INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

(REQUEST FOR ADVISORY OPINION)

WRITTEN COMMENTS OF THE REPUBLIC OF NAURU

15 AUGUST 2024

I. INTRODUCTION

1. These written comments are filed in accordance with the Court's Order of 30 May 2024.

2. Nauru agrees with those participants that argue that climate change poses an existential security threat.[1] It has noted in that regard the determination by the International Tribunal for the Law of the Sea (ITLOS), in its recent advisory opinion, that "climate change represents an existential threat and raises human rights concerns".[2] Nauru agrees.

3. In summary, Nauru's written comments as regards **Question *(a)*** are set out in **Part II**, where Nauru explains that it is wrong to contend — on the basis of the principle of *lex specialis* or otherwise — that the UNFCCC régime, including the Paris Agreement, displaces, limits, or modifies important principles of general international law, such as the principle of prevention of significant transboundary harm, the right to territorial integrity, and the right to self-determination. For the *lex specialis* principle to apply, there must either be some inconsistency between the two provisions at issue; or there must be a clearly expressed intention of exclusion as between them. Neither obtains in the present context: the UNFCCC régime is not *lex specialis* (**Section A**). Furthermore, State practice shows that the principle of prevention of significant transboundary harm is of general application; it is moreover capable of applying to highly complex situations. The principle of prevention applies regardless of the nature of the activity, so long as the damage caused is significant. The principle of prevention has been in existence — and has laid down obligations for States in the present context — since at least the mid-twentieth century. This, too, is borne out by State practice, which Nauru has sought to set out in some detail. A ruling by the Court as to the obligations of States in this regard will naturally be retrospective: the terms of the obligations must be held to have always borne the meaning which the Court's ruling places upon them (**Section B**). Nauru makes similar comments as to the principles of territorial integrity (**Section C**) and self-determination (**Section D**). Finally, in **Part III**, Nauru makes certain comments as regards the legal consequences for States under **Question *(b)***.

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[1] See e.g. Written Statement of Bangladesh, para. 119; Written Statement of Mauritius, para. 138; Written Statement of the Democratic Republic of the Congo, para. 139; Written Statement of the Dominican Republic, para. 4.37; Written Statement of the Pacific Islands Forum Fisheries Agency, para. 20.

[2] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion*, 21 May 2024, para. 66.

II. QUESTION (a)

A. Lex specialis

4. Certain participants contend that the UNFCCC régime should, on the basis of the *lex specialis* principle, displace, limit, or otherwise modify what are considered to be the *leges generales* in these proceedings, i.e. important principles of general international law such as the principle of prevention of significant transboundary harm, the right of all States to territorial integrity, and the right to self-determination.

(1) One participant argues that the climate change treaty régime "constitutes *lex specialis* with respect to any obligations potentially relevant to climate change contained in other instruments and principles of a more general nature",[3] such that "no basis exists for imposing specific legal obligations that go beyond what States have agreed to in the UNFCCC, Kyoto Protocol and Paris Agreement".[4]

(2) Another participant makes the point that "the climate change treaty regime of the UNFCCC, Kyoto Protocol, and Paris Agreement" is "*lex specialis*".[5]

(3) Yet another contends that the UNFCCC and the Paris Agreement "have priority of application by virtue of the rule of the *lex specialis*".[6]

5. These contentions are ill-founded. They are based on an incorrect understanding of the question of unity and diversity in international law. It is of course true that there is, as the Court has emphasized, a requirement to ensure "the essential consistency of international law".[7] This requirement is based on the expansion over time of the international legal system by means of treaties, customary international law, and general principles of law. The fact that different rules and principles lay down different levels of obligation is no threat to the essential consistency or unity of international law. It is a commonplace of

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3 Written Statement of the Kingdom of Saudi Arabia, para. 5.8.

4 *Ibid.*, para. 5.10.

5 Written Statement of the Organization of the Petroleum Exporting Countries, para. 62.

6 Written Statement of Japan, para. 14. In their respective Written Statements, Kuwait (para. 8), South Africa (para. 14), the United States of America (para. 4.25), and the Russian Federation (p. 20) argue along similar lines to the three examples set out in the main text above.

7 *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 664, para. 66; *cf.*, however, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 104, para. 101.

international law that more than one rule bears upon a particular question; such parallelism occurs frequently.[8] As Judge Greenwood has observed, therefore, an incorrect assumption,

> "encouraged by the use of the term 'fragmentation', is that unity and diversity must be in conflict. But there is nothing inevitable about such a conflict. Diversity is inevitable in an international community characterised by decentralisation and the absence of a global legislature."[9]

This means that "[d]iversity exists without, on the whole, compromising the essential unity of the legal system."[10]

6. Nauru agrees with the approach of ITLOS in its advisory opinion in *Commission of Small Island States on Climate Change and International Law*, where the question was whether the Paris Agreement was *lex specialis* in relation to the United Nations Convention on the Law of the Sea:

> "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. … The Tribunal also does not consider that the Paris Agreement modifies or limits the obligation under the Convention. In the Tribunal's view, the Paris Agreement is not *lex specialis* to the Convention and thus, in the present context, *lex specialis derogat legi generali* has no place in the interpretation of the Convention."[11]

7. Nauru makes two specific submissions in this regard. For the *lex specialis* principle to have any application, it is necessary that there should either:

(1) be some actual inconsistency between the two provisions; or

(2) that there is a clearly expressed intention that one of them is to exclude the other.

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8 *Southern Bluefin Tuna (Australia and New Zealand* v. *Japan)*, (2000), vol. 119, I.L.R., p. 548, para. 52.

9 Sir Christopher Greenwood, "Unity and Diversity in International Law" in M. Andenas & E. Bjorge (eds.), *A Farewell to Fragmentation* (2015), p. 39.

10 *Ibid*., p. 55; see also M. Lachs, "The Development and General Trends of International Law in Our Time" (1980), vol. 169, *Recueil des Cours*, p. 245 ("the underlying consistency of international law must be broad enough to accommodate the great variety of political and social phenomena that characterize the intercourse of nations.").

11 *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion*, 21 May 2024, paras. 223–224.

8. The two points were summarized in the observation of the International Law Commission (ILC) that:

> "[f]or the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other".[12]

1. There is no inconsistency

9. First, treaty rules can constitute *lex specialis* vis-à-vis principles of general international law only where the treaty rules in question are actually inconsistent with the former.[13] For example, two treaties

> "may deal with the same subject from different points of view or be applicable in different circumstances, or one of the treaties may embody obligations more far-reaching than, but not inconsistent with, those of the other. A conflict in the strict sense of direct incompatibility arises only where a party to the two treaties cannot simultaneously comply with its obligations under both".[14]

10. Thus the tribunal in *Southern Bluefin Tuna*, where the question was whether one treaty régime was *lex specialis* in relation to another, observed that:

> "[t]he array of modern standards in international law has been achieved by a process of accretion and cumulation, not by erosion and reduction. Only where there is actual inconsistency between two treaties do questions of exclusion arise, and that is not the instant case".[15]

11. There is no actual inconsistency between, on the one hand, the principles of general international law of the prevention of transboundary harm, the right to territorial integrity, or the right to self-determination and, on the other hand, the treaty régime relating to climate change. A State party to the climate change treaty régime can comply with that régime and at the same time comply with the — more far-reaching — relevant principles of general

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12 ARSIWA Commentary, Art. 55, Yearbook of the International Law Commission, 2001, vol. II, p. 140, para. 4; see also Report of the Study Group of the International Law Commission, finalized by Mr. Martti Koskenniemi, Yearbook of the International Law Commission 2006, Volume II, Part One, A/CN.4/SER.A/2006/Add.1 (Part 1/Add.2), p. 25, para. 89.

13 See also M. Forteau, A. Miron and A. Pellet, *Droit international public* (9th edn., 2022), p. 536 ("*les dispositions conventionnelles constituent une* lex specialis *par rapport aux normes du droit international général dès lors qu'elles s'en écartent ou que leur application conjointe n'est pas possible*").

14 C. W. Jenks, "The Conflict of Law-Making Treaties" (1954), vol. 30, B.Y.I.L., p. 426.

15 *Southern Bluefin Tuna (Australia and New Zealand* v. *Japan)*, (2000), vol. 119, I.L.R., p. 543, para. 41.

international law. This point is further reinforced by the inclusion of the general principle of prevention in various other environmental treaties.[16]

12. This general point has been made by participants in the present proceedings.

13. Egypt argues that:

> "the existence of treaties dealing with the subject of climate change does not preclude the application of the general rules of international law."[17]

14. Cook Islands observe that:

> "the UNFCCC, including the Paris Agreement, is not a *lex specialis* regime that regulates all climate change 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".[18]

15. Switzerland (which refers to the principle of prevention as the no-harm rule) argues that,

> "[i]nsofar as the conventions relating to climate change do not contain norms derogating from the general rule, they do not constitute a *lex specialis*. By definition, a *lex specialis* presupposes a normative conflict between the general rule and the more specific rules. This is clearly not the case regarding the relationship between the no-harm rule and the conventions on climate change".[19]

16. New Zealand contends:

> "that any parallel obligations, to the extent applicable, would be consistent with, rather than in conflict with, the obligations under the climate change treaty regime. In New Zealand's view, therefore, it is not necessary to have regard to the rule of *lex specialis derogate lex generali* because that rule is only necessary where norms are in a relationship of conflict."[20]

17. Costa Rica argues that climate change treaties:

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16 See e.g. Vienna Convention for the Protection of the Ozone Layer (adopted 22 March 1985, entered into force 22 September 1988) 1513 *U.N.T.S.* 293, Preamble; Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 *U.N.T.S.* 79, Article 3, United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (adopted 14 October 1994, entered into force 26 December 1996) 1954 *U.N.T.S.* 3, Preamble.

17 Written Statement of Egypt, para. 71.

18 Written Statement of Cook Islands, para. 135.

19 Written Statement of Switzerland, para. 68.

20 Written Statement of New Zealand, para. 86.

> "cannot simply be considered the exclusive *lex specialis* to respond to the questions submitted to the Court."[21]

18. Nauru agrees that the climate change treaty régime is not *lex specialis*. The climate change treaty régime, including the Paris Agreement, does not displace, modify, or otherwise limit the obligations of States under the principles of general international law such as the prevention of transboundary harm, the right to territorial integrity, and the right to self-determination.

19. As the legal obligations stemming from such sources simply accumulate, *lex specialis derogat generali* has in these proceedings no place in the interpretation or application of the climate change treaty régime or in the interpretation or application of general international law.

2. There is no discernible intention that one body of law is to exclude the other

20. Second, there is no discernible intention in the climate change treaties that the application of the three principles of general international law mentioned above is to be excluded.[22] International treaties cannot be understood tacitly to override important principles of general international law. The general position was well described by Thirlway:

> "if a treaty provides that the parties, in their mutual relations, shall not be obliged to do something which customary international law would otherwise have required of them, it is trite law that the obligation so set aside does not form part of the law between the parties. On the other hand, where the treaty is silent, general international law continues to apply."[23]

21. The constant jurisprudence of the Court and other international tribunals confirms the correctness of this position.

22. First, Nicaragua had asserted in *Construction of a Road in Costa Rica along the San Juan River* that the 1858 Costa Rica–Nicaragua Treaty of Limits[24] applicable in the case

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21 Written Statement of Costa Rica, para. 32.

22 *Cf.* ARSIWA Commentary, Art. 55, Yearbook of the International Law Commission, 2001, vol. II, p. 140, para. 1.

23 H. Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence Volume I* (2013), p. 127.

24 Costa Rica–Nicaragua, Treaty of Limits, 15 April 1858, 118 *C.T.S.* 439.

"constitutes the *lex specialis*" in relation to an obligation to notify and consult under general international law.[25] The Court, however, held that:

> "the fact that the 1858 Treaty may contain limited obligations concerning notification or consultation in specific situations does not exclude any other procedural obligations with regard to transboundary harm which may exist in treaty or customary international law".[26]

23. Second, Japan had contended in *Southern Bluefin Tuna* that the conclusion between the parties of the Southern Bluefin Tuna Convention[27] meant that the latter took priority over the provisions of UNCLOS concerning the conservation and utilization of southern bluefin tuna.[28] The tribunal rejected the contention. It held that:

> "there is support in international law and in the legal systems of States for the application of a *lex specialis* that governs general provisions of an antecedent treaty or statute. But the Tribunal recognizes as well that it is a commonplace of international law and State practice for more than one treaty to bear upon a particular dispute. There is no reason why a given act of a State may not violate its obligations under more than one treaty. There is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes arising thereunder. The current range of international legal obligations benefits from a process of accretion and cumulation; in the practice of States, the conclusion of an implementing convention does not necessarily vacate the obligations imposed by a framework convention upon the parties to the implementing convention."[29]

24. Third, the Chamber of the Court in *ELSI* had no doubt that the parties to a treaty could in principle agree that even an important principle of general international law should not apply between them; yet the Chamber found:

> "itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so."[30]

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25 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015*, p. 708, para. 107.

26 *Ibid.*, p. 708, para. 108.

27 Convention for the Conservation of Southern Bluefin Tuna, 10 May 1993, 1819 *U.N.T.S.* 359.

28 *Southern Bluefin Tuna (Australia and New Zealand* v. *Japan)*, (2000), vol. 119, I.L.R., p. 548, para. 51.

29 *Ibid.*, p. 548, para. 52.

30 *Elettronica Sicula S.p.A., Judgment, I.C.J. Reports 1989*, p. 42, para. 50; see also *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America)*, judgment of 30 March 2023, para. 207. It was on a similar basis that the Court in *Bosnian Genocide* refused, "in the absence of a clearly expressed *lex specialis*", to entertain a claim that a particular law should displace a more general law: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina*

25. Fourth, the Court observed in *Military and Paramilitary Activities in and against Nicaragua* that "customary international law continues to exist alongside treaty law".[31] More specifically, the Court held — on the basis that the areas governed by the two relevant bodies of law "do not overlap exactly, and the rules do not have the same content"[32] — that the body of "customary international law continues to exist *and to apply, separately from international treaty law*".[33]

26. Where, conversely, international courts and tribunals have concluded that there is a *lex specialis*, they have done so on the basis that the special régime includes "*specific* provisions"[34] to the effect that the régime is in fact to displace the general law: in other words, that the special régime says in terms that it is to have the effect of *lex specialis*. Thus the Court in *Nuclear Weapons* seems to have relied on the specific provision "arbitrarily deprived", in Article 6 of the ICCPR, when it advised that, although "the right not arbitrarily to be deprived of one's life applies also in hostilities",

> "what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities".[35]

In *Armed Activities* the Court abandoned its previous reliance on the concept of *lex specialis* that had been set out in its reasoning in *Nuclear Weapons*.[36] Where the special régime has

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v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 209, para. 401. In *Continental Shelf* the Court similarly refused to apply the *lex specialis* principle as the parties to the specific treaty in question, which might have displaced the general law, had not been sufficiently "specific" in setting out any intention to that effect: *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 38, para. 24. In *Korea — Measures Affecting Government Procurement*, a WTO Panel observed that: customary international law "applies to the extent that the WTO treaty agreements do not 'contract out' from it": Communication from the Chairman of the Panel, *Korea — Measures Affecting Government Procurement*, WTO Doc. WT/DS163/R (1 AMy 2000), para. 7.96.

31 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports*, p. 94, para. 176.

32 *Ibidem.*

33 *Ibid.*, p. 96, para. 179 (emphasis added).

34 See e.g. *Reineccius (Claim No. 1), First Eagle SoGen Funds. Inc. (Claim No. 2), Mathieu and la Société de Concours Hippique de la Châtre (Claim No. 3)* v. *Bank for International Settlements* (2002), vol. 140, I.L.R., p. 62, para. 175.

35 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 240, para. 25.

36 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 243, para. 216; *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion

been of a customary international law nature, and not treaty law, the Court has relied on the requirement that the practice must be one that is "clearly established" as having been accepted to govern the relations between the States in question.[37]

3. None of the requirements for the application of lex specialis *obtains*

27. It cannot be said that there is some actual inconsistency between the régime of the climate change treaties, on the one hand, and the relevant principles of general international law, on the other. There are, furthermore, no provisions in these bodies of law that — whether taken together or singly — could be said to display any actual inconsistency between them. It is not the case that the régime of the climate change treaties provides that the States parties shall not be obliged to do something which general international law would otherwise require. Nor is there any discernible intention that one body of law should exclude the other.

28. As regards the principle of prevention of transboundary harm, the UNFCCC, far from expressing a clear intention to vacate this principle, instead *recognizes* it in its preamble. The provision makes it apparent that there was no intention to exclude from operation between the Parties to the UNFCCC the principle of prevention of transboundary harm.[38] In that regard, Nauru does not agree with the interpretation, volunteered by one participant,[39] according to which it would have been necessary for the principle of prevention to have been more specifically "incorporated into the specialised climate change treaties".[40] That argument seeks to turn the correct position on its head. As the ILC observed in connection with the *ELSI* judgment, "the general rules operate unless their operation has

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of 19 July 2024, para. 99; see also R. Kolb, "Le droit international comme corps de 'droit privé' et de 'droit public'", (2021), vol. 419, *Recueil des Cours*, pp. 126–27.

37 *Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 44; see M. Kamto, "La volonté de l'état en droit international" (2004), vol. 310, *Recueil des Cours*, pp. 163–64.

38 The preamble provides: "that States have, in accordance with the Charter of the United Nations and the principles of international law, … the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

39 Written Statement of Australia, para. 4.11.

40 *Ibidem* ("[w]hile the preamble to the UNFCCC refers to the responsibility to ensure that activities within States' jurisdiction and control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction, neither the substantive nor the procedural aspects of the principle of prevention are otherwise incorporated into the specialised climate change treaties").

been expressly excluded".[41] This is so because it is in the nature of general law to apply generally, that is, inasmuch as it has not been specifically excluded. It cannot:

> "be claimed that these parts of the law — 'important principles' as the Court put it — have validity only insofar as they have been 'incorporated' into the relevant regimes".[42]

29. The interpretation for which Nauru argues is confirmed by General Assembly resolution 77/276, and not only in relation to the principle of prevention of transboundary harm. In its resolution, the General Assembly set out, by consensus, its view that a number of treaty instruments (e.g. the Charter of the United Nations, the ICCPR, the ICESCR, the UNFCCC, and the Paris Agreement) would apply in parallel with principles of general international law such as "the principle of prevention of significant harm to the environment" and "the duty of due diligence". The preamble of the resolution also emphasized the importance of:

> "the relevant principles and relevant obligations of customary international law, including those reflected in the Declaration of the United Conference on the Human Environment and the Rio Declaration on Environment and Development, to the conduct of States over time in relation to activities that contribute to climate change and its adverse effects".

30. Resolution 77/276 constitutes "an authoritative expression"[43] of all Member States of the United Nations to the effect that the climate change treaty régime does not exclude application of principles of general international law such as the principle of prevention of transboundary harm.

31. This conclusion is further reinforced by interpretative declarations made in relation to the régime of the climate change treaties by a number of States which are "specially affected" by the adverse effects of climate change.[44] Upon its ratification of the UNFCCC, and the Paris Agreement, Nauru made the declaration that no provision in the Convention or the Agreement "can be interpreted as derogating from the principles of general international

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41 Report of the Study Group of the International Law Commission, finalized by Mr. Martti Koskenniemi, Yearbook of the International Law Commission 2006, Volume II, Part One, A/CN.4/SER.A/2006/Add.1 (Part 1/Add.2), p. 43, para. 184.

42 *Ibid*., para. 185.

43 *Cf.* E. Jiménez de Aréchaga, "International Law in the Past Third of a Century" (1978), vol. 159, *Recueil des Cours*, p. 32.

44 To use the terminology of Question (b) and *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 42, para. 73; see also Written Statement of Nauru, para. 7.

law".[45] Similar declarations were made by Cook Islands,[46] Fiji,[47] Kiribati,[48] Marshall Islands,[49] the Federated States of Micronesia,[50] Niue,[51] Papua New Guinea,[52] Philippines,[53] Solomon Islands,[54] Tuvalu,[55] and Vanuatu.[56] None of these interpretative declarations attracted any rejections, or any other negative reactions, from other States.

32. Even if (as Nauru argues it should not) the Court were to recognize the UNFCCC régime as *lex specialis*, principles such as the principle of prevention, territorial integrity, and self-determination would still apply to all matters not strictly covered by the relevant treaty obligations. The tribunal in the *Georges Pinson* case thus observed that:

> "[e]very international convention must be deemed to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way."[57]

33. And as the ILC has observed,

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45 1771 *U.N.T.S.* 318; 3156 *U.N.T.S.* 95.

46 3156 *U.N.T.S.* 87 ("no provision in the Paris Agreement can be interpreted as derogating from principles of general international law").

47 1771 *U.N.T.S.* 317 ("no provisions in the Convention can be interpreted as derogating from the principles of general international law").

48 1771 *U.N.T.S.* 317–318 ("no provisions in the Convention can be interpreted as derogating from the principles of general international law").

49 3156 *U.N.T.S.* 92 ("ratification of the *Paris Agreement* shall in no way constitute a renunciation of any rights under any other laws, including international law").

50 3156 *U.N.T.S.* 94 ("no provision in this Paris Agreement can be interpreted as derogating from principles of general international law").

51 See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en ("no provision in the Paris Agreement can be interpreted as derogating from principles of general international law")

52 1771 *U.N.T.S.* 321 ("ratification of the Convention shall in no way constitute a renunciation of any rights under International Law concerning State responsibility for the adverse effects of Climate Change as derogating from the principles of general International Law").

53 See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en ("its accession to and the implementation of the Paris Agreement shall in no way constitute a renunciation of rights under any local and international laws or treaties").

54 3156 *U.N.T.S.* 96 ("no provision in the Paris Agreement can be interpreted as derogating from principles of general international law").

55 1771 *U.N.T.S.* 318 ("no provisions in the Convention can be interpreted as derogating from the principles of general international law"); 3156 *U.N.T.S.* 97 ("no provision in the Paris Agreement can be interpreted as derogating from principles of general international law").

56 3156 *U.N.T.S.* 98 ("ratification of the *Paris Agreement* shall in no way constitute a renunciation of any rights under any other laws, including international law").

57 *Georges Pinson case* (1927–1928) Annual Digest no. 292; (1928), vol. 5, R.I.A.A., p. 422.

"[t]he scope of special laws is by definition narrower than that of general laws. It will thus frequently be the case that a matter not regulated by special law will arise in the institutions charged to administer it. In such cases, the relevant general law will apply."[58]

B. The principle of prevention of transboundary harm

34. Nauru agrees with the more than 30 States and international organizations which argue that the principle of prevention of significant transboundary harm is part of the applicable law in these proceedings.[59] Nauru makes five submissions as regards the principle of prevention:

(1) First, the principle had crystallized by the mid-twentieth century;
(2) Second, the principle is one of general application;
(3) Third, for the principle to apply, the damage caused must be significant;
(4) Fourth, the principle is not reflected in the modest commitments that States parties have undertaken pursuant to the UNFCCC; and
(5) Fifth, a ruling by the Court as regards the principle will be retrospective.

35. First, the principle of prevention of transboundary harm crystallized as a well-recognized principle of general international law at the latest by the mid-twentieth century. The Court was correct to recall in 1949 that, as a matter of general international law, it was every

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[58] Report of the Study Group of the International Law Commission, finalized by Mr. Martti Koskenniemi, Draft Conclusions of the Work of the Study Group (Annex), Yearbook of the International Law Commission 2006, Volume II, Part One, A/CN.4/SER.A/2006/Add.1 (Part 1/Add.2), p. 105, para. 15.

[59] Written Statement of France, paras. 57–58; Written Statement of the Democratic Republic of the Congo, para. 138; Written Statement of Burkina Faso, paras. 161–163; Written Statement of Switzerland, para. 14; Written Statement of The Netherlands, para. 3.52; Written Statement of Sri Lanka, paras. 95–96; Written Statement of Sri Lanka, paras. 88–89; Written Statement of Sierra Leone, para. 3.10; Written Statement of Ecuador, para. 3.18; Written Statement of Egypt, paras. 98, 330; Written Statement of Belize, paras. 31–33; Written Statement of Seychelles, paras. 101–102; Written Statement of the European Union, para. 297–321; Written Statement of the Republic of Korea, para. 33; Written Statement of Kenya, paras. 5.3–5.4; Written Statement of Slovenia, paras. 18, 40; Written Statement of Mauritius, para. 189; Written Statement of the International Union for Conservation of Nature, paras. 308–309; Written Statement of the Cook Islands, para. 161; Written Statement of Thailand, para. 9; Written Statement of Costa Rica, paras. 40–49; Written Statement of Vanuatu, paras. 261 *et seq*; Written Statement of the Bahamas, para. 92; Written Statement of New Zealand, paras. 96–97; Written Statement of Kiribati, para. 112–114; Written Statement of Saint Vincent and the Grenadines, para. 107; Written Statement of Saint Lucia, para. 66; Written Statement by Palau, paras. 14–15; Written Statement of the African Union, paras. 54–56; Written Statement of Chile, paras. 35–37; Written Statement of Pakistan, paras. 29–39.

State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.[60] It has been in existence — and laid down obligations for States — since at least that time. There is ample State practice to that effect:

(1) In 1957, in the context of freedom of maritime communications, Australia's representative in the General Assembly, Sir Percy Spender, referred to the "general and well-recognized principle … that every State has an obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".[61]

(2) In 1958 the French representative in the Security Council, Pierre de Vaucelles, observed, in connection with transboundary weapons smuggling, that "[t]he preamble of the United Nations Charter has given States a solemn reminder that they have an obligation to live together as good neighbours. This has moreover always been a fundamental principle of international law"; this obligation included for States obligations relating to the "control of their frontiers and of the activities, on their territory or originating in their territory".[62]

(3) Russian treaty practice since the mid-twentieth century is to the same effect: the Soviet Union and other States recognized the principle in numerous agreements, for example in the context of prospecting for minerals and various frontier questions, by undertaking not "to harm the territory of the other Party".[63]

(4) In the 1960s the United States of America and Canada took the principle — including the obligation to provide compensation for transboundary harm — for

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60 *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22; *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), I.C.J. Reports* 2022, p. 648, para. 99.

61 General Assembly, 638th plenary meeting, 17 January 1957, p. 882, para. 57.

62 Security Council, 824th meeting, 10 June 1958, pp. 45–46, para. 245; see for further French State practice also Ministère des Affaires étrangères. Note du Service juridique en date du 10 janvier 1938, A. C. Kiss, *Répertoire de la pratique française en matière de droit international public Tome II* (1966), p. 30 ("*Il existe un principe fondamental, c'est celui du respect mutuel qui se doivent les Etats souverains et qui découle de cette souveraineté même. Les Etats sont libres, indépendants et égaux en droit. Chacun d'eux a l'obligation de s'abstenir de tout acte qui porterait atteinte à l'exercice par un autre de ses droits à la liberté, à l'indépendance et à l'égalité juridique*.").

63 Agreement concerning the régime of the Norwegian–Soviet frontier and procedure for the settlement of frontier disputes and incidents (with protocols), 29 December 1949, 83 *U.N.T.S.* 291, Art. 18. This is an example of codification of a principle of general international law: J. Salmon (ed.), *Dictionnaire de droit international public* (2001), pp. 1122–1123. See, for other examples, also Agreement (with Supplementary Protocol and annexes) concerning the régime of the Soviet–Czechoslovak frontier and the procedure for the settlement of frontier incidents, 30 November 1956, Art. 22(1); Treaty (with annexes and Protocols) concerning the regime of the Soviet–Afghan state frontier; 18 January 1958, Art. 24(2); Treaty concerning the régime of the Soviet-Iranian frontier and the procedure for the settlement of frontier disputes and incidents (with Protocol and annexes), 14 May 1959, 457 *U.N.T.S.* 213, Art. 19(1); Agreement concerning the régime of the Czechoslovak–Soviet state frontier and co-operation and mutual assistance in frontier questions (with annexes), 10 February 1973, Art. 44(1); Treaty concerning the régime of the Soviet–Iranian frontier and the procedure for the settlement of frontier disputes and incidents (with Protocol and annexes), 14 May 1957, 457 *U.N.T.S.* 162, Art. 19(1); Agreement concerning the régime of the Czechoslovak–Soviet state frontier and co-operation and mutual assistance in frontier questions (with annexes), 10 February 1973, 971 *U.N.T.S.* 218, Art. 45(1).

granted in the context of transboundary watercourses in their settlement of the Gut Dam claims.[64]

36. By the mid-twentieth century, a principle of general international law had crystallized according to which every State has an obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States. Subsequent recognition by States of the obligation can be found in the Stockholm Declaration of 1972[65] and General Assembly resolution 37/7 of 1982,[66] which adopted and proclaimed the World Charter for Nature, providing that States should:

> "[e]nsure that activities within their jurisdictions or control do not cause damage to the natural systems located within other States or in the areas beyond the limits of national jurisdiction".

37. There is also the authority of the most eminent publicists for the proposition that the obligation had crystallized by the mid-twentieth century. Thus Bastid observed in 1951,

> "*la souveraineté territoriale entraîne des obligations positives pour l'Etat qui l'exerce. Cette idée a été développée dans l'arrêt relatif au détroit de Corfou. Le principe général bien connu, traditionnel dans les relations internationales, consiste dans 'l'obligation pour tout Etat de ne pas laisser utiliser son territoire aux fins d'actes contraires aux droits d'autres Etats'.*"[67]

38. Reuter set out his view in 1958 that:

> "*le territoire d'un Etat ne doit pas servir à des entreprises dirigées contre les droits des autres Etats. Ce dernier principe a été rappelé fréquemment par la jurisprudence internationale (CPA, affaire de l'île de Palmas, 4 avril 1928 ; CIJ, affaire du détroit de Corfou, Recueil, 1949, p. 22)*".[68]

39. In 1967 Jennings observed, in connection with the underlying principle of the territorial régime, that:

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64 Canada–United States: Settlement of Lake Ontario (Gut Dam) Claims (1969), vol. 8, I.L.M., p. 118; see also Yearbook of the International Law Commission 1988, vol. I, A/CN.4/SR.2062, Summary record of the 2062nd meeting, p. 123, para 11 (the Gut Dam case "could be taken as an instance of State practice in which the 'State of origin' had recognized an obligation to provide compensation for transfrontier harm resulting from its use of an international watercourse").

65 Declaration of the United Nations Conference on the Human Environment, A/CONF.48/14/Rev.1, 16 June 1972, Principle 21.

66 General Assembly resolution 37/7, 28 October 1982.

67 S. Bastid, "La jurisprudence de la Cour internationale de Justice" (1951), vol. 78, *Recueil des Cours*, p. 644.

68 P. Reuter, *Droit international public* (1958), p. 103–104.

> "there is necessarily a corresponding territorial responsibility ... enunciated in the *Corfu Channel (Merits)* case where the Court speaks of: 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.' This principle is the foundation of the law of State responsibility."[69]

40. Second, the principle of prevention is of *general application*. It applies as much in the field of climate change as in any other. For this reason, the "obligation" that the Court set out in *Corfu Channel* is among the obligations of States in respect of climate change.[70] As Kiss observed:

> "Transfrontier pollution can … be prohibited by international legal rules which protect in general the territory of a state against all damaging intervention from outside. The basic rule has been formulated by the International Court of Justice in the *Corfu Channel* case, stating as *a principle of international law of general applicability* 'every state's obligation not to allow knowingly its territory to be used contrary to the rights of others."[71]

41. Judge Lachs described the obligation enunciated by the Court in *Corfu Channel* as an example of a situation where "international law, in its basic principles, gives a *general* reply".[72] He explained that, in the Court's judgment:

> "the *general* rule is confirmed that while the territory remains under the sovereignty of a State it cannot use it — or permit it to be used — in a way which may cause damage and disaster to other States, and that *any such action or negligence* will result in international responsibility."[73]

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69 R. Y. Jennings, "General Course on Principles of International Law" (1967), vol. 121, *Recueil de Cours*, p. 370.

70 See e.g. Hoge Raad 20 December 2019, Civiel recht Cassatie, *Urgenda*, ECLI:NL:HR:2019:2007, English translation by Urgenda (https://www.urgenda.nl/wp-content/uploads/Translation-Summons-in-case-Urgenda-v-Dutch-Statev.25.06.10.pdf), para. 5.7.5 (which recognized the principle of prevention as being a "generally accepted principle of international law which entails that countries must not cause each other harm", and noted that States "can be called to account for the duty arising from this principle. Applied to greenhouse gas emissions, this means that they can be called upon to make their contribution to reducing greenhouse gas emissions")

71 A. Kiss, "The International Protection of the Environment" in R St.J. Macdonald & D. M. Johnston, *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (1983), pp. 1073–1074 (emphasis added); see also A. Kiss, *Droit international de l'environnement* (1989), pp. 60–61, 73.

72 M. Lachs, "The Challenge of the Environment" (1990), vol. 39, International and Comparative Law Quarterly, p. 664 (emphasis added).

73 *Ibid.*, p. 665 (emphases added); see also M. Kamto, "Le nouveaux principes du droit international de l'environnement" (1993), Revue juridique de l'environnement, p. 16 ("*un principe de portée générale*").

42. State practice is to the effect that the principle is of general application and applies regardless of the nature of the activity:

(1) In 1958 Japan protested the planned atmospheric nuclear tests by the United States in the Enewetak Atoll (which was then part of a trusteeship territory of which the United States was the administering authority): "in the event the United States Government conducts nuclear tests in defiance of the request of the Japanese Government, the United States has the responsibility of compensating for economic losses and damages that may be inflicted on Japan and the Japanese people as a result".[74]

(2) In 1964 India set out its view that: "The observations of the International Court of Justice in the *Corfu Channel* case unquestionably indicate that a State which knowingly uses its territory or allows its territory to be used for acts contrary to the rights of another State commits an internationally illegal act."[75] India also observed that: "the State harbouring dangerous things on its territory or entering upon adventures on its territory likely to cause damage outside its territory should incur responsibility to other States. *The responsibility should extend to every kind of damage whatsoever — biological, meteorological, economic and otherwise —* which can proximately be traced to the acts of the State in its own territory."[76]

(3) In 1964 Burma expressed its view that the *Trail Smelter* arbitration laid down relevant "principles of state responsibility"[77] and on that basis, as well on the position in different national legal systems, observed that "a State harbouring dangerous things on its territory or carrying out dangerous experiments within its territory should be held liable for damage or harm caused to neighbouring States."[78]

(4) In 1964 Thailand observed that a State that engaged in nuclear tests that caused damage to another would be under obligation to pay compensation: "This liability is eminently under the heading of State responsibility or sub-heading 'private claims' or 'international claims'. There is no need to go into the history of the development of international law on this particular topic. But if trace must be made, it can be made to the common law concept of nuisance as illustrated by the *Trail Smelter Award*, or the theory of absolute liability, or the maxim '*sic utere tuo ut alienum non laedas*'".[79]

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74 Note of 20 February 1958 presented to the United States Government, M. Whiteman, (1965), vol. 4, Digest of International Law, pp. 585–586; as to the illegality of the tests in so far as they affected the high seas: see S. Oda, "The Hydrogen Bomb Tests and International Law" (1956), vol. 53, Die Friedens-Warte, p. 126; G. Gidel, "Explosions nucléaires expérimentales et liberté de la haute mer" in *Festschrift für Jean Spiropoulos* (1957), p. 198. See also Japan's position set out in Asian–African Legal Consultative Committee, Report of the Sixth Session, 24 February–6 March 1964, (1964), pp. 223–224.

75 Asian–African Legal Consultative Committee, Report of the Sixth Session, 24 February–6 March 1964, (1964), p. 50 (C. K. Daphtary).

76 *Ibid.*, p. 16 (emphasis added).

77 *Ibid.*, p. 62.

78 *Ibid.*, p. 64.

79 *Ibid.*, pp. 226–227.

(5) In 1964 Pakistan took the stand that "[t]he legal principles established" in *Trail Smelter* and *Corfu Channel* were "rationally valid and correct".[80] Six years later, it set out its view of "the international responsibility of a State in respect of acts done within its territory which have a detrimental effect in the territory" of another.[81] Among the legal bases of this international responsibility was "the general principle of law expressed by the Latin maxim: *Sic utere tuo ut alienum non laedas*, that is, no one may exercise his right when this exercise causes damage to another".[82]

(6) In 1971 Ceylon relied, in the context of international watercourses, on the "well-known basic rule relating to the law of property namely, *sic utere tuo ut alienum non laedas*. That is to say, a person must not use his own property so as to cause injury to another. This is also a rule which might profitably be borrowed by the international community. In fact, in the *Corfu Channel Case*, the International Court of Justice reminded States that it was their obligation 'not to interfere with the rights of other States'".[83]

(7) In 2005 Uganda assumed the position that "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" was a "general and well-recognized principle" which had been "recognized not only in international environmental law but also in instruments concerning the fight against international terrorism and relating to the prohibition on the use of force".[84]

(8) In 2021, in the context of cyber operations, Germany set out its position that, "[a]s a corollary to the rights conferred on States by the rule of territorial sovereignty, States are under an 'obligation not to allow knowingly their territory to be used for acts contrary to the rights of other States' — *this generally applies* to such use by State and non-State actors. The 'due diligence principle', which is widely recognized in international law, is applicable to the cyber context as well and gains particular relevance here because of the vast interconnectedness of cyber systems and infrastructures."[85]

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80 *Ibid.*, p. 73.

81 Asian–African Legal Consultative Committee, Report of the Eleventh Session, 19–29 January 1970, (1970), p. 193.

82 *Ibid*., p. 194.

83 Asian–African Legal Consultative Committee, Report of the Twelfth Session, 18–27 February 1971, (1971), p. 41.

84 CR 2005/10 (translation), *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, Wednesday 20 April 2005 at 3p.m., p. 22 (Suy); see also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 262, para. 277.

85 Official compendium of voluntary national contributions on the subject of how international law applies to the use of information and communications technologies by States submitted by participating governmental experts in the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security established pursuant to General Assembly resolution 73/266, A/76/136, 13 July 2021, p. 33 (emphasis added); compare Written Statement of Germany, para. 38.

(9) In 2021, in the same context, Norway took the view that: "As a consequence of the right to exercise sovereignty over cyber infrastructure located on its territory, States also have a corresponding obligation not to allow knowingly their territory to be used for acts causing significant harm to the rights of other States under international law. This customary international law obligation, often referred to as the due diligence principle, was recognised by the ICJ in the 1949 *Corfu Channel* judgment, and is reflected in numerous rules in specialised regimes of international law. Norway is of the view that the due diligence obligation applies in situations where there is a risk of transboundary harm from hazardous activities, *regardless of the nature of the activity*, and accordingly also applies to cyber operations."[86]

43. Leading publicists were also, from the 1960s onwards, of the view that the principle necessarily applies to *all* types of activity, regardless of the nature of the activity in question. Thus Fitzmaurice observed in 1968 that the obligation set out in *Corfu Channel* had until then:

> "found its application mainly as regards the use a State may physically make of its territory and the objects therein, or as regards its obligations relative to these, as in the *Corfu Channel* case. Other examples would be the obligation not to allow the pollution of waters flowing on to other States, or the escape of noxious fumes across the border. *But is there any reason of principle requiring a limitation to these sorts of case? Changed conditions — above all revolutionary developments in communications — have brought the nations psychologically as well as physically closer*."[87]

44. Thus it was obvious to Schachter, who was writing 1991, that the principle that it is every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States would apply to "[i]njury to the atmosphere, such as ozone depletion, or *detrimental climate change*".[88] In a similar vein Maurice Kamto, writing in 1993, concluded that the principle of prevention was:

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86 Official compendium of voluntary national contributions on the subject of how international law applies to the use of information and communications technologies by States submitted by participating governmental experts in the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security established pursuant to General Assembly resolution 73/266, A/76/136, 13 July 2021, p. 71 (emphasis added); compare Written Statement by the Governments of Denmark, Finland, Iceland, Norway, and Sweden, paras. 71–72.

87 G. Fitzmaurice, "The Older Generation of International Lawyer and the Question of Human Rights" (1968), vol. 21, Revista Espanola de Derecho Internacional, p. 481 (emphasis added); see also M. Sørensen, "Principes de droit international public" (1960), vol. 101, *Recueil des Cours*, pp. 194–198; I. Brownlie, "A Survey of International Customary Rules of Environmental Protection" (1973), vol. 12, Natural Resources Journal, pp. 179–180, 183.

88 O. Schachter, "The Emergence of International Environmental Law" (1991), vol. 44, Journal of International Affairs, pp. 460, 464 (emphasis added).

"*un principe de portée générale dans la mesure où il peut et doit s'appliquer à tous les domaines de l'environnement. Ainsi pourrait-on le faire valoir en matière de climat, de pollution, de protection de la couche d'ozone, de la désertification*".[89]

45. Against this background, Nauru agrees with France's contention in these proceedings, as regards the principle of prevention, that:

"[*s*]*'il est traditionnellement invoqué dans le cadre bilatéral entre deux États voisins, rien ne fait obstacle à son application dans le contexte global des changements climatiques*."[90]

46. Third, every State is, under the obligation incumbent on all States not to allow knowingly their territory to be used for acts contrary to the rights of other States, "obliged to use all the means as its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing *significant damage* to the environment of another State in a transboundary context".[91] The damage must necessarily be "significant". As ITLOS has advised, with reference to the ILC's Draft articles on Prevention of Transboundary Harm from Hazardous Activities, the term "significant":

"involves more factual considerations than legal determination. It is to be understood that 'significant' is something more than 'detectable' but need not be at the level of 'serious' or 'substantial'."[92]

47. Fourth, Nauru agrees, for the avoidance of doubt, with the position that the scope of the principle of prevention is not fully reflected in the modest commitments that States parties

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89 M. Kamto, "Le nouveaux principes du droit international de l'environnement" (1993), Revue juridique de l'environnement, p. 16 (underlined here).

90 Written Statement of France, para. 58; see also P. Dupuy, "International Liability of States for Damage caused by Transfrontier Pollution" in *Legal aspects of transfrontier pollution* (1977), p. 351 ("[i]t would be a mistake … to think that the principle could be applied only to relations between neighbouring States and not in a wider geographical context"); OECD Secretariat, "Observations on the Concept of the International Responsibility of States in Relation to the Protection of the Environment" in *ibid.*, 382, fn. 3 ("the general principle … could just as well apply to a case of long-distance pollution (air pollution for instance)").

91 *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), I.C.J. Reports* 2022, p. 648, para. 99 (emphasis added; internal quotation mark removed), citing *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), I.C.J. Reports 2010*, p. 56, para. 101; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 242, para. 29; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), I.C.J. Reports 2015*, p. 706, para. 104.

92 *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion*, 21 May 2024, para. 433, citing Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, Yearbook of the International Law Commission, 2001, vol. II, Part Two, p. 148, at p. 152, para. 4.

have thus far undertaken pursuant to the UNFCCC. Thus, it agrees with the position of Belize that:

> "in the context of greenhouse gas emissions and climate change, the scope of the Prevention Obligation is not fully reflected in the modest commitments that States Parties have thus far undertaken pursuant to the UNFCCC".[93]

48. Nauru furthermore agrees with the position of Pakistan, to the effect that:

> "in the context of greenhouse gas emissions and climate change, the scope of the obligation to prevent significant transboundary harm is not reflected in the commitments that States Parties to the UNFCCC and the Paris Agreement have thus far undertaken pursuant to those agreements".[94]

49. Fifth, as set out above it would be incorrect to say that it is only very recently — such as in the 1990s or even later — that there have come into existence obligations of States in respect of climate change. Certain participants have, however, taken the view that such obligations have arisen only very recently. One participant argues, with reference to the UNFCCC and the Paris Agreement, that:

> "[i]n the context of climate change, the earliest international obligations that directly arise are those found in the Convention and the Paris Agreement. As a State cannot be liable for something that was not a violation of international law, customary or otherwise, at the time of action, any action that a State took prior to become a Party to the Convention or the Paris Agreement could not be counted against it as a breach of international law in the context of climate change."[95]

50. Another, making its focus the question of retrospectivity, argues that:

> "under customary international law, when a primary obligation comes into force for a State, that State incurs no responsibility retrospectively for conduct in which the State engaged before the obligation attached".[96]

51. Nauru makes three points in this regard.

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93 Written Statement of Belize, para. 36.

94 Written Statement of Pakistan, para. 48.

95 Written Statement of Canada, para. 32.

96 Written Statement of the United States of America, para. 5.4.

52. The first point is that it is self-evidently correct, as some States have argued,[97] that the Court cannot render judgment, or an advisory opinion, "*sub specie legis ferendae*, or anticipate the law before the legislator has laid it down".[98] In these proceedings, as in other advisory proceedings, therefore, the Court "states the existing law and does not legislate".[99] But it is equally the case that, "in stating and applying the law, the Court necessarily has *to specify its scope*".[100] It is precisely that which the Court has been requested to do in the present proceedings.

53. The second point is that, if the Court advises, by specifying its scope, that the principle of prevention of transboundary harm applies to climate change caused by anthropogenic greenhouse gas emissions (as Nauru submits is the case), that finding will not only apply prospectively, i.e. for the future. It will also have what the Permanent Court of International Justice called "retrospective" effect.[101] As the Permanent Court laid down in its advisory opinion in *Access to German Minority Schools in Upper Silesia*, where the obligation in question was a treaty obligation:

> "in accordance with the rules of law, the interpretation given by the Court to the terms of the Convention has retrospective effect — in the sense that the terms of the Convention must be held to have always borne the meaning placed upon them by this interpretation".[102]

54. More recently the Court applied the same principle in *Bosnian Genocide*.[103] This general principle applies not only to treaties but also to international law in general and is recognized in State practice. In the Subsequent Agreement on the Interpretation of the

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97 See e.g. the Written Statement of Saudi Arabia, para. 3.9.

98 *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, pp. 23–24, para. 53.

99 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 237, para. 18; see the Written Statement of Saudi Arabia, para. 3.10; Written Statement of Australia, para 1.30.

100 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 237, para. 18 (emphasis added).

101 *Access to German Minority Schools in Upper Silesia, Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 40*, p. 19; H. Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence Volume II* (2013), p. 1233 (who uses the term "quasi-retrospective").

102 *Access to German Minority Schools in Upper Silesia, Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 40*, p. 19; see also J. Basdevant, *Dictionnaire de la terminologie du droit international* (1960), p. 545.

103 *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. 230, para. 452.

Energy Charter Treaty, the 26 States Parties to the Energy Charter Treaty, the European Union, and the European Atomic Energy Community recalled that an interpretation by an international court "applies *ex tunc*".[104] They further recalled that:

> "this rule on the application in time of the interpretation of international law given by the competent international court reflects a general principle of public international law, as confirmed by the Permanent Court of International Justice in … *Rights of minorities in Upper Silesia* … , where that Court held, in relation to a Convention of 15 May 1922 between Germany and Poland concerning Upper Silesia that 'in accordance with the rules of law, the interpretation given by the Court to the terms of the Convention has retrospective effect — in the sense that the terms of the Convention must be held to have always borne the meaning placed upon them by this interpretation'."[105]

55. The United States has similarly taken the position that when an international tribunal interprets a provision, the determination is:

> "retroactive in effect, since an interpretation does not change the content of a provision, it merely clarifies what the provision always meant".[106]

56. It could not be otherwise. By making a finding in these proceedings to the effect that the obligation enunciated by the Court in *Corfu Channel* applies in respect of climate change, the Court would do no more than to give the provisions of the principle of prevention of transboundary harm "the meaning and scope that they had possessed from the outset".[107] The Court will lay down what has "always been the case", since the point in time when the norm in question crystallized or otherwise came into being.[108] As Salmon explained:

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104 Annex to the Communication from the Commission to the European Parliament and the Council, as well as to the Member States on an agreement between the Member States, the European Union, and the European Atomic Energy Community on the interpretation of the Energy Charter Treaty, COM(2022) 523 final, available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=COM:2022:523:FIN.

105 *Ibidem*.

106 See Post-Hearing Submission of the Respondent United States of America, 20 July 2001, *Methanex Corporation* v. *United States of America*, pp. 4–5, available at https://www.italaw.com/sites/default/files/case-documents/italaw9121.pdf; see also Rejoinder of Respondent United States of America to Methanex's Reply Submission Concerning the NAFTA Free Trade Commission's July 31, 2001 Interpretation, pp. 9–10, available at: https://2009-2017.state.gov/documents/organization/7027.doc;

107 *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. 230, para. 452; see also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 258, para. 263.

108 H. Thirlway, *The International Court of Justice* (2016), p. 151; see also R. Kolb, *The International Court of Justice* (2013), p. 650.

> "*Le résultat du processus interprétatif étant de dégager le sens de la norme, ce sens est censé être celui que la norme possède depuis sa création. Il en découle que l'interprétation a un caractère déclaratif. Ses effets rétroagissent à la date de la création de la norme puisque celle-ci est censée avoir eu le sens fixé dès l'origine. Ses effets sont* ex tunc *et non* ex nunc *comme ce serait le cas s'il s'agissait d'un processus non d'interprétation mais de révision*."[109]

57. Any State that has, since the principle crystallized in general international law, breached the principle of prevention of transboundary harm, in the context of climate change as in any other context, will have breached an international obligation by which it was bound at the time of the commission of the act.

58. The third and final point is that, even if (as Nauru contends it should not) the Court were to hold that the climate change treaty régime did have the effect of displacing or otherwise modifying the obligations that States have under the principle of prevention of transboundary harm, such an effect could be said to have eventuated only from the time the relevant treaty obligations came into force.

C. Territorial integrity

59. Twelve States or international organizations have argued that climate change is a threat to the territorial integrity of certain States and that States have, under the principle of territorial integrity, obligations in respect of climate change.[110]

60. The Commission of Small Island States on Climate Change and International Law argues that:

> "climate change fundamentally and negatively impacts a State's territorial integrity by submerging major geographic features of coasts or islands on an unprecedented scale due to sea-level rise".[111]

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109 J. Salmon, "Le fait dans l'application du droit international" (1982), vol. 175, *Recueil des Cours*, p. 358.

110 Written Statement of the Bahamas, paras. 44–45, 57, 155; Written Statement of Kiribati, paras. 86, 132–135; Written Statement of Vanuatu, paras. 292, 299; Written Statement of Costa Rica, paras. 73–74, 113; Written Statement of the European Union, paras. 237; Written Statement of Sri Lanka, para. 88; Written Statement of Tonga, paras. 233, 237; Written Statement of Tuvalu, para. 78; Written Statement of the Dominican Republic, paras. 4.34–4.42; Written Statement of Burkina Faso, para. 207; Written Statement by the Democratic Republic of the Congo, para. 138; Written Statement of Pakistan, para. 30.

111 Written Statement of the Commission of Small Island States on Climate Change and International Law, para. 69.

61. Costa Rica argues that greenhouse gas emissions

> "are provoking climate change, which in turn leads to the phenomenon of sea level rise, affecting coastal States and in particular insular ones. … 'Land inundation stemming from sea-level rise can pose risks to the territorial integrity of States with extensive coastlines and to small island States …'"[112]

62. Burkina Faso argues that:

> "*le droit à l'intégrité territoriale s'applique à tous les peuples et aussi aux Etats qui les représentent sur la scène internationale. En ce sens, il est établi que les émissions anthropiques de gaz à effet de serre et les changements climatiques qui en résultent ainsi que leurs effets néfastes causent des pertes de territoires du fait de la survenance des phénomènes extrêmes comme l'érosion côtière et l'élévation du niveau de la mer. Elles compromettent ainsi la jouissance par les peuples et les Etats de leurs droits à l'intégrité territoriale*."[113]

63. Tonga similarly argued how sea-level rise:

> "threatens to undermine territorial integrity of coastal and small island States and thus their very statehood. By extension, threats to, or a complete loss of, statehood as a result of sea-level rise poses risks to the inhabitants of affected States and their enjoyment of the right to a nationality, and further exposes those inhabitants to a heightened risk of statelessness".[114]

64. Nauru agrees. It adds that this, too, is a principle of general international law that has been in existence for a long period of time. To cite an instance of French State practice from 1919:

> "*La notion de souveraineté d'un Etat n'est — pas plus que celle de la liberté de l'homme — une notion absolue: la souveraineté des uns est limitée par la souveraineté des autres*".[115]

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112 Written Statement of Costa Rica, para. 74, quoting ILC, "Sea-level Rise in Relation to International Law: Second Issues Paper" by Patrícia Galvão Teles and Juan José Ruda Santolaria, Co-Chairs of the Study Group on Sea-level Rise in Relation to International Law' UN Doc A/CN.4/752 (19 April 2022), para. 252(j).

113 Written Statement of Burkina Faso, para. 207.

114 Written Statement of the Kingdom of Tonga, para. 237.

115 Sénat, séance du 3 octobre 1919, rapport fait au nom de la commission des Affaires étrangères, chargée d'éxaminer le projet de loi, adopté par la Chambre des députés, portant approbation du traité de paix conclu à Versailles le 28 juin 1919, par M. Léon Bourgeois, sénateur, *Journal Officiel*, Sénat, Documents parlementaires, 1919, p. 572, A. C. Kiss, *Répertoire de la pratique française en matière de droit international public Tome II* (1966), p. 31; see also Ministère des Affaires étrangères. Note du Service juridique en date du 10 janvier 1938, A. C. Kiss, *Répertoire de la pratique française en matière de droit international public Tome II* (1966), p. 30 ("*Il existe un principe fondamental, c'est celui du respect mutuel qui se doivent les Etats souverains et qui découle de cette souveraineté même. Les Etats sont*

65. The principle — one of logic as much as of international law — was generally recognized by the interwar period. In 1938 Mexico referred, in the context of a debate in the Assembly of the League of Nations, to respect for "the inviolability of State territory" as one of the "essential principles for the life of all nations".[116] Greece referred in the same debate to the principle of "respect for territorial integrity and political independence of the nations";[117] Bulgaria observed that "the principle of the inviolability of the national territory must be safeguarded".[118]

66. This was precisely the principle that the tribunal in *Island of Palmas* enunciated in 1928: the right of one State to sovereignty "has as a corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability".[119] Reuter summarized the principle as follows:

> "*chaque Etat doit s'assurer que son territoire ne serve pas des entreprises destinées à violer le territoire d'un autre Etat*".[120]

D. Self-determination and subsistence

67. The right to self-determination belongs to peoples: not to States, nor to individuals as such.[121] The same is the case with the cognate right of every people not to be deprived of its own means of subsistence. In that sense, the principle of the right of peoples to self-

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libres, indépendants et égaux en droit. Chacun d'eux a l'obligation de s'abstenir de tout acte qui porterait atteinte à l'exercice par un autre de ses droits à la liberté, à l'indépendance et à l'égalité juridique.").

116 Special Session of the Assembly of the League of Nations Convened in Virtue of Article 15 of the Covenant at the Request of the Chinese Government, General Commission, Minutes of the Fifth Meeting, 5 March 1932, at 10:30p.m., A. [Exrt.]/G.C./P.V. 2, p. 5 (Romeo Ortega).

117 Special Session of the Assembly of the League of Nations Convened in Virtue of Article 15 of the Covenant at the Request of the Chinese Government, General Commission, Minutes of the Fifth Meeting, 5 March 1932, at 3:30p.m., A. [Exrt.]/G.C./P.V. 3, p. 5 (Politis).

118 Special Session of the Assembly of the League of Nations Convened in Virtue of Article 15 of the Covenant at the Request of the Chinese Government, General Commission, Minutes of the Fifth Meeting, 8 March 1932, at 3:30p.m., A. [Exrt.]/G.C./P.V. 5, p. 7 (Batoloff).

119 *Island of Palmas (Netherlands, United States of America)* (1928), vol. II, R.I.A.A., p. 839; see also Written Statement of Nauru, para. 34.

120 P. Reuter, *Droit international public* (6th edn., 1983), p. 258; see also P. Dupuy, "Due Diligence in the International Law of Liability" in *Legal aspects of transfrontier pollution* (1977), p. 372; M. Bourquin, "Crime et délits contre la sûreté des Etats étrangers" (1927), vol. 16, *Recueil des Cours*, pp. 236–242.

121 See J. Crawford, "The Rights of Peoples: 'Peoples' or 'Governments'?" in J. Crawford (ed.), *The Rights of Peoples* (1988), p. 55.

determination has "contributed to the break with the classical conception of international law as a law which concerned itself solely with the relations between states".[122] In *Chagos* the Court advised that the principle of self-determination was part of customary international law from no later than 1965.[123]

68. More than 30 States and international organizations make reference to the right of peoples to self-determination and/or the right of every people not to be deprived of its means of subsistence.[124] The Court brought out one aspect of the right to self-determination when it advised recently that, "by virtue of the right to self-determination, a people is protected against acts aimed at dispersing the population and undermining its integrity as a people."[125]

69. Tuvalu contends that the principle that in no case may a people be deprived of its own means of subsistence:

> "is both inextricably linked to the right to self-determination contained in Article 1(1) common to the ICCPR and the ICESCR and distinct from it. This makes good sense:

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122 A. A. Yusuf, "The Role the Equal Rights and Self-Determination of Peoples can Play in the Current World Community" in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (2012), p. 376.

123 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, I.C.J. Reports 2019*, pp. 131–135, paras. 145–161; see also *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion of 19 July 2024, para. 237.

124 Written Statement of the Democratic Republic of the Congo, para. 151; Written Statement of the Kingdom of Tonga, para. 243; Written Statement of Singapore, para. 3.81; Written Statement of the Solomon Islands, paras. 171–73; Written Statement of the Cook Islands, paras. 344–45; Written Statement of Kenya, paras. 5.66–5.68; Written Statement of the Melanesian Spearhead Group, para. 233–45; Written Statement of the Philippines, para. 106(a); Written Statement of Albania, para. 96(b); Written Statement of Vanuatu, paras. 288–307; Written Statement of the Federated States of Micronesia, paras. 80, 82; Written Statement of Sierra Leone, paras. 3.88–3.99; Written Statement of Liechtenstein, paras. 27–29, 32; Written Statement of Saint Lucia, para. 39(i)–(ii); Written Statement of Saint Vincent and the Grenadines, para. 109; Written Statement of the Bahamas, paras. 154–155; Written Statement of Kiribati, paras. 132–140; Written Statement of Timor Leste, paras. 333–338; Written Statement of Samoa, para. 185; Written Statement of the African Union, paras. 198, 220; Written Statement of Sri Lanka, paras. 97, 99; Written Statement of the Organization of African, Caribbean and Pacific States, paras. 64–71; Written Statement of Madagascar, paras. 59–60; Written Statement of Tuvalu, paras. 75–83; Written Statement of Bangladesh, paras. 120–123; Written Statement of the European Union, paras. 235–238, 257; Written Statement of Mauritius, paras. 167–169; Written Statement of Costa Rica, paras. 71–72, 112; Written Statement of Antigua and Barbuda, para. 195; Written Statement of Burkina Faso, paras. 204–206; Written Statement of the Commission of Small Island States on Climate Change and International Law, paras. 67, 74–77; Written Statement of the Dominican Republic, paras. 4.44–4.46.

125 *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion of 19 July 2024, para. 239.

denial of a people's own means of subsistence necessarily threatens their future as a people."[126]

70. Sri Lanka argues that:

> "every people has the right not to be deprived of its own means of subsistence. This fundamental human rights principle is a 'legal principle of general application'. It is a right that 'entails corresponding duties for all States and the international community'. The principle that in no case may a people be deprived of its own means of subsistence has played an important role in the Court's own case-law."[127]

71. Burkina Faso contends that:

> "*En insistant sur l'obligation de ne jamais priver les peuples de leurs moyens de subsistence, l'article 1 commun aux Pactes de 1966 consacre le droit des peuples à l'existence en s'attaquant à une menace à cette existence*."[128]

72. Madagascar observes that:

> "*Le droit à l'autodétermination des peuples, droit à la fois coutumier et conventionnel, dont le respect est une obligation erga omnes, suppose le droit pour un peuple de ne pas être privé de ses propres moyens de subsistance. Or, les effets du changement climatique menacent les moyens de subsistance des peuples, leurs vies, leurs modes de vie et leur survie. En effet, le changement climatique cause, à court et à long terme, des problèmes liés à la perte de territoires ainsi qu'à l'inadaptation de certaines terres pour l'agriculture. Face à l'insécurité alimentaire et les pertes de propriété, certaines populations marginalisées sont dans l'obligation de quitter leurs habitations et sont ainsi privé es de leurs territoires naturels et habituels. La République de Madagascar prie la Cour de souligner que les Etats demeurent dans l'obligation de respecter les droits des peuples menacés par les effets néfastes du changement climatique à l'autodétermination*."[129]

73. The European Union observes that the reports of the IPCC:

> "indicate that climate change affected the ability of certain people to dispose of their natural resources, which sometimes constitute the very means of subsistence of a people, which is one specific aspect of the right to self-determination"[130]

and, on this basis, the European Union contends that:

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126 Written Statement of Tuvalu, para. 95

127 Written Statement of Sri Lanka, para. 99.

128 Written Statement of Burkina Faso, para. 205.

129 Written Statement of Madagascar, paras. 59–60.

130 Written Statement of the European Union, para. 238.

> "climate change particularly affects the right to self-determination of small island developing States, whose very cultural identity and statehood is threatened by climate-related sea-level rise".[131]

74. Nauru agrees with these arguments. It makes four further submissions in relation to self-determination.

75. First, the "fundamental human right"[132] of self-determination goes to the heart of the existential threat that climate change represents and the human rights concerns to which it gives rise.[133] The Court itself recognized the connection between human rights and the environment when it observed that:

> "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings".[134]

76. Second, the right to self-determination is of particular importance because its realization is a necessary condition for the effective observance and promotion of other human rights. Judge Yusuf has observed that self-determination can contribute to "a better realization of human rights and fundamental freedoms"[135] and "provide the preconditions necessary to the fulfilment of individual human rights, particularly in the economic, social, and cultural sphere."[136] As the UN Human Rights Committee observed in its General Comment No. 12,

> "[t]he right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights".[137]

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131 *Ibid.*, para. 257.

132 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 133, para. 154.

133 *Cf. Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion*, 21 May 2024, para. 66.

134 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 241, para. 29; *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion*, 21 May 2024, para. 166.

135 A. A. Yusuf, "The Role the Equal Rights and Self-Determination of Peoples can Play in the Current World Community" in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (2012), p. 377.

136 *Ibid.*, p. 375.

137 UN Human Rights Committee, CCPR General Comment No. 12 — Article 1: Right to Self-Determination, 13 March 1984, para. 1; see also See also UN Human Rights Council, Resolution 10/4, *Human rights and climate change*, A/HRC/RES/10/4 (25 March 2009) in *Report of the Human Rights Council on its tenth session*, UN Doc. A/HRC/10/29 (9 November 2009), preamble.

77. Third, a number of States make submissions relating to restrictions as regards the territorial application of *individual* human rights. One participant contends that obligations under international human rights law are subject to the rights-holders being within the jurisdiction of the State that owes the obligation.[138] Another contends that:

> "[i]nternational human rights law has an important role to play alongside the climate change treaties …, though that role is limited because States owe international human rights obligations only to individuals within their respective territories or jurisdiction"; "human rights only apply extraterritorially where a State exercises 'effective control' over territory or persons".[139]

As Nauru observed in its written statement, no such territorial restrictions apply to the fundamental human right of self-determination, which is codified in Common Article 1 of the ICCPR and the ICESCR.[140] As indicated above, the right to self-determination is a collective right, one that belongs to peoples rather than to individuals. It is therefore set out in Part I of the two Covenants; the territorial restrictions in the ICCPR, set out in its Article 2, apply only to the individual rights, which are set out in Part II of that Covenant.

78. In any event, as regards the territorial scope of individual rights Nauru notes that a State party to the ICCPR has, according to its Article 2(1), the obligation to respect and ensure to all those individuals "subject to its jurisdiction" the rights enshrined in the Covenant. It is important, in the present proceeding, to understand the requirement in Article 2(1) in its proper context. As is well-known, a State "may not exercise its *power* in any form in the territory of another State".[141] Jurisdiction in the current context signifies "power".[142] If the territorial State knowingly allows its territory to be used for acts contrary to the rights of another State by violating the territory of the latter,[143] it is exercising its powers wrongfully

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138 Written Statement of Canada, para. 28.

139 Written Statement of Australia, para. 364 and fn. 236; see also Written Statement by the Governments of Denmark, Finland, Iceland, Norway, and Sweden, para. 86; Written Statement of Germany, paras. 91–94.

140 Written Statement of Nauru, para. 40(3).

141 *"Lotus", 1927, P.C.I.J., Series A, No. 10,* p. 18 (emphasis added).

142 *Territorial Jurisdiction of the International Commission of the River Oder, 1929, P.C.I.J., Series A, No. 23*, p. 16. The same is the case with "*compétence*", the term used in the French text of Art. 2(1) ICCPR: as Bourquin observed, "*compétence, c'est le pouvoir d'accomplir certains actes*": M. Bourquin, "Règles générales du droit de la paix" (1931), vol. 35, *Recueil des Cours*, p. 112 (underlined here).

143 *Cf. Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22.

to interfere with that State's "exclusive right to display the activities of a State".[144] If the territorial State, through anthropogenic greenhouse gas emissions, knowingly allows its territory to be used for acts which violate the territory of another, the territorial State is, therefore, for the purposes of Article 2(1) ICCPR, exercising "jurisdiction". In the sense of Article 2(1), that State would thereby render "subject to its jurisdiction" such individuals in the territory whose enjoyment of the rights enshrined in the Covenant are affected by the transboundary harm. No doubt this is why the Court accepted, in its *Nuclear Weapons* advisory opinion, that the right not arbitrarily to be deprived of one's life in Article 6 of the ICCPR was capable in principle of applying in the transboundary context of the use of nuclear weapons.[145]

79. Fourth, the obligation to respect the right of self-determination encompasses positive duties for States.[146] As the Court advised in the *Wall* case, common Article 1 "reaffirms the right of all peoples to self-determination, and lays upon the States parties the obligation to promote the realization of that right and to respect it".[147] The Court observed in the *Chagos* case that: "Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples".[148]

III. QUESTION *(b)*

80. Question *(b)* specifically requests the Court to determine the legal consequences "for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment".

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144 *Cf. Island of Palmas (Netherlands, United States of America)* (1928), vol. II, R.I.A.A., p. 839.

145 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 240, para. 25. The transboundary aspect is evident *inter alia* from the Court's reference to "the general obligation of States to ensure that activities within their jurisdiction and control respect the environment *of other States or of areas beyond national control*": *ibid.*, p. 242, para. 29 (emphasis added).

146 Written Statement of Tuvalu, para. 76.

147 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 172, para. 88.

148 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 139, para. 180; see also Written Statement of Bangladesh, para. 121.

81. Certain States have contended that the conduct causing significant harm to the climate system would not incur any legal consequences under the law of State responsibility. One participant, for example, argues that:

> "Question B does not refer, explicitly or implicitly, to a State's breach of the obligations addressed in Question A. Nor does it otherwise refer to or identify the commission of any internationally wrongful act, or international responsibility for any such act."[149]

82. According to another, "question (b) cannot be answered by an application of the secondary rules of general international law on State responsibility for wrongful act. Rather, question (b) must be addressed in light of the specific legal consequences identified in the climate change treaties."[150] Yet another maintains that "the legal consequences of any breach of these obligations must be determined by reference to the specialized treaty regime".[151]

83. Nauru disagrees with these submissions. It makes three points in this regard.

84. First, when the General Assembly adopted the Request for the advisory opinion, the same State that seeks now to take its stand upon the position that Question *(b)* does not refer to a State's breach of the obligations addressed in Question *(a)*, or even refer to international responsibility at all, the United Kingdom, was itself pleased to:

> "welcome the International Court of Justice considering the current obligations of all States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases, *as well as the legal consequences when States, by their acts or omissions, breach such obligations, causing significant harm*.[152]

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149 Written Statement of the United Kingdom, para. 137.2.

150 Written Statement of Japan, para. 41.

151 Written Statement of Saudi Arabia, para. 6.3.

152 General Assembly, seventy-seventy session, 64th plenary meeting, 29 March 2023, 10 a.m., A/77/PV.64, p. 20; it also noted that the questions of the Request "look at the *consequences* if and when" breaches do occur: *ibidem* (emphasis added).

85. Other participants — such as the European Union,[153] Australia,[154] Norway,[155] Canada,[156] and the United States[157] — placed the same interpretation upon General Assembly resolution 77/276 when it was adopted. These declarations constitute recognition that the Request does indeed ask the Court to address the issue of legal consequences. As the Court advised in *International Status of South-West Africa*,

> "Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument."[158]

86. Second, the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) represent the customary international law framework applicable to the "whole field of international obligations of States",[159] regardless of the specific primary rules that have been breached. The Court made this clear in *Bosnian Genocide*, where Bosnia and Herzegovina had argued that there was a *lex specialis* in relation to the crime of genocide as regards the rules for attribution of internationally wrongful conduct to a State. The Court disagreed and held that: "[t]he rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*."[160] There is, as regards the rules of State responsibility, no such clearly expressed *lex specialis* in the UNFCCC régime.

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153 The European Union observed that the Request would "clarify the obligations of States under applicable international law *and the legal consequences for all States for the breach of those obligations*": *ibid*., p. 8 (emphasis added)

154 *Ibid.*, p. 14, referring to the "request for the International Court of Justice to clarify the obligations *and the related legal consequences* for all States under international law" (emphasis added).

155 *Ibid*., p. 26, "welcom[ing] the consideration by the International Court of Justice of the current obligations of States under international law to ensure the protection of the climate system and the environment, *as well as the legal consequences where by their acts or omissions States breach such obligations*" (emphasis added).

156 *Ibid*., p. 27, stating that the Request "seeks the advice of the International Court of Justice with regard to what obligations *and legal consequences for current or future breaches States face*" (emphasis added).

157 *Ibid.*, p. 28, noting that the Request "asks about obligations *and the related legal consequences under those obligations for all States*" and that it "asks about the *consequences* if and when" breaches occur: *ibid*., p. 28 (emphasis added).

158 *International status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, pp. 135–136.

159 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*, UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), General Commentary, para. 5.

160 *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*, pp. 208–209, para. 401; see

87. Third, the very wording of Question *(b)*, which refers to "legal consequences", stemming from "acts or omissions" and "injured States", reflect the terms of ARSIWA. The Court itself has on previous occasions confirmed that "legal consequences" indicates the consequences arising from the general law of State responsibility for internationally wrongful acts.[161]

88. It follows that, once the relevant obligations stemming from the norms spelled out in Question *(a)* are assessed, the Court must apply the law relating to State responsibility. The latter entails the obligation to cease the wrongful conduct, and the subsequent obligation to provide full reparation.[162] As regards the forms of reparation, full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination.[163]

89. Restitution provides redress for harm, involving the restoration of the situation to its state prior to the commission of the wrongful act.[164] While some effects of climate change are irreversible, all efforts to achieve restitution should be made. The peccant State is under obligation to provide compensation to the extent that such damage is not fully rectified by restitution.[165] As one participant correctly observes, "compensation is warranted for harm inflicted on the environment of States, even when the harm may result from multiple concurrent factors".[166] Compensation must address (*inter alia*) loss of territory and resources, loss of biodiversity, economic impacts on development, and other economically quantifiable damages.

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also ARSIWA Art. 55; ARSIWA Commentary, Art. 55, Yearbook of the International Law Commission, 2001, vol. II, p. 140, para. 4.

161 *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. 172, 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.

162 ARSIWA, Arts. 30–31.

163 ARSIWA, Art. 34

164 *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 67, para. 273.

165 *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 81, para. 152.

166 Written Statement of Colombia, para. 4.14.

90. If restitution or compensation cannot provide full reparation, then a third and complementary form of reparation is satisfaction, which can take the form of "an acknowledgment of breach, an expression of regret, a formal apology or another appropriate modality."[167]

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167 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*, UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), General Commentary, Article 37, paras. 1, 2.