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CR 2024/49

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2024

Public sitting

held on Wednesday 11 December 2024, at 10 a.m., at the Peace Palace,

President Salam presiding,

***on the* Obligations of States in respect of Climate Change**
(Request for advisory opinion submitted by the General Assembly of the United Nations)

VERBATIM RECORD

ANNÉE 2024

Audience publique

tenue le mercredi 11 décembre 2024, à 10 heures, au Palais de la Paix,

sous la présidence de M. Salam, président,

***sur les* Obligations des États en matière de changement climatique**
(Demande d'avis consultatif soumise par l'Assemblée générale des Nations Unies)

COMPTE RENDU

Present:	President	Salam
	Vice-President	Sebutinde
	Judges	Tomka
		Abraham
		Yusuf
		Xue
		Bhandari
		Iwasawa
		Nolte
		Charlesworth
		Brant
		Gómez Robledo
		Cleveland
		Aurescu
		Tladi
	Registrar	Gautier

Présents : M. Salam, président
M^me^ Sebutinde, vice-présidente
MM. Tomka
Abraham
Yusuf
M^me^ Xue
MM. Bhandari
Iwasawa
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M^me^ Charlesworth
MM. Brant
Gómez Robledo
M^me^ Cleveland
MM. Aurescu
Tladi, juges

M. Gautier, greffier

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Pour consulter la liste complète de toutes les délégations, prière de se reporter au CR 2024/35.

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The PRESIDENT: Good morning. Please be seated. The sitting is now open.

The Court meets this morning to hear Saint Vincent and the Grenadines, Samoa, Senegal, the Seychelles and The Gambia on the questions submitted by the United Nations General Assembly. Each of the delegations has 30 minutes at its disposal for its presentation. The Court will observe a short break after the presentation of Senegal.

I shall now give the floor to Mr Edmund Jackson speaking on behalf of Saint Vincent and the Grenadines.

Mr JACKSON:

INTRODUCTION

1. Mr President, Madam Vice-President, honourable judges of the Court. My name is Edmund Jackson, and I have the honour to introduce the delegation of Saint Vincent and the Grenadines in these advisory proceedings, as this is our first ever appearance at the International Court of Justice.

2. Ms Shernell Hadaway will address, among other things, the impacts of climate change, climate finance and the right to self-determination. After which Dr Justin Sobion will speak to the no-harm rule and the obligation of States to protect the atmosphere.

3. But before these submissions, Mr President, we are going to take you to our beautiful island, through a three-minute video entitled "The Race: Survival vs Death and Debt", which highlights the devastation caused by extreme weather events, including most recently on 1 July 2024, when our multi-island State was ravaged by the category four Hurricane Beryl, which left some of our islands unrecognizable and thousands of families homeless.

4. Mr President, with your leave we will now play that video submitted to the Court, and then invite Ms Shernell Hadaway to take the floor. I thank you.

[On screen: video entitled "The Race: Survival vs Death and Debt"]

Ms HADAWAY:

IMPACTS OF CLIMATE CHANGE, CLIMATE FINANCE AND THE RIGHT OF SELF-DETERMINATION

1. Mr President, Madam Vice-President, honourable Members of this Court, this video depicts our race for survival climbing the metaphorical ladder of death and debt. Our climate injustice. These are the realities that haunt us.

2. Greetings to this honourable Court from Hairouna — Land of the Blessed, Saint Vincent and the Grenadines, or in the indigenous language of our Garifuna people — *Yurumein,* which means "our homeland". They are the descendants of the co-habitation which occurred during slavery of our local Carib-Arawak population and the enslaved Africans seeking refuge. Ironically, due to colonization in the 1700s, our ancestors were exiled to Battowia and Balliceau. As such, since the 1700s we have suffered the loss of our people, of our culture and our traditions. This "wicked" problem of climate change, as we deem it in the environmental world, is colonization on repeat. Let us never forget who bears the historical responsibility. To tackle an issue, we must go not to the symptoms but beyond to the root cause. The 2022 Working Group II report of the IPCC[1], marked a shift in discourse by explicitly identifying colonialism as both a historical and current contributor to this climate crisis — the first reference to the influence of colonialism in the 30 years of its existence. Yet some question: why our calls for reparation?

Impacts

3. The topography of the island, coupled with the socio-economic conditions, render Saint Vincent and the Grenadines highly susceptible to climate-related impacts.

4. We have faced significant economic and social impacts from natural disasters in many years. Despite our rank on the world risk index determined by exposure and vulnerability for 2020 and 2021 — at 179th and 138th respectively —, apparently deemed comparatively low risk, the recent spike in environmental disasters has proven the metrics used to calculate vulnerability questionable. For context, in 2010, Hurricane Tomas caused an estimated US$49.2 million in loss, affecting over 5,000 residents. In 2021, Hurricane Elsa displaced over 200 residents and caused an additional

[1] Climate Change 2022: Impacts, Adaptation and Vulnerability.

US$14 million in damages, further exacerbating my country's vulnerability to climate-related disasters.

No application of *lex specialis*

5. Mr President, Madam Vice-President, this honourable Court, I will now address the applicable law. It is important to note that the UNFCCC and the Paris Agreement entered into force in 1994 and 2016 respectively, whereas the relevant conduct has persisted for over a century prior. Therefore, this has long involved taking into consideration: treaty law and general international law including customary international and *jus cogens* — particularly given the dynamic nature of climate change marked with progression according to the best available science. This approach promotes the unified development and implementation of international law, guaranteeing consistency among the various legal obligations imposed on States. As such, our submission firmly refutes the *lex specialis* arguments proffered by some States and more so, the legal principle of *lex posterior derogat priori* as the Paris Agreement, the Kyoto Protocol and the UNFCCC in no way supersede or displace these existing frameworks but, I say, it works in tandem to offer a holistic perspective aligned with the ITLOS pronouncement that "simply complying with the obligations and commitments under the Paris Agreement" would *not* satisfy the UNCLOS obligations.

The obligation of States in addressing climate change before the International Court of Justice

6. This submission asserts that States bear an obligation under international law to act responsibly in mitigating climate change and its adverse effects. The failure, Mr President, of the *fossil-fuel GIANTS* to demonstrate political will and provide adequate support to us, even under the UNFCCC process made under the *lex specialis* arguments, constitutes a breach of these obligations.

Climate justice and State responsibility

7. Climate change disproportionately impacts us, undermining fundamental rights enshrined in international law, including the right to self-determination and the permanent sovereignty of peoples over their natural resources. As Madam Vice-President Sebutinde in the separate opinion in

Legal Consequences of the Separation of Chagos Archipelago from Mauritius in 1965[2] enunciated, "the right to self-determination within the context of decolonization has attained peremptory status (*jus cogens*), whereby no derogation therefrom is permitted — As a direct corollary of that right is the *erga omnes* obligation". Likewise, Saint Vincent and the Grenadines, we submit that this principle ought to be transposed to be directly applicable within the climate change sphere, given the prevalence of sea level rise and climate-induced mobility.

8. The preservation of sovereign and jurisdictional rights is not only a uniquely legal issue — squarely falling within the Court's jurisdiction — but one of significant systemic importance. However, as the Alliance of Small Island States (AOSIS) has put forward in written submissions, even with the disappearance of a State's terrestrial space, statehood persists and thus the duty of co-operation of States to ensure that the sovereignty afforded SIDS in the aftermath is more than a mere title.

9. Yet it begs the questions: What is right to life without the quality of life and its natural environment? What is a land without its people? What is a land without its tradition and culture? In the case of my homeland, Hurricane Beryl displaced over 1,600 persons, thus creating who I deem "climate refugees" — ripping them from their homes, ripping them from their culture, their loved ones. In essence, it pertains to the adaptation of the international legal framework in response to physical changes brought about by harmful anthropogenic activities to adequately address "climate refugees".

10. Its devastation —described as Beryl's Armageddon, Category 4 — exemplifies the ongoing threat we face. Who feels it, knows it. It inflicted direct economic damages equivalent to 22 per cent of Saint Vincent and the Grenadines' annual GDP for 2023. This makes Hurricane Beryl one of the costliest hurricanes on record in Saint Vincent and the Grenadines.

11. The Caribbean region, often described as the "canary in the coal mine" of this climate crisis, bears witness to the intensification of extreme weather events. Hurricane Beryl shattered historical records. This unprecedented phenomenon underscores the urgency of addressing the systemic inequities in the global climate response.

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[2] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, separate opinion of Judge Sebutinde, p. 270, headnote; see also p. 277, para. 13.

Failure of international mechanisms and financial institutions

12. Despite the increasing severity and frequency of climate-related disasters, international financial institutions remain inadequately aligned to address our financial needs. Recovery and rebuilding efforts in Saint Vincent and the Grenadines are delayed by bureaucratic international processes, with funding for reconstruction often taking years to materialize, in stark contrast to the pace of recurring disasters. This failure perpetuates systemic injustice. As our honourable Prime Minister Dr Ralph E. Gonsalves aptly stated, the global response resembles "going up the down escalator", highlighting the inequity and the unsustainability of the current political economy. It is unfair. It is unjust.

13. States have an unequivocal obligation to act responsibly in addressing this crisis, recognizing their historical contributions to the problem and their capacity to mitigate its impacts. The failure to provide support to vulnerable nations constitutes a violation of international law and an affront to the principles of equity, justice and human rights.

14. This Court is called upon to affirm these obligations, to hold these States accountable for their actions and inactions regarding climate change, ensuring a just and sustainable future for all, including our future generations.

COP29 and climate finance

15. The concept of "climate debt" and the principle of CBDR-RC enshrined in Article 3 (1) of the UNFCCC collectively emphasize the inequities in the responsibility for addressing the climate crisis. Over the past 150 years, the Global North has been responsible for 92 per cent of surplus emissions, with two major blocs contributing 69 per cent. Saint Vincent and the Grenadines contributes a negligible less than 0.01 per cent of that share — not even 1 per cent — yet devastation is our portion.

16. Together, these frameworks call upon high-emitting countries to contribute their fair share in reducing emissions and providing support to lower-income nations to avert and address these adverse impacts of climate change, in alignment with principles of equity and justice.

17. The vulnerable, we firmly demanded US$1.3 trillion per annum by 2035 from historic emitters at COP29 but developed nations balked, with a paltry promise of US$300 billion by 2030,

lest I say do not wait with bated breath as the trend mirrors empty pledges, annual "talk-shop" arguably raising the question whether it is really still fit for purpose?

18. Developing and middle-income States face significant limitations in addressing this crisis as a substantial portion of their GDP is allocated to debt servicing and rebuilding following climate disasters. It is a cycle. Multilateralism is required to effectively tackle climate change as it is a multidimensional ticking time bomb waiting to explode.

19. As observed, the global financial structure retains remnants of imperialistic inequities, with borrowing costs markedly disproportionate: the Global North can secure financing at interest rates of 1 per cent to 4 per cent, while the Global South faces rates of 14 per cent. That is preposterous. Such disparities significantly undermine the efficacy of certain initiatives. Hence the important call for reparations — the urgent support in finance, technology transfer, unfulfilled pledges for the loss and damage fund and capacity-building to address adaptation across SIDS. These arguments are supported through the work of COSIS.

20. Mr President, Madam Vice-President, this honourable Court, I yield the floor to our external counsel, Dr Sobion.

The PRESIDENT: I thank Ms Shernell Hadaway. I now give the floor to Mr Justin Sobion.

Mr SOBION:

THE NO-HARM RULE AND THE OBLIGATION OF STATES TO PROTECT THE ATMOSPHERE

1. Mr President, Madam Vice-President, honourable judges, it is an honour to appear before you once again.

2. We have heard many arguments on the no-harm rule, and one of the aims of this submission is to clarify the scope and applicability of this rule to this advisory opinion.

3. There is no doubt that the no-harm rule is well established[3]. This customary law obligation goes as far back as the *Corfu Channel* case (1949) which confirms that every State has an obligation

[3] Caroline E Foster, "Due Regard for Future Generations? The No Harm Rule and Sovereignty in the Advisory Opinions on Climate Change" (2024), *Transnational Environmental Law* 1.

not to knowingly allow its territory to be used for acts contrary to the rights of other States[4]. The no-harm rule addresses how sovereigns must act in relation to the legal rights of other States and their populations[5].

4. The obligation of ensuring that State activities within their jurisdiction do not cause damage to the environment of other States is also enshrined in both the Stockholm (1972) and Rio Declarations (1992)[6].

5. I would also like to add the Institut de droit international, in its resolution on the environment (1997) which provides that "[e]very state . . . has the responsibility to ensure that activities within its jurisdiction or under its control do not cause damage which may affect the lives of the present and *future* generations"[7].

6. We therefore agree with Saint Lucia that the no-harm rule existed long before the UNFCCC and the Paris Agreement. Saint Vincent and the Grenadines aligns itself with the oral submission made by Nauru on the general rule laid down in the *Corfu Channel* case. That rule is — while the territory remains under the sovereignty of a State, it cannot be used in a way which may cause damage to other States. Any such action or negligence in this regard will result in international responsibility[8].

7. Mr President, it is a flawed argument that the no-harm rule does not apply to greenhouse gases because they are diffuse or come under a wide range of activities[9]. Yesterday this Court heard arguments from the United Kingdom to the effect that the no-harm rule is limited to smelter fumes, the potential use of nuclear weapons and the discharge of effluent into a transboundary river[10].

8. The fact that this is the first time that greenhouse gas emissions have come before this honourable Court is not an automatic bar to its applicability to the no-harm rule. The scope of the no-harm rule is evolutionary and not static. In this twenty-first century, the Court must keep up with

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

[5] Caroline E Foster, "Due Regard for Future Generations? The No Harm Rule and Sovereignty in the Advisory Opinions on Climate Change" (2024), *Transnational Environmental Law* 1, p. 2.

[6] *Report of the UN Conference on the Human Environment*, UN doc. A/CONF.48/14/Rev 1 (5-16 June 1972) at 5 (principle 21). *Report of the UN Conference on Environment and Development*, UN doc. A/CONF.151/26 (Vol I) (12 August 1992), Annex I at principle 2.

[7] Institut de droit international, "Environment" (Rapporteur Luigi Ferrari Bravo), adopted at the Strasbourg Session, 4 September 1997, at Article 6.

[8] CR 2024/46 (Nauru).

[9] See, for example, the United States' Written Statement dated 22 March 2024, pp. 66-67.

[10] CR 2024/48 (United Kingdom).

new circumstances and transboundary threats, such as climate change, which affect vulnerable small island developing States.

9. If this Court accepts the argument that greenhouse gas emissions do not apply to the no-harm rule, that will give the largest polluters a "free pass" to continue and exacerbate the climate crisis. We therefore urge this honourable Court to apply the no-harm rule to this advisory opinion.

10. I now turn to the issue of the concept of a common concern of humankind and how it relates to climate change as well as the atmosphere.

11. The UNFCCC provides that the "change in the Earth's climate and its adverse effects are a common concern of humankind"[11]. The Convention goes on to recognize that the atmosphere is a critical component of the climate system[12]. The Paris Agreement, on the other hand, acknowledges that "climate change is a common concern of humankind"[13]. But what exactly does a common concern of humankind mean?

12. This Court has the ideal opportunity to clarify the meaning of this term, especially as it is contained in the very climate treaties that major emitters claim are the only relevant law for the purposes of this advisory opinion.

13. According to Shelton — an eminent American publicist — common concerns establish a general basis for the concerned community to act[14]. A common concern of humanity means that a subject is no longer under the exclusive jurisdiction of any one State and it requires international action[15]. Taylor, a New Zealand jurist, opines that a common concern of humankind (CCH) can apply to global ecological concerns which occur beyond the national jurisdiction of States, such as climate change and its adverse effects[16].

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[11] United Nations Framework Convention on Climate Change (opened for signature 4 June 1992, entered into force 21 March 1994), preamble.

[12] United Nations Framework Convention on Climate Change, Art. 1 (3).

[13] Paris Agreement (opened for signature 12 December 2015, entered into force 4 November 2016), preamble.

[14] Dinah Shelton, "Common Concern of Humanity" (2009) 39 (2), *Environmental Policy and Law* 83, p. 85.

[15] *Ibid.*, p. 86.

[16] Prue Taylor, "Common Heritage of Mankind and Common Concern of Humankind" in Michael Faure (ed.), *Elgar Encyclopedia of Environmental Law* (Edward Elgar Publishing, Cheltenham, 2023) at 303, at 304.

14. A Swiss jurist found that the common concerns of humankind are inherently transboundary and potentially affect all of humanity[17]. Invoking "humankind" to common concern therefore depicts the commonality and collective responsibility of States[18].

15. Antônio Cançado Trindade, a former judge of this Court explained, extrajudicially, that the common concern of humankind embodies "universal solidarity and social responsibility". It emanates from the human conscience and reflects the basic values of the international community (rather than State interests)[19].

16. In *Whaling in the Antarctic*, this Court, relying on the work of a UNEP Group of Legal Experts, also examined the constitutive elements of the common concern of humanity which include the involvement of all countries, all societies, as well as present and future generations[20].

17. To sum up, Mr President, a common concern centres around a specific problem (such as climate change) and implies an urgency on the international community to act[21]. Based on the views expressed, under international law, climate change falls squarely within the parameters of a CCH.

18. As it specifically relates to the atmosphere, scientists have long warned that the Earth's climate is changing rapidly due to the increasing concentrations of anthropogenic greenhouse gases[22]. The atmosphere, one of our global commons, also lies outside the national jurisdiction of any State. The atmosphere is *res nullius* (nobody's thing)[23]. As a result, we align ourselves with Kiribati's statement that no State owns the atmosphere[24].

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[17] Judith Schäli, "Marine Plastic Pollution as a Common Concern of Humankind" in Zaker Ahmad and Thomas Cottier (eds.), *The Prospects of Common Concern of Humankind in International Law* (Cambridge University Press, Cambridge, 2021) 153, p. 187.

[18] Thomas Cottier, "The Principle of Common Concern of Humankind" in Zaker Ahmad and Thomas Cottier (eds.), *The Prospects of Common Concern of Humankind in International Law* (Cambridge University Press, Cambridge, 2021), p. 12.

[19] Antônio Augusto Cançado Trindade, *International Law for Humankind – Towards a New Jus Gentium* (3rd ed, Brill Nijhoff, Leiden, 2020), at 349. See also *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, separate opinion of Judge Cançado Trindade, para. 46.

[20] *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, separate opinion of Judge Cançado Trindade, para. 46.

[21] Paulo Magalhães "Common Interest, Concern or Heritage?" in Timothy Cadman, Margot Ann Hurlbert, and Andrea C Simonelli (eds), *Earth System Law: Standing on the Precipice of the Anthropocene* (Routledge, Oxon, 2022), p. 249.

[22] Will Steffen and others, *Global Change and the Earth System – A Planet Under Pressure* (Springer Berlin, Heidelberg, 2005), pp. 4–7.

[23] Klaus Bosselmann, "Environmental Trusteeship and State Sovereignty: Can They be Reconciled?" (2020) 11 (1–2) *Transnational Legal Theory* 47, p. 51.

[24] CR 2024/43, p. 45, para. 10 (Kiribati, Benvenisti).

19. Since no State owns the atmosphere, States do not have an absolute right to use the atmosphere as their personal dumping ground. In other words, no State has absolute sovereignty over the atmosphere. To the contrary, when it comes to the atmosphere, sovereignty must be couched in the language of responsibility. Sovereignty as responsibility means that States have to be accountable to both the domestic and the international community[25].

20. We therefore invite this Court to recognize that States have a collective responsibility to the atmosphere, and that State behaviour towards it cannot go unchecked. This is simply because anthropogenic greenhouse gases emitted into the atmosphere are harmful and continue to cause injury to present and future generations[26].

21. The ILC's Special Rapporteur, on the protection of the atmosphere, recommended that the protection of the atmosphere from atmospheric pollution and degradation is a common concern of humankind[27]. The report added that the atmosphere should be utilized in an equitable and reasonable manner, taking into account the interests of present and future generations[28]. This rule is also consistent with the UNFCCC, which requires States parties to protect the climate system for the benefit of present and future generations[29].

22. This Court, in both *Pulp Mills*[30] and *Whaling in the Antarctic*[31], has acknowledged that intergenerational equity forms part of the conventional wisdom of international environmental law. In other words, when it comes to the State's obligation to the protect the atmosphere from harmful greenhouse gas emissions it must have regard to future populations[32].

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[25] Francis M Deng and others, *Sovereignty as Responsibility – Conflict Management in Africa* (The Brookings Institution, Washington DC, 1996), p. 211.

[26] CR 2024/43, p. 44, para. 7 (Kiribati, Benvenisti).

[27] Shinya Murase, *Sixth Report on the Protection of the Atmosphere* UN Doc A/CN.4/736 (11 February 2020), p. [31]. See also the preamble at the Annex.

[28] *Ibid*. Draft Guideline 6. See also *Draft International Covenant on Environment and Development – Implementing Sustainability* (5th ed, IUCN, Environmental Policy and Law Paper No. 31 Rev 4, 2015), Art. 3, p. 3.

[29] United Nations Framework Convention on Climate Change, Art. 3 (1).

[30] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, separate opinion of Judge Cançado Trindade, p. 181, para. 122.

[31] *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, separate opinion of Judge Cançado Trindade, para. 47.

[32] Caroline E Foster, "Due Regard for Future Generations? The No Harm Rule and Sovereignty in the Advisory Opinions on Climate Change" (2024) *Transnational Environmental Law* 1.

23. Based on the foregoing, we urge this Court to find that the atmosphere is a common concern for humankind. As a common concern for humankind, States have an obligation to protect it. To fulfil this obligation, States have a responsibility to collectively act as trustees for the atmosphere[33].

24. Mr President, Judge Weeramantry could not have said it better: "the principle of trusteeship of earth resources" is the "first principle of modern environmental law"[34]. On this, we align ourselves with the position of Grenada in its oral submissions.

25. Mr President, since our delegation is the last Caribbean country to address you in these proceedings, it would be remiss of me to not make this closing remark. We are proud of our other nine sister Caribbean islands who have addressed this Court, some for the very first time, including Saint Vincent and the Grenadines. We are confident that the impact of climate change in our region have not fallen on deaf ears.

26. The journey continues. Mr President, I thank you.

The PRESIDENT: I thank the representatives of Saint Vincent and the Grenadines for their presentation. I now invite the delegation of Samoa to address the Court and I call Ms Peseta Noumea Simi to the podium.

Ms SIMI:

I. INTRODUCTORY COUNTRY REMARKS

1. Mr President, Madam Vice-President, distinguished Members of the Court, I am honoured to address this Court on behalf of the Government and people of the Independent State of Samoa.

2. Samoa is a small island developing State in the Blue Pacific continent with more than 70 per cent of its population living in coastal ancestral villages and more than 80 per cent of our land are customary. Land and the ocean are central to Samoan culture and are also the bases of people's

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[33] Klaus Bosselmann, "The Atmosphere as a Global Commons" in Jordi Jaria-Manzano and Susana Borrás (eds), *Research Handbook on Global Climate Constitutionalism* (Edward Elgar Publishing Ltd, Gloucestershire, 2019) 75 at 81.

[34] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (Judgment) I.C.J. Reports 1997*, separate opinion of Judge Weeramantry, p. 102. See also *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I.C.J. Reports 1993*, separate opinion of Judge Weeramantry, para. 240, and *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v*. France) *Case (New Zealand* v. *France), Order of 22 September 1995, I.C.J. Reports 1995*, dissenting opinion of Judge Sir Geoffrey Palmer, para. 114.

sense of belonging and inheritance. Village boundaries were marked by the age-old banyan trees on the mountain ridges and extend to the protruding reef.

3. Such are the values that make a distinct people where our history, traditions, identity, livelihoods and everyday lives are intimately connected to our precious island ecosystem, underpinned by our unique communal *faa-Samoa* culture and traditions.

4. Our geographical isolation and insularity no longer shields or protects us from the increasingly complex and dynamic security challenges. The rules-based international system is being bent out of shape. Gone were the days when we took only what we needed from our environment; when we were a lot more conscious of the importance of our cultures and distinctive values. Then, we did not worry much about borders because the original migrations of our peoples defined for us our ocean space and place.

5. Unfortunately, this important connection makes us particularly vulnerable to the adverse effects of climate change. Over the past decades, we have witnessed more frequent and intense storms and cyclones, which left a trail of destruction in its wake — homes flattened, lives lost, food crops destroyed, and constant threats to relocation.

6. The reality of climate change and increased severity of disasters mean many communities are at risk of losing traditional homelands as rising sea levels, king tides and storm surges wash away the shoreline; inland communities experience landslides leaving them devoid of safer and more disaster resilient land. Regrettably, continuous inaction, means detrimental effects on all aspects of Samoan life.

7. As the majority of the submissions have highlighted, for islands like Samoa, climate change is more than an environmental issue. It is a health, food security, economic, social, cultural, human rights and security concern. As large ocean States, it fundamentally affects our ability to draw sustenance from the pristine oceans and seas that surround us.

8. Climate change continues to challenge our resolve and the development of a people and nation. We continue to pay the heaviest price for a crisis we did not create. We hope the Court will not ignore the majority of the voices making this point.

9. Even with our most ambitious nationally determined contributions, the impact is minimal. As we patiently wait for more ambitious commitments to significantly curb anthropogenic

greenhouse gas emissions, we are told climate change impacts are bound to intensify, reducing the habitability of small island States, even under the lowest global emissions scenario of 1.5°C. Where is the justice in this?

10. Mr President and Members of the Court, we therefore endorse and echo the voices of the record number of small island developing States, especially those from the Pacific, that have appeared before you to argue that the harm inflicted upon us is not an unfortunate accident. It is the foreseeable result of actions taken — and not taken — by those who have long known the consequences of their conduct. Decades of scientific warnings and our advocacy have been ignored in favour of short-term economic and political interests. The principle of prevention and the duty of due diligence has been cast aside, violating international law and neighbourly responsibility.

11. This case is about the violation of our fundamental human rights as much as it is about environmental degradation. The two cannot — and must not — be separated. Human well-being and dignity are related to environmental health and sustainability. The right to self-determination — a peremptory norm of international law — is being violated. The verities that make us Samoa are under assault. Our chiefly system, which is also a system of land and ocean governance, becomes untenable in the face of ecological collapse at a village and at a national level and this could lead to instability.

12. International law is not indifferent to our plight. We are here to demand justice simply by asking this Court to apply the various international obligations to the conduct, which has occurred overtime and is known to cause significant harm to the climate system and other aspects of the environment — Samoa and our blue planet.

13. The processes that have caused such immense harm must be corrected. It is not enough to discuss future reductions in emissions while current practices continue unabated. There must be an immediate cessation of activities that continue to damage the climate system, and worsen our current situation.

14. Mr President and Members of the Court, Samoa has no regular military forces, does not belong to a military grouping and has only a small unarmed civilian police force. Its only defence and shield against any threats is the “rule of law and international justice”. Regional and national stability has never been more critical in order to maintain peace and security, prosperity and well-being of all Pacific peoples.

15. Samoa appearing before the Court for the first time in its history is a testament to the confidence we have in this world Court and the seriousness of the case at the heart of these proceedings. Many of us therefore are counting on this Court to hear the voices of the masses versus the few.

16. Let us not allow history to record that when faced with the clear and present danger to entire nations and cultures, we failed to act decisively so that our people and their special relationship to their lands, seas and environment were unjustly sacrificed for political convenience.

17. Let this moment be a turning point where words are transformed into action, where legal principles are translated into economic measures, and where justice prevails over inertia and destruction. The eyes of the world are upon us, and the stakes are nothing less than the survival of peoples, cultures and the integrity of our shared planet.

18. Mr President, I thank you for your attention. I now respectfully request that you invite Ms Su'a Hellene Wallwork to take the floor.

The PRESIDENT: I thank Ms Peseta Noumea Simi. I now give the floor to Ms Su'a Hellene Wallwork.

Ms WALLWORK:

II. LEGAL SUBMISSIONS

Introduction of legal submissions

1. Mr President, Madam Vice-President, distinguished Members of this Court, my name is Su'a Hellene Wallwork and I am the Attorney General of Samoa. It is my privilege to address the honourable Court on behalf of Samoa together with my colleague, the Head of our Ministry of Foreign Affairs and Trade.

2. Samoa has filed a detailed written statement in these proceedings. We also subsequently filed detailed written comments. The submissions we present this morning reaffirm our written submissions. In the interests of time, we make use of this opportunity to highlight some key points from our written submissions and to address some of the oral submissions that have been presented by other parties at this hearing.

3. Samoa's position is clear. All States do have obligations under international law to protect the climate system and other parts of the environment from harmful anthropogenic emissions of greenhouse gases (GHGs). Samoa respectfully urges this honourable Court to issue an advisory opinion that confirms and clarifies these legal obligations are binding on all States to protect our environment for our current and future generations. For brevity in these oral submissions, I will use the term "conduct" to refer to the individual and cumulative releases of GHG emissions over an extended period of time, from activities under the jurisdiction or control of particular States that result in significant harm to the environment.

4. It goes without saying that when a State fails to comply with binding legal obligations there must be legal consequences under the accepted general rules of State responsibility.

5. A positive advisory opinion from this Court would mark, in my respectful view, the most significant progress to date in our global action against climate change.

6. Mr President, these submissions will focus on three main topics, namely:

(a) the legal obligations that apply to the conduct;

(b) the impact of the conduct on fundamental human rights, including the right to self-determination; and

(c) the legal consequences for failing to comply with the legal obligations.

The legal obligations that apply to the conduct

7. It is indisputable that the conduct at issue here amounts to a serious violation of multiple international obligations designed to prevent precisely the kind of harm now befalling on Samoa. Many of these obligations are identified in the *chapeau* paragraph of the operative part in the General Assembly's Request for the advisory opinion[35].

8. Some States have sought to narrow the applicable legal obligations to the United Nations Framework Convention on Climate Change (the UNFCCC) and the Paris Agreement[36]. They do so in two ways. First, some States rely on the principle of *lex specialis*. Second, other States argue that

[35] UNGA resolution 77/276: Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change, 29 March 2023, operative part, *chapeau*.

[36] For example, CR 2024/35, Germany, paras. 5, 10-14; CR 2024/36, Kingdom of Saudi Arabia, paras. 7 and 10, Australia, para. 5; CR 2024/38, Canada, para. 37 (Aumais), China, para.8 (Ma), Republic of Korea, para. 10 (Hwang); CR 2024/39, Denmark, Finland, Iceland, Norway and Sweden; CR 2024/40, United Arab Emirates, United States of America, para. 7 (Taylor), Russian Federation, paras. 8 and 88 (Musikhin).

the UNFCCC and the Paris Agreement are not *lex specialis* but have a central or primary role. Yet, these countries also acknowledge the shortcomings of these agreements. For example, the submissions from Australia noted that the parties are not currently on track to achieve the goals of the Paris Agreement[37]. This is already raising alarm bells for the vulnerable small island States such as Samoa, who are already experiencing significant harm.

9. Our written submissions have set out in detail the legal arguments as to why the principle of *lex specialis* does not apply here. We note and endorse the arguments presented by various other parties that multiple international obligations are applicable to the issue before the Court and should be the focus of the advisory opinion to be provided by this honourable Court.

10. Certain States have described the climate change agreements as the primary source of international obligations concerning climate change *or* as central *or* at the heart of the law on climate change. But what do these terms mean? We in Samoa cannot help but think that this language is being used to insinuate that the Paris Agreement covers the field. This is *lex specialis* by another name.

11. Samoa respectfully submits that the UNFCCC and the Paris Agreement are not the only nor, even, the primary or central obligations under international law that apply to the conduct for three reasons.

12. Firstly, the *ratione temporis* application of these instruments is limited to the period after March 1994 and November 2016 when the UNFCCC and the Paris Agreement respectively came into force. Yet, the conduct by the responsible States which is driving climate change took place long before this time. This fact is also indisputable and well supported by science and numerous internationally accepted reports[38].

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[37] CR 2024/36, Australia, para. 3 (Donaghue).

[38] Intergovernmental Panel on Climate Change (IPCC), Synthesis Report of the IPCC Sixth Assessment Report (AR6). Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policymakers, Statement A.1 (2023); IPCC, Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policymakers, Statement A.1.1 (2021).

13. Second, States had the requisite knowledge about climate change well before the UNFCCC and the Paris Agreement. Since at least the 1960s the causal link was well established between anthropogenic GHG emissions, observed climate change and related risks[39].

14. A range of other treaties, as well as rules and principles of general international law were in operation for much, if not the entirety of the period during which States have been causing significant harm to the climate system and other parts of the environment. Samoa submits that the responsible States had the requisite knowledge from at least the 1960s. It cannot be seriously contended that the States did not have the requisite knowledge prior to 1994[40].

15. As such, a broader range of international obligations would still apply to the conduct. These obligations include the right to self-determination, human rights obligations regulating State conduct vis-à-vis individuals and groups, and of course, the obligation to prevent significant transboundary harm to the environment of other States and areas beyond national control.

16. Third, the conduct and the significant harm it caused to the climate system and other parts of the environment had already occurred before the UNFCCC came into force. In its first Report in 1990, the Intergovernmental Panel on Climate Change (IPCC) found that global mean surface air temperature had increased by 0.3°C to 0.6°C over the preceding century, and global sea level had risen by 10-20 cm[41]. The IPCC's Sixth Assessment Report confirms further sea-level rise since 1901[42]. Such harm underscores that the duty of prevention and due diligence under customary international law applied — and had been breached — well before these treaty frameworks were established.

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[39] CR 2024/36, Barbados, paras. 12-17; Written Statement Vanuatu, paras. 177-192; Expert Report of Professor Naomi Oreskes on Historical Knowledge and Awareness, in Government Circles, of the Effects of Fossil Fuel Combustion as the Cause of Climate Change (dated 29 January 2024) (Written Statement Vanuatu, Exhibit D).

[40] See IPCC, First Assessment Report, Overview and Policymaker Summaries and 1992 IPCC Supplement available at https://www.ipcc.ch/report/ar1/syr/ (last accessed 9 Dec. 2024).

[41] *Ibid.* at section 1.0.5, p. 53.

[42] Fox-Kemper, B., H.T. Hewitt, C. Xiao, G. Aðalgeirsdóttir, S.S. Drijfhout, T.L. Edwards, N.R. Golledge, M. Hemer, R.E. Kopp, G. Krinner, A. Mix, D. Notz, S. Nowicki, I.S. Nurhati, L. Ruiz, J.-B. Sallée, A.B.A. Slangen, and Y. Yu, 2021: Ocean, Cryosphere and Sea Level Change. In Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Masson-Delmotte, V., P. Zhai, A. Pirani, S.L. Connors, C. Péan, S. Berger, N. Caud, Y. Chen, L. Goldfarb, M.I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.B.R. Matthews, T.K. Maycock, T. Waterfield, O. Yelekçi, R. Yu, and B. Zhou (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, pp. 1211-1362, doi: 10.1017/9781009157896.011. See, also, United Nations, *Surging Seas in a warming world: The latest science on present-day impacts and future projections of sea-level rise*, 26 August 2024, p. 3.

The impact of the conduct on fundamental human rights, including the right to self-determination

17. Second topic: the impact of the conduct on fundamental human rights, including the right to self-determination. Samoa strongly contends that the conduct infringes our people's fundamental human rights, including the right to self-determination.

18. The forced displacement of our communities due to climate impacts erodes our sovereignty and disrupts our social structures[43]. Extreme weather events create a cycle of recovery and debt. Climate impacts deny us the ability to freely pursue our economic, social, and cultural development, and constitute a deprivation of our means of subsistence[44].

19. The conduct also violates our cultural rights and our right to family and home life[45]. Traditional knowledge systems, practices, and expressions are intimately related to our environment, as already explained by my colleague, the Head of our Ministry of Foreign Affairs and Trade.

20. The loss of biodiversity, destruction of significant sites and alteration of landscapes and seascapes sever the threads that weave our cultural tapestry and belonging. Our ability to grow crops is imperilled, because we are already at the threshold of heat tolerance for our food systems[46]. These crops are not just our means of subsistence; they are part of the web of relationships that defines who we are as Samoans.

21. I refer this honourable Court to the Convention on Biological Diversity[47], which recognizes the vital role of indigenous cultures in conservation, sustainable use as well as with respect to traditional knowledge of biodiversity. This Convention also enshrines the prevention principle as an operative principle[48]. This illustrates perfectly the way in which it is impossible to separate the environment from human rights considerations, which has been a dominant theme across all the small island States' submissions, including ours.

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[43] Written Comment Samoa*,* paras. 57-66, Written Statement Samoa, paras. 15-83.

[44] Written Comment Samoa*,* paras. 57-66, Written Statement Samoa, paras. 15-83. See*, also, common article 1, International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR).*

[45] Article 25, ICCPR/Article 15, ICESCR/Articles 22 and 27 Universal Declaration of Human Rights (UDHR) and Article 17, ICCPR/Article 12, Universal Declaration of Human Rights.

[46] Written Comment Samoa, paras. 115-122.

[47] We refer the Court to the Written Statement of the World Wide Fund for Nature (WWF) International, submitted to the Registry, Peace Palace Library.

[48] Article 3 and Article 8 *(j)*, Convention on Biological Diversity.

22. Mr President, it is Samoa's submission that these obligations have been breached by the conduct.

23. Samoa notes with concern that some States dispute that the right to life has been violated by the relevant conduct[49], despite IPCC findings that climate change has already caused premature deaths[50]. The right to life with dignity obliges States to take proactive measures to prevent foreseeable threats to life[51].

24. If States continue to turn a blind eye to this and fail to take proactive preventative measures then there will be even more widespread and serious violations of this right. The IPCC has predicted at a confidence level of "very high": "Climate change and related extreme events will significantly increase ill health and premature deaths from the near-to-long term."[52]

25. Further, Samoa notes that the IPCC has noted that 1.5°C, which is one of the Paris Agreement temperature thresholds, is not safe for most nations, communities and ecosystems and sectors[53]. This underscores our lived reality: dangerous climate change has, sadly, become part of our day-to-day experience and the worsening outlook, compounding and accelerating impacts are terrifying.

26. Samoa is strongly committed to protecting the rights of our children, but we find ourselves unable to protect them against the conduct causing climate change. This is violating their rights — and those of future generations[54]. This is an intragenerational as well as an intergenerational issue and human rights obligations apply to protect both present and future generations.

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[49] See, for example, CR 2024/35, Germany, para. 34 (Zimmerman).

[50] See, IPCC, Sixth Assessment Report, Working Group II Impacts, Adaptation and Vulnerability, *Fact Sheet — Health* at "Observed Impacts on Health" at https://www.ipcc.ch/report/ar6/wg2/downloads/outreach/IPCC_AR6_WGII_FactSheet_Health.pdf (last accessed, 9 Dec. 2024).

[51] Article 6, ICCPR/Article 3 UDHR, Human Rights Committee, General Comment No. 36 (Article 6), 3 September 2019, CCPR/C/GC/36, paras. 2, 3, 7 and 26.

[52] See, IPCC, Sixth Assessment Report, Working Group II Impacts, Adaptation and Vulnerability, Fact Sheet – Health at "Projected Risks" at https://www.ipcc.ch/report/ar6/wg2/downloads/outreach/IPCC_AR6_WGII_FactSheet_Health.pdf (last accessed, 9 Dec. 2024).

[53] Written Comments Samoa, para. 139 (citation therein).

[54] Written Comments Samoa, paras. 141-152.

Legal consequences for failing to comply with legal obligations

27. Third topic: legal consequences for failing to comply with legal obligations. Mr President and Members of the Court, Samoa urges the Court to opine that a State that causes significant environmental harm violates international law and is therefore liable to legal consequences under the accepted general rules of State responsibility.

28. On the issue of causation, Samoa submits that the science can now identify with precision the contributions of particular States to either the global mean temperature rise or to the total GHGs emitted over a certain date range[55].

29. Carbon dioxide is responsible for roughly 70 per cent of total GHGs and it has a well-established near-linear relationship with global temperature rise[56]. This direct causation chain extends to sea level rise, with IPCC data confirming that human-caused global warming drives melting land ice and thermal expansion of the seas[57].

30. Suggestions that causation is too complex or uncertain are misplaced[58]. Certain States have emphasized the complexity of determining causation, suffice to say in the context of these advisory proceedings. Samoa has every confidence in the ability of this Court and other international courts and tribunals. This honourable Court has shown itself capable to do so many times in the past[59].

31. Although regional variations exist, they do not negate the fundamental causal link. Question *(b)* of resolution 77/276 refers specifically to the causal link between acts and omissions of certain States and significant harm to the climate system itself. This causal link is unanimously recognized by the best available science, including the IPCC reports.

32. From a legal perspective on causation, Samoa urges this Court to adopt the material contribution approach reflected in Article 47 of the Articles on State Responsibility, and to view the conduct as a composite act as per Article 15. Courts have, in multiple sources of pollution cases, apportioned responsibility among multiple polluters[60]. Equitable principles and a recognition of

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[55] See, for example, Written Statement Vanuatu, Expert Report of Professor Corinne Le Quere on Attribution of global warming by country (Written Statement Vanuatu, Exhibit B).

[56] *Ibid*.

[57] See, United Nations, *Surging Seas in a warming world: The latest science on present-day impacts and future projections of sea-level rise*, 26 August 2024, p. 3.

[58] See, for example, CR 2024/35, Australia, para. 3 (Parlett).

[59] See also, CR 2024/37, Belize.

[60] See the cases cited in *Smith* v. *Fonterra Co-operative Group Ltd* [2024] NZSC 5.

complex causal chains are not new to international jurisprudence, as indicated by this Court's Judgment in 2018 in *Certain Activities Carried Out by Nicaragua in the Border Area*[61].

33. As all Participants have acknowledged, the general rules of State responsibility apply when climate change obligations are breached, as with any other rule of international law. Of the consequences which generally flow from breaches of international rules, Samoa emphasizes the practical importance to us of immediate cessation of wrongdoing. Reparation, whilst important, will not assure our survival. Even if States pay compensation for their wrongful conduct, we simply cannot continue with a situation where wrongs continue to be committed and GHGs continue to be emitted.

Closing remarks

34. In closing, Mr President and Members of the Court, it is often said that the Court is the final bastion of hope for those seeking justice when their rights have been ignored and trampled on. Samoa is here at the esteemed International Court of Justice full of hope that justice can be achieved. We are not asking for special treatment. Together with a number of other States here, we are simply asking the Court for a fair application of sound and well-established legal principles.

35. The honourable Court's advisory opinion is essential in reinforcing the rule of law and protecting the rights and futures of nations, such as Samoa, imperilled by climate change.

36. Mr President and esteemed Members of the Court, that concludes Samoa's submissions. I thank you for your attention.

The PRESIDENT: I thank the representatives of Samoa for their presentation. J'invite maintenant la délégation du Sénégal à prendre la parole et appelle S. Exc. Ramatoulaye Ba Faye à la barre.

M^me^ BA FAYE :

1. Monsieur le président, Madame la vice-présidente, honorables Membres de la Cour, Mesdames et Messieurs, il m'échoit l'honneur, avec la délégation qui m'accompagne, de vous présenter l'exposé oral du Sénégal sur la demande d'avis consultatif adressée par l'Assemblée

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

générale de l'ONU à la Cour internationale de Justice sur les *Obligations des États en matière de changement climatique.* L'argumentaire du Sénégal dans le cadre de cette procédure orale est structuré en deux parties et abordera, à cet effet, deux points essentiels : 1) la question de l'existence et de l'identification d'obligations juridiques des États en matière de changement climatique ; et 2) la question des conséquences juridiques attachées au manquement à ces obligations.

2. Monsieur le président, Madame la vice-présidente, honorables Membres de la Cour, à sa 64e séance plénière tenue le 29 mars 2023, et conformément à l'article 96 de la Charte des Nations Unies, l'Assemblée générale des Nations Unies a adopté la résolution 77/276 intitulée « Demande d'avis consultatif de la Cour internationale de Justice sur les obligations des États à l'égard des changements climatiques ».

3. Du point de vue de la République du Sénégal, invitée à exprimer son opinion relativement aux questions de droit posées à la Cour, plusieurs remarques préliminaires s'imposent, qui doivent aider à circonscrire le débat :

— Il est d'abord question de déterminer l'*existence même d'obligations, puis de les identifier* : celles qui s'imposeraient aux États dans le domaine du changement climatique.

— Il s'agit ensuite de déterminer les *conséquences des manquements à de telles obligations juridiques*, ce qui suppose bien entendu que l'existence de celles-ci ne fasse pas de doute.

— L'objet même de ces obligations internationales doit en outre être précisé : il est relatif, aux termes de la résolution qui saisit la Cour, au *système climatique* lui-même, mais également à « *d'autres composantes de l'environnement* ».

— Enfin, *les manquements éventuels commis par les États doivent être envisagés à plusieurs points de vue* : celui des États en général et des petits États insulaires en développement en particulier, celui des peuples et celui des générations actuelles et futures.

4. Ces précisions préalables étant faites, la République du Sénégal entend livrer son opinion sur les deux questions qui ont été posées à la Cour, en les examinant successivement.

I. SUR LA QUESTION DE L'EXISTENCE ET DE L'IDENTIFICATION D'OBLIGATIONS JURIDIQUES DES ÉTATS EN MATIÈRE DE CHANGEMENT CLIMATIQUE

5. La République du Sénégal est d'avis qu'il existe aujourd'hui dans le droit international plusieurs éléments qui sont de nature à fonder l'existence d'obligations pesant sur les États en matière de changement climatique.

6. De telles règles existent aussi bien dans le droit international général que dans des secteurs spécifiques de ce droit, notamment le droit international de l'environnement et le droit international des droits de l'homme.

A. Dans le domaine du droit international général

7. Un premier principe susceptible d'aider à l'identification d'obligations internationales en matière climatique est le principe de l'utilisation non dommageable du territoire de l'État. Il s'agit là d'une règle devenue coutumière, s'imposant donc en principe à l'ensemble des États. Elle a été notamment énoncée dans la sentence arbitrale relative à la *Fonderie du Trail*, de 1941, qui a opposé les États-Unis au Canada. Il ressort de cette jurisprudence essentielle que, de façon générale, l'exercice d'activités sur un territoire étatique ne saurait causer un préjudice à d'autres États.

8. Le principe de l'utilisation non dommageable du territoire national a été repris par la déclaration de Rio sur l'environnement et le développement durable, en son principe 2. Celui-ci précise que les États « ont le devoir de faire en sorte que les activités exercées dans les limites de leur juridiction ou sous leur contrôle ne causent pas de dommages à l'environnement dans d'autres États ou dans des zones ne relevant d'aucune juridiction nationale ».

9. Tous les États doivent donc veiller à ce que les activités exercées dans les limites de leur juridiction ou sous leur contrôle respectent l'environnement d'autres États, ne dégradent pas celui-ci en favorisant ou en accélérant le changement climatique.

B. Dans le domaine du droit international de l'environnement

10. Les États sont également soumis à des obligations précises, qui pourraient, sous réserve de leur contextualisation, s'appliquer au changement climatique.

11. Deux obligations juridiques pourraient être identifiées ici : une obligation de protection et une obligation de précaution, que l'on confond parfois, volontairement, avec le devoir de prévention.

12. Ces deux obligations figurent dans un certain nombre de *conventions internationales*, comme la convention-cadre des Nations Unies sur le changement climatique, précisément, en son article 3, paragraphe 3.

13. L'*obligation générale de protection* de l'environnement est également énoncée dans la déclaration de Rio, en son principe 4, l'obligation de protéger l'environnement étant reliée à l'impératif du développement durable.

14. Dans le domaine du droit de la mer, l'article 192 de la convention des Nations Unies de 1982 formule également une obligation générale des États de protéger le milieu marin en général, qu'il relève ou non de la juridiction d'un État.

15. Enfin, dans la convention de l'UNESCO relative à la protection du patrimoine mondial culturel et naturel, les États ont également l'obligation, aux termes de l'article 4, « d'assurer l'identification, la protection, la conservation … et la transmission aux générations futures du patrimoine culturel et naturel ».

16. Le devoir de protéger l'environnement a également été consacré par la *jurisprudence internationale*, et notamment celle de la Cour internationale de Justice elle-même, par, au moins, deux fois.

17. Ce qu'il convient de relever à cet égard est la clarté de la position affichée par la Cour, quant au statut de l'obligation générale de protection de l'environnement : il ne s'agit ni d'une simple exhortation ni d'un principe philosophique, mais bien d'une obligation proprement juridique.

18. Dans son avis du 8 juillet 1996 sur la question de la *Licéité de la menace ou de l'emploi d'armes nucléaires*, la Cour a déclaré que les États restent soumis à une « obligation … de veiller à ce que les activités exercées dans les limites de leur juridiction ou sous leur contrôle respectent l'environnement ». Surtout, la Cour fait remarquer au passage que cette « obligation générale » « fait maintenant partie du corps de règles du droit international de l'environnement »[62].

19. Puis, dans sa jurisprudence du 20 avril 2010, dans l'affaire relative à des *Usines de pâte à papier*, la Cour a précisé que l'obligation de préserver le milieu aquatique « implique la nécessité non seulement d'adopter les normes et mesures appropriées, mais encore d'exercer un certain degré

[62] *Licéité de la menace ou de l'emploi d'armes nucléaires, avis consultatif, C.I.J. Recueil 1996 (I)*, p. 242, par. 29.

de vigilance dans leur mise en œuvre »[63]. La Cour a rattaché l'obligation en cause à celle de diligence due.

20. Le *principe de précaution* est également susceptible d'entrer en jeu dans la définition d'obligations étatiques résultant du changement climatique. Il pourrait alors conduire les États à ne pas retarder l'adoption de mesures tendant à pallier des dommages graves ou irréversibles à l'environnement.

21. Dans un débat sur l'identification d'obligations étatiques en matière de changement climatique, la République du Sénégal considère que l'évocation du principe de précaution peut s'avérer féconde pour plusieurs raisons.

a) Tout d'abord, la promotion de ce principe en obligation juridique s'imposant aux États est acquise dans un certain nombre de *conventions internationales*. On peut citer, sur une longue liste, l'article 3, paragraphe 3, de la convention-cadre des Nations Unies sur les changements climatiques, les articles 9 et 10 de la convention sur la diversité biologique et son protocole de Cartagena sur la biosécurité, ainsi que diverses conventions relatives au milieu marin. À l'échelle régionale, l'on peut également évoquer l'article II de la convention africaine pour la conservation de la nature et des ressources naturelles, adoptée en 1968.

b) En deuxième lieu, la *jurisprudence internationale* elle-même, qui a évolué, doit être prise en compte.

22. Certes, dans certains prétoires internationaux, le principe de précaution n'est pas toujours apparu comme une obligation juridique, *mais il nous semble que l'importance et l'acuité de la menace climatique devraient pouvoir infléchir cette réticence.* Nous sommes, pensons-nous, devant un cas type de nécessité d'ajuster le droit à un contexte à la fois nouveau et périlleux.

23. Le Tribunal international du droit de la mer (TIDM) semble se faire l'écho de cette évolution des choses lorsqu'il relève, dans son avis du 21 mai 2024, rendu précisément au sujet du changement climatique, que « [l]e niveau de diligence requise est élevé, compte tenu des risques aigus de préjudice grave et irréversible »[64].

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[63] *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), arrêt, C.I.J. Recueil 2010 (I)*, p. 79, par. 197.

[64] TIDM, Demande d'avis consultatif soumise par la Commission des petits États insulaires sur le changement climatique et le droit international, avis consultatif, 21 mai 2024, par. 441, al. 3, *litt. c)*.

24. La menace est devenue plus pressante et, au même moment, les incertitudes scientifiques se sont réduites, l'appréhension scientifique des effets du changement climatique s'est affinée, est devenue plus précise. Ces éléments historiques et factuels devraient, du point de vue de la République du Sénégal, conduire à une plus grande prise en compte du principe de précaution dans la définition des obligations des États en matière climatique.

25. La Cour européenne des droits de l'homme a déclaré, dans son arrêt *Tatar c. Roumanie* du 27 janvier 2009, que le principe de précaution a évolué d'un « concept philosophique vers une norme juridique ».

26. La Cour internationale de Justice elle-même a semblé plus réceptive à la mutation qualitative du principe de précaution, dans la jurisprudence précitée relative à des *Usines de pâte à papier*, où elle affirme que l'approche de précaution peut se révéler pertinente pour interpréter et appliquer le statut du fleuve Uruguay[65].

27. Du point de vue de la République du Sénégal toujours, la détermination des obligations des États en matière climatique peut offrir l'opportunité d'appréhender le principe de précaution dans une perspective pragmatique et immédiate, à travers l'obligation qui serait faite aux États de ne pas retarder l'adoption de mesures de prévention de dommages climatiques ou environnementaux graves et irréversibles, dans des contextes d'incertitude scientifique relative.

28. Cette projection futuriste est d'autant plus souhaitable et appropriée qu'il est question, selon les termes mêmes de la résolution qui saisit la Cour, de dommages susceptibles d'être infligés aux générations futures.

29. Le traitement de périls existentiels comme celui du changement climatique commande une approche transgénérationnelle et implique des réponses juridiques pionnières, rompant avec un certain conservatisme.

30. Au demeurant, le Tribunal international du droit de la mer, dans son avis précité du 21 mai 2024, a mis en évidence trois obligations des États en matière de changement climatique : une obligation de prévention, une obligation de réduction et une obligation de maîtrise de la pollution

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[65] *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), arrêt, C.I.J. Recueil 2010 (I)*, p. 71, par. 164.

résultant des émissions de gaz à effet de serre[66]. Déjà en 2011, dans un avis consultatif du 1er février relatif aux obligations des États qui patronnent des activités dans la Zone, la même juridiction avait évoqué l'obligation de diligence requise des États, impliquant l'anticipation sur des risques potentiels dans des situations d'incertitude scientifique[67].

C. Dans le domaine du droit international des droits de l'homme

31. Plusieurs droits reconnus aux personnes par des conventions sont susceptibles d'être concernés par le péril climatique. On peut citer le droit à la vie, le droit à l'alimentation, le droit à la santé, le droit à un habitat convenable.

32. En raison de son importance cruciale et de l'attraction qu'il exerce sur d'autres droits conférés aux personnes, le *droit à la vie* mérite d'être rapidement évoqué. Il s'agit d'un droit particulier, doté d'une forte résonance en général, et dans le domaine de la menace climatique en particulier. Dans un rapport déposé le 15 janvier 2009 devant l'Assemblée générale de l'ONU, rapport précisément consacré aux menaces induites par le changement climatique sur les droits de l'homme, le haut-commissaire aux droits de l'homme des Nations Unies a mis en évidence la centralité du droit à la vie devant le risque climatique.

33. Appréhendé dans une perspective transgénérationnelle, le droit à la vie acquiert une dimension collective et non plus seulement individuelle ; il relève alors de contraintes sociales et systémiques, et s'apparente dès lors à un droit d'accès aux ressources vitales : eau, air, terre. La biodiversité, l'équilibre climatique sont au cœur de ce droit à la vie.

34. Une certaine *jurisprudence internationale* tendrait à accréditer ce point de vue.

35. La Cour interaméricaine des droits de l'homme, dans son avis consultatif du 15 novembre 2017 rendu à la suite d'une requête de la Colombie, a retenu que le changement climatique peut affecter le droit à la vie, à l'intégrité physique, ainsi que d'autres droits de l'homme, comme le droit à la santé, à l'eau ou au logement.

36. Dans une décision du 9 avril 2024, la Cour européenne des droits de l'homme a condamné la Suisse pour son inertie face au changement climatique. Cet arrêt est intéressant en ce qu'il laisse

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[66] TIDM, Demande d'avis consultatif soumise par la Commission des petits États insulaires sur le changement climatique et le droit international, avis consultatif, 21 mai 2024, par. 441.

[67] *Ibid.*, par. 131.

entrevoir que les États ont des obligations positives en matière de changement climatique et que des omissions peuvent, dans un tel contexte, être constitutives de manquement[68]. Déjà, dès 1994, soit près de trente ans plus tôt, la même Cour avait considéré que « des atteintes graves à l'environnement peuvent affecter le bien-être d'une personne et la priver de la jouissance de son domicile de manière à nuire à sa vie privée et familiale »[69].

37. La décision du 27 octobre 2001 rendue par la Commission africaine des droits de l'homme et des peuples dans l'affaire *SERAC et CESR c. Nigéria*, à propos de la dégradation du cadre de vie du peuple Ogoni, est également intéressante, dans la mesure où elle met en évidence l'imbrication des droits de l'homme avec les violations en cascade qui se produisent dès lors que le droit à un environnement sain a été violé[70]. La Cour de justice de la Communauté économique des États de l'Afrique de l'Ouest (la « CEDEAO ») a pour sa part, dans un arrêt du 14 décembre 2012, condamné un État pour « omission de prévenir la dégradation de l'environnement »[71].

38. On notera que ces deux décisions ont été rendues au sujet du droit des peuples à bénéficier d'un environnement sain, stipulé par la Charte africaine des droits de l'homme et des peuples[72], et qu'elles sont certainement pertinentes pour répondre à la question posée par l'Assemblée générale, laquelle porte aussi sur les dommages climatiques éventuels subis par les peuples.

39. L'identification de quelques obligations étatiques en matière climatique étant esquissée, il s'agit à présent, et en suivant l'ordre des questions posées à la Cour, d'examiner les conséquences d'une méconnaissance de telles obligations.

II. SUR LA QUESTION DES CONSÉQUENCES JURIDIQUES ATTACHÉES AU MANQUEMENT À CES OBLIGATIONS

40. Le traitement de cette question implique que l'on s'interroge sur les termes mêmes par lesquels l'Assemblée générale a formulé ses questions à la Cour. Il est notamment question, au sujet

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[68] Arrêt *Verein KlimaSeniorrinnen Schweiz et autres c. Suisse*.

[69] Arrêt *Lopez Ostra c. Espagne*, 9 décembre 1994.

[70] Commission africaine des droits de l'homme et des peuples, *SERAC et CESR c. Nigéria*, décision du 27 octobre 2001, par. 58 et suiv.

[71] CEDEAO, *Serap c. République fédérale du Nigéria*, arrêt du 14 décembre 2012, par. 111-112.

[72] Charte africaine des droits de l'homme et des peuples, art. 24.

des éléments constitutifs mêmes des manquements, de « dommages significatifs » et d'« effets néfastes ». Il est donc indispensable de tenter de définir ces expressions.

41. Il est possible, au sujet de la notion de *dommages significatifs*, de s'inspirer des travaux de la Commission du droit international (CDI). En effet, la CDI a expliqué et graduellement consolidé sa définition de la notion de « dommages significatifs » dans trois projets de principes et d'articles[73], et dont le dernier, qui date de 2022, synthétise le sens de l'expression en ces termes : le dommage « significatif » est un dommage « plus que "détectable", mais sans nécessairement atteindre le niveau "grave" ou "substantiel" ».

42. S'agissant de la seconde expression, celle d'*effets néfastes*, la convention de Vienne pour la protection de la couche d'ozone de 1985 les définit comme

> « les modifications apportées à l'environnement physique ou aux biotes, y compris les changements climatiques, qui exercent des effets nocifs significatifs sur la santé humaine ou sur la composition, la résistance et la productivité des écosystèmes naturels ou aménagés, ou sur les matériaux utiles à l'humanité »[74].

43. Cette approche a été littéralement reprise par l'article premier de la CCNUCC.

44. La résolution 53/6 adoptée par le Conseil des droits de l'homme le 12 juillet 2023, et intitulée « Droits de l'homme et changements climatiques », est également susceptible de fournir des indications sur le concept d'« effets néfastes ». Le Conseil des droits de l'homme (CDH), se fondant sur un rapport du Groupe d'experts intergouvernemental sur l'évolution du climat, y souligne que les effets néfastes des changements climatiques ont une série d'incidences directes et indirectes, d'autant plus fortes que le réchauffement s'accentue, sur l'exercice effectif des droits humains.

45. Une autre résolution du Conseil des droits de l'homme, adoptée le 6 octobre 2022 et relative aux « droits de l'homme à l'eau potable et à l'assainissement » va dans le même sens[75].

46. Les éléments caractéristiques du manquement ayant été soulignés, il importe d'examiner à présent les diverses victimes potentielles d'un tel manquement, visées par la demande d'avis ainsi

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[73] Projet d'articles sur la prévention des dommages transfrontières résultant d'activités dangereuses ; projets de principes sur la répartition des pertes en cas de dommage transfrontière découlant d'activités dangereuses et commentaires y relatifs ; projet de principes sur la protection de l'environnement en rapport avec les conflits armés et commentaires y relatifs.

[74] Convention de Vienne pour la protection de la couche d'ozone, *Recueil des traités*, vol. 1513, p. 340, art. premier, par. 2.

[75] Nations Unies, résolution 51/19 du Conseil des droits de l'homme sur les droits de l'homme à l'eau potable et à l'assainissement, 6 octobre 2002, A/HRC/RES/51/19, par. 2.

que les conséquences éventuellement judiciaires de cette violation des obligations étatiques en matière climatique.

A. Les victimes, notamment les petits États insulaires en développement, les peuples et les individus des générations présentes et futures

47. *S'agissant des petits États insulaires en développement*, il y a lieu de rappeler que selon la Banque mondiale, sur les cent quatre-vingt-treize (193) États qui sont Membres de l'Organisation des Nations Unies, cent cinquante-deux (152) sont inclus dans la catégorie des pays en développement (PED). Parmi ces cent cinquante-deux (152) États, trente-huit (38) relèvent de la sous-catégorie des petits États insulaires en développement (PEID).

48. Si aucune mesure pour réduire les émissions de gaz à effet de serre n'est adoptée à court terme, l'élévation du niveau des océans pourrait avoir comme conséquence la réduction, voire la disparition du territoire terrestre de plusieurs de ces États. Les océans, qui absorbent 90 % de l'excédent de chaleur causée par les émissions de gaz à effet de serre, sont l'objet, de ce fait, de changements physiques et climatiques qui portent directement atteinte au processus de développement des pays insulaires[76].

49. *S'agissant des peuples*, la reconnaissance d'un droit des peuples à un environnement sain, dans le contexte de la menace climatique, peut s'avérer utile. La sanction d'un tel droit existe de façon certaine dans les systèmes interaméricain et africain de protection des droits de l'homme, ainsi qu'on l'a vu à travers leurs jurisprudences.

50. *S'agissant enfin des générations actuelles et futures*, la Cour devrait reconnaître que la stabilité du système climatique et le maintien de la biodiversité sont essentiels pour la survie même de l'humanité et celle des générations futures.

51. De façon immédiate, les changements climatiques sont non seulement à l'origine de catastrophes naturelles, mais ils entraînent aussi des déplacements d'individus et de populations,

[76] Cf. TIDM, Demande d'avis consultatif soumise par la Commission des petits États insulaires sur le changement climatique et le droit international, exposé écrit de la Commission des petits États insulaires sur le changement climatique et le droit international.

rendant pertinente la notion de « réfugié climatique », ainsi qu'il ressort de deux rapports des Nations Unies, commis en 2022 et en 2023[77].

52. Il convient de souligner sur ce point l'existence d'un traité pionnier, conclu sous les auspices de l'Union africaine eu égard à l'acuité de la question sur ce continent. La convention de Kampala du 22 octobre 2009 sur la protection et l'assistance aux personnes déplacées en Afrique est, à l'échelle du monde entier, le premier traité régional juridiquement contraignant sur la protection et l'assistance aux personnes déplacées à l'intérieur de leur propre pays, pour des raisons environnementales et climatiques.

B. Les implications proprement judiciaires : principe de réparation et intérêt à agir

53. *S'agissant du principe de réparation*, il est reconnu par plusieurs textes internationaux comme : le principe 22 de la déclaration de Stockholm de 1972, le principe 13 de la déclaration de Rio, l'article 235 de la convention des Nations Unies sur le droit de la mer.

54. Il est vrai que la question des modalités de la réparation des dommages écologiques en général, climatiques en particulier, reste ouverte, les États ne s'entendant pas, à l'heure actuelle, sur la définition d'un cadre juridique de leur responsabilité. Un tel cadre n'est esquissé ni dans la CCNUCC, ni dans le protocole de Kyoto ni dans l'accord de Paris sur le climat.

55. Aux yeux de la République du Sénégal, qui considère que la présente procédure consultative constitue une opportunité inédite pour formuler les linéaments de la responsabilité juridique des États en matière climatique et de la réparation qui s'ensuit nécessairement, *deux idées doivent guider la Cour* dans son appréciation.

56. *La première est le principe des responsabilités communes mais différenciées*, qui atteste que si le changement climatique affecte tous les États, ceux-ci n'ont pas tous la même responsabilité dans le réchauffement de la planète. Dans l'établissement des responsabilités et des réparations subséquentes, l'approche devra nécessairement être discriminatoire, au sens propre du terme, c'est-à-dire modulée en fonction des parts respectives que les États assument dans le réchauffement de la Terre. Une telle exigence ressort de l'avis précité du TIDM, rendu le 21 mai 2024, où il est

[77] Rapport spécial sur les droits humains des migrants, A/77/189, 19 juillet 2022, par. 14, et rapport spécial sur les droits humains des personnes déplacées, A/HCR/53/35, 4 mai 2023, par. 82.

clairement énoncé l'« obligation particulière d'aider les pays en voie de développement, dans leurs efforts pour lutter contre les effets du changement climatique »[78].

57. *La seconde idée est la particularité de la situation du continent africain face au changement climatique.* Plusieurs études ont mis en évidence le fait que ce continent reste particulièrement vulnérable à ce changement, alors même qu'il ne figure pas parmi les plus grands responsables de ce dérèglement. La résolution 77/276 de l'Assemblée générale qui saisit la Cour a bien mentionné que l'Afrique était dans une situation de vulnérabilité évidente, du fait notamment de la désertification induite par la mutation climatique. La CCNUCC reconnaît par ailleurs, dans son préambule et dans son article 3, paragraphe 1, que « la majeure partie des gaz à effet de serre émis dans le monde par le passé et à l'heure actuelle ont leur origine dans les pays développés », et que ces derniers se doivent « d'être à l'avant-garde de la lutte contre les changements climatiques et leurs effets néfastes ».

58. *S'agissant de l'intérêt à agir* contre les effets du dérèglement climatique, la République du Sénégal estime que l'action en question peut être multiforme, et ne s'épuise pas nécessairement dans une action en justice. Il appartient aux États, et dans une certaine mesure à la Cour, de déterminer ou de suggérer les voies et moyens de telles actions.

59. Il est toutefois impératif que la capacité à agir soit élargie dans toute la mesure du possible. Le contentieux climatique, en particulier, ne peut pas être traité selon les canons d'un procès classique, avec une vision étriquée et rigoureusement bilatérale des enjeux. Au contraire, nous sommes ici, de façon objective et certaine, dans des enjeux planétaires, globaux et transversaux.

60. En conséquence, tous les États devraient pouvoir jouir de la capacité à agir contre les effets du changement climatique, l'intérêt qu'ils ont pour ce faire n'étant pas à démontrer.

61. *Mutatis mutandis*, la Cour devrait pouvoir s'inspirer à ce stade des travaux de la Commission du droit international sur la responsabilité des États pour fait internationalement illicite, dont le chapitre III prescrit des obligations *erga omnes*, en cas de violations de normes impératives du droit international ainsi que le devoir de tous les États de coopérer pour faire échec à de telles violations.

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[78] TIDM, Demande d'avis consultatif soumise par la Commission des petits États insulaires sur le changement climatique et le droit international, avis consultatif, 21 mai 2024, par. 441.

62. Un dispositif se rattachant à la même philosophie solidariste pourrait également prévaloir dans le domaine du changement climatique.

En conclusion, Monsieur le président, Madame la vice-présidente, honorables Membres de la Cour, la République du Sénégal est d'avis que la Cour devrait :

— *premièrement :* affirmer sa compétence à traiter de la demande d'avis qui lui est adressée ;

— *deuxièmement :* définir les contours des obligations des États en matière climatique, dont notamment celle de ne pas nuire aux autres États ainsi que l'obligation de précaution et d'anticipation ;

— *troisièmement :* poser le principe d'une responsabilité pour des actes dommageables au système climatique et à d'autres composantes de l'environnement, cette responsabilité pouvant résulter d'actions ou d'omissions ;

— *quatrièmement :* poser le principe d'une obligation de réparer de tels dommages, compte dûment tenu des responsabilités effectives des États et de l'inégalité objective dans laquelle ceux-ci se trouvent devant la menace climatique, les plus vulnérables devant recevoir les compensations qui leur sont dues ;

— *cinquièmement :* définir largement l'intérêt à agir dans de telles circonstances, lequel devrait être reconnu à chaque membre de la communauté internationale, également débiteur de l'obligation de coopérer pour faire cesser les manquements climatiques.

— *Enfin*, le Sénégal voudrait partager les mêmes préoccupations formulées par l'Union africaine et s'inscrire dans la droite ligne de ses positions sur les conséquences du changement climatique.

63. Telles sont, Monsieur le président, Madame la vice-présidente, Mesdames et Messieurs les Membres de la Cour, les observations que la République du Sénégal entend formuler dans la présente procédure de demande d'avis consultatif.

64. Je vous remercie.

Le PRÉSIDENT : Je remercie la représentante du Sénégal pour sa présentation. Avant d'entendre la délégation suivante, la Cour observera une pause de 15 minutes. L'audience est suspendue.

L'audience est suspendue de 11 h 30 à 11 h 45.

The PRESIDENT: Please be seated. The sitting is resumed. I now invite the next participating delegation, the Seychelles, to address the Court and I give the floor to Mr Flavien Joubert.

Mr JOUBERT:

OPENING REMARKS

I. The importance of the advisory opinion for Seychelles

1. Mr President, Madam Vice-President, distinguished Members of the Court, it is an honour to appear before you today. I bring special greetings from the people of Seychelles or, as we say in Creole, *en bonzour spesyal zot tou*. Let me start by emphasizing that these proceedings are both timely and of critical importance for the people of Seychelles and in fact for all humanity, whether acknowledged or not.

2. Mr President, Seychelles is a small island developing State in the middle of the Indian Ocean. We are 115 islands of which 42 are granitic and the remainder coralline. Our population is only 100,000, and our territory is 99.99 per cent ocean and 0.01 per cent land.

3. Seychelles was first settled by French colonists and their African slaves in the eighteenth century. We are, today, a proud Creole people, with big aspirations, gathered from the five corners of this Earth. We are considered one of the most successful examples of racial integration living in one of the most exotic spots in the world, with majestic mountains, green forests, pristine beaches and a clear blue sea. But we face special vulnerabilities to climate change. Our coralline islands are low-lying and located on average between 2 to 4 metres above sea level. Our main granitic islands, all our beaches and coastal areas are within the same elevation, and some are even lower. Our coral reefs are susceptible to and impacted by global climate warming. Rising sea level, increasing temperatures and extreme weather events harm our people, our land, our economy and our future generations. Climate change also endangers our right to self-determination and our ability to shape our own destiny.

4. The ocean, our lifeline, is becoming heated, acidified and deoxygenated. The ecosystems that provide our food, economic livelihood and cultural heritage are suffering. Apart from our people, this ecosystem also supports all forms of life, including fauna and flora of global importance.

5. This is particularly worrying because Seychelles is home to two UNESCO World Heritage Sites, that is the Vallée de Mai nature reserve and the Aldabra atoll, and is also an ecologically and biologically significant marine area. In 2016, the country experienced a mass coral-bleaching event resulting from an exceptionally intense El Niño phenomenon, which caused water temperatures to rise and exceed seasonal averages by 1 to 2°C for months. This bleaching event reoccurred in 2024. We ask the Court to consider that the loss of ecosystems within the multiple island States scattered throughout our oceans will irreversibly and negatively impact the entire world ecosystem.

6. Seychelles is significantly impacted by the consequences of the massive anthropogenic emission of greenhouse gases, but Seychelles' contribution is less than 0.003 per cent of the world's cumulative emissions[79]. This is unfair. This is unjust.

II. The expected outcome

7. Seychelles expects that this Court's advisory opinion will ensure that States are reminded of their obligations and are held accountable for their actions and their inactions.

8. We pray the Court to duly confirm that:

— First, as already clarified by the International Tribunal for the Law of the Sea in relation to UNCLOS[80], that States have a legal obligation to take urgent action to limit global warming to 1.5°C above pre-industrial levels. This is essential for the very survival of small island States like Seychelles.

— Second, that every State has an individual obligation to take all measures objectively necessary to prevent further significant harm to the climate system and other parts of the environment by, at the very least, implementing their nationally determined contributions.

— Third, that these obligations are *erga omnes*.

— Fourth, that States' responsibility to protect human rights from harm due to climate change is not territorially limited in scope.

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[79] Seychelles' Third National Communication, December 2023, available at: https://unfccc.int/sites/default/files/resource/TNC%20FEB%202024%20-FINAL.pdf.

[80] ITLOS, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law,* p. 87, para. 243, and p. 148, para. 441.

— Fifth, that breaches of the relevant treaty and customary obligations by States causing significant harm to the climate system, and other parts of the environment, make them responsible.

— Sixth, that those States held responsible are obliged to make full reparation.

9. Mr President, Members of the Court, to develop these points, the Court will hear three submissions, the first of which will be delivered by Professor Thouvenin, whom I would respectfully ask you to call to the podium. Thank you.

The PRESIDENT: I thank Mr Flavien Joubert. Je passe maintenant la parole au professeur Jean-Marc Thouvenin. Professeur, vous avez la parole.

M. THOUVENIN :

LES OBLIGATIONS

1. Merci beaucoup, Monsieur le président. Monsieur le président, Mesdames et Messieurs les juges, c'est un très grand honneur de représenter les Seychelles dans cette procédure à laquelle ce pays vulnérable accorde la plus grande importance et dont il attend beaucoup.

I. Droit applicable

2. Par contraste, force est de constater que ce n'est pas le cas de la plupart des États principalement responsables des émissions massives de gaz à effet de serre au cours des âges. Ceux-là craignent manifestement d'être pointés du doigt et vous disent en substance que l'accord de Paris et la convention-cadre de 1992 les protègent en formant un bouclier de *lex specialis* ne contenant que des obligations procédurales et, pour les plus audacieux, des obligations de *due diligence*, mais leur laissant une large, voire totale, marge de discrétion.

3. Ceci appelle quatre observations.

4. Premièrement, il ne vous est pas demandé d'identifier nommément les États responsables, mais de dire que tant le droit que les faits, éclairés par la science, permettent à coup sûr d'identifier les États dont la responsabilité est engagée à l'égard de celles et ceux qui sont frappés par le désastre

climatique. Les dommages climatiques ne sont pas dus à « the international community at large »[81]. Les petits États insulaires et leurs populations, pour ne prendre que ceux-là, n'y sont pour rien.

5. Deuxièmement, même si vous admettiez — *quod non* — la thèse du bouclier de *lex specialis*, il demeurerait crucial que vous donniez votre avis sur la *lex generalis* puisqu'il est possible de se retirer des accords climatiques, laissant donc intacte la prétendue *lex generalis*.

6. Troisièmement, pour les tenants de la *lex specialis*[82], ladite *lex* contient essentiellement des obligations procédurales. Or, de telles obligations n'ont aucun effet sur l'applicabilité des obligations de fond issues d'autres sources, car « [l]es deux catégories de règles se rapportent en effet à des questions différentes »[83].

7. Enfin, et en tout état de cause, la thèse de la *lex specialis*, déjà rejetée par le TIDM[84], ne tient pas, comme ceci a déjà été démontré à juste titre par de très nombreux autres exposants.

II. Principe de prévention

8. Monsieur le président, Mesdames et Messieurs les juges, votre avis devra nécessairement évoquer le principe de prévention[85].

9. Depuis quand fait-il partie du droit international coutumier, s'est-on demandé ?[86] 1941, date de la sentence *Fonderie du Trail* est à considérer, ensemble avec le fait que c'est dans les années 1960, au plus tard, que les États ont pleinement pris conscience que les émissions massives de CO_2 génèrent un réchauffement climatique, phénomène d'ailleurs anticipé dès 1856 par la

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[81] CR 2024/35 (Allemagne, Zimmermann), p. 150, par. 19.

[82] Voir notamment CR 2024/38 (Chine, Ma), p. 29-30, par. 8-9, et CR 2024/39 (Russie, Musikhin), p. 64, par. 83. *Contra*, voir CR 2024/36 (Barbade, Volterra), p. 82, par. 5 ; CR 2024/34 (Bangladesh, Akhavan), p. 68-69, par. 8-11 ; CR 2024/37 (Belize, Wordsworth), p. 10-11, par. 5 ; CR 2024/37 (Bolivie, Calzadilla Sarmiento), p. 22, par. 14 ; CR 2024/37 (Burkina Faso, Hébié), p. 43-44, par. 2-4 ; CR 2024/38 (Colombie, Olarte Bácares), p. 44, par. 12 ; CR 2024/38 (Commonwealth de Dominique, Sobers-Joseph), p. 57, par. 22 ; CR 2024/38 (Égypte, Aboulmagd), p. 64, par. 31 ; CR 2024/39 (Fidji, Leung), p. 70, par. 10 ; CR 2024/40 (Sierra Leone, Jalloh), p. 20-21, par. 6 ; CR 2024/41 (Îles Salomon, Narulla), p. 37-38, par. 2(i) et 5-7.

[83] *Immunités juridictionnelles de l'État (Allemagne c. Italie ; Grèce (intervenant)), arrêt, C.I.J. Recueil 2012 (I)*, p. 140, par. 93.

[84] TIDM, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, p. 81, par. 224.

[85] Exposé écrit des Seychelles, p. 35, par. 100.

[86] CR 2024/41 (France, Colas), p. 14-15, par. 26.

scientifique Eunice Newton Foote[87]. En tout état de cause, en 1972 le principe 21 de la conférence de Stockholm a rappelé sans équivoque l'existence en droit positif du principe de prévention.

10. Depuis lors, Mesdames et Messieurs de la Cour, vous l'avez constaté encore aujourd'hui et tout au long de ces audiences, des dommages substantiels ont été causés du fait des émissions anthropiques massives de gaz à effet de serre déréglant le climat. Certains États en sont nécessairement responsables.

11. Par ailleurs, la science la mieux établie confirme depuis 2015 qu'une augmentation générale de la température au-delà de 1,5 °C prendrait un tour encore plus catastrophique[88]. Dès lors, tout comportement allant à l'encontre de l'objectif de l'accord de Paris causerait nécessairement, on le sait, un préjudice substantiel au climat, à l'environnement et aux États vulnérables, et constituerait un manquement conscient à l'obligation de prévention.

III. Contributions déterminées au niveau national

12. Quant à l'accord de Paris, je rappelle que son article 3 dispose que,

> « [à] titre de contributions déterminées au niveau national [CDN] à la riposte mondiale aux changements climatiques, il incombe à toutes les Parties *d'engager* et de communiquer des efforts ambitieux au sens des articles 4, 7, 9, 10, 11 et 13 en vue de réaliser l'objet d[e l']accord » (les italiques sont de nous).

13. Il en découle non seulement une obligation de « communiquer », mais plus encore « d'engager » des efforts ambitieux en vue, comme le précise l'article 4, d'atteindre l'objectif fixé par l'article 2, c'est-à-dire limiter l'augmentation de la température à 1,5 °C. Il s'agit d'une obligation, bien entendu, de comportement dont le contenu s'évalue à l'aune du standard de *due diligence*.

14. Je n'ai pas le temps de détailler le contenu de ce standard, mais seulement de souligner que les Seychelles soutiennent que la « CDN » d'un État reflète ce que cet État lui-même considère comme étant les mesures raisonnables minimales qu'il doit nécessairement, et peut, mettre en œuvre pour atteindre l'objectif de l'accord de Paris. Dès lors, s'il ne remplit pas sa CDN, il ne peut respecter son obligation de *due diligence* telle qu'il l'a lui-même cadrée et définie.

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[87] Exposé écrit de Vanuatu, p. 38, par. 73.

[88] Voir notamment IPCC, "Global warming of 1.5°C An IPCC Special Report on the impacts of global warming of 1.5 °C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty", 2019, 630 p.

15. Bien entendu, mettre en œuvre une CDN n'est en aucun cas suffisant. Les CDN sont généralement trop peu ambitieuses. C'est pourquoi elles ne sont qu'un standard de non-conformité, pas de conformité, du comportement des États à leur obligation de *due diligence*.

IV. Extraterritorialité

16. Mesdames et Messieurs de la Cour, les Seychelles vous demandent également de vous prononcer sur l'extraterritorialité de principe des obligations en matière de droits humains au regard des dommages climatiques.

17. La Cour interaméricaine des droits de l'homme a reconnu que le changement climatique est une forme de dommage environnemental transfrontalier[89]. Ce dommage menace directement les droits des personnes humaines et des populations vulnérables, notamment le droit à la vie, à l'intégrité personnelle, à l'eau, à l'alimentation, et, bien entendu, le droit de ne pas être déplacé de force[90].

18. Cette même Cour a également estimé en 2017 que,

> « when transboundary damage occurs that [a]ffects treaty-based rights, it is understood that the persons whose rights have been violated are under the jurisdiction of the State of origin, if there is a causal link between the act that originated in its territory and the infringement of the human rights of persons outside its territory »[91].

19. Le Comité des droits de l'enfant a considéré cette jurisprudence pleinement applicable aux dommages transfrontaliers issus du réchauffement climatique découlant des émissions massives de gaz à effet de serre[92].

20. Par exception, la Cour européenne des droits de l'homme est d'un autre avis[93]. Mais sa jurisprudence ne vaut qu'au regard de la convention européenne des droits de l'homme[94].

21. Sur ces bases, les Seychelles suggèrent à la Cour de préciser que l'obligation des États de respecter et faire respecter les droits de la personne humaine et de leurs groupes s'étend en principe

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[89] Cour interaméricaine des droits de l'homme, avis consultatif OC-23/17, The Environment and Human Rights, 15 novembre 2017, par. 96.

[90] *Ibid*., par. 66.

[91] *Ibid*., par. 101-102.

[92] Comité des droits de l'enfant, décision adoptée par le Comité en vertu du protocole facultatif à la convention relative aux droits de l'enfant sur une procédure de communication, concernant la communication n° 104/2019, 11 novembre 2021, doc. CRC/C/88/D/104/2019, p. 11, par. 10.7 (les italiques sont de nous).

[93] Cour européenne des droits de l'homme, *Duarte Agostinho et autres c. Portugal et 32 autres*, par. 212.

[94] *Contra*, voir CR 2024/35 (Allemagne, Zimmermann), p. 150-151, par. 20 et 23.

aux effets extraterritoriaux dommageables des gaz à effet de serre émis sous leur juridiction ou leur contrôle et qui contribuent au dérèglement climatique.

22. Monsieur le président, Mesdames et Messieurs de la Cour, ceci conclut ma très brève présentation de ce jour, et je vous serais reconnaissant de bien vouloir appeler à la barre mon collègue, M. Villegas.

Le PRÉSIDENT : Je remercie le Professeur Jean-Marc Thouvenin. I now give the floor to Mr Andrés Villegas Jaramillo. You have the floor, Sir.

Mr VILLEGAS JARAMILLO:

LEGAL CONSEQUENCES RESULTING FROM THE FAILURE TO ADDRESS CLIMATE CHANGE

I. Introduction

1. Mr President, distinguished Members of the Court, it is a great honour to appear before you on behalf of the Republic of Seychelles.

2. My task now is to address question *(b)* on the legal consequences.

3. Most States appearing before you have presented their views in favour of the applicability of the rules on State responsibility[95] as outlined in the ILC Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)[96].

4. A few others disagree on the basis of two main objections[97]. One is related to the climate change treaties being an all-encompassing specialized or self-contained régime which, consistent with Article 55 of ARSIWA, excludes the applicability of the general rules on State responsibility[98].

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[95] See e.g. Written Statement of COSIS, Sec. IV; Albania, para. 130 *(d)*; Bangladesh, para. 146; Burkina Faso, paras. 346-401; DRC, paras. 255-271; Written Statement, Mauritius, para. 210; Saint Lucia, para. 86; Saint Vincent, para. 128; Switzerland, paras. 72-73; Tuvalu, Sec. IV; Vanuatu, para. 558; OACPS, para. 162; MSG, para. 292; El Salvador, para. 50; Kenya, Ch. 6 (I); Singapore, para. 1.9; CR 2024/35, Vanuatu and MSG, p. 100, para. 3 (Loughman) and pp. 110-111, paras. 2-3 (Wewerinke-Singh); CR 2024/35, South Africa, p. 121, para. 7 (Brammer); CR 2024/37, p. 67, para. 10 (Guevarra); CR 2024/37, p. 50, para. 22 (Hébié); CR 2024/38, Chile, p. 25, para. 5 (Chiappini Koscina); CR 2024/38, Commonwealth of Dominica, paras. 27 and 35, pp. 58 and 60 (Sobers-Joseph); CR 2024/40, Ecuador, p. 21, para. 22 (Vásquez-Bernúdez); CR 2024/40, Fiji, p. 73, para. 28 (Leung).

[96] Articles on State Responsibility for Internationally Wrongful Acts, Art. 55, commentary, p. 140, para. 2.

[97] See e.g. Written Statement of: France, paras. 177-211; Kuwait, para. 3.4; China, Sec. VII; Iran, para. 162; Japan, paras. 40-41; Saudi Arabia, paras. 6.1-6.8; CR 2024/38, China, p. 37, para. 50 (Ma).

[98] Art. 8, Written Statement: France, Korea, Japan, Iran, Australia, OPEC, Ecuador, Egypt, Mauritius, RDC, Vanuatu, Netherlands. See also the Oral Statements of Saudi Arabia, CR 2024/36, p. 34, para. 23 (Bajbaa); Kuwait, CR 2024/43, pp. 59-60, paras. 26-27 (Sarooshi).

The other question is applicability due to alleged difficulties in the determination of attribution and causation[99]. In this presentation, I will address these two objections.

II. Article 55 of ARSIWA is not applicable; therefore, the rules on State responsibility apply

5. Mr President, as we all know, Article 55 of ARSIWA provides that the rules on State responsibility do not apply "where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law". So, the question is whether the climate change régime treaties contain such special rules. The answer is they do not.

6. A good-faith interpretation in accordance with the ordinary meaning to be given to the terms of the Paris Agreement, and in particular Article 8, confirms this view[100].

7. The key points are as follows:

— This article focuses on *co-operation*, *facilitation*, *enhancing understanding*, *action* and *support* in relation to loss and damage.

— On the context[101], it is enlightened by the Conference of State Parties who, in adopting the Paris Agreement, explicitly agreed that Article 8 does not involve or provide a basis for any liability or compensation[102].

— As it comes to the object and purpose, the Agreement "aims to strengthen the global response to the threat of climate change"[103].

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[99] Written Statement of Denmark, Finland, Iceland, Norway and Sweden, p. 36, para. 107; Written Statement of China, p. 54, para. 136; Written Statement United States of America, Sec. 2.A (ii); Written Statement of New Zealand, p. 51, para. 140; Written Comments of Saudi Arabia, p. 50, para. 4.57. See also CR 2024/38, South Korea, p. 68, para. 13 (Lee); Denmark, Finland, Iceland, Norway and Sweden, CR 2024/39, pp. 54-55, paras. 26-36 (Pasternak Jørgensen).

[100] Vienna Convention on the Law of Treaties (VCLT), Art. 31. *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017,* p. 29, para. 63, and *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I),* p. 116, para. 33.

[101] VCLT, Art. 31(2).

[102] See e.g.: Report of the Conference of the Parties on its twenty-first session, FCCC/CP/2016/10/Add.1, 29 Jan. 2016, Decision 1/CP.21 para. 51.

[103] Paris Agreement, Art. 2, para. 1.

— All this is further supported by the position of various parties who upon ratification, lodged declarations manifestly stating that they were not renouncing to any rights under international law concerning State responsibility or reparations[104].

8. Consequently, Your Excellencies, a correct interpretation of the Paris Agreement confirms that it never sought to create a self-contained régime or specific provisions on wrongful acts or State responsibility, nor to make any derogation therefrom. The condition provided for in Article 55 of ARSIWA is thus *not* triggered and the general rules on State responsibility are applicable in the context of question *(b)*.

9. An interpretation of the UNFCCC would yield the same result.

III. The best available science helps in assigning attribution and causation

10. Mr President, Your Excellencies, having established that the general rules on State responsibility apply, Articles 14, 15, 42, 46 and 47 of ARSIWA are particularly relevant as they address breaches consisting of continuing or composite acts, invocation of responsibility and plurality of injured and responsible States. This framework is particularly relevant in the context of climate change as it paves the way for those most responsible to be held accountable. It is crucial for the Court to acknowledge the applicability of the rules enshrined in these Articles in addressing question *(b)*, as they reflect the precise dynamics of climate change: cumulative emissions from numerous actors over an extended period, across various regions globally, impacting a multitude of stakeholders.

11. However, as mentioned, some States have cited difficulties in the determination of the key elements of attribution, causation or both. This would ultimately render the rules on State responsibility inapplicable. To rebut these arguments, the role of the best available science ought to be highlighted.

12. The reports of the Intergovernmental Panel on Climate Change (IPCC), whom you have recently met[105], reflect a scientific consensus. They have been endorsed by nearly all Participants in

[104] Cook Islands, Federated States of Micronesia, Nauru, Niue, Philippines, Solomon Islands, Tuvalu.

[105] ICJ Press Release No. 2024/75, 26 Nov. 2024.

these proceedings and have received high praise from other tribunals[106]. Moreover, numerous scientific reports have been appended by States and international organizations to support their arguments before the Court in these advisory proceedings[107]. All these represent but a sample of the more extensive and well-established body of climate change science.

13. Now, the central point of the matter, Your Excellencies, is that this best available science provides data linking anthropogenic emissions of greenhouse gases to significant harm to the climate system and other parts of the environment[108]. They help in determining the specific source of the emission, its overall effects and the resulting damage. They thus bridge over questions of attribution and causation. The science also clarifies that there is nothing like an "indivisible injury"[109] suffered by vulnerable and small island developing States, that would render impossible for them to link any of this injury to any particular wrongdoer. Each high-emitting State has its own measurable share in this injury since their cumulative emissions can be calculated[110]. The injury is inherently *divisible* and *attributable* to each wrongdoer accordingly.

14. And even though "the Court is not the arbiter of scientific issues [and] is charged with deciding disputes brought to it on the basis of law"[111], this judicial body has had ample experience in dealing with cases which have a scientific dimension to them[112]. This advisory opinion, Your Excellencies, should not be the exception.

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[106] ITLOS, *Request for an advisory opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion of 21 May 2024, para. 208; ECtHR, *Verein KlimaSeniorinnen Schweiz and others* v. *Switzerland*, no. 53600/20, Judgment, 9 April 2024, para. 64.

[107] See e.g. Twenty-seven expert reports submitted by: Vanuatu (5); Cook Islands: (5); Tonga: (1); Grenada: (1); Saint Lucia (1); Saint Vincent and the Grenadines (1); Sri Lanka (1); African Union (1); Melanesian Spearhead Group (10); Organization of African Caribbean and Pacific States (1).

[108] See for example, IPCC, 2023: Sections. In: *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, p. 42.

[109] CR 2024/36, Australia, pp. 51-52, para. 3 *(d)* (Parlett).

[110] See e.g.: Written Statement of Vanuatu, paras. 73, 152-153, 162-170; Expert Report of Professor Corinne Le Quéré on Attribution of global warming by country (dated 8 December 2023) (Vanuatu Written Statement, Exhibit B). CR 2024/35, Vanuatu, p. 100, para. 4 (Loughman).

[111] Speech by HE Mr Abdulqawi A. Yusuf, President of the International Court of Justice, before the Sixth Committee of the General Assembly, 26 Oct. 2018, p. 11, para. 63.

[112] See for example: *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*; *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), Judgment, I.C.J. Reports 2022 (II)*; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*; *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2023 (II).*

15. Mr President, Members of the Court, the general rules on State responsibility apply in the context of question *(b)*; and any concerns in relation to their application can well be dispelled through the use of the best available science.

16. I appreciate your time and attention today and respectfully call you, Mr President, to call upon Minister Derjacques.

The PRESIDENT: I thank Mr Andrés Villegas Jaramillo. I now give the floor to Mr Anthony Derjacques. You have the floor, Sir.

Mr DERJACQUES:

CONCLUSIONS: THE RIGHT OF SMALL ISLAND STATES TO FULL REPARATION

I. Introduction

1. Thank you. Mr President, Madam Vice-President, Members of the Court, I join my colleagues in expressing how honoured I am to convey this plea of the Seychellois people before you today.

2. As you have heard, the Seychelles submits that the rules of State responsibility are applicable when the no-harm obligation, the climate change régime, and other treaty obligations are breached by States' massive emissions of greenhouse gases. Some of these obligations are of due diligence. The best available science and NDCs allow for an objective basis upon which to assess their non-compliance.

II. Types of breaches and the obligation to repair harm

3. With this in mind, one can envisage several kinds of breaches:

— breach of procedural obligations under the Paris Agreement, which is the case, for example, when a State does not respect Article 4, paragraph 2 obligations;

— breach of due diligence obligations under UNCLOS, or under the Paris Agreement;

— breach of customary no-harm obligations; and,

— breach of human rights obligations.

4. Each of these breaches "involves an obligation to make reparation in an adequate form"[113].

5. As to the "adequate form" of reparation for vulnerable and small island developing States, the basic principle is that these States, including Seychelles, have a right to *full* reparation. But what does the full reparation mean in this context?

6. First, concerning breaches of a continuous character, in particular regarding the no-harm obligations and the conventional due diligence obligation, the very first form of reparation is a declaration of the duty of performance, cessation, and obligation of non-repetition.

7. This is urgent and critical. The catastrophic heating of the planet beyond plus 1.5°degrees is close but not unavoidable. We certainly have a right to reparation for the injuries we have already suffered, but that does not mean that we accept that further harm can be inflicted to the climate system. This must stop. This is the first step for climate justice. And this is what the law of international responsibility requires.

8. We request those States causing significant harm to the climate system and other parts of the environment to cease their harmful actions or omissions. We are at the brink of an abyss. The transition to a clean, green and sustainable economy must no longer be delayed. It is imperative that they meet their international commitment. Urgent and diligent action is required now. Stop harming us.

9. Second, for all breaches, reparation also entails restitution, compensation and satisfaction[114].

10. Regarding harm done to individuals and indigenous people, the régimes of protection of human rights are of course, when relevant, to be properly applied, and corresponding remedies be afforded.

11. As to harm done to vulnerable and small island developing States, "compensation may be an appropriate form of reparation, particularly in those cases where restitution is materially

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[113] *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9,* p. 21. See also *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II),* p. 691, para. 161; *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I),* p. 59, para. 119; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997,* p. 80, para. 150); *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I),* p. 15. See also ILC Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), Art. 31.

[114] ARSIWA, Art. 34.

impossible or unduly burdensome"[115]. Indeed, Seychelles contends that there are instances where restitution is likely to be both impossible and insufficient. It is hard to envisage that any restitutive measures could reverse the damage done to Seychelles islands caused by sea-level rise and coastal erosion. Furthermore, the potential for mass displacement, the adverse impacts on the economy, the extinction of species and ecosystems due to ocean acidification, and the destruction of our way of life, our culture cannot be undone. Compensation is thus the relevant relief. It must "cover any financially assessable damage including loss of profits insofar as it is established"[116].

12. Assessment of damage needs not be accounted for with absolute precision. As the Court has said: "the absence of adequate evidence [as to] the extent of material damage will not, in all situations, preclude an award of compensation for that damage". And the Court has even determined that the amount of compensation can be based on equitable considerations[117].

13. But let me add that the traditional means of compensation might fall short as it comes to harm caused by climate change, the magnitude of which is totally unprecedented. Figures in the order of millions and trillions of dollars were recently touted in COP29 in Azerbaijan. It is in this context that the African Union and the African States have proposed innovative satisfaction mechanisms, including debt relief and debt cancellation[118]. Seychelles strongly echoes these proposals and prays for the Court to endorse such just and fair alternatives, while being cognizant that some small island developing States, like Seychelles, currently only have access to limited funding because of our income status, yet being one of the most affected.

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[115] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I)*, p. 26, para. 31. See also *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I),* pp. 103-104, para. 273.

[116] ARSIWA, Art. 36.

[117] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I),* p. 337, para. 33. See also, *Trail Smelter case (United States, Canada), 16 April 1938 and 11 March 1941, United Nations, Reports of International Arbitral Awards (RIAA),* Vol. III, p. 1920.

[118] Written Statements of Kenya, para. 6.112; Sierra Leone, para. 3.149; Namibia, para. 145; Written Comments of the African Union, paras. 86-91; Kenya, p. 67, para. 5.24, The Gambia, pp. 66-67, paras. 5.26-5.27, Oral Statements of Kenya, CR 2024/43, pp. 38-39, paras. 34-38 (Okowa); Malawi, CR 2023/44, pp. 37-38, para. 23 (Chakaka-Nyirenda) and p. 43, para. 23 (Pasipanodya); African Union, CR 2024/44, p. 71, paras. 30-31 (Mbengue).

III. Conclusion

14. Mr President, as we said earlier, we are a proud Creole people, brought together from the four corners of the world to our archipelago. Yet we now face the dire threat of being dispersed back to these distant corners. Are we condemned to be scattered to the four corners of the world yet again?

15.Thank you, Mr President. Thank you, esteemed Members of the Court.

The PRESIDENT: I thank the representatives of the Seychelles for their presentation. I now invite the delegation of The Gambia to make its oral statement and I call His Excellency Pa Musa Jorbateh to the podium.

Mr JORBATEH:

I. Introduction

1. Mr President, Madam Vice-President, distinguished Members of the Court, it is an honour to appear before you on behalf of the Republic of The Gambia. The Gambia remains steadfast in our commitment to international law and to this Court's role as the principal judicial organ of the United Nations.

2. The more than 100 participants in these proceedings all recognize the need to confront the urgent realities and fundamental inequalities of climate change. And yet, for far too long, we have put aside the question of what States are required by international law to do, while the climate crisis has worsened by the day. These proceedings present a historic opportunity to address this gaping hole.

3. That is why The Gambia proudly co-sponsored the resolution that requested this advisory opinion — under the leadership of Vanuatu. We salute the next generation of youth, especially those whose dedication and efforts have brought us here today. They stood and reminded the world of the responsibility that our generations owe to them. And to future generations.

4. Mr President, all States are affected by climate change. But for some, like us, the stakes are incomparably higher. The Gambia ranks among the countries most vulnerable to climate change.

This, despite that our country accounts for less than 0.01 per cent of the world's carbon emissions each year[119].

5. The Gambia is one of the world's lowest-lying coastal States[120]. About half of our country's total area lies less than 20 metres above sea level[121]. For States like us , sea-level rise is an immediate and existential threat. The Gambia's vulnerability to flooding is only further exacerbated given that the Gambia River spans the entire length of the country.

6. Nine out of ten Gambian households are vulnerable to coastal erosion[122]. A one-metre rise in sea level could inundate 60 per cent of our mangrove forests, one fifth of our rice-growing areas and 10 per cent of our total land area, including our capital city[123]. In addition to displacing our people and damaging our infrastructure, sea-level rise has devastating impacts on the productivity of our fisheries and agricultural crops[124]. This, in turn, threatens the food and economic security of Gambians, many of whom depend on rain-fed subsistence farming and fisheries[125].

7. Climate change also presents a major threat to national treasures that have historical, cultural and social value to our people, including the Kunta Kinteh Island, a UNESCO World Heritage site. As we stand here today, the island is eroding as the Atlantic Ocean moves landward[126].

8. Mr President, The Gambia is one of the world's Least Developed Countries, making it disproportionately exposed to the most severe impacts of the climate crisis. In the summer of 2021, we faced severe windstorms and floods, which displaced more than 1,500 people. That is a lot of

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[119] International Monetary Fund, The Gambia: Climate Change Vulnerabilities and Strategies (2023), p. 6.

[120] UNDAC, *The Gambia Floods: Rapid Needs Assessment Report and Response Recommendations* (2022), p. 7.

[121] The Gambia's Long-Term Climate Neutral Development Strategy 2050, p. 17.

[122] UNDAC, *The Gambia Floods: Rapid Needs Assessment Report and Response Recommendations* (2022), p. 53.

[123] The Gambia's Long-Term Climate Neutral Development Strategy 2050, pp. 8, 17; UNDAC, *The Gambia Floods: Rapid Needs Assessment Report and Response Recommendations* (2022), pp. 3, 6-7; M. S. Jaiteh et al., *Climate Change and Development in The Gambia*, available at https://www.columbia.edu/~msj42/pdfs/ClimateChange DevelopmentGambia_small.pdf, p. vii.

[124] The Gambia's Long-Term Climate Neutral Development Strategy 2050, p. 17.

[125] The Gambia's Long-Term Climate Neutral Development Strategy 2050, pp. 8, 17; B. M'Komfida et al., "The Impacts of Saline-Water Intrusion on the Lives and Livelihoods of Gambian Rice-Growing Farmers" (2018) 6 *J. Ecology & Env't Scis.* 2, 5; Gambia National Adaption Programme of Action (NAPA) on Climate Change (Nov. 2007), available at https://unfccc.int/resource/docs/napa/gmb01.pdf, p. 17.

[126] M. I. Vousdoukas et al., "African heritage sites threatened as sea-level rise accelerates" (2017) 12 (3), *Nature Climate Change* 256-262, available at https://doi.org/10.1038/s41558-022-01280-1; K. Monks, "Gambia fights to stop Kunta Kinteh returning to sea", *CNN* (3 May 2017), available at https://www.cnn.com/2017/05/03/africa/kunta-kinteh-island/index.html#:~:text=The%20Gambia's%20unforgiving%20climate%20is,building%20on%20the%20Albreda%20waterfront.%E2%80%9D.

victims for a small country like The Gambia, because in comparison to a country like Germany, that would be equivalent to about 60,000 affected people. The following year, we suffered the heaviest rainfall the country had experienced in three decades[127].

9. We know that The Gambia is not alone in this predicament. Over the last 50 years, almost 70 per cent of worldwide deaths caused by climate-related disasters were suffered in LDCs[128]. Every single death is a shocking reminder of this price we are paying for failing to take immediate, co-ordinated and ambitious action.

10. Mr President, the questions before the Court are the most urgent questions of our time. We reiterate the African Union's plea for considering these proceedings as an opportunity for the international community to adopt bold — legally required — steps to combat climate change and assist the most vulnerable States in doing so[129]. The stakes are too high to confine our obligations to timid statements that simply echo the bare minimum[130]. As resoundingly confirmed by the best available evidence, the window for us to secure a liveable future on this planet is rapidly closing.

11. Mr President, please let us remind ourselves that these proceedings are not merely a tick box exercise. This is a collective call for action, because the fate of more than half of the world's population is dependent on the climate's future, which is now partly in your hands.

12. The Gambia is hopeful that the Court's advisory opinion will provide much-needed judicial guidance on the concrete and actionable obligations that States have to address the existential threats of climate change. And that is why we intend to be present in New York after this opinion is rendered to assist the General Assembly in giving concrete effect to it.

13. Mr President, Madam Vice-President, distinguished Members of the Court, I thank you for your kind attention. I now ask you to call to the podium Professor Charles Chernor Jalloh.

The PRESIDENT: I thank His Excellency Pa Musa Jorbateh. I now give the floor to Professor Charles Chernor Jalloh.

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[127] P. Saine, "Floods affect thousands in Gambia after heaviest rainfall in decades", *Reuters* (4 Aug. 2022), available at https://www.reuters.com/world/africa/floods-affect-thousands-gambia-after-heaviest-rainfall-decades-2022-08-03/.

[128] UNDRR, "Disaster Risk Reduction in Least Developed Countries", available at https://www.undrr.org/disaster-risk-reduction-least-developed-countries.

[129] Written Statement of the African Union, para. 18 *(c)*.

[130] *Ibid.*

Mr JALLOH:

II. PROPER INTERPRETATION OF THE OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

1. Mr President, honourable judges, I feel privileged to appear before you again, and to do so on behalf of the Republic of The Gambia. Given the late stage of the proceedings and the fact that we have made extensive written submissions, for today, we will focus on three key points of divergence. I will discuss what international law requires when it comes to the proper *interpretation* of the obligations of States in respect of climate change. Mr Loewenstein will then address the prevention principle. He will be followed by Ms Hioureas, who will then address human rights law and remedies.

2. The General Assembly has posed two broad questions on the obligations of States concerning climate change. And, in so doing, it has underlined the relevance of many treaties and instruments from various fields of international law[131]. The Gambia submits that climate change understood generally, and in the context of this specific Request, is regulated by different areas of international law. Thus, the rules of treaty interpretation under customary international law are crucial.

3. The rules of treaty interpretation in Article 31 (1) to (3) of the Vienna Convention on the Law of Treaties (VCLT) provide that a treaty is to be interpreted in good faith in accordance with the ordinary meaning of the words in the treaty in their *context*, taking into account the wider context including the preamble and annexes[132]. We must also consider, together with the context, any *subsequent agreements between the parties* regarding the interpretation of the treaties or application of their *provisions*; and as well any *subsequent practices* when applying those treaties[133].

4. The reference in paragraph 3 *(c)* of Article 31 of the VCLT to "any relevant rules of international law", and specifically the use of the word "*any*", indicates that the set of potentially relevant rules should be inclusive. It extends to all sources of international law which can be of

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[131] UN General Assembly, resolution 77/276: Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change, UN doc. A/RES/77/276 (4 April 2023) (Dossier No. 2) ("Request for Advisory Opinion"), preamble.

[132] Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980), 1155 UNTS 331, art. 31 (1) (emphasis added).

[133] *Ibid.*, art. 31 (3) *(a)-(b)*.

assistance in interpreting State obligations on climate change — whether found in treaties, customary international law or general principles of law[134]. Judicial and other decisions, from this Court and other tribunals[135], as well as teachings, are also relevant under Article 38 (1) *(d)* of the ICJ Statute, as confirmed recently by Conclusions 4, 5 and 8 of the ILC topic on subsidiary means[136].

5. The Gambia's submission on the proper approach to the interpretation of the present Request reflects the premise that all the relevant treaties, and sources of international law, must operate harmoniously in order to avoid fragmentation. As this Court explained in its *Namibia* Opinion in 1970, "an international instrument has to be interpreted and applied within the framework of the *entire legal system* prevailing at the time of the interpretation"[137].

6. The ILC has likewise *repeatedly* confirmed, both generally and on topics addressing environmental matters, that "when several norms bear on a single issue they should . . . be interpreted, so as to give rise to a single set of compatible obligations"[138]. Indeed, key climate change treaties themselves indicate that States understand the overlap of obligations in different areas of international law. States also endorse the principle of systemic integration. For instance, the Paris Agreement's reference to States' "respective obligations on human rights"[139], as well as the UNFCCC's reference to the prevention principle under general international law makes this clear[140].

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[134] O. Dörr, "Article 31", in O. Dörr & K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018), pp. 604-605.

[135] International Law Commission, "Chapter V: Subsidiary means for the determination of rules of international law", in *Report of the International Law Commission in its seventy-fifth session*, UN doc. A/79/10 (8 August 2024), pp. 47-53, Conclusion 8. See also *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 664, para. 66.

[136] International Law Commission, "Chapter V: Subsidiary means for the determination of rules of international law", in *Report of the International Law Commission in its seventy-fifth session*, UN doc. A/79/10 (8 August 2024), pp. 32-41.

[137] *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. 31, para. 53 (emphasis added).

[138] International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, UN doc. A/CN.4/L.702 (18 July 2006), p. 8, para. 14 (4). See also International Law Commission, Draft guidelines on the protection of the atmosphere, in *Yearbook of the International Law Commission, 2021*, Vol. II, Part Two, Guideline 9; International Law Commission, Draft principles of the environment in relation to armed conflicts, in *Yearbook of the International Law Commission, 2022*, Vol. II, Part Two, Principle 9.

[139] Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016), 3156 UNTS 79 (Dossier No. 16) ("Paris Agreement"), preamble, p. 2.

[140] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994), 1771 UNTS 107 (Dossier No. 4) ("UNFCCC"), preamble.

7. The reference in the Request to, "among other instruments, and . . . relevant principles and relevant obligations of customary international law"[141], and to about 15 treaties and instruments in various areas of international law, confirms the same understanding[142]. Indeed, the General Assembly expressly invited the Court to pay "*particular* regard" to the United Nations Charter, the International Bill of Rights, the UNFCCC, the Paris Agreement and UNCLOS as well as the due diligence and the no-harm principles. The fact that the Request was adopted by consensus demonstrates that States recognize the relevance of those treaties, instruments and rules to the Court's advisory opinion. It follows that the Court must consider *all relevant principles and rules* when determining the obligations of States under international law.

8. The Court should also consider the numerous climate change and other human rights resolutions[143] adopted by competent United Nations bodies. The relevance of all subsequent agreements of the parties when interpreting State obligations has been clarified by the ILC in Conclusions 10[144] and 11[145] of its 2018 Conclusions on Subsequent Agreements and Subsequent Practice. Equally important[146] are the decisions of the Conferences of the Parties which are authentic means of interpreting treaty obligations. Such decisions reiterate the CBDR principle and the financial and technical assistance provisions in climate treaties.

9. Mr President, given the above, The Gambia respectfully disagrees with the minority of Participants urging the Court to adopt a restrictive approach to the applicable law. Not only would this risk fragmenting international law, and contradict the principle of systemic integration, it would also undermine the value of the requested opinion.

10. The importance of systemic integration of international human rights law with international environmental law is well settled in Africa. Article 24 of the 1981 Banjul Charter enshrines "the right

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[141] Request for Advisory Opinion, preamble, pp. 1-2.

[142] *Ibid*.

[143] See, for example, Human Rights Council, resolution 52/23, *The human right to a clean, healthy and sustainable environment*, UN doc. A/HRC/RES/52/23 (13 April 2023) (Dossier No. 282).

[144] International Law Commission, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, in *Yearbook of the International Law Commission, 2018*, Vol. II, Part Two, p. 75, Conclusion 10.

[145] *Ibid.*, p. 82, Conclusion 11.

[146] CR2024/37, p. 37, paras. 16-17 (Brazil).

to a general satisfactory environment"[147]. More broadly, the Banjul Charter treats individual and collective rights as well as civil and political rights and economic, social and cultural rights as integrated and *indivisible*. The first preambular paragraph of the 1991 Bamako Convention requires Parties to be "[m]indful of the growing threat to human health and the environment posed by . . . hazardous wastes"[148]. And in the landmark decision *SERAC* v. *Nigeria*, the African Commission stated: "a clean and safe environment . . . is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual"[149].

11. Systemic integration has also been endorsed on the international level. To take only one of many possible examples, the Paris Agreement provides that State parties "should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights"[150].

12. In short, the General Assembly requested the Court's guidance on the concrete obligations of States under international law. This means that although vital, the climate change treaties that anchor this request should not be read "in clinical isolation"[151] from the rest of public international law. Thus, the Court has been entrusted with interpreting the obligations of States concerning climate change under *all* of international law. The Gambia hopes that giving the oral submissions to date, our highlighting the rules of interpretation and the principle of systemic integration could be of assistance to this Court.

13. Mr President, with your leave, if you may ask Mr Loewenstein to take the floor. Thank you very much.

The PRESIDENT: I thank Professor Charles Chernor Jalloh. I now give the floor to Mr Andrew Loewenstein.

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[147] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986), 1520 *UNTS* 217, Art. 24.

[148] Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (adopted 30 January 1991, entered into force 22 April 1998), 2101 *UNTS* 177, preambular para. 1.

[149] African Commission on Human and People's Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights* v. *Nigeria*, Communication No. 155/96, Decision (27 October 2001), para. 51.

[150] Paris Agreement, preambular para. 11.

[151] WTO, *United States — Standards for Reformulated and Conventional Gasoline*, AB-1996-1, Report of the Appellate Body, WT/DS2/AB/R (29 April 1996), p. 17.

Mr LOEWENSTEIN:

III. THE PREVENTION PRINCIPLE

1. Mr President, Members of the Court, it is an honour to appear before you on behalf of the Republic of The Gambia. I will present The Gambia's views concerning the relationship between the prevention principle and the climate change treaties.

2. I begin by responding to the argument that the principle does not apply to climate change. The basis for this argument is that greenhouse gas emissions are said to be "materially different from the conventional case of transboundary harm"[152].

3. That is mistaken. As the ILC has explained, the only activities that are excluded from the concept of "transboundary harm" are those which "cause harm only in the territory of the State within which the activity is undertaken without the possibility of any harm to any other State"[153].

4. It is thus immaterial whether the harm is "direct" or "temporally proximate" to the activity[154]. That is why, for example, UNCLOS includes *indirect* introduction of harmful substances into the marine environment in its definition of marine pollution[155].

5. Nor is it relevant that the cases involving transboundary harm that have been litigated to date have concerned an identifiable source spreading between neighbouring States, or that the harm caused by greenhouse gases may be experienced far from the source of emissions[156]. The duty of prevention is not geographically limited[157]. It is owed by all States to all States. The sovereign equality of States demands no less[158].

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[152] CR 2024/36, p. 43, para. 10 (Australia).

[153] International Law Commission, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries (2001), reproduced in *Yearbook of the International Law Commission, 2001*, Vol. II, Part Two ("Draft Articles on Prevention of Transboundary Harm"), p. 151, Art. 1, commentary (13).

[154] See CR 2024/36, p. 43, para. 10 (Australia).

[155] UNCLOS, Art. 1 (1) (4).

[156] *Ibid.*

[157] See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 241-242, para. 29.

[158] UN General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, A/RES/2625(XXV) (24 October 1970); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 101-103, paras. 191-193; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 437, para. 80; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 133, para. 155.

6. The argument that the principle does not apply to harm caused by greenhouse gas emissions because a rule of customary international law concerning this particular form of transboundary harm has not crystalized is equally baseless[159]. The principle is a rule of general application. There is no predetermined list of harms that qualify. As the ILC put it, "[t]he Commission cannot forecast all the possible future forms of 'transboundary harm'"[160]. Thus, in all instances, a State must prevent its territory from being used to harm that of another[161].

7. Mr President, some try to redefine the obligations imposed by the prevention principle by reducing them to those owed under the climate change treaties[162]. This is flawed as well. A State that fails to comply with the treaties cannot be said to have acted with due diligence[163]. But it does not follow that the treaties encompass the totality of what due diligence requires[164].

8. Such treaty provisions do not occupy the due diligence field. In *Pulp Mills*, the parties had concluded a treaty governing the protection and use of their shared watercourse that contained elaborate substantive and procedural obligations[165]. Nonetheless, the Court interpreted the treaty obligations by reference to the requirements of due diligence, not the other way around[166].

9. Mr President, those who equate the climate change treaties with due diligence emphasize the Paris Agreement's provisions concerning NDCs and their establishment. But they avoid mentioning the pillars upon which the obligations pertaining to NDCs are based: the temperature goal in Article 2 and the timeline in Article 4.

10. Each — the temperature goal and the timeline and thus the NDC obligations to which they are tied — is based on the state of science as it existed in 2015. This is crucial, because due diligence requires continual monitoring, evaluation and reassessment, always having regard for the best

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[159] CR 2024/36, p. 44, para. 12 (Australia); CR 2024/38, p. 14, paras. 19-20 (Canada).

[160] Draft Articles on Prevention of Transboundary Harm, p. 153, Art. 2, commentary (9).

[161] See *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22; *Trail Smelter case (United States, Canada)*, 16 April 1938 and 11 March 1941, *RIAA* Vol. III, p. 1965; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 56, para. 101.

[162] See, e.g. CR 2024/38, p. 14, paras. 19-22 (Canada); CR 2024/43, pp. 54, 58-59, paras. 2, 22-23 (Kuwait); CR 2024/48, pp. 54-56, paras. 58-63 (United Kingdom). See also Written Statement of the United States of America, para. 4.25; Written Statement of New Zealand, para. 105; Written Statement of OPEC, p. 36.

[163] See Written Comments of The Gambia, paras. 4.3-4.4.

[164] *Ibid.*, para. 3.22.

[165] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 32, paras. 26-27.

[166] *Ibid.*, pp. 776-77, paras. 185–187.

available science as it exists at the time of the activity. The scientific consensus today regarding risk and what may be required to mitigate that risk may be different from what science may say about these issues in the future. Thus, the "standard of due diligence may change over time", given that "scientific and technical information", "risk of harm" and the degree of "urgency" all "constantly evolve"[167]. Freezing what due diligence requires with the Paris Agreement's temperature goal and timeline and the NDC obligations on which they are based — all reflecting the scientific consensus in 2015 — cannot be squared with due diligence's evolutionary requirements.

11. Advances in our understanding of climate change risk is not a theoretical possibility. Although Article 2 provides for a 2°C increase in global average temperature as a *goal* and 1.5°C as an *ambition*, the best available science *today* understands the latter *not* as an ambition but as the threshold that cannot be crossed[168]. Indeed, just three years after the Paris Agreement, in its 2018 Special Report, the IPCC concluded that the risk of unacceptable levels of harm is *significantly lower* at a 1.5°C increase than at 2°C[169]. In other words, the Paris Agreement's temperature goal is no longer adequately protective. Yet the Agreement's NDC obligations, no matter how carefully negotiated or detailed, are tethered to that scientifically outdated goal.

12. Mr President, we do not know what the best available science will tell us about the risks of greenhouse gas emissions in five years, much less in 10 or 50. But the Court's opinion will determine the content of the legal rules that will apply. Nothing you have heard provides any basis for fossilizing the due diligence obligation in the state of science as it existed nearly a decade ago. However, that is precisely what some Participants ask you to do.

13. Mr President, those who argue that due diligence requires only compliance with the climate change treaties also do not acknowledge what this leaves out. That includes EIA, as the climate change treaties contain no EIA obligations. Thus, if the due diligence obligation was confined to

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[167] See Responsibilities and Obligations of States with respect to activities in the Area, ITLOS Case No. 17, Advisory Opinion (1 February 2011), p. 43, para. 117; *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, ITLOS Case No. 31, Advisory Opinion (21 May 2024) ("ITLOS Climate Change Advisory Opinion"), para. 239. See also Written Comments of The Gambia, para. 3.18.

[168] Paris Agreement, Art. 2.

[169] IPCC, *Global Warming of 1.5°C: An IPCC Special Report on the impacts of global warming of 1.5 °C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*, Summary for Policymakers (CUP 2018) (Dossier No. 72) ("IPCC, *Global Warming of 1.5°C*"), available at https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SPM_version_report_LR.pdf.

complying with the treaties, a State would be under no obligation to carry out an EIA for an activity that emits greenhouse gases, even though, as Judge Owada observed, EIA can play a "crucial role in ensuring that the State in question is acting with due diligence under general international environmental law"[170].

14. Mr President, the Participants who argue that due diligence requires just compliance with the treaties made a similar argument at ITLOS[171]. The Tribunal rejected it[172]. Those same Participants do not explain how a State could be obligated to discharge the full range of due diligence obligations with respect to the *marine* environment but must do less with respect to *other* parts of the environment. That disjuncture is irreconcilable with systemic integration.

15. This brings me to the content of the due diligence obligation. The acts required to discharge the obligation must be determined by reference to the IPCC's conclusion that limiting the increase in global temperature to 1.5°C is needed to prevent irreversible harm[173]. Whether a State acts with due diligence must be considered against this objective, which can change over time[174].

16. As ITLOS determined, given the IPCC's findings, the standard of due diligence is *stringent* for a State to discharge its obligation to prevent pollution of the marine environment[175]. And, it is even *more* stringent in a transboundary context[176]. A State is therefore required to "do the utmost"[177] and to "exert its best possible efforts"[178] to minimize the emission of greenhouse gases, having regard

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[170] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, separate opinion of Judge Owada, p. 752, para. 18. See also Written Statement of Egypt, para. 113.

[171] ITLOS Climate Change Advisory Opinion, p. 80, para. 220; Australia's Oral Statement on the *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (13 September 2023), Verbatim Record ITLOS/PV.23/C31/5, pp. 6-10; United Kingdom's Oral Statement on the *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (25 September 2023), Verbatim Record ITLOS/PV.23/C31/18/Rev.1, pp. 38-39.

[172] ITLOS Climate Change Advisory Opinion, pp. 80-81, paras. 223-224.

[173] See IPCC, *Global Warming of 1.5°C: An IPCC Special Report on the impacts of global warming of 1.5 °C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*, Summary for Policymakers (CUP 2018) (Dossier No. 72), pp. 5-11; IPCC, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP 2021), p. 21.

[174] ITLOS Climate Change Advisory Opinion, p. 86, para. 239.

[175] *Ibid.*, p. 87, para. 243.

[176] *Ibid.*, p. 89, para. 248; *ibid.*, p. 92, para. 256.

[177] Responsibilities and obligations of States with respect to activities in the Area, ITLOS Case No. 17, Advisory Opinion (1 February 2011), p. 41, para. 110.

[178] Draft Articles on Prevention of Transboundary Harm, p. 154, Art. 3, commentary (7).

for the need to prevent the 1.5°C threshold from being exceeded, and taking into account the CBDR principle. In the words of the *Silala* Judgment, a State must take "*all* appropriate measures" to prevent significant transboundary harm[179]. Mr President, in the climate change context, as in every other, "all" means "all". It does not mean only those climate change treaty obligations.

17. Thus, it is not the NDCs, nor the process for their establishment, that provides the benchmark for assessing due diligence. Rather, it is the IPCC's scientifically agreed standard that determines the concrete measures which a State must adopt, implement and enforce.

18. Mr President, this concludes my presentation. I ask that you invite Ms Hioureas to the podium.

The PRESIDENT: I thank Mr Andrew Loewenstein. I now give the floor to Ms Christina Hioureas.

Ms HIOUREAS:

IV. RESPONSE TO QUESTION *(A)* ON HUMAN RIGHTS LAW AND TO QUESTION *(B)* ON LEGAL CONSEQUENCES AND REMEDIES

1. Mr President, distinguished Members of the Court, it is an honour to appear before you on behalf of the Republic of The Gambia.

2. My presentation will focus on two key issues: the proper interpretation of human rights law in the context of climate change and certain legal consequences resulting from the due diligence standard.

1. The interplay between human rights law and the climate agreements

3. On question *(a)*, some have expressed the view that human rights treaties should be interpreted "in line with obligations States have undertaken under treaties that specifically address

[179] *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), Judgment, I.C.J. Reports 2022 (II)*, p. 648, para. 97 (emphasis added).

climate issues"[180]. Thus, the argument goes, "States fulfilling the Paris Agreement thereby simultaneously fulfil their human rights obligations"[181].

4. We respectfully disagree.

5. As Professor Jalloh just outlined, The Gambia supports the systemic integration of relevant bodies of law in ascertaining the climate change obligations of States. But this *does not mean* that the Paris Agreement can both *limit* and *fulfil* human rights obligations.

6. Take the Human Rights Committee decision in *Portillo Cáceres* v. *Paraguay*, which some States invoke to argue otherwise. The relevant passage is as follows[182]:

> "States parties should take all appropriate measures to address the general conditions in society that may give rise to threats to the right to life . . ., and *these conditions include environmental pollution*. In that respect, the Committee observes that the State party *is also bound* by the Stockholm Convention on Persistent Organic Pollutants."[183]

So as you can see, the Human Rights Committee did *not* consider that compliance with the relevant environmental treaty *would necessarily* fulfil the obligation in respect of the right to life. Rather, it is only *one* relevant consideration.

7. The Committee also clarified that the relationship between human rights law and environmental law is *not* a one-way street, as some suggest[184].

8. In its General Comment No. 36, the Committee observed that while "international environmental law should . . . inform the content of article 6 of the [ICCPR], the obligations . . . to respect and ensure the right to life *should also inform . . . obligations under international environmental law*"[185]. Put simply, the Paris Agreement must be interpreted "in line with" human rights obligations, not just the other way around.

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[180] CR 2024/35, p. 147, para. 4 (Germany). See also Written Statement of Australia, para. 3.58; Written Statement of New Zealand, para. 121; Written Statement of OPEC, para. 92; Written Statement of Japan, paras. 17-18; Written Statement of Kuwait, para. II.B; CR 2024/36, p. 42, para. 6 (Australia); CR 2024/43, p. 54, para. 2 (Kuwait); CR 2024/38, p. 14, para. 22 (Canada).

[181] CR 2024/35, p. 148, para. 10 (Germany).

[182] CR 2024/35, p. 147, paras. 4-5 (Germany).

[183] UN Human Rights Committee, *Portillo Caceres and Others* v. *Paraguay*, UN doc. CCPR/C/126/D/2751/2016 (25 July 2019), para. 7.3.

[184] CR 2024/35, p. 149, para. 14 (Germany).

[185] UN Human Rights Committee, *General Comment No. 36 — Article 6: right to life*, UN doc. CCPR/C/GC/36 (3 September 2019) (Dossier No. 299), para. 62 (emphasis added).

9. Finding otherwise would be to override the obligations States have under human rights treaties. International jurisprudence, including from the African continent, confirms that States have mitigation obligations under human rights law that *go beyond* what is set out in the climate change treaties.

10. For example, in holding that the African Charter on Human and Peoples' Rights requires States to conduct and permit "environmental and social impact studies prior to any major industrial development"[186], the African Commission in *SERAC* v. *Nigeria* went *beyond* what is required under the UNFCCC and the Paris Agreement, *neither* of which mandates environmental and social impact assessments[187]. As this Court has held, decisions of the African Commission are given "due account"[188].

11. Likewise, the Grand Chamber of the European Court of Human Rights[189] recently found that legislation a State had enacted to reflect the commitments in its updated NDC under the Paris Agreement was *insufficient* to meet the State's duty to protect individuals from the adverse effects of climate change on their rights to life and health[190].

12. Mr President, I will now briefly address question *(b)*.

2. The legal consequences resulting from a breach of the due diligence obligation

13. The Gambia agrees with most Participants, that States must swiftly bring to an end any breach of the duty of due diligence[191]. This obligation may entail both negative *and* positive actions,

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[186] African Commission on Human and People's Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights* v. *Nigeria*, Communication No. 155/96, Decision (27 October 2001), para. 53 (emphasis added).

[187] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) (Dossier No. 4), art. 4 (1) *(f)*; Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016), 3156 UNTS 79 (Dossier No. 16), art. 9 *(d)*.

[188] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 664, para. 67.

[189] *Ibid.*, para. 66.

[190] See case of *Verein Klimaseniorinnen Schweiz and others* v. *Switzerland*, ECHR Application No. 53600/20, Judgment (9 April 2024), paras. 564-567.

[191] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), reproduced in *Yearbook of the International Law Commission, 2001*, Vol. II, Part Two, art. 30 (1); Written Comments of The Gambia, paras. 5.10, 5.13.

including changes to national policies, enforcement of climate targets and the phasing out of fossil fuels[192].

14. In this regard, The Gambia endorses the views expressed by Albania, Burkina Faso, Cameroon, Sierra Leone, Kenya, Côte d'Ivoire and Mexico[193], that the Court should reinforce the principle of the margin of appreciation enjoyed by States to regulate in the public interest[194]. The ITLOS advisory opinion itself recognized that due diligence obligations in respect of climate change under UNCLOS require them to regulate "activities carried out by both public and private actors"[195]. Recognition of the deference owed to the judgment of States would help thaw the regulatory chill that has resulted from investment arbitration claims threatened, or brought by, the fossil fuel industry in response to State measures aimed at addressing climate change[196].

15. Mr President, distinguished Members of the Court, this concludes the submissions of The Gambia. We thank you for your kind attention.

The PRESIDENT: I thank the representatives of The Gambia for their presentation. This concludes this morning's sitting. The oral proceedings will resume this afternoon at 3 p.m., in order for Singapore, Slovenia, Sudan, Sri Lanka, Switzerland and Serbia to be heard on the questions submitted to the Court.

The sitting is closed.

The Court rose at 12.50 p.m.

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[192] See Written Comments of The Gambia, para. 5.13.

[193] CR 2024/37, pp. 58-60, paras. 29-34 (Cameroon); CR 2024/34, p. 133, para. 25 (Albania); CR 2024/41, p. 24, para. 20 (Sierra Leone); CR 2024/39, p. 35, para. 21 (Côte d'Ivoire); CR 2024/43, p. 39, para. 38 (Kenya); CR 2024/45, pp. 14-15, para. 11 (Mexico).

[194] See UN General Assembly, Resolution 3281 (XXIX), *Charter of Economic Rights and Duties of States*, UN doc. A/RES/3281(XXIX) (12 December 1974), art. 2 (2) *(a)*. *Id.*, art. 30. See also *Powell and Rayner* v. *the United Kingdom*, ECHR Application No. 9310/81 (A/172), Judgment, Merits (21 February 1990), para. 44; *Evans* v. *the United Kingdom*, ECHR Application No. 6339/05, Judgment (10 April 2007), para. 77; *Fadeyeva* v. *Russian Federation*, ECHR Application No. 55723/00, Judgment, Merits and Just Satisfaction (9 June 2005), para. 105; *Philip Morris Brands Sarl, Philip Morris Products S.A. and ABAL Hermanos S.A.* v. *Oriental Republic of Uruguay*, ICSID Case No. ARB/1/7, Award (8 July 2016) (J. Crawford, P. Bernadini, G. Born), para. 399; *Glamis Gold, Ltd.* v *United States of America*, UNCITRAL, Award (8 June 2009) (D. Caron, M. Young, K. Hubbard), para. 805.

[195] *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, ITLOS Case No. 31, Advisory Opinion (21 May 2024), para. 258.

[196] See Sierra Leone's Oral Statement on the *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (19 September 2023), Verbatim Record ITLOS/PV.23/C31/12/Rev.1, pp. 34-38.