



INTERNATIONAL COURT OF JUSTICE

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

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**WRITTEN STATEMENT SUBMITTED BY  
THE CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW (CIEL)**

***MEMORANDUM ON APPLICABLE LAW***

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# MEMO ON APPLICABLE LAW

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## **I. Introduction**

1. States have obligations under multiple existing sources of law—including the law of State responsibility, customary and conventional international environmental and human rights law, and the law of the sea—to act in the face of the climate emergency to prevent further foreseeable harm from climate change and to remedy harm that has occurred and is occurring as a result of climate change.
2. The international climate agreements, comprising the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement,<sup>1</sup> should inform, but cannot, and indeed do not purport to, exhaustively set out or exclusively define state legal responsibilities and duties of care with respect to climate change. Climate change is not just an environmental problem—it is a global phenomenon of a transversal nature affecting nearly every dimension of human existence, ecological well-being and State relations, and specific aspects of climate change are correctly governed by distinct legal frameworks.
3. The climate agreements are neither the origin of the legal obligations of States to act in the face of the climate emergency, nor the final word on the extent of those obligations. The Court can and should reason from first principles, looking at the nature of the conduct and harm at issue, to ascertain which rules of international law are relevant. Such reasoning we respectfully contend would clarify that multiple sources of law speak to State obligations regarding climate change. However, it is also evident from the climate agreements themselves, from their text and relevant negotiating history, that they do not exhaustively or exclusively answer the questions before the Court.
4. The questions posed before the International Court of Justice (ICJ or “the Court”) in the request for an advisory opinion on the obligations of States in respect of climate change reference “the obligations of States under international law,”<sup>2</sup> citing a wide range of legal instruments and sources of law. This section of CIEL’s submission seeks to establish what constitutes applicable international law in this case.

## **II. Applicable Law: multiple sources of international law define the scope of State obligations in respect of climate change**

5. In accordance with Article 38(1) of the Statute of the International Court of Justice (ICJ Statute), the sources of international law the Court can apply include treaty law, customary international law, and general principles of law.<sup>3</sup> These main sources of interpretation are not in a hierarchical

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<sup>1</sup> The Paris Agreement did not supersede the UNFCCC but rather is subsidiary to the Convention. Margaretha Wewerinke-Singh & Curtis Doebbler, *The Paris Agreement: Some Critical Reflections on Process and Substance*, 39 UNSW L. J. 1486, p. 1498-1499 (2016).

<sup>2</sup> Rep. of the I.C.J., *Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change*, U.N. Doc. A/77/L.58 (2023) at p. 3.

<sup>3</sup> Statute of the International Court of Justice, art. 38(1), Oct. 24, 1945, <https://www.icj-cij.org/statute>.

relationship *inter se*.<sup>4</sup> As subsidiary means for the determination of rules of law, judicial decisions and scholarly works can also be drawn on.<sup>5</sup> The sources of law listed in 38(1) are considered to be non-exhaustive in nature,<sup>6</sup> as reflected in the ICJ's flexible approach to the sources on which it has relied.<sup>7</sup>

6. Article 38(1) of the ICJ Statute applies to contentious cases. However, although the provisions of the Statute referring to advisory opinions do not reference sources of international law, they clarify, under Article 68, that “In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.”<sup>8</sup>
7. Climate change is not just an environmental problem; it has a cross-cutting “effect on society and all areas of the law.”<sup>9</sup> No one legal source under Article 38(1) of the ICJ Statute can fully respond to the complex interlocking dimensions of climate change and the myriad of ways in which climate change affects public and planetary well-being. This is true also for climate agreements such as the UNFCCC and the Paris Agreement, which specifically address climate change but in targeted ways, “limited to certain timeframes, areas, sectors, gases and activities.”<sup>10</sup>
8. The obligations of States in respect of climate change are defined under multiple sources of international law, conventional and customary, applying concurrently, as “separate and distinct” obligations,<sup>11</sup> to define the full scope of State obligations. Some relevant legal frameworks and norms may not have climate change as an issue explicitly under their purview, and yet remain an

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<sup>4</sup> Rep. of the Study Grp. of the Int'l L. Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* U.N. Doc. A/CN.4/L.702 (13 July 2006) [hereinafter *Fragmentation of International Law 2*], at p. 20, para 31.

<sup>5</sup> Statute of the ICJ at art. 68.

<sup>6</sup> Rebecca McMenamin, *Advisory Opinion on Obligations of States in Respect of Climate Change: Potential Contribution of Human Rights Bodies*, 13 *Climate L.* 213 (2023), at 217; Alain Pellet & Daniel Muller, *Competence of the Court, Article 38 in the Statute of the International Court of Justice: A Commentary* (Andreas Zimmerman, et al. eds., 3d ed., 2019), at 75-83.

<sup>7</sup> McMenamin, at 217. As an example of this flexible approach, the Court has referenced and relied on UN treaty body decisions although they might not readily be characterized either as judicial decisions or scholarly works. *See, eg.*, Case Concerning Ahmadou Sadio Diallo (*Guinea v. Dem. Rep. Congo*), Judgment, 2010 I.C.J. 639, (Nov. 30), at para. 66 (“The interpretation above is fully corroborated by the jurisprudence of the Human Rights Committee established by the Covenant to ensure compliance with that instrument by the States parties ... Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of its ‘General Comments’. Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty.”). *See also* Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9), at para. 109.

<sup>8</sup> Statute of the ICJ, at art. 68.

<sup>9</sup> Christoph Schwarte & Will Frank, *The International Law Association's Legal Principles on Climate Change and Climate Liability under Public International Law*, 4 *Climate L.* 201 (2014), at 216.

<sup>10</sup> Benoit Mayer, *Climate Change Mitigation as an Obligation under Customary International Law*, 48 *Yale J. of Int'l L.* 105 (2023), at 114.

<sup>11</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*), Judgment, 2015 I.C.J. No. 118 (Feb. 3), at para. 88; Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), Judgment, 1986 I.C.J. 14 (June 27), at para. 179.

important source of State duties either because the nature of the issue(s) they govern is similar to climate change, for example concerning environmental threats or degradation, or because the issues the laws address include the drivers or consequences of climate change, such as transboundary harm or human rights violations.

9. As manifest in the questions to the Court, State obligations in respect of climate change encompass horizontal and vertical duties under international law. Horizontal obligations indicate State duties *inter se*. In contrast, vertical duties of a State entail obligations vis-a-vis peoples and individuals, primarily governed under human rights law.
10. A request for an advisory opinion of the ICJ on the obligations of States with respect of climate change,<sup>12</sup> was adopted by consensus by the United Nations General Assembly on 29 March 2023 following “intense and engaged negotiations within the core group and with the broader United Nations membership.”<sup>13</sup> The Resolution explicitly affirmed the importance of a wide range of treaties as well as core customary international law principles in relation to State obligations in respect of climate change.<sup>14</sup> Furthermore, the Resolution requested the Court to render an advisory opinion having particular regard to the following instruments and norms, namely, the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the UNFCCC, 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.<sup>15</sup>
11. Sources of international law are subject to rules of interpretation and application which are addressed in Part III of this submission.

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<sup>12</sup> Rep. of the I.C.J., *Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change*, U.N. Doc. A/77/PV.64 (2023) (UN Request to ICJ).

<sup>13</sup> *Ibid.*, at p. 3.

<sup>14</sup> “The frameworks and norms outlined included: the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the United Nations Convention on the Law of the Sea, the Vienna Convention for the Protection of the Ozone Layer, the Montreal Protocol on Substances that Deplete the Ozone Layer, the Convention on Biological Diversity and the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, among other instruments, and of the relevant principles and relevant obligations of customary international law, including those reflected in the Declaration of the United Nations Conference on the Human Environment and the Rio Declaration on Environment and Development, to the conduct of States over time in relation to activities that contribute to climate change and its adverse effects.” Rep. of the I.C.J., *Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change*, U.N. Doc. A/77/L.58 (2023), at p.2.

<sup>15</sup> UN Request to ICJ. A few countries, such as the UK, Iceland, Norway and Canada, adopted the resolution without prejudice to their position on, and interpretation of, the obligations, instruments and concepts to which resolution 77/276 refers, while other nations including El Salvador, Chile and Marshall Islands emphasized the importance of wider international law. *Ibid.*, at pp. 21, 24-27, 31-32, or “connect[ing] and better realiz[ing] the common threads across international law.” (Marshall Islands, *Ibid.*, at p. 31.).

### **III. Climate agreements inform the scope of State obligations in respect of climate change but do not fully encompass all applicable law relevant to the questions before the Court**

12. Some States and scholars have argued<sup>16</sup> that the climate agreements definitively set out State obligations in respect of climate change, or that these climate agreements occupy a preeminent place within applicable law relevant to climate change. Alternate formulations of this assertion contend that, given their scope and procedures, the UNFCCC and the Paris Agreement together could be considered a special “regime” or set of specialized norms sufficient to address the obligations of States in relation to climate change.<sup>17</sup> Such contentions are legally unwarranted. As this section will establish, the climate agreements are clearly relevant to defining the scope and content of State obligations with regard to climate change, but do not fully define those obligations. The relevant corpus of applicable law is broader.

#### **A. The rules of interpretation establishing the relationship between the climate agreements and the wider corpus of applicable international law affirm that States have concurrent duties with regard to climate change**

13. As considered in Subsection (i)(a) and (b) below, **the plain text of the UNFCCC and Paris Agreement makes clear that they build upon and do not supplant or replace other international obligations relevant to climate change. Any analysis of an instrument should**

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<sup>16</sup> To illustrate: “...with respect to the chapeau of the question [to the International Court of Justice], while the Paris Agreement sets forth a number of climate change obligations, as well as many non-binding provisions, the reference to other treaties should not be understood to imply that each of those treaties contains obligations to ensure the protection of the climate system.” UN Request to ICJ (Statement of the United States when the GA resolution was adopted), p. 28; “The obligations of States in relation to climate change and its impacts are not dealt under UNCLOS. They are dealt with under a separate climate change treaty regime, namely the UNFCCC, its Kyoto Protocol and its Paris Agreement.” India in its written statement to the ITLOS climate advisory proceedings - *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Case No. 31, Written Statement by the Republic of India, at para. 21; [https://www.itlos.org/fileadmin/itlos/documents/cases/31/written\\_statements/3/C31-WS-3-4-India.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/3/C31-WS-3-4-India.pdf); “Australia submits that Part XII of UNCLOS should not be interpreted as imposing obligations with respect to greenhouse gas emissions that are inconsistent with, or that go beyond, those agreed by the international community in the specific context of the UNFCCC and the Paris Agreement.... It follows that compliance with the UNFCCC and the Paris Agreement satisfies the specific obligation under article 194 of UNCLOS to take measures to prevent, reduce and control pollution of the marine environment arising from greenhouse gas emissions.” *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion Submitted to the Tribunal)*, ITLOS/PV.23/C31/5/Rev.1, Verbatim Record (Sept. 13, 2023), pp.3, 9; The Paris Agreement “could hardly be effective if it did not cover the field.” Alexander Zahar, *The Contested Core of Climate Law*, 8 *Climate L.* 244 (2018), at 255-56.

<sup>17</sup> See, e.g., *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Case No. 31, Written Statement by the Republic of India, [https://www.itlos.org/fileadmin/itlos/documents/cases/31/written\\_statements/3/C31-WS-3-4-India.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/3/C31-WS-3-4-India.pdf), at para. 21 (“The subject of climate change has evolved over a period of time as a distinct and specialized legal regime, under international law. The United Nations Framework Convention on Climate Change (UNFCCC), 1992 along with its Kyoto Protocol, 1997 and its Paris Agreement 2015 constitute the comprehensive legal regime that deals with the subject.”). See also, *id.*, at paras. 16, 17, IIIA & 33 iii.

**start with its text.** In terms of treaty interpretation, in accordance with the Vienna Convention on the Law of Treaties (VCLT), the text of the treaty in question, including its preamble and annexes<sup>18</sup> is paramount, while “recourse may also be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.”<sup>19</sup>

14. Beyond textual interpretation there are also relevant rules and jurisprudence relating to harmonization of relevant norms under multiple sources of law. These are considered in the subsequent paragraphs below [paras 15-18].
15. In the *Case concerning the Right of Passage over Indian Territory (Portugal v. India)* this Court stated that “[i]t is a rule of interpretation that a text emanating from a government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it.”<sup>20</sup> Scholars dating back to Grotius have “expressed the presumption against the conflict of international legal norms.”<sup>21</sup>
16. According to the *International Law Commission Study Group on the Fragmentation of International Law*, it is generally accepted under the principle of harmonization that “**when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations.**”<sup>22</sup> Relevantly, the **first arbitral tribunal under the UN Convention on the Law of the Sea in the *Southern Bluefin Tuna* arbitration has recognized that** “it is a commonplace of international law and State practice for more than one treaty to bear upon a particular dispute. **There is no reason why a given act of a State may not violate its obligations under more than one treaty.** There is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes arising thereunder. The current range of international legal obligations benefits from a process of accretion and cumulation.”<sup>23</sup> Similarly, in *Costa Rica v Nicaragua*, the ICJ itself has observed that a treaty enshrining “limited obligations concerning notification or consultation in specific situations does not exclude any other procedural obligations with regard to transboundary harm that may exist in treaty or customary international law.”<sup>24</sup>
17. With specific regard to climate change, the *Declaration of Legal Principles Relating to Climate Change*<sup>25</sup> has emphasized the inter-relationship between climate law and other overlapping areas

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<sup>18</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S 331 (entered into force Jan. 27, 1980), art. 31(1)(2).

<sup>19</sup> *Ibid.*, at art. 32.

<sup>20</sup> *Case concerning the Right of Passage over Indian Territory (Port. v. India)*, Judgment, 1957 I.C.J. 125 (Nov. 26), at 142.

<sup>21</sup> Rhonda Ferguson, *Conflict of Norms in International Law: Theories and Practice*, in *The Right to Food and the World Trade Organization's Rules on Agriculture* 51 (2017), at 51; Hugo Grotius, *De Jure Belli ac Pacis Libris Tres (Law of War and Peace)*, Ch. 16 (Knud Haakonssen eds., Natural Law and Enlightenment Classics 2005) (1625), at Ch. 16.

<sup>22</sup> Rep. of the Study Grp. of the Int'l L. Comm'n, *Fragmentation of International Law 2*, at para. 14 (1) (4) (emphasis added).

<sup>23</sup> Reports of International Arbitral Awards, *Southern Bluefin Tuna (New Zealand-Japan, Australia-Japan)*, Vol. XXIII (Aug. 4, 2000), at 1-57, para 52 (emphasis added)

<sup>24</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.)*, Judgment, 2015 I.C.J. 665, (Dec. 16), at para. 108.

<sup>25</sup> Int'l L. Assoc. Res. 2/2014, *Declaration of Legal Principles Related to Climate Change* (2014).

of public international law such as, *inter alia*, the protection of human rights, the law of the sea, and the law of international trade and investment.<sup>26</sup> The commentary thereto clarifies that in the design and implementation of international law, conflicts between the rules applicable under different international regimes should be avoided as far as possible and solved through a harmonizing interpretation.<sup>27</sup>

18. In considering applicable law, including in respect of climate change, multiple norms and frameworks may be relevant in relation to a specific issue. As per the International Law Commission (ILC), such norms can either be in “relationships of interpretation” or in “relationships of conflict.”<sup>28</sup> As regards to the former, which mirrors the principle of harmonization, one norm assists in the interpretation of another, such that the norms are applied in conjunction.<sup>29</sup> Conversely, when applicable legal standards are in relationships of conflict, “where norms that are both valid and applicable point to incompatible decisions,” a choice must be made between them.<sup>30</sup> Mere divergence of content however, does not suffice to establish conflict, there must be actual incompatibility, and if so, there are rules of interpretation that may provide guidance in terms of applicable law.<sup>31</sup> These rules of interpretation govern the relationship between treaties, and between treaties and customary international law, and are thus relevant when considering the relationship between the climate agreements and the wider corpus of relevant international law.
19. One legal maxim is of particular relevance: *lex specialis derogat legi generali* (special law has priority over general law).<sup>32</sup> Also relevant here in view of the climate agreements is the notion of special “self-contained” regimes, which can be defined as “a group of rules and principles concerned with a particular subject matter [that] may form a special regime (“self-contained regime”) and be applicable as *lex specialis*.”<sup>33</sup> **However, for *lex specialis* to apply it is not enough that the same subject matter is covered by two provisions, there must be some actual inconsistency between them, or else a perceivable intention that one provision is to exclude the other.**<sup>34</sup> The ILC has emphasized a strong presumption against normative conflict,<sup>35</sup> and, in general, norms will be interpreted to avoid or minimize any inconsistent application.
20. The preambles of the UNFCCC and the Paris Agreement, and text of subsequent decisions adopted by consensus thereunder, indicate that they were agreed against the backdrop of States’ existing

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<sup>26</sup> *Ibid.*, at draft art. 10.

<sup>27</sup> Schwarte & Frank, at 204; International Law Association, *Washington Conference Report on Legal Principles Relating to Climate Change*, (2014), at p. 35, [https://www.ila-hq.org/en\\_GB/documents/conference-report-washington-2014-5](https://www.ila-hq.org/en_GB/documents/conference-report-washington-2014-5).

<sup>28</sup> Rep. of the Study Grp. of the Int’l L. Comm’n, *Fragmentation of International Law 2*, at para. 14 (1) (2).

<sup>29</sup> ILC, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, U.N. Doc A/61/10 178 (2006) at para. 251(a)(2).

<sup>30</sup> Rep. of the Study Grp. of the Int’l L. Comm’n, *Fragmentation of International Law 2*, at para. 14 (1)(2).

<sup>31</sup> Mayer, 48 Yale J. of Int’l L. at 115.

<sup>32</sup> Rep. of the Study Grp. of the Int’l L. Comm’n, *Fragmentation of International Law 2*, at para.14 (2) (5)-(10).

<sup>33</sup> Rep. of the Study Grp. of the Int’l L. Comm’n, *Fragmentation of International Law 2*, at para. 14 (3)(11) (parentheses added).

<sup>34</sup> International Law Commission (ILC), *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, U.N. Doc A/56/10 (2001), at art. 55 cmt. para 4.

<sup>35</sup> Rep. of the Study Grp. of the Int’l L. Comm’n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682 and Add.1 (13 April 2006), Martii Koskenniemi (Chairman), at para 37 [hereinafter *Fragmentation of International Law 1*].



legal obligations and established principles of international law, and do not reflect an intention to displace such law.<sup>36</sup> Thus overall, the issue of conflict does not arise between the climate agreements and other relevant international law, signifying the existence of concurrent duties to be read in a harmonious manner.

21. While a comprehensive analysis of all relevant norms will be impossible, the subsequent paragraphs [paras 23-34] demonstrate that concurrent duties can and do exist, and conflict does not arise between certain select primary and secondary rules of the wider corpus of relevant international law and corresponding provisions, if any, of the UNFCCC and the Paris Agreement.
22. The ILC has considered obligations, both customary and conventional, whose breach could be a source of responsibility as “primary,” while characterizing other rules as “secondary,” as they were aimed at determining the legal consequences of failure to fulfill obligations established by the “primary” rules.<sup>37</sup> This next section will establish that no conflict exists between obligations set forth in the UNFCCC and the Paris Agreement, and those contained in certain primary rules in other sources of conventional and customary law, such as the duty to prevent transboundary harm, human rights obligations, and rules pertaining to the law of the sea, or in secondary rules under the law of State responsibility.

#### **i. The UNFCCC and the Paris Agreement can be read harmoniously with primary rules under the wider corpus of relevant international law**

23. It is important to clarify at the outset that the UNFCCC and the Paris Agreement exist concurrently, with the Paris Agreement’s preamble expressing commitment to pursuing “the objective of the Convention, and being guided by its principles.”<sup>38</sup>
24. Additionally, it is important to note that the VCLT requires preambles in treaties be treated the same as the text of the treaty while related commentaries by the ILC considers the preamble to be an integral part of an agreement, and the principle “too well settled to require comment.”<sup>39</sup>

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<sup>36</sup> See, e.g., United Nations Framework Convention on Climate Change, 9 May 1992, 1771 U.N.T.S. 107 (entered into force on 21 March 1994) [UNFCCC], at preamble (“Recalling also that States have, in accordance with the Charter of the United Nations and the principles of international law, ... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”); Paris Agreement to the United Nations Framework Convention on Climate Change, pmbl. Dec. 12, 2015, 3156 U.N.T.S. (entered into force Nov. 4, 2016) [hereinafter Paris Agreement]; see also UNFCCC, COP 27, Decisions 1/CP.27 and 1/CMA.4, 2022, at pmbl. (Sharm el-Sheikh Implementation Plan).

<sup>37</sup> ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, at para. 1, p.31; International Law Commission, *Summaries of the Work of the International Law Commission: State Responsibility*, (June 29, 2023), [https://legal.un.org/ilc/summaries/9\\_6.shtml](https://legal.un.org/ilc/summaries/9_6.shtml).

<sup>38</sup> Paris Agreement, at pmbl. It is clear that the Paris Agreement does not supersede the UNFCCC. See Wewerinke-Singh & Doebbler, at 1498-1499. The UNFCCC Secretariat and Parties to the UNFCCC also reflect this understanding of the complementary nature of the agreements through their utilization of phrasing such as “the UNFCCC and its Paris Agreement.” See, e.g., UNFCCC, *Adaptation and resilience*, <https://unfccc.int/topics/adaptation-and-resilience/the-big-picture/introduction>; European Commission, *Climate Action and the Green Deal*, [https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/climate-action-and-green-deal\\_en](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/climate-action-and-green-deal_en).

<sup>39</sup> ILC, Rep. on the Work of the Second Part of its Seventeenth Session, U.N. Doc. A/6309/Rev.1 (1966), at p. 221.

Moreover, the ICJ has frequently referenced the preambles of treaties to guide the interpretation of specific commitments contained in the operative provisions.<sup>40</sup>

25. In terms of textual interpretation, on the duty to prevent transboundary harm, the UNFCCC preamble, reflecting this long-standing principle, reads, “Recalling also that States have, in accordance with the Charter of the United Nations and the principles of international law, ... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”<sup>41</sup> The framing here references concurrent duties under international law.
26. Meanwhile the Paris Agreement preambular text also specifically “[A]cknowledg[es] that climate change is a common concern of humankind, [and] **Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights...**”<sup>42</sup> The reference to human rights obligations in the preamble reflects an understanding of international human rights law as a preexisting and concurrent set of duties relevant to climate change.
27. Similarly, States have recognized the importance of protecting the ocean and its ecosystems in the Convention and the Paris Agreement and subsequent Conference of the Parties (COP) decisions have underlined the commitment of States to strengthen ocean-based climate action.<sup>43</sup> In terms of textual references, the UNFCCC, for example, in Article 2 expresses its objective to protect the climate system, which it defines as the “totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions” (in Article 1.3),<sup>44</sup> and the Paris Agreement acknowledges the importance of “ensuring the integrity of all ecosystems, including oceans.”<sup>45</sup> However, while there have been specific events and dialogues on oceans during meetings of the Parties, there is little substantive guidance in the text of the climate agreements related to States’ binding obligations in relation to climate change and oceans, which suggests an understanding of concurrent duties.
28. Notably at the oral hearings of the ongoing climate advisory proceedings before the International Tribunal for the Law of the Sea (ITLOS), the Commission of Small Island States (COSIS), in response to whether the obligations of States Parties to the UN Convention on the Law of the Sea (UNCLOS) go beyond obligations assumed under the UNFCCC and the Paris Agreement, argued that “UNCLOS is the applicable law in relation to the marine environment, and the global climate change regime does not in any way displace or dilute its application. Indeed, it would be misplaced

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<sup>40</sup> See, e.g., Case Concerning Rights of Nationals of the United States of America in Morocco (*Fr. v. U.S.*), Judgment, 1952 I.C.J. 176 (Aug. 27), at 183-184, 197-198. *Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slov.)*, Judgment, 1997 I.C.J. 7 (Sept. 25) [hereinafter *Gabčíkovo-Nagymaros Project*], at 17.

<sup>41</sup> UNFCCC, at pmbl.

<sup>42</sup> The Paris Agreement is the first global environmental treaty to make an explicit reference to human rights. This builds on and expands the basis of an earlier reference in the cross-cutting section of the Cancun Agreements adopted by the Sixteenth Conference of the Parties to the UNFCCC (COP16) in 2010. Sébastien Duyck & Yves Lador, *Human Rights and International Climate Politics* 3 (Friedrich, Ebert, Stiftung eds. 2016).

<sup>43</sup> United Nations, *The Ocean*, <https://unfccc.int/topics/ocean> (last visited March 15, 2024).

<sup>44</sup> UNFCCC, at art. 4(1)(d) (enshrining State commitments to “[p]romote sustainable management, and promote and cooperate in the conservation and enhancement, as appropriate, of sinks and reservoirs of.. greenhouse gases ... including ... oceans as well as other terrestrial, coastal and marine ecosystems.”).

<sup>45</sup> Paris Agreement, at pmbl.

to refer to the general hortatory provisions of the Paris Agreement as *lex specialis* when there is so little in the way of binding obligations.”<sup>46</sup> COSIS further asserted that “[T]here is in fact no identifiable normative conflict between competing regimes. To the contrary, there is a complementary relationship between UNCLOS and the global climate regime...”<sup>47</sup>

29. Importantly, in relation to the preceding sections [paras 26-28],<sup>48</sup> there is no explicit language expressly abrogating, displacing, or preempting application of the aforementioned primary rules, or establishing the exclusivity of the climate agreements. International treaties cannot be read to silently displace or supplant long standing existing law.<sup>49</sup>
30. Since “preparatory work of the treaty and the circumstances of its conclusion” is considered a supplementary means of interpretation,<sup>50</sup> it is germane that declarations made by some State parties upon ratification, acceptance, approval, or accession to the UNFCCC and the Paris Agreement reinforced the understanding that the agreements do not derogate from public international law. Fiji’s declaration in relation to the UNFCCC, for example, expressed that “signature of the Convention shall, in no way ... be interpreted as derogating from the principles of general international law.”<sup>51</sup> While the Marshall Islands’ declaration in relation to the Paris Agreement expressed that “...the Government of the Republic of the Marshall Islands declares its understanding that ratification of the Paris Agreement shall in no way constitute a renunciation of any rights under any other laws, including international law.”<sup>52</sup> A number of other countries made similar declarations.<sup>53</sup> Subsequently, small island States<sup>54</sup> facing existential climate stakes have persistently asserted via legal instruments<sup>55</sup> and public statements<sup>56</sup> that the corpus of international law addressing climate change is broader than the provisions of the UNFCCC and the Paris Agreement.

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<sup>46</sup> ITLOS, Verbatim Record of Public Sitting on Sept. 13, 2023 in re *Request for an Advisory Opinion Submitted by the Commission of Small Island States (COSIS) on Climate Change and International Law*, ITLOS/PV.23/C31/5/Rev.1 (Sept. 13, 2023), pp-25-26, [https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral\\_proceedings/verbatim\\_records\\_rev/ITLOS\\_PV23\\_C31\\_1\\_Rev.1\\_E.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/verbatim_records_rev/ITLOS_PV23_C31_1_Rev.1_E.pdf) (emphasis added.)

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*, at paras. 24-27.

<sup>49</sup> Communication from the Chairman of the Panel, *Korea - Measures Affecting Government Procurement*, WTO Doc. WT/DS163/6 (Jan. 25, 2000) [hereinafter *Korea Communication*], para.7.96.

<sup>50</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S 331 (entered into force Jan. 27, 1980), art. 32.

<sup>51</sup> *Declarations by Parties*, United Nations Climate Change, <https://unfccc.int/process-and-meetings/the-convention/status-of-ratification/declarations-by-parties>.

<sup>52</sup> *Depository: Status of Treaties, Chapter XXVII.: Environment, 7.d Paris Agreement, Declarations*, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg\\_no=XXVII-7-d&chapter=27&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=XXVII-7-d&chapter=27&clang=en) [hereinafter *Paris Agreement Status of Ratification, Declarations*].

<sup>53</sup> *Ibid.*

<sup>54</sup> United Nations, *The Ocean*, <https://unfccc.int/topics/ocean> (last visited March 15, 2024).

<sup>55</sup> See, e.g., Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law, Ant. and Barb.- Tuvalu (Oct. 31, 2021) <https://www.cosis-ccil.org/storage/documents/I-56940-0800002805c2ace.pdf>.

<sup>56</sup> See, e.g., PM Browne, *AOSIS Statement at COP26 World Leaders’ Summit*, Alliance of Small Island States, <https://www.aosis.org/aosis-statement-at-cop26-world-leaders-summit/>.

**ii. The UNFCCC and the Paris Agreement can be read harmoniously with secondary rules under the wider corpus of relevant international law**

31. Article 55 of the ILC Draft Articles on State Responsibility addresses *lex specialis* and states that: “These articles [*on State Responsibility*] do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.”<sup>57</sup> Neither the UNFCCC nor the Paris Agreement sets forth such special rules regarding international responsibility. The text of the UNFCCC and of the Paris Agreement nowhere expressly mentions State responsibility for wrongful acts.<sup>58</sup> Thus no incompatibility of norms or conflict arises between the climate agreements and the secondary rules of State responsibility, and the latter continue to apply.
32. As with the primary rules discussed above, there is no explicit language expressly abrogating, displacing, or preempting application of the law of State responsibility, or establishing the exclusivity of the climate agreements on matters relating to breach of international obligations. In absence of such carveout, the customary international law of State responsibility applies to breaches of the UNFCCC and Paris Agreement. In an analogous context related to international agreements on trade, a World Trade Organization (WTO) panel expressed that “[c]ustomary international law applies generally to the economic relations between WTO members. Such international law applies to the extent that the WTO treaty agreements do not ‘contract out’ from it. To put it another way, to the extent that there is no conflict or inconsistency, or an expression in a covered WTO agreement that applies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.”<sup>59</sup> Likewise here, it is a reasonable assumption that the existing law of state responsibility continues to apply to the climate agreements as it does to other applicable international obligations with respect to climate change.
33. The negotiating history of the UNFCCC demonstrates that “omission of any provision specifically concerning State responsibility for the adverse effects of climate change was deliberate.”<sup>60</sup> The Alliance of Small Island States (AOSIS) had put forward text for inclusion into the UNFCCC, but the proposal was unsuccessful due to the refusal of developed countries to explicitly include reference to State responsibility within the text.<sup>61</sup> Notably, declarations made by some State parties upon ratification, acceptance, approval, or accession to the UNFCCC reinforced the understanding that the agreements do not derogate from the law concerning state responsibility. Nauru’s declaration in relation to the UNFCCC expressed that “signature of the Convention shall in no way constitute a renunciation of any rights under international law concerning state responsibility for

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<sup>57</sup> ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, at art. 55 (parts in brackets added).

<sup>58</sup> While the term “responsibilities” is contained in both the UNFCCC and the Paris Agreement, it relates to States’ common but differentiated responsibilities and respective capacities, a phrase which modifies the application or implementation of the primary obligations outlined in the agreements.

<sup>59</sup> *Korea Communication*, para. 7.96.

<sup>60</sup> Matthew Happold, *The Relationship Between the United Nations Framework Convention on Climate Change and Other Rules of Public International Law, in particular on States’ Responsibility for the Adverse Effects of Climate Change*, Legal Response Initiative (Jan. 31, 2013), at p.6.

<sup>61</sup> *Ibid.*

the adverse effects of climate change....”<sup>62</sup> Other countries such as Kiribati, Fiji, and Papua New Guinea made similar declarations.<sup>63</sup> Several countries including Micronesia, Nauru, Niue, Philippines, Cook Islands, Tuvalu, and the Solomon Islands made such declarations in relation to the Paris Agreement as well.<sup>64</sup>

34. One of the areas where the law of State responsibility becomes particularly relevant is with respect to legal consequences for climate harm or “loss and damage.” Article 8 of the Paris Agreement recognizes the importance of averting, minimizing and addressing loss and damage from climate change.<sup>65</sup> While Paragraph 51 of COP Decision 1/CP.21 (the adoption of the Paris Agreement) states that Article 8 does not provide a basis for liability and compensation,<sup>66</sup> it does not limit the application of the law of State responsibility in any way. Paragraph 51 does not bear on the basis for liability or compensation stemming *not* from the breach of Paris Article 8, but from the contravention of preexisting, independent duties. Paragraph 51 reflects compromise text that countries registered their opposition to, on the record.<sup>67</sup> Notably, the Philippines, in their declaration in adopting the Paris Agreement, expressed that its “accession to and the implementation of the Paris Agreement shall in no way constitute a renunciation of rights under any local and international laws or treaties, including those concerning State responsibility for loss and damage associated with the adverse effects of climate change.”<sup>68</sup>
35. From the aforementioned paragraphs, it may be concluded, at least from the rules examined, that the issue of conflict does not arise between those primary and secondary rules, and corresponding provisions in the climate agreements, and thus *lex specialis* does not apply at least in the specific context of the rules outlined. Therefore, the Court’s interpretation of relevant State obligations necessarily entails harmonization of relevant norms under multiple sources of law.

**iii. Even if the UNFCCC and the Paris Agreement were to be considered the predominant governing instruments with respect to climate change under international law, this would not equal field preemption**

36. In judgments or opinions where the ICJ has found a primary set of rules to most directly govern an issue, it has not considered that instrument or legal framework to create field preemption—displacing or precluding all other rules pertaining to the subject matter—but has interpreted the agreement in its normative environment.<sup>69</sup> The Court has recognized, “[a]n international instrument

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<sup>62</sup>*Declarations by Parties*, United Nations Climate Change, <https://unfccc.int/process-and-meetings/the-convention/status-of-ratification/declarations-by-parties>.

<sup>63</sup> *Ibid.*

<sup>64</sup> See Paris Agreement Status of Ratification, Declarations.

<sup>65</sup> Paris Agreement, at art. 8.

<sup>66</sup> UNFCCC Conference of the Parties, *Report of the Conference of the Parties on its Twenty-First Session, Held in Paris from 30 November to 13 December 2015*, U.N. Doc FCCC/CP/2015/10/Add.1 (Jan. 29, 2016), at para. 51.

<sup>67</sup> Martin Khor & Meenakshi Raman, *A Clash of Climate Change Paradigms: Negotiations and Outcomes at the UN Climate Convention* (Third World Network, 2020), at p. 191.

<sup>68</sup> Paris Agreement Status of Ratification, Declarations (emphasis added).

<sup>69</sup> See, e.g., *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226, (July 8), at p. 240, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory*, Advisory

has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.”<sup>70</sup> This approach is further consistent with the jurisprudence of the International Tribunal for the Law of the Sea and Annex VII Arbitral Tribunals, which have relied on other sources of international law, including international human rights law and international environmental law,<sup>71</sup> in interpreting UNCLOS, citing customary international law, general principles, and treaties.<sup>72</sup>

37. Systemic integration is indeed a well-established principle in international law, enshrined in Article 31(3)(c) of the VCLT, which provides that “any relevant rules of international law applicable in the relations between the parties” are to be considered in interpreting treaties. Professor Martti Koskenniemi, the ILC Special Rapporteur on Fragmentation of International Law, has expressed the ‘systemic integration’ approach thus: “[I]t is sometimes suggested that international tribunals or law-applying (treaty) bodies are not entitled to apply the law that goes “beyond” the four corners of the constituting instrument ... But if ... all international law exists in systemic relationship with other law, no such application can take place without situating the relevant jurisdiction endowing instrument in its normative environment. This means that although a tribunal may only have jurisdiction in regard to a particular instrument, it must always interpret and apply that instrument in its relationship to its normative environment—that is to say ‘other international law.’”<sup>73</sup>
38. “The scope of special laws is by definition narrower than that of general laws. It will thus frequently be the case that a matter not regulated by special law will arise in the institutions charged to administer it. In such cases, the relevant general law will apply.”<sup>74</sup> Additionally special regimes may fail, and in the event of failure, the relevant general law becomes applicable. Failure could be manifested, for example, by the “failure of the regime’s institutions to fulfil the purposes allotted to them, persistent non-compliance by one or several of the parties....” among other causes.<sup>75</sup> Ample evidence suggests that the climate agreements are failing to achieve their objectives, due to persistent non-compliance of multiple Parties. Findings of specialized UN agencies and Secretariats, such as the UN Environment Programme (UNEP) and the UNFCCC Secretariat, as

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Opinion, 2004 I.C.J. 136 (July 9), at para 106 (while citing international humanitarian law as *lex specialis*, the Court nonetheless considers a range of legal frameworks as applicable law in the case., at para. 86.).

<sup>70</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, 1970 I.C.J. 16 (June 21), at para. 53; see also Case Concerning Oil Platforms (*Iran v. U.S.*), Judgment, 2003 I.C.J. 161 (November 6), at para. 41.

<sup>71</sup> The South China Sea Arbitration (*The Republic of Philippines v. the People’s Republic of China*), PCA Case no. 2013-19, Arbitral Award, ICGJ 495 (Arbitral Tribunal constituted under Annex VII of UNCLOS, 2016), paras. 945, 956; Responsibilities and obligations of States with respect to activities in the Area, Case no. 17, Advisory Opinion, ITLOS Rep. 2011, (Feb.1, 2011), para. 135; see generally, Alexander Proelss, “*The Contribution of the ITLOS to Strengthening the Regime for the Protection of the Marine Environment*,” in A. Del Vecchio, R. Virzo eds., Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals (Springer Nature Switzerland AG, 2019), p. 93.

<sup>72</sup> See, e.g., Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Case no. 21, Advisory Opinion of April 2, 2015, ITLOS Rep. 2015, paras. 142-150; M/V Saiga No. 2 (*St. Vincent v. Guinea*), Case No. 2, Judgment of July 1st, 1999, ITLOS 1999, paras. 80, 85.

<sup>73</sup> *Fragmentation of International Law 1*, at para. 423.

<sup>74</sup> *Fragmentation of International Law 2*, at para. 15; *Bankovic v. Belgium*, 2001-XII Eur. Ct. H. R. Admissibility, ECHR 2001-XII, at p. 351, para. 57.

<sup>75</sup> *Fragmentation of International Law 2*, at para. 16.

well as outcomes adopted by consensus by the Parties to the treaties, demonstrate the insufficiency of States' implementation of the Paris Agreement as well as the lack of an enforcement mechanism to prevent dangerous anthropogenic interference with the climate system, climate breakdown, violations of human rights, and harm to natural ecosystems.<sup>76</sup> This would support an argument that adherence only to climate agreements would not suffice to satisfy States' international legal obligations.

39. Notwithstanding the arguments under Part A (iii), we respectfully submit that the climate agreements be considered as one relevant source amongst others, rather than the predominant legal regime, given the transversal nature of climate change and the existence of other equally relevant legal frameworks including the law of the sea, human rights, and the law of State responsibility.

### **B. The UNFCCC and the Paris Agreement are relevant to the questions before the Court, but their limited scope does not allow them to fully answer those questions**

40. While the UNFCCC and the Paris Agreement do not and cannot fully answer the questions posed to the Court given their limited scope, they are nevertheless relevant to consider within the scope of what they do cover.

#### **i. Relevant provisions of climate agreements**

41. In looking to the UNFCCC and Paris Agreement, alongside other relevant international legal norms, to inform its interpretation of State obligations with respect to climate change, the Court should consider the overall objectives, principles, and duties set forth in the climate agreements, not isolated provisions.
42. In their objectives and aims, the UNFCCC and Paris Agreement, which enjoy near universal ratification,<sup>77</sup> respectively engage States to “prevent dangerous anthropogenic interference with the climate system”<sup>78</sup> and pursue efforts “to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.”<sup>79</sup> In addition to the mitigation objective of the Paris Agreement, the aims of the treaty include “increasing the ability to adapt to the adverse impacts of climate change and foster climate

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<sup>76</sup> See UN Env't Programme et al., *Emissions Gap Report 2023: Broken Record – Temperatures hit new highs, yet world fails to cut emissions (again)* (UNEP, eds. 2023), <https://wedocs.unep.org/bitstream/handle/20.500.11822/43922/EGR2023.pdf>; UNFCCC Subsidiary Body for Sci. and Tech. Advice, Synthesis Rep. by the Co-Facilitators on the Tech. Dialogue, *Technical Dialogue of the First Global Stocktake*, U.N. Doc FCCC/SB/2023/9 (Sept. 8, 2023); Stockholm Environment Institute et al., et al., *The Production Gap: Phasing down or phasing up? - Top Fossil Fuel Producers Plan Even More Extraction Despite Climate Promises* (2023); [https://productiongap.org/wp-content/uploads/2023/11/PGR2023\\_web\\_rev.pdf](https://productiongap.org/wp-content/uploads/2023/11/PGR2023_web_rev.pdf); UNFCCC Secretariat, Synthesis Report, *Nationally Determined Contributions under the Paris Agreement*, U.N. Doc FCCC/PA/CMA/2023/12 (Nov. 14, 2023) [hereinafter NDC Synthesis Report], <https://unfccc.int/documents/632334>.

<sup>77</sup> *Status of Ratification of the Convention*, United Nations Climate Change, <https://unfccc.int/process-and-meetings/the-convention/status-of-ratification-of-the-convention>; *Paris Agreement- Status of Ratification*, United Nations Climate Change, <https://unfccc.int/process/the-paris-agreement/status-of-ratification>.

<sup>78</sup> UNFCCC, at art. 2.

<sup>79</sup> Paris Agreement, at art. 2(1)(a).

resilience”<sup>80</sup> and making finance flows “consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.”<sup>81</sup>

43. The principles of equity and common but differentiated responsibilities and respective capabilities (CBDR-RC) together constitute one of the fundamental pillars of the climate agreements<sup>82</sup> and require high-income, high-emitting States to move first and fastest on climate action.
44. On the importance of aligning climate action with the best available science, under the Paris Agreement, States agreed on “the need for an effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge”<sup>83</sup> and that Parties should take mitigation actions, including the reduction of anthropogenic GHG, “in accordance with best available science.”<sup>84</sup>
45. On a mandatory basis, the Paris Agreement requires Parties to prepare, communicate, and maintain successive nationally determined contributions (NDCs) that it intends to achieve,<sup>85</sup> with NDCs defined as ambitious efforts in line with commitments under the Agreement intended to achieve the purpose of the Agreement.<sup>86</sup> The Agreement further specifies that, “Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.”<sup>87</sup> The principle of progressive realization as reflected in the Paris Agreement also appears obligatory in nature with the text stating that “[T]he efforts of all Parties will represent a progression over time...”<sup>88</sup> and that, consistent with equity, each “successive nationally determined contribution will represent a progression beyond the Party’s then current nationally determined contribution and reflect its highest possible ambition...”<sup>89</sup>
46. Both climate agreements call “for the widest possible cooperation by all countries”<sup>90</sup> with Parties committing to work on a cooperative basis on mitigation,<sup>91</sup> adaptation,<sup>92</sup> and loss and damage,<sup>93</sup> with clear duties for developed countries to provide developing countries with climate finance,<sup>94</sup>

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<sup>80</sup> *Ibid.* at art. 2(1)(b).

<sup>81</sup> *Ibid.* at art. 2(1).

<sup>82</sup> UNFCCC, at arts. 3.1, 4; Paris Agreement, at art. 2.2.

<sup>83</sup> Paris Agreement, at pmbl.

<sup>84</sup> *Ibid.*, at art. 4.1; *see also* Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, 26th session, Glasgow Climate Pact, 1/CMA.3, U.N. Doc. FCCC/PA/CMA/2021/10/Add.1, art. 1.

<sup>85</sup> Paris Agreement, at art. 4.2.

<sup>86</sup> *Ibid.*, at art. 3.

<sup>87</sup> *Ibid.*, at art. 4.2.

<sup>88</sup> *Ibid.*, at art. 3.

<sup>89</sup> *Ibid.*, at art. 4.3.

<sup>90</sup> This exact phrasing is the preamble to the UNFCCC. Very similar wording, ‘cooperation at all levels’, can be found in the Paris Agreement. Paris Agreement, pmbl.

<sup>91</sup> UNFCCC, at art. 4(1)(d); Paris Agreement, at arts. 4(5), 4(15), 5(2), 6 (the Paris Agreement recognizes a multitude of ways for Parties to cooperate, however the compatibility of these principles with the action necessary to address climate change varies. For example, article 6 allows for market-based approaches, which could lead not only to no overall reduction of emissions, but could increase emissions if the activities taking place under article 6 allow for the offsetting of business-as-usual fossil fuel development, which could undercut the integrity of the entire Agreement).

<sup>92</sup> UNFCCC, at art. 4(1)(e); Paris Agreement, arts. 7

<sup>93</sup> Paris Agreement, at art. 8.

<sup>94</sup> UNFCCC, at arts. 4(3), 4(4); Paris Agreement, at art. 9.



technology transfer,<sup>95</sup> and capacity-building support.<sup>96</sup> While there is a strong focus on cooperation, the mandatory nature of key duties must be noted, with the Paris Agreement text providing that, “[d]eveloped country Parties *shall* provide financial resources to assist developing country Parties with respect to both mitigation and adaptation,”<sup>97</sup> and also that “support, including financial support, *shall* be provided to developing country Parties . . . including for strengthening cooperative action on technology development and transfer at different stages of the technology cycle...”<sup>98</sup>

47. The aforementioned provisions, while not sufficient, are relevant to determining the scope and content of State obligations with respect to climate change.

## **ii. Fulfilling duties under climate agreements does not discharge all duties in relation to climate change**

48. While fulfillment of a State’s obligations under the international climate agreements represents a welcome step for required climate action, in discharging its duties under the UNFCCC or Paris Agreement, a State does not thereby discharge all its duties domestically and extraterritorially, under international law.<sup>99</sup>

49. The UNFCCC and Paris Agreement enshrine State agreements regarding how they will pursue their legal obligations to act on climate change, and thus sets out some specific responsibilities, but do not purport to set forth all States’ duties with respect to climate change or to limit State action to that prescribed under the climate agreements. Because the UNFCCC and Paris Agreement specifically focus on climate, they provide important guidance on measures to take in line with overarching legal obligations. But the adequacy of the measures taken—that is, whether they satisfy States’ legal obligations with respect to climate—will ultimately depend on their conformity with multiple duties. **Given the voluntary nature of most commitments under the Paris Agreement, other legal requirements necessarily shape and condition action undertaken pursuant to it.**

50. The conspicuous silence of the climate agreements on fossil fuels, the principal driver of anthropogenic climate change and resultant human rights harm,<sup>100</sup> and their inadequacy in terms of addressing legal consequences for States where they, by their acts and omissions, have caused

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<sup>95</sup> UNFCCC, at arts. 4(1)(c), 4.5; Paris Agreement, at art. 10.

<sup>96</sup> UNFCCC, at arts. 4(1), 4(4); Paris Agreement, at art. 11.

<sup>97</sup> Paris Agreement, at art. 9(1).

<sup>98</sup> *Ibid.*, at art. 10(6).

<sup>99</sup> See Comm. on Econ., Soc. & Cultural Rights (CESCR), Climate Change and the International Covenant on Economic, Social and Cultural Rights, U.N. Doc E/C.12/2018/1, para. 3 (Oct. 8, 2018); Joint statement by the Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities, *Statement on human rights and climate change*, UN Doc. No. HRI/2019/1 (May 14, 2020, initially issued Sept. 2019) [hereinafter UN Human Rights Treaty Bodies’ joint statement on human rights and climate change].

<sup>100</sup> David Boyd, Pedro Arrojo Agudo, Marcos A. Orellana, Livingstone Sewanyana, Surya Deva & Olivier De Schutter, “Fossil Fuels at the heart of the planetary environmental crisis: UN experts (Nov. 30, 2023), <https://www.ohchr.org/en/press-releases/2023/11/fossils-fuels-heart-planetary-environmental-crisis-un-experts>.

significant harm, illustrates that the UNFCCC and Paris Agreement are not exhaustive when it comes to elaborating the State duties in relation to climate change.<sup>101</sup>

51. Ultimately, obligations under the wider corpus of applicable international law, in particular, human rights law, require States to adopt a broader range of policies than that expressly required in the Paris Agreement as the science evolves.<sup>102</sup> This is especially so given mounting evidence that current levels of warming are already causing significant human rights impacts, and at a faster rate than anticipated by governments and the scientific community when the Paris Agreement's targets were set.<sup>103</sup> At the ITLOS climate advisory hearings, in asking for clarification of legal duties under international law beyond the climate agreements, Mr Arnold Kiel Loughman, Attorney General of the Republic of Vanuatu expressed that “[V]anuatu has participated for decades in multilateral climate negotiations with good faith... participated vigorously in deliberations of the UNFCCC and at each and every COP. ... We have been patient, but to little avail. We now feel that our good faith has been exploited. Our ambition has been sidelined. Our voices have been ignored and our hope is now hanging by a thread.... Action is required now, and the call for action is not just a matter of lofty ideals; it is a matter of legally binding obligations.... This Tribunal could provide a road map.”<sup>104</sup>
52. The questions before the Court involve both horizontal and vertical duties, which also point to the insufficiency of the climate agreements in addressing these questions fully. The horizontal (*inter se*) agreements of the global climate agreements do not dictate or constrain the vertical obligations of States to individuals and communities. Because the requirements of the climate agreements do not address States' duties to individuals and communities affected by conduct subject to their jurisdiction and control, beyond a cursory reference to human rights in the preambular text of the Paris Agreement, discharging a State's obligations under the UNFCCC and the Paris Agreement does not discharge its obligations under human rights law.
53. While on the very specific areas in relation to climate change that the UNFCCC and the Paris Agreement cover, they may constitute the primary governing instruments, for human rights-related

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<sup>101</sup>See CIEL, Memo on the Legal Obligations of States in relation to Fossil Fuels as the key driver of Climate Change, Part IV, in Written Statement submitted to the ICJ in the climate advisory proceedings, March 2024; See, e.g., Harro van Asselt, *Governing Fossil Fuel Production in the Age of Climate Disruption: Towards an International Law of 'Leaving it in the Ground'*, 9 Earth Sys. Governance 100118 (2021).

<sup>102</sup> *Neubauer et al v. Germany*, Bundesverfassungsgerichtshof (BverfG) (Federal Constitutional Court), 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 (Apr. 29, 2021), [hereinafter *Neubauer et al v. Germany*], at para. 212 (noting that best available science could mean that the Constitutional requirements, in this instance in Germany, require setting emissions reductions targets to go beyond what is necessary to achieve the Paris temperature targets).

<sup>103</sup> IPCC, 2022: Summary for Policymakers, para. B.1.2 (H.-O. Pörtner, et. al eds. 2022), in *Climate Change 2022: Impacts, Adaptation, and Vulnerability*. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (H.-O. Pörtner, et. al eds., Cambridge University Press, 2022) (stating “The extent and magnitude of climate change impacts are larger than estimated in previous assessments (high confidence)”).

<sup>104</sup> ITLOS, Verbatim Record of Public sitting on Sept. 11, 2023 in *Request for an Advisory Opinion Submitted by the Commission of Small Island States (COSIS) on Climate Change and International Law*, ITLOS/PV.23/C31/1/Rev.1, pp. 15-16 (Sept. 11, 2023), [https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral\\_proceedings/verbatim\\_records\\_rev/ITLOS\\_PV23\\_C31\\_1\\_Rev.1\\_E.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/verbatim_records_rev/ITLOS_PV23_C31_1_Rev.1_E.pdf) [hereinafter ITLOS, Verbatim Record of Sept. 11, 2023 Public Sitting].

issues which cut across several dimensions of climate change, human rights law must be the touchstone; similarly for issues in relation to oceans, the law of the sea must be the primary framework, and for biological diversity related matters, the Convention of Biological Diversity should constitute a primary source, and so on, in relation to relevant frameworks. In all cases, such frameworks must be read in light of their full normative environment. This approach is reflected in evolving jurisprudence in relation to climate change as will be addressed in the next section.

#### **IV. Climate change jurisprudence affirms concurrent duties under international law**

54. That States have concurrent legal duties in relation to climate change law is reflected in the growing body of climate jurisprudence from national and regional courts. At least 2,341 climate litigation cases have been filed across the world, a majority against States.<sup>105</sup> In terms of the legal bases on which cases against States are being brought at domestic, regional, and international fora, an understanding of the concurrent duties of States with respect to climate change is demonstrated in claimants drawing not just on climate agreements but a varied range of legal frameworks including, *inter alia*, human rights law,<sup>106</sup> domestic legal protections such as the constitutional right to a clean and healthful environment,<sup>107</sup> statutory law,<sup>108</sup> intergenerational and intragenerational equity, and international environmental principles of sustainable development and precaution.<sup>109</sup> A number of these cases have cleared admissibility hurdles with courts accepting to hear the cases and considering a range of legal sources in their deliberations, looking to climate agreements as a complementary interpretive source rather than the primary governing instrument.<sup>110</sup> Although many of the proceedings are still ongoing, where decisions have been made on the merits, “courts have generally accepted that domestic or international law may require more than compliance with climate treaties.”<sup>111</sup>

55. There are a number of climate judgments that acknowledge the concurrent duties of States under multiple sources of law. In Europe, in multiple cases such as *Urgenda*,<sup>112</sup> *Neubauer*,<sup>113</sup> *Grande-*

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<sup>105</sup> Joana Setzer & Catherine Higham, *Global Trends in Climate Change Litigation: 2023 Snapshot* p. 2 (Grantham Research Institute, et. al., 2023), [https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/06/Global\\_trends\\_in\\_climate\\_change\\_litigation\\_2023\\_snapshot.pdf](https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/06/Global_trends_in_climate_change_litigation_2023_snapshot.pdf).

<sup>106</sup> See, e.g., *Daniel Billy et al. v Australia*, CCPR/C/135/D/3624/2019, pp. 3-4, (complaint: [https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2019/20190513\\_CCPRC135D36242019\\_complaint.pdf](https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2019/20190513_CCPRC135D36242019_complaint.pdf)); *KlimaSeniorinnen v. Switzerland*, Application no. 53600/20.

<sup>107</sup> See, e.g., Complaint for Declaratory and Injunctive Relief at para. 2, *Navahine v. Hawai'i Dep't of Transp.*, No. 1CCV-22-0000631 (Haw. 1st Cir. Ct. June 1, 2022), [https://climatecasechart.com/wp-content/uploads/case-documents/2022/20220601\\_docket-1CCV-22-0000631\\_complaint.pdf](https://climatecasechart.com/wp-content/uploads/case-documents/2022/20220601_docket-1CCV-22-0000631_complaint.pdf).

<sup>108</sup> See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007); *Earthlife Africa Johannesburg v. Minister of Env't Aff.*, [2017] ZAGPPHC 58, 2 All S.A. 519 (2017) (S. Afr.), at pp. 3-8, [https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2017/20170306\\_Case-no.-6566216\\_judgment-1.pdf](https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2017/20170306_Case-no.-6566216_judgment-1.pdf).

<sup>109</sup> *Ashgar Leghari v. Federation of Pakistan*, (2015) W.P. No. 25501/2015 (Lahore High Court) (Pak.), at p. 6.

<sup>110</sup> See, e.g., *Neubauer*; *Generaciones Futuras v. Minambiente*, Supreme Court of Colombia, STC. 4360-2018 (Apr. 5, 2018) (Col.).

<sup>111</sup> Mayer, 48 Yale J. of Int'l L. at p. 107.

<sup>112</sup> Supreme Court of the Netherlands, *The State of the Netherlands v. Urgenda*, Case. No. 19/00135 (Engels) (Dec. 20, 2019).

<sup>113</sup> See *Neubauer et al v. Germany*.

*Synthe*,<sup>114</sup> and *Klimaatzaak*,<sup>115</sup> courts have found that State mitigation measures to meet commitments under the UNFCCC and the Paris Agreement were inadequate in view of the duties of care States had under their human rights obligations and other domestic laws. In so holding, those courts referenced climate agreements not as the primary source defining the scope of what a State must do, but rather as elements of a broader set of complementary sources determining interpretation. The Procurator General observed in the *Urgenda* case that reduction commitments under climate agreements such as the Kyoto Protocol, have the status of “minimum standards” but do not “relieve states of their general obligations under international law, such as obligations under human rights conventions or the no harm rule.”<sup>116</sup>

56. The primary legal basis for the Future Generations case<sup>117</sup> in Colombia was the fundamental rights of the youth plaintiffs under the Colombian Constitution. On State obligations, the Court held that “...a multitude of regulations, both hard and soft law, have been established at the international level. These regulations form a global ecological public order, which serves as a guiding principle for national legislation. Their purpose is to address citizen complaints regarding the destruction of our environment and to protect the subjective rights of present and future generations,”<sup>118</sup> and the Court listed various relevant instruments including but not limited to the UNFCCC and Paris Agreement, with reference also to the International Covenant on Economic, Social and Cultural Rights, as well as the additional protocol to the Geneva Convention and the Stockholm Declaration.<sup>119</sup> Similarly, in an influential climate case in Pakistan, their Supreme Court invoked constitutional provisions on fundamental rights, and for interpretation of those rights, drew on “international environmental principles of sustainable development, precautionary principle, inter[generational] and intragenerational equity, and the doctrine of public trust doctrine.”<sup>120</sup>
57. At the international level, *Billy v Australia*,<sup>121</sup> a case concerning the adequacy of the State’s climate change measures, was decided by the Human Rights Committee on the basis of international human rights claims. The primary instrument guiding the Committee was the International Covenant on Civil and Political Rights (ICCPR). The Committee did reserve the right to refer to other international treaties or agreements including the climate agreements “in interpreting the State party’s obligations under the Covenant.”<sup>122</sup> In other areas of their work beyond the communications procedure, United Nations Treaty Bodies have demonstrated that they fully recognize that climate change is a pressing human rights issue.<sup>123</sup> In a joint statement, five UN Human Rights Treaty

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<sup>114</sup>French Conseil d’Etat, Nov. 19, 2020, *Commune de Grande-Synthe, et. al v. France*, No. 427301, Admissibility (Nov. 19, 2020).

<sup>115</sup> Brussels Ct. of App., *Klimaatzaak ASBL v. Belgium*, 2021/AR/1589 (Nov. 30, 2023).

<sup>116</sup> Opinion of the Procurator General, Supreme Court of the Netherlands, *The State of the Netherlands v. Urgenda*, Case. No. 19/00135 (Engels) (Dec. 20, 2019), at para. 2.77.

<sup>117</sup>*Generaciones Futuras v. Minambiente*, Supreme Court of Colombia, STC. 4360-2018 (Apr. 5, 2018) (Col.).

<sup>118</sup> *Ibid.* at p. 22, para 6.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ashgar Leghari*, at p. 10.

<sup>121</sup> *Billy v. Australia*.

<sup>122</sup> *Ibid.* at para 7.5.

<sup>123</sup>Center for International Environmental Law, *States’ Human Rights Obligations in the Context of Climate Change: Guidance Provided by the UN Human Rights Treaty Bodies* (2023), <https://www.ciel.org/reports/human-rights-treaty-bodies-2023/>.

Bodies noted with great concern that “States’ current commitments under the Paris Agreement are insufficient to limit global warming to 1.5°C” and that many States are not even on track to meet their commitments consequently, “exposing their populations and future generations to the significant threats to human rights associated with greater temperature increases.”<sup>124</sup> The Committees emphasized that under binding human rights treaty law, States have “obligations, including extraterritorial obligations, to respect, protect and fulfill all human rights of all peoples” including with respect to “human rights harm caused by climate change.”<sup>125</sup> In the face of recognition that climate change affects human rights, far from abdicating the space to climate bodies or deferring fully to climate agreements, human rights experts have instead elaborated what human rights law requires of States in the climate context. This approach underscores that the climate agreements do not have an exclusive claim to or domain over the issue of climate.

58. As seen in Section I, the request to the ICJ for an advisory opinion on climate change adopted by consensus by the member States of the General Assembly referenced several multilateral agreements and customary international law as being of relevance to the interpretation of State duties, including but not limited to climate agreements. The other ongoing climate advisory proceedings were brought before ITLOS and the Inter-American Court of Human Rights (IACtHR), fora where the primary instruments of interpretation are, respectively, the UN Convention on the Law of the Sea and the American Convention on Human Rights. In their ITLOS written submissions, while some States reserved judgment in relation to the issue of jurisdiction and two States argued against the Tribunal having jurisdiction, most States agreed that ITLOS did have jurisdiction.<sup>126</sup> COSIS has stated that the framing of requests for advisory opinions on climate change reflect a resolve to ensure “compliance with States’ legal obligations under a range of international laws to protect the rights of present and future generations.”<sup>127</sup>

## V. Conclusion

59. The question before the Court is decidedly not what are States’ obligations under the UNFCCC or Paris. It is what are States’ obligations under international law, with respect to the climate system. In answering the questions posed before it, we respectfully request that on the issue of applicable law, the ICJ clarify that States have concurrent obligations under multiple existing sources of law—including the law of State responsibility, the duty to prevent transboundary harm, human rights law, the law of the sea and international climate law—to meaningfully prevent and minimize the risk of harm from climate change, and such obligations must be interpreted harmoniously.

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<sup>124</sup> UN Human Rights Treaty Bodies’ joint statement on human rights and climate change, at para. 9.

<sup>125</sup> *Ibid.* at para. 10.

<sup>126</sup> *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)*, ITLOS, <https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/>.

<sup>127</sup> ITLOS, Verbatim Record of Sept. 11, 2023 Public Sitting.