

INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

(REQUEST FOR ADVISORY OPINION)



Written statement of the Republic of Kiribati

22nd March 2024

Table of Contents

<i>I. INTRODUCTION</i>	3
<i>II. JURISDICTION AND ADMISSIBILITY OF THE REQUEST</i>	3
A. The Court has Jurisdiction to Render the Requested Advisory Opinion	3
B. There are no Compelling Reasons for the Court to Exercise Discretion not to Render the Requested Advisory Opinion	4
<i>III. CLIMATE CHANGE AND ITS IMPACT ON THE REPUBLIC OF KIRIBATI</i>	8
A. There is a Scientific Consensus Regarding Climate Change, its Cause and Impacts	8
B. The Impact of Climate Change on the Situation of the Republic of Kiribati	11
<i>IV. SUBMISSIONS ON THE QUESTION</i>	32
A. The Conduct of States which Gives Rise to States' Obligations	33
B. The Legal Obligations of States in Relation to Climate Change	38
C. The Legal Consequences of the Violations of the Above-Mentioned Obligations	59
<i>V. CONCLUSION</i>	69

I. INTRODUCTION

1. Pursuant to the Order of the President of the Court of 20 April 2023, the Republic of Kiribati hereby submits its written statement on the request for an advisory opinion contained in UN General Assembly Resolution 77/276, adopted by consensus on 29 March 2023.
2. The Republic of Kiribati is amongst the most vulnerable nations to climate change on Earth. As a nation, Kiribati faces considerable risk from climate variability and sea-level rise. The potential risk of permanent inundation, and land and marine ecosystem degradation link climate change intrinsically with national development in Kiribati.¹ In the context of global greenhouse gas (GHG) emissions, Kiribati's per capita CO₂ emissions represent only 0.0002% of global emissions.²
3. The ratification of the Paris Agreement by Kiribati in 2016 signalled the renewed commitment by Kiribati to act on climate change, including to build resilience and adaptive capacity of the atoll nation as well its people and to address the cause of climate change through mitigation actions based on Kiribati's national circumstances.
4. The written statement is structured as follows; following (I) this introduction, the statement addresses (II) matters relating to the jurisdiction of the Court to render the requested advisory opinion and the admissibility of the request; (III) the Republic of Kiribati's situation with respect to climate change; (IV) the Republic of Kiribati's submissions on the questions put forward to the Court; and (V) Conclusion.

II. JURISDICTION AND ADMISSIBILITY OF THE REQUEST

A. The Court has Jurisdiction to Render the Requested Advisory Opinion

5. Article 65(1) of the ICJ Statute establishes the power of the Court to give an advisory opinion. It provides that the Court “*may give an advisory opinion on any legal question*” at the request of a body authorized by the Charter of the United Nations (UN Charter) to

¹ World Bank and Asian Development Bank (ADB), *Pacific Climate Risk Country Profile Kiribati* (2021) available at https://climateknowledgeportal.worldbank.org/sites/default/files/country-profiles/15816WB_Kiribati%20Country%20Profile-WEB.pdf.

² Government of the Republic of Kiribati, United Nations Framework Convention on Climate Change (UNFCCC), in accordance with of the Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104, at Art. 4, ¶ 12, *Intended Nationally Determined Contribution* (2016) available at https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Kiribati%20First/INDC_KIRIBATI.pdf; see also, Republic of Kiribati, *Nationally Determined Contribution (Revised)*, Nov. 2022, available at <https://unfccc.int/NDCREG>.

request it. Article 96 of the UN Charter complements that provision, by authorizing the General Assembly to request an advisory opinion of the Court “*on any legal question*”.

6. The UN General Assembly regularly addresses different matters relating to climate change, including in its annual resolution on the “Protection of the global climate for present and future generations”, the latest of which is resolution 77/165 adopted by consensus on 14 December 2022.³ Consistent with these points, the two questions asked by the UN General Assembly are clearly “legal questions”, one focusing on the “obligations of States under international law” and the other on “the legal consequences under these obligations”.
7. Furthermore, Article 96(1) of the UN Charter and Article 65(1) of the ICJ Statute regulate the competence of the UNGA to request an advisory opinion from the ICJ. Accordingly, the Court may issue an advisory opinion if the following two requisites are satisfied: (a) the request for an advisory opinion was submitted by an authorized body competent to submit the request- in this case the UNGA and (b) the request concerns a legal question.
8. In the case at hand, Kiribati considers that both requisites are satisfied, and considering its consensus adoption and the fact that 132 countries co-sponsored the Resolution A/RES/77/276, there is no evident of disagreement on this point.

B. There are no Compelling Reasons for the Court to Exercise Discretion not to Render the Requested Advisory Opinion

9. Under the terms of Article 65(1) of the ICJ Statute, the Court “*may give*” an advisory opinion. These terms have been consistently interpreted by the Court as giving it discretion to render or not the opinion requested.⁴ The ICJ itself has never declined to render the advisory opinion requested. According to the Court, its reply to a request for an opinion “*represents its participation in the activities of the UN and, in principle,*

³ G.A. Res. 77/165, U.N. Doc. A/RES/77/165 (Dec. 14, 2022), on the report of the Second Committee (A/77/443/Add. 4, at ¶ 11) (Protection of Global Climate for Present and Future Generations of *Humankind* [sic]).

⁴ See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 44 (July 9) [hereinafter 2004 I.C.J. 136]; in accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶ 29 (July 22); Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 97, ¶ 63 (Feb. 25) [hereinafter 2019 I.C.J. 97].

should not be refused".⁵ Only "*compelling reasons would justify refusal of such a request*".⁶

10. Kiribati submits that there are compelling reasons for the Court to issue an advisory opinion. This are identified in Resolution A/RES/77/276; whose preambular paragraphs highlight, among others, the following compelling reasons:

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

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

"Recalling also its resolution 70/1 of 20 December 2015 entitled "Transforming our world: the 2030 Agenda for Sustainable Development.

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

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

"Noting with utmost concern the scientific consensus, expressed inter alia in the reports of the Intergovernmental Panel on Climate Change, including that anthropogenic emissions of greenhouses gases are unequivocally the dominant cause of the global warming observed since

⁵ 2004 I.C.J. 136, *supra* note 4, ¶ 44; *see also* 2019 I.C.J. 97, *supra* note 4, ¶ 65.

⁶ Western Sahara, Advisory Opinion, 1975 I.C.J. 12, ¶ 23 (Oct. 16) [hereinafter 1975 I.C.J. 12]; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 14 (July 8); 2004 I.C.J. 136, *supra* note 4; in accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Reports 403, ¶ 30 (July 22); *see also* 2019 I.C.J. 97, *supra* note 4, ¶ 65.

the mid-20th century, has caused widespread adverse impacts and related losses and damages to nature and people, beyond natural climate variability, and that across sectors and regions the most vulnerable people and systems are observed to be disproportionately affected,

“Acknowledging that as temperature rise, impacts from climate and weather extremes, as well as slow onset events, will pose an ever-greater social, cultural, economic and environmental threat, (...)”

11. The Court’s response to the first question would assist the General Assembly in establishing the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations.
12. The Court’s response to the second question is necessary for the General Assembly to determine the legal consequences under international law that flow from States which, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment with respect to vulnerable States and with respect to people and individuals for present and further generations.
13. The Court may exercise its discretion not to render the advisory opinion to a State on the following grounds:
 1. if the request is an attempt to circumvent the principle of consent;⁷
 2. if there is lack of sufficient information and evidence for the Court to form its opinion;⁸
 3. if the before the court is one which the court has already rendered its opinion⁹;
 4. if matters are pending before another international court or tribunal and concerning the constitutive treaty of the latter.¹⁰
14. There are no compelling reasons for the Court to decline to exercise the advisory jurisdiction which the Charter and the Statute having been conferred upon it. The request

⁷ 1975 I.C.J. 12, *supra* note 6, ¶ 33; *see also* 2019 I.C.J. 97, *supra* note 4, ¶ 85.

⁸ *Id.*

⁹ *Supra* notes 4 – 6 and accompanying text. *Contra*, 2019 I.C.J. 97, *supra* note 4, ¶ 81 (‘The Court observes that the principle of *res judicata* does not preclude it from rendering an advisory opinion. When answering a question submitted for an opinion, the Court will consider any relevant judicial or arbitral decision. In any event, the Court further notes that the issues that were determined by the Arbitral Tribunal in the *Arbitration regarding the Chagos Marine Protected Area* [...] are not the same as those that are before the Court in these proceedings’).

¹⁰ *Supra* note 6, 1975 I.C.J. 12, ¶ 46 (citing *Status of Eastern Carelia*, Advisory Opinion, 1923 P.C.I.J. Ser. B No. 5, at 29); *see also* 2019 I.C.J. 97, *supra* note 4, ¶ 71.

is not an attempt to circumvent the principle of consent; there is sufficient information and evidence for the Court to form its opinion on the questions before it; the questions are not among those which the Court has already rendered an opinion about, and there are no questions pending before another international court or tribunal and concerning the constitutive treat of the latter. The Court's exercise of its advisory jurisdiction will not circumvent any principle of international law, and it will furnish the General Assembly with legal tools to further environmental protection and climate change mitigation and adaptation.

15. There is wealth of information and evidence before the Court enabling it to form its opinion on the questions before it. There is a clear scientific consensus on climate change reflected in the reports of the Intergovernmental Panel on Climate Change (IPCC), particularly in the Summaries for Policymakers, which are approved by consensus, line-by-line, by all 195 member States of the IPCC.¹¹ The cumulative emissions since at least 1850 of greenhouse gases which have caused climate change, and its adverse effects are also empirically well established. The information and evidence about the impact of climate change on Kiribati is particularly clear and present, as will be elaborated in this submission.
16. Only this Court has the general competence to provide the type of advice needed by the UN General Assembly, as made clear by the scope of the question, adopted by consensus, which goes far beyond the interpretation of any single treaty (or constitutive instrument). While there are pending requests for advisory opinions before the International Tribunal for the Law of the Sea (ITLOS)¹² and the Inter-American Court of Human Rights

¹¹ Intergovernmental Panel on Climate Change (IPCC), Principles Governing IPCC Work, *Appendix A: Procedures for the preparation, review, acceptance, adoption, approval and publication of IPCC Reports*, §4.4, at 8 (Oct. 2013), available at <https://www.ipcc.ch/site/assets/uploads/2018/09/ipcc-principles-appendix-a-final.pdf> (Appendix to the Principles Governing IPCC Work contains the procedures for the preparation, review, acceptance, adoption, approval and publication of IPCC reports and other materials relevant to methodologies. These Procedures for the Preparation, Review, Acceptance, Adoption, Approval and Publication of IPCC Reports were adopted at the Fifteenth Session of the IPCC (San Jose, 15-18 April 1999) and amended at the Twentieth Session (Paris, 19-21 February 2003), Twenty-First Session (Vienna, 3 and 6-7 November 2003), Twenty-Ninth Session (Geneva, 31 August-4 September 2008), Thirty-Third Session (Abu Dhabi, 10-13 May 2011), Thirty-Fourth Session (Kampala, 18-19 November 2011) and Thirty-Fifth Session (Geneva, 6-9 June 2012). and the Thirty-Seventh Session (Batumi, 14-18 October 2013)) [hereinafter Principles Governing IPCC Work].

¹² 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) (No. 31), *pending*, Case No. 31, Order of Dec. 16, 2022, 31 ITLOS Rep. 4, available at: <https://www.itlos.org/en/main/cases/list->

(ICtHR),¹³ these should not desist the Court from accepting the request of the General Assembly. The UN General Assembly is a distinct body from the entities seeking the other advisory opinions (the Commission of Small Island States on Climate Change and International Law (COSIS) for the ITLOS request and Chile and Colombia for the ICtHR request). The questions raised in those other initiatives are much narrower and specific than the general ones before this Court. That these processes are distinct from the present one before this Court is reflected also by the approved request by COSIS from the ITLOS tribunal to take part in the Court proceedings.

17. To conclude: the Republic of Kiribati submits that the Court has jurisdiction to render the requested advisory opinion and that there are no compelling reasons for the Court to deny the request. In fact, the Republic of Kiribati firmly believes that there are compelling reasons for the Court to issue the advisory opinion as requested. The court's response to the questions would assist the General Assembly in establishing the obligations of States under international law to ensure the protection of the climate system and other parts of the environment, and to comprehend the legal consequences under international law that follow violations of those obligations, thereby contributing to protecting the climate system, the environment, and affected peoples and individuals.

III. CLIMATE CHANGE AND ITS IMPACT ON THE REPUBLIC OF KIRIBATI

18. This section addresses (a) specific consensus on climate change and its impact in general; and (b) the specific impacts of climate change on Kiribati.

A. There is a Scientific Consensus Regarding Climate Change, its Cause and Impacts

19. Preambular paragraph 9 of Resolution 77/276 recalls four aspects of the scientific consensus. First, paragraph 9 emphasises the consensus on the cause of climate change, namely anthropogenic GHG emissions:

'Noting with utmost concern the scientific consensus, expressed, inter alia, in the reports of the Intergovernmental Panel on Climate Change, including that anthropogenic emissions of greenhouses gases are

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/.

¹³ Request for an Advisory Opinion on the Scope of the State Obligations for Responding to the Climate Emergency (Art. 64 § 1, American Convention on Human Rights), Advisory Opinion OC-32, Inter-Am. Ct. H.R., *pending*, (Jan. 9, 2023), *available at*: https://www.corteidh.or.cr/observaciones_oc_new.cfm?nId_oc=2634.

unequivocally the dominant cause of the global warming observed since the mid-20th century.’

20. Secondly, it summarises the scientific consensus on the fact that the conduct causing climate change has had devastating impacts:

‘*Noting with utmost concern* the scientific consensus, expressed, *inter alia*, in the reports of the Intergovernmental Panel on Climate Change, including that ... human-induced climate change, including more frequent and intense extreme events, has caused widespread adverse impacts and related losses and damages to nature and people’

21. Thirdly, the two components of the scientific consensus signed out in preambular paragraph 9 rely on statements in Summaries for Policymakers of IPCC reports.
22. These Summaries for Policymakers have been approved by consensus, line-by-line, by all 195 member States of the IPCC.¹⁴ They are the expression not only of scientific consensus but also of State consensus on the science of climate change. Therefore, there is no need for the ICJ to engage or feel drawn into a trial of the science. The science is settled in all relevant respects.
23. The contents of preambular paragraph 9 of Resolution 77/276 have strong and deep roots in the scientific consensus expressed in the reports of the IPCC, particularly their Summaries for Policymakers. With respect to the cause of climate change, in the Summary for Policymakers of the IPCC’s 2023 Synthesis Report (6th Assessment Report), the conclusion is formulated as follows:

“Human activities, principally through emissions of greenhouse gases, have unequivocally caused global warming, with global surface temperature reaching 1.1°C above 1850–1900 in 2011–2020. Global greenhouse gas emissions have continued to increase, with unequal historical and ongoing contributions arising from unsustainable energy use, land use and land-use change, lifestyles and patterns of consumption and production across regions, between and within countries, and among individuals”¹⁵

Regarding the devastating impacts of climate change, 6th Assessment Report further confirms that:

¹⁴ Principles Governing IPCC Work, *supra* note 11, § 4.4.

¹⁵ IPCC, 2023: Summary for Policymakers. In: *Climate Change 2023: Synthesis Report. 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.)]. IPCC, Geneva, Switzerland, at 1–34, doi: 10.59327/IPCC/AR6-9789291691647.001 [hereinafter ‘AR6 SYR SPM’].

“Widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred. Human-caused climate change is already affecting many weather and climate extremes in every region across the globe. This has led to widespread adverse impacts and related losses and damages to nature and people (high confidence). Vulnerable communities who have historically contributed the least to current climate change are disproportionately affected (high confidence)”¹⁶

Additional components of the scientific consensus that are of utmost concern, including the following:

- (1) Global warming has already exceeded 1°C,¹⁷ and the resulting scale of changes in the climate system are unprecedented over many centuries to many thousands of years¹⁸
- (2) Climate and weather extremes and their adverse impacts on people and nature will continue to increase with every additional increment of rising temperatures¹⁹
- (3) Global sea level has risen faster since 1900 than over any preceding century in at least the last 3000 years,²⁰ driven by human influence,²¹ and it will continue to rise over the 21st century²²

¹⁶ *Id.*

¹⁷ IPCC, 2018: Summary for Policymakers. In: *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* [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, at 3-24, <https://doi.org/10.1017/9781009157940.001> [hereinafter IPCC 2018 SPM Special Report]; *see also*, AR6 SYR SPM, *supra* note 15.

¹⁸ IPCC, 2021: Summary for Policymakers. In: *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Masson-Delmotte, V., P. Zhai, A. Pirani, S.L. Connors, C. Péan, S. Berger, N. Caud, Y. Chen, L. Goldfarb, M.I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.B.R. Matthews, T.K. Maycock, T. Waterfield, O. Yelekçi, R. Yu, and B. Zhou (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, at 3–32, doi:10.1017/9781009157896.001, *available at* https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf [hereinafter IPCC 2021, The Physical Science Basis].

¹⁹ 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* [Core Writing Team, R.K. Pachauri and L.A. Meyer (eds.)]. IPCC, Geneva, Switzerland, at 151, *available at* https://www.ipcc.ch/site/assets/uploads/2018/02/AR5_SYR_FINAL_SPM.pdf; IPCC 2021, The Physical Science Basis, *supra* note 18; *see also*, Glasgow Climate Pact, FCCC/PA/CMA/2021/10/Add.1 (Mar. 8, 2022), Dec. 1/CMA.3, ¶6, *available at* https://unfccc.int/sites/default/files/resource/cma2021_10a01E.pdf?download [hereinafter Glasgow Climate Pact].

²⁰ IPCC 2021, The Physical Science Basis, *supra* note 18.

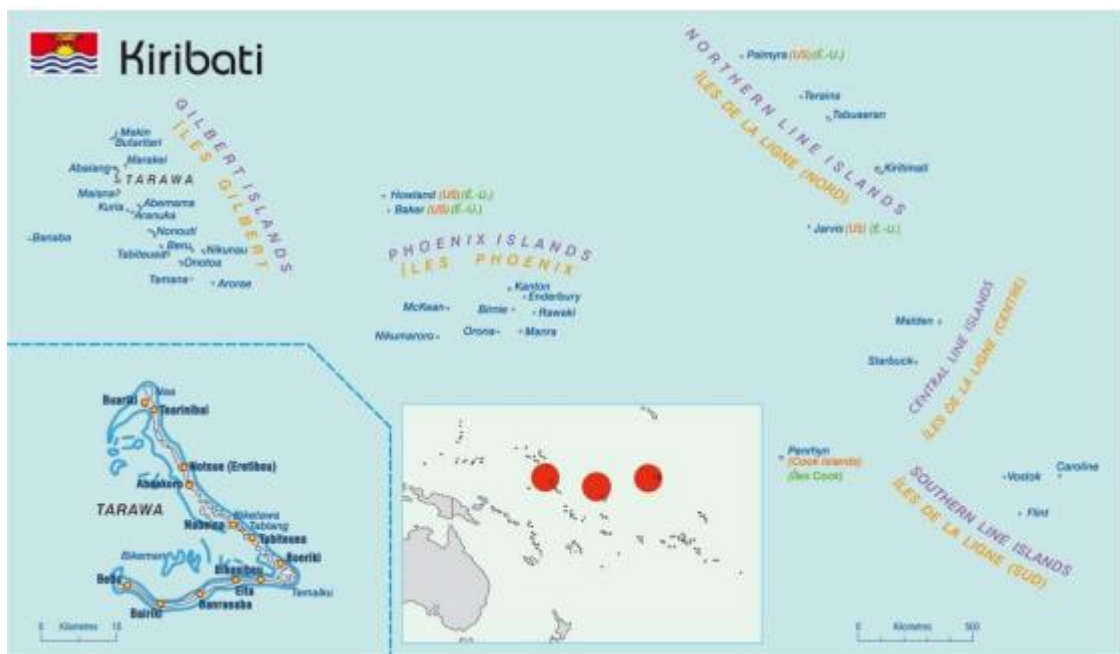
²¹ *Id.* at A.1.7.

²² *Id.* at B.5.3.

- (4) The risks associated with such sea level rise are exacerbated for small islands, low-lying coastal areas and deltas,²³ with resulting damage and adaptation costs of several percentage points of gross domestic product²⁴
- (5) Without urgent and significant increase in mitigation efforts beyond those in place today, warming by the end of the 21st century will lead to severe, wide-spread and irreversible impacts globally,²⁵ and it will slow down economic growth, make poverty reduction more difficult, further erode food security, and prolong existing and create new poverty traps²⁶
- (6) Countries must urgently increase the level of ambition and action in relation to climate change mitigation, adaptation and finance in this critical decade to address the gaps in the implementation of the goals of the Paris Agreement.²⁷

B. The Impact of Climate Change on the Situation of the Republic of Kiribati

Background



²³ IPCC 2018 SPM Special Report, *supra* note 17, at B.2.3.

²⁴ Glasgow Climate Pact, *supra* note 19, at 17 (Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change).

²⁵ *Id.* at 3.2 (Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change).

²⁶ *Id.*, at 20.

²⁷ *Id.*, ¶ 5; see also United Nations Environment Programme (UNEP), *Emissions Gap Report 2021: The Heat Is On – A World of Climate Promises Not Yet Delivered*, Executive Summary, at conclusions 6 and 7, available at <https://wedocs.unep.org/handle/20.500.11822/36990;jsessionid=2EE25CE2E8AF3B2BD73700D7A61DBF5>.

COUNTRY STATISTICS (Source: CIA, n.d.)	
Geographic coordinates	Lat. 4°N–3°S, long.157°W–172°E
Total land area	810.5 km ²
Coastline	1,410,000 km
Exclusive economic zone	3.6 million km ²
Geography	33 islands, 21 inhabited; three island groups: Gilbert Islands, Line Islands and Phoenix Islands & one isolated volcanic island, Banaba
Climate	Hot, humid, tropical

Pictured: Background of Kiribati island groups and basic country statistics

24. The Republic of Kiribati is made up of 33 scattered islands dispersed over 3.6 million square kilometres (km) in the Central Pacific Ocean. It is only 88 km from the northernmost end to southernmost end of the country, but 3,210 km from east to west (see Figure 1). There are three main island groups: Gilbert, Phoenix and Line Islands consisting of 32 low-lying atolls that rise to no more than 2 or 3 metres above sea level, apart from Banaba, a raised coral island with a high point of 81 meters, which was once a rich source of phosphate.
25. The Kiribati 2015 census determined that the total population was 110,136, of whom 50.9 per cent were female and 49.1 per cent male. This indicates an increase of 6.9 per cent, or 7,078 people, over the five years since 2010, when the census recorded a population of 103,058. This represents an average annual growth rate of 1.2 per cent.
26. On the capital island South Tarawa (in the Gilbert Group) the population density is one of the highest, at 3,184 people per square kilometre. This is where 51.1 per cent of the population of Kiribati resides, and the population here increased by 12.4 per cent from between 2010 to 2015. On the outer islands of the Gilbert, Line and Phoenix Groups, the 2015 census recorded a population of 10,503.
27. The Republic of Kiribati has two seasons- '*te Au Maiaki*' (the dry season) and '*te Au Meang*' (the wet season). The periods of the seasons vary from location to location and are strongly influenced by the seasonal movement of the South Pacific Convergence Zone (SPCZ) and the Intertropical Convergence Zone (ITCZ).
28. The Republic of Kiribati, as other small island developing States, due to its geographical circumstances and level of development, is among the most specially affected and particularly vulnerable States to the adverse effects of climate change. For the Republic

of Kiribati, the well-documented harms include but are not limited to extreme weather events, sea-level rise; coastal erosion; ocean warming, acidification, and deoxygenations; and adverse effects on pelagic and coastal fisheries; coral reefs and biodiversity; drought and water security; agriculture; and food security.²⁸

For the people of Kiribati, life revolves around an intimate relationship with their land and the sea. Perhaps this cherished connection is best captured in the symbolism of how I-Kiribati first travelled to and discovered their land: the *Te Wa* or ‘canoe’. It is more than just a canoe; it is a significant piece of architecture with a remarkable history and measure of identity for Kiribati. It connects the land and the ocean and symbolizes cultural skills and traditional knowledge—it is what ancestors used to navigate the Pacific and find the coral island. It also symbolizes family. Kiribati has maintained a traditional family structure where men take on a role as the head of the family and women become the carers and home makers. Because of these hunter or gatherer roles, the canoe is seen as a male domain. Traditionally, women were not allowed to take part in the construction of the canoe nor were they allowed to take it to sea by themselves.

29. Nevertheless, women hold a significant role in the construction of the *Te Wa*, which cannot be understated. They provide the string that holds *Te Wa* together. *Te Wa* is bound by a string made from dried coconut husks. Women, usually sitting in a circle, would tightly roll the fibres of the coconut husks along their thighs to form perfectly bound rope. Although it may seem like a menial task, it can take years to perfect the process of drying the husk, separating it, and then coiling the husk to create an almost unbreakable thin twine. This rope holds the riggers against any raging tides, and holds fast when the salt water threatens to destroy even the toughest steel. While men discover islands and fish for their family’s food, the women provide the strength that holds the man’s canoe together.

²⁸ See The Pacific Community (SPC), Expert Report for Kiribati, Dr. Stuart Minchin (compilation and authorship by Johanna Gusman, M.Sc., J.D.), Mar. 12, 2024 [hereinafter *SPC Expert Report*] at Annex 1; See also, Simon McGree, Grant Smith, Elise Chandler, Nicholas Herold, Zulfikar Begg, Yuriy Kuleshov, Philip Malsale and Mathilde Rittman, SPC. *Climate Change in the Pacific 2022: Historical and recent variability, extremes and change*. Chapter 5 ‘Kiribati’; and Gillett R. and Fong M. 2023. Fisheries in the economies of Pacific Island countries and territories (Benefish Study 4). Noumea, New Caledonia: Pacific Community, at 704, available at <https://purl.org/spc/digilib/doc/ppizh>. SPC also received further data from experts at the Secretariat of the Pacific Regional Environment Programme (SPREP) in consultation with the Kiribati government.

30. Having ventured out to the Pacific for thousands of years, the *Te Wa* symbolises everything the people of Kiribati have achieved. It is part of who the Kiribati people are—their respect for the ocean, land, culture and family all encompassed into one structure. Thus, the effects of climate change that disturb Kiribati people’s relationship to their ocean, land, culture and family tampers directly with their very identity. This is why sea-level rise creates such an existential threat—to have to leave their land because of climate change-related sea-levels swallowing it up is devastating and people do not want to leave because of this.²⁹

Climatic Effects

31. While the people of Kiribati remain resilient in the face of climate change, it does not mean that its effects are not felt daily, with significant ramifications, both economic and non-economic, as captured below.

(1) Sea-level rise

32. First and foremost, climate change-induced sea-level rise is an existential threat to Kiribati.³⁰ As a low-lying country composed of 33 atolls and reef islands—32 of which stand on average *just* two meters above sea level, reaching three metres at its highest point³¹, it is particularly vulnerable to rises in sea level. Living at sea-level is hard to conceptualize for those who have not visited an atoll. Kiribati people live at the level of the sea; there is nowhere higher that the people of Kiribati can retreat to when the ocean meets their doorstep.

²⁹ See generally, Annex 2, Statements 1-12.

³⁰ United Nations International Children’s Emergency Fund (UNICEF), *Climate Change Impacts on Children in the Pacific: Kiribati and Vanuatu*, available at <https://reliefweb.int/report/kiribati/climate-change-impacts-children-pacific-kiribati-and-vanuatu>, (explaining that climate change-related issues confronting Kiribati are dominated by the projections of sea level rise because of the expected life-changing impacts. Even low-end projections will require considerable roll-out of infrastructure solutions (such as sea walls and water storage facilities) as well as non-engineering-based responses (psychosocial support). The high-end sea level rise projections challenge the very existence of Kiribati).

³¹ Republic of Kiribati, Sendai Framework for Disaster Risk Reduction: Midterm Review Report, available at <https://www.undrr.org/publication/sendai-framework-disaster-risk-reduction-midterm-review-report-republic-kiribati>.



Pictured: A sign in Eita Village marking the highest point on South Tarawa, a mere 3-meters above the sea-level.

33. Because of this, the Republic of Kiribati has suffered and continues to suffer significantly increased coastal erosion, and saltwater intrusion into its freshwater lens.³² This means severe erosion of coastal areas that includes inundation of islands, flooding, contamination of water resources, saltwater contamination of arable soil (a resource that is already quite limited in the Republic of Kiribati, given its small land surface), as will be explored below:

- (i) *Coastal Erosion*

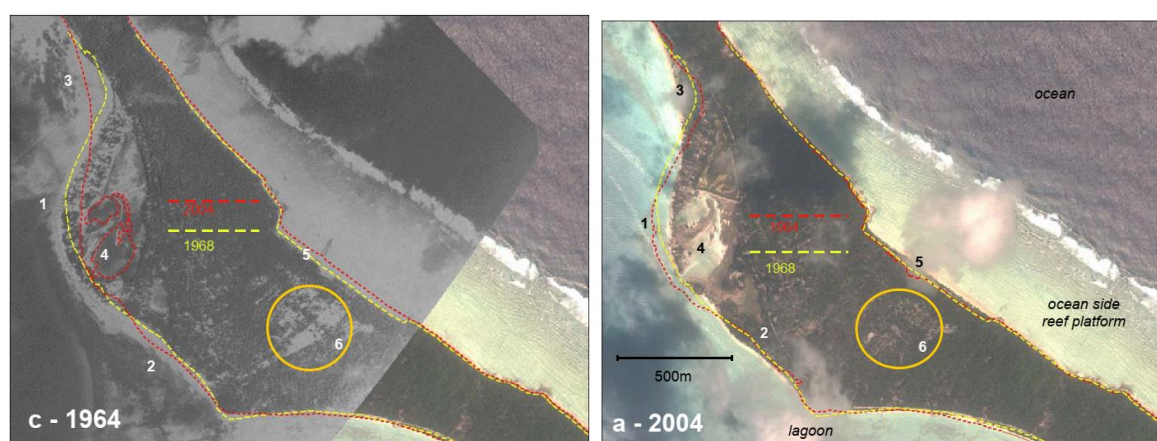
34. Shoreline change from significant coastal erosion due to sea-level rise is a major concern for Kiribati. Observed and anticipated effects of sea-level rise continue to threaten low-lying reef islands and shoreline change over the last 30 years depicts widespread erosion as well as increases in size, driven largely by reclamation projects in urban South Tarawa.³³ Accretion helps explain why Kiribati's land changes. Vertical accretion refers to the build-up of deposits or sediment in flood areas from periodic flooding of its banks and occurs in successive layers measured over time. The ability of land to sequester sediments and expand its volume is directly related to the pace of rising sea levels.
35. In rural North Tarawa, most reef islands show stability with localised changes in areas such as embayments – referring to a recess in a coastline forming bay-like formations

³² SPC Expert Report, Annex 1, at 3, para. 8.

³³ See e.g., plans for Kiribati's Temaiku Land and Urban Development Project to address challenges posed by sea level rise, available at <https://youtu.be/EnKIPEndfCM>.

often linked to irregular corrosion or modification of groundmass – sand spits, and beaches adjacent to, or facing inter-island channels. Shoreline changes in North Tarawa are largely influenced by natural factors, whereas those in South Tarawa are predominantly caused by human factors (i.e., reclamation) and seasonal variability associated with El Niño–Southern Oscillation (ENSO). However, there are serious concerns for the future of South Tarawa reef islands, as evidence shows widespread erosion along the ocean and lagoon shorelines and further encroachment onto active beach areas. This will disrupt the longshore sediment transport, intensify erosion, and increase the susceptibility of reef islands to the adverse impacts of sea-level rise.

36. Although coastal erosion is experienced in all the islands of the Republic of Kiribati, a village named ‘*Tebunginako*’ in Abaiang Island is one extreme example of it. The village has receded up to 80m since 1964 and the village elders have reported that erosion has been an ongoing issue as long as they can remember. Due to this, the whole village relocated further inland. The coastal instability experienced at *Tebunginako* is the result of ongoing adjustment of this shore to the blocking of the channel and consequential halt of sand supply from the ocean to the lagoon beaches. Predominant northerly transport on the lagoon coast continues to redistribute material accumulated by the former channel northwards, causing erosion in the southern areas of the bulge and accretion in the northern areas of the village.³⁴



Pictured: Comparisons of Tebunginako village from 1964 to 2004 depicting significant coastal erosion over the course of 40 years.

³⁴ Webb, A.P., 2006: Analysis of Coastal Change and Erosion –Tebunginako Village, Abaiang, Kiribati. EU EDF 8/9 – SOPAC Project Report 53: Reducing Vulnerability of Pacific ACP States, South Pacific Applied Geoscience Commission (SOPAC), SOPAC Secretariat, Suva, Fiji, at 3.

37. As Mr. Kiaitonga Burera, an Elder from the Tebunginako Community in Abaiang recalled: *“My village—where I was born and raised—is now underwater. It no longer exists as I remember it. My family has always lived in this area, my parents, their parents, as far as we can remember [...] the village was big. All that is now underwater. Even the buildings. In the past, the wind and the waves went onto the land and destroyed the land and made the water salty [...] My people are known for (laughingly) people good at eating. That was before, now this island is well known as an island effected by climate change. We did not want that identity.”*³⁵

(ii) Wave inundation and flooding

38. With sea-level rise comes higher incidents of wave inundation leading to flooding.³⁶ When flooding from waves occurs regularly, it has immense impacts on communities: *“When Kings tide happen twice a month, full moon and new moon, the sea is coming in most of the places and goes around 40 cm. Before, this was not a problem, the sea was not coming so high. The problem started around 2000 when the tide was so high so the sea from the lagoon forced its way to enter in the land. Since that time, we are facing this problem, and it seems to be rising up more than before. Places we didn’t consider to be a problem before, now we need to put more sands and find solutions. More than half of the community is facing the same issue.”*³⁷
39. Many government officials testify to the fact that these issues dominate their work, demonstrating the ubiquity of the problem. As one climate change officer describes, *‘It seems that there is much effort needed to go to the public and tell them about these kinds of impacts and events. In terms of public awareness, it has increased our load to try to convince and tell the public about how they can deal with erosion, high tide and strong waves, etc.’*³⁸

³⁵ See Annex 2, Statement 12, at paras. 2, 5, and 7.

³⁶ SPC Expert Report, Annex 1, at 5.

³⁷ Annex 2, Statement 3, at para. 8.

³⁸ Testimonial Notes, Interview with the Officer in Charge and climate change officers from the Ministry of Environment, Lands and Agriculture Developments, on file with SPC’s Human Rights and Social Development Division (Feb. 20, 2024).

40. For example, on 20 February 2015, coastal flooding overflowed causeways along South Tarawa and damaged the hospital in the town of Betio.³⁹ The hospital was left in a state of disarray and patients were evacuated to a sports complex for treatment. All medical services were suspended. The waves destroyed the hospital's maternity ward, toilet block and part of the seawall built to protect it.
41. Countries near the equator like Kiribati are normally protected from cyclones but have, in recent times, had to deal with them directly, or as cyclones become more and more intense, deal with the extreme waves they generate, even from afar. For example, some of the more recent significant swells that have affected Kiribati's more isolated islands originated from strong storms all the way in Cook Islands. Another example happened in February 2019. Infrastructure and properties were severely damaged in Tamana Island and Arorae Island by a storm surge that was caused by an active low-pressure (tropical depression) system that developed near the southern islands in Kiribati and later moved southward to Fiji Islands, where it fully developed into Tropical Cyclone Mona.⁴⁰
42. These types of extreme events are becoming more common as is corroborated by the experience and expertise of Mr. Ueneta Toorua, Director of Kiribati's Meteorological Service: *"Over the course of my career at the Meteorological Service (MET), there have been a lot of events, including extreme events that were once rare to observe now affecting our people more frequently [...] What is normal, is no longer 'normal'. Now, we are starting to categorize what was once considered 'normal' as an extreme. The threshold of what is 'extreme' is happening more and more frequently."*⁴¹

(iii) *Salinification of Water Sources*

43. On atolls, freshwater sources are precious. People need freshwater for drinking and growing food. Therefore, once it is contaminated with the salt from seawater, the results can be catastrophic. Residents of the capital South Tarawa only have three main sources of water: rainwater, groundwater (or well water), and a piped water system. Those who

³⁹ *Pacific Waves: Severe damage at Kiribati hospital due to coastal flooding*, Radio New Zealand Pacific Waves (Mar. 2, 2015), available at <https://www.rnz.co.nz/international/programmes/datelinepacific/audio/20169245/severe-damage-at-kiribati-hospital-due-to-coastal-flooding> (last visited March 8, 2024).

⁴⁰ Government of the Republic of Kiribati, *Kiribati Joint Implementation Plan for Climate Change and Disaster Risk Management (KJIP) 2019-2028*, at 40.

⁴¹ Annex 2, Statement 10, at paras. 4 and 6.

reside on the outer islands depend solely on groundwater and rainwater, for those who even have access to tanks that store rainwater. When rising sea levels cause intrusion of saltwater into these freshwater sources, it undermines water and food security for entire communities, and threatens the very existence and livelihoods of large segments of the population.

44. Increased storm surges also contaminate drinking water and water used for agriculture. Rising sea levels have led to contamination of groundwater (salinification) as well, which is killing native plants and destroying crops. Almost all agricultural crops in the capital South Tarawa have been killed by salinification of groundwater, resulting in food scarcity. Kiribati's main three crops; '*te mai*' breadfruit, '*te bwabwai*' swamp taro and '*te bwabwaia*' papaya, are all susceptible to dying from salinization of groundwater.
45. While many testimonials from across Kiribati discussed how seawater kills crops, Mr. Brian Ritang described his battles in creating even a small garden for his family as his mother had done for him: '*Before, when I visited my mother here, there were breadfruit trees, but they have all gone because of the sea water which brings salt to the soil. Even coconut trees are dying. There is no way to make a plantation here due to the sand...*'⁴²
46. The Buota water reserve in South Tarawa is one of the two major water sources in Kiribati's capital South Tarawa. Flooding from rising sea levels caused the Tarawa bridge to collapse in June 2008, severing pipelines from the water reserve. The Kiribati Adaptation Program Phase III was able to replace the bridge and lay down new pipes, which gives water to citizens living in South Tarawa and not near another water reserve, allowing them to access safe drinking water without having to commute to the Bonriki reserve (also preventing its over pumping).⁴³

(2) Droughts

47. While Kiribati regularly experiences the intrusion of saltwater into groundwater, it also experiences frequent droughts. In 1971, 1985, 1998 and 1999 annual rainfall was less than 750mm for each year. The drought from April 2007 to early 2009 severely affected the southern islands in the Republic of Kiribati and Banaba. The recent drought from 2018

⁴² Annex 2, Statement 2, at 21.

⁴³ Rosen, E. *Climate Change in Kiribati*, Storymaps ARCGIS (Jan. 23, 2021) available at <https://storymaps.arcgis.com/stories/7f455136b85f4edd8655d15a89b5039f>.

to March 2019 severely affected groundwater. During this period, groundwater turned brackish, and leaves of most plants turned yellow.⁴⁴

48. During these prolonged dry spells, the water lens can turn briny, whereas heavy rains and storm surges can lead to contamination of the lens, so water safety is affected under both extremes of too little and too much rainfall. For example, South Tarawa is home to more than half of Kiribati's population, but piped water is only available for about two hours every second day. Thus, if rains do not replenish water storage for families outside this window, it means that most Kiribati households lack access to piped, safe drinking water.
49. A report from the UN published in 2016 found that 94% of households were impacted by environmental hazards in the preceding ten years, such as sea level rise, saltwater intrusions, and drought.⁴⁵ Without proper rainfall, Kiribati's water is getting saltier and saltier making it harder to withdraw the necessary amount of fresh drinking water people need.

(3) Ocean warming, acidification, deoxygenation and its effects on coral reefs

50. Coral reefs in the Central Pacific, such as in Kiribati, are on the leading edge of the predicted global collapse of coral reefs. Kiribati has already experienced the biological or ecological extinction of multiple *Acropora* coral species due to marine heat waves lasting for months on the end. Scientists predict that by 2050, according to present trends, bleaching will become an annual occurrence on most reefs and by that time only 10% of the world's reefs will persist.⁴⁶

⁴⁴ Ueneta Toorua, *Kiribati Meteorological Service Country Report: Reporting on National Priority Actions of the Pacific Islands Meteorological Strategy (PIMS) 2017-2026*, presented at the Fifth Pacific Meteorological Council (PMC-5) Meeting, Apia, Samoa (Aug. 7, 2019), available at <https://www.pacificmet.net/sites/default/files/inline-files/documents/10.6%20KIRIBATI%20PMC-5%20country%20report.pdf>.

⁴⁵ United Nations Economic and Social Commission for Asia and the Pacific (ESCAP), *Kiribati: Climate change and Migration—Relationships between household vulnerability, human mobility, and climate change*, Report No. 20, (Nov. 2016), at 11, available at: https://collections.unu.edu/eserv/UNU:5903/Online_No_20_Kiribati_Report_161207.pdf.

⁴⁶ United Nations Environmental Programme (UNEP), *Life Below Water*, from data in *The Status of Coral Reefs of the World: 2020* by the Global Coral Reef Monitoring Network; see also, Responsible Seafood Advocate, Experts: *World's coral reefs could vanish by 2050 without climate action*, Apr. 20, 2022, available at <https://www.globalseafood.org/advocate/experts-worlds-coral-reefs-could-vanish-by-2050-without-climate-action/>.

51. Coral is an integral part of the physical make up of Kiribati's islands. They are home to a diverse array of marine life and play an important role in the country's ecosystem and economy. These reefs provide habitat for many species of fish, invertebrates, and other marine animals and they protect the shores of the island from storms and erosion. Coral reefs also serve as a source of food and income for the people of Kiribati, who rely on the seafood and tourism industries for their livelihoods.⁴⁷
52. However, like coral reefs around the world, those in Kiribati are threatened by a variety of factors, including climate change. Rising sea temperatures and increasing of acidity of the ocean due to climate change has led to coral bleaching in the western portion of Kiribati back in 2004-2005 and 2009-2010. In addition, increased sea surface temperature can increase coral reef bleaching, resulting in changes in fish migration and breeding patterns, leading to potential decrease in some fish stocks.⁴⁸

Ramifications:

53. *Tungaru* (the local language term for 'Kiribati') ancestors understood the interconnectedness of land, ocean, and people just as the *Te Wa* connects all three. The ramifications of climate change impacts continue to demonstrate this interconnectedness because its consequences effect every person on this planet, not just those living on atolls. This section will touch upon those most pressing to Kiribati, but they are not just limited to health, water security, food security, economic harms, non-economic harms, and impacts to self-determination.

(1) Health

54. Many health problems in Kiribati are due to the increasing impact that climate change is having on their environment. For example, deteriorating water quality—caused by salinization, drought, and the mixture of both – seriously impacts people's health. The high rate of population growth in South Tarawa is causing stress on water and sanitation

⁴⁷ See generally, *SPC Expert Report*, Annex 1.

⁴⁸ *Id.*

services, intensifying the issue. This incidence of overcrowding, especially in urban Tarawa, coupled with the shortage of fresh water, have increased cases of diarrhoea and infectious diseases, such as scabies, for children.⁴⁹ Exposure to these conditions have caused many diseases and further health problems for the people of Kiribati with the survival of young children being particularly at risk. According to Dr. Alfred Tonganibeia, *“the quality of water in Kiribati is very poor because of this narrow strip of land where we are situated. In time of droughts, we see an increasing number of diarrhoea and skin infections. The same is happening with heavy rainfalls.”*⁵⁰

55. Climate change may also be directly or indirectly linked to an increase in vector-borne, waterborne, and food-borne diseases, and to other climate-induced and disaster-related diseases. In Kiribati, climate change is linked to increased risk of infectious and vector-borne diseases, particularly dengue fever, diarrhoeal disease, and cholera.⁵¹ At the time of drafting this report, there is a current outbreak of rotavirus due to these aspects. Populated areas such as the capital city of Tarawa have been heavily impacted. The Environmental Health Unit (EHU) in Kiribati’s Ministry of Health & Medical Services (MHMS) has begun a surveillance and study of climate sensitive diseases to help with Kiribati's health security. It has also refurbished and built new laboratories to study these diseases.
56. Kiribati has a high mortality and morbidity rate of both communicable and non - communicable diseases (NCDs).⁵² NCDs, including cancer, hypertension, diabetes and heart diseases are becoming more common, increasing the health costs for the country. NCDs are increasing because of poor nutrition due to imported food and a limited ability to purchase food or to grow and produce healthy food, resulting in an overreliance on

⁴⁹ Ministry of Infrastructure and Sustainable Energy, South Tarawa Sanitation Project, *available at* <https://www.mise.gov.ki/35-stsp-esia-clean>.

⁵⁰ Annex 2, Statement 9, para. 13.

⁵¹ Republic of Kiribati, Joint Statement 35th Universal Periodic Review, Human Rights Council, (July 22, 2019) at para. 17 (addressing ‘Right to health’) *available at* <http://www.edmundriceinternational.org/kiribati-joint-statement-35th-upr-session-of-hrc/#:~:text=Right%20to%20health,-17.&text=In%20Kiribati%2C%20climate%20change%20is>.

⁵² *Id.* at para. 18.

imported food, that in turn, worsens NCDs. In fact, Kiribati has one of the highest diabetes percentages in the world.⁵³

57. Dr. Alfred Tonganibeia, Officer in Charge of the Public Health, explains that the burden of NCDs in Kiribati which affects around 20% of the population, and “contributes to 70% of the total mortality”,⁵⁴ is due to inaccessibility of healthy food, due to climate change: *“We are not able to grow or cultivate fresh vegetables. Instead of that, people are relying on the imported foods. Climate change is there, really, it’s just exacerbating effect of sugar consumptions with high obesity rate for instance.... How can we grow vegetables or fruits? If the water is high, there’s sea water intrusion everywhere so nothing can’t really grow much. This pushes people to access unhealthy diets.”*⁵⁵
58. Without the ability to grow food from soil contamination, healthy eating becomes difficult.⁵⁶ *“There is no way to make a plantation here due to the sand not fertilized so the impact on us is our health with a lot of diabetes, hypertension and blindness. I do [myself] have diabetes.”*⁵⁷

(2) Water Security

59. Climate change impacts and related natural disasters are affecting the quantity and quality of the water available to the small island atolls of Kiribati. As previously discussed, sea-level rise is one major culprit as it increasingly threatens the water stored in the groundwater lenses and will also exacerbate existing seasonal conditions such as king tides. On low-lying atolls with porous soils, the groundwater lens – the main source of water available – is highly vulnerable to inundation and saltwater intrusion.
60. Most recently, on 11 of June 2022, the Government of Kiribati declared a State of Disaster due to drought. A lack of fresh water, severely depleted reserves and increasing salinity in existing water supplies resulted in thousands being left without sufficient

⁵³ John Paul Cauchi, Hilary Bambrick, Ignacio Correa-Velez, Stefano Moncada, *White flour, white sugar, white rice, white salt: Barriers to achieving food and nutrition security in Kiribati*, Food Policy, Vol. 101 (2021), 102075, ISSN 0306-9192, <https://doi.org/10.1016/j.foodpol.2021.102075>.

⁵⁴ See Annex 2, Statement 9, at para. 4.

⁵⁵ *Id.*

⁵⁶ *Id.* at para. 6.

⁵⁷ Annex 2, Statement 2, at para. 21.

access to safe drinking water. In Kiribati, the main source of potable water depends on the rainwater harvest and aquifers (naturally occurring freshwater sources). According to the estimates in 2015, only 64.4 per cent of the population in Kiribati had access to basic drinking water services – that is, improved water within a 30-minute round trip – with 35 per cent of the population having access only to an unimproved source – that is, more than one third of the population.⁵⁸

61. Additionally, in an interview with the Director of Agriculture, Kinaai Kairo, she described how these troubles also affect agriculture: *“In the past, drought was not very common. Nowadays, drought is a must to come every year and they don't come more frequent, but they are more tense. That's really affecting the production of not only the plants but the animals as well. The water we use for agriculture is the same as for the domestic usage. In that way, we are competing on the use of that water domestic use and agriculture.”*⁵⁹

(3) Food Security

62. Food insecurity is prevalent in South Tarawa where over half the population is situated. The lack of nutritional knowledge and the cultural perception regarding foreign food exacerbate this issue. Traditional food production systems are negatively affected by climate change leading to a shift towards imported foods of poor nutritional quality over fresh fish and vegetables. Certain programs aimed at teaching how to cultivate vegetables in elevated containers are being implemented by the government, but funding is required to further develop these initiatives.⁶⁰
63. In addition, food insecurity is also prevalent on some atoll islands such as Marakei. The porous and infertile soil has led communities to adapt to new techniques or revive traditional knowledge from old people to support the planting of indigenous and imported vegetable plants. Plants that were grown previously, including ‘*te mai*’ breadfruit, ‘*te*

⁵⁸ International Labour Organization (ILO), Regional Office for Asia and the Pacific, compilation using World development indicators, last updated May 21, 2018; <http://databank.worldbank.org/data/reports.aspx?source=world-development-indicators>, at 3.

⁵⁹ Annex 2, Statement 4, at para. 6.

⁶⁰ Annex 2, Statement 3, at para. 13.

bwabwai’ swamp dalo and ‘*te nii*’ coconut trees have been affected by changes in climate, as normal rain seasons are not occurring and an increase in temperature as well as sea level rise have prevented plants from getting good nutrients from the soil for their growth. This resulted in poor produce and reduced yields.

64. The effect of sea surface temperatures rise and ocean acidification in Kiribati impact food security. Kiribati’s Minister for Fisheries & Marine Resources Development, Honorable Minister Ribanataake Tiwau, emphasised the vital role of tuna for his country in a panel discussion at a COP28 side event on 11 December 2023, on the impact of climate change on fisheries.⁶¹ The economic and food security significance of tuna for Kiribati is critical and will be further explored below.
65. The fishing contribution to GDP – A\$47.2 million – is 15.6% of the A\$302.8 million GDP of Kiribati in 2021. Thus, any changes to fish health and migration resulting from climate change is of major concern. This is particularly true for tuna, which is Kiribati’s largest source of revenue.⁶² Despite the variable oceanic conditions, the prime area for tuna is the convergence zone between the two large ecological provinces dominating the equatorial Pacific Ocean: the ‘western Pacific warm pool’ and the ‘Pacific equatorial divergence’, also known as the ‘cold tongue’.⁶³
66. This convergence zone, which is several hundred kilometres wide, is characterized by relatively high concentrations of tuna prey and sea surface temperatures that are favoured by skipjack tuna. The location of this convergence zone is strongly impacted by El Niño and the Southern Oscillation (ENSO). During El Niño events, the warm pool can extend by up to 4,000 km, relocating the convergence zone further to the east (often within Kiribati’s EEZ). Thus, changes in the position of this convergence zone due to the

⁶¹ Pita Ligaiula, Pacific Islands News Association, *Climate Change threatens tuna and economic stability, warns Kiribati Fisheries Minister*, Dec. 13, 2023 (accessed 11 March 2024) available at <https://pina.com.fj/2023/12/13/climate-change-threatens-tuna-and-economic-stability-warns-kiribati-fisheries-minister/>.

⁶² *SPC Expert Report*, Annex 1, at 8, para. 20.

⁶³ Bahri, T., Vasconcellos, M., Welch, D.J., Johnson, J., Perry, R.I., Ma, X. & Sharma, R., eds. 2021. Adaptive management of fisheries in response to climate change. FAO Fisheries and Aquaculture Technical Paper No. 667. Rome, FAO. <https://doi.org/10.4060/cb3095en>.

(ENSO) will have a major influence on the abundance of tuna in the EEZ of Kiribati, which could result in significant losses of GDP and threaten food security.⁶⁴

67. As oceans warm, acidify, and deoxygenate, Kiribati becomes less and less food secure. Climate change threatens Kiribati's ability to feed themselves, thus impacting their realization of the right to food. The resulting national scarcity of agricultural products has forced people to rely on imported food commodities to meet their everyday needs. These imports are essential for survival, but they are costly, and people buy whatever they can afford.

(4) Economic Harms

68. While there exist many forms of quantifiable, economic harm that arise from climate change, this section will focus on the two most damaging for Kiribati: agriculture and aquaculture.

(i) Agriculture

69. Extreme weather conditions wreak havoc on crops, making dependence on agriculture insecure for both subsistence and economic activities, particularly on atolls where arable soil is scarce. This will not only have negative impacts on food security but will also have negative impacts on household incomes and wellbeing, especially for the people living on the outer islands where subsistence farming is most common.
70. The Republic of Kiribati relies much on subsistence fishing and simple agriculture. Subsistence agriculture on the small islands of Republic of Kiribati is threatened by rising sea levels, as coastal erosion reduces the land available for crop use. As such, much of the remaining soil is contaminated with saltwater restricting the ability for crops to grow.
71. The reliance by Republic of Kiribati people on coconut production cannot be emphasized enough. The Republic of Kiribati's economy is heavily dependent on copra or '*takataka*', the dried meat of a coconut, which is used to produce coconut oil. The government

⁶⁴ SPC Expert Report, Annex 1, at 6, para. 15; see also Bell JD, Johnson JE, Ganachaud AS, Gehrke PC, Hobday AJ, Hoegh-Guldberg O, Le Borgne R, Lehodey P, Lough JM, Pickering T, Pratchett, MS and Waycott M (2011), *Vulnerability of Tropical Pacific Fisheries and Aquaculture to Climate Change, Summary for Pacific Island Countries and Territories*. Secretariat of the Pacific Community, Noumea, New Caledonia.

supports the agriculture section via heavily subsidizing copra. Under the Republic of Kiribati's current export structure, fisheries and copra account for more than 90 per cent of total exports.⁶⁵ This crop, which comprises the majority of agricultural exports, is highly sensitive to rainfall making it vulnerable to the impact of climate change and the influence of La Niña years, when droughts can be experienced. Copra production, the main income source for people in the outer islands, declined.⁶⁶ Other crops important to subsistence farmers are *breadfruit*, *pandanus* and *te babai* (giant taro) which are all impacted by loss of land due to inundation, contamination of groundwater and storm surges or overwash.

(ii) *Aquaculture*

72. With one of the largest Exclusive Economic Zones (EEZ) in the world, Kiribati is highly dependent on revenue from fisheries; with 81% of actual revenue in 2015,⁶⁷ or approximately AUD 207.1 million, derived from fishing licenses and other fishing revenue. However, the new environmental threats that have emerged, which include the threat due to climate change, such as the depletion of water and pollution of water from salinity in the lagoons have affected inshore fisheries. Marine life is also under threat from pollution and plastic waste. Any changes in climate will also have a direct negative impact on the marine ecosystem and fisheries stocks, which will result in reduced revenue for Kiribati.
73. Commercial and subsistence fishing account for more than 50 per cent of Kiribati's GDP. It is estimated that the production from coastal subsistence fisheries in Kiribati in 2021 was 11,000 tons, worth A\$30 million to fishers. The HEIS 2019 – 2020 indicates that 44% of households in Kiribati participate in fisheries activities. In 2021, the tuna catch by the locally based longliners was 2,686 t, with an in-zone value of A\$17.6 million.⁶⁸

⁶⁵ International Monetary Fund, Asia and Pacific Department, *Kiribati: 2023 Article IV Consultation*, Sept. 15, 2023, available at <https://www.elibrary.imf.org/view/journals/002/2023/329/article-A001.xml>.

⁶⁶ Government of Kiribati, Kiribati Joint Implementation Plan for Climate Change and Disaster Risk Management available at, Kiribati-NAP.pdf (unfccc.int).

⁶⁷ Government of Kiribati, Ministry of Finance and Economic Development, 2017 Budget available at Kiribati 2017 Budget.pdf (mfed.gov.ki).

⁶⁸ See e.g., *SPC Expert Report*, Annex 1, at 7 – 9.

74. Commercial tuna fishing plays a vital role in the economy of Kiribati. Income from fishing licences fee provides over 40% of total government revenue annually. Since tuna is a migratory species, changes in weather patterns and ocean conditions due to climate change have adverse economic effects on Kiribati. In El Nino periods Kiribati gets a good return on its fishing licences and the reverse is true in La Nina periods, as the ocean gets colder than normal. The latter was experienced in 1988-89, late 1990/early 1991, 1995, in the early 2000s and the 2021-2022 period. As the effects of climate change become more prevalent, these oscillations may change and alter the interactions between tuna fishing and ecosystem structures,⁶⁹ negatively affecting the tuna fishery sector in Kiribati, as temperature warming is likely to be larger in the eastern Pacific than in the western Pacific.
75. The potential implications for Kiribati's economy in 2050 include an average decline in purse-seine catch of 20% (range=-10% to -30%), an average annual loss in regional tuna-fishing access fees of US \$90 million (range=-US\$40 million to -US\$140 million) and reductions in government revenue of up to 13% (range=-8% to -17%) for individual Pacific SIDS.

(iii) Effects on Culture, Tradition and Family life

76. The climate impacts deeply effect Kiribati culture: loss of habitable and productive land, traditional crops, livelihoods, freshwater sources, access to viable and lucrative fishing waters, and much more. Kiribati has a rich cultural heritage that contributes not only to social development but also to its peoples' adaptive capacity in facing climate change and issues with food. One such example can be found in traditional food preservation, which is important to Kiribati's heritage, passed down as an art form from generation to generation. It uses natural resources (e.g., native plants, shells, traditional tools, etc.) in the multi-step process of preserving food. This traditional knowledge is decreasing given modern technologies. However, in the face of climate change impacts, as energy needs

⁶⁹ Callahan, C.W., C. Chen, M. Rugenstein, J. Bloch-Johnson S. Yang and E.J. Moyer. 2021. Robust Decrease in El Niño/Southern Oscillation Amplitude under Long-term Warming, *Nature Climate Change*, Vol. 11, September, at 752–757.; *see also*, Cai, W., A. Santoso, G. Wang, S.W. Yeh, S.I. An, K.M. Cobb, M. Collins, E. Guilyardi, F.F. Jin, J.S. Kug, M. Lengaigne, M.J. McPhaden, K. Takahashi, A. Timmermann, G. Vecchi, M. Watanabe and L. Wu. 2015. ENSO and Greenhouse Warming, *Nature Climate Change*, Vol. 5, September, at 849-859.

and natural resources can diminish, including due to drought and long bouts of extreme weather, traditional food preservation can be used to build resilience,⁷⁰ a value Kiribati holds in high regard, as mentioned. This is an example of how a loss of traditional knowledge can mean a loss in the ability to adapt to climate change.

77. Mr. Kiaitonga Burera describes these processes: “[i]n the past, imagine that all the people tell stories and pass the skills to children and grandchildren. It is passed as oral tradition. Also, there is a subject in the schools that gets taught, but it is not the same as learning from your grandparents. In the past, traditional skills were encouraged, now there is a change with new generations... For our village, the main resource is the coconut tree. It is symbolic of true—what you all say— ‘sustainability’. Imagine that most families in the village protect the tree and try to cultivate it in order for it to produce more. And that every part of it is used. Not one part goes to waste.”⁷¹
78. When travelling in Kiribati or visiting another island for the first time, when you reach that island, before you do anything, you must announce yourself to the place by visiting a sacred site. An “*unimwane*” (respectful name for old man) will take you the sacred place and introduce you to the “*spirits of the land*”, and to show your respect, you must present a gift consisting of either a tobacco or cigarette. There is a superstition that if you failed to do this something bad might happen to you. As part of the island’s culture, it is a must. Before the rapid change of sea level rise, the areas were more inland, but after the erosion, the areas are just over the beaches.
79. Sea level rise threaten the existence of some sacred sites by flooding the area and causing it to erode. An example is Marakei Island. Maraki Island is located 71.49 kilometres northwest of South Tarawa and is the only island of the Republic of Kiribati with a round shape. This island is unique as you must go around the island anticlockwise once you arrive, especially for the first-time visitors. Every visitor must bring a tobacco during ‘*te Katabwanin*’ as a gift ‘*mweaka*’ to four shrines on this island. If a visitor fails to do so,

⁷⁰ Marii Marea, Director of the Culture and Museum Division, Kiribati Ministry of Culture and Internal Affairs, “Our Skills, Our Heritage, Our Resilience,” *Unheard Stories, Disappearing Ecologies*, December 2023, Suva, Fiji.

⁷¹ See Annex 2, Statement 12, paras. 13 - 14.

there is a good chance they will be cursed. The four shrines are named after the four goddesses of Marakei Island- ‘*Nei Reei*’ who protects the island in the west, ‘*Nei Rotebenua*’ protector of the south side, ‘*Nei Tangangaua*’ protector of the east side and ‘*Nei Naantekimam*’ who protects the island in the north. Three of the island shrines are far enough inland to avoid high tides, but ‘*Nei Rotebenua*’ is especially vulnerable and may eventually move further inland. ‘*Nei Rotebenua*’ was moved once about 15 years ago when the tide washed away the old site, and if the sea level rise continues and affects this shrine, it will be moved a second time.⁷² Every island in Kiribati has its own special way to move a shrine and this knowledge is kept by the elders and passed on to the next generation. Elders fear that if erosion of land keeps occurring, and the shrines need to keep relocating, and there aren’t many people who know the process, these sacred places might disappear with the eroded lands.

80. As Mr. Kiationga Burera, an elder who has lived all his life on Abaiang Island, and must relocate, stated “*People of Abaiang, including my village, are connected to the sea and to the land. Imagine that in the past, in the old place, it was a big community with big land. Now, since we relocated, we are scattered. Broken.*”⁷³
81. In Kiribati, most children’s homes, health facilities, schools, churches and recreation areas are located within a few hundred metres of the coast. Women, children and the elderly, who are among the most disadvantaged household members, often bear the disproportionate share of the burden of inadequate fresh water supply.⁷⁴ So, when the ocean continues to creep inward, and fresh water is increasingly at risk, these groups become even more marginalized.
82. Research has shown that gender also plays a critical role in addressing climate change. The responsibility for temporary dislocation disproportionately falls on women as they are

⁷² Janice Cantieri, *Shoreline Creeps Close to Kiribati’s Sacred Sites*, *National Geographic Society Newsroom*, available at <https://blog.nationalgeographic.org/2016/01/06/shoreline-creeps-closer-to-kiribatis-sacred-sites/> (accessed on Mar. 2, 2024).

⁷³ Annex 2, Statement 12, para. 11.

⁷⁴ ADB, *Climate Change, Water Security, and Women: A Study on Water Boiling in South Tarawa, Kiribati* (2021), at 4, available at <https://www.adb.org/sites/default/files/publication/722186/climate-change-water-security-women-kiribati.pdf>.

the ones to speak to relatives and initiate the moving. An oft-cited statistic is that 80% of people displaced due to climate change are women and girls.⁷⁵

Impact on the exercise of self-determination

83. Vulnerability to climate change is shaped by the environment in a multitude of ways, including through sociopolitical circumstances. The British left Kiribati in 1979, within many of people's lifetimes and memories. These pre-existing conditions from colonisation can have lasting impacts on the exercise of self-determination, particularly for low-lying island states like Kiribati that are fighting the consequences of sea-level rise, which has jeopardised aspects of cultural identity and choice of staying in one's ancestral village.
84. The Gilbert Islands were named in honor of Thomas Gilbert, a British captain whose ship sighted some of the islands after transporting convicts to Australia in 1788. In default of a generally acceptable indigenous name, it was decided at the time of independence to adopt "Kiribati" (pronounced "kiribass"), the local respelling of "Gilberts," for the new nation. The poetic "Tungaru" usually connotes the ancestors. Almost all of the citizens of Kiribati have at least some I-Kiribati ancestors and inherited lands rights in the Gilbert Islands. The indigenous inhabitants of Banaba (Ocean Island) speak a Gilbertese dialect and practice a variant of Gilbertese culture but consider themselves a separate people politically (causing some strife in Kiribati's political history). Most Banabans have lived on Rabi Island in Fiji since 1945.
85. The ideal of decolonisation from the 1960s assumed that it would bring economic independence and well as political freedom but given the structural vulnerability of island economies and their physical isolation, this was not the case for Oceania. Given the long history of colonisation, economic dependencies were created, limiting Kiribati's ability to effectively adapt to the climate vulnerabilities it inherited. For example, the British effectively diminished phosphate and mineral production. In the early 1970s, annual production reached a high of 550,000 tonnes, but deposits were exhausted by the time of

⁷⁵ United Nations, Office of the High Commissioner on Human Rights (OHCHR), "Climate change exacerbates violence against women and girls," July 2022, (accessed Jan. 23, 2024), *available at* <https://www.ohchr.org/en/stories/2022/07/climate-change-exacerbates-violence-against-women-and-girls>; *see also* Fran Woodworth, "The Gender Dimensions of Climate Displacement," Sept. 14, 2023, accessed Jan. 23, 2024, <https://www.shechangesclimate.org/blog/the-gender-dimensions-of-climate-displacement>.

Kiribati's independence in 1979,⁷⁶ left with the vulnerabilities caused by previous environmental destruction.

86. The rising sea-level and other climatic impacts documented here threaten the territorial integrity of the Republic of Kiribati as loss of landmass and communities were forced to move inland from inundated areas severely hinder the I-Kiribati's ability to exercise their right to self-determination and to control their own natural resources.

Conclusions

87. The Republic of Kiribati, as other developing small island States, due to its geographical circumstances and level of development, is among the most specifically affected and particularly vulnerable States to the adverse effects of climate change. For Kiribati, the harms described in this Part are all encompassing, and they deeply affect each aspect of individual and communal life. The harms that include extreme weather events, including sea-level rise, coastal erosion, ocean warming, acidification, deoxygenation and drought, create adverse effects on agriculture, food security, and water security, and on coastal fisheries, coral reefs and biodiversity. This results in severe harm to individual and collective rights, including the rights to life, to family life, to community life and the right of the Kiribati to enjoy its right to self-determination while being able to protect of their natural wealth and resources from the impact of climate change, and to pursue their economic, social and cultural development.

IV. SUBMISSIONS ON THE QUESTION

88. The questions formulated by the UN General Assembly in the operative part of Resolution 77/276 reads as follows:

“(a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from

⁷⁶ See generally, Britannica, The Editors of Encyclopaedia. "Banaba". *Encyclopedia Britannica*, 17 Oct. 2023, <https://www.britannica.com/place/Banaba> (accessed Mar. 11, 2024).

anthropogenic emissions of greenhouse gases for States and for present and future generations;

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

(i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, 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?”

89. This section (a) defines “the conduct of States over time in relation to activities that contribute to climate change and its adverse effects” which Resolution 77/276 refers to in its fifth preambular paragraph; section (b) defines the obligations that States have in relation to their conduct; and section (c) the legal consequences of their conduct.

A. The Conduct of States which Gives Rise to States’ Obligations

90. This section seeks to identify the relevant conduct of States over time (“the Conduct”) that gives rise to their legal obligations, to be further discussed in the subsequent sections. This section itself is divided into two types of conduct: (i) acts or omissions of states over time that resulted in emission of anthropogenic GHG from activities within their jurisdiction which have caused significant harm to the climate system and other parts of the environment, and (ii) the omission of States to take active steps to mitigate the consequences of those harms within and beyond their jurisdiction.

91. The distinction between these two different types of conduct is reflected in the two questions addressed to the Court. While question (b) refers to obligations of states for harm caused by States’ acts and omissions, question (a) casts its net wider when inquiring about the obligations of States to ensure the protection of the climate system and other parts of the environment (without necessarily having contributed to the harm in the first place). After all, States’ human rights obligations are implicated regardless of the question whether their previous acts or omission are the reason for the suffering of the individuals under their jurisdiction; and States may incur international obligations even

when they, as innocent bystanders, find themselves in a position to assist another State that is subjected to a natural disaster.

1. Acts or Omissions of States Over Time that Resulted in Emission of Anthropogenic GHG from Activities within their Jurisdiction which have caused Significant Harm to the Climate System and other Parts of the Environment

92. The conduct consists of acts and omissions of individual States that have led to anthropogenic greenhouse gas emissions from activities under their jurisdiction or control, causing interference with the climate system and other environmental components to a degree that constitutes significant harm to the environment. This is true whether or not GHG emissions of a particular State are the primary cause of climate change, or even the only cause, and whether or not they are the only or the main cause of the specific damages experienced by other states, communities, or individuals, people, or individual. The acts and omissions involve either the direct emissions of GHGs by the State itself or be connected to such activities, or related to such activities, which occurs when non-State actors carry out the activities within the jurisdiction of the State.
93. Anthropogenic greenhouse gas emissions originating from a specific State, whether initiated by the State or by non-state entities, are considered those that play a role in exacerbating climate change and its negative impacts. It is important to note that merely contributing to the harm is not the same as being its sole or primary cause. The crucial point here is the substantial contribution to the ongoing climate crisis.
94. As defined in the IPCC Glossary, the climate system encompasses other legal objects such as the “marine environment”, part of the hydrosphere, or species, ecosystems and their biological diversity, as encompassed by the biosphere.⁷⁷

⁷⁷ IPCC, 2022: Annex II: Glossary [Möller, V., R. van Diemen, J.B.R. Matthews, C. Méndez, S. Semenov, J.S. Fuglestedt, A. Reisinger (eds.)]. 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, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, pp. 2897–2930, doi:10.1017/9781009325844.029, available at <https://apps.ipcc.ch/glossary/>.

95. There is a undeniable scientific connection between GHG emissions over time and the phenomenon of climate change, established by a scientific consensus which has been politically endorsed.⁷⁸ Global warming, as an expression of climate change measured in terms of global mean surface temperature, is caused by cumulative emissions of GHG. There is sufficient evidence to identify the share of States or groups of States in causing climate harms by the GHG emissions of specific States and groups of States. The contributions to the climate crisis are profoundly unequal. In 2022, the IPCC noted the significant inequality among States in terms their contribution to the crisis.⁷⁹
96. The Conduct has had, and is expected to have, devastating consequences on certain States, peoples, and individuals. It is therefore not in question that climate change “has caused widespread adverse impacts and related losses and damages”, as states by the IPCC.⁸⁰
97. The Conduct is particularly consequential for Kiribati, as Part III of this submission has described. As reported by the IPCC, Global warming has exceeded 1°C, causing unprecedented climate changes;⁸¹ Climate extremes and their adverse effects will worsen with rising temperatures;⁸² Global sea levels, driven by human influence,⁸³ have risen faster since 1900 than over any preceding century in at least the last 3000 years,⁸⁴ and

⁷⁸ Principles Governing IPCC Work, *supra* note 11, § 4.4.

⁷⁹ See IPCC, 2022: Summary for Policymakers [P.R. Shukla, J. Skea, A. Reisinger, R. Slade, R. Fradera, M. Pathak, A. Al Khourdajie, M. Belkacemi, R. van Diemen, A. Hasija, G. Lisboa, S. Luz, J. Malley, D. McCollum, S. Some, P. Vyas, (eds.)]. In: *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [P.R. Shukla, J. Skea, R. Slade, A. Al Khourdajie, R. van Diemen, D. McCollum, M. Pathak, S. Some, P. Vyas, R. Fradera, M. Belkacemi, A. Hasija, G. Lisboa, S. Luz, J. Malley, (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA. doi: 10.1017/9781009157926.001., at statements B.3.1 and B.3.2.

⁸⁰ IPCC, 2022: Summary for Policymakers [H.-O. Pörtner, D.C. Roberts, E.S. Poloczanska, K. Mintenbeck, M. Tignor, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem (eds.)]. 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, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, pp. 3–33, doi:10.1017/9781009325844.001, available at https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf

⁸¹ IPCC 2021, The Physical Science Basis, *supra* note 18, at A.2.

⁸² IPCC, *Climate Change 2014 Synthesis Report*, *supra* note 19, at B.2; see also, *Glasgow Climate Pact*, *supra* note 19, at para. 6.

⁸³ IPCC 2021, The Physical Science Basis, *supra* note 18.

⁸⁴ *Id.*

will continue to rise over the 21st century,⁸⁵ creating exacerbated risk for small islands, low-lying coastal areas and deltas.⁸⁶

98. For decades, it has been widely recognized that greenhouse gas emissions have a significant impact on the environment, particularly on the climate system. States that have been responsible for large emissions of these gases, resulting in substantial harm to the climate and other environmental components, were aware or should have been aware of the consequences of their actions since at least the 1960s, as reflected in the decision of the United Nation's Economic and Social Council to address the "Question of Convening an International Conference on Problems of the Human Environment."⁸⁷ This is also the time period when the bulk of GHG emissions were released.

ii. The Omission of States to Take Active Steps to Mitigate the Consequences of those Harms in their Jurisdiction and Beyond Managing the “Carbon Budget”

99. The Conduct encompasses also the failure of States to take measures within their power to mitigate the consequences of such harms in their jurisdiction and beyond, regardless of their past contributions to the crisis.
100. The obligation to mitigate the consequences of such harms in their jurisdiction and beyond arises from the understanding that the Conduct is not only backwards-looking but also future-looking. The Conduct also extends to cover the conduct necessary to prevent or mitigate further harms.
101. In this context, the Conduct also extends to cover the management of the remaining so-called global “carbon budget” or “CO₂ budget” going forward. This global budget reflects the amount of emissions that the atmosphere can tolerate before temperatures rise beyond a certain harmful threshold. This concept of a carbon budget was defined by the IPCC, in its Special Report, Global Warming of 1.5°C (2018).⁸⁸

⁸⁵ *Id.* at B.5.3.

⁸⁶ IPCC 2018 SPM Special Report, *supra* note 17, at B.2.3.

⁸⁷ *See* U.N. Economic and Social Council, 45th Sess. Question of convening an international conference on the problems of human environment, U.N. DOC. E/RES/1346(XLV) (July 30, 1968), *available at* <https://digitallibrary.un.org/record/214491?ln=en>.

⁸⁸ IPCC 2018 SPM Special Report, *supra* note 17.

102. The IPCC distinguishes between two aspects of the budget : the ‘*Total carbon budget*,’ namely the estimated cumulative net global anthropogenic CO₂ emissions from the pre-industrial period to the possible result of limiting the warming to a given level, and the ‘*Remaining carbon budget*’ which is the estimated cumulative net global anthropogenic CO₂ emissions from any given start date to the reaching of net zero emissions.⁸⁹
103. In discussing Germany’s constitutional obligations in respect to climate change, the Federal German Constitutional Court⁹⁰ referred to what the IPCC called the remaining carbon budget, defined as “how much CO₂ can still be released into the Earth’s atmosphere and remain there permanently without causing the desired temperature to be exceeded.”⁹¹
104. The German Federal Constitutional Court endorsed the view that:
- “There is a direct causal link between anthropogenic climate change and concentrations of human-induced greenhouse gases in the Earth’s atmosphere [...]. CO₂ emissions are particularly significant in this regard. Once they have entered the Earth’s atmosphere, they are virtually impossible to remove as things currently stand. This means that anthropogenic global warming and climate change resulting from earlier periods cannot be reversed at some later date. At the same time, with every amount of CO₂ emitted over and above a small climate-neutral quantity, the Earth’s temperature rises further along its irreversible trajectory and climate change also undergoes an irreversible progression. If global warming is to be halted at a specific temperature limit, nothing more than the amount of CO₂ corresponding to this limit may be emitted. The world has a so-called remaining CO₂ budget. If emissions go beyond this remaining budget, the temperature limit will be exceeded.”⁹²
105. The Supreme Court of The Netherlands⁹³ and the Federal Constitutional Court of Germany⁹⁴ have already found that their respective governments had failed to take the

⁸⁹ *Id.*, at Part C.1.3.

⁹⁰ Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court] Mar. 24, 2021, Order of the First Senate, 1 BvR 2656/18, 1-270, (Ger.) (official English translation), ¶ 36 [hereinafter BVERFGE, 1 BvR 2656/18].

⁹² *Id.*

⁹² *Id.*, ¶ 119.

⁹³ Urgenda Foundation v. The Netherlands [2015] HAZA C/09/00456689 (24 June 2015); aff’d (9 October 2018) (District Court of the Hague, and The Hague Court of Appeal (on appeal)) (affirmed by the Supreme Court, Dec. 20, 2019).

⁹⁴ BVERFGE, 1 BvR 2656/18, *supra* note 90, ¶ 36.

necessary steps to manage responsibly their share of the global carbon budget. Similar petitions are pending before other national and international courts.

106. To conclude: The Conduct that is the focus of the questions put to the Court in the operative part of Resolution 77/276 include (a) acts or omissions of states over time that resulted in emission of anthropogenic GHG emissions from activities within their jurisdiction and which have caused significant harm to the climate system and other parts of the environment and (b) acts and omissions of States with respect to the current and future use of the remaining carbon budget, including the failure of States to take active steps to mitigate the consequences of those harms in their jurisdiction and beyond.

B. The Legal Obligations of States in Relation to Climate Change

107. The question formulated by the UN General Assembly in letter (a) of the operative part of Resolution 77/276 reads as follows:

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

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

108. Question (a) inquires broadly about the obligations of states under general international law, in addition to the specific legal regimes specified in that question, to the protection under international law of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations. These include the anthropogenic emissions that affected the Republic of Kiribati as described in the previous Section. This Section sets out the views of the Republic of Kiribati with respect to this question.
109. Given the all-encompassing implications of climate change as a global problem, and its specific overwhelming effects on the Republic of Kiribati and its people, the anthropogenic emissions of greenhouse gases are covered by a wide range of areas of

international law. This submission focuses on the most fundamental principles of general international law that have direct bearing on the legality, or more correctly, the illegality of the Conduct. Beyond specific obligations that arise under international human rights law, the law of the sea, customary international environmental law, international peace and security or other areas of law, the issue of anthropogenic emissions of greenhouse gases is first and foremost a matter of general international law, and specifically, the law on state sovereignty, that is at the heart of international law.

i. The Principle of Sovereign Equality and its Implications

States Have an Obligation not to Cause Significant Harm to Other States or to Common Resources

110. At the heart of international law lies the principle of sovereign equality.⁹⁵ This foundational principle is itself grounded in the basic norm of international law, which stipulates equal rights and self-determination of peoples. As concisely and authoritatively articulated in the preamble to the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24th October 1970 [hereinafter; The Friendly Declaration]:

“Convinced that the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among States, based on respect for the principle of sovereign equality,”⁹⁶

111. Sovereign equality implies more than equal formal status to all states. It provides that no State has more rights than any other State. As stated by the Permanent Court of International Justice (PCIJ) in *The Case of S.S. Lotus*,

⁹⁵ U.N. Charter art. 1, para. 2 (The purposes of the United Nations are: [...] To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples); *see also* art. 2, para. 1 (The Organization is based on the principle of the sovereign equality of all its Members).

⁹⁶ G.A. Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (A/8082), at 122 (Oct. 24, 1970).

“‘[T]he principles of international law’ ... are in force between all independent nations and ... therefore apply equally to all the contracting Parties.”⁹⁷

112. Sovereign equality means also that States must respect the equal sovereignty of other States and hence may not cause, by acts or omissions, significant harm to them or to common resources. As this Court has stated early on, “[I]n general international law it is “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.”⁹⁸
113. The same obligation not to cause significant harm applies to the common marine environment. States have both a direct duty not to degrade the marine environment as well as a duty “in relation to ensuring activities within their jurisdiction and control do not harm the marine environment”.⁹⁹
114. In the *Pulp Mills* case, the Court elaborated on this “principle of obligation,” as follows:

“The Court points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States” (Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949, p. 22). 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. This Court has established that this obligation “is now part of the corpus of international law relating to the environment” (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I), p. 242, para. 29).”¹⁰⁰

States Have an Obligation not to Use More than an Equitable and Reasonable Share of Common Resources

⁹⁷ S.S. ‘Lotus’ (France v. Turkey.), Judgment, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), ¶ 37.

⁹⁸ Corfu Channel (United Kingdom v. Albania), Merits, Judgment, 1949 I.C.J. (Apr. 9) (1949 I.C.J. Rep., p. 22).

⁹⁹ In the Matter of the South China Sea Arbitration before an Arbitral Tribunal Constituted Under Annex VII to the 1982 United Nations Convention on the Law of the Sea (Permanent Court of Arbitration, Case No. 2013–19, July 12, 2016) (Philippines v China) (Award), ¶ 944.

¹⁰⁰ Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Rep. 2010 (Apr. 20), p. 14, ¶ 101; The Court has subsequently referred to the prevention principle, including the requirement of “significance”, in Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) I.C.J. Rep. 2018 (Feb. 2), p. 15 and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Rep. 2015 (II) (Dec. 16), p. 706, ¶ 104; Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia), Judgment, I.C.J. Rep. 2022 (Dec. 1), p. 614, ¶¶ 83, 99.

115. Another manifestation of sovereign equality that is deeply embedded in international law is that all sovereigns are equally entitled to enjoy access to shared common resources yet not use up more than their equitable and reasonable share of such resources.
116. The transformational moment for the current system of international law, that is based on sovereign equality, can be traced back to Hugo Grotius's *Mare Liberum* (1609). That influential publication successfully challenged the earlier claim for unilateral appropriation of the High Seas.¹⁰¹ Since then, global commons are recognized as *res communis*, "belonging to everyone or to no one."¹⁰² As (then Professor) Hanqin Xue wrote in 2003,
- "In recent years, the idea of claims for damage to the global commons has gained force, as communal interests in the protection of the commons come to be recognized and expressed in various legal instruments. It is still arguable, however, that all States parties to such instruments have the responsibility to protect the natural environment and the common areas, and the correlative rights to see others do so. In this regard, whether the commons as *res communis* or *res nullius* is no longer relevant."¹⁰³
117. The principle of sovereign equality shaped the evolution of the law on shared natural resources during the nineteenth and twentieth centuries. The first subject of international regulation was international watercourses.¹⁰⁴ All matters related to their regulation,

¹⁰¹ See Hugo Grotius, *THE FREEDOM OF THE SEAS* (Trans. with a revision of the Latin Text of 1633, Ralph Van Deman Magoffin, ed. James Brown Scott, New York: Oxford University Press, 1916).

¹⁰² See Hanqin Xue, *TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW* 193–196 (Cambridge University Press 2003) [hereinafter *TRANSBOUNDARY DAMAGE INT'L LAW*]; see also Nico Schrijver, *Managing the global commons: common good or common sink?*, 37 *TWQ* 1252–1267, 1253 (2016) ("The high seas, the deep seabed, outer space, the Moon and other celestial bodies, as well as the two polar regions, can be viewed as global commons because no national entity can claim sole jurisdiction over these physical areas. [...] it can be argued that certain global natural assets, such as the climate system, the air, water, seeds, winds and sunshine, could also be viewed as global commons in view of the vital ecological functions that they perform for the Earth and its population"); see also Malgosia Fitzmaurice, *Liability for Environmental Damage Caused to the Global Commons*, *REV. EUR. COMP. & INT'L ENVTL. L.* 305–311 (1996).

¹⁰³ *TRANSBOUNDARY DAMAGE INT'L LAW*, *supra* note 102, at 6–7.

¹⁰⁴ See Juraj Andrassy, *LES RELATIONS INTERNATIONALES DE VOISINAGE* 79 (Vol. 79 *RdC*, 1951) (French, discussion within 73–182).

including the delineation of boundaries along shared rivers,¹⁰⁵ navigational¹⁰⁶ and non-navigational¹⁰⁷ uses of such rivers, were all based on the principle of sovereign equality, even if sometimes other concepts such as good-neighbourliness¹⁰⁸ or *sic utere tuo ut alienum non laedas* (use your own property so as not to injure that of another),¹⁰⁹ were invoked.

118. The 1911 Resolution of the Institut de Droit International *Réglementation internationale de l'usage des cours d'eau internationaux en dehors de l'exercice du droit de navigation* provided that riparian States were all entitled to the same access and use of international rivers and lakes. It therefore stated that:

“1. Lorsqu'un cours d'eau forme la frontière de deux Etats, aucun de ces Etats ne peut, sans l'assentiment de l'autre, et en l'absence d'un titre juridique spécial et valable, y apporter ou y laisser apporter par des particuliers, des sociétés, etc. ... des changements préjudiciables à la rive de l'autre Etat. D'autre part, aucun des deux Etats ne peut, sur son territoire, exploiter ou laisser exploiter l'eau d'une manière qui porte une atteinte grave à son exploitation par l'autre Etat ou par les particuliers, sociétés, etc., de l'autre. Les dispositions qui précèdent sont également applicables lorsqu'un lac s'étend entre les territoires de plus de deux Etats.”¹¹⁰

¹⁰⁵ *Id.*, at 147–148 (“La frontière est formée par la ligne médiane du cours d’eau et le cas échéant par la lignemédiane de son bras principal. Pour déterminer cette ligne médiane, il convient de partir duprincipe que les riverains doivent pouvoir accéder à l’eau sans quitter le territoire national, quelque soit le niveau des eaux. Par ligne médiane, il faut entendre une ligne égalisée et continue, à distance égale des deux bords du cours d’eau (bras principal).”).

¹⁰⁶ Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder, 1929 P.C.I.J. (ser. A) No. 23 [hereinafter River Order].

¹⁰⁷ Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Rep. 1997 (Sept. 25), p. 7; *see also* Convention on the Law of the Non-navigational Uses of International Watercourses, May 21, 1997, 2999 U.N.T.S. 77 (entered into force Aug. 17, 2014).

¹⁰⁸ On good neighbourliness as the basis for the law on shared watercourses, *see* Laurence Boissons de Chazourness and Danio Campanelli, *Neighbour States*, OXFORD PUBLIC INTERNATIONAL LAW: MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW [MPIL] (Dec. 2006), *available at* <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1072#>; *see also* Juraj Andrassy, *supra* note 104.

¹⁰⁹ ULRICH BEYERLIN, THILO MARAUHN, INTERNATIONAL ENVIRONMENTAL LAW 285 (1st ed. 2011) (on the maxim of *sic utere tuo ut alienum non laedas* as a general principle that subsequently evolved into the harm prevention rule); Jutta Brunnée, *Sic utere tuo it alienum non laedas*, Oxford Public Internaitonal Law: Max Planck Encyclopedias of International Law [MPIL] (Jan. 2022) <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1607?prd=MPIL#law-9780199231690-e1607-div1-1>.

¹¹⁰ Institut de Droit International, *Réglementation internationale de l'usage des cours d'eau internationaux en dehors de l'exercice du droit de navigation*, Déclaration de Madrid (Apr. 20, 1911), ¶ 1.

119. According to Professor Juraj Andrassy in his Hague Lectures,¹¹¹ that approach is based on the principle of sovereign equality:

“Cette règle est couverte par la formule plus générale adoptée par l’Institut de droit international à sa session de Madrid. Quant au partage des quantités, chaque riverain a un droit égal, il peut donc disposer de la moitié des quantités disponibles, sans tenir compte des proportions, d’ailleurs très variables, dans les quantités qui se trouvent effectivement séparées par la ligne frontière.”¹¹²

120. The same principle of equal rights in sharing common resources was invoked by the 1993 Montevideo Declaration of the Pan-American Union, Organization of American States, concerning the Industrial and Agricultural Use of International Rivers:¹¹³

“2. The States have the exclusive right to exploit, for industrial or agricultural purposes, the margin which is under their jurisdiction, of the waters of international rivers. This right, however, is conditioned in its exercise upon the necessity of **not injuring the equal right** due to the neighbouring State over the margin under its jurisdiction. In consequence, no State may, without the consent of the other riparian State, introduce into water courses of an international character, for the industrial or agricultural exploitation of their waters, any alteration which may prove injurious to the margin of the other interested State.”¹¹⁴ (emphasis added).

121. The link between sovereign equality and the right to equitable and reasonable share of global commons was recognized by the Institut de Droit International in its 1961 Resolution on the Utilisation of Non-maritime International Waters (Except for Navigation).¹¹⁵ The Resolution is imbued with the principle of sovereign equality as it underlines the various equal duties that States sharing such international waters have toward each other:

“Considering that the obligation not to cause unlawful harm to others is one of the basic general principles governing neighborly relations. [...] Article 2: Every State has the right to utilize waters which traverse or border its territory, subject to the limits imposed by international law ... This right is limited by the right of utilization of other States interested in the same watercourse or hydrographic basin.

¹¹¹ Juraj Andrassy, *supra* note 104, at 119.

¹¹² *Id.*

¹¹³ Pan American Union, Seventh International Conference of American States, *Plenary Sessions, Minutes and Antecedents* (Montevideo, 1933).

¹¹⁴ *Id.*, at 114.

¹¹⁵ Institut de Droit International, *Utilisation of Non-maritime International Waters (Except for Navigation)*, Session of Salzburg (Sept. 11, 1961) (The French text is authoritative. The English text is a translation.).

Article 3: If the States are in disagreement over the scope of their rights of utilization, settlement will take place on the basis of equity, taking particular account of their respective needs, as well as of other pertinent circumstances.

Article 4: No State can undertake works or utilizations of the waters of a watercourse or hydrographic basin which seriously affect the possibility of utilization of the same waters by other States except on condition of assuring them the enjoyment of the advantages to which they are entitled under article 3, as well as adequate compensation for any loss or damage.”

122. That shared natural resources must be subject to equitable and reasonable sharing by states was recognized by the PCIJ in the *River Oder judgment*,¹¹⁶ and by this Court in the *Gabcikovo/Nagymaros Project* case.¹¹⁷ In the *River Oder* judgement, the PCIJ found the international river as the object of a “common legal right” of the riparian States,

“the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others.”¹¹⁸

123. In the *Gabcikovo/Nagymaros Project* case, the Court adopted and extended the said principle to non-navigational uses of international watercourses, and on this basis criticized Czechoslovakia’s “unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube.”¹¹⁹

124. The 1997 Convention on Non-Navigational Uses of International Watercourses,¹²⁰ which the Court in its *Gabcikovo/Nagymaros Project* judgment found to reflect customary international law,¹²¹ also invokes the principle of equitable and reasonable use and the obligation not to cause significant harm to other riparian States. Crucially, demonstrating the riparian States’ common obligations to all individuals under their jurisdiction, regardless of their citizenship, the Convention adds that in the event of a conflict between

¹¹⁶ River Order, *supra* note 106.

¹¹⁷ Gabcikovo-Nagymaros Project, *supra* note 107, p. 7.

¹¹⁸ River Order, *supra* note 106, at 27.

¹¹⁹ Gabcikovo-Nagymaros Project, *supra* note 107, ¶ 86.

¹²⁰ Convention on the Law of the Non-navigational Uses of International Watercourses, *supra* note 107.

¹²¹ Gabcikovo-Nagymaros Project, *supra* note 107, ¶ 85.

uses of an international watercourse, it shall be resolved “with special regard being given to the requirements of vital human needs.”¹²²

125. In *Dispute over the Status of the Waters of the Silala (Chile v. Bolivia)*,¹²³ the Court said:

“[T]he concept of an international watercourse in customary international law does not prevent the particular characteristics of each international watercourse being taken into consideration when applying customary principles. [...] **the Parties agree that under customary international law they are both equally entitled to the equitable and reasonable use of the Silala’s waters.**”¹²⁴ (emphasis added).

126. The Court further emphasized that the right comes with a corresponding obligation.

“Under customary international law, every riparian State has a basic right to an equitable and reasonable sharing of the resources of an international watercourse [...]. This implies both a right and an obligation for all riparian States of international watercourses: **every such State is both entitled to an equitable and reasonable use and share, and obliged not to exceed that entitlement by depriving other riparian States of their equivalent right to a reasonable use and share.** [...] In the present case, under customary international law, the Parties are both entitled to an equitable and reasonable use of the waters of the Silala as an international watercourse and obliged, in utilizing the international watercourse, to take all appropriate measures to prevent the causing of significant harm to the other Party.”¹²⁵

127. The atmosphere and the marine environment constitute global commons, just like the High Seas and other common resources.¹²⁶ The right to enjoy an equitable and reasonable share of the common resources and the obligation not to cause significant harm to them apply with equal force to the protection of those global resources. The Court has confirmed several times that principle of prevention of significant environmental harm is part of customary international law, including in “areas beyond national control.”¹²⁷

¹²² Convention on the Law of the Non-navigational Uses of International Watercourses, *supra* note 107, art. 10(2).

¹²³ *Dispute over the Status and Use of the Waters of the Silala*, *supra* note 100, ¶ 95.

¹²⁴ *Id.*

¹²⁵ *Id.*, ¶ 97.

¹²⁶ TRANSBOUNDARY DAMAGE INT’L LAW, *supra* note 102, at 193.

¹²⁷ Gabčíkovo-Nagymaros Project, *supra* note 107, ¶ 140; Pulp Mills, *supra* note 100, ¶ 101; Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) I.C.J. Rep. 2018 (Feb. 2), p. 15 and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015 (II), p. 706, ¶ 104; *Dispute over the Status and Use of the Waters of the Silala*, *supra* note 100, ¶¶ 83, 99.

128. As the Court stated in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*,¹²⁸

“[I]t is not contested between the Parties that all States have the obligation under customary international law to protect and preserve the marine environment.”¹²⁹

The Court delineates how this obligation is allocated in areas that are subject to the control of specific States:

“In the exclusive economic zone, however, it is the coastal State that has jurisdiction to discharge that obligation. [...] A third State, in the capacity of a flag State, also has “an obligation to ensure compliance by vessels flying its flag with relevant conservation measures concerning living resources enacted by the coastal State for its exclusive economic zone.”¹³⁰

129. The global carbon budget, including the remaining carbon budget as defined by the IPCC and invoked by the German Federal Constitutional Court fits the definition of a global commons,¹³¹ which all States must share in an equitable and reasonable way, without causing significant harm to it. Therefore, by consuming more than their fair share of the carbon budget, and causing harm to the atmosphere, the major polluting States consumed more than their fair and equitable share of the collective carbon budget, and ignored their obligation not to cause significant harm to it. They thereby breached their obligations to all other states, and especially to certain States, among them low-lying island States such as Kiribati.

130. This obligation has an *erga omnes* character. That the obligation with respect to global commons is of an *erga omnes* character has been recognized by the Institut de Droit International in its 2005 Resolution on Obligations *Erga Omnes* in International Law.¹³²

The first two preambular paragraph provide:

“Considering that under international law, certain obligations bind all subjects of international law for the purposes of maintaining the fundamental values of the international community;

¹²⁸ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Judgment, I.C.J. Rep. 2022 (Apr. 21), p. 266, ¶ 95.

¹²⁹ *Id.*

¹³⁰ *Id.* (citing Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, Apr. 2, 2015, ITLOS Rep. 37, ¶ 120.)

¹³¹ BVERFGE, 1 BvR 2656/18, *supra* note 90, ¶ 36.

¹³² *See*, Institut de Droit International, Resolution on Obligations *Erga Omnes* in International Law, Aug. 27, 2005, Krakow.

*Considering that a wide consensus exists to the effect that the prohibition of acts of aggression, the prohibition of genocide, obligations concerning the protection of basic human rights, obligations relating to self-determination **and obligations relating to the environment of common spaces** are examples of obligations reflecting those fundamental values;”*¹³³

131. The atmosphere and the marine environment present a space where some GHG emission could be tolerated. In other words, the international community has, or had, a global carbon budget,¹³⁴ that States could collectively share. Grounded on the same principle of sovereign equality, States’ use of this global carbon budget must have been subjected to the same rules of equitable and reasonable use and of not causing significant harm, taking into account current and future needs, and most importantly, paying special regard to the requirements of vital human needs.

States Have Obligations to Respect and Promote the Equal Rights of Other States and their Right to Continue Exercising their Right to Self-Determination

132. Beyond the obligations States have with respect to their own use of global commons, States have obligations to those States that are specifically affected by the Conduct. This obligation concerns particularly affected States, most prominently low-lying small island States whose territorial integrity is threatened by the consequences of the Conduct. Even more pronounced obligations exist toward those small island States whose peoples’ ability to continue to exercise their self-determination and to control their natural resources are jeopardized as a result of the Conduct.
133. The States whose acts and omissions contributed to the harm to the climate and environment change have thereby also contributed to the jeopardizing the territorial integrity and even the very ability of some States to exercise their peoples’ self-determination.
134. But even without assigning responsibility for States for causing such harms by their acts or omissions, States may be responsible for failing to comply with their obligations to act positively to mitigate the harsh consequences of those harms or facilitate the adaptation to the climatic disaster. This is especially the case when the certain States face

¹³³ *Id.*

¹³⁴ BVERFGE, 1 BvR 2656/18, *supra* note 90, ¶ 36.

a threat to their territorial integrity as a result of inundation and even loss of their ability to exercise self-determination.

135. The Friendly Declaration elaborates on the principle of sovereign equality, recognizing positive duties incumbent upon states:

“In particular, sovereign equality includes the following elements: [...] c. Each State has the duty to respect the personality of other States; d. The territorial integrity and political independence of the State are inviolable;

136. The duty of all States to act positively to facilitate the realization of other people’s right to self-determination is firmly grounded in international law.¹³⁵ This positive duty has been recognized by the Court in the *Palestinian Wall Advisory Opinion*.¹³⁶ In this Court’s *Advisory Opinion on Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, the Court relied on the Friendly Relations Declaration, stating that:¹³⁷

“Since respect for the right to self-determination is an obligation *erga omnes*, all States have a legal interest in protecting that right [...]. The Court considers that, ... all Member States must co-operate with the United Nations to put those modalities into effect.”¹³⁸

137. According to the Human Rights Committee’s General Comment No. 12 on the right to self-determination, “all States parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination.”¹³⁹ This

¹³⁵ The Office of the High Commissioner for Human Rights therefore concluded that “States have a duty to take action, individually and jointly, to address and avert threats to the right to self-determination by mitigating climate change.” See Frequently Asked Questions on Human Rights and Climate Change, Fact Sheet No. 38 (2021) at 6, available at https://www.ohchr.org/sites/default/files/Documents/Publications/FSheet38_FAQ_HR_CC_EN.pdf

¹³⁶ 2004 I.C.J. 136, *supra* note 4, ¶ 159 (“It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall to the exercise by the Palestinian people of its right to self-determination is brought to an end.”).

¹³⁷ 2019 I.C.J. 97, *supra* note 4, ¶ 180.

¹³⁸ *Id.* See also the case of *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 90, “[t]he principle of self-determination ... ha[ving] an *erga omnes* character ... is one of the essential principles of contemporary international law.” As interpreted by the Commentary on the Draft articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), this reference implies that the right “gives rise to an obligation to the international community as a whole to permit and respect its exercise.” Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, 2 Y.B. INT’L L. COMM’N 113, ¶ 5, U.N. DOC. A/RES/56/83.

¹³⁹ U.N. Human Rights Committee (UNHRC), *General Comment No. 12: Article 1 (Right to Self-determination) The Right to Self-determination of Peoples*, 21st Sess., U.N. DOC. HRI/GEN/1/Rev.1. (Mar. 13, 1984), ¶ 6 [herein after UNHRC General Comment No. 12].

implies the duty “to take positive action, individually and jointly, to address and avert [the threat that climate change poses to the right of peoples to self-determination].”¹⁴⁰

138. Climate change threatens the ability of low-lying small island states, including, and perhaps primarily, the Republic of Kiribati, to exercise their right to self-determination, as the nation loses much of its land resources, and the people are being fragmented as families are required to dislocate and entire island communities are uprooted from their homelands and dispersed in other locations around the country, and others are being forced to migrate to foreign countries. The integrity of the people is threatened and its ability to exercise its right to self-determination on its own territory is challenged.
139. These adverse consequences were captured in the 2016 Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment:

“Climate change threatens the very existence of some small island States. Global warming expands ocean waters and melts land-based ice, causing sea levels to rise. Long before islands are inundated, climate change may make them uninhabitable by increasing the frequency and severity of storm surges or by causing sea water to invade their freshwater resources.”¹⁴¹

140. Therefore, by consuming more than their fair share of the atmosphere, and causing harm to it, the major polluting States have breached their duties to respect and ensure the ability of low-lying states, including the Republic of Kiribati, to continue to exercise their right to self-determination. In addition, these and other States that will have not come to the assistance of the victim States, at least by recognizing the victim States’ right to maintain their sovereignty and territorial integrity, will have breached their obligation to positively secure the right of threatened peoples to their self-determination.

States have Positive Obligations to Promote Self-Determination in line with the Obligation of Due Diligence, and the Principle of Common but Differentiated Responsibilities

141. The obligation incumbent upon all States, individually and jointly, to respect and protect the rights of other States to continue to exercise their peoples’ right to self-determination

¹⁴⁰ Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights A/HRC/10/61 (2009), at pp 14-15.

¹⁴¹ 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/HRC/31/52 (Feb. 1, 2016), ¶ 29.

is subject to two conditioning considerations: the principles of due diligence and common but differentiated responsibilities.

Due Diligence

142. In fulfilling the above-mentioned obligations, States are required to exercise due diligence. This Court has frequently affirmed this duty of due diligence under general international law and also in the context of transboundary resources.¹⁴²

143. As this Court has recently noted, and in the context of environmental protection, as a corollary of the obligation of every State not to allow knowingly its territory to be used for acts contrary to the rights of other States,

“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’ in a transboundary context, and in particular as regards a shared resource.”¹⁴³

144. This obligation entails a positive obligation of all States to exercise due diligence in the prevention of reasonably foreseeable harm from activities within their jurisdiction or control had crystallised as a primary obligation of international law by the end of the nineteenth century.

145. This obligation is obviously incumbent upon States who have contributed over the years to the climate crisis through their Conduct. Bearing responsibility for causing the significant harm to our planet and taking much more than their fair share of the carbon budget, their responsibility for their past acts and omission is beyond dispute. But at the same time, given the limited carbon budget that remains, and the likely risks to some states, and in particular low-lying island States such as Kiribati, the obligation extends to

¹⁴² See e.g., *Dispute over the Status and Use of the Waters of the Silala*, *supra* note 100, ¶ 99 (citing *Corfu Channel* (United Kingdom v. Albania), Merits, Judgment, I.C.J. Rep. 1949, p. 22); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996 (I), p. 242, ¶ 29; *Pulp Mills*, *supra* note 100, ¶ 101; *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, I.C.J. Reports 2015 (II), p. 706, ¶ 104.

¹⁴³ *Dispute over the Status and Use of the Waters of the Silala*, *supra* note 100, ¶ 99 (citing *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010 (I), p. 55-56, ¶ 101); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996 (I), p. 242, ¶ 29; *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, I.C.J. Reports 2015 (II), p. 706, ¶ 104.

all states to exercise due diligence in their respective efforts to take the remaining carbon budget into account.

Common But Differentiated Responsibilities

146. The principle of ‘common but differentiated responsibilities’ embodies a collective acknowledgment of the shared challenge of addressing global issues such as climate change, environmental degradation, and sustainable development, while recognizing the diverse capacities and historical contributions of nations. This principle reflects the obligation to reverse long-term practices that have burdened the atmosphere, the seas, and the consumption of a large share of the common carbon budget, along with an understanding that responsibility for addressing them should be distributed fairly.
147. This principle underscores the importance of collaboration in tackling common challenges, yet it also emphasizes that responsibilities should be distributed in a manner that reflects disparities in economic development, historical contribution to GHG emissions, and capabilities. In essence, it advocates for tailored approaches that consider the unique circumstances and vulnerabilities of different countries.
148. As Professor Hanqin Xue explained,
- “[G]lobal actions in addressing climate change should be taken in accordance with the principle of common, but differentiated responsibilities. [...] Due to their historical emissions accumulated during the industrialization process and unsustainable economic model and high consumption, developed countries ... should take serious actions to reduce their emissions and honour their commitments under the Kyoto Protocol. Moreover, given their financial capacity and advanced low-carbon technologies, they should provide necessary technological and financial assistance to the developing countries and help them build up technical capacities to cope with climate change.”¹⁴⁴
149. The principle of ‘common but differentiated responsibilities’ is deeply intertwined with the principle of due diligence. In fact, it can be said to be a manifestation of due diligence. This is manifested in the position of the International Law Commission in its Commentary to its Articles on International Liability for Injurious Consequences Arising

¹⁴⁴ TRANSBOUNDARY DAMAGE INT’L LAW, *supra* note 102, at 180–181.

Out of Acts Not Prohibited by International Law.¹⁴⁵ In the Commentary to Article 3 (“Prevention: The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof.”) the ILC referred to principle 11 of the Rio Declaration which stipulates that “Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries,”¹⁴⁶ and to “[s]imilar language [that] is found in principle 23 of the Stockholm Declaration.”¹⁴⁷ The ILC pointed out that “[t]he economic level of States is one of the factors to be taken into account in determining whether a State has complied with its obligation of due diligence.”¹⁴⁸ It then emphasizes:

“The main elements of the obligation of due diligence involved in the duty of prevention could be thus stated: the degree of care in question is that expected of a good Government. [...] It is, however, understood that the degree of care expected of a State with a well-developed economy and human and material resources and with highly evolved systems and structures of governance is different from States which are not so well placed.”¹⁴⁹

150. As stated by Professor Xue,

“The principle of common but differentiated responsibilities recognizes the limits on the equality of States. It is generally agreed that the major polluters should bear a heavier responsibility to redress the consequences to the world environment.”¹⁵⁰

Professor Xue adds that, accordingly,

“[a]s the major contributors to atmospheric damage, industrial countries are rightfully held responsible for the present state of climate change under the [United Nations Framework Convention on Climate Change].”¹⁵¹

151. Professor Xue refers to the principle of common but differentiated responsibilities as a result of an understanding that the equality of states is “limited.” Perhaps an additional

¹⁴⁵ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Supplement No. 10 (A/56/10), chp.IV.E.1, November 2001 (commentary to Article 3, ¶12, ‘Draft articles on prevention of transboundary harm from hazardous activities: Text of the draft articles with commentaries thereto’), available at https://legal.un.org/ilc/documentation/english/reports/a_56_10.pdf#page=149 Id., at 144.

¹⁴⁶ *Id.*, commentary to Article 3, ¶ 13 at 155.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*, commentary to Article 3, ¶ 17, at 155.

¹⁵⁰ TRANSBOUNDARY DAMAGE INT’L LAW, *supra* note 102, at 230.

¹⁵¹ *Id.*, at 227.

way to understand this principle is to regard it as respecting the principle of sovereign equality, especially as it pertains to the duty to protect *erga omnes* and *jus cogens* obligations, such as the principle of peoples' self-determination.

152. Certain States have both emitted a lot since the industrial revolution and thereby gained significant capacities to address the climate crisis. These States are consequently both more responsible than others for the climate crisis, and they are better positioned to contribute to reducing the harsh consequences of that crisis. Certainly, they are more capable of doing so than States whose part of the conduct has been insignificant, which are exposed to a greater share of the risk, including a risk to their very survival and to the lives of their citizens, whose subjection to colonization involved robbing them of much of their natural resources,¹⁵² and whose resources are insufficient to address these risks.
153. On the other side, there are other States that due to the same historical and economic differences have been rendered more vulnerable to the effects of climate change and less capable of adapting to them. This is especially the case of former colonies, such as the Republic of Kiribati, whose natural resources have been depleted during the colonial period, and whose geographical position renders them particularly vulnerable to climatic changes. Particularly vulnerable are indigenous communities whose exposure to climate change significantly affects their culture and traditions. As three UN Special Rapporteurs have stated in their Amicus brief submitted to the Inter-American Court for Human Rights as part of the pending request for an Advisory Opinion on Climate Emergency and Human Rights,

“Indigenous Peoples are particularly vulnerable where processes of colonization have deprived them of ownership of their traditional territories, targeted these lands for extractive industries, and failed to provide adequate investment in adaptation.”¹⁵³

154. As this submission elaborates in Part III, this dire situation is especially the lot for the Republic of Kiribati, as it is for other low-lying developing island states.

¹⁵² On the economic and political background of the Republic of Kiribati upon gaining independence from British rule in 1979, see Howard Van Trease, Ed., *ATOLL POLITICS: THE REPUBLIC OF KIRIBATI* (1993), esp. 226–228.

¹⁵³ Special Rapporteurs on Toxics and Human Rights (Marcos Orellana), Human Rights and the Environment (David Boyd), and the Right to Development (Surya Deva), Amicus Brief (Nov. 22, 2023), Request for an Advisory Opinion on the Scope of the State Obligations for Responding to the Climate Emergency, Inter-Am. Ct. H.R., available at https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20231125_18528_na.pdf.

ii. International Human Rights Law

155. State parties to international human rights treaties commit to respect protect and ensure human rights “within their jurisdiction.”¹⁵⁴
156. In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*,¹⁵⁵ the Court interpreted that provision. It found that:
- “[W]hile 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, States parties to the Covenant should be bound to comply with its provisions.”¹⁵⁶
157. The Court grounded its findings *inter alia*, on the *travaux preparatoires* of the Covenant, which, according to the Court, showed that “the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory.”¹⁵⁷ It follows, *a fortiori*, that the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction within their national territory and that exercise of jurisdiction causes human rights violations to persons residing abroad.
158. This interpretation is consistent with the fundamental obligation elaborated above concerning the obligation of all States not to allow their territory to be used for acts contrary to the rights of other States.
159. Inspired by this Court’s jurisprudence, the Inter-American Court of Human Rights recognized in its Advisory Opinion, issued in 2017, the applicability of States’ international human rights obligations to avoid transboundary environmental damage that can affect the human rights of individuals outside their territory:

“The obligations to respect and to ensure human rights require that States abstain from preventing or hindering other States Parties from complying with the obligations derived from the [American]

¹⁵⁴ Cf 2004 I.C.J. 136, *supra* note 4, at 136.

¹⁵⁵ *Id.*, ¶ 109.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

Convention []. Activities undertaken within the jurisdiction of a State Party should not deprive another State of the ability to ensure that the persons within its jurisdiction may enjoy and exercise their rights under the Convention. The Court considers that States have the obligation to avoid transboundary environmental damage that can affect the human rights of individuals outside their territory. For the purposes of the American Convention, when transboundary damage occurs that effects treaty-based rights, it is understood that the persons whose rights have been violated are under the jurisdiction of the State of origin, if there is a causal link between the act that originated in its territory and the infringement of the human rights of persons outside its territory.”¹⁵⁸

160. The same approach was taken by the UN Human Rights treaty bodies such as the Human Rights Committee¹⁵⁹ and the Committee on the Rights of the Child.¹⁶⁰
161. This is certainly the case if one regards the Universal Declaration of Human Rights as reflecting customary international law.¹⁶¹ The UDHR expressly extends its coverage to “[a]ll human beings”¹⁶² without delimiting any territorial restriction on States’ obligations to respect, protect and fulfil them.
162. In light of the above, the International Covenant on Civil and Political Rights is also applicable in respect of the Conduct of States parties to the convention to the extent that the conduct infringed the enumerated rights of persons living abroad, including in low-lying small developing islands like Kiribati.

The Right to Life

¹⁵⁸ State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity (Arts. 4(1) and 5(1) in relation to Arts. 1(1) and 2 American Convention on Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R., ¶ 101 (Nov. 15, 2017).

¹⁵⁹ Human Rights Committee, *General Comment No. 36: Article 6: Right to Life* U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019) ¶¶ 62, 63 (“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. [...] a State party has an obligation to respect and ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control.”).

¹⁶⁰ Committee on the Rights of the Child, *General Comment No. 26 on children’s rights and the environment, with a special focus on climate change*, U.N. Doc. CRC/C/GC/26 (Aug. 22, 2023) ¶¶ 84, 86, 106.

¹⁶¹ 2019 I.C.J. 97, *supra* note 4, ¶ 35 (“Certainly the [UDHR] reflects customary international law”). In the regional context, *see e.g.*, *Anudo Ochieng Anudo v. United Republic of Tanzania*, No. 012/2015, Judgment, ¶ 76 (Afr. Ct. on Hum. and Peoples’ Rts. Mar. 22, 2018) (recognizing the UDHR as “forming part of Customary International Laws”).

¹⁶² G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948), Universal Declaration of Human Rights (UDHR), Dec. 10, 1948, Art. 1.

163. The right to life under Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR)¹⁶³ is clearly impaired by the Conduct. As the Human Rights Committee pointed out in *Billy v. Australia*¹⁶⁴:

“[T]he obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life. [...] The Committee considers that such threats may include adverse climate change impacts, and recalls that environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.”¹⁶⁵

164. The Human Rights Committee’s General Comment on the right to life (Article 6 of the ICCPR)¹⁶⁶ stated that “environmental degradation can compromise effective enjoyment of the right to life, and [...] severe environmental degradation can adversely affect an individual’s well-being and lead to a violation of the right to life.”¹⁶⁷

The Right to family and community life

165. In *Billy v. Australia*, the Human Rights Committee found a violation of Article 17 of the ICCPR, that:

“when climate change impacts – including environmental degradation on traditional [indigenous] lands in communities where subsistence is highly dependent on available natural resources and where alternative means of subsistence and humanitarian aid are unavailable – have direct repercussions on the right to one’s home, and the adverse consequences of those impacts are serious because of their intensity or duration and the physical or mental harm that they cause, then the degradation of the environment may adversely affect the well-being of individuals and constitute foreseeable and serious violations of private and family life and the home”¹⁶⁸

166. In the same case, the Human Rights Committee also found a violation of Article 27 of the ICCPR:

¹⁶³ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

¹⁶⁴ Human Rights Committee, U.N. Doc. CCPR/C/135/D/3624/2019, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019, (Sept. 22, 2022) [hereinafter *Billy v. Australia*].

¹⁶⁵ *Id.*, ¶ 8.3.

¹⁶⁶ Human Rights Committee, *General Comment No. 36: Article 6: Right to Life*, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019), ¶ 62.

¹⁶⁷ *Billy v. Australia*, *supra* note 164, ¶¶ 8.4–8.5.

¹⁶⁸ *Billy v. Australia*, *supra* note 164, at ¶ 8.12.

“The Committee recalls that, in the case of indigenous peoples, the enjoyment of culture may relate to a way of life which is closely associated with territory and the use of its resources, including such traditional activities as fishing or hunting. Thus, the protection of this right is directed towards ensuring the survival and continued development of the cultural identity. The Committee further recalls that article 27 of the Covenant, interpreted in the light of the United Nations Declaration on the Rights of Indigenous Peoples, enshrines the inalienable right of indigenous peoples to enjoy the territories and natural resources that they have traditionally used for their subsistence and cultural identity.”¹⁶⁹

167. As in the case of *Billy v. Australia*, the rights of the people of Kiribati under Articles 17 and 27 of the ICCPR are infringed due to the impairment of their ability to maintain their culture, due to the reduced viability of their islands and the surrounding seas, owing to climate change impacts.¹⁷⁰ For example, Mr. Kiatonga Burera, an elder in his community, laments the fact that his eldest son does not remember the original village they had to leave due to climate change, and describes in his testimony how the submergence of land has had dire effects on the social structures of the community:

*"In the past, there was strong system for the village, with one leader for the village, and our church to also manage the village. Now, it's the same, but disjointed."*¹⁷¹

And he adds:

*"People of Abaiang, including my village are connected to the sea and to the land. Imagine that in the past, in the old place, it was a big community with big land. Now since we relocated, we are scattered. Broken. In the past, all this was in the vast place. There was a bond between us because they live closely, now it is not the same. Now we all live far apart."*¹⁷²

The Human Right of Peoples to Self-Determination

168. As mentioned above, all States have obligations to respect and to actively promote the existing rights of peoples to continue to enjoy their self-determination. International human rights law bolsters this right as constituting also a human right.

¹⁶⁹ *Id.*, ¶ 8.13

¹⁷⁰ *Compare Id.*, ¶ 8.14.

¹⁷¹ Annex 2, Statement 12, para 6.

¹⁷² *Id.*, para 11.

169. The right to self-determination encompasses the right of peoples to exercise control over their territory and their right to their permanent sovereignty over natural resources, which this Court has confirmed is a customary norm.¹⁷³ As the Inter-American Court for Human Rights has observed,

“[T]he close ties of indigenous people with the land must be recognized and *understood* as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.”¹⁷⁴

170. Ms. Kautunata Kobia, of the Island of Abaiang, describes cultural loss when children are not able to train in soccer¹⁷⁵ or dance,¹⁷⁶ and the difficulties of maintaining a cultural and social life when the land this life was built around is no longer sustainable:

“The *old* village has now been entirely destroyed by the sea. We lived in the new place for several years until the sea came again in our garden in 1998. At that time, I was feeling bored and sad because before we used to have community programs in the older village where we would all gather. Now that we have moved, gathering is becoming difficult because houses are far apart. Before if you need help, you don’t have to ask for it, if the community members see that you need help they would just come and lend a hand. Now, it is different. Since we have been relocated, the families live on their own.”¹⁷⁷

171. In conclusion, the Republic of Kiribati submits that the Conduct and its effects on Kiribati and other low-lying small developing States entails the violation of several legal obligations incumbent upon States:

- (a) The obligation not to cause significant harm to other states or to common resources – the atmosphere and the marine environment, as well as the global “carbon budget” all constituting commons resources;
- (b) The obligation not to use more than an equitable and reasonable share of common resources;

¹⁷³ Armed Activities on the Congo (Congo v. Uganda), Judgement, I.C.J. Rep. 2005, p. 251–252, ¶ 244 (Dec. 19).

¹⁷⁴ Mayagna (Sumo) Awas Tingni Community v. Nicaragua (Merits, Reparations and Costs), Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149 (Aug. 31, 2001).

¹⁷⁵ Annex 2, Statement 5, para. 7.

¹⁷⁶ *Id.*, para. 14.

¹⁷⁷ *Id.*, para. 12.

- (c) The obligation to respect and promote the equal rights of other states and their right to enjoy their territorial integrity and to continue exercising their right to self-determination; particularly toward those States that are specifically affected by the Conduct, and particularly toward low-lying small island States whose territorial integrity is endangered as a result of the Conduct, and toward peoples whose exercise of their right to self-determination and to control their natural resources is jeopardized as a result of the Conduct;
- (d) The obligation to positively promote the self-determination of the Republic of Kiribati and other low-lying small island States, in line with the obligation of due diligence and the principle of common but differentiated responsibilities;
- (e) The obligation, regardless of States' past Conduct, to act positively to secure against the harsh consequences of any such Conduct, at least by recognizing the existing rights of States whose control of certain parts of their land territory or other natural resources is precluded as a consequence of the Conduct; all States must accept that the integrity of all States is inviolable and their entitlement to self-determination is inalienable;
- (f) The obligation to respect and protect the international human rights of individuals outside their jurisdiction when they exercise jurisdiction within their national territory and that exercise of jurisdiction causes human rights violations to persons residing abroad;
- (g) More specifically, the obligation to respect and protect the internationally recognized rights to life, to family and community life, and to self-determination, of individuals and communities affected by the Conduct.

C. The Legal Consequences of the Violations of the Above-Mentioned Obligations

172. This section addresses Question (b) as formulated by the UN General Assembly in the operative part of Resolution 77/276, namely:

- (b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:
 - (i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, 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?”

173. Whereas Question (a) also covers the obligations of States that have not caused significant harm to the climate system and other parts of the environment, Question (b) is devoted to the legal consequences for the States who have failed to abide by their obligations. Nevertheless, the legal consequences for the latter group might be extended by analogy to the former group, *mutatis mutandis*.

i. The Conduct Constitutes, in Principle, a Breach of International Law

174. The Conduct is inconsistent with the States’ obligations as articulated above.

175. For a breach to be established, it is not necessary for the non-conformity of Conduct with the relevant obligation to be total. As the ILC explains, a breach may result both from total or partial non-conformity, whether as a result of acts or omissions of the State or a combination thereof.¹⁷⁸

176. The Conduct has unfolded over time, beginning in an era when the consequences of GHG emissions were not fully recognized. Moreover, it might be argued that certain legal obligations were not always clear or even applicable during those early days of the Industrial Revolution. But this inter-temporal question has only limited relevance to Question (b). This is because Question (b) distinguishes between the ‘actus reus’ – the States’ acts and omissions which have caused significant harm to the climate system and other parts of the environment – and the consequences of their legal obligations today. Arguably, there can be legal consequences for States’ obligations today for past acts and omissions even during an earlier era when the Conduct was not unlawful. For example, a State that has benefited economically from past appropriation of a large and inequitable share of the carbon budget might be subject *now* to stronger mitigation obligations with respect to the future uses of the current carbon budget, than States that have not taken a large share of the carbon budget.

177. This conclusion is strengthened by the nature of the obligations in question. The Conduct is subjected to obligations that are owed *erga omnes* and, in the case of Kiribati and other vulnerable States, to peremptory norms of international law, including the obligations

¹⁷⁸ International Law Commission, *supra* note 145, as corrected, Article 12, commentary, ¶ 2.

arising from the right to self-determination.¹⁷⁹ As recognized in Article 41 of ARSIWA, “States **shall** cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.”¹⁸⁰

ii. The legal Consequences of the Breaches

178. The clarification of the legal consequences arising from the Conduct is requested “with respect to” two categories of victims of such conduct. The first category of victims is of “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”.
179. The Republic of Kiribati is among those States, as can be concluded from the description of its situation in Part III above. This makes Kiribati an “injured State” in the sense of Article 24 ARSIWA.¹⁸¹ As Kiribati’s right to self-determination is at risk, the obligations of other States are both owed to Kiribati individually, and at the same time owed to “a group of States including that State, or the international community as a whole,” as the breach of the obligation specially affects Kiribati.

Cessation

180. The legal consequences of the Conduct under general international law require the cessation of the Conduct, when a State or group thereof is still displaying it.¹⁸² and reparation, by all States having displayed the Conduct.

Reparations

¹⁷⁹ East Timor (Portugal v. Australia), Judgment, I.C.J. Rep. 1995, p. 90, ¶ 29 (June 30); International Law Commission, *supra* note 145, Vol. II, as corrected, Article 40, commentary, ¶ 5 (“[t]he principle of self-determination ... is one of the essential principles of contemporary international law”, which gives rise to an obligation to the international community as a whole to permit and respect its exercise.”).

¹⁸⁰ International Law Commission, *supra* note 145, with commentaries, 2 Y.B. INT’L L. COMM’N 113, art. 40(1), U.N. Doc. A/RES/56/83.

¹⁸¹ Art. 42 of Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA): “A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to: (a) that State individually; or (b) a group of States including that State, or the international community as a whole, and the breach of the obligation: (i) specially affects that State; or (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.”

¹⁸² Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Rep. 2012, p. 153, ¶137 (Feb. 3) (“... the State responsible for an internationally wrongful act is under an obligation to cease that act, if it is continuing.”), this is also by reference to Article 30(a) of ARSIWA. The same conclusion was reached, by reference to Articles 30 and 31 of ARSIWA, by the Grand Chamber of the European Court of Human Rights in Case of Georgia v. Russia (I), ECtHR (Grand Chamber) Application No. 13255/07, Judgment (Jan. 31, 2019), ¶ 54.

181. In its judgment on compensation in the *Costa Rica v. Nicaragua* case, the Court confirmed that the principle that “the breach of an engagement involves an obligation to make reparation in an adequate form”¹⁸³ extends to the determination of legal consequences in cases of environmental harms.¹⁸⁴ The obligation to make reparations is therefore applicable to the Conduct as defined above.

Types of Reparations: Restitution and Compensation

182. According to the rules on State responsibility, the obligation placed on the responsible State is to make “full reparation,” namely to “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.”¹⁸⁵ According to ARSIWA Article 31(2), “Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.”¹⁸⁶

183. Restitution and compensation for an illegal act require the identification of the moment when the Conduct was regarded as illegal and hence States have “knowingly”¹⁸⁷ breached their obligations to others.

184. On this point of timing, the Republic of Kiribati invites the Court to accept that States’ “knowledge” of the adverse effects of GHG emissions including limits of the collective carbon budget can be traced well into the past and at least as far back as the 1960s when the United Nation’s Economic and Social Council resolved, at its forty-fourth session (1968) to include on its agenda an item entitled “Question of Convening an International Conference on Problems of the Human Environment.”¹⁸⁸ In preparations for the session,

¹⁸³ Certain Activities Carried Out by Nicaragua in the Border Area (*Costa Rica v. Nicaragua*), Compensation, Judgment, I.C.J. Reports 2018, p. 25-26, ¶ 29, (quoting the judgment of the Permanent Court of International Justice in *Factory at Chorzów*, Jurisdiction, Judgment No. 8, 1927, P.C.I.J. (ser. A) No. 9, at 21 (July 26)).

¹⁸⁴ Certain Activities Carried Out by Nicaragua in the Border Area (*Costa Rica v. Nicaragua*), Compensation, Judgment, I.C.J. Reports 2018, p. 25-26, ¶ 34 (Feb. 2); *Gabčíkovo-Nagymaros Project*, *supra* note 107, p. 80, ¶ 150; *Pulp Mills*, *supra* note 100, p. 103, ¶ 273.

¹⁸⁵ *Factory at Chorzów*, *supra* note 182, p. 47.

¹⁸⁶ ARSIWA, Article 31(2).

¹⁸⁷ *Corfu Channel Case*, *supra* note 98, ¶ 2 (“... every State's obligation not to allow *knowingly* its territory to be used for acts contrary to the rights of other States”) (emphasis added).

¹⁸⁸ See U.N. Economic and Social Council, Question of convening an international conference on the problems of human environment (1968) U.N. DOC. E_RES_1346(XLV)-EN.pdf available at <https://digitallibrary.un.org/record/214491?ln=en>.

the UN Secretary General Report¹⁸⁹ reviews the activities and findings *inter alia* of the World Meteorology Organization, which, under the heading of “Protecting the atmospheric environment.” indicated that

“*Application* of meteorology to the protection of the atmosphere is mainly related to the problem of increasing air-pollution. There are large-scale air pollution problems where we are interested in global spread of debris from nuclear tests, the increase of acidity due to increased industrialization over a large part of the globe **or the increase of the carbon-dioxide in the earth's atmosphere which may change our climate.**”¹⁹⁰ (emphasis added)

185. The same period is also the moment when the right to self-determination had been crystallized as a fundamental obligation under international law.¹⁹¹
186. Therefore, restitution and compensation are due to the injured States, including Kiribati, from those States that have continued to emit GHG emissions since the 1960s.
187. In this context the Court is invited to consider the immense adverse consequences of the Conduct as described in Part B of this submission, which include sea-level rise which leads to the submergence of land, increased flooding and storm surges, and the warming of seas that has a lethal impact on coral reefs, which in turn impacts the fisheries and tourism and thus impairs the exercise of permanent sovereignty over these natural resources, as well as the stronger tropical cyclones and the destruction of freshwater resources and cultivable land which deprive the people in Kiribati and in other low-lying island States of their own means of subsistence, of safe access to drinking water, sanitation and food security.

Types of Reparations: Mitigation

188. In the context of Kiribati and other low-lying developing islands, the fulfilment of the requirements of restitution and compensation, in a way that would “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,”¹⁹² will necessitate support

¹⁸⁹ U.N. Secretary-General, *Activities of United Nations Organizations and programmes relevant to the human environment*, ¶¶ 71–83, U.N. DOC. E/4553 (July 11, 1968), available at <https://digitallibrary.un.org/record/729430>

¹⁹⁰ *Id.* at ¶ 78.

¹⁹¹ 2019 I.C.J. 97, *supra* note 4, ¶ 148.

¹⁹² *Factory at Chorzów*, *supra* note 182, at 47.

for mitigation and adaptation measures, effective redress for the human toll caused by the Conduct, the ongoing acknowledgment of the sovereignty, statehood, territorial integrity, and maritime boundaries of small island developing States.

189. The obligation of mitigation covers also States' obligations that result from prospective Conduct which amount to unequitable or unreasonable consumption of the remaining carbon budget, or who otherwise do not promote the low-lying island states' right to self-determination.
190. As part of mitigation measures, all States must continue to recognize the sovereignty, statehood, territory and maritime spaces of Kiribati and other small island developing States. The continued statehood of those island States is incumbent upon all States under Article 41(2) ARSIWA, which stipulates that "[n]o State shall recognize as lawful a situation created by a serious breach within the meaning of article 40."¹⁹³ To the extent that sea-level rise will adversely affect the Republic of Kiribati's territorial integrity of its ability to exercise its self-determination including by benefiting from its natural resources, inland or maritime, the recognition of such effects as legally valid will be a demand to recognize an unlawful situation contrary to Article 41(2) ARSIWA.
191. The obligation to continue to recognize Kiribati's full extent of boundaries and maritime resources is not only a measure of mitigation. It is also a free-standing right that derives from the principle of sanctity and stability of boundaries. As this Court recalled in 1978, the key element of stability and permanence of frontiers and boundaries in international law pertains also in the context of the law of the sea:

“Whether it is a land frontier or a boundary line in the continental shelf that is in *question*, the process is essentially the same, and inevitably involves the same element of stability and permanence, and is subject to the rule excluding boundary agreements from fundamental change of circumstances.”¹⁹⁴

¹⁹³ Article 41(2) ARSIWA.

¹⁹⁴ Aegean Sea Continental Shelf, Judgment, I.C.J. Rep. 1978, p. 3, ¶ 85 (Dec. 19); *see also* Rolf Einar Fife, *Sea-Level Rise in Relation to International Law: How to Protect Coastal State Rights by Operationalizing Legal Analysis*, in THE INTERNATIONAL LEGAL ORDER IN THE XXIST CENTURY: ESSAYS IN HONOUR OF PROFESSOR MARCELO GUSTAVO KOHEN, 180 (Jorge E. Viñuales, Andrew Clapham, Laurence Boisson de Chazournes, and Mamadou Hébié, eds., 2023); Alfred H.A. Soons, *The effects of sea level rise on maritime limits and boundaries*, NETHERLANDS INTERNATIONAL LAW REVIEW 37 (1990), at 217; David D. Caron, *When Law makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Sea-level*, ECOLOGY LAW QUARTERLY 17 (1990), at 635.

192. In the context of Kiribati's and other low-lying developing coastal States' dependence on the migrating tuna stocks, effective restitution and compensation require ensuring Kiribati's and similarly situated States' continued exclusive management of the stocks that have thus far been within Kiribati's and other similarly situated States' Exclusive Economic Zone. In light of other States' obligation to protect Kiribati's sovereignty and self-determination, they must desist from claiming access to such stocks and recognize Kiribati's exclusive control over those stocks. To the extent that such tuna stocks are to be seen as "stocks occurring both within the exclusive economic zone and in an area beyond and adjacent to it" in the sense of Article 63(2) UNCLOS, the States other than Kiribati fishing for such stocks in the adjacent area shall be required, as part of the reparations they owe to Kiribati, or alternatively, as part of their on-going obligation to promote Kiribati's self-determination, to accept Kiribati's exclusive authority to determine the measures necessary for the conservation of these stocks in the adjacent area.¹⁹⁵
193. Moreover, the obligation to mitigate the consequences of the Conduct by continued recognition of Kiribati's and other similarly situated low-lying developing coastal States's territorial integrity and its right to self-determination is derived from the internationally recognized human right to peoples' self-determination as enshrined in the ICCPR. As the Human Rights Committee stated in its General Comment No. 26 (1977),

"The rights enshrined in the Covenant belong to the people living in the territory of the State party. The Human Rights Committee has consistently taken the view, as evidenced by its long-standing practice, that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant."¹⁹⁶

¹⁹⁵ Article 63(2) UNCLOS: "Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area."

¹⁹⁶ CCPR, *General Comment No. 26: Continuity of Obligations Adopted at the Sixty-first Session of the Human Rights Committee*, on 8 December 1997 U.N. Doc. CCPR/C/21/Rev.1/Add.8/Rev.1 (Contained in Document A/53/40, annex VII), Art. 4; Concluding Observations of the Human Rights Committee, Serbia, U.N. Doc. CCPR/C/UNK/CO/1 (2006), Art. 4.

194. As the Kiribati people's right to self-determination is inalienable, even a physical disappearance of their land cannot amount to a legal disappearance of their right, collectively and individually. As a collective and as individuals, the Kiribati people will forever retain their "right to have rights"¹⁹⁷ secured by international law; this law forever ensures that they never become stateless.
195. The Kiribati people will continue to remain entitled to exercise their right to self-determination in their entire territory even if forced to temporarily relocate due to climate events. This right is derived from their human right to their ancestral lands which is an essential element in their identity. As the Human Rights Committee stated in its General Comment No. 26 (1977),

"The rights enshrined in the Covenant belong to the people living in the territory of the State party. The Human Rights Committee has consistently taken the view, as evidenced by its long-standing practice, that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant."¹⁹⁸

Types of Reparations: The Loss and Damage Fund

196. The creation of the Loss and Damage Fund by Parties to the UNFCCC reflects a consensus among States of the international obligation of States to provide reparations to the affected States by way of restitution, compensation and mitigation.¹⁹⁹ Such Fund must provide affected and vulnerable States adequate climate finance, technology transfer and capacity-building to enable them to adapt to the adverse effects caused by the Conduct.

The Legal Consequences of the Breach of Peremptory Norms

¹⁹⁷ See Hannah Arendt, *THE ORIGINS OF TOTALITARIANISM* (Harcourt Brace & Company, 1951).

¹⁹⁸ CCPR, General Comment No. 26 and Concluding Observations of Human Rights Committee, *supra* note 195.

¹⁹⁹ UNFCCC, Conference of the Parties, Decision 2/CP.27, *Funding arrangements for responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage*, Report of the Conference of the Parties on its twenty-seventh session, held in Sharm el-Sheikh from 6 to 20 November 2022, FCCC/CP/2022/10/Add.1 (Mar. 17, 2023).

197. The legal consequences of the violation of the right to self-determination are covered by Article 41(1)-(2) of ARSIWA. They are widely regarded as reflecting customary international law.
198. These consequences include the obligation “to bring to an end through lawful means any serious breach” and the obligation not to “recognize as lawful a situation created by a serious breach.” This implies a duty not to recognize any modification of the territory or the maritime zones of small developing island States at the time of their joining UNCLOS, and the rights and entitlements that flow from them, notwithstanding climate change-related changes. Additionally, all States must recognize the continued sovereignty of small island States, and their continuing sovereign rights in historical maritime resources despite the effects of climate change.
199. The positive obligation “to bring to an end through lawful means any serious breach” of the small developing island States’ maritime rights requires the recognition of those States’ sovereign rights in their traditional EEZ, including the fisheries. Fisheries migrating as a result from climate change must therefore continue to be subjected to those island States’ sovereignty rights.

iii. Legal Consequences with Respect to “Peoples and Individuals of the Present and Future Generations Affected by the Adverse Effects of Climate Change”

200. As described earlier, individuals, and indigenous peoples and minorities living Kiribati like those in other low-lying small developing States, are extremely vulnerable to the continued Conduct of other States. These individuals and groups are protected by general international law and specifically by international human rights law. Future generations are also affected and are equally protected by this law.
201. International human rights instruments have their own specific set of legal consequences for the breach of primary obligations. Those include the obligation to end and avoid recurrence of the violation,²⁰⁰ the obligation to provide an effective remedy for the human

²⁰⁰ UNHRC, *General Comment No. 31: The nature of the general legal obligation imposed on States Parties to the Covenant*, 80th Sess., adopted 26 May 2004, CCPR/C/21/Rev.1/Add.13, ¶ 15.

rights violation,²⁰¹ the obligation to give access to courts to obtain remedies,²⁰² the obligation to provide structural remedies.²⁰³

202. In its View in the case of *Billy v. Australia*,²⁰⁴ the Human Rights Committee found violations of Articles 17 (the right to family life) and 27 (the right to minority culture) of the ICCPR as resulting from the effects of climate change on indigenous peoples in low-lying islands. Elaborating on the legal consequences, the Committee stated that:

“[p]ursuant to article 2(3)(a) of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, inter alia, to provide adequate compensation, to the authors for the harm that they have suffered; engage in meaningful consultations with the authors’ communities in order to conduct needs assessments; continue its implementation of measures necessary to secure the communities’ continued safe existence on their respective islands; and monitor and review the effectiveness of the measures implemented and resolve any deficiencies as soon as practicable. The State party is also under an obligation to take steps to prevent similar violations in the future.”²⁰⁵

203. While these consequences address a State vis-à-vis its own citizens situated within its jurisdiction, similar consequences apply *mutatis mutandis* to citizens of other affected States, such as the people of Kiribati, whose human rights, including the rights under Articles 17 and 27 of the ICCPR have been severely affected by the Conduct of many States.
204. Of particular importance in this context is obligation to implement measures necessary to secure the Kiribati people’s and other affected communities’ continued safe existence on their respective islands, including their ability to preserve their culture and their traditional knowledge.

²⁰¹ See Dinah Shelton, ‘Human Rights, Remedies’, in *Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum, in MPEPIL, at paras. 1 – 3, available at <http://opil.ouplaw.com.ezproxy.is.ed.ac.uk/view/10.1093/law:epil/9780199231690/law-9780199231690-e1738?rkey=QnwVH0&result=2&prd=EPIL> (accessed Mar. 11, 2024).

²⁰² Francioni, Francesco (ed.), *Access to Justice as a Human Right*, Collected Courses of the Academy of European Law, (Oxford, 2007; online edn, Oxford Academic, 22 Mar. 2012), available at <https://doi.org/10.1093/acprof:oso/9780199233083.001.0001>, accessed 6 Mar. 2024.

²⁰³ UNHRC, *General Comment No. 31: The nature of the general legal obligation imposed on States Parties to the Covenant*, 80th Sess., adopted 26 May 2004, CCPR/C/21/Rev.1/Add.13, ¶ 17.

²⁰⁴ *Billy v. Australia*, *supra* note 164.

²⁰⁵ *Billy v. Australia*, *supra* note 164, ¶¶ 10 – 11.

205. The legal consequences under both general international law and international human rights law include the obligation to mitigate the consequences of the States' Conduct by securing and ensuring the capacity of the Kiribati people to maintain their livelihoods on their islands, and to benefit from food safety and water safety, to them and to their future generations.

V. CONCLUSION

206. On the basis of the foregoing considerations, the Republic of Kiribati respectfully submits that for the reasons set out in this Written Statement, the following elements should be part of the answers of the Court to the questions raised by the General Assembly in its request for an Advisory Opinion contained in Resolution 77/276:

- (1) The Court has jurisdiction to give the Advisory Opinion requested, and there are no grounds for declining to exercise such jurisdiction;
- (2) The relevant conduct of States for the purpose of this Advisory Opinion consists of:
 - (a) Acts or omissions of States over time that resulted in emission of anthropogenic GHG from activities within their jurisdiction which have caused significant harm to the climate system and other parts of the environment, as established by a scientific consensus which has been politically endorsed;
 - (b) There is sufficient evidence to identify the share of States or groups of States in causing climate harms by the GHG emissions of specific States and groups of States;
 - (c) The contributions to the climate crisis are profoundly unequal. For low-lying small island States, the relevant conduct has resulted in sea-level rise which leads to the submergence of land, increased flooding and storm surges, as well as strong tropical cyclones and the warming of seas that have a lethal impact on coral reefs, which in turn impact the fisheries and tourism, destroys freshwater resources and cultivable land, which in turn deprive the people in Kiribati and in other low-lying island States of their means of subsistence, of safe access to drinking water, sanitation and food security, and impair the ability to exercise control over parts of the islands and natural resources;
 - (d) States whose acts and omissions resulted in massive GHG emissions and thereby caused significant harm to the climate system and other parts of the environment knew or should have known the implications of their conduct at least from the 1960s onwards. This is also the time period when the bulk of GHG emissions were released; and
 - (e) The relevant conduct encompasses also the failure of States to take measures within their power to mitigate the consequences of such harms in their

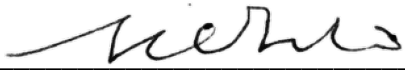
jurisdiction and beyond, regardless of their past contributions to the crisis. This is due to the fact that the relevant conduct also extends to current and future conduct necessary to prevent or mitigate further harms, including the ongoing management of the remaining global carbon budget.

- (3) The relevant conduct's effects on Kiribati and other low-lying small developing States entails the violation of several legal obligations incumbent upon States:
 - (a) The obligation not to cause significant harm to other States or to common resources, which include the atmosphere and the marine environment, and the global carbon budget;
 - (b) The obligation not to use more than an equitable and reasonable share of common resources;
 - (c) The obligation to respect and promote the equal rights of other states and their right to continue exercising their right to self-determination; particularly the obligation toward those States that are specifically affected by the relevant conduct, and particularly toward low-lying small island States whose territorial integrity is endangered as a result of that conduct, and toward peoples whose exercise of their right to self-determination and to control their natural resources is jeopardized as a result of that conduct;
 - (d) The obligation to positively promote the self-determination of the people of Kiribati and of other low-lying small island States, in line with the obligation of due diligence and the principle of common but differentiated responsibilities;
 - (e) The obligation, regardless of States' past conduct, to act positively to mitigate the harsh consequences of any such conduct, at least by recognizing the existing rights of States whose control of certain parts of their land territory or other natural resources is precluded as a consequence of the conduct;
 - (f) The obligation incumbent on all States to accept that the integrity of all States is inviolable and their entitlement to self-determination is inalienable;
 - (g) The obligation to respect and protect the international human rights of individuals outside States' jurisdiction when they exercise jurisdiction within their national territory and that exercise of jurisdiction causes human rights violations to persons residing abroad; and
 - (h) More specifically, the obligation to respect and protect the rights to life, to family and community life, and to self-determination, of individuals affected by the Conduct.
- (4) The legal consequences of the breaches of those legal obligations include:
 - (a) The immediate the cessation of the conduct, when a State or group thereof is still displaying it, and reparation, by all States that have taken part in that conduct;

- (b) In the context of Kiribati and other low-lying developing island States, the fulfilment of the requirements of restitution and compensation will necessitate support for mitigation and adaptation measures, effective redress for the human toll caused by the relevant conduct, and the continued recognition of the sovereignty, statehood, territory and maritime spaces of low-lying small island developing States;
- (c) The obligation of mitigation covers also States' obligations that result from prospective conduct which amount to unequitable or unreasonable consumption of the remaining carbon budget, or who otherwise do not promote the low-lying developing island States' right to self-determination;
- (d) As part of mitigation measures, all States must continue to recognize the sovereignty, statehood, territory and maritime spaces of the Republic of Kiribati and other small island developing States.
- (e) In the context of Kiribati's and other low-lying developing coastal States' dependence on the migrating tuna stocks, effective restitution and compensation require ensuring Kiribati's and similarly situated States' continued exclusive management of the stocks that have thus far been within their Exclusive Economic Zones. In light of other States' obligation to protect Kiribati's sovereignty and self-determination, they must desist from claiming access to such stocks and recognized those island States' exclusive control over those stocks;
- (f) The obligation to mitigate the consequences of the wrongful conduct by continued recognition of Kiribati's and other similarly situated low-lying developing coastal States' territorial integrity and their right to self-determination is derived from the internationally recognized human right to peoples' self-determination as enshrined in the ICCPR;
- (g) The creation of the Loss and Damage Fund by Parties to the UNFCCC reflects a consensus among States of the international obligation of States to provide reparations to the affected States by way of restitution, compensation and mitigation. Such Fund must provide affected and vulnerable States adequate climate finance, technology transfer and capacity-building to enable them to adapt to the adverse effects caused by the wrongful conduct; and

- (h) The obligation to mitigate the consequences of the States' wrongful conduct entails securing and ensuring the peoples of low-lying coastal developing States' and peoples' continued safe existence on their respective islands, their capacity to maintain their livelihoods on their islands, to preserve their culture and their traditional knowledge, to them and to their future generations.

22nd March 2024



Hon. Teburoro Tito

Kiribati Ambassador to the United Nations

LIST OF ANNEXES

Annex 1: Expert Report for Kiribati from the Pacific Community (SPC).

Annex 2: Statements

1. Mr. Kaon Tiamere, Director of Oceanic Fisheries Division, Ministry of Fisheries and Marine Resources Development
2. Mr. Brian Ritang, Betio Community, Betio Villlage
3. Mr. Timereta Eria, Tebikenikoora Community, Eita Village
4. Mrs. Kinaai Kairo, Director of Agriculture, Ministry of Environment, Lands and Agricultural Development
5. Ms. Kautunnata Kobia, Nurse Aid at Tebunginako Village, Abaiang Island
6. Ms. Bubunrenga Ieu, Youth rep of Tebunginako Village, Abaiang Island
7. Mr. Katimero Nawere, Elder of Te Nei Community, Temwaiku Village
8. Mr. Joseph Charles, Youth rep of Te Nei Community, Temwaiku Village
9. Dr. Alfred Tonganbeia, Officer in Charge of Public Health, Ministry of Health, and Medical Services
10. Mr. Ueneta Toorua, Director of Kiribati Meteorological Service
11. Mrs. Ruita Teiabauri, Office in Charge for Kiribati Lands Division, Ministry of Environment, Lands and Agricultural Development
12. Mr. Kiaitonga Burera, Tebunginako Village, Abaiang Island
13. Mr. Choi Yeeting, Director of Climate Change & Disaster Risk Management- Office of Te Beretitenti