Commonwealth Lawyers Association

INTERNATIONAL COURT OF JUSTICE
(General List No. 187)

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

(REQUEST FOR ADVISORY OPINION)

Written Statement to the International Court of Justice by the Commonwealth Lawyers Association

25 March 2024

Commonwealth Lawyers Association

WRITTEN STATEMENT TO THE INTERNATIONAL COURT OF JUSTICE BY THE COMMONWEALTH LAWYERS ASSOCIATION ("CLA")

1. On 29 March 2023, the United Nations General Assembly adopted resolution 77/276 entitled "Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change." In this resolution, the General Assembly decided to request such an advisory opinion in accordance with Article 96 of the Charter of the United Nations.

2. On 12 April 2023, the Secretary-General of the United Nations made a Request for an advisory opinion under article 65 of the Statute of the International Court of Justice (the "**Court**").

3. The Commonwealth Lawyers Association makes this written Statement to the Court as an international non-governmental organisation, filed on its own initiative, in accordance with the Practice Direction XII of the Court's Practice Directions.

CHAPTER 1: INTRODUCTION

The Commonwealth Lawyers Association

4. The Commonwealth Lawyers Association ("**CLA**") is an international association of legal professionals that exists to maintain and promote the rule of law across member states of the Commonwealth, who share a substantial common ground in their legal systems. It is an accredited organization of the Commonwealth. Established in 1986, the CLA is a membership-based organization that is governed by a Council of 60 senior legal professionals covering 78 member jurisdictions from across the Commonwealth. Its members include individual lawyers in private and government practice, law societies, bar associations, students and academics.

5. The rule of law is the foundation of peaceful societies. The harms inflicted on communities as a result of climate change are leading to a breakdown in society, climate refugees and other injustices. We emphasize in our Statement that States have a duty under international law to uphold the rule of international law and to maintain peace and friendly relations among themselves. We respectfully draw the attention of the Court to the UNDHR which states that:

> "Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law"

6. The Commonwealth is home to 2.5 billion people, being one-third of the world's population across 56 member countries. Its members are advanced and developing economies, including 33 of the world's 42 small states, of which 25 are small island developing states ("**SIDS**") from across Africa, the Caribbean and the Pacific and 6 of the 18 Associate Members of UN regional Commissions. A significant number of Commonwealth member states are disproportionately and negatively impacted by climate change, particularly those that are small and other vulnerable countries. Our members range from countries who are historically and currently large greenhouse gas polluters to countries who are carbon sinks. Nevertheless we share a common commitment to finding peaceful and workable solutions to the current climate crisis and to ensuring that our common but differentiated responsibilities produce justice for all.

7. CLA is formed as a company limited by guarantee in England. Its objectives, as outlined in its Memorandum of Association, are to promote the rule of law throughout the Commonwealth including to promote the administration of justice and protection of human rights in accordance with the principles enshrined in the Harare Declaration of 1991, the Milbrook Action Programme of 1995 and the Commonwealth (Latimer House) Principles on the Accountability of and the Relationship between the Three Branches of Government (2003) and the Commonwealth Charter 2013. The Commonwealth Charter in particular has a significant emphasis on human rights and environmental protection as well as recognition of the needs of small states and vulnerable states and the importance of sustainable development.

8. The Commonwealth has enshrined commitments to environmental, climate and sustainable development objectives through the Langkawi Declaration on the Environment (1989), Commonwealth Blue Charter (2021), Commonwealth Living Lands Charter – A Call to Action on Living Lands (CALL) (2022) and the Commonwealth Declaration on Sustainable Urbanisation (2022). Commonwealth climate initiatives include the Commonwealth Sustainable Energy Transition (CSET) Agenda and the Commonwealth Climate Change Programme (November 2023). Most recently, CLA adopted the Sabah Declaration on Climate Justice (February 2024) which affirms principles of climate justice in the context of human rights, justice, equity and sustainable development.

9. CLA's work programme is in part delivered by its committees. These include the Climate Justice Committee and Human Rights and Rule of Law Committee, whose members are senior lawyers from across the Commonwealth with expertise in environmental and human rights law.

10. The CLA represents a significant body of legal expertise, comprising practitioners, scholars, and jurists from diverse Commonwealth jurisdictions worldwide. Its membership reflects a broad spectrum of legal perspectives and experiences, contributing to a comprehensive understanding of complex legal issues, including those related to climate change. As an organization deeply committed to upholding the rule of law and promoting

access to justice, the CLA has a vested interest in addressing issues of global significance such as climate change. Climate change presents multifaceted legal challenges that intersect with various areas of international law, including environmental law, human rights law, and state responsibility. Through this Statement, the CLA aims to contribute to the advancement of international law and the protection of fundamental rights and freedoms in order to strengthen the legal framework for addressing climate change and promoting sustainable development on a global scale.

11. The remainder of this Statement is organized as follows:

(a) Chapter 2: summarises the current climate science that underpins States' obligations under international law with respect to human rights and climate change.

(b) Chapter 3: identifies and discusses international law rules relevant to the Court's advisory opinion and responds to the questions referred to the Court.

(c) Chapter 4: makes concluding statements.

CHAPTER 2: CLIMATE SCIENCE

> "It is unequivocal that human influence has warmed the atmosphere, ocean and land. Widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred.[1]"

12. We are undoubtably facing the most significant threat to our planet's future in the history of humanity: the triple planetary crisis of the climate emergency, pollution and biodiversity loss. In this chapter, we outline the climate science that underpins States' international obligations relating to human rights and climate change.

13. According to the Intergovernmental Panel on Climate Change ("**IPCC"**) Synthesis Report of its Sixth Assessment Report ("**AR6**"), the world is on track for catastrophic climate changes by the end of the century, representing a real and catastrophic threat to human well-being and planetary health.[2]

14. Senior officials warn:

> The world is reaching the tipping point beyond which climate change may become irreversible. If this happens, we risk denying present and future generations the right to a healthy and sustainable planet – the whole of humanity stands to lose.[3]
>
> By polluting the oceans, not mitigating CO2 emissions and destroying our biodiversity, we are killing our planet. Let us face it, there is no planet B.[4]
>
> The effects of climate change are real and must be acted on.[5]
>
> Climate change is the single greatest threat to a sustainable future but, at the same time, addressing the climate challenge presents a golden opportunity to promote prosperity, security and a brighter future for all.[6]

15. Indigenous and First Nations people are disproportionately affected by climate change because of their relationship to the environment and to Country including ancestral lands

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[1] IPCC, AR6 Summary for Policymakers, 3, [3].

[2] IPCC, 2023, AR6 Synthesis Report Summary for Policymakers, 24 [27].

[3] Kofi Annan, Former Secretary-General of the United Nations, The Guardian, 2015, 'We must challenge climate-change sceptics who deny the facts', accessible at: https://www.theguardian.com/environment/2015/may/03/kofi-annan-interview-climate-change-paris-summit-sceptics.

[4] Emmanuel Macron, President of France, Climate Action, 2018, 'Macron tells Trump and US Congress: "There is no Planet B"', accessible at: https://www.climateaction.org/news/macron-tells-trump-and-us-congress-there-is-no-planet-b#:~:text=In%20a%20rare%20opportunity%20to%20speak%20directly%20to,are%20killing%20our%20planet.%20Let%20us%20face%20it.

[5] Joe Biden, (then) Vice President of the United States of America, 31 May 2014, University of Delaware Commencement Address, accessible at: https://obamawhitehouse.archives.gov/the-press-office/2014/05/31/commencement-address-vice-president-joe-biden.

[6] Ban Ki-Moon, Former Secretary-General of the United Nations, 11 April 2014, Remarks at Climate Leaders Summit, accessible at https://www.un.org/sg/en/content/sg/statement/2014-04-11/secretary-generals-remarks-climate-leaders-summit.

and waters. Climate impacts can threaten cultural knowledge, heritage, and traditional practices, and potentially further displace Indigenous and First Nations people from their homes and affect their ability to access Country.

16. Climate change impacts such as sea level rises experienced in island communities and increases in temperature experienced in desert communities could leave Indigenous and First Nations people with no choice but to migrate from ancestral homelands to urban settings or other locations. The consequences for Indigenous and First Nations people facing this possibility, risking further dispossession and a loss of access to traditional lands, waters, and natural resources, can only be described as catastrophic. The loss of ancestral, spiritual, totemic and language connections to lands and associated areas has major implications for the human rights of affected peoples as well as their physical and mental wellbeing. Extreme events are also contributing to the damage of Indigenous and First Nations places and cultural sites.

17. States know of this harm and continue to fail to act in the interests of current and future generations. Their failure to act is a failure of the fundamental duty of a government to protect all its citizens, including its First Peoples, from harm.

18. It is a failure to protect fundamental human rights including the right to life, the rights of the child and the right to self-determination. At its most basic, it is an abrogation of the social contract.

Courts and tribunals' use of scientific evidence

19. There is clear authority that international courts and tribunals may use scientific evidence to determine the scope of a legal obligation and identify the breach of an obligation. In our respectful submission, the Court's findings on States' obligations to ensure the protection of the environment from greenhouse gas emissions for present and future generations must be based on the best available climate science.

20. International courts and tribunals have repeatedly relied on scientific evidence to interpret international legal obligations and to identify breaches of such obligations, particularly under international environmental law. The Court has adopted this approach, using scientific evidence to determine breach of substantive obligations[7] and the nature and extent of harm[8] This is shown through authorities of the International Tribunal on the Law of the

[7] For example, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 20 April 2010, *ICJ Reports 2010*.
[8] For example, *Trail Smelter Arbitration (United States v. Canada)*, Awards, 16 April 1938 and 11 March 1941, *RIAA*.

Sea,[9] the World Trade Organization Appellate Body,[10] and the Permanent Court of Arbitration.[11]

Climate science

21. An important source of climate science relevant to the Court's consideration of the questions before it is the IPCC. The IPCC has 195 Member Countries and its mandate is to assess the risk of climate change caused by human activities, its potential impacts, and possible options for prevention.[12] The international community regards the IPCC's findings as authoritative statements of climate science as can be seen through multiple resolutions of the UN General Assembly[13] and the UN Environment Assembly.[14]

22. The most recent Assessment Report Cycle of the IPCC started in 2015 and completed in 2023 with AR6. The key findings of the several IPCC working groups are collated in the AR6 Synthesis Report. These findings are expressed with relevant "confidence" or "probability" assessments, ie the likelihood that a particular observation or statement can be relied on as fact.

23. It is now unequivocal that anthropogenic greenhouse gas ("**GHG**") emissions have already caused approximately 1.1°C of global warming since pre-industrial levels from 1850.[15] The IPCC has undertaken modelling of different GHG emissions pathways leading to different levels of global warming compared to pre-industrial levels. These models show that projected adverse impacts from climate change will escalate with every increment of global

[9] For example, *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar,* Judgment, 14 March 2012, *ITLOS Reports 2012.*

[10] For example, *United States – Import Prohibition of Certain Shrimp and Shrimp Products,* Report of the Appellate Body, WT/DS58/AB/R, 12 October 1998.

[11] *Indus Waters Kishenganga Arbitration (Pakistan v. India)* PCA Case No. 2011-01, Final Award, 20 December 2013 and *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, PCA Case No. 2013-19, Award, 12 July 2016.

[12] Principles Governing the Work of the Intergovernmental Panel on Climate Change, 1 October 1998.

[13] For example, United Nations General Assembly, Resolution A/RES/77/165, 14 December 2022, preamble at p.4; United Nations General Assembly, Resolution A/RES/76/205, 17 December 2021, preamble at p. 4, para. 6; United Nations General Assembly, Resolution A/RES/73/232, 20 December 2018, preamble at p. 4; United Nations General Assembly, Resolution A/RES/74/219, 19 December 2019, preamble at p. 3, United Nations General Assembly, Resolution A/RES/75/217, 21 December 2020, preamble at p. 4; United Nations General Assembly, Resolution A/RES/68/212, 20 December 2013, preamble at p. 2, para. 9; United Nations General Assembly, Resolution A/RES/63/32, 26 November 2008, preamble at p. 2, para. 2; United Nations General Assembly, Resolution A/RES/64/73, 7 December 2009, para. 8; United Nations General Assembly, Resolution A/RES/65/159, 20 December 2010, preamble at p. 2, para. 8; United Nations General Assembly, Resolution A/RES/62/86, 10 December 2007, preamble at pp. 2, 3.

[14] For example, United Nations Environment Assembly, Resolution UNEP/EA.5/Res.5, 2 March 2022, preamble, para. 2.

[15] AR6 Synthesis Report, Section 2.1.1, p. 6.

warming (*very high confidence*)[16] and climate change risks will be increasingly complex and difficult to manage (*high confidence*).[17]

24. The impacts of anthropogenic GHG emissions are also well known and observed. The oceans have warmed since 1970 (*virtually certain*) caused by human activity (*extremely likely*) due to the oceans absorbing over 90% of atmospheric heat due to GHG.[18] The rate of ocean warming has more than doubled since 1993 (*likely*) and this has contributed to loss of ice sheet mass and reductions in sea ice extent and thickness (*very high confidence*).[19] Ocean warming is projected to increase through the 21st century under all GHG emission scenarios (*virtually certain*),[20] leading to devastating impacts on marine life and sea-level rise.

25. World-wide sea level has increased by 0.2m (1901 – 2018) and the rate of sea-level rise has also increased over that period (*high confidence*).[21] This acceleration is partly due to ice-loss from glaciers and sea ice (*extremely likely*),[22] however, it is experienced unevenly across the globe. The Western Pacific Ocean (which is constituted by many small island developing states including a number of Commonwealth states) has experienced sea-level rise three times higher than the global mean.[23] Sea levels will continue to rise through the 21st century (*virtually certain*)[24] with projected levels varying across scenarios, and multiple metre rises possible if the Greenland and Antarctic ice sheets melt.[25] Ocean warming affects ocean chemistry by reducing oxygen levels and increasing absorption of carbon dioxide resulting in ocean acidification. It is virtually certain that the main cause of ocean acidification has been anthropogenic carbon dioxide emissions.[26]

26. The IPCC concluded with high confidence that climate change has caused substantial damage and irreversible losses to ecosystems worldwide, including ocean and coastal ecosystems.[27] These impacts include: the shifting of species towards the poles; reduction

[16] AR6 Synthesis Report, Section 3.1.2, p. 36 and Section 3.1.1, p. 34.

[17] AR6 Synthesis Report, Section 3.1.2, p. 36.

[18] AR6 Synthesis Report, Section 2.1.2, p. 11.

[19] AR6 *2019 Special Report on the Ocean and Cryosphere in a Changing Climate* ("Special Report on the Ocean and Cryosphere").

[20] AR6 *2021 Working Group I report on Climate Change 2021:The Physical Science Basis* ("WGI Report"), Technical Summary, TS 2.4, p. 74.

[21] AR6 Synthesis Report, Section 2.1.2, p. 11.

[22] Special Report on the Ocean and Cryosphere, Sections 3.3.1 and 4.2.3, pp. 236-240, 344-367.

[23] IPBES 2019: *Global Assessment Report on Biodiversity and Ecosystem Services of the Intergovernmental Science- Policy Platform on Biodiversity and Ecosystem Services (*"IPBES 2019: Global Assessment Report"), Section 2.1.17.1, p. 127.

[24] AR6 Synthesis Report, Section 3.1.3, p. 42.

[25] AR6 *2018 Special Report on Global Warming of 1.5*°C ("Special Report on 1.5°C"), Chapter 3, p. 178.

[26] AR6 Synthesis Report, Section 2.1.2, p. 11.

[27] AR6 Synthesis Report, Section 2.1.2, p. 15.

in growth, reproduction and survival of fisheries; and marine heatwaves causing coral bleaching and reef degradation.[28]

27. The global scientific consensus conservatively establishes that the consequences of even small increases in temperature on freshwater resources, the health of reefs systems and coastal wetlands and other island ecosystems will surpass the ability of those ecosystems to adapt. It establishes that every tonne of GHG emissions matters to the accumulation of GHGs in the atmosphere and that every fraction of a degree of warming is significant.

28. The best available science and expert consensus, including the reports of the IPCC, United Nations Environment Programme (**UNEP**), World Meteorological Organisation (**WMO**), demonstrates that:

- human activities resulting in increased atmospheric concentrations of GHGs have created conditions of radiative forcing which have warmed the atmosphere, ocean and land and caused long-term accumulating associated climate impacts;

- in 2019, atmospheric CO_2 concentrations were higher than at any time in at least 2 million years, and concentrations of nitrous oxide and methane were higher than at any time in at least 800,000 years.[29]

- in order to avoid the worst climate impacts, rapid and substantial reductions in GHG emissions are required;

- the relationship between anthropogenic GHG emissions and global warming is near-linear;

- every tonne of GHG emissions increases global warming;

- anthropogenic GHG emissions cause, globally and locally:

    - temperature increase;
    - ocean temperature increase;
    - ocean acidification;
    - sea level rise and coastal inundation;
    - increased frequency, size and intensity of extreme weather events;
    - changed precipitation patterns;
    - increased health issues including heat induced mortality and morbidity;
    - harm and destruction to ecosystems and non-human species and dieback of ecosystems;

[28] Special Report on the Ocean and Cryosphere.

[29] IPCC, Climate Change 2021: The Physical Science Basis – Summary for Policymakers [.0332].

- certain levels of global GHG emissions will and likely already have resulted in reaching tipping points causing substantial, abrupt and sometimes irreversible changes such as observed in recent observations of the West Antarctic and Greenland ice sheets, melting permafrost, ocean gyre circulation and mass coral die offs including extreme bleaching of Australia's Great Barrier Reef;

    - global carbon budgets and remaining cumulative GHG emissions for global temperature increases can be calculated;

    - methodologies exist for the allocation of global carbon budgets between nations;

    - All States' emissions reduction targets are incompatible with preventing catastrophic impacts of climate change.

29. The 2023 UNEP Emissions Gap Report states that:

> The world is witnessing a disturbing acceleration in the number, speed and scale of broken climate records. At the time of writing, 86 days have been recorded with temperatures exceeding 1.5°C above pre-industrial levels this year. Not only was September the hottest month ever, it also exceeded the previous record by an unprecedented 0.5°C, with global average temperatures at 1.8°C above pre-industrial levels. These records were accompanied by devastating extreme events, which the Intergovernmental Panel on Climate Change (IPCC) has warned us are merely a meek beginning. While the records do not imply that the world has exceeded the 1.5°C temperature limit specified in the Paris Agreement, which refers to global warming levels based on multi-decadal averages, they signal that we are getting closer.[30]

30. The IPCC Representative Concentration Pathways and updated Shared Socioeconomic Pathways indicate the world is no longer on track to meet the UNFCCC commitment to keep global temperature increases to 1.5 °C and well below 2 °C in the near term and would require deep cuts by all nations to achieve these goals in the long term. The only emission scenario that simulates a world in which global temperatures are about 1.5°C warmer than preindustrial times by the end of this century is SSP1-1.9. Under this scenario, global warming will peak around the middle of the century, with a temporary overshoot of 1.5°C by no more than 0.1°C, before temperatures slowly decline as net global emissions fall below zero between 2050 and 2100.[31] This underscores the necessity of cutting emissions immediately in order to hold global temperature increase to 1.5°C.

30 UNEP Emission Gap Report 2023, 15.

31 Karoly Report [84].

CHAPTER 3: INTERNATIONAL LAW RULES

31. This Chapter responds to the specific questions referred to the Court and identifies and discusses international law rules relevant to the Court's advisory opinion.

Question 1

What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations?

32. The key sources of international law relevant to the question before the Court include both treaty law and principles of international law covering diverse and complex areas of law about human rights, climate change and law of the sea. Relevant treaties include:

- Charter of the United Nations;
- International Covenant on Civil and Political Rights;
- International Covenant on Economic, Social and Cultural Rights;
- Universal Declaration of Human Rights;
- Convention on the Rights of the Child;
- United Nations Framework Convention on Climate Change;
- Paris Agreement; and
- United Nations Convention on the Law of the Sea.

33. Key principles of international law that derive from treaties and customary international law and that are relevant to the Court's deliberation include:

- The principle of prevention of significant harm to the environment;
- The duty to protect and preserve the marine environment;
- The obligation to protect, respect and fulfil human rights;
- Principles of intergenerational equity, intragenerational equity and the precautionary principle;
- The principle of equity under international environmental law;
- The principle of protection of transboundary harm including the duty to exercise due diligence, obligation to conduct an environmental impact assessment, the obligation to notify and consult in good faith and the duty to compensate for harm;
- The duty to cooperate, principle of solidarity, principle of common but differentiated responsibilities ("**CBDR**") and respective capabilities, the obligation of good faith and the public participation principle; and
- The obligation to provide remedies for human rights violations arising from climate change.

34. These principles are all part of international law and are valid sources of law for the Court to apply in this case.

35. Fundamentally, States owe a legal obligation to each other to protect the environment and particularly the climate system from greenhouse gas emissions from human sources. This obligation must be read together with the principle of intergenerational equity so that States owe each other and present and future generations to ensure the protection and stability of the environment and climate system from greenhouse gas emissions. These obligations are well established across all sources of international law including treaty law, customary international law, general legal principles, international court and tribunal rulings and scholarly consensus.

36. Protection of the environment and protection of human rights are inextricably linked. Environmental damage frequently results in violations of human rights. For example, rights to health and clean water cannot be enjoyed in the face of climate change and pollution. Children's right to a clean, healthy and sustainable environment cannot be enjoyed in the face of the climate crisis and environmental degradation.[32] The right to self-determination is diminished for First Peoples forced to relocate from ancestral homelands or facing loss of culturally significant species. The right to life, and to live in freedom and safety, rights to health, housing, food and water and the realisation of sustainable development goals are all impacted by climate change.

37. International environmental law principles are directly applicable rules that create legal obligations that are binding on States. Such principles guide the application of the law, limit discretionary power for judges and lawyers when deciding cases and operate as rules of law when there are gaps in international law. International environmental law principles further support the development of government policies to protect the climate system and other parts of the environment from harm caused by human activities, including greenhouse gas emissions.

Equity, intergenerational equity, intragenerational equity and climate change

38. Equity and intergenerational equity are concepts deeply rooted in international law which are fundamentally important to the impact of the climate crisis on future generations. The ICJ has recognized that equity is a general principle directly applicable as law; the Court is required to apply the principle of equity when interpreting relevant international law rules.[33]

[32] See further General Comment No.26 (2023) on children's rights and the environment with a special focus on climate change (CRC/C/GC/26), Committee on the Rights of the Child.

[33] 100 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, ICJ Reports 1982, p. 18, para. 71; *Frontier Dispute* (Burkina Faso v. Mali), Judgment, ICJ. Reports 1986, para. 28.

39. The concept of equity is recognized across various international environmental treaties and declarations including in the UNFCCC[34], the Paris Agreement[35] and the Rio Declaration[36]. It is also reflected in the principle of common but differentiated responsibilities. Both the UNFCCC and the Paris Agreement recognize the importance of equity and the disproportionate impacts of climate change on developing states.[37]

40. Equity requires States to address the disproportionate impacts of the climate crisis on various vulnerable nations, peoples and future generations. States must take action to address environmental inequalities and injustices and prioritise the needs of those most affected by climate change.

41. Intergenerational equity is the principle that our planet is a shared inheritance for all generations: past, present and future. The principle implies fairness and equity between generations for the use and preservation of the environment and natural resources. The principle has been widely applied in treaties[38] and by international courts and tribunals[39] but as yet there is no general international law instrument that defines the elements of intergenerational equity. In our respectful submission, we urge the Court to clarify the applicability and content of the principle of international equity, so that the current generation must consider the impact of its actions on future generations when making decisions related to climate change. The current generation must also safeguard the preservation and stability of the climate system for the benefit of the current and future generations. We submit that States have a duty to act responsibly as caretakers of the planet, and to consider, prevent and redress the impact of environmental degradation and climate change on future generations.

Children's rights & intergenerational equity

42. The rights of children, as described in the UN Convention on the Rights of the Child ("**CRC**"), particularly children from vulnerable groups, are disproportionately impacted by climate change. Children are particularly susceptible to climate change, feeling its impacts with greater severity. As future generations, they will also be exposed to the adverse and worsening long-term impacts of climate change for a greater period of time.

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[34] UNFCCC Art 3.3.

[35] Paris Agreement preamble and art 2.2.

[36] Rio Declaration principle 3.

[37] UNFCCC Art 4.

[38] Eg Convention on Biological Diversity preamble, World Heritage Convention Art 4, UNFCCC Art 3 and Paris Agreement preamble.

[39] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226, Jul. 8, 1996, para. 29; *Pulp Mills on the River Uruguay (Argentina v Uruguay),* Separate Opinion, ICJ Reports 2010, p.80 at para. 122; UNHRC, *Ioane Teitiota v. New Zealand*, Admissibility and Merits Views, No. 2728/2016, CCPR/C/127/D/2728/2016, Sept. 23, 2020, para. 9.4; UNHRC, *Daniel Billy et al. v. Australia*, Admissibility and Merits Views, No. 3624/2019, CCPR/C/135/D/3624/2019, Sept. 22, 2022, para. 5.8.

43. As outlined by General Comment 26 ("**GC26**"),[40] all children's rights are interconnected and equally important, however there are a number of rights under the CRC that are particularly impacted by environmental harm and climate change:

- Right to non-discrimination (art. 2)
- Best interests of the child (art. 3)
- Right to life, survival and development (art. 6)
- Right to be heard (art. 12)
- Right to freedom of expression, association and peaceful assembly (art. 13 & 15)
- Access to information (art. 13 & 17)
- Right to freedom from all forms of violence (art. 19)
- Right to health (art. 24)
- Right to social security and decent standard of living (art. 26 & 27)
- Right to education (art. 28 & 29)
- Rights of indigenous children and children of minority groups (art. 30)
- Right to rest & play (art. 31)

44. The Committee on the Rights of the Child have made clear via GC26 that children have the right to a clean, healthy and sustainable environment in order to enjoy all their human rights. Governments worldwide must consider children's rights in all decisions made about climate change, while also considering climate change in all decisions relating to children. This includes taking urgent mitigation and adaptation actions, providing financial and technical support to countries experiencing loss and damage, ensuring businesses rapidly reduce emissions and ensure that climate finance does not support action that negatively impacts children's rights.

45. The various obligations outlined above concerning the rights of the child are inherently part of intergenerational equity.

Human rights and climate change

46. The climate crisis is undeniably a human rights crisis. Most fundamentally, the climate crisis impacts the right to life and these impacts are felt disproportionately by the most vulnerable such as small island nations, children, indigenous communities, women and the poor. Historically, international environmental law has focused on the relationship between States, resource allocation and transboundary harm. However, climate change cuts across different bodies of law which need to be brought together to detail the obligations of States to each other and to their citizens.

47. There are many obligations regarding human rights and climate change, the most relevant of which are:

[40] General Comment No.26 (2023) on children's rights and the environment with a special focus on climate change (CRC/C/GC/26), Committee on the Rights of the Child.

- Right to life;
- Right to self-determination;
- Right to a healthy environment;
- Right to health;
- Right to private and family life;
- Right to seek, receive and impart information; and
- Right to an effective remedy for breach of human rights obligations.

48. States have an obligation at international law to ensure that human rights are protected. These obligations arise through the ratification of various international human rights instruments in which parties agree to respect, protect and fulfil the rights contained therein.[41] A party to these instruments has a positive obligation to use all means within its disposal to uphold human rights enshrined in treaties to which it is party.[42] The duty to co-operate lies at the heart of human rights protections found in the UN Charter where member states:[43]

> pledge themselves to take joint and several action in co-operation with the organisation for the achievement of...universal respect for and observance of human rights and fundamental freedoms for all.

49. Climate change violates human rights obligations in a variety of ways. The UN has identified six main areas where the physical climate will impact on human lives:[44] ecosystems, food, water health coasts, industry, settlement and society. Climate change is likely to have both direct and indirect impacts on the right to life[45] and the ability of people to enjoy the highest attainable standard of physical and mental health[46] due to extreme weather events and the increased number and impact of infectious diseases, deterioration

[41] Including the Charter of the United Nations *Charter of the United Nations* GA Res 217A (III) UN Doc A/810 at 71 (1948) (UDHR); the *Universal Declaration of Human Rights* 1948 adopted and proclaimed by General Assembly resolution 217A(III) on 10 December 1948; *International Covenant on Civil and Political Rights* (ICCPR) opened for signature 16 December 1966 999 UNTS 171 (entered into force 23 March 1976) ; *International Covenant on Economic, Social and Cultural Rights*; (ICESCR) G.A. res. 2200A (XXI), 21 U.N.GAOR Supp (No. 16) at 49, UN Doc A/6316 (1966), 993 U.N.T.S. 3, (entered into force Jan. 3, 1976); *The Vienna Declaration of Programme of Action*, GA Res A/RES/50/201, 29 February 1996; and the *Convention on the Rights of the Child* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (CRC); UN Office of the High Commissioner for Human Rights, *What are Human Rights?* (2008) at: http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx.

[42] UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3 - On the Nature of State Parties' Obligations* (1990) UN Doc, E/1991/23, annex III.

[43] UDHR art 2(1), 55 and 56.

[44] Office of the United Nations High Commissioner for Human Rights *Report on the relationship between climate change and human rights*, 15 January 2009 (A/HRC/10/61) p 5.

[45] The right to life is contained in ICCPR, Article 6 (1); CRC Article 6 and UDHR Article 3.

[46] The right to health is referred to in Articles 7(b), 10 and 12 ICESCR, Articles 12 and 14, paragraph 2(b) CEDAW, Article 25 UDHR; Article 5(e)(iv) ICERD, Article 24 CRC, Articles 16, paragraph 4, 22, paragraph 2 and 25 CRPD and Articles 43, paragraph 1(e), 45, paragraph 1(c) and 70 International Convention on the Protection of the Rights of All Migrant Workers, opened for signature December 18 1990 (entered into force July 1, 2003) (ICRMW). The right to an adequate standard of living is confirmed in OHRC res 6/27 of 14 December, 2007 at [3] and the report of the Special Rapporteur to the General Assembly on the right to enjoyment of the highest attainable standard of physical and mental health: A/62/214.

in health, increased air and water pollution, increased susceptibility to disease and increased hunger and malnutrition.[47]

50. The right to adequate food and the right to be free from hunger [48] are likely to be impeded due to decreased food production due to an increase in the frequency of extreme weather events disrupting agriculture; land degradation and crop yields; coastal instability and changes to migratory patterns of fish stocks.[49] Water quality and availability are likely to be impacted.[50]

51. The right to adequate housing will be affected. [51] Numbers of environmental refugees will be displaced from their homes, forced to relocate due to deteriorating low level and coastal environments, or extreme weather events.[52] A rise in sea level and storm surges will also have a direct impact on delta and coastal settlements.[53]

52. Indigenous peoples may be denied full enjoyment of the right to self-determination[54] due to consequences such as sea level rises, increases in temperature and extreme weather events, that threaten their traditional hunting grounds and thus the ability to sustain a

[47] Intergovernmental Panel for Climate Change AR4 Working Group II (WGII) Report, p. 393; Professor Ross Garnaut, *Garnaut Climate Change Review*, 2008, Chapter 6; Human Rights and Equal Opportunity Commission, *Human Rights and Climate Change*, Background Paper, 2008.

[48] The right to adequate food is contained in ICESCR art 11 and art 24(c) CRC, art 25(f), and 28, paragraph 1 *Convention on the Rights of Persons with Disabilities*, (CRPD) opened for signature 30 March 2007, (entered into force 3 May 2008) Article 14, paragraph 2(h); *Convention on the Elimination of All Forms of Discrimination against Women,* (CEDAWA) opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 August 1981), Article 5(e) *International Convention on the Elimination of All Forms of Racial Discrimination*, (ICERD) opened for signature December 21 1965, 660 UNTS 195 (entered into force Jan. 4, 1969) and Article 25 UDHR. The right to be free from hunger is enshrined in Article 11, paragraph 2 *International Covenant on Economic, Social and Cultural Rights,* (ICESCR) opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

[49] Professor Ross Garnaut, *Garnaut Climate Change Review, 2008*, Chapter 6; Human Rights and Equal Opportunity Commission, *Human Rights and Climate Change*, Background Paper, 2008.

[50] The right to water is found in Articles 11 and 12 ICESCR, Article 14, paragraph 2(h) CEDAW, Article 28, paragraph 2(a) CRPD and Article 24, paragraph 2(c) CRC. The right to water is implicit in Articles 11 and 12 (CESCR General Comment No. 15 (2002), paragraph 2). CEDAW and CRPD explicitly refer to adequate standard of living provisions. The CRC refers to the provision of 'clean drinking water' to combat disease and malnutrition. OHRC decision 2/104 of 27 November, 2006 confirms the link between human rights and access to water. Human Rights and Equal Opportunity Commission, *Climate Change and Human Rights* at http://www.hreoc.gov.au/Human_Rights/climate_change/index.html.

[51] The right to adequate housing is contained in Article 11 ICESCR, Article 5(e)(iii)ICERD, Article 14, paragraph 2 CEDAW, Article 27 paragraph 3 CRC, Article 43 paragraph 1(d) ICRMW, Articles 9, paragraph 1(a), 28, paragraphs 1 and 2(d) CRPD and Articles 25 UNDHR.

[52] Garnaut, R., *Garnaut Climate Change Review*, 2008.

[53] IPCC AR4 WGII Report, p. 333.

[54] The right to self-determination is contained in Article 1, paragraph 1 ICESCR, Article 1, paragraph 1 ICCPR, Articles 1 and 55 United Nations Charter, Article 1, paragraph 2 Declaration on the Right to Development and Articles 3 and 4 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Indigenous peoples, both collectively and individually, also have the right to full enjoyment of all human rights and fundamental freedoms recognised in the Charter of the United Nations, UDHR and international human rights law: Article 1 UNDRIP.

subsistence existence. They may be deprived of their traditional territories, sources of livelihood and cultural heritage.[55]

53. In September 2007 the Interagency Support Group on Indigenous Issues pointed out that:[56]

> the most advanced scientific research has concluded that changes in climate will gravely harm the health of Indigenous peoples, traditional lands and waters and that many of plants and animals upon which they depend for survival will be threatened by the immediate impacts of climate change.

54. Indigenous persons are particularly vulnerable to the effects of climate due to the remoteness of their communities and subsequent inadequacies of infrastructure, health services and level of employment.[57] The right to development was reaffirmed by the Vienna Declaration and the Declaration on the Right to Development as a universal and inalienable right, integral to human rights.[58] It is however a right that appears to pose conflicting priorities for developed nations seeking to impose sustainable development goals on states in the throes of industrialisation. The assumption, based on historical precedents of OECD states, is that development necessarily involves high GHG emissions with relatively primitive but power-hungry industry and a low priority for reduction of GHG emissions as states transform from agrarian cultures to technology based economies.

55. The UN General Assembly[59] and the Human Rights Council[60] have also recognized the right to a clean, healthy and sustainable environment as a human right. This right is recognized in almost all regions of the world through human rights treaties and other conventions.[61] The promotion of the right requires "the full implementation of the multilateral environmental agreements under the principles of international environmental law"[62], as affirmed by the UN. It includes the elements of the right to clean air, a safe climate, healthy ecosystems and biodiversity, safe and sufficient water, healthy and

[55] The right to culture is contained in art 27 ICCPR.

[56] Inter-Agency Support Group On Indigenous Peoples' *Issues/Collated Paper On Indigenous Peoples And Climate Change*, 7 February 2008, E/C.19/2008/CRP.2.

[57] UN Office of the High Commissioner for Human Rights, What are Human Rights? (2008) p 17 at http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx; Australian Government Submission to the Office of the High Commissioner for Human Rights on *The Relationship between Climate Change and Human Rights*, p 2

[58] *Vienna Declaration and Programme of Action*, A/CONF.157/24 (Part I), chap. III./ adopted by the World Conference on Human Rights, held in June 1993 and endorsed by GA Res A/RES/50/201, 29 February 1996; *Declaration on the Right to Development* GA Res A/RES/41/128, 4 December 1986.

[59] United Nations General Assembly, Resolution A/RES/76/300, 1 August 2022.

[60] United Nations Human Rights Council, Resolution A/HRC/RES/48/13, 18 October 2021.

[61] For example, African Charter on Human and Peoples' Rights, Articles 16, 24, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Article 11, Arab Charter on Human Rights, Article 38, ASEAN Human Rights Declaration, Article 28(f), Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, Articles 1, 4(1).

[62] United Nations General Assembly, Resolution A/RES/76/300, 1 August 2022.

sustainable food and non-toxic environments.[63] Although the status of this right under international law may not be clearly delineated, there is little divergence between States that human rights of present and future generations are negatively impacted by the climate crisis, environmental degradation, biodiversity loss and unsustainable development. As environmental obligations and a number of human rights are closely interlinked, we respectfully urge the Court to take into account the right to a clean, healthy and sustainable environment, as well as other human rights norms, in its deliberations.

56. International law provides special safeguards and care of the rights of the child by reason of the child's immaturity[64]. The right extends to the primacy of the child's interests in all public and private actions concerning children, to maximum efforts to achieve the protected rights, to pursue the highest attainable level of health, standard of living and most particularly in this context, the inherent right to life and requirement the State 'shall ensure to the maximum extent possible the survival and development of the child'.[65]

57. The rights of the child dovetail neatly with the intergenerational principle of ecologically sustainable development (**ESD**), which states that the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations. They also complement the commitments of the international community to address the consequences of the degradation of the environment expressed in the Millenium Development Goals.[66]

Environmental law principles and climate change

58. There are a number of principles of customary international law which must be read together with States' obligations under international environmental and international human rights law in the context of climate change. These include the following obligations:

- Prevention of significant transboundary harm;
- Precautionary principle;
- Duty to cooperate;
- Principle of solidarity;
- Principle of common but differentiated responsibilities and respective capabilities;
- Good faith obligations; and
- Public participation.

[63] See various reports of the UN Special Rapporteur on human rights and the environment including UN Doc. A/74/161, 15 July 2019, UN Doc. A/75/161, 15 July 2020, UN Doc. A/HRC/46/28, 19 January 2021, UN Doc. A/76/179, 19 July 2021 and UN Doc. A/HRC/49/53, 12 January 2022.

[64] UN Convention on Rights of the Child Preamble.

[65] Ibid art 3,4,24,27 and art 6.

[66] The millennium development goals developed out of the United Nations Millennium Declaration, signed in September 2000 available at http://www.un.org/millenniumgoals/.

59. **Prevention of significant transboundary harm** requires States to take measures to prevent environmental harm to other areas outside their control, including areas that are a significant distance away from the cause of the damage. It involves several international obligations relevant to preventing the adverse effects of climate change including due diligence in the prevention or mitigation of harm, obligation to conduct an environmental impact assessment, and the duty of notification.

60. The **precautionary principle** is relevant in cases of scientific uncertainty, which may be used by some in the context of the climate crisis to justify inaction. The principle requires States to take measures to prevent or minimize the impact of environmental harm, and that lack of full scientific certainty should not justify failure to take measures to prevent environmental harm. The principle has been broadly adopted across many treaties and international instruments[67], texts created by civil society[68], rulings of the International Tribunal of the Law of the Sea[69] (ITLOS), regional instruments[70] and, most notably the UNFCCC.[71] However, its status as part of customary international law has not been uniformly recognized by international courts and tribunals. We respectfully submit that these proceedings provide the Court with an opportunity to clarify how the precautionary principle applies to the questions before it.

61. The **duty to cooperate** in the environmental law context means that States must collaborate with each other to protect the environment because it is a common or shared resource. This principle has several consequences, including sharing important information with neighbouring States, conducting environmental impact assessments before action is taken and enforcing environmental standards across national boundaries. This principle is

[67] See WCN, art. 11 (b); Vienna Convention for the Protection of the Ozone Layer (Vienna Ozone Convention), preamble; International Convention on oil pollution preparedness, response and cooperation, 1990 (1990 London Convention), preamble; CBD, preamble; Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions, preamble (LRTAP Convention); Protocol to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, preamble and art. 3; Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Cartagena Protocol), arts. 10 (6) and 11 (8); Stockholm Convention on Persistent Organic Pollutants (POPs Convention), preamble, arts. 1 and 8 (7) (a).
[68] For example, the IUCN Draft Covenant, Art. 7; 2015 Oslo Principles on Global Climate Change Obligations (Oslo Principles), paras. 1 (a-b); CIDCE Draft Covenant, Arts. 3 (1-2).
[69] *Southern Bluefin Tuna (New Zealand v. Japan;* Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p. 280, para. 77; Activities in the Area, Advisory Opinion, Case No. 17, para. 135.
[70] For example, Treaty on the Functioning of the European Union, Art. 191 (2); Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), Art. 2 (2) (a).
[71] UNFCCC Art 3 paragraph 3.

recognized in civil society texts[72], international environmental law[73], the World Trade Organization[74] (WTO) and various UN agreements[75].

62. The concept of mutual assistance without seeking reciprocity underpins the **principle of solidarity**. It promotes fair responses based on equity, cooperation, and sustainable development along with intergenerational equity. In practice, the principle of solidarity means that present generations should forgo some advantages for the benefit of future generations. It also means developed countries should bear a greater load to address climate change as they have benefited more from the emissions that have caused climate change.

63. The **principle of common but differentiated responsibilities and respective capabilities** is based on the precept that (1) countries are not all equally responsible for climate change, based on their present and historic emissions, and (2) countries differ in the ability to carry out mitigation and adaptation measures based on their levels of development and wealth. This principle is broadly recognized across various international instruments[76] and is a foundational concept of international environment law. All States have collective responsibility to prevent climate change harm, however, States who have contributed more to the climate crisis must bear a greater share of mitigation and adaptation costs in lower-income countries. Those States with greater financial capacity must support those States who have less resources and experience a larger share of the adverse impacts of climate change.

64. The **principle of good faith** is fundamental to international law and is reflected in foundational documents such as the UN Charter. States must act with honesty, fairness and reasonableness in the climate crisis context, and must go beyond simply avoiding bad faith actions. They must recognize their common interest in taking climate action, engage in actions to further those common interests and not act to harm that interest.

65. A further fundamental principle that is part of customary international law is the principle of **public participation**. This has been particularly important in international environmental law for over 30 years since it was enshrined in Principle 10 of the 1992 Rio Declaration. States must ensure that they include meaningful and effective public participation in their environmental decision-making processes, including participation by groups vulnerable to climate harm and/or those who are underrepresented, such as women, children, Indigenous peoples and people living in climate-vulnerable locations (including

[72] Art. 20 of the Oslo Principles, preamble; CIDCE Draft Covenant.
[73] Principle 24 of the Stockholm Declaration; Art. 197 UNCLOS; Arts. 21 (a) and 22 WCN; Art. 2 (2) (a) Vienna Ozone Convention; Chapter 2.1 of Agenda 21; Principles 5, 7, 9, 12–14, 24 and 27 of the Rio Declaration; UNFCCC preamble and Art. 3 (5); CBD, Art. 5; Arts. 3(b) and (c) of the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD); Arts. 7 (6)–(7) (a) and 8 (4) (a)–(f).Paris Agreement.
[74] World Trade Organization, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, AB-1998-4, Report of the Appellate Body, 12 October 1998, para. 168.
[75] Art. 4 of the Draft articles on prevention of transboundary harm from hazardous activities.
[76] UNCCC Art 3.1 and 4, Paris Agreement Art 2.2 and Kyoto Protocol.

small island states). The principle of public participation extends to access to information, transparency and access to justice and effective enforcement.

International treaties

66. States have specific obligations arising from international climate treaties and law of the sea, particularly the Paris Agreement ("**PA**"), UNFCCC and the United Nations Convention on the Law of the Sea ("**UNCLOS**"), including the decisions adopted by their governing bodies.

67. The **PA and UNFCCC** have codified 3 principles of international environmental law: common but differentiated responsibilities ("**CBDR**"), cost lowering and the primacy of States as the fundamental actors to take responsibility for lowering GHG emissions and climate change cooperation. These treaties also aim to have States lower costs, increase transparency and promote technological sharing.

68. States also have a duty under **UNCLOS** to protect and preserve the marine environment,[77] which has a major role in climate mitigation and adaptation through the ocean's role in the carbon cycle and absorption of excess heat in the climate system.[78] ITLOS has held in the *South China Sea Arbitration*[79] that the under this rule, States have a positive duty to protect the environment by taking measures to do so and to abstain from degrading the marine environment. Other UNCLOS provisions relevant to climate change include:

- Requirement to prevent, reduce and control pollution of the marine environment (art. 194);
- Duty to cooperate (art. 197);
- Duty to notify of transboundary harm (art. 198);
- Duty of technical assistance to developing States (art. 202);
- Duty to prevent, reduce and control pollution of the marine environment (arts. 201 & 212); and
- Duty to put in place measures to enforce these obligations (arts.213-222).

69. We respectfully submit States' obligations under UNCLOS require them to reduce their GHG emissions which degrade the marine environment.

70. The **PA** imposes specific obligations on States with its central aim being to keep global temperature rise well below 2 degrees Celsius above pre-industrial levels, and aim to limit

[77] UNCLOS Art 192

[78] IPCC, "Special Report on the Ocean and Cryosphere in a Changing Climate" (*Headline Statements*) <https://www.ipcc.ch/ srocc/headline-statements/>.

[79] *In the matter of the South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China*, UNCLOS Annex VII Arbitral Tribunal, PCA Case No 2013-19, 29 October 2015.

the increase to 1.5 degrees Celsius. [80] It contains key provisions for mitigation, including the '*preparation, communication and maintenance'* of Nationally Determined Contributions ("**NDCs**"), implementation of measures to achieve NDCs and emission caps.[81] States parties must also take adaptation measures including strengthening resilience and reducing vulnerability to climate change. Least developed countries (LDCs) and SIDS may establish and publicise low-GHG emission development strategies, plans, and actions that take into account their unique conditions.[82] Developed countries are also obliged to provide additional financial resources to developing countries to support mitigation and adaptation. States must report on their NDC implementation as well as submitting National Inventory Reports of GHG emissions while complying with their declared NDCs and acting in good faith to adhere to PA commitments.

Common heritage

71. The crisis of global GHG accumulation in the atmosphere has been described as a 'tragedy of the commons. No State accepts responsibility for global GHG emissions, or the impacts of climate change. Many States describe the futility of domestic action, referring to short term domestic economic impacts and the small or 'immaterial' contributions each makes to global temperature increase as a justification to minimise GHG emissions reduction action.

72. The atmosphere has been variously treated as a sovereign resource separate to, but bound up with, subjacent space and land mass;[83] as undistinguished air space subject to sovereign claims;[84] or as a distinct strata of gases surrounding the planet within the troposphere and stratosphere before outer space begins, a common resource or global commons,[85] consistent with the treatment of 'outer space' and celestial bodies as common heritage. [86]

73. The common heritage notion applies to the sea-bed and ocean floor in 1970[87] to the Moon[88] and Antarctica,[89] founded upon concepts of trusteeship and distributive justice, is peculiarly apt to climate change mitigation and implicitly recognises the intergenerational equity principle of ESD.

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[80] Article 2, PA.
[81] Article 4.1.
[82] Article 4.7.
[83] *Trail Smelter Case (US v Canada)* 3 R Intl Arb Awards 1905 and Principle 21 of the Stockholm Declaration.
[84] Art 25(2) *Geneva Convention on the High Seas*; *Convention on International Civil Aviation*, Chicago 1944, UNTS II:102.
[85] *Vienna Convention for the protection of the Ozone Layer* (1987) 26 ILM 1516; *Protection of the Atmosphere: Statement of the Legal and policy Experts* 1989, para A1 and 3.
[86] 1979 *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies* (Moon Treaty) art 7.
[87] UN GA adoption of the *Declaration of Principles Governing the Sea-bed and Ocean Floor and the subsoil thereof, beyond the Limits of National Jurisdiction* leading to the UN Law of the Sea Convention
[88] Moon Treaty above.
[89] Antarctica Treaty.

74. The Protection of the Ozone Layer Convention recognises the scientific imperative for domestic and international measures to protect the atmosphere and the responsibility of signatories are not differentiated as they are under UNFCCC [90]. The legal and strategic response of the international community has resulted in the substantial arrest in growth of the 'hole' in the ozone layer and apparent diminution in the problem.[91]

75. The relative success of Ozone Convention indicates that despite the differences in the conceptualisation of the atmosphere and concomitant assumptions about territory and jurisdiction, a functional approach can prevail in light of the common threat of global warming now faced by humanity. Such approach favours the treatment of the earth's atmosphere holistically, as a common concern or common heritage of mankind following the precedents including the outer space and the moon.[92]

Question 2

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

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

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

76. This question seeks guidance on the consequences or remedies available to those injured by climate change and environmental harm. It covers both injured States (particularly SIDS) and people of present and future generations.

77. The general consequence of breaching obligations under international law is **state responsibility**.[93] The principle of state responsibility serves as a cornerstone of the international legal framework, imposing obligations on states to be accountable for their actions or omissions that violate international norms and obligations. States are bound by

[90] Evidence of depletion and consequences and conventions re ozone led to the adoption of the *Vienna Convention for the Protection of the Ozone Layer (1985)* opened for signature 22 March 1985, 26 ILM 1529, (entered into force 22 September 1988).

[91] See Reports of the Assessment Panels: http://ozone.unep.org/Assessment_Panels/EEAP/eeap-report2006-FAQ.pdf.

[92] *Moon Treaty* art 7.

[93] Eg *Corfu Channel case*, Judgment of April 9th, 1949 ICJ Reports 1949, at p.23, *Gabčíkovo-Nagymaros Project Case,* (Hungary/Slovakia), Judgment, ICJ Reports 1997, p. 7, ILC Articles on Responsibility for Internationally Wrongful Acts (ARSIWA), https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf.

a multitude of international agreements and customary norms that oblige them to protect the environment and mitigate climate change. The UNFCCC and the PA represent key legal instruments aimed at addressing climate change at the global level.

78. State responsibility consists of three main principles. First, a State has international responsibility for its internationally wrongful acts. Second, a State's act or omission attributable to it that is a breach of the State's international obligations is an internationally wrongful act. Third, whether or not an act is an internationally wrongful act is determined by international, and not domestic, law. This includes actions taken by state organs, as well as actions of individuals or entities exercising governmental authority under the state's direction or control.[94]
79. States have a duty to take proactive measures to prevent harm to the environment and mitigate climate change. This duty encompasses both affirmative actions, such as implementing emission reduction targets and promoting renewable energy, and refraining from activities that may harm the environment, such as deforestation or unsustainable resource extraction. When states fail to fulfill their obligations relating to environmental protection and climate change mitigation, they breach their international legal responsibilities. This breach may occur through acts of commission, such as permitting excessive GHG emissions, or acts of omission, such as failing to enact or enforce adequate environmental regulations. According to the ICJ's Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons,* Principle 21 of the Rio Declaration is a customary international law rule that limits states' rights to activities within their territory and jurisdiction.

80. The UN General Assembly has reiterated that, "All States have the responsibility to ensure that activities within their jurisdiction or control do not cause harm to the environment of other states or of areas beyond the limits of their national jurisdiction."[95]

81. International tribunals and domestic courts have increasingly addressed issues of state responsibility in the context of climate change. For example, in the 2019 Netherlands case of *Friends of the Earth* (*Milieudefensie) et al v. Royal Dutch Shell plc*[96], plaintiffs requested a verdict requiring Shell to cut CO_2 emissions by 45% by 2030 and attain net zero by 2050, in accordance with the Paris Agreement. The Hague District Court ordered Shell to decrease its emissions by 45% by 2030, citing the Dutch Civil Code's norm of care, human rights, and international and regional commitments. The court ordered Shell to cut emissions from all sources, including its own and end-use emissions. In the 2021 case of *Notre Affaire a Tous et Others v. France*[97], the Administrative Court of Paris ordered the

[94] Article 4, ILC Draft Articles. The ICJ further confirmed the norm categorically in the case of *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights Advisory Opinion,* I.C.J. Reports 1999*,* p. 87, para. 62.

[95] UNGA Res. 3281 (XXVII) 1974.
[96] District Court The Hague, Judgment of 26 May 2021.
[97] No. 1904967, 1904968, 1904972, 1904976/4-1, Paris Administrative Court (3 February 2021).

state to take urgent action to meet its pledges to reduce carbon emissions. Further, in the 2016 India case of *Mahendra Pandey v. Union of India*[98], the National Green Tribunal directed the Delhi administration to draft and submit an Action Plan on Climate Change for approval. In the 2020 case of *Neubauer et al. v. Germany*[99], the Federal Constitutional Court declared elements of the Federal Climate Protection Act 2019 incompatible with fundamental rights for failing to include appropriate measures for emission reductions after 2030. The court emphasized the need of a carbon budget strategy to limiting warming and determined that the legislature did not allocate the budget proportionately between current and future generations. In another instance in the 2015 Dutch case *Urgenda Foundation v. State of the Netherlands*[100], the foundation sued the government for limiting GHG emissions to 25% below 1990 levels by 2020. The lower court directed the state to meet the Netherlands' fair contribution to the global temperature objective established by climate change agreements. The Supreme Court affirmed this ruling in December 2019.

82. Once State responsibility is determined, the offending State must immediately cease the breach, give assurances it will not be repeated and provide reparations to address the harm caused. In the context of environmental harm, reparations may include financial compensation and other redress such as restoration of affected ecosystems. International jurisprudence, including decisions of international tribunals and the ICJ, has recognized the importance of state responsibility in environmental matters. Precedents set by landmark cases, such as the *Trail Smelter arbitration*[101] and the *Corfu Channel* case, provide guidance on the application of state responsibility principles in environmental disputes.

83. The failure to protect the climate system and other parts of the environment from GHG emissions for both States, and people or present and future generations, is an ongoing violation of international law. Climate change violates international law and continues to cause harm. Decisive action must be taken to address the climate crisis and restore compliance with international law. In this respect, we fully endorse the international scientific consensus as specified by the IPCC[102] which says the climate crisis needs immediate action. The endorsement of the IPCC's findings underscores the legal and moral imperative for states to heed the scientific evidence and take immediate measures to address the climate crisis. International law, as articulated in various legal instruments and conventions, imposes obligations on states to protect the environment and safeguard the rights of present and future generations.

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[98] Application No. 470/2016.
[99] BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20 – Germany.
[100] HA ZA 13-1396 (Official Case No); C/09/456689 (Other Reference); ECLI:NL:RBDHA:2015:7145 (Official Case No); ILDC 2456 (NL 2015) (OUP reference).
[101] 16 April 1938, 11 March 1941, 3 RIAA 1907 (1941). The court states, "Under the principles of international law…no state has the right to use or permit the use of territory in such a manner as to cause injury by fumes in or to the territory of another of the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."
[102] IPCC, 2022: Summary for Policymakers. In: Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.

84. Injured States are entitled to invoke state responsibility for breaches of international law and impose countermeasures against the breaching State. [103] These countermeasures must be proportionate to the injury suffered and may include diplomatic actions, economic measures, or other lawful means aimed at achieving compliance.

85. Peoples and individuals affected by adverse impacts of climate change have several legal avenues open to them. They can initiate legal action against their governments for failing to uphold their obligations under international law and seek compensation for damage caused by climate change. They can petition their government to take action against other States whose pollution breaches their rights. When compensation is paid by a polluter State to an affected State, the affected State must apply that compensation to the specific people affected by climate change, whether through direct payments or via programs to remediate the damage. This principle aligns with the ICJ's jurisprudence on the equitable distribution of reparations and restitution in cases of environmental harm.[104]

86. Persons impacted by climate change can also take action to enforce their rights before human rights bodies, such as UN Special Procedures and regional human rights courts like the Inter-American Court of Human Rights, European Court of Human Rights and the African Court on Human and Peoples' Rights. It is clear that States' international responsibility in relation to damage caused by the climate crisis extends beyond their borders. For example, the UN Committee on the Rights of the Child has made clear in the *Chiara Sacchi case* that "the collective nature of the causation of climate change does not absolve the State party of its individual responsibility that may derive from the harm that the emissions originating within its territory may cause to children, whatever their location."[105]

87. The principle elucidated by the UN Committee on the Rights of the Child in the *Chiara Sacchi* case is pivotal in understanding the profound implications of climate change on human rights and state responsibility. It underscores the paramount importance of recognizing the extraterritorial reach of States' human rights obligations concerning climate change. This principle embodies the interconnectedness of environmental degradation and human rights violations, emphasizing that States must be held accountable not only for the direct consequences of their actions within their borders but also for the far-reaching and cumulative impacts of activities contributing to climate change. By endorsing this principle, the ICJ would reaffirm its commitment to upholding the indivisibility of human rights and the universality of state responsibility in the face of global challenges like climate change.

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[103] Article 49, ILC Draft Articles.

[104] *Certain Activities Carried Out By Nicaragua In the Border Area (Costa Rica v. Nicaragua) Compensation Owed By The Republic Of Nicaragua To The Republic Of Costa Rica* ICJ GL No 150, [2018] ICJ Rep 15, ICGJ 520 (ICJ 2018), 2nd February 2018, United Nations [UN]; International Court of Justice [ICJ].

[105] Committee on the Rights of the Child, Decision on Communication No. 104/2019, Chiara Sacchi et al under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, UN Doc. CRC/C/OPAC/104/2019 (14 January 2020).

88. States are responsible for ensuring that effective redress mechanisms are available to those people impacted by human rights abuses and violations caused by environmental damage. States must provide full reparation to those whose human rights have been breached. In the context of the climate crisis, this means that States must take appropriate measures to mitigate GHG emissions, put in place adaptation measures and remedy damage. This must be done without neglecting States' common but differentiated responsibilities for climate action. By upholding the CBDR principle, the ICJ can promote equity and fairness in global climate governance, ensuring that the burden of climate action is shared equitably among states while prioritizing the needs and vulnerabilities of the most affected and least capable nations.

89. Redress mechanisms may include one State invoking state responsibility and notifying a breaching State of its wrongful conduct and requiring corrective action to redress the breach.[106] Such action may include cessation of the conduct or payment of reparations under international law principles. This mechanism may be used by SIDS adversely affected by climate change against high-emitting States. Reparation may take several forms: restitution, compensation and/or satisfaction.[107] Other meaningful and effective means of reparation include technology transfer, capacity-building assistance, and support for adaptation projects under the UNFCCC.

90. SIDS are particularly susceptible to the adverse effects of climate change due to their geographic location and physical characteristics. With many SIDS comprising small islands or low-lying coastal areas, they are highly vulnerable to sea-level rise and storm surges, which threaten infrastructure, livelihoods, and ecosystems. Additionally, their limited landmass and resource base constrain their capacity to adapt to climate change impacts, including implementing infrastructure upgrades, disaster preparedness measures, and ecosystem-based adaptation strategies. Despite their minimal contribution to GHG emissions, SIDS bear a disproportionate burden of the impacts of climate change. High-emitting states, primarily industrialized nations and major economies, are responsible for the majority of global emissions that drive climate change. The principle of CBDR recognizes this disparity, acknowledging that developed countries have historically contributed the most to climate change and should therefore take the lead in mitigation efforts.

91. SIDS have a compelling interest in invoking state responsibility against high-emitting states that contribute disproportionately to climate change. Under international law, states have a duty to prevent harm to other states and to provide reparation for internationally wrongful acts. These principles are enshrined in various international instruments, including the United Nations Charter, customary international law, and judicial decisions. The duty to prevent harm to other states obligates states to refrain from activities that may

[106] ARSIWA, Art 43.
[107] ARSIWA, Art 34.

cause foreseeable harm to vulnerable countries like SIDS. This duty encompasses both positive actions, such as reducing emissions and promoting sustainable development, and refraining from activities that exacerbate climate change, such as fossil fuel extraction and deforestation. States also have an obligation to cooperate internationally to address the transboundary impacts of climate change, including through mechanisms such as the PA and the UNFCCC.

92. The invocation of state responsibility against high-emitting states must be guided by well-established principles of international law, including equity, fairness, and non-discrimination. Additionally, the principles of CBDR and common heritage should inform the determination of appropriate corrective action and reparations. These principles underscore the need for collective action and shared responsibility in addressing the global challenges of climate change and environmental degradation.

CHAPTER 4: CONCLUSION

96. As set out above, our planet is facing an unprecedented triple planetary crisis of the climate emergency, pollution and biodiversity loss. This crisis is existentially threatening both current and future generations of humanity. It is of vital importance that the Court, through these Advisory Opinion proceedings, clarifies the obligations of States under international environmental and human rights law in respect of climate change.

25 March 2024

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