

Finally, besides compensation, almost all international courts and tribunals have awarded interest on the principal sum due, as calculated from the date of the awarding of the sum until the date of payment.³⁶⁴

iii. Satisfaction

Satisfaction is a tertiary form of reparation which is usually employed when an injury cannot be remedied through either restitution or compensation.³⁶⁵ Satisfaction can be given through public acknowledgments or statements, and/or by taking disciplinary actions against state officials who have fostered or committed breaches of international law.³⁶⁶ In this regard, the ICJ found in the Corfu Channel Case that a “a declaration (...) is in itself appropriate satisfaction”.³⁶⁷

4. Espousal of claims

On several occasions, the injury derived from internationally wrongful conduct may not directly affect the State, but rather its nationals and populations. In this regard, States may invoke responsibility on behalf of their nationals. This State faculty is called *espousal of claims*.³⁶⁸

For a State to espouse claims, three elements must be met. In the first place, the injured State may only bring a claim on behalf of a person or collective who is a national of that State. Furthermore, that individual must be a national of that State from the moment when the internationally wrong conduct happened until the moment of the resolution of that claim.³⁶⁹ Second, for a State to bring a claim on behalf of its injured population, all local remedies must be exhausted.³⁷⁰ Third, for a State to pursue a claim on behalf of its injured nationals, the claim must not have been waived, nor the State have acquiesced to the wrongful conduct.³⁷¹

³⁶² *Id.*

³⁶³ Murphy Sean D. 2018. *Principles of International Law* (version Third edition) Third ed. St. Paul MN: West Academic Publishing, p. 237.

³⁶⁴ Murphy Sean D. 2018. *Principles of International Law* (version Third edition) Third ed. St. Paul MN: West Academic Publishing, p. 241-242.

³⁶⁵ ARSIWA, art. 37. See further Murphy Sean D. 2018. *Principles of International Law* (version Third edition) Third ed. St. Paul MN: West Academic Publishing, p. 240.

³⁶⁶ Murphy Sean D. 2018. *Principles of International Law* (version Third edition) Third ed. St. Paul MN: West Academic Publishing, p. 241.

³⁶⁷ *Corfu Channel Case*, Judgment of April 9th, 1949: I.C. J. Reports 1949, p.4, at p. 35

³⁶⁸ *Id.*

³⁶⁹ Murphy Sean D. 2018. *Principles of International Law* (version Third edition) Third ed. St. Paul MN: West Academic Publishing, p. 245

³⁷⁰ ARSIWA, art. 44 (b). *Id.* at p. 246

³⁷¹ ARSIWA, art. 45.

In conclusion, the general consequence of breaching international law obligations is State responsibility, which requires the immediate cessation of any breach of international law, assurance that such actions will not be repeated, and reparations to address the harm caused by this breach. Climate change entails an ongoing breach of international law that causes harm to present and future generations, and compliance with international law requires taking decisive action to address climate change. Injured States and affected populations have the right to invoke state responsibility for the breach of international law obligations and can impose countermeasures against the breaching State. Peoples and individuals affected by climate change may take legal action against their governments for failing to uphold international law obligations, including by seeking reparation for damages caused by climate change. States may also espouse climate change proceedings on behalf of their affected individuals and persons. Affected individuals and persons can also enforce their rights before human rights courts and other competent bodies.

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Disclaimer: We are respectful of the fact that in addition to the matters discussed in this Handbook the Court will identify additional matters which it considers should be addressed, in responding to the first and second question posed by the General Assembly.

ANNEX A

THE ADVISORY PROCEEDINGS BEFORE THE ICJ

The advisory procedure before the ICJ is closely modelled on the contentious procedure; it is divided into a written and an oral phase. However, the Court has the power to dispense with oral proceedings where it considers appropriate. Below, we briefly summarise the advisory proceedings on a step-by-step basis to inform the interested States and international organisations on the preparation of pleadings.

The Statute and Rules of the Court establish the procedural rules. The procedural rules that apply to advisory proceedings are similar to those that apply to contentious cases, with certain modifications.³⁷² In particular, the Statute and Rules of the Court dictate that the advisory proceeding will unfold as follows:

1. Submission of the request. The UN Secretary-General³⁷³ must submit to the Court “a written request containing an exact statement of the question upon which an opinion is requested. This opinion will be accompanied by all documents likely to throw light upon the question.”³⁷⁴
2. Notice of the request. The Court will subsequently provide notice through the Registry, or the permanent administrative secretariat of the Court, which handles all communications to and from the Court. Specifically, “[t]he Registrar shall forthwith give notice of the request for an Advisory Opinion to all States entitled to appear before the Court.”³⁷⁵
3. Special notice of deadlines for submissions. The Court will also notify States and international organisations that are “likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time-limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.”³⁷⁶ The States that are entitled to appear before the Court are the States Parties to the Statute of the Court.³⁷⁷ This direct communication is usually sent to the international organisation that submitted the request (i.e., the General Assembly), and the member States thereof (i.e., all General Assembly member States). Notably, international non-governmental organisations will not have the same rights as intergovernmental organisations; any submissions by international non-governmental organisations “is not to be considered as part of the case file,” but will instead “be treated as publications readily available”—i.e., as any other document in the public domain.³⁷⁸
4. Request for permission to participate. If a State or international organisation did not receive the aforementioned communication, that State or organisation may request to present a written or oral submission, and the Court will decide upon that request.³⁷⁹

372 See Rules of the Court, Art. 102(2) (“The Court shall also be guided by the provisions of the Statute and of these Rules which apply in contentious cases to the extent to which it recognizes them to be applicable. For this purpose, it shall above all consider whether the request for the Advisory Opinion relates to a legal question actually pending between two or more States.”). See also ICJ Handbook, p. 84.

373 In the event that the request was not made by a UN organ, the request would be sent by “the chief administrative officer of the body authorized to make the request.” See Rules of Court, Art. 104.

374 ICJ Statute, Art. 65(2).

375 ICJ Statute, Article 66(1).

376 ICJ Statute, Article 66(2).

377 Art. 35(1) (“The Court shall be open to the states parties to the present Statute.”). The Court has made exceptions under particular circumstances. For instance, although Palestine is not considered a State entitled to appear before the Court, the Court determined that Palestine could provide submissions in the case concerning *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

378 Practice Directions of the Court, Practice Direction XII.

379 See ICJ Statute, Article 66(3) (“Should any such State entitled to appear before the Court have failed to receive the special communication referred to in paragraph 2 of this Article, such State may express a desire to submit a written statement or to be heard; and the Court will decide.”).

5. Written submissions by authorised States and international organisations. As noted above, the President of the Court will establish a deadline for written submissions. The time limits for such submissions are generally shorter than those that apply in contentious proceedings, but the rules allow for flexibility.³⁸⁰ The written submissions must be in English or French, which are the official languages of the Court.
6. Comments on written submissions. The Statute of the Court provides that “States and organisations having presented written or oral statements, or both shall be permitted to comment on the statements made by other states or organisations in the form, to the extent, and within the time-limits which the Court, or, should it not be sitting, the President, shall decide in each particular case.”³⁸¹
7. Oral proceedings. The Court may, but is not required to, hold an oral proceeding during which authorised States and international organisations may make oral submissions.³⁸² The written submissions referred to above will generally be made public at the outset of the oral proceeding.³⁸³
8. Delivery of Advisory Opinion by the Court. The Court is required to “deliver its Advisory Opinions in open court, notice having been given to the Secretary-General and to the representatives of Members of the United Nations, of other States and of international organisations immediately concerned.”³⁸⁴ Members of the Court may append declarations or separate or dissenting opinions to the Advisory Opinion.

380 See ICJ Handbook, p. 86.

381 ICJ Statute, Art. 66(4).

382 See Rules of Court, Art. 105.

383 See Rules of Court, Art. 106; ICJ Handbook, p. 86.

384 ICJ Statute, Art. 67.

