INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

(REQUEST BY THE UNITED NATIONS GENERAL ASSEMBLY FOR AN ADVISORY OPINION)

WRITTEN COMMENTS OF THE COOK ISLANDS

15 AUGUST 2024

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I. INTRODUCTION

1. Pursuant to the Order of the President of the International Court of Justice (‘**the Court**’) of 20 April 2023, and the Court’s letter of 2 February 2024 authorizing the Cook Islands to present a written statement and written comments, the Cook Islands hereby submits its written comments (‘**Written Comments**’) on the written statements presented in connection with the request for an advisory opinion contained in UN General Assembly Resolution 77/276 (‘**UNGA Resolution 77/276**’) adopted by consensus on 29 March 2023.

2. It is recalled that, in the UNGA Resolution 77/276, the UNGA has requested the Court to render an advisory opinion on the following two questions:

“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;

(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?"

3. In these Written Comments, the Cook Islands focuses on reiterating and building on its submissions in its Written Statement and responding to the submissions made by other States and organisations in their written statements. More specifically, these Written Comments endorse and build on the submissions of other participants, particularly those of fellow small island developing States which honour the spirit of climate justice underpinning the UNGA Resolution 77/276, and accordingly, respectfully rebut the contrary submissions of other States and organisations which undermine climate justice.

4. These Written Comments are divided into five further chapters as follows:

- **a.** **Chapter II** presents the Cook Islands' views on the Court's discretion to decline to render the requested advisory opinion. More specifically, in this chapter, the Cook Islands respectfully submits that contrary to the arguments and suggestions from other participants, the existence of ongoing negotiations within the UN Framework Convention on Climate Change ('**UNFCCC**') is not a compelling reason for the Court to exercise its discretion to decline to render the requested opinion, or moreover, limit how it renders its opinion on the two questions put to it.

- **b.** **Chapter III** presents the Cook Islands' views on the correct characterization of the conduct of States that are of concern in these proceedings and that underpin the two questions put to the Court. More specifically, in this chapter, the Cook Islands endorses and concurs with the characterizations of the conduct of concern from fellow small island developing States, namely the Republic of Vanuatu ('**Vanuatu**'), the Republic of Kiribati ('**Kiribati**'), the Republic of Palau ('**Palau**'), and the Republic of Costa Rica ('**Costa Rica**'), and rebuts the contrary characterizations other participants offer. Additionally, the Cook Islands respectfully submits that another type of conduct of concern in these proceedings is States' conduct regarding the support, assistance and financing of adaptation actions.

c. **Chapter IV** presents the Cook Islands' views on the applicable law for the present proceedings. More specifically, in this chapter, the Cook Islands respectfully submits that in regard to Question (a) concerning the legal obligations of States in respect of climate change ('**Question (a)**'), the Court should reject the submissions of other participants which argue that the applicable law governing the obligations of States is limited to the laws contained in the UNFCCC, including the Paris Agreement. Then, in regard to Question (b) concerning the specific legal consequences for breaching these obligations (**'Question (b)**'), the Cook Islands respectfully submits that the Court should reject the submissions of participants which argue that the Draft Articles on the Responsibility of States for Internationally Wrongful Acts ('**ARSIWA**') are inapplicable or have limited applicability.

d. **Chapter V** presents the Cook Islands' views on Question (a). More specifically, in this chapter, the Cook Islands emphasizes the importance of States' human rights obligations arising from the prohibition of racial and gender discrimination, and respectfully submits that these obligations can be synthesized with other obligations, including the obligations the Cook Islands proposes in its Written Statement.

e. **Chapter VI** presents the Cook Islands' views on Question (b). Specifically, in this chapter, the Cook Islands submits that the two types of States' conduct that **Chapter III** characterizes effectively breach States' obligations in respect of climate change and submits some of the specific legal consequences that apply to these breaches.

f. **Chapter VII** summarizes the conclusions reached by these Written Comments.

II. THE DISCRETION OF THE COURT

5. A key issue emerging from the written statements is the differing views around how the Court should exercise its discretion to decline to render the requested advisory opinion on the two questions put to it in light of ongoing negotiations within the UNFCCC.

6. The Cook Islands and other small island developing States, including **Vanuatu**, the Kingdom of Tonga ('**Tonga**'), the Federated States of Micronesia ('**Micronesia**'), the Republic of Seychelles ('**Seychelles**') and Grenada ('**Grenada**'), broadly argue that there are no compelling reasons why the Court should exercise its discretion not to render the requested advisory opinion.

7. However, other participants broadly argue, or at least strongly suggest, that the Court should exercise its discretion to limit how it renders the requested advisory opinion on the questions put to it due to the existence of ongoing negotiations within the UNFCCC. Some examples of these arguments and suggestions include:

a. **The Organization of the Petroleum Exporting Countries** ('**OPEC**'): *"Where no clear international consensus exists on an issue of international law, international tribunals should refrain from declaring obligations or legal consequences to govern States' conduct or accept subjective views of the law as a valid source for all States."*[1]

b. **The Kingdom of Saudi Arabia** ('**Saudi Arabia**'): *"[T]he Court should take care in exercising its jurisdiction because of the political nature of ongoing negotiations on the international law of climate change."*[2]

c. **Canada**: *"While recognizing that States have obligations related to climate change under other treaties, Canada reiterates that these treaties should not be interpreted as imposing international legal obligations on States that are*

[1] Written Statement of the OPEC, para. 23.
[2] Written Statement of Saudi Arabia, para. 3.5.

contrary to those carefully negotiated through the climate change regime. Doing so would undermine the effectiveness of the UN Climate Change Process, which is the opposite of what the world needs to achieve."[3]

8. The Cook Islands respectfully submits that the Court should reject these arguments and suggestions. This is on the grounds that four of the Court's previous opinions strongly support it exercising its discretion to answer the questions put to it while participants in the present proceedings engage in negotiations within the UNFCCC as follows:

a. In *Legality of the Threat or Use of Nuclear Weapons*, some participants argued in their submissions that an advisory opinion from the Court *"might adversely affect disarmament negotiations and would, therefore, be contrary to the interest of the United Nations."*[4] The Court did not accept that the existence of ongoing negotiations provided a compelling reason to decline to exercise its jurisdiction and instead noted that its opinion would *"present an additional element in the negotiations on the matter."*[5] Similarly, the Cook Islands respectfully submits that there are no compelling reasons why the requested opinion would adversely affect UNFCCC negotiations. Further, the Cook Islands submits that the requested opinion would provide helpful authoritative legal guidance as an additional element in such negotiations.

b. In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, some participants argued that an advisory opinion from the Court "*could impede a political, negotiated solution to the Israeli-Palestinian conflict"* by undermining the 2003 roadmap towards a two-State solution that was endorsed by the UN Security Council, or otherwise "*complicate the negotiations*" under that roadmap.[6] The Court found that this roadmap did not provide a compelling reason for it not to render the requested opinion, and

[3] Written Statement of Canada, para. 38.
[4] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* I.C.J. Reports 1996, p. 226, para.17.
[5] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* I.C.J. Reports 1996, p. 226, para.17.
[6] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion,* I.C.J. Reports 2004, p. 136, para. 51.

said it was "*conscious*" that the roadmap "*constitute[d] a negotiating framework*" and that participants had "*expressed differing views*" as to "*what influence the Court's opinion might have on those negotiations.*"[7] The Cook Islands respectfully submits that in rendering the requested opinion, the Court can be similarly conscious of the UNFCCC negotiations, rather than cite the negotiations as a reason to decline to answer the questions put to it.

c. In *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, some participants argued that "*the time frame for completing the decolonization of Mauritius is a matter for bilateral negotiations to be conducted between Mauritius and the United Kingdom*."[8] The Court took the view that the existence of these bilateral negotiations did not restrict the Court's interpretation of the question, but rather formed the practical backdrop for its authoritative guidance. The Cook Islands respectfully submits that *Chagos* is particularly relevant to the present proceedings because it shows the correct relationship between an advisory opinion and any relevant ongoing negotiations, where negotiations can form the practical backdrop for courts in providing its authoritative guidance. Specifically, *Chagos* made clear how the existence of negotiations can be key to the Court's susbstantive responses on the questions put to it, where it found that the United Kingdom had "*an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible*" and that "*all Member States must co-operate with the United Nations to complete the decolonization of Mauritius*."[9] Importantly, the Court made a similar comment in the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* case, that it can be

[7] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion,* I.C.J. Reports 2004, p. 136, para. 54.
[8] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion,* I.C.J. Reports 2019, p. 95, para. 176.
[9] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion,* I.C.J. Reports 2019, p. 95, para. 182.

conscious of ongoing negotiations as part of the "*actual framework of law and fact*" to give a "*pertinent and effectual reply.*"[10]

d. In *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, some participants contended that the Court should decline to reply to the questions put to it as an advisory opinion would *"interfere with the Israeli-Palestinian negotiation process"* and *"may exacerbate the Israeli-Palestinian disagreement, thereby compromising the outcome of negotiations."*[11] In response, the Court stated that *"the question of whether the Court's opinion would have an adverse effect on a negotiation process is a matter of conjecture. The Court cannot speculate about the effects of its opinion."*[12] The Cook Islands respectfully submits that the arguments and suggestions of the **OPEC**, **Saudia Arabia** and **Canada** similarly suggest that the Court should speculate about whether the requested opinion would negatively impact ongoing negotiations within the UNFCCC and the Court should reject such suggestions accordingly.

9. Furthermore, the Cook Islands respectfully submits two reasons why the Court should reject any other argument and suggestion that it should in any way limit its discretion in rendering the requested opinion because of the political nature of the questions put to it:

a. **First**, the Cook Islands respectfully submits that the political nature of the questions put to the Court is not a relevant consideration for the Court when it is deciding whether or not to render an advisory opinion. This was made clear by the Court in the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* case, in which it acknowledged that

[10] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion,* I.C.J. Reports 1980, p. 73, para. 10.
[11] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, I.C.J. Reports 2024, p. 18, para. 38.
[12] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, I.C.J. Reports 2024, p. 18, para. 40.

obtaining an advisory opinion may be "*particularly necessary*" to clarify "*the legal principles applicable with respect to the matter under debate*".[13]

b. **Second**, the Cook Islands respectfully submits that the Court should recognise that the UNGA has made clear the significant political usefulness and importance of this particular request for an advisory opinion by passing the UNGA Resolution 77/276 *by consensus*. Importantly, the Court in the *Kosovo* advisory opinion emphasized that it is unwilling to undermine or second-guess the UNGA's judgement on the political usefulness of an advisory opinion, remarking that: *"Just as the Court cannot substitute its own assessment for that of the requesting organ in respect of whether its opinion will be useful to that organ, it cannot — in particular where there is no basis on which to make such an assessment — substitute its own view as to whether an opinion would be likely to have an adverse effect."*[14]

10. Therefore, the Court has provided clear guidance on how it should exercise its discretion in circumstances of negotiation processes and has also made it clear that it strongly supports the provision of an advisory opinion that gives comprehensive legal guidance to ensure that all participants are fully apprised of their rights and obligations under international law. Therefore, to argue that the Court should limit how it exercises its discretion in the present advisory proceedings because of ongoing UNFCCC negotiations, would be to argue that the Court should contradict its own guidance on the importance of its advisory function alongside negotiation processes. Furthermore, the political nature of the questions put to the Court is irrelevant to whether and how the Court exercises its discretion to render an advisory opinion. Also, the fact that the UNGA Resolution 77/276 was passed by the UNGA by consensus shows universal agreement on the significant political usefulness of the request.

[13] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt,* Advisory Opinion, I.C.J. Reports 1980, p. 73, para. 33.
[14] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, I.C.J. Reports 2010, p. 403, para.35.

III. THE RELEVANT CONDUCT OF STATES

A. Chapter outline

11. A key issue emerging from the written statements is the differing characterizations of the conduct of States that are of concern in these proceedings and that underpin the two questions put to the Court.

12. Some participants, including several small island developing States, like **Vanuatu**, **Kiribati**, **Palau**, and **Costa Rica**, broadly characterize the conduct of concern as consisting of acts and omissions of States that have resulted over time in a level of anthropogenic greenhouse gas emissions ('**GHG emissions**') which caused significant harm to the climate system and other parts of the environment ('**Relevant Conduct regarding GHG emissions**').[15] For example, **Vanuatu** succinctly characterizes the Relevant Conduct regarding GHG emissions as follows:

> *"[The] Relevant Conduct consists of acts and omissions of individual States – and of a specific group thereof – that have resulted over time in a level of anthropogenic GHG emissions from activities within their jurisdiction or control which have interfered with the climate system and other parts of the environment to an extent which amounts to at least significant harm to the latter,* ***whether or not the anthropogenic GHG emissions of a given State over time are the only or the main cause of climate change, and whether or not they are the only or the main cause of the specific "harm suffered by another State, people or individual****."*[16]

[15] See Written Statement of Vanuatu, Chapter III; Written Statement of Palau, paras. 3, 13, 16-17; Written Statement of Kiribati, paras. 90-106; Written Statement of Costa Rica, paras. 103-114; Written Statement of the OACPS, paras. 32-36.

[16] Written Statement of Vanuatu, para. 65 (**emphasis added**).

13. In contrast, other participants like the **USA** and the **OPEC** characterize the conduct of concern as consisting of specific acts and omissions that can be directly attributed to specific adverse effects of climate change.[17]

14. In this chapter, the Cook Islands concurs with and endorses **Vanuatu's** characterization of the Relevant Conduct regarding GHG emissions as one type of conduct of concern for these proceedings. Accordingly, the Cook Islands respectfully submits that the Court should reject the contrary characterizations from the **USA** and the **OPEC**.

15. Additionally, the Cook Islands respectfully submits that another type of Relevant Conduct of States of concern in the present proceedings consists of acts and omissions regarding supporting, assisting and financing adaptation actions ('**Relevant Conduct regarding adaptation actions**').[18]

16. Accordingly, this chapter is divided into three further parts as follows:

a. **Part B** presents the Cook Islands' submission that the Relevant Conduct regarding GHG emissions correctly characterizes one type of conduct of States of concern in these proceedings.

b. **Part C** presents the Cook Islands' submission that the contrary characterizations of the conduct of concern from the **USA** and the **OPEC** should be rejected by the Court.

c. **Part D** presents the Cook Islands' submission that the Relevant Conduct of States also includes the Relevant Conduct regarding adaptation actions.

[17] See Written Statement of the USA, paras. 2.20-2.26, 4.15-4.21, 5.7-5.10, Written Statement of the OPEC, paras. 112-120.

[18] In doing so, the Cook Islands acknowledges that there are other types of Relevant Conduct that is also of concern in these proceedings, includes, but not limited to, the conduct of States regarding loss and damage. However, for these proceedings, the Cook Islands' Written Statement and Written Comments focuses on the Relevant Conduct regarding adaptation actions, as well as the Relevant Conduct regarding GHG emissions.

B. The Relevant Conduct regarding GHG emissions

17. The Cook Islands respectfully submits the Relevant Conduct regarding GHG emissions correctly characterizes one type of conduct of States that the Court is concerned with in these proceedings. This is on the grounds that this characterization reflects and demonstrates a cogent interpretation of the text of the UNGA Resolution 77/276.

18. Specifically, the following parts of the text of the UNGA Resolution 77/276 make clear that the Relevant Conduct of States regarding GHG emissions correctly characterizes one type of conduct of concern as follows:

- **a.** Preambular paragraph 5 *"emphasizes the importance"* of a number of treaties and sources of international law "*to the conduct of States **over time** in relation to activities that **contribute to** climate change and its adverse effects*". This indicates that the Court is being asked to draw on these sources of international law to advise on this conduct of States that *"over time...contribute to"* the adverse effects of climate change, rather than specific acts or omissions with specific adverse effects, as **Vanuatu's** characterization of the Relevant Conduct regarding GHG emissions clearly captures.

- **b.** Preambular paragraph 9 notes with *"utmost concern"* the scientific consensus of the IPCC that "*anthropogenic emissions of greenhouses gases are unequivocally the dominant cause of the global warming observed since the mid-20th century"*. It is important to note that the IPCC Glossary defines "*anthropogenic emissions*" as GHG emissions from several "*human activities*", including "*the burning of fossil fuels, deforestation, land use and land use changes (LULUC), livestock production, fertilisation, waste management, and industrial processes*." This indicates that the conduct of States that the Court is being asked to advise on encompasses a range of *"human activities"* that lead to "*anthropogenic emissions*" as GHG emissions, which again, **Vanuatu's** characterization of the Relevant Conduct regarding GHG emissions captures.

c. Question (a) asks the Court to advise on *"obligations of States....to ensure the "protection of the* ***climate system*** *... from anthropogenic emissions of greenhouse gases"*. The IPCC glossary defines the "*climate system*" as the global system consisting of (interactions between) the atmosphere, the hydrosphere, the cryosphere, the lithosphere, and the biosphere, which **"*changes in time"*** under the influence, *inter alia*, of "*anthropogenic forcings such as the changing composition of the atmosphere and land-use change"*. This again indicates that one type of conduct of States that the Court is concerned with is conduct which contributes to *"anthropogenic forcings"* through GHG emissions which results in *"changes in time"* or over time to the climate system. Again, **Vanuatu's** characterization of the Relevant Conduct regarding GHG emissions captures this.

d. Question (b) asks the Court to advise on 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*". This confirms that one type of conduct the Court is concerned with are acts and omissions that have contributed to GHG emissions to such an extent that crosses the threshold of *"significant harm"*, which **Vanuatu's** characterization of the Relevant Conduct regarding GHG emissions captures clearly.

19. In addition to endorsing **Vanuatu's** characterisation of the Relevant Conduct regarding GHG emissions, the Cook Islands endorses **Vanuatu's** view that the Court may choose to address the Relevant Conduct regarding GHG emissions generally without reference to one or more specific States or a group thereof.[19] As **Vanuatu** notes, precedent for this approach can be found in the Court's advisory opinion on the *Legality of Nuclear Weapons* for which the Court was asked by the UNGA in Resolution A/RES/49/75K to advise about the permissibility *"under international law"* of the *"threat or use of nuclear weapons"* with regard to *"any circumstance"*.[20] Notably, Resolution A/RES/49/75K did

[19] Written Statement of Vanuatu, paras. 155-156.
[20] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* I.C.J. Reports 1996, p. 226, para. 1.

not specify any individual State or group thereof or, still, any specific set of circumstances of threat or use.[21] In its opinion, the Court addressed the conduct in general, at times distinguishing between *"nuclear-weapon States"* and *"non-nuclear-weapon States"* as well as identifying other relevant subjects such as individual bearers of the human right to life.[22] Accordingly, the Cook Islands respectfully submits that in its advisory opinion for the present proceedings, the Court may address the legality of the Relevant Conduct in general terms, as it did in its advisory opinion on the *Legality of Nuclear Weapons*. The Court may also choose to refer to specific States for the purposes of illustration only, rather than to articulate a State or States' particular liability for reparations for specific harms which would go beyond the current advisory proceeding. In making such illustrative points, the Court may wish to refer to the parts of **Vanuatu's** written statement which provide the Court with specific empirical information to identify who are the main State emitters of GHG, individually and collectively,[23] and the share of both emissions and global warming for which each of them (and groups thereof) is responsible.[24]

C. The Court is not being asked to attribute conduct of States to specific adverse effects of climate change

20. The **USA** and the **OPEC** characterize the conduct of concern in the present proceedings as consisting of specific acts and omissions that can be directly attributed to specific adverse effects of climate change.

22. This characterization is evident in the following excerpt from the **OPEC's** written statement:

> *"There are...a myriad of factors that have impacted the climate system. Many of these causes are historical, like the exponential increase in emissions due to*

[21] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* I.C.J. Reports 1996, p. 226, para. 1.
[22] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* I.C.J. Reports 1996, p. 226, paras. 24-25, 60-63.
[23] Written Statement of Vanuatu, paras. 151-154, 162-170, 177-192.
[24] Written Statement of Vanuatu, paras. 162-170.

the Industrial Revolution, revealing some of its effects today, and others through natural causes. ***Thus to establish that States are to be liable for damage to the environment individually or collectively, is misleading and lacks the preciseness that rulings on these matters require before declaring a judgment.***

Correspondingly, ***legal consequences for States by acts or omissions causing harm to the climate system and broader environment is to consider the interconnectedness of causal relationships between degradation to the climate system and acts or omissions over a considerable span of time throughout history*** *... The answer to the second question presented to the Court about legal consequences is to thus defer to States' agreed upon self-contained special provisions in the primary sources of international law, the UNFCCC, Kyoto Protocol and Paris Agreement."*[25]

23. Similarly, the **USA** posits that no legally relevant connection can be drawn between the manifold sources of GHG emissions "*in every country and every part of the world"* and *"the harm caused by anthropogenic climate change*", whether through extreme weather events or slow-onset events.[26] The **USA's** written statement expresses this position in the following three ways:

a. **First**, in its strong emphasis on the uncertainties arising from attributing climate change to GHG emissions from a particular source, event attribution (attributing specific events to climate change), and *"attributing particular harms to anthropogenic climate change."*[27]

b. **Second**, in its argument for the exclusion of GHG emissions from a State's due diligence duty to prevent significant harm to the environment because the alleged complexity of source and event attribution regarding climate change.[28]

[25] Written Statement of the OPEC, paras. 117-119 (**emphasis added**).
[26] Written Statement of the USA, paras. 4.17–4.19.
[27] Written Statement of the USA, paras. 2.20–2.26.
[28] Written Statement of the USA, paras. 4.15–4.21.

c. **Third**, in its strong emphasis on the alleged difficulty in drawing a causal link between the specific breach of an obligation and any injury caused by climate change for the purpose of reparation.[29]

24. The Cook Islands respectfully submits that the Court should reject the **OPEC's** and the **USA's** broadly similar characterization of the conduct of concern. This is on the grounds that this characterization reflects and demonstrates a misinterpretation of the text of the UNGA Resolution 77/276. As result, the characterization overstates the evidential complexities the Court faces in addressing the two questions put to it.

25. To support this submission, the Cook Islands respectfully reiterates its endorsement of **Vanuatu's** characterization of the Relevant Conduct regarding GHG emissions as reflecting a correct interpretation of the text of the UNGA Resolution 77/276, and respectfully submits the following points around the misinterpretations evident in the above submissions by the **OPEC** and the **USA**:

a. Nowhere in the preambular paragraphs of the UNGA Resolution 77/276 is it suggested that the Court is being asked to be concerned with specific acts and omissions of specific States that can be directly attributed to climate change and its specific adverse effects.

b. It is important to note that Question (a) asks the Court to advise on the *"legal obligations...to ensure the protection from anthropogenic emissions of greenhouse gases*" in broad terms and does not ask the Court to advise on obligations of specific States around acts and omissions that can be directly attributed to climate change and its specific adverse effects.

c. Similarly, Question (b) asks the Court to advise on the "*legal consequences under these obligations for States where they, by their acts and omissions, have*

[29] Written Statement of the USA, paras. 5.7–5.10.

caused significant harm to the climate system and other parts of the environment". It does not ask the Court to advise on the liability of a State or specific States for particular legal consequences regarding their specific acts and omissions that can be directly attributed to specific adverse effects of climate change, and for the Court to order specific consequences on specific States to repair particular injuries.

26. To further clarify the nature and scope of the conduct of States the Court is concerned with in the present proceedings, the Cook Islands respectfully notes that in other future contentious proceedings, States, peoples, or individuals can ask the Court or other courts and tribunals to look into the liability of a particular State or States for specific acts and omissions of States which can be directly attributed to climate change and its specific adverse effects on States, peoples or individuals – and accordingly, request the Court to order particular consequences and reparations for injuries suffered in those proceedings. However, the text of the UNGA Resolution 77/276 makes clear that this is not what the UNGA is asking the Court to do in these advisory proceedings.

D. The Relevant Conduct regarding adaptation actions

27. The Cook Islands respectfully submits that the Relevant Conduct of States also consists of acts and omissions regarding supporting, assisting and financing adaptation actions. This is on the grounds that the text of the UNGA Resolution 77/276 clearly indicates that the Court is to be concerned with such conduct, as the Cook Islands outlines in the following five arguments below:

28. **Firstly**, preambular paragraph 11 of the UNGA Resolution 77/276 explicitly emphasizes the urgency of States' conduct and obligations regarding supporting adaptation actions as follows:

> "Emphasizing *the* ***urgency of scaling up action and support, including finance, capacity-building and technology transfer, to enhance adaptive capacity and to implement collaborative approaches for effectively responding to the***

***adverse effects of climate change**, as well as for averting, minimizing and addressing loss and damage associated with those effects **<u>in developing countries that are particularly vulnerable to these effects</u>**,"*[30]

The Cook Islands argues that this paragraph makes explicitly clear the UNGA's intention to include States' acts and omissions around supporting, assisting and financing adaptation actions within the ambit of the types of conduct that it wants the Court to advise on in the requested opinion.

29. **Secondly**, preambular paragraphs 6 and 7 of the UNGA Resolution 77/276 reference the UNFCCC and the Paris Agreement, which both contain several obligations of States regarding adaptation actions.[31] Importantly, there is no implicit or explicit indication in these two paragraphs that the applicable law for these proceedings from the UNFCCC and Paris Agreement is strictly limited to the obligations they contain regarding the mitigation of GHG emissions, nor any indication that obligations regarding adaptation actions are to be excluded and rendered inapplicable. Therefore, the Cook Islands argues that States' acts and omissions regarding adaptations actions, which may be governed at least in part by States' obligations contained in the UNFCCC and the Paris Agreement, are included within the Relevant Conduct of States.

30. **Thirdly**, preambular paragraph 5 of the UNGA Resolution 77/276 explicitly emphasizes the importance of specific instruments like the United Nations Convention on the Law of the Sea ('**UNCLOS**'), the Convention on Biological Diversity ('**CBD**') as well as *"other instruments and ... customary international law"* to *"the conduct of States"* as follows:

"Emphasizing *the importance of ... the United Nations Convention on the Law of the Sea, ... the Convention on Biological Diversity, ...* ***<u>among other</u>***

[30] The same text was adopted by the Meeting of the Parties of the Paris Agreement, see Decision 1/CMA.3, para. 7; and was reiterated again in the Glasgow Climate Pact, see Decision 1/CP.26: Glasgow Climate Pact, FCCC/CP/2021/12/Add.1, para. 6.

[31] UNFCCC, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107, arts. 3(3), 4(1)(b)(e)(f), 4(4); "The Paris Agreement", Decision 1/CP.21, 12 December 2015, FCCC/CP/2015/10/Add.1 ('**Paris Agreement**'), arts. 7, 9 and 11.

***instruments**, and of the relevant principles and relevant obligations of customary international law ... **to the <u>conduct of States</u> over time in relation to activities that contribute to climate change and its adverse effects**,"*

Importantly, there is no implicit or explicit indication in this paragraph that the applicable law for these proceedings from these instruments and customary international law is strictly limited to the obligations and broader laws they contain regarding GHG emissions and mitigation. Therefore, the Cook Islands argues that States' acts and omissions regarding adaptations actions, which may be governed at least in part by States' obligations contained in the UNCLOS, the CBD, and *"other instruments"* such as the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction ('**BBNJ Agreement**'), are included within the Relevant Conduct of States the Court is concerned with in these proceedings. This is especially because these acts and omissions also *"over time...**contribute to climate change and its adverse effects**"* as the Cook Islands argues in more depth in these Written Comments at **Chapter VI, Part C below**.

31. **Fourthly**, the Cook Islands argues that another reason why States' acts and omissions regarding adaptation actions fall within the ambit of Question (a) is that the fulfilment of States' obligations regarding adaptation actions is undoubtedly required *"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"* as stated in text of Question (a). This reality is made clear in the following two supporting documents the Cook Islands is providing to the Court, which clearly explain why States must fulfil their specific adaptation obligations to support, assist and finance the use and implementation of traditional knowledge in adaptation actions *"to ensure the protection of the climate system..."*:

a. Liam Koka'ua's expert report emphasizes the specific importance of State's conduct regarding the use and implementation of traditional knowledge in adaptation action for the protection and "*survival*" of the climate system from the impacts of climate change through effective adaptation actions as follows:

> *"**[T]raditional knowledge is much more suited to identifying extraordinary changes at the local scale, these may include changes in climate, biodiversity, soil health, and water quality.** This is due to the continued ability of indigenous peoples to observe the traditional signs (i.e. environmental indicators) on a daily basis, during everyday activities (such as fishing and planting) and to compare these daily observations with hundreds if not thousands of years of ancestral knowledge which has been passed down through the generations.*
> *[...]*
> *Therefore, the Cook Islands must have the resources and support needed to scale up our integration of traditional knowledge in climate adaptation for the following two reasons:*
>
> > *(1) Science in conjunction with traditional knowledge would be the most effective method to understand the impacts of climate change, especially in specific localities where indigenous peoples continue to exercise guardianship in their territories...*
> >
> > *(2) In the context of climate change adaptation, utilising traditional knowledge will allow for a focus on the localised aspects of the environment and climate which are most relevant for indigenous peoples, such as food security....*
> > *[...]*
> > *There is also a need for more acknowledgement by ... funders, and non-Indigenous politicians and community leaders around the world, that **traditional knowledge is <u>essential</u> to not only climate change adaptation but the <u>survival</u> of our species,***

especially so on remote landmasses in the middle of large oceans*."*[32]

b. Dr Teina Rongo's written testimonial in support of the Cook Islands' Written Statement notes the critical importance of using and implementing traditional knowledge in adaptation actions to *"ensure the protection of the climate system and other parts of the environment"* as follows:

> *"**I believe that traditional knowledge is important in combatting climate change.** This knowledge was developed by people living and adapting to their environments for centuries; they knew the most sustainable way to live in a space they called home. For example, while the pa'i taro (taro patches) provide us food, by using it, **we protect this habitat from being developed to maintain the ecosystem service it provides**. Wetland areas where taro is planted play a role in soaking up the nutrients from land; by the time runoff water enters the lagoon, the nutrients in the water are removed by the plants that grow in the pa'i taro habitat, thus preventing nutrients from reaching the lagoon and causing problems ... **We are trying to go back to traditional lifestyles to help combat climate change impacts.** People have a responsibility to take care of their own immediate and local environments."*[33]

32. **Fifthly**, the Cook Islands argues that the States' acts and omissions regarding adaptation actions fall within the ambit of Question (b), which to recall, asks the Court: *"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..."*. This is on the grounds that various acts and omissions of States have contributed to *"significant harm to the environment"* by impeding, undermining or

[32] Liam Kokaʻua, *Traditional Knowledge and Climate Change Adaptation in the Cook Islands - Expert Report by Liam Kokaʻua*, 5 July 2024, pp. 4-5, 10 (**Annex No. 1**). This expert report expands on the written testimony Liam Kokaʻua wrote in support of the Cook Islands' Written Statement.

[33] Written Statement of the Cook Islands, para. 112, Annex No. 9: Teina Rongo, *Testimony of Teina Rongo Impacted by the Effects of Climate Change*, 14 March 2024, paras. 18-19.

inhibiting the adaptation actions that States, peoples and individuals need to adapt to the adverse effects resulting from the *"significant harm to the environment"* caused by the Relevant Conduct regarding GHG emissions. In other words, States' acts and omissions regarding adaptation actions have effectively deprived, and continues to deprive, States, particularly small island developing States, and peoples and individuals therein, of the protection that such adaptions would provide to them and the wider "*climate system and other parts of the environment..."* against the *"significant harm"* of GHG emissions. The Cook Islands argues that such acts and omissions, at the very least, helps to maintain such *"significant harm"* if not exacerbate it, thus effectively <u>contributing to</u> such *"significant harm"*. This argument is supported by the following sources:

a. The following excerpt from Koka'ua's expert report which strongly emphasizes *"the significant harm to the climate system and other parts of the environment"* caused by States' acts and omissions regarding adaptation actions:[34]

> *"**If ... recognition, support, and integration of traditional knowledge is not provided, <u>there will continue to be significant harm inflicted on the Cook Islands due to climate change</u>, and we will continue to receive technical advice or infrastructure which is not fit for purpose.** These costly gifts of support will not necessarily focus on what matters to the indigenous communities, for example, food security, cultural vitality, or holistic wellbeing. For example we are likely to receive climate infrastructure which is ill-placed, not taking into account wind and wave patterns, flood-prone areas, or the seasonal movements of animals. Or we may receive recommendations on crops and animals which are ill-suited for our climate or that people are not accustomed to eating or processing. While people fund hard infrastructure, valuable traditional*

[34] The Cook Islands outlines some of these obligations in its Written Statement in proposing Proposed Obligation B, see Written Statement of the Cook Islands, pp. 86-113, and outlines how the proposed Relevant Conduct regarding adaptation actions breaches some of States' obligations regarding adaptation actions in **Chapter VI, Part C below**.

> *knowledge of dozens of varieties of traditional crops or animal foods (such as taro or flying-fish) may be being lost because it is not being valued by donors or even our own people.* ***What is the use of a sea wall if you have nothing to eat? All the aforementioned risks are those which integration of traditional knowledge can address. Without this, all climate adaptation work will not be as successful as required for our survival on our remote islands*** *[...]*
> *Some governments, NGOs, and conservation groups around the world are becoming more aware that traditional knowledge is an absolute necessity for ensuring we have the full set of tools we need to navigate and adapt to the impacts of climate change.* ***However, my concern is that this recognition may not be happening fast enough to reverse our species' current trajectory of emissions and extraction of natural resources.*** *We therefore need to do all we can to ensure traditional knowledge is valued and integrated into climate change projects across the planet, in every ecosystem where it is possible to do so."*[35]

b. The UN Human Rights Committee's decision in *Daniel Billy et al. v. Australia* made clear that States' acts and omissions regarding supporting, assisting and financing adaptation actions can cause *"significant harm to the climate system and other parts of the environment"* in finding that Australia's acts and omissions regarding adaptation actions resulted in it violating its human rights obligations under the ICCPR as follows:

> *"The Committee concludes that the information made available to it indicates that by failing to discharge its positive obligation to implement adequate adaptation measures to protect the authors' home, private life and family, the State party violated the authors' rights under article 17 of the Covenant. [...]*

[35] Liam Koka'ua, *Traditional Knowledge and Climate Change Adaptation in the Cook Islands - Expert Report by Liam Koka'ua*, 5 July 2024, pp. 5, 7, 9 (**Annex No. 1**).

[T]he Committee considers that the information made available to it indicates that the State party's failure to adopt timely adequate adaptation measures to protect the authors' collective ability to maintain their traditional way of life, to transmit to their children and future generations their culture and traditions and use of land and sea resources discloses a violation of the State party's positive obligation to protect the authors' right to enjoy their minority culture. Accordingly, the Committee considers that the facts before it amount to a violation of the authors' rights under article 27 of the Covenant."

While it might argued that human rights violations inflict significant harm to peoples and individuals, rather than to *"the climate system and other parts of the environment"*, the Cook Islands argues that Australia's human rights violations regarding its adaptation actions in *Billy* evidence "*significant harm to the climate system and other parts of the environment"*. Furthermore, the Cook Islands argues that peoples and individuals inevitably form part of *"the climate system and other parts of the environment"* as well and cannot be understood to be separate or distinct from it.

33. For the reasons outlined in the above submissions, it can be confidently concluded that States' acts and omissions regarding adaptation actions are clearly of concern in the present proceedings and underpin the two questions put to the Court.

34. In terms of how this conduct can be characterized, the Cook Islands respectfully submits that a sound interpretation of the text of the UNGA Resolution 77/276 follows that the Relevant Conduct of States regarding adaptation actions should be characterized as follows:

"[The] Relevant Conduct consists of acts and omissions of individual States – and of a specific group thereof – that have resulted over time in a level of anthropogenic GHG emissions from activities within their jurisdiction or control which have interfered with the climate system and other parts of the

environment to an extent which amounts to at least significant harm to the latter, whether or not the anthropogenic GHG emissions of a given State over time are the only or the main cause of climate change, and whether or not they are the only or the main cause of the specific harm suffered by another State, people or individual.

The Relevant Conduct also consists of acts and omissions of individual States and of a specific group thereof – that impede, undermine or inhibit adaptation actions by impeding, undermining or inhibiting the scaling up of action and support, including finance, capacity-building and technology transfer, to enhance adaptive capacity and to implement collaborative approaches for effectively responding to the adverse effects of climate change, particularly for developing countries that are particularly vulnerable to these effects - with these effects resulting from the Relevant Conduct regarding GHG emissions characterized above and the significant harm caused by it, and with the acts and omissions that impede, undermine or inhibit adaptation actions further contributing to this significant harm, whether or not the acts and omissions of a given State over time are the only or the main cause of the impeding, undermining or inhibiting of adaptation actions, and whether or not these acts and omissions are the only or the main cause of the specific harm suffered by another State, people or individual."

35. Like **Vanuatu's** characterization of the Relevant Conduct regarding GHG emissions, the above characterization of the Relevant Conduct regarding adaptation actions makes clear that it constitutes a composite breach of States' obligations, irrespective of whether the specific acts and omissions underpinning it are each, in and of themselves, a violation of international law, in line with the scope of State responsibility under Article 15 of ARSIWA. Importantly, this composite nature of the breach reflects the largely composite nature of States' acts and omissions regarding adaptation actions, where many States, particularly developed country Parties, provide support, assistance and financing through established multilateral funds and mechanisms and are obligated to do so at international law. The Cook Islands outlines how the Relevant Conduct regarding adaptation actions, which largely occurs through such multilateral funds and mechanisms, breaches States' obligations in **Chapter VI, Part C below**.

36. In regard to the spatial and temporal scope of the Relevant Conduct regarding adaptation actions, the Cook Islands respectfully submits that this scope can be limited to when States' various obligations regarding adaptation actions under the Paris Agreement emerged and became binding to provide as much clarity and certainty as possible. This scope is also reflected in the language characterizing this Relevant Conduct, which derives largely from the text of preambular paragraph 11 from the UNGA Resolution 77/276 (which adopts the wording from the Decision of the Meeting of the Parties of the Paris Agreement and the Glasgow Climate Pact).

37. Finally, the Cook Islands also submits that the great importance of States' conduct regarding adaptation actions to these proceedings is made clear by the numerous submissions made by several other participants which identify States' obligations around adaptation actions, including specific obligations for developed country parties to provide support, assistance and funding for adaptation actions, in response to Question (a). These participants include other small island developing States like **Vanuatu**[36] and **Antigua and Barbuda**,[37] as well as **the Arab Republic of Egypt** ('**Egypt**'),[38] **the United Arab Emirates**,[39] and **the Republic of South Africa** ('**South Africa')**.[40] Accordingly, the Cook Islands concurs with and endorses all of these participants' submissions, and thus respectfully submits that the submissions by the **USA** and **Saudia Arabia** that broadly undermine the importance and binding nature of States' various obligations regarding adaptation actions should be rejected.[41]

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[36] Written Statement of Vanuatu, paras. 129, 419-423 (on adaptation obligations), 424-425 (on obligations to provide support to developing countries).

[37] Written Statement of Antigua and Barbuda, paras. 447, 451 (on adaptation obligations), 505 (on obligations to provide support to developing countries).

[38] Written Statement of Egypt, paras. 152-165 (on adaptation obligations), paras. 166-197 (on obligations to provide support to developing countries).

[39] Written Statement of the United Arab Emirates, paras. 124-125, 127 (on adaptation obligations), 131-132 (on obligations to provide support to developing countries).

[40] Written Statement of South Africa, paras. 89, 99, 101 (on adaptation obligations), 112, 114, 116, 118, 121, 125 (on obligations to provide support to developing countries).

[41] See Written Statement of the USA, para. 319; Written Statement of Saudi Arabia, para. 4.63.

IV. THE APPLICABLE LAW

A. Chapter outline

38. A key issue emerging from the written statements is the differing views around the applicable law for the present proceedings. This chapter presents the Cook Islands' views regarding the applicable law which reiterate its submissions in its Written Statement and respond to other participants' submissions.

39. It is divided into two further parts as follows:

a. **Part B** presents the Cook Islands' submissions regarding the applicable law for Question (a). Specifically, in this part, the Cook Islands respectfully submits that the Court should reject submissions by other participants that argue that the applicable law governing the obligations of States in respect of climate change are limited to the laws contained in the UNFCCC, including the Paris Agreement.

b. **Part C** presents the Cook Islands' submissions regarding the applicable law for addressing Question (b). Specifically, in this part, the Cook Islands respectfully submits that the Court should reject submissions by other participants which argue that the ARSIWA are inapplicable or have limited applicability in the present proceedings.

B. The applicable law for Question (a)

40. Some participants argue that States' obligations in respect to climate change are found only in the UNFCCC and the Paris Agreement.[42]

[42] See Written Statement of the OPEC, paras. 17-21; Written Statement of China, paras. 92, 123, 105, 128, 131; Written Statement of Saudi Arabia, paras. 4.90-4.97; Written Statement of the United Arab Emirates, paras. 16-17.

41. For example, the **OPEC** stresses that the only applicable obligations of States are to be found in the "*self-contained lex specialis regime of the Kyoto Protocol, Paris Agreement and the UNFCCC*" and thus argues that the general international law on environmental protection, including the prevention principle, the precautionary principle, and the duty of due diligence, should be excluded, and any additional obligations or legal consequences for breaching such obligations in respect of peoples or individuals should be precluded.[43]

42. Similarly, the People's Republic of China ('**China**') posits: *"The objectives, principles and norms of the UNFCCC regime serve as specialized laws tailored to address climate change and its adverse effects and constitutes a sui generis body of law."*[44] This position then informs **China's** submissions that seek to exclude sources outside the UNFCCC from the applicable law governing States' legal obligations in respect of climate change as follows:

a. Regarding human rights treaties: *"The obligations deriving from international human rights law […] are applicable only to the extent that the provisions of international human rights law are compatible with those of the UNFCCC regime."*;[45]

b. Regarding the United Nations Convention on the Law of the Sea ('**UNCLOS**'): The identification of anthropogenic GHG emissions as *"pollution of the marine environment"* is inconsistent with the UNFCCC regime;[46]

c. Regarding the principle of prevention: *"The principle of prevention of significant harm to the environment is inapplicable to the issue of climate change."*;[47]

d. Regarding the duty of due diligence: "*In assessing whether States have fulfilled their duty of due diligence by their actions to address climate change and its*

[43] Written Statement of the OPEC, paras. 9, 87, 121.
[44] Written Statement of China, para. 92.
[45] Written Statement of China, para. 123.
[46] Written Statement of China, para. 105.
[47] Written Statement of China, para. 128.

adverse effects, it should follow the relevant benchmarks set by the provisions of the UNFCCC regime".[48]

43. The Cook Islands respectfully submits that the Court should reject these arguments for the following three reasons outlined in sections **1-3** below:

1. Human rights law contains applicable law

44. The Cook Islands respectfully submits that the applicability of human rights law is supported by the following findings of human rights courts and bodies which have firmly established that human rights law provides many important legal obligations governing both types of the Relevant Conduct:

a. The UN Human Rights Committee in *Billy* affirmed that human rights law contained in the ICCPR governs States' conduct regarding its GHG emissions and adaptation actions by finding that Australia violated the human rights of Torres Strait Islanders as protected under Articles 17 and 27 of the ICCPR due to its insufficient climate action in regard to its mitigation and adaptation measures.[49] Furthermore, in *Billy* and *Teitiota v. New Zealand,* the UN Human Rights Committee confirmed that States' failure to take adequate mitigation and adaptation measures *"may expose individuals to a violation of their rights under article 6."*[50] Notably, the conduct of Australia in question in *Billy* is closely aligned with, if not encompassed within, the Relevant Conduct regarding GHG emissions and Relevant Conduct regarding adaptation actions.

[48] Written Statement of China, para. 131.

[49] UN Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019: Daniel Billy et al. v. Australia*, CCPR/C/135/D/3624/2019, 22 September 2022, paras. 8.10-8.12, 8.14.

[50] UN Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019: Daniel Billy et al. v. Australia*, CCPR/C/135/D/3624/2019, 22 September 2022, para. 8.7; UN Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016: Teitiota v. New Zealand*, CCPR/C/127/D/2728/2016, 23 September 2020, para. 9.9.

b. The UN Human Rights Council has recognised the applicability of human rights laws to States' obligations in respect of climate change in several of its resolutions, as expressly noted in preambular paragraph 4 of the UNGA Resolution 77/276.[51]

c. The European Court of Human Rights' decision in *KlimaSeniorinnen v. Switzerland* provides strong support for the view that States' conduct regarding GHG emissions engages and is governed by human rights obligations as follows:

> *"[T]he Court will proceed with its assessment of the issues arising in the present case by taking it as a matter of fact that* ***there are sufficiently reliable indications that anthropogenic climate change exists, that it poses a serious current and future threat to the enjoyment of human rights guaranteed under the Convention****, that States are aware of it and capable of taking measures to effectively address it, that the relevant risks are projected to be lower if the rise in temperature is limited to 1.5C above pre-industrial levels and if action is taken urgently, and that current global mitigation efforts are not sufficient to meet the latter target."*[52]

Although *KlimaSeniorinnen* concerned Switzerland's breaches of its human rights obligations under the European Convention on Human Rights as a of member States of the Council of Europe, rather than States' obligations under international human rights law generally, the Cook Islands submits that the above comment is nonetheless helpful as it shows how other international courts are recognising that that States' acts and omissions regarding GHG emissions clearly engage States' human rights obligations. Furthermore, there are clear conceptual and substantive overlaps and synergies between many of

[51] Specifically, preambular paragraph 4 cites: *"Human Rights Council resolution 50/9 of 7 July 20221 and all previous resolutions of the Council on human rights and climate change, and Council resolution 48/13 of 8 October 2021."*
[52] *Case of Verein Klimaseniorinnen Schweiz and others v. Switzerland*, ECtHR Application no. 53600/20, Judgment of the Grand Chamber (9 April 2024), para. 436 (**emphasis added**).

the rights protected in the European Convention and those in international human rights law, which is unsurprising given the fact that the European Convention was largely inspired by the Universal Declaration of Human Rights[53] as many, if not all, subsequent international human rights law treaties are.

45. The Cook Islands also notes that small island developing States like the Cook Islands have already recognized the applicability of human rights law and human rights conceptions more broadly in their climate change policies. This point is made in the expert report by Linda Siegele, a legal practitioner who has supported small island developing States like the Cook Islands with climate policy and legal advice in international fora. Specifically, Siegele outlines how the Cook Islands has recognized the interdependent relationship between its human rights laws and climate change laws policies as follows:

> *"In recognising the importance of protecting and upholding its human rights obligations in addressing climate change, the Cook Islands has included the following two human rights considerations in its policy responses to climate change:*
>
> *• Cook Islands Climate Change Policy 2018-2028: This Policy contains "Policy Measure B: Strengthen resilience and reduce vulnerability to climate change" which states:*
>
>> "Activities to reduce vulnerability to climate change must respect human rights and allow for those most at risk such as children, the elderly, and persons with disabilities."

[53] Clare Ovey and Robin C.A. White, *The European Convention on Human Rights* (Oxford University Press, 2006), pp. 1–3.

• *Cook Islands Third National Communication: On the need for the Cook Islands to mainstream gender frameworks in policy frameworks regarding climate change, this document notes that:*

> "Improving the capacity of women to contribute to climate change adaptation strategies is necessary as directed in the National Gender policy. This requires ensur[ing] gender perspective and women human rights are properly integrated in climate change strategies and that funding mechanisms favor gender responsive initiatives."[54]

46. Importantly, Siegele's expert report also notes that the impacts of climate change also risk violations of Cook Islanders' human rights as protected in the Constitution of the Cook Islands, which includes rights clearly engaged by climate change, including, but not limited to, the right of the individual to life, liberty, and security of the person; the right of the individual to equality before the law and to the protection of the law, the right of the individual to own property and the right not to be deprived thereof except in accordance with law.[55] Siegele notes that these risks underscore the importance of the Court's authoritative guidance on the applicability of States' human rights law to States' obligations in respect of climate change in the requested advisory opinion as follows:

> *"...[T]here is overriding evidence that climate change impacts risk the violation of human rights – as such, the Cook Islands must respect and protect the...listed rights when it takes action to address climate change...*
> *[...]*
> *As the constitutional human rights provisions and policy measures provide national-level obligations on the Cook Islands to its own people, the ability of the Cook Islands to fulfil these obligations will depend upon*

[54] Linda Siegele, *Expert report around the importance of upholding and protecting human rights in the face of the impacts climate change by Linda Siegele, JD LLM*, 15 July 2024, pp. 9-10 (**Annex No. 2**).
[55] Linda Siegele, *Expert report around the importance of upholding and protecting human rights in the face of the impacts climate change by Linda Siegele, JD LLM*, 15 July 2024, pp. 9, referring to Constitution of the Cook Islands, art 64(1) (**Annex No. 2**).

> *how the ICJ's opinion considers a State's responsibility to meet its human rights obligations to its own citizens in the face of climate change impacts."*[56]

2. The UNCLOS contains applicable law

47. Contrary to **China's** argument about the UNCLOS above, the International Tribunal for the Law of the Sea ('**ITLOS**') concluded in its recent advisory opinion that *"anthropogenic GHG emissions into the atmosphere constitute pollution of the marine environment"*.[57]

48. Furthermore, the ITLOS confirmed in its opinion that the Paris Agreement is not the only treaty that governs the Relevant Conduct, but that the general obligation of States under Article 194(1) to the UNCLOS also governs States' conduct regarding GHG emissions, including that encompassed by the Relevant Conduct regarding GHG emissions, as follows:

> *"The Tribunal does not consider that the obligation under article 194, paragraph 1, of the Convention would be satisfied simply by complying with the obligations and commitments under the Paris Agreement. The Convention and the Paris Agreement are separate agreements, with separate sets of obligations. While the Paris Agreement complements the Convention in relation to the obligation to regulate marine pollution from anthropogenic GHG emissions, the former does not supersede the latter."* [58]

49. Notably, the ITLOS did not advise on the applicability of human rights to States' obligations in respect of climate change under the UNCLOS specifically, noting only that

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[56] Linda Siegele, *Expert report around the importance of upholding and protecting human rights in the face of the impacts climate change by Linda Siegele, JD LLM*, 15 July 2024, pp. 9-10 (**Annex No. 2**).
[57] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion of 21 May 2024, ITLOS Case No. 31, para. 179.
[58] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion of 21 May 2024, ITLOS Case No. 31, para. 223.

"climate change represents an existential threat and raises human rights concerns."[59] The Cook Islands respectfully submits that this limited reference to human rights reflects the text of the request of the Commission of Small Island States on Climate Change and International Law ('**COSIS**') to the ITLOS for the advisory opinion which did not implicitly or explicitly refer to any sources of international human rights law, unlike the UNGA's request to the Court in the UNGA Resolution 77/276 which makes several explicit references to human rights.

3. The Synthesizing Approach is a permissible and necessary approach to articulate States' obligations in respect of climate change

50. The Cook Islands respectfully reiterates its submission from its Written Statement that a synthesizing approach, which seeks to read and synthesize different sources and areas of international law together to articulate obligations of States, is both permissible and necessary for these advisory proceedings. To recall, this submission is based on the four reasons below:

a. **First**, a synthesizing approach aligns with the text of UNGA Resolution 77/276 which requests for the Court not to limit itself to the interpretation and application of one or two treaties, but to identify the relevant obligations from the entire corpus of international law and assess the legal consequences of the conduct causing climate change under international law.[60]

b. **Second**, a synthesizing approach is permissible because the UNFCCC, including the Paris Agreement, is not a *lex specialis* regime that regulates all climate action and singularly provides for all of States' obligations in respect of climate change, and legal consequences under States' obligations, to the exclusion of all other general rules of international law, including States' human rights obligations. Rather, the Cook Islands respectfully submits that in regard to

[59] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion of 21 May 2024, ITLOS Case No. 31, para. 66.
[60] Written Statement of the Cook Islands, paras. 132-134.

States' climate change obligations under the UNFCCC, the principle of *lex specialis* applies only to a limited extent, for example in respect of certain core principles such as the common but differentiated responsibility ('**CBDR**') principle.[61]

c. **Third,** a synthesizing approach helps the Court and all States to clarify how existing sources of law provide the obligations and legal consequences they contain, and does not in any way seek to articulate obligations and legal consequences under these obligations that are new, unfamiliar and unlike the obligations that States have consented to.[62]

d. **Fourth**, a synthesizing approach enables the Court and all States to understand and articulate key connections between various sources of international law that are deeply engaged and implicated by the impacts of climate change, particularly in relation to present and future generations and small island developing States which are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change.[63]

51. Additionally, the Cook Islands submits that the synthesizing approach is buttressed and complemented by the principle of systemic integration at international law, which follows that treaties like the Paris Agreement and the UNCLOS may be taken into account in the interpretation of obligations human rights obligations, and vice versa.[64] As **Vanuatu** notes, the principle of systemic integration forms part of the general rules

[61] Written Statement of the Cook Islands, paras. 135-142.
[62] Written Statement of the Cook Islands, para. 143.
[63] Written Statement of the Cook Islands, paras. 144-147.
[64] See, e.g., the Court's previous opinions on the interpretation of the right to life in light of international humanitarian law: *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* I.C.J. Reports 1996, p. 226, paras. 24-25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion,* I.C.J. Reports 2004, p. 136, para. 105-106. For other examples of systemic integration, see *Kasikili/Sedudu Island (Botswana v. Namibia), Judgment,* I.C.J. Reports 1999, p. 1045, para. 93; *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment,* I.C.J. Reports 2003, p. 161, paras. 41-45 ; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment,* I.C.J. Reports 2008, p. 177, paras. 112-114; *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment,* I.C.J. Reports 2010, p. 14, paras. 64-66, 204-205; *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections*, Judgment,* I.C.J. Reports 2017, p. 3, paras. 89-91.

of treaty interpretation under customary international law,[65] as codified in Article 31 of the Vienna Convention on the Law of Treaties,[66] and as applied several times by the Court when interpreting treaty provisions.[67]

C. The applicable law for Question (b)

52. Some participants argue that the ARSIWA[68] are inapplicable[69] or have limited utility[70] in governing the legal consequences for breaches of States' obligations in respect of climate change.

53. For example, **China** makes a *lex specialis* argument that the UN climate change regime has a self-contained compliance mechanism under the Paris Agreement which precludes the applicability of the ARSIWA, and that the Paris Agreement provides a "*tailor-made*

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[65] Written Statement of Vanuatu, p. 103, fn 334, citing: *Territorial Dispute (Libyun Aruh Jamuhiriyu/Chad), Judgment, 1. C. J. Reports 1994, p. 6*, p. 21, para. 41; *United States - Gasoline (Brazil and Venezuela v. United States)* Appellate Body, WT/DS2/AB/R, WT/DS4/AB/R, Report No AB-1996-1, Doc No 96-1597 (29 April 1996) ITL 013 (WTO 1996), 16.

[66] Written Statement of Vanuatu, p. 103, fn 335, noting and citing: *"Under Article 31(1) of the Vienna Convention on the Law of Treaties (23 May 1969, entry into force 27 January 1980), 1155 UNTS 331, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Under Article 31(3), there shall be taken into account, together with the context: Article 31(3)(c) then provides that there shall be taken into account, together with context, "any relevant rules of international law applicable in relations between the parties". The corpus of applicable international law rules include not only those arising from treaties, but also general principles of law and rules of customary international law: see International Law Commission, "Draft Conclusions of the Work of the Study Group, Finalized by Mr. Martti Koskenniemi", annexure to* Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, 13 April 2006, UN Doc A/CN.4/L.682, para. 19."*

[67] Written Statement of Vanuatu, p. 103, fn 335, citing: *Kasikili/Sedudu Island (Botswana v. Namibia), Judgment,* I.C.J. Reports 1999, p. 1045, para. 93*; Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment,* I.C.J. Reports 2003, p. 161, paras. 41-45; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment,* I.C.J. Reports 2008, p. 177, paras. 112-114; *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment,* I.C.J. Reports 2010, p. 14, paras. 64-66, 204-205; *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections, Judgment*, I.C.J. Reports 2017, p. 3, paras. 89-91*. See Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment.* I.C.J. Reports 1986, p. 14, para. 175.

[68] Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the ILC (2001), Volume II, Part II, Report of the Commission to the General Assembly on the Work of its Fifty-Third Session*, document A/CN.4/SER.A/2001/Add.1 (Part 2)

[69] See e.g. Written Statement of China, paras. 133, 135; Written Statement of the OPEC, paras. 119-120, Written Statement of the United Kingdom, paras. 136, 137.2, 137.4; Written Statement of Japan, paras. 41.

[70] See e.g. Written Statement of Saudi Arabia, para. 6.7; Written Statement of the Russian Federation, p. 18; Written Statement of Australia, paras. 5.9-1.10.

assistance arrangement for loss and damage" in the form of the Warsaw International Mechanism for Loss and Damage.[71]

54. The **United Kingdom** argues that the "*legal consequences*" referred to in the text of Question (b) does not refer to the general law of State responsibility but to the legal consequences "*under*" the primary obligations of States addressed in Question (a), which it confines to the climate change regime.[72] As such, the **United Kingdom** submits that the text of Question (b) does not refer explicitly or implicitly to any breach of international law or otherwise to State responsibility.[73]

55. The Cook Islands respectfully submits that the Court should reject these arguments. To support this submission, the Cook Islands makes the following three submissions:

56. **First**, the Cook Islands respectfully submits that the Court should reject **China's** *lex specialis* argument due the following reasons:

a. It is universally recognised that the rules of State responsibility in ARSIWA apply regardless of the type or source of primary rules in question,[74] and Article 55 of ARSIWA makes it clear that the ARSIWA is only displaced for a breach of a treaty obligation when there are specific special secondary rules in that treaty, and it will only give way to the specific aspects actually addressed in such rules. Importantly, in this case, the UNFCCC, including the Paris Agreement, does not provide special secondary rules defining the content of State responsibility for breaches of States' obligations in respect of climate change, and notably only contain non-compliance mechanisms. The important distinctions between

[71] Written Statement of China, paras. 139–142.

[72] Written Statement of the United Kingdom, para. 136.

[73] Written Statement of the United Kingdom, para. 137.2.

[74] Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the ILC (2001), Volume II, Part II, Report of the Commission to the General Assembly on the Work of its Fifty-Third Session, document A/CN.4/SER.A/2001/Add.1 (Part 2), general commentary, para. 5 (*"the present articles are concerned with the whole field of State responsibility. Thus they are not limited to breaches of obligations of a bilateral character, e.g. under a bilateral treaty with another State. They apply to the whole field of the international obligations of States, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole."*)

these non-compliance mechanisms and the laws of State responsibility in ARSIWA are evident in the following provisions of the Paris Agreement and the UNFCCC:

i. Article 15 of the Paris Agreement provides a "*mechanism to facilitate implementation of and promote compliance*" but neither explicitly nor implicitly precludes the applicability of the ARSIWA.

ii. Article 24 of the Paris Agreement adopts the provisions of dispute settlement under Article 14 of the UNFCCC. Article 14 of the UNFCCC expressly provides for the submission of any dispute before the *"International Court of Justice"*, thus permitting invocations of the rules of State responsibility under ARSIWA for breaches of States' obligations under UNFCCC in contentious or even advisory proceedings, like the present one, where certain matters are clearly in dispute.

iii. In regard to the UNFCCC's Warsaw International Mechanism for Loss and Damage, Article 8 of the Paris Agreement states that the Warsaw International Mechanism "*does not involve or provide a basis for any liability or compensation"*. Importantly, this provision only excludes liability and compensation regarding the Warsaw International Mechanism itself, and does not explicitly or implicitly exclude or prohibit liability or compensation under any other law or rule outside of the Warsaw International Mechanism specifically and the UNFCCC more broadly.

iv. Furthermore, Article 8(1) states: "*[T]he Parties recognize the importance of averting, minimizing and* ***addressing*** *loss and damage associated with the adverse effects of climate change*". The word *"addressing"* indicates that loss and damage is already occurring, which follows that if this loss and damage can be causally linked to the breach of a primary obligation of States under the UNFCCC, such rules may give rise to an obligation to make full reparation under the secondary rules of State responsibility in ARSIWA, including where the acts or omissions occurred before the UN climate change regime entered into force.

b. There is a fundamental distinction between non-compliance mechanisms like those contained in the Paris Agreement and the laws of State responsibility for breaches of States' obligations at international law, as clearly explained in the 2018 report by the International Law Commission's ('**ILC**') Special Rapporteur on the protection of the atmosphere as follows:

> *"**There is a fundamental difference between "breach" and "non-compliance" in relation to international obligations.** A "breach" of international law by a State entails its international responsibility, which may be realized either through recourse to dispute settlement procedures or, in certain circumstances, by taking unilateral countermeasures against a non-performing party. Since State responsibility is based on an objective conception of "breach" of international law, it does not and cannot take into account the subjective reasons for such a breach, although they may in some cases constitute circumstances precluding wrongfulness or extenuation**. In contrast, the concept of "non-compliance" aims at an amicable solution. It is the basic idea underlying the concept of "compliance" that failure by a State to comply with an international obligation may not be due to a lack of willingness to comply, but rather due to a lack of capacity to deal with the situation for reasons such as technical or financial difficulties."***[75]

[75] ILC, Fifth report on the protection of the atmosphere by Shinya Murase, Special Rapporteur, UN Doc. A/CN.4/711 (8 February 2018), paras. 16-18, 33-34 (**emphasis added**).

c. Several States Parties to the Paris Agreement, namely *"small island developing States"* that Question (b) is particularly concerned with, including the Cook Islands, the Federated States of Micronesia, Nauru, Niue, Solomon Islands, and Tuvalu – explicitly declared in signing the Paris Agreement that nothing in the text can be interpreted as derogating from the general law of State responsibility or any claims or rights regarding compensation for the adverse effects of climate change.[76] Vanuatu and the Marshall Islands declared more generally that ratification of the Paris Agreement "*shall in no way constitute a renunciation of any rights under any other laws, including international law*."[77] Therefore, it is essential that these explicit declarations be respected and honored in good faith by all States.

57. **Second**, the Cook Islands respectfully submits that the Court should reject the **United Kingdom's** argument that the text of Question (b) precludes or limits the applicability of ARSIWA due to the following reasons:

a. The different parts of the text of Question (b) below specifically use the terminology of ARSIWA, making it clear that member states of the UNGA agreed by consensus to request the Court to respond to Question (b) with reference to the ARSIWA:

i. "*legal consequences under these obligations for States*": Here, the UNGA uses the same language as Part II of ARSIWA, which sets out "*legal consequences for the responsible State*" of its internationally wrongful act, including cessation and reparation for injury.[78]

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[76] United Nations Treaty Collection, *Paris Agreement*, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en#EndDec

[77] United Nations Treaty Collection, *Paris Agreement*, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en#EndDec

[78] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected, p. 86, commentary, para. 1.

ii. "*acts and omissions*": Here, the UNGA paraphrases Part I of ARSIWA which sets out the key elements of an internationally wrongful act, specifically "*actions or omissions*" that are attributable to a State or States and constitute a breach of an international obligation.

iii. *"States,...which...are injured or specially affected by":* Here, the UNGA borrows from Article 42 of ARSIWA which reads: *"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...".*

b. The Court has understood the terminology of *"legal consequences"* to be a clear reference to the general international law of State responsibility in several of its judgements, which the UNGA specifically used in the text of Question (b) in the UNGA Resolution 77/276.[79]

c. The Court has also previously underscored the importance of a request for authoritative guidance on the "*legal consequences*" of a certain conduct with respect to ARSIWA.[80]

58. **Third**, the Cook Islands respectfully submits that strong support for the applicability of the ARSIWA to these proceedings can be found in the European Court of Human Rights' decision in *Klimaseniorinnen*. Here, the European Court of Human Rights noted that at international, States cannot attempt to avoid responsibility and resulting consequences outlined in the ARSIWA for breaching their obligations by pointing to the responsibility

[79] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion,* I.C.J. Reports 1971, p. 16, paras. 117-118; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion,* I.C.J. Reports 2004, p. 136, paras. 148-153; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion,* I.C.J. Reports 2019, p. 95, paras. 175-177.

[80] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion,* I.C.J. Reports 2010, p. 403, para. 51.

of other States. This is on the grounds that according to both the European Convention on Human Rights and the ARSIWA, an individual State can be held accountable for its share of the responsibility for the breach through the composite act**:**

> *"[T]he Court notes that while climate change is undoubtedly a global phenomenon which should be addressed at the global level by the community of States, the global climate regime established under the UNFCCC rests on the principle of common but differentiated responsibilities and respective capabilities of States (Article 3 § 1). This principle has been reaffirmed in the Paris Agreement (Article 2 § 2) and endorsed in the Glasgow Climate Pact (cited above, paragraph 18) as well as in the Sharm el-Sheikh Implementation Plan (cited above, paragraph 12). It follows, therefore, that each State has its own share of responsibilities to take measures to tackle climate change and that the taking of those measures is determined by the State's own capabilities rather than by any specific action (or omission) of any other State (see Duarte Agostinho and Others, cited above, §§ 202-03).* ***The Court considers that a respondent State should not evade its responsibility by pointing to the responsibility of other States, whether Contracting Parties to the Convention or not.***
>
> *[…]*
>
> *This position is consistent with the Court's approach in cases involving a concurrent responsibility of States for alleged breaches of Convention rights, where* ***each State can be held accountable for its share of the responsibility for the breach in question*** *(see, albeit in other contexts, M.S.S. v. Belgium and Greece, cited above, §§ 264 and 367, and Razvozzhayev v. Russia and Ukraine and Udaltsov v. Russia, nos. 75734/12 and 2 others, §§ 160-61 and 179-81, 19 November 2019).* ***It is also consistent with the principles of international law relating to the plurality of responsible States, according to which the responsibility of each State is determined individually, on the basis of its own conduct and by reference to its own international obligations (see ILC, Draft***

articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Commentary on Article 47, paragraphs 6 and 8)."[81]

Therefore, the Cook Islands respectfully submits that the Court can refer to the above analysis in rejecting arguments and suggestions like **China's** and the **United Kingdom's,** which if accepted by the Court, would allow States to evade responsibility for breaching their obligations at international law by displaying both types of Relevant Conduct.

59. For the reasons set out in the above submissions, the Cook Islands respectfully submits that the ARSIWA are applicable in governing the legal consequences for breaching States' obligations in respect of climate change.

[81] *Case of Verein Klimaseniorinnen Schweiz and others v. Switzerland*, ECtHR Application no. 53600/20, Judgment of the Grand Chamber (9 April 2024), paras. 442-443 (**emphasis added**)

V. QUESTION (A): LEGAL OBLIGATIONS

A. Chapter outline

60. This chapter presents the Cook Islands' views on Question (a) in response to the arguments submitted by other participants in their written statements.

61. More specifically, this chapter builds on the considered submissions of **the Organisation of African, Caribbean and Pacific States'** ('**OACPS'**) arguing that States' human rights obligations arising from the prohibition of racial and gender discrimination apply to States' obligations in respect of climate change.[82] The Cook Islands also submits that these obligations can be synthesized with other obligations and sources at international law to articulate other obligations, including, but not limited to, the following two synthesized obligations the Cook Islands proposed in its Written Statement:

a. **Proposed Obligation A:** States have an obligation to take all necessary measures to mitigate their GHG emissions to protect and preserve the marine environments of other States in accordance with their extraterritorial human rights obligations;[83] and

b. **Proposed Obligation B:** States have an obligation to support, assist and finance the implementation of traditional knowledge in adaptation actions in accordance with their human rights obligations.[84]

62. Accordingly, this chapter proceeds in three further parts as follows:

a. **Part B** outlines key general points around States' human rights obligations arising from the prohibition of racial and gender discrimination, including their respective sources, how they have been understood to apply to States'

[82] Written Statement of the OACPS, paras. 81-90.
[83] Written Statement of the Cook Islands, pp. 62-85.
[84] Written Statement of the Cook Islands, pp. 86-113.

obligations in respect of climate change generally, and how these obligations make clear the importance of an intersectional approach to understanding intersectional discrimination.

b. **Part C** presents the Cook Islands' submission that Proposed Obligation A can be synthesized with human rights obligations arising from the prohibition of racial and gender discrimination.

c. **Part D** presents the Cook Islands' submission that Proposed Obligation A can be synthesized with human rights obligations arising from the prohibition of racial and gender discrimination.

B. An outline of States' human rights obligations arising from the prohibition of racial and gender discrimination

63. In regard to the sources of States' human rights obligations arising from the prohibition of racial and gender discrimination, the Cook Islands concurs with and endorses the **OAPCS'** submissions on these points,[85] including its submissions that these obligations are sourced in the UN Charter, the International Convention on the Elimination of All Forms of Racial Discrimination ('**ICERD**'), the Convention on the Elimination of All Forms of Discrimination against Women ('**CEDAW**').[86] The Cook Islands also concurs with and endorses **OACPS'** submission that the prohibition of racial discrimination and gender discrimination are *jus cogens* norms of international law.[87]

64. In terms of how these obligations arise in respect of climate change, the Cook Islands also concurs with and endorses the **OCAPS'** incisive submissions below that explain how States are obliged to address differential treatment on the basis of race and gender, even when such differential treatment or disparate impact may be facially neutral and not motivated by clear intent or animosity as follows:

[85] It is noted that the Cook Islands is a member State of the OACPS.
[86] Written Statement of the OACPS, para. 81.
[87] Written Statement of the OACPS, paras. 82-84.

"States' obligations to eliminate racial and gender discrimination extends to the disproportional impacts of climate change on the populations and groups of OACPS members. ***States have the duty to promote racial and gender equality, and to prevent breaches of the prohibition of racial and gender discrimination by tackling climate change and its adverse effects on groups and individuals disproportionately affected by such effects.***

.....

The OACPS recalls that a difference of treatment, which is neutral on its face, may still fall under the jus cogens prohibition of racial and gender discrimination when it causes a disproportional impact on a specific person or group distinguished by race, colour, descent, national or ethnic origin or gender.

...

In sum, international human rights law obliges States to address discrimination that is intentional or effectuated through facially neutral policies. ***They must reform any laws or practices that create or perpetuate environmental or climate-related racism****."*[88]

65. As another important general point, the Cook Islands submits that these human rights obligations, as with all universal human rights obligations, apply to all States regardless of whether they have ratified the ICERD and the CEDAW, and other key human rights instruments providing similar protections like the ICCPR, the ICESCR and the UNCRC. **Vanuatu** aptly makes this submission when emphasizing the interconnected universal human rights obligations in the ICCPR and ICESCR as follows:

*[T]hese obligations...****are applicable to <u>all</u> States in relation to the Relevant Conduct over time, irrespective of whether and when they have ratified the ICCPR or ICESCR****. Put another way, these obligations are* ***not*** *personally or temporally limited to only those States who have signed and ratified the ICCPR or ICESCR from the time of doing so. Overall....the sources of human rights*

[88] Written Statement of the OACPS, paras. 84, 89 (**emphasis added**).

obligations across the corpus of international human rights law are many and varied; and, in combination, produce a cumulative set of norms which govern all States in respect of the Relevant Conduct.

...[C]limate change affects essentially all human rights. Human rights are universal, indivisible, interdependent and interrelated; and the range of implications which flow from the adverse effects of climate change can impair the enjoyment of rights in necessarily overlapping and layered ways ... the Relevant Conduct violates a wide range of internationally protected human rights."[89]

66. **Vanuatu's** crucial recognition of how climate change impairs human rights in "*overlapping and layered ways"* raises the importance of an intersectional approach to understanding the intersectional discrimination or discrimination on multiple grounds. Importantly, an intersectional approach was adopted in Judge Charlesworth's declaration for the Court's advisory opinion in *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* to ***"[shed] light on the complexity of discrimination"*** and to illuminate how the *"material before the Court indicate[d] the existence of discrimination on multiple and potentially intersecting grounds".*[90] The Cook Islands respectfully emphasizes the importance of the Court also adopting such an approach in responding to the two questions put to it, and thus concurs with and endorses the following sources that make clear the need to recognise how both types of Relevant Conduct engage and breach States' human rights obligations arising from the prohibition of racial and gender discrimination, and intersectional discrimination by extension:

a. The **OACPS'** position that *"Discrimination based on intersections between race and other characteristics like gender, disability, or indigenous status must also*

[89] Written Statement of Vanuatu, paras. 341-342.

[90] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Declaration of Judge Charlesworth*, I.C.J. Report 2024, paras. 5-6.

be remedied",[91] as well as the expert report the **OACPS** draws on by Professor E. Tendayi Achiume which noted that the UN has recognized the need for an intersectional approach to discrimination as follows:

> *"The UN recognizes the need for an intersectional approach to discrimination. Intersectionality is an analytical framework that describes how different identities a person holds results in intersecting forms of privilege or oppression, reflecting existing power structures, such as patriarchy, ableism, colonialism, imperialism, and racism. As CERD has noted, racial discrimination manifests alongside multiple, intersecting forms of discrimination, such as gender, class, nationality, disability, and age. Many other treaty bodies and international organizations likewise adopt an intersectional lens to discrimination, including CESCR; the Committee on the Elimination of Discrimination against Women; the UN Human Rights Council; the Committee on the Rights of Persons with Disabilities; and UN Women."*[92]

b. The findings in the IPCC's sixth synthesis report released in April 2023 that *"historical and ongoing patterns of inequity such as colonialism"* and *"inequity and marginalisation related to gender and ethnicity"* have exacerbated the effects of climate change and drive the particular vulnerabilities of certain regions and countries as follows:

> *"Vulnerability of ecosystems and people to climate change differs substantially among and within regions (very high confidence), driven by patterns of <u>intersecting</u> socio-economic development, unsustainable ocean and land use, inequity, marginalisation**, historical and ongoing patterns of inequity such as colonialism,** and governance (high confidence)*

[91] Written Statement of the OACPS, para. 89.
[92] Written Statement of the OACPS, Appendix B: Racial Equality and Racial Non-Discrimination Obligations of States in Respect of Climate Change, Expert Report Of Professor E. Tendayi Achiume, March 2024, para. 35.

…

Present development challenges causing high vulnerability are influenced by historical and ongoing patterns of ***inequity such as colonialism,*** *especially for many Indigenous Peoples and local communities (high confidence).* ***<u>Vulnerability is exacerbated by inequity and marginalisation linked to gender, ethnicity, low income or combinations thereof</u>, especially for many Indigenous Peoples and local communities (high confidence)***"[93]

It is also important to note that the IPCC is the UN body for assessing the science related to climate change with 195 member States, including the Cook Islands and other small island developing States, as well as developed States like the USA and the United Kingdom.[94] Therefore, given this broad and near-universal membership, and the procedures for IPCC reports by which all material must receive detailed line-by-line discussion and agreement by the appointed Working Group/Panel, the Cook Islands respectfully submits that it can be reasonably concluded that all member States of the IPCC agree with the IPCC's findings above and moreover, would not oppose to these findings supporting and informing the Court's articulation of States' obligations in respect of climate change, and the legal consequences for breaching these obligations.

C. Proposed Obligation A

67. In regard to Proposed Obligation A, to recall, the Cook Islands submitted in its Written Statement that there are the following three reasons why States' obligations under human rights treaties can be extraterritorial in scope to create a point of convergence with States' extraterritorial obligation under Article 194(2) of the UNCLOS:

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[93] IPCC, *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* (International Panel on Climate Change, 2023), pp. 51, 101 (**emphasis added**).

[94] IPCC, 'About', IPCC, available here: https://www.ipcc.ch/about/

a. States’ obligations under human rights treaties can be extraterritorial in scope to create a point of convergence with States’ extraterritorial obligation under Article 194(2) of the UNCLOS;[95]

b. The majority of States Parties to the UNCLOS are also States Parties to key human rights treaties;[96]

c. States’ extraterritorial human rights obligations are engaged by the extraterritorial pollution of States’ GHG emissions as made clear by comments and findings by UN Human Rights Treaty Bodies, UN Special Rapporteurs, and international courts,[97] and illustrated by the case studies of:[98] (i) The Right to Food[99] (ii) The Right to Enjoy a Minority Culture;[100] and (iii) The Rights of the Child to Culture.[101]

68. The Cook Islands submits that these reasons also apply to synthesizing States’ human rights obligations arising from the prohibition of racial and gender discrimination. Specifically, in regard to the reasons in **Paragraphs 67b.-c. above**, the Cook Islands submits:

a. The majority of States Parties to the UNCLOS are also States Parties to the ICERD[102] and the CEDAW[103] – and moreover, as the Cook Islands submits at **Paragraph 65 above**, the obligations of States arising from the prohibition apply regardless of whether States have ratified the ICERD and the CEDAW.

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[95] Written Statement of the Cook Islands, paras. 183-194.
[96] Written Statement of the Cook Islands, paras. 195-208.
[97] Written Statement of the Cook Islands, paras. 209-211.
[98] Written Statement of the Cook Islands, paras. 212-217.
[99] Written Statement of the Cook Islands, paras. 218-222.
[100] Written Statement of the Cook Islands, paras. 223-228.
[101] Written Statement of the Cook Islands, paras. 229-234.
[102] For ICERD, there are 182 States Parties, United Nations Treaty Collection, *International Convention on the Elimination of All Forms of Racial Discrimination*, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en
[103] For CEDAW, there are 189 States Parties, United Nations Treaty Collection, *Convention on the Elimination of All Forms of Discrimination against Women*, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en

b. States' extraterritorial human rights obligations arising from the prohibition of racial and gender discrimination are engaged by the extraterritorial pollution of States' GHG emissions and the Relevant Conduct regarding GHG emissions as follows:

i. In terms of obligations regarding racial discrimination, as Professor Achiume explains in her expert report, the Relevant Conduct regarding GHG emissions is engaged by States' obligations in the ICERD as follows:

- *"ICERD's prohibition of racial discrimination applies equally to the broad range of civil, political, social, economic, and cultural rights violated as* ***a consequence of anthropogenic emissions of greenhouse gases****. Notably, Article 5 requires States Parties to prohibit racial discrimination and guarantee equality before the law in enjoyment of, inter alia: the right to freedom of movement and residing within the border of a State; the right to leave any country, including one's own, and return to one's country; the right to nationality; the right to housing; and the right to public health;*[104]

- Furthermore, Professor Achiume notes the importance of Article 2 of the ICERD, which requires States Parties to *"condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms"*,[105] with Article 2(2) further mandating States Parties to take concrete

[104] Written Statement of the OACPS, Appendix B: Racial Equality and Racial Non-Discrimination Obligations of States in Respect of Climate Change, Expert Report Of Professor E. Tendayi Achiume, March 2024, para.29 (**emphasis added**).
[105] Written Statement of the OACPS, Appendix B: Racial Equality and Racial Non-Discrimination Obligations of States in Respect of Climate Change, Expert Report Of Professor E. Tendayi Achiume, March 2024, para.30.

affirmative action or special measures to ensure the adequate protection of racially marginalized groups or individuals;[106]

- Additionally, Professor Achiume states that under Article 1(4) of the ICERD, States may engage in special measures *"for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection"* as a means of promoting equal enjoyment and exercise of fundamental human rights,[107] and remarked further that *"In its jurisprudence concerning the rights of Indigenous Peoples, for example, CERD has underscored the importance of special measures in order to uphold the non-discrimination and equality rights of Indigenous Peoples."*[108]

- The Cook Islands also concurs with and endorses **Micronesia's** submission which argues that States have obligations to mitigate GHG emissions in order to uphold their obligations to not engage in racial discrimination, and prohibit and bring to an end racial discrimination against Indigenous peoples under the ICERD as follows:

> *"Anthropogenic emissions of greenhouse gases undermine the ability of Indigenous Peoples to enjoy their collective rights under CERD as identified above and arguably equate to racial discrimination by offending States Parties against*

[106] Written Statement of the OACPS, Appendix B: Racial Equality and Racial Non-Discrimination Obligations of States in Respect of Climate Change, Expert Report Of Professor E. Tendayi Achiume, March 2024, para.32.
[107] Written Statement of the OACPS, Appendix B: Racial Equality and Racial Non-Discrimination Obligations of States in Respect of Climate Change, Expert Report Of Professor E. Tendayi Achiume, March 2024, para.33.
[108] Written Statement of the OACPS, Appendix B: Racial Equality and Racial Non-Discrimination Obligations of States in Respect of Climate Change, Expert Report Of Professor E. Tendayi Achiume, March 2024, para.33.

those Indigenous Peoples, including with respect to the ability of those Indigenous Peoples achieve socio-economic development in reliance on, and enjoy and practice their cultural traditions and customs associated with, their natural resources and other parts of their natural environments that are negatively impacted by such anthropogenic emissions."[109]

ii. In terms of obligations regarding gender discrimination, the Cook Islands concurs with and endorses the submissions of other States that highlight the particular impacts of climate change on women and girls,[110] like the Cook Islands' Written Statement,[111] as well as the other submissions from other States that emphasize States' obligations under the CEDAW are engaged by the Relevant Conduct of States around GHG emissions as follows:

- **Nepal:** *"States must give particular consideration to the rights of women as they are particularly vulnerable to climate change. Pursuant to Article 12 of CEDAW, women's health must be given particular regard as climate change disproportionately affects women's health systems."*[112]

- **Indonesia:** *"[O]ther thematic international human rights instruments contain provisions which refer to a specific element of the environment. These include Article 14 of the Convention on the Elimination of All Forms of Discrimination*

[109] Written Statement of Micronesia, para. 83.
[110] See Written Statement of Columbia, paras. 258-259; Written Statement of Albania, para. 106; Written Statement of Egypt, para. 229-230.
[111] Written Statement of the Cook Islands, paras. 129-130.
[112] Written Statement of Nepal, para. 33.

against Women, which states that women have the right to adequate living conditions, including water supply;"[113]

- **Egypt:** *"The Committee on the Elimination of Discrimination against Women, in its general recommendation No. 37 (2018) on "the gender-related dimensions of disaster risk reduction in the context of climate change", indicated that the CEDAW and other relevant international frameworks "should be understood to apply at all stages of climate change and disaster prevention, mitigation, response, recovery and adaptation."*[114]

- **Germany:** *"Subject to the issue of whether a certain person finds him- or herself subject to the jurisdiction of a given State Party to a specific treaty protecting the rights of women, children, or people with disabilities, States to such treaties thus have to take appropriate steps to safeguard and protect the rights of members of such specific groups against the effects of climate change in order to avoid a discriminatory effect on their rights caused by greenhouse gas emissions,"*[115]

- **Mexico:** *"It is important to note that, the consequences of climate change have differentiated effects on women and girls, particularly on Indigenous and rural women and girls, and therefore States shall guarantee the effective participation of all women and girls in climate matters. According to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) "States Parties*

[113] Written Statement of Indonesia, para. 40.
[114] Written Statement of Egypt, para. 231.
[115] Written Statement of Germany, paras. 114-116.

shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country."[116] Additionally, Mexico aptly noted: **"***Considering General Recommendations 34 (2016), 37 (2018) and 39 (2022) of the CEDAW Committee, States shall assure the full participation of women and girls in all their diversity in the design, planning and application of policies related to environment, climate change, and damage risk reduction, so disasters and adverse effects of climate change prevention and response are effective and incorporate perspectives from all society sectors."*[117]

69. The Cook Islands reiterates the submissions made in its Written Statement that the duty of due diligence embedded in Article 194(2) of the UNCLOS follows that there are necessary measures States must take under it.[118] In doing so, the Cook Islands also concurs with and endorses **Vanuatu's** rigorous submissions regarding the sources, scope and thresholds of harm pertaining to the duty of due diligence,[119] including its apt submission that *"the duty of all States to exercise due diligence in the prevention of reasonably foreseeable harm from activities within their jurisdiction or control crystallized as a primary obligation of international law no later than at the end of the nineteenth century."*[120] Given that States' obligations arising from the prohibitions of racial and gender discrimination are engaged by the Relevant Conduct regarding GHG emissions, the Cook Islands submits that the necessary measures it outlines in its Written Statement for Proposed Obligation A regarding the UNCLOS[121] also apply to States' obligations arising from the prohibition of racial and gender discrimination. For example, necessary measures for States include ensuring that when States *"observe, measure, evaluate and analyse, by recognized scientific methods, the risks or effects of*

[116] Written Statement of Mexico, para. 95.
[117] Written Statement of Mexico, para. 96.
[118] Written Statement of the Cook Islands, paras. 158-165, 174-180, 235-249.
[119] Written Statement of the Vanuatu, paras. 235-248.
[120] Written Statement of the Vanuatu, para. 235.
[121] Written Statement of the Cook Islands, paras. 235-249.

pollution of the marine environment" per Article 204(1) of the UNCLOS, that they also include risks and effects in regards to racial, gender and intersectional discrimination as well, and report on these risks and effects per their reporting obligations under Article 205 of the UNCLOS as well.

D. Proposed Obligation B

70. In regard to Proposed Obligation B, to recall, the Cook Islands submitted in its Written Statement that synthesizing States' obligations under the Paris Agreement, the CBD, and the BBNJ Agreement together with their obligations under human rights treaties is not only permissible but necessary on four interconnected grounds:

- **a.** The texts of the Paris Agreement, the CBD and the BBNJ Agreement make it clear that obligations under these treaties must be fulfilled in accordance with States' human rights obligations;[122]

- **b.** States' obligations under human rights treaties are extraterritorial in scope;[123]

- **c.** The majority of States Parties to the Paris Agreement and the CBD[124] are also States Parties to the ICERD and the CEDAW;[125]

- **d.** States' human rights obligations are engaged by the use and implementation of traditional knowledge in adaptation actions,[126] as well as the Relevant Conduct of States regarding adaptation actions that the Cook Islands characterises further at **Chapter III, Part D, Paragraph 34 above.**

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[122] Written Statement of the Cook Islands, paras. 300-319.
[123] Written Statement of the Cook Islands, paras. 320-329.
[124] Regarding States Parties to the BBNJ Agreement, as the Cook Islands noted in its Written Statement *"Notably, as of 8 March 2024, the BBNJ Agreement has not yet entered into force with only 88 signatories and 2 State Parties so far after only recently being opened for signature on 20 September 2023. Nevertheless, the Cook Islands respectfully submits that this should not prohibit or preclude the Court from considering submissions regarding the BBNJ Agreement in this Statement or providing its views on obligations under the BBNJ in its advisory opinion for future reference if the BBNJ Agreement enters into force."*, see Written Statement of the Cook Islands, para. 287.
[125] Written Statement of the Cook Islands, paras. 330-340.
[126] Written Statement of the Cook Islands, paras. 341-354.

71. The Cook Islands submits that these grounds or reasons also apply to synthesizing States' human rights obligations arising from the prohibition of racial and gender discrimination. Specifically, in regard to the reasons in **Paragraphs 70c.** and **d. above**, the Cook Islands submits:

a. States Parties to the Paris Agreement and the CBD are also States Parties to the ICERD and the CEDAW – and as the Cook Islands submits at **Paragraph 65 above**, States' obligations arising from the prohibition apply regardless of whether States have ratified the ICERD and the CEDAW.

b. States' human rights obligations arising from the prohibition of racial and gender discrimination are engaged by the Relevant Conduct regarding adaptation actions. To support this point, the Cook Islands notes the following:

i. In terms of obligations arising from the prohibition of racial discrimination, the Cook Islands notes the importance of the obligation of States regarding participation of cultural activities under Article 5(e)(vi) of the ICERD, which states:

> *In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:*
> ***(e) Economic, social and cultural rights, in particular:***
> ***(vi) The right to equal participation in cultural activities;...***

ii. **Micronesia's** important submission below which highlights statements by the UN Committee on the Elimination of Racial Discrimination regarding the positive obligations of States Parties to the ICERD regarding the cultural traditions and customs of Indigenous peoples as follows:

> *"The Committee on the Elimination of Racial Discrimination, in applying the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), stated in its General Recommendation No. 23 on Indigenous Peoples that CERD applies to Indigenous Peoples, and called on States Parties to CERD to, inter alia, "[p]rovide [I]ndigenous [P]eoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics" and "[e]nsure that [I]ndigenous communities can exercise their rights to practice and revitalize their cultural traditions and customs and to preserve and to practice their languages."*[127]

The Cook Islands endorses this submission, and further argues that *"cultural characteristics"* and *"cultural traditions and customs"* encompass traditional knowledge, and thus makes clear that States should provide Indigenous peoples with conditions that allow for sustainable economic and social development compatible with their traditional knowledge, in order to fulfil their obligations to support, assist and finance the use and implementation of traditional knowledge in adaptation actions under the Paris Agreement, the CBD and the BBNJ Agreement (per Proposed Obligation B), and in doing so ensure that Indigenous communities can exercise their rights to practice and revitalize their cultural traditions and customs, and preserve and practice their languages in such adaptation actions as well.

[127] Written Statement of Micronesia, para. 83, citing: Committee on the Elimination of Racial Discrimination, General Recommendation No. 23: Indigenous Peoples, Aug. 18, 1997, U.N. Doc. A/52/18, annex V, paras. 2, 4(c), 4(e).

iii. In terms of obligations arising from the prohibition of gender discrimination, the Cook Islands notes and endorses the following comments which make clear how States' obligations arising from the prohibition of gender discrimination and intersectional discrimination are engaged by the Relevant Conduct regarding adaptation actions:

- From Henry Puna, former Prime Minister of the Cook Islands and former Secretary General of the Pacific Islands Forum: *"Our women are at the forefront of climate change and they are resilient. They are the guardians of our traditional knowledge and in times of disaster, they fall back on their traditions and culture as a coping mechanism to protect their families and communities."*[128]

- From Mona Ainuu, Minister of Natural Resources for the Government of Niue: *"Women are important custodians of traditional knowledge and natural resources yet they continue to face challenges in relation to access to land and accessing financial resources. For these reasons, it is important that at COP27, we must ensure that climate finance is gender-responsive, inclusive, and accessible."*[129]

- From the written testimonial of Vaine Wichman, the president of the Cook Islands National Council of Women: *"I believe that increased participation of women and vulnerable groups in decision making processes, along with training activities, will strengthen local capacities to undertake key initiatives for*

[128] Pacific Regional Environment Programme, 'Support for gender and climate change gaining traction at COP27' 16 November 2022, available here: https://www.sprep.org/news/support-for-gender-and-climate-change-gaining-traction-at-cop27

[129] Pacific Regional Environment Programme, 'Support for gender and climate change gaining traction at COP27' 16 November 2022, available here: https://www.sprep.org/news/support-for-gender-and-climate-change-gaining-traction-at-cop27

climate change adaptation. This can be through enhancing food systems resilience, water security and economic recovery. This can also, over time, contribute to change in social, cultural, and gender norms. In addition to helping meet immediate basic needs, livelihood interventions can improve the future prospects of women and girls, and change the way the community treats them when their contribution to economic security is recognized."[130]

- From Koka'ua's expert report: *"Gender equity, including in regard to the participation of women, is extremely important for adaptation efforts in the Cook Islands. However, in my experience, Western perspectives on what gender equity looks like in practice can be different to those of Indigenous communities. For example, women in the Cook Islands are traditionally valued for their abilities to collect and process certain foods, cooking, weaving, producing traditional medicine and so forth. While is there is increasing overlap with men in many traditional activities, women are typically in fields where they are traditionally considered to be the knowledge-holders."*[131]

72. Accordingly, for the reasons set out in the submissions above, the Cook Islands respectfully emphasizes that it is critically important for the Court to recognize the importance of States' human rights obligations arising from the prohibition of racial and gender discrimination, and intersectional discrimination by extension, in its response to Question (a).

[130] Written Statement of the Cook Islands, para. 130, Annex No. 17: Vaine Wichman, *Testimony of Vaine Wichman Impacted by the Effects of Climate Change*, 14 March 2024, para. 7.
[131] Liam Koka'ua, *Traditional Knowledge and Climate Change Adaptation in the Cook Islands - Expert Report by Liam Koka'ua*, 5 July 2024, p. 8 (**Annex No. 1**).

VI. Question (b): Legal Consequences

A. Chapter outline

73. This chapter presents the Cook Islands' views on Question (b) in response to the arguments submitted by other participants in their written statements.

74. More specifically, as preliminary matters, this chapter first presents the Cook Islands' submissions that the Relevant Conduct regarding GHG emissions and the Relevant Conduct regarding adaptation actions breach States' obligations in respect of climate change. It then responds directly to Question (b) with specific legal consequences that apply for breaches of these obligations.

75. Accordingly, this chapter is organised in three further parts as follows:

a. **Part B** presents the Cook Islands' submission that the Relevant Conduct regarding GHG emissions breach States' obligations in respect of climate change.

b. **Part C** presents the Cook Islands' submission that the Relevant Conduct regarding adaptation actions breach States' obligations in respect of climate change.

c. **Part D** presents the Cook Islands' submissions on some of the specific legal consequences that apply for breaches of States' obligations in respect of climate change.

B. The Relevant Conduct regarding GHG emissions breach States' obligations in respect of climate change

76. Some participants argue in response to Question (b) that the Relevant Conduct of States regarding GHG emissions does not breach States' obligations in respect of climate change.

77. For example, **China** argues that there can be no imposition of responsibility on States for "*loss and damage caused by anthropogenic GHG emissions*" due to "*the uniqueness of the issue of climate change*", specifically because "*anthropogenic GHG emissions are not internationally wrongful acts*" and "*loss and damage from the adverse effects of climate change can hardly be attributed to a particular State*."[132]

78. Similarly, **South Africa** argues that the Court's assessment of legal consequences in its advisory opinion should only be limited to an *"academic...restatement of the law"* as follows:

> "*Legal consequences cannot be determined in the abstract and it will require an assessment of each unique case, having regard for each specific State's level of development and unique circumstances, to determine firstly if there is a beach of legal obligations, and secondly the legal consequences that flow therefrom. Any advisory opinion by the Court on legal consequences in the abstract would therefore be purely academic and a restatement of the law."*[133]

79. The Cook Islands respectfully submits that the Court should reject **China's** and **South Africa's** arguments. This is on the grounds that they reflect and demonstrate a misunderstanding of the general law of State responsibility under the ARSIWA, as well as a misunderstanding and mischaracterization of the conduct of concern in these proceedings.

80. To support this submission, the Cook Islands respectfully emphasizes that Article 15(1) of the ARSIWA provides the law for State responsibility pertaining to "***<u>a series</u>*** *of actions or omissions defined in* ***<u>aggregate</u>*** *as wrongful*' and that the Relevant Conduct regarding

[132] Written Statement of China, paras. 134–136.
[133] Written Statement of South Africa, para. 130.

GHG emissions (as the Cook Islands notes from **Vanuatu's** submissions in **Chapter III above**) clearly reflects Article 15(1)'s focus on *"aggregate"* acts and omissions that have caused *"significant harm"* to the climate system. Notably, **Vanuatu's** characterization of the Relevant Conduct regarding GHG emissions provides the following clarifications to avoid misunderstandings like those evident in **China's** and **South Africa's** arguments above: *"...whether or not the anthropogenic GHG emissions of a given State over time are the only or the main cause of climate change, and whether or not they are the only or the main cause of the specific harm suffered by another State, people or individual."* Therefore, the Relevant Conduct regarding GHG emissions, which underpins Questions (a) and (b) put to the Court, concerns breaches arising from a composite act, not specific individual acts and omissions as **China** and **South Africa** suggest.

81. To further support this submission, the Cook Islands highlights and concurs with **Vanuatu's** submissions below which clearly explain how Article 15(1) of ARSIWA covers breaches of States' obligations resulting in States' engagement in the Relevant Conduct regarding GHG emissions as follows:

> *"The ILC commentary to Article 15 clarifies that, by definition, the initial acts and omissions of the composite act are not constitutive of a breach of the relevant obligation.* ***The breach results from all the acts and omissions <u>taken together</u> which at [a] given point in time reached the threshold that makes them illegal under international law*** *...Thus, part of the series of acts and omissions forming the composite act may be lawful when they first occur, either because they are not yet inconsistent with an applicable obligation (e.g. their harm is not yet significant enough) or because the governing obligation has not yet arisen. But, taken together, they constitute a breach of the obligation governing the overall conduct.* ***<u>Thus, the illegality in principle of the Relevant Conduct under international law does not require a showing that each and every act or omission of the past were illegal</u>. It is the cumulative effect of the acts and omissions over time, when they reach a threshold of significance*** *("significant harm to the climate system and other parts of*

the environment"), that constitutes the composite conduct in breach of the obligations clarified in response to Question (a)."[134]

82. The Cook Islands also concurs with and endorses **Vanuatu's** other key submissions below which further clarify the spatial and temporal scope of the Relevant Conduct regarding GHG emissions, as well as the key implications of applying Article 15 of ARSIWA to the Relevant Conduct regarding GHG emissions:

a. At the level of individual States, the moment at which a State's cumulative GHG emissions reached the threshold to consummate the breach should be understood to be the point when such emissions caused *"significant harm to the climate system and other parts of the environment"*. There is no need, at this individual level, for a State to have caused climate change as such or any specific adverse effect of climate change.[135]

b. With respect to the group of States whose GHG emissions, taken together, have caused not just *"significant harm"* to the climate system and other parts of the environment but catastrophic harm in the form of climate change and its adverse effects, it should be understood that their acts and omissions, taken together, also amount to a composite act in breach of the applicable obligations in Question (a).[136]

c. States with historically high cumulative emissions cannot legitimately claim to currently be in compliance with their obligations at international just because their annual emissions may have peaked or declined. Rather, their past lack of diligence in mitigating emissions is sufficient to establish a continuing composite breach. Importantly, the bar for demonstrating diligent conduct is

[134] Written Statement of Vanuatu, para. 532.
[135] Written Statement of Vanuatu, para. 534.
[136] Written Statement of Vanuatu, para. 535.

also higher for such States due to their outsized contribution to the problem, as per the principle of CBDR and respective capabilities.[137]

83. The Cook Islands also respectfully submits that the European Court of Human Rights' 2024 decision in *Klimaseniorinnen v. Switzerland* supports **Vanuatu's** understanding that the Relevant Conduct regarding GHG emissions breaches States' obligations, and thus triggers the law of State responsibility in the ARSIWA. This is because the European Court of Human Rights' analysis in this case helpfully provides other courts and tribunals with a nuanced approach to understanding States responsibility in regard to acts and omissions regarding GHG emissions that appropriately acknowledges the *"special features of the problem of climate change"*. This analysis is worth quoting at length below:

> *"In the context of climate change, the particularity of the issue of causation becomes more accentuated. The adverse effects on and risks for specific individuals or groups of individuals living in a given place arise from aggregate GHG emissions globally, and the emissions originating from a given jurisdiction make up only part of the causes of the harm. Accordingly, the causal link between the acts or omissions on the part of State authorities in one country, and the harm, or risk of harm, arising there, is necessarily more tenuous and indirect compared to that in the context of local sources of harmful pollution. Furthermore, from the perspective of human rights, the essence of the relevant State duties in the context of climate change relates to the reduction of the risks of harm for individuals. Conversely, failures in the performance of those duties entail an aggravation of the risks involved, although the individual exposures to such risks will vary in terms of type, severity and imminence, depending on a range of circumstances. <u>Accordingly, in this context, issues of individual victim status or the specific content of State obligations cannot be determined on the basis of a strict conditioine qua non requirement</u> […]*

[137] Written Statement of Vanuatu, para. 528.

It is therefore ***<u>necessary to further adapt the approach</u>*** ***to these matters, taking into account the special features of the problem of climate change*** *in respect of which the State's positive obligations will be triggered, depending on a threshold of severity of the risk of adverse consequences on human lives, health and well-being […]*

The respondent Government raised an issue concerning the proportion of the respondent State's contributions to global GHG emissions and the capacity of individual States to take action and to bear responsibility for a global phenomenon that requires action by the community of States […] ***Such arguments have been examined and rejected by the domestic courts in some national climate-change cases*** *[…]*

For its part, the Court notes that while climate change is undoubtedly a global phenomenon which should be addressed at the global level by the community of States, the global climate regime established under the UNFCCC rests on the principle of common but differentiated responsibilities and respective capabilities of States (Article 3 § 1). This principle has been reaffirmed in the Paris Agreement (Article 2 § 2) and endorsed in the Glasgow Climate Pact (cited above, paragraph 18) as well as in the Sharm el-Sheikh Implementation Plan (cited above, paragraph 12). It follows, therefore, that each State has its own share of responsibilities to take measures to tackle climate change and that the taking of those measures is determined by the State's own capabilities rather than by any specific action (or omission) of any other State (see Duarte Agostinho and Others, cited above, §§ 202-03). *<u>The Court considers that a respondent State should not evade its responsibility by pointing to the responsibility of other States, whether Contracting Parties to the Convention or not.</u>* *[…]*

This position is consistent with the Court's approach in cases involving a concurrent responsibility of States for alleged breaches of Convention rights, where each State can be held accountable for its share of the responsibility for the breach in question […] It is also consistent with the principles of international law relating to the plurality of responsible States, according to which the responsibility of each State is determined individually, on the basis

of its own conduct and by reference to its own international obligations (see ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Commentary on Article 47, paragraphs 6 and 8). Similarly, the alleged infringement of rights under the Convention through harm arising from GHG emissions globally and the acts and omissions on the part of multiple States in combating the adverse effects of climate change may engage the responsibility of each Contracting Party […]

Lastly, as regards the "drop in the ocean" argument implicit in the Government's submissions – namely, the capacity of individual States to affect global climate change – it should be noted that in the context of a State's positive obligations under the Convention, the Court has consistently held that it need not be determined with certainty that matters would have turned out differently if the authorities had acted otherwise. The relevant test does not require it to be shown that "but for" the failing or omission of the authorities the harm would not have occurred. ***Rather, what is important, and sufficient to engage the responsibility of the State, is that reasonable measures which the domestic authorities failed to take could have had a real prospect of altering the outcome or mitigating the harm […]***

In the context of climate change, this principle should also be understood in the light of Article 3 § 3 of the UNFCCC according to which States should take measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects."[138]

84. Although *Klimaseniorinnen* concerned a European State's violation of the European Convention on Human Rights, rather than States' human rights obligations at international law, the Cook Islands respectfully submits that the Court can nonetheless draw on and adapt the above analysis in rendering the requested opinion. This is because it provides a principled and well-reasoned explanation and understanding of how harm of a certain degree (including *"significant harm"*, which is of concern in these

[138] *Case of Verein Klimaseniorinnen Schweiz and others v. Switzerland*, ECtHR Application no. 53600/20, Judgment of the Grand Chamber (9 April 2024), paras. 439-444 (**emphasis added**).

proceedings) to the environment (including the *"climate system"* or a sub-component, such as the marine environment, which is of concern in these proceedings) is sufficient for the Relevant Conduct around GHG emissions to be in breach of States' human rights obligations (and other relevant obligations at international law more broadly), without a further need to establish a link between such harm and the harm suffered by a specific person or group of persons.

85. The Cook Islands also concurs with and endorses **Vanuatu's** submissions arguing that the Relevant Conduct regarding GHG emissions amounts to a serious breach of States' obligations owed *erga omnes*.[139] In particular, the Cook Islands highlights **Vanuatu's** view that States' plans to still increase fossil fuel production, as noted in the UN Environment Programme's ('**UNEP**') Production Gap Report, amounts to conduct that is "*both a gross and systematic violation of the obligations identified in response to Question (a), including those owed* erga omnes *or with peremptory character."*[140] These obligations are based on peremptory norms of international law and include the obligation to refrain from large-scale violations of human rights,[141] such as the obligations arising from the right to self-determination[142] and the prohibition of racial discrimination.[143]

86. Regarding how the Relevant Conduct regarding GHG emissions is in breach of States' obligations arising from the prohibition of racial discrimination specifically, the Cook Islands concurs with and endorses Professor Achiume's rigorous and deeply considered

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[139] Written Statement of Vanuatu, paras. 536-543.

[140] Written Statement of Vanuatu, para. 543.

[141] *The Obligations in Matters of Human Rights of a State that has Denounced the American Convention on Human Rights and the Charter of the Organization of American States (Interpretation and Scope of articles 1, 2, 27, 29, 30, 31, 32, 33 to 65 and 78 of the American Convention on Human Rights and 3(l), 17, 45, 53, 106 and 143 of the Charter of the Organization of American States),* Inter-American Court of Human Rights, Series A No. 26, Advisory Opinion No. OC-26/20 (9 November 2020), paras. 103-104.

[142] *East Timor (Portugal v. Australia), Judgment,* I.C.J. Reports 1995, p. 90, para. 29; Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected, art. 40, commentary, para. 5; Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries, Yearbook of the International Law Commission, 2022, vol. II, Part Two, conclusion 23 and Annex, letter.

[143] *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment*, 1970 I.C.J. Rep. 3 (Feb. 5, 1970), para. 34; Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected, art. 40, commentary, para. 4; Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries, Yearbook of the International Law Commission, 2022, vol. II, Part Two, conclusion 23 and Annex, letter (e).

analysis, which makes it clear that acts and omissions encompassed by the Relevant Conduct regarding GHG emissions amount to breaches of States' obligations arising from the prohibition of racial discrimination as follows:

> *"[I]nternational law requires States to address not only explicit racism and intolerance but also indirect and structural forms of discrimination that result from the global ecological crisis. ...*
> *States are in breach of their racial equality and non-discrimination obligations under international human rights law when they: fail to adopt or enforce anti-discrimination legislation regulating the conduct of both public and private actors; fail to amend, rescind or nullify any laws and regulations that have the effect of creating or perpetuating discrimination; or fail to adopt all appropriate immediate and effective measures to prevent, diminish and eliminate the conditions, attitudes and prejudices which cause or perpetuate discrimination in all its forms, or, where necessary, fail to implement concrete special measures aimed at realizing de facto, substantive equality. ...*
> ***The racially disparate impacts of environmental degradation and climate injustice, including the proliferation of racial sacrifice zones, <u>amount to evidence that States that have caused significant harm to the climate system are in breach of these racial equality and non-discrimination obligations</u>**"*[144]

The Cook Islands submits that these breaches reflect the undeniable reality that interlocked power structures, such as patriarchy, ableism, colonialism, imperialism, capitalism and racism, are the core driving forces of the Relevant Conduct regarding GHG emissions which underpin the two questions put to the Court, along with the Relevant Conduct regarding adaptation actions. As such, the Cook Islands respectfully submits that the Court cannot effectively respond to these two questions without addressing these power structures, by recognizing in its responses both the breaches of States'

[144] Written Statement of the OACPS, Appendix B: Racial Equality and Racial Non-Discrimination Obligations of States in Respect of Climate Change, Expert Report Of Professor E. Tendayi Achiume, March 2024, para. 36.

obligations that operate to uphold these structures, and the legal consequences for States that are required to help bring these breaches to an end.

C. The Relevant Conduct regarding adaptation actions breaches States' obligations in respect of climate change

87. To recall from **Chapter III, Part D, Paragraph 34 above**, the Cook Islands submits that the Relevant Conduct regarding adaptation actions can be characterized as follows:

> ***The Relevant Conduct also consists of acts and omissions of individual States and of a specific group thereof – that impede, undermine or inhibit adaptation actions by impeding, undermining or inhibiting the scaling up of action and support, including finance, capacity-building and technology transfer, to enhance adaptive capacity and to implement collaborative approaches for effectively responding to the adverse effects of climate change, particularly for developing countries that are particularly vulnerable to these effects - with these effects resulting from the Relevant Conduct regarding GHG emissions characterized above and the significant harm caused by it, and with the acts and omissions that impede, undermine or inhibit adaptation actions further contributing to this significant harm, whether or not the acts and omissions of a given State over time are the only or the main cause of the impeding, undermining or inhibiting of adaptation actions, and whether or not these acts and omissions are the only or the main cause of the specific harm suffered by another State, people or individual."***

88. The Cook Islands submits that this type of Relevant Conduct constitutes a breach of States' obligations in respect of climate change. To support this submission, the Cook Islands highlights the following six sources indicating that States are engaging in this Relevant Conduct:

89. **First**, the Outcome of the first global stocktake, part of the 2023 UAE Consensus, made it clear that States are in engaging in conduct that is effectively in breach of their various obligations to support, assist and finance adaptation actions in "***[noting] with concern that the adaptation finance gap is widening,*** *and that current levels of climate finance, technology development and transfer, and capacity-building for adaptation* ***remain insufficient to respond to worsening climate change impacts in developing country Parties,*** *especially those that are particularly vulnerable to the adverse effects of climate change."*[145] It also stated that adaptation efforts are currently *"fragmented, incremental, sector-specific and unequally distributed across regions"*.[146]

90. **Second**, the UNEP's Adaptation Gap Report published in November 2023, appropriately titled *Underfinanced. Underprepared - Inadequate investment and planning on climate adaptation leaves world exposed*, stated that the total costs of adaptation for developing countries for this present decade from 2020 – 2030 is estimated to be US$251-387 billion a year, whereas the flows of international public adaptation finance to developing countries are estimated to be only at US$21 billion as of 2021.[147] The Report also noted that *"[d]espite the urgent need to accelerate and scale up international public adaptation finance to developing countries, these flows have declined since 2020",* and that the adaptation finance gap is *"likely 10–18 times as great as current international adaptation finance flows."*[148] As **Egypt** rightly notes in its written statement, this financing *"is a far cry from the actual needs of developing countries as well as the USD 100 billion pledged by the developed countries in the Copenhagen Accord, a pledge that was supposed to be met in the year 2020."*[149]

91. **Third**, the Organisation for Economic Co-operation and Development's ('**OECD**') 2023 report titled *Scaling Up Adaptation Finance in Developing Countries: Challenges and*

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[145] Decision _/CMA.5, Outcome of the first global stocktake, 13 December 2023, para. 81 (**emphasis added**).
[146] Decision _/CMA.5, Outcome of the first global stocktake, 13 December 2023, para. 15(c).
[147] UNEP, *Adaptation Gap Report 2023: Underfinanced. Underprepared. Inadequate investment and planning on climate adaptation leaves world exposed*, 2023, UNEP, Nairobi, p. 40, available here: https://doi.org/10.59117/20.500.11822/43796
[148] UNEP, *Adaptation Gap Report 2023: Underfinanced. Underprepared. Inadequate investment and planning on climate adaptation leaves world exposed*, 2023, UNEP, p. XV, available here: https://doi.org/10.59117/20.500.11822/43796
[149] Written Statement of Egypt, para. 184, citing UNFCCC, Conference of the Parties, Fifteenth Session, FCCC/CP/2009/11/Add.1, Decision 2/CP.15, 18 December 2009, available at: https://unfccc.int/process/conferences/pastconferences/copenhagen-climate-

Opportunities for International Providers outlined several challenges and barriers that developing countries face in accessing and increasing adaptation finance due to the *"complex international adaptation finance architecture"*. [150] These challenges included: the fragmentation of the climate funds architecture; accreditation barriers to access climate funds directly; challenges in complying with a wide range of diverse eligibility criteria and application requirements for project proposals; lengthy review processes by providers of adaptation finance; and limited reach to local organisations.[151] Particularly relevant to these proceedings is the reported challenge that the current finance architecture for adaptation is not tailored to the needs of small island developing States, Least Developed Countries ('**LDCs**') and *"fragile states"* as the OECD describes below:

> *"Thanks to their higher capacity, middle-income countries with strong institutions and experience in development co-operation tend to attract proportionally more adaptation finance than countries more vulnerable to climate change impacts such as LDCs and SIDS, which usually have less developed institutional capacities and significant staffing constraints for preparing project proposal (OECD, 2023[9]; LDC Expert Group, 2020[23]; United Nations and Climate Finance Access Network, 2022[20]))."*[152]

These reported challenges and barriers make it clear that States are in engaging in conduct that is effectively in breach of their various obligations to support, assist and finance adaptation actions, especially adaptation actions for developing country Parties and small island developing States.

92. **Fourth**, a 2022 narrative review of the literature on the climate finance landscape for small island developing States by researcher Ellis Kalaidjian and Associate Professor Stacy-ann Robinson provides further details on these structural and institutional barriers

[150] OECD, *Scaling Up Adaptation Finance in Developing Countries: Challenges and Opportunities for International Providers*, 2023, Green Finance and Investment, OECD Publishing, pp. 51 (link).
[151] OECD, *Scaling Up Adaptation Finance in Developing Countries: Challenges and Opportunities for International Providers*, 2023, Green Finance and Investment, OECD Publishing, pp. 51-52 (link).
[152] OECD, *Scaling Up Adaptation Finance in Developing Countries: Challenges and Opportunities for International Providers*, 2023, Green Finance and Investment, OECD Publishing, p. 52 (link).

for developing countries, with a particular focus on small island developing States. Specifically, the review affirmed and provided updates on the following three areas of overarching concerns of small island developing States, or SIDS, regarding adaptation financing as they previously expressed in the 2014 SAMOA Pathway, as follows:

a. On small island developing States' concern that the international community, including its seven multilateral adaptation funds, has not mobilized sufficient capital to meet the costs of adaptation in small island developing States: *"[T]he sixth edition of the UN Environment Programme's Adaptation Gap Report, published in November 2021, had several key messages, including: **"The finance needed to implement adaptation plans [in developing countries] is still far short of where it should be"**."*[153]

b. On small island developing States' concern that many small island developing States struggle to access multilateral finance: *"Robinson and Dornan (2017, p. 1111) capture salient quotes from SIDS policy- and decision-makers about their experience with access—one interviewee explained, ''[t]he GCF paperwork is higher than the sea-level rise in Tuvalu'', **signaling the cumbersome nature of preparing project proposals**. Another related concern for policy- and decision-makers is the type of finance to which SIDS have access. In the Caribbean, 38% of flows are concessional loans and 62%, grants (Atteridge et al., 2017); however, the situation in the AIMS region is starkly different—nearly 75% of the flows are in the form of concessional loans; grants account for the remaining 25% (Canales et al., 2017), **raising questions about issues of fairness and justice for SIDS having to finance adaptation to climate impacts to which they made a negligible contribution**. In the Pacific, 86% of finance is delivered as*

[153] Ellis Kalaidjian and Stacy-ann Robinson, 'Reviewing the nature and pitfalls of multilateral adaptation finance for small island developing states' (2022) 36:100432 *Climate Risk Management* 1, p. 9 (link), citing: UNEP, *Adaptation Gap Report 2021*: *The Gathering Storm*, 2021, UNEP, available here: https://www.unep.org/resources/adaptation-gap-report-2021.

project-based support (Atteridge & Canales, 2017), ***raising questions about the sustainability of adaptation interventions****."*[154]

c. On small island developing States' concern that financial resources have not satisfied States' obligations under the UNFCCC to enhance adaptive capacity: *"****Robinson (2020a) finds considerable variability in adaptation progress and adaptive capacity improvements in SIDS*** *... Robinson (2020a) identifies 'more advanced adaptors', or countries performing many adaptation actions. Cook Islands and Kiribati in the Pacific head the 'more advanced adaptors' list. Robinson (2020a) also identifies 'less advanced adaptors', or countries that perform few adaptation actions. Guinea-Bissau in the AIMS region and the Marshall Islands in the Pacific head the 'less advanced adaptors' list ... Of special note are the discrepancies between the kinds of adaptation strategies that the more and less advanced adaptors prioritize. On average, more advanced adaptors have concentrated on 'planning', 'implementation', and 'monitoring/evaluation'; less advanced adaptors have pursued 'observation and assessment' and 'stakeholder engagement/knowledge management' (Robinson, 2020a),* ***suggesting that most SIDS are engaged in what Berrang-Ford et al. (2014) call 'groundwork' activities that precede 'actual' adaptation****."* [155]

[154] Ellis Kalaidjian and Stacy-ann Robinson, 'Reviewing the nature and pitfalls of multilateral adaptation finance for small island developing states' (2022) 36:100432 *Climate Risk Management* 1, p. 9 (link); citing: Stacy-ann Robinson and Matthew Dornan, 'International financing for climate change adaptation in small island developing states' (2017) 17 *Regional Environmental Change* 1103-1115 (link); Aaron Atteridge, Nella Canales, and Georgia Savvidou, *Climate Finance in the Caribbean Region's Small Island Developing States* (Stockholm Environment Institute, 2017) (link); Nella Canales, Aaron Atteridge, and Annie Sturesson, *Climate finance for the Indian Ocean and African small island developing states* (Stockholm Environment Institute, 2017) (link). Aaron Atteridge and Nella Canales, Climate finance in the Pacific: an overview of flows to the region's Small island developing states (Stockholm Environment Institute, 2017) (link)

[155] Ellis Kalaidjian and Stacy-ann Robinson, 'Reviewing the nature and pitfalls of multilateral adaptation finance for small island developing states' (2022) 36:100432 *Climate Risk Management* 1, p. 10 (link), citing: Stacy-ann Robinson, 'A richness index for baselining climate change adaptations in small island developing states' (2020) 8 *Environmental and Sustainability Indicators* 100065 (link): Lea Berrang-Ford, James D. Ford, Alexandra Lesnikowski, Carolyn Poutiainen, Magda Barrera, and S. Jody Heymann, 'What drives national adaptation? A global assessment' (2014) 124 *Climatic change* 441 (link).

Importantly, Kalaidjian and Robinson's review also noted that another major pitfall of multilateral adaptation finance for small island developing States are the challenges in mobilizing adaptation finance through these funds, where *"divergences in operationalizing equity-oriented norms"* have resulted in different financial entities using vastly different burden sharing schemes. In addition to these mobilizing issues, Kalaidjian and Robinson noted that *"the multiplicity of [multilateral climate funds], institutions, each with its respective interests, mandates, fiduciary standards, and decision-making arrangements,* ***exacerbates the issue of SIDS' access to funding, as it imposes administrative burdens on those countries that have governance systems that are already burdened."***[156] Therefore, this review further highlights that States' have engaged and are still engaging in the Relevant Conduct regarding adaptation actions and are thus in breach of their various obligations to support, assist and finance adaptation actions, particularly for small island developing States.

93. **Sixth**, in regard to the UNFCCC's Green Climate Fund ('**GCF**') specifically, a 2022 empirical analysis of the GCF's local delivery of adaptation finance by Dr Jessica Omukuti and others found that although the GCF's policies and communications express multiple commitments around funding local level adaptation, the following three barriers still prevent the GCF from delivering finance for local level adaptation action:

> *"**First**, GCF lacks a unified framework for identifying and defining the local level, local actors, and local adaptation processes. **Second**, GCF exhibits limited transparency and accountability in relation to how approved funding for adaptation is spent, particularly for projects that claim to generate local level adaptation outcomes. **Third**, some Accredited Entities have limited experience and capacity for designing and implementing projects that deliver finance to the local level. This is because the local delivery of finance is not prioritized by*

[156] Ellis Kalaidjian and Stacy-ann Robinson "Reviewing the nature and pitfalls of multilateral adaptation finance for small island developing states" (2022) 36:100432 *Climate Risk Management* 1, p. 10 (link).

GCF during the accreditation of entities or provision of readiness support to Accredited Entities."[157]

Therefore, it is clear that States have engaged and are engaging in the Relevant Conduct regarding adaptation actions and that this Relevant Conduct is in breach of States' various obligations to support, assist and finance adaptation actions in contexts concerning the GCF's financing of local adaptation actions.

94. The Cook Islands acknowledges there is not yet the same amount of data or reporting indicating how States' are fulfilling their obligations to support, assistance and financing of adaptation actions in contexts specifically covered by the BBNJ Agreement or the CBD (as proposed by Proposed Obligation B). This is to be expected for the BBNJ Agreement which has not yet entered into force. However, there is clear indication that developed country Parties are also engaging in the Relevant Conduct regarding adaptation actions in contexts covered by CBD. Namely, the 2021 report on the workshop on biodiversity and climate change co-sponsored by the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services ('**IPBES**') and the IPCC found that inadequate financing is one of the key existing governance challenges for climate and biodiversity action more broadly as follows:

> *"**Existing funding mechanisms for climate and biodiversity are both underfunded and not well integrated.** Financial flows for biodiversity continue to lag behind projected needs: global conservation budgets for biodiversity were approximately $121.5 billion annually from 2008-2017, which showed steady increases but still falls short of needs (Seidl et al., 2020). The estimated funds for the post-2020 agenda needs are likely to be between $151 to $895 billion annually (CBD, 2020)."*[158]

[157] Jessica Omukuti, Sam Barrett, Piran C. L. White, Robert Marchant and Alina Averchenkova, 'The green climate fund and its shortcomings in local delivery of adaptation finance' (2022) 22:9-10 *Climate Policy* 1225, p. 1225 (link).

[158] Hans-Otto Pörtner and others, *IPBES-IPCC co-sponsored workshop report on biodiversity and climate change*; 2021, IPBES and IPCC, p. 157, available here: https://files.ipbes.net/ipbes-web-prod-public-files/2021-06/20210609_workshop_report_embargo_3pm_CEST_10_june_0.pdf

95. Additionally, the Cook Islands submits that there is strong evidence indicating that States, namely developed country Parties, are engaging in this Relevant Conduct in ways that more specifically breach Proposed Obligation B, which to recall from the Cook Islands' Written Statement, is the obligation to support, assist and finance the use and implementation of traditional knowledge in adaptation actions in accordance with States' human rights obligations. This evidence can be found in the following sources:

a. In his expert report provided in support of these Written Comments, Koka'ua affirms the structural and institutional barriers small Island developing States face noted in the reports and literature above, specifically in regard to the use and implementation of traditional knowledge in adaptation actions in the Cook Islands. In the excerpt below, Koka'ua points out the lack of effective support, assistance and funding from multilateral climate funds like the GCF and the Global Environment Facility ('**GEF**') and by extension, the developed country Parties who are to provide most of the financing in accordance with the CBDR principle:

> *"In terms of what developed high-emitting States are currently doing to support climate change adaptation in the Cook Islands, I understand the Government of the Cook Islands can access funds from donors such as the GCF and GEF.* ***However, in my view and based on my work experiences, these funds are highly bureaucratic and difficult for grassroots communities to access.*** *For example, they are huge documents with highly technical terminology, too many reporting check-ins, and too many technical details required, such as calculating carbon sequestered.* ***Our traditional knowledge practitioners or project managers find these barriers a prohibitive factor in applying for funds and feel that these funding sources are for government****. Because our projects tend to be long term, they often do not fit in with government agenda's as they are more short-term. I know Kōrero o te 'Ōrau [an environmental non-government organization in the Cook Islands]*

struggled to get support for their taramea operation because it did not have a revenue component to it.

I am not sure if these funding mechanisms have established efficient ways to trickle these large funding pots down to everyday practitioners of traditional knowledge. If this trick-down was effective, we would ... encourage our people to continue the traditional practices, while also actively contributing to solutions which assist in climate adaptation, and compensating them for their time. ***Even our national government ministries must navigate the challenges of developing proposals for GCF and GEF which fit into complex funder requirements and goals, which often are irrelevant to the needs of our indigenous communities on the ground.***

...

For traditional knowledge to be effectively implemented and used to address the impacts of climate change in the Cook Islands and even the Pacific Islands more generally, more funding from developed high-emitting States is needed. ***There is also a need for more acknowledgement by these funders, and non-Indigenous politicians and community leaders around the world, that traditional knowledge is essential to not only climate change adaptation but the survival of our species, especially so on remote landmasses in the middle of large oceans***.

Some governments, NGOs, and conservation groups around the world are becoming more aware that traditional knowledge is an absolute necessity for ensuring we have the full set of tools we need to navigate and adapt to the impacts of climate change. ***However, my concern is that this recognition may not be happening fast enough to reverse our species' current trajectory of emissions and extraction of natural resources. We therefore need to do all we can to ensure traditional***

knowledge is valued and integrated into climate change projects across the planet, in every ecosystem where it is possible to do so."[159]

b. This echoes Koka'ua's previous comments in his written testimonial in support of the Cook Islands' Written Statement, which to recall, also highlight the lack of support and value placed on traditional knowledge at the UNFCCC level, including by donor States and funders as follows:

> *[W]e just are not resourced to really undertake a full scale Indigenous knowledge revitalisation at the moment....[Traditional knowledge] is not really valued...by the colonial powers, when we talk about funding at the COP meetings, for example, like Indigenous knowledge, it's a very small mention.* ***[The] Funding that goes directly to Indigenous peoples is very small. [I] don't know what the stats are, but it'd be in the single digits of overall climate funding that would go to Indigenous peoples, probably around one to two percent....*** *[T]hose are obviously clear areas where we could be supported to bring knowledge that can help us [and] help the planet with our adaptation and eventually mitigation to climate change as well.*[160]

c. Koka'ua's comments are also supported by the qualitative empirical research undertaken by researcher Diamir de Scally and Associate Professor Brent Doberstein on the use of local knowledge in climate change adaptation in the Cook Islands which found that another major barrier is the lack of understanding of local knowledge and the low value placed on that knowledge by adaptation donors and funders as follows: *"One key informant highlighted that there were adaptation donors or funders, government officials, and*

[159] Liam Koka'ua, *Traditional Knowledge and Climate Change Adaptation in the Cook Islands - Expert Report by Liam Koka'ua*, 5 July 2024, pp. 9-10 (**Annex No. 1**).
[160] Written Statement of the Cook Islands, para. 124, Annex. No 10: Liam Ramsay Tuaivi Koka'ua, *Testimony of Liam Ramsay Tuaivi Koka'ua Impacted by the Effects of Climate Change*, 14 March 2024, para. 25 (**emphasis and clarifications added**).

islanders themselves who place very low value on local knowledge and consider it irrelevant in a more modern world (KI10)."[161]

d. In regards to breaches of States' human rights obligations, further to its submissions in its Written Statement, the Cook Islands submits that there are strong indications that the Relevant Conduct regarding adaptation actions, specifically in regard to the use and implementation of traditional knowledge in adaptation actions, not only engages, but breaches the obligations of States to protect the right of self-determination under the ICCPR and the ICESCR, the right to enjoy a minority culture under the ICCPR and the rights of the child to culture under the UNCRC.[162] Additionally, the Cook Islands submits that there are also strong indications that States' obligations arising from the prohibition of racial, gender and intersectional discrimination are also being breached by the Relevant Conduct of States regarding adaptation actions, specifically in regard to the use and implementation of traditional knowledge in adaptation actions. These indications are in the following comments from Koka'ua's expert report, which suggest various breaches of human rights obligations as follows:

i. Regarding the right to self-determination and the right to enjoy a minority culture: *"If ... recognition, support, and integration of traditional knowledge is not provided, there will continue to be significant harm inflicted on the Cook Islands due to climate change, and we will continue to receive technical advice or infrastructure which is not fit for purpose***. These costly gifts of support will not necessarily focus on what matters to the indigenous communities, for example, food security, cultural vitality, or holistic wellbeing***. <u>What is the use of a sea wall if you have nothing to eat? All the aforementioned risks are those</u>*

[161] Diamir de Scally and Brent Doberstein, 'Local knowledge in climate change adaptation in the Cook Islands' (2021) 14:4 Climate and Development, p. 366 (link), also cited in Written Statement of the Cook Islands, para. 122.

[162] The Cook Islands' submits these human rights are engaged by the use and implementation of traditional knowledge, see Written Statement of the Cook Islands, paras. 341-354.

which integration of traditional knowledge can address. Without this, all climate adaptation work will not be as successful as required for our survival on our remote islands."[163]

ii. Regarding rights arising from the prohibition of gender and intersectional discrimination, as well as the interconnected right to self-determination and right to culture: *"Gender equity, including in regard to the participation of women, is extremely important for adaptation efforts in the Cook Islands.* ***However, in my experience, Western perspectives on what gender equity looks like in practice can be different to those of Indigenous communities.*** *For example, women in the Cook Islands are traditionally valued for their abilities to collect and process certain foods, cooking, weaving, producing traditional medicine and so forth. While is there is increasing overlap with men in many traditional activities, women are typically in fields where they are traditionally considered to be the knowledge-holders. Therefore, having to tick a donor funder's box by encouraging women to be involved in domains traditionally delivered by men (such as taro growing or fishing beyond the reef) is very difficult and even disrespectful and offensive to Cook Islanders in being culturally inappropriate and harmful. Vice versa is also true when men are compelled by donors' requirements to be involved in an activity which is traditionally for women, such as weaving.*

To emphasize, both men and women have their traditional realms of expertise in regard to adaptation, and they both have significant amounts of traditional knowledge to share when it comes to climate change adaptation, it is not held by one gender

[163] Liam Koka'ua, *Traditional Knowledge and Climate Change Adaptation in the Cook Islands - Expert Report by Liam Koka'ua*, 5 July 2024, p. 5 (**emphasis added**).

solely. ***Therefore, there is an urgent need for funders and donor States and entities to not impose Western notions of gender equity and representation with regard to adaptation efforts, and <u>to respect the sovereignty and rights of Indigenous peoples to self-determination and culture when it comes to adaptation efforts as well</u>***.”[164]

96. Like with States’ breaches of their obligations as a result of engaging Relevant Conduct regarding GHG emissions, the Cook Islands submits that States cannot legitimately claim to be complying with their obligations at international law just because their support, assistance and financing of adaptation actions in developing countries may have peaked or increased. Rather, their past failures to do so is sufficient to establish a continuing composite breach. Importantly, the bar for conduct is also higher for such States due to their outsized contribution to the problem, as per the principle of equity and CBDR and respective capabilities.

D. Specific legal consequences

97. This part presents the Cook Islands’ views on the some of the specific legal consequences for States in breach of their obligations for engaging in both types of Relevant Conduct.

98. It is important to note that the Court has clearly recognized that the general rules of reparation must be read in the light of the specific circumstances arising from the nature of environmental harm.[165] These rules include: Articles 30 (Cessation and non-repetition), 31 (Reparation), 33 (Scope of the international obligations set out in this part), 34 (Forms of reparation), 35 (Restitution) and 36 (Compensation). Moreover, the Court has affirmed that specific aspects relating to the application of those general rules

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[164] Liam Koka‘ua, *Traditional Knowledge and Climate Change Adaptation in the Cook Islands - Expert Report by Liam Koka‘ua*, 5 July 2024, p. 8.

[165] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation*, Judgment, I.C.J. Reports 2018, p. 15, paras. 34, 41-43.

on reparation, including the assessment of the required causal nexus "*may vary depending on the primary rule violated and the nature and extent of the injury*".[166]

99. It is also key to note that Question (b) asks the Court to advise on the legal consequences with regard to two categories of victims: (i) "*States, including, in particular, small island developing States"*; and (ii) "*Peoples and individuals of the present and future generations affected by the adverse effects of climate change".*

100. As a preliminary matter, the Cook Islands concurs with and endorses **Vanuatu's** submissions which carefully characterizes both categories of victims consistently with terminology in the IPCC reports and sources of international law, and which appropriately emphasize how these victims may be entitled to invoke the individual or collective responsibility of States whose acts and omissions have caused *"significant harm"* to the environment.[167]

101. Accordingly, the following two **sections 1. and 2.** below present the Cook Islands submissions for each of these categories of victims, respectively.

1. *Legal consequences of the Relevant Conduct relating to* "States, including, in particular, small island developing States"

102. The Cook Islands submits the following consequences of the Relevant Conduct apply in relation to *"States, including, in particular, small island developing States"* in **subsections (a)** to **(e)** below:

(a) Cessation and non-repetition

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[166] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations,* Judgment of 9 February 2022, para. 94. See also *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation,* Judgment, I.C.J. Reports 2018, p. 15, para. 34.
[167] Written Statement of Vanuatu, paras. 538-55, 608-620.

103. The Cook Islands submits that specific consequences of cessation apply to breaches of States' obligations through engaging in both the Relevant Conduct regarding GHG emissions and the Relevant Conduct regarding adaptation actions.

104. In terms of the relevant laws and principles regarding cessation, the Cook Islands notes the following:

a. Article 30 of the ARSIWA provides that: "*The State responsible for the internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing; (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require*".

b. A case which is particularly pertinent to these proceedings is the *Trail Smelter Arbitration*, in which the established arbitrational tribunal found Canada was in breach of its duty of due diligence over acts of pollution by private industry within its jurisdiction which caused injury in the USA's jurisdiction, and thus ordered Canada to take specific measures to "*prevent future significant fumigations*". This case shows the importance of cessation as a necessary legal consequence of a States' conduct causing transboundary environmental harm and breaching its legal obligations.[168]

c. The Court required cessation of conduct in the contentious case of *Whaling in the Antarctic*, finding that Japan had to "*cease with immediate effect the implementation of JARPA II*" by *"[revoking] any extant authorization, permit or license to kill, take or treat whales in relation to JARPA II, and refrain from granting any further permits […] in pursuance of that programme*."[169] This case demonstrates how the Court can make cessation orders that require a State to undertake certain positive acts in order to stop the breaching conduct.[170]

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[168] *Trail Smelter Arbitration*, RIAA, vol. III, pp. 1905–82, at p. 1934.

[169] *Whaling in the Antarctic (Australia v. Japan; New Zealand intervening)*, *Judgment*, I.C.J. Reports 2014, p. 226, paras. 244-245.

[170] *United States Diplomatic and Consular Staff in Tehran, Judgment,* I.C.J. Reports 1980, p. 3, paras. 63-65, 68, 95.

d. The Court also found that cessation of conduct was required in several of its advisory opinions, including the *Chagos Archipelago* advisory opinion, in which the Court found that the United Kingdom has "*to bring an end to its administration of the Chagos Archipelago as rapidly as possible*."[171] In its *Wall* advisory opinion, the Court found that Israel had to "*cease forthwith the works of construction of the wall […], to dismantle forthwith the structure therein situated, and to repeal or render ineffective forthwith all legislative and regulatory acts relating thereto.*"[172] Similarly, in its recent *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* advisory opinion, the Court found that *"Israel must immediately cease all new settlement activity. Israel also has an obligation to repeal all legislation and measures creating or maintaining the unlawful situation, including those which discriminate against the Palestinian people in the Occupied Palestinian Territory, as well as all measures aimed at modifying the demographic composition of any parts of the territory."*[173] Importantly to these proceedings, the *Wall* and the *Occupied Palestinian Territory* advisory opinions make clear that the Court can require States to cease their breaching conduct by repealing legislation and rendering ineffective regulatory acts and measures that are contributing to the breach. The Cook Islands submits that this follows that States can also be required to enact legislation and introduce and implement regulatory measures required to cease the breach.

e. Furthermore, domestic courts and other international courts have required States to cease violating international obligations by taking positive action, specifically in respect of obligations around climate mitigation - as seen in the

[171] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion,* I.C.J. Reports 2019, p. 95, para. 182.

[172] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion,* I.C.J. Reports 2004, p. 136, paras. 151, 163.

[173] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, I.C.J. Reports 2024, p. 76, para. 268.

Supreme Court of the Netherlands' *Urgenda case* in terms of specific GHG emissions reduction targets and in the *KlimaSeniorinnen case* in regard to human rights and climate change.[174]

105. In applying these relevant laws, the Cook Islands reiterates its submissions above that acts and omissions of States are presently contributing to the Relevant Conduct regarding GHG emissions as a composite breach of several obligations of States, including those deriving from the duty of due diligence, whether by reference to general international law or the provisions of the Paris Agreement.

106. Accordingly, in response to Question (b)(i), the Cook Islands respectfully submits that the Court should advise that the following legal consequences of cessation apply for States' engaging in the Relevant Conduct regarding GHG emissions:

a. **To cease subsidizing fossil fuels:** As **Vanuatu's** written statement aptly notes, this is a continuing positive act of States and entities empowered by States' governmental authority.[175] According to the International Monetary Fund, subsidies for fossil fuels reached an unprecedented peak of USD$7 trillion in 2022 and must be cut drastically to end support for the production and consumption of the major source of anthropogenic GHG emissions.[176] Therefore, a crucial part of cessation as a legal consequence is for States to immediately take all necessary steps to repeal all legislation and regulatory acts and measures that subsidize fossil fuels, and enact legislation and regulatory acts and measures that prohibit the subsidizing of fossil fuels.

b. **To cease the expansion of fossil fuel production: Vanuatu** also notes that the expansion of fossil fuel production is another continuing positive act of States

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[174] *Urgenda Foundation v. State of the Netherlands*, Supreme Court of the Netherlands, ECLI:NL:HR, 20 December 2019 (Netherlands); *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, ECtHR (Grand Chamber) Application No. 53600/20, Judgment (9 April 2024), para. 573.
[175] Written Statement of Vanuatu, paras. 144-145, 495-496.
[176] See Simon Black, Antung A. Liu, Ian Parry & Nate Vernon, 'IMF Fossil Fuel Subsidies Data: 2023 Update' (August 2023) IMF Working Paper (Fiscal Affairs Department), Washington, DC, WP/23/169 (link), as cited in Written Statement of Vanuatu, para. 511.

and entities by States' governmental authority as evident in various energy and climate laws and policies, which according to the aforementioned UNEP's Production Gap Reports are presently leading "*to global production levels in 2030 that are 460%, 29%, and 82% higher for coal, oil, and gas, respectively, than the median 1.5ºC-consistent pathways*."[177] Therefore, cessation of the breach requires States to cease expanding fossil fuel production, by immediately taking all necessary steps to repeal all of laws and policies that expand fossil fuel production, and enact legislation and regulatory acts and measures that prohibit the expansion of fossil fuel production.

c. **To cease their under-regulation of GHG emissions from both public and private sources under its jurisdiction or control:** It is crucial for States to cease breaches of their obligations by engaging in the Relevant Conduct regarding GHG emissions by immediately taking all necessary steps to repeal all legislation leading to the under-regulation of GHG emissions from both public and private sources under its jurisdiction or control, and enacting legislation and regulatory acts and measures which not only inhibit and prohibit under-regulation, but provide for effective regulation of GHG emissions by all sources, entities and corporations under their control.

d. **To cease reliance on geoengineering and associated speculative technologies:** The Cook Islands endorses **Vanuatu's** submissions arguing that reliance on geoengineering and associated speculative technologies is antithetical climate justice and the obligations of cessation above on the grounds that they divert attention and resources away from the obligations to reduce GHG emissions, and that they also carry inherent risks of increasing emissions and global temperatures, and may constitute discrete breaches of international law.[178] Therefore, a crucial part of this type of cessation is for States to immediately

[177] UNEP, *Production Gap Report 2023*: *Phasing down or phasing up? Top fossil fuel producers plan even more extraction despite climate promises,* November 2023, pp. 4-5 (link), as cited in Written Statement of Vanuatu, para. 511.
[178] Written Statement of Vanuatu, paras. 571-575.

take all necessary steps to repeal all legislation facilitating such reliance on these technologies, and enacting legislation and regulatory acts and measures that prohibit these technologies also.

107. The Cook Islands also respectfully submits that Court should respond to Question (b)(i) by noting that the following legal consequences of cessation apply to States' which have breached their legal obligations by engaging in the Relevant Conduct regarding adaptation actions:

i. To cease all acts and omissions that *"impede, undermine or inhibit adaptation actions by impeding, undermining or inhibiting the scaling up of action and support, including finance, capacity-building and technology transfer, to enhance adaptive capacity and to implement collaborative approaches for effectively responding to the adverse effects of climate change, particularly for developing countries that are particularly vulnerable to these effects".* The requirements of such cessation include, but is not limited to:

ii. Immediately ceasing States' omissions to rapidly scale up their support and financial contributions to all multilateral adaptation funds, including, but not limited to, the GCF and GEF.

iii. Taking all necessary steps to cease the inaccessible, fragmented and excessively bureaucratic administrative structures, processes and policies in all multilateral or bilateral adaptation funds. This can include repealing and rendering ineffective all problematic laws, rules, processes and policies creating and maintaining the challenges and barriers developing country Parties and small island developing States face in accessing and mobilising adaptation funding. Steps can also include enacting laws and introducing processes and policies that allow for equitable access to finances for developing country Parties and small island developing States.

iv. To cease all acts and omissions that in effect undermine the use and implementation of traditional knowledge in adaptation actions in accordance with States' human rights obligations, including, but not limited to, contexts such as negotiations, meetings, agreements and in the design and operation and management of adaptation funds.

(b) Reparation through restitution

108. The Cook Islands submits that several legal consequences of reparation for injury apply to States which have breached their obligations through engaging in the Relevant Conduct, specifically the Relevant Conduct regarding GHG emissions.

109. In terms of the relevant laws regarding reparation generally, the Cook Islands notes the following points:

a. Article 31 of ARSIWA provides that the *"responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act"* and further that *"[i]njury includes any damage, whether material or moral, caused by the internationally wrongful act of a State."*

b. Article 34 of ARSIWA further provides that the different forms of reparation include "*restitution, compensation and satisfaction, either singly or in combination.*"

c. The Court in *Costa Rica v. Nicaragua* affirmed that it is necessary to establish a sufficient causal nexus between the relevant breach and the alleged injury or injuries, whether it be material or moral damage as follows*:*

"In cases of alleged environmental damage, particular issues may arise with respect to the existence of damage and causation. The damage may be due to several concurrent causes, or the state of science regarding the causal link between the wrongful act and the damage may be uncertain. These are difficulties that must be addressed as and when they arise in light of the facts of the case at hand and the evidence presented to the Court. ***Ultimately, it is for the Court to decide whether there is a sufficient causal nexus between the wrongful act and the injury suffered."***[179]

d. In terms of the requirements for a sufficient causal nexus, as the Cook Islands notes at **Paragraphs 81-82a. above**, invoking the responsibility of an individual State requires the establishment of a causal link between the composite breach to which its acts and omissions have contributed *"significant harm to the climate system"* and the alleged injury, rather than any specific act or omission of the State or States in isolation.

e. The Court also noted that when establishing a causal link, it must be established that the alleged injury would have been avoided "*with a sufficient degree of certainty*" in the absence of the composite breach.[180] For the present proceedings, **Vanuatu's** written statement outlines robust scientific evidence which establishes how unprecedented changes to the climate system are causing widespread adverse impacts and related losses and damages to nature and people,[181] which the Cook Islands wholly endorses.

110. In accordance with the above points, the Cook Islands submits that an appropriate legal consequence for States engaging in the Relevant Conduct regarding GHG emissions is

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[179] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment,* I.C.J. Reports 2018, p. 15, para. 34; Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected, art. 31.
[180] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment,* I.C.J. Reports 2007, p. 43, para. 462.
[181] Written Statement of Vanuatu, paras. 83-91.

reparation through restitution. As Article 35 of ARSIWA provides, restitution is to "*re-establish the situation which existed before the wrongful act was committed",* provided that such restitution is *"not materially impossible"* and *"does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation."*[182]

111. The Cook Islands concurs with and endorses **Vanuatu's** submissions that the following restitution measures are neither materially impossible nor disproportionately burdensome in proportion to the benefits, and therefore apply as consequences for the Relevant Conduct regarding GHG emissions:

a. **Support for adaptive capacity:**[183] It is important to note that States are required to provide such support both as a matter of fulfilling their primary obligations at international law and as a legal consequence of breaching various obligations due to having engaged in the Relevant Conduct regarding GHG emissions as well.

b. **Non-monetary redress for human mobility:** This includes redress for injury caused by the adverse effects of climate change, including displacement and migration.[184]

c. **Declaratory relief in the form of recognition of the sovereignty, statehood, territory and maritime boundaries of States despite the impacts of sea-level rise**:[185] In noting this consequence, the Cook Islands concurs with and endorses the submissions of multiple participants, including several fellow small island developing States like **Solomon Islands**, **Micronesia**, **Tonga** and **the Bahamas**, which broadly emphasise the importance of the Court recognizing States' obligations to recognise the preservation of sovereign and jurisdictional rights of States despite the impacts of sea-level rise in its advisory opinion.

[182] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected, art. 35.
[183] Written Statement of Vanuatu, paras. 583-584.
[184] Written Statement of Vanuatu, paras. 585-586.
[185] Written Statement of Vanuatu, paras. 586-588.

Specifically, the Cook Islands concurs with and endorses participants' various submissions emphasizing the importance of the Court recognizing the following in its responses to the questions put to it: the emerging State practice spearheaded by small island developing States and the Pacific Islands Forum to recognise that baselines remain legally fixed under the UNCLOS despite the impacts of sea-level rise;[186] the principles of legal certainty and stability as the basis for freezing baselines and maritime boundaries and entitlements;[187] the Court's affirmation in its *Nuclear Weapons* advisory opinion of the *"the fundamental right of every State to survival"*;[188] the principle of territorial integrity;[189] the right of self-determination;[190] the right of permanent sovereignty over natural resources;[191] the principle of stability of boundaries;[192] the obligation of cooperation;[193] and the obligation to provide restitution following the commission of an internationally wrongful act.[194]

(c) Reparation through compensation

112. The Cook Islands also submits that the Relevant Conduct regarding GHG emissions also entails reparation though compensation for loss and damage.

113. The Cook Islands respectfully notes that compensation for loss and damage is required as a legal consequence of the secondary rule of State responsibility, not only as a mere primary obligation to provide aid or financial assistance through the Paris Agreement and wider UNFCCC.

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[186] Written Statement of Solomon Islands, para. 212; Written Statement of the Bahamas, para. 222; Written Statement of El Savador, para. 58; Written Statement of Micronesia, para. 115; Written Statement of Tonga, paras. 235-236.
[187] Written Statement of Solomon Islands, para. 209; Written Statement of the Bahamas, para. 223; Written Statement of El Savador, paras. 55-56.
[188] Written Statement of the Bahamas, paras. 224-226; Written Statement of the Dominican Republic, para. 4.36.
[189] Written Statement of the Dominican Republic, paras. 4.34-4.42; Written Statement of the Pacific Islands Forum, paras. 69-72
[190] Written Statement of Kiribati, paras. 193-195, Written Statement of Liechtenstein, paras. 74-76; Written Statement of the Pacific Islands Forum, paras. 74-75, Written Statement of Sierra Leone, para. 3.91.
[191] Written Statement of Liechtenstein, para. 77.
[192] Written Statement of the Bahamas, para. 223; Written Statement of Kiribati, paras. 191; Written Statement of Nauru, para. 12.
[193] Written Statement of the Bahamas, para. 224-226.
[194] Written Statement of El Savador, para. 55; Written Statement of Vanuatu, para. 582.

114. In terms of the relevant laws regarding reparation through compensation, the Cook Islands notes the following:

a. Article 36 of the ARSIWA provides that compensation is available where the damage caused by breach *"is not made good by restitution"* and *"covers any financially assessable damage including loss of profits insofar as it is established."*[195]

b. In *Costa Rica v. Nicaragua*, the Court confirmed that compensation per Article 36 not only includes indemnification for the impairment or loss of environmental goods and services, but also payment for the restoration of the environment as follows:

> *"[D]amage to the environment, and the consequent impairment or loss of the ability of the environment to provide goods and services, is compensable under international law. Such compensation may include indemnification for the impairment or loss of environmental goods and services in the period prior to recovery and payment for the restoration of the damaged environment."*[196]

c. Importantly, regarding the valuation of that damage, the Court in *Costa Rica* also clarified that "*the absence of adequate evidence as to the extent of material damage will not, in all situations, preclude an award of compensation for that damage*."[197]

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[195] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected, art. 36.

[196] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment,* I.C.J. Reports 2018, p. 15, para. 42.

[197] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment,* I.C.J. Reports 2018, p. 15, para. 35.

115. In applying these legal principles to the breaches resulting from States' engagement in the Relevant Conduct regarding GHG emissions, the Cook Islands firstly concurs with and endorses **Vanuatu's** view that in this context, *loss* should be understood as irreparable harm, including, but not limited to, the disappearance of islands and other features of the environment, destruction of marine and coastal ecosystems, and extinction of species.[198] Damage should be understood as reparable harm and can include the destruction of roads, mangrove forests, schools, buildings, and natural habitats due to extreme events linked to climate change. It is also important to note that losses do not easily lead to restitution to warrant compensation as to fully repair the injury, whereas material damage can be assessed in economic terms for some aspects of loss - for instance, the costs of relocation of populations from islands that have become uninhabitable due to sea-level rise and other adverse effects of climate change.

116. The Cook Islands submits that States who have engaged in the Relevant Conduct regarding GHG emissions also owe compensation for other aspects of climate-induced loss that cause enduring moral and psychological injury to those who lose their culture, traditions and historical associations linked to their land, which cannot be readily quantified in economic terms. The Court's aforementioned approach to the valuation of damage in *Costa Rica* follows that the exact extent of the loss and damage in regard to culture, traditions and historical associations is not required for compensation to be owed, meaning compensation for these forms of loss cannot be precluded for small island developing States even if this loss cannot be fully or easily articulated within current frameworks of understanding climate-induced loss and economic loss more generally.

117. The Cook Islands again emphasizes that States, namely developed country Parties and high emitting States, are required to provide financial payments to those States most vulnerable to the adverse effects of climate change to fulfil their primary obligations under the Paris Agreement and their obligations relating to the Warsaw International Mechanism for Loss and Damage more broadly. Rather, States are also required to make

[198] Written Statement of Vanuatu, para. 590.

financial payments for engaging in the Relevant Conduct regarding GHG emissions as reparative compensation under Article 36 of ARSIWA for breaching their primary obligations towards vulnerable States that have been injured by significant harm to the climate system arising from acts and omissions regarding GHG emissions over time. This is on the grounds that the UNFCCC, including the Paris Agreement, does not expressly or implicitly indicate that the UNFCCC is a *lex specials* regime for determining liability and compensation for loss and damage.

(d) Reparation through satisfaction

118. The Cook Islands submits that States that have engaged in the Relevant Conduct regarding GHG emissions and the Relevant Conduct regarding adaptation actions are obliged to provide reparation through satisfaction.

119. In terms of the relevant laws and principles regarding reparation through satisfaction, the Cook Islands notes the following:

- **a.** Article 37 of ARSIWA provides that satisfaction is to provide reparation *"insofar as the injury cannot be remedied in full by restitution or compensation"* and that it encompasses a spectrum of measures aimed at acknowledging and remedying the breach, including but not limited to *"an expression of regret, a formal apology, and initiatives aimed at truth revelation."*

- **b.** The ILC's Commentary on Article 37 also noted that satisfaction can also take the form of a trust fund to manage compensation payments in the interests of the beneficiaries, or the award of symbolic damages for non-pecuniary injury.[199]

120. In applying these laws and principles to the Relevant Conduct regarding GHG emissions and the Relevant Conduct regarding adaptation actions, the Cook Islands submits that

[199] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected, art. 37, commentary, para. 5

satisfaction in the form of apology is required by high emitting States where both types of Relevant Conduct have inflicted significant wounds upon affected communities and ecosystems that can be addressed through an apology.

121. The Cook Islands also submits that high emitting States are also required to pursue truth revelation initiatives around climate change as satisfaction. As **Vanuatu** notes, these initiatives can include: *"scientific education campaigns that elucidate the drivers and repercussions of climate change, fostering awareness among citizens of responsible States about their role and the suffering and resilience of the affected peoples and individuals."* States can also make *"public acknowledgements or actions [that] would constitute an essential step towards holistic redress [that]....could take a collective and intergenerational form, highlighting the importance of addressing the human rights dimensions of climate change."*[200]

122. The Cook Islands respectfully submits that it is critically important for the Court to recognize that reparative satisfaction, restitution, compensation and cessation are all required for reparations for climate-related injustices to be effective and meaningful.

(e) Legal consequences of serious breaches of obligations owed *erga omnes* or to the international community as a whole

123. The Cook Islands submits that distinct legal consequences arise for serious breaches of States' obligations owed *erga omnes*, or in other words, to the international community as a whole.

124. In terms of the relevant laws and principles around *erga omnes* obligations, the Cook Islands notes the following:

a. Article 41(1)-(2) of ARSIWA provides that *"States shall cooperate to bring to an end through lawful means any serious breach"* and that *"[n]o State shall*

[200] Written Statement of Vanuatu, para. 599 (clarifications added).

recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation."

b. Article 41(3) also expressly provides that the consequences identified are "*without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law"*. The ILC commentary to Article 41(3) also clarifies that this paragraph *"reflect[ed] the conviction that the legal regime of serious breaches [was] itself in a state of development."*[201]

c. The Court in the *Barcelona Traction* case acknowledged that the prohibition of racial discrimination generates *erga omnes* obligations, specifically remarking that *erga omnes* obligations *"derive...from...the outlawing of acts of aggression, and of genocide, as also … the principles and rules concerning the basic rights of the human person,* ***including protection from slavery and racial discrimination****"*.[202]

d. The Court in its *Chagos* advisory opinion affirmed States' obligations *erga omnes* in regard to the right to self-determination as follows: *"Since respect for the right to self-determination is an obligation erga omnes, all States have a legal interest in protecting that right"*[203]

e. The Court in its *Wall* advisory opinion found violations of *"certain obligations* erga omnes*"*[204] and characterized such obligations as follows:

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[201] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected, art. 41, commentary, para. 14
[202] *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment*, 1970 I.C.J. Rep. 3 (Feb. 5, 1970), para. 34
[203] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, I.C.J. Reports 2019, p. 95, paras. 180-182.
[204] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, para. 155.

"Given the character and the importance of the rights and obligations involved, the Court is of the view that ***all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem****. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. 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."*[205]

f. Importantly, the Court also recently noted in its recent advisory opinion on the *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* that States' *erga omnes* obligations also include obligations to abstain from the following conduct in respect of internationally wrongful acts of States: *"treaty relations"*, *"entering into economic or trade dealings"*; and *"establishing and maintaining diplomatic missions"*. The Court also noted the obligations of States "*to take steps to prevent trade or investment relations that assist in the maintenance of the illegal situation."*[206]

g. Other international courts and tribunals have affirmed States' *erga omnes* obligations per Article 41 of ARSIWA. For example, the Grand Chamber of the European Court of Human Rights referred to Article 41 of ARSIWA as a legal basis for the principle of non-recognition of situations arising from violations of human rights.[207] Additionally, the Inter-American Court of Human Rights has

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[205] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, paras. 155 and 159. See also: *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, I.C.J. Reports 2024, p. 76, para. 279.

[206] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, I.C.J. Reports 2024, p. 76, para. 278.

[207] *Güzelyurtlu And Others v. Cyprus and Turkey, European Court of Human Rights (Grand Chamber) Application No. 36925/07*, Judgment, 29 January 2019, paras. 157-158.

confirmed that Article 41 of ARSIWA reflects customary international law and, in addition, that the obligations arising from certain human rights have a peremptory character, including the principle of equality and prohibition of non-discrimination, the principle of non-refoulement, and the prohibition to commit or tolerate serious, massive or systematic human rights violations.[208]

125. In applying these laws and principles to the breaches resulting from States' engagement in the Relevant Conduct regarding GHG emissions and the Relevant Conduct regarding adaptation actions, the Cook Islands respectfully submits that the following legal consequences apply:

a. **The obligation of non-recognition of an illegal situation:** This includes declaratory relief in the form of recognition of the sovereignty, statehood, territory and maritime boundaries of States despite the impacts of sea-level rise just as the Cook Islands outlines at **Paragraph 111c. above** as a required reparative measure of restitution, which reinforces the urgent importance of States' obligations to provide such declaratory relief.

b. **The obligation to cooperate in good faith to bring the breach to an end:** The Court stated in its advisory opinion on the *Legality of Nuclear Weapons* that the obligation to cooperate to achieve a precise result is not *"a mere obligation of conduct; [… but …] an obligation to achieve a precise result — nuclear disarmament in all its aspects — by adopting a particular course of conduct"*.[209] Therefore, in regard to both types of Relevant Conduct, States have an obligation to cooperate to achieve a very specific and precise result - cessation of both types of Relevant Conduct and reparation of loss and damage. To be clear, it is not enough for States to co-operate in treaty settings and UNFCCC

[208] The Obligations in Matters of Human Rights of a State that has Denounced the American Convention on Human Rights and the Charter of the Organization of American States (Interpretation and Scope of articles 1, 2, 27, 29, 30, 31, 32, 33 to 65 and 78 of the American Convention on Human Rights and 3(l), 17, 45, 53, 106 and 143 of the Charter of the Organization of American States), Inter-American Court of Human Rights, Series A No. 26, Advisory Opinion No. OC-26/20 (9 November 2020), paras. 102-106.
[209] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226, para.99.

negotiations in their conduct, and to merely express a commitment to cease the Relevant Conduct and provide reparations within these settings. Rather, there must be unequivocal factual evidence that both types of Relevant Conduct, as breaches of States' obligations, is ceasing and ending, and factual evidence that reparation for loss and damage is being provided to demonstrate this good faith cooperation.

c. **The obligation not to render aid or assistance in maintaining the breach:** In regard to the Relevant Conduct regarding GHG emissions, this obligation requires States to stop aiding and assisting the creation of supply agreements that effectively expand reliance on fossil fuels and thereby increase or extend GHG emissions from this source and continue, rather than cease, the Relevant Conduct. In regard to the Relevant Conduct regarding adaptation actions, this obligation requires States to stop aiding and assisting in the creation and maintenance of inadequate adaptation funding processes, and to stop aiding and assisting in the undermining and underfunding of adaptation actions which use and implement traditional knowledge.

d. **The obligation to abstain from treaty relations, entering into economic or trade dealings; and establishing and maintaining diplomatic missions that facilitate the breach:** In regard to the Relevant Conduct regarding GHG emissions, this Obligation requires States to stop creating and maintaining treaty relations that facilitate the Relevant Conduct regarding GHG emissions, entering into broader economic or trade dealings that facilitate the Relevant Conduct regarding GHG emissions, and establishing and maintaining diplomatic missions that facilitating the Relevant Conduct regarding GHG emissions.

e. **The obligations of States to take steps to prevent trade or investment relations that assist in the maintenance of the breach:** In regard to the Relevant Conduct regarding GHG emissions, this obligation requires States to take steps to prevent trade or investment relations that assist in the maintenance of the Relevant Conduct regarding GHG emissions.

f. **The obligations of States to take action to eliminate and dismantle systemic racism, decolonize and transform international law, and build equitable international economic, political and legal frameworks:** Given that the Relevant Conduct regarding GHG emissions engages and breaches States' *erga omnes* obligations regarding the protection of the right to self-determination and the prohibition of racial discrimination (as the Cook Islands submits at **Chapter VI, Part B, Paragraphs 85-86 above**), States have *erga omnes* obligations to take action to end such breaches and discrimination. As the following excerpt from Professor Achiume's expert report makes clear, doing so requires all States to provide structural reparations in the form of taking action to eliminate and dismantle systemic racism, decolonize and transform international law, and build equitable international economic, political and legal frameworks:

> *"Reparations require addressing historic climate injustice, as well as eradicating contemporary systemic racism that is a legacy of historic injustice in the context of the global ecological crisis.*
>
> *...*
>
> *To the extent that contemporary international legal principles present barriers to historical responsibility for climate change, the law must be decolonized or transformed in a manner that makes it capable of guaranteeing genuine equality and self-determination for all peoples. Reparations, which entail equitable international economic, political and legal frameworks, are a precondition for reorienting the global order away from racial injustice and ecological crisis."*[210]

[210] Written Statement of the OACPS, Appendix B: Racial Equality and Racial Non-Discrimination Obligations of States in Respect of Climate Change, Expert Report Of Professor E. Tendayi Achiume, March 2024, paras. 45-46 (**emphasis added**).

2. Legal consequences of the Relevant Conduct relating to "Peoples and individuals of the present and future generations affected by the adverse effects of climate change"

126. The Cook Islands submits the following consequences of the Relevant Conduct regarding GHG emissions and the Relevant Conduct regarding adaptation actions apply in relation to *"Peoples and individuals of the present and future generations affected by the adverse effects of climate change"* in subsections **(a)** to **(c)** below:

(a) Consequences for breaches of States' human rights obligations

127. The Cook Islands submits that States face particular consequences for breaching their human rights obligations by engaging in both types of Relevant Conduct.

128. In terms of the relevant laws regarding the consequences of breaching human rights obligations, the Cook Islands notes the following points:

- **a.** Article 55 of the ARSIWA provides that the ARSIWA's rules for State responsibility *"do not apply where and to the extent that … the content or implementation of the international responsibility of a State are governed by special rules of international law"*. This follows that depending on the particular human rights obligation breached and the treaty or treaties it comes from, consequences may arise either as a *lex specialis* rule arising from the relevant treaty context(s), or if there are no specific rules for State responsibility in the treaty context(s), consequences arise as an application of the general content of State responsibility coloured by the nature of human rights remedies. Further, the right to a remedy can be seen either as a primary rule of obligation or as a secondary obligation arising from the breach of a primary rule, depending on the context and perspective. In both cases, the Cook Islands respectfully submits that such conceptual distinctions should not detract from the requirement for States to provide a remedy and redress for breaches of their human rights obligations.

b. The Court stated in *Republic of Guinea v. Democratic Republic of the Congo* that it ***"ascribe[s] great weight"*** to the consequences that have been fleshed out in the practice of treaty bodies and special procedures.[211] Helpfully, several treaty bodies have provided guidance on the specific consequences for States' violations of several instruments noted in the preamble of the UNGA Resolution 77/276 which can inform the Court's answer to Question (b), including the ICCPR, the ICESCR and the UNCRC.

c. Regarding violations of the ICCPR, the UN Human Rights Committee in *Billy* affirmed that Article 2(3)(a) of the ICCPR requires violating States to provide remedies, including providing *"adequate"* compensation, engaging in meaningful consultations to conduct need assessments, and taking steps to *"prevent similar violations in the future"* as follows:

> *"Pursuant 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*** *"*[212]

[211] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits*, Judgment, I.C.J. Reports 2010, p. 639, para. 66 (**emphasis added**).
[212] Views adopted by the Committee under art. 5 (4) of the Optional Protocol, concerning communication No. 3624/2019, Human Rights Committee CCPR/C/135/D/3624/2019, 22 September 2022, paras. 10-11.

It is critical to note for the present proceedings that *Billy* concerned Australia's conduct regarding its mitigation GHG emissions and support of effective adaptation actions, and that the UN Human Rights Committee found that both types of conduct contributed to Australia's violations of Article 17 and 27 of the ICCPR. Importantly, the UN Human Rights Committee's judgment did not in any way suggest that remedies for human rights violations only arise out of Australia's conduct regarding its mitigation of GHG emissions, and that the relevant remedies only apply in respect to Australia's future conduct regarding its mitigation of GHG emissions. Therefore, for the present proceedings, *Billy* makes clear that the Relevant Conduct regarding GHG emissions and the Relevant Conduct regarding adaptation actions can amount to violations of States' human rights obligations, and that remedies for such violations can encompass and relate to both types of Relevant Conduct as well.

d. In addition to victim-specific or situation-specific remedies, the UN Human Rights Committee's general comment no. 31 makes clear that it is necessary to adopt measures *"beyond a victim-specific remedy … to avoid recurrence of the type of violation in question"*.[213] As Associate Professor Veronika Fikfak has aptly noted, these measures are also known as structural remedies, which target a *system problem* which arises, typically, from a historical asymmetry in the structure of relationships within the State, which is not and cannot be redressed by victim-specific or situation-specific remedies.[214] Important structural remedies have also been outlined by the UNGA in its 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', with Article 23(f)-(h) providing the following measures that are of particular relevance here:

[213] UN Human Rights Committee, *General comment no. 31: The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 17
[214] Veronika Fikfak, "Structural Remedies: Human Rights Law", in *Max Planck Encyclopedia of Public International Law*, paras. 4 and 8 (link).

"Guarantees of non-repetition should include, where applicable, any or all of the following measures, which will also contribute to prevention: […]

(e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;

(f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;

(g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;

(h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law."[215]

e. Regarding violations of the ICESCR, the UN Committee on Economic, Social and Cultural Rights in *I.D.G. v. Spain* stated:

"In accordance with article 2, paragraph 1, of the Covenant, States parties must take measures to ensure the enjoyment of the rights established in the Covenant "by all appropriate means, including particularly the adoption of legislative measures". This requirement includes the adoption of measures that ensure access to effective judicial remedies for the protection of the rights recognized in the

[215] UN General Assembly Resolution 60/147: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 15 December 2005, Doc A/RES/60/147, Annex, Title IX Reparation for harm suffered, art. 23, letters (e) to (h). As noted by **Vanuatu**, *"The application of the Basic Principles and Guidelines to the question of human rights and loss and damages is confirmed by the OHCHR's Key Messages on Human Rights and Loss and Damage, Office of the High Commissioner for Human Rights, Key Messages on Human Rights and Loss and Damage, November 2023, Key message 2."*, Written Statement of Vanuatu, p. 311, fn 1237.

Covenant, since, as the Committee noted in its general comment No. 9, there cannot be a right without a remedy to protect it." [216]

f. Regarding violations of the UNCRC, the UN Committee on the Rights of the Child's General comment no. 5 stated that:

> *"For rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the Convention and consistently referred to in the other six major international human rights treaties. Children's special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights. So States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives.* ***... Where rights are found to have been breached, there should be appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration****..."*[217]

g. Regarding specific violations of the ICCPR, ICESCR, ICERD and other sources of States' human rights obligations arising from the prohibition of racial discrimination, and thus intersectional discrimination, the Cook Islands concurs with and endorses Professor Achiume's views on the consequences of such breaches in their expert report:

> *In the event of breaches of States' racial equality and non-discrimination obligations, the ICCPR and ICESCR obligate States to redress harms experienced by victims of any breach through adequate and effective reparations. Article 6 of ICERD establishes similar obligations for effective remedies and adequate reparation or satisfaction. Such*

[216] *I.D.G. v. Spain*, ESCRC Communication No 2/2014, Decision (17 June 2015), para. 11.3.
[217] Committee on the Rights of the Child, *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, paras. 24-25.

reparations are required when states violate their international law obligations to ensure racial equality and non-discrimination in the enjoyment of human rights affected by anthropogenic greenhouse gas emissions and the processes associated with the production of these emissions."[218]

f. Article 13 of ARSIWA follows that state responsibility limited by the intertemporal principle to acts that were internationally wrongful at the time the State committed them.[219] However, as Professor Achiume's expert report notes, reading Articles 1 and 15 of ARISWA together follow that the "*intertemporal principle is not an absolute bar, where "extensions in time for international responsibility apply when: (a) an act is ongoing and continues to a time when international law considered the act to be a violation; or (b) the direct ongoing consequences of the wrongful act extend to a time when the act and its consequences are considered internationally wrongful."*[220]

129. In applying these laws and principles to both types of Relevant Conduct, the Cook Islands submits that the legal consequences arising from the violation of human rights obligations due to States' engagement in both types of Relevant Conduct, include, but are not limited to:

a. Immediate cessation of both types of Relevant Conduct found to violate peoples and individuals' rights under the ICCPR, ICESCR and UNCRC, ICERD among other human rights treaties and sources.

[218] Written Statement of the OACPS, Appendix B: Racial Equality and Racial Non-Discrimination Obligations of States in Respect of Climate Change, Expert Report Of Professor E. Tendayi Achiume, March 2024, para. 41.
[219] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected, art. 13.
[220] Written Statement of the OACPS, Appendix B: Racial Equality and Racial Non-Discrimination Obligations of States in Respect of Climate Change, Expert Report Of Professor E. Tendayi Achiume, March 2024, para. 42, referring to: Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected, arts. 1, 15.

b. Provision of adequate compensation as reparations to peoples and individuals whose rights under the ICCPR, ICESCR, UNCRC, ICERD and other human rights treaties and sources have been found to be violated by both types of Relevant Conduct. Importantly, particular compensation claims cannot be precluded by or dismissed due to the existence of funds and financing mechanisms under the UNFCCC, the UNCLOS, the CBD and the BBNJ Agreement and any other treaty regime. Furthermore, in accordance with Professor Achiume's expert view below, the intertemporal principle cannot bar States' obligations to provide reparations based on the contemporary effects of historic GHG emissions:

> *"States bear reparations obligations for historic anthropogenic greenhouse emissions whose contemporary effects violate racial equality and non-discrimination obligations. Importantly, this means that claims for reparations for contemporary racial discrimination rooted in racist, colonial systems are not barred by the intertemporal principle.* ***The intertemporal principle does not bar state obligations to provide reparations for present-day racially discriminatory effects of slavery and colonialism, including as they relate to anthropogenic greenhouse gas emissions****."*[221]

c. Creation and implementation of all measures necessary to secure the continued safe existence of peoples and individuals on their respective lands in accordance with their human rights, including particular measures to monitor and review the effectiveness of the measures implemented in regard to compliance with human rights

[221] Written Statement of the OACPS, Appendix B: Racial Equality and Racial Non-Discrimination Obligations of States in Respect of Climate Change, Expert Report Of Professor E. Tendayi Achiume, March 2024, para. 44.

obligations, and mechanisms to resolve any deficiencies as soon as practicable.

d. Structural remedies to guarantee cessation and non-repetition of human rights violations, including:

i. Structural reparations for the injuries incurred by the racial discrimination resulting from the Relevant Conduct regarding GHG emissions, specifically in the form of taking action to eliminate and dismantle systemic racism, decolonize and transform international law, and build equitable international economic, political and legal frameworks. As the Cook Islands notes at **Paragraph 124 f. above**, these actions are also required as a matter of States' *erga omnes* obligations around the prohibition of racial discrimination and self-determination, thus reinforcing and strengthening the need for all States to pursue these transformative actions.

ii. Providing, on a priority and continued basis, education on human rights and compliance with human rights obligations in respect of climate change for all public officials and personnel involved in mitigation of GHG emissions and adaptation actions. For adaptation funds like the GCF and GEF, providing education on human rights and compliance with human rights obligations in regard to the use and implementation of traditional knowledge in adaptation actions for all personnel.

iii. Creating and promoting codes of conduct that include codes, rules, guidelines and measures for compliance with human rights obligations for public servants and all personnel involved in mitigation of GHG emissions and adaptation actions. For example, for adaptation funds like the GCF and GEF, providing particular codes, rules, guidelines and measures for compliance with human rights in regard to the use and implementation of traditional knowledge in adaptation actions.

iv. Reviewing and reforming laws and policies that contribute to or allow gross violations of international human rights law by contributing to both types of Relevant Conduct, including introducing reforms that ensure procedural consideration of and substantive compliance with States' human rights obligations.

v. Addressing systemic issues with adaptation funds and financing mechanisms for adaptation actions, including but not limited to the GCF and GEF, to address the consistently and very recently reported challenges and barriers facing small island developing States, developing country parties and LDCs, and thus impacting peoples and individuals within such States, and the violation of their human rights. As these Written Comments note in **Part C of this Chapter above,** these challenges and barriers include, but are not limited to: the insufficient contributions of developed country Parties resulting in consistent inadequate support, assistance and funding for effective adaptation actions; the fragmentation of the climate funds architecture; accreditation barriers to access climate funds directly; challenges in complying with a wide range of diverse eligibility criteria and application requirements for project proposals; lengthy review processes by providers of adaptation finance; limited reach to local organisations; and the underfunding, undermining and ignorance of the importance of the use and implementation of traditional knowledge in adaptation actions.

(b) Consequences for loss and damage

130. The Cook Islands submits that there are specific legal consequences for States regarding loss and damage from States' engagement in the Relevant Conduct regarding GHG emissions with respect to peoples and individuals of the present and future generations affected by the adverse effects of climate change.

131. In terms of the relevant laws, principles and findings of treaty bodies regarding consequences for loss and damage, the Cook Islands notes the following:

- **a.** The Cook Islands concurs with and endorses **Vanuatu's** note that *"[o]n loss and damage...there are...key sources of obligations that interlock with but are outside the UNFCCC and the Paris Agreement. The Paris Agreement occupies a vanishingly small spot in the larger landscape of international law in relation to addressing loss and damage."*[222]

- **b.** The UN Committee on the Rights of the Child's General Comment No. 26 in 2023 noted for to address the impacts of loss and damage on children, the *"[a]ppropriate reparation includes restitution, adequate compensation, satisfaction, rehabilitation, and guarantees of non-repetition"*, both for the environment and the children concerned, as well as access to medical and psychological assistance.[223] The Committee also indicated that remedial mechanisms should consider *"the specific vulnerabilities of children to the effects of environmental degradation, including the possible irreversibility and lifelong nature of the harm"* and that reparation should be *"swift, to limit ongoing and future violations"*.[224] To this end, the Committee encourages the creation of innovative forms of reparation, such as intergenerational committees, *"in which children are active participants, to determine and*

[222] Written Statement of Vanuatu, para. 434.
[223] 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*, CRC/C/GC/26, 22 August 2023, para. 89.
[224] 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*, CRC/C/GC/26, 22 August 2023, para. 89

oversee the expeditious implementation of measures to mitigate and adapt to the impacts of climate change."[225]

c. The 2023 report by the UN Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change reported on what States must do in relation to loss and damage in order to comply with their human rights obligations.[226] Helpfully, the report observed *"[a] significant omission in most climate change legislation is any reference to loss and damage and how it can be addressed"*[227] and identifies the following forms of redress through new legislation:

> *"With respect to loss and damage, new climate change legislation should:*
>
> > *(a) Support processes for international cooperation on loss and damage based on the principle of solidarity entailing a duty of assistance without expectation of reciprocity;*
> > *(b) Create provisions for compensation, liability and reparations to ensure that major greenhouse gas polluters – countries and corporations alike – pay for the harm they are causing. This should include domestic and transnational liability;*
> > *(c) Ensure that individuals are granted freedom of movement and given full legal rights as though they were refugees if they are displaced across international borders as a consequence of climate change;*
> > *(d) Develop affordable insurance and risk-pooling mechanisms to assist the most vulnerable*

[225] 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*, CRC/C/GC/26, 22 August 2023, para. 89
[226] Report of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change, Ian Fry (28 July 2023), A/78/255.
[227] Report of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change, Ian Fry (28 July 2023), A/78/255, para. 15

(e) Create mechanisms to assess, quantify and compensate for loss and damage for economic and non-economic losses, including human rights impacts;
(f) Support the establishment of an international mechanism for processing loss and damage claims in an expedited manner."[228]

d. The UNGA's aforementioned 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' are relevant also to loss and damage.[229] Therefore, the obligation to provide remedies and redress as well as to provide structural remedies are particularly relevant in the context of the violations of human rights entailed by loss and damage that has already occurred.

132. In applying these laws and principles to the Relevant Conduct regarding GHG emissions, the Cook Islands submits that the legal consequences for loss and damage include, but are not limited to:

a. The obligation to provide reparations for children and future generations for loss and damage, including restitution, adequate compensation, satisfaction, rehabilitation, and guarantees of non-repetition, including through the establishment of intergenerational committees as recommended by the UN Committee on the Rights of the Child aforementioned comment. Importantly, the provision of restitution, adequate compensation, satisfaction and rehabilitation to children and future generations should not be precluded by the existence of funding and support for loss and damage through or from the

[228] *Report of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change, Ian Fry* (28 July 2023), A/78/255, para. 72.
[229] UN General Assembly Resolution 60/147: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 15 December 2005, Doc A/RES/60/147, Annex. The application of the Basic Principles and Guidelines to the question of human rights and loss and damages is confirmed by the OHCHR's Key Messages on Human Rights and Loss and Damage, Office of the High Commissioner for Human Rights, Key Messages on Human Rights and Loss and Damage, November 2023, Key message 2.

UNFCCC’s Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts. This is because that the UNFCCC is not the *lex specialis* regime when it comes to loss and damage related obligations and consequences for breaching those obligations.

b. The obligation to introduce climate change legislation that provides various forms redress for loss and damage as recommended by UN Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change in their aforementioned 2023 report.

c. The obligation to provide structural remedies that address systemic challenges and barriers inhibiting and preventing liability and compensation under the UNFCCC’s Warsaw International Mechanism for Loss and Damage as identified by several experts on loss and damage.[230]

(c) Consequences arising from breaches of the right to self-determination

133. The Cook Islands submits that there are particular consequences for States’ regarding breaches of the right to self-determination.

134. In terms of the relevant laws around these consequences, the Cook Islands makes the following points:

a. As these Written Comments note at **Paragraph 124 above**, the Court has confirmed that States have obligations *erga omnes* to protect the right to self-

[230] See Shuo Liu, Yu-E. Li, Bin Wang, An-Dong Cai, Chao Feng, Hua Lan, and Ruo-Chen Zhao, ‘Challenges and countermeasures for developing countries in addressing loss and damage caused by climate change’ (2024) 15:2 *Advances in Climate Change Research* 353, p. 360 (noting that challenges for developing countries in adressing loss and damage include *“inadequate financial support for adaptation”* and the *“reluctance of developed countries to assume responsibility for their historical emissions and their evasion of their commitments and obligations with regard to financial support under the UNFCCC”*) (link); Angelica Johansson, Elisa Calliari, Noah Walker-Crawford, Friederike Hartz, Colin McQuistan & Lisa Vanhala, ‘Evaluating progress on loss and damage: an assessment of the Executive Committee of the Warsaw International Mechanism under the UNFCCC’ (2022) 22:9-10 *Climate Policy* 1199, pp. 1199, 1207-1208 (noting that the *“politics of implementation merits greater attention: wider political dynamics around loss and damage shape the pace of the Executive Committee’s supposedly technical work”*) (link).

determination; to not recognize an illegal situation; and to not aid or assist an illegal situation, which includes not entering into or maintaining treaty relations, entering into economic or trade dealings, and establishing and maintaining diplomatic missions involving or in regard to an illegal situation.

b. It is also important to note that the Court in its *Chagos* advisory opinion found that third States also owe *erga omnes* obligations when a State breaches obligations to respect for the right of peoples and individuals to self-determination, stating it is for the UNGA *"to pronounce on the modalities required"* to ensure the continued enjoyment of the right to self-determination by such peoples, and then for *"all Member States [to] co-operate with the United Nations to put those modalities into effect"*.[231] The Court also concluded that the UNGA should address the protection of human rights of peoples and individuals more broadly as a consequence for third States for a States' breach of the right to self-determination as follows: *"As regards the resettlement on the Chagos Archipelago of Mauritian nationals, including those of Chagossian origin, **this is an issue relating to the protection of the human rights of those concerned, which should be addressed by the General Assembly during the completion of the decolonization of Mauritius."***[232]

135. In applying these laws to the present proceedings, the Cook Islands acknowledges the differences between the factual circumstances addressed in *Chagos* and those regarding the two types of Relevant Conduct of concern in the present proceedings. Specifically, *Chagos* concerned the process of decolonization and the resettlement into the people's own territory in accordance with the right to self-determination, whereas the present proceedings concern an encroachment on the possibility for individuals and peoples to continue to exercise their right to self-determination in their own territory as a result of the adverse effects of climate change. Despite these different contexts, the Cook Islands

[231] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion,* I.C.J. Reports 2019, p. 95, para. 180.
[232] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion,* I.C.J. Reports 2019, p. 95, paras. 181.

respectfully submits that the Court's insights in *Chagos* are nonetheless helpful and instructive to the Court because the circumstances in *Chagos* and in the present proceedings both concern the unavailability or risk of unavailability of peoples' territories due to conduct that breaches the right to self-determination.

136. Accordingly, the Cook Islands respectfully submits that the same *erga omnes* obligations as legal consequences for third States that these Written Comments list at **Paragraph 125 above** in respect of *"States"* also apply in respect of *"peoples and individuals of the present and future generations"* when peoples and individuals' rights to self-determination have been breached. These obligations can also entail particular consequences for the UNGA and third States as UNGA Member States as the Court found in *Chagos*.

137. For the reasons set out in the submissions above, the Cook Islands respectfully emphasizes that there is strong evidence that both types of Relevant Conduct breach States' obligations in respect of climate change, and that a wide range of legal consequences apply to help provide climate justice for both categories of victims.

138. The Cook Islands respectfully submits that it is critical for the Court to emphasize in its response to Question (b) that this wide range of legal consequences apply in respect of States' breaches of their various obligations. This is because all of these consequences, from apologies to broad structural transformations and changes to international law itself, are essential for climate justice. As Professor Maxine Burkett rightly posited, effective reparations for climate injustices must be holistic and at least include *"an apology, a monetary or other award that gives actual or symbolic weight to that apology, and, most importantly, a commitment by the perpetrator not to repeat the offending act."*[233] Drawing on Professor Burkett, Dr Sarah Mason-Case and Dr Julia Dehm have powerfully argued that all forms of reparations are a necessary *"first step"* towards reconstituting the international political community and a *"decolonizing international law"* follows:

[233] Maxine Burkett, 'Climate Reparations' (2009) 10:2 *Melbourne Journal of International Law* 509, p. 526 (link).

"The frame of reparations aims to empower marginalized peoples most directly. The objective is therefore to upend hegemonic operations of legality to foster 'solidarity and a just state of affairs'. This includes being honest about morality, ***approaching temporal and spatial matters flexibly****,* *eliminating structural violence**, providing care and healing, and* ***galvanizing action to the benefit of everyone***

...

Although such measures appear deceptively easy and similar to traditional remedies, they represent only the first step in a broader reorientation ***towards reconstituting the international political community and decolonizing international law****."*[234]

139. Therefore, the Court's responses to the questions put to it have the potential to help the international community work towards a decolonizing international law capable of achieving climate justice and bringing about an equitable and just future for all.

[234] Sarah Mason-Case and Julia Dehm, 'Redressing Historical Responsibility for the Unjust Precarities of Climate Change in the Present' in Benoit Mayer and Alexander Zahar, eds, *Debating Climate Law* (Cambridge University Press, 2021), p. 187 (link) (**emphasis added**).

VII. CONCLUSION

140. To summarise the Cook Islands' views in these Written Comments, the Cook Islands respectfully submits the following conclusions:

a. Ongoing negotiations within the UNFCCC do not provide any reason for the Court to exercise its discretion to decline to render the requested advisory opinion, or moreover, limit how it renders its opinion on the two questions put to it. The Court has provided clear guidance on how it exercises its discretion in circumstances of negotiation processes which follows that the requested opinion will not adversely affect ongoing negotiations.

b. The UNGA Resolution 77/276 makes clear that the conduct of States of concern in these proceedings includes the Relevant Conduct regarding GHG emissions and the Relevant Conduct regarding adaptation actions. To accept and adopt alternative characterizations that overstate the evidential complexity of the questions and undermine the relevance of States' conduct regarding adaptation actions would not only be to misinterpret the UNGA Resolution 77/276, but to allow States to evade responsibility for the breaches resulting from both types of Relevant Conduct.

c. The applicable law in these proceedings is not limited to the laws contained in the UNFCCC, including the Paris Agreement. For Question (a), the whole corpus of international law contains applicable law, including those noted in the text of the UNGA Resolution 77/276. For Question (b), the ARSIWA are applicable to the determination of the legal consequences States' face for breaching their obligations due to engaging in the Relevant Conduct.

d. In responding to Question (a), it is critically important for the Court to advise the importance of States' human rights obligations arising from the prohibition of racial and gender discrimination. It is also important for the Court to adopt an intersectional approach to understanding these obligations and to recognize the importance of a Synthesizing Approach to articulating obligations that that are clear, exacting and practical enough to serve the needs and aspirations of present and future generations, particularly those from small island developing States that are particularly vulnerable to the adverse effects of climate change.

e. In responding to Question (b), it is important for the Court to advise that both types of Relevant Conduct breach States' many obligations in respect of climate change, and that a wide range of legal consequences apply to ensure that the Relevant Conduct ends, and that climate justice can finally be achieved.

Respectfully submitted by:

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Sandrina Thondoo
Representative of the Cook Islands

Date: 15 August 2024

CERTIFICATION

I certify that the annexes are true copies of the documents reproduced therein.

Sandrina Thondoo

Representative of the Cook Islands

Date: 15 August 2024

LIST OF ANNEXES

Annex 1:

Liam Kokaʻua, *Traditional Knowledge and Climate Change Adaptation in the Cook Islands - Expert Report by Liam Kokaʻua*, 5 July 2024.

Annex 2:

Linda Siegele, *Expert report around the importance of upholding and protecting human rights in the face of the impacts climate change by Linda Siegele, JD LLM*, 15 July 2024.