INTERNATIONAL COURT OF JUSTICE

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

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

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Executive Summary

This written submission by the Center for International Environment Law (CIEL)[1] addresses the questions posed to the International Court of Justice (ICJ) by the United Nations General Assembly in its Resolution 77/276 of March 29, 2023, concerning the obligations of States under international law in relation to climate change and the legal consequences of the breach of such obligations.

In 1989, the United Nations General Assembly issued another resolution, calling at that time for preparation of an agreement on climate change "as a matter of urgency," with "concrete commitments" based on "sound scientific knowledge" and taking into account "the specific development needs of developing countries." Nearly thirty-five years later, the sound scientific knowledge has advanced, an agreement exists, and yet the need for urgent action on climate change has never been more acute.

What is perhaps most striking about the escalating global climate crisis is not its increasingly severe and devastating impacts on individuals, peoples, ecosystems, and States, inflicting damage through sudden and slow-onset events, alike. Nor is it the fact that those impacts are hitting people in situations of structural vulnerability hardest, compounding inequalities, entrenching impoverishment, and undermining human rights. It is the fact that the world knows and has known for many decades what is causing the crisis, and yet those most responsible—particularly industrialized States—have not only failed to act with the urgency and decisiveness required to halt it; they have, through their acts and omissions, made the crisis worse and continue to do so.

"[E]xpressions of *the determination to address* decisively the threat posed by climate change," like those enshrined in the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement, do not discharge States' legal obligations—to other States, to peoples, and to individuals—to *act decisively* to avert the threat and repair the harm. Those obligations, rooted in multiple sources of international law, including customary and treaty-based environmental and human rights law, both predate and survive the international climate agreements, meaning they continue to apply concurrently. They require States to use all means at their disposal to prevent significant transboundary environmental harm and minimize the risk thereof, to protect against foreseeable violations of human rights, and to preserve the global commons for the benefit of present and future generations.

Yet States—particularly industrialized countries—have continued to increase their generation of greenhouse gas (GHG) emissions and expand the fossil fuel activities behind them, further degrading the global atmosphere and exacerbating adverse effects on people and ecosystems. Under the Court's own precedents and the well-established law of State responsibility, States that have contributed the most over time to the cumulative emissions driving climate change, with knowledge of its fossil fuel causes and foreseeable consequences, have a legal duty to cease their destructive conduct and provide full reparation for the past and current harms.

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The issue before the Court is simple at core: Many laws have been broken. Many lives have been lost and many more will be lost. And there has been no accountability. States, peoples, individuals—indeed the whole world—is looking to the Court for the clarity and candor that will unlock requisite ambition and reparations owed.

As singularly challenging as the problem of climate change may be, it is not beyond the reach of law or legal cognition, under well-established principles that this Court has clarified and applied in countless contexts. Climate change is not just an environmental problem, but a transversal global phenomenon that sounds in the law of State responsibility, human rights, and the environment, including the international climate agreements. No one legal instrument can fully respond to the complex interlocking dimensions of climate change and its impacts on public and planetary well-being. But this Court is singularly placed to examine all relevant sources of international law in addressing the questions before it.

In confirming what international law requires, prohibits, and permits, this Court has an opportunity to elucidate States' obligations both to prevent continuing harms and to remedy those injuries that have fallen, are falling, and will foreseeably continue to fall disproportionately on those least responsible for the planetary emergency.

The ICJ's legal pronouncements will have ripple effects around the world, as domestic and regional courts facing a rising tide of climate litigation look for guidance, and as communities facing rising sea levels and temperatures look for remedy. We respectfully urge the Court to listen to the perspectives of those whose experiences of climate harm and resilience shed light on the meaning of climate duties and the pathway to climate justice.

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The following submission comprises four memoranda, each of which focuses on a different dimension of the questions before the Court, but all of which are necessarily interconnected. Collectively, they elucidate State obligations under international law with respect to climate change and the legal consequences of their breach, including responsibility to States, peoples, and individuals of present and future generations affected by or vulnerable to the adverse effects of climate change.

The first memo examines the body of international law applicable to the questions before the Court, and demonstrates that multiple sources of law define the scope of State duties in relation to protection of the climate system. The answer to the questions before the Court neither starts nor ends with the UNFCCC and the Paris Agreement. Despite arguments to the contrary by some States and scholars, those agreements do not exclusively or exhaustively define State obligations in relation to climate change. Both agreements were written against the backdrop of States' existing legal duties under customary and treaty-based international law on the environment and human rights, as well as the law of State responsibility. Those duties inform the content of any treaty-based obligations under the UNFCCC and Paris. The climate agreements do not curtail or limit the application of those long-standing principles, which may well speak to issues on which the climate treaties are silent or oblige States to do more than the texts strictly require.

The second memo addresses the legal consequences for States whose acts and omissions have caused significant harm to the climate system, in breach of their international obligations. This brief argues that

the elements of an internationally wrongful act under the law of State responsibility can be made out in relation to State contributions to, and failure to prevent or minimize, climate change. The acts and omissions of States or groups of States, alone and in combination, have over time generated cumulative emissions that cause significant transboundary harm due to degradation of the atmosphere and ensuing climate change. In the face of unequivocal science and longstanding knowledge about the causes and foreseeable consequences of climate change, that conduct breaches a variety of State obligations under international law, thereby constituting an internationally wrongful act under the law of State responsibility, triggering legal consequences in the form of duties to cease the wrongful conduct and provide full reparation of resultant injuries.

When it is shown that a State's acts and omissions have breached one or more of its international obligations with respect to climate change, and that such breach has led to resultant injuries, the State responsible must not only cease the wrongful conduct if it is continuing and provide guarantees of non-recurrence, but provide full reparation for harms attributable to that conduct. That legal responsibility runs not only to other States, under the law of State responsibility, but, where the conduct breaches human rights law, also to affected peoples and individuals, who have a right to remedy. The substantive and procedural dimensions of the right to remedy should shape the form of reparations provided.

Available evidence could be brought to bear in a given case to show not only that climate change is attributable to State conduct in breach of its obligations, but that cognizable injuries to States, peoples, and individuals are attributable to climate change. There is ample evidence attributing cumulative GHG emissions over time to different States or groups of States, which makes plain that wealthier, industrialized countries have generated a disproportionate share of global emissions since the industrial era to date. There is also a growing body of "attribution science" linking specific injuries—both material and moral—to climate change, and thus by extension to the State acts and omissions driving it. While the relevant evidence of injuries and the conduct to which they are attributable will be fact-dependent, extant data make it possible to connect breaches of State obligations with climate-related harm, triggering secondary legal obligations of cessation and reparation.

The third memo in this written statement primarily addresses the implications of States' international legal obligations for conduct related to fossil fuels—oil, gas, and coal. The science is unequivocal: the accumulation of greenhouse gas emissions, chiefly from the combustion of fossil fuels, is driving climate change and its resulting impacts. The evidence of the extent, severity, and acceleration of those impacts is manifold. We respectfully contend that the Court cannot address States' duties with regard to climate change without addressing States' obligations with regard to the primary *cause* of climate change. Second, States' obligations under multiple sources of international law require action to curtail the production and use of fossil fuels, given their role in driving current and foreseeable transboundary harm to the global atmosphere (a shared resource), to people and the environment in States around the world, and to some States themselves. Third, as part of States' due diligence pursuant to their prevention obligations, States must, at minimum, consider the foreseeable emissions resulting from fossil fuel activity under their jurisdiction or control regardless of where those emissions occur; GHGs do not respect borders. Fourth, State conduct that increases the risk of significant transboundary harm from fossil-fueled climate change is presumptively contrary to the above-mentioned legal duties to prevent significant transboundary harm and foreseeable human rights violations, as well as applicable treaty-based obligations to reduce GHG

emissions in line with long-term temperature targets. In the context of the mounting climate emergency, both State inaction and State action on fossil fuels can increase the risk of harm. Lastly, in accordance with the precautionary principle, States must take proven measures capable of reducing the risk of harm from fossil-fueled climate change, not rely on speculative measures.

The fourth and final memo in the submission addresses the State obligations that run to, and the rights of, future generations in relation to climate change. It asserts that the obligations of States in relation to climate change run to both present *and* future generations and that there exists no legal basis in international law to restrict such obligations to present generations. The rights of present and future generations are not in conflict with one another, but rather interconnected; if intra-generational inequities are not redressed, they are more likely to be transmitted as intergenerational inequity, compounding structural marginalization. Thus, protecting the rights of present generations is critical to more effectively securing the rights of future generations. Finally, the submission asserts that the principles of prevention and precaution apply with particular force in relation to the rights of future generations in the context of climate change.

As a complement to this fourth memo, the submission annexes the Maastricht Principles on the Human Rights of Future Generations, which clarify the present state of international law as it applies to the rights of future generations, as well as an annotated list of relevant legal resources on the rights of future generations and the principle of intergenerational equity.

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,[1] 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,"[2] 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.[3] These main sources of interpretation are not in a hierarchical

[1] 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).
[2] 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.
[3] Statute of the International Court of Justice, art. 38(1), Oct. 24, 1945, https://www.icj-cij.org/statute.

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

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."[8]

7. Climate change is not just an environmental problem; it has a cross-cutting "effect on society and all areas of the law."[9] 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."[10]

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,[11] 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

[4] 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.
[5] Statute of the ICJ at art. 68.
[6] 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.
[7] 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*), Judgement, 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.
[8] Statute of the ICJ, at art. 68.
[9] 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.
[10] Benoit Mayer, *Climate Change Mitigation as an Obligation under Customary International Law*, 48 Yale J. of Int'l L. 105 (2023), at 114.
[11] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*), Judgement, 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,[12] 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."[13] 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.[14] 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.[15]

11. Sources of international law are subject to rules of interpretation and application which are addressed in Part III of this submission.

[12] 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).
[13] *Ibid*, at p. 3.
[14] "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.
[15] 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[16] 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.[17] 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**

[16] 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; "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.

[17] *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, 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[18] 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."[19]

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."[20] Scholars dating back to Grotius have "expressed the presumption against the conflict of international legal norms."[21]

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.**"[22] 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."[23] 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."[24]

17. With specific regard to climate change, the *Declaration of Legal Principles Relating to Climate Change*[25] has emphasized the inter-relationship between climate law and other overlapping areas

[18] 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).
[19] *Ibid.*, at art. 32.
[20] *Case concerning the Right of Passage over Indian Territory* (*Port. v. India*), Judgment, 1957 I.C.J. 125 (Nov. 26), at 142.
[21] 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.
[22] Rep. of the Study Grp. of the Int'l L. Comm'n, *Fragmentation of International Law 2*, at para. 14 (1) (4) (emphasis added).
[23] 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)
[24] 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.
[25] 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.[26] 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.[27]

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."[28] 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.[29] 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.[30] 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.[31] 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).[32] 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."[33] **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.**[34] The ILC has emphasized a strong presumption against normative conflict,[35] 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

[26] *Ibid.*, at draft art. 10.
[27] 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.
[28] Rep. of the Study Grp. of the Int'l L. Comm'n, *Fragmentation of International Law 2*, at para. 14 (1) (2).
[29] 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).
[30] Rep. of the Study Grp. of the Int'l L. Comm'n, *Fragmentation of International Law 2*, at para. 14 (1)(2).
[31] Mayer, 48 Yale J. of Int'l L. at 115.
[32] Rep. of the Study Grp. of the Int'l L. Comm'n, *Fragmentation of International Law 2*, at para.14 (2) (5)-(10).
[33] Rep. of the Study Grp. of the Int'l L. Comm'n, *Fragmentation of International Law 2*, at para. 14 (3)(11) (parentheses added).
[34] 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.
[35] 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.[36] 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.[37] 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."[38]

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."[39]

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[36] *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).

[37] 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.

[38] 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.

[39] 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.[40]

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."[41] 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**…"[42] 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.[43] 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),[44] and the Paris Agreement acknowledges the importance of "ensuring the integrity of all ecosystems, including oceans."[45] 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

[40] *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. Slovk.*), Judgment, 1997 I.C.J. 7(Sept. 25) [hereinafter *Gabčíkovo-Nagymaros Project*], at 17.
[41] UNFCCC, at pmbl.
[42] 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).
[43] United Nations, *The Ocean*, https://unfccc.int/topics/ocean (last visited March 15, 2024).
[44] 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.").
[45] Paris Agreement, at prmbl.

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."[46] 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..."[47]

29. Importantly, in relation to the preceding sections [paras 26-28],[48] 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.[49]

30. Since "preparatory work of the treaty and the circumstances of its conclusion" is considered a supplementary means of interpretation,[50] 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."[51] 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."[52] A number of other countries made similar declarations.[53] Subsequently, small island States[54] facing existential climate stakes have persistently asserted via legal instruments[55] and public statements[56] 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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[46] 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 (emphasis added.)

[47] *Ibid.*

[48] *Ibid.*, at paras. 24-27.

[49] 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.

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

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

[52] *Depository: Status of Treaties, Chapter XXVII,: Environment, 7.d Paris Agreement*, Declarations, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-d&chapter=27&clang=_en [hereinafter Paris Agreement Status of Ratification, Declarations].

[53] *Ibid.*

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

[55] *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-56940-08000002805c2ace.pdf.

[56] *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."[57] 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.[58] 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."[59] 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."[60] 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.[61] 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

[57] ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, at art. 55 (parts in brackets added).
[58] 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.
[59] *Korea* Communication, para. 7.96.
[60] 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.
[61] *Ibid.*

the adverse effects of climate change…."[62] Other countries such as Kiribati, Fiji, and Papua New Guinea made similar declarations.[63] 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.[64]

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.[65] 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,[66] 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.[67] 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."[68]

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.[69] The Court has recognized, "[a]n international instrument

[62] *Declarations by Parties*, United Nations Climate Change, https://unfccc.int/process-and-meetings/the-convention/status-of-ratification/declarations-by-parties.
[63] *Ibid.*
[64] *See* Paris Agreement Status of Ratification, Declarations.
[65] Paris Agreement, at art. 8.
[66] 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.
[67] 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.
[68] Paris Agreement Status of Ratification, Declarations (emphasis added).
[69] *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."[70] 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,[71] in interpreting UNCLOS, citing customary international law, general principles, and treaties.[72]

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."[73]

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."[74] 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.[75] 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.).

[70] 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.

[71] 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.

[72] *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.

[73] *Fragmentation of International Law 1*, at para. 423.

[74] *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.

[75] *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.[76] 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,[77] respectively engage States to "prevent dangerous anthropogenic interference with the climate system"[78] 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."[79] 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

[76] *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; 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.

[77] *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.

[78] UNFCCC, at art. 2.

[79] Paris Agreement, at art. 2(1)(a).

resilience"[80] and making finance flows "consistent with a pathway towards low greenhouse gas emissions and climate-resilient development."[81]

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[82] 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"[83] and that Parties should take mitigation actions, including the reduction of anthropogenic GHG, "in accordance with best available science."[84]

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,[85] with NDCs defined as ambitious efforts in line with commitments under the Agreement intended to achieve the purpose of the Agreement.[86] The Agreement further specifies that, "Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions."[87] 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…"[88] 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…"[89]

46. Both climate agreements call "for the widest possible cooperation by all countries"[90] with Parties committing to work on a cooperative basis on mitigation,[91] adaptation,[92] and loss and damage,[93] with clear duties for developed countries to provide developing countries with climate finance,[94]

[80] *Ibid.* at art. 2(1)(b).
[81] *Ibid.* at art. 2(1).
[82] UNFCCC, at arts. 3.1, 4; Paris Agreement, at art. 2.2.
[83] Paris Agreement, at pmbl.
[84] *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.
[85] Paris Agreement, at art. 4.2.
[86] *Ibid.*, at art. 3.
[87] *Ibid.*, at art. 4.2.
[88] *Ibid.*, at art. 3.
[89] *Ibid.*, at art. 4.3.
[90] 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.
[91] 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).
[92] UNFCCC, at art. 4(1)(e); Paris Agreement, arts. 7
[93] Paris Agreement, at art. 8.
[94] UNFCCC, at arts. 4(3), 4(4); Paris Agreement, at art. 9.

technology transfer,[95] and capacity-building support.[96] 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,"[97] 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…"[98]

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.[99]

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,[100] and their inadequacy in terms of addressing legal consequences for States where they, by their acts and omissions, have caused

[95] UNFCCC, at arts. 4(1)(c), 4.5; Paris Agreement, at art. 10.
[96] UNFCCC, at arts. 4(1), 4(4); Paris Agreement, at art. 11.
[97] Paris Agreement, at art. 9(1).
[98] *Ibid.*, at art. 10(6).
[99] *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].
[100] 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.[101]

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.[102] 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.[103] 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."[104]

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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[101] *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).

[102] *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).

[103] 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)").

[104] 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 [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.[105] 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,[106] domestic legal protections such as the constitutional right to a clean and healthful environment,[107] statutory law,[108] intergenerational and intragenerational equity, and international environmental principles of sustainable development and precaution.[109] 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.[110] 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."[111]

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*,[112] *Neubauer*,[113] *Grande-*

[105] 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.

[106] *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); *KlimaSeniorinnen v. Switzerland*, Application no. 53600/20.

[107] *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.

[108] *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.

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

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

[111] Mayer, 48 Yale J. of Int'l L. at p. 107.

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

[113] *See Neubauer et al v. Germany.*

Synthe,[114] and *Klimaatzaak*,[115] 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."[116]

56. The primary legal basis for the Future Generations case[117] 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,"[118] 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.[119] 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."[120]

57. At the international level, *Billy v Australia*,[121] 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."[122] 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.[123] In a joint statement, five UN Human Rights Treaty

[114]French Conseil d'Etat, Nov. 19, 2020, *Commune de Grande-Synthe, et. al v. France*, No. 427301, Admissibility (Nov. 19, 2020).
[115] Brussels Ct. of App., *Klimaatzaak ASBL v. Belgium*, 2021/AR/1589 (Nov. 30, 2023).
[116] 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.
[117]*Generaciones Futuras v. Minambiente*, Supreme Court of Colombia, STC. 4360-2018 (Apr. 5, 2018) (Col.).
[118] *Ibid.* at p. 22, para 6.
[119] *Ibid.*
[120] *Ashgar Leghari*, at p. 10.
[121] *Billy v. Australia*.
[122] *Ibid.* at para 7.5.
[123]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."[124] 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."[125] 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.[126] 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." [127]

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.

[124] UN Human Rights Treaty Bodies' joint statement on human rights and climate change, at para. 9.
[125] *Ibid.* at para. 10.
[126] *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/.
[127] ITLOS, Verbatim Record of Sept. 11, 2023 Public Sitting.

MEMO ON THE LEGAL CONSEQUENCES FOR STATES OF INTERNATIONALLY WRONGFUL ACTS CAUSING HARM TO THE CLIMATE SYSTEM

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Introduction

1. This written submission addresses the second question in the request of the United Nations General Assembly for an advisory opinion from the International Court of Justice on the obligations of States in respect of climate change[1] concerning the legal consequences for States that have caused significant harm to the climate system and other parts of the environment, vis-a-vis States, peoples, and individuals of present and future generations. This question encompasses what States must do once it has been established: (i) that they have international obligations to protect the climate system and other parts of the environment from anthropogenic greenhouse gas (GHG) emissions, (ii) that they have breached those obligations through their conduct leading to cumulative GHG emissions that, over time, cause significant harm to the climate system and other parts of the environment, and (iii) that resultant injuries to States, peoples and individuals, and the environment, are attributable to that conduct.

2. What is perhaps most striking about the escalating global climate crisis is not its increasingly severe and devastating impacts on individuals, peoples, ecosystems, and States, inflicting damage through sudden and slow-onset events, alike. Nor is it the fact that those impacts are hitting those in situations of structural vulnerability hardest, compounding inequalities, entrenching impoverishment, and undermining human rights. It is the fact that the world knows and has known for decades what is causing the crisis, and yet those most responsible have failed to act with the urgency and decisiveness required to halt it. In clarifying the law, this Court has an opportunity to elucidate States' obligations and unlock action needed not only to prevent continuing harms, but to remedy those injuries that have fallen, are falling, and will foreseeably continue to fall disproportionately on those least responsible for the planetary emergency.

3. The science is unequivocal: cumulative greenhouse gas emissions, driven overwhelmingly by the production and use of fossil fuels (oil, gas, and coal), have altered the global climate system, leading to increasing average global temperatures, warming of the ocean and sea level rise, ocean acidification, greater severity and frequency of extreme weather events, droughts, floods, and myriad other climate change-related impacts that infringe human rights and threaten ecosystems around the world. Since at least the 1960s, and in some cases earlier, many high-emitting States have known or should have known that, over time, GHG emission-generating conduct within their jurisdictions and control had resulted in, or would result in, significant transboundary harm and/or the risk of such harm. No later than the early 1990s, when the Intergovernmental Panel on Climate Change (IPCC) issued its first reports and when the United Nations Framework Convention on Climate Change (UNFCCC) was adopted, all States have known that climate change, driven by the accumulation of GHG emissions principally from fossil fuels, is causing significant transboundary harm. And the scientific reports published regularly by the IPCC since the 1990s, including as recently as 2023—the findings of which Member States endorse by consensus—have continuously placed States on notice of the causes and consequences of climate change, and of potential responses to it.

4. In the face of the known causes and the foreseeable (or already manifest) consequences of climate change for States, peoples, individuals, and ecosystems around the world, States have international legal

[1] Request for Advisory Opinion, *Obligations of States in Respect of Climate Change*, 2023 I.C.J., No. 187 (Apr. 12, 2023) [hereinafter Request for Advisory Opinion], at p. 2.

obligations to eliminate or reduce those causes, to prevent the associated harm, and minimize the risk thereof. State acts and omissions that breach those international duties, and thereby contribute to significant transboundary environmental harm and associated human rights violations, injurious to States, peoples, and individuals, carry legal consequences—namely the responsibility to cease the wrongful conduct and repair the resultant injuries.

5. As singularly challenging as the problem of climate change may be, it is not so unique or complex as to be beyond the reach of law or legal cognition, under well-established principles that this Court has clarified and applied in countless contexts. The transversal problem of climate change sounds in the law of State responsibility, human rights, and the environment, including the international climate agreements.

6. The elements of State responsibility are present in the face of harm to the climate system. The elements of an internationally wrongful act under the law of State responsibility can be made out in relation to some States' cumulative contributions to and failure to address climate change. Alone or in combination, acts and omissions, attributable to one or more States, have over time generated cumulative GHG emissions that cause significant transboundary harm due to degradation of the atmosphere and ensuing changes to the global climate. That conduct breaches a variety of State obligations under international law, thereby constituting an internationally wrongful act under the law of State responsibility, which triggers legal consequences in the form of secondary obligations to cease the wrongful conduct and provide full reparation of resultant injuries.

7. International law requires States to protect the climate system and other parts of the environment. States have obligations under multiple sources of international law, including *inter alia* longstanding customary international law principles of prevention, precaution, and due diligence, the United Nations Charter, human rights treaties, and various environmental agreements, including the United Nations Convention on the Law of the Sea (UNCLOS), the UNFCCC, the Paris Agreement and decisions taken by the Parties thereto, to prevent transboundary environmental harm and minimize the risk thereof, to protect against foreseeable violations of human rights, and to preserve the global commons for the benefit of present and future generations.

8. State conduct in breach of those obligations constitutes an internationally wrongful act. That conduct—including acts, such as engagement in, authorization of, and direct or indirect financing or other support for, activities that generate greenhouse gas emissions at levels causing significant transboundary harm, and omissions, such as the failure to regulate or constrain those activities so as to prevent, reduce, and control the greenhouse gas emissions causing significant transboundary harm—has, over time, led to cumulative greenhouse gas emissions at levels causing significant transboundary environmental harm and consequent deprivations of human rights and, in some cases, threats to States' very existence, their territorial integrity, and self-determination. Through such composite acts, those States have breached and are breaching not only general principles of international law and custom, but also specific provisions of relevant treaties including but not limited to international climate agreements.

9. Establishment of an internationally wrongful act triggers secondary obligations, under the law of State responsibility, to cease the breach and repair the resultant injury. Even in absence of any injury, States have a duty to cease their wrongful conduct and uphold their international obligations. They also must provide guarantees of non-repetition. Where there is demonstrable injury attributable to State conduct

that breaches international obligations, the State can be held legally responsible and the consequences of that legal responsibility are a duty to make full reparation. A State's breach of international human rights law not only entails responsibility to other States, but also a duty to provide affected peoples and individuals effective remedy for human rights violations. Like the law of State responsibility, the remedial obligation under human rights law requires cessation of the wrong and reparation of injury caused.

10. The injuries due to climate change are of a material and moral character requiring reparation, and evidence can be adduced attributing those injuries to the acts and omissions of States or groups of States. Evidence exists establishing both the link between wrongful State conduct and climate change, and the link between climate change and some of the injuries experienced by other States, peoples, and individuals, making such damage attributable to States' internationally wrongful acts. Evidence of injury is, unfortunately, manifold, and the science linking those injuries to climate change (and logically, thereby to the conduct that has caused climate change) has advanced and continues to advance rapidly. There is ample evidence attributing cumulative GHG emissions over time to different States or groups of States, which makes plain that wealthier, industrialized countries have generated a disproportionate share of global emissions since the industrial era to date. Consensus science, published by the IPCC, demonstrates that associated atmospheric degradation, increased global average temperatures and other perturbations of the global climate system, result therefrom. Multiple sources document when States knew or should have known of the adverse effects of such emissions on the global atmosphere and planetary climate. There is also a growing body of "attribution science" linking specific injuries—both material and moral—to climate change, and thus by extension to the State acts and omissions driving it. These injuries are of the type that this Court has called upon responsible States to remedy in the past.

11. The relevant evidence in a given case will depend on the State or group of States concerned; suffice it to say that available evidence of the type necessary to demonstrate attribution and causation could be adduced. Consistent with human rights law guaranteeing access to justice and effective remedy, and the precautionary principle, the burden of producing such evidence should not be a barrier to justice or remedy for victims of harm, nor should the absence of specific evidence of injury and causation bar recovery, particularly for those in the most vulnerable situations. The burden should be on those who would persist in conduct that has demonstrable adverse impacts or increases the risks of such impacts to demonstrate why doing so is not inconsistent with their international obligations.

12. This submission first lays out basic precepts of the law of state responsibility and human rights law on remedy and reparation, and then examines their application in the context of climate change. Part 1 provides an overview of key elements of an internationally wrongful act and the legal consequences that flow from it, as well as the remedial obligations provided for under human rights law when a State breaches its duties. Part 2 establishes the basis for finding that States have committed internationally wrongful acts in relation to harm to the climate system, in view of the unequivocal science and longstanding knowledge on the causes and consequences of climate change, and the ample evidence of State acts and omissions that, over time, led to cumulative greenhouse gas emissions. Part 3 sets forth the consequences for those States with respect to cessation of the wrongful acts and reparation of resultant injuries to States, peoples, and individuals. It discusses the types of material and moral injuries that have been and are being experienced with ever greater frequency and severity, the evidence linking those impacts to climate change, and the types of measures States may take to satisfy their remedial

obligations. The conclusion underscores that the elements of international legal responsibility may be made out in relation to a State's contributions to and failure to prevent or minimize harm to the climate system and its consequences for human rights and the environment.

Part 1. The Legal Consequences of an Internationally Wrongful Act and Resultant Injury

A. Under the law of State responsibility, breach of an international obligation triggers duties of cessation and reparation

13. The starting point for an analysis of state obligations in relation to climate change and the legal consequences that flow from any breach thereof is the law of State responsibility. The law of State responsibility is the bedrock of the international legal order. The International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts[2] (hereinafter, ILC Draft Articles on State Responsibility) are widely accepted as a codification of customary international law, and the principles laid out are well established and routinely utilized around the world.[3]

i. Elements of an internationally wrongful act

14. Legal consequences flow, under international law, when a State commits an internationally wrongful act,[4] defined as any action or omission attributable to a State under international law[5] that constitutes a breach of an international obligation of the State.[6] There are thus "two necessary conditions for an internationally wrongful act—conduct attributable to the State under international law and the breach by that conduct of an international obligation of the State."[7] According to the ILC Draft Articles on State Responsibility, "every internationally wrongful act of a State entails the international responsibility of that State."[8] This foundational principle of international law has been consistently applied, both by the

[2] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, U.N. Doc A/56/10 (2001) [hereinafter ILC, *Draft Articles on State Responsibility, with commentaries*], at p. 31, para. 1.

[3] Many ICJ cases cite to the ILC Articles on State Responsibility as authoritative sources, without discussion of their status in international law. Other cases note that specific provisions in the Articles reflect customary international law (CIL). *See, e.g.*, Certain Iranian Assets (*Iran v. U.S.*), Judgment, 2023 I.C.J. No. 164 (Mar. 30), at para. 226 (stating that Article 30 reflects CIL); Armed Activities on the Territory of the Congo (*Dem. Rep. Congo v. Uganda*) Reparations, Judgment, 2022 I.C.J. 13 (Feb. 9), at para. 70 (stating that Article 31 reflects CIL); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*), Judgement, 2015 I.C.J. No. 118, (Feb. 3) [hereinafter *Croatia v. Serbia*, 2015 I.C.J.], at para. 128 (stating that Article 3 reflects CIL); Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Hertz. v. Serb. & Montenegro)*, Judgment, 2007 I.C.J. 43 (Feb. 26) [hereinafter *Bosn. & Hertz. v. Serb. & Montenegro*, 2007 I.C.J.], at paras. 385, 398, 401, 407 (describing the ILC Articles on State Responsibility as reflecting customary international law (CIL)); *see also* ILC Draft Articles on State Responsibility at Part II, General Principles, cmt. para. 1 ("[T]he rules and institutions of State responsibility are significant for the maintenance of respect for international law and for the achievement of the goals which States advance through law-making at the international level.").

[4] ILC, *Draft Articles on State Responsibility, with commentaries*, at art. 2.

[5] *Ibid.*, at art. 2(a).

[6] *Ibid.*, at art. 2(b).

[7] *Ibid.*, at art. 2, cmt. para 9.

[8] *Ibid.*, at art. 1.

ICJ and its predecessor court, the Permanent Court of International Justice, in contentious cases and advisory opinions.[9]

a. Act or omission attributable to the State

15. Both actions and omissions (alone or in combination) can engage State responsibility.[10] The rules of attribution laid out in Articles 4-11 of the ILC Draft Articles on State Responsibility relate not only to acts of States but also omissions (inaction or failures to act) that breach an international obligation. As the ILC Draft Articles on State Responsibility have clarified, "[cases] in which the international responsibility of a State has been invoked on the basis of an omission are at least as numerous as those based on positive acts, and no difference in principle exists between the two."[11]

16. Breaches of an international obligation can be due to a single action or omission, or a combination of actions and omissions. The breach of an international obligation occurs when an act or omission of a State is not in conformity with what is required of it.[12] This includes both isolated (non-continuing)[13] and continuing[14] breaches of an international obligation, as well as composite acts in which multiple acts or omissions, in aggregate, constitute a wrongful act.[15] As set forth in Article 15 of ILC Draft Articles on State Responsibility, a breach may occur through "a series of actions or omissions defined in aggregate as wrongful." Such a breach transpires "when the action or omission occurs which, *taken with the other actions or omissions*, is sufficient to constitute the wrongful act."[16] The duration of the breach "extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation."[17] As will be discussed below, this composite act principle is particularly pertinent to the acts and omissions of States that have, over time, led to the accumulation of greenhouse gas emissions in the atmosphere at levels causing significant transboundary harm and violations of human rights.

17. Depending on the circumstances, a broad range of actors' conduct may be attributed to a State. Conduct attributable to a State under international law includes acts or omissions: of organs of the State;[18] of persons or entities exercising elements of governmental authority;[19] of organs placed at the disposal of the State by another State and exercising elements of the governmental authority of the former State;[20] of organs, persons, or entities exercising elements of the governmental authority of the State, even if

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[9] *See, e.g. Phosphates in Morocco* (*It. v. Fra.*), 1938 P.I.C.J. (ser. A/B) No. 74 [hereinafter *Phosphates in Morocco*, 1938 P.I.C.J], at para. 48; *The Corfu Channel Case* (*U.K. v. Alb.*), Compensation, Judgment, 1949 I.C.J. 244 (Dec. 15) [hereinafter Corfu Channel Case, Compensation Judgment]; *Military and Paramilitary Activities in and Against Nicaragua, Judgment (Nicar. v. U.S)*, 1986 I.C.J. 14 (June 27) [hereinafter *Nicar. v. U.S.*, 1986 I.C.J], and Case Concerning the Gabčíkovo-Nagymaros Project (*Hung. v. Slovk.*), Judgement, 1997 I.C.J. 7 (Sept. 25) [hereinafter *Gabčíkovo-Nagymaros Project*], at p. 37.

[10] ILC, *Draft Articles on State Responsibility, with commentaries*, at art. 12, cmt. para. 2.

[11] *Ibid*., at art. 2, cmt. para.4.

[12] *Ibid.*, at art. 12.

[13] *Ibid.*, at art. 14 (1).

[14] *Ibid*., at art. 14(2).

[15] *Ibid*., at art. 15.

[16] *Ibid.*, at art. 15(1) (emphasis added).

[17] *Ibid.*, at art. 15(2).

[18] *Ibid.*, at art. 4.

[19] *Ibid.*, at art. 5.

[20] *Ibid.*, at art. 6.

they exceed or contravene that authority;[21] of persons or groups of persons acting under the *de facto* direction or control of the State;[22] of persons or groups of persons acting in the absence or default of official authorities;[23] of insurrectional or other movements which become new or successor States;[24] or acknowledged and adopted by a State as its own.[25]

18. States can bear responsibility for failing to regulate private conduct within their jurisdiction or control. The conduct of private persons is not, absent more, attributable to the State.[26] In some circumstances, however, a State's failure to undertake measures to prevent or compel such conduct consistent with international law is conduct—an omission—attributable to the State, and thus the State may bear responsibility for injury attributable to that failure. As stated in the ILC commentary to the Draft Articles on State Responsibility, "a State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects."[27]

19. A State can in some circumstances incur responsibility for its relationship to or role in the conduct of another State. A State that aids or assists another State in the commission of an internationally wrongful act, with knowledge of the circumstances of the internationally wrongful act, or which directs, controls, or coerces another State in the commission of an internationally wrongful act, and in circumstances in which the act would be internationally wrongful if committed by the former State, is internationally responsible for doing so.[28]

b. That breaches an international obligation

20. An international wrong arises when State conduct (an act or omission attributable to the State) breaches any of the State's international obligations—be it an obligation under customary international law (CIL), convention (treaty) law, or non-treaty law.[29] State responsibility is not limited to breaches of a State's bilateral obligations, but applies "to the whole field of the international obligations of States, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole."[30] Correspondingly, "some wrongful acts engage the responsibility of the State concerned towards several or many States or even towards the international community as a whole."[31] International obligations may include duties established through international agreements between States that enshrine the rights of non-State actors, as do human rights treaties.[32] While human rights treaties set out State obligations vis-a-vis peoples and individuals, as the ICJ suggested in *Barcelona Traction*, those "principles and rules concerning the basic rights of the human person" create obligations

[21] *Ibid.*, at art. 7.
[22] *Ibid.*, at art. 8.
[23] *Ibid.*, at art. 9.
[24] *Ibid.*, at art. 10.
[25] *Ibid.*, at art. 11.
[26] *Ibid.*, at art. 8, cmt. para. 1 ("As a general principle, the conduct of private persons or entities is not attributable to the State under international law.")
[27] *Ibid.*, at Chapter II, cmt. para. 4.
[28] *Ibid.*, at arts. 16-18.
[29] *Ibid.*, at art. 2, cmt. para.7.
[30] *Ibid.*, at general cmt. para. 5.
[31] *Ibid.*, at art. 1, cmt. para. 4.
[32] *Ibid.*, at art. 28, cmt. para. 3.

of an *erga omnes* character[33] because, given "the importance of the rights involved, all States can be held to have a legal interest in their protection."[34] A State that breaches its international human rights obligations may incur responsibility to, and face claims by, *both* injured peoples or individuals (discussed further below), *and* other States or the international community as a whole.[35] Unless States expressly specify otherwise when entering into an international agreement or agreeing to be bound by a given international law, the ordinary rules of State responsibility will apply in the event of a breach.[36]

21. International responsibility may be incurred even in absence of injury.[37] A State's breach of its international obligation, alone, gives rise to State responsibility; injury is not required to establish the international wrongfulness of an act, nor is a State's acceptance of the jurisdiction of the Court. This follows from the principle of *pacta sunt servanda*.[38] When a State violates its obligations, State responsibility is established "as immediately as between two (or more) States."[39] No particular knowledge or mental element is required for a State to incur international responsibility beyond whatever mental element may be required to establish breach of the underlying primary obligation.[40]

c. For which there is no applicable defense

22. The law of State responsibility contemplates defenses that a State may invoke to justify or excuse the breach of an international obligation or otherwise preclude its wrongfulness,[41] such as the consent of the other State or States concerned to the breach,[42] or necessity.[43] The latter requires showing that the impugned acts and omissions that breach international obligations were, both individually and in aggregate: (1) "the only way" (2) "to safeguard" (3) "an essential interest" (4) "against a grave" (5) "and imminent" (6) "peril".[44] A State seeking to avoid responsibility bears the burden of proving any defense.[45]

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[33] Obligations in whose fulfillment all states have a legal interest because their subject matter is of importance to the international community as a whole. *Erga omnes obligations*, Oxford Reference, https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095756413.
[34] *See* The Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (*Belg. v. Spain*), Judgment, 1970 I.C.J. 3 (Feb. 5), [hereinafter *Belg. Spain*, 1970 I.C.J.], at para. 33.
[35] ILC, *Draft Articles on State Responsibility, with commentaries*, at art.1, cmt. para. 4.
[36] *Ibid.*, at general cmt. para. 5.
[37] *Ibid.*, at art. 2, cmt. para. 9. *See also*, art. 29, cmt. para. 3 ("[T]he secondary legal relation of State responsibility arises on the occurrence of a breach and without any requirement of invocation by the injured State.").
[38] *See e.g.*,*Croatia v. Serbia*, 2015 I.C.J. at para. 86 ["States are required to fulfill their obligations under international law, including international humanitarian law and international human rights law, and they remain responsible for act contrary to international law which are attributable to them (see, e.g., *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006,* pp. 52-53, para. 127, and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 104, para. 148)."]
[39] *Phosphates in Morocco*, 1938 P.I.C.J, at para. 48.
[40] ILC, *Draft Articles on State Responsibility, with commentaries*, at art. 2, cmt. para. 10.
[41] *Ibid.*, at Ch. V.
[42] *Ibid.*, at art. 20.
[43] *Ibid.*, at art. 25.
[44] *Ibid.*
[45] *Ibid.*, at Ch. V, cmt. para. 8.

23. Domestic law is no defense. The lawfulness of the State conduct in question under the domestic law of the State has no bearing on whether it constitutes an internationally wrongful act.[46] What is salient is whether the impugned State conduct violates an international obligation of the State. As this Court has recognized, the principle that international law governs the characterization of an act as internationally wrongful reflects a "rule of customary law."[47] For example, that a polluting activity "was not prohibited domestically" would be irrelevant to its wrongfulness under international law prohibiting transboundary harm, "because it is the causation of harm that is prohibited, not the polluting activity."[48]

24. State *liability* is, of course, not limited to "internationally wrongful acts." That is, an act or omission of a State that is not contrary to international law can incur liability—such as in the case of a hazardous activity that is not prohibited, but that causes injury. In such instances, a State affected may demand compliance or damages without establishing that the conduct was prohibited.[49]

ii. Legal consequences of an internationally wrongful act

25. The legal consequences that follow the establishment of an internationally wrongful act entail the obligations (sometimes called "secondary" rules or obligations) of the responsible State to cease the wrongful conduct[50] and to make full reparation for any resultant injury or injuries caused by the internationally wrongful act.[51] Once an internationally wrongful act is established, legal consequences flow therefrom even in absence of injury. When there is injury, compensation and reparation is owed.

a. Cessation of the wrongful conduct

26. The State responsible for an internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing (or susceptible to recurrence);[52] and (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.[53]

27. Cessation might be considered "the negative aspect of future performance, concerned with securing an end to continuing wrongful conduct," while assurances and guarantees "serve a preventive function and may be described as a positive reinforcement of future performance."[54] The function of cessation in the international rule of law is critical, as it protects the interests not only of the injured State or States but the international community as a whole.[55]

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[46] *Ibid.*, at art. 3.
[47] *Croatia v. Serbia*, 2015 I.C.J., at para. 128.
[48] Christina Voigt, *State Responsibility for Damages Associated with Climate Change*, *in* Research Handbook on Climate Change Law and Loss & Damage 166 (Meinhard Doelle & Sara L. Seck eds., 1st ed. 2021), [hereinafter Voigt, *State Responsibility for Damages Associated with Climate Change*] at p. 180.
[49] International Law Commission (ILC), *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries*, U.N. Doc A/56/10 (2001) [hereinafter ILC, *Draft Articles on Prevention of Transboundary Harm*], at art. 1, cmt. paras. 1-2, 4.
[50] ILC, *Draft Articles on State Responsibility, with commentaries*, at art. 30.
[51] *Ibid.*, at art. 31.
[52] *Ibid.*, at art. 30, cmt. para. 3.
[53] *Ibid.*, at art. 30.
[54] *Ibid.*, at art. 30, cmt. para.1.
[55] *Ibid.*, at art. 30, cmt. para. 5.

b. Full reparation of injury attributable to the wrongful act

28. The ILC Draft Articles on State Responsibility provide that once an internationally wrongful act is established, the responsible State or States are under an obligation to make full reparation for the injury caused by such act. Injury includes "any damage, whether material or moral, caused by the internationally wrongful act of a State."[56] 'Material' damage here refers to damage to property or other interests of the State and its nationals which is assessable in financial terms. 'Moral' damage includes such items as individual pain and suffering, loss of loved ones, or personal affront associated with an intrusion on one's home or private life."[57]

29. As the Permanent Court of International Justice Court explained in the *Factory at Chorzów* case nearly a century ago: "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form," and 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," in kind or through a sum corresponding to the value that restitution in kind would bear.[58] This reflects a broader aim of compliance with obligations.[59] Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution (restoration of the original state as much as feasible), compensation (payment or redress for harm suffered), and satisfaction (when restitution and compensation are not possible, other means to redress injury for example express acknowledgment of and regret for harm caused), either singly or in combination.[60]

30. The duty to provide reparation exists independent of demonstration of injury or demand for reparation. A State need not establish actual (material or pecuniary) damage before seeking reparation for breach of an international obligation, although damage will inform the form and quantum of reparation owed.[61] Under the Draft Articles of State Responsibility, the notion of "injury" from the breach of an international obligation is broad and can encompass injury, the full extent of which may be "distant, contingent or uncertain."[62] Reparation is owed even when it is not claimed by the injured State(s): "The obligation of reparation arises automatically upon commission of an internationally wrongful act and is not, as such, contingent upon a demand or protest by any State, even if the form which reparation should take in the circumstances may depend on the response of the injured State or States."[63]

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[56] *Ibid.*, at art. 31 (2).
[57] *Ibid*., at art. 31, cmt. para. 5.
[58] The Factory at Chorzow (*Ger. v. Polish Republic*) 1927 P.C.I.J. (ser. A) No. 9 (July 26) at p. 47.
[59] Margaretha Wewerinke-Singh, *State Responsibility for Human Rights Violations Associated with Climate Change*, *in* Routledge Handbook of Human Rights and Climate Governance (1st ed., 2018) [hereinafter Margaretha Wewerinke-Singh, *State Responsibility for Human Rights Violations Associated with Climate Change*], at p. 82.
[60] ILC Draft Articles on State Responsibility, at arts. 34-37.
[61] *Ibid.*, at art. 31, cmt. para. 7.
[62] *Ibid.*, at art. 31, cmt. para. 8.
[63] *Ibid.*, at art. 31, cmt. para. 4.

31. The law of State responsibility requires reparations for damages both 'material and moral.'[64] The ICJ has recognized environmental damage as material damage, for which reparation may be claimed.[65] In *Lusitania* it was held that international law provides compensation for mental suffering, injury to feelings, humiliation, shame, degradation, loss of social position, or injury to credit and reputation, such injuries being "very real, and the mere fact that they are difficult to measure or estimate by money standards makes them nonetheless real and affords no reason why the injured person should not be compensated."[66] International tribunals have granted pecuniary compensation for moral injury to private parties.[67]

32. Reparations in cases of moral or other non-material damage clearly go beyond compensation. In the *Rainbow Warrior* case, the tribunal held that, "[T]here is a long established practice of States and international Courts and Tribunals of using satisfaction as a remedy or form of reparation (in the wide sense) for the breach of an international obligation. This practice relates particularly to the case of moral …damage done directly to the State."[68] Satisfaction may take the form of, for example, an apology, disciplinary action, or a declaration of wrongfulness.

33. The duty to provide reparation attaches to those injuries ascribable to the act.[69] To attribute an injury to a State's internationally wrongful act, there must be a sufficient causal link between the injury and the State's wrongful act.[70] In *Costa Rica v Nicaragua*, a case that involved determining compensation for environmental harm, this Court required a sufficiently "direct and certain causal nexus" between the wrongful act and damage incurred.[71] While the requisite nexus is formulated variously in the case law of this Court and in the resolution of international disputes before other bodies, common to those formulations is the idea that the consequences must not be too indirect, remote, or uncertain to be appraised.[72] Ultimately, the assessment of that link will be fact-specific,[73] and the nature or quantum of

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[64] *Ibid.*, at art. 31, cmt. para. 5.
[65] *See, e.g.*, Certain Activities Carried Out by Nicaragua in the Border Area (*Costa Rica v. Nicar.*), Compensation, Judgment, 2018 I.C.J. 15 (Feb. 2) [hereinafter *Costa Rica v. Nicar.*, 2018 I.C.J.]
[66]Opinion in the Lusitania Cases, UN Reports of International Arbitral Awards (UNRIAA), 1923, vol. VII, at p. 40.
[67] ILC, *Draft Articles on State Responsibility, with commentaries*, at art. 36, cmt. para 16.
[68] France-New Zealand Arbitration Tribunal, *Rainbow Warrior (N.Z. v. Fra.),*82 I.L.R. 500 (1990) [hereinafter *Rainbow Warrior* Case], at para.122.
[69] ILC, *Draft Articles on State Responsibility, with commentaries*, at art. 31, cmt. para. 9.
[70] Armed Activities on the Territory of the Congo (*Dem. Rep. Congo v. Uganda*) Reparations, Judgment, 2022 I.C.J. 13 (Feb. 9), at para. 382: "The Court considers that it is not sufficient, as the DRC claims, to show "an uninterrupted chain of events linking the damage to Uganda's wrongful conduct". Rather, the Court is required to determine "whether there is a sufficiently direct and certain causal nexus between the wrongful act . . . and the injury suffered by the Applicant"; *Costa Rica v. Nicar.*, 2018 I.C.J., at para 34 ("In cases of alleged environmental damage, particular issues may arise with respect to the existence of damage and causation. The damage may be due to several concurrent causes, or the state of science regarding the causal link between the wrongful act and the damage may be uncertain. These are difficulties that must be addressed as and when they arise in light of the facts of the case at hand and the evidence presented to the Court. Ultimately, it is for the Court to decide whether there is a sufficient causal nexus between the wrongful act and the injury suffered.").
[71] *Costa Rica v. Nicar.*, 2018 I.C.J., at para. 72.
[72]ILC, *Draft Articles on State Responsibility, with commentaries*, at art. 31, cmt. para. 10.
[73] *Costa Rica v. Nicar.*, 2018 I.C.J at para. 34.

evidence required will differ depending on the circumstances, including the respective capacities of the parties and their access to information.[74]

34. The existence of multiple States that commit the same wrongful act, or multiple States whose separate wrongful acts contribute to the same damage, does not preclude individual State responsibility. Principle 2 of the Guiding Principles on Shared Responsibility in International Law provides that, "The commission by multiple international persons of one or more internationally wrongful acts that contribute to an indivisible injury entails shared responsibility," and such contribution "may be individual, concurrent or cumulative."[75] Notably, while attribution is rendered complex by "the synergetic effect of diverse pollutants and multiple polluters,"[76] as the ICJ itself has affirmed, and as has been reaffirmed by other international bodies, the existence of multiple causes, or the involvement of multiple States, does not preclude the establishment of independent responsibility, and when relevant, award of damages.[77] Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act. Where a plurality of States have committed separate wrongful acts that contribute to causing the same damage, "the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations."[78]

35. Much as in national law, concurrent liability (the existence of concurrent causes of injury) does not preclude recovery from each international wrongdoer, or justify reduction of reparation.[79] This principle applies where the concurrent causes include conduct of non-State actors, against which a State failed to protect the injured parties.[80] In some instances, the tribunal has placed the burden on the responsible State to show the portion of the injuries for which it is not responsible.[81] A responsible State may have recourse to other responsible States for contribution to reparation, where the acts or omissions of several States in breach of their international obligations contribute to the same injury.[82]

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[74] See para. 38 below & sources cited therein.

[75] André Nollkaemper et al., *Guiding Principles on Shared Responsibility in International Law*, The European Journal of International Law, vol. 31, no. 1 (2020), at principle 2, cmt. para 5, http://ejil.org/pdfs/31/1/3037.pdf [hereinafter EJIL, *Guiding Principles on Shared Responsibility in International Law*]: "Principle 2 "sets out that an indivisible injury resulting from the conduct of multiple international persons can arise in three types of situations: in the case of an individual contribution, in which a single contribution caused the injury by itself; in the case of concurrent contributions, in which each of the contributions could have caused the injury by itself; and in the case of cumulative contributions, in which the conduct of multiple international persons together results in an injury that none could have caused on their own." The latter is particularly relevant to climate change.

[76] Voigt, *State Responsibility for Damages Associated with Climate Change,* at p. 180.

[77] *See*, ILC, *Draft Articles on State Responsibility, with commentaries*, at art. 47. This principle has been applied in numerous cases. *See, e.g.*, for example, Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1905 (1941) [hereinafter *Trail Smelter Arbitration*], (on multiple causes); *United States Diplomatic and Consular Staff in Tehran* (*U.S. v. Iran*), Jurisdiction & Admissibility, Judgment, 1980 I.C.J. 3 (May 24), para. 317; Corfu Channel Case, Compensation Judgment, para. 4 (on multiple States).

[78] ILC, *Draft Articles on State Responsibility, with commentaries*, at art. 47, cmt. Para 8.

[79] *Ibid.*, at art. 31, cmt. para. 12

[80] *Ibid.*

[81] *See, e.g., D. Earnshaw and Others (Great Britain) v. United States (Zafiro case)* UNRIAA, vol. VI (Sales No. 1955. V.3) (1925), pp. 164–165.

[82] ILC, *Draft Articles on State Responsibility, with commentaries*, at art. 47, cmt. paras. 8, 10.

36. Proportionality bears on the provision of reparations. To ensure that the principle of full reparation does not lead to debilitating requirements in relation to the responsible State, restitution is excluded if it would involve a burden out of proportion to the benefit gained by the injured State or other party. Compensation is limited to damage actually suffered as a result of the internationally wrongful act, while satisfaction must "not be out of proportion to the injury."[83]

37. Nor does the existence of multiple injured States preclude responsibility. As set forth in the Draft Articles on State Responsibility, "where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act."[84]

38. Standards of evidence are interpreted and applied in a manner so as not to preclude access to justice. The legal duty to provide reparations is "unaffected by a State's inability to pay or by a claimant's inability to determine the quantity and value of the losses suffered."[85] The absence of adequate evidence as to the extent of material damage will not necessarily preclude an award of compensation for that damage,[86] though it may affect the court's assessment of the amount owed. In circumstances where parties have differential access to information and/or where a risk or harm is ongoing or may be repeated, it may be appropriate to shift the burden of proof to require the State to prove a lack of causation, for which there is precedent in environmental matters.[87]

39. The injured State's contribution to injury may be taken into account when determining the form and extent of reparation owed. Article 39 of the ILC Draft Articles on State Responsibility requires that where the claimant State has through "wilful or negligent" acts or omissions contributed to the injury, the reparation must be assessed accordingly.[88] Thus, contribution to the damage will not lead to an exculpation of the wrongful act, but may limit, to an extent, the legal consequences flowing from it. As discussed below, this principle is salient in the context of the cumulative greenhouse gases emissions causing harm to the climate system, to which multiple States have contributed to greatly varying degrees. That all States have contributed some amount to GHG accumulation in the atmosphere over time, even

[83] *Ibid*., at art. 34 cmt. para. 5.
[84] *Ibid.*, at art. 46.
[85] Margaretha Wewerinke-Singh, *State Responsibility for Human Rights Violations Associated with Climate Change*, at p. 83.
[86] *Costa Rica v. Nicar.*, 2018 I.C.J., at para. 35.
[87] *See Tătar v. Romania*, European Court of Human Rights, App. No. 67021/01 (Jan. 1, 2009), paras. 87, 107 (exempting the applicants from proving the certainty of environmental risk because the State was in a better position to prove a lack of causation and show that it had fulfilled its obligations); Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the *Nuclear Tests (New Zealand v. France)* Case (N.Z. v. Fra.), Order, 1995 I.C.J. 288 (Sept. 22) [hereinafter 1995 *Nuclear Tests case*] (while the ICJ's order in the 1995 *Nuclear Tests* case indicated that it was not going to be decided on the merits, in his dissenting opinion Justice Weeramantry wrote, "..burden of proving safety lies upon the author of the act complained of, and the 'polluter pays principle', placing on the author of environmental damage the burden of making adequate reparation to those affected"). As articulated in the Maastricht Principles on Human Rights of Future Generations, where there are reasonable grounds for concern that the impacts of conduct may result in the violation of rights, triggering the State duty to protect, "the burden of proof in all circumstances must lie with those who would undertake or persist in the conduct involved, not with those who might be harmed as a result. This burden grows proportionately greater as the scale, scope, and irremediability of threats to rights of future generations increases. *See Maastricht Principles on the Human Rights of Future Generations*, (2023), at principle 9, https://www.rightsoffuturegenerations.org/the-principles.
[88] ILC, *Draft Articles on State Responsibility, with commentaries*, at art. 39 & cmt. para 5.

if a *de minimis* or non-material quantity for some States, will not preclude the wrongfulness of the conduct of those that have contributed significantly or exclude the possibility of reparation.

B. Breach of human rights law triggers similar duties to remedy and repair resultant injuries to peoples and individuals

40. An act or omission of a State that breaches its international obligations under human rights law carries consequences both under the law of State responsibility and also directly under the law of human rights. As stated in the ILC Articles on State Responsibility, the responsibility of a State for the breach of an international obligation that is owed to a non-State entity (person or persons) may give rise to recourse by those injured parties outside of the law of State responsibility (without a State intervening): "This is true, for example, under human rights treaties which provide a right of petition to a court or some other body for individuals affected."[89]

41. The reparatory duties of a State under the law of State responsibility do not supplant its duty to provide effective remedy under human rights law. The law of State responsibility does not displace the accrual of rights to a non-State actor arising from a State's breach of international obligations.[90] Where the international obligation breached sets out particular consequences of such a breach (or the corresponding rights of the injured parties in the event of such a breach), those consequences will apply alongside the law of State responsibility.[91] A State's breach of its international human rights obligations, which can be said to be of an *erga omnes* character because all States have an interest in their protection,[92] will trigger legal consequences to other States under the law of State responsibility, as well as a duty under human rights law to provide adequate remedy and reparation to those peoples and individuals whose human rights were violated.

42. The legal duties triggered by a breach under human rights law parallel those under the law of State responsibility—namely, the obligations of cessation and reparation. The right to remedy is guaranteed under international human rights law,[93] and States have a corresponding duty to make reparation to

[89] ILC, *Draft Articles on State Responsibility, with commentaries*, at art. 33, cmt. para. 4.
[90] *Ibid*. at art. 33(2).
[91] *Ibid.* at art. 28, cmt. para 3.
[92] The Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (*Belg. v. Spain*), Judgment, 1970 I.C.J. 3 (Feb. 5) at paras. 33-34 (stating that the "principles and rules concerning the basic rights of the human person" create obligations *erga omnes* because, given "the importance of the rights involved, all States can be held to have a legal interest in their protection").
[93] See, for e.g., Universal Declaration of Human Rights, Dec. 8, 1948, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948) [hereinafter UDHR], at art. 8; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 28, 1979) [hereinafter ICCPR], at. art. 2; and U.N. Office of the High Commissioner on Human Rights, *Guiding Principles on Business and Human Rights*, U.N. Doc. HR/PUB/11/04 (2011) [hereinafter UNGP], at principle 25. *Also see,* U.N. Human Rights Comm., *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant: International Covenant on Civil and Political Rights*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004), paras. 16; *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*, G.A. Res. 60/147, (Dec. 15, 2005) [hereinafter U*N Basic Principles and Guidelines on the Right to a Remedy and Reparation*]; *Maastricht Principles on the Human Rights of Future Generations*, (2023) at para. 30.

individuals and peoples[94] whose rights have been violated. Discharging the obligation to provide remedy which applies domestically and extraterritorially,[95] and runs to present and future generations,[96] requires full reparation of the adverse consequences of human rights violations.

43. Like the law of State responsibility, human rights law provides for remedy and reparation of 'moral' or 'non-material impacts' of human rights violations, as well as material injury. The right to remedy and corresponding State obligations have both procedural and substantive dimensions, involving (i) the procedures and institutions that may be utilized to enforce a right,[97] and (ii) ensuring reparations to victims for the negative consequences of those violations.[98] The procedural dimension of the right to remedy requires remedial mechanisms to be accessible to complainants and capable of providing suitable, effective, and prompt remedy.[99] Moreover, remedies should be prompt and diligent based on the nature of the violation, the vulnerability of the plaintiff, and the imminence or irreversibility of the harm.[100] The substantive dimension of the right to an effective remedy requires States to provide adequate redress, which can take, and may require, multiple forms, including but not limited to: (i) restitution, (ii) compensation, (iii) rehabilitation,[101] (iv) measures of satisfaction, and (v) guarantees of non-repetition.[102] These mirror, for the most part, forms of reparation contemplated under the laws of State responsibility.

44. The next section applies the above-described law in the context of climate change.

Part 2. State Contributions to, and Failures to Prevent, Harm to the Climate System are Internationally Wrongful Acts Triggering Legal Consequences

45. The elements of an internationally wrongful act or acts can be made out with respect to climate change and its resultant impacts—namely: the existence of international obligations, conduct attributable to a State or States that breaches those obligations, and the absence of any applicable defense. This section examines the applicable international obligations and available evidence of State conduct that breaches those obligations, which establishes internationally wrongful acts. State obligations to protect the climate

[94] *United Nations Declaration on the Rights of Indigenous Peoples*, G.A. Res. 61/295 (Sept. 13, 2007) [hereinafter UNDRIP], at art 28.
[95] See for example, *Maastricht Principles on the Extraterritorial Obligations* (2023).
[96] *Maastricht Principles on the Human Rights of Future Generations* (2023), para. 30. *See* CIEL, Memo on the Rights of Future Generations, in Written Statement submitted to the ICJ in the climate advisory proceedings, March 2024.
[97] Dinah Shelton, *Human Rights Remedies*, *in* Max Planck Encyclopedias of International Law (MPEPIL, 2006), at para. 1. In relation to access to justice and remedies in its the UN CRC has noted, "[A]ccess to applicable international and regional human rights mechanisms should be available, including through ratification of the Optional Protocol on a communications procedure. Information about such mechanisms and how to use them should be made widely known to children, parents, caregivers and professionals working with and for children." Comm. on the Rights of the Child, *General Comment No. 26 (2023) on Children's Rights and the Environment with a Special Focus on Climate Change*, U.N. Doc. CRC/C/GC/26 (Aug. 22, 2023), para. 90.
[98] *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation*, at para.VII.
[99] *Ibid*., at para. 1 (b)(c);
[100] *San Miguel Sosa et al. v. Venezuela*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 348 (Feb. 8, 2018), at para. 198.
[101] Rehabilitation includes, for example, medical and psychological care as well as legal and social services. *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation*, at para. 21.
[102] *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation*, at paras. 18, 23.

system are rooted in, *inter alia*, longstanding customary international law regarding the duty to prevent significant transboundary environmental harm and minimize the risk thereof; human rights law regarding the duties to respect and protect (ensure) human rights against foreseeable violations; and multilateral agreements on international cooperation to "stabilize greenhouse gas concentration in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."[103] As elaborated, below, there is ample evidence that States or groups of States have breached and are breaching these international obligations through both their inaction and their actions. A State's failure to take effective measures to prevent and reduce harm due to climate change by curtailing its primary causes, or to minimize resultant injuries by supporting adaptation and resilience, breaches its international obligations. So, too, do State acts that instead augment such harms by increasing dangerous levels of greenhouse gas emissions.

46. Paragraphs 49-90 set out first, States' international obligations under the transboundary harm principle in customary international law, their application to climate change as a form of significant transboundary environmental harm, and the type of State acts and omissions that have breached or are breaching those obligations by generating and failing to prevent and minimize the cumulative greenhouse gas emissions causing climate change. Next, paragraphs 91-108, address some of the relevant obligations under treaty law pertaining to protection of the climate system, and evidence of their breach. Finally, paragraphs 109-119 address State obligations under international human rights law to protect human rights from violations due to climate change, and those State acts and omissions that, by causing cumulative greenhouse gas emissions and failing to take adequate steps to prevent or reduce such emissions, or to minimize climate impacts and bolster resilience to them, breach those obligations, causing injuries to States, peoples, and individuals. The breach of any one or any number of these primary obligations, individually or in combination, by conduct attributable to a State amounts to an internationally wrongful act, giving rise to secondary obligations of cessation and reparation.

47. Part 3 then examines the consequences that flow from such breaches—namely, the responsibility of States to cease their wrongful conduct and repair the injuries to States, peoples, and individuals attributable to such acts, and the types of measures capable of satisfying those remedial obligations.

48. The multiple relevant rules of international law pertaining to State conduct vis-a-vis climate change and its impacts should be interpreted and applied harmoniously, consistent with the Vienna Convention on the Law of Treaties, articles 30 and 31, as well as rules of customary international law, to give rise to a consistent set of obligations and avoid conflict. [See the previous section of this submission: CIEL, Memo on Applicable Law, in Written Statement submitted to the ICJ in the climate advisory proceedings, March 2024.]

[103] United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107 (entered into force Mar. 21, 1994) [hereinafter UNFCCC], at art. 2.

A. Breaches of the transboundary harm principle under customary international law

i. States must prevent and minimize the risk of significant transboundary environmental harm

49. One of the touchstones of States' international legal obligations with respect to protection of the climate system is the duty of States to prevent and to minimize the risk of significant transboundary environmental harm, which constitutes customary international law.[104] The transboundary harm principle (sometimes called the preventive principle) has its roots in the principle of State territorial sovereignty and control over natural resources, which requires respect of and non-interference in other States' sovereignty.[105] At its core, the principle prohibits States from conducting or allowing others to conduct activities within their territories or subject to their jurisdiction and control, that infringe on the rights of other States.

50. That duty has long been understood to encompass environmental pollution that crosses territorial boundaries, as articulated in the 1941 *Trail Smelter* case, an arbitration dispute between Canada and the United States concerning cross-border pollution.[106] It requires States not only to refrain from causing significant transboundary harm, but also to take measures to prevent significant transboundary harm or to minimize the risk thereof.[107] This application of the transboundary harm principle is enshrined in Principle 21 of the 1972 Stockholm Declaration, and Principle 2 of the 1992 Rio Declaration, which both qualify States' "sovereign right to exploit their own resources," with "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."[108] The duty is also reflected in "the Principles of

[104] International Law Commission (ILC), *Draft Guidelines on the Protection of the Atmosphere, with commentaries*, U.N. Doc. A/76/10 (2021), [hereinafter ILC, *Draft Guidelines on the Protection of the Atmosphere, with commentaries],* at guideline 3, cmt. para 8; International Law Commission (ILC), *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries*, U.N. Doc A/56/10 (2001), [hereinafter ILC, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries*], at general cmt. para. 3; *see also Corfu Channel*, 1949 I.C.J. at p. 22. (grounding the notion that a State must not allow its territory to be used for activities contrary to the rights of other States in "certain general and well-recognized principles").

[105] *See* Reports of International Arbitral Awards, *Island of Palmas Case (Neth. v. U.S.)*, Vol. II (Apr. 4, 1928) at p. 839 ("Territorial sovereignty … involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory.").

[106] *See Trail Smelter Arbitration*; *See also* 1995 *Nuclear Tests case*, at para. 29. (observing that the duty to not cause transboundary environmental harm is "now a part of the corpus of international law relating to the environment.").

[107] *See also* ILC, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries*, at art. 3.

[108] *Stockholm Declaration on the Human Environment*, UN Doc. A/Conf.48/14, 2, Corr. 1 (1972), [hereinafter Stockholm Declaration], at principle 21; *Rio Declaration on Environment and Development*, UN Doc. No. A/CONF.151/26/Rev.1 (1992) [hereinafter Rio Declaration], at principle 2. *See also* ILC, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries*, general cmt. para. 4. The preventive principle is also enshrined in various other international legal instruments, including, e.g., the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) and the 1992 Convention on the Transboundary Effects of Industrial Accidents (Industrial Accidents Convention); and the

conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States, adopted by the Governing Council of UNEP in 1978, which provided that States must: avoid to the maximum extent possible and ... reduce to the minimum extent possible the adverse environmental effects beyond its jurisdiction of the utilization of a shared natural resource so as to protect the environment, in particular when such utilization might: (a) cause damage to the environment which could have repercussions on the utilization of the resource by another sharing State; (b) threaten the conservation of a shared renewable resource; (c) endanger the health of the population of another State."[109]

51. This fundamental obligation has been upheld by the ICJ in numerous cases. In its 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ recognized that there is a "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 is now part of the corpus of international law relating to the environment."[110] The ICJ has clarified that this obliges a State not to knowingly allow its territory to be used "for acts contrary to the rights of other States,"[111] and to use "all means at its disposal in order to avoid activities which take place in its territory, or in any other area under its jurisdiction, causing significant damage to the environment of another State."[112]

52. The Court has affirmed the application of this principle "in a transboundary context, and in particular as regards a shared resource."[113] The extension of the principle to damage to a shared resource brings within the purview of this Court's case law degradation of the atmosphere, which, as discussed below, is considered a "shared resource."[114]

53. Transboundary harm is not limited to harm between States that share a border, but must be a significant physical consequence of human activity that crosses borders or affects areas beyond national jurisdiction. The "State of Origin" is the place where the activities likely to cause significant harm occur *or are planned*,[115] and the State or States likely to be affected may or may not be adjacent to it.[116] At its core, the duty is extraterritorial in its reach, running from the State of Origin to other States and the international community as a whole, which has a common interest in shared resources. When an act or omission in a given jurisdiction will foreseeably cause or increase the risk of harm beyond a State's

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Convention on the Protection and Use of Transboundary Watercourses and International Lakes (UNECE Water Convention).

[109] UNEP, *Environmental Law: Guidelines and Principles, No. 2,* Shared Natural Resources (Nairobi, 1978), at principle 3; *see also* G.A. Res. 2995 (XXVII) (Dec. 15, 1972) on cooperation between States in the field of the environment.

[110] 1995 *Nuclear Tests case, at* para. 29.

[111] *The Corfu Channel Case* (*U.K. v. Alb.*) Merits, Judgment, 1949 I.C.J. 4 (Apr. 9) [hereinafter Corfu Channel Case, Merits Judgment], at p. 22.

[112] Case Concerning Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14, ¶ 101 (Apr. 20) [hereinafter *Pulp Mills*], at para. 101.

[113] Dispute over the Status and Use of the Waters of the Silala (*Chile v. Bol.*), Judgment, 2022 I.C.J. Rep. 614 (Dec 1), para. 99.

[114] ILC, *Draft Guidelines on the Protection of the Atmosphere, with commentaries,* guideline 5, cmt. para. 1.

[115] ILC, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries,* at art. 2 (emphasis added).

[116] *Ibid.*, art. 2(c) (defining "transboundary harm" as "harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border").

borders, the duty is triggered, regardless of where the harm occurs. The harm or damage contemplated, which could be to persons, property, or the environment,[117] and must be 'significant,' meaning "something more than "detectable" but not necessarily "serious" or "substantial."[118]

54. Transboundary harm often occurs through a medium, such as air (as in the *Trail Smelter* case[119]), or water (as in the *Lac Lanoux* arbitration[120]). Thus, the cause of transboundary harm can operate indirectly to effect legally cognizable injury.

55. The State has a duty to prevent, reduce and control public and private conduct that causes or poses a risk of transboundary harm. States must act to prevent and minimize the risk of harm in other States or in areas beyond national jurisdiction stemming from any conduct within the State's jurisdiction and control—including not only public acts or omissions, but those of private actors subject to the State's regulatory authority. Given that adverse environmental effects may stem from the conduct of non-State actors, States have a duty to " 'ensure' that such activities within their jurisdiction or control do not cause significant adverse effects....taking into account the context and evolving standards both of regulation and technology."[121] The corollary in human rights law, discussed below, is the duty of States to protect against the foreseeable extraterritorial effects on human rights of the activities of both public and private actors within a State's jurisdiction or subject to its control.

56. A State must deploy "all the means at its disposal" to prevent the harm.[122] States must take "all appropriate measures to prevent, reduce or control human activities where these activities have or are likely to have significant adverse effects," which necessitates not only the adoption of appropriate rules and measures but vigilance in their enforcement and exercise of administrative control.[123] As outlined in the Draft Articles on State Responsibility, obligations of prevention "requir[e] States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur."[124] The text of Article 3 of the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities provides that States shall "take all *appropriate measures* to prevent significant transboundary harm or at any event to minimize the risk thereof,"[125] but the commentary clarifies that this "imposes on the State a duty to take *all necessary measures* to prevent significant transboundary harm or at any event to minimize the risk thereof."[126]

57. Due diligence is a central component of the obligation to prevent transboundary harm.[127] Indeed, "the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State."[128] It is a variable concept which may "change over time as measures considered sufficiently

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[117] *Ibid.*, at Art. 2(b).
[118] *Ibid.*, at art. 2, cmt. para. 4.
[119] *Trail Smelter Arbitration*, at 1917.
[120] Lake Lanoux Arbitration (Fra. v. Spain), 12 R.I.A.A. 281 (Arbitral Tribunal 1957).
[121] *See Draft Guidelines on the Protection of the Atmosphere, with commentaries*, guideline 3, cmt. para. 6.
[122] *Pulp Mills*, 2010 I.C.J., para. 101.
[123] ILC, *Draft Guidelines on the Protection of the Atmosphere*, at guideline 3, cmt.para. 6.
[124] ARSIWA, Art. 14 (3) commentary para 14.
[125] ILC, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries,* at art. 3.
[126] *Ibid*. at art. 3, cmt. para. 4.
[127] *Ibid.*, art. 3, cmt. para.7.
[128] *Pulp Mills*, 2010 I.C.J., para. 101.

diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge."[129]

58. The standard of due diligence "has to be more severe for the riskier activities."[130] The more irreversible or permanent the consequences of the harm, the more demanding the due diligence required.[131] So while States may have a right to exploit their own resources, that right is checked by States' duty not to knowingly cause environmental damage to other States or areas beyond national jurisdiction, which necessarily includes the climate, atmosphere, high seas, and other global commons.[132] "The standard of due diligence against which the conduct of the State of origin should be examined is that which is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance."[133]

59. The level of due diligence required not only varies with the severity of the potential harm, but also with the capacities of the State—that is, the means at its disposal.[134] Legal duties framed in due diligence terms require, as upheld by the ICJ in *Pulp Mills*, "not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party."[135] States must adhere to these duties in line with shared and differentiated obligations, and consistent with their concurrent international obligations[136]

60. The assessment of what is foreseeable risk and what constitutes significant harm may change over time, and with scientific developments.[137] The degree of care required of a State pursuant to the duty of prevention is a function of the degree of harm foreseeable. Foreseeability is an objective standard; a risk is foreseeable unless "no properly informed observer was or could have been aware of that risk at the time the activity was carried out."[138] As the ILC notes in the Draft Articles on Prevention of

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[129] Responsibilities and obligations of States with respect to activities in the Area, Case no. 17, Advisory Opinion, ITLOS Rep. 2011 (Feb.1, 2011), para. 117.
[130] *Ibid.*
[131] *Pulp Mills*, 2010 I.C.J., paras. 185–187; *see also* ILC, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries,* at art. 3, cmt. para 18 ("The required degree of care is proportional to the degree of hazard involved.").
[132] UN Environment Programme, Division of Environmental Law and Conventions, *IEG of the Global Commons*, https://cil.nus.edu.sg/wp-content/uploads/2015/12/Ses4-7.-UNEP-Division-of-Environmental-Law-and-Conventions-Global-Commons.pdf ("The 'Global Commons' refers to resource domains or areas that lie outside of the political reach of any one nation State. Thus international law identifies four global commons namely: the High Seas; the Atmosphere; Antarctica; and, Outer Space.").
[133]LC, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries*, at art. 3, cmt. para. 11.
[134] *Pulp Mills*, 2010 I.C.J., para. 101 ("A State is thus obliged to 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.")
[135] *Ibid.*, at para. 197.
[136] Principles such as "common but differentiated obligations and respective capabilities" rooted in international environmental law, including climate law, and the obligation to "use maximum available resource" to meet human rights duties provide guidance in this context.
[137] *See* ILC, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries,* art. 2, cmt. para. 7.
[138] *Ibid*. at art. 1, cmt. para. 14.

Transboundary Harm from Hazardous Activities, while States are generally not responsible for prevention of harms that are not foreseeable, they do have a continuing obligation to identify activities that pose a risk of harm.[139] "It is possible that an activity which in its inception did not involve any risk …might come to do so as a result of some event or development."[140]

61. The clearer the science linking conduct and harm, the stronger the preventive duty. "From a legal point of view, the enhanced ability to trace the chain of causation, i.e. the physical link between the cause (activity) and the effect (harm), and even the several intermediate links in such a chain of causation, makes it also imperative for operators of hazardous activities to take all steps necessary to prevent harm. In any event, prevention as a policy is better than cure."[141] The more knowledge States have of a risk, the stronger the duty to take measures to prevent it. But the preventive duty exists even in the absence of certain knowledge, according to what is known as the precautionary principle.[142]

62. A closely related but distinct duty is the duty of States to reduce the risk of disasters, which may be the result of transboundary pollution or effects of activity within a State or States other than those in which the disaster occurs. This duty applies to both "natural and human-made"[143] disasters, where disaster means "a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society."[144] Reducing the risk of disaster requires taking measures, "including through legislation and regulations, to prevent, mitigate, and prepare for disasters."[145] Insofar as climate change is fueling disasters and compounding the impacts of disasters driven by other factors, measures to reduce climate change (see Part III Section C below) are critical to fulfillment of the duty to prevent disaster.

ii. Cumulative GHG emissions in the global atmosphere and ensuing climate change constitute significant transboundary harm

63. Climate change and its resultant impacts, driven by cumulative greenhouse gas emissions, satisfy the definition of "significant transboundary harm" laid out above.[146] They are the physical consequence of human activity undertaken within the jurisdiction or control of States, that causes adverse effects to people, property, and the environment to other States and to shared global resources in a transboundary

[139] *Ibid*., at art. 3, cmt. paras 5, 18.
[140] *Ibid*., at art. 1, cmt. para. 15.
[141] *Ibid*., at general cmt., para.1.
[142] *Ibid.*, art. 3, cmt. Para. 14. As stated in the Rio Declaration, the precautionary principle provides that "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26/Rev.1 (1992) (reprinted in 31 I.L.M. 874 (1992)), at principle 15.
[143] ILC, *Draft Articles on the Protection of Persons in the Event of Disasters*, *with commentaries*, (2016), at pmbl.
[144] *Ibid.*, at art. 3.
[145] *Ibid*., at art. 9(1).
[146] *See* International Law Association, *Washington Conference Report on Legal Principles Relating to Climate Change*, (2014), art. 7, cmt. para. 5, https://www.ila-hq.org/en_GB/documents/conference-report-washington-2014-5 ("Application of the customary law principle of prevention of environmental damage to the situation of climate change damage is supported by State practice and the writings of international jurists.").

context[147]—adverse effects which are not only more than "detectable'" but manifestly "serious" and "substantial."[148] That those adverse effects are mediated through the atmosphere does not break the link between the emissions-generating activities and climate-related harm.

64. The transboundary harm of climate change stems from human activities that generate cumulative emission of GHGs and destroy carbon sinks (which absorb and retain (store) GHGs). The science is unequivocal: climate change is a result of the cumulative emission of GHGs—heat-trapping gases such as carbon dioxide (CO_2) and methane—in the atmosphere. Human activity has increased the concentration of GHGs in the atmosphere[149] to its highest level in at least 800,000 years.[150] Since the industrial revolution, anthropogenic emissions of GHGs to the atmosphere —overwhelmingly from the production and use of fossil fuels (oil, gas, and coal)[151]—"have unequivocally caused global warming, with global surface temperature reaching 1.1°C above 1850-1900 in 2011-2020."[152] For decades, the scientific community has concluded that fossil fuels are the main driver of rising GHG emissions, and predicted the magnitude of current climate impacts.[153] Predominantly fossil-fueled emissions "have continued to increase, with unequal historical and ongoing contributions,"[154] driving average global temperatures even higher to current levels of approximately 1.2-1.3°C.[155] Last year, 2023, was the hottest

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[147] ILC, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries*, art. 2(b).
[148] *Ibid*., at art. 2, cmt. para. 4.
[149] IPCC AR6, Summary for Policymakers, para. A.1.
[150] IPCC, 2018: Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty [Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.)], Cambridge University Press, Cambridge, UK and New York, NY, USA [hereinafter IPCC SR1.5], at Chapter 1, Box 1.1; IPCC AR5, SPM, 1.2; see also IPCC AR6 WGI, SPM A.2.1.
[151] IPCC AR6, Summary for Policymakers para. A.1, A.1.4; IPCC, 2021: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 676 [V. Masson-Delmotte et al (eds.)] [hereinafter IPCC AR6 WGI]; United Nations Environment Programme, Emissions Gap Report 2021: The Heat Is On – A World of Climate Promises Not Yet Delivered (2021); Richard Heede, Tracing Anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854-2010, 122 Climatic Change 229 (2014); U.S. Environmental Protection Agency, Causes of Climate Change, https://www.epa.gov/climatechange-science/causes-climate-change ("Burning fossil fuels changes the climate more than any other human activity."); 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 (UN Special Procedures mandate holders stating that "Fossil fuels are the largest source of greenhouse gas emissions, which have unequivocally caused the climate crisis").
[152] IPCC, Contribution of Working Groups I, II and III to the Sixth Assessment Report of the IPCC, Synthesis Report, Summary for Policymakers, 2023 [hereinafter IPCC, AR6, Synthesis Report, Summary for Policymakers], at A.1.
[153] *See*, *e.g.*, The White House, *Restoring the Quality of Our Environment*, Report of The Environmental Pollution Panel President's Science Advisory Committee (1965), appendix Y4, https://www.documentcloud.org/documents/3227654-PSAC-1965-Restoring-the-Quality-of-Our-Environment#document/p19/a2420378 [hereinafter The White House, *Restoring the Quality of Our Environment* 1965 report], at pp. 112-131. *See also infra*, paragraphs 84-87.
[154] IPCC, AR6, SYR SPM, at A.1.
[155] National Aeronautics and Space Administration (NASA), *Vital Signs*, https://climate.nasa.gov/vital-signs/global-temperature (last visited March 19, 2024) (noting that Earth was about 1.36 degrees Celsius warmer

on record.[156] It was the first year that global average land temperature was more than 2°C above pre-industrial levels and the global average ocean surface temperatures were more than 1°C above pre-industrial levels.[157] Producing and using fossil fuels for more than a century, together with deforestation and destruction of other natural carbon sinks, have released GHG emissions into the atmosphere, warming the planet,[158] altering its climate, leading to sea level rise, ocean acidification, and increasing the frequency, likelihood, and intensity of extreme weather events,[159] among other impacts.

65. Harmful impacts of rising global temperatures and climate change have been visible and documented for years, and are undeniably manifest and mounting around the world today—particularly in those communities and States in the most vulnerable situations. At current levels of global warming, "widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred,"[160] causing "widespread adverse impacts and related losses and damages to nature and people"[161] and disproportionately affecting people "who have historically contributed the least to current climate change."[162] Some losses in human and natural systems are already irreversible and others are approaching irreversibility.[163] Those impacts will only worsen with every additional fraction of a degree. Warming of 1.5°C is not safe for most people and ecosystems.[164] Scientists have issued increasingly dire

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in 2023 than in the late 19th century pre-industrial average); NOAA, Rebecca Lindsey & Luann Dahlman, *Climate Change: Global Temperature* (Jan. 18, 2024), https://www.climate.gov/news-features/understanding-climate/climate-change-global-temperature; Raymond Zhong, "Have We Crossed a Dangerous Warming Threshold? Here's What to Know.", N.Y. Times (Feb. 8, 2024), https://www.nytimes.com/2024/02/08/climate/global-warming-dangerous-threshold.html (stating that while 2023 was approximately 1.5°C warmer, most estimates put average warming between 1.2°C and 1.3°C warmer than pre-industrial levels);

[156] National Oceanic and Atmospheric Administration (NOAA), U.S. Dept. of Commerce, "2023 was the world's warmest year on record, by far" (Jan. 12, 2024), https://www.noaa.gov/news/2023-was-worlds-warmest-year-on-record-by-far; NASA, "NASA analysis confirms 2023 as Warmest Year on Record (Jan. 12, 2024), https://www.nasa.gov/news-release/nasa-analysis-confirms-2023-as-warmest-year-on-record/; Raymond Zhong & Keith Collins, "See How 2023 Shattered Records to Become the Hottest Year," *The N.Y. Times* (Jan. 9, 2024), https://www.nytimes.com/2024/01/09/climate/2023-warmest-year-record.html; *see also* Zeke Hausfather, "State of the Climate: 2023 smashes records for surface temperature and ocean heat," *Carbon Brief*, www.carbonbrief.org/state-of-the-climate-2023-smashes-records-for-surface-temperature-and-ocean-heat/ (noting that global surface temperature was "between 1.34C and 1.54C above pre-industrial levels across different temperature datasets").

[157] Zeke Hausfather, Carbon Brief, State of the Climate: 2023 smashes records for surface temperature and ocean heat, Jan 12, 2024, http://www.carbonbrief.org/state-of-the-climate-2023-smashes-records-for-surface-temperature-and-ocean-heat/.

[158] IPCC, AR6, Synthesis Report, Summary for Policymakers, at A.1.

[159] IPCC, *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) [hereinafter IPCC, AR6, WGII], at B.1.

[160] IPCC, AR6, Synthesis Report, Summary for Policymakers, at A.2.

[161] *Ibid.* (high confidence).

[162] *Ibid.* (high confidence).

[163] IPCC, *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), Summary for Policymakers [hereinafter IPCC, AR6, WGII: Summary for Policymakers], at B.1.2.

[164] IPCC, *2018: 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*, Technical Summary, (V. Masson-Delmotte et al, eds., Cambridge University Press, 2018) [hereinafter IPCC,

warnings about the impacts of continued temperature rise, cautioning that any increase above 1.5°C, even if temporary, will cause further irreversible harm and catastrophic consequences for people and ecosystems.[165] It will also increase the frequency, likelihood, and intensity of extreme weather events, as well as the associated harm.[166]

66. Beyond altering the atmosphere and thereby the global climate, cumulative greenhouse gas emissions also have significant, direct adverse impacts on another transboundary, shared global resource: the oceans. While climate change and resultant global warming impacts oceans through heat absorption with a host of deleterious effects, the increased atmospheric concentration of CO_2 increases the absorption of CO_2 in the oceans, changing ocean chemistry. Under current GHG emissions trends, by 2100 ocean acidity is projected to be higher than at any point over the last 20 million years and likely much longer.[167] Ocean acidification also adversely affects human systems and well-being, including by reducing access to food sources, livelihoods, and cultural practices,[168] diminishing ecosystem services from coral reefs,[169] and increasing island and coastal vulnerability to storms and sea level rise,[170] among other impacts.

67. In view of these consequences, many of which have been occurring or were foreseeable for years, atmospheric pollution and the atmospheric degradation it engenders trigger State preventive obligations. The ILC Draft Guidelines on the Protection of the Atmosphere describe three existing obligations to protect the atmosphere from atmospheric pollution and degradation under international law: "the obligation to protect the atmosphere (draft guideline 3)," by "exercising due diligence in taking appropriate measures, in accordance with applicable rules of international law, to prevent, reduce or control atmospheric pollution and atmospheric degradation," "the obligation to ensure that an environmental impact assessment is carried out (draft guideline 4) and the obligation to cooperate (draft guideline 8)."[171] Atmospheric pollution means "the introduction or release by humans, directly or indirectly, into the atmosphere of substances or energy contributing to significant deleterious effects extending beyond the State of origin of such a nature as to endanger human life and health and the Earth's natural environment."[172] Atmospheric degradation refers to "the alteration by humans, directly or indirectly, of atmospheric conditions having significant deleterious effects of such a nature as to

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2018 Special Report, Global Warming of 1.5°C], at 44 (The IPCC's Special Report on Warming of 1.5°C explicitly states that "warming of 1.5°C is not considered 'safe' for most nations, communities, ecosystems and sectors and poses significant risks to natural and human systems as compared to the current warming of 1°C (high confidence)," especially for "disadvantaged and vulnerable populations."); IPCC, 2018 Special Report, Global Warming of 1.5°C, Ch. 5 ("Sustainable Development, Poverty Eradication and Reducing Inequalities"), at 447.

[165] IPCC, AR6, WGII: Summary for Policymakers, at B.3; *see also* IPCC, AR6, WGII, at vii ("The assessment underscores the importance of limiting global warming to 1.5°C if we are to achieve a fair, equitable and sustainable world."); IPCC, AR6, WGII, Technical Summary, at C.1.2.

[166] IPCC, AR6, WGII: Summary for Policymakers, at B.1.

[167] Ellycia R. Harrould-Kolieb and Ove Hoegh-Guldberg, *A governing framework for international ocean acidification policy*, 102 Marine Policy (2019), at p. 1.

[168] *Ibid.*

[169] IPCC, 2019, Special Report on the Ocean and Cryosphere in a Changing Climate [H.-O. Pörtner, D.C. Roberts, V. Masson-Delmotte, P. Zhai, M. Tignor, E. Poloczanska, K. Mintenbeck, A. Alegría, M. Nicolai, A. Okem, J. Petzold, B. Rama, N.M. Weyer (eds.)], Cambridge University Press, Cambridge, UK and New York, NY, USA [hereinafter IPCC SR Ocean and Cryosphere], Summary for Policymakers, at B.8.2.

[170] IPCC, AR6, WGII, Ch. 3, at p. 382.

[171] ILC, *Draft Guidelines on the Protection of the Atmosphere, with commentaries*, at Guideline 10 cmt. para 5.

[172] *Ibid.*, at Guideline 1(b).

endanger human life and health and the Earth's natural environment"[173] and is "intended to include problems of ozone depletion and climate change. It covers the alteration of the global atmospheric conditions caused by humans, whether directly or indirectly. These may be changes to the physical environment or biota or alterations to the composition of the global atmosphere."[174] The alteration of the atmosphere due to increased concentrations of GHGs, a form of atmospheric degradation, has changed the global climate and led to myriad adverse impacts.

68. The due diligence required to satisfy those preventive obligations is heightened in view of the severity and irreversibility of climate change impacts. As noted above, the more serious the risk, the stronger the due diligence required to prevent it. There is perhaps no risk more serious than the existential threat posed by climate change, particularly to certain States and communities in the most vulnerable situations such as small island developing States (SIDS). As the science linking emissions-generating conduct to climate change and its resultant harms becomes ever clearer, the more stringent the duty to take preventive action.

69. In sum, cumulative GHG emissions since the industrial era have caused and are causing transboundary harm directly and indirectly, through degradation of the global atmosphere—a shared resource—which triggers climate change, resulting in a variety of material and moral injuries to States, peoples, and ecosystems, from excessive heat and extreme weather events, to sea level rise, marine warming and ocean acidification, droughts, wildfires, desertification, food insecurity, and increased vector-borne diseases, among other impacts. As discussed below, those cumulative emissions and resultant climate impacts can be attributed to State conduct—combined actions and omissions—that has permitted the continued accumulation of greenhouse gases in the shared global atmosphere.

iii. Acts and omissions attributable to the State that have generated and are increasing cumulative emissions breach this preventive obligation

70. In assessing whether an internationally wrongful act in violation of the transboundary harm principle in customary international law has occurred in relation to climate change, the relevant conduct comprises the acts and omissions of individual States or groups of States that have, over time, through their cumulative GHG emissions, directly or indirectly caused significant harm to the climate system—and by extension to the environment, to other States, and/or to peoples and individuals. This is the case whether or not those States are the main cause of the specific harm at issue in a given case.

71. Evidence can be adduced showing that State acts and omissions which, individually or in combination, have led to and/or failed to prevent cumulative greenhouse gas emissions at levels that significantly alter the climate system, and cause or will foreseeably cause climate change impacts, breach the State obligation to prevent significant transboundary harm and minimize the risk thereof. That conduct in breach of customary international law constitutes an internationally wrongful act.

[173] *Ibid.*, at Guideline 1(c).
[174] *Ibid.*, at Guideline 1 cmt. para 12.

a. Breach results from cumulative, composite acts over time

72. The breach of the transboundary harm principle stems from the composite acts of States. In the case of cumulative greenhouse gas emissions that cause significant transboundary environmental harm, the breach of a State's international obligation is due to a composite act—"a series of actions or omissions defined in aggregate as wrongful."[175] Emissions are cumulative, so by the time that additional emissions crossed a threshold of causing significant harm, they did so because they added onto existing emissions in the atmosphere. The threshold of harm—and therefore breach of the obligation to prevent such harm—is reached "when the action or omission [with respect to greenhouse gas emissions] occurs which, taken with the other actions or omissions [generating previous emissions], is sufficient to constitute the wrongful act."[176]

73. In a composite act, prior conduct is legally relevant to establishing the breach. The conduct relevant to establishing the breach of the duty to prevent transboundary harm due to climate change is not simply the last act or omission of the State that leads to increased emissions, but the prior acts and omissions that, over time, combined to create the cumulative stock of GHGs in the atmosphere. Those prior actions and omissions date back to the industrial revolution, when fossil fuels began to be used. As a result, the conduct that breaches customary international law, because it causes or contributes to significant transboundary environmental harm to the climate, encompasses the cumulative emissions up to and including the moment of breach. Thus, while the initial conduct that led to greenhouse gas emissions (chiefly from the production and use of fossil fuels) may not have been internationally wrongful, once the cumulative effect of those acts and omissions was such as to cause or threaten significant harm to the global atmosphere and thereby the climate, the conduct breached the State's international obligations and became internationally wrongful.

74. According to the ILC, the duration of a breach consisting of a composite act "extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation."[177] The relevant breach in the context of climate change, then, will pertain to the entire period that cumulative emitters have contributed to emissions at a level causing significant harm to the climate system.

75. The moment in time when a given State or group of States' actions and omissions sufficed to breach their international obligation to prevent transboundary harm will be fact-specific, dependent on their cumulative GHG-generating conduct and the magnitude of the emissions attributable to conduct within the State's jurisdiction or control. At some point in time, the greenhouse gas emissions produced directly or indirectly by a State, including by actors within its jurisdiction and control, met the threshold of causing significant transboundary harm. When a State's contribution to and allowance of GHG emissions at constant or increasing levels—including by undertaking, authorizing, or supporting activities that produce greenhouse gas emissions and by failing to reduce or control those emissions by public and private (non-state) actors within its jurisdiction and control through regulation—caused and/or increased the risk of significant transboundary environmental harm, it can be shown to have breached its international duty. Although many if not most GHG emissions are generated by private

[175] ILC, *Draft Articles on State Responsibility, with commentaries*, at art. 15(1).
[176] *Ibid.*
[177] ILC, *Draft Articles on State Responsibility, with commentaries*, at art. 15(2).

actors, they can be attributed to the State that has jurisdiction or control over those actors' conduct because their release into the atmosphere is a result of the State authorizing, supporting, facilitating, or failing to regulate or otherwise control the emissions-generating activities or the emissions. (See para. 18 above)

76. A failure to reduce emissions beyond that point when cumulative emissions caused or were known to increase the risk of significant transboundary harm presumptively constitutes a continuing breach. "The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation."[178] With regard to the duty to prevent transboundary harm and minimize the risk of such harm, then, breach occurs when transboundary harm occurs or when the risk is increased, and extends over the period during which transboundary harm continues or the risk thereof increases. As discussed at paras. 84-87 below, the transboundary harm of climate change has been documented for decades, is clearly continuing and the risk thereof, only mounting.

77. When the State has an obligation to prevent transboundary harm and minimize the risk thereof, any State conduct—be it an act or omission—that increases the risk of such harm is axiomatically at odds with that obligation. State inaction to reduce and control the known drivers of climate change increases transboundary environmental harm and the risk thereof, in breach of customary international law. In the face of mounting climate-related impacts and risk of impacts, States' failure to rapidly reduce the activity causing the majority of emissions—by curbing fossil fuel production and use within their jurisdiction and control—increases the risk. When both adverse impacts and the threat of such impacts are on the rise, through continually mounting global temperatures, cumulative emissions, and compound and cascading impacts of climate change, doing nothing to alter the status quo can *increase* the risk of harm. The persistence of an industrialized State, for example, in permitting the unregulated emission into the atmosphere of greenhouse gases within its jurisdiction and by actors subject to its jurisdiction and control, with knowledge that such emissions are altering the global climate with manifest and foreseeable adverse effects, violates its international obligations to prevent such transboundary harm and minimize the risk thereof.

78. Moreover, some States are not only failing to reduce GHG emissions steeply and swiftly, they are actively driving them higher, particularly through continued expansion of the production and use of fossil fuels, leading inevitably to consequent emissions at rates incompatible with preventing further climate-related harm. In the face of overwhelming evidence regarding the need for deep emission cuts to avoid catastrophic climate consequences, and the consequent need for a just, rapid and equitable phase out of fossil fuels, according to recent research,[179] GHG emissions are set to increase by almost 9% by 2030, compared to 2010 levels, even though the best available science mandates that "emissions must fall by 45% by the end of this decade compared to 2010 levels to meet the goal of limiting global temperature rise to 1.5 degrees."[180] In fact, governments in aggregate, plan to produce more than double

[178] *Ibid.*, at art. 14(3).
[179] Secretary-General's Message - UNFCCC NDC Synthesis Report Launch (Nov. 14, 2023), https://www.un.org/sg/en/content/sg/statement/2023-11-14/secretary-generals-message-unfccc-ndc-synthesis-report-launch%C2%A0#; *see also* UNFCCC Secretariat, Synthesis Report, *Nationally Determined Contributions under the Paris Agreement*, U.N. Doc. FCCC/PA/CMA/2023/12 (Nov. 14, 2023), at para. 8 (b).
[180] Secretary-General's Message - UNFCCC NDC Synthesis Report Launch (Nov. 14, 2023).

the amount of fossil fuels in 2030 as would be consistent with limiting warming to 1.5°C.[181] Analysis shows that just five Global North countries will be responsible for over half (51%) of all planned oil and gas field developments from now to 2050, plans starkly incompatible with a livable future.[182] By driving further climate change, such conduct actually and foreseeably increases transboundary harm and the risk of such harm, in contravention of State duties under customary international law.

79. A State's conduct contributing to cumulative greenhouse gas emissions may be internationally wrongful because it breaches the State's preventive duties, even if that conduct is not the sole, necessary and sufficient, cause of a specific climate-related injury. To the extent that such injury is attributable to climate change—in the sense that it would not have happened at all or to the same degree without climate change—it results from the cumulative contributions of multiple States that have combined to heat the planet. In cases of such cumulative contributions to injury, a contributing State may bear international legal responsibility if its respective contribution constitutes a material contribution—one that played more than a minimal role—in the causation of the injury or is part of a jointly sufficient set of contributions.[183] In the *Corfu Channel* case, for example, both the action of one State in laying the land mines and the omission of another in failing to warn of them caused the injury, and therefore both States bore legal responsibility.[184]

b. Evidence attributes cumulative GHG emissions by State

80. Available evidence attributing cumulative emissions to individual States clearly shows that industrialized, wealthy nations are disproportionately responsible for overall emissions to date. Evidence exists showing the respective cumulative contributions of different States to greenhouse gas emissions over time since the industrial era, and corresponding shares of global average temperature rise (climate change) for which those emissions are responsible.[185] Such evidence could be used to identify those States or groups of States whose cumulative contributions were sufficient to increase atmospheric GHG concentrations to such a level as to cause measurable change to the climate and identifiable adverse effects (injuries). Research quantifying national responsibility for damages related to climate change by

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[181] Stockholm Environment Institute, Climate Analytics, E3G, IISD & UNEP, *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, at p. 4 ("Governments, in aggregate, still plan to produce more than double the amount of fossil fuels in 2030 than would be consistent with limiting warming to 1.5°C") [hereinafter *Production Gap Report 2023*].

[182] Oil Change International, *Planet Wreckers: How Countries' Oil and Gas Extraction Plans Risk Locking in Climate Chaos* (September 2023) https://priceofoil.org/2023/09/12/planet-wreckers-how-20-countries-oil-and-gas-extraction-plans-risk-locking-in-climate-chaos/, at p. 15.

[183] EJIL, *Guiding Principles on Shared Responsibility in International Law*, at Principle 2 cmt. para 9.

[184] Corfu Channel Case, Compensation Judgment, at p. 4; *see also Third Report on State Responsibility, by Mr James Crawford, Special Rapporteur*, UN Doc. A/CN.4/507, at para. 31.

[185] *See, e.g.*, Matthew W. Jones, et al., *National contributions to climate change due to historical emissions of carbon dioxide, methane, and nitrous oxide since 1850*, Scientific Data 10 (2023), https://doi.org/10.1038/s41597-023-02041-1, at p. 2 (presenting a "dataset of changes in GMST during 1851–2021 resulting from historical emissions of CO_2, CH4 and N2O at the global scale and for individual countries"). "National contributions to climate change are closely tied to cumulative emissions of CO2 in the industrial era because a substantial fraction of emitted CO_2 remains in the Earth's atmosphere for centuries. Consequently, emissions from developed nations have contributed significantly to warming since the industrial revolution." *Ibid. See also* Greenhouse Gas Emission Data (WRI, April, 2014); Climate Action Tracker; https://www.climatewatchdata.org/

looking at national contributions to cumulative CO_2 emissions in excess of the planetary boundary of 350 parts per million (ppm) atmospheric CO_2 concentration has found that countries classified by the UNFCCC as Annex I nations (which includes, most industrialized countries) were collectively responsible for 90% of "excess" emissions, with Global North nations responsible for 92%.[186] Recent research reinforces how the wealthiest countries and within each country, the wealthiest individuals, are responsible for using up a disproportionate share[187] of the so-called "carbon budget,"[188] which represents the estimated remaining amount of GHG (CO_2 equivalent) that can be emitted into the atmosphere without raising global average temperature above a given level. While different approaches may be used to depict the relative contributions of different States to atmospheric change, the fact that data exist documenting GHG emissions over time by State provides a basis for connecting State conduct with climate impacts. That such a connection can be substantiated means that attribution could be made out in a given case, providing a legally sound basis for finding an internationally wrongful act.

81. Adjusting data to reflect cross-border transactions and colonial history increases the share of global emissions attributable to the conduct of industrialized States. Most of the above-referenced data is based solely on territorial emissions, and thus does not capture a State's responsibility for emissions caused by its exports or the activities of its nationals (including corporate nationals) extraterritorially. It also treats historical emissions as attributable to States in existence today that were not in existence previously, ignoring the control exerted by some colonial States over others in the past. If responsibility for emissions under colonial rule were to be allocated to the colonial rulers as they held ultimate decision-making authority at the time, the share of former colonial powers would grow significantly in terms of attributing responsibility for contributions to global warming.[189] Attributing the conduct of former colonies to colonial powers would be consistent with Articles 16-18 of the ILC Draft Articles on State Responsibility, which provide that a State may be responsible for the conduct of another State that it aids or assists, directs or controls, or coerces into undertaking. (See the discussion at para. 19 above)

c. Evidence establishes requisite State knowledge (foreseeability)

82. The duty to prevent transboundary harm arises when a State knows or should know that certain conduct is likely to cause or contribute to such harm. "In general, in the context of prevention, a State of origin does not bear the risk of unforeseeable consequences to States likely to be affected by [hazardous] activities."[190] What is foreseeable is not static but necessarily evolves over time with knowledge of risks, and States have an obligation to continuously assess the likelihood of such risks. Moreover, perceptions

[186] Jason Hickel, *Quantifying national responsibility for climate breakdown: an equality-based attribution approach for carbon dioxide emissions in excess of the planetary boundary*, The Lancet 4:9 (September 2020), https://www.thelancet.com/action/showPdf?pii=S2542-5196%2820%2930196-0, at p. 399,
[187] "Revealed: How colonial rule radically shifts historical responsibility for climate change," *Carbon Brief* (Nov. 26, 2023), https://www.carbonbrief.org/revealed-how-colonial-rule-radically-shifts-historical-responsibility-for-climate-change/.
[188] Joeri Rogelj and P.M. Forster, *Guest post: A new approach for understanding the remaining carbon budget*, Carbon Brief (July 17, 2019), https://www.carbonbrief.org/guest-post-a-new-approach-for-understanding-the-remaining-carbon-budget/.
[189] Simon Evans & Verner Viisainen, *Revealed: How Colonial Rule Radically Shifts Historical Responsibility for Climate Change*, CarbonBrief (Nov. 26, 2023), https://www.carbonbrief.org/revealed-how-colonial-rule-radically-shifts-historical-responsibility-for-climate-change
[190] ILC, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries*, at art. 3 cmt. para. 5.

of whether a risk poses a threat of harm significant harm and the acceptability of that risk may change over time. (See para. 60 above) As has been powerfully framed by the Supreme Court of the State of Hawaii in relation to action on climate change in 2023, '[y]esterday's good enough has become today's unacceptable.'[191]

83. The obligation to prevent is triggered when the harm is reasonably foreseeable, not merely when it is certain or already manifest, as it is now in the case of climate change-related harm. Thus, when a State's actual contributions to GHG emissions were enough to cause significant harm, and it had at least some level of foresight or knowledge of that harm or risk thereof—which can be established through evidence, as discussed below—then its conduct in enabling and failing to prevent such emissions becomes a breach of international law.

84. States have known of the risks and adverse consequences of the accumulation of GHGs in the atmosphere for decades**.** Precisely when a State became aware of the risk of transboundary harm to the climate from greenhouse gas emissions varies from country to country, and will ultimately be a question of fact. But ample evidence indicates that States (and corporations[192]) began to understand the drivers of climate change and extent of impacts more than half a century ago: In 1957-1958, nearly seventy governments and thousands of scientists from around the world participated in the International Geophysical Year (IGY), a collaborative initiative to study Earth and its environment, including the atmosphere.[193] The IGY spawned the monitoring of CO_2 concentrations in the atmosphere at Charles Keeling's Mauna Loa Observatory in Hawaii, the site of the longest running such measurement in the world.[194] Data from those observations were first published in 1960 in an article that referred to combustion of fossil fuel as the source of the CO_2 accumulation.[195] Those data subsequently formed the basis of the "Keeling Curve," a geophysical record depicting rising concentrations of carbon dioxide in the atmosphere that spurred the establishment of research on climate impacts in the 1970s.[196]

85. In 1965, the report of an advisory committee to the President of the United States discussed the science on the effects of carbon dioxide on the global climate and its potential consequences,[197] including the

[191] *In re Hawai'i Electric Light Co, Inc*, No SCOT-22-0000418, Supreme Court of Hawaii (March 13, 2023), https://cases.justia.com/hawaii/supreme-court/2023-scot-22-0000418.pdf?ts=1678734177, at p. 9.
[192] Benjamin Franta, *Early Oil Industry Knowledge of CO_2 and Global Warming*, Nature Climate Change 8 (November 2018), https://www.nature.com/articles/s41558-018-0349-9, at pp. 1024-26; Sara Jerving et al, *What Exxon Knew About the Earth's Melting Arctic*, L.A. Times (Oct. 9, 2015), https://graphics.latimes.com/exxon-arctic/; G. Supran, Assessing ExxonMobil's global warming projections, Science 379:6628 (Jan. 13, 2023), https://www.science.org/doi/10.1126/science.abk0063; Memorandum from James F. Black, Scientific Advisor, Exxon Products Research Division, to F. G. Turpin, Vice President, Exxon research and Engineering Co. (Jun. 6, 1978), https://insideclimatenews.org/wp-content/uploads/2015/09/James-Black-1977-Presentation.pdf; Richard Heede, *The Evolution of Corporate Accountability for Climate Change*, in César Rodríguez-Garavito (ed.), *Litigating the Climate Emergency* (Cambridge University Press 2022) at p. 243.
[193] National Archives, Dwight D. Eisenhower Presidential Library, *International Geophysical Year (IGY)*, https://www.eisenhowerlibrary.gov/research/online-documents/international-geophysical-year-igy (last visited March 18, 2024) .
[194] *See* National Oceanic and Atmospheric Administration (NOAA), Global Monitoring Laboratory, *Trends in Atmospheric Carbon Dioxide*, https://gml.noaa.gov/ccgg/trends/ (last visited March 18, 2024).
[195] Charles D. Keeling, *The concentration and isotopic abundances of carbon dioxide in the atmosphere*, Tellus 12:2 (1960), https://onlinelibrary.wiley.com/doi/abs/10.1111/j.2153-3490.1960.tb01300.x.
[196] Robert Monroe, *The History of the Keeling Curve*, UC San Diego Scripps Institution of Oceanography (April 3, 2013), https://keelingcurve.ucsd.edu/2013/04/03/the-history-of-the-keeling-curve/.
[197] The White House, *Restoring the Quality of Our Environment* 1965 report, at pp. 112-133.

possibility of significant temperature rise by the year 2000, on the order of 0.6 to 4°C, and massive sea level rise.[198] The report specifically examined the impacts of carbon dioxide accumulation from fossil fuels, which it called "the invisible pollutant,"[199] and predicted a 25% increase in CO_2 concentration in the atmosphere due to fossil fuel combustion by 2000.[200] Fossil fuels were identified as the principal source of CO_2 being added to the atmosphere, and the report warned that consuming "a little more than half the reserves of fossil fuels" would result in a "doubling of CO_2 in the air" and three times the effect on temperature rise as a 25% increase in atmospheric CO_2 concentrations.[201] A letter to the President of the United States, highlighting the focus of the research on the climate impacts of CO_2, makes clear that knowledge of the risks to the climate from emissions and by extension, risks to people and the environment, ran to the highest levels of government.[202]

86. Similar studies were being developed around that time in other industrialized, high-emitting countries, like Germany, where climate research and greater media attention to global warming took off in the 1970s.[203] In the Soviet Union, scientists published findings on the human influence on the climate system from at least the early 1960s, and a seminal paper by M.I. Budyko published in 1972, *Influence of Humankind on Climate*, which projected future global temperature increases due to anthropogenic activity.[204]

87. At a 1988 hearing of the U.S. Senate Committee on Energy and Natural Resources addressing the issues of global warming and the greenhouse effect, James Hansen famously testified that "the greenhouse effect has been detected, and it is changing our climate now,"[205] placing the issue of global warming squarely at the forefront of public debate. That same year, the Intergovernmental Panel on Climate Change (IPCC) was established[206] and one year later, in 1989, governments created a mandate to negotiate a framework convention on climate change, reflecting the fact that international awareness of the problem of anthropogenic climate change and its causes had reached such a level as to necessitate action.[207] The IPCC published its first assessment report on the state of climate science, climate impacts,

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[198] *Ibid.*, at p.121, 123.
[199] *Ibid.*, at p. 112.
[200] *Ibid.*, at p. 126.
[201] *Ibid.*, at p. 121.
[202] *Memorandum for the President [of the United States] from Donald F. Hornig, Special Assistant for Science and Technology*, 13 January 1965, https://www.documentcloud.org/documents/24231246-memorandum-for-the-president-jan-13-1965.
[203] Jeannine Cavenger and Jill Jager, *The History of Germany's Response to Climate Change*, International Environmental Affairs (1993), pp. 6-9, https://cbs.umn.edu/sites/cbs.umn.edu/files/migrated-files/downloads/1993_Cavender-Bares_Jaeger_IEA.pdf
[204] Jonathan D. Oldfield, *Imagining climates past, present and future: Soviet contributions to the science of anthropogenic climate change, 1953-1991*, Journal of Historical Geography 60 (2018) at pp. 45-46, https://doi.org/10.1016/j.jhg.2017.12.004.
[205] Statement of Dr. James Hansen, Director, NASA Goddard Institute for Space Studies, to the Hearing Before the U.S. Senate Committee on Energy and Natural Resources (June 23, 1988), at p. 2, https://pulitzercenter.org/sites/default/files/june_23_1988_senate_hearing_1.pdf.
[206] UN General Assembly, Protection of Global Climate for Present and Future Generations of Mankind, U.N. Doc. A/RES/43/53, para. 5 (Dec. 6, 1988).
[207] UN General Assembly, Protection of Global Climate for Present and Future Generations of Mankind, U.N. Doc. A/RES/44/207, para. 12 (Dec. 22, 1989).

and responses in 1990.[208] And in 1992, States adopted the UNFCCC.[209] In concluding that Convention, States recognized that climate change was having "adverse effects," defined as "changes in the physical environment or biota … *which have significant deleterious effects* on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare."[210] Such harm did not start when the UNFCCC was agreed, but predated it. The UNFCCC was not the first instrument in which States expressly recognized the deleterious effects of climate change,[211] but it was the first time they collectively agreed to take action to halt those effects.

88. In sum, evidence will show that some countries, principally industrialized States, were aware of the risk of adverse impacts to the climate from the emission of GHGs, principally from fossil fuels, since at least the middle of the 20th century. Some company research predicted impacts with remarkable precision.[212] While they may not have had full understanding of the speed of atmospheric change or the full extent or severity of its impacts, many high-emitting countries had sufficient awareness of the risk of harm to trigger their preventive obligations. Consistent with the precautionary principle, absence of scientific certainty or detailed knowledge regarding the extent of the possible harm did not, and does not, excuse inaction to avert the risk.[213] Thus by approximately 1960, some States, and by no later than 1992, *all* States across the world were in possession of requisite knowledge regarding climate change to have an obligation to act to prevent harm from climate change and the risk thereof.[214] Since then, the scientific

[208] *See* Intergovernmental Panel on Climate Change (IPCC), *History of the IPCC*, https://www.ipcc.ch/about/history/.
[209] United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107 (entered into force Mar. 21, 1994) [hereinafter UNFCCC].
[210] UNFCCC, at pmbl., art. 1(1).
[211] *See, e.g.*, UN General Assembly, UN Conference on Environment and Development, U.N. Doc. A/RES/44/228 (Dec. 22, 1989); UN General Assembly, Protection of Global Climate for Present and Future Generations of Mankind, U.N. Doc. A/RES/43/53 (Dec. 6, 1988); UN General Assembly, Protection of Global Climate for Present and Future Generations of Mankind, U.N. Doc. A/RES/44/207 (Dec. 22, 1989); UN General Assembly, Protection of Global Climate for Present and Future Generations of Mankind, U.N. Doc. A/RES/45/212 (Dec. 21, 1990) (establishing a single intergovernmental negotiating process for the framework convention on climate change); UN General Assembly, Protection of Global Climate for Present and Future Generations of Mankind, U.N. Doc. A/RES/46/169 (Dec. 19, 1991); UN General Assembly, Possible Adverse Effects of Sea-level Rise on Islands, and Coastal Areas, particularly Low-lying Coastal Areas, U.N. Doc. A/RES/44/206 (Dec. 22, 1989).
[212] *See, e.g.*, Geoffrey Supran, Stefan Rahmstorf & Naomi Oreskes, "Assessing ExxonMobil's global warming projections," 379(6628) *Science* (Jan. 13, 2023), https://www.science.org/doi/10.1126/science.abk0063.
[213] Rio Declaration, at Principle 15.
[214] On foreseeability, the Committee on the Rights of the Child has noted: "[R]egarding the issue of foreseeability, the Committee notes the authors' uncontested argument that the State party has known about the harmful effects of its contributions to climate change for decades and that it signed both the United Nations Framework Convention on Climate Change in 1992 and the Paris Agreement in 2016. In the light of existing scientific evidence showing the impact of the cumulative effect of carbon emissions on the enjoyment of human rights, including rights under the Convention, the Committee considers that the potential harm of the State party's acts or omissions regarding the carbon emissions originating in its territory was reasonably foreseeable to the State party." *Chiara Saachi et al. v. Argentina*, Decision Comm. on Rights of the Child, No. 104/2019, U.N. Doc. CRC/C/88/D/104/2019, para. 10.11 (decision adopted Sept. 22, 2021) [hereinafter *Chiara Saachi et al. v. Argentina*]. *See also* L. Delta Merner, "From Research to Action: The Growing Impact of Attribution Science," *The Equation* (Mar. 7, 2023), https://blog.ucsusa.org/delta-merner/from-research-to-action-the-growing-impact-of-attribution-science/ (noting that "The study of climate attribution began to be more widely accepted in the 1990s").

evidence in relation to climate change has only grown, and rendered State inaction, or active perpetuation of the causes of climate change, more and more egregious.

89. Accordingly, continuing to increase a State's cumulative emissions and failing to take action to reduce those emissions, after the State knew or should have known that such conduct posed a risk of transboundary environmental harm, is presumptively a breach of international obligations. Presumptively implies that there may be circumstances where such increase could be justified as the only means available to satisfy other human rights obligations or needs of a State, but the onus is on the State to prove that its acts and omissions are not contrary to its international duties. States that have the capacity to prevent conduct that will foreseeably cause transboundary harm and/or foreseeably undermine human rights, have an obligation to do so or to justify their failure to act.

90. In sum, while States are obliged to prevent transboundary harm and minimize the risk thereof, some States have knowingly caused or permitted cumulative greenhouse gas emissions at levels that have altered the global atmosphere and caused climate change. States have increased, and are increasing manifest harm and the risk of further such harm by: (a) failing to reduce emissions within their jurisdiction and control in sufficient quantity and speed, thereby allowing the present trajectory of climate change to continue or accelerate; and (b) affirmatively engaging in, financing, facilitating, or authorizing climate-destructive conduct, such as increased production and use of, or increased dependence on, the fossil fuels driving climate change.

B. Breaches of climate-related obligations under conventional law

91. State acts and omissions that have, over time, allowed for the accumulation of greenhouse gas in the atmosphere at levels causing significant transboundary harm not only contravene customary international law, they also breach other international obligations under conventional law, from the UN Charter, to the UNCLOS, to the UNFCCC and the Paris Agreement. Such violations constitute independent, concurrent bases of State responsibility. The following discussion is not intended to be a comprehensive summary of all treaty-based obligations relevant to protection of the climate system (for example, it does not discuss relevant provisions in the Convention on Biological Diversity, the UN Convention to Combat Desertification, or other environmental instruments). However, it aims to provide an indication of some of breaches of treaty-based law that could form the basis of findings of State responsibility under international law.

i. Relevant obligations under UN Charter, UNCLOS, UNFCCC and Paris

UN Charter

92. The fundamental principles of international cooperation, human rights, and self-determination, reflected in the preamble to and provisions of the UN Charter, give rise to State obligations relevant in the context of climate change. Member States of the UN have a duty to assist "in good faith" the pursuit of the UN's purposes, including the achievement of "international cooperation in solving international problems of an economic, social, cultural, or humanitarian character," such as climate change, "and in promoting and encouraging respect for human rights and for fundamental freedoms," which are threatened by climate

change and its deleterious impacts.[215] As set out in Articles 55 and 56, Member States must cooperate to promote a) "higher standards of living, full employment, and conditions of economic and social progress and development; b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion", with a view toward stability, welfare, and peaceful relations "based on respect for the principle of equal right and self-determination of peoples."[216] Those longstanding commitments oblige States to act, both independently and jointly, to ensure that their conduct respects human rights, advances human welfare, progress, and development, and upholds the self-determination of all peoples. Fulfilling those obligations requires States to refrain from contributing to, and take effective action to prevent, climate change, given its adverse impacts on and profound threats to human rights, development, and the very existence of certain States and communities.

UNCLOS

93. The UN Convention on the Law of the Sea, adopted in 1982, entered into force in 1994, and ratified by 169 countries, enshrines the preventive principle in its provisions pertaining to the protection and preservation of the marine environment.[217] The Convention requires Parties to take all measures necessary to "prevent, reduce, and control pollution of the marine environment from *any* source,"[218] including "the use of technologies,"[219] land-based sources,[220] activities in and on the oceans such as seabed activities,[221] dumping,[222] and from or through the atmosphere.[223] To fulfill this duty, States must "take all measures necessary to ensure that activities under their jurisdiction or control" do not cause damage by pollution to other States and that pollution arising within their jurisdiction or control does not spread beyond areas over which they exercise sovereignty.[224] UNCLOS therefore imposes limitations on States' "sovereign right to exploit their natural resources," which must be exercised "in accordance with their duty to protect and preserve the marine environment."[225]

94. Anthropogenic GHG emissions constitute a form of "pollution of the marine environment," under the definition laid out in Article 1(1)(4) of UNCLOS, which States are bound to prevent, reduce and control. First, they entail "the introduction by man, directly or indirectly, of substances or energy into the marine environment."[226] Specifically, GHG-emitting human activity results in both CO_2 (a "substance") being deposited directly in the oceans, and oceans absorbing heat (an "energy") resulting from increased

[215] U.N. Charter, at arts. 1(3), 2(2), 2(5).
[216] *Ibid.* at arts. 55, 56.
[217] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3 (entered into force on Nov. 16, 1994) [hereinafter UNCLOS] at art. 192.
[218] *Ibid.* at art. 194(1) (emphasis added).
[219] *Ibid.* at art. 196(1).
[220] *Ibid.* at art. 207(1)(2).
[221] *Ibid.* at art. 208 (1)(2).
[222] *Ibid.* at art. 210 (1)(2).
[223] *Ibid.* at art. 212(1)(2).
[224] *Ibid.* at art. 194(2); *see also Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor (Malaysia v. Singapore)*, Order of October 8, 2003, Joint Declaration of Judges Ad Hoc Hossain and Oxman, 2003 ITLOS Rep. 10 [hereinafter *Land Reclamation case*].
[225] UNCLOS, at art. 193.
[226] *Ibid.* at art. 1(1)(4).

atmospheric concentrations of GHGs. Second, the introduction of GHGs into the atmosphere "results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, [and] hindrance to marine activities,"[227] among other harms. These deleterious effects include, but are not limited to, marine heatwaves,[228] absorption of CO_2 by oceans, forming carbonic acid and altering ocean chemistry in a process known as ocean acidification,[229] coral death,[230] and sea level rise,[231] and the adverse implications of these ecological changes on food security, coastal infrastructure, and oceans-based economies.[232] Measures adopted by States to respond to pollution, pursuant to this duty, must not create a new source of pollution.[233]

International Climate Agreements

95. The multilateral agreements on climate change were written against the backdrop of existing international law and normative frameworks, including *inter alia* the prevention and precautionary principles, human rights law, equity, and international cooperation obligations. The duty to prevent transboundary harm underpins the global climate regime. The preamble to the United Nations Framework Convention on Climate Change contains a full recitation of the transboundary harm principle: "Recalling also that States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."[234] The Paris Agreement refers to human rights in its 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

[227] *Ibid.*
[228] IPCC, 2019, Special Report on the Ocean and Cryosphere in a Changing Climate [H.-O. Pörtner, D.C. Roberts, V. Masson-Delmotte, P. Zhai, M. Tignor, E. Poloczanska, K. Mintenbeck, A. Alegría, M. Nicolai, A. Okem, J. Petzold, B. Rama, N.M. Weyer (eds.)], Cambridge University Press, Cambridge, UK and New York, NY, USA [hereinafter IPCC SR Ocean and Cryosphere], Summary for Policymakers, at para. A.2 (finding that marine heatwaves have "very likely doubled in frequency since 1982 and are increasing in intensity").
[229] Scott C. Doney et al., *Ocean Acidification: The Other CO2 Problem?* 6 Wash. J. Envtl. L &. Pol'y 212 (2016), 217; Ellycia R. Harrould-Kolieb and Ove Hoegh-Guldberg, A *governing framework for international ocean acidification policy*, 102 Marine Policy 10 (2019), at 1 (finding that the increased acidity of oceans is already causing and is expected to cause increased "substantial disruptions to socio-economic systems over the coming decades and centuries, including via reduced access to protein, economic losses from fisheries and tourism, decreased coastal protection and impacts to human health and cultural identity").
[230] IPCC SR Ocean and Cryosphere, Summary for Policymakers, at para. B.6.4, Ch. 4.3.3.5.2, p. 379; IPCC AR6, Synthesis Report, Longer Report, Section 3.1.2, at p. 36.
[231] IPCC SR Ocean and Cryosphere, Summary for Policymakers, at para. A.3.
[232] IPCC, 2022: Summary for Policymakers, para. B.3 (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 at Ch. 3, at p. 382 (H.-O. Pörtner, et. al eds., Cambridge University Press, 2022) [hereinafter IPCC, AR6, WGII].
[233] UNCLOS, at art. 195 ("States shall act so as not to transfer, directly, or indirectly, damage or hazards from one area to another or transform one type of pollution into another.").
[234] UNFCCC, at pmbl.

gender equality, empowerment of women and intergenerational equity."[235] Neither agreement supplants or curtails the application of those preexisting and concurrent obligations; rather they build upon and elaborate some of their implications for international cooperation in the context of climate change.

96. The climate agreements clarify that State actions necessary to address climate change must encompass not only mitigation of the emissions driving climate change, but also adaptation[236] to the impacts of climate change, provision of finance[237] and technology transfer[238] for climate action, and addressing loss and damage[239] due to climate change. Those obligations apply differently to States by virtue of their distinct responsibilities and capabilities.

97. The distinct obligations of States in relation to climate change are grounded in the principle of Common but Differentiated Responsibilities and Respective Capabilities (CBDR-RC), a core tenet of the climate regime reflecting the notion of equity, which bears on interpretations of climate duties. The principle, first articulated in the Rio Declaration on Environment and Development,[240] has been expressed in the UNFCCC as follows: "[T]he Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof."[241]

98. With regard to mitigation, the UNFCCC, which enjoys near universal ratification, binds States Parties to pursue the objective of "stabiliz[ing] of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system" and to do so in a timeframe that would allow ecosystems to naturally adapt and not disrupt essential functions.[242] In furtherance of that aim, the UNFCCC provides that developed country Parties: "shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs. These policies and measures will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions consistent with the objective of the Convention," and aim to return GHG emissions to 1990 levels.[243] The Convention also provides, *inter alia*, that States shall "[p]romote and cooperate in the development, application and diffusion, including transfer, of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases"[244]; and take climate considerations into account with a view to minimizing adverse

[235] 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* Conference of the Parties serving as the meeting of the Parties to the UNFCCC, Cancun Agreements, Decision 1/CP.16, UN Doc. No. FCCC/CP/2010/7/Add.1, para. 8 (Mar. 15, 2011) (acknowledging for the first time in a UNFCCC decision that Parties should fully respect human rights in all climate actions) [hereinafter Cancun Agreements].
[236] *Ibid.* at art. 7.
[237] *Ibid.* at art. 9.
[238] *Ibid.* at art. 10.
[239] *Ibid.* at art. 8.
[240] Rio Declaration, principle 7.
[241] UNFCCC, at art. 3(1); *see also* UNFCCC, pmbl., para. 6.
[242] *Ibid.* at art. 2.
[243] *Ibid.* at art. 4(2)(a)(b).
[244] *Ibid.* at art. 4(1)(c).

effects of mitigation and adaptation actions.[245] The UNFCCC also requires State Parties to take measures to "facilitate adequate adaptation to climate change."[246]

99. In recognition that Parties' actions have been insufficient to achieve that ultimate objective, Parties to the UNFCCC adopted the Paris Agreement, which binds States to "strengthen the global response to the threat of climate change."[247] Anchored in repeated references to the objective and principles of the Convention, the Paris Agreement, which has near universal acceptance amongst States,[248] commits Parties to pursue efforts toward an identified global temperature target, and to deliver progressively more ambitious climate plans to mitigate and adapt to climate change, ensure financing and technology transfer for, and address the loss and damage resulting from, climate change. Article 2(1) sets forth a long-term temperature goal, obliging States to "pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognising that this would significantly reduce the risks and impacts of climate change."[249] The Agreement binds States to prepare and implement, through domestic measures, progressively more ambitious plans to reduce emissions. Article 4 lays out the ambition of States "to reach global peaking of greenhouse gas emissions as soon as possible,"[250] and obliges States not only to set nationally determined contributions to climate action that "reflect [a Party's] highest possible ambition" to achieve the goals of the Agreement,[251] but specifically to "pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions."[252] Like the UNFCCC, the Paris Agreement provides that its implementation will reflect the principles of equity and common but differentiated responsibilities and respective capabilities.[253]

100. In addition to the mitigation objective, Parties to the Paris Agreement also committed to "increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience," and established "the global goal on adaptation of enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change."[254] The Agreement also expressly recognizes the importance of averting, minimizing, and addressing loss and damage from climate change.[255]

101. The Paris Agreement aims to ensure finance flows support mitigation and adaptation action and are "consistent with a pathway towards low greenhouse gas emissions and climate-resilient development."[256] This objective requires redirecting finance away from unsustainable, high-GHG

[245] *Ibid.* at art. 4(1)(f).
[246] *Ibid.* at art. 4(1)(b).
[247] Paris Agreement, arts. 2(1).
[248] *See* Marcel Brus, Andre De Hoogh, Panos Merkouris, *The Normative Status of Climate Change Obligations under International Law*, p. 27 (June 2023), https://www.europarl.europa.eu/RegData/etudes/STUD/2023/749395/IPOL_STU(2023)749395_EN.pdf (pointing out that "With 195 States Parties the Paris Agreement is nearly universally accepted; only Iran, Libya and Yemen have signed but not ratified it"); United Nations Climate Change, Paris Agreement - Status of Ratification, https://unfccc.int/process/the-paris-agreement/status-of-ratification.
[249] Paris Agreement, at art. 2(1)(a).
[250] *Ibid.* at art. 4(1).
[251] *Ibid.* at arts. 3, 4(1)-4(3).
[252] *Ibid.* art. 4(2).
[253] *Ibid.* at art. 2(2); *see also id.* at pmbl., arts. 3, 4(1), 4(3), 4(19).
[254] *Ibid.* at art. 2.1(b), art. 7.
[255] *Ibid.* at Article 8.
[256] *Ibid.* at art. 2(1)(c).

emission activities,[257] which includes fossil fuels investments and subsidies,[258] and to "a decarbonized and resilient economy."[259] In furtherance of that aim, the Agreement binds developed countries to make financing available: "Developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention."[260]

102. The climate agreements tie requisite State action to evolving science. The UNFCCC recognizes all finance and investment that the measures necessary to prevent "dangerous anthropogenic interference with the climate system," must evolve with the best available scientific knowledge.[261] The Paris Agreement reiterates this link to science, in Articles 4(1) and 7(5) of the Paris Agreement, which provide that mitigation and adaptation actions be based on "best available science," and in Article 14(1), which states that Parties "shall periodically take stock of the implementation of this Agreement to assess the collective progress towards achieving the purpose of this Agreement and its long-term goals" in light of the best available science.[262]

103. International climate law, the UNFCCC and the Paris Agreement, are thus relevant to the questions before the Court, as they set forth specific objectives and measures with respect to climate action, but they do not and cannot fully answer those questions. States have concurrent duties under international law, including the law of State responsibility and human rights law, and the Court should draw on these bodies of law in setting out the scope and content of States' duties in this case and clarifying what constitutes breach of those obligations and its legal consequences. [See CIEL, Memo on Applicable Law, in Written Statement submitted to the ICJ in the climate advisory proceedings, March 2024.]

ii. Acts and omissions attributable to States that breach these obligations

Breaches of the UNFCCC and Paris Agreement

104. The State conduct described above, enabling the cumulative emissions of greenhouse gases at levels causing transboundary harm, presumptively breaches the objectives of the UNFCCC and Paris Agreement, and specific binding provisions within them. States have failed and are failing to take action sufficient to comply with either the ultimate objective of the UNFCCC or the temperature target agreed

[257] UNFCCC Standing Committee on Finance, *Fourth (2020) Biennial Assessment and Overview of Climate Finance Flows*, p. 149 (2020) [hereinafter SCF, Fourth (2020) BA].
[258] SCF, Fourth (2020) BA, at paras. 45, 46; UNFCCC Standing Committee on Finance, *Third (2018) Biennial Assessment and Overview of Climate Finance Flows* [hereinafter SCF, Third (2018) BA], paras. 343, 351, 358-359 (highlighting the World Bank's announcement to end funding to the upstream oil exploration and extraction of oil and gas by 2019 as progress and calling on other multilateral banks to "follow this lead."); Report of the Conference of the Parties held in Sharm el-Sheikh, 27th session, *Revision of the modalities and guidelines for international consultation and analysis*, 5/CP.27, UN Doc. No. FCCC/CP/2020/10/Add.1, para. 46 (2022) [hereinafter UNFCCC COP, Decision 5/CP.26].
[259] SCF, Fourth (2020) BA, at para. 476.
[260] Paris Agreement, at art. 9(1).
[261] UNFCCC, pmbl. ("Recognizing that steps required to understand and address climate change will be environmentally, socially and economically most effective if they are based on relevant scientific, technical and economic considerations and continually re-evaluated in the light of new findings in these areas"); Cancun Agreements, at para. 4.
[262] Paris Agreement, at arts. 4(1), 7(5), 14(1).

in Paris in furtherance of it. In the Paris Agreement, Parties strengthened their emissions reduction commitments, by aiming to keep temperature rise to 1.5°C and by requiring that each State implements policies representing its highest possible ambition. And still emissions are on the rise.

105. According to analyses published by the UNFCCC, plans laid out in States' nationally determined contributions, if implemented, would lead to an increase in GHG emissions of approximately 9% by 2030, and temperature rise of between 2.1 and 2.8°C by 2100.[263] A United Nations Environment Programme report, which provides an "annual, independent science-based assessment of the gap between the pledged greenhouse gas (GHG) emissions reductions and the reductions required to align with the long-term temperature goal of the Paris Agreement, as well as opportunities to bridge this gap," confirms that State action to date has failed to set emissions on a downward trajectory, as emissions continue to rise years after the adoption of the UNFCCC and Paris Agreement.[264] The latest State plans, if implemented, would set the world on a course to temperature rise of nearly 3 degrees.[265] Similarly, States' adaptation measures are insufficient in view of commitments under the climate agreements, with "global progress on adaptation … slowing rather than showing the urgently needed acceleration."[266]

106. Moreover, developed countries have not discharged their obligations to provide requisite finance for mitigation and adaptation actions. Despite the obligations enshrined in the Paris Agreement (see article 9(1)),[267] climate finance is not being delivered at scale;[268] and within international climate negotiations, powerful countries are emphasizing voluntary approaches to the provision of loss and damage finance via the Loss and Damage Fund to the exclusion of the key legal principles of remedy, reparations and accountability.[269] Meanwhile the fossil fuel industry is benefitting from subsidies at a rate of $13 million a minute.[270]

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[263] UNFCCC, Nationally determined contributions under the Paris Agreement: Synthesis report by the secretariat, U.N. Doc. FCCC/PA/CMA/2023/12, para. 15 (Nov. 14, 2023), https://unfccc.int/ndc-synthesis-report-2023.

[264] United Nations Environment Programme et al, *Emissions Gap Report 2023: Broken Record: Temperatures hit new highs, yet world fails to cut emissions (again)*, p. xvi (2023) [hereinafter UNEP, *Emissions Gap Report 2023*].

[265] UNEP, *Emissions Gap Report 2023*, at p. xv (pointing out that "fully implementing and continuing mitigation efforts of unconditional Nationally Determined Contributions (NDCs) made under the Paris Agreement for 2030 would put the world on course for limiting temperature rise to 2.9°C this century.").

[266] United Nations Environment Programme et al, *Adaptation Gap Report 2023: Underfinanced. Underprepared. Inadequate investment and planning on climate adaptation leaves world exposed*, p. XII (2023), https://www.unep.org/resources/adaptation-gap-report-2023 [hereinafter UNEP, *Adaptation Gap Report 2023*].

[267] Paris Agreement, at art. 9(1).

[268] *See, e.g.*, IPCC, Press Release, Urgent Climate Action Can Secure a Liveable Future for All (Mar. 20, 2023), https://www.ipcc.ch/2023/03/20/press-release-ar6-synthesis-report/; UNEP, *Adaptation Gap Report 2023*, p. XV; Oxfam, *Climate Finance Shadow Report 2023: Assessing the delivery of the $100 billion commitment* (June 5, 2023), https://policy-practice.oxfam.org/resources/climate-finance-shadow-report-2023-621500/.

[269] *See, e.g.*, Third World Network, "Loss and Damage Fund outcome adopted by Transitional Committee despite US attempts to veto consensus," TWN Info Service on Climate Change (Nov23/01) (Nov. 8, 2023), https://www.twn.my/title2/climate/info.service/2023/cc231101.htm.

[270] Simon Black et al, *IMF Fossil Fuel Subsidies Data: 2023 Update* (Aug. 24, 2023); Damian Carrington, "Fossil fuels being subsidised at rate of $13m a minute, says IMF," *The Guardian* (Aug. 24, 2023), https://www.theguardian.com/environment/2023/aug/24/fossil-fuel-subsidies-imf-report-climate-crisis-oil-gas-coal.

107. More than thirty years since the adoption of the UNFCCC and nearly ten years after the adoption of the Paris Agreement, persistent non-compliance with the objectives and provisions of the climate agreements can be established by, *inter alia*, clear evidence[271] of the failure of State Parties, particularly the largest cumulative emitters, to sufficiently reduce their emissions in line with the best available science, and meaningfully support adaptation and building resilience, domestically and extraterritorially. State conduct is clearly contrary to the progressive ambition required by the Paris Agreement. The inaction of some States to curtail the known causes, and adequately respond to the consequences, of climate change constitutes an internationally wrongful act.

108. It is simply not possible to plead ignorance any longer to justify the failure to act with the requisite scale and ambition to address climate change, or the pursuit of conduct that worsen the climate crisis. As the IPCC has said, "the cumulative scientific evidence is unequivocal: Climate change is a threat to human well-being and planetary health. Any further delay in concerted anticipatory global action on adaptation and mitigation will miss a brief and rapidly closing window of opportunity to secure a liveable and sustainable future for all. (*very high confidence*)."[272]

C. Breaches of human rights law obligations

109. As stated by Judge Weeramantry in the *Gabčíkovo-Nagymaros* case before the Court in 1997, "damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments."[273] Climate change is doing precisely that. The United Nations Human Rights Council has emphasized how climate change impacts "have a range of implications, both direct and indirect, for the effective enjoyment of human rights."[274] As this section discusses, States have longstanding obligations under international human rights law to take measures to avert and minimize the risk and effects of climate change, given its adverse impacts on, and threat to, human rights.

i. Climate-related obligations under customary and conventional human rights law

110. In addition to the duties outlined above, States also have international legal obligations under both treaty-based and customary human rights law to refrain from causing or contributing to, and to protect against, foreseeable threats to human rights,[275] including from environmental degradation and

[271] *See* para.104 above.
[272] IPCC, AR6, WGII, Summary for Policymakers, at para. D.5.3.
[273] *Case Concerning the Gabčíkovo-Nagymaros Project* (*Hung. v. Slovk.*), Judgement, 1997 I.C.J. 7 (Sept. 25), Separate Opinion of Vice-President Weeramantry, p. 92 [hereinafter *Gabčíkovo-Nagymaros Project*].
[274] Human Rights Council, Resolution 10/4. Human rights and climate change (March 2009).
[275] *See* UN General Assembly, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, U.N. Doc. A/RES/53/144, art. 2 (Dec. 9, 1998) ("Each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms…"); Human Rights Committee, *General Comment No. 31 - The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, para. 7 (Mar. 29, 2004) [hereinafter HRC, GC No. 31]; Committee on Economic, Social and Cultural Rights, *General Comment No. 20 - Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. No. E/C.12/GC/20, para. 8 (July 2, 2009) [hereinafter CESCR, GC No. 20].

climate change.[276] Such obligations require States not to engage in, and to regulate so as to prevent and minimize, conduct that foreseeably damages the environment with consequences for the enjoyment of human rights, such as the rights to life, health, water, food, an adequate standard of living, and culture, among other rights. In the words of Judge Weeramantry,"[t]he protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself."[277]

111. The duties to respect and protect apply to all human rights guaranteed in human rights treaties,[278] extend domestically and extraterritorially, and run to both present and future generations. "Neither the Universal Declaration of Human Rights, nor any other human rights instrument contains a temporal limitation or limits rights to the present time. Human rights extend to all members of the human family, including both present and future generations."[279] Fulfillment of these duties requires States not only to refrain from conduct that violates human rights including conduct that interferes "directly or indirectly with the enjoyment of the [] rights by persons outside their territories."[280] They also must address, alleviate, and mitigate foreseeable threats to human rights,[281] including by regulating the activities of business and other actors subject to their jurisdiction, to ensure "effective protection" against rights

[276] *See* Human Rights Committee, *General Comment No. 36 - Article 6: right to life*, U.N. Doc. CCPR/C/GC/36, para. 62 (Sept. 3, 2019) [hereinafter HRC, GC No. 36]; 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," U.N. Doc. HRI/2019/1, para. 10 (May 14, 2020, originally released Sept. 16, 2019) [hereinafter UN Human Rights Treaty Bodies' joint statement on human rights and climate change]; IACtHR, *Advisory Opinion OC-23/17*, at paras. 141-145; UN Special Rapporteurs on Human Rights and Climate Change (Ian Fry), Toxics and Human Rights (Marcos Orellana), and Human Rights and the Environment (David Boyd), amicus brief submitted to ITLOS in Case n.3 (2023).

[277] *Gabčíkovo-Nagymaros Project*, Separate Opinion of Vice-President Weeramantry, p. 91-92.

[278] *See, e.g.*, United Nations Human Rights Office of the High Commissioner, *International Human Rights Law*, https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law; *see also* International Covenant on Civil and Political Rights, art. 2(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; HRC, GC No. 36, at paras. 7, 18, 63; Committee on the Elimination of Discrimination against Women, *General recommendation No. 34 on the rights of rural women*, U.N. Doc. CEDAW/C/GC/34, sec. III (Mar. 7, 2016) [hereinafter CEDAW, *General recommendation No. 34*]; Committee on the Rights of the Child, *General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights*, U.N. Doc. No. CRC/C/GC/16, para. 24 (Apr. 17, 2013) [hereinafter CRC, GC No. 16].

[279] *Maastricht Principles on the Human Rights of Future Generations*, pmbl., para. II (2023), https://www.rightsoffuturegenerations.org/the-principles.

[280] Committee on Economic, Social and Cultural Rights, *General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, U.N. Doc. E/C.12/GC/24, para. 26-30 (Aug. 10, 2017) [hereinafter CESCR, *General Comment No. 24*]; *see also* HRC, GC No. 36, at paras. 22, 63; CEDAW, *General Recommendation No. 34*, at para. 13; Advisory Opinion OC-23/17, at para. 81, 101-102.

[281] *See* Human Rights Committee, *Daniel Billy v. Australia*, CCPR/C/135/D/3624/2019, para. 8.3 ("The Committee recalls that States parties should take all appropriate measures to address the general conditions in society that may give rise to direct threats to the right to life or prevent individuals from enjoying their right to life with dignity.") [hereinafter *Daniel Billy v. Australia*]; CEDAW, *General Recommendation No. 34*, at para. 12; HRC GC No. 36, paras. 18, 22, 26, 62; *Budayeva and others v. Russia*, nos 15339/02, 21166/02, 20058/02, 11673/02, 15343/02 (2008), at paras. 128, 130; *Öneryıldız v. Turkey* [GC], no. 48939/99 (2004), at para. 71, 135; *Tătar v. Romania*, no. 67021/01 (2009), at para. 87 (covering public and private conduct).

violations, and hold actors accountable for violations.[282] The duty to protect requires States to regulate any actor subject to their jurisdiction to prevent them from violating rights when operating abroad,[283] or undertaking conduct that has the foreseeable effect of infringing rights, regardless of where those infringements occur. In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court addressed the issue of extraterritorial jurisdiction stating "while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, State parties to the Covenant should be bound to comply with its provisions."[284]

112. The conception of equity is a central tenet of international human rights law. According to the International Covenant for Economic, Social, and Cultural Rights, State responsibilities are differentiated in that States with the requisite capabilities to do so are required to provide international assistance as needed, including extraterritorially, for the realization of human rights.[285]

113. Those State obligations apply to climate change, which has caused, is causing, and will foreseeably cause further human rights violations. Climate change constitutes one of "the most pressing and serious threats to the ability of present and future generations to effectively enjoy all human rights."[286] Since at least General Assembly resolution 43/53 of December 6, 1988 on the protection of global climate for present and future generations of mankind, the UN has recognized climate change as a "common concern of [human]kind, since climate is an essential condition which sustains life on Earth."[287] The United Nations General Assembly has acknowledged that the impacts of climate change interfere with the enjoyment of the right to a clean, healthy, and sustainable environment and that damage to the environment "has negative implications, both direct and indirect, for the effective enjoyment of all human rights."[288] Recent interpretations of international treaty law has made clear that human rights obligations apply to climate change.[289] The United Nations Human Rights Council has

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[282] CESCR, *General Comment No. 24*, at paras. 14-17, 30; CEDAW, *General Recommendation No. 34*, at para. 13; Committee on the Elimination of Discrimination against Women, *General recommendation No. 39 (2022) on the rights of Indigenous women and girls*, U.N. Doc. CEDAW/C/GC/39, para. 57(d) (Oct. 31, 2022) [hereinafter CEDAW Gen. Rec. No. 39]; HRC, GC No. 36, at paras. 18, 22, 62; IACtHR, *Advisory Opinion OC-23/17*, at para. 118.

[283] *See* CEDAW, *General Recommendation No. 34*, at para. 13; CESCR, *General Comment No. 24*, at paras. 30-32.

[284] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, para. 109.

[285] *See* International Covenant on Economic, Social and Cultural Rights, art. 2(1), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; *see also* Amnesty International, *Stop Burning Our Rights! What Governments and Corporations Must do to Protect Humanity from the Climate Crisis*, p. 24, 32-33 (2021), https://www.amnesty.org/en/documents/pol30/3476/2021/en/.

[286] UN General Assembly, *Resolution 76/300: The human right to a clean, healthy and sustainable environment*, UN Doc. A/RES/76/300, pp. 2-3 (July 28, 2022) [hereinafter UNGA, *Resolution 76/300*].

[287] UN General Assembly, *Protection of Global Climate for Present and Future Generations of Mankind*, U.N. Doc. A/RES/43/53 (Dec. 6, 1988); *see also* International Law Commission (ILC), *Draft Guidelines on the Protection of the Atmosphere, with commentaries*, U.N. Doc. A/76/10 (2021), at pmbl., cmt. para. 3.

[288] UNGA, *Resolution 76/300*, at pmbl.

[289] *See, e.g.*, Committee on the Elimination of all Forms of Discrimination against Women, *General recommendation No. 37 on the gender-related dimensions of disaster risk reduction in the context of climate change*, U.N. Doc. CEDAW/C/GC/37 (Mar. 13, 2018) [hereinafter CEDAW, *General Recommendation No. 37*]; Committee on the Rights of the Child, *General Comment No. 26 (2023) on children's rights and the environment*

repeatedly affirmed the connections between human rights and climate change and the need for State action in more than a dozen resolutions adopted since 2008.[290]

114. As five U.N. Treaty Bodies expressed in a joint statement, the adverse impacts of climate change "threaten, among others, the rights to life, to adequate food, to adequate housing, to health and to water, and cultural rights."[291] Relying on findings by the IPCC, the five treaty bodies recognized that "adverse impacts on human rights are already occurring with 1°C of global warming; every additional increase in temperature will further undermine the realization of rights."[292] Such impacts are disproportionately impacting marginalized populations.[293]

115. The most recent Assessment Report released by the IPCC highlights how current impacts of climate change are undermining human rights, indicating the confidence of their conclusions in

with a special focus on climate change, U.N. Doc. CRC/C/GC/26 (Aug. 22, 2023) [hereinafter CRC, *General Comment No. 26*]; HRC, GC No. 36, at para. 62.

[290] *See* UN Human Rights Council, *Human rights and climate change*, U.N. Doc. A/HRC/RES/7/23 (Mar. 28, 2008); UN Human Rights Council, *Human rights and climate change*, UN Doc. A/HRC/RES/10/4 (Mar. 25, 2009); UN Human Rights Council, *Human rights and climate change*, UN Doc. A/HRC/RES/18/22 (Oct. 17, 2011); UN Human Rights Council, *Human rights and climate change*, UN Doc. A/HRC/RES/26/27 (July 15, 2014); UN Human Rights Council, *Human rights and climate change*, UN Doc. A/HRC/RES/29/15 (July 2, 2015); UN Human Rights Council, *Human rights and the environment*, UN Doc. A/HRC/RES/31/8 (Mar. 23, 2016); UN Human Rights Council, *Human rights and climate change*, U.N. Doc. A/HRC/RES/32/33 (July 1, 2016); UN Human Rights Council, *Human rights and climate change*, U.N. Doc. A/HRC/35/20 (June 22, 2017); UN Human Rights Council, *Human rights and climate change*, UN Doc. A/HRC/RES/38/4 (July 5, 2018); UN Human Rights Council, *Human rights and climate change*, UN Doc. A/HRC/RES/41/21 (July 12, 2019); UN Human Rights Council, *Human rights and climate change*, U.N. Doc. A/HRC/RES/44/7 (July 16, 2020); UN Human Rights Council, *Human Rights and Climate Change*, U.N. Doc. A/HRC/RES/47/24 (July 26, 2021); UN Human Rights Council, *Human Rights and Climate Change*, U.N. Doc. A/HRC/RES/50/9 (July 14, 2022); Human Rights Council, *Human Rights and Climate Change*, U.N. Doc. A/HRC/RES/53/6 (July 19, 2023).

[291] UN Human Rights Treaty Bodies' joint statement on human rights and climate change, at para. 3.

[292] UN Human Rights Treaty Bodies' joint statement on human rights and climate change, at para. 5; *see also* Ian Fry (Special Rapporteur on the promotion and protection of human rights in the context of climate change), *Promotion and protection of human rights in the context of climate change mitigation, loss and damage and participation*, UN Doc. No. A/77/226, para. 1 (July 26, 2022) ("Throughout the world, human rights are being negatively affected and violated as a consequence of climate change.") [hereinafter SR on climate change, Report on the promotion and protection of human rights in the context of climate change].

[293] *See* Intergovernmental Panel on Climate Change (IPCC), 2023: Summary for Policymakers, in, *Climate Change 2023: Synthesis Report. A Report of the Intergovernmental Panel on Climate Change. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, H. Lee and J. Romero (eds.)], paras. A.2.2 (2023) [internal citations omitted] [hereinafter IPCC, AR6, Synthesis Report: Summary for Policymakers]; IPCC, *2018: 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*, Ch. 3, at para. B.5.1 (V. Masson-Delmotte et al, eds., Cambridge University Press, 2018) [hereinafter IPCC, 2018 Special Report, Global Warming of 1.5°C] ("Populations at disproportionately higher risk of adverse consequences with global warming of 1.5°C and beyond include disadvantaged and vulnerable populations, some indigenous peoples, and local communities dependent on agricultural or coastal livelihoods (*high confidence*)"); CEDAW, *General Recommendation No. 37*, paras. 1-9. In terms of disproportionate impacts of the climate crisis on children, relevant resources include: Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, U.N. Doc. A/HRC/10/61, para. 48 (Jan. 15, 2009); UN Independent Expert on human rights and the environment, Mapping Report, U.N. Doc. A/HRC/25/53, paras. 73-75 (Dec. 30, 2013).

parentheticals. Across the globe, more frequent extreme heat,[294] powerful Category 4 and 5 tropical cyclones,[295] and heavy precipitation driven by changes in Earth's climate are negatively affecting human rights, putting communities at risk, and exposing millions of people to health risks, acute food insecurity, reduced water availability,[296] disease,[297] and violence.[298] Climate and weather extremes are also increasingly driving human displacement in the Americas region, Africa, and Asia, "with small island states in the Caribbean and South Pacific being disproportionately affected relative to their small population size (high confidence)."[299] Additionally, "[u]rban infrastructure, including transportation, water, sanitation and energy systems have been compromised by extreme and slow-onset events, with resulting economic losses, disruptions of services and negative impacts to well-being,"[300] particularly impacting "economically and socially marginalised urban residents (high confidence)."[301]

116. Citing "existing scientific evidence showing the impact of the cumulative effect of carbon emissions on the enjoyment of human rights," the Committee on the Rights of the Child affirmed in *Sacchi et. al. v. Argentina et al.* (*Sacchi*) that, "the potential harm of the State party's acts or omissions regarding the carbon emissions originating in its territory was reasonably foreseeable to the State party."[302] Reasonable foreseeability of climate change-related harms to human rights triggers States legal duties to take requisite action.

117. Accordingly, pursuant to the duty to protect, States must take all necessary measures to mitigate and regulate conduct that contributes to climate change, and minimize and bolster resilience to climate impacts, in line with their differentiated obligations. In protecting human rights in the face of foreseeable harm, States must "employ all means reasonably available to them" in order to reach the intended outcome "so far as possible."[303] State acts and omissions contributing to climate change and failing to adequately prevent and minimize it, violate human rights, constituting a breach of human rights treaty law as well as customary international norms pertaining to the prevention of transboundary environmental harm. According to the Human Rights Committee, upholding the right to life under the International Covenant on Civil and Political Rights, in particular a life with dignity, requires States to undertake measures "to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors," including by implementing and enforcing legislative and administrative frameworks capable of minimizing such threats to the right to life, through environmental impact assessment and regulation.[304] The Committee on the Rights of the Child has interpreted the

[294] IPCC, AR6, Synthesis Report, Summary for Policymakers, at para. A.2.5.
[295] Category 4 and 5 tropical cyclones are the most powerful and destructive storms on the Saffir-Simpson Hurricane Wind Scale, with sustained wind speeds of 131-155 mph (Category 4) and over 155 mph (Category 5), capable of causing catastrophic damage and posing significant threats to life and property. *See* IPCC, AR6, Synthesis Report (Full Volume), sec. 2, para. 2.1.2.
[296] IPCC, AR6, Synthesis Report, Summary for Policymakers, at para. A.2.2.
[297] IPCC, AR6, Synthesis Report, Summary for Policymakers, at para. A.2.5.
[298] IPCC, AR6, Working Group II (WGII), Technical Summary, at para. C.8.1.
[299] IPCC, AR6, Synthesis Report, Summary for Policymakers, at para. A.2.5.
[300] IPCC, AR6, Synthesis Report, Summary for Policymakers, at para. A.2.7.
[301] IPCC, AR6, Synthesis Report, Summary for Policymakers, at para. A.2.7.
[302] *Chiara Saachi et al. v. Argentina*, at para. 10.11; *see also ibid.* at para. 10.14.
[303] *Application of Convention on Prevention and Punishment of Crime of Genocide* (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment of Feb. 26, 2007, 2007 I.C.J. 43, para. 430. *See also* ITLOS, *Seabed Chamber Advisory Opinion*, at para. 110.
[304] HRC, GC No. 36, at para. 62; *see also ibid.* at para 21.

Convention on the Rights of the Child, the most widely ratified human rights treaty with 196 State Parties,[305] to oblige States to take urgent collective action on mitigation, adaptation and loss and damage.[306] As the U.N. Special Rapporteur on the promotion and protection of human rights in the context of climate change ("Special Rapporteur on Human Rights and Climate Change") explains, "States are obliged to take measures to mitigate climate change and to regulate the emissions of those businesses under their jurisdictions in order to prevent foreseeable negative impacts on human rights."[307]

118. Human rights bodies have similarly found States have duties regarding protecting peoples and individuals from the adverse effects of climate change through bolstering resilience to and minimizing climate impacts. For example, the Human Rights Committee in *Billy v Australia* has held that, "by failing to discharge its positive obligation to implement adequate adaptation measures to protect the authors' home, private life and family, the State party violated the authors' rights" under the International Covenant on Civil and Political Rights, specifically in relation to arbitrary or unlawful interference with privacy, family, home, or correspondence.[308] The Committee further found that the failure to adopt timely adequate adaptation measures to protect the authors' collective ability to maintain their traditional way of life violates Covenant protected cultural rights.[309]

119. Human rights obligations with respect to climate change apply domestically and extraterritorially. A State's duties under human rights law to prevent environmental degradation that infringes on human rights and to refrain from causing or contributing to it apply with equal force within a country's jurisdiction and control, and to foreseeable extraterritorial consequences of conduct subject to their jurisdiction and control. Regulations must cover the extraterritorial and transboundary activity of actors in the State's jurisdiction and control. In its *Sacchi* decision, the Committee on the Rights of the Child found that, "it is generally accepted and corroborated by scientific evidence that the carbon emissions originating in the State party contribute to the worsening of climate change, and that climate change has an adverse effect over the enjoyment of rights by individuals both within as well as beyond the territory of the State party. The Committee considers that, through its ability to regulate activities that are the source of these emissions and to enforce such regulations, the State party has effective control over the emissions."[310] As UN human rights treaty bodies have confirmed in relation to climate change, regulating businesses whose activities foreseeably threaten human rights includes "holding them accountable for harm they generate both domestically and extraterritorially."[311]

[305] Status of Ratification of the Convention on the Rights of the Child, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4.
[306] CRC, *General Comment No. 26*, at paras. 95-106.
[307] SR on climate change, Report on the promotion and protection of human rights in the context of climate change, at para. 9; *see also* Inter-American Commission on Human Rights, *Climate Emergency: Scope of Inter-American Human Rights Obligations*, Res. No. 3/2021, para. 12 (Dec. 31, 2021) [hereinafter IACHR, Res. No. 3/2021].
[308] *Daniel Billy v. Australia*, at para. 8.12 (looking specifically at State duties under Article 17: No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation).
[309] *Ibid. at* paras. 8.12-8.14.
[310] *Chiara Sacchi et al v. Argentina*, at para. 10.9.
[311] UN Human Rights Treaty Bodies' joint statement on human rights and climate change, at para. 12.

ii. Acts and omissions attributable to States that breach these obligations

120. International human rights bodies have clarified that, "failure to take measures to prevent foreseeable human rights harm caused by climate change, or to regulate activities contributing to such harm, could constitute a violation of States' human rights obligations,"[312] even if the "threat[] do[es] not result in loss of life."[313] And indeed the failure of States to take all measures within their power to minimize climate change has violated, and is violating, human rights law. To comply with their human rights obligations, States must "adopt and implement policies aimed at reducing emissions (including effectively contributing to phasing out fossils fuels), which reflect the highest possible ambition, foster climate resilience, and ensure that public and private investments are consistent with a pathway towards low carbon emissions and climate resilient development."[314] Regional and national tribunals have also observed that the failure to meaningfully address climate change violates human rights.[315] State acts and omissions in this context violate treaty law, and can constitute a breach of international legal obligations, establishing an internationally wrongful act.

121. Acts that affirmatively contribute to and exacerbate climate change likewise can breach human rights obligations. Authorizing, engaging in, supporting (through financing or otherwise), or acquiescing to conduct that generates significant greenhouse gas emissions, exacerbating climate change and thereby increasing the risk of foreseeable human rights violations, is presumptively contrary to States' international obligations under human rights law. The onus is on the State to prove that its acts and omissions are not contrary to its international duties. States that have the capacity to prevent conduct that will foreseeably undermine human rights have an obligation to do so or to justify their failure to act.

122. Climate change is a fossil-fueled global crisis resulting in immense transboundary harm and widespread human rights violations. The conduct of some States or groups of States has failed to prevent and has worsened climate change and its impacts on people and the environment. Thus, both State inaction and State action have contributed to the breach of State obligations. As elaborated above, evidence can be adduced linking the acts and omissions of a State or group of States to cumulative quantities of greenhouse gas emissions over time, and thereby to the climate change caused by those emissions. Ample evidence likewise links climate change to deprivations of human rights, substantiating the causal chain from State conduct to climate change to human rights harm. (See paras. 139-140 below) Thus, for those States that have, through their generation of and failure to regulate cumulative emissions over time, caused climate change-related harm or increased the risk of such harm to human rights, the legal elements of a violation of States' international human rights obligations can be established. As discussed in Part 3, below, that breach gives rise both to remedial obligations vis-a-vis the peoples and

[312] *Ibid.* at para. 10.
[313] HRC, GC No. 36, at para. 7.
[314] UN Human Rights Treaty Bodies' joint statement on human rights and climate change, at para 11.
[315] *See, e.g.*, *Daniel Billy v. Australia*; IACtHR, *Advisory Opinion OC-23/17*; *Ashgar Leghari v. Federation of Pakistan*, (2015) W.P. No. 25501/2015 (Lahore High Court) (Pak.); *The State of the Netherlands v. Urgenda*, Case. No. 19/00135 (Engels) (Dec. 20, 2019) (English translation) [hereinafter *Urgenda*]; *VZW Klimaatzaak v. Belgium*, Brussels Court of First Instance, 2015/4585/A (Nov. 17, 2021); *PSB et al. v. Brazil (on Climate Fund)*, Supreme Court of Brazil, ADPF 708 (July 1, 2022); *Generaciones Futuras v. Minambiente*, Supreme Court of Colombia, STC. 4360-2018 (Apr. 5, 2018) (Col.).

individuals affected, and responsibility to other States, all of whom have an interest in the protection of human rights.

123. The preceding sections (paras. 91-122) have shown that the elements of an internationally wrongful act can be made out in relation to the environmental and human rights harm of climate change because: (i) States have obligations to refrain from causing, to prevent, and to minimize the risk of climate change and resultant injuries, under multiple sources of international law, both customary and conventional; and (ii) State acts and omissions, over time, have led to cumulative greenhouse gas emissions causing climate change and resultant harms, and increasing the risk of such harms, in violation of their international obligations. A State's conduct can violate its obligations under more than one source of law, as State conduct driving climate change has done and is doing. The next section examines what legal consequences follow from the establishment of one or more such internationally wrongful acts.

Part 3. The Legal Consequences of States' Breaches of Their International Obligations Entail Cessation of the Wrongful Conduct and Full Reparation of Resultant Injuries

124. Fundamental to law's ability to deliver justice is the core legal tenet, *ubi jus, ibi remedium*, or where there's a right, there must be a remedy.[316] As laid out above, in Part 1, under both the law of State responsibility and international human rights law, once it is established that a State has breached one or more of its international obligations ("primary rules"), it has a duty to cease the wrongful conduct, if it is continuing, and to provide reparation and remedy for resultant injuries. These core secondary rules, the legal consequences triggered by the breach of primary obligations, apply in the context of climate change.

125. The legal elements exist for States, peoples and individuals to demand cessation and reparation for injury due to climate change resulting from other States' internationally wrongful acts. Where a State, through its inaction and action is failing to use all means at its disposal to prevent the significant transboundary harm of climate change, or minimize the risk thereof, to protect against foreseeable human rights violations, and to deliver on its duties to support adaptation, climate finance and technology transfer, cessation of those breaches of international law requires bringing its conduct in conformity with its international obligations. Where there are injuries attributable to such conduct, the State must provide reparation.

126. The Court should interpret the scope and content of States' remediation-related legal duties harmoniously with relevant principles and concurrent obligations under international law. Just as States' various international obligations to prevent and mitigate harm to the climate system should be interpreted harmoniously in light of all relevant principles of international law, so too should the Court's interpretation of the legal consequences States incur when they have caused significant climate harm

[316] William Blackstone, *Commentaries on The Laws of England* 23 (1768).

with respect to other States, in particular SIDS, and peoples and individuals of present and future generations.[317]

A. Remedial obligations for breaches of climate change-related obligations under the law of State responsibility and human rights law

127. The core components of the secondary obligations under the law of State responsibility and human rights law are parallel. They focus on halting the conduct inconsistent with the State's obligations and righting the wrong, repairing the injuries caused by that breach. Under the law of State responsibility, those States in breach of their obligations, including obligations under customary and conventional environmental and human rights law to prevent and mitigate harm due to cumulative GHG emissions, may be obliged to provide reparations to other States or the international community as a whole, for injuries that can be attributed to that conduct. Under international human rights law, States that have engaged in the same wrongful conduct also may owe remedy and reparation to peoples and individuals of present and future generations whose rights have been infringed. In the case of climate change, that means that States that have breached their obligations to prevent climate harm may owe reparations to those States whose territorial integrity, environments, or populations have suffered injury, and reparations to peoples and individuals whose human rights have been violated by the States' contributions to or failure to prevent cumulative GHG emissions driving climate change.

i. Cessation of wrongful conduct as applied to climate change

128. Where States have breached a preventive obligation, such as the duty to take all reasonable or necessary measures to prevent significant transboundary harm from occurring, that breach continues so long as the measures are not taken and the significant harm occurs. Mounting emissions and escalating global temperatures make clear that the breach of duties to prevent and mitigate the significant transboundary harm of climate change is of an ongoing nature, because the event that States had a duty to prevent (significant transboundary harm and dangerous anthropogenic interference with the climate system) continues and "remains not in conformity with that obligation."[318]

129. Where the breach stems from a failure to act, cessation requires action, such as the adoption of measures capable of satisfying the duties to prevent harm, protect against foreseeable human rights violations, and mitigate interference with the climate system. Where breach stems from action, cessation requires halting the harmful conduct, such as stopping engagement in, authorization of or support for activities known to cause significant transboundary harm or to increase the risk thereof, such as fossil fuel production and use or deforestation.

130. Where the obligation breached is not to prevent an event, but to undertake a given action or provide resources, the breach lasts as long as the State's act (which can be an omission) is not in conformity with that duty. In the case of the failure of certain States to deliver required climate financing or technology transfer, such as that mandated by from developed countries to developing countries under

[317] *See* para. 146 below. *See also,* CIEL, Memo on Applicable Law, in Written Statement submitted to the ICJ in the climate advisory proceedings, March 2024.
[318] ILC, *Draft Articles on State Responsibility, with commentaries*, at art. 14(2).

the UNFCCC and Paris Agreements, that breach is ongoing so long as the States fail to provide support in line with the obligation.

ii. Full reparation of injuries attributable to the wrongful conduct

131. As laid out in Part 1, both the law of State responsibility and human rights law require States that have breached their international obligations to provide full reparation for resultant injuries to States, peoples, and individuals. The human rights framework on remedy and reparations informs what constitutes legally sufficient reparation for the internationally wrongful act of causing harm to the climate system.

132. The right to remedy under human rights law applies in the context of climate change. As we have seen in previous sections, certain acts and omissions of States in relation to climate change may be considered as a breach of their human rights obligations. Attribution science linking the acts and omissions of States with climate-induced human rights violations, makes it easier to establish the violation of human rights standards.[319] Such a breach of obligations would trigger the right to remedy and reparation, and indeed the UN Human Rights Committee in the recent case of *Daniel Billy v. Australia* upheld the legal duty of States to protect people under their jurisdiction from the impacts of climate change and to compensate and remedy climate-related harms.[320] Meanwhile, the UN Committee on the Rights of the Child has found in the case *Saachi, et al., v Argentina et al.*, that countries have extraterritorial obligations related to carbon pollution.[321] The breach of such obligations could in some cases trigger remedial duties.

a. Injuries due to climate change are of a material and moral character requiring reparation

133. The types of injuries caused by climate change, and the conduct driving it, are legally cognizable and capable of reparation, including through compensation. The recognition in the ICJ's jurisprudence, in human rights law, and under longstanding international law that both material and moral injuries can give rise to a duty of reparation and remedy, is particularly significant in relation to climate change. While some climate-related impacts can be readily assessed in terms of financial value, in other instances, the cost of impacts cannot be measured easily, constituting non-economic loss and damage. Such impacts can include, for example, the loss of lives; negative effects on human health and mobility; loss of community networks, access to territories, Indigenous and local knowledge, and societal and cultural identity; as well as loss of biodiversity and ecosystem services.[322]

134. Climate-change induced extreme weather events, including bushfires, cyclones, floods, and droughts, as well as slow-onset processes, such as increasing temperatures and sea level rise, are resulting in destruction, enormously impacting human societies and infrastructure, as well as

[319] See Part 3 A ii. above.
[320] *Daniel Billy v Australia*, at para. 11.
[321] *Chiara Saachi, et al v. Argentina*, paras 10.5-10.10.
[322] *See, e.g.*, UNFCCC, *Non-economic losses in the context of the work programme on loss and damage*, U.N. Doc. FCC/TP/2013/2 (Oct. 9, 2013), https://unfccc.int/resource/docs/2013/tp/02.pdf; UNFCCC, Executive Committee of the Warsaw International Mechanism for Loss and Damage, Non-Economic Losses, https://unfccc.int/process/bodies/constituted-bodies/WIMExCom/NELs.

ecosystems, and undermining the enjoyment of the rights to life, environment, culture, security, food, water, housing, health, education, livelihood, and other rights.[323] Especially at stake are the rights of the most marginalized.[324] States, peoples and communities have experienced, are experiencing and will foreseeably experience material and moral injuries due to these and other climate change impacts, which are projected to escalate. The IPCC has found that "[R]isks and projected adverse impacts and related losses and damages from climate change escalate with every increment of global warming (*very high confidence*). Climatic and non-climatic risks will increasingly interact, creating compound and cascading risks that are more complex and difficult to manage (*high confidence*)."[325] Some of those impacts cause material damage, including destruction of dwellings and infrastructure, loss of crops, businesses, or other livelihoods. According to some estimates, the cost of climate change damage globally could be between $1.7 trillion and $3.1 trillion per year by 2050.[326] Others cause tremendous moral damage, including loss of human life and loss of loved ones, injury, sickness, and cultural losses. Research shows that if warming reaches or exceeds 2°C this century, acts and omissions of mainly developed countries will be "responsible for killing roughly 1 billion humans through anthropogenic global warming."[327] Climate impacts that cannot be avoided through mitigation and adaptation activities are known as loss and damage.[328]

135. Climate change also threatens certain States with loss of territory or their very existence, jeopardizing their sovereignty.[329] The Synthesis Report of the IPCC's Sixth Assessment Report (AR6), published in March 2023, reaffirmed that "every increment of global warming will intensify multiple and concurrent hazards (*high confidence*)"[330] and that "[v]ulnerability will also rise rapidly in low-lying Small Island Developing States and atolls in the context of sea level rise."[331]

136. These injuries are of the type that the ICJ has held compensable in the past. The material and moral damage that has occurred, is occurring, and will foreseeably transpire as a result of climate change are similar to types of damage that the ICJ has considered in past cases, and for which States can be held responsible and remedy can and must be provided, when facts are adduced showing a sufficiently direct and causal link between the acts and/or omissions of that State in contravention of its international legal

[323] *See generally* Office of the High Commissioner for Human Rights, *Frequently Asked Questions on Human Rights and Climate Change: Fact Sheet No. 38* (2021); IACHR, Res. No. 3/2021, at p. 5.
[324] *See generally* Human Rights Council, *The impacts of climate change on the human rights of people in vulnerable situations*, U.N. Doc. A/HRC/50/57 (May 6, 2022); Emmanuel Raju, Emily Boyd & Friederike Otto, "Stop blaming the climate for disasters," 3 Communications Earth & Environment 1 (2022), https://www.nature.com/articles/s43247-021-00332-2.
[325] IPCC, AR6, Synthesis Report, Summary for Policymakers, at para. B.2.
[326] Paige Bennett, *Climate Change is Costing the World $16 million per hour: study* (Oct. 12, 2023), https://www.weforum.org/agenda/2023/10/climate-loss-and-damage-cost-16-million-per-hour/.
[327] Joshua M. Pearce & Richard Parncutt, "Quantifying Global Greenhouse Gas Emissions in Human Deaths to Guide Policy," 16(16) *Energies* 2023, p. 1 (Aug. 19, 2023), https://www.mdpi.com/1996-1073/16/16/6074; *see also* Richard Parncutt, "The Human Cost of Anthropogenic Global Warming: Semi-Quantitative Prediction and the 1,000-Tonne Rule," *Front. Psychol.* (Oct. 16, 2019).
[328] Cynthia Liao et al, *What is Loss and Damage?* (Dec. 6, 2022), https://www.chathamhouse.org/2022/08/what-loss-and-damage.
[329] Jonathan Watts, "'We could lose our status as a state': what happens to a people when their land disappears," *The Guardian* (June 27, 2023, https://www.theguardian.com/environment/2023/jun/27/we-could-lose-our-status-as-a-state-what-happens-to-a-people-when-their-land-disappears.
[330] IPCC, AR6, Synthesis Report, Summary for Policymakers, at para. B.1.
[331] IPCC AR6, Synthesis Report (Full Volume), sec. 4, para. 4.3.

duties and the injury suffered. The type of damages attributable to State acts and omissions that have caused, or contributed to, and failed to prevent or worsened climate change, include damages to States of the types that may be compensable, such as damage to public property, and "the costs incurred in responding to pollution damage."[332] For example, the costs of responding to the damage wrought by excessive greenhouse gas emissions—a form of atmospheric pollution—can include the costs of adaptation (e.g. building sea walls, relocating communities, changing irrigation systems, etc.), and the costs associated with transitioning from polluting practices, which the world can no longer sustain—such as fossil fuel-based energy systems—to those that do not increase the risk of climate-related harm, such as renewable energy.

137. In *Costa Rica v Nicaragua*, the ICJ specifically confirmed the compensability of environmental damage, holding it consistent with principles of international law, and clarifying 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…[and] may include indemnification for such impairment or loss or payment for restoration of the damaged environment."[333] The Court explicitly acknowledged that ecosystem services (ability of the environment to provide goods and services) as part of the compensable damage to the environment, including both direct and indirect services. This recognition is of particular importance given how climate change impacts not just people, but also entire ecosystems and biodiversity. The biodiversity and climate crises mutually reinforce each other,[334] with very detrimental consequences for public and planetary wellbeing. States must take an ecosystems approach with regard to compensatory measures.

138. Human rights bodies have similarly applied the right to remedy both to material climate impacts and to 'moral' or 'non-material impacts.' Understanding of the injury shapes the form that reparation takes. As outlined in previous sections, this aspect of redress is essential to address non-economic loss and damage from climate change, and relevant for a range of rights including the rights of Indigenous Peoples and cultural rights. Cultural rights are not a luxury but rather vital to the overall implementation of universal human rights and a critical part of the responses to many current challenges, including climate change.[335] In the *Daniel Billy* case, the Committee notes the Indigenous plaintiffs' specific descriptions of the ways in which their lives have been adversely affected by flooding and inundation of their villages and ancestral burial lands: (1) destruction or withering of their traditional gardens through salinification; (2) decline of nutritionally and culturally important marine species and associated coral bleaching and ocean acidification; (3) anxiety and distress owing to the impacts of erosion on some homes.[336] The Committee found a violation of cultural rights among other rights, and thus awarded remedy, *inter alia* for non-material climate harm.[337]

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[332] ILC, *Draft Articles on State Responsibility, with commentaries*, at art. 36, cmt. para 8.
[333] *Costa Rica v. Nicar.*, 2018 I.C.J at paras. 42.
[334] *See generally IPBES-IPCC Co-Sponsored Workshop Report on Biodiversity and Climate Change: Workshop Report* (2021), https://files.ipbes.net/ipbes-web-prod-public-files/2021-06/20210609_workshop_report_embargo_3pm_CEST_10_june_0.pdf.
[335] Report of the Special Rapporteur in the field of cultural rights, Karima Bennoune, U.N. Doc. A/75/298, para. 64.
[336] *Daniel Billy v. Australia*, at para 5.2.
[337] *Ibid.* at 8.13, 10-11

b. These climate-related injuries can be attributed to State acts and omissions that violate international obligations

139. These material and moral injuries are attributable to climate change and the conduct that drives it. Recent advances in climate source and event attribution science allow researchers to pinpoint the role of climate change in extreme events[338] and slow-onset events and quantify the contribution of GHG emissions from particular sources.[339] The link between increasing anthropogenic GHG emissions under the laws and policies of States (or lack thereof) and climate change damages is reinforced by near scientific consensus as reflected in the IPCC reports.[340] It is increasingly possible to link emissions of a specific country or from a corporation (under the jurisdiction of a specific country)[341] to specific damage. In terms of establishing a link, given the IPCC reports, the correlation between GHG emissions, atmospheric chemistry, and global warming has been "demonstrated with sufficient confidence" that adjudicators may not require demonstrating specific causation in order to obtain relief.[342]

140. Attribution science that identifies and quantifies the contribution of climate change to global climate trends and extreme weather events has gotten stronger.[343] Such science elucidates the impacts of anthropogenic GHG emissions on people and the environment, documenting not just how climate change contributes to sea level rise or ocean acidification, but also how climate change intensifies heat waves or hurricane-induced rainfall.[344] Studies have linked climate change to increased wildfires in North America[345] and Canada.[346] In Latin America, attribution science evinces how climate change has magnified the likelihood and impacts of heatwaves—making the 2013 heatwave in Argentina, which led to more than 1,000 deaths,[347] five times more likely[348]—and flooding— nearly doubling the chances of

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[338] IPCC, AR6, Synthesis Report, Summary for Policymakers, at para. A.2.1.
[339] Brenda Ekwurzel et al., "The rise in global atmospheric CO2, surface temperature, and sea level from emissions traced to major carbon producers," Climatic Change 144 (2017), https://doi.org/10.1007/s10584-017-1978-0.
[340] Christina Voigt, "State responsibility for damages associated with climate change," in *Research Handbook on Climate Change Law and Loss & Damage* (Meinhard Doelle & Sara L. Seck eds. 2021), at p. 180.
[341] States may be responsible for the effects of the conduct of private parties, if they failed to take necessary measures to prevent those effects as established in Part 1 of this memorandum.
[342] Jacob David Werksman, "Could a Small Island Successfully Sue a Big Emitter? Pursuing a Legal Theory and a Venue for Climate Justice," in Michael B. Gerrard & Gregory E. Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge Univ. Press 2012), at p. 412.
[343] IPCC, AR6, Synthesis Report (Full Volume), sec. 2, para. 2.1.2 (noting that such attribution science has gotten stronger since the IPCC published its Fifth Assessment Report in 2014).
[344] Friederike E.L. Otto, "Attribution of weather and climate events," 42 *Annual Review of Environment and Resources* 627, at p. 628 (2017), https://www.annualreviews.org/doi/10.1146/annurev-environ-102016-060847.
[345] John T. Abatzoglou & A. Park Williams, *Impact of anthropogenic climate change on wildfire across western US forests*, Proceedings of the National Academy of Sciences 113, pp. 11770–11775 (2016).
[346] M.C. Kirchmeier-Young et al, *Attribution of the Influence of Human-Induced Climate Change on an Extreme Fire Season*, 7 Earth's Future, pp. 2–10 (2019).
[347] Francisco Chesini *et al.*, *Mortality risk during heat waves in the summer 2013-2014 in 18 provinces of Argentina: Ecological Study*, 27(5) Ciência & Saúde Coletiva 2071-86, at p. 76 (May 2022) https://doi.org/10.1590/1413-81232022275.07502021; *see also* Union of Concerned Scientists, *The Fossil Fuels Behind Forest Fires : Quantifying the Contribution of Major Carbon Producers to Increasing Wildfire Risk* (2023).
[348] A. Hannart et al, *Causal Influence of Anthropogenic Forcings on the Argentinian Heat Wave of December 2013*, 96(12) Bulletin of the American Meteorological Society, at p. S44 (2015), https://doi.org/10.1175/BAMS-D-15-00137.1.

flooding in 2017 in the Uruguay River Basin,[349] and making 2022 rainfall in Northeast Brazil 20% more intense,[350] displacing thousands. Some research ties specific sources of GHG emissions to specific climate impacts. For example, one study connects the 88 largest fossil fuel and cement producers to observed increases in global surface temperature, sea level rise,[351] ocean acidification,[352] and areas burned by forest fire,[353] linking emission-generating conduct subject to the jurisdiction and control of States to climate impacts that are injuring other States, peoples, and individuals.

141. There is a sufficiently "direct and certain causal nexus" between States' wrongful conduct and the harm.[354] But for the acts and omissions of States that have allowed cumulative emissions to reach present levels and that currently maintain or increase those emission trajectories, climate change and the significant harm it is engendering would not be occurring. Thus, acts that engage in, authorize, finance, or facilitate the activities that are the principal drivers of emissions—principally fossil fuel production and use—and omissions including the failure to adopt regulations and policies requiring a phaseout from fossil fuels, are directly and causally linked to climate-related injuries. As discussed above, rather than address the drivers of climate change, developed nations, with often outsized historical and current contributions to the climate crisis,[355] have consistently failed in taking meaningful and ambitious climate action,[356] and are collectively planning to produce double the amount of emission-generating fossil fuels in 2030 than would be compatible with limiting warming to 1.5°C[357] given that projected emissions from existing fossil fuel infrastructure alone will exceed the remaining carbon budget to limit warming to 1.5ºC.[358]

142. Injury attributable to climate change, and the series of acts and omissions that have caused and/or are causing it is "indivisible injury" in the meaning of the term under international law. That is, the contributions to climate change cannot be distinguished using "a factual test of causation" whereby one State's internationally wrongful act (be it action(s) and/or omission(s)) is the single necessary and

[349] Rafael C. de Abreu et al, "Contribution of Anthropogenic Climate Change to April–May 2017 Heavy Precipitation over the Uruguay River Basin," 100(1) Bulletin of the American Meteorological Society, at p. S37-41 (Jan. 2019), https://doi.org/10.1175/BAMS-D-18-0102.1.
[350] *See* Mariam Zachariah et al,"Climate change increased heavy rainfall, hitting vulnerable communities in eastern Northeast Brazil" (July 5, 2022), https://www.worldweatherattribution.org/climate-change-increased-heavy-rainfall-hitting-vulnerable-communities-in-eastern-northeast-brazil/.
[351] Ekwurzel, at p. 586.
[352] R. Licker et al, "Attributing ocean acidification to major carbon producers," 14(12) Environmental Research Letters, p. 2 (2019).
[353] Kristina A. Dahl et al, "Quantifying the contribution of major carbon producers to increases in vapor pressure deficit and burned area in western US and southwestern Canadian forests," 18(6) Environmental Research Letters 064011 (2023).
[354] *Costa Rica v. Nicar.*, at para. 32.
[355] *See generally* Hickel, *Quantifying national responsibility for climate breakdown: an equality-based attribution approach for carbon dioxide emissions in excess of the planetary boundary*.
[356] Martin Khor & Meenakshi Raman, *A Clash of Climate Change Paradigms: Negotiations and Outcomes at the UN Climate Convention* (Third World Network, 2020). This failure to act with ambition has also been reflected in cases across the world. 81 cases have been filed against governments seeking to challenge their overall climate policy response. *See, e.g., VZW Klimaatzaak v. Kingdom of Belgium*; *Friends of the Irish Environment v. The Government of Ireland & Ors.*, [2020] IESC 49 (Ir.); *Commune de Grande-Synthe*, Supreme Administrative Court (Conseil d'Etat) of France, No. 427301 (Nov. 19, 2020).
[357] *Production Gap Report 2023*, at p. 4.
[358] IPCC, AR6, Synthesis Report, Summary for Policymakers, at para. B.5.

sufficient cause of an injury resulting from climate change.[359] It may be that without a single State's internationally wrongful conduct—for example, without the series of actions and omissions that led to or failed to prevent the release of a substantial share of the cumulative global greenhouse emissions — present levels of climate change and resultant harms would not have occurred or be occurring. But that wrongful conduct may nonetheless not be sufficient, on its own, without more or without being in combination with the wrongful acts of other States, to cause a given climate change-related injury.

143. It could also be the case that greenhouse gas emissions attributable to each of two or more States are sufficient on their own to have significantly degraded the atmosphere and caused climate change impacts. In that case, each State's internationally wrongful act or acts may have been sufficient, but not necessary, to the indivisible injury, in which case the responsibility is shared among them.

144. That the harm results from the conduct of a combination of States does not preclude assignment of responsibility or reparation of the resulting injuries. Notwithstanding State arguments to deflect responsibility on the premise that climate change "is a global phenomenon attributable to the actions of many States," the Human Rights Committee awarded compensation in a case concerning the insufficiency of a State's action to protect rights in the context of climate change.[360] The Committee on the Rights of the Child has affirmed 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 violations that the emissions originating within its territory may cause."[361] These decisions reflect the approach of the Dutch Supreme Court in *Urgenda* which held that "each country can be effectively called to account for its share of emissions."[362]

145. The content of the obligation to provide reparation as applied will vary across States depending on their conduct that contributes to the injuries. That responsibility applies with the greatest force to those States in whose jurisdiction or subject to whose control such activities have caused and are causing the greatest portions of the cumulative emissions. A State that did not contribute materially to the situation (or the preceding acts/omissions) that makes an otherwise lawful act or omission trigger a breach of an international duty does not bear responsibility for resultant harm. A State that has not contributed significantly to cumulative global emissions, for example, and therefore cannot be said to have caused significant transboundary harm or created the situation in which further emissions cause such harm, does not incur international responsibility because its emissions combine with the internationally wrongful significant emissions of other States to cause climate change injury.[363]

B. International climate agreements present no bar to reparation of climate-related injury

146. International climate law, the UNFCCC and the Paris Agreement do not define or limit remedy and reparations in the context of climate change. States have concurrent duties under international law,

[359] *See* EJIL, *Guiding Principles on Shared Responsibility in International Law*, at principle 2, cmt. para 4.
[360] *Daniel Billy v. Australia*, at paras 6.3, 11.
[361] *Chiara Saachi et al v. Argentina*, at para 10.10 (citing the preamble to the Convention on the Rights of the Child, article 3 of the UNFCCC, and the preamble and articles 2 and 4 of the Paris Agreement).
[362] *Urgenda*, at para. 5.7.7.
[363] EJIL, *Guiding Principles on Shared Responsibility in International Law*, at principle 3, cmt. para. 8.

including the law of State responsibility and human rights law, and the Court should draw on these bodies of law in setting out the scope and content of States' remediation duties in its opinion. That States have obligations under multiple existing sources of law is further reinforced by Resolution 77/276 unanimously adopted by the General Assembly on 29 March 2023 requesting an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change.[364] The Resolution explicitly emphasizes the importance of several legal frameworks across the spectrum of international law, including international human rights, international environmental law, and relevant obligations of customary international law.

147. The UNFCCC and Paris Agreement do not squarely address remediation duties where States, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, and by extension SIDS and present and future generations. Article 8 acknowledges that loss and damage exist, and need to be addressed, but does so without discussing the status of loss and damage as injuries resulting from breaches of law by any States and consequent responsibility. 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,[365] it does not limit the application of the law of State responsibility (which triggers the obligation to cease and repair harm if internationally wrongful conduct has been established) in any way. Paragraph 51 does not bear on the basis for liability or compensation stemming *not* from the breach of Article 8 of the Paris Agreement, but from the contravention of preexisting and concurrent independent duties. Paragraph 51 reflects compromise text to which countries registered their opposition on the record.[366] 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."[367]

148. Significantly, nothing in the text of either agreement (or COP decisions) precludes the imposition of responsibility on those who breach obligations that exist independently of, predate, and survive, the climate regime. Rather, the objectives, principles, and obligations set forth in the UNFCCC and Paris Agreement build on and complement States' concurrent duties under other bodies of

[364] UN General Assembly, Resolution adopted by the General Assembly on 29 March 2023, U.N. Doc. A/RES/77/276 (Apr. 4, 2023).
[365] 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*, Decision 1.CP/21, U.N. Doc FCCC/CP/2015/10/Add.1 (Jan. 29, 2016), at para. 51.
[366] Khor & Raman, at p. 191.
[367] United Nations Treaty Collection, *Depository: Status of Treaties, Chapter XXVII*: *Environment, 7.d Paris Agreement*, Declarations, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-d&chapter=27&clang=_en (emphasis added) [hereinafter *Paris Agreement Ratification Declarations*].

international law,[368] including the fundamental duty under human rights law to prevent, minimize, and remediate foreseeable violations of human rights.[369]

149. Moreover, 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.[370] 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.[371]

C. Measures that States must take to satisfy their remediation obligations

150. To meet their obligations in relation to remedy and reparation, whether to other States, or to peoples and individuals, States must undertake certain measures in line with equity considerations.[372] The following section briefly outlines some of those required measures. The list is not exhaustive by any means, but merely illustrates certain types of measures necessary and capable of satisfying States' remediation obligations in the face of a climate emergency.

i. States should take appropriate measures to ensure access to justice in relation to remedy and reparations

151. Access to justice is an essential element of redress. Procedural measures in this context might include, *inter alia*, shifting the burden of proof to require the responsible State to prove a lack of causation,[373] and/or enabling access to attribution science relevant for States with fewer resources.

152. Procedural measures with respect to ensuring access to justice for peoples and individuals who wish to claim remediation would include, inter alia, measures to remove regulatory, social, or economic

[368] *See, e.g.*, UNFCCC, at pmbl. ("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, at pmbl.; *see also* UNFCCC, Decisions 1/CP.27 and 1/CMA.4, at pmbl. (2022) [Sharm el-Sheikh Implementation Plan].
[369] In the preamble to the Agreement, the Parties acknowledged that they "should, when taking action to address climate change, respect, promote and consider their obligations on human rights…." Paris Agreement, pmbl. *See also* Cancun Agreements, para. 8 (acknowledging for the first time in a UNFCCC decision that Parties should fully respect human rights in all climate actions).
[370] *See, e.g.*, Communication from the Chairman of the Panel, *Korea - Measures Affecting Government Procurement*, WTO Doc. WT/DS163/6, para. 7.96 (Jan. 25, 2000).
[371] *Paris Agreement Ratification Declarations.*
[372] In its broadest and most general signification, equity denotes "the spirit and the habit of fairness, justness, and right dealing which would regulate the intercourse of men with men." Equity, Black's Law Dictionary, https://thelawdictionary.org/equity/. In human rights law, equity is understood as rooted in principles such as realization of rights consistent with maximum available resources while in international environmental law, the concept is expressed in the principle of common but differentiated responsibilities and respective capacities.
[373] As discussed above in para. 38.

barriers that prevent or hinder access to justice, adopting an intersectional approach;[374] remove procedural barriers limiting the access of youth and children to justice and effective remedies;[375] and not deny individual standing based on the diffuse effects of climate change.[376] In the context of any reparations program or claim in the service of affected communities, procedural measures would entail consultative processes needed to "ensure that reparation claims accurately reflect the demands of those communities"[377] as directly affected individuals and communities affected by climate change are in the best position to identify and develop suitable remedies for violations of human rights.[378]

ii. States should take appropriate measures for cessation of wrongful conduct and guarantees of non-repetition

153. The measures required for States to meet the obligation of cessation of wrongful conduct and guarantees of non-repetition are determined on the basis of the well-established law of reparation as laid out in Part 1, and will be dependent on the specific facts relevant to a given case.

154. In terms of guarantees of non-repetition, "[W]here the violation results from a state's failure to prevent the negative human rights impacts of climate change, the duty to offer appropriate assurances and guarantees of non-repetition could entail an obligation to adopt and implement enforceable legislation to protect human rights from future climate impacts."[379] This duty also reinforces procedural obligations to "provide information about the risks and consequences of climate change."[380] Meanwhile, to achieve cessation of wrongful conduct, States have a duty to implement measures capable of rapidly

[374] States must ensure substantive equality in the provision of reparations, as well as prevent and redress intersectional discrimination, both in terms of shaping the modalities of remediation and in relation to delivery. (On State obligations in relation substantive equality, UN CESCR has clarified that "[e]liminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations." International bodies have unequivocally clarified how climate change disproportionately impacts the marginalized. Right-holders experiencing intersecting forms of marginalization merit targeted attention and tailored remediation responses. The CEDAW Committee, for example, has recognized that "intersectionality is a basic concept for understanding the scope of the general obligations of States parties..." while the UN Committee on the Rights of Children has emphasized that, "[R]emedial mechanisms should consider the specific vulnerabilities of children to the effects of environmental degradation, including the possible irreversibility and lifelong nature of the harm.") The importance of non-discrimination in the context of remedy and reparations is reinforced in the Basic Guidelines on remedy and reparations.) [Add in GC citations!!] See, for example, Anna Kaijser & Annica Kronsell, *Climate change through the lens of intersectionality*, Environmental Politics, 23:3, 2014, 417-433, p. 418; UNWG Information Note on Climate Change and UNGPs 2023, para 24. For example, in regards to Indigenous and tribal peoples, States have the obligation to establish and offer appropriate proceedings that provide a real possibility for the indigenous and tribal communities to be able to defend their rights and exercise effective control over their territory. *See* also IACtHR, *Kaliña and Lokono Peoples v. Suriname*, para. 240.

[375] CRC, *General Comment No. 26*, paras. 82-90.

[376] *See generally* Mina Juhn, *Taking a stand: Climate Change Litigants and the viability of constitutional claims,* 89 Fordham L. Rev. 2731 (2021).

[377] Margaretha Wewerinke-Singh, *State Responsibility for Human Rights Violations Associated with Climate Change*, at p. 83 (Hart Publishing, 2019).

[378] *Ibid.*

[379] Margaretha Wewerinke-Singh, *Remedies for Human Rights Violations Caused by Climate Change*, 9(3) Climate Law, at p. 242 (2019) [hereinafter Margaretha Wewerinke-Singh, *Remedies for Human Rights Violations Caused by Climate Change*].

[380] Margaretha Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights under International Law*, p. 136.

halting the emissions driving climate change, and enhancing human and natural resilience to withstand the changing climate.

155. Halting emissions requires curbing the primary drivers of climate change: fossil fuel and agroindustrial activity at source, and not relying on speculative technologies or future action in lieu of immediate, proven mitigation measures. Effective fossil fuel phase-out necessarily precludes States from granting licenses for new oil, gas, and coal exploration and production, as well as for transporting, processing, and burning extracted fossil fuels.[381] Additionally such phase out necessarily requires States to divest from and stop financing fossil fuel development, regardless of whether it is being led by public or private actors.[382] Likewise, indirect support of fossil fuel expansion—in the form of subsidies, which hit record levels in 2022,[383] and other financial incentives—also drives climate change-related societal and planetary destruction.[384] States must also ensure that their decisions on whether to advance a proposed activity within their territories or control are based on climate analyses that factor in all foreseeable emissions in their supply or value chain, regardless of where they occur.[385] States must not

[381] *See* International Energy Association (IEA), *Net Zero by 2050: A Roadmap for the Global Energy Sector* (Oct. 2021), at p. 21; *see also* International Energy Agency, *Net Zero Roadmap: A Global Pathway to Keep the 1.5 °C Goal in Reach* (2023), at p. 16; IPCC, Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Technical Summary, p. 85, 89 (P.R. Shukla et al, eds., 2022) [hereinafter IPCC, AR6, WGIII, Technical Summary].

[382] UN Human Rights Treaty Bodies' joint statement on human rights and climate change, at para. 12 ("States should also discontinue financial incentives or investments in activities and infrastructure which are not consistent with low greenhouse gas emissions pathways, whether undertaken by public or private actors"). The human rights treaty bodies have also repeatedly expressed concern over public and private investment in the fossil fuel industry in the context of State reporting procedures. *See, e.g.*, Committee on Economic, Social and Cultural Rights, *Concluding observations on the fourth periodic report of Luxembourg*, U.N. Doc. E/C.12/LUX/CO/4, paras. 10-11 (Nov. 15, 2022); Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Canada*, U.N. Doc. CRC/C/Can/CO/5-6, para. 37 (June 23, 2022); Committee on Economic, Social and Cultural Rights, *Concluding observations on the fourth periodic report on Switzerland*, U.N. Doc. E/C.12/CHE/CO/4, paras. 18-19 (Nov. 18, 2019). [In terms of international law sources under Article 38 of the Statute of the International Court of Justice, while the work of UN treaty bodies might not easily be characterized either as judicial decisions or scholarly works, the Court has in practice both referenced and relied on treaty body jurisprudence. *See, e.g.*, Case Concerning Ahmadou Sadio Diallo (*Guinea v. Dem. Rep. Congo*), Judgement, 2010 I.C.J. 639, at para. 66 (Nov. 30). ("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, at para. 109 (July 9)].

[383] *See* Simon Black et al, *IMF Fossil Fuel Subsidies Data: 2023 Update*, at p. 3.

[384] *See, e.g.*, Committee on the Rights of the Child, concluding observations on the combined 4th to 6th periodic reports of Greece, *Concluding observations on the combined fifth and sixth periodic reports of Canada*, 90th session, U.N. Doc. CRC/C/GRC/CO/4-6, para. 15(d) (June 28, 2022); SR on climate change, Report on the promotion and protection of human rights in the context of climate change, at para. 92(e)(iv) (recommending a redirection of fossil fuel subsidies).

[385] National courts in numerous jurisdictions have recognized the imperative to consider both the direct and indirect GHG emissions of a proposed activity during the decision-making process. *See, e.g., WildEarth*

just regulate industrial activities that generate emissions and erode resilience, but also industry conduct that insulates those harmful activities from scrutiny and regulation.[386] Given the threat that the growing use of investor-State dispute settlement (ISDS) mechanisms poses to States taking effective climate action[387]—in particular, action to regulate and accelerate the phaseout of fossil fuels—States should refrain from entering into agreements with ISDS provisions, amend or terminate existing such agreements, and/or withdraw consent to ISDS.[388] Meanwhile, greater international cooperation in terms of climate finance and technology transfer is needed to realize greater mitigation ambition—without means of implementation, fossil fuel phase-out will remain out of reach.

156. Towards enhancing human and natural resilience to withstand the changing climate, States must similarly increase international finance flows and technological transfers required to address these needs.[389] UNEP has found that "[A]daptation finance needs are 10–18 times greater than current international public adaptation finance flows," and "global progress on adaptation is slowing rather than showing the urgently needed acceleration."[390] States must also engage with the need for structural reform in the international financial architecture while concurrently stepping up action on planning and implementation.[391] Implementation of the reparations focused measures below will also support in building resilience. In line with IPCC recommendations, it is critical for States to pursue climate action

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Guardians v. Zinke, 368 F.Supp.3d 41 (D.D.C. 2019) (U.S.A.) (consideration of downstream GHG emissions stemming from authorization of oil and gas leases); *Gray v. Minister for Planning*, 152 LGERA 258 (2006) (Australia) (consideration of burning coal as indirect impact of extraction, citing intergenerational equity concerns); *Gloucester Resources Limited v. Minister for Planning*, NSWLEC 7 (2019) (Australia), para. 490 (discussing the requirement to consider indirect (Scope 3) GHG emissions in assessing the impacts of a fossil fuel project).

[386] According to the Working Group on the issue of human rights and transnational corporations and other business enterprises, the obligation of States under the Guiding Principles to protect against foreseeable impacts related to climate change, entails, *inter alia*, adopting "a range of regulations to discourage greenwashing and undue corporate influence in the political and regulatory sphere in this area." UN Working Group on Business and Human Rights, *Information Note on Climate Change and the Guiding Principles on Business and Human Rights*, paras. 7-8 (June 2023). Also of relevance is that the United Nations' High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities has urgently called for drawing a red line around greenwashing, emphasizing, *inter alia*, that non-state actors cannot claim to be net zero while continuing to build or invest in new fossil fuel supply, and cannot lobby to undermine ambitious government climate policies either directly or through trade associations or other bodies. The Group recommended States adopt clear, enforceable regulations to limit the potential for corporate greenwashing. *See* United Nations' High-Level Expert Group On The Net Zero Emissions Commitments Of Non-State Entities, *Integrity Matters: Net Zero Commitments By Businesses, Financial Institutions, Cities And Regions* (2022).

[387] Increasingly, when host States take climate action that allegedly adversely affects a foreign investor's returns, investors are using ISDS proceedings to sue the State for compensation, before unaccountable, often confidential arbitration panels. *See* Report of the UN Special Rapporteur on Human Rights and the Environment (David Boyd), *Paying Polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights*, UN Doc. A/78/168, paras. 16, 21, 23 (July 13, 2023); *see also* IISD, CIEL & ClientEarth, *Investor-State Dispute Settlement (ISDS) Mechanisms And The Right To A Clean, Healthy, And Sustainable Environment*, pp. 1-2 (2023).

[388] *See generally* Report of the UN Special Rapporteur on Human Rights and the Environment (David Boyd), *Paying Polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights*, UN Doc. A/78/168 (July 13, 2023).

[389] UNEP, *Adaptation Gap Report 2023* at p. XII.

[390] *Ibid.*

[391] *Ibid.* at p. XVI

and sustainable development in an integrated manner to increase their effectiveness in enhancing human and ecological well-being.[392]

iii. States should take appropriate measures to provide full reparation

157. Similar to measures considered in the preceding sub-section, the measures required for States to meet the obligation to provide full reparation are guided by well-established legal standards laid out in Part 1, and will be dependent on specific facts and appropriate to the injury suffered. As the Court noted in *Avena & Other Mexican Nationals*, "[w]hat constitutes 'reparation in an adequate form' clearly varies depending upon the concrete circumstances surrounding each case and the precise nature and scope of the injury, since the question has to be examined from the viewpoint of what is the 'reparation in an adequate form' that corresponds to the injury."[393]

158. As restitution most closely adheres to the general principle that the responsible State is bound to wipe out the legal and material consequences of its wrongful act by re-establishing the situation that would exist if that act had not been committed, it comes first among the forms of reparation.[394] In terms of restitution, in the context of environmental harm, it may not be possible, in many cases, to restore victims to their original situation, such as through return to their place of residence or return of their property.[395] In certain contexts, restitution, at least to the extent feasible, is possible and appropriate, for instance, in the case of an "inundation of an island, … building an artificial island may repair at least some of the harm."[396]

159. In the context of injuries due to climate change, restitution could mean either restoring the actual situation where possible (for example, rebuilding destroyed infrastructure in case of a natural disaster) or assisting victims in achieving a situation that is similar to the previous one (for example, planned relocation in the context of slow onset events that render an area inhabitable).[397] Restitution measures can restore key environmental functions on which victims depend, such as the guarantees of water protection and access to water and food ordered by the Inter-American Court of Human Rights in its landmark *Lhaka Honhat Association v. Argentina* decision.[398]

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[392] *See generally* IPCC, AR6, WGII, Chapter 18, https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_Chapter18.pdf.
[393] Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004 (I), p. 59, para. 119, *quoted in Pulp Mills*, 2010 I.C.J., para 274.
[394] ILC, *Draft Articles on State Responsibility, with commentaries*, at art. 35.
[395] *See* Frank Haldemann, Thomas Unger, and Valentina Cadelo, eds., *The United Nations Principles to Combat Impunity: A Commentary*, First edition, Oxford Commentaries on International Law (Oxford: Oxford University Press, 2018), at principle 34 [hereinafter UN Principles to Combat Impunity: A Commentary].
[396] Margaretha Wewerinke-Singh, *Remedies for Human Rights Violations Caused by Climate Change*, at p. 240; *see also* John Vidal, "Artificial Island Could Be Solution for Rising Pacific Sea Levels," *The Guardian* (Sept. 8, 2011), https://www.theguardian.com/environment/blog/2011/sep/08/artificial-island-pacific-sea-levels.
[397] ILC, *Draft Articles on State Responsibility, with commentaries*, at art. 35; *see also* Center for International Environmental Law & Amnesty International, *Human Rights as a Compass for Operationalizing the Loss and Damage Fund: A Submission*, p. 6 (Feb. 2023).
[398] IACtHR, *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, Judgment of February 6, 2020, (Merits, reparations and costs), paras. 332-333; *see also* Gino J. Naldi, "Reparations in the Practice of the African Commission on Human and Peoples' Rights," 14 Leiden Journal of International Law 682, at p. 685 (2001).

160. One of the ways in which restitution can be viewed in the context of climate reparations is through the lens of unjust enrichment, and States as well as individuals and communities, may potentially be able to frame reparations claims or programs on the basis of this principle.[399] One of the forms of restitution that may be owed by States that have contributed the most to the climate crisis and have benefited enormously financially from the activities that have caused cumulative emissions, including through profits of fossil fuel corporations and agroindustrial enterprises driving deforestation, headquartered in their countries, could be disgorgement of ill-gotten gains.

161. When full *restitution* is not achievable given irreversible climate-induced damage, States must ensure *compensation* is accessible as a critical component of effective remedy. Compensation, or monetary reparation, is the applicable means of reparation insofar as such damage is not made good by restitution.[400] Irreversible loss, and damage that cannot be repaired, are frequently a reality in climate change.[401] Providing compensation for both pecuniary harm[402] (such as damages to goods and trade, including homes destroyed or damaged as a result of an extreme weather or the capacity to earn a living) and non-pecuniary harm[403] (including physical and psychological injuries, as well as moral damage such as individual pain or suffering) can be a critical component of remedy. In the *Corfu Channel* case the responsible State compensated individuals from the injured State for non-pecuniary harm.[404]

162. While the law of state responsibility envisages reparations following wrongful conduct, in certain cases compensation can be awarded even in situations precluding wrongfulness, as recognized

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[399] There are nations and corporations which have gained enormously from acts and omissions worsening the climate crisis, *see* Noah S. Diffenbaugh & Marshall Burke, *Global warming has increased global economic inequality*, PNAS 116 (May 14, 2019), https://www.pnas.org/doi/10.1073/pnas.1816020116; while poorer countries with often negligible contributions to the climate crisis, have suffered disproportionately from the impacts. The gains continue to "accrue in the present," and the numbers are staggering. The oil and gas industry has delivered $2.8bn (£2.3bn) a day in pure profit for the last 50 years. Damian Carrington, "Revealed: oil sector's 'staggering' $3bn-a-day profits for last 50 years," *The Guardian* (July 21, 2022), https://www.theguardian.com/environment/2022/jul/21/revealed-oil-sectors-staggering-profits-last-50-years. Meanwhile climate change impacts have wiped out one-fifth of the wealth of the most climate vulnerable economies in the world in the last 2 decades. V20, *Climate Vulnerable Economic Loss Report: 2000-2019*, p. 3 (2022), https://thecvf.org/resources/publications/climate-vulnerable-economies-loss-report. While precise correlations are not always possible, it can be said that the structural drivers of the climate crisis, for example fossil fuel production and use, has unjustly enriched certain wealthy nations. Restitutionary remedy, "often termed "disgorgement of profit," is designed to strip a wrongdoer of ill-gotten gains. Unjust enrichment can be based on enrichment being obtained through wrongdoing but may also apply when there is not wrong-doing. In fact at the national level, always relevant to consider in interpreting international law, this principle of unjust enrichment has formed the foundational basis for multiple climate cases. *See generally* Sabin Center for Climate Change Law, State Law - Unjust Enrichment, https://climatecasechart.com/principle-law/state-law-unjust-enrichment/; Maytal Gilboa et al, "Climate Change as Unjust Enrichment," Georgetown Law Journal (forthcoming) (July 12, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4502750.

[400] ILC, *Draft Articles on State Responsibility, with commentaries*, at art. 36.

[401] *See* IPCC, AR6, WGII, Summary for Policymakers, at paras. SPM.B.1, SPM.B.1.2.

[402] ILC, *Draft Articles on State Responsibility, with commentaries*, at art. 36 cmt. paras. 3-5.

[403] ILC, *Draft Articles on State Responsibility, with commentaries*, at art. 36, cmt. paras. 18-19; *see also* Douglass Cassel, "The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights," in *Out of the Ashes: Reparations for Gross Violations of Human Rights*, M. Bossuyt et al. eds. (Intersentia, 2006).

[404] France-New Zealand Arbitration Tribunal, *Rainbow Warrior (N.Z. v. Fra.)*,82 I.L.R. 500 (1990), paras.122-127.

in the *Gabcikovo-Nagymaros* case.[405] In fact the ILC Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities (2006) considers that even if the relevant State is considered to have fully complied with its prevention duties, acts and omissions may occur, and have transboundary consequences that cause harm and serious loss to other States and their nationals, and in such cases, there remains an entitlement to prompt and adequate compensation.[406]

163. Compensation should not just draw on public resources. In light of the general obligation of States to protect human rights and the "polluter pays principle", States should adopt measures that seek to ensure those actors responsible for significant greenhouse gas emissions, such as fossil fuel or agroindustrial businesses, cover costs of emissions reduction, adaptation costs, and remediation of climate change-related violations. States should cooperate on the establishment of international financing mechanisms, such as a fossil fuel levy, or global climate pollution tax, that can secure contributions from polluters to cover human rights violations.[407]

164. Above and beyond the provision of direct compensation, States should also consider redressing harm affecting States or individuals and communities by creating more fiscal space to address climate impacts, through ensuring measures relating to debt and tax justice.[408]

165. While "compensation is perhaps the most commonly sought in international practice,"[409] and is vital in the climate context, not all climate harm can be addressed through monetary compensation and wherever possible, compensation should not be the sole focus. In the *Costa Rica v. Nicaragua* compensation judgment, Judge Cançado Trindade in his dissenting opinion in the case expressed that reparations must go beyond just monetary compensation and include other forms such as restitution, satisfaction, rehabilitation, and guarantees of non-repetition.[410]

166. States must ensure non-compensatory forms of reparation, including *measures of satisfaction*, as well as functional, psychological, social, and vocational *rehabilitation* which could involve holistic medical care as well as legal and social services. Satisfaction entails a broad category of reparations, applied in cases which cannot be redressed through restitution and compensation, often aiming to emphasize the wrongful nature of the harm, publicly and symbolically acknowledge suffering, and respect the dignity of those who have been harmed. This can include recognition of losses or official

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[405] *Gabčíkovo-Nagymaros Project*, at para. 151. *See also* ILC, *Draft Articles on State Responsibility, with commentaries*, at Chapter V.

[406] ILC, *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, with commentaries*, p. 59 (2006), https://legal.un.org/ilc/texts/instruments/english/commentaries/9_10_2006.pdf (notably, this text is without prejudice to the relevant ILC rules of State responsibility. p. 60).

[407] *See* David R. Boyd and Stephanie Keene, *Policy Brief #5. Mobilizing Trillions for the Global South: The Imperative of Human-rights based Climate Finance* (2023) (recommending adoption of a global pollution tax, debt cancellation, global wealth tax, and redirection of fossil fuel subsidies, consistent with the polluter pays principle and a human rights-based approach).

[408] SR on climate change, Report on the promotion and protection of human rights in the context of climate change, at paras. 92(g)(j); United Nations Human Rights Office of the High Commissioner, *Key Messages on Human Rights and Loss and Damage*, messages 3-4 (2023), https://www.ohchr.org/sites/default/files/documents/issues/climatechange/information-materials/2023-key-messages-hr-loss-damage.pdf.

[409] ILC, *Draft Articles on State Responsibility, with commentaries*, at art. 36, cmt. para. 2.

[410] *Costa Rica v. Nicar.* Separate Opinion of Judge Cançado Trindade, at para. 54.

apologies to those who have disproportionately suffered the impacts of climate change.[411] For those who experience trauma from climate-induced losses of their cultural heritage and traditions,[412] measures of satisfaction—which aim to recognize wrong, acknowledge suffering, and respect the dignity of victims[413]—can partly restore what cannot be compensated by money.[414] Just as fact-finding inquiries into perpetrators of human rights abuses may contribute to healing,[415] measures related to the "disclosure of the truth and punishment of wrongdoers serve to address the structural causes of climate change and resulting human rights violations."[416]

167. A holistic conception of rehabilitative remedies should be employed in the context of climate emergency, in order to encompass "all sets of processes and services … to allow a victim of serious human rights violations to reconstruct his/her life plan or to reduce, as far as possible, the violation that has been suffered."[417] The process of being uprooted due to climate change can cause severe psychological harm to the people who are displaced. For instance, the Guna Yala Indigenous People in Panama will be relocated to the mainland as their island has become unlivable due to the rising sea levels. They have recently expressed their feelings of nostalgia and sadness about leaving their home, as they had learned to live on the island and had many dreams and memories associated with it.[418] As recognized by the Working Group on Business and Human Rights, if people are displaced from their land due to environmental-related harm, holistic rehabilitation measures should also encompass "...a provision for a suitable alternative piece of land…because land can support livelihood for generations."[419]

iv. Mechanisms States may consider towards the establishment of international arrangements and funds to deliver climate reparations

168. The preceding paragraphs have sought to establish that the elements exist for a prima facie case of climate reparations to be made by States or peoples and individuals, depending on specific facts. The

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[411] ILC, *Draft Articles on State Responsibility, with commentaries*, at art. 37; CIEL & Amnesty, *Human Rights as a Compass for Operationalizing the Loss and Damage Fund: A Submission*, at p. 6.
[412] Chie Sakakibara, "Our Home is Drowning: Inupiat Storytelling and Climate Change in Point Hope, Alaska," 98(4) Geographical Review 456, at p. 471 (2008).
[413] In a more detailed way, these measures might include: a) the cessation of continuing violations, b) disclosure of truth, c) recovery of bodies, d) an official declaration to restore dignity, e) a public apology and acknowledgment of wrongdoing, e) sanctions of perpetrators, f) commemorations, or g) the inclusion of an account of the violations in educational material. *See* UN Principles to Combat Impunity: A Commentary, Principle 34.
[414] UNGA Report on Human Rights and Transnational Corporations, at page 15.
[415] *Id.*
[416] Margaretha Wewerinke-Singh, *Remedies for Human Rights Violations Caused by Climate Change*, at p. 242 (pointing out further that "While these forms of satisfaction have so far not been awarded in rights-based climate cases, the Inuit petition did invite the IACHR to hold a hearing to investigate the plaintiff's claims and prepare a report declaring the United States responsible for violation of its rights. The IACHR agreed to hold a hearing on the impacts of climate change on the enjoyment of human rights despite rejecting the petition.").
[417] Clara Sandoval, *Rehabilitation as a Form of Reparation under International Law*, Redress Trust, at p. 10 (Dec. 2009).
[418] "Una comunidad indígena se despide de su isla en el Caribe que será devorada por el mar debido al cambio climático," *Infobae* (Sept. 5, 2023), https://www.infobae.com/america/mundo/2023/09/05/una-comunidad-indigena-se-despide-de-su-isla-en-el-caribe-que-sera-devorada-por-el-mar-debido-al-cambio-climatico/
[419] UNGA Report on Human Rights and Transnational Corporations, p. 15.

modalities of providing reparations are also fact-dependent. While direct provision of reparations from responsible States to affected States or Peoples and individuals, including through national level reparation programs, is one way forward, multilateral arrangements are another pathway to consider, given the scale of climate devastation.

169. The ILC's 2006 Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities has expressly considered the establishment of international arrangements and funds if only global efforts can tackle a problem.[420] In the last 70 years, numerous international arrangements and funds,[421] including, *inter alia*, the comprehensive reparation programs for Holocaust survivors,[422] the United Nations Compensation Commission (UNCC) to process claims and pay compensation for losses and damage suffered as a result of Iraq's unlawful invasion and occupation of Kuwait in 1990-1991,[423] and the International Oil Pollution Compensation Funds (IOPC Funds),[424] which provides financial compensation for oil pollution damage, have been established to create legal frameworks for liability and compensation regarding human rights and environmental harm that can provide foundational guidance in relation to arrangements States could consider to deliver climate reparations.

170. The Loss and Damage Fund, referenced in paragraph 106 above, is currently not rooted in an understanding of remedy or reparations, and its present model of voluntary pledges without any obligation for countries to pay limits the Fund's ability to provide effective remedy. However, if due to litigation or negotiations, for example, specific States or groups of States were to provide climate reparations, including through corporations being held accountable to pay their share of remediation costs, it could be a possibility to consider routing such redress measures via the Loss and Damage Fund. This would depend on the Fund's further operationalization, how it will function in practice, and relevant modalities such as community access to funding and meaningful and effective participation of marginalized groups.

171. The intent here is to simply illustrate that there are different means available to States to provide reparations. While the precise nature of delivery will depend on the facts of a specific situation, reparations-related redress measures must be rooted in legal obligations, in particular human rights

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[420] ILC, *Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, with commentaries* (2006), https://legal.un.org/ilc/texts/instruments/english/commentaries/9_10_2006.pdf, at Principle 7.

[421] Also relevant: International Convention on Civil Liability for Bunker Oil Pollution Damage, Mar. 27, 2001, 40 I.L.M. 1493 (entered into force Nov. 21, 2008); International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, May 3, 1996, 35 I.L.M. 1406; Nagoya-Kuala Lumpur Supplementary Protocol, Oct. 15, 2010, UNEP/CBD/BS/COP-MOP/5/17, Report of the Fifth Meeting of the Conference of the Parties to the Convention on Biological Diversity Serving as the Meeting of the Parties to the Cartagena Protocol on Biosafety, Decision BS-V/11, 62-71.

[422] Ariel Colonomos and Andrea Armstrong, *'German Reparations to the Jews after World War II: A Turning Point in the History of Reparations'*, in Pablo de Greiff (ed.), The Handbook of Reparations (Oxford, 2006; online edn, Oxford Academic, 1 May 2006). *See also*, *No. 2137 Israel and Federal Republic of Germany Agreement* (with schedule, annexes, exchanges of letters and protocols), signed at Luxembourg on September 10, 1952, https://treaties.un.org/doc/Publication/UNTS/Volume%20162/volume-162-I-2137-English.pdf.

[423] For more information, *see* United Nations, "Security Council Unanimously Adopts Resolution Confirming United Nations Compensation Commission Has Fulfilled Its Iraq-Kuwait Mandate," SC/14801 (Feb. 22, 2022), https://press.un.org/en/2022/sc14801.doc.htm.

[424] For more information *see:* https://iopcfunds.org/.

principles, including by ensuring access to information, meaningful participation, and access to justice, and advancing substantive equality, and consider lessons from existing mechanisms.

Conclusion

172. The legal elements of an internationally wrongful act and consequent State responsibility to other States, peoples, and individuals affected, can be established with respect to State action and inaction that has, over time, generated cumulative greenhouse gas emissions leading to significant transboundary harm and violations of human rights. For the reasons above, it would be a departure from the Court's firmly established jurisprudence regarding States' secondary obligations were it not to find that legal responsibility attaches to breaches of international obligations to prevent harm to the climate system, that States are obliged to cease their internationally wrongful conduct, and that reparations are owed for resultant injuries.

MEMO ON THE LEGAL OBLIGATIONS OF STATES IN RELATION TO FOSSIL FUELS AS THE KEY DRIVER OF CLIMATE CHANGE

TABLE OF CONTENTS

I. Introduction

1. This section of our submission examines one dimension of States' international obligations to protect the climate system—the duty to minimize production and use of fossil fuels: oil, gas, and coal. Rooted in longstanding customary and treaty-based obligations to prevent significant transboundary environmental harm and foreseeable human rights violations, that duty has both horizontal and vertical effect. A State's obligation to curtail fossil-fueled emissions runs to other States and the international community, as well as to peoples and individuals within States' jurisdiction or affected by conduct subject to their jurisdiction and control.

2. First, the Court cannot address States' duties with regard to climate change without addressing States' obligations with regard to the known *primary cause* of climate change: fossil fuels. The science is unequivocal that fossil fuels are the overwhelming source of the greenhouse gas (GHG) emissions driving climate change and resultant injuries to people, the environment, and the very existence of some States. The fact of the relationship between fossil fuels and climate change cannot be ignored or omitted; it is an indispensable part of the context for and analysis of the legal questions before the Court.

3. Second, States' obligations under multiple sources of international law require action to curtail the production and use of fossil fuels—given their actual and foreseeable harms to the atmosphere (a shared resource), to people and the environment in States around the world, and to some States themselves. These obligations include the duty under customary international law to prevent and minimize the risk of significant transboundary environmental harm (sometimes called the transboundary harm or preventive principle), which has been repeatedly upheld by the International Court of Justice and enshrined in numerous international legal instruments. States have a related obligation under international human rights law to protect against foreseeable violations of human rights or threats thereof resulting from conduct under their jurisdiction and control, including threats due to environmental degradation such as climate change. The preventive principle is also enshrined in the United Nations Convention on the Law of the Sea (UNCLOS), which obliges States to prevent, reduce, and control all forms of marine pollution—the definition of which encompasses GHG emissions, which have deleterious effects on the marine environment.

4. Those preventive duties under customary and conventional law formed the background to and foundation for the international climate agreements, the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement, which do not limit or supplant those long-standing obligations, but build upon and complement them. The UNFCCC and Paris Agreement oblige States to prevent dangerous anthropogenic interference in the climate system, including through the adoption and implementation of progressively more ambitious national plans to reduce greenhouse gas emissions at a rate capable of limiting warming to 1.5°C, with developed countries "taking the lead in combating climate change and adverse effects thereof." Such reduction of greenhouse gas emissions is not possible without the rapid and equitable phaseout of fossil fuel production and use.

5. Third, as part of States' due diligence pursuant to their prevention obligations, States must, at minimum, consider the foreseeable emissions resulting from fossil fuel activity under their jurisdiction or control regardless of where those emissions occur. GHGs do not respect borders. And certain activity, such as the production of fossil fuels, inevitably leads to GHG emissions when the fossil fuels produced are used as intended. Those emissions and their contribution to climate change and resultant harm are foreseeable regardless of where the GHGs are released. This entails an obligation to assess all the foreseeable emissions resulting from fossil fuel activity prior to engaging in, authorizing, or supporting it, through finance or otherwise. Only an accurate and comprehensive assessment of all foreseeable climate impacts of fossil fuel activity will permit States to conform their conduct to their legal obligations.

6. Fourth, State conduct that increases the risk of significant transboundary harm from fossil-fueled climate change is presumptively contrary to the above-mentioned legal duties to prevent such harm and foreseeable human rights violations, as well as applicable treaty-based obligations to reduce GHG emissions in line with long-term temperature targets. In the context of the mounting climate emergency, both State inaction and State action on fossil fuels can increase the risk of harm. That is, the failure of States with high, cumulative and current emissions to reduce fossil fueled emissions sufficiently steeply and quickly increases the risk of significant transboundary harm and human rights violations due to climate change. Because emissions are cumulative, inaction that perpetuates status quo levels of fossil fuel emissions only compounds climate impacts. Likewise, affirmative acts of States that increase the production and use of, or reliance on, fossil fuels—the driver of the climate crisis—by engaging in, authorizing, or financing fossil fuel activity, increases the risk of significant transboundary harm and human rights violations, and are presumptively contrary to State obligations. The burden is on the State that would pursue or continue pursuing an activity, the consequences of which are unequivocally harmful to the global atmosphere and environment, States, and populations, present and future, to justify such activity.

7. Fifth, in accordance with the precautionary principle, States cannot claim scientific uncertainty as a reason to delay effective climate action and must prioritize measures proven to reduce GHG emissions from fossil fuels—namely, by curtailing their production and use—over speculative ones.

8. These State duties to curb the primary cause of climate change and prevent its foreseeable consequences are not new. They date at least as far back as a State's knowledge and foresight of the causes and consequences of climate change, and extend as far as the State's jurisdiction over fossil fuel production and use. The present climate emergency is a result of past and continuing failures of States to adhere to those duties over time—chiefly, industrialized States whose conduct led directly or indirectly to the majority of cumulative fossil fuel emissions. Those breaches trigger legal consequences under both the law of State responsibility and human rights law. Accordingly, in addition to preventing and minimizing further risk of fossil-fueled climate harm today, those States' whose direct or indirect production and use of fossil fuels contributed materially to cumulative emissions over time also have legal responsibility to cease their violations and provide reparation for resultant injuries, as discussed in the second memorandum of this submission [*See* CIEL, Memo on the Legal Consequences for States of Internationally Wrongful Acts Causing

Harm to the Climate System, in Written Statement submitted to the ICJ in the climate advisory proceedings. March 2024].

II. The Court cannot address States' duties with regard to climate change without addressing States' obligations with regard to the primary cause of climate change: fossil fuels

9. Climate change is unequivocally a form of transboundary harm causing significant injury around the world. 2023 was the hottest year on record.[1] Across the globe, in addition to extreme temperatures, there have been catastrophic wildfires, increased hurricanes and typhoons, and droughts—along with ongoing impacts like melting ice sheets, sea level rise, increasing ocean temperatures, and ocean acidification.[2] In the most recent decade (2011-2020), global temperature rise reached 1.1°C above pre-industrial levels.[3] "Global greenhouse gas emissions have continued to increase, with unequal historical and ongoing contributions"[4] and the current levels of warming, approximately 1.2-1.3°C,[5] are already adversely impacting the environment and human rights, including, *inter alia*, the rights to life, to a clean, healthy, and sustainable environment, to food, and to water. Those impacts will only worsen with every additional fraction of a degree. Warming of 1.5°C is not safe for most people and ecosystems.[6] Scientists have issued increasingly dire warnings about the impacts of continued temperature rise, cautioning that any increase above 1.5°C, even if

[1] National Oceanic and Atmospheric Administration (NOAA), U.S. Dept. of Commerce, "2023 was the world's warmest year on record, by far" (Jan. 12, 2024), https://www.noaa.gov/news/2023-was-worlds-warmest-year-on-record-by-far; NASA, "NASA analysis confirms 2023 as Warmest Year on Record (Jan. 12, 2024), https://www.nasa.gov/news-release/nasa-analysis-confirms-2023-as-warmest-year-on-record/; Raymond Zhong & Keith Collins, "See How 2023 Shattered Records to Become the Hottest Year," *The New York Times* (Jan. 9, 2024), https://www.nytimes.com/2024/01/09/climate/2023-warmest-year-record.html.

[2] Intergovernmental Panel on Climate Change (IPCC), 2023: Summary for Policymakers, in, *Climate Change 2023: Synthesis Report. A Report of the Intergovernmental Panel on Climate Change. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, H. Lee and J. Romero (eds.)], paras. A.2-A.2.7, B.1.1, B.1.3-B.1.4, B.2, figs. SPM.1, SPM.4 (2023) [hereinafter IPCC, AR6, Synthesis Report: Summary for Policymakers].

[3] *Ibid.* at para. A.1.

[4] *Ibid.*

[5] NASA, Global Climate Change: Vital Signs of the Planet: https://climate.nasa.gov/vital-signs/global-temperature (noting that the Earth was about 1.36 degrees Celsius warmer in 2023 than in the late 19th century pre-industrial average; Rebecca Lindsey & Luann Dahlman, Climate Change: Global Temperature (Jan. 18, 2024), https://www.climate.gov/news-features/understanding-climate/climate-change-global-temperature; Raymond Zhong, "Have We Crossed a Dangerous Warming Threshold? Here's What to Know., *The New York Times* (Feb. 8, 2024), https://www.nytimes.com/2024/02/08/climate/global-warming-dangerous-threshold.html (stating that while 2023 was approximately 1.5°C warmer, most estimates put average warming between 1.2°C and 1.3°C warmer than pre-industrial levels).

[6] IPCC, *2018: 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*, Technical Summary, p. 44 (V. Masson-Delmotte et al, eds., Cambridge University Press, 2018) [hereinafter IPCC, 2018 Special Report, Global Warming of 1.5°C] (The IPCC's Special Report on Warming of 1.5°C explicitly states that "warming of 1.5°C is not considered 'safe' for most nations, communities, ecosystems and sectors and poses significant risks to natural and human systems as compared to the current warming of 1°C (high confidence)," especially for "disadvantaged and vulnerable populations."); IPCC, 2018 Special Report, Global Warming of 1.5°C, Ch. 5 ("Sustainable Development, Poverty Eradication and Reducing Inequalities"), at 447.

temporary, will cause further irreversible harm and catastrophic consequences for people and ecosystems.[7] It will also increase the frequency, likelihood, and intensity of extreme weather events, as well as the associated harm.[8] Human rights experts[9] and domestic courts[10] have similarly

[7] IPCC, *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), Summary for Policymakers [hereinafter IPCC, AR6, WGII: Summary for Policymakers], at para. B.3; *see also* IPCC, AR6, WGII, at vii ("The assessment underscores the importance of limiting global warming to 1.5°C if we are to achieve a fair, equitable and sustainable world."); IPCC, AR6, WGII, Technical Summary, at para. C.1.2.

[8] IPCC, AR6, WGII: Summary for Policymakers, at para. B.1.

[9] *See, e.g.*, UN General Assembly (UNGA), Resolution adopted by the General Assembly on the human right to a clean, healthy and sustainable environment, 28 July 2022, U.N. Doc. A/RES/76/300, at 2 (acknowledging that climate impacts interfere with the enjoyment of the right to a clean, healthy, and sustainable environment and that environmental damage "has negative implications, both direct and indirect, for the effective enjoyment of all human rights"); Human Rights Committee, General Comment No. 36, U.N. Doc. CCPR/C/CG/36 (Sept. 19, 2019), at para. 62 (recognizing that "[e]nvironmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life"); Committee on Economic, Social and Cultural Rights (CESCR), Statement on Climate and the Covenant (Oct. 8, 2018), https://www.ohchr.org/en/statements/2018/10/committee-releases-statement-climate-change-and-covenant; Committee on the Rights of the Child, *General Comment No. 26 (2023) on children's rights and the environment*, U.N. Doc. CRC/C/GC/26, (Aug. 22, 2023), at para. 8 (stating that a "clean, healthy and sustainable environment (...) is necessary for the full enjoyment of a broad range of children's rights. Conversely, environmental degradation, including the consequences of the climate crisis, adversely affects the enjoyment of these rights, in particular for children in disadvantaged situations or children living in regions that are highly exposed to climate change."); Inter-American Court of Human Rights (IACtHR), *Advisory Opinion OC-23/2017 on the Environment and Human Rights* (2017), at para. 47 [hereinafter IACtHR, *Advisory Opinion OC-23/2017*]; Inter-American Commission on Human Rights, *Resolution No. 3/2021, Climate Emergency: Scope of Inter-American Human Rights Obligations*, (2021), at 8 ("Emphasizing that climate change is one of the greatest threats to the full enjoyment and exercise of human rights of present and future generations, to the health of ecosystems and all species that inhabit the planet."); 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," U.N. Doc. HRI/2019/1 (May 14, 2020, originally released Sept. 16, 2019) [hereinafter UN Human Rights Treaty Bodies' joint statement on human rights and climate change], at para. 5; Joint Statement of the United Nations Special Procedures Mandate Holders on the occasion of the 24th Conference of the Parties, "Climate Change and Human Rights" (Dec. 6, 2018), https://www.ohchr.org/en/statements/2018/12/joint-statement-united-nations-special-procedures-mandate-holders-occasion-24th; Human Rights Council, *Resolution 53/6: Human Rights and Climate Change*, U.N. Doc. A/HRC/RES/53/6 (July 19, 2023) ("Emphasizing that the adverse effects of climate change have a range of implications, both direct and indirect, that increase with greater global warming, for the effective enjoyment of human rights," and stressing the importance of addressing climate change and its adverse consequences). Since 2008, the Human Rights Council has adopted more than ten resolutions on Human Rights and Climate Change highlighting the impacts of climate change on the realization of human rights. *See* U.N. Human Rights Office of the High Commissioner, Human Rights Council resolutions on human rights and climate change, https://www.ohchr.org/en/climate-change/human-rights-council-resolutions-human-rights-and-climate-change.

[10] *See, e.g.*, *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) (Ger.), at paras. 20-28, 148 (recognizing that the dangers of climate change are impacting present and future generations and that there are tipping points beyond which consequences for people are even greater); Supreme Court of the Netherlands, *The State of the Netherlands v. Urgenda*, Case. No. 19/00135 (Engels) (Dec. 20, 2019) (English translation) [hereinafter *Urgenda*], at paras. 4.2-4.8, 5.6.2 (acknowledging that climate change is a "real and immediate risk"); *Shrestha v. Office of the Prime Minister et al.*, Nepal Supreme Court, Decision no. 10210, NKP Part 61, Vol. 3, p. 11 (2018) (Nepal) (unofficial translation) (noting the impacts that climate change has caused, including irreversible harms to nature, and the imminent threat to future generations); *Generaciones Futuras v. Minambiente*, Supreme Court of

recognized the harm associated with increasing temperature rise. Climate change induces not only material and moral injuries to people and the planet, but also to the sovereignty and territorial integrity of States.

10. The primary cause of climate change is known. Climate change is the result of the cumulative emission of GHGs—heat-trapping gases such as carbon dioxide (CO_2) and methane—over time, which has increased their concentration in the atmosphere.[11] That alteration of the atmosphere, a form of atmospheric degradation,[12] has led to increased average global temperatures, increased absorption of CO_2 in the oceans, and myriad other adverse impacts on the global climate system as described above. The primary source of the GHG emissions over time is human activity—and overwhelmingly the production and use of fossil fuels: oil, gas, and coal.[13]

11. Without effectively preventing, reducing, and controlling its primary cause, climate change will only worsen, increasing harm and the risk thereof to States, peoples, and individuals. Absent effective measures to rapidly reduce the production and use of fossil fuels, the world will experience even more drastic, and further irreparable transboundary harm. Effective mitigation requires steep

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Colombia, STC. 4360-2018 (Apr. 5, 2018) (Col.) (unofficial translation by Dejusticia who supported the plaintiffs), at 34-37 (recognizing the dangers of climate change, including the irreversibility of the damage); *Ashgar Leghari v. Federation of Pakistan*, (2015) W.P. No. 25501/2015 (Lahore High Court) (Pak.) (stating "Climate Change is a defining challenge of our time and has led to dramatic alterations in our planet's climate system.").

[11] IPCC, AR6, Synthesis Report: Summary for Policymakers, at para. A.1.

[12] International Law Commission (ILC), *Draft Guidelines on the Protection of the Atmosphere, with commentaries*, U.N. Doc. A/76/10 (2021), at Guideline 1(c) cmt, paras. 6, 12, 13 [hereinafter ILC, *Draft Guidelines on the Protection of the Atmosphere*] (explaining that "'atmospheric degradation' means the alteration by humans, directly or indirectly, of atmospheric conditions having significant deleterious effects of such a nature as to endanger human life and health and the Earth's natural environment.").

[13] IPCC, AR6, Synthesis Report: Summary for Policymakers, at paras. A.1, A.1.4; IPCC, 2021: *Climate Change 2021: The Physical Science Basis*. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 676 (V. Masson-Delmotte et al (eds.), 2021) [hereinafter IPCC, AR6, WGI]; UN Env't Programme et al, *Emissions Gap Report 2021: The Heat Is On – A World of Climate Promises Not Yet Delivered* (UNEP eds. 2021) [hereinafter UNEP, *Emissions Gap Report 2021*]; IPCC, 2014: Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policymakers, p. 5 (R.K. Pachauri & L.A. Meyer, eds. 2014) [hereinafter IPCC, AR5, Synthesis Report]; Richard Heede, *Tracing Anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854-2010*, 122 Climatic Change 229 (2014); U.S. Environmental Protection Agency, Causes of Climate Change, https://www.epa.gov/climatechange-science/causes-climate-change ("Burning fossil fuels changes the climate more than any other human activity."); 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 (UN Special Procedures mandate holders stating that "Fossil fuels are the largest source of greenhouse gas emissions, which have unequivocally caused the climate crisis"); *Juliana v. United States*, 947 F.3d 1159, 1167 (9th Cir. 2020) (noting that the US government has not challenged the factual claims of the youth plaintiffs, which were based on the government's permitting, authorizing, and subsidizing fossil fuels violated their rights due to climate change); *Juliana v. United States*, Civ. No. 6:15-cv-01517-AA (D. Or., 2023), at 2-3 (acknowledging that the climate crisis threatens lives and that burning fossil fuels are the driving force and reiterating the 9th Circuit's holding that the government did not dispute the plaintiffs' factual claims); *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (acknowledging that the EPA had the authority to regulate greenhouse gases in new vehicles even if the Congresses that drafted the relevant section of the Clean Air Act "might not have appreciated the possibility that burning fossil fuels could lead to global warming" at the time of drafting, but that future scientific developments might impact the regulation); *Urgenda*, at paras. 2.1, 4.2; *Neubauer*, at para. 18 (acknowledging that "Atmospheric concentrations of CO_2 have increased by 40% relative to pre-industrial times due primarily to fossil fuel emissions").

reductions of GHG emissions, which in turn requires rapid phase out of all fossil fuels.[14] Continuing business-as-usual will result in global greenhouse gas emissions significantly higher than levels consistent with keeping temperature rise below 1.5°C, the level at which States agreed to aim to limit warming under the Paris Agreement.[15] According to the Intergovernmental Panel on Climate Change (IPCC), "Projected CO_2 emissions from existing fossil fuel infrastructure without additional abatement would exceed the remaining carbon budget for 1.5°C (50%) (*high confidence*)."[16] Even limiting global warming to 2°C "will leave a substantial amount of fossil fuels unburned and could strand considerable fossil fuel infrastructure."[17] That means that effective mitigation requires not only a halt to the development of new oil, gas, and coal, but closure of existing fossil fuel facilities and their replacement with renewable energy, energy efficiency measures, and in some cases, energy demand reduction.[18] This is a critical decade for mitigation action; taking near-term (pre-2030) action to decrease greenhouse gases is essential to keep global temperature rise to below 1.5°C and avoid the associated adverse impacts.[19] "All global modelled pathways that limit warming to 1.5°C (>50%) with no or limited overshoot, and those that limit warming to 2°C (>67%), involve rapid and deep and, in most cases, immediate greenhouse gas emissions reductions in all sectors this decade."[20]

12. Increasing reliance on fossil fuels—the root cause of climate change—by expanding their production and use will, as is self-evident, worsen the crisis, increasing adverse impacts and the risk thereof. Yet government plans and projections would boost production of coal through 2030 and of oil and gas through mid-century.[21] Such actions would generate more than twice the amount of fossil fuels in 2030 than would be consistent with a 1.5°C pathway this decade.[22]

13. As elaborated further below, States have long-standing obligations under international law to prevent significant transboundary environmental harm and minimize the risk of such harm, and to refrain from causing or contributing to and to protect against foreseeable violations of human rights. Those obligations and principles also underpin and are enshrined in international climate agreements. In the face of the actual and foreseeable consequences of climate change for the environment and human rights, these legal obligations require States to take action to curtail its known chief cause: fossil fuels.

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[14] International Energy Agency (IEA), *Net Zero Roadmap: A Global Pathway to Keep the 1.5C Goal in Reach, 2023 Update*, pp. 13, 16, 75-76 (2023); IEA, *Net Zero by 2050: A Roadmap for the Global Energy Sector* (Oct. 2021), at 18-21, 100-05; IPCC, AR6, Summary for Policymakers, at para. B.6, Fig. SPM.5.
[15] Paris Agreement to the United Nations Framework Convention on Climate Change, art. 2(1)(a), Dec. 12, 2015, 3156 U.N.T.S. (entered into force Nov. 4, 2016) [hereinafter Paris Agreement].
[16] IPCC, AR6, Synthesis Report: Summary for Policymakers, at para. B.5.
[17] IPCC, AR6, WGIII, Summary for Policymakers, at para. C.4.4.
[18] UNEP Emissions Gap Report, pp. xxi-xxiii; IEA, *Net Zero Roadmap: A Global Pathway to Keep the 1.5C Goal in Reach, 2023 Update*, pp. 13, 16, 75-76.
[19] IPCC, AR6, Synthesis Report: Summary for Policymakers, at paras. C-1-C.3, fig. SPM.7.
[20] *Ibid.* at para. B.6.
[21] Stockholm Environment Institute, Climate Analytics, E3G, IISD & UNEP, *The Production Gap: Phasing down or phasing up? Top fossil fuel producers plan even more extraction despite climate promises* (2023), at 2, https://productiongap.org/wp-content/uploads/2023/11/PGR2023_web_rev.pdf.
[22] *Ibid*.

14. As with any other matter that the Court is asked to address, certain incontrovertible facts pertaining to the question before the Court are indispensable to its legal analysis. Just as this Court could not address the legality of the threat or use of nuclear weapons without considering known facts about their radioactivity,[23] it cannot address States' duties with regard to climate change without addressing the known facts about the causes and consequences of climate change. In the *Nuclear Weapons* Advisory Opinion, this Court considered the unique characteristics of nuclear weapons and the foreseeable consequences of their use, including the release of radiation that "would affect health, agriculture, natural resources, and demography over a very wide area" as well as future generations and environment and food and marine ecosystems.[24] That fossil fuels are the primary cause of climate change, and that their continued production and use is driving and will foreseeably exacerbate global warming and its adverse impacts on the environment and human rights, is likewise an indispensable fact for the Court's analysis here.

III. The preventive principle requires States to take climate mitigation action including action to curtail fossil fuels

15. Pursuant to the duties to prevent significant transboundary environmental harm and foreseeable violations of human rights, States have an obligation to consider the foreseeable impacts of the greenhouse gas emissions generated by fossil fuel activities that they undertake, support, or authorize, regardless of where those emissions occur, and to take measures to prevent or minimize them.

A. States must take action to prevent and minimize the risk of foreseeable harm to the environment and human rights from fossil fueled climate change

i. The duty to prevent and minimize the risk of significant transboundary environmental harm obliges States to constrain fossil fuel activity within their jurisdiction or control

16. The duty to prevent significant transboundary harm and minimize the risk thereof is a long-standing principle of customary international law. Starting with the *Trail Smelter* arbitration,[25] the duty to prevent significant transboundary environmental harm has been reiterated time and again, including

[23] The request for the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons did not mention radiation or other incontrovertible facts about nuclear weapons and their consequences, yet the Court relied on and named such facts in its Advisory Opinion. *See* UN General Assembly, Resolution 49/75K, Request for an Advisory Opinion from the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons (Dec. 15, 1994); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8) [hereinafter *Nuclear Weapons Advisory Opinion*], at paras. 35-36 (referencing the dangers of radiation and noting that "it is imperative for the Court to take account of the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come."). The fact that the request for an advisory opinion on climate change does not mention fossil fuels, similarly should not prevent the Court from doing so.

[24] *Nuclear Weapons Advisory Opinion*, 1996 I.C.J. at paras. 35-36.

[25] *Trail Smelter Arbitration* (U.S. v. Can.), 3 R.I.A.A. 1905 (1941), at 1905-82.

in the 1972 Stockholm Declaration[26] and 1992 Rio Declaration,[27] in numerous multilateral environmental agreements, including the UNFCCC,[28] and by international courts.[29] As this Court has stated, it is "part of the corpus of international law relating to the environment."[30] Every State has a duty "not to allow knowingly its territory to be used for acts contrary to the rights of other States,"[31] and must do what it can to avoid engaging in or allowing activities in its territory or an area it controls that will cause significant transboundary harm or harm to a shared resource.[32] So while States have a right to exploit their own resources, that right is checked and limited by their duty not to knowingly cause "damage to the environment of other States or of areas beyond the limits of national jurisdiction."[33]

17. The transboundary harm principle encompasses not just cross-border damage between neighboring States but harm to the global commons. While the transboundary harm principle originated in relation to activities that caused harm to a neighboring State, it has evolved to apply to harm that is caused by activities in a State of origin to another State or any area beyond national control—regardless of whether there is a shared border between the State of origin and the area of harm.[34]

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[26] Stockholm Declaration on the Human Environment, 11 I.L.M. 1416 (1972), at principle 21 ("States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction") [hereinafter Stockholm Declaration].

[27] Rio Declaration on Environment and Development, 31 I.L.M. 874 (1992), at principle 2 ("States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction") [hereinafter Rio Declaration].

[28] United Nations Framework Convention on Climate Change, pmbl., May 9, 1992, 1771 U.N.T.S. 107 (entered into force Mar. 21, 1994) [hereinafter UNFCCC]; *see also* Stockholm Convention on Persistent Organic Pollutants, pmbl., May 22, 2001, 2256 U.N.T.S. 119 (entered into force May 17, 2004); United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, pmbl., June 17, 1994, 1954 U.N.T.S. 3 (entered into force Dec. 26, 1996); United Nations Convention on the Law of the Sea, art. 194(2), Dec. 10, 1982, 1833 U.N.T.S. 3 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

[29] *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bol.)*, Judgment, 2002 I.C.J. Rep. 614 (Dec. 1), at para. 99; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, 2015 I.C.J. Rep. 665 (Dec. 16), at paras. 104, 118 [hereinafter *Costa Rica v. Nicar.*]; *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. 14 (Apr. 20), at para. 101 [hereinafter *Pulp Mills*]; *Case Concerning the Gabčíkovo-Nagymaros Project* (*Hung. v. Slovk.*), Judgement, 1997 I.C.J. 7 (Sept. 25), at para. 53 [hereinafter *Gabčíkovo-Nagymaros Project*]; *Nuclear Weapons Advisory Opinion*, at para. 29; IACtHR, *Advisory Opinion OC-23/17*, paras. 95-103; Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands, decision of 24 May 2005, 27 R.I.A.A. 35, at para. 222.

[30] *Nuclear Weapons Advisory Opinion*, 1996 I.C.J. at para. 29.

[31] *The Corfu Channel Case (U.K. v. Albania)*, Judgment of April 9th, 1949, I.C.J. Rep. at. 22; *see also Dispute over the Status and Use of the Waters of the Silala*, 2022 I.C.J. at para. 99.

[32] *See Dispute over the Status and Use of the Waters of the Silala*, 2022 I.C.J. at para. 99; *Costa Rica v. Nicar.*, 2015 I.C.J. at paras. 104, 118; *Pulp Mills*, 2010 I.C.J. at para. 101; *Gabčíkovo-Nagymaros Project*, 1997 I.C.J. at para. 53; *Nuclear Weapons Advisory Opinion*,1996 I.C.J. at para. 29.

[33] Stockholm Declaration, at principle 21; Rio Declaration, at principle 2.

[34] *See Dispute over the Status and Use of the Waters of the Silala*, 2022 I.C.J. at para. 99 (citing *Corfu Channel*, 1949 I.C.J. at p. 22; *Pulp Mills*, 2010 I.C.J. Reports, at para. 101 (citing *Nuclear Weapons Advisory Opinion*, 1996 I.C.J. at para. 29); *Costa Rica v. Nicar.*, 2015 I.C.J. at para. 104) for the proposition that "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States"); *Nuclear Tests, Request of an*

Areas beyond national jurisdiction necessarily include the climate, atmosphere, high seas, and other global commons.[35]

18. This obligation applies to a broad range of conduct. The International Law Commission (ILC) has not defined what activities may fall under this obligation given that it would be non-exhaustive and may change.[36] The duty to prevent and minimize the risk of transboundary harm applies not only to unlawful activities, but also to activities that are not otherwise prohibited under international law and that may cause significant transboundary harm.[37] Such activities could include the States' own conduct—acts and omissions directly attributable to the State, such as permitting, financing,[38] or enacting (or failing to enact) regulations and legislation—as well as the conduct of non-State actors (private entities) that the State has jurisdiction and authority to regulate.[39] Thus, the State of origin, understood to be the State in which the conduct or activities that cause or contribute to the harm are undertaken or planned or the State that has jurisdiction or control over the conduct, has the responsibility to prevent and minimize the risk of harm.[40]

Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) case, 1995 I.C.J. 288, dissenting opinion by Judge Weeramantry, at 346-47 (noting in his assessment of principle to not cause harm that "no nation is entitled by its own activities to cause damage to the environment of any other nation") [hereinafter *1995 Nuclear Tests case*]; International Law Commission, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries*, Article 2(c) & corresponding commentary (2001) [hereinafter ILC, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*]; *see also* IACtHR, *Advisory Opinion OC-23/17*, at para. 96 (identifying climate change as transboundary harm: "Many environmental problems involve transboundary damage or harm. 'One country's pollution can become another country's human and environmental rights problem, particularly where the polluting media, like air and water, are capable of easily crossing boundaries.' The prevention and regulation of transboundary environmental pollution has resulted in much of international environmental law, through bilateral, regional or multilateral agreements that deal with global environmental problems such as ozone depletion and climate change.").

[35] *See, e.g.*, UNEP Division of Environmental Law and Conventions, IEG of the Global Commons, https://cil.nus.edu.sg/wp-content/uploads/2015/12/Ses4-7.-UNEP-Division-of-Environmental-Law-and-Conventions-Global-Commons.pdf ("The 'Global Commons' refers to resource domains or areas that lie outside of the political reach of any one nation State. Thus international law identifies four global commons namely: the High Seas; the Atmosphere; Antarctica; and, Outer Space."); IUCN, *World Conservation Strategy* (1980), at 58 https://portals.iucn.org/library/efiles/documents/WCS-004.pdf; Oxford Reference, Global Commons, https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095855190.

[36] ILC, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities* (2001) at art. 1 cmt. paras. 2-4.

[37] *Ibid.*; *see also* IACtHR, *Advisory Opinion OC-23/17*, at para. 103.

[38] *See* André Nollkamper et al, *Guiding Principles on Shared Responsibility in International Law*, 31 European Journal of International Law 1 (2020), at principle 2, cmt. para. 8 (noting that, in a case concerning the planned construction of a tourist resort in breach of the Berne Convention on European Wildlife and Natural Habitats, the Convention Secretariat took the position that "the funding provided by France for the tourist resort would engage the international responsibility of the latter state").

[39] *See Corfu Channel*, 1949 I.C.J. at 22 (iterating that it is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States"); *see also* Stockholm Declaration, at principle 21; Rio Declaration, at principle 2 (noting that States have "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"); IACtHR, *Advisory Opinion OC-23/17*, at paras. 102-104; Human Rights Committee, *General Comment No. 36 - Article 6: Right to life*, U.N. Doc. CCPR/C/GC/36, para. 22 (Sept. 3, 2019) [hereinafter HRC, General Comment No. 36].

[40] *See* Stockholm Declaration, at principle 21; Rio Declaration, at principle 2; ILC, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, art. 1, cmt. paras. 7-12, art. 2(d); *see also Costa Rica v. Nicar.*, 2015

19. The preventive obligation applies to "significant transboundary harm."[41] There is not a single, universal definition of what "significant" means in the context of transboundary harm; it requires a case-by-case analysis.[42] However, courts and international scholars have considered what level of harm reaches that threshold. For example, the tribunal in *Trail Smelter* determined that States do not have the right to engage in activities that have "serious consequence" in another State.[43] As the ILC has explained, "*'significant' is something more than 'detectable' but need not be at the level of 'serious' or 'substantial.'* The harm must lead to a real detrimental effect on matters such as, for example, human health, industry, property, environment or agriculture in other States."[44] What constitutes "significant" transboundary harm may change over time with new information or changed circumstances; harm that was not initially considered significant due to lack of "scientific knowledge or human appreciation for a particular resource," at a later time, could be considered "significant."[45]

20. The action required of States to satisfy their preventive obligations and adhere to the transboundary harm principle—the requisite "due diligence"—will vary depending on the nature of the risk and the means at the State's disposal. Fundamentally, measures undertaken must be capable of averting harm. States "shall take *all appropriate measures* to prevent significant transboundary harm or at any event to minimize the risk thereof."[46] This Court has noted that "in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage"[47] and riskier activities require a higher standard of due diligence.[48] In this regard, "the concept of due diligence would be the standard of care to evaluate the conduct required of a state."[49] States must take measures, in line with due diligence, as discussed further in section IV below, to prevent and minimize the risk of significant harm to the environment of other States and the global commons.

21. Climate change, driven by cumulative GHG emissions principally from fossil fuel production and use, is transboundary harm. The transboundary harm involves the degradation of a shared resource common to humankind—the global atmosphere—and ensuing alteration of the global climate, with

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I.C.J. at para. 104; *Pulp Mills*, 2010 I.C.J. at para. 101; *Chiara Saachi et al. v. Argentina*, Decision Comm. on Rights of the Child, No. 104/2019, U.N. Doc. CRC/C/88/D/104/2019, para. 10.5 (decision adopted Sept. 22, 2021).

[41] ILC, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, art. 1, art. 2 cmt. paras. 4-7.

[42] *Ibid.*, at art. 2, cmt. para. 4.

[43] *Trail Smelter Arbitration*, at 1965.

[44] ILC, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, art. 2, cmt. para. 4.

[45] *Ibid.*, at art. 2, cmt. para. 7.

[46] *Ibid.*, at art. 3 (emphasis added); *see also Costa Rica v. Nicar.*, 2015 I.C.J. at para. 104; *Pulp Mills*, 2010 I.C.J. at para. 101 (stating that a State "is thus obliged to use all the means at its disposal in order to 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.").

[47] *Gabčíkovo-Nagymaros Project*, 1997 I.C.J. at para. 140.

[48] *Pulp Mills*, 2010 I.C.J. at paras. 185–87; *Responsibilities and obligations of States with respect to activities in the Area, Case no. 17, Advisory Opinion of February 1st, 2011*, ITLOS Rep. 2011 [hereinafter ITLOS, *Seabed Chamber Advisory Opinion*], at para. 117.

[49] Christina Voigt, "State responsibility for damages associated with climate change," in *Research Handbook on Climate Change Law and Loss & Damage* (Meinhard Doelle & Sara L. Seck eds. 2021), at p. 178 .

resultant injuries in all States, albeit to varying degrees and intensities, as well as adverse impacts on other shared resources beyond national jurisdiction, such as the ocean.[50] The climate impacts of fossil fuels are not limited to where they are produced or used, but are global in scope due to the inherently transboundary nature of emissions in the atmosphere.[51] Much like the fallout from the use of nuclear weapons, the climate consequences of fossil fuel emissions "affect health, agriculture, natural resources and demography over a wide area" and cannot "be contained in either space or time."[52] When asked to assess the threat of nuclear weapons to the global environment and humanity, this Court considered international environmental law and, primarily, the principle to prevent transboundary harm, in interpreting the law of armed conflict.[53] In its discussion of applicable law, the Court reiterated that there is "a general obligation to protect the natural environment against widespread, long-term and severe environmental damage,"[54] and States have to consider environmental factors, including the obligation to prevent transboundary harm, in taking action in armed conflict.[55]

22. This global transboundary harm is the result of cumulative human activities (a series of acts and omissions over time) that have taken place and are occurring in a number of different States of origin (principally the most industrialized nations), with impacts on all States and shared global resources. State action, such as undertaking, supporting, and authorizing fossil fuel production and use, combined with omissions, such as failing to regulate emissions by curtailing fossil fuel production and use, have, over time, altered the climate and created the crisis. The greenhouse gases emitted accumulate in the atmosphere and affect its composition in a way that leads to atmospheric degradation and ensuing climate change.[56] Evidence clearly indicates that the vast majority of those cumulative emissions have come from industrialized countries.[57] The impacts of

[50] *See Dispute over the Status and Use of the Waters of the Silala*, 2022 I.C.J. at para. 99; International Law Association (ILA), *Legal Principles Relating to Climate Change*, Draft Art. 7, cmt. para. 5 (2014), https://www.ila-hq.org/en_GB/documents/conference-report-washington-2014-5 ("While it might be argued that Principle 2 [of the Rio Declaration] does not apply to climate change as it falls outside the traditional concept of transboundary pollution, 'neither the decades of ILC debates on the issue of prevention of environmental harm nor international jurisprudence provide evidence that complex instances of environmental change are not to be covered by the general duty to prevent harm and minimise the risk thereof'. Principle 2 itself deals not just with transboundary harm to other States but also with harm to 'areas beyond national jurisdiction', which would extend to the marine environment and the atmosphere.") (quoting Roda Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility* (Martinus Nijhoff, 2005)), at 167.

[51] *See.,e.g., Chiara Saachi et al v. Argentina*, at para. 10.9 ("The Committee considers that it is generally accepted and corroborated by scientific evidence that the carbon emissions originating in the State party contribute to the worsening of climate change, and that climate change has an adverse effect over the enjoyment of rights by individuals both within as well as beyond the territory of the State party. The Committee considers that, through its ability to regulate activities that are the source of these emissions and to enforce such regulations, the State party has effective control over the emissions.").

[52] *Nuclear Weapons Advisory Opinion*, 1996 I.C.J. at paras. 34-35.

[53] *Ibid.* at paras. 27-29.

[54] *Ibid.*, at paras 30-31.

[55] *Ibid.*, at para. 33.

[56] IPCC, 2021: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, para. A.1.1 (V. Masson-Delmotte et al eds., Cambridge University Press, 2021) [hereinafter IPCC, AR6, WGI]; *see also* ILC, *Draft Guidelines on the Protection of the Atmosphere*, at principle 1.

[57] *See, e.g.*, Matthew W. Jones, et al., "National contributions to climate change due to historical emissions of carbon dioxide, methane, and nitrous oxide since 1850", *Scientific Data* | (2023) 10:155, https://doi.org/10.1038/s41597-023-

climate change compound local impacts resulting from the production and use of fossil fuels, such as air, water, and soil pollution.[58] Many of these adverse effects fall disproportionately on countries that have contributed the least to greenhouse gas emissions and are among the most marginalized.

ii. The duty to avoid and protect against foreseeable violations of human rights requires States to curtail fossil fuel activity

23. States have a preventive obligation under international human rights law to refrain from causing or contributing to, and to protect against, foreseeable violations of human rights.[59] States must take "all appropriate measures"[60] to avert foreseeable threats to the realization of human rights, including by putting in place legislative and administrative frameworks to minimize threats to the right to life.[61] These measures must aim to effectively prevent harm not only to the environment, but also to human health.[62] Measures must be those capable of protecting individuals from

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02041-1 (presenting a "dataset of changes in GMST during 1851–2021 resulting from historical emissions of CO_2, CH4 and N2O at the global scale and for individual countries"). *Ibid.* at p. 2: "National contributions to climate change are closely tied to cumulative emissions of CO_2 in the industrial era because a substantial fraction of emitted CO_2 remains in the Earth's atmosphere for centuries. Consequently, emissions from developed nations have contributed significantly to warming since the industrial revolution." *See also* Jason Hickel, *Quantifying national responsibility for climate breakdown: an equality-based attribution approach for carbon dioxide emissions in excess of the planetary boundary*, 4(9) The Lancet E-399-E404, at pp. 400-401 (Sept. 2020) (analyzing cumulative emissions data by country or group of countries), https://www.thelancet.com/action/showPdf?pii=S2542-5196%2820%2930196-0; Climate Action Tracker; https://www.climatewatchdata.org/.

[58] *See, e.g.*, Karn Vohra et al, *Global mortality from outdoor fine particle pollution generated by fossil fuel combustion: Results from GEOS-Chem*, 195 Environmental Research (Apr. 2021); Frederica Perera, *Pollution from Fossil-Fuel Combustion is the Leading Environmental Threat to Global Pediatric Health and Equity: Solutions Exist*, 15(1) Int. J. Environ. Res. Public Health (2018); Savannah Bertrand, Environmental and Energy Study Institute, Fact Sheet: Climate, Environmental and Health Impacts of Fossil Fuels (2021), https://www.eesi.org/papers/view/fact-sheet-climate-environmental-and-health-impacts-of-fossil-fuels-2021.

[59] Human Rights Committee, General Comment No. 36, paras. 7, 18, 21-22, 62 (in para. 62 stating "Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors"); UN Human Rights Treaty Bodies' joint statement on human rights and climate change, para. 5 (stating "[f]ailure to take measures to prevent foreseeable human rights harm caused by climate change, or to regulate activities contributing to such harm, could constitute a violation of States' human rights obligations"); African Commission on Human and Peoples' Rights, General Comment No. 3 on The African Charter on Human and Peoples' Rights: The Right to Life (Article 4), para. 3 (2015) (the Charter "envisages the protection of not only a life in a narrow sense, but of dignified life. This requires a broad interpretation of States' responsibilities to protect life."); David R. Boyd (Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment), Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, U.N. Doc. A/74/161, paras. 28, 62 (July 15, 2019) [hereinafter Special Rapporteur on Human Rights and the Environment, Safe Climate Report].

[60] Human Rights Committee, *Daniel Billy v. Australia*, CCPR/C/135/D/3624/2019, para. 8.3 ("The Committee recalls that States parties should take all appropriate measures to address the general conditions in society that may give rise to direct threats to the right to life or prevent individuals from enjoying their right to life with dignity."); Human Rights Committee, General Comment No. 36, paras. 18, 62; *see also* ECtHR, *Kolyadenko and Others, v. Russia*, no. 17423/05, para. 216 (2012); ECtHR, *Öneryıldız v. Turkey* [GC], no. 48939/99 (2004), at para. 135.

[61] Human Rights Committee, General Comment No. 36, para. 62; *Kolyadenko and Others*, at para. 157 (citing *Öneryıldız*, at para. 89 and ECtHR, *Budayeva and Others v. Russia*, nos. 15339/02, 21166/02, 20058/02, 11673/02, 15343/02 (2008), at para. 129).

[62] *See, e.g.*, Human Rights Committee, General Comment No. 36, para. 26, 62; *see also* ECtHR, *Tătar v. Romania*, no. 67021/01 (2009), para. 88 [hereinafter *Tătar v. Romania*].

foreseeable threats.[63] The duty to protect is also not limited to instances in which a State is the sole cause of the harm or the sole entity capable of mitigating the risk to human rights.[64]

24. Like the duty to prevent transboundary harm, States' duties to respect and protect human rights have extraterritorial application. The duty to respect "requires States parties to refrain from interfering directly or indirectly with the enjoyment of the [] rights by persons outside their territories."[65] The duty to protect requires States to regulate any actor subject to their jurisdiction to prevent them from violating rights when operating abroad,[66] or undertaking conduct that has the foreseeable effect of infringing rights, regardless of where those infringements occur.[67]

25. This duty applies to human rights violations caused by environmental degradation or harm, such as climate change. As has been widely recognized by international human rights treaty bodies and experts, as well as regional human rights systems,[68] States are obliged to take measures to protect against conduct that causes climate change, pollution, and other forms of transboundary environmental harm, because of its actual and foreseeable consequences for human rights.

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[63] *See* Human Rights Committee, General Comment No. 36, paras. 18, 21, 26; *see also Öneryıldız*, at para. 101 (pointing out that measures must be "necessary and sufficient"); ECtHR, *Kılıç v. Turkey*, no. 22492/93, paras. 76-77 (2000); ECtHR, *Fadeyeva v. Russia*, no. 55723/00 (2005), at paras. 124, 133-34; ECtHR, *Budayeva and Others*, at para. 175 (explaining that margin of appreciation is constrained when facing threat to life); *Urgenda* at para. 5.3.2.

[64] Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13(Mar. 29, 2004), at para. 8; Human Rights Committee, General Comment No. 36, para. 7 ("States parties must also ensure the right to life and exercise due diligence to protect the lives of individuals against deprivations caused by persons or entities, whose conduct is not attributable to the State.").

[65] *See* Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 24 (2017) on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, U.N. Doc. E/C.12/GC/24, para. 29 (Aug. 10, 2017) [hereinafter CESCR, *General Comment No. 24*]; *see also* Human Rights Committee, General Comment No. 36, paras. 22, 63; Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 34 (2016) on the Rights of Rural Women*, U.N. Doc. CEDAW/C/GC/34 (Mar. 7, 2016) [hereinafter CEDAW, General Recommendation No. 34], at para. 13; IACtHR, *Advisory Opinion OC-23/17*, at para. 101.

[66] CEDAW, *General Recommendation No. 34*, para. 13; CESCR, *General Comment No. 24*, at paras. 30-32.

[67] Human Rights Committee, General Comment No. 36, para. 22 (iterating that "[States] must also take appropriate legislative and other measures to ensure that all activities taking place in whole or in part within their territory and in other places subject to their jurisdiction, but having a direct and reasonably foreseeable impact on the right to life of individuals outside their territory, including activities undertaken by corporate entities based in their territory or subject to their jurisdiction, are consistent with article 6, taking due account of related international standards of corporate responsibility and of the right of victims to obtain an effective remedy."); CESCR, *General Comment No. 24*, paras. 25-37 (laying out extraterritorial obligations and stating in para. 26 that "States parties' obligations under the Covenant did not stop at their territorial borders. States parties were required to take the steps necessary to prevent human rights violations abroad by corporations domiciled in their territory and/or jurisdiction" and in para. 29 that "[t]he extraterritorial obligation to respect requires States parties to refrain from interfering directly with the enjoyment of Covenant rights by persons outside their territories").

[68] *See, e.g.*, IACtHR, *Advisory Opinion OC-23/17*, at paras. 141-142, 152; *Case of Indigenous Communities of the Lhaka Honhat Association v. Argentina*, Judgement, Inter-Am. Ct. H.R. (ser. C), 6 February 2020, at paras. 207, 208; *Marcelino Díaz Sánchez and others v. Mexico*, Precautionary Measures, Resolution, Inter-Am. Comm'n. H.R. No. 1498-18, 23 April 2019, at paras. 24, 26, 27; Human Rights Committee, General Comment No. 36, at para. 62; UN Human Rights Treaty Bodies' joint statement on human rights and climate change, at para. 10; *see also* UN Special Rapporteurs on Human Rights and Climate Change (Ian Fry), Toxics and Human Rights (Marcos Orellana) and Human Rights and the Environment (David Boyd), amicus brief submitted to ITLOS in Case n.3, 2023.

26. As the primary driver of the cumulative greenhouse gas emissions causing climate change, and the source of other direct adverse impacts on people and the environment, fossil fuel production and use is conduct that threatens human rights and therefore that States have an obligation to prevent and minimize. The release of greenhouse gas emissions, ensuing degradation of the atmosphere, and continued climate change are the foreseeable—and indeed inevitable—consequences of the production and use of fossil fuels.[69] Additionally, fossil fuels have significant impacts on human health due to air pollution, contamination of water and soil, and release of other toxics.[70] Given these consequences, both within and outside of source States' boundaries, States are obligated to take all measures necessary to protect individuals from the threat of fossil fuel production and use.[71]

iii. These preventive obligations under environmental and human rights law apply with particular force in the context of disasters

27. State obligations to prevent transboundary environmental harm and minimize the risk thereof, and protect against foreseeable violations of human rights, require States to act to prevent the risk of disasters, the causes or effects of which are induced or exacerbated by climate change. As discussed above, climate change—driven primarily by anthropogenic GHG emissions—has initiated and will continue to unleash a cascade of impacts, from sea-level rise, flooding, and ocean acidification to extended drought, extreme heatwaves, and severe wildfires.[72] There is no question that such events—individually and collectively—have and will continue to result in not just large-scale environmental damage but also untold levels of human suffering,[73] loss of life,[74] and displacement[75]

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[69] Richard Heede, *Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010*, Climatic Change 122 (2014), at 231-32 (noting that the vast majority of fossil fuels release emissions when used as intended, namely combusted as fuels, and even non-combustion uses can result in emissions due to processing); Paul Griffin, *The Carbon Majors Database: CDP Carbon Majors Report 2017* (2017), at pp. 6-8, https://cdn.cdp.net/cdp-production/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf (highlighting that only a small fraction of fossil fuel production is not ultimately combusted); Simon Evans, *Analysis: Which countries are historically responsible for climate change?*, Carbon Brief (Oct. 5, 2021), https://www.carbonbrief.org/analysis-which-countries-are-historically-responsible-for-climate-change/ (explaining the cumulative emissions from fossil fuels).

[70] Bertrand, Fact Sheet: Climate, Environmental and Health Impacts of Fossil Fuels.

[71] Human Rights Committee, *General Comment No. 36*, paras. 18, 21, 26, 62; *Billy v. Australia*, at para. 8.3.

[72] IPCC, AR6, WGII: Summary for Policymakers, at para. B.1.1.

[73] *See* IPCC, AR6, Synthesis Report: Summary for Policymakers, at para. A.2.5 (finding that in, all regions of the world, "extreme heat events have resulted in human mortality and morbidity (very high confidence)" and that "the occurrence of climate-related food-borne and water-borne diseases (very high confidence) and the incidence of vector-borne diseases (high confidence) have increased."). The report also identifies the association of mental health challenges with increasing temperatures, such as "trauma from extreme events (very high confidence), and loss of livelihoods and culture (high confidence)." *Ibid.*

[74] *See, e.g.*, Rodrigo Pérez Ortega, *Extreme Temperatures in Major Latin American Cities Could Be Linked to Nearly 1 Million Deaths*, Science (June 28, 2022), https://www.science.org/content/article/extreme-temperatures-major-latin-american-cities-could-be-linked-nearly-1-million (finding that almost 900,000 deaths between 2002 and 2015 in major Latin American cities could be attributable solely to extreme temperatures); US Environmental Protection Agency, Climate Change Indicators: Heat-Related Deaths, https://www.epa.gov/climate-indicators/climate-change-indicators-heat-related-deaths; Joan Ballester et al, *Heat-related mortality in Europe during the Summer of 2022*, 29 Nature Medicine 1857-66 (2023) (estimating that over 61,000 people died in Europe in the summer of 2022 from heat-related causes).

[75] *See, e.g.*, IPCC, AR6, Synthesis Report: Summary for Policymakers, at A.2.5 (finding that climate and weather extremes are increasingly driving human displacement in the Americas region, Africa, and Asia).

associated with "disasters." Not all disasters are transboundary in effect or origin, but all climate-induced or climate-intensified disasters are at least transboundary in origin. Beyond causing or contributing to disasters, climate change exacerbates the risk of harm from, and compounds the impacts of, disasters that have other origins. That climate change is a driver of disaster risk and actual disasters around the world underscores the transboundary nature of the harm it represents, and the obligation of States to take all measures at their disposal to prevent and minimize it.

28. The ILC has elaborated on the duty of States to reduce the risk of disasters and mitigate the consequences thereof, including by preventing the drivers of disaster risk. The ILC's Draft articles on the protection of persons in the event of disasters define a disaster as "a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society."[76] Disasters can be both "natural and human-made."[77] The Draft Articles apply to categories of environmental harms associated with GHGs-driven temperature rise: "sudden-onset events" like the above-described hurricanes and typhoons, "slow-onset events (such as drought or sea-level rise), and frequent small-scale events (floods or landslides)."[78]

29. Rooted in both international environmental and human rights law,[79] and "the widespread practice of States"—reflected in numerous multilateral, regional and bilateral instruments[80]—the Draft Articles set forth State obligations to reduce the risk of disaster by, *inter alia,* "taking appropriate measures, including through legislation and regulations, to prevent, mitigate, and prepare for disasters."[81] The duty to prevent disaster obliges States to ensure that their actions and inaction do not increase the risk of disaster in other States.[82] Given that climate change both causes disasters of the type contemplated in the Draft Articles and increases the risk of harm from disasters of any origin, it follows that, as the Sixth Committee's representative from Tonga, Dr. T. Suka Mangisi, pointed out, States have a duty to address its drivers by "tak[ing] measures to reduce greenhouse gas emissions and support other climate change mitigation and adaptation measures that would reduce the risk of disaster."[83]

[76] ILC, *Draft Articles on the Protection of Persons in the Event of Disasters*, *with commentaries*, (2016) at art. 3(A).
[77] *Ibid.*, at pmbl.
[78] *Ibid.*, at art. 3 cmt. para. 4.
[79] *Ibid.*, at art. 9 cmt. para. 4.
[80] *Ibid.*, at art. 9 cmt. paras. 5, 6.
[81] *Ibid.*, at art. 9 cmt. para. 5. According to the ILC, this article "draws inspiration from" the international environmental law principle of due diligence and the duty of States under human rights law to take "positive" measures to prevent harm to the right to life and other rights, including in the context of impending disasters. *Ibid.*
[82] UNGA, Summary record of 68th Sess., 25th mtg., UN Doc. A/C.6/68/SR.25 (Dec. 2, 2013), at para. 86 (statement of representative from Tonga).
[83] *Ibid.*; *see also* the Sendai Framework for Disaster Risk Reduction 2015-2030, para. 13 (2015) ("Addressing climate change as one of the drivers of disaster risk, while respecting the mandate of the United Nations Framework Convention on Climate Change, represents an opportunity to reduce disaster risk in a meaningful and coherent manner throughout the interrelated intergovernmental processes.").

B. The preventive principle is also enshrined in UNCLOS, which obliges States to prevent, reduce, and control all forms of marine pollution, including GHG emissions from fossil fuels

30. The preventive principle is reflected in the United Nations Convention on the Law of the Sea (UNCLOS), which requires States to "protect and preserve the marine environment."[84] Pursuant to that duty, States are required to take all measures necessary to "prevent, reduce, and control pollution of the marine environment from *any* source,"[85] including "the use of technologies,"[86] land-based sources,[87] activities in and on the oceans such as seabed activities,[88] dumping,[89] and from or through the atmosphere.[90] Importantly, the duty applies to forms of pollution that have extraterritorial or transboundary impact. States are required to "take all measures necessary to ensure that activities under their jurisdiction or control" do not cause damage by pollution to other States and that pollution arising within their jurisdiction or control does not spread beyond areas over which they exercise sovereignty.[91] UNCLOS therefore imposes limitations on States' "sovereign right to exploit their natural resources," which must be exercised "in accordance with" their obligation to protect and preserve the marine environment.[92]

31. Anthropogenic GHG emissions unequivocally fall within UNCLOS's definition of "pollution of the marine environment," and are thus subject to States' prevention obligations. Indeed, GHG emissions satisfy the two elements laid out in Article 1(1)(4) of UNCLOS. *First*, they entail "the introduction by man, directly or indirectly, of substances or energy into the marine environment."[93] Specifically, GHG-emitting human activity results in both CO_2 (a "substance") being deposited directly in the oceans, and oceans absorbing heat (an "energy") resulting from increased atmospheric concentrations of GHGs. *Second*, the introduction of GHGs into the atmosphere "results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, [and] hindrance to marine activities,"[94] among other harms. These deleterious effects include, but are not limited to, marine heatwaves,[95] absorption of CO_2 by oceans,

[84] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3 (entered into force on 16 November 1994) [hereinafter UNCLOS], at art. 192.
[85] *Ibid.*, at art. 194(1) (emphasis added).
[86] *Ibid.*, at art. 196(1).
[87] *Ibid.*, at art. 207(1)(2).
[88] *Ibid.*, at art. 208(1)(2).
[89] *Ibid.*, at art. 210(1)(2).
[90] *Ibid.*, at art. 212(1)(2).
[91] *Ibid.*, at art. 194(2); *see also* Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor (*Malaysia v. Singapore*), Case no. 12, Order of October 8, 2003, Joint Declaration of Judges Ad Hoc Hossain and Oxman, ITLOS Rep. 2003, at 10.
[92] UNCLOS, at art. 193.
[93] *Ibid.*, at art. 1(1)(4).
[94] *Ibid.*, at, art. 1(1)(4).
[95] IPCC, 2019, Special Report on the Ocean and Cryosphere in a Changing Climate [H.-O. Pörtner, D.C. Roberts, V. Masson-Delmotte, P. Zhai, M. Tignor, E. Poloczanska, K. Mintenbeck, A. Alegría, M. Nicolai, A. Okem, J. Petzold, B. Rama, N.M. Weyer (eds.)], Cambridge University Press, Cambridge, UK and New York, NY, USA [hereinafter IPCC SR Ocean and Cryosphere], Summary for Policymakers, at para. A.2 (finding that marine heatwaves have "very likely doubled in frequency since 1982 and are increasing in intensity").

forming carbonic acid and altering ocean chemistry in a process known as ocean acidification,[96] coral death,[97] and sea level rise,[98] and the adverse implications of these ecological changes on food security, coastal infrastructure, and oceans-based economies.[99]

32. Thus, because anthropogenic GHG emissions constitute a form of marine pollution, States are required under UNCLOS to take all necessary measures to prevent, reduce, and control the activities that generate them—chief among them, fossil fuel production and use.

C. Even in the absence of express requirements regarding fossil fuels, the obligations of States under the UNFCCC and Paris Agreement to mitigate climate change require action on fossil fuels

33. The preventive principle is reflected in the international climate agreements, the UNFCCC and Paris Agreement, which do not supplant, curtail, or abrogate preventive duties under customary international environmental law and human rights law, but build on and complement them. The UNFCCC explicitly recalls the duty to prevent transboundary harm[100] and calls on Parties to "take precautionary measures to anticipate, *prevent* or minimize the causes of climate change and mitigate its adverse effects."[101] Moreover, in adopting the UNFCCC, States committed to "prevent dangerous anthropogenic interference with the climate system,"[102] which the UNFCCC defines as "the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions."[103] Subsequently, States elaborated on what constituted dangerous anthropogenic interference with the climate system and, in adopting the Paris Agreement, agreed to 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."[104]

34. To realize the objectives of the UNFCCC and Paris Agreement, Parties are obligated to take action to mitigate climate change through the reduction of anthropogenic greenhouse gases, and to do so in line with best available science and with progressively increasing ambition. The UNFCCC established that when it comes to climate action "the developed country Parties should take the lead in combating climate change and the adverse effects thereof."[105] Building on the duty of the the

[96] Scott C. Doney et al., *Ocean Acidification: The Other CO2 Problem?* 6 Wash. J. Envtl. L &. Pol'y 212 (2016), 217; Ellycia R. Harrould-Kolieb and Ove Hoegh-Guldberg, A *governing framework for international ocean acidification policy*, 102 Marine Policy 10 (2019), at p. 1 (finding that the increased acidity of oceans is already causing and is expected to cause increased "substantial disruptions to socio-economic systems over the coming decades and centuries, including via reduced access to protein, economic losses from fisheries and tourism, decreased coastal protection and impacts to human health and cultural identity").
[97] IPCC SR Ocean and Cryosphere, Summary for Policymakers, at para. B.6.4, Ch. 4.3.3.5.2, p. 379; IPCC AR6, Synthesis Report, Longer Report, Section 3.1.2, at p. 36.
[98] IPCC SR Ocean and Cryosphere, Summary for Policymakers, at para. A.3.
[99] IPCC, AR6, WGII, Ch. 3, at p. 382.
[100] UNFCCC, at pmbl.
[101] *Ibid.*, at art. 3(3).
[102] *Ibid.*, at art. 2.
[103] *Ibid.*, at art. 1(3).
[104] Paris Agreement, art. 2(1)(a).
[105] UNFCCC, at art. 3(1); *see also* Paris Agreement, at pmbl., arts. 2(2), 4(4), 9(1), 9(3).

largest historical emitters pursuant to the UNFCCC to adopt national policies and take measures to mitigate climate change,[106] the Paris Agreement requires all Parties to "prepare, communicate and maintain successive nationally determined contributions [NDCs] that it intends to achieve,"[107] with NDCs representing one component of the "ambitious efforts" Parties are committed to taking to achieve the Paris Agreement.[108] It further specifies that "Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives" of their NDCs,[109] and that these efforts "will represent a progression over time."[110] The Paris Agreement further specifies that these measures should align with best available science[111] especially in light of the "need for an effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge."[112]

35. As noted above, scientific consensus concludes that production and use of fossil fuels—coal, oil, and gas—are the primary causes of cumulative greenhouse gas emissions and the ensuing transboundary harm of atmospheric degradation and climate change. And as outlined above (see para. 3), the most recent scientific reports have made clear that it is not possible to pursue the objective agreed to in Paris, of limiting warming to 1.5°C, let alone the ultimate objective of the UNFCCC, without rapid reductions in fossil fuel emissions. And such reductions necessitate not only a halt to new investments in fossil fuels, but also the early retirement of existing fossil fuel infrastructure.

IV. The duty to prevent harm requires States to use all the means at its disposal to halt cumulative GHG emissions and ensuing climate change, which entails curtailing fossil fuel production and use

36. The measures required to satisfy the State's preventive obligations will be all those that are necessary and appropriate to avert the foreseeable harm, and within the means at the State's disposal. In *Pulp Mills*, this Court recognized that "the principle of prevention … has its origins in the due diligence that is required of a State in its territory" and therefore a State is "obliged to 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."[113] Article 3 of the ILC's Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities specifies that "[t]he State of origin shall take all appropriate measures to prevent

[106] UNFCCC, at art. 4(2)(a).
[107] Paris Agreement, at art. 4(2).
[108] *Ibid.*, at art. 3.
[109] *Ibid.*, at art. 4(2).
[110] *Ibid.*, at art. 3; *see also Ibid.*, at art. 4.3.
[111] *Ibid.*, at art. 4.1 (specifying that Parties should take mitigation actions "in accordance with best available science"). Recently reaffirmed in the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, 26th session, 31 October-13 November 2021, Glasgow Climate Pact, 1/CMA.3, U.N. Doc. No. FCCC/PA/CMA/2021/10/Add.1, at art. 1.
[112] Paris Agreement, at pmbl.
[113] *Pulp Mills*, 2010 I.C.J. at para. 101; *see also Costa Rica v. Nicar.*, 2015 I.C.J. at paras. 104, 118; *Pulp Mills*, 2010 I.C.J. at para. 204; IACtHR, *Advisory Opinion OC-23/2017*, at para. 97.

significant transboundary harm or at any event to minimize the risk thereof."[114] This necessarily includes regulating its own activities and the activities of private actors in its territory or area under its jurisdiction, as well as supervising and monitoring potentially harmful activities, such as fossil fuel production.[115] As the Human Rights Committee has declared, States must take measures that enable all individuals to realize the enjoyment of the right to life and that are "necessary to give effect to the right to life."[116] Moreover, States' due diligence obligations encompass "not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators."[117]

37. What constitutes requisite due diligence will vary with understanding of the severity of the risk. While the specific measures required to comply with due diligence and the principle of prevention are variable and will depend on circumstances,[118] they must be "agreeable to reason and not arbitrary," and have a reasonable likelihood of averting the risk of harm.[119] Additionally, what measures suffice to satisfy this duty may change over time, in light of new scientific or technological knowledge,[120] as may the assessment of the risk posed by a certain activity or the significance of the harm caused.[121] Moreover, the riskier a given activity, the more stringent the standard of due diligence required.[122] Calibrating the preventive measures required to the degree of risk posed is consistent with the precautionary approach, which the International Tribunal for the Law of the Sea (ITLOS) has described as "an integral part of the general obligation of due diligence."[123]

38. Applying these due diligence principles in the climate context requires States to take measures that effectively reduce greenhouse gas emissions, and therefore, they must curtail the fossil fuel activity driving them. As discussed above, it is well known that the production and use of fossil fuels will lead to a range of impacts on land, air, water, and people as well as climate change with its

[114] ILC, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, at art. 3; ITLOS, *Seabed Chamber Advisory Opinion*, at para. 116 (quoting ILC's Draft Articles).
[115] *See Pulp Mills*, 2010 I.C.J. at para. 197; *see also* ITLOS, *Seabed Chamber Advisory Opinion*, at paras. 115, 239; Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Case no. 21, Advisory Opinion of April 2, 2015, ITLOS Rep. 2015, para 131; 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), para. 944; ILC, *Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities*, art. 3 cmt. para. 10.
[116] Human Rights Committee, *General Comment No. 36*, para. 18.
[117] *Pulp Mills*, 2010 I.C.J. at para. 197; *see also* ITLOS, *Seabed Chamber Advisory Opinion*, at paras. 115, 239; ILC, *Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities*, at art. 3, cmt. para. 10.
[118] ITLOS, *Seabed Chamber Advisory Opinion*, at para. 117.
[119] Measures can only be deemed "appropriate" if they are "agreeable to reason and not arbitrary," and thus have a reasonable likelihood of success. ITLOS, *Seabed Chamber Advisory Opinion*, at para. 228.
[120] *Ibid.*, at para. 117 (stating "measures considered sufficiently diligent at a certain moment may become not diligent enough in light … of new scientific or technological knowledge").
[121] ILC, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, art. 1, cmt. para. 15; art. 2, cmt. para. 7.
[122] ITLOS, *Seabed Chamber Advisory Opinion*, at para. 117; *Pulp Mills*, 2010 I.C.J. at paras. 185–187.
[123] ITLOS, *Seabed Chamber Advisory Opinion*, at para. 131.

accompanying harms, and some of these harms are already, and will increasingly be, irreversible.[124] In line with customary and conventional international law, a State has to take steps to prevent or mitigate this harm by implementing measures that can rapidly halt the emissions driving climate change and help increase resilience to the changing climate. This necessarily requires curtailing the activities responsible for the overwhelming majority of those emissions: the production and use of fossil fuels. As the world has continued to warm, the science is ever more clear—keeping global temperature rise below 1.5°C requires the immediate halt to fossil fuel expansion and accelerating the shut-down of existing fossil fuel production and use.

39. That means that States must refrain from or halt action that contributes to, and rectify the failure to regulate, fossil fuel emissions. A range of State action and inaction contributes to the fossil fuel activities driving climate change. That conduct includes directly engaging in the extraction and production of coal, oil, and gas, such as through a state-owned (public) enterprise; licensing, permitting, or otherwise authorizing fossil fuel production and use by non-State actors; and financing fossil fuel production and use, including through public subsidies. It also includes failing to adequately regulate fossil fuel production and use, so as to reduce the generation of fossil fuel emissions by non-State actors.

40. Due diligence requires States to prevent or at least minimize the risk of foreseeable harm due to activities within their jurisdiction and control, whether that harm manifests domestically or extraterritoriality.[125] As the Committee on the Rights of the Child stated, where a State has the ability to regulate activities that are the source of emissions, it has effective control over those emissions.[126] The production of oil, gas, and coal is the source of emissions; emissions are not just a foreseeable but an inevitable consequence of extracting fossil fuels, when they are used as intended, regardless of where that use and resulting emissions occur, be it in the same or a different State. And the climate impact of those emissions do not depend on where they are released. Accordingly, the State that has the ability to regulate the production of fossil fuels has effective control over those emissions. Because those emissions foreseeably cause or contribute to transboundary harm and violations of human rights, a State that can exert control over them has an obligation to do so, by regulating fossil fuel production in a manner that prevents and minimizes the risk of harm.

[124] *See, e.g.*, IPCC, AR6, WGII: Summary for Policymakers, at paras. B.5.2, B.6; IPCC, 2018 Special Report, Global Warming of 1.5°C, Ch. 3, at para. 3.5.5.

[125] ILC, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, art. 3, cmt. para. 10 (explaining that "due diligence is manifested in reasonable efforts by a State to inform itself of factual and legal components that relate foreseeably to a contemplated procedure and to take appropriate measures in a timely fashion to address them. Thus States are under an obligation to take unilateral measures to prevent significant transboundary harm, or at any event to minimize the risk thereof…" and this includes developing and implementing policies to prevent harm).

[126] *See, e.g.*, *Chiara Saachi et al v. Argentina*, at para. 10.9 ("The Committee considers that, through its ability to regulate activities that are the source of these emissions and to enforce such regulations, the State party has effective control over the emissions.").

V. At a minimum, due diligence requires States to consider the foreseeable emissions resulting from fossil fuel activity under their jurisdiction or control regardless of where those emissions occur

A. The obligation of States to prevent and minimize transboundary harm requires that States assess the risk of significant environmental impacts before undertaking, authorizing, or otherwise supporting an activity

41. From the transboundary harm principle flows the obligation of States to ensure that environmental impact assessments (EIAs) are carried out for "proposed activities which may have a significant adverse impact in a transboundary context, in particular, on a shared resource."[127] This Court has held that "a State must, *before* embarking on an activity having the potential to adversely affect the environment of another State, ascertain if there is a risk of significant transboundary harm."[128] Embarking on an activity, as elaborated in Section III, encompasses a wide range of conduct, including directly undertaking the activity, approving legal permits, or financing the activity.[129] As this Court explained, a finding of a potential risk associated with the proposed activity would then "trigger the requirement to carry out an environmental impact assessment."[130] If the EIA subsequently confirms the existence of that risk, in accordance with its due diligence obligations, the State planning to undertake the activity at issue must "notify and consult in good faith with the potentially affected State" so that appropriate measures can be taken "to prevent or mitigate that risk."[131]

42. The duty to carry out EIAs prior to advancing a proposed activity is widely regarded as essential to informed environmental decision-making. The duty has been reaffirmed, elaborated, and operationalized by a wide range of legal instruments and foundational sources of international environmental law, including the Rio Declaration.[132] In the transboundary context, as this Court concluded, EIAs "may now be considered a requirement under general international law,"[133] or—

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[127] *Pulp Mills*, 2010 I.C.J. at para. 204.
[128] *Costa Rica v. Nicar*., 2015 I.C.J. at para. 104 (emphasis added).
[129] Indeed, numerous public and private financial institutions around the world require EIAs prior to making decisions on whether to fund an activity that poses a risk of transboundary impacts, such as the generation of GHGs. *See*, *e.g.*, International Finance Corporation (IFC), IFC, IFC Performance Standards on Environmental and Social Sustainability, Performance Standard 1 ("Assessment and Management of Environmental and Social Risks and Impacts") (2012), https://www.ifc.org/content/dam/ifc/doc/2010/2012-ifc-performance-standards-en.pdf; World Bank, "Environmental and Social Framework," Safeguard 1, http://pubdocs.worldbank.org/en/837721522762050108/Environmental-and-Social-Framework.pdf; Equator Principles, *Equator principles: EP4 July 2020* (2020), https://equator-principles.com/app/uploads/TheEquator-Principles_EP4_July2020.pdf (Principle 2 of the Equator Principles, which are voluntary guidelines that have been adopted by a range of financial institutions, requires the commissioning of environmental and social assessments, including climate change risk assessments).
[130] *Costa Rica v. Nicar*., 2015 I.C.J. at para. 104.
[131] *Ibid.*
[132] *See*, *e.g.*, Rio Declaration at principle 17; UNCLOS, at art. 206; Convention on Environmental Impact Assessment in a Transboundary Context, adopted 25 February 1991, entered into force 10 September 1997, 1989 UNTS 309 [hereinafter "Espoo Convention"], at art. 2; Convention on Biological Diversity, 5 June 1992, 1760 U.N.T.S. 79 (entered into force on 29 December 1993) at art. 14.
[133] *Pulp Mills*, 2010 I.C.J. at para. 204.

according to ITLOS—even rise to the level of a "general obligation under customary international law."[134] In the words of Judge Hisashi Owada, EIAs play "an important and even crucial role in ensuring that the State in question is acting with due diligence under general international environmental law."[135] According to the ILC, the obligation of States to conduct EIAs for proposed activities under their jurisdiction or control requires States to "put in place the necessary legislative, regulatory and other measures" for an EIA to be conducted when it is "likely" proposed activities will cause "significant adverse impact."[136] Consistent with this Court's interpretation, "[p]rocedural safeguards such as notification and consultations are also key to such an assessment," as evident in regional agreements like the Aarhus Convention and the Escazú Agreement.[137]

43. GHG-intensive fossil fuel activities require EIAs. Fossil fuel activities are among the "proposed activities" that necessitate EIAs given the inherently uncontainable, transboundary nature of the GHG emissions they produce, which degrade shared resources and drive climate change with resultant harm. Like rivers and other waterways, the atmosphere—on which all life on Earth depends—constitutes a "shared resource"[138] subject to a "community of interest."[139] While the atmosphere is not exploitable, the ILC observes that a polluter can exploit its "physical and functional components" by—for instance—"reducing its quality."[140] And because the degradation of the atmosphere is "a common concern of humankind," according to the ILC's *Draft guidelines on the protection of the atmosphere*, States should ensure that EIAs are undertaken for "proposed activities under their jurisdiction or control which are likely to cause significant adverse impact on the atmosphere."[141] These include activities that entail the "the introduction of harmful substances or energy"—like GHGs—that result in "changes in the atmospheric conditions leading to climate change."[142] Indeed, the Kiev Protocol to the Convention on Environmental Impact Assessment in a Transboundary Context ("Espoo Convention") likewise calls on States to ensure that "strategic environmental assessments" are conducted for activities that have an effect on the climate.[143] These necessarily include fossil fuel activity given its outsized role in driving anthropogenic GHG emissions and, as a consequence, global temperature rise.[144]

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[134] ITLOS, *Seabed Chamber Advisory Opinion* at 10, para. 145.
[135] *Costa Rica v. Nicar*., Separate Opinion of Judge Hisashi Owada, I.C.J. Reports 2015, para. 18.
[136] *Draft Guidelines on the Protection of the Atmosphere, with commentaries*, Guideline 4, cmt (1).
[137] Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, Mar. 4, 2018; UNECE, Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters, art. 7, June 1998, 2161 U.N.T.S. 447 [hereinafter Aarhus Convention], at art. 7(3).
[138] *Pulp Mills*, 2010 I.C.J. at para. 204.
[139] Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P. C. I. J., Series A, No. 23, at p. 27.
[140] *Draft Guidelines on the Protection of the Atmosphere, with commentaries* at Guideline 4, cmt. 1.
[141] *Ibid.*, at Guideline 5, cmt. 1.
[142] *Ibid.*, at General Commentary, at para. 2.
[143] Espoo Convention at art. 1 (vii).
[144] *See* IPCC, AR6, Synthesis Report: Summary for Policymakers, at paras. A.1, A.1.4; IPCC, AR5, Summary for Policymakers, at p. 5; Heede, *Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010*, at pp. 229–241 (concluding that nearly two-thirds of global industrial CO_2 and methane emissions since 1751 can be traced to just 90 'Carbon Majors').

B. EIAs for fossil fuel activity must consider downstream emissions, regardless of where they occur

44. Because the vast majority of GHG emissions from fossil fuel activity stem from the eventual combustion and use of the extracted oil, gas, or coal, it is critical that EIAs for proposed fossil fuel activity adequately assess these downstream emissions regardless of where they ultimately materialize. Such downstream emissions are part of what's called "Scope 3" emissions, which can include emissions from the entire value chain, such as supply chain, transportation, use and disposal of products.[145] In the context of the fossil fuel industry, GHGs produced when extracted oil, gas, or coal is burned, as intended, can account for more than 90% of a fossil fuel company's overall emissions.[146] Those emissions are thus the foreseeable, and indeed ineluctable, consequence of extracting and producing fossil fuels, and must factor into the decision-making process concerning the proposed activity.

45. State practice and domestic case law reinforce the understanding that for an EIA to adequately assess the climate change impacts of fossil fuel activity, it should include all foreseeable emissions, including those generated downstream. Courts around the world have held that impact assessments undertaken to inform decision-making around fossil fuel activities must consider indirect emissions resulting from downstream combustion and use. Australian courts, for instance, have held that EIAs undertaken for coal mines should factor in Scope 3 emissions as an indirect impact, including emissions generated through the transportation and combustion of coal from the mines.[147] In the United States, a federal court recognized that because the "[d]ownstream use of oil and gas, and the resulting GHG emissions" are the "reasonably foreseeable effects of oil and gas leasing,"[148] EIAs undertaken prior to the approval of lease sales should thus include "robust analyses" of these emissions.[149] After all, the sale of oil and gas leases—which opens the door to future oil and gas exploitation and production, and ultimate consumption—are the "legally relevant cause" of downstream emissions; the requisite EIAs are therefore "required to consider those emissions as

[145] *See* WBCSD & WRI, *The Greenhouse Gas Protocol Corporate Value Chain (Scope 3) Accounting and Reporting Standard* (2011), *available at* https://ghgprotocol.org/sites/default/files/standards/Corporate-Value-Chain-Accounting-Reporing-Standard_041613_2.pdf, at 25 (providing guidance on the categories of Scope 3 emissions).
[146] Press Release, Client Earth, *ClientEarth files climate risk lawsuit against Shell's Board with support from institutional investors* (Feb. 9, 2023), https://www.clientearth.org/latest/press-office/press/clientearth-files-climate-risk-lawsuit-against-shell-s-board-with-support-from-institutional-investors/; UKEF, Climate Change Strategy 2021 to 2024 (Sept. 22, 2021), https://www.gov.uk/government/publications/uk-export-finance-climate-change-strategy-2021-to-2024/uk-export-finance-climate-change-strategy-2021-to-2024 (acknowledging that the "biggest greenhouse gas emissions impact is from [its] scope 3 emissions").
[147] *See Gray v. Minister for Planning* (2006) 152 LGERA 258 (Australia) (citing intergenerational equity considerations); *Gloucester Resources Limited v. Minister for Planning*, NSWLEC 7 (2019) (Australia), para. 490.
[148] *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41 (D.D.C. 2019), at p. 73.
[149] *Ibid.* at 83. *See also Sierra Club v. Fed. Energy Regulatory Comm'n*, 827 F.3d 36 (D.C. Cir. 2016), at p. 47 (finding that a pipeline authorization was a "legally relevant cause" of downstream GHG emissions from gas transported by the pipeline, and that the government's environmental assessment was therefore required to consider those emissions).

indirect effects of oil and gas leasing."[150] Courts in Kenya,[151] South Africa,[152] and Canada[153]—among other countries—have likewise held that the impact assessments around fossil fuel projects should consider downstream emissions.

46. Some such cases explicitly address the obligation to consider extraterritorial downstream emissions. National courts have held that EIAs must consider not only downstream emissions that are released within the territory of the State authorizing fossil fuel activity, but also those generated when activity within the territory leads to emissions abroad. For instance, recently, a U.S. court found that a government agency had acted "arbitrarily in excluding [GHG emissions generated from] foreign consumption from its emissions analysis" for an offshore oil and gas lease sale.[154] Similarly, in a decision from January 2024, a Norwegian court invalidated the permits for three new oil and gas fields in the North Sea, citing Norway's failure to assess the global climate impacts that would stem from downstream use of the oil and gas produced from the fields and exported for consumption abroad.[155] As the court observed in its ruling, an EIA is a crucial element in the decision-making so as to ensure an informed and correct basis for the decisions.[156] In this case, Norway's failure to conduct an adequate environmental impact assessment of combustion emissions and climate effects in spite of the harmful impacts of global GHG emissions led the court to invalidate the decision-making process around the fields.[157]

47. It is therefore imperative that prior to approving, undertaking, financing, or otherwise supporting fossil fuel production, a State must ensure that the requisite EIA processes account for and analyze the full scope of GHG emissions generated by the inevitable and intended use of the fossil fuels. These emissions must be considered even if the actual combustion of the oil and gas occurs—and the resulting emissions materialize—extraterritorially, as they are foreseeable and causally linked to the State's authorization of production. Absent consideration of downstream emissions, the EIA would lack complete information on how the proposed project would degrade the atmosphere and global climate, thereby precluding the State considering undertaking, authorizing or financing the activity from ascertaining its compatibility with its legal obligations or taking appropriate preventive measures—and at-risk States from anticipating and preparing measures to avert or mitigate the potential transboundary harm that would follow.

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[150] *WildEarth Guardians v. Zinke*, 368 F. Supp. at p. 73 (citing *Wilderness Workshop*, 342 F.Supp.3d at 1155 ("[C]ombustion emissions are an indirect effect of an agency's decision to extract ... natural resources.").
[151] *Save Lamu v. National Environmental Management Authority* (2016), case No. NEMA/ESIA /PSL/3798 (Kenya).
[152] *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* (3491/2021) [2022] ZAECMKHC 55.
[153] *Pembina Institute for Appropriate Development v. Canada* (2008), 2008 FC 302, 323 F.T.R. 297 (Canada).
[154] *Friends of Earth v. Haaland*, 583 F. Supp. 3d 113 (D.D.C. 2022) at p. 139.
[155] Nerijus Adomaitis & Gwladys Fouche, "Three Norwegian oil and gas field permits invalidated on environmental grounds," *Reuters*, January 18, 2024, https://www.reuters.com/business/energy/development-permits-3-norway-oil-gas-fields-are-invalid-court-rules-2024-01-18/.
[156] *Greenpeace Nordic and Nature & Youth v. Energy Ministry* (The North Sea Fields Case), Case No. 23-099330TVI-TOSL/05 (Oslo District Court, 18 Jan. 2024) (Norway).
[157] *Ibid*.

VI. Conduct by States that increases the risk of further climate change-driven harm is presumptively contrary to their preventive obligations and treaty-based duties to reduce GHG emissions in line with long-term temperature goals

48. It is only logical that States' duty to prevent transboundary harm to the environment and human rights and minimize the risk thereof prohibits States from increasing the risk of such harm and the chance that it will materialize. States therefore have an obligation to refrain from conduct that can contribute to or create conditions that would heighten the likelihood or severity of environmental damage to other States, as has been addressed before this Court. For instance, reviewing a dispute between Costa Rica and Nicaragua relating to the construction of a road along the San Juan River, the Court observed that it was important to "tak[e] into consideration" the ways in which impacts from the construction could interplay with the effects of hurricanes and other natural events common to the area, amplifying the risk of transboundary damage from sedimentation.[158] In *Nuclear Tests*, Australia instituted proceedings against France relating to the latter's plans to carry out nuclear weapons tests in the atmosphere in the South Pacific, giving little weight to France's assurances of safety in light of the fact that even small increases in "the general level of radioactivity" could increase the risk of radiation-related harm.[159] While the Court did not decide on the merits of Australia's application as the claim was mooted, as noted above, it has since found that States have a general obligation to protect the environment against widespread, long-term and severe environmental damage.[160] It follows that States' conduct that contributes to or increases the likelihood of large-scale environmental harm—like that which would result from dangerous levels of anthropogenic GHG emissions—would be contrary to this obligation.

49. Both action and inaction can breach a State's international obligations.[161] This Court has recognized that an omission may be contrary to a State's obligations when it increases the likelihood of a harm materializing. For instance, In *Corfu Channel*, the Court found Albania responsible for harm incurred by the U.K. and nationals when Albania failed to warn of the presence of mines in its waters—which subsequently exploded, causing property damage and human casualties—notwithstanding a third-party State's role in actually placing the mines.[162]

50. In the context of the mounting climate emergency, both State inaction and State action on fossil fuels—the key driver of anthropogenic GHG emissions—increase the risk of harm from climate change. As discussed in Section II, there is indisputable evidence that fossil fuel activity is responsible for the vast majority of anthropogenic GHG emissions and that the accumulation of these emissions in the atmosphere is causing and accelerating climate change. Moreover, the

[158] *Costa Rica v. Nicar*., 2015 I.C.J. at para. 154.
[159] Case concerning Nuclear Tests (*Australia v. France*), Application Instituting Proceedings, General List No 58, 9 May 1973, at 34.
[160] *Nuclear Weapons Advisory Opinion*, at para. 31.
[161] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, U.N. Doc A/56/10 (2001), at art. 1, cmt. para. 1 ("An internationally wrongful act of a State may consist in one or more actions or omissions or a combination of both" that breach an international obligation of the State); art. 2.
[162] *Corfu Channel*, 1949 I.C.J. at pp. 22-23, 36.

science makes clear that such atmospheric degradation is increasing the frequency, likelihood, and intensity of extreme weather events and ensuing disasters.[163] Unless emissions decline rapidly, climate change will continue to mount, with ever more devastating and irreversible consequences. In that context, maintaining the status quo and failing to take available measures to rapidly reduce GHG emissions—chief among them, phasing out fossil fuel production and use—will only compound climate impacts and heighten the likelihood that—and the speed at which—irreversible climate change harm will materialize. Thus, States that fail to take the necessary measures within their respective capabilities to reduce GHG emissions sufficiently steeply presumptively violate their prevention obligations, as such inaction increases the risk of further significant transboundary harm and human rights violations due to climate change.

51. Likewise, affirmative acts of States that increase the production and use of, or reliance on, fossil fuels in the context of the present crisis increase the risk of significant transboundary harm and human rights violations, and are *presumptively* contrary to State obligations. As elaborated in Section III, such acts include engaging in, authorizing, or financing fossil fuel activity, whether that involves extraction, processing and sale of oil, gas, and coal, or installation of fossil fuel-based infrastructure. States have responsibility to use the means at their disposal to prevent harm and the risk thereof, which requires them to refrain from increasing the risk of harm through conduct subject to their jurisdiction and control. This applies to activities anywhere along the lifecycle or "value chain" of fossil fuel production and use—upstream, mid-stream, or downstream—all of which entrench reliance on fossil fuels and foreseeably contribute to planet-warming emissions.

52. The word "presumptively" is important, because the legal responsibility that attaches to a State act or omission that increases the risk of harm from fossil-fueled climate change will differ depending on the State's role in and responsibility for the cumulative emissions that have, over time, degraded the atmosphere and created the situation in which any additional emissions increase harm and the risk thereof. Acts that contribute to increased dependence on fossil fuels, through expanded production or use, axiomatically lead to increased fossil fuel emissions, contributing to the significant transboundary harm that the accumulation of such emissions cause. The physical emissions impacts may be the same regardless of who burns the fuels and for what purposes, but the legal responsibility for the resultant harm or risk of harm differs depending on the State's role in cumulative emissions that have made those acts risky. The measures States are required to take to prevent and minimize the risk of harm from fossil fuel activities are those that use all means at the State's disposal and are consistent with its concurrent obligations, including its obligations to fulfill human rights. The burden is on the State "that would undertake or persist" in fossil fuel activity—the consequences of which are unequivocally harmful to the global atmosphere and environment, States, and populations, present and future—to justify such conduct.[164]

[163] IPCC, AR6, WGII: Summary for Policymakers, at B.1.

[164] *See* Maastricht Principles on the Human Rights of Future Generations, Principle 9(c), https://www.rightsoffuturegenerations.org/the-principles/english.

VII. In taking measures to prevent climate harm and minimize the risk thereof, States must take a precautionary approach by prioritizing proven actions capable of significantly reducing fossil fuel emissions.

A. A lack of scientific or technological certainty about the full extent or scope of a risk is no excuse for delaying action or relying on speculative preventive or remedial measures in lieu of proven ones

53. The precautionary principle is well-established in both international environmental and human rights law.[165] It requires States to act with caution in the face of uncertain and potentially harmful consequences of an activity and is applied earlier in States' consideration of activities than the closely linked principle of prevention. As stated in the Rio Declaration, the precautionary principle provides that "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[166] The UNFCCC explicitly incorporates the precautionary principle in Article 3(3). International human rights bodies similarly have adopted the precautionary principle in recognition of its relevance to preventing violations of the right to life and other human rights.[167]

54. Before this Court, States have relied on the precautionary principle in their pleadings related to environmental matters.[168] In *Pulp Mills*, this Court acknowledged that "a precautionary approach may be relevant in the interpretation and application" of the agreement at the heart of the dispute, though ultimately did not rely on it in its decision.[169] The ICJ's order in the 1995 *Nuclear Tests* case indicated that it was not going to be decided on the merits, but the dissenting opinions of two judges discussed the status of the precautionary principle. Judge Weeramantry acknowledged that the precautionary principle was gaining support, in numerous treaties, and extolled the importance of the principle in preventing atmospheric degradation,[170] while Judge Palmer's dissenting opinion stated that "the norm involved in the precautionary principle has developed rapidly and may now be a principle of customary international law relating to the environment."[171]

55. It is generally interpreted to mean that when there is no conclusive evidence of a particular risk or lack of scientific certainty, then a State should take precautionary actions to avoid the risk until it

[165] Rio Declaration, principle 15; Convention on Biological Diversity, June 5, 1992, 1769 U.N.T.S. 79 (entered into force on Dec. 29, 1993), at arts. 8, 14; *Tătar v. Romania*, paras. 108-109; IACtHR, *Advisory Opinion OC-23/17*, at paras. 175-180.
[166] Rio Declaration, principle 15.
[167] *See* Human Rights Committee, General Comment No. 36, at para. 62 (noting that States should "pay due regard to the precautionary approach."); IACtHR, *Advisory Opinion OC-23/2017*, at para. 180 (finding States must "act diligently to prevent harm" to human rights and "act with due caution to prevent possible damage").
[168] *See, e.g.*, *Pulp Mills*, 2010 I.C.J. at paras. 55, 160; *Gabčíkovo-Nagymaros Project*, paras. 97, 113; *Costa Rica v. Nicar.*, paras. 218-220; *1995 Nuclear Tests case*, paras. 5, 34-35.
[169] *See Pulp Mills*, 2010 I.C.J. at para. 164 (acknowledging that a precautionary approach may be relevant, but not that it leads to a reversal of burden of proof).
[170] *1995 Nuclear Tests case*, Dissenting opinion, Judge Weeramantry, at pp. 342-44.
[171] *1995 Nuclear Tests case*, Dissenting opinion, Judge Palmer, at p. 412.

is disproved.[172] Moreover, States cannot justify a delay in adopting effective and proportionate measures to prevent serious and irreversible damage to the environment.

B. In responding to a reasonably foreseeable or known risk, the precautionary principle obliges States to prioritize measures that present a lower potential to cause harm

56. Applying the precautionary principle in the context of climate change means that States should not forego measures that are proven and known to be capable of preventing harm and the risk of harm from cumulative GHG emissions—namely, curtailing fossil fuel production and use—because of uncertainty either about the scope, extent and timing of the harm or about whether reducing production and use of fossil fuels is necessary to avert climate risk. Given the incontrovertible evidence that climate change is already causing significant harm and is driven primarily by fossil fuels, no uncertainty can justify delaying measures that would reduce fossil fueled emissions or forgoing such measures in pursuit of unproven or risky alternatives.

57. Calibrating the preventive measures required to the degree of risk posed is consistent with the precautionary approach, which ITLOS has described as "an integral part of the general obligation of due diligence."[173] The precautionary approach requires States to take urgent and known measures that pose less risk of human rights violations to effectively avert the risk of further climate change-induced harm rather than delayed action or reliance on speculative measures.[174] Effective measures are those that are reasonably seen as capable of averting or mitigating the risks of harm.[175] What the appropriate measures are may change if or when new scientific or technological knowledge becomes available.[176] Given the status of the climate crisis, any uncertainty about where or how climate change-related harms will manifest or precisely when they will cannot justify States delaying the adoption of available measures that have a reasonable likelihood of reducing greenhouse gas emissions and thereby helping to avert environmental harm or human rights violations.[177]

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[172] Patricia Birnlie, Alan Boyle & Catherine Redgwell (eds), International Law and the Environment, pp. 604-07 (Oxford University Press, 2009).
[173] ITLOS, *Seabed Chamber Advisory Opinion*, at para. 131.
[174] *See, e.g.*, Committee on the Rights of the Child, General Comment No. 26 (2023) on children's rights and the environment, with a special focus on climate change, U.N. Doc CRC/C/GC/26, (Aug. 22, 2023), at para. 98(e) https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-26-2023-childrens-rights-and (stating "When determining the appropriateness of their mitigation measures in accordance with the Convention, and also mindful of the need to prevent and address any potential adverse effects of those measures, States should take into account the following criteria … (e) Mitigation measures cannot rely on removing greenhouse gases from the atmosphere in the future through unproven technologies. States should prioritize rapid and effective emissions reductions now in order to support children's full enjoyment of their rights in the shortest possible period of time and to avoid irreversible damage to nature."); Advisory Committee to the Human Rights Council, Impact of new technologies intended for climate protection on the enjoyment of human rights, U.N. Doc. A/HRC/54/47 (July 12, 2023) (advanced unedited version), at paras. 4, 29, https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/advisorycommittee/A-HRC-54-47-AUV.docx.
[175] *Tătar v. România*, at para. 108.
[176] IACtHR, *Advisory Opinion OC-23/2017*, at para. 142.
[177] *Urgenda*, at paras. 5.3.2, 5.6.2 (holding that the State had a duty to act to address the risk of climate-induced harm even if it was uncertain whether the harm will occur); *Neubauer*, at paras. 229, 247 (reiterating that protecting the

58. When there is a known or reasonably foreseeable risk, the precautionary principle requires States to prioritize measures that present a lower potential to cause harm. Reliance on speculative mitigation measures that pose serious environmental and human rights risks is not in line with the precautionary principle. Speculative approaches to mitigation include, among others, measures that have repeatedly proven ineffective at delivering claimed emissions reductions, such as carbon capture and storage (CCS), which purports to trap carbon dioxide from an emitting source before it enters the atmosphere,[178] and carbon offset credits, which studies indicate are often unverifiable,[179] impermanent,[180] and/or harmful[181]—as well as other technologies that have yet to be proven at scale and could introduce new risks, such as direct air capture (DAC), a form of carbon dioxide removal (CDR) that proposes to capture CO_2 already in the atmosphere.[182] These

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rights of future generations includes not delaying action especially given the irreversibility of climate change, and that precautionary measures must be taken to manage the anticipated future reduction burdens in accordance with respect for fundamental rights).

[178] IEA, Carbon Capture, Utilisation and Storage, https://www.iea.org/energy-system/carbon-capture-utilisation-and-storage; Bruce Robertson and Milad Mousavian, *The carbon capture crux: Lesson Learned* (Sept. 1, 2022), https://ieefa.org/resources/carbon-capture-crux-lessons-learned (highlighting the decades long failure of CCS); IPCC, AR6, Synthesis Report: Summary for Policymakers, at fig. SPM.7 (demonstrating that CCS is among the highest cost and least effective in reducing emissions this decade).

[179] *See, e.g.*, Dr. Martin Cames et al, *How additional is the Clean Development Mechanism? Analysis of the application of current tools and proposed alternatives*, Directorate-General for Climate Action, CLlMA.B.3/SERl2013/0026 (March 2016), p. 11 ("Overall, our results suggest that 85% of the projects covered in this analysis and 73% of the potential 2013- 2020 Certified Emissions Reduction (CER) supply have a low likelihood that emissions reductions are additional and are not over-estimated."). *See also* Carbon Market Watch, *Carbon Markets 101: The Ultimate Guide to Global Offsetting Mechanisms* (2020), p. 4; Micah Macfarlane, *Assessing the State of the Voluntary Carbon Market in 2022*, Carbon Direct, Blog (May 6, 2022); Heidi Blake, *The Great Cash-for-Carbon Hustle*, The New Yorker (Oct. 16, 2023), https://www.newyorker.com/magazine/2023/10/23/the-great-cash-for-carbon-hustle; Benedict Probst et al, ETH Zurich, *Systematic review of the actual emissions reductions of carbon offset projects across all major sectors* [Working Paper] (2023), p. 12, https://www.research-collection.ethz.ch/bitstream/handle/20.500.11850/620307/230706_WP_full_vf.pdf?sequence=9&isAllowed=y. *See also* Josh Gabbatis et al, *In-depth Q&A: Can 'carbon offsets' help to tackle climate change?*, Carbon Brief (Sept. 24, 2023), https://interactive.carbonbrief.org/carbon-offsets-2023.

[180] Lisa Song, *An Even More Inconvenient Truth: Why Carbon Credits For Forest Preservation May Be Worse than Nothing*, ProPublica (May 22, 2019), https://features.propublica.org/brazil-carbon-offsets/inconvenient-truth-carbon-credits-dont-work-deforestation-redd-acre-cambodia/; Jutta Kill et al, FERN, *Trading carbon: How it works and why it is controversial* (Aug. 2010), p. 59; M. Carnes et al., 'How additional is the Clean Development Mechanism?: Analysis of the application of current tools and proposed alternatives' (March 2016); M. Castagné et al., Carbon Market Watch, Secours Catholique, CCFD-Terre Solidaire & IATP, *Carbon Markets and Agriculture: Why offsetting is putting us on the wrong track* (2020), p. 6; Winston ChoiSchagrin, *Wildfires are ravaging forests set aside to soak up greenhouse gases*, N.Y. Times (Aug. 23, 2021). https://www.nytimes.com/2021/08/23/us/wildfires-carbon-offsets.html.

[181] Daisy Dunne and Yanine Quiroz, *Mapped: The impacts of carbon-offset projects around the world*, Carbon Brief (Nov. 8, 2023), https://interactive.carbonbrief.org/carbon-offsets-2023/mapped.html; Daniel Grossman, *Dam Lies: Despite Promises, an Indigenous Community's Land Is Flooded*, Pulitzer Center (Mar. 6, 2018), https://pulitzercenter.org/stories/dam-lies-despite-promises-indigenous-communitys-land-flooded#:~:text=The%20Ng%C3%A4be%2DBugl%C3%A9%20people%20in,banks%20of%20the%20Tabasar%C3%A1%20River; Interim Report of the Special Rapporteur on the Right to Food, U.N. Doc. A/70/287 (2015), para. 68-69; J.P. Sarmiento Barletti and A. Larson, CIFOR, *Rights Abuse Allegations in the Context of REDD+ Readiness and Implementation: A Preliminary Review and Proposal for Moving Forward* (2017).

[182] *See Center for International Environmental Law & Heinrich Boell Foundation, IPCC Unsummarized: Unmasking Clear Warnings on Overshoot, Techno-fixes, and the Urgency of Climate Justice*, pp. 26-30 (Apr. 21, 2022) (citing IPCC statements regarding the infeasibility of DAC and concerns about adverse impacts); IPCC AR6 WGIII, pp. 346-

speculative measures pose not only a direct risk to the environment and human rights, but also an indirect risk as they allow or are employed as an excuse for the continued production and use of fossil fuels, and failure to take the necessary measures to reduce GHG emissions in the near-term. Both the IPCC[183] and human rights experts[184] have recognized that some measures taken in response to climate change pose risks to the environment and human rights. These risks underscore States' duties to "respect, promote and consider their respective obligations on human rights" when taking climate action.[185] National courts have also named the precautionary principle as one reason for striking down States' reliance on future measures that the courts deemed too speculative to justify delayed reliable near-term action[186] and have recognized the uncertainty that surrounds the feasibility or impact of certain technologies such as large-scale carbon dioxide removal.[187] To satisfy their legal obligations under customary and treaty-based international law, States must take measures capable of averting harm and the risk of harm from climate change, and that requires tackling fossil fuels.

348, Ch. 12 ("Cross sectoral perspectives"), 12.3.1.1, pp. 1263, 1265-68 (discussing concerns that deployment of large-scale CDR could obstruct near-term emissions reduction efforts), Ch. 3 ("Mitigation Pathways Compatible with Long-term Goals"), p 348, Ch. 4 ("Water"), 4.7.6, p. 654.

[183] IPCC, AR6, WGII: Summary for Policymakers, at para. B.5.4 ("Risks arise from some responses that are intended to reduce the risks of climate change, including risks from maladaptation and adverse side effects of some emission reduction and carbon dioxide removal measures (high confidence).").

[184] Special Rapporteur on the promotion and protection of human rights in the context of climate change (Ian Fry), Report on the promotion and protection of human rights in the context of climate change, U.N. Doc. A/78/255,(July 28, 2023), at para. 16 (asserting that "[n]ew mitigation technologies associated with atmospheric changes and geoengineering also have the potential for significant human rights impacts"); Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes (Marcos Orellana), The toxic impacts of some proposed climate change solutions, UN Doc. A/HRC/54/25, (July 13, 2023), at para. 71 ("Climate engineering is "large-scale, deliberate intervention in the Earth system to counteract climate change". Such interventions are primarily considered as options to compensate for lagging international efforts to mitigate climate change. There is a lack of scientific certainty about the efficiency of climate-altering engineering technologies, such as solar radiation modification, and they can have a wide range of potential impacts on the effective enjoyment of human rights. Pinning humanity's hopes on future technologies should not be used to justify insufficient action to reduce greenhouse gas emissions and phase out fossil fuels"); Special Rapporteur on Human Rights and the Environment, Safe Climate Report, at para. 83 ("Some proposed geoengineering strategies to mitigate climate change involve the large-scale manipulation of natural systems through measures such as fertilizing the oceans with iron, installing mirrors in outer space to reflect solar radiation, or shooting aerosols into the atmosphere (imitating the effects of large volcanic eruptions"). These untested technological approaches could have massive impacts on human rights, severely disrupting ocean and terrestrial ecosystems, interfering with food production and harming biodiversity. These types of geoengineering strategies should not be used until their implications are much better understood".); *see also* Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance (E. Tendayi Achiume), Report of the Special Rapporteur on Ecological crisis, climate justice and racial justice, UN Doc. No. A/77/549, October 25, 2022, para. 65 (noting that climate response measures potentially pose significant risks to human rights).

[185] Paris Agreement, at pmbl.

[186] *Urgenda*, at para. 7.2.5.

[187] *Neubauer*, at paras. 222, 227; Supreme Court of Ireland, *Friends of the Irish Environment CLG v. the Government of Ireland*, Appeal No. 205/19, July 31, 2020, paras. 3.4, 6.46-6.47; *see also* England and Wales High Court of Justice - Administrative Court, *Friends of the Earth Limited et al. v. Secretary of State for Business, Energy and Industrial Strategy*, Case no. CO/126/2022, CO/163/2022, CO/199/2022, July 18, 2022, at para. 250.

VIII. Conclusion

59. It is not possible to define the full scope and content of State obligations to protect the climate system under international law without addressing State obligations with respect to the fossil fuels driving climate change. Global climate change caused primarily by the production and use of fossil fuels is wreaking havoc and devastating the environment, livelihoods, and lives of millions of people. States' duties under customary and conventional international law to take measures necessary to prevent foreseeable harm to the environment and to human rights require action to curtail fossil fuel production and use. Consistent with the principles of prevention, precaution, and associated due diligence, and in view of the inherent transboundary nature of climate change, States must at minimum, assess all foreseeable emissions from fossil fuel activity, regardless of where they occur, and take measures necessary to prevent further catastrophic harm from fossil-fueled climate change.

MEMO ON THE RIGHTS OF FUTURE GENERATIONS

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I. Introduction

1. In the request for an advisory opinion in respect of State obligations on climate change, the questions posed to the Court ask for clarification of the obligations of States to future generations, and the legal consequences of the breach of such obligations.[1] This submission asserts that the obligations of States in relation to climate change run to both present ***and*** future generations and that there exists no legal basis in international law to restrict such obligations to present generations. It annexes the Maastricht Principles on the Human Rights of Future Generations,[2] which clarify the present state of international law as it applies to the human rights of future generations. This submission also annexes an annotated list of relevant resources on the rights of future generations and the principle of intergenerational equity.

2. In advance of considering relevant legal norms, it is important to clarify the definition of 'future generations' and what is meant by the principle of intergenerational equity. There is at present no one authoritative definition of the concept of 'future generations.' Future generations have been variously defined as "all those generations that do not yet exist, are yet to come and who will eventually inherit this planet"[3] and to "include persons, groups and Peoples."[4] They are considered distinct from children and young generations, although "present children, adolescents and youth occupy a proximate position to future generations"[5] and the duty held towards the two categories, may to some extent overlap.[6] The principle of intergenerational equity recognizes responsibilities towards future generations.[7]

3. While current levels of global warming are leading to devastating climate impacts in the here and now, the science is also clear regarding the risk of dangerous climate harm associated with exceeding 1.5°C.[8] At current levels of warming, climate change is having deleterious effects on

[1] 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, pp. 3-4 (2023).
[2] *Maastricht Principles on the Human Rights of Future Generations*, para. 1 (2023), https://www.rightsoffuturegenerations.org/the-principles.
[3] *Elements Paper for the Declaration of Future Generations*, p. 1 (2022), https://www.un.org/pga/76/wp-content/uploads/sites/101/2022/09/Elements-Paper-Declaration-for-Future-Generations-09092022.pdf.
[4] *Maastricht Principles*, para. 1.
[5] *Maastricht Principles*, para. 22(c).
[6] *See generally* Office of the United Nations High Commissioner for Human Rights, *Analytical study on the relationship between climate change and the full and effective enjoyment of the rights of the child*, U.N. Doc. A/HRC/35/13, paras.30-33 (stating in para. 30 that, "The importance of children's rights in the context of climate change is explicitly recognized in the Paris Agreement under the United Nations Framework Convention on Climate Change, in which States are called on to respect, promote and consider their respective obligations on, among other things, the rights of the child and intergenerational equity when taking action to address climate change," and in para. 33 that, "A child rights-based approach requires States to take urgent action to mitigate climate change by limiting emissions of greenhouse gases in order to prevent to the greatest extent possible their negative human rights impacts on children and future generations.").
[7] United Nations, *Our Common Agenda: Report of the Secretary General*, p. 43 (2021), https://www.un.org/en/content/common-agenda-report/assets/pdf/Common_Agenda_Report_English.pdf.
[8] Intergovernmental Panel on Climate Change (IPCC), 2023: Summary for Policymakers, in, *Climate Change 2023: Synthesis Report. A Report of the Intergovernmental Panel on Climate Change. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, H. Lee and J. Romero (eds.)], paras. A.2-A.2.7, B.2-B.2.4, figs. SPM.1, SPM.4 (2023) [hereinafter IPCC, AR6, Synthesis Report: Summary for Policymakers].

natural ecosystems and communities around the world. Every fraction of a degree of temperature rise accelerates and intensifies those effects. The 2023 Synthesis Report of the Intergovernmental Panel on Climate Change (IPCC) Sixth Assessment Report (AR6), published in March 2023, reaffirmed that "every increment of global warming will intensify multiple and concurrent hazards (*high confidence*)."[9] The stark failure of States to take meaningful action to meet the 1.5°C temperature target of the Paris Agreement, leading to a worsening climate crisis, poses a direct, and possibly the greatest threat[10] to the human rights of future generations. Failing to take climate action further curtails the fundamental rights of future generations as it deprives them of political choices.[11] Protecting the rights of future generations in the context of the climate crisis is a legal obligation "an essential dimension of humankind's duty to uphold the inherent dignity, equality, and inalienable rights of all"[12] and critical to ensuring "both justice and sustainability across an array of timescales including the present, near term and distant future."[13]

4. The subsequent paragraphs lay out how the rights of future generations and the principle of intergenerational equity are rooted in multiple sources of international law spanning almost a century; thereafter establishing that the rights of future generations apply in the context of climate change; and finally arguing that the principles of prevention and precaution apply with particular force in the context of the rights of future generations.

II. The rights of future generations and the principle of intergenerational equity are rooted in multiple sources of international law

5. The rights of future generations and the principle of intergenerational equity are rooted in a wide range of international legal norms and instruments across a great diversity of subject areas.

6. The ICJ itself, in interpreting customary and conventional law, referenced principles of intergenerational equity and the rights of future generations. In its *Advisory Opinion on the Legality of the Threat of Nuclear Weapons*, for example, the ICJ unanimously stated 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."[14] In his dissenting opinion, Judge Weeramantry stated that, in regards to the environment, the Court must "pay due recognition to the rights of future generations" and noted that "the rights of future generations ...have woven themselves into international law through major treaties, through juristic opinion and through general principles of

[9] IPCC, AR6, Synthesis Report: Summary for Policymakers, at para. B.1 SPM B.1.
[10] Human Rights Committee, *General Comment No. 36 - Article 6: right to life*, U.N. Doc. CCPR/C/GC/36, para. 62 (Sept. 3, 2019) (stating "Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life"); UNICEF, *Unless We Act Now: The Impact of Climate Change on Children*, p. 6 (New York, 2015);
[11] *See Neubauer et al v. Germany*, Bundesverfassungsgerichtshof (BverfG) (Federal Constitutional Court), p. 34 (Apr. 29, 2021).
[12] *Maastricht Principles on the Human Rights of Future Generations*, pmbl., para. iv.
[13] *Maastricht Principles on the Human Rights of Future Generations*, pmbl., para. vi.
[14] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. (July 8), at para. 29 [hereinafter *Nuclear Weapons Advisory Opinion*].

law recognized by civilized nations."[15] Thus, "[w]hen incontrovertible scientific evidence speaks of pollution of the environment on a scale that spans hundreds of generations, this Court would fail in its trust if it did not take serious notes of the ways in which the distant future is protected by present law."[16] Subsequently, in the *Gabčíkovo-Nagymoros* case, the ICJ further recognized that protection of the environment includes protection for future generations.[17] More recently the *Pulp Mills* case, which focused on transboundary environmental risks, reaffirmed that "inter-generational equity forms part of conventional wisdom in International Environmental Law."[18]

7. In terms of conventional law, the UN Charter reflects the duty of present generations to protect future generations.[19] Over the subsequent 70 years, this principle has been reiterated, reaffirmed, elaborated, and operationalized in numerous international legal agreements.

8. Several international instruments concerning environment protection, natural resources and cultural heritage enshrine the principle of intergenerational equity and explicitly reference the rights of future generations. These include, for example, the African Convention on the Conservation of Nature and Natural Resources, which, in its preamble, considers the "the present and future welfare of mankind,"[20] the World Heritage Convention averring that each State Party to the Convention has "the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage,"[21] and the Rio Declaration, which in laying out numerous principles of international environmental law including obligations to future generations, proclaimed that "[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."[22] To date, at least 42 international environmental agreements explicitly incorporate or reference the principle of intergenerational equity and/or references to future generations.[23]

9. Multiple international human rights bodies have recognized the relevance of human rights treaty law for future generations.[24] Recent interpretations of international treaty law also make clear

[15] *Ibid.* at pp. 233-34 (dissenting opinion of Judge Weeramantry who was dissenting on the merits of the case, but not this principle).
[16] *Ibid.* at p. 234.
[17] *Case Concerning the Gabčíkovo-Nagymaros Project* (*Hung. v. Slovk.*), Judgment, 1997 I.C.J. 7 (Sept. 25), at para. 140 [hereinafter *Gabčíkovo-Nagymaros Project*].
[18] *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Separate opinion by Trindade, J., 2010 I.C.J. Rep 135 (Apr. 20), at para. 122, https://perma.cc/F3GH-H6AQ (last visited March 17, 2024) (both States in the dispute also highlighted intergenerational equity and considerations of future generations as central to the case).
[19] *See* U.N. Charter pmbl. (1945) (stating "We the Peoples of the United Nations determined to save succeeding generations from the scourge of war.").
[20] African Convention on the Conservation of Nature and Natural Resources, pmbl., Sept. 15, 1968, 1001 U.N.T.S. 3 (entered into force June 16, 1969, revised July 11, 2003).
[21] UN Educational, Scientific and Cultural Organization (UNESCO), Convention Concerning the Protection of the World Cultural and Natural Heritage, art 4, Nov. 16, 1972.
[22] Rio Declaration on Environment and Development, 31 I.L.M. 874 (1992), at Principle 3.
[23] *See* Annex 2.
[24] *See, e.g.*, Committee on the Elimination of all Forms of Discrimination against Women, General recommendation No. 37 on the gender-related dimensions of disaster risk reduction in the context of climate change, U.N. Doc. CEDAW/C/GC/37, paras. 1, 19 (Mar. 13, 2018); Committee on the Rights of the Child, *General Comment No. 26* (2023) on children's rights and the environment with a special focus on climate change, U.N. Doc. CRC/C/GC/26, paras. 11 (Aug. 22, 2023) [hereinafter CRC, *General Comment No. 26*]; Committee on Economic, Social and Cultural

reference to the rights of future generations and intergenerational equity.[25] For example, the Human Rights Committee mandated to monitor the implementation of the International Covenant on Civil and Political Rights has interpreted the right to life as applying to future generations, observing how "Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life."[26] In a similar vein, the Committee on Economic, Social and Cultural Rights, when interpreting the scope of State obligations under the International Covenant on Economic, Social and Cultural Rights has observed that, "[C]ultural heritage must be preserved, developed, enriched and transmitted to future generations."[27] Furthermore, the rights of future generations are centered in regional human rights treaties and jurisprudence.[28]

10. The ICJ also draws on general principles of law[29] reflected in "laws, norms, customs and values of States and peoples from all global regions and belief systems"[30] as another source of international law. It is thus relevant that the legal interests of future generations and principles of intergenerational equity are recognized in traditional legal systems across the world.[31] In his separate opinion in the *Maritime Delimitations* case between Denmark and Norway, Justice Weeramantry noted that the principles of intergenerational equity and trusteeship of earth's natural

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Rights (CESCR), General Comment No. 15 (2002) on the right to water, U.N. Doc. E/C.12/2002/11, paras. 11, 28 (Jan. 20, 2003); Committee on Economic, Social and Cultural Rights, General Comment No. 19: the right to social security, U.N. Doc. E/C.12/GC/19, para. 11 (Feb. 4, 2008); Committee on Economic, Social and Cultural Rights, General Comment No. 21 on the right of everyone to take part in cultural life, U.N. Doc. E/C.12/GC/21, para 50 (Dec. 21, 2009) [hereinafter CESCR, General Comment No. 21]; Committee on Economic, Social and Cultural Rights, General Comment No. 25 (2020) on article 15: science and economic, social and cultural rights, U.N. Doc. E/C.12/GC/25, para. 56 (Apr. 30, 2020). The ICJ has referenced and relied on UN treaty body work in its jurisprudence. *See, e.g., Case Concerning Ahmadou Sadio Diallo* (*Guinea v. Dem. Rep. Congo*), Judgement, 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, para. 109 (July 9).

[25] *See, e.g.*, Committee on the Elimination of all Forms of Discrimination against Women, *General recommendation No. 37 on the gender-related dimensions of disaster risk reduction in the context of climate change*, U.N. Doc. CEDAW/C/GC/37, paras. 1, 19 (Mar. 13, 2018); CRC, *General Comment No. 26*, at para 11.

[26] Human Rights Committee, General Comment No. 36 - Article 6: Right to life, U.N. Doc. CCPR/C/GC/36, para. 62 (Sept. 3, 2019) [hereinafter HRC, General Comment No. 36, at para. 62].

[27] CESCR, General Comment No. 21, at para 50.

[28] *See, e.g.*, African Youth Charter, art. 19 (July 2, 2006); *Awas Tingni Community v. Nicaragua*, Judgment, Inter-Am. Ct. HR (ser. C) No. 79 (Aug. 31, 2001), at para. 149; Inter-American Court of Human Rights (IACtHR), *Advisory Opinion OC-23/2017 on the Environment and Human Rights* (2017), at para. 59 [hereinafter IACtHR, *Advisory Opinion OC-23/2017*]; African Commission on Human and Peoples Rights (ACHPR), *The Centre for the Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Communication No 276/2003, para. 152, 157 (2009) AHRLR 75.

[29] Statute of the International Court of Justice, art. 38(1), Oct. 24, 1945.

[30] *Maastricht Principles on the Rights of Future Generations*, at art.2.1(c).

[31] *See, e.g., Gabčíkovo-Nagymaros Project*, separate opinion of Judge Weeramantry, pp. 94-95, para.(e); *Awas Tingni Community*, at para. 141 (regarding the Indigenous Peoples' worldview).

resources, according to which the latter shall be managed for the benefit of present and future generations, is contemplated in Pacific and Islamic traditional legal systems, among others.[32] Furthermore, Indigenous legal systems have long recognized intergenerational equity.[33] Notably, Indigenous perspectives on future generations have also been recognized by a rich body of jurisprudence of the Inter-American Court of Human Rights.[34] Additionally, the human rights of future generations have been extensively recognized in global constitutions and case law. To date, 81 out of 196 national Constitutions in force mention future generations explicitly,[35] while decades of national level jurisprudence and legislation across regions have advanced the rights of future generations.

11. The aforementioned paragraphs make clear that the rights of future generations and the principle of intergenerational equity are well-established in international law. These rights also apply in the climate context, as will be laid out in the next section.

III. State obligations under international law with respect to climate change extend to future generations

12. State obligations in relation to climate change apply to the rights of present and future generations.

13. In advance of establishing that State climate obligations extend to future generations, there are two considerations, which are also relevant beyond climate, to take into account. Firstly, international human rights law has no temporal bounds, and thus extends to present and future generations. Secondly, intergenerational and intragenerational human rights obligations are deeply interconnected.

14. No human rights instrument limits its application only to present generations—there are no expressed temporal limits. Travaux préparatoires are a source of treaty interpretation,[36] and with respect to certain instruments these preparatory documents provide evidence that the treaties were intended to apply to future generations.[37] In fact, as seen in paragraph 9 above, numerous human rights bodies have recognized the relevance of human rights treaty law for future generations. In its first analytical study on the relationship between human rights and climate change, the UN

[32] *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.)*, Judgment, 1993 I.C.J. 38 (June 14), Separate Opinion of Judge Weeramantry, paras. 242-243.
[33] *See* Margaretha Wewerinke-Singh, Ayan Garg & Shubhangi Agarwalla, *In Defence of Future Generations: A Reply to Stephen Humphreys*, 34(3) European J. of Int'l Law, p. 653-657 (Aug. 2023), https://shorturl.at/gruKS.
[34] *Ibid.* at 651–668.
[35] *See* Annex 2; World Constitutions Illustrated, https://home.heinonline.org/content/world-constitutions-illustrated/; *see also* the global survey realized by Renan Araújo & Leonie Koessler, "The Rise of the Constitutional Protection of Future Generations," LPP Working Paper No. 7-2021 (2021) (containing a global survey) "The rise of the constitutional protection of future generations, p.4..
[36] Vienna Convention on the Law of Treaties, art. 31(2), May 23, 1969, 1155 U.N.T.S 331 (entered into force Jan. 27, 1980).
[37] *See, e.g.*, William Schabas, *The Universal Declaration of Human Rights: The Travaux Préparatoires*, pp. 1643, 1842-43, 2551, 2719 (2013); Antonio A. Cançado Trindade, "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)," 202 Recueil des cours de l'Académie de droit international 21, 284-285 (1987).

Office of the High Commissioner for Human Rights (OHCHR) noted that the principles of equality and non-discrimination extend to future situations, as "it is understood that the value of these core human rights principles would not diminish over time and be equally applicable to future generations."[38] This understanding was reinforced in *Neubauer et al. v. Germany*, with the Federal Constitutional Court of Germany emphasizing that fundamental rights are "intertemporal guarantees of freedom" and that mitigation burdens cannot be "unilaterally offloaded onto the future."[39]

15. The rights of present and future generations are not in conflict with one another, but rather very interconnected. Research demonstrates the intergenerational transmission of systemic disadvantage and trauma which means that the descendants of Peoples and individuals that have been historically marginalized and experienced human rights violations in a structural way are more likely to experience marginalization and human rights violations in the future.[40] Thus protecting the rights of present generations is critical to more effectively securing the rights of future generations. In speaking to a common agenda including in the context of climate change, the UN Secretary-General has expressed that "[u]pholding the rights and meeting the needs of those alive today is a precondition for securing a better future. Our first action on behalf of future generations must therefore be to fulfil the commitments to those currently alive, in a sustainable way and with more emphasis on long-term thinking."[41] While reasonable restrictions must limit activities that clearly impact or may impact the rights of future generations, such as unsustainable and inequitable resource use, particularly relevant in relation to climate change, care must be taken to impose restrictions in a manner that does not disproportionately impact marginalized peoples and individuals. Prominent legal scholar, Edith Brown Weiss, in discussing the need for trade-offs in resource use when balancing intra-generational and inter-generational equity, has reflected that, "[t]oo often, long-term costs are accrued for short-term benefits which often go only to the few."[42]

16. UN human rights bodies, UN Special Rapporteurs, and IPCC scientists have unequivocally spoken to climate change's disproportionate impacts on future generations' rights to life, food and water security, land, culture, and to a clean, healthy and sustainable environment.[43]

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[38] Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, U.N. Doc. A/HRC/10/61, para. 90 (Jan. 15, 2009) [hereinafter OHCHR Report on Climate Change and Human Rights].

[39] *Neubauer at* p.38.

[40] *See, e.g.*, *Azanian Peoples Organization (AZAPO) v. President of the Republic of South Africa*, (CCT17/96) [1996] ZACC 16, 1996 (8) BCLR 1015, 1996 (4) SA 672 (July 25, 1996), at para 43; Ambar Narayan et al, *Fair Progress? Economic Mobility Across Generations Around the World* (World Bank Group, 2018); United Nations, *The Sustainable Development Goals Report 2022*, p. 47 (2022).

[41] UN General Assembly, *Our Common Agenda: Policy Brief 1: To Think and Act for Future Generations*, U.N. doc. A/77/CRP.1, para. 13 (Feb. 7, 2023).

[42] Edith Brown Weiss, "The Theoretical Framework for International Legal Principles of International Equity and Implementation through National Institutions," *in* MC Cordonier Segger et al (eds), *Intergenerational Justice in Sustainable Development Treaty Implementation: Advancing Future Generations Rights Through National Institutions* (2021), at pp. 16-45, 23.

[43] *See* HRC, *General Comment No. 36*, at para. 62; Towards a just transformation: climate crisis and the right to housing, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, U.N. Doc. A/75/298 (2022), para. 9; IPCC, AR6, Synthesis Report: Summary for Policymakers, at paras. A.2-A.2.7, C.1.3, fig. SPM.1.

17. As set forth in paragraph 6 above, the ICJ has referenced the rights of future generations and the principles of intergenerational equity in the context of environmental law, which are of vital relevance to State climate obligations, as climate change is an environmental concern, although not limited thereto.

18. The right to a clean, healthy and sustainable environment encompasses the right to a safe climate.[44] Several Constitutions also protect the right to a clean, healthy and sustainable environment for future generations as we have seen in the preceding paragraphs, and these provisions also apply in the climate context in their distinct context, but also as general principles of international law. One compelling example of such constitutional protection can be found in article 40 of the Constitution of Fiji, which notes that "every person has the right to a clean and healthy environment, which includes the right to have the natural world protected for the benefit of present and future generations through legislative and other measures."[45] Often, the constitutional protection of the rights of future generations is associated with a limit on the State's power to use its natural resources.[46]

19. There is a strong legal basis rooted in multiple sources which affirms that States' climate-related legal obligations run to future generations. The United Nations Framework Convention on Climate Change (UNFCCC), adopted in 1992, introduced the principle of intergenerational equity in international climate law. The principle, affirmed at article 3.1 of the UNFCCC, and then reiterated in the preamble of the Paris Agreement, states that the parties should protect the global climate system for the benefit of present and future generations.[47] Since the adoption of these agreements, 33 decisions adopted by their Parties by consensus have referred explicitly to intergenerational equity and the need to protect the climate for the sake of future generations. Moreover, the United Nations has reproduced and developed such intergenerational commitments in several resolutions and also interpretations of treaty law, indicating the importance of climate action for future generations.[48]

20. Human Rights Treaty Bodies, which are responsible for assessing Parties' adherence to their obligations with respect to the relevant human rights agreement, have consistently countered the compatibility of fossil fuel-related activities with human rights law, including due to their

[44] Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, U.N. Doc. A/74/161, para. 43 (July 15, 2019) [hereinafter Special Rapporteur on Human Rights and the Environment, Safe Climate Report].
[45] Constitution of the Republic of Fiji, art. 40(1).
[46] *E.g.*, Constitution of Angola, art. 39; Constitution of Argentina, art. 41; Constitution of 2009 of the Plurinational State of Bolivia, art. 9(6); Constitution of the Republic of Chile, art. 57.
[47] United Nations Framework Convention on Climate Change, art. 3.1, May 9, 1992, 1771 U.N.T.S. 107 (entered into force Mar. 21, 1994) [hereinafter UNFCCC]; 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].
[48] *See, e.g.*, UN General Assembly, *Charter of Economic Rights and Duties of States*, U.N. Doc. A/RES/3281/29 (2009); UN General Assembly, *Protection of global climate for present and future generations of mankind : resolution*, U.N. Doc. A/RES/46/169 (1991); UN General Assembly, *The Future We Want*, U.N. Doc. A/RES/66/288 (July 27, 2012). For interpretations of treaty law, which considers State obligations in relation to climate to extend to future generations, please, see paragraph 9, especially accompanying footnotes 25 and 26.

intergenerational impacts.[49] In that context, for example, the Committee on Economic, Social, and Cultural Rights and the Committee on the Rights of the Child have expressed doubts and concerns on the compatibility of a fracking project in Argentina,[50] and of continued investments in fossil fuels in Austria, Australia, and Japan,[51] alluding to their impacts on future generations and children's rights.

21. In several cases,[52] Courts have found that State obligations in relation to climate change run to future generations. For example, the German Constitutional Court has found, "one generation must not be allowed to consume large parts of the CO2 budget under a comparatively mild reduction burden … and expose their [future generations'] lives to serious losses of freedom."[53] Similarly, the Hague District Court in *Urgenda*, which was upheld by the Supreme Court, held that "the [Dutch] State, in choosing measures [to combat climate change], will also have to take account of the fact that the costs are to be distributed reasonably between the current and future generations."[54] Courts in France have likewise held that planned future action could not excuse the failure to meet near-term targets, given the long-term effects of current emissions[55], and the risk that delayed action would require drastic cuts later.[56] Furthermore based on their long-term effects, and in light of the principle of intergenerational equity, domestic courts have withdrawn or upheld the withdrawal of the authorization of coal, gas flaring and cement plants, in Australia, Ecuador and Pakistan[57] and partially invalidated an act to promote fracking.[58]

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[49] Center for International Environmental Law & Global Initiative for Economic, Social & Cultural Rights, *States' Human Rights Obligations in the Context of Climate Change: Guidance Provided by UN Human Rights Treaty Bodies - 2023 Update*, pp. 10-11 (2023), https://www.ciel.org/wp-content/uploads/2023/04/States-Human-Rights-Obligations-in-the-Context-of-Climate-Change-2023.pdf.

[50] Committee on Economic, Social and Cultural Rights, *Concluding observations on the fourth periodic report of Argentina*, U.N. Doc. E/C.12/ARG/CO/4, paras. 13-14 (Nov. 1, 2018).

[51] Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, para. 41, U.N. Doc. CRC/C/AUS/CO/5-6 (Nov. 1, 2019); Committee on the Rights of the Child, Concluding Observations on the combined fourth and fifth periodic reports of Japan, para. 37, U.N. Doc. CRC/C/JPN/CO/4-5 (Feb. 1, 2019).

[52] National level case law is relevant as judicial decisions are a source of interpretation under Article 38 of the Statute of the ICJ.

[53] *Neubauer*, at p.55.

[54] The Hague District Court, *Urgenda v. The State of the Netherlands*, Case. No. C/09/456689/HA ZA 13-1396 (June 24, 2015) (English translation), at para. 4.76.

[55] *Association Notre Affaire à Tous et al v. France*, Paris Administrative Court, No. 1904967, 1904968, 1904972, 1904976/4-1, para. 31 (2021).

[56] *Commune de Grande-Synthe*, Supreme Administrative Court (Conseil d'Etat) of France, No. 427301, para. 15 (Nov. 19, 2020).

[57] *See Waratah Coal Pty Ltd v. Youth Verdict Ltd & Ors*, (No 6) [2022] QLC 21, at para. 1603 (stating "The children of today and of the future will bear both the more extreme effects of climate change and the burden of adaptation and mitigation in the second half of this century. Their best interests are not served by actions that narrow the options for achieving the Paris Agreement temperature goal. This weighs the balance against approving the applications."); Provincial Court of Justice of Sucumbios, *Herrera Carrion et al. v. Ministry of the Environment et al. (Caso Mecheros)*, Provincial Court of Justice of Sucumbios, No. 21201-2020-00170 (2020), at p. 18; *D.G. Khan Cement Company v. Government of Punjab*, Supreme Court of Pakistan (2021), at pp. 15-16, para. 19-20.

[58] *Robinson Township, Washington County, Pa. et al. v. Commonwealth of Pennsylvania*, 83 A.3d 901 (Pa. 2013).

IV. The principles of prevention and precaution apply with particular force in relation to the rights of future generations, including in the climate context

22. Directly related to the duty to protect the environment for future generations are the principles of prevention and precaution.

23. It is well established customary international law that States have a duty to prevent foreseeable environmental and human rights harm.[59] This duty extends to both present and future generations and requires States to take measures to prevent or minimize the known risk to people and the environment.[60]

24. Closely related, but distinct, the precautionary principle applies earlier and requires States, in the face of scientific uncertainty about the potential consequences, to act proactively and in a manner that avoids or minimizes these potential harmful consequences.[61] Article 3(3) of the UNFCCC establishes the precautionary principle as a core principle in preventing dangerous anthropogenic interference in the climate specifying that, "Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change."[62] The precautionary principle is firmly part of the corpus of international environmental law,[63] but given the inextricable link

[59] Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1905 (1941), at 1905-82; Stockholm Declaration on the Human Environment, 11 I.L.M. 1416 (1972), at principle 21; Rio Declaration, at principle 2; Dispute over the Status and Use of the Waters of the Silala (Chile v. Bol.), Judgment, 2002 I.C.J. Rep. 614 (Dec. 1), at para. 99; Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, 2015 I.C.J. Rep. 665 (Dec. 16), at paras. 104, 118; Pulp Mills, at para. 101; Gabčíkovo-Nagymaros Project, at para. 53; Nuclear Weapons Advisory Opinion, at para. 29; IACtHR, *Advisory Opinion OC-23/17*, at paras. 95-103; Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands, decision of 24 May 2005, 27 R.I.A.A. 35, at para. 222; The Corfu Channel Case (U.K. v. Albania), Judgment of April 9th, 1949, I.C.J. Rep. at. 22; HRC, General Comment No. 36, paras. 7, 18, 21-22, 62 (in para. 62 stating "Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors"); 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," U.N. Doc. HRI/2019/1(May 14, 2020, originally released Sept. 16, 2019), para. 5 (stating "[f]ailure to take measures to prevent foreseeable human rights harm caused by climate change, or to regulate activities contributing to such harm, could constitute a violation of States' human rights obligations"); African Commission on Human and Peoples' Rights, General Comment No. 3 on The African Charter on Human and Peoples' Rights: The Right to Life (Article 4), para. 3 (2015) (the Charter "envisages the protection of not only a life in a narrow sense, but of dignified life. This requires a broad interpretation of States' responsibilities to protect life."); Special Rapporteur on Human Rights and the Environment, Safe Climate Report, at paras. 28, 62.

[60] *Gabčíkovo-Nagymaros Project*, at para. 140; *Nuclear Weapons Advisory Opinion*, at para. 29.

[61] *See* Rio Declaration, at principle 15; UNFCCC, at art. 3.3; Patricia Birnie, Alan Boyle and Catherine Redgwell, eds., *International Law and the Environment*, pp. 604-07(Oxford University Press, 3d ed. 2009).

[62] UNFCCC, at art. 3.3.

[63] *See* International Tribunal of the Law of the Sea, *Responsibilities and obligations of States with respect to activities in the Area, Case no. 17, Advisory Opinion of February 1st, 2011*, ITLOS Rep. 2011 [hereinafter ITLOS, *Seabed Chamber Advisory Opinion*], at paras. 122, 131, (stating in para. 131 that "the precautionary approach is also an integral part of the general obligation of due diligence"); *see also* Anja Lindroos & Michael Mehling, From Autonomy to Integration? International Law, Free Trade and the Environment 77 Nordic J. of Intl. L. 253, 265 (2008) (and

between human rights and a clean, healthy, and sustainable environment, it is relevant when considering States obligations to respect and protect the rights of present and future generations.[64] Writing a separate opinion in *Pulp Mills*, Judge Cançado Trindade discussed the precautionary principle and intergenerational equity as interlinked.[65] The duty for "each generation to pass the planet in no worse condition than it received it in" and to respect future generation's right to "inherit the earth in as good condition as it has been in for any previous generation"[66] demands a precautionary approach.

25. States' acts or omissions that increase the risk of harm are contrary to the principles of prevention and precaution as they are aimed at preventing the risk of serious and irreversible damage to the environment and people. Thus, inaction or insufficient action to curb the causes of climate change (primarily the production and use of fossil fuels: coal, oil, and gas) today, increases the risk of harm to present and future generations, but with disproportionate impact on future generations. As the climate continues to warm, so too will the impacts on people and the environment. Every fraction of a degree of warming exacerbates ongoing harm and increases the risk of irreversible harm, and these burdens will fall disproportionately on future generations who will have to live the entirety of their lives in this warmer world, which, if we stay on the current path, will not be safe.[67] A stable climate is critical to "the ability of both current and future generations to lead healthy and fulfilling lives."[68] The duty to prevent and act with precaution, therefore, requires States to take action that is known to curb the causes of climate change.

26. Climate measures taken today that have uncertain benefits or introduce additional adverse impacts (such as reliance on speculative technologies) increase the risk of harm to future generations. The 1997 UNESCO Declaration on the Responsibilities of Present Generations Towards Future

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references therein). Already decades ago, scholars argued that the precautionary principle "ha[d] evolved into a general principle of environmental protection at the international level." See James Cameron, "The Status of the Precautionary Principle in International Law," in Timothy O' Riordan & James Cameron, eds., Interpreting the Precautionary Principle (London, Earthscan Publications, 1994) 262 (and references therein).

[64] HRC General Comment No. 36, para. 62 (noting that States should "pay due regard to the precautionary approach"); IACtHR, Advisory Opinion OC-23/17, para. 180.

[65] *Pulp Mills*, at paras. 122-24 (noting also that both States in the dispute highlighted intergenerational equity and considerations of future generations as central to the case with Argentina asserting that effectively applying the prevention and precautionary principles "would have made it possible [for Uruguay] to comprehend the risks of grave harm for present and future generations").

[66] Edith Brown Weiss, Our Rights and Obligations to Future Generations for the Environment, 84 American Journal of International Law 198, p. 200 (1990).

[67] *See* IPCC, *2018: 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*, Technical Summary, p. 44 (V. Masson-Delmotte et al, eds., Cambridge University Press, 2018) [hereinafter IPCC, 2018 Special Report, Global Warming of 1.5°C] (The IPCC's Special Report on Warming of 1.5°C explicitly states that "warming of 1.5°C is not considered 'safe' for most nations, communities, ecosystems and sectors and poses significant risks to natural and human systems as compared to the current warming of 1°C (high confidence)," especially for "disadvantaged and vulnerable populations."); IPCC, 2018 Special Report, Global Warming of 1.5°C, Ch. 5 ("Sustainable Development, Poverty Eradication and Reducing Inequalities"), at 447.

[68] John H. Knox (Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment), *First Report to the General Assembly*, U.N. Doc. A/73/188, para. 59 (July 19, 2018).

Generations acknowledged that "each generation should ensure that life is not prejudiced by harmful modifications to the ecosystems and that scientific and technological progress in all fields does not harm life on Earth."[69] Recently, the Committee on the Rights of the Child stated "Mitigation measures cannot rely on removing greenhouse gases from the atmosphere in the future through unproven technologies. States should prioritize rapid and effective emissions reductions now in order to support children's full enjoyment of their rights in the shortest possible period of time and to avoid irreversible damage to nature."[70]

27. In conformity with the precautionary principle, States must not delay climate action in reliance on speculative future measures that risk an overshoot of 1.5°C and impose a disproportionate mitigation burden onto future generations.[71] In assessing the adequacy of Germany's climate plans, the German Constitutional Court applied the precautionary principle in reiterating that protecting the rights of future generations includes not delaying action especially given the irreversibility of climate change, and that precautionary measures must be taken to manage the anticipated future reduction burdens in accordance with respect for fundamental rights.[72] Similarly, the Dutch Supreme Court in *Urgenda* noted that the technology to remove emissions does not currently exist at sufficient scale and that reliance on this would be irresponsibly risky and against the precautionary principle.[73]

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[69] UNESCO, Declaration on the Responsibilities of the Present Generations Towards Future Generations, 12 November 1997, art. 4 ("Preservation of life on Earth").
[70] *See* CRC, *General Comment No. 26*, at para. 98(e).
[71] HRC Advisory Committee, *Report on Impact of New Climate Technologies*, at para. 70; *see also* OHCHR Report on Climate Change and Human Rights, at para. 91 (stating "by drawing attention to the broader human rights implications of climate change risks, the human rights perspective, in line with the precautionary principle, emphasizes the need to avoid unnecessary delay in taking action to contain the threat of global warming"); Special Rapporteur on the promotion and protection of human rights in the context of climate change (Ian Fry), Report on the promotion and protection of human rights in the context of climate change, U.N. Doc. A/77/226, July 22, 2022, para. 16 (asserting that "[n]ew mitigation technologies associated with atmospheric changes and geoengineering also have the potential for significant human rights impacts"); Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes (Marcos Orellana), The toxic impacts of some proposed climate change solutions, UN Doc. A/HRC/54/25, para. 71 (July 13, 2023), https://www.ohchr.org/en/documents/thematic-reports/ahrc5425-toxic-impacts-some-proposed-climate-change-solutions-report ("Climate engineering is "large-scale, deliberate intervention in the Earth system to counteract climate change". Such interventions are primarily considered as options to compensate for lagging international efforts to mitigate climate change. There is a lack of scientific certainty about the efficiency of climate-altering engineering technologies, such as solar radiation modification, and they can have a wide range of potential impacts on the effective enjoyment of human rights. Pinning humanity's hopes on future technologies should not be used to justify insufficient action to reduce greenhouse gas emissions and phase out fossil fuels"); Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (David Boyd), Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, July 15, 2019, U.N. Doc. A/74/161, para 83 ("Some proposed geoengineering strategies to mitigate climate change involve the large-scale manipulation of natural systems through measures such as fertilizing the oceans with iron, installing mirrors in outer space to reflect solar radiation, or shooting aerosols into the atmosphere (imitating the effects of large volcanic eruptions). These untested technological approaches could have massive impacts on human rights, severely disrupting ocean and terrestrial ecosystems, interfering with food production and harming biodiversity. These types of geoengineering strategies should not be used until their implications are much better understood".).
[72] *See Neubauer*, at pp 68-69, 73; *see also* Supreme Court of the Netherlands, *The State of the Netherlands v. Urgenda*, Case. No. 19/00135 (Engels) (Dec. 20, 2019) (English translation), at paras. 5.3.2, 5.6.2 (holding that the State had a duty to act to address the risk of climate harm even if it was uncertain whether the harm will occur).
[73] *Urgenda*, at para. 7.2.5.

V. Conclusion

28. In light of the above and the following annexes which contain the *Maastricht Principles on the Human Rights of Future Generations* and a non-exhaustive reference list on the Rights of Future Generations, we respectfully request that the Court find that State obligations with respect to climate change extend to future generations.

VI. Annexes

Annex I:
Maastricht Principles on the Human Rights of Future Generations

Maastricht Principles on the Human Rights of Future Generations

July 2023

Maastricht Principles on the Human Rights of Future Generations

July 2023

More information about the Principles can be found at RightsOfFutureGenerations.org.

Introduction

The rights of future generations have long been neglected in the analysis and application of human rights. Yet, human rights law does not limit itself to present generations. The foundations for international law to address the rights of future generations are established in international instruments in an array of subject areas spanning nearly a century; constitutions and legislative acts adopted by the majority of the World's States; in the laws, traditions, and cosmologies of Indigenous Peoples from every continent; and in the doctrine of major faith traditions representing the majority of the world's people.

The Maastricht Principles on the Human Rights of Future Generations seek to clarify the present state of international law as it applies to the human rights of future generations. The Principles consolidate the developing legal framework and affirm binding obligations of States and other actors as prescribed under international and human rights law. They also provide a progressive interpretation and development of existing human rights standards in the context of the human rights of future generations. They further recognize that States may incur additional obligations as human rights law continues to evolve.

These Principles provide examples of how realizing rights of future generations requires attention to the distinct rights of particular groups and peoples, but does not do so comprehensively. It is important to read these Principles together with other human rights standards setting out the implications of human rights for particular groups, including groups subject to historic and current systemic discrimination in its many forms.

The Principles represent the result of a process of close to six years of research, dialogue and collective brainstorming, with the engagement of a range of academic experts, national and regional current or former human rights mandate holders, civil society organizations, members of Indigenous Peoples, and social movements. They build on historic traditions and knowledge spanning millennia.

The Principles were adopted in Maastricht on 3 February 2023. Signatories include experts located in all regions of the world and include current and former members of international human rights treaty bodies, regional human rights bodies, and former and current Special Rapporteurs of the United Nations Human Rights Council. This initiative builds on expert legal opinions adopted in Maastricht, the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986); the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997); and the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (2011) and its accompanying commentary.

The full explanation of each Principle, and the sources supporting them will be set out in the Commentary to these Principles.

More information about the Principles can be found at RightsOfFutureGenerations.org.

Preamble

I. The Universal Declaration of Human Rights, the International Covenant on Economic, Social, Cultural Rights, and the International Covenant on Civil and Political Rights all proclaim that recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

II. Neither the Universal Declaration of Human Rights, nor any other human rights instrument contains a temporal limitation or limits rights to the present time. Human rights extend to all members of the human family, including both present and future generations.

III. Human generations exist within an unbroken continuum that is continually renewed and redefined as untold new members join the living human community. Any treatment of human generations and their respective rights must recognize and reflect this continuum.

IV. The human rights of future generations form an essential dimension of humankind's duty to uphold the inherent dignity, equality, and inalienable rights of all.

V. Decisions being taken by those currently living can affect the lives and rights of those born years, decades, or many centuries in the future. In recent decades, the need to recognize the intergenerational dimensions of present conduct have taken on increasing urgency. Humanity, the Earth on which we live, the natural systems of which we are but one part, and our political, social, cultural and economic systems, are in the midst of profound, rapid, and perilous change at humanity's own hands.

VI. Recognizing and ensuring the rights of future generations demands an evolution of decision-making processes to consider and ensure both justice and sustainability across an array of timescales including the present, near term and distant future.

VII. Children and youth are closest in time to generations still to come and thus occupy a unique position, and have an important role to play, within this transition to long-term, multigenerational thinking. Accordingly, their perspectives and participation in decision-making with respect to long-term and intergenerational risks must be accorded special weight.

VIII. Intergenerational justice has both individual and collective dimensions.

IX. Women and girls continue to bear the burden of many of societies' greatest challenges. Pervasive social norms and gender stereotypes continue to hold society back from attaining substantive gender equality. Women and girls face systemic discrimination in their enjoyment of all human rights, including a lack of meaningful participation in decision-making processes despite their influence and vital role in securing community and household resources. Gender inequality, if unaddressed, undermines the rights of both present and future generations.

X. Systematic racial, ethnic, religious and other forms of discrimination, exploitation and the inequitable distribution of wealth, resources and opportunities, between and within countries, undermine the rights of present generations and compound the threats to future generations. Accordingly, efforts to address and remedy intragenerational injustice are essential to achieving justice between generations. This requires the fulfilment by States of their extraterritorial obligations, including in the context of the regulation of transnational corporations.

XI. The worldviews and ways of life of many Indigenous Peoples reflect the continuum of the relationship between present and future generations and the intrinsic linkage between humankind and the land and ecosystems of which humanity is a part. These systems, and the continuum and interlinkages they safeguard, are endangered through the taking and degradation of Indigenous Peoples' lands, territories, and resources. Accordingly, the full recognition of the sovereignty and effective implementation of the rights and sovereignty of Indigenous Peoples is a shared obligation to both present and future generations of humanity.

XII. Peasants and traditional communities, including fishers, pastoralists, forest-dependent people, nomadic people and rural women play a key role in conserving biodiversity and ensuring adequate and sustainable food systems for both present and future generations. Safeguarding their rights and resources is critical for safeguarding and realizing the human rights of future generations.

XIII. Humanity is a part of the world, not apart from it. The rights of future generations must be interpreted and applied in light of humanity's dependence on and responsibility to Earth's natural systems, now and throughout our species' future.

XIV. The human rights of future generations must be understood, interpreted, and integrated within the evolving legal context recognizing humanity's relationships with the natural world, and the best available science. This context includes the right to a clean, healthy and sustainable environment, the growing recognition of the rights of Nature, and the knowledge systems of Indigenous Peoples, local and traditional communities.

XV. The cessation of unsustainable patterns of production, consumption and lifestyles is required to guarantee the full enjoyment of human rights, including economic, social, cultural and environmental rights, by all members of present and future generations. Human development must be decoupled from the destruction of Nature and the overconsumption of natural resources to achieve the realization of the human rights of present and future generations and the integrity of nature and natural systems.

I. General Provisions

1. Definition: Future Generations

For the purposes of these Principles, future generations are those generations that do not yet exist but will exist and who will inherit the Earth. Future generations include persons, groups and peoples.

2. Legal Basis for the Human Rights of Future Generations

2.1 Future generations are legally entitled to human rights on the basis of amongst others:

a) International law in its various forms which recognizes human rights for all people, without limiting these rights to present generations;

b) International law in its various forms that explicitly or implicitly recognize obligations and responsibilities towards future generations, and seek to ensure intergenerational equity; and

c) General principles of law, as reflected in laws, norms, customs and values of States and peoples from all global regions and belief systems that recognize obligations and responsibilities towards future generations, or that are and will continue to be relevant to the protection of the human rights of all, without limiting them to present generations.

2.2 The above bases do not preclude other sources of law recognizing the rights of future generations that are consistent with these Principles.

3. Limitations and Derogations

States may only subject human rights, including the rights of present and future generations, to limitations and derogations expressly permitted under international law pertaining to those specific rights, and subject to the procedures and safeguards prescribed in the relevant international law.

4. Interpretation

a) Nothing in these Principles should be understood to affect any national or international standards that are more conducive to the realization of the rights of future generations.

b) Nothing in these Principles may be interpreted to imply that any State, group, or person has a right to engage in any activity or to perform any act aimed at undermining any human rights recognized in these Principles, whether those of present or future generations.

c) Nothing in these Principles recognize any rights of human embryos or fetuses to be born nor does it recognize an obligation on any individual to give birth to another. These Principles may not be construed as accepting any interferences with the bodily autonomy of women, girls, and others who can become pregnant, including their actions and decisions around pregnancy or abortion and other sexual and reproductive health and rights.

d) These Principles must be interpreted and applied in a manner that is consistent with humanity's dependence on Nature and all living beings, and with the need to uphold the realization of the rights of Nature and all living beings.

5. Universality and Indivisibility of Human Rights

a) All human beings – in the past, present and future – are equal in dignity and entitled to the full and equal enjoyment of human rights.

b) All human rights are universal, indivisible, interdependent and interrelated. Future generations are entitled to all individual and collective human rights, including but not limited to, civil and political rights, economic, social and cultural rights, the right to a clean, healthy and sustainable environment; the right to development; the right to self-determination; and the right to peace.

6. Equality and Non-Discrimination

a) Future generations have the right to equal enjoyment of all human rights. States must guarantee the rights of future generations as set out in these Principles without discrimination of any kind. States and other duty bearers must refrain from any conduct which can reasonably be expected to result in, or perpetuate, any form of discrimination against future generations.

b) States must eliminate all forms of direct and indirect discrimination, including intersectional discrimination, on grounds of race, color, ethnic origin, sex, gender, sexual orientation, gender identity, marital and family status, work, descent, disability, health status, place of residence, age, national or social origin, religion, culture or language, political or other opinion, property, birth, economic and social situation, or any other status recognized, or to be recognized under international human rights law.

c) States must protect present and future generations against all forms of discrimination by public and private actors and prevent the emergence of new forms of discrimination.

d) States must take special measures to eliminate and prevent all forms of discrimination against groups and peoples that have experienced historical and/or systemic forms of discrimination such as slavery, colonialism, racism, discriminatory gender norms and practices and patriarchy. Such measures must include eliminating and preventing the intergenerational transmission of inequality, poverty and oppression. States must also redress the continuing impacts of past injustices in order to ensure that present and future generations are not subject to similar abuses. Special measures must be continued until the full and equal enjoyment of human rights by all is achieved in law and in practice.

e) Future generations must be free from intergenerational discrimination. This discrimination includes but is not limited to:

i. The waste, destruction, or unsustainable use of resources essential to human life;

ii. Shifting the burden of responding to present crises to future generations; and

iii. According less value to future lives and rights than the lives and rights of present generations, including discounting the impacts and burdens of present conduct on the lives and rights of future generations.

7. Intragenerational and Intergenerational Human Rights Obligations

a) States must address and remedy intragenerational human rights violations – that is violations affecting members of present generations – in order to both realize the human rights of present generations and to avoid transmitting these violations to future generations.

b) States must respect and ensure the full enjoyment of children's human rights in the present as well as ensuring that their human rights in the future are not jeopardized, and refrain from conduct that would undermine their human rights as adult persons.

c) To meet their obligations to future generations, States must necessarily impose reasonable restrictions on activities that undermine the rights of future generations, including the unsustainable use of natural resources and the destruction of Nature. Such restrictions must not impair or nullify the enjoyment of human rights of present generations; must rectify the vastly disproportionate levels of control over and use of resources by some members of the present generation; and not impose disproportionate burdens on disadvantaged groups.

8. Intergenerational Duties and Trusteeship

a) Humanity is of the Earth, wholly dependent upon it, and interdependent with it. Every generation lives on the Earth and has an interlinked relationship with Nature and its biodiverse ecosystems. During their time on Earth, each generation must act as trustees of the Earth for future generations. This trusteeship must be carried out in harmony with all living beings and Nature.

b) Each generation has the duty to protect and sustain the Earth's natural and cultural heritage for future generations.

c) The principle of trusteeship and intergenerational duties includes the decisions each generation makes about the near-Earth environment and the Moon.

9. Prevention and Precaution

a) Where there are reasonable grounds for concern that the impacts of State or non-State conduct, whether singly or in aggregate, may result in violations of the human rights of future generations, States have an obligation to prevent the harm, and must take all reasonable steps to avoid or minimize such harm.

b) Doing so demands a strong approach to precaution, particularly when conduct threatens irreparable harm to the Earth's ability to sustain human life or to the common biological and cultural heritage of humankind.

c) The burden of proof in all circumstances must lie with those who would undertake or persist in the conduct involved, not with those who might be harmed as a result. This burden grows proportionately greater as the scale, scope, and irremediability of threats to rights of future generations increases.

10. International Solidarity

a) All human beings, whether within present or future generations, are entitled to a social and international order in which rights and freedoms can be realized for all. Such an international order is only possible, now or in the future, if people, groups and States adopt the principle of international solidarity.

b) States have an individual and collective duty to recognize, respect and practice international solidarity in their relations with each other to ensure the rights of present and future generations, including the right to live in a clean, healthy and sustainable environment, and the rights of nature.

11. Learning from and Upholding the Rights of Indigenous Peoples

a) In implementing and upholding the rights of future generations, States and non-state actors should draw inspiration and guidance from Indigenous Peoples' knowledges, cultures and traditional practices which contribute to sustainable and equitable development and the proper management of the environment.

b) Indigenous Peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, and other resources, and to uphold their responsibilities to future generations in this regard. States must respect and take active measures to protect the sovereignty of Indigenous Peoples over the lands, territories and resources they have traditionally owned, occupied or otherwise used or acquired.

c) States must respect and protect the rights of Indigenous Peoples to maintain their institutions, traditional lifestyles, languages, cultures, knowledge systems, and spiritual ontologies for the benefit of present and future generations of Indigenous Peoples and for future generations of humankind.

12. Peasants, Local and Traditional Communities

a) Peasants, local, and traditional communities, including small-scale fishers and fish workers, pastoralists, and forest-dependent communities, have a special relationship with the land, water, and natural processes on which they depend for their livelihoods. They play a vital role in conserving and restoring biodiversity, protecting cultural heritage, undertaking sustainable practices of agricultural production, and ensuring food security for present and future generations. States should draw inspiration and guidance from their knowledge, traditions, and practices.

b) States must safeguard the full and equal enjoyment of all human rights to peasants and traditional communities, including, individually and collectively, their right to land, traditional knowledge, and seed systems; to participate equitably in sharing the benefits arising from the utilization of plant genetic resources; and to participate in the making of decisions on matters relating to their rights. In doing so, States must ensure that this knowledge and these vital resources remain available to future generations.

II. State Obligations

13. Obligations to Respect, Protect, and Fulfil the Human Rights of Future Generations

a) States have obligations to respect, protect, and fulfil the human rights of future generations.

b) These obligations extend to all conduct of States, whether through actions and omissions, and whether undertaken individually or collectively, including decisions made in their capacity as members of international or regional organizations. Such conduct includes, but is not limited to, the adoption or implementation of policies, practices, programs and legislation.

c) Failure to comply with these obligations constitutes a violation of the rights of future generations.

d) States must ensure an effective remedy for failure to respect, protect and fulfil these rights as set out in section IV (Accountability and Remedies).

14. Scope of Jurisdiction

Each State has obligations to respect, protect and fulfil the human rights of future generations in any of the following circumstances:

a) Situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law;

b) Situations over which its conduct brings about foreseeable effects in the enjoyment of human rights for present or future generations;

c) Situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence, or to take measures to realize the human rights of future generations in accordance with international law.

15. Limits to the Entitlement to Exercise Jurisdiction

The State's obligation to respect, protect and fulfil the human rights of future generations does not authorize a State to act in violation of the United Nations Charter and general international law.

16. Obligation to Respect the Human Rights of Future Generations

States must refrain from conduct they foresee, or ought reasonably to foresee, will create or contribute to, a substantial risk of violations of the human rights of future generations.

17. Violations of the Obligation to Respect

Violations of obligations to respect the human rights of future generations include, but are not limited to:

a) Depriving future generations of sustainable and equitable enjoyment of natural resources, Nature or ecosystems necessary for the enjoyment of their rights to life, health, and an adequate standard of living for themselves and their families, including the rights to food, water, housing and sanitation;

b) Unsustainably using and depleting natural resources;

c) Polluting or degrading ecosystems;

d) Contributing to a decline in biodiversity or to anthropogenic climate change;

e) Creating human rights risks resulting from the development and/or deployment of technologies for reducing greenhouse gas emissions or removal of carbon from the atmosphere;

f) Engaging in conduct that results in discriminatory access to natural resources and benefits enjoyed by future generations as compared to present generations;

g) Impairing the ability of future generations to prevent and respond to climate change and other forms of environmental harm;

h) Censoring, withholding, intentionally misrepresenting, or criminalizing the provision of information related to the climate crisis;

i) Entering or remaining in bilateral or multilateral agreements that undermine the enjoyment of human rights by future generations;

j) Interfering with the voluntary perpetuation of a community or peoples' cultural legacy to future generations;

k) Taking measures that are foreseeably likely to result in displacement of future generations from their land, territories and/or housing, or that deprive them of enjoyment of Nature, ecosystems or natural resources;

l) Developing or using surveillance or data gathering technologies or other means of social control that would infringe the human rights of future generations;

m) Developing or using artificial intelligence systems that threaten the full enjoyment of human rights of future generations;

n) Developing or using weapons of mass destruction, including, but not limited to, inhumane conventional weapons, nuclear and biological weapons;

o) Producing or facilitating the production of any waste material or hazardous substances of a kind, or at a scale, that cannot be soundly managed, and safely and completely disposed of by the generation that produced it;

p) Developing or using reproductive technologies that threaten or violate future generations' human rights, including but not limited to, the rights to privacy, health, safety, bodily integrity, and equality;

q) Unjustifiably reducing expenditure on programs and institutions required to realize human rights, thus putting future generations at risk of diminished enjoyment of their rights.

18. Obligation to Protect the Human Rights of Future Generations

a) States must take all necessary measures to protect the human rights of future generations against substantial risks posed by the conduct of public and private actors, including business enterprises.

b) States have a continuing obligation to reasonably foresee and prevent the creation of circumstances likely to result in the violations of the human rights of future generations.

c) Necessary measures include, but are not limited to:

i. Adopting and implementing appropriate legislative and administrative measures as well as establishing procedures, institutions and mechanisms so as to identify and effectively prevent national and international threats to the human rights of future generations;

ii. Establishing special mechanisms, processes or institutions to monitor and report on the extent to which public bodies are setting and meeting their human rights obligations towards future generations;

iii. Ensuring effective and accessible judicial and other remedies for violations of the human rights of future generations in accordance with Part V.

19. Violations of the Obligation to Protect

Violations of obligations to protect the human rights of future generations by States include, but are not limited to:

a) The failure to adequately monitor and regulate the conduct of public or non-State actors where it is reasonably foreseeable that such conduct will impair future generations' human rights, or failing to hold them accountable for such conduct;

b) The failure by States to phase out fossil fuels within the shortest possible time, with States with the greatest responsibility and capacity to move most expeditiously;

c) The failure to avert, minimize and address loss and damage associated with the adverse effects of climate change; including the failure of States with greater responsibility and capability to adequately contribute both financially and through all appropriate policies and measures;

d) The failure to take steps to protect future generations from biological risks and threats;

e) The failure to prevent the degradation or destruction of irreplaceable topsoils and freshwater vital to sustaining the lives and livelihoods of future generations;

f) The failure to effectively regulate, and where appropriate prohibit, scientific research and activities that pose a reasonably foreseeable and substantial risk to the human rights of future generations, including genetic engineering and geo-engineering;

g) The failure to adopt effective measures to protect State and international decision-making processes from undue corporate influence or corporate capture which nullifies or impairs the human rights of future generations;

h) The failure to prevent the monopolization of access to knowledge and abusive corporate control of data required for the realization of the human rights of future generations;

i) The failure to adopt legislation, programs, and policies to protect the right to work and rights in work in the context of technological innovations that pose a substantial and reasonably foreseeable risk to the full enjoyment of these rights by future generations;

j) The failure to protect Indigenous Peoples, peasants and traditional communities' rights and prevent the appropriation of their systems of knowledge by State and non-State actors;

k) The failure to investigate and provide appropriate remedies for human rights abuses by non-State actors, including prosecution where appropriate, and reparation.

20. Obligation to Fulfil Human Rights of Future Generations

a) States must take all necessary measures to fulfil the human rights of future generations, including by providing and mobilizing adequate financial resources and technical assistance.

b) States must create an enabling environment to prevent and remove the causes of asymmetries and inequalities between and within States, and the structural obstacles and factors that generate or perpetrate poverty and inequality for future generations.

c) Necessary measures include, but are not limited to:

i. Recognizing the human rights of future generations in appropriate normative instruments, such as national constitutions and legislation;

ii. Adopting framework legislation that allocates duties and responsibilities in relation to the fulfilment of the rights of future generations to different levels and branches of the State and dedicated agencies and commissions, and sets appropriate time-bound targets;

iii. Establishing a domestic mechanism that conducts a prior review or audit of the potential effects of legislation, bills and policies and other governmental decisions on the human rights of future generations;

iv. Imposing duties on State and non-State actors to carry out environmental and human rights impact assessments of decisions, explicitly including impacts on the rights of future generations;

v. Ensuring that the burdens of mitigating and remedying climate change and other forms of environmental destruction are not shifted to future generations;

vi. Ensuring that disadvantaged groups, developing States, in particular least developed States, small island developing States, and States in conflict and post-conflict situations do not bear disproportionate costs and burdens of mitigating and remedying environmental destruction;

vii. Designing and implementing educational and awareness programs on the human rights of future generations;

viii. Taking positive measures to facilitate knowledge and understanding of the human rights of future generations;

ix. Phasing out unsustainable consumption and production patterns and waste generation that jeopardizes the Earth's ability to sustain future generations. Wealthier States must proceed more expeditiously under the principle of common but differentiated responsibilities and respective capabilities;

x. Developing and implementing human rights-based governance and regulation of information and communication technologies that ensure, non-discriminatory access to the internet, and public control of data infrastructure;

xi. Providing financial and other forms of support to representatives of future generations to participate in public deliberation, mobilize, and advocate for their human rights;

xii. Creating an enabling environment that fosters and promotes the capacity of individuals, community-based organizations, social movements, non-governmental organizations, and Indigenous Peoples to defend all the human rights of future generations, including the right to self-determination;

xiii. Removing barriers for women and girls to participate fully and equally in education and the economy, including in areas in which they are under-represented, such as science, technology, engineering and mathematics.

21. Violations of the Obligation to Fulfil

Violations of obligations to fulfil the human rights of future generations by States include, but are not limited to:

a) The failure to take positive measures to facilitate knowledge and understanding of the human rights of future generations;

b) The failure to adopt and implement legislation, policies and programs to eradicate the intergenerational transmission of poverty and disadvantage;

c) The failure to establish appropriate monitoring mechanisms to evaluate progress in the fulfilment of rights, including the rights of future generations;

d) The failure to ensure that the rights of future generations are fully integrated in national human rights strategies and plans of action;

e) The failure to ensure, at the very least, the satisfaction of essential levels of social, economic and cultural rights for present generations, and to take measures that enable future generations to ensure these levels for themselves;

f) The failure to take individual and collective measures to reduce inequality both within and between States;

g) The failure to mobilize and allocate adequate resources, including from international assistance and cooperation, to facilitate the full and equal enjoyment of human rights by future generations;

h) The failure to invest adequate resources to ensure a just and fair transition from the production and use of fossil fuels and other ecologically harmful activities;

i) The failure to take appropriate measures to prevent potential public health emergencies in the future;

j) The adoption of retrogressive measures that result in the unjustified reduction or diminishment in the enjoyment of human rights by future generations;

k) The failure to prioritize the realization of the rights of marginalized and disadvantaged groups in realizing the rights of future generations.

22. Participation and Representation

a) Future generations must be represented meaningfully and effectively in decision-making that may impact on their enjoyment of human rights.

b) States must create the enabling conditions for representation of future generations to participate in decision-making. This includes recognizing bodies established by Indigenous Peoples, peasants and traditional communities that have developed their own mechanisms to represent future generations.

c) States must recognize and respect that present children, adolescents and youth occupy a proximate position to future generations, and must protect their rights to be heard and other participatory rights, including when advocating for human rights on behalf of themselves and future generations.

d) States must create accessible and inclusive bodies and institutions at all levels to ensure that the representatives of future generations can effectively participate in decision-making that affects their human rights. Examples of such bodies and institutions include: Ombudspersons, guardians, trustees or commissioners; designated seats in parliaments, National Tribunals to protect Nature and/or National Human Rights Institutions. Special attention must be paid to ensure that these institutions and mechanisms are diverse and include meaningful and effective participation by groups that are disadvantaged or who have experienced systemic discrimination. The independence of such institutions must be guaranteed.

e) States must take adequate and effective measures to guarantee the rights of individuals or groups of individuals working to protect or promote the rights of future generations, including women, children and youth, Indigenous Peoples and environmental and human rights defenders. Such protection must ensure freedom from attacks, threats, intimidation, retaliation, stigmatization or criminalization.

23. Access to Information

a) States must make every effort to ensure easy, prompt, effective and practical access to comprehensible information about issues that may affect the human rights of future generations, including by proactively making this information available. They must also put in place procedures that provide representatives of future generations with the right to seek and receive such access to information, and ensure transparency about decisions reached.

b) Fees, where charged, should not constitute an unreasonable impediment to access to information, and an appeals system should be in place to challenge failures to provide information.

c) States must provide and disseminate information on matters that are important for the effective protection of the human rights of future generations, such as environmental and climate-related information, information on inter-generational toxic, chemical and radiological hazards, technological developments and scientific research. They must respect, protect, and fulfil the freedom to seek, receive, publish and disseminate such information.

d) States must ensure disclosure of information necessary to fully and properly identify State and non-State actors that may be responsible for human rights impacts on future generations.

e) Information should be provided in languages used by affected peoples, groups and communities, in alternative formats, and through suitable channels of communication that are accessible to disadvantaged groups. Information must also be disseminated in an accessible manner for persons with disabilities, including through braille and other assistive technologies.

f) States must refrain from the dissemination of false and misleading information on issues that are important for the protection of the human rights of future generations including, but not limited, to climate change, the implications of technological developments, and scientific research. They must counter and, where appropriate, prevent dissemination of such misinformation by other actors. They should regulate and address conflicts of interest that undermine the right to information.

24. Extraterritorial Obligations

a) States have obligations towards future generations who will exist within their territory and outside their borders. These arise on the basis of:

   i. Obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory; and

   ii. Obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights universally.

b) States must take all appropriate legal, political, economic and diplomatic measures to refrain from conduct that would create a reasonably foreseeable risk of impairing the enjoyment of human rights by future generations, including outside their territory. They must conduct regular assessments of the extraterritorial impacts of their laws, policies and practices.

c) States must prevent corporations and other non-state actors under their jurisdiction from engaging in conduct domestically or outside their borders that would create a reasonably foreseeable risk of impairing the enjoyment of human rights by future generations, including outside their territory. States should provide effective judicial or other State-based mechanisms to hold corporations and other non-state actors legally accountable for such violations.

d) States must, individually and jointly, take deliberate, specific, and targeted measures in decisions and international agreements to create an international enabling environment conducive to protecting the rights of present and future generations. Such measures must include economic, social and environmental and climate-related measures. These measures must be taken in accordance with equity, and the common but differentiated responsibilities and respective capabilities of States.

e) States must ensure that international trade and investment agreements are applied and interpreted in a manner consistent with the human rights of future generations, and where necessary to realize these rights, terminate, amend or withdraw from existing agreements. Consistency between trade and investment agreements and human rights obligations require that the former be designed, implemented, applied and interpreted in a manner that does not undermine or restrict the State's capacity to fulfil their human rights obligations. They have the duty to notify, consult and negotiate with other States in situations where there is a substantial and foreseeable risk of violating the human rights of future generations.

f) States have an obligation to provide international assistance commensurate with their capacities, resources and influence, and to cooperate with each other, to ensure respect for, and the protection and fulfilment of, the human rights of future generations, as established in the Charter of the United Nations and in international human rights treaties.

g) States in a position to do so should individually and collectively take steps to prevent and resolve unsustainable State debt (including, as appropriate, through unconditional debt relief) owed by other States that will infringe the human rights of future generations.

h) States in a position to do so should provide international assistance, including financial, technological, and other forms of assistance, to contribute to the realization of human rights of present and future generations.

i) International assistance should not undermine national development strategies or polices and domestic accountability mechanisms and procedures and must observe international human rights standards, including the right to self-determination, the right to participate in decision-making, and the protection of the human rights of future generations.

j) States providing aid and those receiving it should be accountable to present and future generations for their actions and the results of their interventions. This requires that mechanisms are created for representatives of future generations to participate in decision-making about international assistance, and to seek remedy and redress on behalf of future generations.

III. Obligation, Duties and Responsibilities of Other Actors

25. Duties and Responsibilities of Non-State Actors Including Business Enterprises

a) Non-State actors, including business enterprises, must at the very minimum, respect the human rights of future generations, and thus refrain from causing or contributing to adverse impacts on their human rights through their activities, products or services, and prevent harm, mitigate risk and remedy such impacts when they occur.

b) Businesses and other non-state actors whose actions may negatively affect the enjoyment of human rights by future generations must adopt a clear policy commitment to respect future generations' human rights. They must comply with their duty of care including along their value chains. They must undertake human rights due diligence processes to identify and assess any actual or potential impacts on human rights posed by their activities, products and services in all their business relationships. They must also disclose, prevent harm, mitigate risks and remedy the adverse effects of their actions on the human rights of future generations.

c) Non-state actors that breach these duties and responsibilities should be held accountable under international law.

26. Obligations of Intergovernmental Organizations

a) States and international institutions of which they are members must create an enabling global environment with the aim of achieving the full realization of human rights of future generations.

b) International financial institutions and other inter-governmental and supranational institutions are subjects of international law and have a duty to not impair the ability of their members to comply with their legal obligations. They must accordingly respect the human rights of future generations, and engage in conduct consistent with the realization of these rights. They must comply with all obligations imposed by the general rules of international law and ensure access to remedies for any violations of their obligations towards future generations.

c) International financial institutions and other inter-governmental and supranational institutions must ensure that their policies, practices, and economic reform measures will contribute to the realization of, and not undermine, the human rights obligations of States towards future generations. They must refrain from designing, adopting, financing, and implementing policies or measures that, directly or indirectly, impair the enjoyment of human rights by future generations.

d) Inter-governmental and supranational institutions, at the global and regional level, should support efforts by States to uphold the rights of future generations including through multilateral cooperation. Such support should include technical cooperation, financial assistance, institutional capacity development, knowledge sharing, exchange of experiences and transfer of technology.

e) International financial institutions and other inter-governmental and supranational institutions must adopt effective measures to protect decision-making processes and spaces from undue corporate influence or corporate capture which nullify or impair the human rights of future generations.

27. Responsibilities and Duties of Individuals and Communities

a) Every person has responsibilities and duties to themselves, their community and society, and to humanity as a whole, including duties to respect and promote the human rights of future generations.

b) Civil society organizations and non-governmental bodies have responsibilities to respect and promote the human rights of future generations.

c) National human rights institutions must have the competence to oversee decisions that may have an impact on future generations. They should incorporate the human rights of future generations in their plans

and programs, and should put in place mechanisms to monitor and report on the activities, decisions or policies (and the implementation thereof) by States' authorities which affect the human rights of future generations.

d) The recognition of individual and community responsibilities in no way diminishes the obligations of States to respect, protect, and fulfil or the duties of non-state actors to respect the human rights of future generations.

IV. Accountability and Remedies

28. Incorporation and Implementation in Domestic Law

States must ensure that the human rights of future generations are effectively incorporated into their domestic law, or otherwise recognized in their domestic legal system.

29. Victims

For the purposes of the present section, victims of violations refer to future generations, including persons, groups, and peoples, who face a substantial and reasonably foreseeable risk of suffering human rights violations, whether individually or collectively, through acts or omissions of present States and non-State actors. The designation of persons, groups and peoples subject to such violations as victims in this context refers to their entitlement to hold accountable those responsible for violations of their rights, while affirming their dignity, autonomy and self-determination.

30. Effective Remedies

Everyone has the right to an effective remedy for conduct violating their human rights. To that end, States must:

a) Provide adequate judicial, quasi-judicial and administrative mechanisms for the supervision and enforcement of the human rights of future generations;

b) Investigate, adjudicate, and redress violations of future generations' human rights caused or contributed to by States or private actors;

c) Ensure that victims (and their representatives) have standing before courts and human rights bodies, and take all necessary measures to ensure that representatives are able to enforce the human rights of future generations through the judicial system;

d) Ensure access to justice, including by removing barriers to access and providing appropriate and adequate assistance to victims' representatives;

e) Disseminate, through public and private mechanisms, information about all available remedies for violations of the human rights of future generations;

f) Where the harm resulting from an alleged violation is expected to occur on the territory of a State other than the State where the harmful conduct took place, any State concerned must provide the victims with access to justice, whereas the obligation to provide reparations falls on the States responsible for the harmful conduct.

31. State Responsibility

A State is responsible for the breach of obligations to respect, protect and fulfil the rights of future generations from the moment that it fails to act in conformity with these obligations.

32. Prevention, Cessation, Non-repetition and Redress

States' obligations to respect, protect, and fulfil the rights of future generations include, among others, the obligations to:

a) Take appropriate legislative, administrative and other measures to prevent violations, including the regulation of activities by non-state actors under their jurisdiction;

b) Take effective measures aimed at the cessation and non-repetition of activities that risk harming the rights of future generations; including preliminary measures to prevent harm while remedial procedures are underway;

c) Provide effective guarantees of non-repetition of violations;

d) Provide adequate, effective, prompt and appropriate redress to victims, including reparation, as described below.

33. Full and Effective Reparation

Victims are entitled to full and effective reparation, as laid out in Principles 34-36 below, which include the following forms: restitution, compensation, and satisfaction. Reparation for violations of the human rights of future generations should be proportionate to the gravity of the violations and the harm caused by the violation. States, in consultation and cooperation with representatives of victims, must establish national and international programs for reparation for violations of the human rights of future generations.

34. Restitution

Restitution should be aimed at restoring the ability of victims to enjoy their human rights to the greatest possible extent. It should be informed by the best available scientific evidence, as well as Indigenous Peoples' and traditional knowledge, by precaution, and the participation of victims' representatives. Restitution includes, as appropriate: restoration of degraded ecosystems and means of subsistence and development, return of land, territories, resources, and other property, and means to identify, restore, revitalize and transmit cultural heritage.

35. Compensation

Appropriate compensation must be provided for any damage that cannot be prevented or repaired, including when restitution is not possible. Compensation may be made in kind, or in the form of monetary compensation committed to victims.

36. Satisfaction

Satisfaction must include, where applicable, any or all of the following:

a) Verification of the facts and full and public disclosure of the truth regarding the causes and conditions pertaining to the violations, including the role and responsibility of non-state actors;

b) Mechanisms to provide victims and their representatives with information on the causes and conditions pertaining to the violations and to learn the truth in regard to these violations;

c) An official declaration or a judicial decision restoring the dignity, status and rights of the victims;

d) Public apology, including acknowledgement of the facts and acceptance of responsibility;

e) Judicial and administrative sanctions against persons liable for the violations;

f) Inclusion of an accurate account of the violations that occurred in national and international human rights law training and in educational material at all levels.

Original Endorsers

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More information about the Principles can be found at RightsOfFutureGenerations.org.

Annex II:
Legal references: Rights of Future Generations

[*This list is non-exhaustive*]

INTERNATIONAL COURT OF JUSTICE

Judgments

The International Court of Justice highlighted the importance of preserving the environment, in the interest of present and future generations, in the following proceedings:

- *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226, International Court of Justice (ICJ), 8 July 1996, para. 29.

The International Court of Justice noted 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."* The decision has been quoted in several State submissions presented in proceedings before the International Tribunal for the Law of the Sea (ITLOS) (Congo, EU, Nauru, New Zealand, Pacific Community, Rwanda, COSIS).

- Gabčikovo-Nagymaros Project, Hungary v Slovakia, Judgment, Merits, ICJ GL No 92, [1997] ICJ Rep 7, [1997] ICJ Rep 88, (1998) 37 ILM 162, ICGJ 66 (ICJ 1997), 25th September 1997, International Court of Justice [ICJ], para. 140.

The Court noted that the growing awareness about the environmental risks faced by both present and future generations had driven the development of international law, i.e., of *"new norms and standards, set forth in a great number of instruments during the last two decades."*

Separate or dissenting opinions recognizing the rights of future generations:

- Judge Weeramantry, Separate Opinion in *Maritime Delimitation in the Area between Greenland and Jan Mayen,* 1993 I.C.J. Reports 38, 14 July 1993, paras. 234- 240.

Judge Weeramantry noted the International Court's function to represent *"the main forms of civilization and the principal legal systems of the world",* and its obligation "*to search in all these traditions and legal systems for principles and approaches that enrich the law it administers."* Based on an analysis of different legal systems and traditions, he noted the existence of an "equity-based global jurisprudence," based on, among others, the notion of respect for the rights of future generations.

- Judge Weeramantry, Dissenting Opinion in *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, International Court of Justice (ICJ), 8 July 1996, p. 233.

In his dissenting opinion, Judge Weeramantry noted that *"this Court, as the principal judicial organ of the United Nations, empowered to state and apply international law with an authority matched by no other tribunal must, in its jurisprudence, pay due recognition to the rights of future generations."* Already in 1994, the Judge considered that, "the rights of future generations" have long passed the stage of "an embryonic right struggling for recognition". Instead, *"they have woven themselves into international law through major treaties, through juristic opinion and through general principles of law recognized by civilized nations."* The Court is obliged to apply international legal instruments protecting the rights of future generations, even in the distant future, "*when incontrovertible scientific evidence speaks of pollution of the environment on a scale that spans hundreds of generations [...]."*

INTERNATIONAL TREATY LAW

International agreements and instruments explicitly incorporating the principle of intergenerational equity, or references to future generations:

- Charter of the United Nations and Statute of the International Court of Justice, 1 UNTS XVI, 26 June 1945, (Preamble)
- International Convention for the Regulation of Whaling, 161 UNTS 72, 2 December 1946, (Preamble)
- African Convention on the Conservation of Nature and Natural Resources, 1001 UNTS 3, 15 September 1968, (Preamble)
- UNESCO World Heritage Convention, 16 November 1037 UNTS 151, 23 November 1972, (Article 4, obligation)
- Declaration of the United Nations Conference on the Human Environment, 11 ILM 1416, 16 June 1972, (Clause 6, Principles 1, 2)
- Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, 993 UNTS 243, (Preamble)
- Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques, A/RES/31/72, 14 December 1976, (Preamble)
- Convention on the Protection of Nature in the South Pacific, 26 ILM 38, 12 July 1976, (Preamble)
- Bonn Convention on the Conservation of Migratory Species of Wild Animals, 1651 UNTS 333, 23 June 1979, (Preamble)
- Berne Convention on the Conservation of European Wildlife and Natural Habitats, 19 September 1979, ETS No.104, (Preamble)
- Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment, 9 EPL 56, 14 February 1982, (Preamble, Article 1)
- Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, 20 ILM 746, 23 March 1984, (Preamble)
- Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region 21 June 1985, (Preamble)

- ASEAN Agreement on the Conservation of Nature and Natural Resources, 9 July 1985, (Preamble)
- Convention for the Protection of Natural Resources and Environment of the South Pacific Region, 26 ILM 38, 24 November 1986, (Preamble)
- UN Framework Convention on Climate Change, 1771 UNTS 107, 16 June 1992, (Article 3.1)
- UN Convention on Biological Diversity, 22 May 1992, 1760 UNTS 79, (Preamble)
- UNECE Convention on the Protection and Use of Transboundary, Watercourses and International Lakes, 1936 UNTS 269, 17 March 1992, (Article 2.5.c)
- Paris Convention for the Protection of the Marine Environment of the North-East Atlantic, 2354 UNTS 67, 22 September 1992, (Preamble)
- Convention on the Transboundary Effects of Industrial Accidents, 2105 UNTS 457, 17 March 1992, (Preamble)
- Rio Declaration on Environment and Development, 31 ILM 874, 13 June 1992, (Principle 3) Non-legally binding forest principles (sic),1992, (Principle 2.b)
- Vienna Declaration and Programme of Action, World Conference on Conference on Human Rights, A/CONF.157/23, 25 June 1993, (Paragraph 1)
- North American Agreement on Environmental Cooperation, 17 December 1993, (Preamble)
- Convention to Combat Desertification, 1954 UNTS 3, 23 December 1994, (Preamble)
- Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region 2161 UNTC, 1995, (Preamble)
- Revised Barcelona Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, 1102 UNTS 27, 10 June 1995, (Preamble and Article 4.2)
- Agreement on the Conservation of African-Eurasian Migratory Waterbirds, 16 June 1995, (Preamble)
- Agreement on the conservation of cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area 1996, (Preamble) 1996
- Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 36 ILM 1, 7 November 1996, (Preamble)
- United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, 36 ILM 700, 21 May 1997, (Preamble)
- Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, 53 UNTS 357, 5 September 1997, (Article 1 and Article 4)
- UNESCO Declaration on the Responsibilities of the Present Generation Towards Future Generations, 12 November 1997
- UNECE Aarhus Convention on Access to Information, Public participation in Decision-making and Access to Justice in Environmental Matters, 2161 UNTS 447, 28 June 1998, (Preamble, and Article 1)

- Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, UN Doc. MP.WAT/AC.1/1999/1, 17 June 1999 (Article 5.d)
- Agreement on the Conservation of Albatrosses and Petrels, 2258 UNTS 257, 21 June 2001, (Preamble)
- Stockholm Convention on Persistent Organic Pollutants, 2256 UNTS 119, 22 May 2001, (Preamble)
- International Treaty on Plant Genetic Resources for food and agriculture 3 November 2001, (Preamble)
- Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific, 2002, (Article 1 and Article 3)
- Protocol on Strategic Environmental Assessment to Espoo Convention, ECE/MP.EIA/2003/2, 21 May 2003, (Preamble)
- Black Sea Biodiversity and Landscape Conservation Protocol 14 June 2002, (Article 1.2)
- Charter of Fundamental Rights of the European Union, 2012/C 326/02, 2 October 2000 (Preamble) 18
- Protocol to the Aarhus Convention on Pollutant Release and Transfer Registers, 8 October 2009, (Preamble)
- Minamata Convention on Mercury, 10 October 2013, (Preamble)
- Paris Agreement on Climate Change, 12 December 2015, (Preamble)
- UN Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, Escazú, 4 March 2018, (art. 1)
- Kunming-Montreal Global Biodiversity Framework, 19 December 2022, (Section C. 7)
- Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction, New York, 19 June 2023, (Preamble, Article 1.13)

CONSTITUTIONS

As of today, 81 out of 196 Constitutions mention future generations explicitly in their text. Among those, 57 explicitly recognize future generations' environmental rights, or the State's duty to guarantee the right to a healthy environment for present and future generations. Among the remaining ones, four explicitly recognize the rights of future generations in general terms, while others enshrine general commitments towards the protection of future generations.

Constitutions explicitly referencing future generations in the context of environmental protection or the management of natural resources*:

- Albania (art. 59)
- Algeria (art.63)
- Andorra (art. 31)
- Angola (art. 39)

- Argentina (art. 41)
- Armenia (art. 12)
- Bhutan (art. 5)
- Bolivia (art. 33)
- Brazil (art. 225)
- Burundi (art. 35)
- Chile (art. 57)
- Cuba (art. 75)
- Ecuador (art. 395)
- Egypt (art. 46)
- Eritrea (art. 8)
- Fiji (art. 40)
- France (Preamble)
- Gambia (art. 59)
- Georgia (art. 29)
- Germany (art. 20a)
- Ghana (art. 36.9)
- Guyana (art. 149)
- Hungary (Preamble; P1)
- Italy (art. 9)
- Iran (art. 50)
- Ivory Coast (Preamble)
- Kenya (art. 42)
- Lesotho (Preamble)
- Luxembourg (art. 41)
- Malawi (art. 13d)
- Maldives (art. 22)
- Malta (art. 9.2)
- Mongolia (art. 6.2)
- Mozambique (art.117)
- Namibia (art 95)
- Nepal (art. 51)
- Niger (art. 35; 149)
- Norway (art. 112)
- Palestine (art. 33)
- Poland (art. 74)
- Portugal (art. 66)
- Papua New Guinea (art. 4)
- Qatar (art. 33)
- Senegal (art. 253)
- Seychelles (Preamble)
- South Africa (art. 24)
- South Sudan (art. 41)
- Swaziland (art. 210)
- Sweden (art. 2)
- Switzerland (art. 2.4)
- Timor Leste (art. 61)
- Tunisia (art. 48)
- Uganda (art. 27)

- Uruguay (art. 47)
- Vanuatu (art. 7)
- Venezuela (art. 127)
- Zimbabwe (art. 73)

E.g.:

- Constitution of Luxembourg:

Art. 41 (Objectives with a constitutional value)

"The State guarantees the protection of the human and natural environment and works for the establishment of a durable equilibrium between the conservation of nature, in particular its capacity for renewal, as well as the safeguard of biodiversity and the satisfaction of the needs of present and future generations. The State is committed to fighting climate change and working in favor of climate neutrality. It recognizes animals as sentient non-human living beings and seeks to protect their well-being."

***Among those, the Constitutions of Angola, Bolivia, Iran, Malawi, Mongolia, Mozambique and Norway, Venezuela, directly recognize the rights of future generations in the environmental context. See, e.g.:**

- Constitution of Fiji:

Art. 40 (Environmental rights):

"1. Every person has the right to a clean and healthy environment, which includes the right to have the natural world protected for the benefit of present and future generations through legislative and other measures."

- Constitution of Bolivia:

Article 33 (Section I: Environmental Rights)

"Everyone has the right to a healthy, protected, and balanced environment. The exercise of this right must be granted to individuals and collectives of present and future generations, as well as to other living things, so they may develop in a normal and permanent way."

- Constitution of Malawi:

Art. 13. (d)

"The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goal [....] d) To manage the environment responsibly in order to iii. accord full recognition to the rights of future generations by means of environmental protection and the sustainable development of natural resources."

- Constitution of Norway:

Article 112 (Protection of the environment)

"Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well. In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out. The authorities of the state shall take measures for the implementation of these principles."

Constitutions including general references to future generations and/or constitutional duty to protect future generations:

- Austria (art.14)
- Azerbaijan (Preamble)
- Belgium (art. 7 bis)
- Czech Republic (Preamble)
- DPR Korea (Preamble)
- Estonia (Preamble)
- Kazakhstan (Preamble)
- Latvia (Preamble)
- Libya (Preamble)
- Moldova (Preamble)
- North Macedonia (Preamble)
- Russia (Preamble)
- Sri Lanka (Preamble)
- Sudan (Preamble)
- Tajikistan (Preamble)
- Ukraine (Preamble)
- Uzbekistan (Preamble)
- Zambia (art. 198)

Constitutions assigning rights to future generations in non (strictly) environmental context:

- Jamaica (art. 13)
- Japan (art. 11, 97)
- Maldives (Preamble)
- Morocco (art. 35)

E.g.,

- Constitution of Japan

Article 97

The fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolate.

CLIMATE & ENVIRONMENTAL LITIGATION

In multiple climate cases, Courts have recognized the State's constitutional duties towards future generations and/or the rights of future generations:

- **Advisory Opinion, Inter-American Court of Human Rights, OC 23/17, 15 November 2017**

The Court acknowledged the right to a healthy environment as a human right, and noted that both environmental degradation and climate change affect human rights. Furthermore, the Court noted that "the right to a healthy environment *"constitutes a universal value that is owed to both present and future generations." (p. 26, para. 59)*

- **Future Generations v. Colombia, Constitutional Court of Colombia, 5 April 2018**

The Constitutional Court acknowledged that the insufficient protection of the Colombian Amazon Forest, by contributing to climate change and environmental deterioration, represented a direct threat to the human rights of present and future generations. Namely, the Court noted that:

"Sin ambiente sano los sujetos de derecho y los seres sintientes en general no podremos sobrevivir, ni mucho menos resguardar esos derechos, para nuestros hijos ni la ***generaciones venideras.*** *[...] El deterioro creciente del medio ambiente es atentado grave para la* ***vida actual y venidera*** *y de todos los otros derechos fundamentales." (p. 13, para. 2)*

The Court explicitly noted that the State's duty to environmental protection extends to all human beings, including unborn generations, who deserve to live in the same environmental conditions as the present ones:

"Como se anotó, el ambito de protección de los preceptos iusfundamentales es cada persona [...] pero, además incluye a los ***sujetos aún no nacidos*** *[...]." (p. 18, para. 5.2)*

- **Neubauer et al v. Germany, Constitutional Court of Germany, 29 April 2021**

The Federal Constitutional Court struck down parts of Germany's climate law, alleging that the national mitigation targets allocated a disproportionate mitigation burden to the future, thus violating the State's constitutional duty to environmental protection (art.20a). The Court found that Article 20a of the German Constitution *"also concerns how environmental burdens are spread out between different generations." (para.183)* The Court also noted that,*"in their subjective dimension, fundamental rights – as intertemporal guarantees of freedom – afford protection against the greenhouse gas reduction burdens imposed by Art. 20a of the Basic Law being unilaterally offloaded onto the future." (para. 122)*

- **Supreme Court of Pakistan, D.G. Khan Cement Company v. Government of Punjab, 15 April 2021**

The Supreme Court of Pakistan upheld a bar on the construction of new cement plants in environmentally fragile zones. In its reasoning, the Court emphasized the role played by the judiciary in protecting future generations from climate change:

'This Court and the Courts around the globe have a role to play in reducing the effects of climate change for our generation and for the generations to come. Through our pen and jurisprudential fiat, we need to decolonize our future generations from the wrath of climate change, by upholding climate justice at all times.Through our pen and jurisprudential fiat, we need to decolonize our future generations from the wrath of climate change, by upholding climate justice at all times." (p. 16, para. 19)

- **Supreme Court of Pennsylvania (in the United States), Robinson Township v. Commonwealth of Pennsylvania, 2013**

The Supreme Court of Pennsylvania relied on the public trust doctrine to strike down a law supporting fracking for violating a healthy environment for both the current and future generations. The Court held that the public trust doctrine requires the trustee to "*refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources, whether such degradation, diminution, or depletion would occur through direct state action or indirectly, e.g., because of the state's failure to restrain the actions of private parties*." *(p.10)*

In a few climate cases, courts have recognized standing to young applicants or environmental organizations, to act as representative of future generations:

- **Supreme Court of Philippines, Oposa v. Factoran, G.R. no. 101083, 30 July 1993**

The Court recognized standing to children to act as representatives of future generations based on the principle of intergenerational responsibility and to the right to a balanced and healthy environment:
"Petitioners assert that they represent their generation as well as generations yet unborn. We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit." (para. 22)

- **Urgenda v. the Netherlands, District Court of the Hague, 24 June 2015**

The Court noted that Urgenda had sufficiently demonstrated to have standing, having among its aims, to defend the right of both present and future generations, and hence, to strive for sustainable development:
"In defending the right of not just the current but also the future generations to availability of natural resources and a safe and healthy living environment, it also strives for the interest of a sustainable society. [...]." (para. 4.8 - 4.10.)

UNITED NATIONS HUMAN RIGHTS BODIES

Human rights bodies have long acknowledged the disproportionate effects of climate change, and more recently, of the "new technologies for climate protection," on youth and future generations.

- **Analytical study on the relationship between climate change and the human right of everyone to the enjoyment of the highest attainable standard of physical and mental health, (A/HRC/32/23), 6 May 2016.**

"Climate change [...] exacerbates existing health inequities and threatens the very notion of intergenerational equity because its impacts will be felt most severely by children and future generations who have contributed little or nothing to its making." (para. 27)

- **Report of the Human Rights Council Advisory Committee, Impact of new technologies intended for climate protection on the enjoyment of human rights, A/HRC/54/47, 2023, para. 18; 25-26; 38; 48; 53). See, e.g.:**

"Right to life. NTCPs could perpetuate and exacerbate the threats that climate change already poses to life and the enjoyment of the right thereto by present and future generations." (para. 48)

Human Rights Treaty Bodies

- **Committee on the Elimination of all Forms of Discrimination against Women,** General recommendation No. 37 on the gender-related dimensions of disaster risk reduction in the context of climate change, CEDAW/C/GC/37, 13 March 2018 (paras. 1, 19)

- **Committee on Civil and Political Rights, General Comment No. 36 on Article 6: right to life*, CCPR/C/GC/36, 3 September 2019**

The Committee noted that climate change, among others, is among the greatest threat to the right to life of future generations: *"Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life." (para. 62)*

- **Committee on the Rights of Children, General Comment No. 26 (2023) on children's rights and the environment with a special focus on climate change, CRC/C/GC/26, 22 August 2023**

The Committee notes that, based on the principle of intergenerational equity, States bear responsibilities with regard to foreseeable environmental threats that might only manifest in a distant future: *"The Committee recognizes the principle of intergenerational equity and the interests of future generations, to which the children consulted overwhelmingly referred. [...]Beyond their immediate obligations under the Convention with regard to the environment, States bear the responsibility for foreseeable environment-related threats arising as a result of their acts or omissions now, the full implications of which may not manifest for years or even decades." (para. 11)*